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REVUE CRITIQUE

DE

Législation et de Jurisprudence.

CONSTITUTIONAL LAW.

CHURCH AND STATE.

I. In Spiritual Matters.

§ 2. *Ecclesiastical Law under the British Crown.*

(*Continued from page* 32.)

Admitting for argument's sake, the alleged spiritual authority of the Sovereign over the colonial churches, that authority could not be exercised otherwise than by means of the courts established in the colony. Now, in Canada, the courts established under the British Crown have not and never have had jurisdiction in ecclesiastical matters.

A few months after the ratification of the Treaty of Paris, the Crown by Royal Proclamation, dated the 7th October, 1763, created a provisional government for Canada, with power "to erect and constitute courts of judicature and public justice within our said colonies, for the hearing and determining all causes as well *criminal as civil*, according to law and equity, and, as near as may be, agreeable to the laws of England, with liberty to all persons who may think themselves aggrieved by the sentence of such courts, *in all civil cases*, to appeal, under the usual limitations and restrictions, to us, in our Privy Council." This royal commission does not contain a syllable concerning ecclesiastical matters, and the jurisdiction of the courts both in original suits and in appeal to the Privy Council was evidently confined to civil and criminal causes. It may perhaps be objected that this proclamation was unconstitutional, that the Crown had no right to

change the established institutions and laws of a ceded and settled colony without the sanction of the Imperial Parliament. That is indeed the case; but the proclamation proves, nevertheless, that His Majesty had no intention of exercising ecclesiastical supremacy in Canada.

The next act of the legislative authority relating to the courts of justice in Canada is the *Quebec Act*. Mr. Justice Badgley, in the *Guibord case*, referred to it in the following terms:—

"Whatever the treaty of that year, or the proclamation of the same year, or the capitulations of Montreal and Quebec may aver, the Imperial Act of 1774, surely removed all possible difficulty upon that score, having declared by s. 4, 'that the inhabitants at the conquest,' (not the cession), 'professed the religion of the Church of Rome, and enjoyed an established form of constitution and system of laws, by which their persons and property had been protected, governed and ordered for a long series of years from the first establishment of the Province of Quebec, &c.,' and again afterwards, by the 8th section, 'that all His Majesty's Canadian subjects may hold and enjoy their property and possessions, together with all their customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial manner, as if the proclamation, &c., had not been made, and as may consist with their allegiance to His Majesty and subjection to the Crown and Parliament of Great Britain; and that in all matters of controversy relative *to property and civil rights*, resort shall be had to the laws of Canada, as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the courts of justice, to be appointed within and for the said province by His Majesty, shall, with respect to such property and *rights*, be determined agreeably to the said laws and customs of Canada, until varied or altered, &c.' I presume it would be, therefore, no difficult thing to ascertain and fix the jurisdiction of our courts in matters of ecclesiastical *abus*, the more so as the Court of King's Bench has been more than once declared to have inherited all the superior jurisdictional powers of the highest jurisdictions and courts in Canada previous to the conquest. The necessity for such an examination does not present itself in this cause."

It is evident that in the opinion of the learned judge international treaties are not of much legal weight. There is no reason to fear, however, that Canada will be considered a *conquered*

instead of a *ceded* country, because the word *conquest* happens to be met with in a statute, * or that the argument "whatever the treaty, &c., may aver," will convince any person that any legislature can validly violate the pledged faith of nations, regarded as sacred by the universal sentiment of mankind in every age of history.

And is section 8 of the Quebec Act, lauded by the honorable Judge as "having removed all possible difficulty upon that score," contrary to the stipulations of the Treaty of Paris? No, not in the least; it expressly confirms the Treaty, inasmuch as it enacts that "the inhabitants of Canada may hold and enjoy their property *and all other their civil rights*, and that in matters in controversy relative to property and *civil rights*, resort shall be had, &c. and that all causes instituted with respect to such property and *rights* shall be determined," &c. How can the words *civil rights* be reconciled with the transmission of the ecclesiastical law of *La Nouvelle France* or *l'appel comme d'abus*, into the British province by virtue of the above-mentioned clause of the Quebec Act? No doubt, the ecclesiastical law before the cession respecting temporal matters, was included in that section as forming part of the *civil rights*, but not spiritual or ecclesiastical rights properly

* Chief Justice Draper of Ontario lately remarked in the Provincial Anglican Synod that this colony had been obtained by *conquest* and not by *cession*. The learned judge added, however: "The conquest was ratified by a subsequent treaty conveying to the inhabitants confirmation of the rights which had been secured to them by the articles of the capitulation." Before the definitive treaty of 1763, the country was occupied conditionally by the British troops; the fortresses of Quebec and Montreal were not taken by assault, but capitulated on terms which show in the clearest manner that the fate of Canada was to be decided by the Treaty of Peace,—See articles 5 and 6 of the capitulation of Quebec, and articles 9, 13 and 30 of the capitulation of Montreal,—and the Treaty far from recognizing the conquest, makes a cession of the colony subject to certain charges. Forsyth (Constitutional Law, p. 26) also affirms that Canada was acquired by cession. The word *conquest*, used in a legal or historical sense, is a very incorrect one, and the use of the expression should therefore be discountenanced, as was lately done by the honorable Mr. Justice Mondelet, who peremptorily stopped a counsel who had made use of it, with this remark: "Ne pensez-vous pas qu'il vaudrait mieux ne pas se servir de ce mot de *conquête* en parlant de la cession du pays par la France à l'Angleterre? On ne peut pas dire que nous avons été conquis; ça été une cession honorable et non pas une conquête."

so called, which had never constituted part of those *civil rights*, or the laws or customs relating thereto.

The remark may perhaps be made, that the *appel comme d'abus*, or ecclesiastical jurisdiction in France, and in *La Nouvelle France* supposing it existed there, appertained as a matter of right to the civil tribunals and formed a part of their ordinary civil jurisdiction. We have already had occasion to remark that the French parliaments exercised jurisdiction in ecclesiastical causes for the sole and simple reason that the King of France was a catholic prince, the eldest son of the church, and the protector of the church canons, in fact, *evêque extérieur*, as d'Agnesseau says*; that this jurisdiction was by no means suitable to the young colony of *La Nouvelle France*, situated beyond seas, and so to speak in a very different political and social atmosphere.

But why go back so far to show that within the meaning of the Quebec Act, the expression *civil rights* does not comprise *ecclesiastical or spiritual rights?* The distinction is clearly laid down in section 17: "Nothing in this Act contained shall extend or be construed to extend to prevent or hinder His Majesty, by his Letters Patent under the Great Seal of Great Britain, from erecting, constituting such courts of criminal, civil and *ecclesiastical* jurisdiction within and for the said Province of Quebec, as His Majesty shall think necessary and proper for the circumstances of the said Province." The words *civil rights*, therefore, did not include *ecclesiastical* matters within the meaning of the above sections of the Quebec Act.

Let us now see whether this civil, criminal and ecclesiastical jurisdiction has been given to the courts of justice established in the Province of Quebec.

The Court of Common Pleas, which was the first court established (1777) under the authority of the Quebec Act, had "full power, jurisdiction and authority to hear and determine all matters of controversy relating to property and *civil rights* according to the rules prescribed by the said statute, and such ordinances as might hereafter be passed by the Governor and legislative council."

In the case of *Ferland* and *Deguise*, 1789, the Court of Appeals decided in the most formal terms that the Court of Common Pleas had no ecclesiastical jurisdiction, not even for assessments and *répartitions* upon the parishioners for the construction and

* Œuvres, vol. 1, p. 235, 5th Réquisitoire.

repair of churches,—assessments which were imposed under the French Government by the *Intendant* as a civil impost.

It was in order to create a remedy for this state of things that, when the Court of King's Bench was substituted for the Court of Common Pleas in 1793, the provincial legislature gave it the same jurisdiction that the *Intendant* had exercised over the temporalities of the Catholic Church. Section 2 * says that "the said Court of King's Bench shall have original jurisdiction to take cognizance of, hear, try and determine *all causes, as well civil as criminal.*" Section 8 adds: "And the said Court of King's Bench shall have full power and jurisdiction, and be competent to hear and determine all plaints, suits and demands of what nature soever, which might have been heard and determined in the courts of *prévôté, justice royale, intendant,* or superior council, under the government of the Province, prior to the year 1759, *touching rights, remedies and actions of a civil nature.*" With respect to the terms of the said Court at Three-Rivers, section 11 enacts that the judges thereof "shall have original jurisdiction, take cognizance of, hear, try and determine all *civil suits and actions.*" Section 23, which creates the provisional Court of Appeals, declares that the judges of the said court "shall be constituted a superior court of *civil jurisdiction*, and shall take recognizance of, try and determine all cases, matters and things appealed from *all civil jurisdictions and courts* wherein an appeal by law is allowed." Section 27 provides that "an appeal shall lie to the Court of Appeals from every judgment which may be given in the *civil* superior terms of the said Courts of King's Bench, in all cases where, &c." Finally, section 43 declares that "nothing herein contained shall be construed in any manner to derogate from the rights of the crown to erect, constitute and appoint courts of *civil or criminal* jurisdiction within the Province."

In 1849, the present Superior Court was constituted in lieu and stead of the Court of King's Bench, with all the powers and attributes of the latter, but no more. The Consolidated Statutes for Lower Canada, c. 78, sect. 2, declares: The Superior Court has original *civil* jurisdiction throughout Lower Canada, with full power and authority to take cognizance of, hear, try and determine in the first instance and in due course of law, all *civil* pleas, causes and matters whatsoever."

* 34 Geo. III, ch. 6.

Section 6, par. 2, declares: "The said Superior Court has full power and jurisdiction and is competent to hear and determine all plaints, suits and demands of what nature soever, which might have been heard and determined by the courts of *prévôté, justice royale, intendant*, or Superior Council, under the gouvernment of the province prior to the year 1759, *touching subjects, remedies and actions of a civil nature.*"

Sub-section 3 says: "But nothing in this Act shall extend to grant to the said Superior Court any powers of a legislative nature, possessed by any court prior to the conquest."

Let us now see whether the jurisprudence of the province under British rule, has admitted the *appel comme d'abus* or ecclesiastical jurisdiction of the civil tribunals.

In the case of *Ferland et al.*, and *Deguise*, already alluded to, the Court of Appeal, composed of Chief Justice Smith, and Messrs. Harrison, Collins, Pownall, Grant and Baby held*: "That while this country was under the government of France, the Bishop was a member of the Superior Council.....

"That while the Bishop was left to his authority and the exercise of his episcopal functions, the rights of the people were protected, and the sovereignty of the Crown secured by the power of the *Intendant*, who held exclusively of the *civil courts* of the prévoté of Quebec and royal court of justice of Montreal, and of all other *inferior* jurisdictions in the province, the right of representing the sovereignty in homologating, ratifying and validating all such transactions of the curate, the church wardens and parishioners (even after the bishop's sanction and approbation of their compacts) as might bring the parish into charge; as well as of executing his own decisions, for all assessments and reparitions upon the parishioners for the purpose afore mentioned, the Intendant exercising legislative authority in the departments of justice, police, finance and the marine.

"That upon the conquest, the act of parliament of the 14th year of His Majesty's reign, commonly called the *Quebec Act*, secured to his Canadian subjects (the religions orders and communities only excepted) their property and possessions, their customs and usages relative thereto, and other their *civil* rights, and allow-

* Registers of the Court of Appeal, Montreal, vol. 2, p. 242. At that time the Court of Appeal was composed of the Chief Justices and of the members of the Executive Council in the Province.

ed to them the free exercise of the religion of the Church of Rome, and to the clergy their accustomed dues and rights.

" That in constituting the frame of the provincial government under that statute, His Majesty gave instructions, that the courts of common pleas to be erected, were to have full power to hear and determine *all civil suits and actions cognizable by the Court of Common Pleas in Westminster Hall*, according to the rules prescribed by the said act of parliament. That although *that act of parliament* authorised the establishment of a colony legislature for making laws and ordinances, it *prohibited any ordinance touching religion, and reserved to the Crown the right of erecting courts of ecclesiastical jurisdiction*, and the judges and officers thereof, as His Majesty and his heirs and successors might think necessary and proper for the circumstances of the province; but that while it secured the inhabitants from all taxes and duties to be imposed by the said legislature, power was given to it for such as any town or district might be authorised by the legislative council, to assess, levy and apply within such town or district for the purpose of making roads, erecting and repairing public buildings, or for any other purpose respecting the local convenience and economy of such town or district.

" That the provincial ordinance of the 17th year of His Majesty's reign, passed under the authority of the said statute, and his royal commission and instructions for establishing the Courts of Common Pleas, enacts: ' That the said courts shall have full power, jurisdiction and authority to hear and determine all matters of controversy relative to property and civil rights according to the rules prescribed by the said statute, and such ordinances as might thereafter be passed by the Governor and legislative council.'

" That the creation of a subordinate jurisdiction for the exercise of the ample and complicated powers of the French *Intendant* involves consideration of high consequence to the Crown and the Canadian subject, and does not appear to have been expressly or implicatively vested in the Court of Common Pleas, or any other Court of the Province as yet established, but to remain for legislative deliberation, in a competent provision to be made, under all the guards requisite to the conservation of the religion of the people, the rights of the episcopal functions, the due protection of private property, and the dependence of the colony upon the sovereignty of the Crown and Parliament of Great Britain; a

law doubtless attainable upon application to the Legislative Council, and in which the security of all concerned will require that the powers of the *Intendant* be described with accuracy, and committed to a confidence adequate to its importance."

This judgment clears up many of the principal points in dispute in the present controversy, to wit: 1. that under the French government, the church was independent of the State in spiritual concerns; 2. that the *Intendant* possessed only civil jurisdiction over the temporalities of the Catholic Chuch; 3. that the Catholic religion was granted full freedom of worship under the Quebec Act; 4. that this statute prohibits any ordinance touching religion; 5. that courts of justice had only civil jurisdiction, like the Court of Common Pleas in Westminster Hall, which never exercised any spiritual authority; 6. and lastly, that courts of ecclesiastical jurisdiction did not yet exist at that time in the country, and could not be founded otherwise than by the Crown, agreeably to the 17th section of the Quebec Act.

The case of *Champlain* v. Messire *Vézina* has been alluded to in the *Guibord* case, but proves nothing. A suit was brought by M. de Champlain against the curate Vézina in damages laid at £11, 2 0, for having refused to admit him as godfather, under the pretext that he was incapable and unworthy, *incapable et indigne*. The provincial Court of Three Rivers, before which the suit was instituted, rendered on the 10th October, 1811, the following interlocutory judgment: " Considérant que la Cour du Banc du Roi est la seule cour en ce pays qui ait la juridiction ecclesiastique, renvoie les parties devant la Cour du Banc du Roi." On the 13th March, 1812, the Court of King's Bench, before which the cause had been carried, adjudged thus: " Considérant que la cause est de la compétence de la dite Cour Provinciale, y renvoie les parties pour y procéder ainsi que de droit." No final judgment was rendered by the Provincial Court; but on the writ of summons will be found the following memorandum of Judge Foucher, presiding the said Court:

" Ne doutant nullement que la Cour n'eût droit de connaître de la matière j'ordonnai au Défendeur de passer outre et de plaider, réservant toujours à considérer si, lorsque je procèderais au jugement, ces exceptions devaient m'arrêter: en conséquence le Défendeur ayant plaidé une défense générale, les témoins furent entendus."

The next case is that of *Naud* v. *The Lord Bishop of Mon-*

treal, (Mgr. Lartigue), decided on the 19th June, 1838, by the Court of King's Bench, Montreal, No. 861, composed of Chief Justice Reid and Messrs. Justices Pyke, Rolland and Gale. The judgment, which was given unanimously, is to the effect that the Court, " se déclare incompétente à prendre connaissance sur la présente demande de la sentence rendue par le défendeur en sa qualité d'Evêque diocésain, qui suspend le demandeur de ses fonctions sacerdotales ou curiales et de la procédure qui a eu lieu devant le tribunal de l'Evêque à cet égard."

On the same day, the same Court composed of the same Judges pronounced a similar judgment in an other case of Messire *Naud* v. Messire *Lafrance.*

On the 17th March, 1838, Sir James Stuart, then a practising advocate and afterwards the learned Chief Justice of the Court of Appeals on being consulted by Mr. Naud, said : " Upon the point whether the right of a *Curé* or Rector to be maintained in, or recover possession of his *Cure* or Rectory, can be made the subject of a civil action in His Majesty's Courts of Justice in this Province, it is only necessary that the most clear and express provisions of the law of France, *as it obtains in this Province*, vests the temporal courts with the exclusive cognizance of questions relating to the disputed possession (le possessoire) of *Cures* or Rectories." *

The expressions *as it obtains in this Province*, and *le possessoire of cures* indicate clearly that in the opinion of the learned jurist the whole body of the French ecclesiastical law had not been introduced into the colony. He does not say in fact that our civil courts have ecclesiastical jurisdiction, but that they have cognizance of the *possessoire* of the *cures*, an action which has always been regarded as of a civil nature.

Reference is also made to the case of *Harnois* v. Messire *Rouisse*, decided by Mr. Justice Rolland, 1844, in the following terms: " Considérant que le défendeur n'a pu refuser de donner le baptême à l'enfant nouveau-né du demandeur son paroissien, sans manquer à son devoir comme curé, suspendant à faire droit sur la demande en dommages et intérêts, et voulant donner au défendeur l'occasion de réparer en autant que cela se peut, la faute par lui commise, ordonne que le demandeur présente au plutôt et en temps convenable, aux fonts baptismaux, en l'Eglise Paroissiale, son dit

* Défense de Messire Naud, p. 237.

enfant, requérant le défendeur de par lui, son vicaire ou autre prêtre par lui commis, conférer le baptême à son dit enfant, et d'enrégistrer suivant la loi sa naissance ainsi que son baptême ès-Registres de la paroisse, dont il est le dépositaire légal. Et de ce qui aura été fait en obéissance au présent jugement, sera fait preuve devant cette Cour, le dix-sept de février prochain, pour alors être procédé à condamnation du défendeur, aux dommages soufferts par demandeur, suivant les circumstances, et condamne le défendeur à tous les dépens."

Mr. Justice Mondelet, in the course of his argument in the *Guibord* case, has invoked this decision of Judge Rolland to prove the intervention of the civil courts in religions matters. Mr. Justice Berthelot holds it to be agreeable to law. He says: "Le curé Rouisse refusait de donner le baptême et d'enrégistrer la naissance de l'enfant du demandeur, son paroissien, aux régistres de sa paroisse. Comme curé, il était tenu à ces deux devoirs vis-à-vis de son paroissien. La circonscription des paroisses en ce pays, n'appartient pas à l'autorité ecclésiastique exclusivement. Une fois la paroisse érigée civilement, tous les résidants catholiques dans cet enclave, ont le droit de s'adresser au curé, officier de l'état civil représentant l'autorité ecclésiastique, pour leur rendre les devoirs qu'il leur doit comme tel: et le Juge Rolland avait raison de rendre le jugement contre Messire Rouisse en sa qualité de curé et officier de l'état civil. Rien dans ce jugement qui puisse blesser l'autorité ecclésiastique."

With all due reference to the opinion of the honorable judge, it seems that Judge Rolland went farther than the law authorised him. As depositary of the civil authority, he had jurisdiction over Mr. Rouisse, not as a priest but as an officer of civil status, and consequently could only order the birth of the parishioner's child to be entered in the registers of civil status. The sacrement of baptism is essentially a spiritual matter and as such must be beyond the reach of the civil tribunals.

In a burial case reported by Mr. Justice Berthelot, date and names not given, Judge Morin said: "Nous avons des lois venant de France ou Provinciales sur l'établissement des Cures, la dîme, la contribution forcée pour les édifices du culte, qui donnent une sanction au corps de droit sur l'administration des fabriques; nous *n'en n'avons pas pour forcer à dire des prières*, du moins pas sous forme impérative. L'autorité *compétente* en ce cas est toute autre.

" Je n'ordonnerais donc dans *aucun cas des actes religieux.*

" Celui qui en ce cas dirait *non possum* aurait avec lui une autorité supérieure à la mienne.

" Et où est la mienne pour ordonner des choses spirituelles ?

" Je sais bien que l'on trouve des décisions, des jugements de tribunaux francais. Ils ont tous été rendus dans ces temps où le servilisme établi sous Louis XIV, et auquel le Clergé avait malheureusement trop participé, avait confondu la distinction protectrice des deux pouvoirs.

" Le Clergé, soumis à l'appel comme d'abus devenu fréquent dans le cas de fonctions purement religieuses, n'avait que ce qu'il s'était attiré,

" Il recueillait des Parlements le fruit de l'abandon à l'absolutisme royal, des principes qui assuraient la liberté.....

" Du nombre de ces devoirs, dans ce respect pour les lois et pour les droits d'autrui, dont le Clergé de toutes les dénominations doit donner le premier l'exemple, ne sont pas un *service funèbre, des prières, des cérémonies religieuses.* Ce n'est pas du moins à l'autorité *civile, politique* ou *judiciaire* à les commander.

" J'accorderais donc sans hésiter un *mandamus* pour forcer un Curé par exemple :

" 1o. à admettre un marguiller.

" 2o. à présider une assemblée.

" 3o. à faire ou corriger des entrées dans le Régistre de la Fabrique.

" Je n'ai mission pour lui commander de dire la messe, d'administrer les sacrements, de *faire des prières.* . . . .

" Je pense que la cour n'a pas plus d'autorité pour ordonner des prières et des cérémonies protestantes que catholiques. Si dans une religion comme dans l'autre, ces prières avaient été refusées contrairement aux règles de l'Eglise dont il s'agirait, et par des motifs non justifiables, je me croirais obligé de prendre connaissance des refus comme réductibles en dommages-intérêts."

It is difficult to reconcile the principles upheld by the honourable judge with the action in damages to which he refers. If matters of the spiritual domain are not within the jurisdiction of courts of justice, how can they give rise to any civil action, to a suit in damages or any other ?

In the case of *Wurtèle vs. The Lord Bishop of Quebec*, the Superior Court at Quebec (Duval and Meredith JJ., 1851) held that a clergyman of the Church of England, in a parish in

which there is a burial ground set apart *and consecrated by the authorities of the Church*, cannot be compelled to bury the dead in a place that has not been sanctioned or approved of as a burial ground *by the authorities of that Church*. Meredith J. said: "Were we to grant the present application, we should, as far as depends upon us, indirectly, but most effectually, *divest the Church of England of the authority which it has at all times possessed, of determining upon the places that ought to be set apart for the burial of the dead, who have died in the communion of that Church.*"

The Guibord case contains the latest judicial decision on the question under consideration.

Mr. Justice Mondelet, presiding in the Superior Court at Montreal, supported the order for giving ecclesiastical burial to the remains of the deceased Joseph Guibord by the consideration that the *appel comme d'abus* exists in Canada as it existed in France:

"Considérant que la Demanderesse a fait preuve des allégués essentiels de sa requête libellée, et nommément, que les Défendeurs ont mal à propos, et sans aucun droit, mais en contravention aux usages et à la loi, refusé d'accorder et donner, aux restes de feu Joseph Guibord, époux de la Demanderesse, décédé à Montréal, 18 Novembre 1869, la sépulture qu'ils étaient et sont par la loi et les usages, tenus et obligés de leur donner dans le cimetière catholique de la Côte-des-Neiges, dans la Paroisse de Montréal, suivant qu'il est allégué en la dite requête libellée;

"Considérant que les défendeurs sont malfondés en leur dite 3me exception et nommément, à faire valoir la prétention que la sépulture ecclésiastique a du et doit être refusée aux restes du dit Joseph Guibord, attendu qu'il était lors de son décès le 18 novembre 1869, membre de l'Institut Canadien de Montréal, et au dire des défendenrs, sous le coup de censures et peines ecclésiastiques, prétention injuste de la part des défendeurs dont le refus d'accorder, comme dit est la dite sépulture est une violation *des lois civiles et ecclésiastiques et des canons;*

"Considérant que les défendeurs ne peuvent pas s'affranchir de leur obligation de donner aux restes du dit Joseph Guibord, la sépulture réclamée par la Demanderesse, en s'appuyant, comme ils le font, sur une défence de l'administrateur du Diocèse de Montréal articulée dans une lettre adressée par ce dernier, à Messire Rousselot Prêtre, Curé, l'un des Défendenrs en cette cause,

datée, "Evèché, 18 Novembre 1869" produite par les Défendeurs au dossier, laquelle défence de l'administrateur, est illégale, injuste, et sans fondement;

"Considérant que le dit Administrateur du diocèse de Montréal est mal fondé en ce qu'il prétend s'appuyer sur ce que Sa Grandeur l'evêque diocésain lui a commandé ou enjoint de refuser la sépulture susdite, tandis qu'il appert par la dite lettre du 18 novembre 1869, de l'administrateur, à Messire Rousselot, l'un des défendeurs, qu'il n'est mention que du "refus de l'absolution même à l'article de la mort, à ceux qui appartiennent à l'Institut-Canadien, qui ne veulent pas cesser d'en être membres,"—et qu'il n'est pas dit en mot du refus de la sépulture ecclésiastique:

"Considérant que si Sa Grandeur l'Evêqué Diocésain, en se servant des mots "l'on doit refuser l'absolution même à l'article de la mort," a par cela seul donné à l'administrateur du Diocèse, l'ordre de refuser la sépulture dont il est question, il s'est, comme l'a fait l'Administrateur du Diocèse, *rendu coupable d'un abus de pouvoir que répudient les lois ecclésiastiques*, etc., etc."

In Review before Berthelot, Mackay and Torrance, JJ.; Mr. Justice Mackay said:

"I will not adjudicate upon these questions involving the rights and powers of the Bishop and *Curé*, as they have not been impleaded; but I have no objection to say this, (and it may tend to quiet some minds): that in all churches in Lower Canada there may be rules so touching matters spiritual that the civil Courts will not interfere about them. There are matters that fall to be disposed of only by such ecclesiastical jurisdictions as may exist in the various churches We have no ecclesiastical Court, such as is in England. The Court of King's Bench in the case of *the Queen* vs. *La Fabrique of Pointe Aux Trembles* (2 *Rev. de Leg. p.* 53) recognized that some cases may be outside of its jurisdiction.....

. "Under our system it must be so. In the matters of burials and of the sacraments, there may be rules in the various churches that this court, tho' it may enquire as to what they are, will not interfere with. Suppose the holy communion be refused in one of the Protestant churches, to a man as for living in violation of the rules of the church, suppose him also to approach the holy table without a token, as required in that church, and to be repelled, then to take a *mandamus* to compel the minister to admit him to the sacrament! Would this Court proceed to a peremptory *man-*

damus? The same Church has its burying ground and a rule or custom to bury in a particular portion of it, persons dying to whom the sacrament has been so refused. Would the civil court order peremptory *mandamus* to bury such a man as I have referred to, in the other portion of the burying ground contrary to the rule of that Church?

"Would this court interfere with a Church of England rector and church-wardens refusing place in their churchyard for the remains of a Wesleyan Methodist, or appointing a particular place in it for the burial of an unbaptised infant?"

Mr. Justice Berthelot:—"Si le nouveau souverain avait voulu voir exercer dans le pays, nouvellement soumis à sa domination, l'autorité judiciaire des parlements français en matière d'appel comme d'abus dans les causes ecclésiastiques, il aurait établi des tribunaux à cette fin, dont l'autorité aurait correspondu à celle du Parlement du royaume de France et à leur image; et bien que cette Cour jouisse des même attributions judiciaires que celles du Conseil Supérieur, *en matières civiles*, il est au moins bien douteux que la jurisdiction du Conseil Supérieur fût celle des parlements du Royaume en appel comme d'abus, et je ne vois pas que ce tribunal puisse aucunement s'attribuer jurisdiction en matière spirituelle et ecclésiastique.

"S'il en était autrement, il n'y aurait rien pour contrôler ce tribunal, lequel étant choisi par un souverain qui n'est pas observateur des canons de l'Eglise de Rome, et qui n'est pas lié par serment comme l'était le Roi de France à les faire observer, pourrait encore beaucoup plus facilement tomber dans les excès de jurisdiction dans lesquels sont tombés si souvent les tribunaux civils en France, à l'égard des ecclésiastiques et de l'Eglise, sous l'empire du droit gallican, excès tels qu'ils ont été ouvertement condamnés et répudiés tant par les savants avocats de la demanderesse que par l'Honorable Juge Mondelet dans les notes de son jugement.

"Ce serait contraire à ce qui a été garanti par les articles du traité de Paris aux catholiques du pays, c'est-à-dire la liberté entière du culte catholique romain suivant les rites de cette Eglise, avec sa complète indépendance en tout ce qui s'y rattache dans le libre exercice et l'observation de ses canons et de ses règles de discipline.

"En outre les Juges qui composent les tribunaux civils du pays ne font pas d'études pour les qualifier à juger ces matières;

il en était bien autrement en France, parceque n'y ayant alors qu'une religion d'Etat que le souverain était obligé de professer et jurait de faire respecter et observer, il était tenu, par celà même, de créer des tribunaux pour le représenter et faire observer ce à quoi il était tenu par serment et par les lois de l'Etat, et j'ai déjà cité les articles 71 et 72 des Libertés gallicanes, rapportées par Pithou, pour faire voir qu'à la grande chambre du Parlement, qui avait jurisdiction en la matière, il devait y avoir nombre égal de personnes des Pairs de France, ce qui prouve une attention toute particulière dans la composition du tribunal.

"Dans le Canada il ne peut en être ainsi.

"Si les tribunaux de ce pays, tels qu'ils sont composés et formés, devaient assumer ces fonctions et ces pouvoirs, nous nous trouverions dans un chaos affreux.

"Des Juges catholiques romains seraient appelés à dicter aux Evêques anglicans et autres dignitaires dissidents de la religion protestante, ou de l'Eglise d'Ecosse, l'interprétation des canons et des règles de discipline de ces églises en matières religieuses.

"Ils dicteraient même aux Juifs les pratiques de leur religion, depuis celle de la circoncision jusqu'à celles pratiquées en cas de sépulture, sans omettre celles de leur sabbat, et à toutes les classes de dissidents l'observance des règles d'une religion qui ne leur sont pas connues, ou pour l'observance desquelles ces disidents réclament une *liberté complète.*

"De même des Juges protestants de quelque dénomination quelconque ou Juifs de religion dicteraient aux Evêques catholiques et aux diverses classes de dissidents de l'Eglise d'Angleterre ou d'Ecosse, l'ibservance des canons de l'Eglise Romaine et les règles et l'observance de croyances différentes.

"Un pareil état de choses n'existe heurensement pas et ne peut exister ni se supposer. Je dis plus; il ne serait pas toléré par les différentes dénominations religieuses qui vivent en harmonie en Canada sous un tout autre régime.

"Et elles ne vivent en harmonie que parceque toutes sont également libres et protégées devant la loi par un système de tolérance judicieuse, égal à la liberté des cultes.

"A chacune d'elles on peut appliquer l'expression de M. de Cavour, et chaque membre de ces différentes dénominations religieuses peut répéter avec lui, "Mon Eglise est libre dans l'Etat libre."

Mr. Justice Torrance expressed no opinion on the merits.

In the Court of Appeals, the following remarks were made: Mr. Justice Badgley:—"It is not my business according to my appreciation of this cause or of its merits, to question the validity of the Bishop's decree of ecclesiastical disabilities nor to follow out the legal objections taken against it; it is sufficient to say that he is the highest R. C. ecclesiastical authority in the Diocese and as such his decree was within his authority to enforce upon his Diocesan clergy until it should be set aside by appeal to superior ecclesiastical authority, *Non nostrum tantas componere lites*, and the more especially as, in my apprehension, it is but very remotely connected with the real points of this contention which the Court must adjudicate upon; *as long as the decree was confined within its ecclesiastical province, civil jurisdiction might not touch it*, but when it overreached its sphere and extended into the region of civil or mixed jurisdictions, the civil law of the province by its civil jurisdiction might question its abuses, and subject it to a power paramount to its own."

Mr. Justice Monk:—"It must be borne in mind that the powers of the Church in spiritual matters are exceedingly great—are, in fact, supreme—and as we Roman Catholics view her object and end on earth, and her divine origin, it is proper that they should be so. The laws for her government, and the rules of her moral discipline, are precise and peremptory enough. The obligation of obedience and submission on the part of those who belong to her communion is of the most sacred and binding character. But if much is expected from the faithful—if in their own eternal interests much is required—still more is expected from the Church itself. If she admonishes and commands, she is also our infallible teacher and guide; and any mistake or omission by one of her ministers would be lamentable in the extreme, and might lead to the most deplorable consequences. These of course are obvious truths; but they are adverted to here as indicating the very great importance of this matter, and also to intimate that if we possessed the power, we should look closely into the proceedings of the ecclesiastical authorities in this case. But, as before stated, I think it is manifest that we have no such power. It is quite true that instances are cited where the Civil Courts in France did interfere and did adjudicate in such matters when connected with the performance of civil duties; they went very far and were under peculiar influences, whilst the organization and the composition of their High Courts were different from ours. It is plain

to my mind that no such power exists in the civil tribunals of this country, nor do I believe it ever existed as a regular and recognized authority in the *Conseil Supérieur* of Quebec, and if it ever did, I am clearly of opinion that it did not continue to exist after the cession of this country to the Crown of Great Britain, and after we came under the rule of a Protestant Sovereign. It was the theory and pratical exercise of the Royal power in France which gave to their High Courts the apparent right to interfere and to exercise certain control in ecclesiastical questions.

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"If a man is not satisfied with the teaching and authority of his Church—if he is not disposed to submit to her decrees—he has a very plain course before him—he may leave it and go elsewhere;—but while he remains a member of it, he owes his Church and the Church's authority in all spiritual matters, implicit and absolute obedience—it seems to me that practically there can be no wavering evasion here. A man must be either one thing or the other or nothing—in any case he must settle these questions with his own conscience and with the Church. The civil tribunals of the country can give him no relief. We can not touch the Bishop's order."

Mr. Justice Drummond:—"Under the ancient French law the civil tribunals could intervene in these matters. The people and the Sovereign were Catholic. There was an intimate connection between Church and State, and the Sovereign, as a pledge of the protection extended to the church, assumed the right in certain cases to intervene for the purpose of checking and repressing the abuses and encroachments which ecclesiastics sometimes committed. The cession of Canada to England changed this state of things. The guarantee of the free exercise of the Roman Catholic religion granted to the members of that faith, and the fact that the new Sovereign was a Protestant, necessarily changed the ancient state of things, and rendered it as impracticable as dangerous for the State to intervene in ecclesiastical matters. If it were not for this want of jurisdiction, I would have been disposed to order the burial to take place."

Mr. Justice Caron:—"Les questions qui viennent d'être énumérées et plusieurs autres, sont justement celles dont je disais au commencement de ce mémoire, quelqu'importantes qu'elles fussent, que la considération pouvait s'en remettre avec profit à une autre occasion.

"Je me contenterai de dire en passant qu'il me parait extrêmement difficile de poser des règles générales quant à l'étendue et aux limites des deux juridictions, l'ecclésiastique et la civile. Il est hors de tout doute que dans tous les cas où les questions agitées sont purement ecclésiastiques, les autorités ecclésiastiques sont seules compétentes à les juger, mais la grande difficulté, suivant moi, est de distinguer les cas qui sont purement ecclésiastiqnes de ceux qui ne le sont pas en tout ou en partie.

"Il me parait arriver si souvent que les sujets à décider sont mêlés de droit religieux et de droit civil, que dans une infinité de cas les autorités ecclésiastiques ont besoin de l'intervention des tribunaux civils pour les aider dans l'exécution et l'accomplissement des droits et privilèges qui leur appartiennent incontestablement. Il me parait donc que la question de juridiction dépend beaucoup des circonstances de chaque cas, sans qu'il soit possible avec avantage de poser une règle générale.

"Comme la chose ne me parait pas nécessaire dans le cas actuel, je m'abstiendrai de poser cette règle, me réservant de le faire en temps convenable."

Mr. Chief Justice Duval, expressed his regret he had to dispose of the case "on what may be considered a question of form." It is indeed to be regretted that his Honor, as well as his learned colleagues Messrs. Justices Caron and Badgley, did not decide the cause both as to the procedure and the merits. There was no law to the contrary; and if they had done so, they would have settled a branch of constitutional law of the most delicate nature and of the highest importance to the whole community.

To sum up the discussion, it may confidently be concluded that it is a fundamental maxim of law in Canada, consecrated both by the French and the British constitutions of the country, by imperial statutes and treaties, by the peculiar jurisdiction and by repeated decisions of our courts, that all the churches in the colony are free and independent of civil or judicial intervention in spiritual matters.

From this principle of our public law flow the rights and liberties which are dearest to our mixed population; liberty of conscience, freedom of public worship and freedom of the press in religious matters. Congregations can worship God in whatever form and manner they see fit, provided that in so doing, they don't interfere with rights of property, nor disturb the public peace and

outrage public morality. With due regard to those principles of public law, they may ring bells, raise crosses and calvaries, form processions, convoke religious councils and synods, &c. The Catholic, the Protestant, the Jew may hold any public office in the country, take his seat on the benches of the constitutional assemblies, without any inquiry being made into his faith or mode of worship. Every person has a right to speak, write and print his opinions upon any religious question or point of controversy, without permission from the government or from any one else. Apostasy, heresy and non-conformity are not crimes by the law of Canada and cannot be punished except by ecclesiastical or spiritual penalties and loss of benefices in certain cases. In fact Canada is one of the freest countries of the world in religious matters.

This freedom does not mean that every one has the absolute right to speak, write or print concerning religious matters whatever he may please, without any responsibility private or public. Such a law would give to every citizen the right to outrage the feelings, destroy the public and private character and even endanger the personal security of his fellow members of society. Libel and slander in religious as well as in secular matters are offences punishable by the laws of Canada.

II. In Temporal and Mixed Matters.

The principle of the exclusive jurisdiction of the Canadian churches in spiritual matters being thus established, little remains to be said concerning their status in civil and mixed matters.

By the common law, all the churches in Lower Canada, with the exception of the Catholic Church whose institutions and parishes have always held the rank of corporations—are merely voluntary associations, governed by the rules of equity and the principles of the common law. Nevertheless, as the majority if not all of these bodies have been incorporated by royal charter or act of the Colonial Legislature, the Canadian Churches in general may be regarded as corporations. These corporate rights, however, are not vested in the church *eo nomine* and by its general name—such as the church of Rome or the church of England, but in the church of each place, mission or parish.

The Anglican Church in Canada is constituted into diocesan synods composed of the bishop, the clergy and the laity, entrusted with the management and good government of the

church in the diocese and of its property and affairs, and into a Provincial Synod, composed of delegates from the dioceses of Quebec, Montreal, Huron, Ontario and Toronto, in which is vested all the spirituality and temporality of the whole Anglican Church. By recent statutes, the dioceses of Nova Scotia (including Newfoundland), and of Fredericton, (comprising the provinces of New Brunswick and Prince Edward Island), have been authorised to join the Provincial Synod of Canada, and there is no doubt that in a few years the General Assembly will be made up of delegates from all the provinces of the confederation.

This General Assembly is invested with the most extensive privileges ever conferred upon any ecclesiastical or lay corporation in Canada, for it is entrusted even with legislative power over the temporalities of the church with the approbation of the Governor in Council. To what extent this legislative jurisdiction conferred by the Parliament of the old province of Canada can be exercised under the Federal Constitution of 1867 might be a subject for discussion; but it would seem at least that the canons of the Assembly can repeal only such statutory enactments as are mentioned in 29-30 Vict. ch. 15, and not the general law of the land.

The Anglican Synods are corporations, as are also the incumbent and church-wardens of each church or mission. Nevertheless in some diocese, the church-wardens alone form the corporation.

The legislature has conferred no spiritual or ecclesiastical jurisdiction on the bishop, but it is still a question whether by the constitution and usages of Anglican churches in the colonies, he has not such a jurisdiction in certain matters.

The ecclesiastical institutions of Nova Scotia bear some resemblance to those of Lower Canada. The Anglican bishop has the power, with a majority of the church members, to constitute parishes, even without the approbation of the civil authorities. The church-wardens and vestries of these parishes are bodies corporate, entrusted with the management of the property and affairs of the parish church.

The other religious bodies in Nova Scotia are either voluntary associations or corporations created by royal charter or act of the Provincial Legislature. However, under the general law* applic-

* Revised Statutes of N. S., ch. 51.

able to all religious bodies, any twenty persons can form a church by a deed passed before two witnesses and duly registered. This deed must contain the constitution of the association and the names of the trustees who can sue and be sued by their name of office.

In the Province of Quebec we meet with all the ecclesiastical institutions which existed in England before the Reformation, and in France before the revolution of 1793, and also those existing in all countries in which no particular church is established by law. The first consist of the secular clergy, composed of persons having communication with the world, such as the chapter of the diocesan bishop and the curates and missionaries in general. But the bsihop, as head of the clergy of the diocese, alone constitutes the corporation under the name of "La Corporation épiscopale catholique Romaine du diocèse de———." The second are religious communities recognized at the time of the cession and subsequently approved by the Crown or Legislature, the member of which by solemn and perpetual vows, entirely renounce all intercourse with the world; such are the ladies of the Hôtel-Dieu and the Ursilines of Quebec and of Three Rivers.* The third are religious communities, the members of which, without taking any such vows, live together in communication with the world, in order to serve the interests and aims of the catholic church; such are the gentlemen of the Seminary of St. Sulpice, the ladies of the Congregation, or Black Nuns, the ladies of the General Hospital or Grey Nuns, and generally all religious communities in the country, exclusive of those mentioned as bound by solemn and perpetual vows. The fourth are the vestries, *fabriques*,

* By an act of the last session of the Legislature of Quebec, 35 Vict., c. 46, comprising five short clauses, pp. 145, 146, the Order of Jesuits has been civilly revived under the name of *Les Missionaires de Notre Dame S. J.*, "with all the rights, powers and *privileges* of other corporations, and particularly of those having a religious, *spiritual* or moral object." Will this enactment be so construed as to restore to the reverend Fathers the privilege which they enjoyed under the French Crown of taking perpetual and solemn vows? The Act of Incorporation further provides that they may acquire "by purchase, *gift, devise,*..... or any other lawful means..... any movable or immovable property *whatever, for the usages and purposes of the corporation*"; they may dispose of the same *lawfully*, in whole or in part, for the same purposes; they may possess real estate to any amount, provided that "within five years from the acquisition of the same" they

which are both civil and ecclesiastical corporations, composed of the parishioners and of the curate. In fact, the whole of Lower Canada is or may be divided into catholic parishes, erected by the bishop with the concurrent consent of the catholic free holders and the civil authorities, and which are at the same time parishes for all civil and municipal purposes. It would seem that even by the common law, the bishop can establish canonical parishes which are valid for certain civil effects, as for baptism and marriage, although he cannot and never could impose a *répartition* or coercive assessment on the parishioners without the approbation of the *Civil Commissioners* or *Intendant*. Nevertheless, we do not wish to express any formal opinion upon these delicate questions, which form the subject of an important issue concerning the division of the Roman Catholic parish of Montreal.

The fifth class of ecclesiastical corporations comprises all religious bodies and all Protestant churches formed of one or more congregations.

The rights which the ecclesiastical corporations can exercise in temporal matters are those which are conferred upon them by their acts of incorporation, the general and special laws which apply to them, and generally all the rights which are necessary to attain the subject of their creation. The ecclesiastical law applicable to the Catholic church is that which existed in Canada at the time of the cession as amended by usage and the statutes of the colonial legislature. Several works have been published respecting these laws; among others, the *Code des Curés* by Mr. Justice Beaudry, the *Manuel des Curés* by Mgr. Desautels, and the *Manuel des Paroisses et Fabriques* by Mr. H. L. Langevin, the present Minister of Public Works.

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convert into "mortgage or other valid securities" such immovable property, which may exceed "in annual value the sum of ten thousand dollars, *over and above the value of the immoveables used for the purposes* of the said corporation." These purposes are "to perform the various functions of their office, in cities and country places, such as the preaching of missions and retreats, to assume the direction of religious congregations, brotherhoods and societies, both of men and women, and also, at the request or with the permission of their lordships the Roman Catholic bishops, or *of any one of them*, to devote themselves to other works for spiritual or moral purposes, by preaching, precept and education." The corporation may make by-laws "not contrary to the laws of this Province, but which it may judge necessary and advantageous for its proper administration." Altogether the charter is a model one; it is short and comprehensive enough.

The ecclesiastical law applicable to the Protestant churches of Canada is found in their respective acts of incorporation and in their local customs and usages, and in default of these, in the law applicable to the churches of the mother country with which they are in communion.

As a general rule, the common law of the country governs all the churches in matters purely temporal.

Thus they may acquire, alienate and possess property, saving the restrictions imposed by the law of mortmain; they may contract and incur obligations like civil corporations. They cannot, however, sell or encumber real property without special formalities and for certain specific purposes. The edifices devoted to sacred purposes cannot be either hypothecated or sold by the sheriff, as being out of commerce, *hors du commerce*.

The persons of the clergy and *religieux* in general enjoy all civil rights, except that those in holy orders cannot contract marriage and that the *religieux* bound by solemn and perpetual vows, are civilly dead, and neither can marry, nor hold property or contract any civil obligation. With these exceptions, a priest or minister may hold any public office; he can be a lawyer, medical man or notary, be a municipal candidate, be eligible for election to the Local Legislature or to the House of Commons. Ecclesiastics are exempt from arrest for debt, from military service and from serving as a juror whether in civil or criminal causes, and also as a municipal councillor in Ontario. In Quebec, they are disqualified from holding any municipal office.

Ecclesiastical corporations and ecclesiastics in general are governed in secular matters, whether criminal or civil, by the laws affecting individuals, saving the privileges accorded them by special enactments and the disabilities to which they are subjected, particularly those relating to mortmain. The *curés* and ministers in charge of a parish, mission or congregation are the civil officers to whom the law has entrusted the keeping of the public registers of baptisms, marriages and burials, and as such are specially subject to the jurisdiction of the civil tribunals. The French constitution, which recognized many cases of privilege in favour of the clergy, and placed them, even in civil and criminal matters, under the jurisdiction of an ecclesiastical court, called the *officialité*, has never formally existed, or at least has long since ceased to exist in Lower Canada. As has been already remarked, the law giving the Superior Court jurisdiction in all civil causes does not except

any person, and therefore includes within its terms all persons whatsoever in the country. It is thus we have seen the Court of Appeals condemn *Messire curé Michon* in damages for having married a minor without the consent of his parents, as an *abus* of his civil authority. Like judgments were rendered against the Rev. Mr. Bonar and Rev. Dr. Taylor under similar circumstances. Mr. Justice Mondelet has also mentioned the case of Mallette, a parishioner of Chateaugnay, whom the curate attempted to render ineligible for the office of church-warden by the infliction of spiritual censures.

The conclusion, however, cannot be drawn that because the secular and spiritual jurisdictions are kept distinct under our constitution, there is a real separation of Church and State. Doubtless, in our country there exists no such close union of Church and State as is to be found in England, Scotland and Russia, in each of which there is a national church establishment. In Canada there is no one established church; they may be said to be all established for the benefit of our mixed population. One of the learned counsels in the *Guibord* case referred to the preamble of sect. 3 of the Clergy Reserves Act, *—*And whereas it is desirable to remove all resemblance of connection between Church and State,*—as establishing the principle of separation of Church and State in Canada. On reading the clauses of this statute it will easily be seen that the intention of the legislature was not to abolish the connection between Church and State, but to do away with a privileged or preferential establishment in favor of certain churches, more particularly the churches of England and Scotland. The Clergy Reserves, in fact, were an endowment granted to these churches by the British Crown contrary to the colonial principle of the equality of all churches before the civil ruler. At all events, the principle enunciated, but not enacted by the 18 Vict., is undoubtedly contrary to the body of law in force in the Dominion. The union of Church and State does not consist merely in the pecuniary subventions granted to the ministers of religion by lands reserved for the clergy, or donations from the public treasury, which our legislators open so liberally in favor of all religious institutions without distinction of creed; it consists above all in the harmony of the civil laws with the doctrines professed by the various churches of the country; and in this respect it cannot be

* 18 Vict. ch. 2, 1854.

denied that a close union exists between the Church and State in Canada. The minister of religion, beside the cradle of the infant, establishes his faith and his civil status, by the sacrament of baptism and its registration in the public registers. The minister of religion forms the marriage tie, which is in the first place either a sacrament or a simple religious ceremony according to the religious belief of the parties, producing certain civil effects. The minister of religion, at least in the Catholic Church, grants dispensations from certain marriage impediments and formalities. The minister of religion is called upon to sanctify the grave of the dead and to record his demise from civil life. Finally, if we reflect that in the erection of civil parishes, the initiative is conferred upon the ecclesiastical authorities, that as soon as the parish is thus erected, the construction of buildings for sacred purposes is provided for by the levying of assessments as a first charge upon the lands of the Catholic parishioners, even in preference to school and municipal taxes; that these buildings are free from all taxes; that the support of the *curé* is ensured by a share of the produce of the soil, called tithes; that these tithes as well as the income and fees generally due to ecclesiastics are exempt from seizure; that elementary and superior schools under the immediate control of the clergy receive annual allowances from the government; that Sunday and religious festivals, whether common to all Christian churches, as Christmas, or peculiar to one church, as the day of the Conception and Easter Monday, are observed as legal holidays; that the State has recognized the disabilities arising from the taking of solemn and perpetual vows, and from entry into holy orders, and from other causes of a purely religious nature; and finally that the decision of mixed matters is provided for by our system of laws—we cannot fail to conclude that in Lower Canada at least there is no separation of Church and State. Nay, even if these tokens of union were entirely effaced from our civil laws; or if the State should absolutely divorce itself from all and every church within its border, as it has done in France and the United States, the separation would be utterly impossible. The promulgation of the great doctrines of Christianity, the being, the attributes and providence of one Almighty God, of our responsibility to him for all our actions; of a future state of rewards and punishments; of the dread retribution and the sanctity of oaths; of respect for the persons and properties of others; of good faith in the daily and hourly transactions of life: these

fundamental truths, we say, can never be diffused and believed but through the instrumentality of religion, and never can be matter of indifference in a civilized State. It is indeed impossible for those who believe in the divine character of Christianity—and we trust for the good of our community that all our fellow-countrymen believe in it,—to doubt that it is the bounden duty of our government to protect and encourage religion among all classes under its control. This sacred duty can be fulfilled towards all churches without in any way trespassing on the rights of private judgment and liberty of conscience.

The great civilian Domat, in his *Traité des Lois** has laid down principles which so exactly define our constitution that the reader cannot fail to read them with interest.

" Ces différences entre l'esprit de la religion et l'esprit de la police, et entre le ministère des puissances spirituelles et celui des puissances temporelles, n'ont rien de contraire à leur union; et les mêmes puissances spirituelles et temporelles, qui sont distinguées dans leur ministère, sont unies dans leur fin commune de maintenir l'ordre, et elles s'y entr'aident réciproquement. Car c'est une loi de la religion et un devoir de ceux qui en exercent le ministère, d'inspirer et de commander à chacun l'obéissance aux puissances temporelles, non-seulement par un sentiment de crainte de leur autorité et des peines qu'elles imposent, mais par un devoir essentiel et par un sentiment de conscience et d'amour d'ordre ; et c'est une loi de la police temporelle et un devoir de ceux qui en exercent le ministère, de maintenir l'exercice de la religion et d'employer même l'autorité temporelle et la force contre ceux qui en troublent l'ordre."

The union which exists in Canada between the Church and the State has just been mentioned, and we may here explain the rules which govern matters which result from this union and which are on that account called *mixed.* It is evident that in mixed matters, there is a double jurisdiction, namely, of the ecclesiastical authority over that part of the cause involving spiritual interests and of the civil authority over that part which is of a temporal or civil character. When these two elements are clearly and precisely defined, no difficulty can arise; the civil authority acting through the courts of law can pronounce only on the civil right and remedy in the mixed cause, and not upon the remainder, which

* Ch. 10, S. 5.

being thus distinguished and separated from the civil portion, becomes purely ecclesiastical and falls under the sole and exclusive jurisdiction of the Church. This rule is based upon the principles which have been already laid down and can scarcely be seriously called in question. The real difficulty consists in determining whether it is the civil or the ecclesiastical authority that shall decide as to the ecclesiastical or civil character of the remedy. On the part of the church, and particularly of the Catholic Church, it is contended that she is the representative of God upon earth; that she is judge in the domain of spiritual things which are superior and paramount to temporal things; and that the civil judge is liable to err in declaring that to be civil which is ecclesiastical. On the part of the civil power, it is answered that Her Britannic Majesty like His Most Christian Majesty, is sovereign *by the Grace of God*, that the temporal power though more immediately concerned with earthly things, has also been established to assist man in fulfilling the end of his being; and lastly that the ecclesiastical authorities, such as the *curé* or bishop, are liable to declare a right to be ecclesiastical which is really civil. It must be acknowledged that both systems present very grave if not insurmountable difficulties in a mixed community like this; difficulties that can be done away with in a certain measure only by the establishment of mixed tribunals, composed of an equal number of representatives of the civil and ecclesiastical authorities. This is not the place to enter upon a discussion of this question of high social importance; the duty of the lawyer is far much more modest and simple; whether rightly or wrongly, he has only to ascertain what is the law of the country. Our constitution recognizes only one authority competent to decide in mixed matters, to wit, the civil authority and its ordinary tribunals. The law of this colony has at all times, as well under the French as under the English Crown, granted to the Superior Court sole jurisdiction *touching rights, remedies and actions of a civil nature.* As a civil right exists in every mixed cause, the Superior Court alone is competent to define and decide it and to enforce its execution; but as already observed, its jurisdiction does not extend farther, and it can under no pretext whatever, even were the canon or ecclesiastical law openly violated, take cognizance of the non-secular questions which are exclusively cognizable by the tribunals of the church. Besides it is but reasonable that in case of doubt, the benefit of the doubt be given to the church authorities, who not

being represented in the civil courts, and being attacked, are in the position of defendants, and that at all events the civil tribunal does not pronounce its decision without having before it the decision of the ecclesiastical court in a certain and authentic shape. This was done under both the French and British Governments, especially in the cases of *Lussier* v. *Archambault*, decided in 1848 by the Honorable Justices Rolland, Day and Smith, and of *Vaillancourt* v. *Lafontaine*, decided in 1866 by the Honorable Mr. Justice Polette.

The whole gist of the *Guibord* case, therefore, consists in the question whether the burial that was demanded and refused was civil or ecclesiastical burial. The Honorable Mr. Justice Mondelet decided that it was ecclesiastical burial, and he ordered it to be performed, holding that he had the power of reviewing and quashing the decision of the curate or of the bishop who had refused to perform it; and in this point His Honor's judgment is plainly unfounded, not only in law, as we have seen, but even in common sense. Does not reason clearly teach us that the ecclesiastical authorities offer the best guarantees of a sound and full investigation in spiritual matters? Is it not strange to see a lay judge, whether sitting on the bench of the Superior Court in Lower Canada or in the Judicial Committee of Privy Council in England, holding forth upon the subject of excommunication, as in the *Guibord* case, or on the rites of the church, such as the use of incense, kneeling, elevation of the cup and paten, and lighted candles, &c.,—as in some instances before the Privy Council? Still in England, the national church is at least represented in that tribunal. But in Canada no such provision exists, and it would be a gross violation of liberty of conscience, if the judge called on to decide the sacred matters appertaining to a Jewish synagogue, for instance, should be a Catholic or Protestant judge.

Mr. Justice Badgley conceded the independence of the churches in matters purely spiritual, but would not extend it to mixed matters. But is not the spiritual portion of the mixed question at issue, when once separated from the secular portion by the court, as distinct as if the case were entirely ecclesiastical? How then can the church be held in subjection in the former case while proclaimed sovereign arbiter in the latter? It

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* L. C. Jurist.

is impossible that this should be the case. All that relates to rights of a spiritual nature, in whatever form they present themselves, whether in the secrecy of the confessional, or in the rites of baptism, marriage, sepulture, and other like matters, is withdrawn from the scrutiny of courts of justice. If the communion has been refused to a member of a congregation; if a minister has been deposed for heresy, the Court cannot constitute itself supreme judge of the heresy or of the motives of refusal of communion, under pretext of insult and slander in the one instance or of material damage in the other. The only recourse which remains for the aggrieved party is an appeal to the higher ecclesiastical tribunals, and if he cannot obtain redress, he can leave the church and enter another whose doctrines and government are more in harmony with his feelings, or remain aloof from all and every church if more congenial to his wild disposition.

But to return to the *Guibord* case: in Review, Messrs. Justices Berthelot and MacKay also decided that the burial demanded was ecclesiastical, and therefore beyond the cognizance of Courts of Justice. The reader is already fully aware of the opinion of the Hon. Mr. Justice Berthelot; his learned colleague expressed himself to the following effect:

"The defendants consider it their duty to refuse grave for burial in the larger part of the cemetery, unless the church's ceremonies can be performed at the proposed burial. Ecclesiastical burial had been refused to Guibord by the Bishop and the *Curé*. The defendants aware of the fact, might govern themselves, they say, by the Bishop's and Curé's determination, and refer Guibord's friends to the ecclesiastical authorities.

"They claim that owing to the church's refusal to give Guibord ecclesiastical burial, they were justifiable in indicating the place they did for his burial, if civil burial only or mere interment was sought.

"I think the defendants right, and whether the Curé's refusal was warranted or whether it was wrong, needed not affect them. It was for the plaintiff to get removal of the Curé's opposition and the administrator's, if defendants insisted.

"Did Guibord die under the *censures ecclésiastiques?* The *Fabrique* found that he did.

"Had the administrator reason to refuse him burial ecclesiastic? Does membership of the *Institut* justify denial of such burial? The *Fabrique* says that it is not for them to decide such questions.

" The plaintiff says: " Ceux-là seuls qui sont frappés de l'excommunication majeure sont privés de la sépulture ecclésiastique et cette excommunication n'existe pas dans le cas de Joseph Guibord."

" Against this, is the *curé* who swears that from mere *refus des sacrements suit toujours, comme conséquence, le refus de sépulture.*" So thought the administrator. The *Fabrique* say that it is not for them to settle such questions. They claim right to recognize ecclesiastical censures *de facto*, coupled with Curé's and the church's refusal of ecclesiastical burial, and upon these to refuse place for *Guibord* in that larger part of the cemetery reserved for burial of those who die in peace with the church and in which ecclesiastical burials, and none other (*as is proved*), are usually performed. I cannot say that any of these claims of the *Fabrique* are outside of legality."

In appeal, Mr. Justice Monk said :—" The appellant, if I understand her demand rightly, asks that the remains of her late husband, he having died a Roman Catholic, be interred in the Roman Catholic cemetery according to the law of the land and the usages of the Church. She does not in express terms require any particular form of interment, nor the observance of any particular ceremonies at the funeral. But as a matter of fact, it would appear that if even civil burial *en terre sainte* were granted, she would be in a great measure satisfied. I collect this from the appellant's case—it is the condition attached to the offer of civil burial, that is, interment in the unconsecrated, or rather unallowed part of the cemetery, that constitutes the appellant's chief ground of complaint. This is very natural—very reasonable. Can this Court come to her assistance in this matter? It is quite possible that we might order civil burial—but can we direct that the remains of the party claiming it should have a grave in that part of the cemetery destined to the interment of those who alone are entitled to ecclesiastical burial? If not, it is plain we can do nothing. Now, as a matter of fact, the cemetery is divided into two parts. It will not be disputed that the respondents, under the direction of the curé, or the Bishop, had the right to make this division, and that for the purposes before adverted to. It is prohibited by no law, and it is in strict conformity to custom. Catholic cemeteries in Lower Canada are, with scarcely an exception, so divided, and for precisely the same object and for the same reasons. The custom in this case makes the law—in

fact is the law. Every person entitled to burial in that cemetery is aware or should be aware of this state of things, and they must abide by them. There is, therefore, a distinction and a difference in the rights of persons claiming to be buried in the Cemetery. This is perfectly legal. Now is it the Fabrique as a lay corporation that determines who are to be interred respectively in these divisions? If so, we may perhaps order them to give Guibord civil burial in the consecrated part of the cemetery. But it is beyond controversy that it is not the Fabrique which decides this question—it is the Church and the Church alone. It is the ecclesiastical authority of the parish. It is to it exclusively that belongs the right to regulate this matter. In this instance they have done so in the exercise of a purely spiritual power. It is legal, and the decision is final. From this action of the ecclesiastical authority determining *where and in what part* of the cemetery Guibord's remains shall be interred, there is no appeal to this Court as I understand the law."

Mr. Justice Drummond thought that the burial demanded was ecclesiastical and that he had no jurisdiction to order the same.

Mr. Justice Caron :—" De temps immémorial, il a été d'usage, non-seulement dans la paroisse de Montreal, mais encore dans tout le diocèse et même dans toutes les parties catholiques du pays de faire dans les cimetières la division faite à Montréal et dont se plaint l'appelante, que l'une de ces divisions est appropriée à la réception des corps de ceux des catholiques romains qui ont droit à la sépulture ecclésiastique et l'autre dastinée à ceux qui n'ont pas ce droit, que c'est dans cette dernière partie que sont inhumés ceux qui se trouvent dans la position où était Guibord lors de son décès; que c'aurait été déroger à la règle générale et à l'usage, si l'on avait accordé au nommé Guibord ce qui aurait dû être refusé à d'autres..... .....

" Ce serait bien inutile de s'étendre davantage sur cette partie de la cause toute importante qu'elle soit; en le faisant, je ne pourrais que répéter ce qui a été dit sur le sujet dans le factum des Intimés et surtout dans le mémoire supplémentaire produit de leur part auquel j'ai déja fait allusion et auquel je réfère de nouveau."

Chief Justice Duval :—" With respect to the burial itself, here again I must say I could have wished that this question had not been touched, for it may be said that we are not meeting the

merits of the case. What has taken place, however? What was asked of the Fabrique? The widow deputed a person to call on the *curé*. He stated that Madame Guibord would be satisfied with a civil burial. The *curé* answered that he was willing to give civil burial. Here came the difficulty. The *curé* said: I will bury the body in unconsecrated ground. There is a division in the cemetery. The two portions are distinct, the one being allotted for persons dying without baptism and unknown individuals. In France, the power of the *Fabrique* extended over cemeteries. As a matter of right the churchwardens were authorized to direct where the graves were to be dug. There could be no doubt of this in France, and according to the authorities which had been cited, the same rules had been laid down in England. If there is a little difference in the powers held, the result is the same."

Thus was terminated this famous cause, the argument upon which occupied twelve sittings of the Superior Court, two sittings in Review and four in appeal. Every plea that learning and talent could produce *pro.* and *con.* was set up. Theology, philosophy, law, history, were relied upon by each party. When we read the report of the pleadings before the Honorable Mr. Justice Mondelet, we seem to be present at a religious conference rather than a judicial contestation. It was not until the cause was carried before the Court of Review, where the judges constituted the sole auditory, that the parties deemed it their duty to confine themselves to the merits of the case and to develop their respective pretensions of law.

Have their Honors, Messrs. Justices Drummond, Monk, Berthelot and Mackay, judged rightly or wrongly in holding that the burial refused to the remains of Joseph Guibord was ecclesiastical, and consequently beyond the jurisdiction and competency of the civil courts? Into this question we shall not enter, seeing that the cause has been carried before the Privy Council, who, it is to be hoped, will render a decision based not upon questions of form, but on the intrinsic merits of a case so fraught with deep consequences to all classes of the community, Protestant as well as Catholic.

Before concluding this essay, which has already perhaps been too long extended, we would make one observation. Much has been said concerning the independence of the Church in spiritual matters and of the union of Church and State in Canada. Why

should not that independence be rendered still more perfected and that union made more close and harmonious? Why, for instance, perpetuate the conflict concerning the minor's marriage without his parents' consent, a marriage which the State declares annulable within a limited time, and which the various Churches regard as valid? It may be argued that the law desires to protect the minor against the consequences of an ill-assorted union effected in a moment of blind and unreflecting passion. But is it not the fact that of one hundred marriages contracted under these circumstances, there is scarcely one in which the nullity is demanded by the parents? Do not our judicial registers testify that this provision of the law is only resorted to by the tutors and guardians of wealthy minors, with the sole and sordid view of serving their own interest?

Why, again, that absolute incapacity of the surviving consort to contract a legal marriage with the brother or sister of the deceased husband or wife, a marriage forbidden, it is true, by the Anglican Church, but admitted or at least tolerated by all other religious bodies in the Dominion? Has the State by this prohibition,—a prohibition founded on considerations neither of public order, morality, nor consanguinity,—succeeded in one instance in preventing such marriages from taking place? No: the prohibited marriage is contracted in the United States; society regards it with much the same favour as if it were strictly legal, and the provisions of a will removes every consequence of illegitimacy. Why this contempt on the part of the State for the creed of the majority? For the State is deeply interested in preventing those disputes from obtruding themselves on public attention, their natural tendency being to throw discredit on the religious principles which are the stay and safeguard of a society. No people which aspires to lay the foundations of solid prosperity and durable empire, can in our day seriously aim at public indifference in religion. A continental jurist * referring to our marriage law, expresses his astonishment that the religious marriage should be obligatory in Canada. The European who breathes in an atmosphere impregnated with the poison of socialism, may be astonished by such a phenomenon, but to the Canadian who has escaped the influence of modern philosophism, this state of things

* 2 Revue de Droit International, 269, 345.

appears quite natural, most wise and salutary. The reader, glancing at the political and social condition of Europe, cannot fail to observe that anti-social conspiracies have multiplied in inverse and alarming proportion to the decline of religious ideas: today Europe trembles before the International Society. Infidelity has been the source of the crimes and confusion of Paris. Religious faith alone can rescue Europe from a general revolution. Look also at the youthful Republic on our southern frontier, so wonderful in material progress, but committed by its constitution to indifference in religion. Within its borders, Mormons, Free Lovers, Spiritualists and Communists may be regarded as forming so many established institutions already engaged in the work of destruction. Let, therefore, all good citizens, who desire the principles of Christian morality to constitute the rule of conduct of our newly-founded nationality, strive to bring the State into harmony and unison with the various Christian Churches existing under its sway, and every subject will respect that which will be thus openly and avowedly protected and respected by the State.

D. GIROUARD.

Montreal, 15th March, 1872.

WILLS AND INTESTACY.

To La Revue Critique :

In your January number, 1872, page 101, you quote from the " Canada Law Journal " of Toronto, some criticisms on the article under the above head contributed by me to your October number. The Journal says: " From the general tenor of the " essay, it appears that the author professes to shew wherein the " law on the subject differs in the various provinces. If his re- " marks were confined to *the Statutes* merely they would not be " so open to criticism, but as we have seen, he does not confine " himself to them alone."

In reply, my introductory article in your July number entitled " Assimilation of the statutory laws of the Provinces of Ontario, New Brunswick and Nova Scotia," speaks for itself,—the article in the October number under the above head saying, " It is proposed to examine *the provisions made in Ontario*, New Brunwick and Nova Scotia in these respects," shews that the enquiry was into one of the branches into which the original subject might be divided. That article, then, gives in detail a short summary of the *actual statutory legislation* on wills in New Brunswick and Nova Scotia, and taking point by point says : " *That in Ontario there is no provision of this general character*," or " *no provision to this effect*," or " *that there is no statutory provision of this character*," or " *that in Ontario there is no general statute as in Nova Scotia and New Brunswick with reference to Wills*"—and specifying where in the consolidated statutes of Upper Canada the subject had been legislated upon, referring *to C. S. U. C. chap.* 82–73 *to chap* 16, A.D. 1859, *regulating the Surrogate Court* to the Ontario statute, chap. 13. 1869, relating to witnesses—to the Ontario Registry Act, 1868—to the Revised and other Statutes in New Brunswick and Nova Scotia—saying, " *equivalent provisions have never been enacted in Ontario*"—to 1st Vict. c. 26, (Imperial Act), " *That it had been substantially re-enacted in New Brunswick and Nova Scotia—not so in Ontario.*" And so on. Could any language in the world more distinctly designate, that the enquiry was one into local legislation, and that the *provisions* referred were those of local enactment.

The "Law Journal" then alleges that many of these points are provided for by the Statute of Henry the 8th of Wills, and the Statute of Frauds of Charles the 2nd, which are in force in Ontario. Who said they were not? My observation was "that in "Ontario there is no general statute as in Nova Scotia and New "Brunswick with reference to wills." And there is not or was not at the time the article was written. No man of the most ordinary sense would for one moment suppose that in a province like Ontario, there was *no law* under which the making of wills would be regulated. The point was, that that law was not to be found in the Local Statutes as in the other two provinces. By reference to the article in your July number on the "Assimilation," it will be seen that this very fact of the provinces of New Brunswick and Nova Scotia having re-enacted many of the old English Statutes affecting the ordinary relations of life, while Ontario (or Upper Canada) had not, and *that with reference to such subjects in Ontario*, the law in regard thereto, must be sought for under the authority of Chap. 9, Con. Stat. U. C.: "An act respecting property and civil rights," which declares "that in all matters of "controversy relative to property and civil rights resort shall be "had to the laws of England as they stood on the 15th of Octo- "ber, 1792, as the rule of decision" *had been pointed out.* And *thus that the very mode* which *the "Law Journal" alleges is the mode in Ontario, namely of reference to the old English Statutes,* had been *previously clearly indicated by me.*

The "Law Journal" therefore in this respect is incorrect.

Secondly, with reference to the point as to whether "A will of freehold estate attested by a witness whose wife or husband had an interest in the will as Devisee or Legatee would be invalid or not, was to some degree uncertain." I had expressly guarded myself by saying: "In the absence of any knowledge as to what may have "been done by the Courts of Upper Canada on this subject it "would appear, &c.," (a qualification which the Journal omits to note.) And the Court having decided by Ryan vs Devereux, that such a will in Ontario could not be proved, because the witness under such circumstances was not a credible witness under the Statute of Frauds of Charles the 2nd., the question is removed from the pale of discussion. But *nothing could more clearly shew the difference between the three provinces arising from local legislation.* in New Brunswick and Nova Scotia by *local statutes* (and in England by 1st Vic. c. 26), the devise or legacy in

such case is simply declared void, the interest of the witness is removed, the *will can* be proved, and the testator's wishes carried out in every respect but that one. Whereas in Ontario the will *cannot be* proved, and the testators' wishes in other respects cannot be carried out, because, there has *been no local legislation on the point.*

The practical aim of my observations was to show that certain legislation existed in some of the provinces which did not exist in others, and thereby to promote an assimilation that would facilitate the convenience of the residents in each, for it may be assumed, taking into consideration the opening remarks in my article in your October number, that inasmuch as the Ontario business man in Nova Scotia or New Brunswick could find out the law relating to wills by reference to *a plain local statute*, so a business man from either of those provinces in Ontario, (and perhaps an Ontario business man himself) would find it more simple to do the same *than by referring to the statutes of Henry the* 8th and *Charles the* 2nd and *George the* 2nd and the *laws of England as they stood on the* 15th of *October*, 1792.

It is said the laws of Caligula were inscribed on pillars so high, that the people who suffered for their infringement could not read them. Is there no analogy?

The object of the Journal's reference to the Ontario Act, 32 Vict. cap. 8, sect. 1, is not very clear. It does *not alter* the law as to real estate acquired subsequent to the execution of the will passing by virtue of the Con. Stat. of U. C., cap. 92, sect. 11, but simply uses more general terms and comprises personal as well as real estate and so far from "*overriding if not virtually repealing*," sect. 11, c. 82, as he says it does, there is an express section in 32 Vict. c. 8, sect. 6, which says: "*This Act shall not apply to the will of any person who is dead before the* 1st *of January*, 1869," only three years ago. Half the disputes on wills in Ontario for the next twenty years may arise out of the wills of parties who died before that time. It is inconceivable how a law journal could make such a statement.

My answer to your correspondent's objection from New Brunswick (same number 105), with reference to the mother in New Brunswick under certain circumstances, in case of intestacy, becoming entitled to the real estate, will be extremely brief.

The law was as he states up to 1857. In 1858 the legislature repealed the law as it then stood, and made a new enactment.

By 21st Vict., c. 26, A.D. 1858 (limited to "*real estate* only" by 22nd Vict., c. 25, A.D. 1859), it *in words* repealed sect. 1, chap. 3, title 30, of the Revised Statutes "of Intestate Estates," in which "Heir at Law" is found, which mainly governed the decision cited by him, and enacted "that in case there be no children of the intestate, then to *next of kindred* in equal degree," *entirely omitting all reference to the "Heir at Law,"* which words "being used," says your correspondent, "shewed that the principles of the Common Law and not of the Civil Law, were to be resorted to in the construction,"—cessat ratio, cessat lex. In the very judgment—Doe ed. Mahoney vs. Crane—cited by him, the Chief Justice in delivering the judgment of the Court, says: "Taking the words of the last clause in their order, the "*next of kin* in the present case is *undoubtedly the mother*, she "being in the *first* degree, whereas the *brothers and sisters* are in "the *second* degree, and if this term stood unqualified by any "words, she would take the remainder after the portion of the "heir at law. But the remainder is to go to the next of kindred "in equal degree. In equal degree with whom? We think "according to the natural connexion of the words of the whole "clause, they import *an equal degree with the person to whom "the first and double portion is assigned*, namely the *heir at law*, "and this must necessarily exclude the parents, who must always "be not of equal but of a nearer degree of kindred than any "collateral heir. The testator being, according to the civil law, "the terminus, a quô the computation of kindred commences. "This construction is strongly fortified by the stern principle of "the Common Law, which prevents an inheritance from ascend-"ing to the parents, and the Legislature appears to have had a "kindly regard to the common law, in the favor which they have "shewn to the heir at law in giving him a larger share than to "others which stand in the same degree of relationship with "him." But the Legislature in 1858, and again in 1859, with a full knowledge of this construction of the existing law, repealed it, in express words (shewing they had it under consideration), and entirely ignored all kindly regard to the Common Law in shewing no favor to the heir at law. Thus the guiding term which was to settle who the next of kindred in equal degree was then to be is thrown out. Who then, in the absence of any such term (taking the Court's decision) are next of kindred in equal degree? The father and mother. The father being dead, the

simple point is, the mother has nobody in equal degree with herself, and *the governing point of direction* becomes the "*next of kin*" with *which she complies.* This view is rather sustained by the second case—Doe ed Lee vs. Troughton—cited by your correspondent, where the Court after making some observations on the particular circumstances of that case, showing the importance of the words heir at law, and stating that there were considerable difficulties in getting at the true meaning of the Act, proceeds to say: "The effect of our present decision is, that the "person who would be entitled by the Common Law to inherit "as heir, is not excluded under our Act by the fact of not being "one of the next of kin to the intestate, but more remote than "other relations who cannot inherit by the Common Law. Nei- "ther are *the next of kin* prevented from inheriting the remain- "der under the provisions of our Act of Assembly—because *they* "*are not in equal degree with the heir at law, but nearer in* "*degree.* It is proper to observe here, that although this may "not altogether accord with the reasons given for the judgment "in Doe ed Mahony vs. Crane, we would not be understood "as impugning the correctness of that decision, which rested "upon other grounds beside that adverted to, which have been "in no way weakened or assailed in the present case—*although* "*on more mature reflection we are of opinion that in regard to* "*the words of the Act,* "*next of kindred in equal degree and* "*their representatives,*" *when the question is—equal degree with* "*whom? the proper answer is, in equal degree with each other.*" This decision was in 1857, and was also known when in 1858 the law was changed. In order that the distinction may be clearly seen, the statutes are given as they *stood,* and as they *now* stand.

In 1846, when Doe ed Mahony vs. Crane was decided, the Act of Assembly, 26 Geo. 3rd, chap. 3, section 12, read thus: "When "and so often as it shall happen that any person dies intestate, "*the heir at law of such intestate shall be entitled to receive a* "*double portion,* or two shares of the real estate left by the in- "testate, saving to the widow her right of dower; and the re- "mainder of such estate shall be divided equally to and amongst "the other children or their legal representatives, including in "the said distribution children of the half blood, and in case "there be no children to the next of kindred in equal degree "and their representatives."

In 1857, when Doe ed Lee vs. Troughton was decided, it stood:

1 vol. Rev. Stat., chap. 3, title 30, page 282—"Of Intestate Estates."

"Sect. 1.—When any person shall die intestate, the *heir at "law, whether lineal or collateral*, shall be entitled to have a "double portion or two shares of the real estate (subject to "widow's right of dower), and the remainder of such estate "shall be divided equally to and amongst the other children or "their legal representatives, including in the distribution children "of the half blood; and in case there be no children of the in- "testate, then to the next of kindred in equal degree and their "representatives."

It now stands:

21st Vic., c. 26. Act to amend Act relating to "Intestate Estates." A.D. 1858.

"Sect. 1.—When any person shall die intestate, his estate "shall be divided equally to and amongst his children or their "legal representatives, including in the distribution children of "the half blood; and in case there be no children of the intes- "tate, then to next of kindred in equal degree, and their repre- "sentatives."

"Sect. 3.—Sect. 1, chap. 3, title 30, of the Revised Statutes "is hereby repealed."

22nd Vic., c. 25. A.D. 1859.

"Sect. 1.—The word 'estate' in 21st Vic., c. 26, shall mean "*real estate* only."

The change in the Statutes has evidently escaped your correspondent's attention.

J. H. GRAY.

Ottawa, Feb. 20th, 1872.

DU TIMBRE DES EFFETS DE COMMERCE.

Qui n'a, bien des fois, remarqué la rédaction imparfaite, le manque d'ordre, et l'obscurité de nos statuts ? Qui n'a eu souvent à se plaindre des lacunes regrettables qu'on y rencontre ?

On se console assez facilement de ces défauts, lorsqu'il s'agit de lois dont la mise en pratique exige l'intervention des avocats. On se dit, qu'après tout, il faut bien qu'ils gagnent leur argent, et que les clients seraient volés, si l'interprétation des lois était facile.

Malheureusement, l'obscurité n'est pas l'apanage exclusif des lois qui sont du ressort spécial des avocats. Les mêmes vices de rédaction existent, et peut-être à un dégré plus élevé que partout ailleurs, dans les lois qui doivent être mises en pratique par les gens d'affaires, les marchands, les hommes du monde.

Pour ne pas parler du Code Municipal, ce Pérou des avocats, est-il, dans tous nos statuts, une loi plus importante, d'une application plus générale et plus journalière, dont l'interprétation erronée puisse entraîner des conséquences plus graves, que l'acte de faillite ? Et, cependant, en est-il une plus mal rédigée, plus obscure, donnant lieu à plus de difficultés et de contestations ? Bien qu'elle ait été remise sur le métier plusieurs fois, on y trouve, à chaque instant, des vices et des lacunes ; tous les jours elle reçoit des tribunaux des interprétations contradictoires.

Une autre loi que tout le monde est exposé à mettre en pratique, dont la violation peut être suivie des plus désastreux résultats, c'est celle qui fait le sujet du présent article (31 Vict. ch. 9, 33 Vict. ch. 13). Et, ce qu'elle a de particulier, c'est qu'habituellement, on n'a pas le temps de consulter, à son égard, un homme de loi ; il faut que chacun soit lui-même son propre jurisconsulte. Il faut que chacun prenne une décision prompte, et une décision d'où peut résulter, si elle est erronée, une perte pécuniare considérable. Cette loi devrait donc être aussi courte, aussi claire, et aussi simple que possible. Au contraire, elle est une des plus obscures, une de celles dont la rédaction est la plus entortillée. Il faut avoir une longue habitude du langage, moitié français, moitié anglais, de nos statuts, pour la pouvoir comprendre.

Aussi, de la meilleure foi du monde, ceux qui ont à la mettre

en pratique l'enfreignent tous les jours. J'oserais dire que, si tout le monde voulait se prévaloir de ses dispositions, il n'y a peut-être pas un effet de commerce qui ne fût invalidé par les tribunaux.

J'ai donc pensé qu'un examen sommaire de cette loi ne serait ni sans à propos, ni sans utilité. Voici dans quel ordre je me propose de traiter les différentes questions qu'elle soulève : 1o Quels sont les effets de commerce qui ont, et quels sont ceux qui n'ont pas besoin d'être timbrés ; 2o Quand le timbre doit-il être apposé, de quel timbre faut-il se servir, et comment doit-il être mis ; 3o Quand et comment peut-on remédier au défaut d'apposition régulière de timbres, et qui a ce droit ; 4o Quelles sont les conséquences du défaut d'apposition de timbres, ou de leur apposition irrégulière.

I.

Quels effets de commerce ont besoin de timbres ?

On peut dire que ce sont, en général, tous les effets de commerce, c'est-à-dire, tous les écrits négociables, faits ou négociés en Canada, promettant ou ordonnant le paiement d'une somme d'argent.

Cela comprend les billets, les lettre de change, les mandats, les lettres de crédit, les obligations (débentures) des corporations, les coupons d'intérêts de ces obligations, les reçus ou certificats de dépôts d'argent donnés, soit par des banques, soit par d'autres corporations, soit par des particuliers, pour faire obtenir de l'argent d'un tiers (sect. 1 et 2).

Mais il faut que ces documents soient négociables ; aucun timbre n'est nécessaire sur les effets payables à une personne individuellement déterminée. Ceux-ci ne sont pas des instruments de commerce, et il suffit de lire la loi pour se convaincre que c'est de ces instruments seuls qu'elle a voulu parler, et pour voir qu'elle n'a entendu taxer que les documents négociables. Elle le dit formellement, à l'égard des billets promissoires, lettres de change et certificats ou reçus de dépôts. Quant aux autres documents que nous avons vus, elle ne le décide pas formellement, mais elle l'indique d'une manière évidente. Sauf dans les clauses qui énumèrent les documents sujets au timbre, elle ne parle que de billets, traites, lettres de change. Puisqu'elle n'a pas répété le nom des autres documents, c'est qu'elle les considérait comme de même nature. De plus, elle parle, à plusieurs reprises, des droits et des obligations d'un porteur de bonne foi. Un porteur de cette espèce ne peut

jamais être une des personnes qui ont pris part à la confection du document; car aucune d'elles ne pourait ignorer une violation de la loi commise à ce moment. C'est nécessairement quelqu'un à qui le document a été transféré. Cela suppose donc qu'il s'agit d'un effet négociable.

Il faut, en second lieu, que ces documents aient pour objet le paiement d'une somme d'argent. Ici encore, la loi est formelle, à l'égard des billets, lettres de change, traites, certificats de dépôt, et lettres de crédit. Elle est moins claire quant aux obligations de corporations. Mais tout doute disparaît, lorsqu'on fait attention que la qualité de l'impôt est en proportion du montant en argent de l'effet dont il s'agit. Comment pourrait-on établir cette valeur, s'il s'agissait de quelque chose qui ne serait pas une somme d'argent?

Mais, pourvu qu'ils aient ces deux caractères, peu importe que ces documents soient à ordre ou au porteur; peu importe qu'ils soient payables à demande, à une date déterminée, à tant de leur date, à tant de jours de vue. Et, puisqu'il faut des timbres sur tous les instruments de cette espèce, il suit que si un billet ou une traite sont altérés de manière à en faire un nouveau document, il faut les timbrer de nouveau. On considère comme suffisante pour constituer un nouveau document, l'altération qui porte sur la date, sur la somme. Il n'y a pas besoin de timbrer de nouveau un écrit qui n'a reçu qu'une altération sans importance, surtout lorsqu'elle se fait en exécution d'une convention primitivement arrêtée entre les parties.

Quels effets n'ont pas besoin de timbres?

Se trouvent exempts de timbres, les billets faits, soit sous seing-privé, soit devant notaire, qui promettent de payer autre chose qu'une somme d'argent déterminée, ou qui, promettant une somme d'argent, ne sont payables qu'à un individu, parcequ'ils manquent aux deux conditions que nous avons vues. A cette dernière classe appartiennent les *obligations* notariées.

En sont aussi exemptés, les billets, lettres de change, traites ou mandats, qui promettent ou ordonnent le paiement d'une somme d'argent sous condition, parceque ce ne sont pas des billets ou lettres de change, ou traites dans le sens ordinaire, et que la loi n'ayant pas défini les expressions qu'elle emploie, celles-ci doivent être prises dans le sens ordinaire.

Il résulte de ce qui précède une conséquence qui pouvait être

d'une grande portée, lorsque nous étions inondés par la monnaie d'argent des Etats-Unis, et qui n'est pas sans importance pratique encore aujourd'hui. On faisait alors un grand nombre de billets et de traites *payables en monnaie*, c'est-à-dire, en monnaie d'argent. De pareils documents sont négociables, sans doute, au moins depuis la promulgation du code civil, (art. 1573) ; mais ce ne sont pas des billets ou des lettres de change, au sens propre et légal du mot. Ils n'entrainent pour leurs porteurs, ni les droits stricts et spéciaux résultant des billets et des lettres de change. Ils ont les mêmes effets légaux que des billets ou traites pour la livraison de grains ou autres marchandises. Notamment, ils ne donnent aucun recours au porteur contre les endosseurs. Et, pour ne nous occuper que de la question du timbre, ils ne sont pas soumis à l'obligation du timbre proportionnel.

Il est, cependant, à ma connaissance, qu'en pratique on avait l'habitude de leur apposer des timbres comme à de véritables effets de commerce. Il est vrai aussi, que les marchands les considéraient comme tels, et s'imaginaient, à tort, qu'ils donnaient à leurs porteurs tous les droits du porteur légal d'une lettre de change, ou d'un billet promissoire.

On ne voit guère de ces billets aujourd'hui, mais il n'est pas inutile de constater que, s'il s'en faisait encore, ils seraient exempts de la loi sur le timbre des effets de commerce.

Sont encore exempts de timbres, les billets, lettres de change ou traites, émanant d'un officier soit du gouvernement impérial, soit du gouvernement de la Puissance, en sa qualité officielle ; les mandats snr la poste ou sur une caisse d'épargnes de bureau de poste ; les *débentures*, ou coupons d'une corporation municipale, les billets des banques incorporées par le parlement du Canada, et les chèques sur ces mêmes banques ou sur des banques d'épargnes, si ces chèques sont payables à demande.

Quelques unes de ces exemptions demandent un mot d'explication. J'ai donné comme exemptés les *billets* donnés par certains officiers publics. La loi ne parle que des traites ; mais il est évident qu'on doit l'appliquer aussi aux billets. La même raison se rencontre dans les deux cas ; c'est que taxer ces documents, ce serait taxer l'Etat lui-même, ce qui est contraire à tous les principes de taxation. D'ailleurs, la question est sans intérêt pratique, car il est bien certain que, ni ces officiers, ni le gouvernement du Canada, ne s'aviseront jamais de se prévaloir, pour ce cas, des dispositions de la loi.

J'ai dit: officier soit du gouvernement impérial, soit du *gouvernement du Canada*. Au lieu de ces derniers mots, le statut se sert de l'expression: *gouvernement provincial*. Mais il est clair qu'ici *provincial* a été mis par inadvertance. On a oublié de changer le mot, en copiant la loi qui avait été faite pour l'ancienne province du Canada.

Quant aux chèques, on est généralement sous l'impression à Québec du moins, que pour qu'ils n'aient pas besoin de timbres, il faut qu'ils soient au porteur. Beaucoup de marchands qui ont des blancs de chèques portant *à ordre ou au parteur*, croient devoir rayer les mots *à ordre*. Je ne sais d'où peut vénir cette idée; mais elle n'est certainement pas fondée sur la loi. Tout ce que le statut exige, c'est que le chèque soit payable à demande. Peu importe, du reste, qu'il soit payable à ordre ou au porteur.

Les seules *débentures* exemptées de timbres sont celles émises par une corporation municipale. L'exemption faite pour cette espèce de corporation, implique nécessairement que les débentures émises par d'autres corporations doivent être timbrées. On doit donc apposer des timbres aux débentures des compagnies des mines, de chemins de fer, ou de toutes autres compagnies incorporées qui sont autorisées à en émettre.

Cette dernière conséquence de la loi a une portée si grande, qu'elle démontre la nécessité de l'amender pour assimiler toutes les débentures de corporations. L'impôt du timbre serait ume charge énorme pour nos nombreuses compagnies de chemin de fer de formation récente.

Bien que la loi ne le dise pas expressément, l'exemption ne doit pas s'appliquer aux débentures de corporations municipales étrangères au Canada. Car la raison de l'exemption ne leur est aucunement applicable, sans compter que celles de ces corporations qui ne sont pas établies dans une possession britannique, ne sont pas des corporations d'après nos lois.

Enfin, sont exempts de timbres, les effets de commerce que nous avons vu y être ordinairement assujettis, lorsqu'ils sont pour une somme moindre de $25 (sect. 1). Ainsi, un billet de $24,99 n'a pas besoin d'avoir de timbre; mais un billet de $25, ou davanvantage, doit en être revêtu.

II.

Quand le timbre doit-il être apposé ?

Il faut ici distinguer entre les effets de commerce créés en Canada, et ceux créés à l'étranger qui sont seulement négociés dans la Puissance.

Pour les effets de commerce créés en Canada, le timbre doit être apposé lorsqu'ils sont émis ; car, c'est à ce moment qu'ils commencent à exister au point de vue légal, (L. C. R. 17 p. 3 ; contra, *ibid.* p. 51).

Mais, que faut-il entendre par émission ? Il faut entendre, non pas la confection, ni l'action de signer, mais la remise au premier porteur ou bénéficiaire. C'est à ce moment, mais à ce moment seulement, que le document est dans la circulation, et qu'il produit des effets légaux. Auparavant, ce n'était qu'un morceau de papier. Or le billet ou la traite d'*accommodation* n'étant émis, n'entrant en circulation que lorsqu'ils sont escomptés, c'est à ce moment seulement qu'ils ont besoin d'être vêtus de timbres, (Downes c Richardson 5 B et A, page 674.

Quant aux effets de commerce créés à l'étranger, ils doivent être timbrés au moment où ils sont négociés pour la première fois en Canada. Et, par *négociation*, il faut, ici, entendre *endossement* ou *acceptation ;* car la loi (sect. 4) ne s'occupe pas du transfert des effets au porteur créés à l'étranger. Est-ce par inadvertance, est-ce à dessein ? C'est ce qu'on ne pourrait dire avec certitude.

Du reste, pourvu que le timbre soit mis au moment voulu, peu importe, s'il s'agit d'un effet créé en Canada, que ce timbre soit apposé par le faiseur ou tireur, ou par le preneur ; et, s'il s'agit d'un effet étranger négocié en Canada, que le timbre soit apposé par l'endosseur ou par le preneur.

La loi dit, il est vrai, (sect. 10) que le timbre doit être mis par le faiseur, ou le tireur, ou, s'il s'agit d'un effet étranger, le premier endosseur en Canada. Mais cela veut seulement dire que ce sont ces personnes qui sont obligées de payer le coût du timbre. Car l'intention du législateur, qui est d'assurer le paiement de l'impôt, se trouve aussi bien réalisée d'une manière que d'une autre.

Mais, encore une fois, car on ne saurait faire trop d'attention à ce point, il faut en tout cas que le timbre soit mis, s'il ne l'a été plus tôt, pendant que les parties, soit à l'émission d'un effet, soit à sa première négociation en Canada, sont encore en présence l'une de l'autre. Dès que les parties se sont séparées, ne se fût-il

écoulé qu'une minute, il est trop tard, et les conséquences graves qne nous allons voir seront produites. Sans doute on présume bien que les timbres qui se trouvent sur un effet de commerce ont été mis au moment voulu ; mais la preuve contraire est permise. C'est ainsi, par exemple, qu'on pourrait prouver qu'une lettre de change qui comporte avoir été tirée hors du Canada, sur laquelle on n'a apposé de timbres qu'an moment de sa négociation dans la Puissance, a réellement été tirée dans le Canada, et aurait dû être timbrée lors de sa confection, (Bartlett c Smith, 11 M. et W. p. 483 ; Hamelin c Bruck, 9 Q. B. p. 306 ; Steadman c Duhamel, 1 C. B. p. 888).

Ceci montre le danger d'une pratique très générale dans le commerce. Beaucoup de marchands se font donner des billets, les gardent, ou même les mettent dans une banque pour faire collecter, et n'y apposent des timbres qu'au moment où ils sont obligés de s'en servir dans une poursuite. Il est clair qu'il y a là une violation flagrante de la loi, une violation qui fait perdre des sommes considérables à l'Etat, et peut entraîner les résultats les plus désastreux pour ceux qui s'en rendent coupables.

Quels sont les timbres qu'il faut apposer ?

Cette question ne soulève guère de difficultés. D'abord, il faut que ce soient des timbres émis par le gouvernement du Canada. Il est bien évident, par exemple, que l'apposition d'un timbre judiciaire, ou d'enrégistrement, de la province de Québec, serait considérée comme non avenue.

Mais il ne suffit pas qu'on se serve de timbres émis par le gouvernement du Canada. Il faut que ce soient des timbres destinés aux effets de commerce. C'est ainsi par exemple, qu'il ne servirait de rien d'apposer des timbres-poste. On a jugé le contraire en Angleterre, mais c'est parceque le statut anglais n'avait pas une disposition précise comme celle du nôtre.

Quant à la valeur que doivent avoir les timbres, elle dépend de la somme portée dans l'effet de commerce. Il faut 1 cent pour $25 ; 2 cents pour une somme de $25.01 à $50 inclusivement ; 3 cents de $50.01 à $100 inclusivement ; puis 3 cents pour chaque $100 additionnels, et pour la fraction de 100 qui dépasse le dernier cents piastres. Par exemple : un billet de $600.01 doit porter 21 cents de timbres. En effet, il faut 3 cents pour le premier cent, 3 cents pour chacun des cinq $100 additionnels, puis 3 cents pour la fraction de 100 qui dépasse 600.

Mais, pour savoir la valeur des timbres qu'il faut mettre sur un effet de commerce qui porte intérêt, faut-il tenir compte seulement du principal, ou bien faut-il compter, en outre, les intérêts à accroître jusqu'à l'échéance ? (Pruessing c Ing, 4 Barnew. et Ald. page 204). Il ne faut tenir compte que du principal ; car le document, lors de sa création, ne comporte que le principal, et comme il pourrait être payé de suite, exiger un timbre pour les intérêts, ce serait exiger un timbre pour.

Voilà pour le cas où il s'agit d'un effet de commerce à un seul exemplaire. Mais, s'il s'agit d'une lettre de change à plusieurs exemplaires, chacun devant porter la preuve de l'acquittement du droit, on doit traiter chacun comme une lettre de change distincte, et le revêtir de timbres en conséquence. Seulement, s'il y a deux exemplaires, on doit mettre 2 cents là où il en faudrait 3 pour un exemplaire unique ; s'il y a trois ou quatre exemplaires, on n'est obligé de mettre qu'un cent sur chacun à la place de chaque 3 cents qu'il faudrait sur un exemplaire unique.

Supposons, par exemple, une traite tirée à deux de change pour $543. Chaque exemplaire devra porter 12 cents de timbres. En effet, il faut y mettre autant de 2 cents qu'il aurait fallu de 3 cents sur un exemplaire unique. Or, d'après ce que nous avons vu plus haut, il aurait fallu ici 6 fois 3 cents. Il faudra donc apposer 6 fois 2 cents sur chacun des deux exemplaires.

S'il y avait eu trois exemplaires ou quatre, chacun aurait dû porter 6 cents de timbres.

Comme on peut le voir, le total du droit se trouve plus élevé, non seulement pour 4 exemplaires que pour trois, mais même pour deux que pour trois. En effet, ce total sera de 24 cents pour deux exemplaires, et de 18 cents seulement pour trois.

Il y a là une anomalie. L'intention évidente de la loi, c'est de faire payer le même droit, quel que soit le nombre d'exemplaires. Mais, pour réaliser complètement cette intention, il aurait fallu, au cas de deux exemplaires, ne mettre que $1\frac{1}{2}$ cent, au lieu de 3, sur chacun ; au cas de quatre exemplaires, il aurait fallu ne mettre que $\frac{3}{4}$ de cent, à la place de 3 cents, sur chacun d'eux. Cela aurait nécessité des timbres pour des fractions de cent. Ne voulant pas en émettre, on a dû adopter le système que nous avons vu.

Nous savons quels timbres il faut mettre dans chaque cas, et la valeur totale que doivent représenter ceux mis sur un même document. Il ne me reste plus qu'à ajouter ceci, savoir : peu importe

la valeur de chacun des timbres apposés. Ainsi, lorsqu'il faut 60 cents, on peut indifféremment se servir d'un seul timbre de 60 cents, ou bien de plusieurs timbres de 1, 2, 10 cents, etc.

Comment doivent être mis les timbres?

J'ai toujours supposé, jusqu'ici, que le timbre des effets de commerce consiste dans un timbre mobile. C'est parceque je me suis placé au point de vue de la pratique. La loi autorise le gouvernement à faire fabriquer du papier timbré. On pourrait, si la chose eût été faite, satisfaire à la loi en écrivant les effets de commerce sur une feuille de ce papier portant le timbre voulu.

Mais l'administration n'a pas encore fait fabriquer de ce papier. Elle en a probablement été empêchée par la dépense qu'aurait entraînée la confection de papier aux différentes sortes de timbres nécessaires, et surtout par ce qu'elle supposait que le commerce préférerait des timbres mobiles au papier timbré. Souvent il arrive, dans le cours des affaires, qu'une personne prépare un billet, soit pour le faire signer par son débiteur, soit pour le faire escompter. Que cette personne change d'idée, que le débiteur refuse de signer, ou la banque d'escompter, la valeur du timbre sera perdue, si le billet est sur du papier timbré. Au contraire, on ne perd rien, dans un cas pareil, avec des timbres mobiles.

Nous allons donc nous occuper exclusivement de ceux-ci. Voici comment ils doivent être apposés. Après les avoir collés sur le document à timbrer, ou avant de le faire, peu importe, le faiseur ou tireur écrit sur le timbre son nom, ou ses initiales, ou une partie quelconque de sa signature. Il est évident qu'il peut faire faire cette opération par une autre personne comme il peut lui faire signer pour lui le document.

Mais une personne qui n'en aurait pas reçu le mandat du tireur ou du faiseur, n'aurait pas plus le droit d'oblitérer le timbre que de signer le document. Par conséquent, on doit considérer comme illégale une pratique assez répandue dans le commerce. On laisse, volontairement ou par inadvertance, le timbre intact jusqu'au moment où l'on a besoin du document dans une poursuite, ou pour un protêt. Puis alors, le porteur, ou une personne quelconque met les initiales du faiseur ou tireur, et la date que nous allons voir. Ceci est contraire, non seulement à la lettre, mais à l'esprit le plus évident de la loi (sect. 4). En effet, la formalité dont nous nous occupons, a pour objet d'empêcher que le même timbre ne puisse servir une seconde fois. Il faut donc que, dès la pre-

mière fois qu'on en fait usage, on le mettre impropre à servir de nouveau. Or, avec la pratique que je viens de signaler, le même timbre pourrait passer successivement sur dix billets, ou même davantage.

En même temps que l'on met sur le document la signature ou les initiales du tireur, ou du faiseur, il faut aussi y écrire ou imprimer la *date du document.*

Mais, que faut-il entendre ici par date du document ? Est-ce la date qui y est portée? Est-ce, au contraire la date du jour où il est véritablement créé comme effet de commerce, c'est-à-dire, la date du jour où il est mis en circulation par la remise qui en est faite ? La loi n'est pas très-claire sur ce point. Dans un endroit, elle dit qu'on doit mettre la date du jour où le timbre est apposé. Quelques lignes plus loin, elle exige que la date écrite sur le timbre *s'accorde avec celle du document.*

Je n'hésite cependant pas à dire que la date qu'il faut écrire, c'est celle portée sur le document. Il ne faut pas oublier que, comme le statut lui-même le déclare, cette formalité, comme celle de l'apposition de la signature, a pour but d'identifier le timbre avec le document, pour empêcher qu'il ne serve une seconde fois sur un autre. Le timbre doit donc porter les caractères qui servent à individualiser un effet de commerce, à le faire distinguer de tout autre. Or ces caractères, ce sont le nom de la première personne qui y devient partie, et la date qui y est mise. Il faut donc que ces deux choses soient écrites sur le timbre, pour que l'oblitération en soit complète, pour qu'on ne puisse plus le faire servir.

Quant à l'objection tirée de ce que la loi dit, dans un endroit, que l'on doit mettre la date de l'apposition du timbre, il est facile d'y répondre. Le rédacteur de la loi s'est placé au point de vue de ce qui arrive le plus souvent en pratique; il a supposé que le timbre est apposé précisément le jour où le document est écrit, par conséquent à la date qui y est portée. La preuve qu'il a entendu obliger de mettre sur le timbre cette dernière date, c'est qu'il ne fait résulter une présomption de violation de la loi, que du fait de n'avoir pas inscrit une date s'accordant avec celle du billet, et non du fait d'avoir omis d'indiquer la date de l'apposition du timbre.

Si l'opinion que je viens de soutenir, et la raison que j'en ai donnée sont admises, il faut considérer comme erronée la décision de la Cour de Révision de Québec, dans la cause de la *Banque*

d'Union c. Cook, et s'en tenir à l'avis du juge J. T. Taschereau, qui a différé d'opinion avec la majorité de la cour. Il a été jugé dans cette cause que, lorsqu'il y a plusieurs timbres sur le même document, il n'est pas nécessaire d'écrire le nom et la date sur chacun d'eux, et qu'il suffit que sur chacun se trouve une partie soit du nom, soit de la date.

On peut facilement se convaincre, qu'avec ce mode d'oblitération, le même timbre pourrait servir plusieur fois. Supposons, par exemple, que, sur l'un des timbres, on n'ait mis que la date, qu'est-ce qui empêcherait qu'on ne le mit sur un autre billet de même date signé par une autre personne. Si l'on n'a mis que les initiales, ne pourrait-on pas faire servir le timbre à un autre document, de date différente, signé par la même personne ?

J'ai supposé, dans ce qui précède, que l'oblitération des timbres doit se faire en y mettant et les initiales de la personne qui doit apposer les timbres, et la date du document. Ce n'est pas ce qui se fait en pratique. Dans l'usage on se contente de mettre la date. On se fonde pour cela sur la section 4 du statut, laquelle n'exige qu'une des deux choses dont j'ai parlé. Mais cette opinion est condamnée par la sect. 11, laquelle les exige toutes deux, et décide que s'il en manque une, il y a présomption qu'on n'a pas apposé de timbres comme le veut la loi. Or des deux clauses, la 11e doit l'emporter sur la 4e, car elle est plus récente de plus de trois ans. D'ailleurs, toutes les raisons que je viens de donner montrent la nécessité qu'il y a d'exiger la date et les initiales pour assurer le paiement du droit. Elles prouvent donc que mon interprétation du statut est la seule qui soit conforme à son objet et à son esprit.

III.

Qui peut remédier au défaut d'apposition des timbres, ou à l'irrégularité de l'apposition ?

Supposons qu'un effet de commerce ait été mis en circulation sans être timbré, ou après l'avoir été d'une manière irrégulière, nous verrons dans un instant, qu'il peut résulter de cette omission les conséquences les plus graves. Il est donc important de savoir s'il y a moyen d'éviter ces conséquences, et qui peut s'en sauver.

Ici encore, on est sous de très fausses impressions dans le commerce. Voici ce qui, à ma connaissance, se pratique assez souvent. On fait un billet ou une traite, on les met en circulation, sans y apposer de timbres, ou avec un timbre insuffisant. L'écrit

passe ainsi dans plusieurs mains. Finalement, il arrive à un porteur qui, soit parcequ'il se fait scrupule de frauder l'Etat, soit parcequ'il a besoin de se servir du document dans une poursuite, désire remédier à la violation de la loi. S'imaginant qu'il en a le pouvoir, il emploie les moyens que nous verrons, et se croit en règle avec la loi comme avec sa conscience.

Cette opinion, assez généralement répandue dans le commerce, s'explique facilement. Nous allons voir que la loi parle d'un porteur de bonne foi. Or, pour une personne qui n'a pas étudié la loi, il semble que, lorsqu'un homme s'est comporté de manière à avoir la conscience tranquille, il est difficile de ne pas admettre qu'il est un porteur de bonne foi. De plus, cette opinion peut s'appuyer sur un jugement rendu par la Cour Supérieure de Québec, et sur un autre rendu par la Cour Supérieure de Montréal. Ces deux cours ont déclaré valide l'apposition de timbres faite après qu'une action a été intentée sur un billet insuffisamment timbré, (L. C. Jurist, 12, 291 ; L. C. R. 17, 2).

Mais il n'en faut pas moins tenir cette opinion pour erronée. Le jugement de la Cour Supérieure de Québec a été renversé à l'unanimité par la Cour d'Appel, et il devait l'être. Car la doctrine qui est consacrée est contraire aux principes les plus certains de la loi sur le timbre des effets de commerce, et elle en détruirait toute l'économie.

Cette loi a voulu punir sévèrement tous ceux qui prennent part à une fraude au détriment des revenus de l'Etat. Mais le législateur n'a pas entendu que la peine édictée retombât sur un innocent, sur un individu qui est devenu partie à un effet de commerce, ou l'a acquis, sans savoir que ceux qui l'on créé ont violé la loi du timbre. Il protège donc le porteur de bonne foi, c'est-à-dire, le porteur qui a pu ignorer la fraude commise au détriment du revenu public.

Voyons quelle est la partie à un effet de commerce qui se trouve dans ces conditions. Est-ce le premier preneur d'un billet? Non évidemment. Car au moment où il a reçu le document, celui-ci était en contravention avec la loi. Il a dû voir, de suite, que la loi était violée, et savoir que l'écrit était nul. S'il l'a accepté dans cet état, il a consenti à en courir tous les risques, et ne peut s'en prendre qu'à lui-même s'il souffre une perte.

Est-ce le preneur d'une lettre de change qui l'a reçue directement du teneur? Pas davantage. Car si, à ce moment, elle n'a pas été timbrée, et ne l'est pas avant que la transaction entre eux

soit terminée, il doit savoir que les pénalités légales sont encourrues.

Non, jamais l'infraction à la loi ne peut être couverte par une personne qui a reçu un effet de commerce non-timbré. Cette personne connaît toujours la violation de la loi, et ne mérite aucune faveur, aucune protection.

Voici ce que la loi entend par un porteur de bonne foi. Pierre fait un billet pour $500 en faveur de Jacques, et le lui remet sans y apposer de timbres, ou avec des timbres insuffisants. Jacques garde le billet dans cet état, puis, voulant le transférer à Paul, il y met les timbres voulus et le lui endosse. Au moment où le billet arrive à Paul, celui-ci n'a aucun moyen, à la seule inspection du billet, de savoir s'il a été timbré d'une manière régulière. Il n'en peut être informé que par une preuve extrinsèque. Tant qu'il n'a pas cette preuve, il ignore la violation de la loi. Il doit donc être traité comme un porteur de bonne foi.

La loi considère encore comme un porteur de bonne foi, celui qui, par inadvertance, a reçu un document qui ne portait pas assez de timbres. Mais c'est à lui de prouver cette inadvertance, et l'on ne peut guère l'admettre que dans le cas où il se serait trompé sur la somme portée dans le document. Car si, connaissant cette somme, il s'est simplement trompé sur la quantité de timbres qu'elle rendait nécessaire, son erreur n'est plus qu'une erreur de droit, et personne n'est sensé ignorer la loi. Admettre cette erreur comme excuse, ce serait détruire presque tout l'économie des lois fiscales et même des lois de police.

Il s'est présenté sur la question qui nous occupe, un grand nombre d'espèces intéressantes, J'en rapporterai deux pour faire comprendre l'interprétation qu'il faut donner à la loi. Un individu voulant se procurer de l'argent pour jouer, se faisait endosser des billets par un grand nombre de personnes, et les faisait escompter par des changeurs. Pour éviter des frais, on ne timbrait pas ces billets. Mais, à leur échéance, le faiseur se hâtait de les payer, pour conserver son crédit, et en faire escompter d'autres. Tout alla bien, tant que le faiseur fut capable de payer. Mais, à la suite de pertes considérables au jeu, il dut cesser ses paiements Les changeurs, porteurs de ses billets, voulurent alors se retourner contre les endosseurs. Mais, auparavant, ils eurent la précaution de timbrer les billets. Les endosseurs refusèrent de payer, disant que la loi avait été violée. Les porteurs avaient-ils pu remédier à cette violation de la loi ? Il est clair que non ; car ayant accepté

les billets timbrés, ils s'étaient rendus complices de la violation de la loi, et ne pouvaient plaider leur bonne foi.

Une traite non timbrée est présentée, par une personne autre que le tireur, pour être acceptée par le tiré. Elle ne porte pas de timbres. Le tiré qui s'est obligé d'accepter les traites du tireur, est-il tenu, envers lui, d'accepter celle-là? Certainement non Au moment où la traite lui est présentée, elle comporte à sa face une violation de la loi. Il encourrait donc l'amende en l'acceptant ainsi. D'un autre côté, il n'a pas le droit de remédier à l'infraction qui a été commise.

J'ai supposé la traite présentée par une autre que le tiré. Car si, comme cela arrive souvent, Pierre qui vient de vendre des marchandises à Jacques, tire de suite sur lui pour le prix, et lui présente la traite pour la faire accepter, Jacques peut l'accepter sans qu'elle soit timbrée. Mais, alors, elle doit être revêtue de timbres avant que les parties ne se soient séparées.

Quand peut-on remédier au défaut d'apposition des timbres?

Ceux qui ont droit de remédier au défaut d'apposition des timbres ne le peuvent pas faire à un moment quelconque. Ils n'ont ce droit que lorsqu'ils apprennent, pour la première fois, que la loi a été violée à l'égard d'un effet de commerce dont ils sont porteurs. A fait un billet en faveur de B. On n'y appose pas de timbres en le faisant. B, après l'avoir gardé un certain temps dans cet état, y appose des timbres et l'endosse en faveur de C. Celui-ci, recevant le billet revêtu de timbres, est de bonne foi. Il a donc droit de remédier à la violation de la loi. Dès qu'il apprend, de n'importe qu'elle manière, que la loi a été enfreinte, il doit, sans perdre instant, se mettre en règle avec elle. Si, au lieu de cela, il garde le billet dans son état actuel jusqu'à ce qu'il ait besoin de s'en servir, il se rend lui-même coupable d'une violation de la loi, et aucun acte de sa part ne l'en peut relever. Il cesse d'être le porteur de bonne foi au secours duquel la loi a voulu venir. Il en court toutes les peines et les déchéances que nous allons voir dans un instant.

Comment peut-on remédier au défaut d'apposition des timbres?

De ce qui précède il faut conclure qu'on ne peut jamais remédier au défaut absolu de timbres et très-rarement on peut suppléer à l'insuffisance des timbres quant à la valeur. On ne peut remédier non plus, à l'apposition irrégulière. Supposons, par exemple,

qu'on ait mis sur le timbre une date autre que celle du document. C'est comme si l'on n'avait pas apposé de timbre du tout. Mais il s'agit là d'une violation de la loi que tout le monde peut apercevoir à la simple inspection du document. Par conséquent, celui qui reçoit un effet de commerce sur lequel elle se rencontre, ne peut pas être considéré comme un porteur de bonne foi. On peut tirer de cela une conclusion pratique importante : c'est qu'il ne faut jamais acquérir un effet de commerce sans s'assurer, un moment où l'on en devient possesseur, qu'il porte des timbres au montant voulu, et que ces timbres ont la date du document.

On peut voir facilement, maintenant, comment on remédie à la violation de la loi du timbre : c'est en apposant deux fois autant de timbres qu'il en aurait fallu à l'origine, et en mettant sur chacun d'eux la date du document, ainsi que les initiales de celui qui fait l'opération.

IV.

Quelles sont les conséquences du défaut d'apposition des timbres, ou de leur apposition irrégulière ?

Il est extrêmement important de pouvoir remédier à la violation de la loi. Car cette violation entraîne les conséquences les plus graves. La première, c'est une amende de $100 contre celui qui *fait*, *tire*, *accepte*, *endosse*, *signe* ou *paie* un effet de commerce qui n'a pas été revêtu des timbres exigés par la loi. Chose assez singulière, la loi ne fait pas encourir l'amende à celui qui *reçoit* un pareil document, qui en devient possesseur, bien qu'il puisse être aussi coupable que celui qui le lui donne.

Mais la conséquence du défaut d'apposition des timbres, c'est la nullité complète du document. Nous avons vu que dans certains cas il y a des personnes qui peuvent être relevées des suites de cette nullité. Sauf ces cas, le document n'est plus qu'un morceau de papier blanc. Par conséquent, ni le faiseur, ni le tireur, ni l'accepteur, ni l'endosseur dont les noms y figurent, ne peuvent être poursuivis pour les forcer à en effectuer le paiement.

La loi va encore plus loin que cela : elle déclare nul même le paiement d'un effet non timbré. Celui qui l'a fait peut donc poursuivre en répétition. C'est là une disposition qui déroge au droit commun. Personne n'ignore qu'il n'y a pas d'action en répétition de ce qui a été donné en exécution d'une obligation naturelle. Il y a certainement obligation naturelle à la charge du faiseur ou de l'accepteur d'un effet non timbré. Cependant le

statut déclare ce paiement nul, et permet par là même d'en répéter le montant.

La nullité édictée par la loi donne beaucoup d'intérêt à une question qui s'est souvent présentée; c'est de savoir si l'on peut alors poursuivre sur la dette pour laquelle le billet ou la traite ont été donnés. Je n'hésite pas à la resoudre dans l'affirmative. Il ne faut pas oublier qu'il s'agit ici d'une loi pénale. On ne peut donc en étendre les dispositions au delà des termes même du statut. Or ce que le statut frappe de nullité, c'est le document lui-même. Il ne dit rien de la dette qui peut en avoir amené la création. Pour décider qui celle-ci est éteinte, il faudrait prétendre que la dation d'un effet de commerce à la place constitue une dation en paiement ou une novation. Il n'y a certainement ni l'un ni l'autre. Celui qui donne et celui qui reçoit un effet de commerce à la place d'une créance, ont l'intention d'augmenter, et non de diminuer les avantages du créancier. Ni l'un ni l'autre n'a la moindre volonté d'acquitter le débiteur, même si l'effet de commerce n'est pas payé. Quant à la novation en particulier, il y a une raison additionnelle de décider qu'il n'y en a pas ici; car le code, (art. 1171) décide que l'intention de nover doit être évidente. Aussi, depuis longtemps la jurisprudence en France et en Canada, décide invariablement que l'acceptation d'un effet de commerce par un créancier n'entraine aucune novation de sa créance, (Wilson *c.* Kennedy, 1 Esp. p. 245; Brown *c.* Watts, 1 Taunton, p. 353.)

Non seulement la nullité d'un effet de commerce non timbré n'entraîne pas la nullité de la créance qui a pu en occasionner la création, mais elle n'empêche pas même absolument de se servir du document devant les tribunaux comme moyen de preuve. Il faut à cet égard, faire une distinction. Il est évident que celui, par exemple, qui ne peut poursuivre sur un billet, parceque ce billet est nul à raison de l'absence des timbres voulus, ne pourrait s'en servir pour établir l'existence d'une dette que lui devait le faiseur, et pour laquelle le billet lui a été donné. Ce serait aller contre l'esprit de la loi, laquelle veut que le billet ne serve alors, à aucune des fins pour lesquelles il a été donné. Mais, supposons qu'un tiers, ou même une des parties au billet, ait besoin de prouver un fait étranger an billet, ils pourront se servir de celui-ci pour l'établir. Ainsi, par exemple, on pourrait prouver qu'un fait a eu lieu tel jour, en prouvant qu'il a eu lieu le jour indiqué par la date d'un billet non timbré. On pourrait prouver

par la manière dont il est écrit ou signé, la foliu on l'ivresse de celui qui l'a fait (Gregory c. Fraser, 3 Campb. p. 454.).

De ce que la nullité d'un effet de commerce non timbré n'empêche pas de poursuivre sur la dette pour laquelle il a été donné, ni même de s'en servir en certains cas, on aurait tort de conclure que la nullité édictée par la loi est sans importance. Elle peut avoir, au contraire, les conséquences les plus graves. Ainsi, par exemple, le porteur d'une traite ou d'un billet nul pour cette cause, ne pourrait poursuivre l'endosseur qui le lui a transféré, ni aucun endosseur précédent. Il ne pourrait même pas poursuivre le faiseur ou le tireur, s'il n'a de droits contre eux qu'en vertu de la cession qui lui a été faite du document. En un mot, l'effet de commerce étant nul comme tel, on ne peut lui faire produire aucun effet qui serait tiré de sa nature propre.

Voilà les effets du défaut d'apposition des timbres. Mais nous avons vu qu'il ne suffit pas de les apposer, et qu'il faut, en outre les oblitérer d'une certaine maniére. Si la chose n'a pas été faite, quelles sont les conséquences de cette omission ? D'abord, c'est la présomption que les timbres n'ont pas été mis au moment voulu et que la loi a été violée. Si c'était la seule peine elle serait insuffisante, car on pourrait détruire cette présomption en prouvant que les timbres ont été mis au moment voulu. Mais il y a une peine beaucoup plus grave. Le timbre qui n'est pas oblitéré régulièrement est considéré comme s'il n'avait pas été apposé ; le document est traité comme s'il n'était pas timbré du tout, et il est frappé d'une nullité absolue.

La loi prononce aussi une peine de $100 d'amende contre celui qui met *une date fausse* sur un timbre. Il est assez difficile de comprendre cette disposition. Que faut-il entendre par date fausse ? Est-ce une date autre que celle portée pour le document ? Est-ce au contraire une date autre que celle de l'apposition du timbre ? Il me parait évident qu'il faut admettre cette dernière interprétation. La première interprétation n'est pas soutenable ; comment supposer qu'une personne sera assez folle pour mettre volontairement une date autre que celle du document, sachant qu'elle encourt par là l'amende.

Voici comment la loi me parait devoir être expliquée. Le rédacteur du statut s'est placé au point de vue de ce qui se fait le plus souvent en pratique ; il a supposé que le billet est fait et émis le jour même de la date qu'il porte. Dans cette supposition c'est cette date qui doit être mise sur le timbre, et

elle est aussi la date de son apposition. En un mot, dans l'idée du rédacteur, la date du billet et la date du jour où devait avoir lieu l'apposition du timbre, se confondent. Suivant lui par conséquent, mettre la date du timbre, lorsque celui-ci est apposé plus tard, c'était violer la loi, et c'est cette violation qu'il voulait punir; mais nous avons vu que cette idée est erronée: jamais un effet de commerce n'a besoin d'être timbré avant d'être mis en circulation. Et comme il peut être mis en circulation après sa date il peut légalement être timbré à une époque subséquente à celle-ci. La peine édictée par le statut ne pourra donc jamais être encourue.

F. LANGELIER.

POWERS OF COURTS TO PRONOUNCE UPON THE CONSTITUTIONALITY OF FEDERAL AND PROVINCIAL STATUTES.

In the last number of *La Revue Critique*, at pp. 50 and 51, the writer of the present article in discussing the powers of Provincial Legislatures, made use of the following expressions: "One of the consequences resulting from the distribution of legislative powers between the Federal Parliament and the Provincial Legislature is that all persons occupying judicial positions throughout the Dominion, may, at any moment in suits or proceedings before them, be obliged to pronounce upon the constitutionality of Federal or Provincial Statutes. In such case the duty of such persons is clear; if a Federal Statute be unconstitutional, to disregard it; and to act in like manner where a Provincial Act is *ultra vires*."

In giving judgment on an application for *habeas corpus* by Robert Dickson, based on the alleged unconstitutionality of the Acts of the Legislature of the Province of Quebec, creating the office, and regulating the duties, of the Fire Commissioners, four of the judges of the Court of Queen's Bench pronounced the Acts in question constitutional. Mr. Justice Caron "would say nothing as to the power of the Court to pronounce an Act uncon-

stitutional." Mr. Justice Drummond "did not pronounce upon the right of this Court to declare an Act unconstitutional." Mr. Justice Monk "wished to guard against the supposition that he held this Court had any right to give an opinion declaring an act unconstitutional. He simply said that he found a statute granting certain powers to the Fire Marshal. He found that law and he obeyed it. He was far from believing, and would not like it to be supposed that this Court assumed the right to declare an act unconstitutional if it did not appear to be unconstitutional. He was not aware of any attributes this Court had to declare any law unconstitutional. If this Court had such power, then the Superior Court had the power. And if the Superior Court had it, then the Circuit Court had it. And if the Circuit Court, then the Commissioners of small causes, inasmuch as they exercise judicial functions. And if the Commissioners, then the Prothonotary and Clerk of the Court, who also exercise judicial functions, have also the power to say, I shall not do this or that, because the Act is *ultra vires* or clashing. This would be an amazing state of things."

Mr. Justice Badgley's "opinion was this: they found in the Statute book a local act for a particular purpose. They found also a general law of the Dominion for general purposes. They had, then, a local law as repugnant to the general law. If the local law is repugnant to the general law and yet is allowed to stand, then it overrides the general law. That was the rule laid down in England, 1 L. R., 865. Here there was a local law that had not been set aside by the general government. If the general government allowed the local law to stand what were Courts of Justice to do? They must take the Statutes as they were."

Mr. Justice Monk's opinion is merely a series of doubts resolving itself into "an amazing state of things."

Mr. Justice Badgley, on the other hand, virtually declares that if a local Act is repugnant to the B. N. America Act, 1867, or to a law of the Dominion, and has not been disallowed by the Governor General, it overrides the general law, and Courts of Justice must give effect to such local Act.

The object of this article is to show that not only is it within the jurisdiction of Courts to declare Federal or Provincial Statutes unconstitutional, but that it is their duty to decide as to the constitutionality or unconstitutionality of such Statutes in

all cases coming before them wherein such questions arise or are raised.

By s. 91 of the B. N. Act of 1867, it is provided: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say." (Here follows the enumeration of twenty-nine subjects.) "And any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

By s. 92 it is provided: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say." (Here follows the enumeration of sixteen subjects.)

By s. 129 it is provided: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, and New Brunswick at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act."

By s. 56 it is provided: "Where the Governor-General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's principal Secretaries of State, and if the Queen in

Council within two years after receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act, from and after the day of such signification."

By s. 90 it is provided: "The following provisions of this Act respecting the Parliament of Canada, namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of acts, and the signification of pleasure on bills reserved, shall extend and apply to the Legislatures of the several Provinces as if these provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant Governor of the Province for the Governor-General, of the Governor-General for the Queen, and of the Province for Canada."

"The British North America Act, 1867," is the charter of the Dominion and of the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick. In its provisions are the written Constitution of the Dominion and the written Constitutions of the Provinces. By and through it alone the Dominion Parliament exists, and the Provincial Legislatures have being. From its grants of powers alone do Parliament and Legislatures draw their rights of legislating. Apart from the powers so granted, neither Parliament nor Legislature possesses strength to do anything.

The first condition then required for the validity of a Dominion Statute is that it shall not exceed the powers of legislation vested in the Parliament of Canada by the Constitution of the Dominion. It is clear that if the right to legislate at all depends upon the power given by the British North America Act, 1867, and that that power is limited, a statute passed in excess of such limited power is unauthorised and consequently is null. To give such statute effect would be to violate the Constitution and to assume that an act of the Imperial Parliament could be changed, altered or repealed *de plano* by an Act of the Parliament of Canada, which assumption would be simply absurd.

Provincial Statutes are also invalid if they exceed the powers of legislation vested in Provincial Legislatures by the respective Constitutions of the Provinces.

When, therefore, by an Act of the Parliament of Canada, it is sought to legislate upon a subject over which by s. 92 of the B. N. A. Act, 1867, Provincial Legislatures have exclusive power to legislate, and over which by s. 91 the Parliament has no such right, such Act of Parliament is null, because not only it is not justified by, but it is in open violation of the provisions of "The British North America Act, 1867."

When a Provincial Legislature passes an Act upon a subject exclusively reserved by s. 91 to the Parliament of Canada, such Act of the Provincial Legislature is null and void, because it is *ultra vires* and is in open violation of the B. N. A. Act, 1867.

The pretension that if the Governor-General does not signify his disallowance of such Act of the Provincial Legislature it must be held to be valid, cannot for one moment be entertained. The non-disallowance does not render that which was originally void, valid. The power so given to disallow was not vested by the Imperial Parliament in the Governor-General to be exercised with respect to void Acts of the Legislature, for it would be a violation of all principles to maintain that such power was granted because the Imperial Parliament anticipated or presumed that Provincial Legislatures would pass Acts *ultra vires* in violation of their Constitutions. The power in question was given merely to enable the Dominion Government to exercise a certain control over Acts of Local Legislatures passed in accordance with the principles of the Constitution. The mere waiver by the Governor General or the Dominion Government of the right to disallow in such case, could not legalize the repeal of a portion of the Imperial Statute by an Act of a Provincial Legislature.

Upon this point the case of *R. v. Rose** is a clear authority, for it is impossible to deny that the principle therein recognized governs the case of a Provincial Statute void for want of legislative power but not disallowed by the Governor-General.

In Great Britain it is a principle of law that an Act of Parliament delivered in clear and intelligible terms cannot be questioned, or its high authority controlled in any court of justice. "It is," says Sir William Blackstone,† "the exercise of the highest authority that the kingdom acknowledges upon earth."

In the United States, and in all countries having a written

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* 1 Jur. N. S. 802; S. C. 24 L. J. (N. S.) M. C. 130.

† 1, Blackstone's Com. p. 185.

Constitution, designating the powers and duties of the legislative, as well as of the other departments of the Government, an Act of the legislature may be void as being against the Constitution. Chancellor Kent in the 1st vol. of his Commentaries, p. 449, thus expresses himself: "The law with us must conform in the first place to the Constitution of the United States, and then to the subordinate Constitution of its particular State, and if it infringes the provisions of either it is so far void. . . . The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us that every act of the legislative power contrary to the true intent and meaning of the Constitution is absolutely null and void.

Alexander Hamilton in No. 78 of the Federalist, wrote: "There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act therefore contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers authorize but what they forbid."*

In the case of *Marbury* v. *Madison*, 1 Cranch, 137, Marshall C.J. of the Supreme Court of the United States, made use of the following expressions in giving judgment: "The original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and

* Dawson's ed., vol. 1, pp. 541, 542.

acts acts allowed are of equal prohibition. *It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.*

"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

"Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written Constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of the subject."

Having established the supremacy of the Constitution, and the nullity of all legislative acts passed in contravention of its principles, Marshall C. J. thus continued his judgment:

"If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its validity, bind the courts and oblige them to give it effect? Or in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; *and would seem at first view an absurdity too gross to be insisted on.* It shall however receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the Constitution; or conformably to the Constitution dis-

regarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

"Those then who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.

"*This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which according to the principles and theory of our government is entirely void, is yet in practice completely obligatory.* It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."

The principles advanced by Marshall C. J. in the foregoing extract from the judgment in *Marbury vs. Madison*, have been recognized in numberless decisions of the Federal and State Courts in the United States.*

Soon after the confederation of the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, the German Empire was created. Like the United States and Canada, composed of many separate States, the constituent portions of that Empire are bound together by a written Constitution.

Dr. Von Holtzendorff in his article entitled "Du principe fédératif dans son application à la législation criminelle en Allemagne," † points out the difference existing between the United States and Switzerland on the one hand, and the German confederation on the other, with respect to criminal legislation:

* See 1 Kent 450–454; Calder & ux. *vs.* Bull & ux. 3 Dallas 386, 401, per Iredell, J. Sedgewick on Stat. and Con. Law (1st ed.) pp. 215, 216, 476 not. 478–480; 1 Revue Critique, pp. 269—272; Story on the Con. § 1570, § 1842.

† 3 Revue de Droit International et de Legislation comparée; p. 440.

" L'empire Allemand, à peine rétabli, se distingue des autres états fédératifs par l'unité de sa législation pénale. Ce caractère manque en effet à la Suisse comme aux Etats-Unis d'Amérique. La Grande-Bretagne elle-même n'est pas complètement unifiée sous ce rapport. Ce sont en effet des lois différentes qui regissent en Angleterre et en Écosse, la procédure criminelle et le droit pénal proprement dit. Quant à la Suisse et à l'Amérique du Nord, elle ne possèdent de lois pénales communes à toute la fédération que dans la mesure ou celles-ci sont nécessaires pour protéger le gouvernement fédéral et les institutions qui en dépendent directement. En Allemagne, au contraire, on est arrivé à ce point que l'empire n'est pas seulement chargé de le protéger lui même, mais encore de protéger contre toute attaque contraire au droit les différent États qui en forment les éléments constitutifs. Desormais c'est dans certaines limites seulement que la législation de chaque État en particulier est compétente pour comminer les peines, et elle ne l'est en général que pour édicter des peines de simple police où des mesures disciplinaires."

Dr. Von Holtzendorff does not consider the question in all its phases, he merely presents one of them in the following words:

" On peut encore se représenter le cas, où la législature particulière du Mecklembourg, de Hambourg ou de tout autre État se mettrait plus tard en contradiction avec l'Empire, en statuant par méprise sur des objets connexés à des matières déjà reglées par la législature fédérale. Ici s'élève une question difficile; *comment le juge doit-il se conduire devant une contradiction de ce genre ?*

" Dans la livraison de Mai 1870 de la *Allgemeine Deutsche Strafrechtszeitung*, un avocat de Hambourg, le Dr. Belmonte a cité un exemple remarquable d'un cas de ce genre. D'après l'art. 20 de l'ancien code pénal hamburgeois du 30 Avril 1869, il fallait condamner le délinquant étranger au bannissement dans tous les cas où, s'il s'était agi d'un sujet hamburgeois, il eût fallu le placer sous la surveillance de la police. Le tribunal suprême de Hambourg a banni un Prussien sur le fondement de cette disposition, sans avoir égard ni au § 3 de la constitution fédérale du 26 Juillet 1867, ni au § 11 de la loi du 1er Novembre 1867 sur la libre circulation. Il y a plus : le tribunal suprême de Hambourg a déclaré, dans les motifs de son arrêt qu'il n'appartient pas au juge d'examiner si la législation du pays s'est mis par erreur où à dessein en opposition avec le droit fédéral, le juge ayant le devoir

d'obéir à la loi de son pays dès qu'elle a été regulièrement publiée, alors même que la teneur en serait contraire au droit fédéral.

" Cette décision fut remarqué, le monde juridique s'en émut et elle parvint à la connaissance de la chancellerie fédérale à Berlin. Celle-ci crut devoir, devant une question de principe aussi importante, inviter le gouvernement de Hambourg à faire en sorte que l'interprétation erronée du tribunal suprême demeurât sans effet dans la pratique. Si la méconnaissance et la violation des lois fédérales pouvaient, dans les tribunaux des États confédérés, se dissimuler sous l'abri inviolable de la *res judicata*, l'erreur du juge deviendrait objectivement plus dangereuse pour le maintien de la législation fédérale que la haute trahison d'un criminel politique. Le tribunal suprême de Hambourg était nourri des traditions de l'ancienne Confédération Germanique. Tant que vécut celle-ci le juge eut moins à s'inquiéter d'une résolution fédérale que d'un Ukase Russe. Tous les jours il voyait des résolutions fédérales demeurer sans exécution, parceque le gouvernement du pays omettait de les publier. Mais depuis qu'il est expressément écrit dans la constitution, que les lois fédérales vont avant les lois particulières de chaque pays, le juge est sans contredit en droit *d'examiner si la législature du pays* se trouve d'accord avec la législation fédérale, et il est tenu de ne pas suivre la loi du pays lorsqu'elle va à l'encontre du droit fédéral. Car le juge aussi reçoit *directement* la loi fédérale comme un droit obligatoire et auquel la législation du pays ne peut porter aucune allenite. De là cette règle certaine et inattaquable ; il incombe au juge d'examiner la constitutionnalité au point de vue fédéral des lois publiées dans les différents États, toutes les fois que cette question lui est soumise à l'occasion d'un débat judiciaire. Le droit public se trouve par l'adoption de cette règle avoir fait un progrès considérable et inattendu. Le même juge auquel la constitution prussienne par exemple interdit d'examiner la constitutionnalité d'ordonnances royales prussiennes régulièrement publiées, est obligé de rechercher si une loi émanée du roi et des deux chambres du parlement est, ou non, en concordance avec la constitution de l'Empire. La communication faite au sénat de Hambourg par la chancellerie fédérale, et tendant à ce que le juge n'applique aucune loi contraire à la législation de l'empire, alors même qu'elle est postérieure à celle-ci, cette communication répond entièrement à la nature des choses. Il est en effet inadmissible qu'un gouvernement, confiant dans la condescendance de ses juges, puisse à son

gré méconnaître ou éluder les lois de l'Empire en promulguant lui-même des dispositions qui leur sont contraires."

Under article 4 of the Constitution of the German Empire, it would appear that the Federal power had and has a right to legislate upon certain matters, amongst which is the criminal law. Up to the moment when such right of legislation was exercised the States of the Federation had the right of passing laws for the repression and punishment of crimes. But so soon as the Federal Parliament exercised its right of legislation over criminal matters, then the State legislation upon the same subjects was virtually repealed by such Federal legislation under art. 2 of the Constitution, which provided that the Federal laws, passed in accordance with the Constitution, should be of superior authority to those of the States composing the Federation.

Thus then Dr. Von Holtzendorff, it may be said, comes to the following conclusions: 1o. that when an act of the legislature of one of the Federal States composing the German Empire violates the Constitution of that Empire, it is null; 2o. that it is the duty of the judges of such State to declare such legislative act unconstitutional and void, whenever its constitutionality is in issue in any suit pending before them.

Comparing the judgment of *le tribunal suprême* of Hambourg with the opinion of Mr. Justice Badgley, cited at the commencement of this article, is there not apparent precisely the same error. Dr. Von Holtzendorff says: "Le tribunal suprême de Hambourg était nourri des traditions de l'ancienne Confédération Germanique." May it not be said of Mr. Justice Badgley "That he is imbued with the idea that all Parliaments possess the powers of the Imperial Parliament, and that he cannot realize the fact that the Dominion of Canada and the Provinces comprising the Federation are but bodies corporate and politic, created by the Imperial Parliament, wanting in that *quasi* omnipotence which is supposed to be possessed by their Creator."

In the different Provinces of the Dominion cases have been presented for the consideration of the Courts in which the question forming the subject matter of this paper was formally raised. In New Brunswick in the case of *The Queen vs. Chandler in re Hazleton*, the Supreme Court rendered judgment on June 11th, 1869, maintaining its right, consequently that of all Courts throughout the Dominion, to disregard the provisions of an Act of a Local Legislature passed in violation of the B. N. A. Act,

1867, In that case Ritchie C.J. in giving the apparently unanimous judgment of the Court made use of the following expressions: "The British North America Act entirely changed the legislative Constitution of the Province. The Imperial Parliament has intervened, and by virtue of its supreme legislative power, has taken from the subordinate legislative body of the Province the plenary power to make law which it formerly possessed by depriving it of the right to legislate on all matters coming within certain enumerated classes of subjects, and has within the Dominion of Canada delegated the sole right to deal with such matters to the exclusive legislative authority of the Parliament of Canada. Insolvency being one of these subjects, and the Local Act, the validity of which is now questioned, treating of matters in our opinion directly within that subject, the Act in question being an Insolvent Act in the strictest sense of the term, there arises an undoubted conflict between the Statute of the Imperial Parliament and such Act of the Local Legislature, and presents the case suggested by Mr. Justice Parker, *where we are bound to pronounce our opinion on the validity of the Local Act.* The Imperial Statute says that the Parliament of Canada shall exclusively legislate on Bankruptcy and Insolvency; in other words, that the inhabitants of the Dominion shall be bound only by laws passed after the 1st July, 1867, within the Dominion, on these subjects, by the Parliament of Canada. The subordinate legislative body of the Province, *in defiance* of this Statute, has undertaken to legislate on this subject, and by so doing seek to bind the inhabitants of this portion of the Dominion by their Act. Their right to do so is now contested, and under these circumstances can there be any doubt as to what we are bound to do. We think not. We must recognize the undoubted legislative control of the British Parliament, and give full force and effect to the Statutes of the Supreme Legislature, *and ignore the acts of the subordinate, when, as in this case, they are repugnant and in conflict.* . . . . The Constitution of the Dominion and Provinces is now to a great extent a written one, and where, under the terms of the Union Act, the power to legislate is granted to be exercised exclusively by one body, the subject so exclusively assigned is as completely taken from the others as if they had been expressly forbidden to act in it; and if they do legislate beyond their powers or in defiance of the restrictions placed on them, *their enactments are*

no more binding than rules or regulations promulgated by any other unauthorized body. The fact of this Act having been confirmed by the Governor-General was much relied on as giving it a binding force and effect, but we fail to see how this can be. No power is given to the Governor-General to extend the authority of the Local Legislature, or to enable it to override the Imperial Statute, which would be the necessary result if the Local Legislature could, by assuming their right to legislate on a prohibited subject, have their action legalised and validity given to their acts by the simple confirmation of the Governor General, thus making the individual act of the Local Legislature or of the Governor-General, or of their united acts, superior to the Parliament of Great Britain."

Mr. Justice Drummond in giving judgment in *Ex pte. Papin* for writ of *habeas corpus*, said: "The enactments of the B. N. A. Act, 1867, 30 and 31 Vict., c. 3, s. 92, sub. sec. 15, are as follows: 'The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.' Therefore the punishment imposed by Local Legislatures on an offence cannot be cumulative; it must be either fine, penalty, or imprisonment; it cannot be fine and imprisonment. This provision therefore limits the whole of the powers of imposing punishment by Provincial Legislatures, and they cannot grant to Corporations any greater powers of punishment than they possess themselves, so that the 32 Vict,, c. 70, s. 17, is clearly *unconstitutional* in so far as it assumes to authorize the imposition of punishment by fine and imprisonment for an infraction of a by-law of the City of Montreal. This sect. 17 of the 32 Vict. c. 70, being the clause relied on to maintain the commitment and conviction in this matter, Papin having been condemned to pay $20, and to be imprisoned for two months, it is clear that both conviction and commitment are null and void. The petitioner must therefore be discharged." *

Mr. Justice Torrance, in the case of *Delisle v. L'Union St. Jacques de Montreal*, said: "The Court now comes to the important question whether this Act was beyond the power of the Local Legislature. The Dominion Legislature has exclusive jurisdiction in matters of insolvency. From this and the other clauses cited above, the Court came to the conclusion that the Provincial

* 15 Lower Canada Jurist, 335.

Legislature had no power to make such a law as that passed last session with regard to the Union St. Jacques." *

Mr. Assistant Justice Ramsay whilst holding the Court of Queen's Bench, Crown side at Sherbrooke, in the case of *Pope* and *Griffith*, said, in giving judgment dismissing the appeal: "The grounds of the appeal are substantially that the conviction is not supported by the evidence, and that the Act in so far as it prescribes any criminal procedure is beyond the powers of the Legislature of the Province of Quebec.

"With regard to the second of these questions, I have no doubt that it is competent for this Court, or indeed for any Court in this Province, incidentally to determine whether any Act passed by the Legislature of the Province be an Act in excess of its powers. This is a necessary incident of the partition of the Legislative power under the British North America Act, without reserving to any special Court the jurisdiction to decide as to the constitutionality of an Act of any of the Legislatures."

Applying the authorities quoted to the Constitution of Canada and to Canadian Courts, it can hardly be doubted that not only is it within the jurisdiction of Courts of Justice throughout the Dominion to declare Federal or Provincial Statutes unconstitutional, but that it is their duty to decide as to the constitutionality or unconstitutionality of such Statutes in all cases coming before them wherein such question arises or is raised. And as a consequence, if any Statute, or any provision of a Statute, be in their opinion unconstitutional, to disregard such Statute or such provision.

In Canada many of the difficulties which beset Courts in the United States in coming to the universal conclusion now there admitted, are wanting. The supremacy of the Creator of the Constitution cannot be doubted. The impotence generally of Colonial Acts to vary or change the provisions of Imperial Acts, is not only generally admitted but is specially declared by 7 & 8 Wm. 3, c. 22. The power to repeal or alter any of the laws in force in the Provinces at Confederation, by the Parliament of Canada or the Legislature of the respective Province, is expressly denied and refused by s. 129 of the British North America Act, 1867, save according to the authority of the Parliament or of the Legislature under that Act, with the special exception from all power to repeal, &c., of all laws in force enacted by, or existing

* 1 Revue Critique, 119.

under, Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland.

Thus then in Canada the powers of Parliament and of the Provincial Legislatures are clearly defined. If either Parliament or Legislature passes a Statute in excess of its powers, it is an attempt to change a valid existing law otherwise than according to the authority of the Parliament or of the particular Legislature under the British North America Act, 1867. Such Statute is consequently in violation of an Act of the Imperial Parliament and of the Constitution, and is void.

But little remains to be added to this article. It is hardly possible to suppose that judges are ignorant of the first duty of their office. As ministers of the law they are bound to administer the law. They cannot administer as law that which is not law; consequently in every case the first duty of a judge is to apply the particular provisions of the law governing the facts proved before him. In so doing, if there are many Statutes applying to such facts, he must single out and apply the one which actually governs the case and reject the others. In Canada with a written Constitution of supreme authority, against which Parliament and Legislatures may dash their Statutes for ever without producing either alteration or change, are we to be told that the climax of absurdity has been reached by our Courts declaring that that which is impossible in the nature of things has been effected, and that a Corporation can repeal its own Act of Incorporation; that judges are bound to accept as law that which is not law—to bow to usurped authority—to declare that to be binding which is illegal, and in lieu of basing their decisions upon the law of the land, that they are bound to ignore that law, and found their judgments on void and illegal Statutes. An example perhaps is the best way of testing the question. The Quebec Legislature passes an Act by which playing marbles on Sunday is created a capital offence. That Act is not disallowed. A person plays marbles on Sunday, is convicted, and sentenced to be hanged. He obtains a writ of error on the ground that the Legislature of Quebec cannot under s. 92 of the B. N. A. Act, 1867, impose punishment other than by fine, penalty, or imprisonment. Would the judges of the Queen's Bench say, that it was their duty to allow the convicted man to be hanged under the provisions of such Act of the Quebec Legislature, made and passed in gross violation of the provisions of the B. N. A. Act, 1867?

WILLIAM H. KERR.

THE ALABAMA INDIRECT CLAIMS.

When during the past year the Treaty of Washington was discussed by the press and the parliament of Great Britain, it was regarded as a fair and honourable solution of the long pending controversies between Great Britain and the United States. The concession of the three *ex post facto* rules of neutrality, if mentioned at all, was passed over as lightly as possible; it was strenuously denied that any apology had been made; it was loudly proclaimed that the Alabama claims had been narrowed down and strictly confined to the measure of the direct damages, and finally, the Canadians were assured that their interests had been faithfully guarded in the deliberations of the Joint High Commission. But within the last three months the indirect claims have reappeared in all the vast proportions of a war indemnity, and the British Government finds itself forced to appeal to the large concessions which it has made for the sake of peace, and even to confess that the claims advanced by Canada for damages arising out of the Fenian incursions have been finally abandoned. Such an avowal is highly important to Canada, inasmuch as she is henceforth reduced to press her claims for satisfaction, not upon the American but upon the British Government. Mr. Gladstone summing up in Parliament the long series of concessions made to the United States, said: "Another concession not undeserving of notice, was that with regard to the claims which Her Majesty's Government might have made in regard to the Fenian invasions of Canada, upon the United States. When the United States demanded arbitration in the case of the Alabama, who could have blamed England if she had said, we grant it, on condition of your going into arbitration on the Fenian claims? Well, this was conceded, and a remarkable concession it was." In what has this remarkable concession resulted? Like all the concessions which preceeded or accompanied it, it has resulted in fresh demands on the part of the United States, more extravagant, if possible, than any hitherto put forward.

The Alabama claims are summed up in the American *factum* or case, as follows: "1. The claims for direct losses growing out

of the destruction of vessels and their cargoes by the insurgent cruisers. 2. The national expenditure in the pursuit of those cruisers. 3. The loss in the transfer of the American commercial marine to the British flag. 4. The enhanced payments of insurance. 5. The prolongation of the war, and the addition of a large sum to the cost of the war, and the suppression of the Rebellion."

The production of these claims was received in England with the deepest indignation; the entire press, without distinction of party, denounced it as a contemptible imposition which left to the British Government no alternative but to withdraw immediately from the arbitration. At the moment when the excitement was at its height, Parliament assembled. The course which Her Majesty's Government should take was watched with deep anxiety on both sides of the Atlantic. The speech from the Throne alluded to the matter in the following calm and courteous language: "Cases have been laid before the arbitrators on behalf of each party to the Treaty. In the case submitted on behalf of the United States Government, claims have been included which were understood on my part not to be within the province of the arbitrators." A friendly note addressed at the same time to the Washington Government completely tranquillized the public agitation, and since that time the question of the admissibility of the indirect claims has been left to the slow and silent operations of diplomacy.

The view held by the American Government seems to be that the parties to the Treaty of Washington appear before the Tribunal of Geneva, in the position of two litigants in a court of justice; that they may rightly or wrongly set up the most extensive claims, which may be in turn rejected by the arbitrators, if not falling within the meaning and the object of the Treaty.

It cannot be denied that the Tribunal of Geneva differs widely in its attributes from an ordinary court of justice. The courts of every country exercise a full and general jurisdiction over all suits or demands which its citizens may bring forward, while the jurisdiction of an arbitrator does not extend beyond the case submitted to him, under penalty of the nullity of his award, at least as regards matters not included in the submission. In private causes, this nullity is pronounced by the higher courts; but in cases of international arbitration there is no higher jurisdiction, no court to which an appeal can be made. The Geneva Commis-

sion, therefore, can take no notice of matters which have not been clearly defined by the parties, and in case of doubt as to the admissibility of any matter they cannot decide, as in so doing they might mistake the meaning of the Treaty and ascribe to themselves an extent of jurisdiction which the parties had never contemplated giving them. Nothing, therefore, except the formal and mutual consent of the parties, can justify the admission of matters foreign to the arbitration or obscurely defined in the Treaty.* A qualified or conditioned consent, *v. g.*, a consent under protest, as suggested to the British Government, would not be sufficient. The aggrieved party would remain free to withdraw, even after the rendering of the final award; and indeed it was thus that the United States acted after the question of the north eastern boundary between Canada and the State of Maine had been decided by the King of the Netherlands. And when to all these considerations is added the magnitude of the interests that are at stake, it is manifest that it is of the greatest importance to the contracting parties to avoid assuming any position which would not be amply authorized by the spirit and the letter of the Treaty. The whole question, then, may be reduced to the following form: Do the Alabama Indirect Claims clearly fall within the scope of the Treaty?

If the Treaty is ambiguous on this point, we must apply to its interpretation the maxim, that in case of doubt a contract must be construed favorably to the party bound by it. In the present case, Great Britain is the party who promises to pay; she is the party bound, the promissor; she must consequently be given the benefit of the doubt.

Grotius says that in the interpretation of promises, the intention is more important than the terms in which it is couched, or as Cicero expresses it, *Semper autem in fide quid senseris, non quid deceris cogitandum.* Modern science does not go so far: it regards the words as the expression of the will,† but calls the intention to its aid to discover the meaning of the words. Was it the intention of the high contracting parties to submit the indirect claims to arbitration?

Before the nomination of the Joint High Commission, the indirect claims had been repeatedly presented and as often *withdrawn by* the American Government, but it is an equally certain fact

* Vattel, Vol. 1, p. 103, ed. 1820.

† Vattel, 51, 58.

that the English Government uniformly refused to entertain them for a moment. The Clarendon-Johnson and Stanley-Johnson Conventions are full and final proof on this score. It is well known that the two chief objections raised against the Clarendon-Johnson treaty by Mr. Sumner in his famous speech in the Senate were, that Great Britain made no apology, and that the national losses of the United States were disregarded and rejected.

It is a maxim of international law that every treaty must be interpreted in the sense in which it was understood by the parties at the time when it was prepared, signed and ratified. *

In the diplomatic correspondence that resulted in the nomination of the Joint Commission we find the President of the United States referring to the Ababama claims as "growing out of the acts committed by the several vessels.†

At the commencement of the deliberations of the Joint High Commission, ‡ the American Commissioners expressed the hope entertained by their Government that Her Majesty's Commissioners "would be able to place upon record an expression of regret by Her Majesty's Government *for the depredations committed by the vessels;*" but they made *no allusion to constructive* and remote damages. On the contrary, the words which we have italicized, as well as the following which immediately preceded them,—"that the United States had sustained a great wrong, to an amount of $14,000,000, without interest, which amount was liable to be increased by claims which had not been presented,"—clearly indicate that the Joint High Commission had provided only for the direct damages. Thus, at that time, the indemnity claimed amounted to $14,000,000, which might be augmented by claims not yet presented. And yet we are gravely asked to believe that the Commission intended to submit to arbitration all the claims that the United States Government might invent or imagine, reaching the fabulous figure of $2000,000,000, the approximate total, it is said, of the claims presented to the tribunal of Geneva! Such a proposition is absurd and ridiculous in the extreme. No! it was not in view of these two thousand million dollars that Great Britain consented to abide by the award of arbitrators upon her conduct and her responsibility, but with

* Vattel, 52.

† Note of Mr. Fish to Sir E. Thornton, January 30, 1871.

‡ 8 March, 1871.

regard to the $14,000,000, with interest, mentioned in the proceedings of the Joint High Commission.

But the argument need not be pressed on these grounds only. For has not the American Government already abandoned those indirect claims in the most formal manner? If not, what can be the meaning of the declaration embodied in the protocols "that in the hope of an amicable settlement, *no estimate was made of the indirect losses*, without prejudice, however, to the right of indemnification on their account in the event of no such settlement being made?" Is not a settlement by the Geneva tribunal an essentially amicable one?

Finally, when in June, 1871, the Treaty was being discussed in the British Parliament, at the very time that the exchange of ratifications was made in London, what was the view taken of it by Her Majesty's Government? Was it not openly declared that the concessions which it made were yielded in consideration of the abandonment of the indirect claims? When Lord John Russell attacked the Government respecting these very concessions, what was the reply? Lord Granville said: "We have secured a limited area of defined claims, and we have given to the whole proceedings a limited and definite character. Under this Treaty you can only be called upon to give compensation for the acts of destruction that have been done by the privateers." The Lord Chancellor said: "We have given to this Treaty a character so limited that you know exactly what risks you incur. For the acts of the privateers done, you are responsible if you have not shown due diligence with reference to them." And during the recent debates in the British Parliament (8th February, 1872) Lord Granville spoke as follows:

"Many references have recently been made by the public press to a statement which your lordships will recollect I made in this House last year respecting the interpretation which Her Majesty's Government put upon the Treaty. I recited the direct claims which Mr. Fish had put forward in the protocols, and made the remark that many of these claims to which we were liable under the Stanley-Johnson Convention, had entirely disappeared and were closed by the limits of reference. I made that statement before your lorships, and also before a gallery of experienced reporters; I made it in the presence of the representatives of different foreign nations, and those who were most likely to take an interest in the controversy; and that statement was corrobor-

ated both by my noble friend the Lord President and by the noble duke the Secretary of State for India. That statement so corroborated was the opinion of Her Majesty's Government then, and it is the opinion of that Government now. In support of that view I will cite now only a passage from a speech made in another place, on the 4th of August last, by Sir Stafford Northcote, who had supported the action of the Government, and who, in a public-spirited manner, had given assistance to the Government by going out as a High Commissioner to discharge one of the most difficult tasks a Commission ever had to perform. That right hon. gentlemen said :—

" 'The hon. and learned member for Richmond (Sir Roundell Palmer), in his observations as to the advantages which the Treaty possessed over the Conventions which had been previously negociated, remarked that the Convention which had been negociated, but not adopted, had allowed the introduction of a number of claims which could never have been admitted. In fact they were so vague that it would have been possible for the Americans to have raised a number of questions which the Commissioners were unwilling to submit to arbitration. They might have raised the question with regard to the recognition of belligerency; with regard to constructive damages arising out of this recognition of belligerency, and a number of other matters which this country could not admit. But if hon. gentlemen would look to the terms of the Treaty actually contracted, they would see that the Commissioners followed the subjects very closely by making a reference only to a list growing out of the acts of particular vessels, and in so doing shut out a large class of claims which the Americans had previously insisted upon, but which the Commissioners had prevented from being raised before the arbitrators.' "

The factum or case of Great Britain laid before the Geneva tribunal makes no allusion to the indirect claims specified in the United States factum; on the contrary, its whole argument proceeds on the assumption that the direct claims alone are provable. It says :—" Losses of which such negligence is the direct and proximate cause (and it is in respect of such only that compensation could justly be awarded) are commonly not easy to separate from those springing from other causes. Success in warlike operations is generally due not only to the force possessed, but to the skill and courage exerted, by the successful combatant. If claims of this nature were to be freely admitted, a belligerent

might demand to be indemnified by the neutral against consequences fairly attributable, in part or altogether, not to the fault of the latter, but to his own want of capacity and enterprise."

How can it be denied in view of all these circumstances, that Great Britain, both at the time when the Treaty was negotiated and at all times subsequent thereto, acted on the firm conviction that the indirect claims had been abandoned, a conviction warranted not only by the language of the American Commissioners during the Conferences, but also by the very text of the Treaty?

The preamble of the Treaty—and it is well known that the preamble of a treaty, equally with that of a statute, is of great service in its interpretation—declares: 1. That "Whereas differences have arisen between the Government of the United States and the Government of Her Brittanic Majesty, and still exist, *growing out of the acts committed by the several vessels*, which have given rise to the claims generally known as the Alabama Claims"; and 2, that "the British Commissioners were authorized to express in a friendly spirit the regret felt by Her Majesty's Government for the escape under whatever circumstances of the Alabama and other vessels from British ports, *and for the depredations committed by these vessels.*" The enacting part of the article (1st) then goes on to provide that "*all the said claims growing out of the acts committed by the several vessels*, shall be referred to a tribunal of arbitration."

All these expressions are limitative, aud can be applied only to the acts and depredations committed by the privateers, and in no wise to acts or depredations committed for any other cause, however hurtful or injurious they may have been to the United States. But the following provisions of the Treaty shows still more evidently the correctness of this interpretation. Art. 7 declares that "the said tribunal shall first determine *as to each vessel separately*, whether Great Britain has by any act or omission failed to fulfil any of the duties set forth in the foregoing three rules or recognized by the principles of international law not inconsistent with such rules, *and shall certify such fact as to each of the said vessels.*" In case the tribunal find that Great Britain has failed to fulfil any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all claims referred to it. Article 10 provides that in case the tribunal "does not award a sum in gross, the indemnity shall be paid by Great Britain to

the United States on account of the liability arising from such failure *as to each vessel.*" How can the assessors assign to each vessel a definite share of the consequential losses, as, for instance, of the costs of the prolongation of the war? And if Great Britain should not be held responsible for the depredations of all the Confederate privateers; if she should be declared to have failed in her duty as a neutral with respect to some only of them,—it is certain that some of the cruisers which preyed upon American commerce did *not* sail from a British port,—how can the assessors equitably debit these vessels with a definite share of the national losses? In our humble opinion Great Britain cannot be held responsible for these losses, unless she be considered as a belligerent, which certainly is not the intention of the Treaty.

It is further urged on the part of the British Government that its interpretation of the Treaty is the only rational one. According to the maxims of both international and private law, any interpretation that leads to an absurd conclusion must be rejected.* From the American interpretation of this Treaty, it would appear that unprecedented concessions were made to the United States by Great Britain, without any equivalent, or rather without any consideration whatever. In a letter addressed to the New York Tribune, Mr. Thomas Hughes tells his American friends: "Thus every one of the old claims is revived. You have obtained an expression of regret from England, and a modification of the rules of international law, expressly agreed to by us for the purpose of bringing the case of the Alabama within the cognizance of the tribunal of arbitration, and you have given absolutely nothing in return."

Mr. Hughes might have included in his list of the concessions (made with the now avowed object of getting rid of the indirect claims,) the surrender of the fisheries and of the free navigation of the St. Lawrence and its canals and the abandonment of the Fenian claims. And our neighbours insist that Great Britain shall make all these sacrifices and undergo all these humiliations in order to preserve the friendship and good-will of the United States, and doubtless also as a partial equivalent for the free navigation of the Porcupine and the Yucon!

All the foregoing considerations sufficiently demonstrate that the American construction of the Treaty cannot bear a serious

* Vattel, vol. 1, p. 61.

examination. There remains, however, another and perhaps still more conclusive argument against it. Even if the Treaty had failed to define the subject matter of the arbitration; if it had, for instance, merely mentioned the *Alabama Claims*, without confining them to the losses growing out of the acts and depredations committed by the vessels: even then the claim for indirect and remote damages could not be admitted.

It is an elementary principle of international law as well of private law, that in the interpretation of treaties and contracts, every word must be understood in the sense given to it by usage, and that scientific terms must be understood according to the definition given of them by the scientific authorities.* Let us now see what is the meaning attached by usage and by legal science to the word *damages*.

The subject of damages is not treated in any of the works on international law which we have been able to consult. International wrongs have almost always been settled either in a friendly manner or by the sword. At all events, no instance can be cited in which indirect claims have been submitted to arbitration. But private law defines the measure and appreciation of damages on principles so clear and rational and so generally, if not universally, recognized by nations, that its maxims may be regarded as constituting the established rule of international law on this point.

According to the authors, the extent of responsibility varies according as the injuries sustained have been caused by malice or by negligence merely. In the case of the Alabama Claims, the wrong-doer is not and cannot be accused of bad faith. From the commencement of the negotiations Great Britain has uniformly affirmed the good faith in which she acted. That good faith has never been called in question by the United States, at least before the Joint High Commission, and the Treaty of Washington, far from presuming bad faith on the part of Great Britain, supposes quite the reverse. In the first article, Great Britain denies that she is in any way responsible. Farther on (art. 6), the American Commissioners concede to the British Commissioners the right of denying that the famous three rules of neutrality were recognized at the time of the escape of the Alabama. By article 7, the arbitrators are called upon to decide whether

* Vattel, vol. 1, pp. 55, 56.

Great Britain, *by any act or omission*, has violated any of the three rules, or any other principle of international law. In fact, as remarked by Bluntschli, she is only guilty *d'une omission contraire au droit.** Not a word is to be found in the Treaty or in the protocol concerning the motives of Great Britain's conduct, and the maxim, so true in private law, that fraud or bad faith must not be presumed, but must be alleged and proved, holds equally good in international disputes. Great Britain, then, stands charged with a wrong or tort in having failed to fulfil her duties as a neutral power. What is the measure of damages in such a case?

The Code Napoleon, which has furnished the model for all modern European codes, says (art. 1149): "Les dommages et intérêts dûs au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après.

(Art. 1150) "Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée.

(Art. 1151) "Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre, à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention." †

These principles, which are equally applicable to torts or delicts

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* 2 Revue de Droit International, p. 473.

† (Art. 1149) "The damages due to the creditor are in general the amount of the loss that he has sustained, and of the profit of which he has been deprived, subject to the exceptions and modifications hereinafter contained.

(Art. 1150) "The debtor is only liable for the damage foreseen, or which might have been foreseen, at the time of contracting the obligation, when the breach of it has not been caused by fraud on his part.

(Art. 1151) "Even in the case of non-performance of the obligation, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor and so much of the profit which he has been prevented from acquiring, as directly and immediately result from the inexecution of the obligation."

and quasi-delicts * form, so to speak, a portion of the common law of Europe and America. †

Toullier, ‡ one of the earliest commentators of the Code Napoleon, says:—" S'il n'y a eu ni dol, ni mauvaise foi, le débiteur n'est tenu que des dommages et intérêts, qui ont été prévus ou qu'on a pu prévoir lors du contrat. Il n'est pas tenu de ceux que l'on n'a pu prévoir, quand même ces dommages imprévus seraient la suite immédiate et directe de l'inexécution du contrat." Toullier adds (on article 1151) that even in case of fraud, the debtor is responsible only for the loss and the profit which are the immediate and direct result of the non-performance of the obligation.

Marcadé §: " Le débiteur ne doit jamais la réparation des pertes qui ne sont qu'une suite éloignée et indirecte du défaut d'exécution.

S'il y a eu simple faute, il ne doit que celles que l'on doit raisonnablement prévoir lors du contrat."

Larombière ||: " C'est une conséquence de la règle posée par l'article 1150 que les dommages et intérêts ne peuvent jamais exéder la chose principale, et se bâser sur des résultats qui s'y rattachent par des rapports plus ou moins éloignés, à moins que le débiteur n'y ait engagé sa responsabilité expressément ou tacitement." Farther on (at article 1151), the same commentator says:—" L'auteur du fait dommageable ne doit de dommages et intérêts que pour ce qui en est la suite directe, immédiate et nécessaire."

From these authorities it is plain that the debtor, who is guilty of negligence or *faute*, is responsible only for the damages which he has foreseen or might have foreseen, provided that they are the immediate, direct and inevitable result of his fault, while the wrongdoer, who is in bad faith, is bound to make good all losses foreseen and unforeseen, if they flow directly and immediately from his act.

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* Larombière, Des Obligations, Art. 1151.

† Austrian Code, art. 1333; Prussian Code, or *Landrecht*, arts. 286 to 291; Russian Code, or *Svod*, art. 487, and *Ukase* of the 21st March, 1851, substituted for articles 521 to 555 of the Code.

‡ Droit Civil Français, vol. 11, p. 291.

§ Des Contrats, vol. 4, p. 418, art. 1149.

|| Des Obligations, art. 1150.

These rules are in no way novel in France, at least with respect to the non-execution of obligations in good faith; they are also to be found in the old French law.

Pothier*: Lorsque le débiteur ne peut se reprocher aucun dol et que ce n'est que par une simple faute qu'il n'a pas exécuté son obligation, soit parcequ'il s'est engagé témérairement à ce qu'il ne pouvait accomplir, soit parcequ'il s'est depuis, par sa faute, mis hors d'état d'accomplir son engagement; dans ce cas, le débiteur n'est tenu que des dommages et intérêts qu'on a pu prévoir, lors du contrat, que le créancier pourrait souffrir de l'inexécution de l'obligation; car le débiteur est censé ne s'être soumis qu'à ceux-ci.

"Ordinairement les parties sont censé n'avoir prévu que les dommages et intérêts que le créancier, par l'inexécution de l'obligation, pourrait souffrir par rapport à la chose même qui en a été l'objet, et non ceux que l'inexécution de l'obligation lui a occasionés d'ailleurs dans ses autres biens. C'est pourquoi, dans ce cas, le débiteur n'est pas tenu de ceux-ci, mais seulement de ceux soufferts par rapport à la chose qui a fait l'objet de l'obligation, *damni et interesse ipsam rem habitam.*"

In the countries governed by the common law of England, where every law issue may be said to be left to the jurisprudence of the courts, it must be allowed that the question of damages is not so clearly defined as in those countries which are ruled by codes. In many respects there is a marked difference between the English common law and the continental systems. The principles which apply in matters of tort are often entirely foreign to those relating to damages for breach of contract. It is needless to notice these distinctions in the present discussion. For, in regard to torts, the rules of the English common law are essentially the same as those prevailing on the continent. The English law also lays down the distinctions between malicious motive and negligence, between the contemplation and the non-contemplation of the loss, and between direct and indirect damages.†

Lord Bacon‡: "It were infinite for the law to judge the

* Obligations, Nos. 160, 161.

† Mayne on Damages, Am. ed., 1856, p. 35; Seers v. Lyons, 2 Stark. 317; Pearson v. Lemaitre, 5 M. & G. 700; Warwick v. Foulkes, 12 M. & W. 507; Per Pollock, C.B., 13 M. & W. 51.

‡ Maxims of the law, Reg. 1.

causes of causes and their impulsion one on another. Therefore, it contenteth itsef with the immediate cause, and judgeth of acts by that without looking to any further degree."

Sedgwick, an eminent American jurist, says in his *Treatise on the Measure of Damages*, page 56: "It has already been stated that the law does not aim at complete compensation for the injury sustained; that it seeks rather to divide than satisfy the loss, and that in case of contract, as well as of tort, where no question arises of fraud, malice or oppression, the direct pecuniary damages, with the costs of the litigation, form the measure of relief. In other words, the law refuses to take into consideration any damages remotely resulting from the act complained of. This proposition, or one correlative to it, is expressed in the maxim, *causa proxima, non remonta, spectatur.*"

Reviewing the whole subject, in cases arising out of contracts, it seems to Mr. Sedgwick, (p. 77) that "the language of the Louisiana Code expresses the true rule, and that it is no more than just that a defendant in fault be compelled to make good the damages sustained by his breach of contract 'which were contemplated or which may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract.' Such, too," he adds, "are the recent English decisions."

In speaking of the actions of torts, without malice, the same author (p. 116) observes that the general rule "in this class of cases, is to adhere as closely as possible to the maxim that the natural and proximate consequences of the act are alone taken into consideration."

In the case of the *Pennsylvania Railroad* vs. *Kerr*, 1870,* Chief Justice Thompson made the following observations: "There is a principle applicable to most cases of injury, which amounts to a limitation. It is embodied in the common law maxim *causa proxima, non remota, spectatur*—the immediate and not the remote cause is to be considered.... It is certain that in almost every considerable disaster, the result of human agency and of dereliction of duty, a train of consequences generally ensue, and so ramify as more or less to affect the whole community. Indemnity cannot reach all these results."

Authorities and precedents innumerable might be brought forward to prove that it is an axiom of the English common law

* 62 Pa., 363; 1 Am. Rep. 431.

that the word *damages* denotes only direct and actual losses. But what renders the truth of this still more evident is that the American courts, like those of England, do not allow proof of indirect damages to be made, unless specially and circumstantially set up in the declaration.*

The uniformity of the laws of different nations relative to damages for torts unaccompanied with bad faith, can be easily accounted for by the fact that in this branch of law as in so many others, England and the United States have drawn from the never-failing sources of the Roman law, which also forms part of the common law of the European continent as well as of many American countries. "The Code Napoleon," says Molitor, † "adopts in the matter of damages the principles laid down by the Roman law in obligations *bonæ fidei*." The rules of eternal justice," says De Saint-Joseph, ‡ "laid down by the Roman law have been followed by every modern legislator." "The general principles of the civil law," says Sedgwick (p. 63) "have been repeatedly recognized in our jurisprudence." The Supreme Court of the State of New York, § quoting the language of Pothier on the measure of damages, said: "It will be seen that on the subject in question our courts are more and more falling into the track of the civil law."

But supposing the municipal laws of all nations to be at variance on the point, to what law would it become necessary to have recourse? Bynkershoek, one of the great masters of the law of nations, says: "Reason alone, reason is the soul of the law of nations." || The Roman law having been for ages considered, especially in matters of obligations, as the most perfect expression of equity and reason, it would follow that in such a case its principles would constitute the final and decisive resort. In fact, to those who are conversant with international law, it is well known, as observed by Bynkershoek,¶ (spoken of with so much admiration in the "American Law Journal,") and as also

* Sedgwick, p. 64, 612, notes; Armstrong v. Percy, 5 Wend. 535, 538.

† Les obligations en Droit Romain, vol. 1, p. 390.

‡ Concordance entre les codes civils, vol. 1, p. LVII.

§ Blanchard v. Ely, 21, Wend. 342.

|| *Quæst. Juris Publici*, translated by Du Ponceau in the American Law Journal, vol. 3, 2nd part, p. 11.

¶ Ibid, p. 107.

admitted by Mr. Sumner in his famous speech,* that the principles of the law of nations may generally be sought for in the rules of Roman jurisprudence.

The distinguished civilian Domat says in his *Traité des lois*:† "On voit que les dommages et les pertes dont les dédommagements peuvent être demandés, sont de deux sortes: l'une des pertes qui sont tellement une suite du fait de celui à qui le dédommagement en est demandé, qu'il est évident qu'on doit les lui imputer, comme ayant ce fait pour leur cause unique; et l'autre, de celles qui ne sont que des suites éloignées de ce fait, et qui ont d'autres causes."

Lastly, the same rules are to be found laid down in the works on natural law which are also authorities in international law.

Grotius‡: "Primum, aliud esse damnum directè datum, aliud quod in consequentiam venit. Directè datum voco, quo cuiquam aufertur ad quod jus proprium habet. Per consequentiam, quo fit ut quis non habeat quod habiturus alioquin habebat. Et Paulus jurisconsultus *a præposterum esse* ait, *antè nos locuples dici quam acquisierimus.*"

Puffendorf§: "Pour ce qui regarde l'estimation du dommage.... il est clair que tout le mal qui provient, par une suite nécessaire et naturelle, du dommage que l'on a causé directement et immédiatement est censé faire partie d'un seul et même dommage." Upon which Barbeyrac (note 11) remarks "qu'il y a des événemens, qui sont des suites directes et immédiates de l'action d'où provient le dommage, en sorte qu'on peut dire qu'elle en a été la cause précise; et d'autres qui ont une cause particulière, indépendante de ce fait qui en a été l'occasion, ou du moins ne s'y trouve jointe que par un cas purement fortuit."

Applying these principles to the question of the losses caused by the Alabama and other privateers, what is the extent of Great Britain's responsibility for their escape from her ports in consequence of her want of due diligence as a neutral state? Can it reasonably be asserted that she foresaw or could have foreseen the remote consequences of the acts committed by those ships? We can understand it to have been thought likely that the cruis-

* 2 Revue de Droit International, p. 474.

† Lib. III, Tit. 5, S. 2 § 6, Rémy's ed. vol. 2, p. 124.

‡ Jure Belli, p. 589. See also Burlumaqui, Principes du droit de la Nature, vol. 2, p. 444; Leçons du droit de la Nature, vol. 1, p. 225.

§ Le Droit de la Nature et des Gens, ed. 1712, p. 295, 296.

ers might capture some merchant vessels; but was it possible for the most clear-sighted intelligence (especially at a time when the two continents had not yet been united by a telegraphic cable) to expect that the casual and desultory exploits of the privateers should have the effect of prolonging the civil war and delaying the suppression of the rebellion? Was it natural to suppose that the American navy would be found unable to protect the commercial marine covered by the Stars and Stripes? If the United States failed to employ all the means of self-protection which are expected to be used by a powerful nation; if in one word, they did not use all reasonable precautions, care and diligence, to avoid or reduce the damages, are they not alone to bear the blame and suffer the consequences? * Even if Great Britain had or could have foreseen that the Confederate privateers, escaped from her ports, would inflict on the United States any other loss than the destruction of a number of merchant vessels, still how can it be shown that the prolongation of the war and the other items of damages comprised under heads 2, 3, and 5 of the American case, are, to use the language of the commentators of the European codes, *the immediate, direct and necessary consequence*, or to borrow the expression of Sedgwick and other writers on the common law, *the proximate and natural consequence* of the acts of the privateers? No; the true cause of the national losses of the United States must be sought, not in the construction and equipment of the privateers, but in the warlike resources of the South, and in the vast extent of territory to be conquered. And even if they could be shewn to have been caused in part directly by the acts of the privateers, still, according to the rules of the civil law amalgamated and incorporated (as we have seen) with the common and statutory laws of all modern nations, they cannot be laid to the charge of Great Britain, it being well known that they were not caused solely by her acts. She can accordingly be held accountable only for the loss of the vessels captured or destroyed, for their cargoes and freight, and the premiums of insurance, these losses alone constituting the foreseen, direct, and immediate damages. Surely we need not repeat that the losses specified under heads 2, 3, and 5 of the American case are not direct; the United States lay claim to them not as direct but as

* Sedgwick, p. 95; Starkie on Evidence, vol. 2, p. 741; Toullier, vol. 6, p. 303; Mayne on Damages [207].

indirect damages, and the law assuredly never presumes that indirect as well as direct losses are comprehended under the general expression of a claim for damages.

Furthermore: The United States have frequently applied these rules to cases of illegal captures by privateers tried in their national courts. Thus in the case of *Del Col* vs. *Arnold*,* the Supreme Court of the United States held that the owners of a privateer are responsible for the conduct of their agents, officers and crew, to all the world, and that the measure of such responsibility is the full value of the property injured or destroyed.

In the case of *The Amiable Nancy*,† the same court laid down as a rule, that in case of an illegal seizure by a privateer, the original wrong-doers are responsible beyond the loss actually sustained, if there be gross and wanton outrage, but that the owners of the privateer, who are constructively liable, are not bound to the extent of vindicative damages. The prime cost or the value of the property lost, and, in case of injury, the diminution in value by reason of the injury, with interest thereon, affords the true measure for estimating the damages.

In the case of *The Anna Maria*,‡ the same supreme tribunal held that in a suit by the owners of captured property, lost through the fault of the captors, only the value of the captured vessel and the prime cost of the cargo, with all charges and the premium of insurance, will be allowed in ascertaining the damages.

In all these cases, consequential damages were refused, the court remarking in the case of *The Amiable Nancy*: "This rule may not seem a complete indemnity for all possible injuries; but it has certainly a general applicability to recommand it, and in almost all cases will give a fair and just recompense."

It may be objected that all those cases were suits between private individuals. But by what rule of law or of equity is it taught that the liability changes its nature according as the offending party is a sovereign power or a private individual? Is not Great Britain liable in the same way as the owners of *The Amiable Nancy*, solely and simply because she is regarded as the owner of the privateers and the passive or implied author of their acts? The amount of the damages to be paid, therefore, must in all cases, be regulated by the gravity and extent of the losses only, and not by the name or quality of the owner or defendant.

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* 3 Dal., 333. † 3 Wheaton, 546. ‡ 3 Wheaton, 327.

It is unnecessary to discuss at greater length this proposition, the truth of which has been recognized in the most formal manner by the highest court of the United States. "The right to indemnify for an unjust capture," said Judge Story, for the Supreme Court of the United States,* "whether against the captors or the sovereign, whether remediable in his own courts, or by his own extraordinary interposition and grants upon private petition or public negotiation, is a right attached to the ownership of the property itself."

Finally, Dr. Bluntschli, in noticing, in his *Opinion Impartiale sur la question de l'Alabama* (translated into English at the expense of the U. S. government†), the so called indirect or national losses, concludes by only admitting the claim to an indemnity for the destruction of the merchant vessels and of their cargoes. "La véritable solution du différend," says the learned publicist, "consiste dans la combinaison d'une réparation matérielle destinée à indemniser les propriétaires Américains, avec une garantie morale des relations commerciales et maritimes contre le retour de semblables dommages. Le premier de ces buts sera atteint au moyen d'une juste indemnité pécuniaire, que la Grande-Bretagne paiera à l'union pour être partagée entre les personnes lésées; le second le sera par nne nouvelle proclamation du devoir incombant aux Etats neutres et amis d'empêcher autant que possible qu'on n'abuse de leurs territoires neutres pour y organiser des expéditions militaires." ‡

The Alabama indirect claims, therefore, should be withdrawn by the United States Government. 1st. Because the language of the American Commissioners, during the sittings of the Joint High Commission, was such as to lead the British Government to conclude that the indirect claims had been abandoned. 2nd. Because Great Britain had never shown by word or deed her intention to admit them directly or indirectly. 3rd. Because the text of the Treaty of Washington is formally opposed to their admissibility. 4th. Because they lead to absurd consequences; and, 5th. Because they are dissallowed by the rules of law universally admitted by civilized nations, and by the maxims of natural and therefore of international law.

What will be the ultimate solution of this new dispute between

* Comey's et al vs. Vassé, 1 Peters, 193.

† 3 Revue de Droit International, p. 661. ‡ 2 Ibid, 479.

Great Britain and the United States. It has been stated that the American Government has proposed to submit it to arbitration, and has even suggested that it be decided by the Geneva tribunal. It is true that we find in the history of the U. S. a few precedents in which the interpretation of treaties has been left to arbitration. It was thus that the difficulties, which arose between Great Britain and the United States, respecting the meaning of certain clauses of the Treaty of 1783, the Treaty of Ghent and the Oregon Treaty were settled by special commissions. But in those instances, the arbitrators' award could not in any manner compromise the national honor of either party, while the reference of even unforseen (although direct) damages to arbitration could be made only on the assumption that Great Britain acted, or at least may have acted, in bad faith; for in law, as we have seen, this class of damages is admissible only where there is bad faith. Great Britain would then be treated as guilty, not of fault or negligence merely or of a *quasi-delict*, but of a delict, and indeed almost a crime. We can therefore easily understand the indignation of the English people on seeing the Alabama indirect claims pressed on the notice of the Geneva Tribunal. For the same reason any offer to submit the admissibility of these claims to arbitration is altogether futile. In our humble opinion, there remains no other means of settling the dispute in a quiet and honorable manner, than the withdrawal of the indirect claims by the United States.

But if the American Government persists in these claims—and we know it to be characteristic of that Government to advance claims very often, and withdraw them very rarely—what will be the decision of the English Cabinet? Will it withdraw from the arbitration? Will it expose the nation to the horrors and dangers of a disastrous war. A war with the United States would certainly be very unpopular in America. The equivocal attitude of England towards the South, during the late great struggle, gives her no hope of a diversion in that quarter; the South will choose rather to remain quiet under the yoke of the negroes, than come to the aid of the nation which it calls by the epithet of "perfidious Albion." And even in the North, the British Provinces, which see in the Alabama Claims only the source of the humiliations and of the enormous sacrifices imposed upon them by the Treaty of Washington, have already commenced to agitate publicly the policy of breaking rather than strengthening the colonial tie.

There is a further reason which renders an Anglo-American

war a very improbable contingency, namely, the unvarying policy of Great Britain towards the United States during the last fifty years.

Lord Derby, recently speaking of the Treaty of Washington in the House of Lords, observed that "when the American negotiators found that up to that time the more they asked the more they got—for such has been their uniform experience—I am not surprised that this led them to continue the game they had played with so much skill and so much success." No language could be more accurate than that in which the noble lord thus describes the policy pursued by the United States towards Great Britain.

By the Ghent, the Ashburton and the Oregon Treaties, she surrendered immense tracts of country, which would at the present time be of incalculable value to Canada; and that without any consideration, and although it was as clear as noonday that in some instances, notably in the case of the North-Eastern Boundary of Maine, the American Government was not only destitute of the shadow of a valid claim, but was acting in downright bad faith.

After having, with the aid of treaties and conventions, pushed their encroachments upon the territory of the Empire to an extent surpassing their most sanguine expectations, they now seem to cast wistful and longing eyes upon the sovereignty of the seas. They need the Island of San Juan to enable them to command the entrance of the gulf, which divides Vancouver from the mainland; they at once inform Great Britain that it is theirs by virtue of the first clause of the Oregon Treaty, and they wrest from her an agreement to abide by the arbitary decision of the Emperor of the Germans.

They covet the rich and inexhaustible fisheries of the British provinces; they wish to obtain possession of them without any trade equivalent, and they tell Great Britain in substance: "Here are a few thousand dollars for the *semi-sovereign and irresponsible Government of Canada;* make it give up to us its bay fisheries and the three miles of sea over which it exercises jurisdiction," and England, after a faint resistance, gives her word of honor that this privilege shall be obtained for them.

The navigation of the River St. Lawrence and its 220 miles of canal, on a footing of equality with Canadian subjects, is indispensible to 17,000,000 of people in the Western States; and the

American Government boldly demands the right of way *for ever*, in exchange for the free navigation of the Sault Ste. Marie Canal (one mile and a half in length) and the winter transit of Canadian merchandise by the railways of the Union for *ten years;* and Great Britain consents.

But this is not all. It is not enough that the colonies should be sacrificed to the boundless ambition of the aspiring Republic, it is necessary to humble the mother country also.

Contrary to the expectations of foreign diplomats, the United States does not hesitate to demand an apology for the depredations of the Alabama, and that apology they, after some days spent in tergiversation, succeed in wresting from their reluctant rival.

To insure the ultimate triumph of their cause before the Tribunal of Geneva, they draw up and distinctly define certain rules of international law, and present them to Great Britain with the haughty words: "We do not wish the Court of Geneva to decide what duties the law of nations requires from a neutral power; we demand not only that you abandon the principles which you have hitherto professed, and on which you have always acted, but that you likewise submit your conduct, past, present, and to come, to the test of our three *ex post facto* laws, and that you invite all other nations to give their adhersion to them." And England again submissive says: "Yes, for peace sake."

Finally, the American Government, while expressing the noblest contempt for money, desires to replenish the coffers of the national treasury, and in time of peace, and as the price of its friendship and good will, advances a claim to a war indemnity against a neutral state, nearly equal in amount to that wrung from France by victorious Prussia. What course will Great Britain adopt—she who has never seriously resisted the clamorous demands of her transatlantic sister? She is certain to pay, in some shape or other, a larger sum than the amount of the Alabama direct claims, or the $14,000,000, with interest, mentioned in the proceedings of the Joint High Commission! And will the United States be then satisfied? Never, so long as the British Empire and other European nations retain a vestige of power upon the northern continent of America!

D. GIROUARD.

Montreal, 30th March, 1872.

EXPROPRIATION.

(*Continued.*)

STATE OF THE LAW AT ROME.

The law of expropriation, *as an organized system* for the protection of the citizen against arbitrary power, and for reconciling private rights with the general interests of the community, is beyond question the product of the present century and of its innumerable public enterprises. But while we need not look beyond this century for guidance on the subject, still it must ever be a matter of interest to enquire into other systems of former times. Hence amidst the impulse given to the study of the law of expropriation in our day, especially in France, it was most natural that writers should direct their inquiries to that great body of law, so rich in its provisions on nearly all the relations of life, which has furnished the staple of the laws and civil institutions by which modern nations are even now governed. One result of these enquiries has been to establish that the references in the Roman law to anything like expropriation are meagre and in striking contrast with the stupendous public works constructed by the Roman people in every period of their history and in every quarter of the ancient world—works "which even now in their ruins furnish some idea of the greatness of Rome to thousands on thousands who have never read a page of her history."

But while there is general agreement as to the meagreness of the Roman law on the subject, this very meagreness contrasted with the fullness of that law on other matters, and the importance and number of Roman public works, has led different writers to entirely opposite conclusions as to the existence of expropriation in Roman law. Some have thence inferred that expropriation, or such a thing as the State taking possession against the will of private individuals, was unknown to the Romans, and impossible; while others, from the same premises, have gone to the other extreme, and come to the conclusion that there must have been a special system of legislation on the subject, which has not descended to us, it being well known that only a small portion of the vast mass of Roman law, and that chiefly private law, was

embodied and survived in the compilations which are the existing sources of our knowledge of Roman jurisprudence.*

Among those who have put forth the opinion that no expropriation of any kind was known to the Romans, are such names as Proudhon, *Domaine Public*, 11, p. 198; and Laboulaye, *Histoire de proprieté*, 11, 2.

Proudhon says: "Chez les Romains l'expropriation pour cause d'utilité publique était inconnue: *le refus d'un particutier limitait la puissance de l'État:* soit par oubli du législateur, soit à dessein, *la volonté de tous était obligée de fléchir devant l'obstination d'un seul citoyen.* Ainsi l'Empereur Commode (Augustus) se trouva dans la necessité de renoncer à l'idée d'élargir le forum par respect pour les droits qui refusaient de s'abdiquer."

In addition to this passage from Suetonius, there are several others which give an appearance of reality to the views stated by Proudhon. Thus Livy, XL. 51, says that the censors (who with the aediles had the superintendance of the aqueducts during the times of the Republic), were thwarted in their scheme of building a new aqueduct in the year 179 B.C., by Licinius Crassus, who refused to allow it to be carried through his land. "Locârunt (censores) aquam adducendam fornicesque faciendos: impedimento operi fuit M. Licinius Crassus, qui per fundum suum duci non est passus."

When, however, we consider, as we must, the history, career, and spirit of the Roman people, we come to the conclusion that these passages have some other meaning than that apparently, on their face, deducible from them. They must mean something else than that it was in accordance with the spirit of Roman law and policy that the nation, as stated by Proudhon, should stand baffled in its greatest enterprises by the obstinacy of one of its individual members. Such was not the spirit or policy of Rome. It is not credible that a state of things which is impossible in any civilized State was possible with the Roman people, who, says Batbie, "fut le plus grand constructeur de l'antiquité." Even lately (1855) portions of the public works of the ancient monarchy have been brought to light, in the great Servian wall, which, to use the words of Mommsen, "have risen as it were from the tomb to testify to the might of a *national spirit* as imperishable

* See the question well discussed in Bauny de Récy; Exp.

as the rock walls which it built, and in its continued influence more lasting even than they."

The term *moenia*, "tasks," retained as the name for walls, shews how they were first built, and how heavy were the direct calls and sacrifices imposed by the State.

But it is the public works of the Republic and Empire that have most interest for our subject, as it is these, if any, that would have created an equitable system of expropriation in Roman law. And here we may say, that there are circumstances in the history of Rome and Roman law which on the one hand shew us how impossible it is to believe that her great public enterprises could be checked by the will of private individuals, and on the other largely take from our surprise at so vast a system of public works, with apparently such frequent occasions therefor, never having given rise to an organized system of land expropriation.

In order to be convinced of the impossibility of Rome suffering her public works to be turned aside out of respect for private rights, we have only to look at her policy and plan in constructing the most important of them all, the great Roman highways, the railways of antiquity, which "issuing from the Forum of Rome, traversed Italy, pervaded the Provinces, and were terminated only by the frontiers of the empire."* This vast system of internal communication was an essential part of her great mission of conquest and civilization. No country was considered as completely subdued till it had been rendered pervious in all its parts to the arms and authority of the conqueror.* These highways, which connected the 2000 cities of the empire with each other and with Rome, were carried in a *direct* line from point to point, over mountain, valley and river, and were turned aside neither by the obstacles of nature nor out of respect for the rights of private property.* "The sense of unity and common dependance on a central authority, says Merivale, was admirably maintained by the instrument of communication with Rome, which in whatever quarter the subjects of the State might cross it, always pointed with a silent finger in the direction of their invisible mistress. Far as the eye could reach, till it was lost in the remote horizon, stretched this mysterious symbol of her all-attaining influence; and where the sense failed to follow the imagination came into

* Gibbon.

play, and wafted the thoughts of the awe-stricken provincial to the gates of Rome and the praetorium of the venerable imperator. Along these channels, as he knew, the arms, the laws, and the institutions of the city streamed in ceaseless flow to every corner of the earth; they were the veins through which the life-blood of the empire circulated from its heart, making every pulse to beat with unfailing harmony and precision."

It is not difficult to see what were some of the circumstances that prevented the construction of these works from giving rise to a system of land expropriation, notwithstanding their construction in the present day would certainly do so equally with the construction of any system of railways.*

Perhaps the most important occasion for calling forth such a system of expropriation was swept away by the fact, that, both in Italy where the great highways were the work of the Republic which inaugurated them, and in the Provinces where they were chiefly the work of the Empire,† the main lines of road were carried over the lands of conquered communities.

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* The Roman aqueducts were also gigantic public works, but both on account of their comparative shorter length and manner of construction, they were calculated to interfere much less with the rights of private property than the great highways. Thus the great Marcian aqueduct, built in 144 B.C., upwards of sixty miles in length, was carried underground fifty-four miles, and the rest of the distance mostly on arches. It was built by order of the Senate, a few years after the attempt to build an aqueduct stopped by Crassus, which would indicate that the power existed of carrying out such works when properly authorized. An idea of Roman public works may be had from this one aqueduct (Marcian), which cost the public treasury 180,000,000 sesterces, or £2,000,000 stg. gold, all raised and paid out in cash within three years. (Mommsen.)

† It is well known that the celebrated system of Roman roads began with the great *Via Appia*, called *regina viarum*, built as far as Capua in 442 A.U., during the Samnite war, by Appius Claudius who, says Livy ix, 29, "viam munivit et aquam in urbem duxit." To him, (Appius Claudius) says Mommsen, the Roman State was indebted for its first great military road, and the Roman city for its first aqueduct. Following in Claudius' steps the Roman Senate wove round Italy that network of roads and fortresses, without which, as the history of all military states from the Archaemenides down to the creator of the road over the Simplon shews, no military hegemony can subsist." With reference to the works of the Empire in the provinces, witness the great roads built throughout Gaul by Agrippa

Indeed centuries after the period of construction of the principal of these great public works, the ownership in the soil of nearly the whole Roman world was legally in the State, the inhabitants being in the eye of the law only occupants and as such paying an annual rent or tax for the use of the lands to the State as proprietor.

Gaius (ii, 7) could say in his time, time of the Antonines: "*in provinciali solo dominium populi Romani est vel Cæsaris: nos autem possessionem tantum et usumfructum habere videmur.*"

With reference to Italy: far into the times of the Republic the extent of private landed property was small and mostly owned by the plebeians, the powerful governing aristocracy occupying by preference enormous portions of the *ager publicus* or public domain.

The numerous agrarian laws during the whole of the Republic shew what a vast public domain the State had at all times at its command, and a *legal* right to resume. These laws, indeed, in so far as they recognized and provided for indemnifying the possessors as having rights of property on tho score of improvements and long possession, were the most important laws of expropriation in Roman legislation, although they did not expropriate the soil or *fonds* which legally already belonged to the State.*

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in the reign of Augustus; they led from Lugdunum (Lyon): 1. to the Rhine; 2. to the Somme and the Channel; 3. across the Cevennes to the ocean; 4. to Massilia and Narbo; also the great aqueduct, Pont du Gard, yet existing ar Nimes. Vide Merivale iv, p. 80.

The Republic, too, built great highways in the earlier acquired Provinces, as the great *Via Egnatia* across Macedonia, spoken of by Polybius (34, 12, 3); and the *Via Domitia*, from the Rhone to the Pyrenees, to connect with Spain, which was the primary object in conquering southern Gaul and founding the early Roman province of Narbo. A strip of from 1 to 1¾ miles wide along the coast was handed over to the Massiliots to keep the road in repair. Vide 3 Mommsen, 403.

* Thus as late as 133—115 B.C., under the agrarian laws of the Gracchi alone, about 80,000 allotments of 30 *jugera* each were made of the public domain in Italy, equal to 2,400,000 Roman acres. These laws made provision for indemnifying the possessors; and the fact that some of the public lands retaken by the State had been in heritable private possession 300 years, shews what a permanent legal hold the State kept on its lands, and how rigidly the principle of "no prescription against the State" was carried out. Vide 3 Mommsen, 95.

To sum up here some of the reasons which we think prevented the want of a system of expropriation being felt and springing up in Roman law: The monarchy with its walls, and perhaps also as constructor of the great *Cloaca*, provided for the fortifications and sanitary requirements of the city and relieved the Republic for a long time from the construction of public works on this score in the capital: that the Republic, intent upon war, constructed, during its first period, few public works of importance beyond great military roads and fortresses which were constructed over conquered territory; and later, public works were largely constructed by powerful and wealthy public and private individuals, acting from different motives, without expropriation or interference by the State.

That the quantity of private landed property, even in Italy, was long small, and the domain, *ager publicus*, of vast extent; while in the Provinces the whole soil, with slight exceptions, belonged to the State as private property.

For these reasons, among others, the construction of the great public works of the Romans interfered much less than might be supposed with the rights of private ownership in lands, and infinitely less than the construction of similar works would do in any civilized country of the present day.

But notwithstanding these facts, and that the other great public structures, besides highways, such as circuses, baths, temples, aqueducts, and other works of use or embellishment, of the later Republic and Empire, were largely constructed by private liberality, or by politicians and successful leaders seeking popular favor, or by the emperors, who had large resources, public and private, at their command, both in lands and money, and whose wishes were not likely to be thwarted; notwithstanding all this in favour of the absence of a system of expropriation, there must have been, and were, many cases, particularly under the Empire, where private property had to be taken *in invitum* by the State for purposes of public utility; and we do find in Roman law certain provisions made for those cases.

It is not, however, during the Republic nor early Empire, but only in the later Empire, after separation of East and West, that we find any provisions of a general nature on the subject. One title *De Operibus Publicis*, of the Theodosian Code, A.D. 438, with some fragments of the *Corpus Juris Civilis*, comprehend substantially all the passages that we possess in Roman law on

expropriation, and it is in consequence this later Roman law that has been the subject of examination by Serringy and by most others who have treated of the subject.*

These passages, particularly from the Digest, shew that the principle of expropriation was applied at times to moveables and incorporeal things as well as immoveables. Thus, for instance, there were a great many cases in which the master might be forcibly deprived of his slaves for an indemnity or price; as when the slave was required to be examined as a witness under the usual torture (*quæstio*)†; where the slave was cruelly treated as in the well-known cases mentioned in the Institutes‡: where the slave received freedom from the State as a reward for making known manufacturers of spurious coin § or deserters.

Art. 407 of our Code, like Art. 545 Code Napoleon, says: "No one can be compelled to give up his property except for public utility and in consideration of a just indemity previously paid." This Art. clearly recognizes the principle of expropriation as applicable to moveables as well as immoveables, but as neither our law nor the law of France contains any provisions for carrying this principle into effect as regards moveables—a thing seldom or never required—the Roman law in this one respect went further in practice than does even our law or the French law.

Still, much as with us, it was chiefly to immoveables that expropriation was applied in Roman law. The principal provisions relative to immoveables, nearly all of which, indeed, relate to cases at Constantinople, are contained in L. 50, L. 51, L. 53 of the Theodosian Code Title *De Operibus Publicis*, and in the VII. Novel of Justinian, chapter 2.

L. 50, Th. Code, relates to the construction of the Portico of

* We find before this certain exceptional cases. Vide Bauny de Récy, Exp. L. 12, Dig.: "De Religiosis et Sumpt, somewhat like Art. 540 of our Code, said: "Si quis sepulchrum habeat, viam autem ad sepulchrum non habeat et a vicino ire prohibeatur, imperator Antoninus cum patre rescripsit iter ad sepulchrum peti precario et concedi solere: ut quotiens non debetur impetretur ab eo qui fundum adjunctum habeat," &c.

† D. 48, 5, 27. D. 48, 18, 6 and 13.

‡ I. 1, 8, 2: "praecepit, ut, si intolerabilis videatnr saevitia dominorum, cogantur servos suos bonis conditionibus vendere ut pretium dominis daretur."

§ C. 7, 13, 2 and 4.

the Thermæ of Honorius at Constantinople. It provides: "Opus cæptum exstruatur et porticus thermas Honorianas praecurrat acie columnarum, cujus decus tantum est ut *privata* juste negligeretur paulisper utilitas." The indemnity in this case was not a sum of money but a right of superstructure and habitation: "Sed ne census sui quisquam intercepta lucra deploret, sed e contrario cum pulchritudine civitatis etiam fortunas suas auctas esse laetetur, pro loco quod quisque possederat, *superædificandi* licentiam habeat. Nam *in locum privati aedificii quod in usum publicum translatum est*, oecupationem basilicae jubemus vetustae succedere, ut contractus quidam et *permutatio* facta videatur, cum dominus qui suum dederat civitati, pro eo habiturus sit ex publico, remota omni formidene, quod inconcusso robore et ipse habere, et quibus velit, tradere habebit liberam facultatem."

L. 51 of the Th. Code, the same as L. 18 of the Code of Justinian, Title *De Operibus Publicis*, relates to the construction of the towers of the new wall of Constantinople: "Turres novi muri, qui ad munitionem splendidissimae urbis exstructus est, *completo opere praecipimus eorum usui deputari, per quorum terras idem murus* studio ac provisione tuae magnitudinis ex *nostrae serenitatis arbitrio* celebratur, &c." Here again the indemnity was not a sum of money previously paid or at all, but a right of habitation in the towers to the proprietors whose land had been taken for the wall constructed *ex arbitrio* of the emperors, and on condition, as the context shews, of their keeping the towers in repair.

L. 53 of the Th. Code provides for the enlargement of certain public halls at Constantinople by taking from the adjoining proprietors: "His tamen ipsis quae humiliores aliquanto atque angustiores putantur, vicinarum spatia cellularum ex utriusque lateris portione oportet adjungi, ne quid aut ministris eorundem locorum desit aut populis. Sane si qui memoratas cellulas probabuntur vel imperatoria largitate, vel quacunque alia donatione aut emptione legitima possidere, *eos magnificentia tua competens pro iisdem de publico pretium jubebit accipere.*" Here the indemnity is a sum of money, which the magistrate is authorized to pay from the public treasury. But the provision most general in its nature on expropriation is in the VII. Novel of Justinian, ch. 2, § 1, which shews that the emperor had the power to expropriate even the property of churches: "si qua communis commoditas est ad utilitatem reipublicae respiciens." Justinian

says: "Sinimus igitur imperio si qua communis commodi[tas] est, et ad utilitatem reipublicae respiciens, et possessionem exigens talis alicujus immobilis rei, qualem proposuimus: hoc ei a sanctissimis ecclesiis, et reliquis venerabilibus domibus, et collegiis percipere licere, undique sacris domibus indemnitate servata, et recompensanda re eis ab eo, qui percepit, aequa aut etiam majore quam data est. Quid enim causetur imperator ne meliora det? cui plurima dedit Deus habere, et multorum dominum esse, et facile dare et maxime in sanctissimis ecclesiis, in quibus opitma mensura est donatarum eis rerum immensitas. Unde si quid tale fiat, et pragmatica præcesserit forma præcipiens imperio dare aliquid talium rerum, et recompensaverit mox rem meliorem, et uberiorem et utiliorem, sit ea permutatio firma," &c. N. VII. ch. 2, § 1.

We may also give as throwing light on the state of the law, L. 9 of the Code of Justinian, Title De Operibus Publicis. The words are: "Si quando concessa a nobis licentia fuerit exstruendi, id sublimis magnificentia tua sciat esse servandum, ut nulla domus incohandae publicae fabricae gracia diruatur, nisi usque ad quinquaginta libras argenti pretii taxatione aestimabitur; de aedificiis vero majoris pretii ad nostram scientiam referatur; ut ubi amplior poscitur quantitas imperialis exstet auctoritas."

From this law it appears that the express authorization of the emperor was required when the building to be pulled down exceeded the value of fifty pounds of silver.

Under this amount, the Prefect might cause the demolition under the general authority to construct the work.

There is a number of other less direct references on expropriation in the Titles *De Operibus Publicis* of the Theodosian and Justinian Codes, and in others parts of the Roman law, which have been collected and examined by De Fresquet, "Expropriation à Rome et à Constantinople"; by Bauny de Récy, Expropriation, and by others.

They are however of minor importance compared with the texts given above, which, as already stated, contain nearly all the provisions in the Roman law of a general nature on the subject.

De Fresquet, who was among the first to examine the Roman law on the subject, comes to the conclusion: 1st, That private individuals might be deprived of their property for purposes of public utility: 2nd, That the proprietor received an indemnity ordinarily judicially determined: 3rd, That this indemnity was in most instances in money and was payable before dispossession.

This however is going very far and indeed too far, towards finding in Roman law a regulated system of expropriation. The texts given fairly shew the nature of the law on the subject, and they do not justify the inferences of De Fresquet.

The proper conclusion, perhaps, to come to in relation to the Roman law is: 1st, That expropriation must have been practised both under the Republic and Empire. 2nd, That for various reasons an organized system of expropriation was not called forth in Roman jurisprudence during the Republic and creative period of the nation's history, and that none such really ever existed at any time in Roman law. 3rd, That it is only in later Roman law, after the government had become a sort of oriental despotism, that we find any direct and positive provisions on the subject: 4th, That expropriation was exercised arbitrarily by the emperors or in minor matters by imperial officials: 5th, That the indemnity was fixed in the same arbitrary manner, there being nothing to justify the opinion that it was fixed judicially: 6th, That there was no rule requiring the indemnity to be paid in money, and in fact it often was not so paid: 7th, That there was no rule requiring the indemnity to be paid previous to dispossession, nor does it appear from the texts given to have been generally so paid: 8th, That there is no proof that the indemnity was full and ample, which indeed it hardly could be when paid only after the work was completed by a right of habitation and the like, subject to charges.

The above are substantially the conclusions arrived at by Serringy in his valuable work, "Droit Public et Administratif Romain," No. 953, who says: "Le principe de l'expropriation pour cause d'utilité publique existait dans le droit romain, mais ce principe, non réglé par la constitution et les lois, s'exerçait arbitrairement."

They are also the views of Bathie, Droit Public VII, 3: who says: "Il résulte de ces textes que le droit de prendre la propriété privée pour exécuter des entreprises d'utilité publique était reconnu à Rome, et qu'il était plutôt admis implicitement comme un sous-entendu dont l'expression formelle est inutile. Aucun texte ne le proclame expressément et comme un principe; mais plusieurs dispositions impliquent que ce droit n'était pas contesté. Quant à l'indemnité, elle consistait tantôt en argent et tantôt en nature. La pluspart du temps, elle était fixée en argent parce qu'il était rare qu'on pût indemniser les propriétaires au moyen

d'avantages semblables," (habilation in the towers). On ne peut induire d'aucun texte que l'indemnité, soit en argent, soit en nature, dût précéder la prise de possession. Quelques lois parlent d'indemnité préalable; mais de ces mesures particulières, il n'y a pas lieu de conclure à une règle générale. La vérité est qu'à Rome cette matière n'était pas réglémentée par une loi complète et générale; que, si le droit était reconnu, il était diversement appliqué; que, dans chaque affaire, se présentaient des particularités: qu'*enfin il n'y avait aucune règle sur la nature* de l'indemnité, sur la manière dont elle était fixée, sur les autoritées préposées à l'expropriation, pas plus que sur le moment où l'indemnité était payable.

Il n'y a là rien qui doive nous surprendre, puisque l'expropriation était ordonnée par le pouvoir souverain. Le peuple ou l'Empereur qui ordonnaient la cession de la propriété privée pouvaient, en vertu même de cette souveraineté, fixer les conditions auxquelles aurait lieu la prise de possession. La puissance qui faisait céder le droit privé était capable aussi de déterminer la compensation qui serait allouée au particulier. Nous trouvons dans notre ancien droit un état de choses semblables, et cette analogie s'explique par l'identité du régime. Comme l'empereur romain, le roi de France est investi du pouvoir absolu. Quod principi placuit legis habet vigorem. Le pouvoir d'exproprier n'est pas réglementée par une loi générale: il n'est même pas formellement établi en principe. Mais le roi puise dans sa toute-puissance le moyen de faire céder le droit privé et, en ordonnant ces mesures, il fixe les conditions auxquelles les propriétés seront prises. Aussi ne trouvons-nous dans l'ancien droit que des édits spéciaux et point d'ordonnance générale sur la matière."

This last passage, with what was said in my last article, will serve as an introduction to the modern law of France, to which I now pass.

MODERN LAW OF FRANCE.

Nowhere, so far as we know, has the law of expropriation been so fully treated of as in the works of modern French writers, and it is to these chiefly that we in this province have recourse for a full discussion of the theory and principles of the law on the subject. The contrast between the French and English law in this respect is most striking. The law catalogues of modern French books, such as those of *Thorin and Warée*, contain about forty works professedly and exclusively on expropriation, besides

upwards of one hundred works on public and administrative law, nearly all of which treat of the subject; and of all these works a large proportion and the choicest of them are in the Advocates Library, Montreal, whereas, there is not a single English treatise in the library on the *general* law of the subject, or even in existence, so far as appears to be known to the Bar.

It seems extraordinary, in view of the vast importance and manifold application of the English law, the Lands Clauses Consolidation Act, 1845, that it should not have found one commentator to clearly and ably set forth its principles as existing in English legislation and applied by the English courts, and thus not only relieve the profession from the task of looking through a host of decisions in order to glean what the law actually is, but also afford a valuable guide for legislation on the subject, as is the case in France.*

But to notice modern French law, in which we have a real and elaborate jurisprudence on expropriation, unlike in this respect the old French law, we may say that the modern period, that is from 1789, presents four different systems of expropriation which we may sufficiently characterize, by a prominent feature in each, as: (1) the administrative system from 1789 till 1810; (2) the judicial, from 1810 to 1833; (3) the special jury system, from 1833 to 1841, and (4) the existing system under the law of 1841, which is a combination of the best features of all the others, with

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* As an example of the gigantic interests and expenditure connected with English legislation on one branch of public works, railways; it is stated in Beeton's Dictionary that 200 Acts of the Imperial Parliament were passed relative to one railroad alone, the London and North Western; that in case of another, the Great Northern, £763,000 stg., equal to $3,815,000, were expended for Parliamentary charges to obtain leave to build 245 miles of a road, being £3,115 stg., or $15,575 per mile for these charges; that by a return made to the House of Commons in 1855, it appeared that it had cost £14,000,000 stg., or seventy million of dollars for Acts for railways existing in 1855; that the average for Parliamentary or law expenses for railways in England is £2,000 stg., or $10,000 per mile, which would amount to £25,000,000 stg., or one hundred and forty million of dollars, for law expenses for the railways now in operation in the United Kingdom.

Expropriation can hardly be said to exist under such a system, which shews how difficult and costly it is to interfere with rights of private property in England.

many additions and improvements called for by practice and experience.

Under the administrative system, 1789 to 1810, the whole operations continued, as under the old *régime*, to be purely administrative, the indemnity being fixed either by the administration, its agents, or by the *Conseil de Préfecture*, an administrative tribunal.

During these years the solemn declaration (called for by past abuses,) of the inviolability and sacredness of private property was indeed embodied in the constitution and permanently incorporated into the French law in 1804 by Art. 545 of the Code Napoleon, but in effect it remained in great measure an abstract principle, often violated in practice. The civil tribunals were not permitted to intervene in any way for the protection of the individual or to check the irregular or arbitrary proceedings of the administration.

Public works by their nature appertaining to the administration, it was regarded as unconstitutional for the Courts to interfere in any degree with matters connected with their execution. The law of 24th August, 1790, declared: "*Que* les fonctions "judiciaires sont distinctes et demeureront toujours séparées des "fonctions administratives: et que les juges ne pourront, à peine "de forfaiture, troubler, de quelque manière que ce soit, les "operations des corps administratifs."

Grievous complaints arose as to the conduct of the administration and its officials, relative to expropriation, and Napoleon, desirous of allaying this feeling and impressing upon the people that they could only be expropriated *par l'autorité de la justice* and not by the Prefect, sketched in a celebrated note written from Schoenbrun on the 29th September, 1809, and which is commended for its clearness by French writers, the provisions of an entirely new system of expropriation, in which property was to be placed under the protection of the civil tribunals of the country, its natural guardians. Until this end was attained and expropriation bore on its face the character of being effected *par l'autorité de la justice*, Napoleon did not rest satisfied, and his project was embodied in the well-known law of expropriation of the 8th March, 1810, which inaugurates our second or judicial system, in which the *pourvoir judiciare* stood forth as the most prominent characteristic.

Under this system the public utility or necessity for expropria-

tion was declared by an imperial decree; the lands required for the object were designated by the Prefect in accordance with prescribed formalities, after the parties interested had been notified, and their objections and demands heard by a commission specially charged therewith. Thus far it was administrative. The courts then took up the proceedings, and decided: 1st, whether the declaration of public utility and other administrative preliminaries had been in conformity with law; and if so, they in the in the 2nd place, pronounced judgment of expropriation; and 3rdy, fixed the indemity, having recourse to the title deeds, and after being instructed on the matter by experts named by the Court.

But this law of 1810, or judicial system, was found in practice to be attended with grave defects and evils, chief among which were the prolonged delays before the Courts, causing the government to be gravely compromised in its most important projects, as by the doctrine of *préalable indemnité* it could only get possession after the indemnity had been finally fixed by the Court. The administration also complained that they enjoyed no protection against the exaggerated estimates of experts, who generally favored the individual at the expense of the government, particularly when the latter was represented in the enterprise by contractors, companies, *concessionaires*, who as speculators were regarded with little favor.

The needed reform was attempted by the law of 1833, which introduced our third or jury system of expropriation. By this law a general reform was effected, the law of 1810 abolished, and the whole procedure reorganized in cases of ordinary expropriation,—a special law which had been passed in 1831 to enable the administration to obviate the delays of the law of 1810, and take temporary possession in cases of urgency, as for fortifications, being still retained for like cases. The principal changes effected by the system of 1833 were—1st and chiefly, the substitution of a special jury of twelve instead of the civil tribunals and experts, to fix the indemnity; and 2nd, the transfer from the executive to the legislative body, of the power to declare the public utility and authorize the undertaking in case of *les grands travaux*, which thereafter had to be authorized by a law, while less important works could be authorized by a Royal ordinance, in both cases preceded by an administrative *enquête*. The parcels to be expropriated were designated by the Prefect, and expropriation was pronounced by the civil tribunals as before, under the law of 1810.

But the law of 1833 was also found in practice defective, and the amendments called for gave rise to the law of 1841, which, with the senatus-consultum of 25th December, 1852, and some other accessory Acts,* is the Code of Expropriation, as it now exists in France. It is therefore to this existing system, under the law of 1841, that our attention will be chiefly directed, as upon it also are written nearly all the modern French works we possess on the subject.

The general nature of the Code or law of 1841 may be known by saying; That it preserved of the law of 1810: (1) the principle of expropriation by authority of justice, the first Art. declaring l'expropriation pour cause d'utilité publique s'opère par autorité de justice: (2) the power of the Courts to decide whether the declatation of *l'utilité publique* and the other administrative preliminaries had been in accordance with the formalities prescribed by the law: (3) the administration commission of preliminary enquiry charged to hear and receive the objections of parties interested: That it borrowed from the law of 1833: (1) the provision transferring from the executive to the legislative body the power to authorize the undertaking, *pour les grands travaux*: † and (2) the fixing of the indemnity by a special jury: and from the special law of 1831 it borrowed the provisions relative to cases of urgency, as for fortifications.

The law of 1841 also made additions to and simplified the law and procedure, so that it may be said to be, as already stated, a combination of the best features of all its predecessors, with the fruits of experience superadded.

NORMAN W. TRENHOLME.

Montreal, 16th April, 1872.

(To be continued.)

* For a full account of these, see De Lalleau, preliminary chapter.

† By the *Sctm* of 25th December, 1852, and from that date, all public works were required to be authorized by a decree of the Emperor.

LA LÉGISLATION PROVINCIALE DE 1871.

Les statuts de la dernière session de la Législature de Québec, en force depuis le 23 Décembre 1871, viennent d'être publiés, et tout praticien doit en prendre connaissance à peine de s'exposer à de durs mécomptes. Le sommaire de cette nouvelle législation suffira pour donner une idée de son importance.

Licences de mariage.

Jusqu'à l'Acte Fédéral de 1867, les licences de mariage en usage dans les églises protestantes étaient accordées par le gouverneur de la Province du Canada, en vertu d'une prétendue prérogative royale dont il est difficile de tracer l'origine. La Couronne, en effet, ne jouit pas de la suprématie ecclésiastique dans les colonies. Depuis 1867, le gouvernement du Canada s'est arrogé l'exercice de cette prérogative pour la raison que les questions de mariage et de divorce sont du domaine exclusif du parlement fédéral. Mais on perdait de vue que les licences de mariage ont rapport à la célébration du mariage, qui, par le même Acte de 1867, est exclusivement de la juridiction des législatures provinciales. Aussi les gouvernements locaux n'ont pas tardé à revendiquer ce privilège qui leur appartient de droit ; de là la passation du chapitre 3 des statuts de la dernière session. Sans doute cette loi n'a pas révoqué le droit du gouvernement d'Ottawa; mais elle est de nature à le faire tomber en défaveur et en désuétude, s'il existe. La licence du gouvernement général n'offre aucune protection à l'officiant; ce dernier est toujours passible des pénalités imposées par la loi. Au contraire, le ministre muni d'une licence du Lieutenant-Gouverneur, émanée en vertu du chapitre 3 des statuts de Québec 1871, est exonéré de tout blâme, quelqu'empêchement qui puisse exister, à moins qu'il n'y ait mauvaise foi de sa part. La justice de cette règle n'est guère contestable, puisque les églises protestantes n'ont aucun contrôle sur les dispenses des bans. Mais la législature locale a-t-elle, en vertu de l'Acte Fédéral, le pouvoir de législater de la sorte et par là même de toucher indirectement aux lois sur les empêchements de mariage ? Peut-elle ordonner, par exemple, qu'un ministre qui marie un mineur ne sera plus assujetti aux

amendes et aux poursuites du droit commun? A tout événement, il est regrettable que la législature, en introduisant ce nouveau système, n'ait pas donné au public des garanties contre les fraudes ou même la simple négligence de l'officier des licences de mariage. Elle aurait dû donner contre lui l'action pénale et celle en dommages et intérêts décernées par notre Code contre le ministre même de bonne foi. A l'avenir, il parait que les parties lésées devront s'adresser à son Excellence *by petition of right.*

Ajoutons que la validité du mariage n'est aucunement touchée par cette législation; elle reste soumise aux articles du Code.

Promulgation des lois.

D'après l'article 2 du Code Civil et les statuts de la province, les lois sont exécutoires du jour de leur sanction. Les inconvénients pratiques de ce principe d'ailleurs faux étaient évidents; toujours les statuts n'étaient publiés que plusieurs jours et même plus d'un mois après avoir été sanctionnés; et souvent les droits des parties subissaient des atteintes qu'elles ne pouvaient prévoir. Le statut de la dernière session, c., 4, remet en force la règle de l'ancien et du nouveau droit français; les lois ne sont exécutoires que le soixantième jour après leur sanction, c'est-à-dire en fait après leur publication. Cette règle ne s'applique pas néanmoins aux statuts de la dernière session.

Bureaux de consignations.

Le défaut de législation sur les dépôts judiciaires fut aussi la cause des abus les plus déplorables. Des shérifs et greffiers, défalcataires et insolvables, ont laissé des plaideurs dans l'impossibilité de toucher le montant des consignations faites en leur faveur. Par le chapitre 5, les dépôts excédant $100 doivent être faits dans le trésor de l'Etat. Un certificat de dépôt est livré par le Trésorier de la Province ou ses agents et produit dans la cause. Sur signification du jugement, par exemple, d'un ordre de distribution, s'il n'y a pas d'opposition, ni d'appel, le Trésorier donne à l'officier de la cour un mandat payable à l'ordre de la partie colloquée.

Il est regrettable que ces sages dispositions ne s'addressent pas également aux syndics des faillites.

Jusqu'à ce jour, il n'y avait pas de bureau de consignation pour les matières extra-judiciaires; le débiteur n'était tenu que de faire des offres *à bourse déliée et deniers découverts*; et, si le

créancier les refusait, le débiteur reprenait son argent, dont il profitait en attendant le temps de répéter ses offres en justice. Lorsque le créancier était inconnu ou absent, il était impossible au débiteur de se libérer. Les sections 8 et 9 du même acte ont remédié à cet état de choses.

Les deniers injustement refusés par un créancier ou dûs à une personne ne résidant pas dans le lieu où la dette est payable, peuvent être consignés au Bureau du Trésorier du District, et dès ce jour les intérêts cessent de courir, sans autre formalité.

On sait aussi qu'il arrive qu'un débiteur ne sait à qui payer, lorsque plusieurs réclamations se présentent. Jusqu'ici il lui fallait de toute nécessité faire ses offres au vrai créancier. Maintenant, l'embarras du choix n'existe plus; il lui suffit de consigner la somme dûe au Bureau du Trésorier, sans même en donner avis aux parties intéressées, s.s., 10-11.

Dans le cas de dépôt volontaire d'une créance hypothécaire, l'enrégistrement d'un double du certificat de dépôt a le même effet que l'inscription de la quittance du créancier, s. 12.

Tous les dépôts peuvent être retirés à l'exception de ceux qui ont été inscrits sur les livres du Bureau d'Enrégistrement, ou qui ont été consignés en justice, s.s., 11 et 12.

Sous l'ancien système, les shérifs et greffiers profitaient des intérêts que produisaient les vastes capitaux qu'ils avaient en main; on a vu des shérifs s'enrichir à même les consignations judiciaires; la nouvelle loi rend ces sortes de spéculations impraticables et oblige le Trésorier Provincial d'allouer sur les dépôts d'un mois au plus tout taux d'intérêt que les dépenses des bureaux de consignations permettront, s. 19.

Les dépôts sont sujets à entièrcement sur saisie-arrêt avant ou après jugement, en observant les formalités prescrites par la section 23.

Signification de transports, actions, etc.

L'Acte, c. 6, a aussi rapport à l'administration de la justice; en vertu d'une disposition particulière, il est devenu en force le 2 Avril courant, jour fixé par une proclamation du Lieutenant-Gouverneur.* Les sections 1 et 2, amendant les articles 64 et 68 du Code de Procédure Civile, indiquent le mode d'assigner en justice les compagnies de chemin de fer étrangères et les débiteurs absents.

* Cette proclamation fixe le 1er d'avril; mais ce jour se trouve le lundi de Pâques qui est un jour férié.

L'article 1571 du Code Civil déclare que le transport des créances et droits d'action ne vaut à l'encontre des tiers, à moins qu'il ne soit signifié ou accepté; mais il n'avait pas prévu le cas où le débiteur n'a pas ou n'a jamais eu de domicile dans le pays. Les sections 3 et 4 ordonnent que la signification pourra alors s'en faire par deux annonces dans deux papiers-nouvelles, ou encore par la règle de cour qui appelle un défendeur absent conformément à l'article 68 du Code de Procédure.

Dans les ventes de dettes dûes par plusieurs débiteurs, il suffit de les annoncer deux fois dans deux journaux et de produire copie du transport à certains endroits indiqués dans la section 5; l'observation de ces formalités équivaut à une signification réelle sur chaque débiteur.

Cautionnement pour les frais.

Dans le cas où un demandeur est tenu de donner cautionnement pour les frais, le délai fixé par le Code de Procédure civile pour la production des exceptions préliminaires ou au fonds, ne commence à courir que du jour de l'avis du cautionnement.

Enquêtes.

Le système d'enquête de l'ancien droit français est encore suivi dans le pays dans les causes tant commerciales que civiles. En France, la connaissance des affaires commerciales appartenait et appartient encore à un tribunal de commerce. Plusieurs fois le Barreau de cette Province, celui de Montréal en particulier, demanda des réformes sous ce rapport. Des amendements furent introduits en 1870; mais loin de remédier au mal, ils ont accru la confusion et multiplié l'encombrement. Les affaires toujours croissantes rendaient nécessaires, à Montréal du moins, l'abolition totale des jours d'enquête ou d'audition au mérite de la Cour Supérieure, et l'établissement de deux divisions d'enquête et mérite à la fois, constamment ouvertes au public, avec une cour de pratique pour y vider les questions de forme, de procédure et de droit. Néanmoins la législation de 1871 a donné au système des enquêtes plus d'empire que jamais. A Montréal, désormais, les seize premiers jours de neuf mois de l'année, les premiers neuf jours d'un autre mois (juillet) et les seize derniers jours de janvier sont des jours d'enquête obligatoires. Août est le seul mois où les avocats, plaideurs et témoins pourront respirer ailleurs que dans l'atmosphère de la Cour d'Enquête, sect. 8.

Sténographe.

Les sections 10 et 11 permettent dans toute cause l'emploi d'un sténographe, du consentement des parties. Dans les procès par jury et les causes d'enquête et mérite à la fois, il suffit qu'une demande en soit faite par écrit par l'une des parties.

Témoignage du mari séparé de biens.

La clause 9 autorise le tribunal de permettre au mari, procureur de sa femme séparée de biens, de déposer pour ou contre sa femme, à l'égard de ce qui a rapport à son administration. Son témoignage est soumis aux mêmes règles que celui de la femme ou partie même.

Procès par jury.

Les motions pour nouveau procès ou *nonobstante verdicto* doivent être faites en Cour de Révision le ou avant le deuxième jour du plus prochain terme, pourvu qu'il se soit écoulé au moins dix jours entre le jour du verdict et celui du terme de la cour, sect. 13.

Tierce-opposition.

La tierce-opposition doit, à peine de nullité, être accompagnée d'un affidavit, sect. 14.

Procès-verbal de saisie.

Le procès-verbal de saisie doit contenir la signature du débiteur, ou son refus ou incapacité de le faire, ou le fait de son absence, suivant le cas, s. 15.

La section 16 mérite une attention particulière. Dans le cas où un débiteur n'a plus de domicile dans le district où le jugement a été rendu, il n'est pas nécessaire de lui signifier le double du procès-verbal de saisie ; il suffit de le déposer au greffe. Art. 570 du Code de Procédure.

Lorsqu'une fois une demande de paiement a été faite en vertu d'un bref d'exécution, il n'est pas nécessaire d'en faire une seconde sur une autre saisie exécution, quand bien même elle serait pratiquée dans un autre district, s. 26.

Saisie-arrêt.

Les tribunaux nièrent à un créancier le droit d'avoir recours à la saisie-arrêt avant jugement, lorsque le défendeur était *simplement sur le point de receler ses biens.* C'était indubitablement le droit

ancien, qui, par une évidente omission des codificateurs, ne fut pas introduit dans l'art. 834 du Code. La clause 18 a corrigé cette erreur, en permettant la saisie-arrêt, lorsque le *débiteur recèle, ou est sur le point de receler ses biens, avec l'intention de frauder ses créanciers ou le demandeur*, au lieu " de frauder ses créanciers et nommément le demandeur," comme le veut l'article 834.

Ratification de titre.

L'avis en ratification de titre, requis par les articles 950 et 951 du Code de Procédure civile, doit être lu à la porte l'Eglise le *troisième* ou *quatrième* dimanche qui précède le jour où la demande en ratification doit être faite.

Le requérant en ratification n'est pas tenu de déposer au greffe le montant des hypothèques dont l'immeuble est grevé en sa faveur ; il lui suffit de donner caution au protonotaire, comme dans le cas d'un décrêt par le shérif, s. 20.

Brefs de prérogative.

On se rappelle la discussion qui eut lieu dans l'affaire Guibord sur la forme des brefs de prérogative. La section 21 déclare que la formule des brefs de *mandamus, prohibition, quo warranto*, est la même que celle des brefs ordinaires d'assignation. De plus il suffit, dans tous les cas, de produire un seul affidavit de cir constances, s. 22.

Cour de Circuit.

A compter du 2 d'avril courant, la Cour de Circuit appelable a cessé d'exister dans les cités de Montréal et Québec. Les demandes qui s'y portaient, comme toutes les causes pendantes, sont transportées à la Cour Supérieure.

La Cour de Circuit siégera à Montréal tous les jours (à moins d'un ajournement spécial) aussitôt que le nouveau juge sera nommé, s. 27.

Licitation.

Par le chapitre 8, les ventes des biens des mineurs et autres incapables, d'une valeur de $400 ou moins, sont soumises à des règles particulières. Elles ont lieu par encan sur l'ordre d'un juge, à la requête du tuteur, sans convocation du conseil de famille, ni de rapport d'experts, après deux annonces dans la gazette officielle et deux papiers-nouvelles. Les annonces ne sont pas même nécessaires, si le juge ordonne que la vente sera faite à l'amiable pour un prix fait.

Le statut ne déclare pas si ces pouvoirs peuvent être exercés dans les districts ruraux par le protonotaire, en l'absence du juge, ni s'il y a appel conformément aux articles 1339 et 1340 du Code de Procédure.

Code Municipal.

Le chapitre 8 est consacré aux matières municipales. Personne n'aurait pu prévoir qu'un Code de 1087 articles, sans compter d'innombrables paragraphes, couvrant 102 pages octavo * n'aurait pu résister aux attraits de la nouveauté au moins durant une session parlementaire. Cependant, après une enfance d'un mois à peine,† le Code Municipal, dont la naissance avait couté plusieurs années d'un travail constant, si non douloureux, subissait pas moins de vingt-cinq amendements.

Un coup d'œil général sur ces nouveaux venus ne serait pas sans intérêt. Pour y arriver, il faudrait d'abord embrasser l'ensemble du Code même. A quiconque possède un peu d'expérience des matières municipales, cette tâche peut paraître si non facile, du moins non insurmontable. Il faut pourtant avouer que l'étude du Code exige plus qu'une somme ordinaire de la connaissance du droit et de la pratique des affaires. Avec la meilleure volonté du monde, il est impossible de saisir les principes fondamentaux de l'ouvrage. En vain l'on y cherche les libertés du peuple ; partout on n'y trouve que les prérogatives du Lieutenant-Gouverneur ou la discrétion du tribunal, c'est-à-dire la volonté arbitraire.

L'obscurité du langage et des contradictions nombreuses, dont les deux articles qui suivent sont des échantillons,‡ font désespé-

* Le Code Civil a 2615 articles, 357 pages, et le Code de Procédure 1361 et 191 pages, même format.

† Le Code devint en force le 2 novembre, 1871.

‡ Art. 705, " Néanmoins toute taxe, contribution, pénalité ou obligation imposée par un règlement sujet à être cassé et échue avant la cassation du réglement, est exigible nonobstant la cassation de tel réglement, si la requête sur laquelle a été prononcée la cassation n'a pas été présentée à la cour dans les trois mois après l'entrée en vigueur du réglement.

" Tout emprunt contracté et tout bon émis en vertu d'un réglement sujet à cassation sont également valables, et les taxes imposées pour payer cet emprunt ou ces bons, sont dues et exigibles, *si la requête en cassation a été présentée à la cour après les trois mois qui suivent la mise en vigueur du réglement.*

Art. 708 :—" Le droit de demander la cassation d'un réglement se PRESCRIT PAR TROIS MOIS À COMPTER DE L'ENTRÉE EN FORCE DE TEL RÉGLEMENT."

rer les plus érudits de jamais connaître l'intention du législateur. Et pourtant ce corps de lois est destiné à la classe agricole. Aussi faut-il s'étonner si après une expérience de quelques mois à peine, il a produit une couple de douzaines de contestations devant la Cour de Circuit, c'est-à-dire la plus haute cour municipale. *Tot capita quod sensus.*

Avant la prochaine lune parlementaire, le pays entier ne pourra plus longtemps se refuser le luxe des magistrats de district, qui par le Code sont les juges municipaux par excellence.

Renouvellement des hypothèques.

Le Code Civil, articles 2166-2172, décrète que le renouvellement des hypothèques et droits réels, comme les servitudes, doit se faire dans les dix-huit mois du jour indiqué par la proclamation du Lieutenant-Gouverneur, mais un statut de la dernière session, c. 16, s. 4, fixe ce délai à deux ans "à dater du jour de telles proclamations," ou suivant la version anglaise, "from the date of such proclamations." Ainsi dorénavant, le Lieutenant-Gouverneur n'a d'autre contrôle sur la mise en force des cadastres que celui de lancer une proclamation à cet effet; le renouvellement dès lors ne dépend plus du jour qu'il pourrait plaire à Son Excellence de fixer, mais de la date de la proclamation, c'est-à-dire du jour de sa publication et non du jour de sa signature; car l'ordre de Son Excellence ne devient une proclamation que par sa publication dans la gazette officielle. Il est vrai que depuis ce dernier statut, deux nouvelles divisions, le quartier St. Jacques et le quartier Ste. Marie, à Montréal, ont été proclamées soumises aux lois cadastrales à compter, dans le premier cas du 1er Mai, et dans le second du 2 Mai prochain. Mais, en cela, ces proclamations violent le statut de 1871 ; le public ne doit regarder que la date de ces proclamations et le régistrateur est tenu de recevoir les renouvellements, sans tenir compte du jour fixé par la proclamation, qui doit être considéré comme non avenu.

Le statut, bien entendu, ne s'applique pas aux comtés de Chambly et de Laprairie, ni au quartier Ste. Anne, où l'expiration des délais prescrits a donné aux parties des droits acquis. Il se rapporte aux divisions suivantes et à toutes celles qui seront proclamées à l'avenir.

Quartiers St. Laurent, St. Antoine, Centre et Ouest, proclamés le 25 juin 1870, délai expirant le 25 juin 1872.

Quartier St. Louis proclamé le 2 août 1871, délai expirant le 2 août 1873.

Quartier Ste. Marie, proclamé le 2 mars 1872, délai expirant le 2 mars 1874.

Le quartier St. Jacques fut proclamé une première fois le 24 janvier et une deuxième fois le 24 février 1872. Dans le premier cas, le jour fixé pour la mise en force du cadastre était le 1er mars et dans le second le 1er mai. Comme nous l'avons déjà dit, la fixation de ces délais est arbitraire et illégale. La seconde proclamation ne fait pas même allusion à la première ; mais sans doute que l'intention du Conseil Exécutif était qu'elle fut une révocation de la première. Quoiqu'il en soit, la seconde proclamation est d'une nullité radicale ; car elle est postérieure au nouveau statut, et partant, la proclamation du 27 janvier est un droit acquis au public.

Il faut donc fixer la date de la proclamation cadastrale pour le quartier St. Jacques au 27 janvier 1872, délai expirant le 27 janvier 1874.

D. GIROUARD.

Montréal, 8 Avril 1872.

SOMMAIRE DES DÉCISIONS RÉCENTES.

CONSEIL PRIVÉ.

30 janvier 1872.

Wardle et *Bethune*.—Jugé sur l'autorité de la cause de Brown *v.* Laurie, que même avant le Code les architectes et entrepreneurs répondaient *des vices du sol*, Sir James Colville, Sir Joseph Napier, Sir John Stuart, Sir Montague Smith.

3 février 1872.

Mignault et *Malo*.—Jugé, 1o. qu'un testament verbal et nuncupatif des meubles seulement, fait avant le Code, est valide, en vertu du

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* L'apparition de la *Revue Critique* fut saluée par la *Revue Légale* de Sorel par l'unique observation qu'elle était "destinée à faire un grand bien." La *Revue Légale* avait évidemment raison ; car elle n'a cessé depuis de s'alimenter dans nos sommaires de décisions récentes. Pour ne signaler qu'un exemple, elle trouvait moyen d'introduire dans les rapports judiciaires d'un de ses derniers bulletins, les sommaires de décisions publiés dans nos livraisons d'octobre et de janvier derniers, en tout 29 pages, en se contentant de nous donner crédit pour six lignes. Nos sommaires de décisions sont soumis à l'approbation des juges avant d'être livrés à la publicité, et cette approbation leur donne une valeur dont nous réclamons tout l'avantage. Nous informons donc la *Revue Légale* que dorénavant la *Revue Critique* sera publiée avec privilége du droit d'auteur.—NOTE DE LA RÉDACTION.

Statut des Fraudes; 2o. qu'un testament commencé dans la forme notariée, mais non terminé, (le testateur étant mort sur son fauteuil pendant que le notaire couchait par écrit ses dernières volontés) peut valoir comme fait dans une autre forme, s'il en a les qualités requises. Sir James Colville, Sir Robert P. Collier, Sir Montague Smith.

COUR D'APPEL.

Montréal 22 janvier 1872.

L'Hon. P. J. O. Chauveau & al. et *les Commissaires d'Ecoles de la paroisse de St. François de Salles.*—Un ordre ayant été donné par le ministre de l'Instruction Publique, contre les commissaires d'Ecoles de la dite paroisse, et ces derniers ayant refusé d'y obéir, un bref de *mandamus* fut émané contre les commissaires à la requête de Mr. Chauveau et d'un contribuable conjointement. Jugé que le Ministre de l'Instruction Publique doit être mis hors de cour sans frais; mais que le bref de *mandamus* doit être maintenu au profit du co-poursuivant. Duval, J. C Caron, Drummond et Monk, JJ. Contrà, Badgley J., qui était d'opinion que le *mandamus* était indivisible et que, partant, le rejet de Mr. Chauveau du dossier rendait le bref nul et non avenu.

Tranchemontagne et *Martin.*—Jugé que la cession volontaire, faite sous la loi de faillite de 1869, par un débiteur insolvable, après l'expiration des cinq jours, savoir le jour même de l'émission du bref de compulsoire, qui ne fut signifié et exécuté que le lendemain, est nulle. La liquidation forcée prévaudra alors sur la liquidation volontaire demandée par la cession. Duval J.C., Caron et Drummond JJ.; contrà Badgley et Monk JJ.

Graham et *Côté.*—Jugé qu'un voyageur ou engagé dans les chantiers à préparer et descendre les radeaux de bois quarré n'a pas de saisie conservatoire pour sureté du paiement de ses gages, Duval J.C. Caron Drummond et Badgley JJ. Mr. le Juge Monk croit que, si l'ouvrier eût complété le voyage pourlequel il avait été engagé, il aurait peut-être eu droit à cette saisie.

Montréal 26 janvier 1872.

La Reine vs. Morrison et al.—Cas réservé. Mr. le Curé Morrison ayant, sur l'avis de son avocat donné un mois auparavant, éconduit l'huissier porteur d'un bref d'éxécution contre les meubles, valide à sa face, mais obtenu par suite du défaut de ce même huissier de faire rapport à la cour d'une opposition à un premier bref, fut accusé d'assaut conjointement avec son conseil. Un verdict fut rendu de consentement, mais des questions de droit furent réservées par le juge pour la décision de la cour d'appel. Jugé: 1o, qu'il suffit que le bref soit valide à sa face, et que la cour ne doit pas considérer les faits extrinsèques qui peuvent le rendre nul, *inasmuch*, dit le jugement, *as the said writ of execution, whether voidable or not, was not void, but on the contrary correct on the face of it*; 2o, que l'avocat qui de bonne foi con-

seille son client, ne peut être incriminé comme principal, ni autrement, pour le conseil qu'il a donné. Verdict maintenu contre le client mais annulé contre l'avocat. Caron, Drummond, Badgley et Monk JJ.

Montréal 14 mars 1872.

La Reine vs. Coote.—Cas réservé. Jugé : 1o, que la déposition du prisonier donnée librement devant les prévôts d'incendie ne peut faire preuve contre lui subséquemment sur une accusation pour incendiat. Duval J.C. ; Caron et Drummond J.J. Contrà Badgley J. Mr. le Juge Monk diffère aussi, mais sur un point de procédure.

Ex parte Dixon pour Bref *d'Habeas Corpus.*—Dixon fut incarcéré sous soupçon d'incendiat par les prévôts d'incendie. Il demandait son élargissement pour la raison que le statut provincial, créant les prévôts d'incendie, était contraire à la Charte de 1867, en autant, disait-il qu'il touchait à la procédure criminelle, matière qui est du ressort exclusif du parlement d'Ottawa. Jugé : 1o, que le statut en question n'a aucun rapport avec la procédure criminelle ; 2o, que tout temoin assigné devant les prévôts d'incendie peut refuser de répondre à toute question qui peut l'incriminer ; 3o, que le pouvoir d'emprisonner le défendeur sous soupçon d'incendiat est exercé par les prévôts en leur qualité de magistrats établis par la législature locale, qui par l'acte fédéral a le droit de créer les tribunaux de jurisdiction criminelle. Mêmes juges à l'unanimité qui expriment en sus plus ou moins de doute sur le pouvoir des tribunaux de décider les questions constitutionnelles.

Montréal 18 mars 1872.

The Victoria Skating Rink et *Beaudry*—Jugé que le propriétaire de l'héritage est tenu du dommage causé par la pluie et la neige qui tombent du toit de ses batiments sur l'héritage voisin. Duval J.C., Caron, Drummond J.J. ; contrà Badgley et Monk J.J. qui étaient d'opinion que les conclusions de l'action (qui était à la fois négatoire et en dommages) auraient dû spécifier les ouvrages à faire pour empêcher la chute de la neige, et que d'ailleurs les allegations et les conclusions de la déclaration n'etaient pas suffisantes.

Prévost et *Pikle.*—Un billet donné par un tiers (dans l'espèce la mère du failli) à un créancier dans le but de consentir à la décharge du failli, est nul, faute de considération et aussi comme ayant été consenti contre les règles de morale et d'ordre public en matières de faillite. Caron, Drummond et Badgley JJ. ; diss. Monk J.

Colville et *The Building Society.*—le 23 mars 1842, Colville et autres vendirent un immeuble, par acte qui ne fut pas enrégistré. Plus tard, en 1848, cet acte fut récité au long dans un acte de déclaration de l'acheteur, dûment enrégistré, mais auquel les vendeurs n'étaient pas parties. Jugé que les vendeurs perdent leur privilège de bailleurs de fonds à l'encontre des créanciers hypothécaires qui ont enrégistré même après l'enrégistrement de la déclaration de 1848. Duval J.C., Caron et Drummond JJ. ; contrà Badgley et Monk JJ.

Fabrique de Verchèrres et *La Corporation de Verchères.*—Jugé que les actions autres que celles d'une nature conservatoire, intentées par une fabrique de paroisse, doivent préalablement être autorisées à une assemblée régulière des paroissiens, à peine de nullité. Duval J.C. Caron, Drummond et Badgley JJ.; contrà Monk, J.

Rooney vs. Lewis—Joseph vs Lewis.—Jugé, que dans le cas de violation des lois de douane par les officiers du port, v. g. de surcharge d'impôts, le recours de l'importateur est par action directe contre le collecteur ou celui qui le remplace. Per Badgley, Drummond et Monk J.J.; contrà, Duval J.C. et Caron J.

Myers vs. Lewis.—Jugé que dans le cas de violation des lois de douane par les officiers du port, v. g. de surcharge d'impôts, le recours de l'importateur n'est pas par action contre le collecteur ou celui qui le remplace, qui ne sont que des officiers de la Couronne, mais *by petition of right*. Per Duval J.C., Caron J., et Polette J. *ad hoc*; contrà, Drummond et Badgley JJ.

COUR DE RÉVISION.

Montréal, 30 janvier 1872.

Whyte ès qualité v. The Home Insurance Company.—Jugé que le transport d'une assurance, endossé sur la police, mais sans aliénation de la chose assurée ne donne pas au cessionnaire plus de droit qu'en avait l'assuré; comme ce dernier, il est soumis à toutes les conditions de la police et par conséquent n'a pas de recours contre la compagnie tant que l'assuré lui-même n'a pas prouvé sa perte conformément aux stipulation de la police, Mondelet, Berthelot et MacKay JJ.

Lainé et al v. l'Honorable H. J. Clarke.—Jugé: 1o, que la Province de Manitoba ne fait pas partie du Canada aux termes de l'article 797 du Code de Procédure et que partant un débiteur, qui laisse la province de Québec pour cette partie de la Puissance, ne peut, pour cette seule raison, réclamer d'être exempt d'arrestation en vertu d'un *capias ad respondendum*, Mondelet, Berthelot et Torrance, JJ.

In Re Solman et al et *Samuel*, requérant pour décharge, et *Robertson et al*, contestants.—Jugé que dans les contestations de décharge, c'est au failli à procéder le premier et à montrer qu'il a rempli les conditions prescrites par la loi de faillite, Mondelet, Berthelot et MacKay, JJ.

Carden v. Lennen.—Jugé qu'une admission dans un factum en Révision, (dans l'espèce un désistement) lie la partie qui la donne.

Worthen v. Holt.—Le député protonotaire ne peut autoriser l'émision d'un *capias ad respondendum.*

COUR SUPÉRIEURE.

Montréal, 30 janvier 1872.

Lacroix v. Delisle.—Jugé sur défense en droit, 1o, que la section 84 de l'Acte de l'Amérique du Nord 1867, qui a rapport aux lois électorales de la ci-devant Province du Canada, n'ayant pas fait mention des pénalités imposées par le chap. 6 des Statuts Refondus du Canada, contre les fonctionnaires qui votent aux élections parlementaires, ces pénalités n'existent pas sous le régime fédéral, suivant la maxime *expressio unius exclusio est alterius*, 2o, qu'à tout événement dans le cas d'élections provinciales, ces pénalités ne pourraient s'appliquer aux officiers de douane qui relèvent du Gouvernement Fédéral exclusivement; Beaudry J.

Le même jour, l'honorable juge Torrance dans une cause semblable de *Sery v. Delisle*, tout en ordonnant la *preuve avant de faire droit*, déclarait qu'il penchait plutôt pour l'opinion contraire à celle de l'honorable juge Beaudry.

29 février 1872.

Hudon v. Champagne.—Un billet daté et payable à Montréal, mais de fait consenti et signé à Sorel, fut poursuivi à Montréal. Le défendeur plaida ces faits par exception déclinatoire, sans l'affidavit requis par l'article 145 du Code de Procédure.—Jugé que, dans un tel cas l'affidavit n'est pas requis, MacKay J.

Thomas et al v. Villeneuve et *Laurin* opp. (C. C. app. No. 1372.) Le défendeur Villeneuve ayant fait cession * pendant que Thomas et autres procédaient à obtenir jugement contre lui, le Syndic Sauvageau vendit les biens mobiliers du failli à Laurin, qui les laissa en la possession du défendeur. Thomas, ayant obtenu jugement, les fit saisir. Opposition de la part de Laurin.—Jugé : 1o, que l'acte concernant la faillite de 1869, ne s'applique pas à ceux qui ont cessé de faire commerce avant la loi de 1864 ; 2o, que l'amendement de 1871, n'a pu avoir l'effet d'éteindre les droits acquis de Thomas en vertu de sa saisie exécution. Opposition déboutée, Torrance J.

Thomas ayant procédé au recolement de sa saisie, Villeneuve fit une nouvelle cession, cette fois sous l'acte de 1871, à John Whyte, qui demanda quil fut ordonné à l'huissier saisissant de lui remettre les effets saisis ou les deniers qui proviendraient de leur vente. Le 30 mars dernier, l'honorable juge Berthelot accorda la requête, son Honneur étant d'opinion ; 1o, que les lois de faillite sont surtout passées pour venir au secours des anciens commerçants ; 2o, que l'amendement de 1871 ne laissait d'ailleurs aucun doute sur ce point.

McGauvran v. Johnson et *Cushing*, T. S.—Un propriétaire passe marché avec un entrepreneur pour la construction de certains édifices pour un prix fixe, qui doit lui être payé à raison de 85 par cent suivant les progrès de l'ouvrage, et sur le certificat de l'archi-

* Voir Revue Critique, p. 108.

tecte. Jugé qu'en cas de déconfiture de l'entrepreneur, la propriétaire n'a pas de privilège, ni de droit de retention sur les matériaux, payés sur l'ordre de l'architecte, qui sont sur les lieux, mais qui n'ont pas encore été incorporés dans la bâtisse. Berthelot J.

Exparte Smith.—Jugé que l'acte de la Puissance qui permet l'examen d'un témoin en matières civiles, en vertu d une commission rogatoire émanée à l'étranger, est d'intérêt international, " international comity," et par conséquent de la jurisdiction du Parlement d'Ottawa. Torrance J.

ELECTIONS MUNICIPALES.

COUR DE CIRCUIT.

L'Assomption 26 janvier 1871.

Huneau v. *Magnan*, ou l'*élection de l'Epiphanie.*—Jugé: 1o. Que malgré les dispositions des articles 310, 311 et 349 du Code Municipal de la province de Québec, le président d'une élection, avant qu'il se soit écoulé une heure depuis l'ouverture de l'assemblée, a le droit de proclamer un candidat mis en nomination qui n'a pas d'opposant, et de procéder à la tenue du poll et à l'enrégistrement des voix des électeurs pour les autres condidats; 2o, Que certain nombre d'électeurs peuvent convenir entr'eux que l'on votera pay liste ou *ticket* et que les voix peuvent être *enrégistrées* pour six condidats quoique l'électeur n'ait voté que pour un *seul* condidat, savoir celui dont le nom était en tête du *tiket*. Beaudry, J.

Montréal, 31 janvier, 1872.

Brousseau v. *Brouillet*, No. 1, ou l'*élection des Tanneries.*—Jugé que la requête indiquée en l'article 349 du Code Municipal ne peut être présentée à la cour avant l'expiration des quinze jours qui suivent la confection du cautionnement, même du consentement des parties, l'article 350 étant d'ordre public ; que dans l'espèce la requête ayant été reçue, les parties devront procéder au mérite ; 2o, que des intervenants dans une contestation d'élection ne sont pas obligés de fournir le cautionnement que doivent donner les requêrants; 3o, que l'on peut attaquer le procès verbal du président de l'assemblée électorale sans incription de faux. Beaudry J.

Montréal, 3 février, 1872.

Méme cause.—Jugé au mérite que l'omission de l'avis public requis par l'article 294 du Code empêche la tenue de l'assemblée, et cela même dans le cas où cette omission aurait été commise à dessein par le secrétaire-trésorier, dans le but d'avoir des conseillers nommés par le Lieutenant-Gouverneur. Le fait que le jour et l'heure de l'assemblée électorale était notoire dans la municipalité et que électeurs se sont constitués en assemblée, au lieu, jour et heure voulus par le Code, en plus grand nombre que les années précédentes, et qu'il n'y a eu aucune

injustice réelle, n'a pas l'effet de rendre valide la tenue de la dite assemblée, qui doit être considérée comme n'ayant pas été tenue. Le défaut de la tenue de l'assemblée, " suivant que prescrit par la loi," justifie le gouvernement de nommer les conseillers. Beaudry J.

Ste. Scholastique 16 février 1872.

Globensky v. Champagne, ou l'*élection de St. Eustache*.—Jugé : Qu'aux termes de l'article 296 du Code Municipal de la province de Québec, l'élection des conseillers municipaux ne peut être présidée par un des membres du conseil *sortant de charge* à cette époque, qu'une élection ainsi présidée doit être déclarée nulle, et qu'une nouvelle élection doit être ordonnée aux termes de l'article 361. Berthelot, Juge.

Montréal, 26 février 1872.

Tremblay v. *Roy*, No. 4, ou l'*élection de Boucherville*.—Jugé : 1o, qu'il n'est pas nécessaire de décrire aucune propriété foncière dans le cautionnement d'une seule personne ; 2o, que même dans le cas d'irrégularité, la cour permettra la production d'un nouveau cautionnement ; 3o, que l'on peut se plaindre de la nullité d'une élection en présentant autant de requêtes qu'il y a de conseillers dont l'élection est contestée, MacKay J.

Sherbrooke, 5 février 1872.

Lawford v. *Robertson*, ou *l'élection de Sherbrooke*.—Jugé que l'on peut, par une seule et même requête et par un seul cautionnement, et au nom de cinq électeurs seulement, contester l'élection de plusieurs conseillers, même dans le cas où les moyens de contestation ne sont pas communs à tous les défendeurs, Ramsay J.

Le lendemain, le même juge décidait sur défense en droit ; 1o que le *moteur* et le *secondeur* doivent être électeurs et par conséquent doivent avoir payé leurs taxes, à peine de nullité de la nomination et de l'élection ; 2o, que dans le cas de la tenue d'un *poll*, il n'est pas nécessaire de s'objecter en aucune manière au vote offert, pour pouvoir ensuite se prévaloir de son illégalité dans une contestation d'élection.

Montréal, 5 mars 1872.

Legault v. *Paiement*, No. 2, ou l'*élection de la paroisse Ste. Geneviève*. —Jugé : 1o, que le choix d'un président fait à l'unanimité par l'assemblée d'élection, nonobstant la présence du secrétaire-trésorier, est valide et régulier, la loi présumant alors un acquiescement ; 2o, que l'on peut discuter à cette assemblée toute matière municipale que les électeurs jugent à propos ; 3o, qu'il n'est pas nécessaire de proposer les candidats séparément ; 4o, que l'assemblée peut être présidée par une personne qui n'est pas électeur ; 5o, que les candidats, pour être validement élus, doivent être d'abord mis en nomination, et après un intervalle de temps raisonnable, proclamés par le président, en lisant hautement les noms de chaque candidat dans chaque cas ; 6o, que le président est tenu de mettre en nomination tous les candidats qui sont proposés verbale-

ment ou par écrit par deux électeurs ; 7o, que dans l'espèce l'élection est nulle, vu que les noms des sept conseillers n'ont été lus qu'une seule fois, "une ou deux minutes" avant onze heures, et qu'avant la fin de cette lecture, ou dans tous les cas avant la fin de la deuxième, s'il y a eu véritablement deux lectures, les électeurs proposèrent d'autres candidats en amendement, proposition qui fut rejetée par le président comme venant trop tard ; 8o, que l'ancienne doctrine, que la preuve affirmative l'emporte sur celle qui est négative, est fausse ; que cela dépend des circonstances qui sont laissées à l'appréciation du juge, MacKay J.

Montréal, 6 mars 1872.

Boileau v. *Proulx*, ou l'*élection du village de Ste. Geneviève*.—Jugé : 1o, que la mise en nomination de candidats par deux électeurs, qui ne donnent pas leurs noms, ni prénoms, mais qui sont notoirement connus comme tels, (dans l'espèce ils étaient le curé et le membre de la Chambre des Communes pour le comté, résidant dans la municipalité depuis un grand nombre d'années) doit être reçue par le président ; 2o, que c'est au président à demander les noms et prénoms du moteur et du secondeur ; 3o, que les formalités prescrites par le Code non à peine de nullité sont, par l'article 16, laissées à la discrétion du juge, qui doit les exiger suivant qu'il y a injustice ou non pour les parties, MacKay J.

Dans la même cause, le même juge décida le 4 mars qu'il n'est pas nécessaire de s'inscrire en faux contre le procès verbal de l'assemblée électorale.

Montréal, 12 mars 1872.

Loiseau v. *Lacaille*, No. 6, ou l'*élection de Boucherville*.—Jugé : 1o, que le seul fait qu'un conseiller a laissé son domicile ou sa place d'affaires dans la municipalité rend sa place vacante ; 2o, que cette place est alors tellement vacante qu'il n'a plus le droit de siéger à aucune session du conseil ; 3o, que partant un règlement divisant la municipalité en quartiers électoraux, adopté par quatre conseillers, dont l'un avait ainsi cessé de faire partie du conseil, est d'une nullité absolue ; 4o, que l'article 120 du Code n'a pour but que de protéger les droits des tiers contre le conseil dans le cas où par inadvertance un vote illégal aurait été admis ; 5o, que la présence d'un conseiller à une assemblée du conseil couvre le défaut d'avis ; 6o, que le secrétaire-trésorier ne tient sa charge que sous le bon plaisir du conseil ; 7o, que les rôles d'évaluation de 1870 et 1871 étant hors du contrôle du conseil, l'élection a été validement faite sur le rôle d'évaluation de 1869 ; 8o, et qu'enfin dans l'espèce, ce dernier rôle n'a causé aucun grief, l'élection ne pouvant avoir d'autre résultat même avec le rôle de 1870 ou celui de 1871. MacKay J.*

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* Dans le plus grand nombre de ces causes, la condamnation aux frais fut comme dans une cause de $50 à $100.

COURT OF VICE-ADMIRALTY.

Quebec, 13th Decr. 1871.

"*The Lorne.*"—The Court has jurisdiction in cases of damages done by a steamer to a schooner in the St. Lawrence, opposite or near Varennes, district of Montreal. Black J.

COURT OF REVIEW.

5th Feb. 1872.

In Re Nolan, insolvent, & Wurtèle, petitioner.—Upon petition by the assignee to imprison the insolvent for retaining certain moneys, the latter moved for a Com. Rog., which was refused by the judge before whom the motion was made. On this he inscribed in review under sec. 83. Inscription discharged. Meredith C.J., Stuart and Taschereau JJ.

Lavigne vs. Dion.—Held (Stuart and Taschereau JJ.; Meredith C.J. contrà): That the powers given to the Commissioner of Crown Lands to annul a location ticket under 23 Vic. c. 2, sec. 20, are judicial, and before exercising such powers some proceedings must be had to establish contradictorily the default of the occupant under such ticket.

(Meredith C.J. and Stuart J.; Taschereau J. contrà): That this power of cancelling location tickets is vested in the Commissioner alone, and not in his deputy or assistant.

SUPERIOR COURT.

Langevin vs. Galarneau & ux.—A married woman may be sued with her husband pending the community for a debt contracted by the husband and wife jointly, and judgment obtained against her thereon. Taschereau J.

The City Bank vs. The Montreal Bank.—Motion to the end that the defendants do file a draft or copy of their peremptory exception (which had been lost), or a plea to the same effect, and in default that the plaintiff be permitted to proceed to trial and judgment on the issues raised and perfected on the general issue and the statement of facts; granted. Stuart J.

27th Feb. 1872.

Bélanger vs. Balfour.—Bail may be put in by leave of the Court under Art. 824 C. P. C. even after judgment. Meredith C.J.

Breton vs. The Grand Trunk.—In an action for damages for the loss of a trunk, in which action the value of the time lost by plaintiff in making inquiries thereafter was also claimed: Held that the value of the property lost was the measure of the damages. Meredith C.J.

7th March, 1872.

Partridge vs. McLeod.—In an action on a promissory note payable at a particular place therein mentioned, presentment there must be alleged. Plaintiff allowed to amend. Taschereau J.

Burroughs vs. Bourget.—When a law issue is raised in a case by demurrer, the case must be heard thereon before it can be inscribed at enquête. Taschereau J.

Mantha vs. Coghlan & Fraser oppt.—When the affidavit produced with an opposition afin d'annuler is not sworn to by the opposant, the deponent must state therein that he is duly authorised in that behalf. Opposant allowed to amend affidavit. Taschereau J.

12th March, 1872.

Lebel vs. O'Brien.—In an affidavit for capias, the plaintiff stated the defendant was indebted to him in the sum of £15 "pour effets d'épicerie vendus et livres à Quebec," and gave no other statement as to the indebtedness. The reasons given for his belief that the defendant was about to leave the country, was certain information he had received, but the names of his informants were not given. Held that the affidavit was insufficient on both these points, and capias quashed. Taschereau J.

COURT OF QUEEN'S BENCH.

8th March, 1872.

Kerr vs. Regina.—Reserved case. In an indictment for wounding with intent to murder, the offence must be charged to have been committed by the prisoner wilfully, maliciously, and of his malice aforethought, and judgment will be arrested when indictment defective in this respect. Duval C.J., Badgley and Monk JJ.; diss. Caron and Drummond JJ.

Talbot vs. Blanchet.—In action for the recovery of property lost by the plaintiff and found by the defendant, the only proof of the finding was the admission of the defendant; held, that verbal evidence thereof could be adduced without a "commencement de preuve par écrit." Drummond & Monk JJ. diss.

RECENT DECISIONS IN THE PROVINCE OF ONTARIO.

Since the confederation of the Provinces there have been but two decisions in Ontario upon the provisions of the "British North America Act, 1867."

One decision was of an important character, by the Court of Queen's Bench, in relation to the constitutionality of the Statutes of Ontario, 32 Vict. c. 32, respecting the regulation of shop and tavern licenses. A complaint was made under the local act by the defendant against one George Lindsay, for selling ale by retail without license, which the defendant compromised for a small sum. The chief constable of Toronto proceeded against Boardman for compounding this offence, and secured his conviction. Thereupon a *habeas corpus* was brought,

and the defendant's discharge moved for on the ground that the local legislature had no power to create an offence punishable by hard labour, which was in effect a crime.

The Court held that under the B. N. A. Act, sec. 92, Nos. 9, 15 and 16, the local legislature had the exclusive right to legislate in relation to shop, tavern, auctioneer, and other licenses, in order to raise a revenue; and that it had the right to impose punishment by fine, penalty, or imprisonment, for enforcing any law properly passed on matters within its exclusive jurisdiction.

The Court further placed a construction upon sec. 91, No. 27, and held that when the Imperial Parliament used the words "The Criminal Law," and "including the procedure in criminal matters," they did not mean that the local legislature had not power to legislate so as to punish by fine and imprisonment for the purpose of enforcing laws in respect of local matters, but only applied to cases "on which there was no power given to the local House to legislate."

It was held that the Act was within the scope of the powers conferred on the Provincial legislature, the punishment prescribed being with a view of effectually enforcing a law which the Ontario Parliament had the power to enact.

Richards C.J. (who delivered the judgment of the Court), goes on to observe that if the local legislature were to pass a *general* law forbidding the compounding or settling of the offence by any person who had been guilty of a violation of local statutes, and declaring the same to be a misdemeanour, for which the party could be indicted and punished by fine and imprisonment, that might be considered as passing a criminal law and regulating the procedure in it.—*Regina vs. Boardman*, 30 U. C. R. 550.

The other case was one relating rather to practice, decided by Mr. Dalton, the clerk of the Queen's Bench, sitting in Chambers. It was held that the fiat of the Attorney General was necessary to the due issuing of a writ of *scieri facias*, to set aside a patent at the instance of a private relator. This was the law under the Consolidated Stat. Canada, c. 34, and the Statutes of Canada, 1869, sect. 29, does not alter it. In view of the B. N. A. Act, 1867, sec. 92, Nos. 13 and 14, when such writ issues in Ontario it should be upon the fiat of the Attorney General of that Province, the Attorney General of the Dominion having no jurisdiction in the premises.—*Regina vs. Pattee*, 5 Prac. Rep. 292.

Upon the Insolvency Act, 32, 33 Vict. c. 16 (Dom.), several decisions have been pronounced by the Courts of Queen's Bench, Chancery and Common Pleas, which may be noted as follows:

Sec. 31.—The County Judge of a County in which no board of trade exists, appointed an official assignee for the county within 3 months after this Act came into force (1st Sept. 1869). It was held by the Court of Common Pleas that this appointment was valid under sec. 31, although a board of trade existed in an adjoining county, but had

not appointed an assignee. (Gwynne J. was of the opinion that the words "adjacent to which" should be rejected as insensible).—*Blakeley vs. Hall*, 21 C. P. 138.

Sec. 47.—Advertisements by assignees for the sale of the insolvent's property, should describe the same and state the title, with the distinctness required in equity in the case of sales by trustees and other officials.—*O'Reilly vs. Rose*, 18 Grant R. 33.

Sec. 50.—When a sale by assignees is open to objection on the part of creditors (v. g. for insufficiency of advertisement), the remedy should be sought by application to the County Court Judge, not by suit in chancery in the first instance.—*O'Reilly vs. Rose*, 18 Grant R. 33.

When an assignment is made, it is the duty of a Sheriff, who has seized goods under a *fi fa* against the insolvent, to surrender the goods to the assignee, leaving the executive plaintiff to assert his privilege for costs, if any he has, before the judge in insolvency.—*Blakely vs. Hall*, 21 C. P. 142.

This section applies to proceedings between creditors, parties to the insolvency proceeding, or who have it in their power to become parties thereto. It does not prevent a person who is not a creditor at all, and whose property has been wrongfully taken by the assignee as the property of the debtor, from pressing his redress by action of trespass or otherwise in the ordinary courts of law.—*Archibald vs. Haldane*, 30 U. C. R. 37.

It may be, however, that the effect of this section would compel a creditor who had a mortgage with a power of sale to appear before the domestic tribunal of the Judge to enforce his rights by summary petition, and disable him from proceeding without regard to the insolvent law.—Per Wilson J. in *Archibald vs. Haldane*, 30 U. C. R. 37.

This section confers jurisdiction over not only an existing assignee but over one who has been retired or has been removed, till he has fully accounted for his acts and conduct.—*Re Botsford*, 22 C. P. 65.

Sec. 54.—The Judge has jurisdiction to examine into and decide upon the correctness of the items of an assignee's account, and to adjust such account. The jurisdiction exists till the assignee has fully accounted for his acts and conduct. An assignee has not fully accounted till he renders an account and duly pays over the sums due from him.—*Re Botsford*, 22 C. P. 65.

Sec. 56.—The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver them a barrel of flour of a specified quality for so many bushels of wheat. He thus became liable to deliver them 955 barrels of flour, as the equivalent of wheat received by him and made away with. It was held that this was only a bailment of the wheat to the insolvent; such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it, either as wheat, or (if ground) as flour; that the test might be waived, and the value of the goods sued for, and consequently that

the claim was provable as a debt within the meaning of the Insolvent Act.—*Re Williams*, 31 U. C. R. 143.

Sec. 57.—But held that a claim for compensation as to a certain number of barrels (under the circumstances mentioned above) which turned out not to be of the quality agreed for, was clearly a claim for unliquidated damages, and could not be proved.—*Re Williams*, U.S.

Sec. 89.—The presumption that transactions within 30 days next before the assignment, was made in contemplation of insolvency, is not conclusive, but may be rebutted by evidence.—*Campbell vs. Barrie*, 31 U. C. R. 279; *Archibald vs. Haldan*, *ib.* 295.

Sec. 94.—If some of an insolvent's creditors are purposely or negligently omitted by him from all lists of creditors furnished by him, and they are still left out and excluded from all consideration in a composition made by the insolvent with all his other creditors, and no provision whatever be made for composition with them, it would be contrary to the whole spirit of the Act to hold that the omitted creditors should be barred of their action by the discharge agreed upon in a deed of composition so executed, notwithstanding it might be confirmed by a judge.—Per Gwynne J. in *Shaw vs. Massie*, 21 C.P. 270.

The deed of composition must shew on the face of it that it is an agreement made with all the insolvent's creditors, or for the benefit of all.—*Ib.* 271.

The majority of creditors, required for a discharge, may agree to accept a smaller composition than the debtor, if hard pressed, might have been able to pay, in the absence of any fraud.—*Ib.* 276.

Sec. 104.—The confirmation by a judge does not give to a deed or consent in writing any greater effect than is provided for in the deed or consent itself, or in the clauses of the Act prescribing their effect. —*Shaw vs. Massie*, 21 C. P. 270.

Sec. 154.—The specifying the value and amount of a security held and putting a value on it under oath, and the other proceedings to be taken with respect to it, is not a matter of procedure merely under this section.—*Re Chaffey*, 30 U. C. R. 73.

Anything affecting the rights of creditors in the distribution of the assets, or creating a new or different method of proving against a joint or separate estate, which would substantially alter the course of distribution, cannot be considered a mere "matter of procedure." But matters connected with the conduct of assignees and the jurisdiction of the Court over them, do fall within these words.—*Re Botsford*, 22 C. P. 68.

SUPREME COURT OF NEW BRUNSWICK.

HILARY TERM 1872.

European and N. American Railway Co. vs. Thomas.—The plaintiffs were incorporated by Provincial Act, 27 Vict., c. 43, for the purpose of constructing a railway from St. John to the boundary of the United States, the capital stock to be two millions of dollars, and the Company to proceed to locate and complete the road as soon as $50,000 of the stock were paid in. The Directors were authorised to make equal assessments on the shares from time to time, as they might deem necessary, to be paid to the Treasurer, who was to give notice thereof; and in case any subscriber for stock neglected to pay the assessment on his share for 30 days after notice, the Directors might order his share to be sold at auction, and in case of any deficiency he should be accountable to the Company for the balance. By an Act, 32 Vict., c. 54, to amend the Act of Incorporation, after reciting that it was doubtful whether the subscribers for shares were legally liable to pay assessments, unless the whole amount of the capital stock had been subscribed for, and the $50,000 paid in, and also whether the notices of assessment had been given in accordance with the Act of Incorporation,—enacted, 1. That the subscribers for stock should be liable in the same manner and to the same extent as if the whole capital stock had been fully subscribed, and as if the $50,000 had been paid in, in the manner directed by the Act of incorporation, and as if all assessments on the shares and the notices given thereof, had been made and given according to the same Act. 2. That to entitle the Company to recover against any stockholder, two months' notice of the assessment should be published in a newspaper, and after the expiration of that time the Company should be entitled "to sue for recovery, and receive from any stockholder the amount due for unpaid subscribers' stock, *in the same manner* as if the calls for assessment had been regularly made" in accordance with the requirements of the Act of Incorporation.

Held: 1. That the Act 32 Vict., c. 54, was not *ultra vires* of the Local Legislature, under "The British North America Act, 1867," § 92, sub. sec. 10.

2. (Per Ritchie C.J., Allen & Weldon JJ., Fisher J. *dubitante.*) That an action of debt could not be maintained under the Act of Incorporation for the assessments on stock; but that the proceeding by sale of the shares must be adopted.

3. (Fisher J. *dissentiente.*) That the preamble of the Act 32 Vict., shewed that the object of the Legislature was not to alter the remedy given by the Act of Incorporation for the recovery of assessments, but to remove other difficulties; and that the words of sect. 2 did not give the Company a right to sue for assessments.

The Commercial Bank vs. Fleming.—In an action on a bill of exchange, the defendant claimed to set off the amount of a check pay-

able to "bearer," drawn by one L. upon the plaintiff several years previously, upon which the cashier of the bank had written the initials of his name. In 1867, L. gave the check so initialed to G, who kept it till a few days before the trial of the cause (1871), and then gave it to the defendant.

Held: 1. That if the check could be treated as an inland bill of exchange, the initialing of it would not operate as an acceptance within the statute. 2. That even if the initialing of the check could operate as an agreement by the plaintiffs to pay the amount to L., it was only a chose in action, which the defendant could not avail himself of in this suit.

Commercial Bank vs. Stephenson.—Defendant, at the request of the cashier, and for the benefit of the Bank, bid in certain shares of the bank stock, which were advertised for sale. Defendant had no funds in the bank, but the cashier told him he could draw a check for the amount of the purchase money, which he did, and the amount was paid by the bank to the seller of the shares, which were then transferred to the defendant. The purchase of the shares was contrary to the charter of the bank. Defendant offered to transfer the shares to the bank, but they refused to accept them, and repudiated the whole transaction—the cashier having in the meantime become a defaulter and absconded.

Held: (Wetmore J. *dissentiente*) That no money having been received by the defendant on the check, and the money not having been paid for his use, but for the use and benefit of the plaintiffs, they could not recover the amount of the check.

Kay vs. Harrington.—The election of the defendant as a member of the House of Assembly was set aside under "*The Bribery and Corruption and Election Petition Act*, 1869," for bribery and treating by his agents—the Judge certifying that the bribery was not committed by or with the knowledge and consent of the defendant. At the election held to fill the vacancy, the defendant was again elected.

Held: That he was not disqualified for re-election, the Act not having declared any such disqualification, except where personal bribery had been committed; and that the practice of the Imperial Parliament in such case did not apply.

Dever vs. Morris.—M., a creditor of defendant, made a demand upon him under the 14th sect. of "The Insolvent Act of 1859," requiring him to make an assignment of his estate for the benefit of his creditors. No petition against this demand was presented within five days, as required by the Act, but after that time the defendant settled his debt witn M., who took no further proceedings.

Held: That the estate of the defendant was nevertheless subject to compulsory liquidation, and that the demand of M. enured to the benefit of his other creditors.

McKay vs. The Commercial Bank.—L., residing in St. John, drew bills of exchange on the plaintiff at Liverpool, which he accepted for the accommodation of defendants, who agreed to guarantee the payment of them at maturity; these bills would fall due on the 2nd Sept. 1868. On the 11th August, L. drew other bills on the plaintiff, also for the defendants' accommodation. The plaintiff received L's letter advising the drawing of these bills on the 24th August, and not having at that time received funds from the defendants to take up the bills falling due on the 2nd Sept., telegraphed to L. that unless those funds were sent he would not accept the bills drawn on the 11th. At this time L. had become insolvent, and left the Province, having assigned his property to trustees, for the benefit of his creditors. L.'s trustees received the plaintiff's telegram, and took it to the cashier of the bank, who knew that L. had absconded, and an answer was sent to the plaintiff, by cable, in the name of L., stating that the funds had been sent by the last mail, which was the fact. In consequence of this answer, the plaintiff accepted the bills drawn on the 11th August, and was obliged to pay them, L. not having shipped to the plaintiff cargoes of lumber, as he had agreed. The telegram sent to the plaintiff was in the handwriting of one of L.'s trustees, but was sent to the telegraph office by the cashier of the bank, and the cost of transmitting it charged to L. in the bank books. The cashier swore that it was sent by direction of the president of the bank; but he, and also the directors, denied all knowledge of it till several months afterwards, and after the cashier had become a defaulter and absconded.

Held: In an action against the bank for falsely representing by the telegram that L. was in St. John, whereby plaintiff was induced to accept the bills (per Allen & Fisher JJ., Weldon J. *dissentiente*) that the answering the telegram addressed to L. was not within the scope of the cashier's duties, and therefore that it should have been left to the jury to find out whether the answer was sent by the authority of the Directors; and *Quære*, whether the stockholders would be liable even if the Directors had authorised it.

Per Weldon J.: That as the telegram to L., related to the payment of the bills of exchange, in which the bank was interested, the cashier had authority to answer it, and the defendants were liable for his false representation.

Walker vs. The Mayor of St. John.—Defendants being the conservators of the harbour of St. John, with power by charter to regulate the navigation, anchoring and fastening of vessels, and to make by-laws, &c., granted to the plaintiff the right to build a wharf extending into the harbour, and to demand and receive the wharfage and emoluments to be derived from vessels lying at such wharf, and all other rights, privileges and appurtenances to the same belonging. The plaintiff built a wharf, and the defendants afterwards made a bye-law that no vessel should lie at this wharf with her bow to the south.

In consequence of this bye-law, the plaintiff lost the wharfage of a vessel which otherwise would have discharged her cargo at his wharf.

Held—per Allen and Fisher JJ., in an action on the case for depriving the plaintiff of the wharfage, that the defendants had no right to limit by contract their power to make by-laws relative to matters within their control under the charter, and that the grant must be taken subject to their right to make such bye-laws from time to time as they should deem necessary for the anchorage, &c., of vessels.

Henderson vs. The Mayor of St. John.—Defendants having authority by law to lay out and open streets in the city, laid out a street through an unenclosed and hilly piece of ground. Several houses were built on the line of this street, but the land in the vicinity remained unenclosed, and people were accustomed to pass over it in various directions as they pleased, though there was no right of way except by the street. Defendants having determined to level and improve the street, made cuttings through the hill in order to level the road, several feet deep in some places. The plaintiff had formerly lived in the neighbourhood of the street, and had been in the habit of crossing the open space. After the street was levelled, the plaintiff was crossing the open space in the night, and not being aware of the cutting, fell into the street, and was injured.

Held (per Allen J., Fisher J. *contra*) : That there was no legal obligation on the defendants to light the street, or to fence the sides of it against persons using the adjoining lands, and therefore they were not liable for the plaintiff's injury.

ON REVIEW FROM MAGISTRATES' COURT.

Knapp vs. Trites.—A student in office of the plaintiff, and boarding with him, presented a family railway ticket of the latter, which contained a printed proviso that it should be used by the plaintiff or some "member of his family residing with him." The conductor—Trites—forfeited the ticket, as being improperly used. In an action of trespass, a verdict was given for plaintiff. At the trial before the Magistrate, it was objected : 1st. That the action should have been trove and not trespass ; 2nd. That the ticket was forfeited as being improperly used by one *not* a member of plaintiff's family. On review the learned judge over-ruled the first point under 1 Rev. Stat. cap. 37 : and held that the student was a member of the "family" of plaintiff, and that the term "family" even includes *lodgers* or *boarders*. Judgment of Justices' Court confirmed with costs. Allen J.

LA RÉDACTION.

BIBLIOGRAPHY.

American Trade-Mark Cases.—A compilation of all the reported Trade-Mark cases decided in the American Courts prior to the year 1871, with an appendix, containing the leading English cases, and the United States Act in relation to the registration of Trade-Marks, with constructions of the Commissioners of Patents affecting the same. Edited by ROWLAND COX. Robert Clarke & Co., Cincinnati, 1871.

Many collections of leading cases have been published within the last few years. The late J. W. Smith was the first adventurer in that direction, and the success which attended his experiment induced Messrs. Ross, Tudor and others to follow in his footsteps. Smith's leading cases have now reached the 6th edition. Two of the editions were edited by Messrs. Willes and Keating, then practising barristers, now judges of the Court of Common Pleas. The great value of all collections of leading cases lies very much in the notes of the editors. In them the jurisprudence of the courts is brought down to the date of publication. A volume containing all the reports of cases on one particular subject is a boon to the members of the bar. The necessity of examining the thousands of volumes published in England and the United States in order to discover all the cases on the subject is thereby done away with. It relieves the profession of a great deal of drudgery, and if the compilation is well and carefully done, the compiler deserves the thanks of his *confrères*.

We have examined "American Trade-Mark Cases" carefully, and are persuaded that Mr. Cox has performed his task well and faithfully. Henceforth his compilation will always be consulted by the lawyer as presenting in a most convenient form the body of English and American law on the subject of Trade-Marks.

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