Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dame Henriette Brown v. Les Curé et Marguilliers de l'Œuvre et Fabrique d Notre Dame de Montréal, from Canada; delivered 21st November, 1874.

Present :

LORD SELBORNE.
SIR JAMES W. COLVILE.
SIR ROBERT PHILLIMORE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from a Judgment of the Court of Queen's Bench for the Province of Quebec, in Canada, confirming a Judgment of the Court of Review, which latter reversed a Judgment of the Superior Court in First Instance.

The question which was the subject of these different Judgments related to the burial of the remains of Joseph Guibord, one of Her Majesty's Roman Catholic subjects, who died at Montreal on the 18th of November, 1869.

His widow and representative, Dame Henriette Brown, instituted and prosecuted the suit in the Canadian Courts, and was also the original Appellant before their Lordships. She died on the 24th of March, 1873, and by her will devised her property to the "Institut Canadien," and also appointed them her universal legatees.

This Corporation, having accepted the appointment, applied for leave to continue this Appeal, which leave was granted by their Lordships on the 26th of June, 1873.

This leave was granted without prejudice to any question which might be raised as to the competency of the Institute to continue the Appeal. It

appeared that the widow had been condemned in the costs in the Canadian Courts, and her universal legatees were therefore, of course, interested in procuring the reversal of these sentences; and the objection to their competency, though mentioned in the "Reasons" of the Respondents, was not insisted upon in the arguments before us.

The suit on behalf of the representative of Guibord was for a *mandamus* to "Les Curé et Marguilliers de l'Œuvre et Fabrique de Montréal," upon receipt of the customary fees, to bury his body in the parochial cemetery of members of the Roman Catholic Church at Montreal, entitled the "Cemetery of La Côté des Neiges," conformably to usage and to law, and to enter such burial in the civil register.

"La Fabrique de Montréal" is a corporation consisting of the Curé and certain lay church officers called "Marguilliers," whose relation to the church and churchyard is analogous to that of churchwardens in an English parish. This corporation manages the temporalities of the church, which temporalities are also sometimes designated by the title of "La Fabrique."

"La Fabrique de Montréal" had the control of this particular cemetery.

The cemetery is divided into two parts, the smaller part being separated from the larger by a paling. In the smaller part are buried unbaptized infants and those who have died "sans les secours ou les sacrements de l'Eglise;" and (as appears from the evidence) persons who had committed suicide, and criminals who had suffered capital punishment without being reconciled to the Church. In the other and larger part are buried ordinary Roman Catholics in the usual way, and with the rites of the Church.

Neither portion of the cemetery is consecrated as a whole; but it is the custom to consecrate separately each grave in the larger part, never in the smaller or reserved part.

The cemetery is thus practically divided into a part in which graves are, and into a part in which they are not, consecrated.

The circumstances which led to this litigation were as follows:—

Guibord was a lay parishioner of Montreal. He

appears to have been of unexceptionable moral character, and to have been, both by baptism and education, a Roman Catholic, which faith he retained up to the time of his death.

In the year 1844 a literary and scientific institution was formed at Montreal for the purpose of providing a library, reading-room, and other appliances for education. It was incorporated by a Provincial Statute (16 Vict., c. 261), under the name of the "Institut Canadien."

The preamble of this Statute recites:—

"Whereas several persons of different classes, ages, and professions, residing in the city of Montreal and elsewhere, have formed a literary and scientific association in the said city, under the name of the 'Institut Canadien,' for the purpose of establishing a library and reading room, and of organizing a system of mutual and public instruction by means of lectures and courses of instruction."

It then states that the number of members already exceeded 500, that they had a library of 2,000 volumes, and a reading-room provided with newspapers and periodical publications. Then follows a prayer to be constituted a legal corporation. The prayer was granted by the Legislature, and the statute incorporates the Association, and directs, among other provisions, that the corporation is to make an annual return to the Government of their estates real and personal.

Guibord was one of the original members of this Institute.

In the year 1858 certain members of the Institute proposed a Committee for the purpose of making a list of books in the library, which in their opinion ought not to be allowed to remain therein.

An amendment, however, was carried by a considerable majority to the effect that the Institute contained no improper books, that it was the sole judge of the morality of its library, and that the existing Committee of Management was sufficient.

On the 13th of April in the same year the Roman Catholic Bishop of Montreal published a Pastoral which was read in all the Churches of his Diocese, in which he referred to what had taken place at the meeting of the Institution, and after praising the conduct of the minority, pointed out that the majority had fallen into two great errors:

first, in declaring that they were the proper judges of the morality of the books in their library, whereas the Council of Trent had declared that this belonged to the office of the Bishop; secondly, in declaring that the library contained only moral books, whereas it contained books which were in the Index at Rome. The Bishop further cited a decision of the Council of Trent, that any one who read or kept heretical books would incur sentence of excommunication, and that any one who read or kept books forbidden on other grounds would be subject to severe punishment; and he concluded by making an appeal to the Institute to alter their resolution, alleging that otherwise no Catholic would continue to belong to it. He says:—

"Car il est à bien remarquer ici que ce n'est pas nous qui prononcons cette terrible excommunication dont il est question, mais l'Eglise dont nous ne faisons que publier les salutaires décrets."

The resolution of the Institute was not rescinded.

In 1865 several of the Roman Catholic members of the Institute, including Guibord, appealed to Rome against this Pastoral.

They received no answer to their application. But in the year 1869, the Bishop of Montreal issued a Circular—

"Publiant la réponse du Saint Office concernant l'Institut Canadien et le Décret de la Sainte Congregation de l'Index condamnant l'Annuaire du dit Institut pour 1868."

This Circular was dated from Rome, 16th July, 1869. He also sent a Pastoral letter from Rome dated in August of that year, which contained two inclosures; one the sentence or answer of the Holy Office, as printed in the case before us:—

"Illme. ac Rme. Dne.

"Cum in Generali Congregatione S.R. et U.I. habita feria IV. die 7 curr. Emi. ac Rmi. Generales Inquisitores jamdiu motam de Instituto Canadensi controversiam ad examen revocassent, singulis mature ac diligenter expensis, A: tuæ significandum voluerunt, rejiciendas omnino esse doctrinas in quodam annuario quo dicti Instituti acta recensentur, contentas, ipsasque doctrinas ab eodem Instituto traditas prorsus reprobandas. Animadvertentes insuper laudati Emi. ac Rmi. Patres valde timendum esse ne per hujusmodi pravas doctrinas Christianæ juventutis insti-

tutio et educatio in discrimen adducatur, dum commendandum expresserunt zelum ac vigilantiam a te huc usque adhibitam excitandam eamdem [the next word is a misprint] jusserunt, ut una cum tuæ diœceseos clero omnem curam conferas, ut Catholici ac præsertim juventus a memorato Instituto, quousque perniciosas doctrinas in eo edoceri constiterit, arceantur. Dum vero laudibus prosequuti sunt alteram societatem *Institutum Canadense Gallicum* nuncupatam, nec non ephemeridem dictam '*Courrier de St. Hyacinthe*,' utramque fovendam adjuvandam que mandarunt ut ita iis damnis ac malis remedia quærantur, quæ ex alio præfato Instituto haud dimanare non possunt. Quod a tuæ pro mei muneris ratione communicans omni cum observantia maneo.

"Romæ ex Æd. S.C. de P.F. die 14 Julii, 1869, &c."

The other inclosure was a *Decretum* of the "Congregatio," to whom the care of the Index was committed, it was as follows:—

"Decretum.

"Feria II., die 12 Julii, 1869.

"Sacra Congregatio Eminentissimorum ac Reverendissimorum Sanctæ Romanæ Ecclesiæ Cardinalium a SANCTISSIMO DOMINO NOSTRO PIO PAPA IX. sanctaque Sede Apostolica Indici librorum pravæ doctrinæ, eorumdemque prascriptioni, expurgationi, ac permissioni in universa Christiana republica præpositorum et delegatorum, habita in Palatio Apostolico Vaticano, die 12 Julii 1869 damnavit et damnat, proscribit proscribitque, vel alias damnata atque proscripta in Indicem Librorum Prohibitorum referri mandavit et mandat opera quæ sequuntur."

Then the names of several works unconnected with the Institute are mentioned. And then—

"Annuaire de l'Institut Canadien pour 1868, célébration du 24ème anniversaire de l'Institut Canadien le 17 Décembre, 1868. (*Decr. S. Officii Feria IV. die 7 Julii*, 1869.)

"*Itaque nemo cujuscumque gradus et conditionis prædictæ opera damnata atque proscripta, quocumque loco, et quocumque idiomate, aut in posterum edere, aut edita legere vel retinere audeat, sed locorum ordinariis, aut hæreticæ pravitatis Inquisitoribus ea tradere teneatur, sub pœnis in Indice librorum vetitorum indictis.*

"*Quibus SANCTISSIMO DOMINO NOSTRO PIO PAPÆ IX. per me infrascriptum S. I. C. a Secretis relatis SANCTITAS SUA decretum probavit, et promulgari præcepit. In quorum fidem, &c.*

"*Datum Romæ, die 16 Julii*, 1869."

The pastoral letter containing this inclosure drew attention to the fact that two things were especially forbidden by this Decretum:—1. To belong to the Institute while it taught pernicious

doctrines. 2. To publish, retain, keep, or read the "Annuaire" of 1868. And the Bishop also pointed out that any person who persisted in keeping or reading the "Annuaire," or in remaining a member of the Institute, would be deprived of the Sacrament, "même à l'article de la mort."

The Institute held a meeting on the 23rd September, 1869, and resolved:—

"1. Que l'Institut Canadien, fondé dans un but purement littéraire et scientifique, n'a aucune espèce d'enseignment doctrinaire, et exclut avec soin tout enseignement de doctrines pernicieuses dans son sein.

"2. Que les membres Catholiques de l'Institut Canadien, ayant appris la condamnation de l'Annuaire de 1868 de l'Institut Canadien par décret de l'autorité Romaine, déclarent se soumettre purement et simplement à ce décret."

These concessions produced no effect.

The Bishop in a letter, the last which appears in the case, dated Rome, 30th October, 1869, to the Administrator of the Diocese at Montreal (which that officer received, he says, on the 17th November, the day before Guibord's death), denounces these concessions as hypocritical, and gives five reasons why they are insufficient, the third of which is—

"3. Parceque cet acte de soumission fait partie d'un rapport du comité approuvé à l'unanimité par le corps de l'Institut, dans lequel est proclamée une résolution tenue jusqu'alors secrète, qui établit en principe la tolérance religieuse qui a été la principale cause de la condamnation de l'Institut."

The letter concludes—

"Tous comprendront qu'en matière si grave il n'y a pas d'absolution à donner, pas même à l'article de la mort, à ceux qui ne voudraient pas renoncer à l'Institut, qui n'a fait qu'un acte d'hypocrisie, en feignant de se soumettre au Saint Siége."

It is right to observe here that this "principal ground of condemnation" of the Institute, viz., that it had passed a resolution which established the principle of religious toleration, was entirely new, does not appear in any former document, and further, it would seem, could not have been known by Guibord.

It should also be mentioned, in order to complete the necessary history of the case, that Guibord, about six years before his death, being dangerously ill, was attended by a priest, who administered

unction to him, but refused to administer the Holy Communion unless he resigned his membership of the Institute, which Guibord declined to do.

Guibord having died, as has been stated, on the 18th of November, 1869, suddenly of an attack of paralysis, on the 20th of November the widow caused a request to be made on her behalf to the Curé and to the Clerk of the Fabrique, to bury Guibord in the cemetery, and tendered the usual fees.

Previously to this application M. Rousselot, the Curé, having heard of the death of Guibord, and knowing that he was a member of the Institute, had applied to the administrator of the diocese for his directions. He replied that he had yesterday received a letter from the Bishop of Montreal, directing him to refuse absolution "même à l'article de la mort" to members of the Institute; he could not, therefore, permit "la sépulture ecclésiastique" to Guibord. The Curé, having received this letter, refused to bury Guibord in the larger part of the cemetery, where Roman Catholics were ordinarily buried, but offered to allow him interment in the other part, without the performance of any religious rites.

It seems that the agent of the widow offered to accept burial in the larger part without religious services; but this offer was rejected.

On the 23rd of November the widow presented a petition to the Superior Court setting out the facts and prayed that a mandamus might issue as above stated.

On the 24th one of the Judges of the Superior Court ordered a writ of mandamus to issue; but it must be observed that the writ issued was a writ of summons calling upon the Defendants to appear and answer the demand which should be made against them by the Plaintiff for the causes mentioned in the said petition thereto annexed. The proceeding was in substance the same as a rule to show cause why a writ of mandamus should not be issued. The Defendants appeared and filed a petition praying that the writ might be annulled for irregularity, upon the ground that it was a writ of summons and not a writ of mandamus, and also upon other technical objections. The Defendants, at the same time, filed a traverse of the Plaintiff's

petition and three pleas. The first plea was to the same effect as the petition of the Defendants, and set up the same alleged grounds of irregularity, and pointed out the same defects as those mentioned in that petition.

The second plea in substance denied that the Respondents had refused to bury the deceased, and alleged that they were entitled to point out the place in the cemetery where he should be buried, and that they were ready to do so, and to give him such burial as he was entitled to.

The third plea averred that the service (*culte*) of the Roman Catholic religion in Canada is free, and the exercise of its religious ceremonies of whatever nature is independent of all civil interference or control; that, for the purpose of assuring the freedom of that religion, the law recognizes the Respondents as proprietors of the Roman Catholic parish church of Montreal, and of its parsonage, cemeteries, and other dependencies, which are all Roman Catholic property devoted to the exclusive use and exercise of that religion, and subject to the exclusive control and management of the Respondents, and of the superior Roman Catholic ecclesiastical authority; that the Respondents, in such capacity, had for more than ten years been proprietors and in possession of the Roman Catholic cemetery in question, and are empowered by law to point out the precise spot in the cemetery where each burial is to be made; that besides their above-mentioned capacity the Respondents are also civil officers within certain limits, having to fulfil certain duties defined by law, and are legally responsible in that capacity and sphere only; that the Respondents, in their double capacity thus existing, are, by the Roman Catholic religious authority and by the law, set over the burial of persons of Roman Catholic denomination dying in the parish of Montreal, and are responsible to the religious and civil authorities respectively for the religious and civil portions of such functions; that the Respondents for the execution of their double duty, and in accordance with the immemorial custom of the Roman Catholic parishes throughout the country, have assigned one part of the cemetery for the burial of persons of Catholic denomination and belief who are buried with Roman Catholic religious

ceremonies, and another part for the burial of those who are deprived of ecclesiastical burial; that Joseph Guibord was a member of a literary society at Montreal, called the Canadian Institute, and as such was at the time of his death, and had been for about ten years previous, notoriously and publicly subject to canonical penalties resulting from such membership and involving deprivation of ecclesiastical burial; that immediately after the death of Joseph Guibord, the Rev. Victor Rousselot, Roman Catholic priest, and curate of the parish of Montreal, submitted the question of his religious burial to the Rev. Alexis Frédéric Truteau, Vicar-General of the Roman Catholic diocese of Montreal, and administrator of the diocese, with supreme ecclesiastical authority therein, in the absence of the Bishop, by virtue of the rescript of the Pope, dated 4th October, 1868; and that the said administrator replied by a decree declaring that, since Joseph Guibord was a member of the Canadian Institute at the time of his death, ecclesiastical burial could not be granted to him; that the Plaintiff, by her agents, having required M. Rousselot and the Respondents to give to the body both religious and civil burial in the cemetery in question they repeatedly informed the said agents of such decree of the administrator of the diocese, and that in consequence thereof ecclesiastical burial could not be granted and was refused, but that they were ready as civil officers to bury the remains civilly, and authenticate the death according to law, which offer was never accepted by the Plaintiff or her agents, and that, having regard to the above facts, the Plaintiff could not claim from the Respondents for the remains of her late husband more than civil burial, and that under the conditions laid down by the ecclesiastical laws of the Roman Catholic Church, which the Respondents had never refused. The plea then concluded by saying that the Respondents had refused nothing but ecclesiastical burial, for the refusal of which they were responsible only before the religious and not before the civil authority.

The widow filed several answers to these pleas, some in the nature of demurrers, some of traverses of the facts alleged, and to the third plea also a special answer, setting out the facts with respect to the dispute between the Institute, the Bishop,

and the Court of Rome,—which have been already mentioned.

The Respondents joined issue on these answers, and also, by leave of the Court, filed a special replication to the Petitioner's third answer to the Respondent's third plea; in which, after repeating that the Civil Courts were incompetent to question a decision of the ecclesiastical authorities on ecclesiastical matters, and could not inquire into the grounds upon which ecclesiastical burial had been refused to Guibord, they, nevertheless, cited the decrees of the Council of Trent with regard to the Index and the proceedings relating to the Institute, and concluded by an averment that, in consequence of the premises, Guibord at the time of his death must be considered as "un pécheur public," and, as such, obnoxious to the canonical penalties imposed by the Roman Catholic ritual, among which was privation of sepulture.

That the members of the Institute having refused to obey the pastoral, and persisted in their refusal, "le jugement de l'Evêque imposant la peine canonique sus-mentionnée est démeurée en pleine force et effet."

It then avers, after stating the proceeding relating to an appeal to Rome, that the Administrator-General, taking into consideration all the facts relating to Guibord, "comme membre du dit Institut," had "justement rendu le décret qui l'a privé de la sépulture ecclésiastique," and further, "que ce décret, rendu dans la forme où il se trouve, est d'ailleurs un décret nominal."

Issue was joined on this special replication.

It is to be noticed that in this replication it is for the first time alleged that, on the ground of his being "pécheur public," Guibord was disentitled to ecclesiastical burial.

The case was argued before Mr. Justice Mondelet in the Superior Court, on the demurrers and on the merits.

The Court gave judgment for the widow on the merits, and on the demurrers to the first and third pleas, and ordered a peremptory writ of mandamus to issue; but declared that it did not pay any regard either to the widow's special answer to the third plea or the special replication, which it seems to have considered as improperly pleaded.

There was an Appeal to the Court of Revision, before three Judges, who reversed the Judgment of the Court below, quashed the writ originally issued, and dismissed the writ of mandamus with costs.

From this Judgment the widow appealed to the Court of Queen's Bench, and presented petitions of recusation against four of the Judges, which the Judges refused to admit. It is unnecessary to enter upon this part of the case, as in the course of the argument their Lordships fully expressed their opinion that these petitions could not be sustained.

The Court of Queen's Bench affirmed the Judgment of the Court of Revision; but the Judges did not agree as to the grounds upon which their decision was founded. They discussed at some length the matters raised upon the third plea; but they decided against the Appellant upon the questions as to the form of the writ and the regularity of the proceedings.

The questions of form, which are not unimportant, may be disposed of before the graver questions which arise out of the third plea are considered.

And first, is the mandamus bad upon the ground of uncertainty, or upon any other ground?

Their Lordships are of opinion that the writ was in proper form according to the Code of Procedure for Lower Canada; the procedure therein pointed out, though called a mandamus, was not a writ of mandamus in the first instance, but, in effect, a summons to answer a petition praying for an order upon the Defendants to do certain specified acts. The first thing to be done by the Defendants was not, as in the case of a writ of mandamus in England, to make a return to the writ, but to appear to the summons, and plead to the petition. The sections of the Code of Procedure bearing upon this point are 1023, 1024, and 1025. Article 1023 evidently contemplates a writ of summons. It says the application is made by petition, supported by affidavits setting forth the facts of the case presented to the Court or a Judge, who may thereupon order the writ to issue, clearly meaning a writ of summons, for it goes on, "and such writ is served in the same manner *as any*

other writ of summons." This is rendered more clear by Article 1024, which directs the subsequent proceediugs to be had in accordance with the provisions of the first chapter of that section. That refers to Articles from 997 to 1002, both inclusive; which, in cases similar to our *quo warranto,* require an information to be presented to the Court or a Judge, supported by affidavits, upon which the issue of a writ of summons may be ordered. The writ of summons commands appearance upon a day fixed, and is to be served in the manner pointed out. The Defendants are to appear on the day fixed (Article 1011), and to plead specially to the information (Article 1012). In the case of mandamus under the Code, therefore, the parties are not to make a return to the summons; the pleadings are to commence with a plea to the petition, and not a plea to the return to the writ. In our opinion, therefore, the objection to the writ, so far as it related to its being a mere writ of summons, and not a writ of mandamus, was untenable, and the practice of the Court in this respect, which has always been adopted, is in compliance with the directions of the code. The other technical objections to the writ have no substantial foundation. Three of the Judges of the Court of Queen's Bench held that the writ was correct in point of form, although one of them, Mr. Justice Badgley, being of opinion that the writ asked for too much, held that a peremptory writ could not issue commanding the Defendants to do the one thing only, viz., to bury, which, according to his view, they were legally bound to do. The procedure therefore requiring a petition and plea to the petition, it appears to follow that the applicant for the writ is not so strictly bound by the prayer of his petition as he is in this country to the command contained in the first writ of mandamus, and that the Court may mould the order for the peremptory writ in the same manner as the Court here may mould the rule for a mandamus. There being no rule which requires a peremptory writ of mandamus to be granted in the precise terms of the first writ, it seems to follow that the general rule applicable to pleadings, either in equity or at common law, may be acted upon. According to them, a Plaintiff

may generally obtain a decree for less than that for which he asks, and for relief in a more distinct and specific form than that for which he has prayed, provided it is within the scope of the prayer.

In the present case the prayer of the petition was—that the Defendants might be commanded to bury or cause to be buried the body of the deceased Joseph Guibord, in the Roman Catholic Cemetery, conformably to usage and to law. That was, doubtless, as pointed out by the Court of Review, extremely vague.

The objection to issuing a peremptory writ in that form was clearly stated by Mr. Justice Mackay (Record, pp. 270, 271).

"Under such vague conclusion," he observes, "the point really meant to be tried is hidden. That the Defendants are bound to bury Guibord in the Roman Catholic Cemetery, according to the usages and the law, is indisputable, and is not disputed. Peremptory mandamus to do this would nevertheless leave things just as unsettled between Plaintiff and Defendants as they were the day before the Plaintiff presented the requête."

But if the principle above laid down be acted upon, the Court may, in a peremptory writ, specify distinctly what they consider the Defendants are bound to do according to usage and law, and may peremptorily command the Defendants to do it. If they consider that the Defendants are bound to provide ecclesiastical burial with the rites and ceremonies of the Roman Catholic Church, they may say so. If they consider that the Defendants are bound to bury the body in that part of the cemetery in which bodies of those interred with ecclesiastical burial are usually buried, the peremptory writ may be worded accordingly. If they think the Defendants are bound to register the burial, the writ may go on to order such registration; or, if they think that the Defendants are not bound to register the burial, they can order the burial alone.

The next point of form relates to the question who are the Defendants to this writ. Are they the Curé and "Marguilliers" personally, or in their corporate capacity? The name used in the conveyance of the land for the cemetery, and that used

in the plaint and writ of summons are identical. And their Lordships upon the whole are clearly of opinion that the writ was against "les Curé et Marguilliers," for the time being, in their corporate capacity as holders of the land and administrators of the cemetery; and that the Curé in his individual or spiritual capacity is not a party to this suit.

It now becomes necessary to determine the merits of the case, and the grave questions of public and constitutional law which are raised by the third plea, and the subsequent pleadings.

In order to do this, it is desirable to consider shortly the status of the Roman Catholic Church in Lower Canada, both before and after the cession of the Province of Quebec in 1762.

It is certain that before the cession the Established Church of that Province, as in the Kingdom of France itself, was the Roman Catholic Church; its law, however, being modified by what were known as "les libertés de l'Eglise Gallicane." There seem also to have been regular Ecclesiastical Courts, and besides them there was vested in the Superior Council of Canada the jurisdiction recognized in French jurisprudence and enforced by the Parliaments of France as the "appellatio tanquam ab abusu," or the "appel comme d'abus."

In Dupin's "Manuel du Droit Public Ecclésiastique Français," ed. 1845, the celebrated work of Pithou is set forth, with notes of the learned editor, in the 79th Article. Pithou's treatise defines the "appel comme d'abus" as that—

"Appellation précise que nos pères ont dit estre quand il y a entreprise de jurisdiction ou attentat contre les saincts décrets et canons receux en ce royaume, droits, franchises, libertez, et priviléges de l'Eglise Gallicane, concordats, édits, et ordonnances du Roy, arrests de son Parlement: bref, contre ce qui est non-seulement de droict commun, divin ou naturel, mais aussi des prerogatives de ce royaume et de l'Eglise d'iceluy."

The following are the public documents which show how the Roman Catholic Church in Lower Canada was dealt with on the conquest and cession of the province:—

The 27th Article of the Instrument of Cession is in these terms:—

"Le libre exercice de la religion Catholique Apostolique et Romaine subsistera en son entier, ensorte que tous les états et le

peuple des villes et des campagnes, lieux et postes éloignés, pourront continuer de s'assembler dans les églises et de fréquenter les sacrements comme ci-devant, sans être inquiétés d'aucune manière, directement ou indirectement. Ces peuples seront obligés par le Gouvernement Anglais à payer aux prêtres qui en prendront soin les dîmes et tous les droits qu'ils avaient coutume de payer sous le Gouvernement de Sa Majesté Très Chretienne. Accordé pour le libre exercice de leur religion l'obligation de payer les dîmes aux prêtres dependra de la volonté du Roi."—(Page 15, "Actes Publics.")

Again, in the Treaty of 1763 it is said:—

"Sa Majesté Britannique consent d'accorder la liberté de la religion Catholique aux habitans du Canada, et leur permet de professer le culte de leur religion, autant que les lois de l'Angleterre le permettent."

And lastly, by an Act of Parliament passed in 1774 (14 Geo. III, c. 83), intituled, "An Act for making more Effectual Provision for the Government of Quebec, in North America," it was declared by section 5 that, for the more perfect security and ease of the minds of the inhabitants of the said province His Majesty's subjects professing the religion of the Church of Rome of and in the said province of Quebec might have, hold, and enjoy the free exercise of the religion of the Church of Rome, subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Her Majesty Queeu Elizabeth, over all the dominions and countries which then did, or should thereafter belong to the Imperial Crown of this realm, and that the clergy of the said Church might hold, receive, and enjoy their accustomed dues and rights with respect to such persons only as should profess the said religion.

And by the 8th section it is enacted:—

"That all His Majesty's Canadian subjects within the province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample, and beneficial manner as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Parliament of Great Britain; and that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same." &c.

From these documents it would follow that, although the Roman Catholic Church in Canada

may on the conquest have ceased to be an Established Church in the full sense of the term, it, nevertheless, continued to be a Church recognized by the State; retaining its endowments, and continuing to have certain rights (*e.g.*, the perception of "dîmes" from its members) enforceable at law.

It has been contended on behalf of the Appellants that the effect of the Act of Cession, the Treaty, and subsequent legislation, has been to leave the law of the Roman Catholic Church as it existed and was in force before the Cession, to secure to the Roman Catholic inhabitants of Lower Canada all the privileges which their fathers, as French subjects, then enjoyed under the head of the liberties of the Gallican Church; and further, that the Court of Queen's Bench, created in 1794, possessed, and that the existing Superior Court now possesses, as the Superior Council heretofore possessed, the power of enforcing these privileges by proceedings in the nature of "appel comme d'abus." Considering the altered circumstances of the Roman Catholic Church in Canada, the non-existence of any recognized ecclesiastical Courts in that Province, such as those in France which it was the office of an "appel comme d abus" to control and keep within their jurisdiction; and the absence of any mention in the recent Code of Procedure for Lower Canada of such a proceeding, their Lordships would feel considerable difficulty in affirming the latter of the above propositions. Mr. Justice Mondelet, indeed, (Record 227–236) refers in his judgment to various cases of a mixed character in which the Civil Courts appear at first sight to have recently exercised a jurisdiction somewhat analogous to that exercised in the "appel comme d'abus." But on examination these cases prove to be suits of a different character, actions for damages against spiritual persons for wrongs done by them in their spiritual capacities.

Their Lordships do not, however, think it necessary to express any opinion as to the competence of the Civil Courts to entertain a suit in the nature of the "appel comme d'abus," as they agree with Mr. Justice Mackay and other Judges of the Court of Revision, that in such a suit the procedure must be different from the present, and that at least it would be necessary to bring the proper

ecclesiastical authorities before the Court as Defendants.

It is another and a different question, to be considered hereafter, whether the jurisprudence and precedents relating to the "appel comme d'abus" may not be considered by their Lordships as evidencing the law of the Church in Canada, by the maladministration of which the Appellant complains that he has been wronged.

Nor do their Lordships think it necessary to pronounce any opinion upon the difficult questions which were raised in the argument before them touching the precise *status*, at the present time, of the Roman Catholic Church in Canada. It has, on the one hand, undoubtedly, since the cession, wanted some of the characteristics of an Established Church; whilst, on the other hand, it differs materially in several important particulars from such voluntary religious societies as the Anglican Church in the Colonies, or the Roman Catholic Church in England. The payment of "dîmes" to the clergy of the Roman Catholic Church by its lay members; and the rateability of the latter to the maintenance of parochial cemeteries, are secured by law and statutes. These rights of the Church must beget corresponding obligations, and it is obvious that this state of things may give rise to questions between the laity and clergy which can only be determined by the Municipal Courts. It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this Church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

In the case of "Long *v.* the Bishop of Cape-Town," their Lordships said:—

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the

members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them. It may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice."—(1 Moore, N. S., 461.)

Their Lordships will bear in mind these principles in the judgment which they are about to pronounce.

Now, what is the question to be here decided? It is the right of Guibord to interment in the ordinary way in the cemetery of his parish, a right enforceable by his representative. It may be observed that the Curé and Marguilliers are only proprietors of the parochial cemetery, in the sense in which a Parson in England is the owner of the freehold of the churchyard, that is to say, subject to the right of the parishioner to be buried therein. The Respondents do not contest that Guibord had that right, but say that they have refused nothing but ecclesiastical burial, for the refusal of which they are responsible only to the religious, and not to the civil authority. They admit, however, that the consequence of the refusal of ecclesiastical burial is that the remains of the deceased can be interred only in the smaller or reserved portion of the cemetery. It cannot be doubted on the evidence that this qualification of the general right of interment, this separation of the grave from the ordinary place of sepulture, implies degradation, not to say infamy.

That forfeiture of the right to ecclesiastical burial, involving these consequences, may be legally incurred, is not denied by the Appellants. Their contention is, that it was not so incurred by Guibord; that, according to the law of the religious community to which he belonged, he retained at the time of his death his right to be buried in the larger portion of the cemetery in the usual manner.

Their Lordships are disposed to concur, with one qualification, in the opinion expressed by

Mr. Justice Berthelot as to the mixed character of these questions. He says:—

"Le baptême, le mariage, et la sépulture sont de matière mixte, et les ecclésiastiques ne peuvent se refuser de les administrer à ceux de leur paroissiens qui y ont droit, comme résidants dans l'enclave de sa paroisse, à moins cependant qu'il n'y ait des peines ecclésiastiques prononcées contre eux par l'evêque ou autre authorité ecclésiastique compétente."

If this passage is to be taken to imply that it is competent to the Bishop to deprive a Roman Catholic subject of his rights by pronouncing against him *ex mero motu* ecclesiastical penalties, their Lordships are of opinion that the proposition is too wide. They conceive that, if the act be questioned in a Court of Justice, that Court has a right to inquire, and is bound to inquire, whether that act was in accordance with the law and rules of discipline of the Roman Catholic Church which obtain in Lower Canada, and whether the sentence, if any, by which it is sought to be justified, was regularly pronounced by an authority competent to pronounce it.

It is worthy of observation, as bearing both upon the question of the *status* of the Roman Catholic Church in Lower Canada, and the manner of ascertaining the law by which it is governed, that in the Courts below, it was ruled, apparently at the instance of the Respondents, that the law, including the ritual of the Church, could not be proved by witnesses, but that the Courts were bound to take judicial notice of its provisions.

The application of this ruling would be difficult, unless it be conceded that the ecclesiastical law which now governs Roman Catholics in Lower Canada is identical with that which governed the French province of Quebec. If modifications of that law have been introduced since the cession they have not been introduced by any legislative authority. They must have been the subject of something tantamount to a consensual contract binding the members of that religious community, and, as such, ought, if invoked in a Civil Court, to be regularly proved.

It seems, however, to be admitted on both sides that the law upon the point in dispute is to be found in the Quebec ritual, which was certainly accepted as law in Canada before the cession of the province,

and does not differ in any material particular from the Roman ritual also cited in the Courts below. The Quebec ritual is as follows:—

"On doit refuser la sépulture ecclésiastique,—1°, aux Juifs, aux infidèles, aux hérétiques, aux apostats, aux schismatiques, et enfin à tous ceux qui ne font pas profession de la religion Catholique. 2°. Aux enfants morts sans baptême. 3°. A ceux qui auraient éte *nommément* excommuniés ou interdits, si ce n'est qu'avant de mourir ils aient donné des marques de douleur, auquel cas on pourra leur accorder la sépulture ecclésiastique, après que la censure aura été levée par nos ordres. 4°. A ceux qui se seraient tués par colère ou par désespoir, s'ils n'ont donné avant leur mort des marques de contrition ; il n'en est pas de même de ceux qui se seraient tués par frénésie ou accident, aux quels cas on la doit accorder. 5°. A ceux qui ont été tués en duel, quand même ils auraient donné des marques de repentir avant leur mort. 6°. A ceux qui, sans excuse légitime, n'auront pas satisfait à leur devoir pascal, à moins qu'ils n'ayent donné des marques de contrition. 7°. A ceux qui sont morts notoirement coupables de quelque péché mortel, comme si un fidèle avait refusé de se confesser, et de recevoir les autres sacrements avant que de mourir, s'il était mort sans vouloir pardonner à ses ennemis, s'il avait été assez impie pour blasphémer sciemment et volontairement sans avoir donné aucun signe de pénitence. Il ne faudrait pas user de la même rigueur envers celui qui aurait blasphémé par folie ou par le violence du mal, car en ce cas les blasphèmes ne seraient pas volontaires, ni par conséquent des péchés. 8°. Aux pécheurs publics qui seraient morts dans l'impénitence ; tels sont les concubinaires, les filles ou femmes prostituées, les sorciers et les farceurs, usuriers, etc. A l'égard de ceux dont les crimes seraient secrets, comme on ne leur refuse pas les sacrements, on ne doit pas aussi leur refuser la sépulture ecclésiastique. Pour ce qui est des criminels qui auront été condamnés à mort et exécutés par ordre de la justice, s'ils sont morts pénitens, on peut leur accorder la sépulture ecclésiastique, mais sans cérémonie. Le curé ou vicaire y assiste sans surplis, et disent les prières à voix basse. Quand il y aura quelque doute sur ces sortes de choses, les curés nous consulteront ou nos grands vicaires."

The refusal of ecclesiastical burial to Guibord is not justified, and could not have been justified by either the 1st, 2nd, 4th, 5th, or 7th of the above rules.

To bring him within the 3rd rule it would be necessary to show that he was excommunicated by name. That such a sentence of excommunication might be passed against a Roman Catholic in Canada and that it might be the duty of the Civil Courts to respect and give effect to it their Lordships do not deny. It is no doubt true, as has already been observed, that there are now in Canada no regular ecclesiastical Courts, such as existed and were recognized by the State when the province formed part of the dominions of France. It must, however, be

remembered that a Bishop is always a *judex ordinarius*, according to the canon law; and, according to the general canon law, may hold a Court and deliver judgment if he has not appointed an official to act for him. And it must further be remembered that, unless such sentences were recognized, there would exist no means of determining amongst the Roman Catholics of Canada the many questions touching faith and discipline which, upon the admitted canons of their Church, may arise amongst them. There is, however, no proof that any sentence of excommunication was ever passed against Guibord *nominatim* by the Bishop or any other ecclesiastical authority. Indeed, it was admitted at the Bar that there was none; their Lordships are therefore relieved from the necessity of considering how far such a sentence, if passed, might have been examinable by the Temporal Court, when a question touching its legal effect and validity was brought before that Court.

It should be borne in mind that an issue was distinctly raised by the pleadings upon the fact of such a sentence; and the necessity of such a sentence to justify the refusal seems to be, to some extent, admitted by the allegation in the Defendant's pleading that *le décret*, as it is there called, of the Administrator-General, was *un décret nominal*.

In the course of the argument it was suggested, rather than argued, that the refusal of ecclesiastical burial in Guibord's case might be brought within the 6th of the above rules, and justified on the ground that, without legitimate reason, he had failed to communicate at Easter. But upon this their Lordships have to observe that this failure was not the ground on which ecclesiastical burial was denied to him; and that, so far from wilfully abstaining from receiving the sacraments of the Church, those sacraments were refused to him when he desired to receive them simply because he continued to be a member of the Institute.

The cause of refusal finally insisted upon was that Guibord was "un pécheur public" within the meaning of the 8th rule.

This defence was set up for the first time in the replication.

The Administrator-General's evidence on the point should be noticed:—

" *Question.*—Pour quelle raison feu Joseph Guibord, comme membre de l'Institut Canadien, ne pouvait-il pas être admis aux sacrements de l'Eglise?

" *Réponse.*—Parce que, comme tel, il est considéré comme pécheur public. On entend par pécheur public celui qui, pour une raison connue publiquement, ne peut participer aux sacrements de l'Eglise. M. Joseph Guibord, en appartenant à l'Institut Canadien, appartenait à un Institut qui se trouvait, comme il se trouve encore, sous les censures de l'Eglise par la raison qu'il possède une bibliothèque contenant des livres défendus par l'Eglise sous peine d'excommunication, *latæ sententiæ* encourue *ipso facto*, et réservée au Pape, par le fait de la possession des dits livres. Cette espèce d'excommunication s'encourt par le fait même, dès que l'on connaît la loi de l'Eglise qui en défend la lecture et la retenue, dès que cela parvient à la connaissance de ceux qui les possèdent. Cette excommunication a atteint M. Guibord par le fait même qu'il était membre de l'Institut. Lorsqu'on est sous l'effet de la dite excommunication, quoique l'on puisse continuer à être membre de l'Eglise Catholique, et que, de fait, l'on continue à en être membre, l'on est privé de la participation aux sacrements, ce qui entraîne la privation de la sépulture ecclésiastique. Voilà pourquoi cette espèce de sépulture a été refusée à M. Guibord."

The evidence continues—

" *Question.*—Le dit feu Joseph Guibord, comme membre de l'Institut Canadien, était-il sous l'effet de l'excommunication, en vertu de quelque règle générale de l'Eglise seulement, ou en conséquence de quelque décret particulier?

" *Réponse.*—Il y était d'abord en vertu de la loi générale de l'Eglise, et en vertu de l'application qu'en a faite l'Evêque de Montréal par son mandement."

The evidence further continues—

" *Question.*—A quel mandement faites-vous allusion?

" *Réponse.*—C'est à celui produit en cette cause comme l'Exhibit B. de la Demanderesse.

" *Question.*—Est-il déclaré quelque part dans aucun mandement ou lettre pastorale émanant de l'Evêque de Montréal que le fait d'appartenir à l'Institut Canadien entraîne l'excommunication; et si vous répondez affirmativement, veuillez indiquer les termes qui décrètent telle chose?

" *Réponse.*—Ceci est déclaré dans l'annonce de Monseigneur de Montréal, que, en ma qualité d'administrateur, j'ai fait publier le quatorze Août mil huit cent soixante-et-neuf, laquelle annonce est produite comme pièce D. de la Demanderesse. Voici dans quels termes ceci est déclaré: 'Ainsi, nos très chers freres, deux choses sont ici spécialement et strictement défendues, savoir: 1, de faire partie de l'Institut Canadien tant qu'il enseignera des doctrines pernicieuses; et 2, de publier, retenir, garder, lire l'*Annuaire* du dit Institut pour 1868. Ces deux commandements de l'Eglise sont en matière grave, et il y a par conséquent un grand péché à les violer sciemment. En conséquence celui qui persiste à vouloir demeurer dans le dit Institut, ou à lire ou seulement garder le sus-dit *Annuaire*, sans y être autorisé par

l'Eglise, se prive lui-même des sacrements, même à l'article de la mort, parceque, pour être digne d'en approcher, il faut détester le péché, qui donne la mort à l'âme, et être disposé à ne plus le commettre.'

" *Question.*—Etre privé des sacrements et être excommunié, est-ce la même chose?

" *Réponse.*—Dans le cas présent c'est la même chose.

" *Question.*—L'excommunication, peut-elle être prononcée sans qu'il soit même fait usage du mot?

" *Réponse.*—Je ne suis pas prêt à répondre à cette question."—(Record, 146, 7.)

It is impossible wholly to avoid a suspicion that it had originally been intended to rely on an *ipso facto* excommunication, and that this subsequent defence of "pécheur public" was resorted to when it became manifest that a sentence of excommunication was necessary, and that none had been pronounced.

What is this category of "pécheur public" to include? Is the category capable of indefinite extension by means of the use of an *et cætera* in the Quebec Ritual? Or if the force of an *et cætera* is to be allowed to bring a man within the category of persons liable to what in ecclesiastical law is a criminal penalty, must it not be confined to offences *ejusdem generis* as those specified? Guibord's case did not come within any of the enumerated classes.

Some argument was raised as to the effect of the words, "quand il y aura quelque doute sur ces sortes de chose les Curés nous consulteront ou notre grand Vicaire;" but their Lordships are of opinion that these words can at most imply a duty on the part of the Curé to consult the Ordinary as to the application of the law in doubtful cases, not a power on the part of the Ordinary to enlarge the law in giving those directions, or to create a new category of offenders.

To allow a discretionary addition to, or an enlargement of, the categories specified in the Ritual, would be fraught with the most startling consequences. For instance, the *et cætera* might be, according to the supposed exigency of the particular case, expanded so as to include within its bann any person being in habits of intimacy or conversing with a member of a literary society containing a prohibited book; any person visiting a friend who possessed such a book; any person sending his son to a school in the library of

which there was such a book; going to a shop where such books were sold; and many other instances might be added. Moreover, the Index, which already forbids Grotius, Pascal, Pothier, Thuanus, and Sismondi, might be made to include all the writings of jurists and all legal reports of judgments supposed to be hostile to the Church of Rome; and the Roman Catholic lawyer might find it difficult to pursue the studies of his profession.

Their Lordships are satisfied that such a discretionary enlargement of the categories in the Ritual would not have been deemed to be within the authority of the Bishop by the law of the Gallican Church as it existed in Canada before the cession; and, in their opinion, it is not established that there has been such an alteration in the *status* or law of that Church founded on the consent of its members, as would warrant such an interpretation of the Ritual, and that the true and just conclusion of law on this point is, that the fact of being a member of this Institute does not bring a man within the category of a public sinner to whom Christian burial can be legally refused.

It would further appear that, according to the ecclesiastical law of France, a personal sentence was in most cases required in order to constitute a man a public sinner.

Jean de Pontas (Article 2, des Cas de Conscience, vo. Sépulture, A.D. 1715, Record 245) says :—

"Un homme en France n'est point censé pécheur public, et ne peut être traité comme tel, à moins qu'il n'y ait une sentence déclaratoire rendue par le jugement ecclésiastique contre le coupable.

"A propos d'un concubinaire public, pendant près de dix ans, mort endurci dans le crime, sans avoir voulu se confesser, Pontas décide que 'le curé doit enterrer cet homme en observant toutes les formalités pratiquées par l'Eglise, sans pouvoir ni s'absenter, ni feindre de refuser la sépulture ecclésiastique, sous prétexte d'intimider les autres pécheurs semblables, ni enfin ordonner à un autre prêtre de l'enterrer sans observer les cérémonies ordinaires.'"

Durand de Maillane (Droit Canonique, t. 5, p. 442) says :—

"On ne reconnaît pour véritables excommuniés à fuir, que les Païens et les Juifs, ou les hérétiques condamnés et séparés ainsi totalement du corps des fidèles. Les autres coupables de différents crimes qu'ils n'expient point avant leur mort ne sont privés de la sépulture que lorsqu'ils sont dénoncés excommuniés,

ou que leur impénitence finale est tellement notoire qu'on ne peut absolument s'en deguiser la connaissance. Le moindre doute tire le défunt hors du cas de privation, parce que chacun est présumé penser à son salut.

"Suivant les maximes du royaume, on ne prive de la sépulture ecclésiastique que les hérétiques séparés de la communion de l'Eglise, et les excommuniés dénoncés. La notoriété sur cette matière n'est pas absolument requise, parce qu'il y a des cas où il est très nécessaire de faire respecter à cet égard les saintes lois de l'Eglise; mais elle n'est pas aisément reçue, à cause des inconvénients qui pourraient en résulter; car le refus de la sépulture est regardé parmi nous comme une telle injure, ou même comme un tel crime, que chaque fidèle, pour l'honneur de la religion, et la mémoire ou même le bien de son frère en Jésus Christ, est recevable à s'en plaindre. Cette plainte se porte devant des juges séculiers, parce qu'elle intéresse en quelque sorte le bon ordre dans la société, et l'honneur même de ses membres."

Héricourt (Lois Ecclesiastiques, p. 174) :—

"Avant de dénoncer excommunié celui qui a encouru une excommunication *lata sententia*, il faut le citer devant le juge ecclésiastique, afin de justifier le crime qui a donné lieu à la censure et d'examiner s'il n'y aurait pas quelque moyen de défense légitime à proposer."

No personal sentence, such as is contemplated by these authorities, was, as already pointed out, ever passed against Guibord.

It is also to be borne in mind that no sentence, whatever might have been its value, was passed even after Guibord's death. There is indeed a letter called a *décret* of the Administrator-General to the Curé, which, after referring to a letter of the Bishop, written before Guibord's death, refuses ecclesiastical sepulture to him as a member of the Institute. The representatives of Guibord were neither summoned nor heard. This so-called *décret* had none of the essential elements of a judicial sentence.

It remains for their Lordships to consider what is the substantive law upon which the Respondents rely in support of their contention that Guibord is to be considered a public sinner within the terms of the Quebec ritual.

They appear to place their principal reliance on Rule X of the Council of Trent :—

"Omnibus fidelibus præcipitur ne quis audeat contra harum regularum præscriptum, aut hujus Indicis prohibitionem libros aliquos legere aut habere.

"Quod si quis libros hereticorum vel cujusvis auctoris scripta ob heresim vel ob falsi dogmatis suspicionem damnata, atque prohibita legerit vel habuerit, statim in excommunicationis sententiam incurrat."

Various observations arise on this citation, which seem to deprive it of all authority in the present case.

In the first place it is a matter almost of common knowledge, certainly of historical and legal fact, that the decrees of this Council, both those that relate to discipline and to faith, were never admitted in France to have effect *proprio vigore*, though a great portion of them has been incorporated into French Ordonnances. In the second place, France has never acknowledged nor received, but has expressly repudiated, the decrees of the Congregation of the Index.

Gibert, in his Institutes, says that the *ipso facto* excommunication inflicted by the Council of Trent as the punishment of reading or possessing prohibited books would have no effect in France *dans le for extérieur*. *Dupin*, a jurist already mentioned, denies the authority in France of the decrees of the Congregation. He says:—

" En effet, en consultant les précédents, on trouve un célèbre arrêt du Parlement de Paris qui l'a jugé ainsi en 1647, après un éloquent plaidoyer de l'Avocat-Général Omer Talon:—

" '*Nous ne reconnoissons point en France*,' dit ce Magistrat, 'l'autorité, la puissance, ni la juridiction des congrégations qui se tiennent à Rome; le Pape peut les établir comme bon lui semble dans ses Etats; *mais les décrets de ces congrégations n'ont point d'autorité ni d'exécution dans le royaume* . . . . Il est vrai que dans ces congrégations se censurent les livres défendus, et dans icelles se fait *l'index expurgatorius*, lequel s'augmente tous les ans; et c'est là où autrefois ont été censurés les arrêts de cette cour rendus contre Chastel, les œuvres de M. le Président de Thou, les libertés de l'Eglise Gallicane, et les autres livres qui concernent la conservation de la personne de nos rois et l'exercice de la justice royale.' " &c.—(Dupin, Droit Public Ecclésiastique, avertissement sur la 4ème édition.)

No evidence has been produced before their Lordships to establish the very grave proposition that Her Majesty's Roman Catholic subjects in Lower Canada have consented, since the cession, to be bound by such a rule as it is now sought to enforce, which, in truth, involves the recognition of the authority of the Inquisition, an authority never admitted but always repudiated by the old law of France. It is not, therefore, necessary to enquire whether since the passing of the 14 Geo. III, c. 83, which incorporates (s. 5) the 1st of Elizabeth, already mentioned, the Roman Catholic subjects of

the Queen could or could not legally consent to be bound by such a rule.

The conclusion, therefore, to which their Lordships have come upon this difficult and important case is that the Respondents have failed to show that Guibord was, at the time of his death, under any such valid ecclesiastical sentence or censure as would, according to the Quebec ritual, or any law binding upon Roman Catholics in Canada, justify the denial of ecclesiastical sepulture to his remains.

It is, however, suggested that the denial took place, in fact, by the order of the Bishop or his Vicar-General; that the Respondents are bound to obey the orders of their ecclesiastical superior; and, therefore, that no mandamus ought to issue against them. Their Lordships cannot accede to this argument. They apprehend that it is a general rule of law in almost every system of jurisprudence that an inferior officer can justify his act or omission by the order of his superior only when that order has been regularly issued by competent authority.

The argument would, in fact, amount to this: that even if it were clearly established that Guibord was not disentitled by the law of the Roman Catholic Church to ecclesiastical burial, nevertheless the mere order of the Bishop would be sufficient to justify the Curé and "Marguilliers" in refusing to bury him in that part of the parochial cemetery in which he ought on this hypothesis to be interred; or, in other words, the Bishop, by his own absolute power in any individual case, might dispense with the application of the general ecclesiastical law, and prohibit upon any grounds, revealed or not revealed, satisfactory to himself, the ecclesiastical burial of any parishioner. There is no evidence before their Lordships that the Roman Catholics of Lower Canada have consented to be placed in such a condition.

Their Lordships do not think it necessary to consider whether, if the parties and circumstances of the suit had been different, they would or would not have had power to order the interment of Guibord to be accompanied by the usual religious rites, because the widow finally forewent this demand, and Counsel at their Lordship's bar have not asked for it, and also because the Curé is not before them in his individual capacity; but they will humbly advise Her Majesty that the Decrees of the Court

of Queen's Bench and of the Court of Review be reversed. That the original Decree of the Superior Court be varied, and that, instead of the order made by that Court, it should be ordered that a peremptory writ of mandamus be issued, directed to "Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montréal," commanding them, upon application being made to them by or on behalf of the Institut Canadien, and upon tender or payment to them of the usual and accustomed fees, to prepare, or permit to be prepared, a grave in that part of the cemetery in which the remains of Roman Catholics, who receive ecclesiastical burial, are usually interred, for the burial of the remains of the said Joseph Guibord; and that, upon such remains being brought to the said cemetery for that purpose at a reasonable and proper time, they do bury the said remains in the said part of the said cemetery, or permit them to be buried there. And that the Defendants do pay to the Canadian Institute all the costs of the widow in all the lower Courts, and of this Appeal, except such costs as were occasioned by the plea of *recusatio judicis*, which should be borne by the Appellants.

Their Lordships cannot conclude their Judgment without expressing their regret that any conflict should have arisen between the ecclesiastical members of the Roman Catholic Church in Montreal, and the lay members belonging to the Canadian Institute.

It has been their Lordships' duty to determine the questions submitted to them in accordance with what has appeared to them to be the law of the Roman Catholic Church in Lower Canada.

If, as was suggested, difficulties should arise by reason of an interment without religious ceremonies in the part of the ground to which the mandamus applies, it will be in the power of the Ecclesiastical authorities to obviate them by permitting the performance of such ceremonies as are sufficient for that purpose, and their Lordships hope that the question of burial, with such ceremonies, will be reconsidered by them, and further litigation avoided.

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