Technical and Bibliographic Notes / Notes techniques et bibliographiques

Canadiana.org has attempted to obtain the best copy available for scanning. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of scanning are checked below.

Canadiana.org a numérisé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de numérisation sont indiqués ci-dessous.

- ☐ Coloured covers / Couverture de couleur
- ☐ Covers damaged / Couverture endommagée
- ☐ Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- ☐ Cover title missing / Le titre de couverture manque
- ☐ Coloured maps / Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- ☐ Bound with other material / Relié avec d'autres documents
- ☐ Only edition available / Seule édition disponible
- ☐ Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.

- ☐ Coloured pages / Pages de couleur
- ☐ Pages damaged / Pages endommagées
- ☐ Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached / Pages détachées
- ☑ Showthrough / Transparence
- ☑ Quality of print varies / Qualité inégale de l'impression
- ☐ Includes supplementary materials / Comprend du matériel supplémentaire
- ☐ Blank leaves added during restorations may appear within the text. Whenever possible, these have been omitted from scanning / Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été numérisées.

- ☒ Additional comments / Commentaires supplémentaires: **Comprend du texte en anglais.**

LA

REVUE CRITIQUE

DE

Législation et de Jurisprudence

DU

CANADA.

PUBLIÉE PAR

MM. Wm. H. Kerr, L. A. Jetté,
D. Girouard, John A. Perkins,
H. F. Rainville.

avec le concours de plusieurs avocats.

De fide et officio judicis non recipitur quæstio, sed de scientiâ sive sit error juris sive facti.—Lord Bacon.

Tome II. - - - - 1872.

MONTRÉAL:
DAWSON BROTHERS, EDITEURS.

MITCHELL & WILSON, PRINTERS.

SOMMAIRE DES MATIERES.

1ÉRE LIVRAISON.

2ME LIVRAISON.

3ME LIVRAISON.

4ME LIVRAISON.

REVUE CRITIQUE

DE

Législation et de Jurisprudence.

CORRIGENDA.

Page	74	22	line,	read,	1791.
"	80	8	"	"	any body.
"	"	12	"	"	excluded.
"	"	16	"	"	fairness.
"	"	24	"	"	ever.
"	"	last	"	"	Roquière.
"	82	"	"	"	citius.
"	84	30	"	"	Foucart.
"	85	1	"	"	ou la commune.
"	87	27	"	"	Sebire.
"	89	23	"	"	account.

Again, it is quite certain that the Lieutenant had no jurisdiction in ecclesiastical matters. The royal commissions uniformly say that he is to be judge in all matters civil as well as criminal, and even to be judge, solely and without appeal, in civil matters: "Juger toutes les matières tant civiles que criminelles et même juger seul souverainement en matières civiles." *

Much stress is laid on the Edict of Installation of Mgr. de Pontbriand (1741), cited in the first part of this article,†

* 3 Ed. et Ord., 34, 39, 42, 46, 50, 56, 60, 62, 64, 66, 70, 75.

† Vol. 1, p. 437.

24293

REVUE CRITIQUE

DE

Législation et de Jurisprudence.

CONSTITUTIONAL LAW.

CHURCH AND STATE.

I. In Spiritual Matters.

§ 1. *Ecclesiastical law under the French Crown.*

(*Continued from Vol. I., page* 456.)

Since the publication of the first part of this article, we have examined the supplementary factum of Messrs. Doutre and Laflamme, in the Guibord case. According to the learned advocates, the revocation of the Intendant Dupuy's ordinance of 1728, proves only that he had no power to act without the concurrence of the Governor. Well, admitting that Governor De Beauharnois did not go farther than that, where is the law conferring upon our present courts the combined powers of the Governor and the Intendant?

Again, it is quite certain that the Intendant had no jurisdiction in ecclesiastical matters. The royal commissions uniformly say that he is to be judge in all matters civil as well as criminal, and even to be judge, solely and without appeal, in civil matters: "Juger toutes les matières tant civiles que criminelles et même juger seul souverainement en matières civiles." *

Much stress is laid on the Edict of Installation of Mgr. de Pontbriand (1741), cited in the first part of this article,†

* 3 Ed. et Ord., 34, 39, 42, 46, 50, 56, 60, 62, 64, 66, 70, 75.

† Vol. 1, p. 437.

JUN 4 1907

by which the King declares that he confirms the Papal bulls granted to that bishop "*vu qu'il ne s'y est trouvé aucune chose contraire aux priviléges, franchises et libertés de l'Eglise Gallicane.*" But this Edict does not say that the liberties of the Gallican Church ever did exist in Canada. The King, as protector of the Church in France, simply declares by these words that he had no intention of making or permitting innovations in the status of that Church. Such a declaration was the more necessary, because the edict was promulgated to confirm the appointment of a bishop, holding not from the Gallican Church, but immediately and directly from the See of Rome.

It is further contended that the name of "Catholic, Apostolic and Roman," given to the Church in the official papers of the colony, was a form generally adopted to distinguish it from the reformed churches. But what reason is there for supposing that any confusion could have been caused by the use of the term Gallican or Catholic Church? Was it not thus that the Church in France was universally and invariably designated; although the danger of confounding it with other religious bodies was much greater in the Mother Country than in Canada, where the number of the reformed was extremely small? No, the reason for so designating the Catholic Church in the colonial ordinances and statutes and in the articles of the capitulations and in the Treaty of Paris was a very different one; it was because she depended immediately on the Holy See. The Church of France was indeed a Catholic Church,* but her civil status was very different from the status of the same church in the other European countries, and especially in England and Scotland. In France the civil courts took cognizance of appeals in ecclesiastical matters and even in matters purely spiritual, while in England and in Scotland, before the Reformation, those appeals were carried directly to Rome, as they are to-day in Canada.

The court of the officiality, at first ignored by the Superior Council, is confidently asserted to have been at a later period recognized by that supreme tribunal. Whether there was or was not an officiality in the French colony is of no consequence, there being none in Canada to-day; for it is well-known that the *appel comme d'abus* existed in France, because the eccle-

* In most of the dioceses of France, the *Rituel de Paris*, not the *Rituel Romain*, was followed.

siastical jurisdiction had been created and exercised by the State. No authority can be quoted to show that the civil courts of France possessed or claimed original jurisdiction in ecclesiastical matters, although that jurisdiction is the one claimed for our courts in the name of the French King.

What results from the various decisions cited by Messrs. Doutre and Laflamme? Do they prove that the Superior Council of Quebec attempted to review the spiritual judgments of the Bishop or of his official—for, as we have shown in the first part of this article, an officiality, invested with private and voluntary jurisdiction, did exist in Canada, but destitute of the coercive and civil powers which it had in France? In the cause of the *Grand Chantre de Merlac*, letters of relief, *lettres de relief*,* and not a writ of appeal, or *intimation en appel*, were granted from a decision of the bishop by which he disposed of the *installation of the canons*, and which consequently affected their temporal income or benefices. In the case of Saint Fort, † the matter in dispute was a question of marriage, and the appeal was allowed *only on the clause forbidding the said St. Fort to contract marriage.* The *arrêt* of the 10th September, 1714, rendered in the cause of the official *Calvarin* and *Le Boulanger*, proves nothing more than that in a suit against a Recollet father, the nature of which is not stated, the Superior Council sent the parties back to the officiality. Like the other judgments in the two cases before cited, it is merely interlocutory and appears to be of the same nature as the judgments of *our present courts* in the cases of *Lussier* v. *Archambault*, and *Vaillancourt* v. *Lafontaine*; for it reserves the costs, thus giving it to be understood that the case would again come before the Council.‡ In the case of the widow *Peuvret*, § the dispute originated in the violation of a temporal right created by a general regulation or *règlement* of the Council itself concerning the position of widows' seats in the church. The judgment of the 12th June, 1741, is of the same nature; it forbids the *curés* to solemnize the marriage of minors without their parents' con-

* Ed. & Ord., Vol. 2, p. 129–130. The *lettres de relief* were a remission or grace supposed to be granted by the King in person. (Guyot, vis *Relief précis* and *Grand Bailli*).

† Ed. & Ord., Vol. 2, p. 160.

‡ Ed. & Ord., Vol. 2, p. 163.

§ Ibid, 193.

sent. (Ibid, 204.) The proof sought to be drawn from the *arrêts* rendered in the matter of the Canon *Tonnancourt* and the Curé *Récher* is no more satisfactory. In that case the matter in dispute had referenee to the division of a parish by the Bishop. Letters of relief were granted on the 30th June, 1750; but on the 16th October following, the appeal was dismissed on the merits, and the canons condemned to a fine of 75 livres and costs, the Council holding that there was no *abus*. (Ibid, 228—232.)

The judgments recorded on pages 58, 63, 154–157 of Vol. 2 of the Edicts and Ordinances, also all relate to the temporalities of the Church. Far from proving the arguments of the learned advocates, they render it certain that no appeal *comme d'abus* lay from the acts of the ecclesiastical authorities except in civil matters. Thus the ordinance of the Council on page 58 relates to abuses committed by the churchwardens and the *curé* in the management of the Church property. The decision on page 63 commands M. de Bernières or Messire Dudouyt to file immediately in the office of the Council the titles of their alleged ecclesiastical jurisdiction. The *règlement* on page 154 has reference to the honors due to the *seigneurs* in the churches, and declares among other things that "le seigneur aura droit de sépulture dans le choeur, hors du sanctuaire, pour lui et sa famille, lorsqu'il aura donné la terre sur laquelle l'église aura été bâtie."

Upon the representation of the Vicars-General that this regulation was founded neither in right nor in possession, *and would be contested by the Bishop*, the Council decided that the *seigneur* and his family could be buried in that part of the Church wherein his pew was placed.

Such are the precedents,* drawn from the records of a Court possessing legislative power over a colony having a national church, which have been invoked to prove the existence of the *appel comme d'abus* in ecclesiastical matters. All these decisions relate to the temporalities of the Church. There is nothing to show that in the greatest number of instances the judgment was a final one; and it seems to us not more logical to deduce from them the conclusion that the *appel comme d'abus* existed in New France as in the Mother Country, than to infer the ecclesiastical jurisdiction of our Superior Court from the fact of its issuing a writ of *mandamus* in order to hear the

* They are also reproduced by Mr. Gonzalve Doutre in a communication published farther on.

civil part of a mixed cause. Finally, the reader may form an idea of the legal weight of some of these decisions when he is informed that there were no lawyers in the colony, it being thought to its advantage to exclude them; and that even the greater part of the judges, as the King says in his instructions to the Intendant Duchesneau, were possessed of very little experience.* It is therefore not surprising to find that some of these decisions are based upon statutes of the Mother Country which were never in force in the colony; as for instance that of 1714 rendered in the case of the Recollet Father in pursuance of the ordinance of 1695, although it is universally admitted that this ordinance had never been registered by the Superior Council, and consequently has never formed part of the laws of Canada.

It is further argued that General de Tracy was commissioned to "commander tant aux peuples qu'à tous nos autres sujets, *ecclesiastiques*, nobles et gens de guerre et autres de quelque qualité et condition qu'ils soient." Who has ever pretended that the ecclesiastics were not subjects of the French King, as they are to-day of Her Britannic Majesty?

Messrs. Doutre and Laflamme likewise bring forward the instructions given by the King to M. de Tracy, dated 15th November, 1664: "de tâcher de n'avoir pas de querelle avec les RR. PP. Jésuites, ce qui a été la cause pour laquelle le gouvernement a été retiré à M. d'Avangour et à M. de Mézy; mais en les ménageant, qu'il prenne garde de les laisser rien entreprendre sur l'autorité qui lui a été commise ainsi que contre les intérêts de sa Majesté." It must be confessed that a very clear mental vision is required to find in this counsel any trace of the introduction into Canada of the liberties of the Gallican Church.

The instructions given to M. Talon on the 23rd March, 1665, and to Count de Frontenac on the 7th April, 1672, do not afford any stronger proofs. M. Talon is informed "que ceux qui ont fait des relations les plus fidèles et les plus désintéressées du pays ont toujours dit que les Jésuites (dont la piété et le zéle out beaucoup contribué à y attirer les peuples qui y sont à present) y ont pris une autorité qui passe au-delà des bornes de leur véritable profession, qui ne doit regarder que les consciences. Pour s'y maintenir ils ont été bien aises de nommer le Sieur Evêque de Pé-

* 1 Ed. et Ord. 107.

trée (Mgr Laval) pour y faire les fonctions épiscopales, comme ils l'ont dans leur entière dépendance, et même jusqu'ici où ils ont nommé les Gouverneurs pour le Roi en ce pays-là, où ils se sont servi de tous moyens possibles pour faire révoquer ceux qui avaient été choisis pour cet emploi, sans leur participation ; en sorte que comme il est absolument nécessaire de tenir en une juste balance l'autorité temporelle qui réside en la personne du Roi, et la spirituelle qui réside en la personne du dit Evêque et des Jésuites, *de manière toutefois que celle-ci soit inférieure à l'autre*, la première chose que le dit Sieur Talon devra bien observer et dont il est bon qu'il ait en partant d'ici des notions presque entières, est de connaître parfaitement l'état auquel sont maintenant ces deux autorités dans le pays et celui auquel elles doivent être naturellement."

It is true that this document mentions the spiritual as being inferior to the temporal jurisdiction. But it cannot be denied that in mixed matters the civil authorities alone were competent to draw the line of division between the civil and the spiritual; and it is in this sense only that the spiritual authority in Canada was subordinate to the civil, just as it is to-day under the British Crown. And what is the meaning of the recommendation made to Talon "*de connaître parfaitement l'état des deux autorités dans le pays et celui auquel elles doivent être naturellement ?*" Does it not demonstrate in the most convincing manner that the civil status of the Catholic Church in France had not been transplanted into, and was not yet settled in Canada ?

The instructions given to M. de Frontenac command "que le dit Sieur de Frontenac aît beaucoup de considération pour eux (les Jésuites), mais en cas qu'ils voulussent porter *l'autorité ecclésiastique plus loin qu'elle ne doit s'étendre*, il est nécessaire qu'il leur fasse connaître avec douceur la conduite qu'ils doivent tenir, et en cas qu'ils ne se corrigent pas, il s'opposera à leurs desseins adroitement, sans qu'il paraisse ni rupture ni partialité, et donnera avis de tout à Sa Majesté, afin qu'elle y puisse apporter le remède convenable."

The instructions given to M. Talon, as above cited, show that the ecclesiastical authority extended to spiritual matters. And even in the event of encroachment upon the temporal authority, the instructions to M. de Frontenac are not that recourse should be had by *appel comme d'abus*. On the contrary, he is directed to oppose their designs, *adroitement et sans rupture*, and to make a report of the whole to His Majesty.

"Mais," say the learned Counsels in conclusion, "l'ordonnance de 1667, qui a toujours eu tant d'autorité en Canada, où elle a été executée avant même d'avoir été enrigistrée (en 1678) au Conseil Supérieur (voir arrêt du Conseil Supérieur du 10 Sept. 1674, *in re* Abbé de Fénélon, registre A, folio 194), consacre le titre XV aux procédures sur le possessoire des bénéfices et sur les régales. L'art. 4 de ce titre dit: 'Les complaintes pour bénéfice, seront poursuivies pardevant nos juges, auxquels la connaissance en appartient, *privativement au juge d'église*, etc.' L'art. 8 du même titre dit: 'Il ne sera ajouté foi aux signatures et expéditions de la Cour de Rome, si elles ne sont vérifiées, etc.'"

The reason why complaints on account of the benefices of the Church were declared to be within the jurisdiction of the Civil Courts, is a very simple one: these matters, being temporal, were necessarily within the range of the Civil Courts. As to article 8, do the learned Counsels wish it to be understood that the bulls and decrees of the Holy See were to be verified and previously approved by the Superior Council? Such must be their intention, since they endeavour to prove the Council's jurisdiction in matters ecclesiastical. Well, article 8, when quoted more fully and as it stands in the Edicts and Ordinances, (vol. 1, p. 141), reads as follows: "Il ne sera ajouté aucune foi aux signatures et expéditions de Rome, si elles ne sont vérifiés, ET SERA LA VERIFICATION FAITE PAR UN SIMPLE CERTIFICAT DE DEUX BANQUIERS ET EXPÉDITIONNAIRES, ÉCRIT SUR L'ORIGINAL DES SIGNATURES ET EXPÉDITIONS SANS AUTRE FORMALITÉ."

In France, all benefices were, by law, granted by the King. In Canada they were also granted by him, not by virtue of the law of the realm, but in his quality of founder and patron of the Diocesan Chapter of Quebec, "conformément," says an Edict of 1713, "à la bulle du mois d'Octobre, 1674, qui attribue la nomination des bénéfices du dit chapitre à ceux qui les fonderont." *

Messrs. Doutre and Lareau in the October number of their *Histoire Générale du Droit Canadien*,† (pp. 217–312) speaking

* 1 Ed. et Ord. 339.

† By an entirely involuntary omission, the name of Mr. Edmond Lareau was not mentioned in our reference to this publication in the first part of this article, precisely as a lawyer, in pleading, cites Chitty *on Carriers*, without alluding to his colleague, Temple. We

of certain general regulations between the Bishop of Quebec and his Chapter, confirmed by His Most Christian Majesty on the 11th February, 1692, "du *consentement* du sieur Evêque de Québec et du sieur Abbé de Brisacier, supérieur du Séminaire des Missions Étrangères, faisant tant pour le dit Séminaire que pour le dit Chapitre de Québec, au sujet de plusieurs contestations, etc.," make the following remark: "Sur les articles à être réglés entre l'Evêque et le Chapitre de Québec, il y a peu de choses à remarquer, si ce n'est que *l'on oblige l'Evêque de se conformer aux usages des Eglises de France.*" Do the learned legists desire it to be understood by this, that the Canadian Church was held to conform to the privileges and liberties of the Gallican Church? We suppose so, for those privileges and liberties formed part of the usages of the French Church. Now, the regulation here alluded to, cited at length from the Edicts and Ordinances, p. 267, and not merely as analysed in the *Histoire Générale*, is in these terms: "Le grand vicaire, l'official et le promoteur de Monsieur l'Evêque se conformeront *pour les places et les rangs dans l'Eglise Cathédrale et partout ailleurs* aux usages de l'Eglise de France." The regulation, then, far from proving that the whole ecclesiastical law of France passed into the Colony, shows the contrary, inasmuch as the intervention of the King was necessary in order to introduce into the Province the usages of the French Church respecting the place and precedence of certain dignitaries in the Church.

Finally, the authors of the *Histoire Générale du Droit Canadien* have in their last number completely proved the fact that there was no *officialité contentieuse* in Canada. On page 249 the learned gentlemen say that the officiality *connaît du mariage quant à sa validité ou invalidité.*" At page 242 they say: "Le 26 Janvier, 1711, dans une procédure pour *faire casser* le mariage fait en contravention des dispositions du Concile de Trente, Montoléon, le marié, refusa de répondre, prétextant que le Conseil Supérieur n'avait aucune juridiction et demandant à être renvoyé à l'officialité de cette ville. LE CONSEIL SUPERIEUR REJÈTE LE DÉCLINATOIRE."

---

beg to assure Mr. Lareau that we had no intention of ignoring his due share of merit in the composition of that work. The name of Mr. Lareau is not, however, of sufficient weight to take away the presumption that his colleague, as President of the *Institut Canadien*, is naturally biassed in favour of the doctrines of that institution.

With regard to the revocation of the decisions of the Superior Council, rendered under the presidency of the Intendant Dupuy, against the Chapter of Quebec, Messrs. Doutre and Lareau observe: "Le Roi se contente de faire *grâçe* des amendes, tout en respectant l'autorité des arrêts du Conseil et de l'Intendant." And yet on reference to the letter of the Minister of State, the reader will see that "l'intention de Sa Majesté est qu'il y ait à donner *main levée des saisies et amendes.*"* How can it be pretended that the decisions of the Superior Council were respected by the King at the very time they were thus declared *non exécutoires* and nullified by his order.

The following letter of Governor de Beauharnois and the Intendant Hocquart to the French Court is conclusive:—"Nous avons examiné la procédure et les dépositions qui concernent ces deux frères, par les quelles il demeure comme constant que le Frère Césarée a contribué plus que tout autre à l'évasion de ces prisonniers. Le crime tout grave qu'il est par les conséquences, est devenu par les circonstances qui l'accompagnent une affaire très-difficile à juger en ce pays-ci. Les coupables sont religieux, et comme tels il aurait fallu instruire leur procès conformément à l'article 38 de l'Edit de 1695 sur la juridiction ecclésiastique, quoique cet Edit et les Déclarations de 1678 et de 1684, rappelées dans le dit article 38, ne soient pas enrégistrés au Conseil Supérieur, ni même trop connus ici; cependant comme nous sommes instruits que l'intention de sa Majesté est de maintenir les Ecclésiastiques dans leurs privilèges, M. Hocquart aurait été attentif à suivre les dispositions de ces Edits, s'il y avait en Canada une Officialité, comme dans les autres diocèses de France, pourvue de Juges éclairés. D'ailleurs le concours des deux juridictions n'aurait fait que multiplier les incidents, alonger une procédure, faire dépérir les preuves et peut-être favoriser l'impunité. C'est ainsi que nous en avons délibéré, mais dans une affaire aussi délicate, nous avons pris le parti de vous en rendre compte et de suspendre la procédure commencée contre ces Frères."

Thus, in 1731, the edict of 1695 respecting the privileges of ecclesiastics had not been registered in the Superior Council, and had scarcely been heard of in the colony. His Majesty did not establish it, he had merely the intention of doing so; ecclesiastics

* See Vol. 1, p. 449.

would, however, have been tried under that edict, if there had been an officiality in Canada, and besides an officiality composed of enlightened judges as in France; finally, the concurrence of the two jurisdictions would only have led to the multiplication of the proceedings; and still, in spite of evidence so clear and so precise, it is contended that there really existed an officiality in Canada. So true is it that the officiality of the Bishop of Quebec was not recognized civilly or otherwise than within the pale of purely spiritual matters, that Messrs. Doutre and Lareau, in conclusion, are unable to regard it as an established institution. —"L'Evêque" they say (page 307), "chef du Clergé Canadien, avait établi une Officialité, qui avait pour but principal de détacher les prêtres de la juridiction séculière. Le Gouverneur, soucieux de conserver intacte la puissance civile, ne voulait pas reconnaître cette Officialité, qui menaçait de servir de refuge aux délinquants religieux; de là la grande lutte, celle qui domine presque toutes les difficultés de la colonie, et que les historiens sont obligés de suivre dans d'infinis détails. Les Régistres du Conseil Supérieur constatent, presqu'à chaque page, le refus d'un Ecclésiastique de comparaître devant ce tribunal suprême, se refugiant dans cette officialité *mystérieuse, que celui qui se prétendait le promoteur et l'official, était incapable de définir et d'affirmer d'une manière certaine.* Dans cette lutte entre le temporel, représenté par le Gouverneur, et le spirituel, représenté par l'Evêque, l'Intendant au lieu de rester neutre prenait activement le parti soit de l'un ou de l'autre. Parmi les plus acharnés, l'Intendant Duchesneau et l'Intendant Dupuy se distinguent, le premier, en faveur du clergé, et le second, en faveur de l'autorité civile."

§ 2. *Ecclesiastical law under the British Crown.*—On the 10th of February, 1763, the colony of La Nouvelle France, temporarily occupied for some years previous by the English troops, was formally ceded to Great Britain by the Treaty of Paris. At that time England possessed and still possesses an established national church, provided with ecclesiastical tribunals from whose decisions an appeal lay to the Sovereign. It is alleged that the cession had the effect of introducing into Canada this spiritual supremacy as being a portion of the royal prerogative. "By the English public law," remarked Mr. Laflamme Q.C., of Counsel for the prosecution in the Guibord case,* "the

* Plaidoyors et Jugements *in re* Guibord (1870, Louis Perreault & Co.,) p. 13.

Sovereign power is the supreme arbiter in things spiritual and temporal." Relying on Blackstone and the statutes of Henry VIII and Elizabeth, by which all the powers of the Holy See were united to the Imperial Crown of the Realm, the learned advocate concludes: "Such is the law which governs us and which defines the limits of the royal jurisdiction and consequently of the Courts."

In England, the appeal for usurpation or abuse does not and never did lie from the ecclesiastical courts to the civil courts, but an appeal is allowed to the clerical authorities, to the Bishop, Metropolitan and other high tribunals, and finally to the Queen in her Privy Council (formerly in Chancery), according to Blackstone "as supreme head of the English Church in the place of the Bishop of Rome who formerly exercised this jurisdiction."* Many imperial statutes have enunciated formal declarations to the same effect, among others section 3 of the 37 Hen. VIII, ch. 18: "But forasmuch as Your Majesty is the only and undoubted supreme head of the church of England and also of Ireland, to whom by Holy Scripture all authority and power is wholly given to hear and determine all manner of causes ecclesiastical." The *appel comme d'abus* from ecclesiastical strictures in all the other churches, and particularly from the protestant dissenting churches was impossible; this would have been tantamount to their recognition, and it is well known that for a long period the dissenting churches as well as the Catholic church were strictly repressed, as dangerous to public order and the peace of society. Not until 1829 did the British Government, by the great Emancipation Act, admit that a Roman Catholic could be a good and loyal subject of Her Majesty.

Furthermore, the existence of this English national church must necessarily have the effect of doing away with the *appel comme d'abus* established by the laws of France, supposing that it had been introduced into the colony. The Crown could not maintain the canons and doctrines of the Catholic Church and constitute itself judge in her spiritual matters, without deviating from the constitutional law which created the English State

* Book III, p. 65, see also, p. 67, Book I, p. 278; 26 Henry VIII, c. 1; 1 Eliz. c. 1.

Since the 1st January 1871, the Church of Ireland is disunited from the Church of England under a statute passed in 1869, 32-33 Vict. c. 42.

Church, and without, so to speak, *establishing* the Catholic as the national church of Canada and of the British Sovereign.

This right of *appel comme d'abus* has never passed to the civil courts of the colony under British rule, for the reason that it is contrary to the belief of the Protestant population and incompatible with the constitution of the English Church. In 2 P. Wms 75, there is a statement by the Master of the Rolls to the effect that the Privy Council decided, upon an appeal from the plantations, that "the laws and customs of the conquered country shall hold place, *unless where these are contrary to our religion.*" Burge (Colonial Law, p. 15, 31,) says likewise: "Until such laws be given by such conquering prince, the laws and customs of the conquered shall hold place, *unless they are contrary to our religion.*" It is evident that if our courts exercised jurisdiction by way of *appel comme d'abus*, this jurisdiction would be general and would extend to all churches in the colony; and this would be directly opposed to the doctrine of the Anglican Church which rejects the intervention of the civil tribunals in matters spiritual. In the Bishop of London's preface to the *Ecclesiastical Judgments of the Privy Council* by Messrs. Brodrick and Fremantle, a work far from favorable to the ecclesiastical jurisdiction (p. xi) will be found the following language: "By the union of Church and State, *the Courts of the Church* had been constituted Courts of the Realm, and their decisions were recognized as carrying with them certain civil as well as spiritual consequences; and the State in return for this privilege, claimed the right on the part of the Civil Ruler to hear appeals from the *Spiritual Courts.*"

Finally the *appel comme d'abus* formed an integral element of the political institutions of France, institutions which have been all swept away by the mere fact of the cession. "Political laws and systems," says Wheaton,* "imply a reciprocal relation between the citizens and the body politic. By the complete conquest the former body politic had ceased to exist. Consequently, the former political system disappears and a new one takes its place, and the new political system is established and regulated *by its own force and on its own principles.*"

As the great American writer on international law shows, the new institutions of a conquered colony are neither those which formerly existed, nor those of its new masters; but those estab-

* 347, n. 2. (ed 1866.)

lished by the colony herself under the authority of her new Sovereign and with his express or tacit sanction. Such is also the doctrine of the English public law. It is now a well established principle, although for a long time contested and denied, that the royal supremacy in spiritual matters and the establishment of the national church do not extend to the colonies; that on the contrary all colonial churches are on the same footing and all intirely independent of the civil courts in spiritual matters, unless the contrary be specially enacted or declared by the colonial legislature.

In the case of the *Reverend Mr. Long* v. *The Lord Bishop of Capetown*,* the Privy Council held that "the Church of England in places where there is no church established by law is in the same situation with any other religious body, in no better but in no worse position."

In the case of *Dr. Colenso, Lord Bishop of Natal*,† decided by the Privy Council on the 20th March, 1865, the Lord Chancellor speaking for the Judicial Committee, said: "The United Church of England and Ireland is not a part of the Constitution in any colonial settlement, nor can its authority, nor those who bear office in it, claim to be recognized by the law of the colony, otherwise than as members of a voluntary association." Farther on, he adds: "It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no established Church, and in the case of a settled colony the Ecclesiastical Law of England cannot, for the same reason, be treated as part of the law which the settlers carried with them from the Mother Country."

In the case of *The Lord Bishop of Natal v. Gladstone*,‡ Sir John Romilly, Master of the Rolls, summed up as follows: "The members of the Church of South Africa may create an ecclesiastical tribunal to try ecclesiastical matters between themselves, and may agree that the decisions of such a tribunal shall be final, whatever may be their nature or effect. Upon this being proved the civil tribunal would enforce such decisions against all the persons who had agreed to be members of such an association, that is against all the persons who had agreed to be bound by these decisions, and it would do so *without inquiring into the propriety of such decisions*."

---

* 1 Moore, P.C., (N.S.) 411.
† 3 Ibid, 115. ‡ L. R. 3 Eq. 1.

The principles laid down in these leading cases have been re-affirmed in 1869 in the cause of *The Lord Bishop of Capetown v. Bishop of Natal*,* wherein Lord Justice Giffard said, in the name of the Judicial Committee, that "the conclusions arrived at in any of these cases, have scarcely been disputed and cannot be successfully controverted."

In an opinion given by the Solicitor-General, Sir John Coleridge, Sir Roundell Palmer and Dr. Deane, in April, 1869, these high authorities say: "We cannot see that any tribunal, civil, criminal, or ecclesiastical, exists in Natal which can determine whether the doctrinal opinions of Dr. Colenso are erroneous or not, and can enforce its decisions. . . . .

"It has been suggested that the Crown as visitor, or as supreme in causes ecclesiastical, or by virtue and in exercise of some other supposed power, may be able either by Commissioners specially appointed, or by means of the Privy Council, to hear and determine the points raised against Dr. Colenso.

"We are unable to find the slightest ground on which this suggestion can be supported.

"The Crown is supreme over all causes ecclesiastical in the same and in no other sense, and to no greater extent, than the Crown is supreme over causes temporal,—that is, by law, and by means of the various established Courts of law.

"The Submission of the Clergy Act (25 Hen. 8, c. 19) gave no such power to the Crown. Section 4 of that Act made it lawful for the parties grieved by any decision of an ecclesiastical judge *in England* to appeal to the King in chancery, for which Court of Appeal the Judicial Committee of the Privy Council is now substituted. . . . .

"No argument in favour of the power of the Crown can be derived from 3 and 4 Will. 4, c. 41, s. 4, by which it is enacted that it shall be lawful for His Majesty to refer to the Judicial Committee for hearing or considering any such matters as His Majesty may think fit; and such committee shall thereupon hear or consider the same, and shall advise his Majesty thereon in manner aforesaid.

"To make this section applicable to the judicial determination of an ecclesiastical matter would be in effect to restore the High Commission Court. The section is to be taken as referring to

* 3 L.R.P.C., p. 1.

questions not of judicial cognizance on which the Crown may desire to be solemnly advised by persons conversant with the law.

"We are therefore of opinion that no means at present exists for trying before any tribunal competent to decide the question whether or no Dr. Colenso, the present Bishop of Natal, has advocated doctrinal opinions not in accordance with the doctrine held by the Church of England; and assuming the present Bishop of Natal to have been guilty of an ecclesiastical offence, no steps can be taken to bring him, as such Bishop, before any tribunal."

In the United States, which were, as English colonies, settled under the authority of the English laws, the ecclesiastical law is laid down to the same effect. "Churches," said Chief Justice Shaw in 1850,* "have authority to deal with their members for immoral and scandalous conduct, and for that purpose to hear complaints, to take evidence and to decide; and upon conviction to administer proper punishment by way of rebuke, censure, suspension and excommunication. *To this jurisdiction every member, by entering into the church covenant, submits and is bound by his consent.*"

In Louisiana, Mr. Justice Nicholls held in 1843† that the treaty of cession to the U. S. "guarantees to the inhabitants of Louisiana the unrestrained exercise of their religion, and recognizes the right of self government in the Roman Catholic Church, as then known and established." In Appeal, Martin J., reversed this decision, the learned judge being of opinion "that the treaty of cession, art. 3, provides that the inhabitants of the ceded territory, shall as soon as possible, be admitted into the Union or Confederation of the U. S. and that in the *meantime* they shall be protected in their persons, property and the free exercice of their religion. Since the 30th of April 1812, the day on which Louisiana took her rank as an independent State among her sisters, that article of the Treaty has ceased to have any political effect whatsoever, and has become obselete." Thus in Louisiana no treaty guarantees the free exercise of the Church of Rome; yet the learned judge (Martin) concluded: "Neither the Pope, nor any bishop, has, within this State, any authority, *except a spiritual* one; and as courts of justice sit to enforce *civil* obliga-

* Farnsworth vs. Storrs, 5 Cushing 415.

† The Church of St. Francis of Pointe Coupée v. Martin, 4 R. 62.

tions only, they never attempt to coerce the performance of those of a spiritual character."

If under the public common law of England as affirmed by these authorities, all colonial churches are on a footing of equality; if the Sovereign himself, although Head of the Established Church of England, cannot receive appeals from the judgments given by the ecclesiastical authorities in communion with that Church; if, furthermore, the constitution of every colonial church is sacred and inviolable, to be maintained and protected by the civil courts, provided, of course, that it be not at war with public morality and the public peace, or positively condemned by the legislation of the colony; if, finally, no court can take cognizance of any matter purely ecclesiastical, how can it be asserted that, by virtue of that constitutional law, the Church of Rome, whose members are religiously bound to exclusive and entire obedience to the authorities of their church in matters spiritual, is subject likewise to the jurisdiction of the civil courts in the same matters? No! the Church of Rome, like the Church of England, like all Protestant dissenting Churches in Canada, is entirely free in spiritual things, and is therefore subject, so far as these matters extend, to the sole jurisdiction of her own constituted authorities.

That such is the law existing in and applicable to the colonies, ought not to be matter of surprise: such was the law in England before the reformation; that is before the changes made by the statutes of Henry VIII and Elizabeth. Whatever diversity of opinions may prevail among jurists as to the legality of Papal intervention in temporal matters before the era of the Conqueror, there can be no doubt that the English Crown did not arrogate to itself any pretention to be supreme judge in ecclesiastical matters until it had effected the complete separation from the Church of Rome. In the year of 1533, when Henry VIII had secretly married Anne Boleyn and had determined on a rupture with Rome, the statute 14 Henry VIII, c. 19 was passed, the preamble whereof declares: "that the body politic of the realm of England *is divided in terms and by name of spirituality and temporality;* .....the body spiritual whereof having power when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted and showed by that part of the said body politic, called the *spirituality*, now being usually called the English Church..... and the laws temporal, for trial of property of lands and goods, and for the

consideration of the people of this realm in unity and peace, without rapine or spoil was, and yet it is administered, adjudged and executed by sundry judges and ministers of the other part of the said body politic, called the *temporality*."

Thus, at that period, the Parliament of England still acknowledged that spiritual things were wholly subject to the ecclesiastical jurisdiction. No allusion was then made to the appeal to the Sovereign, doubtless for the reason that he had not yet been proclaimed supreme Head of the Church of England. The Statute 14 Henry VIII, c. 19, does not even abolish all appeals to the Court of Rome. The commentators on the Ecclesiastical Judgments of the Privy Council, very properly remark, (p. xxxii): "It is material to notice, 1. That the Statute of which the preamble has been quoted, by no means relates to all ecclesiastical causes. It is limited to questions of matrimony, wills and titles. Whatever had been the course of appeals in matters of doctrine and clerical discipline, remained unaltered, and it would seem that such causes might still have gone on appeal to the Court of Rome."

It was not till the enactment of the 25 Henry VIII, c. 19, that it was commanded that *no manner of appeals shall be had to the See of Rome of what nature, condition or quality soever they be of*, under the penalties of *præmunire*. Such appeals to the Pope were to be made to the King in Chancery, ss. 3 and 4. Section 6 enacts distinctly that parties appealing shall proceed in a form similar to that which had been made to the Pope: "in like manner and form as they used before to do to the See of Rome."

That the appeal in ecclesiastical causes was made in England up to that time not to the Sovereign but to the Pope, is plain from a number of other Statutes. Thus the 28 Henry VIII, ch. 6, s. 2, declares that the subjects shall appeal to the King, *as they or any of them* were WONT *and accustomed to have in their provocations, appeals and other process in cases of debate and contention, to and from the Bishop of Rome.* The words *as they were wont and accustomed* show that the appeal to the Pope was not an innovation introduced into the English public law, as has been asserted by some writers, but a *custom*, that is according to the definition of the term, a right existing and exercised from time immemorial. It was also the law throughout the

whole Catholic world, except in France, as remarked by Merlin, Vo. *Libertés de l'Eglise Gallicane.*

In 1844, the Right Hon. Duncan McNeil, then Lord Advocate and afterwards Lord Justice General of Scotland, said in his evidence taken before a select Committee of the House of Lords appointed to consider Lord Brougham's Bill to amend the jurisdiction of the Judicial Committee of the Privy Council: (Question 8)—"The Committee understand that previously to the late changes that have taken place in the Scotch Courts, there was, as here, a consistorial or spiritual Court which had cognizance of questions of Divorce?" Answer: "There was a Consistorial Court which had cognizance of questions of Divorce." Q. 9. "To the exclusion of the common temporal court, the Court of Session in the first instance?" A. "Yes." Q. 10. "Was there an appeal from the Consistorial Court to the Court of Session." A. "There was." Q. 13: "*Before the Reformation*, that Consistory Court was the Bishop's Court? A. "Yes; *the law in that department was administered by the tribunals of the Church.*" Q. 14: "Before the Reformation, was there any appeal to the Court of Session in those cases?" A. "*No, I believe not.*" Such were the principles which governed England and Scotland before the establishment of the national churches.

Does the reader wish to know why these principles were adopted in the Colony of Canada instead of those which had been proclaimed by the Statutes of Henry VIII and Elizabeth? The reason is very simple; they were more suitable to the colonies in general, and particularly to Canada, where the free exercise of the Catholic religion was garanteed by the Treaty of Cession of 1763. Lord Mansfield speaking of a colony acquired by occupancy or settlement—and his remarks apply equally to those who pretended that the wholy body of English public law passed into colonies acquired by cession, like Canada—said: "It is absurd that in the colonies they should carry all the laws of England with them. They carry such only as are applicable to their situation. I remember it has been so determined in the Council. There was a question whether the Statute of charitable uses operated on the Island of Nevis. It was determined it did not. No laws but such as were applicable to their condition, unless expressly enacted."* Even in the case of a colony discovered or

* Campbell v. Hall, 20 Howell, State Trials 289; see also Stokes, Law of Colonies, 4; 1 Chal. Opin. 195, 198, 220, and 2 Ibid 202; 1 Chitty on Commerce, 639.

settled by British subjects, Clarke,* says: "They carry only so much of these laws as is applicable to the condition of an infant colony... For the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary, nor convenient for *them, and therefore not in force.*" How can it be pretended that the Statutes of England were suitable to the inhabitants of Canada, either to the thousands, subjects of His Christian Majesty, professing the faith of the Catholic Church, or to the few British settlers, (who in 1770 numbered no more than 160 inhabitants besides women and children) belonging to various protestant religions, and consequently incapable of receiving and maintaining the English national Church?

We have alluded to the treaty by which Canada was made an English Colony, and we may here seize the occasion to lay before the reader the text of this document. But it may not be amiss first to ascertain the effects of such international agreements.

Bowyer says:† "The articles of capitulation upon which a country is surrendered, and the treaty of peace or of cession by which it is ceded, are sacred and inviolable according to their true intent and meaning."

Forsyth says:‡ "The same rule of English law as to the power of the Crown to impose law, applies equally to a country obtained by cession, except that, of course, the right of legislation may be regulated by the terms of the treaty with the ceding power; *and those terms ought to be invariably observed.* Thus, in *Re Adam* P. C. 470, the Court said: "The Mauritius, before its surrender to Great Britain, in 1810, was a French Colony, and having been surrendered on the condition that the inhabitants should preserve their religious laws and customs, we must look to the law of France as established in the colony before that event."

"It is well settled," said Mr. Justice Smith, in *Stuart* v. *Bowman*, "that the King cannot violate any articles of capitulation, which have been assented to in favor of the conquered, and that these articles are sacred."§

Mr. Justice Aylwin said in the same case:—"Nor can the King *legally* disregard or violate the articles on which the country

---

* Colonial law, p. 8.
† Const. Law, p. 45.
‡ Const. Law, p. 16.
§ 2 L. C. Jurist, 11.

is surrendered or ceded; but such articles are sacred and inviolable according to their true intent and meaning."

Article 6 of the capitulation of Quebec is as follows:

"That the exercise of the Catholic, Apostolic and Roman religion shall be maintained; and that safe guards shall be granted to the houses of the clergy, and to the monasteries, particularly to his Lordship the Bishop of Quebec, who, animated with great zeal for religion and charity for the people of his diocese, desires to reside in it constantly, to exercise freely and with that decency which his character and the sacred offices of the Roman religion require, his episcopal authority in the town of Quebec, *whenever he shall think proper*, until the possession of Canada shall be decided by a treaty between their Most Christian and Britannic Majesties."

"The free exercise of the Roman religion is granted, likewise safe guards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise, freely and with decency, the functions of his office, whenever he shall think proper, until the possession of Canada shall have been decided between their Britannic and most Christian Majesties."

Article 27 of the capitulation of Montreal (8th September 1760) is to the following effect: "The free exercise of the Catholic, Apostolic and Roman religion shall subsist *entire in* such manner that all the states and the people of the towns and countries, places and distant posts, shall continue to assemble in the churches, and to frequent the sacraments as heretofore, without being molested in any manner, *directly or indirectly*. These people shall be obliged by the English Government to pay their Priests the tithes, and all the taxes they were used to pay under the Government of His Most Christian Majesty." "Granted as to the free exercise of their religion; the obligation of paying the tithes to the Priests will depend on the King's pleasure."

The definitive Treaty of Peace (10th February, 1763,) between Kings of France and Great Britain, art. 4, says:—

"His Britannic Majesty, on his side, agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will consequently give the most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, as far as the laws of Great Britain permit."

"Voilà," said Mr. Jetté, of counsel for the defence in the

Guibord case, in language equally clear and logical, "les expressions mêmes de ce traité, rédigé par les diplomates des deux pays, c'est-à-dire par les hommes les plus aptes, les plus compétents, les plus exercés à apprécier et peser la valeur et la portée des mots et des expressions, par des hommes qui étaient à la fois des jurisconsultes et des hommes d'état. Or, qu'est ce que l'on stipule quant à l'exercice libre de la religion catholique? Réserve-t-on pour les Canadiens, devenus sujets d'un roi protestant, l'exercice libre de leur religion avec toutes les garanties, tous les priviléges, toutes les libertés, et pour bien dire toutes les servitudes de l'église gallicane? Non, au contraire, les canadiens auront la liberté d'exercer le culte de leur religion, *selon les rites de l'Eglise de Rome.* Peut-on croire que cette expression se soit ainsi rencontrée par hasard sous la plume de ces diplomates?

"Peut-on supposer que sur un si grave sujet ces hommes éminents auraient employé, sans y réfléchir, une expression qui devait nécessairement éveiller dans l'esprit d'un diplomate français de ce temps, l'idée de l'Eglise gallicane. Comment, ce serait à l'époque où le droit gallican était dans toute sa force, où les magistrats comme les hommes politiques ne perdaient aucune occasion d'affirmer ces libertés et ces principes du droit gallican, que le roi de France n'aurait réservé pour ceux de ses sujets qui passaient sous la domination d'un prince protestant, que l'exercice libre de leur religion conformément aux rites de l'Eglise de Rome, et l'on ne verrait là que le hazard d'une expression sans portée? Non, il est impossible de le penser.

"Ces termes ont donc leur signification absolue, et il est impossible de ne pas croire qu'ils n'ont été ainsi employés qu'après avoir été non-seulement pesés et mûris, mais encore après avoir été discutés entre les diplomates des deux pays. Comment en effet, le roi de France aurait-il pu exiger du roi d'Angleterre qu'il se fit le protecteur des saints canons de l'Église catholique? comment aurait-il pu demander à ce roi protestant de se charger de la protection même spirituelle de cette religion catholique dont la liberté seule était accordée? Et l'eût-il demandé, le roi d'Angleterre aurait-il pu concéder cette demande? Assurément non, il suffit donc de connaître un peu l'histoire pour apprécier ces termes si clairs du Traité de Paris."

Mr. Laflamme, on the other hand, sees only illusory guarantees in the fourth article of the Treaty of Paris: "Par le traité de 1763," he remarks, "dont ces articles de capitulation n'étaient

que le préliminaire, et qui fut fait et rédigé par les autorités souveraines réglant définitivement le sort du Canada, Sa Majesté Britannique consent d'accorder la liberté de la religion catholique aux habitants du Canada, et leur permet de professer le culte de leur religion *autant que les lois d'Angleterre le permettent.* Il faut avouer que cette restriction enlevait pour ainsi dire la valeur de la première disposition et assurément que l'on ne pouvait plus formellement réserver la plénitude de la suprematie royale et souveraine même en matière ecclésiastique."

The learned counsel, in support of his opinion, attempts to resuscitate an ancient policy of some Crown officers, a policy based solely upon religious prejudice and fanaticism, and which has been long since forgotten. He relies upon the following authorities:

1st. Opinion given to the Imperial Government on the 3rd July 1811: "We notice the condition of such benefices as a destruction arising out of the general question, and also as showing that the right of patronage under the French Government was dependent, in some measure, on the Sovereign, and cannot be considered to have been vested in the Bishop by virtue of rights or powers derived solely from the Pope. If, however, the right be supposed to have originated from the Pope, we think the same consequence would result from the extinction of the Papal authority in a British Province. For we are of opinion, that rights of this nature, from whichever source derived, must in law and of necessity be held to devolve on His Britannic Majesty as the legal successor to all rights of supremacy, as well as of Sovereignty when the Papal authority, together with the episcopal office, became extinct at the conquest by the capitulation and treaty, and the 1 Eliz. cap. 1, sec. 16, as specially recognized in the act for the Government of Canada."

2nd. Opinion of the Canadian Attorney General Sewell, given in 1806, relative to the dismemberment of parishes: "That the office of the Roman Catholic Bishop of Quebec was annihilated and all the powers inherent therein transferred to His Majesty by the capitulation of Quebec and Montreal, by the conquest of Canada, the treaty of peace of 10th February, 1763, the Statutes of Henry VIII, cap., I. the 1 of Elizabeth cap. I., and 14 George III, cap. 83, and that the said office hath not at any time since been by law reestablished; that no such office as superintendent of the Romish Churches hath at any time existed in this Province,

and that no person or persons hath or have been at any time appointed by our Sovereign Lord the King, or under his authority to such office..... That the Ordinance made and passed by the Governor and Council of the late Province of Quebec in the 31st year of His Majesty's reign instituted: An Act or Ordinance concerning the building and repairing of churches, parsonagehouses, church-yards, is wholly and altogether null and void and for the following among other reasons:

"Because it abridges the King's supremacy and royal prerogative, in express contradiction to the letter of the capitulation of Montreal, and consequently as it infringes upon the rights of the crown, and the principles of the constitution of the colony, far exceeds the powers vested by the Quebec Act in the Governor and Legislative Council of Quebec;

"Because it empowers the Titular Roman Catholic Bishop of Quebec to exercise in virtue of his office and authority derived from the See of Rome, which by the law of the land cannot be done in any of His Majesty's dominions without the assent of the King's Lords and Commons of the Imperial Parliament of the United Kingdom of Great Britain and Ireland."

3rd. A conversation between Bishop Plessis and the Attorney General of the Province, which is thus related by Christie:* "Let me remark," said the Attorney General, "that the government having permitted the free exercise of the Roman Catholic Religion, ought, I think, to avow its officers, but not however at the expense of the King's rights, or of the established Church; you cannot expect, nor ever obtain any thing that is inconsistent with the rights of the crown; nor can the government ever allow to you what it denies to the Church of England." To this Bishop Plessis answered:—"Your position may be correct. The Government thinks the Bishop should act under the King's commission, and I see no objection to it." The Attorney General added; "*My* principle is this: I would not interfere with you in concerns purely spiritual, but in all that is temporal or mixed, *I would subject you to the King's authority.* There are difficulties I know on both sides; on the one hand, the crown will never consent to your emancipation from its power, nor will it ever give you more than the rights of the Church of England, which have grown up with the constitution, and whose power, restrained as it is, is highly serviceable to the general interests of the State."

* Hist. of Canada, Vol. 5, p. 74.

The learned advocate did not think proper to include in his list of authorities the opinion of the Solicitor General Wedderburn given to the Imperial Government in 1772; perhaps he found it too liberal; at all events, his learned friend, Mr. Cassidy, Q.C., also counsel for the defense in the Guibord case, has cited it: "The religion of Canada is a very important part of its political constitution. The 4th article of the Treaty of Paris, grants the liberty of the Catholic religion to the inhabitants of Canada, and provides that His Britannic Majesty should give orders that the Catholic subjects may profess the worship of their religion according to the rites of the Romish Church, as far as the laws of England will permit. This qualification renders the article of so little effect, from the severity with which (though seldom exerted) the laws of England are armed against the exercise of the Romish religion that the Canadian must depend more upon the benignity and wisdom of Your Majesty's Government for the protection of his religious rights than upon the provisions of the treaty, and it may be considered as an open question, what degree of indulgence true policy will permit to the Catholic subject."....

"True policy dictates then that the inhabitants of Canada should be permitted freely to profess the worship of their religion; and it follows of course, that the ministers of that worship should be protected and a maintenance secured for them."

It is plain that the language held by the Canadian Attorney-General to Bishop Plessis is far from being entirely favorable to the argument of the learned advocate, for that functionary says; "my principle is this; I would not interfere with you in concerns purely spiritual and in all that is *temporal or mixed*, I *would* subject you to the King's authority," without defining what that authority was in the colony.

As regards the opinions of the English Crown lawyers, not only have they been over-ruled by many subsequent decisions of the Privy Council, but they are contradicted in the most formal manner by the highest Government functionaries of that fanatical age.

No one could be in a better position to explain the meaning and effect of the Treaty of Paris than the eminent lawyers who filled the offices of Attorney and Solicitor-General at the time it was ratified,—Sir Fletcher Norton and Sir William de Grey. Their opinion, as transmitted us by the author of an anonymous work in defense of the Quebec Act, published at London in 1774, was

to the following effect: "In 1765, the Lords of Trade sent the following query to Sir Fletcher Norton and William de Grey, then Attorney and Solicitor-General: Whether His Majesty's subjects, being Roman Catholics, and residing in the countries ceded to His Majesty in America by the Treaty of Paris, are not subject in those colonies, to the incapacities, disabilities and penalities, to which Roman Catholics in this Kingdom are subject by the law? To which query those gentlemen answered on the 10th of June, that they were not; and the Advocate, Attorney and Solicitor-General, in their joint report to the Privy Council upon the propositions of the Board of Trade, presented on the 18th January, 1768, state their opinion to be that the several Acts of Parliament, which impose disabilities and penalties upon the public exercise of the Roman Catholic religion, do not extend to Canada."

The light in which the Treaty of Paris was considered by the most distinguished statesmen of Great Britain during the debates on the Quebec Act, is seen on referring to the reports preserved by Sir Henry Cavendish. We extract the remarks of Lord North, Lord Thurlow, and Mr. Edmund Burke.

Lord North (p. 12): "As to the free exercise of their religion, it likewise is no more than what is confirmed to them by the treaty, as far as the laws of Great Britain can confirm it. Now, there is no doubt that the laws of Great Britain do permit the full and free exercise of any religion, different from that of the Church of England *in any of the colonies*. Our penal laws do not extend to the colonies; therefore, I apprehend, that we ought not to extend them to Canada."

Lord Thurlow (p. 27): "When Canada was taken, gentlemen will be so good as to recollect upon what terms it was taken. Not only all the French who resided there had eighteen months to remove, with all their moveable effects, and such as they could not remove, they were enabled to sell; but it was expressly stipulated that every Canadian should have the full enjoyment of all his property, particularly the religious orders of the Canadians, and that the full exercise of the Roman Catholic religion should be continued. And the definitive treaty of peace, if you examine it as far as it relates to Canada, by the cession of the late King of France to the Crown of Great Britain, was made in favour of property; made in favour of religion; made in favour of the several religious orders."

Edmund Burke (p. 222): "The noble Lord has told you of the right of those people by the treaty; but I consider the right of conquest so little and the right of human nature so much, that the former has very little consideration with me. I look upon the people of Canada as coming, by the dispensation of God, under the British Government. I would have us govern it in the same manner as the all-wise disposition of Providence would govern it. We know He suffers the sun to shine upon the righteous and unrighteous; and we ought to suffer all classes, without distinction, to enjoy equally the right of worshipping God, according to the light He has been pleased to give them. The word "established" has been made use of; it is not only a crime, but something unnatural to establish a religion, the tenets of which you do not believe. Applying it to the ancient inhabitants of Canada, how does the question stand? It stands thus:—You have got a people professing the Roman Catholic religion, and in possession of a maintenance, legally appropriated to its clergy. Will you deprive them of that? Now, that is not a question of "establishment"; the establishment was not made by you; it existed before the treaty; it took nothing from the treaty, no legislature has a right to take it away; no governor has a right to suspend it. This principle is confirmed by the usage of every civilized nation of Europe. In all our conquered colonies, the established religion was confirmed to them; by which I understand, that religion should receive the protection of the State in those colonies; and I should not consider that it had received such protection, if their clergy were not protected."

Stokes, Chief Justice of Georgia under the British Government, says in his *Constitution of The British Colonies*, 1783, p. 30: —"The province of Canada was *ceded* to Great Britain by the Treaty of Paris, concluded 10th Feb., 1763; and at the time of the cession, Canada contained about sixty-five thousand inhabitants, who were of the Church of Rome, and had always been governed by the customs of Paris. It was therefore both just and prudent to indulge the inhabitants with the exercise of their religion (subject to the King's supremacy) and to make the laws of the country the rule of decisions there, in all matters of controversy relative to property and *civil* rights. But the constitution of Great Britain would not permit the criminal laws of a despotic Government (which were inforced without the intervention of a jury) to continue in any of its plantations; and therefore the Statute 14, Geo. III, c. 83 was made."

Now can any unprejudiced mind entertain for a moment the idea that the expression "as far as the laws of Great Britain permit," have had the effect of rendering illusory the stipulation for the liberty of the Catholic religion? Is it not an elementary principle of international law that in interpreting a treaty the intention of the parties is the chief object of research, and that a clause susceptible of two meanings must be understood in the sense in which it will produce some effect rather than that in which it can produce none? Can it for a moment be doubted that the intention of the high contracting parties to the Treaty of Paris was to guarantee the free exercise of the Roman Catholic worship to the inhabitants of Canada? Or can it reasonably be supposed that when His Britannic Majesty entered into a solemn engagement, he acted in bad faith and with the intention of really promising nothing? Certainly not. That promise was and is a binding one not only in the light of international law, but also by and under the laws of Great Britain; for as observed by Lord North, and decided repeatedly by the Privy Council, all churches in the colonies are by the common law on a footing of perfect equality, free and untrammelled by the civil power in the management of ecclesiastical matters. That freedom not only accompanies the exercise of Catholic public worship, but comprises the exercise of the spiritual authority of its constituted authorities, and consequently of the Pope, inasmuch as it is a fundamental tenet of the Catholic faith that the Sovereign Pontiff is head of the Catholic Church.

It is not necessary for the determination of the subject matter under consideration to inquire whether the Imperial Parliament or a colonial legislature can validly nullify the stipulations of an imperial treaty; this question has been already discussed in the first volume of this Review in an article entitled "Le Droit Constitutionnel du Canada" to which the reader is referred. The statutory laws of Canada are in accordance with the Treaty of Paris and with the public common law of England.

An Imperial act passed in 1774* commonly called the "Quebec Act," makes the ensuing declaration (by its 5th section): "And, for the more perfect security and ease of the minds of the inhabitants of the said province, it is hereby declared, That his Majesty's subjects, professing the religion of the Church of Rome of and in

* 4 Geo. 3, C. 83.

the said province of Quebec, may have, hold and enjoy the free exercise of the religion of the Church of Rome subject to the King's supremacy, declared and established by an act, made in the first year of the reign of Queen Elizabeth, over all the dominions and conntries which then did or thereafter should belong, to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive and enjoy their accustomed dues and rights, with respect to such persons only as shall profess the said religion.

It is contended that by virtue of this statute of Elizabeth, the King has a right to supremacy over the Canadian Catholic Church in spiritual matters. That statute certainly does proclaim his Britannic Majesty "supreme Governor, as well in all spiritual or ecclesiastical things or causes as temporal," but it does not give to the civil courts jurisdiction in spiritual matters; and as observed by the Solicitor General Sir Roundell Palmer, and Dr Deane, in the opinion which has been cited, the Crown is supreme over all causes ecclesiastical, but only by means of the various courts of law established in the country. In Canada no court has been established to take cognizance of ecclesiastical causes. Therefore, in the absence of such courts, the Sovereign cannot exercise an ecclesiastical supremacy even by means of the Privy Council, inasmuch as, according to the same high authorities, the judicial committee has only an appellate and not an original jurisdiction.

But is it really true, as has been asserted, that by the terms of the 1 Elizabeth, c. 1, s. 9 (1558), the Catholic Church in Canada is subjected to the spiritual supremacy of the English Crown? Blackstone* speaking of the supremacy declared by that Statute, says: "The oath of supremacy is principally calculated as a renunciation of the Pope's pretended authority." The spiritual authority of the Canadian Bishops thus remains untouched, free from all intervention of the Sovereign, and *a fortiori* of the civil tribunals. Such was also the opinion of Lord Castlereagh as quoted by l'abbé Ferland, p. 131: "L'Acte du Canada," said the noble Minister, "assure aux Catholiques du Canada le libre exercice de leur religion, à leur clergé le droit de recevoir les dîmes payées par ceux qui appartiennent à cette croyance, sauf l'acte de *suprématie*. La suprématie du roi, suivant cet acte se borne à empêcher les étrangers d'exercer aucune juridiction spiri tuelle dans les possessions de la Couronne. Or, l'Evêque n'est

* Lib. 1, 368.

pas un étranger; il est le chef d'une religion, qui peut *être pratiquée librement sur la foi du Parlement Impérial;* il peut réclamer et recevoir des catholiques les dîmes et droits ordinaires, et exercer à leur égard les pouvoirs dont il a toujours joui. Ce serait donc une entreprise fort délicate, que d'intervenir dans les affaires de la religion catholique à Québec, ou de forcer l'Evêque titulaire à abandonner ses titres et à agir, non comme évêque, mais seulement comme surintendant....."

And further; the supremacy set up by the Act of Elizabeth has not been entirely introduced into Canada by the Quebec Act, but only that portion of it which relates to temporal matters. Lord North, indeed, in the course of the debates on the Quebec Act, declared in the name of the Government: "Whether it is convenient to continue or abolish the Bishop's jurisdiction, is another question. I cannot conceive that his presence is essential to the full exercise of religion; but I am sure that no Bishop will be there under papal authority because he will see that Great Britain *will not permit* any papal authority in the country. It is expressly forbidden in the Act of Supremacy."

What! the presence of a Bishop not essential to the free exercise of the Catholic religion!! But if there be no Bishop, who will consecrate the priests? And if the presence of the Bishop be a necessity, who is to ordain him, as there was then only one Bishop in the colony? A Catholic, Apostolic and Roman Church without a Bishop and without a Pope is an impossibility. Lord North evidently alluded merely to the temporal authority of the Pope, which Great Britain jealously prohibited in her dominions, not to the exercise of his spiritual jurisdiction.

Hence, nearly all the members of the House of Commons were under the impression that the Quebec Act made the Roman Catholic Church the established Church of Canada.

Dunning, afterwards Lord Ashburton, said: "The Roman Catholic religion is established by law; all the arguments urged by the noble Lord, tending to shew that, *de jure*, the Roman Catholics are entitled to a full toleration, I admit to be well founded in law; but does that imply that the same toleration should be given to them everywhere?..... Without going further into the subject, it suffices for me to say that the religion of England seems to me to be preferable to the religion of France, if your object is to make this an English colony..... Are we, then, to establish the Roman Catholic religion and tolerate the Protes-

tant religion? I conceive so; for this distinction is founded in the terms of the bill."

Sergeant Glynn: "A countenance is given to the Roman Catholic religion, as far as the law takes notice of any religion, by making a direct provision for it. This is the only religion that receives any countenance and protection. The Protestant religion is left to shelter itself under such regulations as hereafter may be found necessary for the due exercise of it."

Fox: "We are now going, for the first time, to levy a tax for the support of a Roman Catholic establishment."

Cornwall: "With regard to religion, the same liberality which has been extended to their laws has been extended to their religion also..... I have always understood that, in every country, a certain portion of the public money had been appropriated for the establishment of the popular religion of that country. "This bill goes upon that principle."

The Solicitor General: "I agree that the Roman Catholic religion ought to be the established religion of that country in its present state."

Colonel Barré: "This Bill originated with the House of Lords. It is Popish from the beginning to the end."

Such was the interpretation given by the members of the British House of Commons to the 5th clause of the Quebec Act, and certainly it is very different from that given to the same clause by those legists of our day who discover in it the subjection of Catholicism to the British Crown. And indeed in what way the latter interpretation can be entertained for a moment, in defiance of the express and precise words of the act, is more than we can conceive. How can the grant of *the free exercise of the religion of the Church of Rome* be coupled with the subjection of that church to the spiritual supremacy of the King? In what country, and by virtue of what rules of law, of equity or of plain common sense, can the Church of Rome be found *free* and at the same time *subject* to the spiritual authority of a Protestant Sovereign in spiritual matters? The idea is self-contradictory and absurd.

All difficulties on this head are cleared away, upon observing that the Quebec Act did not oblige the Catholics of Canada to take the oath of allegiance prescribed by the statute of Elizabeth or to recognize the spiritual supremacy of the King, but a special oath by which they swear fidelity to the sovereign in matters

temporal, and containing no allusion to or admission of his spiritual jurisdiction. M. Jenkinson in bringing up the form of this oath in committee, spote as follows:

"It having been mentioned last night, that the act of Supremacy, besides declaring that all supreme power resides in the King, &c., enacts that every person in holy orders, every person exercising office, shall be obliged to take the oath which enters very largely into the speculative question of the Pope being the head of the church; the consequence would be, that every priest, if obliged to take that oath would certainly relinquist his cure, and that parishes would be left without priests; or persons of bad morals, who would have no scruple to take the oath, would be in possession of this charge. I have drawn up a new oath, which I beg leave to bring up, and which it is my wish to have inserted as a clause in the bill."

Finally, when any intelligent man is reminded that the spiritual authority of the Pope has never ceased to be publicly exercised in Canada from the cession of the country to the present day; that all the bishops of the conntry have been consecrated in virtue of the Pope's bulls, and have been formally recognized by the Imperial and Canadian Governments, * and even by the colonial legislatures; that Her Most Gracious Majesty has solemnly recognized in principle the spiritual independence of the Pope, in her answer to the petition presented to her by the Catholic clergy of Canada relative to the invasion and occupation of Rome by the Italian Government †; how can he seriously argue that the Quebec Act has abolished the spiritual jurisdiction of the Pope in the Catholic hierarchy of Canada.

It may not be out of place to remark here that the Parliament of the Dominion as well as the Local Legislatures of Quebec and

---

* Forsyth, Constitutional Law, 49-51.

† In a dispatch from the Secretary of State for the Colonies to the Governor General, dated 8th Sept. 1871, No. 505, Her Majesty's Government declare that they "have not interfered in the civil affairs of the Roman States on the occasion offormer events which have occurred during the reign of the present Pope, nor can they now so interfere; but the deep interest which is felt by many millions of Her Majesty's subjects in the position of the Pope, *renders all that concerus his personal dignity and independance and freedom to exercise his spiritual functions, fit subjects for the notice of Her Majesty's Government*, and they have not failed to take such steps as are in their power to afford to the Pope the means of security in case of need.

Ontario have not the power to alter the provisions of the Quebec Act. The British North America Act, 1867, sect. 129, in order to remove all doubt on a matter of so great importance to the large number of Her Majesty's subjects in America, has positively forbidden the Colonial legislatures to touch the cases provided for by statutes of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland The Imperial Parliament alone, in case if did not consider itself bound by the Treaty of Paris,—a step which there is no reason to fear,—could modify the rights of the Catholic Church in Canada; while the other churches of Canada, including even the Anglican Church, deriving their existence from the common law of the country and the fiat of the colonial legislatures, remain in all respects subject to the action of these legislatures.

D. GIROUARD.

Montreal, 30th December, 1871.

(*To be continued.*)

L'EGLISE ET L'ETAT.

Le dernier bulletin de la *Revue Critique* contenait sous ce titre un travail, qui n'est autre chose qu'une revue critique du procès Guibord, encore pendant. L'auteur s'est contenté d'affirmer les plus étranges prétentions, sans apporter à la discussion un argument nouveau, un document de nature à éclairer le débat. Une publication aussi durable qu'une Revue ne devrait passer au creuset de la discussion que les procès définitivement jugés, car il n'y a que ceux là qui soient du domaine de la science.

M. Edmond Lareau et moi, nous publions depuis huit mois une histoire documentaire du droit Canadien. L'auteur de l'article en parlant de l'ouvrage et le citant avec une insistance qui nous fait trop d'honneur, omet le nom de mon laborieux collaborateur. Il est difficile d'attribuer cela à un oubli. Non content de cette omission intentionnelle, il me donne une qualité autre que celle qui apparait sur notre livre. Ce ne serait pas, d'après lui, comme historien, Avocat ou Professeur, que je travaillerais à cette histoire du Droit, mais bien comme *Président de l'Institut Canadien*. En parlant de M. Lareau, qui ne fait pas partie de l'Institut Canadien, l'auteur manquait de prétexte pour me faire figurer comme Président de cette institution. Et pourtant il fallait bien me couvrir de ce titre pour le succès de la cause: Ce n'était pas le procès de la veuve Guibord que l'on critiquait, mais celui de l'Institut Canadien. Or tout ce que son Président pourrait dire ou écrire comme avocat, professeur ou historien serait entaché de partialité et même d'exagération, si ce n'est d'un peu de fausseté. Cette tactique peut-être de guerre louche, même dans une polémique; elle n'est pas admissible dans une revue scientifique du genre de celle-ci. J'ai dû protester ailleurs, lors de la publication de la Revue et je réïtère mes regrets de me voir engager sur un terrain qui répugne à mes habitudes.

Dans son travail, l'auteur cherche à prouver que j'ai voulu affirmer trois points de fait que mes propres citations contredisent. Ceci est grave et demande une réponse.

1o. Les libertés gallicanes, dit-il, n'ont jamais été introduites dans la Nouvelle France.

2o. Il n'y a jamais eu d'officialité sous la domination Française.

3o. L'appel comme d'abus n'a jamais existé.

Telles sont les affirmations au sujet desquelles on prétend trouver dans notre livre des preuves dont il sera facile d'apprécier la valeur.

Libertés gallicanes. La déclaration de 1682 n'a été que la réaffirmation du Concordat de 1515. Nous sommes d'accord sur ce point, c'est beaucoup. L'auteur ne veut pas admettre que les *Ordonnances royaux* postérieures à 1663 n'avaient pas besoin de l'enregistrement au Conseil Supérieur pour avoir force de loi, mais il ne peut se soustraire à l'aveu qu'au moins celles antérieures à cette époque avaient cette qualité en dehors de l'enregistrement, puisqu'il n'y avait pas alors de Conseil Supérieur, ni d'enregistrement possible. Si l'Edit de 1682 ne trouve pas grâce devant l'auteur, il respectera au moins le concordat de 1515. Les libertés gallicanes ne datent pas de 1682 et c'est ignorer l'histoire que de n'en pas faire remonter l'établissement à une époque beaucoup plus reculée. En 1582, juste cent ans avant la célèbre déclaration des évêques de France, Mgr. de Foix, archevêque de Toulouse, écrivait au Pape Grégoire XIII au sujet d'un appel comme d'abus récemment jugé par le parlement de Paris: "Que si après Dieu et la piété et dévotion de nos rois, il y avait chose qui eut conservé la juridiction ecclésiastique, l'autorité du Saint Siége et la foi et la religion catholique en France, c'étaient les parlements, juges souverains des appellations comme d'abus; que ces appellations étaient fondées en plus grande équité qu'on ne croyait, et qu'elles étaient si enracinées en France, que l'on déracinerait plutôt tout l'appenin du milieu de l'Italie, que l'on abolirait les appellations comme d'abus de ce royaume, ou qu'on souffrit qu'autre en jugeât que le roi ou sa cour de parlement." (Fevret, T. 1er, pp. 24 et 25).

Nous sommes d'accord aussi sur la portée du Concordat de 1515 relativement à la nomination des évêques: *au roi la nomination, au pape l'institution.* Ceci est une des libertés gallicanes, n'en déplaise au savant critique! Rayer cette liberté du Code ecclésiastique en France, qu'obtenez vous? Si ce n'est de réunir dans les mains du pape et la nomination et l'institution des évêques. Le pape, par le concordat de 1515, a renoncé à la prérogative de nommer aux évêchés. Depuis cette époque, ce droit a été réuni à la Couronne de France, et lors de l'établissement du Conseil

Supérieur en 1663, rien n'était changé à cet égard. Il est donc tout naturel de conclure que puisque tous les évêques de la Colonie ont été nommés par le Roi de France et institués par le Pape, ce fut en vertu du Concordat de 1515, ou ce qui est tout un, de l'édit fondé sur la déclaration de 1682. Pour réfuter victorieusement cet avancé, il faudrait citer le nom d'un seul évêque, sous la domination Française, qui ait été nommé et institué en même temps par le pape; et l'on peut défier les plus laborieuses recherches historiques pour en trouver un.

Dans une dissertation comme celle-ci, il ne faut pas se laisser distraire par la poursuite d'un but mystérieux, autrement les citations d'auteurs diront tout le contraire de ce qu'elles contiennent. Ainsi le Roi en installant Mgr de Pontbriand, au siége épiscopal de Québec, dit qu'il n'a rien trouvé dans les bulles d'institution de contraire aux *privilèges, franchises et libertés de l'Eglise gallicane.* En faisant cette citation nous disions, M. Lareau et moi, que c'est la meilleure preuve que les Evêques de la colonie se sont conformés à la déclaration de 1682, autrement appelée la réaffirmation des libertés gallicanes. Le critique, à vues préméditées, ne trouve pas du tout que ce soit là une preuve. Les mots *libertés gallicanes* sont en toutes lettres dans le document qu'il reproduit, il les souligne même afin qu'ils ne passent pas inaperçus, et cependant il veut nous faire admettre qu'ils n'y sont pas! Le reste de la discussion sur ce point est de cette force. Il pose des prémisses claires comme 2 et 2 font 4 et il tire une conclusion qui ne va à rien moins qu'à 2 et 2 font 5. Il dit (page 439 de la Revue): "M. Doutre ajoute que Mgr. de Laval a été *nommé* par le Roi et *institué* par le Pape, conformément au Concordat de 1515. Soit! Est ce que cela prouve l'introduction en Canada des libertés de l'Eglise gallicane?" Ce raisonnement choque la logique la plus élémentaire. Il faut choisir entre le paradoxe et l'aveuglement. Si la nomination de Mgr de Laval a été conforme au Concordat de 1515 et si ce concordat a créé les libertés gallicanes, faut-il un grand effort de logique pour dire que ces libertés ont dû être introduites dans la Nouvelle France, puisque la nomination de Mgr de Laval a été faite conformément à ces libertés?

Avant de terminer ce sujet, je ne puis laisser passer une excentricité, qui devient plus comique, quand elle est répétée pour la quatrième fois. Parce que l'on trouve dans les Chartes, Provisions, Brevêts &c., les mots: *religion catholique, apostolique et romaine,*

on en couclut qu'il n'y avait pas de libertés gallicanes en Canada. Aurait-il fallu pour rendre ce gros argument impossible, remplacer ces mots par: *religion gallicane*! Depuis quand les gallicans ont ils cessé d'être catholiques, apostoliques et romains? Existe-t-il une religion gallicane? Les Catéchismes en 1600 ou 1700 comme en 1871, en France, font-ils dire aux enfants qu'ils sont *gallicans*, au lieu de leur apprendre qu'ils sont *catholiques apostoliques et romains*? M. Mame, le libraire religieux par excellence, en France, publie des *Paroissiens romains*, à l'usage des catholiques, mais n'a jamais, à ce que je sache, publié des *Paroissiens gallicans*. Dans dix ansd'ici, quand l'affaire Guibord sera quelque peu oubliée, ceux qui auront attaché leur nom à cette espiéglerie rougiront candidement sans qu'on leur demande.

Ceux qui ont trouvé que dans l'acte de rédaction du Conseil Supérieur, l'énonciation des causes *civiles et criminelles* dans la définition de la juridiction de ce conseil, excluait la compétence dans les causes canoniques, associeront leur modestie à celle de la première catégorie de logiciens. N'y eut-il que les appels comme d'abus dont le conseil a si souvent pris connaissance qu'ils suffiraient pour établir le fait que le Conseil exerçait un contrôle et une juridiction sans limite.

Officialité: Il n'y a pas de doute que pendant longtemps le Conseil Supérieur ne voulut pas reconnaitre l'officialité et c'est pour cette raison que dans la plupart des arrêts, on voit les mots: *prétendue officialité*. Mais dès 1713, l'officialité est formellement reconnue. Il peut se faire que le savant critique l'ait ignoré, puisque ses connaissances historiques étaient limitées aux bulletins de notre ouvrage, qui ont été publiés. S'il s'était donné le trouble d'ouvrir un volume qui est à la portée de tous: les Edits et Ordonnances, il aurait trouvé à la page 160 du second volume, une reconnaissance de l'officialité dans l'appel comme d'abus de Jacques Sivre dit St Fort; une autre reconnaissance de l'officialité à la page 163 du même volume, dans l'affaire de Pierre Le Boulanger. On ne peut ici prétexter que ces documents soient inédits: ils sont en la possession du public depuis près de 50 ans. Le seul document inédit que nous ayons publié, a été un défaut accordé à Jacques Sivre dit St Fort contre le promoteur de l'officialité, qui avait jugé à propos de ne pas plaider en Appel: il est néanmoins condamné par le Conseil Supérieur, qui jugeait, en pleine connaissance de cause, un appel comme d'abus. Si le critique auquel je réponds voit si souvent des appels comme d'abus non dé-

finitivement décidés, il ne faut pas en conclure que ces appels n'existaient pas, il faut plutôt supposer qu'on règlait la difficulté à l'amiable, avant d'attendre la jugement final: ce qui prouve hors de doute l'efficacité de cette procédure. Nier que l'officialité a existé, c'est rejeter de l'histoire les nombreux documents qui l'établissent et c'est user de la même force de raisonnement déjà signalée, qui a servi à nier l'existence du droit gallican, en Canada.

Appel comme d'abus: Il faudrait ici me répéter pour démontrer qu'il y a eu plusieurs appels comme d'abus.

Il s'est trouvé toutefois des touristes qui, ayant lu *Notre-Dame de Paris* et croyant que tout était fiction dans ce livre, ont eu besoin d'être conduits sous le péristyle de l'église pour croire à son existence. Je vais en faire autant pour ceux qui ont des yeux et ne voient pas.

Edits et Ordon. T. 2, pp 129 et 130 Appel Comme d'Abus.
" " p 160 "
" " p 163 "
" " p 193 "
" " p 204 "
" " p 328 "
" " p 331 "
" " p 332 "

Ce dernier est celui qui a fait le plus de bruit. Il concernait les funérailles de l'Evêque de St Valier. Le cas de Sivre dit St Fort est conclusif vû que l'appel a été définitivement jugé. Comme on le voit nos affirmations sont conformes à nos citations.

GONZALVE DOUTRE.

En publiant cet écrit de M. Doutre, la Rédaction de la *Revue* doit rappeler à ses correspondants deux règles invariables de sa direction:

1o Lorsqu'un article de la *Revue* provoque une réponse, cette réponse doit être adressée directement à la *Revue* d'abord, et ne peut être admise lorsque celui qui la fait s'est déjà adressée à la presse quotidienne pour discuter le même sujet.

2 Les écrits adressés à la *Revue* doivent être strictement exempts d'allusions personnelles et garder toujours la dignité du style légal.

L'article de M. Doutre manque à ces deux règles, mais comme il a trait à un écrit publié par un des Directeurs de la *Revue*, à la demande spéciale de ce dernier, la Direction a cru devoir consentir à sa publication.

NOTE DE LA RÉDACTION.

REMARKS ON THE LAW RELATING TO MARRIAGE LICENSES, QUEBEC.

By "The British North America Act, 1867," the Dominion Legislature is charged with legislation regulating "Marriage and Divorce" in Canada, while 'the solemnization of marriage in the Provinces is entrusted to the several local parliaments. Under this authority, the Quebec Legislature, at its last session, passed a bill respecting marriage licenses modifying the present law. This bill will come into force on the 1st July next (1872).

It is to be regretted that the legislation on the law of marriage, and of the solemnization of marriage, should have been divided betwen two distinct legislative bodies. The law of marriage in the Province of Quebec is already confused, by the tacking on of church discipline to the civil law. Instead of uniformity on so important a subject as the law of marriage, which we should seek to secure throughout our confederated states, a conflict of law, such as we see in England, Scotland and Ireland, is likely to be reproduced here.

It will be necessary to refer to the chief points of the law relating to marriage licenses as it now stands, that the alteration under this Quebec Act may be understood.

Under the Civil Code of Lower Canada, §57, unless a minister about to solemnize a marriage has published the banns of marriage himself, he must be furnished with a certificate establishing that the publications of banns required by law have been duly made.

By §58, this certificate must be signed by the person who published the banns.

§59, provides that "The marriage ceremony may, however, be performed without this certificate, if the parties have obtained and produce a dispensation or license from a competent authority authorizing the omission of the publications of banns."

Heretofore "marriage licenses" have been issued by the Governor General as representing the Crown. Our statutory law (35 Geo. 3, c. 4, §4,) as well as the Civil Code L. C., (secs. 59, 127, 134, 157,) recognize the existence of this licensing power, although it does not appear to have been specially enacted in

Lower Canada, as in Upper Canada (see Con: Stat: U. C. cap. 83, §2.) This system is evidently adopted here under the Common Law of England. By this Common Law, as well as by the English Statutory Law, the Crown holds supremacy in civil as well as ecclesiastical matters.*

In England the marriage license system has passed through several phases, and is now adopted under a public system of registration which is required for some time prior to the marriage.

In this Province of Lower Canada (now Quebec) marriage licenses are issued by an officer appointed by the Crown, to any applicant who furnishes a bond of $800 in himself and two sureties, that no legal impediment exists. As the Church of Rome by its discipline does not allow its priests to use Crown license, and only admits the dispensing power of the Bishop of the Diocese, their use has been confered to Protestants, the Church of Rome wisely adopting as its rule the publication of banns.

By Art §130, C. C., the publications of banns is made by the priest, minister or other officer, in the church to which the parties belong, at morning service, or if there be no morning service, at evening service, on three Sundays or holidays, with reasonable intervals. If the parties belong to different churches, these publications take place in each of such churches.

By §131, if the actual domicile of the parties to be married has not been established by a residence of six months at least, the publications must also be made at the place of their last domicile in Lower Canada.

By §132, L. C., if their last domicile be out of Lower Canada, and the publications have not been made there, the officer who in that case solemnizes the marriage, is bound to ascertain that there is no legal impediment between the parties, and

By §133, C. C., if the parties or either of them be, in so far as regards marriage, under the authority of others, the banns must be also published at the place of domicile of those under whose power such parties are.

As the consent of the parties to the marriage, and of those interested therein, is of the essence of the contract, and as the prevention of an illegal marriage is of more importance than the annulling of the same, it will be apparent that the publication of

* Stephens Com: Vol. 2, p. 515, 533; Vol. 3, p. 47.

banns is well adapted to secure this prevention, whereas the license system, according to our law, makes no pretension to publicity, but relies solely on the penalty under the bond, and the penalty on the minister to be hereafter referred to.

By §129, C. C., "All priests, rectors, ministers and other officers authorized by law to keep registers of Acts of Civil Status are competent to solemnize marriage; But none of the officers thus authorized, can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs."

From this clause, it may be inferred that unless there be any impediment through "doctrine," "belief," or discipline, all priests *et al.* may be compelled to solemnize the marriage of any parties presenting themselves, subject, however, to no impediment having been disclosed, under the publication of banns, the license, or existing to the personal knowledge of the priest or minister.

A refusal would subject the priest to an action for damages or proceedings under *mandamus*, and then the point as to how far the discipline of the church is subservient to the Civil Law would arise. This point has not been presented before our Courts.

By Art. §157, C.C., "If the publications required were not made or their omission supplied by means of a dispensation or license, or if the legal or usual intervals for the publications or solemnization have not elapsed the officer solemnizing the marriage under such circumstances is liable to a penalty not exceeding five hundred dollars."

By §158, C. C., "The penalty imposed by the preceding article is in like manner incurred by any officer who in the execution of the duty imposed on him, or which he has undertaken, as to the solemnization of a marriage, contravenes the rules prescribed in that respect by the different articles of the present title."

This last article recognizes the solemnization of marriage as "a duty imposed on him," and gives effect to the penalty in case of his contravening the title "on marriage," which embraces every rule in the entire law regulating marriage and its celebration.

This penalty was found to be a terror to Protestant clergyman in the solemnization of marriage. Some, it is true, assumed incorrectly, that the marriage license from the Crown conveyed full authority to celebrate the marriage, and was a guarantee that no

legal impediment did exist. They contended, and with apparent reason, that it was the duty of the issuing officer to ascertain and satisfy the requirement of the law that no legal impediment did exist, and that it only remained for the priest to perform the religious form attending the contract, and that if any penalty were imposed as a security to the public, that this penalty should be imposed on the officer issuing the marriage license.

The Act of the Quebec Legislature provides, §1. "That in so far as regards its solemnization of marriage by Protestant ministers of the Gospel, all marriage licenses shall be issued from the office of the Provincial Secretary under the hand and seal of the Lieutenant Governor, who for the purposes of such licenses, shall be the competent authority under article 59 of the Civil Code."

It might have been correct to say a competent authority, as the Quebec Legislature cannot derogate from the right of the Crown under the Common Law of England to issue a license if it see fit.

§2. Provides: "In so far as regards the solemnization of marriage by Protestant ministers aforesaid, no marriage license issued in any other manner or from any other authority shall be necessary."

§3. Provides that "The licenses issued under this Act shall be furnished by such persons as the Lieutenant Governor in Council shall name for that purpose, to all persons requiring the same, who shall previously have given bond, together with two sureties being householders, and in the form appended to this Act."

The bond is in the sum of $800, on the condition that "if it shall not hereafter appear that they or either of them the said ——— and ——— have any lawful let or impediment, pre-contract, affinity or consanguinity to hinder them being joined in holy matrimony and afterwards then living together as man and wife, then this obligation to be void and of none effect, otherwise to be and remain in full force and virtue."

§4: Declares that the fee shall be $8, not more than $2 of which shall be allowed to the issuer, the balance to be paid to the Treasurer of the Province.

§5: Provides that the revenue so raised shall be apportioned among protestant institutions of superior education, by the minister of public instruction, under the authority of the Governor in Council.

By §6: "No minister who has performed any marriage ceremony, under the authority of a license issued under this Act, shall

be subject to any action or liability for damage or otherwise, by reason of there being any legal impediment to the marriage, unless at the time when he performed such ceremony he was aware of the existence of such impediment."

§7: Provides that the Act shall come into force on the 1st July 1872.

The gist of the Act is thus in the declaration of: 1. Who shall issue licenses for Protestant ministers. 2. That no other license shall be necessary. 3. That the funds derived from the sale of licenses shall be applied to the purposes of superior Protestant education. 4. That ministers using the license shall be relieved from all penalty unless aware at the time of the celebration of the marriage of the existence of an impediment.

Now although this relief from a penalty for the transgression of the law, for which a license affords no means of guarding against, and which license the law obliges ministers to adopt, is reasonable and just so far as the priest or minister is concerned, still a wrong is done to the people by such a law. Thus the most sacred rights of family as to civil status, succession and inheritance, are guaranteed by the security of what? Of the collection of a penalty of $800 under a bond, and of the proof that the priest or minister *was aware at the time of the celebration of the marriage* that an impediment did exist. However respectable any class of ministers or men may be, such vital interests to citizens of a State should not be so imperilled. Even with the greatest care and in perfect good faith, injustice may be committed. Ministers of religion cannot be supposed to know by intuition that no impediment exists, and the "license" system effectually prevents their ascertaining the facts which they should know and might learn through the publications of banns.

The truth is apparent that the license system is a vicious one as it now exists in Canada.

If the English system of public registration of marriage licenses for some time prior to their use were adopted, some publicity might be obtained, but neither this plan nor any other appears so practical and likely to attain the object sought as the publications of banns in the face of the congregation where the parties interested reside and are known.

Or if the system of licenses be persisted in, then the issuing officer should be charged as a public officer to satisfy himself by evidence taken in a legal manner that no impediment does exist.

Any penalty for a neglect of duty should fall on him, but even this would not be just, as he may be deceived by false evidence.

It cannot be assumed that the issuing of licenses is for revenue purposes. Such trifling with the most sacred rights of a community for such purpose would justify the denunciation of the tax as immoral. If the discipline of the several churches could make the publications of banns obligatory on all, then the simple remedy would be the adoption of that rule.

This the Church of Rome professes to do. Whether the law will recognize such a pretension is a point which is open to discussion, and brings up the consideration of the Law of Marriage in this Province.

I may on a future occasion discuss this question and close the present remarks, by stating that although the *use* of marriage licenses under the Quebec Act is restricted to Protestant ministers of the Gospel, their *effect* may extend beyond the Protestant people, and that mixed marriages and the marriage of Roman Catholics under Crown licenses may give an importance and an effect to this Act not contemplated by the Quebec Parliament.

W. B. LAMBE.

Montreal, 29th December, 1871.

RAILWAY GRANTS.

The construction of railroads as aids to the settlement of our public lands is an enterprise of the highest national importance, and as such ought to receive from the community and from the Government all the assistance which they can command. Every person must have seen with satisfaction the liberality with which our rural and urban municipalities have subscribed to the stock of the various companies now in process of organization or which are already pushing on the construction of new lines. The Provincial Legislatures have resolved to insure the success of these enterprises by granting to them large tracts of the public lands. Are these grants constitutional? Such is the question to which the writer purposes to draw public attention. This point of constitutional law would have been raised more opportunely before the incorporatiou of these companies; but it cannot be denied, even at the present time, that it is one of great practical importance. If the success of the present railway movement depends in great measure on the grant of those public lands; if the money votes of the municipalities have been given on the faith of these grants, it becomes necessary to ascertain that their legality cannot be called in question. If the constitution is defective in this respect, it must be amended, not violated. The following opinion is published only after a full discussion in the editorial committee of the *Revue*, and after having received the approbation of several *confrères* of the Montreal Bar.

By the common law, all the public lands are the property of the Crown. It was formerly a disputed question whether the Kings of England had the right to alienate the Crown Lands. In course of time the Kings certainly exercised the right of granting the Crown Lands at their pleasure. But the exercise of this prerogative having greatly impoverished the Crown, it has been restrained by several modern statutes.*

In the Province of Canada previous to 1867, the public lands were the property of the Crown for Provincial purposes and sub-

* 5 Cruise's Dig., 46; 2 Greenleaf on Real Property, 39.

ject to many restrictions enumerated at length in chapters 22, 23 and 24 of the Consolidated Statutes of Canada. Certain free grants could even be made by the Governor in Council. As to the Legislature, its power over the public lands was unlimited.

Under the British North America Act of 1867, the tenure of the public lands has undergone very large modifications. The ownership is vested in the Dominion or in the Provinces, according to the nature and situation of the property. With regard to the Dominion, section 108 declares that "the Public Works and Property of each Province enumerated in the third schedule in this Act, shall be the property of Canada." This property comprises the canals, public harbours and fortifications, and others of a like nature.

The right of ownership in the Dominion of this property is absolute and free from all restriction. Section 91 enacts that the exclusive legislative authority of the Parliament of Canada extends to certains matters therein specified and particularly to "the public debt and property."

Is it thus with the right of ownership vested in the several Provinces? Section 109 declares: "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due and payable for such lands, mines, minerals and royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate and arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

Thus, the public lands are the property of the Provinces, subject to the restrictions imposed by the law. There is no doubt that if the Imperial Parliament had not made any other provision, the Provincial Legislatures could dispose of the public lands in the same manner as the heretofore Province of Canada, subject to the trusts established by previous laws, such as the trusts in favour of the Clergy, the Indians and the Schools. But the constitution, adopting in this respect a policy wholly different from the one applied to the Dominion, has taken care to limit the exercise of the right of ownership of the Provinces to certain objects. It declares at section 92, par. 5, that the exclusive authority of their legislatures shall extend, not to the ownership of the public property or lands of the Province, but to "*the management and sale of the public lands* belonging to the Province and of the timber and wood thereon."

Thus, then, the Province is proprietor of the public lands; she can administer and sell them, but she cannot make a gift of them. Without this 5th paragraph, she might dispose of them according to her good pleasure by sale, gift or otherwise; but with these expressions the enumeration of the powers given ought to be interpreted as limiting and exclusive, according to the maxim *qui dicit de uno negat de altero.*

It cannot be asserted that the 16th paragraph, giving to the local legislature jurisdiction "generally in all matters of a merely local or private nature in the Province," gives to it by implication the right of making land grants. That paragraph, in fact, relates only to matters which have not been expressly provided for by the constitution. Now, as the public lands have been arranged in a certain way, it cannot be supposed that it was the intention of Parliament that the Local Legislature should dispose of them in a different way.

The intention of the Imperial Parliament appears to have been to ensure the permanency of the local revenues and to put the lands beyond the reach of great corporations religious or otherwise, like those railway companies which in the United States have become mighty political potentates through the aid of numerous land grants. There can be no doubt that it is in the highest degree dangerous to abandon the public domain in favor of any corporation which is not under the exclusive control of the Government. This question of high political importance,—the policy of grants of the public lands,—can have no place in the pages of a legal review. But it cannot be denied that the aim of the framers of the constitution was to prevent these grants, seeing that the prohibition bears only upon the public lands and forests, and does not touch the mines, minerals and other royal reserves of the Provinces, nor the property of the Dominion, over which the respective legislatures have absolute and unlimited control. It may be said that the intention of the Imperial Parliament was to confer upon the Dominion Parliament and the Provincial Legislatures the whole of the powers formerly enjoyed by the legislature of the Province of Canada. We can only say of the legislature with Lord Ellenborough in *Rex* v. *Shone, quod voluit non dixit.** "If the Legislature intended more," said Lord Denman in *Haworth* v. *Ormerod,* "we can only say, that according to our opinion, they have not expressed it."†

* 6 East 518. † 6 Q. B. 307.

"A *casus omissus*," said Dwarris,* "can in no case be supplied by a court of law; for that would be to make laws. Judges are bound to take the Act of Parliament as the Legislature have made it."

The grant of public lands by the Imperial Parliament to the Provinces must be strictly interpreted; it must, in fact, be regarded as a grant by the Crown; that is most favorably to the Imperial Parliament and against the Provinces. "A grant made by the King," says Blackstone, (lib. II, p. 347.) "at the suit of the grantee, shall be taken most beneficially for the King and against the party.....The King's grant shall not enure to any other intent than that which is precisely expressed in the grant." "The King's grant," says Cruise, vol. 5, p. 53, "are construed in a very different manner from conveyances made between private subjects; for being matter of record, they ought to contain the utmost truth and certainty; and as they chiefly proceed from the bounty of the Crown, they have at all times been construed most favorably for the King and against the grantee, contrary to the manner in which all other assurances are construed."

Story lays down as a rule of interpretation of the American Constitution—similar to ours in so many respects—the following principle: "A rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic or even mischievous. If it be mischievous the power of redressing the evil lies with the people by an exercise of the power of amendment."† Further on (sec. 207) the learned commentator remarks: "It is often said that in an instrument a specification of particulars is the exclusion of another. Lord Bacon's remark that as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated, has been perpetually referred to as a fine illustration."

It has been also said, that a statute must be construed, if possible, so as to give sense and meaning to every part, and the maxim *expressio unius est exclusio alterius* is never better applicable than in the interpretation of a statute.‡

Dwarris, p. 605, says: "The maxim is clear, *expressum facit cessare tacitum*, affirmative specification excludes implication."

* p. 598.

† Const. of U. S., §193.

‡ Brown's Legal Maxims, p. 592; 9 Johns, U. S., 349.

It was on the same principle that the statutes by which our Courts were invested with jurisdiction in civil and criminal causes, were recently construed, in the Guibord case, as limitative and exclusive of ecclesiastical matters.

Coleridge *in re The Queen* v. *Ellis*,* observed: "It is an inflexible rule that under a special power, parties must act strictly on the conditions on which it is given."

It has been intimated that the restriction could be evaded by making a sale to the Railway Companies for a merely nominal consideration. But the Legislatures, any more than individuals, are not allowed thus to trifle with the laws of their country. Land grants are either constitutional or unconstitutional. If they are unconstitutional, they cannot be made in an indirect manner and in fraud of the law. Mr. Justice McLean, for the Supreme Court of the United States, said: "The power must not only be exercised *bonâ fide* by a State, but the property, or its product, must be applied to public use.....The public purpose for which the power is exerted must be real, not pretended."†

Judge Woodbury said in the same cause: "If on the face of the whole proceedings it is manifest that the object was not legitimate, or that illegal intentions were covered up *in forms*, or the whole proceedings a mere pretext, our duty would require us to uphold them."

How is this want of power to be remedied? The Constitution has wisely withheld from the Parliament of the Dominion all control over the Provincial lands; it has not been conferred expressly and it is certain that it has not been granted impliedly by section 91, declaring that the Parliament of Canada "for the peace order and good Government of Canada" has general jurisdiction "*in relation to all matters not coming within the laws of subjects assigned exclusively to* the legislatures of the Provinces." The matter of the public lands is especially assigned to the Provincial Legislature.

An amendment of the British North America Act by the Imperial Parliament is the only legal means to remedy the evil. Each Provincial Legislature can change or amend its own constitution without the sanction of the Parliament of Great Britain agreeably to section 92, par. 1; but these change can affect only its local political organization as established by ss. 58–90, for in-

* 6 Q. B. 501, 1844.

† The West River Bridge Co., v. Dix et al., 6 Howard, U. S. 537.

stance the abolition of the Legislative Council, and they cannot extend to its jurisdiction or the distribution of the legislative powers. These can be changed only by means of an Imperial Statute, sect. 129. This mode of procedure may be slow and troublesome, but it is prudent at the least, if not absolutely necessary.

D. GIROUARD.

Montreal, 5th January, 1871.

POWERS OF PROVINCIAL LEGISLATURES.

"The British North America Act, 1867," by s. 92, provides that "In each Province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say"—and then enumerates sixteen classes, amongst which are—

"8. Municipal institutions in the Province.

"14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

"15. The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

"16. Generally all matters of a merely local or private nature in the Province."

By s. 91 it provides that "It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (*notwithstanding anything in this Act*), the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say"—and then enumerates twenty-nine classes of subjects, amongst which is—

"27. The Criminal Law, except the constitution of Courts of

Criminal Jurisdiction, but including the Procedure in Criminal matters."

And the section closes in the following words: "And any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

A vast difference between the powers granted to the Federal Parliament and those bestowed on the Provincial Legislatures, is apparent to any one carefully studying the sections in question.

To the Federal Parliament belongs the right of making laws, not only upon all classes of subjects enumerated in s. 91, but also upon all classes of subjects not enumerated in s. 92. To the Provincial Legislatures is allotted the right of making laws in relation to matters coming within the classes of subjects enumerated in s. 92 alone. But that right is further restricted by s. 91, which in effect provides that if there be any clashing, or conflict, between the classes of subjects allotted to the Federal Parliament and those allotted to the Provincial Legislatures, the matter, with respect to which such clashing or conflict arises, shall be deemed to come exclusively within the jurisdiction of the Federal Parliament.

The authority, then, of the Federal Parliament, so far as the Provincial Legislatures are concerned, is supreme, save with respect to the classes of subjects enumerated in s. 92, over which the Provincial Legislatures have, to a certain extent, exclusive power to legislate. But when a matter is presented for legislation which falls within a class of subjects enumerated in s. 91 and at the same time comes within a class of subjects enumerated in s. 92, such matter belongs exclusively to the jurisdiction of the Federal Parliament.

The powers of the Provincial Legislatures are sharply defined by the Act creating the constitutions of the Province.

The powers of the Federal Parliament, on the contrary, are general, embracing all subjects save those specially confided to the Provincial Legislatures; so that all powers of Government granted by the B. N. A. Act, 1867, save those exclusively allotted to the Provincial Legislatures, which do not clash with those specially granted by s. 91, vest in the Parliament of Canada.

One of the consequences resulting from the distribution of

legislative powers between the Federal Parliament and the Provincial Legislatures is, that all persons occupying judicial positions throughout the Dominion, may, at any moment, in suits or proceedings before them, be obliged to pronounce upon the constitutionality of Federal or Provincial Statutes. In such case the duty of such persons is clear; if a Federal Statute be unconstitutional, to disregard it; and to act in like manner where a Provincial Act is *ultra vires*. A Supreme Court vested with authority to pass in review all acts whether Federal or Local, and to declare an Act of Parliament or of a Legislature constitutional or unconstitutional, as the case may be, is an absolute necessity of a Federation such as the Dominion of Canada. Its non-creation vests in Justices of the Peace and Commissioners for the trial of small causes, the powers which should alone be vested in such Supreme Court, and confides to the most ignorant, powers which should be entrusted solely to the most erudite, of judicial officers. If this state of things is allowed to continue, the greatest confusion will prevail, and it is the duty of the Imperial Parliament immediately to provide for the constitution, maintenance, and organization of a Court possessing the power of deciding in favour of, or against, the constitutionality of Acts of Parliament and of Provincial Legislatures.

A constitutional question, fraught with grave consequences to Municipal Corporations, was lately raised in the Province of Quebec, under the following circumstances:

The Legislature of the Province of Quebec, by 32 Vic. c. 70, s. 17, provided as follows: "In addition to the powers already accorded to the Council of the City of Montreal, in and by its acts of incorporation, and the several acts of amendment thereof, to enforce the observance of the by-laws of the said Council, made under and by virtue of the acts for the purposes in the said acts expressed, it shall be lawful for the said Council to impose in and by such by-laws a fine not exceeding twenty dollars and costs of prosecution, to be forthwith leviable on the goods and chattels of the defendant, or to enact that in default of immediate payment of the said fine and costs, the defendant may be imprisoned in the common gaol for a period not exceeding two months, the said imprisonment to cease upon payment of the said fine and costs, or to impose the said fine and costs in addition to the said imprisonment."

Sec. 19 of the same Act provides that "the five preceding

sections, and sections fourteen and fifteen of the thirty-first Victoria, chapter thirty-seven, shall not be deemed to apply to any matter of criminal procedure before the said Recorder's Court."

Previous to the passing of the 32 Vic. c. 70 (Quebec) the City Council of Montreal had passed a by-law, chap. 17 (Glackemeyer, p. 306), whereof s. 3 was in the following words: "Every description of gaming and all playing of cards, dice, or other games of chance, with betting, and all cock fighting and dog fighting, are hereby prohibited and forbidden in any hotel, restaurant, tavern, inn or shop, either licensed or unlicensed, in this said city; and any person found guilty of gaming or playing at cards, or any other game of chance, with betting, in any hotel, restaurant, inn or shop, either licensed or unlicensed, in this said City, shall be subject to the penalty hereinafter provided."

S. 9 of the same by-law provided that "any person who shall offend against any of the provisions of this by-law shall, for each offence, incur a penalty not exceeding twenty dollars, and be liable to an imprisonment not exceeding thirty days, and a like fine and imprisonment for every forty-eight hours that such person shall continue in violation of this by-law."

So far as the provisions of the said by-law against gaming were concerned, the City Council derived its authority from 23 Vic., c. 72, s. 10, § 1, which provided as follows: "it shall be lawful for the said Council at any meeting or meetings of the said Council, composed of not less than two-thirds of the members thereof, to make by-laws which shall be binding on all persons, for" (amongst others) "the following purposes . . . . to restrain and prohibit all descriptions of gaming in the said city, and all playing of cards, dice, or other games of chance, with or without betting, in any hotel, restaurant, tavern, inn, or shop, either licensed or unlicensed, in the said city"; and by the 13th section of the last-mentioned Act, it was provided: "And by any such by-law, for any of the purposes aforesaid, the said Council may impose such fines, not exceeding twenty dollars, or such imprisonment, not exceeding thirty days, or both, as they may deem necessary for enforcing the same."

On the 18th March, 1870, the City Council of Montreal, acting as was supposed under the authority of 32 Viet, c. 70, s. 17, re-enacted all the sections of by-law chap. 17, with the exception of s. 9, in lieu of which it was provided as follows: "Any person offending against any of the provisions of this by-law shall

be liable to a fine not exceeding twenty dollars and cost of prosecution, and to an imprisonment not exceeding two months for each offence." (By-law 36, Glackmeyer, App. p. 138.)

Under by-law 36, a person was convicted of playing cards with betting in an hotel in the City of Montreal, and was condemned to pay $20 fine and costs, and to be imprisoned in the common gaol for two months.

The by law and conviction are referred to solely as illustrations of the working of 32 Vic., c. 30, s. 17, and it is proposed to inquire whether the said section is not *ultra vires* of the Legislature of Quebec.

The arguments made use of in favour of the constitutionality of the section in question are to the following effect:

Under "The British North America Act, 1867," s 92, the Provincial Legislatures have the exclusive right of making laws in relation to matters coming within certain classes of subjects therein enumerated, amongst which classes figure "8. Municipal Institutions in the Province." Consequently the Quebec Legislature had a right to legislate exclusively in relation to all matters relating, or essential, to the Corporation of Montreal. Having the power to legislate in relation to Municipal Institutions exclusively, it necessarily follows that the Provincial Legislatures have the power of granting to such Municipal Institutions the right of making by-laws, and as without the power of enforcing obedience to their provisions such by-laws would be but waste paper, it must be taken for granted that the power, formerly exercised by the Province of Canada, of delegating a right to Municipal Institutions of passing by-laws and of enforcing obedience to such by-laws, by therein imposing punishment on offenders against their provisions, is under s. 92, § 8, vested in the Provincial Legislature of Quebec. Further that there really is no conflict with the exclusive power possessed by the Federal Parliament over the Criminal Law and Procedure in Criminal matters, as the offence charged, to wit, playing cards with betting, is not an offence under the Criminal Law, but is merely an act prohibited under what may be called Police Regulations, which form no part or portion of the Criminal Law of the Dominion.

Apparently there is a good deal of force in the line of argument adopted in defence of the section of the Statute attacked, but it is not the less true that its validity rests entirely upon the meaning to be attached to, and the extent of, the words "The

Criminal Law, except the constitution of Courts of Criminal jurisdiction, but including the Procedure in Criminal Matters," occurring in s. 91, § 27 of "The British North America Act, 1867."

It becomes necessary, therefore, in the first place, to establish the meaning of the words "The Criminal Law," and "The Procedure in Criminal Matters."

No difficulty can be experienced in arriving at the conclusion that the Criminal Law is that portion of the law relating to Crimes. Consequently the investigation becomes narrowed down into an inquiry as to what is a crime?

It would almost seem as if the Legislature of Quebec were of opinion that the Criminal Law does not apply to any minor non-indictable offence—that in fact all offences punishable solely on summary conviction do not fall within the domain of Criminal Law, and are not recognized as crimes.

According to the definition of Blackstone, "A crime or misdemesnor is an act committed or omitted, in violation of public law. This general definition comprehends both crimes and misdemesnors; which, properly speaking, are merely synonymous terms; though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of misdemesnors only." *

Mr. Sergeant Stephens in his Commentaries gives the following definition: "A crime is the violation of a right; when considered in reference to the evil tendency of such violation as regards the community at large." †

Mr. Justice Littledale in *Mann v. Owen*, 9 B. & C. 602, thus expressed himself: "The proper definition of the word 'crime' is an offence for which the law awards punishment."

In the case of *Hearne v, Garton*, 2 E. & E. 64, it was held that the provision of The Great Western Railway Act, 5 & 6 W. 4, c. 107, enacting "that every person who shall send or cause to be sent by the said railway any vitriol, or other goods of a dangerous quality, shall distinctly mark or state the nature of such goods on the outside of the package, or give notice in writing to the servant of the Company with whom the same are left, at the

* 4 Bl. Com. p. 5 (ed. 1769.)

† 4 Stephens' Com. p. 77.

time of sending, on pain of forfeiting 10*l.* for every default, or being imprisoned," made such sending of dangerous goods without notice a criminal offence—and Mr. Justice Crompton there said (p. 76): "I do not think that the act is merely for the protection of the railway; it is also for the protection of the public; and it makes the sending a crime, not merely in form, but in reality, by affixing a punishment to it."

In the case of *Atty. Gen. v. Radloff*, 10 Ex. 84, which was an information in the Exchequer to recover penalties for smuggling tobacco, the whole question turned upon the point whether such information was a criminal proceeding, and the Court, composed of Pollock C.B., Parke, Platt and Martin BB., was equally divided. Pollock C.B., and Parke B., being of opinion that it was a criminal proceeding, and Platt and Martin BB. considering it a civil matter. Parke B. made use of the following expressions: "Next, is this a criminal proceeding by which the defendant is charged with the commission of an offence punishable by summary conviction? As to its being a criminal proceeding: an information by the Attorney General for an offence against the revenue laws is a criminal proceeding—it is a proceeding instituted by the Crown for the punishment of a crime—for it is a crime and an injury to the public to disobey statute revenue law; and accordingly the old form of proclamation, made before the trial of informations for such offences, styles these offences misdemeanors."

Pollock C.B. said: "In the first place I am of opinion that the proceeding in this Court to recover penalties on an information fyled by him on behalf of the Crown, is a criminal proceeding. . . . . The only remaining question then is—is it a criminal offence? I should be sorry if I could bring myself to entertain any doubt about it. I think it is a very grave offence against the public. I cannot distinguish, either in morals or law, between cheating the State and cheating a private individual. . . . . I am of opinion, therefore, that it is a criminal offence. It is very true that it is not punishable in the ordinary way by indictment; but it is punishable by fine, and the fine may be imposed on summary conviction. Therefore, this being, in my judgment, an offence punishable on summary conviction, and the question arising in a criminal proceeding, I am of opinion that the defendant was not a competent witness, and was properly rejected."

Platt B. though of opinion that the proceeding by information in the Exchequer was not a criminal proceeding, put the follow-

ing question: "What then is a 'civil proceeding' as contradistinguished from a 'criminal proceeding'? It seems to me that the true test is this, if the subject matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceeding—that is a civil proceeding; but, if the proceeding is one which may affect the defendant at once, by the imprisonment of his body in the event of a verdict of guilty, so that he is liable as a public offender—that I consider a criminal information.

In the case of *Bancroft v. Mitchell*, 2 L. R. Q. B. 549, a bankrupt who had obtained an order of protection under s. 112 of 12 & 13 Vict. c. 106, was arrested on a warrant of commitment for not obeying an order made on him under 43 Eliz. c. 2, s. 7, for payment of a weekly sum to the guardians of a union for the support of his mother:—and it was held that the process under which the plaintiff was arrested was of a criminal nature and not for a debt; and that he was, therefore, not protected from arrest under s. 113 of 12 and 13 Vic., c. 106.

Blackburn J. (at p 555 of the report), said: "The question remains, what is the nature of the process under which the plaintiff was arrested? What is it that the plaintiff has done or omitted to do? He is the son of a woman who is chargeable to the parish, and he is of sufficient ability to support her. There was a moral duty on him, but at common law no legal duty, to support her. By statute 43 Eliz., c. 2, s. 7, it is enacted that the children of every poor person not being able to work, being of sufficient ability, shall, at their own charge, relieve and maintain every such poor person, in that manner and according to that rate, as by the justices shall be assessed, upon pain that every one of them shall forfeit 20*s.* for every month which they shall fail therein. It was as a *punishment* for the disobedience of an order made under this section that the plaintiff was arrested. . . . The statute makes what was a duty of imperfect obligation a positive duty. . . . . The offence here is that the plaintiff being of ability would not support his impotent relative—that is a duty the neglect of which though only morally wrong before the statute, is made a *crime* by the statute."

In the same case (at p. 556) Mr. Justice Mellor said: "But I have come to the conclusion that the duty of a son to support his mother, having been originally moral only, was made a positive duty by the statute which requires that in the event of the

son neglecting that duty, he shall pay such sum as the justices shall order, and then the ultimate enforcement of that duty is carried by fixing a penalty, and in the event of the non-payment of that penalty, a punishment of not more than three months' imprisonment is imposed. That is in the nature of a punishment for a criminal offence."

In *ex pte. Graves in re Prince*, 3 Ch. Ap. 642, where a debtor was convicted under the 6th section of the Copyright Act (25 & 26 Vic. c. 68), for violations of copyright in engravings, and sentenced to pay a fine *to the proprietor of the copyright*, and in default was imprisoned, and after his conviction executed a deed of composition with his creditors, it was held by the present Lord Chancellor, Lord Hatherley, then Sir W. Page Wood, L.J., and Sir C. J. Selwyn, L.J., that the process under which the debtor was arrested was of a criminal nature, and not for a debt, and that he was not entitled to his discharge. Lord Hatherley (at pp. 644, 645) said: "The case of *Bancroft v. Mitchell* has thrown great light on the construction of the provisions of the sections referred to. The *Copyright Act* clearly makes that which the debtor has done an offence against the law. . . . The scope of the Statute throughout is to make the act done an offence; the penalty is to be paid to the person injured, but it is not to be the measure of the damages which he may recover, for he may bring his action and recover damages independently of the penalty. . . . . I think, therefore, that the arguments that the debtor escapes by paying money, and therefore the imprisonment is only a process to enforce a payment of money, is answered by Mr. Justice Blackburn's judgment."

Sir C. J. Selwyn, L.J. (at page 646) said, after referring with approval to Mr. Justice Mellor's opinion in *Bancroft v. Mitchell*, "Whether we take the letter or the spirit of the Act, the result is the same. If we look at the letter, the words used are "penalty" and "conviction," all pointing to a criminal offence. If we look to the spirit of the Act, we find certain acts prohibited and treated as offences and certain penalties imposed, and in addition to the penalty, the prosecutor may recover damages by action."

In the 5th edition of Paley's Law and Practice of Summary Convictions, edited by H. T. J. Macnamara, Esq., Recorder of Reading, at pp. 112, 113, the question of what is a "criminal proceeding" is treated in the following manner: "The question,

therefore, what is a 'criminal proceeding' as the subject of summary conviction, depends on the manner in which the legislature have treated the cause of complaint, and for this purpose the scope and object of the Statute, as well as the language of its particular enactments, should be considered. It may be, as a general rule, that every proceeding before a magistrate, where he has power to convict in contradistinction to his power of making an order, is a criminal proceeding, whether the magistrate be authorized, in the first instance, to direct payment of a sum of money as a penalty, or at once to adjudge the defendant to be imprisoned; and it must be borne in mind that where a Statute orders, enjoins, or prohibits an Act, every disobedience is punishable at common law by indictment; in such cases the addition of a penalty, to be recovered by summary conviction, can hardly prevent the proceeding in respect of the offence from being a criminal one."

T. W. Saunders, Esq., Recorder of Dartmouth, in his work on the Practice of Magistrates' Courts, p. 58 (2nd ed.) thus expresses himself: "Except, therefore, in criminal proceedings, which include an *offence* punishable on summary conviction, the parties and their husbands or wives (as the case may be) are eligible as witnesses on either side, and even in criminal cases the disqualification only applies to the defendant."

J. F. Stephen, Esq., Recorder of Newark on Trent, in his work entitled "A General View of the Criminal Law of England," says: "A law is a command enjoining a course of conduct; a command is an intimation from a stronger to a weaker rational being that if the weaker does or forbears to do some specified thing, the stronger will injure or hurt him. A crime is an act of disobedience to a law, forbidden under pain of punishment "(p. 8). "The definition of crimes may therefore be conveniently restricted to acts forbidden by the law under pain of punishment. This definition, however, requires further explanation; for what, it may be asked, is a punishment? Every command involves a sanction, and thus every law forbids every act which it forbids at all, under pain of punishment. This makes it necessary to give a definition of punishments as distinguished from sanctions.

"The sanctions of all laws of every kind will be found to fall under two great heads; those who disobey them may be forced to indemnify a third person either by damages or by specific performance, or they may themselves be subjected to some suffering.

In each case the legislator enforces his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying. It is imposed for public purposes, and has no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, but they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public (p. 4). . . . . The result of the cases appears to be that the infliction of punishment in the sense of the word just given is the true test by which criminal are distinguished from civil proceedings, and that the *moral nature* of the act has nothing to do with the question." (p. 5.) It is sufficient in this place to observe that they illustrate the general proposition that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but that it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment." (p. 7.)

It may, perhaps, be as well here to give an extract from Le Sellyer's *Traite de la Criminalité*, showing what constitutes in France the "crime" of the English Law. "La criminalité c'est la qualité de certains actes les rendant passibles de l'application d'une loi pénale. Ces actes sont compris sous l'expression générale d'*infractions*. . . . Nous donnerons de l'infraction, la définition que donnait du délit le code de brumaire en ajoutant cependant un caractère oublié par ce code, à savoir qu'il n'y a de délit où d'infraction que dans les actes ou omissions *punis* par la loi. . . Nous dirons donc que l'infraction est toute action toute omission contraire aux lois qui ont pour objet le maintien de l'ordre social et la tranquillité publique et qui est punie par la loi." * (Nos. 2 and 3.)

To define is always difficult, and it is easy to perceive that the answer to the question, what is a crime? is necessarily a definition.

From the foregoing citations, however, it is submitted that the definition of a crime as "an act or omission forbidden by

* See also *Parker v. Green* 2 B. & S. 299; *Cattell* v. *Ireson* E. B. & E. 91; 2 Austin (ed. 1869) 1101.

the law under pain of punishment," is strictly correct; but in order thoroughly to understand it, the word "punishment" must also be defined.

The task in this case is hardly less, difficult than in that of "crime," but "punishment," it is submitted, may be declared to be "suffering in property or person imposed by the law (in the interests and name of society), on those who violate the law."

The imposition of punishment, then, appears to be the true test by which criminal are distinguished from civil proceedings, and punishment stamps the act or omission to which it is affixed as a crime.

But it has already been shewn that the Criminal Law is that portion of the law relating to crimes; therefore that portion of the law relating to acts or omissions forbidden under pain of punishment, forms part of the Criminal Law, and all laws regulating proceedings to be adopted to apply such punishments to offenders are laws regulating procedure in criminal matters, and also form part of the Criminal Law.

It is clear, therefore, that the by the 32 Vict. c. 70. s. 17, the Legislature of Quebec usurped authority over the Criminal Law (not within the limits granted to them by s. 92 of "The B. N. A. Act, 1867") and its authorization of the Council of the City of Montreal to pass by-laws inflicting punishment on certain offenders against the provisions of those by-laws, was invalid null and of no effect.

Moreover, a Provincial Legislature has but the right of imposing punishment by fine, penalty *or* imprisonment for enforcing any law of the Province, made in relation to any matter coming within any of the classes of subjects enumerated in s. 92. It cannot, therefore, impose punishment for any offence which is not an infraction of some of its own laws, made in relation to some matter coming within a class subjects enumerated in s. 92. It cannot impose punishment by fine *and* imprisonment for the same offence. It cannot regulate the proceedings by which such punishment shall be applied to offenders (otherwise called the Procedure).

The Parliament of the Province of Canada possessed full power over the Criminal Law and had also full power over Municipal Institutions, so that the grant to the Corporation of Montreal of a limited power to award punishment for violation of its By-laws, was strictly within the powers of that Parliament,

and such delegation was valid. But how can it be pretended that Provincial Legislatures have the right of delegating to Municipal Institutions greater legislative powers than they possess themselves? How can it be pretended that when Provincial Legislatures have but the right of punishing infractions of *their own laws* by fine, penalty or imprisonment, they have power to vest in municipal institutions the right of punishing infractions of *their* by-laws by fine, penalty *and* imprisonment?

The true rule to follow, it is submitted, with respect to the legislative jurisdiction of Provincial Legislatures, is to confine it strictly to the subjects expressly allotted to them, and in all cases where there is the slightest conflict between the local and federal legislative jurisdiction as to the right to legislate upon any matter, to place it amongst the subjects falling within the powers of the Dominion Parliament.

So far as Procedure in Criminal matters is concerned, Provincial Parliaments have no right to legislate, even upon the Procedure to be followed in order to secure the punishment of persons guilty of infractions of their own laws. It is perfectly true that Provincial Legislatures have the right of creating certain crimes under s. 92, § 15, by imposing punishment for enforcing observance of their laws; but having so created the crime, their powers with respect to it, save in one particular, appear to end; it then becomes a portion of the Criminal Law, over which alone the Federal Parliament has jurisdiction, and the Federal law of Criminal Procedure governs all the proceedings to be taken against the offender, the Provincial Legislature having, however, the exclusive right of repealing the Act by which such crime was created, and thereby removing it from the calendar of crimes.

It may be here remarked that it is exceedingly doubtful if Provincial Legislatures can appoint the mode in which a person accused of a crime created by a Local Act, can be tried. It would seem as if in the Federal Parliament alone was vested the power of providing that certain offenders should be tried summarily. Consequently, as the law of Procedure exists at the present moment, all persons charged with offences created by Provincial Legislatures must be tried before a jury. The only mode in which this inconvenience can be remedied is by Act of the Federal Parliament, providing that in all cases, wherein the punishment for an offence imposed by any Act does not exceed a certain sum, or a specified term of imprisonment, the offender shall be tried summarily.

In conclusion, it is submitted that by "The British North America Act, 1867," it was intended to place the Criminal Law and the administration of justice in criminal matters amongst the exclusive powers of the Federal Parliament—that but two exceptions to the general rule therein laid down are made, one by s. 91, sec. 27 and s. 92, sec. 14, by which the constitution, maintenance, and organization of Provincial Courts of Criminal jurisdiction are placed amongst the exclusive powers of Provincial Legislatures; the other by s. 92, sec. 15, by which in each Province the Legislature may exclusively make laws imposing punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in s. 92.

Evidently the intention of the British Parliament was to provide for the uniformity of the Criminal Law throughout the Dominion— to avoid the inconvenience of having one system of Procedure governing Federal crimes, and another system governing Provincial crimes.

The delicious *pot pourri* which might be expected if Provincial Legislatures had unlimited power to meddle with Criminal Procedure is apparent from 34 Vic. c. 2, s. 171 (Quebec), which is in the following words:

"In prosecutions for the sale or barter of intoxicating liquor of any kind, without the license therefor by law required, or contrary to the true intent and meaning of the law in that behalf, it shall not be necessary that any witness should depose directly to the precise description of the liquor sold or bartered, or the precise consideration therefor, or to the fact of the sale or barter having taken place with his participation, or to his own personal and certain knowledge, but the justices trying the same, so soon as it may appear to them that the circumstances in evidence sufficiently establish the infraction of law complained of, shall put the defendant on his defence, and in default of his rebuttal of such evidence, shall convict him accordingly."

It is to be remembered that penalties to a very large amount may be inflicted under 34 Vic. c. 2, and that in default of immediate payment, it is therein provided that, at the option of the prosecutor, the defendant may be imprisoned for a period of not less than two, and not exceeding six months, so that there can be no doubt that all acts therein prohibited under pain of punishment, are crimes, created by the Legislature of Quebec

under and by virtue of s. 92, § 15 of "The British North America Act, 1867." But whence did the Quebec Legislature draw authority to *amend* and alter the law of Procedure in Criminal matters as is attempted by 34 Vic. c. 2, ss. 148—199?

It is submitted that all the sections of that Act, having reference to Procedure, are null, void, and of no effect, having been passed in violation of the provisions of "The British North America Act, 1867."

WILLIAM H. KERR.

INSOLVENCY.

CAN A TRADER WITHOUT ASSETS MAKE AN ASSIGNMENT?

An important question relative to the interpretation of the Insolvent Act of 1869, was decided at Halifax, N. S., on the 13th September, 1870, upon an application for discharge by *Robert G. Noble et al.* The discharge was refused on account of, among other reasons, the failure of the insolvents to deliver up any assets to their assignee. Per Sutherland, J. :—

"I have been drawn to the conviction that where there is not any estate, nor any debts, effects, on property to assign, an Insolvent is not entitled to claim a discharge from the Court under an assignment made conveying nothing. The 3rd section of the Act of 1869 directs the proceedings at the meeting of the Insolvent's creditors and directs among other things that the Interim Assignee shall exhibit a statement showing the amount and nature of all the assets of the Insolvent, including an inventory of his estate and effects. This leads, surely, to the belief that the act designed that there should be estate and effects, or debts due to the Insolvent, to assign. It seems to me to be a mere sham to present a piece of paper to the assignee and call it an assignment, when it is unaccompanied with property upon which he can act." *

In the Province of Ontario, on the other hand, Judge Jones, *in re W. Perry*, not only held that the delivery of assets is unne-

* *The Acadian Recorder* of the 17th September, 1870, in which the learned judge's opinion is published in full, under his own signature.

cessary, but even that the Insolvent can obtain confirmation of a consent to his discharge, *without having made an assignment*, upon affidavit that he had nothing to assign. *

In our opinion, the former of these decisions is unfounded in law, and the latter carried too far.

Insolvency laws are laws of public order ; consequently, when the legislature has not expressly established any prohibition or exception, the Courts have no right to supply it. Section 2 of the Insolvent Act of 1869 declares that " any debtor unable to meet his engagements, and desirous of making an assignment of his estate," shall do so to an official assignee, &c. The Act does not make it obligatory on the Insolvent to produce or deliver any assets.

The honorable Judge of the Insolvency Court at Halifax objects that, by section 3 of the Insolvent Act, the assignee, at the first meeting of creditors, must exhibit a statement showing the amount and nature of the Insolvent's estate, debts and effects. But that section does not say that the assignment shall be null and void if the Insolvent has no property of which a statement can be made. The Legislature evidently and quite naturally foresaw that the great majority of Insolvents would possess property, and simply desired to point out to the assignee the line of proceeding to be adopted by him in the generality of cases.

The learned Judge is unable to see how a debtor holding no property at the time of his assignment, can assign anything ; and adds that an assignment made under those circumstances is *a mere sham*. But he forgets the terms of section 10 : " The assignment shall be held to convey and vest in the interim assignee. . . all his personal estate and moveable and immoveable property, debts, assets and effects, which he has *or may become entitled to at any time before his discharge*."

Section 101 of the Insolvent Act, which enumerates the grounds for opposing the confirmation of discharge, does not mention the want of assets.

Mr. Justice Jones' decision goes much too far. It is true that a deed of composition or of discharge may be agreed to at any time " before, during or after the proceedings taken *upon an assignment or for the forced liquidation of the Insolvent's estate*."

* L. C. Jur. 1866, p. 75 : Law Journal, U. C. (N. S.) p. 75 ; Edgar, Insolvent Act of 1869.

But do not these last words indicate the necessity of an assignment or of compulsory liquidation ?

Section 98, corresponding to section 9, par. 3, of the Act of 1864, declares that "the consent in writing of the said proportion of creditors to the discharge of a debtor absolutely frees and discharges him, *after an assignment or after his estate has been put in compulsory liquidation*, from all liabilities whatsoever." With a provision of law so clear and express, it must be held that the learned Judge's decision is directly opposed to the letter of the statute.

Section 105 of the Insolvent Act of 1869, as well as clause 9, par. 10 of the Act of 1864, is clear and positive with regard to the discharge granted by the Court. "If after the expiration of one year from the date of an assignment made under this Act, or from the date of the issue of a writ of attachment thereunder," the debtor cannot obtain his discharge from his creditors, he may petition the Court for a discharge.

And if it were otherwise, the creditors, who have the right to oppose all and every application for discharge, and whose number cannot be legally ascertained until a month have elapsed from the assignment, would be completely at the Insolvent's mercy. He could simply divest himself of his property under the common law so as to make the requisite affidavit, with which he would immediately present himself before the judge and obtain his discharge at once. Such a mode of procedure is too summary to be authorized by the Insolvent Act of 1869.

CAN A PERSON WHO CEASED TO BE A TRADER BEFORE THE PASSING OF THE INSOLVENT ACT OF 1869, TAKE BENEFIT OF THE ACT?

J. E. Villeneuve was a trader of Laprairie, in 1857, when he became an insolvent. Failing to make a settlement with his creditors, he then ceased to be a trader and became and has ever since been an officer of the Custom House in Montreal. In 1870, being still debtor of his commercial liabilities, which for the most part were not yet prescribed, he made an assignment to Sauvageau, official assignee, under the Insolvent Act of 1869. In 1871, after the passing of the Amendment Act of that year, he applied for a discharge. Three creditors, holding claims created since he retired from trade, opposed his petition, upon the ground that under the Statute of 1871 the discharge could not be granted, ex-

cept subject to their claims. On the 29th December last, the Superior Court (Mackay J.) absolutely refused the discharge, the learned judge holding that the petitioner, not being a trader at the time of, nor since the passing of the Insolvent Act of 1869, could not in any way take benefit of the Act. A contrary decision was given on the 2nd June last, 1871, by the Supreme Court of Nova Scotia, *in re* Archibald & al., which only this day came under our notice. Under the circumstances, it will probably be perused with interest.

"Sir William Young, C. J., delivered judgment as follows: *

"This is an appeal from an order of the Judge of Probate and Insolvency at Halifax, dated 1st March last, discharging the insolvents under secs. 105 and 106 of the Act of 1869. Their petition set out their assignment of 1st December, 1869, and that more than one year having elapsed from the date thereof, and the petitioners having failed in obtaining from the required proportion of their creditors a consent to their discharge, they applied to the judge to grant such discharge pursuant to the statute. The insolvents were thereupon subjected to personal examination before the judge respecting their dealings, books and liabilities, which extended over three days, and after careful examination, the counsel who appeared for the creditors and against the insolvents, expressed themselves satisfied with the explanations afforded by the insolvents, and acquitted them of fraud in their dealings. Some delay then took place with a view to the legal objection being raised which was urged on the appeal, but which had not been brought before the Judge of Probate, who granted the order of discharge as unopposed. The first hearing on the appeal was had before me at Chambers on the 31st March, when some preliminary objections were taken on the part of the insolvents, which were afterwards withdrawn, and the main question came up on an admission of the insolvents that at the time the Act passed in 1869 they had ceased to be traders. The case of *Surtees* v. *Ellison*, 9 B. & C. 750, decided in 1829, was then cited, and I looked into the point and was prepared to give judgment, but withheld it at the instance of the counsel, who were negotiating for a settlement. In the meanwhile the Dominion Parliament passed, on the 14th April, the amending Act of 1871, chapter 25, upon which the insolvents insisted at a

* 7 Canada Law Journal, N. S. 301.

second hearing on the 26th May, and I am now to consider the effect of both Acts.

"The policy of the imperial and colonial legislatures has varied much from time to time, as to the persons to whom the privileges and obligations of the bankrupt laws should extend. The 34 & 35 Hen. VIII c. 4, passed in 1542, was aimed at all persons who, in the quaint language of the preamble, "craftilly obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but, at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience,"—a description which might be applied to a good many bankrupts of the present day. The 13 Eliz. c. 7, and the 21 Jac. I. c. 19, comprehend all persons using or exercising the trade of merchandise and some other trades or professions. By the 6 Geo. IV. c. 16, all persons using certain trades, and doing certain acts, and all persons using the trade of merchandise, shall be deemed traders; and the present Bankrupt Law in England, the 32 & 33 Vic. c. 71, passed in 1869, extends to non-traders as well as traders, a full description of traders being given in the schedule, while a recent decision * has extended it to peers of the realm.

"The Canadian Insolvent Act of 1864, the parent of the present one, applied in Lower Canada to traders only; and in Upper Canada to all persons, whether traders or non-traders. The Dominion Act of 1869 applies to traders only, and this the amending Act of 1871 has somewhat modified.

"Under the Act of 1869, I should have held, on the authority of *Surtees* v. *Ellison*, that a person who had ceased to be a trader at the passing of the Act did not come within it. The trading in that case was before the passing of the 6 Geo. IV. c. 16, and the court were all of opinion that they must look at the statute as if it were the first that had ever been passed on the subject of bankruptcy, and that there was no sufficient trading to support the commission. Lord Tenterden, in stating this result, lamented that a statute of so much importance should have been framed with so little attention to the consequences of some of its

* *Ex parte Morris. In re Duke of Newcastle*, L. R. 5 Ch. 172. See 6 C. L. J., N. S. 189.

provisions. The legislature, he added, cannot be said to be *inops consilii*, "but we may say that it is *magnas inter opes inops*." The reasoning of this case has a direct bearing on the Act of 1869, and in my opinion confined its operations to persons who had been and continued to be traders at the time it passed.

"We may infer that such was the opinion also of the Dominion Parliament, and that it led, among other things, to the Act of 1871, amending the Act of 1869, the first section of the later Act being as follows: "The first section of the said Act (that of 1869) is hereby amended by adding thereto the following words: 'And persons shall be held to be traders who, having been traders, and having incurred debts as such, which have not been barred by the Statutes of Limitations or prescribed, have since ceased to trade; but no proceedings in compulsory liquidation shall be taken against any such person based upon any debt or debts contracted after he has so ceased to trade."

"This is a very comprehensive and a very important provision, peculiar, so far as I know, to our law, and the true construction of which it is of great moment to ascertain. The section I have just cited is not declaratory in its form—it is professedly, as it is in fact, an amendment, but an amendment incorporated with the original section, and henceforth forming an essential part of it. Even in statutes distinct from each other, but on the same subject, the several Acts are to be taken together as forming one system, and as helping to interpret and enforce each other—being in *pari materia* they are to be read as one statute. The doctrine as to the retrospective operation of statutes, was fully considered by this court in the case of *Simpson's Estate*, 1 Oldright, 317, and had been previously reviewed in the case of *Wright* v. *Hale*, in the Exchequer, reported in 6 H. & N. 227. We held "that however it may be in the United States, where the constitution expressly condemns and forbids retrospective laws which impair the obligation of contracts, or partake of the character of *ex post facto laws*, there can be no doubt that the Imperial Parliament or Colonial Legislatures, within the limits of their jurisdiction, have a more extended authority; and where their intention is to make a law retrospective, it cannot be disputed that they have the power. That intention is to be made manifest by express works, or to be gathered clearly and unmistakably from the purview and scope of the Act. It is a question of construction; and, the Act being its own chief exponent, still the surrounding circumstances are to be looked at."

"Applying these principles to the Act of 1871, there can be no question, I think, that it was intended to govern the operation and to enlarge the scope of the Act of 1869, and that all future proceedings in cases of bankruptcy, and the traders to whom it shall apply, must be regulated by it.

"The reference to the Statute of Limitations is not strictly within the scope of our present enquiry, but in a matter coming before all the Courts of Probate in our Province, and which will be eagerly discussed, it is not amiss, I think, that I should add, that where the debts of a person who had been a trader before, but had ceased to be so on the 22nd June, 1869, have been barred by the Statute of Limitations or prescribed, (that is where they are no longer enforceable at law,) such person is not entitled to the benefit of the Act.

"Under the facts in this case I am of opinion that the insolvents came within the Act, if it applies to proceedings actually commenced in our Courts of Probate, or under appeal in this court.

"This is the only question that remains, and several cases in Fisher's Digest, 8231, were cited by Mr. McDonald as bearing on it, on behalf of the insolvents. In *Wright* v. *Hale* it was held that the 23 & 24 Vic. c. 126, enabled a judge to certify in an action commenced before the passing of the Act. "There is a considerable difference," said Pollock, C. B., "between new enactments which affect vested rights, and those which merely affect the procedure in courts of justice. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does not apply to such actions." See the Imperial Act 24 & 25 Vic. c. 26, sec. 5. The same principle is recognized in *Freeman* v. *Moyes* I. A. & E. 338, and in the Admiralty case of *The Ironsides*, reported in 1 Lush. 458. I have already held that the first section of the Act of 1871 must operate as a retrospective enactment, and I see no reason why it should not apply to a pending suit or appeal. To hold otherwise would only oblige the insolvents to commence *de novo*. The case of *Cornill* v. *Hudson*, 8 E. & B. 429, where it was held that the 10th section of the Mercantile Law Amendment Act did not extend to actions already commenced, and our own decision of the like purport in *Coulson* v. *Sangster*, 1 Oldright, 677, proceeded mainly on the language of the enactment, and, as I think, do not apply here. I confirm, therefore, the discharge of the insolvents,

but as they have succeeded on a ground which had no existence when they entered their appeal, I must decline giving them costs."

D. GIROUARD.

Montreal, 13th January, 1872.

EXPROPRIATION.

In view of the many projects in which expropriation is being actively invoked in this Province, and the great lengths to which there appears a disposition to push the doctrine, it may not be amiss to occupy a few pages of *La Revue Critique* in noticing some points bearing on the subject.

The discussion is, perhaps, all the more allowable, as we have as yet very little established jurisprudence of our own on the matter; and to cite directly from other systems, particularly from the old French Law, is, as I shall endeavour to shew in this article, to rely upon guides which are never authoritative and generally unsuitable and false when applied to us and our political constitution and social condition. The relations and practice, also, of our Local Legislature on the matter towards the people of the Province, and the respect which private rights is to enjoy at its hands, are being established, and although we make no claim to touch legislation, still we may open a discussion which, continued by others, may aid in forming a more correct public opinion on the subject than appears at present to exist. The fact is, the question can hardly be said to have been seriously considered amongst us. The immediate proximate apparent utility, as it strikes us at the moment, is apt alone to be considered, without troubling ourselves about fundamental views on property or Government or with that higher utility that has to do with far-reaching consequences.

Without attempting to treat each head wholly separate and distinct, what I shall say may be referred generally to the following heads; 1st. I shall endeavour to shew both on general and special grounds that we are without authority on this subject in the usual sources of our jurisprudence. 2nd. I shall briefly notice the state of the law of Expropriation at ancient Rome, in France, and England; and 3rd. I shall try to shew on what

grounds and conditions, and upon payment of what indemnity, it should be allowed among us. It is evident that on so vast a subject what I shall say must be a mere attempt and notice.

Taking up the first point, then, which has for its object to guard against being led astray by false guides in so important a matter, we must throughout bear in mind that the question, as intimated, is one of public law. It has to do with the relations between individuals and the State, with the guarantees and respect private property is to enjoy against unjust interference and arbitrary proceedings on the part of the State. It is a measure of the emancipation and freedom of the individual.

It is not hard to see that such a question depends intimately upon the views and practice that prevail in any particular nation or under any particular system, as to the powers and supremacy of the State or Sovereign and the rights of the subject and his tenure of property. A brief reference to some of the views that have prevailed on these points under the systems to which we are accustomed to look for the sources of our private law, will, I think, show us how inapplicable, on generals grounds, are the doctrines borrowed from those systems, as a measure of our individual rights. Thus while the private law of the Romans has passed into and forms the basis of the laws of nearly all modern nations, and is more or less of universal application, their public law, as contained in the *Corpus*, has been everywhere rejected except where seized upon by despotism to further its own ends. Who would think of invoking public law whose maxim was *quod principi placuit legis habet vigorem ?* And yet upon slight reflection, it is as surprising that the old French Law should be invoked in a matter of expropriation—of the rights of the individual towards the State or Sovereign. Do we forget the volumes that have been written on the iniquities of that old *regime*—the insolent trampling under foot of all personal and individual rights ? A *regime* in which "*la grande masse de la nation, sans droits politiques, exploitée par des pouvoirs temporels et spirituels au moyen des divers droits seigneuriaux, des dîmes, des corvées &c., fût partout opprimée et maintenue dans un servage spirituel et matériel*"* : a *regime* of which the French Revolution was the appropriate and legitimate fruits and its violence a measure of the oppression.

Can a system of public law that grew up under such a *regime* as this and permeated to the core with the spirit of feudal des-

potism, be appealed to to determine the individual rights of the Canadian people? These general considerations are well worth our attention when looking for authorities on expropriation.

But we must specially notice the Royal authority, the centering of all the powers of the State in the King.

In what I say here I make no pretension to make known any thing new. I merely transcribe and call to mind well-known facts which are sometimes lost sight of, and which I deem useful in support of my argument.

The saying that no true knowledge of any system of laws and of their applicability can be had without reference to their history, the state of society, political organization and influences under which they were formed, applies with tenfold force in a matter of public law like expropriation.

The current of despotism similar to Roman Imperialism that at one time or another run through nearly every country of modern Europe, and which in England cost Charles I his head, appeared in France in full force under the old *regime*, particularly during the hollow and falsely brilliant reign of Louis XIV.

Under the *Grand Monarque*, "Le Roi, Il veut" might challenge comparison in infamy with *quod principi placuit.*

Louis' predecessors, as supreme seigneurs of France and otherwise, had claimed and exercised sufficiently arbitrary powers; but he was not only supreme seigneur, but full and absolute master and owner of all the property of his subjects and arrogated to himself the right to dispose both of their property and themselves without the slightest regard to law or equity.

The general authority over the whole nation attributed to the Sovereign, for the common good, by the French lawyers anxious to overthrow feudalism by means of the Royal power, was never meant to give him any special right in the property of his subjects; nevertheless in the hands of courtiers it proved most disastrous, and ended in the King being told as stated by Troplong: "que tous les biens de ses sujets étaient à lui, et que la France estant une source inépuisable de richesse, il n'y avait point de prodigalité que le pût incommoder." †

When this principle came to be acted upon under Louis XIV, the King at first hesitated: "Le ‡ projet de Desmarets avait con-

* Ahrens, Droit Naturel.

† Preface to Dons. p. 118. ‡ Troplong.

tristé son âme ; mais le père Letellier l'avait mis au large en lui apportant une consultation des plas habiles docteurs de Sorbonne qui décidait nettement que tous les biens de ses sujets étaient à lui *en propre, et quand il les prenait, il ne prenait que ce qui lui appartenait.* Le Roi ajouta que cette décision avait ôté ses scrupules et lui avait rendu le calme et la tranquilité. En conséquence, le Roi tint *pour la forme* un Couseil et fit bâcler par un edit de 1692 cette "*sanglante affaire de dixième.*"

The King was not a slow learner. In his instruction to the Dauphin he said: * "Tout ce qui se trouve dans l'entendue de nos Etats, de quelque nature qu'il soit, nous appartient au même titre. Vous devez être bien persuadé que les rois sont *seigneurs absolus et ont naturellement la disposition pleine et libre* de tous les biens qu'ils sont possédés, aussi biens par les gens d'église que par les seculiers, pour en user en tout comme de sages economes."

Is it any wonder that Troplong should say that the Code Napoleon gave to France "*la souveraineté du citoyen francais sur lui-même et sur sa propriété ?*"

Now we have in all the above a measure of the certain rights and guarantees enjoyed by individuals as towards the State under the old *régime.* I say of the certain rights; for no one supposes that the above doctrines were carried out literally and generally against the French people; still the individnal enjoyed no sure legal guarantee that they would not be put into practice against him, and it would not be hard to shew instances in French history where they were.

Is it this public law or a system formed under these doctrines, that we should invoke as applicable here?

But there are other reasons why the old French Law on the subject is inapplicable, and that is, that no fixed equitable jurisprudence on the subject or on any subject where the State was interested, was possible in France or could exist under such an arbitrary system, any more than it could exist under the *régime* of *quod principi placuit* of Roman Imperialism.

Hence all the modern commentators agree that there was no fixed jurisprudence on expropriation under the old *régime.*

Batbie T. 7, p. 8, speaking of the absolutism of Roman public law and of the old French law in relation to expropriation, says: "Nous trouvons dans notre ancien droit un état de

* Troplong.

choses semblables, et cette anologie s'explique par l'indentité du régime. Comme l'empereur romain, le roi de France est investi du pouvoir absolu. *Quod principi placuit legis habet vigorem.* Le pouvoir d'exproprier n'est pas réglementé par une loi générale : il n'est même pas formellement établi en principe. Mais le roi puise dans sa toute-puissante le moyen de faire céder le droit privé et, en ordonnant des mesnres, il fixe les conditions auxquelles les propriétés seront prises. Aussi ne trouvons-nous dans l'ancien droit que des édits spéciaux et point d'ordonnance générale sur la matière,

Il paraît qu'en vertu d'anciennes lois le roi pouvait faire bâtir des murs de fortifications sur les propriétés privées sans donner d'indemnité : c'était une espèce de servitude militaire dans l'intérêt do la défence commune."

Their ideas on this matter, like those of our city corporation, were that compensation was of pure grace or authority and not of right,although to do these old despots justice, it must be admitted that their systems afford numerous authorities for compensation which put to shame their modern imitators. Of this, however hereafter.

" Antérieurement à la Constitution francaise des 3-14 Septembre 1791" says Del-Marmol, " il serait difficile de rencontrer un texte législatif qui proclame le droit d'exproprier pour cause d'utilité publique avec l'obligation d'indemniser le propriétaire dépossédé."

" Avant 1789," says Debray, p. 3, " aucune loi générale ne régissait la matière. Tel était, avant cette époque, le besoin d'ouvrir des débouchés à l'agriculture, que le bienfait de nouvelles voies de communication compensait, aux yeux des particuliers, la perte des terrains utiles à leur emplacement, et que souvent *l'administration s'en emparait sans indemnité aucune.*"

This last, however, was not the general rule, although the real measure of the certain rights of the individual.

De Lalleau T. I. p. 4, says : " Sous le régime antérieur à 1789, l'opération toute entière de l'exécution des travaux publics, ce que comprend ; la confection et l'approbation des projets, plans et devis, la mise de l'État en possession des terrains, la direction des travaux, la liquidation et le paiement des indemnités, toute cette marche fut administrative," that is to say absolutely in the hands of the King.

Herson Exp. p. 4, says : " Dans l'ancien droit, elle s'exerçait

sous la dénomination de *retrait*, au nom du souverain et en vertu de ce qu'on nommait son *domaine éminent*. Ce ne fut qu'à l'époque de la confection de nos codes que le législateur s'occupa d'établir pour cette matière une suite complète de règles spéciales."

The constitution of 1791, Art. 17, declared : " La propriété est inviolable et sacrée. Nul ne peut en être privé, si ce n'est lorsque la nécessité publique légalement constatée l'exige évidemment et sous la condition d'une juste et préalable indemnité."

"Ce principe," says Debray p. 2, " il appartenait à la révolution française de proclamer."

No doubt the principle and numerous instances existed in the old law, as must exist in every civilized State, of causing private rights to yield to the public necessities ; but then everything was done arbitrarily, and it was only at the epoch of the French Codes that the law of expropriation was based on permanent principles of equity, and subject to fixed and certain rules and procedure without which there can be no guarantee for private rights and no jurisprudence worthy the name.

De Lalleau, T. 1, p. 5, cities a number of edits and arrêts of Louis XIV, relative to the construction of canals and highways, in proof of his statement that all was administrative, that is done by the King.

Proudhon, T. 2, p. 199, says : " Aussi quoique *l'ancienne législature française ne présente aucune loi positive et générale* sur l'expropriation dans l'intérêt de l'État, il est certain que cette mesure, dont le principe se trouve déjà dans une Ord. de Philippe Le-Bel, de l'an 1303, fut consacrée plus tard sous le nom de *retrait* d'utilité publique par les Parlements et cours de justice : *elle était autorisée pour chaque cas spécial par un arrêt de conseil d'État qu'en réglait le mode d'application et les conditions.*"

How much room there was for a sound jurisprudence to exist on the subject under the old *regime* may be judged from the example of Louis XIV in the cases given by De Lalleau. Kingly absolutism appears complete and shews that here also Louis' doctrines as to the powers of sovereigns, did not remain pure theory. The carrying out of the projects were entrusted to the King's nominees, Royal *Commissaires* so infamously known in French history, and to make sure of keeping all in his arbitrary power and excluding all intervention by the ordinary tribunals he declared : Evoque S. M. à soi et à son conseil toutes les contestations qui

pourraient naître au sujet de la dite entreprise . . . renvoi pardevant le dit sieur intendant commissaire départi . . . . . faisant défense à ses cours et autres juges d'en connaître et aux parties de se pourvoir ailleurs, à peine de cassation de procédure et de 500 livres d'amende, et de tous dépens dommages et intérêts. Enjoint S. M. au dit sieur intendant, commissaire départi, de tenir la main à l'exécution du présent arrêt." In an arrêt of 26 May, 1705 the King closes thus : "Et en cas d'appel, Sa Majesté s'en réserve à Elle et à son Conseil la connaissance."

It would be hard to distinguish here what were the rights of the subject beyond what the arbitrary will of a despot chose to allow.

No small portion of what has been said of the old French system before the Revolution will apply, although in a less degree, to the old law of England prior to the Revolution of 1688. We shall hardly look for our guide on expropriation, to the good old days of the English common law, or of high prerogative, when Kings, notwithstanding *Magna Charta* and many nice theories about English freedom, enriched themselves with the spoils and confiscations of their oppressed people, and wantonly mutilated and imprisoned obstinate Commoners.

To say nothing of the earlier kings and Henry the VIII, who was "despotism personified," we find very high notions of kingly authority under the Stuarts, as already intimated. "As it is atheism and blasphemy," says James I, "in a creature to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what a king may do in the height of his power." (Blackstone.)

This absolutism did not have its own way in England, but still the idea of the King's supremacy ; and the doctrine, under the influence of which the English law was for centuries, and was moulded, and upon which the whole land tenure of England was founded, viz : that the King was the universal lord and original proprietor of all the lands in the Kingdom : "*Tout fut in luy et vient de luy au commencement*" ; have left deep traces in, and profoundly affected English law on the subject of the rights of individuals where private property is forcibly taken by the sovereign for public purposes.

Blackstone B. 2, ch. 5, speaking of tenures, says : "Thus all the land in the Kingdom is supposed to be holden, mediately or immediately, of the King, who is styled the lord *paramount*, or

above all." And again in ch. VII, he says: "This allodial property (*dominium directum*,) no subject in England has: it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the King. The King therefore only hath *absolutum et directum dominium*. . . A subject therefore hath *only the usefruct and not the absolute property of the soil*: or as Sir Edward Coke expresses it: he hath *dominium utile*, but not *dominium directum*." This system lasted in more than theory right up to the middle of the 17th century, and Kings often acted, to use the words of Blackstone "as if the English people in, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord."

Is it surprising that we find the most monstrous doctrines in the English common law as to the rights of individuals to be compensated by the State, when the above doctrines as to ownership were "for many ages a fixed and undeniable maxim" of that law? Long after the *dominium directum* of the sovereign had totally disappeared in practice everywhere else, it remained as if a fact to justify taking private property without compensation for military and other national purposes.

In these cases the old doctrine that the Sovereign in taking private property only took what was his own seemed to remain as a living active principle in favor of the sovereign State or King as its representative in such matters.

When men and communities ceased to endure the absolutism of the personal Sovereign and his *dominium*, many of them appear simply to have transferred these to the ideal Sovereign or State. This accounts in a measure at least for the extraordinary doctrines we find, and still put forth even in our Courts, as to the omnipotence of the State and its rights to inflict any amount of injury upon private individuals without indemnity, and for the absurdities we hear about *damnum absque injuria*.

An instance of this absurd doctrine, and a consequence no doubt of the influence on English Common Law of the doctrines mentioned as to the absolute *dominium* of the Sovereign, is given in the case of *Cast Plate Manufacturers* vs. *Meredith*, which is much cited by the advocates of the omnipotence and immunity of the State, 4, D. & E. R., p. 793. What I allude to are the words of Buller J. who said: "I am by no means satisfied that, on the broad principle stated by the plaintiff's counsel, any action could

be maintained. *There are many cases in which individuals sustain an injury, for which the law gives no action :* as forinstance, pulling down houses, or raising bulwarks, for the preservation and defence of the Kingdom against the King's enemies. The civil law writers indeed say, that the individuals who suffer have a right to resort to the public for a satisfaction ; but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *salus populi suprema lex esto.* If the thing complained of were lawful at the time, no action can be maintained against the party doing the act. In this case express power was given to the commissioners to raise the pavement : and not having exceeded their power, they are not liable to any action for having done so."

We need hardly say that in England, in virtue of Statutes, and under the influence of the principles almost universally recognized by Statutes, the courts have generally abandoned these absurd and iniquitous doctrines of the common law which are now left to defenders on this side of the water, to our municipal corporations, and some of our learned judges.

I shall notice the above matter more fully when I come to treat of the compensation and indemnity to which individuals are entitled.

On the whole, from what has been said, we think it will be granted that it is neither to the *old* law of France or England, or of Imperial Rome, we should look for guides and authority on expropriation. These systems are no models for us. They may be referred to at times to shew, strange to say, that even under the most arbitrary and unjust systems rights and indemnity were often accorded which are denied us by petty municipal authority under our free constitution ; but they never can be cited as a limit or measure of our individual rights.

I wish to notice now a question of expropriation which has lately created some discussion among us, and in connection therewith to add some special reasons why the old law of France as also the new is of no authority to support such expropriation. I refer to expropriation for cemeteries.

The argument for such expropriation, intended no doubt to secure its justification before the community, has been publicly put by Mr. Jetté, a well known advocate of this city, and the authorities he cites, though not numerous, must be supposed to be he best that were available in support of the project.

These authorities I hold do not justify the expropriation sought.

In France, under the old *regime*, it was alone because cemeteries were national that expropriation was allowed, and where they were not national but denominational, expropriation was refused, and the authorities cited by Mr. Jetté prove this. Everybody knows that in France the Roman Catholic Church was a State or national Church, and it was for the cemeteries of that Church alone that expropriation was permitted.

The arrêt cited by Mr. Jetté from Bardet T. 2, p. 93, of January 1633, has the holding :

" *Cimetière de ceux de la religion prétendue réformée n'est pas de nécessité publique, et ne peut faire contraindre un particulier de vendre sa terre.*"

It appears that there had been a common cemetery in which both Catholics and Protestants were buried together. This the R. C. Bishop prohibited and caused the Protestants to be excluded from the common burying ground: and the question in the case was whether or not the Protestants should be allowed another cemetery by expropriation. M. l'Avocat Général Talon resisted the application, and speaking of the necessity that justified expropriation said : " Mais cette nécessité se droit prendre étroitement, d'une nécessité *publique*, absolue, et communément *interprétée et appliquée aux églises paroissiales, à leurs cimetières. . .* Appliquant le droit au fait de la cause, on dit que s'agissant d'un cimetière, la nécessité est publique : mais il faut distinguer ; s'agissant d'un cimetière pour ceux de la religion prétendue réformée on ne peut dire que c'est la cause de la nécessité publique, parce qu'en ce royaume il n'y a qu'une seule religion, savoir, la catholique.

" *Véritablement il leur faut un cimetière : mais il faut qu'ils trouvent un fonds qu'on veuille vendre,* au prix duquel les catholiques contribuent."

This doctrine was maintained and was the jurisprudence, and does it not prove clearly that under the old French law expropriation was not allowed for denominational cemeteries but only for national ones, and solely because they were national—affected with the character of national—belonged to the national church. On this point the above was not a solitary arrêt. (See Brillon Vo. Cim.)

Now the Protestants of France, or as the arrêt legally styles

them, *ceux de la religion, P. R.*, were at that time (1633,) before the revocation of the Edict of Nantes, entitled to all civil and religious rights short of those privilages only which result from a church being national. None of our religious or denominational bodies have a right to claim greater privileges before the law in relation to expropriation than had the Protestants of France of that day. It will not be pretended that we have a national church, and anybody entitled to claim those privileges which belong to a church purely in virtue of its being national. All churches and cemeteries are denominational with us and do not come under those reasons which admitted, but under those which excluded expropriation for cemeteries under the old French system.

We cannot allow it to one body and deny it to another without unfairness. Give it to the Roman Catholics and you must in fairness do the same for Episcopalins, Presbyterians, Wesleyans, Baptists, and so on down to Jews and Quakers, and the weakest body in the Province, if they ask it, for they are all equal before the law, and all simply denominations. Nay, there are reasons why expropriation should be allowed in favor of a small or unpopular body who possess no land, which do not exist in favor of a church like the Roman Catholic, whose adherents possess everywhere three-fourths of the land. I do not know whether the Jews will ever claim a right to expropriate: it may be that leaving that to us, they will prefer to follow the venerable example of Father Abraham when he weighed to Ephron the four hundred shekels of silver, current money with the merchant, for the cave and field of Macphelah; but should they ever make the claim in their desire to have a separate cemetery at any place, there would exist special reasons in their favor.

But the authorities cited by Mr. Jetté from the old French system are authorities primarily and chiefly in snpport of expropriation for churches, parsonages, convents, colleges, and other church establishments. There was no jurisprudence or law allowing expropriation for cemeteries considered as something standing by themselves.

Expropriation for cemeteries was allowed on the ground or maxim: "Cœmeterium gaudet eodem privilegio quo Ecclesia." The church was mentiond first after the King as having a right to enjoy expropriation. Thus Maillart *sur Cout. d'Artois*, cited by Roquière Exp. p. 13, mentions the right "au roi, à *l'église*,

aux villes de se faire subroger dans l'achat même d'acquérir la propriété d'un héritage limitrophe, ou trouvé nécessaire aux fortifications, à *l'édification d'une église, à la décoration d'une place, d'une ville, d'une maison royale, d'un collége.*"

In Louet, Lettre A. vi, referred to by Mr. Jetté as an authority, contains far more cases of expropriation for churches than for cemeteries; and not only cases for the erection of churches but also cases of expropriation to increase the size of churches, and for the décoration and increase, "pour la décoration et accroissement d'une église paroissiale."

Again the Ord. of Philippe Le-Bel, cited by Mr. Jetté as an authority for expropriation for cemeteries, does not, as given in I. Laurière, p. 404 and quoted by the authors, contain one word about expropriation for cemeteries, but only "*pro ecclesiis aut pro domibus ecclesiarum parochialium fundandis vel ampliandis, and pro domibus rectorum.* The words of the ordonnance are:

Item. Concedimus ex nunc, quod possessiones, quas pro Ecclesiis, aut pro domibus Ecclesiarum parochialium fundandis de novo, vel ampliandis, infra villas, non ad superfluitatem, sed ad convenientem necessitatem acquire continget de cetero, apud ipsas Ecclesias perpetuo remaneant absque coactione vendendi, vel extra manum Ecclesiarum ipsarum ponendi, quodque possessores illarum possessionum ad eas dimittendas pro justo pretio compellantur.

Item: Pro Ecclesiis etiam* parochialibus et domibus rectorum extra villas fundandis vel ampliandis concedimus illud idem.

Now if this Ord. and the old French jurisprudence are authority to justify expropriation here for cemeteries, *a fortiori* are they authority to justify expropriation for churches, colleges, convents, and all manner of ecclesiastical establishments. Are we prepared to take this ground? We must do it, or say the old law is worthless as an authority. Imagine every religious body or denomination among us expropriating for all these objects, and everywhere throughout the Province, and we have in some degree a measure of the authority of the old law and of the soundness of the doctrine that would admit expropriation for denominational cemeteries. Then what about schools and hospitals, refuges, and the numerous charitable institutions? Is it not very

* A foot note mentions that the word *cemeteriis* is added in the Register of Nimes.

wrong that a man should be allowed to ask a high price from one of these charitable institutions, particularly when truly public, like the General Hospital.

The Cemetery is denominational and sectarian; the Hospital is truly catholic. The Cemetery is for the use and benefit of one particular body or denomination only; the Hospital is for the benefit of the whole public, irrespective of class, nationality, or creed. The Cemetery belongs exclusively to, and is under the sole and exclusive control of one religious body; the Hospital belongs to and under the control of all. The Cemetery is the property of a rich corporation or body, which re-sells what it expropriates to particular persons; the Hospital has only the benevolence of the public to rely upon for support and to pay for its property, and does not sell but gives away and uses for the good of the whole public both what it gets and what it might be allowed to expropriate. On what grounds, then, is the Hospital, which possesses so many attributes of a truly public character, denied the right of expropriation, while denominational cemeteries which possess none, are allowed it?

Before I leave the old French law I must say a word more about citing an Ord. of Philippe le-Bel, as an authority in Canada. To cite at all from the old feudal and despotical *regime* anterior to the French revolution, for a measure of our individual rights of property, was bad enough; to have cited from the old feudal-ecclesiastical period of an early time would have been worse still; but to cite from Philippe le-Bel is to combine all the demerits of the former two, with the demerits of perhaps the most selfish and unscrupulous despot of the Middle Ages superadded.

It would be hard to say what outrageous measures might not find authority in the 354 or more ordonnances promulgated by him. For instance, by one of them he appropriated to himself (expropriated) the plate of the bailiffs of his kingdom, and in part that of his subjects, in return for a future and partial consideration.

An example of his justice is given in an Ord. of his of 1306, only three years after the former Ord. p. 443 of I. Lauriere; it is: "Mandamus vobis et vestrum singulis quatenus omnes terras, domos, vineas, et possessiones alias quas Judæi dictae senescalliae (Tholosanae) tanquam suas proprias habebant, tempore captionis ipsorum, sufficientibus proclamationibns, et subhastionibus factis, vendi et distrahi, pro justis pretiis nobis applicandis, quam citius commode poteritis faciatis," &c.

It is to be hoped that neither our Quebec legislature nor our Courts will accept Philippe le-Bel as an authority to decide what individual rights the people of this Province are to enjoy.

I shall now notice the modern French law, which also I hold does not justify expropriation for cemeteries with us; and for one grand reason, that cemeteries under the modern law of France are municipal (*communal*), are provided by and belong to the municipalities—are truly public, and are held and controlled by the public authorities for the general public of all creeds, without it being in the power of any religious body to claim the ownership or control of the cemetery, and exclude from burial therein. Is there no difference between expropriation for such cemeteries and expropriation for a cemetery with which neither municipality nor public authorities have anything to do after it is once acquired, but which remains in the exclusive control and ownership of a particular sect or denomination? Or is the difference fundamental, and constitutes all the difference between an object that possesses that truly public character which justifies expropriation and an object for which expropriation is not allowed, except on the principle that it is the right of the State to make bargains for private persons.

To shew the public character of cemeteries in France and their establishment and control by public authority, I refer to the decree of 23 prair. an XII which was national in its scope: Art. 2. says: "Il y aura, hors de chacune de ces villes et bourgs à la distance de 35 à quarante mêtres au moins de leur enceinte, des terrains spécialement consacrés à l'inhumation des morts."

Art. 3. "Les terrains les plus élevés et exposés au nord seront choisis de préférence; ils seront clos de murs de deux mêtres au moins d'élévation. On y fera des plantations, en prenant les précautions convenables pour ne pas gêner la circulation de l'air."

The whole decree is a provision for a great public object regarded purely as such.

Merlin, Rep. *Vo. Cim* p. 325, says: "Aujourd'hui, l'autorité Ecclésiastique n'intervient plus dans l'établissement des cimetières. *C'est un objet de pure administration municipale.*" It is for this reason and this alone that expropriation is allowed. The Municipality is one of those *fractions constitutive de la Société* or a constituent portion of the State spoken of by Debray, p. 6; but neither the Catholics by themselves nor the Protestants by themselves within any municipality constitute a *constituent*

fraction or portion of the State in the sense meant. "Le territoire de la France est divisé," says Touillier, T. 3, p. 47, "en départements, en arrondissemens communaux ou en cantons."

These are the constituent portions of the State meant, and not the Catholics, the Protestants, the Jews, &c., as Mr. Jetté would argue.

The words of Debray, page 6, are: "Un des caractères essentiels de l'expropriation, c'est de ne pouvoir être ordonné, que pour les travaux profitant directément à la societé ou à une des fractions constitutives de societé." Do the words "une des parties constitutives de la societé" mean the different religious bodies in the State? Is this the basis? are the different religious bodies recognized in France, and by the French constitution as the constituent parts on which the whole municipal and administrative system of France is organized?

What the constituent portions mean, may be inferred, I believe, from Tit. 2 of the French constitution of 1791: "Les citoyens françaises, considerés sous le rapport des relations locales qui naissent de leur reunion dans les villes et dans de certains arrondissemens du territoire des compagnes, forment les communes."

Dufour, page 16, says: "Nous avons pour plus de simplicité raisonné comme si la societé ne se personnifiait que dans l'État et ne pouvait avoir d'autre organe que le gouvernement. En realité il n'en est pas ainsi; les *administrations departmentales* et *communales* sont au lieu et place du gouvernement pour les services de nature à être localisés."

"Il était donc rationel d'autoriser le département et la commune à user du droit d'expropriation pour les besoins publics abandonnés à leurs prévisions."

Foucart, Droit Public, 3, 35, says: "Elle" (la commune) "est le dernier terme de la hierarchie administrative. C'est dans la commune que a lieu l'application immediate des lois et reglements d'ordre public:" and "C'est au point de vue administratif qu'elle concourt à l'administration générale de l'État."

Roquière, one of the latest writers on expropriation, says, p. 39: Qui peut aux yeux de la loi entreprendre des travaux ayant le caractère d'utilité publique nécessaire pour autoriser l'expropriation. Il n'y a pas de doute possible pour l'Etat et pour le Département, mais pour les communes on en avait fait une question avant que la loi du 3 Mai, 1841, ne fut venue resoudre. L'art. 3 de cette loi met sur le même ligne les travaux entrepris

par l'Etat, le Département ou la commune. Avant de la loi de 1841, le Conseil d'État avait constamment répondu, *ce que est encore vrai aujourd'hui*, que les travaux des communes étaient des travaux d'utilité publique quand ils étaient entrepris *dans l'intérêt collectif de la commune, considerée comme communauté politique*, mais qu'ils perdaient ce caractère lorsqu'ils n'avaient en vue que los intérêts de la commune, *considerée comme propriétaire privée*."

These extracts pretty clearly shew what is the nature of those *fractions constitutives* in favour of which expropriation is allowed, and why and when only it is allowed. The idea does not appear to have ever entered the head of any of these writers on the subject that expropriation could be allowed in favour of a particular religious body within the commune or municipality in order to confer on it exclusive ownership, *comme propriétaire privée*, which is, I believe, the position of property acquired by religious bodies among us. That the claimants for expropriation in the case of the Cote-des-Neiges cemetery consider the property to be expropriated the absolute property of a particular body, we know from themselves in a case where this very point was raised: "Ma pretension est," said Mr. Trudel in Brown *vs.* The Fabrique, "que *c'est l'Eglise qui est propriétaire du cimetière.* Si le droit de propriété absolue du cimetière résidait dans l'assemblée des fidèles ou dans tous les paroissiens de la paroisse de Notre Dame, et que par hazard tous embrassent le protestantisme, ils auraient donc le droit d'affecter l'Église et le cimetière au culte protestant? mais il n'en peut être ainsi. L'Église ne peut *pas perdre son droit absolu* de propriété sur des biens d'Église par l'abjuration d'un certain nombre de fidèles.

"Le corps des anciens et nouveaux marguillers, qui composent la Fabrique ne sont qu'un corps d'admlnistrateurs. La question est de savoir pour qui ils administrent: Est-ce pour la communauté des fidèles? Est-ce pour l'autorité supérieure ecclésiastique? *Pour constater ce droit absolu de propriété*, il faut remonter à l'origine du christianisme et étudier la constitution de l'Église.

"Le juge: Il faut trouver cette propriété quelque part.

"M. T:—Pour y arriver, je pose comme principe que dans l'Église, l'autorité réside en la personne de son chef visible, et que cette autorité est conférée directement par Dieu en sa personne. Sous ce rapport, la forme de la constitution de l'Église se rapproche le plus d'une monarchie absolue: et c'est sur ce principe qu'on doit se guider pour arriver à la solution de cette question. .

"A mon sens, les biens d'Église doivent être comparés, dans une certaine mesure, aux propriétés des gouvernements monarchiques.

"Qui a la propriété absolue de ses biens ? Le Gouvernement, n'est-ce pas ?

"Je soumets donc, quoique la question soit difficile à décider, et quelque étrange que paraisse cette opinion, que *la propriété absolue de ces biens* réside en la personne du chef d'Église comme représentant de Dieu.". . .

"Le juge :—Vous dites donc que le cimetière appartient à l'Evêque ?

"M. Trudel :—Comme représentant l'autorité supérieure ecclésiastique. De même que dans une monarchie absolue les biens de l'Etat sont censés être la propriété du roi, *qui possède dans ses provinces par ses lieutenants.*"

I am not dealing with any mere theoretical question of theology, and have no desire to do so ; I am merely citing from a solemn legal argument of claimants relative to the ownership of the very cemetery in question in this article. My argument, however, does not rest on any distinction as to whether the property is in a religious organization independent of all the Canadian people or an organization of the Canadian people. I take ground against all expropriations for denominational cemeteries. I do not claim for one religion or religious body what I would not grant to another.

The strongest authority cited by Mr. Jetté in favour of expropriation, and in my opinion the only one, was the precedent in the case of the Mount Royal Cemetery, and the unfairness of denying to one what was allowed to another. But this authority does not rest upon principle. It was wrong in both cases, and the sooner we cease from a wrong course the better ; and no better time for gracefully doing so could present itself to a Legislature mainly composed of Roman Catholics, than when application for a Roman Catholic cemetery was before them. They did not do so, and it is hard to suppose they will oppose such expropriation in any other cases that may come before them, although it is to be hoped they will, no matter who may be the applicant.

The fact is, all such expropriation is not only wrong in principle and without authority, but it is to allow particular religious bodies and organizations to push their domain and interference beyond the legitimate field of their authority into a field from which they have been excluded in whole or in great part by national or public authority in both the great civilized nations to which we owe our origin and our laws.

A very grave legal question may be raised as to the limit of the powers of our Local Legislature to authorize expropriation, and whether if they go beyond a certain limit their acts may not be resisted and judicially set aside as unconstitutional—as beyond the scope of the powers conferred by their charter. They are the seat only of a delegated sovereignty in the matter, and it is hard to see how in any case they can go beyond the practice and constitutional principles followed by the Imperial Parliament.

The proper rule would appear to be that stated by Roquiere p. 32. " L'expropriation ne peut être demandée que dans l'intérêt des *grands services publics* auxquels *l'administration est chargée de pourvoir*, et l'affectation de l'immeuble exproprié à un *usage public* en est la condition."

I shall now give a couple of authorities to shew how they regard expropriation in France for Municipal Cemeteries :

Fauchét Code des Municipalités, Vol. 1, p. 520, says : "Nul doute que l'établissement des cimetières ne puisse donner lieu à l'application de la loi du 3 Mai, 1841, sur l'exp pour cause d'utilité publique, néanmoins, on ne doit recourir à cette mesure extrême qu'avec la plus grande réserve, et qu'autant qu'il serait absolument impossible d'acheter amicablement *dans la Commune aucun autre terrain propre* aux inhumations : car, comme l'a fait observer le Comité de l'Intérieur dans *plusieurs avis, la convenance ou l'avantage que trouverait la Commune* à prendre tel ou tel terrain ne serait pas un *motif suffisant pour en exproprier le propriétaire.*"

In Sebire et Carteret, Encyc. du droit, *Vo. Cimetière* : the very case in question, of enlargement of the cemetery, is put as follows :

"Dans le cas spécial de l'agrandissement du cimetière, que devrait-on décider si le propriétaire des terrains contigus se refusait à les vendre à l'amiable, et si d'un autre côté, il existait *dans la Commune* des terrains sur lesquels le cimetière insuffisant pût être convenablement transféré et agrandi ? Faudrait il pousser le respect de la propriété jusqu'à imposer *à la Commune* les dépenses d'une translation plutôt que de déclarer l'expropriation pour cause d'utilité *publique ?*

"Le Comité de l'Intérieur a émis dans le sens de l'affirmative en date du 13 Juillet, 1825, un avis aux principes duquel l'Administration *est restée fidèle.*"

And this in case of Municipal Cemeteries, observe. Where would the enlargment of our denominational cemeteries stand ?

I come now to notice very briefly the English Law in relation to cemeteries; and here too I hold we find no authority for expropriation for denominational cemeteries, and for much the same reasons as in France.

In England, there exist not only the claims of a national church, but cemeteries are truly public and under the control of public authority. It is sufficient to cite the principal Acts of the Imperial Parliament relative to cemeteries, to shew what a matter of national concern they are.

The principal acts constituting the law of England on the subject as it now stands are known by the general name of the Burial Acts. Under these Acts, Burial Boards, subject to the control or one of Her Majesty's Principal Secretaries of State and to Her Majesty in Council, are established all over England, divided into Burial Districts, for the purpose of providing and maintaining great public cemeteries.

The principal of these Burial Acts are: "The Metropolitan Interments Act, 1850," amended by 15 and 16, Vict. c. 85, the principles of which have been extended to the whole of England by "An Act to amend the laws concerning Burial of the dead *in England* beyond the limits of the Metropolis, and to amend the Act concerning Burial of the dead in the Metropolis;" 16 and 17 Vict. c. 134. Also: "An Act to make further provision for the Burial of the dead *in England* beyond the limits of the Metropolis," 17 and 18 Vict. c. 87, also the 18 and 19 Vict. c. 79; and c. 128, "An Act to further amend the laws concerning the Burial of the dead *in England*." The whole amended by 20 and 21, Vict. c. 81; "An Act to amend the Burial Acts;" and 22 Vict. c. 1, "An Act more effectually to prevent danger to Public Health from places of Burial," also the 23 and 24, Vict. c. 64, and the 25 and 26 Vict. c. 100.

The preamble to the Metropolitan Act, in its tenor and objects like the others Acts, says; "Whereas it is expedient to make better provision for the Interment *of the dead in and near* the Metropolis: Be it therefore enacted &c., &c., ; that the Cities and Liberties of *London and Westminster* respectively the *Borough* of Southwark, and the *Parishes, Townships, Precincts,* and *Places* mentioned in the Schedule (A) to this Act, shall for the purposes of this Act be *One District* to be called, "*The Metropolitan Burial District.*"

Extend these Burial Districts with their Burial Boards and

public cemeteries open to all denominations over all England—the whole subject, as stated, to the control of n Secretary of State and orders in Council, and this alone is enough to shew that allowing expropriation for such a great public and national system, cannot be invoked as authority in cases of denominational cemeteries here.

The length of this article already will not allow an examination of the elaborate provisions of thsse Burial Acts, which would furnish additional proof, if any were required, to support the pretentions I have urged.

The fact that a particular portion of the cemetery may be set aside for the national church does not affect the argument any more than does assigning different portions of the Municipal cemeteries in France to different religious persuasions.

In both countries there is a connection between State and Church that does not exist here—and in both the cemeteries still continue subject to the control of the public authorities and remain public or municipal property.

This article has been devoted chiefly to pointing out in some measure how devoid of authority we are on expropriation in the usual sources of our jurisprudence, particularly in old French Law, and that to cite simply and directly even from Modern French and English systems is to be led astray unless we take into account the differences of political constitution, of the relations between the State and the religious societies within it, and many other modifying circumstances, on all which intimately depends the law of expropriation, being wholly unlike in this respect mere private law which is comparatively independant of such circumstances.

The question of expropriation for cemeteries has been noticed mainly by way of illustrating this part of the subject. Without revertiag to it again, the subject will be continued on the other two heads referred to at the beginning of this article.

NORMAN W. TRENHOLME.

JUDICIAL APPOINTMENTS.

A great deal of excitement has been created in England by the appointment of Sir R. Collier to the seat in the Court of Common Pleas vacated by Mr. Justice Montague Smith, in order simply to qualify the late Attorney General for a seat in the Judicial Committee of the Privy Council, under the 34 & 35 Vic. c. 91.

The following correspondence on the subject has been published:

Sir,—Having heard with considerable pain, on authority on which I can rely, that an impression prevails among the legal profession that my objection to the late appointment of Sir Robert Collier, as cotmmunicaed to Mr. Gladstone, was based *inter alia* on an ungenerous disparagement of the personal merits of the late Attorney-General, I am naturally desirous of removing an impression which is the reverse of the truth, and of having the grounds of my objection properly understood. The shortest way of effecting this being the publication of the ensuing correspondence, with which otherwise I might not have thought it necessary to trouble the public, I shall be glad if you can conveniently find room for it in your columns.

I beg to remain,

Your obedient servant,

Dec. 2, 1871. A. E. COCKBURN.

The Lord Chief Justice to Mr. Gladstone.

Court of Queen's Bench: Nov. 10, 1871.

Dear Mr. Gladstone,—It is universally believed that the appointment of Sir Robert Collier to the seat in the Court of Common Pleas, vacated by Mr. Justice Montague Smith, has been made, not with a view to the discharge of the duties of a judge of that Court, but simply to qualify the late Attorney-General for a seat in the Judicial Committee of the Privy Council, under the recent Act of the 34 & 35 Vict. c. 91.

I feel warranted in assuming the general belief to which I have referred to be well founded, from the fact that the Lord Chancellor, with a view to contemplated changes in our judicial system, has, notwithstanding my earnest remonstrance, declined for the last two years to fill up the vacant judgeship in the Court of Queen's Bench. I cannot suppose that the Lord Chancellor would fill up the number of the judges of the Court of Common Pleas, while, to the great inconvenience of the suitors and the public, the number of the judges of the Queen's Bench is kept incomplete.

I assume, therefore, that the announcement in the public papers, which has so startled and astounded the legal profession, is true; and, this being so, I feel myself called upon, both as the head of the common law of England and as a member of the Judicial Committee of the Privy Council, to beg you, if not too late, to reconsider any decision that may have been come to in this matter; or, at all events, to record my emphatic protest against the course proposed—as a judge; because a colourable appointment to a judgeship for the purpose of evading the law appears to me most seriously to compromise the dignity of the judicial office—as a member of the Judicial Committee, because, while grave doubts as to the legality ot the appointment are entertained in many quarters, none seem to exist as to its grievous impropriety as a mere subterfuge and evasion of the statute.

The statute in question (34 & 35 Vict. c. 91) contains in section 1 the following enactment:—

"Any persons appointed to act under the provisions of this Act as members of the said Judicial Committee must be specially qualified as follows—that is to say, must at the date of their appointment be, or have been, judges of one of Her Majesty's Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature at Port William in Bengal, or Madras, or Bombay, or of the late Supreme Court of Judicature in Bengal."

Now, the meaning of the legislature in passing this enactment is plain and unmistakeable. It was intended to secure in the constitution of the high appellate tribunal, by which appeals, many of them in cases of vast importance from our Indian possessions as well as from the rest of our colonial empire, are to be finally decided, the appointment of persons who had already held judicial office as judges of the Superior Courts. Whether wisely or unwisely, it plainly was not intended that the selection might be made from the bar. It was to be confined to those who were, or had been, judges, and who, in the actual and practical exercise of judicial functions, had acquired and given proof of learning, knowledge, experience, and the other qualifications which constitute judicial excellence. No exception in this respect is made in favour of an Attorney-General or other law officer of the Crown, who, however eminent and distinguished their position, of course remain members of the bar. Nothing could have been easier; had it been intended to make such an exception, than to have included the law officers of the Crown among the persons specified as eligible. But the eligibility of the law officers does not even appear to have been contemplated by the Government in passing the present Act, a provision enabling the appointment to the Judicial Committee to be made from the bar, contained in the bill of the previous year, having been, I presume purposely, omitted from the bill as introduced in the last session. It is, however, unnecessary to dwell further on this point. No one will be found to say that is was intended to make a law officer, as such, eligible under this Act.

It being, then, plain that the intention of the Legislature was that the selection should be made from the judges, I cannot shut my eyes to the fact that the appointment of the Attorney-General, who, as such, was not qualified under the statute, to a judgeship (the functions of which he is not intended to discharge) in order that he may thus become qualified according to the letter of the Act, cannot be looked upon otherwise than as colourable, as an evasion of the statute, and a palpable violation, if not of its letter, at all events of its spirit and meaning. I cannot help thinking of what would have been the language in which the Court of Queen's Bench would have expressed its opinion, if such an evasion of a statute had been attempted for the purpose of qualifying an individual for a municipal office, and the case had been brought before it on an information in the nature of *quo warranto*. In the present instance, the Legislature having settled the qualification for the newly-created office, momentarily to invest a party, otherwise not qualified, with a qualifying office, not that he shall hold the latter, but that he may be immediately transferred to the former, appears to me, I am bound to say, to be nothing less than the manufacture of a qualification, not very dissimilar in character to the manufacture of qualifications such as we have known practised in other instances in order to evade the law. Forgive me, I pray you, if I ask you to consider whether such a proceeding should be resorted to in a matter intimately connected with the administration of justice in its highest departments.

It would obviously afford no answer to the objection to the proposed appointment, to say that a gentleman who has held the position of a law officer of the Crown must be taken to be qualified to fill any judicial office, however high or important. This might have been a cogent argument to induce the Legislature to include the Attorney-General among the persons "specially qualified" under the Act; but it can afford no justification for having recourse to what cannot be regarded as anything better than a contrivance to evade the stringency of the statute as it stands. The section in question makes the office of an Indian Chief Justice a qualification for an appointment to the Judicial Committee. Suppose that, as might easily have happened, an Indian Chief Justiceship had chance to be vacant. An Attorney-General would, of course, be perfectly qualified for the office. What would have been said if the Attorney-General had been appointed to such a Chief Justiceship, not with the intention of his proceeding to India to fill the office, but simply for the purpose of his becoming qualified, according to the letter of the statute, for an appointment to the Judicial Committee? What an outcry would have been raised at so palpable an evasion of the Act! But, what possible difference, allow me to ask, can there be, in principle, between such an appointment as the one I have just referred to and an appointment to a judgeship in the Court of Common Pleas, the duties of which it is not intended shall be discharged, for the sole purpose

of creating a qualification in a person not otherwise qualified? I cannot refrain from submitting to you that such a proceeding is at once a violation of the spirit of the Act of Parliament and a degradation of the judicial office.

I ought to add, that from every member of the legal profession with whom I have been brought into contact in the course of the last few days, I have met with but one expression of opinion as to the proposed step—an opinion, to use the mildest terms I can select, of strong and unqualified condemnation. Such, I can take upon myself to say, is the unanimous opinion of the profession. I have never in my time known of so strong or universal an expression, I had almost said explosion, of opinion.

Under these circumstances, I feel myself justified, as Chief Justice of England, in conveying to you what I know to be the opinion of the profession at large, an opinion in which I entirely concur. I feel it to be a duty, not only to the profession, but to the Government itself, to protest—I hope before it is too late—against a step, as to the legality of which I abstain from expressing any opinion, lest I should be called upon to pronounce upon it in my judicial capacity, but the impropriety of which, for the reasons I have given, is to my mind strikingly and painfully apparent.

I beg you to believe that I make these observations in no unfriendly spirit, and from a sense of duty only. I should sincerely rejoice at the promotion of an Attorney-General who has filled his high office with dignity and honour; but in the position I occupy I feel I ought not to stand by and, without observation or objection, allow a judicial appointment to be made which, from the peculiar circumstances under which it will take place, is open to such serious exception, and which, as I have abundant reason to believe, will be the subject of universal condemnation and regret.

I beg to remain, very faithfully yours,

A. E. COCKBURN.

The Right Hon. W. E. Gladstone, M.P., &c.

Mr. Gladstone to the Lord Chief Justice.

Dear Lord Chief Justice,—I beg to acknowledge the receipt of your letter of this day's date.

As the transaction to which it refers is a joint one, and as the completed part of it, to which you object, is the act of the Lord Chancellor, I have referred your letter to him.

Yours faithfully,

W. E. GLADSTONE.

Right Hon. the Lord Chief Justice
of the Queen's Bench.

[I have unfortunately mislaid this note, but I can trust to my memory for giving the *ipsissima verba* in which it was expressed.—A. E. C.]

The Lord Chief Justice to Mr. Gladstone.

Court of Queen's Bench, Nov. 11, 1871.

Dear Mr. Gladstone.—I beg to acknowledge the receipt of your note of yesterday evening.

Learning from it that you have referred to the Lord Chancellor my letter on the proposed appointment of Sir Robert Collier to the Judicial Committee of the Privy Council, I should not have troubled you further on the subject, but for a passage in your note which appears to me to call for immediate observation.

You assign as a reason for transmitting my letter to the Lord Chancellor, that the transaction is a joint one, and that the completed part of it to which I object was the act of the Lord Chancellor.

I cannot allow an expression so wholly erroneous to remain without seeking to remove it.

I have not objected, and could not object, to the appointment of Sir Robert Collier as a judge of the Common Pleas. If it had suited his views to accept a judgeship, I should have been the first to welcome his advent to the bench. My objection to the present appointment of Sir Robert Collier is not an objection to the appointment *in se*, but as being intended to create a factitious qualification for a seat on the Judicial Committee.

It was because its ulterior object was to be your act that I took the liberty of addressing myself to you. Had I objected to the part of the transaction already completed I should have addressed my observations to the Lord Chancellor.

My only object in now troubling you being to set myself right as to any supposed objection to the appointment of the late Attorney-General to a judgeship, I shall not expect any notice to be taken of this communication.

I remain, yours faithfully,

A. E. Cockburn.

Right Hon. W. E. Gladstone, M.P., &c.

The Lord Chancellor to the Lord Chief Justice.

31 Great George Street, S. W.: Nov. 10, 1871.

Dear Lord Chief Justice,—Mr. Gladstone has sent me your letter with reference to the appointment of members of the Judicial Committee under the Act of last session.

The appointment of the late Attorney-General to a judgeship, vacated by the appointment of Mr. Justice Montague Smith, to the Judicial Committee, has been completed, and he will be sworn in to-morrow morning.

The appointment has been made with a full knowledge on my part of the intention of Mr. Gladstone to recommend him for appointment as a member of the Judicial Committee under the Act.

I have thus acted advisedly, and with the conviction that the arrangement was justified as regards both its fitness and its legality.

I take upon myself the responsibility of thus concurring with Mr. Gladstone, and am prepared to vindicate the course pursued.

You will not, I trust, think that I am wanting in respect if I reserve my explanation for a more suitable opportunity than could be afforded by a correspondence with yourself, either directly or through the medium of Mr. Gladstone.

Yours faithfully,

HATHERLEY.

The Right Hon. Sir A. Cockburn, Bart.,
Lord Chief Justice of England.

The Lord Chief Justice to the Lord Chancellor.

Court of Queen's Bench : Nov. 11, 1871.

Dear Lord Chancellor,—I beg to acknowledge the receipt of your note of last night, having reference to my letter of yesterday's date, addressed to Mr. Gladstone.

I am obliged for the information which you are good enough to convey to me, to the effect that the appointment of Sir Robert Collier to the vacant seat in the Common Pleas, to be followed by his immediate transfer to the Judicial Committee of the Privy Council, has been arranged with your concurrence and under your advice. You will, I hope, forgive me when I say I have received this information with mingled sentiments of surprise and regret, which all the deference due to your opinion does not enable me to overcome. I must still retain my view as to the objectionable character of the proceeding in question.

It was superfluous to say that you should "reserve your explanation for some more suitable opportunity than could be afforded by a correspondence with me." Nothing could be further from my expectation than that my letter to Mr. Gladstone should lead to a vindication of the course proposed to be adopted. My only object was to bring under the consideration of the Government the very serious objections to this appointment which presented themselves to my mind, or at all events to record my protest against what I honestly believed to be a violation of the spirit and intention of an Act of Parliament, and, therefore, a degradation of the judicial office. I may add that I should have hesitated to press my views on the Government if I had not had abundant reason to believe that those views were shared by every member of the bench, and I may add of the entire bar.

While, however, I freely admit than I am not entitled to any explanation of the course you have determined to adopt, I must in candour say that I think I might have expected that grave objections to a proceeding connected with the administration of justice, coming from one holding the office I have the honour to fill, would have received somewhat more consideration, and would not have been dismissed in quite so summary a manner.

Under the circumstances, while you reserve your explanation till a fitting opportunity shall arise, so I, on my part, must reserve to myself the right to make public, when I may deem it proper, the fact of my protest and the grouuds on which it is founded, as stated in my letter to Mr. Gladstone.

Without troubling you further, I remain, your faithful and obedient servant,

A. E. COCKBURN.

The Right Hon. the Lord Chanceller.

On the correspondence, *The Law Journal* published in its issue of December 8th the following editorial:

THE JUDICIAL PATRONAGE SCANDAL.—The correspondence between the Lord Chief Justice, the Prime Minister, and the Lord Chancellor has produced a painful impression on the public mind. A gross evasion of the law is followed by quibbling and a rude breach of official decorum. On this subject reticence would be criminal, and whoever we offend, we shall faithfully discharge the unpleasant duty that devolves upon us as representatives of the legal profession. But we are not apprehensive of giving offence. We have not met with, or heard of, any member of the profession who does not strongly censure the conduct of the Government, and the unprecedented discourtesy of the Lord Chancellor. So far as we know, only two papers have dared to defend the Government; one is the *Daily Telegraph*, the thick and thin supporter of Mr. Gladstone; and the other is an evening news-sheet which has no sort of pretension to political influence. The condemnation is both loud and unanimous.

It would be superfluous to discuss the affair on its merits, for that we have already done, and indeed there is no room for argument. The wrong is too palpable for defence. Besides, there is the letter of the Lord Chief Justice, in which our arguments are repeated and enforced. Moreover, it is not the individual opinion of the learned Chief, but he protests on behalf of the whole bench, and we have no doubt he is right in assuming that the profession agrees with the judges. On a question of the legal interpretation of an Act of Parliament, and on a matter that immediately concerns the judicature, the unanimous opinion of the judges is conclusive.

The letter of the Lord Chief Justice is firm, frank, and courteous, and is properly addressed to the Prime Minister. Instead of replying, Mr. Gladstone hands it to the Lord Chancellor. Now it was not the patronage of the Lord Chancellor that was criticised, but the patronage of the Prime Minister. No objection was made to the appointment of Sir R. Collier to a common law judgeship, but it was against Sir R. Collier being made a common law judge for a day in order that he might be made a judge of the Judicial Committee that the head of the common law protested. At the date of the Lord Chief Justice's letter Mr. Justice Collier had not been translated, and therefore Mr. Gladstone refers the letter to the Lord Chancellor. We call this quibbling and even insulting to the Lord Chief Justice.

The Lord Chancellor refuses any explanation. His letter may be expressed in four words, "Mind your own business." Both Lord Hatherley and Mr. Gladstone put off the evil day of explanation, but if they think that the matter will have blown over before Parliament meets they are egregiously mistaken, and their position will not be improved by this rudeness.

To whom was the curt, and we must add, coarse, letter of the Lord Chancellor addressed? It would be indecorous to comment on the high character of Sir Alexander Cockburn, but certainly no man ever sat on the seat of Gascoigne who was more esteemed than the present occupant. But we waive all such considerations. Sir Alexander Cockburn protested as the Lord Chief Justice of England in his own name and on behalf of his colleagues. The Gladstone Government is notorious for discourtesy, and by their discourtesy they have made a host of enemies; but we are amazed that the Lord Chief Justice of England should be snubbed with gross impertinence. If the protest had been sent by a barrister called last term the answer of the Lord Chancellor would have been inexcusably rude. Sir Alexander Cockburn must be personally indifferent to the treatment he has received Neither Mr. Gladstone nor Lord Hatherley can hurt a judge who is so eminent for his learning and probity that both England and America rejoiced in his appointment as the arbitrator for England under the Washington Convention. But Sir Alexander Cockburn justly resents the slur cast on his exalted official position. Whatever else Parliament may do or leave undone, we may be sure that the discourtesy of Lord Hatherley will be emphatically rebuked.

But unless the Prime Minister admits his error, we are persuaded that Parliament will expressly censure the evasion of the law in the appointment of Sir R. Collier. We venture to say that, if Mr. Gladstone will not confess himself in the wrong, he will have to submit to a vote of censure or to resign. It may be urged that a Government with a majority of seventy or eighty should not be turned out on account of an evasion of the law in the disposition of patronage; but in this instance the matter is of vital importance. It concerns the repute of the judicature, and God forbid that the public should believe that in the appointment of our judges there is any shuffling or any tampering with the plain intent of the law. We say with regret, but we say most emphatically, that the appointment of Sir R. Collier to the Judicial Committee was an act for which Parliament will be fully justified in censuring the Government.

The excitement so manifested in England about an evasion of the law, the immediate result of which will be merely the placing on the Judicial Committee an undoubtedly able man, will hardly be understood in the Province of Quebec. Such an admirable way of shelving an Attorney-General, will in all likelihood be

generally regarded as deserving of admiration, and the only regrets expressed will be that Quebec law unfortunately does not at the present moment admit of an analogous proceeding.

In Quebec, to the shame of its inhabitants, let it be regretfully said, there is no public opinion. It is quite possible to excite religious or national hatreds, but it is simply impossible to interest the public in the administration of justice. Now-a-days the grand object of man's existence being to make money, the proper administration of the law, the purity of the Bench, and the security of property and life are subjects which do not command public attention. Absorbed in money making, the people of the Province of Quebec have no time for any other occupation. Municipal, protectionist, railway, religious, and political rings, manage the affairs of the country. Seats on the Bench are amongst the prizes offered by political rings for uncompromising support, and it makes very little matter whether *rouge* or *bleu* be in the ascendant, the same principle is acted on by both parties, and generally judgeships are conferred, not on account of fitness for the office, but because it is necessary to provide for a member of the party in power.

The system is radically bad, for in lieu of good lawyers, worn-out politicians are placed on the Bench. If a man is a political failure, *presto* he is made judge, so that there is a very fair chance of the Bench becoming the receptacle for that favored class of the community, which, fifty years ago in England was said to monopolize the Church. Thanks to the system, the Bench of Quebec does not command the respect which is accorded to persons occupying judicial positions in other countries. Complaints against the judges are made from all parts of the Province, and although amongst them are many hard-working earnest and well-read men, yet they have to share the odium with those whose sole qualification for the office was a thorough subservience to their political leaders.

Is it possible to suggest any mode by which none but fit and proper persons should be appointed to the Bench? In the first place, inducements must be offered sufficiently strong to make men cleave to their profession and not forsake its practice for the struggles of the political arena. A judge should be placed in such a position as regards salary as to make him perfectly independent. Judges now-a-days receive in Montreal and Quebec £1000 per annum, the same salary judges received sixty years

ago, when the actual expenses of living were not one-half what they are at present. The salary now-a-days is insufficient. Cashiers and managers of banks receive, as a rule, higher compensation for their services. Many merchants, brokers, insurance agents, and barristers, make far more than $4000 per annum. Consequently, it is impossible for the judge to retain that position in society which his office requires, if his salary be not such at all events as to enable him to live like a gentleman, and to absolve him from the necessity of grudging every farthing given in charity as an act of robbery of his creditors. A judge, then, should have at least $6000 per annum. In the next place judges should be taken from the ranks of practising advocates; nothing is more absurd than the nomination of a Clerk of a Court to a seat on the Bench; it is a realization of the old proverb of "put a beggar on horseback," &c. It in fact may be regarded as a violation of our law, which is in the following words: "The Chief Justice and Judges of the Superior Court, when the ninth section of the Act 20 Vic. c. 44 took effect, remain such by virtue of the commissions they then held; the new Judges of the Court were appointed from among the then Circuit Judges and the Advocates of at least ten years' standing at the Bar of Lower Canada; and all future Judges shall be appointed from such Advocates of the said standing." (C. S. L. C. c. 78, s. 7.) With respect to the Queen's Bench, it is provided that no one shall be appointed as Chief Justice or Judge thereof unless at the time of his appointment he hos been a judge of the Superior Court, or is an advocate of at least ten years' standing at the Bar of Lower Canada. (C. S. L. C. c. 77, s. 1, § 2.)

But the real difficulty arises when it is proposed to take away the right of appointment from those who now enjoy it and vest it elsewhere.

In England it has been proposed to vest the right of nominating the judges in the Lord Chancellor and Chief Justices. Here it may perhaps be permitted to advocate a still greater departure from old principles.

Who, may it be asked, have a greater interest in securing the appointment of a fit person to be a judge than the Bar and the Bench of the district within which such judge after his appointment is to act? Where can there be found persons better qualified to judge of a person's fitness for a seat upon the Bench than those who plead against him and those who hear him plead, nearly

every day of their lives. Taking, then, the opportunities possessed of judging fairly, considering also their interest in choosing the most fit and proper person for the office, it must be admitted that the Bar and the Bench of the district in which a man practises his profession, should be the best judges of his fitness for promotion to the Bench.

Why not then allow such Bar and Bench to give the benefit of their experience and knowledge to the Minister of Justice, who now-a-days can know but very little of the *personnel* of the Quebec Bar.

Should a vacancy occur on the Bench of the Superior Court in Montreal, for instance, let all barristers of over ten years' standing, practising in the district meet, and by a plurality of votes suggest the names of six practising barristers to the Judges of the Superior Court there resident, who should be bound to select from the six names so suggested, three, which should be sent in to the Minister of Justice, who should thereupon appoint one of the three barristers whose names had been so received, to the vacant seat on the Bench.

It may be urged that politics would in any meeting of the Bar colour the nomination, but the necessity of the names suggested being approved of by the Judges, would in all likelihood prevent such a misfortune; moreover, vesting the right to vote solely in men of over ten years' standing, would have a great effect in checking such an abuse. Were, however, politics to control such a meeting, it might well be said, that it was useless struggling to obtain a good Bench, owing simply to the fact that the Bar was too irretrievably bad.

WM. H. KERR.

MAINE STATE LIBRARY

"WILLS AND INTESTACY."

The article of the Hon. J. H. Gray, entitled "Wills and Intestacy," published in the last number of *La Revue Critique*, has been criticised in the *Canada Law Journal*, Vol. 7 N. S., p. 286, and also by a correspondent of authority from New Brunswick. The criticisms in question were communicated to Mr. Gray but lately, owing to his absence from Ottawa, and he has just informed us that it is impossible for him to enter upon a discussion of the points involved in the present number, but that in April he will answer the objections taken. We publish below the criticisms referred to.

LA RÉDACTION.

The *Canada Law Journal* observes :

"From the general tenor of the essay, it appears that the author professes to show wherein the law on the subject differs in the various Provinces. If his remarks were confined to the *statutes merely*, they would not be so open to criticism ; but. as we have seen, he does not confine himself to those alone. He commences by stating that :—

"In *New-Brunswick*, a testator may, by his will, dispose of all property, and rights of property, real and personal, in possession or expectancy, corporeal and incorporeal, contingent or otherwise, to which he is entitled, either in law or equity, at the time of the execution of his will, or to which he may expect to become at any time entitled, or be entitled to at the time of his death, whether such rights or property have accrued to him before or after the execution of his will. In *Nova Scotia*, the same."

"It is further said that :—

"In *Ontario*, there is no provision of this general character ; but, by the Consolidated Statutes of Upper Canada, chapter 82, section 11, real estate, acquired subsequently to the execution of a will, would pass under a devise conveying such real estate as testator might die possessed of."

"Now, the provisions of this section of the U. C. Con. Stat. are overridden, if not virtually repealed, by the Ontario Act of 32 Vic. cap. 8, sec. 1, which now governs, and under which after-acquired property passes. *Gibson* v. *Gibson*, 1 Drew, 62 ; Leith's Real Prop. Statutes, 293. The statute we have referred to reads

as follows: 'Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.'

"Contingent and executory interests were devisable under the Statute of Wills of Henry VIII. and 1 Jarman on Wills, p. 43; and consequently, by reason of the application of that statute here, such interests were also devisable in Ontario since 32 Geo. III. cap. 1, introducing the English law. Independently of this, it has generally been considered here that the Consolidated Statute referred to, authorized devises to fully as large an extent as is said to be the law in New Brunswick: (See secs. 14, 11, 12.)

"Futher on in the article it is said that 'in New Brunswick and Nova Scotia a testator must be of age,' but that 'in Ontario there is no provision to this effect.' Now, the Statute of Wills of Henry VIII. is, as above mentioned, the origin and source here of the right to devise, and governs, unless varied by subsequent Acts. It expressly exempts infants from the right there given to devise, and we need hardly mention that at common law no one could devise a freehold.

"It is further said, where speaking of the execution of wills, that in Ontario there is no general statute, as in Nova Scotia and New Brunswick, with reference to wills; and reference is made to Con. Stat. U. C. cap. 82, s. 13. The Statute of Frauds should also have been referred to as applying to the mode of execution of wills here. That statute was introduced here by the Act of 32 Geo. III. cap. 1, above referred to. It is in force, and cumulative in its provisions with secs. 13 of Con. Stat. U. C. cap. 82. Mr. Leith, in his work on Real Property Statutes, vol. 1, p. 290, recites the provisions of section 5 of Statute of Frauds (29 Car. II. cap. 3), which enacts as follows:

"All devises and bequests of any lands and tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or of any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else shall be utterly void and of none effect."

"Mr. Leith then goes on to say—

"The variance between the statute of Charles and of William is this: that by the former the will must be attested and subscribed, *in*

presence of the testator, by three or four *credible* witnesses, who need not subscribe or attest in the presence of each other, or at one and the same time: the latter statute is silent as to the credibility of the witnesses; and execution in the presence of and attested by two witnesses, is as valid as if in the presence of and attested by three witnesses; and it is sufficient if such witnesses subscribe in the presence of each other, without subscribing (as required by the statute of Charles) in the presence of the testator.

"Notwithstanding the act of William is silent as to credibility of the witnesses, that qualification still continues to be as requisite as under the act of Charles: *Ryan* v. *Devereux*, 26 U. C. Q. B. 107. The statute of Charles is not impliedly repealed by that of William: *Crawford* v. *Curragh*, 15 U. C. C. P. 55. It seems clear, therefore, that a will invalid as not complying, with the latter Act, is valid if it complies witht he former. In a late case (*Crawford* v. *Curragh*, supra), the court went further, and held, in effect, that the statutes were cumulative, and might be read together, and so that a will invalid under either statute, taken singly, might be supported on their joint authority. Thus a will executed in the presence of two witnesses, who subscribed in the presence of the testator, but not in presence of each other, has been held sufficient. The author does not presume to question the unanimous judgment of the court; but he deems it right in a matter of such importance, to refer to the language of Draper, C. J., in a subsequent case, and to suggest that it may be a proper precaution always to comply with the statute of William, and require that when there are only two witnesses, they should sign in presence of each other. In the case referred to *Ryan* v. *Devereux*, 26 U. C. Q. B. 107), Draper, C. J., in alluding to the doctrine laid down in *Crawford* v. *Curragh*. says, 'I advisedly abstain from expressing an opinion of concurrence in, or dissent from, that decision. I have not arrived at any positive conclusion upon it.'

"The practitioner should bear in mind that the Imp. Act I Vic. cap. 26, has in England varied the mode of execution of wills, and therefore the cases decided under that act may be inapplicable here, unless on the words 'signature,' 'presence,' 'direction,' 'other person,' 'attested,' 'subcribed,' which are common to the Imperial Act of Victoria, the Statute of Frauds, and the Provincial Act."

"On again referring to the article in *La Revue Critique*, we find it stated that—

"Under the English law, as prevailing before 1st Victoria, chap ter 26, whether a will of freehold estate attested by a witness whose wife or husband had an interest in the will as devisee or legatee, would be invalid or not, was to some degree uncertain, though if the devise or legacy had been to the witness himself, under 25 Geo. II. chapter 6 the doubt as to the invalidity is removed, because it clearly make him competent, and declares the devise or legacy void."

"As to these observations, we would refer to *Ryan* v. *Devereux*, 26 U. C. Q. B. 107, decided here in 1866; also *Little* v. *Aikman*, 28 U. C. Q. B. 337; and in England to *Holdfast* v. *Dowsing*, 2 Str. 1253; and *Halfort* v. *Thorp*, 5 B. & Ald. 589. In the case of *Ryan* v. *Devereux*, the plaintiff claimed under a conveyance from the heir-at-law of John Devereux, sen., and the defendant claimed under Devereux"s will. The question for the court was, whether a certain Peter McCann, who had been one of the two subscribing witnesses to the execution of the will, was disqualified on account of his being at that time married to a daughter and legatee of the testator. It was held that he was so disqualified: that the bequest of a legacy to his wife was not avoided by 25 Geo. II. cap. 6; and that such bequest prevented him from being regarded as a *credible* witness within the meaning of the Statute of Frauds. The English cases have never been questioned there, and are refered to in the text-books as undoubted law. See also *Emanuel* v. *Constable*, 3 Russ. 436. On this point, therefore, we cannot agree that there has been any uncertainty in England or here, or that, as is further stated in another place, the question here is open.

"Again, as regards obliterations, interlineations, or alterations made in a will after its execution: the Statute of Frauds applies here as introduced with the other general English Law by the above Act of 32 Geo. III. cap. 1, subject to the provisions of 32 Vic. cap. 8.

"We have not, in the few remarks made above, touched upon all the points which are open to criticism in the article in *La Revue Critique*; but whilst the observations of the writer, and the mode he has adopted of comparing the law on the subject of wills in the different Provinces, would not, in our opinion, facilitate the object which is stated as the inducement for the article, we are free to admit that it gives the professional reader in Ontario some useful information as to the state of the law as to wills and intestacy in the Provinces of Nova Scotia and New Brunswick, with which the writer is probably more familiar than he is with that in Ontario."

Our learned correspondent from New Brunswick, in a letter addressed to one of the editors of *La Revue*, says:

"FREDERICTON, 10th Nov. 1871.

"SIR,—I notice in the article on "Wills and Intestacy," by Mr. Gray, published in the last number of *La Revue Critique*,

page 427, that he states the law of the Province relative to real estate, where a person dies intestate and without children, to be as follows, viz.: 'That the mother as well as the father would conjointly succeed to the real estate of the deceased (inasmuch as they being next of kin *in equal* degree, would succeed to the personal estate of the intestate, who, leaving no widow, died without issue, in exclusion of his brothers and sisters), and, assuming the father was dead, she being the nearest of kin according to the civil law, would be entitled to the whole,'—and he adds: 'so that with reference to real estate in New Brunswick, the mother is in a better position than she is with reference to personal estate.'

"Mr. Gray is entirely in error in this statement of our law, for the Supreme Court of the Province decided, in the year 1846, in the case of *Doe dem Mahoney* v. *Crane*, reported in 3 Kerr's Reports, 228, that where a person died intestate and without children, leaving a mother and brothers and sisters, the brothers and sisters were entitled to his real estate under the Act of Assembly, *as the next of kindred in equal degree*, to the exclusion of the mother.

"The same argument was used in that case in support of the mother's claim, as being the "next of kin," under the Statute of Distributions, 22 & 23 Car. 2, as Mr. Gray now uses, but the Court held, looking at the whole clause of the Act, that such was not the true construction; that the words "heir at law" being used, shewed that the principles of the common law, and not of the civil law, were to be resorted to in the construction; and that if the Legislature had contemplated that the real estate should ascend to the parents (contrary to the common law maxim) they would have made a special provision with regard to the share the mother would take, in case she survived the father, at the time of the intestate's death, as they had done in a subsequent part of the Act with respect to personal property.

"The question was again incidentally considered in 1857, in a case of *Doe dem Lee* v. *Houghton* (3 Allen 414) and the correctness of the decision in *Doe* v. *Crane* fully recognized on the point upon which I have stated it.

"As it is desirable that the law of inheritance in the several Provinces of the Dominion should not be mis-stated, perhaps you will correct Mr. Gray's statement of it in the next number of the Review.

SOMMAIRE DES DÉCISIONS RÉCENTES.

COUR D'APPEL.

Montréal, 12 Décembre, 1871.

The Queen vs. Coote.—Un point de droit ayant été reservé, le prisonnier, convaincu d'incendiat, fut admis à caution par la Cour (Badgley J.) ; mais le montant du cautionnement ne fût pas fixé. Le cautionnement fut pris et fixé par un juge en Chambre. Sur motion de la Couronne que le cautionnement soit déclaré nul et que le prisonnier soit ré-incarcéré, *Jugé* que le cautionnement était régulier et valide. Duval J. C., Caron, Badgley et Drummond, JJ. *Contra* Monk J ,qui était d'opinion que le cautionnement n'aurait dû être donné, fixé et pris que par la Cour et non par un juge en Chambre.

22 Décembre, 1871.

McAndrews et Rowan.—Jugé que nonobstant le consentement des parties que le jugement dont est appel soit renversé, cette Cour doit le confirmer, si l'examen du dossier démontre qu'il est bien fondé, et dans l'espèce, elle le confirme—Duval J. C., Caron, Drummond. Badgley et Monk JJ.

Whitney et Shaw.—Jugé que dans l'espèce, Shaw, le gendre de Warren, connaissait l'insolvabilité de ce dernier au moment où il lui donnait une hypothèque pour $3,000, laquelle est par conséquent nulle. La parenté dans des causes de cette nature est toujours considérée comme une présomption de fraude, surtout si le créancier est en position de connaître l'état des affaires de son parent et débiteur—Duval J. C. Badgley et Drummond JJ. *Contrà* Caron et Monk quant à l'appréciation de la preuve. M. le juge Caron pense de plus que la parenté n'est pas une présomption de fraude.

COUR DE REVISION.

Montréal, 31 Octobre, 1871.

Dagenais vs. Douglass.—*Jugé* que le maître d'une barge a un privilége pour ses gages durant le dernier voyage ; mais qu'il n'a pas de saisie-conservatoire ou *saisie arrêt* sans affidavit, qui n'est accordée par notre Code qu'au dernier équipeur. Berthelot et Mackay JJ. *Contrà* Mondelet J.

Graham vs. Kempley.—Si les bornes d'un héritage ne sont pas établis, le propriétaire qui se plaint d'empiètements de la part de son voisin, doit avoir recours à l'action en bornage et non à l'action au pétitoire—Mêmes juges—Mondelet, J diss.

Perrault vs. Herdman.—Le compensation n'a lieu qu'entre des dettes également claires et liquides. Le défendeur rencontra une action

sur un billet promissoire en offrant en compensation une égale somme qu'il disait lui être dûe pour sa part de la récolte d'une terre dans laquelle les parties avaient un intérêt commun, et dont le demandeur refusait de lui rendre compte—*jugé* par Berthelot et Mackay que cette dette n'est pas également claire et liquide—Mondelet J. diss.

Roy et Vacher.—Jugé que la possession d'un immeuble en vertu d'un acte de donation accepté, mais non enrégistré, n'a aucun effet contre le porteur d'une obligation consentie par le donateur après la donation et enrégistrée plus d'un an après sa passation—Berthelot et Mackay J. J., Mondelet J. diss.

May vs. Ritchie.—Un jugement rendu à l'étranger, même dans le Haut-Canada, n'a aucun effet, à moins qne la copie ou *exemplification* constate que le défendeur a reçu signification de l'action dans le pays étranger. Mondelet, Berthelot et Mackay, JJ.

Lafond vs. Rankin.—Jugement mentionné à la page 476 du 1er volume de la Revue confirmé purement et simplement.

29 Décembre, 1871.

Brault vs. Barbeau.—Le décès d'un tuteur conjoint met fin à la tutèle de son co-tuteur survivant. Mondelet, Berthelot et Mackay JJ.

Marcoux vs. Morris.—Les parties, ci-devant en société, avaient fait un arrêté de leur compte social, par lequel le défendeur se reconnut endetté au demandeur en la somme de $232. L'action intentée était l'*assumpsit* de la procédure anglaise, pour marchandises vendues et livrées, argents prêtés, matériaux fournis, *account stated. Jugé* que l'action doit être l'action *pro socio* et non pas l'*assumpsit* qui n'existe pas et ne peut être toléré dans notre système de procédure.—Mondelet et Berthelot, JJ. Dis—Mackay, J.

Tylee vs. Donegani.—*Jugé* que le locataire d'une maison inhabitable et malsaine a le droit de l'abondonner et par là même de résilier le bail, sans action, ni mettre en demeure son propriétaire, et cela quand bien même la nuisance aurait pu être enlevée à peu de frais et sous peu de temps.—Berthelot et Torrance JJ. Dis. Mondelet, J.

In Re Martin Ins., et *St. Amour*, Syndic, et *Stewart*, Syndic à la première faillite de Martin, créancier colloqué, et *Charland*, Cont.,—*Jugé* que les significations d'actes de procédure en faillite doivent être faites au domicile du syndic officiel, créancier colloqué, et non à son bureau, comme dans les cas de procédure ordinaire, à peine de nullité—Berthelot, Mackay et Beaudry, JJ.

COUR SUPÉRIEURE.

Montréal, 31 Octobre, 1871.

Mercantile Library Association, vs. Corporation de Montréal.—Pour qu'un propriétaire puisse réclamer une indemnité par suite du nivelage des rues, il faut que ce nivelage ait été fait sur la devanture de sa

propriété. Le nivelage sur le front du voisin n'est pas suffisant. D'ailleurs dans l'espèce, il ne parait pas que le nivelage chez le voisin ait été fait avec l'autorisation de la Corporation. Mondelet, J.

Atty. Gen. Ouimet et *Hon. J. H. Gray.*—Le défendeur fut nommé Arbitre Provincial de la Puissance, en vertu de la 142e clause de l'Acte de l'Amérique Britannique du Nord, 1867. Le Procureur Général pour la Province de Québec procède contre lui, par bref de *quo warranto*, alléguant que les arbitres provinciaux procédaient à Montréal, et que l'Hon. J. H. Guay, était domicilié dans le Haut-Canada, ce qui aux termes de l'Acte Impérial le rendait inhabile à être nommé et à agir. Le défendeur répondit, par une exception déclinatoire, qu'ayant été nommé Arbitre par Lettres Patentes sous le Grand-Sceau de la Puissance sous l'autorité d'un Statut Impérial, le droit et les effets de cette nomination ne pouvaient être contestés dans une Cour Provinciale. *Jugé* que sous les Statuts Refondus du Bas-Canada C. 78, S. 4, 12 Vict. C. 33, S. 7, le Code de Procédure Civile, livre 2, ch. X et XI, Art. 1016, Code Civil, Art. 1034, 1035, la juridiction de la Cour Supérieure s'étend aux plus hauts fonctionnaires et même à toutes personnes qui se trouvent dans la Province de Québec. L'intention de notre Code n'est pas seulement que la Cour Supérieure prenne connaissance de tout privilége, franchise ou office créé dans et pour la Province, mais de juger de la validité de l'exercise de tout pouvoir ou office dans la Province, quelque soit d'ailleurs la source de ce pouvoir. Beaudry, J.

29 Décembre, 1871.

In-Re Villeneuve, Ins. et *Sauvageau* Syndic, et *Villeneuve*, requérant pour décharge et *Thomas & al.* Contestants. Dans cette cause, le failli et trois créanciers contestant sa requête pour décharge sous l'acte de 1869, ont admis par écrit "que le dit failli était commerçant au village de Laprairie, en 1857, et durant plusieurs années auparavant ; qu'alors il cessa de faire commerce, devenant insolvable en déconfiture, ayant plusisurs créanciers, porteurs de dettes commerciales contre lui à un montant considérable, lesquelles dettes sont encore dues et exigibles ; que le dit failli, lors de son commerce, tenait les livres nécessaires à son dit commerce, mais que depuis il n'a tenu aucun livre ; que la dette due aux contestants pour argent emprunté pour l'usage de la famille du dit failli et mentionnée dans la liste de ses créanciers, a été contractée bien après que le dit failli eût cessé de faire commerce, savoir au temps où il était un employé des Douanes de Sa Majesté ; que le dit failli n'a pas fait commerce depuis l'époque ci haut mentionnée."

Mackay, J. "Considering that the said Petitioner at the date of the *cession* alleged by him, made by him in October, 1869, was not a trader ; that in 1858 and ever since, he has not been a trader ; that consequently said *cession* by him was idle, and of no use to get for him (as if entitled to it) the benefit of a discharge under the Insolvent Act of 1869, to avail against said *Henry Thomas et al.* (les contestants) the Court rejects the said petition for discharge and orders that no discharge, to avail against said *H. Thomas et al.* be granted.....

"And the Court proceeding finally to adjudge on the merits of said *Requête*, petition of said Joseph Edouard Villeneuve, independently of said three contestations ; considering that the said petitioner has not proved the allegations of his petition and that the admission of the three contestants cannot help him on his principal demand ; CONSIDERING THAT AT THE DATE OF THE CESSION ALLEGED BY HIM MADE IN OCTOBER 1869, HE WAS NOT A TRADER, WITHIN THE MEANING OF THE INSOLVENT ACT OF 1869, *sanely interpreted ; that consequently said cession made by him was idle and of no use to get for him a discharge under the Insolveut Act of* 1869, and that by no law does he show and prove himself entitled to a discharge ; considering that the said J. E. Villeneuve is not entitled to a discharge as claimed, the Court rejects said petition."

Roy et vir v. *Gauvin et al.*—Le 10 février 1830, Marie Anne Girouard, ayant alors trois filles à Montréal et plusieurs petits enfans, fit son testament solennel, par lequel elle disposa de la généralité de ses biens comme suit : "Quant à tous les biens immembles, acquêts, conquêts et ptopres, qui appartiendront à la dite testatrice et qu'elle délaissera au jour et heure de son décès à quelque quantité et qualité qu'ils pourront monter et consister et en quelques lieux et endroits qu'ils se trouveront, *elle en donne et légue la jouissance aux dits enfans* issus de son dit mariage avec le dit Sr. Pierre Barsalou, *pour par eux en jouir à titre de constitut et précaire* leur vie durante seulement, à la charge d'entretenir les dits biens fonds, des réparations nécessaires à y faire et de faire assurer la maison et bâtiments érigés sur iceux au montant d'une somme de Mille Livres, cours actuel, *et après le décès des dits légataires en usufruit être réversible et appartenir la propriété des dits biens fonds à leurs enfans nés et à naître en légitime mariage pour n'être partager entre eux également qu'après le décès du dernier des enfans de la dite testatrice.*" La testatrice décéda à Montréal le 10 Mai 1843, deux de ses fillese lui survivant, la troisième étant décédée avant sa mère laissant plusieurs enfans.—*Jugé* 1o que la disposition testamentaire en question contient non pas une substitution, mais une donation d'usufruit en faveur des enfans de la testatrice, et de la propriété des immeubles en faveur des petits enfans vivant au jour du décès de la dernière des usufruitières; 2o que dans le cas du décès de l'une des usufruitières, sa part d'usufruit accroit à l'usufruitière survivant ; 3o qu'à compter du jour du décès de la testatrice jusqu'à celui de la dernière usufruitière, la nul propriété des dits immeubles résidait sur la tête des héritiers en loi de la testatrice. 4o que les seuls petits enfans vivant au jour du décès de la dernière usufruitière sont légataires en propriété par têtes ou parts égales sans égard aux souches : 5o que les arrière-petits enfants, vivant au jour du décès de la dernière usufruitière, viennent au partage par représentation au cas du prédécès des petits enfants, leur père ou mère. MacKay J.

Laviolette v. *Duverger.*—Une montre fut déposée par un emprunteur entre les mains de son prêteur, son beau-frère, en gage du prêt d'une

somme de $40—L'emprunteur Laviolette, alléguant que le gage était prohibé et nul, attendu que Duverger n'était pas un prêteur sur gages licencié, (*pawnbroker,*) revendiqua la montre.—*Jugé* 1o que le contrat de gage n'est pas prohibé par le Statut gouvernant les *pawnbrokers*; 2o que le *Pawnbrokers" Act* ne s'applique qu'aux personnes qui font des prêts sur gages leur commerce et profession.—MacKay J.

COURT OF REVIEW.

Quebec, 6th November, 1871.

Craig vs. Corporation of Leeds.—Held, that before action can be brought against a municipality for damages sustained by reason of bad state of the roads under its supervision, one month's notice of action must be given. Meredith, Stuart and Taschereau, JJ. Stuart J. diss.

Ward vs. Newhall.—On a renunciation to a judgment made in the Court below (after the case has been carried into review) the Court of Review will discharge the deliberé, and order the record to be sent back. Meredith, Stuart and Taschcaeau, JJ.

Desrosier vs. McDonald.—A case may be inscribed in review by an attorney other than the one of record *en première instance,* and without substitution. Meredith, Stuart and Taschereau JJ.

1st December, 1871.

Evanturel vs. Evanturel.—A clause in a will depriving a legatee of his legacy in case he contests the will, is legal and valid, and will be enforced. Meredith, Taschereau and Bossé, JJ. Taschereau J. diss.

30th December, 1871.

Doyon vs. Doyon.—No inscription *en faux* is necessary to admit evidence that money, the receipt of which is acknowledged in a deed of sale, has never been paid. Meredith, Stuart and Taschereau, JJ.

Lainé dit Laliberté vs. Toulouse.—No action can be maintained on an indication of payment which has not been accepted. Meredith, Stuart and Taschereau, JJ.

Bilodeau vs. Tremblay.—The mother of an illegitimate child (though she has not been named tutrix) has an action against the father for the support of the child. Meredith, Stuart and Taschereau, JJ.

SUPERIOR COURT.

Quebec, 18th September, 1871.

Anderson vs. Walsh, and Ross opp't.—Property belonging to third parties attacqed by a seizure before judgment, must be claimed by intervention and not by opposition. Taschereau, J.

Valin vs. Anderson.—Held, that a defendant is entitled to have judgment declaring a suit perempted though the Plaintiff who had been originally represented by two attorneys, practising in partnership

has not, since the nomination of one of them to a situatien in the Civil Service, appointed a new attorney, even though the office held by the one be incompatible with the practice of his profession. The mandate of the other still continues, and the party is represented by him. Taschereau, J.

8th November, 1871.

Cook vs. Millar.—Calling a case from the roll of *enquête* is no useful proceeding therein, such as will prevent *preemption d'instance.* Stuart, J.

Gugy vs. Brown.—A duplicate declaration is equivalent to a certified true copy. Meredith, C.J.

14th November, 1871.

George Sylvesler, insolv. & N. Sanders & al. partners.—Held, that according to arts. 1698 and 1899 of the Civil Code of Lower Canada, in a case of insolvency, the revendication must be made within fifteen days after the sale, and also within eight days from the delivery of the goods revendicated. Meredith, C.J.

27th November, 1871.

Gauthier vs. Amyot.—Held, that a party has a separate recourse against each of those who have contributed to the publication of a libel against him, but he can have but one satisfaction. Meredith, C.J.

Fraser vs. Pouliot, and Lavoie Interst.—Held, that an intervening party must serve his petition in intervention on all the parties in the case, as well those who have not appeared as those who have. The Court has the power of extending the delay of three days allowed for such service. The grounds of interventions should be served on both Plaintiff and Defendants. Meredith, C.J.

9th December, 1871.

Cassavant vs. Pattenaude.—When the grounds urged by the affidavit for a capias are that the Defendant has concealed or is concealing his estate, debts and effects, no reasons in justification thereof are necessary. Taschereau, J.

Poulet vs. Larivière.—To compel a witness to attend, his expenses to go and return must be tendered him. Taschereau, J.

11th December, 1871.

Mantha vs. Coghlan.—When a party is entitled to demand security for costs, he may either present his petition in vacation within the four days, or give notice within such delay, and move at the ensuing term. Stuart, J. (after consulting Taschereau J.)

29th December, 1871.

Grace vs. Crawford.—Held, that the master of a foreign vessel who domiciled out of the Province, was temporarily within its limits with his ship at the time the action was brought, is bound to give security when Plaintiff. Meredith, C.J.

Anderson vs. Wurtele.—Held, that no action lies against an assignee under the Insolvent Act, to resiliate a lease made to the Insolvent prior to his insolvency, on the ground that the premises are not garnished with sufficient moveables to secure the rent. Taschereau, J.

Brousseau vs. Bédard.—Held, that a tutor *ad hoc* cannot bring an action for breach of promise of marriage for a minor who has no tutor, and could he, he must first register the deed of tutorship. Taschereau, J.

Miller vs. Lambert.—Held, that a Sheriff can only demand fees for one title deed for all the properties sold to the same person, at one sale. Taschereau, J.

CIRCUIT COURT.

Quebec, 26th December, 1871.

Picard vs. Gosselin.—Held, that where the Plaintiff and Defendant had settled the case together, to which settlement the Plaintiff's attorney, who had prayed for *distraction ds dèpens* by the declaration, was no party, and had not been paid his costs, and the Plaintiff was insolvent, there was evidences of bad faith, and the Plaintiff's attorney was entitled to judgment for the costs *distraits* in his favour. Taschereau, J.

Lanyevin vs. Martin.—The bill of costs in a contested case must be taxed before execution can issue for the costs. Taschereau, J.

LA RÉDACTION.

La direction a l'honneur d'accuser reception des revues et ouvrages de droit suivants :

1o. Echanges.

The New York Nation.
The London Law Journal.
La Revue Légale.
The Canada Law Journal.
The American Law Review.
The Albany Law Journal.
The American Law Register.
The Legal Gazette.
Le Droit Civil Canadien.

2o. Bibliographie.

American Trade Marks Cases, Cincinnati, 1871, grand 8vo.

La prochaine livraison de la *Revue* contiendra une notice de cet ouvrage.

N.B.—L'administration donne avis que tout échange avec les journaux de la campagne cesse avec l'envoi de cette livraison ; le tirage limité de la *Revue* ne lui permettant d'échanger qu'avec les journaux quotidiens des villes et les revues.