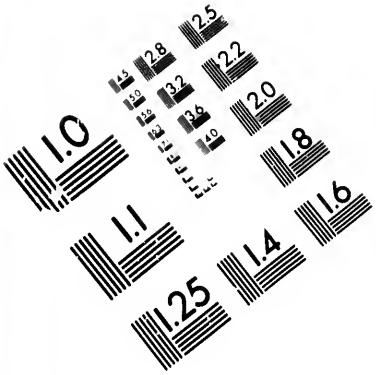

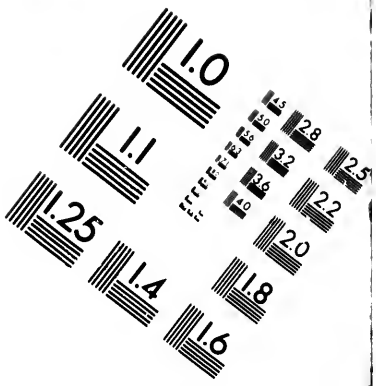

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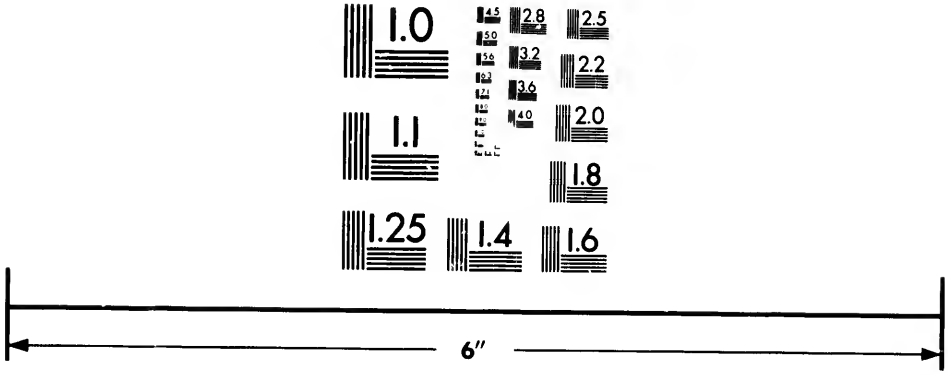

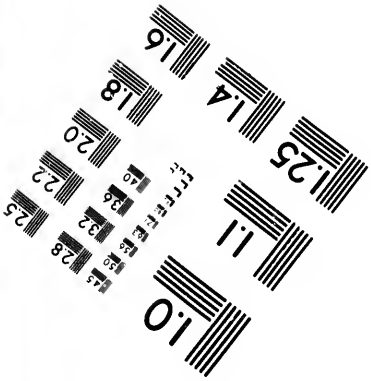

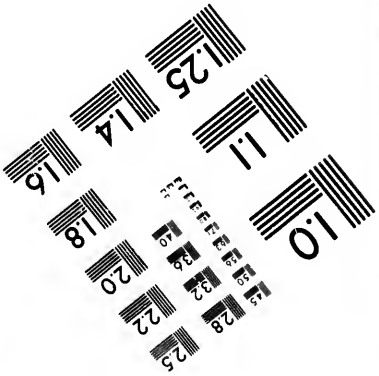

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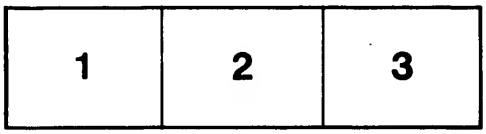

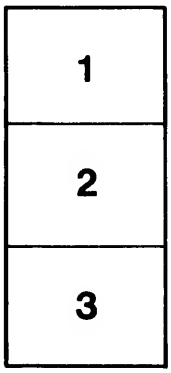

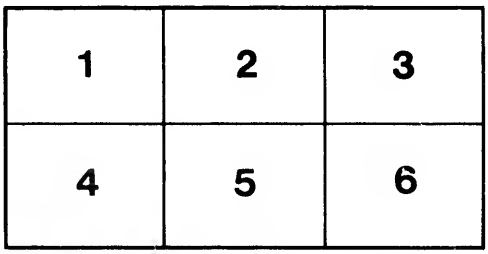

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PARTLY

LOWER-CANADA REPORTS.

DECISIONS DES TRIBUNAUX

DU BAS-CANADA.

SEIGNIORIAL QUESTIONS;

A COMPILATION

Containing the Seigniorial Act, the Amendment to the Seigniorial Act, of 1855, the Questions submitted by the Attorney General for Lower Canada, the Counter-Questions submitted by divers Seigniors, the Proceedings and Desisions of the Special Court constituted under the authority of the Seigniorial Act of 1854, the Pleadings and Memoirs of the Advocates, and the Observations of the Judges, &c., &c.

EDITORS : MM. LELIÈVRE & ANGERS.

VOLUME B.

PRINTED,

PARTLY AT QUEBEC, BY A. CÔTÉ, & PARTLY AT MONTREAL,

BY DUVERNAY BROTHERS.

1856.

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OPINION

OF THE

HONORABLE E. BOWEN,

CHIEF JUSTICE OF THE SUPERIOR COURT

FOR LOWER CANADA.

The course usually observed in Courts of Justice when rendering judgment as between party and party, is, I admit, that the Judges state their reasons *seriatim* in support of or against it, as the case may happen, before the judgment is delivered, but I believe our reasons, where there is a dissent on the part of any Judge, in the present instance would be much better understood were the subject matter laid open by the previous reading of the numerous Questions submitted with the several Answers adopted by the majority of the Judges; but being over ruled in this respect, I acquiesce, as I am bound to do, in the present mode of proceeding.

After studying attentively the several Factums so ably drawn, as well by the Counsel for the Crown as by the learned Advocates for the Seigniors, and upon which much pains and great labor have necessarily been bestowed; and considering the very elaborate and profound expositions "historiques" and "légales," delivered by the learned President on the subject matter of the deliberations had by the Judges, as well upon the several Questions submitted to them by the Attorney General, under the provisions of the Canada Tenures Act of 1854, 18 Vict. cap. 3, as of the Counter-Questions by several proprietors of seigniories in Lower Canada, it cannot be fitting or expedient that each of the Judges now present should repeat the reasons and grounds for the opinions and answers given to the Questions and Counter-Questions so submitted; unless, in so

far as they are necessarily involved in the discussion of those parts of the subjects under consideration, on which a difference of opinion may happen to be entertained, from that held by the majority of the Judges, for in such case it is highly proper that the parties whose interests may be affected by such answers and decisions should be made acquainted with the individual reasons of dissent; I will therefore proceed to state, in the fewest terms possible, my reasons of dissent upon the very few points in relation to which I feel constrained to differ at all from the majority of my colleagues.

It may be well to observe here, that our answers, strictly speaking, cannot be called the judgment of a Court of Justice, for the proceedings bear rather the character of legislative proceedings or of a declaratory act intended to guide and assist the Commissioners in settling the indemnity to be awarded to the proprietors of seigniories in Lower Canada, coming under the operation of the Tenures Act, than as the judgment of a Court of Justice.

The Crown Officers have classed the matters for our opinions principally under four heads though the Questions under each of these are branched out and repeated in different forms, some of them probably, strictly speaking, but of little practical utility in deciding the matter.

The four principal heads of inquiry are:

1o. The right of *cens et rentes*, whether the rate was fixed or not, and whether the Seignior was bound to concede or not, and if so bound, at what rate he must concede.

2o. The right of Banality, its extent and consequences.

3o. The waters, navigable and non navigable to whom do they of right belong?

4o. The extent and legality of certain reserves in the concessions made by the Seigniors to their *Censitaires*.

Under the first head, the right of *cens et rentes*, and was there a fixed rate, at which Seigniors were bound to concede? On this point there are, I believe, but two dissenting voices, all the other Judges being of opinion, that the rates were not fixed by any known or positive law, and that they were different in almost every seigniory, and often times differed even in the concessions of one and the same seigniory.

Then as to the assertion which has been so repeatedly made, that the Seignior, in Canada, was but a mere trustee or *fideicommis*, and bound to concede on the demand of any one desirous of obtaining a concession of land, I hold, as I believe the great majority of us do, that the Seigniors had the *dominium plenum*, the absolute right of property in their seigniories, and were under no legal obligation whatever to concede previous to the *Arrêt* of Marly of 1711. In several of the grants we find the following words, the grant is made "*en toute propriété, justice et seigneurie et à toujours*," words of more absolute and unequivocal import could not have been used, nevertheless it was certainly the interest of the Sovereign and the interest of the Seigniors to concede, for if they neglected to settle the lands by themselves, or those under them, they incurred the risk of having their seigniories reunited to the Crown, failing to fulfil one of the conditions of their grant, namely, "*de tenir feu et lieu*," to cause dwellings and clearances to be made; but when the *Arrêt* of Marly of 6th of July, 1711, was promulgated, the Seigniors from thence forward were bound to concede on demand, and upon their refusal so to do, the Governor, Lieutenant General and the Intendant, who by the said *Arrêt* were created, not a Court of Justice, but as an exceptional executive and administrative body, delegated to carry out the then views of the Sovereign for the settlement of the colony, which persons or delegates, upon the refusal of the Seignior to concede, (he having been previously duly summoned so to do,) were authorised to reunite to the demesne of the Crown, the land so demanded and refused,

and thereupon to make a grant of it to the Applicant, the *cens et rentes* and *redevances* in that case being made payable to the Crown, to the entire exclusion of the Seignior who had so refused to concede.

That this *Arrêt* and that of 1732, in aid thereof, continued to be law down to the period when Canada, in 1763, was ceded to Great Britain, is undeniable; (tho' I believe they were seldom if ever put in force), but not so subsequent thereto and after the Proclamation of 1763, by which the English Law was introduced into Canada and practiced therein, subject however to the Royal Instructions to Governor James Murray, of 26th June, 1766, and until the passing of the British Statute, in 1774, whereby the whole French System was reintroduced and recognized as law, the Statute 14, Geo. III, cap. 83, having enacted, "that, in all matters of "controversy relative to property and civil right, resort shall "be had to the laws of Canada as the rule for the decision "of the same,"

This then brings me to one point of my dissent from the majority of the Judges, namely, as to the existence of the *Arrêt* of Marly of 6th July, 1711, as law in Canada, from and after the year 1763, or what amounts to the same thing in effect, namely the non existence of any Tribunal or Persons possessing the exceptional executive and administrative powers, which, under the French System, could only have been exercised by the said Governor and Lieutenant General and the Intendant conjointly.

Now the Judicature Act of 1793, 34 Geo. III, cap. 6, altho' it conferred upon the Courts of King's Bench thereby created the ordinary judicial powers of the Intendant in civil matters, the words of the Statute being, the said Courts of King's Bench thereby established, "shall have full power "and jurisdiction, and be competent to hear and determine "all plaints, suits and demands of what nature soever, "which might have been heard and determined in the

" Courts of *Prévoté*, *Justice Royale*, Intendant or Superior " Council under the Government of the Province, prior to " to the year 1759, touching rights, remedies and actions of " a civil nature," yet most assuredly no Court in Canada, since the cession, has had power or authority to grant lands upon the refusal of the Seignior or otherwise, and even under the supposition that the Courts had the power to reunite to the demesne of the Crown upon such refusal, (which I altogether deny,) the lands so reunited, could only be subsequently granted by Letters Patent under the Great Seal of the Province.

Is it not a glaring inconsistency to hold that these *Arrêts* continued as law in force down, to the passing of the Tenures Act of 1854? for if so, the Seigniors would have been compelled to concede on demand *à titre de redevances*, upon pain of having the land reunited to the demesne of the Crown, to be then granted to the *Censitaire*, the *cens et rentes et redevances* being made payable to the Crown to the total exclusion of the Seignior, (but no instance has been met with in which such forfeiture has been enforced,) and if the charges and reserves to be found in almost every modern concession, do not fall within the catagory of *redevances*, then, to be consistent, such charges and reserves not being *redevances*, ought to be declared illegal, being in direct contradiction with the provisions of the said *Arrêt* of 1711, nevertheless they have been maintained in the Courts as valid and binding contracts; so that, for all practical purposes, it is of little moment, whether these *Arrêts* be considered in force or not, as the Seigniors can enforce the payment by the *Censitaires* of the several charges and reserves contained in their contracts of concession, and being so entitled, the Seigniors cannot claim at the hands of the Commissioners indemnity on that score.

Much has been written and said to disprove the assertion, that the *Arrêts* of 1711 and 1732 had fallen into desuetude from *non user* during a lapse of nearly hundred years since

the cession, and from which period, they have not been enforced ; the law on this subject is thus laid down by Solon.

" L'abrogation de la loi, par le non usage, repose d'un " côté sur le concours tacite et général du peuple qui refuse " de l'exécuter, et d'un autre côté sur la volonté du légis- " lateur et l'autorité qui tolèrent cette non exécution." Again he says, as to the facts necessary to show that a law has gone into desuetude : " Que les faits sur lesquels on " veut faire reposer la désuétude comme ayant abrogé la " loi, soient multipliés, qu'ils puissent être en quelque sorte " attribués à la généralité des habitants." " *Tacitè omnium* " *consensu*."

Now if it be true, as will be asserted, that a mere *non usage* is insufficient to abrogate a law, and that a practice contrary thereto is likewise necessary, have we not, under the principle contended for that every contract between Seignior and *Censitaire* not being *contrà bonos mores* or prohibited by some positive public law, have we not, I say, overwhelming evidence that these *Arrêts*, tho' intended to be *d'ordre public* have invariably been treated as *d'ordre privé*, to which the maxim " *Unicuique licet jus pro se introducto renunciare*," is strictly applicable, and have been universally renounced ; is there a concession to be found, as well prior to 1711 as down to 1854, in which charges and reserves are not to be found wholly inconsistent with these *Arrêts*, and constituting concessions *à titre de redevances*, and yet they have been invariably upheld as binding on both parties ?

Such then being the case, I cannot help asking myself the question, of what practical utility, in settling the indemnity to the Seignior, will be the declaration that these *Arrêts* were or were not in force down to 1854 ? To which I answer, it is matter of a purely speculative character, and of no practical utility either way ; the Seignior cannot be indem-

nified for what he does not lose as to the past and as to the future he will be free to sell or do as he chooses with his land.

But I go further and say that even if the said *Arrêt* of Marly and that of Versailles of the 15th March, 1732, the latter forbidding the sale of wild lands by the Seignior to his *Censitaire*, as also the like sale by *Censitaire* to *Censitaire*, had been law and in force at any time after the cession they fell into complete desuetude by *non user* for a period little short of 100 years.

I am fully aware that those who are opposed to my opinion, that those *Arrêts* ceased to be law in Canada from and after the cession, will refer to the cases at Quebec of Dubois vs Caldwell, in which I did not sit, being related to the Defendant, and to that of Langlois vs Martel, in which latter it may possibly be asserted, that I virtually admitted these *Arrêts* as still being law, but whoever will read with attention both the one case and the other, may convince themselves that no admission of the kind is to be found in either; it is true that these *Arrêts* were invoqued, but in neither of the cases did the party invoking bring himself within the letter or the spirit of the *Arrêts* supposing them to be law; consequently in the one case the Demurrer was maintained and the action dismissed—and in the other, the Peremptory Exceptions and the evidence adduced thereon were not sustained.

It is true, a case, in Montreal, of François Lavoie vs La Baronne de Longueil has been cited, in which the Court and the late Chief Justice Reid (whose opinions are justly entitled to the highest consideration of every one), over ruled a Declinatory Exception, in an action brought under these *Arrêts*, and it was held that the Governor, Lieutenant General and the Intendant constituted a *Cour Royale*, and therefore that their powers passed to the Courts erected under the Statute of 1794, but I cannot acquiesce in the

correctness of that ruling, for they did not constitute a Court of any description, much less were they a *Cour Royale*, we might, with as much propriety at the present time, call the Governor and Executive Council, a *Cour Royale.*

The Governor and Executive Council were at one time a Court of Appeals, but were created such in virtue of a positive law to that effect, and not as exercising a delegated power from the Sovereign such as that alluded to. The case however did not go to a final judgment. *Faits et articles* to La Baronne were exhibited and allowed by the Court at Montreal, tho' they charged her with fraud, but that allowance was reversed in Appeal, and so the case ended without a final judgment.

Before closing my observations on this head, I beg to remark that in voting with the majority, in answer to the 6th and 7th Counter-Questions, proposed by Filmer, that these *Arrêts* were not repealed by the Imperial Statutes 3. Geo. 4, cap. 119, and 6 Geo. 4, cap. 59, I must be understood as not admitting that the said *Arrêts* continued in force, but, on the contrary, that these Imperial Statutes did not repeal these *Arrêts*, because, in my opinion as before stated, they had entirely ceased to be law or to exist, having fallen into perfect desuetude by lapse of time, and consequently that there existed nothing to repeal or annul by the said Statutes.

I shall add nothing further to the grounds of my dissent to that part of the decision about to be given namely, in answer to the twenty-first Question, submitted by the Attorney General, which is thus conceived :

" These laws were still in force at the time of the passing of the Seigniorial Act of 1854."

I now come to the second head, the right of banality, its extent and consequences.

On this subject I entirely concur with the majority of the Judges in the answers which will presently be given, for,

tho' an opinion is entertained by one amongst us that the right of banality was necessarily coeval with that of the first settlements in the Country, it appears to me to be but of little moment at this day to consider, whether such might have been the case or not, tho' it must be self evident, it would not have carried with it any of the exclusive rights given by the *Arrêt* of 1686, since it must have been purely conventional prior to that *Arrêt*, and we have positive law in that *Arrêt* of 1686, which grants and confirms that right to every Seignior, upon the fact of his having built a mill or mills, "*un moulin à farine*" within the *enclave* of his seigniory, and upon his default to do so, transferring that right to any *Censitaire* or other individual erecting such mill in as ample a manner as the Seignior might have possessed the same, with the right also of compelling the *Censitaires* of the same seigniories to carry the grain for the consumption of their families, to be ground at the said banal mill, to the exclusion of all other mills for grinding corn or grain, within the *enclave* and limits of the said seigniory.

Such has been the Jurisprudence observed in Canada both before and subsequent to the cession, tho' when first introduced here under the 71 article of the Custom of Paris, it was a purely conventional right, and could not be enforced without title.

This right of banality carried with it also that of preventing the erection of any grist mill within the limits of the seigniory, and of causing the shutting up or demolition of all such mills, tho' erected for the purpose of grinding grain, not intended for home consumption, "*la consommation de la famille*," and not subject to the right of banality.

Next as to the third head: the waters navigable and non navigable, to whom do they belong?

It is well understood in law, that navigable rivers and the beaches and beds thereof, between high and low water mark, belong exclusively to the Crown, for the benefit of the public,

in like manner as highways, and that no individual can claim or hold any part of such navigable river or beach unless it be in virtue of a special grant from the Sovereign.

But as to non navigable rivers, streams, lakes or where they (*baignent*) wash the lands of the Seignior, they, in my opinion, belong to him exclusively, by virtue of his titles as Feudal Seignior, tho' some among us hold that they are the property, not of the Feudal Seignior, but of the Seignior *Haut-Justicier*. It is not perhaps of much importance to consider the latter proposition, in as much as altho' in some grants, the right of *haute, moyenne et basse justice*, is to be found, yet I believe that there were not more than two or three instances of the exercise of the right of *haute-justice* in Canada before the cession, and most certainly no instance of the kind since.

There are many conflicting authorities to be found in the books as to the rights of *Hauts-Justiciers;* in this particular it being held by many that they had only the police over, these waters, but arrogated to themselves, under that pretext, the right of property therein.

It may be well to cite one or two out of a multitude of authorities, to show how this matter was generally understood in France, namely that *ès pays de droit écrit* the *Hauts-Justiciers* were held proprietors ; but that, *dans les pays de Coutume*, they belong to the Seignior *féodal*.

" 5. Traité des Fiefs, p. 664, *verbo* Rivières.

" Nous parlons des petites rivières qui arrosent les sei-
" gneuries particulières qui ne portent point bateau, si ce
" n'est par artifice au moyen d'écluses.

" Chopin, Rivières, no. 25, les appelle rivières banales,
" rivières de cens, *id est*, au Seigneur du territoire.

" Bacquet, Droits de Justice, c. 30, no. 25, dit que dans
" ces petites rivières, le Roi, ni les Seigneurs hauts-justiciers

" n'y ont pas plus de droit que sur un autre héritage appar-
" tenant aux particuliers.

" Cette maxime est contraire à la pratique universelle de
" la France, "*ès pays du droit écrit*," où communément elles
" appartiennent aux hauts-justiciers.

" Boutiller, Somme Rurale, liv. 1, ch. 73.

" Loysel, Inst., liv. 2, tit. 2, règle 6.

" Dans les pays de Coutume, elles sont généralement un
" droit de fief, le Seigneur haut-justicier peut y avoir la po-
" lice, mais la propriété qui emporte droit de moulin et de
" pêche exclusif appartient au féodal.

" Le Bret, Droit de Souveraineté, liv. 2, ch. 15.

" En Normandie, les arts. 161, 206, 207, 210, nous prou-
" vent bien clairement que les petites rivières appartiennent
" aux Seigneurs féodaux, la pêche, le droit de cours d'eau
" et de moulins sont droits de fief."

As to the *Censitaire*, he being a proprietor *riverain*, whose land is bounded by a running stream, or non navigable river, I hold he has no property whatever in such running stream or river, unless by an express grant thereof to him from his Seignior, but that all lakes or ponds, *les eaux mortes*, which arise or spring within the limits of the concession, do belong to him the *Censitaire* and not to his Seignior.

Under the fourth head, viz: as to the extent and legality of the reserves.

I wish here to be perfectly understood with respect to the reserves, and to distinguish those made in concessions prior to 1759, (if such now exist,) that is while the *Arrêts* so often alluded to were in force, which required the Seignior to concede *aux redevances accoutumées*, and such concessions as

have been made by Seigniors subsequent to the cession of Canada to the British Crown, when if my view of the subject be correct, and that these *Arrêts* ceased to have any effect, then whatever reserves may have been mutually agreed upon since 1759, must be held binding as between Seignior and *Censitaire*, and no Court of Justice would set them aside.

It is held by some of the Judges, that any reserve which may have been made between Seignior and *Censitaire*, (no matter at what time made), if not prohibited by some positive law, or not being "*contrà bonos mores*," is lawful and binding. In certain respects I feel bound to differ with them for some of the reserves to be found in the concessions, between 1711 and the period of the cession, ought not to prevail, for though the Seigniors were not limited as to the amount of *cens et rentes*, they were nevertheless, during that period, in virtue of the said *Arrêts*, held to concede *à titre des redevances accoutumées*. Now any reserve which did not partake of the character of a *redevance*, *reditus*, which means an annual payment by the *Censitaire* to his Seignior, (in money, grain, fowls, or such like,) ought to be held illegal, with the exception of the *corvée*, which when not exacted in personal labor, was generally estimated and paid in money at or about 2s. *per diem*.

The Crown Officers have admitted that, by universal suffrance or custom, the reservation of timber for the building of the manor house, mills and churches, without indemnity, seems to have been sanctioned, being for the public good. With respect, however, to churches, if I mistake not, no such custom has prevailed. The Legislature has imposed on the *habitants* the obligation of building churches, the parishioners are generally assessed in labor, money and materials of different descriptions; with respect, therefore, to the last mentioned reserve for the building and repairs of churches, as also, the reserve of firewood for the use of the Seignior, the reserve of wood for commercial purposes, the reserve of

mines and minerals, (other than gold and silver,) the reserve of sand, stone lime and such like, may well be declared to have been illegal during the existence of the *Arrêts* of 1711 and 1732.

I hope to have made myself intelligible as to the grounds of my dissent as here stated. I may be in error throughout, but such being my views on the different points alluded to, it becomes my duty to declare them freely.

Called as I felt I was, under the provisions of the Canada Tenures Act, to answer the several Questions propounded to the Judges, for the sole purpose of assisting by their answers the Commissioners in the discharge of their arduous duties, and not to write either a history of the early settlement of the Colony, under the french Crown, or a treatise on feudal tenures, I have abstained from attempting either, and by not doing so as some of my learned brethren have so fully and ably done, it may be thought I have slighted the subject, but such I must be permitted to say has not been the case, the whole matter has engrossed my undivided attention and received the fullest consideration, it was in my power to bestow on the all important and various subjects of our deliberations.

OPINION

OF THE

HON. MR. JUSTICE AYLWIN'S.

In delivering my opinion upon this occasion, I deem myself called upon to begin by adverting to the first supplementary or counter-question submitted by Dame Louise Chartier de Lotbinière, wife of the Hon. Robert Unwin Harwood, and the proposition stated to this Court, on her behalf. That proposition asserts that the *Arrêts and Declaration* of the King of France, upon which such stress has been laid by Mr. Attorney General, cannot be held to affect, in any wise, any lands in Canada being within the *enclave* of any fief or seigneurie:—Firstly, as to which the seignior holding the same may have obtained from the Crown of Great Britain and Ireland, a commutation of all feudal burthens due to the Crown thereon, and a re-grant of the lands thereof under the tenure of free and common soccage, by virtue of the Statutes of the Imperial Parliament, the 3 Geo. IV. c. 119, commonly called the Canada Trade Act, and the Act of the 6 Geo. IV. c. 59, known as the Canada Tenures Act;—or, secondly, as to which the seignior holding the same may, in the terms of, and under the said Statutes, or either of them, duly have applied to Her Majesty, or any of her predecessors, for such commutation, release, and re-grant;—or, thirdly, as to which the seignior may hereafter apply;—or, fourthly, as to any person holding any of such lands whether en *fief* or otherwise;—or, fifthly, in

respect of any contracts thereto belonging. My attention is first directed to this proposition, because, whatever may have been the object of the party who asserted it, if true, its practical and necessary result, and the consequence arising therefrom are, not only to supersede the *Arrets and Declaration* referred to, but the very statute of the Province by which this Court is empowered to sit here. Whatever may be the consequences, and I am deeply impressed with their importance, they cannot weigh a feather in the scales of justice. It is urged, then, that the statutes of the Imperial Parliament in question, are in full force, and entitle the owners of seigniories to obtain from the Crown a commutation of tenure now, and at all times hereafter, till repealed. To test the question, each of the two statutes upon this subject must be examined. Beginning with the first in order of time, the 3 Geo. IV, c. 119, the reader will notice, that it is an Act for the regulation of Canadian trade, and that yet it contains two provisions unconnected with the subject and relating to one very different, namely, the Tenure of Lands in Canada. These provisions are contained in the 31st and 32nd sections, which are as follow:—

" XXXI. And whereas doubts have been entertained whether the tenure of lands within the said Provinces of Upper and Lower Canada holden in *fief* and seigniory can legally be changed; And whereas it may materially tend to the improvement of such lands, and to the general advantage of the said Provinces, that such tenures may henceforth be changed *in manner hereinafter mentioned:* Be it therefore further enacted and declared, that if any person or persons holding any lands in the said Provinces of Lower and Upper Canada, or either of them, in *fief* and seigniory, and having legal power and authority to alienate the same, shall *at any time* from and after the commencement of this Act surrender the same into the hands of His Majesty, His heirs or successors, and shall by petition to His Majesty, or

to the Governor, Lieutenant-Governor or person administering the Government of the Province in which the lands so holden shall be situated, set forth that he, she, or they, is or are desirous of holding the same *in free and common soccage*, such Governor, Lieutenant-Governor, or person administering the Government of such Province as aforesaid in pursuance of His Majesty's instructions, transmitted through his Principal Secretary of State for Colonial Affairs, and by and with the advice and consent of the Executive Council of such Province, shall cause a fresh grant to be made to such person or persons of such lands to be *holden in free and common soccage, in like manner as lands are now holden in free and common soccage in that part of Great Britain called England;* subject nevertheless to payment to His Majesty, by such grantee or grantees, of such sum or sums of money as and for a commutation for the fines and other dues which would have been payable to His Majesty under the original tenures, and to such conditions as to His Majesty, or to the said Governor, Lieutenant Governor, or person administering the Government as aforesaid, shall seem just and reasonable; Provided always, that on any such fresh grant being made as aforesaid, no allotment or appropriation of lands for the support and maintenance of a Protestant Clergy shall be necessary; but every such fresh grant shall be valid and effectual without any specification of lands for the purpose aforesaid; any law or statute to the contrary thereof in any wise notwithstanding.

XXXII. And be it further enacted, that it shall and may be lawful for His Majesty, His heirs and successors, to commute with any person holding lands at *cens et rentes* in any censive or fief of His Majesty within either of the said Provinces, and such person may obtain a release from His Majesty of all feudal rights arising by reason of such tenure, and receive a grant from His Majesty, his heirs or successors, in free and common soccage, upon payment to His

Majesty, his heirs or successors, may deem to be just and reasonable, by reason of the release and grant aforesaid, and all such sums of money as *shall be paid upon any commutations made by virtue of this Act shall be applied towards the administration of justice and the support of civil government of the said Province.*"

These sections are declaratory, and to remove then existing doubts, and they are also remedial, as furnishing means for effecting a change henceforth, which " may materially tend to the improvement of such lands, and to the general improvement of the said Provinces." The enactment is, that if at any time from and after the commencement of this Act, a surrender be made and a petition presented, setting forth the desire of the holder of lands en fief to hold the same in free and common soccage, the Governor, &c., shall cause a fresh grant to be made to such person of the said lands, to be holden in free and common soccage, as lands are now holden under that tenure in England. Here the surrender of the land, followed by the signification of the desire of the holder, is made to suffice to secure the commutation of tenure. The grantee is subjected to the payment of such sum or sums as a commutation for the fines and other dues, payable under the original grant of tenure, and to such conditions as to the Crown of Great Britain shall seem just and reasonable. So much for the holders en fief. By the 32nd Section, the censitaires of the Crown are enabled to obtain a release from all feudal rights, and to receive a grant in free and common soccage, merely upon payment of such sum of money as the Crown may deem to be just and reasonable, and without any condition annexed. And the Act appropriates the monies paid upon any commutations made under it towards the administration of justice, and the support of the Civil Government of the said Province. Whatever may have been the objections as to the mode adopted, in introducing these two sections into

the Canada Trade Act, the Legislature of this Province, by passing our own Act of the 10 & 11 Vic. c. 111, recognised its beneficial tendency. It is intituled "An Act to facilitate commutation of the tenure of lands *en roture* in the Queen's Domain into that of free and common soccage, and to avoid the unnecessary delays and expense heretofore incidental to such commutations," and provides as follows:—

"That whenever, pursuant to the aforesaid Act, passed in the Third year of the Reign of His late Majesty King George the Fourth, by the Imperial Parliament, intituled: "An Act to regulate the trade of the provinces of Lower and "Upper Canada, and for other purposes relating to the said "provinces," any person, holding land, real or immoveable property *à titre de cens et rentes* within the *censive* of any fief or seigniory of Her Majesty in this Province, or in any of the estates of the late Order of Jesuits, shall be desirous to obtain a release from Her Majesty of all feudal or seigniorial rights arising therefrom, and to commute the tenure of such land, real or immoveable property from that *en roture* into free and common soccage, and shall apply for this purpose to the proper officer or agent thereinafter mentioned specially appointed and duly authorized by the Governor or person administering the government of the province for the time being on the part of the Crown, for the fief or seigniory in which such land, real or immoveable property is situate, setting forth in his application by writing the description, according to his titles, of the land, real or immoveable property, the tenure whereof he is desirous of commuting, exhibiting also therewith his titles, and requesting commutation of the tenure of such land, real or immoveable property and shall have been mutually agreed upon by such officer or agent on the part of the Crown and the applicant, as the commutation fine, indemnity or consideration in that behalf, to be paid to Her Majesty on the intended commutation, or that shall have been fixed, ascertained and determined in

manner hereinafter provided, and have also duly paid or secured the payment of all arrears of seigniorial rights, dues and duties which he, she or they owed or may owe Her Majesty thereupon, or with which the said land, real or immoveable property in respect whereof such commutation, release and extinguishment may be sought or required, had been, was or may then be chargeable in favor of Her Majesty, such officer or agent shall be and he is hereby authorized to execute a release by act duly executed before notaries, as nearly as may be in the form prescribed in the Schedule of this act (and for which the notary shall be entitled to a fee of twenty shillings, and no more, from the applicant) in the name of Her Majesty, of the said land or real property, from all feudal or seigniorial rights, dues and incumbrances arising and accruing thereupon, to Her Majesty by reason of the tenure thereof à titres de cens et rentes et roture, declaring also the tenure of the said land to be in virtue of such release for ever thereafter commuted into that of free and common soccage, and which release and act or deed of Commutation shall be deemed, held and taken to be to all intents and purposes tantamount and equivalent to a grant of such land from Her Majesty, her heirs and successors as provided by the above recited Act of the Imperial Parliament of the third year of the reign of His late Majesty George the Fourth, and the commutation of tenure of the said land or real property shall thereby be perfect and accomplished, and the land to which such commutation shall relate be for ever thereafter held in free and common soccage, according to the true intent and meaning of the said Act.

It is to be observed that the commutation under the 3 Geo. 4, c. 119, was to be obtained " in manner hereinafter mentioned," that is, by surrender and petition. Our Colonial Statute provided a shorter and less expensive process to facilitate the working of the said Act, and, by the 9th

section, it enacts that those who take advantage of it, although their tenure shall be free and common soccage, yet, unlike lands so held in England, shall hold them, so far as respects descent, alienation and dower, as if they were held en franc aleu roturier. The words "shall have been so as aforesaid commuted under this Act, or any other law in force in this Province," are open to much observation unnecessary at this time, as they are susceptible of being construed into the future, and not as contemplating a retrospective effect. This Act of legislation was not sanctioned by the Governor in the usual way, but was reserved for the signification of Her Majesty's pleasure thereon. The Royal Assent having been given to it, it was proclaimed as law on the 11th December, 1847, a fact which is to be remarked now, though it must be more fully noticed hereafter. The operation of this Colonial Act is limited to the Queen's domain and Her censitaires, as falling under the 32nd section of the Trade Act, and has no reference to fiefs or their holders, as viewed by the 31st section. It is an affirmative statute, and contains no negative, express or implied; it gives greater facilities to carry out the Imperial Statute, but does not undertake to alter or repeal it. The new manner of obtaining a commutation is perfectly consistent with the manner of proceeding under the Imperial Statute, and both may coexist. So that the applicant for commutation, desirous of obtaining it under the soccage tenure as lands are held in England, may still continue to obtain it, with its incidents, by pursuing the more costly and difficult course prescribed by the Imperial Statute, while another censitaire of the Crown may obtain, with much greater facility at less expense, a regrant by the free and common soccage tenure, but with the incidents of franc aleu roturier. To pass now to the Imperial Statute of the 6 Geo. 4, c. 59, it will be found that the restricted application of the Geo. 4, c. 119, to seigniors and tenants of the Crown, led to a further interference

on the part of the Imperial Legislature, for the purpose of extending its operation. The Statute now in question is intituled " An Act to provide for the extinction of Feudal and seigniorial rights and burthens on lands held *à titre de fief* and *à titre de cens* in the Province of Lower Canada, and for the gradual conversion of those tenures into the tenure of free and common soccage, and for other purposes relating to the said Province." It provides: " That whenever any person or persons holding of His Majesty as proprietor or proprietors of any *fief* or seigniory in the said Province of Lower Canada, and having legally the power of alienating the same in which Fief or seigniory lands have been granted and are held *à titre de fief*, in *arrière fief*, or a *titre de cens*, shall by Petition to the King, through the Governor, Lieutenant Governor, or Person administering the Government of the said Province, apply for a commutation of and release from the *droit de quint*, the *droit de relief*, or other feudal burthens due to His Majesty on such *fief* or seigniory, and shall surrender into the hands of His Majesty, His Heirs or Successors, all such parts and parcels of such *fief* or seigniory as shall remain and be in his possession ungranted, and shall not be held as aforesaid *à titre de fief*, in *arrière fief*, or *à titre de cens*, it shall and may be lawful for His Majesty, or for such Governor, Lieutenant Governor, or Person administering the Government, as aforesaid, in pursuance of His Majesty's Instructions transmitted through one of His Principal Secretaries of State, by and with the advice of the Executive Council of the said Province to commute the *droit de quint* the *droit de relief*, and all other feudal rights and burthens due to His Majesty upon or in respect of such *fief* or seigniory, for such sum of money or consideration, and upon such terms and conditions as to His Majesty, or to such Governor, Lieutenant Governor, or Person administering the Government as aforesaid, in pursuance of such instructions, and by and with such advice

as aforesaid, shall appear meet and expedient ; and thereupon to release the person or persons so applying, his, her and their heirs and assigns, and all and every the lands comprised in such *fief* or seigniory, from the said *droit de quint*, *droit de relief*, and all other feudal burthens due or to grow due thereupon to His Majesty, His Heirs or Successors, of whatsoever nature or kind, for ever ; and to cause a fresh Grant to be made to the person or persons so applying, of all such parts and parcels of such *fief* or seigniory as shall as aforesaid remain and be in his, her or their possession ungranted, and which shall not be held *à titre de fief*, in *arrière fief*, as aforesaid, or *à titre de cens, to be thenceforward holden in free and common soccage, in like manner as lands are now holden in free and common soccage in that part of Great Britain called England*, without its being necessary for the validity of such Grant that any allotment or appropriation of Lands for the support and maintenance of a Protestant Clergy should be therein made ; any Law or Statute to the contrary thereof notwithstanding.

III. " And be it further enacted. That in all cases where any seignior or seigniors, or person or persons holding land, *à titre de fief* in the said Province of Lower Canada, shall by reason or means of a commutation with His Majesty, or of a surrender of his, her, or their *fief* or seigniory, or any part thereof, to His Majesty, or by reason or means of a commutation with his or their immediate superior lord or seignior, or otherwise howsoever, have obtained or shall or may hereafter obtain for himself, herself, or themselves, his, her or their heirs or assigns, from His Majesty or from the Governor, Lieutenant Governor, or person administering the Government of the said Province of Lower Canada, or from his, her, or their immediate superior lord or seignior, a release from and extinguishment of the *droit de quint*, or *droit de relief*, due and payable by him, her or them, his, her or their heirs and assigns, for, or in respect of lands so

held *à titre de fief*, such seignior or seigniors, person or persons aforesaid, his, her, and their heirs and assigns, shall be held and bound, when thereunto required by any of his, her, or their censitaires, or the persons who now hold or hereafter may hold the said lands, or any of them, or any part thereof, *à titre de fief*, in *arrière fief* as aforesaid, or *à titre de cens, to consent to grant, and allow to and in favor of such censitaires, or other person or persons as aforesaid requiring the same, a commutation, release, and extinguishment, of and from the droit de quint and droit de relief, or droit de lods et ventes, as the case may be, and all other feudal and seigniorial rights and burthens to which such censitaire or other person or persons, his or their heirs and assigns, and his and their lands so held by him or them, may be subject or liable, to such seignior or seigniors, person or persons aforesaid, his, her, or their heirs and assigns, for a just and reasonable price, indemnity, or consideration, to be paid for the same same, which price, indemnity, or consideration, in case the parties concerned therein shall differ respecting the same, shall be ascertained and fixed by experts, to be in that behalf nominated and appointed, according to the due course of law in the said Province of Lower Canada, regard being had to the value of the said lands so held a titre de cens or a titre de fief, in arriere fief, as aforesaid.*

Under these provisions, an application by petition to the King, whenever made, that is to say, in all time to come, while the Act shall be in force, by the proprietor of any *fief* or seigniory in which lands have been granted, for the commutation of and release from the feudal rights and burdens due to the Crown, and a surrender into the Royal hands, of the ungranted parts and parcels of such *fief* are sufficient to enable the applicant to commute, for such consideration and upon such terms and conditions as shall appear most expedient, and to entitle him thereupon to be released from the said rights and burdens, present and future, to His

Majesty, his heirs and successors, of whatever nature and kind for ever, and to obtain a fresh grant of all ungranted and unconceded lands, *thenceforward to be holden in free and common soccage, in like manner as such lands are held in England.* As to the lands conceded or granted by such applicant, his rights as the seignior continue unimpaired until a commutation shall have been obtained by the censitaire or vassal, and this right of commutation may by him, at any time, be claimed at the hands of the seignior, who, when thereunto required, is obliged to grant the same, for a just and reasonable indemnity, which, in case of disagreement, is to be ascertained by *experts* to be nominated according to the due course of law in Lower Canada, regard being had to the value of the said lands so held *à titre de cens*, &c. These two Imperial Statutes are not temporary but perpetual, and have never been repealed by the Parliament of Great Britain. It will not be pretended that the Parliament of Canada has the power expressly to repeal them, and any Act which would profess to do so in direct terms would be a nullity upon its very front. The power of legislation exercised by the Parliament of Canada is derived from the Imperial Act of Union, the 3rd and 4th Vic. c. 25, the third section of which enacts :

" III. That from and after the reunion of the said two Provinces, there shall be within the Province of Canada one Legislative Council and one Assembly, to be severally constituted and composed in the manner hereinafter prescribed, which shall be called. " The Legislative Council and Assembly of Canada " ; and that, within the Province of Canada, Her Majesty shall have power, by and with the advice and consent of the said Legislative Council and Assembly, to make laws for the peace, welfare, and good government of the Province of Canada, *such laws not being repugnant to this Act, or to such parts of the said Act passed in the thirty-first year of the reign of his said late Majesty*

as are not hereby repealed, or to any Act of Parliament made or to be made, and not hereby repealed, which does or shall, by express enactment, or by necessary intendment, extend to the Provinces of Upper and Lower Canada, or to either of them, or to the Province of Canada and that all such laws being passed by the said Legislative Council and Assembly, and assented to by Her Majesty, or assented to in her Majesty's name by the Governor of the Province of Canada, shall be valid and binding to all intents and purposes within the Province of Canada."

" And the 49th Section, at the same time that it repeals so much of the Canada Trade Act as relates to the appointment of arbitrators between Lower and Upper Canada, in relation to the apportionment of the revenue derived from the customs, expressly recognises the other parts of that Act, and among others the 31st and 32nd sections just read. The important question now arises whether the " Act for the abolition of feudal rights and duties in Lower Canada" be repugnant to the two Imperial Statutes in question, for, if such be the case, though it appears on the Statute book, and has been acted upon as law, though we are here assembled in obedience to it, it is no law having binding efficacy even in Canada, as the authority which passed it, great as it is, will in this case have transcended the power of legislation delegated to it, and having exceeded the limits prescribed to it, will have become shorn and divested of its legislative character and functions. Excess of authority, if any there be, like every other excess of jurisdiction vitiates and annuls the Act *ab initio*. In the conflict of two laws, one Imperial and the other Provincial, the latter must give way, for without this all order and due subordination would cease. Happily, in the present instance, it is not necessary to enter at any length upon the vast field of enquiry into the power of the judiciary of a country governed by a charter granted by supreme authority, or having a fixed con-

stitution reduced to writing as the fundamental law of its organization, to pronounce upon legislative Acts conflicting with such organic law or constitution. I have little doubt that such a power is, in such cases, inherent in the judiciary, and that it arises *ex necessitate rei.*

" In No. 78 of the Federalist, which comprises a view of the constitution of the judicial department, in relation to the tenure of good behaviour, we read—" The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

" Some perplexity respecting the right of the courts to pronounce legislative Acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

" There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative Act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm

that the deputy is greater than the principal; that the servant is above his master; that the representatives of the people themselves, that men, acting by virtue of powers, may do, not only what their powers do not authorize, but what they forbid.

" If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be recollected from any particular provisions in the constitution. It is not otherwise to be supposed, that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law, it must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcileable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred: in other words, the constitution ought to be preferred to the statute; the intention of the people to the intention of their agents.

" Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the

latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

" This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation; so far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; when this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an equal authority, that which was the last indication of its will, should have the preference.

" But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us, that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority: and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

" It can be of no weight to say, that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the Legislature, this might as well happen in the case of two contradictory statutes ; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law ; and if they should be disposed to exercise will instead of judgment, the consequences would equally be the substitution of their pleasure to that of the Legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

" If then the courts of justice are to be considered as the bulwarks of a limited constitution, against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

" This independence of the judges is equally requisite to guard the constitution and the rights of individuals, from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it consistent with their happiness ; yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary

inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions: or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.

"But it is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may imagine.

"The benefits of the integrity and moderation of the judiciary have already been felt in more states than one;

and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of all descriptions ought to prise whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress."

But there is to be noticed an express provision contained in the 36th section of "the Seigniorial Act of 1854", in these words, "nor shall anything in this Act be construed to weaken or to support any claim of any seignior, or of any censitaire to any right claimed by or for them respectively, at the hearing on the questions and propositions to be submitted under this Act to the judges for their decision, but the same shall be decided by the Law, as it stood immediately before the passing of this Act." There is also the provision contained in the 16th section of the Act, sub-division 4, by which any seignior "may submit any supplementary or counter-question, and may append to every such question a statement of the proposition or propositions he intends to maintain with regard thereto," by means of which the lady of Mr. Harwood has brought under the notice of this Court her claim to the privilege granted to seigniors by the two Imperial Statutes. That she is entitled to an answer is certain, and to deprive her of that answer would either impede or frustrate the right which she possesses to appeal from our decision to her Majesty in her Privy Council, a right which, under the Seigniorial Act of 1854, Sec. 16, Subdivision 9, is limited to those questions only as to which there may be any one dissentient judge. The Act does not specify the seigniories to which it applies, but the 39th Sec-

tion exempts from its operation certain seigniories therein named, and it is to be inferred, therefore, that it extends to all others, and among them, to the nine seigniories as to which a commutation of tenure has taken place under the Imperial Legislature, in so far as concerns lands therein still held *en censive.* Now, with respect to these seigniories, although the feudal tie, or *vinculum*, between the Crown and the seignior has been broken, yet the 2nd section of the 6 Geo. IV. c. 59, has enacted that, as between the seignior and the *censitaire*, " the fresh grant from the Crown shall not take away, diminish, alter, or in any manner or way affect the feudal, seigniorial or other rights of the seignior," but, on the contrary, that " all and every such feudal, seigniorial, and other rights shall continue and remain in full force upon and in respect of such lands, and the proprietors and holders of the same, until a commutation, release, and extinguishment thereof shall have been obtained."—How ? " In the manner hereinafter mentioned." And what is this manner ? The payment of a just and reasonable price, indemnity, or consideration, either agreed upon between the parties or to be ascertained by experts, regard being had to the value of the said lands." The right of the seignior is to continue in force until such payment be made. It is plain then that when a law is passed in the terms of the 14th section of " The Seigniorial Act of 1854," which declares, that from and after the date of the publication in the Official Gazette of a notice of the deposit, *not of the indemnity*, but only of the *schedule of any seigniory*, every *censitaire* in such seigniory shall, by virtue thereof, hold his land *en franc aleu roturier*, free and clear of all *cens*, *lods et ventes*, *droit de banalité*, *droit de retrait*, and other feudal and seigniorial duties and charges whatever," the condition upon which the seignior obtained his commutation is broken, the provisions of the Imperial Act are infringed, and the public faith of the Empire is violated. Instead of payment of an indemnity in

money, the seignior is compelled to take a *rente constituée*, of which he shall not have the right to recover more than five years' arrears; instead of mutual agreement, or a reference to experts in whose nomination he will have a voice, as prescribed by the Imperial Statute, he is to be subjected to the judgment of Commisioners appointed by the Crown; instead of the measure of indemnity he stipulated and obtained,—" regard being had to the value of the land," another and a different standard is imposed upon him; his *droit de retrait* is taken from him, without indemnity, under Section 5, subdivision 4, and his honorary rights under Section 14. And as there is no clause to exempt him from the general prohibition to seigniors, he is not to grant any land, to be held by any other tenure than *franc aleu roturier*, and his right to concede or alienate any part of the unconceded lands in his seigniory is suspended, " until after the notice of the deposit of the schedule thereof has been given as aforesaid," and any " such concession or alienation is made null and void." But, if the right of the seignior who has commuted under the Imperial Statute has been impaired, diminished, varied, and altered contrary to its intent and meaning, he is not the only sufferer under this Act of legislation, his *censitaire* is on his side also deeply injured. The commutation, which before was optional with him and voluntary, is now made compulsory;—under the Imperial Statute it was left to him to propose to commute at the time he deemed most favorable, he is now made to do it at once, whether he will or not. He could make terms with his seignior as to the amount of indemnity, and the mode of payment, he is now debarred from this; his land which, before, he held subject to annual redevances, but otherwise unburthened with debt, is now subject to a *rente constituée*, and his obligations, instead of being regulated by *expertise*, are left to the decision of judges, not of his own choosing. What is even worse, under the 33rd section of the Act, when the *censitaire*, under the Imperial Statute, may have actually

commuted with the seignior, his land, although by a deed in writing executed before the passing of the Seigniorial Act of 1854, it may have been released from all seigniorial rights, in consideration of the payment of a sum of money, or of an annual rent, is not only declared to be, but, by retrospective and *ex post facto* legislation, " is declared to have been, from the day of the date of the said deed holden in *franc aleu roturier*," although he may have stipulated for free and common soccage. " Nay more, although he shall have agreed with his seignior for an annual rent, the Commissioners are directed to" deal with all such lands as if they were now held *en roture*, and, when the same are liable to an annual rent, shall establish and specify in the schedule the capital of every such rent, in order that the same may be redeemed by the person liable therefor, in the same manner as any *rente constituée* established by this Act." In other words, an *ex post facto* Act alters his contract with the seignior, entered into in good faith under the Imperial laws, and charges him with a *rente constituée*, which under the 28th and 29th sections of the Act is not redeemable unless by consent of the seignior, or by the united action of *all the censitaires*, without whose consent and concurrence he cannot redeem. He is subjected to a new Colonial law, notwithstanding his contract under the Act of the Parliament of Great Britain which had freed him for ever. Under these circumstances, I do not hesitate to express my opinion that, in so far as the Seigniorial Act of 1854 touches the rights either of seigniors or of *censitaires* in the conceded lands in the nine commuted seigniories, or in any manner relates to them, that Act is repugnant to the Imperial Statute of the 6 Geo. 4. c. 59, and is *ipso facto* null and void. To come now to the other case stated in the proposition of the party in question, that is, of those seigniors who may, in the terms of and under the Imperial Statutes, or either of them, duly have applied to Her Majesty or any of her predecessors

for a commutation, release and regrant. The object of the Parliament of Great Britain, in passing the two Acts in question, was to effect the *gradual* conversion of lands in Lower Canada held *à titre de fief* and *à titre de cens* into the tenure of free and common soccage, as lands are holden in England. So far from containing any compulsory provisions for extinguishing the feudal system within a limited period, these statutes left it to be the work of time. The initiative was given to the seigniors; if they adopted it, the *censitaires* in their turn then, and then only could, on their side, claim the right to commute. Every seignior in Lower Canada under the terms of these Acts has the right to claim from the Crown, and to obtain the benefit of a commutation of his tenure, into free and common soccage, upon compliance with the conditions prescribed by Parliament. The Crown cannot refuse to recognize this right, and to allow its free exercise, without violating the Acts and improperly preventing them from taking effect. The Legislature has declared that "it may materially tend to the improvement of such lands, and to the general advantage of the said Provinces that such tenures may henceforth be changed in manner hereinafter mentioned," and, by the Statute of the 3 Geo. 4, it is made imperative upon the Governor, by and with the advice and consent of the Executive Council, to cause a fresh grant to be made, &c. The terms of the Statute 6 Geo. 4. c. 59, "it shall and may be lawful for His Majesty, &c.," though more respectful than the imperative form of words in the previous Act, as applied to the Government, import the same duty to carry out the law when its benefits are claimed by the seignior. No time is prescribed for making this claim, in the words of the 3 Geo. 4, "if any person holding any lands, &c. in *fief* and Seigniory, &c., shall *at any time* from and after the commencement of this Act, surrender the same &c., the Governor shall cause a fresh grant, &c. In the words of the Statute 6 Geo. 4, "whenever any person holding of his Majesty, as proprietor, any *fief* or Seigniory, &c.

shall, by Petition to the King, &c., apply for a commutation &c , it shall and may be lawful for His Majesty, or for such Governor, &c., by and with the advice, (but not consent) of the Executive Council to commute," &c. The Seignior then is left to take his own time, and to suit his own convenience. Can it be in the power of the Canadian Legislature to deprive him of this right, or in any way to abridge its exercise? Surely not, unless it can take away that which a superior authority has given, but which it never gave itself. The Parliament of Great Britain provides for the *gradual conversion* of tenure in manner and form which it prescribes. Can the local Legislature, by passing an Act for the *immediate* "abolition of feudal rights and duties in Lower Canada," substitute another manner and form totally at variance with the Imperial Acts, and annihilate their operation? Can the will of the Imperial Legislature, that the conversion of tenure shall be into free and common soccage, according to the law of England, be controlled by the contrary will of the Parliament of Canada, that it shall be into *franc aleu roturier* according to the law of France? If the Seignior who has made an application which has been intercepted by the Seigniorial Act of 1854, is in *morâ*, is there laches on his part? No, whenever he claims his right he is entitled to it, and must so continue to be entitled until the two acts of Parliament shall be repealed by competent authority. If the incidents of the two tenures were the same, the change would be only nominal, but they are totally different, and carry with them entirely different rules of descent, alienation, testamentary disposition, and dower. Is it not virtually to repeal the two Acts of Parliament in question, if, from and after the date of the publication in the *Canada Gazette*, or other Official *Gazette*, of a notice of the deposit of the Schedule of any Seigniory as aforesaid, all lands therein are to be held in *franc-aleu*, and if provision be made to bring every Seigniory in Lower Canada subject to the British Acts, under the *immediate* operation of the conflicting

Canadian law, at utter variance with them. To abolish all feudal rights and duties in Lower Canada is to withdraw effectually all the Seigniories and all Seigniors and *Censitaires* out of the purview of the British Acts. If the Seigniorial Act of 1854 be carried into effect, will any thing remain to which the Imperial Statutes can apply? Will not those Statutes become a dead letter as effectually as if repealed in express terms? Whenever commutation under these Statutes shall have been effected in all the Seigniories of Canada, they will become effete, but can this be accelerated by conflicting legislation? Certainly not; for there is no surer mode of repealing a law than by absorbing its subject matter and the rights which it governs. The Seigniorial Act of 1854 attempts to do indirectly what it cannot do in direct terms, and must therefore fail of success. And hence, it is to be observed, that if the Statute of the 10 and 11 Victoria, already mentioned, the tendency of which was only to facilitate the commutation, and not to abolish the tenure, and which was limited to the Queen's Domain, and did not, like this, extend to all the seigniories in the Province, was yet reserved for the signification of Her Majesty's pleasure, *a fortiori* the Act of 1854 should also have been reserved. As to the consequence even then, I express no opinion; but I am firmly convinced that not only the seigniors who had applied for commutation under the Imperial Acts, as enquired of by Mrs. Harwood, but that all the seigniors who have made no application and have remained silent are as fully entitled to the benefit of those Acts now as they ever were; anything in the Seigniorial Act of 1854 to the contrary notwithstanding. I hold it to be equally out of the power of the Imperial Government as of the Provincial, by refusing commutations, to thwart the execution and carrying into effect of the two Acts of Parliament. Duty requires that they be enforced until repealed by competent authority, for the Legislature and not the Executive is the

superior power. Before dismissing this subject, I think it right to add that the appropriation of monies made by the Statute of the 3 Geo. 4, is at variance with that of our Colonial Act, and that these monies are not comprehended "in the territorial and other revenues now at the disposal of the Crown, arising in this Province," mentioned in the Act of the 9 Victoria, for granting a Civil List to Her Majesty. The Imperial Statutes, in securing to the seignior a grant in free and common soccage of the unconceded lands in his seigniory, whenever he shall be pleased to demand it, and which authorises him at any time to surrender the same to the Crown for the purpose of such grant, impliedly repealed the *Arrêts* and Declaration of the King of France mentioned in the Counter-questions of Mrs. Harwood, and I have, therefore, to give my entire assent to the proposition submitted to the Court on her behalf.

To pass now to the questions proposed by Mr. Attorney General, the Seigniorial Act has directed that officer to "frame such questions to be submitted for the decision of the Judges, as he shall deem best calculated to decide the points of law which will in his opinion come under the consideration of the said Commissioners, in determining the value of the rights of the Crown, of the seigniors, and of the *censitaires*."

The questions proposed are 46 in number; they are extended by the subdivision of one of them under ten heads, and of another under three, amounting in all to 59 questions; on the part of certain seigniors thirty three questions have been put. The *censitaires* have entered no appearance, and have filed no questions. With reference to very many of the questions on the part of the Crown, they are doctrinal and speculative, rather than practical, and I would fain hope that such like points will not be raised before the commissioners, or come under their consideration, as they would

lead to almost interminable discussion. The abolition of the feudal tenure in France, though dating so far back as the revolution, has created at the present day new theories and excited renewed discussions. The courts of justice are embarrassed with questions which, it was supposed, were set at rest for ever, and the most distinguished lawyers of France are divided in opinion. " Un grand nombre d'écri- " vains ont entrepris de porter la lumière dans ce cahos, et " malheureusement aucun d'eux n'a les mêmes opinions ; " chacun a bâti son système sur des faits et sur des raison- " nements qui ont été combattus par des faits et des raison- " nements capables de décourager ceux qui veulent appro- " fondir la législation et la jurisprudence féodale." (Ancien RÉPERT. vo. *Fief.*) In speaking of this subject, M. Troplong says : " Appelé par mes fonctions à prendre part à ces " débats judiciaires, j'ai dû me livrer à l'étude spéciale de quelques-uns de nos feudistes et publicistes les plus renommés, par exemple, DUMOULIN, LOYSEAU, LEBRET, DAGUESSEAU, HENRION de PENSEY. Mais le dirai-je ! *fremant omnes scilicet*, je n'ai rien trouvé dans ces vivains qui puissent satisfaire les esprits nourris des doctrines mises en honneur par l'école historique siècle. Vues mesquines et passionnées sur nos , fausse intelligence des sources, préjugés de ps, haines systématiques, voilà ce qui m'a frappé dans es auteurs plus vantés qu'étudiés par la génération " actuelle." (Revue de Législation, tome 1, p. 5.) The difficulty of the subject has been felt by the counsel to whom has been confided the interest of the Crown on one side, and that of the seigniors on the other, and a protracted argument, conducted whith great ability, displayed the patient study, the unwearied industry, and the profound learning of these gentlemen, alike honorable to themselves and creditable to the country. But the argument itself smoothed the difficulty, and the elaborate investigation into

which his Honor the President of the Court has entered, and his intimate archeological acquaintance with all points of Canadian history both legal and political, even to their most minute details, have greatly relieved me in the discharge of my duty on this occasion. After what has been said, I do not feel myself justifiable in entering at any length upon the discussion of the several points which have been raised before the court. Upon most of the questions put in issue there is substantially such agreement among the members of the Court, that general observations will suffice to express the views which I individually entertain. The introduction of the feudal system into the country by the French authorities is, no doubt, to be attributed to the prevalence of that system in Europe at the time. The maxim " *nulle terre sans seigneur* " had taken such deep root, that it was deemed as applicable to the forests of New France, as to the long settled and cultivated soil of the mother country. But it is evident that the circumstances of the colony and its occupation in a state of nature by the native Indians, very much modified the system, and that, when the Custom of Paris was proclaimed as law, so much of it only as was suitable to the state and condition of the country could be acted upon in Canada, and that it had to be moulded so as to adapt it to local use. The feudal policy, which resisted the *démembrement de fief*, and sought to keep the property in its integrity, the better to secure the *suzerain* in the exercise of his rights, was inconsistent with the settlement of a new country, which required hands as well for the plough as for the sword, to make it productive of a supply of food as well as to protect the colonist from the native tribes, and from the no less hostile inhabitants of New-York and New England. Hence, large tracts of land were granted *en fief* to persons of wealth and in power, with a view to induce them to use their means to promote emigration and settlement. As the government freely made the grants, it as freely rescinded

them, when circumstances shewed that the grantees were unable or unwilling to comply with its views in making them. The feudal contract was readily broken in Canada, as it assumed a type and form unknown in Europe, and its enforcement was not to be met by *commise, saisie féodale*, the pains and penalties of older societies. Again, the *titre valable* could not be subjected in the new country to the twenty five years enjoyment required in the old, by the article 71 of the Coutume de Paris (1) and the *Justice*, so profitable and important in France, was of small value in Canada, and difficult to be exercised; the *banalité* also was different. In controlling and carrying out the seigniorial system, an important functionary was the *Intendant de la justice, police et finances*. He was possessed of legislative, administrative and judicial powers, all at once, and had in his hands the management of the colonial treasury. In his judicial capacity he was President of the *Conseil Supérieur* composed of twelve councillors, eleven being laymen and one spiritual, in which also, the Governor General and the Bishop had seats. "Il n'y était reçu, "(says Cugnet, p. 70,) que des affaires en appel des sen- "tences rendues dans les trois cours subalternes" (that is the *Prévôté*, at Quebec, and the *jurisdictions royales* at Montreal and Three Rivers) "l'Intendant, comme chef de "la justice et de la police, pouvait s'évoquer toutes affaires "tant civiles que criminelles et de police, et il était juge (pri- "vativement à tous autres,) dans toutes les affaires qui con- "cernaient le Roi et la police, ainsi que pour vuider et juger "toutes difficultés, tant entre seigneurs et seigneurs, sei- "gneurs et censitaires, que censitaires et seigneurs. En sa "qualité de chef de la justice, il établissait des sub-délégués "à son choix, pour décider sommairement toutes les petites "affaires depuis vingt sols jusqu'à cent francs, et pour juges "de police; des jugements desquels on appelait à lui-même;

(1) "N'est reputé titre valable, s'il n'est avant 25 ans."

" et le Commissaire-Ordonnateur à Montréal était son subs-
" délégué né et de droit quand aux différends des seigneuries;
" et il était loisible aux parties qui se trouvaient lésées de
" ses jugements d'en appeler à l'Intendant qui les confirmait
" ou les infirmait, ainsi qu'il le trouvait juste. Les parties
" pouvaient appeler des arrêts du Conseil Supérieur et des
" jugements d'Intendant au Conseil d'Etat du Roi. Il n'y
" a eu, (adds Cugnet) depuis le premier établissement du
" Canada, que cinq ou six exemples d'appels, parce que ces
" arrêts étaient réfléchis, et que l'Intendant ne rendait ses
" jugements, dans des affaires d'importance, que sur les
" avis de plusieurs conseillers qu'il appelait à cet effet, et
" dans lesquelles le Procureur-Général donnait ses conclu-
" sions. La jurisdiction attribuée à l'Intendant n'occasion-
" nait aucun frais de procédure aux parties, les jugements
" en étaient délivrés *gratis*. L'Intendant jugeait aussi les
" affaires de commerce, et fesait en Canada les fonctions de
" Juge Consul." The *Intendants* of Canada moulded the Custom of Paris according to their own views of the wants and requirements of the Colony, and their authority was enforced by fines and confiscation, at their discretion. They made reports and suggestions from time to the Metropolitan Government, which occasionnally were enforced by *Rescripts*, or *Arrêts* and *Ordonnances* from the King of France, as the Supreme Legislator. In the exercise of their high powers, the Intendants were exempt from the wholesome control of an enlightened bar, or the publicity or latitude of discussion of the proceedings of modern Courts of Justice, even as now allowed in France. In directing the registration of his ordinance of 1667, Louis XIV says of Canada: " ayant
" égard à la pauvreté des habitants de ce pays, à l'état d'ice-
" lui, à la difficulté qu'il y a de faire des voyages dans
" toutes les saisons, au peu d'expérience de la plupart des
" juges, au peu de capacité des huissiers, et pour éviter aux
" frais qui arriveroient en beaucoup de rencontres par l'i-

" gnorance des habitants qui entreprennent des procès " quelquefois sans y pouvoir réfléchir, et sans pouvoir " prendre conseil, ne se trouvant en ce pays avocats, procu- " reurs, ni praticiens, étant même de l'avantage de la co- " lonie de n'en pas recevoir," and directs that provisional regulations be made by the *Conseil Supérieur* to meet the emergency. In 1678, the *Conseil Superieur*, while enregistering the ordinance, places in the margin of article 16 of title 2, the following observation : " Parce qu'il n'y a point " d'avocats et de procureurs en ce pays, et qu'il n'est pas à " propos d'y en établir, pour les raisons rapportées dans le " procès-verbal, le dit article sera exécuté en cas que l'ab- " sent ait laissé une procuration à un de ses amis." In the land-granting department under the French *régime*, the *Intendant* was associated with the Governor, the patents issuing in their joint names. In the exercise of their more than pretorian power, judicially, we have the testimony of one of them, M. Raudot, *père*, that they could not, under the circumstances of the colony, follow the rules of law, however much disposed so to do, without running the hazard of committing injustice. He writes, on the 10th November 1707, to his government : " Ce n'est pas que tout ne se soit " pas fait souvent dans la bonne foi, mais l'ignorance et le " peu de règles qu'on a observées dans toutes ces affaires " a produit tous ces désordres, lesquels en causeraient de " plus grands, si l'on souffrait que ceux qui pourraient se " prévaloir de cet esprit, ou de leur chef, ou par le conseil " des autres, intentassent des procès sur ce sujet. Il y " aurait plus de procès dans ce pays qu'il n'y a de person- " nes. Et comme les juges sont obligés de juger suivant " les règles dont ils commencent à avoir quelque teinture, " en les appliquant à des affaires où l'ignorance a fait qu'on " n'en a point observé, ils seraient obligés de faire mille in- " justices, ce que j'aurais cru faire moi-même, Monseigneur, " si je m'y étais entièrement assujéti dans plusieurs

" procès qui sont venus par devant moi." (Correspondance entre le Gouvernement Français et les Gouverneurs et Intendants du Canada; published pursuant to an address of the Legislative Assembly, page 6.) To the representations of the *Intendant*, no doubt well intended and made with a sincere desire to bring about useful reform the *Arrêt de Marly*, 1711, in respect of which so much has been said, is fairly attributable.

1 *c*

OPINION

OF THE

HONORABLE JUDGE DUVAL.

I.

Of the Imperial Acts, 3. Geo. IV, cap. 119, and 6. Geo. IV, cap. 59.

I have given to the several Questions submitted to us all the attention which their importance calls for, and I have not formed my opinion on any one of them without weighing deliberately all that has been urged at the Bar and during the many conferences which have taken place among the Judges. I have no intention of going over the same ground as that already taken up. I can see no advantage to be derived to the public from a repetition, though in different words, of the same ideas and the same arguments, the same principles of law, as those we have already heard.

I shall speak first of the power of the Legislature of Canada to pass the Act known as the Seigniorial Act of 1854. It is clear that if the Provincial Legislature had no power to pass this Act, we are relieved from the duty that it has imposed upon us of giving our opinions on the several points submitted to us.

On this head I have, from the commencement, entertained no doubt whatever. I see nothing in the 2 Acts of the Imperial Parliament, 3 Geo. 4, c. 119 and 6 Geo. 4, c. 59, which can be fairly construed to take from our Legislature the right of legislation it has exercised.

The Imperial Parliament did not make the commutation imperative either on Seigniors or *Censitaires*, but left it optional with both. It did not prohibit future colonial legislation; it gave the right of demanding a commutation to him

who holds a *fief*. In no part of the Imperial Statutes is it enacted that the feudal law of Canada shall continue unaltered or unimproved,—neither the letter nor the spirit of the Statutes would justify such an interpretation. The intention of Parliament is clear; it may be expressed in few words. You have in Canada a tenure which many believe opposed to the prosperity of the Colony, we will allow a commutation of this tenure to any proprietor of a *fief* desirous of obtaining it; but the change must depend on the exercise of his free will. He must be allowed to be the only Judge of his own interests. We, therefore, do not command, we merely permit such commutation. Beyond this, the Imperial Parliament never intended to go. It interposed it's authority solely to enable the proprietor of a *fief* to get rid of the burthens of the old tenure *en fief et seigneurie*. But surely until the commutation had taken place, the land remained subject to the power and control of the Colonial Legislature. A contrary interpretation would establish the monstrous doctrine, that the Imperial Parliament intended to place all the lands of the Country held *en fief et seigneurie* beyond the action of its legislative authority, at the same time that the Colonial Legislature exercised full powers as to lands held in free and common soccage, and to place such a power of legislation in whose hands? Not certainly in those of the Imperial Parliament, which has not put forth the extravagant and absurd design of doing away with a vital part of the constitution of Canada. Far from it, the authority of the Colonial Legislature for all purposes of domestic and internal regulations has always been recognised by Parliament. Has not the Imperial Parliament, by granting to the Legislature of Canada (see Imperial Acts, 6 Geo. 4, c. 59, § 8 & 1, Wm. 4, c. 20), the right of regulating the descent, grant, bargain, sale and alienation of lands then or afterwards to be held in free and common soccage only, put its own interpretation on its Acts, by including in such legislation, such lands only as were held under a tenure subject to the laws of England? Surely no language could be stronger or

plainer than this—it is beyond all cavil. And remark that the 8th clause of the 6 Geo. 4, ch. 59, was introduced for the express purpose of removing the doubts entertained by some as to the laws by which the descent, &c., of such lands were to be governed—and it was on no slight grounds that the canadian jurists not merely questioned, but positively denied that lands held in free and common soccage were to be governed by the laws of England. The Courts of Justice in Lower Canada had invariably applied to them the old laws of the Country to the exclusion of the laws of England. The distribution of all monies arising from the sale of such lands by *décret forcé* was governed by this old law; these lands passed by descent according to the same rule. The Court of King's Bench at Quebec, so expressely decided in an action brought for the very purpose of having this question decided, as to the descent of lands held in free and common soccage, and belonging to the estate of the late Honorable François Baby. This decision was not then questioned.

And so with respect to *hypothèques*, unknown to the laws of England, but existing in Canada, either by mere operation of law, or resulting from agreements executed before a notary, a public officer invested by French law with powers not recognised by English law. As to the correctness of these decision I entertain no doubt whatever on this subject.

I shall refer to the opinion given by Mr. Stephens, an english lawyer, before a committee of the House of Commons. Being asked what would be the law which in Lower Canada would regulate the inheritance of land held in free and common soccage if the owner died without a will? He answered that, before the Canada Tenures Act, lands held in free and common soccage in Lower Canada, would have descended in the same manner and according to the same rules as seigniories holden of the Crown.

This is sound doctrine, in accordance with those principles of public law which, Merlin says, are acknowledged

by all the States of Europe, and which the english Judges have repeatedly laid down as English law. (See lord Mansfields' Judgement in the case of Campbell and Hall, 20 vol. State Trials ; also the argument in Sir Thomas Picton's case, 30 vol. State Trials ; and lord Thurlow's opinion in Cavendish's Debates on the Canada Bill, p. 37 ; Baron Mazères argument in the Canadian Freeholder ; Chitty on Prerogative, p. 30 ; Story, in his Commentaries on the constitution of the United States, says : " Until such new laws are promulgated, the old laws and customs of the Country remain in full force, unless so far as they are contrary to our religion, or enact any thing that is *malum in se*.

It is not necessary here to do more than mention the Ordinance of 1763, by which it is pretended the laws of England were introduced into Canada, as by the Act of the Imperial Parliament, 14 Geo. III, ch. 83, § 8, the old laws and customs of Canada were made the rule of decision in all cases of controversy relative to property and civil rights. I may, on some future occasion, be called upon to express my opinion on this Ordinance.

The rules of law thus laid down by the Courts of Justice, for their guidance were those which the Legislative Assembly of Lower Canada, acted upon in the exercise of its legislative authority, previous to this Imperial Act above referred to, and this exercise of authority was never questioned by the Home Government. This could not have occured if the Canadian Assembly had usurped the power it exercised ; for, on referring to 2 vol. of Dwarris on Statutes, p. 999, we find what precautions are taken to obtain all the required information on the Acts of a Colonial Legislature. The Acts of the Session are referred by the Secretary of State to the Counsel for the Colonial Department, who is required to report his opinion upon them in point of law. By this old and established form of expression is understood to be meant that, the Counsel is to report, whether the Acts are such as consistently with his commission and instructions,

the Governor is authorized to pass; whether in the language of the Statute of 7 & 8 Wm. 3, c. 22 § 9, the act is repugnant to any law made in the United Kingdom having reference to the Colony.

I will now advert to the Ordinance incorporating the Montreal Seminary, and providing for the commutation of the tenure within the seigniory. It cannot be said this Ordinance passed without its provisions having been severely scrutinized by all the parties having adverse interests. The gentlemen of the Seminary were themselves deeply interested in not taking a title from a body not having the power to confer it. There were also people in England who did not view with indifference the passing of this Ordinance; and yet its legality has not been questioned, it has remained up to this day the acknowledged law of the land, regulating interests of paramount importance. Surely the Home authorities would never have connived at the exercise of such powers if they had viewed such exercise a mere usurpation.

I will next enumerate several Canadian Legislative Acts, whose legality has never been questioned.

1843, ch. 11. Act vesting in H. M. Ordinance the estates and property therein described.

1843, ch. 27. Act to commute the tenure of lands in the *fiefs* Nazareth, St. Augustin and St. Joseph.

1845, ch. 42. Act to facilitate optional commutation of tenure of lands.

1847, ch. 111. Act to facilitate the commutation of tenure in the Queen's Domain.

1849, ch. 49. Act to facilitate optional commutation of the tenure of land.

1853, ch. 207. Also respecting the optional commutation of the tenure of lands.

I have been thus minute in showing that lands held in free and common soccage were always subject to the old laws and customs of Lower Canada, down to the passing of the Imperial Statute 6 Geo. 4, c. 59, because Parliament having then interposed its authority, ostensibly to remove doubts, but in reality to introduce new laws into the Colony of Lower Canada, it at the same time gave to the Canadian Legislature the right of enacting such laws as might be necessary for the better adapting the rules of the laws of England to the local circumstances and conditions of the inhabitants of Lower Canada. Thus is made clear and beyond doubt the right of the Canadian Assembly to legislate for lands held in free and common soccage, from the time that tenure was introduced into Lower Canada down to the present day. And, here let me call attention to what I have before stated, that the Imperial Statute 6 Geo. 4, c. 59, speaks only of lands held in free and common soccage. In giving the Canadian Legislature the right to legislate for these in the manner it may deem advantageous to the inhabitants of Lower Canada, it does not give similar powers as to lands *en fief et seigneurie.* And why? Clearly because such lands were never subject to the laws of England, but were always subject to the old laws and customs of Lower Canada, and these old laws and customs the Canadian Legislature could at all times change. Had a different opinion been entertained, would not the same powers of legislation, and to a like extent, have been conferred on the Canadian Legislature respecting lands held *en fief et seigneurie*? What reason could be assigned to induce the Imperial Parliament to say to Lower Canada: You may change or modify the laws of England now in force in your Country, but we cannot allow you to touch the laws of old France. In thus abstaining from confering power, when power was not required, the Imperial Parliament has decided the question we are now discussing, and in my opinion it was right in not including in its legislation, (6 Geo. 4, c. 59,) lands held *en fief et seigneurie.*

I am glad to have it not to say that, in its legislation, the Imperial Parliament violated established principles, and substituted might to right.

Those who complain of the Seigniorial Act of 1854, argue that by the letter of the Imperial Act, a right is vested in all Seigniors to demand a commutation of their tenure, and that no time is limited within which such right is to be exercised. Further, that until such commutation is obtained, all and every the feudal, seigniorial and other rights of the Seigniors shall continue and remain in full force on lands so held *en fief et seigneurie*.

I shall examine each of these three propositions.

The first two may be included in one proposition, viz: that a right, without limitation of time, is vested in each Seignior, and that of this right confirmed by Imperial Legislation he cannot be deprived by an Act of the Colonial Legislature.

To ascertain with accuracy the nature and extent of the right so conferred, it is necessary to repeat what I have before stated, that the commutation is not made imperative but is optional both with the Seigniors and *Censitaires*. It is what the French lawyers call *une faculté*. Merlin, speaking of rights acquired, says: "Mais tel n'est jamais un "droit purement facultatif, à moins qu'il n'ait été exercé, "et que, par l'exercice qui en a été fait, la chose qui en est "l'objet, ne soit devenue notre propriété. En effet, il en est "des facultés accordées par la loi, comme des facultés ac- "cordées par des individus. Tant que celles-ci ne prennent "point le caractère de droits contractuels, elles sont toujours "essentiellement révocables. Or, le législateur ne con- "tracte jamais, lorsqu'il accorde une faculté; il permet, "mais il ne s'oblige pas; il conserve donc toujours le pou- "voir de retirer sa permission; et ceux à qui il la retire, "avant qu'ils en aient fait usage, n'ont aucun prétexte pour "s'en plaindre."

The opinion thus expressed by Merlin is so consonant to reason, and, when applied to contracts, so conducive to the maintenance of that good faith, the observance of which every legislator must enforce, that it requires no elaborate argument in its support. Apply it to the question now under consideration. On the 5th August, 1822, the Seigniors were told they might, if they thought it advantageous to themselves, commute the tenure under which they held their lands. On the 22nd June, 1825, the same right was again given to them and extended to their *Censitaires*, and yet, in 1854, that is 32 years after the right has been given to the Seigniors, and 29 years after it has been given to the *Censitaires*, these persons who have not exercised their right of option, but who, by not exercising their right, have clearly shewn their preference for the old tenure *en fief et seigneurie*, set up a cry of injustice and deny the right of the Legislature to deprive them of their option. Their argument is this: the law is still in force, and as we have not been limited as to time, we have a right this day to make our option. My answer to them is: so long as you have not exercised the right of option granted to you, you have no vested right, and consequently, so long has the Legislature the power of withdrawing the right of option granted you.

As to the reference made to an alleged Address of the Legislative Council and of the Legislative Assembly, as also to the opinions of the Attorney General for Lower Canada, there is an error of fact. The Attorney General clearly states, that the object was not to deprive Seigniors of the rights acquired in virtue of commutations already made, but to take from Seigniors, who had not commuted, the right of availing themselves of the enactments of the Imperial Statutes on this subject. Prudential considerations dictated such a step; but it can be of little weight with the Judge called upon to declare what the law is. The Judges in England have refused to enforce the execution of a law, though its existence was admitted by an Act of Parliament, the Judges being of opinion that the law was not in force.

I will now come to the objection urged that the Provincial Statute introduces one tenure, *franc-alleu*, and the Imperial Acts another and a different tenure, free and common soccage. The answer is plain and obvious. The tenure, so to be introduced in virtue of the Imperial Acts, was considered a benefit to the *Censitaires* who claimed—A Seignior, who has himself commuted, and who is called upon to commute with his *Censitaire*, has certainly an interest in getting a fair value put on his *Censitaire's* land; but once this value ascertained and the amount paid, the tenure by which the *Censitaire* will hold the land afterwards is a matter in which the Seignior has no interest whatever, this concerns the *Censitaire* alone, and to him, the *Censitaire*, the argument against the pretended vested right of the Seignior who has not commuted, is equally applicable and conclusive.

To the objection that the mode of ascertaining the value as prescribed by the Provincial Statute, is different from the mode prescribed by the Imperial Act, there are two answers.

First, the mode prescribed by the Imperial Statute, applies only to the *Censitaire* who is desirous of commuting the old tenure into that of free and common soccage. As this is entirely optional with the *Censitaire*, the Seignior who has himself commuted, can take no action in the matter so long as the *Censitaire* does not make known his desire to obtain such tenure. The Imperial Statute clearly does not apply to the case of a *Censitaire* demanding a tenure totally different. If, therefore, the *Censitaire* will not avail himself of the right given to him by the Imperial Act, as he cannot be compelled to do so, it is clear the provisions of the Imperial Act cannot be extended to the case of one whose demand is altogether different from that contemplated by it.

II.

OF THE SEIGNIORIAL GRANTS BY THE KING OF FRANCE.

I am of opinion that the grant by the King of France of a *fief* and seigniory to be held *en pleine propriété* according to the Custom of Paris, had the effect as well by the terms of the grant as by law, of transferring the entire and absolute right of property *dominium plenum*, *jus integrum*, in the land so granted, and that the grantee thereby became vested with the same rights, as to the sale and disposal of his property, as the Seignior in France had.

By a subsequent law of the King of France of the 6th of July 1711, known as the *Arrêt* of Marly, this entire and absolute right was considerably modified; the King having conferred on the inhabitants of the Country, the right of demanding from the Seignior a concession of lands in the seigniory, and on the refusal of the Seignior to make such a grant, having authorized the Governor, Lieutenant Governor and Intendant of Canada to make such grants on the terms and conditions of the pre-existing grants in the same seigniory. This *Arrêt* unquestionably conferred on the inhabitants a right which they previously had not, and imposed on the Seigniors an obligation not to be found in the Custom of Paris, and unknown to the law of France, as it existed at the time the *Conseil Supérieur* was established at Quebec. From the time this *Arrêt* became law in Canada, a Seignior could not effectually withhold a grant from the *habitant* who insisted on obtaining the concession of a piece of ground. But, in my opinion, neither the letter nor the spirit of this *Arrêt* prohibited a private agreement based upon the mutual understanding between the Seignior and the *habitant*. This private contract, the result of what both the contracting parties considered it best to promote their interests must, in the absence of fraud and error, be held binding on the parties. *Volenti non fit injuria*. I am unable to conceive any grounds of public policy which would justify any in-

terference with the terms and conditions of such a contract. This *Arrêt* was evidently promulgated in favor of intended settlers, with the view of securing to them a grant of land to be held *en seigneurie*, but it never was, it could not be the intention of the King of France to prevent a *habitant* making what is called a good bargain for himself. If, therefore, an applicant for a grant considered the terms and conditions on which former grants were made in the seigniory contrary to his interest, it would be a strange perversion of the meaning of words to call that sound policy which prohibited a man promoting his own interest and that of his family by a contract with his Seignior on terms fully understood by both and by both considered beneficial to them.

In a letter written by Messrs Beauharnois and Hocquart, dated 10 Oct. 1730, and addressed to the Minister of France, it is stated that Mr. Hocquart refused to set aside contracts between Seigniors and *Censitaires* entered into voluntarily and without fraud ; M. Hocquart stating, with great reason, that as the *Censitaire* had not availed himself of the law in his favor, he could not afterwards complain. *Volenti not fit injuria* are the very words used by Hocquart. The decision thus made known to the French Government was not disapproved of.

It is true the French King, by the *Arrêt* of 6th July 1711, has declared that in making grants of land in Canada, he intended to promote settlement in the Country, by clearing, cultivating and improving the land. And, therefore, any contract, entered into since the *Arrêt* became law in Canada, having a tendency to defeat this intent, might have been set aside as being prohibited by law. But any covenant, not prohibited by law and not of a tendency to defeat the intention of the King of France, is valid. It is for the Courts of Justice to make a due application of these general principles to each contract submitted for their judgment. I will here observe that it is easy to suppose a case in which

a reserve, standing alone in a contract, might be declared legal and binding on the parties, and that the same reserve, when included with several others in one and the same contract, would be declared illegal, and, therefore, not binding on the ground that the several reserves, thus included in our contract, would put it out of the power of the *Consitaire* to clear and improve the land, and thus impede the settlement of the Country.

The decision in all such cases must rest on the general principle that all laws promulgated, not solely for the protection of private rights, but with the view of promoting the general interests of the whole community, are to be considered laws of public policy, which contracting parties cannot set aside by conventional stipulations. The two *Arrêts* de Marly referred to, must be considered as laying down rules of public policy, *d'ordre public*, in so far as their enactments tend to promote the settlements in the Country; their provisions cannot be so construed as to affect the validity of any private covenants not of a tendency to impede such settlement.

It is almost unnecessary to add that, the opinion above expressed, of the right of a Seignior to withhold a grant previous to the *Arrêt* of Marly, does not apply to the grants, if any exist, made by the King of France, in which the obligation to grant, *concéder*, is expressly imposed on the grantee.

As to a fixed rate, *quotité de cens*, I confess I have listened in vain for a reason sufficiant to raise a doubt in my mind on the subject; for it is a fact that, previous to the *Arrêt* of Marly, there was no law fixing such a rate, nor can any judgment, pronounced either before or since the cession of the Colony, be referred to, in which the rate is acknowledged to be fixed. In fact, the rate differed in different seigniories and at different times. The French Government acknowledged the rate was not fixed, and in Mr. Dunkin's Summary, No. 427, clause 11, the grantee is allowed to fixe

a rate "*en égard à la qualité et situation des héritages au temps des concessions.*" Further, the correspondance between the Intendant of Canada and the French Minister, in Paris, expressly acknowledges the rate was not fixed; and such was the opinion of the three French jurists as it will be found in the 2d Volume of the Seigniorial Documents. The Attorney General, in the answer he has given to his own 13th question, admits the rate was not fixed by law. Cugnet says the same thing, and the paper writing intituled "*Document trouvé dans les Archives de la Marine en France*" likewise acknowledges the right was not fixed.

With such authentic documents before us, I cannot entertain a doubt on the subject.

It has been argued that the *Arrêt* of Marly of 6th of July, 1711, establishes a fixed rate. I answer it does no such thing, but the very contrary. Had it been the intention of the King of France to establish by that *Arrêt* a fixed rate, the King would have said in plain words the Seignior shall concede at 1, 2, 3 sols per *arpent*, or any other given amount. This he has not said for the plain reason that he did not intend it. By this *Arrêt* the rule of the old feudal law of France is laid down. So that this very *Arrêt* may be referred to as conclusively establishing there was no fixed rate.

In virtue of this *Arrêt*, the Governor, Lieutenant General and Intendant called upon to make a grant, when the Seignior had refused, must on the same day have pronounced several judgments fixing one rate in one seigniory, and another and a different rate in each seigniory in which a grant was ordered. Of this it is impossible to doubt. How then can it be said a rate was fixed?

As to the *relief*, I am obliged to admit its legal existence.

In a report submitted to Sir Guy Carleton, the Governor of Lower Canada, it is said the 46 and 48 articles of the Custom of Paris are not observed; but of the 48 article

which defines the *droit de relief*, not one word is said that it also had been set aside. But in admitting its legality, the Judges have remarked that it had not been demanded. It is easy to understand that in a Colony, in its infant state, no such right could be enforced without ruining the Seignior. It is proper to add that Cugnet, a writer well informed on all that occured in his day, says the *droit de relief* was abolished by the King of France by a law enregistered in Canada.

On the question of desuetude, the Declaration of 1743, is conclusive as to the time of the French Government.

Since the cession of the Colony by the French, to establish desuetude we should require evidence to show that the Seigniors had refused to concede and that the Government and the people of the Country had acquiesced in this. We have no such evidence. We cannot rest an opinion on facts not proved ; if we could, we must come to the conclusion that the *Arrêts* had not fallen *en désuétude*.

III.

OF THE JURISDICTION OF THE COURTS.

The French King, in the two *Arrêts*, commonly called *Arrêts de Marly*, of the same date, 6th July, 1711, kept in view the distinction clearly existing between the powers of a Governor and those of an Intendant. To the latter alone, he gave the power of re-uniting certain lands to the domain. And why ? Because the *Arrêt* having imposed on the grantee the obligation *de tenir feu et lieu*, the demand for such re-union was based on the letter of the law, the injunctions whereof had not been obeyed by the grantee. When the original grants were made on such terms, it required no special law to enable the King to demand such re-union. He had against his grantee the action *ex contractu* to rescind the grant on the ground of non-compliance with the terms on which it had been made. So had every Seignior

against his *Censitaire* a like action *ex contracta* to obtain such re-union. With the execution of this, the second *Arrêt de Marly*, the powers conferred being purely and exclusively of a judicial character, the French Governor had nothing to do.

Not so with the first *Arrêt*. By it the King imposed on the Seigniors the obligation of granting lands to such of the inhabitants as made a demand, and in case of refusal, power was given to the Governor, Lieutenant General and Intendant to make such a grant on the terms and conditions therein expressed. Why, I ask, such a distinction in the two laws passed on the same day? Plainly, because the demand for a re-union being based either on the letter of the law or on the terms of a contract, the powers to be exercised were strictly of a judicial character. But the granting of lands and the making of contracts with persons desirous of settling in Canada and cultivating the land, is no part of the business of a Court of Justice. This is a measure exclusively of an administrative character, and therefore very properly confided to the King's Representative in Canada, that is, the Governor, assisted by the other officers named. The *Arrêt* provides for the case of a difference of opinion existing among these officers, and directs that no grant be made until the King's orders are received; it also gives the power of calling in the oldest Counsellor of the *Conseil Supérieur*, concluding with these remarkable words: *le tout sans préjudice de la prépondérance de la voix des Gouverneurs dans les affaires concernant notre service où elle doit avoir lieu*. This certainly would be strange language to use on organising a Judiciary Department. It is very plain and intelligible when applied to a land granting department or to a Board of Public Works; but the idea of calling in a Counseller of State, who might be a Bishop, or his Grand Vicar, or a Receiver General, to assist the judiciary in making up a judgment, and forbidding judgment being pronounced until the King's orders had been notified to the Judges, is somewhat novel,

and I might add startling in legislation. To my mind, the intention of the King of France to retain in his own hands, uncontrolled by the Judiciary, the power of granting lands to whom he judged it expedient, and on the terms he deemed most advantageous to promote the settlement of the Country is conveyed in language as plain and unambiguous as it is possible to make use of. If the language of the *Arrêts* admitted of a doubt, before I acknowledged these powers to be vested in a Court of Justice, I would put this question. How are such powers to be exercised by a Court of Justice? on what *data*? If called upon as a Judge to decide on the conflicting claims of any two individuals, I have the severe, unbending rule of law to look to as my guide, but when called upon to make a grant of the unconceded lands of the Crown throughout Lower Canada, by what rule am I to be guided? Can I find that rule laid down in any legislative enactment, or explained by any jurist who has written on the laws of Canada. I may be told that this rule is to be found in the *Arrêt* of Marly, but this I deny. This *Arrêt* did not vest any absolute right in the first applicant. The Governor, Lieutenant General and Intendant might have rejected the demand or grounds which a Court of Justice could not and ought not to enter into, such, for instance, as the well established inability of the applicant to fulfil his agreement, either from want of pecuniary means or other causes. Further to illustrate what I have said, I will suppose these powers to have been lately vested in a Subordinate Officer of the British Government, and that, on his refusal to make a grant, an application were made to a Court of Justice for a writ of *Mandamus*. Would not such refusal be justified by showing the instructions of the Government of this day no longer to grant lands on the old terms and conditions? Would any man seriously contend that it was the intention of the French King, that his policy, settled more than a century back, for the granting of lands, should continue unchanged, and above all future controll? The words of the first *Arrêt* of Marly shew the contrary, and if so uncontrolled, Courts of Justice

must take their instructions from a State Officer, as a land agent receives his from his employer. In one word, in the exercise of this power, so deeply affecting the future welfare of the Country, a Court of Justice must be above all controlling power on the part of the Executive Department, or it must act in strict obedience to the mandates of that Department. To confide the granting of the lands of the Country to the Judiciary, uncontrolled by instructions which the state of the Country and public policy must call for, from time to time, would be so strange a confounding of powers, that it is impossible to suppose it to have been the intention of the French King; so to interpret the law as to require the Judges to receive their instructions as land agents, from time to time, would be subversive of all the ideas we have hitherto entertained on the administration of justice.

But it is said that as the reunion might have been ordered by the Intendant alone, his judiciary powers are now vested in the existing Courts, and therefore these might pronounce such reunion.

I answer that such is not the case as to the first *Arrêt* of Marly. By it no such power is given to the Intendant alone, but the very contrary, as the *Arrêt* directs that the reunion shall be pronounced by the Ordinances of the Governor, Lieutenant General and the Intendant *à la diligence du Procureur-Général du Conseil Supérieur de Québec.* So far from the Intendant being allowed to exercise this power alone, the French King, by a Declaration of the 17th of July, 1743, reiterates his orders to these high public officers to act together, *conjointement*, provides, as I have above shewn, for the case of absence of one of them, and declares null, in the following words, *toutes réunions qui ne seront pas prononcées et tous jugements qui ne seront pas rendus en commun par eux ou leurs représentants.*

I am not called upon to justify the *Arrêt* of the French King. I take this *Arrêt* as I find it, and whatever may be

said to shew that this demand of reunion, whether founded on the letter of the law, or on the terms of the contract, ought to be decided by a Court of Law, I answer the Legislator has ordered otherwise.

As to the 2nd *Arrêt* of Marly, it provides for the reunion to the demesne of the Seigniors only, not of the Crown. I have already observed that this demand of reunion was based on the letter of the *Arrêt*, and on this ground it was a judiciary power. This *Arrêt* gave the Intendant the power of proceeding in a summary manner, on the certificate given by the *Curés et Capitaines de la Côte*. As the latter officer has been unknown in Canada since it has become a British Colony, and no law has prescribed that other evidence shall be received in lieu of his certificate, this summary jurisdiction could no longer be exercised.

All persons who have taken any part in the administration of justice in Lower Canada will be forcibly reminded of the existence of the late Court of Appeals, composed in part of members of the Executive Council. But on reference to the Provincial Laws on this subject, it is easely ascertained that the late Court of Appeals exercised no legislative or administrative power, its jurisdiction was strictly confined to the power vested in a Court of law. It was not therefore as officers of the Executive Department but as Judges that the members took their seat in the Courts of Appeals.

The Courts in the District of Quebec have never exercised these powers. The action instituted by Dubois against the late Sir John Caldwell, Seignior of Lanzon, was, it is true, dismissed on a preliminary plea, but the opinion of the Court was so well known at the time that Dubois abandoned his claim.

These reasons induce me to say that the Courts of Justice have not the power of making grants of land in virtue of the *Arrêt* of Marly.

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OPINION

OF THE

HONORABLE JUDGE CARON.

The Legislature of the Country, acceding at last to the pressure of public opinion, which for a long time past demanded the abolition of the feudal system, and the suppression of the Seigniorial rights in that part of Lower Canada which was still subject to that system, enacted, during the Session of 1854, a law which will be for ever memorable in our history. That law has effected, without any commotion or tumult, a reformation of the most vital importance, and has created in our institutions a remarkable change, which had become indispensable, and which could not have taken place elsewhere unless during a period of turmoil, revolution and anarchy, and even then it must have been brought about by violence, injustice, and spoliation.

As might be expected, a change such as that, ordered under such circumstances, could not take place, unless upon a just basis, and in such a manner as to render full and entire justice to all the parties who would be affected by it, therefore our law of abolition of 1854 lays down the principle, that the suppression of the feudal rights and duties cannot take place, unless the Seignior be guaranteed a reasonable indemnity for all the lucrative rights which he held by law, and of which this enactment must deprive him. It also declares that in consequence of the immense advantages which the Province in general must derive from the abolition of these feudal rights and duties, and the establishment of a free tenure instead of the one under which property subject to it, had been held up to that time, it was expedient to assist the *Censitaire* to redeem those charges.

With a view of carrying out these declarations and of granting suitable indemnity and assistance to those entitled to it, and rendering to each man the justice due to him, the law provides for the nomination of Commissioners upon whom those duties devolve, and who are bound to make, in such manner as may be pointed out to them, such valuations and estimates as may be necessary to ascertain the value of those rights, charges and obligations, the abolition and suppression of which will give a right of indemnity, compensation, or reimbursement, together with the proportion of them in each case.

It was easy to foresee what numerous difficulties those Commissioners would have to encounter in the execution of such varied and complicated duties, and what serious and perhaps irreparable errors they might commit, more particularly in the interpretation of the law of *fiefs* which is so obscure and so uncertain, and in the application of that law to the particular cases which would come up before them.

In order to assist them in this task, to direct them in this operation, and to point out to them the principles of law by which they were to be governed, and upon which they were to base their decisions, the Legislature, at the time of enacting this law, created an exceptional Tribunal, composed of all the Judges of the two principal Courts of the Country, upon whom it imposed the duty of pronouncing their decisions and expressing their opinions upon the questions which would be submitted to them by the Attorney General, touching those points of law which it was believed would require the consideration of the Commissioners, in determining the value of the rights of the Crown, of the Seignior, and of the *Censitaire*, and also touching such supplementary questions or counter-questions which every Seignior would have a right to make in support of his rights and pretensions.

In order to discharge the duty imposed upon him, the

Attorney General has prepared a series of questions which comprise and recapitulate the probable difficulties which the Commissioners will have to meet; and on their part, several Seigniors, availing themselves of their right prepared supplementary questions or counter-questions, together with some propositions which they wish to maintain in their favor. Those questions and counter-questions have been argued and maintained before this tribunal, by the Counsel retained on both sides with such zeal, skill and talent that nothing more can be desired, and in a manner fully equal to the important interests entrusted to them, and which they had undertaken to maintain.

The importance of those interests, together with the delicacy and difficulty of the questions to be decided, has imposed upon the Judges forming this tribunal, a responsibility, the importance of which they fully feel, more particularly when they consider that the decision which they are to pronounce upon each of these questions and propositions must guide the Commissioners in their determination, and must be considered by them as a final judgment, without appeal, binding them in their adjudication upon every similar or analogous case which may be raised before them.

In order the more easily to fulfil that portion of the duty which has fallen upon me as one of the members of this Tribunal, the few remarks which follow have been written. They are the result of the researches and reflections made by me before coming to a final decision upon the different questions which we were called upon to solve.

In the preparation of my work, the plan which I followed was, in the first place, to examine, with all necessary care, the questions and counterquestions proposed to this Court in their entire; and without undertaking to answer each one separately, I divided them into a small number of classes, comprising in a general manner the principal

subjects to which they have reference. I have divided those classes into a small number of questions which I have put to myself, and which I have answered according to such principles as I thought most applicable. I have made use of my answers to these questions as the basis for the solution of such questions as were put to us pursuant to the law.

The whole of the subject contained in these questions and counter questions may be summed up in the three great divisions which follow :

1. The nature and extent of the right of ownership of the Seigniors of this Country, in their *fiefs* and Seigniories.

2. The nature and extent of their right of *Banalité*.

3. The proprietorship of the Rivers and running waters, as well navigable, as unnavigable.

FIRST DIVISION.

The nature and extent of the right of the Seigniors over the lands composing their *fiefs* and Seigniories.

The first division may be subdivided in the following manner :

1. According to the deeds of concession from the King of France, and the laws in force at the time they were granted, did the Seigniors of the country acquire the full and entire ownership of their Seigniories ; if not what were the limitations and restrictions imposed upon them ?

2. If the Seigniors did originally obtain and acquire this full and entire ownership without any restrictions, has that right been limited and restricted since then, what is the nature of those limitations and restrictions, and when and in what manner were they imposed ?

3. If the Seigniors were originally obliged by their titles,

or since then have been constrained by law, to concede the lands within their Seigniories, were they bound to do so at a fixed, uniform, and determined rate; if so what was that rate, was it the same for the whole country, did it vary in different Seigniories, and in what manner was this rate determined?

4. Whether the rates of the concessions were fixed and determined, or whether they were unlimited and voluntary, and dependent on the stipulations entered into between the parties, could the Seigniors, in their titles, legally impose other dues besides *cens et rentes*, and annual dues; or were they allowed legally to stipulate such other charges, reservations and restrictions as the *Censitaires* might be willing to submit to; if such charges and reservations were prohibited, were they void of themselves, or could they merely be declared void?

5. Upon what laws is this prohibition founded?

6. If at any time any competent authority has passed any Legislative enactment relative to fixed and limited rates, and to the prohibition to concede otherwise than for *cens et rentes*, and annual dues, have those laws or Legislative enactments been followed up and enforced, or have they been abandoned; have they fallen into desuetude and thereby become null and of no effect?

7. If those laws were still in force at the time of the cession of the country, have they ceased to be so since that time, either in consequence of the change of Government and of the influence which such a change would have on laws of such a nature, or because there have been no tribunals in the country since that time competent to carry them out?

8. If those laws did exist, were they only for the advantage of individuals, so that these latter might renounce them and deviate from them, by making contrary stipula-

tions, or were they laws of public order (*d'ordre public*) so that they could not be departed from by private individuals in any manner or under any pretext whatever?

The answers to those several questions will be found in as many paragraphs which are in the following pages:

§ 1. From the time when the first concessions of Seigniories were granted in the country, the custom of Paris was the law in force, having been introduced both by the Edict creating the Superior Council (April, 1663,) and by the deeds of concession and other documents anterior and subsequent to the said Edict.

December, 1640, Concession of the Island of Montreal to the Seminary,---and, December, 1649, Concession to Chavigny by the company of New-France,---Establishment of the Company of New France (1627-28.)

In order, therefore, to be able to state what was the feudal law of Canada at the time of the first establishment of the country, (we may say from 1627 to 1711,) from the formation of that Company up to the *arrets* of Marly, it is necessary to ascertain what was at the same period the law which governed *fiefs* in the country subject to the Custom of Paris; for it is according to the dispositions of that law that the right of the Seigniors of the Country must be judged, so long as they are not governed by some special law and have not been altered by the deeds of concession, which, as they emanated either directly or indirectly from the King, the Seignior paramount of the whole of New France, might legally contain whatever charges, clauses and conditions as he or his representatives chose to insert, although they might be contrary to the common law of the country.

In France the Seigniors had an absolute right of property over their *fiefs*, which allowed them to dispose of the land forming those *fiefs*, upon whatever conditions they thought proper. The right of disposing of their lands was only

restricted in so far as the quantity which they might alienate was concerned; this restriction is to be found in articles 51 and 52 of the custom, which establishes the full power which the Seignior has over his *fief*. The regulations concerning the power held over the *fiefs*, were, as we know, all in favor of the dominant Seignior, in order that he might be protected, in his rights, against his vassal, and in order that the latter should not have the power of putting himself in such a position as to be unable to fulfil his obligations as a vassal, which obligations formed part and parcel of the feudal system and were imposed upon him both by his titles and by common law.

To attain the object which I have at present in view it is unnecessary to discuss and examine into the effect of those two articles of the Custom, the only object of which was to restrain and limit the right which the vassal had in France, of disposing of his *fief*, by alienating more than a certain portion of it: no person has ever contended that this right does not belong to the Seigniors of this country; not only is the most unlimited power given to them to dispose of their lands, but it is even contended that they obliged them to alienate those lands. It is sufficient to say that in France it was optional with the Seignior to retain the whole of his *fief*, of whatever extent it might be, he might make use of it as he thought proper, he might cultivate it or not, according to his own option, without being bound to render an account to any person whatever; but when he did alienate any portion, with the exception of such reservations as were made in favor of the higher powers, he could alienate upon such charges and conditions as he thought proper to impose, if the purchaser submitted to them.

In short the Seignior in France was not bound to alienate the lands composing his *fief*, no person could oblige him to do so, but he had a right to alienate a certain proportion of them upon such charges and conditions as might be agreed upon.

We have already stated that the Seignior in Canada would be in the same position, unless that [illegible] has been altered either by law, jurisprudence or by [illegible].

During the space of time, which we have denominated "the commencement of the establishment of the country" (from the time of the formation of the Company of New France, 1627-28, to the Edicts of Marly, in 1711,) I do not find any Legislative documents, emanating from the Legislative authority of that time, or any law which can be considered as having altered, in a positive and direct manner, the rights and obligations of the Seigniors arising from the common feudal law of France, unless it is desired to give a legal character to the two decrees of revocation and retrenchment passed during that time, the one bearing date the 20th April, 1663, and the other the 4th June, 1675. But these two decrees, which only have reference to certain particular concessions upon which the necessary works and clearings had not been made, and which, moreover, are applicable to all the uncultivated lands of that time, and therefore include the lands held *en roture* as well as those held *en fief*, cannot be considered as establishing in a general manner the law of *fiefs*, and as introducing formal and durable changes.

These decrees were merely the regulations which were made to remedy the inconveniences mentioned in them, and they ceased to be in force from the moment of the attainment of the object for which they had been passed; it is therefore out of our power to infer from them that the Seigniors were obliged to concede their lands, upon one condition more than upon another. The whole result, which is very important, is that in the two cases in question, the King publicly announced his desire and firm determination to have the land of the country cleared, cultivated and settled, and made a summary and expeditious use of the right, which he maintained he had, of punishing all infractions, in that respect, of his royal will and pleasure, by

confiscation and retrenchment.

I say that this result is important, since it leads us to inquire into and ascertain the source of such a power, which cannot be attributed to an arbitrary will, unless no other cause can be found. The source therefore of this exorbitant power, which did not exist in France and is contrary to common law, is to be found in the deeds of concession and other public documents of the period of which we speak. In the public documents emanating either from the sovereign himself or from his representatives, we everywhere discover the strongest expression and the most evident proof of his intention to use all the means in his power to settle and colonize the country, and to cause the land to be cleared, cultivated and settled upon, together with the firmest determination to set aside the obstacles which might oppose the fulfilment of his plan, and severely to punish those persons who should put any obstacles in the way.

The enumeration of all those documents would be too long, it will be sufficient to mention a few of them, from which we may judge of the others, and in order to be brief I will cite, without any comment, from the two *arrets* which have been spoken of: 1. The Act creating the Company of New France in 1627-28. 2. The resignation of that Company, and more particularly the acceptance by the King of that resignation in 1663. 3. The formation of the Company of the West Indies, in 1664. 4. The revocation of that Company in 1674. 5. The lengthy correspondence between the Colonial authorities of Canada and the Colonial Department in France during the years 1707 and 1708.

But if the King's intentions, in relation to that matter, are made clearly manifest by means of those documents, and many others which might be cited, we find, in the deeds of concession of the period in question, the positive proof that those intentions were perfectly understood by the

parties to whom those concessions were made, and that those parties had formally promised to agree to them. In order to become satisfied of the truth of this assertion, it is only necessary to refer to the numberless grants of Seigniories, in which the obligations of conceding or cultivating, of settling upon or causing the land which had been granted to them to be settled upon, is mentioned in the most clear and express terms. Within the lapse of time which comes under our notice, we find a number of titles of different dates, which contain that obligation, which was moreover so reasonable, so conformable with the position of the country, and in such harmony with the interests of the Seigniors themselves, as well as with that of the colony itself.

Those titles have been recapitulated in Mr. Dunkin's work, to which I refer generally, confining myself to the citation of a few concessions only, which will give an idea of the others.

According to my mind, although those conditions were stipulated in the titles, they did not prevent the Seigniors from being the real proprietors of their *fiefs*; those conditions do not constitute the Seigniors mere trustees, as it has been pretended they did, into whose hands all the lands of the country had been confided for the purpose of being subsequently distributed to such persons as might require them. No, the Seignior in this country, as in France, was the master of his *fief*, he had the *dominium directum*, and *dominium utile* of it, he could use it and cultivate it himself, and retain for himself such portion as he thought proper; the French Government, whose object was to colonise and settle the country, merely saw that the Seigniors did not, either through apathy, negligence, or false views of prospective profit and speculation, retard the realisation of plans which would benefit them as well as the other settlers. In one word, the object in view was, and it was all that could be reasonably desired, that the conceded lands should be

cleared, cultivated and become inhabited, not only in order that they should not remain useless and valueless for those to whom they belonged, but also that they should not become an obstacle and a nuisance to those persons who were desirous of deriving benefit from their own lands. In several of these titles we actually do find the condition, that the Seigniors *shall be bound to concede*, but that clause was about the same as the one *to cultivate, settle upon and improve;* because it was well known that those lands could not be obtained unless by conceding, *sousinfeodant ou accensant.*

We will now refer to some of these concessions.

The first that I cite is that of the 16th January, 1634, to one Giffard, of the Seigniory of Beauport, that concession confirms what I have just stated ; the following clause is to be found in it :

"On condition, upon each mutation, of the payment of "one year's revenue of whatever the said Giffard "may have reserved for himself, after having grant- "ed a *fief* or *à cens* or *à rentes* the whole or a portion "of the said premises." By that clause Giffard was at perfect liberty to grant *a fief* or *à cens* all the lands of his Seigniory, if he thought proper to do so, but it was equally optional with him only to grant a portion, and to retain as much as he pleased ; and even upon what he thus retained, he paid no dues to the Sovereign who had only stipulated payment upon what was sold, and not upon the remainder.

The concession of the 15th January, 1626, contains a like clause and gives rise to the same inference ; there are several more in the same terms, or in analogous ones, and I conclude from that, that the Seigniors were bound by their titles to cultivate their lands, but were not absolutely obliged to grant them *a fief* or *a cens*, nor even to alienate them at all.

But in order to become convinced as to the existence of the obligation on the part of the Seigniors, by virtue of their titles, to work and cultivate those lands or have them cultivated, it is only necessary to refer to some of those titles, in which that obligation is fully and plainly expressed. The following citations are due to Mr. Dunkin, to which I refer, merely giving for my own part the numbers of the titles pointed out; to wit: No. 5, 8, 9, 10, 12, 13 and a great number of others, in which is mentioned, in varied terms, the obligation which the grantees contracted or had contracted of cultivating the lands which had been granted to them, and of introducing into the country persons able to do so.

In other titles such as No. 43, 55, 57, 61, 62, 63, 64, 65, 66, 67, and several others, the Seignior is obliged personally to reside upon his Seigniory (*tenir feu et lieu*) and to force his tenants to reside upon the lands (*tenir feu et lieu*) which may have been granted to them, and to make an express stipulation in their deeds of concession to that effect, in default whereof the said lands would return to the Seigniors.

Finally there are others wherein it is stipulated that, within a certain time, the Seignior shall commence the clearing of his concession, in default whereof the lands forming the same shall be reunited to the domain of the Company, (see Nos. 135, 140, 163, 167, 169, 177, 192, 202, 258, 267, 328.) or else he shall have them cleared and settled upon, and put up buildings and stock them with cattle within two years, otherwise the grant shall become void, (see Nos. 173, 174, 175, 176, 282, 287, 295, 321.)

All those concessions and many others contain one of the clauses above mentioned, that is to say, 1. To reside upon the land (*tenir feu et lieu*) or cause others to reside upon it; 2. To bring over to the country a certain number of persons to reside upon, establish and cultivate the said lands; 3. To clear them and cause them to be cleared within a certain

time, in default whereof the concession should become void.

It is nevertheless true that there are some titles, and they are sufficiently numerous, in which no mention whatever is is made of that obligation, neither in one form nor in another ; it is not to be understood from this omission that the concessions which do not contain that obligation, have been made upon any other conditions than the others, and that the persons to whom they had been granted, were not bound to cultivate, improve, and reside upon the said lands, and cause them to be cultivated, improved and inhabited, and that this is the place to apply the maxim, *inclusio unius fit exclusio alterius.* Such a conclusion would be absurd, since it cannot be reasonably imagined that the authorities had an idea of making a difference between some of the Seigniories and the others, upon such an important point ; that they could have desired to see some Seigniories improved, while they allowed others to remain without any improvement ; such a supposition is not possible, since it would have the effect of entirely paralysing the settlement of the country, which they were so desirous of colonising, in such a case these Seigniories would become an obstacle to the clearing and cultivation of the others, upon which that obligation had been imposed under pain of forfeiture. It is much more natural to suppose that, in those concessions where that obligation is not expressed, it has been understood ; it was not thought necessary to insert it, since the interest of the Seigniors being, as it has been before stated, identical, in that respect, with the interest of the State, it might be expected that they would act of themselves in accordance with the requirements of that interest, without its being necessary to state it in a formal manner.

From all that precedes I come to the conclusion (and I thus answer the first question I have put to myself) that within the interval which elapsed from the settlement of the country up to the year 1711, the custom of Paris has been the common

feudal law of Canada; that during that period no general law was promulgated which altered it, and, therefore, according to law, the rights and duties of the Seigniors, at the period in question, were the same as they were in France in such localities as were governed by that custom; consequently the Seigniors, here as well as there, were the proprietors of the lands composing their *fiefs*; and here as well as there, they had the *dominium directum*, and the *dominium utile*, but, nevertheless, that right of property was, from the commencement, limited and circumscribed according to the circumstances of the country, to the obligation of residing upon the said lands and causing them to be settled and cultivated either by themselves personally or by their tenants; that this obligation was imposed upon them by their deeds of concession, in a number of which it is expressly mentioned, while in the others it is perfectly understood, as it is established by the regulations and public documents previously mentioned, and by others emanating from the Royal authority which, although it was not in the form of a law, and did not impose any punishment against those contravening it, was nevertheless of such an obligatory character that it could not be misunderstood, and in fact was not misunderstood.

§2. But as experience has proved, that neither the clauses contained in the titles, nor the warnings from the authorities, nor the self-interest of the Seigniors were sufficient motives to induce them to carry out an obligation so important to the prosperity of the country, the King of France, being informed by his representatives in the colony of the abuses which existed in that respect, thought the time had arrived when it was no more right to leave to the Seigniors the performance of a duty which they had so long neglected to fulfil, and the non-execution of which had been so prejudicial to the interests of the colony. It was for these reasons that the King of France promulgated the *Arrêt* of the 6th of July, 1711, which may be considered as the first legislative document concerning

the concession, and the manner of disposing of the lands forming the Seigniories of Canada.

The preamble to this *Arrêt* points out three abuses which the Seigniors of the country were guilty of; the first is that the lands which had been granted as Seigniories were not settled upon nor cultivated as they should have been; the second is that the Seigniors themselves had not yet commenced to clear the land in order to establish their domain, and the third is, that some Seigniors refused to concede lands to such settlers as required them, with a view of selling them. It was for the purpose of remedying these abuses that this *Arrêt* was made, and that it was thereby ordained:— 1. That the proprietors of those Seigniories who had not cleared their domain, and who had placed no settlers upon their lands, should be bound to put the land under cultivation and have it settled within one year from the date of the *Arrêt*, in default whereof, after the expiration of that time, the said Seigniories were to be reunited to His Majesty's domain, at the suit of the Attorney General, and by virtue of the ordinances to be passed for that purpose by the Governor and Intendant. 2. That the Seigniors should concede to the settlers such lands as they might require in their Seigniories on condition of the payment of dues, and should not require any sum of money on account of such concessions, in default whereof those settlers should have a right of demanding those lands by summons and, in case of refusal, to appeal to the Governor and the Intendant, whom his Majesty commanded to concede the lands required within the said Seigniories for the same dues as were imposed upon the other lands conceded within the said Seigniories, which dues should be paid by the new settlers into the hands of his Majesty's Receiver, and the Seigniors should have no share whatever therein.

The first part of this decree does nothing more than order, under form of law, the putting into execution of the clauses we have mentioned, which were either expressed or understood in all the deeds of concession, and which obliged

the Seigniors to live (*tenir feu et lieu*) upon their lands, to cultivate and improve them, and also to cause their tenants to reside upon them, and oblige them to cultivate and improve the lands which were granted to them.

By this condition the King of France was desirous of making up for many omissions which had been made in certain deeds of concession, and of establishing uniformity throughout all the Seigniories, and more particularly of providing expeditious and sure means of enforcing the fulfilment of an obligation of so much importance, by establishing a penalty with which they would be visited. This clause in the law, refers both to the concessions already made, and to those which might be made thereafter. There was no injustice in this, if it be true, as it has been stated above, that the concessions granted up to this time contained the obligation, either expressly made or implied, that this law was to be put into execution.

As to the second enactment in this decree, it is without doubt, introductory of a new right, and effected a remarkable alteration in the freedom which the Seignior had possessed up to that time of disposing of his *fief* as he thought proper. For we have already remarked that, although the Seignior was bound to cultivate his lands, reside upon them and improve them, he had nevertheless full and entire liberty as to the mode by which he attained that object; he could either cultivate them himself or by persons in his employ; he could sell, give, exchange or otherwise dispose of his lands. When conceding, which was the easiest system, and the one generally followed, he could do so under such charges and conditions, and at such rates and terms as might be agreed upon with the *Consitaires*. Before 1711, there was no law, either expressed or understood restraining the powers of the Seigniors in those respects; so long as the lands were settled and cultivated, he had fulfilled his obligation, and nothing more could be required of him.

The preamble to this decree set forth a statement which, in point of fact, was false, that is to say, that the right of selling and disposing of their lands on any other conditions than for dues, is prohibited by the clauses contained in the deeds of concession to the Seigniors. This statement is incorrect and is not founded on fact; no such prohibition is to be found in the titles; nevertheless it was quite sufficient that it should be contrary to his Majesty's intentions, as it is stated in the preamble to this decree, for the King of France, whose authority was unlimited, legally to ordain, as in fact he did ordain, that in future the Seigniors should be bound to concede lands in their Seigniories to such settlers as would request them to do so. This provision of the *Arrêt*, although based upon an erroneous statement, is not the less binding for that reason, and from the date of its promulgation, the Seigniors of the country had no right to receive any sum of money for the concessions of their lands, nor to sell them. From that time they could be obliged, by the means provided by the *Arrêt*, to concede for dues alone; and we must understand from this, that from the time of the passing of that law, the Seigniors were not only obliged to concede their lands to such persons as would require them, but moreover they were not at liberty, in these concessions, as they had previously been, to impose such charges, reservations and restrictions as they thought proper; but that the only charges which they had a right to stipulate for, were the *cens et rentes* or a presentation either in grain or money or other produce, payable annually, as intended by the word *dues* (*redevances*) which means a *debt, charge* or *rent* to be paid every year.

Consequently from the time of the passing of the *Arrêt* of Marly, the Seigniors were bound to concede on condition of payment of dues only, (*à titre de redevances.*) All other charges in the form of reservations and restrictions were illegal and contrary to this law.

But the right of the Seignior thus limited, was not re-

stricted, so far as the amount of dues to be imposed is concerned. In that respect no restriction was made by this *Arrêt*, which did not establish the rate at which those concessions were to be made. It is only in the case, foreseen by the decree, where the concession was to be made by the Governor and the Intendant, that it should be made "upon the same conditions as were imposed for the other lots of land conceded in the same seigniories." The reason of such a condition is easily understood; the Governor and the Intendant had no right of ownership over the lands which they were empowered to concede; they could not make any stipulations with the purchasers; they required a certain and uniform rule of conduct, applicable to all cases; and this rule was naturally applicable to the concessions already made in the seigniories, wherein the lands to be conceded were situated. No more just or satisfactory suggestion could be made with reference to the conditions to be inserted in the concessions, than to adopt those which the parties interested had freely agreed to in the other deeds of concession in the same locality. This rule was moreover conformable in every respect to the common law observed in France, according to which, in those cases where the original deeds of concession could not be produced, either by reason of their having been lost or from any other cause, the *Censitaire* of a lot of land was bound, so far as the Seignior was concerned, to submit to the same charges and dues as were imposed upon the lots of land situate in the same seigniory, and in certain cases to those imposed in the adjoining seigniories. Consequently, that portion of the *Arrêt* of 1711, which establishes the rates at which the Governors and the Intendants were to grant concessions, is merely the expression of the common law.

But the same reason did not exist where the Seignior was the person who conceded to the *Censitaire* who freely accepted; both being parties to the agreement, so far as the amount of *cens et rentes* and annual dues was concerned,

they could make such stipulations as they thought proper, since the law did not deprive them of that right.

From all this, we must conclude that the first *Arrêt* of Marly limited the rights of the Seigniors of the country, so far as the right of keeping and retaining their lands, and the obligation which had been imposed upon them to concede them for dues alone, (*redevances*) were concerned. But with reference to the amount of those dues, (*redevances*) they had the right to settle them as before.

The *Arrêt* of 1732 did not make any innovation in that respect; it merely confirmed the *Arrêt* of Marly, and ordered the more precise and rigorous execution of it, and more particularly of that portion of it which prohibits the Seigniors to sell their forest lands, and which commands them to concede for dues alone (*redevances.*)

It is proper to remark here that, in several deeds of concession of Seigniories granted immediately after the *Arrêt* of 1711, is to be found the stipulation: "to concede for dues "alone (*redevances*) and not to insert any other condition in "the deeds than for dues alone (*simple titre de redevances*",) (see Dunkin's Digt. Nos. 369, 370, 374, 375, 376,) and that in several other subsequent deeds is to be found another clause obliging the Seigniors to concede "for the customary *cens*, *rentes* or dues," (see Nos. 380, 383, 384, 385, 386, 387, &c.)

These conditions, which are almost in the very words of the *Arrêt* of 1711, are not found in any of the titles granted previous to the passing of this *Arrêt*, from which we must conclude, that it was in order to put this *Arrêt* into force, that they were inserted, and they assist in confirming and explaining that *Arrêt*.

In framing my answer to the second question I recapitulate what I have said by stating: that the right of property in the land belonging originally to the Seigniors, sub-

ject only to the obligation expressed or understood in the deeds of concession, of residing upon them, of cultivating and of increasing their value, has since then been further limited by the *Arrêt* of Marly of the 6th of July, 1711, which deprived the Seigniors of the right of disposing of their lands upon such terms and conditions as they thought proper, and commanded them to concede those lands for dues alone (*à simple titre de redevances,*) and this was under the penalty of reunion to the domain of the Crown, according to the terms of the said *Arrêt* by which the obligation of residing upon, establishing and increasing the value of the Seigniories was put into the form of a law and was made general and uniform for all the Seigniors, independently of the deeds of concession.

§ 3. But the obligation to concede for dues alone, imposed upon the Seigniors by the *Arrêt* of Marly, is not accompanied by any obligation to concede at any certain rate more than at another. Not a word is said about it in this *Arrêt*, and everything is left in the same state in which it was at first. This law did not, any more than any other, either anterior or subsequent to it, fix or limit the rate at which concessions were to be made ; the law of the country did not establish it either, since we do not find in any of the decisions of the tribunals, any fixed rate or uniformity in the acknowledged rates, there being a variance in that respect at different times and in different Seigniories ; from this I must conclude, while giving an answer to the third question, that, neither according to law, nor according to jurisprudence or custom, there was no uniform and fixed rate at which all the Seigniors were bound to concede their lands ; that they were always free legally to stipulate with their *Censitaires* for such an amount of dues, (*redevances*) as the latter chose to submit to.

§ 4. But by the *Arrêt* of Marly, confirmed in that respect by that of 1732, the Seigniors are particularly commanded to concede merely on condition of payment of dues, (*simples redevances*) therefore, all the charges, restrictions and reservations which do not come under the category of dues, (*redevances*) are

prohibited by law, and must be looked upon as being void.

I shall not at present inquire whether these charges and reservations, over and above the dues (*redevances*) are null *pleno jure*, or if it is merely possible to have them annulled; for the present I shall only state, with the understanding that I shall hereafter have a right of giving my reasons, that those reservations being prohibited by a positive law, the Seigniors have no right to make them the foundation of a claim for indemnity on account of the suppression of rights which they had arrogated to themselves contrary to law, although it was done with the consent of the *Censitaire*; more particularly when, as in the present case, the *Censitaire* is not the only one who is called upon to pay the indemnity, but that a large portion of this indemnity has to be paid out of the public Treasury, while the country has had nothing to do with these illegal stipulations.

Therefore to the fourth question which I have put, I answer that the different reservations contained in the deeds of concessions, over and above the annual *cens et rentes* and dues, are illegal and contrary to a positive law, and cannot be a reason for paying an indemnity to the Seigniors.

§ 5. The illegality of those reservations which do not come within the category of dues, (*redevances*) and could not legally form part of the conditions of the concessions, is founded upon the first *Arrêt* of Marly, which is confirmed by that of 1732.

§ 6. It will be seen that the *Arrêt* of Marly, as I understand it, has not fixed, nor limited, the rate at which the Seigniors could make their concessions; that no other law has deprived them of the right of making such conditions with their *Censitaires* as they thought proper in respect to

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the amount of dues to be exacted. The laws which prohibit the Seigniors from selling their forest lands, and which oblige them to concede those lands on the condition of the payment of dues alone, are the *Arrêts* of Marly and of 1732. The difficulty which I have to solve in order to answer the sixth question, is to ascertain if those two laws have fallen into disuse, or if they are still in force.

The affirmative is maintained on behalf of the Seigniors who pretend that those laws are not now in force, that they have fallen into disuse, in so far as the obligation is concerned under which they were, pursuant to those *Arrêts*, of conceding their land to the *Censitaires* who demanded any on condition of the payment of dues only; and that for two reasons: 1. because previous to the conquest these laws were not put into force; 2. because since the conquest, they were not enforced, and they could not be enforced, there being no tribunal competent to enforce them.

These laws did exist, they had been legally promulgated, and at one time they were in force in this country. It remains for those who pretend that they have been abrogated, to show what law, custom, or jurisprudence could have caused the abrogation of them; the *onus probandi* remains with them, and so long as they have not established that, these laws may be looked upon as being in force, and may be set up against them. Let the authorities which establish what is necessary in law, to cause the abrogation of any law by its not being in use, or because it was not conformable to the ordinary custom be read, it will then become necessary that the parties, who invoke the nullity of these laws should show that in point of fact what is necessary to establish such nullity can really be invoked against those laws. It is not sufficient for this purpose to say that no judgments were rendered upon those laws; it is possible that the Seigniors did not expose themselves to the penalties

imposed by the decrees in question, or, that if they did so, it was not remarked, or that the law was not carried into effect. It would be necessary to establish that the question was regularly submitted to a tribunal, and that by a series of uniform decisions given after due examination, and in cases where the question had been raised by the parties and submitted to the judges, it has been decided contrary to those laws.

§ 7. I shall now pass on to the seventh question by which it is asked whether the cession of the country, and the change of Government, could affect the validity of those laws, if they were previously in force ; and if since that time, there have been any tribunals having authority to put those laws into execution.

The laws relating to *fiefs* form, of necessity, part of the civil law of the country, and those laws were guaranteed to us by the capitulation and the treaties. The *Arrêts* of 1711 and 1732 which had modified the laws of *fiefs*, being part of our civil laws at the time of the conquest, were allowed and preserved in the same manner as the others ; and since then have continued to form a part of our system, as they had previously done, and have been in full force and effect as they were previously.

But on behalf of the Seigniors, it was pretended that these *Arrêts* were nothing but penal laws, that they were only rules of police, and as such they had become void with the change of Government, which at the same time that it placed us under the control of the English Criminal Code, had abrogated all the laws of that kind in existence before the period in question.

But this pretension is too absurd to merit any serious consideration. These *Arrêts* only modify the Custom of Paris, they repress a mere civil abuse, they impose a penalty which is entirely a civil one, not for the punishment of a misdemeanor, but to enforce an ordinance relating to property,

which is in every respect essentially a civil one, and they cannot for that reason, be numbered among the criminal laws of which we have been deprived by the conquest.

Consequently the cession of the country has not, in the slightest degree, had any effect upon the Edicts which are now before us ; it remains for us to ascertain if, since that period, it is really true that there have been no tribunals in the country with competent authority to have them enforced, and if in consequence of that supposition, it must necessarily follow that these laws are abrogated and have ceased to exist.

As to the first point, it has been pretended that the powers granted to the Governor and the Intendant jointly, by the first of the two *Arrêts* of Marly were, at least in part, administrative and not judicial powers. It appears to me that the terms of the decree are repugnant to such a pretension. In the first place the reunion to the domain must be effected by the Attorney General whose duty is purely judicial, under the ordinance of the Governor and the Intendant. The word *ordinance* is equivalent to the word judgment, and that cannot be rendered by any but a judicial tribunal.

By the second part of the decree, those persons who have been refused lands by the Seigniors, are allowed to appeal to the Governor and the Intendant. The word appeal implies that those officers formed a tribunal for that purpose.

But this proposition appears much clearer when we look at the King's declaration of the 17 July, 1743, relating to concessions in the colonies, in which it is stated among other things " *that the Governor and the Intendant shall continue to take cognizance, to the exclusion of all other Judges,*" of all contestations which may arise among the settlers; and they shall also have the right of ordering reunions to the domain.

The terms of the fourth article of this declaration can only

be applicable to a *Tribunal*. In the fifth clause, it is stated " that all reunions shall be null which shall not be *pronounced, and all judgments void, which shall not be rendered by both of them.*" The seventh clause speaks of nomination of *experts*, reports and *enquêtes* in the same manner as such matters are conducted before an ordinary Court of Justice. The eighth clause speaks of *appeals* from *Judgments* rendered by those officers.

The preamble of this same declaration does not leave the slightest doubt, that the Governor and the Intendant really formed a Judicial Tribunal, which had a right of taking cognizance of those cases within the category of which came those arising out of the *Arrêts* of 1711 and 1732. If that be the case, I do not hesitate to say that the powers possessed by the Governor and the Intendant were transmitted to our Courts by the 34th Geo. IV. cap. 6, and have remained with the different Tribunals which have since succeeded that one, up to the present time.

The second clause of this Act is entirely general and gives to the established Courts jurisdiction in *all cases* both civil and criminal, without any exception whatever. The first part of the eighth clause gives power to the Court of King's Bench " to hear and determine all legal matters and causes " for the rescision of all contracts and deeds, and to rescind " and annul the same, in the same manner as if special " letters of rescision had been obtained." The reunion to the domain which the *Arrêt* of Marly commands the Governor and the Intendant to pronounce in the cases provided for in the *Arrêt*, is really a rescision of the deed of concession, and notwithstanding this, that portion of the clause which has just been cited, would authorise the Court of King's Bench to decide upon that rescision.

But the argument against the jurisdiction of our Courts, is that in a subsequent portion of this eighth clause, jurisdiction is specially granted in those cases where the Inten-

dant alone had a right to act, while there is no mention made of those in which the Governor and the Intendant could act jointly; that, according to the principle *inclusio unius fit exclusio alterius*, we must come to the conclusion that the Court of King's Bench had juridsiction in those cases where the Intendant alone had a right to act, but not in those where he had to be assisted by the Governor, as in the cases provided for by the *Arrêt* of 1711.

We have been for a long time aware of the value of the maxim "*inclusio unius, &c.*," at the present time, no person looks upon it as a rule to be followed. Nevertheless there is no case in which it is less applicable than in the present one. Every body is aware that, under the French Government, the Intendant was the person charged with the administration of justice. His Court was not the only tribunal, but it was the most common one, and the one in which the greatest number of cases were decided. At the time of the conquest, the powers of the Seigniorial Courts were carried out to a very limited extent, they were badly organised and were almost forgotten. The Superior Council, although competent to decide certain important cases which came within its jurisdiction as a judicial tribunal, was looked upon more as a legislative body than as a Court of Justice. With reference to the Tribunal composed of the Governor and the Intendant, it was an exceptional Court, established for a particular object; it was for the purpose of looking after the settlement of the lands in this country, and for seeing to the punishment of infractions of the laws made to carry out that object. The settlement of the lands and the colonisation of the country were looked upon as matters of such vital importance, that it was thought proper not to leave them in the hands of the ordinary Judge. It was requisite that the ordinary Judge, in the accomplishment of that portion of his duty, should be assisted by the principal functionary of the country, the Governor himself, in order doubtless to give greater weight and solemnity to

their decisions. But, as I have before stated, this Tribunal was established for a particular purpose, and did not exist for any other. If these facts be correct, it is not surprising that the authors of the Act 34, Geo. III, which has established our Courts of Justice, while defining the jurisdiction of the Tribunals which it created, should, among other things, have bestowed upon them the jurisdiction of the tribunal of the Intendant, which was well known, and that we should have forgotten that exceptional tribunal, composed of the Intendant and the Governor, who in their capacity of Judges, previous to the conquest, had acted in such a small number of cases that it is quite probable that even the existence of that Tribunal was unknown to the authors of the Judicature Act. This omission was not made intentionally, if it had been known that this Court existed, it would certainly have been included in the Act, more particularly when we consider the importance of the object for which it had been created. Or perhaps it may have been thought that when the Intendant was mentioned, it was at the same time intended to include all the cases in which he had jurisdiction, those in which he had a right to sit alone, and those where he was to be assisted by the Governor. What appears to be very certain is, that this omission could not have been willingly made; consequently we cannot come to any conclusion as to the desuetude. If that was not a voluntary omission, and if it creates a void in the law and renders it incomplete, it is a part of our duty to supply that omission and to include in the law what has been omitted, if it be possible; and I have shewn that nothing is more easy to do, according to the second clause, and the first part of the eighth clause of the above mentioned Act.

But supposing that I should be in error in that respect, and that in point of fact there should be no means, while interpreting this law, to bring the present case within its limits, still it would not folllow that such an omission proved that, at the time of the passing of the Act 34, Geo.

III, the *Arrêts* of 1711 and of 1732 were looked upon as having fallen into disuse, because it was not thought proper to establish a tribunal to put them into execution. The reasons given above forbid such an idea; the only fact which remains is, that since the conquest, the law in question could not have been carried out judicially because there was no tribunal established for the purpose; this would not have had the effect of abolishing those laws, but would only have rendered them ineffective for a time, the abolition by disuse being founded upon the presumption that the law, thus abrogated, has been abandoned by the mutual consent of the authorities and of those subject to it, and that it has been agreed to look upon it as being no more in existence.

It is however false that, since the conquest, there has been no tribunal to put those *Arrêts* into execution: the contrary is clearly proved.

§8. The eighth and last question is whether those laws were laws of public policy (*ordre pub'ice*,) and whether private individuals were allowed to derogate from them by any private agreements.

This question was partly answered when I stated in reply to the fifth question that there was no necessity to solve the difficulty raised by the desire of ascertaining if the charges, conditions and reserves stated in the deeds of concession contrary to the edicts above mentioned, were null *pleno jure* or merely voidable; that it was sufficient to state that they were illegal and contrary to a positive law, and that consequently they could not form sufficient ground for any indemnity in favor of the Seigniors. But I am desirous of explaining, and of giving, at greater length, the reasons upon which I found my opinion.

It is necessary to examine the enactments of a law in order to ascertain if it is a law of public policy, (*d'ordre*

public), or if the parties subject to them, have a right to derogate from them. The first *Arrêt* of Marly contains two separate provisions. 1. The obligation on the part of the Seigniors to cause their lands to be cultivated, and to place settlers on them within one year, under penalty of reunion to the domain; 2. The obligation to concede their lands for dues alone, *à simples redevances*, to such persons as should require them; otherwise, after having demanded the concession and having been refused, they had a right to obtain the concession of the lands from the Governor and the Intendant, who were commanded to grant those concessions upon the same conditions as the other lands were conceded in those Seigniories.

There is not the slightest doubt that the first provision, which obliged the Seigniors to reside upon the lands and cultivate them, or cause them to be cultivated, was one of public policy, and that no individual could avoid obeying it. The public authorities were bound to see that it was put into execution, in order to promote the settlement of the country, for public interest.

As to the second clause, which obliged the Seignior to concede for dues alone, (*à simple titre de redevances*,) it gave the person who was desirous of obtaining a grant of land, in case of refusal a right to cause it to be granted by summoning the Seignior before the Governor and the Intendant; this right was in favor of private individuals, and also for the general interest of the country. Nevertheless this portion of the law could not be carried into effect unless at the request of private parties; it was only when they made a complaint, and the Seigniors had refused, that the Governor and the Intendant could make use of the powers conferred upon them by the *Arrêt*; so long as no complaint was made, the authorities were supposed to ignore the grievance and could not interfere. I infer from this, that that portion of the law was more particularly in favor of private individuals. If these latter, instead of taking advantage of

the right given them to summon before the Governor and the Intendant, the Seigniors who should have refused to grant them by way of concession the land they required, upon the conditions pointed out by law, had preferred submitting to conditions other than those at which they had a right to obtain the concession, this agreement, so far as they were concerned, was valid and binding upon them ; the public authorities had nothing to do with the matter, for, in that particular case, public interest was satisfied, inasmuch as the concession was granted, and the land was taken for the purpose of being improved as required by law, although it was upon less favorable conditions than the tenant might have obtained.

This view of the subject appears reasonable, for without entering into an examination of the question to ascertain if, under those circumstances, the *Censitaire*, by appealing to the authority of the law, could be exonerated from the obligations he might have voluntarily contracted, we may say, without any hesitation, that he alone had that right, and that no other person would be justified in making such a request, because he was the only person interested in making it, and that the public were not interested in the least.

But that is not the view we must take of the subject.

The Sovereign power which enacted the law in question now desires to abolish it in the interest of the public, but it does not wish to make this reformation without a good and sufficient indemnity to the persons entitled to the same. In order to establish the amount of that indemnity, the representatives of that power to whom the execution of the new law is entrusted, have caused the Seigniors to produce their titles, and have discovered that they contain clauses prohibited by the *Arrêts* of 1711 and 1732, upon which these latter found their claim for indemnity under the pretence that the *Censitaires* had voluntarily agreed to them. Is the

Seignior justified in his pretension ? that is the question.

For my part I think this question should be decided against the Seigniors.

So long as the violation of the law was kept secret between himself and his *Censitaire*, the public authority could not, and had no right to interfere. But from the moment the question is regularly brought before the public, it must reject a claim based upon an infringement of the law, more particularly when, as in the present case, the public treasury furnishes a large portion of the indemnity; would it not be an absurdity to indemnify the Seigniors for having violated a public and general law which we acknowledge they were bound to submit to.

These arguments might be carried much further, but what has already been said is, I think, sufficient to prove that the Seigniors are ill advised in demanding an indemnity for the loss of the value of charges and reservations which they should never have imposed nor stipulated, and for the imposition of which they might have been punished by the law which was in force at the time they were imposed.

I am therefore of opinion that without declaring those deeds to be null and void which contain those illegal stipulations, and without declaring those clauses themselves to be void *pleno jure*, or only voidable, the Court has a right to state, and it is the duty of the Court to declare, that those conditions are illegal, and in direct contradiction to a law which prohibits them, and consequently that no indemnity should be paid to the Seigniors for the loss of the pretended rights which they had thus acquired. In consequence of the above reasons, in answer to the eighth question I state that the *Arrêts* of Marly, and the *Arrêt* of 1732, were public laws from which neither the *Censitaires* nor the Seigniors could derogate to the detriment of the public.

SUMMARY OF THE FIRST DIVISION.

Before 1711 the common feudal law of Canada was the same as that in force under the Custom of Paris. Up to that period no general law had modified it so as to make any alteration in the rights of the Seigniors of the country over their *fiefs*, from what they were in France.

But in the deeds of concession of the Seigniories and in the public documents of that period, we find inserted, either expressly or otherwise, the obligation of settling upon the lands which had been granted them, or having them settled upon and put under cultivation ; but they had a right to fulfil this obligation in the manner they thought proper ; they could retain the lands in their own possession or alienate them upon such conditions as the purchaser thought proper to accept. So long as the Seigniories were established, the Seigniors fulfilled their duty, and in that respect they had the same power as they had in France.

But this power was limited in 1711 by the *Arrêt* of Marly, which, under the form of a law, caused the obligation to establish the lands, or to have them established, independently of the deeds of concession, and of the conditions which had been imposed, to be a general one for all the Seigniors of the country ; another obligation was imposed upon them at the same time, which was to concede the land to those persons who should require them for dues alone ; and an express prohibition was made to sell those lands.

This *Arrêt* as well as the other one of the same date, on the same subject, relating to the *Censitaires*, have been confirmed by another *Arrêt* of 1732 which commanded the preceding ones to be put into effect : the whole three were enforced, they never fell into disuse, and were part and parcel of our laws at the time of the passing of the Seigniorial Act of 1854.

These *Arrêts*, while obliging the Seigniors to concede for lues alone, debarred them from the right of inserting in their concessions any other charges than *cens* and *rentes* and other annual dues which come under that denomination; consequently they had no right to impose upon their *Censitaires* the different charges and reservations which are inserted in their titles; these charges and reservations being illegal, the Seigniors have no claim for an indemnity in consequence of their suppression.

With respect to the amount of those dues, no law having yet established that amount, the Seigniors were allowed to impose such dues as the *Censitaires* agreed to, and whatever might be the amount of those dues, they have a right to be fully indemnified for them.

These are public laws, (*d'ordre public*,) and the *Censitaire* by derogating from them in favor of the Seignior, could not confer upon him, contrary to public interest, rights which were prohibited by those laws, and for the loss of which the Seignior claims an indemnity, to be paid partly by the Country.

SECOND DIVISION.

NATURE AND EXTENT OF THE RIGHT OF BANALITY.

This second division may be subdivided in the following manner:

1. At the time of the first settlement of the country, what was the character of the banality possessed by the Seigniors, was this banality legal and was it the result of law or custom, or was it merely conventional, and did it result from the titles?

2. Did this right subsequently change its character, and has it since then become obligatory, independently of any agreements between the parties; at what period and by what means was this change effected?

3. According to the law of the country such as it existed at the time of the passing of the Seigniorial Act of 1854, what was the extent of the right of banality, what was the quantity and quality of the grain which the *Censitaire* was bound to have ground at the banal mill belonging to his Seignior, was it only the wheat which had been grown upon his land, and which was necessary for the use of his family, or was it every kind of grain which the *Censitaire* must have ground, whether the same was necessary for the use of his family or not?

4. Did the right of *banalité* consist solely in obliging the *Censitaire* to carry his grain to be ground at the banal mill, or did it also go so far as to prevent the building of all kinds of flour mills, within the extent of the *banalité*, without the consent of the Seignior, and to cause the demolition of those which had been built for that purpose?

5. Was this privilege of preventing the building and causing the demolition of such mills, merely an accessory, a protection which the law granted the Seignior, in order to facilitate the execution of his principal right of obliging his *Censitaires* to have their grain ground at his banal mill, and as such accessory, should it be set aside with the other privilege *pleno jure* and without any indemnity; or was it a separate and distinct right from the other one which did not necessarily disappear with the other, and for the loss of which the Seigniors consequently may exact an indemnity?

6. If the Seigniors had a right to prevent the building of any mills as above stated, was it by virtue of the right of *banalité* and independently of the ownership which they might have in the waters within their Seigniories?

§ I. At the time of the settlement of Canada, the Seigniors possessed the right of *banalité* throughout France. In certain provinces this right existed by virtue of the law and of the customs, independently of any private agreement between

the parties ; in other provinces, the right of *banalité* was looked upon as a mere servitude, which, like all others, could not be acquired unless by virtue of a title. For the first, the right of *banalité* was legal and customary ; for the latter, it was merely conventional.

The custom of Paris being included in the latter class, it contained for that purpose a particular clause in the 71st article, which declares, in express terms, " that the Seignior cannot oblige his tenant to go to the banal mill or oven, unless his title binds him to do so, or that there be an acknowledgement of long standing to that effect. We have already seen that the custom of Paris was introduced into the country as well as the Common law, from the time of its first settlement, and the article relating to the *banalité* having been introduced as well as the others, had the effect of law so long as it was not changed. Therefore at first, the right of *banalité* was merely conventional, and continued so during a long period of time, when we find that that obligation was imposed upon the *Censitaires* in almost every, or in all the deeds of concessions up to the year 1686, when an *Arrêt* was passed which altered the law in that respect.

It is true that we find an *Arrêt* of the 1st July, 1675, relating to the right of *banalité* ; but that *Arrêt*, instead of altering the law in that respect, rather confirms what has been said, that at the period in question the right of *banalité* was still conventional ; at the same time that it declares that windmills shall be considered as banal mills, it states that those persons only shall be held to carry their grain to them to be ground, who may have obliged themselves to do so by their titles.

Therefore in answer to the first question I state that, at first, the right of *banalité* in this country was neither legal nor customary, but was purely conventional, and only affected those persons who had subjected themselves to it by their titles.

§ II. Previous to 1686, the *Arrêts* made relative to the right of *banalité*, were only with a view of settling the difficulties which had arisen between the Seigniors and the *Censitaires* as to the fulfilment of the agreements entered into on that subject between them by virtue of their deeds.

The *Arrêt* of 1686 (4th June,) made an alteration in this order of things ; up to this period the right of *banalité* was conventional according to the custom of Paris, but the *Arrêt* in question rendered it legal and obligatory both for the Seignior and the *Censitaire*, independently of all conditions and stipulations between them.

By this *Arrêt* every seignior was bound to have banal mills built in his Seigniory within one year, in default whereof any individual had a right to build such mills, and he acquired, by that means, the right of *banalité*.

The right of *banalité* granted in the latter case, to the exclusion of the Seignior, can be nothing more than the same right which belonged to the Seignior in the case where he should himself have built the said mills, which proves that he did possess the right of *banalité* when he had built the mills which were required.

It would however be absurd to oblige the Seignior to incur heavy expenses in building mills, without at the same time obliging the inhabitants to conform to the obligations of *banalité*.

Consequently I look upon the edict of 1686 as a modification of the law such as it had existed up to that time, by obliging the Seigniors to build mills, and the *Censitaires* to conform to the right of *banalité*.

A number of judgments subsequently rendered in this country, confirm this interpretation of the *Arrêt* of 1686 and lead me to believe that from the time of its promulgation, the right of *banalité* became legalised and was law in

all the Seigniories (27th May, 1716, Cugnet 36—10th July, 1728, Cugnet 50—10th July, 1728, Cugnet 51—18th February, 1731, Cugnet 58—10th March, 1734, Cugnet 65—23rd June, 1736, Cugnet 69—11th July, 1747—Cugnet 74.

§ III. The third question goes to ascertain: 1. If wheat was the only grain which a tenant, subject to *banalité*, is bound to have ground at the banal mill; 2. If all the grain grown within the *banalité* whether consumed within it or not, are subject to the *banalité*; 3. If the grain purchased beyond the limits of the *banalité* and brought into it for use is subject to *banalité*?

With reference to the first point, all the writers in France are not of the same opinion; some of them pretend, with the *Nouveau Denizart*, vo. *banalité*, No. 9, vol 3, p. 148, "that "wheat is not the only grain subject to *banalité*, but that all "other kinds of grain are subject to it." This opinion appears to me to be more in conformity with reason and with the principles upon which the rights of *banalité* are based, if it be true that it arose out of the obligation, either expressed or understood, that the *Censitaire* should indemnify his Seignior, who had constructed a mill, for the expenses incurred by him for such building, and for those which the Seignior must incur to keep the mill in repair. We see no reason in this proposition to make a distinction between wheat properly so called, and other grain such as barley, oats and Indian corn, and other kinds which it is necessary to have ground, and which in fact the *Censitaire* gets ground for the use of his family, within the extent of the Seigniory. The Seignior having gone to the expense of putting his mill in a fit state to grind that grain, should, according to my mind, have the preference over all other mill owners, in order that he should be indemnified.

This extension of the right of *banalité*, according to certain authors in France, appears to have been adopted in Canada,

if we can judge by the different *Arrêts*, *ordinances*, and judgments rendered relative to that subject by the tribunals of the country, in the greatest number of which, no distinction is made between wheat and any other grain, which should all, it appears to me, be taken to the banal mill to be ground. I say the greatest number, because it must be understood that there are some *Arrêts* or judgments in which mention is only made of wheat.

It is certain that in those cases in which the *Censitaire* has bound himself by his title, to have his grain or all his grain ground at the banal mill, it is very difficult to assert that he fulfils his obligations by taking his wheat alone to the mill; and by having the remainder of the grain which he requires for the use of his family, ground elsewhere.

Other authors in France limit the right to the obligation on the part of the *Censitaire* of having his wheat alone ground, (see some of these authorities, 3 Lefebvre 168, 173, 175, 174; 1 Grand Cout: 1031—Rousseau DeLacombe: vo. *banalité*, No. 2, p. 67) I do not find any one of them more positive on this subject than the *Nouveau Denizart* already cited.

Sometimes the authors mention wheat, at other times they mention grain. The fact is that in France, it was only wheat which was generally ground. If any other kinds of grain were ground, it was such a rare occurrence, that it was not thought of sufficient importance to be mentioned while writing on this subject.

Upon the whole I am inclined to believe that the right of *banalité* included not only wheat, but all other kinds of grain.

The right of *banalité* is a personal right; consequently it is not because grain has been grown within the limits of the

Seigniory, that it should be subject to the right of *banalité*, but because it was to be made use of within the Seigniory. Consequently the grain grown within the limits of the country subject to the right of *banalité* by a person who does not reside there, may be ground where he pleases. 8 Pothier, 176.—" If I possess grain out of the limits of " the *banalité* where I reside, I may have it ground else- " where and bring the flour produced therefrom to my own " house."

The tenant who purchases wheat elsewhere than within the limits of the Seigniory, may also cause the said wheat to be ground elsewhere, and carry the flour home without violating any of the rights of *banalité* (1 *Fréminville*, *Principes des fiefs*, 143 ; *Lacombe*, 67 ; 1. *H. de Pansey*, 191.)

In answer to the third question, I am of opinion that not wheat alone but all kinds of grain, are subject to the right of *banalité* ; that the *Censitaire* is only bound to cause the grain which he requires for the use of his family to be ground, and that all the grain grown within the *banalité* is not subject to that right ; that what he sells elsewhere in flour may also be ground elsewhere ; that what he purchases elsewhere may also be ground elsewhere, although the flour may be consumed within the Seigniory ; that the grain purchased elsewhere and brought into the Seigniory must be ground within its limits.

IV. This question should be answered in the affirmative, and I do not hesitate to say that from all the authorities which can be consulted on the subject, the right of *banalité* in France included that of preventing the building of any other mills within the limits of the *banalité*.

This result of the right of *banalité* did exist and was acknowledged without any difficulty, both in the provinces where the right was legal and customary, and in those where it was only conventional. With reference to this

matter, it is well to remark here, that although the origin of those two kinds of *banalité* was different, still the effect of both was the same, whether it was legal or only conventional; unless some particular derogation had been stipulated in the title which established it. (*Lacombe*, *banalité*, 68; *Duplessis*, *fiefs*, 66; 2 *Rept. banalité*, 112; 1. *H. de Pansey*, 89; 3 *Despeisses*, *No.* 5, *p.* 296; 8 *Pothier*, 174; *Carondas sur Paris*, *Art* 1.)

Our law, in that respect, is the same as it is in France; all the authorities cited there are applicable here. The consequence is that in this country as well as there, the Seignior has a right to prevent the building of all mills within his Seigniory, and to cause the demolition of those which may be built without his consent.

§ V. This fifth question is of great importance; it causes the necessity of examining the pretension which is generally set up against the Seigniors, by saying: "Admitting that "the right of *banalité* includes the right of preventing the "erection or causing the demolition of mills erected within "the *fiefs* without the consent of the Seignior; this right is "only an accessory of the principal right, and only protects the *banalité*; and as this *banalité* has been abolished, any accessory to it falls with it; being nothing by itself, the suppression of it cannot be a reason for paying an indemnity.

In order to add more weight to this proposition, this privilege of the Seignior has been compared to the right of *retrait* which as an accessory of the right of *lods et ventes*, and as being granted to the Seignior in order to protect him from fraud, must have become extinct at the time the *lods et ventes* were done away with, and was abolished without any indemnity.

This proposition appears to me to be unjust and false in itself and the reasons upon which it is based appear erroneous.

As to the comparison made with the right of *retrait*, I must say that the Legislature itself has seen a difference between those two rights, since it has thought proper expressly to suppress the *retrait*, without any indemnity, whereas nothing at all has been said with reference to the right of *banalité*. I must add that I have some doubt as to the justice of that decision of the Legislature, and as to the question whether that decision is quite in accordance with the declarations contained in the Seigniorial Law, that no individual can be deprived of his rights without being indemnified.

The right of *retrait* which really owes its origin to the cause already mentioned, was, notwithstanding that, a lucrative right, which the Seignior could make use of for his own benefit, or could make over for a certain consideration to a third party, who could then exercise it in his name. It was an odious right, it had been abused of; and it became necessary to abolish it; but as it was acknowledged by and founded upon law, was it just to do away with it without paying an indemnity? For my part I doubt it.

It is with all due deference that I make these reflections, and merely to come to the conclusion that with reference to the privilege now under consideration (that of allowing or prohibiting the building of mills,) that privilege has in no wise been suppressed. The law has abolished the right of *banalité*, and the privilege in question, being attached to it, arising out of it and forming part of it, cannot exist without it; but if this consequence, this portion of the right of *banalité*, was of itself a lucrative right by which the Seignior could benefit, could it be set aside without paying any indemnity; that is the question now before us.

All the authors agree in stating that the Seignior being vested with the right of preventing the building of mills within his Seigniory, it follows as a natural consequence

of the *banalité* that the person who possesses the right of *banalite*, possesses also by law the right of causing the demolition. I am inclined to believe that the reason which gave rise to this privilege, was to prevent frauds, and to assist the Seignior in enforcing his principal privilege, which was to oblige the *Censitaire* to come to his mill. But let the origin of that right be what it may, it nevertheless existed as a distinct portion of the *banalité*; it was in itself a lucrative privilege. The Seignior could sell his rights, and acquire, by such sale, profit which no person has a right to call him to account for, inasmuch as he sold only what was his own, and what no person could oblige him to dispose of. If you do away with the *banalité*, you deprive him of that source of revenue; and I think that cannot be done away with without some indemnity. Whether this indemnity be granted to him as a part of the principal right, or only as forming a distinct branch of it, it is a matter of indifference, but in the amount to be paid him in consequence of the suppression of the *banalité*, the right of which we have spoken should be taken into consideration.

§ VI. Theprivilege possessed by the Seignior of preventing the building of mills within his Seigniory, belonged to him by virtue of his right of *banalité* and independently of the proprietorship which he might have over the waters of his Seigniory, since the erection of wind or steam mills, would have been a violation of his privilege, just as well as mills driven by water power.

THIRD DIVISION.

Proprietorship of rivers and running waters, both navigable and unnavigable.

Of all the subjects submitted for the consideration of the Court, there are perhaps none of greater importance than the one which forms the subject matter of this division, and without doubt it is the one which presents the greatest difficulty, uncertainty and difference of opinion, and it may for

the present purpose be subdivided into two principal questions.

The first one is what were the rights of the Seigniors over navigable rivers and streams, at the time of the abolition of the seigniorial tenure in this province.

The second one is to whom the non-navigable rivers and streams belonged, at the same period.

I. The entire doctrine relative to the ownership of navigable rivers will be found summed up in the following passage of Boutarie, in his *Institutes*, at page 125, where he says :

" Most decidedly the navigable rivers belong to the King ;
" they form a portion of the Domain of the Crown, with the
" exception of the rights of fishing, of building mills,
" placing ferries, and other rights which private indivi-
" duals may legally possess by virtue of their titles."

According to this doctrine, which is really the true one and which cannot be contested, the Seigniors have no rights over such rivers ; in the same manner as all other individuals, they can exercise such rights as may have been granted to them by the Sovereign, by virtue of special titles, and which are not contrary to the custom of navigation and trade, and to the general interest of the State. We must look into those titles and into the possession which corroborates such titles, in order to be able to judge of the extent and nature of those rights which, being a derogation to the common law, must be kept within the terms of the charters by which they were established.

If those rights, by their constitution, partook of the Seigniorial or feudal tenure, and that the law of 1854 had the effect of abrogating or setting them aside, such suppression might give room to the payment of an indemnity. If on the contrary, the grant made of those rights, contains nothing of

a Seigniorial or feudal nature, in such a case, the law of 1854 does not affect them in the least, they do not come under the class of those upon which this Court is called upon to decide, and consequently it is useless to mention them here.

II. The second question relating to non-navigable rivers, reduced to its most simple meaning, and put in a practical manner, is made in order to ascertain :

Whether the Seigniors or the *Censitaires* of the country were the proprietors of the non-navigable and non-floatable rivers and streams at the time of the passing of the Seigniorial Act of 1854.

In order the more easily to arrive at a solution of this question, I shall, in the first place, state some propositions which appear to me to be incontestable and which I shall consider as being admitted, that is to say, that these rivers form a portion of the private domain and may belong to private individuals ; and that for such reason they are subject to the control of the civil laws of the country ; that, in Canada we have no particular law relative to this matter, and therefore that this question must be decided according to the French laws in force in this country in 1854 ; that even in France there never was any special law to settle this difficulty before 1789, at which time the abolition of the feudal and Seigniorial rights and of everything arising out of them was decided upon ; that in order to come to a solution of the question before us, it is necessary to have recourse to the laws and jurisprudence in force in France before the period of 1789, and to the decisions of the french courts and of our provincial courts.

This was a question relative to which much difference of opinion existed in France ; nevertheless the conflict was not between the Seigniors and the *Censitaires* ; on the contrary, almost all the authors who have written on the subject, and almost all the *Arrêts* attest that, in fact,

the ownership of the rivers and non-navigable running waters did not belong to the *Censitaires* or riparian proprietors, but generally to the feudal Seigniors or to the *justiciers*; I say *generally* because some authors, the first of whom is Pothier, say that "The rivers belong to those persons who have a right to them by virtue of their titles or by possession, and who can call themselves the proprietors of them within the limits mentioned in their titles or of which they have possession.

This doctrine being perfectly correct so long as it is properly understood, does not in the least contradict the one which is generally admitted, that this ownership is vested, by the common law, in the feudal Seigniors or *justiciers*. This passage of Pothier states nothing more, in substance, than that those rivers, forming part of the *Domaine privé*, may belong to the persons who should have obtained titles from the proprietors, and that those individuals acquire all the rights over them, that is to say those rights only which may be mentioned in their titles. Consequently unless there be a title or a possession during a long period which leads to the presumption of the existence of such title, no individual possesses any right over those rivers which, as Pothier says in the same place, "belong "to those Seigniors *justiciers* within whose territory they "are, when they do not belong to the individual proprietors." In other words it means that the Seigniors *justiciers* are the proprietors of the non-navigable rivers which they have not themselves disposed of, or which may not have been granted to other parties by the Sovereign, to whom they all originally belonged, and who had every right to dispose of them to whom and upon such terms as he thought proper, inasmuch as he possessed the same right with respect to the navigable rivers.

What has been said above was in order to show that in France the general opinion and acknowledged jurispru-

prudence were that the non-navigable rivers did not belong *pleno jure* to the *Censitaires* who lived along the banks of those rivers, but that by virtue of the common law (*droit commun*) they were the property of the Seigniors, either as possessors of the *fief*, or as exercising jurisdiction, (*droit de justice.*)

I shall not at present cite, in support of this statement, the opinions of the authors, or the *Arrêts* upon which it is based; the counsel of the parties cited them, and they will be found in the statements which have been laid before the Court; I shall merely refer to them as I feel satisfied that any one who shall look into them, must finally come to the conclusion that at the time of the abolition of the feudal right in France, in 1789, the rivers in question were all really in the possession of the Seigniors, and that the proprietors of the land through which they ran laid no claim to them. The only point upon which there was a difference of opinion was the one which has been already mentioned, that is to say, whether it was a right coming from the *fief* or from the right of jurisdiction, which we may ascertain by referring to the following authorities:

"Under the feudal system, (says Henrion de Pansey, "Competence des Juges de paix, page 233,) the small rivers "belonged to the Seigniors, they were the proprietors of "them and had control over them, consequently no person "had a right to dispose of the waters belonging to the Seig- "niors, unless such person had a concession from them."

"The best possible reason for stating that the bed of the "non-navigable rivers was not transferred to the riparian "proprietors by any enactment of our law, arises out of "the numerous efforts which have been made to introduce "into our code of laws, such an enactment which it is "impossible to find in it." (3 *Foucard, Droit public et administratif*, page 422.)

" Another rule was followed in France ; these rivers " (that is the non-navigable rivers) belonged in almost every " locality to the Seignior *justicier* as an indemnification for " the duties imposed upon him in the administration of " justice." (Troplong, prescription, No. 145.)

The above authorities and a number of others which could be cited, prove this fact, that so long as the feudal system existed in France, the riparian proprietors, did not for that reason have the ownership of the non-navigable rivers.

If such be the case, and if it be true, which cannot be doubted, that with respect to the non-navigable rivers, our position in the year 1854, is the same as it was in France in the year 1789, it would be useless to examine further into the subject, since we might, apparently, say that in this country the *fief* and the jurisdiction are almost in every case united in the one person, consequently it becomes a matter of slight importance by virtue of which of those two titles the rivers in question belong to the Seignior ; so far as the latter is concerned, the result is the same. With reference to the *Censitaire*, he either has a title or he has none ; if he has a title together with the possession his right will be acknowledged, and he obtains what he demands ; if he has no title, his demand is dismissed, and in such a case, he can have no interest in ascertaining who will possess what he knows does not belong to himself. It would consequently appear that we might at once set the *Censitaire* aside, declare his claim to those waters unfounded, and adjudge them to the seignior, without in the least trying to ascertain if they are to belong to him as a *fief* or by virtue of jurisdiction.

Such however is not the case, for according to the view taken of the subject by several persons, the question of ascertaining whether the rivers belonged to the Seigniors or to the *Censitaires* in 1854, depends entirely upon the answer

given to this other one " was the ownership which the " Seigniors had or might have had in those rivers, a right " acquired as owners of the *fief*, or was it a right acquired " by jurisdiction."

According to those who hold this opinion, it would be necessary, in order that the *Censitaires* should gain their point, to decide in favor of the feudality, and to declare that it is not a right acquired by jurisdiction.

Those persons who support the interest of the *Censitaires* in this respect, maintain that these latter have a right to those rivers, because the right was transmitted to them through the feudal Seigniors to whom it belonged, while it is stated in opposition to this pretension that as the feudal Seigniors never possessed that right themselves, they could not transmit it to the *Censitaires*.

Let us now briefly explain these two theories, and then examine into the reasons why one should be preferred to the other.

Those persons who look upon the right in question as a dependent part of the *fief*, say that the Sovereign, as absolute master of everything that he had not alienated, previous to the concession which he makes of the *fief* watered by a non-navigable river, was the proprietor of such river as well as of the lands in the *fief*; that he could have reserved them for himself if he had thought proper; but as those rivers might fall into the private domain, there was nothing to prevent him from alienating them; moreover he was expected to have disposed of them with the land through which they ran, unless there was an express stipulation to the contrary; and consequently whenever the rivers and streams were not expressly excepted in the deed of concession of a *fief*, they passed into the possession of the grantee, as a portion of the *fief*.

In this theory no distinction is made between those rivers which merely flow along the border of the *fief* and

those which run through it; although those rivers which flow along the border of the *fief* are pointed out as the boundary of the concession, still they form a portion of it as well as the others. Consequently, according to this doctrine, the proprietor of a *fief* possesses, as proprietor, every right of property over the non-navigable rivers and streams, which it is possible for him to have, unless there be an express stipulation to the contrary.

Taking this principle for a basis and drawing the conclusions from it, those parties who have adopted it add: "since the Seignior of the *fief* has become the proprietor of the non-navigable streams which run through it or along its border, as being a portion of it, merely because no reservation or exception was made of them, it must follow that when that same Seignior disposes of a portion of his *fief* either by subinfeudation or by *accensement*, without at the same time reserving or excepting those streams, he makes them over to the new proprietor in the same manner as they were made over to himself personally by virtue of his title, as a portion of the property alienated. The same rule which was applicable to himself with respect to his dominant Seignior, may be invoked against him by his grantee, who shall acquire the waters in the same manner and for the same reason that he had acquired them, under like circumstances, from his dominant Seignior."

They come to the conclusion from this, that at the time of the passing of the Seigniorial Act of 1854, the Seigniors of *fiefs*, in this country, were only proprietors of the non-navigable waters which ran through or alongside of the lands which they had not disposed of, and which had remained in their possession either as a part of the domain, or because they had not been conceded; but that they had lost all right of property in those waters, upon all the lands which they had disposed of by subinfeudation or by *accensement*.

According to this system we perceive that it was through

the Seigniors that the waters in question came to the riparian proprietors and that it was necessary that they should first have belonged to the Seigniors in order to come into the possession of the tenants.

Let us now look at the doctrine of those who say that the right of property in the waters is derived from the right of jurisdiction, and who give it to the *justicier* to the prejudice of the Seignior of the *fief*.

These latter, starting from the principle that the *fief* and the right of jurisdiction have nothing in common between them, separate the *fief* and the right of jurisdiction into two distinct and different rights, existing independently of each other, which may belong to two different parties, may be disposed of separately, and which confer upon the persons to whom they may belong advantages which may be of quite a different nature and impose obligations quite dissimilar. The Sovereign who, in the origin, is the possessor of both those rights, may grant one of them and retain the other; if he grants the *fief* without including the right of jurisdiction in the grant, the latter remains with him; in such a case the grantee becomes a feudal Seignior, but he is not a *justicier*. If both are included in the grant, and there is nothing to prevent it, the grantee then unites both qualities in his own person, he is both feudal Seignior and Seignior *justicier*. The two however do not become one and the same, they remain separate, there are certain rights which he can exercise only in the one capacity, and of which he becomes deprived the moment he loses it. Finally there are in this case, in the eyes of the law two separate and distinct beings, so much so that the Seignior may, by the alienation of the *fief*, lose his feudal rights and remain *justicier*, and this same rule would apply equally well the other way.

According to this doctrine, the feudal Seignior becomes, as such, the proprietor of the soil, of the land composing his

fief, but he has no right to the ownership of the running waters which may be in the *fief*, whether they are navigable or not. They both require to be looked after with particular care, in the public interest, and to be governed by rules and regulations emanating from public authority, of which the Sovereign is the fountain head, and for that purpose they should remain under his control and not leave it unless upon the express condition and with the firm assurance that those important duties, with which he was charged, will be properly fulfilled. With respect to those navigable rivers intended for the use of the country in general, and which are the means of communication between the different provinces and even between different States, they have remained under the immediate control of the King, who has retained the right of exercising in person jurisdiction over them, and of making the necessary regulations for that purpose ; and in order that he might meet with no difficulties in the accomplishment of that duty, it has been his will to reserve for himself the exclusive ownership of those rivers, and he has retained the exclusive privilege of personally granting such rights which he should think proper and compatible with the public interest.

It is particularly for the reasons just given that the navigable rivers belong to the King and form a portion of his domain ; and that is why he receives the dues and emoluments arising from them, in order to be able to defray the costs and expenses of maintaining order upon them.

With respect to the non-navigable rivers, the utility and importance of which are much less, when compared with the others, and the use of which is much more limited, it has been thought that the care of maintaining order and proper regulations on them was not of such great importance, but that the King might free himself from that duty by delegating other persons to fulfil it. That is exactly what was done, when the Seigniorial jurisdiction extended over those rivers, and the Seignior *justicier* was empowered to exercise the same authority over the non-navigable rivers, per-

sonally and in his own name, as the King exercised ; it being universally admitted that the grant of superior jurisdiction (*haute justice*) conferred upon the person, to whom it was made, jurisdiction over all the non-navigable rivers and running streams within his territory, and obliged him to maintain order thereon at his own cost and expense, and to administer the law independently of and without reference to the Royal Tribunals, which only had jurisdiction over the navigable rivers, but not over such as were not navigable.

From this doctrine we come to the conclusion, that the ownership and control of the non-navigable streams, was by common law, one of the dependencies of the superior jurisdiction, (*haute justice*) and belonged to the Seigniors *hauts-justiciers* to the exclusion of the feudal Seignior, who had no right whatever over those rivers, any more than other individuals, his *fief* being limited to the soil and not extending to the waters. Any grant which he might give of a portion of his land, could not empower the *Censitaire* to exercise rights over those waters which he, as grantor, did not possess, himself : consequently neither the feudal Seignior nor the *Censitaire* did or could hold any rights over the waters which, in every case, belonged, by common law, to the Seigniors having superior jurisdiction, when such superior jurisdiction had been conferred by the Sovereign ; and which rights remained the property of the King in all cases where he had retained that jurisdiction.

It is difficult to make a choice between those two systems, which are so different in their results ; they are and may both be supported by good and plausible reasons ; they are both advocated by authors whose talents it is impossible to call into question : nevertheless a choice has to be made, and after serious consideration I have adopted that theory which maintains, that the ownership to the waters in question is derived from the right of jurisdiction. I have nothing more to do at present, than to give the reasons which induce me to decide in this manner.

In the first place, I must state that I am very much mistaken, if the greatest number and the best of the French authorities upon this subject, (I mean those authors who have written, and the *Arrêts* which were passed previous to 1789,) are not in favor of the doctrine which I support. To the long list given by Mr. Championnière, the greatest adversary of the Seigniors, and the most zealous and able advocate of the riparian proprietors, we may add the names of several authors who are quite as respectable and quite as celebrated as those named by him. He has omitted mentioning them, and the omission will appear the more surprising, when their names are given.

I shall give the names only of some of those Juris-consults whom Mr. Championnière has not deigned to mention, commencing with Boutaric, in his *Traité des Fiefs*, where he says : " At common law and in the customs that are " silent on the subject, most certainly the Seignior *justicier* " alone has the right of allowing a mill to be built upon his " river," and he adds further on : " It is necessary to hold " a title for all the other *banalités*, but for the *banalité* of the " river, it is quite sufficient to be the Seignior with superior " jurisdiction over the land through which it passes." This author advances the same doctrine in his Institutes. (*Serres, Institutions de droit ; Lefevbre de Laplanche, Traité du Domaine ; Despeisses ; Renauldon, Dict. des Fiefs ; Rousseau de Lacombe, vo. fleuve* ; *Jacquet, Traité des Justices ; Porquet, Règles du Droit François ; Pocquet, Traité des Fiefs ; Ancien Rept. vo. Rivière et vo. Pêche.*) I shall now stop, although it would be easy for me to add to this list the names of a number of authors who have been forgotten by Mr. Championnière.

The opinions advanced in relation to this subject by all those writers are confirmed by, or are founded upon a number of *Arrêts* rendered in the different Provinces of France, both in those governed by the civil law, and in those which were governed by Customs. Almost all those *Arrêts* acknow-

ledge the Seigniors *hauts-justiciers* to be the proprietors of the non-navigable rivers, with the exclusive right of fishing in them or allowing others to fish in them, of building mills or factories, and allowing or preventing the building of them. One of these *Arrêts* may be seen, among a great number of others, in the II vol. of *Maréchal*, *Droits honorifiques :* page 99.

It cannot be denied, and I am far from doing so myself, that there are *Arrêts* also, where the Seigniors of *fiefs* appear in that capacity, as the proprietors of the rivers. Without positively stating it, and without having any positive information authorising me to make the assertion, I must say however that in those cases, it might have happened that the Seigniors of the *Fief* were also *justiciers* (and this happened frequently) and inasmuch as it did not matter in which capacity they acted, they might have taken the title of feudal Seignior, instead of that of *justicier*. But I can state that I have not found one *Arrêt*, where a decision has been come to between the feudal Seignior and the Seignior *justicier*, in any case where the question has arisen directly between them.

But let us admit, which is doing a great deal, that the authorities and the *Arrêts* are both equal in standing and respectability on both sides of the question, it appears to me that that equality should have no weight in the face of the solemn declarations contained in the *Arrêt* of the King of France, of the 22d November. 1695, which applies to the entire Kingdom. This *Arrêt* acknowledged and made known, in the fullest manner, that all the non-navigable waters belonged to the Seigniors within whose superior jurisdiction they were, just as those same waters belonged to the King, when they were within the limits of those superior jurisdictions of which he himself had remained in possession as proprietor.

This *Arrêt* appears to me to be very important and very decisive.

The importance of it consists more particularly in this, that, by this general law, which after all was merely declaratory, the King proclaims, as *existing law*, that the ownership of the non-navigable rivers is one of the dependencies of the Superior jurisdiction. The King thereby claims for himself the ownership of the waters within the limits of the superior jurisdictions which belong to him, and recognizes to the Seigniors the same undoubted rights within their own jurisdictions.

Under these circumstances, this *Arrêt* would be sufficient to maintain me in my opinion in favor of the Seigniors *hauts justiciers*. But I have a still stronger reason for adopting this opinion and holding to it, which is the difficulty of reconciling the contrary doctrine with the historical facts, upon this subject, with which we are acquainted.

We have already seen, that it is a fact beyond dispute, that, at the time of the abolition of the feudal rights and of the Seigniorial jurisdiction in France, in the year 1789, all or nearly all the non-navigable waters were in the possession either of the feudal Seigniors or of the *justiciers*, and that such was the case long before that period. This fact is proved by all the modern authors who have treated this subject, and in addition to those already mentioned, more particularly, by Mr. Rives, in his "*Traité de la propriété des Rivières non-navigables et non-flottables*," where he states at the 48 page : "From all that precedes, the consequence is "that at the time the *Assemblée Constituante* opened, the "feudal Seigniors or *hauts justiciers*, in virtue of our public "law, had the entire ownership of all the streams of water "which were neither navigable nor floatable. The Court of "*Cassation* maintained it, against the conclusions taken "by Mr. Merlin, on the 20th *ventôse*, *an X*, and main-"tained it again by its *Arrêt* of the 19th July, 1830."

If that be the case, how can we possibly reconcile the

possession of the waters in question by the Seigniors, with the system which attributes the ownership, by means of infeudation to the Seignior, and by the *accensement* to the *Censitaire.*

How can we, according to that theory, explain by what means the Seigniors *hauts justiciers* had acquired that possession? was it by means of grant from the Crown? We do not find mention made any where of such grant. Was it by deed of purchase or by other contract between private individuals? Nothing proves that to be the case, nor leads us to presume it. Was it by prescription? That is very improbable, or rather it is impossibe.

We cannot consequently assign any reason which will explain the origin of the possession which the Seigniors *justiciers* in France had of the lucrative rights over most of the non-navigable rivers, unless we attribute it to the right of jurisdiction itself, as being a portion of it, and arising out of it naturally and legally; if we reject this theory to explain the fact of such a possession, which is so well established, we must have recourse to suppositions which have nothing to support them.

With respect to the feudal Seigniors, how does it happen that, in a number of cases, they should be found in possession of those waters, if it be true that the proprietorship of them is transferred either by infeudation or by *accensement* to the grantee of the soil through which they run? If the Seignior acquired it from the Sovereign by infeudation, he can only have retained it so long as he retained the lands; from the moment he granted the land, that ownership, as a matter of course, was transferred to the *Censitaire*, as a portion of the concession, and the consequence in such a case would be that the *Censitaires* and not the Seigniors, would have been generally found in possession of the non-navigable rivers running through the conceded lands.

Such would be the inevitable consequence, unless we suppose, and this is neither pretended nor proved, nor is it probable, that in every case the Seignior made a reservation of those waters in his own favo ı the deeds of concession ; or unless we suppose again, which is hardly more probable, that after transferring those rivers, the Seigniors should have acquired them anew from the *Censi aires*, either by agreement or by prescription. Such suppositions as these are entirely gratuitous, and it wou'd be unreasonable to make them the basis of a theory upon such an important subject as the one now before us.

Consequently from the fact of the possession by the Seigniors of the non-navigable waters, I have come to the conclusion that their ownership was not a privilege appertaining to the *Fief ;* for, it was not so, it would be necessary to suppose, which some persons have already done, that the proprietorship of those waters is transferred, as a matter of course, and without any express mention of the same being made, to the feudal Seignior, by means of the infeudation, but that that same ownership is not transferred to the *Censitaire* by the *accensement.* That is a doctrine which could not be received counsel for the *Censitaires*, whose system is, by that means, shaken to its very foundation.

In this theory I find the same difficulty in explaining the fact of the possession by the Seigniors *justiciers*, in those localities where they had such possession. If the non-navigable waters be an appendage of the jurisdiction, there can be no difficulty ; the Seigniors *justiciers* are in possession of them, because they have retained a right which always belonged to them ; so long as they had the right of jurisdiction, they had or they should have had the proprietorship and the possession of the non-navigable waters. But if they did not acquire that right as a portion of their jurisdiction, by what means could they have acquired it over such a

large extent of territory, as that which they had possession of, at the time of the abolition of all those rights in 1789.

In answer to that question it is pretended that the origin of that right in the hands of those Seigniors, is due to fraud and usurpation, which consisted in changing, by unjust means, the right of jurisdiction which they had over the rivers, and which no person contests, into a right of property which never legally belonged to them.

This explanation does not appear satisfactory and is not founded upon any solid basis ; fraud and usurpation may easily be employed in certain cases to the disadvantage of a few isolated individuals ; but they become quite impracticable, when used openly and publicly against important interests and facts, which may sensibly affect the most numerous class of the community.

However this proposition has been so frequently and so cleverly set aside by the best authors, that I shall not say anything more about it ; I will merely state again that the theory, which makes the ownership of the non-navigable waters one of the dependencies of the *Fiefs*, presents difficulties which I find answered nowhere to my satisfaction.

If on the contrary, we adopt the opposite theory, which makes that right a consequence. a dependency of the Superior Jurisdiction, those difficulties disappear, or they are explained.

In France, in 1789, the *Censitaires* were not in possession of the non-navigable rivers ; nothing could be more simple and natural than that, inasmuch as they never had any right to them ; the feudal Seignior from whom alone this right could have been acquired, could not grant it, inasmuch as he did not hold it himself ; the concession must have been bounded by the river at which it abutted, without including that river, which belonged to another who

was the Seignior *haut ju cier* from whom the *Censitaires* were bound to obtain a title to the river, in order to be able to prefer a claim to it as proprietors.

According to this system, it was to be expected that the Seigniors *hauts-justiciers* would have been found in possession of the largest number of those rivers; and such was really the case; this was the natural consequence of the fact, that the grant of jurisdiction, while it obliged the Seigniors to maintain proper regulations upon the rivers of which we are now speaking, at the same time it gave them the ownership of those rivers, and granted them all the rights and privileges arising out of that ownership, as an indemnity for the trouble and expenses they incurred. With respect to such of those rivers which belonged, at the time of the abolition of the feudal system in France, to the Seigniors of *Fiefs* and were found in their possession, the matter may be explained, either by what has been already stated, that in those cases the rights of the *Fief* and Jurisdiction, being united in the same person, it was useless to enquire upon which of those two titles the possession was founded; or because that ownership had been acquired by the feudal Seigniors by prescription or otherwise, from the parties who were the proprietors of it by virtue of special deeds of concession from the Crown; or because having originally received the grant of the *Fief* together with the right of jurisdiction, they might have parted with their right of jurisdiction, and reserved their rights over the rivers with the *Fief* which they retained.

But we may be told: "Supposing your proposition to be correct for France, it cannot be correct for Canada.

1. Because, in this Country, the Superior Jurisdiction never was carried into effect by the Canadian Seigniors to whom it had been granted, so as to give them a right to the advantages and privileges arising from it.

2. Because admitting that, at a certain period, the Seigniors had a right to avail themselves of the advantages and

privileges of the Superior Jurisdiction, they lost those advantages afterwards, when the Seigniorial Courts were replaced by other Tribunals, and when the Seigniors *justiciers* ceased to continue in the exercise of their jurisdiction.

To the first of these objections, I will answer that there is no proof, and there is no authority, for stating that the Seigniors *justiciers* ever refused or neglected to administer that justice which they were bound to administer; it is not at all established that they did not do so as much as was necessary and in such a manner as was conformable to the circumstances under which the country was placed; that, in the absence of such proof, the presumption is that they did fulfil their duty; moreover that this Court has no jurisdiction authorising it to decide upon such a question; and if it had such jurisdiction, it would be necessary, in order to come to a decision, to have heard the interested parties, to have given them the means of shewing whether they had fulfilled their obligations fully and in a legal manner, or that the parties who were thus bound, had been exonerated from so doing by the proper authorities, whose duty it was to see to their proper fulfillment. With reference to this subject, we may here mention, that it is a matter of notoriety which is recorded in history, that before the Cession of the country, the French Goverment, instead of insisting upon the fulfilment, to their full extent, of the obligations of the *justiciers*, with respect to the administration of Justice, on the contrary did all in its power to depreciate the Seigniorial Courts and render them unpopular, and to bring the suitors before the Royal Courts, which were established in different parts of the country.

At the present time and under the present circumstances, it would be most unjust to declare that certain persons, who have not been and who could not be heard, have forfeited rights of the greatest importance and value, upon a supposition, which is perhaps unfounded, that about a century or

more ago, certain persons, who consequently would not suffer by the decision, had failed to fulfil obligations and duties, which had been imposed upon them and confided to them.

It is a well known fact, at the present day, which no person contests, that the superior jurisdiction was very rarely administered in this country by the Seigniorial judges, and that the other jurisdictions which had been granted to the Seigniors, that is mean and inferior jurisdiction, were only administered in a very imperfect manner.

But that negligence, if it can be called so, did not entail forfeiture or abrogation of the jurisdiction, (*pleno jure*) nor of the advantages and prerogatives attached to it. It would most certainly have been necessary for the authorities of that period to have adopted proceedings, and have had the confiscation or abrogation of those rights declared in a legal manner.

Nothing of the kind took place. It is true that we do find examples, where abuses and negligence in the administration of justice have been repressed and punished, but in no place do we find any decision declaring that the Seigniors were deprived of the rights of jurisdiction, for having failed in the performance of their duties or for any other cause. From this, we are bound to conclude that the Seigniors performed the duties they were obliged to perform, or that they were exonerated from performing them by the authorities having a right to take cognizance of the matter.

To the second of these objections we answer, in the first place, that the rights of jurisdiction granted to the Canadian Seigniors were never suppressed, revoked or abolished in a positive manner or by any positive law. The Seigniorial Courts were only replaced by other tribunals which were found to be more convenient and more in conformity with the position of the country ; by that means, the Seig-

niors were indirectly deprived of the exercise of their jurisdiction, and they were exonerated from and even prevented from fulfilling their obligations in that respect; if the fulfilment of that duty had been beneficial and profitable to them, they might have demanded and obtained an indemnification for the loss they would have suffered involuntarily; but they did not demand that indemnity, and the question now before us is not to ascertain, if they would have had a right, but the question raised by the objection, which I am answering, is to ascertain if the lucrative advantages, attached to the right of jurisdiction at the time the same was granted, but which do not form an inseparable portion of it, such as the right to the rivers and some others of the same kind, which although arising out of the right of jurisdiction, do not indispensably exist through the exercise of it, may, with a shadow of justice and reason be abolished, suppressed and lost, so far as the Seigniors are concerned, by the mere fact that the authorities had thought proper, without the consent and participation, and probably against will of those same Seigniors, to put them under the impossibility of fulfilling a duty, which had so many advantages attached to it. The emoluments arising out of the administration of justice, if there were any, disappeared as a matter of necessity and were done away with by the suppression of the right of jurisdiction, but the other prerogatives which owed their existence to it, and which could exist without it, could not be set aside at the same time.

That doctrine, so reasonable and so just in itself, is the one we find mentioned in *Renauldon*, *Dict : des Fiefs*, vo. *rivières*, page 216, where he says : " But the Seignior, " who loses his right of jurisdiction, does not, for that reason, " lose the other rights which may appertain to it, such as " *épaves*, islands, islets, alluvions, &c."

If we were to act contrary to such a just rule, we would be doing worse than the Assemblée Constituante did in France,

in August, 1789, when it abolished, in one instant and without any indemnification, all the Feudal and Seigniorial rights; there was in that case, at all events, an ordinance emanating from the Legislative power then in existence: in the present case, that formality even is wanting, since it would be attempted to effectuate a spoliation by mere implication, without having received any order whatever from any competent authority.

I think, therefore, that I have good reason for stating that if the grant of jurisdiction had the effect of investing the Seigniors of the country with the ownership of the non-navigable rivers and waters within the limits of their jurisdiction, those Seigniors could not, since then, have lost that right any more than the other lucrative privileges arising out of the jurisdiction, by the mere suppression of the Seigniorial Courts, and that notwithstanding that suppression, their rights have remained the same.

Those are the principal reasons which have induced me to adopt the theory, which I have just now explained in such an imperfect manner; it is susceptible of being developed at much greater length, which I have been unable to do for want of time; but what I have said appears to me to be sufficient to establish:—

1. That the navigable rivers belong to the State, but that private individuals, such as Seigniors and others, may exercise such rights over them as may have been granted them by public authority, so long as they are not incompatible with the general interest.

2. That with respect to the non-navigable rivers and running streams, they were, in this country in the year 1854, as they were in France, in 1789, an appendage of Superior Jurisdiction, and were the property of the Seigniors to whom that Jurisdiction had been granted.

3. That in the few cases where the Superior Jurisdiction

was not granted, the right to those rivers remained with the Sovereign, and was not transferred to the Seignior to whom the *Fief* had been granted without the right of jurisdiction.

4. That the Seignior of the *Fief*, not having, in his capacity of Seignior, any right to the waters in question, could not transfer them to his *Censitaires*, either in express terms or by subinfeudation or *accensement*.

5. Lastly, that since the passing of the law of 1854, abolishing the Seigniorial rights, the Seigniors high *justiciers* of the country, either remain the proprietors of the rivers in question, or they have a right to be indemnified, if they are deprived of them.

OBSERVATIONS

OF THE

HONORABLE MR. JUSTICE DAY.

This Court is one of an extraordinary character, and I must be permitted briefly to advert to the nature of the duties imposed upon it, and the peculiarity of the position which as Judges we occupy here. The object of the statute under which we sit, as declared in its preamble is "To abolish "all feudal rights in Lower Canada, whether bearing upon "the Censitaire or the Seignior, and to secure fair compen- "sation to the latter, for every lucrative right which is now "legally his, and which he will lose by such abolition." One of the chief difficulties in legislating upon the subject is indicated by the foregoing extrat: it consists in settling the extent to which the rights claimed by the Seigniors ought legally to be sustained. With a view to such settlement it is provided by the 16th section of the act that in order to avoid all errors as to matters of Law, the Attorney General shall frame such questions "as he shall deem best calculated "to decide the points of law, which will in his opinion "come under the consideration of the Commissioners, in "determining the value of the rights of the crown, of the "Seignior, and of the Censitaire." These questions with such others as may be submitted by the Seigniors and Censitaires, the Judges are to take into consideration, and after having heard counsel upon them, but without previously requiring any case or pleadings, which is prohibited by the

statute, they are to render their decision or opinions, with reasons assigned, (*motivées*); and it is provided, that the decision so to be pronounced on each of the question, shall guide the commissionners and the Attorney General, and shall in any actual case thereafter to arise, be held to have been a judment in appeal *en dernier résort* on the point raised by the question in a like case though between other parties. In conformity with these provisions, a series of questions framed by the Attorney General, and six distinct series from as many Seigniors have been submitted to us, embracing almost every hypothesis and proposition which can be suggested by a study of the Feudal Tenure, and of the local laws modifying it in this country. By our answers to these questions we are expected to lay down abstract rules as an authoritative interpretation and settlement of all the conflicts, obscurities, and uncertainties with which the whole subject is embarrassed. It is not, therefore, too much to say of this Court, in the words of the Attorney General, that " its mode of organization and the powers with which " it is endued are extraordinary, and without precedent in " other countries." Its character and functions are indeed altogether anomalous. There is an assemblage of Judges but the office to be executed is not judicial: they are to express opinions but to give no judgment; for there is nothing before them to serve as the basis of a judgment, no suitors, no issue, no evidence, no case or record, and the statute in terms declares, that no sentence is to be given against any party. The duty then would have been little more than that of commentators on the Law, were it not that a sanction is given, which confers upon our answers a real and formidable power. The statute enacts that they shall have the virtue of judgments in the last resort; and this not merely against the parties who have appeared before the Court, leaving to others interested the right of testing the soundness of these opinions, and of maintaining their rights before

other Courts of Judges; but that they shall be absolutely binding against all classes of persons. These opinions, therefore, in effect not only interpret but supersede the Law, and if erroneous they repeal it, and substitute a new law in its place. Hence the functions we are exercising, are in their nature legislative: our pesition is not that of Judges, applying special rules to a particular case, for regulating and enforcing the rights of individual parties; but it is that of legislators, giving an authoritative interpretation of the law for the governance of the whole community; or which is the same thing establishing a declaratory law,—

(1) "Il y a "says Toullier" deux sortes d'interprétations, " l'une par voie de doctrine l'autre par voie d'autorité. " L'interprétation par voie de doctrine consiste à saisir le " véritable sens d'une loi dans son application au cas par- " ticulier. L'interprétation par voie d'autorité consiste à " résoudre les doutes et à fixer le sens d'une loi " par forme de disposition générale, obligatoire pour " tous les citoyens et pour tous les tribunaux..... " Il est évident qu'une telle disposition ne diffère en rien " de la loi; et par consequent que l'interprétation par voie " d'autorité doit appartenir au pouvoir legislatif..... " L'art : 5 du code défend au juges de prononcer par voie " de disposition générale et règlementaire sur les causes " qui leur sont soumises. Ce serait usurper le pouvoir lé- " gislatif."

I do not insist upon this peculiar and anomalous character of the Court, with any design of questioning the wisdom of the law by which it has been created. I am willing to believe that amid all the difficulties surrounding the settlement of this great public question, difficulties which the agitation of the country has greatly increased, the course adopted has much to justify it; but I would couple the extra

(1) Toul. nos. 121, 136, 137, 145.

judicial nature of the office imposed upon us, with the intrinsic importance of the subject, in order to shew how delicate and orduous is the duty, and how grave the responsibility, which by this Seigniorial act has been shifted from the legislative to the judicial body ; and I would derive from it this practial consequence, that since we have to deal with the matter we must be careful to do so with a severe and jealous logic, founded upon known principles of judicial interpretation, and upon them alone. It is to be viewed by us in its legal aspect only ; without regard to the interest it has excited abroad, to the unpopular and objectionable character of any rights, or of any class to which it relates or to any other extrinsic consideration whatever.

The questions and propositions laid before the Court by the Attorney General in substance tender the conclusion that the contracts affecting some of the most important rights of property under the feudal system, as it exists in this country, are illegal and null. It is certainly a startling conclusion. If the law be so, we must of course declare it ; but nothing less than an absolute certainty that it is so, can justify this Court in thus subverting the rights stipulated and enjoyed by a whole class of great landholders in Seigniorial Canada, and confirmed to them by long and undisturbed possession. In all ages it has been the policy of civilized nations to sustain conventions and the rights of property. Every where we find rules established, which after the lapse of a certain period, preclude all question of the validity of Titles. Such rules are necessary for guarding against the insecurity which must result from the power of invoking ancient causes of nullity, long after the changes and chances of life may have rendered it impossible for the possessor to defend his rights ; without them nobody could feel safe. This is a conderation of great public moment, even in reference to individual cases, but when ancient nullities are invoked to impair the titles, not one man or of ten, but of an entire

class of landholders in a country, it becomes a matter which yields in importance and solemnity to few, which can arise in humain society. In this view then of the subject, I repeat, that I turn to the closest and most inflexible rules of law, and of judicial interpretation of the law as the only safe guide. I feel that I am not to cast abroad for conjectural or remote reasons for such a construction of the law, as would disturb the established order of things, but that, on the contrary, it will be my duty, to maintain the integrity of contracts, unless I find a settled principle or an express law of no doubtful meaning which declares them bad. I have said that the questions and propositions of the Attorney General tender in effect a conclusion, that the conventions between nearly the whole body of Seigniors and their Censitaires, regulating some of the most important terms and conditions of the concessions of land, are illegal and null. The great question then, in its ultimate form and practical consequence, is not merely how the laws of Canada, anterior to its cession to Great Britain, and especially the arrêts of 1711 and 1732 were understood at or immediately after their promulgation, or how concessions were modified by their authority; nor is it even solely, what the true construction of these laws was: but it is, whether the present owners of Seigniories, claiming under deeds many of which are more than a century old, can by the decision of this Court be now deprived of the benefit of their titles; and the rights stipulated in them be virtually declared and abuse and a fraud. And with this statement of the question are to be coupled its dependent facts: *First.* That none of these titles have ever been declared null by judicial authority, but have without exception been acquiesced in and acknowledged in a variety of forms and in repeated instances, sometimes by successive generations. *Second.* That the parties of the original contracts have, in most cases, long ceased to exist, and are now chiefly represented by those who have paid for

their property, according to its value under and order of things existing universally throughout Seigniorial Canada.

This statement of the true question is important; for in the multitude of propositions, and the variety and extent of the discussion, we are in danger of losing sight of the ultimate character of the points which we have to determine, and of the great consequences which hang upon our decision.

Upon the whole subject counsel have taken a very wide range; but the members of the Court connot individually be expected to follow in this course. From the nature and magnitude of the interests at the stake, it was proper that the largest scope of discussion should be encouraged; but when we come to deal with it as Judges, we must fall back upon narrower and safer grounds. As an able diffusiveness has characterized the argument on these questions, so it is to be desired, that legal precision and a strict adherence to principle should characterize our answers to them. They are not to be disposed of, by the Court, as a matter of historial speculation, of social economy or of political expediency, but simply as unmixed questions of legal right. To their elucidation and settlement as such, great variety and force of reasoning, and profound learning have been applied from a variety of sources, as well at the Bar as on the Bench. I therefore design to avoid as well the citation of books and documents, which others have brought under the notice of the Court, as the repetition of reasonings already urged; and to confine myself, so far as is practicable, to an announcement of the result of my deliberations, without entering upon any detailed exposition of the process by which such result has been attained; except in cases of obvious necessity, and those in which I may differ in opinion from the majority of my brethren. The observations, which I shall thus offer, will constitute my reasons or *motifs* for the answers in which

I concur with the Court, and for my dissent from those answers upon which I am in the minority.

The whole subject seems to me to resolve itself into three principal divisions.

The first division comprehends all the questions of the Attorney General numbering from one to five inclusive ; relating to the effect of the feudal contract, and to the nature and extent of the Seigniors right of property *dominium* in the lands of his fief, under the Custom of Paris ; and all the supplementary interrogatories relating to the same subjects.

The second division comprehends all the questions relating to the obligation of Seigniors in this country to concede their lands on a rent charge ; to the rate of such rent being fixed by law ; to the character and effects of the *arrêts* of the 6th July 1711, and of the 15th March 1732 ; and to the powers of the Courts of Justice in this Province, to enforce those arrêts since its cession to Great Britain. This division embraces the questions of the Attorney General numbering from seven to twenty-five inclusive and the thirty-ninht, fortieth, forty-first, and forty-second questions, together with the supplementary interrogataries relating to the same subjects.

The third division comprehends the questions relating to the rights of the Seigniors in the waters ; and to the rights of *banalité*, *banalité des moulins*. It embraces the questions of the Attorney General numbering from twenty-six to thirty-eight.

FIRST DIVISION.

Upon the questions included in this division, relating to the nature and extent of the Seignior's rights of property *dominium* in the lands of his fief, and the effect of the foudal contract as to the division of the prope rty in them under the

Custom of Paris, it appears to me that no difficulty can be felt. I take it to be undeniable that under that system of law, the Seignior was truly proprietor of the lands held by him *en fief*, as a proprietor under any other form of tenure can be. He had both the *dominium directum* and the *dominium utile*, or more properly the *dominium plenum*, subject of course to certain fundamental rules, which characterize that tenure just as certain other rules characterize the tenure *en franc aleu* or in free and common soccage. By *accensement*, this right of property was divided, and the Seignior parted with just so much of it as was formally conveyed to the *censitaire*; subject always to certain dues implied by law, such as *cens et rentes* and *lods et ventes*, and also to such conventional charges and conditions, as he might see fit to stipulate. This was the mesure of the *dominium utile*, and all that was not so conveyed was the *dominium directum*. The *accensement* or subinfeudation was optional with the Seignior. He might retain in his own possession the lands of his fief, and use and enjoy them as he pleased, or he might if he saw fit alienate and dispose of them; but in the latter case, he was subject to certain restrictive rules established by the 51st and 52nd Art. of the Custom, which have already been recited and explained.

The above view of the Seignior's rights, under the Custom of Paris, is founded upon recognized rules of law resting upon the concurrent authority of the best writers on the feudal system. Henrion de Pansey says: " L'université du " territoire appartenait originairement au seigneur direct, et " il est encore propriétaire de tout ce qu'il n'a pas aliéné, " de toutes les parties qu'il n'a pas comprises dans les beaux " à cens qu'il a jugé à propos de faire." (1) I make no further citation here, because these authorities are before the Court in a variety of forms, and particularly in the elaborate

(1) Dissertations Feod. Eaux. §VII pp. 557 to 559.

and able examination of the question by his Honor the presiding Chief Justice.

SECOND DIVISION.

The second general division comprehends the questions which relate to the obligation of the Seigniors in this country to concede their lands on a rent charge ; to the rate of such rent being fixed by law ; to the character and effect of the *arrêts* of the 6th July 1711, and of the 15th March 1732 ; and to the powers of the Courts of this province, to enforce these *arrêts* since its cession to Great Britain.

In entering upon this division of the subject, it may be at once assumed that the great design and policy of the Crown of France, in granting large tracts of land in New France, was to colonize the country. This is apparent from the tenor of the Royal Grants, from the acts of ratification from the *arrêts de retranchement* and indeed, from all the orders and proceedings of the government, relating to the matter, as well before as after the arrêts of 1711. In the Royal Grants, the policy has been indicated by the insertion of terms and conditions, of gradually increasing stringency. In the few concessions made before the year 1627, it does not appear at all; and in those by the company of New France up to the year 1663, an express condition of cultivation is only found when they are made *en censive*. In the grants from 1664 to 1674 by the West India company, the condition to clear and cultivate the land is not universal, or even general, but it may be frequently found in them and becomes more frequent with the advance of time ; and in these grants we find also the obligation imposed, to make the tenants cultivate and inhabit their lands, under penalty of their being reunited to the Seignior's domain. Almost all the grants under the Royal Government from 1674 contain these conditions of cultivation ; and from about the year

1683, they are inserted in a more stringent form, providing that if the lands be not cultivated within a specified time (usually 2, 3 or 6 years) the grant shall be null; and in the ratification by the King of the grants of eleven Seigniories between the 6th July and the 6th November 1711, it is declared that the grantees shall be held " d'y tenir feu et lieu, " et le faire tenir par leurs tenanciers, à faute de quoi, les " terres seront réunies au domaine de Sa Majesté; et de " déserter et faire déserter incessamment les dites terres." Subsequently to the year 1711, four grants require in specific terms, that the lands shall be conceded " *à simple titre* " *de redevance sans insérer ni sommes d'argent ni aucune* " *autre charge*" and prescribe the amount of the rent. These are the augmentation of Beaumont conceded on 10th April 1713. Mille Isles conceded 5th March 1714. Lac des Deux Montagnes conceded 17th October 1717 and the augmentation of St. Jean, Rivière du Loup, conceded 18th April 1718. In the Lac des Deux Montagnes these conditions were, by the acts of ratification in the years 1718 and 1735, relaxed and changed for others of a very favorable nature; shewing that the King after the arrêt of 1711, followed no certain rule, but inserted in each grant such terms as he deemed fit. A considerable number of the grants, subsequent to that period, have the following clause, " de faire " insérer *pareilles* conditions, dans les concessions qu'il fera " à ses tenanciers, aux cens et rentes et redevances accou- " tumés par arpent de terre de front sur 40 arpent de pro- " fondeur." There is also a series of royal *arrêts* or decrees extending over almost the whole period of the french domination. The first is on the 22d March 1663 and is an order for the revocation of all grants of land, unless they were cleared (*défrichées*) within six months. Then comes an arrêt of the 4th of June 1672 requiring the Intendant Talon to make a report of the unsettled lands in order that one half of them might be resumed by the Crown. This was followed by another arrêt in the same terms on the 4th June 1675, and

by both these *arrêts* it was to be a condition of the regrants of the lands, that they were to be cleared within four years from the grant. By letters patent dated the 20th May 1676, the King empowered his Lieutenant General Frontenac, and the Intendant Duchesneau conjointly, to make grants; subject always to ratification within a year from their date; and to the condition of the land being cleared and cultivated (*défrichée et mise en valeur*) within six years, under pain of nullity of the grant. On the 9th May 1679 an *arrêt* orders, in conformity with the arrêt of the 4th June 1675, (under which the Intendant had made his report as required) that one fourth of the unsettled lands should be resumed by the Crown; and also that in each year after 1680, one twentieth of them should be resumed, and regranted to others by the Lieutenant General and Intendant, by virtue of their letters patent of the 20th May 1676. It is to be observed with respect to all these *arrêts* or decrees, that they are not restricted in their operation to lands held in fief and Seigniory, but include all grants of lands which had not been redeemed from a wild state. The same obligation to settle and cultivate is announced in the acts of confirmation of the grants. There is one by Frontenac 1674, another by him in conjunction with Duchesneau, on the 29th May 1680, in which it is made a condition to cultivate *défricher* within six years under pain of nullity. The same rigorous condition is inserted in the confirmation by the King, on the 15th April 1684, of the grants made by the Governor LaBarre, and the Intendant De Meulles between January 1682, and september 1683; and also in the confirmation, on the 14th July 1690, of the grants made by the Governor Denonville, and the Intendant Champigny, between November 1698 and October 1699. The royal confirmation 6th July 1711 of the grants made by the Governor DeCallière, and the Intendants Talon and Champigny up to October 1710, among various other conditions, contains that of clearance and habitation, "*défriche-*

ment et tenir feu et lieu," under pain of nullity; and specially provides that these conditions shall be binding although not stipulated in the grants. Taking then the conditions of the grants, and those contained in the acts of confirmation, together with the comprehensive terms of the several *arrêts de retranchement*, it may, I think be asserted without hesitation, that all the lands granted previously to the *arrêt* of 1711, were independently of that *arrêt* liable to be reunited to the domain of the Crown, in case they were not cleared and settled within a specific period of time.

Indeed, nothing can be more explicit or more stringent, than the terms in which the obligation to clear and cultivate (*défricher*) is expressed in these instruments. But even without such expressions, the design and policy of the sovereign must be inferred from the nature of things. After the Great Companies, which successively became proprietors of the colony, had surrendered their rights, and a Royal Government had been established, the first object of administrative and legislative action would naturally be to subdue the wilderness of this wide territory in the new world, and to cover it with cultivation, and a population from the parent state. So far the intentions and policy of the Kings of France are too manifest to admit of controversy. But when we come to enquire into the particular means by which this policy was to be carried out, and whether for that purpose, a legal obligation to concede his land, was imposed upon the Seignior from the beginning, a question is raised touching the rights of property, which assumes an entirely different character. By the law, as it obtained under the Custom of Paris, the Seignior was under no obligation to concede. If such an obligation were to be found as an express condition of his grant, of course, no difficulty could be felt: the contract would make the law for those who were parties to it; but it is admitted that no such expressed condition exists in any grant anterior to the year 1711, and it is

surely not allowable to assume, as a matter of implication, and in the face of the law, that merely because an object of declared public policy might be advantageously attained by a certain course of action, therefore that particular course of action becomes obligatory upon all parties. The case must go much further to justify such an inference; it must shew that in point of fact, the declared object of the grant, and the obligation imposed by it could not be satisfied in any other way. But it is certain that such a case is not before us: for the business of cultivation and settlement, might have been promoted and carried on in a variety of ways other than by conceeding the land. The Seignior might, for instance, have cultivated large tracts by his own servants; or he might have given long leases; or he might have caused them to be cleared by third parties, on the condition of their retaining as their own a certain proportion of them. By these and a variety of other modes, the lands might have been cleared and settled, as they have been in other colonies, without any concession *en censive* being ever made. The law, which exists as well for the protection of private rights as of public interests, cannot be changed upon an assumption so unsubstantial as this: nor yet can it be controlled by a declaration of the policy of the legislator, or by his intentions, unless these be expressed in the form, and subject to the conditions necessary to make them law. Such legislative expression of the royal intentions, I no where find anterior to the arrêt of the 6th July 1711; and the conclusion, that, prior to this arrêt, the Seignior was bound to concede his lands *en censive* merely because that was apparently the most effectual mode of settling the country, although such an obligation was unknown to the law of his tenure, and the object of settlement might have been attained by other means, appears to me far too loose and illogical to be made the basis of a judicial decision.

The truth seems to be, that up to the date of the arrêt

of the 6th July 1711, the matter of concession by the Seignior was left to his own discretion. That arrêt declares, that by the royal concessions to them they were *permitted* (*permis seulement*) to concede their lands, not obliged to do so, and the same form of expression occurs in the other *arrêt* of the same date. The government considered that self-interest, and common prudence would induce the Seignior to adopt the means obviously the easiest and most effectual, for causing his Seigniory to be settled and cultivated. His income and means of subsistence depended upon it; and the preservation of his property also depended upon it, for if not put in a state of cultivation, he was liable to be summarily deprived of it. The Crown, the sole legislator, insisted constantly, and inflexibly, upon the work of colonization going on, but if the end were attained, left the means to the choice of the Seignior. It is apparent however, as well from the terms of the arrêt of 1711, as from the official correspondence which preceded it, on the subject of concessions and the relations between the Seignior and his Censitaire, that there had grown up a state of things greatly at variance with the royal views. The King expected that the Seignior would of course, for his own benefit, concede as fast as he could, but instead of doing so he speculated in the wild lands of his Seigniory by selling them to other speculators, so that no settlement went on. This description of commerce was regarded as a public abuse, and the *arrêts de Marly* were the consequence then, and later the arrêt of 1732. The preamble of the first of these arrêts, that relating to the Seigniors, sets forth, first: That the lands conceded in Seigniory remain uncultivated and without settlers; and secondly: That the Seigniors refuse to concede their lands, in order to sell them, imposing at the same time like dues (*droits de redevance*) as were paid by the established inhabitants; which, says the preamble, is entirely contrary to the intentions of His Majesty, and to the clauses of the titles of concession, by which it is *permitted* only to concede the lands upon a title of rent (a

titre de redevance). The remedy applied by the arrêt to these evils consisted of two orders or requirements, the first was that the lands should be settled and cultivated within a year from that date, and in default, should be reunited to the Royal domain; and the second, that Seigniors should concede their lands upon a title of rent *à titre de redevance*, without exacting any sum of money; and in default of so doing the inhabitants were *permitted* to demand the concession by summons, and on refusal, to resort (se pourvoir) before the Governor and Intendant, who are ordered to concede the lands to the inhabitants so applying, for the same dues (droits) imposed upon other lands conceded in the said Seigniory; and these dues were to be paid to the Receiver General of His Majesty's domain, without the Seignior being entitled to any claim whatever upon them.

It is to be observed of this *arrêt*, that it did not introduce any new rule respecting the obligation of Seigniors to clear and settled their lands; that obligation, as has been shewn, existed before in its most rigorous form by virtue of the Royal Grants, and acts of ratification and the *arrêts de retranchement*; but it conferred an authority upon the Provincial officers, the Governor and Intendant, to pronounce ordinances or decrees for escheating and reuniting lands to the domain of the Crown, and this was a new authority, which up to that time had not been exercised except by the direct intervention of the King. The arrêt also introduced a new provision, in relation to the manner in which the settlement of lands held in fief and Seigniory was to be carried out; by obliging the Seignior to concede *à titre de redevance* without exacting money; and by ordering the Governor and Intendant upon his refusal to do so, to concede his land for certain dues (droits) to be paid to the Crown.

A further observation is rendered necessary by the question which relates to the extent of the application of this law

I cannot avoid the conviction that in its terms it applies only to those grants which had been made *en seigneurie* before its promulgation. The preamble, and indeed its whole texture and phraseology seem to me to shew that it was not intended to affect subsequent grants; which of course, the King could regulate by such special conditions as he might see fit. But on passing from the terms of the law to the fact of its repeated recognition, both under the French dominion and since, as being of universal application, I feel that it is too late to rest the interpretation of it, and to limit its operation simply upon the language in which it is expressed; and it is upon the ground of its having been invariably treated as a law applying to all grants without regard to the time at which they were made, that I have concurred in the answer on the subject given by the Court.

Upon the provisions contained in this arrêt relating to the concession of lands by the Seigniors, three important questions have arisen.

First.—Does the arrêt in imposing upon the Seigniors, the obligation to concede, establish or shew either directly or by legal implication, that he was bound to do so at any fixed rate of rent?

Second.—Is a concession which stipulated the payment of a sum of money or other charges in addition to the rent void or voidable in whole or in part?

Third.—Has the authority conferred on the Governor and Intendant to concede under the terms of the arrêt passed to the Courts of this Province?

The first of these questions, viz: whether the arrêt obliges the Seignior to concede at any fixed rate of rent, has perhaps been regarded with more interest and been more elaborately discussed than any other submitted to this Court

It is certain the law contains no express terms by which any specific amount of rent is fixed; but several propositions have been argued for the purpose of shewing from its general scope and character, and the object it had in view, that there was such a specific amount fixed by law, or by Custom, or by both combined. These propositions may be reduced to two; First. It is said the mere requirement to concede, necessarily implies the obligation to do so at a certain rate; otherwise the requirement becomes inoperative, for the Seignior has only to demand an exorbitant rent, and thus avoid the law. The obvious answer to this argument is that in all cases turning upon the refusal of a party to do something required of him by law or by contract, the refusal may be either direct or implied, and in the latter case the Court exercises its discretion in determining what circumstances constitute an implied refusal. Such a discretion belongs to the Judge even under our strict judicial system, and there can be no doubt that officers holding the larger powers belonging to the Governor and Intendant, would at once have determined, that the demand of an extravagant rent was a virtual refusal to comply with the law. They would exercise a discretion in that respect as they would be obliged to do upon other points of at least equal importance. The general and imperfect manner in which the *arrêt* is expressed, necessarily left much to be supplied by the officer enforcing it. For instance, they would be obliged to determine the quantity of land which the *habitant* was entitled to demand, for the *arrêt* and the preceding law are silent on the subject; and also to fix the amount of dues, *droits*, at which they were to concede lands in Seigniories, where there had been no previous concessions, or where the concessions had not all been made upon equal terms. The truth is, that in order to carry out this law at all, it would have been necessary to exercise a large discretionary power. But there is a broader answer to this proposition. The arrêt of 1711 had provisions of a most stringent character for compelling Sei-

niors to observe its requirements. The absolute order made upon them to concede implies, not a legal obligation, but a plain necessity for conceding on the terms customary in the Country, for the obvious reason, that nobody would be found to pay more; just as in our time, it rarely happens that any body will pay more than the current price for wild lands or for the rent of a house. It is a matter which regulates itself without legislative intervention. The law says, concede for a rent; if you do not, one of two things must follow; either the King's officers will concede your land and take the rent, or if the land remain unconceded and unsettled it will be forfeited to the Crown. With these alternatives before the Seignior, who can doubt that the rate of rent in concessions must from the necessity of the case as a matter of fact, but not as a rule of law, have been the customary one. But again it is argued as a second proposition, that the requirement to concede, taken with the order that the Governor and Intendant shall do so, for the same dues imposed upon other lands conceded in the same Seigniory, justifies the conclusion that there was a universal customary rate, to which the Seigniors under the law were bound to conform; and this conclusion it is said is aided and sustained, as well by the fact that all the concessions in the Province up to the time of its cession to Great Britain, were made at low rates varying but little in amount; as by certain judgments of the Intendants; and the public correspondence and documents of the period, relating to the subject. The special question here submitted is still whether by implication of law, the Seignior was bound to concede at a certain rate of rent. The provision of the *arrêt* which is relied upon, as thus legally implying that the rate of rent was fixed and obligatory, whether taken by itself, or aided by information derived from external sources, does not appear to me to justify the construction put upon it; and for this reason. When upon the refusal of the Seignior to concede, it became the duty of the officers of the Government

to do so in the name of the King, the idea of the settlement of the terms of the concession by convention was of course excluded. It therefore became necessary that some certain rule should be established for their guidance in relation to such concessions, and no better or more obvious rule could be adopted, than that the terms should be the same as those of the concessions already made by the expropriated Seignior within whose Seigniory such lands lay. There was nothing new in this rule, it was derived from the recognized usage in France. In cases there, when the terms under which the Censitaire held were not settled by convention, or could not be otherwise ascertained, they were taken to be the same as those prevailing in the neighboring concessions. So far then from considering that the establishment of this rule, for the guidance of the public officers, shews that the same rule was applicable to the concessions by the Seignior, it seems to me to tend the other way, and to justify the presumption that as the rule was not expressly extended to these latter concessions, they were to be made on such terms as the contracting parties might agree upon.

As to the decisions of the Courts under the French dominion, I find none which warrant the conclusion, that there was any fixed uniform rate obligatory by law or by custom having the force of law. The chief, in fact, the only case which has been presented to the Court as bearing materially upon this point is that of the Inhabitants of the Seigniory of Gaudarville and the Demoiselle Peuvret adjudged by the Intendant Hocquart on the 23rd January 1738. (1) In this case, the contest turned upon the situation and boundaries of certain lands conceded by her, but of which no formal titles of concession had been given. She (the Defendant) offered before the Intendant to concede for such *cens rentes et droits* as he should be pleased to order. She was maintained in her pretension by the judgment, and the plaintiffs

(1) Ed. et Ord. 8vo. 2d vol. p. 545.

were ordered to take their title from her accordingly, at the "cens et rentes ou lonnes par Sa Majesté, savoir : un sol de "cens par chaque arpent et un sol de rente pour chaque ar- "pent en superficie et un chapon ou vingt sols au choix de "la dite demoiselle pour chaque arpent de front." From what source this alleged order of His Majesty was derived, whether from this rate having been specified in two or three of the Royal Grants before that time, or from the King's instructions to his officer, or from that ready knowledge of his intentions which the Intendants seem always to have had at hand, does not appear; but it is certain that notwithstanding all the researches which have been made, no such order has hitherto been found in the form of law. I abstain from any thing more than a bare mention of the decision on the 5th of Feb. 1675, by Daillebout in the case of Noir dit Rolland vs. Berthé reducing the amount of *cens*; for it appears upon the face of the judgment, that it was an exercise of arbitrary power, and it does not even assume to have been based upon any existing law. I do not deem it necessary to dwell upon the peculiar character of the decisions of these Courts, or upon the influence which they ought to have in the formation of our opinions; but it may be said of them in general terms, that they so often combine with the application of the law, a discretion that is beyond law and without law, that it is difficult to extract from them, I will not say any uniform jurisprudence, but even any certain rule. They are frequently more in the form of orders or *règlemens* than of judgments, not unfrequently arbitrary, and such as no Court of Justice acting upon recognized principles, and subject to the restrictions observed by mere judges, could ever have rendered. The fact undoubtedly is that the Intendant, keeping in view the general policy of forcing settlement in the country, applied the means which under the circumstances immediately before him, he thought best adapted to that end, and thus constantly gave decisions and orders, which could not have been justified in any Court in

France; and which certainly no Court in British Canada could venture to give. It would be a grave and dangerous error to suppose, that such decisions given under a political and judicial system, and in a state of society so radically different from ours, can be received as an unerring exposition of the law, or that as Judges, we can safely regard them with any other, than a very qualified respect. I pass therefore to the concessions. There is without doubt a uniformity in the amount of rent, and in the general terms stipulated in a great multitude of the concessions anterior to the conquest; and the change in these respects from first to last, is with a very few exceptions remarkably small. But these low rates, and this uniformity do not establish that there was a legal obligation not to exceed them. They simply shew that the value of land was inconsiderable, and the progress of the country very slow. And these are indeed facts of history for in 1759. 150 years after the founding of Quebec, the whole population had attained only to some 65,000; and the accounts given by Charlevoix some 30 years earlier of the condition of the Seigniors, and of the colony generally afford no exalted idea of the prosperity of either.

But the uniform low rents even if unexplained by the circumstances of the Province, could establish no rule of universal obligation. I am willing to bow to the authority of a Jurisprudence of arrêts and judgments, and to accord to them the force of law,—but a jurisprudence of concessions is a novelty which I am not yet prepared to receive. I would admit that every concession in *censive* in French Canada, and all in British Canada, had been made at one fixed and unvarying rate with the exception of one which was higher; yet in the absence of positive law declaring such higher rent illegal and the stipulation of it null, I should hold it to be valid and binding. With respect therefore to the concessions, I have no difficulty in saying,

that they are not of a nature to sustain the argument, that there was at any time either before or after the arrêt of 1711, any fixed amount of rent; nor is the correspondence relied upon any more effectual for that purpose. The official letters preceding the arrêts of 1711, which call the attention of the French minister to the necessity of legislation upon the subject of the Seigniorial Concessions;--the memorials of the King;--the brevets of ratification of grants from the Crown, are not Law; are not an authoritative interpretation of the Law. They are mere suggestions, or illustrations, or records of existing evils, and of remedies which it might be expedient to apply to those evils. All these sources of information, together with historical investigations into the State of the Country, the necessities of the population, and the immediate occasion of the law, may be admitted for the purpose of elucidating an ambiguous expression found in it, but not to supply a defect, and still less to make a law, where none exists. If it had been the intention of the Legislator by the arrêt of 1711, to confine the Seignior in his concessions to a fixed unvarying amount of rent, surely it was the easiest thing possible to have declared it. Finding no such declaration, I can presume no such intention: and it is my settled conviction, that notwithstanding that arrêt, it was lawful for the Seignior to take avantage of the increasing value of lands, and by agreement with the *habitant*, increase his rates accordingly; and that he might at any time concede one tract of land at any higher rate than another, in conformity with his estimate of their relative value, and the convention he could make with the party applying for it. This matter now cast before us in an aggregate form has been repeatedly presented to the Courts of British Canada in a great many particular cases, and the decisions upon it, without I believe a single exception, have substantially sustained the views above expressed. Whether then, upon grounds of original judicial interpretation, or upon the authority of long established and uniform jurisprud-

ence, the pretension that there was at any time a fixed amount of rent at which the Seignior was bound to concede, and which could not be varied by convention, may with safety be pronounced to be without foundation.

The second question stated in the present division, is, whether a deed of Concession stipulating the payment of a sum of money, or charges reservations or prohibitions in addition to an annual rent, is void or voidable in whole or in part. And in connection with this question, it will be necessary to examine the points whether the arrets of 1711 and 1732 are still in force; and if so, whether the law of prescription can be invoked, notwithstanding their provisions.

My opinion has already been expressed, there was no rate of rent fixed by law, and consequently that any deed of concession stipulating an unusually high rent was not for that reason invalid. The immediate question now is, whether it would be invalidated under the arrêt of 1711, by stipulating a money payment or any charges reservations or prohibitions in addition to the rent. I am clearly of opinion that it would not. In assigning the grounds upon which this opinion rests, I shall apply them directly to the case of the exaction or stipulation of a money payment; because the words "*sans exiger aucune somme d'argent*" are prohibitive, and make that a stronger cause of nullity, than is presented by the stipulation of reservations, with respect to which the *arrêt* has no express provisions. But the whole of my argument will apply to the latter case also, and for the reason just mentioned it will apply with greater force. To proceed then: the effect of the arrêt of 1711 in relation to this subject, is to create a right in favor of the inhabitant to obtain from the Seignior a concession upon a rent charge, *à titre de redevance;* and if he insist upon that right and the Seignior denies it, the remedy

is provided by the Law ; the applicant receives no concession from the public authority, and the Seignior is punished by the forfeiture of his property. But if the party interested, instead of insisting upon his strict legal right and availing himself of his remedy, be willing to settle the conditions of the concession by convention with the Seignior, he is not forbidden in terms to do so; nor can I find in the arrêt anything which seems to me by legal implication, to warrant a Court in pronouncing the nullity of such a convention. It is indeed not pretended that the arrêt in terms makes the convention void, but it is said, it requires a specific thing to be done in a particular manner, and prohibits the doing of another thing in connection with it ; and this requirement and prohibition are both founded on public policy. The Law therefore is one *d'ordre public*, and any contract derogating from it, must be regarded as null. Upon this proposition, that all acts at variance with the requirements or prohibitions of a Law founded on public policy, *d'ordre public*, are necessarily void, I have to remark, that it is one which must be received with caution and great qualification. If the acts complained of fall within the operation of the public criminal Law, or interfere with the fundamental institutions of the Realm, or affect personal liberty, or the civil status, or violate public morals, the question of their nullity can rarely involve any difficulty: but out of this class of subjects the expression, public policy, *d'ordre public*, becomes of uncertain signification, and conveys no precise or fixed idea ; for in this looser sense it may be said that every law which enacts rules for the Governance of the whole community upon matters of general interest, is a law of public policy, *d'ordre public*, in so far as such interests are effected. When therefore a Law like the arrêt of 1711 regulates merely civil rights and rights of property, but with a public object in view, the declaration of nullity under it must depend upon the circumstances of

each case. It is not enough for the voidance of the contract, to say that it is at variance with the provisions of the Law; but it must also be shewn that such variance is upon the precise points, in which the policy of the Law or in other words, the public interests are essentially involved. "*Multa prohibentur in jure fieri quæ tamen facta tenent*" says Ulpian and again "Lex imperfecta, veluti Cincia, quæ super certum "modum donare prohibet, et si plus donatum sit non "rescindit" and the same rule will be found to prevail in the jurisprudence of France. My meaning will be more fully illustrated by what follows. The requirement of the arrêt is to concede; the prohibition is against the exaction of money on the concession. This prohibition is for the purpose of affording to the inhabitant an additional facility in obtaining land, and thus to promote settlement in the Colony; which is the great public object in view. If the inhabitant refuses to pay the money, he has a remedy by which he may nevertheless obtain the land; but if he consents to pay the money, and thereby obtains the land, the public policy, which is settlement, is answered, and the Law in so far as its object is of public interest is satisfied. This then is the whole extent, to which the Law can be regarded as being of a character which prevents individuals from regulating their rights by contract upon terms at variance with its provisions. It should never be lost sight of, that in matters of property, the primary Law is that which the parties make for themselves by mutual agreement, and that all the presumptions should favor its observance. For although it is unquestionable, that private rights must yield, when they are in conflict with a Law intended for the promotion of the general interests, yet they yield so far only, as is absolutely necessary, and the invasion of the private right by the public necessity must be stopped at the precise point where such necessity ceases. In the case before us, the necessity ceased when the settler obtained his

land, and the principle applies to prevent the extension by implication, of any further invasion of the common Law right of parties to regulate their affairs as they might see fit. But before leaving this point, I will briefly state the argument upon it, in another and more technical form. The arrêt, it is admitted, does not in terms pronounce the nullity of the contract. Does it create such nullity by legal implication? The general rule seems to be, that direct and absolute prohibitions not coupled with penalties imply the nullity of all acts contravening them; and prohibitions coupled with direct and absolute penalties or forfeitures, might in some cases, but far more doubtfully, be held to fall within the same rule. But the arrêt of 1711 presents neither of these conditions. The refusal to concede, merely gives to a private party, a right to a certain remedy. Upon his option to pursue this remedy the forfeiture depends; no other authority public or private can provoke it. If he drop the pursuit the matter remains as it was before. The Seignior notwithstanding his refusal, keeps his land, and the Law, although defeated, is inoperative and powerless. The forfeiture then under the Law, is secondary to the enforcement of the private right, and if the only person entitled to enforce it, and who may if he please thus abstain altogether from enforcing it, waives a part of his interest and his right, and enters into a contract by which the great object of the Law is attained; by what possible latitude of construction, and upon what satisfactory reason, could a Court declare such a contract null? I have looked carefully into the doctrine of nullities implied in cases of positive requirements and prohibitions, with penalties, and without, and I can find none which goes so far as to include a case like this. Indeed the observations of Mr. Hocquart in his letter of the 10th October 1730, concluding with the maxim "*volenti non fit injuria*," shew that this idea of the nullity of the concession, under the arrêt of 1711 in consequence of the payment of money, is altogether a modern one.

I pass to the consideration of the arrêt of 1732, which after reciting at full length the two arrêts of the 6th July 1711 and alleging their infringement in strong and pointed terms, requires that all proprietors of lands held in Seigniory then uncleared, shall bring them into a state of cultivation, and settle inhabitants upon them within two years from that date, under pain of forfeiture, without any further proceeding being had. It then prohibits all Seigniors and other proprietors from selling any woodlands, *terres en bois debout*, on pain of nullity of the deed of sale, and restitution of the price, and also of the forfeiture and reunion of the land to His Majesty's domain. The *arrêt* also orders that both the arrêts of 6th July 1711 be put in execution according to their form and tenor. There can be no doubt, that this law makes null all sales of wild land by any person whatever; its declared object being to exclude all commerce in such lands, as an abuse prejudicial to the public interests. The law is prospective in character, applying only to contracts of sale which might afterwards be executed. It contains no declaration of nullity of the sales previously made, although it sets forth that Seigniors and others had in violation of both the arrêts of 1711 sold and resold wild lands; thus confirming the opinion that no nullity was created by the arrêt of 1711 relating to the Seigniors. Further it is to be observed that the law introduces nothing new, except the general prohibition to sell wild lands, and the annulling of all such sales, with restitution of the price and confiscation of the land to the royal domain. In all other respects, this arrêt is nothing more than a recital of the *arrêts de Marly*, with an injunction that those arrêts should be put in execution. Every thing therefore contained in this arrêt, could have been enforced under those of Marly if it had never been promulgated, with the sole exception mentioned of declaring the nullity of sales of wild land and the forfeiture consequent upon such nullity

It remains to inquire, whether the stipulation of conventional charges, reservations and prohibitions in the concessions in addition to the rent, were a cause of nullity. The observations which I have made on the arrêt of 1711 as affecting stipulations for the payment of money apply as I have already stated, with additional force to stipulations of this nature; for if there is no nullity where there are express prohibitive words, it is certain there can be none where such words are wanting. All that I would now add is, that the requirement of that law upon the Seignior is, not to concede for an annual rent, but to concede on a *rent charge à titre de redevance*, which I understand to mean an alienation by contract of perpetual Lease, *Bail à cens*, in contradistinction to an alienation by contract of sale, *à titre de rente*. The *arrêt* prescribes the nature of the Title by which the land shall pass and nothing more; it has no restrictive expressions as to the terms on which it shall so pass, except the prohibition to exact money, which has already been disposed of. But in looking closely, at that portion of the *arrêt* which imposes upon the public authorities the duty of conceding in case of the Seigniors refusal to do so, we find new terms used in relation to such concessions. It is no longer the word "*redevances*" but the more general term rights or dues imposed, *aux mêmes droits imposés sur les autres terres concédées dans les dites seigneuries*. This expression *droits imposés*, may include all stipulated rights of whatever description, and the unqualified use of the term warrants the conclusion, that the law recognized and adopted as legal and binding on the parties all those rights which had already been settled by convention between the Seignior and his *Censitaire*. It cannot be answered to this, that the concessions, anterior to 1711, contained no burdensome charges or reservations; for from cases recorded, we find the contrary to be the fact. There is for example an ordonnance of M. Raudot, the great reformer of seigniorial abuses, date

the 2nd July 1706, maintaining a reservation of a most onerous character by the Seigniors of the Island of Montreal, to cut firewood upon the lands of the censitaires; the judgment merely subjecting the right to a very liberal limitation which the Seigniors themselves proposed. Another ordinance of the 4th June 1710 by the same Intendant maintains the Seignior of Chevrotières in his right of *corvée*; and this right was again confirmed and enforced, by an ordinance of the Intendant Begon, dated 22nd June 1716. A similar decision, in favor of the Seignior of the Isles Bouchard, upon the right of *corvée*, was rendered by M. Begon on the 3rd June 1714. It is unnecessary to seek for other cases; for the admission involved in any one case, that a right which is not legally incident to the tenure, may be validly stipulated, is fatal to the entire argument for the nullity of stipulations imposing the same rights or other rights of the same nature. If one such right may be established or reserved by convention, no reason can be assigned why the others may not. It may be objected, that the particular rights maintained by these ordinances, were not of a nature to be exacted or stipulated in behalf of the Royal Domain; but that does not affect the argument, which is that the use of the expression "***mêmes droits imposés sur les autres terres concédées dans les dites seigneuries***," taken with the fact, that burdensome rights had before that time been imposed by convention and judicially enforced, overturns the pretension, that the obligation to concede "à titre de redevances et sans exiger aucune somme d'argent;" implies a prohibition to stipulate any right or reservation not legally incident to the tenure.

The Arret of 1732 adds nothing to the others in this respect. It recites literally and fully both arrêts of the former date and then goes on to say that His Majesty was informed "*qu'au préjudice des dispositions de ces deux arrêts il y a des seigneurs qui se sont reservé dans leurs terres des domaines considérables, qu'ils vendent en bois debout, au*

lieu de les concéder simplement à titre de redevances," and therefore, Seigniors and other proprietors are ordered to clear and settle their wild lands, within two years on pain of forfeiture. The use of this word *simplement*, has been made the basis of an argument, to establish the exclusion and nullity of all stipulations of charges in addition to the rent; but it seems to me that it only requires to read the passage to be convinced that it does not sustain such a conclusion. The King is informed, " qu'ils vendent leurs terres en bois debout au lieu de les concéder *simplement* à titre de redevances." There is here no legislative disposition; it is the mere assertion of a fact, and that not in connection with any question of imposing charges, but in connection with the sale of wild lands. All that it amounts to is that Seigniors sell their wild lands instead of simply conceding them *à titre de redevance*. Nothing follows this announcement to give greater stringency to the former laws, which are merely ordered to be executed according to their tenor and effect; without any modification being made in them. Surely, contracts ought not to be set aside upon authority so remotely inferential and so uncertain as this. It may be proper, before leaving this subject, to allude to an opinion given 17th February 1767, by MM. Elie de Beaumont, Target, and Rouchet, three eminent lawyers of the Parliament of Paris, and registered at Quebec 28th August 1782. It is to be found in the second volume of Seigniorial Doc. p. 235. These gentlemen state in positive terms. " Quant aux bois étant sur les terreins de vassaux: si le seigneur s'en est expressement reservé la propriété nul doute que les vassaux ne les peuvent couper ny vendre puisqu'ils ne font pas partie de la concession " and I am satisfied that these expressions are intended to apply not as between the Crown and the Seignior, but as between the Seignior and the censitaire. In several statutes of the Provincial Parliament, there is to be found in terms more or less direct a general admission

of the legalty of stipulated rights. These are principally the statutes which relate to the commons, in different parts of the Province. The 1st Geo. IV, cap 17, to partition the common of the Seigniory of Boucherville in its 13th section has the following language " nothing shall " extend to prevent the Seignior from having and exercising " all and every the rights of cens et rentes, lods et ventes, " corvées, retrait and *other* rights to him due and owing " and which may become due and owing by virtue of the " original deed of grant of the said concession or by virtue " of the deeds of grants of the lands or dwellings of the said " proprietors, or by virtue of the instrument of grant of the " said Seigniory generally, all each and every which right " and rights whatsoever are wholly and specially reserved ; " which reservation shall be expressly stipulated in the con- " tracts, which shall be passed in manner hereinbefore pres- " cribed." This is, by implication at least a large recognition of the right to stipulate charges beyond those legally incident to the tenure and (1) the same or similar expressions occur in other statutes. The statute 3rd Geo. IV, capr 14, relating to the township of Sherrington, and the Seigniory of Lasalle, in the 1st, 2nd and 3rd sec. seems also to recognize the validity of conventional charges. It may also be mentioned that in very numerous cases oppositions *à fin de charge* by Seigniors for the preservation of these conventional rights, against the effect of sheriffs' sales, have been maintained ; but in all the instances which have come to the knowledge of the Court, this has been without contestation. These judgments therefore establish no jurisprudence ; but they indicate what for a great length of time has been the course acquiesced in and pursued both by the parties interested and the Courts.

(1) 3rd Geo. IV, cap. 18, and the 4th Geo. IV, cap. sec. 6, 1st William IV, cap. 32, sec. 7 and 12, and the 3rd William IV, cap. 24 sec. 9.

There are some obvious limitations to stipulations of this nature, to which I will briefly allude. The first is applicable to all acts of alienation, and seems almost too plain to require mention. It is, that the deed must not contain such and so many reservations as taken in the aggregate, would comprehend the whole estate; as would be the case if *all* the reservations specified under the Attorney Generals thirty ninth question, were found together in the form they are there put. But the reservation of any part of the estate less than the whole, is not liable to the same objection. The other limitation is that every such reserve, isliable to be modified and defeated, whenever it manifestly hinders cultivation and settlement. Thus the Seignior could not, by a reservation of timber or firewood, obstruct the clearance and habitation of the land by his *censitaire*. Subject to these limitations and such others as are by the common law applicable to all contracts, I am of opinion that the Seignior reserving a recognition of the Domaine directe, could lawfully stipulate all such charges reservations and prohibitions as he might think fit, and that neither the *censitaire* holding under the contract to which himself or his predecessors were a party, nor the crown, is entitled to obtain any reduction of such stipulation. I am desirous that any opinion expressed upon the subject of these reservations and prohibitions, should be regarded as simply the opinion of a lawyer and a judge compelled to declare whether they are legal or illegal. In holding them to be legal, I cannot avoid feeling as a citizen, that from their exacting character, they constitute a feature in the Seigniorial Tenure of this country peculiarly odious, and although they may not after all, be of much pecuniary value; yet without doubt, among a free and intelligent population, their pressure would be sensibly felt, and perhaps more impatiently suffered, than those incidents of the tenure, which in so far as their effect upon the prosperity of the country is concerned, are far more burdensome

and objectionable. In order that the precise opinion which I entertain upon the nature of the arrêts of 1711 and 1732, and upon the subject of these reservations and prohibitions may be recorded, answers have been prepared to the 18th, 19th and 20th and also to the 39th and 41st questions of the Attorney General, and in these answers M. Justice Meredith and M. Justice Badgley concur.

The question here presents itself whether these arrêts of 1711, and 1732, have still the force of law. With respect to that one of the 6th July 1711, which relates to Seigniors, I have acquieseed in the answer which affirms that it has. It must I think be admitted to be in force, at least in that restricted sense, in which a law can be so considered, which establishes a rule of conduct, that for want of competent official authority, it is impossible to carry into execution. The arrêt of 1732 offers greater difficulties in reference to this question. I have said of this latter arrêt, that the only new dispositions contained in it are those by which sales of wild land are declared null, with the penalties consequent upon such nullity. The point of examination therefore is narrowed to these dispositions. I must confess that I have felt great embarrassment and perplexity in coming to a final opinion upon this subject. Considerations of great weight, favored the conclusion that these dispositions of the *arrêt* had ceased by the lapse of time, and the change of circumstances, to have the force of law. I shall content myself with a brief statement of some of these considerations. The prohibition to sell wild lands, and the nullity of such sales, are by the terms of the law of universal application; including the Seignior, the censitaire, and the *franc aleutier*. The nullity of every such sale under all circumstances, is declared without limitation or qualification If therefore this portion of the *arrêt* be in force, no *censitaire* could buy from his neighbor a few acres of uncleared land *lortes en bois debout* for the supply of fuel to his house, no

man with too much land, could sell a portion of the wooded acres, in order to be able the better to cultivate the remainder; and a party after having bought the land in a wild state, and cleared and improved it into greater value, would still fall under the ban of the law; and his title be of no validity. Under the french dominion, all this might be adjusted and controlled. The Intendant possessed functions of a mixed nature, partly judicial, partly legislative. With his various and flexible powers he could always measure the application of the law according to his discretion. He could enforce it, in such cases as he might deem it just and beneficial to do so; and in other cases, such perhaps as I have supposed above, he would abstain from its enforcement; and with a declaration from his intuitive knowledge that such were His Majesty's intentions, would send the parties out of Court. But under the existing system, no Judge can exercise the same discretion. If the law be in force, it is in force for all parties, and for all cases, which fall within its provisions. Every prohibition, and every right which it establishes, may be invoked, and the Courts of law will be compelled to enforce them, without regard to the evident injustice, or other circumstances of evil public or private, which may be inseparable from their enforcement. Ought not then the disappearance of the official powers, which could extract from the law all that was salutary in it, and avoid all that was mischievous, to carry with it, the abrogation of the law; when under the inflexibility of the new system its execution might lead to so much injury? Is not such a law temporary from its intrinsic character? Again it may be said that a law prohibiting the sale of wild lands is necessarily temporary, as being founded upon a transient condition of society, which in a young and growing country, every successive year must modify. The inevitable result of progress, must be to change the relative value of wild and cultivated lands; so that at last the former will become the more valuable of the two. This is even now

the case in a large portion of seigneurial Canada; and so completely are circumstances inverted, that the present policy in most of the seigniories, is to preserve, and not to clear the wood lands. When such a state of things has replaced the old order, it would seem that a case is presented, in which under the rules of the civil law, inapplicability, cessation of motives, and change of times, of manners, and of circumstances might be regarded as having effected a repeal. "Une loi (says Merlin) cesse d'être obligatoire, non " seulement lorsque le législateur l'abroge par une disposi- " tion expresse, non seulement lorsqu'elle est suivie d'une " autre loi qui lui est contraire, mais encore lorsque l'ordre " des choses pour lequel elle avait été faite n'existe plus, et " que par là cessent les motifs qui l'avaient dictée, ***Ratione*** " ***legis omnino cessante cessat lex***, disent tous les interprê- " tes." (8 Merlin Qu. de Dr. p. 547, vo. Tribunal d'appel, § 3.) This is the expression of the civil law, and it has been followed under the dispositions of the modern code in France. (1) The only addition which I shall make to this view of the subject, is that the dispositions of the law under examination, from the time of its promulgation to the present day, nearly a century and a quarter, have never in any instance that has come to the knowledge of the Court been carried into execution. It is true that it has in many instances, and with a greater or less degree of directness been declared to be in force, but I think it may be safely asserted, that notwithstanding all the diligence of research which from so many quarters has been applied in the investigation of the important subject before the Court, no man can affirm as a matter of fact, that these dispositions of the

(1) Authorities, 1st. Toul. No. 153 and 161 to 165, Rep. de Guyot, vo. Desuetude, p. 558, Rep. de Merlin, vo. usage, § 2, Hub. de Conf. Leg. p. 20, no. 9, En II. Inst. p. 19, no. 45. Dwarris on Stat. 672, Disc. Préle. du premier projet du Code civil, 1 Domat. C. 12 et no. 5, p. xxiv, fol. Ed. Also Liv. 1, tit. 1, Sec. 17, p. 4, Reflexions by Jusieux de Montluel, pp. 59, 74—9 D'Aguesseau, pp. 446-7 Titre 329, Dal. Dict. de Leg. vo. Lois, nos. 355-6.

arrêt of 1732 have ever been judicially altered. It would certainly seem, then, that this *arrêt*, in so far as relates to the new dispositions contained in it, fails within many, if not all the conditions which are necessary for the abrogation of a Law by desuetude. And when we consider the intrinsic character of this portion of the law, its utter inapplicability to the present state of the Country, the mischiefs which might follow its indiscriminate enforcement, the change of views as to what is prejudicial to the public interest, and the consequent explosion of the idea that wild lands ought not to be bought and sold; joined to the fact, that it has never in one known instance been carried into execution, it can scarcely be denied that there is much to favor the conclusion, that the Arrêt of 1732, in so far as it is a new law ought now to be regarded as inoperative and a dead letter. But notwithstanding all these considerations, I have after great hesitation, and a long balanced deliberation been led to a conclusion adverse to them. The *arrêt* without doubt presents features which shew that it is in some respects intrinsically temporary and inapplicable to the present order of things;—And the evil which might arise from its indiscriminate enforcement might be great. In the examples given, I have by no means exhausted the possible illustrations of it. But in so far as the dispositions prohibiting sales, apply to the Seignior in his relation to the *Censitaire*, their enforcement is not liable to the same objection. In this respect these dispositions are merely the completion of a system. They cover the imperfection in the *Arrêt* of 1711; which in requiring the Seignior to concede without exacting money failed to declare null the contract by which money was to be paid. The new law is a sequel to the old, adding to its provisions a more stringent vindication. And it is to be remembered, that in now dealing with this question, we cannot deal with it in any point of view, or with reference to any relation, other than that between the Seignior and the *Censitaire*. What is to

done with other classes of cases, which might appear before the ordinary tribunals, we are not now called upon to consider ; and it may be answered to the argument founded on these, and similar cases, that after all it is only an argument *ab inconvenienti*, and does not afford legal ground for holding, that the law has lost its force. But there is a stronger and I think a conclusive view of this subject. It is always a matter of extreme delicacy, for a Court to declare that it will not execute a Law, because in its opinion, it has fallen into desuetude. This position should never be taken without great caution and careful examination. It is safe only in cases admitting of no reasonable doubt ; for strictly speaking, it his beyond the legitimate province of the judge, and belongs more properly to that of the Legislator. It is the business of Courts to apply and enforce the Laws ; it is that of the Legislature to determine when they have become useless, or mischievous and to abrogate or change them accordingly. In the present case, reasons of this nature apply with unusual force to oppose the judicial declaration, that the law has by desuetude, become a dead letter. A Provincial Legislature in one form or another, has been constantly at hand from year to year almost ever since the cession of the Country. Before this Legislature this *Arrêt* together with that of 1711 has been brought at various times, and formed the subject of elaborate discussion, and the opinion that it had ceased to be in force has never been sustained ; but the contrary has invariably been affirmed. This affirmation would of course not have made it law, if it had ceased to be so , but the affirmation by the popular branch of the Legislature, that it was law, without any action being taken to repeal it, shews that in the opinion of that body, its repeal was inexpedient. But besides what has occurred in the Provincial Legislature, there is a series of opinions from Law Officers, and other public functionaries, beginning from an early period after the cession of the Country

and continuing down to our own day, in favor of the vitality of the law; and the same conclusion is expressed or implied by different Judges, and in numerous cases which have come before the Courts. I refer to the judgments already cited by the presiding Chief Justice, against the seignior of Longueuil; and those by the representatives of the late Mr. Dunn, against the holders of property in the seigniory of St. Armand; and the others of later date rendered in the districts of Quebec and Montreal. It is true, as has been before stated, that these new dispositions of the *Arrêt* of 1732, were never actually enforced; but it is impossible to escape the conviction, that they were regarded in all these various instances, as still possessing the virtue of law. In the face of these opinions of Judges, Law Officers, and Legislators, I have felt that the case presented for declaring the law inoperative, is not sustained by reasons so absolutely conclusive, as to warrant me in entering upon the delicate and debateable ground which I must necessarily occupy in deciding that the *Arrêt* of 1732 ought to be regarded as an abrogated law; when the Legislature has recognized its existence and advisedly abstained from repealing it.

Upon the conclusion that these laws are in force, there arises under one of the supplementary interrogatories, an enquiry of importance, as applying to the question of the nullity of the contracts between the seignior and censitaire, in all the forms in which it has presented itself. I mean the effect of the lapse of time upon them. In my opinion, there is no reason why the laws of prescription should not be available to those now interested in maintaining these contracts, in the same manner and under the same conditions as they are in relation to other contracts. The uninterrupted possession and enjoyment for thirty years, by seignior or censitaire, ought I think, to constitute a title, not liable to be invalidated by any alleged cause of

nullity, which may be supposed to exist in the original convention. The only plausible objection which has been urged against this conclusion is that the original titles were contrary to laws "*d'ordre public*," and therefore so absolutely void that no lapse of time could cover their nullities. The answer to this objection, is to be found partly in the view, I have already expressed, as to the extent and meaning within which the *Arrêts* of 1711 and 1732 are to be considered laws "*d'ordre public*;" and it will be completed, by a brief examination of the nature of the nullity declared by the latter of these *Arrêts*. The nullity declared by the *Arrêt* of 1732, cannot I apprehend, be regarded as absolute, (*nullité absolue*) in the stringent, and most unqualified sense of that term; such as it would be if the contract stipulated a crime, or immorality, or something which could not produce even a natural obligation. In these and like cases, the nullity might be opposed, not only by the party interested, or by the public officer, but by any third person whatever; and if not opposed, it would be the duty of the Judge himself to take notice of it. Nullities so absolute as these, no prescription can cover; but it seems to me to be plain, that the nullity of sales under the *Arrêt* does not belong to this class. I think it will scarcely be contended, that any party other than the vendee, who is entitled to the restitution of the price or at most the vendee and the Crown could invoke it. This feature alone, necessarily gives to it the character of a relative nullity, as between the vendor and vendee. As a consequence, the law of prescription would apply in relation to these parties, and the right of the seignior as against the *censitaire* might be established by it; and when established, I do not see how the Crown could interfere for the benefit of the *censitaire*, to defeat the right which the seignior had thus acquired against him. As to the *Arrêt* of 1711 if any nullity had been created by it, which I have shew not to be the case, it

would be one exclusiveley between the seignior and *censitaire* and with respect to which no action is given to the Crown. Therefore beyond a doubt it would be covered by the lapse of time.

Let us see, whither the doctrine, that no prescription can cover this nullity, would lead us. Suppose land sold in a wild state, *en bois debout*, by a seignior, or by one censitaire to another fifty years ago, and afterwards reduced by the purchaser, to a state of cultivation and value. Could any stranger, who might happen to obtain possession of the land, answer to a petitory action by him, that the original sale was null under a law *d'ordre public ;* and that therefore, no title could be acquired, either under the sale, or by the law of prescription ? Or if no such exception were raised, would it be the duty of the Court to raise it, and thereupon to dismiss the action and leave the trespasser in possession of the land ? Those who hold, that the nullity of the sale is absolute, in the strictest sense of the term, under a law *d'ordre public ;* and that no prescription cover it, must be prepared to accept thes consequence of their doctrine. Is this the existing law of the land and in the cases which may hereafter present themselves, will Judges be bound to apply and enforce such a law ? I feel convinced that it is not so, and that neither of the laws referred, can, by a sound judicial interpretation, be made to deprive parties of the benefit of those salutary rules, which in all countries have been found so important, for quieting titles, and securing tranquility of society.

On third Question which presents itself for examination, upon the provision and effect of the *Arrêt* of 1711 is whether the authority conferred by it upon the Governor and Intendant to concede lands has ever passed to any of the Courts of British Canada. Upon this question although

it has divided the opinions of the members of the Court, I have not individually felt any difficulty. It has from the first appeared to me incontrovertible that the *arrêt*, in ordering these officers to concede lands in the cases contemplated by it, imposed a duty which was certainly administrative, and that the only doubt would be whether it was purely so, or was in part also a judicial function. It seems to me that the whole of the jurisdiction committed to the Governor and Intendant, even in relation to the reunion of certain seigniories to the Royal domain, partook largely of an administrative character. It is to be observed that this jurisdiction was not held, either before or after the *arrêt* of 1711, by the ordinary Courts of the Province. The forfeiture and reunion to the Royal domain of large tracts of land for want of cultivation, up to the promulgation of the *arrêt* of 1711, were made by the direct action of the Royal authority, through the decrees of the King in council, called *arrêts de retranchement*. Without again going over these *arrêts* in detail, for they are substantially alike in this respect, I refer merely to that of 1675, by which the Intendant Duchesneau was required to report upon the quantity of lands conceded and uncleared, and the number of men and cattle employed upon them. Upon his report the direct action of the King again supervened, and by the *arrêt* of 1679, declared the forfeiture and reunion. The King, by his *arrêt* of 6th July 1711, first established an authority in the province, by which his immediate intervention for the purposes of forfeiture and reunion became unnecessary. He did not confer this authority upon any existing Court, but he selected the Governor, his chief executive officer in the colony, and the Intendant, a judicial officer holding also certain legislative powers. And these were the same officers who were empowered conjointly, by his letters patent of the 20th May 1676, to concede lands in *fief* and seigniory in the name of the Crown. It is to be presumed that there was some reason for the particular and

exceptional constitution of this Court ; the obvious one seems to me to be that the King, in divesting himself of the necessity for a direct interference in matters of reunion, intended that the discretionary power which he had exercised should be transmitted to his personal representative ; who instead of of being bound by the rules of an ordinary Court of justice, could thus deal with matters brought up before him, according to the instructions and general views of his royal master ; and would at the same time be aided, and sometimes perhaps held in check by his judicial colleague. This opinion receives support from a comparison of this tribunal for reuniting lands held in *fief* to the domain of the Crown, with that created by the other *arrêt* of the same date for reuniting those held in *censive* to the domain of the seignior. In the latter case, the proceedings were before the Intendant alone, that is to say, before one of the ordinary Courts of the country, because upon the complaint of the seignior against his *censitaire* his function was merely to apply the rules which by the terms of the concession or by law were to regulate the respective obligations and rights of the parties. As a matter of fact, it is established by the royal declaration of the 17th July 1743 that up to that time, more than thirty years, no certain rule had been followed by the Governor and Intendant in the exercise of their powers. After announcing that these officers have jurisdiction to the exclusion of the ordinary judges, that declaration goes on to say " qu'il n'y " a eu jusqu'à présent rien de certain ni sur la forme de " procéder soit aux reunions des concessions" nor upon the other matters referred to in it, and then " pour faire cesser cet état d'incertitude," proposes to establish " par une loi précise des règles fixes." It would certainly be difficult in the face of this announcement of uncertainty and the absence of fixed rules, to believe that the authority of the Governor and Intendant, under the *arrêt* of 1711, had been exercised as a Court of justice exercises its powers subject to

established principles of law, and to known forms of judicial procedure. I am satisfied that it was not so, and that, even in the matter of reunions of *fiefs* to the domain of the Crown, the power of these officers partook more largely of the administrative than of the judicial element. But whatever doubt others may feel as to the correctness of this broader view, there ought to be none when it is united with a consideration of the nature of the duty which the Governor and Intendant had to perform in conceding lands, under the *arrêt* of 1711, upon the seignior's refusal to do so. In my opinion the performance of that duty was an executive act of the government, and cannot by any well founded construction be brought within the definition of a judicial one. It is certain that no Court under any system of law, with which I am acquainted, can take land from the owner and convey it to another, with the condition that he is to pay to a third party, a stranger to the contestation and to all titles connected with it, the supposed price or consideration of the property. There is here necessarily a double operation. If the proceeding be judicial, the land when taken from the owner must belong to some other party, and the title which again passes it must proceed from that party. In the case under consideration, the land, after ceasing to belong to the seignior, must have belonged to the Crown, before it could have been conceded, and then in order to pass to the *censitaire*, it must have been conceded in the name of the Crown, by its appointed officers: surely it cannot be said that this act of conceding is a judicial act. The very statement of the case shews that the functions of the officers dealing with it were something more than judicial. The cases put, in which the judgments of Courts may give title, occur only when the right to have the title, has already been created by the proprietor. The judgment then carries into formal and complete execution that which he had before promised. The title in such cases is not derived from the Court, but from

the proprietor through the Court. As I have said before, I know of no case in which a Court of Justice can originate a title and become the grantor of property. It may be observed that the language used in this *arrêt*, with reference to the concession, is imperative. The King orders "auxquels ordonne Sa Majesté de concéder" in the same language as the seigniors are ordered to concede. This is a command or mandate from the Sovereign to his executive officers, and is not a form of expression by which judicial powers are or can be conferred. The language in the same *arrêt*, and in the following one of the same date, by which powers of a judicial character are given for the purpose of reuniting the uncultivated lands is "*qu'elles soient réunies sur les ordonnances qui en seront rendues.*" This latter is an absolute command to do a specific thing. I have here to advert to a judgment, which is relied upon as adverse to the view I have taken of this whole subject. I mean the judgment rendered by the Court of King's Bench at Montreal on the 10th April 1820, in the case of Lavoie against the Baroness of Longueuil. The action was by an inhabitant (*habitant*) to obtain from the seignior a concession of land *en bois debout*, under the *arrêt* of 1711. A declinatory exception was pleaded by the late Sir James Stuart, then at the bar, setting up that the powers of the Governor and Intendant under the *arrêt* were executive, and that the Court had no jurisdiction. The late Mr. Bedard answered, for the plaintiff, that the powers were judicial, the habitant having by the *arrêt* a right, to the exclusion of all others, to obtain the land; and that the judgment was a mere declaration and enforcement of that right. Judgment was rendered by the late chief justice Reid dismissing the exception to the jurisdiction. In the view taken by that learned and most estimable judge, of the construction to be put upon the *arrêt* of 1711, I most fully concur. "The first point," he says, "to "consider is whether the power given by the King by the

" *arrêt* of 1711 was judicial, or merely an authority emana-
" ting from the Sovereign as seignior suzerain. The words
" of the *arrêt* would imply the latter meaning and construc-
" tion as it is thereby directed, that on the refusal of the
" seignior to grant lands to the tenants (habitants), they
" should apply to the Governor and Intendant " du dit pays
" auxquels Sa Majesté ordonne de concéder aux dits habi-
" tans les terres par eux demandées etc." which seems to
" contemplate no course of judicial proceeding, but contains
" the mandate of the Sovereign to his servants to execute
" his will in this respect." It will be seen by this extract from the reasoning of the chief justice, that thus far it unequivocally sustains the construction which I have put upon the *arrêt* of 1711. But he then proceeds to an examination of the declaration of the 17th July 1743, and upon its authority maintains the jurisdiction of the Court. He says: " but if we consider the most explicit and clear terms and
" dispositions of the declaration of 17th July 1743, we there
" find a similar authority vested in the Governor and Inten-
" dant under certain forms, to hear the contestations brought
" before them and to adjudge thereon, *and from their judg-*
" *ment* an appeal was given to the sup. council." He concludes after an examination of the organization of the several courts under the French dominion, that the powers of the Governor and Intendant were of the class denominated *justice royale extraordinaire* and that they passed, under the act 34 Geo. III, cap. 6, sec. 8, to the Courts of King's Bench. Now I am persuaded that that learned judge, of whose opinions I would always speak with the highest respect, was under a misapprehension as to the application and effect of the declaration of 1743. In the first place, I think it may be shewn that its provisions for judging the contestations mentioned in it, with the right of appeal, do not in any manner apply to the authority of the Governor and Intendant in the matter of concession under the *arrêt* of 1711. And in the

second place, that there is a classification and distinction made by the terms of the declaration itself, which confirm the view taken in the extract first read from his judgment, and which I think he has altogether overlooked. The preamble, or rather the introductory clause of the declaration sets forth at length the subject matter upon which the King proposed to legislate, and this is done in terms so clear and precise as to admit of no misconstruction. These subjects are three in number, first the concessions of lands; second, the reunion to the royal domain, of lands subject to be so reunited; and third, the decision of all contestations which might arise among the grantees, either with respect to the validity and execution of the grants, or in relation to the positions, extent and limits of their lands. All these matters are committed to the authority of the Governor and Intendant. The provision in relation to the authority of these officers over contestations between grantees is in these terms. "Les "Gouverneurs et les Intendants continueront aussi de con- "noitre, à l'exclusion de tous autres juges, de toutes contes- "tations qui naitront entre les concessionaires tant sur la "validité et exécution des concessions qu'au sujet de leurs "positions, étendues et limites." This clause evidently applies to two contending grantees of the Crown, who were either disputing the validity of one another's grant, or the situation and extent of the land granted; but by no allowable latitude of construction, can it be made to extend to the seignior and the habitant who was no grantee at all; and between whom and the seignior no contestation could possibly arise under the *arrêt* of 1711, concerning the validity of their grants and the position and extent of their lands. It is manifest then that those provisions referred to by chief justice Reid have no application to the concessions to be made by the Governor and Intendant, in the cases prescribed by that *arrêt*. But if the declaration of 1743 had in any respect an application or reference to these concessions under the *arrêt*

of 1711, which I am satisfied it has not, it contains a classification and distinction between the administrative and judicial powers of the two officers, in dealing with the subjects committed to them, which it seems to me would be conclusive. The division of the subjects of legislation appearing in the introductory clause of the declaration has already been stated, and this division is continually and clearly preserved throughout. The first article confers upon the Governor and Intendant, or rather confirms in these officers conjointly, authority to grant lands on the usual terms and conditions, and this power, it will not be denied, is purely executive. The second and third articles combine the two descriptions of authority relating to the reunion of lands to the royal domain, and prohibiting a regrant until reunion has been declared. The fourth article, which has been in part recited, has reference to contestations between grantees; and the functions to be exercised under it are judicial. In the fifth article also, the same distinction between the two classes of powers is strongly marked. But in the sixth article it appears in perhaps a more striking form, for we have here a provision that in case of difference of opinion between the Governor and intendant, upon application made to them for a grant of land, they shall suspend the grant until they receive His Majesty's orders; but in case of division (*partage d'opinions*) as to judgments of reunion, or upon contestations between grantees, they are bound to call in the senior member of the superior council to settle the judgment. The distinction here made is unequivocal. In the one case, the King's orders are to dispose of the doubt in matters administrative, that is to say the concession of lands. In the other, a division in the Court consisting of two judges is to be disposed of by calling a third judge from another Court. In the eighth article this same distinction is carried out, by giving an appeal from the judgments of reunion and in contestations between grantees; while, of course, none is given

with respect to application for a concession, which from its nature as an executive act admits of no appeal. I have already expressed the opinion that the provisions of the declaration which relate to reunions of land to the domain do not apply to the proceedings under the *arrêt* of 1711, by which concessions were to be made by the Governor and Intendant for there is no mention in that *arrêt*, of any reunion and from the summary nature of the proceedings, none seems to have been contemplated. "The words of the *arrêt*," says chief justice Reid, "seem to contemplate no course of judicial "proceeding." There is no jurisprudence on the subject, nor even a single case to shew what course would have been followed by the authorities of the day; but taking the terms of the law for a guide, I understand that after the requisition (*sommation*) upon the seignior and his refusal, the party (*habitant*) applied at once, without further formality, to these officers and obtained from them, *not a judgment of reunion* or any judgment at all; but a concession or grant *en censive* in the usual form. There is nothing in the *arrêt* to sustain the opinion that any thing more was required in the matter, and in this view the function exercised was of a purely administrative or executive character.

I am satisfied therefore as well from the terms used in in the *arrêt* of 1711 with respect to the concessions, as from the character of the officers entrusted with the duty of enforcing its provisions; and from the intrinsic nature of the duties imposed; together with the distinction recognized and legislated upon by the declaration of the 17th July 1743 (if that law be at all applicable), that the authority and duties of the Governor and Intendant, under the *arrêt* of 1711, were essentially, if not purely administrative; and the necessary consequence of this conclusion is, that the right to concede under the terms of that *arrêt*, never passed by any law of the province, and indeed under the system prevailing in British

Canada, never could pass to the Courts in existence since its cession by the French Crown.

THIRD DIVISION.

The questions of the Attorney General numbering from 26 to 38, relate to the rights of seigniors, in the waters within their seigniories, and to the right of bannality, *banalité des moulins.*

The first object of investigation under this division, the rights of the seignior in the waters, embraces two questions: First: what are their rights in navigable rivers. Second: what are they in rivers which are unnavigable and in the ponds and lakes.

There seems to me to be little advantage in tracing historically, the doctrines which at different periods have prevailed in France with respect to the right of property in the waters. If we take Championière (1)as our guide, it would appear that up to the middle of the seventeenth century, there was no distinction between navigable and unnavigable streams, and that they were all alike subjects of private property, *de domaine privé.* This property in them was held indiscriminably by the King, the seignior, or the *censitaire*, as owner of the land through which they ran.

In this conclusion however Championnière is not sustained by the authorities. The better opinion is that the navigable rivers in France were always part of the public domain. (2)

This was coincident with the Roman law which included navigable and unnavigable rivers, under the same rule; so that no right of property in them, vested in any private

(1) Champ. Propriété des eaux courantes, pp. 657-658 no. 382.

(2) Rep. de Merlin, vo. Rivière p. 540 § 1.

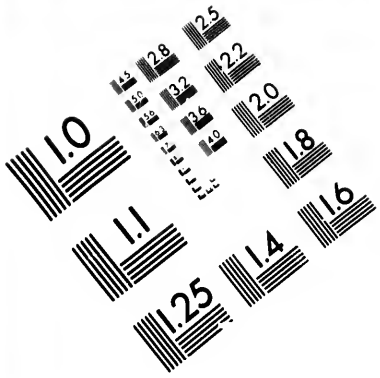
person ; although the right of use for navigation and all other ordinary purposes belonged to the riparian proprietor. During a late period in France, the Kings asserted by their ordinances a right over the navigable streams, as part of the public domain, and this was the admitted doctrine at the time of the cession of the province. But whatever doubt might be raised with respect to the question in France, or whatever agencies may have operated to deny to the Crown a right of property (*domaine*) in the rivers there, those in this country incontestibly belonged to it. When the province passed under British dominion, the ancient law was superseded, and the new sovereignty brought along with it its own prerogative and public law, as well in relation to the King's rights of property in navigable rivers, as upon other rights of a cognate nature. The new law is therefore the one which, I apprehend, must govern the decisions upon the subject, in the absence of conventional rights ; and the rule under that system of law undoubtedly is, that the Crown has the absolute proprietary interest in the navigable rivers. The public have, at common law, a right to navigate over every part of a navigable river, and even the Crown has no right to interfere with its navigable channel. (1 Kent's Com. 423-427.)

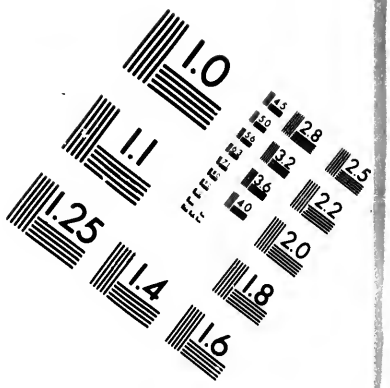
There seems then to be no difficulty in affirming the decision, that the seignior has no right in navigable rivers as an incident to the feudal tenure, or as passing under the general terms of the royal grant. These rights must in all instances be limited by the special terms of the grant conferring them ; and such terms must themselves be restricted when any of the easements to which the public are entitled upon the river, are affected by them.

These observations apply equally to rivers available for the transportation of objects of commerce by floating, *rivières flottables*, in all respects wherever the public easements are concerned.

The claim of seigniors on the unnavigable waters is better founded. There can, I think, be no hesitation in declaring, that in France the small streams, not available for purposes of navigation, were as a general fact, if not as a matter of law, in the hands of the seigniors; and that in this country they passed by the royal grants, to the seignior, seems to me beyond controversy. The chief difficulty which has arisen upon the question, has reference to the nature of the seigniors' title. According to the proposition submitted upon the 31st question, it is considered that the right of the seignior in these waters was merely incidental to his justiciary authority, a right of police over them in his quality of *haut justicier*; and it is contended that in consequence of the change of sovereignty by the cession of the country, this quality necessarily ceased, and as a matter of course all the rights dependent upon it were lost. I am not quite prepared to admit that this latter consequence would follow, even if I concurred in the views stated of the origin of the seigniors' right in the waters. There are many and weighty reasons why the absorption by the new kingly authority of this right of administering justice, should not have the effect of taking away the profitable rights attached to it. But it is unnecessary for me to enter upon this investigation; for after the most careful consideration which I have been able to give to the subject, I have arrived at the conclusion that the right in these waters, in this country, was not a right *de haute justice*, but was on the contrary a right which was included in the grant of the *fief*, and made part of it. It is scarcely necessary to say to any of those who have taken a part in the business before this Court, that this conclusion is not without difficulty. Of all the obscure questions which we have had to examine, this is perhaps the most perplexed. The collection and classification by Championnière(1) of the opinions of the commentators on the feudal law and the treatise

(1) Champ. des eaux courantes pp. 692 to 705.





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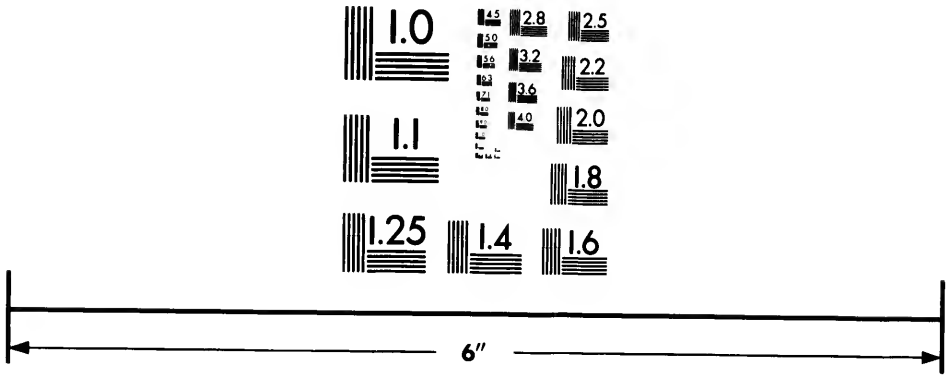

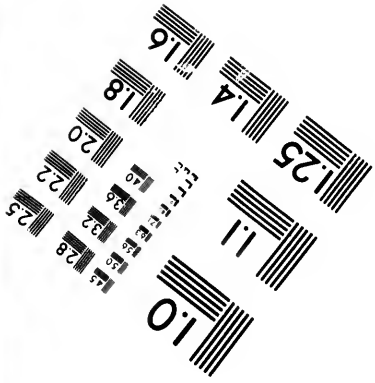

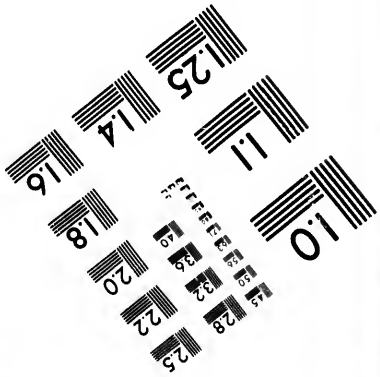

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by Mr. Rives, upon the right of property in unnavigable rivers, expose a great variety of conflicting views. It may however be said, I think, with truth, that those authors who directly sustain the doctrine that the right belongs to the seigniors as *haut justiciers*, are inferior in number, and, it may be added, with one or two doubtful exceptions, in weight, to those who advocate the right of property in the seignior either as feudal lord or as riparian proprietor. Guyot, (1) in his work on *Fiefs*, has also collected and examined the authorities on the one side and the other, and he is in some respects perhaps to be more relied upon than Championnière.

In conformity with the intention already expressed, I abstain from entering upon any statement or discussion of these authorities, for this has been repeatedly done since the Court commenced, and all the sources from which information on the subject can be drawn have been fully disclosed. The result of my consideration amid all these contradictions and irreconcileable incongruity of opinions, is that my own inclines in the direction already indicated.

The seignior then in this country became proprietor of the unnavigable waters, including as well all ponds and lakes, as running streams, by virtue of his grant from the Crown. He holds them precisely as he holds his *fief* or his domain ; or in other words, he holds them because they are a necessary and inseparable incident of the grant and proprietorship of the land, in which they are contained, or through which they pass. But as they are derived from the title of infeudation, so they pass by that of subinfeudation or *accensement*. I cannot discover any peculiar character, or sanctity in the right which the seignior derives from the general terms of the grant from the Crown, which prevents terms of a like character in his concession, from conveying the same right to the *censitaire*. That one rule of interpre-

(1) 5 Guyot Tr. des fiefs, 2d part. pp. 663 to 670.

tation must apply to both contracts is certainly the doctrine of the common law, and I find nothing which convinces me that such an exception, as is contended for by the seigniors, existed in favor of the feudal contract, even in France; and, in this country, looking as well to the nature of the royal grants, as to the entire modified character of the tenure, I am satisfied that the pretension is without foundation. I concur in so far as unnavigable streams are concerned, in the opinion forcibly expressed by Championnière in the 679th page of his treatise. In discussing the necessity of a special clause to convey a right of property in the streams he says, " En effet dans les dispositions féodales, les *eaux* " *courantes* suivent constamment le domaine utile. Leur " jouissance passe successivement du suzerain au domi- " nant, du dominant au vassal, du vassal au censitaire, et " du censitaire à l'emphyteote, *comme condition essentielle* " de toute exploitation territoriale".... and in the same connection " la clause énumerative des formules est rem- " placée par ces expressions *cum omnibus adjacentiis et* " *pertinentiis.* Le détail des actes antérieurs à cette époque " avait pour cause l'absence d'un principe déterminant des " objets compris naturellement dans la transmission d'un " immeuble : plus tard les jurisconsultes constituèrent ce " principe, et l'énumération devint superflue." The ultimate conclusion then, with respect to the rights of the seignior in the unnavigable waters, is that his rights pass with the land by the title of concession, unless a special reservation be made of his property in them. As to those streams which border the lands conceded, instead of being included within them, the rule undoubtedly is, if my view of this branch of the subject be correct, that the right of each riparian proprietor extends to the centre of the stream, *ad filum medium aquæ.* This is the doctrine of the civil law, and of the common law of England, and it seems indeed to be necessarily a universal rule admitting no difficulty. It is ex-

pressed by Henrion de Pansey in these terms. " Lorsque " deux seigneuries sont séparées par une rivière, elle ap- " partient à chaque seigneur pour moitié, c'est-à-dire jus- " qu'au fil de l'eau. Tous les auteurs sont unanimes sur " ce point et quelques coutumes le disent expressément." (1) The rule is not peculiar to the seignior but extends to all descriptions of riparian proprietors.

BANNALITY OF MILLS.

I have now a few observations to make upon the right of *banalité de moulins*, a right which has always been regarded by the opponents of the feudal tenure as peculiarly odious. Among them is Championnière, who discusses its history and character (pp. 552-579) in a spirit of great hostility; and charges pretty freely upon the feudalists a want either of knowledge or of good faith, whenever their views are adverse to his own. It is however of no importance in a practical point of view, to inquire whether this right in France was an unlawful usurpation by the seignior, an advantage wrested by strength from weakness; or whether it grew out of the mutual wants and interests of the parties concerned, that is of the seignior and his tenant. It would probably be near the truth to say that neither of these hypothesis is to be adopted as applicable to all cases; and that sometimes this right originated in one of the modes supposed and sometimes in the other. But in this country no such inquiry can arise, for we have the law; and nobody can doubt that the right was originally established rather for the convenience of the *censitaire*, than for the advantage of the seignior; and was, in its inception, a most beneficial institution. My views upon this most important subject as a law question, have been fully expressed in pronouncing judgment in the case of Monk vs. Morris. The reasoning upon

(1) Matières Feod. Tome 4 § 8, p. 660. 6 Guyot, Tr. des fiefs, p. 670.

which that judgment was based will be found recorded in the 3rd vol. of the Lower Canada Reports, on the 17th and following pages. Upon a careful review of the report, I cannot say that anything which I have heard from counsel in the course of their long and able arguments, has shaken my conviction of the correctness of the conclusions therein declared. I shall not therefore occupy time in endeavouring to strengthen or sustain them. Even with respect to the effect of the *arrêt* of the Sup. Council of 1675, upon which I have taken a view different from that adopted by my brother judges, I shall merely say, that I do not find any evidence that the mill of Dombourg was a windmill or that the litigation which arose between the two millers turned upon a point of that kind. But if it were so, it is still incontestable that the *arrêt* introduced as a legal right something which went beyond the conventional right of bannality. For the 72nd art. of the Custom of Paris, which relates to windmills, is not less stringent or authoritative than the 71st art. which establishes that there shall be no bannality without title; and the 72nd that such title shall not include windmills, unless they be specially mentioned. The bannality thus extended to the latter was extended by the law of the *arrêt* without convention or title and thereby repealed the 72nd art. and first introduced the principle of legal bannality which was confirmed and more completely established by the ord. of 1686. It is not however a matter of any practical importance, whether I be right or wrong upon this point, for there is a general concurrence of opinion, that at all events, *banalité de moulins* exists as a legal right independently of convention, under the *arrêt* or decree of the King in council dated the 4th June 1686 and published in this country in February 1707. This being established, the other questions of moment which the Court has to decide, relate to the extent and effects of the right. The points assumed to be settled by the judgment in the case of Monk vs. Morris are 1st: that the right of *banalité de moulins* ex-

ists in this province without title, as a legal and seigniorial right ; 2nd : that the right of preventing the erection of other mills within the limits *banlieue* of the seigniory and of causing them to be demolished when erected, is a component and essential part of that right. Beyond these points it is necessary to lay down a rule with respect to the description and quantity of grain which those subject to this right were obliged to have ground at the *bannal* mill. I am of opinion that the obligation was not limited to wheat, but extended to every kind of grain. The expression made use of in the *arrêt* of 1675, and which constantly recurs in the judgments of the Intendants against the *censitaires*, is, that they be held "*porter moudre leur grains.*" This is a generic term and cannot be construed to mean but one kind of grain. We find examples of the use of this form of expression in two judgments of the Intendant rendered on the 10th June 1728, and one on the 23rd July 1742, and it occurs also in other cases. I think it may be asserted, that the conclusion that wheat was the only grain comprehended within the obligation, would in this country have led to results highly inconvenient to the *censitaire*, and inconsistent with the object and circumstances of the original establishment of the right. It was from its beginning intended to secure to the *censitaire* the certain means of grinding his grain ; and if these means extended to wheat alone, leaving him without the means of causing any other description of grain to be ground, the benefit extended to him was certainly very incomplete. Then the rights and obligations were correlative ; if the seignior was compellable to build a mill for the convenience of the *censitaire*, it was just that the latter should be bound to contribute to his remuneration, by bringing to the bannal mill the grain of various descriptions, which he might require to have ground for the use of his household. It is certain that in France the right was not restricted to wheat

alone. Denisart, in his collection, (1) cites a decision by the *parlement de Bretagne*, by which the seignior was sustained in his claim, that barley should be included within the operation of his right of *banalité*. In the Rep. de Guyot, vo. *Moulin* p. 696, authorities are given on the subject for and against the extension of the right to other grains than wheat; and the president Bouhier's opinion is stated in favor of its extension when expressed in terms similar to those already alluded to in the *arrêt* of 1675 and the judgments of the Intendants. Under the same word, in the Rep. de Guyot p. 695, an *arrêt* of the *parlement de Normandie* is reported from Basnage, which condemned a party to a penalty for not having ground buckwheat (sarrazin) at the bannal mill, and in Henrion de Pansey, (2) we find a full report of the *arrêt de Gonesse* in which throughout, the terms made use of in the condemnation of the defendant are that he should grind his *bled et grains*. It seems to me difficult in the face of these considerations, to justify the conclusion that the right was restricted to wheat alone. As to the quantity of grain which the *censitaire* was obliged to take to the seignior's mill, there is no lack of authority; but it is again ambiguous, if not conflicting. By the *arrêt de Gonesse* just referred to, and which seems to have been received as an authoritative settlement of the point, all grain ground in the seigniory for the use (*consommation*) of the family, whether grown there or brought from without, was subject to the right; and this is the rule which, I am disposed to say, might be inferred from whatever we find in the ordinances and judgments of the Intendants, although it cannot be said that there is any jurisprudence on the subject, or any decision bearing upon the point otherwise than incidentally. The Court has adopted this rule in its decisions upon the questions relating to the subject and I think it is a true and just one.

(1) Nouv. Den. vo. Banalité, p. 648 no. 5.
(2) Dis. Feod. T. 1, vo. Banalité, p. 9.

I have now to offer a few observations upon certain points, which are not embraced in my general classification.

The first of these comes upon the 44th question of the Attorney General in relation to the right of *relief*, and the others upon the supplementary questions.

DROIT DE RELIEF, 44TH QUEST OF THE ATTY. GEN.

A good deal of difficulty has been felt by various members of the Court in deciding upon the answer to be given to the 44th question proposed by the Attorney General, in so far as it relates to the right of *relief*. The decision adopted by the majority, is to the effect that this right is to be considered as still legally subsisting, and that its value ought therefore to be deducted from the amount of the seignior's indemnity ; but the fact is at the same time declared, that it does not appear to the Court that the right of *relief* has ever been exacted by the Crown. I am unable to acquiesce in this decision ; not that I am prepared to maintain that the articles of the Custom of Paris, under which the right of *relief* subsists, have ceased to have the force of law, but because I think there should be a more decided expression of opinion upon the uninterrupted omission by the Crown to exact it, under the French as well as the English dominion in Canada. Nothing can be stronger as a fact than this constant and long continued dormancy of the right ; and as adding to its significance, we find that in the collection of the laws of Canada, made by the order of Sir Guy Carleton, the articles of the Custom of Paris relating to this right, are omitted, on the ground that they have never been acted upon in this country and Cugnet, no mean authority on the subject, declares that the right of *relief* has been abrogated by an order of H. M. G. Majesty, duly registered in the archives of Quebec, and this right, he adds, has never in any case been received by the officers of the King's domain. (1) The

(1) Tr. des fiefs par Cugnet p. 50.

order mentioned by Cugnet as abrogating the right, is to be found in his collection of the *Edits et déclarations* du Roi. It bears date the 20th May 1676, and is in fact the commission given to the Governor and Intendant to concede, with an additional provision on which he relies, and which he states to be in these words: " Que les anciens titres qui " avaient été donnés par la compagnie sous les conditions " *de la Coutume du Vexin le Français* contenue en la Cou- " tume de Paris seront remis et censés être sous la seule " coutume de la Prévoté et Vicomté de Paris." (1) I do not find in these terms any direct abrogation of the right of relief; and although Cugnet again makes the assertion that such is their effect, yet it would perhaps be going too far to conclude, that the law as established by the Custom of Paris has been repealed by any other law. But it is undeniable, that a case is made out, under which a doubt may fairly exist; and in affirming the naked legality of the right of *relief*, I would connect with it the unequivocal expression of my conviction, that after this long lapse of time, without one instance of its having been demanded, and in view of the opinions just alluded to, the Crown must be held to have made a virtual abandonment of the right; and that it ought not in justice to be included among the lucrative rights which are to be valued against the seignior, in settling the amount of the indemnity to be paid to him.

The enforcement of this right, against the proprietors who have purchased their seigniories with a knowledge that it had never been exacted, and under the belief which was universal in the country, that it never would be, would certainly be a hardship and an injustice. Of course I do not comprehend in this view the *relief* due under the Custom of *Vexin le français* included within that of Paris; as will appear by the answer prepared on the subject, in which I am joined by Mr. Justice Meredith and Mr. Justice Badgley.

(1) Ed. et Dec. du Roi par Cugnet, p. 5.

The next question is one by Mrs. Bingham, on the extent of the powers of the seigniorial commissioners, to declare contracts between the seignior and *censitaire* null in whole or in part. The answer of the majority of the Court is in these terms " Such commissioners may not lawfully " assume to treat any contract or any clause of any con- " trat such as is in this, and in the last preceding question " enquired of, as being null, unless such nullity has been " pronounced by the judgment of a Court of competent ju- " risdiction ; or such contract or clause of a contract has been " declared illegal by the decisions of this special Court." In this answer I concur. I am satisfied from a careful reading of the seigniorial act with reference to this subject, that the powers of the commissioners to treat contracts as void, do not under the provisions of that act, extend beyond the limit assigned by the answer. To go further, would be to assume that the legislature has conferred on them the jurisdiction of the ordinary Courts of law ; and each claim of a seignior, and every concession deed of a *censitaire* might be made the subject of contestation with respect to the general validity of its stipulations. It was to prevent such an anomaly that this special Court was created, to settle all the points of law which might probably present themselves to the commissioners ; and their authority, I apprehend, can go no further than to apply to the contracts produced, the rules established by our decisions. If the *censitaires* were or are desirous of having any stipulations in their deeds reduced, upon grounds other than those settled by this Court, they must resort to one of the ordinary Courts, and produce before the commissioners the judgment of such a Court for their guidance. In all other cases the commissioners are bound to observe the stipulations made by parties, as legal and binding upon them.

There is one topic more, upon which I must bestow a few words before concluding, in order to justify the position

which I have taken with respect to it (and in which I am unsupported by the other members of the Court). It grows out of the fourth supplementary question submitted by Mrs. Harwood in these terms, " can any commissioner or com- " missioners lawfully assume, within either of the two " classes of *fiefs* or seigniories enquired of by the first pre- " ceding interrogatory, to enforce upon the seignior or upon " any *censitaire* thereof, any cooperation on the part of any " such seignior or *censitaire* in any proceedings under the " seigniorial act of 1854, if such seignior or *censitaire* shall " elect to maintain the application of the said Imperial Sta- " tute in the premises? and if so, to what extent, and how " may such cooperation lawfully be enforced." The classes of *fiefs* and seigniories alluded to in this question, would embrace all the lands held under the feudal tenure in the province; and the object of the question as understood by the Court, is to obtain a decision whether the Seigniorial Act " of 1854, is in conflict with the imperial statutes, commonly known as the " Canada Trade Act," and the " Canada Tenures Act; and whether it can be defeated or restrained by those acts. I have declined to give an answer to this question, on the ground that it is one, which under the provisions of the seigniorial Act cannot be submitted to the Court; and upon which it is our duty to declare that we are without authority to answer it. That this question lies beyond the scope of the powers committed to us, and that a decision upon it involves an unwarrantable assumption of authority, may, I think, be clearly demonstrated. If we were sitting here as an ordinary Court of law, without doubt it would be competent for us by virtue of our general powers, to declare that we had no jurisdiction, by reason of such a conflict between imperial and colonial legislation as this question supposes; but here is no question of jurisdiction, for whatever might be the decision upon the effect of these imperial statutes in preventing the abolition of the feudal

tenure in the manner enacted by the Seigniorial Act, the provincial parliament had certainly, in any case, the right to impose upon the judges here the specific duty of answering questions on subjects connected with that tenure; and this duty they must perform, even though it were probable, or certain that their answers might be rendered useless by some conflicting law emanating from the parent state. But we are not now sitting with the powers of an ordinary Court, for it is undeniable that this Court is a purely exceptional one. Its powers are limited to the precise matters committed to it by the statute, and cannot by construction be extended to any other matter whatever. The definition and measure of these powers are to be found in the provisions of the 16th sec. of the act, which are in the following terms. "H. M. Attorney General for Lower Canada, shall as soon as may be practicable, frame such questions to be submitted for the decision of the judges, as he shall deem best calculated to decide the points of law which will, in his opinion, *come under the consideration of the commissioners in determining the value of the rights of the Crown, of the seignior and of the censitaire*; and by the fourth paragraph of this same section, any seignior may submit supplementary or counter questions, which must of course relate to the same matter. Now it is to be observed in reference to the object of the questions to be so submitted, that they must be for the purpose of deciding points to guide the commissioner in a particular matter viz: in determining *the value of the rights* of the Crown, of the seignior and of the *censitaire*; and not for the purpose of instructing him as to the seigniories in which he is to exercise his functions. That point the act has determined by making its provisions of general application to all *fiefs* and seigniories, and then in the 2nd and 35th sections, specifying those which shall not be included. And in order that no difficulty may arise, the Governor is authorised by the 4th sec. to assign the seigniory in and for which

each commissioner shall act; and by the 5th sec. the commissioner is required to act in the seigniory thus assigned to him. There is not an expression to be found in any part of the statute, which in the slightest degree warrants the opinion, that this Court was authorised to declare to what seigniories its provisions should apply even under its own terms. And if the object of the question under consideration, were merely to draw forth an opinion from this Court, whether the seigniories referred to in it, are within the provisions of the Seigniorial Act according to its own terms, it would even then for the reason above stated be inadmissible. But the question goes a great deal further than this, and seeks to obtain a decision whether the Seigniorial Act is not so completely controlled and invalidated by the Imperial Acts, that it can have no operation for the abolition of the feudal tenure in any seigniories at all, or in other words whether it is not in that respect an absolute nullity. Now apart from the argument founded upon the specific expressions in the statute, can it be believed that the provincial parliament, in constituting this special Court, for defining rules of law to aid the commissioners in carrying out its enactments, has by legal implication committed to us also a power to declare that these enactments are themselves an usurpation of authority, and absolutely void; and thereby instead of aiding in carrying out the beneficial purposes of the law, to defeat it altogether? Do we now hold this power to judge the law and the legislature, and has that body voluntarily divested itself by the Seigniorial Act of its functions of judging whether its own statute is legal, and transferred the office to this special Court? Yet such is the power which the Court in answering this question, seems to me necessarily to assume. It is true the majority have affirmed the validity of the statute, but this makes no difference in the principle; for if they have authority to decide that the act is valid, they have it equally to decide that it is void.

Being, therefore, under the conviction that an answer on this point is a manifest excess of authority, I have deemed it my duty to decline the expression of any decision upon it and to record the following answer to Ms. Harwood 4th supplementary question.

According to the tems of the Seigniorial Act of 1854, All *fiefs* and seigneuries fall within its provisions, with the exception only of those specified in the 1st and 35th sections of the act as amended by the seigniorial amendment act of 1855. The two classes of *fiefs* and seigniories referred to in this supplementary question are not included among these exceptions. The judges in this special Court have no authority or jurisdiction to decide whether the provisions of the seigniorial act in relation to any class of *fiefs* and seigniories are defeated and annulled by the imperial acts commonly called the "Canada Trade Act" and the "Canada Tenures Act."

I would not have it understood that I have adopted this course in order to avoid the expression of an opinion adverse to the validity of the statute, for it is not so; but being convinced, upon grounds which appear to me to be perfectly conclusive, that I ought not to render any decision upon that point, I have refrained from maturing any.

I have thus disposed of all the details of the important subject before this Court, upon which I have deemed it necessary to explain and justify my opinions. In forming these opinions, my grand rule has been, as at the beginning I declared it would be, in all cases to maintain the integrity of contracts, unless a settled principle, or an express law of no doubtful meaning declared them bad. The imperfect manner in which the task has been performed must be, in some degree, ascribed to the difficulties which surround it

and which expand and multiply the more nearly they are approached.

I cannot disguise from myself an apprehension which the experience of those difficulties has taught me, that the time within which it has been deemed necessary to terminate our duties here, has been insufficient for their complete and satisfactory performance. More protracted study, and larger conferences with my brethren might have unravelled many perplexities and dissipated many obscurities, and all the minute, yet important ramifications of the subject might have been more fully investigated and more safely settled.

The mere declaration of the law under the numerous questions proposed, upon a system which may almost be said, rather to be suspended upon irreconciliable and balanced conflicts of opinion, than to rest upon settled and universally recognized principles, is of itself a labor of formidable magnitude: but it becomes far more serious when joined to the fact, that upon our decision depend the fortunes of a large class of our fellow citizens, and the effectual carrying out of a legislative measure for a great social reform.

It is to be hoped nevertheless, that for all practical purposes, the performance of our arduous task, in view of consequences so interesting, may produce results correspondingly beneficial; and that we may see this cause of complaint and discontent which has so long agitated the country, at last justly and peacefully disposed of.

The feudal system like many other things, has outlived its age: for there is a decrepitude in human institutions as in the human frame. Each fulfils a mission, and, when its purpose is accomplished, must give way to the new ideas, and the new men which time and social progress, or at least social change require. This ancient institution, in its inception in the province, was undoubtedly good: by the re-

volution of years, and the change in the universal constitution of society, it has beeome as undeniably bad. But we are not to charge the sin or misfortune of its old age, upon the present generation of seigniorial proprietors. The public interests demand the abolition of the tenure: but public virtue and national character demand, even more imperatively, that all private rights invaded by its abolition, should be carefully ascertained and amply provided for.

Allusion has been well and eloquently made by one of the counsel, to the contrast between the peaceful action by which we are dealing with this system, and the convulsion and bloodshed, which elsewhere have made its disappearance so terribly memorable. We have the high privilege of teaching by example, a lesson of moderation and of right, to communities far older and more powerful than our own; and I trust that the statute book and history of our country will bear noble testimony, that no feature of spoliation deforms the great movement, by which its people have shaken off this dusty burden of the past; and calmly, wisely, without tumult and without injustice, have revolutionized and readjusted its whole complicated system of territorial law.

DRAFT OF ANSWERS

REFERRED TO IN THE FOREGOING OPINION.

No. 1.

ANSWER to 18th, 19th and 20th Questions of the Attorney General.

Every law which establishes rules for the government of a people upon matters of common interest, is in a greater or less degree one of public policy, *d'ordre public.*

The laws referred to in these questions were *d'ordre public*, in so far as their object of promoting the settlement of the colony was involved, but not as to the particular means by which that object was to be carried out. Parties could not by private contract defeat the object of the law, but they might by contract promote its object in a manner different from that prescribed by it; provided such contract were in conformity with the fundamental rules of the tenure.

(Signed) CHS. D. DAY

No. 2.

ANSWER to the 39th Question of the Attorney General.

The reservations specified in this Question, under the numbers from 1 to 8, are legal; but the rights of the sei-

gniors under these reservations must always be so exercised as not to obstruct the clearance and cultivation of the land of the *censitaire.*

The claim of the seignior to be indemnified on the suppression of these rights is subject to the limitation above stated and must depend upon the circumstances of each case.

(Signed) CHS. D. DAY

No. 3.

ANSWER to the 41st Question of the Attorney General.

Prohibitions of the kind enumerated in this question, are not always and of necessity illegal, and the seignior may have a right to indemnity by reason of their suppression, if he have in them an interest appreciable in money.

If such prohibition and interest do not fall within the denomination of a seigniorial right, it will of course not be subject to the operation of " The Seigniorial Act of 1854."

(Signed) CHS. D. DAY

No. 4.

ANSWER to the 44th Question of the Attorney General.

The lucrative rights of the Crown, as seignior *suzerain*, established by the Custom of Paris, are the rights of *Quint* and the right of *Relief*. In the schedules to be made in virtue of the Act of 1854, the value of the right of *Quint* ought to be deducted from the price to be paid by the *censitaires* to the seigniors for the redemption of the seigniorial dues. With respect to the right of *Relief*, it does not appear that the articles of the Custom of Paris relating to it, have ever been formally abrogated. But from the long continued dormancy of the right which has never been exacted, (except when due under the Custom of *Vexin le François* included within that of Paris) the Crown must be considered to have intended a virtual abandonment of it. The right of *Relief* therefore ought not in our opinion to be included among the lucrative rights which are to be valued against the seignior in settling the account of indemnity to be paid by him.

(Signed) CHS. D. DAY

ERRATA.

Page 1, line 14, in lieu of *extrat*, read : *extract*.

4, line 3, in lieu of *orduous*, read : *arduous*.

" line 6, in lieu of *practial*, read : *practical*.

" line 35, in lieu of *not one man*, read : *not of one man*.

5, line 27, in lieu of *and abuse*, read : *an abuse*.

6, line 1, in lieu of *and order*, read : *an order*.

" line 10, in lieu of *connot*, read : *cannot*.

" line 19, in lieu of *historial*, read : *historical*.

8, line 30, in lieu of *beaux*, read : *baux*.

18, line 33, in lieu of *by ormation derinfived from enternal*, read : *by information derived from external*.

19, line 22, in lieu of *domain*, read : *dominion*.

20, line 14, in lieu of *than more*, read : *more than*.

21, line 21, in lieu of *whole colony*, read : *colony generally*.

" line 31, in lieu of *unvarging*, read : *unvarying*.

22, line 7, in lieu of *concession*, read : *concessions*.

" line 15, in lieu of *of law*, read : *of the law*.

" line 20, in lieu of *unvarging*, read : *unvarying*.

40, line " in lieu of *exclusiveley*, read: ***exclusively.***

" line 20, in lieu of *cover*, read: ***can cover.***

" line " in lieu of *thes*, read: ***this.***

" line 28, in lieu of *tranquillity*, read: ***the tranquillity.***

" line 30, in lieu of *On*, read: ***The***

60, line 1, in lieu of *Bingham*, read: ***Harwood.***

64, line 6, in lieu of *tems*, read: ***terms.***

" line 27, in lieu of *grand*, read: ***guiding.***

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OPINION

OF THE

HONORABLE MR. JUSTICE SMITH.

1*st. Question.*—What is the feudal system of Canada ?

I take it to be undisputed, that, when the French Crown took possession of this Country, by right of discovery, it fell into and formed part of the Public Domain of the Crown, to be disposed of by the King, by grant, under such tenure, and under such conditions and limitations, as he thought proper The emigration of the inhabitants of France to this Country for the purposes of trade, or for occupation of land, did not of itself introduce any particular form of tenure ; for, the introduction and establishment of any particular tenure, must be the act of the Sovereign himself. The King, therefore, when he determined to found a powerful colony in New-France, as Canada was then called, made grants of land to be held *en fief et seigneurie*, and the conditions and limitations, in these grants, imposed by the King for the great purposes which he had in view, constitute the origin of our feudal law in Canada, and in these conditions and limitations, will be found, those essential differences between the tenure *en fief et seigneurie*, as it existed in France at that time, and the tenure as it was introduced into Canada. For the purposes of the argument it is not necessary to go further back than the grant to the Company of New France in 1627—28. in this grant, will be found the first great modification in the tenure, as it existed in France.

In it, the intentions of the King are clearly stated, which induced him, not only to revoke all former grants, by him made, but to grant to this body so large an extent of territory in the Country. It is only necessary to state here that the previous grantees of the Crown had altogether failed in carrying out the great object of the King, namely that of founding a powerful colony, and thereby, of aggrandizing the Crown of France ; that they had sought only their own interests in trading with the natives of the country, and had altogether neglected the interests of the Crown, in one word, that the previous grantees had entirely failed in fulfilling the obligations which they had assumed, and which had been expressly imposed on them, by the grants from the Crown.

Consequently this grant was made to the Company of New France, for the purpose of carrying out these intentions, and these objects are clearly pointed out in the grant itself.

This Charter may then be taken to be the foundation of the feudal law in Canada. And as by it the whole territory of New France was granted with quasi, if not, full sovereign powers,—the authority of this Company was as unlimited as the terms of the grant, and it could deal with the whole country as it thought proper, subject only to the law and obligations contained in its charter, without reference to any feudal law as it existed in France at the time. In the words in the fifth clause of the grant : " Pourront les dits associés " améliorer et amenager les dites terres, ainsi qu'ils ver- " ront être à faire, et icelles *distribuer à ceux qui habi-* " *teront le dit pays et autres*, en telle quantité et ainsi qu'ils " jugeront à propos ; " this unlimited authority is to be found :—and although no mention is made of the Custom of Paris, yet this Custom as being paramount in France, when other Customs were silent, would necessarily be the guide of the inhabitants of New France, subject only to the limitations and provisions of the charter itself. By this charter

the hundred associates were bound to people the said colony, by sending out Frenchmen ; they were bound to provide for their maintenance for a period of three years, and to foster in every way the infant colony.

On reference to all the grants *en fief et seigneurie* made by the Company of New-France, extending down to the year 1663, when they surrendered their charter back to the Crown of France, it will be found, that the Company of New-France understood that their chief obligation was to people the colony, and that, for that purpose, they were to distribute the lands among the colonists for settlement, for the condition of many of these grants was, that the Seigniors, grantees of this Company, should *défricher*, and cause to be *défriché et mis en valeur et culture, et faire peupler*, the land so granted, and to bring out immigrants from France in discharge of the obligation assumed by the Company. In some of these grants the words "*tenir feu et lieu* " *et de faire tenir feu et lieu par leurs tenanciers, et de faire* " *habiter*," are to be found. These words clearly indicate the nature of the primary obligation imposed on all the grantees of the Company of New France, which was the settlement of the Colony.

This then is the first distinguishing feature of the feudal law in Canada, that the great feudatories of the Company of New France were bound to settle the colony. It has been contended on behalf of the Seigniors that no such obligation was imposed on them, that the grants to them were in full property, without any mention of this obligation in them, or of any obligation to concede; and that as under the law of France, no such obligation existed ; that the same law governed the tenure in Canada ; and that they were absolute owners of the lands granted, to be disposed of, used, and enjoyed, as they thought proper. If this position be a legal one, then the pretentions contented for by the

Attorney-General may be fairly questioned ; for if it be conceded or established, that the grants themselves imposed no such obligation, then the Seigniors, as absolute owners of the lands granted, could distribute or not as they thought proper, and impose such conditions as they thought proper, in distributing. But it cannot be contended for a moment that such a pretention is borne out by the grants themselves. These grants were made to carry out the great political objects of the Crown. They were free grants to the seigniors but charged with a condition. The Company of New France, in undertaking the settlement of the colony, assumed this obligation, and this obligation they likewise imposed on their own feudatories. To hold that these seigniors were not bound to distribute, would be to hold that they, as subfeudatories of the Company of New France, were not bound by the obligation imposed on their own grantors, and which was the great object sought to be attained by the Crown in making the very grants, a position entirely adverse to every principle of feudal law--for the grantees of the Crown could not, by subgranting their lands, either destroy or in any way weaken the feudal obligations which had their existence in the very title under which they held. It has also been contended that even if the distribution of the lands had been so imposed on them, that it did not necessarily follow that this was to be done by concession and by concession alone. This position is also untenable. What is the meaning of the words *distribuer et cultiver, et habiter et tenir feu et lieu*, so often employed in feudal language and as applied to the tenure *en seigneurie.* It necessarily implies that that form of alienation shall be used, which is in harmony with the title of the grantor, and the legal offspring of the tenure itself. Can it be contended that an order to distribute land held *en seigneurie* did not imply from the very nature of the title of the holder himself an obligation to concede. By what other title could such lands be distributed? The principle of the feudal laws is, that a seignior

In disposing of his fief, (I dont mean of the whole as a whole) shall retain *la directe.* Can this be done by a sale of lands? Can it be done by a lease of them or by the employment of labourers and servants? It is clearly impossible. For the words *habiter et tenir feu et lieu* import in legal language ownership of the lands alienated, otherwise how could feudal obligation be enforced and how can such ownership be given by any other mode of conveyance than that of concession. I speak of absolute sales or of alienations equivalent to sales, for such are in fact adverse to the tenure; the taking of *deniers d'entrée* will be spoken of hereafter.

The feudal character of the conveyance must be preserved. The links in the chain descending from the Crown must be preserved. The seignior in alienating his land must preserve its feudal character. Any other form of alienation would be a breach of his feudal contract; and alienating his land by a form of conveyance adverse to the tenure by which he himself held, would be as much a violation of his feudal contract, as his holding the fief in his own hands and refusing to alienate at all. The grants from the Sovereign were made to advance the great political interests of the Kingdom, the lands were freely distributed by the Company of New France, in pursuance of that policy, and the seigniors in accepting these free grants were as much bound to carry out this policy as the Company itself; and the revocation of all grants by the Crown before 1627, for neglecting to carry out this policy, demonstrates beyond the shadow of a doubt, the existence of this obligation on the part of all the vassals of the Crown. Down to the year 1663, this obligation to concede is sufficiently visible from the nature and the terms of the grants themselves, and in the clear language used by the Crown in announcing its settled policy, and in imposing this obligation. But after the surrender by the Company of their rights to the Crown of France, and in the

concession to the Company of the West Indies, and in the subsequent grants by the Crown of lands *en fief et seigneurie* in the Colony, this settled policy and obligation are in the strongest language pointed out, and the various reunions to the Crown for default of carrying out this policy, and of fulfilling this obligation, shew in unmistakeable language, the determination of the Crown to enforce this policy; in fact every legislative and judicial act on the part of the Crown, by its officers in the colony, shew that the observing eye of the Crown was never closed for a moment on this important point, and that it was an admitted principle of the feudal law of Canada, that it was obligatory on the seigniors to concede their lands *en seigneurie*, for if it had not been so, something would have been found in the archives of the country, to shew that such a pretention had been denied or resisted by the seigniors; on the contrary everything tends to prove that such an obligation was universally recognized.

This then is the distinguishing feature of the feudal law as it was introduced into the country, by the King, and it constitutes one of the marked distinctions between the feudal law of France and that of Canada.

In France, before the reformation of the Custom of Paris in 1580, the seignior could dispose of his fief "*jouer et faire profit de son fief* as he thought proper; there was no limitation or restriction to this privilege. He could sell or exchange or otherwise dispose of his lands, *or retain them in his own hands* as he choose, provided he retained some evidence of his own feudal superiority, viz: *la directe*. But by the 51 and 52 articles of the (reformed) Custom of Paris, this unlimited power was restrained, and from thenceforth, he could dispose of two thirds only of his fief, preserving, as before observed, some evidence of his feudal superiority, viz: *la directe*. If he transgressed this rule, without the con

sent of his seignior dominant, he was subject to certain feudal penalties imposed by the Custom, but in all other respects he was perfectly free and uncontroled in *the use or abuse*, as it was termed by feudists, of his fief. The authorities which have been cited, establish this point of french feudal law, and the authors are unanimous on this point. The only limitation was the retention of *la directe*, on the portions alienated. For without the retention of *la directe*, it would have been a *démembrement de fief* and would have subjected the vassal to the pain and penalties imposed by the 51 & 52 articles of the Custom. It is not necessary to enlarge on this branch of the subject under the law of France; It is a well settled point of feudal jurisprudence and is supported by the authority of the most eminent feudists. It is also a well settled rule in french feudal law that the seignior in France could, in conceding his lands, (which in no instance was obligatory on him) concede them on such terms as he thought proper and in addition thereto, take money for the concession, to use the language of the authors, take *deniers d'entrée*, or entrance money.

Now, was it the intention of the King to introduce into Canada the 51 & 52 articles of the Custom of Paris and to permit the seigniors in this Country *de jouer de leurs fiefs*, in other words *de faire profit de leurs fiefs*, in the words of the law, *disposer et faire son profit de toutes les parties utiles et fructueuses de son fief*? Of course, I do not refer to the *profit de fief* or dues which accrue to the seignior when the alienation exceeds the two thirds, but of the profit which the vassal was permitted to make of his fief. It is undeniable that the privilege granted by the law of France to seigniors there, under the 51 & 52 articles, was to *faire profit de leur fief*, "to sell and dispose of them for what they could obtain, subject only to the limitation, that such *jeu de fief* should be limited to two thirds of it, and that a *directe* should be retained on the part alienated. Did then

the King, in making his grants in Canada, intend to give this privilege to the seigniors here, that they might make *profit de leurs fiefs* as they might have done in France? The King by imposing the obligation on his vassals of conceding and distributing their seigniories, without limitation, necessarily surrendered his right as Sovereign Lord, to his dues, when this alienation by concession exceeded the two thirds of the seigniory, which he would and could have claimed under the 51 article of the Coutume.

Is such a privilege at all consistent with the idea of distributing the lands to settlers and this within a given time on pain of forfeiture of their estates? Was it simply the intention of the Crown to remove the restriction imposed by the 51st artiele which permitted this *Jeu*, to extend only to 2|3 of the seigniory, and thereby to restore the law as it existed before the reformation of the Custom in 1580, by which no restriction whatever was imposed on the seignior. Provided he retained the outward form of the alienation, which should be by concession alone, he was at liberty to *jouer de son fief*, with perfect freedom in the conditions on which the alienation should take plaee. By the Custom of Paris, this alienation could take place by sale or otherwise, provided only a *directe* were reserved. By some other Customs of France, the *jeu de fief* was permitted only by sub-infeudation or concession, and all other modes of alienation were contrary to law and no *deniers d'entrée* could be exacted. But even by these Customs, the seignior was free in fixing the terms on which he would concede. The restriction under these Customs, was only, that the *Jeu* should be by concession and not otherwise.

Was it the intention of the Crown to abrogate the Custom of Paris for the sole purpose of substituting these other Customs, to take away the power of making sales of land and taking of *deniers d'entrée*, which was the *prix de l'aliénation*, but otherwise to allow this price or value of the land

to be taken in a concession of the land. (1) To what purpose change the mere form of the conveyance if *profits de fief* could still be taken by the seignior ? The settlement of the Country would not have been advanced. If the Seignior could have taken *profits de fief* under the concession as he might have done under the 51st art. of Paris ; and instead of taking *deniers d'entrée* he had taken these *profits* in the shape of a *rente*, what change was effected ? none whatever ; and the obligation to concede was thereby rendered utterly inoperative. The obligation to concede must mean that no *profits de fief* could be taken, and if so, a mere change in the form of the alienation without this restriction would have left the seigniors perfectly uncontroled in the disposition of their estates and would have rendered the obligation, as applied to the alienation by the vassal of a forced concession, altogether illusory. If so, then, by the law of France under which these grants were made by the Crown, the seignior here could *jouer de la totalité de son fief*, provided only he did so by concession. In other words the seignior, if he fulfilled the obligation imposed on him by his feudal contract, namely that of conceding, by retaining the mere form of the conveyance, he might *faire profit de son fief* as he best might. If so how could the settlement of the Colony have been effectually carried out ? If the emigrants who were induced by the French Government to seek a home in the new Colony had been obliged to purchase lands instead of obtaining a quasi free grant of them, which they would have been compelled to do, if the *jeu de fief* in its true meaning, that of making *profits de fief*, had been allowed. Such a permission is to my mind utterly incompatible with the obligation of a compulsory concession. The obligation to concede on pain of forfeiture and the liberty of making *profits de fief* cannot co-exist. It is no argument to say that the seignior might make *profits de fief*, if he only fulfilled

(1) Henrion de Pansey, vol. p.

his feudal obligation of conceding, for that would be to violate his obligation, and frustrate the very object for which he had received his grant. It is an argument to shew how far a law may be evaded, not to shew that such obligation does not exist.

In the law, as it stood before the passing of the *Arrêts de Marly*, this obligation could only be enforced by the *suzerain* himself. But by this Arrêt, the King provided a remedy for the settler, and enabled him to enforce this obligation by a direct appeal to the tribunal created for that purpose. This *Arrêt* shews clearly and without the power of doubting, what the obligation of the seignior was, as the vassal of the Crown. He could be compelled to concede or the Court would concede for him, if he refused. Is such an obligation consistent with the right of selling and disposing of his fief as he chose " to make *profits de son fief*." I cannot think it is. This, in my opinion, is the most important modification which the Feudal law of France underwent on its introduction into Canada. The 51st and 52d articles were modified necessarily in this, that the Sovereign Lord should not be entitled to his *profits de fief* or dues, when the alienation by the vassal exceeded $\frac{2}{3}$ of his fief. But on the other hand the vassal by being compelled to concede on pain of forfeiture, was deprived of his power to *faire son profit* by sale or otherwise. For the explanations given by the King of the *Arrêts de Marly* shew, that the meaning of the obligation to concede was, that it should be *à simple titre de redevance*. This *simple titre de redevance* must mean one of two things. It either means a *léger cens*, the mere recognition of the Feudal dependency, or it means that if the form of the conveyance be retained, that the *redevance* should be in proportion to the value of the land and as it was in France, and should be whatever was stipulated to be paid, *in traditione fundi*. The former interpretation is the only one which is consistent with the obligation im-

posed on the Seignior, for as it has been already observed, freedom in fixing the terms of concession and an absolute obligation to concede are in their very nature opposed to each other. The *Arrêt* of 1711 establishes that the taking of money with the concession and the imposition of charges more onerous than the *cens, à simple titre de redevance*, were a violation of the Feudal contract, and were illegal, and it is difficult to understand how the imposition of a *rente* substituted for money and exorbitant in its nature and beyond the *cens ordinaire et accoutumé* and unknown to the common law of France, could be considered as legal and not in its very nature fundamentally opposed to the very condition of the original grant. Freminville 1 vol. p. 10, says ; " Le bail à cens est-il susceptible de toutes sortes de clauses ?" Answers : " Oui " par la raison que comme il est libre à celui qui *donne, de donner ou de ne pas donner*, il lui est permis d'imposer *à sa donation*, telles charges et conditions que bon lui semble. C'est au preneur à les accepter ou à les refuser en ne prenant pas l'héritage, et ainsi le bailleur et le preneur ont la même faculté, l'un de *faire la loi* et l'autre *de la refuser*, l'acceptation par l'un *de la loi faite par l'autre* assure la perfection du bail à cens." 1. Brodeau sur Paris, Nos. 2, 3, p. 531. Same authority in Henrion de Pansey &c., Nos. 11,–18, regulated by usual rates in seigniory when no contract is produced. Was the Seignior here permitted *de faire la loi* in making his concession ? If he could, then he must of necessity have the right of refusing the concession, if the stipulations offered by him in the *bail à cens* were declined. If so, then his grant could not have been charged with any condition, but it must have been his absolute property. That every colonist must first try and make an agreement with Seignior who was master in the fullest sense of the estate, and if he could not agree, then to coerce the Seignior by a law suit. Certainly a most extraordinary way of settling a colony.

As this branch of the argument will more properly fall under consideration when the conditions under which grants *en censive* may be made in Canada, I will not further allude to it here.

The distinction therefore to be noticed between the feudal law of Canada and that of France is 1stly. That the *Jeu de fief* was limited in France to $\frac{2}{3}$ of the fief, while in Canada this restriction was removed. 2dly. The *Jeu de fief* was obligatory in Canada and voluntary in France. 3dly. That such *Jeu de fief* was to be effected by subinfeudation and concession alone *et sans faire profits de son fief.*

In discussing this important branch of the matters submitted to the consideration of the Court, I have not transcribed the various documents which may be read in support of the view I have taken, that, by the feudal law of Canada, all seigniors under the French Crown were bound to concede their wild lands to all settlers demanding them. To do so, would be to write a history rather than to decide judicially. I have therefore touched on these matters and extracted therefrom those portions which in my opinion are sufficient in themselves to base the reasoning on which I have come to the conclusion, that the seigniors were bound by the law of Canada, to concede on pain of forfeiture of their estates ; giving only the references to the Edits and Ord. and other documents.

Before leaving however this branch of the subject, it may be necessary to remark that, some time before the surrender by the Company of New France, of their charter to the Crown in 1663, the Custom of Paris was introduced in express terms, and declared to be the rule of decision in all cases in the colony. But it is manifest that its introduction by the King was never intended to nullify all his previous grants in the colony, and to defeat the whole policy of the Crown, by removing that restriction from his grants,

which was the very keystone of the superstructure which he was so anxious to erect, and without which it is clearly impossible that the colony could have been peopled. For, if the *Jeu de fief* by concession alone in Canada, after the introduction of the Coutume de Paris in express terms, ceased to be obligatory, then by what authority could the King have enforced the obligation ? By forfeitures of the estates of the grantees ? To suppose that these forfeitures were an arbitrary and tyrannical act, justified neither by the law nor the express obligation imposed on the grantees themselves, would be to disbelieve the evidence which the whole history of the country has furnished on this point.

Assuming therefore that the *jeu de fief* was obligatory by concession alone, and this on pain of forfeiture of the fief, it is now necessary to determine the nature and character of the contract of concession, *contrat d'accensement*, which the seigniors in this colony were bound to grant.

Was the seignior free to stipulate, or was he, in the concession itself, fettered and restrained by his feudal obligation, as assumed by him in receiving the investiture of his land. It has been assumed as proved, that the seignior was bound to concede ; that he was bound to do so within a limited period varied by the various periods mentioned in the *Arrêts de retranchement*, and this on pain of forfeiture ; that this obligation was imposed on him to carry out the declared and well recognized policy of the Crown ; in fact it was the condition *sine qua non* the grant would never have been made. That it thereby became, and it was so considered, a condition of the feudal grant and an express obligation of this feudal contract. Could he be, by any system of reasoning or by any legal or logical deduction, free and independent in his power to concede ; that is, in the stipulations of his contract of concession ? That is, could the seignior impose at will the terms on which he would

alienate his land? As a mere matter of reasoning, it would appear that such a power was inconsistent with, and in direct opposition to his clearly expressed obligation. It is morally impossible to reconcile the idea of perfect freedom in the terms on which he would concede, and an absolute obligation to concede on pain of forfeiture. For on what principle could he be compelled to concede, if he could refuse the concession, if the terms offered for it were not agreeable to him?

The mere time allowed to him by the various *arrêts de retranchement* cannot alter the principle. For this only the more forcibly pointed out the obligation which he had assumed in taking his grant. He had undertaken to settle his seigniory and it was his business to avert the penalty imposed, by fulfilling his obligation. It is no argument to say, that as he was compelled to effect settlement within a given time, and that, from the necessity of the case, he was compelled to take such terms as censitaires would agree to, that it was only an element in the general obligation to concede, but did not therefore ***by law*** compel him to concede, on such terms, and that once his obligation of settlement was fulfilled, his whole contract was fulfilled, and he might therefore make such terms with his censitaires as he could obtain by agreement, provided actual settlement was the result. Such an argument would lead to the conclusion that there was no other thing to be considered, than the effect of the feudal contract in its relation only to the Crown and the seignior; but if the higher considerations involved in the question are examined, and the public policy and great objects which the king had in view, in making his feudal grants and imposing this condition, for the benefit of his subjects emigrating from France, are taken as an element in the solution of it, then not only the King as the feudal dominant of the seignior, and the seigniors as parties to this contract are to be considered, but the Colonists who

emigrated from France for the purposes of settlement under the sanction and authority of the Crow are to be considered also; and to allow the seignior to refuse the concession, subject only to the forfeiture or penality imposed for refusal, would have been to frustrate altogether or indefinitely postpone the settlement of the Country. For a refusal to concede under such a view, would only lead to forfeiture of the estate, and to a regrant but not to the settlement of the Country. It would be to make the whole policy of the Crown to depend, not on the obligation of the contract, but on the possible agreement of the seignior and censitaire on the terms on which the concession should be taken. Such was never the intention of the Crown. The grants were made to obtain settlement of the Country, and were in free gift for that especial object. In imposing on the Company of new France the obligation of bringing out settlers from France, it is beyond all controversy, that the King, their feudal Dominant intended to secure to these emigrants, the possession of lands on terms similar to those which had been imposed on the seigniors themselves, viz: on ordinary not extraordinary terms. This of necessity involved the right of demanding these lands from the seignior, and if the demand was a legal right, which could not be refused, then the seignior had no option in the matter. In familiar language the case may be thus stated: True it is, I have a free grant of a large tract of land in fief. My obligation to the Crown is purely nominal, *foi et hommage*, and a nominal rent, as a mere recognition of my feudal vasselage. This grant has been given to carry out the great public object of the Crown, that of founding a powerful colony. It has been made on the express condition of *distributing* these lands among settlers to *bring them into value*. This distribution must be made by concession, as that is the only mode by which the distribution can be made under the tenure, and this concession must be made on pain of forfeiture. But as the common law of France permits me to make my own terms in conce-

ding the lands *et faire profit du fief*; therefore I will only concede if the terms are agreable to me; and the King may if he choose inflict the penalty, not for refusing to concede, for I an willing to concede, but because I cannot agree with the censitaires on the terms of the concession- But as by the arrêts de retranchement a certain time must elapse before the penalty can be enforced, I will therefore make the Crown wait that time, before the penalty can be enforced. Under the despotic government of France, I should like to know as a mere matter of curiosity, what answer the King would have made, to a seignior using such an argument.

I have looked at this question simply as a matter of reasoning, without reference to any thing which may be found in law or documents submitted on this branch. Let us now examine the question in its legal aspect not only with reference to the law of France, but the law of Canada also, anterior to the arrêts of Marly.

It is no doubt true that under the law of France the *contrat d'accensement* was a matter of agreement between the Seigniors and Censitaires, the rights of both parties were coextensive with their stipulations. There was no law to restrain either party in making his contract. This is undeniable from the authorities which have been cited.

But it is equally undeniable, that when there was no agreement to regulate the rights of the parties, that the common law established this rule for them. This rule was the *modicum canon* of Dumoulin, the greatest of feudists. It was simply to mark *la directe*, an indication of the lordship of the seignior over his vassal. It was always small, not intended in any way to form a revenue, but it was in the language of feudists, *le vrai cens*, *le cens ordinaire et accoutumé*, *la marque recognitive de la directe*. It is true that whatever was stipulated at the time of the first alienation of the land,

as the consideration of the *contrat d'accensement* was considered as *cens*, and was entitled to all its privileges, but this did not affect the distinction which always existed between the *cens* as stipulated, and the *cens* as regulated by the common law in the absence of any stipulation. (a)

This being the common law of France in relation to concessions *en censive*, at the time of the introduction of the feudal system into Canada, did it become part of the common law of Canada also, and were the seigniors then, under the modification which that tenure had undergone in its necessary application to the condition of the Country, at liberty

(a) Henrion de Pansey, vo. Cens ¶. 8, p. 273, 1 vol. " Il y a deux espèces de cens, l'un modique seulement de quelques deniers, ce qui est le plus ordinaire et que l'on regarde comme étant de droit commun dans les Coutumes censuelles ; l'autre plus considérable, beaucoup plus rare et qui consiste dans une rente en argent ou une partie notable des fruits de l'héritage. Quoique ces deux espèces de prestations aient également la dénomination de cens et qu'elles soient également recognitives de la directe, cependant il existe entr'elles une différence très importante. Comme la première est de droit commun, on n'exige pas que le Seigneur l'établisse par titre ; sa qualité de Seigneur lui suffit, mais comme la seconde suppose une convention qui l'a fixée à cette quotité, il faut que le seigneur représente le titre dépositaire de cette convention, ou une possession qui la fasse présumer. Inutilement prouverait-il que les héritages circonvoisins sont grevés de la prestation qu'il demande, ce moyen serait insuffisant." and cites Dumoulin, Dargentré In ¶. 9, p. 275, in speaking of both kinds of cens, the authors says : " à cet égard le Seigneur bailleur de fonds n'a d'autre droit que sa volonté, tous les droits qu'il se réserve *in recognitionem dominii* sont seigneuriaux et jouissent des mêmes prérogatives. Cependant la différence qui peut se trouver entre ces diverses prestations a fait admettre la distinction que l'on vient d'énoncer. On divise les droit seigneuriaux en deux classes, les droits ordinaires et les droits exorbitans. On donne la première de ces deux dénominations à la prestation qui forme le droit commun, à celle que la Coutume locale admet et indique comme la charge naturelle des héritages, comme le

in Canada, as seigniors were in France, to grant concessions on such terms and conditions *insolites, inusités, et exorbitants*, as they thought proper to impose. It is no doubt true that, by the original grants from the Crown to the Company of New France and the West India Company, these Companies were entitled to make grants on such terms as they thought proper.

In reference to the Company of New France, it will appear by the 5th article that the grants here refered to, are grants en fief and not en censive, for the latter part of the article clearly refers to the great feudatories of the Compa-

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signe spécialement et généralement recognitif de la Seigneurie, tel est le cens de dix ou douze deniers par arpent dans la Coutume de Paris. Cependant rien n'empêche qu'un Seigneur n'impose un terrage sur les terres qu'il aliène. Cet exemple peut être imité par un très grand nombre : cette prestation devenue par là très commune dans le ressort de la Coutume n'en formera cependant pas le droit commun, ne sera pas le signe naturel de la directe. Le droit sera seigneurial, à la vérité mais *exorbitant*. Nul ne pourra le prétendre qu'en vertu de titres particuliers et le vendeur de l'héritage qui en est grevé, sera tenu de le déclarer nominativement à l'acquéreur, à la différence du cens accoutumé qu'il n'est pas même absolument nécessaire d'énumérer dans le contrat parceque la loi publique avertit elle-même tous les acquéreurs comme tous les tenanciers qu'ils ne peuvent posséder qu'à la charge de ce *même cens*.

" Ces principes sont très bien présentés par M. Pothier dans son traité du contrat de vente No. 196. Les droits et devoirs seigneuriaux tels qu'ils sont réglés par les Coutumes sont aussi des charges des héritages qui n'ont pas besoin d'être déclarées par le contrat de vente, lorsque les héritages sont situés dans les Provinces où la maxime *nulle terre sans seigneur* est établie, la présomption étant que l'héritage relève de quelque seigneur ou à fief ou à cens. Cela a lieu lorsque l'héritage n'est chargé d'autres droits et devoirs seigneuriaux que de ceux qui sont réglés par la Coutume du lieu, soit pour les fiefs soit pour les censives. Mais si par des titres particuliers, l'héritage est

ny, for power is there given to erect them into titles of dignity. As regards the West India Company, by reference to the 22d and 23d articles of the grant, it will be found that this power relates also to grants en fief, and altho' incidentally the words *cens et rentes* are used, the article and the general stipulations evidently refer to grants en fief. For it is evident that the Crown in making such vast territorial grants, in investing the companies with the powers to be found in their charter had reference to the grants en fief and no other. So also in the arrêts de retranchement of 4th jan. 1672 and 1675, 9th March 1679 and 6th July 1711; all of

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chargé de droits plus forts que ceux réglés par les Coutumes et *usités* dans la Province, quoique ces droits soient seigneuriaux, ils doivent être déclarés par le contrat de vente, faute de quoi il y a recours de garantie contre le vendeur tant pour ce que l'héritage vaut de moins, par rapport à cette charge *insolite*, que pour ce que l'acheteur a payé de plus que les profits ordinaires, car l'acheteur n'a pu prévoir ces droits *insolites* quoique seigneuriaux." ¶. 10, on page 276. Le Seigneur féodal ou censier n'est tenu s'opposer aux criées pour son droit de fief ou censive. Ainsi est entendu l'adjudication par décret être faite à la charge des dits droits de fief ou censive. Cout. de Paris, art. 355. Cet article enveloppe en sa disposition tous les droits recognitifs de la supériorité féodale, en un mot tous les droits de fief ou de censive, et cela sans distinguer si les droits sont plus ou moins considérables, s'il s'agit de droits *ordinaires* ou *exorbitans*. Mais le raisonnement et l'équité ont conduit à une distinction que les arrêts ont adopté : on a dit s'il ne s'agit que d'un cens *modique*, que du *cens ordinaire et accoutumé*, le décret sera sans influence, parceque l'acquéreur n'ayant pas de motif de penser que l'immeuble était affranchi de la *loi commune* devait l'y croire assujetti. Mais, si la prestation quoique servie sous la dénomination de cens, était considérable et du nombre de celles que l'on nomme *extraordinaires* ou *exorbitantes*, faute d'opposition de la part du Seigneur, elle sera purgée par le décret : par le double motif qu'elle ne devait pas *son existence à la loi*, mais à une simple convention telle que l'adjudicataire ne pouvait pas la connaitre, pas même la soupçonner."

them refer to grants en fief and not en censive. So also the confirmations of the King of the grants en fief made by his representatives in the Colony. If there is nothing to be found in any grant of the Crown to these great feudatories, which gives power to them, to make grants or concessions *en censive*, on such terms and conditions as they thought proper, and I can find nothing in any of the grants to that effect, nor has any thing been cited in argument to justify such an idea, then by what law shall these concessions be regulated in Canada. It is apparent that the seigniors themselves from the first establishment of the Colony down

" On trouve cette distinction dans le traité du déguerpissement de Loiseau en ces termes : liv. 1, ch. 5, no. 5. La troisième prérogative des rentes seigneuriales est qu'elles ne sont point purgées ni abolies, par le décret, comme sont indistinctement toutes les autres rentes, même les simples foncières, et partant, qu'il n'est pas nécessaire de s'opposer aux criées pour la conservation d'icelles encore qu'elles ne soient demandées par l'ordonnance des criées, art. 12 et 13...toutefois pour ce que ces articles ne parlent que de droits seigneuriaux, il faut restreindre cette prérogative aux droits ordinaires, c'est-à-dire accoutumés au pays, ou autorisés par la Coutume du lieu, qui partant sont présomptueusement notoires à l'acquéreur qui achètent par décret. Autrement il ne serait pas raisonnable qu'un acheteur par décret se trouvât chargé, outre le prix de son adjudication, des grosses rentes seigneuriales qu'il n'aurait pu deviner, et lesquelles s'il eût sçu, il n'eut vraisemblablement enchéri l'héritage à un si haut prix, etc.

" Les arrêts ont accueilli cette distinction. Ferrière en a réuni plusieurs (sur l'art de la Cout. de Paris 357) ; voici comment il s'exprime : que si la rente foncière tient lieu de cens et est due *in recognitionem directi dominii* et emporte lods et ventes de même que le cens, il n'est pas nécessaire de s'opposer, pourvû qu'elle n'excède pas les rentes foncières seigneuriales tenant lieu de cens ordinaire et accoutumé dans le lieu, autrement l'opposition serait nécessaire. C'est le sentiment de Lemaitre, de Loyseau, (liv. 1. ch. 5 no 5) de Bacquet, traité des Francs-fiefs ch. 7. no 28. ce qui a été jugé par plusieurs arrêts " and see arrêt of 11 Jan : 1560 reported by Chenu, Cent, 2.

to the arrêts of Marly, must have considered themselves as being under the operation of some law, for the cens et rentes never exceeded a certain rate in the Colony. If the *modicum canon* or ordinary or accustomed *cens*, *le vrai cens* of the French common law was not the standard, why was it never exceeded. If the seigniors were unfettered in fixing the rate of *cens et rentes*, why did they resort to the imposition of new and excessive charges and of exacting *deniers d'entrée* from censitaires, when by merely raising the rates of *cens et rentes*, their object could have been attained. Why should they have resorted to an acknowledged illegality, when they might have entrenched themselves behind the common law of France which made the agreement the measure of their rights. If the seigniors were not restrained in the rates of concession, then, they were equally free in all other respects, and they might have exacted *deniers d'entrée* and have imposed whatever other charges they thought proper. If so why are they declared illegal by the arrêt de Marly, not for the future but for the past. If the obligation to concede did not restrain the seignior in the rates of *cens*, how could it be illegal to take *deniers d'entrée*? If the obligation to concede did not change the law of France, except in making the concession in Canada obligatory, while it was voluntary in France, then, how could the taking of *deniers*

Quest. 32. — 4 December 1599, by Brodeau on 76 art. of Cout. no 10 — 20 April 1650 au rapport de M. Seguier. — 24 March 1635, au rapport de M. Philippeaux who signed arrêt de Marly.

" Par ces arrêts rapportés par Brodeau sur Louet : lettre C. no 19, il a été jugé qu'il faut s'opposer pour rentes foncières quoique seigneuriales quand elles ne tiennent pas lieu de cens, ou qu'elles sont plus fortes que le cens ordinaire. " See also 1 vol of Ferrière Ge. Coutume. p. 1079, no 22. Nouv : Denizart vo. Cens. S. 2. Du droit d'enclave no 4, same, p. 342. 1. Pocquet de Livonière, p. 534-5. supports the view of Henrion de Pansey in relation to *décret*. Prudhomme, Roture, p. 38, 49.—Hervé, vo cens p. 91-2-5, admits Dumoulin altho' contesting his principle. —See Henry, Jeu de fief, 105-6.

d'entrée be illegal? For if the only change was that the concession in Canada should be obligatory, then all the rights of the seignior still existed as they did in France, under the Custom of Paris, and one of these was to make his contract of concession as he pleased, and take *deniers d'entrée* as he choose. It is impossible to deny that if the taking of *deniers d'entrée* was illegal in Canada, that it was equally illegal to claim freedom in any other stipulations, which under the 51 and 52 articles of Paris could have been done.

But it is impossible so to interpret the grants made to the seigniors, without utterly defeating the very object for which alone the grants were made. For, permission to stipulate the rates of cens et rentes, in a deed of concession, necessarily involves in the very nature of things, a right to refuse the concession, and the reasoning naturally presents this contradiction. The seigniors were bound by their contracts from the Crown to concede, but by the common law of France which existed at the time these contracts were made, they were not bound to do so, and they were permitted to refuse the concession. For it is useless to deny that a demand for exorbitant rates of concession is tantamount to a refusal to concede. Then which law shall prevail? The law imposed by the Crown on its great feudatories, or the common law of France which nullified that law? Surely both Crown and seignior must have known that such a rule existed in France under the feudal law, at the time these grants were made. They cannot both subsist together, one must prevail over the other. Was it the intention of the King to preserve this right of refusing to concede unless the *taux* was agreed to, or was it his intention to bring the common law rule as regards the cens, in aid of the obligation which he had imposed on his vassals? In taking the *modicum canon* as the rule, his great object would be attained; in taking the other proposition, these objects would be entirely defeated. The 33 article, in the charter to the West India Company has

been cited, as shewing that in giving the colonists power to contract according to the Coutume de Paris, that power was necessarily given to contract in matters relating to the cens et rentes. On this I would simply observe, that such an intention cannot be presumed, if the reasoning on the subject of the obligation to concede be admitted to be correct ; for the King would thereby have entirely defeated his whole policy. This clause in my opinion refers to the ordinary civil rights of the colonists, and to render the law uniform in relation to grants en fief,—for some grants having been made according to the law of Vexin-le-François, some confusion existed in the colony, and it was intended to have one uniform system of law in relation to feudal grants, throughout the whole colony. On reference to the *Edit de Création* of the Superior Council of Quebec, the following words will be found: " Avons en outre au dit Conseil Sou-
" verain, donné et attribué, donnons et attribuons le pouvoir
" de connoître de toutes causes civiles et criminelles, pour
" juger souverainement et en dernier ressort selon les lois et
" ordonnances de Notre Royaume et y procéder *autant qu'il*
" *se pourra* en la *forme et manière qui se pratique et se*
" *garde dans le ressort* de notre Cour du Parlement de Paris,
" nous *réservant néanmoins selon notre pouvoir souverain*
" *de changer*, *réformer et amplifier* les dites lois et ordon-
" nances, d'y déroger, *de les abolir d'en faire de nouvelles*
" *ou tels réglements*, *statuts* et constitutions que nous ver-
" rons être plus utiles à notre service et au bien de nos su-
" jets du dit pays."

Here the King expressly declares that the law and Custom of the Parlement of Paris shall be the guide, *in so far* as the same could be carried out in the Colony, due regard being had to the great objects which he had in view, the nature of his grants and the obligations which he had imposed on the grantees. The feudal contract which he and the seigneur had made, necessarily implied feudal obedience,

and in taking the grant for the primary purpose of carrying out the Policy of the Crown, and charged with the positive obligation of distributing these lands *for his Sovereign*, he could not be supposed to retain in his own power under color of law, a means of defeating the great objects of the grant itself.—I consider therefore that under the feudal law as it was introduced into Canada, the seigniors were bound to distribute the lands granted to them, and that in granting these concessions, they were bound to grant them at a merely nominal rent, *modicum canon* and that such was their obligation at the time of the passing of the arrêts de Marly. The first arrêt is in the words following : " Le Roi étant in-
" formé que dans les terres que Sa Majesté a bien voulu
" *accorder et concéder* en seigneurie à ses sujets en la Nou-
" velle France, il y en a partie qui ne sont point entière-
" ment habituées et d'autres où il n'y a encore aucun habi-
" tant d'établi *pour les mettre en valeur*, et sur lesquelles
" aussi ceux à qui elles ont été concédées en seigneurie
" n'ont pas encore commencé d'en défricher pour y établir
" leur domaine :—Sa Majesté étant aussi informée qu'il y a
" quelques seigneurs, qui refusent sous différents prétextes
" de concéder des terres aux habitans qui leur en demandent,
" dans la vue de pouvoir les vendre, leur imposant en *même*
" tems des *mêmes* droits de redevances qu'aux habitans
" établis, ce qui est entièrement contraire aux *intentions*
" de Sa Majesté et aux *clauses* des titres de *concession*.
" par lesquelles il leur est *permis seulement* de *concéder* les
" terres, *à titre de redevances*, ce qui cause aussi un
" préjudice très considérable aux nouveaux habitans qui
" trouvent moins de terres à occuper dans les lieux qui peu-
" vent mieux convenir au commerce : A quoi voulant pour-
" voir, Sa Majesté étant en son Conseil a ordonné et ordon-
" ne que dans un an du jour de la publication du présent
" arrêt, les habitans, etc., qui n'ont point de domaine dé-
" friché, et qui n'y ont point d'habitans, seront tenus de les

" mettre en culture, et d'y *placer des habitans dessus*, faute " de quoi... Veut Sa Majesté qu'elles soient réunies à son " domaine à la diligence du procureur général, etc..... " Ordonne aussi Sa Majesté, que tous les seigneurs.. ayent " à concéder aux habitans les terres qu'*ils leur demandent* " dans leurs seigneuries *à titre de redevances et sans exiger* " *d'eux aucune somme d'argent* pour raison des dites conces- " sions, sinon...permet aux dits habitans de leur demander " les dites terres par sommation et en cas de refus, de se " pourvoir par devant le Gouverneur et Lieutenant Général " et l'Intendant, auxquels Sa Majesté ordonne de concéder " les terres par eux demandées dans les dites seigneuries " aux mêmes droits imposés sur les autres terres concédées, " dans les dites seigneuries, lesquels droits" are to be paid over to Receiver General of the domain of Crown. Did this arrêt introduce a new law into the Colony, or did it affirm the pre-existing law ? I think this was a purely declaratory law promulgated on account of the abuses which had crept into the colony. The first part of the *arrêt* orders, that the seigniors should settle their seigniories and place *inhabitants* on them. This was no new obligation. They were bound by the conditions of the grants, as the King himself in a subsequent part of the *arrêt* declares, to settle their seigniories and distribute the lands. Do the words *placer des habitans*, in seigniories granted expressly for settlement on nominal seigniorial dues, such as were imposed on the seigniors, imply a right in the seigniors to charge what they pleased for these concessions ; in the words of Freminville, *de faire la loi* in granting these concession ? Assuredly not. The very reverse is in spirit as well as in words conveyed by the expression. The meaning was that the lands should be distributed by the seigniors as the Crown had distributed the seigniories. The whole territory of New France, extending over thousands of miles, could not be distributed *en censive*. It was therefore absolutely neces-

sary, that this object should be carried out by grants en fief in the first instance, and therefore his feudatories were empowered to concede in order to carry out this design, and these grants were accepted on that condition and for that especial objet. He granted to them their seigniories or nominal rents or dues. The seigniors were bound to distribute their seigniories on nominal rents or dues. The very nature of a feudal grant necessarily implies a gradual transmission, from feudal *suzerain* down to the lowest link in the feudal chain, of feudal obligations. The right of both parties, seigniors and those willing to take lands and settle in the Colony, were settled by one and the same act, the original grant from the Crown. The stipulation made by the Crown, that the seigniories should be settled and the lands distributed, was made in favor of those who emigrated for the purposes of settlement, and this object was to be carried out by means of the subgrants and the grants en censure. The seigniors themselves could not settle their seigniories and *les mettre en valeur*; but when they received their grants, they assumed this obligation and the King in his *arrêt* affirms it. The motive of this enactment as stated in the preamble is, that the seigniors under various pretexts had refused to concede, that they might sell the lands, *at the same time imposing the same rates of cens et rentes* as were imposed on the other inhabitants. It does not say here,—in the same seigniory, thereby indicating that the rates ought to be, if they were not, alike in all seigniories. Now this part of the preamble is the motive also of the second enactment in the *arrêt* which in positive terms, enacts that the seigniors should concede *à titre de redevances*; without demanding money, *deniers d'entrée*, as they might have done in France. This also is no new obligation imposed on the seigniors, for by the same same process of reasoning it is to me clear, that the distribution of the lands granted to the seigniors was to be done by concession alone, and by the

imposition of a *cens ordinaire*, le vrai cens of the Custom, as a *directe* alone, for the latter part of the *arrêt* gives the authority to the Governor and Intendant to concede for the seignior, should he refuse to do so, on the same rates as those already imposed in the said seigniories.

What is the *gravamen* of the charge made by the King in the *arrêt* of 1711. It is, that more than the *droits de redevances* existing in the seigniory had been demanded. That they had demanded or exacted sums of money while they imposed the same "*droits de redevances qu'aux habitans établis*, that is, in addition to these redevances. The charge is, in fact, that they had demanded more then the redevances already established. The illustration given of this excess of charge does not confine it to the mere exaction of money. It was not the demanding of mere money which constituted the pith of the charge, it was demanding something beyond the accustomed rate, which was the violation of contract complained of in the *arrêt*, for the King says, that they demanded money at the same time as they imposed the same rates which had been imposed on the other inhabitants, thereby shewing, that any thing beyond these rates whether in the shape of money, or charges, or rents was contrary to the intentions of His Majesty, and contrary to the clauses of the contracts. To restrict this violation to the mere taking of money, was to limit the abuse complained of to the simple case which was given rather as an illustration of it, than as the abuse itself. To restrain the seignior from taking money alone, while he imposed the same rates of *redevances*, for the concession and leaving him free to take this excess in any other form, is to restrict the spirit and meaning of the law so as to entirely defeat it. It would be to apply the restraining power of the law not to the abuse which it was intended to remove, but to the simple instance which was given as its illustration. The law of 1711 was emphatically a remedial law promulgated for the

express purpose of declaring by legislative authority, what the nature of the grants from the Crown had been, the object for which they had been made, and the conditions and limitations which had been imposed in the grants themselves. The abuse complained of was that money had been exacted in excess of the usual rates existing in the colony, thereby affirming the existence of *droits accoutumés* and that any thing taken in excess of these rates, was illegal and a violation of the grant itself.

It is however pretended that a prohibition to take *deniers d'entrée*, is no prohibition to impose any rates of concession which the parties might agree upon. Why not? Both are matters of agreement under the French law, both are recognized by the law of France, as legal, both are incidental to the tenure. It is true that the taking of *deniers d'entrée* is sometimes qualified as a sale. In its essence it may be so, but technically, it is not so. It is the consideration of the alienation as much as the *cens et rentes*: In France when the concession was based on the proximate value of the land conceded it was *le prix de la concession*. It is attempting to base an argument on a mere technical distinction. If the order to distribute the lands did not deprive the seignior of making his agreement with the censitaire, as to the terms of the concession, then it is impossible to assert that he could not include in his agreement every thing which by the laws of France was considered legal and a valid consideration for the conveyance, if not so, then,—the whole object of the *Arrêts de Marly* must have been merely to change the form of the conveyance ; by which the alienation of the land was effected and no more, and to leave the seignior to *faire la loi* to the censitaire as if he had been the absolute owner of the estate, unfettered by any condition or obligation of conceding or of settling the lands. The seignior must have power to contract or he is deprived of that power. If the former, I cannot see on what princi-

ple he can be limited in making the agreement if he do not transgress the law; if the latter, then he must be restricted to the concession as the King himself by all his Declarations, down to the *Arrêt de Marly* has explained it. To take *deniers d'entrée*, or money or to take the equivalent of money, is one and the same thing. To stipulate for what must be redeemed by money, is the same thing; to convert that money into a rent, is the same thing. It is to take more than the *redevances* established in the colony, and all are a breach of his contract as defined by the King in the *Arrêt de Marly*. In spirit one is as much a violation of the law as the other, and contrary to the declared intentions of the King. The *arrêt* in prohibiting the taking of money and enacting that the concession shall be *à titre de redevances*, plainly means that *redevances* which had been established in the colony, from its earliest settlement, for it refers to that which was established in the colony. There could not be different *titre de redevance*, here referred to. The King referred clearly to one, already in existence and which by universal consent had become the *taux ordinaire et accoutumé* in the colony, and which had been and must have been based on the common law of France as already stated, or settled by express limitation under his feudal grants.

But in my opinion the last part of the *arrêt*, which gives power to the Governor and Intendant to concede on refusal of the seignior, puts the matter beyond controversy. The *arrêt* fixes a rate for the guidance of the Intendant. It is plain that the duty to be done by the Governor and Intendant is a judicial act, for the concession is to be ordered on the summons or application of the inhabitant. The Governor and Intendant were bound to concede at the rates already established in the same seigniory, and it is clear that in the mind of the King there must have existed a well known rate. Now is it possible to suppose that the King intended to make the Governor and Intendant do what the

seignior himself was not bound to do. That altho' the Governor and Intendant were bound to a certain rate of concession, that the seignior could refuse to accept that rate himself, and such a refusal was not the refusal contemplated by the Crown, on the happening of which the jurisdiction and authority of the Intendant should arise. That the Governor and Intendant should be bound by the law, but that the seignior should not. That the King himself should be bound by the *arrêt de Marly* (for by the *arrêt* the King delegated his authority as Sovereign to the Governor and Intendant to enforce the feudal obligation of his vassal) and that the seignior was not bound. Such reasoning is altogether untenable, and if admitted would altogether defeat the law itself. The judicial act of the Governor and Intendant in granting the concession, does no more than what a Court of justice in this country does every day ; the judgment *fait titre* and in giving the judgment which the law ordered, on the refusal of the seignior, they did that which the seignior was himself bound to do. It has been said that the law in fixing a standard for the guidance of the Governor and Intendant did so merely to obviate any possible difference of opinion between these two functionnaires, in fixing the rate of concession, and that in doing so the King followed the common law rule in France and adopted as the basis of the standard *des droits accoutumés*, such as already existed. This is unsound reasoning ; for in France this rule only obtained when there existed no contract or when it was lost or could not be produced. The law presumed that when the seignior allowed the censitaire to enter without a contract, that both parties submitted to the rate already established in the seigniory. But it is not so here, for this is not the case of a possession by the censitaire without a contract, or where the contract could not be found, but the case of the seignior refusing to make a contract. For as all concessions are matter of contract, and as

the King ordered the seignior to concede, he necessarily ordered him to make a contract of concession, and in fixing the rate for the Governor and Intendant on refusal of the seignior, he necessarily fixed it for the seignior himself. The change wich the *Arrêt Marly* introduced was simply to give a right of action to the inhabitant to enforce the concession by a judgment, where no such right of action existed before.

But it is contended that the authority given to the Governor and Intendant was only to be exercised when the seignior could not agree with the inhabitant requiring the concession, as to the terms of it, and that in such difference the governor and Intendant should exercise a discretionary power in settling the rates, with a due regard to the circumstances of value or position. That it must be so, as the seignior had not been deprived of his liberty under the law of France, to make his contract as he choose, and that the exercise of such liberty, was no refusal under the *arrêt* of 1711, or breach of his feudal obligation. In fact that the Governor and Intendant were arbitra torsor unpires, and that they had the common law rule of France to guide them, in case of such disagreement, and this was the *taux ordinaire* or *accoutumé* already established in the colony or seigniory.

If so, on what principle of justice or common sense would the *arrêt* of Marly have decreed the forfeiture of all the lucrative rights to accrue on the lands so conceded, for the judgment ordering the concession, refused by the Seignior deprived him of any money claim whatever over the land so conceded? If the seignior was only exercising his legal rights, why should he suffer any penalty? If he had full liberty to make a contract, his refusal to conceded or his unability to agree on the terms of the concession was surely no violation of the law or of his feudal obligation,

and in such a case, how could any penalty be imposed on him, without a violation of every principle of justice! It is impossible to put such a construction on the law of 1711, a simple transposition of the words will suffice to show the true reading of the *arrêt*. After giving the order to concede, the *arrêt* goes on to say, "*et en cas de refus, de se pourvoir etc.*" Now by transposing the words "*aux mêmes droits imposés*" which follow the order to the Governor and Intendant, and joining them to the words which refer to refusal, the *arrêt* will read as follows: "Et en cas de refus "de concéder aux mêmes droits imposés sur les autres "terres concedées....de se pourvoir...." and will clearly establish what the intention of the King was, in promulgating the *arrêt*, and what he considered to be the abuse which was to be corrected, and what he likewise considered to be a violation of the feudal contract.

But even admitting that the Governor and Intendant were only empowered to carry out the common law rule in France on refusal of the seignior to concede, is not the conclusion inevitable, that the same common law rule was also binding on the seignior, otherwise what is the meaning of the word *refusal*? No one can be considered as refusing to do a thing, if bound neither by contract or law to do it. Under what possible contingency, then, could the jurisdiction of the Governor and Intendant arise? How could any *refusal* in the sense of the *arrêt* even arise, if not in the seigniors refusing to do, what the Governor and Intendant were themselves ordered to do for him the seignior in case or refusal. But it is said that the *arrêt de Marly* was merely intended to enforce the common law rule as it existed in France. If so, then the rule must be found in the Custom of Paris. If so, it must necessarily have been introduced into the Colony before the *arrêt de Marly*. There was therefore no necessity for enacting and enforcing such a rule by a special law as it already existed That it did exist be-

fore that period, and that it was acted upon by the Intendant not only before, but after the *arrêt*, is demonstrated by the numerous judgments which have been read by the President of the Court. Why then erect an extraordinary tribunal for the sole purpose of enforcing a common law rule which existed before the *arrêt* de Marly and which was always enforced by the ordinary tribunals, viz: that of the *Intendant alone* and which continued to be enforced by the Intendant alone after the promulgation of the *arrêt de* Marly. The Court was erected for no purpose whatever if that was its sole authority. It was a rule which was always acted on, whenever the contest arose between seignior and censitaire, when no contract was made. Of course in all these cases, it cannot be pretended that this rule was not binding on the seignior. But it may be said that it was binding in these cases because the censitaire had entered into possession. What possible difference could that make? In the one case a contract is presumed or implied to exist between seignior and censitaire, from the fact of the censitaire taking possession without a contract, in the other, the law of 1711 declaratory of the preexisting obligation of the seignior to grant a concession, was a contract in express terms. Both are made to exist as contracts, the one implied and the other express and made by the law. It will not be denied, I presume, that the contract which the seignior made when he accepted the grant, and as declared by the *arrêt de Marly*, is as much a contract as if he had granted a *billet de concession*, or had allowed the censitaire to enter without a contract. Then, what could be the object of the King in passing the *arrêt de Marly* if not to enforce the contract: The very argument used that this was a *droit acquis* to the censitaire, which the Governor and Intendant were bound to enforce in his favor, necessarily involves the existence of an obligation which this *droit acquis* can enforce; and against whom is it to be enforced? surely against him who

had assumed the obligation. If the *droit acquis* to the censitaire was to have the concession *aux droits accoutumés*, surely the obligation of the seignior was to grant the concession *aux droits accoutumés*. Even on the view taken, that it was to enforce a common law rule, such a rule is utterly incompatible with the idea of freedom in making an agreement. But the *arrêt* intended more than this. In declaring that the existing rates in the seigniory should be the rule, it necessarily fixed *these rates*, even if they did vary slightly, as a rule which all inhabitants could invoke, so long as that rule had the force of law. The refusal contemplated by the law of 1711, is the refusal by the seignior to do that, which by his contract he was bound to do, and that which by his refusal became a *droit acquis* in favor of the censitaire, what else can that be but to grant the concession *au taux ordinaire*? If notwithstanding this the seignior could *faire la loi* to the censitaire in making his concession, then no law whatever can be framed which could restrain him.

The second *arrêt* de Marly which has reference rather to the censitaire than to the seignior is full of instruction, in declaring the nature and the legal effect of the obligations imposed on the seignior by the Crown. The *arrêt* says that the *inhabitants* also had taken concessions of land from the seigniors, and instead of settling on them and bringing them into value, had contented themselves with making a little clearing, thinking thereby that they had done all they were bound to do, thus leaving the lands unsettled and depriving others the inhabitants of the advantages to be derived therefrom. The King then declares that this is contrary to his intentions and that these concessions were only granted and permitted " *dans la vue de faire établir* le païs et à condi- " tion que les terres seront habituées et mises en valeur " etc." Then follows the order to reunite in the terms of the *arrêt*. Now, what were the concessions here referred to

by the King? Were they the concessions to the censitaires? If so, it is clear that settlement was the obligation assumed by the tenant and that it was imposed by the Crown, for the King says that non-settlement was contrary to the very object for which these concessions had been made, and where are these intentions to be found if not in the grants from the Crown to the seigniors themselves. Here is another express declaration that the grants to his great feudatories were made on this express condition.

But in reference to the *arrêt* de Marly, it is necessary to examine the correspondence which took place between the Intendant Raudot and the Government of France in 1707-8, and which, it is said, gave rise to the two *arrêts*. It is pretended by the seigniors that this correspondence did not give rise to these *arrêts* as they do not meet in any way the abuses which are pointed out in the correspondence—That, although it might have been the intention of the King to have issued an edict or law on the subject yet it was never carried into effect, as the project of law framed by Mr. D'Aguesseau to whom the correspondence had been refered for that purpose, was only framed in 1711, and was never in fact carried into execution. The letter of Raudot which gave rise to the correspondence is dated 10 Nov. 1707. The first part of the letter refers to matters unconnected with the present investigation. The part which principally refers to the subject is in the third and fourth clauses of the letter. In speaking of the difficulty experienced by censitaires in obtaining title from the seignior after they had been in possession on mere *billets de concession* or mere promises of concession which did not contain any mention of the *charges de la concession*, the Intendant then says: " Il est ar-
" rivé de là un grand abus qui est que ces habitans qui
" avaient travaillé sans un titre valable ont été assujétis *à*
" *des rentes* et *à des droits fort onéreux*, les Seigneurs ne
" leur voulant donner ces contrats qu'à des conditions les-

" quelles ils étaient obligés d'accepter parce que sans cela
" ils auraient perdu leurs travaux, cela fait que quasi dans
" toutes les seigneuries les droits sont différens. Les uns
" payent d'une façon, les autres d'une autre, suivant les
" différens caractères des seigneurs qui les ont concédés.
" Ils ont introduit même presque dans tous les contrats un
" retrait roturier dont il n'est point parlé dans la Coutume
" de Paris qui est néanmoins celle qui est observée dans ce
" païs, en stipulant que le seigneur à chaque vente pour-
" rait retirer les terres qu'il donne au roture, pour le même
" prix qu'elles seraient vendues, et ils ont abusé par là du
" retrait conditionnel dont il est parlé dans cette Coutume
" qui est quelquefois stipulé dans les contrats de vente où
" le vendeur se réserve la faculté de réméré, mais il ne se
" trouve point établi du seigneur au tenancier. Cette pré-
" férence gêne mal-à-propos toutes les ventes.

" Il y a des concessions où les chapons qu'on paye aux
" seigneurs, leur sont payés ou en nature ou en argent, au
" choix du seigneur ; ces chapons sont évalués à 30 sols et
" les chapons ne valent que dix sols, les seigneurs obligent
" leurs tenanciers de leur donner de l'argent, ce qui les in-
" commode fort, parce que souvent ils en manquent. Car
" quoique 30 sous paraissent peu de chose, c'est beaucoup
" dans ce pays où l'argent est très rare, outre qu'il me sem-
" ble que dans toutes les redevances, quand il y a un choix,
" il est toujours au profit du redevable, l'argent étant une
" espèce de peine contre lui quand il n'est pas en état de
" payer en nature."

This is the only part of the letter which requires to be here noticed, as it is the only part which refers at all to the abuses (except that part which prescribes the remedy for them)and to the conditions of the contract d'accensement. The only part which could possibly refer to the *cens et rentes* or where he uses the word, is " ***à des rentes et droits fort onéreux.***"

reux." In no part of the letter does he say that the *redevances* were overcharged or that they exceeded the *taux ordinaire et accoutumé* established, except in the way they were stipulated, " en payant d'une façon et d'une autre." He complains of the manner in which they were levied and of the imposition of charges unknown to the tenure in Canada. It is in the manner in which the redevances were levied that he complains of, by the substitution of payments *en nature*, and the arbitrary manner in which they were valued : in no part does he say that the rate of *cens et rentes* was raised, from the usual and accustomed rate, except in that way, and in the imposition of new burthens which were redeemable in money ; no stronger evidence can be given to shew that there existed a rate, than that the seigniors attempted to exceed it, by the imposition of new charges. Every part of his letter where he enters into the details of the over charges, shews clearly that this was his view and that the *rentes* became burdensome in this way and in this alone.

It is a complaint of the overcharge illegally, as he thinks, imposed and the way in which the *rentes* were levied and he suggests the remedy in the latter part of his letter, and which was to declare these charges illegal, and fix a uniform rate, as well for the past as for the future, to obviate the exactions which had taken place, where the payments were *en nature*, and to render invalid all charges which were in excess of the *redevances* alone. On reference to the answer of Mr. Pontchartrain and Mr. Deshaguais, this view will be found to be confirmed, for the object which they seek to attain is *pour y mettre une uniformité et de réduire tout sur le même pied.*

This view of Mr. Raudot at any rate shews what the representatives of the King in the Colony thought of the relative rights of the seigniors and censitaires, and the *arrêts*

de Marly met this view, in that respect. It is clear that if the Intendant thought that the difference in relation to the value of the capon, was a matter to be complained of, that it is utterly unreasonable to suppose that there then existed no fixed rate in amount at least, in the Colony and that the seigniors could impose such *cens et rentes* as they could, by any pretext, force their censitaires to agree to.

The *arrêt de Marly* in prohibiting all sales of land, or the taking of *deniers d'entrée*, in compelling seigniors to concede only *à titre de redevance* and without demanding any sum of money for the concession, necessarily excludes the idea of imposing any charges not in the nature of a *redevance* properly speaking and as it was understood in the Colony, which charges they, the censitaires, were afterwards compelled to redeem in money; if charges, even, were considered illegal as being beyond the *redevances ordinaires*, by what possible system of reasoning or logic can it be legal to raise the *redevance* itself. No argument can be drawn from the fact that the project of law by Mr. D'Aguesseau was never carried into effect, if enough can otherwise be found down to and in the *arrêt de Marly* to determine the nature of the rights and privileges of the inhabitants of the Colony. This view, I contend, is fully borne out by the project of law itself supposed to be framed for the express object of removing the abuses complained of by the Intendant Raudot. For, on reference to it, it will be found, that he, D'Aguesseau, especially refers to the vexatious charges and reserves imposed by the seigniors, and rests the *cens et rentes*, or the *redevances* on the basis of the *arrêt* of 1711, and qualifies them in the same language as the usual or accustomed rates under the *arrêt de Marly*. If the Intendant had complained of any raising of the *redevances* by express stipulation, I mean the *cens et rentes* above the *taux ordinaire*, D'Aguesseau would undoubtedly have refered to them in his project of law, and he would never have him-

self used the words of the ***arrêt de Marly*** and leaving the *cens et rentes* to be regulated as they had always been, on the well known usage in the Colony. The last part of the project of law explains the ***arrêt de Marly*** precisely in the way in which I have explained it. These documents shew clearly enough that there was a usual and accustomed rate but that it was attempted to be exceeded not by raising the redevance as it was universally understood and accepted in the Colony, but by the imposition of new burthens unknown to the tenure, as it had been modified on its introduction into the Colony; otherwise it would have been in some way refered to in the project of law of D'Aguesseau and he never could have continued to use the terms ***usual*** and ***accustomed rates***, if these usual and accustomed rates had been interfered with, in any other way than that already pointed out.

The ***arrêt*** of 1732 reiterates in express terms the obligation imposed on the seigniors by the ***arrêt de Marly***, and in the ***dispositif*** of the ***arrêt***, the obligation is clearly enunciated, when speaking of the abuse which had crept into the Colony, of seigniors holding large parts of their seigniories as a ***domaine***, and of selling instead of distributing them as they were bound to do,—in the words "***au lieu de les concéder simplement à titre de redevances.***" If the words ***simplement à titre de redevance*** mean any redevances which the seignior might choose to impose or which he could agree on with his censitaire, then the ***arrêts*** of 1711 and 1732 are a dead letter, and the law authorities of France from whom these ***arrêts*** emanated must have altogether misunderstood their legal force, and although passed to express the true meaning of all the grants of the Crown and to enforce this meaning, if necessary, by the forfeiture of the estate of the grantees, they must have completely failed in their object, and the intentions of the Crown in making these large grants have for ever remained unfulfilled. But these laws were well understood in the colony not only by the King's repre-

sentatives but by the seigniors during the whole period of the french domination in Canada. For the *ordonnance de Hocquart* of 23rd June 1738 in the case of the seignior of Gaudarville and five of his censitaires confirms this ; altho' one part of the dispute related to the place where the concessions should be taken, yet the rate of concession according to the intentions of His Majesty was there established and settled, and it was the rate then established in his seigniory. It has been attempted to shew that as no rate of concession was fixed by the *billets de concession* which had been given to these five censitaires, that it was to be presumed that the rate would be the rate already established in the seigniory and that this judgment only affirmed and carried out the common law rule as it existed in France when there was no contract. If such was the meaning of Hocquart's judgment, he did not know it, he gives a different ground altogether for it, namely the intentions and orders of the King It is unsound reasoning thus to twist the plain and evident meaning of a judgment, on purpose to base a theory, which, it is evident, was quite unknown to the very man who gave the judgment.

In the case of Portneuf 20 July 1733, the rate is fixed by the Intendant unless the censitaires choose to take these concessions according to the contracts which had been produced, of the year 1684 and 1685, this corresponds with the authority cited by Henrion.

The judgment of Raudot in the case of the seignior of Becancour in 1710 is only important as it declares that his judgment *vaudra titre de concession*, in case of the refusal of the seignior to comply with his orders. This case shews that the concession granted by the Intendant on refusal of the seignior was understood to be a judicial act even before the *arrêt* of 1711, and that the Intendant in 1710 had power to concede by a judgment. How the mere fact

of adding the Governor and Lieutenant general to the Court could make it cease to be a Court, I am at a loss to understand. So also in the case of the seignior of Demaure. The Intendant Begon ordered the concession to be given in accordance with the old concession, forbidding at the same time the imposition of new charges. This surely was in accordance with the *arrêt* of 1711. So also in the case of the seigniors of Eboulements, the rate is fixed by the Intendant Begon. So also in the case of Dames Religieuses of Quebec in possession of the seigniory of Demaure, by the judgment of Hocquart of 10th January 1738, the rate is fixed if no contract can be produced. So also in the case of the seignior of Berthier and the seignior Gourdeau and seignior Noel, the first dated on 23rd February 1748 and the latter on 13th April 1745; and in the case of Jean de Paris. These judgments were also rendered by Hocquart See the two judgments in the case of Bissonnet and Dame Verchères, which are said to be contradictory; the first rendered 3rd July 1720 and the 2nd, 14th September 1720 by Begon. These cases were contested on grounds which cannot affect the question. It was a mere contest between two individuals on ordinances which each had separately obtained from different Intendants. See case of veuve Petit. See the case of Vincelotte before Begon of 28th June 1721, were the Intendant fixes the rate according to the most ancient concession, and forbids any charges whatever but those of mere redevance according *to the intentions* of His Majesty in the *arrêt* of 1711. An objection is taken to this case on the ground, I believe, that the concession having been made before the *arrêt de Marly*, the Intendant was mistaken in his right to take cognizance of it and to enforce, in this case, the provisions of that *arrêt*. I think this is wrong reasoning. For it only, the more clearly, shews the view taken of the *arrêt*, that it was purely declaratory in its provisions, embraced all cases as well before as after the

passing of it, and that the inhabitants had the right to enforce its authority even in cases where concession had been made previous to the passing of the *arrêt* of 1711, when the previously existing law had been violated. Apart from these decisions by the Intendant, there are four concessions made by the King after the *arrêt* of 1711, in which the rates of *cens et rentes* are stated, at which alone the seigniors shall concede. In all these the rates are declared to be according to the intentions of the King. What intentions and where expressed? If not in the *arrêt de Marly* and in the interpretation put by himself on his own grants.

The first concession en fief to which I shall refer is the augmentation of Beaumont, granted 10th April 1713. The clause in relation to the *cens et rentes* is in the following terms: " de concéder les dites terres, à simple titre de re- " devances de vingt sols et un chapon pour chacun arpent " de terre de front sur quarante de profondeur et six deniers " de cens, sans qu'il puisse être inséré dans les dites con- " cessions ny somme d'argent, ny aucune autre charge que " celle de simple titre de redevances et ceux ci-dessus, sui- " vant les intentions de Sa Majesté."

The same words are used in the grant of the seigniory of Mille Isles of 5th March 1714, with this exception only that the depth of the concession to be granted is stated to be 30, in depth, instead of 40.

The next to which I shall refer is the grant of Lake of 2 Mountains on 17th October 1717. The same words are used as for the seigniory of Beaumont as to rate of concession, and the clause is repeated in the ratification by the King in April 1718. The last grant refered to is of the 18th April 1727, of the seigniory of augmentation St. Jean, in Three Rivers. The same clause is again introduced, but the depth of the concessions is stated to be 20 arpents. In all these grants, the limitation of the *cens et rentes* is stated

to be according to the intentions of the King Now it is clear, if the intention of the King is to be found solely in the grants themselves and to apply solely to these grants, it was entirely useless to speak of intentions, as the terms and conditions of these grants would sufficiently demonstrate what those intentions were. These grants surely refer to intentions previously made known. If these grants changed the law as it existed before they were made, then the intentions of the King to do so must be found somewhere. If on the contrary these grants were made in pursuance of the law and of the intentions of the King previously declared, then where are these intentions to be found, if not in the previous grants to the seigniors and in the law of 1711, for such was the interpretation which the King himself put in these laws. Here also you have the true meaning which the King had always put on the words "*de concéder à titre de redevances*," so frequently used by the King in all his acts and laws. It means and it can mean nothing else than the explanation which is given in these four grants. It was a mere mark of the *directe*, never intended to be a revenue to the seignior, but to be the basis of the future profits which the tenure would give him. The exclusion of taking money and the imposition of any charges whatever characterises the true change which was introduced into the tenure in Canada, and which was the express condition of the grants, that the *jeu de fief* was to be in Canada without limit, but it was to be by concession alone and *sans faire profit de son fief* on the first alienation of the land. Then follows on all this evidence the subsequent grants of the King, 45 in number, where the words *taux accoutumé* or *redevances accoutumées* are always used. The King must have refered to the rates which had always existed and which were by himself declared to be *ordinaires et accoutumés*, when he, as he thought, sufficiently expressed what this *taux* was in the four grants. But an objection has been

taken to these grants, on the ground that the depth of the concessions having varied from twenty to forty arpents, that the rates must have varied also, as, in calculating the superficial contents of the concession, the rates will be found to be different in these seigniories, and that as there was a variance in these rates, that there was and there could be no fixed and uniform rate of concession. By such reasoning no law can be found which is not liable to objection. The depths of the concessions in Canada always varied according to position, but this cannot affect the principle on which the *cens et rentes* were always applied, viz, by the arpent in front, by the depth whatever it was, not exceeding however forty in depth. In my mind, this, on the contrary, affords very strong evidence that the rate was to be the same, no matter what the concession was in depth not exceeding forty arpents, as the *redevance* was intended, in the words of Hocquart, (if my interpretation be objected to, altho' his opinions, however good they may be in relation to charges and other matters, are of no force when the *cens et rentes* are referred to) to be the mere *cens récognitif*, never intended for purpose of revenue, as all idea of revenue must have been excluded from the mind of the King, when he stipulated that settlers should be sent out and located on wild lands, for the express purpose of giving them a value. How otherwise can the *arrêts de retranchement* be explained. It was the labor of the censitaire which was to give value to the seigniory, and how can it be supposed for a moment that the King intended under these circumstances to allow the seignior *de disposer et faire son profit de toutes les parties utiles et fructueuses de son fief*, under the authority of the 51st article of Paris, before it possessed any value whatever. The other objection which is taken is, that on the ratifications of the King of the augmentation of Lake of Two Mountains, the clause relating to the concessions to be made is struck out, and this on the representation of the *Abbé*

Couturier, and that the striking out of this clause clearly shews that the intention of the King was not to bind the grantees to this obligation, and that it implies therefore the right of making a contract, and of removing the restriction from all other seigniories. If these four cases had imposed conditions which were more onerous than those imposed on all other seigniories, is it likely that the *Abbé Couturier* would not have remonstrated with the King and have had this restriction removed? A glance at the correspondence will shew that such was not the intention, for it will appear that the reason for striking out this clause, was not to give liberty on the subject absolutely, but only in cases when more land was granted in a concession than was usual, and in cases of land being more valuable either by its being partly under cultivation or of its being a natural *prairie* or meadow land. But as regards wild land, *en bois debout*, *en friche*, *non mise en culture*, I can see nothing to justify the idea that the King intended to overturn all his previous legislation and change the whole policy which had dictated this legislation, from the first settlement of the Colony.

As some importance has been given to the change in the conditions of the new grant to the Seminary of St. Sulpice, I will transcribe the few words which refer to this change, in the correspondence of Hocquart of 6th October 1734. In No. 4, he says: "Nous ne savons point les rai-
"sons qui ont déterminé Sa Majesté à fixer dans le brevet
"de 1718 *la profondeur des concessions à* 40 *arpens, et la*
"*quotité des cens et rentes.* On a cru se conformer à ses in-
"tentions en mettant seulement dans celle de 1733, *aux cens,*
"*rentes et redevances accoutumées* par arpent de terre de
"front sur 40 de arpents de profondeur.

"L'observation sur la justice et l'équité de proportion-
"ner les cens et redevances à la qualité de l'héritage qui se
"peut trouver meilleur dans un endroit que dans un autre,

" mérite considération," if it merited consideration, then it must be surely clear that *value* before that time, did not in any way affect the obligations ; for what possible difference In vaine, can exist in wild lands ; even to this day the Crown land office makes no difference but fixes one price for the sale of all the Crown lands, " et il nous paraît que S. M. " peut se contenter de faire insérer dans le nouveau brevet " à expédier, *aux cens et rentes et redevances accoutumées* " par arpent de terre."

Now on reference to the ratification of this grant by the King, the very distinction pointed out by Hocquart, in the following words of the grant, " aux cens, rentes et re- " devances accoutumées par chaque arpent de terre dans les " seigneuries voisines, en égard à la *qualité et à la situation* " *des héritages*" is intended to meet the case of land partly cleared or meadow land as stated in the letter of the Abbé Conturier, " aux temps de la concession ; " and further this clause is to apply to the former grant of seigniory of Lake of Two Mountains, " Cette expression vague laissera la " liberté au Séminaire de concéder plus ou moins de pro- " fondeur et à plus ou moins de cens et rentes, à proportion " de l'étendue des héritages et même de leur bonté. Et " comme les usages sont différens dans presque toutes les " seigneuries, le terme *accoutumé*, restreint seulement les " ecclésiastiques à ne point concéder pour l'ordinaire, " moins de vingt arpens de profondeur et à n'exiger de plus " fortes rentes que celle de vingt sols pour chaque vingt ar- " pens en superficie et un chapon ou l'équivalent en bled. " A l'égard du cens comme c'est une redevance fort modi- " que qui n'a été présumée établie que pour marquer la " seigneurie directe, et qui emporte lods et ventes, la quo- " tité en usage en Canada est depuis six deniers jusqu'à un " sol par arpent de front sur toute la profondeur des conces- " sions particulières *quelle que soit cette profondeur.* L'ex- " posé du mémoire que les seigneurs en Canada ont la li-

" berté comme partout ailleurs de donner à cens et à rentes " telle quantité de terre et à *telle charge* que bon leur sem- " ble, n'est pas juste à l'égard des charges, la pratique " constante étant de les concéder aux charges dessus ex- " pliquées et plus souvent audessous; si la liberté allégnée " avait lieu, elle pourrait tourner en abus, en faisant dégé- " nérer des concessions qui doivent être quasi gratuites, en " de purs contrats de vente." This liberty as regards cens et rentes evidently applies to greater or less extent of land. I think the fair construction to be put on this, is that if the concession should be of more than 40 in depth or of more than the usual front, that the rate which was already calculated on the frontage and by the depth, should be greater if the concession was greater, and that if the land was not wild land, *en friche*, but partly cultivated or in meadow, that a higher rate might be charged. How this can be said to have changed the character of all the other grants, I am at a loss to know. If difference in mere value, in the words of Hocquart, merited the consideration of the King, surely the clear inference must be that any possible difference in value, before this date, could have had no effect on the concessions; and as the King has no where expressed his intention to change the law of 1711, in this respect, but on the contrary frequently reaffirmed it, it remained the law of the Colony down to the termination of the french domination.

On this point it may be proper to refer to the case of Lenoir dit Rolland and [illegible] Berthé, decided by Mr. Daillebout, on 5th February 1675. No contract had been made between the parties, but Lenoir had been tendered a contract, (It does not quite appear whether or not Lenoir had been in possession under a brevet or promise or not by the seignior of the *arrière fief*,) and he refused to sign or attacked the contract if he had signed it, (it does not appear which) on the ground, that the *cens et rentes* and charges were ex

cessive. To this action the procureur Fiscal of the King was made a party by the order of the Court; the plea set up two points: 1o that a seignior was not obliged to concede, and 2o that the value of the land to be conceded was such as to justify seignior in his demand. Both these points were on the contestation of the procureur Fiscal overruled, and the concession was ordered at the rate claimed by Lenoir. The contestation of the Procureur Fiscal clearly points out the true nature and character of the grants from the Crown. This case is remarkable as having formally determined two questions which certainly enter very largely into the settlement of this question. If, as it is pretended, that a progressive rate was to be the rule to be determined by the progressive value which the land might acquire, and that such progressive value was to be the guide for the Governor and Intendant when called upon to grant the concession on the refusal of the seignior; then, how is it that not a document of any kind can be found in the archives of the Colony to justify such an opinion! The very reverse is declared by the King to be the law; for, in ordering the *arrêt* of 1711 and 1732 to be put in force and in fixing the rates of concession in some seigniories, and in others, ordering the concessions to be at the usual and accustomed rates, as fixed by the first of the *arrêts de Marly*, he in the clearest manner negatived the idea of any change or increase in the rates of concession.

Hervé 1 vol. p. 415. " L'usage général d'une sei-
" gneurie appellée *usance* ou *usement* de fief peut quelque-
" fois suppléer à la coutume et aux titres particuliers et suf-
" fire pour soumettre à un droit ou à une prestation qui s'ex-
" erce généralement dans l'étendue du fief, quelques vas-
" saux ou censitaires qui prétendraient se soustraire à ce
" droit ou à cette prestation; car lorsqu'un droit quelconque
" est énoncé dans presque tous les titres du fief et s'exerce
" sur presque tous les sujets de ce fief, il doit être regarde

" comme un droit naturel de la seigneurie dont personne " n'est exempt, à moins qu'il n'ait un titre precis d'ex- " emption."

This is the principle of the feudal law. The *usance* or *usement* exists in France, where full liberty is given in contracting, and exists, when there is no contract. If this law is sufficient to impose the charges on the censitaires, it is equally powerful to relieve the censitaires. The *usement de fief* was established in Canada, for it is in fact the *taux accoutumé* or *ordinaire* invariably declared to exist. The *arrêt* of 1711 in terms affirmed its existence et declared it to be the rule for all seigniories. This rule existed in France when the rates varied, and it was considered an undoubted rule of the feudal law. In Canada the rates varied in the seigniories; why should it not be the rule here? If it obtained in France when the seignior was unrestricted in making his concession, much more should it be the rule here, where this liberty is taken away.

It may be now necessary briefly to allude to the principal objections which have been urged to establish that the seigniors were at full liberty to make the contracts of concession, that no fixed or usual rate existed in the Colony and that the rates varied in all the seigniories.

1. That no rate is mentioned in any of the grants previous to the laws of 1711 and not even in these laws, what difference does this make if a customary rate existed in the Colony and the law of 1711 adopted this rate as the guide for the future? It is clear that there was a variation, in the manner of imposing these rates; that instead of being all imposed in money, the payments in many instances were stipulated to be made in grain and in capons. From all that has been said on this subject it appears to me that there was no variation in the amount of the *cens et rentes*, but that

any variation which can be discovered, will be found to exist and be caused from the changes in value of the species in which the *cens et rentes* were to be paid, and not otherwise, and in applying the rates agreed to be paid to concessions varying in depth, by calculating their superficial contents. The rates varied from a fraction of one *sol* to two *sols* for the whole usual concession, and I think it may be stated as a fact that in no well established instance under the French Government can it be shewn that it exceeded 2 *sols*, by actual stipulation as *cens et rentes*; and even if one, two or three cases can be shewn, these cases cannot change or affect the principle that there was a usual and accustomed rate throughout the whole Colony. This variation, always under 2 *sols* and not over that amount, also will be found to be produced in cases where the depth of the concessions was different, the depth in some seigniories being 20 arpents, some 30, and some 40 arpents according to position; and this uniforme rate was stated to exist in the Colony by all the legally constituted authorities, and so affirmed by the law of 1711; at any rate if a few cases can be produced, it never can be pretended that a violation of a law in a few instances can abrogate the law itself. The cases which have been cited to shew the variance, are based on this calculation of the superficial contents of the whole concession, and about ten only were cited, and this over a period of 160 years.

I think in the view which I have thus taken, that the law of 1711 established this rate beyond controversy; for the King in ordering the Intendant and Governor to grant all concessions at the usual rate, necessarily admits the existence of this rate, for the judgment of the Court only ordered that to be done which the seignior himself was by the law and his contract bound to do. In fact the only thing to be ascertained in reference to this law, is, what constitutes a refusal to concede by the seignior. If it

is no refusal on the part of the seignior to ask what he chooses for the concession, and impose such charge, as he chooses, then those laws cannot bear the interpretation which the King and his officers gave to them and which by universal consent before 1759 was given to them ; and the seignior could not be bound by their provisions.

It is also stated that the law only applied to seigniories then granted and did not apply to any future grants, and that, if no concession had been made in any seigniory , it could not apply to that seigniory. This is altogether untenable, for these laws have been admitted to be in force and applicable to all seigniories by every Court of justice both under the French and English Governments. The declarations of the King and of the French Government down to the conquest have without exception, affirmed these laws to be continuing and subsisting laws, and have uniformly ordered them to be strictly observed and enforced. As to the second objection, that they could not apply to seigniories in which there was no concession, at the time of their promulgation, and that as no standard existed in the seigniory, that the laws could not apply ; it is only necessary to observe that this law was passed for the benefit of all the inhabitants, and not for one individual and that if it be a continuing and subsisting law, it must apply to all, otherwise, it would be in the power of a seignior by making either a fictitious concession or even a fair concession at high rates, thereby to create a rate for his own guidance and thus deprive the other inhabitants of all benefit under the law, and defeat the whole effect of the law.

That it is impossible to establish one uniform rate for all the seigniories, and that to take a medium rate might be unjust, as not being the rate which had been contracted for. This objection or rather the first of them rests on the difficulty or impossibility of determining a matter of fact and

not of law, but this cannot affect the law, if law there be, for it is not contended that the rate was identical throughout the Colony, but that it was *usité et accoutumé* and never exceeded a certain rate. This also is unsound reasoning, for a *taux usité* may exist in amount, altho' it may vary in the manner of payment by the accidental increase in value of the thing given in payment. It is sufficient to shew that a *maximum* rate, in itself only a *modicum canon*, actually existed, and this slight variation can never create a total exemption on the part of the seignior to obey the law. The 2 *sols* rate was unquestionably the *maximum* rate under the French Government, and because some seigniors took less, or that the rate varied from 2 *sols* down to less than one *sol* can never justify the prete ion in law that any rate whatever could be charged.

An objection has also been made on the ground that altho' in France, the *cens et rentes* were in appearance low, that the original constitution of the *cens et rentes* was fixed when money bore a much higher standard of value, and that in reality it approached the value of the land conceded. This may be true as an historical fact, but it is equally true that the authors, who maintain this principle, altho' the most eminent contest it, such as Dumoulin, and Hervé admits almost all the great feudists, also state that such an argument, if good in reference to those seigniories which were conceded when money bore this high value, does not and cannot affect cases where the grants were made after the money had fallen in value, and the grants in Canada fall within this class. This will be found to be the case on reference to Henrion de Pansey, Dissertations feodales vol. p. nouv. Denizart, vo. cens, p.

Both these last authors in contesting the doctrine of Dumoulin on this point, admit, while they contest the principle, that his view is embraced by all feudists, and admit

the law even in the last class of cases given. It must be remembered also that in France the seigniors were absolute masters and owners of their fiefs, while in Canada they were owners, but subject to the conditions originally imposed in the grants.

In conclusion on this branch of the subject, I may remark that the argument of the seigniors has been rather to point out, not what their obligation under their contracts and the *arrêts de Marly* are, but what they are not. First, they say that there was no obligation to concede and that the *arrêts* of Marly and of 1732 are not binding, as they are in fact a violation of their rights under the grants from the Crown. That the contract must bind the Sovereign as well as themselves, and that any interference with their acquired rights is such a violation of them as that no court can with propriety recognize, that is, that they were not bound to concede at all and not in any way restricted in the property and enjoyment of their grants. That the obligation imposed on their grantors the Company of New France and therefore on themselves, was nothing at all. That the arrêts of 1711 and 1732 were nothing, that the *arrêts de retranchement* were nothing, that the reunions to the Crown domain for breach of feudal obligation were nothing, that all was a mere threat, never intended to be inforced; they were, in fact, I can scarcely say what, a mere joke, *une plaisanterie feodale* of the King, intended for what it is impossible to say. On this point I will make no further remarks. I consider the *arrêt* of 1711, as a declaration of the rights of the seigniors under their contracts of concession, a declaration made by the supreme legislative authority of the country, of which the Colony was a dependance, an authority which never was as it never could be contested, a declaration which never was in any way denied to be true, which was on the contrary received and recognized and acted upon during the whole period of the French domination in this country, not

only by the representatives of the Crown, but by all the seigniors themselves. No remonstrance was ever made, still less was it ever pretended that this law was a violation of the rights of the seigniors, as now it is pretended to be. On the contrary it was received by all as a just and true exposition of the feudal contract existing between the Sovereign and his fendatories, an exposition which was reiterated in many declarations of the King, down to the year 1759, in number of grants en *fief* made by the Crown after 1711, an exposition which the Crown, by its declarations, ordered its representatives here, continually and effectively to enforce. And now after a period of 150 years, these titles are exhumed from the tomb in which they had slept, and are invoked to show that, because the Crown did not in all the grants impose, in direct terms, the obligation which the supreme legislator of France declared was the condition on which alone these grants had been made, they are not binding on the seigniors, and that they must be considered to be absolute owners of their *fiefs*, as seigniors were under the law of France and with perfect freedom in their disposition and use.

If their titles are decisive of the question, why were they never invoked by the seigniors under the French Government? When thier seigniories were reunited to the Crown for the violation of the feudal obligations. If this reunion had been an act of despotic power, unsanctioned by any laws, or in direct contravention to the contracts, they would surely have offered some remonstrance to the Crown against such a gross violation of all justice. But they never did so, simply because they could not do so. The law of 1711 was no vague, indefinite and oppressive law to them. It was some thing more than a mere common law rule, to apply only when the seignior did not *make his own contract.* They understood its meaning and its force, and they obeyed it. In argument the law has been submitted to the test of

severe verbal and legal criticisme, and the rules of the present day for the interpretation of statutes are invoked to show that this *arrêt* altho' strong to bind the censitaire, does not in any way meet the requirements of law to enable it to be enforced against the seigniors. In determining the character and legal operation of this *arrêt*, we ought to look, not to the rules of the modern law, but to the condition of the country for which it was promulgated, the object to be attained by it, the circumstances of the country at the time of its promulgation and the kind of legislation which existed at that time. Then the mere order of the King had the force of law. He could change it at will, and above all he could interpret his own laws. His declarations in whatever form made, had all the power and effect of the highest legislative authority and they were so acknowledged and acted upon. In declaring therefore that his representatives should grant the concession for the seignior in case of his refusal to do so, at the *taux accoutumé* or *aux droits accoutumés*, he necessarily affirmed, that there did exist such a *taux accoutumé*, and that declaration had the force of law in fixing that rate which had been so *reconnu, usité et accoutumé*, as the guide for the future in all concessions *en censive*. If the *arrêt* did not mean this, it meant nothing. But it is said that there was no uniform rate in the colony, that there could be no fixed rate to which the seignior could be restricted. If it be contended that to render a rate *usité et accoutumé*, it must be one identical and unchangeable rate, and that any variation therefrom takes from it its character of being *usité et accoutumé*, then the Governor and Intendant could have had no rule to guide them on the refusal of the seignior to concede,—what then becomes of the *common law rule* in France, which was also based on this *taux usité et accoutumé*, which was the guide of the courts in France, in the absence of a contract ; for it is undeniable that in the cases where this rule was to be applied, the rates

as a matter of fact, varied. If thus it could be enforced there, why can it not be enforced here, and if so, then the only question to be setled is, was this rule binding on the seignior as well as on the Governor and Intendant and was it fixed such as it was, by the *arrêt* of 1711, so as to make it a rule binding on all seigniors from that day? On this point I can feel no doubt. The whole legislation on this point followes in complete sequence on the original obligation imposed on the seignior. The concession was made obligatory and without *profits de fief*, either to the dominant or the seignior. This rule was violated and as no action existed in favor of the *censitaire* to enforce this obligation. the *arrêt* of 1711 was promulgated, to explain and enforce this obligation and give this right of action to the *censitaire* to enforce it; this *arrêt* declared that the idea of a compulsory concession was inconsistent with the idea of taking *deniers d'entrée*, or of making *profits de fief*, but action was given to recover back money thus improperly exacted. Then followed the *arrêt* of 1732, which reaffirmed the law and gave this action and as a punishment for its infringement reunited the land to the Crown domain. The laws follow on the abuses to be remedied as they arose, and coincide with the feudal obligations as understood and admitted by all. If these laws do not explain the relative rights of the seigniors and censitaires in relation to their grants, their language is unavailing to do so. If the seignior were under these circumstances free to make their own conditions, *de faire la loi* to the censitaires in granting their concessions, then these laws may be treated as inoperative. but if such an interpretation is to be given of them, then, in the language of Dumoulin, it may be said "*ce serait non* "*pas de jouer de leur fief, mais de leur seigneur.* I conclude my remarks on this branch.

SECOND PART.

ARE THE ARRÊTS IN QUESTION LAWS OF PUBLIC POLICY, (D'ORDRE PUBLIC)?

Assuming therefore, that under the French domination, a uniform rate of concession existed, and that such a uniform rate was affirmed and settled by the *arrêt* of 1711, and on the universal custom of the colony, and before that *arrêt*, the question necessarily arises, could such a law or such a custom be derogated from, by express agreement, between the seignior and the censitaire? On the solution of this question the whole controversy as regards the question of the *cens et rentes*, as, I view it, rests. For, if it can be shewn that the rate of *cens et rentes* could be settled by agreement, notwithstanding the *arrêt* of 1711, and the universal custom of the colony, then the pretensions, set forth by the censitaires, are without foundation. If on the contrary, the usual and accustomed rate could not be derogated from by express agreement, then as auxiliary to and dependant on it, it becomes necessary to determine, what the precise legal enactments of the *arrêt* of 1711 are, and the remedy given by it, for its violation.

First, then, as regards the character of the laws itself. On behalf of the Crown, it is pretended that the law is strictly d'*ordre public*, and that any violation or departure from it, is absolutely illegal and therefore utterly null and void.

That the law was passed in the public interests, for the political object of enforcing the settlement of the colony;

that the seigniors had received their grants as a free gift, on the express condition of distributing the lands in the seigniories to all persons demanding concessions for settlement;—that for the very object of securing settlement, it was necessary to limit the property of the seigniors in their seigniories, and to change what would otherwise have been an absolute property, into a property burdened with the condition of conceding at a certain fixed rate of concession;—that it was a matter of high public policy on the part of the Crown, and that without such an obligation being imposed on the seigniors the very object of the grants to themselves would have been altogether frustrated;—that it was a law passed entirely in the public interest, based on notions of purely public considerations and policy, and therefore in its very nature a public law, not founded on any temporary policy but intended from the very position of the colony to be enforced strictly, so long as this policy existed, that is, so long as there were lands for settlement in the colony;—that from the very nature of things, such a law must be considered as compulsory and as essential to the feudal grant from the Crown, for if perfect liberty had existed in fixing the rates of concession, it is clear that this great policy would or might have been in part, if not altogether, frustrated, and the settlement of the country, which was the great object of the Crown, a might have been entirely prevented, or at any rate indefinitely postponed.

The foregoing may be taken to be the principal, if not the only, reasons which may be urged on this point, for determining that the law of 1711 is one *d'ordre public*, and inviolable. Are they such as to lead to that conclusion, and that the law of 1711 falls within the requirements of a law *d'ordre public*? (1)

(1) Domat. Des lois, ch. 13, no. 7.

" Les matières du droit Public sont celles qui regardent l'ordre du " gouvernement de chaque état, les manières d'appeler à la puissance

A law to be considered a public law, *d'ordre public*, must be one framed in the public interest, embracing in its application the whole public, either in the government of the country, or in the administration of the laws of the country. Thus, laws relating to the civil status of citizens, laws relating to marriage, to the administration of justice, to succession and so forth, are all public laws and *d'ordre public* and cannot be violated. But the private stipulations made in relation thereto, and regulated by contract, where the public laws are not violated, fall within the domain of the private civil law, and are regulated by the conventions of the parties, unless the conventions are specially prohibited in the laws themselves. Now by the common law of France, it is undeniable, that whatever relates to the concessions of lands *en seigneurie* is of private civil law, *et de droit privé et conventionnel*, and is regulated by the agreement of the parties. These agreements may violate some principle of the feudal law as regulated by the Custom of Paris. But the violation of this feudal law does not destroy the conventions of the parties, it only gives rise to the payment of certain dues or penalties which have been imposed

" souveraine les Rois, les Princes et les autres Potentats par succes-
" sion, par élection ; les droits du souverain, l'administration de la
" justice, la milice, les finances, les différentes fonctions des Magistrats
" et des autres officiers, la police des villes et les autres semblables.

" Les matières du droit civil sont les engagemens entre particu-
" liers, leur commerce, et tout ce qu'il peut être nécessaire de regler
" entr'eux, ou pour prévenir des différents, ou pour les finir, comme
" sont les contrats de toute nature, etc."

3 Henrys. Boutarie, p. 236. In speaking of successions being *de droit public*, no. 13 : " à l'égard de ce qu'on dit que les successions sont de droit public, le premier qui est le véritable droit public, est celui qui regarde l'ordre général de l'état, auquel l'on ne peut pas déroger le second est celui qui est établi par l'autorité des lois publiques pour l'utilité des particuliers, auquel par conséquent il est permis de déroger.

in the interest of the fief superior, whenever these conventions would interfere with his feudal rights. Thus the 51st and 52nd articles of Custom of Paris, in limiting the seignior, in the disposition of his *fief*, to 2/3 does not annull the agreement which the seignior has made with his vassal or censitaire, even if he has transgressed the powers given to him by these articles, but this violation gives rise to certain dues and penalties in favor of the immediate superior of this seignior, who may exercise them, if he thinks proper, without reference to the agreement made by the seignior or vassal. It is a violation of the law or of the feudal contract existing between superior lord and his vassal, as regulated by the Custom, and the dominant may enforce his rights, if he thinks proper. But the contract between the seignior and censitaire is not affected thereby, except in so far as the property of the censitaire, that is the land alienated, may be embraced in the infliction of the penalties or dues, which have been incurred by the violation of the Custom. But if the lord or dominant affirms the contract, or is otherwise passive, the contract stands good to all intents and purposes. So with the *arrêt* of 1711. The penalty imposed on the seignior refusing to concede at the accustomed rate, authorizes the censitaire to apply to the Intendant and Governor, who, by this *arrêt*, are authorized to concede on the refusal of the seignior to do so, on the usual and accustomed rate, and, on such concession being made, the revenues are escheated to the Crown. The *arrêt* of 1711 could have no greater authority than an article of the Custom of Paris. Both are laws enacted by the legislative authority. The Custom regulates the law of the feudal contract, so does the *arrêt* of 1711. Both proceed from the same source and are enacted for the same object. The sovereign in his legislative capacity gives the law to the sovereign in his feudal capacity. The *arrêt* of 1711 could have had no greater authority than if its provisions had been incorpora-

ted into the Custom of Paris, before its introduction into the colony, and, as such, it would have regulated the feudal contract in France, but it could possess no greater authority than it would have possessed in France. Now in France, it would have regulated the feudal contract just as the 51st and 52nd articles of Paris do; and as such it would have given rights to the feudal lord i. e. the Sovereign, on its violation, as the law provides for all other violations of the feudal contract. The penalty imposed on the seignior refusing to concede is like any other penalty in its nature and character. The forfeiture of the land, or of the feudal dues on this land are like all other feudal forfeitures. It is a forfeiture in favor of the *suzerain*. This penalty was to be incurred and enforced in a peculiar manner, that is, on the application of any person seeking a concession, and not otherwise, and on refusal of the seignior, the authority is given to the Governor and Intendant to concede in his stead and the dues are given to the Crown.

It is a rule of law that whenever the exercise of common law rights is restricted, and a penalty imposed on the violation of the restriction, the penalty only can be enforced, and it must be enforced only in the manner indicated by the law. Here the penalty is incurred by a refusal to concede. Can it be supposed that it was intended to take the property out of the hands of the seignior, the grantee of the Crown, and that authority was given to the Governor and Intendant to concede for him without any application whatever to the Governor and Intendant? If so, the grant from the Crown was illusory, it conveyed no property whatever to the seignior. It must have been a mere agency. It could have conveyed no estate whatever to the seignior. He must have been a mere agent of the Crown, having himself no right of property whatever in the grants. Such a pretention is clearly incompatible with every principle of law which regulates grants of this description: for, the very idea of a

forfeiture, for violation of any condition of a grant, involves the idea that a grant has been made and that the property has passed to the grantee. It is therefore a violation of the condition of the grant, and, if so, the forfeiture is incurred in favor only of the person in whose favor it has been stipulated. In the *arrêt* of 1711, it was stipulated in favor of the King as feudal *suzerain*, and therefore it is a violation only of the feudal contract; and, if so, it must be regulated and enforced as all other forfeitures of a similar description under the feudal law.

The feudal system is a system of penalties and forfeitures for violations of the feudal contract. These penalties can only be incurred and enforced in the way pointed out by the law, but the nature and the character of the law cannot be changed thereby. Thus the penalty imposed on the seignior for not settling his seigniory was that it should be reunited to the domain of the Crown. The penalty imposed on the seignior for refusing to concede at the accustomed rates, on the request of the colonist, was that the Governor and Intendant should concede for him and that he should forfeit his lucrative rights.

The law of 1711 imposes a penalty and points out one way of incurring this penalty and one way of enforcing it. Can it be extended by implication to every other thing done which by analogy may by supposed to have been included in the law?

It is equally undeniable that penalties cannot be extended by analogy, and that they must be strictly limited, whenever the penalty imposed, on acts which, without the assistance of the law, would not, by common law, involve any penalty whatever. Here it is impossible to contend that without the aid of the *arrêt* of 1711, any penalty whatever could have been enforced. The forfeiture, therefore, must be limited to the cases provided by this *arrêt* of 1711.

The King himself, as feudal *suzerain*, might have enforced his own feudal rights, but no one can enforce these obligation for the Sovereign, unless he himself has given the right to do so.

The *arrêt* of 1711 decrees that concessions *en censive* shall be made at the usual and accustomed rates and without the imposition of any charge, or the taking of money for the concession, and it provides one mode of forfeiture for its violation, namely, on application by any person desirous of obtaining a concession, when the seignior refuses to concede. If no application be made for a concession, can the Governor and Intendant proceed to grant or otherwise act on the *arrêt*? Clearly not. For their jurisdiction arises only on the complaint of a settler demanding a concession. If their authority extends to annul or alter or rescind a concession, then it must be found elsewhere than in the arrêt of 1711. If it is not to be found there, their authority to act must be limited to the case provided for by the law. If no application is made, I take it to be undeniable, that the Governor and Intendant cannot interfere, unless it be shewn that the *arrêt* of 1711 be, in its very terms, a public act involving such prohibitions and nullities, as would cause a Court of justice to declare, by its own authority, the nullity of the act done in violation of it. Now, the authority given by the act of 1711 is a judicial authority. The annulling a contract made in violation of the *arrêt* of 1711, must of necessity be a judicial act. If the *arrêt* of 1711 does not involve the authority of annulling a contract, when no application is made by any party who has been refused a concession, then the law cannot, in its very nature, be a law *d'ordre public*, for it is only in such cases or when the law has pronounced the absolute nullity of such an act, that a court could interfere. The law of 1711 does not in terms give this authority or jurisdiction and it does not pronounce any nullity. It is therefore difficult to conceive on what authority the Gover-

nor and Intendant could have broken or set aside a concession voluntarily entered into, or have granted a concession in the absense of any application for it. It must not be forgotten that, by the law itself, no discretion is given to the Governor and Intendant; their authority is clear. It is to grant a concession only on refusal of the ***seigneur*** to do so. He has no authority to enter into the consideration of any other matter in contest. The ordinary tribunals of the Colony had jurisdiction over all such matters in controversy. The Governor and Intendant's authority and jurisdiction were limited to the one case provided for, viz, that of a refusal to concede and no other. The ordinary courts of justice in the Colony had no jurisdiction whatever over the case, the single case provided for by the *arrêt* of 1711, and no well authenticated case can be cited, in which under the French Government such an authority was ever exercised by the Governor and Intendant; nor is there any case cited, where any application was ever made to interfere with any contract entered into between the seignior and *censitaire* in relation to the rates of concession.

In determining the character of the law of 1711, it must be viewed apart from its stipulations which, in themselves, do not bear the character of a law *d'ordre public* or decree any nullities whatever, either as a public law having for its object the great public policy of the empire solely in view, and as involving purely public considerations, and therefore so absolutely binding in its provisions, as to override all common law rights, but so, solely on the ground that the state policy of France so considered it, or as a law regulating the civil rights of the colonists and securing to them the right of obtaining a grant of land *en censive*, on terms which they had it in their power to demand.

In examining the *arrêt* of 1711, under the first of these two aspects, viz: that of the public policy of the empire in

in its large sense, as having purely national and political considerations in view, independently of the positive enactments of the law itself: then it necessarily forms part of the public law of the empire possessing, for the time being, sovereign power over the colony; and such public law would be considered binding only so long as the sovereign state possessed dominion over the colony. For, it is unquestionable that such public law only exists, so long as this dominion exists. It would necessarily follow that, when this colony passed under the dominion of Great Britain, that it could no longer exist, and like all the rest of the public law of France, it ceased to have force when the sovereign power of France ceased to exist in the colony.

The purely state policy of France, altho' it affects the operation and application of laws, not themselves in their enactments, *d'ordre public*, can never be supposed to have been tranferred to the new dominion so as to apply to those laws, which, in their nature, without this state policy, are of *droit civil privé*. To give these laws the character of public law, *d'ordre public*, under the Crown of Great Britain, some declaration to that effect must have been made and the law of 1711 must remain what it has ever been, in my opinion, a law exclusively regulating the private rights of the inhabitants, in relation to concessions of land.

If examined under its other aspect, namely, that of regulating the civil rights of the inhabitants of the colony, *et de droit civil privé*, then it did not cease to exist because all civil rights under the civil and customary laws of France were guaranteed to the inhabitants of this colony, at the time of the cession of the colony to Great Britain. But as a purely civil right, it must be regulated and determined as all other civil rights are regulated and determined, that is by interpreting the law by its own enactments, and as such the *arrêt* of 1711 gave the right to every inhabitant to demand

a concession of land on the terms and conditions of other settlers in the seigniory, but it did not prevent him making his own contract with the seignior; and supposing, and even admitting that the seignior was bound when requested, to grant a concession at the usual and accustomed rate, and that he might have been compelled to make the concession, at such rates, his conceding at higher rates was, as has been already observed, only a violation of the feudal contract which he, the seignior had made with his sovereign lord, and which his lord alone could complain of and with which he, the *censitaire*, had nothing to do. It is to be observed that there is a marked distinction between the *arrêt* of 1711 and that of 1732. The *arrêt* of 1732 was framed to prohibit absolutely all sales of wild land in the colony, and thereby to secure the immediate distribution of the lands among settlers at a low rate of *cens et rentes* and to enforce actual settlement by the colonists. This *arrêt* therefore declared all sales of wild land by the seignior to the *censitaire* who had taken a concession nominally, but also had paid a sum of money for the concession to the seignior, as absolutely null and void, and decreed the recovery back of all money paid on such transactions. But in the *arrêt* of 1711, no such nullity is decreed on concession made at a higher rate than the then accustomed rates, and it appears from the correspondence of the Intendants at the time with the Home Government, that such a law as that of 1732 was necessary to be promulgated, to enable persons, who had so paid for concessions, or bought land, to recover back the purchase money. Now, it is clear that before the *arrêt* of 1732, the obligation of the seignior was to concede and not to sell, and the *arrêt* of 1732, did not alter or extend the obligation of the seignior, which was, I think, sufficiently apparent before the law of 1732, that he should concede and not sell. But until the *arrêt* of 1732, a sale by the seignior was only a violation of his feudal contract

as created by his original grant and the censitaire had no remedy under the law before the *arrêt* of 1732 to obtain payment back of the money which he might have given for the concession. But the Government had a high policy in passing the law of 1732, as is clearly shewn by the correspondence of the day, and to secure the carrying out of this policy, the law of 1732 was passed. But there is no such nullity decreed in the act of 1711, where contracts were voluntarily entered into in violation of the law, and it is impossible to decree a nullity where the law has not decreed it.

But even supposing that by the force of the law of 1711 all contracts were null and void which had been entered into in violation of it, as being contrary to the public policy and public law of France, then the effect would be to declare these contracts absolutely null and void ; no other conclusion could be arrived at, for, if passed in violation of public law, *d'ordre public*, they are absolutely null, as the law supposes them never to have been entered into.

The contract could not subsist at all, no alienation of the land could have taken place. Such a contract is not voidable, but absolutely void, and it must be absolutely set aside.

It is impossible to suppose that the *arrêt* of 1711, which was passed to regulated concessions of land *en censive*, a matter which by the common law of France falls exclusively within the domain of the *Droit civil privé*, private civil law, could in its nature and character be considered as purely state matter of a purely public nature, and *d'ordre public*. The motive of the King, in passing the *arrêt* of 1711, may have been to advance the political interests of the Kingdom and to promote its greatness : but it is necessary to have more than motives, in passing a law, to cons-

titute it a *public law*, *d'ordre public*, it is necessary that the law itself should, in its very provisions, clearly make it so, and provide the means of enforcing its nullities, in the event of its being violated. Now if the *arrêt* of 1711 had been passed in France, before the colonization of this country, and had become incorporated into the law of France and to have been as binding as any article of the Custom of Paris,—and it could by no argument be shewn that it could have more, then it would have been interpreted as any other article would have been, and have been subject to all the rules of the feudal law which under that Custom regulated the feudal contract. The law in France which regulated *fiefs* and concessions *en censive*, under the Custom of Paris is of purely a private civil nature. The object of the *arrêt* of 1711 was to prevent sales of land and to force seignior to concede *à simple titre de redevances*, and, as I think, to impose a limit on the rate of the *redevance*. Can then the effect of simply imposing a limit on the rate of concession change the whole character of the law itself and convert what was undeniably under that law, a matter of purely private civil right, into a public law, *d'ordre public* which never could be infringed in any way or manner by contract or agreement? It is clear to my mind that it could not. The mere motives in passing a law must be carefully distinguished from the provisions of the law itself. All laws whatever are passed in the public interests to subserve some public object; but that in no way makes them public laws in the sense contended for in the questions submitted. The laws of 1711 was only another limitation imposed on the feudal law, just as the 51 and 52 of the Custom are limitations imposed on the free use and enjoyment of the seigniory of his *fief*, by limiting the *jeu* thereof to $\frac{2}{3}$. In this colony, this limitation of the *jeu de fief*, as it existed in France, was removed, by the *arrêt* of 1711, and, in its stead, a limitation was imposed on the rate of *cens et rentes*

to be paid for the concession. Both were laws to regulate the feudal contract, and not to change the character or nature of the law which was to regulate that contract.

The law of 1711 does not embrace the whole public. It grants a privilege to a certain class only, viz, those who might be desirous of obtaining lands for settlement. In this respect, therefore, it cannot be said, to fall within the definition given by jurists to laws *d'ordre public*. This privilege might have been therefore renounced. This renunciation could neither have affected the general operation or application of the law, or have interfered with others desirous of claiming the same rights and privileges. If the Crown had intended to have extended the operation of the law beyond the case provided for, it would have done so. The public interests were thought to be sufficiently secured, first, by the power of reuniting to the Crown the whole seigniory, when the seignior did not settle his seigniory, and secondly, by escheating the lucrative rights of the seignior when he refused to concede. If these had not been considered by the Crown as sufficient to secure the carrying out of the policy of the empire, no doubt the wisdom of the Crown would have provided for it by the promulgation of some other law. It has not thought proper to do so, and it is not in the power of other persons to do so.

The contracts, therefore, which have been voluntarily entered into by the censitaire with the seignior, are valid and binding contracts, altho' they were made in violation of the feudal contract entered into by the seignior towards the Sovereign, when he received the grant of his seigniory, and cannot be now set aside.

The contract, therefore, in so far as it relates to the *redevances*, must be maintained, altho' such contracts impose charges in violation of the law of 1711. These charges,

altho' illegally imposed, must still be considered binding for the same reasons that the *cens et rentes* are binding, the law itself not being one *d'ordre public.* As regards the question of *reserves*, my remarks will be made when the matter comes under consideration

THIRD PART.

ON JURISDICTION OF COURTS.

The question submitted to the consideration of the court is to determine whether the jurisdiction given to the Governor and Intendant, under the *arrêt* of Marly, is vested in any tribunal now in existence, and if ever such jurisdiction has been exercised; if not, why it has not been exercised.

I take it for granted that it is unnecessary in the solution of this question to go further back than the *arrêts* of Marly themselves, as, up to that period, no such tribunal as that created by the *arrêt* existed in the colony, for the purposes of that *arrêt*. Moreover no question of any other jurisdiction can arise in reference to these *arrêts*, as all others were done away with, in relation to the subject matter of these *arrêts;* and as a new jurisdiction was created for certain especial purposes, and which never could have been exercised until the passing of the *arrêt* of Marly.

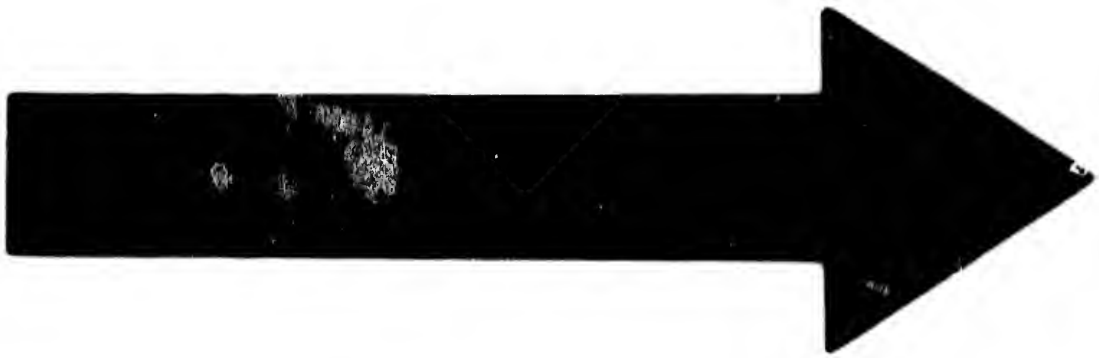
It must be observed that up to the *arrêt* of Marly the jurisdiction given to the Governor and Intendant in relation to lands *non défrichées* under the several *arrêts de retranchement* were considered to be a jurisdiction of a judicial nature. The reunion was the act of a court constituted for the purpose of carrying out the great objects of the Crown, and then was added to the reunion a re-grant which formed no part of the judgment which reunited the lands to the domain of the Crown. A glance at the various *arrêts de retranchement* will shew that a judgment of forfeiture for not having

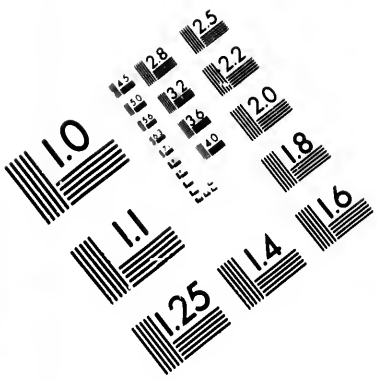
mis en valeur, non défriché the lands granted ***en seigneurie***, was one thing, and the re-grant was another. The one might have been, and it was in fact, a judgment, but once the judgment was pronounced, and the seigniory was re-united, then the judicial authority vested in the Intendant ceased, and the authority to reconcede, which was a purely arbitrary act, began; but this act was not judicial in its nature. It was the administrative act of the Intendant, standing in the room of the proprietor, the Crown, to whose domain the escheated land had been reunited. This was not and could not be a judicial act; for the whole scope and object of the ***arrêt de retranchement*** was to pronounce a forfeiture by reason of the breach of the feudal obligation imposed on the grantee of the Crown. It is clear that once the forfeiture was pronounced and the reunion effected, the subsequent grant of the Crown was a matter of option entirely and in no way connected with, or dependant upon, the act of reuniting to the domain. So the first part of the ***arrêt de Marly*** reasserts this obligation of the seignior to ***mettre en valeur*** his seigniory, and again orders the forfeiture of the whole grant for non-fulfilment of this obligation. But the second part of the ***arrêt*** which relates to the concession by the seignior, ***en censive***, and his refusal to grant at the ***taux accoutumé*** introduces a new feature in the obligation, and, for the first time, authorizes the application, on the default of the seignior, to be made to the Governor and Intendant; and it is this authority which is given especially to the Governor and Intendant in the words of the *arrêt*, and which creates the new jurisdiction; and it is with reference to this new jurisdiction, which never before, under the ***arrêts de retranchement*** was exercised, which it is necessary to examine.

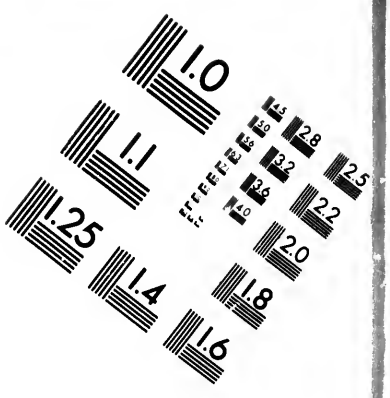
The words of the ***arrêt de Marly*** are as follows, after speaking of the general reunion of the whole seigniory ***faute de défricher*** or ***de mettre en valeur;*** on the ordinance

of the Governor and Intendant: "Que tous les seigneurs " au dit pays de la Nouvelle France ayent à concéder aux " habitans les terres qu'ils leur demanderont dans leur sei- " gneurie à titre de redevances et sans exiger d'eux au- " cune somme d'argent pour raison des dites concessions; si- " non, et à faute de ce faire, permet aux dits habitans de " leur demander les dites terres par sommation, et en cas " de refus, de se pourvoir pardevant le Gouverneur et Lieu- " tenant général et l'Intendant au dit pays, auxquelles Sa " Majesté ordonne de concéder aux dits habitans les terres " par eux demandées dans les dites seigneuries, aux mêmes " droits imposés sur les autres terres concédées dans les " dites seigneuries quels droits seront payés par les nou- " veaux habitans entre les mains du receveur du domaine " de Sa Majesté, en la ville de Québec, sans que les sei- " gneurs en puissent prétendre aucun sur eux, de quelque " nature qu'ils soient."

In this part of the *arrêt* which, for the first time, gives a right of action to a colonist to demand a concession, there is not a word of reunion to the domain of the Crown. The right of action given by the *arrêt* is to enforce an existing obligation on the part of the seignior. The seignior was by law and by his contract towards his feudal superior bound to concede; but before the *arrêt* of Marly, the right of enforcing this obligation remained with the Crown, the grantor of the seigneur: and the *arrêt* now, for the first time gives a right of action to the colonist desirous of obtaining the concession, to enforce this obligation of the seignior, entered into by him towards the Crown, when he received his grant; and creates the tribunal before which he might sue (*se pourvoir*), to enforce this right. This was, I think, a purely judicial proceeding; the words are, after demanding the concession, "*de se pourvoir etc*;" now on the refusal of the seignior to concede, what was the demand to the Governor and Intendant? Surely it was the concession.







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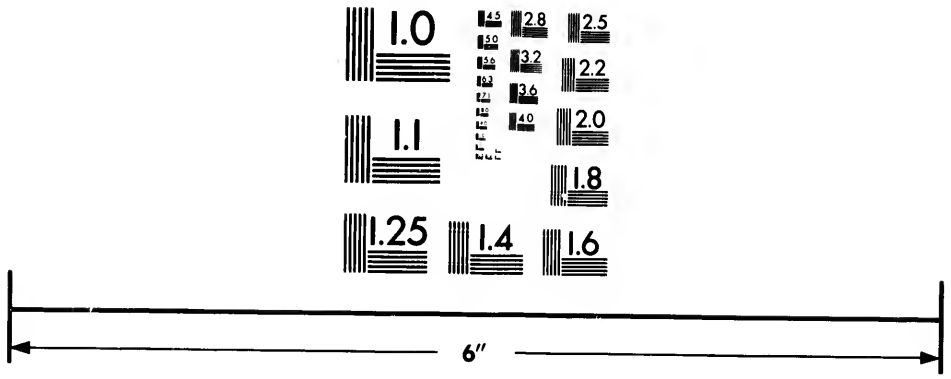

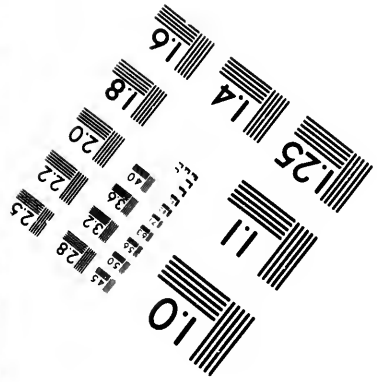

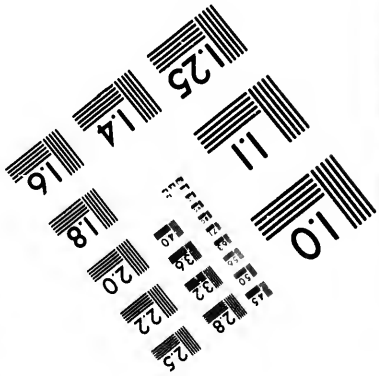

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and that concession which he had formerly demanded from the seignior, and which had been refused. Now the demand before the Governor and Intendant was against the seignior. The seignior was therefore the defendant in the case and it was to enforce this demand, and to compel the seignior to fulfil his contract. How this can be any other thing than the exercice of a civil right before a court of justice, I am at a loss to conceive.

But there is no order to reunite to domain of the Crown, before the concession should be decreed by the Governor and Intendant. The Court was created to enforce and carry out the law; and the penalty decreed on the seignior for non-compliance with the law, was, not that the land should be reunited, but that the rents thereof should be paid over to the receiver of the Crown domain. It will be observed, as has been already stated, that in all the *arrêts de retranchement*, the forfeiture was the reuniting of the whole seigniory or the reduction of seigniories of too large an extent, to a smaller extent; but here it is not a reunion of a part of a seigniory, but a loss to him, the seignior, of the profitable rights or dues accruing on the lands which he refused to concede. Now, it may be argued that such a forfeiture presupposes a reunion to the domain of the Crown, before the Governor and Intendant could grant the concession refused by the seignior. I do not think so, because it is not said so in the *arrêt*. It may be that in effect the forfeiture involved a loss of the land, but that cannot change the principle. It was a concession for the seignior on his refusal to fulfil his contract, and the grant was to be given to the man who claimed it, on the authority of the law giving the right to enforce the contract. (1).

(1) Guyot ch. 3, p. 142–3 and foll. " En général il n'y a que le " propriétaire du fief ou de la censive qui puisse réunir. Je m'expli- " que : celui qui possède propriétairement le fief dominant ou la di- " recte, peut seul réunir le sous-fief ou la roture qu'il acquiert propri-

The reason is apparent why no mention is made, in this part of the *arrêt*, of any reuniting to the domain of the Crown. If it had been the intention of the King to order a reuniting to the domain, he would have said so, as he had done in all the other cases of *retranchement* or reunions, and as he did in the first of the *arrêts de Marly*. But in merely ordering the forfeiture of the rents of the land to be conceded, he, I think, shewed his intention was not to reunite and dismember the *mouvance* or *corps de fief*, but to inflict the penalty pointed out. It cannot be argued that because the King makes the concession, that therefore he must be presumed to have become proprietor of the land, before he could order the concession to be made, and this implies *ab necessitate* a *première réunion*. I don't think so; for the concession is ordered to be made not as feudal suzerain,

" tairement ou *vice versa*. Celui qui possède propriétairement le fief " servant ou la roture chargée de censive, peut seul réunir, quand il " acquiert propriétairement le fief dominant ou la directe d'où le sous- " fief ou la roture qu'il a, sont tenus, et tout cela a lieu à cause du " fief."

" Il est certain que la réunion se fait par la seule considération du " fief. Ce principe auquel je prie mes lecteurs de donner leur atten- " tion entière est tiré de toutes les coutumes. Ce principe est avan- " cé par Brodeau sur l'art. 53, où il débute par ces termes remarqua- " bles: Ces mots, *seigneur de fief acquérant en sa censive*, " marquent deux choses, la première que la réunion se fait (par la " seule considération du fief) et elle a lieu a l'égard du seigneur de " fief, et non du seigneur haut-justicier. Fief et justice n'ont rien de " commun." *Duplessis* sur Paris, des Fiefs liv. 10, uses Brodeau's words. " Voilà le vrai principe. Sa raison est que le sous-fief ou la " roture, sont une émanation du fief, et non de la justice, qui n'a point " de table comme le fief qui est appelé la table du seigneur." See also no. 29 of same. See also Hervé 3 v. p. 393. " Premier principe. " La réunion s'entend d'un fief proprement dit à un autre fief propre- " ment dit, ou d'une censive à un fief." And then follow the distinctions affirming this principle.

but the judges of the tribunal are ordered to make it in the name of the law, which was enacted to enforce the obligation of the seignior. It was not a concession by the Crown as the feudal superior and as proprietor of the land, but the act of the sovereign in his political capacity, enforcing the law, through his recognized judges and the tribunal erected for that purpose. The authority, therefore, given to the Governor and Intendant was to enforce the previously existing obligation of the seignior, and the judgment to be rendered by them, was the concession itself which the seignior was bound to make; the judgment of the Governor and Intendant *vaudra titre de concession.* They were to make the concession instead of the seignior, but the seigniory was not dismembered. The forfeiture of the dues did not *change* the position of the seignior in his seigniory, nor of the censitaire and it was only intended as a penalty on the seignior for his violation of his feudal obligation. It cannot change the argument that this forfeiture might have been applied to all the lands of the seignior in his seigniory, if he had refused to concede them; for he would simply have stood as the man bound to fealty, but he would have lost his profitable rights, as he might have lost the right of *banalité* if he refused to build a bannal mill. The act of the Governor and Intendant, apart from all authorities or analogy to be derived from the *arrêts de retranchement* and the jurisdiction given by these *arrêts* or any other ordinance of the King, is a purely judicial act done by a tribunal erected for a particular and special purpose, but judicial in all its parts and altogether independant of any administrative act; for the judgment granting the concession must be supposed to be the act of the seignior as he was bound to make it by law, and the judgment was the title which the seignior should have given. The order to pay the dues to the receiver of Crown domain in no way affects the character of the judgment. It was to be one judgment and for one pur-

pose only, that is to order and adjudge the concession on refusal.

It may be added that, if a previous reunion had ever been contemplated, why should the King, in the latter part of the *arrêt* of Marly, have declared, that the seignior should never claim any right over the lands of the censitaire which had been conceded by the judgment of the Court. If these lands had been previously reunited to the domain of the Crown, surely such an order would have been altogether unnecessary, and it is not to be found in any of the *arrêts de retranchement* or reunion, ever ordered by the Crown before. This alone would be sufficient to set aside all idea that any reunion was intended to be effected, in relation to the concession *en censive* by the Governor and Intendant.

Another distinction which exists in relation to the reuniting to the Crown, is, that by all the *arrêts de retranchement* or reunion, or when the whole seigniory is reunited to the domain of the Crown, it is always done at the demand of the Attorney General, whereas in relation to the concessions by the Governor and Intendant, under the *arrêt* of Marly, when the seignior refused to concede, the concession was ordered (not any reuniting) on the application of the individual entitled by law to obtain it, which, in my opinion, clearly points out the difference between the two cases provided for by the law. For, if any reuniting had been contemplated, the Attorney General would have been ordered to act as he was always ordered to act, when the crown domain was in contemplation. Here he was not, and therefore the act *in toto* was a purely judicial act and nothing more. The argument, that the right of the inhabitant to obtain the concession is a *droit acquis*, I think, is conclusive. The *droit acquis* must be by virtue of the law or of a contract ; here the law of 1711 affirmed the existence of this contract of the seignior to grant the concession. The application therefore of

the inhabitant was to enforce a contract and the proceeding before the Governor and Intendant was just such a proceeding as would be adopted before the tribunals of this country to enforce a contract.

It was therefore under the French Government a judicial act. But it is pretended that since the Crown of England obtained possession of the colony, there has existed no court possessing the jurisdiction of the Governor and Intendant and to enforce the provisions of the *arrêt* of Marly. A glance at the statutes must settle that.

The first statute creating jurisdictions, necessary to refer to, is the act of 1794 (34 Geo. 3, ch. 6. It is pretended that, as the courts of the ***Prévosté***, ***Justice Royale***, ***Intendant*** and ***Conseil Supérieur*** are alone mentioned, it did not include the Court of the Governor and Intendant under *arrêt* of Marly. But this opinion is untenable, for this act gives in the first instance general jurisdiction on all matters whatever, of a civil and commercial nature, admiralty jurisdiction alone excepted. If then the authority given by the ***arrêt de Marly*** to the Governor and Intendant, was a judicial authority, and the matter to be settled was a civil right, in relation to property litigated before them, on what pretence can it be pretended that the act of 1794 did not embrace it ? As much may be said of the courts created before this period, I mean the Court of Common Pleas in 1764, and whatever other tribunals may have existed before the introduction of a proper judicial system in the colony. In the view I have taken, I do not consider it necessary to analyse further the various statutes which have created jurisdiction in this colony. For, if the act itself done by the Governor and Intendant was altogether a judicial act, doing for the seignior what he was bound to do by law himself, and no more, then the statutes giving general jurisdiction over all civil matters, and not in any way especially excluding the court of the Governor and

Intendant ; the question can admit of no doubt. If it were necessary to enter into a more detailed analysis of the clauses of the acts, it could be shewn beyond contradiction that this power existed in and was given to the courts of justice in Canada, after the conquest ; but such examination would be useless. (1)

It may be stated, as a matter of fact, that the Courts of justice have exercised all the powers given by the *arrêts* of of Marly, and have in many cases acted on the *arrêt* of 1732 also, and that the claim of the colonist to obtain a concession under the *arrêt* of 1711 has been allowed so far as the right of action is concerned ; and I believe that such exercise of jurisdiction has never been or at any rate very seldom been called in question. This fact also establishes the position that in the opinion of the Courts of justice in this province, the laws of 1711 and 1732 had not fallen into disuse, but on the contrary they were even considered to be laws in force and which the subjects of His Majesty might, invoke in support of their civil rights.

(1) Sec. ordin. of 1764, Quebec act 1774, 14 Geo. III ch. 38. 1777, 17 Geo. III, c. 1.

FOURTH PART.

ON WATER COURSES.

28TH QUESTION.—*What were the seignior's rights, at the same period, over unnavigable rivers, rivulets and other running waters which passed through, or bordered upon, the lands of his* censive, *as well as over the lakes and ponds situate wholly or in part therein.*

29TH QUESTION—*At the time of the cession of the country, were the seigniors of Canada the legal proprietors of these waters and unnavigable rivers, or did they possess the right of making use of them for industrial, or other purposes, to the exclusion of the* censitaires.

30TH QUESTION.—*If this right then existed, from what source was it derived? was it a feudal right, or did it belong to the class of rights designated as* justitiæ (droits de justice)? *was it recognized by the Custom of Paris, or was it established by laws promulgated expressly for Canada?*

31ST QUESTION.—*Was the* dominium (domaine) *over rivers and other unnavigable waters incidental to the administration of high justice,* (haute justice,) *and could it be claimed by any seigniors other than those who were entrusted with a police jurisdiction over such waters, and who performed the duties of high justiciars? If it were so, did those seigniors lose their* dominium *over the rivers, and their exclusive right to those waters, when, by the cession of the country, the administration of justice became the exclusive attribute* of the Crown of England?

32ND QUESTION.—*Ought the property of the seigniors in unnavigable waters to be divided, like the property in the soil, into the* dominium directum *and the* dominium utile? *And could this division exist in any other way than by allowing each* censitaire *the possession and enjoyment of those waters within the limits of his concession.*

The above questions are those which are to be answered by the Court, as tending to define the extent of the property of the seignior in all water courses, *eaux non-navigables*, in Canada and the examination of the titles under which this property is claimed. The title of the seigniors produced before the Court may be divided into three general classes. 1. Those which expressly grant to the seigniors the right of property in all rivers and water courses within the territorial extent of the seigniory. 2. Those which grant the territory without any express mention of the rivers; and 3. Those which in addition to the grant of the seigniory accord, at the same time, the rights of justice. I will speak only of *la haute justice;* as regards the inferior justice, *moyenne et basse*, it is not necessary to refer to them, as no right of property in the water courses or rivers, is claimed thro' them. I think it may be stated as a fact, that in all the titles which expressly confer *les droits de justice*, these rights are conferred after the grant of the fief and are added in words distinct from the grant of the lands, and as something beyond what the grant *en fief* itself is intended to convey.

Some of the grants are given *en toute propriété, justice et seigneurie*; but this in no way affects the grant itself; they either give or do not give in some form of words, *droits de justice*; but in all cases they are rights, which are distinct from, and independent of, the property granted. The whole seigniory granted would pass to the grantee as effectually if the words *droits de justice* were not there, and whatever rights of property these *droits de justice* may convey,

they are rights of property distinct from the territory (*propriété foncière*) which passed by the concession *en fief*. In examining the subject, and before passing to the grants from the Crown, it becomes necessary to determine in what manner the Crown itself owned and possessed these waters. As far as Canada is concerned, the Crown of France, as sovereign over the whole territory of New France, possessed by right of sovereignty the property in all rivers. The possession of the Crown in New France would be regulated, I take it, unless otherwise declared, by the public law of France. Up to the year 1583, (1) all rivers whether navigable or not, were possessed by the great feudatories of the Crown, whether by right of title, possession, or usurpation, it is not now important to discover; but as the possession of rivers was a source of great revenue to the proprietors, by the imposition of taxes on them, the attention of the King was drawn to them and by the ord. of 1583, the King for the first time sought to appropriate to himself those rivers which were navigable. This *ordonnance* was followed by the *ordonnance* of 1669 and that of 1683 by which the King appropriated to himself the great navigable rivers of the Kingdom: (2) and by this ordinance the whole of the navigable and *flottable* rivers were reunited to the domain of the Crown, and from that day all navigable rivers became the property of, and fell in the public domain of the Crown, subject however to the limitations contained in the *ordonnances* themselves. The effect of these *ordonnances* was to leave all other rivers non-navigable where they were before their passing, viz, in the hands of those powerful seigniors who had appropriated them to their own use.

These remarks are intended to point out the distinction which existed by the public law of France between

(1) See Henrion de Pausey, Des Eaux, p. 639.
Fiefs, Presc. 184 and many others.
(2) See Rives pp. 40 to 41.

rivers navigable and non-navigable. The first distinction is, that navigable rivers were considered as highways and were held by the Crown for the public uses, and that non-navigable rivers were *dans le domaine privé*. (1)

The Crown, therefore, at the time of the grants *en fief*, possessed the right of property in all waters in New France; the navigable waters were possessed under the limitations of the public law of France, but the non-navigable rivers were possessed by the Crown as any other part of the Crown domain and not subject to any public use, for, not being navigable, there was no public general use to which they could be applied. In looking to the grants *en fief* from the Crown, as above stated, they may be divided into three general classes, and for the better examination of the subject, let us take that class of grants where no special mention is made of rivers, and where the grants were made without *justice*. The non-navigable rivers are either those which traverse the territory granted, or they bathe the territory only. Did these rivers pass with the grant of the territory *en fief*? I take it to be *undeniable* under the authorities above refered to, that if these rivers were not held by the Crown for public uses, that they passed to the grantee with the grant of the *fief* and seigniory. In speaking of public uses, I do not speak of the right of supervision which merely regulates the private use of the rivers, which right of supervision is quite distinct from the general use which the public has of navigating or using all public highways.

(1) See Rives pp. 43 to 45 where a list of authors is given, one set pretending that the property of *petites rivières* is in seigniors, and the other in the riparian proprietors, but reference is here made to them solely to establish the distinction already announced, that the little rivers are in the *domaine privé*, and are not classed as navigable rivers belonging to and in the public domain of the Crown, for the uses of the public.

See Championnière pp. 18 and following.

This is mere police regulation, which no doubt must exist somewhere, but it is perfectly consistent with the existence of the private right in the thing itself. They passed by the same title that the territory itself passed. The waters formed part of the *fief* just as the land did. The same kind of title passed both. The seigniory *en fief* passed as a whole. The law which regulated the land, would regulate the waters on that land. The *droits de fief* were the same in both. The waters traversing the *fief* passed as a part of the *fief*. The grantee possessing both banks of the rivers traversing his seigniory, necessarily became proprietor of the waters which flowed over his land. So, if the seignior as owner of both banks of the river, owned the stream which flowed between these banks, he would own one half of the stream, if he only owned one of the banks. If the stream flowed between two seigniors, each seignior must under this view be owner of one half of the stream separating their seigniories, and it makes no difference whatever whether the stream flows through a seigniory or separates two adjoining seigniories. In both cases they belong to and form part of the territory granted, and unless it can be shewn that there is one law to govern the ownership in waters passing thro' a seigniory, and another law to regulate the territory of the seigniory itself, and over which the waters flow, that there is a *droit de fief* for water, distinct and apart from the *droit de fief* for land, the grant which passes both must be, in its nature and in its legal effect, the same, and must be governed by the same law. The great dispute which arose in France, after the abolition of the feudal law there, was to determine whether the right of property in the streams, which, before the abolition of the feudal law, had belonged to the seigniors, whether as *haut justiciers* or seigniors *féodaux*, passed to the state or to the riparian proprietor. This dispute cannot affect the consideration of the question in Canada, as the Crown was the only possessor of the whole country

before it made any grants at all, and whatever contest might have arisen in France after the abolition of the tenure, by reason of the titles of the seigniors as feudal seigniors or as *haut justiciers*, whether these rights had been usurped or not, cannot affect the character of these grants from the Crown. The only question to be settled, in explaining these grants, is whether the Crown did, in fact, convey the water courses with the grants *en fief*, and if the Crown did convey these water courses, in what way were they conveyed, and by what law shall this conveyance be regulated.

The true question to be first settled, is 1stly whether the Crown did in fact make this grant, and 2dly to determine the extent, the nature and the effect, in law, of this grant. The Crown, in making the grant of the *fief*, did not, in terms, exclude the water courses from this grant; did the waters follow by the necessary legal effect of the grant of the territory, and if they did not, what part of the feudal law, or of the general law of France, prevented these waters from passing. If they did not pass by the grant from the Crown, then these waters must have remained in the possession of the Crown. Now, it is beyond dispute that they could not remain in the Crown, for the public uses; for they are not susceptible of those public uses, for the preservation of which alone the Crown could be supposed to hold them. They must therefore have remained in the domain of the Crown, to be afterwards disposed of by grant. But this cannot for a moment be supposed. In France the Crown for fiscal purposes sought to obtain possession of the waters as against the riparian proprietors on the ground solely, that the riparians could have no claim whatever to them, as their title excluded them from the waters, and that as they could have no claim, the Crown could alone take, the waters being the property of nobody; but then the Crown sought them, not to retain them for public uses, but to derive a revenue from them, as it would have done by the

granting of any other part of its own private or public domain. But the authors, who so strenuously contended for the property of these waters, all admit that they are *en domaine privé*, and that their grant must be regulated and interpreted by the law which regulates all such grants.

In reference, therefore, to the class of grants from the Crown in which no mention whatever is made of the running streams, and where the grants are made without *justice*, I am of opinion that the waters passed with the grant of the land, and that the entire grant is to be viewed as a whole, within the same *mouvance* and to be governed and regulated by the same law.

In reference to the second class of grants, where the rivers are specially mentioned as being granted and conveyed, but without *justice*, I take it that the mere mention of the rivers, if they passed without any mention, can not alter the case. The mention of the rivers in this class cannot alter or extend the nature and legal effect of the grant itself. In the one case and the other, the Crown conveyed the rivers flowing over the seigniory, and it did no more; the intention of the Crown was the same in both grants. I mean in reference to its intentions to convey the property in the water courses. The law is the same which must regulate both, it is a *droit de fief*, an integral and indivisible portion of the whole fief, and is a property just as much as the territory itself is a property under the feudal law, and no more. This property is to be regulated as all other *droits de fief* are within the same *mouvance*, and must pass to and from the seignior as all other his rights of *fief* do. In this class of cases, therefore, the property passed to the seignior by the grant from the Crown, as it did when no express mention of the rivers was made.

As regards the third class referred to, namely, those grants, *en fief*, with the addition of the *droits de justice*,

these grants are either ***en toute propriété, justice et seigneurie***, or ***avec droit de haute, moyenne et basse justice.*** These words are used in some grants where the rivers are expressly mentioned, as well as when the rivers are not mentioned in terms. The first question which naturally presents itself in relation to the concession of the ***droits de justice***, is, does the concession of ***justice*** by the Crown, superadd to the grant ***en fief***, confer any territorial right of property, ***propriété foncière*** in the ***fief*** itself? If the ***droits de justice*** so conferred do not affect the grant ***en fief***, if they neither add to, nor diminish the property in the ***fief*** itself, and if they do not convey to the vassal some part of the ***fief***, which without those words would not and could not have passed to the grantee, then, these words could have no effect on the grant itself For, if the grant ***en fief*** was complete without the addition of the ***droits de justice***, and that all property in the ***fief*** which the sovereign himself could convey, did in truth pass, then the ***droits de justice*** must mean something else than a right of property in the ***fief*** itself.

It has been already shewn that the Crown, in making a grant ***en fief*** simply without express mention of the waters and without ***justice***, passed all that the public law of France permitted the Sovereign to convey, and this of necessity included every thing within the ***mouvance*** of the ***fief*** susceptible of property ***en domaine privé.*** Then nothing more was required to make a perfect and complete grant ***en fief et seigneurie.***

The seigniors themselves contend for this view of the case, and pretend and maintain that their rights in the water courses are complete without any express grant of the rivers or of the ***droits de justice*** ; but as the seigniors claim a right in the water courses by reason of the grant of ***justice***, it is necessary to examine this question under that view. What, then, did the King intend to convey in those grants

where *droits de justice* are superadded to the grant *en fief*? It is clearly only those rights which existed in the Crown itself, before they were granted to the vassal.

What were the *droits de justice* in the Crown, which were superadded to the feudal grant of the *fief*? On this point let the Crown speak for itself. By the original grant to the hundred associates, the Crown, in making the grant, declared that the whole country should be held by the company *en toute propriété, justice et seigneurie.* It must be observed that up to the year 1663, when the *Conseil Supérieur* was established, there had been no court whatever of royal jurisdiction, erected in the country, and the Crown was necessarily compelled to vest the jurisdiction in some one; and it may be fairly presumed that the Crown in granting to this company full and almost sovereign powers, gave them the power of creating courts of justice in the territory. Altho' no express mention is made of the *droits de justice* in the grant to the Company of New France, yet on reference to the act establishing the West India Company, in the 31st article of that grant will be found the following words: " Pourra la dite Compagnie, comme seigneurs haut justiciers " de tous les dits pays, établir des juges et officiers partout " où besoin sera et où elle trouvera à propos, de les dépo- " ser et destituer, quand bon lui semblera, lesquels con- " naitront de toutes affaires de justice, police, commerce, " navigation, tant civiles que criminelles, et où il sera be- " soin d'établir des conseils souverains, les officiers dont " ils seront composés, nous seront nommés et présentés par " les directeurs généraux de la dite compagnie; et sur les " dites nominations les provisions seront expédiées." In 33rd article: " Seront les juges établis en tous les dits " lieux, tenus de juger suivant les loix et ordonnances du " royaume, et les officiers de suivre et se conformer *à la* " *Coutume de la Prévoté et Vicomté de Paris, suivant* " *laquelle les habitans pourront contracter, sans que l'on*

" *puisse y introduire aucune autre coutume, pour éviter la* " *diversité.*" In 34th article : " Et pour favoriser d'autant " plus les habitans des dits pays concédés et porter nos " sujets à s'y habituer, nous voulons que ceux qui passe- " ront dans les dits pays, jouissent des mêmes libertés et " franchises que s'ils étaient demeurant en ce royaume..."

See the *projet de règlement* submitted to the *Conseil* by Talon and duly enregistered in 1667, on pages 33-4 of 2 vol. Edits and Ord. I will cite the whole passage as in it some reference is made to the *cens et rentes.* " Comme " dans toute cette distribution, il n'est rien réservé au pro- " fit de la Compagnie des Indes Occidentales, que Sa Ma- " jesté veut bien gratifier de l'avantage que donne en pa- " reil cas, le droit de seigneurie, ou les habitans releve- " ront immédiatement d'elle, et en ce cas, la haute, mo- " yenne et basse justice pourra lui être attribuée, avec le " droit de lods et ventes, saisines et amendes, et même un " *cens léger*, s'il est jugé à propos, ou si Sa Majesté esti- " mant qu'il soit plus avantageux pour elle, d'avoir pour " vassaux des officiers de ses troupes qui aient sur les ro- " turiers la seigneurie utile et domaniale, elle peut créer " en leur faveur quelque *léger droit de cens* ou censive " peu considérable, qui soient plutôt des marques d'hon- " neur que des revenus utiles, et leur accorder la moyenne " et basse justice, se réservant la haute, qu'elle attachera à " une cour souveraine des fiefs, ou à quelques officiers créés " pour la conservation des droits du seigneur suzerain ou " dominantissime."

From the examination of these extracts from the *Edits et Ordonnances*, it appears to me that the Crown, in conferring on the Company the rights of *justice*, intended to convey to it its prerogative rights in this respect and no more. The power to appoint judges in the various seig- " niories and throughout the whole colony was an attri-

bute of the Crown alone. Without the concession of these rights the appointment would have vested exclusively in the Crown. The special direction given to the west India Company to appoint judges and erect jurisdictions throughout the colony, sufficiently explained the intentions of the King in conferring *droits de justice* on that body. The rights which were conferred were not those extraordinary rights which had been usurped by the great feudatories of the Crown in France, and which had been always and strenuously resisted by the Crown, but such rights as the King possessed, as the fountain of justice, and as proprietor of the domain conceded. Now, is it possible to conceive that, when the *droit de banalité* was extinguished as a feudal right, at the reformation of the *Coutume*, as one which was incompatible with the privileges and natural rights of the subjects, that the King intended to introduce into the colony those more detested rights of *justice*, as they existed in France, and which were even, in truth, a more onerous personal servitude than *banalité* itself, and which were used as a means of extortion and of tyranny, against which the people of France were continually struggling. The very effort which was made by the Kings of France to absorb all the rights of justice and create courts of royal jurisdiction, for the very purpose of curbing and restraining those enormous privileges claimed by the *haut justiciers* in France, is evidence sufficient that they were obnoxious and objectionable, and that the Crown, in the grant to the West India Company itself, defined what it meant by the concession of *droits de justice* in addition to the *droits de fief.* But, even supposing that the concession of the *droits de justice* conferred extraordinary rights on the seignior, it is beyond question that these rights of *justice* were only assumed in four or five cases, in Canada, for the establishment of *cours ordinaires de seigneur*, *justices subalternes*, and were never assumed for the exercise of *la haute justice*, as expressed by the King in the

section of the grant to the West India Company ; and if they were never exercised, it is now too late to claim any right under them.

The grants *en justice* must be settled and explained by the plain and evident intention of the Crown as declared in the grants themselves. These grants are to be explained by the Custom of Paris, and under that Custom, it cannot be found that the *droits de justice* gave any property whatever in rivers. By that Custom certain profitable rights were granted to the *haut justicier* as a compensation for the expenses which he must necessarily incur by the assumption and exercise of these rights, but among these *profits de justice*, the *droit de rivière* or *cours d'eau*, is not to be found ; and unless it can be shewn, that there is some text of the Custom or some well established rule of the common law, as founded on that custom, which gives such a right to the seignior *Haut Justicier*, it would be wrong to explain the grants of the Crown in that respect, by the opinions of authors who wrote, not on the Custom of Paris, but on other customs, the more particularly as their opinions are far from being unanimous and are not founded on any positive general law, and are given without any reason whatever for them. The King in his grants gave the property in the rivers to the *seigneur féodal* as a part of the *fief*, and it is scarcely possible to believe that, in granting *droits de justice*, he intended to grant a property to the same thing by a second title in perfect opposition to the one which he had already granted.

The very definition given by Boerius, which is considered so clear and decisive, presents the question in its true aspect. He says ; the seignior at once proprietor and *haut justicier* is proprietor of the water courses, because he combines the right of property with the *jurisdiction* ; now if this author is correct, and of this I entertain no doubt, a clear

and definable distinction is drawn between the rights of the *seigneur féodal* and the *seigneur justicier*. Right of property and jurisdiction cannot in the very nature of things mean one and the same thing. There cannot be two proprietors of one and the same thing, under titles totally distinct and adverse to each other; and it is undeniable that the *fief* and the *justice* not only might be, but they were frequently held by different persons, and it is this very antagonism which gave rise to the opposite opinions of the feudists in France; some pretending that the *seigneur haut justicier* was the owner of the rivers by reason of his jurisdiction, while the other claimed the ownership for the *seigneur féodal* by reason of his territorial right of property. Either might claim the property according to the law of the particular Custom. Those Customs which adopted the maxim of the Roman Law, that all rivers, whether navigable or not, were to be considered as highways and exclusively devoted to public uses, (and therefore the property of no one) vested this public right in the *seigneur haut justicier*, who possessed the authority of the Sovereign, by the concession of the *droits de justice*, just as the Sovereign continued to hold the jurisdiction over navigable rivers; while other Customs recognized the principle of law that non-navigable rivers, not being vested in the Sovereign, for public uses, fell into the *domaine privé* and passed necessarily to the *seigneur féodal* by the force of the territorial grant. This difference of opinion necessarily divided the jurists and it is in reference to this difference of opinion only that Boerius asserted that, when property and jurisdiction were combined, no doubt could arise. But the *droits de justice* were not changed in any way by this decision. They still were, what *droits de justice* had always been, a concession *de droits régaliens*, which involved a right of jurisdiction over the rivers, but not a property in them. The *seigneur haut justicier* could exercise no greater power than the Sovereign himself; now, if the Sovereign had remained

in possession of them, could he, the Sovereign, have claimed a right of property in the water courses in those *fiefs* which he had granted away. He certainly could not, and if he could not, how can the *seigneur*, as the mere assignee of the Crown, do so. The grant *en fief* was complete and passed the waters. The Sovereign could have regulated the exercise of all private rights in those rivers, but he could have claimed no right of property in the rivers themselves. If the Sovereign could not do so, then, I am at a loss to conceive on what ground the seignior, who merely exercised his rights, could do so.

But by the Custom of Paris, which is the law which must regulate the question in this country, the *seigneur haut justicier* had no property in the rivers. No authority has been produced to establish that by this Custom such a right existed, and unless such a right can be shewn to exist, by some positive text of the Custom, or by some well recognized and uncontested rule of the common law, no such right can be claimed.

The *Seigneur haut justicier* had the jurisdiction over the whole territory of the *fief*, as well as over the rivers. As well might he claim a right of property on the land, by reason of his jurisdiction, as in the waters; no possible distinction can be made. If he had the property in the one, he must have had it in the other, for the jurisdiction embraced the land for the exercise of the Sovereign rights, as well as the waters.

But supposing even, for argument sake, that the *droits de justice*, so conferred on the *seigneur féodal*, vested in him the right of jurisdiction over the rivers and that such right had become a property in the *seigneur*, as it has been stated that it did in that part of France which recognized the *haut justicier* as proprietor, this right would still be what it was then, a *profit de justice*. Now a concession by the

Crown of these Sovereign rights, imposed on the grantee certain charges which were always enforced as the equivalent of those profits. These charges were, as such, a part of the obligation of the seignior, as the profits were a recompense for the burthen so imposed. The *seigneur haut justicier* in France could not enforce the profits, if he had never assumed the obligations. A mere title from the Crown could never convey those privileges, if the seignior had never assumed the correlative obligations; as no right of *banalité* could be claimed if the mill had never been built. The grant of *justice* was distinct from the grant *en fief*, altho' embraced in the same grant, and held by the same person. To give property in the *fief*, an investiture and possession was required; so also, an actual assumption and possession of the *droits de justice*, was as necessary to divest the Crown of those sovereign rights. But a possession of these rights was indispensable; mere possession alone even for 100 years could, scarcely give the right without the grant; and how could a mere grant never accepted or acted on do so. (1) Until such possession was taken under the grant, the Sovereign could, by a reunion to himself, always reinvest himself with that portion of the sovereign rights which he had so conceded to the *haut justicier*, and the seignior could not claim the *profits de justice*, if the mere concession had never been followed by an actual assumption and exercice of the duties. That such reunion did take place in Canada, the references here made will abundantly prove. But it has been contended that a mere grant by the Crown was sufficient to vest in the *haut-justicier* all these profitable rights, and as they had become a complete pátrimony in France, they had also become such in Canada by the force of the grant, and that no suppression of these rights could take them away. I cannot concur in that opinion; no authority, or sound or safe reasoning can justify this con-

(1) See Henrion de Pansey, Dissert. Féod., v. 2, p. 577.

clusion. The whole history of Canada shews that a mere grant of the *fief* itself, not followed by possession and actual occupation and settlement, was unavailing, as the numerous reunions of seigniories for such want of possession fully demonstrate. How could, then, the additional rights of *justice*, which were in all instances rights which were superadded to the grant en fief, and which were merely accessories to the grant itself, and in no instance an independant grant apart from the *fief*, be claimed, enjoyed and transmitted, if not assumed? It is, I think, impossible to support such an argument. As far as I can discover, in no one instance were the duties of *haut justicier* ever assumed in this colony. But pushing the argument to its last result, even supposing that these rights claimed by the seigniors as *haut justiciers*, had been well recognized and that they had been in possession, the effect of the change of domination in 1759, and the subsequent proclamation in 1761, necessarily suppressed these rights. This suppression necessarily reinvested the Crown of England with the Crown rights so alienated by the concession of justice, just as they would have been reunited to the Crown of France. But it is also contended that even this suppression could not take away what had in fact become a property in the seignior, as certain and as legal as the possession of his *fief*, and that the mere fact of the right of administering justice having been done away with by the operation and introduction of a new public or municipal law, did not suppress or take away the other attributes of justice, including the profits arising from them. I cannot concur in this reasoning, for, if the *profits de justice* be considered as given for the discharge of the onerous duties imposed on the *haut justicier*, and if the *droits de justice* in themselves be a mere *démembrement des droits régaliens*, a delegation of the sovereign authority granted for specified objects and on certain considerations, then the suppression or rather

a reunion to the Crown of these sovereign attributes terminated the authority of the *haut justicier*, and if the charges which attached to the performance of the duties so re-acquired by, or reinvested in the Crown were necessarily removed, so all profits which were the equivalent and consideration for their performance, were taken away. (1) The principal, that is, the *haute justice* having disappeared, all the accessories of that *justice* passed away with it. As well might it be said that, when a *fief* was reunited to the Crown domain, that the seignior could retain a portion of the mere profits de *fief*.

The Crown, in granting the *droits de justice*, retained the same control over the *Haut justicier*, by reason of the concession, that it did over the vassal, by reason of the feudal dependancy under the feudal law. The *droits de justice* exist apart from the Crown, only so long as the Crown wills it ; for the concession of *droits de justice* never can mean, in the very nature of things, a perpetual alienation of them, for they are inseparable from the *puissance publique* of the Sovereign. Even in France where these rights had become a patrimony, they could be reunited to the Crown and conferred on another, and no indemnity for the loss could be claimed, if their reunion was effected before any investiture of the seignior with their possession.

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(1) See *arrêt* by Hocquart, in 1741, of reuniting seigniories by force of clause in concessions.

2 Guyot, Fiefs. Prescrip., p. 23.

1 same. ch. 3, p. 142 and foll,—and no. 25.

" ch. 4.

3 Hervé p. 392.

2 Daniel, cours d'eau, p. 9, and foll.

But again, even supposing that by virtue of the *haute justice*, which had been so conferred on the seignior, the *profits de justice* had still remained in the seignior after the suppression of *justices* in the colony, and that such *profit de justice* had included a right of property in the rivers, it is clear that such right of property after the suppression of these rights of *justice*, would have continued in the *seigneur feodal* to be a mere right of property divested of all the characteristics of *justice*, and it would have merged in the general right of property which resulted from the possession of the territory *en fief*. It never could be pretended that the seignior held the rivers by two separate and distinct titles. One must have merged in the other. The property could not be held by two separate and independant titles in their very nature adverse to each other.

See *arrêt* by Hocquart in 1741, of reuniting seigniors by force of clause in concession deed.

The censitaires claim property in the water courses from the seignior. This clearly admits that the water courses are or were before the concession to the censitaires, the property of the seignior. The point then which can alone present itself is : does the concession cover the water courses? The only question, in reality, raised is to determine the legal effect of the concession, for, if the concession does not pass the waters, then the censitaire cannot otherwise contest the title of the seignior or pretend to any right whatever. 2 Guyot. *Fiefs.* Prescrip. p. 23. " Or il ne s'agit pas " ici de ce que peut faire le haut-justicier en vertu de sa " *haute-justice*.... dont les droits n'ont rien de commun " avec ceux du fief ; il peut beaucoup plus en vertu de sa " haute-justice qu'en vertu de son fief."

See *Réunion*, ch. 3, and also 1 Guyot, ch. 3, p. 142. 143 and fol : " En général il n'y a que le propriétaire du

" fief ou de la censive qui puisse réunir. Je m'explique : " celui qui possède propriétairement le fief dominant ou la " directe, peut seul réunir le sous-fief ou la roture qu'il ac- " quiert propriétairement ou *vice versâ*. Celui qui possède " propriétairement le fief servant, ou la roture chargée de " censive, peut seul réunir quand il acquiert propriétaire- " ment le fief dominant, ou la directe d'où le sous fief ou la " roture qu'il a, sont tenus, et tout cela a lieu à cause du " fief.

" Il est certain que la réunion se fait par la seule con- " sidération du fief. Ce principe, auquel je prie mes lec- " teurs de donner leur attention entière, est tiré de toutes les " coutumes.

" Ce principe est avoué par Brodeau sur l'article 53, " no. 3, où il débute par ces termes remarquables : *Ces* " *mots, seigneur de fief acquérant en sa censive, marquent* " *deux choses : la première que la réunion se fait (par la* " *seule considération du fief) et non du seigneur haut-justi-* " *cier ; fief et justice n'ont rien de commun.*" Duplessis sur Paris *des fiefs*, liv. 10, uses Brodeau's words. " Voila le " vrai principe. La raison est que le sous-fief ou la roture " sont une émanation du fief, et non de la justice qui n'a " point de table comme le fief, qui appelé la *table du sei-* " *gneur*. La justice est un droit incorporel qui s'étend sur " un certain territoire, mais qui n'est pas composé, ni de " fief, ni de roture. Elle s'étend sur l'un et l'autre, mais " elle subsiste par elle-même, quoique souvent elle soit co- " hérente au fief. La justice et le fief n'ont point de con- " séquence de l'un à l'autre. La justice, dit Loiseau, ch. " 4, no. 31, des seigneuries suzeraines ou subalternes est au " château comme en son siège ; en la terre comme une an- " nexe, ou une pièce attachée à icelle ; au fief comme à une " dépendance séparable : en la seigneurie comme partie in- " séparable, et sur le territoire comme son corrélatif. La

" seigneurie se prend en son terme féodal, pour la jouisance
" publique et la jouissance privée jointes ensemble, d'où
" vient ce terme *terre et seigneurie*."

See No. 25, which clearly shews the distinction in reference to a reunion.

The 4 chap. shews that *franc-aleu* is entirely separated from domain of Crown, and is not in any way dependant.

Chap. 3, shews that the *seigneurie* of justice is confounded with *seigneurie du fief*, where authors ascribe *droit de rivière* to *seigneur féodal*. (1) The same man combines two qualities but totally distinct, unconnected with each other, and with rights and privileges entirely antagonistic. The same man, holding both qualities, must be supposed to own the *droit de rivière*, by the title which, by the general law, *is supposed to be the one under which alone he can acquire*. Now, the Custom of Paris does not in any way recognize this separate *droit de rivière* apart from the territorial right in any way ; but it exists, in other customs, in the *haut-justicier* ; tho' held by the same man, they are different rights, arising from totally different objects, as Guyot says on p. 144 of 1 vol. *Réunion* ch. 3. " Toutes les fois qu'une
" même personne a deux qualités distinctes, dont l'une fait
" qu'il confond, l'autre fait qu'il ne confond point, ces deux
" qualités doivent produire deux effets différents. Or, dans
" nos principes féodaux, fief et justice n'ont rien de com-
" mun. *Justice et seigneurie mainte chose varie*, dit Loi-
" seau. Ces règles sont établies pour dire, non seulement
" que la justice peut être sans le fief, et *vice versâ* ; mais
" aussi pour dire que leurs droits sont distincts, leurs effets
" différens et qu'ils ne coulent jamais de même source,
" quand même ils seraient dans les mêmes mains."

Now, the *droit de cours d'eau* or *droit de bâtir montin*,

(1) See also 3 Hervé p. 392 already cited.

can proceed from only two sources; I mean in relation to the dispute between the seignior *féodal* and the *haut-justicier*. 1. Either as resulting from the right of property, in water courses, and dependant on the possession of this property, and no more. Or 2. it must be derived from the jurisdiction, *droit de justice* over the river; but in this latter case, it is a *droit incorporel*, in no way connected with the territorial right of property, which indeed vests in *the same man*, but under a different title. The *droit de rivière*, in so far as justice is concerned, is and can form no part of the fief of the same man as *seigneur féodal*. " No. 11. Donc, toutes " les fois qu'un seigneur *haut-justicier*, acquiert des héritages féodaux ou censuels, quoiqu'il soit en même tems " féodal ou direct, si ce n'est un fief en l'air, il ne réunit " pas de plein droit à son fief, parce que dans cette opération, il n'y a rien de la considération du fief, qui seule " opère la réunion. (1)

So if the *seigneur haut-justicier* loses his right of *droit de rivière* by a reunion of the *droit de justice* to the Sovereign, then it produces no sort of effect on him as *seigneur féodal*, the *fief*, as a *fief* neither gains nor loses by the reunion. It leaves the *seigneur féodal* with his property in the *fief*, and with his property in the water as a dependance following the *fief* out of his possession in the same way and by the same law that he acquired it. The water in the seigniory as a dependance of the *fief*, is, and I think, it must and can only be a dependance, not of the whole *fief* as a *fief*, but as a mere dependance of the banks which border the water. By what law, or recognized custom which can affect the question in Canada, can it be shewn to be a *droit de fief* apart from the territory? The various citations from feudists establish rather a fact, that the seigniors were, in France, in possession, some as *haut-justiciers*, others as *seigneurs féodaux*, and as *riverains* according to their respective titles,

(1) See Daniel p. 9 and fol.

than settle or affirm the existence of an incontrovertible principle of law, and unless such a text can be found in the Custom of Paris, the ordinary rules of legal construction must prevail. See Championnière, c. 4, p. 153 and fol :

I am, therefore, of opinion that no right whatever can be claimed by the seignior in the streams and rivers by reason of any concession of the *droits de justice.*

The question, therefore, is presented under this aspect; the seignior as proprietor of the fief is the proprietor of the running streams (non-navigables) within the territory of his *fief.*

It is contended by the Attorney General, on the part of the Crown, that these same rivers and streams having passed by the concession of the whole *fief*, without special mention in the grant of these waters, as well and as effectually as when they were specially mentioned, that the concession by the seignior of land bordering these streams caried with it the property in the streams themselves. That as they passed by grant from the Crown as mere dependencies of the banks, so they equally passed, and by the same rule of law, by the concession *à titre de cens* of the land bordering the stream. This is claimed by the seigniors, on the ground that, though they should and ought to pass in the grant from the Crown, the property in those streams and water courses is a *droit de fief*, and that as such *droit de fief* or *droit domanial* they could not pass by the concession *à cens*, unless they had been specially mentioned in the concession. On this point no sufficient reason has been assigned, nor has any law been cited to create and sanction such a distinction. They must have passed by the grant from the Crown in one of two ways; either the water was considered simply as an accessory of the banks, or the grant passed the water, because in such cases the bed of the river with the water, passed as accessory to the

right of property in the banks. If the water by either of these ways passed to the seignior, by the grant from the Crown, and I can conceive of no other way, by which they could have passed, and no other can be presumed from the grant itself; why should, then, the water or the bed and the water, not equally pass by the concession *à cens*, without any special mention of either? There is no good reason why it should not, for there can be no *directe* retained by the seignior by a concession of mere water apart from the bed of the river, (1) for it has no existence in law except as an element attached by right of *servitude d'usage* (2) to the bed and the banks by which alone it can be useful and applied to any purpose whatever. If the *directe* can be maintained or reserved, it must be on a concession of the *bed* of the stream alone.

But can a d*irecte* be reserved on a bed of a river to the exclusion of the owner of the bank? If it can, how can the bed be used? How can a concession be granted of the bed of a river, when both banks are already granted? If the bed under such circumstances cannot be used, and I don't see how it can be used, the law will not so twist and violate every rule of common sense, to enforce an abstraction of this kind which can have no profitable result. If the bed of rivers did not pass by a concession of the banks, then it must be supposed to be retained for some useful end. It is

(1) Proudhon, Domaine 3 vol. p. 296, no. 944, in speaking of rivers

" Parce que l'on ne peut pas concevoir l'idée d'un fleuve sans lit " et séparé du sol sur lequel il coule." The seignior *haut justicier* no doubt claimed the right of conceding the right of building mills, and in that sense the *droit de cours d'eau* was conceded, but this right was claimed and exercised by virtue of the *puissance publique* over rivers, which had been granted by the concession of *droits de justice*. See Prost de Royer, 4 vol.

(2) I refer to the *droit de servitude* claimed by the seignior and spoken of by Henrion, on ground that river was reserved by seignior.

no argument to say that the seignior wishes to use the waters exclusively; for he can only use the running stream, even if it be his absolute property, and return the water after he has used it. This is not incompatible with the use of the stream by the riparian as owner of the bank. Neither the one nor the other can change or divert the course of the stream, and the seignior, if he remains the owner of the bed of the stream, can only use the water and return it to the stream to be enjoyed by all who have an equal right to it. So also the riparian, if the bed passes to him by the grant *en censive*, can only use the water and return it. There is and can be no difference whatever in either case, the seignior can not say he can erect works in the running stream to the prejudice of the riparian, unless he has a right on the riparian's property and can use his banks; and in an unqualified grant *en censive*, the seignior cannot deprive the riparian of the natural use of the water, even by erecting in the stream itself apart from the riparian's bank, works which do not touch them, for the bed would pass by such a grant *en censive*. (1) In all cases of the concession *en censive* without any reservation or limit in the grant, the river and the bed would pass to the riparian in the same way as they had passed to the seignior by the grant from the Crown, as mere dependencies of the bank and not otherwise. A running stream apart from the territory on which it flows, can have no existence as *property*, strictly speaking, otherwise it would be susceptible of exclusive use. A running stream is susceptible of *usage exclusif* while passing over the pro-

(1) 2 Daniel, p. 551.—" Les proprietaires riverains, soit que le cours " d'eau traverse, soit qu'il borde leurs heritages, ont droit d'empêcher " que des voisins circulent en bateaux dans la partie qui leur appartient. " Ils peuvent en défendre l'accès, comme l'accès de toute autre pro- " priété ; et revendiquer pareille circulation serait vouloir établir sur " l'héritage d'autrui, une véritable servitude de passage."

perty, but not of absolute property. (1) The law of alluvions, *droits d'accroissement*, undoubtedly gives the bed of the river, when the water has gradually retired from its banks, to the riparians; on what principle would the law so award it, if the bed was not considered a part of, and as a dependency of the banks of the river. On this point I will refer to Mr. Daviel who has, I think, discussed this subject with great clearness and ability, and see 5 Hervey p. 261.

I take it for granted, therefore, from the authorities cited, (2) 1. That all rivers not vested in Crown for public uses, fall into *domaine privé*. 2. That a grant from the Crown to the seignior, without any mention of the rivers, will pass these rivers in the grant. 3. That a concession by the seignior to a censitaire of the land bordering the river, will pass the river and the bed over which it flows. 4. That by granting the river, the riparian has the right to use it for all

(1) Prost de Royer, 4 vol. p. 110, 112, 113, 158, 16, 17, 18, 68, 109.

[a] Championnière, p. 22, 23.

1 Daviel, nos. 139, 140.

2 " nos. 551-2.

Guyot 6 vol. p. 670, no. 6.

Proudhon, Domaine Public, no. 1277.

(2) Authorities to show that rivers pass as part of feudal grant.

2 Daviel p. 10, nos. 534, 533. Cites Loyseau, des seigneuries ch. 13, nos. 120, 132.

See note, on p. 12, of authorities on both side, p. 16, 21, no. 537, See note, p. 28, p. 42, 48, 55.

Proudhon, Dom. Public, nos. 1187 and 1452.

Guyot 6 vol. p. 663 on rivers.

purposes not restrained by law. 5. That in using the water he must so use it, as not to interfere with the use which the upper and inferior proprietors have by law of the water.

But it is also contended on behalf of the seigniors that the *droit de cours d'eau* which belongs to them by the grant from the Crown is a *droit domanial*, which gives them the exclusive right to build mills and use the water to the exclusion of all others, and that nothing but a grant of this right *en censive* can divest them of it or give a right to build a mill or use the water. I have already briefly adverted to this pretension and I can find no law to justify it. On reference to Guyot 6 vol, p. 664, no. 2. " Nous parlons des petites rivières qui " arrosent les seigneuries particulières et qui ne portent point " bateaux si ce n'est au moyen d'écluses. Chopin, ib. no. 25, " les appelle rivières banales, rivières de cens, i. e. qui sont au " territoire du seigneur." Bacquet, ibid, no. 25, dit que " dans ces petites rivières, le Roi ni les seigneurs haut-justi- " ciers n'y ont pas plus de droit que sur un autre héritage " appartenant aux particuliers. Cette maxime est contraire à " la pratique universelle de la France ; Es païs de droit écrit, " communément elles appartiennent aux haut-justiciers. " Dans les païs de Coutumes *elles sont généralement un* " *droit de fief, le seigneur haut-justicier peut y avoir* la po- " lice, mais *la propriété* qui emporte *droit de moulin* et de " pêche exclusif, *appartient au féodal.*"

Guypape, Quest. 514, holds opinion of Bacquet. Salvaing, p. 37, and Loyseau, ch. 12, nos. 2, 3, give right to *seigneur féodal.*

D'Olive, liv. 2, ch. 3, makes *droit de pêche*, and *droit de moulin*, *droits de fief.* Despeisses, droits seign. tit. 5, art. 4, gives both *droit de pêche et moulin* to *haut justicier.*

But what is this *droit de fief* or *domanial* which seeks to appropriate the right of building mills and of fishing ?

Is this *droit de fief*, an incorporeal right apart from the *droit de fief* which applies to the whole seigniory and independant of the territory, itself, or is it a portion and integral part of the *droit de fief* which arises from the possession of the territory? If it is the former, then some law would surely be found to justify such pretension. M. Daviel on 2 page of 2 vol. says: " Si l'eau courante, par sa " perpétuelle mobilité, est essentiellement une chose com- " mune, parcequ'elle se dérobe à toute possession perma- " nente, le cours d'eau, en lui-même, tant qu'aucune por- " tion n'est pas recueillie et mise à part, comme composé du " *lit sur lequel il coule, et du volume d'eau qui le constitue,* " *est quelque chose de fixe* et toujours identique, quoiqu'in- " cessamment renouvellé. Les forces motrices qu'il fournit " à l'industrie, les ressources qu'il offre pour l'irrigation et " pour la pêche, *accessoires précieux* du lit et des rives, " dont la disposition favorise les richesses naturelles, voilà " une dépendance essentielle des héritages qu'il traverse."

This authority which is the *rationale* of the whole subject is borne out by Championnière and others. There can, in the very nature of things, be no exclusive right of property in any one, in a running stream apart from the soil over which it runs. It is not susceptible of property, but only of use, and, if so, it is impossible to separate it from the bed in the concession. For, if the seignior could only possess in the manner pointed out by Daviel, and this so long only as he was possessor of the bank, how could he retain a property in the mere dependency when the principal had passed out of his hands? No *directe* can be retained on that which is a mere dependency, or the accessory of property; It must be retained on the property itself. The concession of water alone involves an absolute alienation of it.

The *droit de fief* must therefore exist in the seignior, because he is the proprietor of the banks and the bed of

the river, and of the river as a dependency of the banks. Even Hervé, 4 vol. p. 251, and Bacquet himself, admit the correctness of this principle. He says with Guyot, "que les rivières qui appartiennent aux seigneurs sont " en général un droit de fief et non un droit de justice ; " ainsi c'est le seigneur féodal qui a la propriété des eaux " et tous les accessoires qui dépendent de cette propriété, " comme le droit de moulin et de pêche." The principle then that the *droit de moulin et de pêche* are mere dependencies of the water, is clearly admitted, and the only real difficulty is to determine whether the *cours d'eau* itself is not a mere dependency of the banks.

If the concession of the banks be made, then the property in the stream passes with the concession, and the riparian becomes the owner, subject to the public uses, for all natural purposes. The authorities cited have established that in such a case, no one can interfere with the riparian in the use of the waters, and as the riparian is unrestricted in the use, he can apply the water to all purposes whatever. Thus Bacquet, already cited says : " Mais la pro- " priété qui *emporte droit de moulin et de pêche exclusif* " appartient au féodal." Under these authorities, what is the " droit de propriété qui *emporte droit de moulin et de* " *pêche exclusif*, qui appartient au féodal" ? It is a property in the river itself. altho' it is in this citation called a *droit de fief*, it cannot mean a *droit de fief* apart from the territory, for in the same passage the author says it is " la " propriété qui emporte droit de moulin." Now, if it be the property in the river, which can have no existence apart from the soil over which it flows, the *droit de fief* must be the *droit de fief* which applies to land and it may be alienated in the same way. By the Custom of Normandy art. 216, 210, it is a *droit de fief* contended for in the view taken by the seigniors. This Custom says " il faut être " seigneur féodal des deux rives," and therefore Basnage on

treating on this article says that it is a *droit de fief* which belongs exclusively to the *seigneur féodal.* But Henrion de Pansey on p. 666, of vol. 1, of " Dissertations Féodales" says : " " La Coutume de Normandie qui forme sur ce point le " droit commun," and goes on to cite the Custom. Can the Custom of Normandy form the common law of Canada ? Surely not. The Custom of Paris is the law of Canada, and by that Custom as interpreted by its commentators, it is the " propriété de la rivière qui emporte droit de moulin et de " pêche exclusif." By this Custom, there is no distinction made in reference to the land and the water, and there cannot be two kinds of *droit de fief* in one and the same seigniory. The right of building a mill is not and cannot be a feudal right, it is a *droit utile* simply, which results from the possession of a property in the river, and this property in the river has no separate existence apart from the banks. Ferrière, Grand Com. on Paris, p. , already cited, says no. 15 : " Quant un seigneur n'a " pas le droit de banalité de moulin, il ne peut pas empê- " cher les particuliers d'avoir chez eux des moulins à bras, " de s'en servir pour eux et pour d'autres. Mais ils ne " peuvent pas bâtir sur eau ou à vent sans son consente- " ment. Le seigneur haut-justicier a droit d'accorder la " permission de faire des moulins sur des petites rivières " non navigables au préjudice même des particuliers." This right claimed by the haut-justicier is claimed solely on the ground of his being in possession of the *puissance publique*, in virtue of the concession of the *droit de justice.* Now, if under the Custom of Paris, it was the *seigneur haut-justicier* who claimed the right of permitting mills to be built on *non navigable* rivers, it is clear that the *droit de moulin* can proceed only from the *droit de banalité* and the *droit de rivière* as claimed by the *haut-justicier.* But the *droit de rivière* has been shewn, at least as I view the case, to be in the *eigneur féodal* as proprietor of the territory and not in the

haut-justicier. Boutaric, *Droits seigneuriaux*, ch. 6, des *Rivières*, p. 558, says: "Mais dans le droit *général* et dans les cou-
" mes muettes, il est certain que le seigneur haut-justicier
" a seul droit de permettre de construire un moulin sur sa
" rivière" and page 559. " Qu'est-ce qu'une rivière banale?
" Pour toutes les autres banalités il faut titre, mais pour la
" banalité de rivière, il suffit d'être seigneur haut-justicier
" du territoire où elle passe:" and he cites the arrêt of the *Parlement de Paris* referred to by Ferrière. Now, if it required a title for every kind of *banalité*, except that arising from the property in a river, what title can the *seigneur féodal* claim in the river? Is it not a mere right of property? The right of the *haut-justicier* was not a right of property but of jurisdiction, and unless it can be shewn that the jurisdiction, which gave the right to the *haut-justicier* exists in the *seigneur féodal*, he cannot claim the *droit de moulin* on that ground.

Hervé vol. 5, makes the bed of the river a dependency of the bank. So Henrion de Pansey says on p. 216, vol. " Telles sont les restrictions successivement ap-
" portées à la liberté primitive de construire des mou-
" lins, qui, au fonds, n'est autre chose que la faculté de
" préparer ses alimens à son gré. Ces restrictions déri-
" vent comme l'on voit de trois sources: la propriété de la
" rivière, l'existence de la banalité de moulin dans le terri-
" toire, enfin la police générale." Now the Custom of Paris abolished the *droit de banalité* as a *droit de fief*, as being unjust and exorbitant of the common law, and is it reasonable to suppose that the Custom could retain, as a *droit de fief*, the privilege of building all others description of mills not embraced within the *droit de banalité*. It is on the contrary conclusive evidence that, under that Custom, no other *droit de moulin* existed, than that claimed from the *droit de banalité*. The law in attributing this right to the possession of the property in the river, excludes the idea

that there can exist a *droit de moulin*, otherwise than by the right of *banalité*, and this right of property in the river is derived, not from the right of property in the stream as water, but from the property in the bed of the river, which carries with it the exclusive use of the water of which it is a mere dependency. The authorities which have been cited on the part of the seigniors to show that the *droit de cours d'eau* belongs to the seignior, are all based on the supposition that the seignior remains proprietor of the river, that is of the bed of the river. For, the right of the censitaire is said to be restricted to the border of the water, and that the water being the limit of his property, all the rest, that is the bed and the water, not being conceded, remains with the seignior. It is because the concession is limited, not because the river is a *droit de fief*, that it is supposed not to pass with the concession, unless expressly mentioned, for if the bed of the river passed with the concession, it is difficult to conceive that the water which flows over the bed would not have passed with it. The right is made to rest entirely on the right of property in the river and the only question to be really determined is: does the river pass with the concession? So also when the authors speak of those rivers being *rivières banales* or *rivières de cens*, they mean that so long as the seignior remains proprietor of the river, including the bed, the right may be conceded. But in none of the authors can there be found any thing which can justify the idea that the *droit de cours d'eau*, is a right in water alone, or in the use of water alone, or in the use of water, apart from the bed over which it flows, or that it is *droit de fief*, unconnected with the mere right of property in the river, as has been before discussed... This right may have been conceded by the *haut-justicier* by reason of the jurisdiction granted to him, which placed him precisely in the same situation as the Sovereign was in respect of navigable rivers. But such right is

the *seigneur féodal*, except in the Custom of Normandy, has not been shewn to exist. Even this Custom of Normandy makes no distinction of this kind. It affirms the rule that the right results from the right of property in the banks of the river. But the text of that Custom, requires also that the owner should be at the said time seignior. In no other Custom have I found any thing to support the proposition that it is a *droit de fief* in the sense contended for by the seigniors; and from the citations of Henrion, it is this Custom alone which has given rise to the opinion of the feudists, that this *droit de cours d'eau* is a *droit de fief*, apart from the *droit de fief* which applies to the whole seigniory.

These authorities are sufficient to show that the *right of building mills* apart from the right of *banalité* is a right which results solely from the possession of the water powers. It is a *droit utile* arising from the possession and ownership of the bank of the stream, and of the stream with its bed as the accessory of the bank. If it be not this, the *droit de moulin* must be an incorporeal right, a mere *droit de fief incorporel* which would extend to the erection of all mills which might be erected and moved by other power than water. The *droit de moulin* rests entirely on the *droit de cours d'eau*. The *droit de cours d'eau* rests entirely on the possession and ownership of the *cours d'eau* itself. This right of property is a mere dependance of the banks of the river; if it passes from the seignior, it passes with all its attendant privileges, and these are to use the water for every purpose to which it can be applied, subject only to the servitude of the public.

If it be a *droit de fief* apart from the territory and the *droit de fief* which belongs to it as a whole, then it could not have passed to the seignior by the grant of the Crown without express mention, in these cases at any rate where

no mention is made in the grant of the rivers. For, if it be *droit de fief* in the seignior, it must by the same rule have been a *droit de fief* in the feudal Sovereign, and if not a part of the *fief* conceded, it must have remained in the possession of the Crown.

I will remark that, by the effect of the feudal contract, the entire *utile* of the concession is separated from the *directe* which alone can remain in the seignior. The feudal law of Canada, as I understand it, made this concession of the land obligatory and imperative. The whole land conceded must pass by the concession, and by the force of the feudal law the characters of seignior and censitaire must be separate. The seignior cannot be *censitaire* and seignior at the same time. If the property passed to the *censitaire* and the seignior retained the *directe*, the whole property must pass. The seignior can retain nothing in the land conceded which can vest him with a right of property in the land conceded, otherwise he would be proprietor, (*par indivis*) with the *censitaire*, of property which *releve* of himself as seignior. Hervé 3 vol. p. 392. The quality of seignior and *censitaire* cannot be held at one and the same time. If the seignior held a right of property in the land conceded, it could not be held from him separately from his own domain. The seignior may, when he acquired a piece of land, within his own seigniory, prevent its being reunited to his own domain, by declaring that he intends to hold it *en roture*; but there is no incompatibility there; but in reference to land granted to other persons, he cannot hold a right of property. Now, the reserve here spoken of, gives him a clear right of property in his *censitaire's* land. This right of property gives him a right of contract, and by this right of contract, he can prevent the *censitaire* from fulfilling his obligation of settlement and thereby cause him to forfeit his land. His retention of all wood and building materials and sand, &c., are all reserves of this description, which might prevent the

censitaire from clearing his land, and therefore, as I view it, utterly null and void. It is no argument to say that a man in making a grant, so long as he does not retain piecemeal and in detail that which amounts to the whole, makes a good grant. This may apply to cases where the title or the law makes him absolute master of the estate granted. But by the principles of the feudal law a different rule, as I view the law, must be taken. So with reference to all reserves of waters, the same reasoning will apply. Water is a mere dependance of the land and inseparable from it. The seignior cannot retain the property in the dependency, when the principal has been conceded. The dependency can only be useful to the principal and both must pass together. Keeping therefore these principles in view, I will examine these reserves, and endeavour to arrive at a just in conclusing.

Hitherto the question has been discussed to endeavour to establish that the *droit de cours d'eau* is purely a *droit utile de fief*, and is a *profit de fief*, in the same manner that the land is, and that by the concession of the bank of the stream with the river for the border or limit of the concession, without any reserve whatever in the concession deed, the bed of the river and water pass to the concessionnaire, as dependencies of the bank. But by the 39th and 41st questions submitted on behalf of the Crown, the Court is called upon to determine on the legality of certain reserves and limitations, contained in deeds of concession, granted by the seigniors to their censitaires. The reserves nos. 5, 6, 7 in the 39th question and nos. 1, 2, 3 in the 41st question are reserves requiring special attention. Assuming as a legal proposition, that the concession without any reserve, of a water lot, passed the property and the use of the water with it, any reserve which did not limit this right of property, by restricting the limits of the said concession itself so as to exclude in terms the bed and the river itself from the concession, could not divest the censitaire of any of his

rights of property in the river. That if the right to build a mill is dependant on the possession of the water or stream, as I have endeavoured to establish in the preceding remarks, then if the river passed with the concession, this right of building mills must have passed with it. The reserve, to be valid and effectual, must exclude the censitaire from all right of property in the water itself, by excluding it in express terms from the concession, in other words, the banks of the river must be excluded and form no part of the concession. Take by way of illustration the reserve no. 5 of the 39th question. The words are, " a reservation of all " rivers, rivulets and streams for all kind of mills, works " and manufactures." No. 6 of same question: " a reser- " vation of diverting and directing the courses of streams " and of intersecting lands by channels for that purpose." The very fact that a reserve of this kind is made, implies that without such reserve, the water would have passed with the concession, and if so, it could have passed only with the bed which is not reserved as a dependency of the bank. Now, as regards the first of these reserves it is of no great value, for, after he, the seignior, has used the water for his purposes, he must return it to its channel and then the censitaire can use the water also. The reservation cannot exclude the censitaire from its use. The seignior by law has the right of using the water, if he retains the property in any part of the banks, without any such reservation, but by law he must return it after he has used it.

It did not require this reservation to give him the right, and unless the words can exclude the tenant from the use of the water as it passes by his land, which they clearly cannot do, then the reservation is useless, and it can neither confer nor take away any rights. If the tenant should in defiance of this reservation use the water for a mill, what damage does it inflict on the seignior? He has the use of the water, what more can he demand? Interest is the mea-

sure of all legal rights; if he has no interest, how can the infringement of this reservation by the tenant affect him? it can produce no result whatever. At most it is only a violation of a personal obligation, and to inforce this obligation the seignior must show damage; now what damage could he sustain, if he got the use of the waters reserved to him by his contract.

As regards the sixth reservation, the same argument may be used. He may possibly have the right of diverting the stream, when it passes thro' his own domain, but then only, and even this, without any injury to those who have an equal right to the use of the water; but he must again return the water. The reservation does not say if the diversion is to be made thro' the land of the tenant. It may be diverted otherwise than thro' the land. But if it were to be taken thro' his land, it would be a servitude which he had imposed on his land by agreement and no more; its violation might be a violation of agreement and might give rise to damage; even if such damage could be shewn, it could give no right of indemnity for either of these two causes, for they do not fall under the class of feudal rights extinguished for which any indemnity can be claimed. The indemnity for the *cours d'eau* or the use of waters is given when the lands of which it is a mere dependency is redeemed, and if the right of using the water is a *droit utile* and arising from the property in the banks, it cannot be considered as one of those rights for which indemnity can be claimed, otherwise all *droits utiles* alienated by the seignior would fall under the operation of the act of 1854.

As regards the reservation under the 41st question, the 1 and 3 articles may be disposed of under the argument already given as respects the others. These reserves do not divest the tenant of the right of property in the water courses, if it passed by the concession. They are all stipula-

tions in a contract, not to do himself or to permit another to do a particular thing. They cannot affect the contract itself so as to entitle the seignior to have the contract resiliated or set aside, or to have the specific thing enforced by a judgment of a court. The violation of this obligation would result in damages only, and solely when damages are actually suffered. Suppose that the tenant, in defiance of the reservation, built a mill and used the water as he choose, what could the seignior complain of? Surely his right of recovery at all would depend entirely on the fact that he the seignior was deprived of the water, so that his mill, if he had one, was rendered useless to him, or in any manner interfered with ; I mean as to its working ; for the words of the reservation are not large enough to cover any loss arising from competition in the business of the mill.

These reasons will illustrate the proposition that to deprive effectually the tenant of the right of building mills or of using the waters, the right of property itself must be restricted. The water course must be the property of the seignior or of his tenant. It cannot belong to both. The seignior cannot be joint censitaire with his own tenant, of himself as seignior. By the feudal law the *directe* must be separate and distinct from the *utile*, and as the right of building a mill is a *droit utile* arising from the possession of the water course, nothing but a dispossession from it, can take away the right. The seignior cannot reserve to himself, in alienating the land, any thing which by law, is the natural dependency of the land and which must follow the land into whomsoever possession it passes. The tenant may violate the personal obligations which he has assumed by the *bail à cens* ; but such violation cannot affect his right of property in the thing conceded. He may be liable in damages for the violation of these obligations , but no more, and then only when damage is proved . It surely will not be pretended that the right to indem-

nity is to be established and based on the amount of any possible or contingent damage which may arise from a violation of mere personal obligations stipulated by the contract of concession. The indemnity must rest on the value of the feudal rights which are extinguished and which are certain profitable rights in themselves. If the profitable right has not been disposed of, it remains in the possession of the seignior by continuing to be the proprietor of the water course and therefore he can claim no indemnity. If he had disposed of it by the concession *à cens*, it has passed for ever from him and the capitalisation of the rent reserved for the land of which it is a dependency, is the indemnity which alone he is entitled to claim.

As regards the reservations nos. 1, 2, 3, 4, 7, of question 39, and no. 2, of question 41, nothing more need be said than what has been said when the general question of reserves was treated. These are reservations which, by the very nature of the contract of concession, cannot be made. They involve the retention of a part of the property conveyed ; the entire *domaine utile*, must belong to the censitaire. If the seignior can reserve legally a portion of the *domaine utile*, he can reserve the whole. The law makes no distinction. The amount or a quantity reserved can make no difference in the principle. If he can reserve a portion of the timber, he can reserve all. The obligation assumed by the censitaire to *défricher* would be made dependant on the will of the seignior, and not on the law of his contract. If the seignior can reserve all building materials on a land, he might reserve the land itself. The common law rule in reference to contracts of alienation must prevail. He cannot sell or alienate and retain at the same time. The redevances are paid for the alienation of the land, *traditione fundi* but the *traditio fundi* must be given. Any reservation which the seignior can legally make in the *bail à cens*, must be one which in itself does not reserve any portion

whatever of the property conveyed to the censitaire. He may bind himself either at the time or afterwards, in the use he may make of the water, that may be perfectly legal, but this is not and cannot be a *droit de fief*, for which he is entitled to claim any indemnity. The seignior and censitaire are not deprived of the right to make any contract which they choose as proprietors, the one of the seigniory, and the other of the concession. The censitaire might bind himself not to erect a mill just as any proprietor might do. But such an agreement would be an ordinary stipulation or concession between proprietors, but it would not be a *droit de fief* in favor of the seigniors for which he could claim any indemnity. Such an agreement might exist as well after the abolition of the feudal tenure as before it, and it would be treated by Courts as all other stipulations and convenants made by proprietors in the event of its violation.

No 8 of 39th question is equally illegal. The law *d'expropriation forcée* regulates the rights both of seignior and censitaire, and the seignior can have no indemnity as against his censitaire. His indemnity for the loss of his feudal rights in that respect is regulated by law, and he has no interest whatever in that which relates to the land of his censitaire. On this point therefore he can claim no indemnity. As regards no. 9 of question 39th, such a reserve is not inconsistent with the feudal contract and when the censitaire has consented by his contract to that right, he must abide by it.

As regards no. 10 of question 39th, this is a right which cannot be reserved by the contract, in the view which I have taken. As regards no. 9, no right to indemnity can arise, as it is not a profitable right ; as regards no. 10 the concession having passed the property, all the *droits utiles* must pass with it. But this may be considered rather a personal right of fishing, and is coupled with the right of

hunting which is purely personal to the seignior, and in this view as no possible standard of value can be given on which an indemnity could be based, I think none can be claimed.

PART FIFTH.

ON BANNALITY.

The law of France in reference to *banalité*, as applicable to the feudal tenure on its introduction into this country, is to be found in the 71st and 72d articles of the *Coutume de Paris*. The right of banality is a privilege which the seignior has of compelling his censitaires or tenants to pay tribute to his mill. Before the reformation of the Custom of Paris, it was a feudal right, *droit de fief* and attached to the *tenure en fief*. It was a feudal obligation of a degrading character, and on the reformation of the Custom, it was abolished as such *droit de fief*. The 71st art: is in the following terms: " Nul seigneur ne peut contraindre ses su-
" jets d'aller au four ou moulin qu'il prétend banal, ou faire
" corvées, s'il n'en a titre valable ou aveu et dénombrement
" ancien, et n'est réputé titre valable s'il n'est auparavant
" vingt cinq ans."

By this article it appears that the law of France, as regulated by the Custom of Paris, required, for the exercise of this right on the part of the seignior, a valid title. It was expressly abrogated as a *droit de fief* et *seigneurial*, and from thence forth no *censitaire* could be compelled to pay tribute to the lord's mill, unless he had voluntarily assumed and entered into the obligation. It is therefore a purely conventional right, and such was the law of Canada on the introduction of the feudal tenure of the Custom of Paris into Canada. It is unnecessary to refer to the 8 or 10 Customs in France, which made it a feudal right, and incidental to the *fief*, without any convention between the seignior and censitai-

ic. On reference to Henrion de Pansey, *Dissertations Féodales*, the whole law of France will be found there stated at length. It is the *Coutume de Paris* alone which can determine the character and obligations resulting from this right. The first legislation which took place in Canada, on this subject was in 1675 ; see *Edits et Ord.* in 8, v. 2, p. 162. It is an ordinance of the *Conseil Supérieur* of Quebec, declaring *banaux* the mills moved either by wind or water, built or to be built by the seigniors. This ordinance was rendered by the *Conseil Supérieur* of Quebec on the occasion of a dispute between the millers of two neighbouring seigniories, *DeMaure* and *Dombourg*, arising out of alleged trespasses on the right of bannality, the miller of Demaure pretending that the mill of Dombourg, being a *wind* mill was not by law a bannal mill, and to which it is not necessary here further to allude ; for the ordinance in relation to all mills, is to be found in the latter part and is in these terms : " Le conseil a débouté et déboute le dit Morin de sa de- " mande et prétentions ; et faisant droit sur les dites con- " clusions, et conformément à icelles, a ordonné et ordonne " que les moulins, soit à eau, soit à vent, que les seigneurs " *auront* bâtis ou *feront bâtir à l'avenir* sur leurs seigneu- " ries seront banaux, et ce faisant, que leurs tenanciers, " qui se seront obligés par les *titres* de concession qu'ils " auront pris de leurs terres, seront tenus d'y porter moudre " leurs grains etc." It is clear from the whole tenor of the ordinance that the sole object was to render *wind* mill *bannal* as well as water mills and to compel those *censitaires* who had assumed the obligation of bannality by the concessions which they had taken of their lands, to pay tribute to the *wind* mill, in the same manner as they were bound to do to water mills ; to render the obligation of bannality to water mill, as stipulated in the contract, obligatory for the future as well as for the past, when the seigniorial mill was a wind mill instead of a water mill.

The effect of the ordinance was to modify the law of the Custom of Paris, as expressed in the 72d art: and to declare that, whenever there was a contractual bannality established by the concession without any mention being made of the kind of mills, that it should apply to wind mills as well as to water mills. This ordinance then left the question of bannality where it was before, that is, a purely conventional right; and the only change operated was in rendering the right stipulated for water mills obligatory in the case of wind mills.

The next piece of legislation is to be found in the *arrêt* of 1686. It is in these terms: " Le Roi étant en son " conseil, ayant été informé que la plupart des seigneurs, " qui possèdent des fiefs dans son pays de la Nouvelle- " France, négligent de bâtir des moulins banaux, néces- " saires pour la subsistance des habitans du dit pays, et " voulant pourvoir à un défaut si préjudiable à l'entretien " de la colonie, Sa Majesté, étant en son conseil, a ordon- " né et ordonne que tous les seigneurs qui possèdent des " fiefs dans l'étendue du dit pays de la Nouvelle-France, " seront tenus d'y faire construire des moulins banaux " dans le temps d'une année après la publication du pré- " sent arrêt, et le dit temps passé, faute par eux d'y avoir " satisfait, permet Sa Majesté à tous particuliers de quel- " que qualité et condition qu'ils soient, de bâtir les dits " moulins, leur en attribuant à cette fin, le droit de bana- " lité, faisant défense à toutes personnes de les y troubler." The effect of this *arrêt* was to impose on all seigniors the obligation of building bannal mills whether they had stipulated or not with their *censitaires* for this right, and in default of their building these mills, the *arrêt* conferred the right of bannality on those who should build the mills for them.

It is clear therefore that the Crown by compelling the

seigniors to build bannal mills, must necessarily have intended to convey to them the privilege which by law attached to these mills, otherwise the *arrêt* would have been unjust in its operation, and the effect of doing so, was to render the stipulation of bannality in the concession unnecessary, but it did not change the nature and character of this right in any way. It was still the bannality of the 71 and 72 art. of the Custom of Paris, but it was imposed, by this *arrêt*, on all seigniors without any convention, or agreement to that effect, between seignior and *censitaire*, and the only effect was to render that obligation a *droit de fief*, instead of being conventional. It therefore became a feudal right and attached to all seigniories in the colony after the passing of this *arrêt*. If the *arrêt* of 1686, as it is pretended, did no more than affirm a preexisting conventional right, but still required a convention to be enabled to enforce this right, then, the seignior could be compelled to build a mill, but he could not enforce the right of bannality without an agreement to that effect. Now, before the *arrêt* of 1686, a seignior in Canada, under the mere bannality conventional, could not be compelled to build a bannal mill, for the effect of not building was only to permit his *censitaires* to go elsewhere for the purpose of having their grain ground, but not so under those Customs which declared the *droit de banalité* to be a feudal right. Under those customs the seignior could be compelled to build ; and if the seignior could be compelled to build a mill, on what principle of justice can he be deprived of bannality ? The effect of the *arrêt* of 1686 was therefore to render a convention unnecessary and to give to *censitaires* the right to compel the seignior to build his mill or to forfeit his right. See abstract of art. of custom published in London in 1772. This right is therefore, by this *arrêt*, a feudal right and it changed the law of Canada, as it previously existed in this, that it rendered a convention unnecessary, and imposed upon the seignior the

obligation of building a bannal mill, within a year from the date of the publication of this *arrêt*, on pain of the forfeiture enacted by the *arrêt*. It is true this *arrêt* was not enregistered and published until twenty years or more after it was so rendered, (see Raudot's correspondence of 1707, where the reason is assigned) but this does not affect the question. But what is the right of bannality as it was so imposed? Was it different from the *droit de banalité* as it existed under the 71st art. of Paris? Ferrière in *Coutumier général*, v. 1, p. 1036, at no. 5, says: " *Mais dans la Cou-* " *tume de Paris, ce droit n'est point féodal, ni seigneurial,* " *c'est un droit extraordinaire et contre le droit commun* " *&c.*, " and therefore no such right can be exercised without a good title and by possession. But once acquired by title and possession under the 71st art. does it cease to be what the author represents it to be? No, it is after it has been acquired, what it was before it was acquired and the only change which was introduced into this colony, in that respect, is that the *arrêt* of 1686 gave the right without any contract between the parties, but the right was the same and the *arrêt* of 1686 gave it no more extension or effect than what the convention did, if the *arrêt* had not been passed. Of course, I speak of it, without reference to the right which the *censitaire* had of compelling the seignior to build the mill, for that privilege or right in no way affects the character of the obligation.

Ferrière, on p. 1031 of the same volume, says: " Le " seigneur qui n'a pas droit de banalité ne peut pas empê- " cher ses sujets de bâtir sur leurs héritages et de faire chas- " ser dans le détroit de sa seigneurie, mais *ayant moulin* " *banal*, il peut faire l'un et l'autre."

On page 1035, no. 1: " A l'égard de la banalité, c'est " une espèce de servitude, laquelle par conséquent ne " s'acquiert pas sans titre."

It continues therefore to be a mere servitude and a personnal obligation, but a servitude created by law, instead of by convention. The right may be real in so far as it was inherent in and attached inseparably to the *fief*, but in its obligation, it is still a servitude and personnal in its nature, obligatory on all censitaires within the enclave of the seigniory, with certain limitations, but not real, in respect of all the productions of the seigniory, as in the case of the *pressoir banal.*

The privileges which belong to this right under the Custom of Paris and under the *arrêt* of 1686, are 1st. that the seignior can compel tribute to his mill after he has built a bannal mill, and 2d. that no one can build a bannal mill within his seigniory. On the first point nothing new can be said, as no dispute whatever arises on this point. But as regards the exclusive right of building mills for purposes other than that of bannality, or mills of any other description, it is necessary to examine this right.

Ferrière, loc. cit. on page 1038, no. 13, says : " Il peut " aussi empêcher ses sujets de bâtir des moulins à bled, " sur sa terre et que d'autres n'en fassent bâtir, et intenter " contre eux le cas de saisine et de nouvelleté."

No. 15. " Quand un seigneur n'a pas le droit de bana- " lité de moulin, il ne peut pas empêcher les particuliers " d'avoir chez eux des moulins à bras, de s'en servir pour " eux et pour d'autres, mais ils ne peuvent pas bâtir des " moulins sur eau ou à vent, sans son consentement ; le " seigneur *haut justicier* a droit d'accorder la permission de " faire des moulins sur des petites rivières non navigables " au préjudice même des particuliers qui y ont moulins." In no 15, in speaking of the right of building mills : " ce " même auteur (Brodeau) dit, selon l'avis de Bacquet no. " 10, que les particuliers ne peuvent bâtir moulins à vent,

" sans le consentement du seigneur, quoiqu'il n'ait point
" droit de banalité, ce qui est néanmoins contre l'intérêt
" public et la liberté des sujets, mais ils peuvent envoyer
" moudre leur bled dans les moulins voisins." P. 1012,
" no. 23. " La raison est que le seigneur qui a moulin
" banal peut empêcher de construire un autre moulin bannal
" (sic) que le sien dans sa terre."

I may also cite Brodeau, arrêts notables on Custom of Paris, p. 174, no. 3, 4, 5, 6, 7, 8, 9, 10; p. 176, no. 17.— Bourjon, p. 253, no. 3, p. 235, nos. 11, 13. 1, Duplessis on Paris, p. 66, 63. These authorities are generally similar in all commentators on the Custom of Paris.

From these authorities we may infer that no person can build a bannal mill within the *enclave* of a seignior who has the right of bannality. But does it follow that he cannot build a mill for any other purpose? The prohibition is to build a bannal mill, that is a mill for the purposes and objects for which a bannal mill is built, that is for the grinding of the wheat subject to the *droit de banalité*, but as far as this right is concerned and no farther, for whatever right the seignior may claim *aliundè*, as proprietor of the water courses, the right is commonly considered as dependant on the *droit de banalité*. But is this prohibition to be restricted to bannal mills, properly speaking, or is it to be extended to all mills whatever, when there is no violation of the *droit de banalité*? For, if it is to be so construed, it is clear that no mills whatever of any kind, even for purposes *hors* the right of bannality, could be built and owned by others than by seigniors, for, as by the laws of France and by the laws of Canada, in that part where the seigniorial tenure prevails, and where the rule *nulle terre sans seigneur* prevails, no other than seigniors could possibly possess mills, for in all seigniories the same restriction would prevail, and the *censitaires* would be for ever deprived of the right of building

a mill. The monopoly would necessarily extend to all grist mills whatever, as no other than seigniors could build mills. If the *droit de banalité* be a mere servitude, is it possible to extend the law so far? The precise words of the law are to exclude the erection of bannal mills. In limiting the restriction to bannal mills, is it not fair to conclude that mills not bannal may be erected? If the seignior is preserved in his right of bannality, on what pretence can he, under this right, prevent any one from building a mill for purposes other than that of bannality? For, if wheat or other grain is grown in the seigniory, where can it be ground? It is no argument to say that it may be ground at the seignior's mill, for the *censitaire*, for this grain, is not bound to go there, and if he be not bound to go there, where can he get it ground, unless he go to a neighbouring seignior's mill, which must be a bannal mill or one built by the seignior for purposes other than that of bannality. This necessarily extends the right of the seignior to grind all grain grown in the seigniory and thereby the privilege is extended beyond what the law intended. For if the *censitaire* subject to bannality can only be compelled to grind a certain portion of his grain at the bannal mill, viz, that necessary for the support of the family, (and on this point I take it there will be no difference of opinion) then the right of bannality necessarily involves the monopoly of building all mills whatever; he must either go to his own seignior or a neighbouring seignior, and in either case, it is, in effect, extending the privilege of the seignior far beyond what the law itself has made it, for it is only a servitude and a servitude limited to the grain necessary for the consumption of the family; but by refusing to the *censitaire* the right of himself grinding his grain not included in this right, or forcing him to go to a neighbouring seigniorial bannal mill, it is beyond controversy, that by this interpretation of a rule imposed by law for the advantage of the *censitaire* and just-

ly imposed to meet the wants of the colonists at that time and restricted within fixed and definite limits, you so interprete this rule, as to create a totally new obligation and privilege. To pretend that because the seignior has a *droit de banalité*, that therefore you can have no mills, but the seignior's, is to say that all grain grown must be ground at the bannal mill, and that is a new law, certainly in direct violation of the law of 1686. See Ferrière, p. 1031. Coquille sur Nivernois and the authority on p. 1033-4 of Ferrière.

The privilege is given for certain purposes and no more and it is a universal rule of law, that you cannot interpret a law so as to give an application to it, far beyond the limits prescribed by the laws of the privilege itself. Now the law restricts the privilege to the grain necessary for the support of the family, but if you prevent the *censitaire* from grinding that grain which is not included within the privilege, except at a bannal mill, even if that bannal mill be the mill of another seignior, you thereby declare that the right of bannality shall extend to all grain grown within the limits of any seigniory and that the seignior, shall have the exclusive privilege of grinding all grain whatever, even for all commercial purposes, for as was observed before, there could be no other than seigniorial mills, as all lands being in seigniory, *nulle terre sans seigneur*, no other mills could be erected in any seigniory.

The obligation of the censitaire is clearly defined by law, it is limited to one thing. The privilege can be only co-extensive with the obligation. If it be declared that the right of bannality gives the privilege of exclusively owning all the mills, then the privilege goes far beyond the obligation which has been assumed by the censive. They therefore cannot coexist ; the one must override the other. The obligation of the censitaire must be extended beyond what the laws declares it shall be ; or the exclusive right to build

all mills cannot be admitted. The obligation of bannality is a synallagmatical obligation with reciprocal rights and duties. The seignior undertakes to build the mill, the censitaire to pay tribute to the mill when it is built. This tribute is limited by law ; for the overplus of grain grown, the censitaire is free : he can grind it where he pleases. The seignior can have no interest whatever in this, for it is not liable to the obligation of the tribute. The *censitaire* can dispose of this grain as he chooses. He can sell or convert it into flour, but if he must go to a bannal mill to do so, as he cannot erect a mill himself, then it is impossible to deny that the obligation which the censitaire has assumed is one never contemplated by the law ; for the *arrêt* of 1686 expressly declares that the *droit de banalité* shall cover only the grain necessary for the subsistence of the family. This *arrêt* therefore defines the obligation of the *censitaire* and its extent. Now it cannot be denied that almost all the commentators on the Custom of Paris declare that the *droit de banalité* gave the seignior the exclusive right of building bannal mills or *moulins à bled* ; but this must be explained with the view of giving an interpretation consistent with the nature of the obligation assumed. On reference to Henrion de Pansey, p. Dissertations Féodales, it will be there shewn that this right has been claimed as an integral part of the *droit de banalité*, by almost all feudists, because it was necessary to do so, to protect the seignior in the exercise of his right. If this be the reason which has given rise to the opinion of feudists, and I take it that this will not be controverted, then the question ceases to be of any difficulty or its elucidation of any practical importance. For if it be conceded that this exclusive right is insisted on, as a means only of preventing any infringement of the seignior's right, then it is clear that it can form no portion of the right of bannality, for which any indemnity can be claimed. For the protection which the law gives for the exercise of any right or

privilege can never, in valuing this right or privilege be taken to be a part of the right or privilege itself. If the *droit de banalité* be abolished, then as a matter of course, all that the law granted merely as a means of preserving or of securing this right falls with it. But the indemnity can only be based on the value of the right itself.

But the authorities cited show that the exclusive right of building mills other than bannal mills depend on other pretensions, which have no reference to the *droit de banalité*, and have been discussed in another part when the water courses came under consideration. I think therefore that the *droit de banalité* can confer no such privilege. It is limited to the building of bannal mills and cannot be extended to mills not bannal. But it is said that the law gives the right to the seignior to demolish any mill built within the seigniory. The same reasoning will apply.

I am therefore of opinion that the *droit de banalité* as introduced by the *arrêt* of 1686, is the *droit de banalité* as it existed under the 71 art. of Paris, and is a mere servitude. That this right gave the seignior the exclusive privilege of building bannal mills; that, even if it be admitted that this right necessarily gave the seignior the exclusive privilege of building grist mills and of demolishing those built by a censitaire, in case of any infringement of his right, or even without any actual infringement, such rights existed only as a means of securing to the seignior the exercise of his right, and can give no right whatever to any indemnity.

That this privilege of the seignior was granted on the condition of his building the mill, and his right to exact the tribute or enforce the servitude was acquired only after he had built his mill, and that until he had built a mill, it was an unprofitable right and could give rise to no indemnity under the law of 1854. That the privilege extended to the grinding of the grain necessary for the consumption of the

censitaire, whether he grew it himself or purchased it, or otherwise obtained it, provided it was brought within the limits of the seigniory—that the indemnity must be based on the value of the *droit de banalité* as fixed by law and no more; and that, if no bannal mill was built at the time of the passing of the law of 1854, no indemnity is due. What then does this right consist of under the law of Canada, that is, what is the right of the seignior for which he is entitled to indemnity and on what principle ought it to be taken and established? As has been already observed, the obligation which the *censitaire* has assumed and which the law of 1686 has imposed on him, is to grind the grain necessary for the subsistence of his family, at the seignior's mill. On this he pays a tribute which the law fixes at one fourteenth. The total value of the obligation is the fourteenth part of that grain which is liable to the tribute. What is the seignior's obligation which the law has imposed on him, as a *non*, to obtain this tribute? It is to build a mill and grind the grain. It is a contract involving reciprocal rights and obligations. In determining the value of this right, these rights and obligations cannot be separated. They must be examined together to arrive at a just appreciation of their value. The right of bannality, which the seignior invokes, cannot be determined without ascertaining precisely what the nature and extent of the obligation is which is imposed on the *censitaires*. In valuing this right it is necessary to know what has been paid for it, in other words, what are the correlative and reciprocal obligations which the seignior must assume to obtain this right. It is clear that no right of bannality can exist until the seignior has built his mill; neither can the grain of the *censitaire* be ground, after it is built, without the expenditure, by the seignior, required to effect that object. These two things, therefore, are what, under the contract which the law has made for them, the seignior must pay to obtain this right.

It appears, therefore, also manifest that these two things must be deducted from the total value of the tribute, in order to ascertain the precise value of the privilege for which an indemnity must be given to the seignior. The seignior cannot retain his mill, and at the same time take the capital of the tribute on the abolition of the right. For that would be no relief whatever to the *censitaire*. He would emancipate himself from the obligation of bannality by paying the capital of the yearly tribute and he would still be obliged to grind his grain. It would in fact be a doubling of his tribute. For it is no argument to say that he could build a mill, if he choose, for that would be to relieve him from one burthen by imposing on him one which he could not assume. The capital of the tribute is the total gross value of the *droit de banalité*, but the bannal mill, by the law of 1686, is not the property of the seignior absolutely; it is the property of the seigniory and attached to it;—because it is the equivalent which the law requires from the seignior before he can exercise his right or claim tribute. The equivalent must therefore be surrendered, or be deducted from the total value of the tribute, before the profitable right of bannality can be determined, and this balance, so obtained, is the *droit de banalité*, in so for as any pecuniary value can be ascertained, which must be paid by the censitaire to obtain his emancipation, and if the seignior retains this equivalent on the abolition of the right, its value must be credited to the censitaire, before any just basis of indemnity can be ascertained or settled, otherwise the seignior will be paid the full value of the tribute and retain at the same time, what the law has compelled him to expend to obtain this tribute. But it is contended that the seignior by his right of bannality possesses the exclusive privilege of building grist mills, and that, if this right be abolished, he is entitled to an indemnity to be paid, if the right be admitted to be just. Surely, it cannot be by the *censitaire*, for his obligation being a servi-

unde, in law, to grind a portion only of his wheat at the mill and no more, it can only be the basis of his pecuniary liability. The excess in value of the seignior's mill can only arise from the fact, that being the only mill owner, he necessarily grinds all other grain, not liable to the tribute of *banalité*. But for this excess in value he can, surely, have no claim on the *censitaire*. It is an accident arising from the exercise of the right of bannality, not appertaining to the right itself, for the prohibition imposed on the *censitaire* to build a mill, is established only as a means of protecting the seignior in his right and for no other purpose. If, however, it be contended that this exclusive right of building mills be an inherent part of the right itself, then, indeed, this right might properly be taken into consideration. But the situation of the *censitaire* would be infinitely worse than it was before, for, then, he would be compelled to pay the capital of his tribute, pay for the *droit de moulin exclusif*, as a part of the *droit de banalité*, and the seignior would still be left the owner of the mill, and the *censitaire* be still obliged to grind his grain at the seigniorial mill. For it is useless to deny that the *censitaire* could rarely build a mill or successfully compete with the seignior in possession of all the advantages arising from a mill in full operation. I am therefore of opinion that the only just way of establishing the right of the seignior for which indemnity is due, is to deduct from the total value that of the seigniorial mill and of the expenses incident to its working, for any excess in valuing the mill can only arise from the extension of the privilege for purposes of manufacture, as before observed; and the balance, if any be found in favor of the seignior, will be the just measure of indemnity; and if there be no such excess or balance, then the *droit de banalité* should be abolished without indemnity.

ERRATA.

P. 20, line 11th of the note, in lieu of *achètent*, read ; *achète.*

26, line 15, in lieu of *or* read : *on.*

" line 17, in lieu of *censure* read : *censive.*

30, line 22, in lieu of *functionnaires* read : *funtionnaries.*

" line 5, in lieu of *Arrêt Marly*, read : *Arrêt de Marly.*

31, line 32, in lieu of *conceded*, read : *concede.*

54, line 24, in lieu of *thier*, read : *their.*

56, line 3, in lieu of *setled*, read : *settled.*

100, note, in lieu of *Daniel* read : *Daviel.*

103, note 1st line, in lieu of *Daniel*, read of *Daviel.*

108, line 35, in lieu of *eigneur* read : *seigneur.*

113, line 15, in lieu of *in conclusing*, read : *conclusion.*

118, line 11, in lieu of *concession*, read : *convention.*

" line 12, in lieu of *seigniors*, read : *seignior.*

122, line 17, in lieu of *prejudiable*, read : *prejudiciable.*

128, line 34, in lieu of *laws*, read : *law.*

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OPINION

OF THE

HONORABLE JUDGE C. MONDELET.

The learned dissertations of the Honorable Judges who have spoken before me, and to which we have all attentively listened, would leave nothing for me to add, were I of the same opinion as the majority of the Court, upon the general heads of the Propositions submitted to us by the Attorney General; they would even impose upon me the necessity of merely stating, that my opinions were the same as those which have already been set forth. But as it is impossible for me to agree to some of the Propositions which the Honorable President and several of the members of the Court have maintained as being founded in law, I cannot keep silent. I shall avoid all repetitions, as much as lays in my power, and even then, the task will be an arduous one. The learned and eloquent Counsel, who, while upholding the respective interests of the Seigniors and of the *Censitaires*, and while supporting or contesting the Propositions of the Crown, which, as a general rule, reflect the pretensions of the *Censitaires*, have thrown an additional lustre upon the noble profession which they have such numberless reasons to hold in high respect, and have given to the Court a very wide scope. The Honorable Judges who have spoken before me, have strengthened the phalanx which I am called upon to combat, and I have every reason to believe that the Honorable and Learned Judges who are to follow me, will hardly come to my assistance. Nevertheless, relying upon my own convictions, I shall, without farther delay, express my opinions.

With a view of establishing a certain arrangement in the statement of the principal questions which arise in the inquiry, I shall class those questions in the following order:

I. Is it a bounden duty with the Seigniors in New France and in Canada, to concede?

II. Before the *Arrêts* of Marly, in 1711, was there a fixed rate at which grants were to be made in this Country?

III. What were the effect, character and motives and the object of the *Arrêt* of Marly?

IV. Are the *Edits*, *Arrêts* and *Ordonnances* relative to the rates of grants, laws of public order: could they have been legally derogated from, by virtue of any private agreements?

V. Had the Courts of Law in Canada, at any period and when, and have they still, at present, power to enforce the *Arrêts* of Marly?

VI. Is it true that those *Arrêts* have ceased to be put into force?

VII. As to the right of banality: what is its character in Canada, from whence has it arisen, in one word, what is it?

VIII. Are the Seigniors the proprietors of the running waters and of the non navigable and non floatable rivers: does this form a part of the feudal tenure? If the Seigniors are not therefore proprietors as feudal Seigniors, were they proprietors as Seigniors high justiciars? and after the abolition of this high justice (*haute-justice*), did they hand down this right of property?—Finally, if the Seigniors, in their capacities of high justiciars, were not the proprietors of the waters, and had not the control of the non navigable and non floatable rivers, what was, so far as it relates to this, the effect of the abolition of high justice?

IX. Legality of the reservations: what is the law in relation to them, and what is it in relation to the charges and prohibitions?

Before entering upon the subject, it is proper at once to remark, that the rule here should be not to decide any matter in favor of the Seigniors from analogy, nor upon grounds of pretended justice; I say this for the very simple reason that the system of *fiefs* and the seigniorial tenure are, characteristically, essentially, and more particularly with respect to the advantages which have been derived from them by the Seigniors, entirely foreign not only to common law, but even to the law of nature. It would be superfluous to attempt to demonstrate such a truth as this, as it is universally admitted. The most zealous and inveterate feudists, who have, as it were, heaped privilege upon privilege in favor of the Seigniors in whose pay they were, have had sufficient respect for their own character not to contest the point.

In the face of society, commerce, improvements, progress and more particularly of the dignity of mankind, it is unnecessary for me to point out what such a system affords for the consideration of reflective minds; such is not the duty of the Judge: he should only pause there, when it becomes necessary for him to do so in order to confute the arguments by analogy, which may have been used in order to establish a system which would be disavowed by common justice as well as by natural right.

I shall therefore take up *seriatim* the important questions which we have to decide upon.

I. Is it a bounden duty with the Seigniors in New France and in Canada, to concede?

I do not think that there can be any doubt upon this question. An affirmative answer to it may be read every where in letters of light, since the establishment of the

Country up to the present time. It was a matter of ne-cessity, and we must here render homage to the energetic wisdom of the French Government; that wisdom shews itself through every legislative enactment of that time, tending to attain the great end which it had in view, the colonization of New France. Had the French Government been properly supported in its views, it is most reasonable to suppose that this Court would not now be called upon to decide a number of questions, which have arisen merely because the system has been, as it were, distorted to such an extent, that it is difficult sometimes to recognise it.

II. Before the *Arrêts* of Marly, was there a fixed rate at which grants were to be made in this Country?

I am afraid that, with the best intention in the world, this question has been rendered more complicated, instead of being made more clear and simple. It will be said that I allude to those who have made this important subject the object of their serious consideration; because, apart from those men who are competent to fathom this subject, there are many others who are satisfied to echo back the general or the party cry, no matter if it were raised in favor of the Seignior, or, if in a more vociferous manner, it were raised in favor of the *Censitaire*. The Judges composing this tribunal, men inaccessible to prejudices as well as to the passions which are excited abroad, should energetically give their opinions without fear or favor: for it is high time for them to do so.

In the first place, we must be careful not to assimilate our feudal system in Canada, qualified, modified, special and altogether peculiar as it is, with the feudal tenure such as it existed in France, at the time it was introduced or rather established in New France. The origin of *fiefs*, losing itself as it does in the times of barbarism and in the middle ages, presents nothing to us at first but uncertainties.

At a later period, assuming a certain form, it advanced from one encroachment to another upon the natural rights of the nations which had been obliged by force to submit to its influence. I shall not enter into the details; the history of the system is too well known. It would be a mere loss of time, a work of supererogation; the feudal system of New France, and consequently that of Canada, is the same system, modified, qualified, special and altogether peculiar, as I have said before.

At the time that this system was established in New France, the Seignior, in the old Country and more particularly within the jurisdiction of the Custom of Paris, had a right to concede at the rate he chose to establish. It was however very different in New France. It is not only erroneous to state, that since the Seigniors in New France had a right to and should concede, according to the Custom of Paris, they had a right to exact any rates they pleased, no matter how high they might be, but it is a palpable contradiction, since the system in this Country is governed by particular laws.

Therefore, the question is simply this: before the *Arrêts* of Marly, in 1711, was there a fixed rate at which grants were to be made in this Country?

I maintain the affirmative, and I shall go on to prove it.

The great end and object which the Crown of France had in view, was to establish the Country, to colonize it and to spread the lights of the Gospel and of civilisation through it. They thought seriously of doing this, and they commenced in good faith to accomplish this great and noble idea. But it was not by strengthening and increasing the privileges of one cast, and by centralising, that such an end could be attained; it was by taking an opposite course. Such was the idea, and in good faith the proper means were put in force to carry it out.

Unfortunately, in France, at that time, as well as at a previous period, and later, and even in our time, in this Country, the Seigniors encroached step by step; and this systematic and continued progression, which is so well proved by M. Randot and others, ended, by means of the sanction that class of persons obtained from some tribunals, ended, I repeat, by assuming the apparent form of a system, when in reality it was only founded on prescription, as if, by such means, an abuse could be converted into an established right. Such a thing can no more take place than prescription can take place in the face of a title. The Crown of France therefore used the only proper means. On all occasions, the Seigniors opposed the philanthropical views of the mother Country; and, at the present day, we are called on, upon the American soil, to decide if such a system as that which the Seigniors invoke in their favor, does really exist; and which would be nothing more, after all, than the old European system almost in its entire purity: a system which started into existence during the times of barbarism, and was strengthened by the successive encroachments made upon the rights of nations, whose weakness and ignorance were made such good use of for that purpose.

We are conversant with the history of this institution. The learned Judges who have more particularly made it their study, have explained it to us: it is therefore useless for me to do it. I shall at once come to the question in point. I must first state to you, that, notwithstanding all my researches, I have been unable to find the Edict, establishing a rate, which it is pretended does exist for this Country. If ever such a one did exist, it is not to be found. Nevertheless, from the time of the establishment of the Country up to the time that New France or Canada was ceded to England, there were a series of Edicts, Declarations, Ordinances and Decisions, which are much more conclusive than one solitary Edict could be, and which might only have been the expression of a passing thought;

whereas the others which have been published at different periods, are the expression, not only of one thought, but represent and express a decided, fixed and consistent resolution to act according to a certain principle, the only one at that time which could be realised. For this reason, instead of allowing the Seignior the right, as in France, of oppressing the poor people, the French Government endeavoured to enforce, in favor of that numerous class of society, the *Censitaires*, the humane, christian and manly idea it had conceived, which was merely to oblige the Seignior to concede at moderate and uniform rates, which, instead of being an obstacle to the fulfilment of the humane projects of the Crown, would have facilitated the accomplishment of them. That is the secret which reveals to us the true state of matters at that period : the peaceable diffusion of the lights of the Gospel and of civilisation were the motive powers in this Country. The love of conquest and military glory took their place in Europe and in France. The causes which produced them were very different from each other, and the effects must therefore have been unlike.

The fundamental principle of the concessions here was to be on the condition only of the payment of a rent, without the Seignior having any right to demand a sum of money as the price of the concession. It is superfluous to state that, at all times, this rule has been violated by a number of Seigniors. Another established rule was to concede, and in point of fact, the Crown did concede at moderate rates, and for the customary *cens et rentes* and charges (*redevances*). Although the Seigniors were bound to conform to this last rule, they have also violated it at all times. It is hardly necessary to add that here, as well as elsewhere, a moderate rent was almost an essential part of the seigniorial tenure.

According to the concessions granted in 1652 by the Jesuits, who held their *fiefs* from the Company of New France, up to 1663, when the Company ceded its rights to the Crown, it appears that the rate of *cens et rentes* was almost uniform throughout the Country.

In those seigniories which were held immediately from the King, the rates at first were of one *sol en argent tournois*, half penny for each *arpent* in front, and one *sol* of *cens*, equal to about six shillings and four pence half penny for three *arpents* in depth, forming ni nety *arpents* in superficies. This was the general and established rate, particularly in the district of Quebec, although it was less in some cases.

After the Company of New France had ceded its rights to the Crown, a number of concessions were made, and in most of them, with the exception of those in the island of Montreal, the rates were almost uniform, being about one penny for each *arpent* in superficies, and one capon of the value of ten pence, or half a bushel of wheat in lieu thereof; which amount to about one penny for each *arpent* granted, if the wheat be valued at twenty pence. As the object at present in view is not to find a mean proportional rate, but is to ascertain what was the general rate in this Country before the *Arrêts* of Marly, it is not necessary to consider what I have just now stated as an established rule; for, in the district of Montreal, the price was generally one *sol* and one pint of wheat, for each *arpent* in superficies, and half a bushel of wheat, for every twenty *arpents* in superficies. But in the seigniories which belonged to religious communities, capons were stipulated in lieu of a rent in money.

It appears, however, that the most general rate in the Country, and the one which I consider as being the rule, was one *sol* for each *arpent* in superficies, and one penny of *cens* and one capon for each *arpent* in front. This general and I may say almost uniform rate did exist in the Country; it was known and acted upon. And a most remarkable act is that the rate had never exceeded two *sous* for each *arpent* in superficies, although, in a number of cases, it was only one *sou*, when the *Arrêt* of Marly of the 6th July, 1711, relating to Seigniors, arrived in the Country, and was enregistered in the office of the Superior Court of

Quebec, on the 5th December, 1712. Even in this *Arrêt*, independently of other sources of which I will shortly make mention, I find the proof of several important facts. 1°. That the Seigniors were at that time, as they had previously been, refractory, and neglected to attend to the colonization of the Country. 2°. That they refused, under different pretences, to concede lands to those inhabitants who asked them to concede. 3°. That their zeal in seconding the benevolent views of the Crown, consisted merely of a sentiment of egotism, which induced them to act in this manner, so as to be able to sell those lands to the inhabitants who were desirous of obtaining concessions, and at the same time to charge them the same dues as were paid by the old established inhabitants. 4°. That these pretentions of the Seigniors were contrary to the intentions of His Majesty, and to the conditions contained in the deeds of concession by virtue of which they were only to concede for a rent. 5°. That this conduct on the part of the Seigniors was very injurious to the new settlers who found less lands to be settled upon in those localities which were most advantageous for trade. I also find in it the law of the Country at that time to remedy such great abuses; the law which I mention is as follows: the obligation, on the part of the Seigniors who had no lands cleared, nor settlers upon them, was to put the lands under cultivation, and to place settlers upon them within one year, from the day of the publication of the said *Arrêt*; in default whereof, at the end of that time and without further delay being allowed, the lands were to be re-united to His Majesty's domain, at the instance of the Attorney General of the Superior Council of Quebec, and by virtue of the Ordinances to be made in relation thereto by His Majesty's Lieutenant General and by the Intendant of the Country. I also remark in it an order of His Majesty to all the Seigniors in New France to concede the lands within their seigniories, to the inhabitants who might require them, on condition of the payment of a rent, and not to exact from them any sum of money in payment of those con-

cessions. In default whereof, the settlers were allowed to demand the lands by a summons, and, in case of a refusal, to apply to the Governor and Lieutenant General and to the Intendant of the Country, whom His Majesty commands to grant the lands in those seigniories, which the settlers may have demanded; and the dues to be paid by the new settlers were to be handed to the Receiver of His Majesty's domain in the town of Quebec; and the Seigniors were debarred from having any claim whatever upon them. I also find in it a very significative word applied to "the same dues as "were paid by the old established inhabitants," I mean, the word *paid*, which sufficiently indicates that money was what was intended.

If you examine this *Arrêt* with attention and reflect upon it, how is it possible not to perceive that the King made an enactment, and it must have been a l[illegible], that those concessions should be given for "the same dues as were paid by "the old established inhabitants?" Were there then, at that time, any dues whatever; was there any fixed rate whatever; was there any rule? unless you imagine that the King was telling a falsehood, or did not know what he was saying: this is a supposition which cannot be admitted for an instant. This *Arrêt* therefore proves the all important fact, that before it was promulgated, there was some fixed rate, some rule. In the face of so clear a law, it is therefore an error to state that, before the *Arrêt* of 1711, there was no fixed rate whatever in this Country. It was quite natural that there should be one. The same great mind which had presided over the first establishment of the plan of colonising the Country, still attended to the realization of that plan. Most assuredly it would be very strange that the King, who had passed such a rigorous law against the Seigniors, as would expose them to have their seigniories confiscated, should they refuse to concede, and that, with the same breath, he should allow them to exact such rates as they might think fit and proper, or rather that he should not prevent them from doing so. What! the Seigniors caused very

considerable injury to the new settlers who found less lands to settle upon in those localities which were advantageous for trade, for the very reason that the Seigniors charged the same rates to those to whom they sold, as they did to the old settlers ; and they might with impunity have demanded from them any amount whatever of dues, no matter what it was, but this is incomprehensible. It is moreover a direct contradiction. This extravagant pretention on the part of the Seigniors, is not only opposed to the whole spirit of colonization of that time, but it receives its death blow from the very words of the Decree itself. After I shall have proved that there was a rate, whatever it may be, I assure you I shall not omit establishing what that rate was.

On the 15th of June, 1708, a judgment was rendered by the Intendant Raudot, which, among other things, commanded the Seignior of Bécancour to grant a deed of concession to one Perrault under the same clauses and conditions as he had granted them to his other *Censitaires*, otherwise that the said judgment should be in the place and stead of a title. (Extract from the registers of the Superior Council, and from the registers of Intendance, by Cugnet, p. 26.)

Therefore, three years before the *Arrêt* of 1711, the Intendant acts according to what then was an established rate, a rule ; otherwise he would have left the *Censitaire* to the mercy and discretion, or rather to the indiscretion of the Seigniors.

On the 15th of February, 1716, the Intendant Bégon passed a Decree obliging the inhabitants of Demaure to exhibit to the Sieur Aubert, Seignior of the place, the titles and deeds by virtue of which they held their lands &c., &c., in order that the Sieur Aubert might grant them titles " under the " same clauses and conditions as the old titles, without " however allowing any new charges to be made." (Ed. and Ord. v. 2, p. 449.)

In the very face of such words as these, and of such prohibitions, will any person maintain that the Seigniors were not obliged to concede at the old rates, and that it was optional with them to increase those rates ?

On the 28th of June, 1721, the Intendant Bégon passed another Decree condemning the Sieur Amiot, Seignior of Vincelotte, to establish the boundaries of the lands which he had promised to his settlers by writing upon the conditions mentioned in that Decree.

Some inhabitants of Lebras, of Saint Nicholas, amongst other grievances, complained that, nothwithstanding his promises in writing, to grant them lands upon the same conditions as were mentioned in the titles already granted by him, he was desirous of making them pay other dues than those allowed by the *Arrêt* of 1711 : adding, at the same time, that those conditions could only have reference to some dues which the Seigniors alone had a right to stipulate for ; they further stated at the time, that they were obliged either to submit to conditions which were so severe and so exorbitant that it was impossible for them to subsist, or they had to abandon their farms.

The Decree is based upon the *Arrêt* of 1711, for it is therein stated : " Seeing also the said *Arrêt* of the King's " Council of State, bearing date 6th July, 1711, and it being " considered &c., &c.," terminates as follows : " We pre- " hibit him from imposing any other tax upon the said lands " than the rent."

Does this prove that it was optional with the Seigniors to establish such rates as they thought proper, and is it not as clear as day that the Seigniors could not even take as a precedent the old grants into which had been introduced the right of exacting dues contrary to the *Arrêt* of 1711 ? They should be at the same " *rates as the grants* to the old settlers, not in the seigniory, but throughout the Country, pursuant to the established rule, that is in conformity with

the acknowledged rate. " By the terms of the Decree the " complainants are allowed to appeal to the Marquis de " Vaudreuil and to ourselves, demanding the grant of the " same in His Majesty's name for the same dues and on the " same conditions as stipulated in the same *Arrêt* of the " King's Council of state, passed on the sixth of July, one " thousand seven hundred and eleven." Ed. and Ord. t. 2, pp. 461 and 468.

On the 20th september, 1721, the Intendant Bégon rendered a judgment, upon the petition of the Sieur Lévrard, Seignior of St. Pierre, reuniting to the domain of the latter a farm on which the banal mill was erected, upon the condition that he should concede another lot of land to the grantee which was to be chosen by the latter.

By this judgment, amongst other things, it was ordered, " that the Sieur Lévrard should concede him another farm " in the same seigniory as an indemnity, upon the ordinary " charges and at the ordinary rates &c." (Ed. and Ord. t. 2, pp. 466 and 7.)

Were there ordinary rates then ?

I shall now cite a judgment rendered by the Intendant Gilles Hocquart, homologating a *procès verbal* of the Grand Voyer, and commanding Pierre, Jean et André Robitaille and other inhabitants of Gaudarville to take out deeds of concession from Dlle Peuvret. This Judgment bears date 23 January, 1738. (Ed. and Ord. t. 2, p. 845 and seq.)

Among other things, it is therein stated : " That they " were bound to take deeds of concession from Dlle Peuvret, " of the lots of land which had been conceded to them, of " thirty *arpens* in depth, at the *cens et rentes* established by " His Majesty, that is : one *sol* of cens, for each *arpent* " in superficies, and one capon or twenty *sols* according to " the choice of the said Dlle Peuvret, for each *arpent* in " front. "

Most decidedly that is another proof which indicates an established rate, a rule, something, in one word, which did not depend upon the will of the Seignior. If you couple this with the rents (*droïts de redevances*) imposed upon the old settlers, according to the terms of the *Arrêt* of 1711, and also the prohibition to add new charges, as stated in the Ordinance of Bégon, of the 15th February, 1716, you will easily become convinced that there was some certain rate in this Country.

On the 23 of February, 1748, the Intendant Hocquart rendered a judgment condemning the Seignior of Berthier to grant a deed of concession to the Fabrique of Berthier, of a lot of land given by Dame de Villemur, &c.

Among other things that judgment decided that "the "new purchaser should be bound to pay to the proprietor "of the said seigniory the *cens et rentes*, at the customary "rate of one *sol* of *rente* for each *arpent* in superficies, and "three capons for the whole lot of land, and two *sols* of "*cens*." (Ed. and Ord. t. 2, p. 581 and seq.)

The slight variance which is to be remarked here does not prevent us from recognizing, in this judgment, what is perfectly apparent every where else, that there was such a thing as an *ordinary rate*, no matter what it may have been.

It is true that the greatest number of these judgments and ordinances are subsequent to the *Arrêt* of Marly, but for all that, they do not the less prove the fact that some ordinary rate, some rule, although it was a moderate rate, did exist.

Were it necessary to add any thing, I should appeal for assistance to the *Arrêt* of the Superior Council of Quebec, of the 29th of May, 1713, which prohibits the Sieur Duchénay from conceding any lot of ground within the Bourg de Fargy at Beauport, at a higher rate than one *sol* of *cens* and one chicken of seigniorial rent for each *arpent*.

It is a matter of very slight importance, that it happens to be only a lot of ground; the rate of one *sol* and a fowl is not the less acknowledged as a rule. *Those rules had become established by custom*, as it is stated by M. Cugnet. (Des Censives, p. 44, ed. of 1775.) They therefore did exist (1) in the Country, they were known and universally acknowledged, notwithstanding some slight variances of very little importance. They were in accordance with the King's intentions and favored, in the most admirable manner, the realization of the great idea which presided over the colonization of the Country. If you were to look over all the concessions, with very few exceptions, you would find the rate to be one *sol*, and in proof of this, there are the four following concessions :

5 March, 1711, 1st part of *Mille Isles*, granted for the payment alone of 20 sols and one capon for 1 x 30 *arpents*, and 6d of *cens*, without its being possible to exact in those concessions any sum of money, or any other charge, than the mere dues above mentioned, which were established pursuit to the will and intention of His Majesty.

10 April, 1713, 2d part of Beaumont, granted for the payment alone of 20 *sols* and two capons for 2 x 40 *arpents*, and 6d *cens*, without, &c.

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(1) He says that the rates established for conceding in this Province are one *sol* of cens for each *arpent* in front by forty in depth, french currency, one fat capon for each *arpent* in front, or twenty *sols tournois*, according to the choice and pleasure of the Seignior, or half a bois'sel of wheat, of *cens foncier et seigneuriale*, together with the other seigniorial dues, and this is in consequence of the deeds of concession which the Intendants had granted in the King's name, of lands within his *censive*. M. Cugnet goes on to state that no Edict of the King, can be found in the archives, fixing the rate of *cens et rentes seigneuriales* which the Seigniors should impose. Those rules have become established by custom. The King conceded the land within his *censive* at those rates. It is true, remarks M. Cugnet, that the lands are not conceded at equal rates; that in the district of Montreal, they are conceded at higher rates than in the district of Quebec; without doubt, he says, because lands at Montreal are more valuable than at Quebec.

We might, I think, account for this variation in another manner. Very frequently the cause of it is to be attributed to what is so well pointed out by M. Raudot the elder, in his letter of the 10th of November, 1707, to M. de Pontchartrain. A large number of the settlers preferred submitting to the payment of very onerous dues, rather than expose themselves to lose their work, which they performed upon the strength of mere written promises, and which the Seigniors subsequently refused to ratify, by giving concessions unless under the conditions which they wished to impose.

17 October, 1717, 1st part of the Lake of Two Mountains, conceded at 20 *sols* and a capon for 1 x 40 *arpents*, and 6d of *cens*, without its being possible, &c., &c.

13 April, 1727, *fief* St Jean, to the Ursulines of Three Rivers, 20 *sous* and 1 capon, for 1 x 20 *arpents*, and 6d of *cens*, without its being possible, &c., &c.

It is true that there is a slight variance as to the depth, but it does not prevent the rule of 1 *sol* from appearing every where as the ordinary rate, and even as the rule which was followed.

If it were optional with the Seigniors to impose such rates as they thought proper, in no place would we find a prohibition to exceed the rate, and if in answer to that, you tell me that difficulty is overcome by services rendered, I shall ask for what reason the Governor Vaudreuil, in the concessions made by him to the Seigniors of Montreal, on the 17th of October, 1717, of the seigniory of the Lake of Two Mountains, speak, as had been previously done in other concessions, with such decision, such clearness, of the simple rent (*simple titre de redevances*,) and why does he prohibit the insertion, in the concessions of any sums of money or of any other charge &c. ? How does it happen that in the Letters Patent of the King of France, granted on the 27th April, 1718, confirming this concession, the King allow the lots of land of which there was at least one quarter cleared, to be sold or granted at higher rates? The Seigniors did not require such a permission, unless they were limited to a certain rate. As to those persons who support the exorbitant pretentions of the Seigniors, I cannot see that they can do otherwise than suppose that the King did not know what he was doing. For my part, I shall willingly allow them to take every possible advantage of the position they have assumed.

I think I have fully established that there existed a general rate, a rule, in the Country, in relation to concessions.

All that has to be done now is to determine what that rate was. I shall do so while explaining the character and effects of the *Arrêts* of Marly. I point out several different systems, but I shall insist upon that one alone which appears maintainable to me.

III. What were the effect, and character, motives and the object of the *Arrêts* of Marly ?

The character and the motives of the *Arrêts* of Marly, are clearly defined, it is not possible to be mistaken in them. A number of farms which had been conceded by His Majesty remained uncultivated and uninhabited, and certain Seigniors, under different pretences, refused to concede farms to those settlers who asked for them, with a view of being able to sell them, and at the same time of demanding the same rents as they got from the old established settlers, which was altogether contrary to His Majesty's intentions, and to the conditions of the deeds of concession, by virtue of which they were only allowed to concede lands for a rent. This was also very prejudicial to the new settlers who could find less lands to be taken in the localities which were most adopted to business.

Such abuses required a prompt and energetic remedy. The Seigniors systematically evaded the laws at that time, as well as they had previously done, and so far as that is concerned, we have seen them, at different periods, act with the greatest consistency. The King therefore ordered that the conceded seigniories should be re-united to his domain, if within a year and a day from the publication of the *Arrêt*, they were not put under cultivation, and if settlers were not placed upon them. It was also ordained that all Seigniors in New France should concede to the inhabitants such farms as these latter might require within their seigniories, on condition of payment of rent, and without exacting any sum of money on account of such concessions; otherwise, and in case of a refusal, the inhabitants had a

right to demand those farms by means of a summons, and if it were not complied with, to appeal to the Governor and Lieutenant General, and to the Intendant of the said Country, who had instructions from His Majesty to grant such farms in the said seigniories as such inhabitants might require; these latter being bound to pay the dues into the hands of the Receiver of His Majesty's domain, in the town of Quebec; and the Seigniors were debarred from having any claim whatever upon them.

Before the passing of the *Arrêt* of Marly, whereof the object and intention was to bring the Seigniors to reason, it was a matter of absolute necessity, as well as of good policy, that there should be a fixed rate, otherwise, the Seigniors would have been free to impose any rate, however high; and by thus imposing high rates, they would have rendered abortive those very laws which had been made to effect the settlement of the Country by facilitating it. We see, nevertheless, that the Seigniors made a mockery of those laws, and paid no attention whatever to the benevolent, humane and christian intentions of the King, and appeared to be concerned very little about their realization.

So far as they are concerned, this *Arrêt* becomes an unequivocal warning in relation to a rule about which it was impossible to be mistaken. And if you do not see in that, as clear as the light at noonday, I shall not say, the establishment, but the declaration of the previous existence of a fixed rate, I shall allow those who shut their eyes to the light, not to see it. As far as I am concerned, had I, at the present time, any doubts as to the existence, in New France, before 1711, of an ordinary rate, which by that mean became a fixed one, as it has already been remarked and proved, I do not know how it would be possible for me to entertain those doubts in the face of such a formal declaration as the one contained in that *Arrêt*, which expressed an idea which is reproduced in the *Arrêts* of 1732 and of 1743. Before 1711, the Seigniors were bound to concede at mode-

rate rates, it was a matter of obligation with them. The obligation to do so was as great with them, as the obligation to grant the lands was. It was not precisely a trust, "*fidéi-commis*," as we understand it generally, but it was a kind of trust, and without disputing about mere words, I think that we can mention, without fear, that the Seigniors had not an absolute ownership, but a modified, qualified and conditional one; the threat of re-union to the King's domain, places all doubt on that head out of the question.

Such then is the marked characteristic of the *Arrêt* of Marly in relation to Seigniors. As to the motives which induced the King to issue it, they are sufficiently apparent: the state of matters at the time, and the correspondence of the Intendants, in which the exactions and encroachments of the Seigniors are fully laid open, inform us quite sufficiently of those motives, without its becoming necessary to repeat them. I cannot admit that any doubt can exist as to the character of those laws, but as doubt exists elsewhere, I shall take upon myself to state with Merlin, (*Rep. ro. loi*, § 10.) "The laws should be interpreted by their most natu-" ral sense, by that which has most analogy with the subject, " and which is the most in conformity with the intention of " the legislators, and which equity leans most in favor of; for " that purpose it is necessary to consider the nature of the law, " its motives, the connection it has with other laws, the ex-" ceptions by which it may be restricted, and, at the same " time, everything which might tend to explain the spirit " of it."

For the present I shall not say anything about ascertaining if those laws, both in relation to the Seigniors, and those more particularly concerning the inhabitants of New France, were laws of public policy (*d'ordre public*,) and if private individuals could derogate from them; at a late period, I shall have an opportunity of speaking on the subject. I shall remark, for the moment, that, in the *Arrêt* of Marly relative to the inhabitants, you find expressions

which only reproduce that great idea which presided over the whole wise and admirable french legislation of that time concerning the colonization of New France; "which is "quite contrary, as is there stated, to His Majesty's inten- "tions, who only allowed those concessions with a view of "causing the Country to be established."

What are the results of the *Arrêt* of Marly? The answer is a very simple one to give: it is the confirmation, by a solemn declaration, of what had in reality existed in the Country, since the first establishment of the seigniorial tenure, the lowness and positive settlement of the rates of concession, which were as necessary at that time to the realization of that great scheme of colonization, as hands were to carry it out.

I am aware that it was stated that the threat of the confiscation of the seigniories was quite sufficient to oblige the Seigniors to concede. Over and above what that reason, if it be one at all, contains as an admission of the obligation of the Seigniors to concede at a moderate rate, there is this, that it receives a formal contradiction in the history of the Seigniors, who, at all times, have made light of the *Arrêts* of Marly, in the same manner as they violated, at a later period, the *Arrêts* of 1732. As a matter of course, I speak only of those Seigniors to whom my remarks may apply, and not of those who have conformed to the law. The Seigniors have acted as a knowledge of the human heart teaches us that men generally act when they violate the laws, they counted upon going unpunished. And I must acknowledge that since the *Arrêt* of Marly they have acted so with a good deal of success.

I do not think it necessary to keep an account for the Seigniors of the augmentation hardly gradual, but nevertheless pretty considerable, of the rates of concession, since the cession of the Country. A reason sufficiently plausible has been given for this new encroachment, I mean the gratui-

tous supposition that the Proclamation of 1763 had introduced the English laws into this Country, and consequently that the Seigniors were exonerated from the obligation of conforming to the ancient laws of the Country in relation to that matter. As I go on, I will state that it does appear rather astonishing that, after discovering their error and more particularly since 1774, the Seigniors should have continued to exact rates and dues which were prohibited by the laws of the Country. I prefer the position of those who, though they are, according to my mind, under the influence of a manifest error, do at least act logically, by imposing the highest rates, and would impose them to any amount were the *Censitaires* to consent, since they maintain that there never was any law binding them down to a fixed rate.

I shall close this by expressing my regret, as well as my surprise, that since the cession of the Country there should have been decisions rendered by the Tribunals in that way. Several of those decisions appear to be founded, upon what they have been pleased to term the common law of France, which, so far as those extraordinary ex-privileges of the Seigniors are concerned, never existed in such a manner as to justify the application of it as a rule in this Country. Finally it is very much to be regretted that, since then, they should have fallen back for support upon political and other grounds quite foreign to the only one which should have induced as well as justified them in those decisions. I allude more particularly to the case of Hamilton & al. vs Lamourenx. Viewing those judgments as so many palpable errors, it must be understood that I cannot admit that they establish and fix the law, I do not recognize the necessary qualities in them for such a purpose.

Which part then, so far as the rates are concerned, must be adopted? Several plans are in my mind.

1o. The rate has not exceeded two *sols*, but which has been the most general one? Let us say two *sols* was the most general before 1711.

2o. What was the original rate in this Country before 1711? Let us take one *sol* and the capon.

3o. By applying what has just been said to each seigniory: we should take two *sols* as the general rate, and one *sol* and a capon as the original rate.

In opposition to those three hypothesis or systems, it must be said that we cannot, either for the whole Country in general or for each seigniory separately, take the highest or the lowest rate as the rule. The lowest rate, as well as that which is higher, may perhaps not be the general rate. The original rate in each separate seigniory, may perhaps not be the original rate established throughout the whole Country, I shall therefore reject it. It has become necessary from what precedes to enquire what was the general and customary rate before 1711, so that we may be enabled to deduce some rule: this is what I have done. My researches have led me to one *sol* of *cens et rentes* for each *arpent* in superficies and one capon for each *arpent* in front, and six pence of *cens*. After a close calculation, without attending to very small fractions, it is a matter of little importance that the sum of two *sols* should be found, being the amount which it is very reasonably contended, has never been exceeded in the concessions. The Seigniors must submit to this result as it is the necessary consequence of the principle which I have above established. This however is a matter with which I have nothing to do. In my capacity of Judge, it became my duty to try and ascertain what the general rate was, in order to deduce some certain rule from it. I shall make one observation more; that rate is very low, I may be told; according to my opinion, such an objection should not be made use of, if you were to consider that the *cens* and those dues were after all, only the acknowledgement of the tenure. Moreover if from the time that every thing began to advance progressively in this Country, the Seigniors were losing at the rates above mentioned, why did they not apply to the legislature to have the law modified, and to have the rate of

the dues coming to them increased. I am aware that the answer may be made that they would never have succeeded. But in truth, can you be really serious when you apply to the Judges to obtain, in an indirect manner, what you could never have dared to hope to obtain from the Legislature? That is what I cannot understand.

Further on, while speaking of the character of the *Arrêts* of Marly, I answer the objection arising from the fact that there is not before this Court any request for the resiliation of the contracts by which the *Censitaires* have bound themselves to pay a rate exceeding what was legal. We have nothing to do about the resiliation. The Court has nothing to do but to declare what is the legal rate; it is the Commissioners duty to attend to the remainder.

I have only one more observation to make. It is a matter of principle for me to vote against the answer which the Court has given to the 25th question of the Attorney General. The Court maintains that the *Censitaires*, to whom concessions had been made, from the time of the cession, and previous to the passing of the Seigniorial Act of 1854, at higher rates than were customary before the cession, have no right to be exonerated from the payment of the amount exceeding those dues. If I look upon those clauses of the deeds of concession, as null and void, which are contrary to the law of public order, and which form the subject matter of this question, it is incumbent on me not to draw back from the consequences of those principles; I therefore acknowledge them as legal, and my opinion is that the *Censitaires*, who may happen to be in this particular position, have a right to be exonerated from the payment of the amount exceeding the legal dues, which they may have paid without being indebted in that amount. It does not come within the limits of my duty to speak of the propriety or impropriety of such a demand being made by the *Censitaires* if they should make it. I have nothing to do here but to express my opinions as a Judge, and I shall express them without hinderance.

IV. Are the *Edits*, *Arrêts* and *Ordonnances* relative to the rates of grants, laws of public order : could they have been legally derogated from, by virtue of any private agreements?

The question here is about the colonization of a vast Country. The Crown thinks of realising the great and beautiful thought of diffusing over this continent, the blessings of the Gospel and civilisation which march in its footsteps. That thought is manifested in a thousand different ways, and it has become partly realised, when, also, it is in danger of being entirely suppressed by a class of men who require something more to induce them to carry out His Majesty's intentions. Decrees are issued ; their aim and object is to carry out a great and noble plan in the interest of an entire and immense Country. The Seigniors were not the only class of persons who were exposed to undergo the punishments decreed against those persons who might violate those laws ; the inhabitants of the Country in general come under the scope of the law which concerns them all. The end and object of those two Decrees were therefore the same. It will be willingly acknowledged that so far as the character of the feudal tenure and the essence of the contracts are concerned, those laws are laws of public order, but nothing more. Is it not true that, if I have established in my system, as I think I have, that the *Arrêt* of Marly acknowledged the existence of a fixed or general rate, or, in a word, a certain rule, in that respect it is a law of public policy, as well as in respect to the remainder? Therefore, if I have sufficient reason to maintain this, it must follow that no person had a right to derogate from that law by any private agreements which would be rendered, for that very reason, null and void. The same reason becomes applicable in the face of such facts as these. The *Arrêts* of Marly determine what has reference to the tenure and to the essence of the contract : every body is agreed that, in that respect, they are laws of public policy (*d'ordre public*.) Why are those *Arrets* laws of public policy in that respect? Because they were essentially important to the establish-

ment of the Country, which was the great object in view. Well, but was not the lowness and the uniformity of the rates equally as important and essential for the establishment of the Country? By allowing the Seigniors full liberty to exact any rates they chose, no matter how high they were, did you not endanger the settlement of the Country? And is it really possible that we can be satisfied with the answer, that the Seigniors were interested in conceding, and that they exposed themselves to very disagreable consequences if they refused to do so, when were aware that they did refuse frequently? The King himself declares this to be the case in express terms. They would not concede unless under such burdensome conditions that the settlers "were obliged either to abandon their farms, or "submit to such hard and exorbitant conditions that they "were quite unable to subsist upon their farms." Therefore the rate, as well as the tenure and the essence of the contract, were what characterised these laws, and what stamped them throughout as laws of public policy (*d'ordre public.*) In the face of such facts and declarations, you would allow yourselves to doubt that those laws are laws of public policy! That is what I cannot conceive in my own mind. If it becomes necessary to cite authorities upon the point, I will repeat with Demolombe, v. 1, p. 15, No 17:

"Nevertheless these words, (*droit public*) public law, are "frequently used in a much wider sense. Under this second "point of view, it might be said that public law is that "which, directly or indirectly, has for its object the general "interest and the *public interest*, whereas, on the contrary, "private law has for its object the individual and relative "interest of private persons, or in other words, *private* "*interest.*"

Could they be derogated from by virtue of any private agreements?

"One of the principal differences which distinguish them "(same author, *loco citato*, p. 15,) as to their result, is that no

" renunciation can be made to public law, it cannot be de-
" rogated from, whereas private individuals may derogate
" from a purely private law. We can easily conceive that it
" each person has a right to sacrifice his own private and per-
" sonal interest, on the contrary, no person has a right to com-
" promise the general and public interest."

Further on.... " This distinction being once placed upon
" such a footing, it must, as a matter of necessity, be applied,
" not only to the constitutional laws, but also to all the other
" codes which have much to do with the general interests,
" the maintenance of which is of the greatest importance to
" the whole state."

" At page 16, § 18 : " In the *Code Civil*, we meet with a
" certain number of provisions, which, at first sight, would
" appear to have been introduced merely with a view to pri-
" vate interest, but which, nevertheless, you are not allowed
" to renounce. In that case public interest is more or less
" connected with it."

If I were told, in opposition to this, that the laws which govern the community (*communauté*) and successions &c., are public laws ; I would answer that what you can renounce to in those laws merely has reference to private interest ; and I might add that the laws in relation to the power of the husband and of the father, form part of the private laws. (*droit privé*,) and for all that can the husband renounce his power as a husband ? Can any individual, at his own will and pleasure, declare himself to be legitimate or illegitimate, to be of age or under age, capable or incapable of doing such and such a thing, of making a will or a donation *inter vivos* ? Certainly not because, amongst other reasons, all those laws, in reference to such matters, essentially form a part of the public law, of that law which private individuals cannot derogate from.

"We cannot, (says Toullier, v. 1, p. 88, No. 102), by any
" private agreements, derogate from those laws which relate
" to public order and good morals."

I shall close these citations by stating with Demolombe, "that we should fear that the possibility of renounce-"ing it, might terminate by really destroying it, and by de-"priving society of the benefit which it might gain by it."

It is unnecessary for me to state how applicable to the question in point is this last observation. If there be any doubt about it, you have only to look back to the times which preceded and which followed the *Arrêt* of Marly, and to ask yourselves if the derogations of the Seigniors from the laws in relation to the rate and from the rule established in the Country, have had "the effect or not of depriving society "of the benefit which it might have expected from it." The answer as well as the question comprise and sum up my entire idea.

One objection has been made which I must not omit mentioning here. There has been no demand for the resiliation of those contracts and obligations; moreover, it has been stated that this Court has no jurisdiction about that matter. That is true; but the question here is not about resiliation. The only question here is to know what is the legal rate and to declare what it is. The duty of ascertaining the amount of indemnity has devolved upon the Commissioners. I do not see any difficulty in it. Both for the Court and for the Commissioners it is merely a question of overcharge.

V. Had the Courts of law in Canada, at any period and when, and have they still, at present, power to enforce the *lauds* of Marly?

By the Ordinance of the 17th Geo. III, which established the Court of Common Pleas, that Court had the power to decide upon all contestations between private individuals which had any reference to their properties or to their civil rights. The Court of King's Bench established by the 34th Geo. III, which repeals the Ordinance of 17th Geo. III, acquires all the judicial rights of the Intendant in the fullest manner. A person may very well be allowed to imagine that the

powers of the Court of King's Bench surpassed those of the Court of the Prévoté, of the Royal Justice, and the Intendant or Superior Council, the latter being bound to judge according to the laws and ordinances of our Kingdom; whereas the Court of King's Bench, (sec. 8,) had full power and jurisdiction, and was competent to hear and determine all complaints, suits and demands of whatever nature they might be, relating to all rights and actions of a civil nature, and which were not specially provided for in the laws and ordinances of this Province, &c. The only exception was in relation to what came under the jurisdiction of the Admiralty Court. Therefore, the tribunals, the Court of Common pleas first, then the Court of King's Bench, and those which since then, have succeeded it, could and can at the present time enforce the *Arrêts* of Marly and the *Arrêt* of 1732, and follow up the jurisprudence established, in relation to such matters, before the cession of the Country.

VI. Is it true that those *Arrêts* have ceased to be put in force?

No, assuredly not. The affirmative is quite unmaintainable.

The Seigniors themselves put them in force.

As my opinions on this subject are the same as those expressed by the Honorable President of this Court, and as I am desirous of avoiding repetitions, I shall refer to what he has said on the subject, adopting as I do his observations and arrangements.

VII. The right of banality: what is its character, from whence has it arisen, in one word, what is it?

During the time that article 71 of the Custom of Paris was in force, it only existed by virtue of agreement. Consequently, it was inadmissible into New France, unless by agreement. Therefore it is only necessary to ascertain from whence it proceeds, that is to say, what is its source in this

Country. The Ordinance of 1675 and the *Arrêt* of 1686 will answer that question. That is the foundation of the source of the right of banality in this Country; for it would be absurd to say that the right of banality in general was introduced into this Country with the french laws. At that time, no more than at the present one, there was no general banality; it is a word without meaning, as it is a thing without substance, or a being so complicated and composed of different heterogeneous particles, that it is quite as impossible to define it as it is to size it.

According to my judgment, all that the Ordinance of 1675 and the *Arrêt* of 1686 have done, has been to establish what the banality should be, after it had been stipulated.

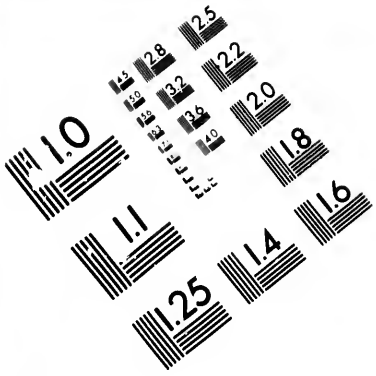
I shall not be guilty of a repetition here; I have given my opinion at lenght in the case of Monk vs Morris (V. Décisions des Tribunaux, v. 3, p. 1 & seq.) I will merely add that where the right of banality is stipulated, the *Censitaire* is only bound to have the quantity ground, which may be necessary for his own subsistence and that of his family, out of the grain which may have been produced, or have grown naturally throughout the extent of the banality.

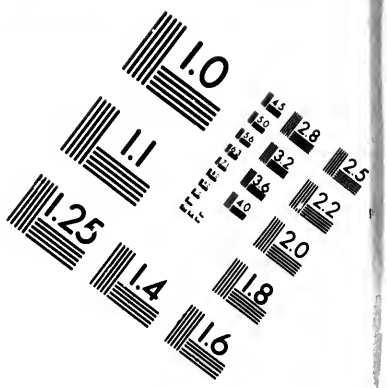
"Neglect to build banal mills necessary for the subsistence of the in habitants of this Country. (*Arrêt* of the 4th June, 1686). I will however add a few words. The *Arrêt* of 1686 evidently has reference to something which occurred previously, when banal mills are mentioned in it. There could be none in New France, unless by agreement, or rather there could be no right of banality, unless it were a banality by agreement. Article 71 of the Custom of Paris made it a law; and article 72 contained the same prohibition in relation to wind mills. The ordinance of the 1st July, 1675, declares that the mills worked by water and wind mills, are banal mills, and it is ordered that the *tenants who may have agreed to it in the deeds of concession of their farms, shall take their grain to those mills to be ground.* I can see

noother interpretation to these terms than one of those which I shall mention; either that the banality of the mills, worked by water power, was binding upon those only who had agreed to it by the deeds of concession of their farms: or that it was only binding, so far as the wind mills were concerned upon those who, by their deeds of concession, had bound themselves to the banality of the mills worked by water. I am aware that a foolish objection is made to the phrase, because the word *it* has been omitted; but in the name of common sense, can it be pretended for one moment, that the obligation which is mentioned here, is that of the *Censitaires*, to pay the *rentes!* And, if they had no deeds, they were not of that class of *Censitaires*, to whom it is pretended that these terms of the *Arrêt* have reference; if they had deeds, in their capacities of *Censitaires*, they had without doubt bound themselves to pay the seigniorial dues, so that it is quite out of the question to put such an interpretation upon words which, notwithstanding the omission of the *it*, evidently denote the obligation entered into by them to carry their grain to the mill to be ground. By the assistance of this reasonable interpretation, it has become possible to understand what the King meant to say in the *Arrêt* of 1686, which did not establish, but merely settled how the right of banality should be exercised in New France, by coupling that *Arrêt* with the Ordinance of 1675. What becomes conclusive on this point, is this, that Art. 71 and Art. 72 of the Custom of Paris, being at that time in force, the Ordinance of 1675 emanating from the Superior Council which could not in any manner act contrary to the *laws and ordinances of the Kingdom*, that ordinance could not set aside those two Articles of the Custom of Paris. And the *Arrêt* of the 4th June, 1686, although emanating from the King himself, had only in that respect the effect of a judgment subject to the Custom of Paris; that is to say, that by virtue of an agreement, there was in New France, a right of banality; not a general banality, that would be absurd, but a banality agreed upon, established

by the Ordinance of 1675, and regulated by the *Arrêt* of 1686. It is true that there were some *Censitaires* who had not bound themselves by their deeds to take their grain to the mill to be ground : they would not be subject to the banality. That is the very thing now under consideration, it is the legal and logical consequence of the law. As a matter of course, a like consequence would follow in the case where the Seignior, having neglected to build a banal mill within the year should have lost his privilege of banality and that the same should have fallen into the hands of the *Censitaire*. The same rule should apply in those cases where the *Censitaire* acquires the right of banality. And the same conclusion must be come to in both the hypothesis which I lay down : in the first place, the almost entire universality of the persons who should not have subjected themselves by their deeds to banality towards the Seignior ; and in the second place, the case where a large number would have bound themselves to banality in favor of the Seigniors, previous to its being forfeited, and a small number who would not have bound themselves. In that case, those who before the forfeiture had bound themselves towards the Seigniors, would, by that very means, become bound towards the *Censitaire* to whom the right of banality had been granted ; and as a matter of consequence the others would not be bound.

If, previous to the Ordinance of 1675, there had been, as it has been pretended there was, a legal banality and therefore a universal one, we would not find in that Ordinance the order that, *those who had bound themselves by their titles, &c.*, would be *held to carry their grain to be ground, &c.*, And if, as I imagine, the *Arrêt* of 1686 refers to the Ordinance of 1675, and is connected with that Ordinance, and in the same manner regulates the right of banality which it had to establish in Canada, that is to say, the conventional banality qualified by that Ordinance, and which might and should be called *banalité canadienne*, it must follow that the *Arrêt* of 1686 it not a universal title of banality in favor of the Seigniors of this Country.





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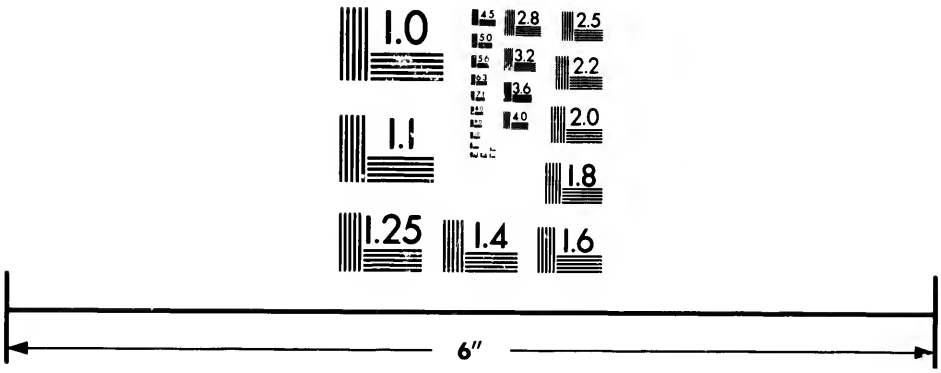

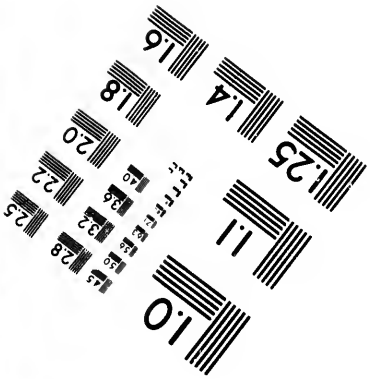

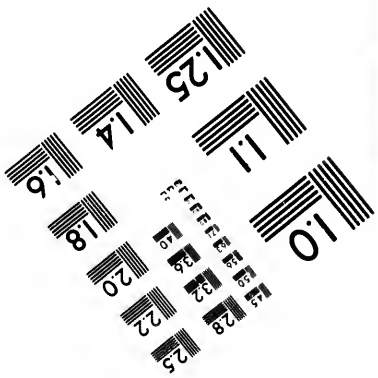

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There is no reason therefore for stating that it was a legal banality which was introduced into New France, and that the *Arrêt* of 1686 has become a universal title for the Seigniors.

But you may perhaps tell me that the Crown has acknowledged that the *Arrêt* of 1686 had produced that result. My answer is that I do not base my opinions upon the admissions of any individual, but upon what I really think is the law of the Country.

If per chance our ideas were not clear, as to the character as well as weight of the *Arrêt* of the Council of State, of the 4th June, 1686, relative to banal mills, it would be very easy to render them more clear, by reading, in the *Repertoire de Jurisprudence* of Merlin, Vo. *Arrêt*, *Arrêt du Conseil*. " *Les Arrêts du Conseil du Roi sont explicatifs, ou* " *simplement confirmatifs d'une loi précédente, faite par Edit,* " *Déclaration ou lettres patentes.*"

Therefore the most we can say is that the *Arrêt* of 1686 is explanatory or confirmatory of the Ordinance of 1675, which refers only to conventional banality, 1o because it speaks for itself, 2o if it were ambiguous, it should be interpreted in favor of those whom we are desirous of binding to banality, 3o because that Ordinance emanating only from the council, could neither revoke, modifiy and still less set aside the Articles 71 and 72 of the Custom of Paris.

So far as stating that the King in Council, by a simple Decree, could do so, instead of having recourse to an Edict which is a law passed for the purpose of prohibiting or ordering any certain thing, that is an absurdity. It is one of the characteristics of the *Arrêts* of Marly that they do not attack any positive law, any text of the Custom of Paris; they only confirm what had been sanctioned by previous laws, and confirmed by rules universally acknowledged and received, or they prohibit what has never been expressly allowed by any law or any text. If the *Arrêt* of

1686 be not coupled with the Ordinance of 1675, it is without effect, because Articles 71 and 72 of the Custom of Paris are there to prohibit the right of banality of any water or wind mill, unless it be agreed to. This proves still better and without the possibility of its being rebutted, that there never was any legal banality, as it is called, established in this Country : they are vague terms, void of sense or meaning.

One word more and I shall have done. It would be more than astonishing if you assigned to the pretended legal banality in Canada, the rights which the Seigniors attach to it, I mean, not only the right of grinding all the grain gathered upon the land, but also all sorts of grain, no matter whether it exceeded or not the quantity necessary for the subsistence of the family. I have only one question to put. How could they supply sufficient for that, and where would they be after the expiration of twice twenty-four hours, since the inhabitants are not bound to leave their grain there? As to the grain intended for exportation, whether gathered or not within the censive, and which the Seigniors contend the inhabitants should be bound to have ground, it is quite sufficient to mention it, in order to render palpable, the rediculous exaggeration of such a pretention. With reference to another extravagant pretension of the Seigniors, that of causing the demolition of the mills built by the *Censitaires;* it is without foundation ; there is no law to sustain it. Moreover for my part, in my system relative to running streams, which I am going to explain, I must say that I cannot for a moment admit that pretension. It must be understood that I admit the right of the Seigniors to recover the indemnity of what the *Censitaires* might have had ground for the requirements of their families elsewhere than at the banal mill, if they had bound themselves to the banality, but I deny the right of causing those mills to be demolished which had been erected by the *Censitaires.*

I have expressed my opinion in the case of Monk vs Morris, upon what we have been pleased to call the juris-

prudence of the Country. I have but one word to add today. It is this, that if it be the duty of a Judge to conform to a series of uniform decisions upon a doubtful question, but one equally balanced, and to regard as the best interpretation of the law, the judgments rendered at the time or shortly after the promulgation of that law ; it is also the sacred duty of that Judge to prefer the law to erroneous decisions, however numerous they may be, when it is evident, as is the case here, that those judgments are based upon an error so palpable that it strikes the eye at once. In my opinion, the first judgment was erroneous ; the second one could not be true if it were in conformity with the first. The third could not cause two errors to produce one truth, and so on, no more than 1 x 1 equal 3 and 1 x 1 x 3 make 6.

VIII. Are the Seigniors the proprietors of the running waters, and of the unnavigable and non floatable rivers ; does that form a portion of the feudal tenure ? If the Seigniors are not proprietors in their capacities of feudal Seigniors, were they proprietors as Seigniors high-justiciars ? and after the abolition of this high justice (*haute-justice*), did they hand down this right of property ? Finally, if the Seigniors, in their capacities of high justiciars, were not the proprietors of the waters, and had not the control of the unnavigable and non floatable rivers, what was, so far as it relates to this, the effect of the abolition of high justice ?

Every thing relating to these questions is of great interest and of the highest importance to the Seigniors and the *Censitaires*, and to society in general. We find in the roman law, and it is the law of nature, that large rivers are public property, and that every person is allowed to fish in them ; the unnavigable rivers, not being public property, belong to the persons through whose land they pass. They can therefore fish in them throughout the extent of their own land and make use of them as of their own property. This agrees with the principles of french jurisprudence, as may be seen on looking at the notes of Ferrière, p.p. 3 et 4 of v. 2, of his

translation of the Institutes. Nothing is more in conformity with good sense and with justice, and it was nothing less than the feudal system which could have furnished a pretence for calling such a principle into question. The encroachments made by the Seigniors upon the properties of their Vassals and upon the roads, they extended by a kind of pretended analogy, to the waters; and following the same plan, they arrogated to themselves, as feudal Seigniors and as high-justiciars, not only the control of the waters which they pretended was derived from high justice (*de la haute-justice*,) but also the proprietorship of the unnavigable and non floatable rivers. In support of, or rather to render current, what I would call false feudal coin, there have been found a certain number of writers, feodists, as you may be pleased to call them, whose pretensions, I may say with Championnière, are quite incredible, and prove to what extent they can go when it becomes necessary to systemize any pretension.

Before beginning to cite any authorities, for, says the same author, the substance of a large number of them is founded, at the present day, upon citations of *Arrêts*, or upon what is said by commentators, I must remark, with Merlin, that rivers were in existence before seigniories were, and that it is impossible to look upon the rivers as seigniorial grants. Navigable rivers belong to the whole population in every Country. They are called public property. It was only by imagination or rather by a perversion of opinion that it was ever held to be a maxim in France, that navigable rivers were the property of the Crown. This is not a matter to be suprised at; when we hear Fréminville (*Pratique des terriers, t. 4, p. 426,*) amongst other presumptuous assertions, tell us, that the Sovereign, as Lord and Master over everything in the Kingdom, distributed the *fiefs* and seigniories to those persons upon whom he chose to bestow them, and gave them the full right of property in the lands and in the waters upon or crossing those lands. Certain paid writers and feudists have speculated heavily upon this question; and in

a Country where everything tended towards centralisation, such doctrines were likely to make the fortune of those who supported them. The King never was absolute proprietor, he was merely the administrator of the navigable rivers in the name of the public which he represented. So far as the non floatable and unnavigable rivers are concerned, he never had and never could have the ownership of them. He could take possession of them as being the most powerful, but he could never take the ownership from those who alone had a right to it by the law of nature. Those rivers belonged, as they do at present, to the soil and to those who lived on their borders. The King could not make them over to the *Censitaires;* and it was not necessary for the *Censitaires* and for those persons to whom the banks belonged, to acquire from the Seigniors the rivers which formed part and parcel of their land, just as much as the soil which it was necessary that they should water. Every time therefore that a Seignior concedes or reserves those rivers, he does a useless action, or he reserves what could never have belonged to him, and the *Censitaire* acquires nothing more that what he possessed with the land which belonged to him, and he loses nothing of what essentially and necessarily belongs to the soil. It is therefore an error, a sophism to state that the Seigniors did not make over the ownership of those rivers ; if these latter did not acquire it from the King, the *Censitaires* acquired nothing themselves.

Upon those grounds we are led to ask if the Seigniors, as high-justiciars, ever did acquire such ownership. As to the ownership I will answer that it is out of the question. As to the control and superintendence of the rivers, the Seigniors, by a kind of pretended analogy, as I have previously said, attributed to themselves, or, in other words, usurped that control and superintendence which the most moderate of the writers have appeared to look upon as a remuneration for the time and expenses, &c., of those Seigniors who were charged with the administration of justice. For my part, I do not even admit this system. But admitting that there was some

foundation for it, it appears to me that it would be nothing but reasonable and legal, that high justice (*haute-justice*) being once abolished, the payment of it should also be done away with.

If I were asked what effect I would atribute to a concession, made by the Seignior, of an unnavigable and non floatable river, or rather of the privileges which the Seigniors, high-justiciars, (*hauts-justiciers*) attached to it, when they fulfilled the duties of high justice? my answer would be, that they could not make over any right of ownership, since they had none themselves. They could only transfer such privileges as they might possess. If they did possess them legally (which I am very far from admitting,) the moment that high justice (*haute-justice*) was abolished, any accessory to it must have fallen to the ground.

It does not appear any where that, before the Country was ceded, high justice had ever been enforced in this Country. At the same time, it is certain that it was formally abolished in the seigniory of Sillery, and in the *fief* belonging to the Jesuits, in the town of Three Rivers. This was effected by an Ordinance of M. Raudot, the Intendant, on the 22nd. October, 1707. (See Cugnet, *Extraits, &c., p.* 25.)

The conclusion to be come to, so far as the Seigniors of Canada are concerned, is quite clear: never having had any right of property in those rivers, and only possessing the privileges, which at a certain time they may have exercised through usurpation or from high justice, (*de la haute-justice,*) which has since been abolished, they cannot at the present time make any claim in that respect.

Those are my opinions, and I think that they are well founded. It is through reflection and by reasoning that I have come to the conclusion which I have just mentioned. Let me now see who are around me? If I am mistaken, it will, at all events, be a consolation for me to share, in good faith, in the errors of several eminent jurists.

Speaking of the objection raised on behalf of the Seigniors, in relation to the effects of the law abolishing seigniorial rights in France, (Art. 1 of the law of 26 July, 1790,) Merlin, *Q. D. Pêche*, § 1, No. 2, expresses himself as follows :

" The objection supposes, as a matter of fact, that some old " laws were in existence, which attributed to the Seigniors " above mentioned the ownership of the unnavigable rivers, as " there were some which attributed to them, as having supe- " rior and mean jurisdiction, (*haute et moyenne justice*,) the pro- " prietorship of those roads which were not public highways. " In this hypothesis, there would be some reason to say that " the repealing of the laws concerning the roads, did not ne- " cessitate the repealing of the laws concerning the rivers ; " but it is false, absolutely false, that any general law ever " did declare the Seigniors to be the proprietors of the unna- " vigable rivers. The Seigniors only succeeded in being " looked upon as such, in the great majority of commonalties, " merely through the analogy which they succeeded in esta- " blishing between the roads which were made over to them, " and the rivers of which no mention was made..... They " have said that Custom had declared them, as Seigniors " having superior and mean jurisdiction, the proprietors of the " roads ; and that therefore they were also proprietors of the " rivers which are only roads by water.

" As to those Commonalties, continues Merlin, which men- " tion neither the rivers nor the roads, those Seigniors have " still less chance, than in the others, of maintaining them- " selves in the proprietorship of the rivers. There, they had no " title assigning the ownership to them ; in that respect they " could not appeal to authors who had written in their favor, " and whose opinions were certainly not law.

" ..... But we reason and argue as if it were established " that beyond the four or five Customs of France, which de- " clare the Seigniors to be proprietors of the unnavigable " rivers by virtue of their jurisdiction, those Seigniors had

" really been the proprietors before the Decrees of the 4th of " August, 1789 ; but that is very far from being the case, and " it is even so far from being the case, that we might, by " imagining the seigniorial jurisdiction to be still in existence, " or what would answer as well by looking back at the time " which preceded its abolition, maintain that the rivers do not " come under the jurisdiction of the Seigniors. That is the " result which must necessarily be arrived at upon a delibe- " rate examination of the Ordinances and Customs, and of the " greatest number of the authors who wrote long before the " Revolution.... If you look at the Ordinances, you will find " that they assign to the State the ownership of the navigable " rivers (1), but you will not find that they say anything about " the rights of property which the laws of nature and the ro- " man laws give to the owners of the adjacent lands over the " small rivers, which by themselves are neither navigable nor " floatable.... If we look into those Customs, we will only " find four (2) which state that the Seigniors are the proprietors " of the small rivers ; and it is not to be doubted that there is " no person but who will say to himself ; It is not possible that " a stipulation so contrary to natural liberty should be the com- " mon law. The object of it was too interesting to escape " being noted down by the writers of the Custom, if they had " looked upon it as a general law. It ought therefore to be " confined to the limits of the Customs which have establish- " ed it."

Bacquet, *Traité des droits de Justice*, ch. 30, No. 25, tells us " that neither the King nor the Seigniors have any more " right over the unnavigable rivers than over any other pro- " perty belonging to a private individual."

Boucheul, on article 40 of the *Coutume de Poitou*, No. 6, states " that the small rivers or streams belong of right to the " proprietors of the land which forms their banks."

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(1) Ordinances of Charles VI, in 1407, art. 2; of Henry II, in 1554; of Charles IX, in 1572; of Louis XIV, in 1669, tit. 17, art. 41.

(2) Hainaut, ch. 134, art. 12; Troyes, art. 179; Vitry-le-Français, art. 121; Nivernais, tit. 16, art. 2 et 3.

Guy-Pape is of the same opinion, he asks in his 514th question, *utrum barones possint prohibere in suis terris, ne quis piscari habeat in rivis labentibus in suis terris;* and he refers to the 171st question, where he states the negative with this restriction "unless there be a custom to the contrary."

Simon, on the Ordinance of 1669, tit. 17, art. 44, remarks that "the proprietors of unnavigable and non floatable "waters, and those through whose lands they run, may make "use of them for all their requirements."

Domat decides it thus, (*Lois civiles, liv.* 11, *tit.* 6, *sec.* 1, *No.* 5): "Those streams which are not in public use, and "which belong to private individuals through whose lands "they pass, do not establish the boundaries, but each proper-"ty has its own boundaries, as prescribed by the title or by "possession."

Then look at Merlin:

"No jurist has treated this question better that Souchet has "in his commentary on the *Coutume d'Angoumois*, printed "in 1730."

Championnière says, speaking of Souchet and of the manner in which he treats the question, "perhaps it would only "be the truth, were we to say that he is the only one who "has really treated the question."

Upon the honorable testimony thus given to the superiority of Souchet, by two men like Merlin and Championnière, who have had the modesty to mention that superiority, we may well be allowed to attach some weight to the opinions and to the assertions of a celebrated author who, in common with Merlin and Championnière, did, at a comparatively recent period, view, in its proper light, that question, which only became one because the matter had become confused, and who, in the same manner as Dumoulin, proved alone against the opinions of all the others who did not wish to aeknowledge him in the right, that a *fief and justice*

have nothing in common, dared to think for himself, and separated from the sheepish crowd of writers, in the pay of the Seigniors, whose whole knowledge, as Championnière says, was composed of citations from *Arrêts* or from commentators, a distinction characteristic of inferior minds.

Listen to the words of Souchet, v. 1, p. 286.

" The Ordinance of 1669, says he, only acknowledges the " King as proprietor of those rivers which carry boats, that is " to say, which are navigable. It does not allude to the rights " of property exercised by those Seigniors having property on " the small rivers, and which are neither navigable nor floatable of themselves.

" He is one of those authors who have made a distinction " between small rivers and rivulets ; others have placed rivers " and rivulets in the same category. Guyot, in his *Traité des* " *Fiefs*, says that the distinction between rivers and rivulets " has fallen to the ground. The distinction is really useless : " the rights of those living on the banks of rivers and rivulets are the same."

" Guyot, Lebret et Chopin are the only authors who pretend " that the Seigniors are the proprietors of rivulets. All the " other authors agree that they belong in part to the individuals " along whose land they run, and that they are part of the " property ; that they all have a right to use the water " for watering their land and for steeping their flax in.

" The Roman law has put a restriction upon that law, which " natural justice would dictate to every man. It is, that while " making use of this great blessing, they must not injure any " person : *dùm tamen hoc sine incommodo cujus quam fiat*....

" Of what use then to the Seignior can the pretention be " which they have of maintaining themselves in all the rights " which, as they say, they had under the old system, over the " unnavigable rivers, since it has been proved that under the " old system, they had no right to the proprietorship of those

" rivers, nt least in those customs which did not expressly give
" it. Most assuredly that pretension is not maintainable, but
" it will appear much less so when we shall compare it with
" the principles by which we have prev iously established that,
" even supposing the proprietorship of the rivers to be gua-
" ranteed by the old system to the Seigniors, it could be in-
" voked by them at present, because they had lost their qua-
" lification of justiciars which was their only title, or more
" justly speaking, their only pretence.

" That being laid down, it is certain that they cannot have
" the exclusive right of fishing in the rivers. They would
" most certainly have it, if the rivers belonged to them, as
" their ponds or their private waters did. But as the rivers
" did not belong to them, by what right did they claim the
" exclusive right of fishing in them ?

" The right of fishing, continues Souchet, is a right inse-
" parable from the property, as the watering of the lands, it
" is a particular custom belonging to the property. For these
" reasons, Guy Pape maintains that the Seigniors cannot
" prevent their *Censitaires* from fishing in the rivers which
" run through their lands.

" The proprietorship of a river would be an illusion, with-
" out the right of fishing in it, and using it freely for the
" irrigation of the land. It is unquestionable that the pro-
" prietors of lands have the right of fishing in the rivers which
" run through their lands and which water them.

" If, under the old system, all those who knew how to place
" at their proper level the attributes of the seigniorial jurisdic-
" tion, where is the man, at the present day, who would dare
" to think and speak otherwise, now when the seigniorial ju-
" risdiction is abolished, and that the privileges attached to
" that jurisdiction, are done away with ? We will therefore
" come to the conclusion that, in every possible respect, the
" Seigniors have really no right whatever to claim the exclu-
" sive right of fishing."

I shall now return to Merlin, and I will cite some passages from his article "*Cours d'Eau*," Q. D. § 1.

"The first principles of reason teach us that rivers existed "before seigniories did, and that it is consequently impos- "sible to look upon the rivers as seigniorial grants, and "therefore that the control which the Seigniors exercised "over the rivers up to 1789, was neither the price, nor the "emanation, nor the modification of any right of property "given up to the public by them. History and the first prin- "ciples of reason both teach us that seigniorial jurisdictions, "at their origin, were only public duties confided, by the "higher functionaries, and by the King to subordinate agents, "which jurisdictions having become hereditary by conti- "nuance, do not, for that reason, lose their original and pri- "mitive natures of public duties; that for this reason they "never could assume the characteristic of properties; and if "they never had that character, with greater reason still, "they never could transmit it to objects over which those "duties were exercised; and therefore that a Seignior could "not consider himself proprietor of the land over which he "had jurisdiction, nor of the rivers under that jurisdiction; "that he never had any right over the rivers, but merely a "power of administration and that, most certainly, the right "of administrating a public property does not confer the "ownership of such property.

"In the ancient reports of our Jurisprudence, we find that "truely the rights exercised up to 1789 by the Seigniors over "the rivers, had no other foundation whatever than their "right of jurisdiction."

Merlin cites Boutiller, Despeisses, Boutaric and Loyseau, who have supported the same side of the question, and he closes this part of the subject in the following terms:

"It is well established that the rights exercised up to 1789 "by the Seigniors over the rivers, were only derived, as we "have before stated, from their jurisdiction, and from this, it

" must necessarily follow, that their right of jurisdiction being " abolished, or to speak with more exactitude, the public " duties which had been delegated to them, having been done " away with, the power, with which they had been charged, " or with which they stated they had been charged, by the " hereditary representative of the Country, being revoked by " the nation itself, the salaries and emoluments attached to " those situations must, at the same time, cease."

Troplong, Prescription, v. 1, p. 190, which I only cite in relation to the jurisdiction, says that :

" The feudal power had invested its Seigniors with the " right of superior jurisdiction (*haute-justice*) as an attribute " of their power, and as that power led to expenses, the " Seigniors taxed their treasury with the payment of certain " amounts to enable them to meet those expenses. Amongst " these revenues were the ownership and control of small " rivers."

Troplong, in the same part of his admirable treatise on Prescriptions, proves that those small rivers, or unnavigable and non floatable rivers did not belong to the Crown, but were the property of the persons owning the land on their banks. And he also goes to show, in what respect and how, by the right of accession, an island rising in an unnavigable river belongs to the person owning the land on the bank of the said river.

I now have only to cite some passages from Championnière : (*Eaux courantes*, p. 691, No. 395.)

" Such, says that distinguished writer, is the description " presented to us by the law of custom in relation to small " rivers, for at least twelve centuries. The possession of " those streams of water has never ceased to belong to those " who owned the land on the banks ; the rivulets have not " ceased to water the fields and pasture lands for the benefit

" of the farmer. No general law ever separated those two " essential elements of proprietorship. I defy any person to point " out any time when it has been otherwise, when the proprie- " tor, at the time he sold the land, did not sell the waters " running through it ; when the heirs did not divide the rivers " at the same time as the lands watered by them ; when the " proprietor of any quantity of land did not believe he was " entitled to unite the running streams, to direct them and " to make use of them as he did of his fields, his forests, his " vines, and his other property, without however interfering " with any rural servitudes, or with certain local and esta- " blished customs, or any certain exceptional rights, arising " from oppression or from agreement, which had been done " away with, were reformed, or were fallen into desuetude " almost every where."

" You will remark, he goes on saying, that in the acknow- " ledged elements of the administrative power, in transactions " between private individuals, they do not sell and do not " divide among themselves the highways and public places " and other portions of land which the seigniorial jurisdiction " has taken possession of ; how then is it to be supposed that, " in the face of a general and legitimate law in relation to the " right of property, the Seigniors would have allowed them " to perform daily acts of possession in reference to those " rivers, and have sanctioned them afterwards."

It is hardly necessary to remark that this short passage expresses the entire idea of the author, and that it exhibits, at a single glance, all that the attentive perusal of Championnière's work contains upon this interesting and important subject. This great writer, who has so ably traced the origin and discovered the character and genius of the feudal institutions, the history of which he has written with as much impartiality and fidelity as he has displayed in developing their progress, shews the rights, and makes known their encroachments, abuses and untenable pretensions, and is therefore very worthy of the consideration enjoyed by him

in consequence of his admirable work. It is a matter much to be desired that, instead of attaching so much importance to the exaggerations of certain feudists, those who are searching after the truth, amidst the confused opinions of those writers, " whose knowledge is composed of cita- " tions from *Arrêts* or from commentators," would take the trouble of reading Championnière's work before condemning him. They would there find an exacts tatement of the opinions contrary to his own, and would thus be enabled, after an attentive examination of the opinions on both sides, to give a well founded judgment.

In order not to be uselessly lengthy, I shall refer to page 692 and to those which follow it.

In one sentence Championnière accounts for the diversity of opinions :

" The immense diversity of local arrangements (he states " at page 692) must necessarily have produced great diver- " sity of opinion."

He then divides the authors into classes in the following manner. I shall only give their names in order that the whole truth of the author's observations about the diversity of opinions, and the reason which he gives of it, may be the better understood.

Authors who distinguish the small rivers from the rivulets.

Boutiller, *Somme Rurale*, tit. 73.

Loysel, *Institutes Coutumières*, book 2, tit. 2.

Boutaric, *Institutes*, book 2, tit. 1, § 2.

Duparc-Poullain, v. 2, p. 398.

Delalande, *Coutume d'Orléans*, art. 169, No. 6.

Authors who maintain that the control is attached to the titles and to the possession.

Guy-Pape, *Jurisprudence du Dauphiné*, quest. 314.

Chasseneux, *Cout. de Bourgogne*, rub. 13, § 2, No. 8.

Bacquet, *Droits de Justice*, ch. 30, No. 25.

Loyseau, *Des Seigneuries*, ch. 12, No. 120.

Choppin, *Du Domaine*, book 1, tit. 15, No. 6.

Gallon, tit. 31 *de l'Ord. de* 1669.

Coquille, *Cout. de Nivernais*, ch. 16, art. 1.

Legrand, *Coutume de Troyes*, art. 179, § 1.

Marcilly, commentator on the Custom of Troyes, art. 179.

Bouhier, commentator on the Custom of Bourgogne, ch. 62, No. 106.

Bouvot, commentator on the Custom of Bourgogne, cited by Henrion de Pansey, *Diss. féod.* Vo. *Eaux*, § 13.

Fabert, *Coutume de Lorraine*, § 301, p. 481.

Ancien Répertoire, Vo. *Rivière.*

Pothier, *du Droit de propriété*, No. 53.

Chabrol, *Cout. d'Auvergne*, v. 1, p. 53.

Hervé, *Théorie des matières féodales*, v. 4.

Authors who assign the ownership of the water courses to those who live on the banks. (1)

Boerius, *décis.* 382, Nos. 4 and 5.

Domat, book 2, tit. 6, sect. 1.

Boucheul, *Cout. de Poitou*, art. 49.

Hévin, *Consultes*, 53.

Ricard, *Coutume de Senlus*, tit. 13, art. 268.

Ferrière, *Institutes*, book 2, § 2.

Traité historique de la Souveraineté du Roi, ch. 9, No. 12.

Authors who assign the ownership of the waters to the feudal Seigniors.

Lebret, *Traité de la Souveraineté*, book 2, ch. 15.

Guyot, *Traité des fiefs*, v. 5, ch. 669.

Henrion de Pansey, *Dissertations féodales*, V. *Eaux*, § 7.

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(1) To these authors, says Championnière, we must add those who are cited *suprà*, No. 381.

Basnage, *Coutume de Normandie*, art. 206.

Hervé, *Théorie des matières féodales*, v. 4.

Authors who assign the ownership of the small rivers to the Seigniors having superior jurisdiction.

Laroche-Flavin, *Traité des droits seigneuriaux*, ch. 17, art. 1.

Despeisses, tit. 5, art. 3, sec. 9, No. 1.

Bobé, *Coutume de Meaux*, art. 182.

Bretonnier, *sur Henrys*, book 3, ch. 3, quest. 35.

Laplace, Vo. *Fleuve*, No. 70.

Pelée de Chenonteau, *Cout. de Sens*, p. 21.

Lapoix-Fréminville, *Pratique des terriers*, v. 4, p. 426.

" I shall close what has reference to the authors (says " Championnière, at page 703, No. 402,) and at the " same time the chapter upon the law relating to rivers, by " making known the opinion of two celebrated jurists, who, " it appears to me, give a summary of the whole subject. " One of them is Souchet, the last commentator upon com- " mon law, and who, according to Merlin, has treated the " question, relative to rivers, better than any other author."

Championnière adds in a note: " Perhaps it would be " true to say that he is the only one who ever really treated " the question. The argument is a very long one, and I only " give the conclusions here."

As I have cited that passage from Souchet previously, I refer back to it.

" The second one (says Championnière, p. 706) is Merlin, " most decidedly the best jurist of modern times, and the " best informed on seigniorial law " *Questions de Droit*, Vo. *Pêche*, § 1.

It has been already cited, and I refer to it. Championnière closes with some very judicious remarks. He says:

" The reader may have perceived how exactly all the infor-
" mation contained in this book, applies to the doctrines of
" Merlin ; therefore, on the one side, the most conscientious
" and minute examination confirms the accuracy of the theo-
" ries of the most eminent jurist of our age, and, on the other
" hand, the result of my own labor will be corroborated by
" knowledge of a high order, and by the authority of a
" great name."

Quite recently, since the able arguments of the Counsel, I have observed, in the notes of one of them, some citations from Demolombe, in support of the pretentions of the Seigniors that they are the proprietors of the small rivers. Demolombe has merely touched upon the subject ; and most certainly, without classing him among " those whose knowledge is composed of citations from the *Arrêts* or from commentators," at the same time that I pay homage to his talents and his great learning, I must say that he does not appear to have taken much trouble to search into the question which we have at present before us. On his way he has gleaned in the field of the celebrated jurist whose opinions, he says, he does not agree with, and he has cited some authors. Nevertheless his superior mind was struck with two things ; in the first place, that the feudists rather establish the state of the possessions than the justice of them ; in the second place, that at the time of the Revolution, the accredited opinion was that the small rivers did formerly belong to the Seigniors having superior jurisdiction. And it does appear to me, as it did to Demolombe, that " those authors rather established the state of the possessions than the justice of them." And without absolutely denying that the " state of the possessions, that is to say in other terms, the social facts themselves, the customs and traditions were at that period the principal component parts of the public law of France." We must not however admit for that reason, that the Seigniors had the full and entire possession of the small rivers.

As to the "opinion," referred to by Demolombe when he says "that, both before and after the Revolution of 1789, nothing was more accredited," it does not established it as law, and if such an opinion were accredited, which might happen, it would prove at least the grave and pernicious error which existed in relation to those pretended privileges, as well as in relation to a number of others which increased the mass of overwhelming abuses which shook the social edifice in France to its foundation, and necessitated the reconstruction of it.

Demolombe is the most recent writer on these subjects, or rather, the one who, in the 10th vol. of his *Code Napoléon*, which he continues, is the last who has cursorily mentioned it.

I therefore sum up my opinion in two words. The Seigniors never were the proprietors of unnavigable and non floatable rivers, and if they did attribute to themselves some privileges on that score, it was either the consequence of encroachments or of the confusion which they brought upon the *fief* and the jurisdiction. Besides the superior jurisdiction being abolished, the accessory which, at the most, could only be the consideration, falls to the ground with it.

IX. Legality of the reservations: what is the law in relation to them, and what is it in relation to the charges and prohibitions?

In the system adopted by me and which I have previously explained, it is strictly logical only to acknowledge, as being authorised by law, those reservations which are expressly allowed by the Custom of Paris, unless the latter has been modified by the law of the Country. As a matter of course, those must be admitted which have been sanctioned by what is properly called the law of the Country. It is unnecessary to add that the same rule should be followed with regard to the charges and prohibitions. I therefore reject, as illegal and null, all the reservations mentioned in the

compendium of the Propositions of the Crown, from the 39th to the 42d inclusively. See the Propositions of the Crown on this subject (1). But I think that the Attorney General has admitted, as being legal, some reservations which, to my mind, are, together with a number of others, quite void and illegal; but I must give some explanations.

(1) 39. 1. Custom seems to have sanctioned the reservation of timber for the building of the manor-house, mills and churches, without indemnity; moreover, such reservations were made for the general good, and were calculated to promote the colonization and settlement of the Country;

2. The reservation of fire wood for the use of the Seignior has not received the same sanction, and is repugnant to the principle of the feudal contract, which gives to the *Censitaire* the entire property of the *dominium utile* (*domaine utile*); therefore, all such reservations are null, and cannot give rise to any indemnity;

3. The same thing must be said of marketable timber;

4. The same with regard to the reservation of all mines, quarries, sand, stone and other materials of the like kind, except the reservation of mines in favor of the King or *Suzerain*, according to the conditions set forth in the original grants of seigniories and *fiefs*;

5. The same with regard to the reservation of all rivers, rivulets and streams, for all kinds of mills, works and manufactures, unless the soil as well as the waters have been reserved;

6. The Seignior could not legally reserve the right of diverting and directing, at his will, the course of streams, and of cutting canals through the farms for that purpose, except for the use of seigniorial mills. (*moulins banaux*), and, in every such case, he was obliged to indemnify the *Censitaires*;

7. The reservation of the right of taking the land requisite for the building of any kind of mills or manufactures, with or without indemnity, is null and illegal, being contrary to the principle of the feudal contract which imports an alienation entire, and for ever, of the *dominium utile* (*domaine utile*);

8. The same must be said of the reservation of the indemnity for the value of the lands of the *Censitaires* required for the construction of railroads;

9. The payment of the *cens et rentes* and other seigniorial dues, should be made at the seigniorial manor, or, at all events, within the limits of the seigniory, and not elsewhere;

10 The reservation of the right of fishing and hunting on the lands conceded, is illegal and null, as having a tendency to deprive the *Censitaire* of a part of the *dominium utile* (*domaine utile*);

Non of the reservations declared null and illegal in the above enumeration, give to the Seigniors a right to be indemnified for the suppression of them, in virtue of "the Seigniorial Act of 1854."

40. It must be held, that all the reservations, stipulated in the deeds of concession, apart from those set forth in the original grants of the *fief*, or recognized by common law, or those sanctioned by usage, such as the reservation of timber for the building of the manor-house, mills and churches, are null and illegal.

41. Prohibitions of the following kind stipulated for the advantage of the Seignior, viz: 1. A prohibition to build any kind of mills, manufactures or other works (*usines*), moved by water, wind or steam; 2. A prohibition to sell marketable timber, to make deals, to grind grain, not subject to banality, grown beyond the *censive*, and intended for market; 3. A prohibition to use streams passing by, or through, the lands of the *Censitaires*, to propel mills, manufactures or other works (*usines*), are illegal; and the suppression of them cannot give the Seigniors a right to indemnity.

42. The covenants contained in certain deeds of concession, by which personal labor (*corvées*) is imposed on the *Censitaires*, for the advantage of the Seigniors are illegal, and give no claim to the Seigniors for indemnity. In France, personal labor (*corvées*) was the price of the redemption of mort-main (*main-morte*); this servitude not existing in Canada, the covenant establishing personal labor (*corvées*) remained without cause or consideration, and is therefore null. Moreover the imposition of personal labor (*corvées*) was prohibited by a Decree (*Arrêt*) of the Intendant Bégon, dated 22nd January, 1716.

In the 39th Proposition, the Crown tells us "that custom appears to have sanctioned the reservation of the timber for the building of the manor, and of the mills and churches without any indemnity ; moreover reservations of that kind were made with a view to the public good, and tended to advance the colonization of the Country."

I am not aware of any law which authorised the Seignior to reserve the timber he might require for the building of the manor and of the mills. So far as the churches are concerned, if the Seigniors, before the law of 1791, had been as zealous to build them, as they were desirous of building their manors and their mills, at the expense of their *Censitaires*, it was very easy for them to furnish the timber, by taking it from their own domains, instead of taking it from the lands of their *Censitaires*.

I acknowledge the reservation of the mines in favor of the King or Seignior, under the conditions contained in the first grants of the seigniories or *fiefs*, as stated in No 4, of the 39th Proposition. In No 5, the Crown admits the reservation of all the rivers, rivulets and streams of water for all kinds of mills and factories, when the land, as well as the water, has been reserved, and the Crown rejects it if the land has not been reserved as well as the water. I cannot agree to this, and I reject them in both cases.

I agree to the 40th Proposition, with the same exception however as to the 39th.

I have one or two observations to make about the *corvées*. If they are only looked upon in the same light as they are seen in by Article 71 of the Custom of Paris, which looks upon them as legal when they are stipulated, there can be no difficulty. Whether they were given or not as the price of the redemption of the mortmain, there is the law which renders the stipulation legal. And such was really the case up to the *Arrêt* of 1711. But this *Arrêt* supervenes, and from that moment, the Seignior is bound to concede *à titre de redevances*

only. The feudal system is modified in this respect as well as in others. The *corvées* cannot consequently be legally stipulated, except in so far as they are dues, in the meaning of the *Arrêt* of 1711. And inasmuch as I consider them to be servitudes or charges, I look upon them as being quite as illegal as the reservations, charges and prohibitions above mentioned.

However, if there be any doubt, which I do not acknowledge, the *Censitaire*, being the person burdened, should reap the advantage, the more so, as I hold to what I said at the commencement, that nothing should be decided in favor of the Seignior from analogy, no more than from pretended ideas of equity, for the simple reason, that the system of *fiefs* and the seigniorial tenure are, in some respects, beyond the limits of common law and even of the law of nature.

I might add that, although I do not attach as much importance to that *Arrêt* as some persons do, I might, I repeat, add the *Arrêt* of the Intendant Bégon, dated 22 January 1716, which prohibits the imposition of *corvées*.

With these explanations, I will refer to the printed explanations of the Crown. I adopt them as being in harmony with my own ideas in relation to the reserves, charges and prohibitions.

Before abandoning this part of the subject, I mean the reservations and prohibitions, I shall mention two ideas which have struck me and which I confidently lay open for the criticism of those persons who are in the habit of doing so.

The first one has reference to the reservations and prohibitions. Seigniors pretend that they have the right of reserving for themselves the timber for the building of the manor-house, the mills and churches, without paying any indemnity for it; the firewood for the use of the Seignior, timber for exportation, all the mines, quarries, sand, stone

and other materials of the same kind ; the right of diverting the water courses, and of cutting canals through the lands for that purpose ; the right of taking such quantities of land as may be required to build all kinds of mills and manufactories upon paying the indemnity which might be paid the *Censitaires* for such portions of land as might be taken for railroads, and the right of fishing and hunting upon the conceded lands. The prohibitions are : to build any kind of mills or manufactories, worked by water, wind or steam ; to sell any timber, to make deals, or grind any grain, not subject to the right of banality, grown out of the limits of the *censive* and intented for exportation ; to make use of the streams running through or alongside of the lands of the *Censitaires*, for the purpose of working mills and manufactories.

After such an enumeration, how is possible to doubt but that the Seignior has the power, if he choses, to reserve almost all the land which he grants, or to limit in such a manner the exercise of the rights which he gives his *Censitaire*, over the timber, sand, stone and everything else, that the *Censitaire* has merely the shadow of a concession ? Finally, where will we stop, since we acknowledge that the Seignior has the right of making reservations. What rule shall we follow to restrain them ? Shall it be the half, the quarter, the third, five eighths, or seven eighths ? And in order that the Seignior may not take everything, will it be maintained that he has not the right to keep almost everything ? I may be told that we should not suppose that the Seignior would be guilty of such tyranny and would commit such an act of injustice. For what possible reason should those reservations be made ? Is it in jest or in earnest, that reservations of this kind, of almost all the land and water, are made ?

The second idea is as follows. The Seigniors, by virtue of the common law and of the feudal law or by both, but it is sufficiently difficult to ascertain which, pretend that they are the proprietors of the unnavigable and non floatable rivers ; and by virtue of the *Arrêt* of 1686, they pretend

to have acquired a universal title to the right of banality without its being necessary for them to stipulate it according to the terms of Article 71 of the Custom of Paris. If such be their conviction, if the law be so clear and decisive, both the Seigniors and Censitaires are equally subject to it. Why therefore should we have these odious reservations, made with so much precaution and perseverance, increasing from year to year to such an extent, that, at the rate certain Seigniors were going on at, the contracts between them and their *Censitaires* would have become deeds of reservation rather than grants? Do these reservations, inserted in the deeds of concession, per chance betray any doubt, any fear, I was going to say, any conviction, that they are not acknowledged by either law or justice? I shall leave it to those who know more about the matter than I do, to account for this singular circumstance. I have not the power of scrutinizing the consciences, nor is it a part of my duty as a Judge, to do so; but, in that capacity, I have a right to judge both the Seigniors and the *Censitaires*, and those interested whoever they may be, by their acts, when I am called upon to weigh them. However I have the satisfaction of concurring almost entirely with the majority of the Court, in the important decision which it renders in relation to these reservations.

I should perhaps say a word, in passing, about the Proclamation of 1763, to which some persons (few in number, it is true) attribute the magical power of having set aside the old laws of the Country, and of having substituted, in their place, the Civil laws of England. It is truely distressing to see, that in 1856 such opinions should be maintained, being, as they are, not only legal but constitutional heresies. The desire that a mere Proclamation of the King, the intention of which was not to attack, even in the slightest degree, the old established laws of the Country, should have the effect of setting them aside, upon a mere recommendation to the Judges, to decide as near as may be agreeable to the laws of England; this recommendation

might perhaps apply to Florida and to New Grenada, but I do not however admit that it does. If the laws of England were introduced into Canada, had the King the power of allowing the Judges not to follow them and put them in execution. Could he give the Judges the discretionary power of deciding according to their own caprice, as near as might be agreeable to the laws of England? Truely, that would be quite a subversion of constitution, laws, treaties and justice.

And, in the face of the Act of 1774 (Quebec Act) sec. 8, how can we be serious in repeating what we have ceased saying for a great length of time, that the French laws were restored in 1774? It is stated, *that resort shall be had to the laws and customs of Canada, as the rule for the decision in all matters of controversy relative to property and civil rights*..... There were laws in Canada at that time, otherwise the Act of 1774 would be void of sense. If there were any laws in Canada, they were the old laws. They were not reestablished, for the simple reason that they had never been abolished; nor were they abolished by virtue of the Imperial Statute, inasmuch as that Statute solemnly acknowledges their existence, and even guarantees that they shall remain in force. That is so far as the serious consideration of the question is concerned. But I should like to know how, and by what process, they who had caused to disappear instantaneously as a shadow, laws which, at the present day, every educated and imprejudiced man, would be sorry for more reasons than one, not to see in force, by what process, I say, they should also, by virtue of their Proclamation, have destroyed the customs of the inhabitants of the Country? It must have required a mighty effort to effect that object! And notwithstanding that, the Act of 1774 talks of laws and customs. If it reestablished those laws which had not fallen to the ground, it should likewise, have revived the customs of the inhabitants of the Country, which had never lost any thing of their vitality.

We can easily see to what absurd consequences such a pretention may lead.

That is not the way successfully and efficaciously to destroy an entire code of laws, in relation to which, Attorney General Thurlow, when giving his opinion to His Majesty Geo. III, used to say: "There is not a maxim of the common law more certain, than that a conquered people, "retain their ancient customs, till the conqueror shall "declare new laws. To change at once the laws and manners of a settled Country, must be attended with hardship "and violence. And therefore, wise conquerors, having "provided for the security of their dominions, proceed "gently, and indulge their conquered subjects in all local "customs, which are in their nature indifferent, and which "have been received as rules of property, or have obtained "the force of laws. It is more material that the policy "should be favored in Canada, because it is a great and "ancient Colony, long settled, and much cultivated by "French subjects who now inhabit it to the number of "eighty or one hundred thousand."

Messrs. York and De Grey spoke to the same purport, so did also all the eminent men of that day in England, who had any regard for their own character.

It is hardly necessary for me to remark that, since the Proclamation of 1763 could not and ought not, in any case, to have caused the result which is attributed to it, in regard even to a conquered Country and with much less reason, could it do so in regard to one which had only been ceded.

I must now stop, it was not my intention to discuss this question; nothing more should be said about it; I merely intended to say a word in passing.

In order to avoid repetitions, I will refer those persons who are curious about the matter, to vol. 2 of the Decisions of the Tribunals of Canada, p. 405 and seq.; there it will

be seen that I treated the subject, at length, in the memorable case of Stuart vs. Borrowman. Moreover, it appears to me that the consideration of this question, is a matter of very slight importance here, since even the men who attribute to the Proclamation of 1763, intentions which the King of England never had, and results which it never could have produced, acknowledge, or I should rather say, are of opinion that the Act of 1774, reestablished the old laws of the Country. I have alluded to the subject, merely from the fear that if I did not, my silence would be looked upon as if I assented to what I consider as a serious legal and constitutional heresy.

I am not aware that it is very necessary to speak of the two Imperial Acts, I mean the "Canada Trade Act" 3 Geo. 4, cap. 19, and the "Tenures Act, 6 Geo. 4; according to my opinion, the questions which have been brought up before us, are not affected by them. All that we could possibly infer from these statutes, is that it was thought necessary in England as well as in Canada, to legislate upon the Seigniorial tenure. Moreover my ideas and opinions upon any intervention of this nature, are quite settled. The Act of 1774, "Quebec Act," is formal and decisive. It is only necessary to read the end of that section; it is only susceptible of one interpretation. The Imperial Parliament does not reserve the right of changing or modifying the laws which it guarantees; on the contrary, those laws are to be the rule, "the principles, on which all mat-"ters in dispute, relative to the property and social rights "of the Canadian subjects, shall be decided, till such time "as they (laws and Customs of Canada) shall be changed or "altered by Ordinances which may be passed here-"after, in the said Province by the Governor, Lieutenant-"Governor or Commandant in Chief, by and with the con-"sent and advice of Legislative Council, which will be "established there as mentioned in that Act."

Without, in the least, commencing to discuss the question about the Sovereign powers of the Imperial Parliament

in relation to the Colonies, and to every thing concerning them, upon which I have my own opinion, it appears quite evident to me, that if the Imperial Parliament possesses the unlimited power attributed to it, it might, in 1774, just as well have delegated its power, to legislate upon our laws, to the Colonial Legislature, rather than keep the power in its own hands and exercise it itself. Those persons who imagine that the power of the Imperial Parliament is unlimited, would have some reason for denying that the Act of 1774 has the effect which I attribute to it, if the Imperial Parliament had been satisfied with deciding that the laws of the Country would be the rule and principle upon which all disputes relating to property and to the social rights of the Canadian subjects, should be decided. But how can such a pretension be maintained, in the face of the solemn and decided declarations of the Imperial Parliament, that matters should remain in that state, until such time as those laws should be altered by the Legislature of the Country. It is an absolute and formal renunciation, and a delegation of its authority to the Colonial Legislature, so far as a certain particular object is concerned.

Mere good sense makes us understand in an instant that such was the intention. What kind of guarantee would the Canadian subjects have had for the maintenance and preservation of their properties and possessions, and of their "laws, usages and customs and all their other rights as citizens, &c.," if that power which agreed to maintain tl em, could at will and at any moment reduce that Act to a dead law? For that reason I am of opinion that the Canada Trade Act and the Tenure's Act, so far as they relate to the present question, could not, and cannot at present, have the effect which some persons attribute to them.

It is not out of place to call your attention to the contrast presented by the Imperial Act of 1774, when compared with the *Edit de création* of the Superior Council of Quebec, in 1663. The first was the act of a constitutional govern-

ment which guaranteed us our laws and formally acknowledged the existence of them ; the latter was the act of an absolute government which, not only subjected the Superior Council of Quebec to the laws and Ordinances of the Kingdom, but reserved also to itself the sole right of making alterations in them.

From these observations, it appears quite natural and reasonable that we should consider that those two Statutes have nothing to do with the question with which we have attempted to connect them. I will now sum up.

The feudal system, as it existed in France under the control of the Custom of Paris, has been considerably modified in New France, and the Seignior, from the freedom he possessed in France, relative to his right of granting and alienating lands, has come in New France under the control of a legislative power which was bound down by the particular circumstances under which an immense Country was placed, and where colonization was the great aim of the Crown of France. The intentions of the King became obligatory, so far as concessions were concerned, in the same manner as a settled and low rate was one of the most proper means to attain the end in view. It is therefore not in the least astonishing that we should find that rule recorded in the laws of that time, and imbued all through with the force of custom, that rule which becomes a general one without however being universal, for the very reason that a number of Seigniors had the unheard of pretention of making rights for themselves, in the same manner as, at a later period, they established privileges commensurate with the extent of their violation of the laws. The important period of the legislation of Marly decided a question of great importance. Those *Arrêts*, being the expression of that legislation, are, as they should necessarily be, laws of public order, both characteristically and essentially, and with regard to the means of carrying them into execution, having, at all times, in view the great project of colonising New

France. The result is a serious matter in itself and is of great practical importance. The advancement of the Country depended upon their observance, and a contrary effect was to be expected from their violation. For that reason it is not astonishing that no person was allowed to depart from them by any private agreements. It is not sufficient for a Country to possess laws, it must have such a judicial organization as will enforce the execution of those laws in such a manner as will guarantee the attainment of the object they have in view. We find therefore, both under the old and new domination, that machinery indispensable to great works, the wounderful *ensemble* of which would, without doubt, have worked well if the Seigniors had not thrown obstacles into the way of the well working of that machinery, which had been so judiciously set in motion by men whose talents equalled at least the narrow minded spirit of criticism of those who did not understand them. Although the action of the Tribunals was frequently impeded, it is a manifest fact, which contradicts, in a formal manner, the pretension of those who were desirous of obliterating the most important part of the ancient law of the Country, by trying to stamp it with desuetude. And certainly that is a most singular kind of desuetude which could be established by means of the continuance of action on the part of the Tribunals, before the cession, and for a short period during the existence of the military Tribunals. That desuetude was in the least quite as strange, which they were desirous should result from the fact that those unabrogated laws were laws no more, because we do not find that those infractions of the laws were punished at every moment ; thus establishing the maxim, that it is necessary to multiply the violation of the law, in order the better to establish its existence. I think, in my humble opinion, that I have determined the interesting and important question relative to the waters, both navigable and unnavigable and non floatable, in the only manner which it appears to me, is consonant with truth. The contrary opinion is, to my mind, a manifest

error which has nothing, (I will not say,) to justify it, but which it could offer as a pretence, except the feudal system such as encroachments and the opinions of superannuated feudists could produce, when they dreamt of a promised land for the Seigniors. The right of banality is a system quite peculiar to the Country. It never was introduced into New France, it was established there. It appears to me that, from the confusion of these two ideas, has arisen the error which I have tried to guard against, in relation to its consequences in this Country. According to my opinion, both the reservations and pretentions of the Seigniors relative to waters, should suffer the same fate. They are encroachments which must, in great part, be done away with. Although I do not rely upon the declarations of Mr. Hocquart, in whose favor we are desirous of admitting that, in that respect, he had an intimate knowledge of the King's intentions, without however giving him the same credit, in declarations which he makes elsewhere, about other matters ; nevertheless I shall cite the *Arrêt* issued by him, prohibiting the imposition of *corvées*. In the midst of the disputed claims of the *Censitaires* and the Seigniors, appear certain rights which are sacred for both of them, and I therefore acknowledge them. I grant them to the Seigniors ; the *Censitaires* are bound to pay the Seigniors those which are mentioned below according to the valuation to be made pursuant to law. They are :

The *cens et rentes*, the *lods et ventes*, the right of banality such as established in this Country, provided that it has been stipulated.

" These are the rights, dues and reservations which should " be valued, in order to ascertain the full amount at which " the seigniorial rights should be redeemed as required by " the Seigniorial Act."

I differ most materially from the majority of the Court upon several important points. Sometimes I stand alone, at other times my name is inscribed with those of several

other members of this Court; sometimes also I agreed in opinion with the whole Tribunal; finally I will be seen voting in favor of the first part of an answer, when I do not compromise my opinions, and voting against the second part of it, not because it may be altogether erroneous, but because at the same time that it asserts a truth, it sanctions an error. I do not agree with the 2nd paragraph of the answer to the 41st question of the Attorney General where mention is made of a *droit principal*, which I reject, although I am of opinion that the suppression of the prohibitions mentioned in it, not only renders all claims on the part of the Seigniors in that behalf, illusory, but also that they had no such right whatever. All those votes are given from profound conviction, and from a principle quite as sacred for a Judge as for every other man, I mean the right and duty of always acting according to one's convictions and never against them.

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OPINION

OF THE

HONORABLE JUDGE MEREDITH.

PART I.

CENS ET RENTES.

Section 1.

Rights of Seigniors under the Custom of Paris, as to the concession of their lands.

The learned Counsel, in their able and elaborate arguments, have treated the important subject which now engages our attention, under four distinct heads :

1st. The annual rents, *cens et rentes*, payable to Seigniors ;

2d. The nature and extent of the right of *banalité ;*

3d. The rights of Seigniors in the rivers watering their seigniories ;

4th. The reservations and prohibitions stipulated in the contracts of concession between the Seigniors and the *Censitaires.*

In the remarks which I am about to make, I shall adopt this division of the subject, which appears natural and convenient, slightly altering however the order from that given above, so as to make my observations on the fourth head (the reservations and prohibitions) follow immediately those on the first—the *cens et rentes ;* as it appears to me that the questions, under both these heads, must be determined by a reference to the same principles and rules of law.

According to this division of the subject, the question first in order, as it is first in importance, among those to be considered is the following :

" Under the law, as it existed in this country immediate-
" ly before the passing of the Seigniorial Act of 1854, have
" *Censitaires*, to whom seigniorial concessions have been
" made after the cession, at higher rates than those that
" were customary before that time, a right to be relieved
" from those onerous dues ? " (1)

On the part of the Crown it is contended, that the Seigniors were under a legal obligation to concede their wild lands, at an annual rent not exceeding two *sols* per arpent; and that the concession deeds, between the Seigniors and their *Censitaires*, in so far as they purport to secure to the Seigniors a higher rate of rent, than two *sols* per arpent, are illegal ; and that the rents stipulated therein, whenever they are above that rate, should be reduced to it.

To enable us to answer this question, we must ascertain what was the law of France on this subject, at the time that law was introduced into Canada ; and then consider how far the question is affected by subsequent legislation for the Colony, or by the titles under which the Seigniors hold their fiefs.

Some time was allowed to elapse after the first settlement of the Country, without any express provision having been made, to determine what portion of the laws of France should be observed in this Colony ; but such a provision was plainly necessary ; for France was then divided into the *pays de droit écrit*, in which the Roman law generally obtained, and the *pays de droit coutumier*, in the different parts of which about 60 general, and 300 special or local Customs, had force of law. (2)

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(1) Question of Attorney General, no. 25.

(2) Répertoire de Guyot, vol. 5, p 145. On compte environ 60 Coutumes générales dans le Royaume, c'est-à-dire, qui sont observées dans une province entière, et environ 300 Coutumes locales qui ne sont observées que dans une seule ville, bourg, ou village.

By the edict of 1663, establishing the *Conseil Supérieur*, that Court was required to observe the laws and ordinances of France, and to proceed as nearly as possible according to the practice of the *Parlement de Paris*. Further provision on this subject however was required ; for the general laws and ordinances of France, did not regulate the tenure of land, and were silent on a variety of other subjects, in relation to which it was necessary that the Colony should have some certain rules of law.

We find accordingly that the Edict, establishing the West India Company, bearing date the following year, in art. 33, declares that "the Judges appointed in the said "places (Canada being one of them) will be held to give "Judgment according to the laws and ordinances of the "realm ; and the officers of Justice bound to follow and to "comply with the Custom of Paris ; according to which, "the inhabitants shall enter into contracts, without its "being lawful to introduce any other Custom in order to "ensure uniformity."

Some persons hold that the Custom of Paris became of necessity the law of the Colony as soon as the country was settled by subjects of the French Crown. But this is not certain. On the contrary, according to the President Bouhier, (1) Guyot, and many other Jurists, that Custom had no greater authority, than any other beyond the territory for which it was specially framed. (2)

We find, as a matter of fact, however, that a number of the grants, made even before 1663, refer expressly to the Custom of Paris as the law by which the Colony was to be governed ; (3) while a few refer to the Custom of the Vexin

(1) Bouhier, vol. 1, p. 373, Coutume de Bourgogne.

(2) Répertoire de Guyot, vol. 5, p. 145, speaking of the Custom of Paris. "Elle "n'a pas plus d'autorité que les autres hors de son territoire." But see Ferrière, Dict. de droit, vol. 1, p. 590, and Coutume de Paris, 1 vol. pp. 19 and 21, folio edition.

(3) See the grants nos. 15, 17, 19, 20, 21, 22, 23, 25, 27, 28 in Mr. Dunkin's abstract—The usual words are as follows, or to the following effect : "Le tout suivant et conformément à la Coutume de la Prévoté et Vicomté de Paris, que la compagnie entend être observée et gardée par toute la Nouvelle-France." See also no. 12 of 1 Decr. 1637, in which I believe the Custom of Paris is first referred to as regulating the grant ; see also no. 14.

le Français, as the rule under which they were to be held, but the Vexin le Français was merely a particular usage, observed within part of the "*Prévoté et Vicomté de Paris.*"

We need not however dwell upon this point, as, for our purposes, it is enough to know that in 1664, the Custom of Paris became part of the common law of Canada.

This being the case, we have next to consider, what, under that Custom, was the rule of law, as to the question under examination.

On this point, there is no room for doubt. Under the Custom of Paris, it is certain that a Seignior was not obliged to concede any part of his *fief*; and that, when he did concede any portion of it *à titre de cens*, the conditions of the concession deed, *bail à cens*, as to the rent to be paid, and as to the reservations and prohibitions in favour of the Seignior, were purely matters of agreement, between the parties, who had the same liberty of contracting, when they entered into a deed of concession, as they had in making any other contract.

I do not dwell upon these points, however important they may be, for they are, as I understand, admitted by the Counsel for the Crown; nor do I deem it necessary to cite authorities; for the opinions of all the most esteemed writers on the feudal law, have been collected and quoted by the learned presiding chief Justice. Indeed I am not aware, that any writer, either ancient or modern, has expressed a doubt as to the law on this subject, under the Custom of Paris.

If then, the owners of *fiefs* in Canada had not the right of conceding their lands on the most favourable terms for themselves, the restriction in this respect, of their common law rights, must have had its origin, either in the laws made for the Colony, or in the titles under which they hold their *fiefs*.

In addition therefore, to examining our Colonial laws on this subject, which however important they may be, are few and simple, I have deemed it my duty to examine all the grants of seigniories in Lower Canada, printed under the authority of our Government; and after giving to the whole the best consideration in my power, I have arrived at the conclusion, that, although before the first of the *arrêts* of Marly, the owners of *fiefs* in Canada, generally speaking, were under an obligation more or less stringent, to settle on their lands, and to cause them to be improved; yet that the legal obligation to sub-concede, was first established by the *arrêt* of Marly, and that even according to that *arrêt*, the parties to a deed of concession were competent to make any agreement they thought fit, as to the rent and charges to be established in favour of the Seignior; provided the conditions agreed upon, were not opposed either to the express provisions or to the obvious policy of the law.

If all the Judges regarded the *arrêt* of Marly in the same light, it might perhaps be needless, upon the present occasion, to advert to any of the laws, or to the title deeds, anterior to it in date. But several of the Members of this Court consider that *arrêt* as being merely declaratory of a pre-existing obligation; while other members of the Court are of opinion, with me, that the *arrêt* in question, in compelling Seigniors to sub-concede, imposed upon them an obligation, unknown to the common law, and not justified by the terms of a majority of the grants then in force.

In order then to see what was in truth the legal position of Seigniors, in relation to their *fiefs*, at the time of the passing of the *arrêt* in question, and thus to obtain light by which we may be enabled the better to read the provisions of that most important law, I propose to examine all the prior laws on the same subject, and also all the grants *en fief* made before the date of its promulgation.

Section 2.

Charter by which Louis the 13*th granted Canada to the Company of the hundred associates, afterwards called the Company of* la Nouvelle France.

The first Act to which reference is necessary for the purpose mentioned in the concluding observations of the foregoing section, is that by which Louis the 13th established the Company of the hundred associates, and gave to them the very extensive territory then known as New France or Canada.

This charter is generally represented by the opponents of the Seigniors' claims, as having subjected the Company to an obligation to sub-concede the land granted to them; and the obligation thus supposed to have been contracted by them, is alleged to have passed to their sub-feudatories, and then by some means (not clearly explained) to have been transmitted to all persons, who afterwards held lands *en fief* in Canada, whether through the company or otherwise.

The provisions of an act, which is supposed to have produced such important consequences, demand doubtless the most attentive consideration.

The object of the King in establishing the Company of the hundred associates (afterwards known as the Company of New France,) are very clearly announced in the preamble, which has already been read and commented on by the other members of the Court.

The principal obligations contracted by the Company are contained in the first section of the act.

" C'est à savoir que les dits de Roquemont, Houel, La-
" taignant, Dablon, Duchesne et Castillon, tant pour
" eux que pour les autres faisant le nombre de cent, leurs
" associés, promettront faire passer au dit pays de la Nou-
" velle France, deux à trois cents hommes de tous métiers

" dès l'année prochaine 162 , et pendant les années sui-
" vantes en augmenter le nombre jusqu'à quatre mille de l'un
" et de l'autre sexe, dans quinze ans prochainement venans,
" et qui finiront en décembre, que l'on comptera 1643, les
" y loger, nourrir et entretenir de toutes choses généra-
" ment quelconques, nécessaires à la vie pendant trois ans
" seulement, lesquels expirés, les dits associés seront dé-
" chargés, si bon leur semble, de leur nourriture et entrete-
" nement, en leur assignant la quantité de terres défrichées
" suffisantes pour leur subvenir, avec le blé nécessaire pour
" les ensemencer la première fois, et pour vivre jusqu'à la
" récolte lors prochaine, ou autrement leur pourvoir en telle
" sorte qu'ils puissent de leur industrie et travail subsister
" au dit pays, et s'y entretenir par eux-mêmes."

The expense of conveying 4000 persons from France to Canada, and providing them with board and lodging, and all things necessary for their subsistence for three years, would even at the present day be very great ; but when we bear in mind the length of time that was then taken to cross the Atlantic, the risk and dangers attending the voyage, the tonnage of the vessels, and the state of the colony in which the settlement was to be made ; we cannot fail to see, that the cost of carrying out such an undertaking now, would be small indeed, compared with what it must have been in the early part of the 17th century. As throwing light upon the onerous nature of the obligation thus assumed by the Company, I may mention that it appears from Chalmers' Political annals of the Colonies, that in 1630 (just two years after the creation of the Company of *la Nouvelle France*), the expense of conveying 1500 emigrants, with the Officers, required by their charter, from Southampton to Salem in new England, amounted to upwards of one hundred and twenty thousand pounds (1), and that the transportation of people and provisions to Maryland, during the first two years of the settlement of that Colony, cost Lord Baltimore,

(1) Chalmers, p. 151.

the proprietary, (1) £40,000 ; large sums, especially when we consider the great difference between the value of money at that day and at present.

I notice the magnitude of the obligations assumed by the Company of *la Nouvelle France*, because the charter granted to that Company has generally been treated, as if it contained a gratuitous donation from the King to the adventurers.

The second section in the charter of the Company provides for the peopling of the Country with natural born french subjects professing the Roman Catholic religion.

The third section compels the Company, at their own expense, to make provision for the conversion of the Savage tribes, and for affording the consolations of religion to the French who settled in New France.

This obligation also was far from being merely nominal. One of the main objects of the King of France, in providing for the settlement of the Colony, as stated in the charter now under consideration, and in the other similar documents of those times, was the propagation of the Christian religion : and the numerous and important grants made from time to time in the Colony to various religious bodies, show that that object was not neglected.

The fourth and fifth sections are those setting forth the principal rights given to the Company and are as follows.

" IV. Et pour aucunement récompenser la dite compa-
" gnie, des grands frais et avances qu'il lui conviendra faire
" pour parvenir à la dite peuplade, entretien et conservation
" d'icelle, Sa Majesté donnera à perpétuité aux dits cent
" associés, leurs hoirs et ayans cause, en toute propriété, jus-
" tice et seigneurie le fort et habitation de Québec, avec
" tout le dit pays de la Nouvelle France, dite Canada, tout
" le long des côtes depuis la Floride, que les prédécesseurs

(1) Chalmers, p. 207.

" rois de Sa Majesté ont fait habiter, en rangeant les côtes
" de la mer jusqu'au cercle Arctique pour latitude, et de
" longitude depuis l'Isle de Terre Neuve, tirant à l'ouest
" jusqu'au Grand Lac, dit la Mer Douce, et au delà, que
" dedans les terres et le long des rivières qui y passent, et se
" déchargent dans le fleuve appelé Saint-Laurent, autrement
" la Grande Rivière de Canada, et dans tous les autres
" fleuves qui les portent à la mer, terres, mines, minières,
" pour jouir toutefois des dites mines conformément à l'or-
" donnance, ports et havres, fleuves, rivières, étangs, isles,
" islots et généralement toute l'étendue du dit pays au long
" et au large et par de là, tant et si avant qu'ils pourront
" étendre et faire connoître le nom de Sa Majesté, ne se
" réservant Sa dite Majesté que le ressort de la foy et hom-
" mage qui lui sera portée, et à ses successeurs rois, par les
" dits associés ou l'un d'eux, avec une couronne d'or du
" poids de huit mares à chaque mutation de rois, et la pro-
" vision des officiers de la justice souveraine, qui lui seront
" nommés et présentés par les dits associés lorsqu'il sera
" jugé à propos d'y en établir : permettant aux dits associés
" faire fondre canons, boulets, forger toutes sortes d'armes
" offensives et défensives, faire poudre à canon, bâtir et
" fortifier places, et faire généralement ès dits lieux toutes
" choses nécessaires, soit pour la sûreté du dit pays, soit
" pour la conservation du commerce.

" V. Pourront les dits associés *améliorer et aménager les*
" *dites terres*, ainsi qu'ils verront être à faire, et icelles dis-
" tribuer à ceux qui habiteront le dit pays et autres en telle
" quantité et ainsi qu'ils jugeront à propos ; leur donner et
" attribuer tels titres et honneurs, droits, pouvoirs et facultés
" qu'ils jugeront être bon, besoin et nécessaire, selon les
" qualités, conditions et mérites des personnes, et généra-
" lement à telles charges, réserves et conditions qu'ils ver-
" ront bon être. Et néanmoins en cas d'érection de duchés,
" marquisats, comtés et baronnies, seront prises lettres de
" confirmation de Sa Majesté sur la présentation de mon

" dit seigneur grand-maître, chef et surintendant général de " la navigation et commerce de France."

By the ninth section His Majesty undertook to give the Company two vessels of war, of two or three hundred tons, equipped and ready for sea, which the Company were to victual and to man with such commanders, soldiers and sailors as they might think fit; the said vessels to be kept in order by the Company and to be employed for their benefit and advantage; and in the event of their deterioration from any cause whatsoever (save and except the vessels being taken in open warfare by His Majesty's enemies), the Company were obliged to substitute others in their place; such other vessels to be kept in a fit and proper state for the advantage of the Company.

It is thought by some of the learned Judges, that under this charter, the Company were obliged to concede the wild land of Canada to any French subject wishing to settle there; but in this opinion, I am unable to concur. Had it been intended to subject the Company to such an obligation, it would obviously have been necessary to make some provision as to the terms upon which they might be compelled to make concessions of land; whereas nothing of the kind was done. If the power of determining the terms had been left to the Company, the supposed obligation in favour of the public, could not have been enforced; and if that power had been given to the King, there would, in effect, have been no grant to the Company. The terms of the act however, according to my views, negative in the plainest manner the existence of any such obligation.

The grant is made *à perpétuité aux dits cent associés, leurs hoirs et ayans cause, en toute propriété, justice et seigneurie*: the only limitation, in relation to these land, being in the words *pour jouir toutefois des dites mines conformément à l'ordonnance.*

The Company it is true undertook to convey to the Colony 4000 persons, and to provide them with " board and

" lodging and all things generally, which may be necessary " to life, during three years, after which period the said as- " sociates will be discharged, if they so desire it, from the " obligation of providing for them, (the persons so to be " conveyed to the Colony) by giving *them a sufficient quan-* " *tity of cleared land* to enable them to support themselves," or to provide for them otherwise in such way, that they might by their labour and industry, subsist in the said Country and support themselves.

But assuredly from this qualified obligation to grant *cleared land* to 4000 persons, we cannot infer an obligation to grant uncleared land to all their fellow subjects.

The only other words in the act, referring directly to the subgranting of land by the Company, are those to be found in the fifth section already quoted; but I cannot comprehend how the clause, " it will be lawful for the said associates " to improve and ameliorate the said lands *as they may* " *deem it necessary* and destribute the same to those who " will inhabit the said country and to others *in such quan-* " *tities and in such manner as they will think proper* ", can be converted into an obligation, to grant land *in such quantities* or *in such manner* as any person or persons, other than the Company, might think proper.

There can be no doubt that the King desired, as the preamble to the act declares, to establish a powerful Colony in his north American dominions; but we must recollect, that the Colony was to be founded, mainly by the exertions and with the means of the Company; and we must therefore consider, not merely, what were the intentions or wishes of the King as *one* of the contracting parties, but, what were the terms and conditions agreed upon by *both* parties; and we have no right in looking for those terms or conditions to go beyond the charter; which was prepared evidently with much ability and care, and which is very explicit as to the nature and extent of the rights and obligations of the Company.

It is however contended, that, although the charter does not in express terms contain an obligation to sub-concede, yet such an obligation must necessarily be inferred from the nature of the grant.

For my part I must say, that I cannot see in the facts, anything to warrant such an inference. I find that four years after the grant of Canada to the Company of *la Nouvelle France*, Charles the first of England granted the province of Maine to Sir Ferdinando Georges ; that seven years afterwards he granted Maryland to Lord Baltimore, and that Charles the 2nd in his time granted Pennsylvania to the celebrated Wm. Penn ; and yet notwithstanding the vast extent of the territory thus granted, it never, so far as I am aware, has been supposed that the grantees could be compelled to alienate any portion of the land granted to them.

Story at p. 110 of the first vol. of his Commentaries on the constitution of the United States, says : " that the charter con- " tituted Penn the true and absolute proprietary of the Ter- " ritory thus described." And at the next page he says : " Penn immediately invited emigration to his province by " holding out concessions of a very liberal nature to all " settlers." Thus admitting as a matter of course, that Penn could hold out such concessions as he thought fit.

The mode in which these and many other like grants, were made by English Sovereigns, and colonies established under them at least in some cases (1), shows that a new country can be settled, without subjecting the proprietaries, as they were then termed, to an obligation to make subgrants.

The fact that Canada was given *en fief* does not make in this respect any difference : for a grantee *en fief*, by the common law, is not under any greater obligation to alienate

(1) Story, same vol. p. 94.

any portion of his property, than a grantee in free and common soccage.

Upon the whole then, I am of opinion that the obligation to sub-concede, which certainly was not imposed upon the Company by the express terms of their grant, and which is at variance, with the whole spirit of the feudal tenure, cannot, as has been contended, be inferred from the nature of that grant, or from the circumstances under which it was made.

The King of France probably felt satisfied, that the interests of the state, and those of the Company, in this respect were identical. If experience had shown this not to be the case, the King for the public good, by his legislative power, could have deprive the Company of the whole, or of a part of the land granted to them; not rightfully however without giving them a reasonable indemnity.

Section 3.

Seigniorial grants by the Company of la Nouvelle France.

From 1623, until 1663, excepting for a short time, after the taking of Quebec by the English, in 1629, Canada remained in possession of the Company of *la Nouvelle France.*

During the existence of that Company, they made about twenty eight extensive seigniorial grants (1) in Canada; to each of which I shall now advert, in so far, and in so far only, as they relate to the clearing or sub-conceding of the land granted.

I confine myself to the conditions bearing on these points, because it is only in so far as the Seigniors were subject to the obligation of sub-conceding their lands, that it is con-

(1) The Company also granted several small lots of land *en fief*, but those from their size, did not admit of sub-concessions being made in them, for agricultural purposes. It is therefore needless to refer particularly to the conditions contained in those grants. See no. 40, Mr. Dunkin's abstract, 40 or 50, arp. granted *en fief*. No. 41, 200 arpens *en fief*—45, 10 arp. *en fief*.

tended, or can be contended that their right of property as Seigniors was limited. The 13th legal proposition submitted to our consideration by the Crown Officers is in the following terms: "The ancient laws of the Country oblige the "proprietors of *fiefs* and seigniories in Canada to concede "their lands *à titre de redevances*, when thereunto required, "and their right of property in those lands was limited and "restricted by such obligation to concede." The right of property in the Seigniors is here distinctly and rightly admitted, and the limitation or restriction contended for, is that only which results from the supposed obligation to concede. No one who has read the titles under which the *fiefs* in Canada have been granted, can hesitate to admit (if the obligation to sub-concede be left out of the question) that the owners of them, have as high and as extensive estates, in those *fiefs*, as it is possible for Seigniors to have in their *fiefs* under the Custom of Paris.

The most zealous advocates of the interests of the *Censitaires*, do not contend that there is any thing in the nature of a trust or agency, in the estate which Seigniors have in that part of the lands which they clear themselves, nor in the *domaine direct* which they retain in the lands which they concede. The supposed trust is confined to the unconceded land, and is founded on the obligation to concede the same. I therefore deem it unnecessary to dwell upon the portions of those titles which convey a right of property to the Seigniors. That right is not, cannot be denied; all that is contended for, against the Seigniors is, that this right of ownership was limited as regards uncleared land, by an obligation to concede it. What I now wish to show is, that the obligation in question was not established prior to the *arrêt* of 1711.

In adverting to each of the titles for the sake of facility of reference, I shall speak of each *fief* under the number, and by the name given to it in Mr. Dunkin's abstract; which I have found most useful. Indeed without some such

work, as the titles have not been printed according to the order of their dates, it would be impossible to form an exact idea, as to the conditions of the grants, at any particular period ; or as to the change that took place, in those conditions, according as the settlement of the Country advanced.

Following then the numbers given in Mr. Dunkin's abstract, we find that two of the printed grants were made before the Charter of 1628 to the Company of New France, which has already engaged our attention.

Grant from the Duke of Ventadour, Vice-roy of New-France to Louis Hebert.

No. 1.—28 February 1826.—This deed in the recital sets forth that the grantee, Louis Hebert, was the head of the first French family settled in Canada, that he had established himself on certain lands " near the Great River St. Lawrence " at the " place called Quebec ;" that he had " by his labour " and industry assisted by his domestic servants " cleared a certain portion of said lands, enclosed the same and built a house thereon, &c., of all which he had obtained from the Duke de Montmorency the previous Vice-roy " the gift and grant " in perpetuity by Letters patent dated the 4th Feb. 1623."

The deed then, for the above " stated considerations, and " in order to encourage those who might thereafter desire to " people and inhabit the said Country of Canada ", ratifies the grant which had been so made to the said Hebert, " to " have and to hold the same . . *fief noble* unto him, *his heirs* " *and assigns for ever as his own lawfully acquired property*, " and dispose thereof fully and peaceably, as he may think " proper, the whole depending on the Fort and Castle of " Quebec, subject to the charges and conditions which shall " hereafter be imposed by us."

The same deed contains in favour of the same grantee, his successors, heirs and assigns, " a grant of the *Fief* St. Joseph

or Epinay " to possess, clear, cultivate and inhabit the same " as he may deem fit on the same conditions as the first do- " nation."

No. 2.—10 March 1626, is a grant by the same Vice-roy to the Rev. Jesuit Fathers, " as a perpetual and irrevocable " donation " of the seigniory of Notre-Dame des Anges— " it being our will that they peaceably enjoy all the woods, " lakes, ponds, rivers, rivulets, &c., &c., which may be " found within the limits of the said lands, on which they " shall have the right of erecting, if they think fit, an habita- " tion, dwelling noviciate or seminary for themselves, and " to educate and instruct the children of the Savages." This grant contains no further conditions as to settlement, and does not either directly or indirectly refer to any obligation to sub-concede.

We now come to the first grant made by the Company of *la Nouvelle France.*

No. 3.—15 January 1634, Beauport.—This deed of concession recites the willingness of the Company to distribute the land of the Company to men " able to have them cleared and cultivated " ;—but does not contain any stipulation as to the clearing or sub-infeudation of the land by the grantee.

It does however contain a clause to the following effect: " That the land should be held subject to fealty and homage, " which the grantee should render by one full homage at " each mutation of possession of the said land, with a piece " of gold weighing one ounce, and one years revenue of " what the grantee shall have reserved to himself, after he " shall have granted *en fief* or *à cens et rentes* the whole or " part of the said land."

The learned Counsel for the Crown, drew our attention particularly to this clause, which is also to be found in a few of the subsequent grants ; but I must say it does not appear to me to have much bearing upon the present con-

troversy. It abolishes the *droit de quint*, and modifies the *droit de relief*, in relation to the *fiefs* to which it applies; but it cannot be regarded as compelling the grantees to subinfeudate the land granted to them, and indeed has no tendency in that direction.

The clause in question doubtless contemplates the probability of sub-concessions being made; but this assuredly affords no proof of a legal obligation to make such sub-concessions. The only other stipulation in the grant no. 3 of Beauport, having any direct bearing upon the improvement of the land granted, is the following: "That the men, "whom the said Giffard or his successors, shall send to New-"France, shall serve to the discharge of the Company in di-"minution of the number which it is obliged to send to "that Country, and, to that end, he shall deliver each year a "list of them at the office of the Company."

No. 4,—16 february 1634, the next grant, is one of 600 arpens, near Three-Rivers, to the Jesuits, &c. It contains these words: "to cultivate and erect the necessary build-"ings on which (said eract of land) the said Rev. Fathers "shall send such persons as they may choose;—and when "the said Rev. Fathers send persons to cultivate the said "lands, they shall every year transmit a list of them to the "office of our said Company, so that it may be assured "thereof, and so far discharged, they being deducted from "the number of those whom it is obliged to send over, &c."

Grant no. 5, of Lauzon; no. 6, Beaupré; no. 7, Isle Orléans; no. 8, confirmation of grant of Notre-Dame des Anges; contain clauses to the same effect as to the men to be taken out by the grantees. (1)

No. 10, part of Grondines, a grant to the Duchess d'Aiguillon for the Hôtel-Dieu, near Quebec, contains a like obligation. (2)

(1) No. 9 is a grant of 12 arpens, site of Jesuits' college.
(2) No. 11 not printed.

No. 12, part of Dautré. The mode in which the obligation to furnish the list of men is worded in this grant, shows the importance the Company attached to it. "And the "sieur Bourdon and his successors—as well as others to "whom grants have been made, shall be held to hand, in "every year, to the secretary of the Company, a list of the "men whom they shall send over to New France, so that the "Company may know by how many the Colony shall have "been augmented."

No. 14, Deschambault.—"And the said Chavigny (grantee) "shall send at least four working men, *quatre hommes de tra-* "*vail*, to commence the clearing, besides his wife and ser- "vant maid, and that, by the first ships which will sail from "Dieppe or la Rochelle, together with goods and provisions "for their support during three years."

No. 24 is another grant to the same person on the same conditions. List of men to be delivered each year.

No. 15, a portion of the Island of Montreal and St. Sulpice. Grantees prohibited from conceding lands to persons already in Colony.—Grants to be made to those only who may be willing to go there for the express purpose of settling thereon so that the Colony may be so much the more extended; and in order to commence the settlement of the said granted lands, the said grantees shall be held to send to New France *a number of men* by the first shipment which the Company shall make, with *the provisions necessary* for their food, and shall continue from year to year, so that the said lands shall not remain uncultivated, and that the said Colony may be so much extended. List of men to be forwarded annually by secretary.

No. 16 is King's ratification, &c.

No. 17, Rivière du Sud or St. Thomas,—contains no direct

obligation to send men. In the preamble, the readiness of the Company to make grants to those " willing to under " take the cultivation of some portion of the lands granted " to our Company ", is set forth ; and the settlement of the lands granted is referred to indirectly thus ; neither the said (grantee), nor his successors, nor any other persons, *who may go to the Country to inhabit and cultivate the lands hereinabove conceded*, shall have the right of trading for skins and furs with the Indians, &c.

No. 19, grant of part of Dautré ; nos. 20 and 25, St. Gabriel and St. Ignace ; no. 21, Portneuf ; no. 22, Repentigny, Lachenaie and l'Assomption ; no. 23, Bécancour ; are all made in effect on same condition as no. 17, that is to say, without any express obligation either to sub-concede or to clear ; the intention of settling on the land being however adverted to in the preamble, as an inducement to the grant ; and the duty of clearing the land being indirectly adverted to among the conditions of the deed, thus : " Neither the said (grantee), " his successors or assigns, nor any other persons who may " go to the Country to inhabit and cultivate the aforesaid " lands, shall have the power to trade for skins, &c."

No. 27. The grant of Vieux Pont (5 square leagues) is made in consideration of the " zeal (of the grantee) for the " extension of the Colony, he having already brought under " cultivation several lands which we have heretofore " granted to him," subject to feudal and seigniorial dues agreably to the Custom of Paris,—but without any other conditions.

No. 28, Jacques Cartier, is, as to conditions, same as no. 27, Vieux Pont.

No. 29, Sillery, confirmed by no. 30, is a grant to the Jesuit Fathers for the benefit of certain converted Indians, and is made without any conditions as to settlement, &c.

No. 32 is also a grant to Jesuit Fathers, Notre-Dame des Anges, &c., not subject to any conditions as to settlement. In the recital in the deed we find these words : " Et de plus " que, par leurs constitutions, ils ne peuvent accepter aucune " fondation qui les oblige à autres charges, qu'à celles aux- " quelles, en conséquence de leur institut et de leurs vœux, " ils se tiennent volontairement, et desquelles ils s'acquittent " si dignement, qu'il n'est pas juste de les y contraindre, ni " honneste de le stipuler d'eux."

No. 33, Gaudarville. The grant mentions in the recital that the grantee " is desirous with time of settling in New-France, " and causing lands to be cleared, improved and occupied " by as many families as possible, in order to fortify the " Country against those who might be disposed to make any " attempt upon it." The grant however contains no condition as to clearing or sub-conceding.

No. 34 annuls the grants nos. 14 and 24 to François de Chavigny, on the ground that he had left the Colony " and abandoned all that he possessed there" and regrants the lands on the conditions of the former grant to the wife of said Chavigny.

No. 34 *b* is grant of St. Ignace, ½ league by 10, to the Rev. *Mères Hospitalières de Québec*, without any condition as to clearing or sub-conceding.

No. 35, augmentation of grant no. 3 to Giffard of Beauport ;—no new conditions.

No. 36. Grant of Mille Vaches ;—no condition as to clearing or conceding.

No. 37, augmentation of Gaudarville,—recites continual irruptions of the Iroquois, massacres of inhabitants, abandonment of the place, &c., so that it runs the risk of being entirely lost on account of its not being within the reach of

assistance, and its wanting the presence of some powerful person, who, with the aid of his friends, might withstand the efforts of those barbarians, by causing some place of refuge *réduit* to be erected there, and judging that Louis de Lauzon, Seignior of La Citière and Gaudarville might undertake the defence of the said post, &c. ;—grant made and on condition of fealty and payment of one year's revenue at each mutation ;—no condition expressed as to clearing or sub-conceding.

No. 38, Neuville or Pointe aux Trembles ; no. 39, St. Etienne ; No. 41, St. Roch des Aunais.—No. condition as to clearing or sub-conceding.

No. 43, A. D. 1656, Point du Lac or Tonnancour. This grant is more explicit as to the settlement duties that are to be performed than any of those that precede it.

The words are as follows, "the said (grantee) shall cause "the said lands to be inhabited throughout their extent, and "[illegible] to be done thereon within four years from this date." But [illegible]mode of fulfilling those obligations is left altogether to the discretion of the grantee.

No. 46, part of Montreal, on same condition as former grant of part of same seigniory, viz : no. 15.

This is the last of the grants en *fief* of any considerable extent, (1) made by the Company of *la Nouvelle France ;* and it appears to me sufficiently plain that they did not subject the grantees to any obligation to sub-concede the land granted to them. Assuredly an obligation to sub-concede, is not expressed in any one of those grants ; and when we bear in mind that such an obligation was unknown under the Custom of Paris, which is referred to in many of the grants, as the rule by which they were to be governed ; it

(1) After this date, by title no. 47, certain small islands were added by the Company to the seigniory of Bécancour, and by no. 48, Jean Bourdon's-house and 60 arpents of land were erected into a *fief ;* but for the reasons already mentioned it is needless to refer to the conditions of these titles.

seems manifest, that if that obligation had been contemplated by the parties, it would have been expressed: whereas not only is no such obligation contained in any of the deeds; but in some of them the power to alienate was expressly limited. (1)

SECTION 4.

Seigniorial grants by West India Company.

Early, in the year 1663, Louis the fourteenth determined to re-unite Canada to the Crown of France; and the company of *la Nouvelle France*, which was then far from being in a prosperous state, having become aware of the King's intention, on the 24 febry. 1663, executed a deed of surrender, which was accepted by His Majesty. In the following year, a charter was granted to the French West India Company; under the first article of which the Leeward islands, Canada, Acadia, Virginia, Florida, &c., &c., were granted to the said Company "*in full property and* "*seigniory* with rights of justice, &c."

The permanent proprietary rights of the Company were, by subsequent clauses, (2) limited to such lands as the Company should conquer, inhabit or cause to be inhabited, *conquérir et habiter*, during the period of forty years for which they were to have, under their charter, the exclusive trade of the countries granted to them.

There is nothing in this second charter which requires the new Company to sub-concede any part of the land granted to them, on the contrary, under the 23d clause, they could in this respect pursue whatever course they deemed best.

That clause is as follows: "The said Company shall "have *power to sell, or dispose of the said land by way of*

(1) See titles 3, 12, 15.

(2) Sec. 19. of the charter of the French West India Company. Edits et Ordonnances, vol. 1, p. 45.

" *enfroffment, either in the said Islands or continent of Ame-*
" *rica*, or elsewhere in the countries granted *upon payment*
" *of, and for such cens et rentes*, and other seigniorial rights
" *as may be deemed proper, and to such persons as the Com-*
" *pany may deem* fit."

Having thus very briefly adverted to the rights conferred on the West India Company, I now pass to the consideration of the grants made after the date of the charter to that Company.—

No. 49 is the first of those grants.—It is a grant to the Jesuit fathers, of a small tract of land, and was made on same conditions as the grant no. 4, hereinbefore referred to. (1)

No. 51, Ste. Marie, is merely the promise of a grant, and was made " in order that the grantee might work thereon immediately."

No. 52, Labadie—was made on condition that the grantee shall cause work to be immediately performed thereon and render the same more valuable "—à la charge d'y faire tra-
" vailler incessamment, et la mettre en valeur suivant et
" conformément aux intentions du Roi."

No. 53, Tonnancour:—" A la charge d'y faire travailler suivant les intentions du Roi."

No. 54. By this grant which is direct from the Crown, Desilets is erected into a Barony and three Royal Burghs are attached thereto. The grant recites, as the reason of the conferring of the dignity, that the grantee had cleared the property called Desilets, and that the King was desirous to promote the settlement of New France by marks of honour where grants well cleared, &c.

No. 55, D'orvilliers.—This is the first of a number of grants made about this time to the officers of regiment of

(1) This grant was made before the registration at Quebec of the charter in favour of West India Company.

Carignan, which was disbanded in Canada on condition that the men should receive land and settle there. (1)

The preamble is very full, and explains clearly the intentions of the French authorities at that time and is therefore given at length. (2)

" His Majesty having always sought with care and that " zeal which is suitable to his just title of eldest son of " the church, the means of making known in the most un- " known countries by the propagation of the faith and diffu- " sion of the gospel, the glory of God and the christian name, " first and principal object of establishing the french " Colony in Canada, and accessorily of making known to " the parts of the earth remotest from the intercourse with " civilized men, the greatness of his name and the strength " of his arms, and having judged that there were no " surer means to that effect than to compose this colony " of persons properly qualified to fill it up, to ex- " tend it by their labour and application to agriculture and to " maintain it by a vigorous defence against the insults and " attacks to which it might be exposed hereafter, has sent " to this Country a number of his faithful subjects, officers " of his troops in the regiment of Carignan and others, most " of them, agreably to the great and pious designs of his Ma- " jesty, being willing to connect themselves with the Country " by forming therein settlements and seigniories of an " extent proportioned to their means ; and the said, &c., &c., " having petitioned us to grant him a part thereof, we, &c., " &c."

The conditions as to settlement are : " That the grantee " shall keep house and home on his seigniory within one " year ; and that he shall stipulate in the title deeds which " he shall give to his tenants, that they shall be obliged " within one year to reside and keep house and home on

(1) Garneau, vol. 1, p. 202.
(2) A preamble in nearly the same words is to be found in several of the grants made about this time.

" the concessions which he shall have granted to them, and " that, in default thereof, he shall re-enter *pleno jure* into the " possession of the said lands."

This is one of the clauses which, it has been contended, show that Seigniors were under an obligation to sub-infeudate their lands; but in my opinion it merely establishes that the making of such concessions was deemed probable, as it certainly was; and the Company therefore stipulated, that the persons receiving grants from the Seignior, should, as to the performance of settlement duties, be subject to an obligation in favour of the Seignior, similar to that contracted by the Seignior in favour of the Company. It cannot however be contended that, because the grantee of a *fief* undertook to insert certain conditions in any concession made by him; that therefore he undertook to grant such concessions deeds to any persons asking for them.

After the grant no. 55, about (1) 64 other grants of *fiefs* were made in Canada, during the time it was in the possession of the West India Company; and in about 59 of these grants, conditions similar to those last mentioned, viz: those of grant 55, or some other of the same nature and having the same object in view, are to be found, sometimes in one form, and sometimes in another. (2)

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(1) Exclusive of small augmentations of grants, &c.

(2) viz. no. 61 1672 Ste Anne de la Parade,
62 do Isle Ste Thérèse,
63 do Contrecœur,
64 do Berthier,
65 do St. Ours,
66 do Varennes et Tremblay,
67 do Tilly,
68 do Sorel,
69 do Durantaye,
70 do Isle Moreau,
71 do Lavaltrie,
72 do Chambly,
73 do On Richelieu,
74 do Isle au portage,
75 do Nicolet,
76 do Isle Perrot,
77 do Ste Anne de la Pocatière,
78 do Rivière Ouelle,

In four of the later grants, made during the existence of the West India Company, the condition obliging the grantee to keep house and home is omitted and in lieu of it, we find a clause in the following words : " And moreover " subject to the charge and condition that the said Sieur.... " shall, within three years, *begin to cause* the said tract of " land to be brought under cultivation, and the same to be " surveyed and bounded within the said space of time, in

no. 79	do	Vorchères,
80	do	Berthier en haut,
81	do	Isle Bouchard,
82	do	Lussaudière,
83	do	Bellevue,
84	do	Boucherville,
85	do	Beaumont,
86	do	On Riv. l'Assomption,
87	do	Part of Longueuil,
88	do	Part of Masquinongé,
89	do	Isle Jésus,
90	do	Gros bois or Yamachiche,
91	do	Part of Masquinongé,
92	do	Vincelot,
93	do	Chicot et Isle au pas,
94	do	Pointe du Lac et Tonnancour—part 3,
95	do	Labadie,
96	do	Maranda,
97	do	Part of Lotbinière,
98	do	Lepinay, etc,
99	do	Lachevrotière,
100	do	Ste Marie,
101	do	Gatineau,
102	do	Grondines,
103	do	Bonsecours,
104	do	Maranda,
105	do	Guillaudière,
106	do	Isle Fortunée,
107	do	Vincennes,
108	do	Part of Lotbinière,
109	do	On Riv des Prairies,
110	do	Ste Marie, T. R. part,
111	do	Riv. du Loup, on haut,
112	do	Isle Bourdon,
113	do	St. Joseph or Fournier,
114	do	Belair or Ecureuils,
115	do	Lusson,
121	1673	Chateauguay,
127	1674	Deschailons,
129	do	Berthier, en haut, augmentation,
130	do	Kamouraska,

131, 132, 133, 134, are augmentations to former grants and do not require notice.

Great variety will be found in the clauses as to the keeping of house and home. In 145, St. Maurice, the clause is worded thus. " La dite, etc., se continuera de tenir et faire tenir feu et lieu sur la dite seigneurie "

184, Lotbinière. " Qu'il y tiendra ou fera tenir feu et lieu par les particuliers à qui il accordera des terres, etc."

231, Augn. Vincelot. " Et que les habitants seront obligés d'y tenir feu et lieu."

And also 235, 232, augn. of Lotbinière "Et faire tenir feu et lieu aux habitants " qu'ils y pourront placer "

" default of the fulfilment of which conditions, the land con-
" tained in the said concession shall be re-annexed to the
" domain of the Company, who shall have the right to dis-
" pose of them as they may think fit."

This condition is to be found in the grants nos. 123, 124, 125 and 126, excepting that by the grant no. 124, the clearing is required to be commenced in 2 years instead of in 3 years as mentioned in the other three.

The condition as to the clearing in no. 135, (Petite Nation, 1764), which is the last grant made by the West India Company, is a follows : " The grantee shall be bound
" within four years to commence making clearances upon
" the said concession, unless he be prevented from so doing
" by war or other reasonable cause ; and that the boundaries
" shall be fixed at the two extremities of the said con-
" cession, &c., failing which, the Company shall have a right
" of disposing, &c., &c."

In 1774, the West India Company gave up their charter to the Crown, on condition of being reimbursed the Capital expensed by them, and then remaining unpaid, amounting to 3,523,000 livres, which in the edict revoking the charter, is treated as so much lost on the capital stock.

The fate which attended this Company, and the Company of New France, and which they shared in common with nearly all the great Companies established for the colonization of North America, (1) shows that grants of territory however extensive, made on condition of settlement, were far from being as profitable as they might at first sight have seemed to be.

(1) Chalmers, p. 95, political annals of Colonies.

Section 5.

Grants subsequent to dissolution of West India Company and down to arrêt *of Marly.*

From the end of the administration of the affairs of the Colony by the West India Company, until the promulgation of the celebrated *arrêt* of Marly, in **1711,** about 111 seigniorial grants were made in Canada.

Of these about 34 (1) were made upon the conditions, which we have found in so many of the grants made by the West India Company, as to the keeping of house and home on the land granted.

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(1) no.	136	1675	Roquetaille,
	137	do	Mitis, &c.,
	142	1676	Longueuil,
	143	do	Isle St. Paul, part of,
	144	do	do do
	145	do	St. Maurice,
	146	do	Gentilly,
	149	1677	Isle au Castor,
	150	do	Rheaume,
	151	do	Isle Bouchard,
	152	do	Islet St. Jean,
	153	do	Port Joli,
	154	1678	Vercheres et augn.
	155	do	St. François du Lac, &c.,
	156	do	Isle Bizard,
	157	1679	Isle Mingan,
	158	do	St. Denis,
	159	do	Rivière de la Magdelaine,
	161	1680	Anticosti,
	166	do	Isle à la fourche,
	184	1685	Lotbinière,
	186	1687	Trois-Pistoles,
	187	do	Bonsecours,
	190	1688	Rimouski,
	191	do	Lanoraie,
	219	1691	Grande Allée des Monts,
	221	do	Ste. Marguerite,
	228	1692	Martinière,
	231	1693	Vincelot augn.
	232	do	Lac Mitis,
	235	do	Augn. Lotbinière,
	237	do	Durantaye,
	245	1694	Lake Madapediac,
	258	1695	Lussaudière.

In about 15, (1) of the 114 grants, made between the dissolution of the West India Company and the *arrêt* of 1711, the grantee is required to commence to clear his land within a specified time; and in about 32 (2) other grants made during the same interval, the grantee is obliged not merely "to begin to clear" but "to clear" the land granted; a certain time being mentioned in some of the grants for the fulfilment of that obligation, in others not.

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(1) no. 197 1688 St. Anne des Monts,
198 1689 Rivière Mitis,
233 1693 Dauteuil,
234 do Fossambault,
243 1684 Rouville,
244 do Belœil,
246 do St. Denis,
255 1695 On Richelieu,
256 do Cournoyer,
259 do On Richelieu,
260 do On Richelieu,
264 do Beauchemin,
266 do Grand Pré,
327 1701 St. Charles,
347 1706 St. Paul.

Each of the above fifteen grants contains a clause as to the keeping of house and home, excepting no. 197, St. Anne des Monts, and no. 198, rivière Mitis.

(2) 167 1682 Bonhomme or Belair,
168 1683 Eboulemens,
169 do Rivière du Loup, en haut,
170 do Isle Madame, &c.,
173 do Lussaudière,
174 do Pierreville,
175 do Baie St. Antoine,
176 do Yamaska,
178 do Madawaska, &c.,
181 1684 Isle verte,
271 1696 Lessard,
274 do Desaulnets or Chaudière,
282 do Grand Pabos,
283 do Lepage and Thibierge,
284 do Port Daniel,
285 1697 St. Anne de la Parade,
298 do Riv. de Bonaventure,
300 do Jolliet,
301 do Lepage and Thibierge augn.,
304 do Grande Rivière,
308 1698 Hubert,
321 1700 Augn St. Anne de la Parade,
325 1701 Lepinay,
328 do St. Jean,
333 1702 On river Etchemin,
334 do Bonsecours,
336 do Soulanges,
337 do Vaudreuil,
344 1705 Carufel,
345 1706 Belair or Ecureuils,
353 1707 Pasbebiac,
365 1711 Ste. Marie.

Each of the above thirty two grants contains a clause as to the keeping of house and home, excepting no. 284, Port Daniel.

There are a few grants made within the same period, that is to say, from 1674, when the charter of the West India Company terminated, until 1711, date of the *arrêt* of Marly, which do not come within any of the foregoing classes, and which I therefore notice separately, but as succinctly as possible.

Nos. 138, 171, 203, 273, 299, are additions to former grants the conditions of which are made applicable to the additional grants. No. 214, includes a like additional grant.

Nos. 160, 180, 188, 189, 293, 302, 306, 307, 310 and 320, relate to Islands or *grèves* adjacent to former grants which are added thereto.

Nos. 164, 165, 286, 312 et 313, are grants for religious purposes, and do not impose any obligation as to clearing or sub-conceding;—and no. 214, includes a grant for a like purposes.—Nos. 302 et 305, are granted for a fishery and slatequarry respectively.

No. 177. Beaumont contains the clause as to the keeping of house and home, and further requires that the said grantee shall "furnish the said land and seigniory with buildings and cattle,"—*et garnira la dite terre et seigneurie de bâtimens et bestiaux.*

No. 311, A. D. 1698, augmentation of Longuenil, is made in consideration of grantee having expended 60,000, on a former grant and contains no conditions as to clearing or sub-conceding. The seigniory of Longuenil was afterwards erected into a Barony for distinguished services of the "Lemoine" family. See no. 326.

No. 354, A. D. 1708, Monnoir, contains a clause as to the keeping of house and home, and another requiring the grantee "to clear and cause to be cleared the said land after the present war;" but the first only of these obligations is made a cause of forfeiture. The proviso is thus worded, "the "said grantee shall be held to have these presents confirmed

" within one year, and after the said confirmation shall have " been obtained and the present war ended, in default of his " keeping house and home thereon within one year the " said concession shall be re-united to His Majesty's do- " main." This grant was made to the Sieur Ramsay, Governor of Montreal, who probably knowing that the immediate clearance of the land granted was utterly impracticable, caused his grant to be so worded, as to prevent it from being liable to forfeiture, for the non-fulfilment of a condition, the accomplishment of which was impossible.

No. 355, A. D. 1708, Bourg-Marie; no. 361, A. D. 1710, augmentation of Longueuil; no. 362, A. D. 1710, Montarville; no. 363, A. D. 1710; De Ramsay—are made upon conditions in substance the same as those in the grant 354, of Monnoir just adverted to.

No. 364, A. D. 1711, augmentation of Grondines—the last grant but one before the *arrêt* of 1711, is made in consideration of services of the grantee as *Capitaine de Milice de sa côte* for a period of 20 years, and of his having a large family, and contains no conditions as to clearing or sub-enceding.

Here it is to be observed, that although but comparatively few of the grants prior to 1711, contain a condition requiring the grantee to clear the land granted, yet as early as 1676, the King of France, in his instructions to Messrs. Frontenac and Duchesneau, ordered that the concessions of land should be made upon condition that the land should be cleared and improved within 6 years from the date of the grant.—Messrs. Frontenac and Duchesneau seem to have paid no attention to this order, for although they made numerous grants between 1676 and 1680, that condition is not to be found in any one of those grants. The successors of Frontenac and Duchesneau, namely, Messrs. De La Barre and Demeules, inserted the condition in question in almost all the deeds granted by them during the first five years of their adminis-

tration. But in 1685 they granted the augmentation of Lotbinière to the Sieur De Lotbinière, then Lieut. General of the *Prévoté de Québec*, without that clause ; and in a considerable number of deeds, later in date than that just mentioned, the condition in question is also omitted. It is not the less true however, that many of the grantees, who subsequently to 1676, obtained land without any condition as to the clearing of the land, were, by the royal ratifications of their grants, expressly subject to the obligation of clearing and improving the property given to them. (1)

Some of the ratifications, however, although subsequent to the instructions of 1676, do not contain any such condition. (1)

SECTION 6.

Arrêts de Retranchement.

Having thus reviewed the printed seigniorial titles prior in date to the *arrêts* of Marly, and having also noticed the edict establishing the *Conseil Supérieur* of Quebec, and considered the charters of the Company of *la Nouvelle France* and of the Company of the West Indies respectively, I shall now advert to the other laws generally relied on as proving that, even before 1711, Seigniors were under a legal obligation to concede their wild lands. I refer to the four *arrêts de retranchement*, as they are generally called.

The first of these *arrêts* bears date the 21 march 1663, and a translation of it is to be found in the third Vol. of the Seig. Doc. page 160.

(" *Edict of the King of France*," 21*st Marsh* 1663, *revolving grants of lands not cleared.*)

" The King having caused to be laid before him, in his " council, his edict of the present month, whereby His

(1) See particularly the Royal Ratifications, nos. 163, 183, 223, 366, &c., which embrace a great number of grants.

(2) See for instance nos. 191, 193, 211, 252, 253, 324, &c.

" Majesty, in consequence of the grant and surrender by " the persons interested in the Company of New-France, " resumed all the rights which had been granted to them by " the deceased King, in consequence of the treaty of the " 29th of April 1627, and His Majesty, having been informed " that one of the chief causes of the said country not having " become as populous as might be desired, and even that " several settlements have been destroyed by the *Iroquois*, " *is to be found in the grants of large quantities of land* " *which have been given to all persons inhabiting the said* " *country, who not having ever had nor having the power of* " *clearing the same*, and having established their residence " in the midst of the said lands, have, by that means, been " placed at a great distance from each other, and even from " obtaining succour from the officers and soldiers of the " garrison of Quebec and other places in the said country, " and thus it even happens that, in a very great extent of " country, *what little land there is in the environs of the* " *dwellings of the grantees being cleared*, what remains can " never become so; which requiring a remedy,—

" His Majesty, being in his council, hath ordained and " doth ordain that, within six months from the date of the " publication of this *arrêt* in the said country, *all persons* " *so being inhabitants thereof, shall cause the lands contained* " (*contenues*) *in their grants to be cleared*, in default whereof " at the expiration of that time, His Majesty doth ordain " that all lands remaining uncleared shall be distributed by " new grants in His Majesty's name, either to the former or " to the new inhabitants thereof, His said Majesty revoking " and annulling all grants of the said lands not as yet clear- " ed by those of the said Company.

" His Majesty doth enjoin and command the Sieur de " Mezy, governor, the Bishop of *Petrée* and *Robert*, inten- " dant to the said country, to see to the punctual execution " of this *arrêt*, even to make a distribution of the said un- " cleared lands, and to grant them in the name of His Ma- " jesty.

" Given in the Council of State, in presence of the King, on the 21st day of March 1663. "

The second of the *arrêts de retranchement* bears date the 4th day of June 1672, and is almost in the same words as the third, bearing date the 4th day of June 1675, of which we have also a translation at page 161 of the third vol. of Seig. Doc.

Arrêt of the King (*4th of June* 1675), *for reducing the concessions which are too extensive, and for making a census.*

" The King having been informed that all the subjects " who have gone from Old to New France, have obtained " grants of a very great quantity of land along the rivers in the " said country, which they have been unable to clear by rea- " son of their too great extent, which is an inconvenience to " the other inhabitants of the said country, and even pre- " vents other Frenchmen from going thither to settle, which " is entirely contrary to the intentions of His Majesty as to " the said country, and to the attention he has been pleased " to bestow, for eight or ten years, on the extension of the " colonies which are settled therein, inasmuch as a part " only of the lands bordering on the rivers is cultivated, the " rest not being so, nor admitting of becoming so, *by reason* " *of the too great extent of the said grants and a want of* " *means in the proprietors* thereof; which requiring a re- " medy,—

" His Majesty, in his council, hath ordained and doth or- " dain that, by the Sieur Duchesneau, councillor in his coun- " cils and intendant of justice, police and finance in the said " country, there shall be made an accurate statement " of the quality of the lands granted to the principal inha- " bitants of the said country, of the number of arpents (or " other measure used in the said country) which they con- " tain on the borders of the rivers and in the interior of the " lands, *of the number of persons and cattle fit for and em-*

" *ployed* in cultivating and clearing the same, *in consequence* " *of which statement, one half of the lands which were granted* " *before the last ten years*, and which are not cleared and cul- " tivated as arable or as meadow land, shall be struck out " of the grants and given to such persons as shall come for- " ward *to cultivate and clear them.*

" His Majesty ordaineth that such ordinances as shall be " made by the Sieur Duchesneau, shall be executed accord- " ing to their form and tenor as being supreme and of ulti- " mate resort, as decrees of a superior tribunal, His Majes- " ty, to that end, attributing to him plenary jurisdiction and " cognizance.

" His Majesty thus further ordaineth that the said Sieur " Duchesneau do give provisionally grants of the lands " which shall have been so struck off, to new settlers on con- " dition, however, that they do completely clear the same " within the four next ensuing years, in default whereof, at " the expiration of the said time, the said grants shall be and " remain null.

" His Majesty enjoins, &c., &c.,.... given in the King's " Council of State holden in the Camp near Namur, on the " 4th day of June 1675."

The fourth and last of the *arrêts de retranchement* bears date the 9th of May 1679.

It recites the *arrêt* of the 4th of June 1675, and sets forth that the intendant Duchesneau had prepared a statement or land roll, such as the King had ordered; and that it appeared from that statement, that the grants of land were of such extent that the greater part thereof was *useless to the proprietors, for want of men and cattle to clear and improve it*, " *faute* " *d'hommes et de bestiaux pour les défricher et mettre en va-* " *leur ;*" that the lands remaining to be conceded were difficult of access, not being near any navigable river, so that many of His Majesty's subjects who went to the colony,

abandoned the idea of settling there; the *arrêt* thereupon ordered that the *arrêt* of 1675 should be executed according to its tenor, and declared that one fourth of all the lands conceded before the year 1665, and remaining uncleared at the time of the passing of the *arrêt*, should be taken from the proprietors and possessors thereof; and further that each year thereafter, one twentieth of the *uncleared remainder* of each grant should be taken from the owner and distributed among His Majesty's subjects resident in the colony, who were able to cultivate the same, or to Frenchmen going to the colony to settle there.

These *arrêts* are constantly referred to as showing that Seigniors, even at that time, were under the obligation to sub-infeudate their lands; but, in my opinion, they furnish no evidence on that point, the only one in relation to which I am now considering them. They do not, in the preamble, declare that the Seigniors had refused to sub-concede their lands, or that they were liable to be compelled to do so; nor do the enacting clauses tend to impose any such obligation. These *arrêts* do not even purport to be based on any breach of the conditions upon which the grants were made.

They affect equally all the grants, irrespective of the conditions stipulated, or the tenure under which the land was held; and make no distinction between the grantees who had, and those who had not fulfilled the conditions imposed upon them.

The first of these *arrêts* declares 'that one of the chief "causes of the country, not having become as populous as "might be desired"—is to be found in the grants of large quantities of land which had been given to all persons inhabiting the said country, *who not having ever had, nor having the power of clearing the same*, and having established their residence in the midst of the said lands, have, by that means, been placed at a great distance from each other, &c., and thus it even happens that in a very great extent of coun-

try, "*what little land there is in the environs of the dwellings* "*of the grantees being cleared, what remains can never be-* "*come so.*"

This statement assumes that the mode in which the grantees were to improve their lands, was by clearing it themselves, and that any part of a *fief*, which the owner himself could not clear, was not likely to be cleared in any other way; thus ignoring sub-concessions as a means of setling and improving the wild lands of the country. The enacting clause, in accordance with the preamble, requires the grantees to cause the "lands contained in their grants, to be cleared within six months, from the date of the publication of the said *arrêt*," but does not contain any order of any kind as to the sub-conceding of the lands.

The second and third *arrêts de retranchement*, in like manner mention that, "part only of the lands bordering on the "rivers is cultivated, the rest not being so, nor admitting of "becoming so, by reason of the too great extent of the said "grants and the want *of means in the proprietors thereof.*"— Now, if, at this time, it was understood that Seigniors were to cause their lands to be improved by means of sub-concessions; and if it be true, (as has been contended) that Seigniors, from the first settlement of the country, were mere trustees or land agents, how could the King declare that the too great extent "of the grants, and the *want of means* in the proprietors thereof" prevented their *fiefs* from being cultivated.

Want of means might prevent the Seigniors from clearing land themselves, but it could have no tendency to prevent them from making sub-concessions, and thereby increasing their means.

The fourth *arrêt* is framed in the same spirit as the others.— After mentioning that the intendant Duchesneau had prepared the statement or land roll ordered by the two former *arrêts*, it proceeds to declare that it appears by that statement, "que ces concessions sont d'une si grande étendue,

" que la plus grande partie est demeurée inutile aux pro-
" priétaires *faute d'hommes et de bestiaux* pour les défricher
" et mettre en valeur."

If the King understood that these lands had been given to the Seigniors merely to sub-concede them to others, and that to sub-concede their lands was their paramount duty, how could he have said that the greater part of those lands were useless to the proprietors for want of labourers and cattle, *faute d'hommes et de bestiaux pour les défricher et mettre en valeur ?*

Opinions are divided as whether the *arrêts de retranchement* ever were carried into effect. As that point is of very little practical importance, I shall content myself with observing that I know of no instance in which they were actually enforced; that is to say, I know of no instance in which a Seignior was deprived without compensation, of all his uncleared land by virtue of the first *arrêt de retranchement;* or of the one half of his uncleared land by virtue of the 2nd and 3rd of those *arrêts*, or of the one fourth or of one twentieth by virtue of the 4th and last of those *arrêts*.

Doubtless many tracts of land, which had been granted either *en fief* or otherwise, were afterwards re-united to the Crown domain. But so far as I am aware, this occurred in cases only where the grantees had failed to fulfil the conditions of their grants; and therefore may have been done, and very probably was done under the general law of the country, and in *pursuance of the contracts* between the King, as Seignior *suzerain*, and his Vassals; and not in plain *violation of those contracts*, as ordered by the *arrêts de retranchement*.

It is quite certain that those *arrêts*, of themselves, did not operate a defeasance of the grants. The first *arrêt* gave the parties against whom it was directed, six months from the time it was enregistered, to clear their lands; and it was af-

terwards modified by the other *arrêts*, which required that a certain portion only of the uncleared lands should be resumed. In order to enforce these *arrêts*, some proceeding would have been necessary to determine what portion of the *fief* was resumed by the Crown; and what portion was left to the Vassal; and of any such proceeding we can find no trace.

The seigniory of La Citière (1) was referred to as an instance of the execution of these *arrêts*, but that was the reunion of the whole *fief* to the Crown domain, and not the resumption of a certain part of the wild land of a *fief* under the provisions of the *arrêts de retranchement*. A case is to be found in the first volume of the Seig. Doc. p. 113, in which one twenty fourth part of the seigniory of Lauzon was taken from the owner and granted to the Jesuits; the governor and intendant declaring in the deed that, although they might have taken the land of their own authority, as it had not been cleared, yet, in order to satisfy and indemnify the owner of Lauzon, they granted to him an equal quantity of uncleared land. Thus we see that, ten years after the date of the last of the *arrêts de retranchement*, the Provincial authorities, although they declared that they had the power to deprive a Seignior of his wild land, yet would not do so even for the benefit of a religious body, without giving the owner a full indemnity.

According to no. 214 of M. Dunkin's summary (which has not been controverted), the Jesuits do not appear to have availed themselves of this grant.

Extensive owners themselves of wild lands, the prudent Jesuit fathers may probably have considered it unadvisable (even for their own immediate benefit) to lend their sanction to an exercise of power, on the part of the governor and the intendant, which might probably afterwards be regarded as a precedent in dealing with their own possessions.

(1) Alluded to in Seig. Doc. vol. I, p. 453.

Section 7.

Sub-infeudation of wild land not made obligatory before arrêt *of* 1711.

I have now, I believe, noticed all the important printed grants *en fief* made prior to the *arrêt* of Marly, and also all the legislative acts up to the same period, bearing on the subject now under consideration; and I must say I do not find any thing in those laws, which, according to my views, would justify me in asserting that they created or enforced, or were intended to create or enforce an obligation on the part of the owners of *fiefs* to sub-concede their wild lands. Indeed, I cannot find that they allude to such supposed obligation in any way.

They evince a constant determination on the part of the Sovereign to cause the colony *to be settled and improved;* but settlement, by means of sub-infeudation, certainly is not enjoined, and does not appear to have been the principal mode then contemplated.

As to the titles, not one of them, so far as I know, contains an express obligation to sub-concede the land granted.

The conditions of a great majority of the grants thus made could (it is plain) have been fulfilled without the making of any sub-concessions; and it appears to me unreasonable to infer an obligation to sub-concede, from conditions, the fulfilment of which had no tendency to require a performance of any such obligation.

A considerable number of the titles, it is true, subjected the grantees to the obligation of clearing the whole of their lands; but there is an important and obvious difference between the obligation to clear and the obligation to sub-concede; indeed, in a legal point of view, the two obligations have hardly any thing in common. The latter obligation, if carried into full effect, would leave the original grantee with-

out an acre of land; whereas the former, even if carried out to the utmost extent, would leave him in possession of his whole *fief*. The french authorities, although they may, in common with others, have had erroneous views as to colonization, knew perfectly the force and meaning of words; and if, from 1628 to 1711, they had constantly intended to compel the owners of *fiefs* in Canada to sub-concede their lands, express words to that effect would have been found in some of the hundreds of grants made during that long interval; and yet we have seen that no such words are to be found in any of them.

It does seem strange that the laws and grants prior to 1711, which are wholly silent as to sub-concession, should be considered to have as effectually imposed the obligation to sub-concede as the *arrêt* of that year, which expressly enjoined it.

Moreover the clause containing the condition that the land granted should be cleared within a certain time, was obviously, even as regards the duty of clearing, a comminatory clause, and could not have been considered otherwise; for the fulfilment of it was not only utterly, but plainly impossible, either by sub-concessions or otherwise.

The *fiefs* granted prior to 1712, contained, it is stated, about 7,000,000 arpents, and as late as 1734, according to a census then made, the whole of the land cleared in Canada did not exceed 180,768 (1) arpents—so that the whole of the land cleared during a period exceeding a century, did not amount to three per cent of the land granted prior to 1711. We can thus form some idea as to how far it would have been practicable for the owners of the *fiefs*, of which we are now speaking, to clear the land granted to them, within the time mentioned in their titles, either by means of sub-concessions or otherwise.

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(1) Garneau—2 vol. p. 440.

Such then are the grounds upon which, notwithstanding the sincere respect which I entertain for the opinion of the learned Judges, from whom I have the misfortune to differ upon the present occasion, I have come to the conclusion that the concession of wild lands for the purpose of settlement was not made obligatory upon Seigniors prior to the *arrêt* of 1711.

Before proceeding to the consideration of that *arrêt*, it may be well to observe, that whatever doubt may exist, as to whether Seigniors, prior to the date of that law, were or were not under a legal obligation to sub-concede their wild lands, there is most assuredly nothing in any of the laws or titles of which I have spoken, which had any, even the slightest tendency, to prevent a Seignior, when he did concede, from obtaining the best terms possible in his own favour.

In none of those laws or titles, do we find any trace of a fixed rate at which, or of any particular conditions upon which a Seignior could be required to concede his land.

A careful review of the grants and laws prior to the *arrêt* of Marly, must at least prove this much, that, up to that time, the parties to deeds of concession could exercise the same unrestricted freedom in those contracts, that they could in making any other agreement, and that, in this respect, our common law, namely, the Custom of Paris, remained unchanged. With these remarks on the legislation and titles prior to the *arrêt* of 1711, I now proceed to the consideration of that *arrêt* which is doubtless one of the most important of our colonial laws.

Section 8.

Arrêt of 1711.

This *arrêt* contains two distinct enactments ; of these, one relates to those Seigniors who had no domain cleared or

settlers established on their seigniories, the other to certain Seigniors who had refused to concede their lands to settlers. The preamble is divided in like manner with reference to these two subjects.

The first enactment affords further evidence, if indeed any were needed, of the determination of the King of France, to compel Seigniors to improve their lands; but beyond this, it has not any direct bearing on the matters now in controversy.

I therefore pass at once to the consideration of the second enactment and of that part of the preamble which has reference to it.

" Sa Majesté étant aussi informée qu'il y a quelques Sei-
" gneurs qui refusent, sous différents prétextes, de concé-
" der des terres aux habitants qui leur en demandent, dans
" la vue de pouvoir les vendre, en leur imposant en même
" temps les mêmes droits de redevances qu'aux habitants
" établis, ce qui est entièrement contraire aux intentions de
" Sa Majesté, et aux clauses des titres des concessions par
" lesquelles il leur est permis seulement de concéder les
" terres à titre de redevances ; ce qui cause aussi un pré-
" judice très-considérable aux nouveaux habitants qui trou-
" vent moins de terre à occuper dans les lieux qui peuvent
" mieux convenir au commerce.....

" Ordonne aussi Sa Majesté que tous les Seigneurs au
" dit pays de la Nouvelle-France, ayent à concéder aux
" habitants les terres qu'ils leur demanderont dans leurs
" seigneuries, à titre de redevances, et sans exiger d'eux au-
" cune somme d'argent, pour raison des dites concessions,
" sinon et à faute de ce faire, permet aux dits habitants de
" leur demander les dites terres par sommation, et en cas de
" refus, de se pourvoir par-devant le gouverneur et lieutenant
" général et l'intendant au dit pays, auxquels Sa Majesté
" ordonne de concéder aux dits habitants les terres par eux
" demandées dans les dites seigneuries, aux mêmes droits
" imposés sur les autres terres concédées dans les dites sei-

" gneuries, lesquels droits seront payés par les nouveaux
" habitants entre les mains du receveur du domaine de Sa
" Majesté, en la ville de Québec, sans que les Seigneurs
" en puissent prétendre aucun autre d'eux, de quelque nature
" qu'ils soient."

The words of this *arrêt*, in so far as it imposes upon Seigniors the obligation to sub-concede, are too plain to admit of doubt. Unless, therefore, (as has been contended,) it can be shewn that the law was null from the first, it is clear that, from the time of its promulgation, the Seigniors to whom it applied were subject to the obligation in question. But if the obligation, under this *arrêt*, to sub-concede be plain, I think it is equally so, that His Majesty did not fix and did not intend to fix an invariable rate at which all concessions of land for the future were to be made. The words of the law are: " Ordonne aussi Sa Majesté que tous les Seigneurs au
" dit pays de la Nouvelle France, ayent à concéder aux ha-
" bitants les terres qu'ils leur demanderont dans leurs seigneu-
" ries, *à titre de redevances*, et sans exiger d'eux aucune
" somme d'argent."

What is there in these words to fix any one rate of rent more than another? To me it appears as plain as any legal proposition can be, that a concession deed made in good faith, at an annual rate of six pence or a shilling per arpent, would be as truly a concession *à titre de redevances*, within the meaning of the law, as a concession deed at a penny per arpent.—Where are we to discover in this *arrêt* the origin of a penny rent or of any other fixed rent? And when it is borne in mind that the lands to be affected by this law extended over a vast range of country of about 1500 miles in length, and that they, therefore, were necessarily widely different from each other as to climate, soil and situation, it must be evident, that it would have been as unreasonable as unjust to establish such a rate.

We know, moreover, that in the correspondence which led to the *arrêt* of 1711, the establishment of a uniform rate

for the whole colony had been repeatedly and strongly urged upon the french minister, by Mr. Raudot senior, then intendant in Canada; his proposal being, "that his Ma- "jesty should ordain that they (the Seigniors) should only "take for each arpent of the contents of the grants, one "*sou* of rent and a capon for each arpent in front, or 20 "*sous* at the choice of the grantee." (1)

We know also, from the printed correspondence, that this subject was for some time under the consideration of the authorities in France; and when, with these facts before us, we compare the proposal, made by Raudot, with the *arrêt* actually promulgated, it seems difficult to avoid the conclusion, that that proposal was deliberately rejected; certain it is, that it was not adopted.

It has however been contended, that the obligation to sub-concede, must necessarily have been nugatory, unless a certain rate had been established, at which concessions should be made. The argument, I think, has little weight. The obligation to sub-concede would indeed have been nugatory if no rule had been laid down, according to which that obligation could have been enforced; but there is a manifest difference between the establishing of such a rule, and the fixing of a uniform rate. Mr. Raudot repeatedly and earnestly suggested the latter alternative; His Majesty in his council of state, after the subject had for some time been under consideration, adopted the former. Under the common law, if a Seignior agreed to concede land without naming the rate, it was determined according to that usually paid for the adjoining lands in the same seigniory: and this rule was adopted as to concessions to be made by the governor and intendant under the *arrêt*.

In doing this, the King not only did not establish one uniform rate, but, on the contrary, sanctioned an almost infinite variety of existing rates; and virtually permitted the

(1) 4 Vol. S. D. p. 9.

establishment of others without any limit as to number or amount. And from the official correspondence, to which I have already adverted, we must presume that this was done advisedly. Mr. Raudot, in his letter of 10 Nov. 1707, had complained "*that, in almost all the seigniories, the dues are* "*different;* some pay in one way, others in another, accor- "ding to the different characters of the Seigniors by whom "the grants were made;" and, in his letter of the 18th of Oct. of the following year, the same intendant says: "It "would also be necessary, with regard to *the seigniorial* "*dues, to make them uniform by reducing them all to the same* "*scale*, and for this purpose, my Lord, I have the honour to "send you a memorandum *containing the dues which I* "*have found in several deeds of concession all different from* "*each other.*" We find the same words in the letter of the 10 July 1708, from Mons. de Pontchartrain to Mr. d'Aguesseau. And yet we see, that, with these facts before them, the King in his council ordered the governor and intendant in Canada, in case of a refusal on the part of the Seigniors to concede their lands, "to concede to the said "settlers the lands demanded by them, in the said sei- "gniories, for the same dues as are laid upon the other con- "ceded lands *in the said seigniories:*"—thus adopting and sanctioning, for each seigniory, when the governor and intendant were required to intervene, the rate usual there at the time of the making of the sub-concession demanded; that being the interpretation put by the colonial authorities, on the words "in the said seigniories," and the only one of which they are susceptible.

It is to be observed that, although the *arrêt* lays down a rule for the concession to be made by the governor and intendant in case of a refusal on the part of a Seignior to concede, it does not attempt to define what should be deemed a wrongful refusal to concede on the part of a Seignior.

The public officers named in the *arrêt* would therefore have had to determine, according to the particular circums-

tances of each case, whether the refusal, on the part of the Seignior, to concede was justifiable or not. And in the event of there being no refusal to concede, but an offer to do so, on terms not accepted by the applicant, the governor and intendant would then have had to decide whether the terms proposed by the Seignior were such as he could legally exact.

But if their was no refusal to concede, nor disagreement between the Seignior and the *Consitaire ;* if, on the contrary, they had agreed as to the land to be conceded and as to the rent to be paid, and that a contract of concession had accordingly been made in good faith, there would not then have been a case to which the terms of the *arrêt* could possibly apply.

The power of the governor and intendant to concede the wild land of a Seignior could only be exercised where he wrongfully refused to concede it himself; and therefore could not be exercised, where a concession had been made and carried into effect in good faith.

The other laws particularly cited by the attorney general, as relating to the concession of seigniorial lands, are the *arrêt* of the 15 March 1732, and the royal declaration of the 17 July 1743.

As to the royal declaration of 1743, it makes provision for the granting of the wild lands of the Crown, also as to the manner in which lands should be re-united to the Crown domain, and upon other subjects ; but does not in any way refer to the conditions upon which concessions were to be made by Seigniors.

The *arrêt* of 1732 prohibits the sale of wild lands by Seigniors and other proprietors, in terms as plain as those by which, under the *arrêt* of 1711, Seigniors are required to concede the same kind of land.

The words of the law are : " His Majesty expressly pro-
" hibiting all Seigniors and other proprietors from selling
" any wood land on pain of nullity of the deed of sale, and
" of restitution of the price of lands sold as aforesaid, which
" lands shall in the same manner be re-united by force of
" law to the domain of His Majesty."

This *arrêt* further orders the 2 *arrêts* of 1711 to be executed according to their tenor and effect, but does not in any way extend or modify the provisions of the *arrêt* of 1711, in so far as they relate to concession of wood lands belonging to Seigniors.

I therefore maintain that the *arrêt* of 1711 is the only law which compels a Seignior to make sub-concessions ; and that there is no other law, which contains any provision as to the manner in which sub-concessions were to be made ; and I hold it to be certain, that the *arrêt* of 1711 did not establish any uniform or fixed rate at which all concessions *en censive* were to be made thereafter. The learned Crown officers appear to have been aware that the laws on which they rely could not, of themselves, cause the seigniorial rents to be reduced as contended for. That they entertained this opinion may be gathered from the terms of the thirteenth proposition in which it is said : " The rates and
" conditions of the concessions of land in the seigniories of
" Canada were regulated by special enactments to be found
" in divers royal edicts and ordinances *as interpreted by*
" *usage, by the judgments of the intendants, and by a large*
" *number of concessions en fief* or by the acts (*brevets*)
" confirming such concessions."

Had it been possible to refer to the provisions of any law or laws, which, taken by themselves, would justify the court in cutting down the rents agreed upon between the Seigniors and their *Censitaires*, those provisions of law, it is to be presumed, would have been cited, and had it been possible to cite any such provisions of law, the attempt to

interpret the *arrêt* of 1711, by the grants to the Seigniors, by usage and by judgments, would not have been necessary.

But as that mode of interpretation has been relied on, I cannot pass it over altogether in silence.

As to the grants to the Seigniors, it is obvious that each grantee is bound by the terms of his own contract; and equally so that the grants to which he was not a party cannot be binding upon him. There are, it is true, four grants *en fief* made subsequently to the *arrêt* of 1711, which clearly imposed upon the grantees an obligation to sub-concede at a fixed rate; but these grants, even as regards the grantees therein named, cannot be said to interpret the law; they impose upon the grantees a conventional obligation, in addition to the obligation to concede resulting from the law; but that is all. The special covenant contained in these grants cannot, either directly or indirectly, affect the grants which contain no such covenant; and I have already shown that no such covenant is to be found in any of the grants made before the *arrêt* of 1711.

As to any usage establishing a uniform rate, I do not believe that any such usage ever existed. Certainly none has been proved; and even, if it had been proved that a usage to concede at a uniform rate had grown up between 1707 (when we have seen the rates were, as Mr Raudot declared, *different in almost all the seigniories*) and 1759; it is undeniable that a contrary usage commenced, almost immediately after 1759.

Now if, for the sake of argument, it be admitted that the Seigniors in Canada ever were bound by usage to concede at a fixed rate, they were so bound only whilst the usage lasted; and it is certain that no such usage has existed for the last 90 years. In fine, it is hardly necessary to observe that if the Seigniors were bound by usage, they could be released by special contracts; and it is upon such contracts that they claim their rents.

It may however be pretended that the Seigniors were not bound merely by usage ; but that the *usage interpreted the law*, and that the law thus interpreted bound the Seigniors to concede at a fixed rate.

I reply that, if the law, of its own force, *did not* bind the Seignior to concede at a fixed rate, and if the supposed usage, by itself, *could not* do so, I am at a loss to understand by what mysterious process the law and usage together can be made effectual to do that which neither the law nor the usage, separately, had any power to accomplish.

It was my intention to have noticed each of the judgments of the intendants, which have been cited by the learned counsel for the Crown, as tending to establish a uniform rate ; but the observations which have been made in relation to them, by the learned president of this court, so completely exhaust the subject, and are so conclusive, that I deem it needless to do so.

Without however entering into details, I may observe that no case has been cited, nor I believe can be cited, in which the rent agreed to in a regular contract of concession was ever reduced merely on the ground of its being higher than the rents customary, at the period of the making of the deed of concession, or at any other period. Moreover, even supposing (what certainly is not the case) that the judgments of the intendants did tend to establish that the rent, voluntarily agreed to by a Seignior and settler, could be reduced, on the ground already mentioned ; *still it is certain* that the courts of justice of the colony, ever since the cession, have held that the parties to a contract of concession were at liberty to make any agreement they liked, as to the rate of rent to be paid by the *Censitaire* to his Seignior. Now, if this court, in interpreting the *arrêt* of 1711, is to be guided by former judgments, assuredly the uniform decisions of the British courts, ought to be deemed of higher authority

than any others; supposing such others to exist, which however is not the case.

Upon the whole then, as to this part of the matter now under our consideration, I am clearly of opinion that the obligations imposed upon Seigniors by the *arrêt* of 1711, cannot be extended by reference to any usage or jurisprudence; and that the provisions of that *arrêt*, interpreted according to the plain and natural meaning of the words in which it is framed, do not preclude the parties to a deed of concession, from effectually agreeing upon any rate of rent they think fit.

Section 9.

Seigniorial grants from date of arrêt of Marly down to cession of Canada.

In the foregoing remarks, I have explained the grounds upon which I am of opinion that none of the *ancient laws* of Lower Canada contain any provision which would justify the Court in cutting down the rents agreed to in contracts of concession.

I have also, I think, shown that none of the grants *en fief* in Lower Canada, made before 1711, had any tendency to determine the rates or conditions upon which the concessions *en censive* should be made; and having done so, I will next advert to the grants *en fief* in Canada made after the *arrêt* of 1711, and before the conquest.

In consequence of the difference of opinion which exists between the Judges, as to whether, prior to that *arrêt*, the owners of *fiefs* were under a legal obligation to make concessions; I deemed it my duty to notice such of the conditions of each grant as could be deemed to have any bearing on that point; but as we are all agreed that there can be no doubt as to the existence of the obligation in question subsequently to that *arrêt*, I do not think it neces-

sary to enter into the same details with respect to the grants after 1711.

Some of those grants however contain conditions materially different from any to be found in the earlier titles, and these conditions require to be specially noticed. The grants *en fief* in Canada, after 1711 and before the conquest, are in all about sixty seven in number. Of these, nine (1) do not contain any conditions as to the terms upon which sub-concessions were to be made; and the grantees in that respect being in exactly the same position as the grantees prior to 1711, I do not deem it necessary to notice them particularly.

Of the remaining fifty eight, (2) four were made subject to an express obligation as to the rate, and other conditions upon which sub-concessions were to be made; thirty three (3) contain the condition so often referred to, "et de faire "insérer pareilles conditions dans les concessions qu'il fera "à ses tenanciers, aux cens et rentes et redevances accou- "tumés, etc.;" and the remaining twenty one (4) were probably made upon the same conditions.

There is however no absolute certainty as to the conditions of the last mentioned twenty one grants in consequence of their not having been registered in full length.

The officers who had charge of the colonial register seem to have transcribed part only of each of these deeds, and then to have made a note, that the part not entered, was similar to some deed duly registered. The omission is the

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(1) Viz: nos. 367, 368, 377, 378, 442, 493, 495, 501, 502.

(2) Viz: nos. 369, 370, 374, 376.

(3) Viz: nos. 380, 383, 384, 385, 410, 411, 432, 434, 449, 450, 451, 453, 454, 455, 456, 471, 490, 492, 497, 498, 504, 505, 510, 511, 514, 517, 52?, also 429, 430 and 470, 48[illegible] 481, 4[illegible]5.—The last four of these grants, in addition to clauses contained in the others, contain a clause to the following effect, "the said grantee shall satisfy [illegible] of the work he shall have caused to be done thereon from this day till next fall, in default whereof [illegible] concession null, &c." The 2 grants that precede these four, viz: 429 and 430, require the grantees to contribute to the making of a certain public road, and a like obligation seems to have been imposed on the grantees of the titles, nos. 431, 439, 440.

(4) Viz: nos. 386, 387, 388, 389, 390, 391, 392, 393, 401, 402, 433, 435, 438, 463, 471, 475, 491, 496, and 431, 439, 440.

more important, as the royal ratifications of the deeds thus imperfectly registered, with, I believe, a single exception (Lasalle, no. 491) do not contain any clause as to the conditions upon which sub-concessions are to be made.

The first two grants, after the *arrêt* of Marly, are under the numbers 367 and 368 (in Mr. Dunkin's summary) and do not contain any conditions as to sub-concession.

The next four grants, nos. 369, 370, 374, 376, are those which contain an express obligation as to the rate of rent and other conditions to be stipulated by the grantee in his sub-concessions.

No. 369 (A. D. 1713), being grant of augmentation of Beaumont, in addition to the clause as to the keeping of house and home, contains the following condition: "à la "charge de concéder les dites terres à simple titre de re- "devances de 20 sols et 1 chapon pour chacun arpent de "front sur 40 de profondeur, et six deniers de cens, sans "qu'il puisse être inséré dans les dites concessions ni "sommes d'argent ni aucune autre charge que celle de "simple titre de redevances et ceux ci-dessus, suivant les "intentions de Sa Majesté." As to the meaning of this clause there cannot be two opinions.

No. 370 (A. D. 1714), Mille Isles, contains a clause to same effect, excepting that the Seignior of Mille Isles is to have the same rent for a farm of 30 arpents in depth, that the Seignior of Beaumont is to have for a farm of 40 arpents in depth.

No. 374 (A. D 1717), is the grant to the seminary of St. Sulpice of the seigniory of the Lake of Two Mountains, and it contains a clause similar to that in no. 369, augmentation of Beaumont, which I have given at full length; but in the ratification, bearing date the 27 April 1718, the clause, as to the making of sub-concessions, was modified by the addition of these words: "leur permettant néanmoins Sa

" Majesté, de vendre ou donner à redevances plus fortes les " terres dont il y aura au moins un quart de défriché." Afterwards, on the 26 September 1733, the seminary obtained an augmentation of their grant. The second grant or augmentation contained the clause, which was usual at the time it was made, viz: " et de faire insérer " pareilles conditions dans les concessions qu'ils feront à " leurs tenanciers, aux cens, rentes et redevances accou- " tumés, par arpent de terre de front sur quarante arpents de " profondeur." With this clause however, the seminary were dissatisfied, and having remonstrated, as appears by the correspondence to be found in the fourth volume of the Seig. Doc., the King, by the deed no. 427, dated 1 March 1735. being the ratification of the 2nd grant to the seminary, modified not only the conditions contained in that grant, but also those contained in the first grant.

The words of the 2nd ratification are: " et de faire insérer " pareille condition dans les concessions, par un titre qu'ils " feront à leurs tenanciers, aux cens, rentes et redevances " accoutumés, par chaque arpent de terre dans les seigneu- " ries voisines, *eu égard à la qualité et situation des héritages* " *au temps des dites concessions particulières*, ce que Sa Ma- " jesté veut aussi être observé pour les terres et héritages " de la seigneurie du Lac des Deux Montagnes, nonobstant " la fixation des dits cens et redevances, et de la quantité " de terre de chaque concession portée au dit brevet de 1718: " à quoi Sa Majesté a dérogé."

The changes, which took place in the grant to the seminary, have caused me to notice the last ratification in their favour somewhat out of its order of date.

I now however go back to 1727, when the last of the four grants already spoken of, was made; it is no. 376, (1727). grant of augmentation of St. Jean. This grant also contains a clause similar to that in no. 369, which I have given at full lenght; but the Seignior of St. Jean was allowed to

receive as much for a farm of 20 arpents, as the Seignior of Mille Isles was allowed to receive for a farm of 30 arpents; and as the Seignior of Beaumont was allowed to take for 40 arpents; and yet these are the grants constantly referred to, and mainly relied on, as proving that a uniform rate was established for all concessions made *en censive*.

I have not seen the ratification, by the Crown, of the grant of Beaumont; but neither the Royal ratification of the grant of Mille Isles, nor that of St. Jean, although they specially enumerate several conditions as those to which the said grants respectively should be subject, contain any reference to an obligation on the part of the grantees to concede at a fixed rate.

The next grant, after the four grants already specially referred to, is a grant made directly by the King to the marquis of Beauharnois, then governor of the Colony, and to his brother; it is no. 377 (A. D. 1729), and it recites that it was made in consideration of the services of the marquis as governor and lieutenant general in New France, and also in consideration of the services which he had rendered during the late war, as a captain in the Navy. It requires the grantees to reside on the grant, and *to clear the land and have it cleared* immediately; but contains no obligation, on the part of the grantees, to sub-concede, nor any reference to a fixed rate of *cens et rentes*.

Nos. 378 and 379 respectively are the grant and ratification of the augmentation of Terrebonne. They recite that the grantee had made extensive improvements on the former grant, and that he was under contract with the Crown to furnish certain lumber, and are made on the same terms as the original grant no. 126, which requires that the grantee "shall, within three years, begin to cause the lands com-"prised in the said concession, to be brought under cultiva-"tion, and the divisions whereof shall be surveyed and "bounded within the said space of time"; but there is no obligation to sub concede at a fixed rent or in any way.

The next grant is the first of the thirty three to which I have already adverted; it is no. 380 (A. D. 1731) on river Yamaska. This grant, after stipulating that the grantee shall keep, on the land granted, house and home, and cause the same to be kept by his tenants, "that he shall clear and "cause to be cleared the said tract of land, in default "whereof the present concession shall be and remain null," and that he shall leave the King's highway and other road ways necessary for the public use, then continues thus: "et de faire insérer pareilles conditions dans les conces- "sions *qu'il fera à ses tenanciers aux cens et rentes et re-* "*devances accoutumés par arpent de terre de front sur* 40 "*arpents de profondeur.*"

This clause is far from being clearly worded, but it seems to me to be susceptible of only two meanings. The words *aux cens et rentes et redevances accoutumés* must have been used, either to limit the cases in which the preceding conditions were to be inserted, or to oblige the grantee to make concessions at the customary rates. In other words, the clause must mean, either, that the preceding conditions were to be inserted in concessions made at usual rates, but not in concessions made at unusual rates: or that those conditions should be inserted in the concessions made by the grantee; which concessions he undertook to make *aux cens et rentes et redevances accoutumés.*

The former meaning would have been so unreasonable, that it cannot be supposed it was intended; and the latter, although not justified by a strict literal construction of the phrase, ought, I think, to be adopted, *ut res magis valeat quam pereat.*

It is however to be observed that, although this clause was inserted in at least thirty three grants and probably in twenty one other grants, yet we find it, so far as I know, in four only of the Royal ratifications, viz: nos. 491, 510, 511 and 517.

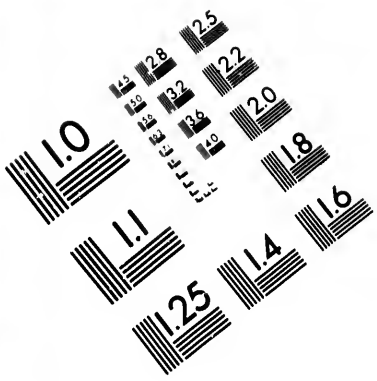
The variations which are to be observed in the grants between 1711 and 1731, when the clause containing the words *aux cens et rentes et reléverances accoutumés* seems to have been generally adopted, deserve to be remarked. We have seen that, by the *arrêt* of 1711, the suggestion of the colonial authorities that a fixed rate should be established, was rejected by the Crown. In the four grants already spoken of:— no. 369, of Beaumont, made in 1713; no 370, of Mille Isles, made in 1714; no. 371, of Lac des Deux Montagnes in 1717; and no. 376, of augn. of St. Jean, in 1727, the governor and intendant seem to have wished to do, as far as they could, by contract, something not unlike what had previously been suggested should be done by law. That the King, to say the least, did not attach as much importance to those clauses as his officers in the colony did, is evident from such [illegible] ratifications of those contacts as have been printed.

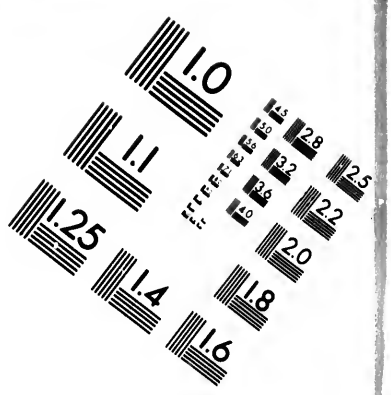
Soon after the making of these four grants, however, it became manifest that the authorities in France did not intend to adopt the clause requiring Seigniors to concede at a fixed rate; for the grant made in 1729, direct from the Crown to the marquis of Beauharnois, then the governor of the colony, and to his brother, did not contain any such clause. (1).

The governor, having thus become the part proprietor of one of the most extensive seigniories in Canada, probably did not feel that prejudice against the owners of *fiefs*, which seems to have been entertained by Mr. Randot and some of the other intendants.

Be this as it may, it is certain that the clause requiring concessions to be made at a fixed rate is not to be found in any grant after that of Beauharnois made by the Crown in 1829, and in which that clause was omitted.

(1) That clause is not to be found in any grant made by the King in France, nor in any grant made in Canada under direct orders from the King. See nos. 378, 493 and 502.





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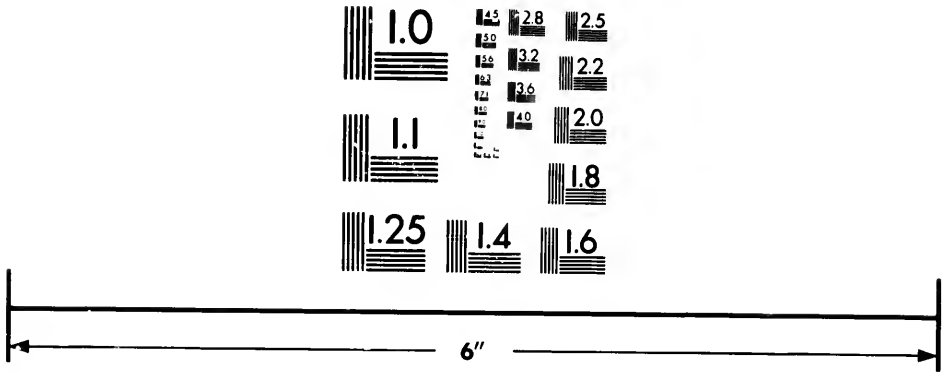

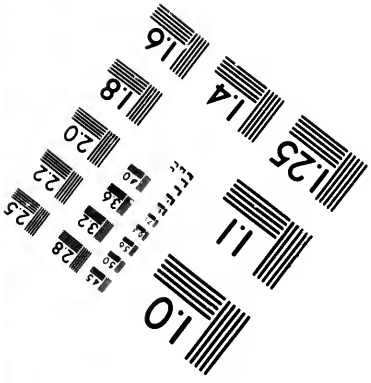

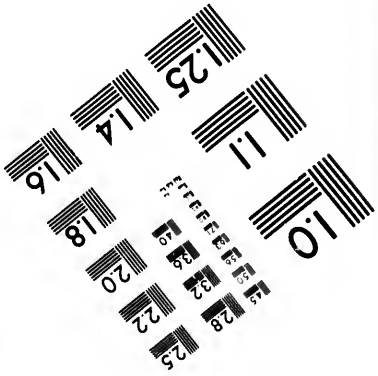

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I deem it the more necessary to advert to this point, because an attempt has been made to connect the *arrêt* of 1711 with the four grants containing a fixed rate; and in like manner to connect the numerous subsequent concessions, which do not expressly mention a fixed rate, with the same four concessions: and thus, in effect, to make those four grants, which are clearly exceptional cases, a guide for the interpretation of all the other titles. In support of this view, it was asserted in effect "that the *first four* "*concessions after* the *arrêts* of Marly, all speak of a fixed "rate of *cens et rentes* as being obligatory upon Seigniors." That this statement, and another statement to which I shall just now allude, were made in good faith, cannot for a moment be doubted; but still I am bound to say they are not exact.

The *first two* grants after the *arrêt* of 1711, are those under the nos. 367 and 368, already mentioned, and they do not speak of any rate of *cens et rentes* as being obligatory upon Seigniors.

The other statement to which I allude was, that all the concessions, subsequent to the four that mention a fixed rate, and down to the cession, contain the obligation "de "faire insérer pareilles conditions dans les concessions "qu'il fera à ses tenanciers aux cens et rentes et redevances "accoutumés par chaque arpent de front sur quarante de "profondeur."

Now the first two grants after those four exceptional cases, are the nos. 377, 379, the one being a Royal grant, and the other being in the form of a ratification by the King of the grant no. 378, and neither of these contains the obligation alleged to be in all the grants after the four containing a fixed rate of *cens et rentes*. The same obligation is also omitted in four of the subsequent grants. (1)

(1) Viz: nos. 493, 495, 501 and 502

I will conclude these observations on the grants after the *arrêt* of Marly, by observing that the clause found in four grants, obliging the grantees to sub-concede at a fixed rate, doubtless limited in a very important manner the exercice of their rights in the disposal of their property ; but the clause requiring the grantees to concede *aux cens, rentes et redevances accoutumés*, created a conventional obligation in extent but little if at all different from the legal obligation imposed upon all Seigniors by the *arrêt* of 1711, according to which, upon the refusal of a Seignior to concede his land, it could be conceded by the governor and intendant " for the " same dues which were laid upon the other conceded lands " in the said seigniories." Even however, in any of the four cases, in which the Seignior was bound to concede at a fixed rate, I do not think that a *Censitaire* could cause an annual rent, voluntarily agreed upon between him and his Seignior, to be reduced, on the ground of its being higher than that mentioned in the Seignior's title. The *Censitaire*, in that case, would be bound by his own contract, and could not take advantage of the covenant between the Crown and its vassal. (1) It would be like the case of a *démembrement* of the vassal's *fief* which could be impugned by the *Seigneur suzerain*, but not by one of the contracting parties.

I shall now make a few remarks on the rate of two *sols* per arpent, proposed by the attorney general, and then close my observations on this branch of the subject under consideration.

SECTION 10.

Observations on the maximum rate of two sols per arpent proposed by attorney general.

I cannot terminate my observations on the questions respecting *cens et rentes* without adverting to the maximum rent of two *sols* per arpent, to which, according to the 25th

(1) See remarks of Ch. J. Reid, in Cuvillier and Stanly, pp. 36 and 38 of Mr Cherrier's factum.

proposition of the attorney general, all higher rents should be reduced. The opinion that a uniform rate had been established by the old laws of this colony was at one time so general, and still has so many advocates, that the attorney general wisely decided to bring the question, as to whether, either by law or otherwise, a fixed rate ever had been established, directly under the consideration of this court, so as to have a formal judgment on the subject.

The propositions advanced by the learned attorney general, as I understand them, are that the *arrêt* of 1711 irrevocably fixed the seigniorial dues at the rate *then* established in the country; that that rate (being the rate mentioned in the 14th proposition) continued to be observed until the cession of Canada to England; but that, soon after that period, Seigniors charged higher rents, and that these should be reduced to two *sols*, per arpent, as mentioned in the 25th proposition. And the contracts of concession, filed in this cause and mentioned in the 15th proposition, are produced as evidence that the dues so mentioned in the 14th proposition, were the customary dues prior to the cession, and that the maximum of those customary dues did not exceed two sols per arpent.

Upon an examination of those contracts, I think it will be found that the concession deeds, *in which rents payable wholly or in part in wheat* are stipulated, do not support either the *wheat rent* or the *maximum rate*, contended for by the learned attorney general. According to his 14th proposition, the customary rent in such cases, exclusive of the honorary *cens*, was for every forty arpents one shilling and eight pence in money and $\frac{1}{2}$ bushel of wheat.

Whereas, according to the contracts produced, the most usual wheat rent, in the district of Montreal, would seem to have been, *not half a bushel* as is said, but *a bushel of wheat* per forty arpents, besides a *sol* or a half *sol* in money per arpent. (1)

(1) In the district of Quebec the rents seem to have been considerably lower than in the district of Montreal; and when the whole of the rent was payable in money, it rarely exceeded two *sols* per arpent in either district.

The rents vary in the different seigniories and are not always by any means the same in any one seigniory. In order therefore to ascertain the difference between the average rental stipulated in the contracts, which are admitted to be legal, and the rent which under the same contracts would be payable according to the rate contended for by the attorney general, I have caused the rental to be calculated according to the two rates, valuing the wheat in both cases in the manner directed by the seigniorial act of 1854. That is to say, taking the price for the last fourteen years (1) and striking out the two highest and the two lowest years. By this mode the price would seem to be five shillings and five pence half penny. A price, I may observe, considerably below the present market rate.

The first set of concession deeds placed before us, are those for lands in the seigniory of Montreal. I exclude all the deeds not containing wheat rents and also all those after 1759, and I find the number remaining is only 20.

By these twenty deeds 1,218 arpents of land were conceded.

The rent, according to the maximum money rate of the attorney general, viz, at two *sols* per arpent, would be £5 1 6, and according to his rate in wheat and money, it would be £6 16 4½, whereas I find by the actual contracts it would amount to £9 11 0. (2)

The next two sets of concessions in which wheat rents are stipulated, are those made in the seigniories of Isle Bizard and Isle Perrot, and I have pursued the same course in relation to them with the same results. We have 12 concession deeds of lands in Isle Perrot, by which 924 arpents were conceded.

(1) The price has been taken from the books of the seminary of St. Sulpice at Montreal.
(2) See Appendix no. 1.

According to the two *sols* rate per arpent, the rental would be £3 17 0 ; according to the rate of the attorney general, payable in wheat and money, the rental would be £5 3 5 ; whereas according to the contracts the rent is equal to £8 5 11. (1)

For Isle Bizard we have 3 deeds ; land conceded 230 arpents ; at two *sols* per arpents 19s. 2 p. ; at wheat and money rate of attorney general £1 5 8 ; according to the contracts £1 16 7. (2)

If the rents payable under the above mentioned deeds of concession were reduced to the rent payable partly in wheat and partly in money, as mentioned in the 14th proposition of the attorney general, the Seigniors would thereby lose nearly one third of their income ; and if the rents in the same concessions were reduced to two *sols* per arpent, the Seigniors would lose nearly half of their income.

It is to be observed that the contracts upon which these calculations have been made, are not contracts entered into after the conquest and called in question as illegal.

On the contrary, they are contracts made before the conquest ; contracts which not only never have been questioned, but which are produced by the crown officers as being legal, and as proving a legal usage, to be urged against the contracts subsequently made.

These statements furnish additional evidence, that, even before the conquest, seigniorial rents were not uniform ; and they establish that so far as regards rents payable in wheat, the contracts produced, not only do not prove, but disprove the maximum money rent and the wheat rate, contended for by the attorney general.

I shall now terminate my remarks on the questions of the attorney general, relating to the *cens et rentes*, by recapitu-

(1) See Appendix no. 2.
(2) See Appendix no. 3.

lating briefly the conclusion at which I have arrived on the subject—and they are as follows :

1stly. That, under the Custom of Paris, a Seignior was not obliged to concede any part of his *fief ;* that, when he did concede any portion of it, *à titre de cens*, the conditions of the concession deed, *bail à cens*, as to the rent to be paid, were purely matters of agreement between the parties who were not restricted, as to their contracting powers, any more than they would have been in making any other contract.

2dly. That none of the seigniorial titles or colonial laws, anterior to the *arrêt* of Marly, seem to have subjected Seigniors to the obligation of sub-conceding their lands ; that, whatever doubt there may be on this point, it is certain at least that none of those laws or titles had any tendency to establish a fixed rate of *cens et rentes*, or to prevent a Seignior, when he did concede his land, from securing for himself the most favourable conditions that he could obtain.

3rdly. That the *arrêt* of Marly subjects all Seigniors to the obligation of sub-conceding their wild lands ; that the *arrêt* of 1732 prohibits all sales of wild land held under the seigniorial tenure ; but that neither the provisions of those laws, nor of any other law, were intended to prevent or ever did prevent the parties to a deed of concession, from effectually agreeing upon any rate of rent they thought fit.

4thly. That of all the seigniorial grants in Canada, in four only is a rate fixed, at which the Crown, as Seignior *suzerain*, could have compelled the grantees to sub-concede their lands. That during the whole period of nearly a century and a half that has elapsed since the date of those grants, the Crown has never attempted, either before or since the conquest, to enforce that condition ; and that the *Censitaires*, who were not parties to the grants containing the condition in question, cannot avail themselves of it, for the purpose of defeating contracts entered into by themselves or their predecessors.

The great controversy between the Seigniors and *Censitaires*, is as to whether the annual rents stipulated in concession deeds are liable to be reduced. This subject is brought directly under our consideration by the 25th question of the attorney general, quoted at the commencement of these remarks, which is in the following words : " Under " the law, as it existed in this country immediately before " the passing of the Seigniorial Act of 1854, have *Censi-* " *taires*, to whom seigniorial concessions have been made, " after the cession, at higher rates than those which were " customary before that time, a right to be relieved from " those onerous dues?"

The question is one, in all respects, of vast importance, and has been much debated for the last half century.

I have therefore deemed it right, however tedious the task, to state my views explicitly on every point connected with it, and to explain fully the grounds upon which I am of opinion that the Seigniors are legally entitled to the rents that have been agreed to between them and their *Censitaires ;* and therefore, that the question of the attorney general above quoted must be answered in the negative.

Seigniory of Montreal.

Date of deed.	Arpents in depth	—do— in front	—do—superficies	Rental according to contract. *Money Cy.* £	s.	d.	*Wheat.* Bushels	Gallons.	Quarts.	Rental according to wheat and money rate of Attorney General. *Money Cy.* £	s.	d.	*Wheat.* Bushels.	Gallons.	Quarts.
3 November..... 1653	20	2	40	"	"	6	"	5	"	"	1	9	"	5	1
10 December..... 1657	20	4	80	"	1	"	2	"	"	"	3	6	1	"	"
14 ....do..... 1658	20	3	60	"	1	6	1	5	"	"	2	7½	"	7	2
4 April..... 1659	20	6	120	"	1	6	3	"	"	"	5	3	1	"	"
20 May..... do	30	2	60	"	1	5	1	5	"	"	2	7	"	7	1
28 July..... do	20	4	80	"	1	8	2	"	"	"	3	6	1	"	"
5 March..... 1691	20	2	40	"	1	"	1	"	"	"	1	9	"	5	1
22 December..... do	15	2	30	"	"	9	1	5	"	"	1	4	"	4	1
25 August..... 1692	20	2	40	"	1	"	1	"	"	"	1	9	"	5	1
28 October..... do	20	2	40	"	"	10	1	"	"	"	1	9	"	5	1
7 December..... do	20	3 1/6	68	"	1	8½	1	5	"	"	3	"	"	8	2
24 January..... 1693	20	4	80	"	1	"	2	"	"	"	3	"	"	8	2
9 February..... do	10	4	40	"	"	10	1	"	"	"	1	6	"	4	1
29 June..... do	20	3	60	"	1	3	1	5	"	"	2	10	"	5	1
3 October..... do	20	3	60	"	1	3	1	5	"	"	2	7	"	7	1
19 December..... do	20	3	60	"	1	3	1	5	"	"	2	7	"	7	1
28 ....do..... do	20	4	80	"	1	8	2	"	"	"	3	6	1	"	"
11 January..... 1694	20	4	80	"	1	8	2	"	"	"	3	6	1	"	"
14 November..... do	20	2	40	"	"	10	1	"	"	"	1	9	"	5	1
14 December..... 1707	20	3	60	"	1	3	1	5	"	"	2	7½	"	7	2
			1218	1	4	6¼	30	5	"	2	13	4¼	15	2	1

Rent of 1218 arpents at 2 *sols* per arpent.....	£5	1	6
Rent according to wheat and money rate of Attorney-General: say 1218 arpents at 1 *sol* per arpent.....	2	10	9
Cens	"	2	9
½ Bushel of wheat per 40 arpents.....	4	3	0½
	£6	16	6½
Rent according to contracts: cash.....	1	4	6½
Wheat, 30 bushels and ½ at 5s. 5d½.....	8	6	5½
	£9	11	0

Recapitulation.

Rent at 2 *sols* per arpent.....	£5	1	6
Rent at money and wheat rate of Attorney General.....	6	16	6½
Rent according to the contracts.....	9	11	0

Seigniory of Isle Perrot.

Date of deed.		Arpents in front.	—do— in depth.	—do—superficies	Rental according to contract. Money Cy. £	s.	d.	Wheat. Bushels.	Gallons.	Quarts.	Rental according to wheat and money rate of the Attorney General. Money Cy. £	s.	d.	Wheat. Bushels.	Gallons.	Quarts.
17 September	1753	3	20	60	"	2	7	1	5	"	"	2	7	"	7	"
do	do	3	20	60	"	2	7	1	5	"	"	2	7	"	7	"
12 January	1755	6	20	120	"	5	3	3	"	"	"	5	3	1	5	"
11 July	1754	3	20	60	"	2	7	1	5	"	"	2	7	"	7	"
28 September	do	6	20	120	"	5	3	3	"	"	"	5	3	1	5	"
7 November	do	5 1/10	20	102	"	4	4	2	5	2	"	4	6	1	3	3
do	do	5 1/10	20	102	"	4	4	2	5	2	"	4	4	1	3	3
do	do	3	20	60	"	2	7	1	5	"	"	2	7	"	7	"
do	do	3	20	60	"	2	7	1	5	"	"	2	7	"	7	"
18 February	1746	3	20	60	"	2	7	1	5	"	"	2	7	"	7	"
22 April	1748	3	20	60	"	2	7	1	5	"	"	2	7	"	7	"
7 February	1754	3	20	60	"	2	7	1	5	"	"	2	7	"	7	"
				924	1	19	10	23	1	"	2	0	6	11	5	2

924 arpents at 2 *sols* per arpent..... £3 17 0

At wheat and money rate of Attorney General, 924 arp. at 1 *sol* in money per arpent..... 1 18 6

Cens..... 0 1 11

Wheat according to rate of Attorney General, 11 min. and ½ and 2 quarts..... 3 3 0

£5 3 5

Rent on same land according to contract: money..... 1 19 10

Wheat, 23 min. and 1 gallon..... 6 6 1½

£8 5 11½

Seigniory of Isle Bizard.

Date of deed.	Arpents in front.	—do— in depth.	—do—superficies	Rental according to contract. *Money Cy.* £	s.	p.	*Wheat.* Bushels.	Gallons.	Quarts.	Rental according to wheat and money rate of Attorney General. *Money Cy.* £	s.	p.	*Wheat.* Bushels.	Gallons.	Quarts.
30 March 1758	4	20	80	"	"	10	2	"	"	"	3	6	1	"	"
25 November ..... do	3	20	60	"	"	10	1	5	"	"	2	7½	"	7	2
12 July 1756	3	30	90	"	3	7	2	2	2	"	3	10½	1	1	1
			230	"	5	3	5	7	2	"	10	"	2	8	3

230 arpents at 2 *sols* per arpent £0 19 2

Rent according to wheat and money rate of Attorney General : 230 arpents at 1 *sol* per arpent 0 9 7

Cens 0 0 5

Wheat at 1s. and 2 p. a bushel 10 p. 40 arp. say 3 m. 8 g. 3 q. 0 15 8

£1 5 8

Rent according to contract.

Money 0 5 3

Wheat, 5 b. 7 g. 2 q. 1 11 4

£1 16 7

PART 2.

Reservations and Prohibitions.

Our decision as to the reservations and prohibitions, which form the subject of the 39th and two following questions submitted by the Attorney General, must turn upon the *arrêt* of 1711; that being, as I have already shown, the only act of a legislative nature regulating the concession of wild land by Seigniors; and having already explained my views as to the general nature and tendency of that law, I shall now confine myself to a brief statement of the reasons upon which my answers to the questions now under consideration, are founded.

The question which we have to determine, is simply whether covenants voluntarily entered into between the Seigniors and their *Consitaires*, (covenants which, so far as I know, have constantly been enforced by all the tribunals of this province) are now to be declared absolutely null and void, irrespective of the circumstances under which they were made. We must hold, either that the parties to a deed of concession had the same liberty of contracting, excepting as to what the law expressly prohibited, as they had in making any other contract, or that the law deprived them of the power of subjecting land, conceded *en censive*, to *any charge* in favour of the Seignior, beyond a mere annual rent. There appears to be no middle course; the parties could either agree upon any thing which the law did not prohibit and which was not contrary to the policy of the law, or they could not agree upon any charge beyond an annual rent.

To me it appears that the *arrêt* of 1711, whether interpreted with reference merely to the words in which the law is framed, or with reference to the official correspondence which preceded and followed it, cannot be taken to have the effect of annulling the reservations and charges now in

dispute. The object of the law was to promote the settlement of the country ; the evil complained of in the preamble is, that this had been retarded by an attempt on the part of certain Seigniors, to exact a consideration in money in addition to the usual rents, when they conceded their wild lands ; and to remedy this, the enacting clause compelled Seigniors to concede their wild lands *à titre de redevances* and without enacting any such capital or *bonus*.

The concession deeds, now impugned, cannot be held either to have frustrated the object, or to have violated the letter or even the spirit of the law. It is not denied that the land conceded has been settled and improved, which was the main object of the law ; and the deeds, upon the face of them, show that they were made *à titre de redevances*, and without the exaction of any *bonus* or other consideration of that kind.

It is contended, however, that the King, by ordering the Seigniors to concede *à titre de redevances*, virtually forbade any charges or reservations which did not come within the meaning of the word *redevances*, taken in its most limited sense. But it appears to me that the words *à titre de redevances* were used merely as opposed to what the law prohibited, namely the exaction of a consideration in money, and not as excluding every possible kind of reservation or charge in favour of the Seignior.

The words of this law, which, we must recollect, changes the common law and cuts down titles, ought not to be extended beyond their plain and ordinary meaning. They must be interpreted strictly, and thus interpreted, they will not be found to afford any ground for treating indescriminately as null and void, all the charges and reservations in question.

The view I take of the *arrêt* of 1711, is much strengthened by the official correspondence and other documents of the same period.

Prior to the *arrêt* of Marly, Mr. Raudot had informed the authorities in France, that the Seigniors, in Canada, had conceded their lands subject to the *retrait conventionnel*, to the *banalité de four* and to other charges which he thought objectionable ; and he had proposed, that His Majesty might in the law which he (Raudot) wished to have passed, insert these words : *without having regard to the charges, clauses and conditions contained in their title deeds, that the dues shall only be paid according to what would be contained in the said declarations of the King*. We find however that neither the words suggested by Mr. Raudot, nor any other to the same effect, were adopted by the King ; and yet, we are now required to interpret the *arrêt* as if Raudot's suggestion *had been adopted*, instead of having *been* (*as it was*) *rejected*.

The correspondence and official documents moreover subsequent to the *arrêt* of 1711, show most clearly that reservations and charges such as those now in controversy, were not then deemed to be null and void under that law.

From the report of the Naval Council in France, bearing date May 1717, we learn (1) that the *intendant* Bégon, about five years after the passing of the *arrêt* of Marly, again brought the subject of the seigniorial charges and reservations under the attention of the home government.

The report of the Naval Council begins by stating : " Mr. " Bégon last year observed that, in the deeds of concession " which proprietors of seigniories grant to those who take " land therein, they introduce a variety of obligations con- " trary to the custom and to the settlement of the colony." Among the obligations of which Mr. Bégon complained, are the *corvées*, the *retrait conventionnel* and the reservation by Seigniors of " the timber necessary for their houses and " their buildings and the wood necessary for their fuel and " timber fit for sale."—The report closes with these words :

(1) 4 vol. S. D. p. 14.

" And inasmuch as it is the intention of the council that the " clauses inserted in the deeds of concession which are " *contrary to the provisions of the Custom of Paris* shall be " declared null and void, it *becomes necessary that his Majesty* " *should make a decree so ordering it.*" A draught of the proposed decree immediately follows the report of the Council.

The proposed decree recites the edict of 1664, which established the Custom of Paris in the colony, and declares " that, notwithstanding the provisions of the said edict, se- " veral persons who hold lands *in seigniory* in New " France, impose in the contracts of concession of the lands " which they grant, very burthensome *clauses and servitudes* " *contrary to the provisions of the said Custom* " and prejudicial to the settlement of the colony, such as the days of husbandry service, *corvées*, the *retrait conventionnel*, the reservation of all wood necessary for their houses or for other works or for fuel, the reservation of all pine and oak trees that may be found in the grant, and various other reservations enumerated in the preamble. To remedy those abuses, the draught in question contains an enacting clause annulling all the objectionable reservations and prohibitions.

This document, although merely a draught, seems to me of very great importance. It shows that neither the authorities in the colony nor those in France, attributed to the *arrêt* of Marly the effect that is now proposed to be given to it, of making void all reservations beyond a mere annual rent. Mr. Bégon, five years after the passing of that *arrêt*, complains of the reservations made by Seigniors *not as being contrary to the arrêt of Marly*, but as being contrary *to the Custom of Paris;* and the council, in like manner, proposed to prohibit those reservations not as being at *variance with the arrêt of Marly*, but as being contrary to the *Custom of Paris.* And one most important point, at least, this draught of *arrêt* establishes conclusively, it is this: that neither the intendant in Canada nor the council in France contemplated the possibility of setting aside the reservations in

question under the *arrêt* of Marly, and yet that is exactly what is now being done by the judgment of a majority of the members of this court.

The interpretation which was thus put upon the *arret* of marly at the time it was passed, accords (so far as I know) with that which it has invariably received from our own courts. I am not aware that the reservations in question have ever been objected to in any judicial proceeding since the conquest.

We all know that from the earliest period, within our recollection down to the passing of the seigniorial act of 1854, oppositions founded on these charges, have been constantly allowed, without any difficulty ever having been raised on the part either of the Bar or of the Bench. We also know that lands *en censive*, sold under the authority of our courts by sheriff's sale or otherwise, have, generally speaking, been so sold subject to the charges and reservations now impugned; and if these charges and reservations are now declared null, the result will be, that those who purchased lands *en censive* under the authority of the courts, will receive more than they paid for; whilst those who have purchased seigniories under the same authority, will receive less than they paid for; that is to say, the *Censitaires* will be discharged without any payment from obligations which they assumed, whilst Seigniors will be deprived without indemnity of the rights to which they were entitled by reason of the same obligations.

The opinion on this subject given by chief justice Reid in 1842, before the seigniorial commissioners, is entitled to great weight. He says: " Quant à une foule d'autres ré-
" serves contenues dans les titres de concession, telles que le
" droit de banalité, de faire réparer le chemin du moulin,
" de couper et prendre le bois sur la terre pour certains
" objets, le droit de retrait et tous les autres droits, charges
" et réserves imposés en sus de cens et rentes stipulés;
" comme toutes ces charges sont d'une nature arbitraire et in-

" certaine, et qu'elles sont d'ailleurs les charges les plus " onéreuses et les plus véxatoires du régime féodal, on " devrait les estimer au plus bas taux possible. " (1)

The learned judge whose words I have just quoted, was one of the members of the court of King's bench for the district of Montreal for a period of 33 years, during fifteen of which he presided as chief justice in that court.

The charges and reservations now in dispute must have come very frequently under his notice during every year, probably during every term of his long judicial career ; and yet, although regarding them as he evidently did with disfavour, it does not seem even to have occurred to him that they could be treated as null and void.

Like the authorities in the colony and in France, at the time the law was passed, and like his predecessors and contemporaries on the bench, he failed to discover that the reservations in question were prohibited by the *arrêt* of 1711.

I wish to guard myself from being misunderstood on this point. I have not asserted and am far from maintaining that the reservations mentioned in the questions of the Attorney General ought to be held legal in all cases and under all circumstances.

Some of those reservations might render it impossible for the settler to cultivate and improve his land, and in such cases they ought to be held null as being contrary to the policy of the law.

In like manner the legality or illegality of the prohibitions mentioned in the questions of the Attorney General would depend upon the circumstances of the case in which they were made. If, for instance, a Seignior not having a saw mill, were to covenant that none of his *Censitaires* should erect any such mill, I think the covenant would be illegal

(1) Report of commissioners in 1844, p. 237.

as being in restraint of trade; but, on the other hand, where, in consequence of the Seignior having himself a mill or from any other such cause, the covenant was made for the protection of the Seignior's just interests, I would hold it unobjectionable.

In fine I do not hesitate to say that I view these reservations and prohibitions in the same unfavourable light in which they were regarded by the late chief justice Reid; but still as the law has not expressly prohibited them, I can declare them to be illegal in so far only as they plainly conflict with the policy of the law, which was the settlement and improvement of the wild lands of the colony.

PART 3.

Banalité.

The right of *banalité* is one of the most important rights enjoyed by Seigniors in Lower Canada; and it is important, not only on account of the profits resulting from it, but also in consequence of the large amount of capital that has been expended with a view as well to the present enjoyment of that right, as in order to secure it for the future. There is however, but one practical question of importance, connected with this subject, in relation to which, according to my views, any doubt can be raised; and that is whether Seigniors, having the *droit de banalité*, have as an incident, the right to prevent all other persons from building grist mills within the limits of their seigniories; and to cause such mills, if erected without their consent, to be demolished.

The existence of this incidental right has been very positively denied by the learned council for the crown; and I, therefore, think it necessary to show that the authorities on this subject are so numerous and weighty as really to leave no room for doubt on the point.

I deem this citation of authorities the more necessary, because the incidental right controverted (which is not one of a favourable nature) cannot be supported by any positive text of law.

Moreover some of the authors generally cited in support of it, were spoken of in disparaging terms at the argument. It will not, however, be denied, that, on this subject, the opinion of Henrion de Pansey, Hervé and Merlin are of the greatest weight; and in addition to these, there will be found, in the following list, the names of many of the esteemed commentators upon our own Custom, and of many others of the old writers usually cited as authorities.

Henrion de Pansey, vol. 1, p. 174, says :—" Les effets de " la banalité consistent principalement en deux points. Le " premier, de contraindre les sujets de venir au moulin-ba- " nal ; le second, d'interdire à toutes personnes de cons- " truire dans l'enclave de la banalité, des moulins, etc."

Same vol. p. 216 : " Ceux qui sont assujettis, soit par " convention, soit par l'autorité de la loi, à moudre à tel " moulin, ne peuvent pas en bâtir même sur les eaux qui " sont dans leurs domaines et qui leur appartiennent, parce- " que ce serait enfreindre la convention ou choquer la loi, " parce que l'assujettissement à la banalité de moulin emporte " naturellement l'abdication de la faculté d'en construire."

Hervé, 5 vol. p. 493 :—" Un troisième effet de la banalité " de moulin est de donner au Seigneur droit d'empêcher de " construire d'autres moulins dans les limites de sa banalité." Hervé refers to Basnage et Poulain-Dupare, who report three *arrêts* on this subject.

Merlin—Rép. verbo moulin, vol. 21, p. 9, art. 1.—" Règles " du droit commun sur la faculté de construire des moulins " sur son propre fonds."—" Il faut distinguer le cas où le " lieu dans lequel il s'agit de savoir, si un particulier qui " peut bâtir un moulin, est soumis à une banalité, d'avec

" le cas, où ce lieu est parfaitement libre. *Dans le pre-*
" *mier cas, personne ne peut construire un moulin sans la*
" *permission du Seigneur de la banalité.* Dès qu'un moulin
" est banal, il n'est plus permis de rien faire qui tende à
" priver le propriétaire des profits qui doivent lui en venir.
" Or n'est-ce pas donner une atteinte manifeste que de se
" permettre la construction d'un autre moulin quel qu'il
" soit ? "

Championnière, p. 616, no. 364 :—" La restriction la plus
" large et la plus absolue du droit de construire moulin ré-
" sultait des banalités ; *là où le Seigneur avait droit de mou-*
" *lin banal, nul autre n'en pouvait construire.*"

See also—Pocquet de Livonière, p. 608 ;—Fréminville, vol. 2, p. 355 ;—Bacquet, Droits de Justice, vol. 1, p. 428, ch. 29, no. 4 ;—Despeisses, vol. 3, p. 229 ;—Ancien Denisart, verbo banalité, no. 5, p. 255 ;—Lacombe, same word, no. 7 ;—Guyot, Répertoire, verbo moulin, p. 685 ;—same, verbo banalité, p. 112 ;—Nouveau Denisart, same word, vol. 3, p. 150, § 4, no. 18 ;—Charondas, ed. of 1578, Commentary on Custom of Paris, p. 117.

Brodeau, Commentary on Custom of Paris, ed. of 1658, on art. 72, p. 770, no. 6 :—" Le Seigneur étant *fondé en*
" *titre valable* de banalité de moulin soit à eau ou à vent,
" il peut contraindre tous ses banniers d'y venir moudre, les
" empêcher d'aller ailleurs, *ni de construire aucun moulin*
" *à blé dans l'étendue* de sa banalité ; *et s'ils en ont fait bâtir*
" *sans son consentement et sa permission, les contraindre de*
" *les démolir, etc.*"

Duplessis, Treatise on Custom of Paris, vol. 1, p. 66, on art. 71 :—" L'effet de la banalité consiste en trois points.
" Le premier, de contraindre les sujets de venir au moulin,
" etc. ; le second, de les empêcher d'en construire dans son
" ressort, etc."

Ferrière, Custom of Paris, vol. 1, p. 1038, art. 71, glose 1re, no. 13 ;—Le Camus, on same article, vol. 1, Custom of

Paris, ed. in-folio, p. 1047, no. 4 :—" L'effet de la banalité " est qu'en attribuant le droit au Seigneur, il donne en même " temps l'exclusion à tous les autres ; ainsi celui qui a ba- " nalité de moulin peut empêcher tous les autres d'en bâtir " dans toute l'étendue de son territoire."

Le Maistre, Commentary on Custom of Paris, same art. p. 92 ;—Auzanet, Commentary on same Custom, p. 52.—

The judgments of our own courts, on this point, are in perfect harmony with the opinions of the authors above cited, as will be found on reference to the following cases, in each of which the incidental right in question was formally maintained.

The first decision on this point appears to have been rendered on 6 Sept. 1774, Court of Common Pleas of Quebec.

No. 74.—Dame Geneviève Alliée. for her minor son, Seigneur de la seigneurie de la rivière du sud vs. Michel Blais.

The words of the judgment are : " La cour déclare le moulin du dit Michel Blais être indûment établi, et en conséquence condamne le dit Blais à démolir son dit moulin et à le dénaturer de façon qu'il ne puisse servir à moudre du grain, etc."

This judgment was confirmed by the court of appeals on 23rd December 1777.

2d case.—Three Rivers: Munro *et al.* vs. Lamy, judgment 27 Jan. 1820, confirmed in appeal, 30 April 1821.

3rd case.—Montreal: Baroness of Longueuil vs. Charles Fréchette, judgment 10 April 1820.

4th case.—Montreal: Seminary of Montreal vs. William Fleming, judgment 20 June 1852, chief justice Reid, justices Foucher and Pyke.

5th case.—Quebec: Noel vs. Langevin, judgment 20 Oct. 1823, chief justice Sewell, justices Kerr, Perrault and Bowen.

6th case.—Three Rivers: Delery vs. Claugh, judgment 23 Sept. 1839.

7th case.—Quebec: Larue vs. Dubord, judgment 25 nov. 1850.

8th case.—Montreal: Monk vs. Morris, judgment 22 June 1852.

Thus we know of ten decisions of our own tribunals confirming the right in dispute. Three judgments in the district of Montreal; a like number in the district of Quebec; two in the district of Three Rivers; and in fine two judgments of the provincial court of appeals.

As to the jurisprudence in France on this subject, it is sufficient to quote the following passage from Merlin.—Répertoire, verbo moulin.—"On cite néanmoins un très-ancien arrêt du parlement de Paris qui a jugé le contraire "(that is against the right now claimed, the date of the "*arrêt* being in April 1301), mais c'est une décision isolée "qui dans des temps plus modernes, *n'a pas trouvé un seul* "*partisan*, et que le parlement de Paris lui-même a renversée "par un arrêt du 2 août 1558."

The foregoing authorities and decisions must be considered as establishing beyond controversy the incidental right now particularly under consideration.

PART 4.

Unnavigable Rivers.

Division of the Subject.

§ 1.—Under the ancient law of France, unnavigable rivers were private property.

§ 2.—The grants *en fief*, in Canada, included unnavigable rivers within the limits of the land granted.

§ 3.—The right to those rivers passed, not as incidental to the right of *haute justice*, but as accessory to the land granted. Authorities on this point.

§ 4.—Land passes as completely under a grant *en censive*, as it does under a grant *en fief*, excepting as to honorary rights; the right to unnavigable rivers is not an honorary right; *Censitaires* therefore entitled to unnavigable rivers within limits of their own lands.

§ 5.—This conclusion appears to be at variance with the state of things which existed in France, at the time of the french Revolution. Observations on this discrepancy.

§ 6.—Notice of ancient authorities cited in support of the claim of the Seigniors as *Seigneurs féodaux*.

§ 7.—Notice of the proposition that the courts under the *code civil* and the majority of the modern french writers, are opposed to the claims of the riparian proprietors, and of two other propositions advanced on the part of the Seigniors.

§ 8.—Conclusion.—§ 1. There has been much controversy as to whether under the *code civil* even unnavigable rivers are susceptible of being private property; but whatever doubts may exist as to the bearing of the modern law of France on this subject, it is indisputable that, before the Revolution of 1789, unnavigable rivers in France were universally held as private property, subject to certain easements and servitudes in favour of the public, and that the state did not pretend to have any right of ownership therein.

Henrion de Pansey, writing in 1789, says: "*Les rivières* "*sont absolument dans le commerce*, le propriétaire peut les

(1) I confine my observations to the case of unnavigable rivers, as the questions relating to navigable rivers present comparatively little difficulty.

" vendre, les donner, les échanger, les affermer, cela se voit " tous les jours." (1)

This is one of the few points, on the subject of unnavigable rivers, respecting which there can hardly be said to be any difference of opinion among the ancient writers ; to use the words of Raymond Bordeaux : " Quant aux anciens " jurisconsultes, ils n'avaient jamais songé à une pareille " question, et ils ne paraissent pas avoir douté de la pos- " sibilité de la propriété." (2)

It is also, I think, well established that these rivers were, for the most part, held by the Seigniors in France, either *hauts-justiciers* or *féodaux*, as their private property.

§ 2.—Such being the case, it appears to me to be clear, that when the king of France made grants of land in Canada, the unnavigable rivers within the limits of the land so granted were included in the grant.

It is needless however to dwell upon this point, as it is admitted both by the counsel for the Seigniors and by the counsel for the crown.

The pretention of the Seigniors is that the unnavigable rivers passed to them with their seigniories, and that they still continue to hold them as their own property, notwithstanding the subgrants made by them of the lands through which those rivers flow. The counsel for the crown contend on the other hand, that as the unnavigable waters passed with the land from the crown to the Seignior, so afterwards they passed in like manner from the Seignior to the *Censitaire*.

§ 3.—As most of the grants of seigniories in Canada included the right of *haute justice*, it becomes necessary for the decision of the highly important point thus in controversy, to ascertain whether these rivers passed to the Seigniors, in the first instance, as an accessory to the land, or

(1) Henrion de Pansey, Dis. Féo. des eaux, vol. 1, p. 669, § 13.
(2) Raymond Bordeaux, p. 75. See also Daviel, vol. 2, p. 12.

as an incident to the right of *haute justice*. The importance of this enquiry is obvious, not only as between the Seigniors and their *Censitaires*, but also as between the Seigniors and the crown; between the Seigniors and their *Censitaires*, because if the ownership of the rivers be an incident to the right of *haute justice*, it is clear that that ownership could not have passed from the Seigniors to the *Censitaires*, as the latter never had or could have the right of *haute-justice*; as between the Seigniors and the crown, because if the right to the rivers be an accessory to the right of *haute justice*, it may be contended that the Seigniors have no longer the principal right, (1) and therefore, that they have lost the incidental right to the rivers.

On this question as to the ownership of unnavigable rivers, the most conflicting views are expressed by the old french jurists; some maintaining that they belonged to the Seigniors *hauts justiciers*; others that they were the property of the Seigniors *féodaux*; and a third class holding that the ownership of these rivers wholly depended on title and possession.

After giving to this subject the utmost care, I feel satisfied that there was not throughout those parts of France, known as *les pays coutumiers*, any general law giving either to Seigniors *hauts-justiciers*, or *féodaux*, or to any other class of persons, an exclusive right to unnavigable rivers. (2)

The authors, who are generally relied upon as holding that the Seigniors *hauts-justiciers* in France were entitled to the unnavigable streams within their jurisdiction, are no doubt numerous and deserving of respect; but it will be found that many of them wrote with especial reference to

(1) Merlin, Questions de droit, cours d'eau, vol. 4, p. 396, § 1,—Brussels, ed. of 1829.

(2) Daviel, vol. 2, p. 12. "Et au milieu de ce conflit d'opinions contradictoires, "la seule conclusion qu'on puisse adopter, c'est qu'on ne peut établir là-dessus aucune "règle générale, et que tout cela dépend des titres et de la possession." See also, Ancien Répertoire, verbo rivière.—"On demande si les rivières qui ne sont pas na- "vigables appartiennent aux riverains ou aux Seigneurs. Mais il parait qu'on "ne peut établir à cet égard aucune règle générale et que tout dépend du titre et "de la possession."—See also other autorities cited by Championnière, p. 698.

the *pays de droit écrit*. As instances, I may mention Henrys (1), Boutaric (2), Despeisses (3), Bretonnier (4), LaRocheflavin (5), Salvaing (6) and Serres (7). But those authors, who distinguish between the *pays de droit écrit* and the *pays coutumiers*, are far from asserting that any such rule existed in the *pays de coutume*. Guyot, who wrote in 1738, after observing that the opinion of Bacquet (which is opposed to the pretentions of the Seigniors) is contrary to the *pratique universelle* in France, adds : " Ès pays de " droit écrit, communément elles (ces rivières) appartien- " nent aux *hauts-justiciers*. *Dans les pays de coutume* elles " sont généralement *un droit de fief* (8)." Hervé, who wrote in 1785, in the fourth volume of his work which purports to be an *exposition de la doctrine féodale particulièrement appliquée à la coutume de Paris*, observes : " Il est à re- " marquer que les rivières sont *en général un droit de fief et* " *non de justice*." (9) And Henrion de Pansey, who wrote in 1789, in discussing the question as to whether unnavigable rivers belong to the Seignior *haut-justicier* or to the Seignior *féodal*, remarks : " Cette question qui parait décidée en " faveur du haut-justicier par la jurisprudence des par- " lements *du droit civil*, *partage les auteurs des pays de* " *coutume* ; (10) but in the following part of the same section, he supports with his own opinion, which doubtless is entitled to great weight, the right of the *Seigneurs féodaux*. We thus see that Hervé and Henrion de Pansey, who both wrote during the very last days of the existence of the feudal tenure in France, and who directed their atten-

(1) Henrys was *avocat du Roi au bailliage de Fores*.
(2) Boutaric, professor of law in the university of Toulouse.
(3) Despeisses, *avocat de Montpellier*.
(4) Bretonnier devoted himself principally to the study of the Roman law and the usages *des pays de droit écrit*. See page 9 of the notice which precedes his work "Recueil de Bretonnier,"
(5) LaRocheflavin at one time *conseiller au parlement de Paris*, afterwards *président aux requêtes du Palais à Toulouse*.
(6) Salvaing, *président de la chambre des comptes en Dauphiné*.
(7) Serres, law professor at Montpelier
N. B. Fores, Toulouse, Montpelier and Dauphiné were all "*pays de droit écrit*."
(8) Guyot, Traité des fiefs, vol. 6, p. 664. See same vol. p. 666.
(9) Hervé, 4 vol p. 251.
(10) Henrion de Pansey, vol. 1, p. 656.

tion specially to this point, concur with Guyot and many other esteemed writers on the feudal law, in asserting that, in the *pays de coutume*, unnavigable rivers belonged to the feudal Seigniors and not to the Seigniors *hauts-justiciers*.

In so far as Guyot, Hervé and Henrion de Pansey are opposed to the claims of the *Seigneurs hauts-justiciers*, they agree with Bacquet (1), Loyseau (2), Domat (3), Pothier (4), Souchet (5), Merlin (6), and several authors of less note, cited by Championnière, all of whom, either expressly or impliedly, deny that there was any general rule of law, which gave either to the *Seigneurs hauts-justiciers* or to the *Seigneurs féodaux*, an exclusive right to the unnavigable rivers within their *fiefs* or jurisdictions respectively.

In considering the conflicting authorities and argument on this subject, we must bear in mind that the *Censitaires* claim merely the water courses on their own lands; whereas the Seigniors claim, not only the water courses on their own lands, but also those on the lands of their *Censitaires*.

The Seigniors therefore claim an exclusive privilege, which cannot be maintained, unless it be founded upon some well established rule of law; and even supposing the claim of the Seigniors as *Seigneurs hauts-justiciers* to have a preponderance of authority in its favour (which in my opinion it certainly has not, in so far as regards *les pays coutumiers*,) still a mere preponderance of authority, can not be deemed equivalent to a rule of law, for the purpose of giving one class of persons a privilege against all others.

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(1) Bacquet, Droit de justice, ch. 30, no. 25.
(2) Loyseau, des seigneuries, ch. 12, no, 120 and no. 131.
(3) Domat, lois civiles, liv. 2, tit. 6, sec. 1, page 174.
(4) Pothier, Propriété, no. 53.
(5) Souchet, Coutume d'Angoumois, tit. des fiefs, ch. 1, art. 39, no. 44.
(6) Merlin, Questions de droit, verbo pêche. All the above authorities and many others having the same tendency, will be found collected in nos. 371, 398 and 399 of Championnière's work. See also other authors cited by Prudhon, Dom. pub. vol. 3, p. 286;—and also Duplessis on Custom of Paris;—Traité des fiefs, liv. 8, ch. 2, vol. I, page 66;—LeMaistre on art. 71, Custom of Paris. I do not think it necessary to transcribe the above authorities here, as they almost all have been already quoted.

I am therefore clearly of opinion, that even those Seigniors, whose titles include the *droit de justice*, cannot claim the unnavigable rivers within their grants, as an incident to the right of *haute justice ;* but that they became the proprietors of those rivers, as part of the property to which they were entitled under their grants. Their rights to their land, and to the unnavigable streams watering that land are precisely of the same nature and of the same origin ; they are proprietary rights held under the *tenure en fief.*

This view is in accordance with the opinions of Hervé and of Henrion de Pansey. The latter says : " Le Seigneur " féodal a la propriété des rivières, puisqu'on les regarde " comme appartenantes à la classe *des propriétés privées* " lors de la réunion présumée de ces *propriétés* dans sa " main, (1) etc.," and Hervé, in his 7 vol. p. 364, says : " On n'a la seigneurie, ou la propriété des eaux *que parceque'on a celle du sol qu'elles baignent ;* c'est là un tout indivisible. *La distinction des eaux et du territoire est véritablement une distinction futile et inadmissible.*"

Being then, as I am, of opinion, that the grants *en fief* in Canada included the unnavigable waters within the limits of those grants, I, of course, hold, that the unnavigable rivers, within the domain and unconceded land belonging to a Seignior, are still his property.

This point admits of no doubt, but brings us to one, that is by no means free from diffienlty ; and that is, as to whether the grants *en censive*, made by the Seignior, include the unnavigable streams, within the land granted, in the same way as they are held to have been included in the grants *en fief* made to the Seigniors. (2)

§ 4.—It must be admitted, that the *land* passes, as completely under a grant *en censive*, as it does under a grant

(1) Henrion de Pansey, vol. 1, p. 660.

(2) I speak of contracts which make no express provision on the subject. Contracts which expressly either exclude or include water courses, according to my views, present no difficulty.

en fief. In both cases the grantor retains a *domaine direct*, and in both cases the grantee receives the *domaine utile.*

Henrion de Pansey, (1) speaking of the *domaine utile* acquired under a *bail à cens*, says : " En général le Censi- " taire peut disposer à son gré du fonds censuel, il peut y " bâtir, renverser les édifices qui y sont construits, en ex- " traire les minéraux qui y sont renfermés, en faire des " promenades, convertir les étangs en terres labourables, " et les terres labourables en étangs ; il a *la propriété ab-* " *solue du domaine utile et il peut en user comme il juge à* " *propos.* "

Pothier defines the *domaine utile* thus : " La seigneurie " utile comprend le droit de percevoir toute l'utilité de la " chose, en jouir, user et disposer à son gré, à la charge " néanmoins de reconnaitre le Seigneur direct." (2)

It is true that the *domaine utile* of a Seignior is in one respect more extensive than that of a *Censitaire*, for the latter, according to the words of Pothier, " n'a que *l'utilite pé-* " *cuniaire de la chose*, et ne peut se rien arroger de ce qui " consiste plus en honneur qu'en utilité pécuniaire ;" whereas to use again the words of the same author : " La sei- " gneurie utile de celui qui tient un héritage à titre de fief, " comprend *même les droits honorifiques attachés à l'héritage* " *qu'il tient en fief.* " (3)

In short, the grantee *en censive* has the land and all rights attached to it of merely pecuniary value ; whereas the grantee *en fief* has the same rights, and, in addition, those of an honorary character.

In order, then, to determine whether water courses pass under *a bail à cens*, it would seem to be necessary to ascertain simply, whether the right to such rivers ought or ought not to be deemed an honorary right ?

(1) Henrion de Pansey, vol. 1. p. 285.
(2) Pothier, vol. 5, p. 4 ;—see also Dumoulin, *fiefs*, tit. 1, § 51, glos. 2, no. 29 ; Prudhomme, ch. 17, p. 95.
(3) Pothier, vol. 5, page 4.

Now I am not aware that any writer upon the feudal law has ever asserted that there is any thing more honorary in the right to water than in the right to dry land.

The *droit de chasse* was doubtless an honorary right, *droit honorifique*, and, under the laws of France a mere *roturier* was not allowed to exercise that right on his own property, even held *en franc-alleu*. (1)

The *droit de pêche*, on the contrary, certainly was not deemed a *droit honorifique*.

Hervé, after a careful examination of the subject, concludes thus : " Il est donc vrai que la pêche n'est pas un droit es- " sentiellement féodal. Cependant comme ce droit est le " plus communément exercé par les *Seigneurs de fiefs*, tant " parce que les propriétés *féodales sont les plus nombreuses et* " *les plus étendues*, que parce que les concessions *à cens em-* " *brassent rarement la pêche*, ce même droit tient presque " toujours à la féodalité *dans l'usage et par le fait*. Ainsi, " c'est *un droit de propriété*, auquel un caractère *de féoda-* " *lité* se mêle *le plus ordinairement*." (2) And Henrion de Pansey, although he speaks of the *droit de pêche* as belonging to Seigniors—says that the *droit de pêche* differs from the *droit de chasse* in this essential point, that—" le droit de " chasse est purement honorifique ; et tout le monde est d'ac- " cord que la pêche est un droit utile et domanial." (3)

As to the other advantages resulting from the ownership of water courses, such as the right to use them for agricultural and manufacturing purposes, it certainly cannot be pretended that they consist *plus en honneur qu'en utilité pécuniaire*.

The foregoing authorities and remarks establish, I think, these three propositions :—1stly. That the owner of a *fief* is entitled to the unnavigable rivers within the limits of his

(1) Pothier, Propriété, no. 37.
(2) Hervé, vol. 7, p. 369.
(3) Henrion de Pansey, vol. 1, p. 671.

grant, as an accessory to the soil ; or as Hervé says : *parce qu'il a la propriété du sol qu'elles baignent*, and as part of the *domaine utile* vested in him by the *contrat d'inféodation*. 2dly. That the *domaine utile* which is transferred by a *bail à cens*, is as extensive as the *domaine utile* held under a grant *en fief*, excepting only, as regards those rights which consist *plus en honneur qu'en utilité pécuniaire*.—3rdly. That a right to unnavigable rivers cannot be considered as one of the last mentioned rights : *la distinction des eaux et du territoire*, being as Hervé says, *véritablement une distinction futile et inadmissible.*

The three foregoing propositions, if well founded, (and I am satisfied they are so) justify the conclusion, that *Censitaires* are entitled to the unnavigable rivers within the limits of their own lands.

§ 5. On the part of the Seigniors, however, it is contended that, as a matter of fact at least, it is certain, that in France Seigniors owned the rivers even that watered the lands of their *Censitaires ;* and that it is impossible to reconcile that fact with the doctrine that the water passes with the land from the Seignior to the *Censitaire*, in the same way that it passed, with the land, from the Crown to the Seignior.

The fact alleged on behalf of the Seigniors (which I feel to be one of very great importance,) is far from being a settled point, and is still regarded as an undecided question in France. I must admit, however, after a careful examination of all the works on this subject to which I have had access, that there seems good ground for believing that the unnavigable rivers in France, even *dans les pays coutumiers*, were not, generally speaking, owned by the *Censitaires* whose lands were watered by them ; but, on the contrary, that those rivers generally, although not universally, belonged to the *Seigneurs féodaux.*

The apparent discrepancy between the state of things, which it would seem existed in France, at the time of the

Revolution of 1789, and what I consider was, even then, the abstract rule of law on the subject, may perhaps be explained in some one of the modes suggested by the learned presiding chief justice, who dwelt fully upon this point ; or it may, perhaps, be accounted for by the change that has taken place in the nature of the *bail à cens*, since the great mass of the lands in France were conceded.

At that time, the *domaine utile* of a *Censitaire* was hardly more extensive than the right which a tenant now has, under a *bail à ferme ;* the *Censitaire* could not remove the buildings on his land, nor even make any important change in the mode of cultivation, he was not in fact the owner of the soil. (1) It was not until the time of Dumoulin, that the *bail à cens* commenced to be viewed in the light in which we now regard it, and we have seen that, before the end of the feudal tenure in France, the estate of the *Censitaire* was described by Henrion de Pansey, as *la propriété absolue du domaine utile.*

The same principle therefore, which gives the unnavigable rivers in Canada to the *Censitaires*, would have precluded the great mass of the *Censitaires* in France from any claim to them.

In one word, *Censitaires*, in Canada, were from the very first really proprietors of their lands ; whereas the *Censitaires*, in France, were not so at the time when the great bulk of the lands in France were conceded *en censive.*

The change which, in later years, took place in France in the nature of the *bail à cens*, of course, gave to the *Censitaires* a higher estate in their lands than they had before ; but could not enable them to advance a claim to water courses, which had remained in the possession of the Seignior at the time the grants *en censive* were made.

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(1) Championnière, p. 591 ;—Dumoulin, Fiefs, t. 1, § 51 ;—glos. 2, no. 29.

Assuming however for the argument, that the unnavigable rivers in France were generally in the possession of Seigniors, still with the knowledge which we possess as to the origin and growth of seigniorial rights, I do not think we would be justified in inferring, from the fact of such possession, that the Seigniors had acquired those rivers under a rule of law upon which we could now act in Canada.

Such an inference would be the less justifiable, when we bear in mind that the existence of any general rule of law, in France, to that effect, is, as I have already observed, denied by Bacquet, Loyseau, Domat, Pothier, Souchet, Merlin and many others ; and it appears to me impossible that any such rule of law could have existed in France, without its being known to those men ; or that, if it had been known to them, they could have written as they have done.

§ 6. It will moreover be found that but very few of the authors cited in support of the pretention of the Seigniors, can be understood, as affirming the existence of any such *general rule of law* in favour of the *Seigneurs féodaux.*

I am not now to be understood as alluding to the writers who support the claims of the *Seigneurs* as *hauts-justiciers.* I have already explained the grounds upon which I deem it impossible to assert that, under the *Coutume de Paris*, Seigniors *hauts-justiciers* were entitled to all the waters within their jurisdiction ; and the authorities which tend to cause water courses to be regarded as a *droit de justice*, are, not only, not in favour of the claim of the Seigniors as *Seigneurs féodaux*, but are directly adverse to that claim. Putting aside, therefore, the writers who are in favour of the *Seigneurs hauts-justiciers*, the following are, I believe, the authors cited as supporting the claims of the Seigniors as *Seigneurs féodaux.* (1)

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(1) See Mr. Cherrier's factum, pp. 53, 54.

Coquille, Loysel, Chassanée, Legrand, Chopin, Salvaing, Lebret, Poulain-Dupare, Lefèvre de la Planche, Guyot, Hervé, Henrion de Pansey. (1)

I shall now refer very briefly to the above authorities in detail, in order to show that but few of them can be cited as affirming the existence of any general rule of law, either throughout customary France generally, or the Custom of Paris in particular, under which owners of *fiefs* could claim water courses within the lands of their *Censitaires*.

Coquille is doubtless a high authority; but it must be borne in mind that the work quoted from is a commentary on the Custom of Nivernois, which differs very materially from the Custom of Paris, as will be seen by reference to the three chapters, *titres*, in the Custom of Nivernois, relating to *rivers*, &c., *forests* and *banalité*, &c. As regards the matter now under consideration, it is sufficient to observe that the Custom of Nivernois expressly speaks of bannal rivers, *rivières bauales*, whereas there is not one word on this subject in the Custom of Paris, although it bears date 45 years after that of Nivernois. Coquille, after observing that unnavigable rivers were *reputées publiques*, under the Roman law, adds: "Mais en France les Seigneurs les tiennent pour la pluspart en propriété domaniale."

I understand this passage as meaning simply, that, although under the Roman law, the rivers in question were deemed public property, yet that, in France, they were considered private property, and that they were generally in the possession of the Seigniors. The expression "*les Seigneurs les tiennent pour la pluspart en propriété domaniale*," is not one which such an accurate writer as Coquille would have used, had he intended to say that Seigniors *féodaux* had, by law, an exclusive right to all unnavigable rivers within their *fiefs*, whether upon conceded or unconceded land.

(1) I do not include the quotation from the *Répertoire de Guyot* in this list; because, although the article *Moulin*, in that work, concludes in favour of the Seigniors, the subsequent article *Rivière*, in the same work, is against them.

Loysel remarks merely: "Les petites rivières et chemins " sont aux Seigneurs des terres et les ruisseaux aux parti- " culiers tenanciers" (1); and cites in support of this opinion Bouteiller, *Somme rurale*, (which, it is to be observed is in favour of the Seigniors *hauts-justiciers*,) and the passage from Coquille to which I have already adverted.

With respect to Chassanée and Legrand, (two of the other authors on the list) it is sufficient to observe, that the former wrote with reference to the Custom of Bourgogne and that the latter is a commentator upon the Custom of Troyes; both of which Customs speak expressly of bannal rivers (2) and, in that respect, differ from the Custom of Paris.

Chopin is quoted by Championnière as one of the authors who maintain that the ownership of unnavigable rivers is regulated exclusively by title and possession, and the passage from Chopin, in Championnière, shows clearly that such was the opinion of the former.

The opinion of Salvaing (who must, I think, be considered as speaking of what was law in the *pays de droit écrit* rather than in the *pays coutumiers*) (3) seems to be in favour of the *Seigneurs hauts-justiciers* and not of the *Seigneurs féodaux*. (4) " Et ces rivières appartiennent en " propriété aux Seigneurs du territoire où elles coulent par " la Coutume de France attestée par Bouteiller." Now the Custom of France, as attested by Bouteiller, is in favour not of the *Seigneur féodal*, but of the *Seigneur haut-justicier*. The observations of Salvaing, in the page following that just quoted from, show most plainly that he did not imagine that there was any exclusive rule of law on this subject in favour of Seigniors.

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(1) 1 Loysel, p. 275.
(2) As to Custom of Bourgogne, see Richebourg, vol. 2, p. 1180; as to that of Troyes, see same author, vol. 3, p 252.
(3) Salvaing was Seignior of the place of that name, and *premier président de la chambre des comptes du Roi en Dauphiné*, (*pays de droit écrit*.)
(4) Salvaing, page 216, ed. of 1731.

Lebret and Poulain-Duparc speak positively of unnavigable rivers as belonging to Seigniors ; but they do not advert to any general law on the subject ; nor do they give any reason in support of their opinions.

Lefèvre de la Planche does not express any opinion of his own, but remarks that Bacquet who maintained that Seigniors had no greater rights in those rivers than other persons, *s'écarte de l'avis des autres auteurs en ce point.*

Guyot (1) gives very satisfactory reasons in support of the opinion, that, in the absence of any express rule of law, the claim of the *Seigneur féodal* should be considered superior to that of the *Seigneur haut-justicier*, and adds that, in *les pays de coutume, ces rivières sont généralement un droit de fief.* This author does not however discuss the question whether a Seignior can be deemed the owner of the water courses upon the lands of his *Censitaires.*

The opinions of Hervé and of Henrion de Pansey, on a question of this kind, are entitled to the highest consideration ; and they are, in so far as regards the mere historical fact of possession, directly in favour of the claim advanced by Seigniors ; but it is to be remembered that those learned writers do not, in any way, countenance the idea, that there was any law which gave Seigniors an exclusive right to the unnavigable rivers within their seigniories. The passages already cited from their works, sufficiently establish, that, in their opinion, the owners of *fiefs* were entitled to the water courses within those *fiefs* simply as accessories to the land upon which they flowed.

The authors, above referred to, establish, I think, that, as a matter of fact, the Seigniors in France were generally before the Revolution in possession of the rivers within their *fiefs* ; but it does not seem to me that they attempt to prove, or have any tendency to prove the existence of any general

(1) Vol. 6, p. 633 and seq.

rule of law on this subject ; and more particularly any law, under which, *Seigniors, within the Custom of Paris, could claim the unnavigable rivers upon the lands of their Censitaires ; which is really the point in controversy.*

In the course of the foregoing remarks, I have laboured to keep prominently in view the difference between the question, whether Seigniors, in France, were generally in possession of unnavigable rivers ; and the question, whether there was any general rule of law, giving to Seigniors, or to any other class of persons, an exclusive right to rivers of that kind. In connection with this point and with a view to indicate the practical importance of not confounding these two questions, I may observe that, although the mode in which the Seigniors, in France, originally acquired the ownership of the rivers which they held, may not after the lapse of centuries, have been of any importance, in so far as regarded the validity of *their own titles* (for a title by prescription is as valid as any other title) ; yet, that when the possession of those Seigniors is urged in support of the claim of the Seigniors here to rivers of the same description, it then does become *essential* to know, whether the possession of the french Seigniors was really the result of a rule of law or of some other and different cause.

Before closing this brief notice of the long and valuable list of authorities from the old french law, for which we are indebted to the industry and research of the learned counsel for the Seigniors, it may be remarked that that list does not contain the names of any of the commentators upon our own Custom, the Custom of Paris.

If it be said that the Custom of Paris is silent on this subject, I may ask, *is not that silence itself of great importance ?*

Several Customs anterior in date to the Custom of Paris, expressly recognise the rights of Seigniors to unnavigable rivers.

At the *redaction* of one Custom at least, (1) the Seigniors claimed an exclusive right to unnavigable rivers, and their claim was, after deliberation, rejected. We know that at the *redaction* of our own Custom, several hundred Seigniors were present, and the *procès-verbal* of the deliberations upon that important occasion, shows the number and variety of the claims that were advanced by Seigniors, and yet we do not find either in the text of the Custom, or in the statement of the rights to which Seigniors *hauts-justiciers* were entitled (2), or in the *procès-verbal* of the deliberations, even one word tending to show, that under that Custom, Seigniors either *hauts-justiciers* or *féodaux* had an exclusive right to unnavigable rivers.

The Custom of Paris provides in a manner truly remarkable, considering the period at which it was framed, for the freedom of property, (3) and for the protection of the interests of the lower classes, (4) and not only is there no provision in it, under which any class of persons could claim an exclusive right to rivers, but, on the contrary, the article 187 furnishes an argument for the denegation of any such right.

Under our Custom, "qui a le sol a ce qui est au-dessus et au-dessous." (5) This rule is in effect the same as the maxim of the english law, "that he who possesses land possesses also that which is above it"; and it is under that rule, that, whenever the english law prevails, water courses are held to pass with the land upon which they run.

The eminent men by whose advice the Custom of Paris was, in preference to so many others, extended to the french colonies, were influenced, one may reasonably suppose, in

(1) Championnière, pp. 622, 640, and Richebourg, 4 vol. p. 708.
(2) See Bacquet, vol. 1, p. 2. "Articles concernant ces droits de justice, haute, moyenne et basse, contenus au cahier dressé lors de la rédaction de la nouvelle Coutume de Paris."
(3) *Vide ex gr.* art 186. "Droit de servitude ne s'acquiert par longue jouissance, quelle qu'elle soit, sans titre, encore que l'on en ait joui par cent ans, mais "la liberté se peut réacquérir contre le titre de servitude par trente ans."
(4) *Vide ex gr.* art. 71.
(5) Le Camus on art. 187, 2 vol. G. C. p. 1573.

such preference, by the considerations to which I have just adverted. They gave the colonists the feudal system; but it was the feudal system free from at least its worst abuses, and reformed in a spirit not only of justice but of liberality; and the judges of this court would commit not only a grave error, but a grievous wrong, were they, in the absence of special legislation for the colony, to subject the seigniorial lands of Lower Canada to any burthen, however distinctly recognized by other Customs, if it have not indubitably the sanction of the Custom of Paris which alone has force of law here.

§ 7. I do not now propose to review the authorities from the modern law of France that have been cited by the learned counsel for the Seigniors. The task would demand much greater powers than I possess, and would require more leisure than I have at my command. Moreover the controversy in France turns in a great degree upon provisions of the *code civil*, to which we have nothing analogous in our law. I would not wish however that, from my silence in this respect, it should be inferred that I admit the proposition that has been advanced, namely, that, at present, not only the courts, but the majority of authors in France are opposed to the claims of the riparian proprietors. (1) In order to show that it is not without reason that I refuse my assent to that proposition, I will give a few passages from the works of two very highly esteemed french authors, who, being among the latest who have written on this subject, have had the advantage of seeing and weighing almost all the arguments and opinions that have been adduced before us in support of the claims of the Seigniors. The works to which I refer are the Treatise of Raymond Bordeaux publised in 1849, and the supplement by Garneau (in 1851), to his former work "Régime des Eaux." Raymond Bordeaux, p. 75, no. 37, observes:

"L'opinion qui fait les petits cours d'eau la propriété des

(1) See Mr. Cherrier's factum, p. 85

" riverains, est assurément la plus ancienne et la plus vul-
" gaire. Si elle compte parmi ses défenseurs des jurisconsultes réputés : MM. Pardessus, Toullier, Duranton, " Troplong, Garnier, Daviel, Dupin, Chardon, Championnière, Sirey, Devilleneuve, (1) elle peut aussi passer pour " être l'opinion publique. Tous les propriétaires, tous les " praticiens n'ont jamais douté que les petites rivières ne " dépendissent les fonds qu'elles arrosent, et jusqu'à ces " derniers temps où la question qui nous occupe est sortie " des arcanes de la science et s'est révélée au public, un " grand nombre de contrats disposaient de la propriété de " ces cours d'eau."

At no. 40, the same author continues thus :

" Le premier argument qui se présente est un argument " historique. Merlin et Henrion de Pansey ont accrédité " dans la jurisprudence moderne l'opinion que les Seigneurs " étaient propriétaires des petites rivières. Personne ne " s'étant donné la peine de vérifier l'exactitude de cette " prémisse, les décrets des 4 et 10 août 1789, qui firent " tomber la féodalité, furent invoqués des deux cotés.

" On a discuté longtemps sur ce terrain, lorsque l'opinion " qui servait de base, est devenue l'objet de doutes qui se " sont affermis depuis. De consciencieux travaux histo- " riques ont démontré que d'abord toutes les rivières, " grandes et petites, ensuite les rivières non navigables " seulement, étaient dans notre ancien droit, des propriétés " privées, et que l'opinion qui tendait à en faire la propriété " des Seigneurs avait été mise en faveur par les feudistes " au moment seulement de la chute de la féodalité. *Toute*

(1) " Voyez dans la nouvelle collection de M. Devilleneuve, tome 9, 2e partie, p. 337, " un relevé très-exact de tous les auteurs qui ont combattu pour ou contre. On peut " remarquer ici que les commentateurs du code civil ont soutenu généralement le " droit des riverains ; qu'au contraire les auteurs de traités généraux sur l'ensemble " du droit administratif se sont plutôt rangés du côté opposé, et qu'enfin, parmi ceux " qui n'ont traité que la question spéciale des cours d'eau, les jurisconsultes ont " apporté leur appui à la cause de la propriété privée, tandis que les ingénieurs se " sont constitués les champions de l'administration. C'est l'antagonisme de deux " doctrines opposées, le résultat de préoccupations différentes, la conséquence logique " des principes de deux écoles antipathiques."

" *discussion sur ce point est donc désormais impossible, et*
" *l'argument a perdu toute sa force contre les riverains.*"

The passage from Garnier, which I cite at length, is interesting not only as giving a succinct review of some of the latest works on this subject; but also as containing some valuable remarks on the french decisions relied on by the learned counsel for the Seigniors, and more particularly in relation to the *arrêt* of the *cour de cassation* of the 10th June 1846, upon which much stress has been laid. The author refers to the opinion expressed by himself at page 132, vol. 3 of his former work, and remarks:

" Depuis que nous avons publié cette opinion, la question
" de propriété des cours d'eau non navigables ni flottables
" a continué d'occuper les tribunaux et les jurisconsultes."

" Aux auteurs que nous avons cités, il faut ajouter M.
" Rives, conseiller à la cour de cassation, dans un travail
" extrait de son grand ouvrage sur les délits et contraven-
" tions, extrait publié en 1844; M. Dufour, Traité du droit
" administratif; M. Marcadé, Elements du droit civil, M.
" Cotelle, Droit administratif, M. Championnière, De la
" propriété des eaux courantes; M. Ratier et M. Raymond
" Bordeaux.

" De ces divers auteurs, MM. Rives et Ratier sont les
" seuls qui contestent la propriété privée; le premier attri-
" bue à l'Etat, au domaine public, la propriété des cours
" d'eau non navigables, ni flottables; le second, adoptant
" la doctrine d'un arrêt de cassation du 10 juin 1846, sur
" lequel nous reviendrons tout-à-l'heure, les range dans la
" classe des choses qui n'appartiennent à personne et dont
" l'usage est commun à tous.

" M. Dufour distingue le courant d'eau du lit qui le reçoit.
" Il considère le courant d'eau comme une chose qui n'ap-
" partient à personne, qui est commune à tous; mais il re-

" connait que la propriété du sol ou lit appartient aux ri-
" verains.

" Quant à MM. Championnière, Marcadé, Cotelle et
" Bordeaux, ils n'hésitent pas à attribuer aux riverains la
" propriété du lit et de l'élément qu'il contient. Leur con-
" viction est entière. Ils soutiennent leur opinion avec
" beaucoup de force et de talent. Le premier et le dernier
" ont donné, dans des traités spéciaux, de grands dévelop-
" pements à la thèse qu'ils ont adoptée.

" Nous ne connaissons que deux arrêts explicites sur la
" question qui nous occupe. L'arrêt de cassation du 10
" juin 1846 (1) et l'arrêt, très-bien motivé et en sens op-
" posé de la Cour d'Amiens, cassé par celui que nous ve-
" nons de rappeler.

" Malgré notre respect pour les décisions de la cour su-
" prême, nous ne pouvons nous rendre à la doctrine de son
" dernier arrêt, et, après une nouvelle étude de la question,
" nous persistons à regarder les riverains comme propriéé-
" taires ; notre conviction est complète ; nous croyons qu'elle
" serait partagée par le pouvoir législatif si la question lui
" était soumise, comme nous le souhaiterions pour terminer
" une controverse qui peut se prolonger longtemps encore.

" Nous dirons d'abord que l'arrêt précité a été rendu par
" défaut après une délibération de trois jours, et, si nous
" sommes bien informés, à la majorité rigoureuse des voix,
" avec la participation d'un président de chambre qui avait
" récemment quitté le ministère des travaux publics ; or,
" l'on sait que les agents attachés à ce ministère, les ingé-
" nieurs, les préfets, sont généralement opposés à la pro-
" priété des riverains, ne veulent voir dans les cours d'eau
" non navigables, ni flottables, qu'une matière que l'admi-
" nistration peut réglementer à son gré, et dont elle a la

(1) Dalloz, 1846, v. 1. p. 177 ;—Journal du Palais 1846, p. 5 ;—Devilleneuve 1846, v. 1. p. 433.

" libre disposition, bien entendu, dit-elle, pour le plus " grand avantage de l'agriculture et de l'industrie.

" Cette arrêt ne saurait, à notre avis, faire jurisprudence. " Il serait à désirer que la question fut portée devant les " chambres réunies et soumise à un débat contradictoire. " Nous pensons qu'elle y recevrait une solution favorable " aux riverains."

I shall now briefly advert to two propositions in connection with this branch of the question, which have been advanced by the learned counsel for the Seigniors ; the first is that water courses pass under a grant *en fief*, *contrat d'infeodation*, although not expressly mentioned, but that they cannot pass under a *bail à cens*, unless expressly granted.

No positive law of any kind has been or can be cited, in support of this pretension. Some passages from the valuable work of Henrion de Pansey have been cited as sanctioning it; but these extracts merely indicate the author's opinion that unnavigable rivers running between or over lands held *en censive* did not belong to the *Censitaires*, but to the Seignior *féodal*. The author does not, however, speak of the Seigniors' ownership of the river, as being the consequence of the rule for which the Seigniors contend. In one passage he mentions the rivers as not being comprised (1) in the different *baux à cens* made by the Seigniors ; and in another he writes " puisqu'en donnant les terres adjacentes le Sei- " gneur s'est reservé la rivière." (1) These passages and the observations of Hervé afford (I may observe incidentally) very conclusive evidence that, as a matter of fact, the owners of *fiefs* in France, even *dans les pays coutumiers*, were, as a general rule the possessors of the rivers within the lands of their *Censitaires ;* but both Henrion de Pansey and Hervé plainly attribute that possession to the conventions between the parties and not to any rule of law on the subject.

(1) Henrion de Pansey, vol. 1, p. 660—Same, p. 664.
(1) Henrion de Pansey, vol. 1, p. 664.

The second proposition that we are called upon by the advocates of the Seigniors to affirm, is, that a grant of a riparian estate, if made *en fief*, will reach the middle of the river; but that if made *en censive*, it must be considered to stop at the water edge.

Rives, Proudhon, Fréminville, Cæpola, Bouteiller, Legrand and Guyot (Répertoire) are cited as supporting this proposition.

As to Rives and Proudhon, it may be remarked that they support a doctrine which would be fatal equally to the aquatic proprietary rights of Seigniors and of *Censitaires*. They hold "que le corps et le lit des petites rivières font "partie du domaine public aussi bien que ceux des plus "grands fleuves." (1) Proudhon adds: "Il faut donc tenir "pour constant que, soit d'après les principes du raisonne- "ment, soit d'après les dispositions les plus formelles du "droit romain et des lois françaises, le corps et le tré- "fonds du lit naturel des petites rivières restent dans le "domaine public." (1)

These authors therefore maintain that the property of all riparian proprietors is limited and determined by the bank of the river; and they make no distinction, in applying this rule, between Seigniors and *Censitaires*.

But holding, as we do, that unnavigable rivers are private property so as to pass to Seigniors, we must also hold them to be private property so as to pass to *Censitaires*.

Cœpola, the next author cited on this point, refers, it is true, more particularly to the rights of grantees *en fief*; but there is nothing in the passage quoted to show that he intended to exclude other proprietors, from the same rights; and as the reason of the rule is equally applicable to all proprietors, they are all equally entitled to the benefit of it.

(1) Proudhon—Dom. pub. vol. 3, p. 290.
(1) Proudhon, Dom. Pub. vol. 3, p. 308.

The passage from Fréminville shows merely, that a Seignior *haut-justicier* had a right to a road upon the land of a *Censitaire ;* although the land may have been granted without any such reserve. Fréminville is not unsupported in this opinion, but such a pretension has never been advanced in this country ; and if advanced here, I question much if any court could be found to sustain it ; and without wishing to speak of Fréminville as he has been spoken of by Hervé and Championnière, (1) I must say that his views are so peculiar, not to say extravagant, as to prevent me from attaching much weight to them.

The passage moreover which has been cited from that author, has no direct bearing on the point now under consideration, and the same may be said of the quotations from Legrand, Bouteiller and the Répertoire of Guyot.

The pretension that the grant of a riparian estate *en fief* goes to the middle of the stream, but that the grant of same real estate *en censive* stops at the margin, is plainly contrary to reason ; such a pretention cannot be maintained, unless founded upon some well established rule of law ; and the authorities cited on this point by the learned counsel for the Seigniors, are, in my opinion, wholly insufficient to prove the existence of any such rule. The rule laid down by Daviel, vol. 2, no. 540, is as follows : " Lorsqu'une rivière " coule entre deux héritages, chaque riverain est réputé pro- " priétaire jusqu'au fil de l'eau. *Usque ad filum aquæ*, " comme disent les jurisconsultes anglais ; c'est-à-dire jus- " qu'à la ligne qu'on suppose tracée au milieu même de la " rivière." Adopting as we do the rule *usque ad filum aquæ* in favour of Seigniors, we must also adopt the same rule in favour of other proprietors.

If it be said that a grant *en censive to a stream*, or bounded *by a stream* ought not to go beyond the border of such

(1) Hervé, 7 vol. p. 371 ;—Championnière, p 703, note 1, and page 613, note 5.

stream : I answer that the same objection would equally apply to a grant *en fief*, and yet, as to such grants, the objection is admitted to be of no weight. Moreover as to both descriptions of grants, it would seem unreasonable that the same words which indicate that the owner is to have a riparian estate, should be deemed to have the effect of depriving him of all the rights, peculiar to a riparian proprietor.

§ 8. In concluding these observations, I may remark, that, if we could adopt any of the systems advocated by the modern french writers, whose opinions have been cited in support of the seigniorial pretensions, such as Laferrière, Sacasse or Proudhon, *Censitaires* would have no reason to complain ; for their more important rights as riparian proprietors would be fully protected. In order that this may be apparent, I shall cite one passage from Laferrière, whose opinion is much relied on by the learned counsel for the Seigniors. (9)

" L'eau courante dans le lit des rivières non navigables peut " être considérée sous deux rapports. Relativement aux par- " ticuliers non riverains, elle est chose commune, *l'aqua* " *profluens* des Institutes, en ce sens, que chacun peut s'en " servir pour son besoin personnel, ou pour y abreuver ses " bestiaux, sauf le moyen d'y aborder sans nuire au pro- " priétaire de la rive.

" Relativement aux riverains, elle constitue avec son lit " ce que les jurisconsultes, comme Pothier (10) et Proudhon, " (10) appel t le corps de la rivière, et elle offre des avan- " tages qui tiennent à sa nature, pour la pêche, l'agricul- " ture, l'industrie ou le seul agrément de son cours. *Ces* " *avantages sont attribués par la situation des lieux à tous* " *les riverains.* Ceux-ci *par la force des choses*, sont, en ce " qui concerne l'eau et ses avantages, des communistes. Ils " ont naturellement droit aux avantages que le cours d'eau " porte avec lui. Toute la question, au point de vue du

(9) Laferrière, Cours de droit public et administratif, vol. 12, p 74.

(10) Pothier, Propriété, 84
(11) Dom. pub. t 3, no 947.

" droit de propriété, se réduit à savoir s'ils sont des *proprié-*
" *taires* communistes ou s'ils sont des *usagers* commu-
" nistes." (1)

This author correctly distinguishes between the advantages resulting from unnavigable rivers, which are common to all persons who can approach such rivers; and those which peculiarly belong to riparian proprietors; (2) such as the use of the water for manufacturing and agricultural purposes; to which advantages, the author says the riparian proprietors are entitled *naturellement par la force des choses.* (3)

In order to show that this doctrine, as to the natural rights of riparian proprietors, is not peculiar to the law of France, I will quote the words of Chancellor Kent on this subject. " Streams of water (says the learned chancellor) were in-
" tended for the use and comfort of man; and it would be
" unreasonable and contrary to the universal sense of man-
" kind to debar every riparian proprietor from the applica-
" tion of the water to domestic, agricultural and manufac-
" turing purposes." (4)

If we were to hold that unnavigable rivers are private property, and yet to declare that the *Censitaires* are not owners of streams which water their own land; then, even after paying for the commutation of the feudal burthens upon their property, the *Censitaires* would still remain, as regards aquatic rights, in a worse position than any other

(1) According to Proudhon, tome 3, no. 933, p. 284 and no. 961, page 311, the riparian proprietors under the code, are perpetual usufructuaries of the unnavigable rivers on their land. But Sacasse agrees with Laferrière in considering them as " usagers." 3 vol. riv. crit. p. 324.

(2) Daviel, 2 vol. no. 542. p. 35—makes and explains clearly the same distinction.

(3) As to natural rights of riparian proprietors *vide* Merlin, Questions vo peche, vol. 12, p. 217. " Si nous ouvrons les ordonnances, nous y verrons bien qu'elles attribuent
" à l'état la propriété des rivières navigables, mais nous n'y appercevrons pas
" qu'elles touchent *au droit de propriété que les lois naturelles et romaines donnent*
" *aux maitres des terres adjacentes sur les petites rivières qui par elles-mêmes ne*
" *sont ni navigables ni flottables.*" Vol. 2, p. 27, Daviel, cours d'eau. " Les forces
" motrices qu'il (le cours d'eau) fournit à l'industrie, les ressources qu'il offre pour
" l'irrigation et pour la peche, accessoires précieux du lit et des rives, dont la dis-
" position favorise ces richesses naturelles, *voilà une dépendance essentielle des héri-*
" *tages qu'il traverse.*" Also Garnier, cours d'eau p. 268.

(4) Kent's Com. vol. 3, p. 354.

class of proprietors that I know of. They would not have the rights which riparian proprietors enjoyed in common with all their fellow citizens, under the Roman law. Neither would they have the strict proprietary rights which are given by the English and American systems. Nor yet would they have the right of perpetual usufruct (1) or usage (2) to which, at the least, they would be entitled under the modern french system.

These general considerations have had some, but I trust not an undue influence upon my mind in adopting the view which I have taken of this interesting and important question.

The principal grounds however upon which my judgment rests, are, firstly, that although the Seigniors claim an exclusive privilege, they have failed to show that there is any rule of law to support that privilege; and secondly, that according to the principles which govern the contracts under which both the Seigniors and the *Censitaires* hold their lands, the latter are entitled to the unnavigable streams within their own property.

If it be true, as I think I have demonstrated it is, that the *domaine utile* which passes under a *bailà cens*, is as extensive (save as to honorary rights) as the *domaine utile* which passes under a grant *en fief;* and if it be also true, that the right to a water course has nothing more of an honorary nature in it, than the right to dry land; then notwithstanding the difficulties which surround this perplexing question, I think we may safely come to the conclusion that unnavigable rivers must be held to have passed from the Seigniors to the *Censitaires*, precisely in the same manner, as they passed from the Crown to the Seigniors; and that the distinctions advanced in favour of the Seigniors must be ignored as being unsupported either by any rule of law or principle of common sense.

(1) Proudhon, Dom. pub. no. 961, p. 311.
(2) 3 vol. Rev. crit. article by Mr. Laferrière, p. 993; art. by M. Sacasse, same vol p. 524; see also Daviel, vol. 11, p. 5.

PART 5.

Counterquestions of the Seigniors.

It would have been satisfactory to me to have stated my views upon each of the questions submitted by the learned counsel for the Seigniors, not fully answered by our replies to the questions of the Attorney General. But the time at my command will not admit of this being done. There are however three among the questions submitted by the learned counsel for the Seigniors, of such great practical importance, that I cannot pass them over in silence.

Th y are in effect the following :

To what seigniories ought the *arrêt* of 1711 be considered applicable ?

Were the *arrêts* of 1711 and 1732 repealed by the passing of the Canada Trade act and of the Tenures act ?

Had those *arrêts* fallen into desuetude before the passing of the seigniorial act of 1854 ?

It becomes the more necessary to consider these questions carefully in consequence of the proposal to charge the Seigniors for any additional value that may be given to their unconceded lands by the abolition of the obligation to sub-infeudate those lands.

Some of the owners of *fiefs*, as has been already observed, are bound by their titles to sub-concede their lands, but in the great majority of cases, the obligation to sub-concede (according to my views) results exclusively from the *arrêt* of 1711.

The importance of the above questions as regards those *fiefs*, the titles of which do not contain any condition as to the sub-infeudation of the land granted, is therefore apparent.

1st. Question—To what seigniories ought the *arrêt* of 1711 be considered applicable ?

The learned counsel for the Seigniors contend that the following words in the preamble of the *arrêt* of 1711, viz : "Ce qui est entièrement contraire aux intentions de Sa "Majesté, et aux clauses des titres des concessions, par "lesquelles il leur est permis seulement de concéder les "terres à titre de redevance," show that law must be restricted to those seigniories the titles of which contain clauses and conditions such as those referred to in the preamble. This part of the preamble, on the other hand, is sometimes referred to by those opposed to the interests of the Seigniors as decisive proof of the nature of grants *en fief* before the date of the *arrêt* ; and it would be very important evidence indeed on this point, had we not the titles themselves which do not contain any clauses or conditions such as alleged in the *arrêt*. It is therefore evident that the statement in the preamble above quoted is erroneous ; but although the preamble of the *arrêt* may contain a mis-statement in this respect, that would not justify us, in treating as null the plain terms of the enacting clause.

The evil, intended to be remedied, was that Seigniors had refused to concede their lands to settlers in the hope of being able to sell the same.

The King's intentions, and the clauses in the contracts, are referred to, not for the purpose of restricting the application of the law to any particular class of Seigniors, but merely as aggravating circumstances.

The words of the enacting clause may not be very technical, but they are as comprehensive as any that could have been used : "Ordonne aussi Sa Majesté que tous les Sei-"gneurs au dit pays de la Nouvelle France ayent à concé-"der aux habitants les terres qu'ils leur demanderont, etc."

The law commands all Seigniors in *la Nouvelle France* without exception to sub-concede, whereas, according to the pretensions to which I now allude, not one of the then Seigniors could have been compelled to do so; for none of their titles contain the clauses and conditions spoken of in the preamble of the *arrêt*.

It has also been contended that the *arrêt* of 1711 is not applicable to the *fiefs* granted after that law. And the preamble and enacting clause are both referred to in support of this view; the preamble, on the ground that it refers to clauses of grants already made; and the enacting clause, if I mistake not, because the rule laid down in it, could not be applied to a *fief* in which there were no settlers; which it is to be presumed would be the case in every *fief* when it was first granted.

I have already briefly explained the reasons which induce me to think that the preamble cannot limit the enacting clause to any particular class of *fiefs;* and as to the other objection, at most, it only goes to prove that the law could not apply to those seigniories until there were some settlers in them. This objection, I may observe, could be urged by all Seigniors who had no settlers on their *fiefs*, whatever might be the date of the grant of the *fief;* and we would thus arrive at a conclusion which would render the law inapplicable to that class of seigniories, in relation to which, above all others, its provisions were most required, —namely the seigniories which were altogether without settlers. It is also to be observed that if the law were to be deemed subject to the two limitations contended for by the learned counsel for the Seigniors, not a single case would remain to which its provisions could apply. The grants made before the law, would all be exempted, because they do not contain the clause mentioned in the preamble; and all the grants made after the law would also be exempted, on the ground that they are not spoken of in the preamble.

and that the rule laid down in the enacting clause would not apply to them in every possible case; and the language of the court would then be: no Seignior can be obliged to concede his land to settlers; whilst the language of the law is: that all Seigniors in the said country of New France shall concede to the settlers the lots of land which they may demand. "Que tous les Seigneurs au dit pays de la Nou-"velle France ayent à concéder aux habitants les terres qu'ils "leur demanderont dans leurs seigneuries."

It appears to me that, according to the plain meaning of these words, they apply to every owner of a *fief*, irrespective of the period at which such *fief* was granted by the Crown.

We know that the intendants held the provisions of this *arrêt* to be applicable to all seigniories, whether granted before or after the promulgation of the *arrêt* of Marly. Of the numerous seigniories reunited to the Crown by the judgment of the 10 May 1741, in accordance with the provisions of that *arrêt*, as the proceedings expressly declare, a considerable number were granted after 1711.

It is true that that proceeding was founded on the first enactment of the *arrêt*, whereas it is the second that is now urged against the Seigniors; but on comparing the two clauses, it will be found than the argument now advanced is weaker as against the second, that asagainst the first enactment of the *arrêt*. The crown lawyers and others who wrote in relation to our laws, soon or some time after the cession, speak of this *arrêt* as applicable to all seigniories without exception; (1) and in the different cases in which it has

(1) *Vide* report of general Murray, governor of Quebec, to the home government on the state of the province of Quebec in 1762.

"The tenure of lands here, is of two sorts. 1o. Fiefs and seigniories. These lands are "deemed noble, &c By law the Seignior is restricted from selling any part of his land "that is not cleared, and is likewise obliged (reserving a sufficiency for his own private "domain) to concede the remainder to such of the inhabitants as require the same, "at an annual rent not exceeding one sol or one half penny sterling for each ar-"pent in superficies."....

Smith's History of Canada, vol. 1, appendix from page 45 to 71.

See also Mazères, draught of report for gov. Carleton, 27 feb. 1769, collections of commissions, &c., by Françis Mazères, &c., atty. genl. p. 21.

been cited since the cession, it does not seem to have been referred to by any member of the bar or of the bench as being applicable to any one class of seigniories more than to another. (2)

For these reasons, I think that the provisions of the *arrêt* in question must, as a general rule, be held to extend to all grants, whether made before or after the date of that law, unless the terms or object of the grant were such as clearly to exclude it from the operation of the *arrêt*. (3)

Second question :—Were the *arrêts* of 1711 and 1732 repealed by the passing of the Canada Trade Act and the Tenures Act.

The rights of Seigniors in Canada were not, I think, in any way affected by the Canada Trade Act or by the Tenures Act, until they had availed themselves of the provisions of those acts. The statutes relied on, it is true, treat Seigniors as proprietors of their *fiefs*, including all their unconceded lands; and the Seigniors doubtless were so. But from that it does not follow that they were not under an obligation to concede those wild lands, as required by the *arrêt* of 1711. The right of ownership and the limitation of the exercise of that right are not incompatible with each other. All the Judges, except M. Justice C. Mondelet, hold that the Seigniors in Canada are and always were really proprietors of their *fiefs*, still we hold that after 1711 the exercise of their rights as Seigniors, was limited by the obligations to concede their wild lands.

Also answer by Mr. Mazères formely atty. genl for the province of Quebec to Mr Cugnet, &c p. 40 See also 14th sect. of the draught of the act of parliament prepared by Mazeres for settling the laws of the province of Quebec.

Tracts on the government of Canada. London 1791, p. 27

Also abstract of the several royal edicts and declarations, &c that were in force in the province of Quebec in the time of the french government, &c., collected from register of the Superior council by Joseph Cugnet, secretary to the governor, and by the direction of the honorable Guy Carleton governor in chief.

See also Cugnet, Traité de la loi des fiefs, p. 60.

(2) See particularly judgment of Ch. J Reid in Cuvillier vs. Stanley and Burton appt The grant in that case was after *arrêt* of Marly.

(3) For instance the grant no. 442 made for the purpose of securing the firewood, necessary for the forges near Three Rivers.

The acts of the imperial parliament declare, that it would be for the general advantage of the province, to change the tenure of the lands in question; but those laws do not lay down, and clearly were not intended to lay down any rule as to what the rights and obligations of Seigniors were in relation to their wild lands, under the existing tenure.

The object of the Legislature was to substitute, as far as possible, the tenure of free and common soccage for the feudal tenure; not to change the feudal tenure while it lasted, by the abolition of laws which had modified it, not in the interest of the owners of *fiefs*, but for the benefit of the public. In a word, the intention of the imperial acts was to give us a tenure which was deemed advantageous, in lieu of one that was deemed objectionable, and not to change the existing tenure for the worse; which would have been done, had the power been given to Seigniors either to concede or not to concede their wild lands at their option.

I am therefore of opinion that the passing of the Canada Trade Act and of the Tenures Act had not the effect of repealing the *arrêts* of 1711 and 1732.

Third question:—Had the *arrêts* of 1711 and 1732 fallen into desuetude before the passing of the Seigniorial Act of 1854.

If I were of opinion that the *arrêt* of 1711 required all Seigniors to concede their wild lands at one uniform rate, I would not hesitate to say that it has fallen into disuse. For a universal usage to the contrary has existed at least for nearly a century, and this usage has been sanctioned by innumerable decisions of all the tribunals of the country.

But holding, as I do, that although the *arrêt* of 1711 compels Seigniors to sub-concede their wild lands, yet that it does not compel them to do so at any particular rate, or interfere with agreements voluntarily entered into between them and their *Censitaires*, I cannot say I know of any usage

opposed to that law *so understood* or to the *arrêt* of 1732 (in so far as regards unconceded seigniorial land), which would justify me in declaring those laws to be no longer in force.

The law on this subject is well explained by Solon. (1) " L'abrogation de la loi par le non usage repose d'un côté " sur le concours tacite et général du peuple qui refuse de " l'exécuter, et d'un autre côté sur la volonté du Légis- " lateur et l'autorité qui tolèrent cette non exécution."

Among the rules laid down by the same author as to the facts necessary to establish that a law has gone into desuetude, are : " 1o. Que les faits sur lesquels on veut faire " reposer la desuétude, comme ayant abrogé la loi, soient " multipliés ; et 4o. qu'ils puissent être en quelque sorte " attribués à la généralité des habitans ; *tacite omnium* " *consensu*." (2)

I do not know that the owners of *fiefs* in Canada ever made it a general and public practice to refuse to concede their wild lands in order to sell, instead of conceding the same ; and it can hardly be contended that any such practice was acquiesced in by the people generally and sanctioned by the authorities. It doubtless has been repeatedly contended that the Seigniors were not under any restriction, either as to the conceding or selling of their wild lands ; but these pretensions have been vigorously resisted as well by the people generally as by their representatives in parliament ; and although the resolutions of one branch of the Legislature cannot be cited as having force of law, yet upon a question of desuetude which depends upon the *concours général du peuple* as Solon says, the formal and reiterated resolutions of the representatives of the people in parliament cannot be deemed unimportant. (3)

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(1) Solon, p. 394.
(2) Solon, p. 395.
(3) See resolutions of House of Assembly of L. C, of 18th of February 1823 and 23th January 1832, 4 vol. Seigniory Doc. pp. 38 and 40.

As to the decisions of the tribunals, I do not know of any one judgment declaring that Seigniors were not under a legal obligation to concede their wild lands, or that they had right to sell the same ; on the contrary, the cases of Cartier vs. the Baroness of Longueuil, McCallum vs. Gray, Lavoie vs. the Baroness of Longueuil have a directly contrary tendency.

Much stress was laid on the fact that no instance can be adduced of a Seignior having been *compelled* to sub-concede by legal proceedings. But the mere fact that the *arrêt* of 1711 was never enforced by judicial proceedings would not justifiy us in saying that it has fallen into disuse. I quote again from Solon.

" Jusqu'ici nous avons supposé que la loi était abro
" gée par des *actes conformes et multipliés et faits en op-*
" *position à ses dispositions.* Nous devons prévoir le cas,
" où cette loi étant ancienne, n'aurait point été exécutée,
" sans que cependant l'usage eût rien consacré de contraire
" à ses injonctions ou à ses défenses. On tenait *autrefois*
" *pour certain* que, dans cette hypothése, la loi n'était pas
" abrogée. Cette opinion nous parait exacte ; *nous ne pou-*
" *vons pas concevoir d'abrogation sans une espèce d'opposition*
" *émanée du peuple. Il faut un usage contraire, etc.* "

In one of the questions submitted to us by the learned counsel for the Seigniors, it is assumed " that the courts of " law within this province have constantly treated these " *arrêts* as not in force." I have, in consequence, prepared and have now before me a note of all the cases within my knowledge bearing on this point, and it is very far from supporting the statement to which I have just alluded ; but as the learned presiding chief justice has referred fully to each of those cases, it is needless for me to comment upon them. I will therefore content myself with observing that chief justice Smith, in 1792, as president of the court of appeals, in rendering judgment in the case of Cuthbert vs. Baril, ex-

pressly declared those *arrêts* to be in force. In 1810 the court of Queen's bench for the district of Montreal (composed of chief justice Monk and of judges Ogden, Reid and Foucher,) by overruling the demurrer in Cartier vs. the Baroness of Longueuil, impliedly declared the *arrêt* of 1732 to be still in force.

The same court, in 1820, chief justice Reid presiding, by dismissing the declinatory exception in Lavoie vs. the Baroness of Longueuil, not only held the *arrêt* of 1711 to be in force, but also held that that *arrêt* could be exercised by the then existing tribunals.

The judgment of the same court, in 1828, in the case of McCallum vs. Gray, in effect recites the provisions of the *arrêt* of 1711 as being in full force; and three years afterwards, chief justice Reid, as president of the same court, (the other judges being Mr. justice Pyke and Mr. justice Rolland) in rendering judgment in the case of Guichaud and al. vs. Jones, observed: "The only question is as to the "construction to be put upon the deed in question; if it is "to be considered as a sale of land *en bois debout, it is* "*illegal and void* according to the laws of the country." A plainer declaration as to the *arrêt* of 1732 being then in force, could not have been made. (1)

Within the last 15 years, the provisions of the *arrêt* of 1711 have been pleaded in a considerable number of cases, in the district of Montreal, and the judges invariably held, as we now hold, that the laws of this country have not established a uniform rate at which Seigniors could be compelled to concede their wild lands, but I am not aware (and I was professionally engaged in most of those cases) that any opinion was expressed by the court or by any one of

(1) See also the evidence given by Mr. O'Sullivan, afterwards chief justice of the district of Montreal, before the Canada commissioners in 1835, page 50, of their report. The evidence of the atty. genl. is to the same effect and will be found p. 47. Neither of those officers was of opinion that the *arrêts* in question had fallen into desuetude.

the judges, as to those *arrêts* having fallen into disuse. It will also be found that, in several judgments rendered by the superior court for the district of Quebec within the last three or four years, the provisions of those *arrêts* are recited in the *motifs* of the judgments as subsisting laws. (1)

I was, at one time, under the impression that Seigniors in Canada were not under any obligation to concede their wild lands ; but with the information on this subject which I now possess, (many important parts of which have not until lately been generally accessible) I have felt constrained to abandon that view, and now find it impossible to acquiesce in the proposition, that the courts of law have constantly treated the *arrêts* in question as not in force ; or to declare that those laws have fallen into disuse, *tacite omnium consensu.*

(1) Langlois vs. Martel, 2d. L. C. Repts. p. 51.

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OPINION

OF THE

HONORABLE JUDGE BADGLEY.

To arrive at a satisfactory determination of our present investigation, which involves a variety of usages, rights and duties, extending from the early settlement of Canada to the present time and, applying to settlers of two distinct national origins, and which presents different views and aspects at different periods, obviously demands something more than the mere collection and collocation of doctrinal or judicial authorities, and necessarily requires a close examination and consideration of no small portion of our provincial history as well before as after the Cession of Canada to Great Britain by the Treaty of 1763.

The discovery and subsequent occupation of Canada by French adventurers necessarily subjected the country to the domination of France, and to the public laws of that Kingdom, as a part of the Royal Domain, which embraced not only Canada proper, but also, from an early period, the whole of Acadia, which with Canada was then designated New-France, *la Nouvelle France.*

From the middle of the sixteenth century, when Cartier explored the river Saint-Lawrence, until the early part of the succeeding century, no permanent French settlements had been established in the country. Various attempts had been made with little positive success, but the temptation offered by the trade in furs and skins of wild animals was irresistible, and in consequence, early in the seventeenth century, the combination of commercial enterprize with the spirit of foreign adventure then pervading civilized Europe, led to the permanent occupation of the country, under the direction

of Champlain, at his second voyage in 1608; thence forward the attention of the French Monarchs was favourably directed to the only Colony for some time held by France, whilst the fur trade itself and the profits proceeding from it, created in that Kingdom a lively interest respecting its settlement and progress. The Royal desire for the prosperity of the country was much thwarted by the great European contests, in which France was so constantly engaged during the seventeenth and eighteenth centuries, whilst a variety of local causes combined together to retard the increase of the population and to prevent the growth of the Colony, during the entire period of its connection with the French empire.

Colonization was evidently not the object contemplated by the early adventurers to the Colony; their chief inducement for remaining abroad was connected more or less intimately with the trade to which allusion has been made, and which was conducted, from the first, not by individual enterprize, but by associated companies to whom a monopoly was granted, and by whom that trade and its increase were considered paramount to every public or patriotic consideration.

It is recorded in the Preamble to the Royal Charter incorporating the Company of the Hundred Associates in 1627, that "only one habitation existed in the Colony, wherein forty "or fifty persons were collected more for commercial purposes "than for the King's advantage, that the cultivation of the "land had been so little encouraged that these persons were "supported by supplies from France, and that they would have "perished had the annual arrivals from France been delayed "for a month beyond their usual period."

The accredited French records demonstrate that in 1666 the population of Canada had reached to 3,418 souls, which had increased to 9,400 in 1679, in 1719 it was 22,530. 37,152 in 1734 and at the conquest in 1759–1760, the estimated population was about 60,000 in the whole.

Until the year 1627, when the Charter grant was executed in favor of the Company of the Hundred Associates, the history of the Colony exhibits frequent disastrous and unsuccessful attempts at settlement, whilst, at the same time, the most extensive and arbitrary powers were confided to a succession of Governors appointed to administer what was in fact a wilderness, tenanted solely by roving tribes of Savages who acknowledged no subjection to French authority, but who, it was believed, might be induced or at worst compelled to yield to French power. From Roberval and de la Roche, the latter authorized by his commission to "engage in the ports of France such vessels, captains and "seamen as he might require ; to raise troops, make war and "build cities in his Vice Royalty, to make and promulgate "laws, with power to enforce them ; to grant lands to gentle- "men with the titles of *fiefs*, *seigneuries*, *baronnies*, *comtés*, "&c., attached to the grants"; through Chauvin who secured for himself the entire monopoly of the fur trade of the Colony ; de Chaste who first induced Champlain to accompany his expedition to America ; down to de Monts who brought out Champlain a second time, and who was appointed Governor and Lieutenant, by whom Quebec was founded in 1608, when the settlement of Canada may be considered to have taken its rise, all were more interested in the success of their trading adventures than in the colonization of the country. The powers delegated to those officers of a despotic character indeed, whether executive, administrative or judicial, were all united in one hand, and, although better fitted for an old established and populous Colony than for an infant settlement, may nevertheless have been justified by the circumstances of the time and the state of the country ; they were however continued until the grant of 1627, and some of the most important of them even long beyond that period The terms of Champlain's commission as given by Garneau in his 1st vol. *Histoire du Canada*, p. 127, are :

"En paix, repos, tranquillité y commander tant par mer "que par terre ; ordonner, décider et exécuter tout ce que

" vous jugerez se devoir et pouvoir faire pour maintenir,
" garder et conserver les dits lieux sous notre puissance et
" autorité par les formes, voies et moyens prescrits par nos
" Ordonnances. Et pour y avoir égard avec nous, com-
" mettre, établir et constituer tous officiers tant ès affaires
" de la guerre que de la justice et police pour la première
" fois, et de là en avant nous les nommer et présenter pour
" en être par nous disposé, et donner des lettres, titres et
" provisions tels qu'ils seront nécessaires. Et selon les oc-
" currences des affaires, vous-même avec l'avis de gens
" prudents et capables, prescrire sous notre bon plaisir des
" lois, statuts et ordonnances, autant qu'il se pourra, con-
" formes aux nôtres, notamment ès choses et matieres aux-
" quelles n'est pourvu par icelles."

It has been well observed by Garneau that in the exercise of these powers: " les Gouverneurs n'avaient pour tempérer leur
" volonté que les avis d'un conseil de leur choix et qu'ils
" n'étaient pas tenus de suivre. Ce système avait peu d'in-
" convénients dans les commencements parce que la plupart
" des planteurs étaient aux gages d'un Gouverneur ou d'une
" Compagnie sous les auspices desquels se formait l'établis-
" sement."

The last Canadian Company established previous to that of the Hundred Associates was formed by Champlain in 1611, actually for trading purposes but ostensibly for the colonization of the Colony. Its existence was limited to a period of fifteen years, and to promote its success and afford it protection, it was placed under princely patronage, first, that of a Bourbon, the Comte de Soissons, who was succeeded by the prince de Condé, who afterwards ceded his patronage to the Duke de Montmorency for 11,000 *écus*, and which was finally ended in the hands of the Duke de Ventadour in 1626. The patronage of these eminent noblemen was evidently obtained for the support of the commercial rather than of the colonizing purposes of the Company, and the price paid by the Duke de Montmorency shews that

the adventure was considered extremely lucrative. "But "even to the last moment, complaints were made to the "Duke de Ventadour of the indifference of the Company "to the interests of the Colony, which was represented as "only requiring a little assistance to flourish and prosper."

It was under these last circumstances that Cardinal de Richelieu projected the Company of the Hundred Associates, to whom he proposed, in the King's name, a proprietary grant of New France under the very favourable and extensive terms and conditions contained in the instrument establishing the Company. The Associates, among other conditions, were required to establish a joint stock Company for effecting their enterprize, to be governed by articles of association which were afterwards approved by Richelieu, and the Company was named "The Company of New France." Their capital was 300,000 livres, £12,500 0 0, divided into 100 shares of 3,000 livres or £125 each, of which 1000 livres or £41 13 4 was to be payable within the year, and the balance by instalments at the call of the directors. The instruments and articles of association were fully ratified and approved by the Royal letters patent of 6 May, 1628, and the Company thereby became fully constituted.

The complaint against the last, or Champlain's Company of Canada, as stated in the Charter of 1627, "that they had "so little power or inclination to settle and cultivate the "country, that during the fifteen years of their charter ex- "istence, they proposed to carry over only fifteen men, and "that even at that time, after they had existed for some years, "that they had made no attempt or preparation whatever to "perform their obligations," was endeavoured to be removed by the new Company who pledged themselves "to employ "their best efforts to settle New France called Canada," and among other obligations "engaged to transport to Ca- "nada in 1628 two or three hundred mechanics, and to in- "crease the number of settlers there to 4000 of both sexes

" during the course of the following years to expire in 1643, " supporting them for three years after their arrival, and after " that time settling them on cleared lands with sufficient " wheat for seed and their support until the next harvest, " or *otherwise providing for them* in such manner that they " might by their own industry and labour support them- " selves in the country."

The Royal grant was a full proprietory conveyance to the Company, their heirs and assigns for ever, in full property, justice and lordship, *en perpétuité, en pleine propriété, justice et seigneurie* of the fort and habitation of Quebec, together with the entire country of New France called Canada, including rivers, lands, mines and minerals, ports and havens, streams, rivulets, ponds and islands great and small, and generally the whole extent of the country in length and breadth, &c., &c., together with a variety of rights, exemptions and privileges, of which the most important to the Company, was the greatly coveted monopoly of the trade of the Country.

The Company of the Hundred Associates protracted a languid and unprofitable existence until 1663, when, becoming aware of the King's determination to revoke their grant, they wisely forestalled the Royal intention by a voluntary surrender to His Majesty of all their proprietary and domanial rights, titles and property, all of which were formally reunited to the Royal demesne by the Letters Patent of Acceptance of March 1663, and among the motives therein stated, is the following: " that seeing the long period of time in which the company have been in possession of the Country, the King learned with regret that not only the number of its inhabitants was small, but also that even they were daily exposed to be driven away by the attacks of the Iroquois."

In May, 1664, Letters Patent issued, establishing a second great proprietory Company called " the Company of the

West Indies," to whom were granted all the French possessions in Africa, in New France, and the West Indies, with the monopoly of the trade in those countries and a variety of powers and privileges ; but this Company was even less successful than its predecessor, and after an existence of about ten years, their Charter was revoked in 1674, and all the territory granted to them was reunited to the King's demesne, to be thereafter governed and administered like the other *fonds et domaine de la Couronne.*

Monsieur Petit, in his *Histoire des Colonies Françaises en Amérique*, observes : " The object of the establishment " of these Colonies was the creation of means for the for- " mation and extension of national commerce, and every kind " of encouragement and support was extended to the Com- " panies by the state. That of 1664 was unable to realize " these views, and the King abolished that Company by his " Edict of December, 1674, which reunited to his demesne " all the granted lands and countries, to be governed there- " after like the other Crown domaines, the domanial rights " and dues were to be collected and received at the times " and in the manner that the King should direct."

From that time, Canada ceased to be a proprietory and became a Royal Colony which continued as long as the French dominion existed in the country.

In the interval of time between 1626 and 1674, the French King had not only established those two important commercial proprietory corporations intimately connected with the Colony, but had ceded and conveyed to them the entire country ; and after their abolition, he himself continued to exercise the same domanial right of appropriation, by special grants to individuals, of greater or less extent of territory in the Colony.

The Royal right to make these grants cannot be questioned, because, according to the generally acknowledged doctrine of public law, at that time generally understood by the

powers of Europe, the savage occupants of the country were not considered to have any property in the soil which they hunted over, and the absolute proprietary and domanial rights were held to belong to the European nation by which the country was first discovered and subsequently occupied. These discoveries, thereforeby, French subjects, whether acting or not under the authority of the Government of France, were admitted as of right to have been made for the benefit of the nation ; the King was the acknowledged legitimate organ by whom alone the public demesne could be disposed of, because the discovered territory was held by him in his public capacity as the national representative, and therefore in him alone resided the right to grant vacant lands, as an exclusive branch of the prerogative.

But in making all such grants, the necessary subjection of the granted territory, as well as the national allegiance of the grantee to the French Crown, were of paramount importance, and hence the King's power to grant was limited by the public law of the Kingdom in this respect, which required the grant itself to contain a stipulation by which the dependence upon and connection with the parent state should be secured, not simply as a mere condition of state policy, but as a conventional obligation reciprocally binding upon grantor and grantee.

It is observed by Henrion de Pansey, in the first volume of his *Dissertations Féodales*, p. 22, under the head "*Aleu*," "that the Crown demesne was alienable, but not without re-"servation of the *directe*, the immediate demesne," and after citing Chopin, *Traité du Domaine*, in support of his principle, he thus proceeds : "The authors referred to by Cho-"pin were of opinion that if the King had power to alienate "portions of the demesne, he could do so only by title of in-"feodation. The laws in relation to such alienations required "that the grants should contain the express reservation of the "immediate demesne, *propriété directe*, (see second Edict of "1566 and the Royal Declaration of 8 April, 1672) ; the

" stipulation was in the following terms: *to hold the grant*
" *of the Crown in full fief, and to render fealty and homage*
" *to Us, with payment of a gold crown, comme redevance, as a*
" *recognitive duty of dependence, &c.* This is still our
" public law, confirmed by written laws and by an usage
" long anterior to them. The King cannot alienate his
" demesne without this reservation, and if that stipulation
" shall have been omitted in the deed of alienation, it must
" be supplied. The rule of law *nulle terre sans Seigneur*,
" no land without a lord or owner, is the legal rule wherever
" the municipal laws are not in express opposition to it,
" wherever the customary laws have not rejected it, and
" wherever dispositions of law have not established the
" existence of the opposite maxim, " *Nul Seigneur sans*
" *terre.*" See also Guyot, *Traité des Fiefs*, 1 *vol. p.* 440. Fréminville, *Praticien des Terriers*, 4 *vol. p.* 449, and others, who all sustain Henrion de Pansey's position.

The form of the Royal Grant in this respect was governed by the principles of the public policy of France above adverted to, for the purpose of maintaining the connection of the granted territory with the Kingdom, whilst at the same time New France, as a French Colony, and considered as a portion of the Royal demesne, became subject to the public general law of France, as has been well observed by Petit :— " The public demesne of countries discovered by France, or
" united to her by treaty, become of right an integral portion
" of the French public demesne, and the legislative disposi-
" tions of those countries posterior to their union also be-
" come subject to the domanial legislation of France, and
" to that legislation of general interest and public policy
" which is fundamental to the French State."

The proprietory grants of 1627 and 1664, after reciting the conveyance to the Companies of the granted country, to its full extent and contents, for ever, in full property, lordship and justice, settled the consideration of the grant, at a reservation to the grantor himself and his successors, Kings of

France, in recognition of Sovereingty and in conformity with the above stated requirements of the public law, of the mere fealty and homage, *ressort de la foi et hommage*, to be performed by the grantees upon each change of Sovereign together with payment of a gold crown.

Three grants of little importance appear to have been made by Champlain's Company previous to the Charter of the Hundred Associates; several were made by the great proprietory Companies during their existence, to which a very considerable addition was subsequently made by the Royal Administration under the authority of the King, until the Cession : by these grants the Colony was parcelled out into tenancies of greater or less extent of territory, covering the surface of the country from the mouth of the St. Lawrence to beyond Détroit in length, and only limited in breadth to the south by the British settlements.

These various grants with a small number made early under the British dominion, are necessarily at the bottom of the matter upon which this Tribunal is exceptionally called upon to determine, and involve a consideration, not only of the technical language of the grants themselves, the extent and nature of the property granted, with its tenure, incidents and rights, but also of the laws and institutions of that part of France from which the settlers chiefly emigrated or proceeded, the municipal law itself of the Colony in connection with the grants, their object and intent, together with the contemporaneous construction given to their terms, conditions and stipulations, and the usages in connection with them, during the long period of their existence and recognition by the judicature and legislature of the Colony, French and British, Imperial and Canadian.

The apparently wide scope here presented will, notwithstanding, occupy but short space ; a large mass of detail

having been collected together and explained by the President of the Tribunal, requires no repetition, and the result only need be noted, whilst the remaining portion of the subject matter will be disposed of as succinctly as its nature and importance will admit, premising however that mere law and legal controversy have comparatively but little connection with the explanation or determination of the points of difficulty submitted to us.

It was in anticipation of the necessity for this examination, that the previous remarks upon the early administrative and proprietory history of Canada have been made.

The principle of general public law already adverted to, which appropriated newly discovered and savage countries to the nation whose subjects first possessed and occupied them, and authorized the national representative to dispose of them as the patrimony of the nation and as part of the national demesne, may be assumed as an incontrovertible and acknowledged principle of French law. The extent and nature of the grant, subject to the limitations of that law, were restricted only by the Royal will and the object contemplated, namely the settlement of the country, subsidiary nevertheless to the commercial advantages, and the increase of funds in the national Exchequer from the possession of the colony ; hence the grants of 1627 and 1664 were in full and absolute property of the entire territory included within their terms, with unlimited authority and right to allocate and distribute the country in such quantities, to such persons, and upon such terms as the Companies should think proper, and most for their own advantage, and with power moreover to ennoble the grants with titular dignities, subject to the King's confirmation ; these great proprietory grants distinctly gave the Companies unlimited power of alienating their lands in such manner as they pleased ; and the charter of 1664 contained the power, in express terms, either to sell and dispose of the lands, or to infeodate them at such rent, charges and seigniorial dues as

the Company should think proper, but without directing any particular mode for the purpose. These Royal grants were in both instances full and entire conveyances of the property of the grant by the King to the Companies with the rights therein, entirely unlimited and unrestricted by law either national or municipal ; and the subsequent Royal grants were not only equally full and complete conveyances of property, but invariably abstained from specifying the mode of their sub-distribution. Sub-infeodation was not compulsory in any instance, and was adopted only when the grantee could not himself improve his grant. Furgole, Treatise of *Franc-Alleu*, p. 59, observes : " It is true that " the King is the Sovereign lord throughout his Kingdom in " jurisdiction and power which are rights united with and " inseparable from the Monarchy. But feudal lordship is " not a right of Sovereignty ; it is derived from another " source, that is to say, from the convention and the con- " veyance of lands *à titre de fief*, to effect which the grantor " must necessarily have the possession of them, because the " *fief*, which conveys the useful demesne to the grantee, but " reserves the immediate demesne to the lord, cannot ope- " rate that effect unless the full property be in the grantor " at the time of the grant."

The Custom of Paris itself has no provision for any compulsory grant. Its provisions, in perspicacious and intelligible language, authorize alienations by any form of contract, even by sales, in fact *par tous les contrats qui transportent la propriété* ; but fealty and some recognitive render must be retained ; beyond this there is no legal interference with the grantee whether Seignior or tenant.

The sub-grants made by the chartered Companies and the very numerous Royal additions, were uniformly proprietory grants of a certain realty in full property, with other rights attached, and subject to fealty and recognitive duties, as required by the French public law ; they were in the common form either *à titre de fief* or *en censive*, in the former held

by the stipulated recognitive duties of homage and render, and in the latter at a rent charge or service with such special stipulations and conditions in both cases, as the Companies or the King might consider fit to impose, and which were accepted by the grantee, but in no manner limited or controlled the proprietory effect of the grant itself.

These grants offer no peculiarity for remark, if the circumstances of the time at the progressive periods of the grants and the nature of the granted Country be considered. In connection with the increasing desire in civilized and maritime Europe for the extension of foreign commerce and the consequently anticipated enrichment of the Nation, a solicitude for colonization became generally prevalent and strongly manifested itself in France as well as in other European States early in the seventeenth Century. However desirous therefore the French Government from the time of Richelieu downwards, may have been to augment the commercial wealth of the Nation, French Statesmen exhibited a great political anxiety to extend the Imperial possessions of France by means of foreign Colonies. The language employed in the public documents by which the proprietory Companies were established and revoked, as well as that used in the *Arrêts de retranchement* or orders of revocation registered in Canada of grants of Canadian territory and the expressed or broadly implied condition of settlement to be found in the several grants themselves prevent all doubt upon the subject, whilst the futility of the desire is apparent in the frequent revocation of royal grants, the slowly increasing population of the Colony from natural causes alone, and the acknowledged inability of France amidst her European contests to furnish settlers, except of the military class ordered out for the military protection of the colony, or of a description of forced emigrants, who were sent out as a relief to the mother Country rather than as an advantage or assistance to the Colony in the way of settlement.

The settlement of the Country became however at last from political motives the paramount consideration in the Royal mind, and to foster and encourage that important object, grants were purposely lavished under the persuasion that private interest and enterprize would more readily effect the purpose, than the efforts of the Government under the control and superintendance of its agents; the Country was in consequence parcelled out by grants evidently in many instances beyond the means and capacity of the grantees, as will be apparent from the fact that up to 1667, upwards of seventy grants had been made covering more than of 40,000 superficial miles, and necessarily spreading over a much more extended surface from the grants not being contiguous, whilst at that same period the entire population of the Colony did not reach 4,000 souls of whom the largest portion were in Quebec, and only 11,000 *arpents*, acres of land, were under cultivation. The same lavish system of land grants was continued during the entire period of the French dominion, with this difference only, that the relative disproportion between the extent of the grants and the amount of the population was greater after than before the year last mentioned.

These proprietory sub-grants as well as the subsequent Royal grants invariably professed to convey the full and unlimited property in the land or realty described in them by the usual formula *en toute propriété* for ever, to the grantee, his heirs and assigns, with absolute power of disposal and distribution of the estate granted, but subject to the special condition of settlement and improvement expressed by another formula *de tenir feu et lieu par lui et ses tenanciers*, or words of like import; the grantees however were not in the most remote degree controlled by the letter of the grant or by any public or municipal law in the mode or manner of effecting the settlement, and in fact could not have been controlled, as well from the inability to procure settlers from France and the very heavy outlay required to be in-

curred in bringing them across the Atlantic, as from the uncertainty of retaining their service after they had been landed in the Country.

The grantee was therefore in fact at perfect liberty to improve his grant by his own hands, by the labor of his servants, by leasehold tenants, by subgrants or mode of any other alienation which he should deem best for his own interest, but always at the same time liable to the special penalty of forfeiture of the grant upon failure to accomplish the condition of improvement: in truth no revocation of a Royal grant was ever made by reason of any other cause or breach of condition on the part of the grantee.

French jurists concur in considering such grants as conveyances of the full proprietory and domanial rights in and over the property conveyed. Merlin *Répertoire de Jurisprudence*, *vo. Domaine*, *p.* 755, stiles it "an incommutable property," Guyot, *Traité des Fiefs*, 1 *vol. p.* 139, and Hervé, *Matières Féodales et Censuelles*, concur with Merlin, Hervé observing "when I can give, sell or alienate "my property in any way, &c., in a word dispose of it as "I please, it must be admitted that I possess the *jus utendi et* "*abutendi* in which true property consists." It is true that these authorities apply to holders of property in France, where titles could not at all times be produced, and prescription was more frequently invoked than title, yet how much more is the right of property assured in this Country, where the Royal right to grant and the grantee's capacity to receive were alike unquestionable and visible in existing deeds, and where nothing in the language of the grant or of the law of the land was found to limit the absolute property in the estate conveyed.

The grants became of course technically synallagmatical contracts between the King and his grantee. Hervé, 1 vol. p. 386, says: "The first fundamental principle is that the "grant *en fief* is a perfect synallagmatical contract; indeed

" the lord's obligation, under the contract, to give to the " Vassal full enjoyment of the object granted, in the man- " ner agreed upon, and the Vassal's obligation to maintain " a constantly subsisting acknowledgment of the lord are " two essentially correlative obligations and equally princi- " pal which cannot subsist independent of each other and " from which a direct action results to each party." Such a contract necessarily became subject to the municipal law of the Colony for its construction and enforcement in so far as that law could be rendered applicable ; it therefore becomes necessary to ascertain the nature and extent of that law and its applicability to the contractual grants themselves.

Until the creation of the Superiour Council of Quebec in 1663, the only acknowledged law of the Colony was to be found in the Royal Instructions contained in the Commissions of the Governors " to make and prescribe Laws and Ordi- " nances subject to the King's pleasure and as conformable " as might be with existing Royal Laws and Ordinances in " matters and things not already regulated by the latter." Charlevoix, *Histoire du Canada*, 2 vol. p. 135, says: " Until " 1663, no Court of Justice could properly be said to exist " in Canada ; the Governors judged upon differences sub- " mitted to them in a sufficiently arbitrary manner, ap- " peals from their decisions were not thought of, their *Arrêts* " or judgments were generally rendered only after arbitra- " tion had been ineffectually attempted, &c., &c." " In 1640 " a Great Seneschal of New France was appointed, and a " jurisdiction established at Three Rivers for this military " magistrate, *magistrat de l'epée*, whose functions however " were subordinate to the powers of the Governors, the latter " invariably retaining in their own hands the administra- " tion of justice whenever application was directly made " to them and which very frequently occurred."

This system continued until the establishment of the Superiour Council of Quebec in 1663, composed in the first in-

stance, of the Governor, the Bishop and five Councillors, selected by the Governor and Bishop; by a subsequent Royal *Arrêt*, the Intendant and five other Councillors, were added to the original Council.

The jurisdiction of the Council was supreme and final in *effect* in the Colony in all matters civil and criminal, but not as a Court of original jurisdiction. The Council were required *to judge according to the Laws and Ordinances of the Kingdom, and to adapt its proceedings as closely as possible to the form and manner practised and observed in our Court and parliament of Paris:* the King reserving the power and right to himself to abrogate or alter existing laws or to enact such others as he might consider most advantageous for the inhabitants of the Country: whereupon, Charlevoix descants upon the Royal anxiety to secure a prompt and ready administration of justice and remarks that "the Superiour "Councils of Martinique, Saint Domingo and Louisiana "were formed on the model of that of Quebec, but that all "were Military Councils: *tous ces Conseils sont d'épée.*" They could scarcely be otherwise with a Military Governor at their head, whose influence was paramount.

The enactment of police laws for general as well as special purposes was first intrusted to the Intendant Talon in 1672.

In the proprietory Charter grant of 1664, the King ordered that the Judges who were to be appointed, should decide according to the Laws and Ordinances of the Kingdom, and that the judicial officers *should act according to the Custom of the Prévoté de Paris, according to which Custom the inhabitants might contract with each other, without admitting the legal existence in the Colony of any other French Custom in order to insure uniformity.* The original language employed is: "*les Juges à juger suivant les lois et Ordonnances du* "*Royaume et les Officiers suivre et se conformer à la Coutume* "*de la Prévoté et Vicomté de Paris suivant laquelle les ha-*

" *bitants pourront contracter sans que l'on y puisse introduire*
" *aucune autre Coutume pour éviter la diversité.*"

Until 1663 therefore, the Colony was without civil tribunals or municipal law and was subjected to the arbitrary power of the Governor or of the Military Seneschal at Three Rivers, presumably subject to the influence of so much of the public general law of France as accompanied the French emigrant and was applicable to his condition in the wilderness of Canada. By the Ordinance establishing the Superiour Council, the Laws and Ordinances of France for the first time, became the legal texts for the Council and the Judges, whilst the Custom of Paris was declared to be the only law for the regulation and enforcement of contracts entered into by the inhabitants with each other. This last provision was evidently introduced to prevent the continuance of the Norman Custom which, up to that time, had probably been generally followed, the Normans having been the first settlers and in consequence till then the appellate jurisdiction reached to Rouen and not to Paris.

The Custom of Paris was not introduced in any more formal or explicit manner, or by any other public document or act of Legislative power, hence the Municipal law of the Colony from 1664, was composed of the public laws and Ordinances of France, in so far as they applied to the Country, and of so much of the Custom of Paris as regulated the contracts of the inhabitants, together with the local legislation established for and in the Colony by the Crown and its Executive Officers to whom that power was delegated.

The commonly received doctrine that colonists are accompanied to their new settlements by the law of the parent state, in so far as it applies to their condition in an infant Colony is scarcely correct in its application to France at that period, with its various provincial Customs and local laws; indeed France possessed no other established and

settled Colony than Canada until many years after Champlain's settlement at Quebec in 1608, and had no colonial legal system for such an event : after 1663, the Custom of Paris being set out in terms in the subsequent Royal Colonial or charter grants gave occasion to French jurists to affirm the maxim, that the Custom of Paris was exclusive Colonial law ; but that maxim is not to be found in any author until long after 1663, and its authority has always been supported by a reference to public documents bearing date after that year. See 1 Ancien Denizart, vol. *Colonies Françaises*, p. 502.

The establishment of Colonies by Royal sufferance or grant in the first instance, with subjection of the emigrants to the delegated power contained in the Governor's Commission, naturally rendered them dependent on the Royal will and the public laws of the State without consideration of the particular Customary laws of the parent French province from whence the settler had proceeded. The subsequent introduction into the Colony of any one French provincial custom by the mere effect of the Royal will gave it force of paramount local law to the extent of its express establishment, and to that extent alone it became municipal law; hence the Custom of Paris introduced as above was Municipal only in so far as it regulated contracts among the Colonial inhabitants.

It must be evident therefore from the foregoing that the so called feudal tenure of the Paris Custom was not and could not have been established in the Country by the Edict of Creation of the Superior Council of Quebec, nor by the provisions of the Proprietory Grant of 1664; the tenure of the estate granted is in fact a creature of the grant alone and by that in the first instance imposed upon the grantee to the extent of its obligations : this is in strict conformity with the well established rule of feodal law *tenor est qui legem dat fundo*, it is the tenor of the grant which regulates its effect and extent : these were to be found in the stipulation

of fealty, the recognition of and obligation to the dues and duties expressed in the grant as mere conventional stipulations and conditions, but they did not introduce with them the rights, obligations and incidents of the law of seigniories, *Fiefs et Censives*, of the Custom of Paris or of the Common law of France in relation to that description of property, except in so far as any of these laws had application to the terms and conditions expressed or legally implied in the grant.

This is strikingly exemplified in the case of Louisiana, which at first formed part of the Government of Canada. The Letters patent of 1712 granting Louisiana to a proprietory Commercial monopoly through the agency of the Sieur Crozat expressly provides, that "Our Edicts, Ordinances "and Customs and the usages of the Custom of Paris shall "be observed as the Laws and Ordinances of that Country;" and by the subsequent Royal Grant and Conveyance of that Country in 1717, to the *Compagnie d'Occident*, similar proprietory rights over the Country are granted and similar language employed as in the proprietory Canadian Grants of 1627 and 1664 above mentioned, namely in full property, justice and lordship, "*toute propricté, justice et seigneurie*," with the usual recognitive reservations of fealty and a gold crown: the same power is given to appoint Judges and officers in precisely the same language as that employed in the Canadian grants with the same requirement in the former to judge according to the laws and Ordinances of the Kingdom, and in the latter to conform themselves to the practice of the Custom of Paris, according to which the inhabitants may contract, *sans que l'on puisse introduire aucune autre coutume pour éviter la diversité*." No grants could be more similar in language and conditions, yet notwithstanding this peculiarly striking similarity, the tenure law of the Paris Custom never was introduced into Louisiana and never formed a part of its municipal system.

Moreover, Petit states that the Superiour Councils in the

West Indian possessions, judged it necessary to cause the Custom of Paris to be registered there *in extenso*, bodily, in order to give it full effect, yet the lands were held by an allodial tenure free from seigniorial rights and dues, although those possessions were originally granted in the Charter of 1664 above referred to *en toute justice, propriété et seigneurie, with the same infeodation as Canada*, and subject to the same judicial system. The cause of the difference of tenure between Canada and those countries in this respect is manifest, and must be sought not alone in the Royal grants, but in the subsequent sub-grants which, in Canada, generally contained the feudal stipulations of censual grants known to the Custom of Paris, whilst the sub-grants to the *terre* tenants in Louisiana and the West Indian Islands were allodial ignoring altogether the feudal tenure of the Canadian concessions.

Upon this part of the subject an examination of the British proprietory grants of the American possessions, some of them made at about the period of the French grants, will shew the similarity of the nature and extent of the grants made by the two Royal National representative the concurrence in the extent of the grant, *full property and lordship* and the recognitive obligations of fealty and render, the Spanish grants were also similar in these particulars; yet in none did feudality as a tenure follow the original grant.

Mr. Williams, Solicitor General of British Canada in 1790, and afterwards Chief Justice of the Province characterized the matter in the following terms, in his report to the Executive Council of the Province in that year, upon the subject then mooted of the abolition of the feudal tenure: "There appears to be engrafted on the Royal grants a "fiction of feudal tenure drawing after it the servile "appendages of alienation fines, Quint &c., upon the "tenure *en fief* and *lods et rentes* and the servitude of *banalité* upon that *en censive*," corroborating the origin of the tenure in the grant, but by error ascribing to a fiction,

what in so far as it was stipulated, was a convention as regards the fines, and what was positively established by Royal Legislation, as will hereafter be shewn, as regards the *Banalité*.

The jurists are precise upon this point of the establishment of the tenure by title alone, and their opinions are thus summed up by an eminent modern French jurist Championniere in his Treatise *des Eaux Courantes*, p. 190, in whose work the citations will be found and the principle commented upon at length. "The *fief* is a contract having "like all other contracts substantial, natural and accidental "conditions; the entirety of these conditions forms the "law of the *fief*, the law that governs it, for conventions "are naturally the law of the contracting parties. Hence "the true text of the feudal law is the Deed constituting the "*fief*, its spirit is the will of the contracting parties."

The determinate extent of the territory granted which formed the property of the grantee, and his proprietory right in it with the legal qualifications and characteristics, conditions and stipulations attached to the grant, as the law of the parties, compose the fief and form but one and the same whole. Hervé, 1st vol. pp. 377, 595, says: "It is for this "whole *ensemble* determinately, collectively and according to "its state and condition at the date of the contract, that the "Seignior must be acknowledged.... The nature and extent "of the seigniory can only be known and appreciated there-"fore by the terms of the title or grant. The Custom is "powerless and inapplicable in the presence of titles: the "most respected law for all parties is that voluntarily made "by themselves; this very simple rule of good sense is "laid down by Dumonlin and d'Argentré as an undoubted "legal maxim." Ferrière, *Commentaire sur la Coutume de Paris*, Ed. in Fol., pp. 99, 100, observes: "*Fiefs* were "contracts made by powerful lords who conveyed their "lands, under certain conditions, to individuals whom they "desired to gratify; wherefore the powers of Seigniors and

"the duties of Vassals are those which they have imposed "upon each other and upon which they have agreed." And Guyot, 6 vol., p. 692, observes: "The *fief* is formed by the "will of the grantor who grants as he thinks proper one or "more estates contiguous to or distant from each other, and "upon his own terms, which become binding by the "acceptance of the grantee; this reciprocal consent once "consummated forms the *fief*, or feudal contract, truly "synallagmatical, which neither of the parties can change, "increase or diminish without the consent of the other."

It is assumed therefore as a sound deduction of common sense and of law, that Canadian feodality exists only in the express terms, conditions and stipulations of the contractual grant and in its acknowledged legal incidents; whatever was beyond these was conventional not feodal, and thus the feudality of the Custom of Paris, with all its legal or customary incidents established in France within the *Prévoté* of that custom, except as they are brought within the extent of the terms of the grant and its legal incidents as above stated, are inapplicable in Canada.

The mystification which has arisen in the discussions in Canada upon this subject, had its origin in the absence of all advertence to this essential element of the nature and extent of Canadian feudality, and in the search for it in the Articles of the Custom of Paris and the opinions of the host of commentators, upon that and all the other feudal Customs of France, which were examined and discussed in litigated forensic questions in Canada: this has been not a little aided by the absurd supposition that Louis the 14th contemplated the formation in Canada, with a population of one person to 20 or 30 square miles, of a system of feodality which was already dying out in France itself, and that the words *fief* and *seigneurie* with their magniloquent appendages *haute, moyenne et basse justice, avec droit de chasse et de pêche*, at once and immediately converted the new made grantee into an exact imitation of the haughty Barons of

France, whilst all the time their *traite avec les Sauvages*, trading with the Indians, which was allowed to these territorial wilderness lords, was the most general and the most profitable although the least honorific part of their grant, and one which as a Bourgeois accomplishment would have been viewed with little favour or respect by the Seigniors of France; it would be the height of credulity to believe that either Louis the 15th or his successor viewed the feudal system so favourably as to desire its perpetuation in Canada alone of all the French Colonies; a notion which no doubt sprung from the use of the terms *à titre de fief et seigneurie* which were merely amplificative of the property granted and did not fix the tenure, and is one of the many absurd examples offered to notice of the appliance of old world technical legal terms to new and uninhabited or at best newly settled countries or colonies.

It has been already remarked that the grantee was under no compulsory obligation to sub-grant his land; but its extent, in almost every case, was beyond his means to improve, and this compelled him, *malgré lui*, to secure the assistance of others for carrying out the improvement necessary for his own advantage and for preventing the revocation of his grant for a breach of the Royal condition of settlement. As previously mentioned, he was uncontrolled in the mode of alienating his estate, but circumstances compelled him to select one as the most effectual, namely that by proprietory sub-grants to parties capable and willing in their own interest to put their grants under improvement. Garneau observes: "the "Monarch made to his Civil and Military Officers and "to others of his subjects whom he desired to reward or "favour, grants of lands in the Colony extending from two "to ten leagues square. These great land holders unable, "from their limited means or personal unfitness, them-"selves to improve their grants were under the necessity "as it were to distribute their estate among veteran soldiers "and other colonists for a perpetual rent charge called

" *cens et rentes.*" Charlevoix, 5 vol. p. 160, says : " Canada " was a great forest when Frenchmen first settled there. " The grantees of seigniories were unable to improve their " grants ; they consisted of Military Officers, Gentlemen, " Religions Bodies none of whom possessed sufficient funds " to maintain and support the labourers and workmen re- " quired for the purpose. They were therefore compelled " to effect settlements by inhabitants who could advance " their own labour and money upon sub-grants before any re- " turn could be derived from their outlay. Their contracts " with their Seigniors were in consequence at a very mode- " rate rent charge, *modique redevance*, and this with *lods et* " *ventes*, fine on mutations, which added little to the means " of the Seignior, his right of toll for milling and grinding, " and the profits of his own cultivation of his own property " rendered a seigniory of two leagues in extent in front by " almost unlimited depth, a source of little really productive " revenue in so thinly populated a country and where so " little internal commerce existed." These remarks were written by the very intelligent and instructive Jesuit in 1721.

He subsequently proceeds to describe his visit to the *Grand Voyer de la Nouvelle France*, the Baron of Bécancourt and Seignior of Portneuf, at Portneuf, and the details which he has left are not only amusing but exceedingly instructive in this matter, as being characteristic of the state of things at that period existing in the Colony : *ex uno disce omnes.* " The Baron's mode of life in this desert, because there is " no other near settler, naturally recalls to mind that of the " patriarchs who did not disdain to cultivate their property " with their servants, and the Baron lives almost as fru- " gally as they did. The profits which he derives from the " trade with the Indians, his neighbours, in the purchase of " their furs at first hand from themselves, is fully equal to all " the *redevances*, rents, which he might receive from tenants " to whom he might concede his lands. Hereafter he may " have tenants and will improve his position when all his

" estate shall be cleared. " This visit as stated above was made in 1721, ten years after the publication of the *Arrêts* of Marly which have formed a very prominent ground of discussion in the investigation before us and which will be referred to at length hereafter. From the foregoing it must be apparent, that with the uncontrolled freedom to make use of his grant as the grantee considered best for his own interest, the adoption of the *bail à cens* or sub-grant with a rent reserved was a necessity not a choice, in preference to sale for a paid price, in a country without money capital and offering labour only as the means of improvement, whilst it is equally undeniable that the consideration of the sub-grant must have been subjected to some understanding or contractual agreement betwen the grantor and his sub-grantee.

The consideration in this manner agreed upon for the concessions including the rent charge, of course thus matter of bargain between grantee and subgrantee or tenant became the criterion of the rate of charge on subsequent concessions or subgrants in not essentialy dissimilar circumstances, at periods ranging about the same time, for lands of similar character, in the same seigniory and locality and presenting generally the same quality and feature, although not affecting with the same uniformity the more advantageous localities of the same seigniories or other seigniories where the grantors were uncontrolled in that respect, or who possessed sufficient means themselves to accomplish their settlement duties without fear of forfeiture. Still however as a general rule, the very great quantity of unoccupied land offered and the very limited number of intending settlers or applicants for grant necessarily and constantly retained the rate of rent charge within extremely moderate terms until the Cession of the Country to Great Britain, from which time an entire change took effect in the Colony.

The following figures are adduced in support of that bargained, *modicité*, moderate rent charge, shewing the population and extent of cultivation at different distinct periods.

In 1667	4312	souls with	11000,	arpents	under cultivation
1679	9100	"	22000	"	"
1719	22000	"	48000	"	" and
			8000	"	in *prairies.*
1734	37000	"	163000 arpents in cultivation and		
			17000	"	in *prairies*,

in 1721, 25000 souls, of whom 7000 in Quebec and 3000 in Montreal with 62000 arpents under *prairie* and cultivation giving 2½ arpents for each soul of the entire population, or 4 arpents for each soul out of the Cities.

The form of the sub-grant or concession was attractive to these intending settlers, from being in harmony with a system in operation in their mother Custom in France, whilst the consideration in the shape of an annual rent charge with particular service, placed the sub-grants within the reach of a class of settlers whose circumstances prevented the payment of a price for the land, but whose labour upon it would soon enable them to satisfy the annual rent; hence subgrants became generally adopted as a mode of alienation and acquisition; the reserved rent was technically known under the term *cens et rentes* and the sub grants as *concessions à cens* or grants in *censive.*

This reserved rent was in effect a recognition of the seigniorial connection and dependence in the same manner as the render in the Royal grant, and was usually stipulated in money, grain or kind with such other charges and conditions as might be agreed upon by the parties, Seignior and tenant, as the consideration of the grant, and which became in fact the representative of the settled value of the concession; it thus evidenced a conventional bargain and agreement in which the grantor must be supposed in his own interest to have stipulated the highest rate he could obtain, whilst the tenant in his own interest kept it as low as his means would warrant. On the one hand, the Seignior not absolutely nor by law compelled to sub-grant, exercised his full proprietory right over his property in settling his own estate as

much as possible by fixing his own terms and conditions upon his sub-grants, whilst on the other hand, the settler having no claim or right to participate absolutely in the royal bounty to the Seignior or to compel the latter to parcel out the land for his advantage or occupation alone, was content to take his sub-grant upon the best terms he could obtain it for: self interest on both sides wisely left to work out its legitimate consequences, acting and acted upon by a scanty population or small demand on the one hand and an immense quantity of land offered for settlement, an over abundant supply on the other, exhibited the result that must have been anticipated, a moderate rent charge in the early concessions, and the same self interest continuing to operate at all subsequent times continued to make the consideration of the concession a matter of bargain between grantor and grantee, subject to interference only in the special exceptional case provided against by the first *Arrêt* of 1711, the refusal of a Seignior to grant a land to an intending and applying tenant, and which, singular to say, has in no instance ever been rendered operative since the promulgation of that *Arrêt*.

The concession so made was necessarily a synallagmatical contract between the grantor and grantee, or to use the common terms, Seigneur and *Censitaire*, Lord and tenant, and conveyed an estate in as full property and right to the latter and as incommutable in its nature as the Royal grant to the Seignior himself; its conditions were expressed in the terms of the concession and in the legal incidents necessarily flowing from them; to the extent of these conditions and incidents it was of feudal nature "*tenor est qui legem dat fundo*," "*ainsi la veritable loi censuelle c'est l'acte constitutif de la censive, son esprit est la volonté des contractants*," hence Mr. Solicitor General Smith's feudal fiction of tenure in the concession, as between Seignior and tenant, is to be found in the grant alone, and not in the provisions of the law either customary or municipal; this principle appears to have been fully adopted in the Seigniorial Act of 1854 itself,

which provides in the 6th Section of the 5th Clause, that "*in determining the seigniorial charges to which each land is subject, the Commissioner shall be guided by the title of the owner from the Seignior, &c.*"

The same desire for settlement evinced in the condition of the Royal grant to the Seignior, was expressly extended to his sub-grants and his *Censitaires* who were, by theRoyal condition in the original grant, required to agree *de tenir feu et lieu* upon their concessions on pain of forfeiture and revocation of the concession, and hence this stipulation has made part of the conventional contractual undertaking between *Censitaires* and Seignior.

The distinctive rights between the Sovereign the dominant Seignior and the Seignior his immediate grantee, and between the latter and his sub-grantee the *Censitaire*, were plain and apparent and thus the exact proprietory rights of each became full and absolute. The ancient derivations and speculative notions upon the origin of feudal property were at that time abandoned and replaced in France by a modern and more common sense system. Hervé, 5th vol. pp. 75, 89, says that the old technicalities, *droite seigneurie* immediate seigniory, appropriated to the Seigniors, and the old prohibitions imposed upon the tenants no longer applied, and a direct proprietory right existed in each under his title. Championniere, p. 146, thus explains the matter and sums up much authoritative learning upon the subject; "In this "system the full, entire, absolute property constituted "the *dominium plenum* the *jus integrum*, and he who united "all its elements in his own possession enjoyed *jure pro-* "*prietario in integritate.* By the effect of the feudal "contract this property was divided, the feudatory or "tenant received the useful demesne whose profits consisted "in the produce of the soil, the grantor reserved the im- "mediate demesne whose profits consisted in the obligations "and dues of the feudatory." At page 589, he proceeds: "These considerations fix the true meaning of the words *fief*,

" Seignior of *fef*, fendal law; in Customs all posterior to " the extinction of the state of society which had established " it, as its chief object.....no personal superiority re- " mained, the Seignior could no longer command his vassal, " the latter was independent of the former. The seigniorial " association only subsisted in one of its means of existence, " namely infeudation. The grant was not set aside with " the cessation of the chief object of that association, the " grant survived in its nature though not in its original ef- " fects. It no longer produced actually and usefully, fealty, " military service nor the right to administer justice: but " it always consisted in a division of the property, and a " partition of its elements between the Seignior and the " vassal. The former was always proprietor of the im- " mediate, the latter of the useful demesne; their respective " relations extended no further. All that the vassal held by " his contract constituted the useful demesne." Henrion de Pansey, 1 vol. pp. 270 to 2, admits that " property or *seigneurie privée*," as he designates it, " was of two kinds, the " immediate and the useful, originating in the Roman law, " and proceeding from the annual return due by the one to " the other under a contract, recoverable by the direct or the " useful action as the circumstances of the case required: " these actions became synonimous with and were replaced " by the terms immediate and useful demesne." Prudhomme, *Droits en roture*, p. 95, says: " the censual contract " is that whereby the proprietor of a fief disseises himself, " and gives up the whole or part of his property, and " conveys it by grant to the tenant in full property in " consideration of a perpetual reserved rent charge on the " realty in recognition of its immediate connection with the fief, &c."

Neither the immediate nor the sub grant purported to settle mere fendal rights or privileges, but actually conveyed a portion of territory, a certain extent of land, a realty in fact subject to certain stipulated conditions of the

contracts and establishing the Seignior as well as the tenant equally full and absolute proprietors of the property granted to either.

Thus an immense *allodium* was in effect parcelled out into distinct individual properties, all charged distinctly and expressly with the condition of settlement under the penalty of forfeiture and revocation of the grant in favour of the respective grantors, the King and the Seignior, as the case should occur, upon the neglect of the Seignior or tenant to carry out that object of the grant, but the mode of settlement in both instances was left to the discretion of the grantee, and no revocation can be shown to have taken place when improvement had actually been performed.

The chief and great objection raised at the argument before this tribunal with reference to concessions is that the rent charge, *cens et rentes* stipulated in the concession or subgrant is excessive and that the law has fixed and established a certain *quotité ;* this is a mere repetition of former forensic efforts and has been the staple of the popular orator at the hustings and in the Legislature but it has no foundation either in law or in justice.

Upon this point the discussion may be narrowed to small dimensions ; no complaint has been urged by the tenants themselves with reference to their concessions or the stipulations contained in them ; the existence of the charge as matter of fact payable by all seigniorial tenants, individual and collective, is undisputed and unquestioned as having existed from early Canadian times and growing with the growth of the Colony ; the President of the Court has however so entirely exhausted this part of the subject that a repetition would be tedious and unprofitable ; suffice it to notice briefly some of its principal features.

By the Custom of Paris, the owner of a fief was only permitted to alienate two thirds of it without fine to the immediate Seignior, but in Canada where the grants pro-

ceeded from the King, the dominant Seignior and Legislative Lord, by whom a general settlement was intended by the terms of the grant itself, where the entire wilderness was required to be made useful and productive and where no ancient family or political distinctions existed, the restriction of the Custom was not and in common sense could not be law, and the Seignior grantee might alienate his entire grant by sub-grants of right without fine to his dominant Lord the King whose object was free and early settlement; the obvious reason is given in the report of the Canadian Committee to Governor Carleton in 1775, "*se jouer* "*de son fief* is to alienate a portion of the *fief* without divi- "sion of the fealty; but this alienation could not by the "law of the Custom exceed two thirds; the excess even "without division of fealty, becomes the property of the "dominant Lord. But this customary prohibition is in no "way an obstable to concessions tending to settlement be- "cause these are rather an amelioration than an alienation "of the *fief*;" and Henrion de Pansey, p. 390, establishes that principle as law.

The technical words of the Custom *se jouer de son fief et faire son profit* have been uniformly explained by French jurists of admitted authority, as signifying the power to alienate the limited quantity of the estate by sale or any other mode of alienation agreeable to the Seignior at such price and terms as might be agreed upon. 1, Henrion, pp. 375, 380–3, Hervé, p. 361–1, Guyot, p. 115, 116, 142–1, Brodeau, p. 534–1, Ferrière, Grand Com., p. 842, 848, *cum multis aliis*—The customary restriction, as applicable to the extent of the sub-grants being inoperative to that portion of the Seigniory in France, namely the aliénable two thirds, did the custom, if indeed applicable at all, establish a *quotité* or fixity of rentcharge for the restricted portion or did it in fact establish such *quotité* at all? It has been shewn that the rent charge was in fact a matter of bargain and agreement, and the custom giving latitude of alienation,

within the limited extent of the alienable portion of the seigniory requires only the retention of fealty and of some domanial or seigniorial right on the property alienated, without however specially establishing what it shall be. The Custom in its text is silent, and its expounders, the French authors and jurists, are united in the opinion, that the Seignior had power to convey and concede at any rate that he could obtain from his grantee or tenant. Guyot, 1 vol. p. 162, says : " A primary " principle acknowledged by all feudists is that *Dominus* " *concedit ad modum quem vult.*" Hervé, 5 vol. p. 91, sect. 9, discusses the question whether the *cens* is a rent charge proportioned to the true produce of the subject *accensé*, or a mere honorific right recognitive only of seigniorial connection. He establishes it " to have always represented the value " of the property, and to be a revenue proportioned to the " produce of the land," and adds, " the object of the *jeu de* " *fief* is to enable the Seignior to obtain the greatest possible " benefit from his property, to profit by it as laid down in the " 51 article of the Custom, and thereby to advantage himself " in the most ordinary and usual way, which is shown by " the authors to be by the *bail à cens* or censual contract ; " how could that advantage be reached, if the *cens* were " merely honorific ?" he adds " that the old money rates had " become exceedingly small by comparison with the then " value of money, but that the old rates in grain and kind " were still high and marked a very striking connection " with the then exact return and produce of land ; that the " *sol* and *denier* of old times were gold and silver coins, and " *that all the services and obligations charged upon a conces-* " *sion, including the cens, formed a censual unity of considera-* " *tion explaining the seeming modicity of the ancient rate* ;" he thus concludes : " it was natural for an intending tenant " to calculate the whole charge and payment to be made, " and to pay so much less in money in proportion as his " land should be subject to a number of services or obliga- " tions charged upon it ; no rent charge great or small in " amount is of the essence of the *bail à cens*, and its defini-

" tion cannot be made to depend or rest upon the greater " or less *redevance censuelle* always stipulated either in the " contract or by usage." A multitude of authors support the above, and it will be sufficient to add that the rent was of different kinds, according to the produce of the French Province in which it was payable, and according to the title from the Seignior. In the Paris Custom it was, as stated, made payable in money, grain or kind, whilst in Champagne the number of horses employed served as the rule. Fréminville, 1 vol. p. 211, mentions, in corroboration of his opinion of the *cens* being representative of value, that " in the sales of " Crown lands in France in the Reign of Louis the 14th, the " rent reserved was fixed at 1-20 or 5 per cent on the an- " nual revenue of the land sold." This was the usual interest rate at which sales of land were made *à constitut*, shewing the common known value of the return not only in France but in French Canada also, and at which, from the force of usage, they continued to be made among the French inhabitants of the Colony, long after the interest rate had been raised to 6 per cent by the Legislature.

The *quotité* was not stipulated in the original grants themselves of lands in the Colony, except in four exceptional cases explained by the President of the Court, and which form no precedent, as well from their limited number as on account of the peculiar circumstances connected with three of them in the grants themselves. Perfect freedom in this respect was established by judicial decisions from very early times, the Superior Council, by its Decree of enregistration of the *Compagnie du Canada*, sustained the application of the Company's agent Du Barroys, " that the grants proceeding from the Company should be made for such rent charge, *cens et rentes*, as the Intendants should deem proper, and declared that nothing could be more conformable to the Royal intentions, and that it was just and proper to accord the demand." The same principle of non interference was continued not only by the Judicial action of the Colonial Intendants down

to the period of the Conquest, except in the case of one judgment rendered by Hocquart in 1738, evidently defective in the report given of it, and which defect or omission has been clearly and conclusively explained by the President, but also since the conquest, by numerous decisions of the British colonial tribunals, for nearly a century to the time of the passing of the Seigniorial Act of 1854, under which we have been compelled to act judicially in this matter.

One word on that part of the *Arrêt de Marly* of 1711, which is supposed to sustain the fixity. The *Arrêt* provides for the gran to applicants, by the Governor and Intendant jointly, of particular portions of land refused to be conceded to them by Seigniors, and these officers are directed not only to divest the latter of the particular realty applied for grant, but to charge it for the u[illegible] the Crown, with the same, *droits*, charges as were imposed upon concessions in the same locality. This provision evidently goes upon the assumption that the Seignior had already admitted and established his own value for similar lands by his own contracts with his *Censitaires*, tenants, and was clearly based upon an uncontradicted legal principle, that in the absence of proof by the contract itself as between the Seignior and tenant to fix the rent charge, the *redevance* paid by neighbouring tenants should be sufficient *primâ facie* evidence of the rate for the grant in such case: it is only necessary to repeat that this provision of the *Arrêt* has never been enforced.

This point has been elaborated and discussed at so much length, that it may be considered as conclusively settled; that neither the law of the Country nor the law of the Custom of Paris alludes to a fixity of rate, that the Royal grants generally contain no such stipulation, that the freedom from fixity is involved in the complaints, made by the Chief Executive and Judicial Officers of the French King, in the Colony, to the Home authorities, of the want of uniformity in that respect, as an evil to be remedied, but which was never

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accomplished; that the British Chief Justice and Attorney General, as early as 1769, declare it not to be uniform, that Cugnet, a Canadian lawyer, publishes the fact in 1775, in his Treatise of the laws of the Country, pp. 44, 45, in which he asserts, "that no Royal Edict exists fixing the "rate *imposable* by the Seignior; that lands are not con- "ceded at equal rates; that they are higher in the District "of Montreal than in that of Quebec, because the lands are "more favourable in the former than in the latter;" that it has varied at different times and in different seigniories; that there is a marked want of uniformity in that respect where chiefly of course it should not be expected particularly to exist, in the Crown seigniories themselves, and that the judicial decisions of the British Canadian Courts of Justice have uniformly sustained the contract rate whatever that might have been.

From all this it is manifest that the rent charge has never been fixed and has not been uniform, and that the want of uniformity has been sustained by an unbroken series of decisions reaching to present times, maintaining the stipulated rates agreed upon and settled by the title or deed of concession, *bail a cens*, and by them concluding the rate in the absence of contract.

An erroneous impression prevailed for a long time after the conquest and extended down to a recent period, that a *quotité* or rate fixed by provincial custom had been established as a rule of law which might be enforced between *Censitaire* tenant and Seignior; a more full examination into the subject, assisted very materially by the mass of documents published by the Government at various times during the late parliamentary discussions and before unknown, has shown the error broadly and distinctly, but it existed as early as 1769. when the then Attorney General Maseres stated in his unadopted report to the Executive Council, that "wild lands are conceded at higher rates "than *allowed* under

" the French Government without regard to a *custom or* " *rule in force at the time of the conquest that restrained* " *them in this particular*," but he admits the absence of a uniform rule, and says " that the sub-grants were ordinarily at one *sol* per square acre, but two *sols* were charged where the lands were richer, with one half minot of wheat additional for each sub-grant." Maseres was incorrect in his statement of the fixity of the rate, but his belief in the establishment of a customary rate continued to prevail, and impressed myself and others of my colleagues upon this inquiry as well as others whose opinions were entitled to respect; it was however clearly an error and has been found to be no longer tenable.

The next point of interest submitted for our determination is the supposed compulsion upon the Seignior to concede his lands, and this is based almost exclusively upon the *Arrêt* of 1711, technically and generally known as the first *Arrêt de Marly*, because no such stipulation exists in any of the grants themselves nor in any law or regulation previous to the promulgation of that *Arrêt*. It might suffice to observe that *défrichement*, improvement, not *concession*, subgrant, was the condition of the original grant, the neglect of which entailed its revocation; as this *Arrêt* has been adverted to, its terms and provisions must now be briefly examined to ascertain the support which they are supposed to give to this compulsory obligation upon the Seignior. It may be here observed that publication of the *Arrêt* was not generally or fully made in the province for twenty years after its date, and indeed only by the *Arrêt* of 1732 which repeated its terms and provisions.

The *Arrêt* sets out distinct complaints, and provides distinct remedies. The first complaint stated in the preamble to the *Arrêt*, is that " among the Royal grants of lands *en seigneurie* to His subjects in New France, there are some which are *not entirely settled*," this is passed over without observation and without remedy, and evidently not considered

to be an evil, because no remedy is provided. The second is "that other grants have no inhabitants on them to bring them under cultivation, and that the Seigniors have not commenced clearances on them for their own residence thereon:" for this evil, which is assumed to be an absolute breach of the condition of the grant to improve the estate granted, a remedy is expressly provided, commanding "those "Seigniors, grantees, within one year from the publication "of the *Arrêt*, to bring their grants under cultivation and "place inhabitants thereon, under the penalty of revocation "of the grant and re-union of the granted estate to the King's "demesne by the Governor and Intendant, upon the com-"plaint to that effect of the Attorney General, *Procureur du* "*Roi*." The compulsory concession is evidently not to be found in the *Arrêt* so far. The third evil is "that some *Seigneurs* refuse, under various pretexts, to concede lands to inhabitants applying for them, *with the view to sell them* imposing at the same time upon the purchased lands the same dues and duties, *droits de redevances*, as the settled inhabitants are charged with, which His Majesty declares "to be entirely contrary to His intentions and to the terms of His grants, which permit concessions of lands subject to dues and duties *à titre de redevances* merely," and for this evil a special remedy is also provided, "His Majesty ordaining that all Seigniors do concede *qu'ils ayent à concéder* in their seigniories the lands demanded of them subject to dues and duties, without exacting any sum of money as a price for such concessions, otherwise and on the Seignior's contravention of His commands in that respect, that the demanded lands on the formal summons of the applicant shall be escheated to the Crown, and concession thereof made by the Governor and Intendant for the same dues and duties, *droits de redevances*, as those imposed upon the other concessions, and which are ordered to be paid to the King's Receiver." It is too much to seek in this third evil, and its remedy, for a general compulsion on the Seignior to concede his lands, whereas its object was the prevention of

land speculation, and of obstructions by Seigniors to the settlement of the Country by sub-grants at a rent charge only, sale impeding the *habitants*, whose scanty monied means preventing purchase, were essentially and absolutely necessary for their first settlement upon their concessions. The King himself explains his meaning on the subject of the *Arrêt de Marly* in his Instructions to the Governor and Intendant of 26th June, 1717, in which he observes "that "their attention to the enforcement of the *Arrêt* of 6th July, "1711 (the *Arrêt de Marly*), which provides for the escheat "to the Crown of unimproved seigniories, and to the obliga- "tion upon Seigniors to concede lands in their *seigneu-* "*ries* which they desire to part with, is very necessary for "the settlement and extension of the Colony; they must "prevent Seigniors from receiving money for conces- "sions of wild lands *terres en bois debout*, as it is not just "that they should sell the property on which they have "incurred no expense, and which was given to them only "to have it settled."

To discover a compulsory obligation to concede in the plain and evident words of the *Arrêt* above transcribed argues a manifest mis-apprehension of the plain object and intention of its provisions, and a mis-application of the plain language of the enactment itself, whilst it is at the same time at variance with every just principle of the legal construction of such documents. It is sufficient to add that no authoritative adjudged case can be discovered in which the *Arrêt* has been enforced in this particular, evidently indicating the supposed intention of its promulgators to have it considered what it became a mere *brutum fulmen*.

The subsequent *Arrêt* of 1732, which re-enacted the prohibition to sell of the *Arrêt* of 1711, was as ineffective for compulsion as the former, whilst the Royal Declaration of 1743, which provides a code of practice to be observed in matters of escheat, makes no special enactment in respect of the compulsory concession of lands.

It may here be observed that in several of the Royal grants, chiefly in those subsequent to 1732, a condition will be found that the concessions shall be "*aux cens et rentes accoutumées par arpent de terre de front*," which was evidently inserted by the advisers of that last *Arrêt*, solely for the purpose of reaching the difficulty above adverted to, of the sale of wild lands by Seigniors, and of giving contractual effect to the prohibitions and penalty of the *Arrêts*. This condition however had not the most distant connection with compulsory concessions by the Seignior when he could improve his grant without resorting to sub-grants.

To the extent, therefore, of a legislative and authorative settlement of the consideration of a sub-grant, namely for *droits de redevances*, dues and duties alone, when a sub-grant was made by the Seignior, and the prohibition to demand a price for the concession in addition to those recognized *droits*, and in the further legislative and authorized enforcement of its observation for the purposes of cultivation, not speculation or land jobbing, the *Arrêt* of 1711 was undoubtedly compulsory, but to that extent alone ; it did not, nor by any mode of discovery or explanation that can be legally applied to it could it be intended to interfere with or compel Seigniors to part with their property : as under the Custom of Paris when alienation was made *en fief*, which the Seignior was however not compelled to do, some feudal recognition was required to attach to it, so in Canada, when the Seignior was willing to sub-grant, it was with the distinct understanding that it should be *à titre de redevance* and without exacting in addition a price in money ; this clearly was the sole object of the Royal Legislation of the *Arrêts* of 1711 and 1732.

To obviate long argumentative responses in the judgment, no objection was recorded by me to the 7th, 8th, 9th and 10th answers touching this point of compulsion, with its further references, because, in fact, the matter was of no importance or interest in a practical point of view for the solu-

tion of the legal points involved, and might have been omitted altogether in the reference; and moreover, because the language of the answers discussed and agreed upon by the Judges at their final adoption, in fact conveyed undeniable facts and references which offered grounds for a partial acquiescence in them; but to avoid mis-conception, reservation was made to explain my assent as published with this Judgment, and to state my distinct denial of the compulsion to sub-grant either by the terms of the *Arrêt* or otherwise.

The first *Arrêt* of 1711 and that of 1732 had reference to Seigniors and their grants; but the second *Arrêt* of 1711, which was registered in the Superior Council of the Colony at the same time with the first, above referred to, provided for the escheat in favour of the Seignior, of conceded but unoccupied sub-grants, a summary process for its enforcement before the Intendant alone was thereby provided; no discussion has arisen with reference to this second *Arrêt*, which has been frequently enforced, as well under the French as under the British Dominion.

It is obviously important to refer for explanation on this head of escheat, *réunion*, to the course pursued in France in the matter. From early times unoccupied lands were viewed with disfavour *socialiter et utiliter*, and Fréminville, 3 vol., pp. 344, 5, says: "that they might have been taken "possession of by the first occupant; this occupation be- "came in time the right of the Seignior *justicier*, which "by the Ordinance of Charles 9th, of 1566, was intro- "duced into all Letters Patent granting to Seigniors power "to renew their Terriers, and was the more legal because "it tended to the public good, for the useful cultivation "of unoccupied lands in the seigniory, and this appears by "the *Arrêt* of 13th Oct., 1693." 1 Henrion de Pansy, p. "237, repeats the words of Dumonlin: "Vacant and unoc- "cupied lands belong to the feodal seigniors, because they

" were in the origin of *fiefs* invested with the entire territory " of the *fief*, and those lands remained uncultivated only be- " cause it was not thought proper to infeodate or accense " them ; in as much, therefore, as the Seignior did not alie- " nate them he remained proprietor of them, this is the le- " gal presumption ; all *terre tenants* within the limits of a " seigniory are presumed to hold their lands under concession " from the Seignior, in virtue of successive alienations made " by him as new acquirers offered. The uncultivated lands " must therefore be considered as portions which the Sei- " gnior of the *fief* has not *accensed*, because he has either " been unwilling to do so or has met with no applicants for " them." DePansy further observes that " Dumoulin's opinion is sustained by legal principle and the nature of things, and has never been controverted."

In France, the King had no power of appropriation and escheat, *réunion*, to his demesne of any abandoned and unoccupied lands not within it ; that right over seigniorial lands resided in the Seignior *Haut-Justicier* of the Seigniory. Furgole, Treatise of *Aleu*, p. 6, observes : " However " exalted the Royal influence may be within the State, " Kings have not presumed to stretch their power to the " disposal of the property of their subjects without their " participation, or without some object or motive of public " good as a ground for their proceeding." In Canada, the grants proceeded directly from the King himself, and contained his own stipulations and conditions agreed upon and accepted by the grantee, and specially the paramount obligation of settlement ; a breach of that obligation was a breach of the subsisting contract between the grantor and grantee, and brought the unoccupied land clearly within the law of the escheat and *réunion*, of the granted estate to His Royal Demesne, by his mere right as *Seignior dominant*, immediate Seignior ; the first *Arrêt* of Marly in effect did no more than declare the existing law, whilst it provided a speedy means for its enforcement, in a summary manner, by an extraordinary special tribunal, composed of the Gover

nor and Intendant, instead of by the tedious course of legal proceedings before the ordinary tribunals of the Province, even if these had been competent to adjudge between the King and his grantee.

Both the *Arrêts* of Marly in this respect affirm the principle of the common law, and offer novelties only in the mode of proceeding for its enforcement, the first providing a species of Land Board for determining upon the propriety of the escheat and the subsequent regrant, and the second providing an easy mode of proof, and an expeditious proceeding to adjudication, without the necessity for the employment of counsel, or the incurring of expense by the Seignior whose sub-grant had been abandoned and was unoccupied; the chief object of the first *Arrêt* of Marly was to relieve the King himself from the necessity of personal interference with his grants, whilst that of the second was to procure prompt action for the reunion to the seigniorial domaine of vacant land.

This joint tribunal, first established by the first *Arrêt* of Marly, may be, with truth and correctness, denominated an administrative Land Board, whose attributes and powers it becomes necessary to appreciate and understand, inasmuch as the conclusions to be therefrom deduced bear strongly upon the answers to be given to several of the questions propounded. As previously stated, those attributes and powers had connection only with the grant and regrant of lands, and did not extend farther. The Board not only controlled the grant of ungranted or unoccupied land, but directed the escheat or re-union of granted land and its regrant as unoccupied land; the escheat was simply formal, the regrant being essential as part of the Royal intention of settlement, for which alone the power to escheat was given as subsidiary: these attributive powers were uncontrolled by any legal rules, and solely influenced by the discretion of the Board, by their consideration of the King's supposed or express intention, and by their appreciation of the best

and most effective mode of advancing the interests of the Colony. The objects within the scope of these attributes and powers conferred upon the Governor and Intendant jointly, as above mentioned, could not with any propriety be intrusted to judicial authority, because the subject was of administration and police, without any law whatever applicable to its exigency, or by which a Court of justice could be directed or guided. Monsieur Petit pertinently remarks upon this subject, "that the laws have not explained what "the *Arrêts* call the *settlement*, which is required to be es "tablished for the avoidance of the re-union of lands to the "domaine. This would be difficult to determine by a ge- "neral law, because circumstances cannot always be alike "at all times, and all lands are not susceptible of the same "culture, &c. Hence the necessity for the interposition of "the Executive Government, not only to declare upon the "propriety of re-uniting the grant but, also upon the re-con- "cession of the property re-united, or the arbitrary grant of the "Seignior's land applied for and refused." "At first all "grants were made by the Intendant, as the representative of "the principal agent of the great Companies. This authority "was afterward intrusted to the Governor and Intendant "jointly, because the selection of the land to be granted, and "of the person of the grantee, might and did interest the pre- "servation of the Colony under the King's dominion, and "for which the Governor was responsible": "This un- "doubtedly was the reason for the attribution extended by "Letters Patent, within a few years after the re-union of the "Colonies to the Crown domaine, to these two officers in "common and to none other than themselves, conjointly and "not to either of them, to make grants of lands." With reference to the administration in relation to French and English concessions in America, Petit observes "that the "legislation of both nations was the same in matter of con- "cessions. The officer accountable for the preservation of "the Colony confided to his charge could not be a stranger "to it: the choice of grantees is evidently too important a

" matter to be made independently of the Governor. The " police over the reunion to the domain of lands granted by " abusive concessions is the same, and for the same reasons : " the conditions of the Crown grants are potestative in the " grantees, who can only blame themselves if they neglect " or refuse to fulfil them. The threatened penalty of for- " feiture of the grant, like the obligation imposed upon the " West Indian grantees to have and maintain a certain " number of black and white persons on their estates, des- " troyed the laws requiring the performance of the con- " dition. If it could be held just and necessary in regard " of persons in good circumstances, how much less " should it apply to grantees who, with small means and " little or no credit, or who depended upon the feeble ex- " pectations derived from plantations upon which they were " compelled to labour with their own hands to preserve them " from forfeiture. It is impossible to expect any good result " from such conditions of concessions, the first of which " should have been to limit the extent of the lands granted, " according to the nature of the plantations or culture of " which they were susceptible ; the omission of this con- " dition has prevented the increase of the population in the " Colony. Re-union is a punishment, it is true, but if the " settlement made by the first settler has exhasted his " means, the Colony loses an inhabitant whom she would " retain if his outlay in labour and advances were accounted " to him by his successor, who has the advantage of enter- " ing upon a cleared or partially opened land, the whole " profit from which would soon be within his own grasp."

The joint nature of the attributes intrusted by the *Arrêts* of 1711 and 1732 to the Military Governor and Judicial Intendant, not alone for the reunion or escheat of the unimproved grant, but for its subsequent re-grant in the same manner as any other ungranted land, the fact of the preponderance distinctly given to the Governor over the Intendant by virtue of the Royal Declaration of 1743, and to which Chief-Justice Hay adverts in 1767 in the following terms : " the power of

" the Governor was absolute in his department and he could " even control the Intendant in civil matters ; in matters of " great importance, particularly in granting lands, it was ne- " cessary that both should join" these, together with the reasons stated above, demonstrate these attributes therefore to be merely of state policy, intrusted to this peculiar administrative Land Board, and bearing about them no judicial attribute or organization whatever. One instance only has been found of the enforcement of the *Arrêts* of 1711 and 1732, namely the *Arrêt de réunion* of 10 May 1741, *Edits et Ordonnances*, 1 vol. p. 555, but this was a special case, proceeded upon by the express and special order and direction of the King himself, for non settlement of the grants after a delay of twenty years and without any attempt at occupation or improvement, and yet, notwithstanding that neglect, the Governor and Intendant promise new grants of the escheated estates to the same ejected grantees, if they would undertake to perform some slight settlement duty within a year ; thereby clearly shewing that the attributes of this special Board were administrative not judicial.

The peculiar provisions of these *Arrêts*, examined at this distance of time and without having received at any time any operative effect, present them to our notice as peculiarly inapplicable to any country in which settlement is progressing ; they were in fact eminently favorable to the Seignior, inasmuch as the prohibition to sell, applying exclusively to wild uncleared lands, *terres en bois debout*, did not reach cleared lands at all, and were strongly recommended by the Board not to affect the natural pastures, *prairies* ; their inapplicability may also be acknowledged from an appreciation of the nature of the country, and the habits and character of its inhabitants, and from the fact, that the requirement to settle and improve the grant within the limit of one year, according to the *Arrêt* of 1711, extended to two years by the *Arrêt* of 1732, was neither more nor less intended to be made operative, than as a covert declaration of confiscation under the guise of a liberality, which could not

within the knowledge of the Legislator and his colonial advisers by any possibility be carried into effect.

These observations necessarily lead to an inquiry into the nature and character of the *Arrêts* themselves, keeping in mind that the second *Arrêt* of 1711 does not fall within the discussion. The inquiry in the first instance may be sought for in the correspondence between the Home authorities in France and the Colonial authorities in Canada in relation to them. The joint annual report of the Governor and Intendant in October 1730 informs the Minister that the *Arrêt* of 1711 was generally unknown in the Colony, but would be promulgated in the following year, unless H. M. should otherwise direct; the continuance of the then state of things without interference was however recommended until H. M. should publish a second *Arrêt* to prevent the sale of wild lands under the penalty suggested by the writers and adopted in fact in the *Arrêt* of 1732; their report of October 1731, especially declares the fact that Seigniors do in general concede their lands, and that *Censitaires* have never complained against them, but the necessity is urged for another prohibitive *Arrêt*, and the report concludes with the intimation that since 1712, the intendant has given operative effect to the second *Arrêt* de Marly, by re-uniting to the domains of Seigniors two hundred vacant concessions. The *Arrêt* of 1732 followed out these suggestions, repeating the provisions of the *Arrêts* of Marly and promulgating a special prohibition against the sale of wild lands, under the penalty suggested by the Governor and Intendant, but extending the limit for settlement to two years instead of the more limited period of one year fixed by the *Arrêt* of 1711.

Upon the subject of this limitation for settlement, the Governor and Intendant themselves state in their annual Report of 1734, "that it is a provision which it is impossible to enforce *à la lettre;* they observe that settlements can only be established after several years, "*on croit que ce n'est qu'après quelques années qu'elle peut avoir lieu*," but that "the

matter was within the range of their discretionary powers." The extract from the Report of 1734 above adverted to is as follows, "the penalty of re-union for non settlement within the year and day must not be taken literally. We know that settlement cannot be effected until after several years, and that it is in the power of the Governor and Intendant alone, under the *Arrêts* of 1711 and 1732, to pronounce the re-union, which they will never rigorously enforce against the Seminary of Montreal to whom the writers are ordered to extend the utmost reasonable facilities. "It is even proper for the King's service and the Colony's advancement to extend the time, according to circumstances, to the *concessionnaires* of the granteess, one year being insufficient: but it appears indispensable, seeing H. M's intentions, that the *clause should remain to excite settlements more promptly:* as to the Seminary they need have no fear."

The temporary nature of these *Arrêts* will thus be found in the correspondence of these Colonial Officials with the Home Authorities, in a referrence to the language of the *Arrêts* themselves, and in an examination of the state, condition and local circumstances of the Colony at the time. No Colony was in fact ever placed in more peculiar and distressing circumstances than French Canada: the settlement from the commencement of the eighteenth century was almost constantly exposed to Indian surprizes, or to a system of harrassing attacks from the neighbouring British Provinces; the Colony had a succession of military governors who at all times rejoiced to head military expeditions not only near home but at a distance from their seat of government, and it contained a limited population of a roving and military disposition, rather than fixed and permanent settlers as agriculturists, and who were not only liable to be called out at all seasons to repel aggression, but more frequently themselves voluntering to make attack. The state of the Country is exemplified by General Carleton in his examination before the House of Commons in 1774, previous to the passing of the Quebec Act, in the following terms:

" Under the French Government, the spirit of the government was military, and conquest was the chief object ; very large detachments were sent up every year to the Ohio, and other interior parts of the continent of North America. This drew them from their land, prevented their marriages, and great numbers of them perished in those different services they were sent upon. Since the conquest, they have enjoyed peace and tranquillity ; they have had more time and leisure to cultivate their land, and have had more time to extend their settlements backwards ; the natural consequence of which is, that wheat is grown in great abundance, &c.

It has been observed by an esteemed French writer: " that the French government seeing that private enterprize did not succeed in peopling New France gave to its colonization a character almost entirely military, not so much as a means of rapid settlement as a defensive precaution for the protection of the colony. Beausejour, Niagara, Frontenac, Detroit, Fort Duquesne were merely military Colonies. The fur trade and constant wars had distasted the Canadians with peaceable pursuits. A hunting and warlike people, they despised agriculture, arts and commerce : reputation and honor could only be gained in hardy and dangerous enterprizes or in battle. The Canadian, inspired by his Government too poor to protect him by regular troops, seized his gun, became a soldier and acquired that love for war which so greatly impeded the developement and progress of the country." And Charlevoix, 5 vol. p. 127, observes whilst remarking upon the faults of the system adopted in Canada: " Premièrement, on a été un temps " infini sans se fixer; on défrichissait un terrain sans l'avoir " auparavant bien examiné ; on l'ensemençait, on y élevait " des bâtiments, puis sans trop savoir pourquoi on l'aban- " donnait et on allait se placer ailleurs." In such a state of things it was not wonderful, that the second *Arrêt of Marly* was so frequently enforced in favour of the Seignior,

and that in fact frequent *réunions*, escheats, had been obtained even without it, from the Intendant in his judicial capacity, for years previous to its publication in the colony, for breach by the *Censitaire* of the condition of settlement stipulated in the sub-grant or concession.

It is in the face of such a system and of such circumstances, that the *Arrêts* of 1711 and 1732 are asserted to be municipal laws intended for enforcement and execution as applying to Seigniors ; a supposition at variance with the temporary character attributed to them by the Colonial Officials themselves, by their futility to be enforced and by their inapplicability to an improving and progressive country. They were in fact emanations of state policy as already observed for temporary and special purposes only, and entirely abandoned to the Governor and Council by whom the enforcement of the escheat was altogether discretionary : the French Minister intimating to them the Royal will : " that the obligation to settle within the year, inserted in the grants must not be taken strictly and H. M. leaves it entirely within your discretion, *S. M. s'en rapporte à votre prudence à cet égard.*

Admitting, however, that these *Arrêts* were municipal laws within the powers and authority conferred upon the French Governor and Intendant, can they be legally brought within the attributes of a British Colonial Judiciary ? It is undeniable that no power to dictate land grants to the Crown could reside in such a body, that power having been clearly deposited by the Royal Instructions in the hands of the British Governor of the colony alone, acting for and in the name of the Sovereign ; unless indeed it can be conceived, that the British Crown and its Colonial Executive were subjected, in the grant of lands, to the judicial supervision of the Canadian Courts of Justice, constituted for the sole purpose of deciding upon litigated difficulties arising among the inhabitants of the colony, with reference to their possessions and their civil rights : land granting clearly is not

within the recognised powers of the British Canadian Judges. What remains ? The enforcement of settlement within the stipulated limited period of one or two years, upon the prosecution of the Attorney-General as directed by the Delcaration of 1743, without whose action the judges had no power to act at all, and upon whose prosecution alone the *Arrêt* must have been carried into absolute operation, without possible commination or *locus pœnitentiæ* afforded to the grantee : the discretionary power of the Governor and Intendant administrative and executive united in those officers, but judicial only in the Colonial Courts, could not avail at all, and the *réunion* would be absolute at the expiration of the period of limitation. But by what rules of law could the Courts appreciate the grounds and reasons of the Seignior's refusal, the politic or personal capacity or *bona fide* intention of the applicant, or his means and ability to render the concession available for settlement ? No such rules exist or can exist in such case : the action of the public officer or of the Courts, if authorised to act, must necessarily therefore be discretionary and above as well as beyond law, and could not belong to a British Court of Justice, however eminent, bound to administer law. I am not aware that the British Crown has, in any instance, profited by and appropriated to itself land grants in any of its conquered or ceded Colonies, under penalties established by a law of forfeiture promulgated by the foreign legislature of the colony, before its conquest or cession to the British Crown. It is difficult to conceive any combination of circumstances imperial or colonial, administrative or judicial which can sustain, at this day, the existence of such provisions or the devolution of the powers contained in the *Arrêts*, to the existing Courts of Justice in the Colony constituted by the unambiguous language of the statutes of their creation, to administer municipal law and justice to the subjects of the Crown and not to declare or control the public or state policy of the Colony in the grant of lands.

Upon this matter Monsieur Petit observes that " the 4th Art. of the Declaration of 1743 assumes as already existing and confirms the power conferred upon the Governor and Intendant, *to the exclusion of all other judges*, to determine upon all disputes respecting the validity and execution of land grants, their position, extent and limits." If these attributes were actually included in the jurisdiction conferred upon the Colonial Courts, it must follow that they could control the position, extent and limit of a land grant in defiance of the Crown, a supposition as absurd, as the alleged erection of the Governor and Intendant into a Court of Justice, because of the use of such common technical terms as " *Ordonnance rendu* " " *connaître des contestations* " in the *Arrêt* of 1711 and Declaration of 1743 conveying the Royal intentions upon the subject, and the investiture of those state officers with an *extraordinary* judicial jurisdiction as a *Cour Royale*, because certain regulations were imposed by that Declaration upon their observance in the performance of their duty of granting and regranting lands in the Colony ; with such reasoning the present Crown land Department and its regulations for granting lands would necessarily become a Court also, and its reports, judgments *Ordonnances*, of similar judicial effect.

In a word, the exceptional authority of this joint delegation which could not be and never was administered by the existing French Courts in the Colony, which had no concurrence with those Courts and could not be extended beyond the subject matter and parties for which that delegation was specially established, or the acts as such and only such as were necessary to carry out its powers, is supposed to have been devolved upon the British Colonial Courts, because their jurisdiction was, by special statutory enactment, declared to embrace all the civil matters which those French Courts took cognizance of, amongst which were, however, none of those executive acts performed by the public Officers, the Governor and Intendant jointly, and involving discretion and judgment in determining whether

the duty existed, for their application of the law of the *Arrêts* as part of the ordinary *routine* of the business of Government.

With the Cession therefore, the first *Arrêt* of Marly of 1711 and the *Arrêt* of 1732 in corroboration of it ceased to exist, and the Declaration of 1743 in so far as it applied to the provisions of these *Arrêts* or to the joint power of Governor and Intendant had lapsed ; no subsequent legislation has re-established them or either of them.

As early as 1767, the Attorney General Maseres was under the impression " that a formal enactment was necessary to restore the laws in force under the French administration relating to the tenure and alienation of lands and to the forfeiture, confiscation, re-annexation or reuniting to the domaine of land by escheat or other devolution of same whatsoever :" this was in the interval between 1764, the date of the Ordinance of the Governor and Council which had assumed to abolish all the French laws and to substitute the entire body of the laws of England civil and criminal in their place, and the year 1774 when the 14 George III was passed, which enabled the King's Canadian subjects " to hold and enjoy their possessions and property with the usages and customs relative thereto, and all other their civil rights in as large a manner as if the Proclamation of 1763, and the Ordinances for the administration of justice, including that of 1764 above cited, had not been made, and as may consist with their allegiance and subjection to the Crown and Parliament of Great Britain." The 14 Geo. III also provided, " that in matters of controversy relative to property and civil rights resort should be had to the laws of Canada, as the rule for the decision of the same and that all causes to be instituted in Courts of Justice to be appointed within the Province by His Majesty should, with respect to such property and rights, be determined agreeably to those laws until altered by the Governor and Council." The 34 George III reconstituted the judiciary

and settled their jurisdiction, extending to the King's Bench Court thereby constituted, power and jurisdiction "over all plaints, suits and demands which might have been heard in the Courts of *prévoté*, *justice royale*, Intendant or Superior Council before 1759, touching rights, remedies and actions of *a civil nature* and not specially provided for by legislation since that year," but without a word of the joint action of the Governor and Intendant or their joint powers respecting land grants.

The jurisdiction formed by these statutes therefore is distinct and altogether separate from the peculiar and special duties and powers imposed upon the Governor and Intendant as public administrative functions, these latter and their official exercise in that respect cannot be included within the jurisdiction and powers of *a civil nature*, or within the denomination of either the Court of *Prévoté*, the *Cour Royale* or the Superior Council, whose attributes and jurisdiction were invested in the provincial Courts constituted to decide upon the litigated rights and property of the provincial inhabitants among themselves.

The power of *réunion* and regrant conferred upon the Governor and Intendant jointly, as such public administrative officers, could not and did not manifestly form any part of the jurisdiction of the British Colonial Courts of Justice established by the Statutes. The difference between the attributes of the old French land Board and those of the Colonial Courts of Justice are so plain and palpable as to require no comment. It is not possible to conceive, that the administrative and discretionary powers specially and distinctly conferred upon the Board could be conferred upon the Courts of Justice by implication alone, and in opposition to the express instructions of the British Sovereign, by which the grant of lands was intrusted to the Governor of the Colony and the Executive Council, whilst it is at the same time undeniable, that the powers of the Intendant in his acknowledged judicial capacity and attributes, un-

der the second *Arrêt* de Marly, were expressly given to and do exist in the Colonial Courts. It may be asked in conclusion, whether the arbitrary authority conferred upon the *procureur du roi* under the said *Arrêts* and Declaration of 1743, fall within the scope of the official duty of the Attorney General of Lower Canada ; that he could or would act of his own mere motion as in the French time, and without the previous order of the Governor in Council, is not credible nor is it possible ; and it is difficult to discover the ground for the belief of the existence of such a power in any delegation of royal authority to Colonial Courts at any time by any British or Colonial legislation.

Before concluding this part of the reference, it is proper briefly to notice that part of the *Arrêt* of 1732 which prohibits the sale of wild lands ; the preceding portion being a repetition of the *Arrêt* of 1711 has been fully discussed.

The *Arrêt* of 1732 states as preamble to this special enactment, H. M's., information " that in contravention of the *Arrêt* of 1711 some Seigniors have retained large tracts of uncleared wood lands, as domaines, which they sell, instead of conceding them at a reserved rent, that their grantees resell these lands to others who again sell them and thereby injure the growth *commerce* of the colony, wherefor H. M. expressly prohibits all Seigniors and other proprietors from selling any uncleared wood lands, under the penalty of nullity of the contracts of sale and *réunion* of the land to the Crown domaine." This provision is evidently a regulation of state policy, and although probably few instances have occurred in which it has been contravened by Seigniors, it is idle to suppose that it can be existing law to control or limit the sale of wood or uncleared lands by holders, when it is known that the wood of Canada has been one of its chief staples and commercial commodities for nearly a hundred years certain ; and that no judicial case under this enactment has ever occurred either since or previous to the Cession. The terms of the enactment moreover shew that it was not applicable to Seigniors alone.

A moment only need be given to the Ordinance of the Governor and Council above referred to of 1764, because in its effect, this Ordinance was supposed to have more or less interfered with these *Arrêts*. This Ordinance passed by the Governor and his Council of the day, undertook to establish a new judicial system for British Canada, and to substitute for the laws and usages of the Colony under the French regime, the entire system of the English civil and criminal law. Whether correctly or not, the Ordinance was generally understood to have abolished all the French laws and legislation, and in the generality of its revocation, to have embraced these very *Arrêts* of 1711 and 1732 as public laws with the Declaration of 1743 as the Code of practice for their enforcement and for that of the forfeitures and penalty therein contained, at the suit of the public prosecutor, the Attorney-General. The Ordinance is no longer in force, and its constitutionality need not be questioned; it was, however, recognized as law for ten years and though it was distasteful at the time, its legal existence was affirmed by the Stat: 14 Geo. 3rd, which not only established by Statutory enactment the Criminal law expressly introduced into the province by this very Ordinance, but did not in fact revive or restore the provisions of the *Arrêts* of 1711 and 1732 and the *Decl:* of 1743, in so far as these had reference to Imperial or public rights and attributes; the 14 Go. 3rd, did authorize, all Canadian subjects in the province to hold and enjoy their possessions and property, together with all Customs and usages relative thereto and all other their civil rights as if they had not been questioned, and moreover did require the decision of all controversies relative to property and civil rights to be governed by the laws and customs of Canada until altered by competent authority. The administrative attributes affecting land grants and escheats under the *Arrêts* above referred to were, however, evidently not contemplated and certainly not revived by the 14 Geo. 3.

The foregoing observations might suffice for a negative answer to the Questions submitted, whether the law of those

Arrêts was of public policy and still in force at the passing of the Seigniorial Act. This matter has been elaborated more than its importance in this controversy or the Questions in connection with it deserves: the subject might have been omitted altogether, inasmuch as the existence or otherwise of the *Arrêts* or of the administrative or even judicial powers of the Governor and Intendant jointly, has no practical bearing upon the settlement of the rights of the Seigniors for commutation: their antiquarian value has been recognized and submitted to us for the expression of our opinion, but notwithstanding their unimportance practically, a legal point with reference to them has been raised and asserted by the Counsel for the Seigniors, not without reason and strong authority to support the pretension, that even admitting these *Arrêts* to have been laws of public policy at the Cession, a contrary usage for a century and an entirely new order of things in Canada have absolutely and altogether nullified them. The following authorities were cited at the Bar and are here repeated as conveying their own explanation.

" Laws may be abrogated by *usage contraire*:—1 Solon, des Nullités, p. 267:

" Nos lois nouvelles n'ont rien de contraire à des prin-
" cipes aussi généralement admis, et comme autrefois, elles
" sont susceptibles d'être abrogées par un usage contraire.
" Nous devons même dire que si ce genre d'abrogation a
" été toujours considéré comme tenant à la paix des fa-
" milles et à l'ordre public, il a dû acquérir plus d'impor-
" tance dans les nombreuses révolutions que nous avons eu
" à subir depuis '89. Combien de lois en effet ont été faites
" avec légèreté et repoussées par l'opinion publique! Com-
" bien de lois n'ont dû qu'à des circonstances passagères
" une vie aussi courte que la cause qui les avaient pro-
" duites, et nos bulletins ne sont ils pas remplis de dispo-
" sitions législatives qui ont cessé d'exister sans aucune
" abrogation formelle!

No. 394. La jurisprudence a aussi confirmé sur ce point les anciens principes.

No. 399. *Quid* si la loi était prohibitive de tout usage contraire ; si par exemple le législateur avait déclaré que la loi serait observée, nonobstant tout usage qui tendrait à l'abroger ! Nous ne saurions partager cette opinion : sans doute l'abrogation serait beaucoup plus difficile à s'opérer ; il faudrait beaucoup plus de temps et un plus grand nombre d'actes contraires, mais du moment que ces actes seraient multipliés qu'ils se renouvelleraient journellement avec les charactères ci-dessus, ils abrogeraient la loi, malgré la défense qui se trouverait comprise dans ses dispositions.

Avant d'aller plus loin, il est à propos de rappeler les principes de la jurisprudence françaises sur les effets de la désuétude et l'abrogation qui en résulte.

M. Dupin fait observer que les lois ne sont pas seulement abrogées par la volonté expresse du législateur ; elles peuvent l'être par la *désuétude*, c'est-à-dire lorsque, par un long temps, on s'est accordé à ne point les exécuter.

" Cette inexécution, quoiqu'elle ne soit qu'un fait négatif, " a cependant une force positive dont le législateur lui- " même est obligé de reconnaître l'empire. Ainsi les au- " teurs des lois romaines," ajoute-t-il, " reconnaissent que " c'est avec très grande raison qu'on a admis que les lois " seraient valablement abrogées, non seulement par le suf- " frage exprès du législateur, mais aussi par le tacite con- " sentement de tous, si l'on s'accordait généralement à les " laisser tomber en désuétude."

" Chez nous l'ordonnance de 1619 en avait aussi une dis- " position expresse dans son article 1er qui enjoint l'exécu- " tion de toutes les ordonnances qui ne sont spécialement " révoquées *ni abrogées par usage contraire, reçu et approuvé* " *de nos prédécesseurs et de nous.*—Et à cet égard il faut re- " marquer que cette approbation elle-même n'a besoin que

" d'être tacite et qu'elle résulte suffisamment de ce que " l'autorité qui a le pouvoir de faire exécuter toutes les lois, " s'est dispensée de tenir la main à cette exécution, et a " laissé pratiquer ouvertement le contraire." Dupin, Manuel des Etudiants en Droit, Notions sur le droit, p. 406, Paris, 1835.

Le chancelier d'Aguesseau a reconnu la puissance du non-usage, en disant qu'on ne peut recourir en cassation pour violation d'une *loi abrogé par désuétude.*

Cochin reconnaît aussi l'abrogation des lois par désuétude.

" Ainsi, quand les lois sont demeurées sans exécution, " et qu'un usage contraire a prévalu, on ne peut plus in- " voquer leur sagesse ni leur puissance ; on peut bien les " renouveller pour l'avenir et arrêter le cours des contraven- " tions par une attention exacte à les faire exécuter, mais " tout ce qui a été fait auparavant subsiste et demeure iné- " branlable, comme s'il était muni du sceau même de la " loi." *Vide*, Œuvres de Cochin, tome 3, LII consultation, " p. 707.

Suivant Dupin, ce mode d'abrogation s'applique principalement aux lois *peu réfléchies*, à celles qu'on peut appeler de *circonstance*, lois d'exception, etc., catégorie dans laquelle se place naturellement l'arrêt dont il s'agit.

On peut aussi consulter, sur la désuétude, Solon, Traité des Nullités, Tome 1, chap. VI., De la Désuétude, p. 364 et suivantes, and also 9 Dalloz. Jurisp. Générale du Royaume, vol. Lois, Sect. 7, Chap. des Lois and Merlin Questions de Droit, vol. Droits et Effets public, Sect. 1."

In addition to the foregoing citations from jurists, it is true that non user cannot, as a general principle of English law, be invoked against an Act of Parliament, but it is equally a principle of the Municipal law of Lower-Canada and of every country in which English Common Law, does not prevail as paramount to the Civil Law, that laws

may go into desuetude. In Scotland, where the Civil law prevails, the principle of disuse applies even to Statutes themselves, which lose their force by desuetude if they have not been put into operation for sixty years. The framers of the Code Napoléon forcibly observe upon this point: " Les " Lois conservent leur effet tant qu'elles ne sont point abro- " gées par d'autres loix ou qu'elles ne sont point tombées " en désuétude. Si nous n'avons point formellement au- " torisé le mode d'abrogation par la désuétude ou le non " usage, il eut été peut-être dangereux de le faire. Mais " peut-on se dissimuler l'influence et l'utilité de ce concert " indélibéré, de cette puissance invisible par laquelle sans " secousse et sans commotion, les peuples se font justice de " mauvaises lois et qui semblent protéger la société contre " les surprises faites au législateur et le législateur contre " lui-même.—2 Dwarris on Statutes, p. 673.

Upon this point therefore our municipal law is at variance with the common law of England which has no effet in this respect in Lower Canada.

The facts stated at length above in connection with these *Arrêts* and their provisions, appear to bring them within the principles of désuétude. The *Arrêts* were evidently not made for any necessary or expedient remedial purpose, inasmuch as they were never inforced: no cause of complaint existed requiring their existence or their promulgation, because the advisers of the *Arrêts* admit, "that Seigniors do concede their lands at a *redevance* and that no complaints exist"; they were, moreover, inapplicable to the state of the Country down to the Cession to Great Britain. It is scarcely necessary to repeat the assertion, that they have never had an operative effect since the Colony became a British dependency, and its wonderful progress and advance in settlement and population since that time, are conclusive against any possible necessity for their existence from the close of the French dominion in Canada.

Having disposed of these speculative matters, the important practical questions in connection with the waters and water privileges so called now present themselves, and these must, of course, be considered in conection with the grants expressly or impliedly conveying them to the immediate grantees.

The Royal proprietory grant necessarily included every thing technically lying within the terms of the grant, and corporeally within the limits of the estate granted. The general formula employed, included the description or specification of the granted realty with its contents and boundaries, of such extent in front and in depth, either bordering on a river if that were the case with "*ensemble les rivières, ruisseaux et tout ce qui s'y trouve compris*" or "*ensemble tous les bois, prés, isles, rivières et lacs qui s'y trouvent*" or "*avec les rivières, ruisseaux et étangs si aucuns y a*" or "*jusqu'à la rivière icelle comprise*" or "*le long de la rivière avec les isles, islets, etc.*

The only difficulty with respect to the waters, arose as to their inclusion in the grant and as to the riparian rights of the Seignior, where the granted estate was bounded or traversed by a river.

The difficulty was susceptible of easy adjustment in France where the rules and principles of the feodal law were paramount, where possession and prescription filled up all intervals, and where titles, if any existed, never or rarely appeared in the controversy. The riparian Seignior extended his proprietory grant to the mid stream *ad filum aquæ* dividing his grant from that of his neighbour, and appropriated the river traversing the seigniory entirely to himself, upon the principle of the feodal law as laid down by Guyot, p. 669. "It is a general customary principle that the entire "extent of the seigniory belongs to the feodal Seignior "either in useful or immediate property: hence the water "which runs over his land incontestably runs over the land

" of the feudal Seignior." The property in the river in France was therefore a legal incident of the *fief* established by law apart from and independent of the technical construction of the terms of the grant. Hervé, p. 363, de la Pèche, says : " The Crown right of fishing is not domanial or inherent : " the right of fishing in the waters of its domaine or public " property is like that of individuals exercising their rights " on their private property ; but they do not hold their pis- " cary from the King more than they hold from him their " lands, fields, woods and all their property. These remarks " he says do not apply to special grants." The diversity in this respect between the Canadian grants and the tenure of France shews that the feodal incidents established in the latter cannot control or extend the terms of the former, which must be taken in their technical sense alone, subject to such legal construction as contracts conveying property necessarily bear, and to the operation of such general principles of the public law of the country as properly apply to them, for the simple reason that the lands were all held by grant.

It must be observed that the land of Canada before grant and as it lay in grant, was a great *allodium* held by the King as the representative and for the benefit of the Nation, and that his grants only conveyed what they expressly comprehended, and so far as they were not inconsistent with state policy, public laws or the restrictions and limitations of his grant. The grant to include rivers could therefore pass them subject to those limitations only as property, in the same manner as the property of the realty was passed, not as mere rights or privileges, and the operation of the grant wherever it affected the rivers at all, was to consider them as immoveable property. Henrion De Pansy in his 2 vol. pp. 639-40, says : " A navigable river is an immoveable, a " realty, in a word a material part of the domaine and as " such may belong to individuals ; it is subject to the gene- " ral laws affecting the alienation of the domaine. Hence " the King may alienate the bed of rivers in the same way

" as all other parts of the domaine ;" and Pothier, *Traité de Propriété*, No. 53, says : " As to non navigable rivers, " they belong to the different individuals who have title and " possession to qualify them as proprietors within the ex- " tent comprehended by their titles or their possession. " Those rivers which do not belong to individual proprietors " belong to the Seigniors *Haut-Justiciers* of the territory in " which they flow. No person is free to fish in them without " the permission of their proprietor."

A great number of concurring authorities declare, that they belong to the King and form part of the domaine of the Crown, but subject to separation from it by special grant : thus the *sol* or bed of these rivers may be alienated like any other immoveable, but for that purpose particular and special words of grant, and the observance of certain forms, for the determination and fixation of the extent of the grant are specially needed and require. Mere general terms used in the grant are not sufficient. De Pansy, p. 644, 645, remarks : " A river navigable *sans artifice* or rendered na- " vigable at the King's expense is nothing but a royal high- " way. Great rivers and great roads have the same object, " the same destination, the same public interests and must " in many respects be governed by the same rules." This author then makes the very evident distinction between a natural navigable river and a proprietory unnavigable river rendered navigable at the expense of the Crown. " The former is absolutely within the King's domaine, but " the property of the *sol* or bed of the improved river is in " the proprietor, the grantee, any interference with it is a " privation by the Crown of the subject's property and can " only be admitted after indemnity made. The joint pro- " prety is reconcileable. Navigable rivers belong to the " Crown on account of their importance ; the instances of " their grant to riparian proprietors are very rare ; but small " rivers having been included in the feodal grant with the " remainder of the estate, *surplus du territoire*, form the pa-

" trimony of the Seignior, who must submit to the sacrifice " on the Crown demand for the general interest ; the extent " of the sacrifice however is controlled by the public ne- " cessity, which does not compel the Seignior to give up his " property in the *sol* or bed of the river and all his other " rights over it, but only its police or regulation during the " period of its consecration to commerce : during that time, " the river in some sort becomes domanial, without however " becoming an integral part of the Crown domaine. Such " an improved river traversing a seigniory and made na- " vigable by the Seignior himself, remains not only his pro- " perty but also subject to all his rights even to that of police " as before its improvement." So also 4 Hervé, p. 249 ; Le Bret, p. 62 ; Freminville, p. 418. The latter says : " Streams and all rivers *qui portent bateaux*, which are " called navigable, and floatable rivers belong in full pro- " perty to the King *jure speciali* although they traverse the " territory and justice of Seigniors. So also 6 Guyot 663. " 2 Henrys, p. 19, Quest. 41. Merlin Rép. vo. Pèche, " p. 214, vo. Rivière, p. 541.

The law, which subjects navigable rivers to the Crown domaine, is based upon the principle of the public interest ; whenever the river ceases to be navigable, the Crown rights over it cease also and those of the Seignior commence ; from that point the river becomes *une petite rivière*, *une rivière seigneuriale*, *une rivière banale*, and therefore the property of the grantee, *Arrêt du* 9 *Mars* 1651. 2 Henrys, p. 20—4 Hervé, p. 250—Jousse on 41 *Art.* of 27 Tit. of Ord. of 1669.

Whatever differences of opinion may have existed in France, as to the respective rights of the *Haut-Justiciers* and Feodal Seigniors, on the subject of rivers, and their respective property and rights in and over them, no such difference can exist in this country, because the grant of *Haute-Justice* as well as that of *moyenne et basse* justice almost invariably accompanied the grant of the property

to the Royal grantee. The feodal rights attributed to this *Haute-Justice*, to control the use of rivers traversing a seigniory, as a regalian Royalty of general police either by grant or presumption, for the purpose of preventing the diversion of streams, removing impediments and interruptions to the employment of the rivers, the exclusive appropriation of fisheries, islands, etc. and the regulation of fisheries by others, were not included in the Canadian grants, and could not therefore give to the Canadian Seigniors any feodal privileges over rivers.

The great Royal police control of the King, which undeniably extended over his State and every property in it, also included rivers within it, because of their connection with commerce and public advantage. De Pansy, p. 640, 1, says : " Navigable rivers as well as the sea are assistants " to commerce, and as such belong to the entire nation, " *même à toutes nations*, and are under the control and " protection of the temporal sovereign : that is, the general " police and sovereign administration over the rivers must " be in the prerogative, for the conservation of governmen- " tal unity and the advancement and protection of the public " prosperity : hence it is a sovereign charge, enabling the " Crown to remove all obstacles to the improvement of pub- " lic commerce and securing for the public every possible " advantage from the free navigation of the rivers them- " selves ; this right of police with its incidents, the right of " fishing, the construction of mills, &c., differs from the " rights of property in the rivers themselves ; the domaine " and the sovereignty, the property of the Crown and the " rigths attached to the Crown are different and distinct ob- " jects " and Freminville, p. 62 of his 4 vol. speaking of this Royal property, police, &c., in all navigable streams, says : " It is so, not because the King owes his protection to " strangers coming into his dominions for commercial pur- " poses, but for the sake of commeree itself as that which " promotes the wealth of his Kingdom and the prosperity

" of his people ; his power alone can provide for the police " of his ports, rivers, &c., and if some Seigniors have the " *droit de pêche, de moulins et autres plus grands droits c'est* " *qu'ils sont fondés en titre.* 6 Guyot, p. 663." These principles have received the unanimous approval of all the feudists, and Hervé, 4 vol. p. 229 says that it is a *principe constant* in French law, and that the *Ordonnance des eaux et forêts* of 1669 confirms the right, which is more ancient even than the Ordinance itself.

It was in imitation of this regalian police control over navigable rivers, that *Hauts-Justiciers* in France assumed a similar right for similar objects over non navigable rivers, see 2 Henrion de De Pansy, pp. 639, 40, 41 ; Lacombe, vbo. Fleuve, p. 314 ; 4 Hervé, p. 441, 454, 55. Renauldon, p. 387 ; but as these matters never were in their keeping nor exercise in Canada, their *Haute-Justice* as such, in this respect never existed legally over the non navigable rivers of the grant, and hence the authority to control the enjoyment of the river, as a feodal right, by withholding *droit de pêche* or preventing the construction of mills or manufactories, *usines*, on their banks, even if it had come down to the Cession, absolutely died out with the *Haute-Justice*, upon the occurrence of that event.

From the foregoing it will be evident that the question is narrowed to the terms of the original grant and the legal construction to be put upon them ; and that a similar rule will apply to the subgrants or concessions from the Seigniors to their *Censitaires*, applying in both cases to the mere grant of certain real property.

The grants to the Seigniors are not uniform, some bound the estate by the river, whilst some have the river *comprise*, some include the navigable streams, whilst other include the river with its banks, *battures*, *isles*, *islots*, *&c.* This absence of uniformity necessarily leads to the conclusion, that no particular or fixed principle governed the grant, which appears to have been drawn out, in many instances

from the description of the estate given in by the grantee himself in his application to the Crown, whilst the reasons adduced in the grant for its allowance plainly indicate the effect of private influence ; in the construction of law however, it must be presumed, that the King's grant did not convey more than was expressly and specially granted or intended to be, without interfering with the public interests: whatever part of the common fund intrusted to the King for the common benefit, did not expressly pass by the clear and special words of the grant denoting the conveyance of an exclusive property or right, remained in the Crown for the benefit and advantage of the whole community and required a strict construction. A general enunciation, *la rivière y comprise*, is therefor not sufficiently special or formal in law to convey the navigable stream in the proprietory grant, whilst the common rule of construction would include the non navigable stream traversing the grant, 4 Freminville, p. 430. Salvaing, ch. 7. D'Olive 2, ch. 3. *Arrêt* of 14 April 1628, Despeisses *Droits Seigneuriaux*, *lib.* 5. *art.* 5. *sect.* 9. 6. Guyot, *lib.* 5. Livonière, p. 621. Renauldon, p. 365, because the latter, called *Rivières Banales*, *Rivières à Cens* were actual property and considered as such, whether traversing or in any way included in the estate granted, or whether mentioned or not in the grant ; hence the right in them, as property in the grantees, was unquestionable. A navigable river boundary limited the estate granted to high water mark in tidal rivers, and to the high water line in other navigable streams, and the extension of those boundaries beyond those limits required a special express and peculiarly formal grant. A non navigable river boundary limited the estate to the mid water line or mid stream, including of course the *ripa* or river bank within the property of the grantee. These principles, consecrated by a host of jurists and legal commentators, are equally applicable to the immediate or Royal grant and to the sub-grant or concession by the Seignior to his *Censitaire*, tenant, and will serve as grounds for the answers to be given upon the submission to us of these points.

In addition to the realty conveyed as above stated, the immediate grants professed to convey other rights, such as the *droit de justice* specifying in some of them the *Haute*, *Moyenne et Basse Justice* and in others one or both of the latter two. It is unnecessary to investigate the ancient legal learning upon this subject, nor attempt to discover the origin of the right, whether as proceeding from agreement or usurpation: it is sufficient to observe that the maxim of the older law, *point de fief sans justice*, was replaced in later times by another maxim, *fief et justice n'ont rien de commun*, and that the territorial grants in which *justice* was also mentioned should be examined in a technical sense in connection with the latter maxim. The terms appear to carry with them only the proprietory legal incidents of the grant of *justice*, which consisted in the *profits de justice*, such as the *droits de caducité*, *de batardise*, *les épaves* including wreck of the sea, the right of appropriating all vacant and unoccupied property in the seigniory, with all fines and confiscations. These rights were originally allowed to the *Hauts-Justiciers* as an indemnity for the expenses incurred by them in the administration of justice. Renauldon, p. 55, p. 8. Livonière, p. 21, and others. No grant of the *justice* was made in this country disconnected from the realty; it was exercised in only three or four instances, and, upon the Cession of the Country, under the influence of the establishment of a different system of judicature, ceased to exist either as a feudal or as a proprietory right; it possesses no interest whatever in this discussion.

The other rights professed to be conveyed, were *droit de chasse et de péche et traite avec les Sauvages dans tout l'étendue de la seigneurie:* none of which are exclusive. The *droit de chasse* even in France was not proprietory, it was merely honorific; it never could be feodal or seigniorial in Canada, otherwise the *droit de traite* or traffic with the Indians granted in the same category, must have been feudal also. So little was *chasse* deemed exclusive or feodal

in this country, that a variety of Ordinances and *Arrêts* were made by the King's Council, by the Superior Council and by the Intendants, in which the general right to hunt in the wilderness was regulated in different and frequently contradictory ways at different times. The reasons given for its restriction to the nobility and gentlemen in France, are simply ridiculously inapplicable in Canada, where the trade in furs constituted the chief motive for the original occupation of the country. In France it was a Royal and noble pastime, in Canada it was a necessity, and consequently, whilst the legislation of the Colony regulated its exercise it did not deprive the people of its advantages. The trade in the skins of wild animals killed by hunting was the staple trade of the country during the French dominion, and must necessarily have been left free under certain regulations, which were rather *de police* than prohibitions, such as not going over seeded lands, and not going into the depths of the wilderness, to the encampments and hunting grounds of the Indians, without the Governor's permission, with others of like character.

Charlevoix referring to the officers of Carignan's Regiment who had settled in the country, remarks, " *ce qui peu-*
" *ple le pays de gentilshommes dont la plupart ne sont à leur*
" *aise : ils y seraient encore moins si le commerce ne leur était*
" *pas permis, et si la chasse et la pêche n'étaient pas ici de*
" *droit commun. On chasse beaucoup, quantité de gentils-*
" *hommes n'ont guère que cette ressource pour vivre à leur*
" *aise.*"

The *droit de chasse* was therefore, in no sense either patrimonial or feodal in Canada, although nominally granted with the estate. The *droit de pêche* was not more privileged. This grant was exclusive, however, in a very few instances such as the special grant to the Seminary of Quebec of the beach of their seigniory of Beaupré, and the case of one or two other seigniories, and in a very few special grants on the shoes of the Gulf of St. Lawrence for the *pêche à*

marsouins and others of that description, where the fishing was the express object of the grant ; the special grant in those instances prevented fishing within the limits of the grant, except with the permission of the grantee, but at the same time proved the general freedom when no such special grant existed. Moreover, in the Royal Ratification of grants from the 6 of July 1711 inclusive, which confirmed a number of previous grants commencing in 1672, it was expressly and in terms conditioned, that the beaches of the rivers connected with the grants, should be left free for fishing, except what the Seignior might require for his private use, " *de laisser les grèves libres à tous pêcheurs à l'exception* " *de celles dont ils* (*les Seigneurs*) *auront besoin pour leur* " *pêche.*" In all these therefore, the *pèche* cannot be considered in the nature of a feodal right in Canada in the water of the river, or in the fish floating in it. The object of the grant and of the sub-grants, was the establishment of the colony : indeed the freedom of fishing could not well be prohibited ; for the men who first formed the settlements, could not have been expected to encounter the hardships, that unavoidably attended the first opening out the lands in this new world, and to people the banks of its bays and rivers, if the land under the water at their very doors, was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment, or unable to take a fish from its water or fasten a stake or even bathe in its stream, without becoming a *trespasser* upon the rights of others. The *droit de pêche* was part of the common fund in the Colony, intrusted to the King for the common benefit, and could not be passed, as an exclusive right, without some special grant beyond the mere formula above mentioned, and such as was given in the Beaupré grant. The *Arrêts* cited at the argument in support of the prohibition, and the law authorities which distinctly applied to the *droit de pêche* as a known feodal right in France, are alike inapplicable in this Colony. The *Arrêt* of the Intendant, in the matter of M. de Ramzay

against the Inhabitants of Sorel, prohibiting the inhabitants to fish in front of their own lands without the Seignior's permission, was not only illegal but arbitrary and unjust ; the grant of the seigniory did not contain even the usu ' formula, *droit de pêche*, and the King's ratification of that grant commanded the freedom of beaches for all fishermen. The *Arrêt* for the protection of the Seigniors of Beaupré, was in strict conformity with the special grant in that case, as also were some others, whilst the remaining eight or ten *Arrêts* had reference, not so much to the protection of fishing rights, as to the inflicting of penalties upon strangers for *trespassing* upon property not their own nor in their possession. The situation of the Country and the wants of the inhabitants in new settlements, at considerable distances from each other, must necessarily have contemplated free hunting and free fishing, as a necessary means of subsistence, and were just so far and no more feodal and exclusive in the Seignior, as they happened to be mentioned specially in his grant from the Crown, and to no greater extent than the *droit de traite avec les Indiens.* The exclusive proposition is unsupported either by special words in the generality of the grants or by common sense.

This opinion is supported and strengthened by the report of the Governor and Intendant of 6 Oct, 1734 to the Home authorities, on the subject of the grant of the Augmentation of the Lake of Two Mountains to the Seminary of Montreal, in the ratification of which by the King, the clause of free beaches was left out ; these Officials remark, that it was an ancient protocol inserted in a great number of ratifications of very early grants, and was not confined to Seigniories only on the borders of the Sea : that the power to fish by the tenants, greatly facilitated settlements and improvements in concessions which would be less sought after, if that right were refused to new settlers, as by means of fishing, they were enabled to subsist at the commencement of the settlement and clearance ; moreover, that its reservation in favour of the Seminary, in such a country as Canada,

would be impossible, in as much as Seigniors could not protect their *droit de pêche*, and that it would produce endless disputes and quarrels between Seigniors and Censitaires.

The *droit de traite avec les sauvages*, the right to trade with the Indians, is the last of the so-called specific privileges, which are mentioned in general terms in the immediate grants from the Crown. It is simply sufficient to deny the feudal right or character of this grant, as well as those of *pêche et chasse*, all granted together in the same category and in immediate connection with each other, in very few cases with special words of exclusion, in favour of the Seignior. They plainly indicate the use of a common formula, impossible to enforce as positive exclusive rights in the Seignior, and clearly exorbitant of the feodalism, such as it was, to be found in the articles of the Custom of Paris. No feodalism could, by any possibility, attach either to the use or abuse or non-use of these rights, or to their retention or alienation: if indeed they were appreciable at all, they could be so, only as proprietory rights.

Neither were the limitations and restrictions contained in the immediate grants, other than of a proprietory character: they were all of a territorial nature and had in view, not the establishment of feodalism in the Colony, but the carrying onward to completion, of the great principle of settlement, and the securing to the State the advantages not feudal but material in the realty described in the grant. Among these may be noticed, the condition for the discovery to the Crown, of mines and minerals in the estate granted, the conservation of all the oak timber on the granted estate for the construction of H. M. ships, the maintenance by the grantees of the public roads, the appropriation to the King's use of so much of the estate, as might at any time be required for fortifications and public works, with the necessary timber for their construction, and the fire-wood for the use of the garrisons; of course the great condition of *défrichement* overode the entire

grant and all its stipulations and conditions, but in no way affected the right or title of the grantee in the estate conveyed.

The conclusion plainly to be drawn from the foregoing details is evident, that the immediate grant was a full and entire conveyance of property, limited by one great condition only, the *défrichement* of the estate, that it was free from all feodalism or feudal incidents, except those expressly conditioned, that it was in fact the title to a full and perfect property in the grantee of the express contents of the Deed of grant and of all incidents, which the law applicable to such grants would include within them.

The remaining objects of interest submitted for our investigation are connected with sub-grants, or the concessions from the Seignior, to which cannot be denied the full proprietory character established by the grant from the King. The authors generally admit that the sub-granted estate is property in the tenant. Hervé observes, p. 376, " in general, the tenant, *le Censitaire* may dispose of the censual land as he may think proper; he may build upon it, destroy his buildings, make pleasure walks of it, &c, he has the absolute property of the *domaine utile* of his grant, and may use it as he shall think proper." hence it is a necessary legal inference that the tenant has a full title of property in his sub grant and it is idle to waste time upon this point.

The charges affecting the grant, either expressly set out in itself or by implied operation of law from its terms, do not interfere with the right of property in the land granted, *which is full and incommutable.* These charges, are either conventional between the parties in the terms of the sub-grant, technically called the Deed of Concession or simply Concession, agreed upon between the sub grantor and grantee, or created by the plain operation of law.

Of this latter, which will be first adverted to, the most important is *Banalité*, known to the English law, as " doing suit to the mill."

The indispensable necessity for mills for the sustenance of families, naturally, not only compelled extensive landed proprietors to erect mills on their respective domains for the public advantage, but also enabled them to fetter their gift with the condition, that the inhabitants and residents within their respective Estates, should bring their corn to be ground at the mill so erected; this was called in France *droit de Banalité*, and in England, "doing suit to the mill"; it became a principle of customary law in France, and was gradually incorporated into the feudal system in force in the custom of Paris, as a legal right in the Seignior independent of title, and compulsory upon the inhabitants of his Seigniory. In 1580 this legal principle was, by the operation of the reformed 7, and 72 articles of that custom, altogether altered in effect, and the subjects of the Seigniors, were relieved from this duty, unless the Seignior had title to require it, custom thus being replaced by contract.

In the settlements in this colony, the King's grants made no mention of this duty, and difficulties supervened which required the attention of the local Government, and which were afterwards settled and enforced finally by the Imperial authority.

The interests of the Royal Grantees and the poverty of their tenants, naturally combined to compel the Seignior to erect mills for grinding the grain required for the sustenance of the inhabitants of their seigniories, and justified the expectation, that all the grain required for such support, should be brought to the mill to be there ground for a customary toll. In this there was nothing of a feudal character, the tenant had not the means to erect the mill, and his Seignior was willing to make the outlay, provided he was protected against interference by others, and that a return for this expenditure was secured to him, this was in effect established by positive legislation.

The very early legislation of the colony evidently contemplated such an arrangement and, undertook not only to

enforce it, but arbitrarily established a rate and regulations, by which both mill owner and mill employer should be governed. As early as 1667 within four years of the creation of the Superior Council at Quebec, upon a representation of mill owners, *propriétaires de moulins de ce pays*, shewing the great expense incurred by them in the erection of their mills and in keeping them in good order, as well as in the high wages of their millers, exceeding those of old France, and their claims to a higher toll than that exacted or obtained in that country, the Superior Council of Quebec enacted, that one fourteenth should be the toll, and directed certain regulations to be observed by the millers, in weighing the grain before being ground and the flour after the milling. The Ordinance of the same Council in 1675, bannalizes all water and wind mills, then erected or to be erected by Seigniors in their seigniories, and directs the tenants who have agreed thereto by their concession deeds, to carry their grain to mill and there leave it for forty eight hours, after which, they might remove it elsewhere without claim of toll, if unground, concluding by prohibiting millers from collecting grain, out of their seigniories, for grinding under a penalty. Finally, in 1686, the King's Edict. charges all Seigniors of *fiefs* in New France to erect banal mills, sufficient for the subsistence of the inhabitants of their respective seigniories, and on their failing so to do within a specific time, gives the right of *banalité* to any person who might erect such mill. The effect of this positive legislation was to abolish the 71 and 72 articles of the custom as regards the conventional *banalité*, and to establish a legal *banalité* in Canada in its place, at the same time investing the wind mill with the same character, of *banalité* unsustained by convention, as the water mill.

Banalité has therefore in this colony been established by positive law, not by feudal right, and has been so declared and sustained by a long array of French and British judicial decisions. The doing suit to the mill, on the one hand,

compelled the inhabitants of the Seigniory to "bring to the mill' all the grain which would be used in their family, whether grown in the Seigniory or imported into it for the purpose, and on the other hand interdicted all other persons from erecting or working such mills within the Seigniory, where a Banal Mill existed: without those means, the right would have been nugatory, and the outlay made by the Seignior, in obedience to the law and the Royal legislative, command, would have become injuriously burdensome, rather than profitable to him. It may be observed here that the discussions of French jurists upon the subject of *Banalité* in France are idle in this colony, in the face of positive law and a settled jurisprudence, and that as to the extent of the right, it is co-extensive with the Seigniory, but not beyond it, and affects not wheat alone, but all grain milled for the sustenance of the inhabitants of the Seigniory: a limitation of the right to wheat alone, might be highly detrimental to the mill owner, and could not have been contemplated by the Legislator: positive authority has formally settled that point. 3 Nouv. Denisart vbo. Banalité, §III p. 148, observes, "wheat alone is not the only grain subject to the *Banalité*. All other grain is equally subject to it, wherefore all persons who use other grain are bound to employ the Seignior's mill." This very respectable authority is precise. The various *Arrêts*, ordinances and judgments of the Intendant on the subject of mills and *Banalité de Moulin*, extends to the general inclusion of all grain capable of being manufactured; the terms *grains et bleds*, *bleds et autres grains* are frequently found together in the same *Arrêts*, in some *grains* alone, in others *bled* alone is used according to the circumstances of the case, evidently without design in the selection of the word; and 5 Herve, p. 235, observes "the term "wheat" is more or less restrained in our Customs: usage must be the guide for settling the extent of certain words used with reference to the right of champarty." No case has presented itself of a juridical character in this province, either extendining or

limiting the term, and no difficulty has arisen on that part of the matter of *Banalité.*

It is only necessary to add, that *Banalité* is not absolutely connected with Rivers, because positive law has attached that quality to wind as well as to water mills : that it is not a feodal right in the sense of the French authors as proceeding from the mere possession of a *Seigneurie*, but from the erection of a *Seigneurial* Mill in the possession of the Seignior, and lastly that it does not originate in this colony in the law of the Custom of Paris, but in the special Legislation made in or applied to the Colony and in the common law of France in reference to it.

The concluding portion of this part of the subject embraces the questions which apply to the reservations and prohibtions contained in the concession deed.

It might suffice simply to answer, that these are found in formal contracts entered into between the Seigniors and their *Censitaires*, and that such stipulations are *in latitudine voluntatis contrahentium.* Both these grounds have been disputed, and it therefore becomes necessary to ascertain if that latitude of will has been controlled in either of the parties. It is difficult to conceive on the one hand that any municipal law can interfere to prevent a *Censitaire* from submitting to the terms of a contract, voluntarily entered into by him, of which he has at no time complained, and which the public officers, the guardians of public rights and morals. have never questioned : it is moreover difficult to believe on the other hand, in the possibility of a legal interference to prevent a Seignior from stipulating in his own favour and interest, conditions and terms in the grant of his own property, not contrary to good morals nor to the express prohibitions of any public law. But how stands the case ? The absolute right of property of the Seignior in the estate granted to him is admitted, his voluntary and non-compulsory alienation of any part of it has been demonstrated, and his perfect

freedom to obtain the best terms in his own interest in the disposal of it, has been generally conceded. It has been shown that the *Bail à cens*, commonly called concession, was the most advantageous mode of parting with the estate in portions, to carry into effect the condition of *défrichement*, and finally, that no *quotité* of *cens* was directed to be taken. The French jurists have harmoniously concurred in the principle asserted by Dumoulin, that "*Dominus concedit ad modum quem vult.*" Guyot already cited denominates this a "a primary principle," and declares "that the Seignior "concedes at his own conditions: it is for the vassal, or "rather for the applicant for a concession to accept or reject "it. The contract perfected is irrevocable for both." 1. Herve, p. 296, says: "The reason is that as both "Seignior and tenant are in the exercise of their just rights, "the Seignior may attach to his concessions his own con- "ditions, and that their acceptance by the vasssal is not "subject to be controlled or interfered with by other per- "sons, "*Consessu vassalli facto, non licet quidquam immutare aut derogare.* Renauldon, p. 173, says: "Censual "grants proceed from the Seignior's liberality or from con- "ventions freely entered into: it would be eminently unjust "not to sustain them, or at least faithfully to maintain the "stipulations solemly contracted between the parties." "Hervé, 1 vol., p. 386, 389, 393, "Le troisième "principe est que tous les devoirs que le vassal doit au seigneur, comme seigneur, outre la reconnais- "sance (de quelque espèce qu'ils soient, et de quelque "manière qu'ils aient été établis) sont censés dans l'usage "et l'état actuel, être la charge et la condition de l'inféoda- "tion primitive, et l'effet *d'une convention volontaire à* "*laquelle il n'est pas permis de toucher.*"

"Le seigneur de son côté, ne peut étendre ses droits, "sous prétexte *d'interprétation et de présomption* de la "volonté des parties, lorsqu'elles ont contracté; ce serait "ajouter au titre primitif, *Non opportet ab extranco jure* "*suppleri quod spontanea omissio repudiavit.*"

" En un mot le seigneur et le vassal ne peuvent ni l'un " ni l'autre rien changer au contrat sans un consentement " commun, mais ils peuvent, de *concert*, y apporter tel " changement et telle modification qu'ils jugeront à propos " en ce qui ne touche point à son essence. *Nihil enim tàm* " *naturale est quàm eo genere quod que dissolvi quo colliga-* " *tum est.*"

It is unnecessary to multiply quotations in support of the principle above adverted to, but upon this point it is merely just to employ the language of Hervé, already quoted : " That all the services and obligations charged upon a con- " cession, including the *cens* formed a censual unity of " consideration, explaining the modicity of the ancient rate ; " that it was natural for an intending tenant to calculate the " whole charge and payment to be made, and to pay so " much less in money in proportion as his land was subject " to a number of services and obligations charged upon it." The reservations and prohibitions inquired of, have the legal character of a stipulated consideration for the grant of the land. The concession deed *bail à cens*, between the Seignior and *Censitaire*, containing those charges has existed for an exceedingly long period, publicly and without contradiction, these charges have been constantly enforced in the Courts of justice as universally acknowledged and undoubted rights without objection, and the Seigniorial property of the country has changed hands more or less frequently since the cession with those charges included as part of the property sold or conveyed, and for which the price has been calculated and paid. Even if the charges inquired of were against the *jus publicum* or public law, it was in the perfect right of Seignior and *Censitaire* to make the agreement by which the concession should be charged with those reservations and prohibitions : this is the common case of *volenti non fit injuria*, with which Courts of justice cannot gratuitously interfere.

It is asseted, that because the *Arrets* of 1711 and 1732 require the concession to be made at a rent charge only, that this provision is preventive of the Reservations: this is clearly erroneous, because the direction in reference to the rent charges, was evidently dictated for a particular purpose, as antagonistic only to the complaint of the sale of wild lands, and for the purpose of restraining that jobbing alleged to be prejudicial to the colony and preventing the increase of clearance and settlement. It will be seen that the penalty of the *Arrêts* applies to all proprietors of wild lands as well as to Seigniors, and that no mention is made of the reservations in the terms of the *Arrêts*. A general examination of these *Arrêts* themselves is repugnant to the interpretation desired to be put upon particular expressions contained in them, as annulling the reservations or setting aside the stipulations as being contrary to the principle of public law implied in those expressions. The expressions referred to "*il leur est permis seulement de concèder à titre de redevance*" in the preamble of the *Arrêt* of 1711 must be taken in connection with its context, with reference to the sale of wild lands, which is "*contraire aux* "*intentions de S. M. et aux clauses des titres de concessions* "*par lesquelles il leur est permis*," &c. as above; and "*qu'ils* "*vendent en bois debout au lieu de les concèder simple-*"*ment à titre de redevance*" in the *Arrêt* of 1732, must likewise be taken in connection with its context, which refers to the Seigniors retaining "*des domaines considérables* "*qu'ils vendent*," &c., as above. The entire language of the *Arrêts*, and the collocation of those expressions are opposed to connection or reference with the stipulated reservations inquired of: "*on ne distingue point où la loi n'a pas dis-*"*tingué, car c'est dans l'esprit de la loi qu'on doit en chercher* "*l'interprétation.*" The maxim "*modus et conventio vincunt legem*," is only controlled by the other maxim "*fortior et* "*potentior est dispositio legis quam hominis.*" The Royal intention to promote settlement in itself alone, without declarative legistation or judicial exposition enforcing that

intention generally, is ineffectual to set aside a contract voluntarily made by Seignior and *Censitaire*, or to annul the reservations and prohibitions agreed upon between them. But in every case of positive legislation, such as the positive law of Lower Canada with reference to the construction or Churches the clear assumption of a right and control over property without title and contrary to public usage, such as the prohibibition by Seigniors against the erection of manufactories *usines* on the banks of navigable streams, and against the use of the water of such streams for such manufactories, the reservation is a nullity clearly within the law, and must be declared to have no effect. The general principle of law, that contracts cannot be interfered with unless they are illegal, repugnant or impossible, none of which apply in this matter, will sustain the charges, which are moreover supported by another principle "*quilibet potest renunciare juri pro se introducto*," every man can renounce a benefit which the law would have introduced for his own convenience ; the inconvenience, if it be one, has been voluntarily adopted by the *Censitaire*, and it is not for this tribunal to interfere with his own agreement.

The principles above with respect to to the reservations apply equally to *corvees*, which are legal when stipulated.

I will only add, that in the investigation of the questions submitted, the most prominent points for investigation were confined within the titles from the Crown and from the Seigniors, and the operative effect of the municipal laws of the colony upon the stipulations and conditions contained in them. The immediate and the sub grant in every instance was of a certain realty, conditioned to be held subject to the performancee of certain stipulated and agreed upon a render, as recognised and used in certain customs in France. The evident intention in both grants, was the conveyance of land in full and indisputable property, so long as the conditions of the grant were fulfilled, and the explanation and

extent of those conditions were obtained in the provisions of the custom to which they had reference. Beyond those conditions the grantees were free agents and proprietors of their respective estates, and could in no way be interfered with by King or Seignior. It is idle to examine beyond this : The old French tribunals invariably sustained the right of property, and although some of the Colonial officials were over zealous in their representations and applications for Imperial Legislation, which they never applied, upon matters of complaint, which had no real foundation, the Royal Legislator never by the strong hand, interfered with or cancelled his own grants, but left them to their full operation. It is beyond my power or inclination to consider these grants whether Royal or Seigniorial other than as deeds concerning property, which compels me to regard them as titles to property in the grantees, quite as sacred as those by which any description of realty may be held. The deeds themselves, their existence and their validity have been sustained for nearly two centuries of French and British rule, by French and British Legislation; and jurisprudence, Imperial and Colonial. The determination of questions of abstract right or possible defeasance, or misfeasance, cannot affect contracts ; in them alone are their terms, extent and stipulations to be discovered and to these only when discovered, should the application of the municipal law be made. It has been my desire to avoid all discussions arising from disputed questions of feudal or Seigniorial law, the origin of Seigniories in old France, and the rights and incidents belonging to them or their owners, and whether they were derived from grant or extortion: such questions were idle in reference to grants within a not distant period, which were submitted to us for investigation in their own terms, with the contemporaneous public and private history connected with them. It is from these that my opinion has been formed upon the matters submitted, and on these has that opinion been expressed.

A change was made by the Canada Trade Act, 3 Geo. 4 ch. 59, by which Seigniors were enabled to

effect with the Crown a commutation of their Seigniories and of their ungranted lands, thereby extinguishing all Crown rights and dues on the Seigniory generally, and at once converting their unconceded lands from the tenure *en fief* into that of free and common soccage.

It is generally admitted that the unconceded lands so converted into free and common soccage were entirely and absolutely freed from all feudal incidents.

As to the effect of the Statute upon the granted or conceded lands, it is expressly provided, that the commutation of the Seigniory effected by the Seignior, shall not interfere with the feudal dues and duties of the tenants as they existed at the time of the commutation, but that all and every such feudal Seigniorial or other rights shall continue and remain in full force upon, and in respect of such lands.

The Imperial legislation provides for a voluntary commutation and release of the feudal burthens upon the conceded lands, for a just and reasonable price, indemnity or consideration to be established by private agreement or by experts chosen by the parties, to be paid to the Seignior for the same by the tenant, whereupon the tenure of free and common soccage became substituted for the feudal, in the conceded land: but the feudal rights shall continue between Seignior and tenant until the changes shall be fully effected, as provided in the terms of the statute above mentioned.

The Imperial law is enabling not mandatory in its charactor, and in whatever instance it has been carried into effect by the Seignior, would appear to be conclusive of his rights, as well as of colonial legislation with respect to them. The section 2 of 6 Geo. 4, ch. 659 provides, "pro-
"vided always, &c., that where such first grant as afore-
"said shall be made, nothing in this act contained shall
"extend or be construed to extend to take away, diminish
"alter or in any manner or way affect the feodal, seignio-

" rial or other rights of the Seignior or person in whose fa-
" vour such grant shall be made upon and in respect of all
" and every the lands held of him, &c., as aforesaid, mak-
" ing part of his *fief* or seigniory, in which a commutation
" of the *droit de quint*, *&c.*, shall have been obtained as
" aforesaid, but that all and every such rights shall con-
" tinue and remain in full force upon and in respect of such
" lands and the proprietors and holders of the same as if
" such commutation or grant had not been made, until a
" commutation, release and extinguishment shall have been
" obtained in the manner hereinafter mentioned."

The clear and unambiguous terms of the Statute and of the foregoing proviso in particular, remove all possible hesitancy upon the inapplicability of provincial legislation to the disturbance of or interference with the rights of the commuted Seignior, until the *Censitaires* shall have themselves taken advantage of the law : and the House of Assembly of Canada in its address to H. M. of the 29 August 1851 praying for the repeal of those Imperial Statutes, in their relation to the tenure of Canadian lands, professes to abstain from such interference ; in addition to which the following language in relation to Canadian Legislation on the subject, is to be found in the Official Report of the Attorney General, dated 26 January 1852, prepared for the information of and transmitted to the Home authorities for their guidance. " The rights acquired by the holders of these fiefs, naming several commuted seigniories, as well as those of all others who have taken advantage of the facilities accorded to them by the Imperial enactments, should of course, be maintained as suggested in the address now under considération. The Imperial Parliament is not called upon to any interference with rights acquired under the enactments complained of, but to prevent individual holders of *fiefs* not yet commuted from availing themselves of the Imperial Statutes, to deprive the *bonâ fide* settler of rights acquired to him under the preceding laws of Canada, namely, the right of claiming unconceded lands in seigniories, upon the

payment of a moderate rent, which the proprietors of *fiefs* prevent by converting them into a free tenure under the Imperial Acts." These complaints do not appear to be supported by law and are set aside by the act of 1854.

Nothing has since that time occurred to alter the relative position of parties in the commuted seigniories, and the Seigniorial Act of 1854 cannot affect them or be put in operation in any such seigniory, nor in seigniories or lands commuted under provincial Statutes, which have ceased to exist, by the provisions of the Seigniorial Act.

It has been objected that the Seigniorial Act of 1854, cannot coexist with the Imperial Statutes as not only being in *pari materi* but as being also repugnant to them. It might be sufficient to observe that the Imperial Statutes are not mandatory but enabling, and only become mandatory upon the full advantage being taken of the facility offered, and that Seigniors and other proprietors who have not taken advantage of their facilities, have not intended to avail themselves of those provisions and facilities, and that as to them the maxim applies *volenti non fit injuria*. In fact however, there is no such repugnancy between the Imperial and Colonial Legislation, as prevents the operation of the Act of 1854.

The 14 Geo. 3, which secured to the inhabitants of Canada their property and possessions together with all customs and usages relative thereto, also subjected all matters in controversy relative to property, &c. and civil rights, to the laws of Canada until these should be varied by subsequent competent authority. The first constitutional holders of that authority derived their power from the Imperial Act 31 Geo. 3, ch. 31, which constituted a provincial Legislature for Lower Canada, and gave that Legislature the power of making laws not repugnant to the Act of its creation, and provided, that all such laws passed and assented to by the Governor should be valid and binding laws in the province, subject however to disallowance by the Sovereign within

two years, and to becoming *ipso facto* void after the signification of the Sovereign's pleasure of disallowance thereof, this Act also restricted to a certain extent the action of the Colonial legislature on the subject of religious classes, but did not interfere with or limit its legislative power over the tenure of the Country.

The Union Act of Upper and Lower Canada 3 and 4 Viet. ch. 35, also provides, for the validity and binding effect to all intents and purposes of all laws passed by the Colonial Legislature and assented to by the Governor in H. M. name, such laws not being repugnant to that Act or to such parts of the 31 Geo. 3, as were not thereby repealed *or to any Act of parliament made* or to be made and not thereby repealed extending to Canada ; but these laws are also subject to Royal dissallowance within two years after their receipt by the Secretary of State, and to being declared void and null after the signification of H. M. pleasure of disallowance. The Union Act also limited the legislative delegation with reference to Ecclesiastical and Crown rights, but did not restrict legislation upon the tenure of the Country.

In the interval of the dissallowance of any existing Colonial Act, and until its dissallowance, it was valid and binding in the Colony.

It appears therefore that by the Imperial Act 14 Geo. 3, the laws and customs of Canada with reference to property and possessions in Canada, were to remain in force until varied or altered by any Ordinance to be passed by the Governor and Council, a power afterwards vested in the Provincial Legislature of L. C. by the Imperial Act 31 Geo. 3, and continued to the present time in the United Legislature by the Imperial Act 3 and 4 Viet. ch. 35, unless that power shall have been restricted or repealed by other Imperial Legislation, which is said to exist in the two Canada Trade and Tenure Acts alone. The former declares, that doubts exist whether

the tenure of lands in Upper and Lower Canada holden in *fief* and *seigneurie*, can legally be changed, and provides that holders of lands in *fief* and seigniory may surrender them to the Sovereign and may petition for their re-grant in free and common soccage, which shall be accorded on payment of an agreed upon commutation, to be applied to the administration of justice and the support of the Civil Government in the Province. The latter 6 Geo. 4 making further provision in the matter provides, that any proprietor of a *fief* or Seigniory in Lower Canada having lands therein granted by and held of him *à titre de fief* or a *cens*, on petition therefore and surrender of the ungranted lands, in the *fief* or Seigniory, and on payment of the agreed upon commutation, shall have his *fief* and Seigniory and lands freed from all Royal Seigniorial rights and burthens, and shall receive a re-grant of all the unconceded lands in the tenure of free and common soccage. It must be observed with reference to this Act, that it is facultative merely, enabling the Seigniors at their pleasure to obtain the tenure advantages offered, and thereupon authorizing their tenants at the pleasure of these last, to compel the Seignior to commute their conceded lands into the tenure of free and common soccage. In the Imperial Statutes the voluntary principle for action and commutation is adopted, but there are no restrictive words or limitations upon the powers of the colonial legislature to enact compulsory mode of commutation for such Seigniors as are not willing to take advantage of the Imperial Legislation, which contains no mandate upon them to adopt its provisions, and which might therefore remain for ever unapplied for, to the public disadvantage in this matter, if it could be considered as restrictive of Colonial Legislation. Wherever the Seignior has omitted to secure the operation of the Imperial Statutes, they are a dead letter, and the right of Colonial Legislation at once takes effect.

Moreover it is clear, that the Imperial Legislation of the Union Act, 3 & 4 Victoria, passed since the Canada

Trade and Tenure Acts, has validated and given binding effect in the colony to the Seigniorial Act of 1854, from the time of its assent by the Governor, wherever it can legally apply, as in uncommuted Seigniories, and that all acts done under it are legal, until the disallowance of the Provincial Act shall have been signified. This is carrying out the principle laid down by Dwarris on Statutes, 2 vol. p. 999 in which he says: "Acts however, passed in a "Colony without a suspending clause, immediately that "they are assented to by the Governor, become and con- "tinue in force till notice is given of their being disallow- "ed." He then illustrates the rule by reference to the course of proceedings, adoped in England by the Commissioners of legal inquiry for the colonies, and thus proceeds: "from the preceding statement it appears, that comparative- "ly few of the Statutes passed in the Colonies receive "direct confirmation or disallowance of the King. It is "clearly understood, that so long as this prerogative is not "exercised, the Act continues in force under the qualified "assent which is given by the Governor in the Colony itself, "on behalf of the King;" and this doctrine is affirmed *ipsissimis verbis* by Clarke, in his Colonial law, p. p. 41, 2, 3, 4.

From the foregoing, therefore, it is evident that the Act of 1854 is good law in the Colony, that it does not operate in commuted Seigniors, but that it applies in all other cases, suspending the *faculté* of the Colonial subject, under the enabling Imperial Statutes, and preventing him from taking advantage of its provisions.

It is true that the Constitution of the United States has formally extended to the Supreme Court, the necessary power and authority to question ths legality of any Legislative Act, whether made by the General or by a State Legislature; but this has arisen from the peculiar federative union of the different Sovereign States in one large body, and their agreement to submit the constitntionality of their laws to

some independent arbiter who will confine them within the terms of their written constitution or constitutional compact because in that sense the interpretation or construction of the constitution or compact, is as much a judicial Act and as much requires the exercise of the same legal discretion in the interpretation or construction, as of a law. In England the generally 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. This principle applies equally in this Province, where we may be held to obey Provincial Legislaton, whilst it is equally our duty to shew in what manner it may conflict with the paramount Legislation of the Empire.

It only remains to be observed, that the judgment pronounced upon the various questions of the Attorney General, contains the answers which it has beenconsidered expedient to give to them.

ERRATA

In opinion of Hon : Judge Badgley.

Page	15	6 line,	read, or any other mode of.
	17	1 line,	" and the Bishop with.
	22	22 line,	" 395.
	31	27 line,	omit, as.
	41	17 line,	" was thereby provided.
	"	34 line,	read, 251.
	57	4 line,	" observe.
	59	29 line,	" it may be observed as true.
	63	17 line,	" required.
	65	18 line,	" territorial sovereign.
	73	17 line,	" 5 Hervé 86.
	74	14 line,	" 71 and 72.
	75	20 line,	" millers, under a penalty.
	"	21 line,	omit, under a penalty.
	78	19 line,	read, *consensu*.
	81	6 line,	" of churches and in the assumption.
	"	16 line,	" charges with above exceptions, and
	"	32 line,	" of a certain.
	"	" "	omit, a, before render.
	83	12, 14 lines,	read, feudal.
	"	22 line,	read, become.

ANNO DECIMO-NONO

VICTORIÆ REGINÆ.

CAP. LIII.

The Seigniorial Amendment Act of 1856.

[*Assented to* 19*th June*, 1856.]

Preamble. WHEREAS it is expedient to amend the Seigniorial Act of 1854, and the Seigniorial Amendment Act of 1855, in order to facilitate the operation of the same: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows

The ten year average rule to be dispensed with in cases to which it is not applicable. I. Whenever the rule prescribed by the second sub-section of the sixth section of the Seigniorial Act of 1854, for determining the yearly value of any casual rights cannot be applied in any Seigniory, the Commissioner shall himself adopt some other equitable mode of estimating such yearly value.

Sub-section 7 of section 6, repealed. II. The seventh sub-section of the sixth section of the said Seigniorial Act of 1854, is hereby repealed.

Casual rights of the Crown, how to be estimated. III. In estimating the casual rights of the Crown in the several Seigniories in Lower Canada, the Commissioners shall establish the average yearly revenue of the Crown arising from these rights throughout Lower Canada, and such average yearly revenue shall be taken as representing the interest at six per cent, of a capital sum to be apportioned among all the Seigniories liable to the payment of *Quint*, in proportion to their value: the amount apportioned to each Seigniory shall represent the rights of

the Crown therein, and shall be deducted from the amount to be paid by the *Censitaires* for the redemption of the casual rights of the Seignior.

All provisions for the appointment of *Experts*, repealed.

IV. From and after the passing of this Act, all the provisions relative to the appointment of *Experts*, contained in the tenth Section of the Seigniorial Act of 1854, or in any other Section of the said Act, shall be repealed; and in all Seigniories in which there shall have been requisitions for or appointments of *Experts*, the Commissioners shall act in every respect as though there had been no such requisition for or appointment of *Experts*.

Section 11 of Seigniorial Act of 1854, amended.

Where the schedule shall be left for examination.

Commissioner to decide on objections.

V. All the words after the words "following the said notice" in the first paragraph of the eleventh section of the said Seigniorial Act of 1854, (including both the sub-sections,) are repealed, and in lieu thereof the following are substituted, "in some convenient place in the Seigniory, "in charge of some fit and proper person, and the name of "such person and the place of deposit shall be indicated in "such notice; and any person interested in the Schedule "may point out in writing, addressed to the Commissioner "and left with the person in charge of the Schedule, any "error or omission therein, and require that the same be "corrected or supplied; and at the expiration of the "said thirty days it shall be the duty of the Commissioner "to be present at the place indicated in such Notice, and to "examine into and decide upon the objections made in "writing as aforesaid."

Sub-section 4 of section 12, to apply only to Commissioner completing the Schedule.

VI. The fourth sub-section of the twelfth section of the said Seigniorial Act of 1854, shall apply only to the Commissioner who shall have finally completed the Schedule in question, and not to the Commissioner or Commissioners who shall have taken any of the proceedings preliminary to the completion of the Schedule.

Sub-sections 5 & 6 of section 12, repealed.

VII. The fifth and sixth sub-sections of the twelfth section of the said Seigniorial Act of 1854, are hereby repealed.

Period for demand of revision of Schedule, limited

VIII. No revision of any Schedule shall be allowed, unless application be made for the same within fifteen days after the Commissioner shall have given his decision, as provided for by the eleventh section of the Seigniorial Act of 1854, as amended by this Act ; and every such application shall be made by a petition presented on behalf of the party interested, to the Revising Commissioners or any one of them, specifying the objections made to such Schedule.

Proceedings where revision is demanded

Upon the receipt of any such petition, it shall be the duty of the Revising Commissioners, after having given eight days' notice to the parties interested, in the manner prescribed by the seventh section of the said Seigniorial Act of 1854, to proceed to revise the Schedule therein mentioned, and for that purpose, to hear, try and determine the matters alleged in the said petition. The proceedings upon such revision shall be kept of record, and if the Commissioners find any error, they shall correct the same.

Where the revising Commissioners shall sit.

IX. The Commissioners selected to form a Court for the revision of the Schedules, shall sit at Montreal for the Seigniories in the districts of Montreal and Ottawa; at Three Rivers for those in the District of Three Rivers ; at Quebec for those in the District of Quebec ; at Kamouraska for those in the District of Kamouraska ; and at New Carlisle for those in the District of Gaspé ; but any petition for the revision of a Schedule may be presented to the Revising Commissioners, or any one of them, in any District.

Special provision as to certain unsettled Seigniories.

X. And inasmuch as the following *fiefs* and Seigniories, namely : Perthuis, Hubert, Mille Vaches, Mingan and the Island of Anticosti, are not settled, the tenure under which the said Seigniories are now held by the present proprietors of the same respectively, shall be and is hereby changed into the tenure of *franc aleu roturier :* The difference in value between each of the said Seigniories as heretofore held and the same Seigniory when held in *franc aleu roturier*, and also the value of the casual and other

rights of the Crown in the said Seigniories, shall be ascertained and entered in the Schedule of the Seigniory, and the amount of the whole shall upon the fyling of the said Schedule become due and payable by the Seignior to the Crown, and shall form part of the fund appropriated in aid of the *Censitaires;* And whenever the Governor in Council shall have been satisfied that any other *fief* or Seigniory is wholly unconceded, it shall be lawful for the Governor to issue a Proclamation declaring that such *fief* or Seigniory shall thenceforth be subject to the operation of this Section of the present Act: and from and after the date of the publication of any such Proclamation in the *Canada Gazette*, the tenure under which the *fief* or Seigniory or *fiefs* and Seigniories therein mentioned are now held, shall be changed into the tenure of *franc aleu roturier;* and in making the Schedules thereof, the Commissioners shall deal with such *fiefs* or Seigniories in every respect as if they had been specially mentioned in this Section.

Governor in Council may extend this section to Seigniories proved to be unsettled.

Special provision as to Crown Seigniories.

XI. And whereas the third section of the Seignioral Amendment Act of 1855, does not apply to Seigniories held by the Crown in Lower Canada, whether such Seigniories form part of the domain of the Crown, or are so held under any title or from any other cause; and it is expedient to grant to the *Censitaires* in the said Seigniories, advantages similar to those granted to the *Censitaires* in other Seigniories by the said Section; therefore it is enacted, that—

No *lods et rentes* on sales after 30 May, 1855.

1. No *Lods et Ventes* shall be demanded from purchasers in the said Seigniories held by the Crown, upon purchases made since the thirtieth day of May one thousand eight hundred and fifty-five;

Crown Agents to be guided by decisions of Seignioral Court.

2. The Crown Agents for the said Seigniories shall, in the collection of the revenue of the Crown therefrom, and in regard of all other rights of the Crown as Seignior of such Seigniories, take notice of and be guided by the answers and decisions of the Special Court under the Seig-

niorial Act of 1854, upon the questions of Her Majesty's Attorney General for Lower Canada, except in so far as such rights may have been reduced or modified by any order or orders of the Governor in Council.

Unconceded lands and waters to be absolute property of the Crown.

3. All unconceded lands and waters in the said Seigniories, shall be held by the Crown in absolute property and may be sold or otherwise disposed of accordingly, and when granted shall be granted in *franc aleu roturier*.

Section 3 of Act of 1855, amended: Approximate value of mutation fines to be paid in the mean time to the Seignior, instead of interest on his approximate share of the fund.

XII. And in amendment of the third section of the said Seigniorial Amendment Act of 1855, it is enacted, that the Commissioners or any one or more of them, shall forthwith make a separate statement for each Seigniory, shewing, as nearly as can then be ascertained, and subject to correction thereafter:

1. The average yearly revenue from *lods et ventes*,—

2. The average yearly revenue from *quint*,—

3. The average yearly revenue from *relief*,—and

4. The average yearly revenue from other casual rights (if any) which, under the said section, ceased to be payable after the passing of the said Act:

5. Such statement shall be made separately for each seigniory and so soon as the Commissioners are able to make it, and shall be sent to the Receiver General; and instead of the interest mentioned in the said amended third section, (which shall accumulate as part of the Provincial aid to the *Censitaires*,) the amount of such yearly revenue in each seigniory as shewn by such statement, from the thirtieth day of May one thousand eight hundred and fifty-five, (the day of the passing of the said Act,) up to the first day of January or July last past at the time the statement shall come to the Receiver General, shall be then paid by the Receiver General to the Seignior or Seignior *dominant* of such Seigniory; and thereafter one half of the average yearly revenue men-

tioned in each such statement respectively, shall be paid to the Seignior or Seignior *dominant* entitled to it, on the first day of January and the first day of July, until the Schedules are finally deposited ; and the amount so paid to each Seignior shall be debited to him, as so much received by him on account of the portion of the Provincial appropriation for the relief of *Censitaires* payable to him, and of the interest on such portion ; but in computing the amount to be deducted on account of the said Provincial aid, from the total value of the Seigniorial rights in any Seigniory as shewn by the Schedule thereof, in order to ascertain the amount remaining chargeable upon the *Censitaires*, the correct value of such casual rights (as finally ascertained by the Schedule) from the said thirtieth of May one thousand eight hundred and fifty-five, to the publication of the notice of deposit of the Schedule (and not the approximate value first above mentioned) shall (as representing the average sum saved by the *Censitaires* during the same period, by the non-payment of the said casual rights or any compensation therefor,) be deducted from the total amount of principal and interest payable to the Seignior from the said Provincial Aid, and the remainder shall be the sum to be deducted from the total value of the Seigniorial Rights as shewn by the Schedule, in order to ascertain the amount payable by the *Censitaires* : Provided always, first, that the whole sum to be paid by the Receiver General to any Seignior *dominant*, shall be also deducted from that which would be otherwise payable by the *Censitaires* of the Seignior *servant* ; and secondly, that if the approximate sum paid to any Seignior *dominant* under this section by the Receiver General, shall be more or less than the true value of his rights for the time, the difference shall be deducted or added (as the case may require) from or to the sum to be paid by the Receiver General to such Seignior *dominant*, under the sixth sub-section of section six of the said Seigniorial Act of 1854.

How the Provincial aid to be deducted from the value of Seigniorial charges, shall be computed.

Proviso.

Proviso

Money owing

XIII. In the event of any Seignior or Seignior *dominant*,

being indebted to the Crown in any sum of money for any right arising from any Seigniory held by such Seignior or Seignior *dominant*, the Receiver General shall retain the amount so due to the Crown from the amount payable to such Seignior or Seignior *dominant* under the provisions of this Act or of the Acts hereby amended; and the amount (if any) due to the Crown by each Seignior, shall be ascertained by the Commissioner making the Schedule of each Seignory and certified by him to the Receiver General.

Debts to the Crown by a Seignior may be retained out of his share

XIV. In any case in which, by reason of an equal division, no judgment has been rendered by the Judges of the Court of Queen's Bench and Superior Court for Lower Canada, on any of the questions to them submitted by the Attorney General for Lower Canada under the provisions of the sixteenth section of the said Seigniorial Act of 1854, the Commissioner making the Schedule shall, in any case to which such question refers, decide it in such manner as he shall think most equitable under the circumstances, saving the right of the Court for the revision of Schedules, to be appointed under the twelfth section of the said Seigniorial Act of 1854, to pronounce a final decision on such question or questions, and to amend such Schedule according to such decision, if need shall be.

Provision where the Judges have been equally divided in opinion.

XV. The Commissioner making the Schedule of any Seigniory shall have full power, either by himself or by any person authorized by him, to inspect the Repertory of any Notary, whenever he shall think such inspection desirable for obtaining information to ensure the greater correctness of the Schedule, such inspection being demanded and made at reasonable hours and on juridical days; and any Notary refusing to allow such inspection shall thereby incur a penalty of one hundred pounds; and for each such inspection the Notary shall be entitled to five shillings for each hour it shall continue; Provided that whenever any such inspection shall be demanded by any Seignior, it shall be made at his expense.

Commissioners may inspect Repertories of Notaries.

Seigniorial possession to be sufficient for the purpose of the Schedule.

XVI. For the purpose of making the Schedule of any Seigniory, the boundaries thereof shall be deemed to be those actually possessed by the Seignior, although all or any part thereof may be in dispute.

Seigniors allowed to alienate unconceded lands.

XVII. And whereas the provision in the Seigniorial Act of 1854, prohibiting any Seignior from conceding or alienating the unconceded lands in his Seigniory until after the deposit of the Schedule thereof, retards settlement, it is therefore enacted, that from and after the passsing of this Act, all unconceded lands in any Seigniory the tenure of which has not been theretofore commuted, shall be held by the Seignior *en franc aleu roturier*, and may be dealt with by him in like manner as lands held by other persons under the same tenure may be dealt with ; except that if the Seigniory be entailed (*substituée*) or held by any party otherwise than as absolute owner thereof, then the price of such lands shall form the capital of a *rente constituée*, which capital shall not be paid except to some party holding the Seigniory as absolute owner thereof ; but any party whose title would, before the passing of the Seigniorial Act of 1854, have authorized him to concede such unconceded lands, may after the passing of this Act, sell the same for such *rente constituée* as aforesaid and not otherwise.

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Lands in Soccage or *franc-aleu* not to be charged with irredeemable rents, or mutation fines, &c.

XVIII. No lands held in Free and Common Soccage or *en franc aleu roturier*, shall be charged with any perpetual irredeemable rent ; and whenever any such rent shall be so stipulated, the capital thereof may be at any time redeemed at the option of the holder of the land charged therewith, on payment of the capital of such rent calculated at the legal rate of interest ; and any stipulation in any deed of conveyance (*translatif de propriété*) of any such land, tending to charge the same with any mutation fine or any payment in labor, or tending to entail upon the holder of any such land, the duty of carrying his grain to any particular mill, or any other feudal duty, servitude or burthen whatsoever, shall be null and void.

XIX. And whereas the notice of the deposit of the Schedule of any Seigniory, which the provisions of the thirteenth Section of the Seigniorial Act of 1854, should be given by the Commissioner who shall have made such Schedule, is erroneously referred to in the twenty-second and twenty-sixth Sections of the same Act, as a notice to be given by the Receiver General,—it is hereby declared and enacted, that the said twenty-second Section should, and the same shall henceforth be read and interpreted as if the words " by the Receiver General ", in the second and third lines of the said twenty-second Section, had never been inserted therein,—and that the said twenty-sixth Section should, and the same shall henceforth be read and interpreted as if the words " of the Receiver General ", in the third line of the said twenty-sixth Section, and as if the words, " in his hands ", in the fourth line of the same Section, had never been inserted therein. Correction of an error in ss. 22 and 26 of the Act of 1854, as to notice of deposit of Schedule.

XX. This Act shall be called and known as " The Seigniorial Amendment Act of 1856." Short Title

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(*The items printed in Italics refer to the parts no longer in force.*)

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