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.**
Pagination continue.

REVUE CRITIQUE

DE

Législation et de Jurisprudence.

CONFLICT OF PRESCRIPTIONS.

Is extinctive prescription or limitation of personal actions governed by the law of the country where the suit is brought, the lex fori, or by the lex loci contractûs ?

An important question of private international law, which for many years has been, and still continues to be, discussed by legal writers and in courts of justice, is, whether the limitation of personal actions is governed by the *lex fori* or by the *lex loci contractûs*. It is true that in England and the United States the point may be considered as settled in favour of the *lex fori*, although even in those countries we see jurists of such high standing as Westlake and Bateman, strongly defending the claim of the *lex loci contractûs*. In a late case of *Harris* v. *Quine*, the learned Lord Chief Justice Cockburn inclined towards the latter view, although he admitted the *lex fori* to be the rule. And if to these considerations be added the fact that the question remains as yet undecided on the continent of Europe and in this Province, a review of the law on the question may not be found without interest and practical utility.

True it is that the legal profession in every country is familiar with the reasonings *pro* and *con*. At the same time it must be admitted that there exists no complete review of the different systems advocated throughout the commercial world. The English and American writers do not fail to produce every English and American authority, but they rarely pay to the French and continental jurists the attention and consideration which their learning

deserves, and the same disregard of English and American writers is manifested by the European jurists. Thus, Félix, Troplong. Marcadé, and even Savigny, make little or no allusion to the English and American jurisprudence; and when we refer to the English or American writers, we find that in their appreciation of the opinions of French and continental jurists, they fall into many inadvertent mistakes, sometimes into grave errors. Thus, Dr. Parsons, in his late work on Notes and Bills, affirms, upon the alleged authority of Pardessus, "that in France the limitation and prescription of the place where the contract was made would prevail, no matter where the contractor was used," (vol. 2, p. 382) whereas Pardessus supports the *lex loci solutionis*, and in default of it, the *lex domicilii debitoris* at the time of the contract. Again, at page 383, foot note *r*., the learned professor states it to be the opinion of Pothier that the *lex loci* and not the *lex fori* should govern, whereas Pothier never speaks of any but the *lex domicilii creditoris*. Mr. Guthrie, p. 219, in turn, says that Pardessus and Boullenois favour the *lex domicilii debitoris*, and does not notice the distinction which both these commentators make, when a place of payment is specified. Mistakes have even been commited by writers in their citation of works composed in their own language, Thus, Félix asserts that Dunod favours the *lex domicilii debitoris* at the time of the institution of the action, whereas it is the *lex domicilii debitoris* at the time of making the contract which is supported by Dunod. These examples, to which many others might be added, show the importance of a careful and detailed investigation of the subject.

In this Province there exists a wide diversity of opinion. In the late case of *Wilson* v. *Demers*, the question was raised before all its tribunals, and was differently decided by each of them; but before going into the grounds of these varying judgments, the facts of the case must be briefly stated.

Demers, the defendant, a native of Chambly, P. Q., went to Fonds du Lac, Wis., and there carried on business for some years. In the course of his dealings in the city of New York, in 1857, he gave his promissory note to Wilson, the plaintiff, payable four months after date, at a particular bank, at Fonds du Lac. A few months afterwards he left Fonds du Lac, and, returning to Canada, began business at Valleyfield, near Montreal; and, so as not to differ from the honorable judges in appeal on mere matters of fact, it may even be said that he absconded

from the United States, as their Honors held; for it is quite immaterial to the decision of his case whether he did or did not leave his American domicile suddenly, secretly, and fraudulently. Demers has ever since the beginning of the year 1858 resided at Valleyfield. Wilson alleging that he became acquainted with the whereabouts of his debtor only on the 19th of April, 1866, and that by the laws of the State of New York and the State of Wisconsin, the said promissory note was not prescribed, brought his action thereon before the Superior Court in Montreal, against Demers.

The defendant first demurred to this demand, upon the ground that that court had nothing to do with those foreign laws, prescription being governed by the *lex fori* exclusively. This demurrer was maintained by the court below, his Honor Mr. Justice Berthelot holding that "the prescription of a promissory note made in a foreign country, and payable there, is to be governed by the *lex fori* and not by the *lex loci contractûs* or *lex loci solutionis*." * This decision having been appealed from to the Court of Queen's Bench, was reversed on a point of procedure; and the question at issue was reserved until the final determination of the case on the merits.

The defendant also pleaded, 1st, the general statute of limitation of six years, 10 Vict. c. 11; 2nd, a special prescription of five years, under 12 Vict. c. 22, applicable to bills of exchange and promissory notes *due and payable in Lower Canada*.

These pleas were dismissed by His Honor Mr. Justice Mondelet, before whom the case was argued on its merits, the learned judge holding that the true rule of both the old and the new French jurisprudence, which should prevail in Lower Canada, is the *lex loci contractûs* or the *lex loci solutionis*, when a place of payment is specified. †

Brought before the Court of Review, in Montreal, the decision of Mr. Justice Mondelet was reversed by Mackay and Torrance, JJ., on the 30th of November, 1868. His Honor Mr. Justice Mackay, for the Court, maintained that both pleas were well founded, that the statute of limitations fully applied to this as a commercial case, that the Promissory Note Act equally applied, and that the words "due and payable in Lower Canada," therein used, involved no more than "due" or "due and exigible"; and

* 12 L. C. Jurist, 222. † Ibid.

in support of this ruling the learned judge quoted Symond's Law Making, p. 413. He concluded his opinion by the following remarks:

"Volumes have been written on the domicile of the debtor, as affecting the remedy or the suit; about his domicile, at the time of the contract, at the time of the suit; on the place of the contract, the place for payment, &c. The Bar is familiar with the reasonings *pro* and *con*. As many authors are on one side as on the other. The old ones were divided, and so are the new. *Pothier* has been attacked for his opinions by *Troplong*, and lastly *Troplong* by *Marcadé*. A refuge can be found only in the old general rule, that the *lex fori* must prevail in cases of personal action such as the present one." *

The case having been taken into the Court of Queen's Bench, by Wilson, the decision of the Court of Review was reversed, upon the ground that the defendant absconded from the United States, and that his creditor did not discover his whereabouts until shortly before the institution of the action, their Honors applying to this case the maxim of the Roman law: "*Contrà non valentem agere nulla currit præscriptio.* †

Mr. Justice Badgley, however, held that in general and ordinary cases, the *lex fori* should rule in matter of limitation of personal actions, 1st, because prescription affects merely the remedy; and 2nd, because prescription is a law of public order and policy.

The honourable Chief Justice and Mr. Justice Monk expressed no opinion whatever as to the *lex loci contractûs* or the *lex fori*, and simply concurred with Mr. Justice Badgley in holding that, as the defendant had been guilty of fraud against his creditor by absconding from the United States and by not informing his creditor of his removal to Valleyfield, the laws of Lower Canada could not be invoked for his relief.

Mr. Justice Caron concurred in the judgment of the Court, for, amongst other reasons, the following: "*D'après notre droit commun applicable*," he said, "l'absence du défendeur telle que prouvée a interrompu la prescription et l'a empêché de courir au préjudice du demandeur."

It is admitted that prescription is a law of public order and policy; and yet the public interest is superseded by the private

* 13 L. C. Jurist, 24. † 14 Ibid.

interest of a creditor. If such reasoning were logical, no one could be astonished at the ruling of the honourable court.

It is because prescription is a law of public order and policy that no attention should be paid to the fact that the defendant was absent or had absconded from a foreign country, and that the protection of that law which has been enacted to secure the peace of the whole community should be extended to all, to foreigners as well as to residents. Is the maxim *privatum incommodum publico bono pensatur*, not applicable in this as in all civilized countries? Clearly, the reasoning of Mr. Justice Badgley should have led him to a conclusion absolutely the reverse of the one at which he arrived.

In the case of *Lippman* v. *Don*,* the defendant, Sir A. Don, had left France for parts of England unknown to his French creditor; and yet the counsel and judges in the case never for a moment entertained the idea of invoking the maxim *contrà non valentem agere non currit præscriptio*. Still, the English statutes of limitations contain an exception in favour of persons "beyond seas," whether they be creditors or debtors, provided that the limitation had not commenced to run. But this exemption was never applied to foreign prescription.

In virtue of what law, moreover, can absence, fraud, or any other disability of a creditor to bring his suit in due time, be held a cause of interruption of short prescriptions, such as prescriptions of five or six years in commercial matters. Not a single authority was quoted or indeed can be quoted in support of this novel proposition. It is true that absence is a cause of interruption of long prescriptions, such as those affecting real rights, because the *Coutume de Paris*, which is part of our common law, expressly declares and enacts that prescription can be thus interrupted; but that law never extended this rule to short prescriptions. †

True, the ordinance of 1673, in an express article, declares that the five years prescription of bills of exchange runs *à l'égard des mineurs et même des absents*. But as the commentators observe,

---

* Infrà, p. 140.

† Massé, 1 Dr. Com. 257, 492; Rivière, Répétitions Ecrites, 395; Pardessus, Lettre de Change, No. 331; id. Dr. Com. No. 1990; Merlin, Répertoire, Sup. t. xvii, p. 589; Troplong, Prescription, t. 2, No. 1038; Paris, 23 avril 1836, Dev., 26, 2, 258; Delangle, t. 2, p. 727; Bédarride, Des Sociétés, t. 2, p. 699; Pothier, Lettre de Change, p. 206.

this restrictive proviso was unnecessary, it being already a principle of the common law. The Code Napoleon contains no such proviso; and yet all the jurists and courts of justice reject absence of plaintiff or defendant as a cause of interruption of prescription in commercial matters.

The *Coutume de Paris*, in order to make absence a cause of interruption of prescription of real rights or actions, made a special enactment to that effect, which would have been unnecessary if the common law had been as alleged.

Heretofore in Lower Canada, prescription in commercial matters was generally of one year, under the article 126 of the *Coutume de Paris;* but no provision was made for cases of absence, minority, interdiction, or any other like disabilities; and as Pothier remarks, * no interruption could be presumed. †

The same rule has been maintained with regard to the prescription of five years of arrears of *rentes constituées*. The ordinance of 1510, which introduced that prescription, has no disposition with regard to minors, absentees, or other like persons; and consequently absence, minority, or any other disability was not considered a cause of interruption of that short prescription.‡

Finally our statutes of limitations in commercial matters have been framed upon the English statutes of limitations; still they do not contain the exception made in favour of persons "beyond seas," by the statutes of James and Anne. The 10–11 Vict., c. 11, enacts that no action, of a commercial nature, shall be maintained unless commenced within six years; and it is remarkable that the only exception provided for is where there has been an acknowledgment of the debt in writing or a partial payment. while the Promissory Note Act contains no exception whatever. Therefore absence, or any other disability, not being mentioned in either of these statutes, the Legislature clearly intended that absence, minority, or any other disability, should not be held a cause of interruption, for the simple reason that prescriptive laws are laws of public order and policy.

Moreover, has not our Provincial Legislature expressly sanctioned this rule, by enacting special exceptions in favour of absentees and

---

* Des obligations, p. 717.

† See also arrêt of the 3rd February, 1650, reported by Grillon, Recueil des arrêts.

‡ Arrêt of the 1st June, 1548, Traité des Minorités par Mesle, p. 502.

other like persons in respect to the limitation of the time for bringing certain appeals? *

This construction of statutes of limitations is moreover strongly supported by the authorities.

"Indeed," says Angell, on Limitations, ed. 1869, § 194, "there appears to be no authority in favour of the doctrine that if the persons mentioned in the above section are not expressly excepted from the operation of the statute of limitations, there exists a *virtual* exception. But it has been holden that no exception can be claimed unless expressly mentioned. † General words of a statute, it is considered, must receive a general construction, and unless there can be found in the statute itself some grounds for restraining it, it cannot be restrained by arbitrary addition or retrenchment. ‡ And on this principle it was adjudged by Sir Wm. Grant that *absentees* who are not expressly excepted in the act of limitations of Jamaica were intentionally rejected, and therefore could not be introduced by construction; and it was also declared by Sir Eardly Wilmot in the House of Lords, that *infants*, like other persons, would be barred by an act limiting suits at law, if there was no saving clause in their favour. §

The disability of being "beyond the seas," provided for by the English statutes of limitations and those of most of the States of the American Union, is omitted in the statute of New Jersey as well as in that of the Province of Quebec; and consequently is not recognised by the courts of that State. ||

In the case of *Fenn* v. *Bowker*, ¶ the Court of Appeals of Lower Canada laid down the same rule, and held that although at common law an acknowledgment in writing or a partial payment did operate as an interruption of prescription, yet as the Promissory Note Act contained no exception, the court would not make one. How can the honourable court reconcile its ruling in *Fenn* v. *Booker* with its ruling in *Wilson* v. *Demers*, more

* Cons. St. L. C., c. 77, s. 55.

† *Bucklin* v. *Ford*, 5 Barb. (N. Y.) sup. ct. 393; The Sam Slick, 2 Curtis, C. C. 480; *Howell* v. *Hair*, 15 Alab. 194.

‡ See Mr. Chancellor Kent in *Demarest* v. *Wynkoop*, 3 Johns 129.

§ *Beckford* v. *Wade*, 17 Ves. R. 87.

‖ *Buckinghamshire* v. *Drury*, cited in *Beckford* v. *Wade*, *Beardsly* v. *Southmayd*, 3 Green, 171; *Taberrer* v. *Brintnall*, 3 Harr. (N. J.), 262.

¶ 10 L. C. Jurist, 120.

especially as the common law never admitted absence or any other disability as a cause of interruption of commercial prescription?

Finally the judgment of the Court of Queen's Bench is contrary to the letter of our Code. Article 2269 is indicated by the *Codificateurs* as showing the old law to be that "prescriptions which the law fixes at less than thirty years, other than those in favour of subsequent purchasers of immoveables with title and in good faith, and that in case of rescision of contracts mentioned in article 2258, run against minors, idiots, madmen, and insane persons, whether or not they have tutors or curators, saving their recourse against the latter."

If absence of the debtor suspended prescription in commercial matters, as the Court of Appeals has held, according to the maxim *contra non valentem agere nulla currit prescriptio, à fortiori* prescription should not run against minors; for as it has been very properly said, "les absents méritent moins de faveur que les mineurs et les interdits." *

Mr. Justice Caron further urged that the Promissory Note Act did not apply to Demers' note, because it was not *due and payable* in Lower Canada. However, that statute does not require that the note should be *made due and payable* in Lower Canada; the words *due and payable* involve no more than *due and exigible*, and every promissory note sued upon in Lower Canada must be considered as *due and payable* in Lower Canada.

Even granting that the 12 Vict. c. 22, does not apply to this case, then the 10–11 Vict. c. 11, does. If the 12 Vict. merely refers to notes made due and payable in Lower Canada, it cannot be reasonably assumed that the same does supersede in this case the 10–11 Vict., which provides for the limitation of all notes payable in or out of Lower Canada. Mr. Justice Caron is of opinion that the 10–11 Vict. has been repealed by the 12 Vict. This was certainly not done by express enactment; it can only be inferred from the fact that the 12 Vict. provides for the prescription of promissory notes. But if that statute does not comprise all notes, v. g. that of Demers, then it cannot be considered as repealing the former statute in respect of the same.

But, not to be severe upon the judgment of the learned judges, it must be mentioned that two of their Honors expressed a dictum a "je pense" upon the real question at issue; it may even be

* Laurent, Principes du Droit Civil, vol. 2, p. 148.

said that they were of the opinion that the *lex loci contractûs* or *solutionis* should rule in all cases of prescription of personal actions. No authority was quoted, no argument made to support the proposition. "Je pense," said again Mr. Justice Caron, "que le juge Mondelet a bien jugé en disant que c'était d'après la loi du lieu où avait été fait le billet ou bien de celui où il avait été mis payable, que la cause se devait décider; *cela étant*, d'après la preuve, la prescription n'était pas acquise, et le défendeur a été bien condamné." By *cela étant*, does the learned judge intend to convey the idea that the proposition he enunciated should be accepted as a matter of course. The question, however, is extremely complicated and difficult; and as it is the only point worthy of any notice in the decision of the learned judges, we shall say nothing further of the judgment of the Court of Queen's Bench; and we will now endeavour to show that the rule laid down by Mondelet, Drummond, and Caron, JJ., is unfounded in law, and that the *lex fori* should govern in all cases.

Relying upon the authority of Boullenois, Pardessus, Félix, Troplong and Savigny, Mr. Justice Mondelet drew the conclusion "that the true doctrine is that the prescription of the place of payment must govern, and where the place of payment is not specified, then that of the place where the contract was created."

Boullenois holds the law of the place of payment, and if no place of payment be specified, the law of the domicile of the debtor, and not, as the learned judge asserts, the *lex loci contractûs*.*

The old French commentators, moreover, do not appear to concur in the opinion of Boullenois.

Dunod, † contends that the law of the domicile of the debtor, at the time of the contract, governs.

Merlin ‡ quotes two *arrêts* of the Parlement de Flandre, the first of the 17th July, 1692, the second, of the 30th October, 1705, which held the law of domicile of the debtor at the time of the institution of the action to rule in all cases of conflict of personal prescriptions; and he further reports another case which originated before the Code Napoleon, and was decided in the same sense by the *Cour de Bruxelles*, on the 24th September, 1814.

---

* T. 1, p. 530; t. 2, p. 488.

† Des Prescriptions, part 1, ch. 14.

‡ Répertoire, vo. Prescription, s. 1, § 3, par. 7.

Berryer and Laurière on Duplessis, * express the same view. And if to the above authorities we add the old civilians Huber and Voet, and also Merlin, who evidently wrote under the influence of the then prevailing notions on the matter, it seems that the old French common law does not admit the *lex loci contractûs*.

It is contended that the weight of modern French authority is against the doctrine of the *lex fori*. But what is the present opinion in France and on the continent generally?

On reference to Pardessus, † we find first that his language has not been quoted in full by Mr. Justice Mondelet, for there the sentence contains these words, immediately after those cited: "et s'il ne l'a pas déterminé, par celui du domicile qu'avait ce débiteur lorsqu'il s'est obligé; *parceque la prescription étant une exception qu' il est permis au débiteur d'opposer à la demande de son créancier, c'est naturellement dans sa propre legislation qu'il doit trouver ce secours.*" If the debtor is thus to look only to the law of his own domicile, and if his plea of prescription affects merely the remedy, as admitted by Pardessus,—what has the law of the place of payment, or of the domicile of the debtor at the time of the contract, to do with the case. Nothing; it seems clear that the reasoning of Pardessus should lead to the opposite conclusion, to wit, the *lex fori*, or *lex domicilii debitoris* at the time of the institution of the action; and it is remarkable that two years before the publication of his *Droit Commercial*, he had, in his *Eléments de Jurisprudence Commerciale* (page 112), pronounced in an unqualified manner for the latter opinion.

With regard to the alleged authority of Félix, ‡ it is astonishing that the learned judge did not quote a few pages further on. Félix lays down various exceptions to the rule *locus regit actum*, and among others, the case of limitation of personal actions. He contends that the law of domicile of the debtor at the time of the action should be the criterion, without paying any regard to the place of payment. He further declares that the *lex loci solutionis* is favoured only by Boullenois, Pardessus and Troplong among the French writers, and by Christin, Burgundus, Mantica, and Favre among the civilians.

That Félix is in favour of the *lex fori* is evident from the fol-

* Traité de la Prescription, liv. 1, chap. 1.
† Droit Commercial, t. 6, No. 1495, p. 383.
‡ Droit International, p. 221 *et seq.*

lowing remarks, made by him after reviewing the various systems advocated in this matter: "*Bien qu'il y ait quelques différences dans les termes employés par ces auteurs, on voit qu'ils aboutissent tous à cette conclusion que la prescription s'acquiert d'après la loi en vigueur au lieu où siége le juge compétent, pour statuer sur les actions personelles formées contre celui qui oppose cette défense.*"

Troplong holds that the law of place of payment should rule in all cases. *

Savigny † is decidedly in favour of the doctrine maintained by the honourable judge. "Many say," he remarks, p. 201, "that laws as to prescription are laws of procedure, and must, therefore, be applied to all the actions brought within their territory, without respect to the local law of the obligation.

"According to the true doctrine, the local law of the obligation must determine as to the term of prescription, not that of the place of the action; and this rule, which has just been laid down in respect to exceptions in general, is further confirmed in the case of prescription, by the fact that the various grounds on which it rests, stand in connection with the substance of the obligation itself. Besides, this opinion has always been acknowledged to be correct by not a few writers."

Savigny finally holds the view that when a place of payment is specified, the law of that place should apply, in pursuance of the rule, *contraxisse unusquisque in eo loco intelligitur in quo, ut solveret, se obligavit.*

Savigny (in foot note *u*) futher observes, that this doctrine is agreed to by Hert, § 65; Schaffner, § 87; Wachter, 2, pp. 408-412; Koch, 1, p. 133, note 23; and Bornemann, 1, p. 66; but that their agreement is only in regard to the principle, not to all the applications of it; since the local law of the obligation is not determined in the same way even by these writers. In fact Hert and Schaffner are of opinion that the *lex loci solutionis* should be entirely overlooked, and that the *lex loci contractûs* should rule in all cases.

In addition to the foregoing authorities referred to by Mr. Justice Mondelet, as supporting his decision, Demangeat,‡ Domin-Petrushevecz, § and Massé || may also be quoted.

---

* Prescriptions, No. 38.

† Conflict of Laws, Guthrie's ed., 1869.

‡ Demangeat on Félix, vol. 1, p. 223, note *a*.

§ Précis d'un Code de Droit International, art. 197, p. 88.

|| Dr. Com. vol. 1, Nos. 558–565, ed. 1861.

Demangeat, although not positive, inclines for the *lex loci contractûs* exclusively.

Domin-Petrushevecz says: "L'objection de prescription est jugée d'après la loi suivant laquelle la convention ou le droit en question lui même est jugé."

Massé adopts the view of Troplong. "Il faut donc arriver," he says, p. 460: "au dernier système qui évite ces inconvénients, tout en se rattachant d'ailleurs au principe par lequel on rapporte la prescription, non à la formation du contrat, mais à son inexécution. Ce système fait prévaloir la loi du lieu de paiement ou de l'exécution, quand un lieu a été indiqué, et celle du domicile du débiteur, quand aucun lieu n'a été indiqué pour le paiement, parce que c'est là que l'obligation est payable." Massé quotes in support of his view Casaregis,* and a decision of the Senate of Chamberry (1593), reported by Favre, and thereupon he attacks Pardessus,† for holding that, when no place of payment is specified, the law of domicile of the debtor at the time of the contract, and not at the time of the institution of the action, should be applied. "J'ai donc de la peine à m'expliquer pourquoi M. Pardessus qui reconnaît que la prescription doit être réglée par la loi du lieu où le débiteur a promis de payer, veut que dans le cas où ce lieu n'est pas déterminé et où par conséquent, le paiement doit être demandé au domicile du débiteur, la prescription soit réglée par la loi du domicile qu'avait le débiteur au moment où il s'est obligé, bien que, s'il y a eu changement, le paiement ne doit pas être fait à ce domicile."

Marcadé on art. 2219 of the *Code Napoléon*, in turn attacks the opinion supported by Troplong and Massé: "M. Troplong," he observes, "qui tient pour la loi du pays où le paiement devait se faire, en donne cet incroyable motif, que la prescription extinctive des obligations étant la peine de la négligence du créancier, c'est la peine établie dans le lieu convenu pour le paiement que ce créancier doit subir, puisque *c'est dans ce lieu qu'il a été négligent*. . . . . Nous avouerons que loin de trouver une pareille raison fort simple, nous la trouvons au contraire fort bizarre, fausse deux fois pour une, comme on va le voir bientôt. . . . . .

"Ainsi, de quelque côté qu'on se tourne et quelque ordre d'idées qu'on prenne pour point de départ, on se trouve toujours ramené à cette conclusion, conforme à la doctrine des anciens

* Discurs. 130, No. 25 *et seq.* † Droit Com. No. 1495.

auteurs, que c'est uniquement le domicile du débiteur qu'il faut considérer ici."

Such is the state of opinion on the continent of Europe, upon the question under consideration; and it will be conceded that if no other resource than these authorities were to be found, it would be difficult, if not impossible, to arrive at a satisfactory conclusion. The review just made, clearly shows that no less than eight different systems prevail on the continent:

1. *The law of domicile of the creditor in all cases*, supported by Pothier and also by Dumoulin.

2. *The law of domicile of the debtor at the time of the institution of the action in all cases*, supported by John Voët, Pôhl, Thôl, Bar, Berroyer and Laurière on Duplessis, Arrêts of the *Parlement de Flandre* (17th July, 1692, and 30th October, 1705), Bruxelles, (24th September, 1814), Merlin, Marcadé, Arrêts de Cologne, (7th January, 1836, 4th April, 1839, and 14th December, 1840). Cour de Cassation of Berlin, (8th October, 1838.)

3. *The law of the place of the contract in all cases*, supported by Hert, Mansord, Rocco, Reinhardt, Schaffner, Demangeat; Douai (16th August, 1834); Paris, (7th February, 1839. Alger, 18th August, 1848, and 18th January, 1840.)

4. *The law of the place of the contract, and when a place of payment is specified, the law of that place*, supported by Wachter, Koch, Brunnemann, Savigny, and Domin-Petrushevecz.

5. *The law of the domicile of the debtor at the time of the institution of the action, and when a place of payment is specified, the law of that place*, supported by Christin, Burgundus, Mantica, Casaregis, Favre, Boullenois, Troplong and Massé.

6. *The law of the domicile of the debtor at the time of making the contract, and when a place of payment is specified, the law of that place*, supported by Pardessus.

7. *The law of the domicile of the debtor at the time of the making of the contract in all cases*, supported by Dunod.

8. *The law of the place where the action is brought, in all cases*, supported by Paul Voët, Hommel, Félix, Huber, Weber, Tittmann, Mayer, Glück, Mittermaier, Mühlenbruch, de Linde, and by the English and American decisions, as will be seen hereafter.*

* In Scotland another system, still assented to by Guthrie on Savigny, prevailed in former times, viz, the law of the domicile of the debtor during the whole currency of the term of prescription.

It is evident that the question in controversy is not a question of local, but of international law, *une question d'école*, upon which the jurisprudence of all nations ought to be properly consulted and weighed. It is necessary that upon matters of this highly practical importance not only to a special community, but to the commercial world at large, there should be uniformity of decision. It is equally beneficial to the people of this country and to foreigners, when they deal with each other, that they should know that the obligations arising out of their transactions are submitted to the same rules of international law. There has been in England, Scotland and the United States, a uniformity of jurisprudence on this point, and it is against public policy for our courts to rule differently.

We find in the nature of the English Statute of Limitations, adopted by the United States and the British Colonies, another reason for adopting the *lex fori*. On the European continent, prescription is essentially a presumption of payment, which may be rebutted by contrary evidence; it is more an exception than a defence. On the contrary, in Canada as in England and the United States, prescription is a mere denial of action, so much so that the oath of the debtor, as to payment, cannot be demanded in a Court of Justice.

The law of prescription in force in Lower Canada being borrowed from the English one, it ought to be governed by the same rules in cases of conflict of prescriptions, viz., by the *lex fori*; and such was the opinion of the *Codificateurs* (3rd report, *Title Prescription*, Art. 8); and their opinion is moreover in accordance with our jurisprudence.

In the case of *Côté* v. *Morison*,* a note made in Mackinaw, State of Michigan, was declared to be subject to our quinquennial prescription (12 Vict., ch. 22), by the Superior Court of Montreal; and in Appeal that judgment was confirmed on other grounds, the Court remaining silent on the question of prescription.

In the case of *Fenn* v. *Bowker*,† the Court of Appeals maintained a plea of prescription of five years in an action on a promissory note made at Rochester, State of New York.

In the case of *Adams* v. *Worden*,‡ an action was brought upon a promissory note made at Plattsburg, New York. The defendant

---

* 2 L. C. Jurist, p. 206. † 10 L. C. J. p. 121.

‡ 6 L. C. Rep. p. 237.

pleaded the Statute of Limitations of the State of New York. To this plaintiff demurred: 1. Because the defendant cannot set up any foreign law or statute of limitations; 2. Because in Lower Canada there is no such law of prescription as is alleged in the exception. On the 15th December, 1852, judgment was rendered by the Superior Court at Montreal, composed of Day, Smith and Mondelet, J. J., dismissing the said plea of limitation, on the ground "that the laws of the State of New York whereby the pretended limitation is created, have no force or operation in this Province." In appeal the Court held this judgment premature, because the statute of the State of New York had not been proved.

In all the above cases, no place of payment was specified, but the above decisions do not the less conclusively lay down the principle that prescription is governed by the *lex fori* and not by the *lex loci contractûs*.

What can have been the cause of the conversion of Mr. Justice Mondelet from the opinion he held in *Adams* v. *Worden*? In his decision in *Wilson* v. *Demers*, the learned judge does not even notice his judgment in the former cause.

In Louisiana, another French Colony, which like Canada, has been transferred to a nation governed by the common law of England, and which like Lower Canada, has adopted many of the commercial laws of Great Britain, it is not surprising to find the English principle of the *lex fori* fully adopted.* Mr. Justice Slidell remarked in *Lacoste* v. *Benton*: "There is a general principle which has been so frequently recognized by the Courts of this State as to be now beyond dispute. It is that prescription is a question affecting the remedy, and is controlled by the *lex fori*. The rule is not peculiar, however, to our Courts, but has become a universal one in international jurisprudence."

The courts of the Province of Ontario also have adopted the doctrine of the *lex fori* †. In the late case of *Darling* v. *Hitchcock*, a note made in Ontario, payable in Montreal, was prescribed by

---

* *Union Cotton Manufactory* v. *Lobdell*, 9 Martin, 435 (1828), Matthews, J.; *Erwin* v. *Lowry*, 2, An. Louis, R. 314 (1847), Slidell, J.; *Newman* v. *Goza*, 2 *ib.*, 643 (1847), Slidell, J.; *Lacoste* v. *Benton*, 3 *id.*, 220 (1848), Slidell, J.; *Brown* v. *Stone*, 4 *id.*, 235 (1849), Rost, J.; *Bacon* v. *Dahlgreen* (1852), 7 An. Louis, Rep. 599, Eustis, C. J.; *Succession Lucas*, (1856), 11 *id.*, 296, *per* Spofford, J.; *Walworth* v. *Routh*, (1859), 14 *id.* 205, *per* Merrick, C. J.; *Pecquet* v. *Pecquet*, 17 *id.* 204.

† 2 Q. B. U. C. Rep. 265.

the law of Quebec, but not by the law of Ontario, and the defendant pleaded the Lower Canada prescription. The question principally was, whether a Court of Justice in Ontario was bound to enforce the Promissory Note Act,* enacted by a legislature common to both Provinces, and declaring that all notes "due and payable in Lower Canada" should be considered as absolutely paid, unless sued on within five years from maturity. But as the note was made payable in Montreal generally, without the words "only, not otherwise and elsewhere," as required by the laws of Ontario, the same was considered as not payable in Lower Canada, and judgment went for the plaintiff. Chief Justice Draper, however, on delivering the judgment of the court, fully recognized the soundness of the *lex fori*. He said: "I take it to be equally true as a general proposition that a plaintiff has the full period prescribed by such local law (the law where the action is brought) for bringing his suit before it would be so barred."

What we have said would seem to be sufficient to show that in England, the rule of the *lex fori* is well established. It is, however, contended, upon the authority of Westlake,† and Bateman,‡ that the English decisions rest, 1. upon the authority of Story, and 2. on fallacies.

The case of the *British Linen Company* v. *Drummond*, decided on the 22nd May, 1830, has been often cited as a leading one bearing upon the question in controversy, and the principle therein laid down has been acknowledged in many cases anterior to the publication of Story's Conflict of Laws, as in *De la Vega* v. *Vianna*; § *Trimbey* v. *Vignier*; || and *Hubert* v. *Steiner*; ¶ and it has been also admitted long previous to these cases, particularly in *Williams* v. *Jones*,** and other cases cited in *Lippmann* v. *Don*, decided in the House of Lords on the 26th May, 1837,†† and although in that case Lord Brougham mentions the name of Story in conjunction with the names of Huber and Paul Voet, we will soon have occasion to shew that the doctrine laid down by his Lordship rested, not upon fallacies or the *dictum* of Story, but upon the soundest reasoning. Suffice it to say at present, that, notwithstanding the objections of Westlake and Bateman, the

* 12 Vict. ch. 22.
† Private International Law, § 250 *et seq.*
‡ Commercial Law, § 143 *et seq.*
§ 1 B. & Ad. 284, 1830.
|| 1 Bing. N. C. 151, 1834.
¶ 2 Bing. N. C. 203, 1835.
** 13 East. 439, 1811.
†† 2 S. & M. 682.

decision in *Lippmann* v. *Don* has been recognized as an authority in both Great Britain and the United States, and is taken, with the other precedents, as fixing the law of those countries.*

That the *lex fori* is still the English rule is evident from the following authorities:

In the second edition of his *Leading Cases on Commercial Law* (1868), Mr. Tudor in reviewing the English jurisprudence on the matter, says, p. 280: "The limitation of actions clearly does not belong to, and will not be determined by, the law of the country where the contract was entered into, but by the law of the country where proceedings are taken to enforce."

Mr. Forsyth in his *Opinions on Constitutional Law* (1869), also remarks p. 249: "The *lex fori* applies to all modes of enforcing rights, and governs as to the nature, extent, and character of the remedy, including statutes of limitation."

In the case of *Harris* v. *Quine*,† decided in the Court of Queen's Bench, 7th June, 1869, by Cockburn, C. J., and Blackburn and Lush, JJ., the authority of *Huber* v. *Steiner*, and other cases above cited, were fully sustained. It must be admitted that

---

* 13 Peters, 327; 2 B. & Ad. 413; 1 id. 284; 10 B. & Cresw. 903; 3 Burge's Com. on Col. and For. Laws, 883; Principles of Equity by Lord Kames, vol. 2, p. 353; 4 Cowen, 528, note 10; id. 530; 1 Gall. 371; 2 Mason, 151; 6 Wend, 475; I Green's N. J. Rep. 68; 3 Peters, 270, 277; 5 id. 466; 8 id. 361; 13 id. 312; 13 id. 378; 13 Serg. & R. 395; 2 Rand, 303; 3 J. J. Marsh, 600; 8 Vern, 150; 3 Gilman, 637; 1 Meigs, 34; 7 Missouri, 241; 9 How, U. S. 407; 7 Maine, 337, 470; 36 Maine, 362; 1 Penn. State R. 381; 2 Mass. 84; I3 id. 5; 17 id. 55; 3 Conn. 472; 2 Bibb. 207; 2 Bailey, 217; 1 Hill, S. C. 439; 2 Dall. 217; 1 Yeates, 329; 1 Caines, 402; 1 Johns, 139; 3 id. 190; 3 id. 263; 11 id. 168; 4 Conn. 49; 2 Paine, C. C. 437; 2 S. & M. 682; 1 Ross's Leading Cases, 559-605; Angell on Limitations (ed. 1869), p. 52-64, No. 64-68; Parsons on Bills, p. 381-391 (ed. 1867); Phillimore on International Law, vol. 4, p. 573; Dickson on Evidence, pp. 532-537; Tait on Evidence, 3rd ed. pp. 460-465; Henry on Foreign Law, appendix p. 237; 5 Johnson, N. Y., 152; 10 B. & C. 816; 1 Smith, Leading Cases (ed. 1866), p. 954; N. 786; Story, Conflict of Laws, § 576, p. 576 and *seq.* (ed. 1865); Wheaton, International Law, p. 187; 1 Bing. N. C. 111; 2 id. 202; 3 Conn. 54; 1 Wis. 131; 10 Pick. 49; 11 id. 36; 6 Cush. 238; 13 East, 439; 2 Q. B. Rep. U. C. 265; 9 Martin's Rep. 435; 2 an. Louis Rep. 315; id. 646; 3 id. 221; 4 id, 235; The English Jurist, 1851 to 1855, p. 122; Ruckmaboye v. Mottichund (1852), 8 Moore, p. 4; *Hogan* v. *Wilson*, Stuart's Rep. p. 145.

† L. R. 4 Q. B. 653.

the Chief Justice felt inclined to adopt the *lex loci contractûs*, but he would not undertake to derogate from the well settled jurisprudence of England. "If the matter," he said, were *res integra*, and I had to form an opinion unfettered by authority, I should be much inclined to hold, when by the law of the place of contract, an action on contract must be brought within a limited time, that the contract ought to be interpreted to mean: 'I will pay on a given day or within such time as the law of the place can force me to pay.'" His decision, however, was in the following terms: "On the question as to whether the judgment on the plea in the Manx Court is a bar to bringing an action in the courts of this country, I think we are bound by authority that it is not; *Huber* v. *Steiner*, and other cases, having decided that such a statute of limitations as the present, simply applies to matters of procedure, &c., not to the substance of the contract."

Blackburn and Lush, JJ., while concurring in the decision of the Chief Justice, expressed no opinion as to the soundness of the rule of the *lex fori*, but merely admitted the same to be the law of England.

In Scotland, however, the *lex fori* does not appear to have been long established, and, there, another system, which has not yet been noticed anywhere else, was in former times strongly supported. Mr. Guthrie, in his late translation of Savigny's Conflict of Laws, (1869), Note B., p. 219, says:—"The Scottish Courts, since the middle of last century, decidedly preferred the prescription of the debtor's domicile. . . . . But they looked not to the debtor's domicile at the time of the action, but rather to the debtor's domicile *during the whole currency of the term of limitation*."

Mr. Guthrie, who quotes several Scottish decisions previous to *Lippmann* v. *Don*, as supporting this view, is of opinion that it is the *real Scottish rule*, but concludes his remarks by stating that "the case of *Lippmann* v. *Don*, renders it imperative to apply the *lex fori*, without respect to the domicile of the debtor, except in so far as this may fix the place where the action is brought." And so the Courts there have held since. See cases cited by Guthrie, p. 220, and decided in 1839, 1843 and 1854.

It may here be observed that Bateman, who wrote in 1860, on the *Commercial Law of the United States*, is not even noticed in *Power* v. *Hathaway*, decided 5th December, 1864, by the Supreme Court of the State of New York.* By the Court, Smith,

* 48 Barbour, 217.

J.: "It is a settled principle of international law that all suits must be brought within the period prescribed by the local laws of the country where they are brought. The *lex fori* governs all questions arising under the Statutes of Limitations of the various States of this country."

Merlin, Marcadé and Bar merge the rule of the *lex fori* in that of the *lex domicilii debitoris*, because the domicile of the debtor being the place where, by the common law, the action is brought, the two rules are really the same in their result. This, however, although true in most instances, is not so in the case where a foreigner, for instance, transiently in Lower Canada, or against whom jurisdiction is found by the possession of property therein, is sued in that country. As remarked by Mr. Guthrie, since the decision in *Lippmann* v. *Don*, the judgment would, in Scotland, be the same as if the defendant were domiciled within the jurisdiction of the Court. There is thus always regard to the forum, not to the debtor's natural and permanent forum, but to the forum in which the action is instituted. There is, however, no doubt that the French jurists who maintain the rule of the *lex domicilii debitoris*, meant in reality the *lex fori*, inasmuch as by the common law of France, no action can be brought but before *le juge du domicile du débiteur*, and a foreigner cannot implead another foreigner before the French tribunals, unless there has been some decree or judgment of a foreign court declaratory of the right of the claimant.*

And now on what grounds are based the objections to the *lex fori?*

Firstly among the French jurists, Troplong and Massé urge that the *laches* of the creditors to sue must be considered as existing at the place of payment, and consequently must be dealt with according to the law of that place.

"La raison en est simple," says Troplong, No. 38, "la prescription afin de se libérer est, en quelque sorte, la peine de la négligence du créancier. Or, dans quel lieu le créncier se rend-il coupable de cette faute? C'est évidemment dans le lieu où il doit recevoir son paiement. Donc il encourt la peine établie dans ce lieu: donc la prescription qu'il doit subir se règle par la loi du même lieu."

"Ainsi," Marcadé replies,† "soit une dette contractée par un

* The Cabinet Lawyer for 1864, p. 411; 1 N. Pigeau, p. 150.

† Sec. 6, p. 12.

Piémontais domicilié à Turin envers un Français domicilié à Paris, mais avec convention que le remboursement sera fait à Rome, (où d'ailleurs il faut supposer qu'il n'a pas été fait élection de domicile par le débiteur, puisqu'alors la question n'existerait plus, Rome devenant ainsi le lieu du domicile); c'est d'après la loi de Rome, quoique le débiteur n'y eut pas de domicile, que la dette se prescrit, et la raison en est simple, dit M. Troplong, puisque *c'est à Rome que le créancier a été négligent!* . . . . Comment! cet homme *qui n'a jamais quitté Paris,* vous me dites que pendant quinze ans, vingt ans ou plus, *il a été négligent* à Rome! C'est à Rome qu'il est resté dans cette longue inaction, à Rome qu'il s'est endormi dans cette insouciance prolongée, à Rome, *lui qui n'y a jamais* mis le pied! . . . . . Il faut donc ici encore, comme au No. IV., rappeler à M. Troplong que *priùs est esse quàm esse tale,* et que pour avoir été n'importe quoi à Rome, pour y avoir été négligent ou soigneux, insouciant ou vigilant, pour y avoir été tout ce qu'on voudra, il faut tout d'abord avoir été à Rome . . . . . Qu'on nous dise que ce créancier a négligé son affaire *de Rome,* à la bonne heure: mais cette affaire de Rome où l'a-t-il négligée? C'est à Paris."

In the second place, Mr. Westlake, as the sole English representative *de l'école* adverse to the *lex fori,* says that Lord Brougham's opinion, in *Lippmann* v. *Don,* rests on two fallacies:—

"First, 'the argument that the limitation is of the nature of the contract, suppose that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition.' But this is to confound the interpretation of the contract with the operation on it of the *lex loci contractus.* . . . . . Secondly, 'it is said that by the law of Scotland'—the *lex fori,* which it was proposed to apply as governing the remedy —'not the remedy alone is taken away, but the debt itself is extinguished. . . . . I do not read the statute in that manner. . . . . The debt is still supposed to be existing and owing.' There is, however, little or no meaning in saying that a debt subsists which cannot be recovered." *

As to the first of Mr. Westlake's objections, it would perhaps be sufficient to remark, that Lord Brougham referred merely to the intent of the parties, irrespective of the operation of the law upon their contract. The question, moreover, is not the effect or

* Private Int. Law, p. 151, ed. 1859.

operation of the *lex loci contractûs*, but of the *lex fori;* and if the contracting parties contemplated a breach of the contract, and a suit upon the same, they must have had reference to the law of the place where that suit would be brought, for everything relating to that suit. But, as the noble jurist observes, and his observations are a complete answer to the remarks of Lord Chief Justice Cockburn:

"Nothing can be more violent than the supposition that the breach of the contract is in the contemplation of the parties, and indeed nothing more contrary to good faith. It is supposing that when men bind themselves to do a certain thing, they are contemplating not doing it, and considering how the law will help them in the non-performance of a duty. If the law of any country were to proceed upon the assumption that contracting parties have an eye to the period of limitation, and only bind themselves during that period, it would be sanctioning a faithless course of conduct, and turning the provisions which have been made for quieting possession after great *laches* on the part of creditors, and possible destruction or loss of evidence, into covers for fraudulent evasion on the part of debtors." *

Mr. Westlake cannot discern a distinction between a debt that cannot be recovered *en justice*, and a debt extinguished *in se*. There is a wide difference between the two. 1. A debt extinct *in se* is not susceptible of payment, and the action *condictio indebiti* would then lie. But a debt declared prescribed may be paid, without danger of such an action; 2. In a case like the present one, the debtor is still liable to an action in the country where the contract was made or is payable. These characteristics of a debt which is prescribed are so plain that we need not be called on to quote any authority, and they clearly show that prescription does not affect the contract, but the remedy.

This rule is distinctly laid down in all the books, and should be applied to cases of conflict of prescriptions. The Civil Code of Lower Canada, art. 2183, states the old law to be that "extinctive or negative prescription is a bar to the action;" and the same principle is held not only by all the American and English jurists, but likewise by the French commentators.

"La loi," observes Merlin, "qui déclare une dette prescrite, n'anéantit pas le droit du créancier en soi: elle ne fait qu'opposer

* Ross, Leading Cases, vol. 1, p. 594, ed. 1854.

une barrière à ses poursuites." Even Boullenois* properly remarks: "L'exception ne tombe que sur l'action et la procédure intentée." "Puisque," says Marcadé, "la prescription n'anéantit pas le droit du créancier par-elle-même et *ipso facto*, mais procure seulement au débiteur une exception qu'il lui sera facultatif d'opposer à l'action, c'est donc par la loi du lieu où ce débiteur doit être actionné, c'est-à-dire du lieu de son domicile, que la prescription doit tout naturellement se régler. Il n'importe pas qu'un autre lieu soit désigné pour le paiement, où ait été celui de la passation du contrat; car selon la pensée d'Huberus, la chose capitale à considérer, la chose à laquelle la prescription se rattache intimement, puisqu'elle vient en opérer l'extinction, c'est l'action et non pas telle ou telle circonstance de la convention : *jus ad actionem pertinet, non ad negotium gestum*.

The Court cannot supply a plea of prescription; it is personal to the defendant; and hence it must be ruled by the law of the place where he is served with process. "La prescription," says even Pardessus, "étant une exception qu'il est permis au débiteur d'opposer à la demande de son créancier, c'est naturellement dans sa propre législation qu'il doit trouver ce secours." †

In opposition to this plain, intelligible doctrine, Savigny, Massé and Westlake insist upon this last reasoning, that the *lex loci contractûs* is the most reasonable rule, "because it excludes both the arbitrary power of the plaintiff to choose between competing forums that which allows the longest term of prescription, and the arbitrary power of the defendant to defeat his creditor by removing his domicile to the forum which allows the shortest term, and avoiding, while it runs, personal presence in the special forum of the obligation." ‡

Massé calls the result of such uncertainty *une conséquence déplorable*. But it is certainly more imaginary than real. No man can presume that when one removes from one country to another, his aim is to defeat his creditor by acquiring a shorter term of prescription. As to the arbitrary power of the plaintiff to choose between competing forums, it is certainly not a hardship to him; and again with regard to the debtor, it suffices to remark that he is the best judge of his own interest, and to add with Story, § 579, that "if he choose to remove to any particular territory,

* Observ. 23, vol. 1, p. 530. † Félix, vol. 1, p. 121.)
‡ Westlake, p. 151.

he must know that he becomes subject to the laws of that territory as to all suits brought by or against him."

If, however, inconvenience can be urged as grounds of reasoning, it may be stated that if the *lex loci contractûs* should be the rule in one country, for instance in Lower Canada, its citizens would in many instances be placed at a great disadvantage as regards their neighbours. In Ontario and in most of the bordering States, prescription in commercial matters is of six years; and in some of these States, the discharge of indebtedness under the Statutes of Limitations of foreign nations is not recognized; and we may at once suppose the case of a Lower Canadian removing to any of those countries, immediately after his liability on negotiable paper is terminated here by a prescription of five years. He would, therefore, notwithstanding his discharge here, remain liable to an action there, where the *lex fori* is the exclusive rule. This would be a more *déplorable conséquence* than that pointed out by Savigny and Massé: it would be nothing less than a public inconvenience, and would be contrary to the policy of any commercial nation.

In the third place, what are the grounds of objection urged by Mr. Bateman, the American champion of the *lex loci contractûs*? After admitting it to be well settled that the plea of limitations is a plea to the remedy, and consequently is governed by the *lex fori*, he makes this argument: "What is the essential or necessary difference between a discharge of the obligation of the contract, and a bar of the remedy upon it? In what manner are they related to each other? It is of the essence of the obligation that it shall be enforced · of moral obligation, that it shall be enforced by moral means; of legal or civil obligation, that it shall be enforced by such means as are given to courts of justice for that purpose. The exact relation of the obligation and the remedy to enforce it, then, is that of an end to be attained and the means of attaining it; not that of an end to be attained, and the means of preventing its attainment." *

Granting this to be so, as to the country where the contract is made; is it to be inferred that every other country is bound to do likewise, even in opposition to its laws of public order and policy? It is chiefly because prescription is a law of public order and policy, that the *lex fori* should govern.

* Commercial Law, p. 105, § 143 *et seq.*

The maxim of the Roman law was *Interest reipublicæ ut sit finis litium*, and it has been recognized by the jurisprudence of modern nations.

"Les prescriptions," observes Domat,* "ont été établies pour le bien public," and elsewhere he says, "afin de mettre en repos ceux qu'on voudrait inquiéter." †

Blackstone ‡: "The use of these statutes of limitations is to preserve the peace of the kingdom."

Angell ||: "They are statutes, as has often been asserted by courts of justice, *of repose*. Without it, a right might travel for a very long period, in direct contravention of the intent and principles of these statutes. As has been asserted by Lord Eldon, in respect to real actions, it might travel through minorities for centuries."

Story §: "They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects, or by or against foreigners. And there can be no just reason and no sound policy in allowing higher or more extensive privileges to foreigners than are allowed to subjects. Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose to quiet titles, to suppress frauds, and to supply the deficiency of proofs, arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished, whenever they are not litigated in the proper forum within the prescribed period. They take away all solid grounds of complaint; because they rest on the negligence or *laches* of the party himself. They quicken diligence by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times, which are unexplained, and have now from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of

* Liv. 1, tit. 7, sect. 4, § 2 (Rémy's ed. p. 211).

† See also Pothier, Obligations, Nos. 676, 678; Broom's Legal Maxims, Am. ed. 1864, p. 600 *et seq.*

‡ Vol. 3, p. 307.

|| § 197, p. 189, note 2.

§ Conflict of Laws, ch. 14, § 576.

time, lest they should be immortal, while men are mortal: *Ne autem lites immortales essent, dum litigantes mortales sunt.*"

Again (§ 578): "But if the question were entirely new, it would be difficult upon principles of international justice or policy to establish a different rule. Every nation must have a right to settle for itself the times, modes and circumstances, within and under which suits shall be litigated in its own Courts. There can be no pretence to say that foreigners are entitled to crowd the tribunals of any nation with suits of their own, which are stale and antiquated, to the exclusion of the common administration of justice between its own subjects. As little right can foreigners have to insist that the times and modes of proceeding in suits, provided by the laws of their own country, shall supersede those of the nation in which they have chosen to litigate their controversies, or in whose tribunals they are properly parties to any suit."

"A person," said Lord Tenterden, "suing in this country, must take the law as he finds it: he cannot by virtue of any regulation of his own country enjoy greater advantages than other suiters." *

Laurent,† "Il va sans dire que les lois qui règlent la procédure sont applicables aux étrangers, car elles sont de droit public. C'est pour la même raison, à notre avis, que les lois sur la prescription sont des lois réelles auquelles les étrangers sont soumis comme les citoyens. Quand il s'agit de l'usucapion, l'intérêt public est évident; la loi sacrifie le droit du propriétaire au droit du possesseur, parce que le droit du possesseur se confond avec le droit de la société, qui demande la sûreté et la stabilité des propriétés. Quand à l'usucapion des meubles, elle s'accomplit, instantanément par application du principe qu'en fait de meubles possession vaute titre. C'est l'intérêt du commerce qui a fait établir ce principe, par conséquent un intérêt social. D'où suit que l'étranger y est soumis comme l'indigène. Il eu est de même de la prescription extinctive. *La prescription met fin aux procès: voilà un intérêt social qui domine tous les intérêts individuels.*"

Before closing, we will briefly refer to the articles of the Civil Code of Lower Canada, which have settled the question for the future. Still as foreign notes due and payable before the coming

* *De la Vega* v. *Vianna.*

† Principes du Droit Civil 1869, vol. 1, p. 200.

into force of the Code (1866) can be sued in this province so long as the debtor is absent from the foreign country and his whereabouts remain unknown to his creditor, the question is and will be for years to come of great practical importance.

The Civil Code of Lower Canada has combined several systems; it admits:

1. Foreign prescription fully acquired in the foreign country, provided the obligation be not contracted nor made payable in Lower Canada.

2. Canadian prescription fully acquired in Lower Canada, provided the debt be contracted or made payable, or the defendant, at the time of the maturity of the debt, or during the whole currency of the Canadian prescription, be domiciled in Lower Canada.

3. Prescription resulting from the union of successive periods of time elapsed abroad and in Lower Canada.

The articles of the Code are worded as follows:

"As regards moveable property and personal actions, even in matters of bills of exchange and promissory notes and commercial matters in general, one or more of the following prescriptions may be invoked.

"1. Any prescription entirely acquired under a foreign law, when the cause of action did not arise or the debt was not stipulated to be paid in Lower Canada, and such prescription has been so acquired before the possessor or the debtor had his domicile therein.

"2. Any prescription entirely acquired in Lower Canada, reckoning from the date of the maturity of the obligation when the cause of action arose, or the debt was stipulated to be paid therein, or the debtor had his domicile therein, at the time of such maturity: and in other cases from the time when the debtor or possessor becomes domiciled therein.

"3. Any prescription resulting from the lapse of successive periods in the cases of the two preceding paragraphs, when the first period elapsed under the foreign law. Art. 2190.

"Prescriptions commenced according to the law of Lower Canada are completed according to the same law, without prejudice to the right of invoking those acquired previously under a foreign law, or by a union of periods under both laws, conformably to the preceding article. Art. 1191.

From the foregoing remarks, the following conclusions may be drawn:

1. Under both the French and English common law, absence or any other disability is not a cause of interruption of commercial and other like short prescriptions.

2. Statutes of limitations are laws of public order and policy.

3. They do not admit exemptions unless therein expressly made. *

4. Prescription affects not the contract but the remedy.

5. In cases of conflict of prescriptions of personal actions, the prescriptive laws of the country, where they are instituted, should prevail.

6. In every country where the English statutes of limitations are in force, as in Lower Canada, cases are not governed by the *lex loci contractûs* but by the *lex fori*.

D. GIROUARD.

---

* Since the above article was sent to press, the 21st volume of the *Annual Louisiana Reports* reached us, containing a very elaborate decision upon the question of interruption of commercial prescription in the case of *Smith* v. *Stewart*, in which case the Supreme Court of the State of Louisiana held: 1. That prescription runs against all persons except such as are included in some exceptions established by law; and that the existence of war not being among the exceptions established by law, will not work an interruption or suspension of prescription. 2. That *the inability to sue will not avail against the plea of prescription, except in the cases specially excepted by law.* 3. That the maxim *contrà non valentem agere non currit præscriptio*, has no application under the system of jurisprudence of Louisiana. 4. That where the Legislature has prescribed rules regulating prescription, and enumerated the causes that interrupt or suspend prescription, the courts will admit no other exceptions. This decision was not only rendered unanimously; but two of the honourable judges, Messrs. Taliaferro and Howell, had on a former occasion arrived at quite the opposite conclusion. See also *Jackson* v. *Yoist*, 21 A, 108; *Bartley* v. *Bosworth*, 21 id. 126; *Nelson* v. *Scott*, 21 id. 203, 626; *Rabel* v. *Bourciau*, 20 id. 131; *Hatch* v. *Gilmore*, 3 id. 510; Walker's Louisiana Dig. vo. Prescription, 363; *McElmoyle* v. *Cohen*, 18 Peters, 327; *Bank of the State of Alabama* v. *Dalton*, 9 Howard, 250; *Troup* v. *Smith*, 20 Johns 33; Marcadé on art. 2251; Duranton, Nos. 285, 286.

D. G.

THE LAWS OF LOUISIANA AND THEIR SOURCES.

By Hon. E. T. Merrick,
Of New Orleans,
Attorney and Counsellor at Law; and late Chief Justice of the Supreme Court of the State of Louisiana. *

The chairman of each section or the Academy is required by a resolution to read a paper on the branches of science submitted to such section. This resolution imposes upon me the duty of reading a paper on either law or political economy.

It is a maxim that all men are presumed to know the law, and that ignorance of the law excuseth no man. This maxim is well enough as it respects offences *malum in se* and such questions of right and wrong as one's conscience settles, without any elaborate appeal to reason. But when we come to consider regulations which are made merely for convenience, or questions which require the cautious weighing of reasons by the cultivated mind to arrive at what is just, the propriety of the maxim is by no means so clear; yet it is essential to administration of justice.

It has occurred to me that of the subjects at my disposal, a few observations on *the laws of Louisiana and their sources* would be probably the most useful and interesting, and contribute in a slight degree perhaps to awaken a greater interest in our laws, and tend to diminish the distance between the fact and the presumption, contained in the maxim.

It is well known that the laws of Spain were the laws of Louisiana at the cession of the territory to the United States in 1803, by the treaty of Paris.

It is true, the country had been settled by the French in 1699, and had continued in the possession of France for seventy years, when O'Riley took possession of the same in 1769 for Spain, and that the larger part of the inhabitants were of French descent, and that the country had been retroceded to France by the treaty of Ildefonso in 1800, and by that power transferred to the United States, yet the brief possession *de facto* by France from the 30th

* This article was read on the 23rd January last, before the New Orleans Academy of Sciences, of which body Mr. Merrick is a member.

day of November, A. D. 1803, to the 20th of December of the same year, did not permit the carrying into effect of any material changes in the laws. The only changes made by Lausat, acting for France, was to substitute a Mayor and Council for the government of New Orleans in the place of the Cabildo, and to re-establish the black code of Louis XV, prescribing the duties toward and the government of slaves. But as Spain and her Indies were governed by the civil law, which also prevailed in France and Louisiana, the change was not so marked so far as private rights were concerned as it was respecting the parceling out of the public domain, and laws affecting the public order and the substitution of the Spanish language for the French in legal proceedings. It is quite apparent that the Spanish laws were acceptable to the inhabitants, for no attempt was made to change them after the cession, further than was operated by subjecting the country to the authority and Constitution of the United States. So that at this time, Louisiana is the only State of the vast territories acquired from France, Spain and Mexico, in which the civil law has been retained, and forms a large portion of the jurisprudence of the State. The Treaty of Paris guaranteed to all the inhabitants of Louisiana, then embracing the immense territory from the Gulf to the forty-ninth parallel of latitude, and from the Mississippi River to the Rocky Mountains, all the rights, advantages and immunities of citizens of the United States, and protected them in the enjoyment of their liberty, property and religion. As in matters of treaties, the President and Senate of the United States possess the supreme power, no steps were needed to naturalize the inhabitants of the territory, how short soever the residence in it had been at the time of the cession- They became at once citizens of the United States.

The first government provided for the ceded territory by our Government was exceedingly simple: Congress, in advance of the transfer on the 31st October, 1803, provided that until the expiration of that session of Congress (unless provision for the temporary government should be sooner made) all the *military*, *civil* and *judicial* powers exercised by the officers of the existing government of the same, should be vested in such person or persons, and should be exercised in such manner as the President of the United States should direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion.

It was not long, however, before the principal part of the present State of Louisiana was organized into a territorial government under the name of the territory of Orleans. I say principal part, because although the terms of the law embraced within the territorial limits that part of the State between the Mississippi River and Pearl River, and between the Mississippi territory and the Manchac or River Iberville, this part of the territory was at that time actually held by Spain, and continued to be so held until 1810. The legislative power of the territory of Orleans, by the act of Congress of March 22, 1804, was vested in the Governor, appointed by the President, and in thirteen of the most fit and discreet persons of the territory, who were to be appointed annually by the President. The ancient laws were continued in force until repealed or modified by the Legislature. In March, 1805, Congress reorganized the territorial government, by authorizing the President to establish a government similar to that exercised in Mississippi Territory, which had been created by adopting the same government as that organized under the celebrated ordinance of 1787, for the government of the territory of the United States, northwest of the river Ohio, excluding the last article of the ordinance which prohibited slavery. Therefore to know what law governed the territory, recourse was had to the ordinance of 1787.

As was to be expected, the first changes made in the laws of Louisiana were in relation to crimes and offences, which could, in a country having no immemorial usages, exist only by virtue of statute law, and which were introduced in language and terms known to the laws of England; and in the act of the 4th of May, 1805, the following provision was adopted, viz.: "All the crimes, offences and misdemeanors hereinbefore named, shall be taken, intended, and construed according to and in conformity with the common law of England, and the forms of indictment (divested, however, of unnecessary prolixity), the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of said crimes, offences and misdemeanors, changing what ought to be changed, shall be (except by this act otherwise provided for) according to said common law."

The crimes and offences referred to in the section comprised the principal offences known to our law, so that at the present time the section of the statute of 1805 is deemed to be applicable to all crimes and offences. Standing as it has done on the statute

book from 1805 to the present time, without modification or change, in the midst of the various schemes for the revision of our statute laws, it has had a marked influence upon the criminal jurisprudence of Louisiana. It has given stability to that jurisprudence, since the inquiry of our judges was limited to the common law as it stood at the time of the passage of the act. They were not bound to follow the common law of England, as it became modified by adapting itself to the changes introduced by statutory law of England, but they were to look to a single standard, viz. the common law of 1805. This venerable provision was re-enacted for the first time in 1870, but at the same time in the last section of the revised statute it is excepted from repeal. The common law of England, ever pliant, and bending itself to the gradual changes wrought by the improvements in science, the arts, manufactures and commerce, and by the modified habits of the people, has never been precisely the same from age to age. Hence the modern English authorities, whenever overruling the standard works on the criminal law of the period of 1805, have not been regarded as of binding authority.

The next important measure affecting the civil laws was the codification of the civil law of the territory. A great misapprehension exists in the minds of many in regard to the Civil Code of Louisiana. It is supposed to be but a re-enactment of the Napoleon Code. It is true the French code preceded our code of 1808 by five years, and a *projet* of it (for the Napoleon Code, as adopted, had not reached the territory) may have suggested to our legislators the necessity of reducing the laws, which were in the Spaniah language, a tongue foreign to the largest portion of the citizens of Louisiana—Americans, or those who were of French descent—into a single code, which should be published in French and English.

In June, 1806, the Legislature, by a resolution, appointed two prominent lawyers, James Brown and Moreau Lislet, to compile and prepare a civil code, and they were expressly instructed by the legislature "to make the civil law by which this territory" was then "governed, the groundwork of said code," in other words, to make the Spanish law the groundwork of the code. On the 31st of March, 1808, the old code was adopted, declaring merely an abrogation of the ancient laws, wherever the same were contrary to that code, or irreconcilable with it. The effect of this provision was to leave all the Spanish laws not irreconcilable with the code

in force, and they continued to be quoted and acted on in the courts untill 1828, when by one sweeping clause in the statute of 25th of March, known to lawyers as the great repealing act, all the civil laws which were in force before the promulgation of the civil code then lately promulgated, were repealed. If it was the intention of the Legislature to prevent reference to foreign systems of law, principles, maxims and rules for the exposition and interpretation of our own, and to confine our courts to the meagre provisions of the civil code and of statutory law for all rules of right and justice, it was a mistaken labor. The Legislature might as well attempt to repeal and abrogate the language of its people and the rules of logic, as to prevent the lawyer from recurring to the ancient principles and maxims of the law as well as its history, in order to ascertain its meaning. The enactment of a law whether organic, as in the case of constitutions, or legislative, presupposes the existence of rules of interpretation. And so it has happened that the ancient laws are still examined, not only as reflecting light upon those remaining, but also as furnishing the great store-house of equitable maxima for the decision of cases not foreseen by the lawgivers. The ancient laws and maxims teach us what is equitable and just.

By resolution of the Legislature, passed the 14th of March, 1822, Messrs. Livingston, Derbigny [and Moreau Lislet were appointed on joint ballot, to revise the civil code of 1808, by amending it in such a manner as they should deem advisable, and by adding thereto such laws as were still in force and not included therein. These jurists, among whom the last named was not the least, reported their proposed amendments of the code to the Legislature, and the articles of the old code and the amendments were numbered continuously, and on the 12th of April, 1824, they were approved by the Legislature, aud went into operation in 1825; in the city of New Orleans, the 20th day of May, 1825, the day of its promulgation.

There are very many articles in the civil code of 1808, and as amended in 1825 and continued by the recent revision of 1870, which are identical with articles in the Napoleon code, and lead to the supposition that whenever the compilers of the code of 1808 found an article in the *projet* of the French code, which fully expressed the sense and meaning of a provision of the law of Louisiana, it was appropriated. In other instances, the French text was amended to conform to our law and so adopted.

In others, the Spanish law was first written in French and translated into English. Nevertheless, the laws of Louisiana, where differing from the Napoleon code, have been preserved, and thus the civil code contains some provisions in sharp contrast with the Napoleon code. The Napoleon code has 2281 articles; ours has 3556, and that of 1825 had 3522 articles.

When the code of 1808 was enacted, laws were passed in French and English. The government being territorial, there was no constitutional provision requiring the laws to be passed in the English language. Hence the French text of the articles found in code of 1808, and still retained, have been held to be of equal force with the English articles, and have been resorted to by the courts to prevent the evils which might flow from a bad translation.

Although Spanish law has been the law of the land, and our courts take judicial knowledge of the same without proof, and although the French laws are estemeed foreign laws which require to be proven when brought in controversy in our courts, yet the similarity of the French text of our late codes to the Napoleon code has been so great, that commentators on the French code, as well as the decisions of the Court of Cassation, have exercised great influence on controversies arising under our own code. Perhaps one reason has been that we have no commentaries of our own further than some annotated codes, and a work on criminal law and digests of the decisions of the courts, owing to the limited sale which has followed all similiar publications. Hence French authors are an essential part of a lawyer's library.

The practice of the State courts of Louisiana up to September, 1825, when the Code of Practice, prepared under the resolution of 1822, approved April, 1824, went into effect, was regulated by the act of 1805 (which was based on the Spanish laws) and amendments thereto. The Code of Practice itself was written by its compilers in the French language, and many of its articles are badly translated. It has recently (1870) been revised, by incorporating some amendments (which have from time to time been enacted) into the body of the work. It has not been materially changed in other respects, and the numbers of the articles remain the same.

We notice some efforts now being made to introduce further amendments in order to lessen the present heavy costs of litigation which drives suitors from the courts of justice. Some change is certainly very desirable, not so much to amend, as enforce the law

respecting costs. When we consider how extensive the litigation is which arises from the adoption by the Legislature of a new system of practice, it should admonish us to modify with some caution. It took twenty years to settle the Practice Act of 1805. and since 1825 our courts have had much of their time occupied in ascertaining the meaning of the Code of Practice. The experiments in our sister States in adopting codes of procedure have also given rise to a great deal of litigation. Hence it would seem that if any change was to be introduced, it could best be done by way of amendments to the present system. It may also be observed that the new codes of procedure are rather imitations of our Code of Practice than otherwise. The preparation of the pleadings by the attorneys in New York is, I think, but a continuation of the ancient practice in that State of making up the rolls by the attorneys. The attempts of the Legislature to codify the other branches of the law failed.

A *projet* of a commercial code was prepared under the resolution of 1822, but fortunately never was adopted. It would be extremely unsatisfactory for a single State of the Union to adopt a system of commercial law which should sometimes come in conflict with the commercial law of the neighbouring States, as settled by their courts, and in conflict with the law as settled by the courts of the nation. As it is, the courts being free to act, have gracefully yielded on questions of commercial law to the customs of merchants and the rules settled under the common law and in our sister States, so that the whole body of the commercial law governing this Union is, in the main, moulded into a harmonious whole. As it had been formed upon the custom of merchants, engrafted upon the common law, the decisions in England were generally looked to with great respect, and what is commercial law in London is commercial law in Washington, as well as among most commercial nations.

A like attempt was made to reduce the criminal law and criminal proceedings to a simple code in 1820. In 1821, Edward Livingston was elected by ballot of the General Assembly to draft a criminal code. Livingston prepared and presented to the Legislature a system comprising "a code of crimes and punishments, a code of procedure, a code of evidence, a code of reform and prison discipline, and a book of definitions." This constituted the celebrated Livingston code, a work more famed abroad than at home—a work noted for its scientific description

of crimes and offences, and of the proceedings devised for the trial, prison discipline and punishment of offenders and their reformation. The *projet* never having become a law, has left the world unenlightened as to what would have been its practical operation. Being based upon the common law, which Livingston sought to simplify, much of it would doubtless have worked well, but like all unbending legislative provisions regulating the details of practice, it would have taken years of discussion before the courts to settle its meaning. As it was, scarcely a question could be raised under the criminal law which had not been previously decided by some binding decision.

The Legislature of 1855 attempted to revise the statutes of the State, and adopted the hazardous experiment of annexing to each statute a clause, not only repealing all laws contrary to the provisions of each act revised, but all laws on the same subject matter, except what was contained in the Civil Code and Code of Practice. There being no saving clause except as to the act relating to crimes and offences, an adherence to the language of the statutes would have occasioned the overthrow of offices and the loss of rights. It forced the courts to depart from the letter of the law in order to ascertain its meaning and prevent an evil which the lawgivers had not foreseen.

In the recent revised statutes the Legislature has repeated the same experiment, without even a saving clause as to crimes and offences, and again forced the courts to interpret so as to prevent great evils. The revised statutes of 1870 are comprised in 3990 sections, and contain the matters of the revised statutes of 1856, and the recent amendments.

Having thus hastily glanced at some of the prominent points in our legislation, we will look for a moment into the courts in session in our midst, and take a practical view of the laws enforced in them. We shall find that the courts of the United States have jurisdiction of cases—

1st. In admiralty.

2d. In bankruptcy, patents and copyrights; and

3d. Of revenue and prize cases, offences against the United States, and other causes in which the United States Government is interested as a plaintiff, and concurrent jurisdiction with the State courts.

4th. Of all causes in which a citizen of another State is plaintiff or defendant, and the other party is citizen of the State, and of cases in which an alien is a party.

We shall find that the State courts have exclusive jurisdiction of crimes and offences against the State, of probate matters, of all controversies between citizens of the State, whether it respects their property or *status*, or obligations arising from wrongs done to them by others. And they have concurrent jurisdiction with the courts of the United States on all these questions when an alien or citizen of another State submits himself to the jurisdiction of the State courts, or when sued, does not avail himself of the right which he has to remove his cause to the courts of the United States.

If we now regard the mode of proceeding in the different courts we shall find it very dissimilar, and in a few particulars, resting upon principles directly the opposite of each other; for example, if your ship has been damaged by collision, on navigable waters, and the party who was instrumental in occasioning the damage is within the reach of process of the court, you have your choice, to proceed against such party on the law side of the State or Federal courts, according to the citizenship of the party, or to bring your action in admiralty *in rem* or against the person. If you sue on the law side of the courts you must take care that neither you nor your agents controlling the ship have been in fault. For the courts of law deriving their rules from a rigid morality, inform you that they do not sit to balance negligences, faults and wrongs; that whoever comes before them must come with pure hands. Their maxim is, *procul, O procul este profani*, and the suitor who has been partly in the wrong is sent away without redress, however much he may have been damaged, and how much greater soever may be the fault of the other party.

The courts of admiralty looking at human actions in a more benevolent light and with a juster appreciation of the conduct of men in times of danger and excitement, consider the faults and negligence of both parties, and where both are in fault estimate the loss of both vessels, and divide the loss between the parties, and grant relief where in a court of law it would be refused.

The proceedings in admiralty are of civil law origin, and many of the principles governing the court of very great antiquity. They can be read back to the Greeks before the Christian era from whence they were received into the Roman jurisprudence.

The jurisdiction of the courts of admiralty is exclusive whenever the proceeding is *in rem*, that is, against the vessel or other thing not subject of maritime jurisdiction. If, however, at the

same time persons can be found and service made upon them by arrest, which is still allowed as citation, and the matter to be brought to the consideration of the court, is one for which the common law gave a remedy, the courts of ordinary jurisdiction have concurrent jurisdiction *in personam*, and may decree compensation and damages as in other cases. But if the ship or vessel is the object of pursuit, and the same is to be taken into the custody of the law and made responsible for liens and privileges in ordinary cases, civil and maritime, including spoliation, civil and maritime or prize cases, the district courts of the United States alone have jurisdiction, and any judgment pronounced in a proceeding *in rem* in the highest court in the State where the same can be rendered, if that court be but a justice of the peace, in an unappealable case, can be carried before the Supreme Court at Washington, where it is sure to be reversed; that court zealously protecting the jurisdiction of the Federal courts over such cases.

In admiralty personal qualities are in effect attributed to matter, so that it is the ship, vessel, or other thing which is supposed to have offended in prize cases, and in ordinary civil cases it is the ship or vessel which owes the duty or lien, as well as the captain and owners, and all persons interested are admitted in the process *in rem* as claimants, and the thing is treated as a real defendant. Revenue cases are in some respects assimilated to the above, although not belonging to the admiralty jurisdiction.

The proceedings are commenced by a libel, (*libellus*, a little book,) in which the plaintiff, through his lawyer, called a *proctor*, alleges and articulately *propounds*, in a series of numbered propositions the grounds of his complaint, to be specifically answered by the defendant, or by whoever comes into the case as claimant, if the proceeding be *in rem*. If either party give a bond for property, etc., he borrows a term from this, a solemn form of the civil law, and calls it a stipulation.

The Constitution of the United States conferred upon the courts of the Union exclusive jurisdiction in admiralty. In England this jurisdiction extended to tide waters only. At the commencement of the Government, giving the language the signification it then bore, it was supposed the power conferred only extended to tide waters, and so it was decided by the Supreme Court of the United States. The jurisdiction in the case of *Warring et al, vs. Clarke*, 5 Howard's Rep., 44, decided in 1847, for a collision between the steamboats *Luda* and *De Soto*, was maintained by proving that

there was a preceptible tide extending up the Mississippi river as high as Bayou Sara.

Since that period the Supreme Court of the United States, notwithstanding the earnest dissent of some of its members, has, as it always happens when convenience and expediency demand a chance, extended the admiralty jurisdiction over the lake and all rivers navigable by vessels of ten tons burthen and upwards. The simple and speedy proceedings in the courts of admiralty make that court a great favorite with many, while others think they see the tendency in the national courts to engross jurisdiction, which may lead to greater evils in the end than the present good attained by decisions, which they think overstep the limits of the Constitution as understood by those who framed it. The Constitution of the United States also confers upon Congress power to pass uniform rules of bankruptcy. It is a principle governing many of the provisions of the Constitution of the United States, that they are inoperative until Congress has passed some law to carry the provision of the Constitution into effect. Thus the Constitution gives the Courts of the United States the right to take jurisdiction of controversies between citizens of different States, between aliens and citizens, and as it respects the grants of lands made by different States, etc. But the Courts of the United States hold that they cannot take cognizance of such controversies without an act of Congress to carry the provisions of the Constitution into effect. Hence the individual States have power to pass and enforce insolvent and bankrupt laws when no act of Congress is in force on the subject. Since the formation of the Federal Government bankrupt laws have been passed between long intervals and following commercial disasters, on three occasions, viz., April 4, 1800, repealed in 1803; and 19th of August, 1841, repealed 3rd of March, 1843, and that of 1867, still in force and which is probably intended to be perpetual.

The insolvent laws of Louisiana, now dormant by reason of the act of Congress, are of Roman origin.

Under the law in the period of the twelve tables, the borrower of money or debtor could deliver himself, his family and effects, into the hands of his creditor, and became bound to him *nexu vinctus*. He was only released on payment of the debt by himself or by another for him. If he failed to pay, he was adjudged to the creditor with all his property. In other cases, after certain publications and delays, the debtor was adjudged (*addictus*) to

the creditors, who could slay him, or sell him as a slave beyond the Tibor. If there were several creditors, the twelve tables ordained that he should be cut in pieces *and fairly divided* among the creditors; which probably meant a division of the price of the debtor, after he and his goods were sold. As the *pater familias* had the power of life and death over his children and grandchildren, of whatever age they might be, as well as over his slaves, this provision of the twelve tables does not seem so extraordinary.

After the preceding provision was abolished, there was a period of the Roman law, in which the debtor's goods were sold in mass (*per universitatem*), and the vendee succeeded *actively* and *passively* to the effects and debts of the insolvent, and was bound to pay the price to the creditors *pro rata*. Hence, as the debtor had an universal successor, he was discharged from the debt. The benefit of the cession of goods, as it now exists in our law, had its origin in the time of Julius or Augustus Cæsar. Where the cession was made under the law Julia, (*ex lege Julia,*) the debtor enjoyed the right to the *beneficium competentiæ*, which is a point of difference between the bankrupt laws and our own, the *cessio bonorum*.

A man may commit an act of bankruptcy and be forced into court without being insolvent. Under the State law he cannot be forced into insolvency so long as he has effects to meet executions. The bankrupt laws discharge the debtor absolutely from the debt. The *cessio bonorum* does not relieve the debtor absolutely from his obligations, but if he comes to a fortune subsequently to his surrender, he can be compelled to make a second surrender; but he is entitled to retain for his own use a competency; that is the *beneficum competentiae* just mentioned. The insolvent laws of Louisiana, in common with the bankrupt laws of the individual States, did not discharge the debtor from his obligation due the citizens of the other States, and only barred the obligation due citizens of the same State. Where contracts are entered into during the existence of a bankrupt law, there can be no question of the right of the courts (considered as a question of morals) to discharge the debtor. The right is a condition making a part of the contract. The debtor could say to his creditor: "When I bound myself to pay you a sum of money, it was with the understanding that if by misfortune I should become embarrassed, that I should be discharged from the debt by surrendering to you and my other creditors all of my effects. You

took my obligation, knowing that the law which was a part of the contract gave me this right, and you are bound by the contract." But where the bankrupt law is passed after the debt was contracted, the right to discharge the debtor is not quite so apparent, since it is a fundamental principle of our law that the States cannot impair the obligation of contracts.

The property of enacting bankrupt laws by the sovereign power, depends upon the weighing of the propositions whether it is better that some persons should suffer inconvenience on account of the incautious use of credit, as an example to deter others and prevent the like occurrences, and the advantage which the State will derive from the free and untrammelled industry of all its citizens, particularly where many are embarrassed, coupled with the drawback that the bankrupt laws are frequently made the means of screening the money and effects of a fraudulent debtor from the pursuit of his creditors.

The insolvent, oppressed with debt, is incapable of engaging in new business and occupation. Freed from the overwhelming burden, he engages again in useful employments with spirit and zeal, and becomes a wealth producer and a valuable citizen to the State.

In 1824 Congress passed a law adopting for the practice of the Federal courts in this State the rules of proceeding of the State courts. At this time, as already shown, the *Code of Practice* was not adopted. But the rules of proceeding under the practice acts were very similar to those prescribed by the Code of Practice. A large number of the Bar were of the opinion that the broad terms of the act of Congress of 1824 introduced into the Federal courts the State practice in all cases and to the exclusion of proceedings on the equity side of the court, according to the forms common in the other States. After a strenuous contest it was finally settled, that the courts of the United States had equity jurisdiction according to the ancient forms, and all causes proper for the consideration of the chancellor are required to be brought on the equity side of the court: that is, they must be brought according to the rules of the practice in chancery; and these rules are uniform throughout the United States, while the law side of the Federal courts is governed by the laws of the individual States to the same extent as the State courts in ordinary affairs.

There are great misapprehensions as to the meaning of the term equity or chancery. It will suprise some to be told that proceedings in equity are governed by laws as well known and as faith-

fully carried out as those upon the statute book, and after all that it is nothing more than a mode of rendering justice and granting relief in a different manner, concurrently with, or in a different class of cases from those relievable at law.

In every system of laws there must arise a state of facts with which courts of justice are required to deal, not contemplated by the law-giver, nor provided for by him, or if within the express letter of some broad provision which he has laid down, yet of such a character that to carry the provision into effect, would shock that innate sense of justice implanted in the bosom of every one, and such considerations would leave no doubt that the law-giver never intended the provision in question to govern the particular case. In the first example the courts find rules of decisions from the equitable maxims which are supposed to be the foundation of all laws; in the other, the courts interpret according to rules of equity and the general intent or scope on other laws or like subjects, and endeavor to arrive at the true spirit and meaning of the law, and exclude from the broad words of the law what was not the intention of the lawyers to embrace in them. For, as St. Paul has it, "the letter killeth but the spirit giveth life." If, from some forgotten statute, or from time immemorial, the practice of the courts of law has been confined to a set of *formulas*, there will arise a condition of things not contemplated in former ages, and a class of wrongs which these *formulas* are insufficient to redress. Precisely this condition of affairs did arise under the *jure civile* in the Roman law. which was remedied by the jurisdiction which the *proctor* assumed or amplified when he established the *jus honorarium*, and allowed petitions to be addressed directly to him in extraordinary cases, and in England, where the Chancellor assumed jurisdiction of those cases in which there was no adequate redress at law. In the latter country (as in the former in ancient time) proceedings on the law side of the courts were regulated according to certain strict forms, and relief could not be afforded in any other manner. In the action of *assumpsit*, for example, a judgment could only be rendered for damages; in debt that the defendant recover his debt and damages; in covenant even to convey land, the judgment is that plaintiff recover his damages, and so of the other actions. It was found in very many cases that the relief granted by the courts at law was wholly inadequate to the injury. The Chancellor of England gradually assumed jurisdiction over this class of cases and uncontrolled by *formulas* rendered

his decree according to the right of the case. If the defendant had contracted to sell to the plaintiff a tract of land, while a court of law could only in the action of assumpsit or covenant give judgment for damages, the Chancellor, meeting the very equity of the case, ordered the defendant to make title and to account for the revenues, and compelled obedience to his decrees by proceedings known to his court.

The kind of jurisdiction assumed by courts of equity, may be illustrated by an example from the statute of frauds and perjuries passed in England in 1677, and adopted in some form or another in most of our sister States. By this act, among other things, it was provided that no action should be brought upon any contract for the sale of lands, unless the agreement or some memorandum or note thereof should be in writing and signed by the party to be charged therewith.

Now it sometimes happens that verbal contracts are made and partially performed, as for example the intended purchaser who paid part of the price and has been put in possession. By the strict letter of the statute the vendee would be defeated in his action upon the verbal contract. But a court of equity viewing the statute as made for the purpose of preventing fraud, comes to the relief of the purchaser, on the ground that to allow the vendor to avail himself of his advantage would be to encourage one of the mischiefs which the legislature intended to prevent. It compels him to answer plaintiff's complaint under oath, and decrees a specific proformance. Under our State law, where equity and law are administered together, the like relief is only granted where the defendant admits the contract under oath, and possession has been delivered the vendee. Equity, among other things, grants relief in the following cases, viz: suits for the specific preformance of contracts for the sale of real estate; to foreclose or redeem mortgages; to stay waste of lands; to enforce trusts; to relieve against fraud and enjoin parties against enforceing judgments of courts at law where obtained by fraud; to compel a party to answer under oath, in order that the replies of defendant, or the documents, where any are disclosed as existing, may be used as evidence in suits at law; to settle long and intricate accounts; to marshal securities; to settle boundaries; to correct mistakes in contracts; to relieve, in some cases, against penalties and forfeitures, and to protect the rights of married women, minors, etc. It is thus seen from the examples given

that equity embraces a very considerable proportion of jurisprudence, and as it is governed by principles of its own, it is easy to see that in many instances it may come in conflict with the State laws. For if citizenship gives the United States courts jurisdiction, and the case be one of exclusive equity jurisdiction, and should be brought in the United States courts, it will not be heard, except on the equity side and according to the rules in equity, no matter what is the State practice in the same case.

The practice on the law side of the courts of the United States sitting in Louisiana in civil cases, is governed by the practice of the State, which practice was adopted in 1824 by the act of Congress for the Federal courts, as stated above.

Criminal proceedings, both in the courts of the United States and the State courts, are conducted, as already shown, according to the forms of the common law.

Without adverting to their more remote origin, the following branches of law come to us with the forms with which they have been clothed, and the principles with which they are allied from England, viz:

Admiralty and matters of maritime jurisdiction; the law and practice of courts of admiralty; equity and the rules and practice of courts of chancery.

Bankruptcy;

Criminal law and criminal proceedings, including warrants for arrest, indictments, informations, etc., although unlike the original States of this Union, we have no common law offences, and all crimes and misdemeanors are created by statutes.

Evidence, criminal and civil.

Commercial law, which in addition to maritime contracts just mentioned, among others, embraces promissory notes, bills of exchange, bank paper, checks, etc.

The great writ of habeas corpus.

And martial law, of which this city, since O'Reilly's entry, in 1769, has had large experience, both Spanish and American.

The law relative to the *status* of persons, domicil, minority, emancipation including the *venia ætatis*, corporations, (*universitates*), donations, testaments, dotal rights and property, the contract of sale, exchange, letting and hiring, including leases, loan to use, loan for consumption, partnership, mandate, suretyship, annuities and rents, the aleatory contracts, pawns and pledges, antichresis, privileges, mortgages, usucaption, prescription, the

discharge of debts by novation, compensation, payment with subrogation, release, or acceptilation, and the effect of notarial acts, are from the civil law.

The law respecting the community of acquets and gains is no doubt of German origin. It prevailed in certain provinces of Spain, as for example in Grenada and Salamanca, while other provinces like the South of France, were governed by the dotal regime, called the written law. The community of acquets and gains prevailed in the colony under the custom of Paris, from its first settlement, and it is stated by our excellent historian, Mr. Gayarrt, that it was a subject of complaint to the colonists at one time, that it was extended to the cases where colonists had married (with the forms of the Catholic church) Indian wives, who having less stable habits than the whites frequently absconded after the death of their husbands, with the personal effects, without paying the debts of the estate or settling up the same in due form. (The evil was corrected.)

One of the most marked peculiarities of the laws of Louisiana, as compared with the laws of the other States is this institution of the community of acquets and gains. It is more favourable to married women than any other system with which I am acquainted except the Spanish laws of the Indeas, from which it was, I think, immediately taken. By the custom of Paris and the Napoleon Code the personal effects of the wife, in the absence of a marriage contract, fall into the community. Under our law, in the same case, the personal effects remain the property of the wife, that is, they remain paraphernal.

The advantages of the institution are decidedly in favor of the wife. The husband cannot withdraw from the partnership, and he, the community, and his separate estates, are alike bound for the debts of the community as it respects third persons. The wife, on the other hand, can at its dissolution by death or divorce, withdraw from it without detriment to her separate estate, and where the affairs of the husband are embarrassed she can be declared separate in property from her husband by the courts, and sell under execution the community or his estates to reimburse herself for any property or money used by him in his business, and as the law gives her a mortgage for her security, she is always a formidable adversary to a creditor seeking to recover a debt even of the community. The income of the husband, (married without a marriage contract) from his own labor, and from

his separate property, falls into the community, without any ability on his part to prevent it. On the other hand, the wife has at all times the absolute right to withdraw from her husband, (by contributing one-half of the matrimonial expenses) her separate or paraphernal property, and to manage it herself, and reinvest the income thereof in her own name, and for her own use, and I know no law to prevent her also from sharing in the community at its dissolution.

The husband, it is true, is the head and master of the community during the existence of the marriage, and can dispose of the effects of the same at his pleasure and without his wife's sanction by onerous title, that is, for an equivalent; but if he conveys the same by gratuitous title, that is by gift or donation, his estates become responsible to the wife for the loss.

If prior to or at the marriage, the parties choose, they can settle property in what we call dower; the *dos* of the civil law. Property so settled cannot be sold by either husband or wife, or both, (except in one or two cases,) during the marriage, and thus the wife is assured of her estate at the termination of the marriage.

The provision prohibiting married women from binding themselves with or for their husbands is Spanish, and from the 61st law of Toro. The *senatus consultum Velleianum* had previously prohibited women from going surety for any one: *ne pro ullo foeminae intercederent.*

The marital fourth was given by the fifty-third and one hundred and seventeenth novels of Justinian.

The action of redhibition was given by the edict of the *ædiles.* The order of seizure and sale, to coin a word, that Rhadamanthine provision of our law where execution comes first and judgment afterward, is from the Spanish law.

The various pacts which supplied the defects of the *strict leges civiles* are of pretorian origin.

I have thus briefly, and therefore imperfectly glanced at some of the most striking features of our laws. It was my intention to have suggested some amendments which our present circumstances, in my opinion, seem to demand, but the length of this paper precludes the attempt and the subject must be left to others more competent, or reserved for a future occasion.

These laws, such as they are, and with their slight imperfections, are justly dear to the people of Louisiana. They have

protected and shielded the home and the fireside, the labours, the bargains and the acquisitions, the estates, and the persons of this people during all the growth of the State of Louisiana. The immigrant who has come here from the sterile hills of New England, from the more genial climes of the South, from the fertile fields of the West, as well as our ancient French, Spanish and German populations, have approved and blessed these laws. To those who would like to see the body of the common law introduced among us, we say, What have you of value in the common law? The trial by jury, the habeas corpus, known and defined crimes and offences, and enlightened rules of evidence? We have it all here and more: Your criminal law is ours; your commercial law also is ours. But we have also the most admirable provisions of the civil law filled with benevolence, equity and justice, to regulate our dealings and define our rights in our every day life. That our laws, like all others, may require amendments to make them more perfect, none will deny. Let us amend, but never change them for others, of which our people have no experience, and the adoption of which promises us no advantages in the future.

DEEDS OF COMPOSITION AND DISCHARGE BETWEEN COPARTNERS AND THEIR CREDITORS UNDER THE INSOLVENT ACT OF 1869.

The law of the Province of Quebec, as it existed previous to the time when the Insolvent Act of 1864 came into force, did not empower a majority in number or value of a trader's creditors to force a minority to accept in full discharge a percentage on their claims—the discharge of a debtor from liability in full, in consideration of a composition could only be effected by the consent of all his creditors. In trade, this provision of the law gave rise to great inconvenience, and begat in favour of recalcitrant creditors a system of fraudulent preference, pregnant with evil to the interests of commerce. The Insolvent Act of 1864 effected a change, but as its provisions are to a very great extent re-enacted in that of 1869, it is unnecessary to refer to them at greater length.

The subject of Composition and Discharge is treated of in fifteen sections of the Insolvent Act of 1869, beginning at § 94 and ending with § 108.

§ 94 is in the following words:

"A deed of composition and discharge, executed by the ma-"jority in number of those of the creditors of an Insolvent who "are respectively creditors for sums of one hundred dollars and "upwards, and who represent at least three-fourths in value of "the liabilities of the Insolvent subject to be computed in ascer-"taining such proportion, shall have the same effect with regard "to the remainder of his creditors, and be binding to the same "extent upon him and upon them, as if they were also parties "to it; and such a deed may be invoked, and acted upon under "this Act although made either before, pending or after proceed-"ings upon an assignment, or for the compulsory liquidation of "the estate of the insolvent; the whole subject to the exceptions "contained in section one hundred of this Act."

This section is evidently borrowed from the 192 section of the English Bankruptcy Act of 1861, which reads as follows:

"192. Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their

behalf relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, management and winding up of his estate, or any such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same provided the following conditions be observed.

"1. A majority in number representing three-fourths in value of the creditors of such debtor, whose debts shall respectively amount to ten pounds and upwards, shall before or after the execution thereof by the debtor, in writing assent to, or approve of such deed or instrument."

There are six other conditions attached to the 192 section, but they have reference merely to procedure, so that it is unnecessary to set them out.

The similitude existing between the English Bankruptcy Act of 1861 and the Canadian Insolvent Act of 1869, does not end with the two sections cited. In the matter of proof on the joint and separate estates of partners, the provisions of those Acts resemble each other in a most striking manner.

Under the 145 section of the Bankruptcy Act of 1861 it was provided with respect to firm creditors as follows:

"But such creditor shall not receive any dividend out of the separate estate of the bankrupt until all the separate creditors shall have received the full amount of their respective debts." *

The Insolvent Act of 1869 thus provides:

"64. If the Insolvent owes debts both individually and as a "member of a co-partnership, or as a member of two different "co-partnerships, the claims against him shall rank first upon the "estate by which the debts they represent were contracted, and "shall only rank upon the other after all the creditors of that "other have been paid in full."

It must be admitted that the clause in the English Act is much more comprehensible than § 64, just given, for it is difficult to see how a separate creditor can rank on a joint estate after its creditors have been paid off, ere the accounts of the partners have been settled, when, as a matter of course, each partner's share of the balance falls into his separate estate.

By § 98 of the Insolvent Act of 1869, it is provided that:

"The consent in writing of the said proportion of creditors to

* B. L. C. Act, 1849, § 140.

"the discharge of a debtor absolutely frees and discharges him, "after an assignment, or after his estate has been put in compul- "sory liquidation, from all liabilities whatsoever (except such as "are hereinafter specially excepted) existing against him and prove- "able against his estate, which are mentioned or set forth in the "statement of his affairs exhibited at the first meeting of his credi- "tors, or which are shewn by any supplementary list of creditors "furnished by the Insolvent, previous to such discharge, and in "time to permit of the creditors therein mentioned obtaining the "same dividend as other creditors upon his estate, or which appear "by any claim subsequently furnished to the Assignee, whether "such debts be exigible or not at the time of his insolvency, and "whether the liability for them be direct or indirect; and if the "holder of any negotiable paper is unknown to the Insolvent, the "insertion of the particulars of such paper in such statement of "affairs or supplementary list, with the declaration that the hol- "der thereof is unknown to him, shall bring the debt represented "by such paper, and the holder thereof, within the operation of "this section."

The liabilities excepted are enumerated in

"§ 100. A discharge under this Act shall not apply, without "the express consent of the creditor, to any debt for enforcing "the payment of which the imprisonment of the debtor is per- "mitted by this Act, nor to any debt due as damages for assault "or wilful injury to the person, seduction, libel, slander, or mali- "cious arrest, nor for the maintenance of a parent, wife or child, "or as a penalty for any offence of which the Insolvent has been "convicted, unless the creditor thereof shall file or claim there- "for; nor shall any such discharge apply without such consent, "to any debt due as a balance of account due by the Insolvent as "an assignee, tutor, curator, trustee, executor or administrator "under a will, or under any order of court, or as a public officer; "nor shall debts to which a discharge under this Act does not "apply, nor any privileged debts, nor the creditors thereof, be "computed in ascertaining whether a sufficient proportion of the "creditors of the Insolvent have voted upon, done, or consented "to any act, matter or thing, under this Act; but the creditor "of any debt due as a balance of account by the Insolvent as "assignee, tutor, curator, trustee, executor, administrator or "public officer may claim and accept a dividend thereon from

"the estate without being, by reason thereof in any respect "affected by any discharge obtained by the Insolvent."

It may be laid down as a principle governing deeds of Composition and Discharge, that all the creditors signing the same must be placed upon a footing of equality the one with the other, and that the creditors who have not, should be entitled to reap from it the same advantages as those who have signed the deed.*

No difficulty, as a general rule, will be experieneed where the Insolvent has not been in partnership with other persons; for the only exception to the general rule recognized was in a case where a creditor acting as surety for the debtor to the other creditors, was held entitled to receive some advantage over the others, in respect of his acting in that position;† but such a bargain must be apparent on the face of the deed.‡

But when three or four persons trading in partnership either make an assignment or are put into insolvency, a difficulty presents itself in the event of any, or all, of the members wishing to effect an arrangement with his or their creditors, as the case may be.

In the Province of Quebec a partnership is dissolved by its insolvency, § consequently once in insolvency and an assignee appointed, there can be no doubt but that the partnership is at an end.

It is the object of this paper to bring before the public the leading cases on the subject of deeds of composition between members of partnerships and their joint and separate creditors, and to establish the proper course to follow in the framing of the deed so far as regards the joint and separate creditors, and the composition rate agreed upon.

Upon the construction to be placed on certain words occurring in § 94 depends, to a very great extent, the meaning to be attached to the other sections of the title of Composition and Discharge

---

* Sills on Composition Deeds, p. 42; *Walter v. Adcock*, 7 H. & N. 559, 561; *In re Rawlings*, 9 Jur. (N. S.) 316, 317; *Ilderton v. Castrique* 9 Jur. (N. S.) 993, 994; *Berridge v. Abbott*, 13 C. B. (N. S.) 507; *Clapham v. Atkinson*, 4 B. & S. 722, 726, 731; *Dingwall v. Edwards*, 4 B. & S. 738. 747, 754, 758; *Ex pte. Cockburn*, 10 Jur. (N. S.) 573; *Ilderton v. Jewell & al.* 10 Jur. (N. S.) 748.

† *Wells v. Hacon*, 33 L. J. Q. B, 204.

‡ *Wood v. Barker*, 1 L. R. Eq. 139.

§ Code Civil, art. 1892.

in the Insolvent Act of 1869. The words "the creditors" therein occurring are, in fact, the key-words of the whole title; they certainly are not limited in their signification; they comprise all persons who can be considered creditors of the Insolvent. The only question then to be decided is whether the creditor of a firm is also a creditor of the members of that firm. Under our law members of firms are jointly and severally liable for the debts of such firms to the firm creditors. It is perfectly true that the creditors of the individual members are entitled to be paid out of the proceeds of such member's private estate before the creditors of the firm to which such members belong can be paid thereout, but the liability of the members to their firm and the individual creditors is the same, the only difference is that one set is privileged on the private estate, the other is privileged on the joint estate. It cannot be urged that because the whole property (consisting entirely of moveables) of a person is pledged to a third party, that such debtor, though largely indebted to others, has no other creditor than the pledgee, and has no other liabilities than those existing in such pledgee's favour. Such a proposition would not be entertained for a moment, and therefore it may be laid down as incontestable that the creditors of a firm are also creditors of the members of such firm, and that the words "the creditors of the Insolvent" in § 94 of the Insolvent Act of 1869, mean the joint and separate creditors of such Insolvent.

The interpretation placed by the English Courts upon the words "his creditors" and "the creditors of such debtor" in § 192 of the Bankruptcy Act of 1861, is precisely similar to that which it is contended should be applied to the words "the creditors of the Insolvent" in § 94 of the Insolvent Act of 1869.

As already mentioned § 94 has evidently been borrowed from § 192 of the English Bankruptcy Act of 1861. The intention of the Parliament of Canada was to copy as closely as possible the provisions of the English law on the subject of Composition and Discharge. Moreover the common law of the Provinces of Ontario, New Brunswick, and Nova Scotia is based on the English common law. The court of last resort from judgments rendered throughout the Dominion is the Privy Council. The decisions of the English Courts are received throughout the sister Provinces as of binding authority. Consequently it may not be out of place here to cite at length some of the dicta of English

judges in rendering judgments, on matters affecting deeds of Composition and Discharge, under the Bankruptcy Act 1861.

In the case of *Walter* v. *Adcock*, 7 H. & N. 559, Bramwell, B, thus expressed himself: "The 192 section" (of the Bankruptcy Act of 1861) "says, 'every deed or instrument made or entered "'into between a debtor and his creditors,' that means all his "creditors, but the section proceeds, 'or any of them.' That "cannot mean any of them to the exclusion of the rest, because "it would follow that a debtor might enter into an arrangement "with some of his creditors by which the others would be bound "though they received no benefit. That would be senseless. "In my opinion 'any of them' means as trustees for the rest, "that is, not on behalf of them, but on behalf of the whole. "The section proceeds, 'relating to the debts or liabilities of the "'debtor,' that is, to all his debts, 'his release therefrom, or the "'distribution, inspection, management and winding up of his "'estate, or any of such matters, shall be as valid and effectual and "'binding on all the creditors of such debtor as if they were parties "'to and had duly executed the same.' That applies only to deeds "which comprehend all the creditors and might be consistently "executed by all. In fact it means a deed for the benefit of all "his creditors. . . . . It seems to me clear that a compo- "sition deed under the Bankruptcy Act, 1861, to be binding "upon creditors who have not executed it, must appear *on the "face of it* to be a deed of which any creditor may have the "benefit, and may execute without repugnancy."

In re Rawlings, Court of Appeal in Chancery, Sir G. J. Turner, Lord Justice, thus expressed himself on the subject of deeds of Composition and Discharge, then presented to him for adjudication (9 Jur. N. S. 317): "I agree in the opinion expressed by "one of the learned barons of the Court of Exchequer, that in "order to bring a case within the section" (192nd of B. A. 1861) "that the composition must be with all the creditors. . . . . "I think that the words 'debts' and 'liabilities' as used in the "section thus read must be taken to relate to all the debts and "liabilities; for not only is this, as I conceive, the ordinary "meaning of the words. but it is scarcely possible to suppose that "the Legislature could intend that all the creditors should be "bound by an arrangement which was partial and confined in "its operation to some of them only. In all these cases, there- "fore, I think the question to be considered must be, does the "deed or instrument extend to all the creditors?"

Erle C. J. in the case of *Ilderton* v. *Castrique*, 9 Jur. N. S. p. 994, in giving judgment as to the validity of a deed of Composition and Discharge, after referring to the opinions of Sir G. J. Turner, L.J., and Bramwell, B. hereinbefore given, with approval, said, "The judges, therefore, seem to be agreed as to that point, and "as this deed has not complied with the provisions of the section," (192, B. A. of 1861) "by not being for the benefit of all the "creditors, it is consequently invalid." Willes, Byles and Keating, JJ., concurred.

In the case of *Clapham v. Atkinson*, 4 B. & S. p. 726, where a like question as to the validity of a deed of Composition and Discharge came up for consideration, Blackburn, J., in delivering the judgment of the Court of Queen's Bench, composed of Wightman & Mellor, J.J., and himself, said: "It is, independent of authority, clearly necessary that the creditors who are "to be bound by the acts of those executing the deed should be "at least in as good a position as those who bind them. . . . "And on the whole we think that the reasons which are so fully "stated by Lord Justice Turner in *Ex parte Rawlings*, that we "need not repeat them, are convincing."

This judgment was confirmed in the Exchequer Chamber, 4 B. & S. 730.

In *Dingwall v. Edwards*, 4 B. & S. p.747, on a question affecting the validity of a deed, Blackburn, J., said: "In the recent case of "*Ilderton v. Jewell*, 16 C. B. N. S. p. 142," (cited hereafter) "in "the Exchequer Chamber, it was decided that the deed must, *on "the face of it*, show that it was intended to apply to all, and that "a deed not doing so was not helped by the facts extraneous to it "showing that it was in fact so intended. . . . . It is also, "I think, settled by the decisions that in order to be within the "Act, the deed must be such as relate *to all the debts and liabilities* of the debtor, and to all his creditors, and that a deed which "excludes from its provisions any of the debts due to any of the "creditors, or, what I think comes to the same thing, does not "either expressly or by necessary inference include all of them, is "not binding on those who do not execute it . . . . even "if the point were not concluded by the decision of the Court of "Exchequer Chamber, I should, as now advised, hold that the "deed must be such as, when properly construed, to show within "the four corners of the instrument itself that it is such a deed "as is within the provisions of the Act. . . . . It has

"been determined, and I think most properly, that though the "Bankruptcy Act of 1861 does not in terms say so, yet by neces- "sary implication it is meant, that the provisions of the deed must "be such as to give the non-assenting creditors, who are bound "by it without their consent, the same advantages as are given to "those who execute or assent to the deed. The injustice of per- "mitting any part of the creditors to bar the rest, and at the same "time to obtain for themselves any benefit beyond what is given to "those whom they bar, is obvious; and even if there were no "decisions upon this point, I think it could not be disputed that "the Legislature never intended to give them such a power."

Cockburn, C. J., in the same case at p. 753 says: "There is "no difficulty in the law. It is not disputed that, in order that "creditors not executing a composition deed shall be bound under "the 192nd section of the Bankruptcy Act, 1861, they must be "entitled to the same benefit under it, as is secured by it to the "creditors executing it."

Lord Westbury, at that time Lord Chancellor in *Ex pte. Cockburn re Smith & Laxton*, 10 Jur. N. S. p. 574, whilst rendering judgment as to the validity of a deed of Composition and Discharge, said, "But to render a deed of composition and release "binding on the minority of the creditors, who have not executed, "or assented to, or approved of it in writing, *it is necessary* that "the non-assenting creditors should stand under the deed, in the "same situation, and with the same advantages, as the creditors "forming the majority. The 192nd section enacts that the credi- "tors who have not assented are to be bound, 'as if they were "parties to, and had duly executed, the deed.' It follows, that "the provisions of the deed must be such as will apply to *all the* "*creditors* equally, and without distinction or difference;" and at page 575: "It" (meaning the power to bind the minority) "of "course rests on the assumption that terms which so large a pro- "portion of creditors, both in number and value, are willing to "accept from an Insolvent, must be advantageous to the whole "body of creditors; and this assumption necessarily implies that "the terms agreed to are the same for all, and that *those who bind* "*and those who are bound are in a situation of equality.* Where "this is not the case, it seems to me that non-assenting creditors "are not bound, according to the true intent and meaning of the "statute;" and at p. 576: "As I explained on a former occasion, "in my view of the statute, a deed to bind creditors who have not

"executed it, must be a deed which places the parties who execute "and the parties who have not executed upon an equal footing in "point of law."

In *Ilderton v. Jewell*, 10 Jur. N. S. p. 748, Martin, B., in delivering the judgment of the Court of Exchequer Chamber said: "I am of opinion, and five of my brethren agree, that the judg- "ment of the Court of Common Pleas, ought to be affirmed. "We have all the same views of the Act of Parliament. The "192nd section enacts that 'Every deed entered into between a "'debtor and his creditors, (that must mean *all* his creditors,) "'or any of them or a trustee on their behalf' (which must be "taken to mean on behalf of *all*) 'relating to the debts and lia- "bilities of the debtors (that is *all* the debts and liabilities) "'shall be valid and effectual and binding on all the creditors, "provided certain conditions are observed."

In *Walker v. Nevill*, 3 H. & C. p. 414, Martin, B., remarked: "The statute enables a debtor to compound with his creditors, "but makes no distinction with respect to joint and separate "creditors." And Pollock, C. B., there said: "In all the cases "in which composition deeds have been held valid where partners "were the debtors, there must have been joint and separate credi- "tors and joint and separate estates."

In the same case the present Lord Justice Mellish, then but Mr. Mellish, for the defendant, said (at page 416 of the report), "Where a debtor assigns all his property for distribution amongst "all his creditors, the estate must be administered as in bank- "ruptcy. But under a composition deed it is not necessary that "there should be any assets of the debtor to be distributed. A "third person may covenant to pay the composition, and the credi- "tors may thereby obtain a larger dividend than they could realize "from the bankrupt's estate. Where there are partners there "must always be joint and separate debts."

In *ex parte Glen in re Glen*, 2 L. R. Ch. Ap. p. 670, a person who carried on business in partnership, executed a composition deed for the benefit of his separate creditors only, which was assented to by the requisite majority of separate creditors. The firm was also indebted; and it was held that the deed was not binding on a dissenting separate creditor, for that a deed providing for one class of creditors only is not within § 192 of the Bankruptcy Act, 1861. Lord Cairns, at that time one of the Lords Justices, afterwards Lord Chancellor, (p. 672 of the re-

port) made use of the following expressions: "The debtor was "a partner; he had joint creditors and separate creditors. Now "§ 192 *primâ facie* makes no difference between these classes; "it speaks generally of a deed entered into between the debtor and "his creditors, or any of them. The words 'or any of them' have "been observed upon, but their meaning is obvious. The section "contemplates as parties to the deed either all the creditors, or "some of them as trustees for, or as representing the whole body "of creditors. But to render the deed binding there must be an "assenting majority in number, representing three-fourths in value "of the creditors whose debts amount to £10 and upwards; that "is, all the creditors need not be parties to the deed, but there "must be the requisite majority approving of it; and according to "the natural construction of the section, it must be a deed of "which the benefit will enure to all the creditors generally."

Lord Justice Rolt in the same case at p. 673, said, "I am "unable to understand how there can be, under the Act, a deed "having the effect of binding some of the dissentient creditors "without binding them all. There is no authority for holding "section 192 and the following sections to give a deed such an "effect; and the consequences of such a construction, which does "not give to the words 'creditors' its natural meaning would be "very serious."

In the case of *Tomlin & al., v. Dutton & al.*, 3 L. R. Q. B. p. 466, it was held that a deed of composition made between the members of a partnership and the joint creditors of the firm, none of the separate creditors being parties thereto, nor any provision being made for the separate creditors of the partners reaping equal benefits with the partnership creditors, was not within § 192 of the Bankruptcy Act, 1861, and was invalid against non-assenting joint creditors. Blackburn, J., there said (p. 468 of the report): "The plea sets up a deed made between the de-"fendants and the creditors of the partnership only; if that be a "deed within § 192 of the Bank-ruptcy Act, 1861, then the Act "has given a new power, and it rests upon those that rely on this "authority given by statute, and not known to the common law, "to show by what words it is conferred. § 192 makes, under "certain conditions, a deed entered into between a debtor and his "creditors or any of them, or a trustee on their behalf, as bind-"ing *on all the creditors of such debtor*, as if they were parties "to and had executed the deed. Now the literal sense of these

words must be, that the deed is to be between and for the benefit of all the creditors, inasmuch as it is to bind all the creditors of such debtor."

In *Rixon v. Emary*, 3 L. R. C. P., p. 550, Montague Smith, J., said in giving judgment: "We entirely agree in the decision "of the Lords Justices in the case of *Re Glen*" (*supra*) that where "there are distinct classes of joint and several creditors, the deed "must include and bind both sets of creditors;" and Bovill, C. J., in the same case said (p. 551): "I consider the law to be now "settled, that a deed of arrangement by several debtors with their "creditors must, in order to be binding upon non-assenting credi- "tors under the 192nd section of the Bankruptcy Act, 1861, "purport to be made or entered into with and to bind all their "creditors, and must embrace several as well as joint creditors "where any of each class exist."

In *Buvelot v. Mills*, 1 L. R. Q. B., p. 104, Cockburn, C. J., in delivering judgment said: "In order to make a deed under § 192 "binding and effective upon the creditors who are not parties to it "otherwise than so far as the statute compulsorily makes them "parties, the deed must provide for such creditors in the same "manner that it provides for those who are assenting parties."

In *Thompson v. Knight*, 2 L. R. Ex. p. 44, Kelly, C. B., said in delivering judgment: "There are, no doubt, a great "number of these deeds executed daily, and daily forming the "subject of discussion, and it is therefore necessary to state clearly "the principle on which they are to be held valid or invalid. Now "I think it absolutely essential that all the creditors should be "placed on an equal footing, especially when I remember that, "generally, a great number of them are in these cases bound by "an instrument, to which they are not parties and to which they "have not assented."

In *ex pte. Nicholson in re Nicholson*, 5 L. R. Ch. Ap. 335, Lord Justice Giffard in rendering judgment in a case wherein a deed of composition had been attacked, said "I agree that all "deeds of this kind must deal equally with all . . . . . "thus to put an extreme case, if a deed were simply to provide "that one class of creditors should receive a larger composition "than another, that could not bind dissenting creditors, for it "would be on the face of the deed unfair."

In all the cases cited, two principles are recognised as governing deeds of Composition and Discharge. 1. That if the debtor

has joint and separate creditors, the majority required to bind the minority must be of the whole mass of his creditors joint and separate. 2. That under the deed perfect equality must reign, so far as the composition is concerned, between all the assenting and dissenting creditors, that is that each creditor should thereby be bound to submit to the same proportionate loss in the pound on his claim.

The French authorities, on the subject of equality between the creditors of a bankrupt who has effected a concordat with his creditors, are in accord with the dicta of the English judges. Renouard says: "Et cependant point de concordat s'il ne con-"tient pas les mêmes conditions à l'égard de tous." *

Gadrat expresses himself more fully on the subject: "Récipro-"quement, tous les créanciers jouissent des avantages stipulés au "concordat en faveur de la masse, et, à ce titre ils peuvent exercer, "contre les tiers qui ont garanti l'execution du concordat, les "mêmes droits que les créanciers verifiés et affirmés. La situation "de tous les créanciers est identiquement la même; aucun d'eux "ne peut recevoir un dividende avant que les autres créanciers le "reçoivent; chacun d'eux n'a droit qu'à sa part proportionelle "dans chaque distribution, et si par événement l'un d'eux avait "reçu au delà de sa part proportionelle, il serait tenu de faire à "la masse le rapport de cet excédant." †

No difficulty can be experienced, as a general rule, in the drawing up of a deed of Composition and Discharge between a trader who has never been in partnership and his creditors. It is only when a partnership has been put into insolvency, or has assigned, that difficulties arise if there be joint and separate estates, or joint without separate estates, or separate without joint estates.

The cause of the difficulty in such case is the presumed clashing of the general principle of equality with that of distribution of the estates under § 64, and the respective ranking of joint and separate creditors.

The provisions of the English Bankruptcy Act of 1861, and those of the Insolvent Act of 1869, with respect to the ranking by partnership creditors on the separate estates of partners, are almost identieal (*ante* p. 172). The general principles, out of insolvency or bankruptcy in England and Quebec, would appear

* Faillites & Banqueroutes, p. 9.

† Faillites & Banqueroutes, p. 291.

to be, that the assets of a partner are liable in the first instance for his separate debts, and those of the joint estate for the joint debts. Certain modifications of those principles exist under certain circumstances, but for the purposes of this paper it is unnecessary specially to consider them.

From what has already been shewn it is clear that the creditors of a person who has been in partnership are not only his separate creditors, but also the creditors of the partnership—the mere fact of there being no separate assets does not prevent the partnership creditors from being creditors of the partner having no separate property—the liability still exists, although there may be no separate and no joint estate, to the partnership creditors—if the contrary be held, it can only be on the absurd principle of "no assets, consequently no liabilities, consequently no creditors."

But it is said in matters of composition effected by partners with their creditors, that, although no doubt the majority signing the deed of composition must be of the mass of their joint and separate creditors, the general rule of equality laid down as governing such deeds may be departed from, and different rates of composition may thereby be made payable to their joint and separate creditors, the same rate to each class, based upon the respective values of the joint and separate estates of the Insolvents.

A case presenting these features was recently decided in Montreal by Mackay J. holding the Superior Court.

B. H. & E. L. trading in partnership, in the month of March, 1870, made an assignment under the Insolvent Act of 1869; an assignee to their joint and separate estates was in due course appointed, and soon after a Deed of Composition and Discharge was drawn up and signed to the following effect:—For and in consideration of a composition of 7s. in the £ to be paid by B. H. the joint creditors discharged B. H. & E. L. from their partnership liabilities, and ordered the assignee to deliver over the partnership assets to B. H. For a composition of 10s. in the £ the separate creditors discharged B. H. from his separate liabilities, and ordered his private estate to be delivered over to him; and for a composition of ½ cent on the $, the separate creditors of E. L. discharged him from his separate liabilities. The creditors in each class were declared to be, and actually were, the majorities in number, holding three-fourth of the liabilities in such class.

The applications for the confirmation of the discharges contained in the said deed of Composition and Discharge were resisted by J. J. & al., creditors of the partnership, on the ground of inequality of the composition: to this the Insolvents answered that the rate payable to each class was fair and just, being proportioned to the value of the assets belonging to each estate.

The facts proved maintained the allegations of the Insolvent's answers, but the learned Judge by his judgment rendered on the 30th January, 1871, maintained the contestations, and refused to confirm the discharges. In rendering judgment, he said:

MACKAY, J.—I have before me three petitions for confirmation of composition deed—one by B. Hutchins and E. Lusher as the late firm of B. Hutchins & Co.; the second by B. Hutchins as an individual: and the third by E. Lusher as an individual.

The petitions are all alike. The one by B. Hutchins and E. Lusher jointly, states assignment by them as the firm of B. Hutchins & Co. to John Whyte, an official assignee, on the 3rd March, 1870, and that on the 22nd of April the petitioners made a deed of composition with their creditors, according to law, and obtained a discharge from them; that the petitioners have done all required by them under the insolvency act; wherefore they pray for a sentence of confirmation of the said composition deed and of the discharge granted by it.

The petitions are opposed by Jeffrey & Co., creditors for over $1,900. The reasons of opposition are that the composition deed ts irregular, and does not provide for the creditors of the bankrupts getting equal amounts per £ or $ of composition money; that from the deed of composition it appears that the creditors, joint, and individual or separate, have not agreed for an equal composition for the creditors, as ought to have been. Other reasons of opposition are that the bankrupts appear to have been contracting debts recklessly, and knowing of their being unable to pay; that they have been guilty of wasteful, extravagant living, &c.

The discharges referred to are contained in a deed of composition of 22nd April, 1870. (*His Honor read the Deed of Composition.*)

This deed provides for three compositions.

1st. One of 7s in the £ to the creditors of the firm of B. H. & Co.

2nd. One of 10s in the £ to the creditors of B. H. as an individual.

These compositions are to be paid by B. H.

The 3rd one is of half a cent per dollar which E. L. has paid to certain of his individual creditors.

Four creditors are named, three sign and get paid. No special provision for the 4th, nor for any others as creditors.

I notice that these three who have gotten this half cent, are appointed to get the 7s. composition amount also, and B. H.'s 10s. per pound too.

There is in the deed, after the composition, a general reconveyance clause; all the estates, firm and individual, being appointed to be given up to B. H. on the composition being paid.

As to the facts connected with this insolvency it may be stated briefly that B. H. & Co. in Feb., 1870, suspended with a deficit of over $50,000.

In March, 1870, the assignment was made, one deed of assignment by the firm and individuals.

I can imagine the assignment to have been made as it was to prevent such question or difficulty as was in McFarlane's case.

That case determined that, whenever a firm became bankrupt, the estates of the individuals of it fell for administration in bankruptcy at the same time by the same assignee.

Upon the assignment of March, three meetings were held for appointment of assignees in the cases now before us. One of the firm creditors, at which J. Whyte, the official assignee, was elected assignee to the firm estate; another of the creditors, of B. H. individually. Nobody was at this meeting but J. Whyte, proxy for four persons absent. As proxy for one he moved, seconded by himself as proxy for another, that he himself should be appointed assignee, and it was carried, says his record.

The third meeting was of the creditors of Ed. Lusher individually; not even a proxy attended at this meeting, so J. Whyte as having been *interim* assignee, became the assignee to this estate.

These three meetings might have led to extra trouble had different persons been appointed assignees to the different estates.

The composition agreements on 22nd April, though in one and the same deed, proceed evidently upon the idea that three compositions had to be paid.

The separate creditors generally of B. Hutchins and of Ed. Lusher seem not to have been called to be parties to the 7s. composition of the firm.

It has been agreed that the one copy of composition agreement fyled, and all the evidence in the cause, are to be held common to the three petitions and to Jeffrey's contestations.

At the argument Jeffrey relied chiefly upon his objections to the form of the composition deed; his counsel argued that it was unequal, providing different compositions for different creditors, that the firm creditors and the separate creditors of B. Hutchins individually, and of Ed. Lusher, ought to have fixed one and the same composition rate for the creditors; that the majority of "the creditors," that is, of all the creditors, several and joint, have not agreed upon any one composition; that the creditors, appearing before the notary, have thrown themselves into different sets, and settled different compositions for different creditors. Less stress was laid on the charges of extravagant living made against the bankrupts; it was urged, however, that they were, as regards Jeffrey, to be held in fraud, as they must have known that they were bankrupts when they bought the teas from Jeffrey, in respect of which his claim exists.

As to the charge of extravagant living, there is some proof; but considering that none of the creditors, excepting Jeffrey, appear here to complain of it, and that the inspectors (having considered the subject) excuse it, I am not disposed to be rigorous. Passing to the other charge of having bought Jeffrey's teas, knowing that they had not the means to pay for them, it is to be observed that the bankrupts are shown not to have moved towards that purchase of teas. They were pressed to take them. They pledged them almost immediately afterwards: but such pledgings are common in Montreal; and I cannot bring myself to adjudge upon the proofs before me, that the bankrupts knew themselves to be insolvent when they bought from Jeffrey, yet they were bankrupt a full year before they declared insolvency.

These teas were bought in January, 1870; the notes for them were not matured at the date of the insolvency. Immediately after the insolvency $56,000 were stuck off by the creditors as bad, in estimating the assets of the bankrupt firm, still the firm had good credit almost up to the announcement of its insolvency, and seems to have had no idea that it was on the verge of such a calamity.

The composition deed as made, binds Jeffrey, it is said.

Has the deed all the requisites? Is it in form of law! Am I bound to confirm it?

Jeffrey contends that we have not before us a deed between the bankrupt and the creditors.

He refers firstly to § 192 of the English Act of 1861: "Every deed entered into between a debtor and his creditor," &c., and relies upon the English Courts' decisions on this Act, particularly as to the meaning of the word "creditors" in ours and in the English Act; among the cases cited is Tomlin vs. Dutton.*

"A deed of composition between members of a partnership and their joint creditors without reference to the separate creditors of the different members of the firm is NOT within the 192 sec. of Bankruptcy Act of 1861—and is invalid even as regards a non-assenting creditor of the partnership."

Upon the English decisions, Sills on Composition Deed remarks p. 20: "The effect of these decisions is to render it doubtful "whether any valid deed can be made by a member of a part-"nership if he has separate creditors; at any rate if the deed "operates as a release of debts."

Walker vs. Nevill, vol xi. *English Jurist*, has also been referred as supporting this proposition: that a majority in value and amount of each class taken by itself need not be, for the 162 section of the English Act of 1861, or for a case like the one before us.

It is opposed to Jeffrey that the bankrupts' composition as arranged is perfectly fair; because if distribution under the Bankrupt Act had been worked out to the end, (or were it to be worked out) he Jeffrey *could not* get more than 7s. in the £, if as much. But this involves assumptions; besides, composition is not distribution in bankruptcy but a different thing, and the measure of the estate in bankruptcy or belonging to the bankrupts is for nothing in considering the legality of a composition deed.

It has also been urged that the reconveyance clause helps the composition agreement.

It is said that the creditors can sell all the estate at a dollar rate; but I see that between selling the estate and discharging the bankrupts there is a distance. The sale of an estate does not destroy creditors' hold on their debtors; but under formal composition the debtors go free.

Here is the reconveyance clause. (*His Honor here read the clause.*)

---

* A. D. 1868, law reports vol. iii. p. 467.

I consider it a *non sequitur* that, because of such a reconveyance, a composition deed reading as the one before us is a discharge of the Bankrupt *quoad* a non-assenting creditor like Jeffrey.

Nor can I yield to another argument, viz., that because in bankruptcy distinct accounts are to be kept, of the firm estates, and of the partners' separate estates, and beeause of distribution having to be as per sec. 94, several compositions may be, as in the deed before us.

Taking up the separate composition of B. H. we see it assented to by certain separate creditors, but the firm creditors are not named parties to it, nor counted for it, yet the separate estate is removed from Jeffrey, and from non-assenting creditors like him, and B. H. is declared discharged. This separate estate might yield a surplus applicable to Jeffrey, or to payment of his claim; though of course Jeffery is nominally a firm creditor only.

The separate composition agreement of Ed. Lusher is peculiar, and in considering it we are not to regard the fact alleged of his not having had assets. He might have been a person having assets of $5,000 or $10,000.

The conclusion that I have come to after considering everything is this: I do not see such a composition deed here as fulfils the law's requirement, nor discharge to the bankrupts that Jeffrey is bound by. Jeffrey has right, rather than be forced to submit to this composition deed (under which creditors who take 17s. and ½ a cent in the pound to themselves, appoint him to have only 7s.), to ask distribution by the working out of the bankruptcy act. He has right to dividends from the firm assets, and to the realization of B. H's. private estate, so as to find whether or not he get something out of that. This is not demonstrated to be impossible. This composition deed is irregular, providing dividends or composition amounts for the creditors unequally and contrary to law. So the three petitions are rejected, the contestations of them being to a certain extent, as explained by what has been said, maintained with costs.

Judgment.—The composition deed is pronounced irregular, unequal, and illegal, and of no force against contestant, and allegations of petitioners not being proved, confirmation of the discharge is refused, and the petitions are severally rejected, with costs to contestant, Jeffery.

(*To be continued.*)

WILLIAM H. KERR.

LE DROIT CONSTITUTIONNEL DU CANADA.

La Province de Québec, à part peut-être l'Etat de la Louisiane, est sans contredit le pays où les sources de lois sont les plus diverses et mixtes. En matières civiles, les lois de l'ancienne France, telles qu'en force en Canada lors de la cession à la Couronne Anglaise, forment en général le droit commun de cette colonie originairement Française. Néanmoins, son droit public et criminel lui vient presqu'*in toto* de la Grande Bretagne. Depuis près d'un siécle, sa Législature a encore largement emprunté des lois de la mère-patrie, particulièrement en matières commerciales; et en 1866, son Code Civil lui apportait subitement un grand nombre d'articles de droit nouveau du Code Napoléon. Enfin son Code de Procédure Civile est le fruit d'un mélange encore indigest de droit Français et de droit Anglais. Que faut-il donc ajouter pour démontrer que la science du droit en Bas-Canada est plus compliquée et plus difficile que dans n'importe quelle contrée du monde. Evidemment, le juge et l'avocat ne peuvent y arriver, sans posséder le droit Romain et le droit moderne et ancien des grandes nations de notre époque, sans être familiers aussi bien avec Pothier que Blackstone, Troplong que Story, aussi bien avec les statuts de la colonie et la jurisprudence de ses tribunaux et des tribunaux Français qu'avec les ordonnances de la monarchie Française et les *Law Reports* de ces mille et un précédents dont les Anglais et les Américains nous dotent si libéralement chaque année. Il y a dans ce vaste champ, qui oserait le nier! assez de matériaux pour l'esprit légal le mieux développé, assez d'éléments pour satisfaire pendant des siécles l'ambition des membres les plus érudits du Banc et du Barreau. La sphère du droit en Bas-Canada ne s'arrête pourtant pas là. Les rapports commerciaux que la vapeur et le fil électrique ont si considérablement contribué à multiplier entre nos nationaux et leurs compatriotes des autres provinces, ou les citoyens de l'Union Américaine, sont encore venus jeter sur le terrain judiciaire les matières toujours si épineuses du droit international privé. Voilà enfin que tout à coup un nouveau régime politique vient y ajouter les *Questions Constitutionnelles*; et de fait à peine trois années s'étaient-elles écoulées sous son

empire, que nos tribunaux étaient appelés à décider une de ces questions aussi délicates qu'importantes dans l'affaire de *Bélisle v. L'Union St. Jacques de Montréal.**

La décision de cette cause nous a engagé à offrir au public quelques notes sur le droit constitutionnel du Canada, qui, à cause de la nouveauté du sujet, pourront peut-être avoir quelqu'intérêt et quelqu'utilité pratique.

I.—SOURCES DU DROIT CONSTITUTIONNEL DU CANADA.

Chaque Etat a sa constitution; mais chaque Etat n'a pas un droit civil constitutionnel proprement dit. Dans les pays qui, comme la Grande Bretagne, la France et tant d'autres, sont soumis à une seule autorité souveraine, les conflits constitutionnels ne sont guère possibles; tandisque dans d'autres, où plusieurs souverainetés se côtoient dans de certaines limites, ils deviennent une nécessité du régime politique, que l'on appelle le *régime fédéral.* De ce nombre sont les confédérations de l'Amérique du Sud, les Etats Unis d'Amérique et le Canada. Il est évident que quand deux ou plusieurs Etats se trouvent unis sous deux ou plusieurs pouvoirs souverains, ayant chacun une juridiction spéciale et limitée, la validité ou constitutionalité de leurs actes respectifs (car les législatures ne sont pas plus infaillibles que les autres hommes) doit nécessairement être mise en question; et pour décider le différend, il faudra avoir recours à une autorité suprême, commune à tous. Cette autorité, c'est la Constitution. "If a number of political societies" dit Story,† et son autorité mérite ici tout le respect dont elle jouit dans sa patrie, puisque notre Constitution, à part la souveraineté extérieure, est presqu'identique à celle de nos voisins, "enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent upon the good faith of the parties, and not a government, which is only another name for political power and supremacy. But it will not follow, that acts of the larger society, which are not pursuant to its constitutional powers, but are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. They will be merely acts of usurpation, and will deserve to be

* Suprà, p. 118.

† Commentaries on the Constitution of U. S. § 965.

treated as such. Hence we perceive, that the clause* only declares a truth, which flows immediately and necessarily from the institution of a national government. It will be observed that the supremacy of the laws is attached to those only, which are made in pursuance of the constitution; a caution very proper in itself, but, in fact, the limitation would have arisen by irrisistible implication, if it had not been expressed."

Dans l'examen des questions constitutionnelles, il faut donc consulter uniquement la Constitution du pays, connue sous le nom de "L'Acte de l'Amérique Britannique du Nord, 1867," et devenue en force le 1er juillet de la même année. Le législateur, après avoir déclaré dans le préambule de l'acte: "Considérant que les provinces du Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (Dominion) sous la couronne du Royaume-Uni de la Grande Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni," accorde cette union (sect. 3), qu'il divise en quatre provinces, Ontario, Québec, Nouvelle-Ecosse et Nouveau-Brunswick, pour des fins d'une nature locale.

La Puissance possède un parlement composé de la Reine, representée par le Gouverneur-Général, d'une chambre haute, appelée le Sénat, et de la Chambre des Communes.

Chacune des quatre provinces a sa législature propre composée du Lieutenant-Gouverneur, nommé par le Gouverneur-Général en conseil, du Conseil Législatif et de l'Assemblée Législative. La Province d'Ontario possède une législature composée d'une seule chambre, l'Assemblée Législative.

La section 91 définit l'autorité législative du Parlement du Canada et ordonne que "l'autorité législative exclusive du Parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés," savoir entr'autres:

"La réglementation (regulation) du traffic et du commerce;" (p. 2).

"La navigation et les bâtiments ou navires (shipping); p. 10.

---

* Art. 6, sec. 2, de la Constitution des Etats Unis: "This constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

" Les lettres de change et les billets promissoires ; p. 18.

" La banqueroute et la faillite ; (Bankruptcy and Insolvency,) p. 21.

" Le mariage et le divorce ; p. 26.

" La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle."

La section ajoute : " Et aucune des matières énoncées dans les catégories de sujets énumérés dans cette section (91) ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée."

La section 92 déclare que la législature de chaque province " pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés," savoir, entr'autres :

" Les institutions municipales dans la province" ; p. 8.

" L'incorporation de compagnies pour des objets provinciaux ; p. 11.

" La célébration du mariage dans la province ; p. 12.

" La propriété et les droits civils dans la province ; p. 13.

" L'administration de la justice pour la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux" ; p. 14.

Enfin la section 129 déclare que les lois et pouvoirs en force dans chacune des colonies lors de la mise en force de l'Acte Fédéral, continueront d'exister ; " mais ils pourront néanmoins (sauf les cas prévus par des actes du parlement de la Grande Bretagne ou du Royaume-Uni de la Grande Bretagne et d'Irlande) être révoqués, abolis ou modifiés par le parlement du Canada, ou par la législature de la province respective, *conformément à l'autorité du parlement ou de cette législature en vertu du présent acte.*"

Ces dernières expressions sont formelles et précises. Les législatures pourront faire des lois, *pourvu qu'elles ne violent ni la Constitution, ni les statuts de l'Empire.*

Mais les traités de l'Empire avec les nations étrangères doivent ils être considérés comme faisant partie de la Constitution et par conséquent supérieurs aux lois des législatures coloniales ? Il n'y a aucun doute que les stipulations des traités qui ont été confirmées par des actes du Parlement Britannique ont force de loi et priment les statuts du Canada. Tel est l'article 4 du Traité de Paris

de 1763, qui *accorde la liberté de la religion catholique aux habitans du Canada*, confirmé par l'Acte de Québec de 1774, 14 Geo. 3, ch. 83, sec. 5; et telles sont aussi les stipulations du Traité d'Ashburton pour l'extradition des fugitifs criminels, qui autrefois et encore récemment a reçu la sanction de la législature de l'Empire.

Mais que faut-il décider quand une loi des législatures coloniales viole les dispositions d'un traité qui n'est pas revêtu de l'autorité des statuts Impériaux? Il n'est guère probable que la civilisation moderne soit témoin d'une violation aussi hardie des traités de la nation. Pourtant un tel spectacle n'est pas impossible. L'on peut supposer que le Parlement du Canada prohibe aux citoyens Américains de faire la pêche dans les eaux où ce privilège leur est assuré par le Traité de 1818, et qu'en vertu de cette loi prohibitive un navire Américain soit capturé. Il va sans dire que le Gouvernement de la Grande Bretagne serait alors responsable du dommage. Mais nos tribunaux ont-ils juridiction pour entendre la plainte du propriétaire et ordonner main-levée de la prise comme ayant été faite en contravention du traité et du droit des gens?

La solution de la question présente des difficultés sérieuses, d'autant plus graves qu'elles ont à peine été touchées par les publicistes sur le droit international. Dans cet état incertain et encore imparfait de la science, il serait téméraire de hazarder une opinion. Aussi dans les quelques remarques qui suivent, nous avons plutôt l'intention de poser le problême que de le résoudre.

Chitty * a dit, et son langage parait être accepté par plus d'un jurisconsulte comme l'expression d'un axiôme populaire du droit public anglais: "I should conceive that in no case whatever can "a judge oppose his own opinion and authority to the clear will "and declaration of the legislature. His province is to interpret "and obey the mandate of the supreme power of the State."

Dwarris a admirablement traité cette matière dons son ouvrage *on Statutes*, p. 480–485; et nous croyons faire plaisir au lecteur en reproduisant tout ce qu'il en dit:

"An act of Parliament shall not change the laws of nature, for "† *jura naturæ sunt immutabilia*, and they are *leges legum*: "*Nec vero per Senatum aut per populum, solvi hâc lege pos-"sumus*, says Cicero.‡ The law of nature stands as an eternal

* Sur Blackstone, vol. 1, p. 27. † Hobart 87. ‡ Fragment.

"rule to all men, says Locke, legislators as well as others;* and "the rules that they make for other men's actions must, as well as "their own and other men's actions, be conformable to the will of "God, of which *that* is a declaration.

"If a statute say, that a man shall be a judge in his own cause, "such a law being contrary to natural equity, shall be void. Such "was the (at least, intrepid) opinion of Lord Chief Justice Hobart "in *Day and Savage*. Influenced by the same powerful sense of "justice, Lord Coke, when Chief Justice, in Bonham's case,† un- "guardedly, perhaps, but fearlessly, declared, that where an Act of "Parliament is against common right or reason, or repugnant, or "impossible to be performed, the common law shall control it, and "adjudge it to be void. And Lord Holt, in the case of *The City "of London and Wood*,‡ to the dismay of all mere lawyers, man- "fully expressed an opinion, that the observation of Lord Coke was "not extravagant, but was a very reasonable and true saying.

"There is reason to believe that what Lord Coke said in his "reports upon this subject is part of what King James alluded to "when he said that 'in Coke's Reports were many dangerous "'conceits of his own, uttered for law, to the prejudice of the "'Crown, Parliament and subjects.' Lord Ellesmere, in his "observations on Lord Coke's Reports, calls this passage 'a para- "'dox which derogateth much from the wisdom and power of "'Parliament; that when the three estates, King, Lords and "'Commons, have spent their labour in making a law, three "'judges on the bench shall destroy and frustrate their pains; "'advancing the reason of a particular Court above the judgment "'of all the realm. Besides, more temperately,' he says, 'did "'that reverend Chief Justice Herle, *temp. Ed.* 3, deliver his "'opinion, 8 *Ed.* 3, cited in *Co. Rep.* 11 f, 98, when he said: "'Some acts of Parliament are made against law and right; "'which they *that made them* perceiving, would not put them "'into execution; for it is *magis congruum* that acts of Parlia- "'ment should be corrected by the same pen that drew them, "'than be dashed to pieces by the opinion of a few judges.' "Again, the pugnacious Lord Chancellor, talking *at* the Lord "Chief Justice, speaks of a 'prudent judge as one who did not

* Lib. 2, c. 11, s. 35; and see Hooker's Ecclesiastical Polity, 1, and Bishop Cumberland *De Lege Naturæ*.

† 8 Rep. 116. ‡ 12 Mod. 687.

"'judge statutes void if he considered them to be against com-
"'mon right and reason, but left the Parliament to judge what
"'was common right and reason.' So, Sir W. Blackstone* con-
"fines the rule of avoidance of unreasonable statutes, to any
"absurd consequences which arise out of them collaterally. The
"judges, he says, are in decency to conclude that *this* conse-
"quence was not foreseen by the Parliament, and only *quoad*
"*hoc*, to disregard it. 'If the Parliament will positively enact
"anything to be done which is unreasonable, he knows,' he justly
"says, 'of no power in the ordinary forms of the constitution,
"that is vested with authority to control it.'

"Reasoning *pro*.—But the advocate of natural as opposed to
"positive or instituted law, may inquire what is intended by
"*contrary to reason?* Is not Lord Coke to be taken to mean,
"not merely capricious and without cause; absurd and even mis-
"chievous; but contrary to the law of nature, which we discover
"by the use of reason; to that light, distinct from revelation, by
"which we discover the boundaries of right and wrong? and
"then, our admirable commentator has himself, in another place
"declared: 'No human laws are of any validity, if contrary to
"the laws of nature.'

"An instance is found in the books, in which on the general
"doctrine that statutes contrary to common right and reason, &c.
"'are void,'—and the position from Hobart being cited† the
"judges observed that they would not hold a statute to be void,
"unless it were clearly contrary to natural equity; adding with
"more of force perhaps than of dignity, that they would *strain*
"*hard* rather than hold a statute to be void. Does it not follow
"as an irresistible inference, that if the statute *be* clearly con-
"trary to natural equity—if it impugn that original law which
"is coeval with our nature, and has God for its author, the judges
"(according, at least, to the feelings of those presiding on that
"occasion), *must* with whatever reluctance—however averse to
"defeating a statute—their duty requires them—to disregard it?

"But, it has been observed, to do this, would be to set the
"judicial power above the legislative. Upon which two observa-
"tions may be made: first, this argument seems to prove too
"much; for it applies as strongly to setting aside the collateral
"as the direct consequences of an act; and if the one take place,

* 1 Com. 91. † 10 Mod. 115.

" (barring the objection to the indecency of supposing it neces-
" sary), why not the other. Secondly, Lord Coke does not leave
" the decision to be governed 'by the crooked cord of the dis-
" cretion of the judges;' but it is to be 'measured by the golden
" metwand of the law;' he says, it shall be controlled *by the com-*
" *mon law.* To pronounce such a decision, is, on the part of the
" judges, nothing more than to say, Vast as is the power of an
" Act of Parliament, there are some things which it cannot do.
" It can do no wrong; it cannot abrogate those living laws
" imprinted in our hearts from the commencement of our
" being. In the conceivable and barely possible case, of a statute
" directing the commission of an offence against the law of
" nature, can there be a doubt that, in such instance, no human
" laws would be in any degree binding? or, what amounts to the
" same thing, that there exists a precedent and paramount obli-
" gation to disobey them? A statute cannot make it lawful for
" A to commit adultery with the wife of B, for the law of God,
" forbids it. Neither, it has been asserted, are positive laws,
" even in matters seemingly indifferent* any further binding than
" as they are agreeable to the laws of God and nature.

" Reasoning *con.*—On the other hand, it is said, that though
" the *principle* asserted above is undeniably true, yet the appli-
" cation of it and the conclusion, are most dangerous.† It is
" certain that no human authority can rightfully infringe or
" abrogate the smallest particle of natural or divine law;‡ but we
" must distinguish, it is observed, between right and power, be-
" tween moral fitness and political authority. It must not be
" ascertained as a question of ethics; but of the bounds and
" limits of legislative power.

---

* Fonbl. chap. 1, s. 3.

† 1 Woodison's Lect.—do. Elements of Jurisprudence, 36 and 48. Bl. Com. vol. 1, *ante.*

‡ Among the seven maxims or virtues essential to the written law of Spain, one is, 'that its precepts ought to be respecting things *good, reasonable, just, and not opposed to the law of God,*" to attain its only object, justice, which is rooted virtue *raigada virtud*—Ll. 1 and 4 *Tit.* 1, Partid 1, L. 1, Tit. 1, p. 3. So, the unwritten law, (*uso costumbre y fuero*) receiving its authority from the express or tacit consent of the supreme power, that consent cannot be supposed or presumed when the custom is opposed *to the law of God, to good reason, to the law of the kingdom, and to natural law.* L. 5, Tit. 2, Partid, 1. L. 3, Tit. 1. Lib. 2. Recop.

"Absolute power must reside somewhere; and to it, implicit "obedience must be paid. It can nowhere be so safely placed, "as in the hands of those who frame the laws according to set- "tled forms and after mature deliberation; though the laws they "establish may, sometimes be pernicious, opposed to morality, "and, as we can collect it to the Divine will. As measured by "the law of God, which must be the ultimate test, human laws "may be unjust, but they will still be obligatory.

"All that can be done, it seems, is, to follow the philosophical "advice of Locke, who says that if the magistrate shall enjoin "any thing unlawful to the conscience of a private person, such "private person is to abstain from the action he judges unlawful, "and he is to undergo the punishment; which is not unlawful "for him to bear. The same acquiescence in the laws is enjoined "in the admirable dialogue of Plato, entitled Crito.

"The English lawyers adopt a more cautious and a very cha- "racteristic mode of proceeding. They do not inculcate implicit "obedience to a law which leads to absurd consequences, or to an "infraction of the natural or Divine law, neither do they pro- "claim the law itself, (which may be immoral, but cannot be "illegal), of no validity, and null and void. They only hold it "inapplicable, and declare that the particular case is 'excepted "out of the statute.' A practical mode of dealing with cases "where statutes collaterally give rise to absurd consequences, on "the ground of such consequences being unforeseen, which can- "not be denied to be reasonable.

"The general and received doctrine certainly is, that an Act "of Parliament of which the terms are explicit and the meaning "plain, cannot be questioned, or its authority controlled, in any "court of justice. Yet Sir Edward Coke, manfully, if not con- "vincingly, defended his opinion before the Council, and said: "'If an Act of Parliament were to give to the lord of a manor "'conusance of all pleas arising within his manor, yet he shall "'hold no plea whereunto himself is a party: for *iniquum est* "'*aliquem suae rei esse judicem.*' Now, Sir E. Coke had in his "Second Institute, put the same case, enlarged upon and illus- "trated it; and successfully contended that the case must be "correctly *interpreted* to be exempted out of the provisions of "the statute; that a contrary construction could not be within "the meaning of the act. The law, therefore, was to be properly "*construed* not to apply to such cases; but the law itself was not

"to be held void. See *post*, 'Cases excepted out of statutes' "'*Fit autem non tollendo legis obligationem, sed declarando* "'*legem in certo casu non applicare.**"

Bien qu'il y ait quelques différences dans les termes de ces opinions, elles aboutissent presque toutes à cette conclusion que les actes du Parlement, évidemment contraires à la loi divine ou naturelle, doivent être ignorés par les tribunaux; suivent les unes parceque l'acte de la Législature est nul,† et suivant les autres parcequ'il y a alors lieu d'appliquer la maxime: *Fit autem non tollendo legis obligationem, sed declarando legem in certo casu non applicare.*

Revenant aux traités, est-il nécessaire d'ajouter qu'ils reposent sur le droit naturel, sur ce droit qui permet aux nations comme aux individus de s'engager? La raison et le bon sens ne nous disent-ils pas qu'il n'est jamais permis de violer la foi promise, cette foi que les peuples même barbares ont toujours considérée comme sacrée?

Quoi qu'il en soit, c'est un principe incontestable que le pouvoir qui a fait des lois peut seul les abolir. Or les traités sont des lois pour les nations contractantes et leurs sujets. Ils ne peuvent donc être valablement révoqués ou modifiés que par les parties qui les ont établis. Ils ont donc une autorité supérieure à l'action particulière de l'une de ces parties.

Nous disons que les traités sont des lois pour les parties contractantes, parcequ' ils ont pour elles toute la force du droit international et que le droit international fait partie des lois d'un Etat.

"Les nations," dit Eschbach,‡ sont indépendantes l'une de l'autre, et il est vrai qu'il n'y a au dessus d'elles ni un tribunal suprême pour juger leurs différends, ni une maréchaussée pour contraindre à l'exécution des jugements. Partant pour ceux qui nient l'existence du droit là où ils ne rencontrent pas un pouvoir constitué capable d'en assurer l'observation par la force, le Droit international n'est qu'une chimère, un mot vide de sens. Mais pour quiconque sait distinguer le Droit d'avec la garantie du Droit, le Droit international existe, bien qu'il n'y ait pas de tribunaux internationaux.§

---

* Grotius.

† C'est aussi l'avis de Brown, Legal Maxims (p. 14, ed. 1864.)

‡ Etude du Droit, p. 54.

§ Voir aussi Dana sur Wheaton, § 17.

Ainsi, quoique le droit international soit un droit imparfait *vis-à-vis des nations*, en ce sens qu'il n'est pas *exécutoire* entr'elles, il existe et doit par conséquent recevoir son exécution chaque fois que cette exécution est possible; et elle l'est presque toujours entre particuliers.

Le monde ne possédant aucun tribunal international, il suit naturellement qu' aucune nation ne peut faire exécuter le droit international; et lorsque la foi promise est violée, il ne lui reste pas d'autres recours accessibles que ceux de la diplomatie ou la guerre. Mais la situation n'est pas la même entre les individus lorsqu'il s'agit de donner suite à leurs demandes privées. Ici, il existe un tribunal et le droit international public se trouve entouré de toute la garantie du droit international privé et des autres lois de l'État; alors en un mot l'exécution du droit international est non seulement possible; elle est même un devoir pour toute cour de justice de l'État.

Aussi Lord Talbot disait dans une cause de *Buvot v. Barbut*: "That the law of nations, in its full extent, was part of the law "of England. That the act of Parliament was declaratory, and "occasioned by a particular incident. That the law of nations "was to be collected from the practice of different nations and "the authority of writers."*

Lord Mansfield observait à propos de cette décision: "I was "counsel in this case, and have a full note of it. I remember, "too, Lord Hardwicke's declaring his opinion to the same effect, "and denying that Lord Chief Justice Holt ever had any doubt "as to the law of nations being part of the law of England. Mr. "Blackstone's† principles are right."

N'est-ce pas ce droit des nations que nos cours de justice maintenaient à Montréal dans le célèbre procès des maraudeurs de St. Albans? Le droit international fait donc partie des lois du pays.

C'est un principe trop élémentaire, pour pouvoir être mis en doute, que les traités, une fois dument ratifiés, font partie du

---

* 3 Burrow's Rep. 1481.

† 3 Burrow's R. 1481.—L'immortel commentateur, avocat dans la cause, soutenait que le droit international faisait partie des lois de l'Empire; et dans l'espèce Lord Mansfield déclara que le statut impérial, qui frappait les négociants de certaines pénalités et incapacités, ne s'appliquait pas au serviteur d'un ambassadeur, bien qu'il fût sujet anglais et qu'il eût fait commerce dans le Royaume Uni avant d'être attaché à l'embassade.

droit international. "Où est donc," se demande Eschbach, "la "source des règles et des principes du droit international? . . "Elle est dans le droit naturel, dans les coutumes et *conventions internationales* et dans les théories des publicistes. . . . Il y a donc un droit international conventionel; c'est celui qui repose sur les *traités*, et un droit international coutumier; c'est celui qui est fondé sur les usages."*

Le droit international conventionnel, il est vrai, n'a pas un empire aussi vaste que le droit international coutumier. Le premier est pour ainsi dire limité; il ne lie que les pouvoirs contractants; mais il fait toujours partie du droit international, car il fixe les relations de nation à nation. Pour mieux dire, les traités sont par rapport au droit international ce que sont les conventions des particuliers par rapport au droit civil, avec cette notable distinction que les traités dument ratifiés ne peuvent être répudiés sous prétexte d'être contraires à la morale et à l'ordre public. Le droit international coutumier au contraire est universel et il oblige toutes les nations de la terre.

Enfin, chaque habitant d'un pays est censé être présent aux actes des autorités gouvernementales. Cela est si vrai, surtout en matière de traités, que les sujets sont personnellement responsables devant les tribunaux de l'État des dommages qu'ils causent en les violant, même lorsqu'ils agissent de bonne foi et dans l'ignorance de l'existence du traité.† Les traités ont donc pour le sujet la force des lois de l'État; et c'est aussi ce qu'enseignent plusieurs publicistes d'une haute autorité.

Halleck‡: "The treaty is *a law* to the subjects of the con- "tracting parties."

Félice§: "Si des traités faits dans ces circonstances sont obli- "gatoires entre les États ou les souverains qui les ont faits; ils "le sont aussi par rapport aux sujets de chaque prince en particu- "lier; ils sont obligatoires *comme conventions* entre les puissances "contractantes; mais ils ont *force de lois* à l'égard des sujets "considérés comme tels."

---

* Etude du Droit, p. 58.

† 10 East. 536; Wheaton, Int. Law, pt. 4, ch. 4; Wildman, Int. Law, vol. 1, p. 160; Kent, Com. on Am. Law; Phillimore, Int. Law, vol. 3, § 646, p. 447 (ed. 1857); Heffter, Dr. Int. § 183; Halleck, Int. Law, p. 858; The Mentor, per Sir W. Scott, 1 Robinson, 183.

‡ Int. Law, p. 856.

§ Droit de la Nature, vol. 2, p. 458.

Heffter *: " Les traités publics réels *qui concernent les sujets* " *et les rapports individuels*, ont la même autorité que les lois de " l'État, s'ils ont été contractés et publiés régulièrement."

Dupin † : " Les traités sont obligatoires comme conventions " entre les puissances contractantes; mais ils ont force de lois à " l'égard des sujets considérés comme tels."

Enfin, la Conférence de Londres ne vient-elle pas d'affirmer le même principe de la manière la plus solennelle, en déclarant à l'unanimité : " That it is an essential part of the *law of nations* " that *no power* can shake off the engagements of a treaty or " modify its stipulations except with the assent of the contracting " parties." ‡

La Constitution Américaine n'a pas voulu laisser cette matière importante dans le doute de la science. L'article 6, par. 2, déclare : " This constitution and the laws of the United States " which shall be made in pursuance thereof, and *all treaties* made " or which shall be made, under the authority of the United " States, *shall be the supreme law of the land.*" Il est remarquable que les commentateurs comme les tribunaux ne citent presque jamais cet article pour appliquer le principe qu'il consacre; ils considèrent sans doute qu'il existe par suite de l'ordre naturel des choses, de droit commun public pour ainsi dire.

Abdy sur *Kent* § : " All treaties made by that power become of " absolute efficacy, because they are the supreme law of the land."

Story || : " In regard to treaties, there is equal reason why they " should be held, when made, to be the supreme law of the land. It " is to be considered, that treaties constitute solemn compacts of " binding obligation among nations; and unless they are scrupu- " lously obeyed and enforced, no foreign nation would consent to " negociate with us; or if it did, any want of strict fidelity on our " part of the discharge of the treaty stipulations would be visited " by reprisals or war. It is, therefore, indispensable that they " should have the obligation and force of a law, that they may " be executed by the judicial power, and be obeyed like other " laws. This will not prevent them from being cancelled or " abrogated by the nation upon grave and suitable occasions; for

* Droit International, p. 186.

† Principes du Droit de la Nature et des Gens, vol. 5, p. 198.

‡ Séance de 17 Janvier, 1871.

§ International Law, p. 410.

|| Com. on Const. of U. S., § 966; voir aussi Wheaton, éd. Dana § 266.

" it will not be disputed, that they are subjected to the legislative " power, and may be repealed, like other laws at its pleasure, or " they may be varied by new treaties; still, while they do sub- " sist, they ought to have a positive binding efficacy, as laws, " upon all the states and all the citizens of the states. The peace " of the nation, and its good faith, and moral dignity, indispen- " sably require that all state laws be subjected to their supremacy. " The difference between considering them as laws, and and con- " sidering them as executory, or executed contracts, is exceed- " ingly important in the actual administration of public justice. " If they are supreme laws, courts of justice will enforce them " directly in all cases, to which they can be judicially applied, " in opposition to all state laws, as we all know was done in the " case of the British debts secured by the treaty of 1783, after " the Constitution was adopted. If they are deemed but solemn " compacts, promissory in their nature and obligation, courts of " justice may be embarrassed in enforcing them, and may be " compelled to leave the redress to be administered through other " departments of the government. It is notorious that treaty " stipulations (especially those of the treaty of peace of 1783) " were grossly disregarded by the states under the Confederation. " They were deemed by the states, not as laws, but like requisi- " tions, of mere moral obligation, and depended upon the good " will of the states for their execution. Congress, indeed, re- " monstrated against this construction, as unfounded in principle " and justice."

La jurisprudence Américaine ne laisse aucun doute sur le point que les traités font partie de la loi suprême de l'Union, et qu'ils sont supérieurs aux lois particulières des Etats; mais elle ne va pas jusqu' à indiquer la règle à suivre en cas de conflit entre le Congrès et les traités. Il semblerait que, vu qu'aux Etats-Unis les traités n'obtiennent force de loi que par la sanction du Congrès, le dernier acte de ce corps doit prévaloir sur le premier. D'un autre côté l'action du Congrès dans un tel cas n'est pas seulement législative, elle est surtout internationale; et ne peut-on pas soutenir que tant que les nations étrangères n'ont pas renoncé à la convention, les tribunaux Américains doivent respecter le traité nonobstant l'ordre contraire du Congrès? Quoi qu'il en soit, il n'en est pas ainsi des traités de la Grande Bretagne; ils peuvent généralement être consentis sans le concours des Chambres; et même à propos des traités qui doivent être ratifiés par le Parlement, ne peut-on pas dire que, dès lors qu'il

est admis que la législature coloniale doit se courber devant les conventions internationales de l'Empire, parcequ'elles forment partie des lois Impériales tant qu'elles n'ont pas été éteintes ou modifiées par les pouvoirs contractants, il faut également admettre que le Parlement Britannique lui-même n'est pas plus puissant à cet égard que le Parlement du Canada, et que tous deux sont soumis à l'autorité des traités.

Qu'il nous soit permis, en terminant, d'observer qu'il est temps que la règle (si elle existe), que les lois de l'Etat priment ses contrats, disparaisse de son code national. Elle a son origine dans un état social qui n'existe plus: celui où chaque nation, pour cause d'éloignement et de plusieurs autres circonstances, regardait avec jalousie et méfiance l'action de ses voisins. Les relations commerciales du monde moderne ont effacé les distances et les préjugés nationaux; elles ont fait de l'univers, pour ainsi dire le séjour d'une seule et même société; et evidemment elles rendent les traités aussi nécessaires que les lois particulières de l'Etat. Il est donc hautement à désirer que la justice fasse place à l'égoisme des temps passés, et que les conventions internationales soient vues et appliquées avec ce respect qui entoure les lois spéciales de chaque peuple. L'intérêt public comme l'honneur national et le bonheur de l'humanité en général exigent que tel soit le dernier mot du droit international.

Enfin l'argument que, si les tribunaux peuvent maintenir les traités même à l'encontre des lois de l'Empire, le pouvoir judiciaire serait tout puissant et même au dessus de l'Empire, n'a plus sa raison d'être. Il n'y a pas plus de danger, ni d'anomalie, à investir la magistrature du droit de faire respecter les traités que de maintenir la constitution. Dans ce dernier cas comme dans le premier, le tribunal est juge souverain et en dernier ressort. Les deux matières nous semblent reposer sur un même piédestal, la parole nationale, l'une donnée par le Souverain, l'autre par le Parlement, avec cette remarquable différence que les traités appartiennent à un ordre de choses plus élevé que celui d'aucune législation particulière, et que partant ils commandent plus d'autorité et d'obéissance. Le salut public demande impérieusement qu'il en soit ainsi, et le salut du peuple est la loi suprême. *Salus populi suprema lex.*

Comme nous l'avons annoncé, nous n'avons pas la prétention de trancher cette question delicate, mais seulement de la soumettre à l'examen des esprits philosophes de la profession.

(A continuer.) D. GIROUARD.

THE FREE NAVIGATION OF THE RIVER ST. LAWRENCE BY THE CITIZENS OF THE UNITED STATES.

The consolidation of the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, into the Dominion of Canada, has opened a wide field for the exercise of statesmanship to the leaders of the Canadian people. Dependent but in name, Canadians are now free to shape the destinies of their country.

With increased powers have arisen new responsibilities. The Dominion must now bear a full share of the burthens of the realm in lieu of the trifling weights laid on the infant Provinces by the Mother Country. Conflicting rights require adjustment, national and religious prejudices claim treatment, and international difficulties demand settlement. To restore friendly commercial relations with our neighbours, but lately sources of prosperity; to subdue the jealousy of race, the bane of the Province of Canada; to extinguish the embers of religious feud, now threatening to burst into flame; to arrange the Fishery, the St. Lawrence, and the Fenian difficulties, all pregnant with war, if not settled at once and for ever,—are some of the tasks of the Ministry of the day. Verily, the bark of State requires skilful handling by its pilots to avoid the reefs and shoals lying in its course.

With a population of but four millions, Canada is bounded to the south by the United States, inhabited by nearly forty millions of people. The absorption of Mexico and the Dominion into the Union is favoured by many American statesmen; the Continent of North America, with the adjacent islands, forming one vast Republic, is the dream of United States politicians. The instability of parties, the corruption pervading the body politic, and the power of the mob, all combine to make the policy of the United States uncertain and dangerous to their neighbours. No expedient to divert the minds of their people from the strife of party, would be so popular as a foreign war, undertaken for the acquisition of territory on this continent; each individual would think that in the national losses he would secure a fortune, and would smother his patriotism in his selfishness.

For many years past the United States Government has nursed

grievances against their neighbours—it is of more importance that the Alabama claims should never be settled than that by a money payment far exceeding the actual losses, the grievance should be abated. The Fishery, the St. Lawrence, and the Fenian questions, are all open sores, irritating to Canada and Great Britain, which, when the opportunity is favourable, may furnish pretexts for a declaration of war.

It is the object of this paper to investigate the claim so persistently brought forward by the United States to the right of free navigation of the River St. Lawrence, to determine its validity, and to suggest, if possible, a mode in which it can be quieted for ever.

President ~~Lincoln~~ Grant, in his Message to Congress, delivered on the 5th Nov. 1870, thus drew the attention of his countrymen to the subject:

THE NAVIGATION OF THE ST. LAWRENCE.

A like unfriendly disposition has been manifested on the part of Canada in the maintenance of a claim of right to exclude the citizens of the United States from the navigation of the St. Lawrence. This river constitutes a natural outlet to the ocean for eight States with an aggregate population of about 17,600,000 inhabitants, and with an aggregate tonnage of 661,367 tons upon the waters which discharge into it. The foreign commerce of our ports on these waters is open to British competition, and the major part of it is done in British bottoms. If the American steamer be excluded from this natural avenue to the ocean, the monopoly of the direct commerce of the Lake ports with the Atlantic would be in foreign hands, their vessels on transatlantic voyages having an access to our lake ports which would be denied to American vessels on similar voyages. To state such a proposition is to refute its justice. During the administration of Mr. John Quincy Adams, Mr. Clay unquestionably demonstrated the natural right of the citizens of the United States to the navigation of this river, claiming that the act of the Congress of Vienna in opening the Rhine and other rivers to all nations showed the judgment of European jurists and statesmen that the inhabitants of a country through which a navigable river passed have a natural right to enjoy the navigation thereof as far as the sea, even though passing through the territory of another power. This right does not exclude the co-equal right of the sovereign possessing the territory through which the river debouches into the sea to make such regulations relative to the policy of the navigation as may be reasonably necessary, but these regulations should be framed in a liberal spirit of comity, and should not impose needless burdens upon the commerce which has the right of transit. It has been found in practice more advan-

tageous to arrange these regulations by mutual agreement. The United States are ready to make any reasonable arrangement as to the police of the St. Lawrence which may be suggested by Great Britain. If the claim made by Mr. Clay was just when the population of the States bordering on the shores of the lakes was only 3,400,000, it now derives greater force and equity from the increased population, wealth, production, and tonnage of the States on the Canadian frontier. Mr. Clay advances his argument on behalf of our right, the principles for which he contended have been frequently and by various nations recognized by law, or by treaty has been extended to several other great rivers. By the treaty concluded at Mayence in 1831, the Rhine was declared free from the point where it is first navigable into the sea. By the convention between Spain and Portugal, concluded in 1835, the navigation of the Douro, throughout its whole extent, was made free for the subjects of both countries. In 1853, the Argentine Confederation, by treaty threw open the free navigation of the Paran and Uruguay rivers to the merchant vessels of all nations. In 1856, the Crimea war was closed by a treaty which provided for the free navigation of the Danube. In 1858, Bolivia, by treaty, declared that it regarded the Rivers Amazon and La Plata, in accordance with the fixed principles of national law, as highways or channels opened by nature for the commerce of all nations. In 1859 the Paraguay was made free by treaty, and in December, 1866, the Emperor of Brazil, by Imperial decree, declared the Amazon to be open to the frontier of Brazil to the merchant ships of all nations. The greatest living British authority on this subject, while asserting the abstract right of the British claim, says it seems difficult to deny that Great Britain may ground her refusal upon strict law; but it is equally difficult to deny, first, that so doing she exercises a law harsh in the extreme. Secondly, that her conduct with respect to the navigation of the St. Lawrence is in glaring and discreditable inconsistency with her conduct with respect to the navigation of the Mississippi on the ground that she possessed a small domain in which the Mississippi took its rise. She insisted on the right to navigate the entire volume of its waters, on the ground that she possessed both banks of the St. Lawrence, where it disembogues itself into the sea. She denies to the United States the right of navigation, though about one-half of the waters of Lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan, through which the river flows, are the property of the United States. The whole nation is interested in securing cheap transportation from the agricultural states of the west to the Atlantic seaboard to the citizens of those States. It secures a greater return for their labour to the inhabitants of the seaboard. It offers cheaper food to the nation, an increase in the annual surplus of wealth. It is hoped that the Government of Great Britain will see the justice of abandoning the narrow and inconsistent claim to which the Canadian Provinces have urged their adherence.

Wheaton in his "Elements of International Law," gives a statement of the controversy on the subject in the following words:

"The claim of the people of the United States of a right to "navigate the St. Lawrence to and from the sea, was, in 1826, "the subject of discussion between the American and British "governments.

"On the part of the United States Government, this right is "rested on the same grounds of natural right and obvious neces- "sity which had formerly been urged in respect to the river "Mississippi. The dispute between different European powers "respecting the navigation of the Scheldt, in 1784, was also re- "ferred to in the correspondence on this subject; and the case "of that river was distinguished from that of the St. Lawrence "by its peculiar circumstances. Among others, it is known to "have been alleged by the Dutch, that the whole course of the "two branches of this river which passes within the dominions of "Holland, was entirely artificial; that it owed its existence to "the skill and labour of Dutchmen; that its banks had been "erected and maintained by them at a great expense.

"Hence, probably, the motive for that stipulation in the treaty "of Westphalia, that the lower Scheldt, with the canals of Sas "and Swien, and other mouths of the sea adjoining them, should "be kept closed on the side belonging to Holland. But the case "of the St. Lawrence was totally different, and the principles on "which its free navigation was maintained by the United States "had recently received an unequivocal confirmation in the solemn "act of the principal States of Europe.

"In the treaties concluded at the Congress of Vienna, it had "been stipulated that the navigation of the Rhine, the Neckar, "the Mayn, the Moselle, the Maese, and the Scheldt, should be "free to all nations. These stipulations, to which Great Britain "was a a party, might be considered as an indication of the pre "sent judgment of Europe upon the general question.

"The importance of the present claim might be estimated by "the fact that the inhabitants of at least eight States of the "American Union, besides the territory of Michigan, had an "immediate interest in it, besides the prospective interests of "other parts connected with this river, and the inland seas "through which it communicates with the ocean. The right of "this great and growing population to the use of this its only "natural outlet to the ocean, was supported by the same prin-

"ciples and authorities which had been urged by Mr. Jefferson "in the negotiation with Spain respecting the navigation of the "river Mississippi. The present claim was also fortified by the "consideration that this navigation was, before the war of the "American Revolution, the common property of all the British "subjects inhabiting this continent, having been acquired from "France by the united exertions of the Mother Country and the "Colonies in the war of 1756. The claim of the United States "to the free navigation of the St. Lawrence was of the same "nature with with that of Great Britain to the navigation of the "Mississippi, as recognized by the 7th article of the Treaty of "Paris 1763, when the mouth and lower shores of that river "were held by another power. The claim, whilst necessary to "the United States, was not injurious to Great Britain, nor "could it violate any of her just rights.

"On the part of the British Government, the claim was con- "sidered as involving the question whether a perfect right to the "free navigation of the River St. Lawrence could be maintained "according to the principles and practice of the law of nations.

"The liberty of passage to be enjoyed by any one nation "through the dominions of another, was treated by the most "eminent writers on public law, as a qualified occasional excep- "tion to the paramount rights of property.

"They made no distinction between the right of passage by a "river, flowing from the possessions of one nation through those "of another, to the ocean, and the same right to be enjoyed by "means of any highway, whether of land or water, generally "accessible to the inhabitants of the earth. The right of passage "then, must hold good for other purposes besides those of trade, "—for objects of war as well as for objects of peace,— for all "nations, not less than for any nation in particular,—and be "attached to artificial as well as to natural highways. The prin- "ciple could not therefore be insisted on by the American govern- "ment unless it was prepared to apply the same principle by "reciprocity, in favour of British subjects, to the navigation of "the Mississippi and the Hudson, access to which from Canada "might be obtained by a few miles of land carriage, or by the "artificial communications created by the canals of New York "and Ohio. Hence the necessity which has been felt by the "writers on public law, of controlling the operation of a principle "so extensive and dangerous, by restricting the right of transit

"to purposes of *innocent* utility, to be exclusively determined by "the local sovereign. Hence the right in question is termed by "them an *imperfect* right.

"But there was nothing in these writers, or in the stipulations "of the treaties of Vienna, respecting the navigation of the great "rivers of Germany, to countenance the American doctrine of an "absolute natural right. These stipulations were the result of "mutual consent, founded on considerations of mutual interest, "growing out of the relative situation of the different States con- "cerned in this navigation. The same observation would apply "to the various conventional regulations which had been, at "different periods, applied to the navigation of the river Missis- "sippi. As to any supposed right received from the simultaneous "acquisition of the St. Lawrence by the British American people, "it could not be allowed to have survived the treaty of 1783, by "which the independence of the United States was acknowledged, "and a partition of the British dominions in North America was "made between the new government and that of another country.

"To this argument it was replied, on the part of the United "States, that if the St. Lawrence were regarded as a *strait*, con- "necting navigable seas, as it ought properly to be, there would "be less controversy. The principle on which the right to navi- "gate straits depends, is, that they are accessorial to those seas "which they unite, and the right of navigating which is not ex- "clusive, but common to all nations; the right to navigate the "seas drawing after it—that of passing the straits.

"The United States and Great Britain have between them "the exclusive right of navigating the lakes. The St. Lawrence "connects them with the ocean. The right to navigate both "(the lakes and the ocean), includes that of passing from one to "the other through the natural link.

"Was it then reasonable or just that one of the two co-proprie- "tors of the lakes should altogether exclude his associate from "the use of a common bounty of nature, necessary to the full "enjoyment of them?

"The distinction between the right of passage claimed by one "nation through the territories of another, on land, and that on "navigable water, though not always clearly marked by the "writers on public law, has a manifest existence in the nature of "things.

"In the former case, the passage can hardly ever take place,

"especially if it be of numerous bodies, without some detriment "or inconvenience to the State whose territory is traversed. But "in the case of a passage on water, no such injury is sustained. "The American government did not mean to contend for any "principle, the benefit of which, in analogous circumstances, it "would deny to Great Britain.

"If, therefore, in the further progress of discovery, a connec- "tion should be developed between the river Mississippi and "Upper Canada, similar to that which exists between the United "States and the St. Lawrence, the American government would "be always ready to apply, in respect to the Mississippi, the "same principles it contends for in respect to the St. Lawrence.

"But the case of rivers which rise and debouch altogether "within the limits of the same nation, ought not to be confounded "with those which, having their sources and navigable portions "of their streams in States above, finally discharge themselves "within the limits of other States below.

"In the former case, the question as to opening the navigation "to other nations, depended upon the same considerations which "might influence the regulation of other commercial intercourse "with foreign States, and was to be exclusively determined by "the local sovereign. But in respect to the latter, the free navi- "gation of the river was a natural right in the upper inhabitants, "of which they could not entirely be deprived by the arbitrary "caprice of the lower State. Nor was the fact of subjecting the "use of this right to treaty regulations, as was proposed at "Vienna to be done in respect to the navigation of the European "rivers, sufficient to prove that the origin of the right was con- "ventional and not natural. It often happened to be highly "convenient, if not sometimes indispensable, to avoid controver- "sies by prescribing certain rules for the enjoyment of a natural "right.

"The law of nature, though sufficiently intelligible in its great "outlines and general purposes, does not always reach every "minute detail which is called for by the complicated wants and "varieties of modern navigation and commerce. Hence the right "of navigating the ocean itself, in many instances, principally "incident to a state of war, is subjected, by innumerable treaties, "to various regulations. These regulations—the transactions of "Vienna, and other analogous stipulations—should be regarded "only as the spontaneous homage of man to the paramount

"Lawgiver of the universe, by delivering His great works from "the artificial shackles and selfish contrivances to which they "have been arbitrarily and unjustly subjected."

DESCRIPTION OF THE COURSE OF THE RIVER ST. LAWRENCE, AND OF THE ST. LAWRENCE AND WELLAND CANALS.

The St. Lawrence ceases to be the boundary between the United States and Canada at or near St. Regis, an Indian village situated about sixty miles above Montreal. To the west of that place the northern shores of the river, Lake Ontario and Lake Erie belong to Canada, the southern to the United States. From St. Regis eastward the territory on both sides of the river belongs to Canada. Between St. Regis and Montreal are the Cedars, Cascade and Lachine rapids, all navigable by vessels of small draft of water descending to the sea, but unnavigable by all vessels ascending. The Beauharnois and Lachine canals have been built on Canadian territory, enabling vessels going up the river to pass from Montreal to St. Regis. The Cornwall canal is also on Canadian territory, but the Longue Sault, which it enables vessels to pass, is above St. Regis, and consequently is owned on the south *ad filum aquæ* by the United States. Between lakes Erie and Ontario the river precipitates itself over the Falls of Niagara. On Canadian territory is the Welland canal, affording means of communication for schooners and propellers of moderate size, between those lakes.

AUTHORITIES ON THE QUESTION OF FREE NAVIGATION OF RIVERS.

By the Roman law rivers were public, that is to say, belonged to the particular people through whose territory they flowed, but could be used and enjoyed by all men: the use of their banks also was public.

"Riparum quoque usus publicus est juris gentium, sicut ip-"sius fluminis. Itaque navem ad eas adplicare, funes arboribus ibi "natis religare, onus aliquod in his reponere cuilibet liberum est "sicut per ipsum flumen navigare; sed proprietas earum illorum "est quorum prædiis hærent; qua de causa arbores quoque in "iisdem natæ eorumdem sunt."*

The doctrine in England, from a period anterior to the publication of Selden's "Mare Clausum," has been, not only that cer-

* Ins. lib. 2, tit. 1, § 4.

tain portions of the open sea can be reduced into the absolute possession of a nation, but that all straits and rivers running through its territory belong to the nation in absolute property. Writers upon international law term this right that of exclusive use, but at bottom the right claimed and exercised is not the less one of absolute property.*

Of late years the question of the free navigation of rivers flowing through conterminous States has frequently been considered, and many treaties have been made regulating such navigation, to which several of the States of Europe and America have become parties:

Treaty of Paris, 30th May 1814.
" " 30th March, 1856.
" " 1763.
" " 1783.

Art. 109 de l'acte finale du Congrès de Vienne du 9 juin 1815, concernant la navigation fluviale.

Acte de navigation du Danube, signé le 7 Nov. 1857, art. 1.

Treaty between Austria and the Duchies of Parma and Modena of the 3rd July, 1849.

Treaties of 12th and 13th October, 1851, of Rio Janeiro.

Treaty of 10th July, 1853, between General Urguiza and the representatives of France, Great Britain, and the United States.

Decret du 10 Oct. 1853, de la bande Oriental.

Treaty between Brazil and Peru of 23rd Oct. 1851.†

The rights of States holding territories on rivers, as the United States and Canada do on the St. Lawrence, are treated in the following manner by the text writers:

"En vertu de ce principe l'état pourra exercer une surveillance "et une police pour regler la navigation du fleuve; et pourra "pourvoir, par des règlements opportuns, à concilier l'interêt de "sa sureté avec le droit des autres nations de se servir du fleuve "comme d'un moyen de communication; mais il ne pourra pas "défendre positivement aux autres natious la navigation sur ce "fleuve."‡

"Si le fleuve par court ou baigne plusieurs territoires, les

* See 1 Twiss p. 109.

† See Carathéodary "Du Droit International concernant les Grands Cours d'Eau," pp. 112—151.

‡ 1 Fiore Nouveau Droit International, p. 357.

"États riverains se trouvent dans une communion naturelle à "l'égard de la proprieté et de l'usage des eaux, sauf la souveraineté "de chaque État sur tout l'entendue du fleuve, depuis l'endroit "où il atteint le territoire jusqu'au point où il le quitte. Aucun "de ces États ne pourra donc porter atteinte aux droits des "autres; chacun doit même contribuer à la conservation du "cours d'eau dans les limites de sa souveraineté et le faire par- "venir à son voisin. De l'autre part chacun d'eux, de même "que le propriétaire unique d'un fleuve, pourrait '*stricto jure*' "affecter les eaux à ses propres usages et à ceux de ses regni "coles, et en exclure les autres."*

Wheaton thus expresses himself of what is called "the right of innocent use:"

"Things of which the use is inexhaustible, such as the sea and "running water, cannot be so appropriated as to exclude others "from using those elements in any manner which does not occa- "sion a loss or inconvenience to the proprietor. This is what is "called an innocent use. Thus we have seen that the jurisdic- "tion possessed by one nation over sounds, straits, and other "arms of the sea, leading through its own territory to that of "another, or to other seas common to all nations, does not ex- "clude others from the right of innocent passage through these "communications. The same principle is applicable to rivers "flowing from one State through the territory of another into "the sea, or into the territory of a third State. The right of "navigating for commercial purposes a river which flows through "the territory of different States, is common to all the nations "inhabiting the different parts of the banks; but this right of "innocent passage being what the text writers call an *imperfect* "right, its exercise is necessarily modified by the safety and con- "venience of the State affected by it, and can only be effectually "secured by mutual convention regulating the mode of its exer- "cise." †

APPLICATION OF AUTHORITIES TO QUESTION.

The publicists who favour the doctrine of free navigation of straits running through different States, found their opinions upon the principle, that such straits were made and intended by

* Heffter § 77, p. 155. See Kluber, § 76; Bluntschli, § 319, 322; 1 Ortolan Dip. de la Mer, p. 146; 1 Kent, pp. 35, 36; Wolsey, § 58.

† Laurence's Wheaton, ed. 1863, p. 346, § 12.

nature to serve as channels of communication between navigable seas the common property of all nations. The basis of the American claim to the free navigation of the St. Lawrence is, that nature intended that river as the channel of communication between the Atlantic Ocean, the common property of all peoples, and the great lakes, the joint property of Great Britain and the United States.

The right then of free navigation of the St. Lawrence depends upon the fact of that river being a natural channel of communication between the Atlantic Ocean and the great lakes. If it be not such natural channel, the American claim to its free navigation must be pronounced unfounded.

In order that a strait may be a channel of communication between seas, it must be navigable. If by nature it be not navigable, it cannot be a channel of communication between seas. Therefore no right can exist to navigate an unnavigable strait.

The first point then to be established as the basis of the American claim to the navigation of the St. Lawrence from St. Regis to the ocean, is the navigability of that river in all its course through Canadian territory.

It has already been shewn that at three places between St. Regis and Montreal, the St. Lawrence is unnavigable by ascending vessels, though navigable by those of a light draught of water descending. It cannot therefore be considered navigable in the full sense of the term, owing to the impossibility of its being used as a channel of communication from the Ocean to St. Regis. The right of the Americans then being measured by the natural facilities of its course for navigation, it may safely be laid down that they have a right to its navigation down to the Ocean, but have no right to navigate it from the Ocean to St. Regis.

Granting, then, the right of navigation from St. Regis to the Atlantic Ocean to the Americans, it remains to be seen whether it can be exercised independently of the Government of Canada.

From the authorities already cited, it is apparent that vessels passing through a navigable strait are subject to the sovereignty of the State to which the strait belongs. The right of passage exists in favour of the foreign vessel, the rights of jurisdiction and sovereignty of such State are unimpaired in every other particular. A State has the right of taking such precautions as may be neeessary for self-defence, and the preservation of its revenues and rights within its own territory. The right to search

neutral vessels on the high seas exists in favour of belligerents. The right to search all vessels coming into its maritime territory exists in favour of each State in the world, as well in peace as in war time. A State owning a strait has therefore at all times the right of search over passing vessels, and can take such precautions as may be necessary to insure that such passage be not productive of harm to itself. As a natural consequence of the principle, foreign vessels have but the right of innocent passage through such strait, and must submit to the regulations made by the State proprietor, to prevent their abusing the privilege accorded.

The pretension of the British Government in 1826 as to the right of passage through such strait being but an imperfect right, is incontestable.

The navigation downwards of the St. Lawrence would be of but little use to the inhabitants of the United States, if it were impossible for their vessels to make return voyages through the Gulf to the great lakes. The St. Lawrence presents insuperable obstacles to vessels, trying to ascend the channel between Montreal and St. Regis. The canals on Canadian territory alone enable vessels to take advantage of the navigable, and to avoid the unnavigable portions of the river, and thus make the upward passage to United States territory.

Without the right of navigating the canals, that of navigating the St. Lawrence would be almost worthless. As yet no direct claim of right to such canal navigation has been advanced by the United States; but in the claim so persistently pressed for many years is concealed in embryo that to the navigation of the canals, to be brought forth at the proper moment.

The foundation whereon reposes the American claim to the navigation of the St. Lawrence from St. Regis downwards is, that that river is the natural channel of communication for vessels from the great lakes to the Ocean, and that it is impossible to make use of such channel without navigating that portion of the river which flows through Canada. Thus the impossibility of passing over United States territory forms part of the corner-stone of the right of United States vessels to pass over Canadian territory, in making use of a bounty of nature.

But above St. Regis, Canadian and United States vessels have equal rights in the navigation of the river, each country owning one of the banks. There are no canals in United States territory, whilst on Canadian soil canals have been made by which vessels

can avoid the Longue Sault rapids and the unnavigable parts of the Niagara river, and thus pass with ease from St. Regis up the St. Lawrence to Lake Ontario, and thence through the Welland canal to Lake Erie.

The first objection to the claim to navigate the canals is, that the basis on which rests the American right to navigate the St. Lawrence, viz: that that river is a natural channel of communication between the great lakes and the sea, does not support a right to navigate artificial canals. It may be urged that they are accessional to the navigation of the river, that having been erected by the government with the intention of thereby overcoming the difficulties of navigation, they are dedicated to the public use of all entitled to exercise the right of navigating the St. Lawrence, that the Americans have the same rights of navigation of the St. Lawrence as British subjects and consequently they have the same rights in the Canadian canals. On the other hand it may be urged that the Canadian canals are built on Canadian soil, over which the Americans never possessed any rights, that being superstructures on land, they are owned by the proprietors of the land on which they are built, that having been erected by Canadian labour and capital, they follow the natural order of things and belong to those who built them, that the facts of their having been erected by the State and destined to public use do not give any right to foreign nations freely to navigate them, as in such case the use contemplated was merely that by British subjects, that canals do not necessarily, any more than railroads, by the law of nature, form portions of the public property of the State within which they are built, and that consequently when they are private property no foreign state can possess even a right of servitude upon them, and that to canals generally, the principle of the Roman law which submitted its banks to the use of vessels navigating the river, never has been and cannot now be extended.

If the claim to navigate the canals of Canada be admitted, on the same principle the Erie and the Whitehall canals should also be thrown open to Canadian vessels.

But the impossibility, which may be urged so far as the Cedars, Cascades and Lachine Rapids are concerned, of the United States making canals on their own territory by which those rapids may be avoided, cannot be pleaded in favour of the claim to the navigation of the Cornwall and Welland Canals.

The south banks of the St. Lawrence and the Niagara belonging to the United States, canals might be built thereon, affording to American citizens the same facilities now presented by the Cornwall and Welland Canals to British subjects. If then canals are not in existence on those banks, the United States cannot turn their want of enterprise to advantage by claiming a portion of the benefits secured to British subjects by the enterprise and expenditure of the Canadian government, and insist upon a right to navigate the Welland and Cornwall Canals.

A great deal of ridicule was wasted upon the President's desire, as it was said, to navigate the Falls of Niagara, but it is perfectly clear that the claim advanced was merely to the navigation of the St. Lawrence between St. Regis and the sea.

The President endeavors to fortify his position by referring to the treaties regulating the navigation of the Rhine, Danube, and other rivers in Europe and America. Such treaties he pretends shews the judgment of jurists and statesmen on the subject; so far as regards the *expediency* of throwing open the rivers in question to navigation he is correct in his pretensions, but with regard to the rights of other nations to navigate a river or part of a river, exclusively the property of one State, he is wrong. Principles of International Law are not created by treaties. That Law in its entirety was in existence ere men had banded into tribes; it has ever been and shall ever be immutable. Man sees but dimly in this world and has discovered but few of its principles, whereof still fewer are universally admitted, but as well deny that the laws of gravitation had existence before Newton as affirm that God, ere nations were known, had not framed a perfect code of laws for their government.

But the treaties referred to have really no bearing on the pretensions advanced: 1st. because none of them apply to a river similar in its nature to the St. Lawrence; 2nd. because they all apply to rivers, but from the points where they first become navigable to the sea.

CONCLUSION.

Having thus considered in its legal aspect the claim of the United States to the free navigation of the St. Lawrence, and the objections of the British and Canadian governments to its entertainment, it but remains to consider the manner in which the pretensions of the parties may be reconciled and the question set at rest.

It would seem to be clear that the United States admit that the right of navigation claimed is but an imperfect right, and that

the governments of Great Britain and Canada partake of that opinion. The President in his Message expresses the willingness of the people of the United States to agree to any fair terms for the enjoyment of the right of navigation. Putting aside the question of reciprocity, which, if granted, would remove not only this question but that of the Fisheries from discussion, it would seem that other terms might be agreed upon satisfactory to the Canadian and American peoples.

In order to render the St. Lawrence available as a channel of communication to and from the Great Lakes for the commerce of the West, the canals constructed by the Canadians must be very much enlarged, entailing an expense of many millions of dollars. It would be unfair in the highest degree that Canada should be compelled to pay the expense of such enlargement, as the people of the United States would benefit thereby in far greater proportion than Canadians. Moreover, the original cost of the canals as they now exist was defrayed by Canada. The whole work, when completed, will be for the interest of the great States bordering on the lakes and Canada, and the cost of the whole should be divided between the United States and Canada in proportion to the populations respectively of the lake-bordering States and the Dominion.

Such an arrangement would be extremely beneficial to Canada. The enlargement of the canals and tho throwing open of the St. Lawrence to foreign trade would increase immensely tne commerce of the Dominion. The St. Lawrence would become the highway over which would pass the harvests of the West, to Europe and the sea board States, and the manufactures of the East to the great West.

As it is, Canada is not benefited by the exclusion of American vessels from the navigation of the St. Lawrence. The refusal to allow such passage is, it must be admitted, unneighborly and very like that of the dog renowned in fable. If the United States are blind to the advantages of reciprocity, let Canada secure the benefits which must inevitably flow from the improvement and enlargement of the Dominion canals. If the United States are willing to contribute their fair share of the cost of construction there is no reason why Canada should not possess the finest and most important canals in the world. Thereby both countries would be benefited to an immense extent, and the troublesome St. Lawrence Question set at rest for ever.

WILLIAM H. KERR.

THE JOINT HIGH COMMISSION.

The sitting of this Commission, intrusted with the delicate task of settling the great conflicts of international law, which have so deeply agitated public opinion, not only in the British Empire and in the neighbouring Republic but throughout the civilized world, is an event important, indeed, but not surprising, in the history of our century. In this essentially commercial age, the desire, nay, the determination of nations is, to avoid war, and to have recourse to peaceful means of adjusting their disputes. At the hour when a war, fierce beyond any which the human race has ever witnessed, was ravaging with wildest fury one of the mightiest empires of the earth, the nineteenth century alone could produce the Conference of London and the Joint High Commission at Washington.

This Commission possesses a more than ordinary interest for the people of Canada. At the very moment of writing these lines, the question of our Fisheries may have received a solution by their partial surrender. It is therefore of the highest importance to Canadians to know what will be the legal effect of such a decision.

If we are to believe the Imperial Blue Books, Her Majesty has given to her Commissioners, or to any three of them, full power to decide, jointly with an equal number of the American Commissioners, and "to sign for us and in our name everything so "agreed upon and concluded, and to do and transact all such "matters as may appertain to the finishing of the aforesaid work "*in as ample manner and form and with equal force and efficacy* "AS WE OURSELVES COULD DO IF PERSONALLY PRESENT: "*engaging and promising upon our Royal word, that whatever* "*things shall be transacted and concluded by Our said High* "*Commissioners, Procurators and Plenipotentiaries, shall be* "*agreed to, acknowledged and accepted by us in the fullest* "*manner, and that we will never suffer, either in whole or in* "*part, any person whatever to infringe the same, or act contrary* "*thereto*, AS FAR AS IT LIES IN OUR POWER."

A contemporary, well informed in official circles, on publishing the text of the Commission, made the following remark: "It

"has been understood that no decision arrived at even by a ma-
"jority would be binding until it had received the sanction of
"Parliament. The Commission, however, makes the finding of
"the Joint Commission absolutely final."

The text of the Commission does not justify such an inference. It only grants the powers belonging to the Crown; consequently the powers of the Commissioners are and must be confined to transacting "*as We Ourselves could do if personally present;*" and Her Majesty engages to ratify the same "*as far as it lies in Our power.*"

The Crown has not the right to treat upon every matter which concerns the Empire. In general the Sovereign has sole right to make and ratify treaties; but there are exceptional cases, in which ratification by Parliament is indispensably necessary. The cession of any part of the Canadian fisheries within three miles of the shore, is one of these cases; for these fisheries constitute an integral part of British territory, and no part of that territory can be surrendered in time of peace without the consent of Parliament.

The principle that the fisheries within three miles of the coast belong to the riverain State, is one which is too well established to be seriously called in question; and if any of our readers entertain the slightest doubt upon the point, we refer him to the numerous authorities cited by our esteemed friend Mr. Kerr, in his article on the Fishery Question.*

The only question, then, to be disposed of is: Can the Crown in time of peace cede to a foreign State any portion of British territory without the sanction of Parliament? The negative is ably maintained by Forsyth in his *Cases and Opinions on Constitutional Law*, pp. 182–187 (ed. 1869); and we deem it sufficient to quote his learned observations in full, feeling assured that under the present circumstances they will be read with deep interest.

"Has the Crown the power by its prerogative to cede British
"territory to a foreign power, except under a treaty of peace?
"No doubt ministers who improperly advise such a cession may
"be impeached, but impeachment is punishment, and cannot in-
"validate the grant. If it is part of the prerogative of the Crown
"to cede territory by a simple grant, without any reference to

* Supra, pp. 38—63.

"treaty, then a foreign power has the right *jure gentium* to hold "the ceded territory, however improperly it may have been "granted. A treaty concluded with a foreign State by the "President of the United States alone, without the consent of "the Senate, would not, according to the Constitution, be binding "on the nation, and the foreign State would derive no rights "under it; and, in like manner, it may be contended that a "foreign State derives no title to British territory ceded by the "Crown as a free gift in time of peace, without reference to "treaty.

"There is no doubt that it is part of the prerogative of the Crown "to make treaties with foreign powers; and Blackstone lays down "the law correctly when he says that in doing so, 'whatever con-"tracts he (the Sovereign) engages in, no other power in the king-"dom can legally delay, resist or annul.' Wheaton indeed, says "(Internat. Law, s. 542), that in Great Britain the treaty power "is 'practically limited by the general controlling authority of "Parliament, whose approbation is necessary to carry into effect "a treaty by which the existing territorial arrangemente of the "empire are altered.' But in the case of treaties of peace fol-"lowing a state of war, there is no doubt that the consent of "Parliament is *not* necessary to enable the Crown to alienate part "of British territory to a foreign contracting power. Kent, in "his Commentaries (vol. 1, p. 175, 10th ed.), says that 'the "power competent to bind the nation by treaty may alienate the "public domain and property by treaty.' The reason of this is, "that if the nation has conferred upon its supreme executive with-"out reserve the right of making treaties, the alienation is valid, "because made by the reputed will of the nation.

"In *Conway v. Gray*, 10 East. 536, the Court said: 'In all "'questions arising between the subjects of different states, each "'is a party to the public authoritative acts of his own Govern-"'ment; and, on that account, a foreign subject is as much in-"'capacitated from making the consequences of an act of his own "'state the foundation of a claim to indemnity upon a British "'subject in a British court of justice, as he would be if such "'act had been done immediately and individually by such for-"'eign subject himself.' But the authority of this case was "shaken by *Flindt v. Scott* (in Error), 5 Taunt, 677, as ex-"plained by Thomson, C. B., in *Bazett v. Meyer*, Ibid. 829; and "it was overruled by *Aubert v. Gray* (in Error), 32 L. J. (Q.

"B.) 50, where the Court said: 'The assertion that the act of
"'the Government is the act of each subject of the Government
"'is never really true. In representative governments it may
"'have a partial semblance of truth, but in despotic govern-
"'ments it is without that semblance.'

"Whether the Crown has the power to alienate British terri-
"tory by treaty, not following the close of a war—as, for instance,
"by a commercial treaty—does, I confess, seem to me to be ex-
"tremely questionable. I should doubt much whether the Crown
"without the authority of Parliament, would have the *legal*
"*power* to cede, by treaty, the Channel Islands to France, there
"having been no war, and the cession not being made as part of
"the adjustment of a quarrel between the two countries. And
"to show how cautiously British statesmen have acted where there
"was a case of novelty with regard to the exercise of the preroga-
"tive of the Crown, even as regards peace and war, I may men-
"tion that when it was resolved, in 1782, to recognize the inde-
"pendence of the North American Colonies, an Act of Parlia-
"ment (22 Geo. 3, c. 46) was passed, authorizing the Crown to
"make peace with the colonies, and to repeal and make void acts
"of Parliament relating to them. I may mention also, that
"although, by the Constitutional charter of 1830, the King of
"France had the power expressly given to him to make treaties
"of peace; the opinions of French jurists have been that he had
"not the power of alienating French territory.

"But where there is no treaty, the opinion of jurists seems to
"be strongly against the supposition of such a power residing in
"the sovereign, except ineeed in a purely despotic form of gov-
"ernment; see Grotius de Jure Belli et Pacis, lib. ii, c. 6, ss. 3,
"4, 7, 8; Puffendorf, lib. viii, c. 12; Vattel, lib. i, c. 20, s. 224;
"c. 21, s. 260; Liv. 4, c. 2, s. 11; Phillimore, part iii, c. 14,
"ss. 261, 262.

"In the debate in the House of Lords on the preliminary
"articles of peace, January, 1783, (Parl. Hist. vol. xxii, pp.
"430-1), Lord Loughborough said, with reference to the cession
"of East Florida to Spain, that no prerogative existed in the
"Crown to cede without the authority of Parliament any part of
"the dominions of the Crown in the possession of subjects under
"the allegiance and at the peace of the King. He was answered
"by Lord Thurlow, then Lord Chancellor, who said that if this
"doctrine were true, he should consider himself strangely ignor-

"ant of the Constitution of his country, for till the present day "of novelty and miracle, he had never heard that such a doctrine "existed. The learned Lord, Lord Loughborough, resorted to "the lucubrations and fancies of foreign writers, and gravely "referred their lordships to Swiss authors for an explanation of "the prerogative of the British Crown. He, Lord Thurlow, "for his own part, rejected all foreign books on the point before "them. However full of ingenuity or speculation Mr. Vattel "and Mr. Puffendorf might be on the law of nations, and other "points which neither were nor could be fixed by any solid and "permanent rule, he denied their authority, he exploded their "evidence, when they were brought to explain to him what was, "and what was not. the prerogative of the British Crown. But "we must remember that Great Britain had been at war with "Spain, and the cession of Florida was under a treaty of peace; "so that the declamatory rhetoric of Lord Thurlow proves "nothing for the point we are considering, which is whether by "a mere grant, not under a treaty of peace, the crown can by its "prerogative cede part of its dominions to a foreign power.

"If such a power resides in the British Crown, we may ask "for proofs of its existence by acts done. The only precedent I "know of (with the exception of the Orange River Territory, to "be noticed hereafter), is the sale of Dunkirk by Charles II, for "which Lord Clarendon was impeached, and which can hardly "be considered a constitutional precedent now. It would be easy "to show that the Crown before the Revolution claimed to exer- "cise, and did in fact exercise, prerogatives which were not con- "stitutional, and which, independently of prohibitory statutes, "would now be disallowed; for instance the claim of the Crown "to levy ship-money, the legality of which was, on the authority "of precedents, maintained by Attorney-General Noy, and up- "held by the judges, but which by the statute 16 Chas. I, c. 14, "was *declared* and enacted to be contrary to law. So the claim "of the Crown to suspend or dispense with penal statutes by a "*non obstante*, as to which Mr. Broom says, in his 'Constitu- "tional Law' p. 507: 'The current of authority serves to show "that the prerogative of dispensing by *non obstante* with acts of "Parliament was, subject to certain restrictions, recognized in "former times as vested in the Crown.' But by the Bill of "Rights, it was 'declared' that 'the pretended power of dispens- "ing with laws by regal authority is illegal.' So also the grants

"by the Crown of the right of exclusive trading, as in the case "of the East India Company and the Hudson's Bay Company. "In *East India Company v. Sandys*, 10 State Trials, 371, 554, "the grant of sole trading was held to be good; but it is difficult "to believe that, even independently of the Statute of Monopolies, "such a grant would be held to be good now.

"In a debate in the House of Commons, February, 1863, on "the question of the relinquishment by the British Crown of the "protectorate of the Ionian Islands, it was contended that they "were a possession of the British Crown, and Lord Palmerston "was asked whether it was competent, according to the Constitu- "tion, for the Crown to alienate them without the consent of "Parliament. His Lordship answered that the Republic of the "Seven Islands was, by the treaty of 1815, placed under the "protectorate of the British Crown, and not given as a possession "to the British Crown. He said that the distinction was 'manifest "'and radical,' and added: 'But with regard to cases of territory "'acquired by conquest during war, and not ceded by treaty, and "'which are not therefore British freehold, and all possessions "'that have been ceded by treaty and held as possessions of the "'British Crown, there is no question that the Crown may *make* "'*a treaty* alienating such possessions without the consent of the "'House of Commons.' He then instanced the cases of Senegal, "Minorca, Florida, and the island of Banca, 'all of them for a "'greater or less period of time possessions of the British Crown, "'and they were all ceded by treaty to some foreign power, "'therefore there cannot be a question as to the competency of "'the Crown to make such cessions.'* But all these were cases "of cession made by treaty of peace at the close of a war, as to "which there never was really any doubt that the Crown could "do so by virtue of its prerogative. They do not touch the "question of whether the Crown has the power where there has "been no war, and consequently no treaty of peace.

"It has, I believe, been supposed that a distinction exists be- "tween territory acquired by the Crown by conquest or cession "which has not been the subject of Parliamentary legislation, and "territory to which acts of Parliament have been applied, and it "has been thought that the Crown may, by its prerogative, cede "the former but not the latter to a foreign power.

* Hansard, Parl. Deb. vol. clxiix, p. 230–1.

"In 1853, a question arose as to the abandonment by the "Crown of its sovereignty over the Orange River Territory, which "had been assumed by proclamation of the Governor, and under "the public seal of the colony of the Cape of Good Hope, in "1848. By letters patent, under the great seal, dated March, "1851, Her Majesty ordained and appointed that the said terri- "tory should become and be constituted a distinct government to "be administered by the Governor of the Cape, and that it should "thenceforth be known by the name of the Orange River Terri- "tory. In 1854, the Duke of Newcastle, who was then Secretary "for the Colonies, wrote to Sir George Clerk, the Governor of "the Cape, and informed him that Her Majesty's Government "had come to the conclusion, that the abandonment of the Orange "River sovereignty could be legally and most conveniently effected "by an Order in Council and proclamation. The letters patent "of March, 1851, were accordingly revoked by other letters pa- "tent, and the Queen, by Order in Council, dated January 30, "1854, approved of a proclamation, whereby Her Majesty did "'declare and make known the abandonment and renunciation of "'our dominion and sovereignty over the said territory and the "'inhabitants thereof.'*

"There are two instances of cession (independently of treaty at "the conclusion of a war) by the East India Company to a foreign "State previously to the Indian mutiny:

"1. In 1817, a cession by *treaty*, 'in full sovereignty,' to the "Sikhimputtee Rajah of a part of territory formerly possessed by "the Rajah of Nepaul, but taken by the East India Company, "and ceded to them by a treaty of peace.

"2. In 1833, a cession by *treaty*, to Rajah Voorunder Singh, "of a portion of Assam, lying on the south of the Burrampooter "River, by which the Rajah bound himself, 'in the administra- "'tion of justice in the country now made over to him, to abstain "'from the practices of the former rajahs of Assam, as to cutting "'off ears and noses, extracting eyes, or otherwise mutilating or "'tormenting.'†

"This is not a very satisfactory precedent, and it shows the "kind of risks to which British subjects might be liable in being

* See Correspondence on the State of the Orange River Territory, Presented to Parliament, April 10, 1854.

† Treaties, Engagements and Sunnuds, vol. 1, p. 132.

"transferred to a semi-barbarous power. But I may add, that in "that case the Rajah agreed to pay a large annual tribute, so "that he became a sort of feudatory of the Company. Since the "mutiny there have been several instances of cession of territory "in India by grants, as rewards to native chiefs for fidelity to the "British government. And as to these it may be said that Indian "necessities are peculiar, and cannot be judged of by European "precedents. It is not, as generally with us, a foreign enemy, "but it is the hostility and disaffection of the native population, "a population enormously outnumbering the English, which may "produce dangers quite as imminent and urgent, during apparent "peace, as a foreign European war, and it may be urged that "European precedents cannot be strictly applied to a state of "things wholly different. It is right also to mention that boun-"dary treaties have been made by the Crown, without the autho-"rity of Parliament, and those treaties have in effect altered the "nationality of territory to a certain extent, as in the case of the "Washington Treaty in 1842, and the Oregon Treaty in 1846.

"If cessions of territory by mere grant are valid, what becomes "of the allegiance of the inhabitants? The rule of Roman law "is thus stated by Cicero: 'Jure enim nostro neque mutare "civitatem quisquam invitus potest, neque si velit, mutare non "potest, modo adsciscatur ab eâ civitate cujus esse se civitatis "velit:' *pro* Balbo, 11. It seem to be clear that the Crown can-"not by its prerogative alone release subjects from their allegiance "nor *e converso* deprive them of the rights of British subjects. "In the despatch of the Duke of Newcastle to which I have "already referred, his Grace said: 'with respect to the allegiance "of the inhabitants who may have been born in British domin-"ions either within or without the sovereignty, there is, I believe, "little doubt that no measure resting on the Queen's prerogative "only for its authority, could release them from the tie of such "native allegiance. An Act of Parliament would be required "for such a purpose. But, for the reasons already adverted to "in my despatch of November 14 last, I do not consider it neces-"sary to apply to Parliament on this ground. It is probable "that the inhabitants of the future commonwealth would gener-"ally prefer to retain the rights of British subjects rather than "become wholly aliens, and subject to the ordinary incapacity "of aliens within Her Majesty's dominions.' This part of the "subject, however, will be more fully considered in the chapter "on Allegiance."

Is not the fact that an Act of Parliament was necessary to give effect to the naturalization in the United States of emigrant British subjects, a proof that the Crown cannot cede any part of its territory without the sanction of Parliament? For it cannot be denied that a cession of territory includes in most instances a transfer of allegiance.

It would be a gross error to suppose that, in relation to the Crown, Canada stands on a different footing from the United Kingdom. "When the Crown," says Forsyth,* "has once granted a legislature to a conquered or ceded colony, it cannot afterwards exercise with respect to such colony its former power of legislation, *Campbell v. Hall*, Cowp. 204, 20 State Tr. 389 . . . . . After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom: Re Lord Bishop of Natal, 3 Moore, P. C. (N. S.) 148."

The Parliament whose sanction would be requisite to render valid a surrender of the Canadian Fisheries, in time of peace, is undoubtedly that of Canada—not indeed *stricto jure* but *proprio jure*, on grounds of justice and public policy—for those fisheries form part of the territory subject to its jurisdiction. "The jurisdiction of colonial legislatures," says Forsyth,† extends to three miles from the shore. In an opinion given by the law officers of the Crown, Sir J. Harding, Queen's Advocate, Sir A. E. Cockburn, Attorney-General, and Sir R. Bethell, Solicitor-General, with reference to British Guiana, February, 1855, they said: "We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond *its territorial limits—three miles from the shore.*"

It is reasonable and just that the Imperial Parliament should not exercise the power, which it may possess, of ratifying a cession of our fisheries. It is an acknowledged maxim of natural and of modern public law, that no person can be subjected to the action of a legislature in which he is not represented. The interference of the Imperial Parliament would not only be a violation of this natural and public law, but would be, moreover, an act of supreme contempt for the Legislature of Canada.

For many years the policy of England has been, not to make

* Constitutional Law, p. 16. † Ibid p. 24

any change in the status of a colony or to dispose of its territory in any way without the consent of the colonial legislature. The course pursued at the time of enacting the British North America Act, 1867, and that now pursued with respect to Newfoundland, Prince Edward's Island and British Columbia, are striking proofs of this policy.

It may therefore safely be laid down that the Crown has no more right to cede any part of the Canadian territory than to cede a part of the United Kingdom, without the consent of the Canadian Parliament, or at all events of the Imperial Parliament. A surrender, therefore, of any part of the Canadian fisheries, at least in time of peace, would require the sanction of one of these Legislatures.

D. GIROUARD.

MONTREAL, April 10th, 1871.

A NOS LÉGISLATEURS.

Le mode de procédure suivi dans nos cours criminelles pour prendre par écrit les temoignages est, à mon avis, très peu satisfisant. En supposant même le Juge impeccable, on n'a tout au plus que des notes, des tronçons du témoignage et non pas *verbatim* tout ce que le témoin a dit. Mais la supposition que le Juge ne commet pas d'erreurs en prenant ses notes, n'est-elle pas extrêmement gratuite et contraire à l'expérience? Ne faudrait-il pas supposer aussi qu'il cesse d'être homme et emprunte les attributs de la Divinité en devenant Juge? Il n'y a rien d'étonnant si ces notes contiennent des inexactitudes, des omissions, des erreurs, plus ou moins importantes. Le Juge est obligé de surveiller, de voir et d'entendre à la fois tout ce qui se passe pendant le procès, de prêter l'oreille à une objection que fait tout à coup l'un des avocats, de réprimer les interruptions d'un autre, de constater si les Jurés entendent le témoin, de critiquer, s'il y a lieu, la traduction que fait l'interprête, *etc. etc.*, et l'on veut qu'en sus de tant d'occupations différentes où son esprit et ses sens se trouvent engagés, il fasse de plus l'ouvrage d'un simple écrivain, et cela sans faire d'erreur! L'honorable Juge, malgré tous ses talents et toute sa science,—pour une raison ou pour une autre, soit par la faute du témoin qui ne parle pas assez fort, soit

par la faute des avocats ou de l'interprête qui occupent son attention,—saisira mal quelquefois une réponse importante, tout en croyant sincèrement qu'il a bien entendu; et cette note du témoignage prise incorrectement pourra avoir des conséquences désastreuses. Entr'autres erreurs de ce genre dont j'ai été témoin pendant ma courte expérience, je n'en mentionnerai qu'une faite par un de nos juges les plus éminents et les plus distingués en matières criminelles, mais c'était un erreur grave qui faisait une différence du tout au tout dans la cause; le Juge avait écrit "*he did say*," tandisque le témoin avait dit "*he did not say*." La petite mais extrêmement importante particule "*not*" avait échappé à l'attention généralement très scrupuleuse du Juge, et il était bien convaincu qu'il avait raison. Le Juge bien entendu fit sa charge au Juré conformément à sa note, et bien entendu aussi le Conseil de l'accusé réclama énergiquement, et ce ne fut qu'après beaucoup de difficultés et après un échange d'observations plus ou moins désagréables que le Juge consentit, après que le Juré se fût retiré, à faire revenir le témoin et à accepter une rectification dont dépendait le sort de l'accusé. Mais les Juges ne consentent pas toujours à faire revenir le témoin (et peut-être ont-ils raison de soupçonner quelquefois que le témoin bienveillant serait disposé à venir contredire ce qu'il a dit précédement); le verdict est rendu et le procès se termine en laissant dans l'esprit du plusieurs la conviction désagréable que le Juge dans sa charge au Juré n'a pas dit ou a dit le contraire de ce que le témoin avait déposé.

La système, que je suggère humblement, débarrasserait le Juge d'un travail manuel que la loi lui impose injustement, et ce système, bienqu'on ne puisse pas le considérer comme étant la perfection même, est suivant moi sujet à beaucoup moins d'inconvénients. Je l'ai vu pratiqué dans une des causes les plus célèbres qui se soient plaidées dans le pays voisin, et il ne laisse, ce me semble, rien à désirer: c'est d'employer pour faire le rapport légal des témoignages un sténographe habile et d'une intégrité reconnue, qui comme officier de la cour, serait sous serment, et qu'une rémunération libérale mettrait à l'abri de tout soupçon de corruption. Le sténographe, s'il connait bien son art et s'il veut faire son devoir, est une machine dont l'exactitude ne peut être mise en doute; toutes les paroles du témoin seront saisies et couchées par écrit, et on aura non seulement des notes, mais tout le témoignage dans le langage même du témoin mot-à mot. Cet

employé, n'ayant que cela à faire, ne serait pas sujet aux nombreuses causes de distraction qui sont pour le Juge, pour ainsi dire, inévitables; et celui ci aurait en même temps, comme Président de la Cour, plus de liberté et de loisir pour surveiller, guider et juger. Rien n'empêcherait le Juge de prendre notes des plus importantes parties du témoignage pour aider sa mémoire dans sa charge au Juré. Mais je voudrais que le rapport légal des témoignages fût fait par un employé spécialement nommé, assermenté et payé pour cela, et qu'on en référât à lui dans tous les cas d'objections ou de doute. Une objection survient tout à coup pendant le procès; on prétend que tel témoin a dit ou n'a pas dit telle ou telle chose; avec notre système actuel, de fâcheuses récriminations s'en suivent presque nécessairement entre le juge et l'avocat; le soupçon d'inexactitude blesse l'amour-propre du juge et le désavantage est naturellement du côté du malheureux avocat et de son pauvre client; le juge est maitre de la position; il peut d'un mot mettre fin à ladiscussion et passer outre. Mais avec le système que je propose tous ces inconvénients disparaissent; pour résoudre la difficulté le juge ordonne au sténographe de lire le témoignage ou la partie du témoignage en question, et tout est dit; l'exactitude de cette machine sténographique est telle qu'on ne va pas généralement plus loin; et si l'on pousse l'opiniâtreté jusqu'à demander le retour du témoin dans la boite, l'expérience démontre qu'il confirme presqu' invariablement l'exactitude textuelle du rapport que l'officier a fait de son témoignage.

Je soumets respecteusement à qui de droit l'opportunité des changements que je propose. Ce système n'est pas, comme on le sait, une invention de ma part; je l'ai vu fonctionner ailleurs très bien et à la satisfaction de tous. C'est un progrès que l'on n'aurait, j'en suis convaincu, aucune raison de regretter, s'il était adopté. Du reste, j'invite cordialement la discussion sur ce point.

E. RACICOT.

SWEETSBURGH, 7 février 1871.

JURISPRUDENCE COMPARÉE
DE LA
COUR D'APPEL.

I.—*Droit d'appel.*

L'article 1142 du Code de Procédure Civile dit: Il y a appel de tout jugement de la Cour de Circuit "lorsque la somme ou la valeur de la chose demandée est de cent piastres ou plus." Le statut ajoute que le droit d'appel se détermine par le montant demandé et non par celui accordé. 20 Vict. c. 44, s. 60.

1o. Il n'y a pas d'appel de tout jugement de la Cour de Circuit, quand le montant demandé excède £25.

Le droit d'appel se détermine par le montant accordé et non par celui demandé.

Per Duval, Caron, Badgley et Monk.

Bellerose et Hart, 8 juin 1869. 1 Revue Légale, 157.

1o. Il y a appel de tout jugement de la Cour de Circuit, quand le montant demandé excède £25.

Le droit d'appel se détermine par le montant demandé et non par celui accordé.

Per Duval, Caron, Drummond, Badgley et Monk.

Gutman et La Compagnie du Grand Tronc, 1 déc. 1870.

L'article 1115 dit: "Il y a appel au même tribunal de tout jugement final rendu par la Cour Supérieure."

2o. Sur l'appel d'un jugement final de la Cour Supérieure condamnant le défendeur à payer $30, jugement fut rendu le 8 septembre 1870, à l'unanimité des juges, dans le sens de *Bellerose et Hart;* mais il fut retiré deux jours après avoir été prononcé; et au terme suivant, la Cour (Duval, J. C. disssident) rendit un jugement contraire au premier et décida qu'il y a appel de tout jugement final de la Cour Supérieure.

McCarthy et Lafond, décembre 1870.

2o. Il n'y a pas d'appel d'un jugement final de la Cour Supérieure, de la part d'une partie qui se plaint seulement qu'on lui a refusé des frais, quel que soit le montant de ceux-ci. L'appel interjeté en ce cas sera renvoyé, même si la partie adverse ne le demande pas.

Per Duval, Caron, Badgley et Drummond.

Fillion et Le Séminaire de Québec, "Q" 19 septembre 1868.

3o. Il y a appel d'un jugement rendu en Chambre sur une demande de sequestre, le juge pouvant la recevoir comme la cour, suivant l'article 876.

Per Duval, Caron, Drummond, Badgley et Monk.

Dambourgès et Morison, 10 juin 1869.

3o. Il n'y a pas appel d'un jugement rendu par un juge en Chambre, même sur une demande de sequestre; cet appel n'a lieu que des jugements de la cour.

Per Duval, Caron, Drummond, Badgley et Monk.

Blanchard et Miller, 10 mars 1871.

L'article 1178, par. 3, dit: "Il y a appel à Sa Majesté en Son Conseil Privé de tout jugement final rendu par la Cour du Banc de la Reine, en appel, dans toute cause où la matière en litige (in dispute) excède la somme ou valeur de £500 stg."

Jugé par le Conseil Privé:

1o. Que pour déterminer la valeur de la matière en litige, il faut considérer le montant du jugement aussi bien que celui de l'action.

2o. Que pour déterminer la valeur de la matière en litige, il faut considérer les intérêts accrus depuis le jour de l'institution de l'action.

Kilborn et Boswell, 7 L. C. Jur. 150; 13 Moore P. C. 477.

4o. Pour juger de la valeur de la matière en litige, il ne faut pas avoir égard au montant réclamé par l'action, mais à celui accordé par le jugement.

Duval, Caron, Drummond, Badgley et Monk.

Burland et Larocque 4 septembre 1869.

4o. Pour déterminer s'il y a appel au Conseil Privé il faut uniquement considérer le capital demandé. Il ne faut pas considérer, dans la computation des £500, les intérêts accrus depuis la jour de l'institution de l'action.

Duval, Caron, Drummond, Badgley et Monk.

Wilson et Demers, "Q,"* 18 septembre 1870.

Voyer et Richer, "Q," 18 septembre 1870.

Mêmes juges, Mr. le juge Monk ne siégeant pas.

* Tout décision indiquée "Q" a été prononcée à Québec, et toute autre non ainsi indiquée a été rendue à Montréal.

Permission d'appeler ayant depuis été demandée directement à Sa Majesté en Son Conseil Privé, l'appel fut accordé sur le seul principe qu'il faut considérer les intérêts accrus depuis le jour de l'action aussi bien que le capital.

Voyer et Richer P. C. 8 février 1871.

II.—*Cautionnement en appel.*

5o. Le cautionnement, dans les appels de la Cour de Circuit, doit, à peine de nullité, mentionner une somme déterminée pour laquelle les cautions se sont rendues responsables.

Per Duval, Drummond et Badgley. Caron, diss.

La Fabrique de Ste. Julie et Pâquet, "Q," 20 juin 1868.

6o. On doit y annexer les affidavits par lesquels des cautions ont justifié de leur solvabilité; sinon, le cautionnement sera rejeté, même si l'Intimé n'a pas invoqué cette cause de nullité.

Même cause.

5o. Il n'est pas nécessaire que le cautionnement, dans les appels de la Cour de Circuit, mentionne une somme déterminée pour laquelle les cautions se sont rendues responsables.

Per Duval, Caron, Badgley, Monk et Mackay.

La Fabrique de Ste. Julie et Pâquet, "Q," 14 déc. 1868.

6o. Les affidavits de justification des cautions n'ont pas besoin d'être annexés au cautionnement.

Per Duval, Caron, Drummond, Badgley et Monk.

Gingras et Veer, "Q." 20 septembre 1868.

III.—*Certificat de la transmission du transcript.*

L'article 1181 de notre Code de Procédure Civile dit: "L'exécution du jugement de la Cour du Banc de la Reine ne peut non plus être arrêtée ou suspendue après six mois à compter du jour auquel l'appel est accordé, à moins que l'appelant ne produise au greffe des appels, un certificat du greffier du Conseil Privé de Sa Majesté, ou de tout autre officier compétent, constatant que l'appel y a été logé dans ce délai et que des procédures ont été adoptées sur cet appel."

7o. "Considérant que les *appellants* n'ont point produit "au greffe des appels, dans le "délai de six mois à compter "du jour auquel un appel à Sa "Majesté en Son Conseil Privé "leur a été accordé, savoir à

7o. *La partie* qui interjette appel au Conseil Privé doit bien transmettre le dossier dans les six mois qui suivent le jour où elle a obtenu la permission d'interjeter appel, mais elle n'est pas obligée de produire dans ce dé-

"compter du neuvième jour de "décembre dernier, un certificat "du Greffier du Conseil Privé "de Sa Majesté, ou de tout "autre officier compétent, cons- "tatant que l'appel y a été "logé dans ce délai, et que des "procédures ont été adoptées "sur le dit appel, etc."

Per Duval, Caron et Drummond. Badgley, diss.

Morrison et Dambourgès, 10 juin 1869.

lai à la Cour d'appel un certificat constatant la transmission.

Per Duval, Aylwin, Caron, Drummond et Badgley.

Evanturel et Evanturel, 20 décembre 1867.

"Vu enfin que rien n'oblige "les appellants à établir par "certificat ou autrement que "le dossier est parvenu à sa "destination en temps opportun "et y a été légalement déposé "et admis, etc."

Caron, Drummond, Badgley et Monk.

Morrison et Dambourgès, 9 décembre 1869.

IV.—*Exécution provisoire des jugements dont il y a appel au Conseil Privé.*

Principe Général : "Cette cour, étant dessaisie de la présente "cause (par l'appel au Conseil Privé) n'a ni autorité ni juridic- "tion pour y donner ou rendre aucun ordre ou jugement quelcon- "que."

Caron, Drummond, Badgley et Monk.

Morrison et Dambourgès, 9 déc. 1869. La même doctrine est consacrée dans une cause de *The Montreal Assurance Company et McGillivray ;* Per LaFontaine, Aylwin, Duval et Mondelet, 3 septembre 1860, 10 L. C. Rep. 385 ; et aussi en cause de *Herse et Dufaux*, *Infrà*, No. 10, et de *Muir et Muir*, mars 1871.

8o. Quoique le certificat requis par le statut ne soit pas produit dans les six mois, cette cour peut refuser l'exécution provisoire, et elle est justifiable de le faire quand le transcript a été certifié et envoyé.

Duval, Drummond, Badgley et Mondelet.

Jones et Lemoine, 6 juin 1867, 17 L. C. Rep. 377.

8o. Si le certificat requis n'est pas produit dans les six mois, cette cour ne peut refuser l'exécution provisoire dans aucune circonstance.

Duval, Caron et Drummond ; Badgley, diss.

Morrison et Dambourgès, 10 juin 1869.

9o. Cette cour ne peut, pendant l'appel au Conseil Privé, se dessaisir du dossier et le renvoyer à la Cour Supérieure, pour faire exécuter le jugement provisoirement, bien que le certificat du C. P. ne fut pas transmis.

Aylwin, Drummond, Badgley et Mondelet.

Jones et Lemoine, 7 décembre 1866.

10o. Durant l'appel au Conseil Privé, cette cour est dessaisie de la cause et ne peut s'enquérir de l'insolvabilité des cautions, survenue depuis l'appel, ni exiger de nouvelles cautions.

Per Duval, Caron et Drummond; *contrà* Badgley & Monk.

Herse et Dufaux, 8 juin 1870.

8o. Cette cour peut, pendant l'appel au Conseil Privé, se dessaisir du dossier, et le renvoyer à la Cour Supérieure, pour faire exécuter le jugement provisoirement, bien que le certificat du C. P. ne fut pas transnions.

Duval, Caron et Drummond; Badgley, diss.

Morrison et Dambourgès, 10 juin 1869.

10o. Que durant l'appel au Conseil Privé, cette cour, quoique dessaisie de la cause, peut s'enquérir de l'insolvabilité des cautions et en ordonner de nouvelles; mais cette cour n'a pas le droit de donner suite à son jugement et d'ordonner le renvoi de l'appel, à défaut de nouvelles cautions.

Duval, Caron, Drummond, Badgley & Monk.

Johnson et Connolly, 9 mars 1871.

V.—*Prescription.*

11o. Rien, pas même une reconnaissance expresse et par écrit de la dette, ne peut suspendre la prescription de cinq ans des billets promissoires.

Per Duval, Meredith, Drummond et Mondelet; Aylwin diss.

Fenn v. Bowker, 10 L. C. J. p. 121. (1866.)

11o. La prescription de cinq ans des billets promissoires peut être interrompue; l'impossibilité où était le créancier de poursuivre son débiteur est une cause d'interruption suivant la maxime: "*contrà non valentem agere non currit præscriptio.*

Per Duval, Caron, Badgley et Monk.

Wilson v. Demers, 7 septembre 1870; 14 L. C. J. 317

12o. Jugé que la maxime : "*Contrà non valentem agere non currit præscriptio* ne s'applique pas à la prescription d'un an stipulée dans une police d'assurance.

Browning et The Provincial Assurance Company, C.S. Per Beaudry, J. Jugement confirmé en appel purement et simplement.

Per Duval, Caron, Badgley et Monk ; 10 mars 1871.

VI.—*Décret.*

13o. Cette cour avant la mise en force du Code de Procédure Civile décida que l'adjudicataire d'un immeuble désigné comme contenant 400 arpens, lorsqu'en réalité il n'en contenait que 188 a droit de recouvrer l'excédant du prix qu'il a payé.

Desjardins et La Banque du Peuple, 8 L. C. J., p. 106.

Per Sir LaFontaine, Mondelet et Badgley ; Aylwin et Duval, diss.

Doutre & Elvidge. 10 décembre 1870.

Per Duval, Monk et Loranger ; *contrà*, Caron et Badgley.

Aucun des articles du Code n'est indiqué comme de droit nouveau. De plus le Code n'a pas prévu le cas où la contenance est donnée dans la saisie de l'immeuble ; il ne parle que des saisies de corps certains par numéros ou par *tenants et aboutissants* s'il n'y a pas de cadastre dans la localité.

13o. Depuis le Code de Procédure Civile, la vente du Shérif est sans garantie de mesure, quand même cette mesure serait indiquée dans les annonces et dans le titre du shérif ; et l'adjudicataire d'un emplacement de ville designé comme contenant 10,725 pieds lorsqu'en realité il n'en contient que 7738, soit une différence en moins de 2987 pieds, n'a droit à aucune diminution du prix.

Per Duval, Caron et Badgley ; *contrà*, Drummond et Monk.

Melançon et Hamilton, 10 mars 1871.

14o. L'article 1585 du Code Civil dit : " Dans les ventes judiciaires sur exécution, l'acheteur, *au cas d'éviction*, peut recouvrer le prix qu'il a payé avec les intérêts et les frais du titre ; il peut aussi recouvrer ce prix avec intérêt des créanciers qui l'ont touché, sauf leur exception aux fins de discuter les biens du débiteur."

14o. Jugé que cet article ne s'applique qu'au cas *d'éviction totale* et non à celui *d'éviction partielle.*

Même cause.

VII.—*Preuve du don manuel.*

L'article 776 du Code Civil dit : "La donation des choses mobilières, accompagnée de délivrance, peut être faite et acceptée par acte sous seing privé *ou par convention verbale.*"

15o. La preuve testimoniale des dons manuels accompagnés de livraison, est admissible.

Mahoney et McCready, 15 L. C. Rep. 275.

Per Duval, Meredith, Drummond, Mondelet et Badgley.

Colville et Flanagan, 8 L. C. Jur. 225.

Per Duval, Meredith, Mondelet et Badgley.

15o. La preuve testimoniale du don manuel accompagné de livraison n'est pas admissible.

Duval, Caron, Drummond, Badgley et Loranger.

Voyer et Richer, 7 septembre 1870.

Tableau.

16o. La motion de l'Intimé pour renvoi de l'appel faute de la production des raisons d'appel est accordée quant aux frais seulement.

Duval, C. J., pour la Cour.

McMillan et Buchanan, 6 mars 1871.

16o. La motion de l'Intimé pour renvoi de l'appel faute de la production des raisons d'appel est rejetée sans frais.

Duval, C. J., pour la Cour.

McMillan et Buchanan, 8 mars 1871. Sur l'observation de l'avocat de l'Intimé que jugement avait été rendu deux jours avant, lui accordant les frais de sa motion, le jugement du 8 mars est rétiré.

LE SECRÉTAIRE DE LA RÉDACTION.

"THE AMERICAN LAW REVIEW" ON THE FISHERY QUESTION.

In the April number of *The American Law Review*, appeared an article on "The North Eastern Fisheries." In the January number of *La Revue Critique*, the same subject was discussed, and it would not so soon have been reverted to had the article in the *Law Review* dealt solely with acknowledged principles of law, but some of its propositions are so very new, extraordinary, and startling, that they demand instant examination.

At page 416 of the *Law Review* appear these words: "We "shall now inquire whether the Convention of 1818 is an existing "compact; and if not, what are the rights of American fisher- "men under the treaty of peace of 1783." The result of the inquiry is announced at page 419: "Applying these well estab- "lished principles to the facts under discussion, and the conclu- "sion is inevitable. The Convention of 1818 contained a renun- "ciation of, a limitation and restriction upon, the otherwise full "enjoyment of rights created in 1783. The renunciation, limi- "tation, and restriction were wholly removed, and in place thereof "affirmative provisions were substituted. These latter were "finally annulled, and there is now left no compact between the "two governments interfering with Article III. of the Treaty of "1783. The result is the same as though the United States and "Great Britain had simply and directly abrogated the clause of "renunciation contained in Article I. of the Convention of 1818."

The portion of the article in question referring to the effect produced on Article III. of the Treaty of 1783, by Article I. of the Convention of 1818, hardly requires discussion, as the elaborate argument on pages 418 and 419, if well founded, shows conclusively that the Convention of 1818 novated Article III. of the Treaty of 1783. But, moreover, the Convention of 1818 was in the nature of the *transactio* of the Roman law, and fixed the rights of the parties.*

Are the words "And the United States hereby renounces *for* "*ever* any liberty heretofore enjoyed or claimed by the inhabitants "thereof, to take, dry, or cure fish on or within three marine

* Mackeldey, Man. de Droit Romain, § 470.

"miles of any of the coasts, &c.," of no avail against the words of the treaty of 1783? Did they not in plain terms annihilate any right or liberty which might at any time have been in existence, either enjoyed or claimed by the inhabitants of the United States, to fish, &c., within the limits specified in the renunciatory clause?

In that portion of the article which treats of the effect produced by the Treaty of 1854 on the Convention of 1818, the propositions advanced are startling in their novelty. "It is the "case," says the learned writer, "which often arises in the muni- "cipal law of substituting one contract for another, by which the "prior one is swallowed up, and ended, and the latter alone is "left binding upon the parties."

The Convention of 1818 fixed the rights of American citizens in the Canadian fisheries, the reciprocity treaty, in consideration of certain commercial advantages extended to Canadians, gave to American citizens the liberty, in common with British subjects, to take fish in Canadian waters for the term of ten years after it went into operation, and further until twelve months after either party should give notice of intention to terminate it. The reciprocity treaty, then, was in its nature merely temporary, in contradistinction to the Convention of 1818, which was perpetual. Either party had the power, after the expiration of ten years from its coming into force, to terminate it by giving a year's notice, consequently it was a contract with a resolutive condition (*condition resolutoire*). With all due deference to the writer in the *Law Review*, it is impossible to admit his sweeping assertion that treaties "are interstate contracts, and the doctrines of Inter- "national Law relating to them are borrowed entire and un- "changed from the corresponding departments of municipal "jurisprudence." Where in the mazes of American jurisprudence are we to seek for the corresponding department in this case? Is Massachusetts the blessed State where jurisprudence pure and undefiled is to be found? or does New York with its famed judiciary, furnish municipal jurisprudence of undoubted worth? or are we to seek for it before the United States Courts? The only jurisprudence which is of authority in such case is that of the Civil Law, and from the source of all municipal laws on the subjects of contracts, must be drawn the principles governing the question now raised.*

* Heffter, § 90; Bluntschli, § 450.

The 1183 article of the Code Napoleon thus declares the provisions of the Civil Law affecting contracts containing a resolutive condition "La condition resolutoire est celle qui, lorsqu'elle s'accomplit, opère la revocation de l'obligation, et qui remet les choses au même état que si l'obligation n'avait pas existé, &c."

Article 1088 of the Civil Code of Lower Canada is in the following words declaratory of the Civil Law "a resolutive condition, when accomplished, effects of right the dissolution of the contract. It obliges each party to restore what he has received, and replace things in the same state as if the contract had not existed; subject nevertheless to the rules established in the last preceding article with respect to things which have perished or been deteriorated."*

In this case then it is clear that on the termination of the treaty of 1854, Great Britain and the United States stood to each other, as regards the Canadian Fisheries, precisely in the position they occupied previous to that treaty coming into force, that is to say bound by the provisions of Article I of the Convention of 1818.

Want of space prevents the further ~~enumeration~~ examination of the proposition relating to the novation (erroneously styled payment in the article referred to) of the Convention of 1818. But no doubt can be entertained that it is as erroneous as the proposition therein advanced of the non-novation of the fishery article of the Treaty of 1783 by article I of the Convention of 1818.

WILLIAM H. KERR.

---

* *See* Pothier Obligns. Nos. 224, 672; 4 Marcadé § 564; 3 Massé Dr. Com. Nos. 1795, 1797; Story on Con. § 977; 2 Fiore, p. 58.

SOMMAIRE DES DÉCISIONS RÉCENTES.

DÉCISIONS CANADIENNES.

COUR D'APPEL.

Montréal, 9 mars 1871.

Forgie & al. et *The Royal Insurance Company.*—Jugé qu'une police d'assurance devient caduque par le transport de la matière assurée, à moins que ce transport ne soit fait avec le consentement exprès où tacite de l'assureur. Per Duval, C.J.; Caron, Drummond et Badgley, JJ.; Monk, J., dissident quant à l'appréciation de la preuve sur le consentement tacite.

Lemoine et *Lionais.*—Jugé que cette cour ne peut ordonner qu'aucune partie du dossier, quelqu' inutile qu'elle soit, soit omise du transcript, sans le consentement des parties. Tous les juges à l'unanimité

McCormick et *Buchanan.*—Jugé que l'assistance du mari à une demande judiciaire constitue une autorisation suffisante à la femme de poursuivre ses droits, sans les mots *autorisée par son dit mari à l'effet des présentes.* Tous les juges à l'unanimité.

McAndrews et *Rowan.*—Jugé que cette cour ne peut rendre jugement sur le consentement des parties. Mêmes juges.

Spelman et *Robidoux.*—Jugé que le défaut partiel de considération d'un billet ne peut être l'objet d'une défense à une action. Mêmes juges; Badgley, diss.

Montréal, 10 mars 1871.

Benning & al. et *Cook.*—Jugé que l'acquéreur à une vente du shérif et premier créancier hypothécaire d'un navire enrégistré ne peut prétendre qu'un créancier hypothécaire subséquent ne peut saisir-revendiquer le navire sans offrir le montant de cette première hypothèque. Le premier créancier hypothécaire doit attendre l'ordre de distribution. Mêmes juges.

Bourassa et *McDonald.*—Jugé que le bailleur de fonds qui a saisi l'immeuble vendu dans le délai fixé pour le renouvellement des hypothèques suivant le *cadastre*, mais qui n'a pas renouvelé son hypothèque de bailleur dans ce délai, perd son droit de priorité à l'encontre d'un créancier hypothécaire subséquent qui a renouvelé son hypothèque dans le délai prescrit. Badgley diss.

Torrance & al. et *The Bank of British North America.*—Jugé 1o. Que sur une motion nonobstant le verdict, où par conséquent il s'agit de l'insuffisance du droit de la demande, la cour suivant la pratique anglaise, doit la rejeter et maintenir le jugement sur le mérite, à moins

que l'insuffisance du droit de la demande soit très-claire. 2o. Que si un effet de commerce, v. g. une lettre de change, chèque, &c., est livré à A dans un but spécial en faveur de B, A ou toute autre personne ayant connaissance de son objet, doit l'employer à ce but spécial sous peine de payer ce moutant à B. 3o. Que si une partie refuse de produire un écrit qui peut jeter du jour sur un procès, la présomption sera en faveur de l'autre partie qui peut établir *un primâ facie droit*. Per Duval, C. J., Caron et Badgley, JJ.; *contrà* Drummond et Monk.*

COUR DE RÉVISION.

Montréal, 30 janvier, 1871.

Le Procureur Général, pro Regina, vs. *Hon. J. H. Gray & al.*—Jugé qu'un défendeur, qui, ayant plaidé une exception préliminaire, plaide au mérite sans en être requis, n'est pas censé par là même avoir renoncé à son exception préliminaire. Mondelet, Berthelot et Mackay, J. J.

Le Procureur Général vs. *La Corporation du Comté de Compton.*—Jugé que la couronne n'a pas plus de droit d'appel que les sujets, la juridiction des tribunaux étant déterminée par la législation. Mêmes juges.

Clarke v. *Brean* et *Cornell & al*, opposants.—Jugé que suivant les articles 2017 du Code Civil et 734 du Code de Procédure Civile, les frais en appel encourus sur le recouvrement d'une hypothèque ne sont colloqués que suivant la date de leur enrégistrement.

Childerhouse v. *Bryson.*—On ne peut produire une défense en droit à une action sur billet promissoire *sans conclusions*, la déclaration et le bref d'assignation y suppléant. Mêmes Juges.

Long v. *Brooks.*—La garantie suivante addressée au demandeur Long: "Please let Mr. Holmes have whatever doors, sashes, &c., he may want, and I will settle for the same," ne s'applique qu' aux avances par Long à Holmes pour le parachevement de la maison alors en voie d'érection, et non aux constructions commencées subséquemment. Mêmes Juges.

Cross v. *Judah.*—Jugé 1o. que quiconque est troublé dans la possession d'une servitude dont il a joui pendant un an et un jour, ne peut intenter l'action possessoire sans alléguer et produire son titre; car pas de servitude sans titre; 2o. Que quand le droit de servitude est douteux en vertu du titre, le doute doit être donné en faveur de l'immeuble servant. Mêmes Juges.

Hamilton v. *Kelly.*—Jugé 1o. que la vente judiciaire d'un bâtiment enrégistré ne purge pas les hypothèques régulièrement inscrites avant la vente; 2o. que nonobstant cette vente, le créancier hypothécaire a son droit de suite par saisie conservatoire.

* Il y a appel de cette décision au Conseil Privé.

Montréal, 22 mars 1871.

Corse v. *The British America Insurance Co.*—Jugé qu'une police d'assurance ne peut être transportée que du consentement de l'assureur Un avis de ce transport n'a pas l'effet de lier l'assureur. Mondelet, Berthelot et Mackay, J. J.

COUR SUPÉRIEURE.

Montréal, 30 janvier, 1871.

In Re Benjamin Hutchins & al., Requérants pour décharge et *Jeffery & al.*, Contestants.—Jugé que dans une composition avec les créanciers d'une société commerciale et les créanciers des associés individuellement, les créanciers des deux catégories doivent être mis sur un pied égal et recevoir le même taux de composition. Per Mackay, J.

16 mars 1871.

In Re Morrison, Insolvable, et *Dame Ann Simpson*, Réclamant, et *Henry Thomas*, Contestant.—Par son contrat de mariage, l'insolvable "did settle, give and grant to the said claimant, the sum of £1000 in such a wise that she should enjoy the interest and profits thereof, during the term of her natural life, should she survive her said husband, and at her death shall descend to and become the property of their children and in default of children, the heirs of the said James Morison." Jugé que sous la section 57 de l'Acte concernant la faillite, 1869, la maxime "jamais mari ne paya douaire," n'a pas d'application en cas de faillite du mari ; que le douaire comme tous les gains et donations de survie sont des causes valables d'une réclamation conditionelle ou éventuelle, et que partant dans l'espèce, la femme peut demander à être colloquée, au marc la livre, pour le montant auquel le syndic estimera la valeur de la donation conditionelle ou éventuelle stipulée au contrat de mariage. Torrance, J.

18 mars 1871.

Adam v. *McCready.*—Jugé que l'acquéreur d'un immeuble qui a joui pendant dix ans à titre de propriétaire d'un immeuble grevé d'hypothèques par son vendeur, ne peut refuser le paiement d'aucune partie du prix de vente pour cause de crainte de trouble résultant de l'existence de ces hypothéques, la prescription les ayant éteintes quant à lui. Mackay, J.

30th March, 1871.

Fraser & al. v. *Abbott & al.*—By his last will and testament, executed before Griffin, Notary, on the 23rd day of April, 1870, the late Hugh Fraser did dispose of the largest portion of his fortune as follows :

"I give devise, and bequeath the whole of the rest and residue of my estate, real and personal, moveable and immoveable, of every nature and kind whatsoever, to the said Hon. J. J. C. Abbott, and to the said Hon. Frederick Torrance, hereby creating them my residuary fiduciary

legatees; and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely: to establish at Montreal, in Canada, an institution to be called the 'Fraser Institute,' to be composed of a free public library, museum and gallery, to be open to all honest and respectable persons whomsoever, of every rank in life without distinction, without fee or reward of any kind."

Held, 1st. That the introduction of unlimited power of bequest into the law of Lower Canada (41 Geo. III) has not had the effect of abrogating the Declaration of December, 1743.

2nd. That the Declaration of 1743 has not been abrogated by the cession of Canada to Great Britain.

3rd. That the statute 41 Geo. III reproduced in articles 831 and 836 of the Civil Code forbids bequests to corporations which have not been granted permission to receive them.

4th. That in the Colonies the Royal Prerogative may be restricted in all that does not pertain to the fundamental principles and rights on which the sovereign authority rests, if formal laws exist in the colony restricting the Crown prerogative.

5th. That in substance (if not in form) the Declaration of 1743 is in conformity with the common law of England.

6th. That, although by the *Magna Charta*, it was forbidden to make gifts to religious communities directly or by trusts, this prohibition did not extend to the establishment of schools, nor to gifts made for the support of the poor, or for other charitable objects.

7th. Finally, that by the *ensemble* of the existing laws of Lower Canada, and more particulary under the provisions of Cons. Stat. of Canada, c. 71, c. 72, and article 869 of the Civil Code, the Declaration of 1743 does not apply to the "Fraser Institute."

The judgment is based upon the following grounds:

"Considering that the object of the aforesaid bequest, to wit, the establishment of a Public Library and Museum of Art, is legal, and does not require previous letters patent authorizing the same.

"Considering that under the said will the said Hon. J. J. C. Abbott and Frederick Torrance became and were vested with the estate so as aforesaid bequeathed to them for the purpose in the said will mentioned, and are authorized to construct the buildings necessary for the same.

"Considering that such bequest is valid under the provisions of article 869 of the Civil Code, and that the said residuary fiduciary legatees may hold the said estate and manage the same so as to carry out the desires of the said testator, until a corporation be regularly formed to administer the said Public Library, after the erection of the necessary buildings, and that until such time, no contestation as to the right of such corporation to take the legacy and bequest can take place; and that therefore the plaintiff's action cannot be maintained, doth dismiss the same with costs." Beaudry, J.

Montreal, 11 avril, 1871.

Smith v. *McShane.*—Jugé 1o. Qu'un bail est un *contrat* aux termes du statut 29-30 Vict. c. 56, s. 7 ; 2o. Que les contrats entre la cité de Montréal et un conseiller de ville, prohibés par cette loi, sont ceux qui sont consentis pendant qu'il est en office et non pas ceux, qui quoiqu'encore en force, ont été conclus avant son élection. Mackay, J.

COUR DE CIRCUIT.

Montréal, 28 février 1871.

McLennan v. *Martin.*—Jugé qu'il est nécessaire de signifier au débiteur copie de l'acte de signification, en même temps que la copie de l'acte de transport. Torrance, J.

Arthabaska, 7 octobre 1867.

Rev. Messire Pierre Roy v. *Joseph Bergeron.*—Jugé :

1o. Qu'une action pour dîme est une action personnelle-réelle, et que la Cour des Commissaires est incompétente pour en connaître, aux termes du statut auquel elle doit son existence.

2o. Que le jugement d'une Cour de Commissaires qui prend connaissance d'une action pour dîme est radicalement nul et n'a pas l'autorité de chose jugée.

3o. Que la dîme est due sur les terres tenues en franc et commun soccage, comme dans les autres parties du pays.

4o. Que les terres nouvellement défrichées ne sont pas exemptes de payer la dîme pendant les cinq premières années du défrichement.

5o. Que le droit du curé à la dîme n'est pas limité à la valeur de 500 francs, mais qu'il a droit de percevoir la dîme de tous les grains décimables produits dans la paroisse.

6o. Que la dîme, due avant le Code, s'arrérage et n'est pas sujette à la prescription annale. Polette, J. 2 Revue Légale, 532.

Nous devons à l'obligeance de M. Colston le résumé suivant des décisions récemment prononcées à Québec.

Quebec, 21st January, 1871.

Caron v. *Sylvain.*—Held : That a father, as such, has the right to utilize the services of his minor child, to hire him out and to sue for his wages. Taschereau, J.

Poston & al. v. *Watters.*—M, a member of the commercial firm P. and M., plaintiffs, being indebted to the defendant, sold to him goods, the property of the firm, with the condition that their price should be imputed in part payment of defendant's account against him. On action by the firm for the price of these goods, the defendant pleaded the agreement aforesaid and compensation.

Held : that a partner has no right to dispose of partnership property for his private benefit ; that the agreement pleaded was illegal and null. Judgment for plaintiffs. Taschereau, J.

Blais v. *Barbeau*.—Held: That a *commandement de payer* and notice that application for a *contrainte par corps* will be made in default of payment after the delay fixed by law, must be made and given, before a *contrainte par corps* for non-payment of amount of judgment can be granted. Taschereau, J.

Tessier v. *The Grand Trunk*.—Held: That the delivery to a policeman in the employ of the Co., at one of its stations, of baggage, several hours before the train started, and in the absence of the baggage man, is sufficient to bind the Co, when it is not shown that plaintiff had knowledge of the by-law of Co., that it would only be responsible for baggage when checked. Taschereau, J.

SUPERIOR COURT.

Quebec, 18th February, 1871.

St. Bridget's Asylum v. *Fernay*.—In a petition for sequestration, the grounds on which such demand is based must be stated, and it is not sufficient to allege that it is in the interest of the petitioner that the properties be sequestrated. Meredith, C. J.

Lemay v. *Lemay*.—In a petition to quash a capias or attachment before judgment, grounds of *exception à la forme*, v. g. irregularity of writ and endorsement, want of copy, &c., cannot be set up, and will be overruled on demurrer. Meredith, C. J.

R v. *Hamelin* (certiorari).—Conviction quashed, the mayor of a municipality having prosecuted in the name of such municipality, thus, "G. C. de la Ville de Lévis, maire de la dite Ville, au nom de la Corporation de la Ville de Lévis," and the offences stated in information and conviction being different. Meredith, C. J.

Farrell v. *Cassin*.—A defendant cannot under art. 1535, claim security equal to the value of the property, but where he has paid part of the principal of price of sale, he will be allowed to retain balance and such interest thereon as shall equal part already paid, unless plaintiff gives security for the entire price of sale, but without interest thereon. Meredith, C. J.

Winn v. *Pélissier*.—A shipmaster is only bound as to storage to follow rules and custom of port where he takes his cargo, unless there be an agreement to the contrary. Meredith, C. J.

14th February, 1871.

B. C. A. Gugy v. *Wm. Brown*.—That the clause of the Interpretation Act requiring that whenever an article of the Code is to be repealed, the precise article referred to should and must be mentioned, is inoperative in the face of a statute substituting other provisions to those of the Code, though not specially referring thereto. Taschereau, J.

Montmagny, 13th February, 1871.

Arsenault v. *Rousseau & al.*—Held: That several defendants, though they have appeared separately but by the same attorney, may join in and fyle but one plea. Bossé, J.

Quebec, 2nd February, 1871.

Batten v. *Stone.*—It no longer suffices to give notice within four days and move on first day of ensuing term for security for costs. The application should be made within the four days. Meredith, C. J.

4th March, 1871.

Huard v. *Dunn.*—No action lies for false imprisonment under a conviction, valid on its face, so long as such conviction is in full force and vigor and has never been annuled or vacated. Stuart, J.

IN THE COURT OF REVIEW.

Quebec, 4th February, 1871.

The National Bank v. *The City Bank.*—Held, That the Code has not changed the law existing anterior thereto as to particulars in S. C. cases, and does not require that they be annexed to declaration or fully or in detail set forth therein. Stuart, Taschereau and Casault.

Philippsthal v. *Duval.*—On the 6th May, 1870, an order was made on defendants motion, fixing 9th for striking jury and 14th for trial. On 7th defendant demanded *acte* that he required jury list to be made up at least of one half jurors speaking English. On 9th the jury was not struck as defendant did not make the requisite deposit, he alleging objections to the composition of jury. Subsequently plaintiff moved to vacate order for jury trial; the defendant moved for a jury *de medietatæ linguæ;* both applications were refused. On 18th June, an order was given on plaintiff's motion fixing 20th of June for striking jury and, 7th July for trial. The Prothonotary had prepared a list of forty-eight names for the striking ordered on the 9th May, between that date and 30th of June; when the jury was struck, a jury in another case had been struck. Defendant challenged the array on ground that a new list should have been made commencing with first name after the last on the last panel, *i. e.* that of the jury which had been struck between the 9th May and 30th June. Stuart, J., quashed the panel. Judgment reversed in review. Meredith, C. J., and Taschereau J. Stuart, J., dissenting.

IN THE COURT OF APPEALS.

Quebec, 18th March, 1871.

McLaughlin & Regina.—That no opposition lies to the execution of the judgment entered up by the Prothonotary under C. S. L. C. c. 106, s. 2 on a certificate from the Queen's Bench that a recognizance is forfeited, on the ground that the proceedings are irregular and the opposant should have been called upon to plead and defend before the Superior Court. Badgley & Drummond, dissenting.

Gouin & Dubord.—Held, That a *mandamus* will not lie against a Crown Lands Timber Agent to order him to issue licences for timber limits.

Fraser & Patterson—The Insolvent has no action against the assignee to his Insolvent estate, even after his discharge, to compel him to render an account of his administration; his recourse is by petition or motion; and if he claims under deeds of composition and discharge, these must have been first deposited with the assignee to enable him to give notice of the same under the Insolvent Act.

Gauthier & Sauvageau.—Sénécal, to whose insolvent estate Sauvageau was assignee on 10th August, 1866, transferred to Gauthier certain sums of money owing to him, a year before he became insolvent and made an assignment, and the transfers above mentioned were only served on the debtors a few days prior thereto. On action by Gauthier against debtors, Sauvageau intervened, and Gauthier's action was dismissed in the Court below (Arthabaska). Judgment reversed by C. Q. B., who held:

That the creditors of the vendor are not, in the absence of fraud or simulation, *tiers*, in the sense of the art. 1571 C. C.

That the notification of the transfer under the circumstances was valid, and would have been valid even had the transfers been served "après la faillite notoirement connue et déclarée. Duval dissenting.

Burton & Young & al.—An action was instituted against Young & Knight for a penalty, which was dismissed. Appeal by the plaintiff Burton. The defendants, who had severed in the defence, severed on the appeal. Young died, and Knight forced on the case as against him, and judgment was confirmed. No proceedings were taken on the appeal for or against Young or his representatives. Motion by Knight to transmit record to the Superior Court granted: "Considering that more than six calendar months have elapsed since the appeal to Her Majesty, &c., was allowed, and that no certificate has been filed in this Court, as required by law, that such appeal has been lodged, and proceedings had thereon, &c."

18th March, 1871.

Laventure & Dussault.—Dussault sued the appellant for several hundred dollars. His action was dismissed in the Superfor Court (Arthabaska), but this judgment was reversed in review, and the defendant condemned to pay $250. In appeal, the defendant was condemned to pay $87 and costs of action of that class, and the respondent condemned to pay the costs of appeal and review. Monk dissenting.

16th December, 1870.

The Principal Sec. of State & McGreevy.—McGreevy by his action claimed $8597.50; the defendant pleaded tender of £644 7s, entire amount of indebtedness. Judgment in Superior Court for $3019.18. On appeal by the defendant this amount was reduced to £679 7s. 6d., with costs of Superior Court, plaintiff (respondent) to pay costs in appeal.

LE SECRÉTAIRE DE LA RÉDACTION.