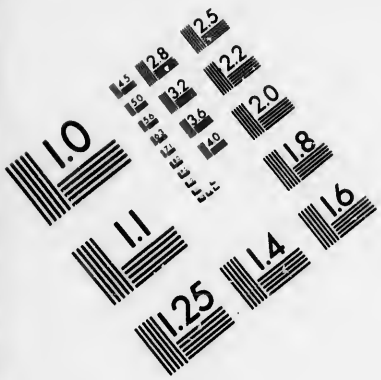

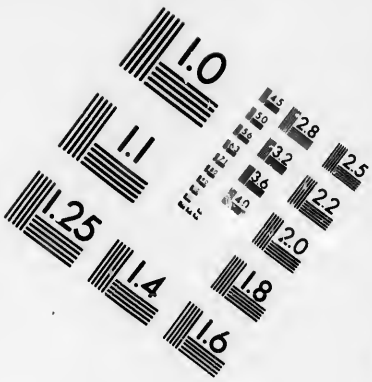

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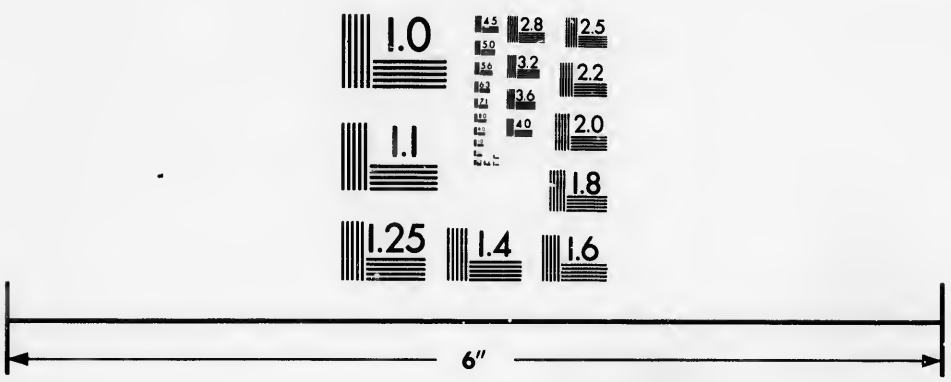

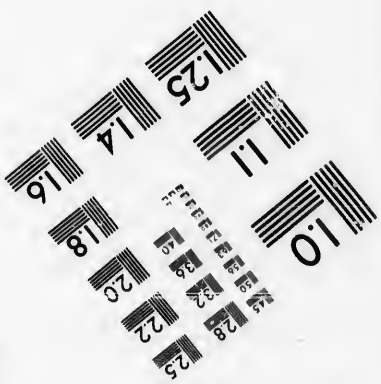

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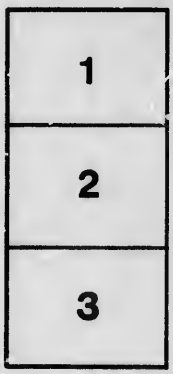

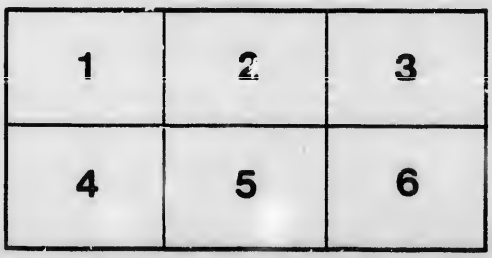

SUPERIOR COURT.

No.

JOHN O'FARRELL & al.,

PLAINTIFFS,

vs.

ALEXANDRE R. C. de LERY & al.,

DEFENDANTS.

PLAINTIFF'S CASE,

OR

A SYNOPSIS

OF THE

LAW OF MINING

IN

LOWER CANADA.

QUEBEC:
PRINTED BY LEGER BROUSSEAU,
1868.

SUPERIOR COURT,

BEAUCE.

JOHN O'FARRELL & AL.,

PLAINTIFFS,

vs.

ALEXANDRE R. C. DE LERY & AL.,

DEFENDANTS.

Supplementary Factum of the Plaintiffs.

QUEBEC:
LÉGER BROUSSEAU, PRINTER AND PUBLISHER,
7, *Buade Street, Upper-Town.*

1867.

SUPPLEMENTARY FACTUM

OF THE

PLAINTIFFS.

INTRODUCTION.

The magnitude of the interests involved in the decision of this case fully justifies the publication, by the Plaintiffs, of a second or supplementary Factum.

The Pleading submitted for the consideration of the Court, is, on both issues, a *Défense au fonds en droit*, or *General Demurrer*, and involves, at the same time, the sufficiency in Law, as well of the Defendants' Demurrer, as of the Plaintiffs' Declaration. The Plaintiffs purpose considering herein the sufficiency in Law : 1stly : of the Demurrer, 2ndly : of the Declaration. They claim that the Demurrer is insufficient in Law, and that their Declaration is sufficient in Law ; and, as to the

This case involves the sufficiency of 1st. The Demurrer, 2nd. The Declaration.

CHAPTER I

INSUFFICIENCY OF THE DEMURRER.

Sec. 1.—The Plaintiffs submit, as they have already done in their Factum, that the grounds of the Demurrer have raised questions, purporting to meet :

Demurrer raises questions touching

1st.—The Plaintiffs' ENTIRE *case*, and numbered, 1st, 2nd 3rd, 4th, 5th, 7th, 9th, 10th, 11th, 13th, 14th, 15th, 18th, 20th and 21st.

1st entire case

2nd.—*Part* ONLY of the Plaintiffs' case, and numbered, 6th, 8th, 12th, 16th, 17th and 19th.

2nd part only of case.

In order the better to understand the points at issue, it becomes necessary to reproduce entire the questions of both classes, namely :

Sec. 2.—Question :

1° To support their present action (the conclusions whereof are not restricted to the demand of revocation of the

Statement of questions raised by Demurrer.

Patent) must the Plaintiffs shew AUTHORITY OR PERMISSION *from the Government* to bring this suit ?

2° & 3° Must such a suit as the present one necessarily be brought in the name of Her Majesty, on the *fiat* of Her Law-officer, and by declaration signed by such Law-officer ?

4° Is the *Scire Facias* the only proceeding by which the Instrument known as the "DE LERY-*Patent*" may be attacked ?

5° Must the Crown necessarily be made a party to a suit such as the present one ?

6° Do the Seigniorial Act and its amendments, and the two Judgments above referred to, and the Schedule of the Seigniory as confirmed, affect the rights claimed by the Defendants under the "DE LERY-*Patent*" ?

7° Is it necessary that the Plaintiffs should have discovered the existence of gold on their lands, and notified the Government of such discovery, before the issue of the Patent ?

8° Were the proprietors of the *Fief* bound, within any given, and what, time, to notify the Government of the existence of gold in their Seigniory ?

Of which 1st, 2nd, 3rd, 4th, 5th, 7th, 9th, 10th, 11th, 13th, 14th, 15th, 18th, 20th & 21st, affect entire case.

9° Did any necessity exist for a formal notice to the owner of the soil, with a requisition on him to work the mine, followed by a judicial sentence, consequent on his neglect or refusal so to do, before the Royal Permission could be given to mine on private property ?

10° Do the Plaintiffs' titles as owners of the soil convey to them the ownership of the gold thereon ?

11° Do the mines belong to the owners of the soil under the circumstances claimed by the Plaintiffs as accompanying their ownership ?

12° Does it appear on the face of the Plaintiffs' Declaration that the proprietors of the *Fief* complied with the condition annexed to their original Grant, namely: of notifying the Crown ?

13° Is the revocation of an Instrument, such as the "DE LERY-*Patent*, an act which may not be decreed in a proceeding to which the Crown is not a party ?

14° Does the DE LERY-*Patent* vest the Defendants with the right of entry on the Plaintiffs' lands ?

And 6th, 8th, 12th, 16th, 17th & 19th affect part only of case.

15° Does the "DE LERY-*Patent*" vest the Defendants with the ownership of the gold mines to be found on the Plaintiffs' lands ?

16° Have the Plaintiffs the right to urge in this case the non-fulfilment of the conditions of the Original Grant and of the Patent ?

17° Have the Plaintiffs a right to recover, by reason of the acts of trespass alleged by them, from the Defendants, other damages than the mere agricultural loss?

18° Is the operation of the Patent divisible with respect to the several distinct and separate lots of land composing the Seigniory?

19° Do the Plaintiffs, in their Declaration, deny the Defendants' claim to other mines, minerals and metals besides those of gold?

20° Is the Plaintiffs' action unfounded, informal and illegal?

21° Have the Plaintiffs, against the Defendants, the right of action claimed in this cause?

Title I.

Questions of the First Class.

The Questions of the first class may again be subdivided into Questions: 1st Strictly grounds of *Exception à la forme*, and 2nd. Fairly matter of General Demurrer.

Questions of first class subdivided into grounds

Sec. 3.—With regard to Questions: 3rd, 4th 5th and 13th, the Plaintiffs contend, that t... grounds of Special Demurrer, or *Exception à* ... which Pleading the Defendants have had, ... their day in Court, the Defendants' several *Except...* *forme* having been already dismissed in this case.

1st of *Exceptions à la forme* 2nd of Demurrer.

Pothier, *Procédure civile, ch:* 2, *sect:* 2, *art:* 1, *p.* 17, thus defines *Exceptions à la forme:*

Questions 1st, 2nd, 3rd, 4th, 5th 13th, are grounds of *Exceptions à la forme.*

" Ces Exceptions sont celles qui tendent à faire *renvoyer* le *Défendeur* " *de la demande* donnée contre lui, à *cause* de quelques *nullités* qui se " trouvent *dans la forme de l'exploit* de demande: par exemple, *parce que* " *l'exploit* de demande *n'est pas libellé.*

The same author, *loco citato*, then lays down the doctrine broadly:

" Ces sortes d'Exceptions doivent se proposer *à limine litis.* Lorsque " le Défendeur a défendu au fonds, il n'est plus recevable à proposer ces " Exceptions, et toutes les nullités sont couvertes. "

" Si le Juge trouve valables les moyens de nullité, il déclare l'exploit " nul, et *renvoie* en conséquence le *Défendeur de la demande*, SAUF A SE " POURVOIR; car il faut bien observer que ces exceptions ne sont " péremptoires que de l'instance; elles ne sont pas péremptoires du Droit " du Demandeur; *elles ne doivent pas opérer la* DECHEANCE DU FONDS DE

" SON DROIT. * * * * * * * * * * *Les moyens de nullité ne tendant qu'à* " *détruire la demande et* NON LE FONDS DU DROIT *du Demandeur*, il s'ensuit, " etc., etc., etc., etc."

The scope of that authority then is, that whatever does not destroy the Plaintiffs' right of action, but merely objects to the particular manner in which it is urged, must be pleaded by *Exception à la forme*; and that whatever nullity does not operate as a *déchéance du fonds du droit du Demandeur*, or would only justify a dismissal *sauf à se pourvoir*, is a ground of *Exception à la forme*. Now the Questions under consideration, as to the want of authority from the Crown, the absence of the Crown from this suit, the necessity for a *Scire-Facias*, &c., &c., are so many matters, which, if resolved in a sense favorable to the Defendants' pretensions, would not destroy the Plaintiffs' right of action, and would, at best, justify a dismissal *sauf à se pourvoir*. Is it not therefore clear that the Questions: 1st, 2nd, 3rd, 4th, 5th and 13th are matters which are strictly grounds of *Exception à la forme*, should have been proposed *in limine*, and before Plea to the merits,—have come too late, and must be overruled by the Court?

And must be overuled, as having been urged too late

Sec. 4.—Moreover, the Questions: 1st, 2nd, 3rd, 4th, 5th and 13th are so many attempts, on the part of the Defendants, to urge in this case matters affecting the Crown only, and in which the Defendants have not the slightest interest; the right of the Crown to the one-tenth Royalty cannot be destroyed, if it exist at all, by the Judgment in this case, which being a thing *inter alios acta*, never can have force of *chose jugée* as regards the Crown, and may, at most, shift the burthen of the Royalty from one subject to another. Those grounds *interest* the Crown ONLY, and may not be urged by the Defendants, who have not the slightest interest in the question whether or not the Crown is a party to this suit: such want of interest, which (NOUVEAU DÉNIZART, *vbo. action*, § 5, *No.* 1.) is the great criterion, as well of the right to urge any given matter in defence, as it is of the right of action, precludes the Defendants from requiring the presence of the Crown in this suit.

And from want of interest in Defendants.

Sec. 5.—Again what is this carping on the absence of the Crown from this suit, but a pleading of the rights of the Crown, a resort, in fine, to the prohibited Plea of the *droit d'autrui*?

The *droit d'autrui*.

Sec. 6.—In any case, the grounds urged by the Plaintiffs against the DE LÉRY-*Patent* form what, in our Law, are termed *nullités absolues*, as will be seen by the authorities to be cited hereafter. Now, by our Law, and according to the maxim : "*Quod nullum est, nullum producit effectum*", in all cases of absolute nullity, not only may the party urge such nullity, without being accused of urging the rights of others, but the Judge is bound to notice the radical defect, even though it be not pleaded by the parties (DUNOD, *prescriptions* and GUYOT, *vbo. nullité* P. 422, *Ed : in oct* : & P. 250, *Ed* : *in quarto*), and no consent, and no lapse of time, however great, short of the secular prescription, can cover the defect of an Instrument bearing, on its face, evidence of absolute nullity, according to the maxim: "*Melius est non habere titulum, quàm habere vitiosum,*" (GUYOT, *vbo. nullité*. P. 475, *Ed*: *in oct*: & *P.* 266, *Ed* : *in quarto*). If then the "DE LERY-*Patent*" can produce no effect, it is clear that the Crown can exercise against the Patentees no action under that Instrument, and no necessity can possibly exist for requiring the intervention of the Crown in this suit. If the Judge must judicially notice the defects in question, whether they be pleaded or not, and if those absolute nullities cannot be covered by the silence of the parties, not even by their consent, not even by immemorial prescription, is it not clear that the silence of the Crown, its absence from this suit, cannot cover those vices, and debar the Plaintiffs from having the nullity of the "DE LERY-*Patent*" decreed by this Court.

And because Plaintiffs objections to Patent are *nullités absolues.*

Sec. 7.—The Crown cannot be said to be absent from this suit. The Superior Court has been substituted to the late Courts of Queen's Bench in Civil matters (*C. S. for L. C. ch* : 78, § : 4, *p* : 667); and the Queen, Herself, sits *here ;* this Court is held *coràm Reginâ ipsâ* (3 BLACKSTONE, *P.* 41, *B. III, ch* : 4, § : 6). Are the parties hereto not litigating before the Queen, Herself? How does the writ of summons herein run? Is it not written :

And Crown is not absent from this suit.

"Victoria, by the Grace of God, &c., &c. to certain Bailiffs, Greeting?"

Does SHE not therein command those Bailiffs to summon the Defendants "*to appear before* HER, *in Her Superior Court, to answer the* DEMANDE" contained in the Declaration in this cause?

And Sovereign cannot be sued.

Sec. 8.—How, the Plaintiffs ask, could the Crown have been compelled to intervene herein? How could the Crown have been made a party hereto? How, otherwise than as Defendant? But is it doubted that the Crown cannot be made Defendant in our Courts, that the Sovereign cannot be sued (1 BLACKSTONE, *P.* 242, *B.* 1, *ch*: 7, § : 1)? And, as a corollary of the maxim: "*nemo tenetur ad impossibile*," the Plaintiffs cannot be called on to bring the Sovereign into this suit.

And existence of the *Tierce-opposition* shows it not to be necessary to bring Sovereign into suit.

Sec. 9.—"But," say the Defendants, "you might "have notified the Sovereign of the institution of this suit." The Plaintiffs answer, as before, that, the issue of the writ, the entry of the declaration, every step, in fine, taken in the case, is a notice to the Sovereign Herself, in Her own Court. Moreover are not the proceedings of our Courts public matters, whereof the subject, much more the Sovereign, who holds the Court, is bound to take notice? Does not the existence of the *Tierce-opposition*, by the relief that remedy affords against judgments affecting third parties, necessarily imply that the Judgments of our Courts shall be binding on third persons, not parties to those Judgments, until such time as those third persons shall have obtained relief by the *Tierce-opposition*? What then precludes the Court from adjudicating on the DE LERY-*Patent*? If the rights of the Crown be involved, let the Crown intervene now, or come in hereafter by *Tierce-opposition*. But, as a matter of precaution, the Plaintiffs have notified the Crown of those proceedings, by a formal, written notice, duly served on Her Majesty's Attorney General for Lower Canada; not that the Plaintiffs attach much value to the step; because no default can be recorded against the Crown, which may, or may not, at discretion, intervene herein; but because the Plaintiffs are as ready to litigate their claim herein with Her Majesty, Herself, as they are to do so with the Defendants.

And Sovereign has been notified.

And non-intervention of Crown is a presumption that Crown acquiesces in advance in decision to be given in this case.

Sec. 10.—If, then, the Crown has not thought proper to interfere between the Plaintiffs and the Defendants in this cause, may it not reasonably be supposed, is it not even a presumption *juris et de jure*, that the Sovereign acquiesces, in advance, in whatever decision may be arrived at, in Her Court, upon the points at issue between the parties hereto? May we not liken the inaction of the Crown to the

silence of the Notary, when one of the parties to a deed executed before that Notary declares free from mortgage a property on which the Notary has a hypothec; in such a case the Notary waives his claim, (GUYOT, *vbo. Notaire* P. 268, *Ed*: *in oct*: *& P.* 206, *Ed*: *in quarto*, and LACOMBE, *vbo. hypothèque*, *P.* 353).

Scire-Facias lies only in the case of a Record of a Common Law Court of Justice.

Sec. 11.—"The *Scire-Facias*," we are gravely told, "is the only remedy, by which Letters-Patent may be attacked." How true it is, as Bacon has said, that "a *little knowledge* is dangerous!" It is not against Letters-Patent, *eo nomine*, that the *Scire-Facias* is the appropriate remedy; it is because of the Record in Chancery formed by their enrolment there, that the *Scire-Facias* lies. So high is the respect due, under British Law, to the sanctity of a *Record*, that it requires the special permission of the Sovereign to enable our Courts to alter it, or cancel it, except it be the mere act of the Court, not of the party, and in the breast of the Court, but not beyond the Term wherein the Record was made (*Turner vs Barnaby, Trin*: 2 *Ann.* B. R. per LORD HOLT, 2 SALKELD, *vbo. Records*, *No.* 6, *P.* 566.) And it is not every thing which the Legislature has thought fit to call a Record, that may not thus be interfered with except on *Scire-Facias;* it must be a *Record* of a COURT OF JUSTICE (*Regina vs. Hughes & al:*, PRIVY COUNCIL CASES, LAW REPORTS, 1 *Vol*: *P.* 81; *Judgment rendered*, 1 *February*, 1866.) In that case it was HELD *that*

So held in case of *Regina vs Hughes*, in Privy-Council.

"Leases granted by the Governor of *South Australia*, under powers "conferred on him by the Colonial Act, 21 Vict: ch: 5 § 13, for regulating "the sale and other disposal of waste lands belonging to the Crown, *but not* "*enrolled or recorded* IN ANY COURT, *are not* in themselves *Records;* and, "though bad on the face of them, being for a larger quantity of land than "allowed by that Act, CANNOT BE ANNULLED *or* QUASHED *by* a Writ of *Scire-*"*Facias*."

"*Such Writ* is a prerogative judicial Writ, which must be *founded on* "*a Record*, and cannot under the constitution of the Supreme Court in "South Australia issue out of that Court."

"The proper remedy for an unauthorized possession of lands of the "Crown in the Colony is by an information in Chancery, Writ of Intrusion."

Facts of that case.

Sec. 12.—In that case *Scire-Facias* had been sued out of the Supreme Court, in *South Australia*, to vacate a Grant of Crown Lands, under the Great Seal of the Province of *South Australia*, signed and executed by the Governor, in the name and on behalf of Her Majesty, but not FILED *or*

RECORDED *in the Supreme Court.* A Rule *nisi* was obtained to quash the Writ of *Scire-Facias*, on the following, among other, grounds; 2nd, that there was *no record in the Supreme Court* of South Australia whereon to ground such Writ. 5th, That the *Writ did not set forth any Record* for annulling of which it had been issued. On the 29th August, 1864, the Supreme Court made the Rule absolute, and quashed the Writ. On Appeal to Her Majesty in Privy Council, the case was argued for the Respondents by the ATTORNEY-GENERAL, SIR ROUNDELL PALMER; and it is but fitting to reproduce his argument, since it was endorsed throughout by the Judgment of the Privy Council, and since it bears on other points of the present case, that shall be more fully noticed hereinafter.

Argument of ATTORNEY GENERAL.

"The Writ of *Scire-Facias*," (said Sir Roundell Palmer, in that case,) "is wholly inapplicable to the Laws and Constitution of the Colony. There is "no Officer or Court in the Colony having jurisdiction to issue such a Writ. "It is a judicial and high prerogative Writ, AND CANNOT BE GRANTED BUT UPON "A RECORD (BAC. ABR. *Scire-Facias* A; 2 INST. 470: 2 WM'S SAUND., 71, "*note* 4; FORSTER on *Scire-Facias*, 2). *Grants of Crown lands in the Colonies "are not records*, THEY ARE NOT PATENTS, *nor are they proceedings of a Court "of Record, or enrolled, which is necessary to constitute them Records.* (COM: "DIG, *Record A, Patent, F.* 7; HINDMARSH *on Patents*, 37—9; 3. *Inst.* 71). "Crown grants of land can only be made by Letters-Patent under the Great "Seal, which are Records without further proof, being enrolled in the High "Court of Chancery, from whence they issue: (Co: LITT: 16; VIN: ABR: "*Prerogative C;* PEAKE, *E*, 31, *note C;* 2 BLACKSTONE 346; DOC: & STUD, "B. 1. *dial* 8; CHITTY *on Prerogative*, 331).

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The *Seal* of the *Governor* is NOT *equivalent to* the *Great Seal;* he has no sovereign authority, and an Act done by him, unauthorized by his Commission is void: (*Cameron vs Kyte*, 3 KNAPP'S P. C. cases, 332.).

"In our Colonies, questions regarding the title to lands are to be "decided in the first instance by the Court of local judicature, from whence "an appeal lies to Her Majesty in Council: (*Attorney General vs. Stewart*, "2 MER: 143). *This must be done in the ordinary mode of procedure:* there "is no instance of such a proceeding as this in the Colonies."

* * * * * * * * * * * * * * * * * * *

"There were other remedies to which resort might have been had: "the parties might have proceeded by Bill in equity, to set aside the grants "as unduly obtained: *Sawyer vs. Vernon*, 1 VERNON, 370; *Attorney General "vs. Chambers*, 4 D. M. & G. 206; *Alcock vs. Cooke*, 5 BINGHAM, 340: or as "in the case of a grant under the Duchy Seal of *Lancaster*, of a manor with "certain rights, *where the question was raised* in an action of trover; or by "information of intrusion, (CHALMERS' *Opinions, vol.* 1, *P.* 160.), where the "very case is put, of error on the face of the grant; or by writ of intrusion. "(CHITTY *on Prerogative*, 332–3)."

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Sec. 13.—In rendering Judgment on the Appeal, LORD CHELMSFORD observed : Observations of LORD CHELMSFORD

" This is an appeal against a rule of the Supreme Court of the Province " of *South Australia*, making absolute a rule of the same Court obtained by " the Respondents for quashing the Writ of *Scire-Facias* issued for the " purpose of revoking certain leases of Crown lands granted by the Governor " of the Province to the Respondents."

" The question raised by the rule, and to be decided upon the Appeal, " is whether the Supreme Court of *South Australia* had jurisdiction to " proceed by writ of *Scire-Facias* to annul grants or leases of Crown lands " within the Province."

" The Writ of *Scire-Facias* to repeal or revoke grants or charters of the " Crown is a prerogative judicial Writ, which according to all the authorities, " *must be founded upon a Record. These Crown grants* and charters under " the Great Seal are ALWAYS *sealed* in the Petty-Bag-Office, which is *on the* " *Common Law side* of the Court *of Chancery*, AND BECOME RECORDS THERE. " Whether grants would be Records by the mere act of Sealing, without " enrolment in the Court, it is unnecessary to consider, because in point of " fact, such grants are invariably enrolled. They are then, at all events, " brought within the definition of a Record given in COMYN'S *Digest*, *title*, " *Record*, A. upon the authority of COKE *on* LITTLETON 260, A, viz : '*a* " '*memorial of an Act or Proceeding of a Court of Record, proceeding* " 'according to the course of the Common Law, entered on parchment for " 'the preservation of it.'

" All Charters or Grants of the Crown may be revoked or repealed " when they are contrary to Law, or uncertain, or injurious to the rights " and interests of third persons, and the appropriate process for the purpose " is by writ of *Scire-Facias*."

* * * * * * * * * * * * * * * * * * *

" This being the long-settled and well known rule of proceeding with " respect to Crown grants in this country, the question to be determined is " whether grants and leases of Crown lands in *South Australia* are of such " an analogous character and description as to be necessarily subject to the " same remedial process of *Scire-Facias* for their repeal."

" The first thing to be considered is the Constitution of the Supreme " Court in the Province."

Sec. 14.—His Lordship, having stated that a Colonial Act had conferred on the Supreme Court all such powers as the Lord High Chancellor of England could or lawfully might exercise within the realm of England, proceeded to observe of the Supreme Court :— The same continued.

" They have promulgated a rule as to the *teste* of Writs of *Scire-Facias ;* " but, as that process is applicable to other objects besides the grants of " Crown Lands (such as Recognizances and Judgments), the right to use it " in order to annul the leases in question must depend upon whether the " grants are of the peculiar nature and character to render them a proper " foundation for this particular remedy."

* * * * * * * * * * * * * * *

"It was contended, in the first place, that these Leases were virtually "Records. That the Governor was entrusted with all the ministerial duties "of putting the Provincial Seal (the Queen's Seal of the Province) to grants "of Crown lands. That the Supreme Court, besides being a Court of Record, "is also a Court of Equity, and can perform 'all such Acts, matters and "'things as lawfully can, or may be done by the Lord High Chancellor "'within the realm of England, in the exercise of the jurisdiction to him "'belonging.'

"The meaning of this argument seems to be, that all the machinery "existed in the Province for placing grants of Crown lands on the same "footing with those in this country, both in their Original creation, and for "constituting them a Record. But it was not pretended that any enrolment "of them had taken place, and it, therefore, became necessary for the "Appellant to insist that the leases were in themselves Records. With this "view it was asserted that every grant under the Great Seal is *ipso facto* a "Record, and that the Seal of the Province, which was entrusted to the "Governor by the Queen's Commission for the purpose of making grants in "Her Majesty's name, is equivalent to the Great Seal. Assuming this to be "the case, it would advance the argument a very short way, unless it "could be established that the mere affixing the Seal to an instrument by "the Governor at once made it a Record. *But a Record* (to recur to the "definition of it given in COMYN'S *Digest*) *must be* 'a memorial of an Act "'or proceeding of a Court of Record,' *and, when it is asserted that. when "the Seal of the Province is affixed to a lease by the Governor, it becomes a "Record*, IT MAY NOT UNREASONABLY BE ASKED: 'A RECORD OF WHAT "COURT'?"

Judgment of Privy Council.

Sec. 15.—After stating the arguments of opposing Counsel as to the existence of other remedies, His Lordship observed:

"There can be *no doubt*, however, that the *other modes of proceeding* "pointed out by the Respondents *are applicable* to the Grant of the leases "in question."

* * * * * * * * * * * * * * *

"Their Lordships, being of opinion that the *Rule* granted by the "Supreme Court *for quashing* the writ of *Scire-Facias* was *rightly made* "*absolute* will recommend to Her Majesty that the *Appeal* against it be "*dismissed* with costs."

Rulings in that case.

Sec. 16.—From that case in the Privy Council it results, that

1stly.—The Writ of *Scire-Facias*, *cannot be used* to attack a *Crown-grant*, that has *not* been *enrolled* IN A COURT OF JUSTICE AND OF RECORD.

2ndly.—The ordinary remedies must be resorted to, in the ordinary course of procedure of the Colonial Courts, in

order to attack Grants not so recorded in a Court of Justice and of Record.

3rdly.—The *validity of Grants*, not under the Great Seal of England, and not enrolled in Chancery, may be *tested by* PRIVATE SUIT *between subject and subject*, and was even so tested in a suit in trover.

4thly.—The introduction, into the Colony, of a form of procedure on *Scire-Facias* (which is applicable to other matters besides Crown-grants) leaves the Law on *Scire-Facias* precisely where it stood before, as to the peculiar nature of the cases, where it lies.

5thly.—*Crown-grants* in *the Colonies* are NOT, and cannot be, LETTERS-PATENT ; for Letters Patent can only issue under the Great Seal of England.

6thly.—The *powers* of the *Governor* are strictly LIMITED by his *Commission ;* and such Grants in the Colony are void as are not authorized by Statute or by the Governor's Commission.

Sec. 17.—In order to apply, to the "DE LERY-*Patent*", the principles involved in the decision of the case of THE QUEEN *vs. Hughes*, it becomes necessary to examine critically the nature of the Instrument commonly called the "DE LERY-*Patent.*" By LETTERS *Open or Patent*, the Governor of Canada, under the Public Seal of Canada, granted to Madame de Léry and her sons, NOT *the waste lands* of the Crown (which our Provincial Statute authorized him to grant) but *the* ROYAL PERMISSION *to work mines* of *gold* and other precious metals, a *Permission* be it observed, *en passant*, which nothing in the Governor's Commission, still less in the Imperial or Colonial legislation, authorized him to grant. That grant commonly called the "DE LERY-*Patent*" HAS NOT *been enregistered, enrolled or recorded in any* COURT *of Justice.* It is, therefore, not a Record of a Court of Justice, and consequently, in the language of LORD CHELMSFORD, as quoted above in the *case of Hughes*, "it is not a proper foundation for the particular remedy of "*Scire-Facias*," which does not lie in such a case as that of the "DE LERY-*Patent.*"

Application of that decision to this case.

"DE LERY-*Patent*" not recorded in a Court of Justice.

Sec. 18.—But we shall perhaps be told that "the "'DE LERY-*Patent*' has been recorded in the Office of the "Registrar of Records." We answer with Lord Chelmsford :

Case not altered by enrolment by so called Registrar of Records.

"Assuming this to be the case, it would advance the argument a very "short way, unless it could be established that the recording of it there at "once made it a Record, that is to say, according to Comyn, following Coke "on Littleton; 'a memorial of an Act or proceeding of a Court of Record, "'proceeding according to the course of the Common Law;'

"And if it is asserted that the "DE LERY-*Patent*" has become a "Record, in the language, again, of LORD CHELMSFORD," it may not unreasonably be asked: "A Record of what Court?"

Enrolment of Patent by Registrar of Enrolments does not make it a Record for *Scire-Facias*.

Sec. 19.—That is not all. This Instrument is not a Grant of lands of any kind; and the Office of Registrar of Enrolments (not of Records) has been created by the Provincial Act, 36 Geo: III, ch. 3, an Act *applying to Grants of Crown lands* ONLY, *but* NOT *to Grants of the Royal Permission to work a mine* (see the Preamble of the Act). Enrolments made by that Officer are by § 2 declared to be "*Records* FOR THE PURPOSES HEREIN *contained*." But not one word is there in that statute of *Scire-Facias*, or of affiliating that officer with any Court of Justice. It is therefore clear that, even supposing the 36 Geo: III, ch: 2, to apply to such Grants as the "DE LERY-*Patent*," (which it does not), nevertheless, for the purpose of sueing out a *Scire-Facias* the "DE LERY-*Patent*" constitutes no Record; and *Scire-Facias*, therefore, does not apply.

Private action may be resorted to, in order to test validity of Crown Grants in Colonies.

Sec. 20.—Moreover LORD CHELMSFORD has declared that the remedies pointed out by *Attorney General Palmer*, are the appropriate remedies to repeal improper Grants in the Colonies; and *Sir Roundell Palmer* in his argument pointed out a case wherein the validity of the Grant had been tested in an action of Trover, in other words in a suit between subject and subject, and this without the intervention of the Crown in any way.

Sec. 21.—In addition to the authorities cited in the *case of* HUGHES, the Plaintiffs beg to refer to the following authorities, namely:

The same.

1stly.—To show the necessity of its being recorded in a Court of Justice.

Dunn vs. Allen, 1 VERNON, 283.

NORMAN *on Patents*, 165, 166, 168, 194 *in fine*, & 209, *English Ed:*

2ndly.—That a bad grant is void, not merely against the Crown, but also in a suit between the Patentee and a third person.

2 VERNON, 388, *note*,
NORMAN *on Patents*, 5 English Ed :
2 ROL. 191, pl, 20.

3rdly.—That the ordinary Tribunals, ON PRIVATE *suit, and without the formality of* SCIRE-FACIAS, are competent to try the validity of Crown-grants not enrolled in a Court of Justice.

Chad vs Tilsed, { 2 B. & B., 403, / 5 MOORE, 185, }
Gray vs Bond, { 2 B. & B., 667, / 5 MOORE, 527, }
Alcock vs Cooke, 5 BINGHAM, 340.
Comming vs Forrester, 2. J. & W. 542.
Parmeter vs Gibbs, 10 PRICE, 412.

Sec. 22.—In the 3rd case, lastly above cited, where, by private suit, the validity of Crown-grants has been tested in the ordinary course, and without the formality of *Scire-Facias*, very large sums of money had been paid to the Crown for the Grants, while in others the Crown had considerable subsisting and pecuniary interest at the time. What then becomes of the argument that a necessity exists for the presence of the Crown in this suit, by reason of the one-tenth Royalty ?

And the Royalty not a reason for requiring presence of the Crown in private suit.

Sec. 23.—Moreover in the case of *The Principal Officers of Ordnance vs. Taylor*, (1 LOWER CANADA REPORTS, 481) it was held by the Court of Queen's Bench, in Appeal, that a Defendant, by Exception, might invoke the nullity injuriously affecting him, without being obliged to have recourse to the *Scire-Facias*. And assuredly if there is any meaning in the maxim : "*Quæ perpetua ad excipiendum, temporalia sunt ad agendum*," it must mean that whatever may be upheld by Plea, may also be urged by Action, subject nevertheless to the question of time, as affected by prescription ; and that a man is at liberty to defend his rights, either by Plea, or by Declaration, according as those rights may have been invaded in, or out of, Court. So much for Questions, 1st, 2nd, 3rd, 4th, 5th & 13th.

L. C. case, in Appeal shows Grant may be attacked by Plea, and therefore by action.

Sec. 24.—As to Questions 20th & 21st, they are too general, and are not to be noticed by the Court, since they

Questions 20th, 21st too general, and faulty.

do not convey particulars of the objections sought to be urged ; and they violate, in that respect, the XXXVth Rule of Practice of this Court, which states " that no party shall " be permitted to urge any ground, in support of a *Défen.* " *au fonds en Droit*, not so set forth and *particularized* in " such notice. "

Remaining Questions of First Class, 7th, 9th, 10th, 11th, 14th, 15th & 18th.

Sec. 25.—The only Questions of the first class, purporting to meet the Plaintiffs' entire case, and remaining to be considered, are the 7th, 9th, 10th, 11th, 14th, 15th, & 18th.

As to 7th, Plaintiffs could not be expected to notify Crown, before issue of Patent, of discovery, since gold had not then been discovered on their lands.

Sec. 26.—The 7th Question is, whether, " in order " to be able to maintain their present action, the Plaintiffs " should have discovered gold on their lands, and notified the " Government of such discovery before the issue of the Patent." The absurdity of the reasoning which prompted the raising of such a question is apparent on reflection, that, although gold had been discovered long ago in other parts of the Seigniory, yet, at the date of the " DE LERY-*Patent*," gold had not been discovered on the particular lands referred to in this cause. The " DE LERY-*Patent* " issued in 1846 ; and the Plaintiffs' Declaration alleges gold to have been a very ancient discovery in some parts of the Seigniory, but not to have been found on the Plaintiffs' lands until 1860, when the Declaration alleges the Plaintiff, O'Farrell, to have been the first to have discovered quartz and other gangues bearing gold and silver, and to have notified the Government of such discovery. How, then, could it be expected that the Plaintiffs, in order to maintain their present action, should, in 1846, have notified the Government of a discovery that was not made until 1860 ?

Misrepresentation by the Defendants of the Plaintiffs' allegations on this head noticed.

Sec. 27.—And here it is fitting that the Plaintiffs should notice a glaring misrepresentation of the Plaintiffs' allegations, perpetrated, unintentionally no doubt, by the Defendants in their Factum. The Defendants, at Page 36 of their Factum, say :

" Il est bien allégué que l'un des Demandeurs, *John O'Farrell*, Ecuier, " *a fait*, SUR LES TERRAINS QU'ILS DECRIVENT, *la découverte de mines, que* " DANS UNE AUTRE PARTIE DE L'ACTION, *ils allèguent* avoir été *connues* et " découvertes *depuis un demi-siècle*, et qu'il a été le premier à en dénoncer " l'existence. Or, M. O'Farrell n'a acquis ces terrains qu'en 1860, etc., etc.

Sec. 28.—In the above quotation the Plaintiffs are accused of having said, in one part of their Declaration, that " the gold on the Plaintiffs' lands was discovered half a " century ago," and, in another part of their Declaration, that " such discovery was made quite recently by the Plaintiff, " O'Farrell." To show that the Plaintiffs have not fallen into any such ridiculous contradiction, the Plaintiffs reproduce entire the allegations of their Declaration, concerning the discovery of the precious metals. At Page 3, *in fine*, of their Declaration, the Plaintiffs say :

Refutation of that misrepresentation by

" That the discovery of the existence of alluvial and diluvial gold in the " Seigniory now called Rigaud-Vaudreuil was not made by said Grantees, " either individually or collectively ; that such discovery had been made forty " years at least before the issue of said Letters-Patent, as evidenced by old " maps whereon the River now called the Gilbert-River in said Seigniory, now " called Rigaud-Vaudreuil, is set down and marked indifferently as " Rivière " dorée," " Rivière de mine d'or," an authentic copy of one of which maps is " herewith filed."

Quotation from Plaintiffs' Declaration,

" That, thirteen years at least before the issue of said Letters-Patent, " a nugget of alluvial gold, of several ounces in weight, had been found in said " River Gilbert by a person named Gilbert ; and that, although the said Dame " Marie Josephte Fraser, Charles Joseph Chaussegros de Léry, Esquire, and " Alexandre Réné Chaussegros de Léry, Esquire, immediately after such " discovery, had knowledge thereof and of like discoveries elsewhere in said " Seigniory now called Rigaud-Vaudreuil, and although, during said period " of thirteen years, the said Marie Josephte Fraser and Charles Joseph " Chaussegros de Léry, Esquire, and Alexandre Réné Chaus egros de Léry, " Esquire, had been exclusive proprietors in possession of said Seigniory now " called Rigaud-Vaudreuil, yet the said Marie Josephte Fraser and Charles " Joseph Chaussegros de Léry, Esquire, and Alexandre Réné Chaussegros de " Léry, Esquire, utterly failed and neglected to disclose, or to cause to be " disclosed, to Our said Lady, The Queen, or to the Governor of this Province, " or to the Civil Government of this Province, as representing Her said " Majesty, the fact of such discovery of gold, or in any manner to comply " with the said clause of the Original Grant of said Seigniory now called " Rigaud-Vaudreil respecting the disclosure of mines, until application was " made by the Grantees aforesaid for the said Letters-Patent in the month of " May preceding the issue of the same."

Sec. 29.—And at Page 8, *in fine*, of their Declaration, the Plaintiffs further say :

And by other quotation from same Declaration.

" That, on the pieces of land so bought by the said John O'Farrell Esquire, from the said (*names of the Plaintiffs' vendors*), there exist deposits of alluvial and diluvial gold, tin, platina and other metals, and veins and courses of quartz and other gangues, carrying gold, silver and platina, uncombined with any other metal, and also chemically combined with copper, lead, tin, zinc, arsenic, antimony and iron.

"That the said John O'Farrell, Esquire, has discovered, and has been the fisrt to denounce (*dénoncer*) to Our Sovereign Lady, The Queen, the existence, on said pieces of land, of the said gold and silver-bearing-quartz and other gangues.

"That, the said Plaintiffs are ready and willing and have sufficient means to work, and to cause to be worked, well and suffleciently, the said alluvial and diluvial gold and other mines, and the said metal-bearing quartz and other gangues; whereof the said Plaintiffs hereby pray *acte*."

That misrepresentation arises from ignorance of nature of mines.

Sec. 30.—In the face of such, the language of the Plaintiffs, and their only allegations on the subject, it is a mystery to them, how the Defendants could have so misrepresented the Plaintiffs as to have accused the Plaintiffs of having made contradictory averments as to the discovery of gold. The mildest explanation of the Defendants' conduct in this particular, is to be found in the supposition that they are so little versed in mining matters, as not to know that there may be as many mines, and consequently as many independent discoveries of mines as there are quartz-reefs,—aye, even as many discoveries, as there are important mineral deposits in the same reef. And the principle of such independent discoveries, even on the same reef, is laid down and recognized by our own Legislature, in the "Gold mining Act of 1864," (27 & 28 Victoria, ch : 9, § : 17), which states :

"*No person* shall be considered the *discoverer of a* NEW *quartz-mine*,
"*unless* the *place* of the alleged discovery shall be distant, if *on a* KNOWN
"*lead*, at least *three miles from* the *nearest known mine* ON THE SAME LEAD,
"and, if not on a known lead, at least one mile at right angles from the
"course of the lead."

Specimen of Defendants' Logic, based on that misrepresentation.

Sec. 31.—Upon that misrepresentation of the Plaintiffs' Declaration, the Defendants, in their Factum, have proceeded to build up what they, no doubt, conceive to be a dilemma of the strictest logic. At Page 36 of their Factum, the Defendants say :

"Alors de deux choses l'une : ou, *il* (the Plaintiff, O'Farrell,) *a donné*
"*cet avis* AVANT *d'être propriétaire* de ces terrains, ou DEPUIS *seulement*.
"—*S'il l'a donné* AVANT, il se trouvait dans la position d'un étranger qui
"demande une concession de mines existantes, dans la propriété d'autrui ;
"et, suivant les prétentions des Demandeurs, *ils devaient auparavant*
"*mettre les propriétaires du sol en demeure* de les exploiter eux-mêmes, et
"*obtenir un jugement* contre eux, *à déchéance* de leurs droits, ce qu'il n'a
"pas fait ; *ou il a donné* cet *avis* DEPUIS les acquisitions susdites, et alors,
"*il venait trop tard, puisqu'*une autre [illegible]ciation avait été faite et *la*
"*concession* de toutes ces mines *dûment acc*[illegible] *aux Messieurs de Léry*."

Sec. 32.—Now all that the above attempt at reasoning requires, in order to be a *dilemma*, is that it should be ***** *a* DILEMMA!! It is, in fact, the very reverse of a dilemma, since neither horn will bear being handled. For instance, as to the first alternative the Defendants offer, that of having failed to place the owners of the soil *in morâ*, and to obtain a judgment of subrogation to the owners' rights, the Defendants seem to have forgotten that *the Plaintiffs*, BY PURCHASE, have become *subrogated to the owners' rights*, and *do not* therefore *need* any judgment of *subrogation*. And, as to the second alternative, that of having given notice too late, since a previous grant of the mines had been made to the Messieurs de Léry, the Defendants' argument is a *Petitio principii*; they assume as admitted, the very proposition denied by the Plaintiffs, the validity of the "De Léry-grant"; and the Defendants conceive that, by urging the existence of a void grant, they can debar the Plaintiffs from questioning its validity. It is of such specimens of logic as the foregoing, of such misrepresentations of authority and of garbled quotations that the Defendants' Factum is made up. For instance, the Defendants, throughout, confound the *Droit Régalien* with the right of ownership; and from the existence of a Royalty, which no one denied, prior to the Seigniorial Act, the Defendants conclude, throughout, that the right of Royalty is synonimous with the right of ownership. But of those errors, into which the Defendants have thus fallen, more will be said hereafter.

Analysis of that specimen of Logic.

Sec. 33.—The difference between the position of the Defendants and that of the Plaintiffs is this, that the Plaintiffs are first (and, as may almost be said, exclusive) discoverers of the mines, as they are exclusive owners of the soil, of their lands; in that respect, they possess two qualities, no one of which ever was held by the Defendants or by the Grantees of the Patent, and which, by the Laws of all Nations, constitute an invincible claim to the mines, when combined, as the Plaintiffs' Declaration alleges they are, with the will and the means of working such mines.

Plaintiffs, unlike Defendants, are proprietors and discoverers, alike, of their mines.

Sec 34.—Admitting, for the sake of argument, that, at some given point, or points, in the Seigniory, the Messieurs de Léry had made a discovery of gold, their position is not bettered. In view of the present argument

Defendants' position not bettered by admission, *Argumenti*

causâ, that they are discoverers of gold elsewhere in the seigniory.

being on the Demurrer, which, *ad hoc*, admits the truth of the Plaintiffs' allegation that they are the first discoverers of the mines on their lands, it is clear that a prior discovery of gold elsewhere by somebody else, never could justify the grant to that somebody else of the mines so discovered by the Plaintiffs on their own lands. For instance, within what area shall you circumscribe the inordinate desires of that somebody else, *non-owner of the soil*, in his demand for a gold-mining grant? If you do not limit him to territory as distinguished by a difference of proprietary, or, in other words, if you give him a gold-mining grant extending over other lands than the particular lot, upon which he may have made his discovery, there is no reason why you should not make to him a grant of unlimited extent. If you do not limit his grant to a particular lot, there is no reason why you should limit the Grant to a Parish, a County, a District, aye, even to a Province. Thus is evidenced the absurdity of the claim set up by the Messieurs de Léry to a Grant of mining rights over ONE HUNDRED AND EIGHT SQUARE MILES of territory, founded on a discovery, not by them, but by one Gilbert, of a nugget, that did not perhaps cover *one square inch* of that territory. That the intention of the Governor of this Province, in issuing the "DE LERY-*Patent*," could not have been to grant any other mines than those to be thereafter discovered by the Grantees, is clear from the very wording of the Instrument itself; and certainly, it was not the intention to grant to the Patentees such mines as other persons (for instance, the Plaintiffs) should there after discover on their own lands; but of this more hereafter. So much for Question 7th, raised by the 7th Reason assigned in the Demurrer.

Questions 9th, 10th, 11th, 14th and 15th, treated of hereafter.

Sec. 35.—Questions: 9th, 10th, 11th, 14th & 15th, (which, with the 18th, form the only remaining Questions of the first class) involve the whole question as to the ownership of gold and silver mines and of Royal rights therein, and will be treated of, in a more appropriate place, in the next chapter, under the heading of the Vth, VIth, and VIIth reasons assigned by the Plaintiffs in their Declaration against the validity of the "DE LERY-*Patent*" (see Section of this Factum).

Operation of Patent is divisible; and

Sec. 36.—As to Question: 18th, whether the operation of the Patent is divisible, it is hardly necessary

to discuss the matter, since the divisibility of its operation seems, to the Plaintiffs, to be a self-evident proposition. Now, (and without waiver of the objection that this Question should have been raised by *Exception à la forme*) just suppose the case of a Crown-grant to A of several lots of land previously and separately patented to B, C, D : Will any one pretend that B may not attack A's Patent, merely because C & D are either unwilling or unable to move in the matter? Could B, C, & D even join in the same suit to complain of that Patent? Clearly not. What right, then, would B have to urge C's rights as against A's Patent? By claiming in B's suit to have A's Patent declared inoperative as against C, would not B lay himself open to the imputation of urging the *droit d'autrui*? In the case, then, of the "DE LERY-*Patent*," is it not clear that the Plaintiffs had no right to ask this Court to declare the Grant inoperative as against any other person than themselves? Moreover the right of entry which the Defendants claim, under that Instrument, to exercise upon and over the Plaintiffs' lands is nothing more nor less than a servitude ; as respects the soil itself, not even the Defendants claim it to be a right of ownership ; and if it is not ownership, it can be nothing else than servitude. Who, then, ever questioned the divisibility of a servitude, as respects the object of that servitude? GUYOT, *vbo. servitude*, P. 236, *Ed* : *in oct* : *&* P. 249, *Ed* : *in quarto*, in an article, which acquires importance mainly from the vast research and great learning it exhibits, has said :

right of action therefore divisible.

Patent rights not a right of property ; therefore only a *serv* ; and *servitude* divisible.

" On dit communément que toutes les servitudes sont dividues, à " l'exception de l'usufruit. Mais quoique cette règle soit assez généralement " vraie, les raisons qu'en donnent bien des auteurs, ne sont guères " satisfaisantes. *Capolla* dit, par exemple, au Chapitre 10, d'après " beaucoup d'autres docteurs, que toutes les autres servitudes, tant réelles " que personnelles, se mésurent sur les besoins de la personne, ou de " l'héritage à qui elles sont dues, et que ces besoins ne sont pas suseeptibles " de division ; tandisque chaque portion de l'usufruit, prise séparément, " apporte une utilité relative à la proportion qu'elle a avec le tout."

" Il n'est pas toujours vrai, d'abord, que les autres servitudes se " mésurent sur les besoins de la personne ou de l'héritage à qui elles " sont dues."

* * * * * * * * * * *

" Cette différenee dérive donc de la *nature* même *des servitudes qui est* " *telle qu'on ne peut* PRESQUE JAMAIS *les diviser*. MAIS *toutes les fois que* " L'OBJET de la servitude *peut être divisé*, LA REGLE N'A PLUS LIEU. Le droit " de puisage, par exemple, qui appartient à une maison pour cinquante " seeaux par jour, peut fort bien être divisé, si la maison elle-même est " divisible ; et rien n'empêchera que, si cette maison est partagée en deux, " chaeune de ces maisons n'ait un droit égal ou inégal dans ce puisage, " selon les conventions de l'acte de partage.

" *De même encore*, lorsque je suis grevé de la *servitude de ne pas élever* " *mon mur* de clôture de plus de six pieds de haut pour ne pas nuire à vos " vues, *rien n'empêche* que je ne me libère de cette servitude pour partie " seulement, et par conséquent *qu'elle ne puisse être considérée comme* " *divisible.* C'est sur ce fondement que DUNOD rapporte au Chapitre 6, " partie 3 de son *Traité des Prescriptions*, un *arrêt* du Parlement de " Besançon, qui a *jugé* qu'on pouvait *prescrire contre une servitude* " semblable POUR PARTIE *seulement.* IL SERAIT FACILE DE MULTIPLIER CES " EXCEPTIONS."

The same doctrine is laid down by LE CAMUS, in his observations on FERRIÈRE, *Grand Coutumier*, art: 187, P. 1491,—and by LANGE, in his *Nouvelle Pratique*, *vol*: 1, *ch*: 3. *Tit*: 3, *P.* 225.

It is therefore clear that the rights claimed by the Defendants, under the " DE LERY-*Patent*," are divisible, since the lands they are supposed to affect were held in different hands, at the time of the issue of the Patent, and are still divided among various proprietors.

The Questions of the first class having been thus disposed of, the Plaintiffs proceed to treat of the

TITLE II.

Questions of the Second Class.

Questions of the second class, either singly or collectively, do not meet Plaintiffs' entire case;

Sec. 37.—As to all the Questions of the second class, namely: the 6th, 8th, 12th, 16th, 17th, & 19th Questions, they purport to answer part only of the Plaintiffs' Declaration; collectively they do not profess to meet the whole case; but, even did they cover all the ground taken up by the Plaintiffs' Declaration, the unsoundness of any one of the Law-points raised by those Questions would preclude the Court from considering the others; because, in the latter case, some part of the Plaintiffs' Declaration would remain unanswered. And the Plaintiffs contend, that, on General Demurrer, professing to answer the whole case, and not praying for the dismissal of each one of the Plaintiffs' conclusions, the Defendants are debarred from urging grounds that profess to meet part only of the Plaintiffs' case. In order to

show that Questions: 6th, 8th, 12th, 16th, 17th, & 19th do not meet the Plaintiffs' entire case, either singly, or collectively, it is well to remind the reader that those Questions are :—6th, as to the effect of the Seigniorial Act on the Patent,—8th, whether the Grantees were bound to notify the Crown, within a reasonable time, of the existence of gold,—12th, whether the Plaintiffs' Declaration shows the Defendants to have notified the Crown in time,—16th, whether the Plaintiffs can urge the non-fulfilment of the conditions of the two Grants,—17th, whether the Plaintiffs can recover for other cause of damage than the mere agricultural loss,—and 19th, whether the Plaintiffs' Declaration denies the Defendants' right to other mines besides those of gold. It is also well to bear in mind, that the Plaintiffs, in their Declaration, besides the matters referred to in the 6th, 8th, 12th, 16th, 17th, & 19th Questions, do also urge, against the "DE LERY-*Patent*," a variety of other grounds, such as fraud, deceit, surprise, misrepresentation, misrecital, uncertainty, the absence of the Great Seal of England, &c., &c., &c. Now the Plaintiffs' claim for damages forms part only of the Plaintiffs' *demande*. The conclusions of each Demurrer (for there are two of them. *See Page* 18 *of the Defendants' Factum*) are in these words :

" Pourquoi, en vertu des raisons ci-dessus alléguées, le dit Défendeur " demande le renvoi de l'action des Demandeurs avec dépens. "

Sec. 38.—Those conclusions therefore pray the dismissal of the Plaintiffs' entire action, for reasons that profess to meet part only of the Plaintiffs' case. Now the Plaintiffs contend that the Defendants' Pleading, being a General Demurrer to part only of the Plaintiffs' case, is therefore bad and must be overruled *in toto* ; in any case, it must be overruled, so far as it urges grounds professing to meet part only of the Plaintiffs' action. In support of their views, on that point, the Plaintiffs beg leave to submit the following authorities :

And cannot be urged by General Demurrer.

TIDDS' *New Practice, ch:* 39 *in initio, P.* 434 *of the* 10*th Edition*, states :

" When there are *several Counts* in a *Declaration, some* of which are " *good* in point of law, and the *rest bad*, the Defendant can only demur " to the latter ; for, *if he* were to *demur to the* WHOLE declaration, the *Court* " would give *judgment against him.*"

Sec. 39.—In support of his opinion, TIDD, *loco citato*, quotes the following decided cases and reports;

1 WM'S SAUND: 5 *Ed:* 286 (9).
2 WM'S SAUND: 5 *Ed:* 380 (14).
Duke of Bedford vs. Alcock.—1 WILS: 248.
Judin vs. Samuel.—1 NEW REP: C. P. 43.
Spyer vs. Thelwell.—3 CROMP: M. & R. 692.
1 TYR. & G. 191.
1 GALE, 348, *S. C.*
Ferguson vs. Mitchel,—4 DOWL. REP. 513.
2 CROMP: M. & R. 687.
1 TYR. & G. 179.
1 GALE, 346. *S. C.*
Price vs. Williams.—1 MEESON & W. 6.
1 TYR. & G. 197. *S. C.*
Wainwright vs. Johnson.—5 DOWL: REP: 317.

Sec. 40.—CHITTY *on Pleading P.* 304 *&* 576, also states:

"*Where the matter* goes only to *defeat* a *part of* the Plaintiffs' cause "of *action*, the *Plea* in abatement should be *confined to that part;* and, "*if the Defendant* were to *plead to the whole*, his *plea* would be *defective.*"

* * * * * * * * * * * * *

"A *Demurrer* is either to the whole or part of a Declaration; and, if "there be SEVERAL *Counts*, or, in covenant, SEVERAL *breaches*, *some* of which "are *sufficient* and the *others*, NOT, or *one Count* which may be *bad* IN PART, "the *Defendant should only demur to the latter;* for *if he* were to *demur* "to the WHOLE Declaration, the Court would give *judgment against him;* "and this *rule applies to one Count*, *part* of which is *sufficient* and the "*residue* IS NOT, when the matters are divisible in their nature.

* * * * * * * * * * * * *

"So, where the Plaintiff declared in *Scire-Facias*, upon a judgment in K. B., "with a *prout patet per recordum*, and also an affirmance of that judgment "in Error, in the Exchequer Chamber, without a *prout patet, &c.*, "and the Defendant demurred to the whole, the Court held the *Demurrer* "TOO LARGE, and the Plaintiff's demand was divisible, and *judgment* was given "*for the Plaintiff.* So if part of a breach be good, it is *no cause* of *Demurrer* "*to the whole*, THAT SPECIAL DAMAGE is laid, which IS NOT RECOVERABLE. "In the case of a *Plea of Sett-off* (two parts of which are considered as "similar to two Counts in a Declaration) if *one part* be *good*, a *General* "*Demurrer* to the whole will be *bad.*"

Sec. 41.—In support of his opinion, CHITTY cites the following decided cases and reports, not referred to by TIDD, namely:

5 B. & A. 712, & 715.
COMYN'S *Digest*, *vbo. Pleader Q.* 3. 5., & C. 82.
1 SAUNDERS' REP : 27.
2 SAUNDERS' REP : 378, 379 & 380, *note* 14.
10 EAST'S REP : 359.
11 EAST'S REP : 565.
3 TERM REP : 374.
5 TERM REP : 557.
5 B. & A. 175, 712.
1 WILS : 284.
1 D. & R. 361, S. C.
2 BLA : REP : 910.
1 SALKELD, 171 *a*, *note* 1.

Sec. 42.—On the merits of the Questions of the second class, the Plaintiffs submit (as at Page 7 of their First Factum they have already done) the following PROPOSITIONS, namely: **Propositions, counter to Demurrer, submitted by Plaintiffs.**

SIXTHLY.—The Seigniorial Act, and the two Judgments referred to, and the Schedule of the Seigniory, very materially affect the "DE LERY-*Patent*."

EIGHTLY.—The proprietors of the *Fief* were bound, within a reasonable time, to notify the Government of the existence of gold on their Seigniory.

TWELFTLY.—The Plaintiffs have not, by their Declaration, shown the proprietors of the *Fief* to have complied with the condition of their Grant.

SIXTEENTHLY.—The Plaintiffs have a right, in this cause, to urge the non-fulfilment of the conditions of the Original Grant, and of the Patent.

SEVEENTENTHLY.—The Plaintiffs have a right to recover other damages than those arising from mere agricultural loss.

NINETEENTHLY.—The Plaintiffs do, in their Declaration, deny the Defendants' right to other metals besides gold, namely, to all the mines, minerals and metals referred to in the Patent.

Sixth Proposition involving ownership of gold, treated of hereafter.

Sec. 43.—As to the *Sixth* PROPOSITION, after they shall have shown what the Law of Lower Canada was, in respect of mines, at the date of the issue of the Patent, the Plaintiffs purpose establishing that the abolition of the Feudal Tenure involves the annihilation of all pretensions, either of the Crown, or of the Patentees, to mines in the Seigniory in question. For evidence of the Plaintiffs' views on that point, the reader is referred to Section of this Factum, where, as the Xth Reason assigned by the Plaintiffs' Declaration against the validity of the "DE LERY-*Patent.*" the matter will be treated of, in its most appropriate place.

Eight Proposition, as to obligation on Defendants to disclose ruinee, proved

Sec. 44.—The *Eighth* PROPOSITION to the effect that "the Patentees (as being in possession of the *Fief*) were bound, "within a reasonable time, to notify the Government of the "existence of gold in the Seigniory" is susceptible of facile proof. The Plaintiffs' Declaration (admitted to be true, for all the purposes of this argument) alleges the discovery of gold to have been made, to the knowledge of the Patentees, on a part of the Seigniory 13 years before the issue of the Patent, and not to have been notified to the Government by the Patentees until the May preceding the date of the Patent. Now it will be seen hereafter (Section of this Factum) that the Law itself, the *Ordinance of* LOUIS XI, dated from *Montilz-lès Tours in* SEPTEMBER, 1471, *Section* 4, PRONOUNCES against all those failing, within the space of forty days, to notify the Crown of such discoveries, the *penalty* of FORFEITURE of all claim to a GRANT of the ROYAL PERMISSION *to work the mine.* How many periods of forty days there are in the thirteen years, silence of the possessors of the *Fief*, how many times over the Messieurs de Léry had earned the forfeiture of all claim to a Royal Permission, before the issue of the Patent, is, therefore, no difficult matter to determine.

Effect, in Law, of failure by Defendants to fulfil that obligation.

Sec. 45.—Independently of the penalty pronounced by the Ordinance, the Plaintiffs' Declaration recites one clause of the Original Grant of the *Fief*, the only one on the subject of mines to be found therein. It is an obligation imposed on the Grantee, his heirs and assigns in these words :

" De donner avis à Sa Majesté ou à nous et à nos successeurs, des " mines, minières et minéraux si aucuns se trouvent dans la dite étendue."

Now the non-fulfilment of that obligation being an act of ingratitude, should have been (had it been known to the Crown) not only a bar to any further liberality of the Sovereign ; but it would, according to POTHIER, following DUMOULIN, have even entailed *Commise* or forfeiture of the *Fief* upon the Seignior. Note the language of POTHIER, *Traité des Fiefs*, *Part.* 1 ch : 3, *Sect* : 2, *Art.* 1, § 1 *P.* 97 :

" De ce rapport entre la commise pour felonie et la révocation des " donations pour cause d'ingratitude, qu donnent lieu à la révocation des " donations, et qui sont rapportées en la loi du COD : *de revoc. donation*, " peuvent être adoptées à la commise pour félonie ; c'est l'avis de *Dumoulin*, " qui décide sur l'*art.* 33, *gloss.* 1, *quæst.* 37, que pour savoir les causes qui " doivent donner lieu à la commise, il ne faut avoir recours ni à celles " exprimées dans les livres *de Feudis*, ni aux causes d'exhérédation des " enfants ou des pères, mais aux causes de révocation des donations " exprimées en la loi du COD. *de revocand. donation.*"

" Ces causes rapportées sont au nombre de cinq.

* * * * * * * * * * * * * *

" La cinquième raison est : ' *Si conventiones donationi appositas* " ' *minimè implere voluerit ;* ' cette raison a rapport au désaveu dont il a été " parlé en la section précédente."

Sec. 46.—According, then, to those authorities, the Grant of a *Fief*, or of a Royal Permission,—of anything, in fine, which constitutes an act of liberality, a gift (*donatio*) from the Sovereign to the subject, is revoked by any act of ingratitude,—the neglect or refusal to fulfil any condition or stipulation annexed to the Grant (*conventionem donationi appositam*). What greater act of ingratitude could the Messieurs de Lery have been guilty of, than this thirteen years' neglect, on their part, to intimate to the Sovereign the discovery of mines which the Defendants pretend to have belonged exclusively to the Crown,—this failure of the Grantees to fulfil the condition annexed to their Grant of the *Fief*,—and their failure to comply with the conditions of the Patent. The non-fulfilment of the conditions annexed to the Grant of the *Fief*, and to the Patent, must therefore be considered as having revoked the Grants. **The same.**

Sec. 47.—The *Twelfth* PROPOSITION of the Plaintiffs is to the effect that " they have not, by their Declaration, " shown the Defendants to have complied with the condition **Twelfth Proposition, as to denial by Plaintiffs of**

Defendant's right to any of the mines, also established.

" of the Grant." It is true, the " DE LERY-*Patent* " recites that the Patentees had notified the Crown of the discovery ; but it does not assign any date to such notification. Now the Plaintiffs' Declaration supplies the omission ; it is there averred that the notification to the Crown was made only in May preceeding the issue of the Patent. If the Defendants conceive that, by alleging them to have knowingly and unlawfully refrained, during thirteen years and upwards, from notifying the Crown, the Plaintiffs have shown a compliance, on the part of the Defendants, with the condition of the Grant, then the Defendants are heartily welcome to the harmless delusion !

Sixteenth Proposition, as to right to urge nonfulfilement of conditions, made manifest.

Sec. 48.—The *Sixteenth* PROPOSITION of the Plaintiffs asserts their " right to urge the non-fulfilment of the " conditions of the Original Grant and of the Patent." A few quotations, with comments showing their application, will suffice to make manifest that Proposition.

In HARRISON's *Digest, vbo. Grant*, P. 3154, we find the following:

" *Grants from the Crown, for the benefit of the King, by augmenting* " *the revenue*, founded on inquisition *ad quod bonum*, must be conformable " with the finding,—*must be for the advantage of the Crown,—must be acted* " *upon* PROMPTLY,—must be upheld by possession and enjoyment,—and the " *Grantees* MUST FULFIL *all continuing considerations*, OR *the right of* " *possession* WILL NOT PASS thereby *from the Crown.*" (ATTORNEY GENERAL " *vs Parmeter*, 10 PRICE, 378.) "

The same.

Sec. 49.—From that authority it appears that, in the case of a Grant, intended for the benefit of the Crown, the Grant must be acted upon promptly, and all continuing considerations must be fulfilled by the Grantee ; ELSE *the Grant is absolutely void, and* PRODUCES NO EFFECT, *since the right of possesion has not passed from the Crown.* Now who will deny that the Original Grant of the *Fief* was intended for the benefit of the Sovereign,—that the Sovereign had in view the rapid settlement of his new and interesting Colony,—the increase of his revenue,—an increase to the supporters of his throne and dynasty by reason of an increase in the number of his devoted subjects, and of his one-tenth Royalty on the mines which the settlement of the country would naturally bring to light ? Who, also, can doubt that the Sovereign intended the " DE LERY-*Patent* " to enure to Her benefit, by

reason of the tenth-Royalty, and the expected rapid development of the mineral resources of the Seigniory? How those legitimate expectations of the Sovereign, in both instances, have been disappointed,—how none of the continuing considerations or conditions of the Grants have been fulfilled, the Plaintiffs' Declaration has clearly pointed out. And the two Grants, in the words of the authority, have passed nothing to the Grantees; they have produced no effect as regards the Grantees; as respects the Grantees, and as a converse of the maxim: "*Quod nullum est, nullum producit effectum*," they are absolutely void, and are polluted with the taint of absolute nullity. In reference to the *nullité absolue*, mark the language of DUNOD, as quoted by GUYOT, *vbo. nullité*, P. 422, *Ed: in oct: &* P. 250, *Ed: in quarto:*

"*Cette nullité peut être objectée*, non seulement par la partie publique, "mais encore *par toutes sortes de personnes*, SANS QU'ON PUISSE LEUR OPPOSER "*qu'elles se prévalent du droit d'un tiers;* et le juge peut y prendre égard "d'office."

Answer to objection.

Sec. 50 —We shall perhaps be told that the nullity of the Original Grant affects the Plaintiffs' present claim to the mines, as *censitaires* of that Seigniory. The answer is obvious. The only person affected by it is the Seignior; the *Commise* of the *Fief* does not affect the *censitaire;* according to the maxim: "*Nulle terre sans seigneur*, the *censitaire* merely exchanged one Seignior for another; when the rights of the Grantee of the *Fief* stand in abeyance, or have reverted back, the *censitaire* holds from the Sovereign, by whom the sub grants are supposed to have been made.

Other objection.

Sec. 51.—We shall perhaps be also told that HARRISON's *Digest*, and the other English authorities herein before cited, are drawn from English Law, and are not applicable to this case. While admitting that the Law of Lower-Canada, when it has provided for the case, should govern in this matter, with the single exception, perhaps of the formalities required to validate Letters-Patent, the Plaintiffs nevertheless claim, that, when our own Law is silent, a resort to English Law is sanctioned by the very highest authority, that of Parliament itself, which, in the "Promissory Note Act," C. S. for L. C., ch: 64, § 30, P. 525, has declared that, in such a case, as to Bills, recourse shall be had to the Laws of England; and the Plaintiffs, moreover, in the researches they have

made on this subject, have been drawn to the conclusion, that there is a closer degree of assimilation between English Law and ours, in matters affecting the Crown, than most persons would, at first blush, be inclined to admit. Much light is thrown upon this subject by the fact that the Norman conquerors of England brought over with them their *Coûtume de Normandie*, which, although tempered for the better, in England, by some good old customs of the sturdy Saxon, is yet observed in its purity in Jersey, and other Channel Islands,—that most of the old Law—books, and not the least valuable among them, are written in Norman French, that the language long spoken in British Courts, as well as the Law administered there was French,—that, to this day, the technical Law-terms, in England, nearly all betray their French Origin. In any case, English authority will have with us, the same weight, as writers on French Law have always given to Roman Law, in Provinces governed by *Coûtumes ;* it must, assuredly, be regarded as sound written reason.

And to other objection.

Sec. 52.—We may again be told that, in urging the non-fulfulment of the conditions of the Grants, the Plaintiffs are making use of the rights of third persons, and pleading the *droit d'autrui*. Such an objection to the Plaintiffs' argument can only proceed from a fast and firm believer in the exploded doctrine of the "right divine of Kings." At this day, in all civilized countries, but more especially under constitutional forms of government, such as ours, the Sovereign is supposed to represent the aggregate wil of the people ; When the Sovereign is deceived, so are his subjects, (NORMAN *on Patents*. P. 20, *Eng. Ed* :). Even under the absolute sway of the Bourbons in France, the same idea had dawned, though dimly, on the public mind, since we find such a writer as COQUILLE, *Tome* 2, P. 566, assert :

"Qui trompe le Roi, trompe le peuple."

If, then, when the Sovereign is deceived, so are his subjects, and whatever thus injuriously affects the Crown is in like manner hurtful to the people, it follows that the Plaintiffs (two of whom are Her Majesty's subjects) may complain as of a matter interesting them, of any thing injuriously affecting the Crown, without laying themselves open to the imputation of pleading the *droit d'autrui*.

Sec. 53.—Moreover does not every thing that tends to diminish the public revenue, even in the matter of a royalty on mines, injuriously affect the subject, aye even the alien indweller, of the Realm, and heighten the fiscal burthens of those persons. The same.

Sec. 54.—The *Seventeenth* Proposition of the Plaintiffs involves the Plaintiffs' "right to recover from the "Defendants other damages than the mere agricultural loss." Before entering on the discussion of the Plaintiffs' right to recover such special damage as they shall establish to have been suffered by them, by reason of the Defendants' unfounded assertion of right to the precious metals on the Plaintiffs' lands, it is perhaps fitting to cite a few authorities to show that the mere assertion of an unfounded claim to a man's property, a bare denial, even extrajudicial, of his rights, constitutes a molestation in law (*trouble de droit*) and gives to that man an action at law to complain of it. *Seventeenth* Proposition, as to right to recover beyond mere agricultural loss, based on authority.

The Ancien-Denizart, *vbo. Champart*, P. 54, *Ed*: *of* 1761, cites two *arrêts*, the one rendered on the 5th March 1718, and the other, on the 27th January, 1737, holding that the bare denial of the *droit de Champart*, gives rise to the action *en Complainte*. One of those *Arrêts*, that of 1718, is reported by the Ancien Denizart, *vbo*: *Complainte*, P. 168 & 169, in these words:

"Un Arrêt rendu le 5 mars 1718, en la Grand' Chambre, sur les "Conclusions de Mr. Chauvelin, Avocat Général, a jugé qu'un Seigneur "peut intenter Complainte pour raison de terrage, champart, et autres "droits seigneuriaux, même contre le débiteur qui dénie les devoir, et refuse "de les payer."

"La question décidée par cet Arrêt ne s'était pas encore présentée "dans des termes aussi précis: en voici l'espèce.

"Les Ducs de Guise jouissaient depuis longtemps d'un droit de terrage "sur les terroirs de la Neuville et d'Etreux, membres de leur Duché, et les "habitants de ces deux Paroisses convinrent, au mois de Juillet, 1717, dans "des Actes d'Assemblées de refuser le droit, jusqu'à ce qu'on leur eût "produit, ou le titre primordial, ou des déclarations ou reconnaissances de "leurs prédécesseurs."

"Les deux Actes d'Assemblées, et le refus de payer furent pris pour "trouble. Madame la Princesse, et la Duchesse de Brunswick, (à qui le "Duché de Guise appartenait alors) formèrent leur demande en Complainte "aux Requêtes du Palais, contre les deux Communautés en nom collectif."

After reporting Maître *Gin's* argument for the *censitaires*, Denizart proceeds to say:

" Maître Huart, avocat des Seigneurs, répondait que la Complainte " n'est pas seulement un combat de possession entre deux personnes qui " prétendent, ou le même héritage, ou le même droit : c'est, disait-il, une " action que les Loix, les Coutumes et les Ordonnances accordent à toute " personne qui est troublée dans la possession d'un héritage ou d'un droit " réel : ' Or, le trouble se fait par la dénégation ou cessation de paiement, " de même qu'il est excité par la prétention d'un tiers : ' ce sont les termes " de Maître Huart ; il citait Faber, Guypape, Pontanus, Papon & Loisel."

C'est sur ces principes qu'est intervenu l'arrêt du 5 mars, 1718, qui maintient les Dues de Guise dans la possession, &c., &c."

LANGE in his *Nouvelle Pratique, vol.* 1, *livre* 3, *ch* : 7, P. 259, has the following :

" Par combien de manières pouvons-nous être troublez en notre " possession ? "

" *Par deux manières, par* PAROLES *et par faits.*"

" Comment par parole ? "

" *Quand on nous* DENIE *un droit dont nous sommes en possession, ou* " *quand par* QUELQUE ACTE *ou exploit on se qualifie possesseur de ce dont* " *nous jouissons ; alors nous prenons l'*ACTE *ou l'exploit pour* TROUBLE, *et* " *formons notre* COMPLAINTE."

* * * * * * * * * * * * * * *

" Comment conclure en Complainte ? "

" A ce que nous soyons maintenus et gardez en la possession et " jouissance d'un tel héritage, en laquelle nous avons été troublez : la *partie* " *adverse* CONDAMNEE à nous *restituer* les *fruits* qu'elle a perçus, ou *qu'elle* " *nous a empêché de percevoir*, et EN TOUS NOS *dommages, intérêts* et dépens."

The same.

Sec. 55.—The doctrine thus laid down and confirmed by the *Arrêt* of 1718, to the effect, that : " LE " TROUBLE *se fait par la dénégation ou cessation de paiement* " DE MÊME QU'IL EST EXCITÉ PAR LA PRÉTENTION D'UN TIERS," establishes conclusively the Plaintiffs' right of action ; and the statement of LANGE to the effect, that the Defendant shall, in such cases, be condemned : " *à restituer les fruits qu'elle* " *nous* A EMPÊCHÉ DE PERCEVOIR, *et* EN TOUS NOS DOMMAGES, " INTÉRÊTS, *et dépens*," bears the Plaintiffs out triumphantly in their claim for such loss as they may show themselves to have sustained by the Defendants' conduct in laying, to the precious metals on the Plaintiffs' lands, a claim which the Defendants, at the time, knew to be unfounded, and further by the Defendants conduct in blasting and quarrying on the Plaintiffs' quartz reefs, and removing thencefrom the rich bunch of visible gold, so as to destroy the then promising appearance of the veins.

Defendants aware that Patent void.

Sec. 56.—That both the Defendants, who are vendor and vendee in the Deed of Ssale of the 9th September

1864, knew their claim to the precious metals in the Seigniory to be utterly unfounded, is evident from the fact, that, in that Deed of Sale, *the* DE LÉRY *Patent-rights are sold* WITHOUT WARRANTY *of any kind*, and the Defendant, DE LÉRY, stipulates that, *in the event of the Patent being* SET ASIDE, *he shall not be obliged to reimburse the purchase-money ! ! !* * *

Sec. 57.—The opinion of LANGE, to the effect, that the Defendant shall be condemned to pay to the Plaintiffs ALL *the damages* they may have suffered, has its source in the very fount of Christianity itself, as expounded by the golden rule of doing unto others as we would wish that others should do unto us ; that doctrine, moreover, underlies the entire Law of Damage in the French system. The NOUVEAU DÉNIZART, *Edition of* 1781, *vbo. Dommages*, § 3, *No.* 1. *P.* 692, has the following, upon this point : Defendants liable for all damages, under French Law.

" Tout dommage est en général une infraction à la loi naturelle qui " défend de nuire à autrui, *neminem lædere ;* c'est pourquoi *il est dû une* " *réparation*, TOUTES LES FOIS *qu'il se trouve un coupable.*"

The same author, *vbo. Dommages et intérêts*, § 1, *No.* 1. *P.* 694, has the following :

" Il est *dû des dommages et intérêts à celui qu'on empêche de faire quelque* " *gain*, comme à celui auquel on fait essuyer une perte. Cela est conforme " à la décision de la loi 13 *ff, rem rat. hab.* : *Si commissa est stipulatio,* " RATAM REM DOMINUM HABITURUM, *in tantum competit, in quantum meâ* " *interfuit, id est, quantùm mihi abest, quantùmque lucrari potui.* En " effet, le dommage qui résulte du *défaut de gain*, est souvent *aussi réel* " dans ses effets, à raison des circonstances, *que* celui qui provient de *la* " *perte :* d'ailleurs, quand ce ne serait pas un dommage aussi considérable, " c'en est toujours un ; et, comme on l'a dit dans l'article précédent, " TOUT DOMMAGE DOIT ÊTRE RÉPARÉ."

Sec. 58.—It will, no doubt, be said, that the Defendants cannot be held responsible for having urged their claims to the precious metals. The answer is plain : the Defendants knew that their claims are unfounded. Else, what is the object of that extraordinary clause in the sale by DE LÉRY to COMAN of the Patent-rights, witholding the usual warranty, and even stipulating that the purchase-money shall not be refunded in the event of the Patent being set aside. Evidently the Defendants have, by the assertion of an unfounded and unjust claim, damnified the Plaintiffs, and must repair the wrong suffered by the Plaintiffs. The position of the Objection and Answer.

Defendants in this respect is not to be distinguished from the case of the man who brings an unjust suit. and of whom GUYOT, *vbo. Dommages et intérêts, P.* 122, *quarto Ed :* speaks thus :

" Suivant les lois romaines, *ceux qui intentaient des procès évidemment* " *injustes,* devaient être *condamnés à des dommages et intérêts,* OUTRE LES " DÉPENS. François premier trouva ces dispositions si judicieuses, que par " son Ordonnance de 1539, il voulut qu'en toute matière on adjugeât des " dommages et intérêts proportionnés à la témérité de l'action de celui qui " succomberait ; mais cette loi est tombée en désuétude, *et le juge* " *ne prononce ordinairement de dommages et intérêts que proportionnément* " *au préjudice ou à la perte* que souffre celui à qui il les adjuge. "

Defendants also liable under English Law.

Sec. 59.—A like liability attaches, under English Law, to all those who, by an unfounded assertion of title to an immoveable have injured the owner thereof, either by destroying the owner's chance of selling, or otherwise, as the case may be. The action, to which, by English Law, resort is had in such cases, is called the action for *slander of title.* Upon an action for slander of title, the Plaintiff is entitled to recover whatever actual special damage he may have alleged and proved himself to have suffered : as for instance, the loss of a customer, to whom the Plaintiff would have sold but for the Defendant's unfounded assertion of title. The doctrine laid down by English Law upon this subject, may be found stated in any one of the following English reported cases :

Lawe vs. Harwood,—CRO : CAR : 140.—JONES' REP : 196.—LEY 82.
Rowe vs. Roach,—1 MAULE & SELWYN, 304.
Crush vs. Crush,—YELVERTON, 80.
Gre'ham vs. Grimsby,—YELVERTON, 88.
Gerard vs. Dickinson,—4 Co : 18.—CRO : ELIZ : 197.
Smead vs. Badley,—CRO : JAC : 397.
Tashburgh vs. Day,—CRO : JAC : 484.
Earl of Northumberland vs. Byrt,—CRO : JAC : 163.
Pennyman vs. Raybanks,—CRO : ELIZ : 427.
Malachy vs. Soper,—3 BINGHAM. 371.
Bold vs. Bacon,—CRC : ELIZ : 346.
Millmann vs. Pratt,—2 BINGHAM, 486.
Hargrave vs. Le Breton,—4 BURR : 2422.
Hartly vs. Herring,—8 T. R. 130.
Manning vs. Avery,—KEB : 153.
Cane vs. Goulding,—STYLE'S REP : 169, 176.

Watson vs. Reynolds,—1 MOODY & MALKIN, 1.
Smith vs. Spooner,—3 TAUNTON, 246.
Pitt vs. Donovan,—1 MAULE & SELWYN, 639.
Fairman vs. Ives,—5 B. & A., 642.
Bannister vs. Bannister,—4 Co : 17.
Mildmay's case,1 Co : 177.

Clear evidence of damage suffered by Plaintiffs.

Sec. 60.—The Plaintiffs flatter themselves that nothing can be more satisfactory than the evidence in their possession, as to the price, at which, in the first fervor of the gold-excitement, the Plaintiffs could have disposed of their property at the Devil's Rapids, to parties with whom the Plaintiff, O'Farrell, had been in treaty, had it not been for the conduct of the Defendants, in causing the negotiation to be broken off, by their unfounded assertion of title to the gold on that property.

Defendants guilty of a *voie de fait*.

Sec. 61.—Moreover the Defendants' conduct in entering on the Plaintiffs' lands, and in blasting, quarrying and removing the gold-bearing quartz, and thus destroying the promising appearance of the reefs, is a *voie de fait*, for all the direct and immediate consequences of which, even to the loss of a customer, the Defendants are indubitably liable. So much for the Plaintiffs' right to recover other damage than the mere agricultural loss.

Sec. 62.—In order to establish the *nineteenth* PROPOSITION of the Plaintiffs, which is to the effect, that the Plaintiffs have denied the Defendants' right to all the mines, minerals and metals referred to in the Patent, it is merely necessary to reproduce a portion of the Plaintiffs' Declaration on that point. At Pages 9 and 10 of their Declaration, the Plaintiffs state :

" That, under the Letters-Patent aforesaid, the said *Defendants* lay *claim* " *to all the gold and all other precious metals*, to be found or existing on " the said pieces of land so owned by the said

(*Plaintiffs' vendors*)

" and in and beneath the bed of the said River so fronting the same ; and " that, under the Letters-Patent aforesaid, the said Defendants, as well by " themselves as by their retainers, and representatives, have claimed and " sought to exercise, and do still claim and seek to exercise, the right of " passing and repassing, at will, in and over the said pieces of land, without " the consent of the said

(*Plaintiffs*)

" for the purpose of working all mines of the precious metals to be found " on the said pieces of land.

* * * * * * * * * * * * * * *

" And that, on the first day of June, one thousand eight hundred and " sixty-two, and on divers days between that day and the first day of " November, one thousand eight hundred and sixty-three, the said " Defendants, as well by themselves as by their hired servants and retainers, " unlawfully entered in and upon the said pieces of land, and in and upon " the river bed so fronting the same as aforesaid, and so then and there " being, did work, mine, blast and quarry into the aforesaid gold and other " metal—bearing veins and courses, and thencefrom did unlawfully extract, " take and carry away, against the will of the Plaintiffs, large quantities of " gold and silver, and other metals, and did further then and there " unlawfully extract, take and carry away thencefrom all the gold there " being visible in position in the said veins and courses, and did thereby " then and there so disfigure and destroy the appearance of the said veins " and courses as to destroy the Plaintiffs' chance of profitably selling and " disposing of the said several pieces of land, and of the river bed so " fronting the same ; *and that the said Defendants, by their unlawful* " *proceedings in the premises, and by* THEIR UNJUST AND UNFOUNDED ASSSERTION " OF RIGHT ON THEIR PART TO THE GOLD AND OTHER METALS to be found in and " beneath the said pieces of land, and in and beneath the river bed so " fronting the same, *have deterred capitalists and miners from purchasing* " *or leasing from the Plaintiffs* the said several pieces of land and the river " bed so fronting the same, the whole thereby causing to the Paintiffs, " damage, amounting to the sum of two hundred and fifty thousand dollars, " current money of this Province, which the Defendants have severally " refused to pay to the Plaintiffs although thereunto requested.

It is therefore clear, that the Plaintiffs, by their Declaration deny, in the most emphatic terms, the Defendants' right to, all the precious metals, the only metals referred to in the " DE LÉRY-*Patent*."

Having thus established, as the Plaintiffs conceive, the insufficiency of the Demurrer, they proceed to make out the

CHAPTER II

SUFFICIENCY OF THE DECLARATION.

Synopsis of Plaintiffs' allegations of

Sec. 63.—In order to attain their object, the Plaintiffs deem it right to reproduce, from their first Factum, a

synopsis of the allegations of their Declaration. They there allege

fact, and objections to Patent.

1° The issue of the obnoxious Patent, at Montreal, on the 18th September, 1846, and the enrolment thereof on the same day by the Registrar of Records.

2° The possession and ownership, by the Defendants, of that Patent, as well by succession as by assignments thereof.

3° The Original Grant to *Fleury de la Gorgendière* by the Governor and Intendant of Canada, at Quebec, on the 23rd September, 1736, of the Seigniory now constituting the Parish of St. François de la Beauce; and the Royal Confirmation of that Grant at Versailles on the 30th April 1737; the only stipulation as to mines to be found in that Original Grant and in the Royal Confirmation thereof being an obligation imposed on the Grantee, his heirs &c., in these words: "*de donner avis à Sa Majesté ou à nous et à nos "successeurs, des mines, minières et minéraux si aucuns se trouvent dans la "dite étendue.*"

4° The Judgment of the Seigniorial Tenure Court, having force of *chose jugée* by statute as between the Plaintiffs and the Defendants; by which Judgment it was adjudged and declared that all reservations of mines by the Seignior were and are illegal, null and void, when the original Grant contains no such reservations; which judgment also adjudged and declared the riparian proprietor of any stream not navigable and not floatable to be proprietor of one half the stream fronting his property.

5° The Seigniorial Tenure Act, and the Judgment of Commissioner Turcotte, homologating the schedule of the Seigniory, by which all the Seignior's rights *hâc vice* were liquidated, and declaring that the Crown had no casual rights therein.

6° The discovery of gold was not made by the Grantees, but was a discovery so ancient that the oldest maps of the Seigniory designate the Gilbert River as the "*Rivière dorée*", the "*Rivière des mines d'or*"; and a large nugget of gold, to the knowledge of the Grantees, was found in the Seigniory by one Gilbert, some 13 years before the issue of the Patent; and that the Grantees, though cognizant of such discoveries of gold, gave the Crown no notice of such discoveries until they applied for the Patent, when, by way of inducement for the Grant, they falsely alleged themselves to be the discoverers of the gold there.

7° Possession by the Plaintiffs and their *auteurs*, as proprietors, under good and valid titles alleged, of certain lands and tenements in the Seigniory now called *Rigaud-Vaudreuil*, and in Plaintiffs' Declaration particularly described, during thirty years and upwards; such possession extending even to a period anterior to the British Conquest of this Province; and that such lands and tenements front the River Chaudière, a River not navigable and not floatable.

8° The existence, on those lands and tenements, of the precious metals as well *in situ*, as in alluvial and diluvial form; the discovery of gold-bearing quartz there by the Plaintiff, O'Farrell; and his denunciation of such discovery to the Crown in compliance with the original Grant; and that the Plaintiffs are ready and willing, and have ample means, to work all such mines of the precious metals on those lands and tenements.

9° The claim set up by the Defendants to the exclusive ownership of all such mines of the precious metals as are found on those lands and tenements, and this under the Patent above referred to.

10° Divers trespasses committed by the Defendants on the Plaintiffs lands and tenements, in assertion of the Defendants' right to the precious metals found on those lands and tenements; and that the Defendants' conduct and acts, in that particular, have destroyed the promising appearance of the gold-bearing veins, and annihilated the Plaintiffs' chances of profitably selling the said veins; whereby the Plaintiffs have been, and are, damnified to the extent of $250,000.

11° The illegality of the "De Lery *Patent*," resulting from the following causes, namely:

I. The deceit, surprise, fraud and mis-representation practised by the Grantees of the Patent on the Government of the day, as to the Grantees being the discoverers of Gold there, and as to other material facts.

II. The recital of the Patent that it is granted for a tract of territory originally conceded *en Fief* to *Pierre Rigaud de Vaudreuil;* that being a misrecital; because the Grant to Rigaud de Vaudreuil lies to the N. E. of the parish of St. François (originally conceded to Fleury de la Gorgendière) and constitutes the parish of St. Joseph de la Beauce (originally granted to de Vaudreuil).

III. The uncertainty prevailing in the description of the thing granted; the weight of this reason will strike the eye on a perusal of the terms in which the Grant is conveyed.

IV. The non-observance of certain formalities essential to the validity of all such Grants, namely:—the Warrant for the Bill—the Bill itself—the Warrant for the Privy Signet—the Privy Signet itself—the Warrant for the Great Seal—And the Great Seal itself.

V. The Crown had no interest to grant; in as much as, by the Laws then in force in Lower-Canada, the rights of the Crown, in private lands, were, and are, restricted to one-tenth of the metals extracted.

VI. The Mines belong to the Plaintiffs as owners of the soil in those lands and tenements, no part of which ever belonged to the Defendants as owners of the soil; and that the Patent issued without notice to the Plaintiffs' *auteurs*, as owners of the soil, and without the Plaintiffs' *auteurs* having been called on to work the mines.

VII. A Royal Permission to work a mine could only issue on the refusal of the proprietor to work the mine, after regular and judicial notice to the proprietor, and a formal judgment to that effect by the Tribunals of the country.

VIII. Such Letters-Patent could not issue under the Great Seal of this Province, as they have done, but only under the Great Seal of the United Kingdom; and such Letters-Patent issued illegally and unadvisedly.

IX. The non-fulfilment by the Grantees of the several conditions of the Grant.

X. The Patent is, in any case, superseded by the Seigniorial Tenure Act, and its amendments, and by the two Judgments above referred to, and by the completion and confirmation of the schedule of the Seigniory.

The Plaintiffs then proceed to conclude against the Defendants' assumed right of entry on the Plaintiffs' lands, in assertion of the Defendants' claim to the precious metals therein, and that the Defendants be declared and adjudged to have no right to such precious metals on those lands or in the half of the river fronting the same; that the Patent and its enrollment be declared null and void, and inoperative as regards the Plaintiffs and their lands, and be set aside, cancelled, revoked and annulled; and that the

Defendants be adjudged and condemned to pay to the Plaintiffs their damages amounting to $250,000, with interest and costs.

Text of the Patent.

Sec. 64 —In order the better to grapple with the objections taken by the Plaintiffs to the "DE LÉRY-*Patent*," the Plaintiffs give the text itself of that instrument. and have italicised such portions of it as bear on some of the points made against it by the Plaintiffs.

"Whereas our loving subjects DAME MARIE JOSEPHTE FRASER, of Our "City of Quebec in Our Province of Canada, widow of the late Honorable "Charles Etienne Chaussegros Delery, in his lifetime also of the same place, "Esquire, CHARLES JOSEPH CHAUSSEGROS DELERY of the same place, "Esquire, *and* ALEXANDRE RÉNÉ CHAUSSEGROS DELERY, also of the same "place, Esquire, *have* humbly *represented unto US* by their Petition in that "behalf *that they are Seigniors and Proprietors of the Fief and Seigniory* "*of* RIGAUD-VAUDREUIL, situate in our District of Quebec in our said Pro- "vince and described lying and being, as follows, that is to say "an extent "of ground three leagues in front by two leagues in depth on both sides "of the River of the Chaudière Falls with the Lakes and Islands in the said "River," *and that there are supposed to exist within the limits of the said* "*Fief and Seigniory certain ores, minerals and mines containing* GOLD *and* "*other precious metals* OF WHICH supposed mines THEY HAVE MADE "THE DISCOVERY, and are now desirous of digging and working for their "own profit and advantage should they obtain Our Royal Permission to "that effect, *and further that in obedience to the conditions of the Original* "*Deed of Concession of the said Fief and Seigniory to Sieur* PIERRE RIGAUD "DE VAUDREUIL dated at Quebec the twenty-third day of September one "thousand seven hundred and thirty-six and signed "Beauharnois" and "" Hocquart," and confirmed at Versailles on the thirtieth day of April "then following by His Most Christian Majesty, Louis the Fifteenth, they "did denounce and declare to *US* for the expression of Our Royal Will and "Pleasure the existence of the said mines within the limits of the said Fief "and Seigniory at several places therein, *of which they will better inform* "*US after further researches under Our said Royal Permission*, which "they humbly pray *US* to grant, *in conformity with the laws and usages in* "*force and applying in that behalf*, so that they may search, dig for and "work the said mines by themselves, or by other experienced persons, "offering to pay *US* the net one-tenth part of the whole produce of the said "mines, praying also to be allowed a remission of the said one-tenth part for "a limited time, after the melting of the said ores shall be in operation, to "compensate them for the first outlay required therefor: NOW KNOW YE "that in consideration of the premises, *WE* of *Our especial grace, certain* "*knowledge and mere motion*, have given and granted and by these Presents "do *give and grant* unto the said Dame Marie Josephte Fraser, Charles "Joseph Chaussegros Delery, Alexandre Réné Chaussegros Delery, their "heirs and assigns for ever, *our Royal permission and authority to make* "*such researches* AS MAY BE REQUIRED IN ORDER FURTHER TO ASCERTAIN THE "POSITION AND EXTENT OF THE SAID MINES and to dig and work the same by "themselves or by other experienced persons at any one or more place or "places within the limits of the said Fief and Seigniory, and for that purpose "to erect furnaces, buildings and other apparatus that may be required to "melt and render available for the profit and advantage of themselves and of

" their heirs and assigns all such ores and minerals which they may have " found, the whole in as ample a manner as may be necessary for the due " effect of these Presents, the whole *on condition that our said grantees* " their heirs and assigns for ever *shall strictly conform to all laws and* " *usages in force and applying in that behalf*, that they shall well and truly " repay to other our loving subjects such damages and compensation as may " from time to time accrue in consequence of the ground occupied, the " opening of Roads and other like causes resulting from the operations in " working the said mines. And *also upon condition that* BEFORE WORKING " THE SAME *they do transmit and deposit* with our Secretary of our said " Province, *a true and correct statement of the nature, situation and extent* " *of the said ores, minerals, and mines.*—And *further upon condition of* " *transmitting* in each and every year to our Receiver General for our said " Province *a true and correct account of the gross produce of the same*, in " such form and manner as We, our Heirs and Successors may hereafter be " pleased to direct, and *also upon condition of well and truly paying and* " *delivering in each and every year* from the time of melting the said ores " for the first time in working furnaces, unto our Receiver General or such " other person as may have authority from *US* our Heirs and Successors " *one net tenth part of the whole gross produce of the said ores minerals and* " *substances* thereunto appertaining whatever, the said one tenth part being " melted, cast and prepared in the same manner as the like may be for the " behoof of our said Grantees, and refined *according to the Laws of France* " *as confirmed by the* EDICT OF HIS LATE MOST CHRISTIAN MAJESTY, OF THE " MONTH OF JUNE ONE THOUSAND SIX HUNDRED AND ONE. And it is further " our Will and Pleasure that our said Grantees have a remission of the said " one-tenth part for five years from and after the date of these Presents."

First objection to Patent

Sec. 65.—The first objection, taken by the Plaintiffs to the " DE LÉRY-*Patent*," is founded on the *deceit*, " *surprise*, *fraud*, *misinformation* and *misrepresentation*, " practised *by the Grantees* on the Government of Canada, " *in relation to* the person by whom *the discovery of gold* " in the Seigniory was made, *and* in relation *to other material* " *facts*." The deceit, fraud and misrepresentation practised by the Grantees in this respect is made apparent by the recital of the " DE LÉRY-*Patent* ; " in one of the italicised portions thereof, it states :

" *WHEREAS* our loving subjects *Dame Marie Josephte Fraser*, " *&c.. &c., &c., have represented unto US, that they are Seigniors and* " *proprietors* of the Fief and Seigniory *of Rigaud-Vaudreuil &c., &c., &c*, " and that there are supposed to exist, within the limits of the said Fief " and Seigniory, certain ores, minerals and mines, containing gold and other " precious metals, *of which supposed mines* THEY HAVE MADE THE DISCO- " VERY * * * * * *.

Thus their " DE LÉRY-*Patent* " recites, as the first and main cause or consideration of the Grant, the representation of the Grantees to the Government, that the Grantees had

made the discovery of those mines. Now, as against the Defendants, whom the Plaintiffs allege to be the bearers of that Instrument, that recital of the Patent is conclusive evidence of the truth of the recital, because the "DE LÉRY-*Patent*" is the Defendants' title, and establishes conclusively, as against them the truth of that recital. It only, now, remains for the Plaintiffs to shew that the Grantees, in representing by their Petition the gold to have been discovered by them, related a gross and wilful falsehood. The Plaintiffs' Declaration, whereof the allegations of fact are by Law held to be true for all the purposes of the Demurrer, contains the following allegations :

"That *the discovery* of the existence of alluvial and diluvial *gold* in the "Seigniory now called Rigaud-Vaudreuil *was* NOT *made by said Grantees*, "either individually or collectively ; that *such discovery* had been *made* "*forty years* at least *before the issue of said Letters-Patent*, as evidenced by "*old maps* whereon the River now called the *Gilbert-River* in said Seigniory, "now called Rigaud-Vaudreuil, is set down and marked indifferently as "*Rivière dorée*," "*Rivière de mine d'or*," an authentic copy of one of "which maps is herewith filed.

"That, *thirteen years* at least *before* the issue of said *Letters-Patent*, a "*nugget of* alluvial *gold*, of several ounces in weight, had been *found* in said "River Gilbert *by* a person named *Gilbert ;* and that, *although*, the said "Dame Marie Josephte Fraser, Charles Joseph Chaussegros de Léry, Esquire, "and Alexandre Réné Chaussegros de Léry, Esquire, immediately after "such discovery, *had knowledge* thereof and *of like discoveries* elsewhere in "said Seigniory now called Rigaud-Vaudreuil, and although, during said "period of thirteen years, the said Marie Josephte Fraser and Charles "Joseph Chaussegros de Léry, Esquire, and Alexandre Réné Chaussegros "de Léry, Esquire, had been exclusive proprietors in possession of said "Seignior, now called Rigaud-Vaudreuil, yet the said Marie Josephte Fraser "and Charles Joseph Chaussegros de Léry, Esquire, and Alexandre Réné "Chaussegros de Léry, Esquire, utterly *failed and neglected to disclose*, or "to cause to be disclosed, to Our said Lady, The Queen, or to the Governor "of this Province, or to the Civil Government of this Province, as represent- "ing Her said Majesty, *the fact of such discovery of gold*, or in any manner "*to comply with* the said clause of the *Original Grant* of said Seigniory "now called Rigaud-Vaudreuil *respecting the disclosure of mines*, until "application was made by the Grantees aforesaid for the said *Letters-Patent* "in the month of May preceding the *issue* of the same."

It is, therefore, clear, for all the purposes of the Demurrer, that the Grantees were guilty of deceit, surprise, fraud and misrepresentation in that respect. Let us now see, whether there be any better foundation for that other statement of theirs as to their being *proprietors* of Rigaud-Vaudreuil. Under the Law which, prior to the Seigniorial Act, governed Seigniories in this country, the Seignior was a mere Trustee

of the Crown for settlement-purposes, receiving, for his services, rewards, some of which were lucrative and others merely honorary; but, apart from the manor-house and tenement, and the Banal mill and its dependencies, and such lands as he might have acquired from the *censitaire*, he did not own, and was therefore not proprietor of, one square inch of the soil within the Seigniory. Such is the scope of the Judgment of the Seigniorial Court: such is the plain deduction from the clause of the Seigniorial Act (C. S. C., chapter 41, §85), which conveys, *en rôture* to the Seignior, all lands unconceded and unoccupied, at the date of that enactment. The Seignior was, no doubt, the owner of all that which the "*Seigniorial Act*," has fitly termed "*Seigniorial rights;*" and in that sense only was he termed proprietor of the Seigniory; but he was not proprietor of the Seigniory, that is, of the soil,—in that sense in which an English Lawyer reading Letters-Patent in the English form would be apt to construe them.

It was, by thus carefully concealing from view the fact of the *Censitaires* being owners of the soil in that Seigniory, that Government was induced to make the Grant in question. What worse species of fraud could have been practised than that exhibited in this connection by the Grantees? Moreover, in the sixth reason assigned by the Plaintiffs in their Declaration against the validity of the "DE LÉRY-*Patent*", it is expressly stated that the Grantees never were the owners of the soil of the tenements in respect of which the Plaintiffs have brought their present action; that allegation must, for the ends of the Demurrer, be taken to be true; and it stamps, at once, the Grantees' representation as a falsehood, a deceit, a misrepresentation and a fraud.

Sec. 66.—Having thus brought home to the Grantees the surprise, deceit, fraud, and misrepresentation charged against them, it is perhaps as well to notice the SECOND, THIRD FOURTH, EIGHTH and NINTH *objections* taken by the Plaintiffs to the "DE LÉRY-*Patent*", in as much as the Law-authorities, which bear out the *first* objection, are applicable to the *second*, *third*, *fourth*, *eighth* and *ninth* objections.

Second objection to Patent.

Sec. 67.—The second objection to the "DE LÉRY-*Patent*" is

"II. The recital of the Patent that it is granted for a

" tract of territory ORIGINALLY CONCEDED en Fief to *Pierre* " *Rigaud de Vaudreuil* ; that being a MISRECITAL ; because " the Grant to *Rigaud de Vaudreuil* lies to the N. E. of the " Parish of ST. FRANÇOIS (originally conceded to *Fleury de la* " *Gorgendière*) and constitutes the Parish of ST. JOSEPH *de la* " *Beauce* (originally granted to *Rigaud de Vaudreuil*).

To shew that the " DE LÉRY-*Patent* " issued, as stated above, the Plaintiffs reproduce the description given in the Patent of the territory affected by the Grant and place it side by side with that contained in the Original Grant to *de Vaudreuil*, for the purpose of shewing that they are identical :

TERRITORY,

described in " DE LÉRY-*Patent*."	*Described in Concession to* DE VAUDREUIL.
" An extent of ground three leagues in front by two leagues in depth on both sides of the River of the Chaudière Falls with the lakes and islands in the said River."	A tract of land of three leagues in front by two leagues in depth on both sides of the River of the Sault de la Chaudière, together with the lakes, islands and islets lying and being in the said River.

The description of the territory granted to *de Vaudreuil* is quoted textually from the English translation of the Original Grant to *de Vaudreuil*, as found on Page 245 of the " *Titles and documents relating to the Seigniorial Tenure* " printed by E. R. Fréchette as the Return to an Address of the Legislative Assembly of Canada of the 29th August, 1851. The Original Grant to *de Vaudreuil* is dated the 23rd September, 1736, the very day assigned to it by the " DE LÉRY-*Patent* " ; and the Plaintiffs, who have had access to the *Régistre de l'Intendant*, No. 8, where the original Grant is enrolled, can vouch for the accuracy of the translation In order to shew that the Seigniory granted to *de Vaudreuil* constitutes the present Parish of St. Joseph, it is only necessary to look at Page 243 *& seq* : of the same Return ; Pages 243 et 244 contain the Grant to Sieur *Thomas Jacques Taschereau* (now constituting the Parish of St. Mary, Beauce) —Pages 245 and 246 contain the Grant to *de Vaudreuil to commence running* (as stated in the Grant) " and ascending " the said River, *from the end of the concession which we* " *have this day granted to the Sieur* THOMAS JACQUES TASCHE- " REAU, and to end at another concession ascending along the " said River, which we have also this day granted to the

"Sieur Joseph Fleury de la Gorgendière." The Grant to *de Vaudreuil* constitutes the Parish of St. Joseph de la Beauce; and at Page 247 of the same Return is to be found the Grant to *de la Gorgendière*, which constitutes the Parish of St. François de la Beauce. Now the Plaintiffs' Declaration, which must be taken to be true for all the purposes of this argument, distinctly avers that the Plaintiffs' lands and tenements are situated in the Seigniory now called *Rigaud-Vaudreuil*, and that such Seigniory was originally granted to *Fleury de la Gorgendière*. Such being the case, it appears undoubted law to the Plaintiffs, that a Patent affecting only lands in the Seigniory originally granted to *de Vaudreuil*, cannot, by any stretch of the imagination, be held to embrace within its scope the Plaintiffs' lands, which are within another Seigniory originally granted to *de la Gorgendière*. In any case the variance must assuredly be held to be a fatal misrecital.

Third objection to Patent

Sec. 68.—The Third *objection* to the "de Léry-*Patent*" is

"III. The uncertainty prevailing in the description of "the thing granted."

What greater uncertainty can there be in the description of the thing intended to be granted, than is conveyed in those words of the Patent "*that there are* supposed *to exist within* "*the limits of the said Fief* and Seigniory certain ores, "minerals and mines, containing gold and other precious "metals of which supposed *mines*, &c., &c"? And if any thing were needed to convince one how little the Grantor and Grantee knew, at the time, of what was being given by the one, and received by the other, it would be found in those other words of the Patent: "they did denounce and *declare* "to Us the existence of the said Mines *within the limits of the* "*said Fief* and Seigniory, at several places *therein, of which* "*they will* better inform *US after further researches*"? Where are those *several places?* What is the extent of those *several places?* Is it *gold in position* in the quartz-reef? Or is it only the loose gold to be found in the gravel of the ancient detritus? or of the more modern alluvial? If it be gold *in situ*, what is the course of the reefs? Can any thing convey a more misty notion of the object of the grant than to say, as does the Patent, that "*they will better inform* Us, after

"FURTHER RESEARCHES"? Again what is the scope of the Grant? Such as it is found in the Patent, it appears to amount to very little. The Patent states the Grant to be: "Our Royal *permission* and and authority *to make such* "*researches* as may be required *in order* further to *ascertain* "the *position* and *extent* of the said *mines* * * * * * * * * * * * "UPON CONDITION *that* BEFORE *working* the same they do "transmit and deposit with our Secretary of our said Province "a *true and correct statement* of the *nature*, *situation* and "*extent* of the said ores, minerals and *mines*." Could any language be framed more vague in describing the object of the Grant, than the words above quoted from the Patent? The intention seems to have been, less a grant than a *mere permission*, NOT EVEN EXCLUSIVELY *in favor of the Grantees*, to search for mines, in order that any subsequent discovery might be the subject of further disposal by the Crown. Evidently the Crown, before finally disposing of the mines, desired further, and more precise, information on the subject, and intended, after obtaining such information, to follow up the "DE LÉRY-*Patent*" by some further action. In any case, the utter ignorance of the Crown as to the nature, situation, extent and value of the mines, is evidence that the Crown was not possessed of that *certâ scientiâ*, so essential to the validity of a Crown Grant. Moreover, the want of further information, as expressed in the Patent, necessarily implies that such further information was required for further action, either executive or legislative, with regard to the mines, and that the "DE LÉRY-*Patent*," was neither a final nor an absolute grant. And yet such is the instrument, under which the Defendants lay, to the precious metals on the Plaintiffs' lands, a claim which the Defendants well know to be unfounded, as is evident from the absence of the usual Warranty clause from the Deed of Sale from de Léry to Conan, as is hereinbefore noticed.

And herein may be remarked *en passant* that the *better information* required of the Patentees as a *condition* of the Grant was never furnished to the Government, and that such a condition seems to the Plaintiffs to be one *suspensive* of the operation of the Patent, even if it does not void the Patent altogether; but of this more hereafter.

The foregoing observations may perhaps serve as an illustration of the wisdom of the rules required for the validity of Crown Grants, as developed in the following sections.

Fourth objection to Patent

Sec. 69.—The FOURTH *objection* to the "DE LÉRY-*Patent*" is

"IV. The non-observance of certain formalities essential "to the validity of all such Grants, namely: The *Warrant* "for the BILL—the *Bill* itself—the *Warrant* for the PRIVY-"SIGNET—the *Privy-Signet* itself—the *Warrant* for the "GREAT SEAL—And the *Great Seal* itself."

The Plaintiffs' Declaration, it will again be borne in mind, is admitted to be true for all the purposes of the Demurrer; and that Declaration charges the omission of quite a number of formalities which the Plaintiffs shall presently shew by authority to be essential to the validity of all such Grants. There is, it may be said no essential difference between French and English Law on this head; and the reason of the rule in this respect is stated, by English and French writers alike, to be for the purpose of protecting the Sovereign against undue solicitation, and against hasty and inconsiderate Grants.

Eighth objection to Patent

Sec. 70.—The EIGHTH *objection* to the "DE LÉRY-*Patent*" is that

"VIII. Such Letters Patent could not issue under the "Great Seal of this Province, as they have done, but only "under the Great Seal of the United Kingdom; and such "Letters-Patent issued illegally and unadvisedly."

Unless it can be shewn that some positive Law has transferred from the Sovereign herself to her Representative here the right of issuing such an instrument as the "DE LÉRY-*Patent*", it is clear from the observations of Attorney General Palmer and Lord Chelmsford in the case of Hughes already quoted at Pages 9 *& seq:* of this Factum, that such an Instrument could only issue under the Great Seal of England. Now Plaintiffs affirm, without fear of contradiction, that there no such Law. True, there is a statute concerning Patents of Invention, and another relating to Grants of land; but the instrument under consideration does not profess to grant land; and it is certainly not a Patent of Invention.

Moreover, if, as some English writers have claimed it to be, gold and silver mines be royal mines, on the principle that gold and silver are the King's metals and essential to his

Royal Prerogative of coinage, how can one suppose that the Government of Canada, which did not, in 1846, and one may say, does not even yet, possess the right of coinage, could be supposed to own, and consequently grant away, those supposed Royal Mines. The maxim: "*accessoria rem sequitur*," forbids any such supposition.

Sec. 71.—The NINTH objection to the "DE LÉRY-*Patent*" is

Ninth objection to Patent

"IX. The non-fulfilment by the Grantees of the several "conditions of the Grant."

Five clearly expressed conditions were annexed by the Crown to the Patent; the Grantees were bound to conform to all laws and usages in force,—to obtain the consent of the owners of the soil,—to supply further and exact information as to the nature of the mines—to furnish a correct account of the working and produce of the mines—and to pay the one-tenth Royalty. Not one of those conditions, as the Plaintiffs' Declaration states, has ever been fulfilled; and the Plaintiffs' allegation that such conditions have not been fulfilled, must, for all the purposes of this argument, be taken to be true.

Having thus stated the FIRST, SECOND, THIRD, FOURTH, EIGHTH and NINTH objections raised by the Plaintiffs, it only remains for them to cite the authorities which bear them out in their pretensions; and although the authors cited speak in some places of Patents for Inventions, yet CHITTY *on Prerogative*, P. 390, note 6, in speaking of Crown Grants, refers back to his remarks on Patents for Inventions for a statement of the formalities required in Letters Patent, conveying Grants of the Crown.

Sec. 72—The FIRST, SECOND, THIRD, FOURTH, EIGHTH and NINTH objections to the "DE LÉRY-*Patent*" are fully borne out by the following authorities.

Authorities in support of first, second, third, fourth, eighth and ninth objections.

CHITTY *on Prerogative, ch: X, sect. 2, p.* 188, 189.

Fourthly. How a Patent is obtained.

"To obtain a Patent, a Petition for it must be prepared, together with an affidavit of the inventor in support of the Petition. These are then taken to

...e office of the secretary of state for the Home Department, where they are lodged. A few days after, the answer to the Petition, may commonly be had, containing a reference of it to the Attorney or Solicitor General, which must be taken to either of their Chambers for the report thereon ; and in a few days afterwards, the Clerk will deliver it out. The report is then taken to the secretary of state's office for the King's Warrant, and the clerk will then inform the person leaving it when it may be called for. The Warrant is directed to the Attorney or Solicitor General, and is to be taken to their Patent-Office for the Bill. When the Bill is prepared it is taken to the Secretary of state's office for the King's sign manual to the Bill. As soon as this is obtained, it is carried to the signet office to be passed there, when the Clerk prepares a Warrant for the Lord Keeper of the Privy Seal, whereupon the clerk of the Privy Seal prepares his Warrant to the Lord Chancellor. This Warrant is then taken to the Lord Chancellor's Patent Office, where the Patent itself is prepared, and will be delivered out as soon as it is sealed. The specification should then be prepared, acknowledged and lodged at the enrollment office, to have the usual certificate of the enrollment endorsed on it; this is commonly done in about a week or a fortnight afterwards, and then the Patent is in every respect complete."

Chitty *on Prerogative, ch : XVI, sect.* 2, *p.* 389.

"It is a *clear Rule*, that, as well for the protection of the King as the security of the subject, and on account of the high consideration entertained by the Law towards His Majesty, *no freehold interest*, franchise, or liberty, &c., &c., can be *transferred* from the Crown but *by* matter of *record* (2 Co. 16, b—17 Vin. Ab. 70. *Prerog. C. b.*—Com. Dig. *tit. Patent.*—2 Bla. Com. 346.) This is effected by Letters Patent under the Great Seal, which is a Record and evidence *per se*, without further proof; and that such seal may not be affixed without due caution and consideration, several preliminary steps are requisite. Grants or Letters-Patent must first pass by Bill (see *ante* P. 188, 189 ; grants of Patents for Inventions), which is prepared by the Attorney and solicitor General, in consequence of a Warrant from the Crown (*no officer which the King has, nor altogether, may, ex officio, dispose of the King's treasure, though it be for the honor or profit of the King himself*, 11 Co. 91, *b.* "*They cannot without the King's own Warrant.*" *Ibidem* 92.), and is then signed, that is, subscribed at the top, with the King's own *sign manual*, and sealed with his *Privy Signet*, which is always in the custody of the principal Secretary of State; and then sometimes it immediately passes under the Great Seal, in which case the Patent is subscribed in these words *per ipsum regem*, by the "King himself," otherwise the course is to carry an extract of the Bill to the *Privy Seal*, who makes out a Writ or Warrant thereupon, to the Chancery, so that the Sign Manual is the Warrant to the Privy Seal, and the Privy Seal is the Warrant to the Great Seal; and in this last case, the Patent is subscribed *per breve de privato sigillo*, "by Writ of Privy Seal" (9 Rep. 18.—2 Inst. 555.)"

When Chitty here says, that "*the* Letters-Patent *under* "*the* Great Seal *is a* Record *per se*," he has reference to the enrollment thereof in Chancery which has just taken

place (see *Hughes'* case P. 9 et seq : of this Factum, and also the authorities cited in the following pages.)

CHITTY *on Prerogative, ch : VII, sect.* 2, *No.* 2, *p.* 90, 91.

" *Where any* LEGAL RIGHT OR BENEFIT is *vested in a subject*, THE KING CANNOT AFFECT IT."

CHITTY *on Prerogative, ch : XVI, sect.* 1, *p.* 385.

" The *King's Grants* are *void* whenever they tend to *prejudice* the *course* and *benefit* of PUBLIC JUSTICE."

* * * * * * * * * * * * * *

" NOR *can the King exempt* any one *from civil responsibilities to a fellow subject.*"

CHITTY *on Prerogative, ch : XVI, sect.* 1, *p.* 386.

" It is scarcely necessary to mention that the *King's Grants* are *invalid*, when they *destroy* and *derogate* from *rights* previously *vested* in another subject by Grant."

CHITTY *on Prerogative, ch : XVI, sect.* 1, *p.* 386.

" A *Grant* from the Crown *in derogation* of the *common Law is* VOID, for the *King* CANNOT *make Law* or Custom *by* his *Grant.*"

CHITTY *on Prerogative, ch : VII, p.* 119.

" And it is a CLEAR *principle* that the *King cannot* by his mere prerogative *diminish* or *destroy immunities* ONCE *conferred* and *vested* in a subject by Royal Grant."

CHITTY *on Prerogative, ch : XVI, sect.* 3, *p.* 394.

" In the second place, the construction and leaning (of Crown Grants) shall be in favor of the subject, if the Grant shew that it was not made at the solicitation of the Grantee, but *ex speciali gratiâ, certâ scientiâ et mero motu regis* (FINCH, *L.* 100.—1 REP. 40.—10 REP. 112.—COM. DIG. *Grant, G* 12.—VIN. AB. *Prerog. E, c.* 3.). *Though* THESE *words do* NOT of themselves *protect* the grantee *against* FALSE recitals. (10 Co. REP. 112.—3 LEON : 2492.—SALK : 561)."

CHITTY *on Prerogative, ch : XVI, sect.* 2, *p.* 394 *&* 395.

" In considering the cases in which a royal grant may be ineffectual, on account of mistakes, deceit, &c., &c., it may be proper to divide the subject into the following branches : 1 *Uncertainties*, 2 *Misrecitals ;* and herein of *false suggestions* and *deceit.*"

" 1 A decided *uncertainty* will avoid a grant from the Crown, not only as against the Patentee, but also as against the King, because it raises a

presumption of deceit (Bulstr. 10.—17 Vin. Ab. 140, *Prerog. F, c*, — 6 Bac. Ab. 602, *Prerog. F*, 2.—Co. Enyr. 384.), as if the King grant a piece of land, parcel of a waste &c., &c., without designating what piece; or grant land or a rent, in which there may be various interests, without limiting or specifying any particular estate in the gift; and *in this case the patentee takes* no interest *whatever* (Rol. Ab. 845.—Dav. 35, 45.—1 Bla. Rep. 118)."

Chitty *on Prerogative, ch: VIII, p.* 125.

"The *King* cannot *take away, abridge,* or *alter any liberties* or *privileges granted by him* or his predecessors, without the consent *of the individuals* holding them (1 Kyd. 67.—3 Buar. 1656.)."

Chitty *on Prerogative, ch: VIII, p.* 132.

"It is a principle of law, that the *King* is bound by his own and his ancestor's grants, and *cannot* therefore, by his mere prerogative, *take away vested immunities and privileges.*"

Chitty *in a note adds:*

"That this doctrine was admitted in the King & Amery (2, T. R. 515)."

Chitty *on Prerogative, ch: XVI, sect.* 3, *p.* 396.

"2. With respect to misrecitals and false suggestions or deceit, these also will, in certain cases, invalidate a Grant from the Crown, (2 Bla. Com. 348.)"

"And here it may be noticed, that to prevent deceits, *it is in general necessary that a grant* by the Crown *of any reversion* should recite *the particular* previous *term, estate or interest,* still in esse and which is of record (17 Vin. Ab. 108, *Prerog. Q. b.* 2—Com. Dig. *Grant G.* 10), and *if the King* (by matter of record, as is necessary), *lease land* to B., *and afterwards grant* him *a new lease,* without reciting *the first, the* last Charter is VOID, without regard to the effect it may have on the first (Cro. El. 231)."

Chitty *on Prerogative, ch: XVI, sect.* 3, *p.* 397.

"But *it seems that Royal grants are* always void *where* the King evidently *mistakes his title* in a material point to the prejudice of his tenure or profit (5 Bac. ab. 603, Prerog. F. 2.)"

"So if the recital of a thing in a Patent which sounds to the King's benefit be false, the grant will be void; for the King is in point of Law deceived (2 Co. 54.—1 Co. 43, *a.*—Dyer. 352, *a.*—11 Co 90.—2 Rol. Ab. 188, l, 12.)"

* * * * * * * * * * * * *

"And if the false recital, &c., &c., arise from the suggession of the party applying *for the grant,* such grant will be void."

* * * * * * * * * * * *

"And, *if any thing mentioned as the* consideration *of the grant,* or which sounds for the benefit of the King, (be it executed or executory,

matter of record or *in pais*,) BE FALSE, the King is deceived, and *the grant will be* VOID (5 Co. 94, *a*.—2 ROL. AB. 188, l, 25; 199, l. 30, 50.—LANE, 75,109.)'

CHITTY *on Prerogative, ch: XVI, sect.* 4, *p.* 399.

"*In the case of lands, the grantee does not*, by taking them from the Crown, *acquire any particular privileges.* HE IS NOT *thereby* PROTECTED *against the common law remedies and rights which others may possess* in respect of the property, however such remedies and rights might be impeded whilst the King held it."

CHITTY *on Prerogative, ch: XII, sect.* 3, *p.* 330. 331.

"The King is, generally speaking, bound by his own grants; but *this is* ONLY *when they are* NOT *contrary to law* either in themselves; or VOID *for* UNCERTAINTY OR DECEPTION; OR UNJUST AS INJURIOUS *to the rights* and interests *of third persons.* In these cases THE KING, *jure regio*, for the advancement of justice and right, *may repeal* his own *grant* (4 INST: 88), *as if the King* GRANT *what*, by law, *he is restrained from granting* (3 BLA. COM. 260. Though if the Patent be void it itself, *non concessit* may be pleaded without a *scire facias.* 2 ROL. AB. 191. S, *pl.* 2.): or the *grant be obtained by* FRAUD OR A FALSE SUGGESTION (BRO. *Patent* 14;—*Petition* 11.—11 REP. 74, b.—2 ROL. AB. 191, *T.*—DYER, 197): or *be* UNCERTAIN (5 BAC. AB. *Prerogative* 602)."

"If a Crown grant prejudice and affect the rights of third persons, the King is by Law bound, on proper petition to him, to allow a subject to use his royal name, to repeal it in a *scire Facias*, (BRO. AB. *Title, Scire* Facias, 69,185.—2 VENTR. 344.—3 BLA. COM. 260), and *it is said that*, IN SUCH CASE, *the party prejudiced may*, UPON THE ENROLLMENT *of the grant* IN CHANCERY *have a* SCIRE FACIAS to repeal it AS WELL AS *the King* (6 MODERN 229.—2 SAUNDERS, 72 q.); as in the instance of an unfounded patent for an invention, or where the specification is incorrect. So in the case of a grant of a mart or fair, &c., &c., whereby another ancient mart or fair is prejudiced (DYER 276, *b*.—3 LEV, 220.—2 VENTR. 344.). *Where the same thing is* GRANTED TWICE, the FIRST *patentee* is *entitled to a Scire Facias* to repeal the subsequent grant (4 INST. 88.—DYER, 137, b. 198, a.—2 ROL. AB. 191, U, *pl*: 2)."

CHITTY *on Prerogative, ch: XIII, sect.* 1, *p.* 342 & 343.

Speaking, in note *a*, of Staundford, says of him:

"Staundford was frequently cited by the Counsel and Court in the case in 12 East, 96."

Chitty then cites Staundford (*Prærog. Regis, ch*: 22, *fol.* 74, *a, to* 75, *b*) as follows:

"To declare specially, says Staundford, where a Petition (of Right) lieth and where not, it were a long matter to intreat of."

* * * * * * * * * * * * *

" Also where the King doth enter upon me, having no title by matter of record or otherwise, and put me out and detain the possession from me, that I cannot have it again by entry without suit, I have then no remedy but only by Petition. *But if I be suffered to* ENTER, *mine entry is lawful*, and no intrusion; or *if the King grant over* the lands *to a stranger*, THEN is my Petition determined, and I *may* now *enter*, *or* HAVE MY ASSIZE, *by order of the* COMMON LAW, *against the said stranger*, being the King's Patentee. (Vide— 4 ED: IV, f. 22.—24 ED: III, f. 65.—10 ED: III, f. 2.) "

* * * * * * * * * * * * * * *

" *Like Law* it is if I have a rent charge out of certain land, and the tenant of the land enfeoffeth the King by Deed enrolled; now during the King's possession, I must sue by petition, *but if his Highness enfeof a Stranger*, I MAY DISTRAIN FOR MY RENT *on the Stranger*; and so it is *in all* the *cases* before, where a man may have his traverse en monstrans de droit, *if the lands be once out of the King's hands*, THE PARTY *then may have* HIS REMEDY *that the common Law giveth him.*

2 SAUNDERS, *Pleading & Evid*: *Civil cases*, *vbo*: *Letters Patent.*

P. 635.—" In pleading Letters-Patent it is necessary to state the Grant to have been enrolled in the Court of Chancery."

1 Co: 43.
1 SAUNDERS' REPORTS, No. 2, p. 119, 187 et 271.

NORMAN'S LAW OF PATENTS, *p.* 19 (*a.*) *&* *p.* 4 (*e.*)

" At Common Law, the Letters-Patent must have been enrolled in " Chancery, otherwise they are void."

P. 19 (*a.*) *p.* 4 (*e.*)

" If they (L. P.) can be taken to enure to a double intent, they shall " be taken to the intent that shall enure most to the King's benefit."

P. 19 (*a.*) *&* *p.* 5 (*e.*)

" A bad grant is void, not against the Crown merely, but in a suit " between the Patentee and a third person."

P. 20 (*a.*) *&* *p.* 5 (*e.*)

" The consideration of the grant failing, the Patent is void."

" Such Grants are intended for the public weal; if the consideration " fail, the grant is void; for the King was deceived. So it is void, if the King " grant a greater estate than be can lawfully do."

P. 131 (*a*). & *p.* 168 (*e*).

" *That no specification was enrolled in Chancery*, is a good Plea."

P. 149 (*a*). *&* *p.* 194 (*e.*)

" Scire Facias is founded on the Record remaining in Chancery."

P. 159 (*a.*) *& p.* 209 (*e.*)

" The Judgment of Q. B. on Scire Facias is that the Letters Patent be " restored into Chancery there to be cancelled."

It has already been shewn moreover, at Pages 10 and 13 of this Factum, that, under English Law, Letters Patent must be recorded or enrolled in some Court of Common-Law Jurisdiction. It remains, however, to be established, that, in that respect, English Law is borrowed from the French Law which was brought over by the Normans under William, at the Conquest. A work published by HOUARD in Paris, in 1776, under the the title " *Anciennes lois françaises recueillies par* LITTLETON " contains an elaborate collection of the French Laws engrafted on the English System and establishes this point conclusively. But, as the Plaintiffs have not now that work in their possession, they are compelled to resort to other French Writers, in order to shew that Crown Grants, such as that invoked by the Defendants, must be enrolled in some Court of record ; and that the Instruments purporting to convey the Grants confer no rights until such time as the parties interested against the Grants have been heard in Court.

GUYOT, *vbo. Lettres-Patentes.* P. 482: *Edition in quarto*, has the following :

" LETTRES-PATENTES. Ce sont des Lettres émanées du roi, scellées du " grand sceau, et contresignées par un Secrétaire d'état.

" On les appelle *Patentes*, parcequ'elles sont ouvertes, à la différence " des Lettres closes ou de cachet, qu'on ne peut lire sans les ouvrir."

" Les Lettres-Patentes *ne produisent leur effet qu'après qu'elles ont été* " ENRÉGISTRÉES *par la Cour* à laquelle elles sont adressées."

" Les Lettres-Patentes accordées à un corps ou à un particulier, sont " *susceptibles d'opposition*, lorsqu'elles préjudicient à un tiers."

The *opposition* spoken of in GUYOT is precisely the opposition preferred before the Chancellor to the sealing of Letters-Patent, as mentioned by NORMAN and CHITTY ; and the suspension of the effect of *Lettres-Patentes* as referred to by GUYOT is equivalent to the axiom laid down by CHITTY : " The King cannot grant except by record."

In speaking of that peculiar form of Letters Patent, called *Lettres Royaux*, the same author, at Pages 482 & 483, says :

" LETTRES-ROYAUX. On appelle ainsi toutes sortes de Lettres émanées " du roi, et scellées du grand ou du petit sceau."

* * * * * * * * * * * * * *

" Ces sortes de Lettres *ne sont jamais censées être accordées* AU PRÉJU-
" DICE *des droits* du roi, ni de ceux *d'un tiers* ; c'est pourquoi la clause,
" *sauf le droit du roi et celui d'autrui*, y est toujours SOUS-ENTENDUE."

* * * * * * * * * * * * *

" *Telles sont* en général les *Lettres de don*, et autres qui contiennent
" *quelque libéralité* ou quelque dispense."

Can words more clearly express than does GUYOT in that quotation, the statement of CHITTY herein before set out, that : " The King cannot by his Grants prejudice the rights of individuals ? "

GUYOT, *vbo. Chancelier*, P. 100, *Ed* : *in quarto*, has an article, from which one might almost fancy that Chitty, Blackstone, Forster and Norman had drawn their statements ; *Guyot* says :

" Et par une autre Ordonnance de 1318, le Chancelier ne devait appo-
" ser le grand sceau qu'aux Lettres auxquelles *le scel du secret* avait été
" apposé : c'etait celui que portait le chambellan, à la différence du *petit*
" *signet* que le roi portait sur lui."

" Charles V ordonna aussi en 1356 que le chancelier *ne ferait pas*
" *sceller* les *Lettres* passées au conseil qu'elles ne fussent signées au moins
" de trois de ceux qui y avaient assisté, et qu'il n'en pourrait être scellé
" aucune *portant aliénation du domaine*, ou don de grandes forfeitures ou
" confiscations qu'il n'eût déclaré au conseil ce que la *chose donnée pouvait*
" VALOIR *de rente par an.*"

GUYOT, *vbo. Chancellerie*, P. 110, *Ed* : *in quarto.*

" Philippe V, dit le Long, fit au mois de Février, 1321, un règlement
" général, où il est dit que le *Chancelier sera tenu d'écrire* au dos des
" Lettres la *cause* pour laquelle il *refusera* de les *sceller*, sans les dépécer."

" On voit par les lettres de Charles V, alors régent du royaume, " qu'il
" y avait déjà des *régistres à la Chancellerie*, où l'on *enrégistrait certaines*
" ordonnances et *Lettres-Patentes* du roi."

The NOUVEAU-DÉNIZART, *vbo. Lettres-Patentes*, P. 137, *Ed* : *of* 1771, says :

" LETTRES-PATENTES. 1. Ce sont des *lettres* du roi, scellées du grand
" sceau : elles ont pour objet, et il faut les obtenir, lorsqu'il s'agit de quel-
" qu'établissement, privilége, grâce, *octroi*, etc., etc."

* * * * * * * * * * * * *

" Les *Lettres-patentes* n'ont *force de loi qu'*APRÈS *qu'elles* ont été
" *vérifiées* dans les *parlemens*, les PARTIES intéressées OUIES *ou* dûment
" APPELÉES."

" Le roi finit ainsi ses *lettres-patentes* : " SAUF EN AUTRE CHOSE NOTRE
" DROIT *et* L'AUTRUI EN TOUTES." "

BOSQUET, *Dictionnaire raisonné des Domaines, vbo. Lettres-patentes*, says :

" *Ces* différentes *lettres* dont le détail va s'ensuivre dans l'ordre alpha-
" bétique, *ne sont pas assujéties à être insinuées dans un* TEMPS FIXE, *mais*
" *seulement*, AVANT QUE DE POUVOIR S'EN SERVIR, *et de les faire enrégistrer ;*
" JUSQU'ALORS, *le fermier* NE PEUT *en demander les droits*, ainsi qu'il a été
" decidé au conseil, le 23 Juin 1741, par des lettres d'érection ; * * * * * * *
" Il y a des lettres patentes et des lettres de chancelleries sujettes à l'insi-
" nuation, quoiqu'elles ne soient pas expressément nommées dans les règle-
" ments : l'édit du mois de Décembre 1703, rapporté ci-devant, verb.
" Insinuation, n. 4, page 547, porte que la formalité de l'insinuation sera
" étendue aux actes, dont il importe au public d'avoir connaissance ; et
" l'arrêt du Conseil rendu en règlement le 30 Septembre 1721, ordonne
" l'insinuation des lettres qui y sont exprimées, et autres semblables ; il est
" rapporté à l'article des lettres d'annoblissement."

In reading the above extracts, one immediately notices the derivation of all the formalities of the *Great-Seal*, the *Privy-signet*, etc., etc., referred to in the English Law-writers herein before quoted ; they contain, in fact, the counterpart of the followiug statements of

2 BLACKSTONE, *Commentaries*, P. 346, 347 et 348.

"The King's grants are also matter of public record. For, as St.
" Germyn says, the King's Excellency is so high in the law, that *no freehold*
" *may be given to the King*, NOR DERIVED FROM HIM, *but by* MATTER OF
" RECORD. And to this end a *variety of offices* are erected, communicating
" in a regular subordination one with another, *through which* ALL *the Kings'*
" *grants must pass, and be* transcribed, and ENROLLED ; that the same may
" be narrowly inspected by his officers, who will inform him if any thing
" contained therein is improper, or unlawful to be gran ed. These grants,
" whether of lands, honours, liberties, franchises, *or oug ht besides*, are
" contained in charter, or letters patent, that is, open letters, *literæ patentes :*
" so called because they are not sealed up, but exposed to open view, with
" the great seal pendant at the bottom ; and are lawfully directed or
" addressed by the King to all his subjects at large. And therein they differ
" from certain other letters of the King, sealed also with his great seal, but
" directed to particular persons, and for particular purposes : which there-
" fore, not being proper for public inspection, are closed up and sealed on
" the outside, and are there upon called writs close, *literæ clausæ ;* and
" are recorded in the close-rolls, in the same manner as the others are in
" the patent-rolls.

" *Grants* or *letters-patent* MUST *first pass by bill :* which is prepared by
" the attorney and solicitor general, in consequence of a *warrant from the*
" *crown ;* and is then signed, that is, superscribed at the top, with the
" King's own *sign-manual*, and sealed with his *privy-signet*, which is always
" in the custody of the principal secretary of state ; and then sometimes it
" immediately passes under the great seal, in which case the patent is subs-
" cribed in these words," *per ipsum regem*, by the King himself." Otherwise
" the course is to carry an extract of the bill to the keeper of the *privy seal*,

" who makes out a writ or warrant thereupon to the chancery ; so that the " SIGN MANUAL is the *warrant* to the *great seal :* and in this last case the " patent is subscribed ; *per breve de privato sigillo*, by writ of privy seal." " But there are some grants, which only pass through certain offices, as the " admiralty or treasury, in consequence of a *sign manual*, without the " confirmation of either the *signet*, the *great*, or the *privy seal* : * * * * * * * " *When it appears* from the face of the grant, that the *King* is *mistaken* or " *deceived*, either in matter of *fact* or matter of *law*, as in case of *false sug-* " *gestion*, *misinformation*, or *misrecital* of former grants ; or if his own " title to the thing granted be different from what he supposes, or if the " *grant be informal ;* or if he grants an estate *contrary to* the rules of " *law ;* IN ANY OF THESE CASES THE GRANT IS ABSOLUTELY VOID. " * * * * * And, to prevent deceits of the King, with regard to the value of " the estate granted, it is particularly provided *by the statute* 1 Hen. IV, " c. 6, that *no grant* of his shall be *good*, UNLESS, in the grantee's *petition* " *for them*, *express* mention he made of the *real value* of the lands.

Here again, in the Statute 1 HEN : IV *ch* : 6, one finds an exact counterpart of the very Ordinance of CHARLES V of 1356, quoted by GUYOT, *verbo Chancellerie*, P. 100 and herein before cited.

The *Ordinance of* 1667, *Title* 1, *Art* : 4 *et* 5, requires the Enregistration of *Ordonnances*, *Edits*, *Déclarations* and *Lettres-Patentes* in the Courts of Law ; and it is a fact that *every Grant* of the French Kings in Canada, is enrolled in the *Régistre de* l'*Intendant*, who dispensed justice in the name of the King in Canada, prior to the conquest. And to this day, in the Superior Court is kept a Register for the enrollment of such Letters-Patent as may be brought there to be recorded. What prevented the Grantees in this instance from seeking to have their Letters-Patent recorded in the Superior Court, and from thereby giving the Plaintiffs and other interested parties an opportunity of being heard against the validity of the Grant.

Could any thing more clearly prove the necessity which existed for the enregistration somewhere of the instrument known as the " DE LÉRY-*Patent*, before it could even be pretended to confer any rights upon the holders. Until the moment of such enregistration, it remains a piece of useless, harmless parchment. And the Plaintiffs have already at Page 14 of this Factum, shewn that the enrollment of it with the Registrar of records here, does not supply the want of enregistration in some Court of Record, because the Statute creating that Office applies *only* to grants of lands, and not to grants of mining rights.

HUSSON, in a *Memoire* of the most profound research, to be found in Vol : 2, *Œuvres de Duplessis*, P. 142, has some

remarks on the subject of alienation of the Crown Domain ; and, if the pretensions of the Defendants be true, that mines are a part of the Domain, the citation is conclusive against the validity of the Patent. *Husson*, speaking of the alienation of the Crown Domain, says :

" Il est vrai, qu'outre la justice de la cause exprimée dans le titre de " l'aliénation, la vérité en doit être connue, et même l'on doit examiner, si " elle ne serait point préjudiciable à l'Etat : et c'est une discussion dont nos " Rois se sont déchargés sur les soins et sur la fidélité des Officiers de leurs " Cours Souveraines, auxquels les Lettres Patentes de l'aliénation sont " adressées pour en faire la vérification et l'enregistrement ; car qu'oiqu'au " sentiment d'un illustre politique : " *Regnantis sententia judicium de* " *solis actibus sumat*," *nos Rois* néanmoins par une sage prévoyance et par " une prudente modération *ont trouvé à propos* que les *dispositions* qu'ils " feraient *de leur Domaine*, fussent *examinées par des Magistrats, dont la* " *vigilance et l'affection* pussent les *garantir contre les* SURPRISES DES " IMPETRANS.

" Il y a quantité d'Arrêts de vérifications et d'enregistrements interve- " nues sur de semblables Lettres-Patentes d'aliénation."

Sec. 73.—The grounds on which the Plaintiffs have thus far urged the nullity of the " DE LÉRY-*Patent*" may, at first sight appear to be purely technical in their nature ; yet this is far from being the case ; those objections have their source in grounds of the highest public policy, and prove the necessity which existed for guarding the Sovereign against inconsiderate grants ; and if so much precaution were then taken to guard the then absolute Sovereign from inconsiderately granting to a stranger what was considered at least to be the Sovereign's own property how much more jealously should the public domain be now guarded, since the subject, under our system, has it in his power to grant the Crown domain not to a stranger, but to himself. In any case the grounds hitherto urged against the " DE LÉRY-*Patent*," are grounds which, as the authors agree in declaring, make the Patent absolutely void.

Objections not merely technical.

The four remaining objections to the " DE LÉRY-*Patent*", namely : the FIFTH, SIXTH, SEVENTH and TENTH objections, are decisive of the real question at issue betwen the parties hereto as to

CHAPTER III

THE OWNERSHIP OF THE MINES.

Remaining objections the Patent.

Sec. 74.—Of the four remaining objections to the "DE LÉRY-*Patent*," the TENTH, which claims that the "DE LÉRY-*Patent* has been superseded by the Seigniorial Act, will be incidentally noticed with the other three, but will moreover form more especially, the subject-matter of the next Chapter. The FIFTH, SIXTH and SEVENTH objections to the "DE LÉRY-*Patent*" are thus stated:

"V. The Crown had no interest to grant; in as much as, "by the Laws then in force in Lower-Canada, the rights "of the Crown, in private lands, were, and are, restricted to "one-tenth of the metals extracted.

"VI. The Mines belong to the Plaintiffs as owners of "the soil in those lands and tenements, no part of which ever "belonged to the Defendants, as owners of the soil; and that "the Patent issued without notice to the Plaintiffs' *auteurs*, "as owners of the soil, and without the Plaintiffs' *auteurs* "having been called on to work the mines.

"VII. A Royal Permission to work a mine could only "issue on the refusal of the proprietor to work the mine, after "regular and judicial notice to the proprietor, and a formal "judgment to that effect by the Tribunals of the country."

How Plaintiffs purpose proving fifth, sixth and seventh objections to Patent.

Sec. 75.—The question involved in those objections is so well treated by MERLIN, that the Plaintiffs reproduce the article almost entire. That author demonstrates, beyond the shadow of a doubt, that the ownership of *all* mines, without exception, was, by the Law of France, vested in the owner of the soil, and that such authors as have emitted a contrary opinion, had evidently never seen the text of the Ordinances of the French Kings in reference to mines, or studied the Roman Law, on which those Ordinances are almost literally based. The Plaintiffs will further reproduce here in their entirety the three great Ordinances promulgated by the French Kings on the subject of Mines; and if one did not know that the existence of the *Capitulaire de* ST. LOUIS,

touching treasure-trove had been denied in open Court by one of the most eminent of French Jurists, and that none of the Ordinances had been printed and published in France until 1765, and that the Ordinances respecting Mines had not been published until the revolution, one might not be able to account for the ignorance of the Law of Mining displayed by certain French Law-writers. As it was, the French Jurists, up to the period nearly of the French Revolution, knew as little of most the Ordinances enregistered in the several Parliaments of France, as we, Canadians, did for many years, of the Edicts and Ordinances enregistered in the Superior Council here. The Plaintiffs, after having cited MERLIN, and the text of the Ordinances referred to, purpose first giving, at length, the opinions enunciated *pro* and *con* by the various French-Writers, and then critically examining those opinions.

Authorities. *Merlin.*

8 MERLIN, *Repertoire, vbo. Mines, No. 1*, P. 193.

"Tout ce qu'on peut tirer des Mines appartient au Domaine du Roi, etc."

"*Telle était* du moins avant la loi du 12 Juillet, 1791, *la doctrine d'une foule d'auteurs;* MAIS J'AI DÉMONTRÉ dans mon *Recueil de Questions de Droit*, Article MINES, § 1, *qu'elle n'avait pour base qu'une interprétation erronée des lois Romaines et des Anciennes Ordonnances*, ET UNE CONFUSION *du Droit de propriété avec le droit d'inspection et la faculté de disposer en indemnisant.*"

MERLIN. *Questions de Droit.* P. 304.

MINES. *No.* 1. "QUELLE *était*, avant les lois du 4 Août 1789, *la nature des droits qu'avaient* SUR LES MINES, *les Seigneurs* hauts-justiciers? *Etaient-ils propriétaires fonciers des mines* non encore découvertes? L'étaient-ils au moins de mines qui, en 1789, étaient découvertes et en pleine exploitation?

No. 2. "*Les droits d'entre-cens* que les *Seigneurs* hauts-Justiciers du Hainaut, s'étaient réservés *sur les mines* dont ils avaient permis l'ouverture et l'exploitation à des entrepreneurs, *étaient-ils* SEIGNEURIAUX, et sont-ils SUPPRIMÉS *par les lois* relatives à la *féodalité.*

No. 3. "S'ils sont supprimés en thèse générale, *sont-ils* du moins *conservés* en *faveur* des ci-devants *seigneurs qui*, postérieurement à la stipulation primitive de ces droits, mais avant l'abolition du régime féodal, les avaient *modifiés* par des *transactions* passées avec les entrepreneurs?

No. 4. "La question de savoir si une redevance promise à un ci-devant seigneur haut-justicier, pour prix de la permission qu'il a donnée d'ouvrir des mines de charbon dans sa haute-justice, est purement foncière et maintenue comme telle, ou si elle est féodale et comme telle abolie; a-t-elle pu, avant la loi du 21 Avril 1810, faire la matière d'une transaction?

No. 5. "La loi du 21 Avril 1810 a-t-elle rendu sans effet les transactions qui antérieurement, et depuis l'abolition du régime féodal, avaient été passées sur des contestations de cette nature?

No 6. "Qu'entendait l'art. 13 du chap. 122 des chartes-générales de

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Hainaut, par le droit de charbonnage qu'elles réputaient héritage ou immeuble ?

No. 7. " Quelle était en Hainaut avant le Code Civil, la nature des actions des sociétés charbonnières ? étaient-elles meubles ou immeubles ?

1o. " *Les trois premières questions se sont présentées dans l'espèce suivante.*

" Le 12 Janvier 1757, Contrat par lequel *Jean Louis Decarondelet*, Seigneur, haut-Justicier des territoires de la Hestre et de Haine Saint Pierre, situés dans le Hainaut Autrichien (aujourd'hui département de Jemmappes), *permet*, perpétuellement et à toujours, *à Arnoult Deschuytener* et à ses associés, *de tirer charbons*, tels et tant qu'ils en trouveront sur les dits territoires.

" Par le même acte, la société s'oblige de continuer le conduit déjà commencé, en vertu de la permission qu'elle en avait obtenue d'un fondé de pouvoir du Seigneur. Dans le cas où elle cesserait, pendant un an, de travailler à ce conduit et d'extraire du charbon, elle sera réputée avoir abandonné l'entreprise pour toujours, sans pouvoir rien réclamer de ce qui aurait été fait ; ni retirer ce qu'elle aurait mis ; et le tout demeurera au profit du seigneur, sans préjudice des dommages-intérêts qui lui seront dûs pour l'inexécution de l'entreprise.—Enfin, il est *convenu* que le *Seigneur aura* à son profit le *onzième denier* de tout ce qui sera vendu ou à vendre, franc de tous frais, pour droit de cens et d'entrecens, à quoi les associés s'obligent solidairement l'un pour l'autre.

" Le 16 Mars 1776 *transactions sur quelques difficultés* survenues dans l'exécution de ce contrat. " Les maîtres charbonniers (y est-il dit), continueront le conduit jusqu'à la première veine travaillable, et poursuivront jusqu'aux veines de charbon découvertes sur la Hestre, lequel ouvrage se reprendra sous quinze jours, aux frais des charbonniers qui travailleront dorénavant, de bonne foi et avec continuité, à faire valoir le charbonnage, de la même manière que le Seigneur le pourrait faire pour son plus grand profit, consentant à tout dédommagement au cas contraire.... ; et pour qu'il ne soit porté aucun préjudice au Seigneur de la Hestre, et qu'il puisse jouir en tout temps de l'extraction qui se fera sur sa Seigneurie, les charbons ne pourront s'extraire à l'avenir sur la dite terre, que par des ouvertures placées sur son domaine ; et les galeries et ouvrages de ces ouvertures seront pratiquées sur les tréfonds de sa Seigneurie, sans les pouvoir détourner sur des terrains étrangers."

" En 1785, procès entre *François Louis Hector Decarondelet*, fils de Jean Louis, *et la Société Deschuytener*,—Le premier se plaint de ce que la Société étend ses extractions de charbon jusques dans la terre de Redemont, dont il n'est pas seigneur ; de ce qu'elle se livre de préférence à l'exploitation des veines qui s'y trouvent, et que, par là, elle néglige l'exploitation des veines de la Hestre et de Haine-Saint-Pierre, ce qui nuit à ses intérêts ; de ce qu'elle a percé des communications à l'aide desquelles les eaux du Redemont s'écoulent dans le territoire de la Hestre et de Haine-Saint-Pierre ; enfin, de ce qu'elle extrait, par une seule et même fosse, le charbon de ce territoire et de celui de Redemont. Il prend, en conséquence, différens chefs de conclusions, *et il demande* notamment *que la société soit condamnée à* lui *payer*, dans la proportion réglée par l'acte du 12 janvier 1757, *le droit d'entre-cens* de tout le charbon qu'elle extraira ailleurs que sur la Hestre et Haine-Saint-Pierre, *si mieux elle n'aime consentir qu'il accorde* à d'autres *le droit d'exploiter* les veines de charbon de son territoire.

* * * * * * *

(Page 306.) " Le 1er ventôse an 5, le Sieur Decarondelet fait citer cette compagnie devant le tribunal civil du département de Jemmappes, pour la faire condamner au payement des Arrérages de sa redevance.

" Le 15 floréal, an 6, *Jugement* de ce tribunal, qui *déclare* la *demande* NON *admissible*, " ATTENDU *que le droit* D'ENTRE CENS réclamé par le demandeur, ne lui compétait à autre titre que celui exprimé en l'art. 1er du chap. 130 des chartes du Hainaut ; qu'ainsi, ce droit ÉTAIT FÉODAL, et que, par la loi du 9 brumaire an 2, il est défendu aux juges, à peine de forfaiture, de connaître des droits féodaux."

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(Page 308.) " Le sieur Deschuytener et un grand nombre de ses conscrits se pourvoient en cassation.

" Les questions que vous présente cette affaire (ai-je dit à l'audience de la section civile, le 16 ventôse an 12,) sont aussi importantes qu'épineuses ; déjà elles ont été agitées dans plusieurs tribunaux qui les ont jugées tantôt dans un sens, tantôt dans l'autre. C'est au tribunal suprême qu'il appartient de leur donner une solution qui par son grand caractère et par la justesse de ses motifs, mettra fin aux contestations qu'elles font naître journellement, régler définitivement les intérêts majeurs auxquels elles tiennent, et asseoir sur une base immuable la fortune de plusieurs milliers de familles.

" La discussion qu'elles exigent de notre part, ne serait ni longue, ni difficile, si nous ne devions nous arrêter aux motifs du jugement attaqué par les demandeurs.

* * * * * *

(Page 314). " ENFIN, *il faut toujours en revenir à cette idée* simple et lumineuse : *le seigneur haut-justicier* N'ÉTAIT PAS, avant sa concession, PROPRIÉTAIRE FONCIER DE LA MINE ; *il n'a donc pas pu*, par sa concession, *transférer* à celui qu'il a, par ce moyen, rendu possesseur d'un droit de charbonnage, *une propriété foncière*, qu'il n'avait pas lui-même. Avant la concession, le Seigneur haut justicier n'avait sur la mine qu'un droit de fouille et d'extraction, la concession n'a donc transmis que ce droit ; le *concessionnaire* N'EST DONC PAS *propriétaire foncier*.

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(Page 315). " QU'ENTEND-ON *par droits seigneuriaux*, et *quels* sont les *droits* qui, SOUS CETTE DÉNOMINATION, ont été *abolis* par nos assemblées nationales ? *Ce ne sont pas seulement* les *droits* qui derivent DU BAIL *à fief et* DU BAIL *à cens ; ce sont* encore *tous ceux qui* ont leur *source*, SOIT *dans la puissance féodale* proprement dite, SOIT *dans la justice seigneuriale* qui n'était qu'une émanation de cette puissance.

" Les droits qui dérivent du bail à fief et du bail à cens, ont sans doute été abolis par nos assemblées nationales, comme les autres droits seigneuriaux ; mais ils l'ont été beaucoup plus tard. L'assemblée consituante les avait conservés, parce qu'ils étaient le prix des fonds concédés par les ci-devant seigneurs à leurs vassaux ou censitaires ; elle s'était bornée, en abolissant le régime féodal, à les convertir en droits purement fonciers, à les assimiler en tout point aux redevances purement foncières ; et ils n'ont été supprimés que par la loi du 17 Juillet 1793.—Mais les autres droits seigneuriaux, les droits qui ne doivent leur origine qu'à la puissance féodale ou à la Justice Seigneuriale, ont été abolis dès le 4 Août 1789 ; c'est à cette grande époque que les lois des 15 Mars 1790 et 18 Avril 1791 en font remonter l'abolition.

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" C'est donc bien mal raisonner que de dire : Tel droit exercé ou possédé par un Seigneur avant le 4 Août 1789, ne dérive ni d'un bail à fief ni d'un bail à cens ; donc il n'est pas supprimé. Non, il n'est pas supprimé par la loi du 17 Juillet 1793 ; *mais s'il dérive ou de la puissance féodale* ou *de la justice Seigneuriale, il est* SUPPRIMÉ *par les lois du 4 août* 1789 ; et sa suppression, dans cette hypothèse, n'est pas seulement plus ancienne, elle est encore plus favorable, parce qu'elle porte un caractère éminent de justice et de raison, auquel il est impossible à tout bon esprit de résister ni de se méprendre.

" Or, est-ce de la puissance féodale, est-ce de la justice Seigneuriale, que dérive le droit dont il est ici question ? Incontestablement c'est de l'une ou de l'autre qu'il dérive si on ne peut lui indiquer une autre source.

" Mais cette autre source, quelle serait-elle ? De deux choses l'une : ou les seigneurs du Hainaut tenaient ce droit de leur puissance féodale, de leur haute justice, ou ce droit était pour eux une dérivation de la propriété foncière. Il n'y a point de milieu entre ces deux propositions alternatives.

" Or, nous l'avons déjà dit, il est prouvé par l'art. 13 du chap, 122 des chartes générales, que les seigneurs du Hainaut n'étaient point propriétaires fonciers des mines de charbon de terre. Ce n'est donc pas de la propriété foncière de ces mines, que découlait pour eux le droit exclusif qu'ils avaient d'en permettre l'exploitation ; ce droit exclusif ne pouvait donc découler pour eux que de la puissance féodale, que de la haute-justice, c'est donc aussi de la haute justice, que découlait pour eux la redevance qui leur était payée pour prix de l'exercice qu'ils faisaient en faveur de tels ou tels, de ce droit exclusif ; cette redevance a donc été supprimée en même temps que le droit exclusif dont elle dérivait en même temps que la puissance féodale et la haute justice desquelles derivait ce droit exclusif.

" *Ces conséquences*, déjà si évidentes par elles-mêmes, *acquerront un nouveau dégré de lumière, par le* RAPPROCHEMENT des dispositions *des chartes générales du Hainaut* SUR LES MINES, *avec les principes du droit naturel et commun sur la même matière.*

" *Par le* DROIT NATUREL, *les Mines* qui existent dans un terrain, *font partie du terrain même ;* et il est LIBRE *au propriétaire* du fonds *d'en extraire les substances minérales,* COMME *il lui est libre d'en couper l'herbe,* COMME *il lui est libre de le cultiver,* COMME *il lui est libre d'en recueillir les fruits.*

" *Cette maxime* de droit naturel a été DE TOUS TEMPS *reconnue* par le droit commun positif.

Sous la RÉPUBLIQUE ROMAINE *et du temps des premiers empereurs,* LES MINES ÉTAIENT ENTIÈREMENT DE DROIT PRIVÉ ; *le propriétaire foncier en avait le domaine* LIBRE, INDÉPENDANT, ABSOLU : *en un mot, il les possédait* OPTIMO JURE, *comme le fonds qui les récélait dans son sein.* La loi 7, §. 17, D. SOLUTO MATRIMONIO, les lois 2 et 6 D, DE ACQUIRENDO RERUM DOMINIO, et le §. 19, aux Institutes, DE RERUM DIVISIONE, *sont là-dessus très-formels.*

" DANS LA SUITE *les Mines furent considérées comme des objets de* DROIT PUBLIC ; NON QUE CES EMPEREURS S'EN SOIENT JAMAIS ATTRIBUÉ LA PROPRIÉTÉ : *aucun texte* du Code Théodosien ni du Code Justinien qui ont des titres entiers sur cette matière, *ne le prononce ;* TOUS, au contraire, Y RÉPUGNENT. Mais cette partie de la richesse de l'Etat parut assez intéressante, pour que l'*Etat* lui-même *s'en réservât la police,* et assez fructueuse pour qu'il en *partageât le profit* AVEC LES PARTICULIERS.

" *C'est de ce double point de vue* que sont parties *toutes les lois des*

empereurs. Les unes, telles que les 1, 2, 8, 13 et 14, C. THÉOD., et les 1, 3, OWNERSHIP et 6, C. DE METALLARIIS, concernent le régime des mines ; elles donnent, OF MINES. refusent, modifient le pouvoir de les exploiter. Les autres, telles que les lois AUTHORITIES. 3, 4, 10 et 11, C. THÉOD., et les lois 1, 2, 5, C. du même titre, déterminent *Merlin.* le droit dû au fisc sur les produits des Mines, et en règlent la perception.

" CE DROIT *était le* DIXIÈME. Une administration, sous le nom des PROCURATORES METALLORUM, ou intendants des Mines, était chargée de le recueillir dans les provinces, et de le verser dans la caisse d'un magistrat supérieur, appelé COMES METALLORUM, surintendant des Mines. Le prince ne se reservait, au-delà de cette prestation que le droit d'obliger l'exploitant qui vendait les produits de ses Mines, à les vendre de préférence au gouvernement. QUIDQUID AMPLIUS COLLIGERE POTUERINT, FISCO POTISSIMUM DISTRAHANT, A QUO COMPETENTIA EX LARGITIONIBUS NOSTRIS PRETIA SUSCIPIANT. Ce sont les termes de la loi, 1, C. titre déjà cité.

" *Aucune* de ces lois, au surplus, NE CONTRARIE *le droit du propriétaire,* AU POINT DE DONNER A UN ÉTRANGER *la faculté de venir* malgré lui, *fouiller les mines* qui existent *dans son fonds.*

" *A la vérité on trouve* dans le CODE THÉODOSIEN, toujours sous le titre DE METALLARIIS, *quatre lois qui permettent* à tout le monde indistinctement *de fouiller les Mines de marbre,* même dans les terrains des particuliers, et n'assujettissent l'extracteur envers ceux-ci qu'au payement d'un dixième pareil à celui qu'il devait payer au fisc.

" MAIS CETTE DISPOSITION, *par cela seul qu'elle était* PARTICULIÈRE *aux Mines de marbre,* FORMAIT *évidemment* UNE EXCEPTION *à la règle générale,* et elle prouve par conséquent que la règle générale était différente pour les autres mines.

" Aussi remarquons-nous qu'elle ne fut, relativement aux mines de marbre elles-mêmes, que le fruit de circonstances et de besoins momentanés et qu'elle fut ou révoquée ou remise en vigueur, suivant que ces circonstances ou ces besoins cessaient ou renaissaient.

" CONSTANTIN et THÉODOSE, auteurs des lois, 1, 10 et 11 du titre cité y consignèrent cette disposition, pour parvenir avec d'autant plus de facilité à l'embellissement de Constantinople, devenue la capitale de l'empire d'Orient. JULIEN la renouvela par la loi 2 du même titre pour embellir Antioche, dont il voulait, disait-il, faire une ville de marbre. Et le même THÉODOSE *qui,* par les lois 10 et 11, *avait permis* indéfinitivement *à tous les particuliers, la fouille des* MARBRES, *leur retira cette permission* par la loi 13.

" *Il faut d'ailleurs observer que les quatre lois* dont il s'agit, ne disent point que la propriété des Mines (*de marbre*) réside dans la main des empereurs ; qu'il en résulte seulement qu'aux empereurs appartient le droit d'en diriger l'exploitation pour le plus grand avantage de l'état, *qu'elles ne dépouillent même pas le propriétaire du droit d'exploiter les mines* cachées dans son propre fonds ; *qu'en accordant* A TOUT LE MONDE, *le droit de les fouiller* partout, ELLES CONSERVENT, à plus forte raison, *au propriétaire, le droit* DE FOUILLER *les siennes* chez lui ; et que CONSÉQUEMMENT *elles supposent que ce* NE SERA QU'A SON REFUS, *qu'un étranger pourra s'en emparer en l'indemnisant.*

" AINSI, *dans le dernier état des lois romaines,* LA PROPRIÉTÉ *des particuliers* SUR LES MINES ÉTAIT CONSTANTE ; *le droit domanial* D'UN DIXIÈME *sur leurs produits le droit de* POLICE *sur leur exploitation,* TELLES SONT LES SEULES RESTRICTIONS *que cette propriété ait essuyées de la part des empereurs ;* et il faut convenir que rien n'était plus propre à conci-

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lier l'intérêt du gouvernement, qui voulait que les Mines ne demeurassent pas inutiles, avec l'intérêt de la propriété privée, qui voulait que chacun pût tirer de sa chose tout le profit dont elle était susceptible.

" *Les monumens* LES PLUS RECULÉS *de notre histoire nous offrent les* MÊMES PRINCIPES *constamment suivis par le gouvernement français.* Déjà nous avons vu que, sous DAGOBERT I, l'*Etat retirait des Mines une rétribution* qui était *qualifiée de* CENS, quoiqu'alors on ne connût encore ni fief, ni seigneurie, ni justice seigneuriale, et c'est assurément *une preuve* BIEN CLAIRE *que les rois de la première race*, en adoptant sur cet objet toutes les dispositions du droit romain qu'ils avaient trouvées en pleine vigueur dans les Gaules, *avaient* MAINTENU *les propriétaires fonciers dans le droit d'exploiter librement les* MINES *cachées dans leurs terres.*

" *Cependant on voit*, par L'ORDONNANCE DE CHARLES VI, de 1413, la plus ancienne de toutes celles que nous avons sur cette matière, *que les Seigneurs cherchaient* dès lors *à s'approprier le droit exclusif de fouiller* ou permettre de fouiller *les Mines* existantes dans les fonds de leurs vassaux ou censitaires ; MAIS *on y voit en même temps que*, dès-lors, LE GOUVERNEMENT S'EFFORÇAIT *de réprimer leurs entreprises et de* PROTÉGER *contre eux* LES PROPRIÉTAIRES FONCIERS.

" *Cette ordonance a* TROIS *objets :* LE PREMIER, *de garantir* DES VEXATIONS DES SEIGNEURS, *les marchands et* MAITRES DE TRÈS-FONDS *des Mines*, C'EST-A-DIRE, *les propriétaires qui exploitent par eux-mêmes* LES MINES *de leurs terrains*, " pour ce afin que dorénavant ils puissent ouvrer continuelle- " ment sans en être empêchés ou troublés en leurs ouvrages, et ouvrer " franchement et sûrement, tant comme ils voudront ouvrer icelles Mines ; " le second, de réserver au gouvernement la dixième partie purifiée de tous métaux, le troisième, " d'assurer à tous mineurs la faculté de quérir, ouvrer " et chercher Mines par tous les lieux où ils penseront en trouver, et icelles " traire et faire ouvrer, et vendre à ceux qui les feront ouvrer et fondre, en " payant à nous notre dixième franchement, et en faisant certification, ou " contenter à celui ou à ceux à qui les dites choses seront ou appartiendront " au dit de deux prud'hommes."

" *Cette dernière disposition*, ABSOLUMENT CALQUÉE *sur les lois du Code* que nous examinions il n'y a qu'un moment, *présente absolument le même résultat. Si elle donne* A TOUT LE MONDE indistinctement *le droit de fouiller* les Mines d'autrui, *à plus forte raison* CONFIRME-T-ELLE *au propriétaire* foncier *le droit de fouiller* LES SIENNES ; *ce n'est même qu'au propriétaire foncier* QUE PEUT S'APPLIQUER *la clause qui permet de vendre les Mines* à ceux qui les feront ouvrer, c'est-à-dire, aux Mineurs, marchands ou maitres de Mines, que l'ordonnance distingue des maîtres de très-fonds ; *ce sont* CEUX-CI *qui vendent* les Mines, et *les premiers* qui *les font ouvrir et fondre.*

" *A cette ordonnance en* SUCCÈDE dans l'ordre chronologique, *un autre* BEAUCOUP PLUS CÈLÈBRE : C'EST CELLE QUE LOUIS XI donna en 1471 à *Montilz-lès-Tours*, et que le Parlement de Paris enrégistra, le 14 Juillet 1475.

" *Par cette loi*, LOUIS XI, crée en titre d'office un grand-maître des Mines, à qui il attribue, entre autre profits celui de chercher, par lui-même et par ses commis, toutes les Mines qui existent en France, et de les faire ouvrir, non-seulement dans les terres du domaine, mais encore dans celles des particuliers et des seigneurs, en payant l'indemnité aux tréfonciers.—*Et il ne faut pas croire que, par là*, LES PROPRIÉTAIRES, *soient dépouillés des Mines* renfermées dans leurs fonds, ainsi que du droit de les exploiter, *et qu'ils n'aient à réclamer* contre les concessionnaires *qu'une simple indem-*

nité. *L'ordonnance elle-même* LEUR CONSERVE *à la fois* ET LEUR PROPRIÉTÉ ET LEUR DROIT D'EXPLOITATION : *elle porte que*, lorsqu'une Mine aura été découverte par les agens du grand maître, *il sera*, à compter du jour *de la signification* qui en sera faite *au propriétaire* du fonds, *accordé* à celui-ci *un délai de six mois* POUR SE METTRE EN ÉTAT DE L'EXPLOITER LUI-MEME. *A son défaut*, LE DROIT D'EXPLOITATION *est donné à son* SEIGNEUR IMMÉDIAT ; *au défaut de ce dernier*, AU SEIGNEUR SUZERAIN, *enfin, au défaut de tous*, AU GRAND-MAITRE. * *

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" L'ÉDIT DE HENRI IV, du mois de Juin 1601, *décide également* EN FAVEUR DES PROPRIÉTAIRES FONCIERS *la question de la* PROPRIÉTÉ DES MINES. *Il annonce*, dans son préambule, *que les ordonnances antérieures*, la création d'un surintendant ou grand-maître, le règlement de ses fonctions, de ses priviléges et de ses droits, *n'ont eu pour but que d'éveiller l'autorité des propriétaires, et de les exciter à* EXPLOITER LEURS MINES. *Ensuite par l'art. Ier*, HENRI IV retire à lui et à sa couronne le droit de dixième sur les Mines, abandonné jusqu'alors aux surintendans. *Par l'art.* 2, particulier aux mines de fer, de charbon et de quelques autres substances terrestres, le Roy, *par amour* pour ses bons sujets PROPRIÉTAIRES DES LIEUX, *les exempte du dixième. Par l'art.* 3, *commun* A TOUTES LES MINES EN GÉNÉRAL, *les propriétaires* qui veulent les exploiter, sont *assujettis à prendre la permission* du grand-maître. *Tout cela prouve encore* BIEN CLAIREMENT *que la* PROPRIÉTÉ FONCIÈRE DES MINES *n'a jamais été séparée de la* PROPRIÉTÉ DES SURFACES ; *et que les propriétaires de celles-là* N'ONT BESOIN *que de la permission* du gouvernement, permission *dont la nécessité tient à la* POLICE, *et nullement* A LA PROPRIÉTÉ.

" Ce que contient sur les Mines de fer l'Ordonnance du mois de Mai 1680, n'est pas moins décisif. Cette loi a su réunir le double avantage d'assurer la propriété des Mines de fer aux maîtres du sol, et d'empêcher que le défaut d'usage de cette propriété ne tournât au préjudice de l'État, à qui il importe que ces Mines soient exploitées. Le moyen qu'elle a adopté, est simple. Le propriétaire a la préférence pour l'exploitation : ce n'est que sur son refus juridiquement constaté, que le droit d'exploiter est donné à un autre ; et celui-ci est tenu de l'indemniser, en lui payant un sou par chaque tonneau de minérai de cinq cents livres pesant. Du reste, cette loi ne déroge pas, même pour le propriétaire qui veut exploiter personnellement ses Mines, à la règle précédemment établie pour la nécessité de l'obtention préalable de la permission du gouvernement.

" Cette règle fut, pour un temps, abrogée relativement aux Mines de charbon de terre, par un Arrêt du Conseil du 18 Mai 1698, qui permit aux propriétaires d'exploiter librement les Mines de cette nature qui se trouvaient dans leurs terrains.

" Mais par un autre Arrêt du Conseil, du 14 Janvier 1744, renouvelé par un troisième du 19 Mars 1783, le gouvernement annonça qu'il était informé que les dispositions de l'Edit de 1601 et de l'Arrêt de 1698 étaient presque demeurées sans effet, soit par la négligence des propriétaires à faire la recherche et l'exploitation des dites Mines, soit par le peu de faculté et de connaissances de la part de ceux qui avaient tenté de faire sur cela quelque entreprise ; que d'aillleurs la liberté indéfinie laissée aux propriétaires par l'arrêt de 1698, avait fait naître, en plusieurs occasions, une concurrence entre eux, également nuisible à leurs entreprises respectives. En conséquence, il faut dire qu'à l'avenir, personne ne pourrait ouvrir et mettre en exploitation des Mines de houille ou charbon de terre, sans avoir préalablement obtenu une permission du contrôleur général des finances, soit que

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ceux qui voudraient faire ouvrir et exploiter les dites Mines, fussent seigneurs hauts-justiciers, ou qu'ils eussent la propriété des terrains où elles se trouveraient.

" TEL ÉTAIT, *par rapport aux Mines de charbon, l'état de la législation française, lorsque l'Assemblée constituante s'occupa de* L'ABOLITION DES DROITS SEIGNEURIAUX. *Alors*, comme vous le voyez, *les droits des propriétaires fonciers* SUR LES MINES *étaient* RECONNUS, *étaient* INTACTS, *étaient* CONSACRÉS *par des lois expresses.* SEULEMENT *l'exercice en était subordonné à une précaution de pure* POLICE, *qui ne tendait qu'à rendre leur propriété plus utile à eux-mêmes et à l'Etat.* SEULEMENT aussi, dans un très petit nombre de coutumes, notamment dans celle du Hainaut, dont une partie était déjà réunie à la France depuis plus d'un siècle, et dans laquelle existaient des Mines de charbon de terre aussi riches que nombreuses, la permission du gouvernement ne suffisait pas, soit à un propriétaire, soit à un concessionnaire du gouvernement qui avait traité avec un propriétaire, pour exploiter les Mines existantes dans le terrain de celui-ci ; il fallait de plus le consentement du Seigneur ; et ce consentement, le seigneur pouvait le refuser, en ouvrant et exploitant lui-même les Mines dont le gouvernement avait autorisé l'ouverture et l'exploitation.

" C'est ainsi que l'usage et la jurisprudence avaient accordé et concilié les dispositions des coûtumes qui donnaient aux Seigneurs le droit exclusif d'ouvrir et d'exploiter les Mines avec les règlements généraux qui avaient interdit toute ouverture et exploitation des Mines sans permission préalable du gouvernement; et nous en trouvons la preuve dans quatre Arrêts du Conseil, des 14 Octobre 1749, 3 Décembre 1754, 18 Mars 1755 et 20 Janvier 1756, qui ont autorisé le prince de Croy, le marquis de Cernay et le chapitre de Saint-Géry de Valenciennes, à exploiter les veines de charbon existantes dans leurs Seigneuries respectives du Vieux-Condé, de Raismes et de Saint-Waast, nonobstant la concession que le gouvernement en avait précédemment faite au vicomte Desandroin, en vertu du règlement de 1744.

" C'est ce que prouve également un Arrêt du Conseil, du 12 Mai 1771, qui, malgré une concession faite par le gouvernement à la Compagnie David, d'après le même règlement, a permis au conseiller d'état, Foulon, d'exploiter indistinctement toutes les Mines de charbon qui se trouveraient dans sa seigneurie de Douay, régie par la coutume d'Anjou, dont l'art. 6, renferme implicitement, pour les Mines, autres que celles d'or, une disposition semblable à celle des Art. 1 et 2 du ch. 130 des chartes générales du Hainaut.

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Page 302. " Un nouveau trait de lumière vient encore se joindre à cette démonstration, par la lecture de la loi du 12 Juillet 1791, concernant les Mines.

" Par cette loi, l'assemblée constituante a renouvelé la plupart des dispositions des anciens réglements sur cette matière importante. Elle a déclaré, non pas comme le disent les demandeurs, que les Mines appartiennent à la nation, mais qu'elles sont à sa disposition, en ce sens seulement qu'elles ne peuvent être exploitées que de son consentement et sous sa surveillance. Elle a déclaré que les propriétaires de la surface auraient toujours la préférence et la liberté d'exploiter les Mines qui pourraient se trouver dans leurs fonds, et que la permission ne pourrait leur en être refusée lorsqu'ils la demanderaient. Elle a déclaré enfin que les anciens concessionnaires seraient maintenus pendant cinquante ans, dans leurs exploitations.

" Mais qu'a-t-elle fait en faveur des ci-devant Seigneurs qui, dans le

Hainaut français et dans l'Anjou, avaient traité avec les anciens concessionnaires, et avaient moyennant une redevance quelconque, consenti à ce qu'ils jouissent de l'effet de leurs concessions? Rien; elle n'en a même point parlé. Et pourquoi n'en a-t-elle point parlé? Est-ce par oubli? Mais il y avait dans son sein des membres très-intéressés à l'en faire souvenir. On y comptait notamment le duc de Croy et le comte d'Aumberg de Lamarck, tous deux députés du Hainaut français, tous deux ci-devant Seigneurs de terres considérables, dans l'étendue desquelles s'exploitaient des Mines célèbres encore aujourd'hui dans toute la France; et il est bien notoire que l'un d'eux, le comte D'Aumberg de Lamarck, avait, avec Mirabeau, qui a paru avec tant d'éclat dans la discussion de cette loi, des liaisons extrêmement intimes. On ne peut donc pas supposer que le silence de l'assemblée constituante sur les prétendus droits des ex-seigneurs du Hainaut sur les Mines, soit l'effet d'un oubli. Ce silence ne peut avoir eu et n'a eu réellement qu'une seule cause, c'est qu'alors il n'existait plus en Hainaut, ni seigneurs, ni seigneuries, ni justices seigneuriales, ni droits seigneuriaux ou justiciers.

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" Le procès, terminé par cette loi, était tout entier entre l'Etat et les propriétaires des fonds où il se trouvait des Mines. Ce n'est qu'entre ces deux parties que l'Assemblée constituante a prononcé; et il est, d'après cela, bien impossible que l'assemblée constituante, en maintenant, sous certaines réserves, les anciennes concessions dans toute leur étendue, ait eu la pensée de conserver à ceux des ci-devant Seigneurs de qui provenaient quelques-unes de ces concessions, les redevances qu'ils s'étaient retenues, lorsqu'ils les avaient accordées. En maintenant ces concessions, l'assemblée constituante ne s'est occupée que des concessionnaires; c'est pour eux seuls qu'elle les a maintenues; et elle les a maintenues, non pour les assujettir de nouveau à des charges dont elle les avait précédemment affranchis, mais pour les laisser jouir pendant un certain temps, du fruit de leurs dépenses et de leurs travaux.

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Page 323. " Ici se présentent des questions absolument particulières à la cause du cit. Decarondelet, et la première consiste à savoir si la transaction du 16 Mars 1776 ne place pas le cit. Decarondelet dans un cas d'exception, par cela seul qu'elle se présente, suivant lui, comme propriétaire foncier des terrains sous lesquels existent les Mines dont il s'agit.

" Cette question est mêlée de droit et de fait.

" *Dans le droit, la redevance connue* dans le ci-devant Hainaut, *sous le nom* D'ENTRECENS, *est-elle conservée au profit des ex-seigneurs qui*, AVANT L'ABOLITION DU RÉGIME FÉODAL *avaient concédé des Mines* existantes intégralement sous leurs propres fonds? Il y a, comme vous le savez, pour l'affirmation un jugement du tribunal de cassation, du 11 nivôse an 8. *La société charbonnière de Sars-Lonchamp attaquait un jugement* du tribunal civil du département de Sambre et Meuse, *qui l'avait condamné à continuer* au cit. Blueau, ci-devant Seigneur du lieu, *le payement du droit* D'ENTRECENS qu'il s'était réservé, en concédant à cette compagnie l'exploitation exclusive des veines de charbon qui se trouvaient dans ses propriétés foncières; VOUS AVEZ REJETÉ SON RECOURS; *et vous en avez motivé le rejet sur le principe, que la* SUPPRESSION *des droits féodaux* prononcée par les lois de la république, NE PEUT PROFITER *qu'aux propriétaires de la superficie des terres.*

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Page 327. " *Disons enfin que ce droit est essentiellement* SEIGNEURIAL, *qu'il est aboli comme tous les droits Seigneuriaux, et qu'il y a nécessité indispensable* D'ANNULLER *le jugement qui l'a maintenu.*

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" *C'est à quoi nous concluons.*"

" SUR SES CONCLUSIONS, *arrêt du* 16 *ventôse, an* 12, au rapport de M. Ruperon, qui déclare :

" Vu les art. 1 et 2 du chap. 130 des chartes nouvelles du pays de " Hainaut, l'art. 4 de la loi du 11 Août 1789, l'art. 5 de celle du 25 Août " 1792, l'art. 1 de celle du 17 juillet 1793, et les art. 1, 4 et 5 du tit. de celle " du 12 Juillet 1791 sur les Mines et Minières ;

" CONSIDÉRANT, en premier lieu, que, suivant les dispositions des chartes " du Hainaut, les Mines ou veines de charbon, sont comprises sous la déno- " mination générique d'avoir en terre non extrayé ;

" *Que* l'avoir en terre non extrayé, consistant dans *le droit de fouiller* " *la Mine* et de s'approprier ce qui serait extrait, *était un attribut de la* " *haute-justice*, un privilége exclusivement *attaché a la qualité de Seigneur* " haut-justicier ;

" Que les ci-devant seigneurs du Hainaut qui ne voulaient ou ne pou- " vaient exploiter par eux-mêmes les mines de charbon qui se trouvaient " dans l'étendue de leur haute-justice, étaient libres de concéder à qui bon " leur semblait la faculté de les exploiter, à la charge par les concessionnaires " de leur payer une redevance conventionnellement reglée et connue sous la " dénomination de droit d'entre-cens ;

" *Que cette redevance*, dérivant d'un droit essentiellement dépendant de " la haute-justice, *n'avait point pour cause la* CONCESSION *primitive* D'UN " FONDS, D'UNE PROPRIÉTÉ, mais seulement l'exercice simple d'une faculté " attribuée à la Seigneurie haute justicière, comme l'a très-judicieusement " reconnu le tribunal d'appel lui-même ;

" Que du moment que la haute justice a été retirée des mains des " ci-devant seigneurs, leur droit d'avoir en terre non extrayé et celui d'en- " tre-cens qui le représente, ont dû nécessairement cesser ; que les disposi- " tions des lois précitées sur l'abolition des droits seigneuriaux sont " positives à cet égard ;

" Qu'il n'y a pas de parité entre le droit d'entre-cens et les terres vaines " et vagues, les biens vacans, qui demeurent irrévocablement acquis aux " ci-devant seigneurs par l'art. 8 de la loi du 13, 20 Avril 1791 ; qu'en effet, " il s'agit, dans cet article, d'immeubles, de corps certains dont la consis- " tance, une fois fixée, ne peut recevoir d'accroissement, et qui ont passé en " entier dans le domaine absolu des ci-devant Seigneurs, sans conserver le " moindre rapport avec le titre féodal dont ils procèdent ; qu'il n'en est pas " ainsi du droit d'avoir en terre non extrayé, en vertu duquel l'exploitation " des Mines s'étendait successivement sur les fonds souterrains, *sans que la* " *loi* DANS AUCUN CAS, rendît *le Seigneur propriétaire du fonds productif :* " *c'est-à-dire* DE LA MINE MÊME, que, si un semblable droit était encore " maintenu aux ci-devant Seigneurs, il en résulterait que la haute-justice, " après avoir été solennellement anéantie, n'en conserverait pas moins ses " attributs et ses effets.

" Considérant, en second lieu, qu'il est évident que, par les articles " précités de la loi de 1791, sur les Mines et minières, portant que les con- " cessions actuellement existantes subsisteront dans toute leur étendue, le " législateur n'a pas entendu parler de l'étendue des dispositions des " contrats de concessions, mais uniquement de l'étendue superficielle des " terrains ; que d'ailleurs cette loi ne peut être censée avoir conservé aux " ci-devant Seigneurs des droits de haute justice qui avaient été déjà " formellement abolis ;

" Considérant, en troisième lieu, que, si d'après la transaction du 21

" Octobre 1787, une partie de la redevance, convenue par cet acte est légitime et justement accordée, en conséquence des abandons faits par les cit. et dame Decarondelet, il n'en reste pas moins vrai que, mal à propos, les juges d'appel ont confirmé la totalité du droit stipulé par cette transaction, puisque les Decarondelet y ayant expressément réservé non seulement l'effet de la concession primitive de 1757, mais encore le droit d'entrecens, le cas échéant, à raison du onzième dernier comme par le passé, dans le terrain dit abonnement; il en résulte qu'une partie de ce droit a constamment une origine féodale ;

" Que-dès-là que, par cette transaction, les Decarondelet percevaient quitte de frais la quantité de charbon convenue, on ne saurait y apercevoir un contrat de société, parce qu'il répugne à la nature de ce contrat, que l'un des associés prenne une part du profit, sans prélever la dépense faite pour se le procurer, en sorte qu'il pourrait arriver qu'il y eut du bénéfice pour lui, tandis qu'il n'y aurait que de la perte pour les autres associés ;

" Que le jugement attaqué, en décidant subsidiairement que cet accord n'a point été anéanti, attendu qu'il n'est pas dit, en termes exprès, dans les lois sur l'abolition du régime féodal, qu'il ait été dérogé aux transactions, a faussement appliqué les lois sur la force et les effets de cette sorte de transaction ; qu'en effet, les lois qui ont aboli généralement tous les droits féodaux, toutes les redevances et prestations seigneuriales, ont en même temps et véritablement anéanti toutes les transactions qui auraient pu être passées sur la quotité, le mode et l'étendue de la perception pour l'avenir de ces droits, de ces redevances, par la raison que la chose même sur laquelle est intervenue une transaction, ayant été anéantie dans sa substance et dans toutes ses conséquences, il est impossible de concevoir que cette transaction puisse continuer de subsister ;

" Considérant enfin que, quand on admettrait, dans toute sa latitude, le principe que la suppression des droits féodaux ne doit profiter qu'aux propriétaires de la superficie, il n'en résulterait pas que le jugement, dont il s'agit, dût être confirmé, attendu qu'il conserve aux cit. et dame Decarondelet la totalité du droit d'entre-cens par eux réclamé, alors même qu'ils avouent qu'ils ne sont propriétaires que d'une partie du terrain de la Haine-Saint-Pierre;

" De tout quoi *il suit que les juges de Bruxelles*, en maintenant ainsi les cit. et dame Decarondelet dans la totalité du droit d'entre-cens, stipulé par le contrat de concession du 12 Janvier 1759 et la transaction du 21 Octobre 1787, *ont violé les lois nouvelles* sur l'abolition du régime féodal et les Mines et minières, et faussement appliqué les lois sur la force et les effets des transactions sur procès ;

" PAR CES MOTIFS....., CASSE ET ANNULLE LE JUGEMENT *du tribunal d'appel de Bruxelles*, du 12 messidor, an 9 . . . "

" Il y a, dans le Répertoire de Jurisprudence, au mot entre-cens, un Arrêt semblable du 23 vendémiaire, an 13.

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That authority from MERLIN, based as it is upon a decision of the highest judicial tribunal of France, *establishes conclusively*

1°. That by Roman Law, under the Republic, MINES *were the exclusive and untrammelled property of the owner of the soil.*

2°. That, in *modifying* the Law of Mining, the ROMAN

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Emperors never laid claim to the ownership of the Mines, but *constantly recognized the owner of the soil as being also the owner of the Mine*, and legislated on that subject with the single view to prevent mineral wealth from lying profitless in the bowels of the earth ; that *the right of the Sovereign over* Mines *consisted in a* mere right of Police *or supervision.*

3°. That *the* French Kings, in *adopting* the Roman Law, which they found in active operation in Gaul, *modeled their Ordinances on Mining* closely *upon the Laws of the Roman Empire, and likewise recognized the owner of the soil as being the* owner of the Mine, *merely* claiming *a right of Police* or supervision over the Mine.

4°. That *under the Roman Law, and under the French Law*, no distinction whatever exists *between* Mines of the *precious metals* and Mines of the *baser metals.*

5°. That the *abolition of the Feudal Tenure*, in France, involved, in the particular case submitted to the *Cour de Cassation*, the extinction *of all claim*, by the Seigniors, *as representing the state, to the Mines on* private lands.

It will be shewn hereafter that our Seigniorial Tenure Act has done no more and no less than the Law of the 4th August, 1789, which abolished the Feudal tenure in France ; and consequently a decision of the *Cour de Cassation* in France, expository of the Law of 1789, may well be cited to illustrate the meaning of our Seigniorial Act. But more of this hereafter. Another decision by the same supreme tribunal maintained the owner of the soil in the exclusive right to the Mines upon his lands. That decision is thus reported by MERLIN, in the same article :

Page 337. " Avant *la loi du* 12 *Juillet* 1791, les maitres de forges *pouvaient-ils*, dans le pays de Liége, *exploiter*, sans le consentement *des propriétaires fonciers*, les Mines de fer existantes dans les héritages d'autrui ?

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" En brumaire, an 3 (ai-je dit à l'audience de la cour de cassation, section civile, le 23 ventôse, an 11), le cit. Daoust, maître de forges, domicilié à Hourbes, fit dans les terres d'une ferme dite Pommereuil, située dans la commune de Ragnies, pays de Liége, et dépendante de l'abbaye de Lobbes, les fouilles nécessaires pour en extraire les Mines de fer qu'elles recelaient dans leur sein.

" Peu de temps après la suppression de l'abbaye de Lobbes, prononcée par la loi du 15 fructidor, an 4, le cit. Daoust, troublé dans son exploitation par le receveur des domaines de Beaumont, parvint à s'y faire maintenir, non pas, comme il l'assure, par un arrêt de l'administration du département de Jemmappes (du moins il n'en rapporte aucune preuve) mais de fait, et d'après un simple avis du directeur des domaines de ce département, daté

du 21 frimaire, an 5, et motivé sur la fausse assertion avancée par lui, et que personne n'était à même de contredire, que le terrain sur lequel il avait établi ses travaux, n'était point national, et qu'il était autorisé du propriétaire de ce terrain à l'exploiter.

" Le 23 floréal, an 6, la ferme de Pommereuil fut vendue par l'état au cit. Lefebvre : et par le procès-verbal d'adjudication, il fut déclaré qu'au milieu des terres de cette ferme, se trouvaient des fosses dont on exploitait la Mine de fer, ce qui avait occasionné deux ou trois bonniers de dommage.

" Le 21 fructidor, an 7, le cit. Lefebvre obtint du juge de paix du canton de Thuin, une ordonnance qui défendit au cit. Daoust d'emporter les mines de fer qu'il avait extraites d'un terrain dépendant de la ferme de Pommereuil, attendu que, d'après la loi du 12 juillet 1791, il ne pouvait faire cette extraction que de son consentement formel, et en lui payant la valeur de ces Mines.

Page 343. " *Ces conclusions ont été adoptées par arrêt du* 23 *Ventôse, an* 11, au rapport de M. Busschop.

" CONSIDÉRANT, sur le premier moyen (porte-t-il) qu'il résulte des dispositions de l'art. 13, du ch. 6 de la coutume de Liége, ainsi que de celles de l'art. 20 du ch. 11 de la même coutume, *que toutes espèces de Mines ouvertes et à ouvrir,* APPARTIENNENT *en toute propriété* AUX PROPRIÉTAIRES DES SURFACES ; *qu'aucune autre loi* ou *usage local* N'AUTORISE *les mines de forges à extraire la mine de fer* SUR LE TERRAIN D'AUTRUI, *sans le consentement des propriétaires ;* D'OU IL SUIT *que le jugement dénoncé* EN DÉCIDANT *qu'avant la publication de la loi du* 12 *Juillet* 1791, *le demandeur* N'A PU ACQUÉRIR *sans le consentement du propriétaire,* LE DROIT D'EXTRAIRE LA MINE DE FER dans la ferme de Pommereuil, située au dit pays, *n'a fait qu'une juste application des susdits art.* 13 *et* 20.

" Par ces motifs le tribunal rejette la demande de Charles Daoust."

The above decision is the more important from the fact that the *Custom* of Liège, where the disputed Mines were situated, is identical with the *Custom* of Paris as to the rights of the owner of the soil, as will be shewn hereafter.

In treating another question, MERLIN, P. 337, throws further light upon this subject, in the following exhaustive argument :

" *Dans les pays où le droit d'exploiter les Mines de charbon, était* en tout ou en partie *seigneurial* avant les décrets du 4 août 1789, *le ci-devant Seigneur* haut justicier qui était *propriétaire des fonds sous lesquels existent les Mines* DONT IL A CÉDÉ L'EXPLOITATION, *avant l'abolition du régime féodal,* PEUT-IL aujourd'hui SE FAIRE PAYER, en sa qualité de propriétaire les REDEVANCES *qu'il s'est réservées en celle de Seigneur ?*

" *Pour résoudre cette question en pleine connaissance de cause, il faut commencer par se former une idée exacte des droits que les propriétaires du sol avaient* SUR LES MINES *avant la révolution.*

" ON A VU, dans le § 1, *que les lois romaines consideraient* LES MINES *comme des parties intégrantes des fonds qui les récélaient,* et par conséquent EN *déféraient le plein domaine aux propriétaires* DE CES FONDS ; *mais que les empereurs entravèrent d'abord, par vues de bien public, l'exercice de ce droit de propriété, et s'en attribuèrent ensuite les produits* JUSQU'A CONCURRENCE D'UN DIXIÈME.

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" Il n'en fallut pas davantage pour ouvrir aux chefs des peuples du Nord qui démembrèrent l'empire romain, une carrière plus large et leur inspirer des idées plus étendues.

" *Ils ne prirent pas la peine de disputer, en légistes,* AUX PROPRIÉTAIRES DU SOL *la propriété des Mines ;* MAIS *profitant de l'habitude* qu'avaient contractée leurs prédécesseurs en souveraineté *de réglementer les matières minérales, et de* S'EN RÉSERVER *les profits* JUSQU'A UNE CERTAINE QUOTITÉ ; *ils partirent de là pour dire aux propriétaires fonciers* : " Il importe peu " que les Mines qui existent sous vos terres, en fassent partie ; nous le " supposons avec vous : mais comme l'intérêt publique exige à la fois que " des propriétés aussi précieuses se soient mises en valeur que sous l'inspec- " tion de l'autorité, et qu'elles ne demeurent pas inutiles, vous ne toucherez " à ces Mines, qu'après en avoir obtenu de nous la permission expresse, et " en nous payant telles redevances. Si vous ne les exploitez pas, nous auto- " riserons d'autres a le faire ; et alors, vous n'aurez d'indemnité à réclamer, " pour le dommage causé à la surface de vos terres."

" C'EST EFFECTIVEMENT A CES DEUX POINTS *que se réduiront toutes les lois publiées* EN FRANCE, *sur l'exploitation des Mines, pendant plusieurs siècles ;* et ce fut notamment *dans cet esprit* que furent rédigées *la célèbre ordonnance de* CHARLES VI, du 30 Mai 1413, *et l'édit de* HENRI IV, du mois de juin 1601. Il y eut même quelques unes de ces lois qui, laissant le droit de propriété foncière des Mines sous une sorte de nuage, déclarèrent expressément que les Mines étaient de droit royal et domanial : c'était notamment le langage de Philippe-le-Long, dans son ordonnance du 5 avril 1321.

" Ce droit exclusif du souverain sur les Mines, éprouva cependant des contradictions, non de la part des propriétaires fonciers, mais de celle des seigneurs qui, ayant usurpé plusieurs droits régaliens, ne pouvaient pas manquer d'étendre leurs prétentions jusque sur celui-ci.

" Ce fut en partie pour réprimer ces entreprises, que fut rendue, par CHARLES VI, l'Ordonnance déjà cité de 1413. " Plusieurs tant d'église " comme séculiers (y est-il dit) qui ont jurisdictions hautes, moyennes et " basses, ès territoires ès quels les dites Mines sont assises, veulent et s'ef- " forcent d'avoir en icelles la dixième partie purifiée et autres droits comme " avons, à qui seul et non à autre elle appartient de plein droit, laquelle " chose est contre raison, les droits et prééminences royaux de la Couronne " de France et de la chose publique, car, s'il y avait plusieurs seigneurs pre- " nant la dixième partie ou autre droit, nul ne ferait plus ouvrir en icelles " Mines dorénavant ou peu, parceque ceux à qui elles sont n'auraient que " très-peu et néant de profit de demeurant. Et s'efforcent les dits hauts " justiciers de donner grands empêchemens et troubles en maintes manières " aux maîtres qui font faire la dite œuvre, et ouvriers ouvrant en icelles ; et " ne leur permettent ni souffrent avoir, par leurs dites terres et seigneuries, " passages, chemins, allées et venues ; caver ni chercher Mines, rivières, " bois ni autre chose à leur convenance et nécessaires, parmi payant juste " et raisonnable prix ; et avec ce, venant et travaillant les dits faisant l'œu- " vre et ouvriers, sous l'ombre de leur dite jurisdiction, en maintes et " diverses autres manières, afin de faire rompre et cesser la dite œuvre . . . . " Pourquoi, voulant sur ce pouvoir et remédier . . . . . , disons, discernons " et déclarons que nul Seigneur spirituel ou temporel de quelque état, " dignité ou prééminence, condition ou autorité quelqu'il soit en notre " royaume, n'aura ni doit avoir en quelque titre, cause, occasion, quelle " qu'elle soit, pouvoir ni autorité de prendre, en notre royaume, la dixième

" partie ni autre droit de Mine, mais en sont et seront, par notre dite ordon- " nance et droit, du tout forclos, car à nous seul et pour le tout, à cause de " nos droits et Majesté royaux, appartient le dixième et non à autre."

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Les Seigneurs hauts-justiciers réclamèrent contre ces dispositions, non qu'ils prétendissent tous disputer au roi le droit exclusif de l'extraction des Mines, mais parce que, selon eux, les travaux nécessaires pour les exploiter, exigeaient de leur part une protection qui devait être payée par quelques prestations.

Leurs remontrances furent accueillies ; et le 10 Octobre 1552, le roi Henri II donna un édit par lequel il leur accorda, pour prix du soin qu'ils prendraient de traiter favorablement les maîtres et ouvriers, le quarantième du produit des Mines de toute espèce, notamment de celles de charbon terrestre, après le prélèvement du dixième royal.

Henri IV par l'art. 2 de son Edit du mois de Juin 1601, exempta les Mines de charbon de terre de ce dixième royal ; et, par les autres dispositions du même Edit, régla le mode de recouvrement de ce droit sur les autres Mines, sans faire aucune mention du quarantième des Seigneurs hauts-justiciers.

" Mais par l'Arrêt de son Conseil, du 4 Mai 1604, concernant l'exploitation des Mines métalliques, " afin que les Seigneurs hauts-justiciers des " lieux auxquels sont et seront ci-après ouvertes et travaillées les dites " Mines, ou fonciers d'icelles, ne puissent apporter aucun trouble ou traverse " au tribunal d'icelles, sous quelque prétexte ou prétention que ce soit. " Sa Majesté veut et ordonne, suivant l'édit fait par le feu roi Henri II en " Octobre 1552, *qui est le seul de tous les rois qui leur a attribué aucun* " *droit*, que, conformément à icelui, après que le droit de sa dite Majesté " aura été entièrement payé et satisfait sur la part qui reste aux entrepre- " neurs, le sieur haut-justicier puisse prendre et recevoir, par les mains du " facteur général, un quarantième denier pour tout droit, et sans qu'il puisse " prétendre aucune chose davantage, à la charge encore d'assister les dits " entrepreneurs de passages et chemins commodes pour leur travail, et de " toutes autres commodités ; et d'être privés à jamais du dit droit et *grâce*, " tant les dits hauts-justiciers que fonciers ; s'ils font refus de laisser faire " les ouvertures et chemins nécessaires pour les dites Mines."

Cependant il y avait alors, même en France, des pays où, indépendamment des entreprises seigneuriales que l'Ordonnance de 1413 avait réprimées, et que l'Edit de 1552 avait reduites à un droit de protection évalué au quarantième denier, la haute-justice était parvenue à se ressaisir relativement aux Mines de charbon de terre, du droit exclusif d'en permettre l'ouverture et l'exploitation.

*C'étaient les provinces d'*Anjou *et du* Maine, *dont les coûtumes, en réservant au roi les* Mines d'or, *laissaient aux hauts-justiciers les Mines de substances terrestres.*

Quelle était *à cette époque, la législation du* Hainaut *sur les Mines? était-elle* plus ou moins *favorable que celle de la France* aux propriétaires du sol? Elle devait l'être BEAUCOUP MOINS, *et par une raison fort simple.*

Il est prouvé par différentes chartes citées au mot Ferrage, § 3, *que cette contrée a formé longtemps, et jusque dans le quatorzième siècle, un* fief immédiat de l'empire germanique.

OR *les publicistes* allemands *sont unanimement d'accord que les* Mines *appartiennent absolument* au souverain, *et que les propriétaires du sol n'y ont aucun droit.*

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Martini, dans ses " elementa juris-publici," imprimés à Vienne en 1773, dit, No 169 et 171: " *quoniam bona publica sunt in dominio* " *populi, nemo possidere, his uti aut frui poterit, nisi is cui populus vel impe-* " *rans in quem jura populi translata sunt, permiserit : quarè jus disponendi* " *de his est jus majestaticum. Hinc intelligitur ad jura imperantis jus* " *quoque venenationis, jus* SUBTERRANEUM, *jus* MINERALE, *jus in thesauros....* " *esse referenda.*"

After citing *Putter* and *Vitriarius* to the same effect, MERLIN proceeds to say :

" Ces maximes durent naturellement s'enraciner dans le Hainaut: et dans le fait, nous trouvons dans le placard des archiducs Albert et Isabelle, de 1613, sur la chasse, que les anciens souverains de ce pays avaient été tellement jaloux d'y exercer tous les droits qui, en Allemagne, étaient réputés régaliens, que le droit de chasse (*jus venenationis*, que l'on a vu tout-à-l'heure rangé, par Martini, dans la classe des droits de souveraineté) y est énoncé, à plusieurs reprises, comme appartenant exclusivement au prince, et que les Seigneurs hauts-justiciers y sont représentés comme n'en jouissant que par l'effet de sa concession spéciale.

Il paraît cependant que les Seigneurs hauts-justiciers de Hainaut étaient parvenus à se mettre, par rapport aux Mines, de niveau avec ceux d'Anjou et du Maine.

By Common Law, gold belongs to owner of soil.

Sec. 76.—It thus appears from MERLIN that, in the Provinces of ANJOU and MAINE, *as exceptions to the Common Law of the Kingdom*, gold-mines belonged to the Sovereign; and the same, as will presently be shewn, may be said of BRETAGNE. Hence it is that, elsewhere in the Kingdom, e. g. under the Custom of Paris, the precious and the baser metals were on precisely the same footing. Indeed the Ordinances treat of all Mines alike, and mention expressly gold and silver conjointly with the other metals, drawing no distinction whatever between them, as will be seen hereafter.

Sec. 77.—Before reproducing the text of the three great Ordinances of 1413, 1471 and 1601, the Plaintiffs enumerate all the *Edits*, *Ordonnances*, *Déclarations* and *Lettres-Patentes* of the French Kings, on the subject of Mines, in chronological oorder, with the date and place of enregistration, and the authority for the existence, of each one. This synopsis is drawn from a

***Blanchard's* compilation.**

" Compilation Chronologique, contenant un Recueil en abrégé, des Ordonnances, Edits, Déclarations et Lettres-Patentes des Rois de France."

By BLANCHARD, Paris 1715.

No. 1.—P. 223, *A. D.* 1413.

Ownership of Mines. *Blanchard's* compilation.

"Edit portant reglement pour les mines d'argent, de plomb et de cuivre, qui sont au Bailliage de Mascon, et Sénéchaussée de Lyon, et ressort d'iceux. Et les priviléges des ouvriers des dites mines. A Paris, le 30 May, 1413. Reg. en la Chambre des comptes le 18 Mars 1483. (Mem. de la Ch. des Comptes, Cotté S. fol. 26. Reg. de la Cour des Mon. Cotté E. fol. 178 & Reg. Cotté G. fol. 15)."

No. 2.—P. 229, *A. D.* 1416.

"Lettres Patentes portant que ceux à qui appartiennent les Mines près la Ville de Lyon, porteront les matières d'or et d'argent qu'ils auront, à la Monnoye establie dans la dite ville. A Paris le 3 Novembre 1416. (Reg. de la Cour des Mon. Cotté E. fol. 188)."

No. 3.—P. 251, *A. D.* 1437.

"Edit portant confirmation de celuy du 30 May 1413, qui concerne les mines d'argent, de plomb et de cuivre, qui sont ès Bailliage de Mascon, etc. A Dun-le-Roy, 1er Juillet 1437. Reg. en la Ch. des Comptes le 18 Mars 1483. Mem. de la Ch. des Comptes, Cotté S. fol. 26. (Reg. de la Cour des Mon. Cotté G. fol. 15)."

No. 4.—P. 315, *A. D.* 1471.

"Edit portant reglement pour les mines et minières du Royaume. Aux Montils-lez-Tours au mois de Novembre 1471. (2 Vol. des Ord. de Louis XI, Cotté F. fol. 22)."

No. 5.—P. 355, *A. D.* 1483.

"Edit portant reglement pour les Mines et Minières dans le Vicomté de Conserans. Au Plessis du Parc lèz-Tours, au mois de May 1483. Reg. le 12 Juin, 1483. (3 *Vol. des Ordonnances de* Louis XI, *Cotté G, fol.* 186)."

No. 6.—P. 360, *A. D.* 1483.

"Edit portant défenses à toutes personnes de travailler aux mines de Conserans, s'ils n'ont le droit du Roy. A. Baugency au mois de Novembre 1483. Reg. le 8 May 1484. (Vol. des Ord. de Charles VIII, Cotté H. fol. 6. Mém. de la Ch. des Comptes, Cotté S. fol. 39)."

No. 7.—P. 362, *A. D.* 1483.

"Edit portant confirmation de ceux des 30 May 1413, et 1er Juillet 1437, concernant les mines d'argent, de plomb et de Cuivre du Bailliage de Mascon, et de la Sénéchaussée de Lyon; et les priviléges des ouvriers des dites mines, etc. Au Montils-lez-Tours, au mois de Février 1483. Reg. en la Chambre des Comptes le 18 Mars 1483. (Mém. de la Ch. des Comptes, Cotté S. fol. 26. Reg. de la Cour des Mon. Cotté G. fol. 15)."

No. 8.—P. 388, *A. D.* 1498.

"Edit portant confirmation des priviléges des Maistres-Marchands, faisant l'œuvre, et des ouvriers et mineurs des Mines de Lyonnais. A Soissons au mois de Juin, 1498. (*Reg. de la Cour des Mon. Cotté G. fol.* 23)."

No. 9.—P. 407, *A. D.* 1506.

OWNERSHIP OF MINES. *Blanchard's* compilation.

" Edit portant reglement pour l'exploitation des mines de Conserans. A Bourges au mois de Février 1506. Reg. le 19 Mars 1506. (Vol. des Ord. de Louis XII. Cotté J. fol. 195.)"

No. 10.—P. 420, *A. D.* 1514.

" Edit portant reglement pour fouiller les mines d'argent, de cuivre et autres métaux. A Paris au mois de Juillet 1514. Reg. en la Ch. des Comptes, le 14 Juillet 1514 et au Parl. le 12 Août 1550. (1 Vol. des Ord. d'Henry II, Cotté P. fol. 8)."

No. 11.—P. 436, *A. D.* 1516.

" Déclaration portant règlement pour l'argent qui provient des Mines du Royaume. A Paris le 6 Mars, 1516. (*Reg. de la Cour des Mon. Cotté G. fol.* 56.)

No. 12.—P. 447, *A. D.* 1519.

" Lettres Patentes portant permission à Jaques de Genoilhac, Chevalier, Seigneur de Capdenat, de faire chercher des mines d'or, d'argent, de plomb de cuivre et de tous autres métaux dans sa Seigneurie de Capdenat. A Chastellerant le 29 Décembre 1519. Reg. en la Cour des Monnoyes le 27 Février 1519. (Reg. de la Cour des Mon. Cotté G. fol. 68)."

No. 13.—P. 450, *A. D.* 1520.

" Déclaration portant reglement pour l'ouverture des mines du Royaume. A Fontainebleau le 17 Octobre 1520. Reg. de la Ch. des Comptes de Grenoble. (Reg. de la Cour des Mon. Cotté, G. fol. 78)."

No. 14.—P. 454, *A. D.* 1521.

" Déclaration portant défenses à toutes personnes de tirer et fouiller des mines, sans la permission du Roy, et de porter des métaux hors du Royaume, sans estre marquez. A Fontainebleau, le 18 Octobre 1521. (Reg. de la Chambre des Comptes de Grenoble)."

No. 15.—P. 555, *A. D.* 1543.

" Déclaration portant reglement pour les mines de fer du Royaume. A Saint Germain en Laye, le 18 May 1543, Reg. le 25 Octobre suivant. (4 Vol. des Ord. de François I, Cotté N. fol. 22.)"

No. 16.—P. 598, *A. D.* 1545.

" Edit portant confirmation de celuy du Mois de Juillet 1514, concernant les mines d'argent, de cuivre, et autres métaux. A Paris au mois de Mars 1545. Rég. le 12 Aoust. 1550. (2 Vol. des Ord. d'Henry II, Cotté Q. fol. 85)."

No. 17.—P. 616, *A. D.* 1547.

" Déclaration portant suppression de l'Impost qui a été mis sur le fer tiré des Forges des Provinces de Bourgogne, de Champagne, et de Bric. A Fontainebleau, le 14 Octobre 1547. Rég. le 19 Décembre de la mesme année. (1 Vol. des Ord. d'Henry II, Cotté P. fol. 51)."

No. 18.—P. 633, *A. D.* 1548.

" Declaration portant permission à Jean François de la Roque, Sieur de Roberval, d'ouvrir et rechercher les mines et substances tant terrestres que metalliques, etc. A Lyon le dernier Septembre 1548. Reg. en la Cour des Monnoyes le 11 May 1555. (Reg. de la Cour des Mon. Cotté K. fol. 258.)" OWNERSHIP OF MINES. *Blanchard's* compilation.

No. 19.—P. 649, *A. D.* 1549.

" Déclaration portant Confirmation des Edits du mois de Juillet 1514, et Mars 1545 concernant les mines d'argent, cuivres et autres métaux. A Fontainebleau, le 6 Mars 1549. (Reg. le 12 Aoust 1550. (2 Vol. des Ord. d'Henry II, Cotté Q. fol. 87)."

No. 20.—P. 670, *A. D.* 1551.

" Déclaration portant reglement pour la recherche des mines d'or, argent, cuivre, fer, plomb, aluns et autres espèces de mines et matières minérales. A Fontainebleau, le 9 Décembre 1551. Reg. en la Cour des Monnoyes le 2 Mars de l'année suivante. (Rég. de la Cour des Mon. Cotté K. fol. 162)."

No. 21.—P. 687, *A. D.* 1552.

" Déclaration portant reglement pour l'exécution de celle du dernier Septembre 1548, et pour l'exploitation et la police des mines, &c. A Rheims le 10 Octobre 1552. Reg. en la Cour des Mon. le 11 May 1555. (Rég. de la Cour des Mon. Cotté R. fol. 259)."

No. 22.—P. 720, *A. D.* 1554.

" Déclaration portant reglement pour les mines d'argent et autres métaux. Au Camp d'Estrée, le 17 Aoust 1554. Rég. le 7 Septembre 1556. (5 Vol. des Ord. d'Henry II, Cotté T, fol. 337. Mém. de la Ch. des Comptes, Cotté 2 X. fol. 227)."

No. 23.—P. 723, *A. D.* 1554.

" Déclaration portant continuation en faveur du Comte Reingrave, et de Jeanne de Genoillac sa femme, de la permission de faire ouvrir des mines accordée à Jacques de Genoillac, son père, par les Lettres Patentes du 29 Décembre 1519. A Paris le 18 Novembre 1554. Reg. en la Cour des Mon le 19 Janvier suivant. (Rég. de la Cour des Mon. Cotté K. fol. 213)."

No. 24.—P. 730, *A. D.* 1554.

" Lettres Patentes portant relief d'adresse à la Cour des Monnoyes pour l'enregistrement des déclarations des dernier Septembre 1548 et 10 Octobre 1552, qui concernent les mines. A Fontainebleau le 23 Mars 1554 Reg. en la Cour des Mon. le 18 May 1555. (Rég. de la Cour des Mon. Cotté K. fol. 267)."

No. 25.—P. 792, *A. D.* 1559.

" Déclaration portant reglement pour l'exploitation des mines de Pontgibaut. A Paris le 7 Juin 1559. Rég. le 27 Aoust 1560. (Vol. des Ord. de François II, Cotté Y. fol. 287. Mém. de la Ch. des Comptes, Cotté, 3 B fol. 231)."

No. 26.—P. 807, *A. D.* 1559.

" Lettres Patentes portant reglement pour les priviléges des maîtres et

Ownership of Mines. *Blanchard's* compilation.

ouvriers des mines dans la Province d'Angoumois. A Blois au mois de Janvier 1559. Rég. le 14 Juin 1560. (Vol. des Ord. de François II, Cotté Y. fol. 237)."

No. 27.—P. 808, *A. D.* 1559.

" Lettres Patentes portant confirmation de la Déclaration du 7 Juin 1559, concernant l'exploitation des mines de Pontgibaut. A Blois, le 2 Février 1559. Rég. le 27 Aoust 1560. (Vol. des Ord. de François II, Cotté Y. fol. 393)."

No. 28.—P. 817, *A. D.* 1560.

" Lettres Patentes portant permission à Claude Gruippon de Guillion Escuyer, Sieur de Saint Julian, d'ouvrir les mines et minières, qu'il pourra trouver dans l'estenduë du Royaume de France : et reglement pour les priviléges des ouvriers qu'il employera pour les découvrir. A Fontainebleau le 29 Juillet 1560. Rég. le 9 May 1562. (1 Vol. des Ord. de Charles IX, Cotté Z. fol. 272. Mém. de la Ch. des Comptes, Cotté 3 C. fol. 137. Fontanon, t. 2, p. 1161. Rec. des Ord. de Charles IX par Rob. Est. fol. 180)."

No. 29.—P. 834, *A. D.* 1561.

" Déclaration portant confirmation des priviléges de ceux qui travaillent aux mines et aux minières. A Saint Germain des-Prez lez-Paris le 11 Juillet 1561. Rég. le 9 May 1562. (1 Vol. des Ord. de Charles IX, Cotté Z, fol. 272. Fontanon, t. 2, p. 1163. Rec. des Ord. de Charles IX par Rob. Est. fol. 185.)

No. 30.—P. 847, *A. D.* 1562.

" Lettres Patentes portant permission à Estienne Lescot d'ouvrir les mines et minières dans toute l'estenduë du Royaume. A Paris le 10 May 1562. Rég. le 10 Mars 1565. (3 Vol. des Ord. de Charles IX, Cotté 2 B, f. 89 Rec. des Ord. de Charles IX, par Rob. Est. fol. 489)."

No. 31.—P. 856, *A. D.* 1563.

" Déclaration portant reglement pour le dixième qui appartient au Roy dans les mines et minières. A Troy, le 26 May 1563. Reg. le 1er Juillet de la mesme année, (2 Vol. des Ord. de Charles IX, Cotté 2 A, fol. 44. Fontanon, t. 2, p. 445. Rec. des Ord. de Charles IX par Rob. Est. fol. 263. Chopin. de Dom. Lib. 1, tit. 2, n. 6)."

No. 32.—P. 873, *A. D.* 1563.

" Lettres Patentes portant que le dixième des mines de la Province de Champagne se prendra en la forge et non sur le fer façonné. A Troyes le 28 Mars 1563 avant Pâques. Reg. le 16 May 1564. (2 Vol. des Ord. de Charles IX, Cotté 2 A, fol. 273. Rec. des Ord. de Charles IX par Rob. Est. fol. 402.

No. 33.—P. 880, *A. D.* 1564.

" Lettres Patentes portant relief de surannation pour l'enregistrement de celles du 10 May 1562, parlesquelles il est permis à Estienne l'Escot d'ouvrir les mines. A Roussillon, le 12 Aoust 1564. Reg. le 2 Mars 1565. (3 Vol. des Ord. de Charles IX, Cotté 2 B, fol. 89. Rec. des Ord. de Charles IX par Rob. Estien. fol. 492)."

No. 34.—P. 1069, *A. D.* 1577.

" Déclaration portant reglement pour les mines et minières du Royaume. A Blois, le 10 Mars 1577. Rég. le 20 Juillet de la mesme année. (2 Vol. des Ord. d'Henry III, Cotté 2 F. fol. 395)."

No. 35.—P. 1106, *A. D.* 1580.

" Déclaration portant règlement pour les mines et minières du Royaume. A Paris, le dernier Janvier 1580. Rég. le 11 Mars de la mesme année. (4 Vol. des Ord. d'Henry III, Cotté,2 L. fol. 18)."

No. 36.—P. 1300, *A. D.* 1597.

" Edit portant règlement pour les mines et minières du Royaume: et pour la jurisdiction du Grand-Maistre Super-Intendant et général Réformateur d'icelles, &c. A Rouen, au mois de Janvier 1597. (Reg. de la Cour des Mon. Cotté 2 B. fol. 205)."

No. 37.—P. 1341, *A. D.* 1601.

" Edit portant confirmation de ceux qui ont esté faits sur le fait des mines et des minières: eréation d'un office de Grand-Maistre Superintendant et Réformateur général des mines et minières, d'un de Controlleur général, d'un de Receveur général, d'un de Greffier, et d'un de Lieutenant général, et reglement pour leur pouvoir, fonctions, etc. A Fontainebleau, au mois de Juin 1601. Rég. au Parl. le 3 Avril 1602, et en la Ch. des Comptes le dernier Juillet 1603. (4 Vol. des Ord. d'Henry IV, Cotté 2 V. fol. 373. Mém. de la Ch. des Comptes, Cotté 4 V. fol. 177)."

No. 38.—P. 1345, *A. D.* 1601.

" Edit portant règlement pour les mines et minières qui sont dans le Royaume. A Paris au mois d'Aoust 1601. Rég. au Parl. le 8 Mars, et en la Ch. des Comptes le 1602. (4. Vol. des Ord. d'Henry IV, Cotté 2 V. fol. 390. Mém. de la Ch. des Comptes, Cotté 4 T, fol. 240)."

No. 39.—P. 1347, *A. D.* 1601.

" Déclaration portant règlement pour les mines et minières du Royaume. A S. Germain en Laye le 19 Novembre 1601. Rég. le 14 May 1602. (4 Vol. des Ord. d'Henry IV, Cotté 2 V. fol. 400)."

No. 40.—P. 2300, *A. D.* 1677.

" Déclaration portant reglement pour la recherche des mines d'or d'argent et d'autres métaux dans les Provinces d'Auvergne, de Bourbonnais, de Forests, et de Vivarais. A Versailles, le 30 Juillet 1677. Rég. le 22 Janvier 1678. (19 Vol. des Ord. de Louis XIV, Cotté 4 D. fol 270)."

No. 41.—P. 2658, *A. D.* 1703.

" Déclaration portant reglement pour la recherche des mines de Cuivre et de Plomb dans les Provinces de la Marche et d'Auvergne. A Versailles, le 2 Janvier 1703. Reg. le 15 May de la mesme année. 43 Vol. des Ord. de Louis XIV, Cotté 5 E. fol. 167)."

No. 42.—P. 2686, *A. D.* 1704.

" Déclaration portant reglement pour la recherche des Mines d'Estain. A Versailles le 8 Mars 1704. Reg. le 5 May de la mesme année. (44. Vol. des Ord. de Louis XIV, Cotté 5 F. fol. 288)."

OWNERSHIP OF MINES. *Blanchard's compilation.*

No. 43.—P. 2742, *A. D.* 1705.

" Edit portant reglement pour l'ouverture des mines d'or et d'argent nouvellement découvertes dans les Terres du Vigean et de l'Isle Jourdain en Poitou. A Versailles au mois de Juillet 1705. Reg. au Parl le 8, et en la Cour des Aydes le 14 Aoust suivant)."

Sec. 78.—Before proceeding to reproduce at length the three great Ordinances, it is perhaps as well to make a few remarks on the various other Laws and Letters-Patent enumerated by BLANCHARD, for the purpose of shewing that the latter were not of general application to the whole Kingdom, and did not appear in most cases to have been received and enregistered by the Parliaments, and also for the purpose of establishing that the French Law recognizes no distinction between the precious and the baser metals.

No. 1, is the earliest one we have of the French Ordinances on mining. The *Capitulaire de* ST. LOUIS, as will be hereafter shewn, concerns *treasure-trove merely.* No. 1, or the Ordinance of CHARLES VI, *of May*, 1413, was drawn forth by discoveries of *silver*, lead and copper near *Mascon & Lyons*, but was made applicable to ALL *the Mines* in the Kingdom, without distinction. That is evident from the words : " Nous " a été rapporté qu'en plusieurs lieux de notre Royaume, et " spécialement de nos bailliage de Mascon et Sénéchaussée de " Lyon, et ès ressorts, *y a plusieurs Mines* D'ARGENT, de plomb " et de cuivre, et autres métaux qui déjà sont trouvés, etc, etc." The general nature of the Ordinance still further appears from these words : " èsquelles Mines *et autres quelconques* étant en " notre dit Royaume, Nous avons et devons avoir, et à nous et " non à autre appartient de plein droit, tant à cause de notre " Souveraineté et Majesté Royale comme autrement, *la dixième* " partie purifiée *de* TOUS *métaux* qui en icelles Mines est ouvré " et mis au clair," In the face of that express mention of silver Mines, and of the Royal claim to one-tenth of all metals extracted from *all* the Mines in the Kingdom, how can it be pretended for a moment that, by the Common Law of France gold and silver Mines belong to the Crown. The intention of the Sovereign to apply that Ordinance to the Whole Kingdom is made still more manifest by the declaration of the Sovereign that the Seigniors shall not have " la dixième partie, ni autre " droit de Mine èsdites Mines, *ni en autres quelconques assises* " *dans le royaume.*" Again the Sovereign commands all Seigniors, *throughout* his Kingdom, to give all necessary facilities to the Miners, such as roads, timber, &c. And after

commanding his *Bailly de Mascon*, and *Sénéchal de Lyons* to see to the execution of that Law, he lays a like injunction on : " *tous nos autres justiciers et officiers de nostre Royaume.*" It is therefore, in consequence of that Law having been made applicable to the entire Kingdom, and having been enregistered by the Parliament of Paris, that the Plaintiffs have deemed it right to reproduce the Law in its entirety. The text reproduced is taken from P. 141 of Volume X of the " *Ordonnances des Rois de France*," being the continuation by *de Villevault* et *de Bréquigny* of *de Laurière et Secousse's* Collection. It is also found with confirmatory Declarations by CHARLES VII, CHARLES VIII, LOUIS XII et FRANÇOIS I, at P. 5 of a very rare little work entitled : " Edits, Ordon- " nances, Arrêts et Règlements sur le fait des Mines et " Minières de France, avec les déclarations du Droit de " Dixième dû au Roy sur l'Or, Argent, Cuivre, Acier, Fer, " Plomb, Azur, etc., etc., etc.," otherwise called " *Mines et Minières* " :—*Anonymous*, Paris 1761 from the Edition of 1631. It is also to be found at P. 386 of Volume VII of ISAMBERT'S *Recueil des anciennes lois Françaises*, Paris, 1833.

OWNERSHIP OF MINES. Nature of Laws referred to by *Blanchard.*

No. 2, which indirectly confirms No. 1, is to be found at length at Page 386, of volume X, of the " *Ordonnances des Rois de France* " ; the King, who shortly before had established a mint at Lyons complains that the Miners were not bringing their gold and silver to be coined there and states : " Pour- " quoi Nous vous mandons et expressément enjoignons que " par les Gardes de nostre dicte Monnoye de Lyon, ou autres " telz que bon vous semblera, vous faites faire commandement " de par Nous *auxditz Marchans* A QUI SONT LES DICTES " MYNES près de nostre dicte ville de Lyon, et à tous autres à " qui il appartiendra que sur les peines contenues èsdictes " Ordonnances toute la matière d'or et d'argent et billon " qu'ilz auront ou pourront avoir ou temps advenir, tant à " cause des dictes Mynes, comme autrement, ilz portent ou " facent porter en nostre dicte Monnoye de *Lyon*, etc." If the gold and silver Mines had then been the property of the Crown, what need would there have been for the Sovereign to order the Miners to bring those metals to the Mint at Lyons? It is further evident that, in those days, any man was free to work a gold or a silver Mine with as little restriction as any other Mine, by paying the royalty of one-tenth.

No. 3, to be found at P. 236 of Volume XII of the " *Ordonnances des Rois de France* " and at P. 15 of MINES ET MINIÈRES, is a confirmation purely and simply of No. 1.

OWNERSHIP OF MINES. Nature of Laws referred to by *Blanchard*.

No. 4, is the second general Law we have on the subject. It treats of *gold* and *silver* Mines, as well as of the baser metals, and places them all on the same footing precisely. It establishes conclusively the pretensions of the Plaintiffs in this cause It is to be found at P. 446 of Volume XVII of the "*Ordonnances des Rois de France*," being the continuation by the *Marquis de Pastoret*, under the first empire, of the Collections of *de Laurière, Secousse, de Villevault and de Bréquigny ;* it is also to be found at P. 623 of volume X of *Isambert's* Collection. That Ordinance is a complete Mining Code, and was enregistered by the Parliament of Paris, with certain modifications, which Plaintiffs reprodnce with the Ordinance hereafter.

No. 5, was issued in *April* 1482, and not in *May*, as *Blanchard* has incorrectly stated. It is by LOUIS XI, and *not* by LOUIS XII, as the *Code* HENRY, among its other manifold errors asserts. It was moreover not enregistered in the Parliament of Paris ; by *Blanchard* it has been improperly styled an *Edit ;* it is, in fact, only Letters Patent, making a special grant to private individuals of certain Mines in *Couserans* or *Conserans ;* its sole reference to the present cause consists in the fact that it treats on equal footing of the precious metals, and of the baser metals ; and it concludes with these remarkable words ; "sauf qu'ils seront tenus de "payer nostre droit de dixie[illegible]e et le droit du Seigneur foncier "tout *ainsi qu'il est accou[illegible] de faire ès autres mynes du* "*Royaume*." It is to be [illegible] at Page 105 of Volume XIX of the "*Ordonnances des [illegible]s de France*." and at P. 911, volume X of *Isambert's* collection.

No. 6, is a confirmation of No. 5, and is to be found at P. 175 of the "*Ordonnances des Rois de France*," and P. 10, Volume XI of *Isambert's* collection.

No. 7, is a mere Confirmation of Nos. 1 & 3, and is referred to in *Note c*, P. 277, volume XIX of "*Ordonnances* "*des Rois de France ;*" it is found at length at P. 17 of MINES ET MINIÈRES.

No. 8, is a mere confirmation of the privileges conferred on Miners by Nos. 1, 3 & 7, and contains no reference to the subject under discussion ; it is to be found at P. 30 of MINES ET MINIÈRES.

No. 9, has not been found noticed any where else than in *Blanchard*'s compilation ; and the text is not there given ; moreover the Plaintiffs have not been able to procure the work referred to by *Blanchard ;* but from the title it would

seem to be a mere confirmation of the special grant contained in No. 5. The fact of its having escaped the observation of the host of keen observers, who searched the rolls of the French Parliaments and Courts for Royal Ordinances, at the close of the last and beginning of the present century, would seem to establish that it never was enregistered, and that it never received an application.

OWNERSHIP OF MINES. Nature of Laws referred to by *Blanchard.*

No. 10, to be found at P. 666 of Volume XI of *Isambert's* Collection, is a Declaration and not an *Edit* as *Blanchard* has termed it, confirming, in favor of two brothers, Pierre and Jean de Besze, a grant previously made to their father of the Chitoy-Mines in Nivernois, and the Pontaubert-Mine in Bourgogne and permitting the brothers to seek and open silver, lead and other Bourgogne-Mines elsewhere, *on condition of settling with the proprietors,* ACCORDING TO THE ORDINANCES *of the Kingdom.*

No one, surely, will pretend that a mere Declaration such as that, one moreover enjoining on the Grantees to settle with the proprietors according to the Ordinances, can have altered the Law of Mining from what it was before.

No. 11, is found at P. 105 of Volume XII of *Isambert's* Collection, and goes no further than enunciated in its title; it orders that the silver raised from the Mines of the Kingdom shall be brought to the nearest Mint to be coined. Those Letters of the King were speedily followed by others of the 27 December of the same year to the like effect, and found at P. 100 of *Isambert's* Collection

No. 12, is noticed, but not given at length, at P. 171 of Volume XII of *Isambert's* Collection; Isambert in a foot note says: " Ces Lettres ne contiennent aucune disposition " d'intérêt public. Elles se bornent à permettre au Seigneur " de Genvilhac de faire chercher et ouvrir des Mines sur ses " propriétés."

No. 13, is to be found at P. 179 of Volume XII of *Isambert's* Collection. It is an *Edit* of general application throughout the Kingdom. It recites the efforts of previous Monarchs to develope the Mining wealth of the Kingdom, the benefits likely to accrue therefrom, and the clandestine removal from the Kingdom of the gold and silver raised from the Mines. It then goes on to state that the prosperity of the country has been greatly retarded by the pretensions of certain persons to the exclusive right of Mining in certain parts of the Realm. And then it decrees the publication of the Edit itself, and that within 3 months thereafter all

Ownership of Mines. Nature of Laws referred to by *Blanchard.*

persons claiming Mining privileges shall be held to exhibit their titles to the King in Council to be examined, and that no one shall thereafter open, or work at any Mine whatever without the King's permission. It further prohibits the exportation of metals without permission, and orders the gold and silver to be brought to the mint to be coined, under pain of confiscation of those metals. The Ordonnance then provides for the collection of the Royalty on all such Mines.

It is clear that, beyond the fact of its having made the Royal permission a condition precedent to the working of a Mine, that Edict made no innovation on the Law. The most remarkable feature about it is that exclusive and large Mining grants, of the description complained of in the Edict, were then, as they are still, 3 centuries later, deemed, a hindrance to the progress of the country.

No. 14, is a reiteration of the prohibitions set forth in No. 13 ; viz: to open a Mine, and to export metals, without a Royal permission : It is merely noticed at P. 196 of Volume XII of *Isambert's* Collection.

No. 15 is to be found at P. 810 of Volume XII of *Isambert's* Collection. It merely commutes the Royalty on Iron from one in kind to a money-payment.

No. 16, merely confirms No. 10, a private grant. to the brothers de Besze, and has not been found noticed elsewhere than in *Blanchard's* compilation.

No. 17, has not been found elsewhere than in *Blanchard's* compilation. and in the work referred to by him. It appears by its title to be a mere suppression of the tax on iron ; and it did not make any alteration in the law of Mining as affecting this case.

No. 18, was an exclusive grant to de Roberval of all the Mines in the Kingdom. His grant met with so much opposition from the several Parliaments that the Monarch, who made the grant, died without seeing it carried into effect ; the struggle between the Monarch and his Parliaments on this head is interesting enough to induce one to notice it apart from the other Mining Laws. The grant is reproduced at length at P. 57 of Volume XIII of *Isambert's* Collection and at P. 42 of Mines et Minières. It will however be more fully noticed hereafter.

No. 19 is a mere confirmation of Nos. 10 & 16, a private grant to the brothers, de Besze.

No. 20, is a mere confirmation of de Roberval's privileges, as set forth in No. 18 ; see P. 236, volume XIII of *Isambert's* Collection where it is noticed.

No. 21, is also a confirmation of de Roberval's privileges, and nothing more. See P. 285 of Volume XIII of *Isambert's* Collection.

No. 22, is a mere confirmation of de Roberval's grant; see P. 400 of Vol: XIII of *Isambert's* Collection, and foot note (2) *Ibidem.*

No. 23, is a confirmation of the private grant, to de Genvilhac, contained in No. 12; it is not noticed elsewhere than in *Blanchard's* compilation.

No. 24, is Letters-Patent in reference to the ever disputed de Roberval-Grant; it is not noticed elsewhere than in *Blanchard's* compilation.

No. 25, seems a local affair, and is noticed by *Blanchard* only.

No. 26, is a grant of privileges to Miners, and is not of general interest; it is noticed by *Blanchard* only.

No. 27, is a confirmation of No. 25, is not of general interest and is noticed by *Blanchard* only.

No. 28, is the de Roberval-Grant again, in another shape; the Sieur St. Julien alleges himself to have been a partner of de Roberval, and obtains a grant to himself of the Mines of the Kingdom for a limited time, see P. 41 of Volume XIV of *Isambert's* collection.

No. 29, is a confirmation of St. Julien's grant and nothing more. See P. 108, Volume XIV of *Isambert's* Collection.

No. 30, is a grant to *L'Escot*, and just such another grant as those to de Roberval and St. Julien, and, in No. 33, we see it revoked, as we have seen the others revoked. It is not noticed elsewhere than in *Blanchard.*

No, 31, is a re-iteration of the King's title to his royalty of one-tenth; it is noticed only at P. 140 of Volume XIV of *Isambert's* Collection. It is to be found at length at P. 337 of Vol: 2 of Fontanon, (second edition). It refers to all metals without distinction and in that respect destroys the absurd proposition that gold and silver are Royal Metals.

No. 32, is a transposition of the King's royalty from the wrought iron to the rough ore; it is noticed by *Blanchard* alone.

No. 33, is a revocation of *L'Escot's* grant, and is noticed by *Blanchard* only:

No. 34, is another of those monopolies so frequently granted in this and the two preceding reigns, to be shortly after revoked. See P. 319 of Volume XIV of *Isambert's* Collection.

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Nos. 35 and 36 are two others of those private grants; it is noticed only by *Blanchard.*

No. 37. is the third and last of the great Ordinances concerning Mining, and was issued by Henry IV in June 1601; it will be reproduced at length with the necessary comments to shew its application to this case; suffice it to say, for the present, that it places gold and silver, on precisely the same footing as other metals, and recognizes in the clearest possible langnage the right of the owner of the soil to work the Mines in his own lands to the exclusion of all others. It is found at P. 253 of Volume 15 of *Isambert's* Collection, and at P. 148 of Mines & Minières, with an *Arrêt du grand Conseil* on the 14th May 1604, in execution of that *Edit.*

Nos. 38 and 39 are two others issued a few months later than the preceding one and are confirmatory of its provisions; they are noticed by *Blanchard* only.

Nos. 40, 41, 42 and 43 are mere private grants in the reign of Louis XIV, and need not be noticed here; because even supposing that the enunciations contained in a private grant were to be taken as being Law, a proposition which the Plaintiffs clearly disprove hereafter, nevertheless with reference to those particular grants, they were not enregistered in this Colony, and have no force here, as will be shewn hereafter.

Others not referred to by *Blanchard*, do not affect question.

Sec. 79.—Over and above the Ordinances cited by Blanchard, there are others, which it is as well to mention, lest the Plaintiffs be accused of having withheld information on this point; those other Laws and Letters Patent are

—21 May, 1455—Letters-Patent granting privileges and exemptions to the iron-masters of France, noticed at P. 573 of Volume IX of *Isambert's* Collection.

—February, 1626—Edict in relation to the iron-mines of the Kingdom—noticed P. 183 of Volume XVI of *Isambert's* Collection.

—May, 1635—Creation of 2 offices of Controller-General of Mines, P. 441 of Volume XVI of *Isambert's* collection.

Those Laws and Letters-Patent do not affect the question at issue between the parties in this cause.

Enregistration of Letters-Patent necessary to give them effect.

Sec 80.—It has already been shewn at P. 54 and *seq:* Sec. 72 of this Factum, that Letters-Patent have no effect until after their enregistration in Parliament, the parties interested having first been heard or duly called. That

proposition of the Plaintiffs is borne out by the following authorities:

GUYOT, *vbo. Lettres-Patentes*, P. 482.
GUYOT, *vbo. Chancelier*, P. 100.
GUYOT, *vbo. Chancellerie*, P. 110.
NOUVEAU-DÉNIZART, *vbo. Lettres-Patentes*, P. 137.
BOSQUET, *Dict. raisonné des Dom : vbo. Lettres-Patentes.*
2 DUPLESSIS, P. 142.
NOUVEAU DÉNIZART, *vbo, Chancellerie.*

Sec 81.—The same necessity existed for the enregistration of all *Edits, Ordonnances and Declarations* ; and, until such enregistration, the Law had no force. To establish that proposition, it is hardly necessary to refer to the following authorities. The same of *Edits, Ordonnances* and *Déclarations.*

NOUVEAU-DÉNIZART, *vbo. Enrégistrement* P. 669.
ANCIEN DÉNIZART, *vbo. Loix*, P. 78.
NOUVEAU DÉNIZART, *vbo. Edit*, P. 422.
ANCIEN DÉNIZART, *vbo. Déclaration*, P. 350.
GUYOT, *vbo. Enrégistrement*, P. 756.
PRÉCIS DES ORDONNANCES, *by* DE MONTVALON, P. 300.

Sect. 82.—In that Ordinance, which introduced, as it were *Law* and *Courts of Law* into this Country, the Ordinance of April 1667, *title* 1, *Art :* 4 and 5, to be found at Page 108 of Vol : 1, *Edits et Ordonnances* of Canada, it is expressly required that all *Ordonnances, Edits, Déclarations* and *Lettres-Patentes* shall be enregistered ; and our Courts of Law have, at all times refused to recognize as binding on us such Laws, subsequent to that period, as had not been enregistered in Canada ; hence it is that the *Ordonnance de Marine* never has been acted upon by our Courts, because no trace of it has been found in the Registers here. Special provision to that effect in Ordinance of 1667, as regards Canada.

Sec. 83.—With those observations, the Plaintiffs reproduce the text of the *first* of the 3 great Ordinances on Mining, that of Charles VI, of the 30th May, 1413. TEXT *of Ordinance of* CHARLES VI.

Lettres de CHARLES VI, par lesquelles il *déclare qu'au Roi* SEUL *appartient* LA DIXIÈME PARTIE *métallique* tirée *des Mines*, après qu'elle a été purifiée ; et accorde des priviléges à ceux qui travaillent aux Mines, et à ceux qui y font travailler.

TEXT *of Ordinance of* CHARLES VI.

CHARLES, *par la grâce de Dieu*, ROY DE FRANCE. Savoir faisons à tous présens et advenir, que pour ce que par plusieurs de noz Officiers et autres personnes notables, dignes de foy, Nous a esté rapporté que *en plusieurs lieux* de nostre Royaume (t espécialement en noz Bailliages de Mascon et Seneschaucée de Lyon, et è[s] ressors d'iceulx, *y a plusieurs Mynes d'*ARGENT. *de plomb et de cuyrre et d'autres métaulx*, qui desja sont trouvez, et esquelz l'on a jà longuement ouvré et ouvre l'on chacun jour, et est le terrouër en iceulx Bailliage et Seneschaucée plus plain de Mynes, que en aucun autre lieu de nostre dict Royaume, qui soit encores venu à la cognoissance de ceulx qui en telles choses se cognoissent, si comme l'on dit; *esquelles Mynes* et AUTRES QUELZCONQUES *estans en nostre dict Royaume*, NOUS *ayons et devons avoir, et* A NOUS ET NON A AUTRE, *appartient de plain droit*, tant à cause de nostre Souveraineté et Majesté Royal, comme autrement, LA DIXIESME PARTIE *purifiée de tous mestaulx qui en icelles Mynes est ouvré et mis au cler*, sans ce que Nous soyons tenus de y frayer ou despendre aucune chose, se n'estoit pour maintenir et garder ceulx qui font faire ouvrer, et sont residens, faisans feu et lieu sur la dicte euvre, par eulx ou leurs depputy qui scavent la manière et science d'ouvrer esdictes Mynes, et à iceulx donner previleiges, franchises et libertez telles qu'ilz puissent vivre franchement et seurement en nostre dit Royaume, mesmement que une grant partie d'iceulx sont de nacions et pays estrangers, et en voit-on plusieurs mourir et mutiler en faisant le dit ouvraige, tant pour la pauuteur qui est esdictes Mynes, commes par les autres perils qui sont d'aller soulz la terre mynant; pourquoy ils ont besoing d'estre preservez et gardez de toutes violances, oppressions, griefz et molestes par Nous, comme le temps passé a esté fait par noz predecesseurs Roys de France en cas semblable; *et il soit ainsi que* PLUSIEURS *Seigneurs* tant d'Eglise comme séculiers, qui ont juridicions haultes, moiennes et basses ès territoires esquelles les dictes Mynes sont assises *veulent et s'efforcent d'avoir en icelles Mynes*, LA DIXIESME PARTIE *purifiée, autre droit comme* NOUS A QUI SEUL ET NON A AUTRES, ELLE APPARTIENT DE PLAIN DROIT, comme dit est, laquelle chose est contre raison, les droitz et préhéminences Royaulx de la Couronne de France et de la chose publique: car s'il y avait plusieurs Seigneurs prenans la dixiesme partie ou autre droit, nul ne feroit plus ouvrer en icelles Mynes doresnavant, *pour ce* QUE CEULX A QUI SONT LES DICTES MYNES, n'auraient que très-peu ou néant de prouffilt de demourant; et s'efforcent les diz Haulx Justiciers de donner grand empeschement et trouble en maintes manières aux Maistres qui font faire la dicte euvre, et ouvriers ouvrans en icelle, et ne leur permettent ne seuffrent avoir par leurs dictes Terres et Seigneuries, passaiges, chemins, allées ne venues, caver ne chercher Mynes ne Rivières, Bois ne autres choses à eux convenables ne necessaires, parmy payant justes et raisonnables pris; et avecques ce, vexent et travaillent les diz faisans faire l'euvre et ouvriers, soulz umbre de leur juridicion, et en maintes autres et diverses manières, affin de faire rompre et cesser la dicte euvre et pour les faire du tout superceder au dit ouvraige; et pour ce se pourrait la terre legièrement reclorre des dictes Mynes qui sont desja ouvrées, et l'allée des diz ouvriers estre empeschée et tout le fait perdu; qui seroit à nostres très grant dommaige; lesquelles choses sont entreprinses contre Nous, nostre Majesté Royal, et les droictz préhéminences de nostre Couronne, au grant prejudice, dommaige et diminucion de nostre Dommaine, et seroit encore plus se hactivement et dilligeamment n'y estoit pourvu de remede convenable.

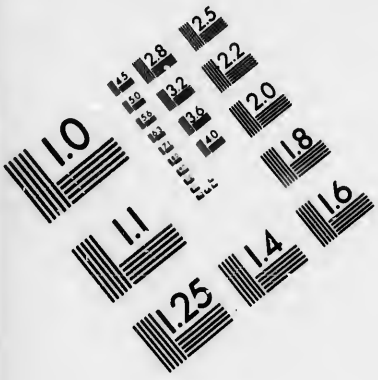
POURQUOY Nous, ces choses considerées, voulans sur ce pourvoir de remede ainsi qu'il appartient de faire en tel cas, par grant et meure

deliberacion de nostre Grant-Conseil, et autres Officiers aians congnoissance des choses dessusdictes et de leurs circonstances et deppendences, *avons* par maniere de Edit, Statut, Loy ou Ordonnance Royal irrevocable, *dit, decerné et declairé, disons, determinons* et declairons par la teneur de ces présentes, *que nul Seigneur* espirituel ou temporel, de quelque estat, dignité ou préheminence, condicion ou auctorité, quel qu soit, en nostredit Royaume *n'a, n'aura ne doit avoir* à quelconque tiltre ise ou occasion quelle que elle soit, *pouvoir ne auctorité de prandre, reclamer ne demander èsdictes Mynes,* NE EN AUTRES QUELZCONQUES ASSISES EN NOSTRE ROYAUME, *la dixiesme partie ne autre droit de Myne ;* mais en sont et seront par nostredicte Ordonnance et droict du tout foreloz : *car à Nous seul et pour le tout,* à cause de noz droicts et Magesté Royaulx, *appartient la dixiesme, et non à autre ;* ET POUR CE, ET AFFIN QUE D'ORESENAVANT LES MARCHANS ET MAISTRES DE TRAFFONS DES MYNES, *qui font ouvrer et les ouvriers* qui ouvrent esdictes Mynes, faisans feu, lieu et residence, ou leurs depputez, *puissent ouvrer continuellement, sans estre empeschez ne troublez en leur ouvraige, et ouvrer franchement et seurement* EN NOSTREDIT ROYAUME, *tant comme ilz vouldront ouvrer en icelles Mynes.* Voulons et ordonnons semblablement que les haulx Justiciers, moyens et bas, souz quelle juridicion et Seigneurie les dictes Mynes sont situées et assises, baillent et delivrent ausdits Ouvriers, Marchands et Maistres desdictes Mynes, moyennans et par payant juste et raisonnable pris, chemins et voyes, entrées et yssues par leurs Terres et pays, Bois, Rivières et autres choses necessaires et prouffitables ausdiz faisans, à faire l'euvre et Ouvriers, ès lieux plus prouffitables pour leur ouvraige faire, et pour l'avancement de la dicte besoigne, et moins dommaige pour lesdiz Seignieurs qui les dictes choses leur vendront, et autres à qui les dictes choses seront, le mieulx que faire se pourra.

(2) Item. *Voulons et ordonnons que tous Myneurs* ET AUTRES, *puissent querir, ouvrir et chercher Mynes par tous les lieux où ilz penseront trouver,* ICELLES TRAIRE ET FAIRE OUVRER, OU VENDRE *à ceulx qui les feront ouvrer et fondre,* parmy payant à Nous nostre dixiesme franchement, et en faisant satisfaction ou contenter à celuy ou à ceulx qui les dictes choses seront ou appartiendront, au dit de deux preudes hommes.

(3) Item. Semblablement avons voulu et ordonné, voulons et ordonnons pour la cause dessusdicte, que d'oresenavant les diz Marchans Maistres faisans faire l'euvre, et les Ouvriers qui esdictes Mynes ouvrent et se occupent, et font residence sur le lieu du Martinet et Mynes, ou leurs depputez par eulx, auront en nosdiz Baillinge et Seneschaulcée, tant en deffendant comme en demandant, un Juge bon et convenable, ou Commissaire, et tel comme Nous leur ordonnerons, lequel congnoistra et determinera de tous cas meuz et à mouvoir, que lesdiz marchans et ouvriers pourra toucher ; et auquel seront baillées nos Ordonnances et Instr ctions par nosdiz Generaulx-Maistres des Monnoyes, sur le fait desdictes Mynes ; excepté de meurdre, rapt et larrecin ; et duquel Juge ou Commissaire l'en appellera qui se sentira grevé, quant le cas y escherra, devant noz Generaulx-Maistres de noz Monnoyes, en leur Sieige et Auditoire de nostre Ville de Paris ; et la partie qui aura mal appellé, payera pour son fol appel, XXX livres parisis, à appliquer à Nous, nonobstant que les appellans et appellacions viennent de pays ouquel l'en use de Droit Escript ; et qui appellera desdiz Maistres des Monnoyes, l'appellacion ira en nostre Court de Parlement, en laquelle qui aura mal appellé, payera soixante livres parisis d'amende pour son fol appel.

(4) Item. Avons voulu et ordonné, voulons et ordonnons par ces présentes que les Marchans et Maistres qui font ouvrer les dictes Mynes à



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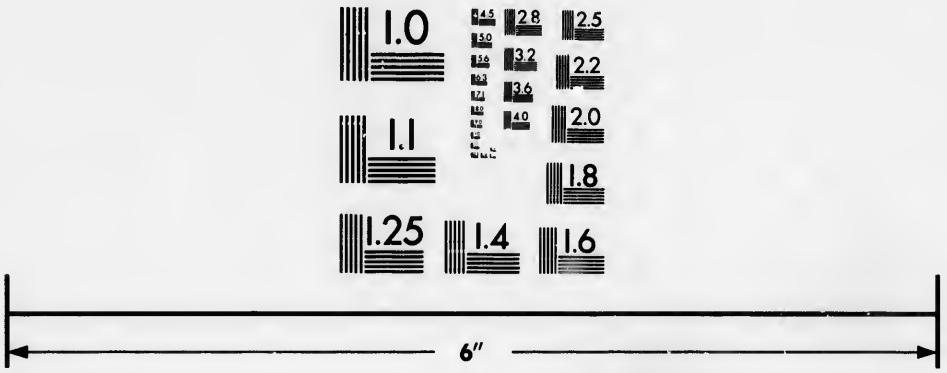

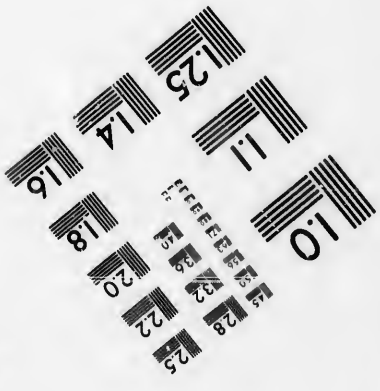

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OWNERSHIP OF MINES. *Authorities.* CHARLES VI.

leurs propres coustz, frais, missions et despens, et font feu, lieu et residence sur lesditz Martinetz et Mynes, ou leurs depputez, les deux Fondeurs et Mineurs en ung chacun Martinet tant seulement, et aussi les diz Ouvriers ouvrans esdictes Mynes, avec noz Gardes et non autres, soient quietes, francs et exempts de toutes aides, Tailles, Gabelles, Quart de Vin, Peaiges et autres quelzconques subscides ou subvencions quelz qu'ils soient, et ayans cours en nostrediet Royaume ; c'est assavoir, du creu de leurs Terres et possessions, et non d'autres choses ; consideré qu'ilz ouvrent et vacquent continuellement ou bien de Nous et de la chose publicque, et pour ce se mettent en peril d'estre desheritez et mors continuellement ; et avec ce, d'abondant, que les diz Marchans, Ouvriers et autres personnes dessusnommez, qui vacqueront aux ouvraiges desdictes Mynes, soient preservez et gardez de toutes offenses, griefs et molestacions indeues, iceulx Marchans, Maistres, Ouvriers, Gouverneurs et Gardes, ouvrans et besoignians pour la dicte euvre avons prins et mis, prenons et mettons par la teneur de ces presentes, en nostre protections especial, sauvegarde et sauf conduict, à la conservacion de leurs droietz tant seulement ; ensemble leurs femmes, familles, serviteurs, biens, meubles et heritaiges quelzconques estans esdiz Bailliages de Maseon et Seneschaulcée de Lyon, et autre part en et partout nostrediet Royaume.

Si donnons en mandement au Bailly de Maseon, Senesehal de Lyon, et à tous noz autres Justiciers et Offieiers de nostrediet Royaume, ou à leurs Lieuxtenans, et à chaseun d'eulx, si eomme à luy appartiendra, que nostre present Ediet, Statut, Loy et Ordonnance Royaux, et nostre presente sauvegarde et sauf eonduict, ils facent crier et publier en et par tous les lieux desdiz Bailliage et Seneschaucie, et ailleurs où il appartiendra et requis en seront, en nostredict Royaume ; en deffendant de par Nous à tous à qui il appartiendra, sur grans peines à applicquer à Nous, que aux dessusdiz Marchands et Maistres, propriétaires, Ouvriers et autres personnes quelzconques ouvrans et besoignans esdictes Mynes, ne meffaeent ou aetemptent, ne souffrent meffaire ou attempter en corps ne en biens, en quelque maniere que ce soit, contre la teneur de ces presentes ; mais les maintiennent et gardent les dessusditz, ès libertey et franchises dessusdietes, sans venir ne soufrir estre venu par aucuns au eontraire en quelque maniere que ee soit, soit par opposition, appellacion ou autrement : Car ainsi le voulons et Nous plaist estre fait pour consideracion des choses dessusdictes ; nonobstant quelzconques Ordonnances, Constitucions, Stille, Usage ou Statut de pays, et Lettres subreptices impetrées ou à impetrer au eontraire. Et que ee soit chose ferme et estable à tous puis, Nous avons fait meetre nostre Séel à ces presentes Leetres : SAUF EN AUTRES CHOSES NOSTRE DROICT, ET L'AUTRUY. Donné à Paris, le XXXe jour de May, l'an de graee mil iiij & xiij., et de nostre Regne le xxxiij. Ainsi signé. Par le Roy, le Confesseur, le Sire de Savoisy, Messire Girard de Graireval et plusieurs autres, presens BORDES.

Ignorance of French Jurists as to contents of that Ordinance.

Sec. 84.—How little the most eminent French Jurists of the last century knew of the Ordinances of the French Kings is strikingly illustrated by a written opinion delivered in 1767, by three eminent French Counsel, *M. M. Elie de Beaumont, Target* and *Rouchet.* That opinion is extracted from the *Rég. Français, letter G, P.* 260, and is found at P. 256 and *seq.*, of a Return to an address of the Legislative Assembly of Canada, of the 29 August, 1851, and

printed in book-form at Quebec by E. R. Fréchette in 1852. The opinion goes on to state :

OWNERSHIP OF MINES. *Authorities. Ignorance of French Jurists as to contents of that Ordinance.*

"The Patents of Concession contain the following clause : " on condition of giving notice to His Majesty of " Mines and minerals, if any should be found in the said " concession."

"In the case submitted it is asked whether this clause is to be understood as constituting the King joint proprietor of the Mines and minerals which may be found upon the property granted, or merely as showing a desire, on the part of His Majesty, to be informed of their existence, in order to have it in his power to provide for the security of these treasures, and protect them from conquest, for the benefit of the state; and whether, under any circumstances, the King would not owe the Grantee an indemnity, or be held to give him a considerable share in the profits of the Mines ; *or whether the proprietor of the land* is not, in virtue of his title to it, *proprietor of the Mines also*, and whether companies could be formed, with privilege or otherwise, who could dispute his right.

"The Counsel answer that this question also ought to be decided by the Laws of France, according to what has been said above. Now by the Ordinance of CHARLES, *the sixth*, of the 30th May 1413, which is the most ancient Law we have concerning this matter : " GOLD MINES " *belong to the King*, and to him, and not to any other, " belongs the tenth part of all metals when purified and " refined, without being bound to pay any thing, but " only to protect the workmen." This Ordinance styles the parties, masters of the soil, and proprietors of the Mines.

Such was those three gentlemen's ignorance of the contents of the Ordinance above quoted in full, that they have put into the King's mouth those words not to be found in the Ordinance : "*gold-Mines belong to the King.*" How those gentlemen could have imagined those words to be found in the Ordinance is a mystery to the Plaintiffs ; such ignorance is the more impardonable, as by looking into *Dénizart's* collection, *vbo. Mines*, just then published, they might at once have learned that the Ordinance, though silent *eo nomine* as to gold, includes it in the general designation of *other metals*, and that the reason given by *Dénizart* for such silence *eo nomine* is not the true one, as will be seen hereafter.

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The same three Counsel, after quoting other Ordinances and *Arrêts du Conseil*, decide the question of the ownership of silver and all other Mines, excepting gold, in a sense unfavorable to the DE LÉRY-*Patentees*; and they proceed to say:

> "Such is the Public Law of France with respect to Mines, and such is the reason of the obligation to give notice to His Majesty of Mines and Minerals, *not that the King may at once become the master of them*, but that He may exercise over them, according to their nature, the rights arising from the Laws of the Kingdom."

Inferences from that Ordinance.

Sec. 85.—From that Ordinance of CHARLES VI, we therefore gather:

FIRSTLY: That the *Ordinance applies to the Kingdom* GENERALLY, and to *silver-Mines*, and to *all* OTHER *Mines*, not even excepting *gold*; because the words are: "*en plusieurs* "*lieux de nostre Royaume* *** *y a plusieurs Mynes d'*ARGENT, "*de plomb et de cuivre, et* D'AUTRES MÉTAUX ****** *ès quelles* "*mynes* ET AUTRES QUELCONQUES *estant en nostre dit Royaume* "*nous avons et devons avoir, et à nous et non à autre appar-*"*tient la dixième partie.*" And the Sovereign gives as the "source of his right: "*à cause de nostre Souveraineté et* "*Majesté Royale.*" The words: *all other Mines whatever* must assuredly be held to include GOLD-*Mines:* moreover the injuction laid on all his officers, throughout the Kingdom to see to its execution, proves the Law to be one of general application; and it was enregistered in all the Parliaments of France. It seems to the Plaintiffs that nothing can be clearer.

SECONDLY. That the *Ordinance recognizes the* OWNER *of the soil as the owner of the* MINE. Because no one, surely, will pretend that the King claims the ownership of the Mine, in view of the fact that he only claims one-tenth of the refined metals extracted. The Sovereign merely says: "*à Nous et* "*non à autre appartient* LA DIXIÈME PARTIE *purifiée* de tous "métaux" in all the Mines of the Kingdom. HE DOES NOT SAY: "*à Nous appartiennent les mynes*"; NOR DOES HE "STATE: "*à Nous appartient l'or.*" Moreover the King, by "these words: "*Et pour ce afin que doresnavant les mar-*"*chands et* MAISTRES DES TRÈS-FONDS ET DES MINES qui font "ouvrer, etc., etc., etc.," clearly shows that the *maître du très-fonds*" (or owner of the soil) is one and the same person with

the *maître des Mines* (or owner of the Mine) ; *the words* ARE NOT "*maistre des trèz-fons, et maistres des Mines*; but the words : *Maistres des trèz-fons et des Mynes.*" shew him to be *maitre* of the one and the other. For ratifications of that Ordinance by CHARLES VII, on the Ist July, by CHARLES VIII, in February, 1483, by LOUIS XII, in June, 1498, by FRANÇOIS I, in December, 1515, see pages 17, 21, 33 et 41 of MINES ET MINIÈRES. OWNERSHIP OF MINES. *Authorities.*

Sec. 86.—If any doubt could possibly remain in one's mind, after reading the Ordinance of CHARLES VI, as to gold being on precisely the same footing as silver and other metals, those doubts will quickly vanish on perusal of the following Ordinance of LOUIS XI, to be found at P. 446 of Volume XVII of the *Ordonnances des Rois de France*, being a continuation by the *Marquis de Pastoret* in 1826, of the collection of *de Laurière, Secousse, de Villevault and de Bréquigny* : LOUIS XI.

ORDONNANCE DU ROI *sur l'Exploitation des Mines dans le Royaume.*

LOYS, *par la grâce de Dieu*, ROY DE FRANCE, *sçavoir faisons* à tous présens et advenir, *que* comme nous avons esté deuement advertis et informés que en nos royaume, Dauphiné, Comtés de Valentinois, Diois, Rossillon, Sardaigne et ès montagnes de Catalogne et ès marches d'environ, *y a plusieurs* MINES D'OR *et* D'ARGENT, *de cuivre, de plomb, estain, pottin, azur et aultres mestaux et matières*, lesquelles, par deffaut de conduite d'ouvriers et d'autres gens experts et connoissans en telles matières, et des edicts et constitutions et ordonnances convenables et nécessaires pour l'entremectement d'iceulx, sont et demourent en chommage et de nul effet et valeur ; et nous ait esté remonstré que si voulons faire besongner esdictes Mines, ainsy qu'on faict en plusieurs autres royaumes et parties de la Chrestienté, comme au pays d'Allemagne, ès royaumes de Hongrie, Boheme, Poulogne, Angleterre et ailleurs, et faire esdicts, ordonnances et constitutions pour mectre sus et entretenir le dict ouvraige, ainsi qu'il est esdites royaumes et contrées, il en pourrait advenir plusieurs grans biens, utilités et prouffit à nous, nosdicts royaume, Dauphiné et autres pardessus nommez et subjects d'iceulx, et que, en deffaut de pourvoir à ces choses, nous et nosdicts subjects y avons de grands dommaiges, *et se vuide chascun jour l'or et l'argent de nosdicts royaume*, Dauphiné, pays et lieux dessusdicts, sans y retourner, dont se pourroit ensuir la totalle ruine et destruction d'iceux, si provision n'estoit à ce par nous donnée, *par quoy* L'OR *et* L'ARGENT *ainsy transporté puisse retourner en nos dicts royaume*, Dauphiné et autres pays dessus nommés, et l'utilité publicque d'iceulx et preservacion des dommages et interests que ont souffert jusqu'à cette heure par deffaut de ladicte provision toutes manières de gens, tant d'esglise que nobles, bourgeois, marchands, gens mecaniques, laboureurs et autres demeurans esdicts pays, *laquelle chose*, comme avons esté en oultre informés, *ne se peut mieux ne par meilleur moyen redrecer que par faire ouvrer esdictes Mines, qu'elles soient ouvertes, que l'ouvraige se continue* ainsy que en tel cas appartient, et que faisions certains esdicts, Recites existence of *gold, silver*, and other Mines,

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constitutions et ordonnances pour ce convenables et nécessaires, *et, en ce faisant*, L'OR *et* L'ARGENT *en seroit et se recouvreroit evidemment en plus grande quantité sans comparaison en nosdicts royaume*, pays et seigneuries, qu'il ne faict à présent, et si auront nos monnoyes, qui sont la pluspart en chommaige, largement à besoigner, et *s'espandroit l'or et l'argent par les bourses*, et y auroient tous et chacun en son endroit grande utilité et prouffit, pour lesquelles choses et laquelle matière avoir et sortir son effect, soit besoin de faire lesdictes constitutions et ordonnances notables telles que la matière le requiert, qui soient solennellement criées par nosdicts royaume, Dauphiné, Valentinois, Diois, Rossillon, Sardaigne, pays et lieux devant dicts, à ce que nosdicts subjects et aussy les estrangiers ayent cognoissance de nostredicte volonté et intention en cette partie, et comme chascun en son endroit se y aura à gouverner : *pour ce est-il que nous*, voulans par effect pourvoir aux choses dessusdictes par l'advis et délibération des gens de nostre grant Conseil et autres notables hommes expers et connoissans en telles matières, et pour le bien et utilité de nosdicts royaume, Dauphiné, pays et lieux que dessus et des subjects d'iceulx, *avons faict, constitué et estably*, et par la teneur de ces presentes, *faisons, ordonnons, constituons et establissons* par esdict solennel, les statuts, ordonnances et declarations qui s'ensuivent.

Grants, to miners, certain exemptions,

PREMIÈREMENT. Que tous les marchands et maistres qui fairont ouvrer les dictes Mines à leurs propres cousts, frais et despens, et fairont feu, lieu et residence sur lesdictes Mines et Martinet, ou leurs desputés, ou les fondeurs et affineurs, et tous aucuns ouvriers mineurs, et *autres qui se mesleront de faire la manœuvre des dictes Mines* EN QUELQUE ESPÈCE QUE CE SOIT, estrangiers et non natifs de nos royaume, Dauphiné, Valentinois, Diois, Comté de Rossillon, Sardaigne, et lieux devant dicts, qui viendront ou sont jà demourans de nosdicts royaume, Dauphiné et lieux devant dicts, et se employeront, besongneront et continueront lesdictes marchandises et ouvraiges, *seront tous et demourront quictes, francs et exempts, pendant et durant le temps qu'ils besongneront esdictes Mines*, d'icy à vingt ans entiers, à compter du jour et datte des dictes presentes, *de toutes tailles, aydes, subsistances, impositions, francs-archiers, guet, garde, porte de ville, et autres charges et subventions quelzconques.*

And privileges,

(2) ITEM. Et avec ce, voulons et nous plaist, et ausdicts estrangiers avons octroyé et octroyons par cesdictes présentes, qu'ils joyssent de tels privileiges, franchises et libertés, soient comme naturalisés, facent testament, acquisitions de biens meubles ou immeubles, donations, transports et dispositions d'iceulx biens, et que leurs enfants et plus prochains lignaiges puissent succeder et recueillir leurs successions soit testats ou intestats, comme s'ils estoient natifs de nosdicts royaume et pays de Dauphiné, Valentinois, Diois, Rossillon, Sardaigne et autres lieux devant dicts, ou qu'ils eussent grace et lectres de naturalité de nous en la forme et maniére accoustumées en tel cas, veriffiées et expediées ainsy qu'il appartient, sans ce qu'ils soient tenus de prendre de nous ne d'autres nos officiers autres lectres de naturalité et grace, ou en requerir l'enterinement ne verification, fors seulement le vidimus de ces présentes faict soubs scel royal, avec la certification du general maistre gouverneur et visiteur desdictes Mines ou son lieutenant, appelé à ce nostre procureur, lesquelles leur voulons valoir et sortir leur plein effect en toutes les choses dessusdictes, tout ainsy que si eulx et un chascun d'eulx avoient lesdictes lectres de naturalité et grace de nous veriffiées et expediées, ainsy qu'en tel cas appartient de faire.

And protection in case of war,

(3) ITEM. Et en oultre, pour plus grande seureté d'iceux et de chascun d'eulx, leur avons octroyé et octroyons par ces présentes qu'ils puissent estre

et demourer seurement en nosdicts royaume et pays de Dauphiné, Valentinois, Diois, Rossillon, Sardaigne, montagnes de Catalogne et ès marches d'environ, pour les causes que dessus, nonobstant quelzconques guerres ou divisions qui puissent fondre entre nous et les seigneurs, pays et communautés dont ils seront natifs, et eux en retourner quand bon leur semblera, pourveu qu'ils ne feront ne pourchasseront ne seront trouvés avoir faitou pourchassé aucune chose préjudiciable à nous, à la chose publicque de nostre royaume ou à nos pays et subjects, et qu'ils aient congé de justice et du dit general maistre gouverneur et visiteur desdictes Mines, ou de son lieutenant, pour ce faire.

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(4) ITEM. *Avons ordonné qu'il sera* CRIÉ SOLEMPNELLEMENT *et* FAICT COMMANDEMENT *de par* NOUS *à tous ceux qui ont cognoissance des* MINES ESTANS EN LEURS TERRITOIRES ET HERITAIGES, *que, après quarante jours après ledict cry et publication, ils viennent reveler et denoncer au general maistre gouverneur et visiteur desdictes Mines ou à son lieutenant estant esdicts territoires,* et aux baillifs, seneschaux, gouverneurs et autres nos officiers de la jurisdiction desquelles lesdits territoires sont, *les Mines qui seront* EN LEURS DICTS TERRITOIRES *et quelles elles sont,* SUR PEINE DE PERDRE LE PROUFFIT QU'ILS EN POURRONT AVOIR JUSQUES A DIX ANS, *ou autrement telle amende ou peine que par nosdicts officiers et ledict maistre et gouverneur et visiteur desdictes Mines ou son lieutenant sera advisé,* LEQUEL GENERAL MAISTRE GOUVERNEUR ET VISITEUR DESDICTES MINES *ou son lieutenant* Y POURRA COMMECTRE GENS IDOINES ET SUFFISANS *un ou plusieurs ainsy que le cas le requerra et qu'il verra estre à faire,* et au surplus comme les dictes Mines se pourront mieux conduire à nostre prouffit et au bien d'iceulx, et que la chose pourroit toucher la chose publicque de nostredit royaume, Dauphiné et pays que dessus.

Orders disclosure of existence of Mines, *under penalty* of LOSING *ten years,* PROFITS of Mines not so disclosed,

(5) ITEM. *Et que auxdicts denonciateurs, s'ils viennent audict maistre general ou à son lieutenant* ou à nosdicts officiers, *en obéissant au cry et au commandement dessusdict,* SI AINSI EST QUE D'EUX MESMES ILS VEUILLENT ENTREPRENDRE LA CONDUITE DE BESONGNER ESDICTES MINES *et à y faire ce qui appartient par l'advis et deliberation du dit general maistre ou de son lieutenant ou de nosdicts officiers, et que* EUX SEULS OU AUTRES PERSONNES SOIENT RECEUS OU SUFFISANT *par reputation pour le pouvoir faire et conduire,* SERA DONNÉ *terme de* TROIS MOIS *après les quarante jours dessus dicts,* POUR FAIRE LEURS PRÉPARATIONS DE CE QU'IL LEUR FAUDRA POUR LE FAICT DESDICTES MINES, sans que pendant lediet temps aucune vexation, travail ou dommaige, leur soit donné pour non avoir besongné jusqu'audict temps esdictes Mines.

Invests party disclosing Mine with exclusive right to work it,

(6) ITEM. *Et sy ainsy est que aucuns de ceux à qui sera trouvé appartenir le territoire auquel seront ou jà ont esté trouvées lesdictes Mines,* NE SOIENT RICHES ET PUISSANS, *pourquoy à leurs despens ils puissent faire et conduire ledict travail et manœuvre desdictes Mines, ou que par autre cause ils ne voudroient pas prendre la charge de ce faire,* ET QU'ILS N'AURAIENT PAS REVELÉ LES DESSUSDICTES MINES *dedans quarante jours,* ainsy que dessus est ordonné, NOUS VOULONS ET ORDONNONS *en outre esdicts cas et à chacun d'eux, que le dict maistre general, ou son lieutenant, ou autres nos officiers qui pour ce seront à appeler puissent, saulve l'indemnité de celuy ou de ceux auxquels appartiendra ledict territoire, ordonner et commectre gens notables, experts et connoissans esdictes matières de Mines, pour voir, chercher et trouver icelles Mines. et sçavoir quelles elles sont et quel metail elles porteront, et l'utilité et proffit que vraysemblablement en peut advenir, et, ce faict, et le rapport ouy desdicts commissaires, lesdicts general maistre ou son lieutenant, appellés nosdicts officiers et autres qui sur ce seront à appeller, pourront faire manœuvrer et besongner esdictes Mines et les bailler à gens*

And, on refusal of owner of soil, subrogates seignior *foncier,* after parties heard,

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receans et solvables tels qu'ils adviseront estre à faire pour les faire proffiter au mieux que possible sera, en nous payant nostre dixiesme pour le droit de nostre souveraineté, et aux Seigneurs trefonciers leur portion qu'ils verront estre à faire, soit d'un dixiesme, demy-dixiesme, ou autre somme plus grande ou plus petite, selon la quantité et valeur des dictes Mines ; TOUTESFOIS, NOUS ENTENDONS ET DECLARONS PAR CESDICTES PRESENTES *que ceux qui n'auront revelé et denoncé les Mines qui sont en leurs territoires dedans les quarante jours, ainsy que dessus est dict,* PERDRONT LE PROUFFIT *que leur en pourra* ADVENIR, POUR TEL TEMPS QUE SERA ADVISÉ, PRONONCÉ ET TAUXÉ *par lesdicts maistre general ou son lieutenant, nostre procureur à ce appellé.*

And, on refusal of both owner and seignior *foncier*, subrogates seignior *suzerain*,

(7) ITEM. *Et si ainsy estait que,* après la dicte denonciation faicte et les dits quarante jours et temps dessus declairés passés, touchant les Mines qui seront ès territoires des gens particuliers, *ceux à qui sont les dicts territoires n'y voudront ou auront puissance d'y besongner,* ainsi que dessus est dict, *et qu'il y aura aucun seigneur feodal ou souverain* à qui sera ledict territoire *qui vienne prendre la charge de conduire ledict ouvraige et manœuvre desdictes Mines* comme eust pu faire celuy à qui est le dict territoire, en iceluy cas NOUS VOULONS, CONSENTONS ET ACCORDONS *ausdicts seigneurs que, trois mois après lesdicts quarante jours, ils se puissent presenter ou faire presenter devant ledict maistre general ou son lieutenant ou autres officiers dessusdicts.* POUR REQUERIR D'ESTRE SUBROGÉS EN LA PLACE ET AU DROIT *touchant lesdictes Mines* DE SON VASSAL ET SUBJECT, *et lequel y voulons estre receu et subrogé par ces presentes, moyennant que lesdicts ainsi subrogés garderont et observeront l'effet et contenu de ces presentes ordonnances, et qu'ils s'obligeront d'entretenir et continuer le dict ouvraige, et manœuvre, comme eussent faict et deub faire ceux à qui lesdicts territoires sont et appartiennent.*

Disposes of Mines in Royal Domain,

(8) ITEM. *Et en tant que touche les territoires qui sont à* NOUS NUEMENT, *esquels lesdictes Mines seront ou jà ont esté trourées,* NOUS VOULONS ET ORDONNONS *que icelles Mines soient faictes, conduittes et manœuvrées, et qu'on les baille au plus offrant et dernier encherisseur, au mieux et le plus prouffitablement à nostre prouffit et advantaige que faire se pourra.*

Provides for salary and expenses of Inspector of Mines,

(9) ITEM. Et pour ce qu'il conviendra faire plusieurs frais et mises, tant aux Seigneurs fonciers comme aux marchands et autres qui prendront la charge et conduite des susdicts ouvraiges et manœuvre desdictes Mines, et que bien souvent y adviennent et escheoient plusieurs grands dangiers, perils et dommaiges, NOUS *desirans que l'ouvraige et manœuvre desdictes Mines soit conduit et entretenu, et qu'il y soit soigneusement, et en grande cure et diligence, œuvré et manœuvré, et que lesdicts foneiers et autres marchands ayant plus grand vouloir, affection, et volanté d'y besoigner, vacquer et entendre,* et pareillement le dit general maistre, son lieutenant et autres nos officiers qui ont et auront la charge de besongner et faire besongner esdictes matières, esquelles faudra plusieurs voyages et dépenses, à ceste cause soient plus enclins à eux employer esdictes matières et y vacquer diligemment et entendre, et nos droits garder esdictes Mines, nous avons, de nostre plus ample grace, octroyé et octroyons par cesdictes presentes, que tout le prouffit qui nous pourrait competer et appartenir, du jour et datte de la publication de cesdictes presentes, à cause de nostre dixiesme desdictes Mines pour le deub de nostre souveraineté, jusqu'à douze ans prochain venant, soit et vienne au prouffit dudit general maistre et visiteur desdictes Mines pour ses gaiges, salaires, voyages et despenses qu'il y faudra faire, et à son lieutenant general et autres ses lieutenans particuliers, nos procureurs, gardes et officiers desdictes Mines, et autres qui s'y employeront par l'ordonnance desdicts maistres et visiteur general et ses lieutenans et autres officiers, à

faire les diligences qu'il faut et qu'il conviendra faire pour mectre sur lesdictes Mines, et semblablement pour en departir aux seigneurs fonciers, marchands, et autres qui auront la charge et dependance pour faire ledict manœuvrage, selon que ledict maistre et visiteur general desdictes Mines ou son licutenant advisera estre à faire, eu regard à l'ouvraige qu'ils feront, et aux frais, mises et despenses que à ceste cause leur conviendra faiae. **Ownership of Mines. *Authorities.* Louis XI.**

(10) Item. *Voulons et ordonnons, en oultre, qu'il soit permis et loisible audict general maistre et visiteur, ou son lieutenant et commis, et pareillement aux maistres et ouvriers besongnans et comtinuans ledict ouvraige, de quérir, ouvrir et chereher Mines par tous les lieux et contrées de nosdicts royaume*, Dauphiné, Valentinois, Diois, Comtés de Rossillon, Sardaigne montagnes de Catalogne et ès marches d'environ et ailleurs, *soient en nostre territoire mesmement et de nos subjects* où ils penseront en trouver, et iceiles ouvrir sans faire indempnite des propriétaires, *et y faire manœuxrer au prouffit de ceux à qui il appartiendra*, selon la teneur de ces presentes ordonnances, sans qu'il soit besoin à nosdicts officiers, maistres, ouvriers et besongnans esdictes Mines, en demander congé et licence aux dicts propriétaires treffonciers ne à autres quelzconques, ne que par eux leur soit ou puisse estre donné aucun destourbiers ou empeschement, pourveu que quand lesdicts maistres mineurs et ouvriers auront trouvé lesdictes mines, *ils seront tenus*, avant qu'ils commencent le voyage pour ouvrer et manœuvrer en icelles, *le notifier et signifier auxdicts maistre general gouverneur et visiteur esdictes Mines*, ou son lieutenant ou commis, nosdicts procureurs et gardes, *et aux seigneurs fonciers auxquels lesdicts territoires appartiendront*, affin qu'en icelles choses nostre droict et celuy des parties y soit cardé

(11) Item. Voulons et ordonnons que nosdicts officiers et aussy les hauts, moyens et bas justiciers, soubs la jurisdiction et seigneurie desquels lesdictes Mines auront esté trouvées et sont assises, baillent et delivrent auxdicts ouvriers, marchands et maistres desdictes Mines, moyennant et par payant juste et raisonnable prix, chemins, voyes, entrées et issues par leurs terres, bois, rivières et autres leurs jurisdictions et toutes autres choses necessaires aux dicts maistres et ouvriers pour faire le dict ouvraige, ainsy que par iceux maistres et ouvriers pour la nécessité dudict ouvraige leur sera requis sans contredict ou difficulté aucune ; et si question ou debat s'esmouvait entre nosdicts officiers et lesdicts seigneurs et treffonciers d'une part, et les dicts ouvriers, marchands ou maistres, d'autre part, pour les causes cy-dessus, ou pour la precaution de l'interest des parties, ledict maistre general ou son lieutenant, en sur ce l'advis de nostre bailly, seneschal ou son lieutenant, ou autre nostre plus prochain juge du territoire ou autre chose dont pourroit estre question à la cause dessusdicte, en appoincteront comme en pourroit faire en cour souveraine, sans ce que de ce l'en puisse appeler ou reclamer en aucune manière.

(12) Item. *Et afin que lesdictes ordonnances puissent estre mieux entretenues et gardées*, et que à toutes les choses qui sont et seront necessaires pour trouver lesdictes Mines, icelles faire ouvrir, procurer les ouvraiges, commencer les ouvertes, entretenir les eaux et autres empeschements qui y peuvent survenir, faire vuider et oster, entretenir aussi et garder les privileiges des maistres, officiers et ouvriers qui y vacqueront et appaiser, accorder, appointer par la voye judiciaire amiable, se faire se peut, tous les debats et questions qui pourront estre et survenir entre les parties, soubs quelque couleur ou occasion que ce soit, nous *voulons et nous plaist, et par ces presentes* l'avons ainsy ordonné *qu'il y ait un maistre general qui soit gouverneur, visiteur et maistre ordinaire desdictes Mines et leurs deppendances*, et lequel *par ces mesmes presentes* NOUS faisons, créons esta-

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blissons et constituons *maistre, visiteur et gouverneur et juge de toutes les questions et debats qui se pourraient mouvoir entre quelzconques personnes à cause desdictes Mines*, soit en matière civile ou criminelle non requerant punition corporelle jusqu'à la mort inclusivement, sans ce qu'autre qu'iceluy, sinon est de sa faute et par sa demeure, depuis que le cas serait venu à sa connoissance, en puisse avoir ou prétendre cour ou connoissance, soit au cas de battures, vilaines injures, ou autre debat entre icelles parties, ou en matière civile pour le debat qui pourroit estre entre lesdictes parties à cause du territoire ou du bail et prix desdictes Mines, ou de nostre droict ou de celuy que les parties pourraient pretendre, *soit à cause de l'ouvraige ou du territoire ou du seigneur foncier, ouvriers ou autrement, en quelque manière que ce soit*, sans *que d'iceluy* maistre general et gouverneur ou son lieutenant *puisse estre appelé* ne reclamé en aucune manière, *et que* se appelé en estait, voulons et deffendons qu'aucun ajournement en cas d'appel en soit baillé, et s'il estoit ainsy qu'on le baillast, *voulons qu'il ne sortisse son effect et qu'il n'y soit obey ne obtemperé en aucune* manière et sans amende, excepté *toutefois des causes et matières qui pourroient toucher la propriété des seigneurs fonciers, s'aucun debat s'esmouvoit entre eux à cause des treffonds*, et les dicts cas et crimes requerans punition corporelle jusqu'à la mort inclusivement, dont *voulons que la connoissance demeure à nos baillifs, seneschaux et aux juges ordinaires, ainsy qu'il estoit auparavant*, pourveu toutesfois que, se question ou debat s'esmouvoit entre lesdicts seigneurs pour les causes que dessus, l'ouvraige n'en soit point retardé ne discontinué ; auquel cas, pour y faire ouvrer duement, sans le préjudice du droict des parties et des procès, nous donnons pouvoir audict maistre general visiteur et gouverneur desdictes Mines, ou son lieutenant commis ou à commectre, appellé ledict juge ordinaire, d'y faire ouvrer et besongner ainsy qu'ils verront estre à faire au bien de nous et de la chose publicque de nostre royaume et pays que dessus, et nonobstant lesdicts procès qui pourroient estre entre lesdictes parties à cause desdicts treffonds et quelzconques oppositions ou appellations faites ou à faire au contraire, auxqueiles en ce cas ne voulons aucunement estre obey ne obtemperé comme dessus.

Si donnons en mandement par ces mesmes presentes, à nos amez et féaulx conseillers les gens de nos cours de parlement de Paris, Toulouse, Poictiers, Grenoble, et Perpignan, aux gouverneurs du Languedoc, Dauphiné et Rossillon, les gens de nos comptes et tresoriers et generaux Conseillers par nous ordonnés sur le faict et gouvernement de toutes nos finances tant en Languedoc comme en Languedoil, aux prevost de Paris, bailliffs de Vermandois, d'Amiens, de Senlis, de Rouen, Caen, Evieux, Gesoris, Constantin, de Lyon et des montagnes d'Auvergne, Senesehaux de Poictou et de Limosin, de Toulouse, Carcassonne et Beaucaire, et à tous nos autres justiciers et officiers ou à leurs lieutenans, presens et advenir, et à chasenn d'eux si comme à luy appartiendra, que nos presens statuts, ordonnances et declaration et tout le contenu ès articles cy-dessus incorporés ils enterinent, veriffient, et enregistrent, et facent enteriner, observer et garder de poinct en poinct sans enfraindre, en les faisant publier par les maistres de leurs jurisdictions ès lieux où on a accoustumé de faire cry et publication et ailleurs où il appartiendra, affin que aucun n'en puisse pretendre cause d'ignorance, et à ce faire et souffrir contraignent et facent contraindre réaument et de faict tous ceux qu'il appartiendra par toutes voyes et manières deues et requises en tel cas, nonobstant oppositions ou appellations quelzconques. Et pour ce que de ces presentes on pourra avoir à faire en plusieurs lieux, nous voulons que au *vidimus* d'icelles, faict soubz scel royal, foy soit adjoustée comme a ce present original. Et affin que ce soit chose ferme et estable à tousiours,

nous avons faict mectre nostre scel à ces presentes, SAUF EN AUTRES CHOSES NOSTRE DROIT ET L'AUTRUY EN TOUTES. *Donné aux* MONTILZ-LÈS-TOURS, *au mois de Septembre, l'an de grâce mil quatre cent soixante-onze, et de nostre règne le onziesme.* SIC SIGNATUM: *Par le Roy en son Conseil,* FLAMENG. *Ownership of Mines. Authorities, Louis XI.*

ET EST SCRIPTUM : *Lecta, publicata et registrata, sub reservationibus et modificationibus in rotulo hic sub contra-sigillo regio alligato contentis. Actum in Parlamento, vigesimâ septimâ die Julii, anno Domini millesimo quadringentesimo septuagesimo-quinto.*

PRIMUS ARTICULUS.—Touchant l'exemption de tous subsides; pourveu que ce soit sans fraude et que soient gens qui ne se meslent d'autres mestiers ou marchandise, durant le temps qu'ils vacqueront au faict desdictes Mines. *Modifications by Parliament of Paris.*

TOUCHANT LE DEUXIESME, que les estrangiers puissent tester et leurs héritiers succéder sans prendre autres lectres fors cestes et la certiffication du maistre, à ce appellé le procureur du Roy; pourveu qu'ils ayent continué lesdictes Mines un an du moins.

TERTIUS. Qu'ils puissent partout demourer, nonobstant les guerres; pourveu que ce soit en l'obéissance du Roy en faisant serment qu'ils ne procureront chose préjudiciable au Roy ne au royaume et pays, et s'en pourront retourner en ayant congé du Roy.

QUARTUS. *Que ceux qui auront connoissance des Mines le viendront dénoncer dans quarante jours* au maistre général, sur peine de perdre le prouffit pour dix ans, ou à ses commis ou au plus prochain juge ou greffier royal, et dedans quatre mois après que les propriétaires en auront esté deuement advertis, ET SANS AUTRE PEINE QUE D'ESTRE PRIVÉS DU PROUFFIT DE LA DICTE MINE POUR DIX ANS.

QUINTUS. POURVEU *que le temps de trois mois octroyé* AUX TREFFONCIERS *pour besongner* auxdictes Mines *sera prorogé d[e] trois mois,* QUELS GENS QUE CE SOIENT, PAUVRES OU RICHES, *à [dé]faire, et le pourront dénoncer au plus prochain Juge ou greffe roy[al] ou maistre general ou ses commis n'estoient sur les lieux.*

SEXTUS. *Se le propriétaire n'est puissant [de] besongner on ne l'auroit revelé, que le general maistre ou au[tres] puissent faire besongner,* SAUF L'INDEMPNITÉ qui sera taxée par [...] ou par le juge ordinaire, appellé l'un des commis du maistre general s'[il] est présent, *et in absentiâ* le procureur du Roy, touchant celui qui aura revelé dedans les quatre mois *a tempore notitiæ, et pareillement touchant celui qui ne l'aura pas revelé,* POUR EN JOUIR APRÈS CES DIX ANS PASSÉS,, *et sans que en ladicte peine soient comprins prisonniers, mineurs d'ans, gens occupés pour la chose publicque ou autres nécessités.*

SEPTIMUS. Que *dominus feodalis subrogabitur loco vassali;* pourveu *qu'il soit haut justicier du lieu et qu'il ayt autant de temps que le proprietaire, après que le temps du proprietaire sera passé ou qu'il aura declaré non y vouloir ou pouvoir besongner.*

OCTAVUS. Que celles qui seront en la terre du Roi, *tradantur ultimo incaritori* sauf les baux jà faits à héritaiges et à tousiours, et aussy à temps jusqu'à ce que leur terme soit expiré.

NONUS. Que le prouffit du dixiesme appartiendra au maistre jusqu'à douze ans pour en départir aux seigneurs fonciers et ailleurs; pourveu que ce soit sans prejudice de ceux qui ont droit ès mines par cy-devant ouvertes, ou des dons faicts par avant par le Roy ou ses successeurs et autres.

DECIMUS. *De ouvrir toutes Mines partout sans congé des propriétaires;* POURVEU QUE CE NE SOIT EN TERRES LABOURABLES, VIGNES, PREZ, JARDINS, BOIS, PASTURAGES, TERRES PORTANT FRUITS INDUSTRIAUX, *et sans le consente-*

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ment du proprietaire, ou par l'ordonnance du juge ordinaire, PARTIBUS AUDITIS, MAIS EN LIEUX DESERTS, NON HANTÉS, EN FRISCHES ET STERILES, *où n'y a labour, fruits venants par labour et industrie: la cherche et ouverture se fera par l'ordonnance du maistre general,* A CE APPELLÉS *le procureur du Roy* ET LE PROPRIETAIRE, *par lequel maistre et procureur du Roy sera disputé de* L'INDEMPNITÉ DU PROPRIETAIRE.

Modifications by Parliament of Paris.

UNDECIMUS. Pourveu que aucun prix ne soient mis aux vivres; *et ne sera baillé passage par terres labourables, vignes, prez, jardins, bois, maisons ou heritaiges portant fruit par industrie, sans le consentement du proprietaire ou par l'ordonnance du juge ordinaire,* LE PROPRIETAIRE APPELLÉ ET OUY, *et quand par autre bien non dommaigeable ne pourrait estre trouvé passaige.*

DUODECIMUS. Le maistre général n'aura que la cognoissance des causes civiles et personnelles sur les officiers, ouvriers et manœuvriers desdictes Mines, quand ils auront à faire l'un contre l'autre pour le faict desdictes Mines ou contrats faicts entre eux et nonobstant appellations, et pareillement des criminelles, fors des cas pour lesquels escherroit mort et perdition ou abcision de membre, et en gardant au surplus les ordonnances royaux touchant le faict desdictes Mines.

Actum in Parlamento, vigesimâ septimâ die Julii, Anno Domini millesimo quadringentesimo septuagesimo quinto. SIC SIGNATUM. BRUNAT.

Lecta pariter, publicata et registrata, in Curiâ Parlamenti THOLOZE, *sub eisdem reservationibus et modificationibus, ac etiam absque jurium et possessionum Comitum Fuxi et Convenarum nec non vice comitum* COZORANI *et* CARAMAGNI *et domini de Mirapisce, aliorumque si qui fuerint in materiâ habentes seu prethendere valentes interesse, prejudicio.* ACTUM THOLOZE, *in Parlamento, vigesimâ sextâ die Februarii, anno Domini millesimo quadringentesimo quinto.* G. DE LA MARCHE.

Inferences from Ordinance of Louis XI.

Sec. 87.—From that Ordinance of Louis XI, we gather.

FIRSTLY. That the *Ordinance applies to the whole Kingdom*; because the Sovereign says so distinctly.

SECONDLY. That *its provisions apply to* GOLD, SILVER, and all other metals. That is evident from those words used by the Sovereign: " *en nos royaume, Dauphiné, etc., etc.,* " *y a plusieurs Mines* D'OR ET D'ARGENT, de cuivre * * *, " lesquelles sont et demourent en chommage, etc., etc.," " and still again from the words: " et en ce faisant l'*or et l'ar-* " *gent* en seroit et se recouvreroit évidemment en plus grande " quantité, etc., etc.," and still further from the words: " et " s'espandroit *l'or et l'argent* par les bourses."

Synopsis of provisions of that Ordinance.

Sec. 88.—After reciting the advantages to be derived from the working of the Mines, the Ordinance proceeds, in twelve separate articles, to lay down a complete mining code.

ART: 1 grants to miners, aliens and others, exemption from the usual taxes of the Kingdom.

ART: 2 grants to alien-miners the right of acquiring and transmitting property, and other civil rights.

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ART: 3 grants protection and rights of neutrality to alien miners, in case of war with their native country.

ART: 4, 5, 6 & 7 establish, in the clearest manner, the right of the Plaintiffs to all the Mines, without distinction, on their lands.

Synopsis of provisions of that Ordinance.

ART: 4 *enjoins on all persons*, who have *knowledge* of the existence *of Mines on their lands*, to DISCLOSE the situation and nature of *such Mines*, within 40 days, UNDER PENALTY *of losing the* PROFITS *of the Mines* DURING TEN YEARS. To say that that Ordinance does not recognize the owner of the soil as the owner of the Mines, is to say that a man may lose that which does not belong to him. How can a man be said to lose the profits, during ten years, of a Mine that does not belong to him? Again, when the Ordinance says that the reticent owner of the soil shall lose the profits of the Mine during ten years, does it not also decree that, after the lapse of ten years, the mine shall revert to the even reticent owner of the soil?

ART: 5 is even more explicit. It states that, if the owner of the soil, who has disclosed the Mines, is willing to work it, he shall have three months to make his preparations for that purpose.

ART: 6 , by implication, again decides that the disobedient owner of the soil, who is unable or unwilling to work it, shall nevertheless be indemnified, and shall become reseized of the Mine after such time as the Master-General of Mines shall determine, after hearing all interested parties.

But ART: 7 clearly and distinctly defines the position of the owner of the soil as one of right to the ownership of the Mine, in these remarkable words: "*Et si ainsy estoit* " que * * * * *ceux a qui* sont les dicts *territoires n'y voudront* " ou auront puissance d'y *besongner*, * * * *et qu'il y aura* " aucun *Seigneur* féodal ou Souverain à qui sera le dit terri- " toire *qui vienne prendre la charge* de conduire le dit " ouvrage, * * * EN ICELUY CAS, *nous voulons*, consentons " et accordons auxdicts Seigneurs, *que*, trois mois après les " dicts quarante jours, *ils se puissent, présenter*, ou faire " présenter devant le dict Maistre général ou son Lieutenant, " *pour requérir d'estre* SUBROGÉS *en la place* ET AU DROIT " *touchant les dictes Mynes* DE SON VASSAL ET SUBJECT." In those words the sovereign treats the claim of the owner of the soil, who is willing to work the Mine as a right (*droit*);

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moreover what is this *subrogation* spoken of by the King? Does not the word "subrogation" necessarily imply a previous existence of certain rights transferred from one to another? It is clear, it seems to the Plaintiffs, that they are the owners of the gold and silver and of all other metals on their lands.

Synopsis of provisions of that Ordinance.

With regard to the subrogation referred to by the King, the Parliament of Paris made certain modifications, approved of by the King, as to how such a subrogation should be demanded and obtained; those modifications shall be presently noticed.

Art: 8 treats of the disposal of Mines in the King's private domain.

Art: 9 bestows his Royalty of one-tenth for the space of 12 years on the Maistre-Général des Mines, in lieu of salary.

Art: 10 empowers his officers to search every where for Mines; but that article was so modified by the Parliament as to preclude the possibility of the owner of the soil being deprived of any Mine discovered by the King's officers, without a fair indemnity not for the soil, but for the Mine.

Art: 11 enjoins on all persons to give every facility to the miners.

And Art: 12 creates a tribunal for the disposal of mining law-suits.

Synopsis of modifications by Parliament.

Sec. 89.—The modifications introduced into that Law by Parliament, in so far as they affect this case, are

1° Proprietors (*pauvres et riches*) are bound within 4 months after notice to them, *à tempore notitiæ*, to declare whether they intend working the Mine.

2° All persons knowing the existence of Mines, are bound within 40 days, *à tempore scientiæ*, to disclose the existence thereof.

3° The right to work a Mine, in subrogation to the owner of the soil, shall be *par l'ordonnance du juge ordinaire*, partibus auditis.

4° Six months instead of three months, are given to the owner of the soil to make his preparations.

Ordinance clearly assigns all metals to owner of soil,

Sec. 90.—In the presence of this clear, unmistakeable declaration of the King as to the respective rights of

the Sovereign and the subject as to Mines, even of gold and silver, how can it be pretended, for a moment, that gold is not included in the scope of the Ordinance, or that the King was proprietor of such Mines in France ?

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Sec. 91.—That Ordinance is further remarkable for the respect it pays to private rights by the use of those words : " sauf en autres choses nostre droit, *et l'autruy en toutes ;* " that reservation as to private rights is in keeping with the reservation, which at P. 54 of this Factum, we have already shewn by authority to be implied as existing in, and forming part of, all Letters-Patent. A like reservation of private rights is found in the preceding Ordinance of CHARLES VI, and in the succeeding Ordinance of HENRY IV.

And reserves private rights,

Sec. 92.—That Ordinance of LOUIS XI was confirmed by CHARLES VIII, in February 1483, and by LOUIS XII in June 1498, as may be seen on reference to Page 453, *note c*, volume XVII of the *Ordonnances des Rois de France*, already quoted.

And was confirmed by CHARLES VIII and LOUIS XII.

Sec. 93.—The position assumed by the Plaintiffs is, if possible, still further strenghthened by the next, and last great Ordinance on the subject, that of HENRY IV, of June, 1601. It is the very Ordinance recited by the DE LÉRY-*Patent*, and is found, with a confirmatory *Arrêt du Conseil*, at P. 148 of MINES ET MINIÈRES. It runs thus :

HENRY IV.

EDICT DE RÉGLEMENT GÉNÉRAL faict par le Roy *sur le faict des Mines et Minières* de son Royaume. Et création d'un Grand Maistre Superintendant et Général Réformateur, ou Lieutenant, un Controolleur et un Receveur Général ; Ensemble un Greffier, aux gages, taxations, priviléges et exemptions portées en icelui.

Vérifié en Parlement et en la Chambre des Comptes, le dernier Juillet et treizième Aoust mil six cent trois.

HENRY, *par la Grâce de Dieu*, ROY DE FRANCE ET DE NAVARRE : A tous présens et advenir, Salut. Nous avons fait veoir en nostre Conseil les Déclarations des Roys nos prédecesseurs, mesmes celles de François Premier, Henry deuxième, François deuxième et Charles neufiesme, nos très-honorez Seigneurs beau pères, frères et autres, vérifiées en nostre Cour de Parlement, Chambre des Comptes et Cour des Aydes à Paris, et ailleurs où besoin a esté sur le faict des Mines et Minières de ce Royaume, Païs et Terres de nostre obéissance : par lesquelles nosdicts prédecesseurs Roys, meuz de la mesme affection que nous sommes, de faire cognoistre à nos

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subjects que Dieu a tellement beny nos Royaumes, Païs et Terres de nostre obéissance, que toutes choses s'y peuvent recouvrer en très grande abondance, ils auraient, pour induire leurs subjects à faire recherche, et travailler auxdictes Mines, et pour y appeller les Estrangers, et leur faire quitter les Mines et Minières de nos voisins, beaucoup moindres que les nostres, fait et attribué plusieurs beaux et grands privilèges, auctoritez, franchises et libertez, tant à l'estat de Grand-Maistre Superintendant et Général Réformateur desdictes Mines et Minières, qu'à ses Lieutenans, Commis et Députez, et ouvriers regnicoles et estrangers, avec pouvoir de Justice audit Grand Maistre, comme plus au long le contiennent lesdictes Ordonnances, Déclarations et Reglemens; et comme l'expérience, seul Juge assuré des bons establissemens, elle a fait cognoistre beaucoup de deffauts auxdictes ordonnances, en ce que par icelles, au lieu de gaiges ordinaires qui devoient être attribuez au dict Office de Grand-Maistre, nosdicts prédecesseurs auroient faict aux pourveus du dict office, don de leur droict pour certain temps, le jugement duquel appartenant aux officiers establis par lesdicts Grands-Maistres, il s'y commettroit de très-grands abus. En ce que lesdicts Officiers dépendans entièrement de lui, lui adjugèrent plutost ce qu'il desiroit que ce qui lui appartenoit, dont se seroient ensuivies plusieurs plaintes en nos cours de Parlement. A quoi désirant pourvoir, et à ce que nostredict droict à nous appartenant à cause de nostre Souveraineté inséparable d'icelle, ainsi que le contiennent lesdicts Edicts et Ordonnances, Réglemens et Déclarations, et qu'il a esté jugé plusieurs fois, spécialement par la Déclaration de feu Roi François second, notre très-honoré sieur et frère, du 29 Juillet 1560, confirmée par autres Lectres du feu Roi Charles neufiesme, aussi notre très-honoré sieur et frère, du 25 Juillet 1561, vérifiées en nostre Cour de Parlement le 9 Mai 1562, par laquelle est enjoint à nostre Procureur Général et ses substitus, de faire poursuites de nosdicts droicts, sans dissimulation, et desirans à l'avenir faire inviolablement garder lesdicts Edicts, Ordonnances, Réglemens et Déclarations, pourvoir à la conservation de nosdicts droicts, et obvier à l'usurpation d'iceux.

I. Nous avons confirmé et approuvé, et par ces présentes confirmons et approuvons lesdicts Edicts et Déclarations de poinct en poinct selon leur forme et teneur : *pour suivans iceux nostredict droict estre passé franc et quitte, pur et affiné* EN TOUTES LESDICTES MINES.

II. *Sans toutefois comprendre* en icelle *les Mines de Souffre, Salpestre, de Fer, Ocre, Petroil, de Charbon de terre, d'Ardoise, Plastre, Croye et autres sortes de pierres pour bastiments et meulles de moulins,* LESQUELLES pour certaines bonnes et grandes considérations, Nous *en avons exceptées,* et par grâce spéciale exceptons en faveur de nostre noblesse, et *pour gratifier nos bons subjects propriétaires des lieux.*

III. Voulons aussi que celui qui sera par nous pourveu du dit office de Grand Maistre, Superintendant et Général Réformateur; et tous les autres officiers et personnes employées auxdictes Mines, et autres qu'il appartiendra, jouissent des privilèges, auctoritez, jurisdictions, prééminences, franchises, libertez et droicts y attribuez par nos prédécesseurs, comme si de mot à autre les dicts privilèges, prééminences, auctoritez, jurisdictions, franchises, libertez et droicts estaient ci-insérez; aux restrinctions toutefois que ceux de nos subjects costisables à nos tailles, qui travailleront et commanderont auxdictes Mines, ne pourront prétendre autres exemptions que des charges desquelles nous les avons deschargé et deschargeons. A sçavoir de Tutelles, Curatelles de Mineurs, Collecteurs de nos tailles, commis à les asseoir, ou d'estre establis Commissaires et Dépositaires des bieus de justice, et de toutes autres commissions, dont nosdicts subjects demeurans tant en

nos Villes, Bourgs que Villages, sont ordinairement choisis et esleus, pourveu néanmoins que ceux qui prétendront telles exemptions, ayent durant six mois servi ou travaillé aux choses dessusdictes auparavant leur ellection, et qu'ils continuent: autrement et si par fraude ils avaient travaillé durant ledict temps, et après avoir eschappé la dicte ellection, ils discontinuoient leur travail, en ce cas ils seront tenus en tous les dépens, dommaiges et intérests de celui qui aura esté esleu en leur lieu.

IV. Et en tant que besoin seroit, et d'abondant, de l'advis de nostre Conseil, auquel estoient plusieurs Princes de nostre sang, et principaux officiers de nostre Couronne, estans près de nous. Oui le rapport fait en icelui nostredict Conseil, par ceux que nous aurions ci-devant envoyez pour faire faire recherche desdictes Mines; et des moyens de les mectre en valeur. Par cestui nostre Edict perpétuel et irrévocable, nous avons faict de nouveau crée et érigé, créons et érigeons en titre d'office, formé ledict estat de Grand Maistre, Superintendant et Général Réformateur desdictes Mines et Minières de nosdicts Royaumes, Pays et Terres de nostre obéissance auquel Nous avons attribué et attribuons treize cens trente-trois escus, vingt sols de gaiges ordinaires par chacun an, à prendre sur le fonds provenant du droict à Nous appartenant sur lesdictes Mines: Ensemble un Lieutenant Général par tout nostredict Royaume, avec la qualité de nostre Conseiller, et un Controolleur général, aussi en titre formé, pour tenir Registre et Controolle desdictes Mines, leur quantité et qualité, et de nosdicts droicts, et pareillement un Receveur Général, pour faire la recette générale desdicts deniers, lequel Nous avons estabii à Paris, et un Greffier, pour estre tant avec ledict Grand Maistre que Lieutenant Général en personne, ou par ses commis pour les Expéditions, Sentences, Jugemens et autres qui se feront en ladicte charge. Auquel Lieutenant Général nous avons donné et donnons pareils et semblables pouvoirs et auctorité sur lesdictes Mines et Minières, et ce qui en dépend, qu'audict Grand Maistre en l'absence d'icelui, et aux choses pressées, et qui ne pourront attendre sa présence ou ses ordonnances, sur les advis qui lui auront esté donnez des occurrences de sa charge.

V. Voulons et Nous plaist que lesdicts Grands-Maistres et Lieutenant Général en son absence, comme dict est, puissent commectre personnes capables et suffisans en qualité de Lieutenans particuliers, par tous les lieux et endroicts que besoin sera, pour en leur absence ordonner, regler, restablir et réformer tout ce que sera besoin et nécessaire pour le faict desdictes Mines et Minières, et conservation de nos droicts, comme il est dict ci-dessus, bailler advis audict Grand-Maistre et Lieutenant Général des nouvelles ouvertures qu'on voudra faire d'icelles, leur en envoyer les qualités, essais et eschantillons, pour estre par ledict Grand-Maistre ou son Lieutenant Général en son absence, ordonné de qui sera cognen plus utile pour nostre service sur l'ouverture desdictes Mines, lesquelles se feront en vertu des Commissions du dict Grand-Maistre ou dudict Lieutenant Général en son absence.

VI. Et afin que Nous puissions faire estat certain à l'advenir du profit et émolument qui pourra revenir de nosdicts droicts, nous voulons et ordonnons que ledict Grand-Maistre Superintendant, et en son absence ledict Lieutenant Général à mesure qu'ils vacqueront à faire leurs chevauchées et visitations, réformations et establissement, chacun séparément esdictes Mines, par les Provinces de nostre Royaume, dressent les Procès-Verbaux desdictes visitations. Et de la recette de nos droicts, desquels, ensemble du Controolle, il en sera par eux envoyé un en nostre Conseil d'Estat, et un autre remis ès mains du Receveur Général pour faire la recette et recouvrement desdicts deniers.

VII. Et pour obvier à ce qu'il n'advienne confusion, par le moyen des

diverses commissions que ledict Grand-Maistre Général Superintendant, et ledict Lieutenant Général pourroit bailler ci-après sur le faict desdictes Mines; Nous voulons et ordonnons que ceux qui seront commis par ledict Lieutenant Général ne puissent jouir de leurs commissions, et en vertu d'icelles faire aucun exercice sur lesdictes Mines, qu'au préalable ils n'ayent sur leurs lectres de commission, prins attache dudict Grand-Maistre; lesquels Commis porteront la qualité de Lieutenant particulier dudict Grand-Maistre, et jouiront pendant le temps qu'ils exerceront lesdictes charges et commissions des priviléges et exemptions attribuées par cesdictes présentes aux officiers desdictes Mines : A tous lesquels estats et offices, Nous avons attribué et attribuons la qualité de nos Conseillers. Et outre ce des gages par chacun an à prendre sur le fonds de nostre droict, comme dict est.

VIII. A sçavoir audict Estat de Lieutenant Général mille escus : au dit Controolleur Général tant pour lui que pour ses Commis, mille escus ; et dudict Receveur Général, tant pour lui, ses Commis, que pour le part et voiture des deniers en ses mains à Paris, pareille somme de mille escus, avec 4 den. pour liv. de la recette actuelle, à l'instar des Receveurs Généraux des Bois, 133 escus, un tiers audict Greffier, et à chacun de ceux qui seront commis esdictes généralités de Lieutenans particuliers esdictes Provinces, un escu et demi par chacun jour qu'ils vacqueront à faire leurs visitations, réformations et establissement sur lesdictes Mines et Minières.

IX. A tous lesquels offices ainsi par nous créez sera par Nous pourveu dès à présent, et ci-après quand vaccation y escherra : lesquels presteront le serment, à sçavoir, ledict Grand-Maistre Général Superintendant et Lieutenant Général, ès mains de nostre très cher et féal Chancelier, et pardevant nos améz et féaux Conseillers les gens tenans nostre Cour de Parlement de Paris. Lesdicts Contrôolleur et Receveur Général pardevant les gens de nos comptes, et ledict Greffier ès mains dudict Grand-Maistre Général Superintendant ou dudict Lieutenant Général en son absence : et sera ledict Receveur Général tenu en outre de bailler caution pardevant nos améz et féaux Conseillers et Trésoriers de France de la somme de

X. Et pour donner plus de moyen auxdicts Grand-Maistre et Lieutenant Général de bien et diligemment vacquer au faict de leurs charges, leur avons ordonné et attribué, ordonnons et attribuons, outre et pardessus lesdicts gaiges ordinaires, à sçavoir, audict Grand-Maistre six écus deux tiers, et audict Lieutenant Général quatre escus par jour qu'ils vacqueront à leursdictes chevauchées par les Provinces de nostre Poyaume, dont ils rapporteront bons et valables Procès-verbaux de tout ce qui aura par eux esté faict sur lesdictes Mines ; et au Greffier un escu un tiers, aussi de taxations expresses.

XI. Tous lesquels gaiges et taxations, et ce qui sera ordonné par ledict Grand-Maistre ou ledict Lieutenant Général desdictes Mines, soit aux Huissiers ou Sergens pour les saisies, contrainctes et autres frais nécessaires pour le faict desdictes Mines, conservation de nos droicts : ensemble les taxations desdicts commis, Lieutenans particuliers, Nous voulons et ordonnons estre payez des deniers qui proviendront du droict desdictes Mines par ledict Receveur Général et ses Commis, en vertu des Ordonances et simples quittances dudict Grand-Maistre et du dict Lieutenant Général et des parties prenantes, en vertu desdictes Ordonnances. Lesquelles Nous avons validez et auctorisez, vallidons et auctorisons ; sans qu'il soit besoin cy d'autres vallidations sur icelles que cesdictes présentes, rapportant lesquelles, ou *vidimus* d'icelles par nostredict Receveur Général pour une fois : avec lesdicts Procès-verbaux dudict Grand-Maistre, du Lieutenant Général et desdicts Lieutenans particuliers et Commis avec lesdictes Ordonnances et quittances

sur ce suffisantes, Nous voulons tout ce que payez aura esté par ledict Receveur Général ou ses Commis, estre passez et allouez en la despense de ses comptes, et rabattu de la requeste d'iceux, par tout où il appartiendra.

XII. Cassant, revoquant et annullant, comme nous cassons, revoquons et annullons toutes provisions, commissions et dons cy-devant faicts desdicts Offices à autres qu'à ceux que Nous en ferons pourvoir en conséquence du présent Edict, et tous dons de nostredict droict, tant impétrez qu'à impétrer, par quelques personnes et pour quelque cause et occasion que ce soit, dérogeant pour cet effet à iceux, et aux vérifications qui en pourroient avoir esté faictes, pour le préjudice que lesdicts dons ont jusques ici apporté au bien et commodité que l'ouverture et travail desdictes Mines devoit rendre à Nous et à nos subjects.

XIII. N'entendons toutefois en ceste révocation générale comprendre le contract par Nous faict au mois de pour nos Mines de nostre Duché de Guyenne, haut et bas pays de Languedoc, pays de Labourt, ensemble les autres contracts passez en nostre Conseil, et depuis ratifiez par Nous, ni les commissions donnéez par le Sieur de Beringhen, suivant le pouvoir qu'il en a eu de Nous: Ainsi voulons qu'ils soient observez et entretenus de poinct en poinct selon leur forme et teneur. Pourveu toutefois que les Impetrans des Commissions du dit Beringhen, prennent nouvelle commission et réglement dudict Grand-Maistre, et satisfassent en tout ce qui leur sera par lui ordonné.

XIV. Pourra le dict Grand-Maistre faire faire et passer tous Contracts et Marchez d'acquisition de fonds de Terres, Maisons, Moulins, Martinets, Bois : faire construire tous Edifices et Maisons, achepter tous ustenciles et outils qu'il jugera nécessaires, ordonner des payemens, ouvriers, chartiers, voicturiers, messagers, et autres personnes qu'il conviendra employer pour faire travailler auxdictes Mines précieuses et austres pour le bien de nostre service, pourveu que que le fonds en soit pris sur ce qui nous reviendra desdictes Mines, et non ailleurs.

XV. Lesquels Marchez, Baulx, et Ordonnances ci-dessus, et tous Règlemens que fera ledict Grand-Maistre, suivant lesdictes Ordonnances, Nous avons deslors comme dès à présent, et dès à prèsent comme deslors, vallidez, auctorisez, vallidons et auctorisons par cesdictes présentes, ensemble les quittances et payemens qui en seront faicts pourveu que le tout soit bien et deuement controollé, et que le Receveur Général ait faict vérifier son Estat au vrai par le dict Grand-Maistre.

XVI. Et d'autant qu'il seroit impossible, tant audict Grand-Maistre et à son Lieutenant, Controlleur Général et Greffier desdictes Mines, d'estre en un mesme temps en tous les lieux auxquels leur présence seroit nécessaire pour notre service et le deub de leur charge. Nous avons permis et permettons auxdicts Grand-Maistre, Controolleur et Greffier, de commectre et subdeleguer en leurs charges personnes resseans, capables et solvables, aux taxations extraordinaires que le dict Drand-Maistre verra et jugera en sa loyauté et conscience estre raisonnable, leur donner selon les occasions et pour le temps qui s'en offriroit.

XVII. Et suivant lesdicts Edicts, Ordonnances, Déclarations et Réglements, *permettons à toutes personnes de quelque estat et conditions qu'ils soient, de rechercher et travailler auxdictes Mines et Minières*, ou eux associer et prendre associez pour ce faire aux conditions ci-dessus, et des Contracts qui leur en seront passez, sans qu'ils puissent pour ce estre dicts déroger à Noblesse, ni à aucunes dignitez et qualitez qu'ils ayent, en nous prestant par les Epayeurs et affineurs, le serment accoustumé entre les mains dudict Grand-Maistre, ou l'un de sesdicts Lieutenans Généraux ou

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particuliers en son absence, appellé le dict Controolleur Général, ou l'un de leurs Commis.

XVIII. *Seront iceux Entrepreneurs et* GENS QUI FERONT LA *recherche desdictes Mines, tenus*, aussi-tôt qu'ils en auront découvert quelqu'une, d'en advertir le Grand-Maistre, *lui apporter ou envoyer l'Essai et Eschantillon qui* en aura esté fait, le lieu, Province et Paroisse où ladicte Mine sera assise, *afin de prendre de lui reglement avant que d'y pouvoir faire travailler.*

XIX. Et pour prévenir tous abus, le dit Controolleur général ou ses Commis tiendront bon et fidèle Registre des noms, lieux et pays, de la naissance et demeure de chaque personne qu'ils employeront, et en quelle qualité, et quels gaiges ou journées, l'arrivée de chacun des ouvriers, les jours et journées qu'ils travailleront, les payemens qui leur seront faits ; ce qui sera fait de jour en jour, de sepmaine en sepmaine, de mois en mois, et d'an en an. Ensemble tous les marchez, achapts et acquisitions qu'ils feront, de quelque chose que ce soit pour servir aux Mines, et de tout ce qu'ils en tireront, tant affiné que non affiné.

XX. Ne pourront lesdicts entrepreneurs et gens qui feront la recherche desdictes Mines, vendre ou faire vendre aucuns Métaux provenans desdictes Mines, sans la marque dudict Grand-Maistre.

XXI. *Et afin que les Mines et Minières puissent estre prises* PAR TOUTES PERSONNES QUI EN AURONT LA VOLONTÉ, et avec toutes les assurances requises, Nous *avons dict et declaré, disons et declarons qu'ils ne pourront estre déposez* ni leurs associez, successeurs et ayans cause, des Mines qu'ils travailleront ou feront travailler sans discontinuation, en payant et satisfaisant par eux aux conditions de leurs contracts et réglements qui leur auront esté baillez par le dict Grand-Maistre.

XXII. ET POUR OBVIER ET ÉVITER AUX DIFFÉRENDS *qui pourroient intervenir* ENTRE LES PROPRIETAIRES *des héritaiges*, auxquels se trouveront aucunes desdictes Mines, et LES ESTRANGERS *ou autres qui les voudroient ouvrir et travailler*, NOUS VOULONS ET TRÉS-EXPRESSÉMENT ENJOIGNONS par ces présentes QUE DES PROPRIETAIRES qui auront dans leurs terres, héritaiges et possessions des Mines ci-dessus non-exceptéez, ET QUI LES VOUDRONT OUVRIR, NE LE PUISSENT FAIRE *sans envoyer premièrement devers ledict Grand-Maistre prendre reglement de lui.*

XXIII. Permettons auxdicts Maistres, Entrepreneurs et Ouvriers, travailler et faire travailler auxdictes Mines et Minières, sans aucune discontinuation à cause des Festes solennelles, en gardant les Saints Dimanches, Festes de Pasques, Pentecoste, l'Ascension et les Festes-Dieu, les quatre Nostre-Dame, des 12 Apostres, des 4 Evangelistes, la Feste de tous les Saincts, celle de Noël et les Festes des Paroisses où lesdictes Mines sont assises, et deffendons très-expressément à tous nos Justiciers, Prélats et autres Officiers et Subjects de les troubler en travaillant les autres Jours et Festes, d'autant que s'ils estoient troublez, cela causeroit trop de perte et de dommaige ausdicts Entrepreneurs et interest au public.

XXIV. Et pour ce que ci-devant lesdictes Mines ou Minières ont esté délaisséez au moyen des troubles qui ont esté donnez aux Entrepreneurs et Ouvriers d'icelles, Nous avons interdit et deffendu, interdisons et deffendons à tous Juges quelconques la cognoissance des différends qui interviendront à cause desdictes Mines, circonstances et deppendances, entre quelques personnes que ce soit, en première instance, et icelle avons de rechef attribué et attribuons au dict Grand-Maistre et susdict Lieutenant Général, pour les juger diffinitivement, appelez avec eux des Juges en nombre suffisant, suivant l'Ordonnance et le Substitut de nostre Procureur Général du Siége au ressort duquel se feront les ouvertures d'icelles Mines, quand le cas y

écherra, et par appel Nous les avons renvoyez et renvoyons en celle de nos Cours du Parlement au ressort de laquelle seront assises lesdictes Mines.

XXV. Enjoignons très-expressément à tous nos Lieutenans généraux, Seigneurs, tant Ecclésiastiques ayant justice, que temporels, de prester auxdicts Officiers, Entrepreneurs et à leurs Commis et Associez tout confort, assistance et telle faveur que requis en seront et que besoing sera, à peine de tous despens, dommaiges et intérests des parties interessées, et de faire en leur pouvoir inviolablement garder et observer le contenu en ces Présentes, sans souffrir qu'il y soit contrevenu sur les mêmes peines, et de privation de leurs dicts droicts et justice.

XXVI. Et afin que soubz prétexte de ces Présentes, ceux qui ont jouy desdictes Mines ne soient travaillez, Nous leur avons quitté et remis, quittons et remettons entièrement tout ce qu'ils nous peuvent devoir du passé, jusques au jour et datte de cesdictes présentes, pourveu qu'ils ne soient refusans de payer ce qu'ils devront par ci-après. Et qu'ils viennent prendre réglement et pouvoir dudict Grand-Maistre. Ce que nous leur enjoignons tres-expressément faire, à peine d'estre de tous privez desdictes Mines, suivant la dite Déclaration du 26 Mai 1563, et d'estre contrainets au payement entier de ce qu'ils doivent de nostre droict à cause du passé, et d'être chastiez comme usurpateurs de nos droicts de Souveraineté.

XXVII. Enjoignons à nosdicts Procureurs-Généraux et leurs Substituts, qui seront sur ce requis de la part desdicts Officiers Entrepreneurs et leurs Commis et Députez, de poursuivre et requérir l'entière exécution des Présentes et payement de nostrediet droict: Ensemble tous nos Lieutenans Généraux, Gouverneurs de nos Provinces, Villes, Ports, Ponts, Péages et Passaiges, Baillifs, Seneschaux, Prevosts, Consuls, Maires et Eschevins, Capitouls, Jurats et Communautez, de prester auxdicts Officiers Entrepreneurs tout confort, conseil, main-forte, et telle faveur que besoing sera, et requis en seront pour l'entière exécution des Présentes, et à tous Huissiers ou Sergens, sur peine de suspension de leurs charges et privation s'il y eschet, de faire tous exploicts requis et nécessaires pour l'exécution des Mandemens, Sentences, Jugemens et Ordonnances desdicts Grand-Maistre, et ses Lieutenans Généraux, Commis et Députez, sans pour ce demander aucunes Lettres de *placet*, *visa ne pareatis*, dont et de ce faire Nous l'avons relevé et dispensé, relevons et dispensons. Mandons et commandons à tous nos justiciers, officiers et subjects à lui en ce faisant obéir.

Si donnons en mandement à nos amez et féaux Conseillers les Gens tenans nos Cours de Parlement, Chambres de nos Comptes, Cour des Aydes, Généraux de nos Monnoyes, Chambre de Nostrediet Trésor, Trésoriers de France et Généraux de nos Finances par tout nostrediet Royaume, Grands-Maistres de nos Éaux et Forests, Gens tenans nos Siéges Présidiaux, Baillifs, Seneschaux ou leurs Lieutenans, Prevosts, et autres nos Justiciers et Officiers qu'il appartiendra, que ces Présentes ils fassent lire, publier et enregistrer, et le contenu en icelles garder et observer selon leur forme et teneur, sans y contrevenir, ny souffrir y estre contrevenu en quelque sorte et manière que ce soit, cessant et faisant cesser tous troubles et empeschemens au contraire : Car tel est nostre plaisir, nonobstant oppositions ou appellations quelconques, pour lesquelles et sans préjudice d'icelles, ne voulons estre différé, en ayant envoyé la cognoissance à nosdictes Cours, nonobstant aussi toutes Ordonnances, dons, priviléges, octrois, exemptions, Edicts, Arrests, Constitutions, Usages ou Statuts de pays et Coustumes, restrinctions, Mandemens, deffenses et Lettres à ce contraires. Auxquelles et aux dérogatoires des dérogatoires y continuës, Nous avons dérogé et dérogeons par cesdictes Présentes, attendu qu'il est question du restablisse-

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ment et conservation des droicts de nostre Couronne, Souveraineté et Majesté Royale. Et pour ce que d'icelles on pourra avoir affaire en plusieurs et divers lieux, Nous voulons qu'au *vidimus* d'icelles soubz Scel Royal, ou deuëment collationné par l'un de nos amez et féaux Notaires et Secrétaires, ou Soubz Seel authentique, foy soit adjoustée comme au présent Original. Auquel afin que ce soit chose ferme et estable à toujours, Nous avons fait mectre nostre Scel, SAUF EN AUTRES CHOSES NOSTRE DROICT ET L'AUTRUY EN TOUTES. Donné à Fontainebleau au mois de Juin, l'an de grâce mil six cens un, et de nostre Règne le douziesme. Signé, HENRY. Et plus bas, par le Roy, DeNeufville.

Leu, publié, registré, ouy le Procureur Général du Roy, du très-exprez commandement du Roy, réitéré par plusieurs Lectres de jussion, sans que le Grand-Maistre et son Lieutenant puissent par provision ny autrement, procéder à l'exécution de leurs jugements, soit contre les Propriétaires, sur l'ouverture de la terre, et autres en conséquence, au préjudice des appellations interjectées, à peine de tous despens, dommages et interests. A Paris en Parlement le derrier Juillet mil six cens trois.

Signé, VOYSIN.

Leu, publié et registré, semblablement en la Chambre des Comptes, ouy le Procureur Général du Roy, aux charges et ainsi qu'il est contenu au Registre de ce jour, le treiziesme d'Aoust l'an mil six cens trois.

Signé, DE LA FONTAINE.

Inferences from that Ordinance.

Sec. 94.—The first article of that Ordinance asserts no other claim than the right (*droict*) to one-tenth refined in all Mines (*pur et affiné en* TOUTES *les dictes* MINES). Can language shew more clearly than do the words of that Ordinance, recited in the "DE LÉRY-*Patent*," that no Mines of any description belong to the King, and that the Royal rights are restricted to the one-tenth Royalty? The second article remits the Royalty on salphur, saltpetre, iron and other substances, and assigns for reason "*pour gratifier nos bons "subjects propriétaires des lieux.*"

King's right a royalty only.

Owner of soil also owner of Mine.

Who else than the owner of the remaining nine-tenths of the Mine could be "*gratifié*" by the remission of the one-tenth Royalty? Who else than the debtor of the Royalty, the owner of the soil, could profit by the remission of the Royalty? The "*propriétaires des lieux*", or owners of the soil, whom the King was thus pleased to "*gratifier*", must have thus been, in the opinion of the Sovereign, owners of the Mines on their lands. And yet there are men, more loyal than the King, more catholic than the Pope, who have attributed, to the sovereign, rights which he thus positively repudiates all claim to!! But more of this hereafter.

Sec. 95.—Articles 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 have no special bearing on this case, and may therefore be passed over without notice. But articles 17 and 18, which allow all persons to search for, and work Mines, but enjoins on them to obtain the Royal permission before opening the mine, must certainly be held to apply to the owner of the soil; he is surely somebody, and must be held to be included in the words "*all persons.*" The same is to be said of articles 19, 20 and 21; they do not affect this case.

Ownership of Mines. *Authorities.* Henry IV.

Owner allowed to work Mines on his own land.

Art: 22, in the most express terms gives to the owner of the soil, the right to work the Mines on his lands in preference to all others, subject to the condition of applying to the Master General of Mines for the Royal permission;

XXII. Et pour obvier et eviter aux differends *qui pourroient intervenir* entre les Proprietaires *des héritaiges*, auxquels se trouveront aucunes desdictes Mines, et les estrangiers *ou autres qui les voudroient ouvrir et travailler.* Nous voulons et tres-expressement enjoignons par ces présentes que des Proprietaires qui auront dans leurs terres, héritaiges et possessions des Mines ci-dessus non-exceptéez, et qui les voudront ouvrir, ne le puissent faire *sans envoyer premièrement devers ledict Grand-Maistre prendre réglement de lui.*

The remaining Articles have no bearing on this case, and may therefore remain unnoticed.

Sec. 96.—There is, however, about the Ordinance of Henry IV, a feature worthy of notice; it recites certain Letters of the Kings, his predecessors, namely François I, Henry II, François II and Charles IX; and while (see preamble and article 1) it confirms so much of the acts of his predecessors as laid claim to the Royalty, and sought means towards the collection of that Royalty, the Ordinance in question (Article 12) revokes precisely those parts of the Letters of his Predecessors as had provoked the successful resistance of the Parliaments of France against the enregistration of the Royal Letters. The Defendants in this case having, at P. 34 of their Factum, laid some stress upon the grants thus revoked by Henry IV, it becomes important to shew that those grants never obtained their execution in France, and were successfully resisted by the Parliaments, and never, for a moment even, had the force of Law in France.

Revocation of *de Roberval and St. Julien-Grants.*

OWNERSHIP OF MINES. *Authorities.* Private grants relied on by Defendants, viz: to

Sec. 97.—The Grants thus insisted on by the Defendants are

1° *de Roberval*, and

Firstly,—*Letters-Patent* of September, 1548, by HENRY II, favor of the *Chevalier de la Roque, Seigneur de Roberval*, granting to that gentleman an exclusive right to all the Mines in the Kingdom for the period of nine years; that grant is merely noticed by *Blanchard* (see P. 77 of this Factum), but is reproduced at length, by *Isambert*, vol. XII, P. 57 (see P. 84 of this Factum).

2° *de St. Julien.*

Secondly,—*Letters-Patent* of the 29 July, 1560, by FRANÇOIS II, in favor of *M. de St. Julien*, granting to him, for a limited time, all the Mines of the Kingdom, only noticed by *Blanchard & Isambert.* (See P. 78 & 84 of this Factum).

Both grants are reproduced entire in the work already quoted, MINES ET MINIÈRES, the first at P. 42, and the second at P. 95. They are also reproduced at length, the first at P. 28, the second at P. 48, of LAMÉ-FLEURY, *Législation Minérale.*

Error of Defendants in stating those two grants to have been enregistered.

Sec. 98.—In noticing those grants, the Defendants have stated, at P. 34 of their Factum, that the grants had been "*toutes deux enrégistrées.*" That is not the case, as may be seen on referring to *Isambert*, *Blanchard*, and MINES ET MINIÈRES, *loc. cit.* So also *Lamé-Fleury*, who wrote in 1857, with all the lights of modern research, and who had further made the most minute enquiry in this direction, says, at P. 28, note 2: "Les tables du Parlement de Paris ne "mentionnent pas l'enregistrement des lettres de 1543, et il "n'est indiqué nulle part." With regard to the *Letters-Patent* of the 29 July 1560, they were not enregistered in the Parliament of Paris until the 9 May 1562, when CHARLES IX, by *Letters-Patent*, dated, as some say the 6 July 1561, others the 11 July 1561 (most probably the latter date), had modified the *Letters-Patent* of 1560, by restricting *de St. Julien's* grant to the Royalty of one-tenth only, as will be seen hereafter.

Origin of resistance of Parliaments to enregistration of those two grants.

Sec. 99.—The *de Roberval*-GRANT is, to say the least of it, a most extraordinary document, giving away, in full ownership, to *de Roberval*, for the space of nine years, all

the Mines of the Kingdom not then actually being worked, with power to expropriate the owner of the soil by paying " pour le regard de la valeur desdites *terres seulement, et* NON " DES MYNES y estans." It does not therefore surprise us that the Parliaments, composed of high-minded and honorable men, who had sworn to preserve the existing Laws of the Kingdom, should have, with the single exception of the Parliament of Grenoble, successfully braved the anger of HENRY II and of his successors, and persistently refused to enregister either the Grant, or any one of its confirmations, although the Kings repeatedly directed *Letters-Patent* to them by name commanding them to enregister the Grant. For a spirited remonstrance, by the *gens du roi*, by the mouth of SÉGUIER, *avocat du roi*, when *de Roberval* unsuccessfully presented his *Letters-Patent* for enregistration in the Parliament of Paris, see *Lamé-Fleury*, P. 47, note 1.

OWNERSHIP OF MINES. *Authorities.*

Sec. 100.—The *de Roberval*-GRANT, was no sooner made than we find *de Roberval* again asking and obtaining from the Sovereign, on the 10 October, 1552, a ratification of the Original Grant, on the ground that his first grant was *insufficient*, (see P. 54 MINES ET MINIÈRES) ! The fact that this renewed g ant makes de Roberval the sole judge of all mining law-suits, and expressly prohibits the Parliaments and the other Courts of France from hearing any mining law-suit, and orders all notaries to refrain from receiving any deed having reference to mining, without de Roberval's consent in writing, would seem to imply that the insufficiency of the first *de Roberval*-GRANT arose less from ambiguity in its language than from the hostility of the Parliaments and Courts (see P. 72, 73 & 76 of MINES et MINIÈRES). That ratification of the *de Roberval*-GRANT is further remarkable for the confirmation it contains of the Ordinance of LOUIS XI, already reproduced entire at P. 93 of this Factum (See P. 56 of MINES ET MINIÈRES). That view of the case becomes something more than mere surmise, when we find the Sovereign stating in that ratification of the first grant :

Royal confirmation of *de Roberval*-GRANT, not enregistered, and why.

" Et pour ce que ce seroit chose trop difficile et prolixe icelles : enthé-
" riner en tous les endroicts susdits, considéré la grandeur du Royaume et
" étendue des pays de nostre subjection, voulons et entendons que le seul
" enthérinement faict en nostre Grand Conseil tant des premières Lectres
" que des Présentes (néanmoins que les premières ne soient audict Conseil

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" adressantes) suffise, comme si en toutes Cours et Jurisdictions elles estoient " veues et enthérinées, esquelles Cours, ou en partie d'icelles ledict de " Roberval et ses ayans cause, les pourront faire enthériner, *si bon leur* " *semble*, POUR PLUS GRANDE SEURETÉ. Néanmoins n'entendons iceux y " estre contraincts, s'ils ne veulent, mais seulement en nostre Grand Con- " seil." (See P. 86 of MINES ET MINIÈRES).

Grenoble, Only Parliament that yielded.

Sec. 101.—Even that decisive declaration of the Sovereign did not induce the Parliaments to enregister the grants, and did not give to de Roberval possession of the Mines; the only Parliament that yielded at last was that of Grenoble, to which Letters-Patent were a third time specially directed (See P. 85 of MINES ET MINIÈRES).

Let us hope that the Parliament of Grenoble yielded to none of those *convincing arguments* to which M. Winchell, late Manager of the *de Léry-Company*, has threatened to resort in this case!

Fourth attempt of *de Roberval* failed.

Sec. 102.—So little progress had *de Roberval* made towards having his grant recognized, that we find him again obtaining, from the same Sovereign, on the 16 september, 1557, other Letters-Patent on the same subject (see P. 88 of MINES ET MINIÈRES).

For the fourth time again, *de Roberval* failed; and the Sovereign who made, and the subject who received, that extraordinary grant, died without seeing it receive effect.

Renewed attempt by *de St. Julien.*

Sec. 103.—On the advent of FRANÇOIS II to the throne, *M. de St. Julien*, who appears to have been related to *de Roberval*, and to have been concerned with the latter in the grant, deemed the moment propitious for another attempt to have the *de Roberval-Grant* recognized. *M. de St. Julien*, on the 29 July, 1560, obtained, from FRANÇOIS II, *Letters-Patent*, reciting the *de Roberval-Grant* and the several ratifications of it hereinbefore adverted to (P. 95 of MINES ET MINIÈRES), and making, to *de St. Julien*, the same grant as HENRY II had made to *de Roberval*, and moreover assigning, to *de St. Julien*, the King's Royalty of one-tenth on all Mines, during four years.

Failure of that attempt.

Sec. 104.—*De St. Julien* appears to have had no better success than *de Roberval*, since we find the former

seeking and obtaining, from CHARLES IX, on the 6 July, 1561 (*Lamé-Fleury*, P. 48, note 1, says, perhaps with reason, the 11 July 1561—see P. 109 of MINES ET MINIÈRES), *Letters-Patent*, enjoining on all the Parliaments of France to allow *de St. Julien* to take possession of the King's Royalties of one-tenth for the space of four years, as set forth in the Letters-Patent of FRANÇOIS II. This time *de St. Julien* was fortunate enough to secure the enregistration, in the Parliament of Paris, of the Letters Patent of CHARLES IX, probably because those Letters merely assigned to *de St. Julien* the King's Royalties, and the Parliament conceived that the Sovereign might be allowed to do as he liked with his own ; but the Parliament of Paris and other Parliaments still refused to enregister the Original Grant, which purported to confer on *de Roberval* all the Mines in the Kingdom.

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Renewed attempt; this time a grant of the Royal tenth only.

De St. Julien, after obtaining that ratification of the grant as to the Royalty, was sworn in (see P. 114, *in fine* of MINES ET MINIÈRES) as "*Général Superintendant aux Mynes du Royaume*" before the Chancellor, on the 11 March 1562. The fact of his having been thus placed on a footing inconsistent with the idea of his having any proprietary rights in the Mines he was about to superintend, as an Officer of the Crown, may have powerfully influenced the Parliament of Paris towards the enregistration of the *Letters-Patent* of CHARLES IX of July 1561, and of the *Letters-Patent* of FRANÇOIS II, of July 1560. The enregistration took place by an arrêt of the 9 May 1562 (see P. 115 of MINES ET MINIÈRES). The *Arrêt* (see P. 48, note 1, of *Lamé-Fleury*) concludes thus: "Pour jouir par le dit *de St. Julien*, impétrant, de "l'effet contenu en icelles, et *par provision seulement*, et *jusques* à ce que par le Roi ou la dite CHAMBRE, *autrement* en soit *ordonné*" (see also P. 121 of MINES ET MINIÈRES). Observe the mental reservation of the Parliament of Paris, as hidden in that *Arrêt* of enregistration ; *de St. Julien* might enjoy his grant provisionally, until the King, or the *Parliament* should order otherwise. On the very first complaint, then, that might be brought before it, the Parliament reserved the power of scrutinizing the grant more closely, and perhaps of *ordering otherwise*. That the Parliament did afterwards *order otherwise*, may be seen at section 107. It was, perhaps, to turn aside the storm about to burst upon him from the Parliaments, that within a month from the date of the *Arrêt*, in the very next *Letters-Patent*, addressed to the Parliament of Grenoble, *de St. Julien* was styled "*Superintendant* et

De St. Julien sworn in as superintendent, a position incompatible with the idea of ownership.

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" Général Réformateur, estably sur les Mynes de nostre " Royaume " (see next section).

The King and de *St. Julien* desist from claim to mines.

Sec. 105.—*M. de St. Julien*, and the Sovereign alike began to tire in their attempts to overcome the resistance of the Parliaments and Courts to that bare-faced invasion of private rights ; and we find Charles IX, on the 1st June, 1562, with the assent of *de St. Julien*, receding from the position assumed by his two predecessors, Henry II, and François II, on this point. In Letters-Patent of that date, we find Charles IX, conforming to the Ordinance of his predecessor Louis XI, from *Montilz-lès-Tours*, and, for the first time, styling *de St. Julien* merely as " *Superintendant et Général Réformateur, estably sur les Mines de nostre Royaume* " and renewing the gift, for four years, of the one-tenth Royalty (see P. 115 of Mines et Minières). The Parliament of Paris also enregistered those Letters, but still persisted in refusing to enregister the Original Grant to *de Roberval* (See P, 122 of Mines et Minières).

King merely asserts right to a royalty of one-tenth.

Sec. 106.—At length the Sovereign and *de St. Julien* seem to have resigned themselves to acquiescence in the views manifested by the Parliaments and Courts of France upon the question of Royal rights in Mines ; for, on the 26 May 1563 (See P. 124 of Mines et Minières, and P. 52, note 1, of *Lamé-Fleury*), we find Charles IX, declaring by Letters-Patent that he has been advised by his Council that his rights in Mines consist in a Royalty of one-tenth on all Mines theretofore discovered, or that might thereafter be discovered, and reciting that certain persons contest his right to any Royalty on the Mines theretofore discovered. The King reasserts his right to that Royalty, but saves the rights of those to whom his predecessors or He might have previously donated the Royalty (See P. 127 of Mines et Minières).

Such also is the express declaration of *Arrêt* of enregistration.

Those *Letters-Patent* were enregistered on the 1st July 1563 (see P. 59, note 1, of *Lamé-Fleury*). The *Arrêt* of enregistration is even more remarkable than that which accompanied the Letters-Patent of 1560 and 1561 (see section 103) ; the *Arrêt* contains, by inference, a positive declaration that the King's rights in Mines are restricted to the one-tenth royalty ; the words are : " Pour *jouir* par l'impétrant du *don*

" à lui fait du *dixième*, pour le temps et terme de quatre ans, " *pour le regard des droits au roi appartenant*, et est connu " lui concerner et appartenir ès métaux et minérales de son " royaume." OWNERSHIP OF MINES. *Authorities.*

At length the storm burst upon *de St. Julien*, and he found his claims repudiated by nearly every judicial Tribunal in the country ; in that strait, he appealed to the Sovereign, and obtained *Letters-Patent* noticed in the next section.

Sec. 107.—Thenceforth the struggle between *de St. Julien*, as representing the Sovereign, on the one hand, and the Parliaments and Courts of France, as the guardians of private rights, on the other hand, was removed to new ground, the only question then being, whether certain Mines theretofore opened were subject to the Royalty even ; so much so, indeed, that, on the 25th September, 1563 (see P. 128 of MINES ET MINIÈRES), we find CHARLES IX, in Letters-Patent, reciting " that FRANÇOIS II had appointed *de St. Julien* as " GRAND MAISTRE, SUPERINTENDANT ET GÉNÉRAL RÉFORMATEUR " DES MINES to collect the one-tenth Royalty on all Mines of " GOLD, SILVER, *copper*, *tin*, *lead*, *Mercury*, *steel*, *iron*, *&c.*, *&c.*, " and that the Parliament of Paris had only *provisionally* " invested *de St. Julien*, with the collection of the Royalty, " and that recently, under colour of an *Arrêt*, the same Parlia- " ment of Paris had prohibited *de St. Julien* from collecting " the Royalty from certain persons named in the *Arrêt*, and " that the Parliament of Grenoble had, in like manner, prohibi- " ted *de St. Julien*, and that a similar prohibition to *de St.* " *Julien* had been made by the Courts of Beaujollais in refe- " rence to the Mines of Jou." By those Letters-Patent the King removed, from the ordinary Tribunals, to His Council the decision of appeals on all contestations between *de St. Julien* and the subject as to the Royalty. The Parliament of Paris so far obeyed the King as to cause those Letters to be published by their *Huissiers*, but refused to enregister the Letters-Patent. King's right to the Royalty even, on certain Mines, disputed by Parliaments. King appoints *de St. Julien*, *Superintendent of Mines.*

Sec. 108.—The struggle was too much for *de St. Julien*, since we find by Letters-Patent of CHARLES IX, dated the 28th September, 1568 (see P. 137 of MINES ET MINIÈRES, and P. 61 of *Lamé-Fleury*) that *de St. Julien* resigned the office of Superintendent of Mines into the King's hands, in favor of *Maistre Anthoine Vidal, Seigneur de Bellesaigues.* *De St. Julien* abandons claim even to royalty and resigns office of Superintendant in favor of *Vidal.*

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By those Letters, the King makes the remarkable declaration that the position of *de Roberval*, with regard to the Mines of the Kingdom, had only been, like *de St. Julien's*, that of "Superintendent of Mines"; and the King appoints *Vidal* to the vacancy left by the resignation of *de St. Julien*. The King defines his rights in Mines of all sorts, *gold, silver, &c., &c., &.*, to be "*nostre dict Droict de "dixiesme denier Royal.*" Though the Sovereign had so far receded from the position formerly taken up by two of His Predecessors as to merely claim a Royalty, where they had claimed the right to dispose, at will, of all the Mines in the Kingdom, yet *Vidal* was not more successful than *de St. Julien* had been; and the Parliament of Paris refused to enregister those Letters-Patent (See P. 143 of MINES ET MINIÈRES).

Error of *Lamé-Fleury* in supposing *Vidal's* appointment to have been enregistered.

Lamé-Fleury, at P. 61, note 2, seems to think that the *Letters-Patent*, appointing *Vidal* were enregistered in the Parliament of Paris, in consequence of other *Letters-Patent* of the 28th September 1569, requiring the Parliaments to enregister *Vidal's* appointment; *Lamé-Fleury*, nevertheless, adds: "cet arrêt n'a point été trouvé aux archives de l'empire." *Lamé-Fleury* has fallen into error in supposing the enregistration to have taken place, for, at P. 143 of MINES ET MINIÈRES, we find *Letters-Patent* of HENRY III (referred to in this and the next sections), expressly stating, in 1574, four years after the pretended enregistration of the first *Letters-Patent*, that *de St. Julien* had not presented the first *Letters* for enregistration, and that he had been prevented by the wars from doing so.

HENRY III, in the Letters of the 21 October, 1574, states:

HENRY, etc., etc., etc. SALUT.

"Sçavoir faisons, que pour la bonne parfaite et entière confiance que "nous avons de la personne de nostre cher et bien aimé Anthoine Vidal "********** à icelluy, Nous **** donnons et octroyons l'estat et "office de Grand-Maistre, Général Réformateur et Superintendant de "toutes les Mines et Minières de ce Royaume. ********** SI DONNONS EN MANDEMENT, par cesdites présentes, à nos amez et féaux les gens "de nos *Cours de Parlements de* PARIS, Tholoze, Bordeaux, ******** "*** de tout le contenu *èsdites Lettres de nostre dit feu Seigneur et frère*, "et de ces présentes ils facent, souffrent et laissent le dit Vidal ****** "tout ainsi et en la propre forme, *si lesdites premières Lettres* avaient esté "par nous octroyées et expédiées, *et* ENCORE QU'ELLES NE LEUR AYENT ESTÉ "PRÉSENTÉES *dedans l'an de leur impétration*, NY DEPUIS, *ce que n'a peu* "*faire ledit Vidal, à cause des guerres et autres empeschemens.*"

It is plain, that if the first Letters appointing *Vidal* had been enregistered in 1570, HENRY III would not have stated,

in 1574, that they had not been enregistered. This accounts for the fact stated by *Lamé-Fleury*, P. 61, note 2, that the *Arrêt* of enregistration could not be found in the Archives of the Empire.

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Sec. 109.—As HENRY II and FRANÇOIS II had died without seeing their efforts to invade private rights crowned with success, so CHARLES IX failed in his attempt to enforce even a Royalty on certain Mines of the Kingdom; and we find his Successor, HENRY III, on the 21 October, 1574, issuing Letters-Patent confirming *Vidal's* appointment as Superintendent of Mines, with jurisdiction to decide all mining law-suits (See P. 143 of MINES ET MINIÈRES).

Vidal's appointment confirmed by King.

Persistent refusal of Parliaments to enregister those Letters of the Kings.

The Parliaments would no more enregister those Letters-Patent than they had enrolled the previous Letters; and there the matter rested until the promulgation, by HENRY IV, in June 1601, of that great Ordinance, which the Plaintiffs have reproduced entire, at P. 103 *et seq :* of this Factum. It was most probably the great abuses resulting from the jurisdiction exercised in mining law-suits by the Superintendent of Mines that led to the successful resistance by the Parliaments and Courts of France to the two grants under consideration, and brought about the Edict of HENRY IV; for we find that Sovereign, in the preamble of that Edict, stating of that jurisdiction :

Probable cause of that successful resistance.

> " En ce que lesdicts officiers, deppendans entièrement de lui, lui adju-
> " gèrent plustot ce qu'il désiroit, que ce qui lui appartenoit, dont se seroient
> " ensuivies plusieurs plaintes en nos Cours de Parlement."

Sec. 110.—Such is the history of those two grants, upon which the Defendants have laid so much stress, as establishing the right of the King, not to a Royalty, but to the Mines themselves. We have shewn how completely they prove the reverse. But that were almost unnecessary, since the Grants were merely so many Letters-Patent, which no more establish what the Law of the Kingdom was, than does the " DE LÉRY-*Patent* " prove the Defendants to be owners of the gold and silver on the Plaintiffs' lands. Under the French system, Edicts, Ordinances and Declarations *alone* defined the Law; Letters-Patent were susceptible of opposition, and had no effect until they had been enregistered in the Parliaments,

Those two grants so much relied on by the Defendants prove the contrary of their pretensions.

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parties intéressées ouies, ou dûment appelées, as we have already shewn at P. 54 of this Factum.

Strange feature of those special grants that shews thm not to have been declaratory of the Law.

Sec. 111.—In laying stress, at P. 34 and 76 of their Factum, upon those abortive attempts at granting awaʃ to *de Roberval, de St. Julien* and *Vidal* Mines on private lands, the Defendants have sedulously kept from view a feature of the Mining policy sought to be inaugurated by the monarchs of that time, a feature which shews conclusively that no one, not even the monarchs themselves, believed those grants to be declaratory of the Law of the Kingdom as to Mines. On the 10 May, 1562, the very next day after the enregistration by the Parliament of Paris of de *St. Julien's* grant of the King's royalty on *all* the Mines of the Kingdom, CHARLES IX, the Sovereign who had confirmed *de St. Julien's* grant and caused its enregistration, issued other *Letters-Patent*, granting *all the* Mines of the Kingdom, not then actually worked, with donation of the King's royalty on all the Mines without exception, for the space of nine years, to *Etienne de Lescot ;* that grant is identical in its terms with, and refers to, the *de Roberval-Grant*, and appoints *Lescot* successor to *de Roberval*, just as, in *de St. Julien's* grant, the latter is declared to be the successor of *de Roberval* (see P. 54 of *Lamé-Fleury*). Under the circumstances, of *de St. Julien* and *de Lescot*, one or other must have been the anti-Pope ! The Parliaments refused to enregister *de Lescot's* grant; *de Lescot* contrived, nevertheless, to obtain, on the 12 August, 1564, other Letters from CHARLES IX, specially requiring the Parliaments to enregister the *de Lescot*-GRANT. The Parliament of Paris, on the 2 March, 1565, enregistered *de Lescot's* grant, with the proviso : " Pour " *jouir* par le dit *de Lescot* de l'effet contenu en icelles, *en la* " *même forme et manière* et sous les *mêmes modifications* que " permis a été à ceux qui ont par ci-devant obtenu *pareilles* " *lettres* et par les arrêts donnés sur icelles."

Here, again, the Parliament of Paris, as in the case of the *de St. Julien*-GRANT, invested *de Lescot* provisonally only, and reserved to itself the right, of revoking and setting aside the grant, on the first opportunity that any judicial contestation of *de Lescot's* rights might offer. No better success seems to have attended *de Lescot's* efforts in that direction than his rivals had met with ; for, on the 10 March, 1577, while *Vidal's* grant still subsisted we find HENRY III, issuing *Letters-Patent*, reciting that *de Lescot's* Mining-works had

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been demolished and ruined, and renewing *de Lescot's* grant for ten years (See *Lamé-Fleury*, P. 63). This grant was enregistered by the Parliament of Paris with the remarkable proviso: "*Pour jouir* par l'impétrant de l'effet et contenu en icelles, "*par manière* de provision, pour le temps et terme de dix "ans, *aux mêmes charges et modifications* apposées en *sembla-* "*bles lettres, à la charge* AUSSI que le dit *Lescot ne pourra* "*fouiller* ÈS TERRES *des sujets du roi*, SINON DE GRÉ A GRÉ." (See *Lamé-Fleury*, P. 63, note 1). Here the Parliament distinctly forbids, *de Lescot* from entering on private lands without the consent of the proprietor. What clearer evidence need be required of the right of the owner of the soil, in the opinion of the highest judicial tribunal of the land, to the Mines imbedded in his soil. *Letters-Patent*, of the 28 February, 1588 (see *Lamé-Fleury*, P. 66, note 1), shew us the end of poor *de Lescot*, and substitute *François de Troyes Seigneur de la Feraudière* to *de Lescot* in the office of Superintendent of Mines, and to all *de Lescot's* privileges, and granting *de Troyes* many further privileges.

While *de Troyes* was thus being substituted to *de Lescot*, we find on referring to *Letters-Patent* of the 31 January, 1580, that *de Lescot* had already received from the Sovereign another successor in the person of *Gobet dit Allonges*, styled *Collonges* in the *Letters-Patent* (see *Lamé-Fleury*, P. 66 and notes 1, 2 and 3), *Gobet's* grant being also for the term of ten years.

The same noticed by *Lamé-Fleury* and *Gobet.*

Sec. 112.—How, in the name of common sense, can it be maintained that those *Letters-Patent* of the French Kings, some of them not enregistered at all, others of them enregistered *par provision* merely, until the Parliament should order otherwise, and with the proviso that the grantee should not enter on private lands against the owner's will, *Letters-Patent* that did not save *de St. Julien* from being prohibited by the Parliaments of *Paris*, and of *Grenoble* and by the Courts of *Beaujollais* (see MINES ET MINIÈRES, P. 128) from trespassing on private rights, *Letters-Patent*, in fine, that professed (see *Lamé-Fleury*, P. 54, note 1) to make an independent grant of all the Mines in the Kingdom, at the same time, not to *two* series of *concessionaires généraux*, as *Lamé-Fleury* says, but to three different sets of grantees, how, in the name of common sense, again we ask, can such

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Letters-Patent be viewed as declaratory of the Law, or explanatory of any thing, save the extraordinary corruption that surrounded the monarchs in those days. *Lamé-Fleury*, P. 54, note 1, qualifies those grants by saying: "Cette sorte "de parallélisme entre deux séries de concessionnaires géné- "raux des Mines de France est fort singulière-" At P. 61, note 1, *Lamé-Fleury* says again: "Il est à remarquer que ni "Charles IX, ni Henry III, bien que rappelant les charges "dont avaient été pourvus *de Roberval* et *St. Julien*, ne font "aucune allusion à *Etienne Lescot*, auquel le premier de ces "souverains avait cependant conféré, le 10 Mai, 1562, des privi- "léges analogues, dont celui-ci devait jouir après *de St. Julien*. "Inversement, on voit que Henri III ne parle en aucune "manière de *Roberval* ou de *St. Julien*, lorsqu'il confirme ces "priviléges en faveur *de Lescot*, de son associé ou de son suc- "cesseur. On lit à ce sujet, dans la préface des "*anciens* "*minéralogistes*" (by Gobet, Paris, 1779): Il ne paraît point "que ces surintendants aient eu un grand succès....L'ambi- "tion, l'avarice et l'intrigue des courtisans étaient la cause "secrète de tant de changements dans les chefs des Mines; car "*Lescot* fut pourvu pendant l'effet de la concession de *Grip-* "*pon* (*de St. Julien*).

Necessity of enregistration.

Sec. 113.—The necessity for such enregistration of all Laws promulgated by the Sovereign is clearly established by the following citations from the Nouveau Dénizart, *vbo. Enregistrement*:

"Dans l'usage, le mot *enrégistrement* s'emploie par rapport aux loix "pour signifier deux objets fort différents."

"Suivant le sens littéral, l'enrégistrement d'une loi est la transcription "sur les registres destinés à cet effet."

"Dans un autre sens, on appelle enrégistrement *l'examen et la vérifi-* "*cation* qui se fait *d'une loi nouvelle*, avant d'en ordonner la promulgation "et l'exécution."

"C'est dans l'histoire que l'on doit chercher l'origine de la vérification "d'une loi; elles nous présentent quatre époques relativement à leur "formation en France."

History of such enregistration.

Sec. 114.—*Dénizart* then proceeds to trace the history of legislation in France, and shews that, originally Laws were promulgated in great assemblies of the nation, which were termed "*Parlements et états*"; but that, eventually, the consent of the Parliaments was substituted for the

assent of the Barons, Prelates and other great personages of the Kingdom. Dénizart says : OWNERSHIP OF MINES. *Authorities.*

" Les Publicistes ne sont pas d'accord sur le temps où a commencé la " forme de législation qui subsiste aujourd'hui. Quelques uns prétendent " qu'elle remonte au temps de Philippe-le-Hardi, d'autres seulement au " temps de la captivité du roi Jean."

" Suivant cette dernière forme, le roi adresse les lois aux Cours Souve- " raines ; et ces Cours, si elles reconnoissent l'utilité de la loi et sa conformité " avec les loix fondamentales, rendent un Arrêt pour en ordonner l'exécu- " tion, soit purement et simplement, soit avec les modifications qu'elles " jugent nécessaires. Dans le cas contraire, les Cours arrêtent qu'il sera " fait des remontrances au roi, pour l'engager à retirer la loi proposée. " C'est ce que l'on appelle VÉRIFICATION DES LOIX."

Sec. 115.—*Dénizart* then cites a number of instances in which the Sovereigns themselves acquiesced in the necessity of such enregistration. The first example cited by *Dénizart* is that of *Saint* LOUIS, who thus addressed the King of England : " Plut à Dieu que nous fussions amis ; mais " *je ne* puis rien faire ni composer avec vous sans le consente- " ment de *mon baronage*, DONT AUCUN ROI *des François* NE " PEUT SE PASSER." After citing the examples of LOUIS XI, FRANÇOIS I, and HENRY IV, Dénizart cites an instance which it is well to reproduce, since it shews the style of legislation affected by the *Chancelier de l'Hôpital*, who prepared the *de St. Julien*-grant, and whom the the Defendants, at P. 34 of their Factum, are pleased to style the *célèbre Chancelier*. The *de St. Julien* GRANT was, no doubt, one of the many Letters-Patent here referred to by *Dénizart :* Acquiesced in by all the Sovereigns. Chancellor *L'Hôpital* nearly cited before Parliament for having published Laws not enregistered by Parliaments.

" *Septième exemple.*—On trouve dans le journal de *Pierre Brulard*, " conseiller au Parlement de Paris, que

" Au mois d'avril 1561, *le Chancelier de l'Hôpital* ayant fait " ès villes et bailliages de ce royaume plusieurs publications de " Lettres-Patentes, et Edits, sans qu'ils eussent été aucunement " reçues ni vérifiés en la Cour de Parlement, contre toute forme " de justice et les anciennes observances et ordonnances. . . . . " *furent en propos* à la Cour de Parlement de Paris *de lui faire* " *donner ajournement*, pour répondre de la publication des dites " Patentes et Edits, sans avoir été vérifiés, comme dit est en la " Cour de Parlement."

Sec. 116.—When the opposition to such Letters-Patent assumed so virulent a form, when the Parliament of Paris went so far as to propose impeaching Chancellor Hence *de St. Julien* abandoned his claim to Mines.

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L'Hôpital, one can readily understand how the Monarch, at length, receded from the position first taken up by him, and how *de St. Julien* also came to abandon all connection, as *Superintendent* even, with Mines, which he had once fondly hoped to control as exclusive owner thereof.

No Law, not enregistered, can be enforced.

Sec. 117.—*Dénizart*, after citing a number of Ordinances and Edicts, which have remained a dead letter, for want of enregistration, proceeds to say :

" Ces faits établissent clairement deux conditions comme devant accom-
" pagner un enrégistrement valable. Il faut 1° que la loi soit envoyée aux
" Cours, pour y être délibérée avant que d'être publiée. 2° Que la délibé-
" ration soit prise librement. Les mêmes faits annoncent que *la transcrip-*
" *tion sur les régistres,* DENUÉE *de ces conditions, est* INCAPABLE *d'autoriser*
" *l'execution de la loi.*"

So it is of Letters-Patent granting real privileges.

Sec. 118.—*Dénizart*, finally declares that Letters-Patent, granting privileges savoring of the realty, also require to be approved by the Parliaments. He states :

" Quant aux priviléges qui tiennent de la réalité, comme sont tous les
" priviléges exclusifs, ils rentrent dans la règle générale, et doivent être
" enrégistrés par tous les Parlements dans le ressort desquels on prétend en
" faire usage."

* * * * * * * * *

" D'après ce qui a été dit sur la nécessité de l'enrégistrement, on sent
" que son effet est de manifester le consentement, *sans lequel la loi ne peut*
" *recevoir une exécution légale.*"

The doctrines thus enunciated by *Dénizart*, as to the necessity for the enregistration of all Laws promulgated by the Sovereign, suffer no difficulty whatever ; the same opinions are held by every French author who has written on the subject.

No distinction between baser and precious metals.

Sec. 119.—It is moreover remarkable that, in the long series of Letters-Patent by which Henry II, François II, Charles IX and Henry III thus vainly sought to exercise the right of disposing, at will, of all the Mines in the Kingdom, no one ever dreamed of making the silly distinction sought to be made by some persons, between Royal Metals and non-Royal

Metals ; throughout all those Letters-Patent, as throughout all the Ordinances, gold and silver are treated of, on the very same footing, as the baser metals. W[illegible]y the Defendants to cite a single line from any Edict, Ordinance, Declaration, or Letters-Patent, drawing any such ridiculous distinction. If the DE LÉRY-*Patent* be held valid, then has the Crown a right to dispose, at will, of all Mines, without distinction, on private lands ; the very absurdity of such a supposition is a strong argument against the Patent.

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Sec. 120.—Before proceeding to shew that the provisions of the several Ordinances reproduced in their entirety in this Factum, were generally unknown in France, until after the fall of the FIRST NAPOLEON, we purpose quoting, *without abridgement*, the opinions of the several authorities for and against the position assumed by the Plaintiffs. Those authors may be divided into five classes, namely :

Authors treating this question divided into five classes.

1° Those, who hold, and say, in so many words, that all Mines, without distinction, belong to the owner of the soil ; they are

1.—MERLIN,
2.—LEFÈBVRE DE LA PLANCHE,
3.—DOMAT,
4.—PERÈZ,
5.—DEMOLOMBE,
6.—BLANCHE,
7.—DU MOLIN,
8.—COQUILLE,
9.—PAUL DE CASTRE,
10.—PROUDHON,
11.—BRIXHE,
12.—BOSQUET,
13.—RENUSSON,
14.—PONTANUS,
15.—DE CROUZEILHES,
16.—FAVARD DE LANGLADE,
17.—COLLYER.

2° Those, who, by implication, assign all Mines to the owner of the soil ; they are

1.—PORTALIS,
2.—HENNEQUIN,
3.—GUYOT, *vbis*, *Domaine*, *Marque des fers*, *Lézion*.
4.—PIGEAU,
5.—POTHIER,
6.—TOULLIER,
7.—DUPLESSIS,
8.—DUPONT,
9.—MIGNERON,
10.—BOUTEILLER,
11.—DALLOZ,
12.—LAMÉ-FLEURY,
13.—GARAULT,
14.—F[illegible]RY,
15.—GI[illegible],
16.—DE CORMIS,
17.—MORNAC,
18.—VOET,
19.—HENRYS.

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3° Those who give ALL *Mines*, without distinction to the King; they are

1.—FERRIÈRE,
2.—FOUCARD,
3.—DELEBECQUE,
4.—TROPLONG,
5.—GUENOIS.

4° Those who give *gold* and *silver*-Mines *only* to the King; they are

1.—POCQUET DE LIVONIÈRE,
2.—CHOPPIN?
3.—LEBRET?
4.—D'ARGENTRÉ?
5.—REBUFFE?
6.—MINIER?
7.—LOCRÉ?
8.—BRILLON?

5° Those, who give *gold*-Mines *only* to the King; they are

1.—DÉNIZART,
2.—DELHOMMEAU,
3.—BOURJON,
4.—LOYSEL.

LEFÈBVRE DE LA PLANCHE, gives all Mines, even of gold and silver, to owner of soil.

Sec. 121.—Of the authors who assign all Mines, without distinction, to the owners of the soil, LEFÈBVRE DE LA PLANCHE, if we may except *Merlin*, appears to be the man who has given the subject the most study.

3 LEFEBVRE DE LA PLANCHE, TRAITÉ DU DOMAINE, *Livre IX*, *Chapitre IV*, § 1, 2, 3, 4 5, 6, 7, 8 *et* 9. *P.* 1 *et seq*: says:

§ 1.—"On a établi ailleurs que tout ec qui n'a point de maître, et que n'appartient à personne, appartient au premier occupant, c'est-à-dire, dans les États policés, à celui qui exerce la puissance publique, auquel ont été transférés les droits offerts par la nature au premier occupant; et cette maxime semble recevoir une juste application aux mines que la nature a cachées dans les entrailles de la terre, et qu'elle n'a pas voulu laisser en la disposition des particuliers; *cependant* ELLES *n'ont* JAMAIS *été regardées comme appartenantes au Souverain.*"

§ 2.—"Par l'ancien Droit Romain, *elles appartenaient* SANS RESTRICTION *au propriétaire de l'héritage*, où elles se trouvaient, L. *Fructus*, 7, §13 et 14, *ff. Soluto matrim*, il en disposait librement, comme des autres émoluments de sa terre, l. 13, § *Indè quæsitum*, *ff. de usufructu, et quem admodùm quis utatur fruatur;* et celui qui en faisait la découverte n'y pouvait rien prétendre, si ce n'était dans le cas dans lequel il avait trouvé ces mines dans des terres désertes et abandonnées."

§ 3.—"Cette jurisprudence fut changée sous les Empereurs qui s'attribuèrent des droits sur les mines, en quelques lieux qu'elles fussent trouvées suivant les différents usages des lieux, *pro varietate Provinciarum*, comme on le voit au titre du Code *de Metallariis:* il faut voir la note de Godefroy sur la loi seconde de ce titre."

§ 4.—" A l'égard des usages on ne voit point que nos Rois aient jamais prétendu la propriété des mines: on ne peut en fournir une meilleure preuve, que l'*Ordonnance de* CHARTES IX, du mois de Mai, 15[illegible], rapportée par *Fontanon*, t. 2, P. 445, par laquelle, en déclarant que " le *dixième des mines* LUI *appartient*," il ordonne que les propriétaires, et autres prétendans droit, seront contraints au paiement: cette réserve du dixième des mines, au profit du Roi, est une imitation des constitutions des Empéreurs."

§ 5.—" Les Ordonnances, qui contiennent cette réserve, expriment que *ce droit s'étend non seulement sur les mines* D'OR *et* D'ARGENT, mais aussi sur les mines de tous métaux et minéraux, et en général de toutes substances terrestres: par *l'Edit du Roi* HENRI IV, du mois de Juin, 1601, rapporté au Recueil d'Edits de la chambre des Comptes, le *droit du Roi* a été *renfermé* AU DIXIÈME *des substances métalliques ;* et les substances terrestres en ont été affranchies : en conséquence, les mines de charbon ont été déclarées exemptes de ce droit, par deux Arrêts des 20 Mai, 1698 et 26 Septembre 1724, Voyez sur cette matière, CHOPIN, *de Dom:* l. 1, tit: 2, n. 6, t. 15, n. 15; CHARONDAS, *Paud.* l. 1, c. 18, p. 89."

§ 6.—" LEBRET, de la Souveraineté, l. 3, ch: 6, p. 194, *pretend* que le droit du dixième que les premières Ordonnances étendaient à toutes les mines en général, a été restreint, par la suite, par une Déclaration du mois de Novembre, 1583; mais cette Déclaration n'est point connue, et aucun autre auteur n'en a parlé."

§ 7.—" Il est vrai que le droit de dixième ne se perçoit pas sur les mines de fer ; mais c'est parceque le droit du Roi a été reglé, d'une autre manière, par les Ordonnances, et en particulier, par celle des aides, de l'année 1630, au titre *des droits de marque sur le fer, acier et mines de fer*, qui fixe, en l'article premier, les droits du Roi à 3. f. 4. den. par quintal de mine de fer."

§. 8.—" Guénois, en ses notes sur le titre *des mines et métaux*, qui est le quatrième du onzième livre de sa Conférence des Ordonnances, soutient qu'il est permis à ceux qui travaillent aux mines, de faire ouvrir la terre en quelques lieux qu'ils jugent à propos, en contentant les propriétaires ; et il cite plusieurs Ordonnances, qui leur donne cette faculté: celle de François II, du 29 Juillet, 1560, le permit en particulier, au Sieur de St. Julien; cependant la crainte qu'on n'abuse de cette faculté, semble exiger qu'on ne puisse en user, qu'en vertu d'une permission spéciale, suivant la loi *Nullam* Cod. Theod. *de Metall & Metall.* Voyez Lebret au lieu qu'on vient de citer

§ 9.—" If faut ajouter une observation que cet auteur fait au même endroit, que ce Droit général du Royaume qui restreint le droit du Roi sur les mines au dixième, ne s'étend pas aux Coutumes qui en disposent autrement, comme les coutumes d'Anjou, Art. 61 ; et celle du Maine, Art. 70, qui décident que la fortune d'or, trouvée en mine, appartient au Roi, et que celle d'argent appartient au Comte, Vicomte et Baron. Boden, dans sa république, l. 6. c. 2, p. 643, édition de 1578, observe qu'il y a peu de mines, ou minières d'argent en France: ainsi, la décision de ces coutumes n'est pas d'un grand usage."

" D'Argentré, sur Bretagne, 56, n. 40 & 41, met aussi les mines d'or au rang des biens qui ne peuvent appartenir qu'au Roi."

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Sec. 122.—*Lefèbvre de la Planche*, in that article, draws the distinction between the Common Law of the Kingdom and the Customs, such as those of *Anjou*, *Maine* and *Bretagne*, which give *gold* and *silver* to the King and his Barons. As we are governed by the Custom of Paris, which, as we shall presently shew, gives all Mines to the owner of the soil, it is plain that the citations made by the Defendants from *Guénois*, *D'Argentré*, *Loysel*, *Pocquet de Livonière* and others, who commented the exceptional Customs, do not apply to this case.

Distinction between common Law, and exceptional Customs.

Defendants, following Dalloz, attribute, to Lefebvre de la Planche, opinion of obscure *Lorri*.

Sec. 123.—Some notes on *Lefèbvre de la Planche*, are cited by the Defendants at P. 44, 45, 46 and 54 of their Factum, as evidence of the opinion of *Lefèbvre de la Planche* in their favor; now those notes are not by *Lefèbvre de la Planche*; they are from the pen of *Lorri*, advocate of the King *au Domaine* (see 2 *Camus*, P. 313, No. 1111). One can, therefore, readily understand why it is, that *Lorri*, in his notes, would express a different opinion from Lefèbvre de la Planche, and would assign, for giving gold-Mines to the King, a reason founded not *on Law*, but on the "*Mœurs du royaume*. The Defendants, at P. 47 and 48 of their Factum, copying Dalloz, vol 31, *Rép. de Lég.*; P. 606, in that respect, erroneously attribute to Lefèbvre de la Planche the opinion so expressed by the obscure *Lorri*.

Contrast between *Merlin* and that servile upholder of the *Domaine*.

What a contrast between the obscure, the servile *Lorri* and *Merlin*, of whom *Camus*, vol: 2, P. 20, Nos. 16 and 18 says:

"Merlin est un très-*savant jurisconsulte*. Ses ouvrages n'ont été critiqués que par ceux qui n'aimaient point sa personne; mais ils sont dans toutes les bibliothèques; on les cite dans tous les procès, et ils ne laissent pas que d'être consultés *en secret* et avec fruit par ceux-là même qui leur rendent le moins de Justice en public."

Domat assigns Mines, without distinction, to owner of soil.

Sec. 124.—*Domat*, another author entitled to the greatest weight, has the following explicit passages on this subject:

Domat.—Lois Civiles, *Choses*, 1 *Vol*: *Titre III*, *section II*, *No.* 5, *p.* 18.

"On peut mettre au nombre des fonds que les particuliers ne peuvent posséder de plein Droit, ceux où se trouvent des mines d'or, d'argent, et autres métaux, ou matières *sur lesquelles le Prince a son droit*."

DOMAT.—DROIT PUBLIC, PUISSANCE, *Vol*: 2, *Livre I, Titre II, section II, No.* 19, *p.* 12.

OWNERSHIP OF MINES. *Authorities.* DOMAT. PERÈZ.

"La nécessité des métaux, *non seulement pour les monnayes*, pour l'usage des armes, et pour celui de l'artillerie, mais pour une infinité d'autres besoins et commodités, dont plusieurs regardent l'intérêt public, rend ces matières et celles des autres minéraux, si utiles et si nécessaires dans un Etat, qu'il est de l'ordre de la Police que le Souverain ait sur les mines de ces matières un droit indépendant de celui des propriétaires des lieux où elles se trouvent. Et d'ailleurs on peut dire, que leur droit dans son origine a été borné à l'usage de leurs héritages pour y semer, planter et bâtir, ou pour d'autres semblables usages: et que leurs titres n'ont pas supposé un droit sur les mines qui étaient inconnues, et dont la nature destine l'usage au public par le besoin que peut avoir un état des métaux et autres matières singulières qu'on tire des mines. Ainsi les lois ont réglé l'usage des mines, et laissant aux propriétaires des fonds ce qui a paru juste, elles y ont aussi reglé un droit pour le Souverain."

The author then proceeds to cite the Roman Law, and refers to the Ordinances of the French Kings on the subject, and then refers to Title 4, section 1, article 9, cited below.

DOMAT.—DROIT PUBLIC, FINANCES, *Livre I. Title IV, Section I, Article* 9, *p.* 42.

"On peut aussi comprendre dans les biens de cette première espèce, les revenus que le Souverain tire des mines reglés à un dixième."

Domat's opinion is of the most decided form; he declares in the most express terms, that the owner of the soil is also owner of the *gold* and *silver-Mines*, *but* not *de plein droit*, as he says, or to such an extent as to prevent the Sovereign from insisting on the treasure not remaining profitless for the state; the profitable interest of the Sovereign consisting, as *Domat* states, in a fiscal burthen merely, not a right of property (*revenus, réglés à un dixième*). And yet Domat has been cited by the Defendants as favoring their views.

Sec. 125.—It is of *Domat*, that the great Chancellor *D'Aguesseau*, in his "*Instructions propres à former un magistrat*", Tom: 1, P. 389, says: *D'Aguesseau's* opinion of DOMAT.

"On peut appeler *Domat* le jurisconsulte des Magistrats; et quiconque "posséderait bien son ouvrage, ne serait peut-être pas le plus profond des "jurisconsultes, mais il serait *le plus solide* et *le plus sûr de tous les juges.*"

What a contrast between that opinion as to *Domat*, and the opinion entertained of *Ferrière*, by his own nephew, as

Ownership of Mines. *Authorities.* Perèz, Choppin. Cujas.

appears by the following citation from *Camus*, vol: 2, P. 101. No. 340:

"*Joseph de Ferrière* a dit avec beaucoup de vérité dans ses additions "aux vies des Jurisconsultes, par *Taisand*, qu'on souhaiterait dans les "ouvrages de Claude de Ferrière *beaucoup moins de vitesse* et plus "d'exactitude."

Perèz holds all Mines, without distinction, to belong to owner of soil.

Sec. 126.—Antonio Perèz, a Spaniard, Professor of Law at *Louvain*, commenting on the Code, L. *de Metal*: has the following, at P. 424, edition of 1695:

"Et primo quæritur an fodinæ ex quibus metalla promanant, sint juris "publici? et juris esse privati, ac in libero privatorum usu indicat "Ulpianus *in l.* 7, § 13 *ff. sol. matr.* ubi marmor et alii lapides, qui renas- "cuntur, quales sunt in Italiâ, Galliâ et Asiâ, item cretifodinæ, argenti- "fodinæ, vel *auri*, vel alterius materiæ, utique in usu esse censentur, atque "ideo si in fundis dominorum inveniantur, eorum sunt prout quævis aliæ "res in illorum fundis natæ, *l.* 1 *et* 6 *ff. de acq. rer. dom. et* § 19 *Inst. de* "*rer. divis.* Cohærunt enim fodinæ et venæ fundo tanquam ejus partes, ita "ut qui est dominus fundi, censeatur quoque dominus partium cohæren- "tium, *l.* 44. *ff. de rei vind.*

* * * * * * * * *

"Ex quibus locis concludit *Cujacius*, *lib.* 15, *obs.* 21, *in fin.*, etiam "privatis *auri*, *argenti* et ferri fodinas possidere licere, quamvis ferrum "facere non liceat cuilibet sinè permissu Principis, *l. ult.* § 11. *ff. de publ.* "*et vectig.*"

The author's knowledge of the Code is not lessened by by his ignorance of the Laws of Nature, an ignorance he shared in common with all others of his age. He, moreover, backs up his opinion with that of the illustrious *Cujas*. After citing poetry, and, as if to relieve the monotony of the study he was then pursuing, the author speaks of the then known gold-fields of the world, and of the extraordinary richness of some of them, and he goes on to treat of the *canon metallicus* or share (equivalent to our Royalty) then paid over to the State under the Roman Law. He then proceeds to discuss the then existing state of the Law of Mining in the various countries of the world, and proceeds, at P. 425, to say:

"Hodiè diversæ sunt consuetudines, et regnorum leges de fodinis in "privato loco repertis, nam in publico, Principi reservari dixi, *sup. N.* 8."

He then states that, *in* Spain, Mines of gold and *silver* belong to the King, even though they are found in private lands, but that, after payment of the expense of mining, a share is given to the discoverer and another share to the owner of the soil.

Sec. 127.—The same author then states, that the Law of Germany, as established by the *Constitution* of the *Emperor* FREDERIC, assigns, to the Sovereign, all Mines, without distinction, and wheresoever found. And, in this connection, it is fitting to notice the bad faith with which the Defendants have quoted authorities in their Factum. At P. 46 and 47, of their Factum, the Defendants quote *Choppin*, at a passage where he speaks of this very *Constitution* of the *Emperor* FREDERIC, i. e. of the Law of Germany, as evidence of what the Law of France was. *Choppin's* own opinion, as we shall presently shew, is to the effect that the King has a Royalty on all Mines, nothing more.

OWNERSHIP OF MINES. *Authorities.* PERÈZ CHOPPIN, LEBRET. COLLYER. LOYSEL. CHOPPIN'S statement as to Law of Germany on Mines mistaken by Defendants for his opinion as to Law of France.

Sec. 128.—*Perèz*, after stating the Law of Germany on Mining, proceeds to state that, by the Law of France, the owner of the soil is owner of all Mines, even of gold and silver, found upon his lands, except under special Customs, such as that of *Anjou*, which gives *gold-Mines* to the Sovereign; he cites *LeBret*, in support of his opinion. The language of *Perèz* is so explicit, that there can be no doubt as to his opinion. He says at P. 426:

Opinion of PERÈZ very explicit.

" In Galliâ vero servatur Regi decima vel alia portio, nisi consuetudo
" aut statutum provinciæ aliùd disponat, prout andegavensis constitutio,
" vult auri fodinas quovis loco repertas, fisco regio acquiri, reliquas dominis
" locorum, aut habentibus altam justitiam, ut vocant, *Le Bret*, *de la Souve-*
" *raineté du Roy. lib.* 3, *cap.* 6."

Sec. 129.—It seems strange that *Perèz* and the Defendants could have succeeded in citing *LeBret* for the purpose of establishing quite contrary propositions; the quotation of *LeBret* by the Defendants, in support of their position, is in keeping with the way in which they tortured unfortunate *Mr. Choppin*, as we shall presently shew.

Choppin *LeBret* misrepresented by Defendants.

Sec. 130.—Here also *Perèz* treats a question of the highest importance in this case; it is the question, whether the Defendants could exercise the right of entry on the Plaintiffs' lands against their will. *Perèz*, in so many words, asserts that the right of entry does not exist.

PERÈZ denies right of entry in any case;

COLLYER *on Mines*, P. 14, *American Edition* (P. 3 of English Edition) has the following:

so do *Collyer*, *Loysel*,

" But the property in minerals is not necessarily accompanied by the right to work for them: indeed, except, where the owner of the fee is in

OWNERSHIP OF MINES. *Authorities.* LAW-OFFICERS. DEMOLOMBE.

possession, the minerals are, without agreement, prescription or custom, accessible to nobody."

LOYSEL, cited by the Defendants at P. 45 and 46 of their Factum, and in commenting on the very *Rule* cited by them, states :

" Mais il paraît par les paroles suivantes du §2 de l'article 35 du livre " 1 du *Miroir des Saxons*, qu'on ne peut aussi ouvrir la terre d'un autre " sans son consentement."

And Attorney General, and Solicitor General.

The Attorney General and the Solicitor General of England, in 1854, gave it as their opinion that the right of entry does not exist to search for *gold* or *silver* on PRIVATE LANDS. That opinion is quoted by *Sir Charles Gore* in a report, dated the 3rd February 1854, and addressed by him as Commissioner of Crown-lands-revenue to the Lords of the Treasury, in reference to the *gold-Mines* of Australia. We quote *Sir Charles Gore's* words from the translation given by the " *Journal de Québec*," in its issue of the 5th December, 1863 :

" Il y a des difficultés à agir dans ces cas (octroi de licences pour exploiter les mines d'or ou d'argent), parce que les officiers en loi ont soutenu que la Couronne *n'avait pas le droit d'entrer sur les terres qui appartiennent à des individus et qui sont en possession des minéraux qu'elles contiennent dans le but d'y rechercher des métaux précieux ;* c'est pourquoi le pouvoir conféré par une licence de la Couronne ne peut s'exercer qu'avec le consentement du propriétaire du sol."

DEMOLOMBE declares owner of soil to be owner of all Mines, without distinction.

Sec. 131.—DEMOLOMBE, in his *Cours de Code Napoléon, Traité de la distinction des biens*, Vol. 1, No. 645, *in fine*, and No. 647, has the following very explicit passages on this point :

" Aussi le droit du propriétaire du sol à la propriété du tréfonds miné- " ral, n'a-t-il pas toujours été reconnu.

" Un certain nombre de nos anciennes Coutumes déclaraient les " Seigneurs propriétaires des biens renfermés dans l'intérieur de la terre, " *de l'avoir en terre non extrayé* (MERLIN, *Questions de droit, vbo. Mines*)."

* * * * * * * * *

Mais l'article 552 soumet formellement, le droit de propriété du sol aux modifications résultant des lois et règlements relatifs aux Mines.

Nous venons à l'instant de dire que les Mines appartiennent au propriétaire du sol dont elles forment le dessous.

Ce principe était incontesté chez les Romains (*L.* 7. § 14. *ff. solut. matr. ; L.* 3, § 6, *ff. de reb. cor. qui sub tut ; L.* 1 *et* 3, *Cod. de Metall. et Metall.*)

Notre ancien droit français l'avait, en général, aussi partout reconnu, si

on excepte un petit nombre de coutumes qui paraissaient attribuer les Mines au seigneur (Ordonnances de 1413 et de 1471 ; édit de 1601 ; Ordonnance de 1680 ; Merlin, Questions de droit. Vbo. Mines. § 1 ; Proudhon, du Domaine privé, T. II, Nos. 738 et suiv.)

OWNERSHIP OF MINES. *Authorities.* ZACHARIÆ BLANCHE.

It is clear from that passage of *Demolombe* that the Common Law of France regarded the owner of the soil as the owner of the Mine.

Sec. 132.—ZACHARIÆ, *Droit Civil Français*, vol: 2, P. 55, § 276, has the following, as to the form of the present action :

ZACHARIÆ supports the present form of action.

1° La propriété n'a par elle-même d'autre limites que celles de la nature.

2° Cette puissance appartient au propriétaire exclusivement à tous autres.

3° Cette puissance existe de plein droit : quiconque réclame un droit sur la chose d'autrui doit donc prouver sa prétention ; et, jusqu'à ce que cette preuve soit faite, le propriétaire a pour lui la présomption légale que son droit est exclusif et illimité.

And again at Page 118. § 300, the same author says :

En vertu de l'essence juridique de la propriété, le propriétaire d'une chose est fondé à en user et à en jouir exclusivement V. § 277.

Le propriétaire d'une chose et en particulier le propriétaire d'un immeuble ou celui qui a sur l'immeuble un droit d'usufruit, d'usage ou d'habitation peut donc former contre quiconque prétend à une servitude prétendue, *à faire interdire au défendeur toute atteinte à la liberté de cet immeuble, et même, suivant les circonstances, à le faire condamner à des dommages et intérêts.*

Cette action qualifiée D'ACTION NÉGATOIRE, *et qui doit être appréciée d'après l'analogie qu'elle présente avec la revendication a cependant ceci de particulier, que lorsque la propriété est reconnue ou établie par le demandeur, il incombe non pas à celui-ci de prouver la franchise ou la liberté de son immeuble,* MAIS AU DÉFENDEUR DE FOURNIR LA PREUVE DE LA SERVITUDE QU'IL PRÉTEND AVOIR ACQUISE SUR LE BIEN-FONDS.

Sec. 133.—ALFRED BLANCHE, in his *Dictionnaire Général d'Administration*, vbo. Mines, P. 1282, has the following conclusive evidence as to the owner of the soil being owner of the Mines :

ALFRED BLANCHE gives all Mines to owner of soil.

Plusieurs auteurs ONT PRÉTENDU *que les anciens rois de France considéraient le produit des Mines comme une véritable portion de leur domaine, comme une propriété de la couronne,* ET QUE LES CONCESSIONS PAR EUX ACCORDÉES N'ÉTAIENT AUTRE CHOSE QUE DES DONS PROPREMENT DITS. *Cette opinion paraît erronnée.* Quand on consulte les édits, les ordonnances rendus à ce sujet, on trouve que les Rois, loin d'envisager les Mines comme

OWNERSHIP OF MINES. *Authorities.* PORTALIS. FAVARD DE LANGLADE.

une propriété domaniale et dépendant de la couronne avait soin, au contraire d'établir : 1° le droit du propriétaire du sol sur tout ou partie du produit de la Mine : 2° un droit inhérent à la personne du roi de choisir tel ou tel de ses sujets pour exploiter les Mines, genre de propriété qui exige une surveillance particulière de la part du chef de l'État, et dont les intérêts sont liés intimement à ceux de l'industrie et de la richesse nationale.

* * * * * * * * * * * * *

Le premier acte réglementaire émané du Souverain est du 30 *Mai* 1413. *On a en effet reconnu aujourd'hui* L'ERREUR *de ceux qui mentionnaient comme point de départ de notre législation sur cette matière une ordonnance de Philip le Long du* 5 *d'Avril* 1321. Cette ordonnance ne s'occupe pas des Mines.

PORTALIS, opinion inconsistent with idea of sovereign being owner of any mines.

Sec. 134.—PORTALIS, in presenting to the *Corps Législatif* the project of the Napoleon-Code, and in commenting on Art: 552 of that Code, identical in its terms, with art : 414 of the Canadian Code, is thus reported at P. 34 *and seq :* of Vol : 4 of the *Code Civil et Motifs*, by Favard de Langlade, editlon of 1820 :

Législateurs,

Vous vous empresserez de consacrer par vos suffrages le grand principe de la propriété, présenté dans le projet de loi comme le droit de jouir et de disposer des choses de la manière la plus absolue.

* * * * * *

Au citoyen appartient LA PROPRIÉTÉ, et au *Souverain* L'EMPIRE. Telle est la maxime de tous les pays et de long temps. C'est ce qui a fait dire au publiciste que la libre et la tranquille jouissance des biens que l'on possède est le droit essentiel de tout peuple qui n'est point esclave ; que chaque citoyen doit garder sa propriété sans trouble ; que cette propriété ne doit jamais recevoir d'atteinte, et qu'elle doit être assurée comme la constitution même de l'état.

L'empire, qui est le partage du souverain ne renferme aucune idée de domaine proprement dit. Il consiste uniquement dans la puissance de gouverner. Il n'est que le droit de prescrire et d'ordonner ce qu'il faut pour le bien général et de diriger en conséquence les choses et les personnes.

* * * * * * *

En France et *vers le milieu du dernier siècle*, nous avons vu paraître des *écrivains* dont les opinions systématiques étaient vraiment capables de *compromettre les antiques maximes* de l'ordre naturel et social. Ces écrivains substituaient au droit incontestable qu'a l'état ou le souverain de lever des subsides, un prétendu droit de propriété sur le tiers du produit des biens.

Les hommes qui prêchaient cette doctrine se proposaient de remplacer toutes les lois fondamentales des nations par la prétendue force de l'évidence morale presque toujours obscurcie par les intérêts et les passions, et toutes les formes connues de gouvernement par un despotisme légal, qui impliquerait contradiction jusque dans les termes ; car le mot despotisme, qui annonce le fléau de l'humanité devait-il jamais être placé à côté du mot légal, qui caractérise le règne bienfaisant des lois ?

Heureusement toutes ces erreurs viennent échouer contre les principes consacrés par le droit naturel et public des nations. Il est reconnu partout que les raisons qui motivent pour les particuliers la nécessité du droit de propriété, sont étrangères à l'état ou au souverain, dont la vie politique n'est pas sujette aux mêmes besoins que la vie naturelle des individus. OWNERSHIP OF MINES. *Authorities* PORTALIS DU-MOLIN.

Sec. 135.—Is it not plain that the idea of the Sovereign being owner of any Mines whatever is utterly incompatible with that declaration of *de Portalis* : L'empire " qui est le partage du Souverain, ne renferme aucune idée de " domaine proprement dit ? " Such is the opinion of the man from all others selected to support the project of the Code by that great man, the least of whose attributes was not, perhaps, his unfailing sagacity in the choice of his assistants. That opinion derives untold weight from the circumstance that Napoleon, himself a man of most despotic will, one not likely to let slip any prerogative theretofore enjoyed by his predecessors, the Sovereigns of France, energetically maintained, in the debate on the Law of 1810, that Mines, without distinction, belong to the owner of the soil (see DEMOLOMBE, *Distinction des biens*, t : 1, No. 645). The same.

Sec. 136.—CHARLES DUMOULIN, or rather DUMOLIN (as he wrote his name), in the Edition of 1681 of his works, Vol : 1, Title 2, gloss : 1, *de censive*, on Article 74 of Our Custom of Paris, has, on this subject, a very explicit passage, for the appreciation of which it is necessary to reproduce that Article of Our Custom ; that Article reads thus : DUMOLIN gives gold and silver mines to owner of soil

" Un *Seigneur censier peut procéder* ou faire procéder *par* voie d'*Arrêt* " ou *brandon sur* les *fruits pendans en l'héritage* à lui redevable d'aucun " cens ou fond de terre pour les arrérages qui lui sont deûs."

In commenting on that Article, *DuMolin* says :

" No. 47. Idem dico de vivariis vel leporariis, in terra censuali : ut " nedum solum, sed etiam venatio ferarum sive vagantium sive inclusarum " impediri possit."

" *Idem de* columbario, *cretifodinâ*, AURI *aut* ARGENTI *fodinâ existente* " *in fundo censuali*, QUI, non soluto censu, IMPEDIRI *poterunt ;* etiam mate- " riæ extractæ in fundo existentes, nedùm solum ipsum, et extractio " materiarum."

According, then, to *DuMolin*, whom *Ferrière*, in his History of the Roman Law, P. 422, styles *the Prince of Jurists*, one, for unpaid *cens*, *could seize*, not only the land, but

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but (as *fruits* of the land) GOLD *and* SILVER-*Mines ;* gold and silver-mines, then, in the opinion of *DuMolin*, were fruits of the soil, and were seizable as such for the debt of the owner of the soil. Had *DuMolin* considered gold and silver-mines to belong to the King, he never would have held them to be seizable for the debt of the King's subject.

Esteem in which DUMOLIN. held by *Ferrières, Camus.*

It is hardly necessary to recall here the esteem in which the great learning of *DuMolin* has been held by French Jurists. Suffice it to say that he commented almost every Custom in France ; but his Master-piece is his Commentary on the *Fiefs*, under the VERY *Custom* that governs us, and from which we have just quoted. CAMUS, *vol :* 1, P. 63 and 64, has said of *DuMolin* :

" *La Coutume de Paris* a eu beaucoup de commentateurs : il n'est pas " nécessaire de les étudier tous ; mais il faut en réunir plusieurs, parce- " qu'ils ont des parties qui leur sont personnelles, et qu'il n'est pas possible " de négliger. *DuMoulin, le* PREMIER *d'entr'eux*, est au droit français ce " que *Cujas* est au droit romain. Son commentaire sur les fiefs et les " censives *nous fera à jamais regretter ceux qu'il avait, dit-on, écrits sur les* " *autres titres de la coutume :* il ne nous reste à cet égard que ses apostilles, " qui formaient un ouvrage séparé, dans le plan duquel toutes les coutumes " sont comprises. Au reste, le commentaire sur le titre des fiefs, en même " temps, qu'il rend la perte du surplus de l'ouvrage plus sensible, nous " en dédommage en partie. Ce traité est *si profond*, qu'il *contient tous les* " *principes du droit français :* c'est une mine inépuisable, qui devient plus " riche, à mesure qu'on la fouille ; et, des différents auteurs que j'ai à indi- " quer sur le droit français, je consentirais presqu'on oubliât les deux tiers, " *pourvu que le temps* destiné à leur lecture *fût employé à méditer* le traité " des fiefs de *Dumoulin.*"

* * * * * * * * * * * * *

" Ce profond jurisconsulte, instruit de toutes les parties de notre droit, " ne concevait pas un principe, sans apercevoir en même temps les restric- " tions auxquelles il est sujet.

and *D'Aguesseau.*

Chancellor *D'Aguesseau*, at vol : 4, P. 619 of his works, says of *DuMolin :*

" Par la profondeur de son jugement, il aurait mérité de naître dans le " siècle des *Papinien* et des *Africain.*

COQUILLE gives all mines to owner of soil.

Sec. 137.—COQUILLE, is no less explicit than *DuMolin ;* in his Commentaries on the Custom of *Nivernois*, Art : 2, *De Justice*, P. 8, Edition of 1703, *Coquille* says.

" Les *minières d'argent*, de fer, de cuivre, d'estain et autres matières " NE *sont* PAS de la condition du *trésor. Car le trésor est mis* en son lieu " par main d'homme : Les minières font portion de la terre naturellement,

" et sont produites par la terre, partant la propriété d'icelles appartient au propriétaire de la terre, *l.in lege fundi, ff. de contrah. empt. l. fructus vel. l. divortio*, §. *si vir. ff. soluto matri*, et ne sont au Seigneur haut-justicier, si ce n'étaient en terre vacante. Bien voudrois-je que le détempteur bordelier de la terre n'aurait le droit de ces minières, parcequ'il est seulement superficiaire, ayant la concession de la terre pour percevoir les fruits que la superficie produit, et selon la face qui était lors de la concession : aussi il n'est pas propriétaire, *l.* 3, §. *penult. ff. de novi oper. nunt. l. si domus*, §. *ult. ff. de lega.* 1. Le *détempteur d'héritage à titre de cens*, a plus ample droit, il est vrai foncier : *pourquoy* A LUI APPARTIENNENT *les entrailles de la terre, et jusqu'au centre.*

OWNERSHIP OF MINES. COQUILLE. PAUL DE CASTRE.

" Quand à la propriété de ces minières, je ne puis consentir à l'opinion de *Paul de Castre, in consil.* 330, vol : 2, quand il dit que celui qui a ouvert la minière en son héritage peut suivre la veine, sous terre, *etiam* en et sous l'héritage d'autruy. Car le propriétaire de la superficie est propriétaire du dedans et jusques au centre, *l. cùm usumfructum, ff. quib. mod. ususf. amitt.*"

Sec. 138.—That quotation from *Coquille* makes no mention of gold, for the reason, probably, that no gold mines were then supposed to exist in France (see *Choppin*, vol : 2, livre 2, titre 5, P. 215, Edition of 1662) see also *Lorri's* note to P. 35 of vol : III, *Lefèbvre de la Planche*; but the reason assigned by *Coquille* as to the other mines, applies equally well to gold-mines, namely, that the owner of the soil owns every thing in the bowels of the earth from surface to center. *Coquille* quotes the opinion of *Paul de Castre*, as being in conformity with his own, as to the ownership of the *Mines*, but disagrees with him as to the Miner's right to follow the vein into neighboring lands. Moreover the opinion of *Coquille* is based upon the Roman Law and upon the Common Law of the Kingdom. *Coquille*, again, in his *Questions et Réponses*, No. 7, P. 132 of same Edition, " *des espaves et autres choses qui se disent selon le droit des Romains* IN NULLIUS BONIS ESSE," has the following clear expression of his opinion :

Coquille does not mention gold, probably because no gold mines known then; but arguments of *Coquille* apply to gold. Opinion of *Paul de Castre* in same sense.

" *Quant aux minières qui se trouvent* en terre ; parceque naturellement elles font portion de la terre, je crois qu'*elles appartiennent* aux Seigneurs *propriétaires de la terre*, et non aux Seigneurs Haut-Justiciers. Car n'y ayant point de terme et proportion jusques à quelle profondeur la terre appartienne au possesseur, il faut dire qu'elle lui appartient jusques au centre ; sinon qu'il fut possesseur superficiaire, comme bordelier ou emphyteute, qui a le seul droit des fruits et de la superficie."

Such is the opinion of *Coquille*, whom *Pothier* has styled " *le judicieux Coquille*," and whom *Camus*, vol : 2,

What *Pothier* and *Camus* thought of *Coquille*.

OWNERSHIP OF MINES. PROUDHON.

No. 827, §3, styles a "*fort bon jurisconsulte, hardi et profond.*" He unhesitatingly assigns all Mines to the owner of the soil.

Defendants falsify quotation from *Proudhon*. His opinion favors views of Plaintiffs.

Sec. 139.—At. P. 35 of their Factum, the Defendants, in quoting PROUDHON, *Domaine de Propriété*, P. 282, No. 753, have fallen into an error, unintentional, we hope, but quite usual with them; we allude to the habit of suppressing a part of the quotation, so as to completely disfigure the sense. The Defendants quote the passage thus: "Il faut se "rappeler... que le droit commun en France est tel qu'on "peut, au moyen des formalités prescrites par la loi, faire "partout des recherches de mines, et en obtenir la concession, "dans les lieux où elles se trouvent, *sans le consentement* et "même malgré les oppositions du propriétaire de l'héritage "où l'on fait la découverte." Now, let us see what those *three dots* stand for! In the *unmitilated* passage, we read in *Proudhon*: "Il faut se rappeler, COMME NOUS L'AVONS DIT "PLUS HAUT, que le droit commun en France est tel, etc., etc., "etc." The words omitted are "*comme nous l'avons dit plus "haut.*"

Why this omission of *Proudhon's*, reference to the preceding number? We shall presently see. We shall also see how widely different is what *Proudhon* actually said from what, by this (we can find no name for it, but call it) *suppression*, he has been made to say. In numbers 748, 749, 750, 751, 752, 753 and seq: of his work, *Proudhon* is commenting, piecemeal, on article 10 of the French Imperial Law of 1810, the present Law of France on Mines; at number 753 (the quoted number) of his work, *Proudhon* reaches the words "*du propriétaire de la surface*" of article 10, of the Law of 1810, and he heads his number 753 with those five words in italics; and, then, he gives the quotation, which has thus been truncated by the Defendants. So that, by an artful suppression of *Proudhon's* reference to preceding numbers, the Defendants have endeavored to palm off, upon this Court, *Proudhon's* appreciation of the existing state of things in France for a statement of what the Law of Mining formerly was in France, and still is in Lower Canada. So much for the skilful use of *dots!* Oh! those three lying little *dots!!*

The same.

Sec. 140.—If *Proudhon* had written no more upon the subject, this detection of the use of *dots* might not, perhaps, have been so overwhelming; but, luckily for us,

in numbers 738, 739 and 740, P. 278 of the same work, *Proudhon* leaves no room to doubt his opinion. In number 738 he says: "Les Empéreurs Romains ne considéraient "point les mines comme étant des propriétés domaniales qui "appartinssent à l'Etat, puisqu'il n'était assigné au profit du "trésor qu'un droit de dîme sur leur produit." In number 739, the same author, passing from the Roman Law to the old French Law, says of the Ordinances of the French Kings: "Nous y voyons qu'à l'exemple des Empéreurs "Romains, ils n'attribuaient à leur fisc que le dixième du "produit annuel des mines." *Proudhon* then refers to the old Ordinances; and, after quoting from the Ordinance of 26 May 1563 (see § 164 of this Factum), *Proudhon* concludes thus; OWNERSHIP OF MINES. PROUDHON. DÉNIZART.

"Nous pouvons donc répéter ici en toute assurance l'observation que "nous avons déjà faite à la vue de la législation romaine sur la propriété "des Mines, et dire que dans l'ancienne monarchie française comme dans "l'empire romain, la propriété du corps des Mines n'était point une "propriété domaniale, puisque nos anciens princes ne devaient, à l'exemple "des empéreurs romains, percevoir sur ce genre de biens autre chose que "le dixième du produit, comme aujourd'hui le trésor public perçoit encore "un droit annuel et fixe sur le produit de chaque mine, droit domanial sans "doute, mais qui n'empêche pas que la propriété de la mine ne soit dans le "domaine privé de ceux qui la possèdent: *autrement il faudrait dire que "par la* SEULE ASSISE d'un *impôt foncier*, l'HÉRITAGE qui en est frappé, *se "trouve* CONFISQUÉ au profit de l'État."

Sec. 141.—DÉNIZART, in his *Collection de Jurisprudence, vbo. Mines*, quotes the opinion of *Coquille*, on the Custom of *Nivernois*, to the effect that Mines naturally form part of the earth, and therefore belong to the owner of the soil; he then goes on to say: *Dénizart* favorable to Defendants, views; his opinion considered, and refuted.

"Cependant en France, et dans quelques autres Etats, les peuples ont "abandonné au Souverain, comme une espèce de Préciput, ce que leur "terre renfermait de plus précieux."

What silliness in the reason given by *Dénizart* for dissenting from the opinion of *Coquille!* When, we ask, was it given by the people of France, and where do we find recorded the gift of that extraordinary *préciput* by the people of France to their Ruler? In what great assembly of the nation, was the gift ratified by the *baronage* spoken of by St. Louis? Seriously speaking, one is tempted to suppose, from the silliness of the arguments in that article and from the way in which the Ordinances referred to are jumbled up, and from the absence

OWNERSHIP OF MINES. DÉNIZART.

of any thing like chronological order in the discussion of them, that the generally acute *Dénizart* must have allowed some tyro to hold the pen for him. Listen again to the process of reasoning, by which, in the same article, he arrives at the conclusion, that gold-mines belong to the King. He had evidently seen somewhere the Ordinance of 1413, and he was compelled to admit that all the mines referred to by CHARLES VI belong to the owner of the soil. *Dénizart* says :

" Parmi nous la permission de chercher des Mines est un droit purement royal ; mais la propriété dés Mines n'appartient point au Roi.

* * * * * * * * * * * * *

" Cette ordonnance (CHARLES VI. of 1413) qualifie les particuliers *Maitres des très-fonds et Propriétaires des mines* " : et c'est une preuve bien constante que le Roi ne s'en prétend point propriétaire par droit de souveraineté."

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" Il faut pourtant excepter les *mines d'or* de cette maxime ; il est bien constant que celles-ci appartiennent à nos Rois comme un appanage du Domaine Royal ; et c'est la raison pour laquelle la Déclaration de 1413 ne parle point de cette espèce de mines."

" Le droit de dixième forme donc le Préciput de nos Rois sur les Mines du Royaume, etc.. etc.

The same.

When *Dénizart* states, as the reason why CHARLES VI makes no mention of gold-mines, the hypothesis of their being the property of the Crown, he manifests an obtuseness utterly at variance with his usual character. Had he stated that gold-mines were not then thought of, or had not then attracted public attention, in France, he might have been nearer the mark ; *Choppin*, vol : 2, livre 2, titre 5, P. 215, Edition 1662, states as a fact, that which is the true reason, no doubt, namely : that there were no gold-mines in France ; and the same thing is said by *Lorri* in his notes on *Lefèbvre de la Planche, vol :* 3, P. 35, and, although he was so struck by the fact that, in that Ordinance, the " *Maistres des traffonds*" and " Maistres des *mynes* " are convertible terms, and although *Dénizart* is thereby forced to the conclusion that all mines specified in that Ordinance belong to the owners of the soil, yet *Dénizart* has overlooked the fact that CHARLES VI has applied his Law to the mines therein referred to " *et aultres* " QUELCONQUES *estant en nostredict royaume* (see P. 81, line 11 of this Factum). Surely that must include gold mines. How came he also to omit all reference to the Ordinance of LOUIS XI of 1471 ? That Law speaks of *gold-mines.* How came he to be ignorant of the fact stated by *Guyot, vbo. Marque des fers*, P. 396, col : 1, that the Ordinance of 1601 was rendered in consequence of reports made to the Govern-

ment of the existence of gold, silver and other mines, which were then thought to be more valuable than they really were? *Dénizart* seems also to have had no knowledge of the fact stated by FRANÇOIS GARAULT in his "*Sommaire des édits et ordonnances royaux concernant la cour des monnaies* (see *Lamé-Fleury*, P. 113, note 2) that CHARLES VI had issued, in 1414, an Ordinance respecting *gold* and *silver*-mines, a textual reproduction of his Ordinance of 1413, which, as *Dénizart* himself admits, confers *silver* and other mines than those of *gold* upon the owner of the soil. So that, since the Ordinance of 1413 gives silver mines to the subject, according to *Dénizart*, the Ordinance of 1414, cited by *Garault* must give gold mines also to the subject.

OWNERSHIP OF MINES. DÉNIZART.

Had *Dénizart* possessed that information, he never would have advanced the silly doctrine espoused by so few ancient writers, and repudiated by all modern writers, that gold mines are on a different footing from other mines. *Dénizart*, in his *Actes de Notoriété du Châtelet*, almost copies the article of his *Collections de décisions*.

Sec. 142.—The silence of *Dénizart* (usually so well informed) as to the existence of the Ordinance of 1471, naturally leads one to enquire the reason of that silence. We have already incidentally (at P. 90 and 91 of this Factum) touched upon the reason. The Ordinances of the French Kings were generally as little known to the Inhabitants of France as our own Ordinances were known to the inhabitants of Canada, until the publication of the first volume of the *Edits et Ordonnances*. We need not be, at all, surprised at such ignorance, when we reflect that an Ordinance, conceived and issued in the first fervor of some mining mania, was sent to Parliament, enregistered there, never printed, but lost sight of, and forgotten there, as soon as the mining-fever had subsided, to be in turn succeeded by some other Ordinance destined to meet a like fate. Even the veneration of the French for their SAINT LOUIS did not preserve the knowledge of his *Capitulaire* on treasure-trove, since we find jurists denying its existence, *Lefèbvre de la Planche* asserting (vol : 3, P. 344) that an eminent lawyer in Court had denied its existence (see BACQUET, *Droits de Justice*, ch : 32, No. 15, P. 350), and *Loisel*, *Pocquet de Livonière* and others making it ch : 88, instead of ch : 90 of the *Etablissemens*. In like manner we find *Regnault d'Epercy*, in proposing the Law of 1791, stating that PHILIPPE-LE-LONG issued in 1321 (when the Lord had called that

Dénizart and some other writers not aware of nature of Mining Ordinances quoted here.

Ownership of Mines. Guyot.

monarch to himself, we trust) an Ordinance declaring all mines to be "*propriétés royales et domaniales*"; even *Merlin* was misled for a while by that statement of *d'Epercy*; but he corrected the error in his article on Mines, reproduced at length at P. 59 of this Factum. *D'Epercy's* historical and legal blunder has been well ventilated by modern French-writers, who have had the advantage of perusing the exhaustive Collections of those Laws since the days of Louis XIV, when they were begun by *de Laurière*; on this head see the authorities cited at § 146 of this Factum to shew that no such Ordinance as the pretended Edict of Philippe-le-Long ever had an existence; and one has only to glance at the several Collections of Ordinances published, prior to the reign of Louis XIV, and to compare them with the Laws contained in the *Collection du Louvre*, in order to see that not one in a hundred of the French Ordinances were known before the publication, (begun in 1723) of the *Ordonnances du Louvre*.

The same. *Guyot's* history of publication of Ordinances.

Sec. 143.—Guyot, *vbo. Ordonnances*, after referring to the very incomplete Collections of Ordinances, published prior to the reign of Louis XIV, proceeds to say at P. 454 of that article:

> "Ces differents recueils d'ordonnances n'étant pas complets ou n'étant
> "pas dans l'ordre chronologique, Louis XIV résolut de faire faire une
> "une nouvelle collection des Ordonnances plus ample, plus correcte et
> "mieux ordonnée que toutes celles qui avaient paru jusqu'alors; il fut
> "reglé pu'on ne remonterait qu'à Hugues Capet, soit parceque les Ordon-
> "nances antérieures conviennent peu à nos mœurs, soit parce qu'on ne
> "pouvait rien ajouter aux recueils imprimés qui ont été donnés sous le titre
> "de code des lois antiques et des capitulaires des rois de France."

Guyot then proceeds to state that Chancellor *Pontchartrain*, whom the King had entrusted with the work, employed Messrs. *Berroyer*, *de Laurière* and *Loger* to collect those Laws, under the Chancellor's directions, that eventually on *de Laurière* alone devolved the whole duty, and that the first volume of that Collection (now known by the name of the *Ordonnances du Louvre*) was published in 1723; the second volume was published in 1728, after *de Laurière's* death, from his notes, by *Secousse*, who was then entrusted with the continuation of the work, and who published six more volumes. Four more volumes, making twelve volumes in all, and bringing the Collection from the year 1051 to 1420 were published by *de Villevault* and *de Bréquigny*. That collection, *Guyot* tells us, at P. 454 of the article on *Ordonnances*)

was the only complete Collection extant when he wrote, A. D. 1785. The Collection was not resumed until after the Revolution. Is it therefore surprising that the Ordinance of Louis XI, of 1471, should have been unknown to the authors, who preceded the Revolution, and should have been unnoticed by them? *Hence* it is that, on mining-questions, many of them have uttered such nonsense in connection with Royal rights in Mines. *Merlin*, profiting by the fact that the researches for old Ordinances had brought to light the Ordinance of 1471, was the first to shake off old prejudices, cite it in his cause of *de Carondelet vs Schuytener*, win the case, and, with success, achieve a lasting fame. It was only in 1820, after the restoration, that the Ordinance of 1471 was published at length, for the first time, although *Merlin* had previously brought it under the notice of the Courts. The only author, anterior to the Révolution who noticed the Ordinance of 1471, is Blanchard; and he only gave the title and date of the Ordinance, with the date of enregistration.

Ownership of Mines. Brixhe d'Angely.

Sec. 144.—An additional, and perhaps a stronger, reason why the Ordinance of Louis XI, of 1471 was unknown in France, may perhaps be gleaned from that extraordinary chain of vain attempts made by Henry II, and his successors down to Henry III inclusively, to lay claim to all the mines in the Kingdom, and adverted to at P. 112 and seq. of this Factum. The jobbing courtiers, who prevailed upon the Monarchs to grant the monopolies there referred to, may have been interested in suppressing all knowledge of an Ordinance, which, if brought to light, would have destroyed their chances of jobbing. Hence it is, perhaps, that, with one exception in 1562, we find no mention of that great Ordinance in any of the Letters-Patent granting those monopolies; hence, perhaps, also is it, that, at a later period of the Monarchy, when the same jobbing spirit was abroad among the King's surroundings, we find no mention of the Ordinance of Louis, XI, of 1471, made in the celebrated *Arrêt du Conseil* of the 22 June, 1728, which recites almost all the *Ordonnances et Declarations* on mining that had theretofore been rendered, as remarked by *Lamé-Fleury*, P. 3, note 1. For that *Arrêt* see *Lamé-Fleury*, P. 97.

Additional reason why some of the Mining Ordinances not generally known.

Sec. 145.—Brixhe, in his *Législation des Mines*, conclusively establishes that the Kings of France never claimed

Erroneous opinion of *St. Jean d'Angely*

OWNERSHIP OF MINES. BRIXHE. ST. JEAN D'ANGELY.

to be owners of the mines, in the sense pretended by the Defendants. He quotes at length the opinion of *Le Comte Regnaud de St. Jean d'Angely* in presenting the Law of 1810. The Count to whom the Ordinances of the French Kings appear to have then been a sealed book, as we shall presently shew, expresses the following erroneous opinion :

" En France, jusqu'en 1791, la législation sur les Mines n'a jamais été " ni bien solennelle, ni bien régulière, parceque les tribunaux n'ont jamais " pris connaissance des affaires de Mines exclusivement traitées au Conseil " du Roi."

* * * * * *

" Toutefois *on tenait pour constant*, AVANT 1791, *que les Mines en " France étaient une propriété domaniale.*"

refuted.

Sec. 146.—The error, into which the Count thus fell, is due to his having followed *Regnault d'Epercy*, who introduced the Law of 1791, and who labored under the impression that, in 1321, PHILIPPE-LE-LONG had issued an Ordinance declaring all mines to be " *propriétés royales et domaniales*," and further to the fact that the provisions of the three great Ordinances of 1413, 1471 and 1601 were then unknown to the Count as they were to the rest of France, and that the existence, even, of the Ordinance of 1471 was not as much as suspected by the Count and his co-legislators of that day. For evidence that no such Law was made by PHILIPPE-LE-LONG, who had died before April, 1321, or by his successor CHARLES-LE-BEL, see 31 DALLOZ, *Répertoire de Jurisprudence, vbo- Mines.*, ch : 1, No. 8, P. 605, LAMÉ-FLEURY, *Législation minérale*, P. 3, note 1, DELEBECQUE, *Législation des mines*, vol : 1, P. 255, DUPONT, *Jurisprudence des mines*, vol : 1, P. 21, note 1, ALFRED BLANCHE, *Dictionnaire général d'administration*, P. 1282, *vbo. Mines*, and RICHARD, *Législation sur les Mines*, t. 1, § 4, P. 7, note 2.

Abundant evidence of the error of the Count in supposing that mining suits had never occupied the Ordinary Tribunals, but were invariably decided by the King in Council, will be found scattered throughout this Factum. It is clear, that, up to the date of the creation of the Superior Council of Canada, all mining suits in France had been determined by the ordinary Tribunals. The Letters-Patent of CHARLES IX, of 25th September, 1563, are the best evidence on that point ; the King complains therein (see § 107 of this Factum) that the Parliaments of Paris and of Grenoble, and the Court of Beaujollais had prohibited *de St. Julien* from collecting the

Royalty on certain Mines specified in the *Arrêts ;* § 115 shews the threat of impeachment held out by the Parliament of Paris against Chancellor L'Hôpital for endeavoring to supersede the jurisdiction of that Court in those matters ; and §148, 194, 195, 196 and 197 of this Factum give the history of that successful resistance made by the Parliament of Paris against the attempts of HENRY II and his successors down to HENRY IV inclusively to deprive the Parliament of Paris of its jurisdiction over Mining suits. It was only after the creation of the Superior Council here, that the *Grand Monarque*, that man of iron-will and despotic sway, by *Arrêts du Conseil* that produced no change in the Jurisprudence here, because they were not enregistered here, contrived to alter the Jurisprudence in France, and evoked the decision of Mining law-suits to the King in Council.

OWNERSHIP OF MINES. BRIXHE.

Sec. 147.—That the existence of the Ordinance of 1471 was then unknown in France, is evident from the fact that neither the Report of the *five* committees which drafted the Law of 1791 (see P. 13 and *seq.* of BRIXHE, *Législation des Mines, vol* : 2) nor *Mr. Hertault-Lamerville*, who opposed the Report, makes any mention of that Ordinance. *Mirabeau*, even, seems to have had no knowledge of its existence. But no better proof can be given of the error into which *Le Comte Regnaud de St. Jean d'Angely* has fallen, than the following quotation from the joint Report of the *five* committees on the Law of 1791 ; after stating, as the reason why all Mines should be declared " *à la disposition de la nation*," the fact that : " quant *aux mines métalliques* jamais les propriétaires " de la superficie ne se sont avisés de vouloir les exploiter," the Report proceeds to state (see P. 20 of vol : 2, BRIXHE, *Législation des Mines*) :

Evidence of ignorance of contents of old Ordinances.

" A l'égard des substances fossiles, telles que les charbons de terre, " plusieurs particuliers ont entrepris de les fouiller, et vous avez même vu, " Messieurs, qu'un de nos Rois, HENRI IV, déterminé par des *considérations* " qui lui parurent puissantes, permit par grâce spéciale, l'exploitation de " ces sortes de Mines ; *qu'avant cette époque on avait donné une liberté* " *indéfinie de les exploiter ;* "

* * * * * * * * * * * * *

" Le préambule de l'arrêt de règlement de 1744, auquel nous devons " une exploitation avantageuse nous offre la preuve de cette vérité.

" Voici comment il s'explique :

" Sa Majesté étant informée que les dispositions de l'arrêt de " 1698, sont presque demeurées sans effet, soit par la négligence

OWNERSHIP OF MINES. BRIXHE.

" des propriétaires à faire la recherche et l'exploitation des dites " Mines, soit par le peu de facultés et connaissances de la part de " ceux qui ont tenté de faire sur cela quelques entreprises ; que " d'ailleurs la liberté indéfinie laissée aux propriétaires par le dit " arrêt de 1698, a fait naitre en plusieurs occasions une concur- " rence entr'eux également nuisible à leurs entreprises respectives, " le Roi a ordonné, et ordonne etc., etc., etc."

Error of *d'Angely* refuted.

Sec. 148.—How then could Count *Regnaud*, with that Report before his eyes, assert, that prior to 1791 Mines had always been considered the property of the Crown. To those who will take the trouble of reading the Ordinance of HENRY IV, of 1601, thus adverted to by the committees, it is plain that, in respect of that *liberté indéfinie d'exploitation* which the Comittees admit to have been allowed the owner of the soil in Mines of matters not metallic, the very same right is given for Mines of all metals without distinction ; the only difference being that the King remitted his one-tenth royalty on the non-metallic substances. That report is further defective in asserting that PHILIPPE-LE-LONG, in 1321, declared all Mines *de droit royal et domanial*, and that his successors followed his example. Sec : 146 of this Factum establishes the inaccuracy of that statement as to *Philippe-le-Long ;* and a perusal of the Ordinances of 1413, 1471 and 1601 will readily disprove the other.

BRIXHE favors Plaintiff's views.

Sec. 149.—In a foot note at Page 33 of Vol : 2 of that work, *Brixhe* has the following :

" 1°. Les lois romaines laissaient la propriété des Mines aux propriétaires des héritages où elles se trouvaient. Constantin, qui avait tant de facilités à trouver juste ce qui lui était profitable, n'a jamais regardé les Mines comme une propriété qui lui appartint à titre de Souverain. Senèque, qu'il faut citer toutes les fois qu'on veut connaître la vérité, Sénèque disait, dans le siècle d'esclavage et de corruption où il vivait, dans le siècle de Néron, qui avait usurpé tous les droits de la république:

" Ad reges pertinet omnium potestas, ad singulos proprietas."

" 2°. Dans les Conférences de Guenois, t. 2, l. 2, tit : 4, p : 121, il est dit qu'à l'exemple des Romains, les Français, peuple libre, disposèrent des Mines de leur héritage, comme des autres productions de la terre. Il ajoute, que ce furent des compagnies privilégiaires qui obtinrent du Gouvernement les premiers ordres qui portèrent des atteintes considérables à ce droit de propriété.

" 3°. Lefèbvre, t. 1, P. 8, et t. 3, P. 32, dit : qui a le sol a le dessous ; la Mine qui se trouve au fonds de la terre n'est pas plus au souverain que la forêt que la superficie produit."

And after stating what, in his opinion, the Law of England is, the author, in that foot note, proceeds to say : OWNERSHIP OF MINES. BRIXHE. HENNEQUIN.

"5°. CHARLEE IX mit un droit de dixième sur les Mines de fer ; il " est clair, que ce droit était un impôt féodal et non un droit de propriété. " Charles ou son ministre n'aurait pas mis un impôt sur sa propriété ; il " l'aurait affermée ; la déclaration, à ce relative, reconnaît même, par ses " expressions dont elle se sert, que les Mines appartiennent aux propriétaires " des héritages. Cet impôt a cessé d'être perçu, et cela devait être d'après " les entraves mises à la propriété, et nous voyons dans le Répertoire de " Jurisprudence de Guyot, que la marque des fers n'est que réprésentative " du dixième, ou droit féodal sur le minerai."

"6°. L'esprit des lois, la bibliothèque de l'homme d'état et du " citoyen et d'autres autorités, ne mettent point en doute que les Mines " n'appartiennent individuellement aux particuliers."

Sec. 150.—BRIXHE observes, with great propriety, that the *tenth* claimed by CHARLES IX was un *impôt féodal*, a feudal burthen or duty, and not a right of property ; that author remarks conclusively that the King and his Minister would not have placed a burthen on the royal property ; "*il l'aurait affermée.*" The author at P. 7 and *seq :* of vol : 2, cites with approbation, the opinion and arguments of *Merlin* already quoted at P. 61 and *seq :* of this Factum ; and at P. 176 and *seq* of the same volume, *Brixhe* quotes the decision of the *Cour de Cassation*, (referred to at P. 61 of this Factum) declaring all claims to an *entrecens* for a Mining-licence to have been abolished with the feudal tenure. The same.

Sec. 151.—HENNEQUIN, who is cited by the Defendants at P. 64 of their Factum, as supporting the views of the Defendants is in reality against them ; he draws no silly distinction between the precious and the baser metals. He merely asserts that by the old jurisprudence of France, no Mine could be opened without the permission of the Sovereign ; and where the Defendants cite with approval his statement : " Mais il " suffit d'ouvrir le Code Théodosien pour reconnaitre que dans " le milieu du quatrième siècle *le droit régalien* était en vigueur " à Rome et dans tout l'empire," we know that the meaning assigned by the writer to the words : " *droit régalien* " is not the ownership, in any sense, of the Mines, but the mere fiscal burthen, heretofore referred to as the Roman *canon metallicus* (equivalent to the French *dixième denier*) and the right of Police as exercised by the Sovereign. HENNEQUIN, although cited by Defendants, is against them on main issue.

OWNERSHIP OF MINES. HENNEQUIN. HENRYS. DECORMIS. MORNAC. D'ARGENTRÉ. GUYOT.

Sec. 152.—In fact HENNEQUIN and MERLIN hold precisely the same views, as to the preferential right of the owner of the soil to work the Mine, subject however to the authorisation of the Sovereign and his *surveillance*. HENNEQUIN, vol : 2, P. 308, combats the opinion of HENRYS (l. 4, ch : 6, quest. 45, edition of 1772), of DECORMIS (vol : 1, col : 773), of COQUILLE, (*Coutumes du Nivernais, titre des justices*, art : 2), of D'ARGENTRÉ, (*Coutumes de Bretagne, titre des Droits du Prince*, art : 56, note 1, no. 40), and of MORNAC (*sur la loi* 67, *de rei vindicatione*), who all hold that the owner of the soil may open the Mines on his lands without obtaining the permission of the Sovereign. That, by the words : "*droit régalien*," HENNEQUIN merely means the right of the State, to see that the mineral wealth of the nation should not remain profitless, is quite clear from the two following passages of that author, at P. 307 and 309 of the second volume of his work :

so also of *Decormis, Mornac, Coquille and D'Argentré.*

" A la vérité, sous la législation romaine, la suzeraineté impériale ne " s'exerçait, en cette matière, que *dans un intérêt* PUREMENT FISCAL ; mais " dans cet intérêt même, et pour donner à *l'impôt* toute son importance, " l'intervention du domaine ne dut pas être sans influence sur les progrès " de la métallurgie.

* * * * * * * * * * * *

" Il est du reste inutile de dire que dans un pays où le *droit régalien* " était un des éléments du Domaine, toute exploitation, quelque fut d'ail- " leurs le titre de l'exploitant, se trouvait subordonnée à la double condition " de l'autorisation royale, et de la surveillance des délégués du prince."

Why it is that *Hennequin's* article has not the slightest allusion to the Ordinances of 1471 and 1601, is a matter of some surprise. It seems hardly possible that he could have been unaware of their existence, since *Pastoret's* Collection had been published then ; and yet from the fact that he merely refers to that imperfect Collection of MATHIEU " *Le* " *Code des Mines* ", for the Ordinances on Mining, one is tempted to conclude that HENNEQUIN did not know of the existence of the Ordinance of LOUIS XI, of 1471. So much for the opinion of *Hennequin*, on whom the Defendants rely so strongly to make out their case ; that author's opinion, as far as it goes, is entirely in agreement with the Plaintiffs' views upon this subject.

GUYOT, although cited by Defendants, is against them.

Sec. 153.—GUYOT, *vbo. Mines*, has the following : in his *Répertoire de Jurisprudence :*

" MINE. Lieu où se forment les métaux, minéraux etquolques pierres " précieuses."

" Tout ce qu'on peut tirer des Mines fait partie du Domaine du Roi, et " appartient à Sa Majesté tant dans les terres du Domaine que dans celles " des particuliers." OWNERSHIP OF MINES. GUYOT. BOSQUET. MEZERAY.

The textual agreement of that article with the opening sentences of BOSQUET's article on Mines, in the *Dictionnaire des Domaines*, quoted elsewhere in this Factum, would lead to the belief that the article in *Guyot* is from the pen of *Bosquet*, and was written by the latter before the servility of his writings had secured for him the post of Director of Correspondence in the *Régie des Domaines*. One could not complain, of course, if, in the later Edition of *Guyot*, the modified views of *Bosquet* had also found their way into the *Répertoire*. How much *Bosquet* subsequently modified his views, we shall shew hereafter. Happily, however, for us, the reader is referred, from *Guyot's* article on Mines, to an article on the *Marques des Fers* in the *Répertoire* for further information on the Law of mining. Let us examine that article.

Sec. 154.—GUYOT, *vbo. Marque des fers*, P. 395, has an article in which he cites *Lefèbvre de la Planche* and other writers to shew that *Mines do not belong to the Sovereign*; but the most interesting paragraph of the article, in this connection, is at P. 396, where he shews conclusively that the Ordinance of HENRY IV, of June, 1601, contemplated *gold and silver*-mines. *Guyot* says: The same.

" On donna, sous HENRY IV, avis au gouvernement de quelques mines " *d'or, d'argent*, de cuivre et d'étain, qu'on faisait plus abondantes qu'elles " n'étaient; ce prince, par un Edit du mois de Juin 1601, confirma à son " profit le droit de dixième sur les mines et minières, etc., etc., etc., etc." He shews that Ordinance of 1601 applies to gold-mines.

Moreover MEZERAY, in his *Histoire de France*, vol : 3, P. 1243, says:

" L'année 1601 trouva toute la Cour en réjouissance : ce n'estoit " que festins, balets, parties de chasse et grand jeu. D'ailleurs les courti- " sans se promettoient un siècle d'or, par la découverte de quelques *mines* " *d'or, d'argent*, de cuivre et d'étain, qu'on faisoit bien plus abondantes " qu'elles n'estoient. Tellement que *par un Edict*, qui pourtant ne fut " vérifié qu'en *Juin*, Bellegarde, Grand Escuyer, s'en fit donner la charge " de Grand Maistre, etc., etc."

" One hardly needed those citations from *Mezeray* and *Guyot* to convince one that *gold* is contemplated by the Ordinance of 1601, since the " DE LÉRY-*Patent*," itself, refers to that Ordinance as authority for its issue; but the opinion of *Guyot*, in that article, based, as it appears to be, upon So does *Mezeray*.

OWNERSHIP OF MINES. GUYOT. POTHIER.

research, is precious in respect of the fact that it shews mines of all sorts to be on precisely the same footing; and if copper-mines belong to the owners of the soil (a fact which no one appears to doubt), then, according to *Guyot*, are gold and silver-mines on precisely the same footing, and then do they also belong to the owner of the soil.

GUYOT, by implication, assigns all mines to owner of soil.

Sec. 155.—If any thing further were needed to shew us what *Guyot's* opinion is, we have only to refer to his article, intituled *Domaine de la Couronne*, § 3, P. 82 et seq: where find a most minute enumeration of all those things, which go to make up the *domaine;* and yet no mention whatever is made of Mines as part of the *Domaine;* he speaks of the King's "*droit* SUR *les Mines*," his royalty, in fact. GUYOT does not say: "DROIT AUX *Mines*. He does not enumerate gold and silver-Mines as forming part of the *domaine*. *Guyot* would not, assuredly, have omitted gold and silver-Mines, if he had thought that they belonged to the Crown. The articles on the *Marque des Fers*, *Domaine*, and also on *Lézion*, hereinafter referred to, show conclusively the absurdity of the doctrine laid down in *Guyot* under the word *Mines*, and still further strengthen the belief that *Guyot's* article "*Mines*" was written by *Bosquet*.

Moreover, in the article *Lésion*, P. 464, col: 2, *Guyot* says:

"Nous avons dit que pour connoître s'il y a lésion dans la vente d'un "héritage, on ne doit considérer que la valeur qu'il avait au temps du "contrat: *ainsi on* NE DOIT PAS, dans l'estimation de cet héritage, *avoir* "*égard à la découverte* que l'acquéreur a pu faire d'un trésor ou *d'une* "*mine depuis le contrat. Cette découverte est une bonne fortune* sur "laquelle le *vendeur n'a rien à prétendre.*"

If, in the opinion of *Guyot*, mines belonged to the King, how could the discovery of a mine constitute a piece of good luck for the purchaser? If, moreover, the mine so discovered did not, in the opinion of *Guyot*, follow the surface, and belong to the owner of the soil, how could the purchaser profit by it? It seems to us that nothing can be clearer. The very same opinion is held by POTHIER and by PIGEAU.

So do POTHIER

Sec. 156.—POTHIER, *vente*, Part: 5, ch: 2, § 2, No. 344 and 345.

"No. 344. Pour connoître si le contrat renferme une lésion suffi-

" sante pour donner lieu à la rescission, on ne doit pas avoir égard a l'état " ni à la valeur présente de l'héritage. OWNERSHIP OF MINES. POTHIER. PIGEAU. BOSQUET.

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" No. 345. Il suit-delà, que *dans l'estimation* de l'héritage, *on* NE DOIT " PAS *avoir égard* à la découverte d'un trésor, ou *d'une mine* faite depuis " le contrat ; *car jusqu'à cette découverte, l'héritage n'en a pas été plus* " *précieux.* Lorsque l'acheteur a acheté l'héritage ce qu'il valoit avant la " découverte et au temps du contrat, le vendeur n'a rien à prétendre. La " découverte est *une bonne fortune* dont L'ACHETEUR doit profiter suivant la " règle *cujus est periculum rei, eum et commodum sequi debet.*"

Pothier, therefore, thinks that the discovery of a Mine makes the property more precious, and is a piece of good luck for the purchaser. How could that be, unless the purchaser were the owner of the Mine ?

Sec. 157.—PIGEAU, in his *Procédure civile du Châtelet*, vol : 2, livre 3, *Retrait lignager*, is still more explicit. In treating of those Contracts, which do not give rise to the *Retrait*, he says, at P. 145 : And PIGEAU.

" *La vente* faite pour un temps *du droit* de tirer d'une carrière, ou " D'UNE MINE, n'est point sujette à retrait, quoique cette vente soit plus " qu'un usufruit (puisque son effet est d'altérer et diminuer la substance de " la chose, à laquelle l'usufruitier ne doit point toucher) ; la raison est que, " soit que la carrière ou mine soit exploitée par le propriétaire, *soit qu'elle* " *le soit par un étranger* A QUI LE PROPRIÉTAIRE EN CEDE L'EXPLOITATION, la " substance n'en sera pas moins diminué ; que dans l'un et dans l'autre cas, " la substance détachée de la carrière ou de la Mine est également perdue " pour la famille, et n'est pas susceptible de cet attachement et de cette con- " servation qui a fait établir le retrait, puisqu'elle devient fongible."

In that paragraph, *Pigeau* distinctly *recognizes* the *right* of the owner of the soil, *not only to work a Mine* discovered on his land, BUT *also the right to* SELL THE MINE *to a stranger !* Moreover, not one of those authors makes any distinction between gold and the other metals.

Sec. 158.—BOSQUET, in his *Dictionnaire raisonné du Domaine*, has an article of the most contradictory nature on the subject of Mines. After stating that *all* Mines, wheresoever found, whether in private lands or in the lands of the Crown Domain, belong to the King, he proceeds to state that the Kings have restricted their rights to one-tenth of the metals extracted, and he makes no silly distinction between the precious and the baser metals such as that drawn in *Lorri's* notes on *Lefèbvre de la Planche.* Most probably BOSQUET does so in express terms.

Ownership of Mines. Bosquet. Tacitus. Dalloz.

he was led to modify his former absurd views, as enunciated in *Guyot's* article, *vbo. Mines*, by that more intimate acquaintance with Mining law which his position, as Director of the correspondence in the "*Régie des Domaines*," enabled him to attain. *Bosquet*, in that work, *vbo. Mines et Minières*, says:

> "Les métaux et toutes les matières profitables, qui peuvent se tirer du "sein de la terre, font partie du domaine des Souverains, et appartiennent "au Roi, tant dans les terres du Domaine que dans celles des particuliers; "nos Rois *se sont réduits au* dixième *à l'exemple* de ce qui se pratiquoit "dans *l'empire romain*, qui avoit fixé son droit à dix pour cent, sur ce qui "se tiroit des carrières de marbres et de pierre."

Here we beg leave to draw the attention of the Court to the suppression, by the Defendants, at P. 48 and 49 of their Factum, of so much of *Bosquet's* article as shews that the Kings of France had restricted themselves to one-tenth of the produce of all Mines, without distinction. We hope that the suppression has not had for object to induce the Court to believe that Bosquet, in his *Dictionnaire du Domaine* favors the view that Mines are the property of the King. Nevertheless the conduct of the Defendants, in this particular, is open to grave suspicion.

Bosquet's mistake as to Roman Law on the subject.

Bosquet then falls into the error, well refuted by *Dupont*, (see § 168 of this Factum) of stating, that the Roman Emperors had reserved to themselves all other minerals and metals and worked, on their own account, all mines of gold, silver and other precious substances. So little, indeed, is that the case, that the most despotic, as he was, perhaps, one of the most infamous, of the Roman Emperors, *Tiberius*, found himself obliged to invent a pretext to put Sextus-Marius to death, when he wished to become possessed of gold-mines owned by that citizen in Spain, (see the *Annals* of Tacitus, lib: 6, § 19.

Case of *Sextus-Marius* misunderstood.

After the gold-mines of the unfortunate Spaniard had been thus confiscated to the State, Tiberius withdrew those Mines from the control of the State, and appropriated them to his own private use, making them his own private property. That passage shews conclusively that gold mines were not, under the Roman Law, the property of the State, but formed part of what French writers call the *Domaine privé*, since those gold-mines were private property, as well in the hands of Tiberius as they had been in the hands of *Sextus-Marius*, Dalloz, vol: 31, *Répertoire de Jurisprudence*, following *Choppin*, erroneously quotes ch: 4, as containing this passage, and further erroneously states that *Tiberius* reserved to himself

the mines in the lands of *Sextus-Marius*, as if those two authors had desired to lead one to believe that *Tiberius*, in the exercise of some supposed regalian right over mines, had been desirous of shewing that gold-mines belonged to the Sovereign; the very reverse is the case. The distortion of the incident is not surprising in *Choppin*, that *zélé défenseur des droits du Roi;* but it can only be accounted for in *Dalloz* by supposing that great accuracy cannot be expected from those who write as much as *Ferrière* and *Dalloz* have done.

Ownership of Mines. Bosquet.

Sec. 159.—To revert to the article of *Bosquet*, that author continues thus:

Bosquet's later opinions support views of Plaintiffs.

"Par l'Ordonnance de Charles IX, donnée à Paris au mois de Mai "1563, il est dit "que le droit de dixième des mines, minières, métaux et "autres substances terrestres, qui se tirent, et se pourront tirer par toutes "les terres du Royaume, soit *or*, *argent*, cuivre, étain, etc., etc., appartient "au roi, par droit de Souveraineté, sur toutes les mines ouvertes dans le "royaume."

On comparing *Bosquet's* statement that the Kings had restricted themselves to one-tenth of the metals and his citation of Charles' assertion of right to one-tenth of all the *gold*, *silver*, *tin*, and other mines in the Kingdom, with that other doctrine found in Guyot, *vbo. Mines*, and supposed to be one of *Bosquet's* earliest productions (see § 153 of this Factum), declaring the King to be the owner of all the mines in the Kingdom, it becomes quite plain that *Bosquet* has greatly modified his views, and that he now believes all mines to belong to the owner of the soil. However, as we shall see in the next section, *Bosquet* believes the King to have the right of seeing to the development of that great branch of national wealth. We do not see much difference, at bottom, between the later opinions of *Bosquet* and *Merlin's* views as already set forth at P. 61 of this Factum; and we therefore class *Bosquet*, in his latter and more learned days, among the authors who assign all mines, even of gold and silver, to the owner of the soil.

Sec. 160.—After referring to the Ordinance of Henry IV, of 1601, for the purpose of shewing that the King had remitted his Royalty on certain substances, *Bosquet* states, in five lines, what the whole Law of France was, and

The same.

Ownership of Mines. Bosquet.

what the Law of this country still is, in reference to mines. *Bosquet, loco citato*, says :

" L'on ne peut absolument, sans une permission du Roi, ouvrir aucunes " mines *d'or, d'argent*, métaux, et autres substances terrestres que ce puisse " être, conformément aux différentes Ordonnances."

That very prohibition, in respect of opening Mines without the Royal Permission, distinctly negatives the supposition of the King's right being aught than one of Police or Supervision ; it confirms the view of *Seneca*, as reproduced by *Brixhe* (see § 149 of this Factum) " *Ad* REGES pertinet omnium *potestas*, ad SINGULOS *proprietas*."

Inalienability of Crown-Domain proves ownership of mines not to be in King.

Sec. 161.—*Bosquet*, on attaining the post of Director of correspondence in the *Régie des Domaines* must have been struck with the reflexion, thrust every day before his eyes, that the *Domaine du Roi*, in France, was inalienable ; and he must have felt that the inalienability of the domain is an unanswerable argument, in connection with the text of every French Ordinance, against the supposition that mines, of any sort, should belong to the King, or, in other words, form part of the royal domain. It must have been some such observation on the part of *Bosquet*, which led him to modify his views on the subject of mines. For instance, BOSQUET, in the *Dictionnaire des Domaines, vbo. Domaine*, § 2, tells us :

" Le domaine de la Couronne et les droits en dépendants sont inaliéna- " bles ; cette inaliénabilité est une suite nécessaire de la substitution perpé- " tuelle de la Couronne, et de la destination du Domaine à l'usage du " Prince, qui, comme grevé de substitution, est obligé de transmettre à son " successeur tous ces domaines et droits qui sont spécialement affectés au " bien de l'état et à l'utilité publique."

Bosquet then assures us that each King, at his Coronation, swore to maintain the inalienability of the domain ; and the author proceeds to say :

" CHARLES VI suivit l'exemple de ses prédécesseurs ; *il fit serment*, " lors de son sacre en 1380, de ne point aliéner son domaine (DUPUY, *traité* " *des droits du Roi*, P. 501). Il paraît même que ce Prince eut des vues " plus étendues pour la conservation du domaine ; en éfet, *M. de la Guesle* " (Remont. P. 181) rapporte que sous son règne, il se fit une *Ordonnance* " solemnelle, *en forme* de pragmatique, *jurée et promise* sur les Saints Evan- " giles, par le Roi, les princes et les Officiers de la Couronne, laquelle prohi- " boit, cassoit et annulloit les dons du domaine soit de l'ancien que le Roi " tenoit alors, soit de ce qui pouvoit lui écheoir et avenir par dons, achats, " successions, forfaitures et confiscations. *Blanchard, comp. chron*, cite " une Ordonnance du même Roi, du 15 Octobre, 1400, portant que les dons " qui seront faits sur le domaine seront nuls."

After giving, from *Brillon*, a more detailed account of the enregistration and verification by Parliament of that solemn Ordinance, in form of pragmatic sanction, sworn to by the King, Royal Princes of the *States-general* assembled at Paris, in February, 1401, *Bosquet* proceeds to state : OWNERSHIP OF MINES. BOSQUET

" *Fontanon*, tom ; 4, P. 1320, cite une autre Ordonnance, *qu'il date* " *du mois de Mai*, 1413, par l'article 90 de laquelle CHARLES VI révoqua " tous les dons des domaines ci-devant faits, et ordonna qu'il n'en seroit fait " aucun à l'avenir, pour quelque cause et à quelque personne que ce soit, " sinon pour apanage ; et que si par inadvertence, importunité ou autre- " ment, il en étoit fait, il les déclarait nuls et de nulle valeur."

How then could the King-worshipper, *Bosquet*, long remain of the opinion that mines, of any sort, belonged to the Domain, when his intimate relations with the *Domaine*, as Director of Correspondence, revealed to him the fact that CHARLES VI, who had half a dozen times sworn, and once even, by form of *pragmatic sanction* (*!*) not to alienate the *domaine*, and who, in the very month when he declared that his rights in mines of all sorts (*mynes d'argent, etc., et autres quelzconques* en nostredict royaume) consisted merely of the one-tenth royalty, also published the Ordinance so cited by *Fontanon* as declaring null and void all gifts and grants of the domain. It is quite plain that Charles VI never considered himself the owner of mines found in private lands, since he merely laid claim to the one-tenth royalty, and that, even if he or his advisers had considered mines to belong to the domain, he never would have been allowed, without remonstrance from the *Etats Généraux*, or from the Parliaments, to have so far departed from his oath, as to alienate the *domaine* by issuing his mining Ordinance of 1413, which merely claims not the mines, but the one-tenth royalty only, and thus to renounce, in less than a year from his oath, a part of his *Domaine*, i. e, the other nine-tenths of the mines. Every principle, every argument, that goes to establish the inalienability of the domain tends also to shew the absurdity of the doctrine that mines, of any sort, should belong to the King. The same.

Sec. 162.—The doctrine of the inalienability of so much of the *domaine* as is figurative of the Sovereignty of the monarch is a doctrine upheld in every civilized country ; although some there are, who held that what is called the *petits domaines* may be farmed out by the Prince ; but the fact, that CHARLES VI, whose claim to a royalty was the first The same.

Ownership of Mines. Dupessis. Husson. Ferrière. Le Camus.

authentic case of the kind, among the French Kings, has put the source and origin of his claim to that royalty, upon such a footing as to place the *droit régalien*, as modern writers term it, in the opinion of every writer, among those things that are utterly inalienable. Charles VI, in his Ordinance of 1413, (see P. 88 of this Factum) says that the royalty belongs to him : "*à cause de nostre Souveraineté et Magesté royal.*"

The doctrine as to the inalienability of the domain is well treated of by *Berroyer* and *de Laurière*, in their note *z*, to Duplessis, l. 2, ch : 3, *Prescriptions*, P. 522, and in the Memoir of *Maître* Husson, already referred to at P. 56 and 57 of this Factum. See also Guyot, *vbo. Domaine*, Dénizart (*Ancien et Nouveau*) *vbo. Domaine.*

Ferrière's opinion analysed ;

Sec. 163.—Ferrière, in his *Grand Coutumier*, vol : 2, title 9, commenting on article 187 of the Custom of Paris, P. 1547, no. 10, has the following :

" Ces termes : " *doit avoir le dessus et le dessous de son sol*," s'entendent du droit particulier et non du droit public à l'égard du *Roy, qui a seul le droit de* faire fouiller les héritages de ses sujets pour en *tirer l'or, l'argent et* LES MINES ; *lesquelles lui appartiennent* PRIVATIVEMENT A TOUS AUTRES, suivant l'Ordonnance du Roy, Charles IX, donnée à Paris, le 6 mai 1563, du Roy, Henry IV, du mois de Juin 1601, et de Louis XIII, au mois de Mai 1635 ; de sorte qu'il n'est pas même permis aux seigneurs de contraindre leurs sujets de leurs vendre leurs héritages pour cet effet, comme il a été jugé par arrêt, rapporté par *Mornac*, sur la loi 15 *ff ad exhibend.*"

His egregious blunders admitted by his own nephew,

Sec. 164.—*Le Camus*, in interpreting the same article, P. 1575, vol : 2, of the *Grand Coutumier*, places no restriction whatever upon the rights of the owner of the soil in Mines. Apart from that circumstance, we shall soon see how much truth there is in the observation forced from the nephew by the blunders of the uncle (see § 125 of this Factum) ; we shall soon have evidence that :

" On souhaiterait, dans les ouvrages de *Claude Ferrière*, beaucoup moins de vitesse et plus d'exactitude."

and further shewn up here.

For the broad and sweeping assertion thus made by *Ferrière*, to the effect, that *gold, silver* and all other mines belong solely and exclusively to the King, *Ferrière* refers us to what he calls three Ordinances, i. e. of Charles IX, dated from Paris, on the 6 May, 1563, of Henry IV, in June 1601,

and of Louis XIII, in May, 1635. Let us now test the extent of *Ferrière's* knowledge of those Instruments. OWNERSHIP OF MINES. FERRIÈRE.

Nowhere, *is to be found* an Ordinance of Charles IX, under date of the 6 May, 1563 ; we have searched the *Ordonnances du Louvre, Isambert, Decrusy* and *Taillandier's* Collection, *Blanchard's* Compilation ; but nowhere is an Ordinance of that date to be found, not even in *Ferrière's* own Edition, in 1720, of *Néron* and *Girard's* Collection. So much for *Ferrière's* want of accuracy True it is, that under date of the *twenty sixth* of May 1563, there is an Ordinance of Charles IX ; but, if that be the Law cited by *Ferrière* in support of his opinion, we think it shews how utterly unfounded the opinion of *Ferrière* is. That Law is reproduced at length by *Fontanon*, tome 2, livre 2, title 13, P. 337 ; it is also found at length at P. 59 of Lamé-Fleury's *Législation Minérale*, and at P. 140, of volume XIV of *Isambert's* Collection ; it is very brief, and it runs thus :

" Charles, etc., etc., à tous ceux qui ces présentes lettres verront, " salut. Nous avons fait, créé et commis nostre cher et amé *Claude de* " *Gruippon*, Escuyer *Sieur de Sainct Julian*, pour grand Maistre, Surinten- " dât et général réformateur sur le fait des mines, minières, métaux, et " toutes substances terrestres qui se tirent et pourront tirer par toutes les " terres de nostre Royaume et obeyssanee, soit *or, argent*, cuyvre, estain, " plomb, argent vif, acier, fer, alun, vitriol, coperos, salpestre, sel gemme, " sel nitre, charbon, ou autre substance desdites mines. Et pour luy donner " moyen de l'entretenir audit estat, et satisfaire aux charges portées par ses " lettres de prouision, *nous luy avons fait don* pour quatre années *des* DROITS " DE DIXIESME A NOUS *appartenants sur les choses susdites*, et autres " substances, *et qui nous sont deuës sur* TOUTES LES MINES *de nostre* " *Royaume.*"

" Et combien que ledit *droit de dixiesme* Nous *appartienne*, de toute " disposition comme estans vrais *droits de souueraineté*, et qui regardent le " droit de la couronne, qui ne peut estre vsurpé par personne qui soit : " toutesfois *plusieurs* personnes qui ont des mines, et qui par vsurpation " ont receu ces droits, prétêdans que ce n'est droit qui nous appartienne, " pour les avoir vsurpez sur Nous, et que ledit *de Sainct Julian* ne leur en " peut rien demâder, *voulans restraindre ledit don* par nous fait audit *de* " *Sainct Juliâ aux mines* QU'IL FERA OUURIR, et non celles qui sont de long " temps ouuertes : et encore d'autres qui ont acheté de nostre domaine, " prétêdant que ces droits leur ont esté vendus, sans qu'il en soit fait " aucune mention en leurs contracts : et toutes ces difficultez redondent à " nostre grand interest, pour ce qu'apres les quatre ans passez les dits droicts " doyvent demeurer reunis à nostre domaine : dont pour oster les doutes."

" Sçavoir faisons, que *de l'aduis de nostre conseil*, nous avons dit et " declaré, disons et declarôs que le *droit de dixiesme nous appartient par* " *droit de Souueraineté sur* TOUTES LES MINES qui ont esté par *cy deuant*, " ou qui seront *cy apres ouuertes*, de quelques temps, ou par quelques mains " qu'elles soyent tenues en nostre Royaume, pays, terres et seigneuries, " auxquelles on travaille de present, ou travaillera à l'advenir : et que si

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" par ci deuant les droits ne nous ont esté payez, nous les declarons vsurpez, " et comme tels, pouuoir estre poursuivis, et sans que les acheteurs ou " autres tenanciers de nostre domaine puissent pretendre lesdits droits leur " avoir esté vêdus ou baillez, s'il n'en est fait expresse mêtion en leurs " contracts, enioignant à nos procureurs generaux, ou leurs substituts, de " faire la poursuite desdits droits, sans aucune dissimulation."

" Si donnons en mandement, etc., etc., etc. Donné à Paris, le vingt- " sixiesme iour de May, l'an de grace mil cinq cens soixante trois : et de " nostre regne le troisiesme. Ainsi signé sur le reply, par le Roy en son " conseil."

" Bvrgensis."

The same.

Sec. 165.—It is surprising how *Ferrière* could have imagined that the Ordinance of Charles IX, of 26 May, 1563, which " *by the advice of the King's Council*," declared the King's rights in mines to consist *merely* of a *royalty* of one-tenth on all mines of *gold*, *silver*, etc., really made the King proprietor " privativement *à tous autres* " of all the mines in the Kingdom. Such ignorance shews how well he deserved the reproaches of his nephew, and how true it is, as *Camus* so bitterly says of him, vol. 1, P. 69 :

" Il n'y a d'estimé dans son livre que ce qui n'est pas de lui."

The Ordinance, referred to by *Ferrière*, expressly names *gold* and *silver*-mines, and asserts no greater right on them, than on other mines ; it merely claims a royalty of one-tenth.

It was not until the 1st July, 1563, that the Parliament of Paris enregistered that Ordinance, with a modification which clearly defines and limits the King's rights, in mines of all sorts, and without distinction, to the royalty of one-tenth. The modification, by the Parliament, is in these words (see P. 59, note 1, of Lamé-Fleury, *Législation Minérale*) :

" *Pour jouir* par l'impétrant *du don* à lui fait dudit droit *du dixième*, " pour le temps et terme de quatre ans, pour le regard *des droits au roi* " *appartenant, et est connu lui concerner et appartenir ès métaux et minérales* " de son royaume."

The Parliament declares that, having regard to the King's rights in mines, the petitioner may take the King's gift of the royal rights in mines ; the *Arrêt* may be said to declare that the gift includes, for a limited time, *all* the King's mining rights, that is to say his royalty of one-tenth (*droit du dixième*).

The same.

Sec. 166.—We have already conclusively established, at P. 110 and *seq :* of this Factum, that the Ordinance

of 1601 proves the very reverse of the sweeping doctrine laid down by *Ferrière*; let us now examine the third and last authority referred to by *Ferrière* in support of his inconsiderate assertion, i. e. the Ordinance of Louis XIII, of May, 1635; that Law is found at length at P. 175 of Lamé-Fleury's *Législation minérale*, and at P. 441 of Volume XVI of *Isambert's* Collection. That Law was not registered by the Parliament of Paris, and cannot therefore be referred to, as Law here (see § 118 and *seq :* of this Factum). But supposing even that it had been so enregistered, what does it amount to? In a preamble consisting of two paragraphs, the King recites the advantages that have accrued from his father's Ordinance of 1601, and that he (Louis XIII) had, by his Edict of 1626, created a second set of Treasurers and Receivers general of the mines; and Louis XIII then proceeds, in a decree of one paragraph to appoint another set of such Officers, i. e. "*deux* "*conseillers et controlleurs généraux*, ALTERNATIF *et* TRIENNAL."

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And there ends the Ordinance, on which *Ferrière* has sought to build up the doctine that all mines belong to the King. In a foot-note, at P. 175 of the same work, *Lamé-Fleury* gives us the key to those extraordinary appointments; he says that the sale of offices had then reached the uttermost limit of abuse, and that, in order to create offices for sale, as many as four occupants were appointed to the same office, to fulfil the duties yearly in turn; the first was called l'*ordinaire*, —the second, l'*alternatif*,—the third, *le triennal*,—and the fourth, *le quadriennal*,—the fourth being but seldom appointed.

Sec. 167.—The only remaining reference made by *Ferrière* is to an *Arrêt* cited by *Mornac;* that Arrêt establishes the very reverse of *Ferrière's* doctrine as to the ownership of the mines; the *Arrêt* was in reference, not to mines, but to a demand made by a seignior upon his *censitaire* to compel the *censitaire* to sell to the Seignior a portion of the *censitaire's* land, ostensibly to enable the Seignior to enlarge his manor-house. Mines may have been at the bottom of the Seignior's demand; hence, perhaps, it is so stated by Ferrière; but it does not appear to be so by the *Arrêt.*

The same; the reason probably being that *Ferrière* drew his inspiration from the *Code Henry.*

If *Ferrière* had only referred to *DuMolin*, whose opinion we give elsewhere, and for whom *Ferrière*, at P. 422 of his *Histoire du droit Romain*, affects the higest respect, calling *DuMolin* "the Prince *of Jurists*", he might have expressed

Ownership of Mines. Ferrière. Code Henry. D'Agueseau Camus. Guyot. Corbin. Dupont.

a different opinion as to gold and silver-mines; but we fear, from the frequent references to the *Code Henry* to be found in *Ferrière*, that he drew his knowledge of the Ordinances from that tainted source, of which we find the following candid opinion in the

I Œuvres de D'Agueseau, p. 397.

Code Henry distorts sense of Ordinances.

"On fera bien de s'aider dans ce travail de ce qu'on appelle le Code Henry, où l'on trouve les ordonnances rangées par ordre de matières. Mais comme le Président Brisson, qui est l'auteur de cet ouvrage et qui espérait de le faire revêtir de l'autorité du Roi, y a travaillé en Législateur plutôt qu'en simple Compilateur, il est bon de vérifier les Ordonnances qu'il cite, pour ne pas s'exposer à regarder comme une loi ce qui n'était que la pensée du Président Brisson. Son Recueil finit en l'année 1585. Ainsi il sera nécessaire d'y joindre l'étude de toutes les ordonnances postérieures qui ont établi des règles sur quelques matières du Droit Romain, du Droit Ecclésiastique ou du Droit Français. Nous n'en avons pas encore de recueil complet, mais il sera aisé de les indiquer à notre futur avocat du Roi."

Camus, vol: 2, P. 167, and Guyot, vbo. *Ordonnances*, B. 473, speak in the very same terms of the *Code Henry*. *Corbin*, in the Preface to his own Collection, speaking of the *Code Henry III*, says: "Le Code Henry III n'est pas "composé du vrai texte des Ordonnances, mais d'un mélange "et nouveau langage que l'on espérait faire passer comme "nouvelles Ordonnances, et les faire vérifier au nouveau "Parlement; ce qui n'a pas été fait." With regard to another Edition, published in 1611 and called the *Code Henry IV*, *Corbin* says of it, that it does not contain a single text of the Ordinances.

Dupont entirely in agreement with Plaintiffs' views.

Sec. 168.—A very recent author, Etienne Dupont, writing under date of 1862, with all the lights that a host of the ablest of modern writers have thrown upon the subject, has an article, which the limits of this Factum reluctantly compel us to abridge. After reasoning out the case, as decided by Natural Law, *Dupont*, at P. 6, volume I, of his *Jurisprudence des Mines*, arrives, though in different words, at the very same conclusion as that formed by the Plaintiffs, in 1862, when, in their Declaration in this cause, as reasons for voiding the "de Léry-*Patent*," they stated their opinion thus:

"V. The Crown had no interest to grant; inasmuch as, by the "Laws then in force in Lower-Canada, the rights of the Crown, in "private lands, were, and are, restricted to 1|10 of the metals extracted."

"VI. The Mines belong to the Plaintiffs as owners of the soil in those "lands and tenements, no part of which ever belonged to the Defendants as

" owners of the soil; and that the Patent issued without notice to the " Plaintiffs' *auteurs*, as owners of the soil, and without the Plaintiffs' *auteurs* " having been called on to work the mines." OWNERSHIP OF MINES. DUPONT.

" VII. A Royal Permission to work a mine could only issue on the " refusal of the proprietor to work the mine, after regular and judicial notice " to the proprietor, and a formal judgment to that effect by the Tribunals " of the country." MIGNERON.

DUPONT, *loco citato*, says :

" De tout ce qui précède il résulte : "

" Que la propriété des Mines ne saurait être attribuée, *d'une manière* " *absolue*, aux propriétaires individuels de la surface, ou à des syndicats de " propriétaires limitrophes."

" Que cette propriété ne saurait non plus être nécessairement donnée " aux inventeurs."

" Que les mines doivent être concédées de manière à embrasser, comme " champ d'exploitation, une étendue proportionnée à la nature du gîte et " aux circonstances locales. Or qui distribuera ainsi les mines de la manière " la plus appropriée à la bonne exploitation des gites, et par suite à l'intérêt " général ? Ce ne saurait être que l'Etat, arbitre naturel des intérêts géné- " raux."

" Nous arrivons ainsi, par une déduction tirée de la nature des choses, " à conclure que les mines doivent être distribuées par l'Etat, qu'elles sont " de *droit régalien*, comme on disait à l'époque où le roi représentait l'état.'

" D'autre part, quoique la nature des gîtes minéraux et l'intérêt géné- " ral s'opposent à ce que la propriété des mines suive nécessairement la " propriété de la surface, *il est juste de reconnaître le* DROIT INCONTES- " TABLE *du propriétaire d'entailler le sol pour rechercher une mine nouvelle*, " AINSI QU'UN *titre vague* DE DROIT DE TRÉFONDS *sur les mines situées dans* " *sa propriété.*"

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" P. 7. Selon l'ancien Droit Romain, le propriétaire de la surface l'était " également de toutes les matières métalliques renfermées dans son tréfonds.

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" P. 8. Les mines d'or ou d'argent et de tout autre métal, trouvées dans " un fonds, sont regardées comme les produits du terrain. *Digeste*, livre " XXIV, t. 3, l. 7, § 14. Plus tard, le droit civil changea, et le *droit réga-* " *lien* se fit jour, sans être encore absolu."

SEC. 169.—At P. 10, *Dupont*, quotes the conclu- The same.
sion arrived at by *Merlin*, in the article reproduced at P. 59 et *seq* : of this Factum, *Dupont*, then proceeds to state his dissent from *Merlin*, and assures as that the last Roman Emperors did something more than impose a mere fiscal burthen on the working of Mines. No doubt, they did ; and *Dupont*, in the next page, quotes the opinion of *Merlin* to that effect. In fact *Dupont* has drawn, between his opinion and that of *Merlin*, a distinction without a difference. Let us

Ownership of Mines. Dupont. Migneron.

hope that *Dupont*, the layman, was not influenced by the desire of plucking a feather from the wing of the *célèbre légiste*, as he otherwise justly styles *Merlin*. If *Dupont* had glanced at the quotation from *Merlin's Répertoire*, P. 193, given by us at P. 59 of this Factum, he might have seen that *Merlin* and he are in perfect agreement; *Merlin* there states:

"Tout ce qu'on peut tirer des mines appartient au Domaine du roi."

"Telle était du moins avant la loi du 12 Juillet 1791, la doctrine d'une "foule d'auteurs; mais j'ai démontré dans mon *Recueil de Questions de* "*Droit*, article Mines, qu'elle n'avait pour base qu'une interprétation "erronée des lois romaines et des anciennes Ordonnances, et une confusion "*du droit de propriété*, avec *le droit d'inspection* et la faculté *de dispo-*"*ser en indemnisant.*"

What is this *faculté de disposer en indemnisant*, but the *droit régalien*, as understood by *Dupont?*

The same.

Sec. 170.—*Dupont*, satisfied with his apparent triumph over the *célèbre légiste*, Merlin, then proceeds, at P. 14, to demolish, in the most absolute manner, the pretensions of the Defendants, as to the State being the owner of the mines, in the following incisive language:

"Le droit régalien sur les mines n'implique pas la propriété absolue de "ces mines de la part de l'Etat."

Migneron of same opinion as *Dupont*, and favorable to Plaintiffs.

Sec. 171.—*Dupont* then quotes *Migneron's* definition of the rights of the State or Sovereign, or *droit régalien*, without reference to the rights of the owner of the soil. We shall presently see what corresponding rights flow, in the opinion of *Dupont* and of *Migneron*, from ownership of the soil. Here are *Migneron's* words, as quoted by *Dupont* at P. 14 of the same work:

"M. *Migneron* résume le droit régalien dans la triple attribution qu'il "confère au prince:

"1o De régler la destination de la propriété souterraine, en d'autres "termes de pourvoir du privilége de l'exploiter, les personnes qui peuvent "le mieux la mettre en valeur."

"2o D'en surveiller l'exploitation dans ses rapports avec l'ordre public, "avec la conservation du sol et avec la sûreté des ouvriers mineurs."

"3o De percevoir un certain tribut sur les produits qu'en obtient "l'exploitant."

The same.

Sec. 172.—*Dupont* then cites the opinion of *Dénizart*, noticed hereafter; and, after berating *Regnaud d'Epercy*

for his historical blunder in asserting that PHILIPPE-LE-LONG, in 1321, had declared all mines to be *propriétés domaniales*, DUPONT proceeds to trace the history of legislation in France upon the subject of mines, much as it has been described by *Merlin*, in the article already quoted in this Factum; and it becomes unnecessary to follow that historical sketch beyond the year 1663, date of the establishment of the *Conseil Supérieur* in this country, since we purpose examining *seriatim* all the Ordinances relating to mining, enregistered in this Colony after that date.

OWNERSHIP OF MINES. DUPONT. MIGNERON.

Dupont quotes the Ordinance of CHARLES VI, of 1413, with precisely the same result as that arrived at by *Merlin*; and he then gives a synopsis of the Ordinance of Louis XI, of 1471, reproduced at length at P. 93 and *seq*: of this Factum. We give the conclusions he draws from it, to shew that they litterally and absolutely agree with our own. At P. 22, *Dupont* says:

" Cet édit de Louis XI institua un grand maître superintendant des " mines, ayant pouvoir d'ouvrir et d'exploiter, par lui et ses lieutenants ou " commis toutes les mines existantes en France soit dans les lieux apparte- " nant, en propre, au roi, soit dans ceux qui appartenaient à ses sujets, " *sauf l'indemnité des propriétaires.*"

" On est heureux de voir ce principe de l'*indemnité due au propriétaire* " écrit dans l'ordonnance d'un roi de France; mais la mention même " de ce droit exclut toute idée de propriété absolue des mines par les tré- " fonciers, et le droit régalien apparait, en ce sens que l'ordonnance donne " au grand-maître le droit de régler cette indemnité, et de statuer sur tous " les différends en matière de mines. Il faut le dire, à ce sujet, que les " Parlements modifièrent l'Ordonnance de Louis XI, en déclarant que l'in- " demnité due aux propriétaires serait réglée, non par le grand maître seul, " mais par le procureur du roi, et le maître général."

" Pour intéresser les propriétaires du sol à rechercher et exploiter " eux-mêmes les mines existant dans leurs fonds, l'Ordonnance de Louis XI " leur donnait un délai de 40 jours pour déclarer s'ils avaient des mines " dans leurs fonds, et s'ils entendaient les exploiter: passé ce délai, et à " défaut de déclaration, le grand Maître pouvait les faire exploiter par " d'autres, le propriétaire du sol était privé de toute indemnité pendant " 10 ans, et il pouvait même, suivant les cas, être condamné au paiement " d'une amende.

" Dans le cas de la découverte des mines par un agent du grand " Maître, le propriétaire du sol était mis en demeure de l'exploiter lui-même " dans un délai de 6 mois: à son défaut, le droit d'exploitation était donné " à son Seigneur immédiat; au défaut de ce dernier, au Seigneur suze- " rain; et au défaut de tous, au grand maître."

" CETTE PRÉFÉRENCE accordée par l'Ordonnance de Louis XI *au propriétaire du sol, pour l'exploitation des mines*, rappelle certaines disposi- " tions de la loi du 28 juillet 1791; mais l'Ordonnance de Louis XI était " plus sage, à certains égards, que cette loi, car elle autorisait le grand

Ownership of Mines. Dupont. Migneron.

" maître à conférer à d'autres qu'au propriétaire foncier le droit d'exploiter " les mines, lorsque celui-ci était reputé incapable."

" D'autre part, si l'on songe que le principe de l'indemnité due au pro- " priétaire était écrit dans l'Ordonnance de Louis XI, que cette indemnité " était réglée par le grand Maître et un magistrat, et qu'une jurisdiction " spéciale était conférée au grand Maître avec le droit de permission, on " reconnaîtra une grande analogie de principes entre la législation des mines " sous Louis XI, et la législation existante, consacrée par la loi du 21 " avril, 1810."

" Cette conformité de dispositions, dans la législation des mines, à plus " de trois siècles et demi d'intervalle, a été signalée, pour la première fois, " par M. *Migneron*."

The same.

Sec. 173.—*Dupont* and *Migneron*, in the last quotation have viewed the *droit régalien* more from the stand-point of the owner of the soil than they had hitherto done; and neither of them dreams of making the absurd distinction between *royal* mines and other mines; after quoting a few of the various other subsequent Ordinances herein before noticed, *Dupont* takes up the Ordinance of Henry IV, of 1601: he quotes it as a mere exercise, by the King, of the *droit régalien;* and then, in the following remarkable admission, at P. 27, the author concedes that Ordinance to have been a great relaxation of the *droit régalien*. He says:

" Ainsi l'édit de 1601 ne supprima point le droit régalien, comme on a " pu le croire; il ne fit qu'en modifier l'exercice par grâce spéciale du roi, " et Henry IV, comme le fait observer *M. Migneron*, en renonçant à son " droit du dixième, *par grâce spéciale*, sur les mines de houille et de fer, ne " renonça ni à la faculté de concéder les gîtes des substances minérales que " leurs dispositions rendaient susceptibles d'être concédée, ni à celle de faire " surveiller l'exploitation de ces substances."

Notwithstanding the great weight due to *Dupont's* opinion in that respect, it is hard to conceive what interest could remain to the Sovereign in mines, wherein, whatever his motive, he had ceased to claim a royalty; and that view of the matter is strengthened by the fact, that, for upwards of a century afterwards, no royal permission to work either coal or iron mines appears to have been asked, or given, in France; and one is inclined to infer from *Merlin's* argument in the *Daoust* and *Lefèbvre* case, that such was the main consideration of the *Arrêt* in that case.

Ordinances of 1471 and 1601 give preference to owner of soil.

Sec. 173 (*bis*).—A feature in the Ordinance of 1601, that seems to have escaped *Dupont's* attention, is contained in article 22 of the Ordinance which clearly gives,

to the owner of the soil, the same preferenoe as that set out in the Ordinance of 1471.

OWNERSHIP OF MINES. DUPONT. MIGNERON. DUPLESSIS.

Sec. 174.—*Dupont* next cites at P. 33, 34, 35 and 36, a number of the most contradictory *Arrêts en Conseil*, in reference to mines near Alais, for the purpose of shewing the inconveniences arising from the absence of fixed rules in determining questions of mining grants.

Some extraordinary *Arrêts* mentioned by *Dupont*.

Those *Arrêts*, which, *in more respects than one*, may be likened to our Canadian Orders in Council, alternately ousted two rival claimants of the mines, six times in 10 years; finally the King in Council, shortly before the Revolution, administered substantial justice by ousting both claimants and by granting the mines to his own brother! The old fable of the oyster!! *Dupont* states the matter without comment; he was, at the date of his writing, *Ingénieur en chef au corps impérial des mines*; and while he states that, under the old monarchy such things were done, he forgets to remind us that those abuses existed only at the decline of the monarchy in France and after this Country had been happily severed from France,—that such acts of injustice were seldom thought of by Kings, and never tolerated by those grand old Parliaments of France, who watched over the interests of the people, in the times when France implanted her Laws here.

No such iniquities could assuredly have taken place under the Ordinance of 1471, as modified by the Parliaments of Paris, which, by article 10, left to the ordinary tribunals the determination of all such questions (see P. 97 & 100 of this Factum). *Dupont* is mistaken in supposing that the *Arrêts* he condemns so mildly were at all influenced by the absence of fixed rules; nothing else than jobbery could have been expected from confiding the decision of such questions to needy Councillors of State. What happened on that occasion in France, is said to have happened quite recently in Canada, in reference to mining lands in the Chaudière. Human nature is the same every where. The early history of the "DE LÉRY-*Patent*" might perhaps, also prove highly interesting in this connection.

Sec. 175.—DUPLESSIS. l. 2, ch: 2, P. 123, has, in this connection, some interesting comments on the 187th

DUPLESSIS favors views of Plaintiffs.

Ownership of Mines. Duplessis.

article of the Custom of Paris, which is Law in Lower-Canada. The article runs thus :

" *Quiconque a le sol*, appelé rez-de-chaussée, d'aucun héritage, *il peut* " *et doit avoir le* DESSUS *et le* DESSOUS *de son sol ;* et peut édifier par dessus " et par dessous, et y faire puits, aiséments et autres choses licites, s'il n'y a " titre au contraire."

The comments of *Duplessis* are as follows :

" *Que la propriété du sol emporte le dessus et le dessous.*"

" *Ce principe est* DE DROIT ; et il est de plus établi par l'article 187 de " cette Coutume."

" Il a trois effets."

* * * * * * * * * * * * *

" Le second qu'*il* (the owner of the soil) *peut faire* SOUS SON SOL *ce qui* " *lui plaît*, et autant avant en terre qu'il veut."

* * * * * * * * * * * * *

" Le troisième est, que *tout ce qui est inédifié* au dessus et AU DESSOUS " *de son sol lui appartient*, SANS AUTRE TITRE *que celui de son sol.*"

DUPLESSIS places no restriction whatever on the rights of the owner of the soil above and below the surface ; he says it is a "*principe de droit*," a principle of Common Law. Can any words more clearly express the opinion that the mines belong to the owner of the soil ? If gold, even, formed an exception to the rule, surely *Duplessis* would have noticed it ; in any case *Berroyer* and *de Laurière*, who are the commentators of *Duplessis'* text, and who had then (in 1726) published the first volume of the *Ordonnances du Louvre*, and had the materials all ready for the publication of the second, containing the Ordinance of 1413, would have inserted, in their commentaries on *Duplessis*, some note, as they have done in other matters, contradicting or qualifying *Duplessis'* assertion.

Principle that *domaine utile* belongs to owner of soil incompatible with Defendants' views.

Sec. 176.—Moreover, is not the supposition of the King, or any other person than the owner of the soil, having any proprietary rights whatever in the soil and its products, utterly at variance with the feudal tenure which prevailed in France, and was thence transplanted here ? Does not such a supposition vest in the King, the *Seigneur Suzerain*, above all others, and in the last instance, some portion of that *domaine utile*, which by Law was exclusively vested in the vassal or owner of the soil ?

Ownership of Mines. Two Arrêts. Pocquet.

Sec. 177.—That principle of the Common Law prevailed, even in the despotic reign of Louis XIV, and underlies a decision of the King in Council, upon a claim made by the King's officers, not to the mine, but to the payment of the Royalty of one-tenth, on a coal mine.

The same; and royal Permission not necessary.

Recueil Judiciaire, Vol: 6, P. 597 & 589.

Contains an Arrêt du Conseil d'Etat (26 January 1744), which referring to the Edict of 1601 and proceding Ordinances, Edicts, Letters-Patent, confirms them, and says: "Les mines de Charbon de terre étaient, *comme les mines de métaux et minéraux, sujettes au même droit dépendant du Domaine de sa Couronne* et souveraineté du droit Royal du dixième. (See also P. 143 Lamé-*Fleury*, *Législation minérale*).

The *Arrêt* declares the King's rights to be a *royalty* only *on* all *Mines;* it is precious as having been made in that very corrupt place, the Council of a King, under the old regime; it draws no distinction between the precious and the baser metals, and asserts no other claim than the King's right to a fiscal burthen on the mine.

The same.

Sec. 178.—An *Arrêt*, of more importance still, as having been rendered by the King's Council, in times of perhaps still greater corruption, and applying to excavations made in quarrying in the environs of Paris, was rendered on the 14 September, 1776, and shews that no royal permission was then considered necessary to quarry beneath the surface (see P. 199 of *Lamé-Fleury.*)

Pocquet de Livonière wrote on exceptional Custom of *Anjou.*

Sec. 179.—The value of *Pocquet de Livonière's* opinion is not increased by the fact that he wrote on the exceptional Custom of *Anjou;* and lucky it is for the Plaintiffs that he gives the sources from which he draws that opinion; at P. 138 of his "*Règles du Droit François*, ch: IV, art: 4, he says:

"Les *Mines d'or* appartiennent au Roi; les *Mines d'argent* aux Comtes, "Vicomtes et Barons; le Roi s'est réservé le dixième sur les substances "métalliques; les substances terrestres sont exceptées de ce droit."

"*Etablissements de St. Louis*, art: 88.
"Loysel, livre 2, tit: 2, Règle 52.
"*Anjou*, Art: 61.—Choppin, ibid.
"LeBret, *Souveraineté*, livre 3, ch: *des Mines.*
"*Ordonnance* de Juin 1601.
"*Delhommeau*, livre 1, Max: 18."

Ownership of Mines. Pocquet.

Analysis of his opinion.

Sec. 180.—A part from the fact that, in the same chapter, the author enunciates doctrines utterly at variance with the Law of this country, as settled by the Seigneurial Court, on the subject of rivers not navigable, *Epaves*, *Bâtardise*, and *Déshérence* &c., &c., &c., there is, about *Pocquet de Livonière*, the remarkable feature that, from his own indirect avowal, he appears to have had some doubt as to the soundness of his opinion. For instance, in his Preface to that work, he says, at P. VII.

" Du tout j'en ai fait un abrégé suivi de notre Jurisprudence Française, " en marquant les principales sources d'où chaque règle a été puisée, *sans* " *trop multiplier les citations*, SI CE N'EST SUR CERTAINS POINTS *plus suscep-* " *tibles* DE DOUTE."

Now, while *Pocquet de Livonière* has given, as a general thing, but one or two quotations in support of the rule he laid down, he has thought fit to back up this particular rule as to mines by no less than seven references to supposed authority on the point. We must presume that, in thus multiplying the quotations on that rule, he felt it was, in his own words, one of those : " *certains points plus susceptibles de doute.*"

The same.

Sec. 181.—Let us now examine the references which *Pocquet de Livonière* has given us, and see whether they bear his opinion out.

The Ordinance of St. Louis, which *Pocquet de Livonière*, copying *Loisel*, places as the 88th Chapter of the *Etablissements*, is, in reality, chapter 90 of that code, and is found at length at P. 180 of volume I of the " *Ordonnances des Rois de* " *France* " (*de Laurière's* Collection). The text of that Law runs thus :

" Nus n'a *fortune* d'or, se il n'est *Rois*, et les fortunes d'argent sont " aus *Barons* et à ceux qui ont grand *Justice en leur terre.* Et se il avenoit " que aucuns hons qui *n'eust voiere en sa terre*, trouvast sous terre aucune " *trouvaille*, elle seroit au *Vavasor*, à qui la *voiere* de la terre seroit, où la " trouvaille fu trouvée ; Et se cil venoit avant qui l'auroit *perdüe*, il l'aurait " à son *serrement*, se il étoit de bonne renommée ; Et se li *hons de foy la* " receloit à son Seigneur, et il li eust demandée, il en perdroit son müeble, " et se il disoit, *Sire, je ne sçavois mie que je la vous deusse rendre*, il en " seroit *quitte par son serrement*, et si rendroit la *trouvaille au Baron.* " FORTUNE SI EST QUAND ELLE EST TROUVÉE DEDANS TERRE, ET TERRE EN " EST EFFONDRÉE."

Sec. 182.—It is evident that *Loysel*, *Livonière* and their followers had never seen the complete text of the Ordinance of St. Louis, since they all place it erronously at ch : 88, instead of ch : 90 of the *Etablissements ;* and it requires no very attentive perusal of that Ordinance to perceive that the King speaks only of a *thing* LOST *by man*, and not of any thing planted in the bowels of the earth by the Almighty Hand of the Creator ; for the King says : " *et se cil venoit avant* QUI " L'AUROIT PERDUF, il l'auroit à son serrement." But the King left misapprehension as to his meaning, when he said : " FORTUNE *si est quand elle est trouvée dedans terre, et terre en* " *est* EFFONDRÉE." In the *Dictionnaire de Trévoux*, vol : III, P. 553, *vbo. Effrondrer*, we find the meaning of that word *effondrer* to be :

OWNERSHIP OF MINES. LOISEL. LIVONIÈRE. ST. LOUIS. DICTIONNAIRE DE TRÉVOUX. LEFÈBVRE DE LA PLANCHE.

ST. LOUIS refers to treasure-trove only.

" *Effrondrer* pour *enfoncer* se trouve dans le Dictionnaire Gaulois, de Borel ; ce qui me fait conclure qu'*effondrer* vient d'*exfundare*, le contraire de *fundare*, comme si d'abord on avait dit *effonder*, et depuis en insérant un *r*, *effondrer ;* ainsi de *bissexte*, bissêtre, de *London*, Londres, de *charta*, chartre, d'*ordo*, ordre."

Sec. 183.—*Fortune d'or*, then, is that which, after having been lost by its former owner, has sunk (*effondré*, *enfoncé*) into the earth, something, in fine, that has lain in the earth (*dedans terre*), not imbedded in the solid rock, as mines are, and that has lain in the earth so long, as to have left no trace of its former owner ; it is, in fact, the *condita ab ignotis dominis pecunia* of the Roman Law, that Law to which St. Louis conformed so much in framing his Laws. *Lefèbvre de la Planche*, vol : 3, livre XI, ch : 10, § 11, P. 344, in laying down the *règle particulière pour les trésors d'or*, says :

The same stated by LEFÈBVRE DE LA PLANCHE,

" Il ne s'agit pas ici (des mines), de ces trésors que la terre produit, " qu'on ne peut dire être, *condita ab ignotis dominis, vetustiori tempore* " *pecunia ;* on en a parlé ailleurs.

" Il s'agit uniquement des trésors cachés en terre, ou en monnoye, ou " en lingot, ou en quelqu'ouvrage monnoyé."

Lefèbvre de la Planche then cites the Ordinance of *St. Louis*, *Loysel* and *Bouteiller*. In like manner *Coquille*, vol : 2, P. 8, Edition of 1703, thus declares that *treasure-trove* and *Mines* are governed by different Laws ; he says :

" Les minières d'*argent*, de fer, de cuivre, d'estain, et autres matières " *ne sont pas de la condition du trésor. Car le trésor est mis en son lieu* " *par main d'homme.*"

OWNERSHIP OF MINES. COQUILLE. *Customs of* ANJOU *and* MAINE. LAMÉ-FLEURY

Coquille does not mention gold for the reason, given by *Choppin*, as we have shewn elsewhere, that there were no gold-mines then known in France; but the fact that he mentions *silver-mines* shews that he does not consider silver-mines to be embraced by the words "*fortune d'argent*, spoken of by ST. LOUIS in his *Etablissements*; and by parity of reason, *Coquille's* doctrine would apply to gold-mines.

and by COQUILLE, and Customs of *Anjou* and *Maine*,

So much is that the case, that the framers of the exceptional Customs of *Anjou*, art: 60 (see P. 535, vol: IV, *Coutumier Général*) and of *Maine*, art: 70 (see P. 471, vol: IV, *Coutumier Général*) deemed it necessary, in order to embrace mines, to say: "*Fortune d'or*, TROUVÉE EN MINE, *appartient au Roy.*" It is clear, then, in the opinion of the eminent men, who framed those two Customs, that *fortune d'or* was not synonimous with *mine d'or*, and that something more than ST. LOUIS' Ordinance was required, ("the words *trouvée* "*en mine*" were required) to confer *gold*-mines on the King under those two exceptional Customs. Arguing, then, on the erroneous supposition that *fortune et treuve d'or* meant mines, it is no wonder that the conclusions drawn by *Loisel*, *Livonière*, and their copyists, from such premises should be unfounded. However, whatever interpretation may be placed upon the *fortune d'or*, spoken of by ST. LOUIS, there can be no doubt as to the meaning of CHARLES VI, for he speaks of SILVER by name, and then treats of all AUTRES MINES QUELZCONQUES, (see his Ordinance of 1413 at P. 88 of this Factum); nor is there any ambiguity in the language of LOUIS XI, for he speaks of BOTH *gold and silver*-mines (see his Ordinance of 1471 at P. 93 of this Factum). Neither can the Defendants pretend that the Ordinance of HENRY IV, of 1601, does not apply to gold, since the "DE LÉRY-*Patent*," under which they claim the gold, professes to have been granted by virtue of that Ordinance (see P. 39 & 103 of this Factum).

Sec. 184.—If any doubt could still remain, LAMÉ-FLEURY, at P. 3, note 1 of his "*Législation minérale*," will help to dissipate it; for he says:

and by LAMÉ-FLEURY.

"Mais quand au langage des établissements de ST. LOUIS, la lecture "simplement complète du ch: 90, du livre 1er, auquel il est fait allusion, "ne permet pas d'y voir autre chose que les *épaves* d'or et d'argent."

And the same author at P. 113, note 2, of the same work, says:

"On voit dans le *sommaire des Edits et Ordonnances Royaux concer-*

" *nant la Cour des monnoyes.* . . . . ., de François Garrault, général de la Cour des monnoyes, que CHARLES VI aurait rendu, en 1414, une ordonnance sur les Mines d'or et d'argent. *Elle n'est que la reproduction* A PEU PRÈS TEXTUELLE *de l'Ordonnance de* 1413." OWNERSHIP OF MINES. *Custom of* PARIS.

Sec. 185.—It is, therefore, clear that the opinion of *Pocquet de Livonière*, and of *Loisel*, is not borne out by the Ordinance of *St. Louis*. But what of the Customs of *Anjou* and *Maine?* We answer that they are merely exceptions to the Common Law of the Kingdom, and, like all exceptions, they prove the rule to be the other way. LIVONIÈRE'S opinion not borne out by his quotations.

Sec. 186.—But, say the Defendants, at P. 40, 41 and 42 of their Factum, this country is governed by the Custom of Paris, and the Jurisprudence is, that, where a Custom is silent on any particular question, that question must be solved by the light of the Roman Law, or by the light of a neighbouring Custom, according as the question is one of written or of customary Law. To that we reply that we have already shewn by the unanswerable arguments of Merlin, at P. 59 and *seq:* of this Factum, that the Roman Law is with us. As for Customary Law, we hold that the Custom of Paris is NOT silent, since article 187 of that Custom says : *Customs of* PARIS not silent ; but gives mines to owner of soil

" Quiconque a le sol, appellé rez-de-chaussé, d'aucun héritage, il peut " et doit avoir le dessus et le dessous de son sol ; et peut édifier par dessus " et par dessous, et y faire puits, aisements et autres choses licites, s'il n'y " titre au contraire." (For the explanation of this article, as we understand it, see § 175, 176, 177 and 178 of this Factum).

But even supposing the Custom of Paris were silent, what of it ? Shall we be told that the Customs of *Anjou* and of *Maine* are not exceptional ? Do they not, like all exceptions, prove the rule of the Common Law to be that ownership of the soil involves ownership of the Mine ? More conclusive evidence of what the Common Law is cannot be found than in the decision of the *Cour de Cassation* of France, referred to by DUPONT, *Jurisprudence des mines.* vol : 1, P. 17 and quoted at length by MERLIN, *Questions de droit, vbo.* Mines, in his article already noticed at P. 59 et *seq* of this Factum. Decision of *Cour de Cassation* as to SILENT *Custom of* LIÈGE shews what Common Law was.

The *Arrêt* was between *Daoust* and *Lefèbvre*, and is also reported at length by *Sirey*, t. III-I, P. 520. The Custom of *Liége* has not one word, one way or the other on the subject of mines ; yet the *Cour de Cassation* held that, under that Custom, the owner of the soil could, without molestation from

OWNERSHIP OF MINES. CHOPPIN. LEBRET.

any one, and without paying royalty to any one, open mines on his lands. That decision can only be upheld upon the supposition that, by the Common Law of the Kingdom, the owner of the soil is also owner of the Mine.

CHOPPIN and LEBRET against Defendants' views.

Sec. 187.—Having disposed of the references made by *Pocquet de Livonière* to the Ordinance of ST. LOUIS, and to *Loisel*, as supporting his opinion, let us now examine his remaining authorities. He next refers to the Custom of *Anjou*, art : 61, and to *Choppin's* commentary on that Custom. We have already shewn the Custom of *Anjou* to be exceptional. It only remains for us to shew that he is, if possible, still less supported by *Choppin* and *LeBret*.

The same.

With regard to the opinion of LEBRET, it is as strong in support of the Plaintiffs' views as language can make it. After relating how the Kings of Persia, the Emperor of the Tartars and the Kings of Bisnaga laid claim to all precious substances found within their realms, how the Roman Emperors levied, on all gold and silver-mines, a tribute, which Valentinian had called *Krusàmous*, and how the learned are divided in opinion as to whether the Emperor, Frederic, of Germany, has included gold mines in his enumeration of regalian rights, LEBRET has the following explicit declaration of his views, at P. 107 of his *Traité de la Souveraineté du Roy*, l. 3, ch. 6, Edition of 1689 :

> " Joint que cette difficulté doit cesser parmi nous, d'autant que *nos* " *Ordonnances comprennent* CLAIREMENT *toutes sortes de métaux ;* savoir est, " L'OR, L'ARGENT, le Cuivre, le Fer, l'Acier, le Plomb, le Vif-Argent, le " Vitriol, l'Alun, la Couperose, le Salpêtre, le Sel nitre, comme il se voit " dans les Ordonnances de Charles IX, de l'an 1563, et de 1567, par les- " quelles il ordonne, que des mines de toutes ces substances on lui en paiera " le dixième : et l'on voit que par une déclaration postérieure que l'on fit à " St. Germain, en novembre 1583, ce Droit fut rétreint sur l'Or et sur " l'Argent."

The same.

It is to be observed, in relation to the reference which *LeBret* makes to an Ordinance of November 1583, restricting the King's royalty of one-tenth to mines of gold and silver, that no such Ordinance as that of 1583 has been noticed by any other author, as remarked by *Lefèbvre de la Planche*, *loco citato ;* but with reference to the Ordinance of 1563, we have quoted it at length, in refuting *Ferrière's* opinion (see § 164 and 165 of this Factum) ; and *LeBret* very properly makes that Ordinance serve as the basis of his opinion that the King's

rights consist in a mere royalty of one-tenth on ALL *metals*, GOLD, SILVER, &c., &c. *LeBret's* words are: "Nos Ordonnances comprennent CLAIREMENT toutes sortes de métaux; savoir est, L'OR, L'ARGENT, etc., etc." Can anything more clearly express the Plaintiffs' views? And, yet, the Plaintiffs were about to take it on trust from the Defendants, that *LeBret* is authority against us. We would have done so, had we not had the good fortune to obtain a look at that rare work of *LeBret*. OWNERSHIP OF MINES. CHOPPIN. LEBRET.

In commenting on the Custom of *Anjou*, which is an exceptional Custom, CHOPPIN, vol 1, livre 1, art: 61, P. 333, states that treasure-trove and mines are very different things:

"Car," says he, "les mines appartiennent au Roy seul, et le trésor à "tous Seigneurs haut-justiciers qui ont jurisdiction."

That is in direct, contradiction with the Ordinance of ST. LOUIS, which gives gold-treasure to the King; it is, however, an answer to the sophistries of *Loisel*, quoted by the Defendants at P. 50 of their Factum. But the language of *Choppin* shews conclusively that, although the Custom of *Anjou*, by the express words "*fortune d'or* EN MINE" gives gold-mines to the King, yet, in the rest of the Kingdom, those mines, like all others, belong to the owner of the soil, and the Sovereign's rights in mines of all sorts, without distinction, consist of the one-tenth royalty only. Observe the language of *Choppin*: The same.

"Les *Rois de France* s'attribuent la *dime* de TOUTES SORTES DE MÉTAUX "dans le Royaume de France par le droict de Souveraineté. Et de ce y a "Lettres-Patentes de May 1563, et de septembre 1570, desquelles j'ay traité "au livre 1, titre 2, art. 6, du Domaine de France. Ce qui doit faire trou- "ver *moins étrange* si *en nostre Coustume* la *mine d'or* est attribuée *au Roy* "PUREMENT ET SIMPLEMENT, comme plus auguste et plus relevée."

Language could not express more clearly that, what ever *strangeness* there might be in this disposition of that Custom, it disappears on comparison with the Common Law of the Kingdom, as established by the King's own Letters-Patent, which gives the King a royalty of one-tenth on all sorts of mines, gold and silver not even excepted.

Sec. 188.—True it is, that, from a variety of examples as to what certain Sovereigns of Egypt, Rome and The same.

Ownership of Mines. Choppin. Brillon. *Arrêt* of 1295.

Poland have done, he says, *not very* logically if he means the early Kings of France :

" De cela je conjecture que les *Anciens Rois* s'attribuaient tous " les trésors, non pas pour prendre tout l'argent monnoyé, trouvé " par hazard, mais les mines d'or, ainsy nommés par excellence : car autre- " ment la monnoye d'or trouvée par hazard a coustume d'estre adjugée *au* " *Seigneur du territoire ;* mesme en ces petites Provinces la Coustume " desquelles n'a rien prescrit touchant les trésors. A quoi se rapporte un " ancien Arrest du Parlement, de Toussaints de l'an 1295, au profit des " Religieux de l'Abbaye de St. Denys, près Paris."

With less of logic, still, *Choppin*, that *zélé* défenseur des " droits du Roi," as Pocquet de Livonière, Fiefs, P. 599, has called him, cites that Arrêt " au profit des Religieux de " l'abbaye de St. Denis, près Paris," in order as he says, to shew that the *early Kings* owned the gold mines, since treasure trove was invariably awarded to the *Seigneur haut-justicier*. Now let us see what were the circumstances of the *Arrêt*. Within the limits of the *Justice haute et basse* of the Monks of St. Denys, a lump of gold, whether wrought or not, we have not been able to ascertain, was found lying upon the surface of the ground, but not imbedded in the soil. The Parliament gave their *Arrêt* adjudging the gold to the Monks " non tanquam *thesaurum*, sed *quandam* rem *inventam*. The gold was awarded not as a treasure, but as a thing found, an *épave* most likely ; no doubt the fact of its having been found on the surface of the ground, and not imbedded in the soil, took it out of the purview of the *Capitulaire de* St. Louis. The one thing quite clear about that *Arrêt* is, that it certainly does not prove as *Choppin* pretends, that treasure is awarded to the *Seigneur haut-justicier*, the main reason of Choppin for awarding gold-mines to the King under the Custom of *Anjou ;* the gold was awarded to the Monks, *Haut Justiciers*, not as treasure, but as a thing found. For the *Arrêt* see Brillon, *vbo. mines.*

Choppin of opinion that, even, under *Custom of* Anjou, owner of soil to be indemnified for mine.

Sec. 189.—Choppin, *loco citato*, is a variance with himself, and with the very article of the Custom of *Anjou* that he comments, when he says :

" Mais combien que les *mines d'argent* soient *attribuées au Roy* par la " Coustume, si est-ce que si elles sont trouvées en la terre d'un particulier, " il est raisonnable d'en payer l'estimation au propriétaire, par argument de " loi 1 de metallor, lib. 11, *cod.* en ces mots, *Cui potentia ex largitionibus* " *nostris pretia suscipiant.*"

" 2. Bouteiller en sa *somme rurale* dit que presque tous les François

" avoient une Coustume pareille, selon l'ancien vsage de la France ; car il " parle ainsi, " La fortune d'argent appartient au Baron ou au Ber," titre " *du Droict au Baron ou au* Ber." OWNERSHIP OF MINES. CHOPPIN. DELEBECQUE.

A remarkable feature about the writings of this *zêlé Défenseur des droits du Roi*, is the silence he observes about the grounds of *Bouteiller's* opinion ; not one word does *Choppin* say of the *Capitulaire* de ST. LOUIS, probably because that Law speaks of the *fortune d'or* purely and simply, and not of the *fortune d'or en mine*, as does the Custom of *Anjou*, and because probably, *Choppin* felt that such a reference to the language of ST LOUIS, on which *Bouteiller* bases his opinion, would have shewn that ST. LOUIS and *Bouteiller* both speak of treasure-trove.

Sec. 190.—Such is the passage, from which DELEBECQUE, *Législation des Mines*, vol : 1, P. 254, (quoted at P. 63 of Defendants' Factum), infers that gold-mines belonged to the King. We have given *Choppin's* words at length, and we have also given *Bouteiller's* words at length. *Delebecque* need not have told us, in the preface to his book, that his work had been written with great precipitation : " cette précipitation " fera excuser plus d'une négligence qu'on pourra y découvrir ; " we see strong evidence of that haste, so little conducive to accuracy, in the fact of his having mistaken *Choppin's* words " *Seigneur du territoire* " as meaning the owner of the soil (" *propiétaire du fonds*, " says *Delebecque*) *Delebecque's* error in the less excusable that he quotes the *Arrêt* as a specimen of the *dog-Latin* then in vogue, without perceiving that the *Arrêt* awards the lump of gold to the monks as having " *omnimodam* JUSTITIAM *altam et bassam*, over the land whereon the gold was found. We have further shewn how much *Choppin* must have drawn upon his imagination in order to infer that *Bouteiller* spoke of gold or silver-mines, for the latter's words merely refer to treasure-trove ; now *Delebecque*, who appears to have had no time to consult *Bouteiller*, gives us to understand that, in so many words, *Bouteiller* states that the Custom almost universally throughout France was to award gold-mines to the King, and silver-mines to the Baron. We subjoin side by side the language of *Bouteiller*, *Choppin* and *Delebecque*, for the purpose of shewing how much each one of the two latter has

DELEBECQUE'S work written, as he states, with great precipitancy. His blunders.

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improved upon his immediate predecessor. The italics are our own :

Comparaison of text of BOUTEILLER, CHOPPIN and DELEBECQUE to shew errors of two latter.

BOUTEILLER.	CHOPPIN.	DELEBECQUE.
" *Fortune d'argent* " *est au Baron* " *ou au Ber.*"	" *Bouteiller* en sa *Somme* " *Rurale* dit " que presque " tous les François " avaient une coustume " pareille selon l'an- " cien vsage de " la France : car il " parle ainsi : " *La* " " *fortune d'argent ap-* " " *partient au Baron* " " *ou au Ber.* Titre, " " du Droict au Baron ou " " au Ber." "	" Et au dire de " *Bouteiller* dans " sa *Somme* " *Rurale*, au titre " du *Droict* au " *Baron* ou *Ber*, il " paraîtrait que " tel était l'usage de " presque toute " la France."

Better for the author, far better for the public, it were, if books written with such carelessness had never been published! Not only has *Delebecque* been thus misled by *Choppin's* improper and unfair conclusions from the writings of *Bouteiller* : but POCQUET DE LIVONIÈRE, *Fiefs*, P. 599, has fallen into the same error ; see P. 51 of the Defendants' Factum, where we quote *Pocquet de Livonière's* opinion, but replace, by their *usual dots*, so much of *de Livonière's* opinion as states that silver-mines do not belong to the King, and that *Choppin* and *LeBret* are both *zélés défenseurs des droits du roi*. No doubt *Pocquet de Livonière* was desirous of being ranged in the same category as *Choppin* and *LeBret*, since the King was then peculiarly the fountain of all honor.

As to *Delebecque* we shall have further opportunities of pointing out his inaccuracies as we proceed with a short notice of his opinions.

Other blunder of DELEBECQUE.

Sec. 191.—After noticing very briefly the Ordinance of 1413, which, as *Delebecque*, at P. 256, vol. I, admits, gives to the owner of the soil the right to work the mine, on paying the King's royalty, he proceeds to draw a conclusion inconsistent with that proprietary right ; for he says, at P 257, vol : 1 :

" En effet de cette Ordonnance résultent pour les mineurs *et autres.*
" 1° le droit de recherche, 2° pour *l'inventeur* le droit de propriété sur la
" mine."

OWNERSHIP OF MINES. DELEBECQUE. DE CROUZEILHES. D'EPERCY.

How, in the name of common sense, we ask, could the owner of the soil and the discoverer of the mine be, at the same time, separately and absolutely owners of the same mine? Evidently such an interpretation cannot be received, for it destroys the Law; some interpretation must be found, which gives life to the Law, some such interpretation, in fact, as that afterwards given to it by the promulgation of the Ordinance of 1471, which expropriated those owners of the soil only, who were unable or unwilling to work the mine.

Delebecque calls trifling the modifications by Parliament, and then quotes *de Crouzeilhes'* opinion in favor of Plaintiffs' views, and admits that Ordinance of 1471 gives to owner of soil a right, at least, to share of profits of mine.

Sec. 192.—*Delebecque* then proceeds, briefly again, to notice the Ordinance of 1471; and he says, at P. 258, vol: 1, that it received some *trifling* modifications; how inattentive *Delebecque* has been will appear to any person reading the modifications made by the Parliament (see P. 99 and 100 of this Factum). The author then quotes the opinion of the *Baron de Crouzeilhes* (*Répertoire de* FAVARD DE LANGLADE, *vbo. mines*) as shewing that mines do not belong to the King, but are the property of the owner of the soil; and then *Delebecque* proceeds to say) at P. 259, vol: 1:

"Ces réflexions sont suggérées à *M. de Crouzeilhes* par l'Ordonnance "de Louis XI; il parait en effet que les droits du propriétaire du sol y sont "reconnus. Mais ce magistrat n'a-t-il pas trop généralisé, en s'exprimant "ainsi qu'il l'a fait? C'est ce que nous pourrons vérifier ci-après. Dans la "période dont nous nous occupons, et *surtout depuis cette Ordonnance de* "1471, SI PAS LA PROPRIÉTÉ DE LA MINE, *au moins un droit à une rede-* "*vance* ÉTAIT, en effet, ATTRIBUÉ *aux propriétaires fonciers.*"

That is a precious avowal from Mr. *Delebecque!*

Error of *D'Epercy* and *Delebecque* as to contents of Ordinances.

Sec. 193.—*Delebecque* then notices the period of those monopolies, which we have elsewhere noticed as having afforded the Parliaments opportunities for that successful resistance which they made to invasions of private rights by the Sovereigns until HENRY IV issued his Edict of 1601. That successful resistance has altogether escaped *Delebecque's* notice; but what appears to be a more extraordinary oversight, on the part of our author, is that, at P. 260, vol: 1, he quotes, *without dissent*, the following statement of *Regnaud d'Epercy:*

"Nous ferons observer que jusques-là les *Ordonnances* des rois "*n'avaient fait* AUCUNE *énumération des mines* et de leurs différentes "espèces."

Ownership of Mines. Delebecque. D'Epercy. Lamé-Fleury

Whatever palliation there may have been for the error of *Regnaud d'Epercy*, who spoke in 1791 before the Ordinances had been published, there is no excuse for *Delebecque*, who might have seen the Ordinances, *had he had time* to look at them. That *Delebecque* has adopted *Regnaud d'Epercy's* blunder, is evident from the fact, that, in speaking of the period of the monopolies, *Delebecque*, at P. 264, vol : 1, says : " A cette époque les Ordonnances désignent les différentes " sortes de minérais ; mais, pour toutes, la législation est " uniforme."

Error of *Delebecque* inexcusable.

In order to shew that the Ordinances of the first period, as some modern writers have been pleased to style it, did enumerate the minerals, we refer to P. 88 of this Factum for the Ordinance of 1413, which enumerates the mines in these words : " *y a plusieurs mynes* D'ARGENT, *de plomb, et de cuyvre, et d'autres metaulx* " ; we also refer to P. 93 of this Factum for the Ordinance of 1471, which enumerates the mines thus : " *y a plusieurs mynes* D'OR ET D'ARGENT, *de* " *cuivre, de plomb, estain, pottin, azur* et aultres *mestaux et* " *matières*." Had he read those two Ordinances, he might have been spared the shame of writing his twaddle about gold and silver-mines.

Ordinances specifically mention gold and silver-mines.

Better, we say again, such works never had been published !

Delebecque's appreciation of Ordinance of 1601 reviewed, and shewn to be incorrect.

Sec. 194.—*Delebecque* then proceeds to analyse the Ordinance of 1601 ; and from it he concludes that the rights of the owner are not respected by that Ordinance. " For," says *Delebecque*, " the owner of the soil could not work the " mine, without first obtaining the permission of the *Grand-* " *Maître* a permission which the latter might refuse." Very true, M. *Delebecque ;* but, then, the Parliament of Paris, in enregistering that Edict, did so only, after a struggle of several years' duration, the several phases of which are well described by Lamé-Fleury, *Législation minérale*, P. 74, note 1, and of which *Lamé-Fleury*, P. 85, note 1, says : " Cette Cour eut en définitive à peu près gain de cause." It may be as well therefore to draw Mr. *Delebecque's* attention, for the next edition of his work, to some of the phases of that struggle.

Four *Lettres de Jussion* disregarded by Parliament.

Sec. 195.—Henry IV, finding the Parliament of Paris disinclined to sanction the powers of the *Grand-Maître*

as to the disposal of Mines, addressed to that Parliament *four* special *Lettres de Jussion*, 1° on the—13 May, 1602,—2° 17 July, 1602,—3° (date erased from the Register).—and 4° 12 September, 1602, expressly commanding the Parliament to enregister the Edict of 1601 *purely and simply*. On the receipt of each one of those Injunctions of the King, the Parliament answered " *Persiste ès délibération* "; and the entry in the Register of Parliament was : " Les dites Lettres " (de 1601) seront enrégistrées ès régistres d'icelle, à la charge " que la juridiction attribuée par l'édit aura lieu seulement " pour le règlement des mines et les malversations commises " par ceux qui seront employés en l'exécution du dit édit et " règlement, *et* SANS QUE LES OFFICIERS *puissent prétendre* " *juridiction* contentieuse sur les *propriétaires des terres* men- " tionnées au dit édit."

OWNERSHIP OF MINES.

ORDINANCE of 1601, and incidents of its *enregistration*.

To two other *Lettres de Jussion* of the 7 January 1603, and 16 February 1603, the Parliament returned the same answer : " *Persiste ès délibération.*"

Two other *Lettres de Jussion* also disregarded by Parliament.

Sec. 196.—HENRY IV, by *Letters de Jussion*, of the 3 May, 1603, declaratory of his intentions, yielded, at last, so far as to consent to require the *Grand-Maître* to associate with him, in his decrees, " *le nombre de Juges* porté par les " Ordonnances." and further declaring : " *n'avoir entendu et* " *n'entendre*, par l'édit fait sur le règlement des mines et " minières de ce royaume, *que autres que le grand maître et* " *son lieutenant général puissent*, en cas de contradiction, " *juger de l'ouverture, travail* ET PRIX *d'icelles mines*, POUR LE " REGARD *des propriétaires.*"

A seventh *Lettre de Jussion* was also disregarded, but, on eighth *Lettre de Jussion*, Parliament enregistered Ordinance *of* 1601, with restrictions, and with declaration that enregistration had been made " *du très exprès commandement du Roi.*"

How can *Delebecque* persist in declaring that the rights of the owner of the soil are not respected, when the King declares that the *prix d'icelles mines* (the price of the mine, not the surface damage) shall be determined by the *Grand-Maître*, and paid to the owner of the soil, before he shall be dispossessed ? In the same *Lettres de Jussion*, the King grants an appeal to the Ordinary tribunals from the decisions of the *Grand-Maître* and his *Lieutenant*, and that their decrees shall remain unexecuted, pending the appeal. Notwithstanding that concession of the King, and notwithstanding those Letters, and other Letters of the 29 June 1602, the Parliament still persisted in its refusal to enregister the Edict.

Finally the King addressed to the Parliament, from Chantilly, on the 26 July, 1603, very sharp Letters, which

Ownership of Mines. Ordinance of 1601, and incidents of its *enregistration*. Lamé Fleury

the Parliament obeyed by entering an order that no Judgment of the Grand-Master or of his Lieutenant should be proceeded with, pending the appeal, as we have shewn elsewhere. The Parliament further ordered it to be endorsed upon the Edict, that the enregistration had been made "*du très exprès* commandement du roi, réitéré par plusieurs Lettres de Jussion." Every tyro is aware that, in the language of Parliament, such an entry meant that the deliberations of Parliament had not been free, and left the Parliament at liberty to decide such questions as might come up, precisely as the Parliament had decided in the matter of the *de St. Julien*-Grant; see § 107 of this Factum.

Investment of the two *Ruzés* in 1604, and 1633, by Parliament, with office of Grand-Master shews that jurisprudence of France, shortly before establishment of Superior Council here, was favorable to Plaintiffs' views.

Sec. 197.—Again, when *Martin Ruzé* succeeded *de Bellegarde* as Grand-Master, he was invested with his office by the Parliament of Paris on the 31 August 1604, "*à la charge de n'entreprendre cour, juridiction ni connaissance que celle qui est attribuée par l'édit et règlement des dites mines et minières*" (see *Lamé-Fleury*, P. 173, note 1). In like manner, on the 15 March, 1633, a descendant of that person, another *Martin Ruzé*, was invested by the Parliament of Paris with the office of Grand-Master "à la *charge* de ne *rien entreprendre* sur la *juridiction contentieuse*, ains *tenir la main à l'exécution des* ÉDITS ET ORDONNANCES VERIFIÉES *en la Cour et Arrêts d'icelles*."

Here then we find the Parliament enjoining on the Grand-Master to observe the Ordinances *vérifiées*: the Ordinances of 1413 and 1471 had certainly been verified, for the deliberation had been free; and the Parliament of Paris, by its latest judicial act, in respect of mining, just before the creation, one may say, of the Superior Council here, orders the observance of those Ordinances. How then can Mr. *Delebecque* say that, at that period in France, the rights of the owner of the soil were not regarded? How can any one say that here, at this period, those rights are disregarded by the Law?

Unnecessary to follow *Delebecque* into history of mining legislation of France, subsequent to creation of Superior Council here.

Sec. 198.—*Delebecque* then enters into the history of mining in France subsequent to the creation of the *Conseil Souverain* in Canada; but it is unnecessary that we should follow him on that ground, since we are affected by those Laws only subsequent to that event, which have been enregistered in this country. After reviewing, in his own way, the legislation of France during the remaining period of the monarchy,

Delebecque, influenced principally by the legislation of the latter days of the Monarchy, says, at P. 274, vol : 1, that, in France, under the old system, the owners were far from being considered owners of the mines. Yet, holding those opinions, he makes a most precious avowal for us, when he states, at P. 291, vol : 1, in speaking of the Law of 1791, that the doctrine we contend for is rational and just. He says :

OWNERSHIP OF MINES. DELEBECQUE. LOISEL. CHARLES VI.

Precious admission of *Delebecque*, in support of Plaintiffs' views.

" Mais tout en déclarant les mines propriété nationale ou publique, ne " pouvait on pas, sans contradiction, accorder la préférence aux propriétaires " du sol ? Cette préférence ne pouvait-elle dépendre que de la propriété " privée des mines ? Et, en considérant les propriétaires fonciers comme " propriétaires de la surface, cette considération seule ne suffisait-elle pas " pour leur assurer le droit de préférence ? En effet, l'exploitation amène " des dégats à la superficie, de là la nécessité d'indemnités, de là des diffi- " cultés, des expertises, et dans le but d'y obvier, ne doit-on pas désirer " autant que la chose le comporte, de voir les propriétaires du fonds, et par " là de la superficie, exploiter par eux-mêmes les mines qui s'y trouvent."

Sec. 199.—*Loisel*, in Rule XIII of his *Institutes Coutumières*, (*Laurière's* edition, vol : 1, P. 281) is of opinion that *gold* and silver-*mines* belong to the King, but that all other mines be'ong to the owner of the soil ; and he qualifies the ownership of the latter by stating that the permission of the Seignior is necessary to enable the owner of the soil to open and work other mines than those of gold. *Loisel*, at P. 280, vol : 1, of *de Laurière's* edition, says :

Loisel in contradiction with himself,

" XIII. *Nul ne peut* bâtir, coulombier à pied, asseoir moulin ni bonde " d'étang, ni *fouiller en terre pour y tirer minières, métaux*, pierre, plâtre, " SANS LE CONGÉ DE SON SEIGNEUR ; *si ce n'est pour son usage.*"

and at variance with text of Ordinances.

How little weight is to be attached to *Loisel's* opinion in that particular, may be realized on perusing the Ordinance of Charles VI of 1413 (see P. 88 of this Factum), where the King states that the miners " ont besoing d'être preservez et gardez " de toutes violances, oppressions, griefz et molestes PAR " NOUS," and further that " *plusieurs Seigneurs* tant d'église " comme séculiers *veulent* et *s'efforcent* d'avoir, en icelles " mynes, la *dixièsme* partie " and again that " et *s'efforcent* les " diz *Haulx Justiciers de donner* grand *empeschement et* " *trouble* en maintes manières *aux maistres* qui font faire la " dite euvre " and where the King expressly declares : " AFIN " que *doresnavant* les *Marchands* et *Maistres de traffonds des* " *Mynes* qui font ouvrer.... *puissent ouvrer* continuellement, " *sans estre empeschez ne troublez* en leur ouvraige..... " *voulons* et *ordonnons* semblablement que les *Haulx Justi-*

Ownership of Mines. Loisel. Choppin. Rebuffe. Loyseau. *Constitution* of Emperor, Frederic.

" *ciers moyens* et *bas, baillent* et delivrent, *ausdits ouvriers*, " marchans et maistres des dictes mynes, *chemins* et *voyes*, " *entrées et yssues.*" Assuredly Loisel could not have heard of that Ordinance, or of the Ordinance of 1471, when he stated that no one could open a mine without the permission of the Seignior. It is also possible that, when he framed Rule XIII, the Ordonnance of 1601, published some few years before his death had not come to his knowledge.

The same.

Sec. 200.—In explaining that Rule XIII, *Loisel*, at P. 281, vol: 1, says :

" *Choppin*, dans son *Traité du Domaine*, livre 1, titre 2, n. 6, écrit " qu'en *Allemagne* on ne peut sans la permission de l'empéreur, ouvrir sa " terre pour en tirer des métaux."

* * * * * * * * * * * * *

" En France, *les mines d'or et d'argent* appartiennent *au roi*, en payant " le fonds au propriétaire, Voyez *Rebuffe*, sur la loi *inter publica, de verbo-* " *rum signif.* page 115, col. 2, ligne 21, et la règle 52 de ce titre."

* * * * * * * * * * * * *

" *A l'égard des autres mines*, elles appartiennent aux propriétaires " des fonds qui peuvent y fouiller comme il leur plait."

Loisel bases his opinion upon the *dictum* of *Choppin* as to what the Law of Germany was. That *Loisel* could infer that the Law of Germany should serve as a guide to the Law of France on this subject shews how little reliance is to be placed on the opinion of *Loisel ;* and this in the face of the positive declarations of the Kings themselves on the subject. However the admission of *Loisel* that all other mines belong to the owner of the soil is most precious to the Plaintiffs, when taken in connection with the fact, that the Ordinances of 1413, 1471 and 1601 draw no distinction between the precious and the baser metals.

History of Constitution of Emperor *Frederic.*

Sec. 201.—We deem it right to devote a few words to the history of this Constitution of the Emperor, Frederic, because we find it cited by *Loisel*, and by *Dalloz* and other writers. Loyseau, *des Seigneuries* ch : 1, nos. 1, 2, 3, 4, 5 and 6, gives us a narrative of an incident, which, if it did not give rise to the memorable constitution of *Roncaille*, most certainly furnished a pretext to the victorious monarch for crushing out the spirit of the people he had just then vanquished. *Loyseau* says that, as *Frederic Barbarossa*,

was returnig from the conquest of Lombardy, he saw a splendid castle, and asked from his attendants the name of the *Seignior* or Lord ot the castle. The attendant gave the name of the Seignior Lord ; but a flatterer, then present, stated that the Emperor was the *Seignior* or Lord, of that castle ; a wager immediately took place between the attendant and the flatterer as to the meaning of the word *Seignior*, and the Emperor was requested to decide the wager. The Emperor required the assistance of two learned Doctors-at-Law, *Bulgare* and *Martin ;* the former decided in favor of the attendant, while the latter delivered a lengthened harangue in support of the flatterer's opinion, and maintained that the Emperor was Seignior or Lord of the world, and the *master and owner of* the property of all his subjects. The Emperor, whether he had got up the scene as a by-play to give a color to his conduct, or whether he really believed with *Martin* that his subjects' property belonged to him, issued from a *Lit de Justice*, that he held at *Roncaille*, that famous Constitution, wherein that monarch appropriated to the Crown all mines without distinction, all rivers, etc., and left his subjects scarce the shadow of ownership in the soil they tilled. That sort of Law may have suited Germany and Italy ; but it is hardly the sort of thing that British subjects would long tolerate, were it transplanted here. If, to-day, England stands unrivalled in respect of the development attained by her mineral wealth, it is mainly owing to the fact that, at the Revolution, the Commons of England swept out of the Constitution all interference by the Sovereign in the matter of mines, and that, for nearly two centuries since the statute of WILLIAM and MARY was placed upon record, the mining interest of England has been free from any tinkering or jobbing by the Sovereign or his favorites.

Ownership of Mines. *Constitution* of Emperor, Frederic. Loisel.

The same.

Sec. 202.—*Loisel*, in his Rule LII, states, at P. 328 of *de Laurière's* edition, vol : 1 :

Loisel in contradiction with himself.

" Le Roi applique à soi la fortune et treuve d'or."

In commenting on that Rule, *Loisel* places himself in contradiction with the doctrine enunciated by him, in his commentary on Rule XIII; there he assigned both gold and silver mines to the King ; here he *only* gives gold-mines to the King ; silver-mines, he gives to the Baron. He admits, nevertheless, that the Jurisprudence of France as

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TEST TARGET (MT-3)

6"

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OWNERSHIP OF MINES. LOISEL. BOUTEILLER.

shewn by Bacquet, ch : 32, P. 350, has been otherwise ; *Loisel*, moreover, cites the case of a treasure as he calls it (see § 187 and 188 of this Factum) found at *Aubervilliers*, and adjudged by *Arrêt*, not to the King, but to the monks of St. Denis. He further supports his opinion by art : 60 of the exceptional Custom of *Anjou* already referred to by us, and by art : 46 of the also exceptional Custom of *Bretagne*. *Loisel* then cites *Bouteiller*, in his *Somme rurale* livre 1, titre 36, (P. 255, Edition of 1603) as placing "*la fortune au nombre des trésors.*"

Loisel finds fault with the framers of the exceptional Custom of *Anjou*, for having qualified *fortune d'or* by the addition of the words *en mine ;* but we have already shewn that, without such an addition, the Custom would not have included mines (see § 183 of this Factum).

BOUTEILLER does not support Defendants' views.

Sec. 203.—The words of *Bouteiller*, as found at P. 255 of the Edition in the Advocates' library at Quebec, are :

"Si aucun trouve en sa terre aucun trésor, ce doit lui appartenir ; et "si c'étoit à autruy terre, avoir y doit la moitié, et le Seigneur de la terre "l'autre moitié ; *mais*, SELON AUCUNS, *si c'étoit fortune d'or*, au roi appar- "tiendroit."

Observe the caution of *Bouteiller ;* he does not give it as his opinion that *fortune d'or* belongs to the King ; "*mais, selon aucuns*" (*according to* SOME *writers*), says *Bouteiller*, *fortune d'or* belongs to the King ; "*selon aucuns*" means that a few authors have said so. Nor does a single line in *Bouteiller* lead to the inference that *mines* are included in the designation of *fortune d'or*. Indeed that remarkable caution of *Bouteiller* is in keeping with the fact which *Choppin*, vol : 2, livre 2, titre 5, No. 10, P. 215, Edition of 1662, has transmitted to us concerning *Bouteiller*, as to the latter having been "Conseiller du Roy, *Charles* VI." The fact that *Bouteiller* was a Councillor of the very Sovereign, who issued the Ordinance of 1413, which, among other mines, treats of *silver*-mines, and speaks, (as we have shewn already, at P. 80 and 92) of this Factum) of the owners of the soil (*maistre des traffonds*) as being also owners of those mines (*Maistres des Mynes*), readily accounts for the caution of *Bouteiller*, when he says "selon aucuns" ; it would also lead to the belief that his own opinion was not so formed.

What more likely, also, than that *Bouteiller*, this *Conseiller du Roy*, was concerned in the framing of that Ordinance

of his Royal Patron. Be that as it may, few will believe, with the Defendants, that *Bouteiller*, the Councillor of CHARLES VI, perhaps even the framer of the Ordinance of 1413 (which certainly does not adjudge silver-mines to the Baron), ever could have shared the opinion of *Loisel*, that silver mines belong to the Baron, and that *fortune et treuve* mean mines.

OWNERSHIP OF MINES. BOUTEILLER. CHOPPIN. BACQUET, DE LIVONIÈRE.

Sec. 204.—CHOPPIN, vol., 2, livre 2, titre 5, P. 214, 215, 216 and 217, Edition of 1662, treats of the question of *treasure-trove*, and states *Bouteiller's* opinion to be that treasure of gold belongs to the King, and that treasure of silver belongs to the Baron; now we have already shewn that *Bouteiller* has not given his opinion; in fact, at P. 256, of the same work, *Bouteiller*, by quite a number of *Arrêts* and by references to *Bacquet*, shews that the Jurisprudence has been the other way. And yet, strange to say, CHOPPIN, whom POCQUET DE LIVONIÈRE, *des Fiefs*, P. 600 calls a "*zélé* "défenseur des *droits du Roi*" expresses no opinion of his own, but is satisfied with calling it "une belle question". After stating, according to *Strabo*, that, in Gascony, pieces of gold had been found in the earth, "*aussi gros et aussi longs que la main*," CHOPPIN apologizes for eluding the question with the following reason:

CHOPPIN, in one part of his work, does not express opinion;

"Mais pourquoy nous arrestons nous tant à ces choses, puisqu'en "France on tient qu'il n'y a point de mines d'or, "alla anthrakes the-"sauroi"."

In Lower Canada we have the gold; it were better, perhaps, if we had the black diamonds.

Sec. 205.—CHOPPIN, vol: 2, livre 1, titre 15, No. 15, P. 167, Edition of 1662, has an article on the *Domaine*, in which he expresses an opinion inconsistent with the supposition of the King's having any proprietary rights in mines. *Choppin*, after stating that, under the Roman Law, private individuals held gold and other mines, says: La souveraineté "et puissance appartiennent au Roy, la propriété aux "particuliers."

but, treating of the *Domaine*, favors the Plaintiffs' views.

It is impossible to conceive how the land, with its accessory of rock, can be owned by the subject, and how the sovereign, at the same time, can own the metal, that is so intimately united and blended with the rock as to prevent

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the metal (the pretended property of the Sovereign) from being separated from the rock, without destroying the latter, which is the undoubted property of the subject.

The same.

Sec. 206.—CHOPPIN, Vol : 2, l. 1, titre 1, no. 4, P. 5, Edition of 1662, tells us that the Roman Emperors levied a duty of one-tenth on all mines for the State, and that the owner of the soil received another tenth.

We now come to the passage in *Choppin*, vol : 2, livre 1, titre 1, in P. 15, Edition of 1662, upon which the Defendants, at P. 46 of their Factum, appear to rely so much in support of their case.

Choppin says :

" L'Empereur FRÉDÉRIC I (of Germany), estant en son lit de Justice, " en un lieu d'Italie, appellé *Ronchaliæ*, déclara quels estoient les droicts " de *Regale* ou Royaux. Les Duchez, Marquisats, Comtez, Monnoyes, " Peages, Fodre, tributs, subsides, droicts de moulins, droicts de pesche, et " autres droicts à cause des riuières, salines, minières d'or, et autres " métaux tirez des veines de la terre, comme il est contenu au liure 2, de " *Radevic*, ch : 5, et aux *Feudes*, ch : 1, *Quae sunt Regalia. Luc. Penna.* " *in l. quicumque. C. de omni agro deserto.* lib. 2."

Choppin does not state what the Law of France is ; he merely states what the Law of Germany was then ; he does not even assert that the Constitution of FREDERIC I ever was adopted in France ; nothing of the sort ; but if he had made any such statement, he would have well deserved the epithet, bestowed on him by *de Livonière, of* " *zélé défenseur des droits* " *du roi* "! How scarce authorities in support of the Defendants' position must have been, when they singled out that passage from *Choppin*, as favoring their views. As well might they have cited to us the Laws of the Esquimaux !

That passage of *Choppin* is immediately followed by these words :

" Au moyen de quoy le Roy Charles IX par son Edict du 26 May 1563, " vérifié en la Cour de Parlement le 1 Juillet ensuivant, ordonna que le " droict de *dixième* comptoit et *appartenoit* au Roy par droict de souuerai- " neté *sur* TOUTES *les mines*, minières, et autres substances terrestres."

Now, by glancing at that Ordinance reproduced at length, at § 164 of this Factum, from LAMÉ-FLEURY, *Législation minérale*, P. 59, it will be seen that the King expressly men-

tions gold and silver mines, the King's rights in which, on his own shewing, amount to one-tenth only. To whom, then, do the other nine-tenths of gold and silver mines belong? To whom else than the owner of the soil. We promised elsewhere to shew how *Choppin* had been tortured to give support to the Defendants' tottering case; we hope that we have succeeded.

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Sec. 207.—In like manner LE BRET is found not to support the view taken by *Loysel* as to gold and silver-mines. The unwillingness of such men as *Choppin* and *Le Bret* to pronounce a decided opinion on the question speaks volumes in favor of the doctrine propounded by us upon this question; if, by any forced interpretation of the Roman Law or of the Customary Law or even of the Ordinances, they could have given the mines to the King, we may be certain that they would have done so, if we may judge of them by the character which *Pocquet de Livonière*, gives of them in his *Traité des Fiefs*, P. 599 and 600, where he says of them that they are "l'un et l'autre ZÉLÉS *défenseurs des droits du roi.*"

CHOPPIN and LEBRET both favorable to Plaintiffs' views.

Sec. 208.—At P. 46 of their Factum the Defendants cite from BRILLON'S, *Dictionnaire des arrêts, vbo.* Mines, P. 371; *in fine*, where it is said: "En France les Mines d'or "et d'argent appartiennent au Roy en payant le fonds au "proprietaire." Now on looking into the references given by *Brillon* for this statement we find him referring to *Loysel* (whose opinion we have discussed at § 199 & *seq:* of this Factum), to *Rebuffe* (cited by *Loisel*) and to *Coquille*. As we have shewn *Coquille's* opinion to be quite the other way (see § 137 & 138 of this Factum), and as we have already shewn how groundless *Loisel's* opinion is, it is unnecessary to notice this inconsiderate statement of *Brillon* any further than to remark, that he never enjoyed any thing like weight, even as a compiler, and that, on the very next page; Col: 1, *Brillon* quotes an *Arrêt* of the Parliament of Paris of 1329, which shews that silver mines belong to the subject; and further down, on P. 372, Col: 2, *Brillon* says: "Il y a quel-"ques coutumes qui veulent que les mines d'or et d'argent "n'appartiennent ni au propriétaire du fonds où elles se "trouvent, ni à l'usufruitier."

BRILLON cited by Defendants, contradicts himself in several places, and has passages favorable to Plaintiffs' views.

What are we to infer from that language, unless it be that, under the other customs, it is otherwise, and that gold and silver-mines belong to the owner of the soil? No other

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conclusion can be drawn ; and that conclusion is in keeping with what *Brillon*, P. 370 of the same article, states on the subject, namely : " Les mines d'or et d'argent font partie des " fruits, et entrent dans la jouissance de l'usufruit," and also with what he says, *vbo. minéraux*, P. 370 : " Les minéraux " font portion de la terre et de ses entrailles." So much for *Brillon*, who, we think, has not, by reason of his contradictions, much strengthened the Defendants' case.

DALLOZ MISQUOTED BY DEFENDANTS.

Sec. 209.—DALLOZ, in his *Répertoire de Législation*, vol : 31. *vbo.* Mines, ch . 1, § 5. 6. 7. 8 and 9, P. 604 and 605, has an article, which completely destroys the pretensions of the Defendants, although *Dalloz* is cited by them, at P. 63 of their Factum, as supporting their views. Before giving a synopsis of that article of *Dalloz*, we regret having it to say that here again occurs one of those ruses, resorted to by the Defendants to bolster up their case, and several of which have already been exposed in this Factum. At P. 63 of the Defendants' Factum we read :

" Dalloz, ainé, dans son répertoire de législation, (tome 31, vbo. mines " et minières) s'incline aussi devant l'opinion générale : " Les mines, "
" " (dans les Gaules), dit-il, furent tout d'abord de domaine public, en
" " ce sens qu'elles apparaissent de bonne heure comme grevées au
" " profit du roi d'une redevance qui comme le droit impérial,
" " consistait en une quotité du produit."

" " *En* 786, *sous Charlemagne, les mines sont formellement mises au*
" " *nombre des droits régaliens*, QUANT AUX MINES D'OR." "

All the words found in that extract from the Defendants' Factum are also to be found, and in the same order in *Dalloz ;* but how different a meaning has been lent to those words by the Defendants in substituting a comma for a period, and in, then, suddenly dropping the quotation in the middle of a sentence. As the extract from the Defendants' Factum now reads, *Dalloz* is made to say that, under CHARLEMAGNE, gold-mines formed part of the domain, and were the property of the Sovereign. Let us now see what *Dalloz* actually did say. DALLOZ, *loc : cit :* says :

" *En* 786, *sous Charlemagne, les mines sont formellement mises au*
" *nombre des droits régaliens.* QUANT AUX MINES D'OR, *Mr. Delebecque*
" P. 254, induit d'un passage de Chopin, qui cite lui-même à cet égard un
" arrêt du parlement de 1295, qu'elles appartenaient au roi comme dépen-
" dantes d'un pur droit régalien et ce même auteur ajoute que primitive-
" ment les mines d'argent ont été, comme les mines d'or, une dépendance

" de la Souveraineté. Mais bientôt cette souveraineté fut fractionnée, au préjudice du pouvoir royal, par suite de l'avénement du régime féodal. Les Seigneurs durent donc usurper la propriété des mines, et, en effet, la Coûtume d'*Anjou* en contient des dispositions formelles, n'exprimant en cela qu'un fait, qui, d'après Bouteiller, somme rurale, tit : *du droit au Baron ou Sr*, parait avoir été général en France."

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It thus appears that the Original text in *Dalloz* has a *period* (.) between the words : " *droits régaliens* " and the words " QUANT AUX MINES D'OR ; " by artfully substituting, in their Factum, a *comma* for the period in *Dalloz*' text, the Defendants have made *Dalloz* say that gold mines belonged to the Crown under *Charlemagne*, while *Dalloz* merely said that what appeared to have been the case under DAGOBERT, if we are to believe *Duchesne's receuil*, t. 1, P. 585, really was done by CHARLEMAGNE, namely the imposition of a fiscal burthen on all mines without distinction. We can find no language to designate the Defendants' conduct in this particular.

The same.

Sec. 209 (*bis*).—DALLOZ, *loc : cit :* speaks of the Roman Law on mines much as it has been treated of by MERLIN, as shewn elsewhere in this Factum, and quotes *Delebecque*, t : 1, ch : 3, P. 29, to shew that, in the last stage of Roman legislation :

Error of DALLOZ and CHOPPIN as to passage cited by them from TACITUS.

" Sous Valentinien, *l'or* étant devenu rare, on accorda à tout particu-
" lier le droit de l'exploiter, mais sous la condition de payer à l'État une
" certaine redevance, et de vendre au fisc tout le produit de l'extraction."

Dalloz then proceeds to says that France adopted the Roman legislation on mines, and gives the extract quoted above. *Dalloz* misquotes *Tacitus*, in reference to the case of *Sextus Marius*. His mistake arises from having followed *Choppin's* erroneous reference to *Tacitus*, as we have shewn elsewhere. The passage is from TACITUS, *Annals*, Book 6, § 19, P. 164 of *Arthur Murphy's* excellent translation ; *Choppin* states the passage to be Book 4, while *Dalloz* places it in Book 5. The passage reads thus : " Sextus Marius, who " held the largest possessions in Spain, was the next victim. " Incest with his own daughter was the imputed crime : he " was precipitated down the Tarpeian rock. That the avariee " of Tiberius was the motive for this act of violence, was seen " beyond the possibility of a doubt, when the gold mines of " the unfortunate Spaniard, which were forfeited to the public, " were known to be seized by the Emperor for his own use." That passage from *Tacitus* establishes, therefore, that, under

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Roman Law, gold-mines were owned by individuals, not by the State; since the Emperor, in order to secure certain gold-mines that he coveted, had to invent a pretext for the death of their owner, that the mines might become forfeited to him, the Emperor, as head of the State. The passage leads to inferences directly the reverse of that drawn from it by *Choppin*, *Dalloz* and others.

DALLOZ, in calling legislation of France "*a série de tâtonnements*, commits an error, well refuted by DUPONT and MIGNERON.

Sec. 210.—DALLOZ, *loc*: *cit*: then refers to the various Ordinances on mining, dividing the legislation on this subject into six epochs, namely: 1° from 1321 to 1548, 2° from 1548 to 1601, 3° from 1601 to 1722, 4° from 1722 to 1740, 5° from 1740 to 1791, 6° the modern epoch. His division is not very logical, and the old legislation has been better classed by *Lamé-Fleury*, as we shall presently shew, into three epochs. *Dalloz* analyses the Ordinances on mining pretty much as *Merlin* has done; and it is therefore unnecessary to do more than state that *Dalloz* concludes, No. 13, P. 606, that, under the monarchy, the Legislation of France on mines had been nothing else than a "*Série de tâtonnements.*" How mistaken he was may be seen on reference to DUPONT, *Jurisprudence des mines*, vol: 1, P. 23 and 24; that author shews that the legislation, which *Dalloz* so much despises, *namely* the Ordinance of 1471, contains the germs of the Law *Dalloz* so much admires, namely, the modern French Law on mines. DUPONT, *loc: cit:* says: "Cette conformité de dispositions, "dans la législation des mines, à plus de trois siècles et demi "d'intervalle, a été signalée pour la première fois par M. "MIGNERON (*Annales des mines*) 3ème série, t: 2, P. 558)." Not a single line from *Dalloz* asserts the belief that, at any period of French History, did the Sovereigns of France exercise proprietary rights over the mines of that country. He merely states what no one denies, that the Sovereigns controlled the working of the mines for the greater benefit of the State.

DALLOZ m's-quotes LEFÈBVRE DE LA PLANCHE.

Sec. 211.—The only fault to be found with *Dalloz* is the manner, in which he has quoted *Lefèbvre de la Planche*; *Dalloz* has unintentionally, no doubt, made *Lefèbvre de la Planche* state the very reverse of what the latter has really said. The Defendants, at P. 44, 45 and 54 of their Factum, have made the same mistake; the error of both consists in attributing to *Lefèbvre de la Planche* observations, by way of

notes made upon *Lefèbvre's* work, by *Lorri*, of whom we have already spoken. Thus it is that Dalloz and the Defendants make *Lefèbvre de la Planche* positively assert, what *Lorri* only said, and that with diffidence, that such a disposal of gold mines APPEARED to be *dans les mœurs du Royaume.*" see § 123 of this Factum, where it is shewn that the notes are by *Lorri* and not by *Lefèbvre de la Planche*; again *Dalloz* and the Defendants, attributing to *Lefèbvre de la Planche* the opinions contained in the commentaries of *Lorri* have made *Lefèbvre de la Planche* say that *fortune et treuve d'or* mean mines. We shall presently shew that the very reverse has been stated by *Lefèbvre de la Planche* in both instances.

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Sec. 212.—DALLOZ, moreover quotes *Lefèbvre de la Planche* thus

The same.

> " Dans les autres mines (que celles d'or et d'argent) le roi ne prétend " point de propriété, puisqu'il ne revendique qu'un dixième, &c., &c., &c."

The quotation is literally exact; but, owing to the neglect of *Dalloz* to tell us that he has quoted from the note, we are led to believe that the opinions there expressed are by *Lefèbvre de la Planche*, while, in fact, we have been reading the scribbling of Mr. *Lorri*, who, as the *Avocat du Roi au Domaine*, has all this time been endeavoring, we presume, to increase the sphere of his usefulness to his master, and the chances of his own promotion. *Lefèbvre de la Planche* has thus been improperly made to say that the King is proprietor of gold and silver mines. Now the very reverse is the case; *Lefèbvre de la Planche*, vol: 3. l: 9, ch: 4, § 1, P. 33, says of mines of all sorts: " *Cependant elles n'ont* JAMAIS *été regardées* " *comme appartenantes au Souverain.*" And, *loc: cit:* § 5, speaking of the Royalty, he says: " Les Ordonnances qui contiennent cette réserve, expriment que *ce droit s'étend* NON " SEULEMENT *sur les mines d'or et d'argent*, mais aussi sur les " mines de tous métaux, &c., &c.

Such positive declarations of opinion on the part of *Lefèbvre de la Planche*, should have led *Dalloz* to pause before coming to the conclusion that the opinions expressed in the notes had been written by *Lefèbvre de la Planche*, the two sets of opinions being so much at variance with each other. In like manner while *Lefebvre de la Planche* distinctly states that *fortune d'or* does not include mines, we find *Lorri*, in his note (a) to *Lefèbvre de la Planche*, vol: 3, livre 9, ch: 4, No, 9, P. 35, stating:

OWNERSHIP OF MINES. LORRI. LEFÈBVRE DE LA PLANCHE. D'ARGENTRÉ.

" Peut-être pourroit-on soutenir que ces mots *fortune et treuve* indiquent plutôt un trésor qu'une mine. Cependant les auteurs les ont regardés, comme s'appliquans à l'un et à l'autre. *Quoiqu'il en soit*, la question a peu d'intérêt, et soit dans l'ancien, soit dans le nouveau-monde, on ne connoit point de mines d'or exploitées dans l'étendue des terres de l'obéissance du Roi."

Lorri, then makes the remarks quoted by *Dalloz* as the opinion of *Lefèbvre de la Planche*. *Lorri* expresses no opinion one way or the other; his words "*quoiqu'il en soit*" may serve as an accompaniment to *Choppin's* "*C'est une belle question.*"

D'ARGENTRÉ favors Plaintiffs' views.

Sec. 213.—By a great misapprehension, D'ARGENTRÉ, on the Custom of *Bretagne*, has been cited in support of the opinion that gold and silver-mines belong to the King. That author, on Article 56 of that Custom, Nos. 38, 39 and 40, P. 227 and 228 of Edition of 1621, has the following:

" 38, Salinæ an sint de regalibus"?
" 39. *Salinæ sunt etiam* PRIUATORUM."
" 40 Auri fodinæ?"

* * * * * * * * * * * *

" 38, Salinas, quod inter regalia reponunt, perquam vetus est auctoritas " et *l.* 1. *D. quod cuiusque vniuers. nom.* Paucis, inquit, concessa esse " corpora, excipit vectigalium publicorum causam, auri et argenti fodi- " narum, et salinarum. Fuisse etiam olim publicam salinarum procura- " tionem apparet ex *l. inter publica, D. de verb. signif.* et *l. si quis. C. de* " *vectig.* Pontificibus quoque idem iuris ostendit *cap. super quibusdam*, §. " *praeterea, ext. de verb. signif.* idem et Imperatores constituêre, *cap*, 1, " *quae sint regal.* et ante constitutum imperium fuisse ex salinis vectigal " ostendit salinatoris appellatio, et vectigal è salariâ annona constitutum, " quod ait *Liuius, lib. IX, Decad.* 3, cuiqui preerat Halisarchen appellabant " alibi salitorem, cuius Cic, alicubi Epistolis ad Atticum, meminit, et " *Joseph* et *Cassiodorus, lib. vj.* variarum. Salinas Martio primùm Rege " institutas Liuius et cæteri prodidêre. Sed tamen privatorum quoque " fuisse indicat *l. magis puto. in princip. D. de rebus eorum.* quod et Alex. " notavit *l. diuortio, si vir in fundo. post Glos. in D. sol. matrim. et Lud.* " *Com.* in § *si fundum. ibid. ubi* et se consuluisse volaterris scribit in causâ " arduâ, atque ità obtenuisse, cum in fundis priuatorum reperirentur " quamuis multi consulerent contrarium per *d. c. I. tit. quae sint regal.*"

" 39. Sed crebris experimentis docemur etiam priuatis ista competere, " et plena sunt littora nostra talibus priuatorum salinis, quibus sal non " effoditur, ut alibi, sed quibus confiscitur et coquitur, utili mortalibus " inuento, nisi antiquorum exempla, et priscarum legum auctoritas cupidita- " tem principum nostrorum denuo provocasset, ut iustis Dominis nego- " tium facesserent ea de re, quam prisca tempora, et vsurpatio per quàm " vetus et ipsorum principum consensus comprobasset. Quare magno dolore " bonorum omnium factum, et ingenti patriae communis detrimento, vt salis " artifices magnis incommodis et publicanorum molestiis vexati externas

" sedes quærere cogerentur proditis arcanis salis coquendi, quæ antè exter-
" ni non nossent. Nam apud Francos Gabellarum salis inuentum, iniuria
" est temporum Philippi Valesij Regis."

" 40. Eadem ratio reperit et auri et argenti fodinas, et picarias, quas
"volunt esse picis fodinas, Principibus vendicare, *l. inter publica. D. de*
"*verb, signif.* et *d. c.* super quibusdam, et *d. c.* 1. *tit. quæ sint regal.* QUÆ
" TAMEN IPSA NON MAGIS PRINCIPUM SUNT, *si in* FUNDO PRIUATO *reperiuntur,*
" *quam lapidicinæ aut cretæ fodinæ :* quod ex eo apparet, quòd decimam
" ex his cogere Principes solebant, *l. cuncti. Cod. de Metall. lib. xj. Cod.* Et
" quæ in de vectigalia priscis Romanis colligebantur in agris publicis.
" Popul. Rom. fuisse apparet, veluti in Tauriscis, in Norico, et Macedoniâ
" de quibus *Tit. Liuius, lib.* 4. *Decadis* 5, et *Strabo* lib. 4. meminit ; et
" *Polyb.* quoque suo tempore repertas propè Aquileiam scribit : Fuisse
" verò vniuersas in Romanorum potestate : Sed et priuatorum fuisse indi-
" cio est *Corn. Taciti* locus, cum aurarias cuiusdam, quamquàm publica-
" rentur, Tyberius sibi seposuisse dicitur, lib. 4."

Facts shewing *D'Argentré's* opinion to be favorable to Plaintiffs.

Sec. 214.—If we understand any thing of the quaint Latin in use in the days of *D'Argentré*, that author places gold and silver-mines among those things which belong, when found on private lands, to the owners of the soil. Moreover, we gather as much from the way in which he puts the question and answers it as to salt works " 38. *Salinae,*" he says, " an sint *de regalibus.* 39. " Salinae *sunt etiam* PRIVATORUM." In discussing the question in No. [illegible] gins by stating that there is very old authority [illegible] the Digest, *quod cujusque univers. nom.*) for placi[illegible]ks among regalian rights. He notices the existen[illegible] Romans, of a Superintendent of salt-works; [illegible] decides the question in the negative, by saying : " Se[illegible]s " exemplis docemur etiam privatis ista competere, &c., &c."

In like manner, with reference to gold and silver-mines, he begins by stating that a like authority claims, for the Sovereign, gold and silver-mines ; and after quoting the Roman Law, which, in his opinion, applies to that view of the case, he again decides the question, in the negative, as to gold and silver-mines, by saying : " QUAE " (mines of gold and silver and of bitumen) " *tamen ipsa* NON " MAGIS PRINCIPUM SUNT, *si in fundo privato reperiuntur,* quam lapidicinae " aut cretae fodinae : QUOD EX EO APPARET, *quòd* DECIMAM *ex* " *his cogere Principes solebant.*"

Finally, if any thing were wanting to satisfy us that *D'Argentré* agrees with his great rival *Du Molin*, we find it in that peculiarity, which led *D'Argentré* to diverge, at times from *Du Molin's* opinion. On this head see 2 *Lettres de*

Ownership of Mines. D'Argentré. Frain. Renusson. Bourjon. Pontanus.

Camus, No. 778.12, where it is said : " *D'Argentré* était en " opposition directe avec Dumoulin. Quelques-uns prétendent " que c'était souvent par *émulation*, plutôt que par convic- " tion." See also *Arrêts de Frain*, vol. 1, P. 167, where *Hévin* reproaches *D'Argentré* with having dissented from *Du Molin* " plus par émulation et par jalousie, que par raison." Now we know that *Du Molin*, in treating of the *Arrêt ou Brandon* holds that gold and silver-mines may be seized by the seignior as fruits of the soil and as being the property of the debtor, for the debt (*censuel*) of the vassal owner of the soil. And since, neither in the passage quoted above at length from *D'Argentré*, nor in treating of the like seizure, under article 129 of the Custom of *Bretagne*, does *D'Argentré* use the settled form of contradiction. " *Et si diversa quædam allegat* " *Molinæus* &c., &c. (see P. 482 of *D'Argentré's* work and § 136 of this factum), we must come to the conclusion that *Du Molin* and *D'Argentré* are in perfect agreement on this point.

The same.

The error into which some writers have thus fallen, as to the opinion of *D'Argentré*, can be explained on the supposition only that they merely read the first sentence of the passage above quoted, and followed our author no further.

Renusson's opinion in favor of Plaintiffs.

Sec. 215.—Renusson, in his *Traité du droit de garde-noble et bourgeoise*, ch : 6, nos. 41, 42 and 43 discusses the question of ownership of mines, as between the *usufruitier*, and the proprietor; he quotes, with approval, *Du Molin's* opinion ; and, in no. 42, says :

" Que dira-t-on des mines *d'or* et *d'argent*, de fer et de plomb et autres " métaux, comme aussi des carrières de pierre, de marbre, d'ardoise, de " craie et autres ?

The same of Pontanus.

He gives all such mines as are open to the usufructuary, and such as are not open to the proprietor ; he quotes the opinion of *Pontanus* on the Custom of *Blois*, as favoring his own views ; and finally he alludes to the Customs, such as *Anjou* and *Maine*, which derogate from the Common Law, and give gold and silver, neither to the proprietor nor to the usufructuary, but assigns gold mines to the King, and silver-mines to the Baron. Does that opinion of *Renusson* look as if he thought that, by the Common Law of France, gold and silver mines did not form part of the *domaine privé ?*

Bourjon bases his opinion on *Loisel.*

Sec. 216.—Bourjon, in his *Droit Commun de la France*, vol. 1, *des Fiefs*, part : 3, ch 1, sect : 1, § 51, note,

(not quoted by the Defendants) expresses the opinion that gold-mines belong to the King and silver-mines to the Baron; he bases his opinion upon the authority of *Loysel*, whose opinion we have already discussed and exploded in this Factum. *Bourjon's* anonymous commentator so far contradicts *Bourjon* as to assign both gold and silver-mines to the King, as forming part of the domain, but assigns no authority for his views. We deem it unnecessary to discuss *Bourjon's* opinion since we have already shewn the worthlessness of the source whence he has drawn his inspiration.

OWNERSHIP OF MINES. BOURJON. LAMÉ-FLEURY

Sec. 217—LAMÉ-FLEURY, *Législation minérale*, in his Preface, P. 5, divides mineral legislation into three epochs, which in his summary, he divides thus:

LAMÉ-FLEURY divides mining-legislation into three epochs,

> "PREMIÈRE PÉRIODE (1413—1548).—Liberté absolue
> "d'exploiter les mines."
>
> "DEUXIÈME PÉRIODE (1548—1597).—Concession tem-
> "poraire de toutes les mines à un privi-
> "légiée."
>
> "TROISIÈME PÉRIODE (1597—1791).—Retours succes-
> "sifs aux systèmes des deux premières
> "périodes."

That author, a layman (*Ingénieur au corps impérial des mines*) has made most profound researches on the Legislation of the Old Monarchy in France, on the subject of mines; and, although, as a layman naturally would, he has failed to appreciate the difference between the force, as Law, of an Ordinance registered in the Parliaments of France, and those private grants we have already refered to, as resisted by the Parliaments and embraced in the second period referred to by him, his work is, on the whole, a most valuable compilation, in fact the most valuable collection extant of mining documents under the old monarchy of France. At P. 169, note 1, of that work, he thus defines the old legislation on mines, and effectually disposes of the doctrine that the old legislation of France, such as it has been transmitted to us in Lower-Canada, had any other than a fiscal object, namely, the collection of the one-tenth royalty. He says:

and shews that King's rights in mines a mere fiscal burthen.

> "Il est également inutile de s'appesantir sur la *nature essentiellement*
> "FISCALE *du personnel des mines* jusqu'en 1781. Il a toujours pour *but*
> "principal, au moins pendant les deux premières périodes, la PERCEPTION
> "*du droit régalien.*"

OWNERSHIP OF MINES. LAMÉ-FLEURY

Again, as if to raise all doubts as to his opinion, he says, at P. 172, note 1 :

" On n'a pu, dans la note 1, de la page 169 que donner une idée confuse " de ce qu'a été l'administration primitive des mines de 1413 à 1548. "

" En ce qui concerne la seconde période de la législation des mines, la
The same. " tâche est plus facile ; malgré le titre de surintendant, donné à Roberval, " St. Julien et Vidal, à Lescot, Collonges et de Troyes, il ne s'agit jamais " que d'un concessionnaire général et temporaire de toutes les mines du " royaume, sur les privilèges excrbitants duquel les actes de 1548 à 1597 " donnent tous les détails désirables. "

" ENFIN, *au commencement de la troisième période* on voit poindre une " *administration technique des mines*, qui *ne perd* définitivement son CARAC- " TERE FISCAL qu'à la fin du XVIIIème siècle. Elle ne se dessine bien " nettement que dans l'arrêt de 1781 ;—ce qui justifie la division introduite " dans cet essai sur le personnel des mines. "

The same.

Sec 218.—According, then, to *Lamé—Fleury* during the first and third periods, the administration of mines had a purely and essentially *fiscal* character, and the *droit régalien* must have been of a like purely and essentially *fiscal* character, and the *royalty*, a mere FISCAL *burthen.*

With regard to the second period, knowing, as we do, that the Law of mines had been well settled by the Ordinances of 1413 and 1471, we find nothing in the private grants, bitterly opposed, as they were by the Parliaments, and temporary as the King declared them to be, nothing, in fact, that altered, repealed or modified a single provision of the organic Laws of 1413 and 1471 on mining. Then again how severely HENRY IV, in his Ordinance of 1601 has judged those private grants, we have already shewn, when he declared in the preamble that " experience had shewn many grave defects which " it was fitting to remedy. "

If then those grants had not already expired by lapse of time, the obnoxious portions of them were set at nought by the Ordinance of 1601.

The same.

Sec. 219.—LAMÉ-FLEURY, P. 74, note 1, gives us the history of a great struggle between the King, and the Parliament of Paris, as to the enregistration of the Edict of 1601, a struggle that had no less than 18 phases, though it lasted but two years. That struggle was one (*Lamé-Fleury* tells us, P. 85, note 1) in which " cette Cour eut en définitive " à peu près gain de cause." In deliberating finally on that Ordinance, the Parliament of Paris decided and ordered that

the *Grand Maître* or his *Lieutenant* should not "procéder à "l'exécution de leurs jugements contre les propriétaires sur "l'ouverture des mines et autres en conséquence, *au préjudice* "des appellations interjettées." The King acquiesced in the modification ; and the Parliament remained with the power of preventing any improper spoliation of the proprietor, with the very same power, in fact, that we ask this Court, as the Successor and Heir of the *Conseil Souverain*, the Parliament of Canada, to exercise in this case. But of this more hereafter. At P. 82, note 2, *Lamé-Fleury* tells us that *de Bellegarde* was appointed *Grand-Master* and *Superintendant*, a fact which, apart from the coincidence of date (June 1601), shews us, that the gold-discoveries spoken of by *Mezeray* brought about the Edict of 1601, and that the Edict in question governs gold mines, equally with all other mines. Conclusive evidence moreover, that the Edict of 1601 applies to gold is to found in the *Arrêt* of 14 May, 1604, in explanation of the Edict, wherein it is expressly prohibited to buy from the workmen, &, etc., any GOLD *or* SILVER *cendrées* not previously marked by the Grand-Master (see P. 87 of *Lamé-Fleury*).

OWNERSHIP OF MINES. LAMÉ-FLEURY. *L'abbé* FLEURI. GIN. HENRYS.

Sec. 220.—*L'abbé* FLEURI, (not to be mistaken for the modern writer *Lamé-Fleury*) was preceptor to the Dauphin, and wrote for his instruction a very valuable little work, intituled : "*Droit public de la France*" ; in that work, t. 2, part : 1, P. 40, Edition of 1769, there is a minute enumeration of the objects composing the *domaine du roi ;* and the only reference made to mines is in these words : "droit de dixième "sur les mines." That, assuredly, does not mean ownership of the mines.

L'abbé FLEURI'S opinion favors Plaintiffs.

Sec. 221.—In like manner, GIN, in his *Analyse du Droit Romain*, P. 612, adverts to the Law of France as to the *domaine*, and declares the domain to be inalienable, "*sauf petits domaines*, which he there minutely enumerates ; he makes no mention of Mines. *He*, also, must be of the opinion that mines do not belong to the Sovereign.

So do GIN,

Sec. 222.—HENRYS, vol : 2, Edition of 1772, P. 350 et *seq* : , livre 4. ch : 6, question 45, decides that mines, without distinction, belong to the owner of the soil. The length, to which this Factum has already grown, prevents us

HENRYS, DECORMIS AND MORNAC.

Ownership of Mines. Henrys. DeCormis. Mornac. Voet. Minier. Troplong. Locré. Foucard.

from giving the very lengthy article of *Henrys* upon this subject. *Hennequin*, vol : 2, P. 308, states that Decormis, t. 1., col : 773, and Mornac, upon l. 67, *de rei vindicatione* share the opinion of *Henrys*. We regret that we are compelled from want of time to leave those two writers unappreciated.

Voet favors Plaintiffs' views.

Sec. 223.—Voet, in his Commentaieres on the Roman Law, with a statement of the Law of his day, says, at P. 169 of the *Hague* Edition of 1707, vol : 1, book 7, title 1, No. 24, *de usufructu*, that the owners of the soil have the right to work all mines on their lands. It is of that work that *Camus*, vol : 2, No. 395, says : " Il y a peu de livres de " droit qui jouissent d'une estime plus générale."

Plaintiffs have not been able to procure Minier, Troplong, Locré, and Foucard cited by Defendants.

There are other writers on this subject, whose works we have not been able to procure ; some of them, such as Minier, Troplong, Locré & Foucard, have been cited by the Defendants as favoring their views. Not having been able to procure those works, we are obliged to take the Defendants' statements on trust ; and yet we have shewn, by a scrutiny of the Defendants' misquotations of *Proudhon*, *Lefebvre de la Planche*, *Bosquet*, *Dalloz*, *Choppin*, *LeBret* and *Hennequin*, how much danger there is of that trust being abused : Why the Defendants cite *LeMaistre* is quite a mystery to us. With reference to *Guénois*, cited by the Defendants, he bases his opinion upon the *de St. Julien*-grant ; we have already most satisfactorily disposed of that grant, and shewn that it utterly fails to support the views advanced by the Defendants.

Ignorance of French Jurists of last century of contents of Ordinances.

Sec. 224.—A most striking illustration of the contents of the the prevailing ignorance of the contents of the Ordinances of the French Kings is to be found in an opinion delivered by three eminent French Lawyers, on the 14 February , 1767, and registered (for what reason we have not been able to ascertain), at Quebec, in the *Régistre Français*, letter G. P. 260. We have already, at P. 90 and 91 of this Factum, alluded to that opinion ; we do so again, as it reaches other points in the case. The names of those three Counsel are *Elie de Beaumont*, *Target* and *Rouchet*. The opinion is found, at P. 256 of the Return to an Address of the Legislative Assembly of the late Province of Canada of the 29 August, 1851, and printed in three volumes, by E. R. Fréchette, by order of the Legislature. Volume 1, printed in

1852, contains a transcript of the original grants of most of the Seigniories of Lower-Canada, and is referred to by Ch : J. Lafontaine, in his Seigniorial Judgment, as *Titres des Seigneuries ;*—volume 2, also printed in 1852, contains Edicts, Ordinances, Declarations of the King and Judgments of the French Courts, of Canada, on Seigniorial matters, and are cited by the same learned and lamented Judge, as *Documents Seigneuriaux*, vol : 2 ;—volume 3, published in 1853, We find cited no where. We shall cite it as volume 3, *Documents Seigneuriaux*, following the Chief Justice. That opinion touches the question at issue between the Defendants and ourselves in three important particulars ; we quote from the authorized translation, (*Doc : Seign :* vol : 2, P. 256 ; it states at the outset :

OWNERSHIP OF MINES. DOCUMENTS SEIGNEURIAUX DE BEAUMONT. TARGET. ROUCHET.

" The undersigned counsel, who have seen the memorial submitted for " their *opinion touching* the *legality* of various *clauses* contained in the " *patents* or *grants of land* in Canada, emanating from His Majesty, and " now subjected to the dominion of His Britannic Majesty, are of opinion " that they are called upon to consider, in the *first place*, what *effect* the " *patents* in question would have had *under* the dominion of His Majesty, " the *King* of *France ;* in the *next place*, to examine *whether* the *trans-* " *mission* of the Sovereign power to *other hands has changed* the *principles* " upon which such *decision* must be based."

In reviewing that opinion, we shall shew its application to the present case, while we incidentally point out how the gentlemen who delivered it have erred in their statement of the contents of the ordinance of 1413.

Sec. 225.—The opinion adverts to the fact that the reservations as to timber are variously worded in the different patents, and concludes from thence that the intention of His Majesty must have varied in each case ; that such reservations do not make the King proprietor of the timber. The opinion then states the following conclusive argument, that bears powerfully on some points of the present case : The same.

" The *King treats* with his subjects in this respect only *as an* " ENFEOFFING *Seignior*, and NOT *as a Sovereign*. They must *both* be *judged* " *by the laws regulating contracts*, laws which BIND the *monarch* as well as " his *subjects ;*—but *if* there could be any *doubt as to* the *meaning* of the " clause, the fundamental *principle* in this matter *is*, that the *decision* must " be in *favor* of the *grantee*, because it is he who is bound, and all *laws* " require that we should invariably *favor* the *party bound* by such " obligations."

On three important points, that opinion bears upon this case. 1° It shews that in the matter of mines, the King's rights were a feudal burthen, since the " King treated with his

Ownership of Mines. Documents Seigneuriaux. de Beaumont. Target. Rouchet.

"subjects as an *enfeoffing seignior*, NOT *as a* sovereign", and that consequently the abolition of the feudal tenure here has swept those mining rights away. 2° It establishes that in such matters the Sovereign is equally with his subjects, bound to the observance of the Laws of the Realm. Hence we infer that, in respect of the monopolies granted by *Henri II* and his successors, adverted to at P. 112 and *seq*: of this Factum, the grants were utterly void as being utterly at variance with the then fundamental Laws of the Kingdom. 3° In reference to the clause, requiring notice to be given of the mines, to be found in the Original Grant, the fundamental principle" is that, if any doubt existed as to the meaning of that clause, it is to be interpreted against the King, and in favor of the party *bound* to give notice; and consequently since the King did not, in so many words, reserve the ownership of the mines, then have the mines not been reserved by the King.

The same.

Sec. 226.—The opinion then discusses the question whether the change of sovereignty has wrought any change in the relative positions of Monarch and subjects in connection with those grants; the opinion cites *Blackstone*, the *Treaty of Versailles*, and concludes an able argument by observing that the Law upon this point has continued unchanged under the new Sovereign.

Then comes the question as to the effect of the clause, contained in the Original Grant of the Seignory (see. P. 27 of this Factum requiring notice of all discoveries of mines to be given to the King. The opinion states:

> "The patents of concession contain also the following clause: "On
> " "condition of giving notice to His Majesty of mines and minerals, if
> " "any should be found in the said concession." "
>
> In the case submitted it is "*asked whether* this *clause* in to be understood "as constituting the *King* joint *proprietor* of the *mines* and minerals which "may be found upon the property granted, *or merely* as *shewing a desire*, "on the part of His *Majesty*, to be *informed* of their *existence*, in order to "have it in his power to provide for the security of these treasures, and to "protect them from conquest, for the *benefit of the state;* and whether, "under any circumstances, the King would not owe the grantee an indem- "nity, or be held to give him a considerable share in the profits of the "mines; OR *whether the* PROPRIETOR *of the land* is not, in virtue of his title "to it, *proprietor of the mines also*, and whether companies could be formed, "with privilege or otherwise, who could dispute his right."

The question could not have been more fairly or squarely put. Let us see the answer:

> "The counsel answer that this question also ought to be decided by

" the Laws of France, according to what has been said above. Now by the Ordinance of Charles the sixth of the 30th of May, 1413, which is the most ancient law we have concerning this matter, "*gold mines belong to the* "*King*, and to him, and not to any other belongs the tenth part of all " metals, when purified and refined, without being bound to pay any- " thing, but only to protect the workmen." This Ordinance styles " private parties, masters of the soil, and proprietors of the mines."

OWNERSHIP OF MINES. DE BEAUMONT. TARGET. ROUCHET. DÉNIZART.

After alluding to the Edicts of the 26 may, 1563, and of June 1601, and to an *Arrêt du Conseil*, the date not being given (most probably of the 14 January, 1744), the opinion states the answer thus :

" *Such* is the *public law* of France with respect to *mines*, and such is " the *reason* of the obligation to give *notice* to His Majesty of mines and " minerals, NOT that the *King* may at once become the *master of them*, BUT " that he may *exercise* over them, according to their nature, the *rights ari-* " *sing from the laws* of the Kingdom."

Sec. 227.—That opinion, then, distinctly states that the Ordinance of 1413, reproduced at P. 88 of this Factum, contains these words : "*gold mines belong to the King*". NOW GOLD IS NOT ONCE mentioned in the Ordinance! DÉNIZART (*vbo. mines*), who appears to have had some idea of the contents of the Ordinance, tells us, as we have already seen, " that the Ordinance of 1413 does not allude to gold mines, it " being unadvisable to do so, since they belong to the King ;" but the best evidence of this inaccuracy in the opinion is furnished by a perusal of the Ordinance itself. Neither does the opinion make any mention of the Ordinance of 1471 ; such ignorance of the nature of the French Edicts on mining is perfectly excusable, since we know, as we have already shewn, that the Ordinances had not been printed until after the Revolution.

That legal opinions bears out Plaintiffs' views.

Sec. 228.—That inaccuracy of the opinion as to the nature of the Edict of 1413, does not lessen the value of the opinion on other matters, founded as it is upon reasoning that is unanswerable. According, then, to the opinion,—if the King had intended to reserve the mines, he should have said so, according to the maxim : "*non quod voluit, sed quod* " *dixit.*" The clause must be interpreted favorably for the party bound to give notice, and therefore against the King ; it must be held that the clause is a mere obligation to give notice, and nothing more, and, consequently, not a reservation of the mines. The opinion also shews that the royal

The same.

Ownership of Mines. Louis XIV.

rights in mines consist of the one-tenth royalty and nothing more.

Louis XIV, by instructions to Governor and Intendant, and by several *Arrêts* shews his intention to have been that *censitaires* should have all the *domaine utile*.

Sec. 229.—It is, however, fortunate, that we are not left to mere conjecture for the discovery of the King's meaning, when he stipulated that notice of all mines should thus be given to him. Louis XIV, by instructions under his sign-manual, countersigned by *Colbert*, on the 20 May 1674, and registered in the Archives of the Superior Council, at Quebec, Reg : A, folio 64 (see *Doc : Seign : vol* : 2, P. 29), enjoined on Messieurs *de Frontenac* and *Duchesneau* to affix to their grants no other condition than that of clearing the land and bringing it into value within 6 years. Such instructions are inconsistent with the idea that the King intended to reserve the mines.

Again, on the 10 November, 1707, Intendant *Raudot* wrote from Quebec to Chancellor *de Pontchartrain*, deploring the evils arising from the unusual reservations which the Seigniors had been introducing into the concessions made by them (see *Doc : Seign :* vol : 3, P. 7), and advising that the King should issue a declaration securing to the tenants "*the* "*ownership of the lands, with all their appurtenances*". The Chancellor promised to attend to the matter; but it was not until 1711 (see *Edits et Ordonnances*, vol : 1, P. 323 et *seq* :), that the King fulfilled the promise of his Minister, and issued the two celebrated *Arrêts* of *Marly* ; for an analysis of those Arrêts, see P. 123 (*a*) of volume A of the L. C. Reports, Seigniorial Court, 1856.

Captain *Moreau*, having applied for a grant of a Seigniory, received for answer in 1719 (see P. 132 (*a*) of vol : A of the L. C. Reports, Seigniorial Court, 1856), that the King had, for several years past, resolved to grant no more lands *en Fief*, but only *en rôture*, and that Captain *Moreau* might have a small grant *en rôture*. Although that, like many other royal purposes, was not adhered to, as regards lands in the present limits of Lower Canada, yet steps were taken towards establishing the *rôture* tenure in the neighborhood of the present City of Detroit, U. S. A. The grants at Detroit, when compared with contemporaneous grants within the present limits of Lower-Canada, throw great light upon the King's intention, when he required notice of all mines to be given to him. At P. 26 of vol : 3, *Doc*: *Seign* :, and at P. 325 and 241 of vol : 1 *Doc* : *Seign* :, we find several grants *en rôture*, one to *Chauvin*, another to *Bonhom-*

me, and again to others whose names are not given; the grant to *Chauvin* is dated the 16 June, 1734; *Bonhomme's* grant is dated the 1 September. 1736; at P. 43 and 44 of this Factum, we have already shewn that the tract of territory which the Defendants seek to affect by the "DE LÉRY-*Patent*" is one of three grants, made on the same day, 23 september, 1736, to the Sieurs *Taschereau*, *de Vaudreuil* and *de la Gorgendière* and reproduced at P. 243 *et seq*: of vol: 1 of *Doc*: *Seign*: Now, while, in the three grants last mentioned *en Fief*, the King, (by *Beauharnois* and *Hocquart*) merely require notice of all mines to be given to the King, yet, in the *Chauvin* and *Bonhomme* grants *à titre de cens*, the King (by *Beauharnois* and *Hocquart* again) is found "reserving in "the King's name * * * * * the ownership of the mines, ores "and minerals, if any be found within the extent of the said "concession." At P. 276 of vol: 1 of *Doc*: *Seign*: we also find a grant to one *Chapotin* on the 18 June 1743, also at Detroit, *en rôture*, *à titre de cens*, and also by *Beauharnois* and *Hocquart* with the same express reservation. Why then is it, that, within *twenty days* from the date of the *Taschereau*, *de Vaudreuil* and *de la Gorgendière* grants, before and after those three grants *en Fief*, we find the very same officers of the King, making grants, afterwards confirmed by the King, to *Chauvin*, *Bonhomme* and *Chapotin*, *en censive*, and expressly reserving the ownership of the mines? Why do the grants *en censive* expressly reserve the ownership of the mines, while the grants *en Fief* merely require a notice to be given of the mines? Is it not because, by the *Arrêts* of *Marly* all lands held *en censive* in this Colony brought with them to the owner of the soil all the *domaine utile*, without curtailment, and that such an express reservation of the mines was absolutely necessary, in order to prevent the mines from passing to the tenants at Detroit. In any case, if the King had intended to reserve the mines, in the three grants *en Fief*, why did he not say so? It is unnecessary to add that the King confirmed those several grants purely and simply.

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The same, shewn by difference between grants near *Detroit*, and grants elsewhere in *Canada*.

Sec. 230.—Finally, those three grants *en Fief*, afford conclusive evidence that the clause, requiring notice, applies to *all* mines, without distinction, to gold and silver as well as to other metals; and since it is admitted, on all hands, irrespective of the evidence we have adduced, that the baser metals passed to the owner of the soil, so have the mines of

The same.

Ownership of Mines. *Intendant*, Hocquart.

gold and silver. That the lands owned by the Plaintiffs, and which the Defendants seek to affect by their "DE LÉRY-*Patent*" had been conceded and held *en censive*, and that, consequently, all mines, even of gold and silver had passed from the Crown, through the hands of the Seignior, into the hands of the Plaintiffs' *auteurs*, as *censitaires*, long before the issue of that Patent, is a matter of express and special allegation in the Plaintiffs' Declaration in this case. However the decision of the Seigniorial Court, and of Commissioner Turcotte have, once and for ever, settled that question; but of this more hereafter.

Judgment of *Intendant* Hocquart, as to slate-quarry, in entire agreement with Plaintiffs' views.

Sec. 231.—The interpretation placed upon that obligation to give notice of the mines is still further exemplified by a Judgment of the Intendant *Hocquart*, (who signed the three grants en *Fief* above-mentioned); the judgment was rendered on the 14 October, 1729, and is reported at P. 143 of vol: 2 of *Doc*: *Seign*: The Judgment is, moreover, a valuable precedent as affording evidence of the jurisprudence of this Colony on mines, and as effectually refuting the doctrine that the owner of the soil, who is able and willing to work a mine on his lands may be driven from it by the first discoverer, *inventeur*, as DELEBECQUE, Vol: 1, P. 257, calls him.

It is true that the decision of the Intendant was in reference to a slate-quarry; but the first law-book that one opens, will convince him that slate and other quarries are included in the words *mines et minières*, under the old Law of France; see, on this head article 2 of the Ordinance of 1601, P. 104 of this Factum, by which the King exempted *mines d'ardoise* from the payment of the royalty. The principle, then, being the same, let us see what Intendant *Hocquart* decided. A slate-quarry had been discovered, on unconceded lands, in the Seigniory of l'Anse à l'étang, owned by one *Sarrazin*. We say unconceded lands, because the judgment of the intendant forbade all persons from settling on the lands, until *Sarrazin* and his associates should have taken the extent of ground they required, for mining purposes; and *Sarrazin* and his associates do not appear to have made the discovery, since we find *Sarrazin*, in his Petition to the Intendant, expressing the fear that some persons might go there, under pretence of being the *first discoverers*, and disturb *Sarrazin* and his associates in the working of the quarry. Now what was the judgment of the Intendant? "We forbid", states the Intendant's decree,

" all, and every person or persons, of any rank or quality, to disturb the said Sieur *Sarrazin*, or his associates in the choice they have made in the said places for their fishing operations, or to settle in the place, until they shall have taken the extent of ground they may want, or further to disturb them and interfere in the working of the quarry of slate belonging to the said Sieur *Sarrazin*, on pain against the contravening parties of a fine of fifty livres, and of a greater penalty if thought fit."

OWNERSHIP OF MINES. *Intendant*, HOCQUART.

There being no *censitaire* upon the land, to whom, under the mining Ordinances, were the *censitaire* unable or unwilling, the Seignior might have been subrogated, for the working of the quarry, it is plain that the Seignior was entitled to the grant, and therefore properly preferred by the Intendant to the first discoverer.

The same.

Moreover, the interpretation which Intendant, *Begon*, put upon the clause obliging the Seignior, *Sarrazin*, to give notice of the Mines, is conclusive in the Plaintiffs' favor, and confirms the view taken of that clause by the Legal Opinion referred to in § 224 & *seq* : of this Factum. *Begon*, upon being notified of the existence of that slate-quarry (*Mine d'Ardoise*), does not treat it as a part of the Crown domain (*propriété royale et domaniale*), and concede it to *Sarrazin* as such ; nothing of the sort ! The intendant treats it as the property of *Sarrasin* ; *Begon's* words are : " the quarry of slate *belonging* to the said Sieur *Sarrazin*."

CHAPTER IV.

NO CHANGE EFFECTED IN LAW OF MINING BY ORDINANCES ENREGISTERED HERE SINCE THE CREATION OF THE SUPERIOR COUNCIL.

Sec. 232.—Having already shewn, that, by the Laws of France prevailing up to, and at, the time of the Creation of the Superior Council here, the owner of the soil was held to be the owner of all mines imbedded in his land, let us now examine whether any of the Laws promulgated by the King in Canada, since that time, have affected a change in this matter.

Law not changed from time of establishment of *Superior Council*.

OWNERSHIP OF MINES.

EDITS ET ORDONNANCES of *Canada*.

The same.

From the instant that Jacques Cartier planted the *fleur de Lys* on Canadian soil, this Country became a portion of the Crown Domain of France, subject to every Law, save one, governing the *Domaine ;* that one exception consisted, from the very nature of things, in the exclusion of the rule as to the inalienability of this new *Domaine ;* then a wilderness,and merely requiring settlers to develope its vast resources. There is therefore, nothing surprising in the fact (whatever stress the Defendants may lay upon it), of the King having, in his Ediets creating the " *Compagnie des cent Associés ou du Canada*," the " *Compagnie des Indes Occidentales* and the " *Compagnie d'Occident ou des Indes*," treated the mines of Canada as his property, since the Country was a mere wilderness, and had then no *censitaires.*

And yet the Defendants seem to think that, because, in the several Ediets creating those Companies (see. art. 4 of the Edict of 29 april, 1627, *Ed : et Ord.* vol : 1, P. 1, see also art : 20 and 24 of the Ediet of May, 1664, *Ed. et Ord.* Vol : 1, P. 40 and see also art : 7 et 8 Ediet of August, 1717, *Ed. et Ord :* Vol : 1, P. 377.) the King granted to those Companies all mines in the wilderness of Canada, it necessarily follows that the King must be the owner of mines on private lands ! Discussion is impossible with men, whose minds lead them to such conclusions ; and yet one must endeavor to lead them to the light. The grant to the " *Compagnie des Cent Associés ou de la Nouvelle France,* " terminated in February 1663, by an abandonment of the Company's rights to the King (see *Ed : et Ord* : vol : 1, P. 33). It is, therefore, hardly neeessary to refer to it ; nevertheless, on examining the text of the Edict creating that Company, it appears that the King gave Canada to the Company *en justice et Seigneurie* with the MINES, " *pour jouir toutefois des dites mines conformément à l'Ordonnance.*" There is surely no innovation there upon the Common Law of France ! ! The Company was merely placed on the same footing with regard to mines, as the Seigniors of Old France ; and we have already shewn that, in Old France, the Seignior had no right to the mine, except upon the refusal of the *censitaire* to work it. In April following (1663), the King, by Edict, created the *Conseil Supérieur*, with power " de connaître de toutes causes " civiles et criminelles, pour *juger* souverainement et en " dernier ressort *selon les loix et Ordonnances de notre* " *Royaume*, et y procéder 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 " (see *Ed* : *et Ord* : vol : 1, P. 37.)

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It seems very plain to us that the King could not have expressed in clearer language his intention of putting in force in Canada, as part of the " *loix et Ordonnances de son* " *royaume,*" those three great Ordinances of 1413, 1471 and 1601 that we have already reproduced and discussed ; no one doubts, either, that he then introduced into Canada the Custom of Paris, for he repeatedly afterwards declared his intention to that effect ; and that Custom, as we have already shewn, gives, to the owner of the soil, all above and below the surface.

The same.

Sec. 233.—When, in May, 1664, the King chartered the " *Compagnie des Indes Occidentales,*" He, by Art : 20 of the Edict, merely erected Canada into a Seigniory ; His words are : pour en jouir à perpétuité en toute propriété, " *seigneurie et justice,* ne nous réservant autre droit que la " seule foi et hommage-lige ; " Art : 22 and 23 still further confirm this view, as the King gives to the Company the Seigniorial dues then levied on the inhabitants, and allows the Company to concede the ungrant d lands ' à tels cens, rentes " et droits seigneuriaux qu'elle jugera bon ; " and, although, by art : 24, the Company " jouira de toutes les *mines et* " *minières,* caps, golfes, ports, havres, fleuves, rivières, isles et " islots ", the grant, in this respect, must be understood not to interfere with private rights or with those lands already conceded, over which the King, in Art : 22, declared the Company's rights consisted merely of the Seigniorial rights already established ; the grant, uncontained in Art : 24, can only have reference to mines on the unconceded lands, since the King closes the Edict with these remarkable words : " *Sauf* " en autre choses *notre droit,* et L'AUTRUI *en toutes* " (see § 72 P. 54 of this Factum). We never pretended that the King was not owner of the mines on his own Domain, or that he might not grant to the Seignior the mines on the unconceded lands ; what we object to is the claim set up by the Defendants, under the " DE LÉRY-*Patent,*" to the mines on our lands.

The same.

Sec. 234.—If any doubt could possibly remain as to the King's intention in this respect, we have only to refer to Art : 33 of that Edict, for the following expressive language

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of the King: "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 Coutume de la "Prévôté et Vicomté de Paris." Here then is a declaration incompatible with the supposition that the Company should have any greater rights in mines on private lands than the royalty of one-tenth contemplated by the Ordinances of 1413, 1471 and 1601, which the Courts of the Company were ordered to observe. Moreover, we have only to glance at the 61 grants made by the Intendant during the Company's rule in Canada (see *Doc: Seign:*, vol: 1, P. 1 to 79), in order to become convinced that the mines were not reserved; the only clause, in respect of mines, to be found in the grants, is the usual obligation to give notice.

The same.

Sec. 235.—The last lingering doubt, if any exist, as to the Company's rights on private lands, disappears on perusal of the Memoir addressed by Mr. *Barroys*, on behalf of the Company, to Lieutenant General, *de Tracy*, and to Governor *Courcelles*, and Intendant *Talon*, on the 15 July, 1665, enumerating, in 31 Articles, the Company's rights, and praying for a recognition of them by the Superior Council. (See *Ed: et Ord:*, vol: 1, P. 51). Art. 16 of that Memoir reads thus:

"Que les concessions qui se font à l'avenir seront données par mon dit "Sieur l'Intendant, *à tels cens et rentes* qu'il sera par lui jugé à pro- "pos en présence du dit agent ou commis général de la dite Compagnie, au "nom de laquelle tous les titres de concessions seront passés."

To that article the Superior Council answered:

"Rien ne parait plus conforme aux intentions de Sa Majesté; ainsi il semble très-juste d'accorder ce qui est demandé par cet article."

It thus appears that, even for lands to be thereafter conceded, the only condition which the Company had power to annex to the grant was the payment of such *cens et rentes*, or annual dues, as the Intendant should fix; and lest any other burthen should be entailed upon the grant, the Intendant alone should be authorized to make the grant; and the Superior Council declares that nothing can be more conformable with the intentions of His Majesty. There is little room for supposing that such grants by the Intendant would not have transmitted the mines to the *censitaires*, subject to the one-tenth royalty.

Sec. 236.—Whatever, may be thought of the effect of the Edict creating the "Compagnie des Indes Occidentales", that other Edict of the King, in December, 1674, extinguishing the Company, and reuniting all their possessions to the Crown Domain (*Ed: et Ord:*, vol: 1, P. 74) and the Declaration of June 1675, confirming and regulating the establishment of the Superior Council (see *Ed: et Ord:*, vol: 1, P. 83), completely dispel all doubts upon the point. The King orders that his Edict of 1663, creating the Superior Council, be punctually executed; needless to remind one that the Edict of 1663 ordered the observance of all the Ordinances of the Kingdom, and of course, among the rest, the Ordinances of 1413, 1471 and 1601.

Sec. 237.—Again, upon the very day, upon which the King issued the two celebrated *Arrêts de Marly* (see *Ed: et Ord:*, vol: 1, P. 324 and *seq*:), which prohibited the Seigniors of Canada from conceding lands, on any other condition, than *à titre de redevance*,—on the 6 July 1711,—the King ratified quite a number of grants of Seigniories made by the Governor and Intendant, with no other condition, as to mines, than the usual obligation of giving notice; and the King expressly mentions and confirms that obligation to give notice, as one of the conditions of the grants (see *Ed: et Ord:*, vol: 1, P. 323). Assuredly, when the attention of the King had been so pointedly drawn to the matter, one must infer that he did not consider that clause as equivalent to a reservation of the Mines. An *Arrêt* of the King in Council, of the 15 March, 1732, (see *Ed: et Ord:*, vol: 1, P. 531) clearly marks the King's intention that the Seignior should be a mere trustee for settlement-purposes, and should have no part of the *domaine utile*, the whole of such *domaine utile* being transmitted to the *censitaire*.

Sec. 238.—We have shewn, that, as the country became peopled, the language of the Sovereign became more guarded, when He undertook to charter Companies; as the charter of the "*Compagnie des Indes Occidentales*" had been more cautiously drawn than that of the "*Cent Associés*," in like manner we find the Sovereign, when He charters the "*Compagnie d'Occident*," in August, 1717, merely giving to that Company such mines as they, themselves, should open up during the period of their

Ownership of Mines. Edits et Ordonnances of *Canada*. Commissions *of Governors* and Intendants.

privileges ; and the King expressly orders, as he had done with the "*Compagnie des Indes Occidentales*," that the Laws and Ordinances of the Kingdom, and the Custom of Paris shall be observed in all things (see Edict of August, 1717, art : 7 and 15, *Ed : et Ord* : vol : 1, P. 377). The existence of that Company is recognized by an Ordinance of the Intendant, *Hocquart*, in April, 1738 (see *Ed : et Ord* : , vol : 2, P. 374), and the Company seems to have been a mere trading corporation, and to have subsisted until the conquest of the Country, for we find enregistered here no Edict for their suppression ; but their hold upon the soil, or upon anything else than the *commerce de castors* seems to have been more imaginary than real, for we constantly find justice administered in the King's own name by Officers of his own appointment, and all the grants are made by the Intendant in the King's name, with stipulations in the King's favor, and requiring to be confirmed by the King himself, as was the case with the very seigniory now called Rigaud-Vaudreuil ; and the Intendant continues, as before, to require a mere notice to be given, not to the Company, but to the King, of all mines found within the extent of the grant. Assuredly there is nothing in the charter of that Company to justify the belief, which the Defendants affect to hold that the Company's charter made any alteration in the Laws of the Kingdom, in respect of mines.

The same.

The same. Commission of Governors and Intendants. *de Champlain*,

Sec. 239.—Some further light is thrown upon this subject by an inspection of the several Commissions held by the Governors and Intendants of Canada. The only instruments, in the nature of such Commissions, referring directly or indirectly to mines, and to be found in the *Edits et Ordonnances* are the two Commissions of *de Champlain* of the 15 October, 1612 (see vol : 3, P. 11) and of the 15 February, 1625 (see vol : 3, P. 13), of *Nicolas Denys* of the 30 January, 1654 (see vol : 3, P. 17), of *Beauharnois*, as Intendant, of the 1 April, 1702 (see vol : 3, P. 56), of *Raudot*, the Elder, as Intendant, of the 1 January, 1705, (see vol : 3, P. 60), and of *Begon*, as Intendant, of the 31 March, 1710 (see vol : 3, P. 63). The two Commissions of *de Champlain* (the Country being then a wilderness) contain the following injunction :

> "Et faire, en la dite terre ferme, soigneusement rechercher et reconnaître toutes sortes de mines d'or, d'argent, cuivre et autres métaux et minéraux ; les faire fouiller, tirer, purger et affiner, pour être convertis, et en disposer selon et ainsi qu'il est prescrit par les Edits et Règlements de sa dite Majesté, et ainsi que par nous sera ordonné."

Such an injunction has nothing in it of a nature to assert a right to the owne ship of mines on private lands, had the Country then been settled, instead of being a waste and part of the Crown domain ; the King merely asserts a right of Police over the mines, and orders his viceroy to see that those treasures should not lie profitless in the bowels of the earth ; it asserts a right that we never denied to the Sovereign. OWNERSHIP OF MINES. EDITS ET ORDONNANCES *of Canada.* COMMISSIONS *of Governors and Intendants.*

The Commission of *Denys* varies remarkably in its terms, on this point, from those of *de Champlain* ; to *Denys* the King's commands are : *Denys.*

> " Faire soigneusement chercher les mines d'or, d'argent, cuivre et " autres métaux et minéraux, et les *faire mettre* et convertir *en usage*, " *comme il est prescrit par nos* ORDONNANCES : nous *réservant* du profit qui " en viendra de celles *d'or* et *d'argent*, seulement le DIXIEME DENIER, et lui " *délaissons* et affectons *ce qui pourroit nous en appartenir aux autres* " *métaux* et minéraux, pour lui aider à supporter les autres dépenses que " sa charge lui apporte."

The King, it is plain, views mining matters as being subject to the operation of the Ordinances of the Kingdom, that we have already reproduced ; he exercises his undoubted right of police and supervision in requiring *Denys* to see that the mines (of all sorts) be " mis et convertis en usage selon " nos Ordonnances." But it is impossible, almost, to state in clearer terms than the King has done that His lucrative rights in mines consist of the one-tenth royalty only. *Beauharnois, Raudot, Begon.*

That view of the case is strenghthened by a reference to the injunction from time to time laid by the King on the three Intendants just named, touching : " *la levée et perception* " de nos droits dans l'étendue du dit pays, savoir : des droits " appelés, *dix pour cent*, quart des castors &c, &c, &c. " ; the *droits de dix pour cent* evidently include the one-tenth royalty on mines ; it is among the *droits de dix pour cent* that GIN and *L'abbé* FLEURI, cited in § 220 and 221 of this Factum, have classed the King's royalty of one-tenth.

The above considerations, taken in connection with what we have already stated as to the difference between the grants near *Detroit*, and the grants in the present limits of Lower Canada (see § 229 of this Factum), and coupled with the judgment of Intendant, *Hocquart*, (see § 231 of this Factum), make it plain to our mind that the Law of Mining in Lower Canada, remains the same as it was in Old France, in 166[illegible] date of the creation of the Superior Council, and that, in this Country, mines of all sorts belong, by French Law, to the owner of the soil, subject to the royalty of one-tenth on certain

OWNERSHIP OF MINES. *What Law, governs case,* FRENCH *or* ENGLISH ?

metals, and to the right inherent in the Head of every State to compel the working of the mine for His own and the public benefit.

CHAPTER V.

FRENCH LAW GOVERNS THIS CASE.

French Law governs case.

Sec. 240.—A question, which we should have perhaps discussed before now, is the enquiry as to which of the two Laws, French or English, should govern the decision in this case. There is no no essential difference between the two Laws, as regards this case, as we shall presently shew; however we shall devote a short space to that enquiry. We shall not dilate upon the effects of art : 37 of the Capitulation of Montreal, which was granted unrestrictedly by General *Amherst*, and which secured to the French Seigniors and *censitaires* of this colony the full and free enjoyment of all their property, real and personal. Nor shall we pause to shew how that enjoyment would be incomplete, and the Article violated, if French-Canadian Seigniors, holding from the French Crown, in trust for their future *censitaires*, lands and Mines, even of gold and silver, were debarrred from executing that trust, and made to violate the very condition of their grants by witholding, from their future *censitaires*, for the benefit of the English Crown, mines of gold and silver intended for the *censitaires*,—or if mines, forming but one undivided whole with that real estate, could be governed by any other Law than that which affects the real estate itself. Neither shall we dilate upon the effect of Art : 42 of the same capitulation, which required that the inabitants of this colony should continue to be governed by the same Laws which had thitherto prevailed therein, and to which General *Amherst* made answer : " They become subjects of the King." It is also unnecessary to refer to the Treaty of Versailles. All these would serve our purpose; but we have the highest and the strongest evidence, namely, the settled, unvarying jurisprudence of this country, for nearly a century, establishing the fact, that property, real and personal, in this country, for so much of it, at least, as consists in Seigniories,has never been governed by any other rule than the public and private Law of France.

It is sufficient, for our purpose, just to mention, that the Law of Nations, as expounded by BLACKSTONE, *Commentaries* vol : 1, ch : 4, P. 107, CHITTY, *Prerogative*, ch : 3, P. 25 .26 & 30, and LORD MANSFIELD, 2 *Cowper*, P, 209, settles this question ; those authorities are unanimous in declaring that in conquered, or ceded countries that have existing Laws of their own, those Laws shall subsist until altered by the King. And when those writers state that the King may, indeed, alter the existing Laws of a conquered or ceded country, they mean an alteration made according to the Constitution of the Realm, a change effected by the King, Lords and Commons, an Act, in fine of the Imperial Legislature, having the concurrence of the three Branches. Let no one, then, imagine, that the King, by his mere Proclamation of October, 1763, still less General *Murray*, by his feeble echo of the Sovereign, under date of September, 1764, not even published in French, have succeeded in engrafting English Law, in civil matters upon the institutions of this country. True it is, that the Courts and Functionaries, appointed by General *Murray*, were in the habit of deciding all suits, civil and criminal, by English Law ; but the fact does not make out the right. Even the time-server, *Mazères*, Attorney-General under Governor *Carleton*, was compelled to admit that English Law had not been introduced into the colony. So strongly had public opinion in this direction grown in England that, in 1766, Attorney General *Yorke*, and Solicitor General *de Grey*, formally advised the Crown that a very trifling portion only of English Law had been introduced into this country ; and as early as 1770, *Cugnet*, *Pressard* and others were entrusted by Governor *Carleton* with the task of preparing for the opinion of the Law-Officers of the Crown in England, a draft of the Custom of Paris as applicable to Canada. Upon *Cugnet's* draft of the Custom, *Sir James Marriott*, Advocate General, *Sir James Thurlow*, Attorney General, and *Mr. Wedderburne*, Solicitor General unanimously reported that Article 37 of the Capitulation of Montreal, by virtue of the Law of Nations, had secured to the Canadian people all rights of property held by them, at the time of the Conquest, together with all the incidents and qualities thereof, and, as a consequence and corollary of that proposition, ensured to them all the Laws that had created, defined and secured that property. Hence it is, that, in 1774, the "*Quebec Act*" was passed by the Imperial Legislature innovating, on the old French Law, in respect of the Criminal Law only.

OWNERSHIP OF MINES. *What Law governs case,* FRENCH *or* ENGLISH ?

The same.

OWNERSHIP OF MINES. *What Law governs case,* FRENCH *or* ENGLISH ?

Every one must agree that the change was for the better. It is a singular fact, however, in connection with this matter, that the desire in England to do justice to the Canadians kept pace with the growth of discontent in the thirteen colonies, and that, both culminating together, that justice was finally done to Canada, that had nearly been denied her on the insensate clamors of the other American colonies about toleration of the Popish creed, the French tongue and French Laws. So far as the Laws were concerned, they might have discovered, had they felt so inclined, that the two systems are not so far apart, as they, no doubt, imagined.

The same.

Sec. 241.—We may, perhaps, be told that the claim of the Sovereign to mines, especially to gold and silver-mines, is a prerogative of the Crown, inseparable from the right of coinage, and from the Crown, and not to be governed by any other Law than the Public Law of England. Now we deny that the right of coinage is inseparable from the Crown; the early history of England is replete with instances of private individuals having exercised that right; *Blackstone*, who refers to some of the cases admits that the right of coinage is not inseparable from the Crown (see BLACKSTONE, *Commentaires*, book 1, ch : 7, P. 277). In any case, the obnoxious Patent is not, as we have already stated, under the Great Seal of England, where the right of coinage exists; it purports to be under the Great Seal of Canada, bearing a date at which Canada, unquestionably, had not the right of coinage.

The same.

Sec. 242.—Apart from all that, our answer to the objection is quite plain and conclusive. BLACKSTONE, book 1, ch : 7, P. 239 & 240 CHITTY, *Prerogative*, ch : 3, P. 25, 26 & 30, and the BRITISH ENCYCLOPEDIA, *vbo. Prerogative*, divide the prerogatives of the Crown into direct or major Prerogatives, and Incidental or Minor Prerogatives. According to *Blackstone*, the right of coinage is an incidental or minor Prerogative; and, according to all writers on the subject, the direct or major Prerogatives are essential to the very existence of the monarchy, constitute the pillars thereof, and are the inseparable attributes of the Crown, and of the political capacity of the Sovereign; the direct or major Prerogatives are engrafted on every soil, wherein the flag is planted. On the other hand, Incidental or Minor Prerogatives are of such a nature that, without them, the sovereign power may be

exercised in all its plenitude, are local only, and do not certainly extend to a country, though conquered, having an existing code of Laws, such as Canada, unless introduced there, in the manner prescribed by the Constitution, as we have already mentioned. OWNERSHIP OF MINES. *What Law governs case,* FRENCH *or* ENGLISH ?

Sec. 243.—Finally, does not the "DE LÉRY-*Patent*", itself, state, that it has been issued in conformity with the Edict of June, 1601 ? Does that not bring this question within the scope of French Law ? Our adversaries have chosen their ground, and we have accepted battle on that ground. Who can object to that ? Certainly not the Defandants. But does not the very Edict, invoked by the Patent, implicitly declare that the owner shall have the preference by requiring him to *prendre règlement* avec le *Grand-Maître* ? And have we not shewn already that, in 1633, in the very last phase of mining legislation in France before the creation of the Superior Council here, Grand-Master *Martin Ruzé* was expressly prohibited by the Parliament of Paris from assuming *juridiction contentieuse* and from expropriating the owner of the soil ? Was it not by that *Arrêt* expressly enjoined on the Grand-Master to see to the execution of the *Edits et Ordonnances vérifiées* in that Court ? And finally was not the Ordinance of Louis XI, of 1471 (which gives the preference to the owner of the soil) verified in the Parliament of Paris ? The same.

Sec. 244.—Again, we ask, are not our Lower-Canadian, and our Canadian Statute books filled with Laws applying the Public Law of France to the decision of questions affecting the Sovereign in Lower-Canada ? By what other Law than the Public Law of France, has the Representative of the Sovereign here received *Foi et Hommage, Aveu et dénombrement* &c., &c., from so many generations of Canadian Seigniors ? By what other Law than the Public Law of France has the Sovereign been governed in his actions and in his suits-at law in Lower Canada ? How else than by virtue of the Public Law of France, has the Sovereign, for nearly one hundred years, filled his coffers with *Quint, Relief, Droits d'aubaine, de bâtardise, de déshérence* ?
What means the language of those statutes which confer, first upon the late Courts of King's and Queen's Bench, and, since then, upon the Superior Court, all the judiciary powers of the The same.

OWNERSHIP OF MINES. *What Law governs case,* FRENCH *or* ENGLISH ?

Conseil Souverain? Did the *Conseil Souverain* in the good old days of English-hating Louis XIV, dispense justice on the principles of the Public Law of England? Finally what means the Seigniorial Act by calling the Sovereign a *Seigneur Suzerain?* We deem it unnecessary to pursue this enquiry further. If we have done so thus far, it is because a French News-paper published in this City, has taken it upon itself to state that the Public Law of England should govern this matter.

CHAPTER VI.

ENGLISH LAW MORE FAVORABLE TO THE OWNER OF THE SOIL THAN FRENCH LAW.

English Law more favorable, even, than *French* Law to owner of soil.

Sec. 245.—We promised to shew that it matters litt'e by wh'ch of the two Laws, the question under discussion should be decided, and that by the one, as well as by the other, the Plaintiffs must equally succeed. Let us now redeem that promise. For a long time, the mining interest had been weighted down and dwarfed, in England, by the pretensions of the Crown as to the ownership of what some writers are pleased to call the royal metals of gold and silver; an incessant struggle had been going on between the owner of the soil on the one hand and the Sovereign and his favorites on the other, until that revolution broke out which drove the Stuarts from the throne. Suffice it to say, that one of the very first cares of the first Parliament which assembled under WILLIAM *and* MARY, was to settle this vexed question; an act was passed, 1 W. & M. ch : 30, § 4, declaring that :

> " No mine of Copper, Tin, Iron, or Lead, shall hereafter be adjudged reputed or taken to be a Royal Mine, although Gold or Silver may be extracted out of the same."

As gold and silver, except gold in alluvial form, are seldom, if ever, found unassociated with one of the four baser metals named in the statute, in greater or in lesser quantities, the controversy was thus virtually ended; and from that day forth dates the unrivalled prosperity of the mining interest in England. Having an eye to that statute, and to the possibility of the very question under discussion being raised, we took the precaution of alleging, in our Declaration, P. 9 and 10 of

our printed Declaration, which, for all the purposes of this argument, must be held to be true:

OWNERSHIP OF MINES. ENGLISH LAW more favorable to Plaintiffs than *French Law.*

"That, on the pieces of land so bought by the said John O'Farrell, "Esquire, from the said (*names of the Plaintiffs'* AUTEURS), there exist "deposits of alluvial and diluvial gold, tin, platina and other metals, and "veins and courses of quartz and other gangues, carrying gold, silver and "platina, uncombined with any other metal, and also chemically combined "with copper, lead, tin, zinc, arsenic, antimony and iron.

"That the said John O'Farrell, Esquire, has discovered, and has been "the first to denounce (*dénoncer*), to Our Sovereign Lady, The Queen, the "existence, on said pieces of land, of the said gold and silver-bearing quartz "and other gangues.'

"That the said Plaintiffs are ready and willing and have sufficient "means to work, and to cause to cause to be worked, well and sufficiently, "the said alluvial and dilluvial gold and other mines, and the said metal-"bearing quartz and other gangues; whereof the said Plaintiffs hereby "pray *acte*."

Sec. 246.—COLLIER *on Mines*, P. 1, of the English Edition, and P. 13 of the American Edition, has the following upon this subject:

Error of COLLIER in saying ownership of gold and silver unaccompanied by Copper, lead, iron, tin, would be doubtful,

"Gold and silver accompanied with certain other metals, copper, lead, iron, tin, belong to the owner of the soil."

"The right of the Crown to Mines in which gold and silver are found, unaccompanied with these metals and mixed with others, would, if the case should rise, be a matter of some doubt."

With all respect for the opinion of M. *Collier*, as to the ownership of Gold and Silver, when not accompanied by copper, lead, iron or tin, we beg leave to say, that, centuries before the passing of the statute of WILLIAM AND MARY, a Law forgotten by the English people (just as the Ordinances of the French Kings had been lost sight of by French Jurists) had settled this question in a sense favorable to the pretensions of the Plaintiffs. We allude to a statute passed in the twelfth year of the Reign of EDWARD III, in the Parliament at Westminster. We quote from a work, intituled "*Aurum Reginæ*" or *Queen-Gold* published in 1668, with the approval of *Sir Robert Atkins*, the Queen's Solicitor General, by WILLIAM PRYNNE, a Bencher of Lincoln's-Inn, and Keeper of the Tower-records. In the preface the author states: "All "the Records here cited I have carefully perused and "examined with my own eyes." At P. 128, *Prynne* says: "Yea, King *Edward* the 3 d. in his Parliament held at *West-*"*minster* in the twelfth year of his reign *at the earnest Petition* "*of the Commons, with the advise and assent of his Prelates,* "*Earls, Barons, and others of his Counsil in that Parliament*

English Statute, 12 EDWARD III settles the question favorably to Plaintiffs.

Ownership of Mines. English Law favorable to Plaintiffs.

"*for the common benefit of the Realm*, granted for him his "heirs and successors, free liberty to all and every person of "this Realm, that they and every of them might dig for mines "of Gold, Silver and hid Treasure, within his or their own "soyl, by the view and oversight of such Clerks and Officers "as he and his heirs should appoint, and extract, fine, and "coyn the same at his Exchange and Mint, at their proper

The same.

"costs, to augment the money of the Realm; *rendring to* "*him*, his heirs and successors the full *third* part of all the "pure *Silver*, and the full *moiety* of all the *Gold* which should "be so digged, fined and coyned by them," reserving the "residue to themselves: which he likewise ratified by his "Letters-Patent in the 15th year of his reign, as this memo- "rable Record (*not hitherto published*) will inform us, now "worthy publike Consideration, to excite all ingenuous per- "sons to a diligent scrutiny after such Mines; to recruit, sup- "ply the extraordinary want of *Gold and Silver Coyne*, to "*advance* the *Trade*, improve, pay *Land rents*, and defray "the *extraordinary publike Taxes* of the *Kingdom*."

Text of Letters-Patent of Edward III, reciting and confirming that Statute.

Sec. 247.—*Prynne*, then, gives the text of the Letters-Patent of the 15 Edward III, which recite the statute 12 Edward III, adverted to by *Prynne*. Those Letters-Patent run thus:

"REX Omnibus ad quos, &c., &c., salutem. Sciatis, quod cum in "Parliamento nostro apud *Westmon.* Anno regni nostro duodecimo convo- "cato, consideratâ tam nostri quam populi regni nostri communi utilitate, "ad instantem requisitionem Communitatis ejusdem regni nobis per Peti- "tionem suam coram nobis et Concilio nostro in eodam Parliamento fac- "tam; de assensu Prælatorum, Comitum, Baronum, et aliorum de Conci- "lio nostro tunc ibidem existentium, concesserimus universis et singulis de "dicto regno, quôd ipsi et eorum quilibet solum suum proprium pro Minâ "Auri et Argenti, et pro Thesauro absconditо quærendo et inveniendo "fodere, et dictam Minam Auri et Argenti per visum et testimonium cujus- "dam Clerici per nos vel hæredes nostros ad hoc deputandi purgare et per- "affinare; ac dictum Thesaurum inventum per visum ejusdum Clerici extrà "solum trahere possunt pro suæ libito voluntatis: Ita quòd totum Argen- "tum sic purgatum et peraffinatum ad cunea nostra et hæredum nostrorum "deferatur Custodibus Cambii vel Cambiorum nostrorum aut hæredum "nostrorum per Indentur. indè faciend. ibidem liberand. ad monetam indè "cudend. Et quòd singuli Dominorum prædictorum omnes sumptus et Cus- "tas qui in præmissis apponendi fuerint, de suo precio facient et apponant. "Quòdque tertia pars monetæ sic cussæ nobis et Hæredibus nostris rema- "neat; et duæ partes ejusdem Dominis, quorum solum illud fuerit, libe- "rentur: Et quòd totum Aurum prædictum sic purgatum et peraffinatum, "et Thesaurus inventus, per præfatnm Clericum et Dominos, qui Aurum "illud sic purgaverint et Thesaurum invenerint, vel illos quos ad hoc

" deputaverint, ad Scaccarium nostrum et hæredum nostrorum salvo ad OWNERSHIP
" sumptus eorumdem Dominorum deferantur, una cum Indenturis, quas OF MINES.
" inter ipsum Clericum et præfatos Dominos indè fieri volumus (prout
" decet) et medietas indè ad opus nostrum et hæredum nostrorum retin-
" et in Thesaurariam nostram et ipsorum et hæredum nostrorum liber-
" et altera medietas præfatis Dominis et eorum singulis restituetur et rema-
" neat ad *Commodum* suum indè faciendum pro dictis sumptibus et Custu-
" bus in præmissis apponendis, (ut prædicitur) faciliùs supportandis. Nos
" volentes Concessionem nostram prædictam effectui mancipari, concessi-
" mus et licentiam dedimus, pro nobis et hæredibus nostris, Prælatis, Comi-
" tibus Baronibus ac cæteris hominibus de dicto regno nostro *Angliæ*, et
" Terrâ nostrâ *Walliæ*, et eorum hæredibus, et successoribus, et aliis, terras et
" tenementa ibidem habentibus et habituris, quòd ipsi et eorum singuli
" solum proprium pro Minâ et Thesauro hujusmodi ibidem quærendo et
" inveniendo fodere ; et dictam Minam per visum et testimonium hujusmo-
" di Clerici sit ad hoc deputandi purgare et peraffinare ; et Thesaurum
" inventum extra solum suum in formâ prædictâ trahere possint, sinè
" occasione vel impedimento nostri vel hæredum nostrorum, Justiciarorum,
" Escætorum, Vicecomitum, aut aliorum Ballivorum seu Ministrorum nos-
" trorum quorumcumque : Ità quòd totum Argentum sic purgatum et
" peraffinatum ad Cunea nostra prædicta, et dictum Aurum similiter purga-
" tum et peraffinatum, et Thesaurus inventus ad Scaccarium nostrum et
" dictorum hæredum nostrorum deferantur ; et prædicta tertia pars monetæ
" sic cussæ, et medietas totius Auri sic purgati et peraffinati et dicti The-
" sauri inventi, nobis et hæredibus nostris remaneant ; et residuum indè
" dictis liberetur et restituatur in formâ supradictâ. Et quòd si dicti
" Domini vel eorum aliquis fodere neglexerint vel neglexerit, tunc nos et
" hæredes nostri in eorum defectu solum suum pro voluntate nostrâ fodere,
" et totam Minam et Thesaurum in eodem inventa, ad commodum nostrum
" et hæredum nostrorum indè faciendum possumus absque contradictione
" alicujus retinere. Volumus tamen quòd aliquis de dictis regno et terrâ,
" cujuscunque statûs seu conditionis fuerit prætextu Concessionis prædictæ
" Minam hujusmodi in absentiâ dicti Clerici nostri purget vel peraffinet, aut
" Thesaurum inventum extrà locum ubi ipsum inveniri contigerit trahere
" præsumat, sub forisfacturâ eorumdem.

" In cujus, etc., etc. Teste Rege apud *Turrim London* 28 die Julii."

" Per ipsum Regem et Consilium."

Sec. 248.—If appears, then, by that statute and the declaratory Letters Patent of EDWARD III, that every man has full liberty to work gold and silver-mines, and to dig for treasure, upon his own lands, under the supervision of the officer of the Sovereign, and on condition of bringing the gold, silver and treasure to the mint to be refined and coined, and also upon payment of one third the silver and one half the gold and treasure. That royalty was gradually reduced as *Prynne* informs us in the margin, to 1⁄18 of the fine gold and silver extracted, then to 1⁄19, then to 1⁄10, then to 1⁄12, and finally to 1⁄15, by successive Letters-Patent of the Kings, successors to EDWARD III. As the Law, therefore, now stands

English *royalty* on gold and silver is 1⁄18 only.

Ownership of Mines. Gold Mining Act. Seigniorial Act. Cour de Cassation.

in England, every man may work mines of gold and silver, unaccompanied by copper, lead, iron or tin, on payment of a royalty of one fifteenth. The effect of the 1 William and Mary, ch : 30, § 4, has only been to abolish the royalty, wherever the precious metals are accompanied by copper, lead, iron or tin. We presume therefore that English Law is much more favorable than French Law to the position of the Plaintiffs. Under English Law, there is no Royal Permission required at all ; that Royal Permission has been granted, and in advance, by Edward III ; in ninety-nine instances out of the hundred, there is no royalty to pay, because the gold and silver are associated with copper, lead, iron and tin ; and, in the very few cases wherein a royalty can be claimed by the Crown, the English royalty is only one-fifteenth while the French royalty is one tenth.

Gold Mining Act of 1864.

Sec. 249.—Our Own Canadian Statute, " The " Gold Mining Act of 1864 ", the 27 and 28 Victoria, ch : 9, as amended by the 29 Virtoria, ch : 9 (*The gold mining amendement Act of* 1868) and by the Quebec Statute, 31 Victoria, ch : 31 (The Gold-Mining amendment Act of 1868), has, in our opinion, made the matter very plain. But, owing to the fact that the latter Statute appears to have been touched by some hand friendly to the " de Léry-*Patent*," we decline to enter here into the particulars of the bearing which those Statutes have upon this case, lest in the next or some early session of the Quebec Legislature, we might be treated to the luxury of *another* " Gold Mining Amendment Act," meeting all our reasoning on the existing Statutes. We deem it safer to reserve our remarks on this head for the ear of the Court *in Banco*.

CHAPTER VII.

THE " DE LÉRY-PATENT " VOIDED BY THE ABOLITION OF THE FEUDAL TENURE.

Cour de Cassation, held that claim to Mines a feudal burthen.

Sec. 250.—We have already seen, in the quotation from Merlin (P. 61 of this Factum), how the claim set up by certain ex-Seigniors of Hainault in France to an annual rent called *entre-cens* was repudiated by the *Cour de Cassa-*

tion. The better to seize the bearing, on this question, of that important decision, it is well to recall the facts. Hainault, which had formerly been a portion of the Germanic Empire, came under the Dominion of France with a peculiar system of Laws, called the Constitution of Hainault. By that Constitution, no mine could be opened in Hainault without the express permission of the *Seigneur-haut-justicier.* For that permission, while the Feudal tenure lasted, the Seignior had sometimes exacted an annual payment, called *entre-cens.* The French Revolution came; and in 1789, the Constituent Assembly decreed the abolition of the Fendal Tenure. The question discussed by MERLIN and his adversaries before the *Cour de Cassation*, was whether the rights possessed by the Seigniors in mines in Hainault before 1789, were rights of property, or merely feudal rights.

OWNERSHIP OF MINES. SEIGNIORIAL ACT. COUR DE CASSATION. MERLIN. DALLOZ.

And abolished, with that tenure, in France.

The *Cour de Cassation*, held with MERLIN, that those rights were purely feudal rights, and as such had been abolished by the Law of 1789. Those rights so declared abolished had been assigned to the Seigniors of Hainault by the Sovereign. For particulars of that decision, see the quotation from MERLIN, *Questions de Droit, vbo. Mines*, reproduced at P. 61 of this Factum; see also 31 DALLOZ, *Rép. de Légis. et de Juris. vbo. Mines*, §

The same.

Sec. 251.—What difference is there between the rights claimed under the "DE LÉRY PATENT" and the rights for which the seigniors of Hainault exacted an *entre-cens*? There cannot be two conflicting possessions of the same thing at the same moment of time! The *de Léry-Patentees* and the Plaintiffs cannot, at the same instant, possess, the one the soil, the other the mines, for both are so intimately blended that they form but one substance; the one cannot be taken away without destroying the other. A better illustration of the absurdity of the pretensions of the Defendants in this particular cannot be found elsewhere than in that sublime conception of Shakespeare, when Portia awards to her father the pound of flesh but adds that he may not draw the tiniest drop of blood.

Sec. 252.—The whole spirit of Our Law repels the supposition of a joint ownership even. Article 429, 430 and 431 of the Canadian Code, in treating of accession, prohi-

There can be no joint ownership.

OWNERSHIP OF MINES. SEIGNIORIAL COURT and their Judgment.

bit such joint possession, and POTHIER, *propriété*, Part 2, ch : 1 No 16, establishes, what hardly needed proof, namely, that there can be no two adverse possessions of the same thing.

Seigniorial Court, Judgment and *Cadastre* have annihilated Patent, even were it a valid grant.

Sec. 253.—Apart from the great authority of the decision of the *Cour de Cassation* above-referred to let us see if we cannot find, in the "Seigniorial Act of 1854" and its amendements, and in the decisions of the Seigniorial Court thereunder, sufficient to convince the most sceptical, that, even if the "DE LERY-*Patent*", were a valid instrument and had conveyed the rights claimed under it, yet, on the day when the *cadastre* of the Seigniory was deposited, those pretended rights became a thing of the past and annihilated. Of the men who made the solution of that great Feudal Problem a life long study, yet lived to see their labors crowned with success, we shall say but little, as they still live in our midst. One figure, in that group of distinguished men, the Attorney General of that day, stands out in bolder relief, remarkable for the courage with which he grappled with, and mastered, the difficulties of a position that, for half a century, had embarrassed the minds of succeeding statesmen here. Suffice it to say that the Seigniorial Court, the crowning act in that grand and peaceful Canadian Revolution, deterged from our midst that blemish on the body politic, which it required rivers of blood finally to blot out in France.

The same,

Sec. 254.—The preamble of that act, 18 viet : ch : 3 (C. S. for L. C. ch : 41), declares : "it is expedient to "*abolish all feudal rights and duties*, whether bearing upon "the *Censitaire*, or upon the Seignior" and that great advantages must result from the "substitution of a *free tenure* for "that under which property hath heretofore been held." We have already shewn that the Roman Law, and its offshoot, the Common Law of France, and the Laws, from time to time, promulgated by the Sovereign, made no distinction between mines of gold and silver, and mines of other metals; and MERLIN (cited at P. 61 *et seq :* of this Factum) conclusively established, and the *Cour de Cassation* held, that the rights claimed by the Seigniors of Hainault for grants of mining-privileges had been swept away by the abolition of the feudal tenure in France. If, under the French Law, a claim to mines on private lands were thus solemnly held to be a feudal burthen in France, and extinguished in France

along with the Feudal Tenure there, how can it be held to subsist here since the abolition, by a like law of the same tenure here? Common sense forbids the supposition.

Sec. 255.—By the *fifth* section of the act, it became the duty of the Commissioners to value:

"1° The *total value* of the Seigniory, i. e. of all "property and *lucrative rights* held by the Seignior, as such, "either as *Seigneur Dominant*, OR OTHERWISE.

"2° The *total value* of the rights of the Crown, in the "Seignory, including *Droit de quint* and all other valuable "rights of the Crown as *Seigneur Dominant*, OR BY REASON "*of any reservation* in the original grant, and the value of "the seigniorial rights therein as they might be ascertained "by the judgment of the Seigniorial Court."

&c., &c., &c., &c.

The same.

Why, it is asked, were the Commissioners enjoined to value the rights of the Crown in the seigniories? Sections 18 & 19 of the Act shall tell us. Those two sections appropriated, among other sources of revenue, in aid of the *censitaire*, the value of the Crown rights, and then deducted the value of such Crown rights from the value of the Seignior's rights. It is therefore clear that the intention of the preamble of the Act has been carried out and the *censitaire* possesses his land free from all feudal rights whether bearing upon the *censitaire* or upon the Seignior, in other words, from all feudal rights whether claimed by the Seignior or by the Crown. So much so indeed that Section 14, in express terms, declares the soil shall thenceforth be *free and clear of* ALL *Seigniorial and feudal duties and charges whatever*, EXCEPT *a rente constituée*, substituted therefor.

Now let us see whether a claim to the mines is among the burthens contemplated by the act, and intended to be removed; let us again quote the words of the 5th section as to the Crown-rights which the commissioners were ordered to value: "and all other valuable rights as *Seignior domi-* "*nant*, OR BY REASON *of any reservation in the original* "*grant.*" *Now a* DILEMMA *for the Defendants:* EITHER the *injunction* on the Grantee *to give notice* of the discovery of

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mines, contained in the Original Grant to *de la Gorgendière*, and quoted by the Plaintiffs at P. 27 of this Factum, IS *a reservation of the mines* OR *it is* NOT ; if it is a reservation of the mines, it is a right that should have been valued under section 5 of the act, and was abolished, and should have been deducted as abolished, under sections 17 and 18 of the act, from the Seignior's rights, in order to ascertain the exact amount of the capital of the *rente constituée* due by the *censitaire* for the perfect redemption of his soil from all burthens whatever ; but, if on the other hand, that injunction to give notice contains no reservation of the mines, then, as we assert under the decision of the Seigniorial Court, did the mines pass to the *censitaire* with the sub-grant made to him by the seignior, long before the issue of the DE LÉRY *Patent.*" Indeed such is the decision of the Seigniorial Court, in answer to the 39th Question submitted to that Tribunal by the Law-Officer of the Crown under that act, as found reported at P. 79 (*a*) of the *Lower-Canada* Reports of 1856, vol : A.

The same.

Sec. 256.—The 39 h Question runs thus :

" In various deeds of concession of lands held *en roture*, covenants are " found tending to establish, in favor of the Seigniors, reservations similar " or analogous to the following, viz :

" 1° A reservation of timber for the building of the manor-house, mills " and churches without indemnity.
" 2° A reservation of firewood for the use of the Seignior.
" 3° A reservation of all marketable timber.
" 4° *A reservation of* ALL MINES, quarries, sand, stone and other materials of the same kind.

&c., &c., &c., &c.

" Were *these reservations*, or any and which of them, *legally made*, and " do they give the Seigniors a right to be indemnified for the *suppression of* " *them* TO BE EFFECTED *by the said Seigniorial Act.*"

It will thus be seen that the question was fairly and squarely put to the Seigniorial Court, as to whether *A reservation of mines* could legally be made by the seignior, or in other words, whether in making the sub grant the seignior could legally withold from the tenant the mines contained in the land. Moreover the question acknowledges in the most positive terms that all reservations, even those legally made, are suppressed by the Seigniorial Act.

The legal Proposition submitted by the Crown, in refe-

rence to that question, as reported at P. 80 (a) of volume A of the L. C. Reports of 1856, is thus stated : Ownership of Mines Seigniorial Court and their Judgment.

" 1°. Custom seems to have sanctioned the reservation of timber for " the building of the manor-house, mills and churches without indemnity ; " moreover, such reservations were made for the general good, and were " calculated to promote the settlement of the country. "

" 2°. The reservation of firewood for the use of the Seignior, has " not received the same sanction, and is repugnant to the principle of " the *feudal contract* which *gives to the Censitaire* the *entire property of* " *the* DOMINIUM UTILE (*domaine utile*) ; THEREFORE *all such reservations are* " NULL, and cannot give rise to any indemnity."

" 3°. The same thing must be said of marketable timber. "

" 4°. THE SAME *with regard* to the reservation of all *mines*, quarries, " sand, stone and other materials of the like kind, except the reservation of " mines in favor of the King or *Suzerain*, according to the conditions set " forth in the Original grants of Seigniories and *Fiefs*."

&c., &c., &c., &c., &c.,

" *None of the reservations* DECLARED NULL and illegal in the above " enumeration, *give* to the Seigniors a *right to be indemnified* FOR THE SUP- " PRESSION *of them*, in virtue of the Seigniorial Act of 1854."

Sec. 257.—That legal Proposition of the Crown distinctly states that all reservations as to mines are illegal, as being inconsistent with the nature of the feudal compact, unless there is a reservation to that effect in the Original grant, and that all feudal rights, even when existing under a reservation of the mines by the Crown in the Original Grant, have been suppressed by the Seigniorial Act of 1854. The Proposition goes still further and declares that the *censitaire*, by the very nature of the feudal compact, is entitled to all the *domaine utile* of his land. It seems to the Plaintiffs that nothing can be clearer. The same.

Sec. 258—Now let us see what was the answer, the solemn judgment of the Seigniorial Court, upon that Proposition of the Crown. That decision is found reported at P. 82 (a) of Volume A of the L. C. Reports for 1856 ; it runs thus : The same.

" § 3. *The following reservations* or others analogous to them, *were* " *illegal and do* NOT *give* to the Seignior, a *right* to any *indemnity* by " reason of their SUPPRESSION."

" Art. 1. A reservation of firewood for the use of the Seignior."

" Art. 2. A reservation of all marketable timber."

" Art. 3. A reservation of all mines, quarries, sand, stone and other " materials of the same kind."

&c., &c., &c., &c.

OWNERSHIP OF MINES. SEIGNIORIAL COURT and their Judgment. CADASTRE.

Sec. 259.—That decision of the Seigniorial Court bears upon this case in more respects than one; not only does the Court, by its Judgment, declare that the reservation of Mines was illegal, except when made in obedience to the Original Grant, and gives rise to no indemnity; but the decision goes still further and holds that all claims of that description have been suppressed by the Seigniorial Act. See, on this head, the able judgments delivered by the Judges of the Seigniorial Court, as reported in the L. C. Reports for 1856.

The same.

Such also, is effect of *Cadastre*.

Sec. 260.—Apart from all this the Plaintiffs contend that the Judgment of Commissioner *Turcotte*, determining Seigniorial rights in that Seigniory, but making no mention of mines, as evidenced by an authentic copy of the Judgment filed in this case has completely settled the question against the Defendants' pretensions.

SEIGNIORIAL JUDGMENT is a *res judicata*, and is so pleaded.

Sec. 261.—Let us now see of what importance that decision becomes in this case. The Plaintiffs maintain that the Judgment of the Seigniorial Court has all the authority of a *res judicata* as between them, as *Censitaires* and the Defendants either as *Seigniors*, or even as representatives of the Crown. The pretensions of the Plaintiffs in that respect are borne out by paragraphs 8 and 9 of section 16 of the Seigniorial Act; those two paragraphs, in speaking of the decisions to be arrived at by the Seigniorial Court, under that Act, state:

"8°. The decision and opinions of the said Judges shall be *motivées*, "and delivered as in a judgment on a case in appeal in which all the ques- "tions had arisen and were put in issue, but without any further sentence "in favor of the Crown, the Seigniors or the *Censitaires*, whether as to costs "or otherwise;

"9°. The decision so to be pronounced on each of the said Questions "and Propositions shall guide the Commissionners and the Attorney-Gene- "ral, and shall, in any actual case thereafter to arise, be held to have been "a judgment in appeal, *en dernier ressort*, on the point raised by such "Question, in a like case, though between other parties."

The 9th paragraph then gives the right of appeal to any one of the parties within a limited time; it is well to mention, that

section 16 made it incumbent on the Attorney General, as representing the Crown, to submit, to the Seigniorial Court, certain Questions and legal Propositions embodying his views ; and that section gave to Seignior and *Censitaire* alike the privilege of submitting counter propositions. That permission was availed of largely by the Seigniors. and but sparingly by the *censitaires ;* Who shall venture to affirm that no effect has been prodeced on this case by that great and solemn Judgment, where the three parties interested in this case, namely : the *Crown*, the *Seignior* and the *Censitaire*, were alike represented, and where the decision as to the suppression of all claim to mining rights must be declared to be a *res-judicata* in this case ! The Plaintiffs specifically allege that judgment as a *res-judicata*, and claim its operation ; it will be, for the " DE LÉRY-*Patentees*, " and for the Crown as well, a rather difficult task, we think, to shew that this " DE LÉRY-*Patent* " has not received its quietus from the Seigniorial Act.

CONCLUSION :

The Plaintiffs have now, I think, satisfactorily shewn that they are entitled to succeed, upon every branch of their case. When I began this Factum, I had no idea that it would have filled more space than a couple score of pages ; as I progressed, however, with the work, I found that each branch of the case, that I entered on, opened up new vistas of enquiry, and compelled me to write *almost* a book, a thing I dreaded all the more from my recollection of Byron's wish that his enemy should " write a book ". Having concluded my task, hardly to my own satisfaction, it only remains for me to express my warmest thanks to Mr. Justice Taschereau and others for the loan of rare and valuable works cited in this Factum. To my gifted young friend, Charles Hamilton, Esquire, Advocate, I am, in an especial manner indebted for a work 200 years' old, and now out of print ; I allude to PRYNNE'S *Aurum* REGINAE. The value to me of that book may be

gathered from the fact that it contains a copy of Letters-Patent, referring to a statute of Edward III, which seem to have escaped the attention of every English Law-writer.

The whole respectfully submitted.

Quebec, 24th December, 1868.

J. O'FARRELL,

Atty. for Plaintiffs.

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aintiffs.