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DE

Législation et de Jurisprudence.

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NOVEMBRE 1845.

REVUE

DE

LÉGISLATION ET DE JURISPRUDENCE.

VOL. I. MONTRÉAL, NOVEMBRE, 1845. No. 2.

DE L'ORGANISATION JUDICIAIRE.

Rechercher les moyens de fixer la Jurisprudence, d'assurer une bonne administration de la justice au pays, et d'épurer les lois qui nous régissent, tel est notre but, tels seront nos travaux en publiant cette Revue. Les rapports des causes jugées dans les tribunaux et des réflexions sur notre organisation judiciaire et sur notre législation, voilà en deux mots notre programme. Cette tâche est rude, nous le savons, aussi avons-nous compté sur l'aide de tous les membres de l'ordre judiciaire pour l'entreprendre.

Parmi les sujets que nous venons d'énumérer, un des plus importans est sans contredit la question de l'organisation judiciaire. De tous temps elle a occupé l'attention des gouvernemens soit despotiques, soit populaires, les uns pour s'en faire un instrument, les autres un boulevart pour maintenir leurs droits et opposer une barrière à la tyrannie. De l'établissement régulier des Cours de Justice, de la séparation distincte des jurisdictions, des sages limites du pouvoir d'appel, et de la perfection dans leur marche découlent nécessairement la confiance et le respect des justiciables, la moralité et le bonheur du peuple. Si les tribunaux ne peuvent rendre à chacun son dû, si leur intervention est rendue difficile ou trop coûteuse, si l'influence du pouvoir se fait sentir sur eux, mieux vaut les fermer, mieux vaut laisser chacun se faire justice que d'avoir des Juges sanctionnant l'iniquité au nom de la loi ; mieux vaut n'avoir point de tribunaux de justice, que d'en avoir dont l'équité et l'intégrité puissent même être mises en doute. Comment s'étonner alors de la sollicitude qu'y portent gouvernans et gouvernés ?

Depuis que le Canada abandonné par la France a vu s'étendre et s'établir chez lui la domination anglaise, depuis que les tribunaux qui existaient avant la cession ont été abolis, maintes tentatives ont été faites pour doter ce pays d'un système judiciaire conforme à ses besoins et au nouvel ordre établi. On ne compte pas moins de quatre vingt et quelques ordonnances et statuts à cet effet. Les uns sont expirés, d'autres n'ont jamais été en force, et ceux qui nous restent rappelés en partie et incomplets en eux-mêmes nous renvoient incessamment de

l'un à l'autre, et par là créent une confusion qui contribue à compliquer le dédale dans lequel nous sommes enveloppés. Les parties encore en force de ces ordonnances et statuts sont en outre l'objet de plaintes continuelles ; elles sont, dit-on, insuffisantes et ne peuvent répondre à l'état actuel de notre Société. Chacun propose un plan de réforme, chaque légiste montant au pouvoir veut signaler son avènement en mettant la main à l'œuvre de la réédification de l'ordre judiciaire.

Dans ces circonstances, il n'est personne qui ne convienne de la nécessité de refondre toutes ces lois éparses, d'en élaguer tout ce qui est devenu inutile ou incompatible avec le progrès du jour, et après y avoir fait les changemens jugés nécessaires, en composer un système dont la simplicité nous garantisse l'excellence ; car la complication des tribunaux et des jurisdictions, loin de parvenir au but de leur établissement qui est de rendre l'administration de la justice facile, ne fait qu'y apporter des entraves, et la comparaison que nous allons faire de différens systèmes, nous convaincra que plus l'organisation judiciaire est simplifiée et plus elle est avantageuse aux citoyens. Cet examen ne peut qu'être utile dans la recherche des élémens qui doivent constituer cette institution en nous découvrant les avantages et les défectuosités de ce qui est mis en pratique chez les autres peuples.

C'est sous ce rapport qu'après avoir passé en revue l'organisation judiciaire en Angleterre, en France et chez nos voisins ainsi que celle qui nous régissait lors de la cession, nous considérerons notre organisation actuelle, les défauts dont elle est entachée, et les perfectionnemens dont elle est susceptible.

DE L'ORGANISATION JUDICIAIRE EN ANGLETERRE.

Rien n'est plus difficile que de tracer un tableau de l'organisation des tribunaux en Angleterre à raison de leur nombre infini, leur variété, leur concurrence de jurisdiction, et la différence dans leur manière de procéder.

Résultat 1°. de la différence marquée des trois ordres, Clergé, Noblesse et Peuple ; 2°. du démembrement de l'ancienne Cour du Roi, où la justice se rendait sous les yeux du Souverain et dont les sections ont sans cesse cherché à empiéter les unes sur les autres ; 3°. de l'opposition du peuple à l'introduction des lois Romaines ou Normandes et de leur attachement à leurs anciennes coutumes ; 4°. de l'intervention du peuple dans l'administration de la justice et du jugement par les pairs ; 5°. du défaut d'ensemble et du vague dans leur législation entièrement différente de ce qui existe ailleurs ; l'organisation de ses cours de Justice a fait de l'Angleterre un pays exceptionnel sous ce point de vue, et est loin de pouvoir nous engager à y chercher des modèles. On peut classer les tribunaux en deux grandes divisions, ceux qui jugent suivant la loi commune ou le droit strict et ceux qui jugent suivant l'équité.

L'Angleterre n'ayant jamais rédigé les coutumes qui la régissent et n'ayant jamais eu d'organisation fixe, marquant les limites de chaque jurisdiction, l'administration de la justice était souvent entachée d'illégalité, ou d'une trop grande sévérité ; leur loi commune qui, dans l'origine, suffisait à ces peuplades alors presque sauvages, se trouva à mesure que les transactions de ces dernières augmentèrent, sans remèdes pour nombre de cas inconnus à leurs mœurs primitives ; souvent les Cours jugaient de questions qui, n'ayant pas été prévues par les coutumes, ne pouvaient être de leur compétence ; les Cours d'équité prirent alors naissance ; leur pouvoir et leur nature se trouvent décrits dans le passage suivant extrait de l'ouvrage de Mr. J. Rey.*

" D'après l'histoire ancienne de notre jurisprudence il paraît que l'administration de la justice par les cours ordinaires, était très incomplète. Pour suppléer à ce défaut, les Cours d'équité se sont fait une jurisdiction qui consiste à sanctionner les principes d'après lesquels prononcent les autres Cours, lorsque la compétence de ces Cours ou leur mode de procéder ne leur permet pas ; à empêcher que ces mêmes principes, lorsque ces cours les appliquent ne deviennent une injustice contre le but même qui les a fait établir ; à décider d'après les principes de la justice universelle quand l'intervention d'un tribunal est nécessaire pour prévenir un tort ou suppléer au silence de la loi. Les Cours d'équité contribuent aussi à l'administration de la justice en écartant les obstacles qui s'élèvent dans d'autres Cours contre une solution convenable des questions, en prenant des mesures conservatoires de la propriété durant les procès, en arrêtant la prétention de droits douteux qui produirait un mal irréparable, en prévenant le dommage qui pourrait résulter pour des tiers, lorsqu il y a un titre douteux, en mettant un frein aux actions vexatoires et en prévenant la multiplication des procès inutiles. Elles contribuent encore à l'administration de la justice, même sans prononcer de jugement sur le fonds des causes en ordonnant certaines recherches qui mettent les autres cours dans le cas de rendre leurs jugements et en conservant les preuves lorsqu'il y a danger de les perdre avant que l'objet en question ne soit la matière d'une procédure judiciaire."

On distingue encore les Cours établies pour tout le Royaume, et celles qui ne sont établies que pour une jurisdiction particulière et spéciale. Dans la première catégorie se trouvent les Cours de la loi commune et celles d'équité, les cours ecclésiastiques, les cours militaires. et les cours maritimes.

Parmi les Cours de la loi commune, au premier degré nous trouvons les Cours de Comté ayant autrefois une jurisdiction complète dans les affaires civiles ; mais l'appel et l'évocation de ces Cours que s'est arrogée la Cour du Banc du Roi (ou de la Reine suivant la per-

* Des Institutions Judiciaires de l'Angleterre comparées avec celles de la France.

sonne qui occupe le trône) dans les causes au-dessus de 40/ sterling a réduit la compétence de ces Cours aux actions au-dessous de cette somme, qu'elles jugent en dernier ressort. Ces Cours sont présidées par le Shériff ou sous-Shériff ; ils représentent les anciens comtes qui administraient eux-mêmes la justice dans l'étendue de leurs comtés ou seigneuries. Les causes s'y décident par le jury sous la direction du sous-Shériff légiste choisi par le Shériff et n'exerçant pas actuellement la profession d'avocat.

Le premier tribunal qui s'offre ensuite à nous est la Cour d'assises siégeant au civil sous le nom de *Nisi Prius* et au criminel sous le nom de *Crown side*, une ou plusieurs fois par année dans les six circuits qui divisent l'Angleterre. Ce tribunal est, si on peut s'exprimer ainsi, le complément de trois grandes Cours du Royaume dont il sera parlé ci-après. C'est dans ces tournées que se décident par le jury d'une manière définitive toutes les causes dont la procédure a été préparée dans les Cours de Westminster. Son pouvoir s'étend à recevoir et consigner la décision du jury et tenir les enquêtes en matières civiles. Il réunit cinq autorités différentes qui lui sont confiées par : 1°. une commission de la Paix pour la répression des délits et offenses, 2°. une commission d'oyer et terminer, 3°. une commission pour vuider les prisons ; et les commissions d'assises et de *Nisi Prius*, la première pour conduire l'épreuve par jury des actions réelles, et la seconde pour résoudre toutes les questions de fait soulevées dans les Cours de Westminster. Ces Cours fixent ordinairement le temps de l'épreuve à Westminster dans les termes après Pâques ou la St. Michel par un jury tiré du comté où l'action a pris naissance, *à moins qu'avant Nisi Prius* le jour fixé les Juges n'aillent dans le comté en question.

Vient ensuite la Cour des Plaids Communs, une des grandes Cours du Royaume et qui, par le démembrement de la Cour du Roi, *Aula Regis*, fut exclusivement chargée de toutes les affaires civiles. Disons en passant un mot de cette Cour du Roi.

Guillaume le Conquérant, craignant les dangers des parlemens annuels où se décidaient les affaires du Royaume et les procès entre les particuliers, s'efforça de séparer leurs pouvoirs ministériels comme juges de leurs fonctions délibératives comme conseillers de la Couronne ; il établit à cet effet une cour perpétuelle, dans sa salle d'audience, et c'est la raison qui l'a fait nommer *Aula Regis*, Cour du Roi. Elle était composée des grands officiers de la Couronne résidant en son palais et attachés à sa personne, tels que le lord *Grand Connétable* et le *Grand Maréchal* qui présidaient seulement dans les affaires d'honneur et en fait d'armes, jugeant suivant les lois militaires et le droit des nations. Il y avait en outre le *Grand Intendant*, et le *Grand Chambellan*, l'intendant de la maison, le lord Chancelier chargé de garder le sceau du Roi et d'examiner tels ordres, octrois et lettres soumis à sa surveillance, et le *Grand Trésorier* qui était le principal conseiller

en matière de finances. On leur adjoignait parfois quelques personnes versées dans les lois et qu'on appellait les Justiciers ou Juges du Roi; ils étaient aussi assistés des plus hauts Barons du Parlement qui avaient tous droit de siéger dans la Cour du Roi et formaient une espèce de Cour d'Appel ou plutôt de consultation dans les matières importantes et difficiles. Toutes ces personnes dans leurs départemens respectifs déterminaient toutes les affaires séculières, tant criminelles que civiles et financières, et à la tête de toute cette Cour présidait un Magistrat Spécial nommé le Grand Juge, qui était aussi le premier Ministre d'Etat, le second personnage du Royaume et en avait la garde en l'absence du Roi. C'était cet officier qui principalement décidait cette immensité de causes qui s'élevaient sous sa vaste jurisdiction. Cette Cour était d'abord tenue de suivre la maison du Roi dans tous ses voyages et expéditions, mais par le onzième chapitre de la Grande Charte il fut arrêté que les Plaids Communs ne suivraient plus la Cour, mais se tiendraient dans un lieu déterminé. Westminster fut l'endroit fixé. On nomma un Chef Juge et d'autres Juges des Plaids Communs dont la jurisdiction était d'entendre et déterminer toutes contestations relatives à la propriété foncière et les injures purement civiles entre les sujets. La chancellerie fut chargée d'émaner sous le grand sceau les ordres ou commissions aux autres cours ; l'échiquier eût l'administration des finances et la Cour du Banc du Roi se réserva la jurisdiction de tout ce qui n'était pas du ressort des autres Cours et particulièrement la surintendance de tout le reste par le moyen de l'Appel, et la connaissance exclusive des causes de la couronne ou poursuites criminelles.

Originairement les Juges des Grandes Cours étaient payés au moyen d'épices prélevées sur les plaideurs. Ce mode peut être assigné comme une des causes des empiètemens des tribunaux les uns sur les autres ; mais quelqu'en soit la véritable raison, il est de fait que la Cour du Banc du Roi, nonobstant le démembrement dont nous venons de parler, a jurisdiction concurrente dans la plupart des matières avec celle des Plaids communs. Cette dernière est un tribunal de première instance sans jurisdiction d'appel ou de cessation, et elle n'est rangée au nombre des grandes Cours qu'à raison de sa jurisdiction qui s'étend à tout le Royaume. Elle siége quatre fois par an.

A côté de ce tribunal la Cour de l'Échiquier jugeant d'après la loi commune prend connaissance de presque toutes les causes qui sont de la compétence de la Cour des Plaids Communs, au moyen d'une fiction d'après laquelle on suppose que *le Demandeur est fermier du Roi* et que *le Défendeur lui ayant causé un certain dommage, lui Demandeur est devenu moins capable de payer le Roi.* Au moyen de cette fiction on peut traduire devant ce tribunal pour toute action personnelle. Ce tribunal se compose en ce cas du Chef Baron et des trois Barons de l'Échiquier. Cette cour tire son nom du tapis qui couvrait la table qui

se trouvait dans la chambre où elle siégeait et qui ressemblait à un échiquier.

Au dessus de ces tribunaux est la Cour du Banc du Roi ou de la Reine suivant le cas.

Outre la jurisdiction d'appel de toutes les cours inférieures, la connaissance des affaires criminelles et sa concurrence de jurisdiction avec la Cour des Plaids Communs, dont nous avons parlé plus haut, elle est encore spécialement chargée de la surveillance des Juges de Paix et de toutes les Cours de la loi commune d'où elle peut évoquer toutes les causes qui y sont commencés avant que jugement ne soit prononcé, et a un pouvoir de contrôle sur tous les corps et corporations.

Elle siége aussi à Westminster et se compose d'un chef Juge et de trois autres Juges tous nommés par le Souverain. Cette Cour comme celle de l'Echiquier a aussi empiété sur la Cour des Plaids Communs. Sa jurisdiction étant spécialement criminelle, pour y traduire un individu on suppose qu'il a commis une injure par force et armes *vi et armis* et, qu'en conséquence, il est sous la garde du *Marshal* ou Geolier de cette Cour, lorsqu'il n'a jamais été réellement appréhendé, ce qu'il ne lui est pas d'ailleurs permis de contester ; et étant ainsi sous la main du Marshal de cette Cour, le demandeur peut procéder contre cette personne pour toute autre injure. Cette Cour siége aussi quatre fois par année.

La chambre de l'Echiquier revise les Jugemens de la Cour du Banc du Roi, mais seulement dans certaines actions intentées dans la Cour du Banc du Roi, (a) et la chambre de l'Echiquier se compose alors des Juges des Plaids Communs et des Barons de l'Echiquier, dont l'appel ressort à la Chambre des Pairs ; mais si l'action n'a pas pris naissance dans la Cour du Banc du Roi, l'appel en est porté directement à la Chambre des Pairs. La chambre de l'Echiquier revise également les jugemens de la Cour de l'Echiquier, jugeant suivant la loi commune, et se compose alors du Lord Chancelier et du Lord Trésorier lesquels s'adjoignent les Juges du Banc du Roi et des Plaids Communs. Il arrive quelques fois que les Juges des trois grandes Cours se réunissent pour délibérer sur les cas difficiles et de grande importance, avant de prononcer dans la cour inférieure où l'affaire est pendante.

Aucun des tribunaux dont on vient de parler ne juge en dernier ressort. Cette prérogative est réservée à la chambre des Pairs qui est la Cour suprême du Royaume, ayant jurisdiction d'Appel et de cassation des jugemens de toutes les autres Cours. C'est la chambre des Pairs qui hérita de ce dernier lambeau des pouvoirs de la *Cour du Roi, Aula Regis*. D'après les fonctions importantes de ce tribunal, on serait porté à croire qu'il est entouré de toute la majesté de la loi, et que sur les Appels qui lui sont soumis, la chambre siége

(a) *Debt, detinue, covenant, account, case, ejectment or trespass.*

avec un appareil imposant et proportionné à la confiance qu'on doit reposer dans la science de personnes appellées à décider sur les plus grands intérêts des citoyens, après l'épreuve successive de plusieurs autres tribunaux formés des légistes les plus estimés. C'est sans doute là encore une fiction ; car, dans ces cas d'appel, il suffit qu'il y ait trois membres de la chambre présens. Le Lord Chancelier en fait ordinairement partie et est pour ainsi dire le souverain arbitre, car presque toujours il est le seul légiste sur le nombre ; ses collègues ne sont pas même astreints à entendre toute la cause. Il arrive néanmoins quelquefois qu'on appelle les grands Juges à donner leur avis sur l'affaire en contestation.

Si maintenant nous passons aux Cours dites d'Equité, nous trouvons l'Echiquier et la Chancellerie.

La Cour de l'Echiquier se divise en deux parties dont l'une a le contrôle des finances et l'autre le pouvoir judiciaire, subdivisée aussi en deux sections dont la première juge suivant la loi commune ainsi que nous venons de le voir et l'autre suivant l'équité. Cette dernière se tient dans la chambre de l'échiquier sous la présidence du Lord Trésorier, du Chancelier de l'Echiquier, du chef Baron et de deux Barons puisnés. Elle n'avait autrefois la connaissance que des poursuites fiscales, mais elle s'est aussi prévalu de la fiction invoquée par l'autre section, et est compétente pour la décision des mêmes causes. L'appel en est réservé à la chambre des Pairs.

Il est bon d'observer ici que la distinction faite entre les Cours de la loi commune et celles d'équité ne donne pas à ces dernières le pouvoir de juger contrairement à la loi positive ou rationelle, ou de l'éluder lorsqu'elle est trop rigoureuse, ni changer les volontés d'un individu ou les conventions entre les parties. De même que les Cours d'équité, les tribunaux de la loi commune suivent l'esprit et non la lettre de la loi ; elles connaissent des matières de dol, accident et fidéicommis ou dépôts ; toutes deux sont réglées par les mêmes principes de justice et de droit positif ; mais elles diffèrent par leurs usages dans les formes et modes de procéder ; et nommément quant à la preuve, au remède accordé au plaignant et au mode d'épreuve. Ainsi la preuve d'un témoin suivant la loi commune est suffisante pour faire condamner le Défendeur qui n'est point reçu à offrir son serment au contraire, ce qui n'est point le cas dans les Cours d'Équité lorsque le Défendeur nie positivement, clairement et précisément le fait ; les deux serments contradictoires se détruisent, et le Défendeur obtient congé de la demande.

Quant au mode d'épreuve dans les cours d'Équité c'est par le moyen d'interrogatoires proposés aux témoins dont les réponses sont prises en écrit quelque part qu'ils soient. Dans les Cours de la loi commune la preuve se fait oralement devant le Jury. Dans les affaires où ces dernières Cours ne peuvent accorder que des dommages intérêts pour

inexécution de convention, les Cours d'équité peuvent obliger la partie à exécuter le contrat tel que convenu à moins qu'il ne soit inconvenant ou impossible, et ceci est fondé sur une autre fiction établie que ce qui devait être fait est considéré comme actuellement fait et a un effet rétroactif au temps où il aurait dû être fait, fiction qui est observée si strictement qu'elle forme la bâse d'un système régulier de Jurisprudence.

La Cour d'Équité par excellence est la Cour de Chancellerie. Ce nom vient du mot latin *cancellando*, canceller, le plus haut degré de sa jurisdiction étant de canceller les lettres patentes du Roi obtenues contrairement à la loi. On a vu plus haut l'origine de sa jurisdiction. A elle appartient le droit de nommer des gardiens aux orphelins et le soin des insensés. Elle connait en première instance des causes des femmes sous puissance de mari, des interdits, des établissemens de charité et des cas les plus importans de Banqueroute. S'il s'agit d'avoir le témoignage de personnes absentes, c'est à ce tribunal qu'il faut s'adresser. Elle a aussi jurisdiction sur plusieurs autres matières, mais si le fait est contesté, l'affaire doit être renvoyée au Banc du Roi pour y subir l'épreuve du Jury. En appel elle réforme les jugemens de la Cour de l'Echiquier jugeant suivant l'équité, ceux des Cours ecclésiastiques et de la Cour des Sewers chargée de ce qui a rapport aux rivages de la mer, aux rivières, cours d'eau, etc. Les Commissaires de Banqueroute, quoiqu'officiers de la Chancellerie, constituent néanmoins un tribunal distinct et permanent. Leur décision n'est pas définitive pour libérer le failli qui doit demander la confirmation de son certificat à la Cour de Chancellerie.

Lorsque les Jugemens de la Chancellerie sont rendus sur un *demurrer*, *Défense en Droit*, l'appel en est porté au Banc du Roi; ces cas sont rares. L'appel ordinaire est à la chambre des Pairs.

La Cour centrale de l'Excise est chargée de tout ce qui a rapport à la perception des contributions indirectes autres que celle des douanes.

Il existe encore nombre d'autres Cours locales et spéciales, telles que la cour des Pieds poudreux, *Piepowders*, la Cour du Baron, *Court Baron*, les centenes, *Hundred Court*, la cour des Forêts, la cour des Polices d'Assurances, celle des Insolvables, celle du Palais, la cour des Mines, celles des Universités, les cours de Requête, du Shérif, du Maire et celles des Médecins ; mais comme leur pouvoir est borné à certains cas particuliers et à des localités, nous ne fesons que les mentionner. Nous nous contenterons de mentionner seulement la cour des *Quarter Sessions*, Sessions trimestrielles prenant connaissance des offenses mineures, et la cour des Sewers, jugeant ce qui a rapport aux rivages, rives, cours d'eau, etc.

Les Cours ecclésiastiques sont communes à tout le Royaume. Outre la discipline cléricale, le recouvrement des dimes et droits dûs

à l'église et dettes ecclésiastiques lorsque les faits ne sont pas contestés, les causes de mariage du vivant des parties et la preuve des testamens, ainsi que leur exécution et la délivrance de legs, sont les matières de leurs jurisdiction.

Il n'existe qu'une seul cour Militaire pour tout le Royaume connaisnaissant des matières relatives aux faits d'armes et de guerre, la Cour de Chevalerie, laquelle est tombée en désuétude, à raison de son manque de pouvoir pour faire exécuter ses jugemens.

Les Cours Maritimes ou d'Amirauté jugent et déterminent des injures qui prennent naissance sur les mers ou dans les parties hors de l'atteinte de la loi commune. L'appel en a lieu devant la Chancellerie. Les jugements des vice-amirautés dans les colonies sont portés aux Cours d'Amirauté dont elles sont des branches. Mais lorsqu'il s'agit de prises maritimes, l'appel est porté devant le conseil privé.

Le conseil privé est encore un tribunal d'Appel en dernier ressort des jugemens rendus dans les Colonies, de ceux de la chancellerie dans les causes de démence ou imbécillité ; et en première instance on en appel sur les questions féodales sur une Province ou une Isle.

Quoiqu'on ait introduit dans notre système quelques détails de celui que nous venons d'exposer, ce que nous venons d'en développer n'est certainement pas de nature à nous engager à y puiser davantage. En Angleterre ce système est généralement blâmé et ne se maintient que par l'influence de la nuée d'employés dont il est le soutien, qui trouvent leur subsistance dans ses abus et n'ont d'intérêt qu'à les perpétuer. Les légistes habitués à leur vieille routine, ne veulent pas en sortir et craignent que l'adoption d'un nouveau système ne les oblige à changer leur ancienne pratique.

Le système judiciaire anglais a des vices qui en demande la réforme entière. Ces vices tiennent cependant au caractère et à la législation nationale fondée sur des privilèges. Les principaux défauts qu'on y remarque sont la diversité dans le mode de juger, le pouvoir exhorbitant de la chancellerie qui, dans bien des cas, empiète sur le pouvoir législatif ; la multiplicité des degrés de jurisdiction et d'appel, la centralisation des grandes Cours à Westminster, le petit nombre de terme chaque année, les évocations, le renvoi d'un tribunal à l'autre pour revenir bien souvent au premier, la trop grande latitude laissée aux juges dans l'interprétation de l'équité ou de la loi commune ; ce dernier inconvénient est néanmoins moins sensible à raison de l'intervention du Jury ; et enfin l'usage des fictions pour saisir les tribunaux de causes qui, de leur nature, ne seraient point de leur compétence. Il est assez curieux de comparer sur ces sujets l'opinion de différens auteurs anglais.

" Quoique ces fictions de la loi, dit Blackstone, semblent dès l'abord devoir étonner l'étudiant, il les trouvera après un examen ultérieur très utiles et avantageuses, particulièrement à raison de cette

maxime invariablement observée, qu'aucune fiction ne peut faire tort son effet particulier étant de prévenir un mal, ou remédier à quelque grief qui pourrait résulter des règles générales de la loi. Tant il est vrai que *in fictione juris semper subsistit equitas.* Dans le cas en question, ces fictions donnent au plaignant l'option sur plusieurs tribunaux devant lesquels il peut exercer son recours ; elles préviennent les circuits et délais, en permettant de porter immédiatement devant un tribunal, telle cause qui pourrait lui être soumise en appel après jugement d'une autre cour."

Cette dernière considération semble un des plus forts argumens contre le système que Blackstone ne cesse de vanter. Mais son opinion est repoussée par les Commissaires nommés pour s'enquérir sur la pratique et la procédure dans les cours supérieures de la loi commune, en leur premier rapport.* Voici comment ils s'expriment :

" Nos anciennes institutions ayant été adoptées à un état de société rude et simple, les Cours dans ces derniers temps ont senti graduellement les défauts et autres inconvénients de leurs jurisdictions, auxquels avaient donné lieu les changemens de circonstances de la nation. Dans quelques cas on y remédia par des dispositions législatives, mais lorsque ces règles manquèrent, les juges furent portés à employer des fictions comme un expédient pour effectuer indirectement ce qu'ils n'avaient pas par la loi le droit d'établir. Mais à quelque cause que l'on puisse assigner l'invention ou l'encouragement de ces fictions, nous n'avons aucun doute qu'ils ne peuvent qu'avoir un effet injurieux sur l'administration de la justice parcequ'ils tendent à jeter dans l'esprit public des soupçons sur la loi elle-même, comme un système peu sûr et trompeur ; tandis qu'elles portent occasionnellement à des impressions de ridicule dont l'effet naturel est de diminuer en quelque sorte le respect pour la science."

L'usage des fictions par les autorités a donné naissance aux fictions, appelées inventions particulières ou jurisprudence populaire, subtilités dont le jury ou le peuple se sert pour résister aux abus du pouvoir ou à la sévérité des loix.

Parmi les avantages que nous offre le système judiciaire anglais, on doit mettre au premier rang l'intervention du Jury dans la décision des procès ; la publicité des débats et de la procédure, le pouvoir des Cours, s'étendant à tous les individus sans exception et sur toutes les causes quelqu'en soit la cause ou l'objet, et leur droit de décider tout ce qui est litigieux sont des moyens d'assurer au peuple une justice égale. Quant aux Circuits qu'il nous suffise de citer un passage de Bentham sur ce point.

" On a vanté l'institution des circuits comme un chef-d'œuvre : de grands personnages parcourant le pays deux fois l'année, s'arrêtant

* Dwarris on Statutes.

deux jours entiers dans le lieu de leurs séances, et portant ainsi la justice jusque sous le toît du menu peuple !... Quelle condescendance!... Certes, il vaut mieux rendre la justice à trente ou quarante milles de distance qu'à trois ou quatre cent milles, et il vaut mieux la rendre quatre jours sur trois cent soixante-cinq que pas du tout. Ce dernier moyen serait certainement quatre fois pire encore que la pénible et curieuse invention des circuits ; mais le moyen le plus simple, qui consisterait à placer des juges partout où ils sont nécessaires, serait justement quatre vingt-onze fois meilleur."

.....

" Mais, dit-on, cette institution est une garantie contre la partialité des juges ; car ne restant qu'un ou deux jours dans chaque comté, ils n'ont pas le temps de former des liaisons. — Pour que ceci fût concluant, il faudrait d'abord que les habitans des comtés ne vinssent jamais dans la capitale ; il faudrait qu'ils n'allassent jamais deux fois dans le même Circuit. Quelque vertu purificative qu'il puisse y avoir dans le mouvement, il y en a heureusement davantage dans le petit nombre des juges, dans leur responsabilité et dans la publicité."

" Mais, dit-on encore, vous avez par ce moyen-là une organisation judiciaire peu coûteuse...Il est certain qu'envoyer un juge quatre jours dans un comté ne coûte que la quatre-vingt-onzième partie de ce que l'on dépenserait en l'y tenant trois cent soixante-cinq jours avec la même énormité de Salaire..... .....

..... Mais, cependant on oublie une chose, c'est que vous dépensez dix fois plus en avocats et en procureurs que vous n'économisez en juges. Au lieu d'un juge à payer pour toutes les causes, vous avez pour chaque cause deux ou trois avocats et deux ou trois procureurs de diverses espèces. Chaque affaire doit aller du comté à la capitale, sans compter les appels ; et l'on sait que les affaires ne voyagent pas pour rien. Vous avez un avocat du comté à payer, un avocat sédentaire à Londres et plusieurs avocats ambulans ; vous avez un procureur du comté et un procureur de Londres. Voilà une partie de ce que vous gagnez en épargnant votre part de la dépense nécessaire pour avoir un juge dans le comté."

.....

.....

" On oublie encore une chose, c'est qu'avec les circuits les prévenus restent en prison six mois dans certains endroits et un an dans d'autres avant de pouvoir être jugés... Mais, réplique-t-on, s'ils n'avaient pas été coupables, on ne les aurait pas mis là.... Il est possible qu'ils soient coupables ; mais si la chose est si certaine, il n'y a pas besoin de les juger."

.....

On oublie bien d'autres choses encore ; c'est que dans l'intervalle des circuits, les preuves s'évanouissent, les témoins sont subornés ; et au

jour de l'audience, les juges se dépitent, si par hasard la montre d'un témoin vient à retarder ; enfin, les causes perdent leurs véritables couleurs par la précipitation qu'amène un tel système."..... .....

Enfin un des moyen d'assurer au peuple un justice impartiale est la nomination à vie des juges des trois grandes Cours. Ils ne peuvent être suspendus ou privés de leur charge que sur accusation admise contre eux dans les deux branches du Parlement.

J. U. B.
M. S. A.

(*A continuer.*)

THE STATUTE OF LIMITATIONS.

SOME REMARKS upon the Provincial Statute, 8 Vict. cap. 31st, entitled : "*An act for the Limitation of Actions, for avoiding suits at law, and for rendering a written memorandum necessary to the validity of certain promises and engagements, in that part of the Province which heretofore constituted the Province of Lower Canada.*"*

We have taken the liberty of calling the attention of our readers to this important Satute. Its interpretation requires, we conceive, no small share of attention and sagacity on the part of the profession, while its operation may seriously affect the transactions of Merchants and Traders. We have not the presumption to believe that our humble efforts to remove the doubts which may arise in the working of the Act, or to point out the extent of its application, have been successful. We feel persuaded they have not. Besides, the aim of the writer has been of a humbler range. These observations are offered chiefly with a view to bringing the subject, and some of its difficulties, particularly under the notice of the reader, and although the expression of passing opinions will, occasionally, result from the statement of these difficulties, yet these opinions, incidentally pronounced, do not thus bear on the main questions which must arise upon this Act. Moreover, the professional reader must remember, that we pretend rather to furnish material for his meditation, than to write for his special instruction.

*This Act is literally, or at least with very little variation, copied from the Imperial Statute, 9th Geo. 4, Cap, 14, entitled : "*An Act for rendering a written memorandum necessary to the validity of certain promises and engagements,*" and generally known as Lord Tenterden's Act. The object of this Statute was to amend the English Statute of Limitations, 21 Jac. 1. Cap. 16, and also a similar enactment passed in Ireland, the 10 Car. 1, Sect. 2, Cap. 6,—an object much more limited than that aimed at by our Legislature. We would remark, that the reprehensibly careless manner in which it has been copied is not one of the least striking and embarrassing defects of the Provincial Act.

This is not the first time that the restless spirit of innovation, so conspicuously displayed in this enactment, has practised its legislative experiments and caprices upon the ancient jurisprudence of this colony. Our Provincial legislation furnishes many proofs of recklessness, incapacity and prejudice ; the work of men "who had not freed themselves from the shackles of authority, or soared above the mists of prejudice." A distinguished writer, and one who had thought much and profoundly upon these subjects, remarks that "in addition to comprehensiveness of mind and rectitude of intention, an enlightened lawgiver should be well informed as to facts—of the local situation, climate, bodily constitution, manners, legal customs, religion, wants and wishes of those with whom he has to deal." These are the strata he requires ; and these are the circumstances which he must respect. Above all, the legislator should be exempt from blinding prejudice and presumption, and should possess, in a high degree, the genius of legislative adaptation. In reading over our Statute Book, any man, familiar with the laws and circumstances of this country, will often have to lament the absence of this reach of mind, and of this spirit of honesty and respect for existing laws. He will, frequently, perceive that the higher qualifications, above alluded to, are not displayed in our Statutes, nor by our legislators, either in enacting new laws, or in adapting foreign Statutes to what has been so frequently denominated the wants, progress and development of the Colony; terms in themselves of vast, but vague signification, and whose meaning, when they are assigned as motives, or the basis of legislation, requires a close and scrutinizing analysis. We shall not be accused of opposing the introduction, from a foreign source, of good laws, wisely adapted to the Province, and cautiously selected as an improvement upon what we possess. Such an opposition would be indicative of a deplorable want both of patriotism and common sense. But what we do protest against, is the rude and abrupt abolition of our old laws and customs, which are very good, after all; and the transferring by arbitrary enactment, the laws of a distant country to this Province, without that salutary care and precaution, which should attend such measures. As a general rule, these innovations should be preceded by prudent and preparatory changes: and should such changes be too slow, or, in some cases, impracticable, yet, when foreign Statutes are introduced, they should be so modified, and their extent and provisions should be rendered so clear, as to guard against all ambiguity, so far as possible, in the intention of the legislature, or any uncertainty in the practical operation of the Act. In wishing to profit by the legislative wisdom of other countries, the Legislature cannot be too precise in its language, or too circumspect in adopting the enacting clauses of foreign laws. They should be made to harmonize, as much as possible, with the existing jurisprudence ; thereby avoiding those ensnaring *lacunes*, with which our laws are beginning to abound.

They should not, from the vagueness of their expression, be introductory of petty doubts and conflicts of law, creating a kind of chronic anarchy in the decisions of our Courts of Justice. Besides the law should not only be good in the abstract, but in bringing it to a remote Colony, and engrafting it upon an incongruous and singularly dissimilar system, the Legislature should proceed with a spirit of prudent and enlightened adaptation to the condition of the people, the real wants of the country, and the pre-existing jurisprudence — an adaptation, which, situated as we are, should embrace considerations of the widest range in political philosophy, and be regulated by well considered motives of local utility and sound principles of law reform.

We have been led into these reflections *à propos* to the Act under consideration, and we think it may be very fairly cited as just the reverse of all this, and as a case for the instruction of our Legislators both present and future; a kind of *lucus à non lucendo* furnishing a negative example to deter from similar exhibitions of carelessnes and precipitation in time to come. It has received at our own hands a careful, and it is hoped, a conscientious examination—but that examination has been any thing but satisfactory. Whether this arise from the fault of the law, or the incapacity of the writer, will be seen in the sequel of these remarks.

Some difficulty has been experienced in characterising this act; and under whatever division or designation of Statutes it be comprehended, or whatever element of interpretation be applied to it, the wording of the law, the application of it in all its bearings, and the extent of its operation upon our pre-existing law, must, it is conceived, cause considerable embarrassment in our Courts of Justice. First, as to the character of the Act. Should we regard it as declaratory of an old Law, and introductory at the same time of an amendment engrafted upon it in a foreign country, our position cannot be maintained without very serious difficulty, if at all. If it be contended that the Act is declaratory only of doubts and questions which had arisen and *prevailed*, and at the same time in a formal manner introductory both of the original Statute of Limitations and of Lord Tenterden's Amendment, the terms of the law will entirely fail us. In order to maintain that ground, we shall be compelled to have recourse to a good deal of rash supposition, and to usurp a sort of Legislative authority. On the other hand, however, it may be said, that although this Act be not declaratory, or formally introductory of the Statute of Limitations, yet, that the formal introduction of the amendment is an implied introduction of the original Statute—and that Courts of Justice proceeding upon the principle *ut res magis valeat quam pereat*, rather than upon the maxim *à verbis legis non est recedendum*, will give effect both to the originial law and the amendment. Such a construction would be based upon the supposition of an implied, or presumed intro-

duction of the original law; and must be strictly governed by the rules applicable in such cases. To these rules we shall have occasion hereafter more especially to refer. Lastly, the original Statute of Limitations may be held to be henceforth a part of our Law in consequence of the supposed assumption on the part of the Legislature, that it was in force in Lower Canada, at the time of passing the Provincial Law, and it may be said, that where the Legislature has assumed the existence of a Law, Courts of Justice will do likewise. It is possible that one of these views of the case may be taken, but it is apprehended, that in doing so, the Courts will embark upon a sea of interpretation difficult to navigate; and, that even when advanced this far, the practical application of the law will be infinitely perplexing. In pointing out such of these difficulties as the present space will permit, it was intended at first, to insert the whole law, and to comment upon each clause separately, and in succession:—but it is thought better to give the Preamble and the first clause, as in these are contained and upon these will arise, the main difficultes in the preliminary view of the law:—

"Whereas by an Act passed in England, in the twenty-first year of the Reign of King James the First, it was among other things enacted, That all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present Session of Parliament, or within six years next after the cause of such actions or suits, and not after: And whereas a similar enactment is contained in an Act passed in Ireland, in the tenth year of the Reign of King Charles the First:* And whereas various questions have arisen in that part of the Province which heretofore constituted the Province of Lower Canada, in actions grounded on debts, promises, contracts and agreements of a mercantile nature between merchant and merchant, trader and trader, so reputed and understood according to law, *not only as to the proof and effect of acknowledgments* and promises offered in evidence for the purpose of taking cases *out of the* operation of the said enactments, *but as to the existence of the said Statutes, as part of* the law of the land in Lower Canada aforesaid, and it is expedient to prevent such questions, and to make *provision for giving effect to the said enactments and to the intention thereof*: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled

* So carelessly has the Amending Act of Lord Tenterden been copied by our Solons that the Legislature is made to recite both the English and Irish Statutes of Limitations. It is made gravely to assert that doubts and questions had prevailed as to the existence of both as a part of the law of the land in Lower Canada, and throughout the Act they are both referred to, precisely as they are, in the Imperial Statute; which was intended to amend by an Act of the United Parliament of England and Ireland, a defective, and a separate law of both countries. This goes beyond even the most barbarous ignorance, and can be the result only of omission, or the most shameful negligence on the part of those entrusted with the transcription the Act, by copying, cutting, clipping, or otherwise. It demonstrates, however, the inconvenience and danger of lawgivers' making an incautious use of the scissors.

by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, intituled, *An Act to Re-unite the Provinces of Upper and Lower Canada and for the Government of Canada*, and it is hereby enacted by the authority of the same, that in all actions grounded on debts, promises, contracts and agreements of a mercantile nature, between merchant and merchant, trader and trader, so reputed and understood according to law, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be *signed by the party chargeable thereby*; and that where there shall be two or more joint contractors, or executors or administrators, of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, *that the Plaintiff though barred by either of the said recited Acts or this Act*, as to one or more of such joint contractors or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

In characterizing this Act, as was intimated before, it is believed to be quite clear, that we must view it, either as declaratory of the old law, and *simul et semel* introductory of the amending Act, 9 Geo. IV, Cap. 14; or as enunciating a previous state of uncertainty as to the existence and operation of the Imperial Statute of Limitations in the Province of Lower Canada, (assigning the inconvenience resulting from these doubts, as a motive for the law), and formally and in express terms, introductory both of the old English Statute of Limitations, and the amendment. If, upon a careful examination of the terms and express provisions of the Act, neither of these positions be found tenable, we may then have recourse to an implied introduction of the old law, as a just and necessary consequence of the express introduction of the amending Act. Finally, and in connection with this view of the matter, we may consider the question, whether the fact of the Legislature having assumed and taken for granted the pre-existence of the Statute of Limitations, as a part of our law, (should such manifestly appear to be its impression), prove sufficient of itself to give that Statute force of law or not? In order to form a settled opinion upon the last two points, we must fall back upon the primary rules of construction, to

ascertain the motive and intention of the Legislature; and rely upon such inferences and presumptions as seem to flow from the whole policy of this Act.

It is apprehended that this Provincial Statute is not what is technically and strictly termed a Declaratory Act. All the books, treating upon these subjects, represent Declaratory Acts to be "those made where the old custom of the kingdom is almost fallen into disuse, or become disputable—in which case, the Parliament thinks proper, *in perpetuum rei testimonium,* and for settling all doubts and difficulties, *to declare what the common law is and ever has been.*" In what particular, we would ask, does this Act come under this definition? In reading the Preamble, one would imagine that it was the intention to make it Declaratory; but we cannot bring ourselves to believe that it is so. It is quite true, that the Preamble, after reciting the English and Irish Statutes of Limitations, enunciates what we must regard as a fact, since the Legislature states it, viz: "That various questions have arisen in that part of the Province, which heretofore constituted the Province of Lower Canada, in actions grounded on debts, promises, contracts and agreements of a mercantile nature, between merchant and merchant, trader and trader, so reputed and understood according to law, not only as to the proof and effect of acknowledgments and promises, offered in evidence for the purpose of taking cases out of the operation of the said enactments, but as to the existence of the said Statutes, as part of the law in Lower Canada aforesaid." It cannot, moreover, be denied that the following words plainly intimate, to a certain extent, the intention of the law: "*And it is expedient to prevent such questions, and to make provision for giving effect to the said enactments and to the intention thereof.*"

This is all very good as an assignment of motive, or as the manifestation of intention; but it must not be forgotten that the Preamble is no part of the Act. It may, indeed, reveal the motive, assist a presumption, or aid in detecting the intent and meaning of the law; but can have no direct, independent, and operating effect whatever. And this we take to be incontrovertibly true, be the terms and intention of the Act what they may. The Preamble has established what must now be received as an historical fact in reference to men's opinions of the existence and operation of the English Statute of Limitations in Lower Canada. It has done more: it has very plainly intimated the main intention of the Act; but indeclaratory language, and in a declaratory sense, it goes no further. We look in vain, in the enacting clauses of the Act, for any form of legislative expression—either word or sentence—declaratory as to the past, present, or future existence of the old Imperial Law. Nor is there any mention of it except as "these acts," intimating obliquely an assumption on the part of the Legislature that "these acts" were in force in this Province at the time of passing the Provincial Act under

consideration. Such an assumption may be of considerable assistance, under another point of view, in the construction of the law, as will be shown hereafter; but the assumption by the Provincial Legislature of the existence of an Imperial Statute of the time of James I. is not a declatory enactment, either *affirmative* or *negative* of the *Common Law* of Lower Canada. It is not necessary to insist upon this. It may therefore be held as undeniably true, that this Act is not declaratory of the Statute of Limitations, even had it been previously a part of the Law of Lower Canada; and *à fortiori*, if it were not in force.

The question of the pre-existence of the Statute of Limitations, as part of our law, being of considerable importance in the interpretation of our Provincial Act, whether it be regarded as declaratory or introductory, by express terms or by implication—or if viewed as having given force of law to the Statute of Limitations, by the assumption of the Legislature that it was law—it is thought advisable to offer a few incidental observations in reference to it. They may assist in elucidating some of the views taken by the writer of these sheets, and probably tend to establish his conclusions on surer foundations.

Notwithstanding the doubts and questions historically commemorated in the Preamble, and in spite of the apparent assumption on the part of the Legislature of the pre-existence of the Imperial Act, the writer has ventured to believe that there was nothing of the kind in force in Lower Canada at the time of passing the Act under discussion, and that it was never, or at least not within half a century, if ever, solemnly or effectively held to be law. Both these propositions, it is believed, are susceptible of conclusive demonstration.*

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* With reference to the opinions of our Courts upon this point, we are aware that a decision was given in the case of Morrogh *vs.* Munn, bearing on this question. It is there stated, "that the prescription of a year being a prescription to Evidence only, and in all commercial cases the Rule of Evidence which formerly obtained under the *Coutume de Paris* being abrogated by the Ordonnance 25 Geo. II, sec. 10, and the rule of the Law of England, which provides that all debts due to merchants may be proved by witnesses or otherwise, in the ordinary course of evidence, until the expiration of six years from the date of such debts, is the rule which we are bound to follow in the present case, and consequently the Plea of *prescription annale* must be overruled." It is believed, that it would have been better Law, if the Court had laid down broadly "that the Law of Prescription is not a Law of Evidence, but a part of the general and fundamental Law of the State; and that the common Law therefore relative to a particular prescription, would not be abolished by a Statute introducing foreign rules of evidence. The Judgment of the Court, in our humble opinion, would have been more distinctly and amply to the point and the Law, if it had run thus :—"The provision of the law of England, which enacts that actions of account and debts shallbe commenced within six years next after the cause of such actions, and *not after*, being a fundamental Law, it cannot be regarded as a Ruleof Evidence, and therefore will not apply in this case, under the 25 Geo. III, cap. 2, sec. 10. And not applying, our *prescription annale* at common law would, in deed, remain in full force, did not the English rules of Evidence prevail. But the oath of payment permitted and required to sustain a Plea of *prescription annale*, not being admissible under the new rules, this prescription becomes inoperative; and we must fall back upon the prescription of thirty years, where not otherwise provided for, by our Common or Statute law; therefore the prescription pleaded in this case, cannot be maintained." Besides, this Judgment leaves the question of the existence of the Statute of Limitations as part of our Law, substantially undecided.

If the Statute of Limitations, 21st Jac. 1, cap. 16, was in force in Lower Canada in commercial matters at the time of passing the Act under discussion, it must of course have been so in virtue of the Ord. 25 Geo. III, cap. 2, sec. 10, which enacts, "that in proof of all facts concerning commercial matters, recourse shall be had in all Courts to the Rules of Evidence laid down by the Laws of England." The chief point to be determined here, is, whether the Statute of Limitations is a Law of Evidence or not. We shall get at this better by transcribing the words of the Act supposed to bear upon this question: which are, that "all actions of account, and upon the case, *other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants*—all actions of debt founded upon any lending or contract without specialty, or any of them, which shall be brought at any time after the end of the present Session of Parliament, *shall be commenced and sued* within the time and limitation hereafter expressed, and *not after*—that is to say, the said actions for account and debts within three years next after this present Session of Parliament, or within six years next after the cause of such actions, *and not after*." These words expressly limit the duration of certain rights, and explicitly enact that beyond the period therein stated, no action shall exist for the prosecution of these rights. Is this a rule of Law regulating or commanding Evidence?—Is it not rather a rule superseding Evidence? or is it a rule relating to Evidence at all? Does it declare, alter, or amend, the English rules of Evidence at Common Law in commercial cases, or is it a general Statute Law of England, as much so as the Statute of Distributions, or the *Habeas Corpus* Act, or as much so as the *Coutume de Paris* is the Common Law of Lower Canada? We think the latter. It leaves the Rules of Evidence as they were, and is an exceptional Law cutting deep into the fundamental principles and provisions of the Common Law:—its policy rests upon a comprehensive basis, and embraces extended views of the practical interests of individuals and society. It is notorious, that since its enactment, it has exercised a mighty influence upon the Jurisprudence of England, and has been expanded into a widely operating Law by the wisdom of English decisions, and the consummate care and prudence of English Legislation. It *bars* the action upon a presumption of satisfaction so strong, that it excludes proof to the contrary, and requires none to sustain it. This presumption is a presumption of Law, conclusive in its nature, and equivalent to the *presumptio juris et de jure* of the Civil Law;—and is emphatically *presumptio à lege introducta et de Jure, ex qua lex inducat primum jus et habeat eum pro veritate.* From what has been said, we think it may be justly held, that this Statute is not a Rule of Evidence, and consequently was not introduced by the Ordinance 25 Geo. III, cap. 2, sec. 10, and did not form a part of the Law of Lower Canada at the time of passing

the Statute under discussion. Thus, if it be attempted to make the latter Act declaratory (and we are not quite sure, that it was not the intention of the Legislature to render it so) then will arise the more complete and profound absurdity of a *declaratory Act, affirming a Statute of James* I. *which has never been in force in the country*: which being legally impossible, what becomes of Lord Tenterden's amendment, which has really been introduced? We shall not presume to answer this question —but proceed to examine whether the original Law, as well as the amendment, has been formally introduced or not? It is a subject of reasonable doubt, whether the Legislature intended this double introduction. If it did so, it is thought that the language of the Law entirely fails us. To have introduced these Acts *formally simul et semul*, it would have been necessary either to transcribe the old Statute of Limitations, or so much of it as the Legislature intended to introduce—or if neither, then to have expressly enacted, that henceforth it should form a part of the Law of the land, applicable to a distinct class of cases in every variety of form. To introduce a new Law, otherwise than by full transcription, or by express direction and enactment, that which is termed the language of reference, should be made very full and explicit, containing substantially the provisions which the Legislature wishes to enforce. Now this Act does not (either compendiously or by full recitation) in explicit terms introduce the Statute of Limitations nor any part of it; nor is the language of reference sufficiently special in regard to that Act. It is quite true, that in the body of the Act, the English and Irish Statutes of Limitations are constantly referred to, *enunciative*, but the special provisions which are thus darkly hinted at, are not literally, or in substance transcribed, nor in any part of the Law is it enacted or provided, that they shall henceforth constitute a part of the Law of the land in Lower Canada, except in one clause, where both the English and Irish Law of Limitations is made applicable to setts off; which, it is apprehended, will cause some embarassment, in consequence of the difference in the French and English doctrines of compensation. Be this as it may; it is presumed, that there has been no formal introduction of the Statute of Limitations. What then, we ask again, is to become of our would-be amendment, which has been so scrupulously transcribed and re-enacted, as to aim at dragging in both the English and the Irish Statutes? We do'nt know.

Of course it will be objected, by men of what is called a practical genius, and of a courageous perspicacity of mind, that these preliminary remarks relative to the distinctive character of our Provincial Law, (and it will be seen hereafter, in the interpretation of this Act, how important it is to establish clearly this distinctive character if possible) is mere pedantic and theoretical trifling. This may be in some degree true; and we fear that this Act will give rise to an unusual amount of this peculiar kind of pastime, among, even the most learned and la-

borious—*hæc recinunt juvenes dictata senesque.* It will be said that it is quite clear, that the Law is neither introductory by express terms, nor declaratory—but that it is introduced consequentially, as a matter of course, and from the very necessity of the case; and that no more is required. Now it is precisely of this necessity, as an *ultima ratio* in interpretation, that we might complain. This necessity, in the present highly important enactment, should have been superseded by express terms and provisions in the Act. It must be the desire of every man to see our Provincial Legislation improving in precision and uniformity, instead of beholding it sinking by perceptible degrees, into an alarming state of confusion and uncertainty: and in spite of the confident tone of the practical man, we pretend that doubts will arise, and that from the carelessness of its language, and the insufficiency of its provisions, this Act is pre-eminently calculated to assist in promoting this latter condition of our law. In the present instance, it is respectfully apprehended, that so much of the Statute of Limitations as was directly necessary to support Lord Tenterden's amendment, as it has been re-enacted in the case before us, should have been expressly introduced—and the whole modified as wisdom might suggest, or considerations of local law and local utility might render expedient. This has not been done, and we are left to the chances of a conjectural interpretation, and to the dangers of caprice and doubt in the application of the Law. To resume, however, the train of our observations.

If we regard this Act as introductory of the Statute of Limitations, at all, we must hold it to be so by implication, if one may so express it; not expressly, but by an implied intention, to be inferred from the express introduction of the Amending Law. We may remark, that the expressed intention of this Act is, "to make provision for giving effect to the Statute of Limitations and to the intention thereof," and although the terms "implied introduction" may not strike a lawyer as very familiar to his ear or mind, when applied to a foreign law; yet, we should not rashly reject this view in the present case. It might be very strongly urged, that the Legislature having this intention, we are bound to conclude, that this Act has, if not expressly, at least impliedly, brought in so much of the original law as may be necessary to sustain and give effect to that intention. This, it may be said, flows from the spirit and design of the Act, as a just and necessary consequence, and correspoeds fully and precisely with the language of the preamble. It is, moreover, a well established rule, "that a thing which is within the intention of a Statute, is as much within the Statute as if it were within the letter." If we believe, that it was the intention of the Legislature to introduce *sub silentio* certain portions of the Statute of Limitations no more will be required. Failing, however, all other constructions, as a last, and we confess, very unsatisfactory expedient, it may be argued, that if the

Legislature has assumed the Statute of Limitations to be in force as Law in Lower Canada, at the time of passing the Act under review, such an assumption will give us enough of that Statute, even if it did not previously exist, to sustain the provisions of the foreign amendment. This would be a bold, and we are free to admit, a very practical mode of settling all the difficulties above alluded to. In the particular circumstances of our Common and Statute Law, we see some objections, to this view of the matter—but taking for granted, that the Legislature assumed the previous existence of the Statute of Limitations, and that such an assumption of Law, though totally unfounded, would bind our Courts of Justice, it is intended in a succeeding number, to extend these remarks over a wide field of practical difficulties, which must arise under the operation of this Law.

S. C. M.

THE RIGHT TO BEGIN AND THE RIGHT TO REPLY.

An Exposition of the Practice relative to the Right to Begin and the Right to Reply, in Trials by Jury, and in Appeals at Quarter Sessions; by William M. Best, Esq., Barrister-at-Law. London: Richards & Co., 1837.

Who begins? is a question in many cases any thing but easy to answer. It is, in fact, *a vexed question*, the reply to it of great importance, decisive as it may, frequently of itself, be of the interests of the litigants. While Treatises have been multiplied upon almost every branch of Law, it is matter of surprise, that, until the appearance of Mr. Best's work, nothing was to be found on the subject but a short, incidental, chapter, in Starkie's work on Evidence. The void which existed has been well filled up by the interesting work before us. We purpose now, in noticing Mr. Best's Treatise, to make such selections from it as may serve to exhibit the principles discussed, and the rules laid down by the author; confident that the more generally diffused such principles are, the more promptly will correct decisions be arrived at by both Judges and Advocates, when cases present themselves, as they *will* continue to do while Courts of Justice shall exist, or parties continue to litigate.

Our author has divided his Work into three chapters; the first treats of the *Onus Probandi* generally, the next of the Right to Begin, and the last of the Right to Reply. The rules laid down in the first chapter, and their illustrations, may be briefly stated as follows:—

Firstly. Generally, the burthen of proof lies on the party who asserts the affirmative on the Record.

Secondly. By the affirmative on the Record is meant the affirmative in *substance*, and not in form, *i. e.* the Judge will consider not so much the form as the substantial question, and will cast the *onus probandi* on

the party with whom the real affirmative seems to lie. In Amos *vs.* Hughes (1 M & Rob. 464,)—which was an action of assumpsit on a contract to emboss calico in a workmanlike manner, and alleging as a breach, that Defendant did not emboss in a workmanlike manner, but on the contrary, embossed it in a bad manner, to which Defendant pleaded that he did emboss the calico in a workmanlike manner, on which issue was joined, it was held by Alderson B. that the *onus probandi* lay on the Plaintiff, that questions of this kind were not to be decided by simply ascertaining on which side the affirmative in form lay, and he laid down that the proper *test* is, which party would succeed if no evidence at all were given, that in the principal case, supposing no evidence at all were given, the Defendant would be entitled to a verdict, for it was not to be assumed that the work was badly executed—consequently the *onus probandi* lay on the Plaintiff.

Thirdly. If there be a presumption of Law in favor of the pleading of either party, the *onus probandi* is cast upon his adversary, even though he may thereby be called on to prove a negative:—Thus, if goods proved to have been stolen are found shortly afterwards in the possession of a particular individual, this raises a presumption that he was the thief, and in the event of his refusing to show how he came by them will fully warrant his conviction. (1 Phill. Evid. 157.)

Fourthly. When there are conflicting presumptions, the *onus probandi* lies on the party who has in his favor the weaker presumption of the two:—Thus, if a man charged with an offence plead insanity at the time of its commission, although the Law would *prima facie* presume his innocence, yet, on the other hand, as it always presumes sanity of mind, here is a case where two presumptions conflict;—the latter however predominates, and it lies on the accused to prove the insanity. Again, where a female had been married seven years, and a few months after her marriage her husband enlisted as a soldier, went abroad and was not afterwards heard of, and she about twelve months after his departure married another person, by whom she had issue, it was held by the Court of K. B. on a case reserved, that the issue were to be deemed legitimate; for although the Law will presume that a party once proved to have been alive, continues so until seven years elapse without any account from him, yet, where the consequence of making such presumption would be to presume another person guilty of felony, (bigamy, as in this case,) the Law will presume his death to have taken place sooner, and that as the presumption of the duration of life clashed with the general presumption of innocence, the former should give way. (R. *vs.* Twining: 2 B. & Ald. 386.

Fifthly. If the case of a party lies on the proof of some particular fact, of the truth or falsehood of which he must from its very nature be peculiarly cognizant, the *onus* of proving that fact lies on him. This rule holds good whether the proof of the fact in issue involve the proof of an affirmative, or of a negative, and even though there be a presumption of Law

(as that of innocence,) in favor of the party pleading the fact. In an action against an Apothecary for practising without a Certificate, it was held that it lay on the Defendant to prove that he had a Certificate, (Apothecaries Co. *vs.* Bentley, R. & M. 159.)—Again, where a party was convicted of selling ale without a License, and the only evidence given was that the party sold ale, the Court held that the conviction was right, and per Abbott, C. J. "The party thus called on to answer sustains not the slightest inconvenience, for he can immediately produce his License; whereas, if the case be taken the other way, the informant is put to considerable inconvenience. (Harrison's Case, Rose. Cr. Evid. 57.

In the second Chapter, the *onus probandi* is considered as affecting the Right to Begin. Our author observes:—

"The having the Right to Begin, and state his case first to the Jury, being sometimes of great advantage to a litigant party, and at others quite the reverse, it is a great perfection in an Advocate to be able to see at once, from the nature of the facts he has to deal with, whether it would be advantageous for his client to have the right to begin cast upon him or not, and accordingly struggle to obtain that right, or transfer it to his adversary, as circumstances require. It is an advantageous right when a party has a good case, and strong evidence to support it, as it generally (and certainly if the opposite side produce witnesses) confers a right to reply on the opener, and thus gives the last word; but on the other hand, if the case which a party has be a weak one, if, to support it, he has only slight evidence to adduce, or, perhaps, none at all, but goes to trial on the chance (if Defendant) of being able to nonsuit the Plaintiff, or that the case of the opposite party may break down through its own intrinsic weakness, or trusts to the speech of his Counsel to destroy, in the minds of the Jury, the effect of the adversary's evidence, then the decision of the Judge that he was the party to begin, might prove fatal instantly to his cause; as it was in the late case of Edwards *vs.* Jones, 7. C. & P. 633. Jan. 17, 1837.—This was an action of assumpsit by the indorsee of a promissory note against the maker, to which the Defendant pleaded a long plea, amounting in substance to want of consideration for the note; to a portion of which the Plaintiff replied, that there had been a good consideration given, and to the rest entered a *nolle prosequi*. Counsel for the Plaintiff said, he believed Defendant should begin, which was ruled accordingly by Alderson B.. on which Defendant's Counsel admitted that he had no witnesses; and the Judge immediately directed the Jury to find a verdict against him; whereas, had the Plaintiff begun, the result might have been different."

The Rules regulating the right to begin are stated to be:

That the party on whom the *onus probandi* on the Record lies has generally and *prima facie* a right to begin.

But the adversary may get it from him by admitting the *prima facie* case; for by such admission he says that Plaintiff is entitled to a verdict, unless *he* destroy Plaintiff's case by *his* evidence. Plaintiff has no *onus* on him.

In England a Rule obtains, (a verbal one) that in cases of slander, libel, and other actions where the Plaintiff seeks to recover damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may in form be upon the Defendant. 1 M. & R. 281.

With the exception of the cases provided for by this Rule, the mere *onus* of proving damages, whether nominal or real, general or special, does not of itself confer on Plaintiff a right to begin when the onus of proving the fact in issue lies on the Defendant.

The Rule does not extend to cases where the damages are either nominal or liquidated. Thus in Silk *vs.* Humphrey 7. C. & P. which was an action of debt for a penalty of £50 brought on 32 Geo. 2. c. 28, against the Defendant who was Sheriff and who having arrested the Plaintiff on a capias had unlawfully carried her to prison within twenty four hours, although she did not refuse to be carried to some safe place of her own nomination to which the Defendant pleaded that the Plaintiff had consented to be taken to the house of one W. L. and that he offered to allow her to remain there twenty four hours but that she requestsd him to carry her to prison which he did ; the replication traversed the allegation that the Plaintiff had consented to be taken to the house of W. L. and per *Coleridge* J. " As the Plaintiff does not go for unliquidated damages, defendant must begin."

It does extend to all actions *ex delicto* which are brought for any injury or violence to the reputation or person of a party and to all actions *ex contractu*, which die with the person.

But it is uncertain whether it applies to actions for injuries to property, or to actions *ex contractu* which survive the person.

In all actions of assumpsit, covenant and debt, the New Rule does not apply, but the party begins upon whom the *onus probandi* is cast by the Record ; except in assumpsit for breach of promise, where Plaintiff has always (under new Rule) the right to begin. 7. C. & P.

In case, and trespass against the person, the New Rule applies—in libel and slander, and actions for malicious arrest or crim. con. Plaintiff *always* begins—he suing for heavy unliquidated damages.

In Trover, which is always for injury to *property*, the New Rule does not apply.

If any one issue lie on Plaintiff he is entitled to begin. In Williams *vs.* Thomas, 4. C. & P. 234, there were nineteen issues—the *onus* of proving seventeen lay on the Defendant, yet as the *onus* of the two others was on Plaintiff it was held that he had a general right to begin.

In criminal cases the general Rule, that the party on whom the *onus probandi* lies has the right to begin, applies.

In appeals against convictions by Magistrates the Appelant's objections may be either to form or substance. If no objection to *form* be made, then as the conviction is for some offence of which Appellant contends he is not guilty, he is entitled to the presumption of innocence, and the Respondents are always to begin.

The general Rule regulating the Right to Reply is " The Counsel of the party which doth begin to maintain the issue, whether of Plaintiff or Defendant, ought to conclude." Vin. Ab. Evidence S. a. 7.

Such is the general principle, but in practice (says our Author) some limitations have been placed upon this privilege. The Defendant usually adopts one of these three courses :—

1.—He states his case and gives evidence.

2.—He confines himself to addressing the jury, but adduces no new evidence and states no new material fact.

3.—He in his speech states some new facts, but adduces no new evidence to establish them.

In the first case the counsel who began has the right of general reply. It is immaterial whether Defendant's evidence has been verbal, or written, trifling or insufficient, andalthough Defendant's evidence be only to character, Plaintiff has the right of general reply.7. C. & P. 673.

In the second case, the opener is clearly not entitled to reply—an exception, however, exists in favor of the Crown. The Crown prosecutor is *always* entitled to reply. This is matter of prerogative.

In the third case in Criminal matters, prosecutor has the right (it seems) to reply. Rex *vs.* Horne, St. T. R. *vs.* Bignold, 4. D. & R. but in Civil cases at *Nisi Prius* it is held otherwise, and if Defendant's Counsel refuse to call witnesses to establish facts alleged, the Judge may, *in his discretion*, permit a reply—per Lord Tenterden, in Crerar *vs.* Sodo M. & M. 85.

If Defendant's Counsel in his address to the Jury raise any point of Law, or cite any case, the other side will be allowed to reply to the point of Law, or observe on the case cited ; but without touching upon the facts. Thus in Arden *vs.* Tucker (1 M. & R. 191.)which was an action of Assumpsit, the Plaintiff having begun, the Defendant opened for a non-suit, submitting that the action could not be supported, and having cited some cases, called witnesses to establish the facts ; this having been answered by Plaintiff's Counsel the Defendant claimed the right to reply, and per Lord Tenterden " The Defendant having raised the objection which was one of Law, and Plaintiff having answered that objection, the Defendant's Counsel is entitled to be heard on matter of Law, in reply."

Before concluding, we beg to recommend to the reader's perusal the work before us. This imperfect sketch of its contents is given with the view to provoke a desire in the practitioner to study the original work rather than from any vain idea that our labours will be taken as a guide. The subject being one essentially practical, we have conceived, that in discussing it, even thus slightly, we would be doing our readers service. Another object has been to save the time taken up so frequently in all the Courts, in arguing who shall begin and who reply, and to remove the causes of those dissatisfactions which are, sometimes, evinced at the ruling of the judge, even where he is quite correct in his decisions. Were the principles set forth in Mr. Best's work generally admitted, such arguments and dissatisfactions would be rare. It is true he has deduced his arguments from English reasonings and cases, but the candid examiner has only to look into those cases to see that they have been decided most correctly, and

that the principles they enunciate are the same as those of the most approved French authors. Some late writers, by attempting to raise other structures, have only fallen into absurdities. Bonnier,* for instance, attempts to fix that the *onus probandi* is always on the Plaintiff, although he may thereby have to prove a negative, that the Defendant need only remain *in statu quo*, and that if the Plaintiff do not prove every thing he must fail. But he falls into embarrassment when, referring to *actions négatoires*, he holds, (carrying out his doctrine,) that the *onus probandi*, even in them, is on the Plaintiff. He says: "Comment établir qu'il n'existe pas de servitude sur mon fonds? C'est là une négative indéfinie qui échappe à la démonstration." To get out of the embarrassment in which he finds himself, he adds: "Dans des espèces semblables, il est un tempérament adopté par les partisans de la doctrine que nous soutenons; tempérament qui consiste à obliger le Défendeur non pas à prouver son droit, mais à alléguer le titre auquel il le rattache. La question se trouvera alors placée sur un terrain positif et il sera possible au Demandeur d'établir que ce titre n'existe pas. S'il n'y réussit pas, il sera débouté de sa demande. Si au contraire il y réussit, la présomption sera en sa faveur, et ce sera au Défendeur, qui aura succombé une première fois, à justifier s'il le peut de l'existence d'un autre titre. Page 32." Curious doctrine surely! Defendant may remain *in statu quo*, is never to be charged with the *onus probandi*, yet may be obliged to "alléguer son titre," and this only because certain "partisans" of a particular doctrine have so arranged. We would like to know the country in which such a Code of Practice exists as this modern author would have. The Defendant defeated, after exhibition of one title, allowed to "alléguer" a second, a third and so on! Again, at page 34, he says: "Il ne faut pas s'imaginer que, parcequ'une partie est chargée de prouver, l'autre pourra impunément se retrancher dans un silence systématique. On aura toujours mauvaise grâce à refuser des éclaircissemens à la justice." Now we do not see how Bonnier, the advocate of the *statu quo* principle, can tax with "mauvaise grâce" a Defendant who is only acting upon that principle. And if the *law* do not punish a Defendant so acting, and charge him with an *onus*, why may he not "impunément se retrancher dans un silence systématique?" And why should a Defendant, not chargeable with any *onus*, be held to furnish "éclaircissemens?" Bonnier's doctrines, to our puny perceptions, seem absurd. Let us hold then, with Pothier, Merlin and Toullier, that, in *actions négatoires*, the *onus* of proving the servitude is on the Defendant. Of course, in such actions the Plaintiff may have to commence the proof, usually he has, but once he has proved his ownership and the exercise by Defendant of the servitude, the *pré-*

* Traité théorique et pratique des Preuves. Paris, 1843.

somption légale, that his land is free, completes his proof. The *onus* is then on Defendant to prove that he has acquired the servitude. There is nothing, however, to compel him to enter into "éclaircissemens," but, if he do not, his fate is certain; in vain will he beg to be left *in statu quo*. In fact, in these cases, the English *test* might be applied "which would succeed if no evidence (or further evidence) were given?" If Plaintiff prove nothing, the Defendant; but, if Plaintiff prove his ownership and the exercising by Defendant of acts amounting to a servitude (without offering further evidence) and the Defendant prove nothing, then the Plaintiff; for his proof, with the *présomption légale*, will be complete. The *onus* is on the party who would fail if no evidence (or further evidence) were given.

R. McK.

CASES IN THE ENGLISH COURTS.

TO THE EDITOR OF THE REVUE DE JURISPRUDENCE.

SIR,—The subjoined report of the Judgment rendered, about two years ago, by Lords Brougham and Campbell, Mr. Justice Erskine and Sir S. Lushington, is submitted for publication, as containing the latest and highest authority upon a question of some importance, and which has been decided in a different way, in this Colony, in the case of Harvey *vs.* Lord Aylmer. (Stuart's Reports, 542.)

It will be seen that, upon the principles laid down in Hill *vs.* Bigge and al. the Judgment must have been similar, even if the cause of action had arisen in Trinidad. This case is, therefore, quite subversive of the authority of Harvey *vs.* Lord Aylmer.

F. G. J.

Montreal, October, 1845.

PRIVY COUNCIL.

HILL *vs.* BIGGE AND RUNDEL.

Before Lord Brougham, Lord Campbell, Mr. Justice Erskine and Sir S. Lushington.

(Appeal from the Court of First Instance of Civil Jurisdiction in the Island of Trinidad.)

Privilege.—Lieutenant-Governor of a Colony.—Exemption from Action.

Fabrigas *vs.* Mostyn considered, and Lord Mansfield's Dictum, or that attributed to him there, overruled.

An Action will lie against the Governor of one of our Colonies, in the Courts of that Colony, while he is such Governor, for a cause of Action unconnected with his official capacity, and accruing out of the Colony before his government commenced.

The question raised by this Appeal was, whether a Lieutenant-Governor of one of our Colonies may be sued, in a Court of that Colony for a debt upon a bond given prior to the commencement of his governorship; or whether, being the representative of the Sovereign, he is not, as the Sovereign, exempt from action, so long as his commission continues, &c. The facts of the case are fully stated in Lord Brougham's Judgment. The Court of First Instance, in Trinidad, held, that the Governor was liable to be sued, and pronounced Judgment for Plaintiff. This was an Appeal from that decision.

Judgment was delivered by Lord Brouham, in the following words:

This was an Appeal from the decision of the Court of First Instance of Civil Jurisdiction in the Island of Trinidad, in which a Petition was filed on the 24th July, 1837, by Messrs. Thomas Bigge and Edmond Walter Rundel, the surviving partners of Philip Rundel and John Bigge, of the City of London, jewellers, to whom the Appellant, Sir George Fitzgerald Hill, Lieutenant-Governor of Trinidad, had executed a bond on the 10th November, 1825, about twelve years previous, for the sum of £820 13s. sterling. The Petition prayed a citation against the Appellant to answer the premises, which citation was accordingly issued, was duly served, and the Appellant was summoned to answer the Petition so filed against him. He did appear under protest, and filed a plea setting forth that he was, at the time of the Petition being filed, and at the date of the plea, Lieutenant-Governor of the said Island and its dependencies, and, as such Governor, he was not liable to be sued in the said Court, nor bound to appear to any process issuing therefrom, nor to answer to any action instituted therein; and, according to the proceedings in that Court, the issue was joined upon the plea, which leaves the whole question for the Court, and the Court, having heard the parties, postponed their Judgment. They afterwards gave Judgment, by which they ordered payment by the Defendant of the sum, together with interest, amounting to the sum of £1578 9s. 7d. currency. From this Judgment, the present Appeal is brought. The question, raised then in this case, is whether an Action will lie against the Governor of a Colony, in the Courts of that Colony, while he is such a Governor, for a cause of Action wholly unconnected with his official capacity, and accruing out of the Colony before his government commenced; and this question appears to be one, whatever may be its importance, of no great difficulty. It may safely be affirmed, that they, who maintain the exemption of any person from the law by which all the King's subjects are bound, or. which is the same thing, from the jurisdiction of the Courts, which administer that law to all besides, are bound to show some reason or authority leaving no doubt upon the point. The reference to analogies, or the supposition of inconvenient consequences, must be much more frequent than any that can be urged, in this case, to support, or even to countenance such a claim. If it be said that the Governor of a Colony is quasi sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission; and being only the

officer to execute the specific powers with which that commission clothes him. "The Governor, (said Lord Chief Justice De Grey, in Fabrigas *vs.* Mostyn, when that case was before the Common Pleas, which afterwards came, by error, into B. R.) is the King's servant, his commission is from him, and he is to execute the powers he is invested with, under that commission, which is, to execute the laws of Minorca under such regulations as the King shall make in Council." It is proper to observe, that this was the case of the Governor of a province formerly belonging to the Crown of Spain, as Trinidad formerly did; and that one of the arguments for the Defendant had put his claim upon the highest grounds, namely, that he was, by the Spanish law and constitution, absolute within a district, at least, of his government, "having supreme power vested in him, and being only accountable to God." Again this Court, in Cameron *vs.* Kyte, 1835, (3 Knapp, not yet published), when a claim, to represent the Sovereign and hold the royal power by delegation, was set up, refused to allow it, and considered him as only an officer with a limited authority. Their lordships, in deciding that case, referred to the dictum of Sir W. Scott, in 3 Robinson's Admiralty Report, that a naval commander may be reasonably supposed to carry with him such portion of sovereign authority as shall be necessary to provide for the exigencies of the service; but, they said that this observation is plainly applicable only to the case of a Commander carrying on war in a remote quarter, and the authority necessarily incident to that situation, and can have no application to the case of a Colonial Governor.

Nor must we forget, in reference to the position of the supreme power in the state, that, by our law and constitution, it rests not in the Sovereign, but in the Parliament, the Sovereign himself being liable to be sued, though in a particular manner; and if his liability to suit were as much restricted as some have occasionally maintained, it would still be greater than the Appellant's argument supposes the liability of a Governor to be. The consequences imagined to follow from holding the Governors liable to actions, like their fellow subjects, are incorrectly stated; and, if true, would not decide the question. First, they are incorrectly stated, for, it by no means follows, that, because an action may be maintained, and Judgment recovered, therefore, the same process must issue against the Governor as against another person, pending his government. His being liable to be taken in execution is not the necessary consequence of his being liableto have a Judgment against him. There were, anciently, more instances than, happily, now remain, of persons privileged from legal process: but there are still some such exceptions, as privilege of peerage and of Parliament, and of persons in attendance upon the sovereign, and upon Courts of Justice. None of these privileges protect from suits; all, more or less, protect from personal arrest in execution on Judgment recovered by suit. Indeed, the old, and we may now say obsolete, writ of protection, which the King granted to his servants and debtor, purported to be a protection from all pleas and suits; yet the Courts held that no one should thereby be delayed in his Action, but only that execution should be stayed after Judgment. (Ces. Jac. 419; see also 25 Edw. 3, sec. 5, c. 19). It may be observed, in passing, that those protections were a provision made by the old law, for the security of persons in the foreign service of the Crown, as commanders of armies, ambassadors, and, doubtless, gov-

ernors of the continental dominions also. (Co. Litt. 130, A.) It, therefore, is not at all necessary, that, in holding the Governor liable to be sued, we should hold his person liable to arrest while on service, that is, while resident in his government. It is not even necessary that we should meet the suggestion of his goods in all circumstances as being liable to be taken in execution, though that is subject to a different consideration.

Next, suppose all these alleged consequences had been accurately stated, they would not, necessarily, decide the question. Many cases might be put, of as great inconvenience, and even of as great violence done to public feeling, and as great mischief to the public service, by the execution of legal process, as any in the cases that have been put; yet, in none of these instances, can it, for a moment, be pretended, that the law is not to take its course. The inconvenience from a general officer or an ambassador being taken in execution, on the eve of his departure to serve abroad, or the mischiefs that would ensue to the administration of justice from a Judge being taken in execution almost at any time, is quite undeniable; but equally certain it is, that these inconveniences offered no argument whatever against the unquestionable liability of all those high functionaries to undergo, like the rest of the King's subjects, the process of the law. Indeed, it is manifest, that, if these alleged consequences prove anything, they prove too much; they go to set up an exemption from suits in the Courts of this country during the continuance of the Governor's functions; for nothing that happens to him within the limits of his own government could be much more injurious to his authority, than his being outlawed in the Courts of Westminster, or having Judgments against him there, supposing he prevented the outlawry by appearing to the Actions. Then, is there any authority of decided cases for the position in question? It is unnecessary to say anything of Napper Tandey *vs.* Lord Westmoreland, because the question there arose upon an act of the Lord-Lieutenant in his capacity of Governor, and there would be no safety in relying upon the report of the case; it ascribes dicta to the Court, which, there is every reason to suppose, must be inaccurately reported; dicta, in some of which it is impossible to concur. The case of Fabrigas *vs.* Mostyn, when it came by error into B. R. furnishes the only thing like authority, for the construction of those who seek to impeach the Judgment under review, and it is not pretended that the decision is upon the point now in question.

In actions of trespass and false imprisonment having been brought against the Governor of Minorca, he pleaded:—First, the general issue, and then justification, and that he had, as Governor, and in the discharge of his duty, imprisoned and removed plaintiff, to prevent and put down a riot and meeting in which he was engaged. To this special plea, there was a replication *de injuriâ*, and both issues were found for the plaintiff; whereupon, the defendant having tendered a bill of exceptions, on the ground, that the learned Judge who tried the cause ought to have directed the Jury to find for defendant, because he had acted as Governor of Minorca, and was not liable to be sued in the Courts of England, for acts done in Minorca, a writ of error was brought in B. R., and the Court gave judgment for the defendant in error, (plaintiff below,) holding it to be quite clear, that the action will lie; and that the learned Judge did right in not directing the Jury as required by defendant,—there having been no evidence to support the

plea of justification, there could be no objection taken to the finding of the Jury; and a motion for a new trial in Common Pleas had been refused. Whether made against this verdict, or against the Judge's directions, does not distinctly appear; nor, indeed, is it quite clear from the report, in what way the Governor's Council really meant to shape their case; and this, though three elaborate arguments had been held, is observed upon by the Court in giving Judgment. This much, however, is quite certain, that the decision is not against the liability of Governor Mostyn, to be sued in the Island during his government, even for the acts of State done by him, much less for a private debt, contracted in his individual capacity before his government commenced. It is only a decision, that he was liable to be sued in England for personal wrongs done by him while Governor of Minorca; nor does the decision thus given rest upon any doctrine denying his liability to be sued in that Island. There is, no doubt, a dictum of Lord Mansfield, in giving the Judgment, "that the Governor is in the nature of a viceroy; and that, therefore, locally, during his government, no civil action will lie against him." And the reason, and the only reason given for this position is, because upon process, he would be subject to imprisonment. With the most profound respect for the authority of that illustrious Judge, it must be observed, that, as has been shewn, the Governor's being liable to process during his government would not follow from his being liable to action; and, that the same argument might be used to shew, that action lies not against persons enjoying undoubted freedom from arrest by reason of privilege. But the decision in the case does not rest on this dictum; on the contrary, Lord Mansfield goes on to say, that another reason of a different kind, "would alone be decisive;" and, indeed, the dictum itself is introduced, as if the question had arisen upon a plea in abatement to the justification; whereas, it arose, not on the pleadings at all, as his Lordship more than once remarked. Nothing can be more clear, than that the action, being of a transitory nature, its being maintainable in Minorca could not have prevented it from lying in England. Also, it is a possibility, that the expressions used may have been somewhat altered in the report; it certainly represents Lord Mansfield, (Cowp. 174) to have treated the manner in which the Privy Council deals with Colonial law, as a similar case to that of Courts having to examine questions of Foreign law, which is proved as matter of fact. But, supposing the report as quite accurate in all respects, the decision in no way supports the construction of the appellant. A case was decided in Parliament at the end of the Reign of Car. 2, (Dutton *vs.* Howell,) which Governor Mostyn's Counsel relied much upon; and in which the Judgment of all the Judges was reversed, and a Governor held not liable to be sued in England for imprisoning a person guilty of delinquincy under his government. It is quite clear, that this case afforded no precedent for Governor Mostyn's, much less for the defence of the present action. It went on the ground of the Governor and his Council having acted judicially. And though the Counsel for the plaintiff in error, before the House of Lords, urged, among other things, that Governors of Scotland and of Ireland could not be sued, so did they also contend, that it would be equally dangerous to sue Privy Councillors, (Shaw, P. C. 27,)—a position probably as much disregarded by the House of Lords, who reversed the Judgment, as it certainly had been with the other arguments of the same cast, by the Judges of the three

Courts who had prononnced it. It is unnecessary to say anything respecting the statutory provisions of 11 & 12, Will. 3, which in one view, makes rather more against the appellant than it does for him in another. Neither is it necessary to say anything respecting the alleged judicial powers of the Governor of Trinidad, as he appears not to stand in the situation which has been supposed. It cannot be alleged that the process runs in his name; and even if he were, (which he is not,) the Court of Error, would not decide that he cannot be sued. The Judges of Courts in this country, which have the most unquestionable jurisdiction in certain actions, are themselves liable to be sued in such Courts, and cases might easily be fingered, in which great difficulty would arise how to try suits brought against them, in consequence of their official position; but the possibility of such difficulties, whatever Legislative enactment it might give rise to upon its nearer approach, can never, surely, be urged as a reason for denying what all men know to be law, namely, that these parties are liable to be sued. The Judgment appealed from must be affirmed, and with costs.—Judgment *affirmed*, with costs.

COLLECTION DE DÉCISIONS

DES DIVERS TRIBUNAUX DU BAS-CANADA.

BAS-CANADA.—COUR D'APPEL.

DAME M. L. E. F..... DITE M.....,
(Demanderesse en Cour Inférieure,)
APPELANTE,

ET

L. E. C..... DIT C.....,
(Défendeur en Cour Inférieure,)
INTIMÉ.

" Un mari est condamné à fournir à sa femme séparée de corps et d'habitation, une " rente et pension annuelle et viagère de £50; ce mari ne possède que certains biens *à charge de substitution*, en vertu du testament de son père qui a dit: " Je défends " expressément que ces biens soient en aucune manière engagés, aliénés, hypo- " théqués, non plus que la *jouissance, intérêt ou usufruit d'iceux*, qu'ils (les gre- " vés) retireront pour leur pension et subsistance et pour la subsistance et l'édu- " cation de leur famille, sous peine de nullité de tous actes qu'ils feront contraires " à mon intention, pour que ces biens retournent à leurs enfans, &c. &c.;"

L'usufruit de ces biens est-il affecté au service de la rente et pension de la femme? Cette question avait été jugée par la Cour du Banc du Roi à Montréal, en faveur du mari, la Cour ayant considéré que c'était le cas d'une substitution fidéi-commissaire établie par le testament; que ce que dit BOURJON, *loco citato* (dans le *factum* de l'Appelante,) n'était nullement applicable au cas actuel; que le testateur avait double motif dans sa prohibition d'aliéner: de conserver les biens dans sa famille et d'assurer des alimens à son fils. Sur l'Appel, ce jugement a été infirmé. Nous tirons des FACTUMS imprimés des parties, l'exposé des faits de la cause et des moyens que chacune d'elles fit valoir.

DE LA PART DE L'APPELANTE:

Elle épouse l'Intimé en Novembre 1834.

Aux termes de leur contrat de mariage, ils furent soumis au régime de la Communauté de biens. En outre l'Appelante est " douée d'une

" sommé de £80 du cours actuel de cette Province, de rente annuelle " et viagère de douaire préfix, à prendre sur les plus clairs et appa- " rents biens du dit futur époux, duquel douaire elle sera saisie dès " l'instant qu'il aura lieu, sans être tenue d'en faire demande en jus- " tice." Préciput de £100 en faveur du survivant.

Le 12 Avril 1842, l'Appelante obtient dans la Cour du Banc du Roi à Montréal, un jugement de séparation de corps et de biens, sur preuve de sévices.

Le 6 Mai 1842, elle renonce à la communauté. Par le rapport du praticien, homologué le 21 Juin 1842, il est constaté que l'Appelante n'avait point de reprises matrimoniales à exercer, et que les seuls biens immeubles que l'Intimé possédait alors, consistent dans trois emplacements situés dans les faubourgs de Montréal, et à lui échus par le partage des biens de la succession de feu J..... C..... dit C....., son père, le dit partage en date du 27 mars 1835, (Papineau, notaire) ; lesquels trois immeubles, formant le troisième lot au dit partage, appartiennent à l'Intimé à charge de substitution en faveur de ses enfants, ou, à leur défaut, en faveur des autres héritiers et légataires du dit feu J..... C..... dit C....., père, aux termes du testament solennel de ce dernier, en date du 22 Mars 1831, (Doucet, notaire). Le 13 Octobre 1842, sur conclusions de l'Appelante et sur confession de l'Intimé, la Cour le condamne à payer à sa femme " la somme de " £50 du cours actuel, de rente et pension annuelle et viagère, à " compter du 1er Novembre alors prochain (1842) par quartier, et d'a- " vance, de £12 10s. chacun."

Les rapports du Shérif sur des exécutions *de bonis* constatent que l'Intimé n'avait pas de biens meubles.

Le 4 Mars 1843, il émane un mandat d'exécution *de terris*, en vertu du jugement qui accorde la pension alimentaire, enjoignant au Shérif de prélever, 1o. la somme de £12 10s. due à l'Appelante, (formant le premier quartier de sa rente et pension viagère) et 2o. £6 16s. 4d. dûs aux Procureurs de l'Appelante, par distraction de dépens sur ce dernier jugement.

Le 8 Mars 1843, il émane un autre mandat d'exécution *de terris*, en vertu du jugement de séparation, enjoignant au Shérif de prélever la somme de £18 9s. 5d. étant les dépens dûs sur ce jugement, par distraction, aux Procureurs de l'Appelante.

En vertu de ces deux mandats d'exécution *de terris*, le Shérif de Montréal procéda à la saisie de " la jouissance et usufruit la vie du- " rant du dit Défendeur," des trois immeubles ci-dessus mentionnés. La vente n'eut pas lieu en conséquence d'une opposition afin d'annuler que l'Intimé logea entre les mains du Shérif, et sur laquelle l'Appelante lia contestation avec l'Intimé. C'est du mérite de cette opposition qu'il s'agit, le Jugement de la Cour Inférieurs ayant au mérite " maintenu la dite opposition avec dépens contre la Demanderesse, et " en conséquence adjugé et déclaré nulles et de nul effet les saisies et " exécutions émanées en cette cause à la poursuite de la Demanderesse " contre les immeubles du dit Opposant."

Par son opposition, l'Intimé prétendait que la jouissance et l'usufruit des dits immeubles saisis ne peuvent être " vendus, aliénés, en- " gagés ou hypothéqués durant sa vie en aucune manière quelconque." Il se fonde sur les dispositions suivantes du testament de son père décédé le 14 Juillet 1832:

" Quant à mes biens meubles et immeubles, argent monnoyé, dettes

" actives, actions et généralement tout ce qui m'appartiendra au jour de " mon décès, je les donne et lègue à tous mes enfants à diviser égale- " ment entr'eux, (les enfans nés ou à naître en légitime mariage de " J..... C..... C....., mon fils aîné né de mon mariage avec feue " Josephte R....., représentant leur père pour une part, excluant le " dit J..... C..... C....., de ma succession). J'ordonne que ma " succession mobiliaire soit investie en acquisition d'héritage ou rentes, " d'abord. Et à l'effet de faire la division de mes biens d'une manière " juste et équitable, Je nomme mes amis les Sieurs..... " ou deux d'entr'eux, et les lots faits, ils seront tirés au sort pour dé- " terminer le lot de chacun de mes dits enfans, et des enfans du dit " J ..... C....., mon fils aîné, auxquels chacun des lots ainsi assignés " sera leur part dans ma succession. La maison, terrein et dépendances " actuellement en la possession de M..... A..... sera part de son " lot à l'évaluation qui en sera faite par les susnommés."

" Et pour assurer à mes dits enfans une subsistance alimentaire et " d'entretien pendant leur vie et procurer à leurs familles une éduca- " tion honnête, Je défends expressément que ces biens soient en au- " cune manière engagés, aliénés, hypothéqués, non plus que la jouis- " sance, intérêt ou usufruit d'iceux qu'ils retireront pour leur pension " et subsistance *et pour la subsistance et l'éducation de leur famille* " sous peine de nullité de tous actes qu'ils feront contraires à mon in- " tention, pour que ces biens retournent à leurs enfans nés en légi- " time mariage à diviser entr'eux, ou en cas qu'ils décèdent ou aucun " d'eux sans enfant, leur part sera repartie entre mes autres héritiers " ou légataires, excepté la part de M..... A....., ma fille, qu'elle " aura en propriété du jour de mon décès à perpétuité."

A cette opposition, l'Appelante fit d'abord une réponse spéciale sous la forme d'Exception péremptoire, puis une Réponse générale sous la forme de Défense au fonds en fait.

Dans l'Exception, après avoir relaté une partie du testament, l'Appelante disait en substance que " les jugements et créances en satisfaction desquels avait été faite la saisie de la jouissance et usufruit des dits immeubles, étaient fondés sur des obligations imposées à l'Intimé tant par la loi du Pays que particulièrement par son contrat de mariage, obligations auxquelles l'Intimé est tenu aussi bien que les immeubles saisis, conformément à la loi du Pays, et d'après le sens et les termes mêmes du testament de son père, lequel testament n'a pu d'ailleurs nullement avoir l'effet de faire déroger à ces obligations, et qu'en outre les biens ainsi saisis sont les seuls que l'Intimé possède, et qu'il n'est propriétaire d'aucun autre."

Les Parties étant appointées à l'Enquête, signèrent une admission par laquelle elles reconnurent que les immeubles dont l'usufruit et la jouissance ont été saisis sur l'Intimé sont les mêmes que ceux qui lui sont advenus par le testament de son père, ainsi qu'expliqué plus haut ; qu'ils sont aussi les mêmes que ceux mentionnés dans l'Opposition et dans l'Exception ; enfin que ces propriétés sont les seules qui appartenaient à l'Intimé au temps de la saisie, et qu'il n'en a aucune autre.

La majorité des trois Juges qui composaient alors le Tribunal Inférieur, donna gain de cause à l'Intimé, en s'appuyant sur la défense " d'engager, aliéner, et hypothéquer," telle qu'énoncée au testament.

Nous avons donc d'abord à examiner quel doit être l'effet légal de la défense que le testateur a faite à ses enfans grevés de substitution, d'engager, aliéner et hypothéquer " la jouissance, intérêt ou usufruit"

des biens légués, et de la déclaration de sa volonté que ses dits enfans retirassent cette jouissance, intérêt ou usufruit " pour leur pension et subsistance et pour la *subsistance* et l'éducation de leur *famille*, sous peine de nullité de tous actes, ajoute-t-il, qu'ils feront, contraires à son intention."

L'un des principes les mieux établis de notre jurisprudence est que, lorsqu'une personne a grévé quelqu'un de ses enfans de substitution, le douaire de la femme du grévé peut, à défaut de biens libres, se prendre sur les biens substitués. (*Vide* POTHIER, du *douaire*, No. 61.) " Cette jurisprudence, dit-il, est fondée sur ce que le désir naturel qu'ont les hommes de se reproduire et de se perpétuer dans leur " postérité, doit faire présumer que lorsqu'une personne grève de " substitution quelqu'un de ses enfans, sa volonté n'est pas de le priver des moyens qui sont ordinairement nécessaires pour trouver à " faire un mariage convenable: étant ordinairement nécessaire, pour " parvenir à cette fin, d'avoir de quoi assigner à une femme un " douaire convenable, on doit présumer que l'auteur de la substitution a eu la volonté d'excepter de la substitution dont il a grévé " son enfant, autant qu'il serait de besoin pour assigner un douaire " convenable à la femme qu'il épousera."

Voir aussi BOURJON, Tome 2, des substitutions, Page 189, chap. 8, section 1, art. 1, 2, 3.

Cette doctrine est inconstestable; elle a été admise par tous les Juges de la Cour Inférieure qui ont reconnu qu'après la mort de son mari, l'Appelante pourra prendre le douaire stipulé dans son contrat de mariage, sur les immeubles en question, à défaut de biens libres suffisants pour le remplir; mais la majorité de la Cour n'a pas voulu lui reconnaître, pour le paiement de la pension alimentaire à elle accordée par jugement, l'exercice du même privilège du vivant de son mari. Il y a néanmoins, ce semble, la même raison de décider dans un cas comme dans l'autre. On pourrait même dire qu'il y a, dans l'espèce présente, de plus fortes raisons de faire l'application du principe à la pension alimentaire accordée par le Jugement qu'à la pension alimentaire résultant de la constitution du douaire. Nous désignons sous le nom de pension alimentaire le douaire stipulé au profit de l'Appelante; en effet c'est expressément comme " rente annuelle et viagère " que ce douaire a été constitué. En outre cela tient même à la nature du douaire de la femme. " Ce douaire," dit Pothier, aux Nos. 1 et 5 de son traité, est " ce que la loi " accorde à la femme dans les biens de son mari, *pour sa subsistance*, " en cas qu'elle lui survive."

Mais, indépendamment de cette pension alimentaire qui, sous le nom de douaire, est assurée à la femme sur les biens de son mari après sa mort, le mari n'a-t-il pas, par le mariage même, contracté l'obligation de lui fournir la même pension de son vivant, et tant que le mariage subsiste? Ne doit-il pas fournir des aliments à sa femme? Ne doit-il pas pourvoir à sa subsistance? N'est-ce pas là au contraire un devoir sacré que la loi et la convention se réunissent pour lui imposer? S'il était même possible de supposer un cas où ce devoir serait plus sacré que dans un autre, ce serait sans doute le cas où le mari, par sa conduite et ses sévices, aurait mis sa femme dans la dure nécessité de quitter le toit conjugal, et de chercher une protection dans une séparation de corps et d'habitation. Or cette subsistance que le mari, de son vivant, est obligé de fournir à sa

femme, consiste dans les choses nécessaires à sa nourriture et à son entretien. C'est une pension, c'est une rente annuelle et viagère, due pendant le mariage, et dont celle qui résulte du douaire et qui, pour la femme, devient exigible sous ce nom après la mort du mari, n'est pour ainsi dire que la continuation. Toutes deux, quant à la femme, existent au même titre, et dérivent de la même cause, l'obligation du mari de pourvoir à la subsistance de sa femme, aussi bien durant le mariage qu'après sa dissolution. Dans l'un comme dans l'autre cas, la femme doit avoir le même droit et le même privilège à exercer pour forcer son mari à lui fournir cette subsistance. Autrement il faudrait reconnaître que la loi a permis à l'Intimé de se soustraire, pendant le mariage, à l'accomplissement de cette obligation.

Il a été démontré que la femme a le droit, dans certains cas, de prendre son douaire sur les biens que son mari tient à charge de substitution. Il faut ajouter que cela a lieu lorsque l'auteur de la substitution est un des ascendants du mari, ce qui est le cas dans l'espèce actuelle. Ce douaire affecte tellement les biens substitués que, quand il y a lieu de l'exercer sur ces biens, non seulement l'usufruit s'en trouve engagé, mais même la propriété peut s'en trouver par suite aliénée, au préjudice de la substitution, qui, dans un tel cas, ne produit aucun effet quant à cette partie des biens substitués que le douaire absorbe.

Mais le testateur, en créant une substitution, a voulu que ses biens fussent recueillis par les substitués. L'exercice du douaire, ayant l'effet de soustraire une partie de ces biens à l'opération de la substitution, ne pourrait-on pas prétendre que cette soustraction est contraire à la volonté du testateur ? Non, tout au contraire ; la loi, en assujétissant au douaire les biens substitués, se fonde sur la volonté présumée du testateur. En grevant son fils de substitution au profit des enfants de ce dernier, le père est nécessairement censé avoir voulu que son fils put s'établir avantageusement par un mariage convenable, et avoir par là même tacitement excepté des effets de la substitution, telle partie de ses biens dont l'emploi peut être jugé nécessaire à former cet établissement. La subsistance de la femme est la première obligation du mari, résultant de son mariage. Si le mari n'a pas d'autres biens que des biens substitués, une partie en doit donc être employée à fournir la subsistance de la femme. Le père, auteur de la substitution, est censé l'avoir voulu ainsi. C'est ainsi qu'une jurisprudence constante, en soumettant les biens substitués au douaire, est venue en aide au silence du testateur pour expliquer sa volonté. Si donc c'est par suite de la volonté supposée du testateur que ses biens, quoique grévés de substitution en faveur des enfants de son fils, doivent être employés, après la mort de celui-ci, à subvenir aux aliments de sa veuve, à plus forte raison doit-on dire qu'il a voulu de même qu'ils fussent employés au même objet pendant le mariage, puisque ce mariage a été, avant tout, dans les intentions et les volontés du testateur, et que sans ce mariage, il ne pouvait avoir aucune espérance que le but qu'il avait, en substituant ses biens au profit des enfants de son fils non encore marié, pût jamais s'accomplir. S'il n'a pas imposé à son fils, en termes exprès, l'obligation d'employer, avant tout, à la subsistance de sa femme durant le mariage, la jouissance et l'usufruit des biens qu'il lui léguait, à charge de substitution, ce n'est pas parce qu'un tel emploi eût été contraire à sa volonté, mais bien sans doute parce qu'il ne voulait pas lui faire l'injure de penser qu'il pouvait ne pas les faire servir à cette destination. Cette destination étant donc

conforme à la volonté du testateur, le mari ne saurait, par son propre fait, en forçant sa femme de se séparer de lui, rendre cette destination sans effet, et éluder ainsi la volonté de son père, ce qui aurait nécessairement lieu, si le jugement de la Cour Inférieure dût être confirmé.

L'Appelante, pour les raisons ci-dessus, est donc bien fondée à prétendre, que, dans les circonstances où elle se trouve, elle a sur les biens en question, du vivant de son mari, pour la prestation de sa pension alimentaire, le même droit et le même privilège à exercer, qu'elle aurait s'il s'agissait du service de la pension alimentaire qui doit dériver du douaire constitué par son contrat de mariage. Elle doit faire remarquer que les saisies qu'elle a fait pratiquer, ne touchent qu'aux revenus des immeubles, ce qui n'affecte en rien la substitution, tandis que quand il y aura lieu d'exercer son douaire, la propriété d'une partie au moins de ces immeubles pourrait par suite être détachée de la substitution. Ainsi de ces deux droits, l'exercice de l'un n'est pas contraire à la substitution, tandis que l'exercice de l'autre pourra y porter préjudice ; ce qui tend à rendre plus favorable, s'il est possible, la position prise par l'Appelante.

Quels moyens a-t-on de repousser les prétentions de l'Appelante ? Il semble qu'il n'en peut exister aucun, à moins de soutenir par hypothèse une proposition qui serait étrange, pour ne pas dire absurde, celle qu'il a été dans l'intention et la volonté du testateur que les revenus des biens par lui légués à son fils, ne seraient pas employés à la subsistance de la femme de celui-ci. Il est vrai que, si la Cour Inférieure pouvait être considérée comme ayant bien jugé, l'on pourrait prétendre que cette proposition a été sanctionnée par elle. Il vaut mieux néanmoins dire que son jugement repose sur une fausse interprétation des droits des parties, de même que sur une fausse application des principes. En effet, si, par impossible, l'on prétendait que telle a été la volonté du testateur, il faudrait au moins trouver cette volonté clairement exprimée. Or, que l'on examine attentivement son testament, et l'on verra que, loin de présenter l'expression d'une pareille volonté, il offre celle d'une volonté tout à fait contraire. Il fait défense, il est vrai, " d'engager, aliéner, hypothéquer la jouissance, intérêt ou usufruit " des biens légués ; mais dans quel but, et comment s'exprime-t-il ? Il veut que ses enfans grevés de substitution retirent cette " jouissance, intérêt ou usufruit " ; mais est-ce pour eux seuls et pour se l'approprier exclusivement ? Non ; c'est pour " leur pension et subsistance," il est vrai, mais c'est aussi " pour la *subsistance* et l'éducation de leur *famille*." C'est ainsi que s'exprime le testateur. La *famille* du grevé est mentionnée par le testateur ; il n'a donc pas borné au grevé seul sa disposition quant à l'emploi qui devait être fait de cette " jouissance, intérêt ou usufruit ;" il l'a expressément étendue *à la famille* du grevé ; celui-ci ne doit rien faire qui puisse en priver cette *famille*. Cette disposition ayant été ainsi étendue à *la famille* du grevé, elle s'étend donc à la femme de ce dernier ; car qui, plus qu'elle, appartient à cette famille ? Si elle n'en fait pas partie, qui donc en fera partie ? L'Appelante a donc pour ainsi dire, par le testament même, par la volonté exprimée du testateur, un droit acquis à participer dans cette " jouissance, intérêt ou usufruit, " pour sa subsistance. Or, la *pension alimentaire* que son mari est condamné à lui payer, lui a été accordée pour sa subsistance ; ainsi tout acte qui, soit volontaire de la part de l'Intimé, soit forcé par ordre d'une Cour de Justice, tend à assurer à l'Appelante cette participation, qui ne doit avoir d'autre effet que de lui procurer cette subsistance que le testateur a eue en vue, est un acte conforme aux volontés du testateur, et par conséquent valide et légal, puisqu'il ne fait que ga-

rantir l'execution de ces mêmes volontés. La défense " d'engager, aliéner et hypothéquer " ne peut donc s'appliquer à un acte de cette nature. Elle ne regarde que l'acte au moyen duquel le mari grevé " engagerait, aliénerait ou hypothéquerait " cette " jouissance, intérêt ou usufruit " au profit d'un tiers, et au préjudice non seulement de lui-même, mais encore au préjudice de sa *famille*, et par conséquent de sa femme.

Il y a d'autant plus de raison de dire que le Tribunal Inférieur a fait une application erronée des principes, que le Président, en prononçant Jugement, parut s'appuyer principalement sur une décision antérieure de la même cour dans une cause de Chabot contre Dillon, donnant à entendre que la même question y avait été jugée dans le même sens, cependant les deux cas sont bien différents. Dillon, père, avait légué la jouissance et l'usufruit de ses biens à ses quatre enfants, avec déclaration expresse que c'était pour leur servir d'aliments, et avec défense, en conséquence, de faire aucun acte qui fut de nature à les priver de ces aliments. L'une de ses filles, non-mariée et avancée en âge, cède et transporte à Chabot, personne étrangère a la famille, le quart qu'elle pouvait prétendre dans la succession de son père. C'est cet acte d'aliénation qui fut déclaré nul comme étant contraire aux volontés du testateur.

DE LA PART DE L'INTIMÉ :

C'est ici le cas d'une substitution fidei-commissaire et non d'un simple usufruit. La jouissance de ces biens est aussi donnée par le testateur à ses enfans (les grevés) pour leur subsistance alimentaire, il en a fait un legs d'alimens non aliénable et par conséquent non saisissable et il en avait le droit. L'effet de la saisie de ces biens devant avoir pour résultat une aliénation et aussi de priver l'Intimé du revenu d'iceux serait directement contre la volonté du testateur qui a voulu tout le contraire, car ces biens aliénés, il ne reste rien à l'Intimé pour sa subsistance alimentaire, ce qu'a voulu empêcher le dit testateur et il en avait le droit.

L'Appelante en vertu du jugement en séparation de corps et de biens qu'elle a obtenu contre l'Intimé et de la condamnation pécuniaire qui s'y trouve en sa faveur est devenue purement et simplement créancière de son dit époux et n'a pas plus de droit pour être payée sur les biens substitués déclarés insaisissables qu'aucun autre créancier et ne peut être considérée que sur le même pied.

L'Intimé cite à l'appui de ses prétentions les autorités suivantes. Proudhon, vol. 1er, page 12. No. 16. Le même, vol. 2d, No. 894, Répertoire de Jurisprudence, Verbo, Aliment, pages 324 et 325. Pigeau, vol. 1er, pages 612 et 650. Héricourt, Vente d'Immeubles par décret, page 44.

Le 10 Mars 1845 est intervenu le jugement de la Cour d'Appel qui met au néant celui du tribunal de première instance. En voici la substance : (traduction de l'Anglais.)

" La Cour d'Appel,..... considérant que l'usufruit viager, saisi et " pris en exécution en cette cause à la poursuite de l'Appelante, et mentionné dans l'Opposition *afin d'annuler* de l'Intimé, appartient (is " vested) au dit Intimé, en vertu du testament de feu J..... dit C....., " son père, et est possédé par lui l'Intimé en vertu d'un legs contenu au " dit testament à l'effet que le dit Intimé jouira du dit usufruit, sa vie durant, pour sa provision alimentaire et pour la subsistance et l'éducation " de sa famille ; et considérant aussi qu'à raison du dit legs, ne peut-être " regardée comme exempte d'exécution et de vente, que telle partie du dit " usufruit saisi et pris en exécution comme susdit, qui peut être nécessaire

" pour assurer et fournir la provision alimentaire susdite et pour la subsis-
" tance et l'éducation susdites, et que la valeur du dit usufruit viager peut
" excéder ce qui peut être nécessaire pour ces fins ; et considérant encore
" qu'il n'a pas été constaté par aucun procédé de la Cour Inférieure, et
" qu'il est tout de même incertain, quelle peut être la valeur du dit usu-
" fruit viager ; et considérant aussi qu'il devrait être constaté si la vente
" du dit usufruit viager d'une certaine partie ou de certaines parties des
" biens immeubles, qui y sont sujets, ne pourrait pas avoir lieu sans affecter
" la provision alimentaire que le susdit legs avait pour but d'assurer et
" qui pourrait être fournie à même l'usufruit du reste des dits biens im-
" meubles, qui y sont sujets ; et considérant en conséquence qu'en main-
" tenant la dite opposition du dit Intimé, et en déclarant la saisie du dit
" usufruit nulle et de nul effet, sans enquête préalable des faits en dernier
" lieu mentionnés, *il y a erreur dans le dit jugement* de la Cour Inférieure ;
" il est décidé par la présente Cour que le jugement dont est Appel, savoir
" le jugement de la Cour du Banc du Roi du district de Montréal, rendu
" en cette cause le 19 Février 1844, soit et il est par les présentes infir-
" mé et annulé ;"

" Et cette Cour, procédant à rendre le jugement que la Cour Inférieure
" aurait du rendre, adjuge et ordonne, avant décision finale sur l'opposi-
" tion susdite du dit Intimé, que par Experts..... les biens immeubles
" dont l'usufruit a été saisi et pris en exécution comme susdit,.....

(*Suit la désignation de ces biens.*)

" seront visités et examinés, et que les dits Experts estimeront, établiront
" et rapporteront à la dite Cour (Cour Inférieure) sans délai, quels sont ou
" quels peuvent être les loyers, revenus et profits, ou la valeur annuelle ou
" autre de chacun des dits biens... et ce afin que la dite L...E.....F.....
" puisse, sur et à même le produit de la vente à faire en vertu du bref de
" *Fieri facias* émané en cette cause, de telles parties des dits biens immeu-
" bles, qui seront trouvées excéder en valeur ce qui peut être nécessaire pour
" la subsistance et l'éducation de l'Intimé et des autres membres de sa
" famille, être payée du montant de son jugement, en principal, intérêt
" et frais, mentionné dans le dit bref de *Fieri facias* ; et que, dans le cas
" où il n'y aurait pas un tel excédant, ou que l'excédant ne serait pas
" suffisant pour acquitter le dit jugement, elle soit maintenue dans ses droits
" concurremment avec le dit Intimé et les autres membres de sa famille."

Ce jugement a été rendu à l'unanimité. Les Juges présens étaient les honorables Sir James Stuart, Baronet, Juge en chef du Bas-Canada, Bowen, Panet, Bedard et Mondelet.

MM. LaFontaine et Berthelot, Avocats de l'Appelante.

M. Giard, Avocat de l'Intimé, et M. Cartier, plaidant en Appel.

QUEBEC.—QUEEN'S BENCH.

No. 1607.

A. FERGUSON & AL. *Plaintiffs,*

vs.

ROBERT CAIRNS & AL. *Defendants.*

The discharge granted to a Bankrupt by two thirds in number and in value, of the creditors who have proved under the commission, by a composition in virtue of the 41st section of the 7th Viet. cap. 10, is not binding upon those of the remaining creditors, who have hypothecary claims, and who have not required that the real estate should be sold for the payment of their claims, and who have not released to the Assignee the property hypothecated ; and such creditors have still their personal action against the said Bankrupt.

This was an action of debt, by which the Plaintiffs claimed as legatees of the late Archibald Ferguson, from the Defendants, sole heirs and representatives of the late Robert Cairns, the sum of seven hundred and sixty nine pounds six shillings, amount of the said late Robert Cairns' obligation in favor of the said late Archibald Ferguson, executed before Glackmeyer and another, Notaries, at Quebec, the 21st July 1827. The action was brought in October, 1841, and after pleadings had been had and issue perfected, the Defendant, Robert Cairns, who was a trader, became a Bankrupt on the 12th February 1844, within the meaning of the Statute of this Province relating to Bankrupts, (7th Viet. cap. 10,) and on the eleventh of April, 1844, the said Robert Cairns, at an adjourned second meeting of his creditors, compounded with them under the provisions of the 41st section of the said Statute. Upon this the Defendant, Robert Cairns, obtained leave to plead *de novo* to the action, and by his plea of Temporary Exception, *péremptoire en droit,* filed on the 22d May, 1844, he pleaded his Bankruptcy. The various proceedings before the Commissioner of Bankrupts, the deed of composition executed before Hossack and another, notaries at Quebec, on the said 11th April 1844, between John Thompson, Assignee to the estate and effects of the said Robert Cairns of the first part :

The said Robert Cairns, of the second part :

John Thompson, acting for George Lermitte, of London, woollen draper, under power of attorney duly executed, and James Hunt, creditors of the said Robert Cairns, of the third part :

And James Douglas, of Quebec, Esquire, of the fourth part; by which deed of composition it is covenanted and declared among other things : that the said Robert Cairns, having committed an act of bankruptcy, and the creditors, who had proved their debts, namely the said George Lermitte and James Hunt, having taken into consideration the insolvent condition of the affairs of the said Robert Cairns, and being two thirds of the said creditors in number and in value, did compound with him for the sum of six shillings and eight pence in the pound, payable in the manner stated and set forth in the said deed, the payment of the said sum guaranteed by the suretyship of the said James Douglas, upon which the said John Thompson, as Assignee and as Agent of the said George Lermitte and the said James Hunt, as well for themselves as for all whom the said deed might concern and affect, as the remaining third of the creditors of the

said Robert Cairns, and in so far as they were authorized by the said statute, did accept of the said composition, and agreed that the said Commission of Bankruptcy should be superseded and the said John Thompson, as Assignee, did assign unto the said Robert Cairns all the estate and effects real and personal which had been previously conveyed to him as such Assignee : And the said John Thompson, agent as aforesaid, and the said James Hunt, did release and discharge the said Robert Cairns from all debts, claims and demands due by him at the time of the issuing of the Commission of Bankruptcy.

He further pleaded that he was indebted to the Plaintiffs in a certain sum for his share, as one of the heirs of the said late Robert Cairns, of the said obligation, his readiness and willingness to perform and fulfil the covenants and undertaking in the said deed of composition mentioned, and to pay the dividend upon the sum due, which dividend he paid into Court.

To this plea of Temporary Exception *péremptoire en droit*, the Plaintiffs replied specially : that the debt claimed by them was contracted by the said late Robert Caires in his lifetime, and that, at the time of his decease, his immoveable property was mortgaged in favor of the late Archibald Ferguson for the payment of the sum mentioned in the obligation of the 21st February, 1827:—that at the time of the decease of the said late Robert Cairns he was proprietor and in possesion of certain immoveable property described in the said special answer :—that the said late Robert Cairns, at the time of his decease, was likewise the sole owner of divers goods, chattels and effects mentioned in an inventory of his estate :—that, at the time the said Defendant Robert Cairns, became a Bankrupt, as alleged by him in his plea of Temporary Exception, he was, as one of the heirs of his deceased father, in possession of one fourth part of the estate real and personal of his said father :—" That by law the said Defendant could not convey or assign over any part of the property, real and personal, so left by his deceased father, in payment of his own debts and to the prejudice of the rights and claims of the creditors of his said deceased father.

" Yet the said Defendant, Robert Cairns, not regarding the just rights of the said Plaintiffs, as his creditors, with a right of mortgage, *droit d'hypothèque*, on the real property left by the said late Robert Cairns, with the view of defrauding the said Plaintiffs and depriving them of of their rights of mortgage, *droit d'hypothèque*, on the said real property, did by the deed of composition made and executed at Quebec on the 11th April 1844, before Hossack and his colleague, Notaries, and alleged in the plea of temporary exception filed by the said Robert Cairns, Defendant in this cause, agree to pay to George Lermitte and James Hunt, each, six shillings and eight pence in the pound of and upon the amount of their several and respective debts, and in full discharge, liquidation and satisfaction of the said several debts then due and owing to the said George Lermitte and James Hunt respectively, in the manner expressed and set forth in the said deed of composition, in consideration whereof the said John Thompson, as Assignee of the Bankrupt estate of the Defendant, Robert Cairns, did, by the said deed, assign and set over unto the said Defendant, Robert Cairns, his executors, administrators and assigns, all and singular the goods, wares and merchandizes, debts and sums of money, estate and effects, real and personal, which were comprised in and assigned over to the said John Thompson, as such Assignee of the Bankrupt estate of the said

Defendant, Robert Cairns, the said assignment comprising, to the knowledge of the said John Thompson, James Hunt, and Robert Cairns the Defendant, the real estate belonging to the said late Robert Cairns, as is above more particularly stated."

That, by reason of the premises, the Plaintiffs were not bou d and obliged by the said deed of composition, but on the contrary had a right by law, to claim from the said Robert Cairns the amount demanded by their declaration :—that the deed of composition was null and void, inasmuch as the said John Thompson, at the time the said deed was executed, was not authorized to sign the same, either as Assignee of the Bankrupt estate of the said Robert Cairns, or as agent or otherwise representing the said George Lermitte and James Hunt.

This issue having been perfected by a general replication to the special answer of the Plaintiffs, and the parties having gone to proof and been respectively heard, the Court, on the 29th July, 1845, rendered its Judgment, which is as follows:

The Court of our Lady the Queen now here, having seen and examined the pleadings fyled, the evidence advanced, and the proceedings of record in this cause, and having heard the parties by their counsel respectively ; considering that the several allegations of the Plaintiffs in their declaration contained to entitle them to recover from the Defendants, Robert Cairns, James Cairns, Hamby Fergusen Cairns, and Ann Hope Cairns, as heirs at law of the late Robert Cairns, their father deceased, the amount of the debt specified in the obligation declared on in this cause, have been legally proved and established ; considering also, that that the matters pleaded in bar of the Plaintiffs' action by the Defendant Robert Cairns, in his plea styled Temporary Peremptory Exception, are without legal foundation, and more particularly that the Plaintiffs have not, in the proceedings had before the Commissioner of Bankrupts on the Commission of Bankruptcy, issued against the said Robert Cairns, one of the said Defendants, required that the real estate hypothecated for the said debt should be sold and the proceeds applied to the payment of their said debt, nor have they released and delivered up to the Assignee of the estate of the said Robert Cairns, the premises on which their hypothec for the said debt subsists, and that they could not therefore be admitted as creditors on the Bankrupt estate of the said Robert Cairns for the said debts; that they have not been, and for this reason could not be allowed to prove their said debt or any part thereof before the Commissioner of Bankrupts, and that therefore the deed of composition in the said plea of the said Robert Cairns mentioned is not binding on the said Plaintiffs, and is without any legal operation or effect on the said debt. Considering also, that by reason of the renunciation of the said Alexander Cairns to the succession of his said late father Robert Cairns, since the attainment of the age of majority, he the said Alexander Cairns is under no legal liability for the said debts or any part thereof. It is adjudged by the said Court now here, that the said plea of exception of the said Robert Cairns, one of the Defendants, be and the same is hereby overruled and dismissed ; and it is further adjudged by the said Court now here, that the said Archibald Ferguson, Joseph Cary and Mary Ann Ferguson, his wife, Margaret Ferguson and Rebecca Ferguson the Plaintiffs, for the causes, matters and things in their said declaration set forth, do recover from the said Robert Cairns,

James Cairns, Hamby Ferguson Cairns, and Ann Hope Cairns, as heirs at law of their late father, Robert Cairns, the sum of seven hundred and sixty-nine pounds six shillings, current money of the Province of Canada, being the amount of the debts specified in the notarial obligation declared on, with interest for the said sum from the first day of February, one thousand eight hundred and thirty-four, till paid, and costs of suit. And it is further adjudged by the said Court now here, that the peremptory exceptions of the said Alexander Cairns be, and the same are hereby maintained, and that the said action of the said Plaintiffs in so far as it respects him the said Alexander Cairns be, and the same is hereby dismissed with costs to the said Alexander Cairns, against the said Plaintiffs, on the said Peremptory Exceptions, and from and since the filing thereof. To which judgment the Honorable Mr. Justice Bedard dissented and declared that he was of a contrary opinion.

The dissent of Mr. Justice Bedard is here to be understood as applicable only to that part of the Judgment dismissing the Temporary Exception of Robert Cairns, and condemning him personally to pay to the Plaintiffs his share of the amount claimed by them.

NOTA.—As the Judgment does not contain the motives of the dissent, here follows the substance of what was stated by the Honble. Mr. Justice Bedard : La seule action, qui reste aux Demandeurs contre Robert Cairns, libéré de ses dettes en vertu de la loi des Banqueroutes, serait l'action hypothécaire. Basnage, livre des hypothèqnes; partie I, c. 17, p. 96, édition folio. "Lorsque l'action personnelle est éteinte, l'hypothécaire ne laisse pas de subsister, quoiqu'elle ne lui soit qu'accessoire. *sublatâ actione personali hypothecaria durat.* L'on ne peut pas, d'abord, constituer une hypothèque sans une obligation principale, mais lorsqu'elle est une fois contractée, elle peut aisément être séparée de l'obligation principale."

QUEEN'S BENCH, MONTREAL.

No. 1928. *Vac. after July Term*, 1845.

WILLIAM FOOTNER, *Plaintiff*;

vs.

JAMES G. HEATH, *Defendant.*

This was an *action redhibitoire* :—Plaintiff declared, that on 7th November, 1844, he bought from Defendant a cask of olive oil, for £48 9*s.* which he paid for at the time, Defendant promising that the oil should be good olive oil, fit for burning; that immediately after the oil was delivered he examined it, and found it unburnable and useless; that he offered it back to Defendant who refused to receive it;—conclusion, that Defendant be ordered to take it back, and to return Plaintiff price paid, with interest and costs.

Defendant pleaded, that at time of sale he was a Commission Merchant, and known as such to Plaintiff; that Defendant had received said oil in consignment from a house in England, and did not know at time of sale that it was affected with any vice; that Plaintiff saw a sample of it at the time of sale; that it was delivered to Plain-

tiff on the 7th November last; that after it had been seven days in Plaintiff's possession, he gave Defendant a note for it, which note was afterwards duly paid, thus closing the transaction in respect of the said oil; that the Defendant, before Plaintiff made any complaint, had remitted to his principal the proceeds of the sale; that Plaintiff made no complaint until six weeks after the sale; that if there was any vice in the oil at the time of the sale, it was easily ascertainable, and that if any such vice did exist, the Plaintiff, by common care, could have ascertained the same at the time of the sale; that if the oil did not burn well at the time of delivery, it was merely because it had not time to settle, and not because any vice existed in the oil affecting its substance or essential qualities; that long before the institution of the action, the oil had become fit for use, and that it had not taken an unreasonably long time to settle, considering that it was sold in the original cask; that more than six months elapsed between time of sale and the action.—Replication was general.

At the Trial—Plaintiff called *Wood*, the Defendant's clerk, who proved the sale, and payment at the time of sale, by a note which was afterwards paid; that at the time of sale he was asked his opinion of the oil, and said it was good but did not guarantee it: first complaint made by Plaintiff about a month after purchase—Plaintiff offered back the oil, but witness refused it; Plaintiff saw a sample of oil in another cask; cannot say that that sample was burnable; after Plaintiff complained of the oil sold to him, witness tried some of the same lot and it would not burn, but afterwards it did, and now it does burn. Plaintiff's two clerks proved the oil unburnable, and useless at the time Plaintiff opened it; it was tried fairly, the part tried being thawed perfectly; this was about a fortnight after delivery; Plaintiff offered it back to Jones, (also an agent for Defendant,) immediately afterwards. Oil such as this is intended for burning. No manufactories here which use or buy such oil. Plaintiff has the oil still in his possession. Plaintiff is now retired from business. Other witnesses proved that such oil, oil in such bulk, was intended for burning, and was generally considered lamp oil; one said that he, sometime after sale to Plaintiff, asked Defendant's clerk if he had olive lamp oil for sale, who replied that he had, but could not sell it, it being bad. Impossible, from merely looking at oil, to say whether it is burnable.

Defendant called several witnesses, among them Wood, the Defendant's clerk, who proved that Defendant was and is a Commission Merchant only; that the oil sold to Plaintiff had been received on commission; that after sale, and before complaint was made, proceeds had been remitted to principals; that since the action brought, witness asked Plaintiff to let him try the oil, but Plaintiff refused. Plaintiff may not have known that Defendant was a Commission Merchant; the bill of sale was made in the name of the Defendant simply. Defendant has a sign over his place of business, but the words "Commission Merchant" are not upon it. The custom of trade is, that by the giving and the taking of a note, the transaction is closed. Other witnesses deposed, that the Board of Trade allowed only two days for examination, after delivery of goods sold; that oil has a great sediment, and does not settle for a long time; that the oil sold to Plaintiff might have required till the spring to settle properly; that before settling, the oil might be unfit for use, although not bad. Olive oil is used in manufactures as well as for burning.

Meredith, Q. C. & *Bethune*, for Defendant. The Plaintiff did not buy *lamp* oil expressly, account sales states olive oil simply. The oil sold is not proved to have been useless for a variety of purposes, for which it might have been used. Defendant did not warrant the oil sound for burning, no fraud is alleged, and the maxim *caveat emptor* applies. Defendant buying the oil when he did, late in the fall, and from a quantity just received, must have known that it would have been congealed, and not very clear for sometime afterwards, but require time for settling. Action is brought too late after settlement. There would be nothing but unsettling of accounts, if actions like the present were successful. Defendant is a Commission Merchant, and has accounted to his principal.

Mackay for Plaintiff. From the nature of the contract of sale, vendor is bound to guarantee that the thing sold is fit for the purposes for which it is bought; he is as much bound to this, although he makes no express guarantee as if he did make one, Troplong, (*vente*) 411. Here the oil sold was not merely inferior, but unburnable, useless; it was affected with a vice latent. That it was bought for burning we must presume; that is the usual purpose to which such oil is applied; witnesses say that oil in such bulk is for burning. Plaintiff complained soon enough, and there is no rule *fixing* time (within thirty years) within which such actions shall be brought. Jury to judge whether or not the action has been brought soon enough. Plaintiff is not proved to have dealt with Defendant except in his own sole name. What if Plaintiff refused to let Wood try the oil since the action was brought? What if the oil be good now? It is proved to have been bad when he wanted it. If bad when Plaintiff wanted to use it, and when action brought, sufficient. Plaintiff is retired from business now. What if Plaintiff paid for the oil? Actions like the present are never brought but to recover a price *paid*.

Day, J. charged the Jury. It is not sufficient that a vice exist in the thing sold. It must be of a character not to be perceived at once. The vice alleged to have been in the oil sold is of such a character. Defendant was bound to guarantee that the oil sold was fit for the usual general purposes. It is for the Jury to say for what purpose Plaintiff probably bought it, and for what purposes it was probably sold—established that oil in such packages is generally used for burning—appears clearly that the oil would not burn when Plaintiff tried it. Defendant said because mucilage was suspended. It is for the Jury to decide, whether the fact that the oil was not combustible at the time, although it may since have become combustible, is, or is not sufficient to set aside the sale. Was the Defendant bound to sell oil burnable *at that time?* Would a temporary defect in the oil entitle Plaintiff to set aside the sale and seek back the price? It is said that the action is not brought in time; the general rule is, that nothing but prescription can bar an action. In cases like the present, usage will govern probably. If the Jurors think that Plaintiff examined the oil within a reasonable time, and that the action has followed soon enough, Plaintiff is entitled to verdict. The payment by Plaintiff neither increases nor diminishes the rights of the parties, nor is the case affected by the Defendant's being a Commission Merchant: Defendant did not treat with him in that quality, and did not know any other party but Defendant.—The Jury returned a verdict for Plaintiff, granting his conclusions.

MONTREAL—QUEEN'S BENCH,

July, 1845.

No. 1337. ZEIGLER *vs.* MCMAHON.

The Lessor to use the right of *Saisie Gagerie par droit de suite*, is bound to declare and prove that the lessee has not left sufficient furniture to secure the rent.

The Plaintiff in this cause, by Deed before Notaries, leased to the Defendant a hardware merchant, a certain house and premises in Notre Dame Street, (Montreal,) for the term of five years from the 1st of May, 1843, for the price of £160 for the first year, and £200 foreach subsequent year, payable by quarterly payments. In the month of March, as the Defendant was removing to another place, the Plaintiff issued against him a *Saisie Gagerie par droit de suite*, setting forth in his declaration that the Defendant was *removing all his household furniture, which furnished the said house, and were affected to the payment of the rent* stipulated in the said lease, praying that the said household furniture and other goods should remain *Saisis gagés*, for security of the rent to become due according to the said lease.

To this action the Defendant pleaded a demurrer and the general issue.

The reasons in support of the demurrer were as follows :—

Firstly. Because inasmuch as at the time of the institution of the present action and of the issuing of the writ of *Saisie Gagerie* in the said cause, the Plaintiffs admit in their declaration, that their was no sum of money whatever due or payable by the Defendant to the Plaintiffs under the lease mentioned in the Plaintiff's, declaration, the Plaintiff could not by law sue out a writ of *Saisie Gagerie* against him, the Defendant, or bring the present action.

Secondly. That inasmuch as it is admitted by the said declaration, that at the time aforesaid the Defendant was not indebted to the Plaintiff in any sum of money whatsoever for rent of the premises in the said declaration described, the Plaintiff could not by reason of the transfer to other premises of any part or even of all the household furniture and other effects contained in the said house, wage any action against the said Defendant other than an action to rescind the lease mentioned in the said declaration.

Thirdly. That it is not alleged in the said declaration that there were not at the time of the institution of the said action household furniture and other chattels sufficient in value to answer for the payment of one year's rent of the premises leased by the Plaintiff to the Defendant.

Fourthly. Because the said Plaintiff has not shewn in his said declaration any right of action against the Defendant.

The answer was general. The Defendant admitted that all the goods seized (forming almost a complete stock,) had been removed by him from the Plaintiff's premises into the new store, within the eight days preceding the seizure thereof, and in that state the cause was submitted. In the argument, the Defendant rested on the 163rd article of the *Coutume de Paris*. granting the right of *saisir gager* for arrears of rent only, and that if there were not in the premises sufficient furniture to secure the rent the Lessor had no other remedy than the action of ejectment, and insisted on the necessity of alleging the insufficiency of the

furniture. On the other part, the Plaintiff contended, that it was incumbent on the Defendant, in order to invoke the exception to the general principle, granting the *droit de suite*, to show that the premises were furnished sufficiently, the Plaintiff being legally unable to enter the Lessee's house to ascertain the amount or value of the goods and furniture therein, otherwise it would be obliging the Plaintiff to prove a denegation, *prouver la négative*; and that the allegation required by the Defendant was contained in the words used in the declaration and above cited. And as to the right of seizing before the rent is due, it would be depriving the Lessor of the recourse intended by the law, which is to be taken in a short delay after the removal of the furniture. On the 28th July, 1845, the Court rendered the following Judgment:

The Court, having heard the parties by their Counsel, as well upon the law-issue raised in this cause, as upon the merits of the case, having examined the proceedings, seen the admissions given by the said Defendant, and upon the whole duly deliberated, considering that there is no proof before the Court, or of record, that the house and premises mentioned and described in the Plaintiff's declaration were not at the time of issuing the *saisie gagerie* garnished for security of the rent to become due for the said premises under the lease thereof from the Plaintiff to the Defendant, passed, &c., doth declare the *saisie gagerie* made in this cause null and void, with costs against the Plaintiff.

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