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REVUE CRITIQUE

DE

Législation et de Jurisprudence.

THE "FRASER INSTITUTE" CASE.

The importance of this case induces the Editors of *La Revue Critique* to publish the arguments of Counsel before the Court of Appeals, September term.

An action was brought by John Fraser and others, Appellants, as heirs-at-law and representatives of the late Hugh Fraser, their brother and uncle, demanding the nullity of a certain devise and bequest contained in his last will and testament, executed before J. C. Griffin and colleague, notaries, at Montreal, on the 23rd April, 1870.

The declaration set forth that by this will the said Hugh Fraser, after several bequests therein enumerated, did appoint the Honorable John J. C. Abbott and John Cowan, two of the Respondents, his executors for the purpose of carrying out the provisions of his will, and did divest himself in their hands of his moveable estate and effects to the end that they might pay the legacies, and immediately after to transfer the balance of the moveable property to a certain fund vested by the will in the fiduciary legatees and trustees in the terms following, to wit:

17th. "I nominate and appoint the said Honorable John J. "C. Abbott and John Cowan my executors for the purpose of "carrying out the provisions of this my will, and I divest myself "in their hands of my moveable estate and effects to the end "that they may pay the foregoing legacies, raising the necessary "funds therefor in the most convenient manner without any "unnecessary sacrifice, and immediately thereafter to transfer

" over the balance of my moveable estate to the fund which, by " the provisions of this my will, is vested in my trustees and " fiduciary legatees hereinafter named.

18th. " I give, devise and bequeath the whole of the rest and " residue of my estate real and personal, moveable and immove- " able of every nature and kind whatsoever, to the said Honor- " able John J. C. Abbott and to the said Honorable Frederick " Torrance, hereby creating them my universal fiduciary legatees, " and it is my will and desire that they do hold the same in " trust for the following intents and purposes, namely, to estab- " lish at Montreal in Canada, an institution to be called the " " Fraser Institute," to be composed of a free Public Library, " Museum and Gallery, to be opened to all honest and respect- " able persons whomsoever, of every rank in life without distinc- " tion, without fee or reward of any kind, but subject to such " wholesome rules and regulations as may be made by the go- " verning body thereof from time to time for the preservation of " the books and other matters, &c., and for that purpose to pro- " cure such charter or act of incorporation as my said Trustees " may deem appropriate to the purpose intended by me, namely " to the diffusion of useful knowledge by affording free access to " all desiring it to books, to scientific objects and subjects, and " to works of art; and to the procuring such books, subjects " and objects as far as the revenue of my estate will serve after " acquiring the requisite property and erecting appropriate build- " ings and after paying expenses of management, making always " the acquisition and maintenance of the Library the leading " object to be kept in view. And it is my desire that three per- " sons should be named by my said Trustees to compose with " them the first board of governors of the " Fraser Institute," " which, it is my desire, shall always be composed of five persons " professing some form of the Protestant faith, with power to " them to supply any vacancy caused by death or resignation, or " by any crime or offence, the conviction whereof shall vacate " the tenure of office of the offender. And it is further my will " and desire that my friend the Honorable John J. C. Abbott " shall be the first President of the " Fraser Institute," and shall " retain that position during his life; and so soon as the requi- " site charter shall have been obtained containing all the powers " necessary to carry out my design herein contained, I desire " that the residue of my estate and effects, after deduction of the

"expenses of the management thereof, shall be forthwith con-
"veyed over to the corporation to be thereby formed, to be called
"the "Fraser Institute" for the purposes herein declared.

"In order to prevent any difficulty arising in the conduct of
"the business of the trust hereby created, it is my will and
"desire that Mr. Abbott, as the senior Trustee, shall have a
"second or decisive voice in the event of any difference of opinion
"between him and his co-trustee, and in the event of a vacancy
"occurring in the said trust from any cause whatever whereby
"the number of Trustees is reduced from time to time to one,
"it shall be the duty of the other, and he is hereby authorized
"to name a Trustee to fill the vacancy so occurring by a notarial
"instrument to that effect, and thereafter the senior Trustee shall
"always have a second or decisive casting vote in any case of
"difference of opinion.

"And I hereby confer upon my executors hereinbefore named,
"full power to settle and adjust all matters connected with my
"moveable property, and upon my Trustees hereinbefore named,
"power to sell and realize such of my estate and effects as they
"shall deem expedient to acquire property wherein to construct
"suitable buildings, and to construct such buildings, and to
"proceed in all respects with all diligence in the carrying out of
"my desires hereinbefore expressed up to such time as the pro-
"perty and estate hereby devised to them shall be conveyed over
"to the "Fraser Institute."

"I desire that the term of office of my executors be continued
"beyond the term limited by law, and until the duties hereby
"imposed upon them in the payment of special legacies be
"completed, and it is my will that my executors and Trustees
"shall be responsible each for his own default only; and lastly I
"hereby revoke and make void all former wills and codicils by
"me heretofore made and I do declare this to be my last will
"and testament."

The declaration, after alleging the death without issue of the said Hugh Fraser, the births of the Plaintiffs, their relationship to the deceased, the possession of the estate by the Respondents, stated that the dispositions of the will above set forth were null and void, they being illegal and made in contravention of the formal disposition of the law, the sole intent and object of such bequest and devise being the establishment of a corporation or the creation of a body to which and in the interest whereof the

residue of the personal estate and the whole of the real estate of the said Hugh Fraser is given without any previous authority, enactment, statute or Letters Patent in due course of law first had and obtained to allow the same; that such bequest and devise is made to the Trustees and fiduciary legatees with the duty, obligation and for the sole purpose of transmitting the whole of the said estate, after deducting certain special legacies, to create and establish a lay corporation to be called the "Fraser Institute," to which the whole residue of the estate, moveable and immoveable, is intended to revert and for such object is by the will devised to the said Honorable John J. C. Abbott, and the Honorable Frederick Torrance, in their pretended capacity of Trustees or fiduciary legatees, which is null and void and in direct violation of law; That this disposition is moreover null and void, inasmuch as the same is made to a supposed future and anticipated corporation to be created after the death of the testator and which had no legal existence at the date of the will or at the time of the death of the testator, and consequently without any legal capacity to take or receive any such bequest or devise or any portion of the estate.

The Appellants, by the conclusion of their action, demanded that the part of the will in question by which the testator ordered his executors to transfer the balance of his moveable estate, after payment of the legacies, to the fund vested by the provisions of the will in the Trustees and fiduciary legatees, and also the devise and bequest of the rest and residue of his estate real and personal, moveable and immoveable, to the said Honorable John J. C. Abbott and Frederick Torrance, to establish at Montreal the said "Fraser Institute," be declared illegal, null and void and set aside. And further, that the said Appellants be declared alone entitled to the residue of the said estate, and Respondents ordered to surrender the same to them and account for the rents and profits thereof, &c.

The Defendants pleaded to the action, and fyled, 1st, a demurrer, by which they pretended that it did not appear by the action that the testator had not the power to bequeath or that the Defendants had not power to take the property disposed of by the said will, or that Defendants had not or have not now power to hold. 2nd. A plea by which it was alleged that the property real and personal claimed by the Plaintiffs had been validly bequeathed to the Defendants, and more particularly to

the said Honorable John J. C. Abbott and the Honorable Frederick Torrance in their capacity of executors, fiduciary legatees and Trustees for the strictly legal purpose of establishing an institution to be called the "Fraser Institute," and for that purpose to procure such charter or act of Incorporation as the defendants in their capacity of Trustees might deem appropriate to such purpose.

That there has been no session of the Legislature of the Province since the death of the said Hugh Fraser, to which they could apply for an Act incorporating the said "Fraser Institute," but have given notice of such application.

The Respondents also fyled a general denegation.

The issue was regularly joined.

The case having been first inscribed for hearing in law on the demurrer, the Court by the judgment reserved adjudicating thereon until the hearing on the merits.

The identity and relationship of the Plaintiffs and the possession of the Estate by Defendants having been established, the case was inscribed for hearing and argued before Mr. Justice Beaudry on the 27th February, 1871.

The issue offered but one question of law;

Was the devise contained in the will for the object of establishing the "Fraser Institute" valid according to our law? in other words: can a testator dispose of his estate for the declared purpose of establishing a corporation for a scientific, charitable or religious use?

As the will itself in every one of its dispositions is constantly referred to and discussed in the course of the argument, we think it useful to cite it in full.

Last Will and Testament of the late Hugh Fraser:

On this twenty-third day of April, in the year of Our Lord one thousand eight hundred and seventy.

Before the undersigned Notaries Public, duly commissioned and sworn in and for the Province of Quebec, in the Dominion of Canada, residing and practising in the City of Montreal, in the said Province.

Personally appeared Hugh Fraser, of the said City of Montreal, Esquire, Merchant, who being in ill-health but of sound and disposing mind, memory and understanding as appears unto us the said Notaries by his words and actions, but considering the uncertainty of life, declares to have made, and hereby doth make, dictate and declare unto us the said Notaries, both being present, his last will and testament in manner and form following, that is to say:

1st. I give and bequeath to my brother Alexander Fraser, the interest derivable from the sum of five thousand dollars during his natural life, the capital whereof shall form part of the residue of my estate, and shall pass to my trustees hereinafter named. I also give and bequeath to the said Alexander Fraser the usufruct during his life of that certain farm and property usually known as the Kings Post farm containing about three hundred and sixty acres of land, together with all such live stock and farming implements thereto belonging, the right of property therein however to be part of the residue of my estate, and to pass to and be vested in my trustees hereinafter named.

2nd. I give and bequeath to my sister Elizabeth Fraser, the sum of four thousand dollars as her own property forever.

3rd. I give and bequeath to the children of George Chapman, issue of his marriage with Catherine Fraser, my sister, the sum of three thousand dollars, the interest whereof shall be payable by my executors hereinafter named to the said George Chapman to and for the use of the said children, until the youngest of such children shall attain the age of majority, at which time the capital thereof shall be divided amongst such of the said children as shall then survive.

4th. I give and bequeath to my sister Jane Fraser, wife of A. Fraser of Hawkesbury, the interest of the sum of two thousand dollars, to be paid to her during her natural life, and at her death or so soon thereafter as any one of her children shall come of age, the said sum of money shall be divided into as many shares as she shall then have children surviving her, and such shares shall be paid to them as they successively attain the age of majority, dividing the shares of any of them that may die before that age among those who reach it, and pending the minority of the said children or any of them after their mother's death the interest upon their shares shall be paid to their father or other natural guardian for their use and benefit.

5th. I give and bequeath to my friend Mr. James Smith, Notary, the sum of one thousand dollars as his property, and I further cancel and discharge him from all sums of money lent or advanced to him which he may owe to me at the time of my death. This bequest and discharge however to be conditional upon a reception from him of a full discharge of all claims against me for services rendered.

6th. I give and bequeath to my faithful friend Edward Moore, the sum of one thousand dollars.

7th. I give and bequeath the sum of three hundred dollars to each of my dear friends Mr. and Mrs. Robert Leckie, to the end that they may purchase some token of remembrance of me.

8th. I give and bequeath to my friend George Denholm the sum of one hundred dollars for a similar purpose.

9th. I give and bequeath to my friend John Cowan the sum of two hundred and fifty dollars as a small compensation of his trouble n assisting his co-executor hereinafter named to perform the duties of executor hereby imposed upon him, which I hope he will accept.

10th. I give and bequeath unto my friend the Reverend William Simpson of Lachine, in the said Province, one hundred dollars.

11th. I give and bequeath to the Montreal General Hospital the sum of one thousand dollars.

12th. I give and bequeath to the Ladies Benevolent Society of Montreal the sum of five hundred dollars.

13th. I give and bequeath to the Protestant Orphan Asylum the sum of five hundred dollars.

14th. I give and bequeath to the St. Andrews Home the sum of five hundred dollars.

15th. I give and bequeath to my old and confidential friend the Honorable John J. C. Abbott, the sum of four thousand dollars, which I desire him to accept as some compensation for the service which I anticipate he will render to me and to my memory under the conditions of this my will in the performance of the functions of executor and trustee in carrying out with zeal and energy the design respecting which I have consulted him, and which is embodied in the latter part of this my will, believing that he will do justice to my memory and to the trust I hereby confide to him, by carrying out my intentions in the spirit in which they were conceived.

16th. I give and bequeath to the Honorable Frederick Torrance, one of the Justices of Her Majesty's Superior Court, the sum of one thousand dollars, as some compensation for the assistance which I hope he will consent to give my friend the Honorable John J. C. Abbott in the carrying out of a design for the public benefit in which I am aware he takes a deep interest. And I trust that a certain preponderance in the trust given to my friend Mr. Abbott, in consideration of the long friendship and confidence existing between us will not prevent Judge Torrance from giving him also cordial co-operation and support.

17th. I nominate and appoint the said Honorable John J. C. Abbott and John Cowan my executors for the purpose of carrying out the provisions of this my will, and I divest myself in their hands of my moveable estate and effects to the end that they may pay the foregoing legacies, raising the necessary funds therefor in the most convenient manner without any unnecessary sacrifice, and immediately thereafter to transfer over the balance of my moveable estate to the fund which by the provisions of this my will is vested in my trustees and fiduciary legatees hereinafter named.

18th. I give, devise and bequeath the whole of the rest and residue of my estate, real and personal, moveable and immoveable, of every nature and kind whatsoever to the said Honorable John J. C. Abbott and the said Honorable Frederick Torrance, hereby creating them my universal residuary fiduciary legatees, and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely to establish at Montreal in Canada an institution to be called "The Fraser Institute," to be composed of a Free Public

Library, Museum and Gallery, to be opened to all honest and respectable persons whomsoever, of every rank in life, without distinctions, without fee or reward of any kind, but subject to such wholesome rules and regulations as may be made by the governing body thereof from time to time for the preservation of the books and other matters and articles therein, and for the maintenance of order, and for that purpose to procure such Charter or Act of Incorporation as my said Trustees may deem appropriate to the purpose intended by me; namely, to the diffusion of useful knowledge by affording free access to all desiring it, to books, to scientific objects and subjects, and to works of art; and to the procuring such books, subjects and objects as far as the revenue of my estate will serve after acquiring the requisite property and erecting appropriate buildings, and after paying expenses of management, making always the acquisition and maintenance of a Library the leading object to be kept in view. And it is my desire that three persons should be named by my said Trustees to compose with them the first board of Governors of the "Fraser Institute," which it is my desire shall always be composed of five persons professing some form of the Protestant faith, with power to them to supply any vacancy caused by death or resignation, or by any crime or offence, the conviction whereof shall vacate the tenure of office of the offender. And it is further my will and desire that my friend the Honorable John J. C. Abbott shall be the first President of the "Fraser Institute," and shall retain that position during his life; and so soon as the requisite Charter shall have been obtained, containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects after deduction of the expenses of the management thereof, shall be forthwith conveyed over to the Corporation to be thereby formed, to be called the "Fraser Institute," for the purposes herein declared. In order to prevent any difficulty arising in the conduct of the business of the trust hereby created, it is my will and desire that Mr. Abbott as the senior Trustee, shall have a second or decisive voice in the event of any difference of opinion between him and his co-trustee; and in the event of a vacancy occurring in the said trust from any cause whatever, whereby the number of Trustees is reduced from time to time to one, it shall be the duty of the other, and he is hereby authorized to name a Trustee to fill the vacancy so occurring by a notarial instrument to that effect, and thereafter the senior Trustee shall always have a second or decisive casting vote in case of difference of opinion.

And I hereby confer upon my Executors hereinbefore named full power to settle and adjust all matters connected with my moveable property, and upon my Trustees hereinbefore named, power to sell and realize such of my estate and effects as they shall deem expedient to acquire property wherein to construct suitable buildings and to construct such buildings, and to proceed in all respects with all diligence in the carrying out of my desires hereinbefore expressed up to

such time as the property and estate hereby devised to them shall be conveyed over to the "Fraser Institute."

I desire that the term of office of my Executors be continued beyond the term limited by law, and until the duties hereby imposed upon them in the payment of special legacies be completed, and it is my will that my Executors and Trustees shall be responsible each for his own default only; and lastly I hereby revoke and make void all former wills and codicils by me heretofore made, and I do declare this to be my last will and testament.

For thus it has been made and dictated, *dicté et nommé*, by the said Testator unto us the said Notaries, and by one of us, the other being present, read and read over unto him the said Testator, who did and doth hereby declare the same to be well understood by him, and to be according to his intentions and meaning.

Thus done and passed at the Saint Lawrence Hall, in the said City of Montreal, on the day, month and year first above written, in the afternoon, and signed by the said Testator in the presence of us the said Notaries, who in testimony of the premises have hereunto signed our names in his presence and in the presence of each other, the whole having been first as aforesaid twice duly read unto the Testator according to law, these presents to remain of record in the office of John Carr Griffin, one of the undersigned notaries, under the number thirty-one thousand nine hundred and twenty-eight.

(Signed) HUGH FRASER.
JOHN C. GRIFFIN, N.P.
H. J. MEYER, N.P.

A codicil was made to this will, but as it merely related to the special bequests, chiefly for the purpose of reducing the paltry legacy made in favor of his brother Alexander, it can be omitted.

The entire estate of the late Hugh Fraser may be estimated at the sum of $350,000. The largest amount given to one of his most favorite sisters for her maintenance and that of her family is $4000, the others receiving respectively sums of $3000 and $2000.

Mr. LAFLAMME, Q.C., for the Appellants:

It may perhaps be matter of surprise that a man so generously disposed towards the public of Montreal as to contribute for their amusement and intellectual enjoyment a sum of $150,000 should be so sparing towards his blood relations as to give to a poor sister encumbered with a large family, the paltry sum of $2000. He entirely overlooks two brothers; and the most liberal allowance made to one of his sisters whom he thought most worthy of his remembrance, reaches the sum of $4000, the same amount which he thought proper to bestow on his executor for the trouble of conveying his estate to the public of Montreal.

In all times, in most of the civilized countries, it has been deemed necessary for the interest of society and for the protection of families to restrain that morbid feeling of remorse or vanity, or the exaggerated and terrified sense of piety which so often seizes individuals in the prospect of death. After hoarding money during a long life time without performing perhaps a single act of benevolence or charity to their kindred or fellow-beings, their conscience suddenly awakens on the retrospect of their egotistical career. Seeing how useless then is the possession of wealth which was before their only pleasure, they seek to redeem for their memory a reputation which all the acts of their lives would contradict. They become suddenly liberal, extravagantly charitable; they order the erection of monuments in the shape of museums, libraries, charitable or religious institutions, iu order to transmit their names to posterity as benefactors of humanity. So long as they lived they may have been selfish, proof to any inducement of liberality or solicitation for the assistance of a poor relative, whatever means they possessed to relieve them. Brothers, sisters, struggling for existence and the education of their numerous children, were not, in the eyes of many of these public benefactors, worthy of their beneficence. They ignored their existence during their life-time, and on their death bed, free by long habit from all family obligations, they believe they can atone for their shortcoming in family duties by the sudden, comprehensive embrace of the whole human family, discarding all blood relations, fascinated by the idea of leaving a name which will last through all succeeding generations, glorified as that of a public benefactor, a satisfaction new and strange to them.

We have not to look into the laws of other countries to determine the question at issue. It must be solved by the principles of our own law, and the Appellants submit that it is clear and positive, and sustains their pretensions.

Several Ordinances and Edicts have been enacted in France during the three last centuries of the Monarchy, prohibiting grants or legacies to religious or lay corporations, or for their creation. The influence of the clergy, in favor of whom these liberalities were usually made, often rendered these prohibitions of no avail, and the pious motives which inspired the donations induced the courts to find means of maintaining them. Moreover the law of succession, as it then existed and was adminis-

tered, secured the mass of the property to the family, and the portion of the estate out of which such liberalities could be made was comparatively of minor importance, and could not injuriously affect families to any great extent. The authorities, however, felt constantly the necessity of providing by repeated legislation against this evil, and the tribunals unhesitatingly interfered to reduce and cancel dispositions of the kind, even when made within the limits of the freedom granted to dispose by last will of the unreserved part of the estate.

The propositions submitted by the Plaintiffs in the Court below, were in substance as follows:

1st. The legacy is for the establishment of a corporation, and is therefore null. It is a direct violation of the Edict of 1743, registered in the "Conseil Supérieur" of Quebec.

2nd. The legacy in question is null and void, inasmuch as it is made in favor of a person who was not in existence at the time of the death of the testator, and who could not receive it.

3rd. It is further null, because corporations are by law prohibited from receiving any devise of land without the express authorization of the crown.

4th. The English law agrees with our own with respect to the nullity of this will.

5th. Under our system of jurisprudence previous to the cession of Canada, bequests and devises for charitable uses even within the limits granted to testators of disposing by will were subject to the controlling power of the courts, who restricted or modified them in favor of the relations of the testator.

FIRST POINT.

I. The legacy is for the establishment of a corporation, and therefore null as a direct violation of the Edict of 1743 registered in the Conseil Superieur at Quebec.

II. This Edict has ever remained in force in this Province.

The law on this point is that which existed in France and in Canada at the time of the cession.

In France, after several Ordinances and Letters Patent issued on this subject, Louis XV published in 1749, an edict which, as the preamble declares, is but a re-enactment of the previous Ordinances relating to the establishment and acquisitions of corporations, or *gens de main morte.*

Merlin Rep. vo. Main morte (gens de) says:

L'Edit du mois d'Aout 1749 renouvelle toutes les dispositions des lois précédentes sur ces deux objets et y ajoute les mesures les plus propres à en assurer l'exécution.

Voici ce qu'il ordonne :—

" Louis.....Le désir que nous avons de profiter du retour " de la paix, pour maintenir de plus en plus le bon ordre dans " l'intérieur de notre royaume, nous fait regarder comme un des " principaux objets de notre attention, les inconvénients de la " multiplication des établissements de gens de main morte, et de " la facilité qu'ils trouvent à acquérir des fonds naturellement " destinés à la subsistance et à la conservation des familles : elles " ont souvent le déplaisir de s'en voir privées, soit par la disposi- " tion que les hommes ont à former des établissements nouveaux " qui leur soient propres, et fassent passer leur nom à la postérité, " avec le titre de fondateur soit par une trop grande affectation " pour des établissements déjà autorisés dont plusieurs testateurs " préfèrent l'intérêt à celui de leurs héritiers légitimes. Indé- " pendamment même de ces motifs il arrive souvent que par les " ventes qui se font à des gens de main morte les biens immeu- " bles qui passent entre leurs mains cessent pour toujours d'être " dans le commerce en sorte qu'une très grande partie des fonds " de notre royaume se trouve actuellement possédée par ceux " dont les biens ne pouvant être diminués par des aliénations, " s'augmentent au contraire continuellement par de nouvelles " acquisitions. Nous savons que les rois nos prédécesseurs, en " protégeant les établissements qu'ils jugeaient utiles à leur Etat, " ont souvent renouvelé les défenses d'en former de nouveaux " sans leur autorité ; et le feu roi notre très honoré Seigneur et " bisaïeul, y ajouta des peines sévères par ses lettres patentes en " forme d'Edit du mois de Décembre, 1666, etc., etc.....

" A ces causes.....voulons et nous plait ce qui suit :

" Art. 1. Renouvelant, en tant que besoin, les défenses por- " tées par les ordonnances des rois nos prédécesseurs, voulons " qu'il ne puisse être fait aucun nouvel établissement de chapitres, " colléges, séminaires, maisons, ou communautés religieuses, mê- " me sous prétexte d'hospices, congrégations, confréries, hopitaux " ou autres corps et communautés, soit ecclésiastiques, séculières " ou régulières, soit laïques, de quelque qualité qu'elles soient, ni " pareillement aucune nouvelle érection de chapelles ou autres ti- " tres de bénéfices, dans toute l'étendue de notre royaume, terres " et pays de notre obéissance, si ce n'est en vertu de notre per-

" mission expresse portée par nos lettres patentes enrégistrées en " nos parlements ou conseils supérieurs, chacun dans son ressort " en la forme qni sera prescrite ci-après.

Art. 2. " Défendons de faire à l'avenir aucune disposition par " acte de dernière volonté, pour fonder un nouvel établissement " de la qualité de ceux qui sont mentionnés dans l'article précé- " dent, ou au profit de personnes qui seraient chargées de former " le dit établissement; le tout à peine de nullité : ce qui sera ob- " servé, quand même la disposition serait faite à la charge d'ob- " tenir nos lettres patentes."

10. " Les enfants ou présomptifs héritiers seront admis, même " du vivant de ceux qui auront fait les dits actes ou dispositions, " à réclamer les biens par eux donnés ou aliénés. Voulons qu'ils " en soient envoyés en possession, pour en jouir en toute pro- " priété, avec restitution des fruits ou arrérages, à compter du " jour de la demande qu'ils en auront formée; laissons à la pru- " dence des juges d'ordonner ce qu'il appartiendra, par rapport " aux jouissances échues avant la dite demande, et le contenu au " présent article aura lieu pareillement après la mort de ceux " qui auront fait les dits actes ou dispositions, en faveur de leurs " héritiers, successeurs ou ayant cause; le tout à la charge qu'- " encore la faculté à eux accordée par le présent article, n'ait été " exercée que par l'un d'eux, elle profitera également à tous ses " co-héritiers ou ayant le même droit que lui, lesquels seront ad- " mis à partager avec lui, suivant les lois et coutumes des lieux, " les biens réclamés, soit pendant la vie ou après la mort de celui " qui aura fait les dits actes ou dispositions."

This Edict was the law of France before the cession of Canada and as the establishment and control of Corporations are matters appertaining to the Sovereign power, in the absence of any other enactment, the disposition of this ordinance would apply to the colonies; but they had been enacted for Canada six years previous, by an Edict of 1743 specially promulgated for this country and containing the identical prohibitions as those of the ordinance of 1749.

The preamble of this Edict, after stating the care bestowed on religion and religious orders by the King and his predecessors and the liberal provisions made on their behalf, continues in the following terms:

" Mais d'un autre coté, l'usage que ces Communautés et ces " Ordres Religieux ont su faire dans tous les temps de leurs

" privilèges et exemptions leur ayant donné lieu d'acquérir des " fonts considérables, le feu Roi notre très honoré Seigneur et " bisaïeul jugea qu'il était nécessaire d'y mettre des bornes: il " régla en l'année 1803 que chacun des ordres religieux établis " dans les Iles ne pourrait étendre ses habitations au-delà de ce " qu'il faudrait de terre pour employer cent nègres; et ce règle- " ment n'ayant pas eu son exécution nous ordonnâmes par nos " lettres patentes du mois d'Aout mil sept cent vingt-un, qu'ils " ne pourraient à l'avenir faire aucune acquisition, soit de terre " ou de maisons, sans notre permission expresse et par écrit à " peine de réunion à notre Domaine. L'état actuel de toutes " nos colonies exige de nous des dispositions encore plus étendues " sur cette matière. Quelque faveur que puissent mériter les " établissements fondés sur des motifs de Religion et de charité, " il est temps que nous prenions des précautions efficaces pour " empêcher qu'il ne puisse, non seulement s'y en former de nou- " veaux, sans notre permission, mais encore pour que ceux qui y " sont autorisés ne multiplient des acquisitions qui mettent hors " de commerce une partie considérable des fonds et domaines de " nos colonies et ne pourraient être regardées que comme con- " traires au bien commun de la société, c'est à quoi nous avons " résolu de pourvoir par une loi précise.....

" A ces causes et autres à ce nous mouvant..... .....nous " avons dit, déclaré et ordonné ce qui suit:

" Art. I. Voulons comformément aux ordonnances rendues et " aux règlements faits pour l'intérieur de notre royaume, qu'il " ne puisse être fait dans nos colonies de l'Amérique, aucune " fondation ou nouvel établissement de maisons ou communautés " religieuses, Hopitaux, Hospices, Congrégations, Confréries, Col- " léges ou autres corps et communautés Ecclésiastiques ou Laïques, " si ce n'est qu'en vertu de notre permission expresse portée par " nos lettres-patentes, enrégistrées en nos Conseils Supérieurs des " dites Colonies, en la forme qui sera prescrite ci-après.

" II. Défendons de faire aucunes dispositions de dernière vo- " lonté pour fonder un nouvel établissement de la qualité de ceux " qui sont mentionnés dans l'article précédent, ou au profit des " personnes qui seraient chargées de former le dit établissement, " le tout à peine de nullité; ce qui sera observé quand même la " disposition serait faite à la charge d'obtenir nos Lettres-Paten- " tes.

. . . . . .

"IV. Déclarons que nous n'accorderons aucunes Lettres Pa-
"tentes pour permettre une nouvelle fondation ou établissement,
"qu'après nous être fait rendre compte de l'objet et l'utilité du
"dit établissement, ainsi que de la nature, valeur et qualité des
"biens destinés à la doter; et après avoir pris l'avis des dits
"Gouverneurs, Lieutenans, Généraux pour nous, et Intendans
"ou des dits Gouverneurs particuliers et Ordonnateurs, et même
"le consentement des Communautés ou Hopitaux déjà établis
"dans la Colonie où la dite fondation sera projetée, et des autres
"parties qui pourraient y avoir intérêt.

"V. Il sera fait mention expresse dans les dites Lettres, des
"biens destinés à la dotation du dit établissement, et il ne pourra
"y en être ajouté aucun autre, soit par donation, acquisition ou
"autrement, sans obtenir nos Lettres de permission, ainsi qu'il
"sera dit ci-après; ce qui aura lieu, non-obstant toutes clauses
"ou disposition générales insérées dans les dites Lettres Patentes,
"par lesquelles ceux qui les auraient obtenues, auraient été dé-
"clarés capables de posséder des biens fonds indistinctement.

. . . . . .

"IX. Déclarons nuls tous les établissements de la qualité
"marquée à l'article premier, qui n'auront pas éte autorisés par
"nos Lettres Patentes enrégistrées en nos dits Conseils Supé-
"rieurs, comme aussi toutes dispositions et actes faits en leur
"faveur, directement ou indirectement, et ce nonobstant toutes
"prescriptions et tous consentements exprès ou tacites qui pour-
"raient avoir été donnés à l'exécution des dites dispositions ou
"actes, par les parties intéressées, leurs héritiers ou ayant cause;
"nous réservant néanmoins, à l'égard des établissements qui sub-
"sistent paisiblement, et sans aucune demande formée avant la
"présente déclaration pour les faire déclarer nuls, d'y pourvoir
"ainsi qu'il appartiendra, après que nous nous serons fait rendre
"compte de l'objet et qualité des dits établissements.

"X. Faisons défenses à toutes les communautés religieuses et
"autres gens de main morte, établis dans nos dites colonies,
"d'acquérir ni posséder aucun bien immeuble, maisons, habita-
"tions ou héritages situés aux dites Colonies ou dans notre
"Royaume, de quelque nature et qualité qu'ils puissent être, si
"ce n'est en vertu de notre permission expresse, porté par nos
"Lettres Patentes enrégistrées en la forme prescrite ci-après, dans
"nos dits Conseils Supérieurs, pour les biens situés dans notre
"Royaume; ce qui aura lieu à quelque titre que les communau-

"tés ou gens de main morte prétendent faire l'acquisition des "dits biens, soit par vente volontaire ou forcée, échange, dona- "tion, cession ou transport, même en payement de ce qui leur "serait dû, et en général pour quelque cause gratuite ou géné- "reuse que ce puisse être. Voulons que la présente disposition "soit observée nonobstant toutes clauses ou dispositions générales "qui auraient été insérées dans les Lettres Patentes ci-devant "obtenues pour autoriser l'établissement des dites Communautés, "par lesquelles elles auraient été déclarées capables de posséder "des biens fonds indistinctement.

. . . . . .

"XIX. Défendons à toutes personnes de prêter leur nom aux "dites Communautés et gens de main morte, pour posséder aucuns "des dits biens, à peine de dix mille livres d'amendes, laquelle "sera appliquée ainsi qu'il est porté par l'article précédent.

. . . . . .

"XXI. Tout le contenu en la présente déclaration sera obser- "vé, à peine de nullité de tous contrats et autres actes qui re- "raient faits sans avoir satisfait aux conditions et formalités qui "y sont prescrites, même à peine d'être les dites communautés "déchues de toutes demandes en restitution des sommes par "elles constituées sur des particuliers, ou payées pour le prix des "biens qu'elles acquèreraient sans nos Lettres de permission; "Voulons en conséquence que les héritiers ou ayant cause de "ceux à qui les dits biens appartenaient, même leurs enfants ou "autres héritiers présomptifs de leur vivant, soient admis à y "rentrer, nonobstant toute prescription et tous consentements "exprès ou tacites qui pourraient leur être opposés."

With a disposition so formal and precise, the devise in the will being for the declared purpose of establishing a Museum, Library and Gallery, to be held and governed by a corporation to be created by Act of Parliament, if this Edict was the Law of Lower Canada at the time this will was made and when it took effect, there can be no doubt as to the illegality of this devise and bequest. There is no room for interpretation. The words of the Edict are clear and positive, every disposition by last will, for the purpose of creating an establishment, college or corporation, lay or ecclesiastical, for charitable or useful purposes, or any devise or bequest made to any person with such an object, is declared absolutely null and void; even when such devises or bequests are made upon condition that Letters Patent should be

first obtained. And by the section 21st: any act in contravention of this ordinance is declared absolutely null; and the heirs and representatives of those to whom the property originally belonged can reclaim it, not withstanding any prescription, consent formal or tacit, which might be invoked against them.

The avoidance of such grants or deeds, being the penalty attached to them, is not reserved to the crown for the public. It is in the interest of the heirs at law. To them the property belongs; it is deemed to have never been legally alienated, and the law says they shall be entitled to claim it. The property so transferred remains in the estate.

In this respect, therefore, the prohibitions contained in the Edict are not matter of public or administrative law, but entirely civil or private, and appertain to the municipal law. The crown may demand the nullity of such grants or bequests in the interest of society if the heirs neglect to do so, but the exercise of this privilege cannot interfere with the absolute right of the heirs to revendicate what has been illegally granted or bequeathed.

The question therefore narrows itself down to that of the existence of this Edict. Is it still the law of Lower Canada, or has it been abrogated?

The Respondents in their argument in the Court below, dared not assert openly that this law had been actually repealed and was not in existence, but they contended, as probably they still do, that the changes introduced in other parts of our laws have virtually and by implication repealed this Edict to the extent required to give effect to the bequest or devise in question.

Strange to say, the Judge below affirmed its existence in positive terms, stating emphatically that it remained unmodified the law of the land, and at the same time he maintained that, because the object of the bequest, the establishment of a public Library and Museum of Art is legal and does not require previous Letters Patent authorizing the same, until the corporation be formed no action could be brought by the heirs, and therefore dismissed their action.

If the *motivé* given by the judge had been all embodied in the judgment, the Respondents might avoid entering into any discussion as to the existence of the Edict, but as the judgment of record does not refer to this principal question, it is necessary to advert to it.

The Courts of this Province have repeatedly maintained that the Ordinance of 1743 was law, and that its dispositions were in force. The first reported case relating to this subject is that of *Desrivières & Richardson*, decided in the Court of Appeals in 1826, to be found in Stuart's Reports, p. 218, where it was held by the Court of Appeals that a statute authorizing the creation of a corporation under the name of the "Royal Institution," for the advancement of learning, with "power to hold, receive, enjoy, "possess and retain without licence in mortmain all messuages, "lands, tenements, and immoveable property, monies, goods, "chattels and moveable property which thereafter shall be paid, "given, granted, purchased, appropriated, devised or bequeathed "in any manner or way whatsoever for and in favor of the said "Schools and Institutions of Royal Foundation," enabled such a corporation to receive a devise or bequest for the purpose of establishing a College or School and Institution, and did away, so far as that institution was concerned, with the declaration of 1743, and which could not apply.

That corporation was established in 1801, by the statute 41 Geo. III, c. 17. On the 8th of January, 1811, Mr. James McGill made his will, by which he bequeathed a large portion of his fortune to four parties in trust, that they should convey and assure the same to the said corporation, "The Royal Institution for the advancement of learning," upon condition that the royal institution do and shall, within the space of ten years from his decease, establish a university or college for the purposes of education, to be distinguished by the appellation of "McGill College," a further sum of £10,000 to be paid by his executors to the said "Royal Institution for the advancement of learning."

The testator died on the 19th of December, 1813.

The Letters Patent constituting the corporation created by the Statute of 1801 were issued on the 8th of October, 1818, nearly five years subsequent to the death of the testator.

The action was brought by the trustees to recover from the executors the legacy of real estate and the sum of £10,000 and interest. The heir at law intervened and claimed that the money belonged to him, that the legacy had lapsed, and besides other grounds he contended: 1st. That the legacy was null, as having been made in contravention of the Ordinance of 1743; 2nd. That no corporation was in existence, either at the time of making the will or at the testator's death, and that having no capacity to receive the legacy it became lapsed.

On the first point the Court of *première instance* said: "It has been urged that by the declaration of the King of France in 1743, enregistered in this country, the bequest of McGill was a nullity, being contrary to the provisions of the declaration, and perhaps it might have been so considered if the Provincial Statute of the 41 Geo. III, cap. 17, had not preceded the bequest, and the bequest had not been made in conformity and with a view to that Statute. . . . . But this declaration of 1743 cannot be brought to bear upon a case which stands upon its own peculiar law. The Provincial Statute of the 41 Geo. III, with a view to provide in the most extensive and liberal manner for the education of the rising generation in Canada, has erected the Corporation of the Royal Institution to which the bequest in question has been *since* made, and in the 2*nd* section has declared that the said institution should be capable in law "to receive, enjoy, "possess and retain without licence in mortmain *all* lands, tene- "ments and immoveable property, monies, goods, chattels, and "moveable property granted, devised or bequeathed in any man- "ner or way whatsoever for and in favor of the said schools and "Institutions of Royal Foundation." . . . .

"If this had been a case of a corporation erected by Royal Letters Patent alone, the declaration of 1743 might have been resorted to with more effect by the Defendant; for, although the King by his prerogative can erect a corporation, yet he cannot give it forms and privileges contrary to the general law of the land. To obtain these powers and privileges or to be exempted from general restrictions, recourse must be had to the aid of an act of Parliament; that aid has been obtained in regard to the Corporation of the Royal Institution whereby it has been authorized to take and receive without limitation or restriction all real and personal property which should, after the passing of the Act, be devised or bequeathed to and in favor of schools and Institutions of Royal Foundation. The old law must consequently give place to the new, which last being beneficial must be expounded liberally and without restrictions."

"It has been further contended that the corporation of the Royal Institution had no legal existence at the period of the devise of the testator, and on that account the bequest by him made became null and void. This is evidently one of those objections which, if founded, is in direct opposition to, and necessarily defeats the manifest intention of the testator as expressed

in his will. . . . It may be admitted that if, by a will, an immediate devise is made to a corporation, not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void even if the corporation were afterwards created without some special or express law to take the case out of the general principle; but in the present case there can be no doubt that the corporation of the Royal Institution was created by the statute of the 41 Geo. III. . . . and it was therefore erected before the testator made his will, though not complete or in operation until the subsequent nomination of the trustees or members thereof. . . . By the third section of the statute it is further enacted that all property which should thereafter be devised or bequeathed in any manner or way whatsoever, for and in favor of the said Schools and Institutions for the purposes of education should be and the same was thereby vested in the trustees of the Royal Institution. Subsequent to this statute, by the will of McGill, a bequest is made of the estate of Burnside to certain devisees in trust to convey the same nominally to the Royal Institution, but in effect to and in favor of one of the objects contemplated by the statute; and it was not necessary that the trustees or members of the Royal Institution should have been nominated at the time of the death of the testator to give effect to the bequest."

"The Court of Appeals confirmed these principles, the report of the judgment stating: that as to the first ground of objection, whatever might have been the effect of the Ordinance of the French King of the year 1743, the Provincial statute of the 41st of His late Majesty (Geo. III) granted full power to the Governor, by an instrument under the great seal of the Province, to establish free schools for the advancement of learning, and declared that the trustees and their successors to be named as therein directed, shall be a body corporate and politic by the name of "The Royal Institution for the advancement of learning." This provision of the statute, by giving such licence to the Governor, completely does away with the ancient law in this respect, and renders this ground of objection unavailable."

The second ground of objection (says the Court of Appeals) "is also untenable; for though it is admitted "that a legacy is lapsed (i. e.) *caduque* when left to an individual or to a body politic and corporate, not *in esse*, yet the principle does not apply to this case, inasmuch as the trustees were all alive when the tes-

tator made his will and they received the bequest for the benefit of the Royal Institution so soon as it should please the Provincial government to give to "airy nothing a local habitation and a name." This mode of settlement by appointing trustees to preserve contingent remainders was devised by Sir Orlando Bridgman and other eminent lawyers, during the time of the civil war in England, after the death of Charles the First."

This case, the most important in our jurisprudence, on this point of the existence of the Ordinance of 1743, establishes conclusively, 1st. that this Ordinance was our law; 2nd. that in the case submitted to the Courts, if the corporation in whose favor the bequest was to be conveyed by trustees, had not been created by Act of Parliament, with the authority to receive any such bequest, the Ordinance would have been applied.

The second reported case bearing upon the question of the effect of this Ordinance is the case of *Freligh & Seymour*, to be found in 5 Lower Canada Rep., p. 492. In this case, although the pleadings did not raise the point which was urged only in the argument before the Court of Appeals, the will of Richard Van Vleit Freleigh gave the whole of the property real and personal, to one John Brush Seymour his heirs and assigns for ever, upon trust to pay annually to his testator's daughter £75 per annum, and the whole of the estate given to her lawful issue after her death, and in default of such issue the testator gave all his property real and personal unto the said John Brush Seymour his heirs and assigns for ever, to apply the rents and revenues of the said real and personal estate to the tuition and advancement of learning in the village of Frelighsburgh, wherein a grammar school shall be established, &c.

Although the pleadings did not bring the question under the notice of the Court, the judges expressed their opinions as to this Edict being the law of the land.

Judge Aylwin in giving his opinion said:

"In ordinary cases it is not for Courts of Justice to supply exceptions, unless when public policy requires it; but in this case I believe it to be my duty to express my opinion on the trust contained in this will and the bequest to the grammar school, and I am ready to do so; this bequest is, in my view, null, as being an attempt by a private individual to make an establishment or corporation contrary to the law of the land. However praiseworthy the object may be, no private citizen can

create such establishment, and on this point the Roman law and our Canadian law have the same provisions, there is a *déclaration* of the King of France in the year 1743 registered here in the *Conseil Supérieur*, and made expressly for this country, the first and second articles whereof are in point, the second forbidding all such bequests, even in favor of persons interested with the formation of such corporations. This declaration underwent the examination of the Court of Appeals in a case of Dunière, Appellant, and the Church Wardens of the Parish of Varennes, Respondents, and received the sanction of the Court, who decided accordingly. Our statute 41 Geo. III, ch. 4, has maintained the rule laid down by the declaration of the King of France, in the proviso attached to the first section. We find also in Visey's Reports a case before the Chancellor, of *Blandford vs. Patrol*, where a similar bequest for the establishment of a school was declared to be in contravention of the statutes of mortmain."

This case did not however turn on that point, the majority of the Court being of opinion that the question could not be raised, Mr. Justice Duval stating that the question of the trust for the establishment of a school could not be decided in this cause. "That question can be raised only after the death of Jane Fre-"leigh without issue, and in the interest of her natural heirs at "law." Mr. Justice Meredith expressed no opinion as to the validity or invalidity of the bequest to the Grammar School.

In the late case of *The Boston Mining Company & Desbarats* this Court unanimously held in June last, that this Edict of 1743 was in full force in Canada.

All these decisions concur in establishing the existence and application of these provisions invoked by the Appellants in support of their action.

If such was the law, at the respective dates of these judgments, has it been altered in any respect?

Nothing can be plainer or more positive than the terms of this declaration which makes null every devise made for the purpose of establishing a corporation. The devise and bequest in this case is specially and formally made to trustees for the object of creating the "Fraser Institute" with the duty on their part to obtain a charter of Incorporation for the same.—If this is the object and the sole object of the devise, as cannot be denied, and if the article 2 of the declaration of 1743 is law, how is it possible to maintain it?

The Respondents in their argument in the Court below, attempted to justify the devise on the ground that it was not made in favor of a non-existing Corporation, but to trustees, with the obligation to create a Corporation, and that such a disposition was valid, according to the article 869 of our Civil Code.

Assuming always that the prohibition of the Edict is law, could it be violated in a more direct manner? The devise is in its terms the very thing prohibited. The law says you shall not give by will to any person for the object of making an establishment for useful or charitable purpose and for creating a Corporation, and the testator by his will puts the whole of his estate, real and personal, in the hands of two trustees for the purpose of establishing a library and museum; commanding them to obtain without delay a charter of Incorporation for its management and perpetuity.

The Code has not modified the law in this respect and the Codifiers had and expressed no intention of so doing; on the contrary every article of the Code, wherever any doubt might arise on this subject, contains a reservation and a proviso maintaining all existing exceptions and prohibitions.

The article 831 declares: "Every person of full age of sound in-
" tellect and capable of alienating his property may dispose of it
" freely by will, without distinction as to its origin or nature, either
" in favor of his consort or of one or more of his children or of
" any other person *capable* of acquiring and possessing, and with-
" out reserve, restriction or limitation, *saving the prohibitions,*
" *restrictions and causes of nullity mentioned in this Code, and*
" *all dispositions and conditions contrary to public order or good*
" *morals.*"

Art. 836. " Corporations and persons in mortmain can only
" receive by will such property as they may legally possesss."

Nothing in these articles indicates any intention on the part of the Codifiers to alter the existing law respecting the prohibitions remaining after the statutes of 1801, 41 Geo. III, cap. 4; on the contrary they could not be more carefully maintained. The liberty of disposing by will is affirmed to be given in favor of any person *capable of acquiring* and saving the prohibitions existing and all dispositions *contrary to public order*, specially enacting that corporations can receive by will *only* such property as they may legally possess.

The declaration of 1743 was made in the interest of public order, the preamble so expresses it. Moreover these articles of

the code are given as the analysis of the statute of 1801, which was our sole law on the subject of wills, and which contained this express proviso: "Provided also that the said right of devising "as above specified and declared, shall not be construed to ex- "tend to a devise by will and testament in favor of any corpora- "tion or other persons in mortmain, unless the said corporation "or persons be by law entitled to accept thereof."

The article 366 of the Code, respecting the disabilities of corporation is as follows:

"The disabilities arising from the law are:

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

"2nd. Those comprised in the general laws of the country re- "specting mortmains and bodies corporate, prohibiting them from "acquiring immoveable property or property so reputed, without "the permission of the crown, except for certain purposes only "and to a fixed amount and value:

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

Viewing and considering these articles together with the pre-existing law, can it be supposed that the Codifiers managed so stealthily to repeal the prohibitions of the declaration of 1743 without any further expression or indication? No one will suspect them of ignoring its existence; they were bound by the law appointing them to indicate any change or alteration which they might think proper to suggest in the existing laws. None has been even hinted by them on this point; on the contrary they declare that devises can be made in favor of none but those capable of receiving by will; they lay down as law that corporations and persons in mortmain can only receive by will such property as they can legally possess; they reserve all existing prohibitions founded on public order and arising from general laws on corporations and mortmain, and notwithstanding such positive enunciations it was and it will probably again be asserted that the Code has removed these prohibitions and virtually abrogated the edict of 1743. Does not every one of these articles admit the existence of anterior existing laws incapacitating parties from giving by will prohibiting devises by will to corporations or per-

sons in mortmain or for motives of public order, and where can these restrictions and prohibitions be found in any part of our general laws on mortmains except in this Ordinance of 1743? There is no other law of mortmain in Canada. The Respondents can point to no other. Assuredly if these dispositions of our Code imply a repeal of the pre-existing law, no plan could be so artfully contrived to deceive the public and conceal their true object and intention, for no person having any interest in maintaining the then existing restrictions could have suspected that they were to be abolished by the promulgation of these articles of our Code.

But the article upon which the Respondents relied more persistently in support of their proposition was article 869 of the Code, which is as follows:

Art. 869. "A testator may name legatees who shall be merely "fiduciary or simply trustees for charitable or other lawful pur- "poses within the limits permitted by law; he may also deliver "over his property for the same objects to his testamentary ex- "ecutors, or effect such purposes by means of charges imposed "upon his heirs or legatees."

This is in fact nothing more than the *résumé* and corollary of the previous articles; it is not given as introductory of any new principle, but is the embodiment of well-known dispositions of our previous law. The codifiers did not enunciate it as new law but gave it as the doctrine of Ricard, whose opinion is most positive as to the nullity of any such bequests, and the consequence of the statute of 1801, which specially reserved the prohibitions respecting corporations and mortmains as above cited. The very words show conclusively that all anterior existing prohibitions and restrictions are reserved: "*Fiduciary legatees and trustees can be appointed for charitable or other lawful purposes, within the limits permitted by law.*" No one will venture to contradict the proposition that a testator can appoint legatees or trustees for charitable or other lawful purposes within the limits permitted by law. The same could be done at any time in France and in Canada, notwithstanding the prohibition of the law, concerning devises for the purpose of creating corporations; the Ordinances with the effect claimed as appertaining to it, may co-exist with this article; there is no clashing or contradiction in the respective dispositions. But there is the whole question; if the law prohibits a legacy or devise to trustees for the purpose of estab-

lishing a corporation, if the law declares null and void any bequest made to any person for such an object, it is not a lawful purpose, it is not within the limits permitted by law, and the article 869 far from indicating any intention on the part of the legislator to remove these prohibitions, on the contrary maintains and confirms them, and thus we are irresistibly brought back to the main and only question which the words of this article point out most forcibly. Is the Ordinance of 1743 still in force in Canada? for if it is, this article 869 subjects to its test every bequest or devise and admits as lawful and valid only such as it may sanction.

It is therefore impossible to find in this article any logical inference or even a supposition of a modification of the ancient law which remains in full force, and if so, the right of the heirs to have the estate is according to the code unquestionable.

Art. 864. "The property of a deceased person which is not "disposed of by will concerning which the dispositions of his will "are wholly without effect, remains in his ab intestate succession "and passes to his lawful heirs."

Leaving aside the positive prohibition of this Ordinance, which leaves no doubt as to the rights of the Appellants, they contend independently of this their main proposition, that this legacy is void on the grouud that it is made to a party having no legal existence.

SECOND POINT.

The second proposition of the Appellants is:

I. *The legacy in question is null and void inasmuch as it is made in favor of a person who was not in existence at the time of the death of the testator and who could not receive it.*

II. *The only legacies known to our law are the direct or absolute.* 2. *The legacy of the estate or a portion of it with a charge on the portion transferred.* 3. *The fiduciary substitution. The legacy in question corresponds to none of these.*

III. *The law of trusts as practised in England is not recognized by our law.*

By the terms of the will the testator appoints two executors for the sole purpose of paying the legacies, and immediately after to transfer the balance of his moveable estate to the fund, which is by the will vested in his trustees and fiduciary legatees; and the residue of the estate moveable and immoveable he gives to the Honorable John J. C. Abbott and the Honorable Frederick

Torrance in trust, to establish the "Fraser Institute," and to obtain a charter of incorporation. And the testator declares: "*I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof shall be forthwith conveyed over to the corporation to be thereby formed to be called the Fraser Institute.*"

The devise is not made to the trustees, *their heirs and assigns* with the charge or condition of making this establishment. The property does not vest in them, but they are bound *forthwith*, to convey over to the corporation to be formed the residue of his estate, after payment of his debts and special legacies. It is an immediate devise to a corporation not in existence. The intention of the testator is manifest; he gives not to the trustees, but to this corporation, they are only the channel or instrument selected by him, through which the property is to pass; but the party seized and vested with the estate, the residuary legatee, is unquestionably this future corporation, to be thereafter formed according to the plan dictated by him, to the Legislature. The legacy is absolute, without any condition to suspend its execution.

Such a disposition has always been considered as illegal and null.

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

The doctrine laid down by the learned judge in this case, is so clear and applies so forcibly to the present case, that it would be unnecessary to confirm it by any further authority, if the Respondents were not prepared to question every principle of law which conflicts with their interests.

It is a well established rule of law that property cannot remain in suspense; it must vest in some one from the moment of the death of the owner, either in his natural heirs or in his legatees, if there is a will. The legatee of the residuary estate being in this case the "Fraser Institute," and not being in existence, the trustees having no right of property in the estate, the devise lapsed; and as there is no exclusion in the will of the lawful heirs, they alone were seized by law as proprietors of the residuary estate.

2. Troplong, Donat. N. 664. " Les Romains avaient à cet " égard un principe constant; c'est qu'une libéralité faite à un " établissement de ce genre n'était valable qu'autant qu'il existait " régulièrement par l'autorisation du pouvoir central. Ce n'est " qu'autant qu'il était certain que le legs était fait non pas au " corps mais aux individus *ut singuli*, que la libéralité se soute- " nait. Quoique le corps soit incapable, les individus peuvent ne " l'être pas. Un legs peut donc s'adresser à eux *nisi singulis le-* " *getur* dit le juris consulte Romain, *hi enim non quasi collegium,* " *sed quasi certi homines admittuntur ad legatum.* Mais quand il " était certain que c'était le corps qui avtit été gratifié et non les " individus et que ce corps n'avait pas été autorisé, le legs était " sans valeur.

" 665. Ces principes sont les nôtres. Un établissement public " qui n'a d'existence que par l'autorisation public nesaurait rece- " voir une libéralité si cette autorisation lui manque. Sans elle " il est une fraude faite à la loi, il ne vit que par un abus et cet " abus ne peut lui profiter. Mais ses membres n'étant pas frap- " pés d'incapacité individuelle peuvent être institués. Ils sont " *ut singuli* dans le droit commun. Seulement il faut que le dis- " posant ait la volonté de l'instituer véritablement, et non pas de " les charger d'un fidei-commis tacite au profit de l'établissement " public, on sent qu'en pareil cas le legs ne serait pas meilleur que " si l'établissement avait été institué directement.

" 666. A cette première condition dont la première idée se trou- " ve dans le droit Romain, il faut en ajouter une autre qui est " propre à notre droit français: c'est que la libéralité soit auto- " risée spécialement. Nous en avons dit tout à l'heure les mo- " tifs: il faut songer aux familles; il faut protéger le mouvement " de la richesse contre la main morte; il faut empêcher la trop " grande concentration des capitaux mobiliers ou immobiliers dans " des corps qui ne doivent être trop puissants."

The first condition required by law: to be capable of receiving a bequest or a devise, is to exist, and the party to which the devise is made in this case had, at the death of the Testator, no existence whatsoever.

Pothier. Don. test. ch. 3, sect. 2, art. 1.

" Les Communautés, corps, confréries, etc, qui ne sont point " autorisées dans le royaume, n'ont aucun état civil, aucune ex- " istence civile et par conséquent sont incapables d'aucunes dis- " positions testamentaires."

" Ainsi (says Demolombe 1. Donations P. 603 No. 577) la " personne qui n'était pas encore conçue à l'époque de la donation, " s'il s'agit d'une donation entre-vifs, ou à l'époque du décès du " testateur, s'il s'agit d'un testament, est incapable de recevoir.

" Telle est la première incapacité absolue qui se présente; et " il est bien juste, en effet qu'elle soit la première! Peut-il y a- " voir une autre incapacité plus radicale que celle du *néant!* " *Esse enim debet cui datur.* (*L.* 14. *ff. de jure codicill.*)

" 578. Mais s'il suffit d'être conçu soit à l'époque de la dona- " tion soit à l'époque du décès du testeteur il faut ajouter que " cette condition est indispensable!

" Et on devrait considérer comme non avenue une disposition " entre-vifs ou par testament, qui aurait été faite au profit d'une " autre personne qui n'était pas encore conçue à l'une ou à l'au- " tre des époques déterminées par notre texte.

" La conception postérieure de cette personne ne saurait avoir " pour effet de validerun acte n'ayant absolument aucune exis- " tence aux yeux de la loi."

This rule of law requiring, as an indispensable and absolute condition, the existence or conception of the party benefitted admits of two exceptions only: the first respecting substitutions and the other donations made by marriage contracts.

Demolombe (n. 587, p. 611.)

" C'est encore par une application de l'article 906 qu'il faut " décider que les corporations, commuuautés ou établissement " qui ne sont pas légalement autorisés sont absolument incapables " de recevoir par donations entrevifs ou par testament."

" Car ils n'ont, disait Pothier, aucune existence civile."

Coin Delisle Donat. & Test. p. 96.

" Pour recevoir il faut exister: on ne peut donc faire aucune " donation à celui qui n'est pas encore conçu."

" Ce principe comporte deux exceptions: la première pour les " donations par contrat de mariage en faveur des époux et des " enfants à naître du mariage; la seconde quand il s'agit de subs- " titutions.

" P. 97.-5. Il n'y a d'exceptions qu'au profit des appelés par " une substitution fidei-commissaire permise, comme nous l'avons " dit No. 1er, en parlant des personnes capables de recevoir par " donation entrevifs; mais dans la substitution vulgaire il faut " aussi, pour en profiter, être né lors du décès du Testateur, " parce qu'elle est une véritable institution ou un legs direct."

" 6. D'après ce que nous venons de dire, un testateur qui veut " gratifier un enfant non conçu à l'époque de son décès n'a qu'un " moyen légal d'y parvenir: c'est d'imposer à son légataire uni- " versel la charge de donner telle somme à l'enfant qui naîtra " d'une personne déterminée; ce ne sera plus un don au profit " d'un individu qui n'existe pas encore, mais un mode conditionel " d'une libéralité faite à une personne capable, ce qu'aucune loi " ne prohibe."

" Id. p. 96. Le défaut de capacité civile peut s'effacer par " des fictions favorables, au lieu qu'il est impossible de feindre " qu'un homme ait existé avant que de naître ou d'être conçu."

The law of trusts, such as practised in England, has never been introduced into this country. No statute can be found introducing this system or any principle from which it could be inferred. We must therefore resort to our own law on the subject. The devises and bequests known to our law are the direct or absolute legacies, the devise and bequest with a charge or condition of a legacy in favor of a third party, and the *substitution fidéi-commissaire*—fiduciary substitution.

The devise in this case cannot be held to be a direct and absolute devise to the legatees named. The very terms of the will repel any such interpretation.

It cannot be held either to be a legacy with the charge or condition of another legacy; for the legacy is given to the corporation, or to the trustees as representing and acting for this corporation, the " Fraser Institute." The trivial sum bequeathed to the trustees is given only as a remuneration for the services which they are called upon to give on behalf of this corporation; the legacy to them is not the principal one, but only an accessory to the main bequest and devise, made in favor of the corporation. Remove or annul the bequest and devise made to the " Fraser Institute," suppose it void, and it is impossible to maintain the other bequest made to the trustees, unless the intention of the testator is set at naught. The following are the words of the will:

" I give and bequeath to my old and confidential friend the " Honorable John J. C. Abbott the sum of four thousand dol- " lars, which I desire him to accept as *some compensation for the* " *service* which *I anticipate* he will render to me and to my " memory under the conditions of this my will, in the perform- " ance of the functions of executor and trustee in carrying out

'with zeal and energy the design respecting which I have con-
"sulted him and which is embodied in the latter part of this
"my will."

"I give and bequeath to the Honorable Frederick Torrance,
"one of the Justices of Her Majesty's Superior Court, the sum
"of one thousand dollars as some compensation for the assist-
"ance which I hope he will consent to give my friend the Hon-
"orable John J. C. Abbott, in the carrying out a design for the
"public benefit."

This is certainly not a legacy to the Honorables Messrs. Abbott and Torrance of his estate, or a portion of his estate, with the charge attached to it of accomplishing a certain obligation; but a mere remuneration for the assistance which he expected from them, in conveying the whole residue of his estate, real and personal, to this "Fraser Institute."

It cannot be construed as a fiduciary substitution, because it is repugnant to the elementary definition of a substitution, and has none of the essential conditions of such a disposition.

Article 925 defines the substitutions existing under our law.

"There are two kinds of substitution (says our Code), vulgar
"substitution is that by which a person is called to take the
"benefit of a disposition in the event of its failure in respect of
"the person in whose favor it is made.

"Fiduciary substitution is that in which the person receiving
"the thing is charged to deliver it over to another either at his
"death or at some other time.

"Substitution takes its effect by operation of law at the time
"fixed upon, without the necessity of any delivery or other act
"on the part of the person charged to deliver over."

Art. 927. "The person charged to deliver over is called the
"institute, and the one who is entitled to take after him is
"called the substitute."

Art. 944. "The institute holds the property as proprietor,
"subject to the obligation of delivering over and without preju-
"dice to the rights of the substitute."

No one will pretend that the present devise can come under any of these articles. According to our law the party receiving a legacy with the charge of substitution, is held to be *the proprietor;* it is absolutely conveyed to him; he must be benefitted by the use and enjoyment of the property for his lifetime or during a fixed period.

Thevenot d'Essaules defines a *substitution fidei-commissaire* " une disposition de l'homme par laquelle, en gratifiant quelqu'un " expressément ou tacitement, on le charge de rendre la chose " donnée, ou une autre chose, à un tiers qu'on gratifie en second " ordre."

The trustees in the present case are not *gratifiés* with the property; it is not granted to them for their use and benefit to restore it after their death or after a certain period to another party, but they are bound *forthwith* to convey it to the " Fraser Institute." They can derive no individual benefit from the property devised to this Institute, and in France at no period could any such devise ever have been considered as a *legs fiduciaire, fidei-commissaire*, or a *legs avec charge*. The legacy cannot be considered as a *legs fiduciare*, as the essential condition of such a disposition is to vest the estate in the heir, who is seized immediately after the death of the testator; the fiduciary being nothing more than the agent of the heir or legatee, who must therefore exist and be capable of taking on the opening of the legacy at the time of the death of the testator.

See Merlin Rep. Vo. Fiduciaire.

Rolland de Nillargues Dict. Vo. Fiduciaire.

THIRD POINT.

This legacy is further null because our law prohibits corporations of every description to receive any devise of land without the express authorization of the Crown.

Corporate bodies or artificial beings cannot legally exist without a law creating them, and consequently cannot receive donations before their existence is sanctioned by law. They require besides the authorization and sanction of the Government to acquire gratuitously after their legal creation. Acquisitions of this kind concern social and political economy. Corporate bodies concentrate large amounts of wealth; they subtract from circulation property which possessed by individuals would feed and activate industry; they may despoil families and ruin them by the temptations offered to the vanity of weak-minded persons, or by influences of a higher and more intangible character. For these reasons, in all times, in France, in England, and in most of the civilized communities, severe regulations have been established to restrict liberalities to corporations, and such were the motives which inspired the Edicts of 1743 and 1749 and the Ordinances anterior.

Merlin Rep. Vo. Mainmorte, gives the history of the law of mortmain, and cites several decisions by the Courts of France showing how strictly they enforced its prohibitions long before the Revolution.

The articles 10 and 20 of the Edict of 1743, cited above, contain positive prohibition on this point: no real property or constituted rents can be devised to corporations.

What is devised here by this will, if not the entire real estate owned by the testator at the time of his death? True it is the trustees charged with the obtaining of the charter are authorised to sell the real estate, but with the imposed ulterior object of conveying the proceeds thereof to the corporation to be formed. The real estate is confided to their management only with the view of conveying it or the proceeds thereof to this corporation, which is alone to enjoy the profits.

If the law forbids the conveyance of real estate in any shape whatsoever to a corporation recognized by law, can it be supposed that it could sanction the conveyance of the proceeds of real estate directly bequeathed to a non-authorized corporation, through third parties, by adopting the shallow form of appointing mandatories or agents with power to sell and realize the real estate for the sole benefit of this corporation, who would so receive the value of this real estate whilst it was prohibited from receiving the property itself?

It is unquestionable that the wish of the testator was not to benefit the legatees individually; they are not properly speaking legatees, but mandatories deprived of any right whatever to keep the legacy for themselves or their family, under any circumstance, but they are bound to transmit the gratuity to the corporate body, having in prospect and in the mind of the testator a perpetual existence, entirely independent of the personal interest of the legatees or trustees, who were to be replaced by other parties having no connection or relationship with them; they being but the attorneys of the future members, the attorneys of the corporation in which they were to be absorbed, and to whom the testator sacrificed his family, and the interest of these so-called fiduciary legatees.

Our Code specially provides for any such case.

Art. 774. "Dispositions made in favor of persons incapable of "receiving are void, whether they are concealed under the form

"of onerous contracts or executed in the name of persons inter-"posed."

In whatever light we consider this devise; either if it be viewed as made to the trustees with the obligation to convey the property itself to this future corporation; or to transmit the proceeds, after realizing the same by way of sale, it is in both cases a violation of the Edict which prohibits the conveyance of real estate by will or otherwise to a corporation, without the authorization of the Crown—and it falls under the article 774, as being a disposition concealed in the form of an onerous contract or executed in the name of persons interposed between the testator and the corporation as the medium or channel through which passes the real estate, converted into coin. The real estate is put in their hands with the command of the testator to transfer it *forthwith*, or the proceeds, if they deem necessary to sell it, to the "Fraser Institute." And if they do not think proper to sell, or whatever they do not think proper to sell, they are bound to convey forthwith, to this corporation. What the law prohibits to be done directly, cannot be done indirectly, is a universal legal axiom which manifestly applies here.

These principles are not peculiar to the French law, and as it has been advanced that the change of Sovereignty had for effect to modify our law of mortmain, as an attribute of the prerogative, it may be important to consider the English law on the subject, and we are logically brought to another proposition of the Appellants.

FOURTH POINT.

According to the English law of mortmain this bequest and devise would be equally null and void.

If the English law is to prevail, it must be found in the statutes which were in force at the time of the cession of Canada to Great Britain. The law in existence at that date, unless altered by local legislation with the sanction of the Crown, would govern this case.

It is unnecessary to refer to the old statutes on the subject. The policy of early times strongly favored gifts even of land to charitable purposes. The statute of 43 Eliz. ch. 4, introduced some strict prohibitions which were directed more against what was then thought superstitious uses, as it was construed by the Courts to authorize testamentary appointments to corporations for charitable uses, and even to enlarge the devising capacity of

testators by rendering valid devises to those uses by a tenant in tail. At the commencement of the eighteenth century however, the tide of public opinion appears to have flowed in an opposite direction, and the legislature deemed it necessary to impose further restrictions on gifts to charitable objects; from the nature of which it may be presumed that the practice of disposing by will of lands to charity had antecedently prevailed to such an extent as to threaten public inconvenience. It appears to have been considered that this disposition would be sufficiently counteracted by preventing persons from alienating more of their lands than they chose to part with in their own lifetime; the supposition evidently being that men were in little danger of being perniciously liberal at the sacrifice of their own personal enjoyment, and when uninfluenced by the near prospect of death. Accordingly the statute of 9 Geo. 2, c. 36 (usually but rather inaccurately called the statute of mortmain), enacted that no hereditaments should be given, conveyed or settled to or upon any persons, bodies politic or corporate, or otherwise for any estate or interest whatsoever, or any ways charged or encumbered in trust or for the benefit of any charitable uses whatsoever, unless such gift or settlement of hereditaments or personal estate (other than stocks in the public funds,) be made by deed, indented, sealed and delivered in the presence of two credible witnesses, twelve calendar months before the death of the donor, including the days of the execution and death, and enrolled in chancery within six calendar months after the execution, and unless such stocks be transferred six calendar months before the death.

1. Jarman on Wills, p. 244 [198].

"The statute it is clear extends to property of every descrip-
"tion which savors of the realty.

"Where lands are devised in trust for a charity the trust not
"only is itself void, but vitiates the devise of the legal estate on
"which it is engrafted.

"Though the Statute does not in terms apply to the proceeds
"of land directed to be sold, yet it is settled by construction that
"a fund of this nature is within its spirit and meaning."

P. 246, [202]. "If however, investment in land is the ulti-
"mate destination of the money, the bequest will not be pro-
"tected by the circumstance of provision being made for its sus-
"pension during an indefinite period; and therefore gift of

" personal estate to be laid out in the purchase of lands has been " repeatedly held to be void, although the trustees were em- " powered to invest the money in the funds until an eligible " purchase could be made."

P. 247. "And it is equally clear (whatever doubt may for- " merly have been entertained on the point) that a legacy to a " charity, on condition that land be provided from another source " for effecting the testator's object, is void, as by such means, " (and this is the test by which the validity of all such gifts is to " be true,) fresh land is put into mortmain."

P. 252. [211.] "Never indeed was the spirit of any legisla- " tive enactment more vigorously and zealously seconded by the " judicature than the statute of the 9 Geo. II. This is abun- " dantly evident from the general tone of the adjudications; but " the two points in which it is most strikingly displayed are, first, " the holding a gift to charity of the proceeds of the sale of real " estate to be absolutely void, instead of giving to the charity " legatee the option to take it as money, according to the rule " since adopted in the case of a similar gift to an alien; and, " secondly, the refusal of equity to marshal assets in favor of a " charity in conformity to its general principle."

" Id. P. 259. [219]. " The necessity of imposing some re- " straint on the power of protracting the acquisition of the absolute " interest in, or dominion over property, will be obvious, if we " consider for a moment what would be the state of a community " in which considerable proportion of the land and capital was " locked up. That free and active circulation of property, which " is one of the springs, as well as the consequences of commerce, " would be obstructed; the improvement of land checked; its " acquisition rendered difficult; the capital of the country gradu- " ally withdrawn from trade; and the incentives to exertion in " every branch of industry diminished. Indeed, such a state of " things would be utterly inconsistent with national prosperity; " and those restrictions which were intended by the donors to " guard the objects of their bounty against the effects of their " own improvidence, or originated in more exceptionable motives " would be baneful to all."

Such are the dispositions of the law of England respecting devises similar to the one in question, and although it has been decided in several cases there, that this statute of Geo. II and the general law of mortmain did not apply to Scotland, Ireland, and

the Colonies, being purely a municipal law (according to decisions cited in 2 Merivales Rep. p. 143, and Redfield on Wills, Part II, p. 790,) nevertheless the Appellants would willingly accept the rule of the English law such as it existed at the time of the cession of Canada to determine the validity of the devise in question.

It is a remarkable fact that the same causes seem to have called for almost identical enactments at the same period in France, England and Canada. The policy and motives of the French Ordinances and the English Statutes are the same, and appear to have originated in a common want to remedy a common evil. And whether you submit this will to the test of the English, of the French or Canadian law, its dispositions are equally inconsistent and violative of the prescriptions of any of them.

If the same rule prevailed in England, when the change of Sovereignty took place, respecting devises and bequests of this kind, the mere fact of the change of Sovereignty cannot have dispensed with legal provisions which, in the opinion of the legislators of both countries, were essential for the protection of families and the welfare of society.

FIFTH POINT.

Under our system of jurisprudence bequests and devises for charitable uses, even when made within the limits of the freedom of disposal by will, were subject to the controlling power of the Courts who restricted them in favor of relatives.

The removal of incapacities existing under our laws effected by the Statutes of 1801 carefully excepted those which existed respecting corporations and other persons in mortmain, unless these corporations were specially authorized by law to accept of any such devise, as shown by the Statute and the various articles of our Code cited above.

Much stress has been laid on the promulgation of this Statute as introducing an unlimited freedom of disposing by will of every kind of property in favor of whomsoever the testator might select as the object of his liberality. The liberty of disposing by will existed nevertheless before this Statute, so far as the personal estate or moveable property was concerned and one-fifth of the *propres*. True it is that there was a portion reserved to the family, and a prohibition existed to bequeath the remaining por-

tion to bastards, concubines, the attending physician and confessor; but no prohibition existed to give for pious or charitable uses the unreserved portion of the estate.

Within these bounds the testator was as free to dispose as now. It did not however prevent the Courts from interfering with such bequests, and whenever a will was found disposing in an extravagant manner to charitable or public uses of the portion left to the free disposal of the owner, overlooking poor relatives, although they had no legal right to the estate by reason of the will, the Courts invariably interfered in their interest, sometimes cancelling and generally curtailing such dispositions.

17 Guyot, Rep. Vo. Testament, p. 176.

"Lorsqu'un testateur a légué tout ou partie de sa succession "aux pauvres, c'est une jurisprudence constante d'en donner une "portion considérable aux pauvres parents."

The author cites five arrêts which set aside legacies to hospitals or charitable uses on the sole ground that these legacies were extravagant and unjust to poor relatives, though the testator had full power and authority by law, to exclude the collateral relatives from his succession by will; and he adds:

"On a encore jugé de même par un si grand nombre d'arrêts "qu'on ne peut pas les rapporter tous et récemment pour les "dispositions du Sieur Alliot, Abbé commendataire de Haute-"feuille. Dans ces cas la justice répare l'oubli du testateur ou "la faute qu'il a faite de préférer de pauvres étrangers à ceux "de son sang."

Every aspect under which the case of the Appellants could be considered seemed conclusive in their favor. A positive law clear and definite covering without possibility of cavil, the clauses of the will impugned by them; these clauses being the very illustration in fact of the prohibition of this law; the solemn declaration of all the tribunals of the country affirming its existence; the absence of any disposition repealing or even implying its repeal; the reiterated sanction of all its dispositions in several articles of our Code; and besides this the character of this legacy made contrary to the fundamental principle of our law of succession, a legacy made directly to a non existing being, through the instrumentality of agents, and a further violation of the law prohibiting devises to Corporations, equally condemned by the laws of Canada and England; resting their case on these irrefutable grounds, the Appellants had reason to expect a favorable decision.

On the 30th March judgment was rendered by Mr. Justice Beaudry dismissing their action.

Three reasons are given by the learned judge in the judgment of record:

1st. That the establishment of a public library and museum is legal and does not require previous Letters Patent authorizing the same.

2nd. That under the will the two trustees were vested with the estate for the purpose mentioned in the will.

3rd. That under the 869 Art. of the Code, the fiduciary legatees can hold and manage the estate so as to carry out the desires of the testator, until a corporation be formed, and that until such time no contestation as to the right of such corporation to receive the legacy can take place.

As to the first ground, it is difficult to understand how it can be an answer or construed as an objection to the action. The Edict does not apply to bequests made for the creation of illegal corporations; but to all bequests made for the purposes of establishing corporations to be *sanctioned and approved* of by the constituted authorities. No corporation can exist without the authority of law, and this principle is not new; it prevailed in 1743 as well as now. The establishment of a public library and museum was at no time illegal, no more than the foundation of an hospital. If an individual thought proper to establish a library, or if two or more parties thought proper to join in the erection of a library or an hospital, no law ever existed to prevent this laudable object.

The only difference made by chapter 72 of the Consolidated Statutes is that the permission is given by Statute upon the condition of fulfilling certain formalities prescribed by the Statute, the most which could be inferred from the promulgation of the Statute is that the necessity of Letters Patent has been done away with, and that persons can subscribe together and form themselves into an association which shall have the same powers as if created by Letters Patent.

The prohibition of the Art. I of the Edict enacts that no establishment or corporation shall be formed without the express permission of the Crown granted by Letters Patent. The Letters Patent are nothing but the evidence of a permissive authority. Whether this authority be given by Letters Patent or by statute, the rule still subsists that no corporation can be formed without

this authority of the Government, and this statute has not altered it.

But the question remains still the same relatively to the application of the Edict; whether a bequest or devise can be made for the purpose of establishing such a corporation.

The existence of this Statute can have no bearing whatever upon the question at issue. The Statute merely allows any ten parties to subscribe money for the purpose of establishing a library and to form themselves into a corporation to carry out this object.

In the present case it is a bequest and a devise to two persons, for the purpose of creating a corporation, receive the entire estate under a totally different law, under a special charter to be obtained according to the directions of the testator.

The learned judge is reported to have stated this ground in the following terms:

1st. "Is the establishment of the Fraser Institute for an object "permitted by law? The answer to this question may be found "in the Consol. Stat. Canada, cap. 72, permitting the establish- "ment of Libraries and Mechanics' Institutes, without obtaining "Letters Patent. It is sufficient that ten persons join with a "capital of $100, and fyle a declaration of name, object, &c. "They then constitute a corporation with right to hold immove- "ables, not exceeding in annual value $2000, in localities with "3000 inhabitants or more. How can it be pretended, in the "face of this law, that the ordinance of 1743 can apply to a cor- "poration such as that contemplated by Mr. Fraser? The same "may be said of all other corporations that are charitable and "philanthropic associations, the establishment of which is allowed "by chapter 71 C.S.C., without the necessity even for the de- "posit required by chapter 72. All these foundations being thus "free, the fundamental part of the declaration of 1743 is inap- "plicable to them, and arts. 1 and 21 are without effect. But "what as to the 2nd article which prohibits testamentary dispo- "sitions for the purpose of forming such establishments before "the issue of letters patent? It must be said, that inasmuch as "there is no longer need of letters patent, this article no longer "applies to the foundation of libraries, which is a benevolent "object within the limit of the law, according to the provisions "of Art. 869 of the Civil Code, so long as the Trustees do not "exceed the limits prescribed by the statute as to the annual

"value of the immoveables which can be acquired by them. "This article of the Civil Code justifies the appointment of "Trustees made by the testator, to carry out his benevolent in- "tentions, and sanctions the doctrine or value *cum capere poterit* "invoked by the Defendants. In fact this Art. 869 has intro- "duced, if it has not confirmed, the English jurisprudence. The "testator wished to establish a public library. That was his "object, and not the creation of a corporation."

The Statute, chap. 72, required money to be paid by ten individuals and a declaration containing the corporate name of the institution; its purpose; the amount of money or money's worth subscribed by them for the use thereof; the names of those who were to be the first trustees; the mode in which their successors are to be appointed or by-laws made for their appointment or the admission of members, or for any other purposes, and generally such other particulars and provisions as they may think necessary "*not contrary to this act or to law.*" This declaration is to be fyled in the office of the Registrar of the County.

By Sec. 4. After the accomplishment of these formalities the Directors or trustees of any such institutions and their successors become a body corporate with such powers and immunities as are vested in such bodies *by law*, evidently intending that they should remain subject to all existing restrictions and prohibitions.

By Sect. 6. It is specially enacted that any library, association, situate in any town having three thousand inhabitants or more, may hold real property not exceeding in annual value the sum of two thousand dollars.

Not a word is to be found in this statute allowing said corporation to receive devises of land or bequests, or authorizing such bequests or devises for the purpose of establishing such institutions.

According to the terms of the statute itself, no such institution can be formed in accordance with the intention of the testator, the trustees cannot avail themselves of this statute for the purpose of establishing this library and museum.

The establishment contemplated by the testator is one which cannot be formed under it. How is it possible then to contend that this statute can have any bearing on this case?

The right given to not less than ten persons to form an association by subscribing a certain sum of money for the establish-

ment of a library, with a right to hold property to an amount of two thousand dollars annual value, is the sole object contemplated by this statute, and this is totally different from the fact of bequeathing money or property for the purpose of creating a library and museum corporation. The provisions of this statute, chap. 72, can be carried out independently and together with those of the Edict of 1743. If the statute contains no repeal of any of the articles of the Edict, and if they do not conflict with one another, as is apparent, from what can the repealing disposition be gathered?

There is assuredly no shadow of an argument to be drawn from this statute. Because the law permits any ten persons to subscribe the amount necessary to establish a library after they have complied with the conditions required, and gives them corporate rights subject to all existing laws, with the privilege however of holding property to the amount of two thousand dollars, it does not follow that a then existing law forbidding the bequest and devise of property to create a corporation by will or otherwise is thereby repealed. The most which could be said is that supposing a corporation was so established it could purchase property or receive property by donation to the amount required to complete this amount of two thousand dollars annual value. But it never was pretended that such a corporation was in existence or ever was intended to be formed. How then can this statute have any effect on the question?

The error of this pretension on the part of the learned judge is still more obvious when compared with his decided opinion as to the existence of the Edict as the law of Lower Canada. The following are the very words used by him in the report of the judgment:

"The plaintiffs, he proceded to say, cannot fail to succeed if "these dispositions of the declaration are still in force. The de- "fendants have therefore endeavored to show that they have been "abrogated: 1st. By the introduction of unlimited power of "bequest. They have invoked under this head the Act. 41, "George III.; but this Act has not had the effect which the de- "fendants allege, for a restriction is placed on the right of dis- "posing by will. This disposition is reproduced in Art. 831 of "the Civil Code. His Honor cited the Statute excluding bequests "to corporations which have not been granted permission to receive "them. This disposition maintained the laws of *mainmorte* which

" previously existed. The first pretention of the defendant was, " therefore, unfounded. 2nd. By the incompatibility of the pro- " visions of the Declaration with the Royal Prerogative of the " English Sovereign. The defendants have contended that the " provisions of the declaration of 1743 had the effect of restrict- " ing the Royal Prerogative, by imposing formalities which do " not exist in England, and that thus its dispositions have been " in effect abrogated by the Cession, leaving out the English law " in force in this respect. Whatever may be the prerogative of " the Crown of England, it is admitted that in the Colonies this " Royal Prerogative may be restricted, in all that does not pertain " to the fundamental principles and rights on which the sovereign " authority rests, if formal laws exists in the colony restricting " the prerogative (Chitty, Prerogative of the Crown, pp. 25, 32); " and that resort must be had to the charter of the colony, or to " the treaty by which the colony was acquired. In substance " the Declaration of 1743 is in conformity to the common law of " England. The difference then could only be as to the formali- " ties, and even supposing that the Royal Prerogative prevailed, " it could only be as to the question of form. It cannot be deni- " ed, however, that although by Magna Charta it was forbidden " to make gifts to religious communities directly or by trusts, " this prohibition did not extend to the establishment of schools, " nor to gifts made for the support of the poor, or for other cha- " ritable objects. Our Declaration of 1743 could not on this " point restrict the Royal Prerogative, since the exercise of that " Prerogative, was not necessary to render valid such dispositions. " The second ground of the defendants must therefore be over- " ruled."

The second ground given by the learned judge is that the two trustees were vested with the estate for the purpose mentioned by the will.

There is no doubt that the entire estate was put in the hands of the trustees; but it is equally undoubted that they are appointed as the mere conduits of the estate which is given to and vested in the Corporation to be formed, according to the directions of the testator and to which they are ordered to transmit it forthwith. It is equally manifest that the trustees have no interest whatever in the estate, they receiving but a slight compensation, as the testator expresses, for their trouble in conveying the estate. But, admitting that, under the will, these trustees were vested

with the estate for the purpose mentioned in the will, the entire question remains; is such a legacy sanctioned by the law? is it contrary to the dispositions of the Edict? and is this Edict still in force in this Province? And, as these points have been fully examined above, the Appellants will not revert to them anew.

The third ground of the judgment is that under article 869 of the Civil Code, the fiduciary legatees can hold and manage the estate so as to carry out the desires of the testator.

This point has been also fully discussed. As it has been shewn, this Article is not introductory of any new principle. It is given by the Codifiers as the expression of the previous existing law, and the proviso it contains is repugnant to any supposition of any intention on their part of altering it. No words could be used to indicate more plainly that the anterior dispositions restricting devises and bequests remained in full force. The mere reading of it must convince every one of the correctness of this view.

"Art. 869. A testator may name legatees who shall be merely "fiduciary or simply trustees for charitable or other *lawful pur-* "*poses, within the limits permitted by law.*"

With these words, how can it it be conceived that the intention of the Codifiers was to change all our system of devises and bequests, by introducing the complete system of trust, as recognized by the English law, utterly unknown to ours and to efface all the dispositions of the Edict prohibiting devises and bequests, for the purpose of creating establishments or institutions for charitable or useful objects? Far from leading to any such conclusion, this article, on the contrary, evidently confirms whatever restrictions or prohibitions existed as positively as the proviso contained in the Article 831, which as the learned judge admits, maintains the laws of *mainmorte* previously existing. If, in his opinion, the Article 831 maintains the law of mortmain, which is none but the Edict of 1743, how can the words of the Article 869 be construed to have a contrary effect?

The same rule ought to apply to both articles, and as well to the Statute Chap. 72, inasmuch as this Statute was in existence when the Code was made.

In reviewing the observations made by the learned judge, his argument can be condensed as follows:

The Edict is in force, as is shown by the Art. 831, but, because a Statute was passed before the Code which serves as general Letters Patent to any institution to be formed by private subscrip-

tions for the purpose of establishing a library or a Mechanic's Institute, according to its provisions, the Article 869 has so far modified the existing law as to allow a bequest and a devise to be validly made, for the purpose of creating an institution by two trustees and to be formed entirely independent from the Statute, provided such bequest does not amount to more than the value of two thousand dollars annually; notwithstanding this right to hold property to that extent, is granted only to institutions formed according to this Statute, by not less than ten persons subscribing together the amount required for such an object.

In the present case, the learned judge, according to this view, could not go beyond the limitations of the Statute chap. 72, and he considers the heirs entitled to set aside the legacy for any sum exceeding the capital represented by the annual revenue of $2,000, but only after the trustees shall have expended such an amount. If such right belongs to the heirs, according to the doctrine of the learned judge, then they have an unquestionable right to have it so declared by the Court, and as the legacy comprises the entire estate of the testator, the Appellants were entitled upon the present action to have a judgment limiting this legacy to that amount.

By the action it was alleged; that the estate bequeathed was worth $200,000; this was not denied by the Defendants. They did not pretend that they were, in any manner, entitled to convey part of this estate or any specified amount to this Corporation, but claimed to be entitled to the possession of the whole; they did not establish that it was an institution under this Statute and which could, according to its provisions hold property. The Court being of opinion, as it is clearly proved, that this Corporation could not hold or receive more, or the object of the legacy, which was the establishment of a library, could not exceed this sum, it should have so declared it, and annulled the devise to that extent.

Here again in this very Statute allowing the establishment of these Libraries and Mechanic's Institutes, as well as throughout every other act creating new Corporations, we find the intention of the legislator to keep these bodies subject to the control of the Sovereign power and to maintain all the restrictions which had been so carefully and so wisely provided in the general interest of the community. They are allowed to hold property, only to a limited amount, what is absolutely required for their strict wants, they are declared to have only such powers which are vested by law in bodies corporate but none others.

The necessity for these restrictions still exists; their usefulness has been well and long tried. If it was believed more advisable or beneficial to society to remove them, it is the duty of the legislature to undertake it, and, until this be accomplished, the Courts are bound to apply the law as it stands, and cannot make exception for the most favorable case.

MR. BARNARD for Respondents:

The ground upon which the Appellants principally rely to set aside Mr. Fraser's will is the ordinance of 1743—but independently of that ordinance, they assert as a distinct principle of our law the nullity of a legacy to a person not *in esse*. Moreover in case it should be held that the change of sovereignty has had the effect of introducing in Canada the English law of mortmain, as a branch of the public law, they contend that the English statute 9 Geo. 2, c. 36, would then apply and be equally favorable to them. As to the other pretentions of the Appellants they are so manifestly irrelevant and unfounded, that they will not need any but a passing notice.

The Respondents deny that the ordinance of 1743 is in force (in the sense contended for by the Appellants), and next they say that if it is in force, it only applies to Ecclesiastical Corporations, *i. e.*, Corporations on the one hand perpetual and on the other restricted as to the disposal of their property, and liable in consequence to the objection that they withdraw a considerable portion of the real estate of the country from circulation and commerce. This second point will form the subject matter of a separate argument; it is with the first point only that the present argument will deal.

The following are the propositions at present submitted by the Respondents.

1o. Under our law Corporations are under the control of the Crown, and can only possess such property as the Crown may allow, but its sanction need not precede, it is equally effective if it follows it.

In other words, our Code, while it has preserved the old law of mortmain upon which the ordinance of 1743 was based, has not reproduced the extreme provisions of that ordinance.

2o. Legacies to persons not *in esse* or otherwise incapable, are valid if made on condition that they become capable, *cùm capere potuerit*.

3o. Which is the consequence of the above, a legacy to a non-existing Corporation, on condition of its obtaining a charter from the Crown, is valid.

The Respondents will also maintain as a separate proposition, although it is more or less implied in the preceding, that the legacy, being made to trustees, was valid under the articles of our Code, which admit the unlimited liberty of making Wills, and in particular under art. 869.

The Appellants' objection to the first of the above propositions is founded upon art. 366 of our Code, which says that the disabilities to which Corporations are subject are among others:

"Those comprised in the general laws of the country respect-
"ing mortmains and bodies corporate, prohibiting them from
"acquiring immoveable property or property so reputed, with-
"out the permission of the Crown, except for certain purposes
"only, and to a fixed amount and value."

If the Appellants are to be believed there never was but one law in force in this country respecting mortmains, and that, the ordinance of 1743, and the Code, they contend, must necessarily refer to it.

The point to be determined is therefore whether the Code does refer to the ordinance of 1743 as being in force, for if it does there is no doubt that it annuals legacies in favor of non-existing Corporations, (supposing them of course to belong to the class of Corporations to which it applies) even those which contain the condition that a charter be obtained, neither is there any doubt that as to all acquisitions by Corporations, it expressly requires the previous consent of the Crown.

In favor of the Appellants' view is the circumstance that our Courts have on several occasions assumed that the ordinance of 1743 forms part of our laws. While fully realising the extent of the prejudice which this fact must create against them, the Respondents are confident they will be able to shew that the ordinance of 1743 has never been held to be in force in the sense understood by the Appellants, and that the doctrine really laid down in those cases, however unguarded perhaps the language used, far from conflicting with the Respondents' present pretensions, supports them. But to do this effectually, the whole subject must first be viewed, as if the pretended jurisprudence had no existence whatever.

In considering the Appellants' pretension that art. 366 refers to the ordinance of 1743, it will be noticed how small is the portion of it which they have dared to quote. It is, at all events, as a whole, that it should be viewed, when its very special character is clearly perceived. Not that it affirmed any new principle, for the law of France had always subjected Corporations to public control, and in that respect as Merlin puts it "cet édit renouvelle toutes les dispositions des lois précédentes," but that under pretext of adding thereto, what the same author calls "les mesures les plus propres à en assurer l'exécution," it adopted for the purpose of enforcing an undoubtedly correct principle, provisions of the most extraordinary, and judged by modern ideas, of the most unreasonable severity. Legacies in favor of existing Corporations, which, subject to the payment of a tax or "*droits d'amortissement*," had always been valid, were for the future strictly prohibited, as were also conditional legacies to non-existing Corporations, while gifts of land to Corporations by deeds *inter vivos* were declared absolutely null and void, unless previously authorized, the formalities to be observed before an authorisation could be obtained, being so numerous and onerous, as to be almost prohibitory—the whole system being in fact so extreme and exorbitant, that it had to be relaxed almost immediately after (in 1762) in favor of hospitals and other similar establishments: After which came the Great Revolution of 1789 when Corporations were not only repressed but entirely suppressed as inconsistent with free institutions; and finally France after many and various experiments, was glad to return to its old common law on the subject of Corporations, the French law, at the present moment, being in every essential particular what it was before 1749.

As far as Canada is concerned, it would be strange indeed, if an ordinance, such as that of 1743, had survived untouched by the many changes which our laws, since that date, have undergone; considering, especially, the favor shewn by our Legislature to Corporations, including Ecclesiastical Corporations, to which, without doubt, the ordinance mainly applied, even if it can be said to have applied to any other. Accordingly a strong presumption exists that it must have been, in some way or other, more or less extensively modified, and the more closely the ordinance is examined, the stronger that presumption becomes, until it grows finally to a conviction, that nothing of it remains, save the

general principle which it affirmed in common with the former laws.

Art. 20 is as follows:

" Voulons qu'aucuns des dits biens ne puissent être donnés " aux dites communautés et gens de main-morte, par des dispo- " sitions de dernière volonté, et entendons comprendre dans la " présente prohibition, les nègres esclaves qui servent à exploiter " les habitations, lesquels à cet égard ne pourront être reputés " meubles, et seront regardés comme faisant partie des dites " habitations, et sera la disposition du présent article, exécutée " quand même le testateur, au lieu de laisser aux dites commu- " nautés et gens de main-morte directement les dits biens et " nègres esclaves, aurait ordonné qu'ils seront vendus et que le " prix leur en serait remis, le tout a peine de nullité."

Art. 18 prohibits notaries from passing any deeds in favor of Corporations " qu'après qu'il leur aura apparu de nos dites let- " tres de permission et arrêts d'enrégistrement d'icelles desquel- " les lettres et arrêts, il sera fait mention expresse dans les dits " contrats et actes, à peine de nullité, même d'interdiction et " dommages et intérêts des parties s'il y écheoit, et en outre d'une " amende qui sera arbitrée suivant l'exigence des cas, et appli- " cable moitié au dénonciateur et moitié à nous."

And article 19 is of a similar nature " Défendons à toutes " personnes de prêter leur nom aux dites communautés et gens " de main-morte, pour posséder aucun des dits biens, à peine de " dix mille livres d'amende, laquelle sera appliquée ainsi qu'il " est porté par l'article précédent."

The following articles relate to the formalities to be observed to obtain a license in mortmain. They should be read in view of the fact that the ordinance of 1666 against mortmains had the following:

" Afin que l'espérance d'obtenir des lettres patentes après coup " ne serve plus de prétexte de commencer l'érection d'aucun mo- " nastère sans notre autorité, nous avons déclaré tels monastères, " etc., indignes d'en obtenir ci-après." This provision, so curiously indicative of the old French *régime* had evidently proved ineffectual, and hence the following articles in the ord. of 1743.

III. " Ceux qui voudront faire une fondation ou établissement " de la dite qualité par des actes entrevifs, seront tenus, avant " toutes choses, de présenter aux gouverneurs, lieutenans géné-

" raux pour nous et intendans, ou aux gouverneurs particuliers " et ordonnateurs des dites colonies, le projet de l'acte par lequel " ils auront intention de faire la dite fondation ou le dit établis- " sement, pour, sur le compte qui nous en sera rendu, en obtenir " la permission par nos lettres patentes, lesquels ne pourront-être " expédiées, s'il nous plait de les accorder, qu'avec la clause ex- " presse qu'il ne pourra être fait aucune addition, ni autre chan- " gement au dit projet, lorsqu'après l'enregistrement des dites " lettres en nos Conseils Supérieurs, l'acte proposé pour faire le " nouvel établissement sera passé dans les formes requises pour " la validité des contrats ou des donations entrevifs.

IV. " Déclarons que nous n'accorderons aucunes lettres paten- " tes pour permettre une nouvelle fondation ou établissement " qu'après nous être fait rendre compte de l'objet et de l'utilité du " dit établissement, ainsi que de la nature, valeur et qualité des " biens destinés à le doter, et après avoir pris l'avis des dits gou- " verneurs, lieutenans-généraux pour nous et intendans, ou des " dits gouverneurs particuliers et ordonnateurs, et même le con- " sentement des communautés ou hopitaux déjà établis dans la " colonie où la dite fondation sera projetée, et des autres parties " qui pourront y avoir un intérêt.

V. " Il sera fait mention expresse, dans les dites lettres, des " biens destinés à la dotation du dit établissement, et il ne pour- " ra y en être ajouté aucun autre, soit par donation, acquisition " ou autrement, sans obtenir nos lettres de permission, ainsi qu'il " sera dit ci-après, ce qui aura lieu nonobstant toutes clauses ou " dispositions générales insérées dans les dites lettres patentes, par " lesquelles ceux qui les auraient obtenues auraient été déclarés " capables de posséder des biens-fonds indistinctement.

VI. " Voulons que les dites lettres patentes soient communi- " quées à nos procureurs-généraux, aux dits conseils supérieurs, " pour être par eux fait telles réquisitions ou pris telles conclu- " sions qu'ils jugeront à propos, et qu'elles ne puissent-être enre- " gistrées qu'après qu'il aura été informé, à la requête de nos " dits procureurs-généraux, de la commodité ou incommodité " de la fondation ou établissement, et qu'il aura été donné com- " munication des dites lettres aux communautés ou hopitaux " déjà établis dans la colonie ou l'établissement sera projeté, et " autres parties qui pourront y avoir intérêt, le tout à peine de " nullité de l'enregistrement des dites lettres en cas d'omission " des dites formalités.

VII. " Ceux qui voudront former opposition a l'enregistre-
" ment des dites lettres, pourront le faire en tout état de cause
" avant l'arrêt d'enrégistrement, et même après le dit arrêt, s'ils
" n'ont pas été appelés auparavant, et seront toutes les opposi-
" tions communiquées à nos dits procureurs-généraux, pour y
" être, sur leurs conclusions, statué par nos dits conseils supé-
" rieurs ainsi qu'il appartiendra.

VIII. " Nos dits conseils supérieurs ne pourront procéder à
" l'enregistrement des dites lettres ni statuer sur les oppositions
" qui seront formées au dit enregistrement que lorsque les gou-
" verneurs, lieutenans-généraux pour nous et intendans, ou les
" gouverneurs particuliers et ordonnateurs y seront présents, à
" peine de nullité des arrêts qui pourraient être sur ce rendus en
" l'absence des dits officiers.

IX. " Déclarons nuls tous les établissemens de la qualité mar-
" quée à l'article premier qui n'auront pas été autorisés par nos
" lettres patentes enregistrées en nos dits conseils supérieurs, com-
" me aussi toutes dispositions et actes faits en leur faveur direc-
" tement ou indirectement, et ce nonobstant toutes prescriptions
" et tous consentemens exprès ou tacites qui pourraient avoir été
" donnés à l'exécution des dites dispositions ou actes par les
" parties intéressées, leurs héritiers ou ayant cause, nous réser-
" vant néanmoins, à l'égard des établissements qui subsistent
" paisiblement et sans aucune demande formée avant la présente
" déclaration pour les faire déclarer nuls, d'y pourvoir, ainsi qu'il
" appartiendra, après que nous nous serons fait rendre compte de
" l'objet et qualité des dits établissements.

Speaking of these formalities but alluding more particularly to the ordinance of 1749 Thibeault Lefebvre p. LXI, says:

" Le fondateur d'une maison religieuse devait parcourir la
" filière administrative suivante. Il devait 1o faire dresser l'acte
" de fondation pardevant notaires 2o faire procéder à une en-
" quête *de commodo et incommodo* auprès des Evêques, des com-
" munautés d'habitans et des directeurs d'établissemens religieux
" déjà établis 3o se pourvoir en autorisation devant le roi pour
" obtenir Lettres Patentes 4o provoquer la délibération et le
" consentement des communautés d'habitans 5o solliciter l'ap-
" probation de l'Evêque 6o demander une enquête judiciaire
" dont on chargait ordinairement le Bailli ou sénéchal 7o at-
" tendre enfin l'enregistrement des lettres patentes d'autorisation
" sur les Registres du Parlement du Ressort, lequel ordonnait

" cet enregistrement par un arrêt rendu sur les requisitions du " Procureur Général."

And what is worthy of special notice is that the effect of this ordinance of 1743 was really to take away the power of granting licenses in Mortmain, from the Crown, to vest it in the Legislature, for to any one conversant with the gradual limitation of the once purely royal authority in France, such is the meaning of the above cited declarations of the King, whereby he binds himself not to grant licenses except in a certain manner.

This is pointed out in the following passage of Thibeault Lefebvre p. LXIII, but the whole passage will be found to throw considerable light upon the subject generally:

" Le pouvoir absolu après avoir accumulé les formalités pour " entraver les fondations arrivait ainsi à les prohiber où à les per- " mettre suivant son bon plaisir. Un droit si illimité pouvait " arriver à tous les scandales de l'arbitraire. Accordées ou re- " fusées sous l'inspiration des idées dominantes au moment où " on les demandait, les autorisations pouvaient se changer, tantot " en des prohibitions inexpliquées, tantot en permissions irréflé- " chies. Selon le caprice ou le sentiment du ministre aux " affaires, selon la nature de l'établissement ne pouvaient elles " pas toujours être accordées ou refusées. Le fléau de l'arbi- " traire est continuellement à craindre, quand l'exécution des " contrats privés est subordonné aux volontés de l'administra- " tion. *Je remarque qu'on en craignait les effets, car on n'avait " confié le droit d'accorder ou de refuser les autorisations qu'au " pouvoir investi de la puissance législative.* Mais ce n'était " pas sous l'ancienne monarchie une garantie suffisante contre " l'arbitraire. L'arbitraire n'était-il pas alors dans le pouvoir " législatif, comme dans l'administration, ou plutôt parceque " tout était confondu n'y avait-il pas arbitraire partout. Il n'y " eût eu quelque garantie contre le bon plaisir gouvernemental que " si une autorisation donnée, se fût étendue a tout un genre " d'établissement, comme en droit romain. Si en outre on n'eût " pas exigé de chaque établissement du même genre, une autori- " sation nouvelle spéciale pour se former, et surtout si on n'eût " point forcé les associations établies à demander une autorisa- " tion pour chaque nouvelle acquisition, car les pouvoirs publics " en permettant à une association de se former, ne lui accor- " daient-ils pas en même temps le droit de vivre et de s'en procu- " rer les moyens."

Finally it should be observed that article ten revokes the powers given to Corporations in their charters " voulons que la " présente disposition soit observée nonobstant toutes clauses ou " dispositions générales, qui auraient été insérées dans les lettres " patentes ci-devant obtenues pour autoriser l'établissement des " dites communautés par lesquelles elles auraient été capables de " posséder des biens-fonds indistinctement."

Such being the ordinance of 1743 and the system it introduced, a system so peculiar as not to be reconcilable with any other, stringent, subversive of former and conflicting with posterior laws, it seems a most extraordinary pretension for the Appellants, solely on the strength of a general and somewhat vague reference in the Code to the laws of the country respecting mortmains, to pretend that such a system has been re-enacted —and to say that the ordinance of 1743 *pure et simple* is now in force, without change or modification, either that of 1762 or any other—in a word that it is as much in force as if it had been bodily inserted in the Code. But if the Code refers to the ordinance of 1743, how is it that instead of a particular reference to it, it should refer to the general laws of the country? if that ordinance is in force, then the general laws of the country are not—and even if this ordinance were one which could co-exist with other laws, where are those other laws, in the system of the Appellants? But again if the ordinance is in force are we to hold that negroes are still slaves, to be classed as moveable or immoveable property, according to circumstances, or that the penalties in the ordinance mentioned can be enforced, or that the Crown cannot grant licenses in mortmain, or that it can only do so on observing the formalities above cited, or that charters issued by the Crown granting the power of holding land with or without limits, and without the necessity of any further authorisation, are of no validity? Are the Appellants after asserting that the ordinance is in force, to be allowed to turn round and say that what they mean is, not that the whole ordinance is in force, but that some portion of it only is, when the only article upon which they rely or can rely, does not mention the ordinance at all and what is more, when not a word in the whole Code and Codifiers' Reports can be found even alluding to it, either directly or indirectly.

Such are a few of the difficulties which the Appellants' interpretation of the 366 article of the Code, must give rise to. But

the Respondents, not content with shewing the unconclusive character of that interpretation, will now proceed to submit their own.

By the terms "the general laws of the country respecting mortmains" the Code refers to the general principles of the law of mortmain upon which the ordinance of 1743 was founded, but it has not reproduced the extreme provisions of that ordinance, and more particularly that which required the "previous sanction." In consequence what the Code lays down is the general principle that all real estate acquired by Corporations without the special permission of the Crown is liable to forfeiture, at the suit of the Crown, while the exception which the Code contains "as to property acquired by certain Corporations and to a fixed "amount and value" is evidently founded upon our statutory legislation, whereby Corporations have been authorised by their charter, in a general way, and once for all, to purchase land, many without limits, and most of them, within certain limits.

To prove that this is the true interpretation the Respondents will shew that the terms used by the Code are those of the old and modern law of France as well as those of the law of England, and that they have always been interpreted as the Respondents now interpret them.

With regard to the old French law before the ordinance of 1743–1749 Bacquet p. 366 lays it down as follows.

"Aussi pour maxime et vrai fondement du droit, il est besoin "de tenir pour certain, ferme et stable, que par les anciennes or-"donnances, lois et Statuts du Royaume, de tout temps inviola-"blement gardés en icelui, il est défendu à gens d'église, commu-"nautés et autres gens de main-morte *d'acquérir, tenir et possé-"der* aucuns héritages, etc., dedans le Royaume, sans permission, "congé ou license des Rois de France.

And Pothier des Personnes, p. 633, explains what is meant by the *défense d'acquérir*, the very words used in art. 366 of our Code: "Avant l'édit de 1749, les communautés n'étaient point "absolument incapables d'acquérir des héritages, elles acqué-"raient valablement, sauf à pouvoir être, comme nous l'avons vu, "contraintes à vider leurs mains dans un certain temps de ce "qu'elles avait acquis. *C'était plutôt la faculté de retenir qui "leur manquait, que la faculté d'acquérir.*"

As to the modern law of France, art. 910 of the Code Napoleon is as follows:

" Les dispositions entrevifs ou par testament au profit des hos-
" pices, des pauvres d'une commune, ou d'établissements d'utilité
" publique, n'auront leur effet qu'autant qu'elles seront autorisées
" par une ordonnance Royale."

In so far as the present question is concerned the terms of this article are entirely analogous to those of our article 366—The difference between the two articles has reference to another entirely different matter. With us the charter which creates the Corporation mentions the amount of real property it can acquire, and so long as the limit has not been exceeded, it can go on acquiring by gift, will or otherwise without any further permission: whereas in France the amount of real estate which the Corporation can hold is not fixed in its charter, and at all events it cannot acquire any kind of property by gift any more than by will—without the permission of the Crown. How then are those terms the "permission of the Crown" interpreted? It is universally admitted or rather assumed that the permission need not be a previous one—for it does not seem even to have occurred to any one that it could be pretended that the permission could be otherwise than a subsequent one. The questions however which have actually arisen upon this article are well calculated to shew how different the ideas of public policy which now prevail in France, in such matters, from the principles laid down in the ordinance of 1743.

2 Troplong Don. No. 677. " Toute donation doit être accep-
" tée, ainsi que nous le verrons plus bas, et il faut qu'elle soit
" acceptée du vivant du donateur, mais pendant les délais pour
" obtenir l'autorisation d'accepter, le donateur peut décéder, et
" alors la donation devient caduque. C'est une perte éprouvée
' par les établissements publics, par un fait qui n'est pas le leur,
" et ce qui est plus grave, par le fait de leur état de tutelle—or
" en principe la tutelle doit protéger, elle ne doit pas nuire."

" Il y a un autre danger.

" En règle générale, les fruits et intérêts de la chose léguée,
" ne courent que du jour de la demande en délivrance. Mais
" comment un établissement public qui n'a pas encore reçu l'au-
" torisation du gouvernement pour accepter le legs qui lui est
" fait, pourrait-il intenter une demande en délivrance? Il fau-
" dra donc qu'il perde les fruits et les intérêts pendant tout le
" temps que la procédure en autorisation sera pendante devant
" l'autorité administrative. Voilà encore une perte dont les éta-
" blissements publics sont victimes sans aucun motif raisonnable."

As to the latter claim for interest, &c., some writers and among others Demolombe, Vol. 18 No. 601, think, contrary to Troplong's opinion, that the subsequent authorisation by the government has a retroactive effect, so that the Corporation can claim interest *à die mortis*. But as to the other grievance pointed out by Troplong it has been admitted to be a real one, and a new law has accordingly been passed which makes the provisional acceptation by the Corporation sufficient—provided the final permission be obtained from the Crown.

So much for the old and modern French law, but as the Code specially recognises the high prerogative of the Crown whereby it erects Corporations and grants them licenses in mortmain, the English authorities are even of more importance in this matter, than the French, since the extent of the prerogative of the Crown is to be determined by the public law of England.

Now upon reference it will be found that in point of fact the terms of art. 366 have been taken from Blackstone, who says pp. 268 and 269: "It always was and still is necessary for Corporations to have a license in mortmain from the Crown "*to enable* "*them to purchase land*," which however does not mean that the licence must precede the purchase, since, as Blackstone goes on to explain, p. 273, "it always was in the power of the Crown, in granting a license in mortmain to remit the forfeiture. And this will be found to be one of the best established principles of the English law in connection with the prerogatives of the Crowu, for at the time of the revolution of 1688, doubts were conceived how far the licence of the Crown dispensing with the statutes which prohibited alienations in mortmain was valid; and the 7 and 8 William III, c. 37, was in consequence passed, providing that the Crown may grant licenses at its own discretion to aliene or take in mortmain, and nothing can show more clearly the inconveniences of the previous authorisation principle than does this statute. In this connection the following passage from Highmore, p. 75 and 96, is interesting:

"Many of the Kings of England have claimed a power of dis-"pensing with statutes, which power was carried to such a "height in the reign of James II, and found to be of such dan-"gerous consequence as to make the execution of the most neces-"sary laws in effect precarious, and merely dependent upon the "pleasure of the Prince; and it is seemingly highly incongruous "that the King should have a kind of absolute unlimited power

"of dispensing with law, wherein the church and state have the "highest interest, when at the same time he has no power to dis- "pense with any law which vests the least right or interest in a "private subject. As soon as William the 3rd had accepted the "Crown, this dispensing power was one of the stipulations for "the recovery of public right. It was therefore expressly de- "clared by the Bill of Rights, that no dispensation by *non-* "*obstante* of or to any statute, or any part thereof, should be "allowed, but should be held void and of no effect, except it be "allowed of in such statute. This abolition of the power hitherto "exercised as undoubted prerogative, came in a few years after- "wards to be considered in a serious light, as tending to be a "great hindrance to learning, if persons well inclined might not "be permitted to found colleges or schools, or to augment the "revenues of those already founded, by granting lands to them "or to other corporations then existing, or to be afterwards in- "corporated for other good and public uses. For the promotion "of religion and learning, it was therefore felt expedient to renew "the encouragement to found seminaries, which the late disputes "and the restraints of mortmain continued to repress, the 7 and "8 William 3, c. 37, was therefore passed, re-vesting in the "Crown this prerogative by a full discretionary power to grant "licenses to alien in mortmain, and also to purchase, acquire, "take and hold in mortmain, in perpetuity or otherwise, any "lands whatsoever, and of whomsoever the same should be "holden: and declaring such lands so aliened or acquired and "licensed not to be subject to any forfeiture by reason of such "alienation or acquisition. This right remains appended to the "Royal prerogative,"

Among modern English writers, 1 Stephen's Com. p. 427, Chitty Prerogatives of the Crown, p. , and Grant on Corporations, p. 103, may also be referred to on the subject. This last writer says: "The Crown grants this license at present under "the authority of that statute (7 and 8 William 3rd), which "was passed to get rid of what seems a merely imaginary objec- "tion to such license on the old practice, because it was said that "the King thereby took upon him to dispense with the statutes "of mortmain."

In the United States the English statutes of mortmain have not been re-enacted, except in the State of Pennsylvania; and the statute passed in 1833 to remove all doubts on the ques-

tion, shews how the question of public policy is understood there. "By that statute," says Kent, 2 vol. p. 333 (note), "all "purchases of land by any corporation, without the licence of the "commonwealth, are made subject to forfeiture, and it was ac- "cordingly adjudged that a corporation of another State author- "ized to purchase and hold lands in Pennsylvania or elsewhere, "is competent to purchase and hold lands in that State, subject "nevertheless to be divested of the estate, and to a forfeiture of "it to the State of Pennsylvania, whenever that State thinks "proper to institute process for that purpose. The corporation "holds a defeasible estate, if held without a license procured "from Pennsylvania."

It seems that the force of these different authorities, of which the number might have been indefinitely increased, and their perfect application to the present case, cannot be questioned, and the Respondents therefore submit them with entire confidence as a conclusive answer to the proposition upon which the whole case of the Appellants really rests—the actual existence of the ordinance of 1743 as part of our laws.

They could also have insisted upon the article of the Code which not only affirms the high prerogative of the Crown in the matter of the erection of corporations and of granting them licenses in mortmain, but also expressly admits the principle that corporations can be constituted by prescription, than which none can be more directly opposed to the ordinance of 1743, which made it absolutely impossible for any corporation to exist which could not produce its letters patent of creation. But it is unnecessary to do more than mention the fact, as its great significance cannot fail to be perceived, and the only further circumstance which they will mention before leaving this part of the case is with regard to existing corporations holding more land than they have a right to hold under their charter.

Under the English law and the American law the purchase of lands affording a greater income than that limited, is a matter between the corporation and the sovereign power only, with which individuals have no concern, and of which they cannot avail themselves in any mode against the corporation. "The "question," says Grant on Corporations, p. 103, "is of the more "importance, as there is no doubt that many corporations have "greatly exceeded the limits of their license, and hold such sur- "plus land without any right derived from it for their doing

"so. It is clear however that if a corporation have exhausted "their license to hold in mortmain, that fact does not make a "devise or conveyance to them void. The only result is that "they may take, but unless they can obtain an extension by the "Crown of their license, they cannot hold the lands, unless the "mesne lords and the Crown choose to sleep upon their respec- "tive titles."

And Angell and Ames, § 151, who treat the question more fully, express themselves as follows: "As a corporation may be "deprived or restrained of its common law right of purchasing "or receiving land, or other property, by general statutes applic- "able to all corporations, so the same right may be taken away "or limited by its charter or act of incorporation; a law peculiar "to itself. To prevent monopolies, and to confine the action of "incorporated companies strictly within their proper sphere, the "acts incorporating them almost invariably limit not only the "amount of property they shall hold, but frequently prescribe in "what it shall consist, the purpose for which it shall alone be "purchased and held, and the mode in which it shall be applied "to effect those purposes. The amount of the capital stock of a "corporation is not *per se* a limitation of the amount of property, "real or personal, which it may own. And where a church cor- "poration is limited by its charter as to the amount of income "which it can receive from lands, such limit cannot apply to the "accidental increase of income from the rise in the value of "these lands, in a long course of years, so as to divest their title "to their estates, or to any portion of them; and even in case of "a purchase of land affording a greater income than that limited, "this is a matter between the corporation and the sovereign "power only, with which individuals have no concern, and of "which they cannot avail themselves in any mode against the "corporation.

"§ 153. To a bill by certain banks for the specific perform- "ance of a contract for the purchase of lands made by an indi- "vidual with them, the defense set up was, that the charters of "the banks, after authorising them to purchase, hold and enjoy "lands to a specified value, and to dispose of them, provided that "the lands it should be lawful for them to hold should be only "such as were for their immediate accommodation, &c., or ac- "quired in satisfactiou of debts, &c.; that the lands in question "did not fall within either of these descriptions, and that there-

"fore the banks could not acquire or convey any title to a pur-
"chaser of them. The Court of Appeals decided that though if
"in purchasing the land in question the banks violated their
"charters, they might for that cause be dissolved by a proceed-
"ing at the suit of the commonwealth, yet that any conveyance
"made before dissolution would pass an indefeasible title to the
"purchaser; that the charters did not prohibit the purchase of
"real property by the banks, but only limited the extent to
"which they should be allowed to hold such property; and that
"the question whether they had exceeded their limits or not
"was not fit to be tried in the suit before them, or at the instance
"of the party before them.

"But even if a court of equity might not always be disposed
"to lend its aid to enforce a contract of such a character, a good
"defense to a bill for specific performance may be a very bad
"ground for a bill to set aside an executed contract; and where
"a corporation vested with power to take and hold real estate
"for specified purposes, purchased and took a conveyance of
"land, and afterwards used the land for other purposes than the
"charter permitted; this abuse of power was deemed to be no
"ground for setting aside the deed at the instance of the vendor."

Such is tne law on this important point, under a system which treats corporations with favor, and which while it excludes captious objections from selfish individuals, leaves it to the Crown to exercise its discretion in the freest manner, without reference to time, for the purpose of most effectually securing the greatest possible amonnt of advantage to the public. No better test, therefore, could probably be found of the correctness of the respective pretensions of the parties in the present case than to apply that reasoning to the case of any corporation in Lower Canada holding more land than its charter allows.

A, we shall suppose, has formerly sold a lot of land to a corporation, and he now claims it back, insisting that he is not only entitled to it, but that he moreover can keep the purchase money, and he alleges that the property held by the corporation exceeds the limit fixed by its charter, either because the property by him sold to the corporation, or the property previously held by them has since greatly increased in value, or because both have simultaneously increased in value; and he cites the 21st art. of the ordinance of 1743, which is as follows:

"XXI. Tout le contenu en la présente déclaration sera obser-

" vé, à peine de nullité de tous contracts et autres actes qui se-
" raient faits sans avoir satisfait aux conditions et formalités qui y
" sont prescrites, même à peine d'être les dites communautés dé-
" chues de toutes demandes en restitution des sommes par elles
" constituées sur des particuliers on payées par le prix des biens
" qu'elles acquerraient sans nos lettres de permission ; voulons en
" conséquence que les héritiers ou ayans cause de ceux à qui les
" dits biens appartenaient, même leurs enfants ou autres héritiers
" présomptifs de leur vivant, soient admis à y rentrer, nonobstant
" tontes prescriptions et tous consentements exprès ou tacites qui
" pourraient leur être opposés."

The corporation, on the other hand, pleads admitting the facts, but alleges that the Crown has not only taken no advantage of the violation of the charter, but that it is moreover willing to grant a license for the excess of property held, and that it is really in the public interest that they should coutinue to hold the property in question.

If that were the case now before the Court, and the facts were proved, would it be prepared to say with the Appellants :

1o. That the ordinance of 1743 has always been held to be law, and its principles of public policy enforced as correct and just.

2o. That art. 366 of the Code unmistakeably refers to the ordinance of 1743 and re-enacts it.

3o. That the previous permission required by art. 366 is beyond all doubt a previous permission, and that any subsequent permission by the Crown would clearly be an absolute nullity.

Or would it hold with the Respondents :

1o. That there is no shadow of reason to say we have a jurisprudence already on this point.

2o. That the whole ordinance cannot possibly be in force while there is nothing in the Code shewing that any particular portion of it has been retained.

3o. That although the *défense d'acquérir* without the permission of the Crown may possibly be interpreted in the sense of a previous permission, it can also be interpreted in the sense of the old law of France and the law of England, and that there is every reason for believing that it is not in the former but in the latter sense that the terms have been used in the Code ;

And 4o and finally, That to apply the ordinance of 1743 to this case would actually be to supply omissions and interpret

what is obscure in a charter, by referring to a system under which that charter itself would be an absolute nullity.

The Respondents now pass to their second and third propositions, which affirm that a legacy to a non-existing corporation on condition of obtaining a charter, is valid.

The Appellants, on the other hand, assert that a legacy to a person not *in esse* is null at common law, and if not null at common law, that it is null under the ordinance of 1743, and if not under that ordinance, then under the 9 Geo. II, and if not under that, then under our own law respecting wills.

What the Respondents propose to shew is that the common law is in their favor, and that our law of wills agrees with the common law, and is inconsistent with both the ordinance of 1743 and the 9 Geo. II.

(*a*) The following authorities are conclusive as to the common law:

1 Ricard Nos. 829 and 830: "Quant à notre usage, la per-"sonne d'un légataire n'est considérable pour la perfection d'un "testament, que lors de l'écheance du legs, de sorte que, quand "le légataire serait incapable au temps que le testament a été "fait on doit présumer que le testateur a prévu que le légataire "pouvait acquérir sa capacité dans le temps qui devait s'écouler "jusqu'a l'exécution du testament."

And to the same effect are Cujas consult. 50 and 53; Hotman quæst. illust. 6; Dumoulin cited by Brodeau sur Louet, lett. D, somm. 51: Domat, 3, 2, 1, 2, 22; Furgole ch. 6, sect. 1, No. 6; and the rule was particularly applied to conditional legacies to non-existing corporations.

Ricard No. 613: "Lorsque les donations et les legs sont faits "pour l'établissement d'un monastère, on ne pourrait pas opposer "le défaut de lettres patentes, ce qui est juste parceque ces sor-"tes de dispositions sont présumées faites sous condition, et pour "avoir lieu, au cas qu'il plaise au Roi, d'agréer l'etablissement. "En effet il serait impossible autrement d'ériger de nouveaux "*établissemens* de monastères, parceque l'on ne souffre pas qu'il "s'en fasse, s'ils ne sont précédés d'une fondation, et il s'observe "même que le contrat ou acte de fondation s'attache sous le "contrecel des lettres Patentes, pour en faciliter l'obtention."

1 Furgole des Testamens ch. 6, sect. 1, No. 37: "Il faut né-"anmoins prendre garde, que quoique les institutions et autres

" libéralités faites en faveur des collèges et confréries illicites, et " non autorisés, soient nulles et comme non-écrites à cause de " l'incapacité actuelle par l'argument tiré de la loi 3 §§. Tou- " tefois celles qui sont faites en faveur d'un collège ou confrérie, " ou quelqu'autre corps que ce soit non encore établi ni érigé, " pour servir à sa fondation ou érection ne sont pas nulles, parce- " qu'elles renferment cette condition tacite, si elles sont fondées, " érigées et autorisées: voilà pourquoi l'effet de la libéralité " étant conféré en un temps où le collège sera capable, il n'y a " point de doute qu'elle ne soit bonne—et c'est ce qui fait la " différence entre la disposition pure, comme étant nulle dans " son principe, avec celle qui est conditionnelle, et dont l'effet est " suspendu, jusqu'à l'évènement de la condition, suivant les prin- " cipes que nous avons établis ci-dessus, lorsque nous avons ex- " pliqué la difficulté sur le temps auquel la capacité devait être " considérée par rapport aux dispositions conditionnelles."

Pothier des Personnes p. 633: " De là il suit pareillement, " *qu'en vertu de l'ordonnance de* 1749, le legs fait à une commu- " nauté, pour une fondation, quelqu'utile qu'elle soit, à la charge " par la communauté d'obtenir des lettres patentes, n'en est pas " moins nulle, ainsi que cela est décidé formellement par l'art. 17. " La raison de douter pourrait être que les communautés peu- " vent être capables d'acquérir par des lettres patentes, et qu'un " legs fait à un incapable, sous la condition qu'il deviendra ca- " pable *cùm capere potuerit* peut être valable. La raison qu'a " eu l'ordonnance de décider au contraire que le legs était nul, " se tire de la défense absolue qu'elle a faite de léguer ces sortes " de choses aux communautés."

The first change in the common law on this point is to be found in the ordinance of 1735 (not in force in Canada) whereof art. 49 says: " L'institution d'héritier ne pourra valoir en au- " cun cas, si celui ou ceux au profit desquels elle aura été faite " n'étaient ni nés ni conçus lors du décès du testateur.

And Furgole thereupon observed: " Cet article 49 ne parlant " que de l'institution d'héritier, et introduisant un droit con- " traire à l'usage reçu, il fallait reserrer sa disposition dans le " cas précis de l'institution par testament, sans l'étendre aux legs " ou fidéi commis."

From the ordinance of 1735, the change passed into the Code Napoleon, art. 906 of which is as follows:

" Pour être capable de recevoir entrevifs il suffit d'être conçu " au moment de la donation."

" Pour être capable de recevoir par testament il suffit d'être " conçu à l'époque du décès du testateur.

" Néanmoins la donation ou le testament n'auront leur effet " qu'autant que l'enfant sera né viable."

Upon this article 2, Troplong Donations, No. 607 says: " Pour parler franchement le système de D'aguesseau l'auteur de " l'ordonnance de 1735 manquait de logique en autant qu'il re- " jetait les institutions conditionnelles, et admettait les legs con- " ditionnels. Le Code l'a senti, il a généralisé la disposition de " l'art. 49 de l'ordonnance de 1735 : il oppose un même obstacle " à toutes les libéralités quelconques faites à un enfant à naître."

Now comes the important question—our Codifiers had to choose between the common law and the Code Napoleon—art. 906. Which have they chosen? To this question the answer is very plain. They have beyond doubt preserved the old common law.

Art. 771 of our Code on donations is as follows:

" Il suffit que le donataire soit conçu lors de la donation, *ou* " *lorsqu'elle prend effet en sa faveur*, s'il est ensuite né viable."

And our art. 838 as to wills is as follows:

" La capacité de recevoir par testament se considère au temps " du décés du testateur: dans les legs dont l'effet demeure sus- " pendu après ce décès, soit par suite d'une condition, soit dans " le cas de legs à des enfans à naître et de substitution cette ca- " pacité se considere au temps où le droit est ouvert."

And further on the same article repeats: " Dans les legs qui " demeurent suspendus, tel qu'il est mentionné précédemment, " au présent article, il suffit que le légataire existe ou soit conçu " au temps où le legs prend effet en sa faveur."

In their Report, the Codifiers, p. 171, speaking of what is now art. 838, express themselves as follows:

" As a general rule the capacity to receive by will is considered, " relatively to the time of the testator's death, that being the " period at which the will most usually takes effect; if however " it take effect only at a subsequent date, the capacity has to be " considered with regard to such latter date. Such is the tenor " of our article, which as regards the person benefitted, also lays " down the rule that he need only be in existence at the time at " which he is called to receive, and be then identifiable as being " the person designated by the testator, even though at the time " of the will or of the death of the testator, he were neither " named nor in existence."

And at page 191, speaking of substitutions, the Codifiers expressly state that provisions in favor of persons unborn or not conceived, formed part of the ancient law, and that they have been preserved by the Code.

The error of the Appellants, who ignore the articles of our own Code, and cite art. 906 of the Code Napoleon, as if it were applicable, is therefore sufficiently obvious. But such is the radical weakness of this part of their case that it is by no means certain that even art. 906 of the Code Napoleon could help it.

On the contrary, it appears from the commentators, and particularly from Demolombe, upon whose authority, singularly enough, the Appellants profess to rely, that many hold that a legacy to a non-existing corporation, on condition of its being authorized by the Crown, is still legal in France, art. 906 notwithstanding—Troplong attesting that such is the jurisprudence of the Conseil d'Etat, while all agree that such a legacy is valid beyond all question, if protected by a trust (*mode ou charge ou fiducie.*) 18 Demolombe, No. 590 and preceding numbers; 2 Troplong Don. No. 612 and seq. Journal du Palais for 1870, p. 590.

(*b*) A conditional legacy to a non-existing corporation being therefore valid under the common law, the next question is whether our law as to wills is different from the common law.

In the first place there can be no doubt that our law respecting wills is inconsistent with the ordinance of 1743 and with the 9 Geo. 2.

The ordinance art. 20, said: "Voulons qu'aucun des dits "biens (immeubles) ne puissent être donnés aux dites commu- "nautés et gens de main morte par des dispositions de dernière "volonté."

This prohibition was positive, and was moreover general, applying to all corporations without any exception whatever.

Thereby a most important principle was introduced as to acquisitions of land by corporations, and a distinction made which had never been made before. Ricard No. 613; Furgole, ch. 6, sect. 1, No. 37. Those made by deeds of purchase or of gift *inter-vivos*, were allowed under certain conditions. Those made by wills were forbidden under any circumstances. As to the reason of the change, it is expressly stated in the ordinance of 1749 to

be to check acquisitions in mortmain, by protecting testators against undue influence and imposition, or as a modern writer expresses it, "en protégeant les mourans contre l'empire des cap-"tations illégitimes, et en défendant contre les facilités de leur "esprit les testateurs d'autant plus libéraux, qu'ils ne souffrent "jamais de leurs largesses."

The 9 Geo. II was a measure of the same general character, and considerably limited in England the former unlimited power of making wills. In so far as alienations of land for charitable uses (a term which in England includes educational and benevolent objects) are concerned, the same distinction was made that we find in the ordinance of 1743. They were allowed if made by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six calendar months after execution—the gift to be made to take effect immediately, and be without power of revocation, or other clause for the benefit of the donor, or those claiming under him. But they were expressly declared null and void if made by will. However there is this important difference between the two systems, that the statute annuls all devises of land for charitable uses, whether made to individuals or to corporations, while it does not touch devises made to corporations for other than charitable uses; and moreover the ordinance did not affect devises made to individuals for charitable uses, while it annulled all devises of land made to corporations for whatsoever purpose, and without any distinction whatever. As to the motive of the 9 Geo. II, it is expressly mentioned in the preamble "as it is apprehended from recent expe-"rience that persons on their death beds may make 'large and "improvident' dispositions even for good purposes, to the des-"herison of their lawful heirs, it is therefore enacted, &c."

It seems it is quite unnecessary to argue that our law touching wills, is essentially different from both the statute and the ordinance, for no one assuredly will deny that Mr. Fraser might, with perfect safety, have willed away the whole of his landed estate to individuals, although for a charitable use. Nor will any one assert that Mr. Fraser could not have appointed for his universal legatees the McGill College, or the Bishop of Montreal, or the City Corporation of Montreal, or the Protestant School Commissioners of Montreal, or any one of the hundreds or thousands of corporations existing in every direction, all of which have the

power to take in mortmain whether by gift or by devise. Our law certainly does not concern itself with the protection of heirs, and prevent their "*disherison*," otherwise wills cuttiug out a man's own wife and children in favor of concubines and adulterine bastards, to say nothing of doctors, tutors, confessors, &c., would not be valid, as they undoubtedly are. In fact, so far from gifts being more favorably treated than wills, it is the reverse that is the case with us, as all are aware.

(As to the unlimited liberty to make wills, see the Codifiers' Report, 2nd vol. p. 151, p. 155 on art. 15, 15 bis., 16, 16 bis., p. 171 art. 90 bis., p. 181 on art. 124 bis., p. 183 on art. 142, and p. 191 on art. 186. These passages must be read together fully to realize the extent of the revolution created in our whole legal system by the introduction of the unlimited liberty of making wills. See also the decided cases of Durocher & Beaubien, as to legacies to tutors; Christie cases as to legacies to adulterine bastards; Harper & Bilodeau as to legacies to a confessor; Miller & Corporation Episcopale as to legacy to a corporation: Lambert & Gauvreau as to conversion of wills, whereby will null in French form may be saved if conformable to English law; and Migneault & Malo as to noncupative wills.)

To the extent, therefore, that ours is a system of the most unlimited liberty to make wills, all incapacities being removed, and the rights of heirs to *légitime*, *réserves coutumières*, ignored, it is inconsistent with the ordinance of 1743 and the 9 Geo. II, and has repealed them, if ever they were in force.

The only possible question is as to the effect of the exception in our will act with regard to corporations. Is it absolute, and whatever it may be, does it apply to non-existing as well as to existing corporations?

The Respondents confidently submit that this exception does not amount to a prohibition, absolutely interdicting devises of moveable as well as immoveable property to corporations, but simply makes land devised to unlicensed corporations subject to forfeiture, in the same way that land, in whatsoever way acquired by an unlicensed corporation, is subject to forfeiture.

This results from a comparison of our will acts with the English will acts of 32 and 34 Henry the 8th, and the 7 William 4th and 1st Vict., and from arts. 766 and 836 of our Code, and various statutes which will be cited.

Although we find it generally stated that the exception of cor-

porations in the 32 and 34 Henry 8th amounted to an absolute prohibition, yet to any one who examines the subject it appears more probable that the only object of the exception was to prevent corporations from claiming the right to take by devise without the consent of the Crown, for there can be no doubt that the 32 and 34 Henry were passed to abolish the feudal restraints upon alienations of land by will, in the same way that feudal restraints upon alienations of land by deed had previously been abolished, corporations being excepted in both cases, and, it is reasonable to suppose, for the same reason, the protection not of the heir but of the lord, *i.e.*, the Crown as paramount lord, not to speak of intermediate lords. Otherwise it becomes impossible to account for the fact that devises of land to non-existing corporations on condition of their obtaining a license in mortmain have always been held valid in England, as have also been devises of land to existing corporations for charitable uses, which every one knows were valid both before and since the 43 Eliz. Be this as it may, the fact upon which the Respondents rely is that the new English will acts (7 William 4th and 1st Vict.) have left out the exception (as they were bound to do, if the theory just advanced is correct), and the effect is stated by Jarman, p. 58, as follows: "The recent statute," he says, "contains no such "prohibition. If therefore the disability of corporations to ac- "quire real estate by devise, had been created by the statute of "Henry, the recent act would by repealing that statute without "reviving the prohibition, have had the effect of giving validity "to such devises. But this is not the case. The disability of "corporations to hold real property was created by various ante- "cedent statutes, which appear to have been founded on the "principle, that by allowing lands to become vested in objects "endued with perpetuity of duration, the lords were deprived of "escheats and other feudal profits. Hence the necessity of ob- "taining the king's license."

And the present position of matters in England is thus described by Grant, p. 113: "At present, therefore, the law is "that every corporation which is empowered by license in mort- "main to take and hold real property at all, may take it by way "of devise, to the extent of its license, as well as by any other "means."

And this, the Respondents contend, is precisely our position in Canada. That the exception in our will act is derived from

the English statute of Henry, is proved by comparing our act with the very clear abstract of the statute of Henry, given by Blackstone, p. 375, and is also proved by the decision of the Privy Council in Meiklejohn & Caldwell, Stuart's Rep., p. 588, shewing that the exception in our act only applied to devises of land, which is also proved by art. 366 of our Code, and by the Interpretation Act, Cons. Stat. of Canada, c. 5, sect. 6, par. 24, which both positively state that the disabilities of corporations do not extend to moveable property. The difference, however, between the exception in our will act and that in the statute of Henry is, that the latter was made in general terms, and hence the pretension of those who like Grant, p. 112, assert, whether correctly or not, however, is another question, that it was "unqualified, relating equally to all corporations, whether licensed "or unlicensed," whereas with us the exception is specially restricted by its terms to unlicensed corporations. The precise terms of the statute of Henry are as follows: "All persons being "seized in fee simple, may, by will and testament in writing, "devise to any other person, except to bodies corporate," whereas our act says: "Every owner of lands, &c., may devise the same, "providing the said right of devising shall not be construed to "extend to a devise by will, in favor of any corporation, unless "the said corporation be, by law, entitled to accept thereof."

And accordingly if we turn to our Code we find all possible doubts removed, the rule in Canada being that a corporation can acquire by will whatever it can acquire by deed.

Art. 766 is as follows: "Corporations may acquire by gift "inter vivos, as by other contracts, such property as they are "allowed to possess."

And 836 is as follows: "Corporations and persons in mort-"main can only receive by will, such property as they may "legally possess."

And many statutes of incorporation can be cited wherein the power given to Corporations is purely and simply to hold lands, the legislature evidently considering that the power to hold, included the power to take by any title whatever.

Thus the 32 Vic. c. 16, sect. 13 says:

"The said School Commissioners of the cities of Montreal and "Quebec shall have a right to hold real estate to any amount, "notwithstanding any provisions of any law to the contrary."

And the Corporation of Montreal is likewise by the 14 and 15

Vic. c. 128 is made capable "of accepting, taking, purchasing "and holding goods and chattels, lands and tenements, real and "personal, and moveable and immoveable estate."

And in particular this Court in the case of Miller and La Corporation Episcopale Catholique Romaine des Trois Rivières had recently to determine the effect of a charter giving the Corporation the right "d'avoir, tenir, acheter, acquérir posséder "et jouir d'aucunes terres ténémens et héritages dans la Pro- "vince du Canada," and it held unanimously that the word "acquire" applies as well to devises as to other modes of acquisition, thus establishing that art. 366 which uses that word, lays down a general rule as to the permission of the Crown, and applies to devises in favor of Corporations, precisely as it does to any other acquisition.

Another mode of testing the question whether the exception in our will act of 1801, referred to the ordinance of 1743 or the 9 Geo. II, is to suppose a devise made to a Corporation licensed to hold by devise within certain limits, of an amount of real estate exceeding in value the amount limited. The ordinance annulling all authorisations given in advance, would it be reasonable to look to it to see how the case supposed is to be determined. But it is deemed unnecessary further to pursue this point.

But in concluding this part of the case the Respondents think it their duty to call particular attention to the fact already mentioned that under the 32 Henry 8th a conditional devise to a non existing Corporation was valid. Grant on Corpns. p. 123, Angell & Ames §174, Highmore or mortmains p. 200. Upon this point there can be no doubt whatever, and as our will act is not only essentially derived from the English Statute, but even goes further than that does in the direction of the unlimited liberty of making wills, it is therefore perfectly legitimate to conclude that even supposing the ordinance of 1743 ever to have been in force our will act has repealed the art. of that ordinance which annulled conditional legacies in favor of non-existing Corporations.

As to the 9 Geo. II, it is so glaringly inconsistent with our law on wills that it is not necessary to do more than put the two side by side, to perceive that if the 9 Geo. II, could possibly ever have been introduced in Canada as part of the public law of England—it must have been repealed not only by our will act, but by the Code under which Corporations can acquire by gifts as by other contracts. In reality as Kent says: (Vol. 4, p.

594,) "that statute was not in any sense a mortmain act, for it "neither prohibited nor authorised alienation in mortmain, or to "a Corporation. It avoided all devises to charitable uses, and "the statute allows the application of property by deed to char- "itable purposes. Its sole object was to protect persons *in ex-* "*tremis* from imposition," therefore there is no reason whatever for saying that because the English mortmain law might have been introduced, the 9 Geo. II, has been introduced along with it, and all the books accordingly say it has not been introduced in the colonies, while the prerogatives of the Crown as to erecting and licensing Corporations have. Moreover it may be added, that even under the 9 Geo. II, there is no reason whatever for believing that a devise to a Corporation for a charitable use on condition of the Crown granting a charter would be held invalid. On the contrary both on principle, and in view of the decision in the Downing College case, which was rendered after the passing of the 9 Geo. II, there is every reason for thinking that it would still be held valid.

The Respondents now pass to their last proposition, which is to the effect that Mr. Fraser's legacy is valid, inasmuch as it is made to trustees who have power to take under art. 869 of our Code.

The Respondents upon this point have in their favor the clear text of the law, and a uniform jurisprudence. Art. 869 says, "that a testator may name legatees who shall be merely fiduciary, "or simply trustees for charitable or other lawful purposes within "the limits permitted by law." The Appellants to break the force of terms so clear, insist that they are controlled by the ordinance of 1743, and that consequently, a trust, the object of which, is to procure a charter for a non-existing corporation, far from being covered by this article, is really excluded by it. But this again is the merest assumption, since the article does not refer, either directly or indirectly, to the ordinance of 1743, and the Appellants have not shewn that the ordinance is in force by virtue of art. 366. The Appellants, it is true, endeavour to take advantage of the words "lawful purposes within the limits per- "mitted by law," in this art. 869; but this is a common formula which is used very frequently (for instance, in speaking of the power of corporations to make by-laws), and has no more significance than has the corresponding formula which relates to the

right of association or the right of meeting in public or private, "for lawful purposes"; and it is found in English and American books, who treat this very subject of trusteeship: see in particular 2 Kent, p. 341, "provided the object be a charity and itself lawful and "commendable." No doubt a testator cannot appoint trustees to carry out a purpose which is unlawful; such a purpose, for instance, as would fall under art. 831, which refers to dispositions contrary to good morals, as being unlawful; there are also, of course, a number of purposes declared unlawful, by the criminal law. But to say that because a testator cannot appoint trustees for an unlawful purpose, that therefore the ordinance of 1743 is in force, and a trust like the one now in question is unlawful under it, is purely and simply to beg the whole question.

The Appellants, therefore, feeling that art. 869 cannot help them, again fall back on what they call the common law on the subject of trusts, and contend that all trusts which are purely fiduciary, are null under our law, the English system of trusts never having, they say, been introduced in Canada.

But what they mean by the English system of trusts is not clear. That we do not employ the terms "future uses raised on feoffments," springing, shifting or secondary uses, and contingent remainders, is true; but we have our terminology which is equivalent—our vulgar substitution and *fidei commis*, our clauses of *constitut* and *precaire*, our *droits d'usage* and *d'usufruit*, our conditions *suspensives et résolutoires*, and our *modes* and *charges*. Our system and the English are equally founded upon the Roman law of *fidei commissa*: the only question is whether the testator in Canada has as great a latitude for the purpose of providing for contingencies of all sorts as is possessed by a testator in England. But there can be no doubt that the liberty of making wills is far greater in Canada than it is in either in England or in the United States, there being with us far less restraint upon perpetuities, although the codifiers seem to have thought that the two systems were uniform. Upon that point a comparison of the English and American systems with our law of substitutions and our art. 869, as it is explained by the codifiers in their report, pp. 181 and 191, will be conclusive.

As to the pretension that our law does not recognise trusts of a purely fiduciary character, it is a most startling one, for if correct it would invalidate the title to a very large proportion of

the lands of the country. But, fortunately, it is no more founded than is the other very extraordinary pretension of the Appellants, to the effect that Courts of Justice may, in their discretion, reduce legacies, however legal they may be, for the benefit of poor relatives. This attack against trusts seems to have been prompted solely by the equivocal character of art. 925, wherein the French term *substitution fidéi commissaire* has been inadvertently translated into the English term "fiduciary substitution," whereas strictly speaking there is a difference between the terms *fidéi commis* and *fiducie*, the *grevé* in the former always being *gratifié*, whereas in the latter he is a *simple ministre*, any slight benefit he may receive not being the object of the disposition.

This is made quite clear by art. 964, which removes any difficulty which art. 925 may occasion. Art. 964 is as follows:

"The legatee who is charged as a mere trustee to administer "the property and to employ it or deliver it over in accordance "with the will, even though the terms used appear really to give "him the quality of a proprietor subject to deliver over, rather "than that of a mere executor or administrator, does not retain "the property in the event of the lapse of the ulterior disposition "or of the impossibility of applying such property to the pur- "poses intended, unless the testator has manifested his intention "to that effect. The property in such cases passes to the heir "or to the legatee who receives the succession."

As to the *fiducie pure et simple* to which this art. 964 so expressly refers, Guyot Rep. Vo. Fiduciaire, Henry's tome 1, liv. 3, quest. 22, Thévenot, No. 541, and Merlin Rep. Vo. Fiduciaire, shew that the principle had been admitted in France, although but partially, whereas with us it has been admitted to the fullest extent, as a consequence of the unlimited liberty of making wills. The very cases of the McGill College and Freligh & Seymour, so much relied upon on the other side to prove that the ordinance of 1743 has always been considered in force, are cases of *fiducie pure*, which have been sustained. Our statutes relating to religious corporations, joint stock companies, banking, and to the Protestant and Catholic sects in the Province, among a number of others, expressly recognize fiducies as valid. No account seems to have been taken in Canada of the French law principle that *la propriété ne peut jamais être en suspens*, and trusts have been introduced for the same reason that they have been introduced in the Roman law, the English law, and the present French law,

to make provisions more or less lasting for purposes which could not be obtained directly, under the ordinary municipal law. In England trusts were first resorted to, and successfully, principally for the purpose of evading the statutes of mortmain, but they were afterwards found useful in a number of cases, until they finally became indispensable. According to Troplong, Don. 109, their modern use in France is principally in connection with dispositions in favor of non-existing corporations, "aujourd'hui les "fiducies ne sont guêres pratiquées que pour faire passer des "liberalités à des établissemens religieux dont la position n'est "pas régularisée, ou que l'on veut favoriser sans le controle du "gouvernement." With us their use is general, and in no case have they been yet treated otherwise than with the utmost favor by our courts. See in particular the case of Davies & Andrews, and the numerous authorities therein cited; and it is singular that they should be contested in a case like this, where the object of the testator was to obtain the consent of the Crown to the carrying out of a noble object, a consent which has since been been obtained.

In other words, art. 869, says that a testator can name fiduciary legatees for a lawful purpose, and art. 964 says these trustees are only to deliver over the property to the heir in the event of the impossibility of applying the property to the purpose intended; and here although the testator left it to the legislature itself to say whether his purpose was a lawful one, and the legislature has held it to be not only lawful but in the highest degree praiseworthy, the heirs are claiming the property on the ground of a flagrant violation of law. It is difficult to conceive a more unreasonable pretension.

It is impossible to read the two very important passages in the Codifiers' Report, pp. 181 and 191, relating to art. 869, without being convinced that they favored the doctrine generally known as the *ci-prês* doctrine, which was admitted by the old French courts, as it is still admitted in the U. S. on the strength of the English chancery practice, and which made the courts and the Government intervene to give effect to the intentions of testators, who having had in view objects beneficial to the public, had failed to give proper technical expression to their wishes. In fact, if the legacy in this case instead of being doubly protected by a condition and by a trust, were made directly to persons not *in esse*, or if the particular objects of the charity were utterly uncertain, it would

still be a fair question whether the heirs of Mr. Fraser could take his estate and disregard his intentions, or whether on a suit in the name of the Attorney-General, representing the Crown, as *parens patriæ*, they could not be made to carry out those intentions as nearly as possible (*ci près*), whether the will contained or not a clause charging them as heirs.

Finally, it should be observed that under the will Messrs. Abbott and Torrance are named trustees for the purpose of establishing the "Fraser Institute," *and for that purpose to procure such charter as they might deem appropriate.* In so far as the trust has in view, to obtain the consent of the legislature, it is, as already observed, an exceptionally favorable one. But suppose the trustees had omitted to apply for a charter or had failed to procure one, the object of the testator could still have been carried out, for it is provided in the will that his said trustees "shall name three persons to compose with them the first "board of governors of the Fraser Institute, which it is my de- "sire shall always be composed of five persons, with power to "them to supply any vacancy caused by death or resignation."

Under this clause and art. 923 of the Code, which says that "the testator may provide for the replacing of administrators "even successively and for so long a time as the execution of the "will shall last, whether by directly naming and designating "those who shall replace them himself, or by giving them power "to appoint substitutes," the trustees could have dispensed altogether with a charter. So that in reality the Appellants might be ever so well founded in their pretensions that a legacy to a corporation, whether an existing or a non-existing one, without the previous consent of the Crown, is null, and still the legacy in this case would be quite safe.

The Respondents having sought, with what success it is for others to judge, to establish their propositions, will now proceed to discuss the pretended jurisprudence in favor of the existence in Canada of the ordinance of 1743.

This is the strong point of the Appellants, in fact the only one in their favor, for without it their case could never have attained the degree of importance it has, there being no difficulty possible, so long as the question is not complicated, by previous decisions, which would make the law different from what, on its face, it appears to be.

That in five cases, the present one included, the ordinance of

1743 has been mentioned as being in force by the Judges who rendered judgment, is undoubtedly true, and the Respondents, of course, do not think of denying that the fact is *primâ facie* of great importance, as being calculated to make a strong impression. But after all they trust that, if it appear upon an impartial consideration of the subject, on the one hand that the questions raised in the present case have never been considered, and on the other, that all that has really been affirmed is the general right of the Crown to control corporations, without reference to the particular manner in which that control should be exercised, then it will be admitted that it does not follow, because the ordinance has been mentioned as being in force, that it has been understood as the Appellants understand it. If that conclusion is once reached, the Respondents are confident that on further inquiry it will be found that when the ordinance of 1743 has been spoken of, the general principle alone of that ordinance has been referred to, and not its details, which, on the contrary, have been treated, as if they had been superseded, by a completely different system.

And in the first place, a circumstance which is not easily reconcilable, with the idea of this pretended jurisprudence, which is spoken of as precise, universal and undoubted, *quod semper ubique, ab omnibus*, is the admission of the Appellants that the English mortmain law may have been introduced in Canada, in consequence of the change of sovereignty—one of the formal propositions maintained in their factum being based on this hypothesis. But what is of more importance is that in many of our Provincial statutes which give the right to corporations to hold lands, we find the formula introduced "the acts of Parliament, "commonly called the statutes of mortmain, or other acts, laws "or usages to the contrary notwithstanding." (See in particular 14 and 15 Vic. c. 176, sect. 18, 7 Vic. c. 68, and 6 Vic. c. 32). This proves that the legislature considered the English mortmain law as being at least as much in force as the ordinance of 1743. But independently of this statutory declaration, it can be shewn that the opinions prevailing in Canada on the subject of the law of mortmain, have always been of the same vague and indefinite character, both the ordinance of 1743 and the English law being referred to as being in force, it being assumed that they were alike, no case having arisen to give prominence to the difference existing between them in some respects. In the case of the

Seminary of St. Sulpice, which was the first case that arose after the cession, we find the Canadian Attorney-General Sewell referring to the ordinance of 1743, while the law officers in England argued from the English mortmain law (6 Christie's History, pp. 230 and 243). In Dunière & Fabrique de Varennes, the first case that was actually decided by our Courts, the legacy having been made *in præsenti* (what Furgole calls *une disposition pure*) to a non-existing corporation, without condition or trust, was null both under the ordinance of 1743 and the English law. The only way in which the legacy could have been saved would have been by the Attorney-General intervening and invoking the *ci-près* doctrine. This was not done, but the 9 Geo. 4, c. 31, relating to *Fabrique* schools, was passed, to make the recurrence of a similar case impossible. This was the first of a number of statutes which were passed in connection with the subject of mortmain, and which while they gradually restricted the area within which difficulties could arise for the future, contained enactments more and more favorable to the principle of corporate association. Ever since the cession, a number of new Roman Catholic parishes had been springing up all over the country, which involved the acquisition of land for churches, *presbytères*, and all sorts of benevolent and charitable purposes connected with the parochial organization. The 2 Vic. c. 26, which in all essential respects was a transcript of an English statute, together with other incidental enactments, regularized all such acquisitions for the future. But it would be a singular fact in the hypothesis of the ordinance of 1743 being considered in force, that none of the innumerable acquisitions of land made in the interval between 1763 and 1840 for parochial purposes without letters patent from the Crown, should have given rise to no contestation before the Courts. The statute 41 Geo. 3, c. 17, so often referred to in the McGill College case, had made provision for the establishment of free schools in the Province, and for gifts and legacies in mortmain, which might be made for their support. Then came the incorporation of the College of Chambly, and several other Roman Catholic colleges, with similar clauses as to their power to take and hold lands in mortmain. And finally, after the union of Upper and Lower Canada, came those statutes with which all are acquainted, and which are so strikingly in contrast with the old French *régime*, which as the Codifiers point out in their Report (Corporations, pp. 229-231), hardly recognized corporations

at all, with the exception of course of purely religious establishments. Our social economy may now be said to depend more upon corporate than upon individual action, the system embracing everything from a municipality to a card club, and as if there were not sufficient encouragement to the principle of association, general statutes based on English and American models, were passed, providing once for all for the future incorporation, on the easiest of terms, of all sorts of persons for all sorts of purposes, thus securing for the whole country an ever constantly extending net-work of corporations. Who will believe that all this time our legislature could possibly have looked upon the ordinance of 1743 as being in force in Canada?

But there is a test which if applied to Appellants' pretension that the ordinance of 1743, *pure et simple*, has always been held to be in force, ought to be conclusive. From the preceding argument of the Respondents, it has been shewn what that pretension implies, viz.:

1o. That the law in force was not the ordinance of 1743, and the English law in combination, in so far as there was no difference between them, but the ordinance of 1743 purely and simply, to the exclusion of every other law.

2o. That the Crown cannot grant licenses in mortmain.

3o. That the legislature alone can grant them after following the innumerable formalities mentioned in the ordinance.

4o. That the license must invariably and necessarily precede the acquisition.

5o. That a conditional legacy to a non-existing corporation is null.

6o. That a legacy to trustees to hold until a corporation is chartered and organized, is null.

Now let us see whether the McGill College case, by far the most important of those relied upon by the Appellants, affirms or denies these several propositions or any of them.

As to the first point, we find Judge Pyke using the following language: "It has been urged that under that ordinance (of "1743) the legacy of Mr. McGill was a nullity. *It might per-* "*haps* have been so considered if it had not been for the 41 Geo. "3, c. 17."

"It is not necessary now particularly to notice the prohibitions "which that declaration contains, which was not to benefit heirs, "but upon sound principles of public policy to prevent the estab-

"lishment of corporations, without the express and particular "permission of the Sovereign, and also to prevent corporations "legally established from obtaining too much favor and influence "by extensive acquisitions beyond the object of their creation. "It will be found that the same policy prevails in the law of "England, for there no corporation can exist without the permis- "sion of the Sovereign, and corporations are restricted in their "acquisitions."

While Judge Kerr expresses himself as follows:

"*Whatever might have been the effect of the ordinance of* 1743, "the 41 Geo. 3, c. 14, is conclusive.

"The statutes of mortmain, which are a part of the public "law of the Province, make no mention of personal property."

Does that language shew that these judges had given any very particular attention to the ordinance of 1743? Does it prove that they considered it as being exclusively in force? Does it not prove, on the contrary, that they took it for granted that there was no difference between that ordinance and the law of England? Does not the language of Judge Kerr go much further and shew that he could not have considered the ordinance in force if he expressly held a legacy of moveable property for the foundation of a future corporation to be valid, since art. 2 of the ordinance positively declares such a legacy an absolute nullity.

With regard to the second, third and fourth points, the following language of Judge Kerr is no less conclusive:

"As to a license in mortmain, if to the Royal Institution, "whenever it should be created, an express license had not been "granted by the 41 Geo. 3, and the power had not been given "to the corporation in their charter, to take and receive move- "able and immoveable property in mortmain, still the Royal "grant of the 31st March, 1821 (nine years after the death of "the testator), erecting McGill College into a body politic, "having recited the bequest of the late Mr. McGill as the cause "moving His Majesty to grant the charter of incorporation, must "be held equivalent to an express license to take and receive in "mortmain."

Judge Kerr therefore held that not only the Crown can grant a license, but that a license subsequent to the *acquisition by will* was perfectly sufficient. This opinion of his surely could not rest on the ordinance of 1743, which annulled legacies to corporations, and required the previous sanction of the legislature after all manner of formalities should have been observed.

With regard to the 5th point, the language of Judge Pyke is interesting:

"It has been further contended that the corporation of the "Royal Institution had no legal existence at the period of the "devise of the testator, and on that account the bequest by him "made became null and void. This is one of those objections, "evidently, which, if founded, is in direct opposition to, and "necessarily defeats, the manifest intention of the testator, as "expressed in his will, and deprives the public of his bounty, "the devisees in trust named in the will being directed to convey "the estate of Burnside to the Royal Institution *established or* "*to be hereafter established*, the meaning of which must be, that "if at the time the bequest was made the Royal Institution "could not then be considered as established, the conveyance was "to be made whenever it should thereafter be established."

It is true that Judge Pyke afterwards reasons as if the conditional legacy was valid under the 41 Geo. 3, c. 117, but it is clear that statute did not create the corporation, it merely provided for its creation and for its endowment as a Royal Foundation out of the public lands. So long as the Crown abstained from appointing the trustees, to which the 41 Geo. 3 refers, there was no corporation in existence. Hence the devise of Mr. McGill to trustees of his own, who should convey to the trustees of the Crown, when they should be appointed, and thereby should bring into existence the proposed corporation, which in point of fact was not actually created for several years after the testator's death. It may even be said—and that constituted one of the most serious difficulties in the case—that the 41 Geo. 3, which contemplated schools of Royal Foundation, could not apply to a private foundation such as Mr. McGill contemplated. So that the statute instead of supporting the legacy, if anything, was opposed to it.

But on the whole the present and the McGill College case are substantially alike in their general features, and there is no objection which has been taken to the Fraser legacy which did not equally apply to the McGill legacy. Mr. McGill gave to a non-existing corporation, provided the Crown should establish it —as it had power to do—and named trustees to hold the property in the meantime. Mr. Fraser also gave to a non-existing corporation, on condition that the Crown should establish it —as it had power to do, without any previous statute—and

Mr. Fraser also named trustees to hold the property in the meantime. If the previous statute 41 Geo. 3, could affect the matter of the McGill College legacy, by evidencing the favor shown by the legislature to free schools of Royal foundation, the legislation favorable to free libraries can be invoked in support of the Fraser legacy with at least equal reason; and the Fraser legacy has this advantage over the other, that we have a general law of recent date under which the Fraser trustees might dispense altogether with a charter, and perpetuate the object by naming their successors, who themselves would name theirs, and so on in perpetuity.

What in fact should principally be borne in mind as to the McGill College case, is that the power of the Crown to grant a charter and do all it did under the 41 Geo. 3, c. 17, would have been exactly the same had that statute never been passed.

As to the sixth point, the Respondents specially refer to the following language used by Judges Pyke and Kerr:

"The second ground of objection," says Judge Kerr, "is also "untenable, for though it is admitted that a legacy is lapsed "(*i. e. caduque*) when left to an individual or to a body politic "or corporate, not *in esse*, yet the principle does not apply to "this case, inasmuch as the trustees were all alive when the "testator made his will, and they received the bequest for the "benefit of the Royal Institution so soon as it should please the "Provincial Government to give to 'airy nothing a local habita-"tion and a name.' This mode of settlement, by appointing "trustees to preserve contingent remainders, was devised by Sir "Orlando Bridgman, and other eminent lawyers, during the "time of the civil wars in England, after the death of Charles "the First, and these gentlemen maintained and enforced it "after the Restoration, from which period it has been the pre-"vailing mode of conveyance. It was to that expedient that "the testator resorted to carry his will into effect, and it would "ill accord either with the principles of French or of English "law were this Court to lay down a rule which would defeat his "intentions, plainly manifested in his will by the words consti-"tuted or to be constituted."

And Judge Pyke also said: "Having then the support of the "statute and the sanction of the Crown, the case becomes a "stronger one in favor of the Plaintiff, when for a legitimate,

"beneficial, and general public object, a bequest is made as in "this case, to devisees in trust, persons in being and capable of "recovering; and it does not lapse."

How after this the Appellants can say that a *fiducie* has never been held valid in Canada, it is for them to explain. At all events it is manifest, that in this very case which they themselves specially rely on, a *fiducie* was held to be valid, and as this particular fiducie had for its object the intermediate protection of a legacy of real estate in favor of a non-existing corporation, pending the proceedings to obtain an incorporation, then Judge Kerr and Judge Pyke would not have spoken as they did, had they held art. 2 of the ordinance of 1743 to be in force, since that article expressly says that a legacy to a non-existing corporation "*à la charge d'obtenir nos lettres patentes*" is null.

So much for the McGill College case.

As to the case of Freligh & Seymour, it is directly opposed to Appellants' pretension on the question of *fiducie*, since the trust to Seymour was maintained and the action dismissed. As to the question whether the ordinance of 1743 was in force, in so far as the decision of the Court can be said to touch that point, it is rather in favor of the Respondents, since the Court carefully abstained from annulling the legacy for the purpose of founding a grammar school, as it might have done, had it considered the ordinance in force, and as did Judge Aylwin, who dissented. But this case should not be taken into account at all, as what the Court did in reality was to abstain from deciding the point.

The next case is that of Chaudière Gold Mining Company and Desbarats, 15 L. C. Jur. p. 44. The question there raised was as to the right of a foreign corporation to sue for the price it had paid for a lot of land, of which the vendor was not proprietor, the pretension being that a foreign corporation not having the right to buy land without a license, cannot have the right to recover the purchase money. In that case there is no doubt that the ordinance of 1743 was generally assumed by the honorable judges to be in force, it being moreover stated by one of them that it was the general law to which art. 366 of our Code refers, but it certainly does not appear from the Report that on the existence of the ordinance of 1743 depended the judgment rendered; in other words, that the Court would not have rendered the same judgment had they held that the ordinance was not in force. Moreover it cannot be said that the non-existence of the ordinance

had been much pressed by the Appellants, or even that it had been distinctly raised.

As to the judgment rendered by the judge *à quo*, it no doubt rejects some of the present pretensions of the Respondents, but on the other hand, it adopts others to which they attach the greatest importance. That judgment, for instance, holds (see 15 L. C. Jur. p. 147) that art. 869 has modified the ordinance of 1743 in so far that the conditional legacy to a non-existing corporation, *cum capere potuerit*, is valid—the English jurisprudence, to which the honorable Mr. Justice Kerr referred in the McGill College case, being held to have been introduced, if it has not been confirmed by this art. 869. The judgment particularly insists that the object of the law is to encourage the establishment of free libraries, and in so far as these are concerned, to dispense with previous letters patent, and in consequence it holds that the ordinance of 1743 has been modified, and that there can be no violation of the spirit of the law if a testator provides for the establishment of a particular free library in a special manner, on condition that the consent of the Crown or of the legislature be obtained, no principle of public policy being infringed so long as the trustees do not hold for the purpose of their library any more land than any free library can hold, which may organize itself under the general statute. The point thus raised by the learned judge *a quo*, and which had been overlooked, is no doubt of great importance. Under the general act for the incorporation of Joint Stock Companies, for instance (31 Vic. c. 25, sect. 4, par. 5), persons desirous of obtaining a charter have to begin by subscribing a certain amount, but if the object of the Company be of a nature to make the possession of real estate necessary, then the real estate can be placed in the hands of trustees, who hold until the incorporation is obtained. If then real estate can be held in trust pending an application for a charter, why cannot real estate be held in trust under a will pending the application for an act of incorporation, which the testator has directed shall be duly made. Further, the judgment holds that the object of the testator was not the creation of an illegal corporation, but the creation of a free library, an object perfectly legal, and that if there could be either on the part of the public or of private individuals, any objection to the trustees acting in a corporate capacity, they had full power to establish and perpetuate the good work intended by the testator, under the will and under art. 905 and 923, without any charter at all.

These different propositions, which are so distinctly affirmed by the judgment appealed from, and which remain, the Respondents submit, unshaken by any argument the Appellants have brought to bear against them, are more than amply sufficient to save the legacy in this case.

As to the grounds upon which the judgment has rejected the Defendants' pretentions as to the true nature of the exception in our Will Act, and as to the effect of the change of sovereignty upon the ordinance of 1743, the Respondents leave it to others to judge whether they are well founded—all they will observe is that it must be obvious to any one who follows the reasoning of the learned Judge upon the propositions submitted to him by the Respondents—that the questions by him discussed are questions which had never been discussed before by our Courts. As to the 9 Geo. 2 the learned Judge admits that it can not possibly be law in Canada. As to the English mortmain law he further admits that legacies to both existing and non-existing corporations for charitable uses, such as the present, were perfectly valid; while he contends, that substantially there is no difference between the ordinance of 1743 and the English mortmain law, which is true in the sense contended for by the Respondents, but perhaps not in that implied in the learned Judge's remarks. As to the effect of the introduction of the Royal Prerogative, he says "that it could only have made a change in the formalities "et conséquemment les dispositions," he says "de la déclaration "ont été conservées en autant que le nouvel état de choses le "permettait quant aux formalités à observer." All which would seem to indicate that the "previous sanction principle" is looked upon as a mere formality, while the fact is apparently overlooked that the King had no Royal Prerogative whatever under the ordinance of 1743.

CONCLUSION.

Mr. Hugh Fraser was not only the master bnt the maker of his own fortune. He left no children, never having been married, and his nearest heirs at law were his brothers and sisters. There is nothing to shew that they had any particular claim on his bounty, or that they needed assistance in any manner. However, the Will shows that with the exception of one brother, whom he possibly may have have had the best of reasons for excluding, he has remembered them all, in a reasonable, and for aught we know,

all things considered, in a generous and handsome manner. What the amount of Mr. Frazer's fortune may be, does not appear. In one place the Appellants speak of $150,000, in another of $200,000, but there is no evidence whatever as to the value of the estate, or the nature of the property; so that while the amounts left to his relatives are known, as well as the amounts left to the principal charitable and benevolent institutions of Montreal, for they have not been forgotten either, the value of the residuary legacy is not. But be the proportion what it may, the Appellants had no vested right in their brother's estate, and their plea, in this respect is utterly irrelevant. Had he disposed of his property in the most unblushing manner, given the whole of it to disreputable persons and for disgraceful objects, it would never have occurred to his relatives to vex a court of justice with their real or imaginary tales of woe, and their pitiful cries for relief, and yet, after experiencing the generosity of the testator they think proper to come in with a poverty plea, for the purpose of defeating an object which is to be an everlasting credit to the memory of their brother. And what makes their conduct the more remarkable is, that what they do, they profess to do on principle and in the interest, not of themselves, but of the public at large, whom they are trying to rob of a most valuable and pressingly needed institution. "In all times," they say, "in most civilized "countries, it has been deemed necessary in the interest of "society and for the protection of families to restrain that morbid "feeling of vanity or remorse, or the exaggerated and terrified "sense of piety which so often seizes individuals in the prospects "of death. After hoarding money during a long lifetime, with- "out perhaps performing a single act of benevolence or charity "to their kindred or fellow beings, their conscience suddenly "awakens on the retrospect of their egotistical career. Seeing "how useless then is the possession of wealth which before was "their only pleasure, they seek to secure for their memory a "reputation which all the acts of their lives would contradict. "They become suddenly liberal, extravagantly charitable, they "order the creation of monuments in the shape of museums, "libraries, charitable or religious institutions, in order to trans- "mit their names to posterity as benefactors of humanity. So "long as they lived, they may have been selfish, proof against "any inducement of liberality or solicitation for the assistance "of a poor relative, whatever means they possesed to relieve

" them. Brothers, sisters, struggling for existence and the edu-
" cation of their numerous children were not in the eyes of
" many of these public benefactors worthy of their beneficence.
" They ignored their existence during their lifetime and on their
" deathbed, free by long habit from all family obligations, they
" believe they can atone for their shortcomings in family duties
" by the sudden comprehensive embrace of the whole human
" family, discarding all blood relations, fascinated by the idea of
" leaving a name which will last through all succeeding genera-
" tions, glorified as that of a public benefactor, a satisfaction new
" and strange to them."

That there was a time when reasoning such as this passed current in England and in France is no doubt true. But that time in the history of both countries, has no connection with the national glories in either the intellectual or the moral order. Those were the days when the greed of the feudal lords looked upon the transfer of property for benevolent purposes and the consequent possible curtailment of their revenues as a public calamity and a heinous offence, while the fanatics whose motto was religious and universal liberty treated all religious men as the enemies of mankind, and charitable institutions as the strongholds of despots. " Laisons," said Barrère, in introducing his measure for public assistance, " laissons à l'insolent despotisme la fastueuse
" construction des Hopitaux pour engloutir les malheureux qu'il
" a faits. Dans la république, tout ce qui peut établir la dépen-
" dance d'homme à homme doit être proscrit." And a writer in the *Revue Critique de Législation*, 1859, (p. 337) thereupon remarks " Un pauvre, s'il ne voulait se dégrader devait donc
" mourir de faim, plutot que de recevoir un secours d'une autre
" main que celle de l'Etat. Cette théorie faillit ruiner à jamais
" les établissemens que la piété séculaire des ancêtres avait pré-
" parés pour le soulagement de toutes les misères et de toutes les
" infirmités." And Ledru Rollin himself, is not less outspoken " Ces lois furent suivies," he says, " du décret du 18 aout 1792,
" qui poussant la réaction jusqu'à ses dernières limites, sup-
" prima complétement toutes les corporations religieuses d'hom-
" mes et de femmes de quelque nature qu'elles fussent, même
" celles qui vouées à l'enseignement public, ou au service des
" Hopitaux ou au soulagement des malades, étaient déclarées
" '*avoir bien mérité de la patrie*' et ce pour la singulière raison
" qu'un état vraiment libre ne doit souffrir dans son sein aucune
" corporation."

Lord Coke little thought that sentiments such as the above would be adopted by a civilized nation when he made his famous remark "that no time was so barbarous as to abolish learning or "so uncharitable as to prohibit relieving the poor."

But fortunately these days are passed, let us hope, never to return. All or any of the eloquent denunciations which the Appellants so fancifully apply to Mr. Fraser, would equally apply to the late Mr. McGill, whose memory so many have good cause to cherish, or to Mr. Peabody or to Sir Richard Wallace whom France and England of the present day, grateful for national benefits conferred, so recently delighted to honor.

It has been seen already that both in France and in the United States, a legacy such as that of Mr. Fraser would be perfectly valid, while it is a question whether it would not be equally valid in England under the 9 Geo. 2. At all events it is admitted, as we have seen, that that law does not apply here. But it is curious to see what the writers whom the Appellants quote, and upon whose opinions they so confidently rely, think of that only remaining relic of a false system:

"After all," says Jarman, p. 244, "it deserves consideration "whether the policy which gave birth to the statute of Geo. 2, "c. 36, is adapted to the state of society at the present day, "when the current of charitable bounty does not appear to flow "in channels calculated to awaken the jealousy or call for the "restraining interference of the legislature. In no instance that "has ever been brought to the attention of the writer, in which "the vacating operation of the statute has defeated the intention "of the testator, has the result been otherwise than mischievous, "without intrenching on the statutory enactment which prevents "the land of the country from being locked up in perpetuity, "trusts of this nature (though even this object does not neces-"sarily involve the prohibition of a few feet of ground being "given for the erection of a building), might it not be provided "that whatever real estate, or the produce of real estate is dis-"posed of in this manner, the property should be sold or con-"verted, and the proceeds only paid over to the charity, in other "words, making it compulsory on the charity, to accept the pro-"duce of the land, instead of the land itself, unless the object "were of such a nature as to be incapable of being carried into "effect, otherwise than by an appropriation of land, in which case "the devise would still be void. The present state of the law

"produces much litigation, and many attempts at evasion, as is "always the case where the feelings of mankind are not in unison "with the provisions of the statute book. Ingenuity is racked "for evasive expedients, and a testator will sometimes rather "confide his property to the honor of a stranger, by devising it "to the treasurer or other public officer of a charity, for his own "benefit, and most explicitly discharging him from all construc- "tive or implied trusts, than abandon a scheme to which he is "impelled by a conscious rectitude of purpose. A measure faci- "litating charitable dispositions by will would seem to be espe- "cially opportune, now that the legislature has, with the excel- "lent design of arresting the progress of pauperism, made such "an alteration in the poor laws, as renders the great body of "the poorer classes more dependent than formerly on private "benevolence. Perhaps it will be objected that a voluntary pros- "pective provision against poverty and destitution partakes of "the vicious principles and mischievous tendency of those laws, "but the objection holds good only to a very limited extent. "There is a great and obvious difference between the effect of a "legal enactment, conferring an absolute right, and that, too, on "all, without distinction of character and conduct, and a provi- "sion which selects only the deserving, and cannot be depended "on by any. And this objection, whatever be its force, does "not apply to institutions whose object is to supply the moral "wants, not to administer to the physical necessities of men."

Referring to this interesting passage in Jarman, Chief Justice Redfield, the highest modern American authority on the subject of wills, remarks, p. 790:

"There is a note in Mr. Jarman's chapter upon the English "statute of mortmain, which shews most conclusively in my "judgment that the spirit of this statute (9 Geo. 2, c. 36) is "conceived in an over-cautious feeling of circumspection in re- "gard to the interests of society and the mode in which they are "liable to be unfavorably affected by devises of land to charitable "uses; and that every security in regard to that liability might "be effected by providing for the sale of such real estate, and "compelling the charities to accept the avails in money; and "that in this mode much litigation would be avoided, and the "scandalous efforts to evade and defeat the charitable intentions "of testators would also be saved, with many other advantages "gained, not a little creditable to the country, and far more in-

"accordance with the spirit of the age than the English statutes "of mortmain, or the decisions of the English courts with regard "to them.

"A careful observation in regard to the interests in America, "which represent the opposition to charitable bequests, will con- "vince us probably that it comes neither from the most laborious "or the most successful of business efforts and enterprises, not "from those who have most at heart either the religious state, "the morals, or the material comforts of any class, and especially "the poorer classes.

"The statute of mortmain, 9 Geo. 2, c. 36, does not extend "to Scotland or Ireland or the Colonies (see the very remarkable "judgment on this point by Sir William Grant, 2 Merivale's "Rep. p. 161): 'It is purely English in its character and force. "The British Parliament has often passed statutes in favor of "particular charities, and the statute of mortmain has been re- "pealed *pro tanto* in favor of the Universities of Oxford and "Cambridge, the British Museum, the Bath Infirmary, Green- "wich Hospital, the Foundling and St. George Hospitals, the "Royal Naval Asylum, the Seaman's Hospital Society, and a "number of other public institutions.'

"And it will be remembered that this statute leaves the entire "personal estate of the testator liable to the unrestricted dispo- "sition of his will for charity, unless he direct it to be invested "in real estate, and this notwithstanding such charitable institu- "tions are made of perpetual duration, and this class of disposi- "tions is highly favored in point of construction."

So much for the *consensus communis* so much relied on by the Appellants. With regard to the observations of Mr. Jarman and Chief Justice Redfield, as to the perfect legality of a legacy of moveable property for charitable purposes, even under the 9 Geo. 2, it is suggestive, inasmuch as in the present case there is no evidence whatever that the real estate of the testator is even sufficient to pay the special legacies, which are not contested and are not of a nature to be contested. For aught we know therefore, what Mr. Fraser has set apart for the foundation of the Fraser Institute, may be nothing more than his moveable property, and if it were not for the charter which they have since obtained, there is no reason why the trustees should own any more land than the few feet for the erection of a building, mentioned by Mr. Jarman.

To sum up, the ordinance of 1743 was made with the intention that it should be put in force in Canada. But whether in the interval between 1743 and 1763 it ever was, does not appear. The presumptions are, that it has been treated in practice as a dead letter, as former ordinances had been. At all events, since 1763 there is nothing to shew that it has been put in force in Canada, in the sense understood by the Appellants. To use the language of the Codifiers, p. 151, speaking of the old law restrictions in general, "the restrictions of the ordinances were opposed "to the new principle governing wills. They belong to a diffe- "rent state of things, and to an order of ideas, socially and le- "gally, which the legislation of the country has constantly been "tending to consign to the history of the past." Had it ever been interpreted as the Appellants would have this Court interpret it, it would long since have been repealed by an express and positive enactment, because its opposition to, and repugnancy with, all prevailing opinions, would have been manifest. But its repeal is no less effectual, though it may not have been express. That repeal was the result of the introduction of the Prerogatives of the Crown and of our legislation generally since 1763; and whether the Codifiers were conscious or not of the fact, the Code finally consecrated that result when in art. 831 it laid down the rule that

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

If therefore the nullities of the ordinance of 1743 apply to this case, it must be because those nullities are mentioned in the Code, and that is what the Appellants have failed to shew, and never can.

The Respondents then consequently claim that the judgment appealed from must be confirmed.

Mr. CROSS, Q.C., on the same side, argued at some length in support of the propositions contained in the following condensed statement.

The question in this case is as to the validity of a legacy to trustees, to establish a library, discretion being given them to procure a charter of incorporation.

It is objected by the plaintiffs that such a legacy is prohibited by law.

The establishment of a library being in itself not only a legitimate but a commendable object, it follows that it is incumbent on the Plaintiffs to prove an existing prohibitory law, and that the present case falls strictly within the prohibition.

The Plaintiffs contend that such law is to be found in the ordinance of the King of France of the year 1743 concerning Religious bodies in the colonies, which they pretend is in full force notwithstanding subsequent events and legislation, and applies to this particular case, in fact to all corporations.

The Defendants contend that the ordinance of 1743 did not apply to cases like the present, and if it did, it has been modified by subsequent events and legislation.

It is easier to cite the text of an old law and allege its vitality than it is to resuscitate the events and legislation by which it has been indirectly modified; but the non-enforcement of such a law for a period of upwards of 100 years is itself a presumption that such influences have had the effect of its modification.

That such an important matter did not escape, nor fail to engage the attention of the codifiers. They have in the civil code declared the existing state of the law of mortmain, including what determines the question involved in this cause, resolving the doubts that existed prior to its promulgation. They have pronounced no nullity nor prohibition against such a legacy as the present, in proof of which see articles 352, 353, 358, 366 and 766, which cover the whole ground.

The civil code gives unlimited power to bequeath by will and to have bequests to trustees for charitable purposes carried into effect: see articles 831, 869 and 905.

Art. 831 acknowledges the validity of the bequest now in question, unless a prohibition, restriction or nullity is pronounced against it, in any other part of the code, and none such is to be found in it.

Its terms are " every person of full age, of sound intellect, " and capable of alienating his property, may dispose of it freely " by will, without distinction as to its origin or nature, either in " favor of his consort, or of one or more of his children, or of

" any other person capable of acquiring and possessing, and " without reserve, restriction, or limitation; *saving the prohibi-* " *tions, restrictions and causes of nullity mentioned in this code.*"

There is no restriction to persons acquiring to procure a charter.

The only restriction, and that is to corporations acquiring property directly, is to be found in §2 of article 366, being merely a restriction to acquiring *real estate* without the permission of the crown; which permission according to the precedents and authorities may be obtained afterwards.

This restriction applies to real estate only, and that beyond a fixed amount and value. In the present case there is no proof of any specific amount or value of real estate.

The restriction refers merely to gifts direct to corporations.

It ceases on the permission of the Crown being obtained.

The present is not a gift direct to a corporation, but to trustees entitled to accept as such under article 869, the terms of which are as follows:

" Art. 869. A testator may name legatees who shall be merely " fiduciary, or simply trustees for charitable or other lawful pur- " poses within the limits permitted by law; he may also deliver " over his property for the same objects to his testamentary " executors, or effect such purposes by means of charges imposed " upon his heirs or legatees."

Lawful purposes, in this article mean every reasonable purpose not prohibited by the code, which has already pronounced as to the disabilities of corporations (art. 366); and as to the full authority to give, save in the case of a declared express prohibition, art. 831.

This article 869 recognises the system of trustees without interest in the property for carrying into effect bequests.

This had already been established as law, in the case of Des Rivieres v. Richardson, Stuart's Reports, p. 218; Freligh v. Seymour, 5 L. C. R. p. 492, and in numerous Statutes permitting property to be held by trustees, as for instance, Con. Stat. L. C. cap. 19; as well as all the Joint Stock Company's acts, and all the Banking and School acts, and many others.

Within the limits permitted by law in article 869, do not mean permitted by the ordinance of 1743.

There is no prohibition, restriction or nullity invoked, save those already pronounced by the code, that is, against morals and public order.

The codifiers contemplated by the article 869 the carrying out of such charities as the present, and based their text on the unlimited power of bequeathing given by the statutes, and the favor of charitable gifts—see Report of codifiers, 4 and 5, p. 181, article 124 bis.

See how such a provision was construed, contained in the statute 43 Eliz. cap. 4; Highmore on Mortmain, p. 200 and seq., and what extensive facilities were given for establishing like charities thereunder.

The present bequest is good, either as a charge imposed on the legatee, as under article 869, or of a suspended legacy, as under article 838, to a person not yet in existence, where the capacity to receive is to be considered relative to the time at which the right comes into effect, *cum capere potuerit.*

See Furgole—Traité des Testamens, t. 1, 309 and 310; Salé Esprit des Ordonnances, t. 3. p. 342.

This bequest might be made effective, either under article 905 for perpetuating executors, or by trustees under article 869, without procuring a charter.

By article 358, corporations may acquire and hold property. The only limit to this is established by §2, of article 366, which requires a licence to be obtained for *real estate*, except for a limited amount.

The code reserves the rights of the Crown only, but vests no right in heirs in case of the violation of the laws of mortmain, they cannot invoke such a pretended nullity. See §2, article 366, and Grant on Corporations, p. 98, 99, 100 and 101, 8 Louisiana An. Rep. 171.

The ordinance of 1743 is not recognized by the code, nor anywhere mentioned in it. If any part of its purport or contents be thereby admitted, it is as to acquisitions by existing corporations, that is, arts. 10 and *seq.*, of the ordinance; on the contrary arts. 1 to 9, as to the manner of creating corporations are totally ignored as not in force, and other provisions in a different sense, take their place as being the law.

The article 353 of the Civil Code, providing for creating corporations, as also 358, allowing them to acquire and hold property, and the arts. 366 and 766, are inconsistent with the ordinance 1743, being in force, at least to the extent necessarily contended for by the Appellants, and especially as regards the arts. 1 to 9 of said ordinance.

The reasons why the codifiers did not report the ordinance of 1743 in force, may have been:

1st. It was inconsistent with the state of things after the change of Sovereignty.

It was modified by the Statutes in regard to wills; Imperial Statute, 14 Geo. III, cap. 83, sec. 10, and Provincial Statute, 44 Geo. III, cap. 4, giving complete freedom of disposal by will, save in the latter statute as to corporations direct. See Report of Codifiers, 4 and 5, p. 181, art. 124 bis.

It was inconsistent with the Queen's prerogative right to create corporations with their incident powers of acquiring and holding property. See art. 353, Blackstone's Commentaries, vol. 1, p. 472, 475 and 478; Chitty on Prerogative, p. 32, 33.

Also with the prerogative right of supervision over charities as *parens patriæ*, one of the major prerogatives. See Chitty on Prerogative, p. 161, also the King v. Black; Stuart's Rep. p. 324.

Also, where there is a concurrence of right between King and subject, the former is preferred. See Chitty on Prerogative p. 381; Highmore, p. 249.

Arts. 1 to 9 of the ordinance of 1743 were at the time it was enacted, new law, and were directed against the creation of additional ecclesiastical corporations in the colonies. Arts. 10 and *seq.*, were in part declaratory of the old law.

Arts. 1 to 9 were merely for instituting forms of procedure to arrive at an incorporation, and as such were superseded by the change of system.

The remaining sections were to prevent the endowment of existing corporations or *gens de main morte* with real estate.

Sections 1 to 9 do not extend generally to *gens de main morte*.

The remaining sections affect only existing corporations, and in regard to real estate.

As requiring licenses to hold real estate, they were in accord with the previous existing law.

The preamble to the ordinance, more particularly the introductory part of it, not printed in Appellants' factum, shews it to have been exclusively directed against ecclesiastical corporations; the enacting clauses of secs. 1 to 9 shew, that in regard to creating corporations, the language was not so comprehensive as that used in section 10, (*gens de main morte,*) for prohibitions as to real estate only, in regard to existing bodies.

The term *Laicque* in section 1, was not meant to extend its provisions to all lay bodies, but was intended to include a class of communities, which, though for the furtherance of ecclesiastical purposes, were connected with and known as lay communities. See Nouv Den Verbo, Communaute Ecclesiastic, p. 743; Dic de Trevoux v. Communaute, p. 730.

It has been held not to extend to commercial corporations, why then to libraries. See Kerskowski v. Grand Trunk, 10 L. C. R. p. 47. The French Ordinance of 1749 was more comprehensive in its terms than that of 1743.

The decisions under the former should not be held wholly applicable. Yet the Ordinance of 1749, as a penal or prohibitory law was generally held as directed against Ecclesiastical Corporations only. It was not exclusively this law that required all Corporations to be authorised by the Crown.

Librairies, such as now promoted by the Legislature and considered highly beneficial to the public interest, had no existence in Canada in 1743.

If arts. 1 to 9 of the Ordinance of 1743 were superseded as above, the law was brought back to what it was in France and in Canada before the ordinance of 1743, and what it was in England before the statute 9 Geo. II, cap. 36—(this act did not extend to the colonies. See Attorney General v. Stewart, 2 Merivale's R. p, 143, Redfield on Wills, vol. 2, p. 790.)

Under these laws, such a legacy as the present was perfectly valid, and the Crown licence might be procured after the grant. See Furgole Traité des Testamens, t. 1, p. 328, No. 37; Salé Esprit des ordonnances, T. 3, p. 342; Highmore on Mortmain, p. 200; Milne's Heirs v. Milne's Exors, 17 Louisiana, R. p. 46.

The Crown only had the right to interfere. See Grant on Corporations, p. 98, 99, 100 and 101.

The Code Napoleon, art. 910, is at least as strong in its prohibitory terms as §2 of art. 366, Code Civile. It has also an art. 810, similar to our art. 774 as regards incapable persons taking indirectly, yet under these, such legacies as the present are valid in France. See Troplong, Donations, Nos. 588 to 612 and *seq.*; also Journal du Palais for 1870, 5me. Livraison, Note to p. 590, and numerous authorities there cited.

Taking indirectly, cannot apply to trustees, taking under art. 869, 17 Louisiana R. p. 46.

The English Stat. of Wills, 34 Hen. 8, cap. 5, excepted Cor-

porations, as did our act, 41 Geo. III, cap. 4; yet bequests to trustees to procure an act of Incorporation were held valid in England, notwithstanding this Statute.

If art. 2 of the ordinance 1743 had reference to a Royal charter, or letters patent of the Sovereign only, the prohibition, if any, would not remain effective as regards the power to incorporate vested in, and to be exercised by a free legislature, as at present constituted. The Appellant can urge no prohibition which applies to, or could ever be binding on our Legislature.

Libraries in particular, and many other like institutions, are authorised by numerous statutes, and may be incorporated at will, therefore they are not illegal or prohibited, and the restriction of the ordinance of 1743 can have no application to them. See Con. Stat. c. 72; Con. Stat. L. C. cap. 19; also Quebec acts, 31 Vic. cap. 25, sec. 2, §7; Sec. 3, §6; Sec. 4, §4 and 5.

The Joint Stock Companies Act 31, Vic. cap. 25, places libraries in at least as favorable a position as was the McGill College under the statute 41 Geo. III. cap. 17. That was an act passed for general educational purposes, sanctioned in 1802, authorising the creation by letters patent of a corporation by the name of the Royal Institution for the advancement of learning. McGill made his will in 1811, leaving property to trustees for the establishment of the College under the Royal Institution; he died in 1813. The corporation of the Royal Institution was created by letters patent on the 13th December 1819, but the will contemplated a special incorporation of the McGil College, and the Royal Institution could themselves only be trustees. The letters patent for McGill College only issued in 1822, yet the bequest to Trustees, under the will was held valid, to hold the property until letters patent for the corporation of the Royal Institution should issue, to enable that corporation, to hold the property until the incorporation of the McGill College, at a still later date. See Des Rivières v. Richardson; Stuarts Rep. p. 218.

The Defendants might have availed themselves of the Joint Stock Companies Act, without applying for an act of the legislature. This Joint Stock Companies act supposes the acquisition of real, as well as personal estate, before the charter is applied for.

The great favor of charities has always induced Courts to act liberally in supporting them. It was a maxim of the Roman, as well as of the English law, that charities were never allowed to

be lost. See appendix to 4 Wheaton's Rep. p. 1, 4, 8, 11, 12 and *seq.*; Jarman on Wills, p. 233, or 197, original edn.; Redfield on Wills vol. 2, p. 783 and 790. See Report of Codifiers, 4 and 5, p. 181, shewing that they incline to the opinion that the old law of France and England in above respect is still in force and that these maintained such bequests as the one in question.

The following is an analysis of a number of leading American cases, under the English system, and under the Civil law system, Louisiana Code.

Baptist Association v. Harts Exors, 4 Wheaton, p. 1. Held that a bequest to such an Association not incorporated was void for indefiniteness.

But this was afterwards entirely repudiated, and see Treatise in Appendix to this volume, especially, pp. 11, 12 and 22.

Trustees of Phillips Academy v. King's Exers 12 Mass. Rep. p. 545. Held that such a bequest was good, and that an aggregate corporation had power to accept, take and hold, even as a trustee, and, although not strictly in conformity with the purposes for which the institution could take and hold by their charter.

McCartee v. Orphan Asylum of New York, 9, Cowen's Rep. p. 437. Held that a bequest direct to a corporation was void, under their Statute of Wills, although it would have been valid, had it been to trustees, and the Court would even supply trustees on their failure.

Milne's Heirs v. Milne's Exs., 17 Louisiana Rep. p. 46. Legacy for Orphans, conditional on incorporation got from legislature held valid, although no capacity to receive at time of decease of testator, and valid notwithstanding abolition of substitutions.

Inglis v. Trustees of Sailors Snug Harbor; 3 Peters R. p. 99. A bequest in trust to the chancellor of the State and recorder of the City of New York, for a Sailor's Hospital, for which they were directed to get an act of incorporation, held valid.

Hubbard v. Bartlett, 4 Metcalfs Rep. p. 379. A devise of real estate for charitable uses to an unincorporated society held valid, and may be enforced against heir.

Vidal v. City of Philadelphia, 2 Howard R. p. 127. The City Corporation without express authority in their charter could take as trustees for charitable uses, becauses English Statute of

Wills not adopted there; but 43 Eliz., adopted; yet the law sufficient without that statute.

Burbank v. Whitney, 24 Pickering, p. 146. Bequest to a foreign corporation valid, either under 43 Eliz., or independently of it.

Heirs of Henderson v. Rost et al,, Exrs, 5 Louisiana annual, R. p. 441. A bequest to perpetuate a succession in violation of the policy of the law abolishing substitutions, held void.

States of Louisiana and Maryland v. The Executors of McDonough and the City of New Orleans, 8, Louisiana Annual Rep. 171. Legacies given to these cities for charities good, without special authority.

Though many of the objects could not be carried out, and the conditions void, still the legacy vested.

In any case the heirs were deprived of the property, and could not avail themselves of the nullity of conditions.

Coin Delisle, Delangle, Giraud, Duranton and Mercadé gave elaborate opinions on the subject, for this case.

Mr. LAFLAMME in reply:—It is difficult to seize exactly the points urged by the counsel for the Respondents; there is nothing definite or precise in their pretensions, which are vague, hypothecial and uncertain. Their efforts seem to have been to involve the case in a cloud. They dare not deny positively the existence of the Edict upon which the Appellants rest their case, but by inferences and far fetched arguments they attempted to show that whatever portions of it clash with their interests, are repealed, that it is an antiquated remnant of a barbarous age, that its main dispositions are contrary to some dispositions of our general law, to the policy of the age and the principles of modern legislation, that they have fallen into disuse. They are bound to forego all the elementary rules respecting the abrogation of positive laws, to secure the repeal of this obnoxious edict by implication and mere suppositions—contrary to the well settled principle that there can be no repeal of a positive enactment by implication.

Dwarris on the interpretation of Statutes, p. 533, says:

" Nor hath a latter act of Parliament ever been construed to " repeal a prior act, unless there be a contrariety or repugnancy " in them or at least some notice taken of the former act so as " to indicate an intention in the law given to repeal it.....

" The law does not favour a repeal by implication unless the " repugnance be quite plain.

" A subsequent act, too, which can be reconciled with a former " act, shall not be a repeal of it, though there be negative words."

Demolombe, 1 Vol. No. 126, affirms the same doctrine: " L'abrogation est tacite lorsque les dispositions de la loi nou- " velle sont incompatibles avec les dispositions de la loi anté- " rieure.

" Mais alors l'abrogation ne résultant que de la contrariété " entre les deux lois, il ne faut la reconnaître qu'à l'égard de " celles des dispositions de la loi ancienne qui se trouvent incon- " ciliables avec les dispositions nonvelles.

" En principe la loi générale n'est présumée vouloir déroger à " la loi spéciale ; et l'abrogation tacite n'a pas lieu dans ce cas, à " moins que l'intention contraire du législateur ne résulte suffi- " samment de la loi elle-même."

The Respondents have certainly failed to show that there is a direct contradiction between any of the articles of the Code or any subsequent statute and this edict. The right to give to a Corporation regularly constituted and authorized to receive, the privilege of association granted by the law for the purpose of forming a Corporation within certain limits and for certain well defined objects, is certainly not inconsistent with the positive prohibition to devise property for the purpose of establishing a Corporation, and cannot therefore possibly be construed as a repeal of this previously existing prohibition.

But it is stated that the Code contains all the prohibitions respecting Corporations and mortmain, and no prohibition can be found as contained in this edict.

Such a proposition was never before stated in a Court of Justice. As well might it be asserted that the Code contains all our law and that no authoritative disposition can exist beyond it or be found any where else. Every one knows that the Code does not and never was intended to embody the entire law of the land. On the contrary constant reference is made to other existing laws.

Have we not our Consolidated Statutes and the whole series of our Statutes containing subsisting legal enactments in full force promulgating principles of law on all matters, many of which connected with subjects treated of in the Code. And on this particular point of devises and bequests to Corporation, the laws

of mortmain, where can any disposition be found in any of the articles of the Code embodying, altering or excluding the previous existing laws on the same subject?

The final provisions of the Code demonstrate that no such intention ever existed on the part of the legislator. The article 2613 limits the repeal of the laws in force, at the time of the promulgation of the Code to those cases:

"In which there is a provision herein having expressly or im-
"pliedly that effect;"

"In which such laws are contrary or inconsistent with any
"provisions herein contained;"

"In which express provision is herein made upon the parti-
"cular matter to which such laws relate."

Where can be found in our Code a provision to the effect of repealing the prohibition of the edict?

There is certainly none in the art. 366 neither in art. 831. The edict is not contrary or inconsistent with any of the dispositions of the Code.

Let us take the article 366 on the disabilities of Corporations arising from law.

"366. The disabilities arising from the law are:

"1o. Those which are imposed on each Corporation by its
"title or by any law applicable to the class to which such Cor-
"poration belongs;

"2o. Those comprised in the general laws of the country res-
"pecting mortmains and bodies corporate, prohibiting them from
"acquiring immoveable property or property so reputed without
"the permission of the Crown except for certain purposes only
"and to a fixed amount and value;

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

It is evident that the Code here supposes and affirms the existence outside the Code, 1stly of laws applicable to Corporation, 2ndly of general laws of mortmain also which are not embodied in the Code; it is equally evident that there exists no other general law of mortmain except the edict of 1743. The Counsel for the Respondents have not and cannot point to any other. The codifiers in this title of the Code refer in general terms to such dispositions of the laws of mortmain, which apply particu-

larly to existing and established Corporation, they had not and could not be expected to embody there the disposition of the edict as to devises and bequests to non-established Corporations or for the purpose of constituting a Corporation; but they did this in the title 2, in the Chapter of Wills.

Art. 831 upon which the Counsel for the Respondents so strongly rely, and in which the codifiers, after stating the general disposition analysed from our Statute of 1801 giving the right to every person to dispose by will of every kind of property, in favor of any person whomsoever, contains the express proviso "*saving "the prohibitions, restrictions and causes of nullity mentioned "in this Code and all dispositions and conditions contrary to "public order or good morals.*"

The power of creating Corporations, the exercise of their rights and the restrictions imposed on their acquisitions, the laws of mortmain have in all countries been considered as concerning most directly public order, and were dictated by the interests of society as the preambles of the edict show conclusively. This proviso attached to the article indicates that there are restrictions and prohibitions limiting this absolute liberty to dispose of by will. Where can they be found? Certainly not in the Code. And again the article 836 says: "*that Corporations and persons "in mortmain can only receive by will property as they may "legally possess.*"

Whence this restriction? and where is it written? Certainly not in the Code. Can a Corporation which has no legal existence whatever be the subject of such a disposition? Has it any right to possess legally any kind of property? Does not this article 836 refer to the edict and in different words contain the same disposition in general terms, viz:—that you cannot bequeath or devise to a non-existing Corporation or to establish a Corporation because such Corporation cannot legally possess, and this interdiction can arise solely from the edict. From what part of our previous law are these articles derived? The codifiers have not expressed any intention to modify it in any respect; they are satisfied with a broad reference to these restrictions and prohibitions existing, and which they acknowledge as existing.

No one will deny that the Statute of 1801 has not been modified and that it never was the intention of the codifiers to do more than to analyse its dispositions, and in this Statute to which they refer as the parent of the article 831 we find this clause:

" And the said right of devising as above specified and de-
" clared shall not extend to a devise by will and testament in
" favor of any Corporation or other persons in mortmain, unless
" the said Corporation or persons be by law entitled to accept
" thereof."

This edict was and is unquestionably the law of the land and the motives of its enactment were dictated by public policy. I am at a loss to conceive how alterations made in the dispositions of our law for special cases, concerning the acquisition of property by regularly and legally constituted Corporations, how the change of Sovereignty substituting a different controling power and another source of authority to which these bodies were bound to apply to enable them to receive by contract *inter vivos* and to add to their possessions, could affect the principle so clearly enuntiated that no devise can be made to establish a new Corporation, and that every bequest or devise of this kind should be considered as absolutely null and void.

Under the old system of French Law as well as under the English Law, no Corporation could possess property beyond the limits allowed by its charter, or by the general laws affecting Corporations without the permission of the Crown; such excess obtained in contravention of this principle was unquestionably liable to forfeiture; but this is entirely independent of the right to dispose of property by will to create a Corporation.

The fact that the Code contains some dispositions similar to some of those of the edict, besides the general reference to the laws of mortmain, cannot be urged as an argument to prove that the remaining dispositions of the edict have been effaced. No one disputes the fact that an illegal acquisition by a Corporation can be remedied by the permission of the Crown, but again what analogy and what bearing can this have upon this case?

In answer to the second proposition of the Appellants, the Counsel for the Respondents do not deny that the maxim of our law is that property cannot remain in suspense; but they here again invoke as their universal panacea the liberty to dispose by will—not only to assist them in removing the obnoxious articles of the edict, but moreover to introduce under its shelter the complete system of trust as established by the law of England, the result of ages of legislation and jurisprudence entirely foreign to our own and requiring for its execution judicial machinery of which we have no idea in this country.

The French authorities cited from Ricard refer to the incapacity of a legatee at the time of the making of the will, but capable when the will takes its effect. No authority can be found contrary to the opinion of Pothier; that a disposition made in favor of a non existing or unauthorized Corporation is null. If reference is made to the cases cited by Ricard and Furgole, it will be found that the legacies there mentioned were made directly to a legally constituted body or to an individual, his heirs and assigns, with the charge of establishing a Corporation, an hospital or a College, to be approved of by the Sovereign, and every one of these decisions are anterior to the Ordinance of 1747, as can be seen by the notes in the last edition of Ricard by Berger.

The articles 771 and 838 are not new law; they made no change in our previous jurisprudence; they are taken from Pothier and all our old jurists. Conditional legacies were not unknown in the cases cited in these articles: "dans les legs dont "l'effet demeure suspendu après le décès du testateur, soit par "suite d'une condition, soit dans le cas du legs d'un enfant à "naître et de substitution;" but can there be found a single case when the principle was carried to the extent of maintaining as valid a disposition *pure et simple* in favor of a non-existing being, without conveying the property in *fidéi-commis*, to some party who was and could be seized of it as proprietors at the death of the testator.

It is difficult to understand the proposition of the Respondents: that our law respecting wills is inconsistent with the Ordinance of 1743, and more difficult still to appreciate their argument in support of it. The proviso of the Statute of 1801, which gave the liberty to dispose by will, specially excludes from this liberty all devises to Corporations or persons in mortmain; consequently, whatever other restrictions and prohibitions have been removed, this one at least is carefully maintained. Since this Statute, it is undoubted that bastards, concubines and confessors, may receive by will, but if the legislator has thought proper to maintain the laws of mortmain, respecting the disposal of property by will, however anomalous and illogical it may appear to the Respondents, the fact nevertheless exists and this prohibition is law which must await the reformatory power and authority of the legislature before the Courts can refuse its application.

The English and American Statutes and authorities cited by the Counsel for Respondents have no bearing whatever upon this

case. They only demonstrate that in those countries, as well as in Canada, the legislator has deemed it necessary to restrict the disposal of property by will for charitable and useful purposes, and notwithstanding the enlightment and progress of civilisation still maintain them as necessary.

The Respondents further pretend that the legacy is valid inasmuch as it is made to trustees who have power to take under art. 869 of our Code.

The Appellants believe that no answer has been given on this point to the argument offered by them. The article 869 could not have the effect of introducing the whole system of English trusts, but limits the appointment of trustees as fiduciary legatees for merely charitable purposes, or other lawful purposes within the limits permitted by law. These terms "fiduciary legatees" prove that there was no intention on the part of the codifiers to introduce a different system than the one recognized by our laws, and it allows no *fiducie* without the existence of the party who is seized of the property, and towards whom the fiduciary stands in the position of a mere agent. And again the proviso "within the limits permitted by law," necessarily subjects any such disposition to existing laws, and amongst others to this edict, if it has not been abrogated. Under the old French system, and our own before the code, a testator could unquestionably make a bequest to the parish priest, or to a friend, for distribution amongst the poor. In such a case the legatee was a simple *ministre* or trustee. The terms used with such restrictions cannot therefore indicate a determination on the part of the codifiers to operate a revolution in our system by introducing the English trusts in Canada. The absolute liberty of disposing by will cannot require for its exercise the overthrow of all the rules of law concerning the transmission of property.

It is useless to make answer on the comments of the Counsel upon the cases wherein the existence of this edict was asserted. The Appellants are not prepared to criticise or defend every opinion given by the Judges in these judgments; but as a matter of jurisprudence, the main fact resulting from these decisions which the Counsel for Respondents cannot overcome, is the existence of the edict, and its application by all the tribunals of the country since more than half a century, and the last of these judgments rendered by this Court after the code, not more than eighteen months ago. How can it be pretended in presence of such facts

that the edict has fallen into disuse? Have we not moreover the proviso of the statute of 1801 embodied in our Consolidated Statutes, published in 1861? declaring that the right of devising shall not extend to a devise by will and testament, in favor of a corporation, or other persons in mortmain. Can this be considered as an abandonment of the edict?

The principles of this law, and their application, are admitted by most of the civilized countries for the protection of the community. The learned Counsel might have saved themselves the trouble of quoting the opinions of various writers as to the opportunity of reason of laws of mortmain such as ours. If they are contrary to the well-being of society, let them be abrogated, but how can the learned Counsel explain that in England and in France no attempts have yet been made to effect any change, and that there they are still subject to these erroneous and absurd dispositions. We find, not later than in the year 1871, a case reported in the Law Journal, vol. 1, p. 24, of Hawkins v. Allen, where the question of a donation for as good and as useful an object as the establishment of a library was brought before the Court of Chancery in England and set aside as being contrary to the laws of mortmain. The facts are given as follows, in the heading of the report:

On the 24th March, 1866, D. gave a cheque for 5000*l.* to trustees for the purpose of building an hospital. The money was received and immediately invested in stock, in the names of trustees, who, on the 3rd April, 1866, executed a declaration of trust to that effect, which was not communicated to the donor. D. died on the 7th April, 1866. Held that the gift was void under the mortmain act, and that the next of kin was entitled to the 5000*l.*

In this case the Judge, Malins V.C., is reported to have stated:

"I take it to be perfectly clear, and indeed it has not been disputed, that whenever money is, by will, given for charitable purposes, for the purpose of building, unless land in mortmain is pointed out, the trust to build, necessarily involving the acquisition whereon to build, falls within the mortmain act, and is void. If, therefore, this lady had given 5000*l.* for the purpose of building a fever hospital at Cheltenham, that would have been within the mortmain act, and absolutely void, and the property would have been held for the next of kin or personal representative.

"I am of opinion," says the Judge, "that this is within the express enactment of the statute, as it is within its policy and object; and although in this particular case, I should have been most anxious, if I could have seen my way, to carry the benevolent object of this lady into effect, and to establish an hospital in the town in which she lived, yet when I see it is impossible for me to do so, without an infringement of the law, as I find it; and I am clearly of opinion the gift is invalid."

A. CROSS, Q.C.
R. LAFLAMME, Q.C.
ED. BARNARD.

CONTEMPTS, AND THE PRESERVATION OF ORDER IN COLONIAL PARLIAMENTS.

The powers of Colonial Parliaments to imprison for contempts, do not seem to be generally understood. In a case which occurred at the last session of the Ontario Legislature, it was thought by some that the House of Assembly in this Province had such powers, while others maintained a contrary opinion.

The constitution of the various Parliamentary bodies in the Dominion is derived wholly from the British North America Act, 1867. By this Act we have been granted a new Constitution, similar in principle to that of the United Kingdom. Whatever may have been the powers of the different Parliamentary bodies in this country prior to Confederation, it is submitted that since Confederation they can only exercise the privileges, immunities and powers granted by this Act.

On the creation of a Colonial House of Assembly, no power to imprison for contempt attaches by analogy to the *lex et consuetudo parliamenti* as part of the common law inherent in the two Houses of Parliament in the United Kingdom. The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of this law, which is peculiar to and inherent in the two Houses of Parliament in the United Kingdom; Doyle v. Falconer, L. R. 1 P. C. Appeals, 339, per Sir J. W. Colville; and therefore they do not extend to the Colonies. The power to imprison for contempt is a judicial power, and as a Colonial House of Assembly has no judicial functions, it cannot claim to exercise the power by analogy to a Court of Justice,

for the latter is a court of record, in which the power is inherent. Nor does the power to imprison for contempt attach as a necessary incident in the creation of a Colonial House of Assembly; ib. 328; Kielley v. Carson, 4 Moore's P. C. Cases 63; Fenton v. Hampton, 11 Moore's P. C. Cases, 347; Hill v. Weldon, 3 Kerr 1 *et seq.*

Prior to Confederation, it was decided in the Provinces of Ontario and Quebec respectively, that the Colonial Legislatures then existing in these Provinces had powers to imprison for contempt. See McNab v. Bidwell, Draper 152; Re Tracey, Stuart's L. C. Appeals, 479.

These cases having been decided before the British North America Act was passed, cannot now be regarded as of any weight, and even if this Act had not been passed, they would have been virtually overruled by the cases before referred to in the Privy Council.

The question at once arises, what powers has the British North America Act, 1867, conferred on the Dominion and respective Local Legislatures in regard to imprisoning for contempts and preserving order in the House? and what is the difference between the Dominion and Local Legislatures in this respect?

S. 18 provides that "the privileges, immunities and powers to be held, employed and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, engaged and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof." This section empowers the Parliament of Canada to define the privileges, immunities and powers of the *Senate and House of Commons and the members thereof.*

In pursuance of this power the 31 Vic. c. 23, s. 1, enacts that "The Senate and the House of Commons respectively and the members thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers as at the time of the passing of the British North America Act, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof, so far as the same are consistent with and not repugnant to the said Act."

This section confers on the Senate and House of Commons in Canada the privileges, immunities and powers enjoyed by the Commons House of Parliament of the United Kingdom, including the power of imprisoning for contempt; and it is submitted that incident to this power there is vested in the Dominion Parliament the right of judging for itself what constitutes a contempt and of ordering the commitment to prison of persons adjudged by the House to be guilty of a contempt and breach of privilege, by a general warrant stating simply that a contempt has been committed, without setting out the specific grounds of the commitment. See The Speaker of the Legislative Assembly of Victoria v. Glass, L. R. 3 P. C. Appeals, 560.

In addition to this no doubt the Dominion Parliament possesses all the powers of preserving order in the House which are enjoyed by the Local Legislatures as hereinafter shewn. The power of imprisoning for contempt inherent in the House of Commons in England by virtue of the law and custom of Parliament, can only be conferred on Colonial Assemblies by express grant; ib. Doyle v. Falconer *supra*.

It has been already shewn that the British North America Act, 1867, and the 31 Vic. c. 23, grant this power to the Senate and House of Commons. But the grant seems restricted to them, and the writer is not aware of any other Imperial statute granting the power of imprisoning for contempt to the Local Legislotures in the several Provinces of the Dominion. As therefore no such grant has been made to these Legislatures, it would seem that they do not possess the powers enjoyed in this respect by the Senate and House of Commons, for as already shewn, there is no ground upon which the power can be exercised. The power being peculiar to the House of Commons in England, does not pass as a necessary incident on the creation of a Colonial House of Assembly. But even where there is no express grant to a Colonial House of Assembly of the right to imprison for contempt, the power to preserve order and remove obstructions in the House being necessary for self-preservation, attaches as a necessary incident. We must distinguish between the power which is *preventive* and that which is *primitive*. The former power being essential to the existence of the House, follows as a necessary incident, and although the Local Legislatures in the several Provinces of the Dominion have no power to *imprison* by way of *punishing* a contempt, yet if a member of any

of these Houses is guilty of disorderly conduct in the House, and it is necessary for the preservation of order that he should be removed, he may be excluded for a time or even expelled. The law would sanction the use of that degree of force which might be necessary to remove the person offending from the House and to keep him excluded. The same rule would apply *a fortiori* to obstructions caused by any person not a member; and whenever the violation of order amounts to a breach of the peace, or other legal offence, recourse may be had to the ordinary tribunals; Doyle v. Falconer, *supra* 340, per Sir. J. W. Colville.

The difference between the Dominion and the Local Legislatures in regard to the right of imprisoning for contempt may be attributed to the fact that the Imperial Parliament has by the British North America Act, 1867, empowered the former to define their privileges and immunities, while no such authority has been conferred on the latter. Nothing seems to turn on the fact that the Local Legislatures are in a measure subordinate to the Dominion. They seem to stand on the same common ground as Colonial Parliaments to which the privileges of the House of Commons in England do not necessarily belong, and it would seem that the Local Legislatures can only obtain their privileges through the intervention of the Imperial Parliament.

S. Robinson Clarke.

LES PROMESSES DE MARIAGE SONT-ELLES VALIDES EN DROIT.

Il est étonnant que la jurisprudence de l'Angleterre et des Etats Unis n'ait pas répudié les promesses de mariage. On y permet au mari de congédier sa femme sans trop d'inconvénients; on peut y divorcer à chaque printemps de la vie pour ainsi dire; l'on y peut impunément séduire une fille, pourvu qu'elle soit majeure, mais il paraîtrait qu'un jeune homme n'y peut se séparer de sa fiancée sans s'exposer à se ruiner. On comprend, qu'avec une telle jurisprudence, il était nécessaire de venir au secours des époux malheureux, et de leur ouvrir les portes d'une cour de divorce. C'est là en effet qu'ils se font relever des conséquences trop désastreuses de l'inexécution d'une promesse de mariage. Mais en Bas-Canada, le mariage est indissoluble; le divorce par le Parlement est une de ces raretés, dont peu de personnes peuvent se donner le luxe; et ne voit-on pas de suite que les demandes, basées sur inexécution de promesses de mariage, qui, dans tous les pays, sont vues d'un mauvais œil, ne devraient pas être tolérées en Bas-Canada.

L'on veut assujettir le fiancé en défaut au paiement des dommages-intérêts, eu égard à sa fortune, à la qualité et position sociale des parties et aux circonstances; mais qui n'aperçoit les dangers de cette doctrine pour la société? Les promesses de mariage, dit-on, sont louables, puisqu'elles résultent du sentiment le plus pur et le plus utile à la société, celui du mariage. Elles sont louables, sans-doute; mais elles ne le sont que tant qu'elles conduisent librement à cette fin; au contraire elles sont immorales et funestes, si directement ou indirectement elles les y mènent forcément. Le jeune homme qui doit choisir entre sa fiancée et la ruine ou la perte d'une partie considérable de son patrimoine, prendra-t-il toujours ce dernier parti? Ne peut-on pas supposer avec raison que dans nombre de cas, il préférera se sacrifier, tant l'intérêt matériel est puissant sur l'esprit et la conduite des hommes. Dans des circonstances de cette gravité, n'est-il pas à craindre qu'il taira les refroidissements de son cœur, et qu'il ira au pied des autels contracter une union que la sympathie et l'amour seuls doivent former. De là les désordres qui trop souvent signa-

lent les mariages mal assortis. Il est donc de l'intérêt des deux parties qu'elles conservent une liberté d'examen absolue et dégagée de tout intérêt matériel, pendant tout le temps que durent les entrevues préliminaires.

Le consentement au mariage doit être libre, et la crainte des dommages résultant de l'inexécution d'une promesse de mariage ne saurait l'atteindre; parce que cette promesse est nulle et doit rester sans effet. Elle est nulle en ce qu'elle tend à gêner la liberté des parties dans le choix d'un époux, et que, pour cette raison, elle est contraire aux lois positives, à la morale et à la saine raison.

Il est de principe que toute obligation qui lie la liberté individuelle, pour quelque cause et de quelque manière que ce soit, est nulle comme contraire aux bonnes mœurs et à l'ordre public; et il n'y a pas d'autres exceptions à cette règle que celles qui résultent soit des textes formels, soit de l'esprit manifeste de la loi. Mais aucune exception n'a été faite par le Code pour les promesses de mariage, et elle devrait d'autant moins se présumer qu'elle violerait ce grand principe de notre droit public qui veut que le consentement au mariage ne soit donné que lors de sa célébration, et que jusque-là il n'est pas permis d'aliéner ce consentement.

On ne saurait pour la même raison soutenir que les promesses de mariage participent de la nature des obligations en général. Notre Code, art. 1062, déclare: " L'objet d'une obligation doit " être une chose possible, qui ne soit ni prohibée par la loi, ni " contraire aux bonnes mœurs." Puis l'art. 1059 dit: " Il n'y " a que les choses qui sont dans le commerce qui puissent être " l'objet d'une obligation." Assurément que l'on ne soutiendra pas que l'objet des promesses de mariage soit une chose dans le commerce.

On ne saurait soutenir non plus que la jurisprudence, qui a prévalu sous l'ancien droit soit en France, soit en Canada, peut suppléer au silence du Code. L'art. 2613 déclare en effet que " les lois en force lors de la mise en force de ce Code, sont abro- " gées dans les cas..... où elles sont contraires ou incompatibles " avec quelques dispositions qu'il contient." Or, nous l'avons vu, les promesses de mariage sont incompatibles avec les dispositions du Code sur le mariage et les obligations en général.

Veut-on s'assurer de l'hostilité des codificateurs à la validité des promesses de mariage? On la trouve exprimée en

toutes lettres dans leur rapport sur l'art. 62 : " Au cas d'opposi-
" tion au mariage," disent-ils (Rapport 2e, page 24), " il doit
" être sursis à la célébration jusqu'après main levée, à moins que
" cette opposition ne soit fondée sur une simple promesse de
" mariage, qui doit être traitée comme nulle et sans effet."
Il est important de remarquer que ces termes ne se trouvent pas dans notre Statut Provincial, S. R. B.-C., ch. 34, s. 4, qui tout simplement déclare non recevable l'opposition basée sur une promesse de mariage, sans qualifier d'ailleurs cette promesse.

Disons encore que, dans le droit primitif, les promesses de mariage n'étaient aucunement reconnues dans le for extérieur.

La jurisprudence romaine fut unanime sur ce point. Toute convention de se marier était absolument nulle et ne produisait aucun effet. *Libera matrimonia antiquitus placuit ideoque pacta ne liceret divertere non valere et stipulationes quibus pœnæ irrogarentur.... Ratas non habere constat.* Et allieurs: *In honestum visum est vinculos pœnæ matrimonia obstringi.* Et encore cette autre loi: *Pœnæ metus aufert libertatem eligendi matrimonii.*

Ce ne fut que par une loi spéciale proclamée par l'empereur Léon que les promesses de mariage furent déclarées valables, et que les dommages, résultant de leur exécution ou de la clause pénale, en cas de dédit, furent recouvrables en justice.
Mais allons plus loin, et voyons qu'elle est la règle qui est suivie dans les pays qui, comme le nôtre, sont soumis à l'empire d'un code de lois.

Les codificateurs de la Louisiane ont-ils considéré qu'il suffisait de garder le silence pour donner un droit d'action pour inexécution d'une promesse de mariage? Les tribunaux y admettraient-ils cette action, si le Code, qui les régit, était parfaitement muet sur le sujet? Voici ce qu'observait M. le juge Slidell, pour la Cour Suprême de la Louisiane, dans une cause analogue à celle-ci, décidée en 1850 *: " We are not prepared to say that
" we should not have concurred with the decision of the district
" judge, even if there were no other reasons for maintaining it
" than those which he gave. But our legislation has not left
" this matter in doubt. The article 1928, C. C., speaks expressly
" of a promise of mariage. It is there treated as a contract, and
" a measure of damages for its breach is given."

* Morgan vs. Yarborough, 5 A, Louis, 316.

Sans cet article (1928) du Code de Louisiane, la validité des promesses de mariage y serait donc douteuse; et lorsqu'on lit la conclusion des remarques du savant juge dons la même cause, on voit de suite que le bénéfice de ce doute aurait été donné, ici comme toujours, en faveur du défendeur. Malgré la précision du Code, voici en effet comment les actions *for breach of promise* ont été jugées par ce tribunal, le plus élevé de cette ancienne colonie française, soumise comme le Bas-Canada à l'ancien droit du Parlement de Paris: "In conclusion we may take occasion " to observe that this is the first time we or our predecessors " have been called upon to consider an action of this kind. It " is a fact creditable to our people, and we hope that such actions " may not become frequent. While we are bound *under our* " *jurisprudence and* CODE, *to recognise the right of action*, WE " ARE CONSTRAINED TO SAY THAT A FEMALE OF REFINED SEN- " SIBILITY COULD SCARCELY BRING HERSELF TO SUCH A SUIT; " and that the appeals which are usually made to juries in such " cases, on the score of the wounded affections of the woman, can " have little foundation in truth. Such suits are not unfre- " quently the mere instruments of extortion. Courts and juries " should therefore cautiously restrict relief to cases of real in- " justice."

En Europe, chez les nations qui ont codifié leurs lois, on n'admet également l'action dont nous parlons qu'en autant que leur code respectif la donne expressément.

Le Code Prussien dit: "Lorsque les fiançailles seront dis- " soutes par la faute de l'une des parties, elle rendra à l'autre " tous les présents qu'elle en aurait reçus, et ne pourra redeman- " der ceux qu'elle aura donnés..... La partie coupable est tenue " d'indemniser la partie innocente des frais et des dommages " qu'elle peut lui avoir causés."

Le Code Sarde, art. 106, déclare que les promesses de mariage, par acte authentique ou sous seing privé, donnent une action en dommages-intérêts à défaut d'exécution.

Il en est de même dans le royaume des Deux Siciles, si elles sont faites devant l'officier de l'état civil.—Art., 148.

Le Code du Canton de Vaud art., 61, les déclare valables, lorsqu'elles sont contractées devant un juge de paix, devant un notaire, ou publiées en chaire.

Enfin, peut on citer un seul pays soumis à l'empire d'un code,

où l'action pour inexécution d'une promesse de mariage a lieu sans avoir été donnée expressément par ce code ?

On ne saurait encore invoquer les dispositions des codes que nous venons de citer, pour repousser l'immoralité dos actions pour promesses de mariage. Le législateur de la plupart de ces pays a été tellement saisi des dangers de cette obligation, qu'il exige des conditions et des formalités qui font qu'elle ne peut être contractée à la légère et, pour ainsi dire, qu'à la veille du mariage. Il faut se présenter devant un juge de paix, un officier de l'état civil, ou être publié en chaire. Evidemment ces formalités et ces cérémonies ne sont accomplies qu'après mure délibération, après des engagements préliminaires qui auraient permis aux parties de se connaître.

En France, sous l'ancien droit, la validité des promesses de mariage contractées avec certaines formalités particulières était aussi expressément reconnue. Les Capitulaires de Charlemagne en parlent, et la Déclaration du 26 Novembre 1639, art. 7, porte ce qui suit : " Défendons à tous juges, même à ceux d'Eglise, de " recevoir la preuve par témoins des promesses de mariage autre- " ment que par écrit, *qui soit arrêté en présence de quatre proches* " *parents de l'une et de l'autre partie*, encore qu'elles soient de " basse condition." Nonobstant cette ordonnance, Barthole considérait comme attentoires aux bonnes mœurs les demandes en dommages-intérêts formées en pareil cas ; et Boniface a recueilli deux arrêts du Parlement de Provence, du 16 mai 1640 et du 2 mai 1656, qui jugent que les promesses de mariage ne produisent pas une telle action.

Le Code Napoléon ne parle pas des promesses de mariage, et comme celui du Bas-Canada, il laisse donc à la doctrine le soin d'examiner si elles sont valables dans les principes généraux qu'il établit. Aussi, comme il arrive assez souvent, lorsqu'il n'y a pas de texte formel en une matière, les opinions des jurisconsultes ont d'abord singulièrement varié sur cette question.

Plusieurs auteurs recommandables, tels que Merlin, Rolland de Villargues et Toullier, ont pensé que les promesses de mariage étaient valables. Suivant ce dernier commentateur, il n'y a de contraire aux bonnes mœurs que les promesses dont l'objet blesse la morale Or, le but des promesses de marriage est, sans contredit, le plus honnête, le plus louable, le plus conforme aux lois et à la morale, puisque c'est l'accomplissement d'un marriage.

Pezzani a traité à fonds la question qui nous occupe dans son

ouvrage sur les *Empêchements du Mariage ;* il a examiné, une à une, les objections faites par les jurisconsultes favorables aux promesses du mariage, et la conclusion à laquelle il arrive, est dans le sens que nous soutenons.

" La liberté, dit-il, No. 79, doit présider aux mariages. Cette " axiôme de la législation modèle, dont nos lois ne sont que des " transformations nécessitées par la différence des mœurs, cet " axiôme, dis-je, intéresse d'une manière essentielle l'ordre public " et la morale. Pour peu que la liberté soit gênée dans le choix " d'un conjoint, l'on peut craindre et prédire l'avenir de grands " malheurs domestiques. On s'est marié par nécessité, pour " obéir à des vues tout autres que celles qui doivent porter au " mariage, et l'on est décidé d'avance à maudire le joug que l'on " subit, en quelque sorte, malgré soi, quelque supportable, quel- " qu'agréable qu'il fût d'ailleurs. La moindre apparence de " contrainte pèse à l'homme, et celui qui, toute sa vie, a désiré " le séjour d'un palais, ne pourrait se résoudre à y vivre content, " s'il lui était donné pour prison. Des chaînes d'or sont toujours " des chaînes. Ainsi la compagne la plus douce, la plus aima- " ble, paraîtra à son époux insipide et accariâtre, et les heures " que, près d'elle, il aurait vu s'écouler avec tant de rapidité, si " son consentement eût été dégagé de toute gêne, lui paraîtront " longues et pénibles. Cette considération qu'il n'a pas été libre " en contractant cette union, il la fera servir d'excuse et de pré- " texte à son inconstance. Je craignais de me ruiner, dira-t-il ; " j'ai consenti au mariage pour échapper aux rigueurs de la loi. " mais en conscience je ne suis point obligé à la fidélité conjugale. " Il négligera sa famille pour se livrer aux excès de la débauche, " et ce seront des rixes continuelles, des reproches amers entre " les époux ; les tribunaux seront l'arêne où viendront se termi- " ner ces funestes débats, et le scandale judiciaire sera la der- " nière scène de ce drame domestique.

" 80. Peut-être nous accusera-t-on d'avoir trop chargé les cou- " leurs du tableau, et d'avoir inventé à plaisir des faits imagi- " naires. Sans doute, tous les mariages contractés pour échap- " per à une peine pécuniaire ne donneront pas lieu à des pareils " malheurs ; mais il suffit que ces scandales soient dans la pré- " vision humaine, et qu'on en ait vu des fréquents exemples, " pour que ce principe, que les mariages doivent être libres, soit " proclamé vrai dans notre législation aussi bien que dans celle " des Romains.

" 81. On ne peut pas dire ici qu'il n'y a véritablement en jeu " que des intérêts privés, et que, par conséquent, il est permis de " déroger aux lois par des conventions particulières. L'Etat est " directement intéressé au bonheur des familles.

" 86. De tout ce qui précède, il résulte que la promesse de " mariage est une obligation illicite et par conséquent nulle. Si " l'obligation principale est nulle, l'obligation accessoire des dom- " mages-intérêts et de la clause pénale est nulle aussi, selon la " maxime: *Quod nullum est, nullum produicit effectum.*

" 87. Pour démontrer que les promesses de mariage ne sont " point contraires aux bonnes mœurs, M. Toullier emploie un " étrange sophisme: *Il n'y a de contraire,* dit-il, *aux bonnes " mœurs que les promesses dont l'objet blesse la morale ; or, quel " est le but ou l'objet des promesses de mariage ? Sans contredit " le but le plus honnête, le plus louable, le plus conforme aux lois " et à la morale, l'accomplissement d'un mariage.* Il n'est pas " difficile de prouver le vice de ce raisonnement. Le mariage " est, on n'en peut douter, une chose licite et conforme à la mo- " rale ; mais c'est un contrat à part, qui demande une complète " liberté, et toute stipulation, tout engagement sur ce point, doit " être interdit, par la raison qu'il faut, pour la validité d'un ma- " riage, que la volonté soit exempte de toute crainte, de toute " influence étrangère au moment où le contrat est formé ; et il " ne serait pas certain aux yeux de la loi que le mariage a été le " produit de la volonté actuelle et parfaitement libre des parties, " si elles pouvaient être gênées, enchaînées et entraînées par " l'effet de stipulations pénales antérieures, ou par la crainte " d'être obligées au paiement de dommages-intérêts."

"C'est ainsi," dit en terminant Pezzani, que l'a jugé la Cour " Royale d'Amiens, et son arrêt a été confirmé par la Cour de " Cassation, à la date du 21 décembre 1814 ; "

Duranton, Code Civil, vol. 10, page 320, dit à ce sujet: " Quel- " ques personnes prétendent que c'est là une obligation de faire " qui doit donner lieu à des dommages-intérêts en cas d'inexécu- " tion, attendu que son objet, le mariage, n'a rien d'illicite.....

" Nous sommes d'un avis opposé. La convention principale " n'est pas obligatoire; elle est contraire à l'esprit de la loi, en ce " qu'elle gêne la liberté du mariage.....

" Une telle promesse, bonne comme ressort de l'art théâtral, " est nulle en droit."

" Sans doute," dit le Répertoire du Palais, Vo., Promesse de

mariage, No. 26, "le mariage est une chose licite et conforme à " la morale; mais dans une promesse de mariage, l'objet de l'o- " bligation n'est pas de contracter mariage, mais bien de con- " tracter mariage *in futurum*, et c'est précisément cette circons- " tance qui rend cet objet illicite. Le mariage est un contrat à " part, un contrat spécial qui demande une complète liberté; et " toute stipulation, tout engagement fait à l'avance, doit être in- " terdit, par la raison qu'il faut pour la validité d'un mariage " que la volonté soit exempte de toute contrainte, de toute influ- " ence contraire, au moment où le contrat est formé.—Duranton, " t. 10, No. 520: Pezzani, No. 87; Vazeille, No. 145; Marcadé, *loc. cit.;* Demolombe, No. 31."

Hâtons nous d'ajouter que cette doctrine a été consacrée par la jurisprudence. "Attendu," dit un arrêt de la Cour de Cassation, à la date du 11 juin 1838, rapporté au Journal du Palais, (J. P. 1838,) " que le seul fait de l'inexécution d'un mariage projeté " ne peut par lui-même motiver une condamnation à des dom- " mages-intérêts, puisque ce serait, sous une nouvelle forme, " porter atteinte à la liberté du mariage."

Quelques jours antérieurs, le 30 Mai 1838, la même Cour de Cassation a rendu un autre arrêt au même effet: " Attendu que " l'arrêt attaqué, en décidant que toute promesse de mariage est " nulle en soi, comme portant atteinte à la liberté illimitée qui " doit exister dans les mariages, n'a fait que proclamer un prin- " cipe d'ordre public qui a toujours été consacré par la jurispru- " dence." (J. P. 1838.)

Le Journal du Palais observe (en note) ce qui suit à propos de cet arrêt: " La jurisprudence paraît se fixer dans ce sens; il " importe de remarquer que sur ce point les principes de la loi " romaine et des arrêts des parlements sont modifiés."

" Attendu," dit l'arrêt de la Cour d'Appel de Bordeaux (S. 1853, 2, 245,) " qu'il est constant, en droit, que l'inexécution " d'une promesse de mariage ne donne ouverture à aucune action " en dommages-intérêts; que les principes du Code Civil sur la " liberté du mariage sont incompatibles avec l'admissibilité d'une " pareille action."

Que peut-on opposer à l'encontre de ces considérations et de ces décisions parfaitement applicables ici, puisque le Bas-Canada comme la France, se trouve soumis à l'empire d'un code de lois silencieux sur le sujet? Invoquera-t-on la jurisprudence de la Grande-Bretagne ou des Etats-Unis? Mais certainement que la

matière ne doit pas être jugée d'après les lois anglaises ou américaines. Cette question, étant une question de *contrat, d'obligation*, doit être décidée suivant les principes généraux posés par notre Code, et suivant la jurisprudence française établie sous un code semblable à cet égard.

D'ailleurs, en Angleterre, les actions *for breach of promise of marriage* n'y sont reçues que défavorablement. A l'origine, il paraît même que dans ce pays, comme dans les autres n'ayant aucun texte formel en cette matière, ces promesses étaient considérées comme illicites et contraires à la liberté du mariage.

Dans une cause de *Kay* vs. *Bradshaw*, 2 Vernon, 202 (1689,) les actions sur promesses de mariage furent déclarées " contrary " to the nature and design of marriage, which ought to proceed " from a free choice, and not from any compulsion."

Dans la cause de *Woodhouse* vs. *Shepley*, 2 Aitk., 535 (1742,) le procureur-général déclara " that a court ought not to receive " those actions for public and general convenience, as those suits " tend to encourage improvident matches."

Dans la cause de *Lowe* vs. *Peers*, 4 Burr., 2230, Lord Mansfield disait: " All those contracts should be looked upon (as Lord " Hardwicke said in *Woodhouse* vs. *Shepley*) with a jealous eye, " even supposing them to be clear of any direct fraud."*

Ce n'est donc que par une jurisprudence moderne assez récente que les actions *for breach of promise of marriage* sont tolérées en Angleterre, et qu'elles ont passé dans la plupart de ses colonies, les Etats-Unis autrefois, et encore aujourd'hui les provinces d'Ontario, du Nouveau-Brunswick et de la Nouvelle-Ecosse. " It is " now perfectly well settled, dit Parsons, *loc. cit.*, both in Eng- " land and in this country, and indeed has been for a considera- " ble time, that *these contracts* are as valid and effectual in law, " as any; and that in actions upon them, damages may be re- " covered not only for the pecuniary loss, but for suffering and " injury to condition and prospects."

Il est impossible de se rendre compte des motifs qui ont engagé les tribunaux de ces pays à abandonner les sages et vrais principes sociaux posés par Lord Mansfield, Lord Hardwicke et les fondateurs illustres de la jurisprudence anglaise. " The reason," dit Parsons, *loc. cit.*, " is obvious: marriage can seldom be cele-

* Voir aussi *Baker* vs. *White*, 2 Vernon, 215; 2 Parsons on Contracts, 60.

" brated simultaneously with betrothment or engagement ; a cer-
" tain time must intervene ; and it would be very unjust to leave
" parties, who suffer by a breach of a *contract* of such eutreme
" importance, wholly remediless."

Cette raison suppose l'existence d'un contrat légal ; mais c'est là toute la question. La promesse de marriage est-elle illicite comme contraire à la loi positive du mariage, aux bonnes mœurs et à l'ordre public ? Les inconvénients, soufferts par une partie privée, sont-ils plus importants que l'intérêt de la société ? Voilà véritablement le siège de la difficulté. Il semble clair que la jurisprudence anglaise repose sur une base fausse et anti-sociale, ce qui, il faut être juste, semble aujourd'hui être au moins en partie compris par les tribunaux anglais.

En même temps qu'on remarque de la part des tribunaux, en Angleterre et dans ses colonies, une détermination bien arrêtée de décourager ce genre de poursuite, on voit que les Etats-Unis l'entourent d'une plus grande faveur. La presse anglaise nous a rapporté plusieurs cas récents où des dommages nominaux furent accordés, et hier encore les journaux du Haut Canada nous en donnaient un exemple remarquable dans une espèce très défavorable au défendeur ; nous faisons allusion au cas de St. Thomas. Aux Etats-Unis, au contraire, le montant des dommages *for breach of promise* semble augmenter avec le nombre des divorces et des *Marriage Brokers*.

Le Bas-Canada, étant régi par l'ancien droit français, avant le Code, et depuis sa promulgation, par les principes qu'il établit, n'a jamais pu accepter la jurisprudence anglaise en cette matière ; et sans les préjugés populaires appuyés sur cette jurisprudence, en nulle manière applicable à cette Province, les principes consacrés par la jurisprudence française seraient peut-être, pour ainsi dire, acceptés pour des axiômes.

Que doit-on conclure de tout ce qui précède ? Après toutes ces raisons et ces autorités est-il possible de maintenir que l'action pour inexécution d'une promesse de mariage peut être admise dans ce pays ? Qu'on le remarque bien, il ne s'agit pas de diffamation de caractère, ni d'aucun autre fait injurieux à la personne. L'on comprend que lorsqu'un homme, pour excuser son inconstance, porte atteinte à la réputation de sa fiancée, qu'il l'accuse, par exemple, d'être une femme de mauvaise vie, une action existe alors, non pas en vertu de la promesse de mariage, mais à cause de la diffamation.

La rupture entre les fiancés ne peut par elle-même être une injure. Elle ne l'est pas en droit, comme nous l'avons vu ; elle ne l'est pas non plus en fait. S'il en était autrement, on trouverait dans la société peu de personnes qui n'auraient quelques reproches à se faire à ce sujet, peu de citoyens intacts. Dans le monde social comme dans le droit, on regarde les ruptures entre amants comme des événements ordinaires et naturels; elles ne laissent aucune idée, aucune trace d'injure, à moins, bien entendu, qu'elles soient accompagnées de circonstances graves, de la séduction, par exemple, ou de la diffamation.

La jurisprudence française a bien décidé que le seul fait de l'inexécution d'une promesse de mariage ne peut former la base d'une action, parce que cette promesse n'est pas légale. Pour être logique, il nous semble que cette même jurisprudence aurait dû consacrer le principe que la partie en défaut n'est pas même responsable des pertes et frais matériels et pécuniaires causés par la contravention. Néanmoins, il n'en est pas ainsi ; et pour maintenir le contraire, on s'appuie sur l'art. 1382 du Code Napoléon : " Tout fait quelconque de l'homme qui cause à autrui un dom-" mage, oblige celui par la faute duquel il est arrivé, à le réparer.

L'article correspondant de notre Code (art. 1053) est plus précis et circonstancié ; il déclare que " toute personne capable " de discerner le bien du mal, est responsable du dommage causé " *par sa faute* à autrui, soit par son fait, soit par imprudence, " négligence ou inhabilité." Les codificateurs (1er Rap. p. 13) observent que ces changements dans les termes ont été trouvés nécessaires pour obvier aux objections soulevées contre les dispositions du code français.

Quoiqu'il en soit, le fonds des deux articles est le même ; et comme l'enseignent tous les auteurs, nuire à autrui par un acte que l'on n'a pas droit de faire, est le quasi-délit; il ne peut exister dans d'autres circonstances. Puisque la partie qui se dédit d'une promesse de mariage est dans l'exercice d'un droit, puisqu'il n'y a pas faute de sa part, il n'a rien à payer, et le dommage réel résultant de l'inexécution du mariage projeté n'est pas recouvrable, cette promesse étant toujours faite sous la condition *si nuptiæ sequantur*. Il nous semble que la jurisprudence française n'est pas logique.

Et puisque les promesses de mariage sont nulles comme contraires aux bonnes mœurs, à l'ordre public, puisqu'elles ne peuvent résulter en une condamnation à des dommages-intérêts, parce

qu'elles gêneraient la liberté du mariage, pourquoi ne peut on pas en dire autant des actions en recouvrement des dépenses et frais que leur inexécution occasionne. Il peut se rencontrer des personnes pour qui le paiement de ces dépenses serait une considération importante, un motif déterminant ; et ici comme à propos des dommages-intérêts résultant directement de la promesse de mariage, ne peut-on pas dire qu'il suffit qu'il soit dans la prévision humaine qu'un pareil malheur puisse arriver.

Néanmoins, nous l'avons dit, la jurisprudence française est contre nos prétentions à cet égard ; et comme nous en avons invoqué le principe, nous consentons, sous réserve, à en accepter le dernier mot. Cette jurisprudence, en effet, ne donne ouverture à l'action que pour les dépenses réelles et matérielles, les pertes pécuniaires.

Sirey, Recueil, an 1806, 2, 160, dit: "Sous l'empire du Code "Civil, la tendance de la jurisprudence a été, en l'absence d'un "texte qui pût les guider, d'établir une distinction entre le cas "où l'inexécution de la promesse n'a occasionné qu'un dommage "en quelque sorte moral et inappréciable à prix d'argent, et "celui où elle a été la source d'une préjudice réel. Au premier "cas on considère en général la promesse comme ne constituant pas "un lien ; et l'on rejette l'action de celui qui se plaint de l'inex-"écution, action qui consiste alors *in lucro captando*. Au second "cas, bien que la promesse n'établit pas d'avantage un lien de "droit, on accorde une action en dommages-intérêts, sinon en "raison de l'inexécution, au moins à cause du préjudice qu'elle "occasionne, *soit que la partie ait fait des dépenses extraordi-"naires dans la pensée du mariage, soit qu'elle ait fait des frais "relatifs à ce mariage ;* alors il s'agit pour elle *de damno vi-"tando*, et l'action qui lui est accordée, n'est qu'une conséquen-"ce toute naturelle du principe posé dans l'art. 1382 du Code "Civil." Puis il cite les autorités suivantes dans le sens de cette distinction : "Cass., 21 déc. 1814 ; 17 août 1813 ; Colmar, "13 mai 1818; Metz, 18 juin 1818 ; Orléans, 12 août 1819 ; "Poitiers, 29 mai 1834 (vol. 1834, 2, 354) ; Cass., 7 mai 1836 "(vol. 1836, 1, 574) ; Id., 5 mars, 30 mai et 11 juin 1838 "(vol. 1838, 1, 287 et 492) ; Favard de Langlade, vo. *obligation*, "sect., 2, No. 2 ; Duranton, t. 10, Nos. 319, 320, 321."

Maleville, Discussion du Code Civil, t. 1, p. 166 : "Si un "garçon a promis d'épouser une fille à peine de dix mille francs ; "s'il manque à sa promesse, cette somme n'est pas due, parce

" que les mariages doivent être libres ; mais si la partie refusant " a occasionné à l'autre *des pertes et des dépenses qui étaient " faites sous la foi de la promesse*, elle doit être condamnée à les " payer. *Vide* Lapeyrère, *lett.* M. note 3, où il cite divers ar- " rêts."

Duranton, Droit Français, vol. 10, No. 321 : " Sans doute, si, " sur la foi d'une convention de mariage arrêtée entre deux " familles, ou entre deux personnes, il y a eu des dépenses faites, " *comme des emplettes de noces, des dispenses de l'Eglise pour " cause de parenté, les frais d'un festin préparé, etc.*, celle des " parties qui a fait ces dépenses, doit être indemnisée par l'autre " qui ne veut plus célébrer le mariage ; car ces dépenses ayant " été faites d'un commun consentement exprès ou tacite, et dans " un intérêt commun, celui qui rompt l'accord doit indemniser " l'autre partie ou sa famille, d'après le principe que tout fait " quelconque de l'homme qui cause à autrui un préjudice oblige " celui par la faute duquel il est arrivé à le réparer (l'art. 1382). " MAIS CE SONT LA LES SEULS DOMMAGES-INTÉRÊTS QUI SOIENT " DUS, *et il ne paraît pas que les tribunaux qui ont déjà eu plu- " sieurs occasions de statuer sur cette question en aient adjugé de " plus considérables.*"

" On doit également approuver", dit Marcadé dans la *Revue Critique de Législation*, 1853, *1ère partie, p.* 197, " sauf un " point important qui nous paraît avoir été mal compris, quatre " arrêts rendus tant par la Cour de Caen que par celle de Mont- " pellier, sur la question de la validité des promesses de mariage " et de la réparation du préjudice qu'un homme a pu causer à " une femme en refusant d'exécuter une telle promesse, qu'il y " ait eu ou non entre eux des rapports intimes à la suite de cette " promesse.

" Quatre questions distinctes sont jugées à cet égard par nos " quatre arrêts, qui présentent sur la dernière seulement une " opposition tenant plutôt, selon nous, aux modes d'expression " des idées qu'aux idées elles-mêmes, et sur laquelle il nous " paraît dès lors facile d'arriver à conciliation. Ces arrêts déci- ', dent en effet :

" 1o. Qu'une promesse de mariage n'est jamais obligatoire et " que son inexécution dès lors ne saurait, par elle-même, donner " lieu à des dommages-intérêts.

" 2o. Que la clause pénale ajoutée à une telle promesse est " nulle comme l'obligation principale qu'elle tend à protéger ;

3o. Que néanmoins la personne, qui par suite d'une telle pro-
" messe, éprouve un préjudice, peut, non en conséquence directe
" de la promesse, puisqu'elle est nulle, mais en vertu du principe
" général qui oblige à réparation tout individu coupable d'un
" fait quelconque causant un dommage à antrui, obtenir une in-
" demnité, *pourvu qu'il s'agisse d'un préjudice touchant directe-*
" *ment ou indirectement aux intérêts pécuniaires et qui soit dès*
" *lors appréciable en argent.*"

" Attendu," dit un arrêt de la Cour de Cassation du 11 juin 1838, J. P. " que sur l'offre faite par de Lavit de payer les dé-
" penses et les déboursés que Rosalie Bessière aurait faits, l'arrêt
" attaqué a condamné le dit de Lavit à ce paiement;—qu'il l'a
" en outre condamné à des dommages-intérêts envers la dite
" Rosalie Bessière;

" Attendu à cet égard, que le seul fait de l'inexécution d'un
" mariage projeté ne peut par lui-même motiver une condamna-
" tion à des dommages-intérêts, puisque ce serait, sous une nou-
" velle forme, porter atteinte à la liberté du mariage;

" Que c'est néanmoins sur ce seul fondement que l'arrêt atta-
" qué a prononcé la condamnation de dommages-intérêts dont il
" s'agit; en quoi le dit arrêt a encore expressément violé la loi,
" etc."*

En résumé, une promesse de mariage est nulle en droit, et la simple inexécution de cette promesse ne donne pas ouverture à une action en dommages, à moins bien entendu, qu'elle soit précédée, accompagnée ou suivie de quelques circonstances particulières qui portent un préjudice réel.

Ce sont ces circonstances qui constituent le délit et le tort, et qui, par conséquent, sont la vraie et seule cause de l'action; la promesse de mariage n'apparaît que parce qu'elle en a été l'occasion.

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* Voir aussi Guyot, Vo. Fiançailles, No. 1.
Denizart, Vo. "
Dictionnaire de Droit Canonique, Vo. Fiançailles.
Favard, Vo. Obligation.
Duranton, t. 10, p. 383; Duchesne, du Mariage, p. 422.
Merlin, Vo. Fiançailles, No. 6, p. 176, 177.
Rolland de Villargues, Vo. Promesse de Mariage, No. 7, 3e alinéa.
Bacquet, Droits de Justice, t. 1, p. 327, Nos. 329, 330, 331, p. 331, 332.
Le Prestre, Cent. 1ère, ch. 68, Nos. 5, 6, p. 209, 211.
Journal du Palais, t. 2, p. 177; arrêt de Poitiers, 29 mai 1834, S. 1834, 235.

Ces raisons furent invoquées dans une cause assez récente, mais elles n'ont pu cependant convaincre les tribunaux. Tous, depuis la Cour Supérieure jusqu'à la Cour d'Appel, ont consacré la doctrine que les promesses de mariage forment des obligations, dont l'inexécution donne ouverture à l'action en dommages. La question était directement soulevée d'abord sur une défense en droit et plus tard sur une motion pour arrêt de jugement et une autre *non obstante verdicto*. En Cour Supérieure, lorsqu'elle se présenta pour la première fois devant l'Honorable juge Torrance, l'avocat de la défense fut invité à reprendre son siège, et deux jours après sa défense en droit était rejetée sans commentaire.

En Cour de Révision, composée des honorables juges Mondelet, Berthelot et Torrance, il n'est reçu que par des interruptions sévères, des observations désespérantes de la part du président de la Cour. Les opinions des commentateurs français et les arrêts des cours royales de France, d'ordinaire accueillis dans cette colonie avec un religieux respect, causent de la surprise, presque de l'indignation. La jurisprudence de la Cour de Cassation, invoquée comme étant celle du premier tribunal du monde ne trouve pas même grâce auprès du savant juge. *Votre premier tribunal du monde*, dit-il, n'est pas une autorité pour cette Cour. ..... Bref, l'avocat croit devoir s'asseoir, convaincu qu'on ne veut pas l'entendre ; son conseil juge prudent de garder le silence, et la poursuite reçoit l'intimation d'en faire autant. Le lecteur est sans doute tenté de croire que nous chargeons les couleurs du tableau ; le jugement de la Cour, prononcé le lendemain, justifie pourtant tout ce qui vient d'être dit.

Mr. le juge MONDELET, pour et au nom de la Cour :—

" La Cour aurait, hier même, décidé cette cause ; mais comme c'est notre devoir d'examiner les pièces de la procédure, nous avons différé notre décision jusqu'à ce jour.

" Il est heureux pour notre société, que nous ayons à constater le fait que c'est la première fois qu'une question semblable se présente devant nous, et il faut espérer que ce sera la dernière ; il est absurde de soutenir qu'une promesse de mariage soit illégale, et que l'action en dommages pour son inexécution soit immorale.

" Cette action, en effet, existe en vertu de notre ancien droit français, celui qui régissait le ressort du Parlement de Paris, lors de l'établissement du Conseil Supérieur de Québec, 1663. C'est ce que nous enseignent tous les anciens commentateurs. Les arrétistes nous offrent aussi une foule de décisions. Je cite Ferrière, Dictionnaire de Droit, vo, Promesse de Mariage : " Comme la volonté doit être moins forcée dans le mariage que dans toute autre action de la vie,

puisqu'elle est plus importante, c'est avec beaucoup de raison qu'il est loisible de révoquer des promesses de mariage, faites même par contrat public.

'On ne peut donc être contraint par aucune voie d'exécuter une promesse de mariage ; elle ne donne lieu qu'à une condamnation en dommages-intérêts contre le garçon qui refuse de l'exécuter sans juste cause.

' De ce que notre volonté doit être moins forcée dans le mariage que dans toute action de la vie, il s'ensuit que, régulièrement, les peines apposées dans les promesses, ne sont pas suivies à la rigueur, et que le juge, sans y avoir égard, condamne celui qui refuse d'accomplir la promesse, à tels dommages-intérêts qu'il juge à propos.

' Mais quand la promesse n'est point faite sous une clause pénale, et qu'on a seulement promis d'épouser dans un tel temps, sinon et en cas de dédit de payer une telle somme, *une telle promesse est valable.*'

" On dit que le code ne parle pas des promesses de mariage. Je suis heureux d'avoir l'occasion de désabuser ceux qui se livrent à l'étude du droit, et qui seraient tentés de croire que le code renferme toutes les lois du pays. Il y a en effet une foule de règles de droit qui ne se trouvent pas dans ce petit livre, tout excellent qu'il soit, et qu'il faut aller chercher ailleurs. L'étudiant qui n'aurait que la connaissance de son code et qui négligerait l'étude des principes et la doctrine des anciens auteurs, ne serait qu'un ignorant.

" Le savant avocat du Défendeur a prétendu que l'ancien droit avait été tacitement rappelé par le code, et comme autorité, il a invoqué l'exemple de la France, des arrêts mêmes de la Cour de Cassation.

" Notre code n'avait pas besoin d'affirmer que les promesses de mariage sont valables ; les principes de la justice y suppléent. Ils nous disent qu'il y a un remède à tout mal ; et les promesses de mariage sont actionnables, parceque d'abord ces engagements ne sont pas prohibés par la loi, et qu'il n'est pas permis de causer du tort à aucun.

" Lorsque l'on considère l'état social de la France, ses idées de morale, on n'est guère surpris d'y trouver la doctrine que soutient le savant avocat. On y est même rendu à nier les premières vérités, l'existence de la divinité, l'immortalité de l'âme, et à poser comme première règle de la conduite de l'homme, qu'il n'est que le perfectionnement du singe. Evidemment lorsqu'on arrive à de telles absurdités, il n'est pas surprenant d'y trouver des jurisconsultes au niveau de ces philosophes. Dieu merci! notre pays est loin de toutes ces fadaises, et ceux qui ont prétendu qu'elles avaient trouvé un partisan parmi nous ont lancé une honteuse calomnie contre un homme respectable et important. Notre premier devoir est de veiller au maintien de ces hautes idées de moralité qui prévalent parmi nous, et par conséqnent de conserver les règles de morale établies par nos prédécesseurs.

" L'action pour inexécution d'une promesse de mariage, n'est pas en effet nouvelle ; il y en a eu un grand nombre devant les tribunaux,

et il n'est jamais venu à la pensée de personne de la révoquer en doute.

" On prétend que de telles actions sont immorales. Mais où se trouve-t-elle l'immoralité, sinon dans l'acte de celui qui, après avoir obtenu l'amour et les sympathies d'une jeune fille, la trompe et l'abandonne sans de justes raisons. Comment! un homme, jeune ou vieux, qui serait ainsi la cause d'une infinité de maux et de souffrances, que ne comprend que la personne qui en est la victime, demeurerait impuni! Mais alors il ne se contentera pas d'une victime ; fier de son droit, il en fera dix ou quinze. L'on connait des cas où des jeunes filles ont été conduites au tombeau par suite de la désertion de leurs amants, et l'on dira qu'une jeune fille qui est ainsi trompée n'a pas de recours! Mais ce serait absurde, immoral, ce serait saper la société par ses fondements. Sans doute elle n'a pas un recours égal à sa douleur, mais les tribunaux lui donnent des dommages-intérêts, qui doivent être déterminés suivant les circonstances.

" Les sentiments que j'exprime ici ne sont pas particuliers à notre population ; on les retrouve chez toutes nations qui n'ont pas encore été démoralisées par la révolution et les mauvaises passions; et pour donner un exemple de la haute indignation avec laquelle ces ruptures sont reçues aux Etats-Unis, je lisais, hier, que le frère d'une jeune fille abandonnée de son fiancé, l'espionna au coin d'une rue de Philadelphie, et lui brûla la cervelle avec un revolver, et c'est ce qu'il méritait. Mais que Dieu me préserve, comme juge, d'approuver un tel acte de justice.

" Si les duels étaient permis, ce serait l'épée qui devrait décider du sort de celui qui viole une promesse de mariage.

Voici le jugement de la Cour :

' Considérant que les prétentions énoncées dans la défense en droit ' produite en cette cause par le Défendeur, sont repoussées par la loi, ' la jurisprudence de ce pays et subversives de toute moralité, et de ' nature à saper, par leurs fondements, les liens et les garanties les plus ' respectables et les plus sacrées de l'ordre social, confirme le jugement de la Cour de première instance, etc.' "

Un appel de ce jugement interlocutoire étant demandé, la révision par la Cour du Banc de la Reine en est différée jusqu'au jugé final de la cause, et les parties sont renvoyées devant la cour inférieure aux fins de liquider les dommages-intérêts. Des dépenses consistant en préparatifs de noces au montant de $200 sont établies; la fortune du défendeur est aussi fixée à $100000. L'honorable juge Mondelet, présidant la Cour, informe alors le jury que, d'après les principes du droit, "no amount can compensate a respectable girl for the injury and suffering caused in consequence of being placed in such a position." Le jury, après quatre heures de délibéré, rapporte un verdict de $3500.

Le défendeur se pourvoit contre ce verdict par une motion pour arrêt de jugement et par une autre *non obstante verdicto*, procédés qui lui permettent de saisir de nouveau le tribunal inférieur des points de droit decidés par la Cour de Révision. Les parties sont entendues de part et d'autre devant l'honorable juge MacKay, le seul juge de la Cour Supérieure du district de Montréal, qui ne se soit pas encore prononcé sur la matière. Voici son opinion :

" No action lies for inexecution of a promise of marriage, says the Defendant. Such a promise is contrary to morality and to the law, for it tends to restrain liberty of marriage; the only action that *possibly* could be for breach of such a promise would be *assumpsit* for material losses and money expenditure by Plaintiff, in consequence of the promise, but (says Defendant,) no specification of such material losses is made by Plaintiff's declaration.

" In a printed paper submitted to me the Defendant says :

" On ne saurait pour la même raison soutenir que les promesses de mariage participent de la nature des obligations en général. Notre Code, art. 1062, déclare : L'objet d'une obligation doit être une chose possible, qui ne soit ni prohibée par la loi, ni contraire aux bonnes mœurs. Puis l'art. 1059 dit : 'Il n'y a que les choses qui sont dans le commerce qui puissent être l'objet d'une obligation.' Assurément que nos adversaires ne soutiendront pas que l'objet des promesses de mariage soit une chose dans le commerce.'

" We have to deal with the Plaintiff's declaration. Of course, we cannot determine whether it sets forth legal cause of action without considering the state of the law upon the matters of fact alleged. Much has been said by the Defendant of the modern jurisprudence in France.

" *Arrêts* are referred to holding promises of marriage not to be enforceable, but illegal, as hampering proper marriage and hindering free choice. At the end of one of these *arrêts, le Journal du Palais* observes : " La jurisprudence paraît se fixer dans ce sens; il importe de remarquer que sur ce point, les principes de la loi romaine et des arrêts des parlements sont modifiés."

" And yet the Imperial Courts are giving damages in France frequently, e.g. Caen, 1850, Nismés, 1855, and giving them for mere *préjudice moral*. Toullier would support this; look at what he says, Vol. 6, No. 293 to 297 inclusively. As to Louisiana, is its jurisprudence settling into that of France? This does not appear, but the contrary does; that action lies and damages have to be allowed.

" But decisions in modern France, or elsewhere than in Lower Canada, are not to control. We have to deal with this case upon the principles of our own law, and what do we find? that actions like the present have been common for hundreds of years. Journal du Palais, folio, tome 2, p. 177, 179. Ancn. Denisart, Vo. Mariage. Code Matrimonial, (Léridant) 3rd part, p. 821, edit., of 1770; and Pothier, Mariage, Nos. 50 to 54.

" From the times of the *arrêts* of the *Journal du Palais* to the present, such actions have been recognized. As to jurisprudence to the contrary, not a judgment of Lower Canada can be discovered holding that the action does *not* lie. I can see right of action too from our Code Civil, Art. 1053 and 1065.

" Has our old law suffered the "modifications profondes" alleged by Defendant? not at all. Defendant says: 'D'ailleurs, depuis que ces actions auraient été décidées (referring to our own adjudged cases,) notre droit et notre jurisprudence ont subi des modifications profondes et nombreuses dans la codification des lois. Le Défendeur prétend donc que sous le code, sous l'empire duquel la présente demande a originé, quelqu'ait été l'ancien droit, quelque soit aussi le droit commun anglais ou américain, les promesses de mariage sont absolument nulles, et qu'étant ainsi nulles, elles ne peuvent résulter en des dommages-intérêts, suivant la maxime: *Quod nullum est, nullum producit effectum.*'

" 'On ne saurait soutenir que la jurisprudence qui a prévalu sous l'ancien droit, soit en France, soit en Canada, peut suppléer au silence du Code. L'art. 2613 déclare en effet que 'les lois en force lors de la mise en force de ce Code, sont abrogées dans le cas....où elles sont contraires ou incompatibles avec quelques dispositions qu'il contient.' Or, nous l'avons vu, les promesses de mariage sont incompatibles avec les dispositions du Code sur le mariage et les obligations en général.

" 'Enfin, veut-on s'assurer de l'hostilité des codificateurs à la validité des promesses de mariage? On la trouve exprimée en toutes lettres dans ler rapport sur l art. 62: 'Au cas d'opposition au mariage,' disent-ils (rapport 2e, page 24), 'il doit être sursis à la célébration jusqu'après main levée, à moins que cette opposition ne soit fondée SUR UNE SIMPLE PROMESSE DE MARIAGE QUI DOIT ÊTRE TRAITÉE COMME NULLE ET SANS EFFET.' "

" As to this Art. 62, I would err egregiously if I held it of any weight for this case. What is meant by it? No. 298, 6 Toullier tells us: A certain particular force was in a promise of marriage formerly. The promise, for instance, by a woman to marry a man, was a kind of *empêchement prohibitif* to her marriage with another. Our Code, to prevent difficulty, removes all doubts. It says it shall not be *empêchement prohibitif*. That is all. Unless I overrule our adjudged cases, old and more modern ones, and also disavow *Pothier*, I cannot grant Defendant's motion. No good reason has been shown, and it would require a strong one to induce me to rule as requested. I see no reason alleged by Defendant's Counsel that has not been frequently urged in the last 200 years on behalf of Defendants in the situation of the present one, and all have been disregarded and overruled. I must administer the law as I find it. Defendant's Counsel have dwelt on the immorality of Plaintiff's action: where is the Defendant's morality, engaging the affections of a young woman and shaking her off without reason? The morality of such Defendants is described on p. 334, 6 Toullier. . . . . .

"As to the damages, not merely the *damnum emergens* may be, (see p. 326, 6 Toullier,) but a *préjudice moral* is to be regarded. Poth. Mar., No. 53, says the *affront* is considered. I have already shown that, in France even, the jurisprudence is not settled, and that in Caen and Nismes, damages have been given for mere *préjudice moral*.

"Some of the modern cases in France, referred to by Defendant's Counsel, have been connected with *dédits*, e. g., the cases of 1836. That was a case in the law of bills more than anything else. An old man gave a note for $5,999 to a young woman "pour vrai et légal prêt" by her to him "en pièces d'or et d'argent.' There was *cause fausse*, and that was pleaded.

"There is no question of *dédit* in this case. For myself, I do not see how a *dédit* more detracts from liberty of marriage than action of damages does. Both warn the man (whom a woman is asking to marry her) of money that he may lose. If the principal obligation is good, why not the *dédit?*"

La cause portée à la Cour du Banc de la Reine y est plaidée pendant toute une séance; et après un délibéré de trois mois (qui est le terme ordinaire des délibérés de cette Cour,) elle est ainsi jugée:—Mr. le juge BADGLEY:

"In countries not less moral, on the whole, than France, whether ancient or modern, from which our common law is derived, or even than Lower Canada, where that law has been applied and become municipal, the marriage promise is the only consecration of the marriage itself, and it is therefore not only ridiculous but paradoxical, where marriage is only a civil contract, but at the same time of the highest and best moral character, to stigmatize as immoral an action for breach of promise of marriage, a consummation which is divinely said to be honorable in the sight of God and man: it would be equally ridiculous and paradoxical to talk of the immorality of marriage itself. In general terms, such as personal wrongs and others scattered through the law books, the usages and customs and feelings of society come in to give them a definition, and hence modern life does not consider an act such as this reputable, it does not admit it to be allowable, but stigmatizes it as a wrong to be redressed. In common parlance a wrong partakes both of injustice and injury; it is, in fact, an injury done by one person to another, in express violation of justice. The man who seduces a woman does her the greatest of all wrongs, so the man who after a long and most unreserved intimacy and companionship with a woman, short of marriage itself, seduces her into the confiding belief that she will be his wife, but finally publicly casts her off without any reason, also commits a wrong upon her, only less in degree than if he had violated her person. An injustice may be repented of, an injury may be repaired, but a wrong must be redressed. His casting her off carries with it an imputation upon her amongst her friends and intimates, and in the society in which she moved, who all were aware of her engage-

ment. Courts of justice are not tied down absolutely to definitions nor precisions, even where they are given in the books, but where only a general term is to be found, such as this of personal wrongs, then Courts must be guided by the common appreciation of the terms themselves, and in this view it is plain that a wrong involves a malfeasance committed which must be redressed, and therefore comes within the legal mode of redress, proper to be compensated in in damages. Judgments are of frequent occurrence in our Courts, where damages are awarded for wrong and injury done by libel and slander, in some cases of a very indefinite character, where material damage is not established, but where the solatium is given for the wounded feelings of the slandered sufferer, and yet it is alleged that that solatium must be legally denied to the cast-off promised wife, for the social slander thrown over her by her promised husband's declaration of refusal, *and that she must be restricted to the recovery only of the material loss she has incurred in the cost of her milliner's bill and the expense of the trousseau which she has been induced, perhaps importuned, by her promised husband, to prepare and purchase. This is not the redress of the law, which is more than a mere trading appreciation of the damage done by the wrong doer, and is neither honest, moral nor legal.* In this case there is no denial of the promise, and besides, the appellant's letters and his answers on facts and articles, clearly establish that fact by written proof of his *promesses avouées*. This point being established, a reference to Pothier is desirable. "Lorsque le juge trouve l'engagement valable, il condamne la partie *qui refuse* de l'accomplir, à une somme à laquelle il arbitre les dommages et intérêts dûs à l'autre partie pour l'inexécution de l'engagement. Les dépenses que les récherches de mariage ont causées pendant tout le temps qu'elles ont duré, à celui qui se plaint de l'inexécution des fiançailles et la perte du temps qu'elles lui ont causée, sont les objets les plus ordinaires de ces dommages et intérêts. L'affront que souffre la partie à qui on a manqué de foi, y peut aussi quelquefois entrer, dans le cas auquel il y aurait lieu de craindre qu'il ne peut nuire à son établissement avec un autre."

"As long ago as 1680, a celebrated arrêt was rendered in France in a case of breach of promise, which confirmed previous arrêts to the same effect, and held "qu'une personne qui change de volonté, doit les dommages intérêts de l'inexécution de son contrat de mariage." And Ancien Dénizart, vo. mariage, holds: "Les mariages devant être libres, on ne peut contraindre qui que ce soit d'en contracter soit en conséquence de promesses, de fiançailles ou pour d'autres causes: mais si, par inconstance ou autrement, après un contrat de mariage de fiançailles, celui qui avait promis de se marier, change de résolution, il doit des dommages intérêts qui s'arbitrent suivant les circonstances," and he then gives several instances in which various amounts were adjudged, 4,000 livres, 60,000 livres; and in the case of the arrêt above referred to, 100,000 livres were given, in every case without what we technically call special damages being proved.

Denizart says, "On accorde des dommages intérêts aux personnes du sexe, dans le cas, &c., parceque ces ruptures peuvent préjudicier à leur réputation," and in the case of the arrêt above stated, heavy damages were claimed and given, because "la demoiselle réfusée se trouvait en quelque façon méprisée par ce changement et exposée à la diversité du jugement du public." So as to the *affront* of Pothier, that cannot be put aside from the estimation of the cast-off woman's damages. The fact of her being cast-off would scarcely be a recommendation to another person to take her up for himself. It is for such reasons the solatium was given in France and cannot be refused here. . . . . Under all these circumstances of fact found in her favor, and of her allegations stating those facts, it only remains to say that by old French common law, by the opinion of its more modern juriconsults of eminence and authority, Pothier, Dénizart and others, and by the jurisprudence of our own Courts of Justice in such cases, she has a legal right of action, and that her allegations are sufficient in law to maintain the verdict, and therefore that the appellant's motion was properly dismissed by the Superior Court."....

DUVAL, C. J. "If the Defendant had moved for a new trial, I would have been disposed to grant it, but the appeal is based on the judgment rendered. The question which might have been raised if the verdict was not before the Court, cannot be raised now with the verdict before us; for there can be no doubt whatever that a female who has sustained special damage, as the jury have found here, is entitled to an action to recover such damage. The Court cannot, therefore, interfere with the judgment."

DRUMMOND, J.: "The jurisprudence on the point raised by the appellant is too well settled to admit of a doubt."

MONK, J.: "I regret that there is no motion for a new trial. If there had been, I would have had no hesitation in saying that the verdict, on the face of the record, is entirely unjustifiable. But as the case come up, the Court has no power to alter the judgment."*

La jurisprudence consacrée en cette cause célèbre vient d'être appliquée au cas d'inexécution d'une promesse de mariage de la part de la femme, dans la cause encore pendante du Dr. Matthieu contre Mlle Laflamme. Par une défense en droit, elle soutenait en octobre dernier devant la Cour Supérieure, à Montréal (Berthelot J.,), que l'action intentée contr'elle n'existe pas en droit, au moins pour les dommages exemplaires. L'honorable juge, sans précisément rejeter la distinction des dommages réels ou particuliers et des dommages exemplaires, débouta Mlle Laflamme de sa défense en droit et ordonna aux parties d'aller à l'enquête. Le raisonnement de l'honorable juge a évidemment été logique: La promesse de mariage, dit-il, est une obligation civile, tous les tribunaux du pays l'ont ainsi jugé: elle l'est pour

* 14 L. C. J., 284.

une femme comme pour un homme. Telle est aussi la jurisprudence en Angleterre et aux Etats-Unis, où cependant l'action contre la femme est vue avec plus de défaveur.

Il suit de toutes ces décisions et de l'article 1076 de notre code que les clauses pénales, ajoutées aux promesses de mariage, sont valides et ne peuvent par conséquent être diminuées ni augmentées par la Cour; en un mot, les promesses de mariage, formant de véritables obligations de faire, produisent tous les effets des obligations de faire ordinaires, et sont soumises aux mêmes règles. Les dommages-intérêts, par conséquent, dûs par la partie en défaut, sont, en général, le montant de la perte qu'il a causée et du gain dont il a privé l'autre partie, conformément aux articles 1073, 1074 et 1075 du Code Civil.

A propos de la cause de *Matthieu* v. *Laflamme*, il est bon d'ajouter que l'action est instituée contre la fille et son père conjointement et solidairement, comme s'étant tous deux rendus coupables de l'injustice et du dommage, par suite d'artifices et de manœuvres frauduleuses, concertés ensemble pour tromper le demandeur et lui faire injure. Le père s'est plaint aussi, par une défense en droit, d'être ainsi mêlé à une affaire sur laquelle sa fille, majeure de 28 ans, avait plein contrôle; mais l'honorable juge, par son jugement du même jour (31 octobre 1872,) le renvoya de ses prétentions et ordonna la preuve des faits articulés contre lui. À l'avenir, donc, les auteurs de tous ces commérages qui sont malheureusement trop souvent la cause des ruptures entre amants, devront se tenir sur leur garde.

Encore un mot, et nous terminons. Un principe, consacré par une jurisprudence constante et uniforme en cette Province comme en Angleterre et aux Etats-Unis, prohibe toute action en dommages résultant de la séduction d'une fille majeure. Ainsi l'on peut ruiner les mœurs d'une femme, sans encourir aucune responsabilité, civile ou criminelle, directe ou indirecte, pourvu qu'il ne survienne aucun enfant, car alors il y a lieu à la recherche de la paternité; on peut impunément déshonorer toute une famille; jusques là tout est légal et dans l'ordre; mais si un jeune homme de vingt et un ans commet l'imprudence de faire une simple promesse de mariage à cette femme; de suite on le livre à la vindicte publique; il faut qu'il soit puni pour tous les inconstants de la société; il est, en conséquence, condamné aux dommages passés, présents et futurs, réels et imaginaires ou exemplaires, physiques et moraux, possibles et impossibles. O logique du droit!

Montréal, 2 novembre 1872. D. GIROUARD.