

I know of no substratum for the argument that such pre-requisites are within the competency of a provincial legislature, other than that afforded by the case of *Sottomayor v. de Barros*. If that argument has been shown to be of little potency, it is perhaps not too foolhardy to hazard the suggestion that a provincial legislature may determine the time when, the place where, and the person by whom marriage may be celebrated; but, beyond the possible power of regulation by the issue of a licence to persons endowed with a capacity to marry by some other authority, has no power to say who shall or shall not intermarry, either with or without consents of other persons.

Edmonton.

WALTER S. SCOTT.

THE NOTARIAL PROFESSION IN THE PROVINCE OF QUEBEC.

I.

The notarial profession is a profession by itself, a profession *sui generis*, little known and less understood in those countries where it has no existence. The purpose of this article is to make the profession known and appreciated by our legal confrères outside the Province of Quebec.

I need hardly make the preliminary observation that the profession in question, which is called in French "le notariat," owes its introduction into Canada to the early French colonists. A knowledge of the history of law is essential to enable one to properly understand and interpret the law itself. I have thought it advisable, therefore, to give briefly some historical facts set out in chronological order.

1302.—In the year 1302 an ordinance was passed by Philippe IV. of France, which contained several important dispositions relating to the profession, and it may be stated that at this period the profession had attained a considerable degree of development in France.

1597.—This is the date of an important ordinance of Henry IV. of France relating to the profession, and it may be stated to have then reached its most complete development. You will observe that this was in the time of Samuel de Champlain.

1608.—In this year Quebec was founded by Samuel de Champlain. There were then no notaries in Canada, although the profession, as being part and parcel of French law, may be said to have been, in a sense, introduced into the colony.

1610.—This is the date of Champlain's Marriage Contract, executed at Paris. The original is still deposited "au Chatelet," and has been seen by Canadian historians.

1627.—The Articles establishing the Company of One Hundred Associates were executed before Pierre Parque and Pierre Guerreau, Notaries at Paris in 1627. This is the first notarial *Acte* which specially concerns Canada.

1635.—In this year Champlain died. There were still no notaries in Canada. Under his Marriage Contract his widow had been irrevocably instituted his universal legatee. Such an arrangement was then lawful in France and is still lawful in France and Quebec. Notwithstanding his Marriage Contract, Champlain made a Will. Under the Custom of Paris (*Coutume de Paris*), which was the common law of France introduced into Canada, there were three forms of Wills—first, the Notarial Will, being a Will before a Notary and two witnesses; secondly, a Will executed before a curé and three witnesses; and thirdly, the holograph Will written entirely in the hand of the Testator. As I have already stated, there appears to have been no notaries then nominated, nor were there parish priests in the legal sense, although there were many missionaries. Champlain, owing to paralysis, was unable to execute a Will in holograph form, and it then apparently occurred to his legal advisers that the safest thing to do would be to make a Will in accordance with the requirements of Roman Law. The Will was accordingly executed in the presence of seven witnesses and as an extra precaution an eighth was added. The only officer present at the execution of the Will was a person who styled himself "Greffier." Under the terms of the Will Champlain bequeathed to the College of Jesuits at Quebec all his moveable property and in addition a certain sum of money to be a charge on his immoveable property. Litigation followed, with the result that the Will was declared null.

It may be said in passing that during the entire French régime there were no lawyers (*avocats*) in Canada. The French kings repeatedly declared in their edicts that they desired promptness in the decision of all cases. In its commentaries on the ordinances of Louis XIV. (1667), the Sovereign Council remarks with energy that there are no advocates or attorneys in the country and that they do not deem it expedient to permit of their establishment. Lawsuits were terminated in a brief and summary manner, seldom extending beyond a week or ten days. Although there were no advocates the notaries frequently acted as such during the entire French régime. Evils, however, soon crept in. Notaries were to be found in court

sometimes demanding the nullity of their own acts or sometimes defending faulty instruments which had been drafted by them. And as a consequence, as will be seen later, the legal profession at an early period in the English régime was divided into two branches.

Although advocates as a profession were not permitted in the colony during the French régime, many of them occupied distinguished positions in the colony and rendered eminent services.

11th August, 1647.—This is the date of a deed signed by Laurent Berman. He is the first notary who styles himself *notaire royal*. There were two classes of notaries in Canada, the Royal notary and the Seigniorial notary. The jurisdiction of the Seigniorial notary was limited to that of the Seignior for which he was appointed. The jurisdiction of the Royal notary extended throughout the colony. Berman, although he was the first Royal notary, was preceded by perhaps a dozen or more other notaries of a lesser rank.

The leading notary up to the year 1663, when the Sovereign Council was established, was Guillaume Audouart, who commenced to practise in 1648. His étude comprised 1067 documents.

From the foundation of Quebec up to 1663, there appear to have been twenty-two notaries in the colony. These functionaries had been nominated either by the Company of One Hundred Associates or by individual seigneurs.

1663.—By his Edict of 1663, Louis XIV. in establishing the Sovereign Council, gave it power to nominate notaries, and at the second meeting of the Council held on the 18th September, 1663, it nominated the person of Jean Gloria as *notaire royal*.

The "*lettres de provision*" of Jean Gloria, which are the most ancient known in the country, read as follows:—

"Le Conseil Souverain établi par le Roi en la ville de Quebec au royaume de la Nouvelle-France.

"A tous présents et à venir, salut:

"Estant nécessaire pour le bien publicq de pourvoir de personnes capables et suffisantes pour dignement s'acquitter des fonctions de l'état et office de notaire royal, et à plien confians au bon sens, expérience, capacité, suffisance et fidélité de Jean Gloria; après due information faicte de ses vie, moeurs, religion catholique, apostolique romaine et de luy pris le serment en tel cas requis et accoustumé; le dict Conseil, en vertu du pouvoir à lui donné par l'édicte de son établissement enregistré où besoin a été, a donné et octroyé par des présentes au dit Gloria un état et office de notaire royal en cette ville de Québec et ressort d'icelle, et icelui reçu et installé au dit estat et office; pour en jouir aux droits, honneurs, prérogatives, franchises,

libertés, fruits, profits, revenus et esmoluments y appartenant et tout ainsi qu'ont accoutumé d'en jouir et user en France les officiers de cette nature, tant et si longuement qu'il sera jugé à propos par le dit Conseil, et ordonné qu'il sera délivré copie au dit Gloria, signé du secrétaire et greffier du dit Conseil, et scellé du sceau des armes de Sa Majesté Pour lui servir et valoir ainsi que de raison. Fait et donné au Conseil tenu à Québec, le vingtième septembre, 1663.

(Signé) Peuvret, Secrétaire.

“ Scellé cire rouge d'Espagne du sceau des armes de Sa Majesté.

(Signé) Peuvret, avec paraphe.”

Les minutes du Conseil du 22 septembre contiennent l'arrêté suivant :

“ Vue la deslibération du vingtième du présent mois par laquelle Jean Gloria, habitant de ce pays, a esté nommé à l'estat et office de notaire royal, en cette ville de Québecq, iceluy Gloria a esté ce jour-d'hui recu à l'estat et office, et presté le serment en tel cas requis et accoutumé, et a signé.”

(Signé) Mézy.

Jean Gloria was, strictly speaking, the first royal notary in Canada, although several notaries before him assumed that title.

17th May, 1675.—This is the date of the nomination of the first notary in Canada by the King of France himself. The person nominated was Gilles Rageot. His nomination reads as follows:—

“ Louis, par la grace de Dieu, roi de France et de Navarre, à tous ceux qui ces présentes lettres verront, salut.

“ Etant nécessaire de pourvoir une personne capable pour exercer un des offices de notaire garde-notes dans notre juridiction de Québec, en la Nouvelle-France, et sur le bon et louable rapport qui nous a été fait de la personne de notre cher et bien-aimé monsieur Gilles Rageot et de ses sens, suffisance, capacité, prud'homie et expérience au fait de pratique :

“ A ces causes et autres considérations à ce nous mouvant nous lui avons donné et octroyé, donnons et octroyons, par ces présentes signées de notre main, un des dits offices de notaire garde-notes en la juridiction de la dite ville de Québec, en la Nouvelle-France, pour le dit office avoir, tenir et exercer conformément à la coutume, prévôté et vicomté de Paris, et en jouir et user aux honneurs, autorités, prérogatives, franchises, gages, droits, profits, revenus et émoluments au dit office appartenans, et ce tant qu'il nous plaira.

“ Si donnons en mandement à nos amés et féaux les officiers de notre Conseil—souverain établie en la dite ville de Québec, qu'après

leur être apparu des bonnes vie et moeurs, religion catholique, apostolique et romaine du dit Gilles Rageot, et de lui pris le serment en tel cas requis, ils le mettent, instituent ou fassent mettre, instituer, de par nous, en possession du dit office, et le fassent reconnaître, obéir et entendre de tous ceux et ainsi qu'il appartiendra ès choses concernant le dit office; car tel est notre plaisir. En témoin de quoi nous avons fait mettre notre scel à ces dites présentes.

“Donné au camp de Casteau de Cambrésis, le dix-septième jour de mai, l'an de grâce mil six cents soixante et quinze, et de notre règne le trente-troisième.

(Signé) Louis.

“Et sur le repli, par le roi:

(Signé) Colbert.

“Et scellé du grand sceau de cire jaune.

“Registrées suivant l'arrêt de ce jour, pour jouir par le dit monsieur Gilles Rageot de contenu en icelles, à Québec, le vingt-quatrième septembre mil neuf six cent soixante quinze.”

(Signé) Peuvret.

25th May, 1703.—On this date, Louis Chamballon, who practised his profession at Quebec from 1692 to 1716, was called to Chateau St. Louis to receive the Will of Governor Callières.

13th August, 1724.—By an “arrêt” of this date, notaries were forbidden to appear before Courts as Attorneys on behalf of persons for whom they had passed deeds. This is a step towards the ultimate division of the legal profession into two branches, which was effected some sixty years later under the English régime.

8th September, 1760.—On this date, the Capitulation of Montreal was signed. The French régime gave way to the English. From the 8th of September, 1760, to the 10th of October, 1764, Canada was under military rule. It is a mistake, however, to imagine that French private law ceased to exist or was not recognized. Martial law, in so far as property rights were concerned, did not exist in fact. Notaries who had been appointed under the French régime continued to exercise their profession, and it was not long before the profession was officially recognized. Thus on the 30th of March, 1761, Governor Burton of Three Rivers, gave instruction to the notaries of his district to deliver to him extracts of all Deeds of Sale or Exchange which had been executed before them or might thereafter be executed before them. Moreover, during the confusion which followed the conquest, certain persons who were not notaries assumed the right of drawing up documents which were usually executed before notaries, and Governor Burton recognizing the danger of allowing unqualified persons to

meddle in such matters, issued a proclamation bearing date the 17th March, 1761, forbidding such unqualified persons to assume such right. This important document is the first authentic evidence we have of the official recognition of the profession during the so-called Military Régime. The following is an extract therefrom—I translate roughly from the French—

“ Documents which secure the property and rights of individuals, such as agreements, gifts, sales, inventories of estates, etc., are subject to certain forms which should be observed. The non-observance of these leads to disputes and litigation. We have a class of people recognized by the Government who are known as notaries, whose duty and profession are intended to give effect to the intention of contracting parties and to clothe such intention with the required formalities. These notaries are under oath. It has come to our knowledge that certain unqualified persons have assumed to act as notaries and to draft legal documents. Without suspecting them of bad faith, it is to be feared that their ignorance may give rise to lawsuits and disputes, and to guard against this we expressly forbid all persons under the jurisdiction of this Government to draw up or execute such instruments or documents as are usually executed before notaries under penalty of a fine or even of such more severe punishment as it may please us to order.”

1763.—This is the date of the Treaty of Paris, when the English régime was confirmed.

1765.—Governor Murray issued commissions to five new notaries, four of whom bore English names. One of them was Richard Mac-Carty. Notice of his appointment was published in the *Gazette* at Quebec on the 15th August, 1765. The notice reads as follows—I translate from the French:

“ RICHARD MACCARTY, NOTARY PUBLIC.

“ Having been duly admitted to practise as such, attests Deeds, Wills, Donations, Codicils, Agreements and Contracts and makes all kinds of Protests, notarial *actes*, etc., draft deeds of sale, Leases, Mortgages, constituted rents, and other writings generally, in French and in English at the most reasonable prices. And should it happen that the two parties do not understand the same language he will execute their deeds in the two languages without charging them more than for one. His office is in his house at Chambly, District of Montreal, where business may be attended to at any hour of the day.”

Edward William Gray, one of the other five notaries appointed in 1765, practised his profession at Montreal till 1797 and his Minutes,

that is, the original documents which were executed before him, are deposited in the Court House there.

1774.—This is the date of the famous “Quebec Act,” by which the French civil law was definitely established. By this Act, all commissions relating to officers of justice were annulled as and from the 1st of May, 1775, and Governor Guy Carleton issued a general commission bearing date the 29th April, 1775, the effect of which was to renew for six months the commission of all notaries whose names were inscribed on the reverse side of the general commission issued. This was the year of the American invasion. Montreal fell into the hands of the American army, and Valentine Jautard, a lawyer, was appointed a notary public at Montreal by the American General, David Wooster, under commission bearing date the 31st of December, 1776. Jautard is probably the only Canadian notary public who held his commission from the American Government.

For many years after the Conquest the nomination of notaries was entirely in the hands of the Governor. He exercised supreme power and could cancel a commission granted without investigation and not unfrequently did so. It is most interesting to read the numerous plaintive petitions which were presented to the Governor by those desiring to be nominated to the profession. The petitions were frequently accompanied by numerous letters of reference.

30th April, 1785.—This is perhaps the most important date in the history of the profession. It is the date of an ordinance passed by Lieutenant-Governor Henry Hamilton, 25 George IV., Chapter 4. Under its provisions no person could become a notary unless he had served regularly as a notarial clerk for five years, and after such clerkship he was obliged to submit to an examination before some of the elder notaries in presence of the Chief Justice or two or more judges of the Court of Common Pleas of the District in which he had served as clerk. It separated the profession of advocate from that of notary, and those who had previously practised both professions were granted a short delay in which to make option as to the profession they would follow. It will be observed that it took from the Government the arbitrary power of nomination and dismissal, although it still rendered the profession subject to judicial control to a certain extent inasmuch as the candidate had to submit to an examination held before a judge or judges as above mentioned. The five years clerkship is still in force as well as an examination as will be seen hereafter, although provision has since been made for shortening the term of five years under certain conditions. Thus for nearly one hundred and thirty-nine years all notaries in the Province of Quebec

have been obliged to serve a regular clerkship and to submit to an examination as to their knowledge of the science of law.

1791.—This is the date of the Constitutional Act, which divided Canada into two provinces, Upper and Lower Canada, and introduced an unsatisfactory form of representative government. The first elections were held in the month of June, 1792. Lower Canada was divided into twenty-one counties, most of which had English names. Of the seventy members of the Legislature elected, sixteen were English and fifty-four French, although the population was almost entirely French. The French-Canadians at this early date thus manifested that spirit of justice and generosity which has characterized them ever since, and as a sort of recompense the English representatives, the first day of the session, proposed the abolition of the French language in the debates of the House, and asked that the Speaker of the House be of their nationality.

It was at this period that one of the most distinguished notaries of the profession appeared on the scene in the person of Joseph Papineau, father of Louis Joseph Papineau, of 1837-38 fame. Joseph Papineau not only distinguished himself in his own profession, but was one of the greatest orators and parliamentarians that the French-Canadian race has produced, and had it not been for his son's participation in the Rebellion of 1837 and the events leading up to it, the name of the father would possibly have been as prominent in the annals of Canada as that of the son.

Several notaries were elected to this first Legislative Assembly, and from that date to this the profession has always been well and worthily represented in our legislative halls. At present some eight or ten members of the Provincial Legislature are notaries. His Excellency the Lieutenant Governor of the Province, the Honourable Mr. Narcisse Perodeau, is a distinguished member of the profession. Letellier St. Just was another notary who was honoured with the office of Lieutenant-Governor of the Province. When Sir Wilfrid Laurier formed his famous cabinet of 1896, two of its members, the Honourable J. I. Tarte and the Honourable M. E. Bernier, were notaries, and about the same time the Honourable F. G. Marchand, a notary, was Prime Minister of the Province of Quebec and, as such, left behind him a distinguished name and record. Garneau, the famous French-Canadian historian, was a notary. Panet, the first Speaker of any Canadian Parliament, was a notary, and Joseph Papineau, above referred to, was our first Parliamentary Leader.

Since the publication, about a quarter of a century ago, of the Commentary on the Civil Code by P. B. Mignault, K.C., a work

which cannot be too highly praised and which has been of inestimable value to the legal profession, lawyers and notaries have been obliged, as regards civic law, almost wholly to have recourse to the writings of two eminent notaries for information on many important legal questions. These two notaries are the late Joseph E. Roy and the late L. P. Sirois, both Professors of Law at Laval University, Quebec. Joseph E. Roy is the author of "L'Histoire du Notariat," and the writer takes this opportunity of putting on record his indebtedness to this work for the greater part of the information contained in this article.

To illustrate the indebtedness of the legal profession generally to the notarial profession I find, on referring to J. J. Beauchamp's General Repertoire on Canadian Jurisprudence, published in 1917, under the heading "Testaments" that the learned author cites twenty-six articles which have been written on the subject. Of these twenty-four were written by notaries. Most of them were published in the "Notarial Review," a publication which was started about a quarter of a century ago. This Notarial Review, until the publication of Mr. Beauchamp's Digest, was not generally familiar to advocates, but after the publication of Beauchamp's Digest and the realization of the fact that legal writers, since the publication of the eminent work of Mr. Mignault, were mainly notaries, there was an immediate demand for the Review, and book-sellers since have been endeavouring to collect all the complete sets they can find. Not only have the principal writers on "Wills" been notaries, but on referring to the word "Sale" in Mr. Beauchamp's Digest I find seventeen legal treatises or articles referred to, of which fifteen are by notaries..

For many years past the notarial profession has been represented on the Law Faculties of McGill and Laval Universities, by distinguished and eminent jurists.

I think, therefore, that I have made the fact clear that notaries are legal men whose opinion is entitled to respect. A notary in the Province of Quebec might be popularly defined as a lawyer who specializes in the law relating to real estate, sales, mortgages and the settlement of estates generally, but who is denied the privilege of appearing before the courts in litigious matters. His opinion, in so far as possible litigation is concerned, is always disinterested.

Sir John Thomson in 1891 said—"I would be glad to see the notarial profession established in every Province in Canada in view of the many services which it renders every day, and I will do all in

my power to preserve intact the rights and privileges of notaries in the Province of Quebec." I retranslate his words from the French.

1836.—On this date the Statute 6 William IV. Chapter 10, was passed whereby candidates for admission to the profession who had followed a complete classical course of studies in some recognized institution were allowed to present themselves for examination after four years clerkship instead of the five years required under the ordinance of 1785.

1837.—This is the year of the insurrection, commonly called by English writers "the Rebellion." Several notaries participated in the uprising, and three suffered the penalty of death for so doing, these were Joseph Narcisse Cardinal, Chevalier deLorimier and Pierre T. de Coigne. Joseph Narcisse Cardinal was born at St. Constant on February 8th, 1808, elected to the Legislative Assembly by acclamation in 1834, and executed at Montreal the 21st of December, 1838. His farewell letters to his wife and small children are most touching. De Lorimier, who was a descendant of a noble French family, was born in 1805, admitted to the notarial profession in 1829, and perished on the scaffold on the 15th of February, 1839.

Pierre T. de Coigne was admitted to the profession on October 7th, 1837, and was executed on the 18th of January, 1839. He was only twenty-seven years of age at the time of his death. It will be observed that Cardinal and de Lorimier were in their early thirties.

28th July, 1847.—This is an important date in the history of the profession. By 10-11 Victoria, Chap. 21, it was completely re-organized. Three boards of notaries were established, one for the District of Quebec, one for the District of Montreal, and one for the Districts of Three Rivers and St. Francis. The boards for the Districts of Montreal and Quebec were composed of twelve notaries each, and the board for the Districts of Three Rivers and St. Francis of nine notaries. They were elected by the notaries of their respective districts and were empowered, after public examination, to deliver certificates of qualification to candidates for admission to the study or the practice of the profession. Extensive disciplinary powers were also granted them, and it was provided that no person should be admitted to the practice of the profession unless he had served an apprenticeship of five years, which apprenticeship could be shortened by one year under certain conditions. The candidate moreover was obliged to submit to a public examination on the science of law and the practice of the profession. It was also provided that after the passing of the Act no candidate would be allowed to present himself for admission to study without passing a public examination on his capacity and

qualification, and unless he proved that he had received a complete classical education. The boards were also authorized to fix the fees which notaries might charge for their services, but any tariff so arranged was subject to confirmation by the Court of Queen's Bench.

The foregoing are the main features of this organic law which profoundly modified the pre-existing law. The profession obtained certain prerogatives, of which the most important were its disciplinary power and its control over the admission of candidates to the study and practice of the profession. Some apprehension was felt as to the possibility of abuses arising from such control, but it must be acknowledged that the boards have exercised their prerogative with discretion and justice, and it can safely be said that no candidate possessing the necessary education, legal knowledge and other qualifications, has been refused admission.

1858.—By an Act sanctioned on the 30th of June of this year, 22 Victoria, Chap. 8, it was provided that any notarial student who had followed a regular law course in a recognized law school and observed the other required formalities might present himself for examination to practise after a clerkship of three years. At first the candidates were rather slow in taking advantage of this privilege, but for many years past a complete legal course in a recognized university has been the rule, as will be seen hereafter.

February 1st, 1870.—This is the date of the sanctioning by the Lieutenant-Governor of the third organic law affecting the profession under the English régime—33 Victoria, Chap. 28. By this Act one single board took the place of the three boards previously referred to. It was clothed with corporate powers. This Act infused new life into the profession, and its subsequent career has been one of constant progress. It is true that by reason of the faults and weaknesses of individual members of the profession the "Notariat" has had its dark days, but no human institution is perfect, and the history of the past three centuries will reveal the profession in the words of a French-Canadian writer as of all professions "la plus ancienne, la plus utile, la plus belle et une des plus importantes."

The foregoing completes my historical observations. Some of them may not make interesting reading to persons outside the Province of Quebec, but the thought occurs to me that if they are put on record in the CANADIAN BAR REVIEW they may possibly be useful or of interest hereafter, especially to persons unfamiliar with the French language, and who would consequently be unable to enjoy the privilege of reading "L'Histoire du Notariat au Canada," by the late J. Edmond Roy—a work in four volumes—which is almost a

complete history of Canada in itself. To J. Edmond Roy, my eminent, distinguished and lamented confrère, I take this opportunity of rendering my most respectful homage.

Montreal.

DONALD MCKENZIE ROWAT.

(*To be Continued.*)

THE LORD CHANCELLOR AND THE PRIVY COUNCIL.¹

To an unusual degree the minds of the English speaking lawyers the world over are turned, at the present time, to that little island whence came the laws which are the pride of the English speaking world—the immediate cause being the near approach of the great, and, what I believe will prove to be, the historic gathering of the lawyers of the United States of America in London, England, as the guests of the Bar of England and of Canada.

The Lord Chancellor, who presides over the Committee of the Law Lords, the ultimate court of appeal for all England, and who, as chairman, presides at the meetings of the Judicial Committee of the Privy Council, the highest court of appeal for the Empire, will, by reason of his great office and by reason of his own personality, prove to be the cynosure of all eyes on that occasion.

Perhaps, therefore, it may not be thought out of place for me to take advantage of this opportunity to say something to the members of the Ontario Bar Association about the Lord Chancellor and the Judicial Committee over which he presides.

It seems to me that Lord Haldane owes much to heredity, and that to properly understand and appreciate Lord Haldane it is necessary to keep in mind the influence brought to bear upon him for many years by his mother. We have all read how his mother, a gracious, cultivated old lady of ninety-nine, has written and continues to write daily letters to her son from the old home at Cloanden, Perthshire, Scotland.

May we not conclude that these daily letters, to an appreciable extent, have inspired that display of tremendous energy, which, combined with unusual capacity and laborious study, has carried Lord Haldane brilliantly through several universities, to triumph at the Bar, to a high place in statesmanship, and for the second time to the exalted position of Lord Chancellor of the Realm of England.

¹ Address to the annual meeting of the Ontario Bar Association held at Osgoode Hall, Toronto, on Thursday, 23rd May, 1924.