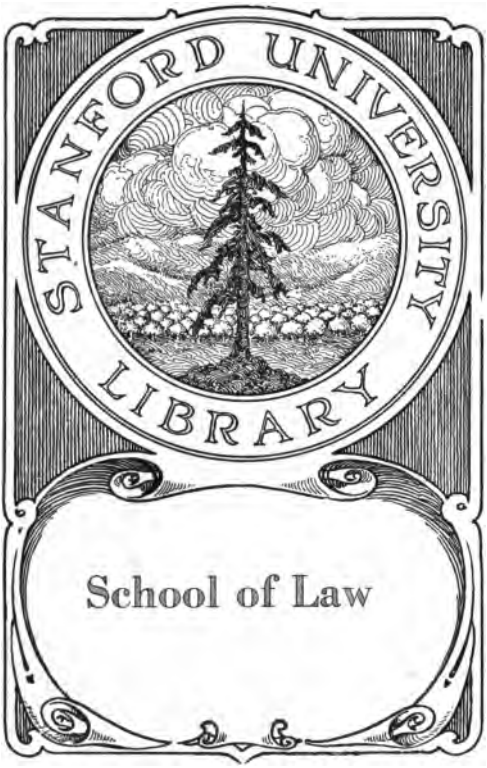

THE

CANADA LAW JOURNAL.

A MAGAZINE OF JURISPRUDENCE.

Edited by James Kirby, Advocate.

VOL. III.—JULY TO DECEMBER, 1867.

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CONTENTS OF VOL. III.

The Canada Law Journal.

VOL. III. JULY, 1867. No. 1.

PROEM TO VOLUME THE THIRD.

As the beginning of the THIRD VOLUME of the LAW JOURNAL coincides with the beginning of a new era in our history, we have thought proper to drop the prefix "Lower" from the title, and to adopt the more general title of "THE CANADA LAW JOURNAL." For while the jurisprudence of that central portion of Canada, hitherto styled Lower Canada, will continue to receive special attention in our pages, it has become necessary that the scope of the LAW JOURNAL should be enlarged so as to include the jurisprudence of the Confederation, and to keep pace with the legislation of the House of Commons, to which have been confided the important subjects of Bankruptcy, Bills of Exchange and Promissory Notes, Banking, Marriage and Divorce, &c., and the Criminal Law.

There is no good reason why there should not be a gradual assimilation of the law of all parts of the Dominion of Canada. In all civilized countries, the differences between the best legal minds are narrowing and dwindling away. The writings and *dicta* of American jurists are received with respect in the highest European Courts, and *vice versa*. All educated men must feel it their duty to do what they can towards assisting the establishment of a broad and uniform jurisprudence.

QUEEN'S COUNSEL.

The creation in one day of two dozen Queen's Counsel in the Province of Quebec alone has naturally excited much criticism. Some received the announcement with violent indignation, others with contemptuous indifference, but no one, as far as we have observed, has had a word to say in justification or apology. The precise amount of honor attaching to the letters Q. C. was previously somewhat vague and uncertain. We knew that the title was frequently conferred as a reward for electioneering services; that it was not uncommonly bestowed on partizans of slight professional repute while it was withheld from men of sterling worth who meddled not in "the muddy pool of politics;" but it was still held in some estimation, and the silk gown was not without dignity. Now, however, all ambiguity on the subject has been removed. That which in England is the victor's palm, the prize of a good fight, the reward of a successful career, has here been conferred, in some instances upon gentlemen who have long ceased to practise their profession, and in others upon political adherents of dubious antecedents. The rank of Q. C. has fallen to somewhat the same level as that of J. P., or some of the other titles which have been lavishly bestowed, and if there were not another appointment for the next twenty years, the prostrate dignity would hardly recover from the shock.

MONTHLY NOTES OF CASES.

With the present volume of the LAW JOURNAL is commenced a series of Notes of such cases as are either not of sufficient importance to require an extended report, or which our limited space will not permit us to report at length, but which nevertheless may afford some useful hints. These MONTHLY NOTES will contain as nearly as possible the *ipsissima verba* of the judges, (pruned of redundancies and repetitions,) taken with the aid of stenography, and will be prepared specially for the LAW JOURNAL. Other publications reprinting them will please give credit.

INDIAN MARRIAGES.

A case of great interest, recently decided by Mr. Justice MONK, will be found in the present number. The points decided by the learned judge are that the connection of a white man with an Indian woman in the Indian territory was a marriage valid in Christendom, and could not be repudiated; that a person going from Lower Canada to the Indian territory on business, and leading a roaming life in that country for twenty-eight years, never lost his original domicile, and that his children by the Indian wife were legitimate,

and entitled to share the community according to the Laws of Lower Canada.

The question of the validity of such a marriage is new, and as the case will probably be carried to the Privy Council, we may in course of time look for an interesting discussion of the subject by the highest legal authorities. It may be within the recollection of our readers that the validity of a Mormon marriage was recently considered in England. Marriage, as understood in Christendom, was defined by Judge WILDE to be the voluntary union for life of one man and one woman *to the exclusion of all others*, and he held that a marriage in a country where polygamy is lawful between a man and woman who profess a faith which allows polygamy is not a marriage as understood in Christendom. A Mormon marriage was therefore held invalid. In the case of Connolly, though we think it to be taking a very extreme view to say that polygamy was not lawful in the Indian country, yet the husband of course did not profess a faith which permitted polygamy.

THE RETIREMENT OF MR. JUSTICE AYLWIN.

The Bench of the Province of Quebec has sustained a serious loss in Mr. Justice AYLWIN, who announced his resignation of office during the last term of the Court of Queen's Bench sitting on the Appeal side. It would be faint praise to speak of this learned judge as one of the ablest on the Canadian Bench, for it would be difficult, if not impossible, to name any one so highly gifted with the qualities which make a great judge. Clear and forcible in his statement of facts, powerful and convincing in his reasoning, and singularly pleasing and impressive in his delivery, he never failed to give the hearer the idea that he was listening to a great man. The vigor and ability with which he presided over the Crown sittings of the Queen's Bench made his name a household word throughout Lower Canada, and gained for that Court an unwonted prestige. Perhaps somewhat of the impression of ability he inspired was due to the rapidity with which he arrived at his conclusions. It seemed as though it were impossible for him to be in doubt. At all events, he seldom or never betrayed the slightest hesitation or uncertainty in the delivery of his decisions. KAYE, cited by MORGAN, thus wrote of him:—"Mr. AYLWIN bore the reputation of the best debater in the Assembly, a man of infinite adroitness and lawyer-like sagacity, skilled in making the worse appear the better reason, and in exposing the weakness of an adversary's case." The fame which he won at the bar and in the Legislature has been greatly augmented by his judicial career, and even while afflicted with ill health and sickness, his zealous attention to public duties has been such as to excite general admiration.

The reasons given by the learned judge for his retirement were not of the most pleasant nature. He expressed deep dissatisfaction at the obstacles that lay in the way of a prompt and satisfactory administration of justice—obstacles in part created by the Executive, in part by his own colleagues, and in part by the unseasonable loquacity of a few members of the bar. However this may be, we trust that the great abilities of Mr. Justice AYLWIN are not yet wholly lost to the profession and the public, and that, being far from the evening of life, he will yet win new claims to the gratitude of his country.

THE CODE OF CIVIL PROCEDURE.

The Code of Civil Procedure of Lower Canada, revised and corrected in accordance with the Act of last Session, by Royal Proclamation dated the 22d of June, was declared to come into force from and after the 28th of June, 1867.

REGISTRATION IN THE PROVINCE OF QUEBEC.

An important change is about to be made in the mode of registration, under the provisions of Arts. 2166—2173 of the Civil Code. It will be remembered that these articles provide for the making of plans by the Commissioner of Crown Lands, upon which plans, each lot of land is to be designated by a number. Copies of the plans and books of reference are to be deposited in the Registry Offices, and nctice thereof given by proclamation, after

which notaries passing acts concerning immoveables indicated on the plans, are bound to designate them by the number given to them upon the plans. Further, within eighteen months after proclamation bringing the provisions of Art. 2168 into force in any registration division, the registration of any real right upon any lot of land within such division, must be renewed, failing which, such rights have no effect against other creditors and subsequent purchasers whose claims have been regularly registered. By proclamation, dated 28th June, 1867, notice is given that the plan and book of reference for the first Registration District of the County of Huntingdon, comprising the County of Laprairie, has been deposited, and the 2nd of November next is fixed for the coming into force of Art. 2168, so that within eighteen months after the 2nd November, the registration of all hypothecs in the County of Laprairie must be renewed.

DRUMMOND COUNTY.

By proclamation dated June 28, the terms of the Circuit Court for the County of Drummond have been altered and fixed as follows: Three terms, each of five days, from the 20th to the 24th of January, June, and September, both days inclusive.

APPOINTMENTS.

The Hon. Sir John A. Macdonald, K. C. B., Hon. George Etienne Cartier, C.B., Hon. Samuel Leonard Tilley, C.B., Hon. Alexander Tilloch Galt, C.B., Hon. William McDougall, C. B., Hon. William Pearce Howland, C.B., Hon. Adams George Archibald, Hon. Adam Johnston Fergusson Blair, Hon. Peter Mitchell, Hon. Alexander Campbell, Hon. Jean Charles Chapais, Hon. Hector Louis Langevin, and Hon. Edward Kenny, to be members of the Queen's Privy Council for Canada. (Gazetted July 1, 1867.

The Hon. Sir John A. Macdonald, K. C. B. to be Minister of Justice and Attorney General. (Gazetted July 1, 1867.)

Charles Prentice Cleveland, of the village of Richmond, Esq., to be Registrar of the County of Richmond. (Gazetted June 24, 1867.)

Jules Chevallier, of the town of Sorel, Esq., to be Registrar of the County of Richelieu. (Gazetted June 24, 1867.)

Louis Baudry, and Pierre J. U. Baudry, to be jointly Prothonotary, Clerk of the Circuit Court, Clerk of the Crown, and Clerk of the Peace, for the District of Beauharnois.

Henry Ogden Andrews, Esq., the Hon. Joseph Noel Bossé, Jacques Crémazie, Robert Mackay, Charles André Leblanc, Pierre Légaré, James Armstrong, Gédéon Ouimet, Eugène Urgèle Piché, Christopher Dunkin, Louis E. Napoléon Casault, George Irvine, Frederick William Torrance, George Futvoye, Frederick C. Vannovous, Louis Charles Boucher de Niverville, François Pierre Pominville, William Hoste Webb, Thomas Weston Ritchie, Thomas Kennedy Ramsay, Philippe Joseph Jolicœur, Henry Joseph O'Conlon Clarke, Paul Denis, and Henri Elzéar Taschereau, Esquires, to be Her Majesty's Counsel learned in the Law, to take rank and precedence according to the date of their commissions as advocates. (Gazetted June 28, 1867.)

Cyrille Delagrave, of the City of Quebec, Esq., Advocate, Norbert Dumas, of the City of Montreal, Esq., Advocate, and Jean-Bte., Varin, of the Village of Laprairie, Esq., Notary Public, to be Seigniorial Commissioners under C. S. L. C. cap. 41. (Gazetted June 1, 1867.

Joseph A. Blondin, of Bécancour, Esq., Registrar for the County of Nicolet. (Gazetted June 1, 1867.)

Didace Tassé, of the town of Iberville, Esq., Registrar of the County of Iberville. Gazetted June 1, 1867.)

Edward Borne, of the Magdalen Islands, Esq., Registrar for the Registration Division of the Magdalen Islands. (Gazetted June 29, 1867.)

James Brend Batten, of Westminster, England, Esq., Solicitor, to be a Commissioner for taking affidavits in and for the Canadian Courts, in England. (Gazetted June 15, 1867.)

ALPHABETICAL INDEX TO STATUTES.—By T. P. BUTLER, B. C. L., Advocate.—This is an Index to all the Statutes passed since the date of the Consolidated Statutes (1859), with an Appendix showing the amendments to the

Consolidated Statutes. Members of the profession thus have in a convenient form what almost all find it necessary to do for themselves, in order to keep pace with new enactments.

TABLEAU GENERAL DES AVOCATS.—This list of Advocates in Lower Canada, whose diplomas have been enregistered by the General Council, has now been issued by Mr. GONZALVE DOUTRE, the Secretary-Treasurer to the General Council. The list contains the names of about one thousand advocates, many of whom, however, have left the profession for other avocations. No one has the right to practice unless his name is inscribed on this Roll, with the exception of those recently admitted to the Bar, whose names will be inserted in due course.

MR. F. W. TORRANCE ON ELOQUENCE.

The following is the able address of Mr. F. W. TORRANCE, Professor of Civil Law, at the last Convocation of the McGill University. It was addressed chiefly to the law students present, and we have much pleasure in laying it before a wider legal circle.

Mr. Chairman, Gentlemen, and Members of Convocation; I desire to speak to you on the subject of oratory or eloquence—the art of oratory or eloquence. Art itself has lately been defined by John Stuart Mill, the political philosopher, in an address which he delivered to the students of a Scotch University,* last February. He defines art as the endeavour after perfection in execution. He says that besides the intellectual and moral education promoted by universities, there is a third division barely inferior to them, and not less needful to the completion of the human being. He meant the æsthetic branch; the culture which comes through poetry and art, and may be described as the education of the feelings, and the cultivation of the beautiful. The art of eloquence is certainly connected with the education of the feelings and the cultivation of the beautiful, and I may therefore define it as the endeavour after perfection in speaking. I cannot agree with those who regard oratory as obsolete. The faculty of speech is one of the noblest of man's gifts, and so long as the living voice appeals as it does to our sympathies and social instincts, the art of oratory or the endeavour after perfection in the use of the living voice cannot be obsolete.

The art of oratory is among the noblest—is perhaps the noblest among human arts. It is also more closely allied, than we often think, to poetry and music; and it is as capable of cultivation as any fine art, like music, painting, and sculpture.

In oratory, two things widely different have to be considered.

First.—The composition of an oration or speech.

Secondly.—Its delivery.

First, as to its composition. I will assume that you have a certain power or copiousness of expression; that you have words at command suited to your subject, though in this respect the resources of men differ greatly. I have somewhere seen it estimated, that a labouring man commands about 300 words, while the average of educated men commands perhaps 3000 or 4000. A poet or orator of distinction will have some 10,000, while a writer like Shakespere has used not fewer than 15,000.

I will also assume that your mind is replete with knowledge; that your conclusions are taken; that your arguments are ready. This is much, but it is not all. In what manner will your ideas be put forth, what energy or vivacity will there be in your expressions, what elegance or grace?

It is of much importance as regards impressiveness, where you place your key words in a sentence, at the beginning, middle or end, according to the meaning you wish to convey. There should be a complete harmony between the words and ideas, the right word should be in the right place. The ancient orators and poets aimed at an impressive rhythm and a musical effect. An instance of this is given in Cicero in his description of Verres; and a famous instance of accord between word and idea you may remember in Virgil, in his description of the galloping of a horse in the 2d Æneid. Here

*St. Andrews.

the *sound* of the words is strikingly in unison with the idea to be expressed.

Lord Brougham says, "Our greatest orators have excelled by a careful attention to rhythm, some of the finest passages of modern eloquence owe their unparalleled success, undeniably to the adoption of those Iambic measures which thrilled and delighted the Roman forum, and the Dactylus and Pæonicus, which were the luxury of the Attic Ecclesia. Witness the former, he adds, in Mr. Erskine's celebrated passage respecting the Indian chief, and the latter in Mr. Grattan's peroration to his speech on Irish Independence."

We cannot do better than look at the practice of the ancients in regard to the rhetorical art, in which their remarkable distinction was the natural consequence of extraordinary care and pains. The masters taught that whatever might be the qualities of the intellect and the gifts of nature, these advantages were of no avail if they were not aided by stubborn labor and by persistent exercises in reading, writing, and speaking. Cicero advised never to speak with negligence, and to give conversation the degree of completeness suitable to the subject; but the best method, in the opinion of the teachers, was to write much. "Write," said Cicero, "and in this way you will the better learn to speak." "The pen," he says elsewhere, "is the best master to teach the art of practical speech." Quintilian, the most judicious of counsellors, advised writing, even though the manuscript was laid aside, in speaking. "We must write," he said, "with much care and very often; without which the gift of improvisation or extemporary speaking will be a vain flow of words."

It is interesting to notice that the ancient orators had a great dislike to extemporary speaking. Cicero, even in the busiest period of his life, wrote the most important part of his pleadings. Augustus committed his speeches to memory. Pliny the younger, who was full of intelligence and grace, only extemporized when compelled by necessity, and said that there was only one way of arriving at good speaking—reading much, writing much, and speaking much.

Another fact which proves the highly artificial and laborious nature of ancient oratory, was the preparation of proemia or introductions of speeches never delivered. Of these proemia many are preserved. It would seem that these introductions were kept for use to meet a demand that might suddenly be made upon a speaker, and for this purpose were held in the memory. Fifty-six of these, written by Demosthenes, have reached us. The elaboration of their compositions by the ancients was most remarkable. Plato, under whom Demosthenes is supposed to have studied, was noted for the care which he took of his diction. Cicero affirmed that Plato wrote by a kind of divine faculty, and it was commonly said that if the Father of the Gods had spoken in Greek, he would have used no other language than Plato's. The first of ancient critics said of his diction that it resembled a piece of sculpture or chasing rather than written composition. He continued to polish it till extreme old age; and a remarkable instance is given of a note-book he kept, in which he had written the first words of his Treatise on Government several times over in different arrangements.

Another notable characteristic of the ancient orators was the respect in which they held their audiences, as possessing a true discernment of oratorical excellence. The anecdote is related of Demosthenes, that when Pytheas taunted him with his speeches smelling of the lamp, his answer was, "True, but your lamp and mine do not give their perfume to the same labors." Cicero remarks himself, that it is astonishing that though there is the greatest difference between the educated and the uneducated man in action, there is not much in their judgments. On this Lord Brougham says: "The best speakers of all times have never failed to find that they could not speak too well and too carefully to a popular assembly; that if they spoke their best, the best they could address to the most learned and critical assembly, they were sure to succeed."

"If," says Henry Rogers, in his charming Greyson Letters, "If you would produce any lively or durable impression on any audience (rustic or polished matters not), you must

give them thoughts that *strike*, and these must be expressed in *apt* words; and to speak in this fashion will require, depend upon it, very careful study."

In connection with this part of my subject, I may be allowed to relate an anecdote of Arago, the great French astronomer, who had many gifts and much success as a popular speaker. His practice in beginning a lecture was to select in the audience the dullest and most stupid-looking person he could see, and during his lecture direct all his observations and appeals to this individual in particular. He was not satisfied that his lecture was successful or produced an effect such as he desired among the audience, until he noticed scintillations of intelligence in the vacant countenance of the one auditor whom he so flatteringly noticed. Following this course one evening in a town in the south of France, where he was lecturing, he spent the next evening in company with some of the townspeople. and among them the individual in question. The latter did not know why Arago had preferred him the night before, but had observed and been singularly flattered by the preference of the great astronomer, and during the evening loudly expressed his admiration of the lecturer, exclaiming that M. Arago was a most charming and fascinating person, for he seemed the night before to address all the observations of his exceedingly interesting lecture to him in particular.

Next, as to delivery. This, for success, is as important as the matter and manner of composition. Here we have to consider both the action of the speaker and his voice, and I affirm that the greatest orators have given heed to voice and action as much as famous actors and famous singers. It is related of Demosthenes, by Plutarch, that returning home, when a young man, in discomfiture after failure to obtain a hearing of the people, he met his friend, the comedian Satyrus, who, noticing his despondency, inquired the cause. On being told, he asked Demosthenes to recite a famous passage in one of their poets, which he did. The actor recited it after him, but in a style, and with an effect so different, that Demosthenes saw at once his own deficiencies in delivery, and resolutely set himself to remedying them. Besides studying under Satyrus, he is also said to have taken lessons from another actor named Andronicus.

His great antagonist, Æschines, was banished to Rhodes after the famous contest for the Crown, and in his exile read to the Rhodians his own speech, which was much admired, and afterwards that of his rival Demosthenes, which elicited still greater applause. Whereupon Æschines, not disparaging or belittling his opponent, as is too often our wont, exclaimed, "What if you had heard the beast himself."

Cicero was equally solicitous about his action and delivery. He studied under Molo, the rhetorician, first at Rome, and afterwards in Greece. Even when holding the office of Prætor at Rome, he attended the school of Gnipho, a celebrated rhetorician, and he is known to have studied delivery under Roscius and Æsopus, who were actors, the one in comedy, the other in tragedy.

I need hardly remind you of the immortal speech of Hamlet to the players, and his counsel not to tear a passion to tatters—"to suit the action to the word, the word to the action."

George Whitfield, the great pulpit orator of the last century, had a voice of such power and melody, that he could effectively address an assembly of 30,000 people, and he would, it was said, make you weep by his pronunciation of the word Mesopotamia. It was said that so much did his delivery improve by repetition that he did not consider that he had attained to his full power in the delivery of a discourse until he had delivered it fifty times. Dr. Franklin singularly confirms this in his inimitable autobiography, where he says, "By hearing him often, I came to distinguish easily between sermons newly composed and those which he had often preached in the course of his travels. His delivery of the latter was so improved, and every accent, every emphasis, every modulation of voice was so perfectly turned and well placed, that without being interested in the subject, one could not help being pleased with the discourse—a pleasure of much the same kind

with that received from an excellent piece of music."

How much a deficient action and a monotonous delivery mar a discourse, I need not say. "How comes it," said an English Bishop to the actor Garrick, "that though we clergy treat of the most solemn realities in life, we are not listened to at all, whereas you actors, though your subjects have no real existence, are so much run after." Garrick replied, "the reason, my lord, is that we actors play our parts as if they were tremendous realities, whereas you clergy deal with your solemn topics, as if you did not believe in them at all."

Let us now take modern instances of men who have distinguished themselves by oratorical power. Without any doubt, the most eminent example of judicial eloquence in England has been exhibited by William Murray, afterwards Earl of Mansfield, and Lord Chief Justice of England. Lord Campbell, his biographer, writes of him: "Those who look upon him with admiration as the antagonist of Chatham, and who would rival his fame, should be undeceived if they suppose that oratorical skill is merely the gift of nature, and should know by what laborious efforts it is acquired. He read systematically all that had been written upon the subject, and he made himself familiar with all the ancient orators. Aspiring to be a lawyer and a statesman, Cicero was naturally his chief favorite; and he used to declare there was not a single oration extant of this illustrious ornament of the forum and the Senate house, which he had not, when at Oxford, translated into English, and after an interval, according to the best of his ability, re-translated into Latin."

William Pitt was second to none as a Parliamentary orator in the generation which saw Burke, Fox and Sheridan. Macaulay says: "His early friends used to talk, long after his death, of the just emphasis and the melodious cadence with which they had heard him recite the incomparable speech of Belial. He had indeed been carefully trained from infancy in the art of managing his voice —a voice naturally clear and deep-toned. His father, whose oratory owed no small part of its effect to that art, had been a most skilful and judicious instructor."

Of all the remains of antiquity, the orations were those on which he bestowed the most minute examination. His favorite employment was to compare harangues on opposite sides of the same question, to analyse them, and to observe which of the arguments of the first speaker were refuted by the second, which were evaded, and which were left untouched.

On one occasion, when a mere youth, he was introduced on the steps of the throne in the House of Lords to Fox, who used afterwards to relate that, as the discussion proceeded, Pitt repeatedly turned to him, and said, "But surely, Mr. Fox, that might be met thus;" or, "yes; he lays himself open to this retort." What the particular criticisms were Fox had forgotten, but he said that he was much struck at the time by the precocity of a lad who throughout the whole sitting seemed to be thinking only how all the speeches on both sides could be answered.

As to forensic eloquence, the eloquence of the bar, the most remarkable at the English Bar was Erskine, who was for some time a subaltern in the British army. For two years he was shut up in the island of Minorca, and laboriously and systematically went through a course of English literature. Milton was his great delight, and Lord Brougham says, "the noble speeches in Paradise Lost may be deemed as good a substitute as could be discovered by the future orator for the immortal originals in the Greek models." He was, likewise, so familiar with Shakespere, that he could almost, it has been said, like Porson, have held conversations on all subjects for days together in the phrases of this great dramatist. Dryden and Pope he not only perused and re-perused, but got almost entirely by heart.

I have mentioned the names of actors in connection with the rhetorical art, and the study of action and delivery. It is said of the great Mrs. Siddons that she studied her profession for a number of years, and played her parts in the provinces for a long time, before a London audience would appreciate her merits. It would appear as if the study and practice

of many years were necessary to develop her great gifts and demonstrate her extraordinary genius. After the peace of 1815, she visited Paris, and as she stood in the public galleries of the Louvre, viewing the paintings, spectators who did not know who she was, gathered about her, unconsciously struck by the dignity of her carriage and gestures.

The great Napoleon attached not undue importance to his public appearances as Emperor of the French, and did not hesitate to take lessons from Talma, the celebrated French actor, as to his carriage and attitudes in the Imperial state robes.

I terminate my reference to modern examples by citing from a remarkable letter of Lord Brougham, written in 1823, to the father of Lord Macaulay, on the education of the latter for the Bar. [This letter will be found entire in the June number of the Law Journal.]

In conclusion, you have seen from what I have said, the artificial nature of the excellence of great orators, and in particular that it would appear to be an indispensable condition of success that much labor be bestowed in the cultivation of the art. There must be much reading and much writing and much speaking. Further, it is an art which appeals to the highest faculties of our nature. It appeals to the imagination—to our sense of the beautiful. Would you confer a pleasure in kind like that which has been conferred by a Siddons, a Garrick, a Rachel, a Ristori—more than that—wield an instrument capable of effecting the highest good? Cultivate assiduously and with earnest zeal the art of eloquence. Setting before you the grand models which have been preserved for our instruction and delight, enthusiastically imbibe their spirit. In a new country like ours, beginning a new existence, we may safely affirm it is most important that the art we have been considering should receive its fullest development and win its highest reward. Among a free people such as we are, liberty of speech is the heritage of all. Let speech be fully cultivated, and the art of eloquence will win its noblest triumphs. A fine landscape in outward nature—a fine work of art in statuary or painting—a work of genius in literature, calls forth our highest admiration. The art of eloquence can evoke admiration as hearty—as intense—as enthusiastic. Follow the example of those great men of old times in Greece and Italy, and France, and England, who have been the tribunes of the people in the noblest sense—to appeal to the reason of thinking, rational beings—to work upon the imagination—to interest and engage the feelings of men. I do hope and believe that in this new Dominion of Canada men will arise who will honour our new civilization—who by intellectual accomplishments—by the communication of knowledge by word of mouth as well as by writing—by oratory as by literature, will be the glory of our country and give her a name and place of honour among the civilized nations of the earth.

BANKRUPTCY—ASSIGNMENTS.—PROVINCES OF QUEBEC AND ONTARIO.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Adair, Johnston		S. C. Wood	Lindsay	June 4th.
Barbe, Dame Julie	Montreal	A. B. Stewart	Montreal	June 12th.
Barbeau, Louis Caliste	Montreal	A. B. Stewart	Montreal	June 11th.
Bedard, Jean Bte	Levis	Wm. Walker	Quebec	June 11th.
Begg, James H. L		John A. Roe	St. Thomas	June 8th.
Bishop, John		A. M. Smith	Brantford	June 18th.
Brabazon, Robert	Francistown	John Holdan, jun	Goderich	June 24th.
Burkholder, Enoch B		Jas. McWhirter	Woodstock	June 4th.
Burwash, Stephen	St. Eugène	John Whyte	Montreal	May 25th.
Cannon, James		Jos. B. Pearse	Norwood	June 25th.
Chapman, William	Township Windsor	J. McCrae	Windsor	June 12th.
Cliffe, Charles		H. C. Jones	Brockville	June 12th.
Cole, Cornelius		Alex. Martin	Brighton	June 25th.
Combs, John	Stoney Creek	W. F. Findlay	Hamilton	June 15th.
Davidson, John	Bruce Mines	John Whyte	Montreal	May 29th.
Davidson, Patrick		Thomas Clarkson	Toronto	June 17th.
Dinning, Henry		Pemb. Paterson	Quebec	May 20th.
Dorland, Paul Trumpour		W. S. Robinson	Napanee	May 31st.
Duckett, Joseph P	St. Polycarpe	T. Sauvageau	Montreal	May 22nd.

BANKRUPTCY—ASSIGNMENTS.—*Continued.*

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Duckett, Richard J., individually and as co-partner of R. J. Duckett & Co.	St. Polycarpe	T. Sauvageau	Montreal	May 22nd.
Egan, John		John Kerr	Toronto	May 18th.
Ernst, Christian, individually and as partner of John Ernst & Son		Alex. McGregor	Galt	June 25th.
Farewell & Co., James	Oshawa	Philip S. Ross	Montreal	June 26th.
Farmer, James	Percy	E. A. Macnachtan	Cobourg	June 24th.
Fletcher, Alexander	Bowmanville	E. A. Macnachtan	Cobourg	July 2nd.
Fletcher, Gordon D.	Bowmanville	E. A. Macnachtan	Cobourg	July 2nd.
Forster, Matthew W.		James Robinson	Markham	June 28th.
Furaman, John	Woodstock	James McWhirter	Woodstock	May 27th.
Gall, Alexander	Windsor	J. McCrae	Windsor	June 12th.
Geissman, Anthony, and Chs. Landsee	Oil Springs	George Stevenson	Sarnia	April 13th.
Giffin, Wm. Wells		H. C. Jones	Brockville	May 31st.
Hampton, Josiah		Thomas Saunders	Guelph	May 28th.
Haywood, William	Petrolia	George Stevenson	Sarnia	June 10th.
Henderson, John	Listowel	Thos. Miller	Stratford	May 28th
Henderson, Robert	Listowel	Thos. Miller	Stratford	May 28th.
Heron, William		Jas. E. Rutledge	Streetsville	June 22nd.
Hess, George		S. Pollock	Goderich	June 27th.
Hill, Moses	Sutton, York Co.	A. Barker	Markham	June 13th.
Hollister, Nelson P.		W. S. Robinson	Napanee	June 14th.
Husereau *dit* Lajeunesse, Benj.	Montreal	T. S. Brown	Montreal	June 19th.
James, Charles G. H	Cornwall	A. B. Stewart	Montreal	June 10th.
Jeffrey, John	Hamilton	W. F. Findlay	Hamilton	May 25th.
Jordan & Brewer		R. M. Rose	Kingston	June 17th.
Kievell, James	Towns'p East Flamboro'	W. F. Findlay	Hamilton	July 3rd.
Knight, Henry		Wm. Walker	Quebec	June 14th.
Lalande, Jean Bte	Montreal	T. S. Brown	Montreal	June 28th.
Leeming, Thomas	Montreal	A. B. Stewart	Montreal	July 3rd.
Leggo, Christopher	Ottawa	Francis Clemow	Ottawa	May 30th.
Livingston, Daniel		Chas. Symon	Action	July 2nd.
Longden, Wm. Francis	St. Thomas	J. Ardagh Roe	St. Thomas	May 28th.
Lothrop, Fordyce Lawton		H. C. Jones		June 21st.
McConnell, Rinaldo	Township of Hull	Francis Clemow	Ottawa	May 28th.
McCullough, James		James Holden	Whitby	June 11th.
McDonald, Patrick		W. S. Williams	Napanee	June 21st.
McGill, Hugh, individually and as partner of McGill & Martin		A B. Stewart	Montreal	June 7th.
McLean, John D. R.	Ridgetown	Adam Hope	Hamilton	June 26th.
McLellan, John		Thos. Churcher	London	May 28th.
Marchand, Peter, jun.		George Stevenson	Sarnia	June 10th.
Mee, James, & Bro.	Strathroy	Robert Watson	Montreal	June 24th.
Miller, Elijah	Toronto	Thomas Clarkson	Toronto	May 27th.
Miller, Bryce B.		George J. Gale	Owen Sound	June 12th.
Mongeon, François Xavier	St. Paul of Abbottsford	T. Sauvageau		June 28th.
Moore, Thomas		Thos. Webster	Brantford	June 1st.
Morrison, Samuel W.	Ontario	J. J. Mason	Hamilton	June 29th.
Mulcahy, Thos.		John Kerr	Toronto	May 28th.
Nangle, Thomas		L. Lawrason	London	June 12th.
Nichol, Asa Harvard		John A. Roe	St. Thomas	June 24th.
Northcott, John		Geo. D. Dickson	Belleville	June 1st.
Parsons, John	Tweed	Robert Watson	Montreal	June 26th.
Paul, Rembler		W. T. Mason	Toronto	June 22nd.
Perine, Moses B., Joseph S., and William D.		H. F. J. Jackson	Berlin, C. W.	May 29th.
Potter, John		Thos. Saunders	Guelph	May 20th.
Price & Spencer		John O. McCrae	Hamilton	May 29th.
Rielle, Joseph	Montreal	T. Sauvageau	Montreal	June 28th.
Roxford, Thomas		John C. Hall	Bolton	July 2nd.
Rustanholt, George	Uxbridge	James Holden	Prince Albert	June 14th.
Sage, Thomas	Wroxeter	S. Pollock	Goderich	May 23rd.
Scott, John	Caledonia	W. F. Findlay	Hamilton	June 17th.
Sewell, Arthur Levingston		Wm. Walker	Quebec	June 10th.
Shannon, Patrick		Thos. Miller	Stratford	May 28th.
Skeeth, John		Chas. Rattray	Cornwall	July 3rd.
Sudworth, Wright		Jas. McWhirter	Woodstock	June 19th.
Thibaudeau, Onésime	Montreal	T. Sauvageau	Montreal	May 22nd.
Thrall, John Hamilton		Jas. McWhirter	Woodstock	June 19th.
Todd, George and G. M.		E. Newton	Guelph	May 31st.
Turcotte, Amant	St. Bonaventure d'Upton	T. S. Brown	Montreal	June 5th.
Turcotte, Joseph	Joliette	T. Sauvageau	Montreal	June 11th.
Vardon, Robert		Jas. Robinson	Markham	June 27th.
Wait, William		L. Lawrason	London	June 8th.
Wheeler, Zachariah		G. D. Dickson	Belleville	May 30th.
Williams, Israel	Township of Grimsby	J. J. Mason	Hamilton	June 12th.
Wood, Nathan L., individually and as partner of Wood & Kirkland	Aylmer	W. F. Findlay	Hamilton	June 4th.
Wright, Samuel Hurd		J. W. Fowke	Oshawa	June 6th.
Zinkann, John, jun.	Wellesly	Alex. McGregor	Galt	May 27th.

LAW JOURNAL REPORTS.

SUPERIOR COURT.

April 12.

LACOMBE ET AL. *v.*

DAMBOURGÈS ET AL.

Will—Olograph Codicil—Undue influence—Unreasonable dispositions—Interdiction—State of mind of testator.

The fact of a legatee being aware that the testator has altered his will in favor of such legatee, is no ground for supposing that undue influence was exerted to induce such alteration.

Where the testator was not interdicted at the time the will was made, and where there is no proof of hallucination, the presumption is that he was of sound and disposing mind.

There is nothing unreasonable or calculated to excite suspicion in the bequest by a testator of *une part d'enfans* to two nieces, who had laboriously tended and nursed him and his wife for several years prior to their decease.

This was an action brought by the heirs of François Xavier Boucher against two nieces of the deceased, for the purpose of setting aside a certain olograph codicil giving the defendants *une part d'enfans* in the estate. The conclusions of the declaration were that the defendants be summoned to declare whether they intended to avail themselves of the codicil, and to proceed to establish its authenticity; in default of which, that it be adjudged that the codicil was false and of no effect; and, in the event of the verification of the document, that the defendants be declared disentitled to the legacies by reason of the abstraction by them of moneys belonging to deceased; further, that by reason of the causes stated, it be adjudged that the will could confer no advantage on the defendants.

The plea set up the fact that during several years preceding the death of the testator, the defendants had tenderly nursed and waited upon him, at a time when none of the children remained with him. The following extract from the plea will show how the defendants came to reside with their uncle, and what followed:

"Qu'environ huit mois avant le décès de Dame Julie Olivier, femme du dit feu François Xavier Boucher, cette dernière étant alors bien malade, le dit Sr. Boucher et sa dite dame envoyèrent quérir avec instance la dite défenderesse Dame Agathe Dambourgès, qui demeurait alors et vivait à l'aise en la paroisse de Ste. Elizabeth, comté de Joliette, sur une propriété à elle appartenant, avec sa sœur Emélie Dambourgès, l'autre défenderesse, et dans le voisinage de plusieurs autres membres de sa famille par elles bien affectionnés, et que malgré le dérangement, les inconvéniens et les désagrémens tout naturels de ce déplacement, la dite Dame Agathe Dambourgès voulut bien se rendre à cette invitation des dits Sr. et Dame Boucher, chez lesquels, lors du décès de cette dernière, elle demeurait depuis environ huit mois, faisant nuit et jour auprès de celle-ci (ce qu'elle fit plus tard auprès de son dit mari) c'est-à-dire, faisant l'office de la garde-malade la plus humble, lui donnant tous les soins les plus délicats jusqu'aux plus grossiers, et accomplissant les fonctions les plus pénibles, le tout avec une attention, un zèle et un dévouement constant, dont les enfans et petits enfans des dits Sr. et Dme. Boucher n'ont jamais été capables, et n'ont jamais donné d'exemple."

As to the charge of exerting undue influence, the defendants further alleged: "que le dit testateur, lorsqu'il a ainsi fait et écrit le dit testament ou codicile olographe, en faveur des défenderesses, était parfaitement sain d'esprit, mémoire, jugement et entendement, qu'il l'a fait avec pleine connaissance de cause, qu'il est l'expression libre, vrai et sincère de ses volontés et intentions, qu'il l'a fait de son propre mouvement, sans aucune obsession ni suggestion, par et de la part des défenderesses."

MONK, J. This is an action brought by the heirs to the succession of the late Col. Boucher, of Maskinongé, against the defendants, Madame Cloutier and Madame Brunelle, two nieces of the testator, for the purpose of having a certain olograph codicil set aside. This codicil was found among the papers of the deceased, and the present action was immediately instituted by the children to have it declared that the codicil was forged, or that Col. Boucher was *non compos mentis*, not in a state of mind to make a will, or that these ladies had exercised undue influence over him; that they had robbed him of £3,000; and lastly, that the

testator had no right to will a share of the property to his neices.

The evidence in the case is of extraordinary length. It appears that Col. Boucher was a man of considerable fortune. His wife becoming ill, one of the defendants Madame Cloutier (Agathe Dambourgès) was sent for. This was about March, 1857. Mad. Cloutier came and found Madame Boucher very ill. Col. Boucher invited her to remain with them, and she continued to live with them till Mad. Boucher's death seven months afterwards. Col. Boucher was very much distressed by his wife's death. They were an aged couple, (Col. Boucher being at this time about eighty,) and were living alone. At the request of Col. Boucher, Mad. Cloutier continued to remain there for a period of four years, during which time she and the other defendant, Mad. Brunelle, (Emélie Dambourgès) another niece who arrived subsequently, about twenty months before his death, faithfully nursed and attended to their uncle. About April or May, 1860, Col. Boucher was struck by paralysis, and fell into a very feeble state, and finally died on the 29th of August, 1861. The two ladies left the house before the funeral; the heirs assembled, and in looking over the papers found the codicil in question, under which the nieces were to have a child's portion of the estate. The children then brought the present action.

The declaration is drawn with very great care (said to have been prepared by one of the most eminent men in the country), and the pleadings are clearly and carefully framed. It becomes the duty of the court to decide, in the first place, whether the codicil is a forgery or not. Mad. Boucher, on the 14th of May, 1857, made her will before Guillet and colleague, notaries, by which, after leaving several legacies, she gave all the residue of her property to her husband. In that will it was declared that he was to have entire disposition of her property, the deceased, however, expressing a wish that he should will part of it in a particular way. Mad. Cloutier, who came there about the time this will was made, was not mentioned in it. Mad. Boucher died on the 15th September, 1857, without having altered her will. Mr. Boucher made his will on the 25th of January, 1858, before notaries, by which he disposed of this property in different ways, but neither of the nieces was mentioned in the will, though they had been there some time. On the 2d of March, 1860, Col. Boucher made a codicil before notaries, in which he gave Mad. Cloutier £30 a year for her good services to his wife and himself. He seems to have had a strange fancy for making codicils, for, on the 24th of October, he made another notarial codicil, by which some changes were made in the original will, but no change was made in the first codicil. On the 12th of January, 1861, he made an olograph codicil, written with all the requirements of the law, and signed by himself at Maskinongé. By this codicil the nieces were to have *une part d'enfants "dans tout ce qui me reste à diviser après ma mort, excepté la seigneurie, en considération des bons soins qu'elles m'ont prodigués pendant ma maladie."* It is for the Court to determine first, whether this codicil is a forgery or not. In the first place there is a strong improbability that it is forged, and the evidence also disproves the charge. These ladies were the relatives of the deceased, and the evidence shows them to be of the very highest respectability, with the good education and moral training customary in families of their standing. They are moreover advanced in life. It is almost impossible to suppose that they committed the forgery themselves. Did they employ any one to do it? The only persons with sufficient intelligence to do it were Mr. Blois, and Mr. Bourdages. Now Mr. Blois was an intimate friend of the deceased, but it is indisputable that his character is very high, and the court must exclude the idea that he perpetrated a forgery. Mr. Bourdages was a student of law, and seems to have been on very friendly terms with Col. Boucher, who was in the habit of conferring pecuniary favors upon him; but he had no interest in the forgery, rather the contrary. It appears that Mr. Bourdages furnished the formula for the codicil, taken from Guyot, the deceased having requested him to obtain a form, but there is nothing to show that Mr. Bourdages had anything further to do with the codicil. I must therefore come to the conclusion that no one

can reasonably be supposed to have participated in the alleged forgery.

But is the codicil a forgery at all, or is it the work of Col. Boucher himself? The document consists of eight lines, and places the two nieces on the same footing as the deceased's children. It is objected that the document is not in his writing, and that it is full of orthographical mistakes. I have examined all the writings in the record in Col. Boucher's hand. There are a number of receipts, and a comparison of the signatures on these with the codicil shows that the writing is marvellously alike. One of the most difficult hands to imitate is the peculiar trembling observable in the writing of a man laboring under paralysis, as Col. Boucher was at this time, but the signature to the codicil is precisely the same as the others. Taking all this evidence, I come to the conclusion that the codicil was written by Col. Boucher himself, and that there has been no forgery at all.

The next question is, whether he was in a state of mind to make a will. It is well know that the peculiar disease of paralysis has a much greater effect upon the body than the mind. There is evidence in this instance of absence of will, but the Court has no hesitation in saying that the testator's mind was not seriously affected. It must be assumed that where a man has not been interdicted he was sane. Here a *conseil* had not even been named. In the absence of interdiction the Court would require evidence of what the books term hallucination, before it could set aside the codicil. Now, there is no evidence in this case of hallucination. Col. Boucher knew every one about him; he knew precisely his relations to these ladies (his nieces), and he continued to manage his domestic affairs, to sign receipts, &c., after the date of the codicil. More than this, he executed a notarial document on the 30th of April, 1861, two months after the date of the olograph codicil. The Court would stultify itself by declaring a man *déchu* from making a will, who continued to manage his own affairs, merely because he was weak and suffering from paralysis. He was a man who had accumulated a large fortune by industry, and attention to minute particulars. He was fretful at this time, and anxious about his money, and would walk about the house with his great coat, and his stick, and his keys, but there is evidence in the record of his being a man of noble character. It appears that he called these ladies *voleuses*, and some weight has been attached to this circumstance, but this is a term easily understood in the case of a fretful, impatient man, and it is shown that he sometimes called other people by the same name. But there is a wide difference between mere fretfulness, and incapacity to make a will. There are other facts of a still more conclusive character. About three months after the date of the codicil, it was thought advisable to have Col. Boucher interdicted. He was now eighty-three years of age, and the disease was making rapid progress. Judge D. Mondelet was sent for, but it appears that that judge did not consider him even then in a state to be interdicted. On the contrary, it was judged sufficient to name a *conseil*, and Mr. Lacombe, his son-in-law, was appointed on the 24th of May, 1861. This, taken in conjunction with other circumstances, shows that he was quite competent to make the codicil three months previously. The evidence of some members of the family has to be taken with a great deal of caution, for there is evidently a great deal of feeling in the case. But even giving full effect to all that evidence, I am bound to say that there is sufficient in the record to show that Col. Boucher was *compos mentis*, and in a fit state to make a will.

It being then established that the codicil is genuine, and validly made, the third point is whether these ladies exercised any undue influence over the testator's mind in obtaining it. They were the nieces of the testator, and friendly relations had always been kept up between the families. Col. Boucher, it seems, was under obligations to their father. Certain correspondence has been produced which shows that Col. Boucher, on one occasion, when Madame Cloutier was at St. Jacques, (whither she had gone to wait on her nephew, Dr. Jacques, then sick) wrote to her more as he would write to a daughter than to a niece. For four years these ladies acted as *garde-malade* to Col. Boucher and his wife. It is

impossible to suppose that Mad. Lacombe, his daughter, and the other daughters, would have allowed them to act thus, unless they were satisfied he could not be in better hands. There is nothing unreasonable in the dispositions of the codicil under the circumstances. The *formule* for the codicil was obtained in this way. Mr. Bourdages, the law student mentioned above, was at the house when the deceased asked him to procure this *formule*. When he was leaving the house, one of the nieces reminded him of this, and told him not to forget it. This showed that they knew that Col. Boucher wanted to make a change in his will, and that they wished him to have a *formule*. The codicil, in the shape of a *projet*, was taken to Guillet, the testator's notary, by Mad. Cloutier, and he said it was all right. The notary is not certain whether it was completed at this time. There are some other circumstances, not necessary to be detailed, which go to establish that these ladies knew what was going on, though it does not appear that they knew the exact nature of the change. But as a matter of common sense and of law, it is not sufficient to justify the charge of exercising undue influence, that they knew what was going on. The Court must be very careful in branding legatees with fraud, and with exercising undue influence, and especially is care to be taken in a case like this. These old ladies, themselves staggering into the grave, were most devoted in their attention to the deceased, they waited upon him like nurses, and performed offices about his person which his children would not do, and from which even servants recoiled. Was this all hypocrisy? Was there no affection, no religion in all this? There is nothing unreasonable in the legacy as a reward for all the devotion displayed by these old ladies. There is another circumstance worthy of notice. The codicil was found among the testator's papers after his death. The nieces left the house the same night that he died. Now, if they had procured the making of a codicil which gave them such an important share in the estate, would they not have been likely to remain? They left because they were treated with insult by the children, but would they have had such a scrupulous sense of what was due to their sense of self-respect, if they were persons capable of the conduct with which they are charged? The Court has come to the conclusien that the allegations of the plaintiffs are utterly unfounded. The accusation of forgery is infamous and discreditable to the parties who made it.

The fourth charge is that these ladies robbed and plundered the deceased to the extent of £3000. This is a grave charge, but there is not an iota of proof that they ever took one copper. There are two circumstances that show how slender a foundation exists for the charges. Two candlesticks were missing, and it was said that these ladies had taken them. It turns out, however, that Mr. Boucher, son of deceased, had borrowed them. Then it was said there was a deficiency of $60 in their accounts. But it appears that the same son had received $50, and Mad. Cloutier paid Judge Mondelet's travelling expenses, $12, so that the balance is really in their favor. *Ab uno disce omnes.* This accusation of robbery is totally and absolutely unfounded.

The last point is whether the testator had a right to will or not. The Court has nothing to do with that point in this case. It has to declare the codicil genuine, that the testator was *compos mentis*; that there was no undue influence exercised; and that the defendants have not been guilty of robbery of money or goods. The action, therefore, must be dismissed with costs.

The following is the judgment recorded:

Considérant que les dits demandeurs n'ont point fait preuve des allegués de leur action, ou demande en cette cause; considérant que les défenderesses ont légalement fait preuve de tous les allegués essentiels de leur exception péremptoire en droit à la dite action; vu l'écrit sous seing privé ou le codicile olographe, produit en cette cause, par les demandeurs:

Considérant qu'il résulte de la preuve en cette cause que le dit testament ou codicile olographe, ci-dessus cité et rapporté et portant la date du 12 Janvier, 1861, a été entièrement fait, écrit et signé par le dit François Xavier Boucher, que la signature "Frs. Boucher" qui se trouve au bas du dit testament ou codicile olographe, est de l'écriture et signature du dit Boucher, et que le dit testament ou codicile est

entièrement de son écriture ; considérant que lors de la confection, écriture et signature du dit testament ou codicile olographe par le dit Boucher, ce dernier était sain d'esprit, et qu'il avait la capacité de tester avec connaissance de cause ; considérant en outre que eu égard aux liens de parenté qui unissaient les défenderesses au dit Boucher, eu égard aux sentiments d'affection, d'estime et de haute considération, qui ont subsisté entre le dit Boucher, son épouse et les défenderesses, eu égard enfin, aux bons services et soins d'abord rendus, à la dite Dame Boucher, jusqu'à son décès par la dite défenderesse Agathe Dambourgès, puis aux bons soins et aux services difficiles, pénibles, importans, réellement prodigués, avec un dévouement filial, constant et sans bornes, au dit Boucher, jusqu'à son dit décès par les défenderesses, le dit testament ou codicile olographe en leur donnant et léguant la part d'enfant y mentionné ne comporte rien que de raisonnable et d'équitable en leur faveur ; considérant que le dit Boucher avait le droit de tester et de léguer, en faveur des dites défenderesses tel et ainsi qu'il l'a fait, par et en vertu de son dit testament ou codicile olographe :

Considérant que le dit testament ou codicile olographe n'est pas le résultat de suggestions ni d'influences indues, mais qu'il est au contraire l'expression libre, vraie, et sincère des dernières volontés et intentions du dit Boucher, en faveur des dites défenderesses :

Considérant que les dites défenderesses ne se sont rendues coupables d'aucun détournement ni *récélé*, mais qu'au contraire durant tout le temps qu'elles sont démeurées chez le dit Boucher, leur conduite sous ce rapport, comme sous tous les autres, a toujours été honnête, irréprochable et honorable :

Considérant enfin qu'il résulte de la preuve en cette cause que le dit testament ou codicile olographe a été et se trouve pleinement prouvé, vérifié, et justifié,—La Cour maintient la dite exception péremptoire en droit des défenderesses, déclare le susdit testament ou codicile olographe dument prouvé, vérifié, dument fait, écrit et signé, etc.

Olivier & Armstrong, and (by substitution) *Lafrenaye & Armstrong*, for the Plaintiffs.
E. U. Piché, for the Defendant.

July 9th, 1867.

CONNOLLY *v.* WOOLRYCH.

Marriage—Indian Territory—Domicile.

A native of Lower Canada went into the Indian or Arthabaska territory in the service of the North West Company, and while there, took an Indian woman as his wife, according to the usages of the country. He lived with this woman as his wife for 28 years, during which time he travelled about from post to post, and finally brought her back with him to Lower Canada. Some time after his return, he repudiated his Indian wife, and married a white. An action being brought after the death of himself and the Indian, by one of the children by the first union, claiming his share of the community, according to the law of Lower Canada :—

Held, that the marriage with the Indian was a valid marriage, and could not be repudiated.

2. That inasmuch as he never acquired a domicile in the Indian country, his domicile continued to be in Lower Canada, and his property must be divided according to the laws of Lower Canada.

Monk, J. This case is one of the very greatest importance, and I have looked into the law of France, the law of England, and of the United States, to see whether I could find any decision in point, but I have not been able to find one. In 1803, a young man named Connolly, went out to the Arthabaska territory, in the employ of the North West Company. The plaintiff appears to have been under the impression, when he brought the action, that he was in the employ of the Hudson Bay Company, but the fact is that he was employed by the North West Company. The plaintiff also seemed to be under the impression that this territory was within the limits of the Hudson Bay Company. The Court has been obliged to make a most extensive investigation, for the purpose of ascertaining the correct position of the territory, and the result will be stated subsequently. Connolly proceeded to this territory, which is 600 miles from York Factory, and is isolated and remote. It was necessary for him to be on good terms with the Indians that lived there, and he made a proposal to a powerful chief to take his daughter Susanne in marriage. The declaration states that he married her according to the usages of the coun-

try, and recognized her for twenty-eight years as his wife. He visited with her almost all the trading posts in that part of the country. They had nine or ten children, and both among the natives and the whites she was acknowledged as his wife. In 1831, nearly twenty-eight years after the marriage, he came to Canada with this woman and his family, and at St. Scholastique and other places introduced her as his wife. She went by the name of Mrs. Connolly. In 1832, however, he repudiated her, and married the lady who is made the defendant in this action, and lived with her till 1849, when he died. He left a will in favor of his wife, who died in 1865, after making a will in favor of her children. The present action is by one of the children of Connolly and Susanne, claiming that she, Susanne, was the lawful wife of Connolly, and seeking to recover one-sixth of her half of Connolly's property. The defendant (the late Mrs. Connolly) met this action by denying that Mr. Connolly was ever married to Susanne, and setting up the marriage with herself in 1832. It is alleged that Susanne acquiesced in this marriage. Secondly, that the law of England prevailed in the Hudson Bay Territory, and therefore even if there was a marriage there, such marriage did not establish a community of property.

It will be necessary to go more fully into the facts to render the decision of the Court intelligible and satisfactory. It is proved, in the first place, that William Connolly went to Rat River in 1803, and married this Indian woman; that she went by his name, and that their connection lasted, without any violation or infidelity on either side, for twenty-eight years. To all intents and purposes they lived exactly as Christian man and wife, and not as a Christian living with a barbarian concubine. These facts are indisputable. His children were baptized, one at Quebec, and others after his return to St. Scholastique. He wished to have two daughters baptized, and went to a priest named Turcotte. He told this priest that Susanne was his lawful wife, but, apparently deficient in moral courage, he did not wish to have his children baptized as his lawful children. They were baptized simply as the children of Connolly and Susanne. The words legitimate marriage were omitted. Susanne received the news of her repudiation, and her husband's subsequent marriage to the defendant with true Indian apathy. It is proved that she smiled when she heard of it, and said, "Mrs. Connolly will have nothing but my leavings, and he will regret it." She was supported in a Convent by Mr. Connolly, and after his death by Mrs. Connolly, and died in 1862. These are the facts.

The Court has to decide, firstly, whether the place where the Indian marriage was entered into was in the Hudson Bay Company's Territory. After reading the Charter, and examining carefully the whole history of the Company, I have arrived at the conclusion it was not within their territory. It was in the possession of the Indians, and if the law of any civilized country had authority there, it was the law of France. Therefore, the English law has no application to the present case. Connolly, as clerk in the North West Company's service, did not take the common law of England with him. It has been laid down by Chief Justice Marshall, nine judges concurring with him, that unless the Supreme Legislature of England were by an act to abolish the customs of the Indians, no other authority could do it; but the Legislature has never interfered with them, and there has never been any interference even on the part of the executive authority, by proclamation or otherwise. Therefore, it must be concluded that in the year 1803, this region was governed by its own system of usages and laws. Mr. Justice Aylwin and Mr. Justice Johnson have been examined as to what law existed in this Indian territory in 1803, and their answer is, the English common law; and Mr. Hopkins, who was twenty-five years there, says, though the territory is not within the limits proper of the Hudson Bay Company, that Company exercises jurisdiction over it. This is not supported, but rather contradicted by the Charter. It is necessary then for the Court to look to the Indian usages, and the authorities are unanimous that the only form of marriage among the Indians is this: that the consent of the father is asked, and then if the parties consent, they take each other for man and wife. Something similar may

be observed in the case of Jacob and the daughter of Laban. It is only in modern civilization that it is necessary to register the marriage. In this Indian territory, there were no registers and no priests. It is quite preposterous to call this a pagan marriage. I see nothing immoral in the fact of man and woman in an Indian country, by mutual consent, choosing each other for man and wife, without any ceremony whatever. It would be different if it were only intended to be a fugitive connection for the purpose of concubinage. But it is said that these Indians practise polygamy, and this is a barbarous custom. The Court, however, has nothing to do with polygamy in this case. But as a matter of fact, I think it is proved that polygamy is only the abuse of marriage. Some of the chiefs take three or four wives, or as many as they can support, but it is proved to my satisfaction that polygamy is not a necessary accompaniment of marriage. At all events, there is the best proof of record, that there is no instance of a European taking two Indian wives; but, on the contrary, it is established that Europeans when they take an Indian to wife, restrict themselves to one wife. It must next be inquired whether Connolly married this woman according to the usages of the country. Now, he told Judge Aylwin positively that he took her to wife; that he wanted to conciliate a powerful chief; and, further, he told the priest to whom he applied to baptize his children, that he had married her according to the usages of the country. She continued to live with him for twenty-eight years. If Connolly had repudiated this marriage in the North West country, he might, perhaps, have validly done so, though even then the question would arise whether a Christian could repudiate a marriage under such circumstances. But Providence appears to have been watching over this man. He brought the woman to a Christian country, and not only did he bring her into Canada, but he introduced her as his wife, and thus came under the operation of our law. Perhaps, even if he had gone back, he might have had some difficulty in repudiating the marriage. But he did not go back to the Indian country to repudiate her; he repudiated her in the very face of the Church which he had invited to baptize his children, on the assurance that Susanne was his lawful wife. This would not do. So far I have very little difficulty in stating that it is the duty of the Court to recognise this Indian marriage, and recognizing it to say that to this point the case for the plaintiff is good. It is pretended for the defendant that the cohabitation went for nothing, because Connolly afterwards showed a contrary intention by the repudiation, and that Susanne acquiesced in this repudiation. I find it difficult to treat this allegation of acquiescence as serious. Will it be pretended for one moment, that if the Indian marriage was valid, any acquiescence on the part of the wife could set it aside? Moreover, as a matter of fact, she never acquiesced. It is true that the plaintiff, her son, solicited favors from Mrs. Connolly, but that amounted to nothing. Then, it is said that she had not the status of a wife, and this action must therefore fail. But she did enjoy the status for twenty-eight years, and she was only deprived of it in 1832, by an act of selfish cruelty on the part of Mr. Connolly in repudiating her and marrying again. In the next place, it is said the certificates of baptism disclose the illegitimacy of the children. But as a matter of fact, these certificates do not say that the children are illegitimate. Two daughters were baptized at St. Scholastique as the children of Connolly and Susanne. The priest being examined says this was not the certificate of illegitimate marriage. The plaintiff, one of the sons, was baptized in Quebec in 1832. What was the certificate of his baptism? It contains these words, "*Jean dont les parens legitimes sont inconnus*," and states that he was born in Upper Canada. It is a strange fact that Connolly, the father, was a party to this certificate and signed it. Now Connolly knew who the parents were, but he did not tell the priest who they were. This was the first falsehood in the certificate, and he also knew that his son was not born in Upper Canada, but in the North West. But the fact is that Connolly had no idea of bastardizing his children, while at the same time for some reason he did not wish to put the matter exactly as it should have been put. But he has gone too far for it to be contended

for one moment that the certificate establishes illegitimacy. Therefore, the status of illegitimacy does not exist, and status is entirely out of the question. Then it is contended that there was prescription; but the legal marriage in the North West was a perpetual bar to prescription. Again, it is said, all the children should have joined in the action, but why so? Was it not competent for any of them to claim his right, and vindicate his mother's name from the stain of concubinage? Lastly, it is said there is no community of property by the law of England, which prevailed at Rat River, where the marriage took place. I have already disposed of this point, by showing that the law of England has no authority in this Indian country. But further, this question is not of much importance, because although the matrimonial domicile was at Rat River, yet Connolly, never remaining long at one point, but wandering about from post to post, and always having the intention to return, retained his original domicile throughout. This was at Lachine, in Lower Canada. Therefore the law of Lower Canada governs the rights of the children, and community of property exists. The Court therefore must maintain the action of the plaintiff, for one-sixth of the half of the property to which his mother, as Connolly's widow in community with him, was entitled on his death.

Perkins & Stephens, for the plaintiff.

Cross & Lunn, for the defendant.*

MONTHLY NOTES.

SUPERIOR COURT.—July 9.

MILLER *v.* FERRIER.

Prothonotary's Certificate—Putting in Bail.

MONK, J. This was an action brought upon a bail bond. A man named Dutton being arrested, gave bail to the sheriff. This was in November. In February following he applied to the Court to put in special bail. This application was not strenuously opposed, and his honor ordered bail to be put in. Bail was put in, but the bail that was put in was bail that he should surrender, and not bail to the action. Although the plaintiff's attorney got notice that bail was to be put in, as he thought it was bail to the action, he did not attend but left the matter to the prothonotary. Subsequently, learning that it was bail to surrender that was put in, disregarding this bail, and without making a motion to set it aside, he brought an action on the bail bond. The defendants pleaded that they got permission from the Court to give special bail. The plaintiff answered that this was bail to surrender, not bail to the action. It must be remarked that in this particular case, where the defendant came into Court and said he was foreclosed by law from putting in bail, and it was necessary for him to obtain permission from the Court to put in bail, if this permission had been taken advantage of by putting in special bail, the present action would have to be dismissed. But there were two descriptions of bail, one bail to surrender, and the other special bail to the action. The statute was clear that there are two descriptions of bail. But there was this difficulty here: the defendant had set up a special plea, saying that although he was in an exceptional position, yet he was taken out of that position by the permission of the Court, and in accordance with that he had put in special bail. Now, had he proved this? He had brought up the certificate of the prothonotary. Was that evidence? If it was, the action must be dismissed, as the certificate set forth that the defendant moved to give special bail; that his motion was granted, and that on March 3rd, special bail was entered by sureties named. But the Court was of opinion that this was not evidence at all. It amounted to nothing. The Court should have been put in possession of the best possible evidence, a copy of the bail bond, and of the notice, and of the motion. The Court had no hesitation in saying that the plea must be dismissed for want of evidence, and judgment must go for the plaintiff.

CAMERON *v.* CUSSON.

Accountant's Report.

MONK, J. The rule of Court in this case stated that the accountant was to be sworn

* His Honor mentioned that owing to the novelty and importance of the case, he was preparing a judgment in writing.

before a judge, and the accountant in his report says he was duly sworn as provided by the rule. It was objected that this had not been done. The Court was of opinion, however, that the report was regular, and must be homologated.

LALIBERTE *es qual. v.* MORIN.

Seduction—Damages.

MONK, J. This was an action brought by a young lady for damages against the defendant who had seduced her. The circumstances were particularly atrocious. The defendant, aged about 38, was a married man. After the death of his wife, and within a year thereafter, he induced this young lady to go and stay at his mother's, where he lived. From the best view he could take of the case, His Honor thought it clearly resulted that by great assiduity, by a series of the basest manœuvres, by promises of marriage, pretending that he only delayed in consequence of the year of his widowhood not having expired, the defendant succeeded in attaining his end. The defendant was the lady's cousin, and he availed himself of the relationship to get her into his mother's house. The Court would award $1000 damages.

LAROCQUE *v.* THE MERCHANTS' BANK.

Deed of Sale—Assessment.

MONK, J. This was an action for a certain amount of interest, arising out of the following circumstances: The defendants purchased a lot of ground at the corner of Notre Dame Street and Place d'Armes. At the time they purchased this property the street was in process of being widened, and two assessments had been made on the property for the purpose of widening the street. The sale took place, and subsequently another tax of about $200 was imposed, nearly equivalent to the amount sued for. The Merchants Bank admitted they owed the amount of interest sued for, but said they had been obliged to pay this tax, and that they bought the property free and clear of all taxes. Two letters were produced, and it must be conceded that these went a great way in establishing the plea. On the 4th of February, 1865, Mr. Atwater, duly authorized by the Merchants Bank, wrote a letter to the plaintiff, and in this letter he stated among other things that the directors of the Merchants Bank had authorized him to accept the plaintiff's offer of the lot for $18,000, adding "It is understood that the Bank is to have the property free and clear. You are to receive the award for the part taken by the Corporation, less the assessment on the lot for the widening of the street, which of course the directors expect you to pay. Please inform me as soon as convenient of your answer." To this the plaintiff answered in substance on the 11th of February: In answer to your note of the 4th instant, I beg to say that we accept your offer of $18,000 for the lot, which we will deliver to you on the 1st of May next, after the widening of Notre Dame street, on your allowing us $800 for the commutation which we will effect for you." Upon the strength of these letters which seemed to embody the verbal agreement, the defendants had a perfectly clear case. There was no difficulty about it. Mr. Larocque accepted the conditions which were specifically stated in the letter. But unfortunately for the defendants there was a deed of sale. There might have been a great deal of talking and writing, but all that was merged into the deed of sale before notary. What did the Court find in the deed of sale? Nothing at all about the assessment. The presumption of the law was that the owner was bound to pay the assessment. Now at the time the assessment in question was imposed, the Merchants Bank were the proprietors. Further, the assessment was not for widening the street, but for some other purpose. In the face of the fact that it was not imposed for widening the street, and that it was not mentioned in the deed of sale, what was the Court to do? Was it to take the letters? The defendants said, if you look at the deed of sale at all, you must look at it in connection with the letters. But the Court did not require the letters to assist it in interpreting the deed of sale. There was no allegation of fraud or error. The Court was bound to say that the whole of the transaction was embodied in the deed, and that it might fairly be presumed there was some change in the bargain before the

deed was drawn. Judgment must therefore go in favor of the plaintiff.

BEAUDRY *v.* BROUILLET *dit* BERNARD.

MONK, J. This was an action brought by a young man against his aunt. It appeared that the plaintiff and his brother were brought up at their uncle's and were well treated. Their uncle and aunt had one daughter who married contrary to their wishes, and thereupon her parents transferred their affections to the two nephews. The uncle died, recommending his nephews to the care of his wife. One of the nephews remained with his aunt, but some misunderstanding having occurred, he now brought a pretty heavy claim against her for wages, and for the produce of a certain farm. The lady pleaded that she had brought this young man up as her own child, and that she had more than paid him by her kindness. Further, she said, if that is not enough, I will plead prescription, and you can only claim for one year. There was some irregularity in the pleas, but the Court was not disposed to insist on strict technicalities in a case like this. Even if the plea of prescription was rejected, the Court was not inclined to give more than the one year's wages and produce admitted. Judgment accordingly for $180 and costs.

MULLIN *v.* RENAUD.

MONK, J. This was an action brought by the plaintiff against the defendant for having engaged his vessel or barge to go from Montreal to Cleveland, Ohio. The plaintiff alleged that in consequence of this agreement, which was merely verbal, he left Montreal on a certain day, and sailed off towards Cleveland. At Port Colborne he refused a cargo. When he arrived at Cleveland he endeavored to find the agent, but there was no cargo for him. Finally, he left, and now brought an action for a large amount, claiming freight, demurrage, &c. At first the Court was inclined to think that the action should be dismissed, but upon the whole, and seeing that the plaintiff was in earnest throughout, the Court was disposed to say that an agreement of a vague character was proved. The evidence of the captain was favorable. But the claim of $1,200 could not be allowed. The Court would give $350 (with costs of the action brought,) which was sufficient to pay the plaintiff for going to Cleveland and back.

DURNFORD *v.* FAVREAU.

Informality in Warrant.

MONK, J. The defendant had been convicted of selling liquor without license. In the absence of Mr. Coursol, Mr. Brehaut had presided. The usual form of words in the summons requiring the defendant to be and appear before C. J. Coursol, Esq., and stating under what authority, had been struck out, and the words Mr. "Brehaut, P.M." substituted. Now what was "P. M." for? Police Magistrate, or Pay Master, or Postmaster, or fifty other things. Mr. Coursol took all precaution to state his authority, but Mr. Brehault apparently did not think it necessary. The Court was of opinion that this summons did not give him authority. The first plea of the defendant was a plea to the jurisdiction; then he pleaded to the merits. The Court was of opinion that this plea to the jurisdiction should have been maintained, and that the plea to the merits under the circumstances was not a waiver of the plea to the jurisdiction. Therefore the judgment of the Court below must be reversed, and the conviction quashed.

DURNFORD *v.* ST. MARIE.

MONK, J. The only difference between this case and the last, was that the defendant made a motion, instead of pleading to the jurisdiction. The Court properly overruled this motion, and on the very day he made the motion, he pleaded to the merits. The Court was further of opinion that in this case the plea to the merits was a waiver of objection to the jurisdiction. The distinction made was that in the first case there was a plea, while in the other there was only a motion.

DURNFORD *v.* CYPIOT.

MONK, J. In this case the defendant was convicted of selling liquor without license. There was a plea of *autrefois acquit*, and then there was the general issue. Subsequently the defendant withdrew the plea of *autrefois acquit*, and there being some difficulty about the identity of the man, the case was dismissed in the Court below. The Revenue Inspector now brought the case up before this Court, contending that the plea of *autrefois acquit* was an admission of the identity of the person. The Court was left to deal with rather doubtful evidence, but his honor was inclined to think that the identity of the man was sufficiently established. The judgment must therefore be reversed, and the defendant condemned to pay a fine of $50, or three months imprisonment.

RECENT ENGLISH DECISIONS.

Embezzlement—Clerk or Servant.—A person who is employed to get orders for goods, and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by a commission on the goods sold, is not a clerk or servant within the meaning of the 24 and 25 Vict. c. 96, s. 68. *Regina* v. *Bowers*, Law Rep. 1 C.C. 41.

Larceny—Indictment.—The prisoner was sent by his fellow-workmen to their common employer, to get the wages due to all of them. He received the money in a lump sum, wrapped up in paper, with the names of the workmen and the sum due to each written inside: —*Held*, that he received the money as the agent of his fellow-workmen, and not as the servant of the employer, and that, in an indictment against him for stealing it, the money was wrongly described as the property of the employer. *Regina* v. *Barnes*, Law Rep. 1 C. C. 45.

[This case was tried by the Recorder of Bolton, and the property was originally laid in the fellow-workmen. The counsel for the prisoner objected that the indictment could not be sustained, because the money was the property of the employers. The indictment was then amended by order of the Recorder, and it was alleged that the money was the property of the employers. The question being reserved whether the evidence sustained the indictment, the Court quashed the conviction on the amended record, holding that the money was the money of the workmen as soon as the prisoner, their agent, received it. The indictment, as it originally stood, would have been sustained.]

Mistake in date of Will.—Parol evidence is admissible to prove that a will was executed on a date other than that which appears upon the face of it.—Two wills were propounded, one bearing date on the 27th of February, 1855, and the other on the 11th of December, 1858. There was no ambiguity on the face of either of them, and each of them contained a general clause of revocation. Parol evidence was admitted to prove that the will bearing date on the 27th of February, 1855, was in fact executed on the 27th of February, 1865, and on that evidence the Court pronounced for the will of 1865, and against the will of 1858. —Sir J. P. Wilde remarked: "I intended in *Guardhouse* v. *Blackburn*, (Vol. 2, p. 180), to point out that there is a distinction between an inquiry into the *meaning* of a written document,—will, contract, or deed,—and an inquiry into the *existence* of such a document." *Reffell* v. *Reffell*, Law Rep. 1 P. & D. 139.

Pleading—Adultery and Cruelty.—In answer to a petition by a wife for dissolution of marriage, charging adultery and cruelty, the respondent denied both those charges, and further alleged that the petitioner had habitually treated him with insolence and neglect, and frequently absented herself from home, and refused to inform him where she had been, and constantly set his orders and wishes at defiance; and that she had withdrawn herself from cohabitation for two years without reasonable cause. The Court refused to order those allegations to be struck out, being of opinion that the respondent was entitled to give evidence of them, for the purpose of showing that his misconduct, if any, had been caused by that of the respondent. *Hughes* v. *Hughes*, Law Rep. 1 P. & D. 219.

Custody of Children.—The Court of Probate and Divorce has jurisdiction by its order to

regulate the custody of children, until they attain the age of 16 years. *Mallinson* v. *Mallinson*, Law Rep. 1 P. & D. 221.

Forgery—Stifling a prosecution—Undue pressure.—A son carried to bankers of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as indorser. These endorsements were forgeries. On one occasion the father's attention was called to the fact, that a promissory note of his son with his (the father's) name on it, was lying at the bankers dishonored. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes with the forged endorsements, were then delivered up to him.—*Held*, that the agreement was invalid.—A father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though that is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity. *Williams* v. *Bayley*, Law Rep. 1 H. L. 200.

Practice—Jurisdiction.—Where proceedings are taken out of the ordinary *cursus curiæ* with the assent of the parties, all subsequent interlocutors in the course adopted, though pronounced adversely, are in the nature of awards, and not subject to appeal. *White* v. *The Duke of Buccleuch*, Law Rep. 1 H. L. Sc. 70.

Bill of Lading.—A Bill of lading for the delivery of goods to order and assigns, is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of an unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the Bill of lading for valuable consideration, although the goods are not paid for; even if Bills have been given for the price of them, which are certain to be dishonored, provided the endorsee for value has acted *bona fide* and without notice. *Pease* v. *Gloahec*. Law Rep. 1 P. C. 219.

Bill of lading—Negligence.—Under a charter-party the shippers put a cargo, consisting of casks of oil, wool, and rags, on board the chartered vessel, and personally superintended the stowage of the cargo in the hold of the vessel. In the margin of the Bill of lading of the casks of oil there was this memorandum, "weight, measurement, and contents unknown, and not accountable for leakage." The Bill of lading was indorsed in blank by the shippers and assigned to B. & Co. In the course of the voyage the oil casks became heated by the action and contiguity of the wool and rags, and a very large portion of the oil was lost:—*Held*, in a suit against the ship for damages occasioned by shipowners' negligence: First, that ignorance of the shipowners as to the latent effect of heat, in storing the casks of oil with wool and rags, did not, in the circumstances of the shippers superintending the stowage, amount to such negligence as to make them liable to the holders of the Bill of lading for the loss occasioned by the leakage of the oil; and, secondly, that the limitation of liability by the memorandum in the Bill of lading, that the shipowners were not to be accountable for leakage, was not restricted as to the quantity of leakage, and protected the shipowners, in the absence of proof that the leakage was occasioned by their negligence. *Ohrloff* v. *Briscall*, Law Rep. 1 P. C. 231.

Salvage.—The Judicial Committee is always reluctant to review cases of salvage, which involve the exercise of the discretion of the Judge of the Court below, but, being a final Court of appeal, will, if the justice of the case requires, increase the amount. The question how far a deviation in a vessel's course, in the performance of salvage services to life or property, may be the voidance of a Policy of Insurance, is not satisfactorily settled,

though the risk of such may operate on the judge's mind in determining the amount to be awarded for salvage services. A moiety of the value of the vessel and cargo, in a case of the salvage of a derelict, was formerly the amount awarded, but the Maritime courts now give only such amount as is fit and proper with reference to all the circumstances of the case, having regard especially to the value of the property salved.—In a case where the vessel was derelict, and her value, with the cargo on board, exceeded £30,000, was salved by two vessels, one of which, with her cargo on board, was worth £150,000, and the other above £3,000, and a tender of £2,000 for salvage services had been refused, which sum was awarded by the Vice-Admiralty Court: the Judicial Committee, looking at the respective values, and taking into consideration the additional risk to the salvors from having to make a deviation in their course, held that sum insufficient, and increased the amount of salvage by £1000. *Kirby* v. *The owners of the "Scindia,"* Law Rep. 1 P. C. 241.

Salvage of Derelict.—In a case where a derelict vessel and cargo of the value of £1,452 was salved by a steamer, which, with her cargo, was of the value of £30,000, the Vice-Admiralty Court awarded £300 for salvage:—*Held*, by the Judicial Committee, that, under the circumstances, that sum was not sufficient, and the same increased to £450. *Papayanni* v. *Hocquard*, Law Rep. 1 P.C. 250.

Solicitor and Client.—A purchaser has constructive notice of that which his solicitor, in the transaction of the purchase, knows with respect to the existence of the rights which other persons have in the property.—It is a moot question (observed Vice-Chancellor Kindersley) upon what principle this doctrine rests. It has been held by some that it rests on this:—that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this: that my solicitor is *alter ego;* he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge: and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable. *Boursot* v. *Savage*, Law Rep. 2 Eq. 142.

Mines.—A lease of land (without mentioning mines) will entitle the lessee to work open but not unopened mines. If there be open mines, a lease of land with the mines therein, will not extend to unopened mines; but if there be no open mines, a lease of land together with all mines therein, will enable the lessee to open new mines. *Clegg* v. *Rowland*, Law Rep. 2 Eq. 160.

Married Woman.—Property settled to the separate use of a married woman for life with a power to appoint the reversion by deed or will, which she exercises by will, is not liable after her death to the payment of her debts. *Shattock* v. *Shattock*, Law Rep. 2 Eq. 182.

Company—Misrepresentation.—A company was formed for mining purposes; the prospectus referred to the memorandum and articles, and described in favorable terms a mine for the purchase of which a contract had been entered into. This mine was afterwards found to be worthless, and the directors rescinded the contract, and agreed to purchase another:—*Held*, that a shareholder who had subscribed on the faith of the prospectus was entitled to an injunction against an action for calls, although the directors had been themselves deceived, and had been guilty of no wilful fraud. *Smith* v. *Reese River Company*, Law Rep. 2 Eq. 264.

Will—Fraud by a Married Woman.—The income of property was given by a testator to a woman in the character of, and whom he described as his wife, but who, at the time of the marriage ceremony with him and at his death, had a husband living:—*Held*, in respect of the fraud committed by her, that the bequest was void.—The testator bequeathed the residue of his property to his "step-daughter," the daughter of his supposed wife:—*Held*, that the bequest was valid. *Wilkinson* v. *Joughin*, Law Rep. 2 Eq. 319.

Will—"Survive."—The words "survive," and "survivor," import that the person who is to survive must be living at the time of the event which he is to survive. *Gee* v. *Liddell*, Law Rep. 2 Eq. 341.

Fraud—Misrepresentation—Company.—A contract to take shares in a company cannot be set aside because it was founded on a prospectus which contains exaggerated views of the advantages of the company, but does not contain any material mis-statement of fact. Where, therefore, a prospectus stated that a certain invention which it was the object of the company to work had been tested, and according to the experiments the material could be produced at a specified cost, but that it was intended to test the invention further, and the invention turned out worthless, and it appearing that there had been some testing:—*Held*, that this was not such a misrepresentation as would enable a purchaser of shares to set aside the contract. *Denton* v. *Macneil*, Law Rep. 2 Eq. 352.

THE U. S. JUDICIARY.

(*From the American Law Register.*)

The rapid deterioration of public morals since the late rebellion began is one of the very sad offsets to the benefits which are believed by many to have resulted from the events to which it led. All things seem to have concurred, during its brief but exciting history, to demoralize official character, business tone, and even social relations. The most ardent admirer of the political results will not deny that the community has been lamentably depraved. The standard of public and private integrity is many degrees lower than it was. Money has been so abundant, speculation has run so high, reckless wealth, and ruin from fraud and folly, have changed so many positions and unsettled so many lives, that an unnatural stimulus has been given to evil agencies. The law seems to be less potent and omnipresent. Crime and violence run riot. And those whose mission is reform, seem to have, day by day, less heart for their work. Years must elapse before the current of vice can be made to set backward, even under the most favorable influences. Shall we have such influences? Is our government equal to the emergency? Is it capable of assuming that new vigor and firmness which are necessary to bring us back even to where we were seven years ago?

The prospect is rather hopeless. This government, to which the pure and earnest citizen is looking for reform, now that it has escaped from its recent danger, is sliding more and more into the hands of the dangerous classes. Men to whom human life and the laws of property are nothing, manipulate primary meetings and set up candidates for office. Gamblers, lottery men, and liquor dealers are active in political campaigns, and are becoming so formidable in their unions that politicians truckle to them more than ever, and submit to the pledges they exact. Revolutionary organizations have powers which no association for good can acquire. All the elements of evil seem to unite, as if they had a common end and a common interest, and their union is against good morals and against good government.

As the drowning man clings to the plank, so we have looked to the judiciary in all the alarming phases of our history. It has been less contaminated than any other department of our government. By influences for which every good citizen should be thankful, though he cannot understand them, the bench has been in a large measure preserved from the fate of other departments. With some exceptions it still remains the balance-wheel of the system, our safety among the corruptions which have invaded other branches of the government.

The object we have in view in these pages is to endeavor to show briefly the peculiar causes which have so far tended to save the judiciary, and continue it in comparative purity, and the ruin which must follow if, in choosing our judges, we abandon the instincts which have heretofore guided us, descend to the same sphere in which we battle for candidates for other offices, and permit ourselves to be governed by the same system which governs us in their elections.

The ordinary division of the departments of government into the legislative, the execu-

tive, and the judicial, is one so long established and so generally admitted that we receive it implicitly, with but little reflection. According to common conception neither interferes with or invades the other, but, in practice as well as theory, they are distinct.

A very slight experience of the actual workings of the judiciary will show how mistaken this view is. Its powers invade both of the other departments. Though the judge does not make laws or execute them in the abstract or the general, he does so in individual cases. He decides without precedent that A. owes B. money, and sends the sheriff to execute his judgment. He decrees that a child must be taken from a parent,—that a citizen shall be deprived of his liberty,—that some street may invade my grounds. He stops the construction of a public work; he sets aside an election; he decides the title to a corporate office; he strikes dead an Act of Assembly; and, when called upon for his reason, he says: "I have found no precedent or analogous case, and I must, therefore, declare that to have been always the law, which in my opinion ought now to be the law." How a bad man would use such a license, it is unnecessary to explain.

The doctrine that there is existing law for every possible state of facts, that every judge is able to find this law, and that in announcing it he only declares or applies it, as distinguished from making it, is a very beautiful theory, and falls in harmoniously with the established views of government to which we have just referred. But in practice and in substance it is wholly illusory. It may restrain a good judge, and coerce him to explore more conscientiously the sources of customary law, in the hope that there are precedents or analogies to guide him. He may hunt, with the patience of an enthusiast, for the smallest rivulets from the fountain of justice, but he may never find them, and when he does, his very excellence of character may lead him to doubt them. It is only when the waters flow in a steady and certain current that he feels constrained to be carried along against his judgment and his sense of right. Instructed that he is not to make, but only to find the law, he may, with his books around him, be put to a somewhat different kind of mental process, and reach a different result from that which he would reach if he were freed from the control of such a principle. But, in the end, it amounts to the same thing; what the judge would have decided if he had been a despot, he decides, believing that he has subordinated his judgment to the received theory of his government.

This result arises, most frequently, when questions connected with the organization and construction of public bodies, titles to office, the regularity of elections, the constitutionality of statutes, and other matters having relation to local governments, or of a public or *quasi* public character are presented. The law on these subjects is less settled, and the judge is left without precedent or analogy more frequently than when he is considering such a point, as one arising between landlord and tenant, or the parties to a note. And this is the very field in which political biasses are most exercised, and passions and antagonisms have most influence. It has been a very melancholy experience to the quiet and unexcited watchers of events, to find, in how many cases, judges, whose decisions in matters of every-day business, are those of justice, with bandaged eyes, and even scales, when questions of public concern arose, have decided, again and again, sometimes with temper, each judge taking the side of the party which elected him.

(*To be concluded in next number.*)

THE HOUSE OF COMMONS contains 128 members of the legal profession: 95 English barristers; 18 Irish barristers; 6 Scotch advocates, and 9 attorneys. There are 5 serjeants-at-law, and 30 Queen's Counsel.

IRISH LAW APPOINTMENTS.—By the substitution of Mr. MORRIS for Judge CHRISTIAN, in the Court of Common Pleas, the present Tory Government has constituted a tribunal consisting entirely of Roman Catholics. The *Times* remarks that this is an unprecedented event.

The Canada Law Journal.

VOL. III. AUGUST, 1867. No. 2.

REPORT OF THE GENERAL COUNCIL OF THE BAR.

The official report of the General Council of the Bar of Lower Canada, recently published, contains some particulars of interest. The report was submitted by Mr. G. DOUTRE, the Secretary-Treasurer, at a meeting held at Quebec on the 28th of May. Some of the leading points noticed are as follows: The Act respecting the Bar which came into force on the 15th of August, 1866, has already produced results beneficial to the profession. After the Act was passed, the General Council and Councils of Sections adopted by-laws, which were printed under the direction of the Secretary-Treasurer, Mr. DOUTRE, and distributed among the members of the profession.

The next thing was to prepare the *tableau général* of advocates required by the new law. The Secretary-Treasurer was unable to obtain possession of the registers, and on going to Quebec in quest of them, was informed by the ex-Secretary that all the archives of the Bar up to 1864 had been destroyed by fire. The Government, however, was able to furnish a list of commissions granted from 1765 to 1849, and the various sections supplied the lists of admissions subsequent to 1849. A notice was issued requiring advocates whose diplomas had not been enregistered, to transmit them for enregistration forthwith. In reply to this notice 131 diplomas were received by the Secretary-Treasurer, but of course in consequence of the destruction of the registers, there was no means of ascertaining whether these 131 were all that had not been enregistered. The ex-Secretary, it appears, did not even put the General Council in possession of the register from 1864. Another obstacle that impeded the making of an accurate list was the difficulty of ascertaining what members of the profession had died, removed from the province, or ceased to practice. Under these circumstances, the list naturally contains the names of many who have either left the country, or have entered upon other pursuits, and it is requested that gentlemen examining the list will apprize the Secretary-Treasurer of such changes.

The Report proceeds to give a table of the number of admissions each year from the cession of Canada to the present day. The list is as follows:—before 1765, 10; in 1766, 4; 1767, 1; 1768, 1; 1771, 1; 1784, 1; 1785, 1; 1786, 1; 1787, 2; 1788, 1; 1789, 3; 1790, 1; 1791, 1; 1792, 1; 1794, 3; 1795, 1; 1796, 3; 1797, 3; 1798, 2; 1799, 4; 1800, 3; 1801, 5; 1802, 1; 1803, 5; 1804, 4; 1805, 2; 1806, 2; 1807, 4; 1808, 2; 1809, 3; 1810, 9; 1811, 8; 1812, 7; 1813, 3; 1814, 5; 1816, 5; 1817, 7; 1818, 6; 1819, 8; 1820, 5; 1821, 7; 1822, 19; 1823, 19; 1824, 15; 1825, 17; 1826, 12; 1827, 13; 1828, 20; 1829, 15; 1830, 19; 1831, 12; 1832, 16; 1833, 19; 1834, 13; 1835, 11; 1836, 17; 1837, 15; 1838, 14; 1839, 16; 1840, 18; 1841, 19; 1842, 18; 1843, 18; 1844, 19; 1845, 18; 1846, 21; 1847, 25; 1848, 32; 1849, 32; 1850, 29; 1851, 29; 1852, 21; 1853, 25; 1854, 20; 1855, 29; 1856, 15; 1857, 16; 1858, 22; 1859, 31; 1860, 32; 1861, 47; 1862, 55; 1863, 59; 1864, 52; 1865, 67; 1866, 47; 1867, 8; making a total of 1253.

The report points out the rapid increase from 1858 to 1865 and the decrease in 1866 and 1867, after the new law came into operation. "Les besoins de la population," says Mr. DOUTRE, in his report, "n'exigent pas un aussi grand nombre d'avocats. Comme le faisait remarquer un avocat français d'un grand mérite, M. DUPIN, les procès augmentent en raison même du nombre des avocats. Moins il y a d'avocats, moins il y aura de procès chicaniers et futiles qui ne naissent que par la nécessité de procurer de quoi vivre au surplus du nombre requis des avocats; moins il y a d'avocats plus il y a de désintéressement et d'honneur dans la profession; car alors les membres du Barreau peuvent suffir aux besoins de la population, et ils n'ont pas besoin d'accepter de ces procès qui déshonorent la profession en même temps qu'ils ruinent les familles.

"Si le Barreau veut être respecté, il doit être respectable. Il cesse de l'être dès qu'il cesse de se recruter exclusivement dans la

classe du mérite et de l'honnêteté. Il est vrai que le talent fait la réputation, mais la moralité seule la consolide et la perpétue. La magistrature qui doit être digne, honnête et impartiale s'alimente dans le Barreau. L'honneur de ce dernier rejaillit sur elle. Il est donc de l'intérêt de la communauté en général que le Barreau soit sévère sur le choix de ses membres. La loi de 1866, quoiqu'elle laisse quelque chose à désirer, offre d'excellents moyens de l'être; c'est à lui à les utiliser vigoureusement.

"Il n'y a pas qu'un sentiment de conservation et d'intérêt qui guide le barreau dans sa sévérité vis-à-vis des aspirants à l'étude et à la pratique de la profession, il y a aussi un sentiment honorable qui consiste à détourner une grand partie de la jeunesse du désir de se livrer à la pratique d'une profession qui ne lui offrira pas les moyens de subsistance, si elle est encombrée. Les cinq mois qui viennent de s'écouler ont démontré parfaitement ce que cette loi nous promettait pour l'avenir.

"Une autre partie importante de la loi mérite d'être remarquée. Les plaideurs qui ont à se plaindre de la conduite de leurs avocats peuvent obtenir plus facilement justice devant le conseil de section auquel ces avocats appartiennent. Sous l'ancien système il était impossible d'obtenir un jugement effectif contre un avocat malhonnête, car ce jugement rendu par le conseil de section ne pouvait avoir d'effet que s'il était ratifié par le Conseil Général qui n'existait alors que sur le papier. Aujourd'hui il n'en est plus de même, le Conseil de section est constitué en tribunal; il possède les mêmes priviléges que les cours de justice pour obliger les témoins à rendre leur témoignage, et son jugement, si on n'en interjette pas appel dans les 30 jours, a son plein et entier effet. Le Conseil Général est un tribunal d'appel, qui ne ratifie pas, comme par le passé, mais qui confirme ou infirme le jugement qui lui est soumis, non par le conseil de section mais par l'accusé. Les assemblées du Conseil Général sont faciles à convoquer. Il est important que les clients sachent qu'ils peuvent se fair rendre justice au Barreau, et faire punir les avocats qui ont trompé leur confiance. Cet accès facile à la justice du Barreau et la publicité des jugements rendront plus scrupuleux ceux qui croyaient que toutes les infractions à la discipline et à l'honneur du Barreau restaient impunies. C'est par ce moyen qu'il est possible de maintenir le Barreau dans une position de moralité et d'honnêteté qui impose le respect et la confiance de la communauté en général."

INCREASE OF SENTENCE.

Two burglars were recently convicted at Kingston Assizes. When their sentences had been pronounced, they suddenly, in a fit of fury, attacked the jailers, and, half a dozen policemen jumping into the dock, a terrible conflict ensued. The sentences were respectively eight and ten years' penal servitude; and, upon this exhibition of ferocity and violence, the judge ordered the convicts to be again placed at the bar, and enlarged their terms of servitude to twelve and fifteen years, respectively. Some question has arisen as to whether the judge was justified in pursuing this course. The *Law Times* declares that the subject does not admit of a doubt; that the regularity and legality of such a proceeding is thoroughly settled. It cites as authorities, *Reg.* v. *Fitzgerald*, 1 Salk. 401; *Inter the Inhabitants of St. Andrews, Holborn, and St. Clement Dames*, 2 Salk. 667; and *Rex* v. *Price*, 6 East, 328. A curious account of similar conduct on the part of a prisoner, and of its speedy punishment, is given in the following marginal note, by Chief Justice Treby, to Dyer's Reports:—

Richardson, C. J. de C. B., at Assizes at Salisbury, in summer 1631, fuit assault per Prisoner la condemne pur Felony; qui puis son condemnation ject un Brickbat a le dit Justice, que narrowly mist. Et pur ceo immediately fuit Indictment drawn pur Noy envers le Prisoner, et son dexter manus ampute et fixe al Gibbet sur que luy mesme immediately hange in presence de Court.

DEFICIENCY OF JUDGES IN ENGLISH COURTS.

The following from the *Times* of June 20, shows how greatly business is impeded by a tenacious adherence to the old judicial machinery, which is quite inadequate to the wants of the present day.

"This was the second of the first two days appointed for the sittings of the Court out of Term, and in the course of the day, as also yesterday and almost every day during the sittings *in banc*, discussions arose as to the difficulty the Court finds in so constituting itself as to enable itself to carry on the business. It will be observed that the Court, as stated by one of the judges to-day, holds these *post* terminal sittings primarily for the purpose of clearing the New Trial Paper, in order that cases in which new trials are granted may be sent down to trial at the assizes without delay. But when the Court sits as a kind of court of appeal on an application for new trial for misdirection, as it is either in the nature of an appeal from the presiding judge, or turns upon the facts with which he is best acquainted, it is not considered by the Bar satisfactory that a case should be heard by less than two judges in addition to the judge who tried the case; and this requires that there should be a court composed, at least, of three members. But, then, as the Lord Chief Justice is sitting at Nisi Prius—and another judge ought to be sitting to clear the enormous cause list—and another is wanted at Chambers, and one or more are wanted in the Courts of Error, Probate and Divorce (to say nothing of the Central Criminal Court), and there are only five judges in each court, there is, it will be seen, great difficulty in carrying on these sittings, and the courts have continually to put off or break off cases, in a manner exceedingly inconvenient to justice, simply because it is impossible for one judge to be in more than one place at a time, and it is also impossible to make five judges into seven or eight. Thus, in the course of the day, Mr. Justice Blackburn having gone to Chambers, and an important case standing next on the paper, which it was found could not come on to-day,—

Mr. BRETT, counsel for the plaintiff, said there was an important new trial case which would occupy a great deal of time when it came to be discussed, and he should not think it satisfactory that it should be heard with only one judge besides the judge who tried it.

The LORD CHIEF JUSTICE.—Certainly not.

Mr. BRETT said that, as it stood for argument at the sittings next week, this must be the result, as the Lord Chief Justice and another judge would be at *Nisi Prius*, and a third at Chambers, or in a Court of Error. He should not object to its standing over till next Term.

Mr. E. JAMES, counsel for the defendants, said he quite agreed in the suggestion of his learned friend.

Mr. Justice MELLOR.—Unless we are somehow relieved of going to Chambers, only two judges can be found to sit, at least for half the day, and as one of these must be my brother Shee, who tried the case, there cannot be a satisfactory tribunal for the parties.

The LORD CHIEF JUSTICE.—What is the present condition of the Bill relating to the Masters at Chambers? In ordinary times we can manage with the present machinery; but out of Term, with two judges at *Nisi Prius*, the demands upon us for the Exchequer Chamber, and the necessity of appointing sittings *in banc* out of Term, unless we are in some way relieved of the business at Chambers, public business in the courts must come to a deadlock.

It was then agreed that the case in question should be postponed till Michaelmas Term.

It may be mentioned that this very day the Court of Error in the Exchequer Chamber had to break off in the middle of a case and rise early, simply through deficiency of judges —two of the learned judges having to go to Chambers, where one from each court is required daily, so that only four were left to review a decision by an equal number of judges in the Court below. The condition of the Court of Exchequer Chamber, with regard to its constitution, is daily a subject of complaint and dissatisfaction, arising from the same cause—cases decided by four judges, and it may be in accordance with one or more decisions by four judges in other courts—*i. e.*, the decision of eight or ten or twelve judges being continually reviewed and reversed by five or six, perhaps by a majority of three out of five, or four out of six. And the condition either on the one hand of the New Trial Paper or Special Paper of the courts *in banc*,

and on the other hand of the cause lists in the different courts, shows an accumulation of business which certainly the Bar believe to be owing to the deficiency of judges, and which, whatever be the cause, and whatever may be the proper remedy, gives rise to an enormous amount of vexation, delay, and expense to the suitors, and often amounts to a denial of justice.

APPOINTMENTS.

Hon. Gédéon Ouimet, to be Attorney General of the Province of Quebec, (Gazetted 15th July, 1867).

Hon. George Irvine, to be Solicitor General of the Province of Quebec, (Gazetted 15th July, 1867.)

Edouard Joseph Langevin, Esq., to be Clerk of the Crown in Chancery, in and for the Dominion of Canada, (Gazetted 13th July, 1867.)

BANKRUPTCY—ASSIGNMENTS.—PROVINCES OF QUEBEC AND ONTARIO.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Allen, Orrin Lawrence	Alexandria	John Whyte	Montreal	July 30th.
Anderson, Duncan		David Rose	Dummer	July 22nd.
Barnes, William		N. R. Britton	Milton	June 26th.
Bell, John	Township Blanshard	Thos. Miller	Stratford	July 23rd.
Bellefleur, J. O.	Laprairie	T. Sauvageau	Montreal	July 9th.
Bergeron, J. B.	Windsor	J. McCrae	Windsor	Aug. 2nd.
Brethen, Henry		W. S. Robinson	Napanee	July 30th.
Bull, David		Geo. D. Dickson	Belleville	June 18th.
Burnet, William		E. A. Macnachtan	Cobourg	July 24th.
Burroughs, William, jun.		J. L. Terrill	Tp. Stanstead	June 25th.
Cadwell, Lewis A.		S. C. Wood	Lindsay	July 13th.
Carruthers, Janet	Hamilton	W. F. Findlay	Hamilton	July 22nd.
Chamberlain, Maitland		W. S. Robinson	Napanee	Aug. 1st.
Champagne, Louis	Lanoraie	T. Sauvageau	Montreal	July 29th.
Chapman, Christopher	Magog	A. M. Smith	Sherbrooke	July 27th.
Chatterson, John		W. S. Robinson	Napanee	July 27th.
Cleveland & Son, J. H.	St. André Avellin	John Whyte	Montreal	July 10th.
Collier, John C.		Richard Monck	Chatham	July 10th.
Cornell, Owen	Township Townsend	A. J. Donly	Simcoe	July 23rd.
Cottingham, Samuel		S. C. Wood	Lindsay	July 24th.
Cronkhite, Nathan	Mooretown	George Stevenson	Sarnia	July 25th.
Danks, Isaiah	Oil Springs	George Stevenson	Sarnia	July 9th.
Dean, James	Township Woodhouse	A. J. Donly	Simcoe	July 23rd
Deguise, C. C. Miller		I. Thibaudeau	Quebec	July 30th.
Donaldson, Charles	Township Grantham	W. A. Mittleberger	St. Catharines	July 20th.
Durocher, Olivier	Stanstead	A. M. Smith	Sherbrooke	July 27th.
Empey, Philip S.		Chas. Rattray	Cornwall	Aug. 8th.
Gordon, Thomas		W. H. Felton	Arthab'k'ville	Aug. 10th.
Guillot, Jas. C.	Windsor	Philip S. Ross	Montreal	July 4th.
Holland, Anthony	Exeter	S. Pollock	Goderich	July 29th.
Hooper, Joseph	Port Hope	E. A. Macnachtan	Cobourg	July 15th.
Horsham, John		A. J. Donly	Simcoe	Aug. 5th.
Hudon, Isafe	Montreal	T. S. Brown	Montreal	Aug. 22nd.
Hudson, Andrew		A. W. Smith	Brantford	July 16th.
Huffman, John L.	Port Hope	E. A. Macnachtan	Cobourg	July 15th.
Jordan, Hollis	Eaton	A. M. Smith	Sherbrooke	July 10th.
Lamprey, Brooke		James Massie	Guelph	July 2nd.
Laycock, Nelson		A. W. Smith	Brantford	July 24th.
Leggatt & Reay	Montreal	A. B. Stewart	Montreal	Aug. 15th.
Lewis, Asa		J. L. Terrill	Tp. Stanstead	July 1st.
Lewis, Reuben Pike	Cornwall	John Whyte	Montreal	July 16th.
Long, Joseph	Township Blenheim	James McWhirter	Woodstock	July 23rd.
Lorimer, James	Montreal	A. B. Stewart	Montreal	July 9th.
Lundy, W. T.	Brampton	John Lynch	Brampton	Aug. 15th.
McIntyre, John	Windsor	J. McCrae	Windsor	July 12th.
McKay, Hugh	Woodstock	Jas. McWhirter	Woodstock	July 31st.
McVittie, Alexander		Richard Monck	Chatham	July 10th.
Merritt, Daniel Harrison		W. Dow Michael	Oshawa	July 10th.
Mitchell, Wm. D., and Andrew G., individually and as firm of Wm. D. Mitchell & Bros.	Township Elma	Thos. Miller	Stratford	Aug. 20th.
Nesbitt, James	Township Toronto	John Lynch	Brampton	Aug. 23rd.
Ogilvie, James		A. W. Smith	Brantford	Aug. 5th.
Ouimet, Eusèbe	Montreal	A. B. Stewart	Montreal	Aug. 21st.
Panneton & Panneton	Sherbrooke	T. Sauvageau	Montreal	Aug. 7th.
Pariseau, Joseph and Stanislas, individually and as firm of Joseph Stanislas & Frère	St. Martin, Ile Jésus	L. J. Béliveau *et al*	Montreal	Aug. 2nd.
Pearce, Samuel	Mitchell	Thos. Miller	Stratford	Aug. 13th.
Pitcher, Charles P.		W. A. Mittleberger	St. Catharines	July 16th.

BANKRUPTCY—ASSIGNMENTS.—*Continued.*

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Rae, Johnson		W.A.Mittleberger	St. Catharines	July 22nd.
Ross, Robert		Joseph Rogers	Barrie	Aug. 3rd.
Rousseau, Joseph	La Présentation	T. Sauvageau	Montreal	July 12th.
Scott, John Alexander	Stratford	Thos. Miller	Stratford	July 23rd.
Sipes, John		Alex. McGregor	Galt	Aug. 6th.
Sloan, James, and Jas. Anderson		Jas. McWhirter	Woodstock	July 20th.
Smith, James Harvey	Frelighsburg	John Whyte	Montreal	July 5th.
Sovereign, Frederick		A. J. Donly	Simcoe	Aug. 5th.
Spencer, Henry	Hamilton	J. J. Mason	Hamilton	Aug. 10th.
Sutherland, Donald		Thomas Clarkson	Toronto	Aug. 6th.
Terryberry, Jacob B.		W.A.Mittleberger	St. Catharines	July 18th.
Terryberry, John Y.		W.A.Mittleberger	St. Catharines	July 18th.
Truax, Chester A.	Windsor	J. McCrae	Windsor	July 24th.
Vancamp, Lewis		John Henry	Oshawa	July 10th
Venner, Pierre		L. H. Gosselin	St. Jérôme, Mt	June 27th.
Wardle, Alfred		Thos. Churcher	London	July 26th.
Wessor, Benjamin		W.A.Mittleberger	St. Catharines	July 19th.
Wills, Jabez		W.A.Mittleberger	St. Catharines	July 27th.
Wright, W., & Co.		A. Fraser	Quebec	July 10th.
YonKilovitz, Dame Alice		A B. Stewart	Montreal	July 16th.

PRIVY COUNCIL CASE.

Nov. 2, 1866.

Present:—Lord Westbury, Sir James William Colvile, and Sir Edward Vaughan Williams.

In the matter of Thomas James Wallace, an Attorney and Barrister.

[On appeal from the Supreme Court, Halifax, Nova Scotia.]

Contempt of Court—Order suspending Attorney and Barrister for contempt.

An order suspending an Attorney and Barrister of the Supreme Court of Nova Scotia from practising in that Court, for having addressed a letter to the Chief Justice, reflecting on the Judges and the administration of justice generally in the Court, discharged by the Judicial Committee, as it substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the offence.

The letter, though a contempt of Court and punishable by fine and imprisonment, having been written by a practitioner in his individual and private capacity as a suitor, in respect of a supposed grievance as a suitor, of an injury done to him as such suitor, and having no connection whatever with his professional character, or anything done by him professionally, either as an Attorney or Barrister, it was not competent for the Supreme Court to go further than award to the offence the customary punishment for contempt of Court; or to inflict a professional punishment of indefinite suspension for an act not done professionally, and which, *per se*, did not render the party committing it unfit to remain a practitioner of the Court.

This was an appeal from an Order of the Supreme Court at Halifax, Nova Scotia, suspending the Appellant from practising in that Court as an Attorney and Barrister, made under the following circumstances.

The appellant was admitted an Attorney and Barrister of the Supreme Court at Halifax, N. S., and practised therein up to the period of his suspension, as hereinafter mentioned; he also practised as an advocate and proctor in the Court of Probate of that Province. The appellant had been defendant in two suits (*Dunphy* v. *Wallace*, and *The City of Halifax* v. *Wallace*) depending in the Supreme Court, and he had also been plaintiff in another suit before the same Court, *Wallace* v. *Connolly*, and was likewise, from time to time, engaged on other matters before the Court in his capacity of Attorney and Barrister. In the suit of *Dunphy* v. *Wallace*, a decision was given by the Supreme Court adverse to the appellant, and leave to appeal therefrom to Her Majesty in Council was refused by the Court in a judgment delivered by the Chief Justice. As the appellant intended to petition Her Majesty in Council for leave to appeal from this refusal, the Chief Justice was requested by the appellant, with a view to such petition, to file the judgment delivered by him in that case. The Chief Justice thereupon filed a written judgment,

differing, as it was alleged by the appellant, materially from the judgment actually delivered in Court; proceeding upon grounds not mentioned in that judgment, and containing additional statements, which the appellant conceived were calculated to prejudice his intended application for leave to appeal.

In the course of the other suit, *Wallace* v. *Connolly*, a decision was likewise given adverse to the appellant. Such decision was pronounced by the Chief Justice after hearing both the parties upon affidavits in open Court, and after taking time to consider; but the Chief Justice, in his judgment, stated that he had received from a Mr. Smith, out of Court, information which differed from the statements made by the appellant in one of the affidavits; the appellant not having been present at the alleged interview with Mr. Smith.

Previously also to the month of January, 1865, the appellant had been informed that, in reference to other proceedings in which he was interested before the Supreme Court, observations prejudicial to him had been made to one of the parties by the Chief Justice out of Court, and that certain proceedings against him had been recommended by the Chief Justice in an interview with one of the parties; and in certain matters also in which the appellant was professionally engaged before him at Chambers, the Chief Justice had, as the appellant conceived, acted in a manner which he deemed unusual and oppressive, and which induced him, as he alleged, to avoid Chamber business before the Chief Justice.

On the 10th of January, 1863, an order was made by Mr. Sutherland, the Judge of the Court of Probate at Halifax, declaring that the appellant had been guilty of a contempt of the Court, and suspending him from practising therein as an advocate and proctor. The appellant appealed from the order of the Judge of Probate to the Supreme Court, conceiving that he was entitled to such appeal under the provisions of the Revised Statutes of *Nova Scotia*, c. 127, s. 77.

The appeal came on for hearing before the Supreme Court in the month of December, 1864, when judgment was given to the effect, that the appeal, having been taken under the Provincial Statute, and not by *certiorari*, was not judicially before the Court and could not be entertained. In the month of January, 1865, the appellant moved the Chief Justice, at Chambers, to allow an appeal from that decision to Her Majesty in Council. The Chief Justice refused leave to appeal from the decision of the Supreme Court against the order of suspension made by the Judge of the Court of Probate. The judgment of the Supreme Court, both upon the main question of the appeal from the order of suspension, and the application of the appellant for leave to appeal therefrom to Her Majesty in Council, was reduced to writing by the Chief Justice, and filed.

The appellant being desirous to petition Her Majesty in Council for leave to appeal from the last mentioned judgment of the Supreme Court, and being, as he stated, apprehensive that additions might be made to the written judgment, as he alleged was done in the case of *Dunphy* v. *Wallace*, as well as aggrieved at the course pursued by the Chief Justice in the cases of *Dunphy* v. *Wallace* and *Wallace* v. *Connolly*, and feeling injured by the observations and the recommendations of proceedings which it had been reported to him, as already stated, had been made with reference to him by the Chief Justice; on the 26th January, 1865, sent the following letter to the Chief Justice: "The Honourable Chief Justice, Sir,—I shall feel obliged by your filing the judgment given in Court, in my case with Mr. Sutherland, without any additions. I say without any additions, because in the case of *Dunphy* v. *Wallace*, I had much reason to complain of the decision there filed, as very material additions were made to it, and much said with a view, as I and others thought, of meeting me at England. I must, I think, decline sending to England the decision given on my petition for an appeal, in consequence of a statement made therein, to the effect that other modes were pointed out by the Court by which the matter might have been removed; but I remember only one way mentioned, that by *certiorari*, and this certainly is not modes. ....It was in that case I good-naturedly remarked, that the decision would likely be

different when it fell to my lot to be on the other side. And I venture to say, had my case with Mr. Sutherland been removed in the first instance by *certiorari*, a course, however, which never occurred to my counsel, I would have been met with a thousand objections, resulting in my defeat, as on the appeal.

"I may be wrong, but I can't help thinking that I am not fairly dealt with by the Court or Judges, and that the well-beaten track is often departed from for some bye-way to defeat me. Even in that little case of *Wallace* v. *Connolly*, the case was not decided upon the affidavits, but a person was spoken to out of doors, and the case decided upon what he said, not under oath, while the rule is, that a judge can't use even knowledge within his own mind, much less obtain it from others, but must decide upon the affidavits. Better tell me at once to bring no affidavits into Court; for if Mr. Smith, or any such person shall even state to me that there is a different impression of the facts on his mind, you must fail as a matter of course. I could also recall cases, where the decision was, I believe, largely influenced, if not wholly based, upon information received privately from the wife of one of the parties by the Judge. Is this justice? I think a Judge in England would be a little startled to hear that a Judge in Nova Scotia listened to, much less decided upon, information obtained in this way.

"I was on more than one occasion almost tempted to bring these things to the notice of the Legislature, but I overlooked them, as I trust you will overlook anything in this, should there be anything in it not strictly within allowable limits. Your very obedient servant, T. J. Wallace."

The appellant stated, in the affidavit he afterwards made, that in writing this letter he had no intention whatever to impugn the conduct of any of the Puisné Judges of the Supreme Court, and no intention whatever of offending or insulting either them or the Chief Justice, his only object being to state in temperate language the grievances of which he felt he had reason to complain; but fearing afterwards that the course, taken under some degree of irritation, might be considered irregular or offensive, he had availed himself of an opportunity of meeting the Chief Justice to disavow any intention to offend or insult him, and offered to him a full apology.

Notwithstanding such apology, however, a rule of the Supreme Court was, on the 18th of July, 1865, without any motion to that effect by Counsel, drawn up on reading the letter, adjudging it a contempt of Court, and calling upon the appellant to show cause why he should not be suspended from practice as an attorney and barrister until he should make a suitable apology in writing, to be read in open Court, for such his contempt.

On the 22nd of July, 1865, the appellant appeared in person, and being called upon by the Court, showed cause against the rule *nisi*, upon an affidavit in which he related the circumstances under which the letter was written, and the fact that he had made an apology to the Chief Justice.

On the 29th of July, 1865, the rule was made absolute by the Supreme Court to suspend the appellant from practice as an attorney and barrister of the Court, without fixing any period for such suspension, or annexing any condition thereto.

The Chief Justice, the other five Judges being present, delivered the following judgment of the Court:—"The judgment I am about to pronounce is to be taken as the judgment of the whole Court; and having been submitted to my brother Judges, and met their approval, it is to be received as the unanimous expression of our opinions. The Judge of Probate at Halifax, having passed an order on the 10th of January, 1863, declaring that Wallace had been guilty of a contempt, committed by him in the face of that Court, and suspending him from practice therein as advocate or proctor, Mr. Wallace appealed from that order to the Supreme Court, and the appeal was heard before us in December last, when we decided, for the reasons assigned in a written judgment now on file, that the appeal having been taken under the Provincial Statute, and not by *certiorari*, could not be entertained; that Mr. Wallace had mistaken his course, and that the contempt, therefore,

was not judicially before us. In January last, having taken charge of the business for that month, Mr. Wallace moved me at Chambers to allow an appeal from the above decision to Her Majesty in Her Privy Council. As a matter of this kind, whoever the mover might be, affected more or less the privileges of the Bar, I thought it advisable to consult such of my brethren as were in town, all the Judges, in fact, being here, except Mr. Justice Dodd, then in Cape Breton, and they concurred with me in thinking, as the main question of a contempt had not been considered, and as the case on that account was not ripe for an appeal, that the appeal ought not to be allowed. The reasons for that decision were expanded in the written judgment already referred to, which was filed on the 24th of January in Mr. Wallace's presence, the instant it was delivered. On the 26th of the same month, Mr. Wallace thought fit to send to me the letter which has led to these proceedings. In that letter he not only impugns, in very offensive terms, my decision of the 24th of January, which appeared on the face of it to have been concurred in by the other Judges, but he assails also the judgment of the whole Court on his appeal in December from the Court of Probate. He then makes a general charge against the Judges, in language too insulting to be repeated, and winds up with a criticism, in the same style, on some of the pettier matters which I had decided at Chambers. A letter of this character from a practitioner to a judge of an English Court is an outrage which probably was never perpetrated before, and which it was impossible to pass over in silence. Neither was it a fit matter to be dealt with by any one Judge, and therefore I contented myself with stating, in the presence of Mr. Wallace and of the Bar at the next Chamber day, that I had received a letter of this extraordinary kind, and that, on the first day of the ensuing Trinity term, Mr. Wallace would be called upon to answer it. While the utmost boldness and liberty of speech and action are fully and freely conceded to every member of the Bar, as belonging to his position, and as essential to the rights of his clients, no less than to his own, and none on this Bench would attempt or desire to restrain them, on the other hand, a gentlemanly conduct, and a decorous and respectful treatment of the Judges of the land, in all intercourse between them and the Bar, must necessarily be observed by the latter. If the Judges can be insulted by language or letter addressed to them, and such a contempt of their persons and authority committed with impunity, their weight and influence would be lost, and, failing to vindicate the dignity of their office thus outraged, they would forfeit, and deserve to forfeit, the public respect and confidence so necessary to their character and the due administration of justice. It was this feeling, and the necessity thus imposed on us by the letter of Mr. Wallace, rather than any personal consideration, which has compelled us to take steps against him. On the 18th instant his letter was accordingly verified and filed, and we passed a rule *nisi*. By the terms of this rule, the offence of which he was guilty and the consequences to which it would subject him were stated, and the mode by which he might atone for the one and avoid the other. To any well-regulated mind, the opportunity so afforded for consideration and apology would have been all that was required. If through ignorance, or want of judgment, or the absence of proper feeling, in a moment of irritation, from infirmity of temper, or any other cause short of a deliberate intention to insult, such a letter had been hastily penned, time and reflection would have enabled the delinquent to see his error, and to make such reparation for it as was in his power. Let us see what course Mr. Wallace has pursued. On the 22nd instant he appeared in person to show cause, and was heard patiently and at length upon several objections to our proceedings. He urged, among other things, that the Court had no authority to move in this matter, except at the instance of a barrister; that there was no evidence of the letter having come into my possession, or how it had gone out of the possession of the writer; that the letter could not be construed into a contempt; that if it were a contempt it would not vindicate a suspension; and on these and other grounds of a technical kind, he insisted that he ought not to be called

upon. But Mr. Wallace entirely misapprehended his position. This was not a contempt for the non-payment of money, or for disobeying some order of the Court in the progress of a suit, but a contempt levelled at the Court itself, and which the Court has the authority and the right to adjudicate upon of its own motion, without invoking the aid of any barrister, upon the production of the obnoxious letter by the Judge to whom it was addressed. In *Lechmere Charlton's case* (2 My. and Cr. 316) Lord Cottenham, then Lord Chancellor, pursued the course we have adopted here. Letters having been addressed by Mr. Charlton, a barrister and member of Parliament, to one of the Masters of the Court of Chancery, and to the Lord Chancellor, of a highly objectionable kind, and reflecting upon the proceedings of the master in an inquiry then before him, his Lordship, after directing copies to be served upon the parties concerned (here there are no parties to be served), took notice thereof in open Court, and after declaring that the letter to the Master contained scandalous matter, and that the conduct of Mr. Charlton, in writing the two letters, was a contempt of the Court of Chancery, passed an order that he should show cause on a certain day, why he should not be committed to the Fleet prison for his contempt. Mr. Charlton having failed to show cause, the Chancellor, after remarking that every writing, letter, or publication, which has for its object to divert the course of justice, is a contempt of the Court, and that every insult offered to a Judge in the exercise of the duties of his office, is a contempt, concluded by ordering Mr. Charlton's committal. This was effected at a subsequent day, and the House of Commons having refused to interfere, and Mr. Charlton having made a suitable submission, and expressed his contrition for the offence he had committed, he was discharged, after having been in prison for three weeks. It will be seen, therefore, that we have guided ourselves by a precedent of high authority, while our right to substitute a suspension from practice for imprisonment is too clear to be disputed. It is proper also to add, that we have looked into the cases of *Smith* v. *The Justices of Sierra Leone* (3 Moore's P. C. Cases, 361; and 7 Moore's P. C. Cases, 174), *In re Downie and Arrindell* (3 Moore's P. C. Cases, 414), in the Privy Council, cited from 3rd and 7th of Moore's P. C. Cases, as well as several others to be found in 1st Knapp's Reps., and 1st and 8th Moore's P. C. Cases. In addition to the technical and other grounds we have thus disposed of, in the place of the apology, which, as I have said, this Court might reasonably have expected, and which any judicious adviser would certainly have recommended, Mr. Wallace produced an affidavit made by himself, which aggravates his offence, and is an accumulation of fresh insults. Had we thought fit, we would have been justified in refusing to receive this affidavit, or in interrupting him while reading it. As we had already pronounced his letter to be a contempt, it was not competent for him to attempt a justification, and he could show cause only by denying, if he could, or if possible, explaining away or extenuating his offence. But we preferred affording him a full hearing, and as no letter or affidavit of his could touch the reputation of this Bench, or any member of it, we allowed him to go on without interfering. This affidavit is the more inexcusable because in the nature of things it could not be answered. Parts of it are founded upon hearsay, which is not evidence, and in the most trifling matters is not admissible in this Court. Parts of it rest upon the mere assertion of Mr. Wallace, at variance with all our impressions and recollections, but in which he must pass of course uncontradicted. And much of it relates to recent transactions in the knowledge of one or other of the members of the Bar, or of the officers of the Court, and which are represented in a manner quite inconsistent with the facts, and with the papers on the file. We content ourselves with these general observations, for it is obvious that to descend into details, and stoop to a vindication of this Court, would be a complete surrender of its independence and its dignity. If Judges forget their duty, if they lay themselves open to imputation, and are amenable to censure, adequate remedies are provided by the law and constitution of the country. A single Judge at every step is subject to control. Every

charge he delivers to a jury, every order he signs at Chambers, every taxation of costs, every judicial action, and every refusal to act, may be appealed from to his brethren; and for the higher breaches of duty by one Judge, or by all the Judges, there are the means of constitutional redress. But this is the first time that Judges have been assailed in their own Court by a practitioner, when invited to atone for a contempt, putting on the files an affidavit which in every paragraph is a new offence. It is evident that no Court, having a just regard to its position, could permit such an affidavit to remain among its records, and, therefore, we direct this affidavit to be taken off the file. In conclusion, we have only to repeat that we would willingly have been excused from moving in this matter. We have not been actuated by personal resentment, nor by any apprehensions that Mr. Wallace's actions or censure in any shape could possibly excite. We have looked only to what was required for the due administration of the law, and while there has never been any difference of opinion or doubt among ourselves as to what was necessary and proper to be done, we have taken care that ample time should be afforded to the party to reflect upon his position, and avert the consequences he has drawn down upon himself. We have no alternative now but the performance of an imperative duty in directing the following rule to be filed."

The rule *nisi* was then made absolute in pursuance of the judgment, suspending the appellant from practice as an attorney and barrister in that Court.

The appellant applied to the Supreme Court for leave to appeal to Her Majesty in Council, when the following judgment of the Court, giving leave to appeal, was delivered by the Chief Justice, the other five Judges being present:— "Mr. Wallace having moved in person for leave to appeal to Her Majesty, in Her Privy Council, from the rule made on the 29th ult., suspending him from practice as an attorney and barrister of this Court, for a contempt thereof; we have referred to the order of Her Majesty in Council of the 20th of March, 1863, making provision for appeals to Her Majesty in Council from this Court; and from the terms in which that order is drawn, as well as from the cases decided in the Privy Council, we are of opinion, that the order in Council does not extend to such cases, and that it is incumbent on Mr. Wallace to apply to Her Majesty, in the first instance, to admit his appeal. But, inasmuch as Mr. Wallace has applied to us for such leave, complaining of the injury and delay to which our refusal would subject him, we have decided on giving him such leave, so far as we have power and authority so to do, not requiring from him any security for costs, but leaving him to act as he may be advised therein, or as Her Majesty may see fit to order."

The appellant brought the present appeal, but in consequence of the judges of the Supreme Court announcing that they would not appear, the appeal was heard *ex parte*.

Sir *Roundell Palmer*, Q.C., and Sir *T. D. Archibald*, for the appellant:—The order making the rule absolute suspending the appellant from practising as an attorney and barrister in the Supreme Court at Halifax, until he should have a suitable apology, is illegal as well as oppressive. The contempt, if any, committed by the appellant, in writing the letter of the 26th of January, 1865, to the Chief Justice, was not committed by him in his professional character as an attorney or barrister, nor was it a contempt committed in open Court. It was a private letter written by him in his character of a suitor, and is in no respect a public document; and if anything unguarded and disrespectful was contained in it, nevertheless the apology contained in the letter, begging the Chief Justice to overlook anything, if there should be anything in it not strictly within allowable limits, ought to have satisfied the Chief Justice; but the subsequent verbal apology made, as sworn to by the appellant, was an ample expiation of the supposed offence. This was not a case of professional misconduct, coming within the decision of this Court in *Bunny* v. *The Judges of New Zealand* (15 Moore's P. C. cases, 164), nor is it similar to *Lachmere Charlton's* case, relied upon by the Judges in the Court below, as the letter there, besides being intemperate and insulting, contained a

threat against an officer of the Court. We submit that there is an absolute denial of justice in this case, for the rule absolute allows the appellant no means of purging his contempt; but, without disbarring him, or striking him off the rolls of the Supreme Court as an attorney, improperly suspends him from practice, indefinitely, and during the pleasure of the Court. The practice is to fine for contempt of Court:—*The King* v. *Clement* (4 B. and Ald. 218); *In re Pater* (33 L. J. [N.S.] M. C. 142). The demand for a written apology to be read in open Court, which the rule *nisi* required, was unprecedented and unusual; the only instance of such a requirement was in *Carus Wilson's case* (7 Q. B. Rep. 984), which was under totally different circumstances, and was decided by the law of Jersey, and not the law of England and the practice of our Courts, which prevails in the Supreme Court at Halifax; that Court having the same powers as are exercised by the Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer in England.

Lord Westbury:—The appellant in this case is an advocate and also an attorney, admitted to practice in the Supreme Court of Nova Scotia. It appears that he was also a suitor in that Court. In two or three cases in which he was such suitor he seems to have supposed that he had reason to complain of the conduct of the Judges of the Court, and he accordingly wrote a letter, addressed to the Chief Justice, reflecting on the Judges, and on the administration of justice generally in the Court; which undoubtedly was a letter of a most reprehensible kind. This letter was a contempt of Court which it was hardly possibly for the Court to omit taking cognizance of. It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor; and it had no connection whatever with his professional character, or anything done by him professionally, either as an advocate or an attorney. It was a contempt of Court committed by an individual in his personal character only. To offences of that kind there has been attached by law and by long practice, a definite kind of punishment, viz., fine and imprisonment. It must not, however, be supposed that a Court of justice has not the power to remove the officers of the Court if unfit to be entrusted with a professional status and character. If an advocate, for example, were found guilty of crime, there is no doubt that the Court would suspend him. If an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the roll. But in this particular case there is no *delictum* brought forward or assigned, except that which results from the fact of addressing an improper and contemptuous letter to the Chief Justice of the Court, in respect of something supposed to have been done unjustly to the writer in his private capacity as a suitor. We think, therefore, there was no necessity for the Judges to go further than to award to that offence the customary punishment for contempt of Court. We do not find anything which renders it expedient for the public interest, or right for the Court, to interfere with the *status* of the individual as a practitioner in that Court. In that respect, therefore, we think that the Judges departed from the course which ought to have been pursued, by adopting a different description of punishment from the ordinary punishment for offences of this nature. When an offence was committed which might have been adequately corrected by that punishment, and the offence was not one which subjected the individual committing it to anything like general infamy, or an imputation of bad character, so as to render his remaining in the Court as a practitioner improper, we think it was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally, and which act, *per se*, did not render him improper to remain as a practitioner of the Court. On this ground, therefore, we do not approve of the order. At the same time we desire it to be understood that we entirely concur with the Judges of the Court below in the estimate which they have formed of the gross impropriety of the conduct of the appellant. But we are still of opinion, that his conduct did not require and did not authorize a departure

from the ordinary mode and standard of punishment; and upon that ground, and that ground only, we shall advise Her Majesty to discharge the order, in respect of its having substituted a penalty and mode of punishment which was not the appropriate and fitting punishment for the case in question. Law Rep. 1 P.C. 283–296.

MONTHLY NOTES.

Superior Court—May 9.

Darling et al., v. Lewis es qual.

Customs Act—Cash Discount.

Monk, J. This was an action against the defendant in his then capacity of Acting Collector of Customs at the Port of Montreal, claiming four boxes of hardware, detained by him for additional duty thereon; and in default of the goods being given up, asking that the defendant be condemned to pay the value thereof, with damages. These goods had been imported by the plaintiffs from the United States, and a question arose as to whether the plaintiffs were entitled to deduct ten per cent, which appeared on the face of the invoice, and which was alleged by them to be a trade discount, and therefore not subject to duty. The Customs appraisers maintaining this to be a cash discount, the point was referred to Messrs. Ferrier and Crathern, as arbitrators under the provision of the Statute. These gentlemen rendered an award to the effect that the actual cost and market value of the goods was the net amount stated in the invoice, no reference being made to the nature of the discount. The Acting Collector was not satisfied with this award, and still detained the goods, whereupon the plaintiffs instituted the present action. The plea was that this ten per cent was a cash discount, and could not be taken off; and further, that the award was illegal, and not such as the law required. The Court had to decide whether this was a trade or a cash discount, and, if a cash discount, whether the award was legal. In the first place, the presumption was that this was a cash discount. Further, the Court had in evidence the circular of the plaintiffs, in which it was stated that the ten per cent was for cash. So far from the pretension of the plaintiffs being sustained by the evidence, it was perfectly clear that the ten per cent was a cash discount. This preliminary question being settled, it remained to be determined whether the award was legal and final. The award stated that the market value was the net amount of the invoice, and this seemed to be in favour of the plaintiffs. In a note to the award reference was made to a letter addressed by the shippers to the plaintiffs, in which it was stated that the ten per cent was a cash discount, and that the plaintiffs never sold on credit. The defendant objected that this could not be received, unless the contents of the letter were sustained by proof, and his Honor was of opinion that the letter in question was utterly valueless as testimony, and he was bound to say that the award was not such as the law required. It must, therefore, be set aside, and the action dismissed with costs.

Cross & Lunn, for the Plaintiffs.

Pominville & Bétournay, for the Defendant.

Hopkins v. Thompson.

Architect—Plans according to conditions.

Monk, J. This was an action brought by an architect to recover the value of his services in the preparation of plans for a church. It appeared that letters were addressed on behalf of the congregation to the plaintiff and three other architects, inviting them to submit plans for the proposed edifice. Certain restrictions were imposed; the cost was not to exceed $32,000. If the plan was rejected the competitor was to receive only $50. The letter to the plaintiff and the other architects was drawn up with a minuteness and precision calculated to put them on their guard to observe the conditions imposed. The plaintiff, among others, prepared plans in accordance with the terms imposed, but all the plans sent in were rejected, except those of Mr. Thomas, and it appeared that his plans were not in accordance with the conditions stated. When this fact became known to the other architects, they appeared to be much dissatisfied, and the plaintiff, one of their number, had instituted the present action for the *quantum meruit* of his services, refusing to accept the $50 offered. The question, then, for the Court to

determine was whether Mr. Hopkins was entitled to his *quantum meruit*, or only to the $50. It was contended in the plea that the congregation had reserved the right to reject the plans. The Court, however, had arrived at the conclusion that Mr. Hopkins was entitled to his *quantum meruit*. He was restricted to a certain price, and it was fully established that this restriction involved a great deal of extra labour and care. The defendants contracted with Mr. Hopkins that if he sent in plans which were satisfactory, he should have the work. He sent in plans accordingly, but the defendants accepted other plans which were not at all in conformity to the conditions. In doing this they violated the contract, and thus put an end to honest competition. If there was no competition, what remained? Why, the plaintiff must recover the value of his services, which were proved to be equal to one per cent, amounting to $320, for which he would have judgment, with costs.

H. Stuart, Q. C., for the Plaintiff.

S. Bethune, Q. C., for the Defendant.

BERTRAND *v.* BRAIS.

Pilot—Negligence.

MONK, J. This was an action of damages against a pilot, brought by the captain of a barge. The plaintiff had a barge loaded with eighty-four cords of wood at the Cedars, and he sent for the defendant and asked him whether he would agree to pilot him through the rapids. It was contended by the plaintiff, in the first instance, that Brais had come to him and offered his services, and that an express agreement was then entered into, that the defendant was to take the barge through the rapids for $4. As a matter of fact, the defendant did take charge of the barge on the 15th July. They left the Cedars about three o'clock in the afternoon, the weather being fine, and got well through the first rapid. Then the question arose as to going through another rapid. Brais did not follow the course he had taken on previous occasions, but attempted to take another channel, and the upshot was that the barge struck, the wood was thrown overboard, and the barge was considerably damaged. Now, the captain brought an action against the pilot for the value of the wood and for the cost of repairing the barge. The defendant said he never undertook to guarantee the plaintiff; and, in the next place, that the plaintiff refused to cast anchor when he told him. The first question the Court had to determine was, whether there was a contract—whether the pilot entered into a contract to pilot this barge through the rapids? It was contended that there was an implied contract to this effect, and for this reason, because on two occasions previously the defendant had piloted the plaintiff's boat down for the same sum. His Honor had come to the conclusion that there was an implied contract. Brais must be looked upon as a professional man, and held responsible for any neglect or want of skill. The duty of a pilot was to know his business well, and to exercise all possible diligence. First, as to the defendant's skill, the testimony was unanimous and conclusive. On the second point —whether he had exercised all the diligence that could be exercised—the Court had had a great deal of difficulty. The first feature to be noticed was that he did not go down the channel which he had gone down twice previously in safety. The case looked as if there had been a want of proper care, as if there had been negligence. The defendant was bound to exercise the utmost diligence. It was said the captain had absolved the pilot from the consequences, when he refused to anchor. Stated as a general principle, this was true; but we must look at the position of matters. The vessel at the time the order was given, was bounding over the rocks. There would have been great danger in casting anchor. His Honor was clearly of opinion that the order to cast anchor came too late, and that no captain, with the responsibility on him of the life of his crew and of himself, and the safety of his cargo, would have been justified in obeying such an order at such a juncture. The pilot must be held responsible, but in what amount? The plaintiff claimed the value of the repairs, and of the wood. This was too much. The evidence showed that he was in too great a hurry in throwing out the wood. He might have saved it. The pilot would not be held liable for the cargo, but he must pay

for the damage to the vessel, which would be assessed at $120, with costs of the action brought.

Dorion & Dorion, for the Plaintiff.

Cartier, Pominville & Bétournay, for the Defendant.

SUPERIOR COURT—March 30.

STEVENSON *et al. v.* MCOWAN.

Right of Capias concurrently with an assignment.

MONK, J. This was an application on the part of the defendant to be discharged from imprisonment under a *capias*. He was arrested on the 25th October last. He had been carrying on business in partnership with one Drummond, as shoe merchants. They took stock in April, 1866, by which it appeared that they had a large surplus over all their liabilities. They took stock again on the 9th September; made large purchases in October, and on the 25th of that month, after a desperate struggle, they found it necessary to suspend. They called a meeting of their creditors on the 25th. Drummond appeared at the meeting. It turned out that their liabilities had been gradually increasing, although there was no evidence of extraordinary losses. On 25th October, their liabilities amounted to $25,170, and their stock to about $10,000. At the meeting of the creditors Drummond could not give any satisfactory account of their affairs, and he declined to make an assignment till he had conferred with his partner, McOwan, who was his cousin, and appeared to have been most active in the management of the business. They did not seem to have had much money on beginning business. Drummond put in $2000, and McOwan $1000, which Drummond said he never saw anything of. After the meeting the plaintiffs thought it prudent to have McOwan arrested. The arrest was apparently made almost simultaneously with the deed of assignment which bore date the 25th October. The *capias* was was based on affidavit, and a motion was made before Mr. Justice Berthelot to quash the *capias* on the ground that the affidavit was insufficient. The Judge was of opinion that the affidavit was fully sufficient in law; and although the allegations respecting the defendant's secretion of his property were chiefly matter of inference, yet upon the whole, the facts stated in the affidavit were of such a character, that no judge could quash the *capias* on the ground of insufficiency of allegation in the affidavit. The reasons assigned in the affidavit were mainly as follows: That McOwan had previously secreted his estate, debts and effects; that although a number of his creditors attended the meeting, yet McOwan had failed to attend, and kept out of the way. His partner, Mr. Drummond, attended, and failed to give any statements, that he represented the assets of their firm to be only $10,000, and their liabilities at over $27,000, although in the month of April preceding, the firm of John McOwan & Co., represented themselves to be worth over $14,000 of a surplus. That neither of the partners had shown what had become of their assets, although thereto requested, and they had refused to make any assignment for the benefit of their creditors. The affidavit was probably made before the assignment was completed. These allegations were substantially sustained and proved by the evidence. Upon this state of affairs, two questions arose: 1st. After a man has made an assignment of his estate, or simultaneously with the making of an assignment, can he be arrested for secreting his property previous to that time? It was argued for the defendant that the Insolvent Act of 1864 did away with the *capias* when once an assignment had been made. On the other side it was contended that there was no enactment expressly doing away with the remedy by *capias*, and in the absence of an express enactment, it still existed. It was stated that Mr. Justice Berthelot had decided that when once an assignment has been made, there is no right to *capias*. His Honour had consulted with his colleague and found that what he said was, that he did not see much use in the *capias* after the debtor had made an assignment, but he went no further than that. He (Mr. Justice Monk) thought the *capias* had not been done away with, more especially in a case like the present where

the secretion took place previous to the assignment. He was clearly of opinion that inasmuch as there was no express abolition of this remedy by the Insolvent Law, it still existed concurrently with the particular procedure under that law. The next question was, was there any evidence of fraud or secretion to justify the *capias*? The affidavit stated no particular acts of fraud or secretion; it merely alleged the gradual diminution of the assets and increase of liabilities. This alone would perhaps hardly justify the Court in deciding that there had been fraudulent secretion; but there was something more in evidence. After Mr. Brown, the assignee, had come into possession of the estate under the assignment, he was informed by parties who were thoroughly familiar with the facts, that there was a considerable amount of property, and this property had actually been removed from the defendant's store previous to the assignment. Mr. Brown acted on this information, and found at the house of one Holmes, in St. Joseph street, a large quantity of goods which should have been at the store, and put into the hands of the assignee. His Honour had no hesitation in saying that this was an act of secretion. The whole circumstances were such as to leave no doubt that there was systematic fraud, and that there must have been considerable abstractions of property. The case was clearly made out, and therefore the petition for discharge must be refused with costs.

Cross & Lunn, for the Plaintiff.
John Popham, for the Defendant.

LEGAL STATUS OF THE CHURCH OF ENGLAND IN THE COLONIES.

As this subject is one of general interest to all denominations, we give the following report of the speech of Mr. S. BETHUNE, at the last meeting of the Church Society.

The CHAIRMAN having announced that an address would next be delivered by Strachan Bethune, Esq., Q.C., Chancellor of the Diocese of Montreal, on "The progress, present state, "and prospects of the Colonial Church, with "special reference to the Church in Canada,"

Mr. BETHUNE rose, and after some introductory observations respecting the difficulty of treating so comprehensive a theme within the limits of a brief address, proceeded to say:—The first Colonial Bishopric created was that of Nova Scotia, and that not very far back, namely, in the year 1787. At the beginning of the present century the Colonial Church could only boast, throughout the whole world, of two Bishoprics. At the end of the first quarter of the present century, they could only claim four; at the end of the second quarter, in 1850, this number had been increased to twenty-one, and at this day they claimed to have forty-two. If success were to be measured by numbers, it would be imagined that the Church must have been extremely successful; but unfortunately you are aware that notwithstanding all the efforts to plant the Church throughout the Colonies, difficulties have arisen of late years which have thrown a cloud over that Colonial Church. I allude of course to the decisions of the Privy Council in the now famous cases of Long and Colenso. In the first of these cases, which may be considered as the leading one, the Judicial Committee decided that letters patent issued by the Crown, after the establishment of a constitutional Government in a colony, are ineffectual to create any ecclesiastical jurisdiction. From the decision in this case and the one of Colenso which followed, it was generally considered that, as it was held that the Metropolitan Bishop of Capetown had no jurisdiction under the letters patent appointing him such, because of the want of ecclesiastical jurisdiction in the Crown in the colony of the Cape of Good Hope, so also, for the same cause, the letters patent appointing Colenso to be Bishop of Natal equally failed to confer ecclesiastical jurisdiction upon that functionary. And yet, in the recent case of Colenso against the Trustees or Treasurers of the Colonial Bishoprics fund, for the recovery of his salary as Bishop of Natal, and which had been withheld from him on the ground that his appointment under letters patent conferred no territorial jurisdiction whatever, Lord Romilly decided, that notwithstanding anything that had been determined by the Privy Council, Colenso was *de facto* Bishop of

Natal, and for that reason entitled to recover the amount of his salary. In Canada, however, the position of the Church was, happily, very different. The first Colonial Bishopric, as I have already said, was that of Nova Scotia, from which we had started in this country. Originally the Church in Canada was so insignificant that it was served from the Bishopric of Nova Scotia and formed part of its Diocese. This continued till 1793 when the Bishop of Quebec was consecrated; in 1839 the Bishopric of Toronto was added by taking off a part of the Diocese of Quebec, and in 1850 our own Diocese was created by letters patent. Our position was different from that of most of the other Colonies. In the Act of 1791, in which provision was made for the better government of the Province, reference was specially made to the patent of the Bishop of Nova Scotia, and all his rights and privileges were specially reserved to him and to his successors. Then we pass on to the Diocese of Quebec, created in 1793, succeeding in direct line to the Diocese of Nova Scotia, and succeeding to all the powers of the Bishop of Nova Scotia, and then to the patents of the Bishops of Quebec, Toronto and Montreal. With respect to the patents of the three bishops last named, it is enough to say that their patents have been repeatedly referred to and recognized in Provincial Acts of Parliament, and have to all intents and purposes been amply confirmed by actual and positive Provincial legislation. The next step in the progress of the Church in Canada was the passing of the act in 1857 which authorized the bishops, clergy and laity in this Province to assemble in Synod. The Diocesan Synods were immediately organized, and very soon after the Bishop of Huron was elected under the provisions of that act. The act being a new one, and all of us in this country and in England being accustomed to the issue of patents, the Bishop of Huron went to England, and there received the confirmation of his appointment by Royal letters patent, and was consecrated in the usual form. Not many years after, a separate diocese was created—that of Ontario; and the Bishop of Ontario having been elected by the Synod of the Diocese of Toronto, out of which the new diocese was formed, doubts had begun to be entertained in England, and instead of a patent being issued, a simple mandate from the Queen was sent out to the Metropolitan Bishop of Canada, directing him to proceed to the consecration of the Bishop of Ontario. In this there was a complete deviation from the old practice. Not only was the Bishop of Ontario consecrated in this country by our own Metropolitan, and on a simple mandate from the Queen, but the oath he took on that occasion was obedience to the Metropolitan of Canada and not to the Archbishop of Canterbury. In the same way, when the vacancy occurred in Quebec, his Lordship now presiding was consecrated Bishop under simple mandate for the Crown, taking the same canonical oath that the Bishop of Ontario had previously taken. Recently, another election, that of Coadjutor Bishop of Toronto, had taken place in this country. The appointment was forwarded to Her Majesty for confirmation. The document reached England while the Metropolitan was there, and attention having again been drawn to the subject, Lord Carnarvon said, that having consulted the law officers of the Crown, her Majesty was advised that her jurisdiction in these matters in Canada had entirely ceased, and that the Metropolitan of Canada might proceed to the consecration of the Bishop of Niagara without further authority. Accordingly, the Metropolitan had issued an order to the Bishop of Toronto to proceed without delay (and with the assistance of two or more bishops) to the consecration of the Bishop of Niagara. It will thus be seen, from the brief narrative I have given of the progress and present state of the Church in Canada, that the Canadian branch of the Church of England is now completely and forever emancipated from all State jurisdiction or control whatsoever; and is left free and unfettered in the management of its own affairs, including the appointment and deprivation from office of even its highest dignitaries. In its present condition, therefore, the Church in Canada has been made to resemble what the Church at large was in the very earliest ages of Christianity—a church, in all respects, acting by its own inherent power,

and in no way dependent on any extraneous or foreign authority. Such a position was indeed a proud one for Canada to occupy, for it undoubtedly placed her foremost in rank and independence of all the branches of our Anglican communion, next after that of our great sister branch in the United States of America. That the Church in Canada is destined, ere long, to play a very prominent part in the great efforts now being made to secure increased unity and uniformity throughout the whole Christian Church, I entertain a very strong conviction, and I am confirmed in this view by the effect already produced in England by the presentation of the address of our Provincial Synod to the Convocations of Canterbury and York, in which address occurs this remarkable suggestion: "Let all the members of our Anglican Communion throughout the world have a share in the deliberations for her welfare, and be permitted to have a representation in one general council of her members gathered from every land." Cheering as the prospects of our own particular branch of the Church undoubtedly are, I am free to admit that the disjointed condition of the other Colonial branches does not present so fair a picture, nor indicate so bright a hope of ultimate success. But when we reflect on the terrible struggles of the American branch of the Church of England during the progress of that gigantic revolution which wrested from Great Britain her old thirteen colonies, and for a considerable time after its consummation,—when we bear in mind that until the year 1784, when Bishop Seabury was consecrated to be their first Bishop, they were wholly without a pastoral head, and were indeed well nigh prostrate and overwhelmed,—and when, from such comparatively recent beginnings, we see a Church of the dimensions and influence of that which is now so firmly established in the United States, we cannot but confidently hope that God, in His all wise Providence, will speedily deliver our Colonial brethren from their present sad and deplorable condition. And, for my own part, I cannot but think that the Church will ere long prove itself entitled to that character of stability so eloquently expressed by the immortal Burke:

"Her fortifications, her walls and her bastions are constructed of other materials than of stubble and of straw. They are built of the strong and staple matter—of the Gospel of liberty. She has securities not shaken in any single battlement, in any single pinnacle."

But, it has been said, that as we are now separated from the controlling power of the Church in England, we have ceased to belong to that Church. This proposition I entirely dissent from. All that has been done is to separate us from the jurisdiction or control of the Crown as the supreme head of the Church of England. Suppose, then, that for any cause a like separation should occur in England itself, would any one seriously contend that the Church was less the Church of England than it was before? Undoubtedly not. Why, then, should only a branch of the same church, with Bishops having regular succession from the Bishops of the Church in England, using the same Liturgy, acknowledging the same ordinances, professing the same faith and doctrine, and maintaining the same discipline, be less an integral portion of the Church of England? For myself, I cannot see in what the distinction claimed for can consist, and I therefore maintain—and I trust shall always have reason to maintain—that we are verily and indeed an integral portion of the dear old Church of England. In bringing these remarks to a close, I cannot better do so than in the eloquent language of one of the ablest of the American Church historians, when alluding to the separation that took place at the time of the revolution:

"No violent disruption of the sacred bond took place. The daughter glided from the mother's side because in the allotment of Providence she had been led to maturity and independence, but the spiritual reunion, the union of faith, of worship, and of discipline was undestroyed; and God grant that it may prove indestructible." [Hear, hear, and cheers.]

—Mr. Justice CARON, one of the Codification Commissioners, having resumed his seat as a judge of the Court of Queen's Bench, Mr. Justice MONDELET has returned to the Bench of the Superior Court at Montreal.

THE U. S. JUDICIARY.

(*Continued from page* 24.)

This judiciary, therefore, on which we have relied, is not, in its best state, beyond danger. It is capable of great misuse, even under the cloak of subordination and submission to principle. Honestly and conscientiously administered, it is conservative in its influence, an asylum for the oppressed citizen, a refuge to which the injured and alarmed may fly with confidence. It may be laughed at for its old-fashioned adherence to the books, for its ties to feudal absurdities, for its weakness for precedents, for its want of a progressive and venturous spirit; but it has the confidence of every citizen. Angry passions submit to its judgments, and fear and despair never enter within its doors. In all the jangling and discord of weak and ill-contrived machinery of government, this is the balance-wheel which adjusts and harmonizes what, but for it, would be wholly unmanageable.

Put this power into unprincipled hands, and what shall we have? The balance-wheel will become a contrivance for accelerating the ruin of the system. At first under a cloak of submission to legal theory, then without any cloak at all, private revenge, personal outrage, corrupt contrivances, will have full sway. The bench will be the tool of a party; but even this, bad as it can be, will not be the worst. Party ties are strong, but the lure of gain is stronger. To the unprincipled politician no sympathy or affinity avails against the hunger for corrupt acquisition. Those who fight and wrangle at the polls with a fierceness which seems as if it never could admit of reconciliation, are natural conspirators to cheat and defraud. Legislative rings are most formidable when they are combinations of both parties. The unscrupulous judge will become the bully of dangerous organizations, the tool in power, ever ready and reckless with process to suit the emergency. The warrant and attachment will become as formidable to our liberties as they could be in the hands of the veriest tyrant; and property and morality will have to fly, or come in with violence, and right the state by revolution.

Though, while one state has been following another in making the judiciary elective, the change has been the cause of a most serious anxiety to impartial and reflective minds; though it is a system necessarily fraught with danger, and sooner or later the results just pictured must, perhaps, happen, it is a very interesting subject for reflection by what causes these results have been so fortunately postponed. Certain it is that the downward tendency of this department has by no means kept pace with that of the others. While legislatures have become, as a rule, corrupt, the bench has been measurably decent and respectable. The stream of justice has run with comparative purity. Reports of new cases may, perhaps, not be of such ripe authority as those of the old; political questions may have disturbed judicial harmony; patronage may have demoralized official tone and influence, and what the English attorneys style "hugging the judges" may not have been sufficiently discouraged; nepotism may have passed the limits of good taste and judgment; prejudices, tempers, weaknesses, or eccentricities may have been permitted to appear so decidedly that the lawyer has been tempted to adroitness in picking his judge for his case; but in the main we have been fortunate. The evils of the elective system have certainly never yet equalled our fears.

What are the causes of this peculiar safety of the judiciary? Does the elevation of the lawyer to this high and prominent position lift him above human infirmities and temptations? Does he acquire a nature different from that which he had in the busy walks of his profession? Certainly not. He has, perhaps, obtained the place by that personal exertion which is now the rule with all candidates for office. He may have had his gloves off, and his feet in the mire, and been down with the lowest of the low, where election frauds are plotted, and the roughs are hired to carry them through. He is affected by all the afterbirths of such work. He feels the bondage of a debt to the vile, and dreads the worse than curses which reward the ungrateful politician. He knows the power of the dangerous classes who come before him,—the fierceness of their unscrupulous antagonism,—how long their vengeance waits,—how every session of his

court may be pregnant with effect upon that day when he is to ask for a re-election. If he has strength to resist, it is not from want of perception, it is not from force of character, it is not from indifference to results.

From whatever cause it may arise there is a popular reverence for the bench, which pervades all classes, and will survive much political degradation. The practice of the law is an "art and mystery," and those who are engaged in it get the benefit of a respect for the machinery they use, if not for themselves. An absurd result of this very respect is the taunt so often flung in our faces that the lawyer is in league with the devil. It is the layman's bitter admission of his own ignorance and inferiority. With that communion with the wisdom of ages which these well-known books afford; with that power to put in motion process which cannot be resisted; with the unknown significance of those motions granted or denied, on which such important results seem to turn; with that singular cordiality between the brethren at the bar, who in the next moment are battling *à l'outrance*; with that immediate deference to decision which in other places would lead to suspicion of indifference or treachery; with a thousand things that he sees and hears, the client has none of the ordinary relations of intelligence. A lawsuit is a game in which he is deeply interested, but which he does not understand. No wonder that he has a respect, much of which is fear, for such a system; and at the head of that system is the judge, lifted above all others, protecting the dignity of his calling, moderating excitements, strong behind his power of punishment, with the last word in every matter, and that word final for the time.

The reverence of years thus acquired is not so easily overthrown. It is endangered by our habits and manners; its gloss has been tarnished by our elective system; by that familiarity between candidate and constituent, which only the politician understands; by the very asking for office, and using the common means of getting it; but it still exists in the mind of the citizen. A singularly strong proof of this is presented by the fact, that, in the midst of the most violent contests, when all around him party lines are drawn with the utmost strictness, and proscription is inflexible, an honest judge is often re-elected by acclamation. It is the living up to this appreciation of the community that tends to support the judge, and give him power to resist evil influences. In the mere calculation of majorities, if he chooses to descend to that,—the balancing of political hazards in view of the time when he is next to come before the people, he cannot be ignorant that, though in candidates for other offices, vice and even crime are often recommendations, to him the greatest danger of all is to throw himself out of the region of decency.

But he has other aids in his struggles against temptation, or rather his office has other protections against disgrace. The training of the bar is a strong conservative influence. It is less so than it was under the more thorough and laborious course which was prescribed in that country from which we took our common law; but even here, superficial as it is, it has strong power to shape and mould the character. From the time when he first opened the pages of Blackstone, at the commencement of his clerkship, to the time when this step of his ambition is reached, his mind has been filled with dreams of rivalling men who rose by honorable exertion; heroes of the bar of incorruptible lives; men lifted mainly by their own brethren; men who passed through all professional ordeals, first in integrity as well as power, and who came to the bench ripe in everything that could win esteem. Maxims of high tone, legends of professional pride and dignity, stories of battles for professional right, and manly struggles for professional pre-eminence, hours with associates of the same dreams and the same aims, a legal atmosphere, legal instincts, these work together in the lawyer's training. If what is received falls upon proper ground, if it grows with wholesome growth, it is easy to see how it may lift the learner to a new standard, and imbue him with principles from which he cannot break away. The well-trained lawyer receives a moral momentum in a course from which he cannot be turned without violence to a thousand ties and associations.

To one who has been rewarded by its best

honors, lifted to its highest place, the scorn of the bar must be intolerable. Its members were once more united than they are now. By want of association they have lost power and influence. But as it is, no one who has ever been of it can stand up against its contempt. The desire to retain its esteem is no mean support to the judge. The most of its members are brave and manly, far above mean sycophancy to the dispenser of patronage, and though patient and forbearing, slow to action and willing to forgive, they are ready and able, when the crisis comes, to speak with an emphasis which cannot be treated lightly. If an erring judge is capable of disregarding such a rebuke; if neither the training to which he has submitted, the pride of his science, or the respect of his brethren, can influence him for good, he is vile indeed; a fitting tool for the enemies of all law and decency.

To secure the safety of the judiciary, therefore, the candidate for the bench must be imbued with the learning of the bar, with its spirit of fraternity and subordination, with its legends and instincts, its confidence in its own organization, the desire which each member has for the respect of all the rest; and such a candidate is to be found only among those who lead in learning and integrity.

Heretofore the judges have, by a sort of common consent, been chosen from among practising lawyers. It might have been otherwise, however. Even in those localities in which it is required that candidates for the bench shall be taken from the bar, it would be easy for designing politicians to evade the rule. Our communities are full of men who have been admitted to practice, but who have been driven from it, or drawn away by other pursuits, and have lost all professional tone and all professional acquirement. From among these, candidates might be sought by those who desire a corrupt and subservient judiciary, and we should lose all those grounds of reliance which have just been enumerated.

But from a singular deference to the common sense of the community it has been generally conceded, if not by expression, by action, that this office is to be treated differently from others. In the midst of the most exciting political struggles, in which, for all other purposes, the lowest agencies have been at work, the bench has been rescued from contamination by being left in the hands, mainly, of the bar. The politician has drawn off, in a measure, from this field, and surrendered it to the profession most directly concerned and interested; and it is to the credit of that profession that in exercising this duty, it has been lifted in the main, far above the considerations that involve themselves with all other portions of the political struggle.

However we may turn, then, with disgust from other fields of political contest, let us not surrender our rights here. Our interest and our duty unite to require vigilance in these elections. With the bench as degraded as the legislature, what are the privileges and honors of the bar worth? When the day shall come in which the client in selecting his lawyer shall do so because he is the son of a judge, or helped a judge into office, or is his friend, favorite, or tool; when learning shall be as nothing before unscrupulous influence; when the highest skill shall be shown in picking the judge for the case, and moulding him by adroit manipulation; when learning shall go down before trick and cunning, and honor and integrity shall be at a discount; when the judge shall drink with the politician, and spend his nights with the gambler and debauchee; when libraries shall become useless, and our three years' training a waste of time; when roughs shall take out licenses to practise, and jostle and threaten us with impunity in the very halls of justice, who that has any pride or decency will practise himself or rear his child to the bar? All these things may be near if we shrink from the struggle, or forget, among the cares and emoluments of practice, the dangers to which we are exposed.

But there is another motive which should operate with each one of us. For ages this profession of ours has been sacredly guarded and preserved. Through all perils it has been borne along bravely, firmly, successfully. High maxims have sustained its character and its privileges. Instances of dishonor have been so few as to serve only as a wholesome contrast. Shall we neglect the trust commit-

ted to us? Shall we, from fear or despair, falter in a duty so manifest? Shall we hand the profession down to our children disgraced and degraded?

To avoid such a result we should be more united. Some stronger bond should bind us to one another for purposes of influence and protection. An association of lawyers, properly organized, would be a power in the community of no mean importance, and always a power for good. No apostle of reform, no lover of his profession, no one who is anxious for his country's honor and permanence, can have a better mission than this, to unite the bar, and give it its deserved weight in the community.

DIGEST OF LAW COMMISSION.

FIRST REPORT OF THE COMMISSIONERS.

To the Queen's most Excellent Majesty.

We, your Majesty's Commissioners appointed "to enquire into the expediency of a Digest of the law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in Judicial Decisions," humbly submit to your Majesty this our first report.

I.—By the term Law, as used in your Majesty's Commission, we understand the Law of England, comprising the whole Civil Law, in whatever Courts administered, the Criminal Law, the Law relating to the Constitution, Jurisdiction, and Procedure of Courts (including the Law of Evidence), and Constitutional Law.

In each of these divisions are comprised Laws derived from three distinct sources:

1. The first source is the Common Law, which consists of customs and principles, handed down from remote times, and accepted from age to age, as furnishing rules of legal right.

2. The second source is the Statute Law, which derives its authority from the Legislature.

3. The third source is the Law embodied in, and to a great extent created by Judicial Decisions and Dicta. These, indeed, as far as they have relation to the Common Law and Statute Law, are not so much a source of law, as authoritative expositions of it; but, with respect to doctrines of Equity and rules of procedure and evidence, they may often be regarded as an original source of Law.

That serious evils arise from the extent and variety of the materials, from which the existing law has to be ascertained, must be obvious from the following considerations:—

The records of the Common Law are in general destitute of method, and exhibit the Law only in a fragmentary form.

The Statute Law is of great bulk. In the quarto edition in ordinary use, known as Ruffhead's, with its continuations, there are forty-five volumes, although (particularly in the earlier period) a large quantity of matter is wholly omitted, or given in an abbreviated form, as having ceased to be in force. The contents of these volumes form one mass, without any systematic arrangement, the Acts being placed in merely chronological order, according to the date of enactment, in many cases the same Act containing provisions on heterogeneous subjects. A very large portion of what now stands printed at length has been repealed, or has expired, or otherwise ceased to be in force. There is no thorough severance of effective from non-effective enactments, nor does there exist in a complete form any authoritative index, or other guide, by the aid of which they may be distinguished. Much, too, contributes to swell the Statute Book, which is of a special or local character, and cannot be regarded as belonging to the general Law of England.

The Judicial Decisions and Dicta are dispersed through upwards of 1300 volumes, comprising, as we estimate, nearly 100,000 cases, exclusive of about 150 volumes of Irish Reports, which deal to a great extent with Law common to England and Ireland. A large proportion of these cases are of no real value as sources or expositions of Law at the present day. Many of them are obsolete; many have been made useless by subsequent statutes, by amendment of the Law, repeal of the statutes on which the cases were decided, or otherwise; some have been reversed on appeal or overruled in principle; some are

inconsistent with or contradictory to others; many are limited to particular facts, or special states of circumstances furnishing no general rule; and many do no more than put a meaning on mere singularities of expression in instruments (as wills, agreements, or local Acts of Parliament), or exhibit the application in particular instances of established rules of construction. A considerable number of the cases are reported many times over in different publications, and there often exist (especially in earlier times) partial reports of the same case at different stages, involving much repetition. But all this matter remains incumbering the Books of Reports. The cases are not arranged on any system: and their number receives large yearly accessions, also necessarily destitute of order; so that the volumes constitute (to use the language of one of your Majesty's Commissioners) "what can hardly be described, but may be denominated a great chaos of judicial legislation."*

At present the practitioner, in order to form an opinion on any point of Law not of ordinary occurrence, is usually obliged to search out what rules of the Common Law, what Statutes, and what Judicial Decisions bear upon the subject, and to endeavor to ascertain their combined effect. If, as frequently happens, the cases are numerous, this process is long and difficult; yet it must be performed by each practitioner, for himself, when the question arises; and in some cases, after an interval of time, it may have even to be repeated by the same person. Without treatises, which collect and comment on the Law relating to particular subjects, it is difficult to conceive how the work of the Legal profession and the administration of Justice, which greatly depends on it, could be carried on; but, however excellent such separate treatises may be, they do not give the aid and guidance that would be afforded by a complete exposition of the Law in a uniform shape.

A digest, correctly framed, and revised from time to time, would go far to remedy the evils we have pointed out. It would bring the mass of the Law within a moderate compass, and it would give order and method to the constituent parts.

For a Digest (in the sense in which we understand the term to be used in your Majesty's Commission, and in which we use it in this Report) would be a condensed summary of the Law as it exists, arranged in systematic order, under appropriate titles and subdivisions, and divided into distinct articles or propositions, which would be supported by references to the sources of Law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated had been discussed or applied.

Such a Digest would, in our judgment, be highly beneficial.

It would be of especial value in the making, the administration, and the study of the Law.

When a necessity arises for legislation on any subject, one of the principal difficulties, which those who are responsible for the framing of the measure have to encounter, is to ascertain what is the existing law in all its bearings. The systematic exposition, in the Digest, of the Law on the subject, would enable the members of the Legislature generally, and not merely those who belong to the Legal profession, to understand better the effect o the legislation proposed. And there would be this further benefit—that new laws, when made, would, on periodical revisions of the Digest, find their proper places in the system, and would not have to be sought for, as at present in scattered enactments.

The Digest would be of great use to every person engaged in the administration of the Law. All those whose duties require them to decide legal questions in circumstances in which they have not access to large libraries or other ample sources of information, would find in the Digest a ready and certain guide. Counsel advising would be spared much pains in searching for the Law in indexes, reports, and text books; and Judges would be greatly assisted as well in hearing cases as in preparing judgment.

The Digest would be most advantageous in

* Speech of the Lord Chancellor (Lord Westbury) on the Revision of the Law. House of Lords, 12th June, 1863. Stevens and Norton. Page 8.

the study of the Law; for it would put forth legal principles in a form in which they would be readily appreciated, contrasted, and committed to mind, and thus substitute the study of a system for the desultory contemplation of special subjects.

It is not unreasonable to expect that this condensation and methodical arrangement of legal principles would have a salutary effect upon the Law itself. It would give the ready means of considering, in connection with one another, branches of the Law which involve similar principles, though their subject matters may widely differ. It would thus bring to light analogies and differences, and by inducing a more constant reference to general principles, in place of isolated decisions, have a tendency to beget the highest attributes of any legal system—simplicity and uniformity.

The persons charged with the framing of the Digest might be also intrusted with the duty of pointing out, from time to time, the conflicts, anomalies, and doubts, which in the course of their labors would appear. Thus the process of constructing the Digest would be conducive to valuable amendments of the Law. These amendments would be embodied in the Digest in their proper places.

Moreover, such a Digest will be the best preparation for a Code, if at any future time codification of the Law should be resolved on.

But great as are the advantages to which we have referred as likely to flow from the formation of a Digest of Law, the argument for it may, we think, be rested even on the higher ground of national duty. Your Majesty's subjects, in their relation towards each other, are expected to conform to the laws of the State, and are not held excused on the plea of ignorance of the Law, from the consequences of any wrongful act. It is in these laws that they must seek the provisions made for their liberty, for their privileges, for the protection of their persons and property, for their social well-being. It is, as we conceive, a duty of the State to take care that these laws shall, so far as is practicable, be exhibited in a form plain, compendious, and accessible, and calculated to bring home actual knowledge of the Law to the greatest possible number of persons. The performance of this duty—a duty which other countries in ancient and modern times have held themselves bound to recognise and discharge—has, in this country, yet to be attempted.

On these grounds we report to your Majesty our opinion that a Digest of Law is expedient.*

II.—Having arrived at this conclusion, we proceed to the consideration of the further inquiry which your Majesty has been pleased to intrust to us—namely, the best means of accomplishing a Digest of the Law.

It may be proper here to advert to what has recently been done in the State of New York. The laws of that State (as in other States also of the Union) rest generally, for their basis, on those of this country as they existed when the States declared their independence. Cases decided in our Courts before that time are still regularly cited before American tribunals, as they are in Westminster Hall; and, indeed, the Reports of our Courts, up to the present day, are largely cited and relied on in argument in American Courts. The work which has been lately accomplished by the Commissioners for framing Codes for the State of New York is, in form, a series of Codes, laying down prospectively what the Law is to be, two of which Codes have already received the sanction of the Legislature. But, as a preparatory step to the formation of these Codes, a complete collection—or what, after great examination, the Commissioners believed to be a complete collection—under appropriate heads, of the Law on each subject, was formed by gentlemen employed for the purpose under the Commissioners.*

We do not desire to conceal that the task of forming such a Digest as we contemplate would necessarily require a considerable expenditure of time and money, though we are strongly of opinion that the benefits that would result from it would amply compensate for any such expenditure.

We think it clear that a work of this nature

* Mr. David Dudley Field, to whose exertions the State of New York is mainly indebted for this important work, was so good as to attend one of our meetings, and to give us full information respecting the course which had been pursued.

(regard being had especially to the importance of its carrying with it the greatest weight) could not be accomplished by private enterprise, and that it must be executed by public authority and at the national expense.

With respect to the means of accomplishing it, we have considered various plans. Any plan must, we think, involve the appointment of a Commissioner or Body for executing or superintending the execution of the work. It is obvious that, whatever arrangement is adopted, a certain number of functionaries must be employed, at a high remuneration, in the capacity of commissioners, assistant commissioners, or secretaries, and that there must be a considerable expenditure on the services of members of the Legal profession, employed from time to time in the preparation of the materials to be ultimately moulded into form by or under the immediate supervision of the Commission or responsible Body.

We are anxious to avoid any recommendation that would involve the necessity of immediate outlay on a large scale; and we therefore recommend that a portion of the Digest, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared, before your Majesty's Government is committed to an expenditure which will be considerable, and which, when once begun, must continue for several years, if it is to be at all efficacious.

We are not authorized, by the terms of your Majesty's commission, to undertake the execution or direction of such a work, but we are of opinion that it might be conveniently executed under our superintendence.

If this should be your Majesty's pleasure, we humbly submit that the necessary power should be conferred on us to enable us to carry this recommendation into effect, and that means should be furnished to us of employing adequate professional assistance for this purpose.

In the progress of the work thus done, light will be thrown on the question of the best organization of the Body to be constituted for the completion of the Digest. A fair estimate will be formed of the time that will be required for the whole. Difficulties, not now foreseen in detail, will doubtless be encountered, and the best way to overcome them will be ascertained. The solution of questions which have already occurred to us will be attained, or at any rate promoted. Some of these questions are the following: What is the best mode of dealing with Statute Law in the Digest? How should conflicting rules of Law (if any), and doubts that have been authoritatively raised respecting particular cases or doctrines of Law, be treated? And what provision should be made on the important point of the nature and extent of the authority which the Digest should have in the Courts, and how that authority can best be conferred on it?

We propose, in this our First Report, to limit ourselves to the conclusions and recommendations we have now stated. The consideration of other questions arising from the terms of your Majesty's Commission, and a fuller treatment of some of the subjects here adverted to, we reserve for subsequent Reports.

All which is humbly submitted to your Majesty's gracious consideration.

Dated this 13th day of May, 1867.

CRANWORTH.
WESTBURY.
CAIRNS.
JAMES PLAISTED WILDE.
ROBERT LOWE.
W. P. WOOD.
GEORGE BOWYER.
ROUNDELL PALMER.
JOHN GEORGE SHAW LEFEVRE.
T. ERSKINE MAY.
W. T. S. DANIEL.
HENRY THRING.
FRANCIS S. REILLY.

—*Weekly Notes.*

—The recovery by Mr. Rufus Lord of $1,400,000 of bonds stolen in 1865 was effected through a New York banking-house, which received them from Baring Brothers, of London, who had them from a London lawyer, a sort of Mr. Jaggers, who forced the guilty one, who was his client, to give them up.

The Canada Law Journal.

VOL. III. SEPTEMBER, 1867. No. 3.

THE MARRIAGE LAWS IN UPPER CANADA.

A case now pending in the Court of Chancery of Upper Canada has attracted general attention to the state of the marriage laws. An action for alimony was brought by the wife against the husband, on the ground of desertion, and the defence set up was that the alleged marriage of the parties was celebrated by the Roman Catholic Bishop of Toronto, without the publication of banns or the procurement of a license from the Governor, under the statute, and such marriage was celebrated privately in the Bishop's house, without any witness being present, and after canonical hours. The aid of the English statute known as Lord Hardwicke's Act, (26 Geo. II., cap. 33.) was also invoked, whereby it is provided that marriages celebrated without banns or license, shall be deemed clandestine, and shall be null and void to all intents and purposes whatsoever. The plaintiff sought to avoid this defence by setting up that these acts did not apply to Roman Catholics (both parties being such in this case, and resident within the diocese of the Bishop who officiated at the marriage ceremony); that marriage was accounted a sacrament by the Roman Church, and, as such, being a part of their religion, it was preserved to them intact by the stipulations made upon the capitulation of Canada, and that it was open to that church to regulate the celebration of marriage by their own ecclesiastical rules—and at all events, if the aforesaid statutes did apply, then the marriage was at most only irregular, but not null and void.

The *Upper Canada Law Journal*, commenting on this remarkable case, urges the necessity of a thorough revision and amendment of the Marriage Laws by the Confederate Parliament. The matters presented to the Court for adjudication are whether the marriage of Roman Catholics by their own Bishops is regulated by the Upper Canada Statute, or by the French law applicable to the subject, which obtained at the time of the cession of Canada, or whether, exempt from both, Roman Catholics are in this respect a law unto themselves.

WRITS OF ERROR.

We have deferred till the present month the publication of the judgment quashing the first Writ of Error, in the case of *The Queen* v. *Dunlop*, and are now enabled to complete the case by the report of the subsequent judgment upon the merits. A considerable amount of indignation has, it seems to us, been lavished unnecessarily upon the action taken by the representative of the Attorney-General in this matter. The objection raised when closely examined, assumes almost a purely technical character. It is difficult to imagine that the Attorney-General would not have been just as much responsible for the act of Mr. RAMSAY under the circumstances as though he had signed the fiat for the writ himself. The subdivision of Lower Canada into a large number of Districts has rendered it almost impracticable for the Attorney-General, or Solicitor-General, to be present and make a personal inquiry into the propriety of signing every writ of error.

A majority of the judges held the act of Mr. RAMSAY to be illegal, and it must therefore be assumed that he exceeded his authority in signing the fiat without a special commission from the Crown. But apart from the strictly legal bearing of the case, if it were necessary to exculpate Mr. RAMSAY in the matter, it is only necessary to observe that although the majority decided against the legality of the act, yet the learned judge, the execution of whose judgment was stayed by the writ of error, was of a contrary opinion; and, further, a majority of the same Court have since sustained the second writ of error, and held that the judgment in question went too far in ordering the immediate destruction of all the powder in the magazine.

Before the latter judgment was rendered, Mr. RAMSAY published some remarks upon the case, in a letter to the *Gazette*, from which we subjoin the following extracts:—

"The question is not alone whether the Attorney-General can sign a fiat for a writ of error by proxy; but whether his duties in Court can be performed by proxy. In fact, the same question may be raised as to signing an information, and has been raised as to signing a *nolle prosequi*. It seems difficult to suppose that the one can be done by proxy and not the other; and yet it has been held in the case of a *nolle prosequi* that it may be done by proxy. When the thing was questioned I shewed, by a tabular statement which I then drew up, that the right to enter a *nolle prosequi* had been exercised nearly a hundred times in Montreal within the fifteen years preceding, and that in not a single instance had it been signed by the Attorney-General in person; but always, save in two or three instances, by the Solicitor-General, by the Clerk of the Crown, or by the usual proxy. I shewed, moreover, that this had been done by the tacit assent of every judge of the Queen's Bench and by several other judges, and most frequently when Mr. Justice AYLWIN was presiding. Mr. Justice AYLWIN explains this by saying it was done without his knowledge; but this explanation is hardly satisfactory. The truth is, the judges never thought of questioning it till they perceived that it could be used by the Executive as a check upon them.

The question of the fiat for a writ of error is exactly parallel. It has been said that there was this distinction, that the power exercised by the Attorney-General, being judicial, could not be delegated. This is sheer nonsense. His power is prerogative, and he exercises it under an implied proxy from the Crown. Formerly it was granted under the sign manual, but that became disused by one or two Attorney-Generals singly signing the fiats, and I never heard of any jealous judge in England quashing a writ upon this ground. Is the step taken here greater? The Attorney-General never prosecutes in person, and yet some one must sign these things who knows something of the facts. If the Attorney-General is to sign personally, he must sign on faith of what his representative puts before him. Judge AYLWIN says, I understand, that formerly, here, the representative of the Attorney-General had a lot of blanks signed by the Attorney-General in his despatch, and ready to be applied in case of need, and that this avoids the difficulty. And what then becomes of the intransmissible judicial power of the Attorney-General?

In matters of information, in the only Courts where they are used, they have constantly been signed by proxy. Indeed, this idea of the Attorney-General being unable to grant a proxy is a novelty. Once before it was questioned whether he had granted it, but never whether he could if he wished. The case is a curious one, and, as we have the advantage of the opinion of the law officers of the Crown on the point (Mr. AYLWIN being the Solicitor-General, L. C.), I shall briefly resume it. The Attorney-General, Mr. OGDEN, being absent in England, Mr. PRIMROSE signed for him several suits which could only be brought "*in the name* of some superior officer of the Customs or navy, or *by* Her Majesty's Advocate or Attorney-General. No one questioned the right of the Attorney-General to give his proxy, but the fact of his having given it was doubted, and Mr. PRIMROSE was called upon to produce it. This he failed to do, and the suits were dismissed. Of this proceeding Mr. PRIMROSE complained to the Governor-General, who referred the matter to the law officers for Upper and Lower Canada; and they reported that by the peculiar nature of the Admiralty Court the proxy could be demanded, and incidentally they stated their opinion "as to the conduct of Crown cases generally by the Queen's Counsel in the absence of the Attorney-General." "With reference, however, to the Crown cases generally, both in the Vice-Admiralty and other Courts, the question raised in the case of the Master of the Dumfriesshire is no doubt of great practical importance, as the personal attendance of Her Majesty's Attorney-General for Lower Canada, in all the Courts, *is rendered impracticable* by the judicial organization of these Courts into distinct and separate tribunals, possessed of equal powers and of the same jurisdiction, which they exercise at the same time in different and distinct districts." * * * "There is no rule of law by which one attorney may not delegate to another the power of

acting, and, therefore, of signing acts for him; and there is even an express rule in the Court of Appeals which enjoins upon attorneys residing out of the City of Quebec to appoint an attorney resident there as an agent for them. We are not aware of any rule, either in the practice of the Courts in England, or in either of the sections of this Province, by which the Attorney-General, or any other attorney, may not delegate to a professional brother the power of signing legal proceedings *for him* and *in his name*. The argument *ab inconvenienti*, resulting from the organization of the Courts of Law of Lower Canada, would be easily shaken by a judicial decision founded upon some known rule of law. But if precedents be adverted to, it will be found that they are in favor of the practice of conducting and *signing* proceedings in the name of the Attorney-General by other counsel. This practice has been sustained, with reference to Mr. PRIMROSE himself, by the Court of Queen's Bench at Quebec, in the cases of the QUEEN v. BONNER and the QUEEN v. PETRY, and also in the District Court of Quebec. We believe that it may be said that the practice never has been shaken, and has been and is general. With reference to the course which obtains in England, we know that in some proceedings under the excise laws, at the instance of the Crown, the Solicitor of the Treasury is the prosecuting officer, *and his printed name at the foot of process has been held sufficient.*" Signed: L. H. LAFONTAINE, Attorney-General L. C.; ROBERT BALDWIN, Attorney-General U. C.; T. C. AYLWIN, Solicitor-General L. C.; and JAS. E. SMALL, Solicitor-General U. C. The Dumfriesshire, STUART'S Vice-Admiralty Cases, p. 245.

It would seem that this general practice has now been shaken by a "judicial decision," but on what "*known* rule of law" that decision is founded is not so evident.

It is fit the public should also know that on the first application made to me for a writ of error, I communicated with four of the judges on the subject, and they declined to give any opinion on the weighty point. I was not, therefore, to *blame* in giving effect to the Attorney-General's proxy, provided I used it discreetly."

JUDICIAL CHANGES IN ENGLAND—LORD JUSTICE TURNER.

The long vacation has again brought with it several changes in the Judiciary. Last year Lord Justice Knight Bruce was, shortly after his resignation, removed by the hand of death; and this summer, Lord Justice Turner has been called away. This learned Judge was born in 1798, was educated at Pembroke College, Cambridge, and was called to the bar in 1822. He was made a Queen's Counsel in 1840, and from 1847 to 1851 was a member of the House of Commons. On the retirement of Sir James Wigram in 1851, he was appointed Vice-Chancellor, and two years later, on Lord Cranworth's becoming Lord Chancellor, Sir George Turner was promoted to be Lord Justice of the Court of Appeal in Chancery, as the colleague of the late Sir James Lewis Knight Bruce, an office which he held till his death on the 9th of July. The Lord Chancellor has said of him: "I am sure the bar will deeply regret the loss which the public and the profession have sustained in the death of that most excellent man and upright Judge, Lord Justice Turner. The unvarying kindness and courtesy which he showed to the profession, his devoted application to every case that was brought before him, the anxious care with which he worked out all his judgments, and which were always full and satisfactory, can never be forgotten; and I am quite sure that there is hardly any one connected with the Court of Chancery, who will not feel that he has lost almost a personal friend in this most amiable and esteemed man, and upright and conscientious Judge."

Sir John Rolt, the Attorney General, has been appointed to the vacancy occasioned by the death of Lord Justice Turner; Sir John B. Karslake, the Solicitor General, succeeds Sir John Rolt as Attorney General; and Mr. Jasper Charles Selwyn, Q.C., a leading member of the Chancery Bar, becomes Solicitor General.

The venerable Dr. Lushington, who has so long occupied the position of Judge of the High Court of Admiralty, has resigned. He was born in 1787, and was made Judge in 1839. While at the bar, he was one of the

counsel for Queen Caroline. He has been succeeded on the bench by Sir Robert Joseph Phillimore, the Queen's Advocate, who has been replaced by Dr. Travers Twiss, Q.C. The *Law Times*, commending the last appointment, says: "Nothing can more preserve the tone and dignity of the profession, than the invariable recognition of the highest claims in the dispensation of its honors and emoluments."

CORRUPTION OF THE BENCH IN THE UNITED STATES.

The following letter, which appeared in the *Times* of August 24, from its New York Correspondent, shows how rapidly the Bench of the neighboring Republic is becoming demoralized by the influences to which it is subjected.

NEW YORK, Aug. 2.

The effect of electing Judges by universal suffrage, and appointing them for short periods, has long been dreaded by that large but powerless class of Americans which desires to place some limit upon the sway of an ever-encroaching democracy. The Bench and the Bar have alike been degraded, and the courts are always full of scandals. Men are placed on the Bench not for any ability they have displayed, still less on account of their legal attainments, but simply as a reward for party services, and because they set their sails dexterously to the breath of popular opinion. In New York the system may be seen in its fullest development; all vicious systems possible under the American form of government flourish there in unrivalled completeness; but in every State where the Judges are elected by the people, incapacity and corruption are the prevailing characteristics of the Judiciary. The founders of the Constitution never looked forward to such an ascendency of the will of the majority as we now witness, but they had their doubts, and they wisely placed the Judges of the Supreme Court, and of such inferior courts as Congress might establish, above the reach of popular caprice. Their idea was, as one of them expressed it in the *Federalist*, that the Courts of Justice should be considered "as the bulwarks of a limited Constitution against legislative encroachment." Madison himself was opposed to electing Judges by a popular vote. The commentators are unanimous in commending their opinions, and in deploring the tendency of recent times to throw the three Departments of the Government entirely into the hands of the people. Mr. Justice Story says,—

"Does it not follow that, to enable the Judiciary to fulfil its functions, it is indispensable that the Judges should not hold their offices at the mere pleasure of those whose acts they are to check, and, if need be, to declare void? Can it be supposed for a moment that men holding their offices for the short period of two, or four, or even six years, will be generally found firm enough to resist the will of those who appoint them, and may remove them?"

I feel that I ought to apologize for quoting the words of these exploded authorities; but there was a time when their interpretation of the Constitution was respected, and their writings still have an interest as historic relics.

It must be a melancholy sort of satisfaction to the Constitutional party to know that all the evils predicted as certain to result from a course which enabled the changing majority of the hour to gain possession of absolute power are now actually experienced. In one State they make themselves felt in one way, in another State by a different way; but the people have them all before them in various shapes. If an example is wanted of the disastrous consequences of electing Judges by universal suffrage we have only to refer to New York. There not only the Judges, but all the officers concerned in the Judiciary, are chosen by popular election. An American publication of well-known character, the *North American Review*, has given an account in its last number of the working of this system. The statement comes with authority; it enters into minute particulars; and it has not been questioned nor denied by any of the persons implicated in its charges. A month has elapsed since it first appeared, and I have watched carefully for some contradiction or disproof. Nothing of the kind has been offered. Nay, the people seem even to be indifferent to the existence of so huge a scandal, and, with

the exception of the *Tribune*, which corroborates the reviewer's assertions, the press is quite silent respecting it. So that an exposure of this kind not only does the parties concerned no harm, but causes neither surprise nor indignation in the public mind, and is looked upon as a thing inevitable, and one of the necessary fruits of that principle of an unrestricted suffrage which appears to grow into favour in other parts of the world the more its disadvantages are revealed here.

It must be understood that there are Judges upon the Bench in New York who are guiltless of the offences described by the reviewer; he admits that fact readily; and it is only to be regretted that he or his publishers had not the courage to disclose the names of the persons whom his accusations specially affect. As it is, the innocent suffer for the guilty, and such men as Chief Justice Robertson, of the Supreme Court, whose integrity is above suspicion, are classed with their dishonest colleagues by readers who know no better. In the same way, it is usual to attack the entire municipal government of New York, without excepting the Mayor, Mr. Hoffmann, who is allowed by all parties to be a gentleman of the highest character.

The reviewer mentions the immense increase in the foreign population as one cause of the degraded state of the Judiciary. He believes that there are 100,000 foreign born voters in the city to 60,000 native voters, and they are "hopelessly degraded by dirt, foul air, and drink." They always choose the worst condidates on the list, such as one of their present representatives in Congress, whom the writer describes as "a man notorious in the past as a pugilist and a criminal, and whose entire claim to a reformation of character consisted in his having given up prize-fighting and become the chief of professional gamblers."

When Judges are chosen by this same class of voters any one may guess what character the Bench is likely to assume. But another cause of their debasement is the patronage placed in their hands by the great increase in the number of referable causes. The referee suffers it to be understood that he is "open to offers" from the parties seeking a decision, and sometimes he manages to pocket $50 or $100 a day as his fee. Receiverships are also offices of profit to the Judges. A public journal of respectable character recently asserted that upon the settlement of a certain receiver's accounts the Judge demanded half his fees, which amounted to some $10,000. Judges of this stamp are as incompetent as they are corrupt, and they drag the Bar down to their level. Formerly Americans used to leave foreigners to make these revelations, and abuse them afterwards; now they tell the truth themselves, and there is consequently a better hope of reform.

Besides taking money as bribes the New York Judges will hear counsel *ex parte, out of court.* The *North American Review* says:

"It very naturally follows that the Judge who will do this is often utterly indifferent to the argument in open court; and it also follows, in not a few cases, that he pledges his decision beforehand. We have known extensive stock speculations to be conducted on the faith of decisions thus promised, and it is not to be wondered at if the Judge was strongly suspected of having an interest, as he certainly had a friend, in the speculation."

The reviewer gives what he describes as a "portrait" of one of the Judges. His knowledge of law is small, but he is naturally quick and acute, and except for a habit which he has of hearing arguments privately, after he leaves the court, he might not be altogether a bad Judge. This probably accounts for the fact, mentioned by the reviewer, that he sometimes cuts short a case before it is fairly stated. "You can go on," he will say to the lawyer who is pleading before him, "all day if you like; but I have decided this case, and I never take back a decision." He indulges continually in coarse language or profane jokes while on the Bench. Once he said in open court "that William Cullen Bryant was the most notorious liar in the United States. On another occasion he referred to the President (Lincoln) and the Secretary of War as "those villains down there." He is greatly under the influence of certain lawyers who are supposed to share their fees with him. "Not long ago," says the reviewer, "certain parties having an important affair in litigation

were privately notified *that if they wished to succeed before the Judge they must employ two lawyers (neither of them having any claim to the business) at a handsome fee.*" Some other instances are given of this man's iniquitous dealings, and then the reviewer proceeds to state that the criminal courts are little, if any, better than the civil courts. "If," he remarks, "we were to relate half the rumours which are afloat, and which are fully credited, too, by the most intelligent and discreet members of the Bar, we should draw a picture as appalling as anything to be found in the books of the prophets Amos and Micah." One Judge (not now on the Bench), before whom an assault case was brought, was asked during the progress of the trial to to go with the prisoner and his counsel to dinner. He accepted the offer, and found a bill for $100 under his plate. He was "astonished," but he literally "pocketed the affront" and decided in favor of the accused. Thus were things pleasantly arranged. Another Judge accepted $500 in return for a decision. "Within a much more recent period," says the reviewer,—

"A man was indicted for a series of enormous frauds, by which he had made himself wealthy. The indictment was quashed for some informality, and he openly boasted that he knew how to manage the drawing of future grand juries so as to secure himself against any renewal of the indictment—a boast which the failure of all subsequent attempts to indict him seems to justify. We are assured, on the most respectable authority, that the judge received $10,000 for his decision."

Most of the judges on the criminal bench are described as "coarse, profane, uneducated men." One of them was a butcher, another a barkeeper:—

"As a rule they are excessively conceited and overbearing, and in some cases positively brutal in their demeanour. The officers in attendance naturally take their tone from their superiors, and treat every one who enters the court-room with a roughness which makes attendance upon such places ineffably disgusting."

If the guilty person be wealthy and the accuser poor there is very little chance of justice being done. The following case is described by the reviewer:—

"We remember an instance in which a rich but infamous brothel-keeper had terribly beaten one of the poor wretches in her house. The 'prisoner' was on bail, the accuser was detained as a witness. When the case was called, the poor creature came forward, her face all clotted with blood and her clothes torn to rags—a ghastly spectacle. The counsel for the accused took her aside, and, under the very eyes of the judge, bullied and coaxed her by turns, threatening her with prosecution as a vagrant, and with the revenge of her mistress, until she agreed not to prosecute the case on condition of her doctor's bill (say $5 or $10) being paid. The counsel then announced to the justice that the complaint was withdrawn. The justice shortly asked the complainant if that was so, to which the poor creature sadly answered that she would not withdraw her complaint if she were not so poor; but as it was she supposed she could not help herself. The justice harshly replied that he had nothing to do with that. The complaint was dismissed, and the miserable woman was promptly bundled out of court by the officers."

The lawyers in such courts match the judges. When a person gets "into trouble" his gaoler, or some friend, recommends him to trust his defence to one or other of a certain set of lawyers. What ensues is best told in the reviewer's own words:—

"The person thus introduced, after making a very few inquiries about the case, asks the prisoner, 'How much money have you?' Usually, of course, the amount is very small; and the next question is, 'How much can you raise.' The answer is, perhaps fifty, perhaps a hundred dollars. 'A hundred dollars!' cries the lawyer contemptuously; 'why, I shall have to give that much to the judge and twenty to the clerk. D—— it, you must squeeze out two hundred and fifty dollars somehow, or you're gone up.' The prisoner asks advice of his keeper, and is told that 'Lawyer —— knows what he is about,' and should be secured at any price. If, after severe pressure, the prisoner declares that he cannot raise the required sum, the lawyer

grudgingly accepts whatever he can get. But it must not be supposed that the fees are limited as a rule to two hundred and fifty dollars. These men, whom long experience has made keen in judging of a prisoner's means, take all he has, be the same more or less. If he has only ten dollars in the world they take that, and really make a good fight upon it; if he has five thousand dollars they will extract it all out of him, if not interfered with, though, of course, such opportunities are very rare."

From Lamirande, the French cashier, these harpies extorted nearly $20,000, and bribed his gaolers with part of the plunder to let him escape. Servant girls are stripped of all they possess, and during the war thousands of men were liberated from prison on condition that they would enlist in the army, *the judge, lawyer, and prison officials receiving the bounty money*, amounting to $600, or even $1,500, for each person. And all this, the reviewer implies, is little to the revelations which might be made. He has purposely understated the case.

One other periodical representing the ruling party of the day, the *Nation*, has come forward with an addition to the reviewer's presentment. His indictment is laid against the bar. The admissions to the American Bar are made without the commonest care or discretion. "There are many lawyers," the writer states, "in practice in this city (New York) who habitually plunder their clients, sometimes by retaining the moneys collected by them, sometimes by selling their clients' interests outright to the adverse party." He further states that "one of the most reputable firms in the city" offered to bribe a young lawyer to allow a judgment to go against his client by default, and afterwards urged in excuse that "such offers had been accepted in other cases." The tone of the profession has sunk, and its leading members are cowed. They might bring about the removal of the most notoriously corrupt judges, but they have not the courage or the spirit to interfere.

I have given but an outline of two articles which might naturally have been expected to shock any community and arouse an imperative demand for reform. But the people are so used to hearing stories of corruption in high places that they pay scarcely any attention to new disclosures. The Constitutional Convention is now sitting, with power, of course, to remodel the laws of the State. It remains to be seen whether they will make an attempt to deal with a Judiciary which is a disgrace to the age; down to the present moment they have let it pass unnoticed.

LEGAL EXPENSES IN ENGLAND.

We have already given some instances of extraordinary bills of costs in England. The following, from the *Times*, shows that a bill of £369 was taxed in a suit for 6s. 8d.

IN RE J. HATTON.

The bankrupt, a farmer, of Mattishall, Norfolk, applied for his discharge from debts of £392. It appeared that having resisted the payment of a rate due to the churchwardens of the parish of Mattishall, proceedings were commenced against him in the Ecclesiastical Court, and eventually an order was made for payment of the rate (6s. 8d.) and the costs of the suit, which were taxed at no less than £369. This constituted practically the only debt upon the schedule. The bankrupt in his accounts made the following statement:—

"In April, 1866, E. W. Crosse, my proctor in the suit instituted against me by Messrs. Edwards and Mann, obtained a judgment against me in an action brought by him for recovery of his costs, and I sold part of my last year's crop to make payments to him on account of his judgment: but on the 4th of February last the said Mr. Crosse levied execution and sold all my remaining crop, stock, and effects, to pay the balance (£165 13s. 10d.) of his judgment and the half-year's rent then due."

Mr. Reynard, for the assignee, did not oppose; Mr. BAGLEY supported the bankrupt.

Mr. LAWRANCE, for the churchwardens of Mattishall, opposed on the ground that the bankrupt, having exhausted his assets, had vexatiously defended the suit in the Ecclesiastical Court.

The bankrupt in his evidence said that he was a Dissenter, and he had refused to pay the rate because he considered it illegal and unnecessary.

By Mr. BAGLEY.—He had occupied the farm at Mattishall, in Norfolk, for 22 years, and during that time he had paid only one rate. He defended the suit upon the belief that he had a good defence to it, and he had been completely ruined in consequence. When the matter came before the magistrates they declined to interfere on the ground of want of jurisdiction.

Mr. BAGLEY said he was prepared to call Mr. Crosse, the proctor, who would prove that the defence was well advised, but

The learned COMMISSIONER, after hearing Mr. Lawrance, said it was unnecessary to adduce further evidence. He was of opinion that, although the result of the suit had been most unfortunate and lamentable, there was no proof that the bankrupt had acted vexatiously. The order of discharge would therefore be granted.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

Montreal, Sept. 9, 1867.

GAULT ET AL., (Plaintiffs in the Court below,) APPELLANTS; and DONNELLY, (Defendant in the Court below,) RESPONDENT.

Secreting—Undue Preference.

Held, that an undue preference given by an insolvent to one of his creditors, by selling him goods in payment of his claim, is not a "secreting with intent to defraud," and does not justify the issue of a *capias ad respondendum*.

This was an appeal from a judgment rendered on the 28th of February, 1866, by *Badgley*, J., giving judgment for the plaintiffs for debt, interest and costs, but granting the defendant's petition to set aside the *capias* which had issued. (This judgment will be found reported in Vol. 1 of the *Law Journal*, p. 119.)

The *capias* issued upon affidavit of one of the plaintiffs that he was credibly informed, had every reason to believe, and did verily and in his conscience believe, that the defendant had secreted, and was then immediately about to secrete his estate, debts and effects, and was immediately about to leave the Province of Canada, with intent to defraud the plaintiffs and his creditors. That defendant was insolvent and *en déconfiture*, and harassed by suits; and that his wife desired him to go to the United States to live there.

The deponent proceeded to allege that on the previous day he had been in the defendant's shop, and the defendant informed him he had just got through stock-taking, and that he had $5,000 stock in store. The next day, when the deponent visited the store, he found that a large part of this stock had been removed, and he saw an entry in the books, of two pages in length, of goods sold to T. J. Walsh.

The defendant first moved to quash the *capias*, and this motion being rejected by *Berthelot*, J., he petitioned to set aside the process, averring that the transaction between the defendant and Walsh was not fraudulent, but for the simple purpose of fairly and honestly paying Mr. Walsh a debt of $1,800, honestly owing him, and for which Mr. Walsh then held the defendant's note for cash before then loaned by him to the defendant.

The evidence adduced upon the petition to quash disclosed the following facts:—Mr. Walsh, a dormant partner of the defendant, had advanced him $1,400. Finding that the business was not prosperous, he endeavored to get his money back, and on the day before the *capias* issued went to the defendant's store, and asked for payment of the debt in goods. The defendant at first refused to allow any goods to be removed, but on the guarantee of Mr. Mullin, who happened to be present, that he would be answerable in the event of any difficulty being raised, he allowed Mr. Walsh to take a considerable amount of goods, which were entered in the sales book. After an attachment had issued, these goods were claimed by the assignee, and were placed in his possession.

The judgment of *Badgley*, J., set aside the *capias* on the ground that the sale to Mr. Walsh, though an illegal preference of one creditor, could not be considered a "secreting" within the statute. From this judgment the plaintiffs appealed.

DUVAL, C. J. In this case a *capias* issued against the defendant, but was set aside in the Court below on the ground that there was no proof of fraudulent secretion by the defendant. The majority of the Court think that this judgment should be confirmed, but I am of a different opinion. The whole case turns upon the interpretation to be put upon the word "secreting." The facts of the case are that the defendant, being the plaintiffs' debtor and being insolvent, made over a portion of his property to Mr. Walsh, another of his creditors. It is contended that this was only an undue preference, and does not amount to a fraudulent secretion. But what meaning can be given to the term "secreting," if it be not a secreting to put property beyond the reach of the creditors, as was done in this case? Suppose the defendant had sold the effects in question and put the money in his pocket, would not that have been a secreting of his effects? I am of opinion, whenever, by any improper means, a creditor is deprived by his debtor of the means of getting his just claims, that such act is a secreting. The majority of the Court, however, are of opinion to confirm the judgment.

[No remarks were made by DRUMMOND, MONDELET, and JOHNSON, JJ., who concurred in confirming the judgment.]

Perkins & Stephens, for the Appellants.

M. Doherty, for the Respondent.

Montreal, June 4, 1867.

DUNLOP, PLAINTIFF IN ERROR; AND THE QUEEN, DEFENDANT IN ERROR.

Writ of Error—Attorney-General.

Held, that the fiat for a writ of error must be signed by the Attorney-General or Solicitor-General, in person, or by some one specially commissioned by the Crown, and that the Attorney-General cannot depute his authority to sign the fiat to another.

The plaintiff in error, Charles John Dunlop, having been convicted on an indictment for nuisance, in the September Term of the Court of Queen's Bench, Crown side, in September, 1866, sued out a writ of error.

A preliminary question was raised as to the validity of this writ, it having been allowed by "Geo. Et. Cartier, Attorney-General, "L. C., for T. K. Ramsay, advocate prose-"cuting for the Crown, and representing the "Attorney-General in criminal cases in the "District of Montreal."

MONDELET J. I must dissent from the judgment about to be rendered. I am of opinion that Mr. Ramsay had power to sign the fiat for the writ of error. In conducting the Crown business he does much more important acts than this in the name of the Attorney-General.

BADGLEY, J. Whatever inconveniences may fall upon individuals, the law must be obeyed. What is the law respecting writs of error? This is a high prerogative writ which at first never issued except on the sign manual of the Sovereign. Then authority was delegated to the Attorney-General to sign the writ, because it was generally upon his advi e that the Sovereign acted. The responsibility of issuing the writ then rested upon the Attorney-General, a high prerogative officer. He is not responsible to us, but in his individual capacity to Parliament. Even the opinion that the Court might grant a writ has been set aside. If the Attorney-General is not present, the Solicitor-General must sign, but no other, unless he be deputed under a commission from the Crown. We have been favored with a copy of the delegation by the Attorney-General to Mr. Ramsay. This paper states that in consequence of the Attorney-General being obliged to leave the country, on public business, he appoints Mr. Ramsay his attorney to do certain acts, and to sign writs of error. Could this mere procuration impose upon the Attorney General any responsibility for Mr. Ramsay's malfeasance? I have always entertained a strong opinion upon this point—that the power of signing a writ of error is in the Attorney-General as Counsellor of the Crown. I think, therefore, the writ has issued improvidently, and was signed by a person who had no authority to do so.

AYLWIN, J. In this case I feel myself obliged to state that there has been an unconstitutional act. The Attorney-General is supposed to hear the party applying for the writ, and after inquiry into the circumstances, he decides whether the writ should issue or not. So far from this being done in the present instance, without any ceremony, the judgment of the

Court of Queen's Bench was at once stopped by the signature of Mr. T. K. Ramsay. Under what authority did he act? He produces a power signed by G. E. Cartier, Attorney-General, in which it is stated, that inasmuch as he is about to leave the Province, he authorizes Mr. Ramsay to act in all things for him, and especially in issuing writs of error. But the instant that the Attorney-General stated that he was about to leave the Province, he had no more right to do anything; and the whole of his *mandat* was worth nothing at all. It fell completely to the ground. What is the law? If the Attorney-General is obliged to be absent, then let the Solicitor-General act. Whether there was a Solicitor-General or no does not appear in this case. We have thus seen the whole of the people of this Province governed by a man who was absent from the country? Was that not unconstitutional? If these things are allowed to be carried on, then I say it is vain for any man in this Province to say that his life or property is worth anything at all. I say that this was clearly unconstitutional. I shall say no more, but that this writ must be quashed at once, and quashed ignominiously.

DUVAL, C. J. There are involved in this case some points that deeply involve the liberty of the subject. There is no question here of *pratique*: it is a question of constitutionality. What are the powers of the Attorney-General? Let any man reflect for one moment upon the extent of the powers committed to him, and then say whether they are to be entrusted to any person he may name. An indictment is preferred, a jury convict, and then a writ of error suddenly stops all proceedings. The door of justice is closed. Why? Because *sic volo sic jubeo*—no trouble taken to enquire as to the reasons for such a course. I am of opinion, however, that he to whom a power is delegated has no right to delegate it to another—*delegatus non potest delegare*. It is said this is done every day in the Criminal Courts, when an indictment is signed by an advocate for the Attorney-General, and that if he has a right to hang an individual, he has a right to sign a writ of error. But it is quite a mistake to suppose that an advocate may not take up and conduct a criminal prosecution without showing an authority from the Attorney-General. So long as the Attorney-General does not interfere, the Court will say nothing. The practice of signing for the Attorney-General is a vicious practice, but it has been allowed, and no harm is done. But the right of private counsel to conduct a prosecution has been tried, and where the Attorney-General does not interfere, the Court will not do so. Upon these grounds, I was quite prepared to say yesterday, when this case was argued, that the Attorney-General had no right to delegate his power to sign writs of error, and therefore the writ was wrongly issued.

The judgment was *motivé* as follows: Seeing that the writ of error in this cause issued, hath improvidently and illegally issued, inasmuch as the same was allowed by T. K. Ramsay, Esq., for and in the name of Her Majesty's Attorney-General, and not by Her Majesty's Attorney-General, &c. Writ quashed.

9th September, 1867.

A new writ having issued, the case came up on the merits.

R. Mackay, Q. C., for the Plaintiff in Error:—The Plaintiff in Error was indicted for nuisance in the September Term, 1866, of the Court of Queen's Bench, (Crown side,) at Montreal. He pleaded on the 12th October, 1866, a kind of plea to the jurisdiction, setting forth that the keeping of gunpowder, in the locality mentioned in the indictment, was regulated by Statute 27-28 Victoria, C. 56: that the Council of the City of Montreal was charged to regulate it by by-laws, and had done so, and that against persons violating any such by-law, proceedings special were to be taken in the Recorder's Court; subject to the jurisdiction of which Court, only, he, Dunlop, was or could be placed. The Plea substantially raised the question of whether the common law was not taken away in such a case as the present by force of the new and special provisions in the 27-28 Victoria, and other Acts. Afterwards in April, 1867, the Plaintiff in Error, having pleaded not guilty after dismissal of his preliminary Plea, was tried, at Montreal, in the Queen's Bench, upon said indictment: he was found guilty, and judgment

was pronounced against him on the 12th of April, as follows:—

"Considering that the defendant not having established before this Court that he hath abated and prostrated, but on the contrary, he having neglected to abate and prostrate the nuisance complained of, and declared by the verdict of the Jury, it is hereby declared and adjudicated, that the defendant should pay, and he is hereby condemned to pay to Her Majesty the Queen a fine of fifty pounds, current money of this province, and to be imprisoned in the Common Gaol of this district until the said fine be paid.

And it is further ordered that the Sheriff of the district do forthwith abate and prostrate the said nuisance, and he is, by this Court, ordered and authorized to employ and use all such means as will enable him to abate and prostrate altogether, fully and completely, the said nuisance, by the immediate destruction of the gunpowder contained in the defendant's powder magazine, found to be a nuisance by the verdict of the jury."

The plaintiff in error having obtained the Attorney-General's fiat sued out the writ of error now pending. The reasons of error assigned are numerous; a material one being that raising the question of jurisdiction in the Court that tried the indictment.

Another one raised the question of whether the indictment could lie, being at common law, in a case in which the plaintiff in error contends that the common law was and is abolished or repealed; other material ones raise the question of whether it was competent to the Court to declare forfeiture of the powder contained in the magazine mentioned in the indictment, and whether it was proper to order the "immediate destruction" of the gunpowder contained in the said magazine.

The plaintiff in error submits that his plea filed 12th of October was good, and ought to have been maintained, and that the common law had been repealed, before the time of the indictment being found against him, and the indictment was therefore bad. Where there are two laws on the same subject the special must prevail over the general. If that be maintained there will not be cause to go farther; but should the Court be, upon these points, against the plaintiff in error, then he will contend that the sentence of the 12th of April last was unreasonable, excessive, illegal and erroneous. Seeing its requirements the owners of the gunpowder, the keeping of which in an alleged excessive quantity was found a nuisance, might actually feel hindered abating the nuisance by the natural course of removing the powder. They might fear to handle their own property. Seeing duty on the Sheriff precisely to take possession of it, and destroy it, they might feel it dangerous to interfere with him.

A kind of forfeiture has been pronounced needlessly, of a very considerable quantity of property, worth over eighty thousand dollars; much of it public property, imported by the province for the public defence.

"Every judgment should be adapted to the nature of the case," says the law. The alleged nuisance here could have been abated perfectly, without destruction of the powder, so much wealth. Gunpowder *per se* is not a nuisance. A precept to the Sheriff to abate the nuisance would have led to its abatement. Abatement is one thing, and destruction of property another. Suppose a Sheriff ordered "to abate the nuisance," in a case like the present, could he proceed by "immediate destruction" of the powder? Certainly not, and were he to presume to do so he would have to answer in damages. Duty would be upon him to hurt as little as possible.

The plaintiff in error obliged to defend the property entrusted to him, had no alternative, after the judgment referred to, but to resort to the writ of error. Whatever may be ruled upon the question of jurisdiction, certainly the plaintiff in error has right to have his property left to him, willing as he is to abate any nuisance. The fine imposed upon him he also complains of.

Badgley, J. The writ of error in this case has occasioned the Court considerable difficulty. In order to render intelligible the judgment which is about to be rendered, it is necessary briefly to review the proceedings in the case. A bill of indictment was, in September, 1866, brought against Mr. Dunlop for nuisance. This indictment contained two counts. The first was that the defendant in a certain building,

"did unlawfully and injuriously receive and keep and still keeps, an excessive quantity of gunpowder;" and the second count charged, that he "did unlawfully, injuriously and negligently in said building receive and keep and still keeps a large quantity of gunpowder, to wit, fifty-one tons of gunpowder, the said building being insecure and unsafe for the purpose of storing gunpowder, being neither vaulted nor fire-proof," &c. The judgment condemned the defendant to pay a fine of £50, and to be imprisoned till the fine be paid. But instead of simply ordering the abatement of the nuisance, the judgment added that the Sheriff should abate the nuisance by the immediate destruction of the powder contained in the defendant's powder magazine. The reasons of error assigned amount to this—that the indictment was brought under the common law, whereas there is authority given to the Corporation to regulate powder magazines within a certain circuit of Montreal. It is sufficient to say that by the common law any quantity of powder kept in a building is a nuisance. It is not the quantity, but the mere keeping of powder that is a nuisance. But the first count does not go so far as the common law, inasmuch as it limits the common law, and charges the defendant with keeping an excessive quantity of powder. The verdict was guilty, and the Sheriff was ordered to abate the nuisance by the immediate destruction of the powder. Now it was unreasonable that the Sheriff should destroy all the powder, when the defendant was merely charged with keeping an excessive quantity. Here was the difficulty. Then the next count was that the powder was stored in an insecure building, and the judgment went upon this count also by ordering the destruction of the powder. The Court is of opinion that the judgment went too far in ordering the destruction of the powder, therefore, in the opinion of the majority, the judgment in this case must be reversed.

DUVAL, C. J. I differ and am for confirming the judgment. I believe that the Court in the case of a nuisance by the keeping of powder, has the right to order its destruction. If the Sheriff were ordered to remove a bridge which unlawfully obstructed a stream, it would not be necessary for him to destroy the timber, because the material *per se* would be harmless. But that is not so with gunpowder. The Sheriff has no place to keep the powder. If he would keep it in a private building, he would be just as liable to an indictment as Mr. Dunlop. I see by the record sent up that the defendant being ordered to abate the nuisance, refused to do it, and then the judge said he had no other recourse but to order the destruction of the gunpowder. I think the judge was perfectly right in ordering the powder to be destroyed, and I would have done the same thing myself, had I been sitting in his place.

CARON, and DRUMMOND, JJ., concurred with BADGLEY, J.

The judgment is recorded as follows: —Whereas there is error in the judgment rendered by the Court of Queen's Bench, sitting at Montreal on the 12th of April, 1867, which orders the abatement of the said nuisance "by the immediate destruction of said "gunpowder, contained in defendant's powder "magazine," this Court doth reverse and set aside the said judgment in that respect and to that extent, and doth order that the said words above related be struck from said judgment.

R. Mackay, Q. C., for the plaintiff in error.

T. K. Ramsay, Q. C., for the defendant in error; and *E. Carter, Q. C.*, for the private prosecution.

September 9, 1867.

J. BTE. LEGER DIT PARISIEN (Plaintiff in the Court below), APPELLANT; and CHARLES LEGER DIT PARISIEN (Defendant in the Court below), RESPONDENT.

Slander—Insufficient Damages.

In an action for slander, the evidence having proved a gross case against the defendant:—

Held, in appeal, that $50 damages and costs awarded by the Court below was inadequate: amount increased to $200 and costs.

The present action was instituted for the recovery of $2000 damages, under the following circumstances:—The plaintiff had been summoned as a witness in a cause pending before the Superior Court, and as soon as his deposition was finished, the present defendant (who was also the defendant in the cause

above mentioned) began to spread injurious repcts concerning him, accusing him of falsehoq and perjury. The plaintiff then brought an ction of damages against him, which proceedd *ex parte*, the defendant having neglectd to plead. The *curé* of the parish, and seveal other witnesses, were called to prove the injurious expressions used by the defendant. The judgment of the Superior Court was rndered by *Monk*, J., on the 31st of October 1866, condemning the defendant to pay $50 damages, and the costs of an action for $50. Of this judgment the plaintiff complained, representing that although his action had been maintained, nevertheless the judgment really mulcted him to the extent of $3.81; in this way: his attorney's taxed costs were $69.31, whereas the damages and costs recovered amounted to only $65.50, leaving a deficit of $3.81. He accordingly appealed, and claimed more ample damages.

The respondent appeared, and submitted that the judgment should not be disturbed.

DUVAL, C. J. The plaintiff had proved his case, and we think it unjust that he should be made to pay money for having brought his action. We are of opinion that the judgment must be set aside, and the defendant condemned to pay $200, with the costs in both Courts.

DRUMMOND, J. I do not think a man should be mulcted in costs for exercising a clear right. The plaintiff having been outraged in a gross manner, only performed a duty from which he could not shrink, in bringing an action against his slanderer. This was a very gross case, and I think it was the duty of the Court to make an example of the defendant, and thus protect witnesses brought before the Courts, and see that they are not hunted down as Parisien has attempted to hunt down his nephew. We think it is the duty of the Court to give exemplary damages, and are of opinion that the Court below should have awarded him $200 damages instead of $50.

CARON, and BADGLEY, JJ., concurred.

The judgment was *motivé* as follows:—

Considérant que la somme de cinquante dollars, que le défendeur a été condamné à payer par le jugement dont appel, est insuffisante pour indemniser le demandeur des injures infamantes et cruellement grossières à lui prodiguées par le défendeur à plusieurs reprises avec une persistance qui indiquait chez le défendeur une malice profonde: considérant partant que dans le dit jugement il y a erreur, &c. Judgment reversed, and defendant condemned to pay $200 damages, with costs of the highest appealable class in the Circuit Court, and the costs of the appeal.

Jetté & Archambault, for the Appellant.

Denis & Lefebvre, for the Respondent.

L'HEUREUX (Plaintiff in the Court below), APPELLANT; and BRUNEL (Defendant in the Court below), RESPONDENT.

Libel—Justifiable Writing.

The defendant in an action for libel had written a letter to the plaintiff's brother-in-law, accusing the plaintiff of dishonesty and trickery, on account of his having broken up a sale from the brother-in-law to defendant:—

Held, in appeal, that although the letter was not a privileged communication, yet that it was justifiable under the circumstances, and an action did not lie.

The plaintiff instituted the present action in the Circuit Court to recover damages from the defendant for libellous expressions contained in a letter written by the defendant on the 5th of April, 1864, to one Lachapelle, the plaintiff's brother-in-law. It appears that Brunel, the defendant, had entered into negotiations with Lachapelle for the purchase of a piece of ground belonging to the latter, and the terms had been concluded, when L'Heureux, the plaintiff, hearing of the proposed sale, succeeded in inducing Lachapelle to sell the ground to him. Brunel then brought an action against Lachapelle to compel him to execute the deed to him; and while this action was pending, being informed of the part played by L'Heureux, he wrote to Lachapelle complaining of the machinations of L'Heureux, and amongst other things using the expression, "Vous voyez maintenant la fourberie, la malhonnêteté et l'injustice avec lesquelles il a agi, et avec lesquelles il agit encore aujourd'hui à votre égard." This letter Lachapelle had no sooner received than he took it to L'Heureux to get him to read it to him,

and then both went to a notary to have it re-read. It was for the expressions contained in this letter that L'Heureux instituted the present action of damages.

On the 30th of December, 1865, judgment was rendered by *Monk*, J., in the Circuit Court, awarding the defendant $50 damages. The defendant then inscribed the case for review, and on the 30th of May, 1866, this judgment was reversed by *Smith and Berthelot*, JJ., (*Badgley*, J., dissenting), and the action dismissed. The grounds of this judgment were that the letter in question was written to Lachapelle confidentially in reference to the transaction of bargain and sale made by Lachapelle to the defendant, and that the publication of the letter was unauthorized by the defendant, and that the letter was under the circumstances justifiable. The following remarks were made when judgment was rendered in review.

SMITH, J. This is an action of damages for slander brought by the plaintiff for a letter written by the defendant. The letter was written strongly and in very severe terms, and was considered by the Court below to be a libel. This judgment appears to us to be erroneous. We think that the slander, if a slander at all, was one which the defendant had at the time a strong reason for writing. The plaintiff's brother-in-law had promised to sell to Brunel a certain piece of ground, and the plaintiff persuaded him to break this agreement, and even went so far as to declare that he would hold him harmless for anything he might suffer for his breach of agreement. Now a man who stands in this position of inducing another to break his agreement, is naturally exposed to imputations on his honesty. The letter in question charged the plaintiff with inducing this violation of contract, and it must be admitted that there was a good deal in the way of justification for this. Moreover the plaintiff did not negative the facts; there is, therefore, a strong presumption that they are true, and, if these facts are true, it cannot be pretended that there is much slander in the letter complained of. The plaintiff does not stand in the position of a man with clean hands before the Court. The defendant has perhaps only told the truth in rather plain language. There is no ground as far as we can see for damages, and we think that the judgment must be reversed, and the action dismissed.

BADGLEY, J. It is perfectly true that the plaintiff does not come into Court with clean hands. He is the cause of the whole trouble. He induced his brother-in-law to break a contract for the sale of property, and afterwards obtained this property for himself. The slander is no slander as between the two parties themselves; but when the defendant went beyond this, and imputed atrocious motives to a third party, he was no longer protected. For these reasons I must dissent, but I would not give the plaintiff vindictive damages. I would merely support the plaintiff's right of action, and say to the defendant, if you do slander, you must take the consequences. The Court must look at a case of this kind as a jury would. Under the circumstances I would have given the plaintiff judgment for $10 and costs, and no more.

BERTHELOT, J., concurred in the judgment.

The plaintiff then instituted the present appeal.

DUVAL, C. J. The Circuit Court condemned the defendant to pay a certain sum of damages. The Court of Revision has reversed this judgment and dismissed the action, upon the principle that the letter was written confidentially and was a privileged communication. We confirm the judgment of the Court of Revision, but not for the reasons given. We do not think the letter was a confidential letter or privileged, but we say this, that every word in the letter is proved to be the strict truth. I do not recollect a single case in which the conduct of the plaintiff was proved to be worse. He interfered between the seller and purchaser, and counselled his brother-in-law to destroy the *acte* of *garantie* which he had given him against the defendant's claim.

JOHNSON, J. I will state briefly the grounds on which I concur. It would appear, and did appear to me, at first sight, that if this letter was not a privileged communication, it was unlawful, and therefore, the plaintiff should not be turned out of Court. But it is clearly proved that the plaintiff acted in a dishonest manner: he is a detected villain, exposed by

the publication, in the most restricted legal sense, by the person who had the greatest interest to detect him. I am satisfied from the evidence that no injury was suffered. Therefore I concur in the judgment of the Court.

DRUMMOND, and MONDELET, JJ., also concurred.

The judgment was *motivé* thus:

"Considérant que, quoique la lettre qui fait le sujet de la présente action ne doive pas être envisagée comme entrant dans la catégorie des communications spécialement protégées par la loi, comme confidentielles, l'intimé se trouve néanmoins justifié de l'avoir écrite et transmise à son adresse. Car la preuve fait voir que l'intimé a écrit cette lettre sans aucune intention malicieuse, mais seulement dans la vue de faire connaître au nommé Jeannot dit Lachapelle, à qui elle était addressée, les effets dangereux pour lui ainsi que pour l'Intimé, de certaines intrigues criminelles dans lesquelles l'appelant cherchait le concours du dit Jeannotte dit Lachapelle, à l'égard de la vente mentionnée dans cette cause. Considérant que quoiqu'il y ait erreur dans l'un des motifs, il n'y a pas mal jugé dans le jugement," &c.; Judgment confirmed with costs.

Dorion, Dorion & Geoffrion, for the Appellant.

Cartier, Pominville & Bétournay, for the Respondent.

COURT OF REVIEW.

Montreal, April 23, 1867.

DUBORD v. LANCTOT.

Revision of Judgments under the Municipal Act.

Held, (affirming previous decisions), that 27-28 Vict., cap. 39, does not give a right of revision of judgments under the Municipal Act.

This case had been inscribed by the defendant for hearing in review on a judgment rendered by *Monk, J.*

Carter, Q. C., moved to discharge the inscription, on the ground that inasmuch as there was no appeal in this case, (an action under the Municipal Act,) there could be no revision of the judgment.

Devlin, for the defendant:—The judgment of the Superior or Circuit Court, when inscribed for review, only becomes a final judgment when it has been confirmed or reversed in review.

[LORANGER, J. There is, I think, a judgment favorable to your pretension—*Johnston* v. *Kelly*, where the judges here held that there was a right of review from a judgment under the Insolvency Act, though there was no right of appeal.]

The judgment in the first instance does not become a judgment of the Court till it has been submitted to this Court. The appeal, after a case has been decided in this Court, is not from the judgment in review, but from the final judgment of the Superior or Circuit Court, as the case may be. Sec. 30 of cap. 39, 27-28 Victoria (1864), says that so much of any Act or Law as is inconsistent with the provisions of this Act, is hereby repealed. Now sec. 20 says, that in every case there shall be the right of review. I contend, therefore, that this gives me a right to have the judgment reviewed. This is not in reality an appeal, it is still the same Court.

[MONK, J. Your view is that it is the same Court, rectifying perhaps the error of its own judgment.]

Yes.

[BERTHELOT, J. When the judgment in *Taylor* v. *Mullin* was being considered, it was shown that there had been decisions at Quebec refusing the right of review in these cases.]

The right of review was granted in *Ex parte Beauparlant*, a case of *certiorari* (10 Jurist, 102.

[MONK, J. If the point were still open, and not decided by the Court of Appeals, I would be inclined to reconsider it. I must say I have great doubts about it.]

Mr. *Carter, Q. C.*, remarked that the judgment in this case merely rectified the procedure.

Mr. *Devlin*. But it is a judgment which cannot be remedied by the final judgment. The judgment complained of allowed the petitioner to supply the original *requête libellée*,

which was missing from the record, by a copy. It is one of those interlocutory judgments which cannot be remedied by the final judgment.

Judgment was given the following day granting the motion of the plaintiff to reject the inscription.

SUPERIOR COURT.

MONTREAL, 28th Feb., 1867.

ASHLEY HIBBARD *v.* BARSALOU ET AL., and W. R. HIBBARD, intervening.

Statement in Plea affecting a stranger to the record—Claim to intervene.

Held, that a person complaining of a statement contained in the pleadings in a cause, to which he is not a party, as false and calumnious, has no right to intervene for the purpose of having the passage complained of struck from the record.

Ashley Hibbard, the plaintiff, sued the defendants in an action of damages for £10,000, charging that the defendants conspired together to ruin him by unfounded indictments; that they procured a number of these to be found by grand jury, and preferred others that were returned "no bill;" that upon some of those found he, the plaintiff, had been acquitted, and upon the others *nolle prosequi* had been entered, &c., &c.

Defendants severed, and pleaded the usual pleas of reasonable and probable cause, absence of malice, &c., and that what they had charged against the plaintiff he had really been guilty of; that among other things he had misused the funds of "The Canadian Rubber Company." By their amended pleas they went further, to allege that W. R. Hibbard, (brother of the plaintiff), while managing the affairs of the said Company in 1863, also misapplied the funds of the Company, appropriated part of them to his own use, to the extent of over fourteen thousand dollars. There were four sets of pleas filed, all very much alike.

The case now came up on four petitions in intervention presented on the 26th of November, 1866, by William R. Hibbard, to be permitted to intervene in the suit.

The petitions, were, of course, nearly alike; one set forth the following grounds of intervention:—In 1863 and 1864, an incorporated Company, called the Canadian Rubber Company, existed at Montreal, of which Company, Murphy, one of the defendants, was a stockholder and director. Petitioner was a stranger to this suit, which was brought by Ashley Hibbard to recover damages from the defendants for malicious prosecution and other torts. In the fifth plea of the defendant Murphy, there occurred the following passage:—"That during the time of "said William R. Hibbard's management, "from 1863 to 1864, the said William R. "Hibbard, plaintiff's brother, did also mis- "apply the funds of the Corporation, appro- "priate part of the same to his own use, and "finally did bind the Company for his own "private use for large sums of money, to wit, "a sum of $1435.60, for which the said Com- "pany since obtained judgment before this "Court, to wit, on the — day of March last "past," which passage was by Murphy said to have been also contained in the pleas of the Canadian Rubber Company in a certain cause formerly pending between the present plaintiff and the Rubber Company, and the statement involved in it was affirmed by Murphy in his fifth plea to be true. The petition proceeded to allege that the petitioner was very much hurt in his feelings and in the estimation of his acquaintances by this passage of the plea, which passage the petitioner averred to be impertinent to the cause, false and calumnious, and meant to hurt the petitioner in his feelings, name and character, and did so hurt him, and would continue to do so day by day till suppressed or discontinued and apologized for. That the intervening party never heard of the said pleas of the said Canadian Rubber Company, in the other cause referred to. That the defendant Murphy could not claim to keep of record a statement falsely charging the petitioner with dishonorable misuse of funds of a public Company. That the statement complained of is a scandalous false statement of matters *étrangers à la cause, &c., &c.* Conclusion, that he be permitted to intervene in the cause, and that the Court

declare this part of the pleas calumnious, and order that it be suppressed as such, and as having no *rapport à la cause* between plaintiff and defendants.

The petition was filed on the 27th of November, 1866, and an argument took place as to whether it should be allowed.

Girouard, and *Cross*, *Q. C.*, for defendants, contended that only by action direct and principal could a party in the position of petitioner obtain his end; that he had not such an interest in this suit as to be entitled to intervene in it. Such an intervention was never heard of in Lower Canada. A pecuniary interest must be shown.

R. Mackay, for intervening party, contended that money interest was not the only one entitling to intervention. Shall it be said that a man having a fifty dollars of interest may intervene in a cause, but that where his character, worth to him thousands, is at stake, he may not? There is therefore *intérêt d'honneur*, entitling to intervention as well as pecuniary interest. The intervening party here is not to be referred to direct action only, against these defendants. This cause is the best one in which to get an order suppressing the *injures* complained of; the intervening party ought to be allowed a standing *in this cause*, to defend his character put in issue between plaintiff and defendants, and as to which they may make articulations, and go to *Enquête*.

In Carré and Chauveau, Qu. 1270, it is shown that a notary may intervene in a case between third parties to defend his *acte argué de faux*. It is said that he has an *intérêt d'honneur* to intervene. Though separate action may lie, intervention may lie too, certainly may lie if concluding only for suppression of *mémoires* or pleas as here. *Merlin*, cited in *Carré*, Qu. 1270 quater. *Bioche* agrees.

In view of these authorities these interventions of W. R. Hibbard have been advised. They purposely conclude only for suppression of portions of pleas objected to as calumnious, the intervening party reserving his recourse for damages, in other, or direct, action.

BERTHELOT, J. The interventions must be dismissed; the intervening party shows no interest such as we are accustomed to. He can get all he wants by another mode. Such interventions would lead to great confusion in causes.

Mackay & Austin, for the Intervening Party.

D. Girouard, and *A. Cross*, *Q. C.*, for the defendants.

MONTHLY NOTES.

COURT OF QUEEN'S BENCH.—APPEAL SIDE.

MONTREAL, Sept. 9, 1867.

RIMMER (defendant in the Court below) Appellant; and MCGIBBON (plaintiff in the Court below) Respondent.

Agreement to share costs.

This was an appeal from a judgment rendered in the Circuit Court by *Monk, J.*, on the 31st December, 1866, condemning the appellant to pay $106.53. The action was brought by the respondent for $106.53, the balance of an account. Defendant pleaded that the balance of $106.53 should be reduced by $15, the value of three cases of Old Tom gin not credited to him; and further, that the sum of $64.91 should also be deducted, this sum being the plaintiff's share of certain extra disbursements and fees paid by the defendant in and about the prosecution of a suit against one Morgan and others. The plea tendered the balance, after deduction of these sums, $126.62. Plaintiff answered that he never promised to pay a share of the costs in question as alleged by defendant. The parties went to proof, and it appeared that plaintiff, defendant, and Dow & Co., were interested in having certain transfers made by one Morgan (against whom they had claims) set aside, and the defendant brought an action against Morgan which was successful, but there were about $180 of untaxable expenses, a third of which, as he pretended, the plaintiff had agreed to pay. The plaintiff, when examined on *faits et articles*, stated the understanding to be this: he had promised to bear a share of the expenses, if the defendant should be unsuccessful, but not otherwise.

The defendant's plea being dismissed in the Court below for want of proof, he brought the present appeal.

DUVAL, C. J., said that the defendant had two offsets to the plaintiff's account. The first of these was with reference to some Old Tom gin. This was a small matter, but the evidence was not sufficient to establish the plea, and this pretension must be rejected. Then with respect to the costs incurred by the appellant for the benefit of the creditors generally, that rested on agreement. The plaintiff had been examined on *faits et articles*, and he stated the agreement to be this: that if the appellant was unsuccessful in the claim he was bringing, the plaintiff would pay part of the costs; but if he was successful, then he (Mr. McGibbon) would have to bring his own action and pay his own costs, and he never agreed to pay more. This would appear to be very reasonable indeed. Mr. Perkins, who acted as attorney for both parties, confirmed this. It was plain that the defendant could not set off these costs, because they were dependent on an agreement, and this agreement the plaintiff denied. Then again, the plaintiff would have a right to a bill of particulars quite different from that given by the defendant. The defendant should have given a detailed account of what he expended on each occasion. The judges were therefore of opinion that the Court below was right, and the judgment must be confirmed.

CARON, DRUMMOND, and BADGLEY, JJ., concurred.

W. H. Kerr, for the Appellant.

John Monk, for the Respondent.

[A case with some slight bearing upon the question here may be found in the Law Reports, 1 A. & E. 78, *The Kestrel*. In this case the plaintiffs were the first mortgagees of a vessel, and a decree had been made by consent that they should receive the sum claimed by them, and the "costs, charges and expenses properly incurred" by them as mortgagees. The registrar having taxed these costs as between party and party, and not as between solicitor and client, the plaintiffs asked for the revision of the taxation. The Court, however, held that the "costs, charges and expenses properly incurred," included only costs as between party and party, and affirmed the Registrar's taxation.—Ed.]

McGEE (defendant in the Court below), Appellant; and LABELLE (plaintiff in the Court below), Respondent.

Delivery of Planks—Proof of Quantity.

The Plaintiff sued for $236.12, balance due for planks sold and delivered. Defendant pleaded that the $400 which he had paid more than covered the plaintiff's account, as the planks were inferior in quality, and deficient in quantity. Judgment having been rendered for the amount claimed, the defendant appealed, on the ground that the plaintiff had not sufficiently proved his case.

DUVAL, C. J., said that judgment had been rendered for the price of a quantity of planks sold. Two objections had been raised; one with respect to the quality, and another with respect to the quantity. With respect to the quality, that objection must be abandoned, because there was proof that the defendant was present at the delivery of the last load, and was quite satisfied with the quality. Besides, the price stipulated was of itself sufficient to show what was the understanding of the parties as to quality. Then with respect to the quantity, the plaintiff appeared to be an unsuspecting man who handed over his planks to the carters without keeping a very strict account of them, and the defendant seemed to have depended on his being unable to prove the quantity delivered. But fortunately for the plaintiff there was proof of the quantity delivered. For one of the carters said he had carted 15 loads of 75 planks each, and that he carted less than the others, because he was sick. If this were multiplied by four (the number of carters), it would apparently make more than the plaintiff claimed for. There was a reason for this: one of the other carters said he did not cart as much as the others, because he only commenced at three in the afternoon. Making a deduction for this, the Court came to the conclusion that the quantity charged was correct. In England it would be left to the jury to say whether it would be fair and equitable to allow the plaintiff the full amount of his claim. Here the Court had

the power of a jury, and it was of opinion that the plaintiff had made out his claim. The judgment, therefore, must be confirmed.

CARON, DRUMMOND, and BADGLEY, JJ., concurred.

M. Doherty, for the Appellant.

Leblanc, Cassidy & Leblanc, for the Respondent.

MESSIER (defendant in the Court below), Appellant; and DAVIGNON (plaintiff in the Court below), Respondent.

Promissory Note—Power of Attorney.

The plaintiff brought his action for a balance of $285 due on a promissory note for $600, payable 24 days after date, signed by one L'Esperance, attorney for the defendant. The plea was, want of consideration, and that defendant had no knowledge of the note in question before the institution of the action. Judgment was rendered by *Monk*, J., in the Superior Court, on the 31st of December, 1866, in favor of the plaintiff.

The defendant appealed, and submitted, 1st, That the note in question was signed by error by L'Esperance, and without the defendant's knowledge or consent. 2nd, That the plaintiff gave no value or consideration for it. 3rd, That the plaintiff had still in his hands the notes for the renewal of which he pretended the note in question had been given.

BADGLEY, J., said the case turned upon the authority of the attorney. The defendant never acknowledged the note, never saw it, never knew of its existence. The plaintiff never made any communication to him about it, nor did his attorney. The only question then was as to the power given by Messier to L'Esperance. The power of attorney was a special act before two notaries, and merely gave L'Esperance power and authority to raise money by loan. Now the note in question was acknowledged by L'Esperance, as a settlement of indebtedness from the defendant to the plaintiff, which act was not within the scope of L'Esperance's authority. The action, therefore, should have been dismissed. The *motivés* of the judgment are: Considering that the promissory note, the basis of this suit, was made by Edouard L'Esperance, as the attorney *ad negotia* of the defendant, in consideration of an indebtedness alleged by the plaintiff to be due to him by the defendant, and in settlement thereof: considering that the said note was made without the knowledge or consent of the plaintiff: considering that the said L'Esperance was actually under a special procuration which did not give him authority to make and sign the said note in settlement between the parties: considering that the act of the said L'Esperance as such attorney has never been recognized by the defendant, nor has he acknowledged the amount contained in said note due by him to the respondent, and that in consequence the action of the said plaintiff should have been dismissed by the Superior Court: considering that in the judgment of the said Superior Court there is error, &c.;—Judgment reversed, and action dismissed.

DUVAL, C. J., CARON, and DRUMMOND, JJ., concurred.

H. F. Rainville, for the Appellant.

Moreau & Ouimet, for the Respondent.

MUTUAL FIRE INSURANCE COMPANY (defendants in the Court below), Appellants; and LORRAIN (plaintiff *par reprise d'instance*), Respondent.

Insurance—Identification of object insured.

The present action was instituted by François Quenneville for £135 10s, namely, £50 insurance effected on a barn alleged to have been destroyed by fire, £75 for grain consumed with this barn, and £10 10s. for animals in it. The plaintiff had another barn insured for £25, and the difficulty arose from a doubt whether it was the £50 or the £25 barn which had been burned. On the 17th of April, 1865, judgment was rendered in the Superior Court by *Monk*, J., in favor of the plaintiff, he being of opinion that it was the £50 barn which had been destroyed. This judgment was confirmed in revision on the 28th of February, 1866, *Badgley*, J., dissenting. (This judgment will be found reported Vol. 1 of the *Law Journal*, pp. 116, 117, *Quenneville v. The Mutual.*) The defendants now brought the present appeal.

DUVAL, C. J., was of opinion that the judg-

ment should be reversed. There was an error as to the barn destroyed.

MONDELET, J., concurred with the Chief Justice.

DRUMMOND, J., observed that he did not consider the case so clear as the majority of the Court did. He had much doubt on the subject at the beginning. The evidence, however, appeared to favor the defendants; and by law the responsibility of the uncertainty must fall upon him who gave the description. It was the insured who gave the description, and it was his fault if it was vague.

JOHNSON, J., said that his judgment rested upon the fact that there was no proof that the thing insured had been destroyed by fire; on the contrary, the proof went to establish that it was another barn that was destroyed.

Judgment reversed. The *motivés* were: Considérant qu'il est acquis en preuve en cette cause que la grange qui a brulé est celle qui avoisinait la maison en bois érigée sur la profondeur de la terre de l'intimée, laquelle n'a été assurée que pour £25, et non pas la grange avoisinant la maison en pierre érigée sur le front de la terre de l'intimé, laquelle a été assurée pour £50, &c. Judgment reversed.

Dorion & Dorion, for the Appellants.

Leblanc & Cassidy, for the Respondents.

LAVOIE (defendant in the Court below), Appellant; and DEGUISE *dit* LAROSE (plaintiff in the Court below), Respondent.

Revendication—Illegal exaction of toll.

This was an action to revendicate a horse and cart under the following circumstances:—On the 26th of April, 1864, the plaintiff was driving to St. Martin, where he resides. He had just passed the Viau Bridge, over the Rivière des Prairies, when he was stopped at the extremity by the defendant (the keeper), who demanded from him 13 *sous* for the toll. The plaintiff tendered him ten *sous* as the toll for the bridge, but refused to pay the three *sous* demanded for the turnpike. The keeper refusing to let him pass, the plaintiff and his wife got out and walked home, leaving his horse and wagon with the tollgate keeper. A few days after he brought an action to revendicate these effects. The effects were surrendered, and the defendant pleaded that he never took possession of them, and was only acting in pursuance of the instructions of his employers.

Judgment was rendered in the Circuit Court on the 30th of April, 1866, by *Badgley*, J., who made the following observations:—This is an action of damages under the following circumstances. There is a bridge leading from this Island to Isle Jesus, at which there is a toll of ten *sous* to be paid. In 1862, certain proprietors, owners of the bridge, formed an association to construct macadamized roads leading from the bridge, and a charter was granted, authorizing the levying of a road toll of not more than one *sou* per mile. The plaintiff and wife one day had crossed the bridge, and on asking the toll collector what was the toll, were informed 13 *sous*, ten for the bridge and three for the road. Larose said, I will pay you ten *sous* for the bridge, but not three for the road, as you are not entitled to it. The toll keeper insisting, Larose wanted to go back, but the toll keeper then said: If you go back you must pay me ten *sous* more for the bridge. Larose then tried to turn round to return home, but the toll keeper seized his horse's head, and refused to allow him to go till he should have paid 13 *sous*. Finally, Larose left his horse and cart there, and walked back home. The toll keeper had a right to ask for 11 *sous* only, as there was only one mile of the macadamized road to be used, and if he had limited his demand to this the plaintiff would probably have paid it. In asking more the gate keeper was in the wrong, and his stopping the horse was illegal. The plaintiff has brought an action of revendication of his property, and claims damages. The property has been already restored, but as the defendant was in the wrong in attempting to exact more than was legal, judgment will go for $10 damages, with costs as of the lowest appealable class.

From this judgment the defendant instituted the present appeal.

DUVAL, C. J., after stating the facts of the case, said, it was evident that the keeper of the bridge had no right to the three *sous* de-

manded. This being the case he was wrong in stopping the plaintiff's horse, and the judgment must therefore be confirmed. It was a pity he had not been better instructed in his duties.

DRUMMOND, MONDELET, and JOHNSON, JJ., concurred.

Cartier, Pominville & Bétournay, for the Appellant.

Loranger & Loranger, for the Respondent.

GRAVELLE (plaintiff in the Court below), Appellant; and BELANGER (defendant in the Court below), Respondent.

Insulting language in a Magistrate's Court—Damages.

The plaintiff instituted an action for £50 damages, under the following circumstances: On the 14th of November, 1863, he made a complaint of trespass before a Justice of the Peace against the defendant and one Leblanc. The defendants were tried separately, and after the trial of the present defendant, Belanger, had terminated, and while the plaintiff was giving his evidence under oath in the case of the other defendant, Belanger interrupted him several times, accusing him of perjury. The plaintiff appealed to the magistrate for protection, and the magistrate reprimanded the defendant, but this did not prevent him from repeating his insults. The plaintiff subsequently instituted the present action for $200 damages, which was dismissed by the Circuit Court on the 30th November, 1865. The plaintiff now appealed.

DUVAL, C. J., after stating the circumstances, said the case was of some importance. If the Court were to confirm this judgment, the plaintiff would go out of Court branded as a perjurer. The evidence did not allow the Court to fix this bad character upon him. The judgment must be reversed. The Court would not award exorbitant damages, but the defendant must pay the costs. He would have stood in a better position, if, instead of repeating the insults, he had expressed his regret at the language he had used. As the costs would be considerable, the damages would be restricted to $20.

MONDELET, J., read the judgment of the Court, as follows:—Considérant que l'intimé, par ses injures proférées à l'égard de l'appelant et à son adresse, cour tenant, en présence de l'auditoire, et tandis que l'appelant rendait son témoignage en la dite Cour, s'est rendu coupable d'une conduite très-répréhensible et attentatoire au caractère et à la réputation de l'appelant, et rendant le dit intimé passible de dommages envers le dit appelant: considérant par conséquent qu'en déboutant l'action de l'appelant la Cour de première instance a erré, cette Cour infirme, &c. Judgment reversed, and defendant condemned to pay $20 damages, with costs of highest appealable class Circuit Court, and all the costs of the appeal.

DRUMMOND, and JOHNSON, JJ., concurred.

Loranger & Loranger, for the Appellant.

Méd. Marchand, for the Respondent.

VENANCE BRUNET *dit* L'ETANG *et al.* (defendants in the Court below), Appellants; and EUSTACHE BRUNET *dit* L'ETANG, *et al.* (plaintiffs in the Court below), Respondents.

Will before a Notary and two Witnesses—Dictation.

This was an appeal from a judgment rendered by *Badgley*, J., in the Superior Court, on the 30th of June, 1865. (Reported 1st vol. LAW JOURNAL, pp. 60, 61.)

The present respondents (two of the children) brought an action *en pétition d'hérédité* claiming from the appellants (the other four children) two-sixths of the succession of the late Eustache Brunet *dit* L'Etang, their father. To this action the defendants pleaded that their father had made his will before Valois, notary, and two witnesses, on the 27th of April, 1863, by which he bequeathed 3,500 francs to each of his two daughters; that Delina (one of the plaintiffs) had already received 2,400 francs, leaving a balance due to her of 1,100 francs. That the testator had bequeathed to Venance (one of the defendants), the emplacement on which the testator resided, with an island at the end of the parish of Pointe Claire; and that he had willed the remainder of his property to his four sons, who had taken possession, and had no account to render to the plaintiffs. The

plaintiffs then inscribed *en faux* against the will produced by the defendants. The principal *moyens de faux* were as follows:—1. The will did not contain the wishes of the testator, 2. It had not been dictated by him. 3. It was made by Valois, notary, according to instructions given to him by Venance Brunet, and without the participation of the testator. 4. At the date of the will, the testator was not of sound mind, memory, and understanding, but was laboring under a disease which had deprived him of his physical and mental powers, and he was not in a state to know what he was doing. 5. The testator did not dictate any of the dispositions of the will, but they were all *dictées et nommées* to the notary by Venance and Theodore Brunet. 6. The will was not dictated to the notary in the presence of witnesses. The inscription *en faux* having been maintained by the Court below, the defendants appealed.

Duval, C. J., said the judges of the Court were of a different opinion from the Superior Court, and thought that the testator was of perfectly sound mind, and that the will was made properly. The testator, in his honor's view of the evidence, understood perfectly what he was saying. He was a man of few words, but this did not show that he had not well considered what he was saying.

Mondelet, J., was also of opinion that there had been no sufficient grounds shown for setting aside the will.

Drummond, J., observed that here it was clearly proved that there was not a word written before the arrival of the notary. But, it was said, it was a will made interrogatively, that is, that it was made by question and answer. There was no doubt that one sort of will made by interrogatory was null; but there were two kinds of interrogatories, one leading questions, and the other direct enquiries for information. The latter was a mode of question not only permissible, but often absolutely necessary, without which it would be impossible for a notary to make a will. The judgment was as follows:—Considérant que les intimés n'ont fait aucune preuve légale des moyens de faux par eux produits au soutien de leur *inscription en faux* contre le testament solennel de feu Eustache Brunet dit L'Etang, lequel testament était invoqué par les appelants dans leur défense à l'action des dits intimés: Considérant que les appelants ont établi par une preuve suffisante que lors de l'exécution du dit testament le dit testateur était sain d'esprit et en état d'apprécier ses actes, et que les dispositions qui se trouvent au dit testament, loin d'avoir été écrites et mises au dit testament par le notaire Valois sur la dictation d'autres personnes par anticipation et hors la présence du testateur, ont été prononcées, déclarées et dictées par le dit testateur lui-même, comme ses dernières volontés, et écrites et redigées par le dit notaire en sa présence et en la présence de deux temoins idoines: considérant que dans le jugement il y a erreur, &c. Judgment reversed, and inscription *en faux* dismissed.

Johnson, J., concurred.

Dorion & Dorion, for the Appellants.

R. & G. Laflamme, for the Respondents.

RECENT ENGLISH DECISIONS.

Contract for Sale—Rights of Way and Water.—A. and B. were tenants of adjoining premises, under the same landlord. A. had a well upon his premises, from which B.'s premises were supplied with water by means of a pipe. Both premises, with others, were put up for sale by auction, in lots, one of the conditions being that each lot was subject to all rights of way and water and other easements (if any) subsisting thereon. A. and B. both purchased the lots of which they had been tenants. The vendor insisted that A. had purchased subject to B.'s right of water. A. filed a bill for specific performance of the contract, without any liability to such easement. *Held*, that B. had no easement or right of water, but merely a license from his landlord during his tenancy; and that A. was entitled to the relief asked. *Russell* v. *Harford*, Law Rep. 2 Eq. 507.

Production of Documents.—A case for the opinion of counsel, stated in reference to a separate litigation about the same subject-matter as the present dispute, and after it had arisen:—*Held*, privileged from production.

A letter written between co-defendants respecting a matter in litigation, with direction to forward it to their joint solicitor:—*Held*, privileged from production. *Jenkyns* v. *Bushby*, Law Rep. 2 Eq. 547.

Partnership—Business of Solicitor.—Where one of a firm of solicitors received from a client a sum of money for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money:—*Held*, that the transaction with the client was within the scope of the partnership business; and that the partners in the firm were jointly and severally liable to make good the amount:—*Held* also, that all the partners were necessary parties to a suit for that purpose. *Atkinson* v. *Mackreth*, Law Rep. 2 Eq. 570.

Corporate Plaintiff—Foreign State.—The United States of America suing in the Courts of England, and thereby submitting themselves to the jurisdiction, stand in the same position as a foreign sovereign, and can only obtain relief subject to the control of the Court in which they sue, and pursuant to its rules of practice; according to which every person sued in the Court of Chancery, whether by an individual, by a foreign sovereign, or by a corporate body, is entitled to discovery upon oath touching the matters upon which he is sued. Sir W. Page Wood, V.C., remarked in the course of his judgment:—"The question in this case is one in some degree novel, but the general principles applicable to it are sufficiently established. Where the suitor is an individual, although he may be the sovereign of a foreign country, and may of himself in reality represent the whole country of which he is sovereign, this Court has refused to acknowledge him when he comes here as a suitor in any other capacity than as a private individual. It has been determined by the highest authority that he must conform to the practice and regulations for administration of justice of the tribunals to which he resorts for relief; and, among other things, as was determined in *The King of Spain* v. *Hallett*, he is obliged to answer upon oath. It is also established that all persons sued in this country as a body corporate are amenable to the process of the Court, and must answer by one or other of their officers upon oath, inasmuch as it is considered essential to justice that answers shall be made upon oath. I say essential to the interests of justice, because I believe the only exception to this is in the case of the Attorney General, where I apprehend it arises from the dignity of the Crown, to which the Court is obliged to have regard, and, accordingly, officers of the Crown in this country are not put to make discovery upon oath..... What, then, is to be done in the case of a bill filed by a political body, such as the United States (not a physical but a metaphysical entity), proceeding as a sovereign state, and endeavoring to assert its rights in this country? Is there any reason why the defendant in the original suit should be deprived of those privileges which are enjoyed by every other party to a suit, or why either he or the Government suing here should not be dealt with according to the rules by which all other individuals, including the sovereign of any other state, must be dealt with when they seek to obtain relief in this Court? It appears to me there is no sound ground for saying that the rule is not to be applied. There may be difficulties in this case in selecting the person who is to make the answer. It is quite impossible, on any principle of analogy, to say that the President has been properly selected, or that he is the person for whose answer upon oath the United States must wait before they proceed in their original suit. I cannot make any order that the proceedings in the original suit be stayed until the President has put in his answer. No doubt ways and means are to be found for getting the discovery sought. I can do no more than make an order staying proceedings until the answer of the United States is put in." *Prioleau* v. *United States, and Andrew Johnson*, Law Rep. 2 Eq. 659.

Freight—Assignment—Priority.—The assignee of a particular freight who gave to the charterers notice of his security:—*Held*, entitled in priority to the general assignee of all freight to be earned by the same ship,

who was prior in date, but gave no notice, and took no steps to enforce his mortgage until after the particular assignee had given notice to the charterer, and the cargo had been in part discharged. *Brown* v. *Tanner*, Law Rep. 2 Eq. 806.

Will—Falsa Demonstratio.—If all the words of description are true, and correctly describe a thing certain, the Court will not presume that there is any error, so as to extend the meaning of the words to something not properly comprehended in the express words. In 1802, testator purchased an estate called A. farm, in the parish of R., in the county of H. In 1813 and 1815 he acquired adjoining land in the parishes of S. and B. in the same county, which was thrown into A. farm, and occupied therewith, and the whole thenceforth called A. farm. By his will, made in 1817, he devised all his estate, consisting of A. farm, in the parish of R., in the county of H., to trustees :—*Held*, that the land in the parishes of S. and B. did not pass by the specific devise. *Pedley* v. *Dodds*, Law Rep. 2 Eq. 819.

BANKRUPTCY—ASSIGNMENTS—PROVINCES OF QUEBEC AND ONTARIO.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Alexander, William		S. C. Wood	Lindsay	Aug. 10th.
Allen, William	Montreal	A B. Stewart	Montreal	Sept. 11th.
Auger, Isidore		J. Amyrould	Granby	Sept. 2nd.
Belfry, Ira F.		Joseph Rogers	Barrie	Sept. 19th.
Bernard, Joseph Zéphirin	Wendover	N. B. Desmarteau	Montreal	Sept. 16th.
Blair, James		W. Collins	Walkerton	Aug. 26th.
Bond, Joseph	Smith's Falls	Wesley Tennant	Almonte	Sept. 18th.
Boyle, Arthur		W.A.Mittleberger	St. Catharines	Sept. 11th.
Corey Brothers	Stanbridge Station	Philip S. Ross	Montreal	Aug. 30th.
Coulson, Edward	Township of Blanshard	Thos. Miller	Stratford	Aug. 27th.
Cowan, Andrew		James Holden	Uxbridge	Aug. 27th.
Crosson, James	Cobourg	E. A. Macnachtan	Cobourg	Sept. 11th.
Duncan, William	Goderich	S. Pollock	Goderich	Sept. 12th.
Ernst, John (individually and as partner of John Ernst & Son		Alex. McGregor	Galt	Aug. 27th.
Fairman, James C		S. C. Wood	Lindsay	Sept. 18th.
Fay, John	Montreal	T. Sauvageau	Montreal	Sept. 2nd.
Fraser, Francis	Montreal	John Whyte	Montreal	Sept. 10th.
Gates, Thomas Charles		Robert Watson	Montreal	Sept. 4th
Hayes, John Joseph (individually and as partner of Bury & Hayes	Montreal	A. B. Stewart	Montreal	Aug. 24th.
Huffman, Charles W		J. Parker Thomas	Belleville	Aug. 24th.
Hutchinson, Charles		Thos. Churcher	London	Aug. 24th.
Inman, James, of Inman Bros	Stratford	Thos. Miller	Stratford	Sept. 4th.
Jackson, Jonas Bertram		Richard Monck	Chatham	Aug. 23rd.
Jones, William		Joseph Hurssell	Cayuga	Aug. 26th.
Kerr, John William		John Barr	Hamilton	Sept. 11th.
Lamoureux & Frères	Montreal	T. Sauvageau	Montreal	Sept. 18th.
Langstaff, Miles		Richard Monck	Chatham	Sept. 7th.
Leriche, Alphonse (individually and as partner of Rapin & Leriche	St. Jean Chrysostôme	T. S. Brown	Montreal	Sept. 18th.
Leeper, R. D.		Thomas McLean	Brantford	Sept. 13th.
Lindsay, James		John Stewart	Dunnville	Aug. 30th.
Lyon, Seth		R. M. Rose	Kingston	Sept. 7th.
Madill, Alexander		Margaret Madill	Peterborough	Aug. 26th.
Mayrand, George E.	St. Rémi	T. Sauvageau	Montreal	Sept. 7th.
Mathews, Edward		A. J. Donly	Simcoe	Sept. 10th.
McIntyre, John	Seaforth	S. Pollock	Goderich	Sept. 4th.
Morin, Edward	St. Anne de la Pocatière	T. Sauvageau	Montreal	Aug. 22nd.
Nestor, Cornelius		W.A.Mittleberger	St. Catharines	Sept. 14th.
Pawling, William		W.A.Mittleberger	St. Catharines	Sept. 11th.
Pelletier, Joseph	Sorel	G. I. Barthe	Sorel	Aug. 17th.
Phillips, William Magford		W. S. Williams	Napanee	Sept. 10th.
Pooley, Henry		C. S. Hayman	Toronto	Sept. 10th.
Robertson, John		A. W. Smith	Brantford	Aug. 22nd.
Robinson, Robert		George Stevenson	Sarnia	Aug. 24th.
Rowell, Joseph		Thos. Churcher	London	Aug. 31st.
Russell, George Hiram	Ottawa	Francis Clemow	Ottawa	Aug. 28th.
St. Jean, Louis G.	Montreal	T. Sauvageau	Montreal	Sept. 4th.
Schoenlank, Samuel		John Kerr	Toronto	Sept. 17th.
Shaw, Joseph E.	Gaspé Basin	JamesJ. Lowndes	Gaspé Basin	Sept. 5th.
Stephens, Charles Nelson		Joseph Rogers	Barrie	Sept. 4th.
Stevenson, Charles N.		W.A.Mittleberger	St. Catharines	Sept. 14th.
Whitworth, William Brown		George J. Gale	Owen Sound	Sept. 9th.

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ADMISSIONS TO LEGAL STUDY.

The number of candidates presenting themselves for admission to the study of the law exhibits a marked decrease since the passing of the Amended Act respecting the Bar. This may be partly owing to the higher standard of qualification required, but must also, undoubtedly, be attributed, in great measure, to the recent increase in the admission fee. Perhaps nothing could better demonstrate the necessity for some step towards closing the flood gates of the profession, than the fact that scores of young men have been turned aside from presenting themselves, by the addition of a few dollars to the admission fee.

With respect to admissions to practice, one would not expect to see much change until those already admitted to study have, in the course of time, all passed into the ranks of the profession, and the new system has come into full operation. Nevertheless, a considerable falling off is already apparent—a result due, no doubt, to the more rigorous examination to which candidates are now subjected.

The list of admissions in Montreal at the last two Quarterly Examinations is as follows:—

JUNE 1867.

ADMITTED TO PRACTICE:—W. A. Lay, A. E. Mitchell, C. E. Carmel, L. A. Carmel, Asa Gordon, Wm. E. Bullock, Edw. Holton, Pierre Brouillet.

ADMITTED TO STUDY:—P. Lanctot,, T. F. Wood, A. Davies, C. B. Devlin, A. Forget.

SEPTEMBER, 1867.

ADMITTED TO PRACTICE:—L. J. Desautels, C. F. Bouthillier, A. Dalbec, H. E. Poulin, M. Souligny, J. Beaupré, A. J. A. Charland, C. Lalime, J. A. Quinn, W. D. Drummond, Abel Adams.

ADMITTED TO STUDY:—Ed. Lareau, J. S. Perrault, H. Bouthillier.

JUDICIAL PENSIONS.

To the Editor of the Canada Law Journal:

Mr. Editor:—Among the many matters which are being suggested for the consideration of the first Parliament of the Dominion, will you allow me to add one, which does not seem to me least in importance: I refer to the regulations respecting the pensioning of Judges. In England the Bench is liberally dealt with in this respect, but the state of things in the Province of Quebec reveals a *mesquinerie* unworthy of a civilized country. It is even now stated, and correctly I believe, that the resignation of one of the ablest of our judges, tendered five months ago, has not yet been accepted, because there is no pension vacant which can be applied to the purpose. Meantime the Appeal Bench is left with four judges. In the same way, the Superior Court at Montreal suffers from the absence of a judge. These facts require no comment.

Yours,

X. E. B.

LAW REFORM IN ENGLAND.

We have already noticed the appointment of a Commission in England to consider the practicability of compiling a Digest of the Law, and have reproduced the interesting report presented by the learned members of the Commission. A second Commission has now issued on the subject of the Court of Chancery and Courts of Law. The persons appointed are, Lord Justice Cairns, Sir William Erle, late Chief Justice of Common Pleas, Sir J. P. Wilde, Judge of the Court of Probate and Matrimonial Causes, Vice-Chancellor Wood, Mr. Justice Blackburn, of the Queen's Bench, Mr. Justice Montague Smith, of the Common Pleas, Sir J. B. Karslake, Attorney-General; Sir Roundell Palmer, W. M. James, Q. C., J. R. Quain, Q. C., and H. C. Rothery, A. S. Ayrton, G. W. Hunt, H. C. E. Childers, John Hollams, and F. D. Lowndes, Esquires. The task assigned to the Commission is, "to make diligent and full inquiry into the operation and effect of the present constitution of our High Court of Chancery of England, our Superior Courts of

Common Law at Westminster, our Central Criminal Court, our High Court of Admiralty of England, the Admiralty Court of our Cinque Ports, our Courts of Probate and of Divorce for England, the Courts of Common Pleas of our Counties Palatine of Lancaster and of Durham respectively, and the Courts of Error and of Appeal from all the said several Courts, and into the operation and effect of the present separation and division of jurisdictions between the said several Courts. And also into the operation and effect of the present arrangements for holding the sittings in London and Middlesex, and the holding of sittings and assizes in England and Wales, and of the present division of the legal year into terms and vacations; and generally into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in Chambers, with a view to ascertain whether any and what changes and improvements, either by uniting and consolidating the said Courts, or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognizance to any other jurisdiction, or by altering the number of judges in the said Courts, or any of them, or empowering one or more judges in any of the said Courts to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said Courts, or any of them, or of the sittings and assizes, is now distributed or conducted, or otherwise, may be advantageously made so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the same Courts and at the sittings and assizes respectively. And, further, to make inquiry into the laws relating to juries, especially with reference to the qualifications, summoning, nominating, and enforcing the attendance of jurors, with a view to the better, more regular, and more efficient conduct of trials by jury, and the attendance of jurors at such trials."

The Commissioners are authorized to examine the officers of the respective Courts as witnesses, and are to report within nine months from the 18th of September, date of issuing the Commission.

NOTICES OF NEW PUBLICATIONS.

THE AMERICAN LAW REVIEW, October. Little, Brown & Co., Boston.—This is the first number of the second volume. The contents of the current number show no falling off in interest. An able article on "Liability as partner" advocates that the participant of partnership profits should be exempt from liability in the five cases enumerated in the English Statute of 1865, viz: when such profits are received as a remuneration for the use of money lent a partnership; when they are received in addition to, or in lieu of, wages for labour performed in the capacity of servant or agent of the partnership; when they are received by way of annuity, in case the participant be the widow or child of a deceased partner; and when they are received by way of annuity in consideration of the sale of the good will of a business to a partnership; and in addition to these five instances, "generally, when the participant is not in fact a partner, and has not held himself out as such to creditors, and has not also, either secretly or fraudulently, enabled others to gain false credit by any act of his."

Five and twenty pages of the *Review* are devoted to a memoir of the late Chief Justice SHAW, for thirty years Chief Justice of Massachusetts, who died in 1861, just at the commencement of the civil war. This is followed by a notice of "A Book about Lawyers," of which we reproduce a part in the present number.

THE AMERICAN LAW REGISTER, October. D. B. Canfield & Co., Philadelphia.—The present number closes the current volume of this able monthly, which has been sixteen years in existence. An interesting letter, written by Dr. LIEBER to a member of the famous constitutional convention, appears in our present issue.

THE UPPER CANADA LAW JOURNAL, October. W. C. Chewett & Co., Toronto.—The last number contains the second part of an article on the Marriage Laws, with reference to the

important question mooted of Roman Catholic marriages without banns or license.

THE NEW DOMINION MONTHLY, October and November, Montreal.—Although it is hardly in our way to notice publications not of a legal character, we cannot forbear expressing our satisfaction at this attempt to diffuse a cheap and healthy literature, somewhat after the style of the Messrs. Chambers' publications. The first two numbers are exceedingly well got up, and the publication has already attained a very wide circulation.

THE NEW YORK TRANSCRIPT.—Besides being the organ of the municipal government, the *N. Y. Daily Transcript* is a law newspaper—the only daily law journal we have yet seen—containing a large selection of English and American cases.

APPOINTMENTS.

Major General Charles Hastings Doyle, to be Lieutenant Governor of Nova Scotia, and Deputy Governor for the signing of marriage licenses. (Gazetted 18th October, 1867.)

Colonel Francis Pym Harding, C. B., to be Lieutenant Governor of New Brunswick, and Deputy Governor for the signing of marriage licences. (Gazetted 18th of October, 1867).

Ovide Leblanc, Esq., N. P., to be clerk of the Circuit Court, in and for the County of Pontiac, District of Ottawa.

BANKRUPTCY—ASSIGNMENTS—PROVINCES OF QUEBEC AND ONTARIO.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Ainesse, Pierre, jun.	Lachine	T. S. Brown	Montreal	Sept. 26th.
Batty, Benjamin	Hamilton	J. J. Mason	Hamilton	Sept. 23rd.
Beauparlant, Hercule	St. Aimé	T. S. Brown	Montreal	Sept. 25th.
Bigger, George	Township of Grey	S. Pollock	Goderich	Sept. 10th.
Bradley, John		Thomas Clarkson	Toronto	Sept. 20th.
Campbell, Alex. William		Alex. McGregor.	Galt	Sept. 19th.
Cheeseman, Thomas	Mitchell	Thos. Miller	Stratford	Sept. 24th.
Empey, Michael Peter	Hawksville	H. F. J. Jackson.	Berlin	Sept. 23rd.
Fretz, Allan Benjamin		W. S. Robinson.	Napanee	Sept. 30th.
Kitchen, Timothy Culver		A. J. Donly	Simcoe	Sept. 24th.
James, Thomas Albert	Hamilton	J. J. Mason	Hamilton	Sept. 17th.
McColl, Donald		Nelson W. Moore	St. Thomas,	Sept. 21st.
Palmer, Coryden	Leamington	J. McCrae	Windsor	Sept. 16th.
Robinson, John		A. W. Smith	Brantford	Sept. 23rd.
Terreberry, Samuel		W.A.Mittleberger	St. Catharines	Sept. 30th.
Watley, Thomas		Wm. Yelland	Peterborough	Sept. 19th.
Wright, George, & Son		Alex. McGregor	Galt	Sept. 25th.

THE UNANIMITY OF JURIES.

The following is a letter from Dr. FRANCIS LIEBER to a member of the New York Constitutional Convention, revised, with additions, by the author. We take it from the *American Law Register* for October:—

Dear Sir,—Observing in the papers that you have proposed in the Convention to abolish the unanimity of jurors as a requisite for a verdict in civil cases, I beg leave to address to you a few remarks on a subject which has occupied my mind for many years, and which I consider of vital importance to our whole administration of justice. Long ago I gave (in my Civil Liberty and Self-Government) some of the reasons which induced me to disagree with those jurists and statesmen who consider unanimity a necessary, and even a sacred element of our honoured jury trial. Further observation and study have not only confirmed me in my opinion, but have greatly strengthened my conviction that the unanimity question ought to be given up, if the jury trial is to remain in harmony with the altered circumstances which result from the progress and general change of things. Murmurs against the jury trial have occasionally been heard among the lawyers, and it is by no means certain that without some change like that which I am going to propose, the

trial by jury, one of the abutments on which the arch of civil liberty rests, can be prevented from giving way in the course of time.

The present constitution of our state permits litigants to waive the jury, in civil cases, if they freely agree to do so. This would indicate that the adoption of verdicts by a majority of the jurors, in civil cases, would not meet with insuperable difficulty; but it seems to me even more important and more consonant with sound reasoning to abandon the unanimity principle in penal cases. The administration of justice is a sacred cause in all cases, and the decision concerning property and rights, and, frequently, the whole career of a man, or the fate of an orphan, is, indeed, sufficiently important not to adopt the majority principle in jury trials, if it implies any lack of protection, or if there is an element of insecurity in it; and if there is not, then there are many reasons, as we shall see, why it ought to be adopted in criminal cases as well as in civil.

At the beginning of my "Reflections," I stated the different reasons of the failure of justice in the present time. Circumstances obliged me to write that pamphlet in great haste, in which I forgot to enumerate among these causes the non-agreement of jurors. It would be a useful piece of information, and an important addition to the statistics of the times, if the Convention could ascertain, through our able state statistician, the percentage of failures of trials resulting from the non-agreement of jurors in civil, in criminal, and especially in capital cases. This failure of agreement has begun to show itself in England likewise, since the coarse means of forcing the jury to agree, by the strange logic of hunger, cold, and darkness, has been given up.

In Scotland no unanimity of the jury is required in penal trials; nor in France, Italy, Germany, nor in any country whatever, except England and the United States; and in the English law it has only come to be gradually established in the course of legal changes, and by no means according to a principle clearly established from the beginning. The unanimity principle has led to strange results. Not only were jurors formerly forced by physical means to agree in a moral and intellectual point of view, but in the earlier times it happened that a verdict was taken from eleven jurors, if they agreed; and the "refractory juror" was committed to prison!* (Guide to English Juries, 1682). I take the quotation from Forsyth, History of Trial by Jury, 1852.

Under Henry II. it was established that twelve jurors should agree in order to determine a question, but the "afforcement" of the jury meant that as long as twelve jurors did not agree, others were added to the panel, until twelve out of this number, no matter how large, should agree one way or the other. This was changed occasionally. Under Edward III. it was "decided" that the verdict of less than twelve was a nullity. At present, in England, a verdict from less than twelve is sometimes taken by consent of both parties. There is nothing, either in the logic of the subject, or the strict conception of right, or in the historic development of the rule, that demands the unanimity of twelve men, and the only twelve men set apart to try a cause or case.

At first the jurors were the judges themselves, but in the course of time the jury, as judges of the fact, came to be separated from the bench as judges of the law, in the gradual development of our *accusatorial* trial, as contra-distinguished from the *inquisitorial* trial. It was a fortunate separation, which in no other country has been so clearly perfected. The English trial by jury is one of the great acquisitions in the development of our race, but everything belonging to this species of trial, as it exists at present, is by no means perfect; nor does the trial by jury form the only exception to the rule that all institutions needs must change or be modified in the course of time, if they are intended to last and outlive centuries, or if they shall not become hindrances and causes of ailments instead of living portions of a healthy organism.

The French and German rule, and, I be-

* We have some doubts about the veracity of the stories told of the treatment of refractory jurors. Perhaps some of our readers fond of Notes and Queries can instruct us on this point.—Ed. L. J.

lieve, the Italian also, is, that if seven jurors are against five, the judges retire, and if the bench decides with the five against the seven, the verdict is on the side of the five. If eight jurors agree against four, it is a verdict, in capital as well as in common criminal cases. There is no civil jury in France, Germany, Italy, Belgium, or any country on the continent of Europe.

This seems to me artificial, and not in harmony with our conception of the judge, who stands between the parties, especially so when the State, the Crown, or the people, is one of the two parties; nor in harmony with the important idea (although we Americans have unfortunately given it up in many cases) that the judges of the fact and those of the law must be distinctly separated. The judge, in the French trial, takes part in the trying, frequently offensively so. He is the chief interrogator; he intimates, and not unfrequently insinuates. This would be wholly repugnant to our conceptions and feelings; and may the judge for ever keep with the American and the English people his independent, high position *between* and *above* the parties!

On the other hand, what is unanimity worth when it is enforced; or when the jury is "out" any length of time, which proves that the formal unanimity, the outward agreement, is merely *accommodative* unanimity, if I may make a word? Such a verdict is not an intrinsically truthful one; the unanimity is a real "afforcement," or artificial. Again, the unanimity principle puts it in the power of any refractory juror, possibly sympathizing more with crime than with society and right, to defeat the ends of justice by "holding out." Every one remembers cases of the plainest and of well-proved atrocity going unpunished because of one or two jurors resisting the others, either from positively wicked motives, or some mawkish reasons which ought to have prevented them from going into the jury-box altogether.

I ask, then, why not adopt this rule: *Each jury shall consist of twelve jurors, the agreement of two-thirds of whom shall be sufficient for a verdict, in all cases, both civil and penal, except in capital cases, when three-fourths must agree to make a verdict valid. But the foreman, in rendering the verdict, shall state how many jurors have agreed.*

I have never heard, nor seen in print, any objection* to the passage above alluded to, in which I have suggested the abandoning of unanimity, other than this: that people, the criminal included, would not be satisfied with a verdict, if they knew that some jurors did not agree. As to the criminal, let us leave him alone. I can assure all persons who have investigated this subject less than I have, that there are very few convicts satisfied with their verdict.

The worst among them will acknowledge that they have committed crimes indeed, but not the one for which they are sentenced, or they will insist upon the falsehood of a great deal of the testimony on which they are convicted, or the illegality of the verdict.

The objection to the non-unanimity principle is not founded on any psychological ground. How much stronger is the fact that all of us have to abide by the decision of the majority in the most delicate cases, when Supreme Courts decide constitutional questions, and we do not only know that there has been no unanimity in the Court, but when we actually receive the *opinions* of the minority, and their whole arguments, which always seem the better ones to many, sometimes to a majority of the people! Ought we to abolish, then, the publication of the fact that a majority of the judges only, and not the totality of them, agreed with the decision? By no means. Daniel Webster said in my presence that the study of the Protests in the House of Lords (having been published in a separate volume) was to him the most instructive reading on constitutional law and history. May we not say something similar concern-

* One objection is probably the lurking opinion in the minds of most people that the majority are not always right, and therefore (while we retain the penalty of death on our statute-book) the chances of the execution of innocent men would be largely increased. Indeed, Dr. Lieber seems not to be wholly free from this idea, when he proposes the arbitrary and clumsy expedient of requiring *nine* instead of *eight* to concur in capital cases.—ED. LAW JOURNAL.

ing many opinions of the minority of our supreme benches?

By the adoption of the rule which I have proposed, the great principle that no man's life, liberty, or property shall be jeoparded twice by trials in the Courts of justice, would become a reality. At least, the contrary would become a rare exception. Why do all our constitutions lay down the principle that no one shall be tried twice for the same offence? Because it is one of the means by which despotic governments harass a citizen, under disfavour, to try him over and over again; and because civil liberty demands that a man shall not be put twice to the vexation, expense, and anxiety for the same imputed offence. Now, the law says, if the jury finds no verdict it is no trial, and the indicted person may be tried over again. In reality, however, it is tantamount to repeated trial, when a person undergoes the trial, less only the verdict, and when he remains unprotected against most of the evils and dangers against which the Bill of Rights or Constitution intended to secure him. This point, namely, the making of the noble principle in our constitution a reality and positive actuality, seems to me a most important motive why we should adopt the measure which I respectfully, but very urgently, recommend to the Convention. So long as we retain the unanimity principle, so long shall we have what virtually are repeated trials for the same offence.

In legislation, in politics, in all organizations, the unanimity principle savours of barbarism, or indicates at least a lack of development. The United States of the Netherlands could pass no law of importance except by the unanimous consent of the States General. A single voice in the ancient Polish Diet could veto a measure. Does not, perhaps, something of this sort apply to our jury unanimity?

Whether it be so or not, I for one am convinced that we ought to adopt the other rule in order to give to our verdicts the character of perfect truthfulness, and to prevent the frequent failures of finding a verdict at all. I am, with great respect, dear Sir, your obedient, FRANCIS LIEBER.

NEW YORK, *June 26th*, 1867.

MICHAELMAS TERM IN ENGLAND.

November is not a pleasant month, either for contemplation in the prospect or to endure in fog. The month commences badly, for on the first of the month the municipal year begins, and civic strife is waged in a thousand boroughs. "Thus bad begins, but worse remains behind," for on the second day the legal world commences the year of litigation, and the Lord Chancellor gives a breakfast to Judges and Queen's Counsel. How pleasantly that breakfast passes off we are never permitted to know, for the institution is shrouded from the gaze of the profane, and even from the outer world that knows not silk at the bar. In public, lawyers attempt to make jokes, and sometimes a judge does really say something so funny as to cause a loyal laugh from the bar and a titter from the audience. Whether amongst themselves the lawyers joke, whether they are as grave as judges and advocates profess to be on criminal trials, or whether Mr. Sergeant Eglantine and Mr. Pipkins do say the sharp things which they occasionally inflict upon juries is beyond our knowledge; and perhaps we are as well without the knowledge, for if it should cost as much to hear what is said on a festive occasion as it costs in Westminster Hall, the game would not be worth the candle. We are proud of our laws and our admirable system of jurisprudence, but we are not proud of our lawyers. Law is so cheap in theory, so costly in practice, that it would be the merest affectation of gratitude to say that we are proud of the officers of the law. It is doubtless a great profession, and has produced, or rather afforded a career for some very great men, but it is probable that men like Mansfield, Hardwicke, Lyndhurst, and Brougham would have carved out for themselves great names even if no such thing as law had existed. It is only fair, however, to admit that the lawyers will contrast favourably with the members of any other profession. They work as hard as medical men, except in the long vacation, very much harder than the clergy, and nearly as hard as the professional politician, when he is out of office. It is rather a mockery, certainly, that the great magnates of the law should begin with a breakfast and

come so leisurely down to Westminster Hall where many very anxious suitors are waiting in order to learn their fate as to the new trials, which if refused, may lead to ruin. The dignitaries think otherwise, and so they breakfast very pleasantly at the expense of the holder of the Great Seal, who may never have the pleasure of entertaining his contemporaries again, under which gloomy prospect he is sustained by the certainty of a retiring pension.

The commencement of the legal year is a great event in the eyes of young barristers who have just been called, and the country cousins who have come up to town to see the sights. To witness the Lord Chancellor and the Judges going down in procession, is only second to witnessing the Lord Mayor's show. Country cousins have seen two judges on circuit accompanied by the High Sheriff and his chaplain and perhaps also by "javelin men," but to see no less than twenty-one judges all in their full-bottomed wigs and ermine, cheerful and contented like well fed men going to their amusement, gives a country cousin a very different idea of the law than he entertained in the country. The very knowing ones never care to see the whole bench of judges, but to witness the new judges going for the first time to Westminster Hall, and as the judges of the Court of Exchequer approach, the gaze of the curious is naturally directed towards the new Lord Chief Baron,* Sir Fitzroy Kelly, who late in life, after more than forty years practice at the bar, has ascended the judicial bench, from which a variety of contingencies had contributed undeservedly to exclude him. The length of Sir Fitzroy's Kelly's life at the bar is such that he had seen all his contemporaries either seated on the bench or removed altogether from the scene. Sir William Follett, the most gentlemanly and successful advocate, and Sir Cresswell Cresswell, the most sarcastic of judges, were called about the same time and were competitors for the honours of the bar with Sir Fitzroy Kelly, Sir Frederick Pollock, and Sir Frederick Thesiger. In their prime at the bar they represented a brilliant age, brilliant so far as the law ever can be. Their names are associated with the great criminal and civil trials which live in the memories of the present generation. There are few who have not heard, and many who have read the trial of Thurtell for the murder of Weare, but few remember that the present Lord Chancellor was one of the counsel on that trial. We remember how Sir Frederick Pollock defended Frost, Williams, and Jones against a powerful bar, led by Sir John Campbell and Sir Thomas Wilde. Sir Fitzroy Kelly was counsel for Tawell, whose trial first proved the use of the telegraphic wires in the detection of crime. In every shipping case of importance, the name of Sir Cresswell Cresswell appeared, and whenever a high-minded and chivalrous style of advocacy was required, Sir William Follett was sought by both parties. The names which figure to-day in our reports are the names of inferior men who have not had the great advantages enjoyed by the great advocates we have named of being concerned in the great trials of the last generation.

In contrast to the long and solid length of service at the bar, which is closed by a well-merited elevation, comes the promotion of Lord Justice Cairns, who, at a comparatively early age, leaves the contentions of the forum for the statuesque position of Justice in the Court of Appeal. No ordinary man ought to have succeeded a judge so profound and so original as Sir James Lewis Knight Bruce; and Sir Hugh Cairns is not an ordinary man, either as a lawyer, an advocate, or an orator. In a parliamentary career of only fourteen years he took the highest place ever occupied by lawyers in the House of Commons, and in the same period he won his way to the front rank of his profession. A very high order of intellect is required at the equity bar, and only men of the highest intellectual calibre ever attain the highest eminence. Sir Hugh Cairns had to make his way in spite of the fact that Mr. Bethell, Mr. Roundell Palmer, and Mr. Rolt were all before him in the race, and all enjoyed eminence, and deservedly so, too, before his claims were even considered by the attorneys. There is something, however, in parliamentary success which leads on to fortune. A man who can make the

* This was written in November of last year.

great special jury of the House of Commons listen to him at the least, and applaud him too, is sure to be listened to with respect in Lincoln's Inn, and at the bar of the House of Lords. In the full play of his forensic and parliamentary powers Sir Hugh Cairns leaves the scene compelled, it is said, by considerations of health. Mr. Rolt, considerably the senior of Sir Hugh Cairns, and not a whit the inferior of any man as an equity lawyer, appears in the long vacation as Attorney-General. It may be open to question whether our courts will now compare with what they once were, for we have had some few disappointments in recent elevations. There are, however, still some great lawyers at the bar for whose elevation we may confidently look, and some great advocates who, if the occasion were to arise, would shed a lustre upon the annals of the bar. We hope that Mr. Rolt will signalise his advent to office by salutary law reforms, than whom no man is better able than he to introduce. The improvement we most of all require is the reduction of the fees which go so largely to increase costs—the most terrible of all the incidents in litigation, except "the law's delay." A great reformer would sweep the fees away which now hamper our system, and so really bring justice to every man's door.

A BOOK ABOUT LAWYERS.*

(*From the American Law Review.*)

This is verily the gossip of the bar. Lawyers pass their lives in discussing the affairs of others: here their own are minuted. The legal profession entails upon its members an intimate knowledge of the virtues, the vices, the foibles, the weaknesses, the habits, at home and abroad, of the rest of the world. They are even called on to become familiar with the little peculiarities and eccentricities of laymen, who come to them for advice, and entrust to them their family secrets, who, unlocking their closets, invite an inspection of the skeletons within. Now, the profession, of course, has no skeletons, for it is forced to see so many belonging to others, that it finds better things to lock up, whether in its closets at home, or safes at the office; but it has its history, little as well as great, with a strong and a weak side; and little, odd nooks and corners and by-ways, alleys and back doors, as well as the great, broad stone front of solid grandeur and respectability, which it presents to an admiring public. Mr. Jeaffreson has chosen to make these smaller matters the subject of his book. Enough to say, he has treated this subject quite cleverly, and has managed to fill two volumes, of nearly four hundred pages each, with entertaining and amusing talk about English lawyers. They are presented in almost every conceivable circumstance, from the cradle to the grave. "Lawyers in Arms" is the title of one of his chapters; and such is the comprehensiveness of the work, that one is rather surprised to find that it is the arms of Mars, and not those of Lucina, that are referred to. Lawyers at the bar and on the bench, on foot and in the saddle, at home and abroad, at their tables, in their chambers, in the House of Commons; lawyers in love, lawyers on the stage, married lawyers, hen-pecked lawyers; lawyers pleading, singing, fighting, jesting, dying. We are even told what they wore, what they ate and drank, when they rose, and when they went to bed. A curious entertainment this. The muse is not great and high and inspiring. There are no battles, and statesmanship, and things of nations; less of the heroic, perhaps, because the sight is from a valet de chambre's stand point. Those erect and dignified old gentlemen, whom we see in the old prints, with the fine black eyes and full-bottomed wigs, have removed these tedious coverings with their flowing robes. My Lord High Chancellor Eldon, becomes "handsome Jack Scott," and elopes with pretty Miss Bessy Surtees, of Newcastle. Lord Thurlow is no longer the savage old peer, with overhanging white eyebrows, giving from the woolsack that justly celebrated reproof to the Duke of Grafton, which American schoolboys delight to declaim; but "lazy, keen-eyed, loquacious Ned Thurlow," perplexed where to find a horse on which to ride his first circuit, taking the animal on trial, riding him the circuit, and returning him on its completion, "be-

*By John Cordy Jeaffreson, Barrister-at-law. In two volumes. London: Hurst & Blackett, 1867.

cause the animal, notwithstanding some good points, did not altogether suit him."

It is the leading principle of English professional etiquette, that the client must consult the barrister only through the medium of an attorney; but in the days of Sir Matthew Hale, and even long afterwards, this was far from being the case. At this time, clients were in the habit of addressing their counsel personally, and taking their advice; and, in the seventeenth century, almost always insisted on having personal interviews: and though their attorneys or solicitors usually conducted them to the counsel's chambers, and were present during the conference, no member of the inferior branch of the profession deemed himself affronted or ill-used if a client chose to confer with his advocate without the presence of a third person. Long, too, in the eighteenth century, barristers were in the habit of acting without the co-operation of attorneys, in cases where no process required the employment of the latter. "They were accustomed," says Mr. Jeaffreson, "to receive their lay clients in the coffee houses fast by Westminster hall and the Inns of Court; just as the eighteenth century physician used to sit at an appointed hour of each day in his public coffee-room, and write prescriptions for such patients as came to consult him, while he drank his wine." The reader will recollect that in one of the series of Hogarth's pictures of "Marriage à la Mode," the young barrister, afterwards the lover and seducer of the wife, sits by and superintends the execution of the marriage settlement; an office which professional etiquette would debar an English barrister from performing at the present time. So, too, as to interviews with the witnesses, whose testimony the English lawyer of the present day knows only from his brief. Roger North says he has heard Sergeant Maynard say, that "no attorney made breviate of more than the pleadings, but that the counsel themselves perused and noted the evidences,—if deeds, by perusing them in his chamber; if witnesses, by examining them there also before the trial; and so," North very sensibly remarks, "were never deceived in the expected evidence, as now the contrary happens; the evidence seldom or never comes up to the brief, and the counsel are forced to ask which is the best witness. But the abatement of such industry and exactness, with a laziness also, or rather superciliousness, whereby the practice of law forms is slighted by counsel, the business, of course, falls into the hands of attorneys."

Fees and retainers, also, which it is now unprofessional in England to receive directly from the client, were, in Sir Matthew Hale's time, paid to the barrister from the client's own hand. Indeed, the modern English fashion, strictly subdividing legal labor and controlling the relation of lawyers and clients, did not come into vogue until the latter part of the eighteenth century. Lord Hardwicke studied in an attorney's office, and Lord Thurlow in a solicitor's. The ancient English bar, in this respect, resembled more closely the American than that of modern England.

Wigs, the distinctive adornment of both judges and bar of modern times, are but an innovation, and were imported from France at the restoration of Charles II; and, though society in general afterwards dropped them, the profession, with its love for precedent, has retained this French fashion to the present day. Our green bags are a relic of ancient times. They are now never carried by English lawyers; but on the stage of the theatres, in the seventeenth century, they were always borne by them. In Wycherly's "Plain Dealer," Widow Blackacre upbraids the barrister, who declines to argue for her, with "Gadsboddikins! you puny upstart in the law, to use me so; you *green bag carrier*, you murderer of unfortunate causes, the clerk's ink is scarce off your fingers." It appears, too, that in Queen Anne's time, these green bags were carried by attorneys and solicitors as well; for Ned Ward, in "The London Spy," observes of a dishonest attorney that "his learning is commonly as little as his honesty, and his conscience much larger than his green bag." Whether in any or all these innovations on the ancient practice, any improvement has been made, may be a matter of divided opinion; but in respect to another change, there can be but one. "In the seventeenth century," says Mr. Jeaffreson, "an aged judge, worn out by toil and length of days, was deemed a notable instance of royal

generosity, if he obtained a small allowance on relinquishing his place in court." Now the English people pay liberal pensions to those faithful servants who have served them long and well. We still retain the ungenerous fashion of the seventeenth century.

The great rewards given to successful members of the profession in England, render the lives of their distinguished lawyers the history of the country. Mr. Jeaffreson says the life of a lawyer comprises three distinct periods: first, the useful but inglorious labors of an overworked barrister; second, a term in which the more lucrative achievements of a popular leader are diversified by the triumphs of parliamentary warfare; third, the honors and emoluments of the woolsack or the bench. Including those peerages which have been won by persons whose families were first made noteworthy by great lawyers, as well as those won by actual lawyers, there were in the English House of Lords, at the time of the elevation of Lord Campbell to the peerage, three dukedoms, seven marquisates, thirty-two earldoms, one viscounty, and thirty-five baronies, held by "peers who, or whose ancestors, have filled the judicial seat in England;" and the number is constantly increased by the ennoblement of successful men, the last of whom is Sir Hugh Cairns. In the reply of Lord Thurlow to the Duke of Grafton, already alluded to, he says, "The noble duke cannot look before him, behind him, or on either side of him, without seeing some noble peer who owes his seat in this house to successful exertions in the profession to which I belong." It would be foreign to the purpose of this book about lawyers, to give any thing like a detailed history of these men; but a curious and entertaining story is told of the Great Seal of England, and the vicissitudes to which it has been subjected. The seals, of which one may see the counterparts in any book of ancient English customs, are certainly not flattering portraits. Edward the Confessor, who is supposed to have set the fashion, appears to have been taken seated on a low stool, so that his legs, for the length of which he was noted, have scarcely that grace which might be desirable; and his knees are brought into painful proximity to his chin, making him resemble a trussed fowl rather than the "Lord's anointed." The conservative spirit of later kings probably induced them to copy their predecessors down to the middle of the eighteenth century, with some few exceptions, —such as the Conqueror, who appears mounted, and Queen Bess, whose expanse of stiff petticoat modestly leaves the position of her knees to the imagination.

The Chancellors were required to guard the royal seal with the utmost care, preserved in its crimson purse of state; but, in spite of all their diligence, the seals appear to have been subjected to a number of curious mischances. When James the Second was fleeing from Whitehall, in 1688, he crossed the Thames by night, in a boat rowed by a single sculler, and, when in the middle of the river, drew forth the seal and dropped it overboard; but, wonderful to say, it was, not long after, brought to shore in the net of a fisherman, who restored it to its proper keepers. When Thurlow was Chancellor, the seal was stolen from his dwelling-house, by a burglar who had forced his way in, and was never recovered. A similar attempt was made to steal the Clavis Regni from Lord Chancellor Nottingham: but it happened that the faithful man was sleeping with the precious trust hidden under his pillow; so that the thief, one Thomas Saddler, failed to find it, and only carried away the mace, for which offence he was afterwards tried and hanged. Lord Eldon's country house once caught fire, and, upon the first alarm, the Chancellor, running out of doors with the seal, which he too kept in his bed-chamber, buried it in the flower bed. The conflagration increased, and even Lady Eldon's maid servants helped to supply the water. "It was," wrote Lord Eldon, "really a pretty sight; for all the maids turned out of their beds, and they formed a line from the water to the fire engine, handing the buckets: they looked very pretty, all in their shifts." Perhaps this sight turned the old gentleman's head; for, when the fire was out and the sun rose, he had forgotten where he had buried the seal, and had to form his whole household into a digging party, who searched for some time before they discovered the buried treasure. In ancient days, the

discarded seals were always broken to pieces, and, until recent times, with great completeness. When Charles the First's seal was surrendered to Fairfax, in 1646, it was, by order of Parliament, brought to the bar of the House of Peers, and there broken to pieces by a smith, amidst loud acclamations. In turn, on the Restoration, in 1660, the Commonwealth's seal met a like fate. For several generations, the custom of breaking discarded seals has been disused; but the ceremony of *damasking*, as it is termed, is still observed. The Sovereign, when he desires formally to set aside an old seal, taps it gently with a hammer, at the same time ordering his loyal subjects to regard it as smashed and ground to powder. The chancellor in office at the time regards the seal so "damasked" as his special perquisite; and a curious controversy on this subject arose between Lord Lyndhurst and Lord Brougham, with regard to their respective claims to George IV.'s great seal. On William IV.'s accession, when an order in council for a new seal was made, Lord Lyndhurst was chancellor; but before this was complete, and while George IV.'s seal was in use, Henry Brougham became keeper of the King's conscience. When at last the old seal was "damasked," the question arose to whom it fell as a perquisite of office. Lord Lyndhurst claimed, that, as the order was made during his tenure of office, the seal was actually discarded during his chancellorship, and therefore it fell to him. On the other hand, Lord Brougham argued, that the order for a new seal was but a step prudently taken in anticipation of the act by which George IV.'s seal was destroyed; that whilst the order was being executed by the engraver, the seal of George IV. was in fact as well as theory the seal of William IV.; that he (Lord Brougham) had held this seal; and had done business with it, no one venturing to hint that its virtue was impaired, or in any way affected, by the order in council; that the seal was not destroyed until William IV. damasked it, at which time he was the holder. This dispute was warmly carried on, until William IV., acting as arbitrator by the consent of the parties, terminated the contest by a decision, which, like most decisions arrived at by arbitration, was directly in defiance of principle and precedent, but probably the only one which would have suited both contestants. The seal is made in two parts,—the obverse and reverse,—being, indeed, separate and distinct seals. The king, therefore, causing each part, at his own expense, to be set in a rich silver salver, gave judgment for both parties, who doubtless both "acknowledged satisfaction."*

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

MONTREAL, June 8th, 1867.

RUTHERFORD ET AL., (Plaintiffs in the Court below) APPELLANTS; and FERRES (Intervening party in the Court below) RESPONDENT. (2). THE MONTREAL AND NEW YORK RAILWAY COMPANY (Defendants in the Court below) APPELLANTS, and FERRES (Intervening party in the Court below) RESPONDENT.

Intervention, Right of—Interest in suit—Dormant Partner.

A party claimed to intervene in a suit, representing that he was a partner of the plaintiffs who were about to compromise their claim against the defendants without his consent:

Held, that his intervention was properly received.

The circumstances which led to these two appeals were briefly as follows:—Rigney and Rutherford, two contractors, in 1851, entered into two contracts with the Lake St. Louis and Province Line Railway Company, now represented by the Montreal and New York Railway Company, to do certain work on the railway. Previous to the second of these contracts, Rigney and Rutherford admitted Ferres as a partner in their firm for these contracts. After the work was completed, in 1853, the balance due was disputed by the Railway Company, and an action for a considerable sum was instituted against the Company by Rigney and Rutherford. About this time Rigney left the Province, and the suit was car-

*To be concluded in next number.

ried on by Ferres and Rutherford, till 1860, when Rutherford, assuming to act for himself and Rigney, without the knowledge or concurrence of Ferres, transferred the claim to Lighthall, N. P., and in 1863, Lighthall and Rutherford entered into a settlement with the Railway Company, by which the suit was to be withdrawn, in consideration of a certain sum in money and stock, to be paid by the Company. No steps appear to have been taken to withdraw the suit till 1864, when motions were made in Court for this purpose. At this time, however, Ferres, becoming aware of the intended settlement, prayed to be allowed to intervene for the protection of his rights, and his intervention was allowed by a judgment of the Superior Court, rendered by *Monk*, J., on the 25th of April, 1864. It was from this judgment that both the plaintiffs and defendants in the suit instituted appeals.

The appellants submitted that the litigation had been put an end to a year before the motions were made in Court, and could not be revived by Ferres, who had his recourse against his partners.

For the respondent it was urged that the intervention disclosed on its face sufficient to establish that he had clearly a right to be in the cause to watch over his interests. He alleged a partnership with Rigney and Rutherford, and therefore had a right to be in the case which they were about to settle without regard to his interests.

DUVAL, C. J. Ferres has asked leave to intervene. I am of opinion that he has no right to intervene. But I am alone in this opinion. My reasons are that no party has a right to intervene in a suit unless he shows cause. Now what does Mr. Ferres complain of? He is a dormant partner of the plaintiffs, and by the law of this country, a dormant partner has no rights against third parties: he may have an action against his own partners. That part of the case should, therefore, be set aside. In the next place, Ferres says, I have claims against my partners, and I am informed that they are about to settle this case with the opposite parties to my detriment. To this I say, suppose this were true, and suppose they settled with the defendants, could not Ferres bring his action directly against them, founded upon the fraudulent concert between them? The conclusions of the petition in intervention are certainly strange; he prays the Court that in case of contestation of his rights by the plaintiffs, the amount of his rights be ascertained by arbitration. What has the opposite party to do with this? They may well answer, "We have nothing to say to you; if you have any action against your dormant partners, exercise that right; but why do you ask to intervene, and pray that your rights may be settled by an arbitration which may last for years before this Court, and in the meantime we are to remain in Court till you and your partners have settled your rights." It is said, however, that this is anticipative. I think it is not. I say that no party has a right to intervene unless he shows cause, and I say that, taking every word that Mr. Ferres says for granted, he has shown no right to intervene in this cause. The defendants ought not to have their proceedings tied up for years, till it shall please Mr. Ferres and his partners to settle their claims against each other. I would at once have rejected the intervention.

JOHNSON, J. This is an appeal from a judgment rendered in the Superior Court adjudicating upon several motions. The interests of the parties were represented as of great magnitude, and the case was very earnestly argued, but the point appears to me very simple. In the first place, there was an objection raised to certain motions of substitution in the Court below. We only say that there appears to be nothing irregular in these. But the main objection of the appellants is that the judgment appealed from proceeded to allow a certain intervention presented by Mr. Ferres, the respondent. The Court has come to the conclusion that all the authorities on this point are fairly condensed in the article of the Code of Civil Procedure, which may now be taken as law. The rule laid down in the Code is that every one having an interest in the event of a pending suit is entitled to be admitted a party thereto, for the protection of his rights. (Art. 154). This appears to be sufficiently general to embrace this case. But it is said that the respondent, asking leave to intervene, does not disclose upon the face of

his petition sufficient grounds to entitle him to intervene. A step further is taken, and it is said that although Mr. Ferres may have shown good reason to intervene, yet the other party may have a good answer. But we cannot go beyond the fact that the respondent has shown a *prima facie* right to intervene. The other question can only be settled after an *enquête*. It may be added that the right to make a demand in a Court of justice is a civil right which can only be restricted by legislation. But it is objected that this may have the effect of protracting the suit. So may an unjust demand. Courts of justice cannot control the justice of demands as regards the right to make them; they can only control the disposal of them. We think, then, the respondent has a right to intervene, and beyond that the Court does not go. The judgment of the Court below is confirmed.

DRUMMOND, and MONDELET, JJ., concurred.

Judgment confirmed, DUVAL, C. J., dissenting.

H. Stuart, Q. C., and *Cross & Lunn*, for the Appellants.

A. & W. Robertson, for the Respondents.

GRIMARD (Defendant *par reprise d'instance* in the Court below) APPELLANT, and BURROUGHS (Plaintiff in the Court below) RESPONDENT.

Retaining fee—Action for services rendered as advocate.

Held, that an advocate has a right of action for a retainer, but he cannot recover from his client more than the fees fixed by the Tariff, unless he can prove an agreement with his client that more than the taxable fees should be paid.

Held, (per BADGLEY, J.,) that there is no right of action in Lower Canada for a retainer.

This was an appeal from a judgment rendered by *Monk*, J., in the Superior Court, on the 2nd of March, 1864. The action was instituted by the plaintiff against Louis DeChantal, for the sum of £250, being for value of services rendered him by the plaintiff as advocate, counsel and attorney, and amount of disbursements made in certain cases specified. The declaration contained, besides the count of *quantum meruit*, two special counts, one for £107 9s. 4d., amount of fees and disbursements taxable against the opposite party; the other for £150, amount of retaining fee for extra services.

Pleas: 1st, that Louis DeChantal had been voluntarily interdicted, and could not be impleaded without the assistance of his wife who was his counsel; 2nd, that Louis DeChantal had never agreed to pay a retaining fee, and that he had paid all the taxed costs and disbursements. It was on the second plea that the case turned.

The plaintiff produced bills of costs for fees and disbursements amounting to £107 9s. 4d. He also produced a register of proceedings in the case of *DeChantal* v. *DeChantal*, one of the cases he had conducted for the defendant, and at *enquête* examined a number of professional men respecting the total value of the services rendered. The defendant produced at *enquête* a number of receipts given by the plaintiff to Louis DeChantal for different sums, amounting in all to £130 10s. 7d. The dates of these receipts extended over a period of two and a half years, and most of them were in these words, "Received for *retaining fee*."

The question was as to the right of the plaintiff to the retaining fee of £150. The Superior Court held that it was proved by the receipts that DeChantal agreed to pay the plaintiff a retaining fee over and above his taxed costs, and that £150 was a reasonable amount. The defendant was accordingly condemned to pay £116 19s. 1d., viz. £19 5s. 5d., balance due upon the retaining fee, and £97 9s. 8d., due upon the taxed costs.

From this judgment, the defendant appealed on the following grounds: 1st, an omission by the judgment to credit the defendant with about £10 charged by the plaintiff, but not actually disbursed by him. 2nd, Because the judgment should have declared the plaintiff entitled only to the £107 of taxable costs, and should have declared this amount paid. 3rd, The Superior Court should not have received proof of a *quantum meruit* to establish a retaining fee, apart from the tariff. The plaintiff not having alleged an agreement with DeChantal as to the payment of a retainer, could not get such retainer by a *quantum meruit*. The tariff of fees established a contract be-

tween the parties, which could not be deviated from without an express agreement, and as such agreement did not exist the tariff was law.

BADGLEY, J. This is more a professional question than anything else. It is one of those questions which are of interest to the bar, and which require a little examination. The facts of the case are these: Mr. Burroughs, an attorney and advocate of this Court, was substituted in a case brought against an old man named DeChantal. He took the case through a long and tedious *enquête*, and obtained judgment. The case was taken to the Court of Appeals, and there the judgment was against Mr. Burroughs' client. While this case was pending, another action was instituted against DeChantal for a smaller amount, and Mr. Burroughs again appeared. An attachment was issued against the defendant, and upon that attachment Mr. Burroughs appeared also, and acted for DeChantal. Execution issued against the defendant's goods, and Mr. Burroughs filed an opposition. Costs were incurred in these various cases and proceedings, amounting to £107. The taxed bills have been filed, and there is no difficulty on this point. While Mr. Burroughs was thus employed as attorney, he was receiving sums of money from his client from time to time, amounting in all to £144. No credit has been given by the plaintiff for these amounts, but they have been established by receipts which the defendant has produced before the Court, and these amounts are represented in the receipts as having been paid on account of retainer. His client not being willing probably to pay any further sums, an action has been instituted against him by his attorney. The action was brought for £250 *i.e.* £107, as the amount of the bills of costs, and £150 for retaining fee for extra services. Now the action is brought simply, in the common assumpsit form, for work and labor amounting to £150, &c., with conclusions for £250. The defendant pleaded that he was not liable for anything beyond what the tariff allowed as taxable costs; that the retainer was not recognized by law, and that he was not liable to pay a retainer. The argument before this Court turned solely upon this charge for a retainer. In addition, there are some small items charged as paid by Mr. Burroughs, but which are shown by the defendant to have been paid by him.

The question then is, has an advocate an action against an unwilling client for the recovery of a retainer? This is the whole question. The question does not turn upon the right of the advocate to receive his taxed costs which are regulated by the Tariff. The question, as I stated before, is almost entirely a professional one, and although it has already been adjudged upon, it may be well to go into it a little in detail.

The question of the right of an advocate to recover fees was originally settled by the Roman law, and that law forbade advocates to make any bargain with their clients for their fees, and also interdicted them from an action for their recovery. In England, the law distinguishes between advocates and barristers; the fees of the latter are strictly honorary. Blackstone says, it is established that a counsel cannot maintain any action for his fees, and it has been so held on the ground of public policy, from the great influence of the advocate over his client, who is compelled to become dependent on his skill and professional experience.

[His Honour also referred to the jurisprudence of France as against the right of action of the advocate.]

Under these circumstances, I would be inclined to dismiss this action without saying a word more. But apart from all this, the case is susceptible of other considerations which appear to have influenced the Court below in rendering judgment. These deserve consideration, because the position of practitioners at the provincial bar is somewhat anomalous. A lawyer unites here both professional offices; he is an attorney, and at the same time he fills the office of the English counsel or advocate. The two offices as they exist in France and England are not clearly distinguishable here. In this union of offices, the Lower Canadian lawyer may be assimilated to professional men in the United States, where the advocate may demand compensation. There the offices of attorney and counsel are frequently blended in one, and actions

for compensation are sustained in most of the States of the Union. Our Tariff rates apply to the services of advocates and attorneys as taxable against the losing party. Costs are generally given to the victorious party against the losing party by distraction. But apart from the Tariff, there is no means of fixing the value of services rendered by an attorney to his client. Of course we all know that it is usual for a lawyer to tell his client, when asked to undertake a case, this is a case of considerable difficulty, and you must pay an additional amount, and the money is paid down at once, and does not go into the account between the parties. Even at a subsequent period if more be required, a refresher may be asked. But in this case, it will be remembered that the services of Mr. Burroughs commenced only with the *enquête*; he took the case through the *enquête*, and through the Court of Appeals. In his statement of particulars, the amount charged rests upon the number of witnesses examined, the length of the *enquête*, and finally the appeal. All these are matters that would be appreciable by the record itself. The record has not been produced in the case, and we have only the testimony of three professional gentlemen, who having heard stated the number of days the *enquête* lasted, gave their opinion that £150 was a very reasonable charge. But can testimony of this kind, however respectable, support an action of *assumpsit*? Then we come to the question of the receipts. These receipts were produced by the defendant to show the actual amount of money paid by him to his attorney; and in these receipts the attorney has taken the precaution to say that they are on account of retainer. It is admitted of record that the defendant was an ignorant man who could not read, and was only able to sign his name. He was ignorant also of the nature of the consideration received for the money paid; for it appears that the plaintiff refused to give an explanation of the word retainer, or *retenu*, although his client expressly requested him to do so. Many of the receipts are in English, and the evidence of the defendant upon this subject strongly supports the objection arising from the receipts themselves. Under these circumstances, the receipts are obnoxious to the objection of being a surprise upon his client, and they can only stand as receipts for money paid. Even if the right of action for a retainer could be maintained, the proof to support the action in this case is wanting. The plaintiff's action therefore must be dismissed.

MONDELET, J., concurred in dismissing the action. He did not deny the right of action, but he thought the proof was not sufficient. The receipts did not constitute a *commencement de preuve.*

DUVAL, C. J. I distinctly recognize the right of action of counsel to recover their fees. We have nothing to do with English law in this case; we have to do with the law of France, and in France the Courts never interfered. When an advocate thought he had a right to complain, he brought his case before the corporation of advocates, and if they thought it was a case in which an action should be brought, then the action was brought in the name of one of their own body. The right of action has also been recognized in Lower Canada; I remember two cases* at Quebec, and, for my part, I never entertained a doubt on the subject. But we are told that the English law denies the right of action. Let us see how the English law stands: the counsel takes care to get his fee in advance from the attorney, and then the attorney brings his action for so much money paid to the counsel, and succeeds. Instead of the barrister claiming it as a fee, which is considered *infra dig.*, the attorney claims it as so much money disbursed to the counsel. This is better to the English advocate than a right of action.— Distinctly recognizing this right of action, as I do, we come to the consideration of the present case. The plaintiff here appears as attorney *ad litem*, as well as counsel. He has made his contract with his client as attorney *ad litem*, and the Court cannot go beyond that contract, in his capacity as attorney. But he says, I had another capacity, I acted as his counsel. To this I answer that if you were not satisfied with what the tariff allowed you as attorney, it was your duty to tell your client that this was a difficult case,

* Not reported.

and you required more. But here a poor man in the country is sought to be charged £150 as a retainer. If he had been told beforehand by his lawyer, that his fees would amount to £150, he might have said that he thought he could settle the case for £75, and get rid of the trouble of litigation. I therefore put my judgment in this case upon this ground: distinctly recognizing the right of counsel in this country to bring an action for the recovery of their fees, I will not recognize the right of an attorney, after the case is over, to bring an action for extra services as counsel, without having notified his client that he would have to pay more, and without obtaining his assent to pay more. In this case, there is in my opinion, no evidence that De Chantal was notified that the usual attorney's fees would not satisfy his counsel, and it was only fair and necessary that he should be notified, as he might have been able to make a better settlement himself with his adversary.

DRUMMOND, J. Although agreeing in principle with, at least, two of the judges, I dissent from the application of that principle to the present case. The Chief Justice has mentioned two cases at Quebec where the Courts granted judgments for retainers. I remember two or three cases here, one by Mr. Devlin against Dr. Tumblety, in which the plaintiff recovered a sum for his retainer. I also remember a case some years ago, before Chief Justice Vallières, in which I obtained my fees as counsel for the defence in a case before the Criminal Court. I do not think that the opinion of the bench has been, that no person is entitled to an action against his client, unless there has been understanding between them. But even supposing this, have we no proof that there was such an agreement here? I think so. I cannot draw a distinction between ignorant men who cannot write, and those who can write. Besides, De Chantal was a man who had long practice before this Court; he knew well the meaning of a retainer. It is proved by the witness Elliott, that he knew and said he was paying more than the taxable costs. The rules followed in France and in England, apply to the profession as it exists there. In the United States, I believe the action is always allowed, and the profession is in a somewhat similar position here. I have, therefore, to dissent from the majority of the Court. I would not confirm the judgment as it stands, but I think that Mr. Burroughs should be allowed his taxed costs, exclusive of what he has already received for retainer. The *Enquête* was long and difficult, and it is proved that De Chantal was in the habit of getting his receipts for the money he paid during this time, read to him by a member of the family.

The *motifs* of the judgment are:—

Considering that the defendant had paid to the plaintiff, and advanced for charges made by the plaintiff, and not credited by him to the defendant previous to the institution of the action against the defendant, the sum of £144 2s. 11d., being £36 13 11 over and above the sum of £107 9, found to be due by the defendant, as mentioned in the judgment of the Court below, and considering that the plaintiff hath not established in law his demand for the sum of £150 by him claimed as retainer in the said professional matters in the said record set out: considering that the said sum of £107 hath been paid by the defendant to the plaintiff previous to the institution of this action, but without credit given therefor by him:—considering that in the judgment rendered by the Court below, there was error, &c. Judgment reversed, and action dismissed, Drummond, J., dissenting.

Leblanc, Cassidy & Leblanc, for the Appellant.

Cross & Lunn, for the Respondent.

HAROLD, (plaintiff in the Court below,) Appellant; and THE CORPORATION OF MONTREAL, (defendants in the Court below,) Respondents.

Negligence—Contractor—Damages.

Held, that a party is responsible for the negligence of his contractor, where he himself retains control over the contractor and over the mode of work. The relationship between them is then similar to that of master and servant.

This was an appeal from a judgment rendered in the Superior Court by *Monk*, J., on the 20th of September, 1865, dismissing the plaintiff's action.

The action was instituted for $10,000 damages for loss sustained in 1862 by the Corporation laying a main sewer through the greater part of McGill Street, and in front of the plaintiff's shoe store. While this sewer was being constructed the street was for a long time blocked up with mud and earth from the excavation; and the plaintiff's business as a shoemaker greatly interfered with, his receipts were diminished, and his customers obliged to go elsewhere. The defendants pleaded that the work had been carried on with diligence, so that the plaintiff, even if he had sustained loss, could not recover. The action was dismissed in the Superior Court on the ground that the defendants were not guilty of negligence or of any acts rendering them in law liable for damages, and that they had used all possible care and diligence in completing the work. The plaintiff appealed.

BADGLEY, J. This is a case of some importance with reference to damages. In 1862, the Corporation of Montreal determined to construct a tunnel, and with this object entered into a contract with Patrick White. The work commenced in August, and the material from the excavation was thrown up, encumbering both the roadway and foot pavement. After some time, the Corporation being dissatisfied with the progress made, protested the contractor that they would employ other contractors unless the work was pushed on with more speed. A second and more formal protest was subsequently served in the end of October, and on the following day the Committee took the work out of White's hands, and a new contract similar to the first was entered into with Valin & Barbeau for the completion of the work. In the meantime, the plaintiff, a shoemaker, doing a large retail business, and other residents in the street, complained of the serious loss entailed upon them by the blocking up of the street. When the work was proceeding near the plaintiff's shop, an accident occurred by the falling in of the sides of the trench, which caused much difficulty and delay. Evidence of the injury suffered by the plaintiff is afforded by the protests of the Corporation. The falling in of the sides of the excavation caused by the quicksand is no excuse, for this might have been provided against. The defendants, however, have urged that the work was done by contract, and that the contractor was not their servant. On this point the doctrine is that a person employing a contractor is not liable for the negligence of the contractor, while a master is liable for the negligence of his servant. But there is this modification of the general doctrine, that where a man keeps control over the mode of work, there is no difference between his liability and that of a master. Now here the Corporation reserved to themselves the control of the work; the contractors were bound to follow their directions in doing the work, and the relation between them was therefore that of master and servant. *Qui facit per alium facit per se:* he who makes choice of an unskilful person as his servant is liable for his choice. It only remains, then, to settle the amount of damage. The plaintiff has put in evidence his sales in 1861, 1862, and 1863, to show the loss of receipts after the obstruction commenced. The Court is not disposed to allow the plaintiff more than the loss of profits during the extra time the obstruction lasted, owing to the negligence of the contractors. This amount has been fixed at $273.70, for which judgment will go in favour of the appellant, with costs of both Courts.

MONDELET, J. No one can doubt that the facts justify a judgment against the Corporation.

DUVAL, C. J. I have come to the same conclusion. The judgment is:

Considering that it has been proved that the respondents during the execution and construction of the works mentioned in the declaration of the appellant, (which said works the respondents were by law authorized to make) were guilty of negligence and of acts rendering them liable in damages to the appellant, by obstructing for the period of four months, from the middle of September, 1862, to the middle of January, 1863, full and perfect access to the shop and premises, and causing him loss and injury therefrom: Considering that the damages have been proved to amount, for the said space of time, to $273.70, etc. Judgment reversed, and judgment for said amount in favor of the plaintiff.

DRUMMOND, J., concurred.

Torrance & Morris, for the Appellant.

H. Stuart, Q. C., and *R. Roy, Q. C.*, for the Respondents.

June 3.

MULLIN, (defendant in the Court below,) Appellant; and ARCHAMBAULT ET AL., (plaintiffs in the Court below,) Respondents.

Notice to terminate lease—Transmissible right.

Two persons, joint owners of a certain property, leased it, reserving to themselves the right to give notice terminating the lease on their electing to build. One of the joint owners sold his undivided half of the property, and notice to terminate the lease was given by the purchaser and the owner of the other half:—

Held, that the right to give notice was properly exercised by the purchaser, who was substituted in the rights of his vendor.

This was an appeal from a judgment rendered on the 28th June, 1866, by *Monk*, J., confirmed in Review, *Smith*, J., dissenting. The action was instituted by P. U. Archambault and James Baylis to obtain the resiliation of a lease made by Archambault and one Levesque to the defendant Mullin. This lease, passed in February, 1860, was for a period of six years and ten months and a half, to be reckoned from the 15th June, 1861, to the 30th April, 1868, and contained the following stipulation:

"And finally it is understood and agreed that the lessors shall have the right to cancel this lease on the 30th April, 1866 or 1867, by giving the lessee notice of such their intention, in writing, at least three months previous to the day on which they desire the lease to expire, and this right shall be exercised in the event of their electing to build, and not otherwise."

On the 25th August, 1865, Levesque and his wife sold their undivided half of the property to Baylis, who gave the notice required to cancel the lease, and upon the refusal of Mullin to give up the property, brought the present action to resiliate. The only part of the pleas necessary to be noticed is that which set up that the stipulation or reserve, giving the right to the lessors to cancel the lease on their electing to build, was *personal* to the lessors, and did not pass to the purchaser.

The Superior Court considered that the right to cancel on electing to build was not personal to the lessors, but was transmitted to the purchaser, and gave judgment in favour of the plaintiff. The defendant having inscribed the case for review, the judgment was confirmed, *Smith*, J., dissenting. The defendant then appealed.

The Court (DUVAL, C. J., AYLWIN, BADGLEY, and MONDELET, JJ.,) was unanimously of opinion that Baylis was substituted in the rights of Levesque by his purchase of Levesque's undivided half, and therefore he had a right to terminate the lease.

Judgment confirmed.

B. Devlin, for the Appellant.

P. A. O. Archambault, for the Respondent.

MONTHLY NOTES.

COURT OF QUEEN'S BENCH.—(APPEAL SIDE.)

June 8th, 1867.

DUFAUX ET AL., (defendants in the Court below) APPELLANTS; and HERSE ET AL., (plaintiffs in the Court below) RESPONDENTS.

Will—Donation—Substitution.

This was an appeal from a judgment rendered by *Smith*, J., in the Superior Court at Montreal, on the 26th of January, 1865. The action was instituted by Marie Louise Herse (and husband), to recover the half of certain immoveable property in Montreal. The declaration set out that by *acte* of donation on the 21st of May, 1825, Pierre Roy gave to his son Joseph, the land in question, to enjoy it *à titre de constitut et précaire*, reserving to himself the usufruct during his lifetime. After the death of Joseph Roy, this property was to go to the children, and, in default of children, to the other heirs of the donor. This donation was enregistered and published on the 28th of June, 1825. Pierre Roy died on the 16th of August, 1832, without making a will subsequent to this donation. After his death, his son, Joseph, took possession of the land in question, built two houses upon it, and died without children, on the 9th of October, 1848. At the time of his death, the plaintiff, Marie Louise Herse, grand-daughter of Pierre

Roy, and the defendants, Joseph Dufaux and Marguerite Dufaux, as representing their mother, a sister of Marie Louise Herse, were the nearest of kin to Pierre Roy. Thus on the death of Joseph Roy, the land in question devolved, by virtue of the deed of donation, one half upon Marie Louise Herse, and the other half upon Joseph and Marguerite Dufaux. But, as the declaration alleged, on the death of Joseph Roy, the defendants illegally took possession of the whole, and continued in possession. The plaintiffs further alleged that on the 2nd of September, 1848, Joseph Roy made a will bequeathing the land in question to the defendants; that subsequently, in May, 1857, one J. Bte. Sancer brought an action against the defendants, to have the plaintiffs, his debtors, declared proprietors of the undivided half of the land willed by Joseph Roy; that to this action (then still pending), the defendants pleaded that the present plaintiffs had ratified the will of Joseph Roy on the 10th of December, 1848, in an *acte* which was the *préambule à l'inventaire* of the effects of Joseph Roy; that Sancer had inscribed *en faux* against this *acte* of ratification, because at this time the plaintiffs were ignorant of the existence of the deed of donation; that Joseph Dufaux, father of the defendants, knew of the existence of the donation, but concealed the fact from the plaintiffs. Conclusion, that the plaintiffs be declared proprietors of the undivided half of the land in question, and that the defendants be condemned to pay £4,000 for revenues and damages.

Plea: That Pierre Roy made a will on the 15th of December, 1821, bequeathing to his son, Joseph Roy, the usufruct of all the property, moveable and immoveable, which he might leave at his death, the *propriété* to be his children's, with power, in case he should not have any children, to dispose of the *propriété* in his discretion.

Two questions arose: 1. Was the will made by Joseph Roy, disposing of the property in favour of Joseph and Marguerite Dufaux, valid? 2. If it was not, did the ratification by the plaintiff of the will of Joseph Roy exclude her from claiming the share which she would have had in the property, if Joseph Roy had not willed it to the defendants? The Superior Court decided these questions in the negative, holding that by the donation *entre vifs*, of the 21st May, 1825, Pierre Roy made over to his heirs-at-law the property in question, reserving to Joseph Roy the life interest of the estate; and that on the death of Joseph Roy, the property devolved equally upon the plaintiffs and defendants. The Court held, further, that the effect of this donation was such as to prevent Joseph Roy from disposing of the property by will, and therefore the will made by him, under which the defendants had taken possession of the whole property, was null and void. The Court lastly held that the fact of the plaintiffs having signed the *préambule d'inventaire*, which did not make any allusion to the donation, could not defeat the pre-existing title of the heirs. The Court accordingly declared the plaintiffs the proprietors of the undivided half of the property, and ordered an *expertise*. From this judgment the defendants appealed.

The following propositions were submitted by the counsel for the appellants as grounds for the reversal of the judgment. 1. By the donation of 1825, Pierre Roy only disposed of the land in question, in favour of his son Joseph, with the reservation that if Joseph died without children, the property should return to his (Pierre's) succession. 2. In the event of Joseph not leaving children, the property would be subject to the testamentary dispositions of Pierre Roy, either before or after the date of the deed of donation, and consequently Joseph Roy could dispose of it by will as he had done. 3. Even supposing that the property devolved upon the heirs as the plaintiffs pretended, yet Joseph Roy could give a part of the property belonging to the plaintiffs to his other legatees, inasmuch as it is permitted to a testator to bequeath the property of others. 4. The plaintiffs expressly ratified the will of Joseph Roy, with knowledge of the donation of 1825, and could no longer demand the setting aside of the legacies contained in it. 5. Assuming that the plaintiff did not expressly ratify the will, she had executed it, after being made aware of the donation, by accepting the legacies contained in it. 6. After being aware of the donation, she had al-

lowed more than ten years to elapse, without taking any steps in the matter.

DRUMMOND, J., said he differed from the majority of the Court.

MONDELET, J., was of opinion that the judgment should be reversed.

MEREDITH, J., after resuming the facts, observed that the main question was whether Joseph Roy had power to make a bequest of the property in dispute. Now by the will of Pierre Roy, in 1821, his son Joseph was to have the usufruct and enjoyment of all his property, and if Joseph should die without leaving any children, he had power to bequeath the property to whom he thought proper. But it was said that a substitution had been created by the deed of donation in 1825. His Honour did not think that such was the intention of the testator, or that the deed should be construed in that way. He believed that Pierre Roy certainly wished his son Joseph, in the event of his dying childless, to divide the property among the heirs. The power thus given by the testator to his son was both important and reasonable. Pierre Roy might reasonably have thought that this arrangement would be best in the interests of his descendants. There was no reason to suppose that Pierre Roy intended by the deed of donation to curtail the powers conferred on his son by his will. The view His Honour took of the case was substantially that submitted by the counsel for the appellants.

DUVAL, C. J., concurred. He read the judgment of the Court which was as follows:

Considérant que feu Pierre Roy, le 21 mai 1825, à Montréal, a fait donation pure, simple et irrévocable à Joseph Roy, son fils, du terrain dont il est question, pour du dit terrain jouir, user, faire et disposer par le dit Joseph Roy *à titre de constitut et précaire*, sa vie durante, à commencer la dite jouissance seulement au décès du dit donateur, qui se réserve la jouissance et usufruit du dit terrain, sa vie durante, à titre de constitut et précaire seulement, et après le décès du dit Joseph Roy, donataire, la propriété du dit terrain devant demeurer à ses enfants nés en légitime marriage, et à défaut d'enfants nés en légitime mariage du dit Joseph Roy, la propriété demeurer et appartenir aux autres héritiers du donateur, qui en jouiraient et disposeraient conformément à ce que le dit donateur en aurait disposé et ordonné par son testament et ordonnance de ses dernières volontés.

Considérant que le dit Joseph Roy, donataire dénommé au susdit acte de donation, est décédé sans enfants, et qu'aux termes du dit acte de donation, les biens donnés par icelle sont devenus la propriété des héritiers du donateur, Pierre Roy, pour en jouir et disposer conformément à ce que le dit donateur avait ordonné par son testament et ordonnance de ses dernières volontés.

Considérant que le donateur, Pierre Roy, par son testament reçu par Papineau, N. P., à Montréal, le 15 décembre 1821, a légué à son fils, le susdit Joseph Roy, la jouissance et usufruit de tous les biens, meubles et immeubles qu'il délaisserait à son décès, pour la propriété demeurer à ses enfants nés et à naître en légitime mariage, de disposer de la propriété des dits biens, tant meubles qu'immeubles, selon sa prudence et discrétion, sans être tenu de suivre aucune loi d'égalité ou de proportion entre les petits enfants du testateur, qui seraient tenus de se contenter du lot, qui leur serait assigné par le dit Joseph Roy, leur oncle, et si aucun des petits enfants du testateur décédait sans enfants légitimes, sa part serait reversible aux sœurs maternelles du dit Joseph Roy seulement, ou à celles de ses sœurs maternelles qui survivraient, et si toutes décédaient sans enfants, nés en légitime mariage, alors ce qui leur serait ainsi revenu du chef du dit testateur serait reversible au sieur Joseph Marie Roy, frère du testateur, pour en jouir sa vie durante seulement, et la propriété demeurer à ses enfants nés en légitimes mariages, avec pouvoir, dans le cas où il n'aurait pas d'enfants, de disposer des biens qui lui seraient échus du testateur, comme il aviserait et sans être tenu d'observer aucune loi d'égalité ou de proportion entre les neveux du dit testateur, lequel testament a été confirmé par le dit Pierre Roy, par son dit codicile reçu par Papineau, N. P., à Montréal, le 12 décembre 1831.

Considérant que les dispositions contenues dans l'acte de donation du 21 mai 1825, n'étant ni prohibées par la loi ni contraires aux

bonnes mœurs, doivent être reconnues valables, et qu'en vertu d'icelles dispositions le sus-nommé Joseph Roy, fils, avait le droit de disposer des biens meubles et immeubles, délaissés par Pierre Roy, et que Joseph Roy, par son testament reçu par Brault, N. P., le 2 septembre 1848, à Montréal, avait légué aux appelants, ses petits neveux, le terrain mentionné dans l'acte de donation, (moins les deux emplacements qu'il avait légués) pour, par eux, ses dits deux petits neveux, Joseph et Marguerite Dufaux, en disposer en toute propriété, à compter de la majorité du plus jeune des deux qu'il avait légué, en outre, un autre terrain aux appelants, et que quant à tout le reste de ses biens, il en avait donné la moitié aux appelants, et l'autre moitié en jouissance à l'intimée, et la propriété à ses enfants, et qu'il avait déclaré que ces legs, ainsi faits en jouissance à l'intimé, était pour servir d'aliment à ses enfants, et qu'ils ne pourraient être saisis ni aliénés sous quelque prétexte que ce fût; qu'il avait de plus ordonné que si quelqu'un de ses petits neveux décédait sans enfants, sa part accroîtrait à ses frères et sœurs:

Considérant qu'en vertu des dispositions contenues tant dans le dit acte de donation, le testament et le codicile du dit Pierre Roy que dans le testament du dit Joseph Roy, la demanderesse Marie Louise Herse n'a droit à aucune partie des conclusions de sa déclaration, et en conséquence infirme le jugement prononcé par la Cour Supérieure, &c.

Judgment reversed and action dismissed, DRUMMOND, J., dissenting.

Dorion & Dorion, for the Appellants.

E. Barnard, for the Respondents.

POITEVIN (plaintiff in the Court below), Appellant; and MORGAN (defendant in the Court below), Respondent.

Action for Slander—New Trial.

This was an appeal from a judgment of the Superior Court rendered by *Badgley*, J., on the 28th of February, 1866. (See Vol. 1, L. C. Law Journal, pp. 120, 121.) The action had been instituted by a clerk for $10,000 damages for verbal slander against his employer. The plaintiff had been dismissed from the service of the defendant for improper conduct and dishonesty, in sending goods out of the defendant's store to a confederate, without charging them in the books. The case was tried before a special jury, and the plaintiff obtained a verdict for $300 damages. It was from the judgment setting aside this verdict, and ordering a new trial, that the plaintiff instituted the present appeal.

DUVAL, C. J., said there were some cases of which the less said the better. It was difficult to understand why the plaintiff should have thought proper to bring his case before that Court. The judgment ordering a new trial must be confirmed.

MEREDITH, C. J. (S. C.) DRUMMOND, and MONDELET, J J., concurred.

Chapleau & Rainville, for the Appellant.

John Monk, for the Respondent.

LEPROHON, *et al.*, (defendants in the Court below), Appellants; and VALLEE (plaintiff in the Court below), Respondent.

Will—Propre fictif.

This was an appeal from a judgment rendered by *Smith*, J., in the Superior Court at Montreal, on the 30th of April, 1863, granting the conclusions of the plaintiff's declaration, and condemning the defendants to pay the sum of £685.

The facts of the case are as follows:—Edouard Martial Leprohon, by will, made the 24th March, 1856, left £2000 to each of his six children, and in the will stated the amount which each had received *en avancement d'hoirie*, which was to be deducted from the £2000, the balance to be paid after his wife's death. The balance coming to Marie Louise Leprohon, one of the daughters, was £685. In the event of the death of any child of the testator before him, the legacy made to such child was to go to his or her children to be *propre* to such children. Marie Louise Leprohon died in 1858, leaving a minor child, Louis Gregory, by her marriage with John U. Gregory. The testator died in 1859, and Louis consequently took his mother's legacy. This child died subsequently at the age of three, and the question then arose as to who were his heirs with respect to the sum of £685, balance of the legacy of £2,000. The father, John U[illegible]

Gregory, claimed this sum from the uncles and aunts of the child, and his claim not being admitted by them, he ceded his rights to Alexandre Vallée, the plaintiff, who brought the present action.

The defendants pleaded that the sum claimed from them was a *propre* which Mr. Gregory could not inherit from his son. They also alleged that the transfer by Gregory to the plaintiff had not been legally signified.

The Superior Court maintained the plaintiff's action, on the ground that the testator could not by his last will and testament constitute a sum of money a *propre*, and that the legacy in question was a moveable. The defendants appealed.

DUVAL, C. J., said they were all of opinion that the judgment must be reversed for the reasons stated in the *Considérants*.

BADGLEY, J., said it was quite clear that the testator intended his property to be equally distributed among his children, and it was also clear that he wished the husbands of the daughters to participate.

DRUMMOND, and MONDELET, JJ., concurred.

The *Considérants* of the judgment are as follows:—

Vû que E. M. Leprohon, par son testament fait et reçu par le Leblanc et confrère, N. P., à Montréal, le 24 Mars 1856, a entre autres legs et dispositions solennelles, ordonné comme condition absolue du legs universel y contenu, que tous les deniers qui se trouveraient dans la succession après les dettes et charges payées, seraient propres aux enfants du testateur, et seraient employées en achat d'héritages et de parts de Banques qui seraient également propres aux dits enfants en vertu du dit testament. Considérant que la réclamation du demandeur est fondée sur une cession transport à lui consenti par Gregory, père du mineur enfant et légataire du testateur, lequel Gregory prétend avoir hérité en sa qualité de père du dit mineur des deniers par lui cédés et transportés: Considérant que les deniers ainsi transportés sont partie des deniers legués par le testateur sus nommé au dit mineur Louis Gregory, et d'après les dispositions contenues dans le susdit testament doivent être distribués comme biens propres dans la succession du dit enfant mineur, et en conséquence que le dit Gregory comme père du dit enfant, n'a pas hérité des dits deniers et n'a pu les transporter au demandeur: Considérant en conséquence que dans le jugement, il y a erreur, &c. Judgment reversed, and action dismissed.

Lafrenaye & Armstrong, for the Appellants.

Leblanc, Cassidy, & Leblanc, for the Respondents.

RECENT ENGLISH DECISIONS.

Winding up—Contributory.—A. on being invited to become a director of a banking company about to be established gave a verbal assent, provided he should be satisfied that a certain proportion of the capital had been subscribed, and that certain persons named in the prospectus as directors would actually join the board. He attended one board meeting, and so far took part in the business as on that occasion to sign a cheque together with one of the directors. On receiving, a few days afterwards, a letter of allotment of the shares necessary to qualify him, he at once returned it, declining at the same time to act as director, as he was not satisfied upon the two points stipulated for by him. The secretary wrote back, stating that A's "resignation" had been accepted. A. had nothing more to do with the bank.

Held, that he was not liable as a contributory. *Austin's case*, Law Rep. 2 Eq. 435.

Set-off—Banker's Lien.—A. being indebted to bank B. for advances, handed to them certain marginal receipts of bank C. for £2000, representing deposits lodged there until advice of payment of certain bills on a firm at Bombay, and discounted by A. with that bank; the course of dealing being for bank C., upon receiving the bills, to pay over to A., or place to his credit in his banking account, less than the full discount value of the bills, retaining the difference as a security for payment in full at maturity of the discounted bills. When advised that the bills had been paid in full, the bank was in the habit of carrying over the retained margin to the credit of A. in his general banking account. Notice of A's assignment of the marginal receipts was given

by B. to C. on the same day that A., who was largely indebted to C., upon an overdrawn account, and upon contingent liabilities upon bills of exchange not then matured, suspended payment:—*Held*, as between B. and C., that B. was entitled to the £2000 covered by the marginal receipts, subject only to a set-off of any sums actually due and payable to C. by A. at the time when such marginal receipts became payable, upon liabilities contracted before notice was received by C. of the assignment to B. *Jeffryes* v. *Agra and Masterman's Bank*, Law Rep. 2 Eq. 674.

Bonus to Trustee or Mortgagee.—A trustee has no right to exact or charge any remuneration or bonus in respect of great advantages accrued to the *cestuis que trust* from services incident to the performance of the duties imposed by the deed of trust. *Barrett* v. *Hartley*, Law Rep. 2 Eq. 789.

Master and Servant—Liability of Master to Servant for Negligence—Foreman a Fellow Servant.—The rule, that a master is not liable to a servant for injuries sustained from the negligence of a fellow servant in their common employment, is not altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey.—The defendant was a maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted (for the purpose of being carried away) by a travelling crane moving on a tramway resting on beams of wood supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved on, having just before ordered the plaintiff to get on the engine to clean it. The plaintiff having got on the engine, the piers gave way, the engine fell, and the plaintiff was injured. This was the first time the crane had been used and the plaintiff employed in this manner:—*Held*, that there was no evidence to fix the defendant with liability to the plaintiff: for that, assuming the foreman to have been guilty of negligence on the present occasion, he was not the representative of the master so as to make his acts the acts of the master; he was merely a fellow servant of the plaintiff, though with superior authority; and there was nothing to show that he was not a fit person to be employed as foreman; neither was there any evidence of personal negligence on the part of the defendant, as there was nothing to show that he had employed unskilful or incompetent persons to build the piers, or that he knew, or ought to have known, that they were insufficient. *Feltham* v. *England*, Law Rep. 2 Q. B. 33.

Debtor and Creditor—Composition Deed—Fraud.—Declaration on the money counts. Plea, that by a deed of arrangement made in pursuance of the law of New South Wales, and made between the defendant of the first part, certain trustees of the second part, and the creditors of the defendant named in a schedule to the deed of the third part, the defendant assigned all his estate to the trustees in trust for distribution equally among all his creditors; and that by the deed the parties of the first and second parts did, if and when the deed should have been executed by four fifths in number and value of the creditors, release the defendant from all demands, &c.; that the deed was executed by such majority, and amongst others by J. W. D. (one of the plaintiffs); and that the defendant was released from all causes of action. The replication, on equitable grounds, averred that the plaintiff, J. W. D., executed the deed on the faith of the several provisions therein contained, but that it was never executed by any of the other plaintiffs; that the defendant agreed with certain of his creditors, being other than the plaintiffs, to pay or secure to such creditors, in consideration of their executing the deed, certain pecuniary and valuable benefits and preferences over the others, and thereby induced such preferred creditors to execute the deed; and that such agreement was made, and such execution by the preferred creditors procured, without the knowledge or consent of the plaintiffs or of the creditors of the defendant other than the preferred creditors; and that the defendant procured the deed to be executed by such majority as in

the plea mentioned by the fraudulent agreement:—*Held*, on demurrer, that the deed was void against the plaintiffs, on the ground that, in order to make such a deed binding upon the creditors, there must be perfect good faith between all the creditors and the debtor, and no creditor be induced to sign the deed in consequence of receiving some benefit beyond the rest of the creditors. *Dauglish* v. *Tennent*, Law Rep. 2 Q. B. 49.

Quo Warranto—Void Election.—The Court will make a rule for a *quo warranto* information absolute, although the defendant has resigned the office, and his resignation has been accepted before the rule was obtained, where the object of the relator is, not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office; as in such case the relator is entitled to have judgment of ouster or a disclaimer entered on the record. *Regina* v. *Blizard*, Law Rep. 2 Q. B. 55.

Company—Registration of Transfer of Shares.—Section 16 of 8 Vict. c. 16, (Eng. Stat.) enacts that no shareholder shall be entitled to transfer any share, after any call has been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him:—*Held*, that the section only applies to the transfer of shares on which a call can be and has been made, and has no application to the transfer of shares on which all the calls have been paid; and a company, therefore, is bound to register a transfer of stock, although the transferror be the holder of shares onwhich there are calls unpaid. *Hubbersty* v. *The Manchester, Sheffield and Lincolnshire Railway Co.*, Law Rep. 2 Q. B. 59.

A QUAKER JUROR.—On Monday, at the Court of Quarter Sessions, Darlinghurst, the name of a juror was called, and in response, an elderly man with a low-crowned and very broad-brimmed hat on his head, made his appearance, to the slight astonishment of the judge and the amusement of many spectators. The following interesting dialogue then took place. Judge Simpson—Have you any objection, Mr. ———, to take your hat off in this Court? Juror—I have, your Honor; I object on principle. Judge—I do not recognise your principle, and if you do not take your hat off, I shall fine you for contempt of Court. Juror—We believe in this principle, your Honor. We believe it to be a mere worldly custom to take off hats. We carry good will, love, and good intentions in our hearts toward our fellow-men. Judge—What is your persuasion? Juror—Friends. Judge—Then you are not a Quaker? Juror—The world, your Honor, calls us Quakers. My class do the same as I in this matter. We love our fellow-creatures, but we cannot do as they choose to make us. I am one of Her Majesty's loyal subjects, none more so, and I carry love and good will in my heart into this Court. Judge—Then you do not come here in contempt of this Court, but from some conscientious principle? Juror—Yes, your Honor, from a conscientious principle. Judge—Were you ever in this Court before? Juror—Yes. Judge—Did you then take your hat off? Juror—No, except for my own convenience, when the weather was oppressively hot. Judge—Do you never take your hat off? Juror—Yes; not in obedience to any custom, but for my own convenience. Mr. Carroll, solicitor, intimated that he was present in Court (Dublin) some years ago, when a person appeared before his Honor, Chief Justice Lefroy, in a similar manner to this Juror. Judge Simpson—And what did that judge do? Mr. Carroll—What your Honor will probably do—look over it. His Honor said he could not allow the Juror to sit with his hat on among the Jury, and the better course would, perhaps, be to let him go altogether. The Juror at once bowed his acknowledgments to the Judge and left the Court.—*Sydney Empire.*

THE THREE DEGREES OF COMPARISON.—The following was perpetrated by Judge Hoar of Massachusetts. A gentleman remarked at dinner that A., who used to be given to sharp practice, was getting more circumspect. "Yes," replied Hoar, "he has reached the superlative of life; he began by seeking to get on, then he sought to get honor, and now he is trying to get honest."

The Canada Law Journal.

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OUR ENQUETE SYSTEM.

Those of our readers who were present at the rendering of judgments in Montreal on the 29th of October, heard a great deal about the mode in which *enquêtes* are too often conducted, and the style in which depositions are reduced to writing. In fact hardly a term goes by without complaints from the Bench respecting the needless multitude of badly written depositions, which the judges are compelled to wade through in search of the facts bearing upon the issue.

These complaints naturally lead us to revert for a few moments to certain correspondence which appeared in this Journal about two years ago. In October, 1865, a forcible writer, and a lawyer of high standing, signing himself "Q." (Vol. 1., p. 48), commented in the severest terms upon our Enquête system, recommending that all causes of importance, where facts have to be appreciated, be tried before a jury. This was followed in the January number of 1866, (Vol. 1. p. 78), by a communication signed "Q. C.," from the pen of one of our most eminent Queen's Counsel, in which the entire abolition of the Enquête system was urgently advocated.—"If each case," wrote 'Q. C.,' "were tried "before a judge in the same way that a case "would be tried before a judge and jury,—*not* "*here*, (for we have, unfortunately, engrafted "on our trial by jury, a bastard system of "*enquête*), but as in England, the United "States, Upper Canada, and in fact every "part of the civilized globe, where the system "of trial by jury is practised, *the judge him-*"*self taking full notes of all the essential* "*points of the evidence*, — I venture to "assert that justice would be more promptly, more correctly, and in every respect "better administered, than it either is or "could ever be hoped to be under a system so "peculiarly Lower Canadian as ours is."—'Q. C.' concluded his remarks by inviting the criticism of the profession upon his suggestions, but to this day no one has had a word to say in defence of or apology for the existing system. It is a fair presumption, therefore, that the system is really indefensible, and that a usage, worthy only of the dark ages, is adhered to from a blind regard to the practice of our predecessors.

Lawyers are naturally conservative, and very properly so. Great changes should not be lightly made, nor without the most careful inquiry and consideration. But adherence to the old track should not be continued too long, and the time has now arrived when the demand for an inquiry into our enquête system must be made, and be made with urgency. Legislation on the subject might fitly be preceded by a commission for obtaining evidence of the working of the present system, and ascertaining the views of the bench and leading members of the bar, though we doubt whether the evil is not too palpable to be disputed.

THE COURT OF APPEALS.

In the report of *Lacombe* v. *Dambourgès*, printed in the present number, the reasons assigned by the Hon. Mr. Justice AYLWIN for his resignation, are included as a matter of historical interest. It is only right to complete the record by the insertion of the official statement promulgated by the other members of the Appeal Bench on the day following Judge AYLWIN'S announcement. The statement was first made verbally by Mr. Justice DRUMMOND, and was we believe, reduced to writing under the supervision of the Court, a copy being sent to each of the daily newspapers. It is as follows:—

Mr. Justice DRUMMOND: "The causes of the delays which are complained of ought to be attributed to the Executive, who neglect, we know not for what reason, to provide an efficient remedy for the actual state of things, which I have had occasion to notice myself. The term commences at Montreal on the first of the month, and finishes on the ninth. It is necessary that the judges hasten to Quebec to open the Court, which lasts to the 21st.—Now it happens that whilst the roll in Montreal is ordinarily heavy, it is nearly always light at Quebec. My colleagues know also,

as well as I do, that they never pass the term at Quebec without the roll being called four or five times. It is certain that the duration of the term at Quebec, to say the least, is sufficient relatively to expedite the work, while at Montreal it is the contrary, and if the term at Montreal began after the close of that at Quebec, the Court would be able to proceed day by day as the roll appeared; all would go for the best and we should not see eighty-five causes inscribed on the roll. The way to remedy the grievances complained of, is to change the periods at which the terms are held, a change that can only be made by the Executive or the Legislature. People should not, therefore, blame the judges because it is not done. As to the causes *en délibéré*, what has been said is without foundation.—There are only upon the roll two old *délibérés*. One is the cause of Dufaux *vs.* Herse, which is an affair of great importance upon which the Judges could not agree. The other old *délibéré* is the Corporation of William Henry *vs.* Geuvremont; if the Court has not rendered judgment sooner in this cause, it is because the parties asked it to be deferred.—Mr. Lafrenaye here present will admit this.

Chief Justice DUVAL: The list of *délibérés* contains only 15 causes, of which 13 have been pleaded in the last term. The mere inspection of this list is sufficient to show how ill-founded are the complaints against the Bench. The cause of the delays is, to my idea, not within the control of the Executive or the Court, but it ought to be imputed in a great measure to the Bar itself, certain advocates causing a considerable loss of time by out of the way arguments to sustain elementary points, which their adversaries care little to contest or contradict. At the same time they consider themselves unjustly treated by the Court if they are obliged to confine themselves within reasonable limits. It has been said that the Court did not open before eleven o'clock; this is incorrect. The Court always opens at 10 o'clock except on some days when judgments are rendered, the judges being then detained in chambers a longer time in their deliberations. At all times the opening of the Court is late on the day on which the judgments are delivered. It was so in the time of Judge Sewell and is so to-day; my honourable colleague, Mr. Justice Aylwin, will admit this without doubt."

NOVA SCOTIA JUDGES.

The following paragraph appears in the daily papers:

"The Judges of Nova Scotia have refused to accept their quarter's salaries at the rates formerly paid in that Province—from £700 to £800 per annum,—claiming the right to be paid, since the 1st of July, at the same rate as the Canadian Judges, being nearly double their former salary. Judges of New Brunswick are supposed to be taking the same course. The case is under the consideration of the Government."

The above, if true, exhibits the Bench of Nova Scotia in a very unfavorable light.—Surely the members of that Bench are aware that the salaries of Canadian Judges are far from being uniform, varying in fact even in the Superior Courts, from £700 to £1250.

PRIVY COUNCIL.

GUY *v.* GUY:—The appeal in this case has been dismissed by the Privy Council, with costs, £241. 8. 8.

ELLICE *v.* THE QUEEN.—The appeal to the Privy Council, on the part of the Crown, has been declared abandoned, no proceedings being had.

MACDONALD & LAMBE.—The appeal in this case was dismissed by the Privy Council, 12th July, 1867, with costs £295. 1. 8.

THE HOWLAND WILL CASE.

The case of the will of Sylvia Howland of New Bedford, Massachusetts, is exciting much interest from the novel character of the evidence introduced. Miss Howland, who died in 1865, left about $2,000,000 by will, mainly to people who were her attendants during her last illness, but who were not her relatives. Her niece, Miss Hetty Robinson (now Mrs. Green), contested her aunt's will, which gave her only $70,000 annuity. It seems that Miss Howland made a will leaving her entire property to Miss Robinson, and that she subsequently made another unfavorable to her niece. However there was found attached to the first

of these two wills a paper sewed to the first page, stating that she (the testatrix) wished that to be considered her true will, whatever subsequent one she might in the feebleness of age be influenced to make. On this document, which has three signatures, the niece relies. The genuineness of these signatures is denied, the allegation being that they were traced from the signatures of the original will. The three signatures on the attached paper are found on examination to coincide with mathematical exactness, not only line for line, letter for letter, but each having exactly the same slant towards the base of the sheet. It was proved that a remarkable similarity existed between all Miss Howland's signatures.—The most curious testimony in the case is that of the recently appointed Superintendent of the Coast Survey, the celebrated mathematical professor at Harvard, who applied to the matter the law of probabilities. Having ascertained the relative frequency of coincidence by comparing many of Miss Howland's signatures, he computed that in her case the phenomena of three absolutely identical signatures "could occur only once in 2,666,000,000,000,000 times." In conclusion, Professor Pierce stated, "Under a solemn sense of the the responsibility involved in the assertion, I declare that the coincidence which has here occurred, must have had its origin in an intention to produce it."

A correspondent has sent to the *Pall-Mall Gazette* the following story in illustration of this question of identity of signature:

"Some years ago a gentleman was sued by one of his friends before the Civil Court in Rome on a promissory note. The defendant pleaded that the signature was a forgery. The judge desired one of the attendants to summon Toto, a well known scribe, who earned his livelihood by writing letters for peasants and making out petitions for alms asked by some of his neighbors from the judge and other wealthy persons. Toto was desired to turn expert and help the judge to ascertain the truth of the defendant's plea. The plaintiff had brought with him an unquestionable signature of the defendant's attached to a letter, and the case was adjourned until Toto could make his report next morning. Without any hesitation he said: 'If the court will lay the promissory note upon the letter it will be found that the two signatures cover point for point the same space, and as it is impossible for any man who writes freely to make two signatures so perfectly identical, I am sure that the promissory note was not signed by the defendant, but that his signature was traced from his letter.' The judge at once decided in favor of the defendant."

COURT OF QUEEN'S BENCH.—APPEAL SIDE.—RESERVED CASES.—*Regula Generalis.* June 1st, 1867. It is ordered that the clerk of this Court, immediately upon the receipt of the papers transmitted, in a case reserved for the opinion of this Court, shall set down such case for hearing on the first juridical day of the then next ensuing term.

WRITS OF ERROR.—*Regula Generalis.*—June 1st. It is ordered that the plaintiff in error in all criminal cases shall file an assignment of errors on the first juridical day after the day of the return of the said writ.—That the joinder in error shall be filed on the first juridical day following the filing of the assignment of errors. That the clerk of this Court on receiving the joinder in error, shall forthwith set down the cause to be heard on the errors assigned.

APPOINTMENTS.

JOSEPH ELLIOTT, Esq., to be Assistant Treasurer of the Province of Quebec. (Gazetted 26th October, 1867).

JEAN BAPTISTE MEILLEUR, Esq., M. D., to be Deputy Registrar of the Province of Quebec. (Gazetted 26th of October, 1867).

GEORGE BOUCHER de BOUCHERVILLE, Esq., Advocate, to be Clerk, Master in Chancery and Accountant of the Legislative Council of the Province of Quebec. (Gazetted Nov. 2, 1867.)

PIERRE LEGARÉ, Esq., Advocate and Queen's Counsel, to be Assistant Clerk, Master in Chancery, French translator, and Assistant Accountant of the Legislative Council of the Province of Quebec. (Gazetted Nov. 2, 1867.)

SIMÉON LESAGE, Esq., Advocate, of Montreal, to be Assistant Commissioner of Public Works and of Colonisation. (Gazetted Nov. 2, 1867.)

BANKRUPTCY—ASSIGNMENTS.—PROVINCES OF ONTARIO AND QUEBEC.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Anderson, Arthur H.	Waterdown	J. J. Mason	Hamilton	Oct. 31st.
Arnold, Walter		John Lynch	Brampton	Oct. 2nd.
Aubertin, Charles	St. Mathias	T. Sauvageau	Montreal	Oct. 30th.
Baukage, Beak & Co		A B. Stewart	Montreal	Oct. 23rd.
Bedell, W. A.		A. G. Northrup	Belleville	Oct. 28th.
Berry, Joseph		Thos. Miller	Stratford	Oct. 9th.
Bowman, Robert		A. J. Donly	Simcoe	Oct. 7th.
Brazeau, Mélanie (wife of F. X. Desève)	Sherbrooke	T. Sauvageau	Montreal	Oct. 11th.
Burnet, John		L. Lawrason	London	Oct. 29th.
Campbell, John		A. Schwaller	Thorold	Oct. 31st.
Chadwick, Allan, and William M. Chadwick		W. S. Williams	Napanee	Oct. 17th.
Charlebois, Alphonse, (individually and as partner of A. Charlebois & Co.)	Montreal	A. B. Stewart	Montreal	Oct. 12th.
Clarke, Albert, and Wm. Rutherford	Oil Springs	George Stevenson	Sarnia	Oct. 22nd.
Colgin, Robert		George J. Gale	Owen Sound	Oct. 17th.
Desève, Germain, (individually and as partner of A. Charlebois & Co.	Montreal	A. B. Stewart	Montreal	Oct. 12th.
Diefenbacher, Frederick	Township of Wellesley	H. F. J. Jackson	Berlin	Oct. 29th.
Dover, James	Shakespeare	Philip S. Ross	Montreal	Oct. 9th.
Dunlop, Robert, (individually and as partner of Jas. McIntyre & Co.		W. F. Findlay	Hamilton	Oct. 14th.
Dunn, Justus		Thomas Clarkson	Toronto	Oct. 26th.
Fairman, Thomas		James Holden	Whitby	Oct. 8th.
Goodbow, Peter		Thos. McIntyre	St. Mary's	Oct. 30th.
Goslee, George	Colborne	E. A. Macnachtan	Cobourg	Oct. 10th.
Graybiel, Michael		Daniel Wilson	Welland	Oct. 9th.
Gundry, Edwin	Wroxeter	S. Pollock	Goderich	Oct. 10th.
Gunn, Robert		L. Lawrason	London	Oct. 23rd.
Hans, John	Township of Maryboro	Thos. Saunders	Guelph	Oct. 2nd.
Hans, William	Township of Maryboro	Thomas Saunders	Guelph	Oct. 24th.
Hartill & Lockington		Thomas Clarkson	Toronto	Oct. 24th.
Harvey, R. L.	Sherbrooke	Philip S. Ross	Montreal	Oct. 5th.
Hawley, John	Township of Torbolton	Francis Clemow	Ottawa	Oct 25th.
Hébert, Sophie	Montreal	A. B. Stewart	Montreal	Oct. 24th.
Hibbert, William	Township of Morris	Samuel Pollock	Goderich	Oct. 30th.
Kells, Edward		S. C. Wood	Lindsay	Oct. 21st.
Kennedy, Angus	Cavan	E. A. Macnachtan	Cobourg	Oct. 10th.
Lafferty, Alexander J.	Windsor	J. McCrae	Windsor	Oct. 22nd.
Lahaye, O. B. (Olivine Bouchard)	Montreal	T. Sauvageau	Montreal	Oct. 10th.
Langs, Lyman Francis		A. J. Donly	Simcoe	Oct. 7th,
Lemon, Arthur Jules	Ottawa	Francis Clemow	Ottawa	Oct. 18th.
Letourneux, Césaire	St. Timothé	A. B. Stewart	Montreal	Oct. 3rd.
Link, Adam		S. C. Wood	Lindsay	Oct. 23rd.
Maryboro, William Hans		Thos. Saunders	Guelph	Oct. 24th.
McElroy, James	Montreal	T. S. Brown	Montreal	Oct. 17th.
McMaugh, Joseph		W. A. Mittleberger	St. Catharines	Oct. 11th.
McMeckin, Gilbert	Windsor	J. McCrae	Windsor	Oct. 2nd.
Mathers, John	Village of Brampton	John Lynch	Brampton	Oct. 11th.
Middleton & Co., Wm.	Montreal	John Whyte	Montreal	Oct. 4th.
Morin, Jérémie	St. Sébastien	Wm. Coote	St. Johns Q.	Oct. 16th.
Mountjoy, Arscott		Thos. Churcher	London	Oct. 26th.
Nichol, Peter Murray	Township of Blanshard	Thos. Miller	Stratford	Oct. 15th.
O'Higgins, John	Stratford	W. F. Findlay	Hamilton	Oct. 30th.
Ouimet, Eusèbe	Montreal	A. B. Stewart	Montreal	Oct. 26th.
Parent, Alexander	Windsor	J. McCrae	Windsor	Oct. 28th.
Pidgeon, Joseph, & Co	Cobourg	E. A. Macnachtan	Cobourg	Oct. 3rd.
Pogue, George	Township of Ops	S. C. Wood	Lindsay	Oct. 15th.
Porteous, Robert	Whitevale	James Holden	Whitby	Oct. 30th.
Poulin, Samuel	Montreal	A. B. Stewart	Montreal	Oct. 26th.
Prest, William		Alex. McGregor	Galt	Oct. 9th.
Pringle, Gilbert	Hamilton	W. F. Findlay	Hamilton	Oct. 28th.
Reid, W. H.	Hamilton	J. J Mason	Hamilton	Oct. 21st.
Rhicard, George Lewis	St. Armand West	Wm. M. Pattison		Oct. 25th.
Riddle, Andrew J., (individually and as partner of Monahan & Riddle	Toronto	Thomas Clarkson	Toronto	Oct. 8th.
St. Laurent, Wm., (individually and as partner of St. Laurent & Co.	Quebec	T. Sauvageau	Montreal	Oct. 27th.
Saul, Henry		L. Lawrason	London	Oct. 12th.
Stephenson, John	Township of Turnberry	Samuel Pollock	Goderich	Oct. 17th.
Tracy, Benjamin		Thos. McIntyre	St. Mary's	Oct. 30th.
Trotter, William		W. S. Robinson	Napanee	Oct. 22nd.
Vansittart, Henry		Hugh Richardson	Toronto	Oct. 4th.
Walker & Smith	Caledonia	Philip S. Ross	Montreal	Oct. 1st.
Wemp, James		Richard Monck	Chatham	Oct. 16th.
Wigney, William	Montreal	T. S. Brown	Montreal	Oct. 17th.

AN AMERICAN LAWYER IN LONDON.

The Hon. I. F. Redfield, the author of several well-known legal works, being on a visit to England, has written several letters to the *American Law Register* (of which he is one of the editors), giving his impressions of English Courts and Judges. We make some extracts of interest.

"By being in London one learns some things about the administration of justice and the course of Law Reform, which would seldom or never come to the knowledge of an American lawyer at home. But it is, after all, matter of surprise how very little of that which it is most important to know in regard to English jurisprudence may not be fully understood by a careful study of the Reports, and a diligent reading of the Law Journals, and the elementary treatises. And the very little that we do come more fully to understand by a closer inspection, or to understand differently, perhaps, from what we otherwise should, cannot be regarded as altogether of unmixed good.

For instance, one cannot feel quite the same veneration for the wisdom of a decision in the British Court of last resort, that august tribunal, the House of Lords, after carefully watching the course of a trial there, that he would from merely reading and reflecting upon the subject. One naturally reflects upon a subject of that character, with some reference to the vastness of the interests at stake, and comes to regard the character of the Court which gives them their final shape and destination, as important and weighty, somewhat in proportion to the vastness or the insignificance of those interests in themselves. And men themselves, while sitting in the seat of justice, evoke greater and nobler powers of reflection, discrimination, and judgment, as the demands for the exercise of such powers arise. Hence, we very naturally expect the weight and dignity of the English House of Lords to rise above that of all other judicial tribunals, in proportion as the vastness and variety of the questions finally determined by it are higher and greater than those of almost any other Court. But when we come to view it with the naked eye of sense, we feel greatly in danger of losing the ordinary standard of weight and measurement. To an American it has very much the appearance of a trial before a committee of the legislature, with even less form and ceremony, if possible. It is true that lookers-on approach with something more of reserve. They meet more public men and more subordinate officers, and at first blush there is more of authority and solemnity in the going forward of the hearing. But this, so far as any undue reserve is concerned, is rather apparent than real; for the moment one breaks through the crust of this official reserve, he finds himself accepted in the fullest and most cordial manner, and thereafter really treated with more watchfulness of attention, and less of official hauteur, than almost anywhere else. So that all one needs, in such cases, is the proper introduction to secure the fullest and most considerate attention; or, if he choose to float along with the mass of spectators, and to conform to the mere outward conventionality, which is by far the readiest and most successful mode of finding out the exterior of judicial procedure everywhere, there will not be the slightest obstacle to *standing* all day in the purlieus of an English court of justice, or sitting, indeed, if one can only find room, and a chair or seat to sit upon.

But to return to the House of Lords. The room itself is a most complete model of graceful and elegant architectural fitness and proportion. It is regarded, both in effect and in detail, as one of the most perfect specimens of architectural beauty in the world. It would be impossible, in a communication of this character, to give the slightest outline of its proportions or adaptations, and especially of its many perfect gems of beauty in the filling up of the detail. Suffice it to say, that it is the very *chef d'œuvre* of Sir Charles Barry's great and crowning work of life, the Westminster Palace or Parliament Houses, covering nearly eight acres of ground, and affording the most perfect model, in modern times, of the rich and elegant tracery of the Gothic architecture. The throne and chair of state for the Queen to occupy in opening Parliament and other state occasions, stands

at the head of the chamber of the Lords. This is approached on every side by three or four circular steps, giving two or three feet in elevation; and a small space beside the steps is railed off from the main area of the room, and surrounds the throne. The upper end of the middle space between the seats in the main hall occupied by the Lords, is occupied by the woolsack, of which we have all heard so much, and really know so little. It is covered with red velvet or plush, or some other rich material, and is nearly six feet square, being divided unequally by a kind of board rising near the Chancellor's back, who sits upon the side remote from the throne, facing the house. Front of the Chancellor is a large table surrounded by the clerks and under-clerks, and opposite this, on the front bench at the right, are the members of the ministry belonging to the House of Lords, and on the opposite side are the leading Lords of the opposition, and the supporters of each side occupy the back benches on either side. Further along towards the principal entrance of the hall is a space about ten feet square, around which the Lord Chancellor and the other Law Lords sit during the argument of appeals from the Courts in England, Ireland, and Scotland. The bar is facing this, on the side of the entrance, being about six feet square, and fenced off from the area occupied by the Law Lords by a single board rising about breast high, with shelves just below on which the advocate may rest his books and papers.

There is one feature in all English Courts, so far as we have observed, which is worthy of all commendation, and it is one which we do not always witness in the American Courts, to the same extent. We mean the entire absence of all apparent anxiety to bend the decision to meet any preconceived theory, either of politics, religion, or morals, or even of philosophy. In other words, it is a seeming indifference to the present popular sentiment. We say the *present* popular sentiment, because we do not intend to intimate that a judge, any more ny other man, should attempt to educate himself up to the point of absolute indifference to a wise, far-seeing, and just public opinion; or that he can, if he would, feel entirely indifferent to that just boon of a good name and fame, which is the inevitable concomitant of worthy actions worthily performed. All we mean is, that a judge, as well as any other public man, or private man indeed, who in all that he says, and all that he does, is measuring himself and his conduct by the low standard of present public opinion, is not likely to accomplish any very heroic deeds, or to initiate any very permanent or valuable reforms, either in legislation or general jurisprudence.

It is certainly a very pleasant sight to sit in an English Court and witness the entire absence of all rivalry, not only between the Court and the bar, but apparently between the different members of the bar. Court and counsel alike seem to feel that every other consideration must be laid aside except that of reaching the absolute justice of the case In this pursuit there is observable a quietness in the course of the arguments of counsel, and especially in the conversational discussions between the Court and the counsel, which cannot fail far more effectually to enable each to see the other's views, difficulties, and doubts, than if the same were had in a spirit of controversy and opposition, and with a disposition occasionally apparent in our own country, to show the spectators the superiority of the bench above the bar. Nothing could more effectually belittle the Court, without in the same degree elevating the bar. A truly great judge is never jealous of any one, and least of all, of his bar, which is his brightest crown, the very jewel of his judicial life."

The last paragraph which we have quoted is not without application in Montreal. Judge Redfield concludes his first letter with an account of some cases he heard tried, and remarks: "We noticed with especial gratification that the English judges address the jury sitting, the jury also remaining in the same position. We have long regarded this as the only mode in which a case could be fairly presented to a jury by the Court, and practised it during most of our own long period of service in that capacity, but we believe this is rather an exceptional mode of proceeding in American Courts, and as far as

we know, as a general rule, is confined to New Hampshire, where the change occurred, at an early day, by the embarrassment of one of their ablest Chief Justices, the late Jeremiah Smith, in delivering his first charge to the jury, which proceeded so far as to compel the judge to resume his seat, and to request the jury to do the same, when he continued his charge in a very able and satisfactory manner, never after attempting to address the jury standing, and this precedent thus accidentally introduced, soon became general in that state, and has so continued ever since. It also exists in some portions of Vermont, but not universally."

A note has been appended to the above by Mr. J. T. Mitchell, of Philadelphia, another of the editors of the *Law Register*. Mr. Mitchell says: "We venture to suggest that our learned colleague is in error. It is the universal habit of judges in Pennsylvania to sit while charging the jury, and we have occasionally been present at trials in New York, New Jersey, Ohio, and Illinois, in all of which the judge remained seated, and we think the contrary habit is peculiar and local to the New England Courts, even if it obtain in all of those. We have the authority of a distinguished ex-judge of the Supreme Court of New Jersey for saying, that when he was a junior at the bar, it was the general custom for the judge to rise in addressing the *grand jury*; but even that has fallen into disuse. The only occasion upon which a Pennsylvania judge stands is while pronouncing sentence of death, and we think the undignified novelty of the judge's rising to charge a jury would be resented alike by the bench and bar of that state, as savoring far too much of advocacy rather than judicial serenity."

For the information of readers at a distance, we may add here that the invariable practice in Lower Canada has been, we believe, for the judge to remain seated. The jury are directed by the crier to rise when the judge begins his charge, but it is usual for the judge to direct them to resume their seats, if he is going to occupy much time in addressing them.

The second letter is of such interest that we reproduce the whole: "One cannot remain for months about Westminster Hall and Lincoln's Inn, and in daily attendance upon the Courts of Common Law and Chancery, without learning many things of interest to the American bar, which he would never otherwise learn. But after having received such kindness and hospitality from the English bar and the English judges as cannot fail to inspire feelings of the most profound and grateful respect and affection, one naturally feels great reluctance to speak of the detail of the administration of justice here, lest, inadvertently, some possible breach of the confidence of social life might be committed or suspected.

But, speaking only of those things which are patent and open to all, it must be conceded that the English Courts have many advantages over us in searching out the headsprings and foundations of the law, which must always give the decisions here greater weight. On one occasion this was made very obvious in the trial of a recent suit in equity, on appeal, before the Lord Chancellor and the Lords Justices, sitting as the full Court of Chancery Appeal, in the Lord Chancellor's room. A case was cited which had not been fully reported. It was the case of *The President of the United States v. The Executors of Smithson*, for the obtaining of the Smithsonian fund. The inquiry before the Court at the time was, in what name the United States might properly sue. It was contended, on the one side, and so held in Vice-Chancellor Wood's Court, that they could only sue in the name of some official party or personage, authorized to represent the interests of the Government, and to answer any cross-bill the other party might bring; while, on the part of the Government, it was very naturally insisted that they should be allowed to sue in the name given in the Constitution, and the only name by which they ever had sued in their own Courts. This suit was brought in that name and dismissed in the Vice-Chancellor's Court, because no personal party had been joined. The case alluded to was brought in for the purpose of showing that they had before sued in the English Courts of equity

in the name of the President of the United States. It became important, therefore, to show how far this case, for the recovery of the Smithson legacy, differed from the ordinary case of the Government suing for the recovery of its own property. The Court ordered the registrar to bring in the file, when it appeared that, by a special Act of Congress, the President had been authorized to sue for and recover this particular legacy, thus constituting him a special trustee to receive the same on behalf of the Government, and consequently to discharge the executor upon such receipt of the fund. This enabled the Court to perceive that it had no bearing whatever upon the general question, and thus virtually confirmed the impression and intimation of the Court of Appeal, that, as they expressed it, "the Government of the United States must be allowed to sue for their own property in their own name;" and this intimation has been since confirmed by the unanimous decision of the full Court of Chancery Appeal. The advantage of this ready opportunity of consulting the records of equity cases in the registrar's office, in order to supply any deficiencies in the reports, is often witnessed in hearings in equity in the English Courts. And there are many other traditional benefits resulting naturally from being upon the ground and having at command all the appliances of such ready access to records and documents, which can never be transferred into a distant country. This of itself must always render these localities of great interest to Americans.

And there are some other things one meets in the English Courts which naturally inspire admiration. The judges seem far more familiar with the leading members of the bar than is common in our country. Being in Court during the whole time of the delivery of the almost interminable judgment in the late case of *Slade* v. *Slade*, in the Exchequer, when the law and the fact both were, by agreement of parties, referred to the Court, we noticed billets passing between the Court and the counsel engaged in the cause in the most familiar manner, indicating the most perfect confidence and intimacy. And in all the arguments which we have listened to in the Courts, either of common law or equity, there is a constant conversation kept up from the bench, but in such a commonplace and kindly manner, that the counsel against whom suggestions and intimations are made, do not seem at all embarrassed by them. The wonder seems to be how counsel can continue such persevering arguments under such multiplied rebuffs as sometimes fall from the bench here. In one case, where the argument continued six or seven hours, there was a constant argument on the part of the bench against the decision of the Court below [it being a hearing on appeal]. But the constant and repeated intimations from the bench that it was impossible to maintain the decision of the Court below, did not seem in the least to daunt the courage of the counsel.

At the conclusion of his judgment in the case of *Slade* v. *Slade*, Baron Martin said he wished, on his own personal account alone, to enter his solemn protest against the practice of submitting matters of fact to the determination of the Court instead of the jury.—He believed nothing was more unsatisfactory than the trial of matters of fact by the judges. He believed the jury the only proper tribunal for the determination of matters of fact, and he must say that he believed one great reason why the decision of matters of fact by the jury was so satisfactory was, that they were not required to assign reasons for their decisions. He thought it not improbable that if jurymen were required to submit to the cross-examination of counsel, as to the grounds of their verdict, they would be quite as much puzzled to find satisfactory reasons for all their decisions as any of the witnesses in the present case.

It seemed that the amount of testimony in this case of *Slade* v. *Slade*, was quite fabulous, and the cost of procuring it almost monstrous, exceeding $150,000. It is true the determination of the suit involved an inquiry into the validity of a marriage celebrated in Lombardy, an Italian province of the Austrian Empire, more than forty years since, upon which depended the title to a baronetcy and large estates. And this incidentally involved in-

quiries into the civil and ecclesiastical law, both of Italy and Austria, to such an extent as to become, not only very difficult and perplexing, but almost impossible of any satisfactory determination. There was in consequence a resort to the testimony of legal experts, which was found, as usual, most unsatisfactory, there being about an equal number on either side, and each determined to vindicate the views of the party for which he had been called. This had led, in many instances, to a most extended cross-examination, in some instances extending over nearly twenty days, until in one case certainly, at the earnest request of the witness, an adjournment of the examination was had, in order to enable him to regain his health, which had been seriously impaired by the extended cross-examination. We did not suppose any new light was to be gathered from the report of these illustrations of the abuse of the duties of experts or of examiners of witnesses; but it seemed refreshing to find, that in Westminster Hall, in one of the most venerable of her ancient Courts, with her skilled and trained counsel, it was found impracticable to elicit from professional experts anything but one-sided opinions. We do not know whether there is any inherent difficulty in so selecting experts as to render them fair and impartial; but it appears that in England as well as in America, when it is allowed to be done by the parties, it is not easy to obtain any such result. That was the great difficulty in regard to the case of *Slade* v. *Slade*.

But to return to Baron Martin's protest against submitting matters of fact to the judges. He said his experience, which was now somewhat extended, convinced him that almost all the divided judgments which had been rendered in that Court arose on matters of fact or construction, and not upon matters of pure law, in regard to which the judges almost never differed. We could not but feel gratified to find so experienced and able a member of the English bench confirming our own opinion, which we had long entertained, but which we believe is not universal with the American bar. There seems to be a growing opinion with the American bar that the jury are not be relied upon as either fair or competent in the trial of matters of fact.—We believe that complaint, or the cause of it, lies far more at the door of the judges than is commonly supposed. If the judge is indifferent, and suffers the cause to glide along without much care how it is decided, or if he is so muddy in his own views or in the mode of expressing them that he cannot make himself understood by the jury, it is not improbable that the result of jury trials will become most unsatisfactory. But where the judge feels bound to master the cause and the testimony, and really sums up in a manner to make the jury understand the law and the facts fully, and also the application of each to the other, the jury will be able to reach, in the majority of cases, a satisfactory result. And a jury does relieve the judge from great responsibility, and one which it is difficult for any tribunal to sustain, where reasons must be assigned for every judgment.

There is so much testimony which is either factitious or exaggerated, that it is impossible to decide matters of fact wisely and justly without disregarding much of the formal testimony, in regard to which, there is no very obvious reason for its rejection, except the vague belief that there must be some mistake about it. But such a reason will not be likely to commend itself to the party who loses his cause in consequence of the rejection. Hence it has been said that courts of equity decide facts by counting the witnesses on either side, and that the Chancellor has no scales for weighing evidence. There will be some exceptions to these general rules, and some judges will possess an intuitive knowledge of facts, as well as law, and will find some mode of satisfying the parties with the results to which their intuition leads them.

There is another thing, which one can scarcely fail to admire in the English Courts. There is no appearance of haste; certainly not of hurry. Perhaps it is more apparent in passing from one Court to another, than anywhere else. In an American Court there seems to be a kind of horror or dread seizing upon the bench the moment one cause is coming to an end lest something else should be crowded in before the Court can reach the next cause on the calendar. Some motion or some question

seems to be the constant dread of the Court the moment there is a pause between two causes. It is not so much during the progress of the hearing, but the moment the final close is attained there is a rush for the next cause, so as to preclude all interruption. But nothing of that kind occurs here. This may be partly owing to some constitutional or habitual difference in the people of the two countries. For one cannot ride across the island of Great Britain in any direction, in an express railway train, and not observe a very marked difference in two particulars between this and our own country, in the stops and in the progress. The train starts on the moment, at the click of the bell marking its time; it runs with terrific speed to its next stopping place, and reaches it the very moment it is due. Every thing then is quiet; time enough for all changes, and everything is ready, and very likely one or more minutes to spare before the time arrives for departure. This is most refreshing. So different from the pauses in railway travelling in our own country sometimes, where there is scarcely time to get out of the train before it is off, as if life and death hung upon losing no time at stops. So in Court here. One cause is finished. Time is given to breathe; to pack up books and papers, and to get in place for taking another cause; and then, after everybody gets ready, quietly start off.

We are by no means sure that a good deal of this quiet passage from one cause to another is not attributable to the fact that no motions can be interposed except upon motion day, and then mostly at Chambers. The English judges attribute their relief from perplexing impediments and motions of every grade of perplexity to the fact of sessions at Chambers, where most of these motions are heard, and where they are attended by solicitors, and not in general by counsel.

And this brings us to dwell for a moment upon the different grades of the English bar, which are maintained with great punctilio.—The sergeants were long regarded as the highest rank of the profession. And now all the judges are made sergeants by special writ, before they can be sworn in as judges. But this is mere form. It is called taking the coif, and is regarded as a kind of degree or grade in the profession, which must be attained before they can be made judges. The order of sergeants was formerly much more numerous than at present, and they still compose a separate Inn, to which all the judges join themselves as soon as they become judges, and afterwards are not allowed to dine in the hall of their former Inn, except on state occasions, (as the Grand Dinner at the close of Trinity Term, which fell this year upon the 12th of June), when some fifty to one hundred benchers and invited guests sit down at the high table, at the end of Middle Temple Hall, and four or five hundred in other parts of that vast hall, and partake of a dinner which would do credit to the first noblemen in England.—After the removal of the cloth, the Master of the Temple, as the rector of the Temple Church is styled, returns thanks, and the benchers and honorary guests retire to the Bencher's Room for dessert, where, fruit and wine being served, the president first proposes the health of the Master of the Temple, who responds in a brief speech. Some other customary toasts follow, concluding with the health of the invited guests, who all respond, of course, in speeches of more or less brevity, as taste or inclination may suggest. On the present occasion, the predominant feeling seemed to be a desire for cordial good understanding with the American nation and people. Nothing but the entire reciprocation of that sentiment was offered in return. But the opportunity of reminding them of the fact that we claimed to be something more, and better, than a mere aggregation of separate sovereign states, held together by compact or treaty, was too inviting to be wholly disregarded. It was explained, in some degree, to that learned assembly of judges and benchers that a constitution which professed to create a paramount national sovereignty, and which in terms gave a national legislature and a national executive, and a national judiciary, having the power to enforce its own decrees, by its own police, and by the army and navy, and which had authority to define the limits of national jurisdiction, and to correct the decisions of all the State Courts bearing upon that point, must of necessity be paramount to all State Sovereignty; and that the result of

the late national conflict was only to establish the decrees of the national courts of last resort, declared years before by our great expounder of the National Constitution, John Marshall, and to enforce the eloquent expositions of our great national orator, and senator, Daniel Webster, to which men the grand result might be as fairly and as truly attributable as to the victories of our armies in the field; to all which these gentlemen responded with all earnestness and sincerity, and blessed the hour of our first and of our final independence. After having been present in that grand old hall of the benchers of three or more centuries standing, where the principles of English liberty had been cultivated and expressed, and having listened to the congratulations of the barristers and judges, and the encomiums of the elder brethren towards the younger members of the same great family of judicial teachers and benchers, one could not well believe in any natural rivalries or jealousies between the two people, except in the matter of each doing the best in its power to maintain and defend the grand and noble principles of English and American liberty. It was a grand and inspiring occasion, both to the English and the few representatives of the American bar.

But to return from this digression. The degree of Queen's Counsel has now practically superseded that of Sergeant. The first rank in the profession here next to the judges is Attorney and Solicitor-General. Then follow some other officials in the profession, such as the Queen's Advocate-General in Scotland, &c. Then come the Queen's Sergeants by special writ, not exceeding two or three; then Queen's Counsel, in the order of seniority of commission; then ordinary barristers. These latter act as junior counsel, and the Queen's Counsel as seniors. These all wear gowns and wigs; Queen's Counsel wearing silk, and the barristers stuff gowns. It is obvious from what one hears, that the English bar are becoming more or less weary of being dressed up in such artificial costume, and that they would be glad, at once, to drop the wig, and many of them the gown also. The most marked indication in this direction which we noticed was in regard to the academic dress worn by the students at Oxford. We met hundreds there with their gowns in their hands, as one would carry a coat on a warm day, or any other garment, which for any cause had become burdensome. That did not seem common anywhere except among the students.—The professors and tutors, the doctors and fellows, all wore the gown with dignified bearing and apparent self-satisfaction. But young men unconsciously catch the sense of the outward sentiment, and are proverbially sensitive to any feeling of ridicule in others towards either their conduct or their dress. This was the only possible explanation of the fact of finding so many, both within and without the college walls, with their academic gown in their hands, when the statutes of the university render it the indispensible badge to be worn at all times, in college hours. We believe, at Cambridge, there is some dispensation in that respect before dinner, and there you do not see the gown before that hour.—But you see it always at Oxford, either worn or carried, and, as it seemed to us, more commonly the latter! It is wonderful how this sense of the ridiculous will crowd out mere pageantry with sober and earnest men, when it once gets hold. We could not but notice how willingly the English judges put aside their wigs and gowns at the state dinner, upon entering the Benchers' Hall, where alone it was allowable. There is no place for the show of pageantry in dress equal to the Lord Mayor of London and the aldermen, when they appear on state occasions. Scarlet puts on its brightest hues and its broadest borders. Possibly in America we are in danger of disregarding forms too much. We have sometimes feared such a result. But one needs only to see how much of official duty here consists in mere ceremonial to feel reconciled to its entire abandonment.

THE BENCH AND BAR AT HONG KONG.

The "scenes" in court between judge and counsel on the Northern Circuit, upon which we commented a few weeks ago, undignified as they were, will yet bear favorable comparison with an incident which is reported by the Hong Kong papers received by the last mail. Mr. Pollard, Q. C., a barrister who has

practised in China for the last twenty years, was conducting a civil action in the Supreme Court at Hong Kong before the Hon. J. Smale, Chief Justice of the colony, and some reference being made to a Chinaman in the service of the plaintiffs in the case, the Chief Justice said that as the man was a servant of the plaintiffs they should have produced him, to which Mr. Pollard, the plaintiffs' counsel, replied, "You cannot produce him like a piece of paper; let him be subpœnaed in the usual way." The judge rejoined that if the witness was not produced, he would "take that into account" in his direction to the jury, upon which Mr. Pollard exclaimed, "I will put only those witnesses in the box which I, as counsel for the plaintiffs, may see fit. I may make a mistake, but I will not be dictated to or talked down by any one as to what I am to do." The Chief Justice, after declaring that the language which Mr. Pollard was in the habit of using was most disrespectful to the court, left the bench, but shortly afterwards returned and asked Mr. Pollard if he apologised. After a good deal of altercation between the judge and the barrister, the case was adjourned "indefinitely," his lordship declaring that he must have an apology from Mr. Pollard before the trial could go on. The litigants, however, preferred submitting their differences to arbitration to waiting for the restoration of a good understanding between judge and counsel. Two days afterwards (on June 29th) another "scene" took place, and the Chief Justice announced that he would give his decision on the matter on July 2, when he pronounced Mr. Pollard guilty of grave contempt of court, fined him two hundred dollars, and suspended him from practice for a fortnight, or until the fine was paid. His lordship read his judgment, which was of considerable length, from a manuscript, occasionally, however, interrupting the thread of his argument to remark upon the deportment of the offending counsel. Once Mr. Pollard smiled, on which the Chief Justice remarked, "this is very amusing, Mr. Pollard, but it is law." Shortly afterwards he suddenly exclaimed, "I am astonished at your staring, Mr. Pollard." "It was a stare of astonishment, my lord," remarked the learned counsel. "Stare on, Mr. Pollard," said the Chief Justice; "This a subject for staring." At another passage in his address his lordship paused, and looking at the contumacious barrister, said emphatically, "Mr. Pollard, your eyes are opened very wide." "And with cause, my lord," replied Mr. Pollard. His lordship pronounced Mr. Pollard to have been guilty of six contempts, which consisted briefly of one "pointed and curt answer," with an "apparent" purpose of raising a laugh against the Chief Justice; two "tones and manners," with "inferences;" one "imputation, the converse of what had occurred;" one avowal of a desire not to be "aggressive;" and one "tone" "inferring" that Mr. Pollard had more respect for the bench, that is, for the wooden chair, than he had for its occupant. At the conclusion of the Chief Justice's address, Mr. Pollard endeavoted to speak, but his lordship declined to hear him, and advised him to appeal to the Privy Council, or bring the matter before the Benchers of the Inn of Court, of which he was a member. Popular sympathy in the colony appears to be strongly in favor of the offending barrister, and the fine imposed upon him has been raised by subscription in small sums and presented to him with an address.—*Pall-Mall Gazette.*

A BOOK ABOUT LAWYERS.*

The gentlemen of the bar who donned the blue in the late rebellion, will find many a precedent for their conduct in Mr. Jeaffreson's book. "As to the sarcasms on lawyers for not fighting," said Bulstrode Whitelock (afterwards Lord Keeper) in the House of Commons, "I deem that the gown does neither abate a man's courage or his wisdom, nor render him less capable of using a sword when the laws are silent. Witness the great services performed by Lieutenant General Jones and Commissary Ireton, and many other lawyers, who, putting off their gowns when the Parliament required it, have served stoutly and successfully as soldiers, and have undergone almost as much and as great hardships and dangers as the honorable gentlemen who so much undervalued them." This same Bulstrode Whitelock was captain in Hampden's regiment of horse. On

* Continued from page 83.

the side of the king fought Herbert, afterwards Lord Keeper to Charles II. in exile, and Hyde, afterwards Lord Clarendon. About the same time, Lord Keeper Littleton also drilled a corps of volunteers. John Somers, attorney-at-law, father of Lord Chancellor Somers, raised a troop of horse, at the head of which he rode as captain in Cromwell's army. During the civil war, a royalist rector, in the parish church near which his troop was quartered, preached violent sermons on Divine Right and Non-Resistance, and called down heaven's vengeance upon the rebels. Somers sent the rector a polite message, requesting him to preach more moderately; but this only served to increase his wrath. One Sunday, therefore, when the enemy was in full action, the captain took aim and sent a bullet through the sounding-board over the parson's head, and subsequently explained, that each repetition of denunciation would produce a similar interruption; and further, that on each successive occasion, for pistol practice, the ball would strike a little lower. This "military despotism" soon put a stop to political sermons.

Chief Justice Hale, in his hot youth, burned with military ardor, and sought to fight under the Prince of Orange in the Low Countries. Though he was persuaded not to go, he sang to his expostulating brothers of the law,—

> Tell us not of issue male,
> Of simple fee, and special tale,
> Of feoffments, judgments, bills of sale,
> And leases!
> Can you discourse of hand grenadoes,
> Of sally ports and ambuscadoes,
> Of counterscarps and palisadoes
> And trenches?"

In the next century, Erskine commanded a volunteer company of lawyers of Temple Bar, christened by Sheridan with the sobriquet of "The Devil's Own." The rival corps was composed of Lincoln's Inn men, and nicknamed by the populace "The Devil's Invincibles." Although Erskine had been a lieutenant in the army, and used to eat his obligatory law dinners in his scarlet regimentals, he seems to have forgotten the Casey of the period, for Lord Campbell says, "I did once, and only once, see him putting his men through their manœuvres, on a summer's evening in the Temple Gardens; and I well recollect that he gave the word of command from a paper which he held before him, and in which I conjectured that his 'instructions' were written out, as in a brief." Eldon and Ellenborough were in the rival corps,—"The Devil's Invincibles,"—but both, unhappily, in the awkward squad. Lord Eldon used to say, "I think Ellenborough was more awkward than I was; but others thought it was difficult to determine which of us was the worst." This corps had attorneys in its ranks, and it was said of it that when Lieut-Colonel Cox, the Master in Chancery, who commanded it, gave the word "Charge," two thirds of its rank and file took out their note books and wrote down 6s. 8d. As a counterpart of this story should be told one of the volunteer company of lawyers which was raised a few years since, during the apprehension of the French invasion. It is said that when the drill-master gave the order "About face," not a man of these logical patriots stirred, but that they all stood still, and cried, "Why?" Certainly, these learned gentlemen cannot be said to have felt with the six hundred,—

> "Their's not to make reply,
> Their's not to reason why,
> Their's but to do and die."

Naturally, no English book of the present day, giving any account of social life, would be complete without some reference to that noble animal, the horse. So the author has introduced some five chapters about lawyers on horseback. He dwells with fond regret on the early days, when the law was forced to have more dependence on the saddle, and less on the express train; and notices, with evident admiration, the hunting lawyers of the present day. He extols, too, with vivid admiration, how "crimson gold, burnished steel, and floating ancient, gladdened the eye," and of the "blare of trumpets, rattle of armor, tramp of iron, neighing of horses, and joyous hum of riders," in the circuit under the Plantagenets. Without any hope for a revival of the floating ancient, or blare of

trumpets, the wish may well be expressed, that our profession in America were obliged to have more familiarity with horses than essays on warranty suffice to give. It is a notorious fact that the health of a large number of our leading advocates is broken down by overwork, and by a neglect of out-of-door exercise, of which that in the saddle is the best; while in England, the large number of their most distinguished lawyers, who have, without doubt, done an equal amount of work, and have far exceeded their threescore years and ten, is a striking proof that the English habits in this regard, are far better than our own.

In the 17th century, it would seem that some knowledge of horsemanship was necessary to all lawyers. Samuel Pepys enters in his diary, on October 23, 1660: "I met the Lord Chancellor and all the Judges riding on horseback, and going to Westminster Hall, it being the first day of the term." He also records how Sergeant Glynne, an eminent lawyer, came to grief at the coronation of Charles II., "whose horse fell upon him yesterday, and is like to kill him." Later than this, the barristers rode their circuits in the saddle, while the judges were carried in their private carriages. Lord Kenyon, when a young man, appeared on a small Welsh pony from his native hills. Erskine, too, rode a pony; and Thurlow's ingenious method of hiring a horse without paying for him, has already been related. In those days, there was peril not only from highwaymen, but from flood and field. An amusing story is told of Eldon travelling the northern circuit, which is thoroughly Scotch in its literal humor. The lawyer was about to cross some dangerous sands, contrary to the advice of his landlord. "Danger, danger," he exclaimed impatiently; "have you ever *lost* anybody there?" "Nae, sir," answered mine host, slowly, "naebody has been *lost* on the sands: the puir bodies have a' been found at low water." In spite of such dangers, all historians of lawyers in England of former days are wont to extol the pleasures of the circuit, with its feasting and balls and circuit mess,—when Scott was Attorney-General of the Circuit Grand Court, and used to prosecute offenders "against the peace of our lord the junior;" when Campbell opened the court with a fire-shovel in his hand as an emblem of office; and when an eminent lawyer was duly indicted and fined a dozen of wine, for the heinous crime of being "the best special pleader" in England. Pepper Arden (afterwards Lord Alvanley) was indicted for having said that "no man would be such a fool as to go to a lawyer for advice, who knew how to get on without it." The archives of the court record:—"In this he was considered as doubly culpable: in the first place, as having offended against the laws of Almighty God, by his profane cursing, for which, however, he made a very sufficient atonement by paying a bottle of claret; and secondly, as having made use of an expression, which, if it should become a prevailing opinion, might have the most alarming consequences to the profession, and was therefore deservedly considered in a far more hideous light. For the last offence he was fined three bottles. Pd."

While the barristers were thus in the saddle on the circuit, they had doubtless left their wives in those dusty, dirty inns of Court which are now never graced by women's presence; unless, indeed, when a visit is made by a pretty girl, such as Thackeray records, with

"A smile on her face, and a rose in her hair,
And she sat there and bloomed in my cane-bottomed chair."

But in those days young couples began housekeeping in chambers where they had six rooms at their disposal, including "a trim, compact little kitchen." "Frequently," says Mr. Jeaffreson, "the lawyer over his papers was disturbed by the uproar of his heir in the adjoining room." The admirer of Dickens will recall Tommy Traddles, with his "dearest girl in the world," and her five sisters and "the beauty" playing in his chambers. Of another sort was Sarah, Duchess of Marlborough, who came to take advice of Mansfield when a young man. The lawyer was supping out, and his clerk told him, "I could not make out who she was, for she would not tell her name; but she swore so dreadfully, that I am sure she must be a lady of quality."

The subject of fees cannot but be an agreeable one to any lover of his profession, however disinterested. Going back as far as the reign of Richard II., it is found that lawyers were so unprofessional as to go to the clients' houses and give them advice. William de Beauchamp, claiming the earldom of Pembroke, "invited," says Dugdale, "his learned counsel to his house in Paternoster Row; amongst whom were Robert Charlton (then a judge), William Pinchbek, William Brauchesly, and John Catesby (all learned lawyers); and, after dinner, coming out of his chapel in an angry mood, threw to each of them a piece of gold, and said, 'Sirs, I desire you forthwith to tell me whether I have any right or title to Hastings' lordship and lands.' Whereupon Pinchbek stood up (the rest being silent, fearing that he suspected them), and said, 'No man here nor in England dare say that you have any right in them, except Hastings do quit his claim therein; and should he do it, being now under age, it would be of no validitie.'" The scene is full of character: the counsel waiting; the Norman baron coming out after dinner, and flinging them each their fee, as to a dog; the haughtiness of the language,—"I desire you forthwith to tell me," and spite of all this, the manly independence of the lawyer's opinion. At this time, and for many reigns later, it was customary for clients to provide food and drink for their counsel. Mr. Foss gives the following list of items, taken from a bill of costs made in the reign of Edward IV.:—

For a breakfast at Westminster, spent there on our counsel, ...1s 6d
To another time for boat hire in and out, and a breakfast for two days, 1s 6d

In like manner, the accountant of St. Margaret's, Westminster, entered in the parish books, "Also, paid to Roger Fylpott, learned in the law, for his counsel given, 3s. 8d., with 4d. for his dinner." Here are some items in an old record of disbursements made by the corporation of Lyme Regis:—

Paid for wine carried with us to Mr. Poulett.....,.....3s 6d
Wine and sugar given to Mr. Poulett 3s 4d
Horse-hire, for the sergeant to ride to Mr. Walrond, of Bovey, and for a loaf of sugar, and for conserves given there to Mr. Poppel....£1 1s 0d
Wine and sugar given to Judge Anderson 3s 4d
A bottle and sugar given to Mr. Gibbs £3 3s 0d

The value of money in the sixteenth century is so different from the present, that it is difficult to make a comparison of the fees of that period with the present. Sir Thomas More, in the reign of Henry VIII., "gained, without grief, not so little as £400 by the year." Lord Campbell regards this as "an income which, considering the relative profits of the bar, and the value of money, probably indicated as high a station as £10,000 a year at the present day. This is but relative, however, and compares but poorly with Francis Bacon's income, which, when he was Attorney-General, not very many years after, amounted to £6000, and was a royal income for those times. Coke made a still larger income during his tenure of the same office, the fees and official practice amounting to no less a sum than £7000 a year.* These were very ex-

* "The salary of Attorney-General," says Lord Campbell, in a note to the "Chief-Justices," was £81 6s. 8d.; but his official emoluments amounted to £7,000 a year. His private practice, too, must have been very profitable." It is extremely difficult to say to what sum of our present money this is equivalent. Coke was Attorney-General from 1594 to 1606. The importation of American gold began to affect the value of silver in England in 1570, according to Adam Smith, and ceased in 1640. During this time, this value sank in the relation of one to four. The value of silver remained about the same until the present century, when a further decrease of fifty per cent. up to the present day may be predicated of it. Coke's term of office occurring just in the middle of the period before mentioned, it may be fair to take the average, and to consider it as worth double what it would have been worth in 1640, or £14,000. Add an increase of fifty per cent., and it becomes £21,000 as the actual equivalent in money. But its comparative equivalent is far larger. Macaulay, writing of the period of James II., nearly a century later, gives the income of the richest peer in England, the Duke of Ormond, as £22,000, and the average income of a peer as £8,000. "A thousand a year," he says, "was thought a large revenue for a barrister. £2,000 a year was hardly to be made in the King's Bench, except by the Crown lawyers. It is evident, therefore, that an official man would have been well paid if he had received a fourth or fifth part of what would now be an adequate stipend." (History of England, vol. 1, c. III.) Further on (vol. IV.), he rates £80,000 so late as the time of William III, at "more than £300,000 in our time when compared with the value of estates." To double Coke's income, even with the fifty per cent already added, cannot therefore be excessive, in order to arrive at its relative value. This makes it £42,000 in our currency of to-day. This was, it will be remembered, exclusive of his private practice, and yet is to be regarded as an extremely moderate estimate.

traordinary incomes; for, in the reign of Charles II., Somers was thought a fortunate and rising man, and made £700. Pepys, as usual, gives some valuable information. Being about to go before the House of Commons to argue an Admiralty cause, he records, "To comfort myself, did go to the 'Dog' and drink half a pint of mulled sack, and in the hall did drink a dram of brandy at Mrs. Hewlett's; and with the warmth of this did find myself in better order as to courage, truly." He acquitted himself so well with this Dutch courage, that a "gentleman said I could not get less than £1000 a year, if I would put on a gown and plead at the Chancery bar." These incomes, though good, were not the highest; for there is preserved a fee-book of Sir Francis Winnington, showing that in 1673 he received £3,371; in 1674, £3,560; and in 1675, when he was Solicitor-General, £4,066. Roger North records of his brother Francis (afterwards Lord-Keeper Guildford), that his income when Attorney-General was £7000. Doubtless these enormous incomes were not gained by the chief law-officers of the Stuarts without the doing of much dirty work. The lawyers of this period were wont to keep the money paid them in their skull-caps; and Roger North says of his brother, "His skull-caps, which he wore when he had leisure to observe his constitution, as I touched before, were now destined to lie in a drawer to receive the money that came in by fees. One had the gold, another the crowns and half-crowns, and another the smaller money." It appears, too, from "Hudibras," that this money was sometimes kept for show on the table:—

"To this brave man the knight repairs
For counsel in his law affairs,
And found him mounted in a pew,
With books and money placed for show,
Like nest-eggs, to make clients lay,
And for his false opinion pay."

Pemberton's fee for defending the "Seven Bishops" shows that legitimate business at this time gave but slight rewards. His retaining fee was five guineas; he received twenty guineas with his brief, and three for a consultation.

In the eighteenth century, Charles Yorke's (afterwards Lord Hardwicke) receipts afford an excellent example of the progress of a rising lawyer. They were, for the first year's practice, £121: second, £201; third and fourth, between £300 and £400 per annum; fifth, £700; sixth, £800; seventh, £1000; ninth, £1600; tenth, £2,500. This gradually increased, until, during the last year of his tenure of the office of Attorney-General, he received £7,322. Lord Eldon used to say about himself, that he agreed with his wife, on beginning practice, that what he got the first eleven months should be his, and what in the twelfth hers; and that for the first eleven months he made not one shilling, and in the twelfth half a guinea. Out of this "eighteenpence went for charity, and Bessy got nine shillings." Whether this was so, or merely told to make a good story, it appears from his fee-book that, in 1786, ten years after he began practice, he made £6,833 7s., and that in 1796 his receipts were £12,140 15s 8d.

It seems, from the extract from Dugdale already given, that one of William de Beauchamp's learned counsel was a judge. From this and other sources it appears that judges were not precluded in ancient times from giving opinions to, and taking money from, private clients; though they were forbidden to take gold or silver from any person having "plea or process hanging before them." Indeed, down to the time of James I., and somewhat later, the salaries paid to judges were merely retaining fees, and their chief remuneration consisted of a large number of smaller fees. They were forbidden to accept *presents* from actual suitors, but no suitor could obtain a hearing from any one of them until he had paid into Court certain fees, of which the fattest was a sum of money for the judge's personal use.

That the salaries of the judges in the time of Elizabeth were small, in comparison with the sums which they received as presents and fees, may be seen from the Table of Judges' Allowance, of which the following is an extract:—

THE LORD CHEEFE JUSTICE OF ENGLAND.

	£	s.	d.
Fee, Reward, and Robes	208	6	8
Wyne, 2 tunnes at £5 .	10	0	0
Allowance for being justice of assize . .	20	0	8

It is unnecessary to say that this system of presents, countenanced and practised even by Queen Elizabeth, gave occasion to great corruption. In it is concerned the whole question of the bribery of Lord Bacon, on which it would be useless here to enter. The very handsome salaries, as well as retiring pensions, paid to judicial officers in England, has long since put a stop to this system.*

In a review of the ancient chronicles of England, it is apparent that the law university was a much more conspicuous feature of London than it has been in more modern generations, and that its members exercised a much greater influence than at present,—circumstances which render its history not only more interesting, but important. "To appreciate," says Mr. Jeaffreson, "the great influence of the law university in the fifteenth and sixteenth centuries, it must be borne in mind that the gownsmen (judges, sergeants, ancients, readers, apprentices, and students being comprised in this term) maintained to the townsmen almost as large a proportion as the gownsmen of Oxford or Cambridge maintain at the present time to the townsmen of those learned places." All that the "season" is to modern London the "term" was to old London, from the accession of Henry VIII. to the death of George II.; and many of the existing commercial and fashionable arrangements of a London "season" may be traced to the old word "term." Besides those students who went to the Inns to study, there were a large number who merely lived there for the sake of the position and convenience it gave them for enjoying the pleasures of the metropolis. In the fifteenth century the students numbered two thousand. In Elizabeth's time the number fluctuated between one and two thousand. In Charles II.'s reign, there were about fifteen hundred. Many of these young men were among the gayest gallants of their periods. Under the Court, they set the fashion in dress, slang, amusement, and vice. They performed plays and masques, or were critics of the plays acted upon the stage; and no actor could achieve popularity if the students of the Temple or the Inns conspired to laugh him down. Mr Jeaffreson relates with much gusto the pomps and processions, the masques, amateur theatricals, the jests, the drinking bouts and revels, in which these young men took part under the Stuarts. We shake our heads, in these sober days of the nineteenth century, at such routs; but it was an age of debauchery, and even the veterans of the bar exceeded the limits of strict propriety. Chief Justice Saunders was a hard drinker, taking nips of brandy (so says Roger North) with his breakfast, and seldom appearing in public "without a pot of ale at his nose, or near him," which was even served in Court. Evelyn tells how, at Mrs. Castle's wedding, "Sir George Jeffreys, newly made Lord Chief Justice of England, with Mr. Justice Withings, danced with the bride, and were exceeding merry." "Where," asked Lord Chief Justice Holt (if the story is true) of a criminal just sentenced to death for horse-stealing, whom he recognized as a boon-companion in the days of his hot youth—"where are all our friends of the Devil's Tavern?" "Ah, my Lord!" said the man, "they are all hanged but myself and your lordship." It is to be remembered, that in those times are to be found the foulest blots on the administration of justice which our common law has ever known. Much later than this, that sound old port wine, which used to be the pride of Britain, caused other high legal functionaries to perform curious freaks. "Returning," says Sir Nathaniel Wraxall, "by way of frolic, very late at night, on horseback, to Wimbledon from Addiscombe, the seat of Mr. Jenkinson, near Croydon, where the party dined, Lord Thurlow, the Chancellor, Pitt, and Dundas found the turnpike gate, situated between Tooting and Streatham, thrown open. Being elevated above their usual prudence, and having no servant near them, they passed through the

	Annual Salary.	An. Pension on retirement.
* Lord Chancellor of England	£10,000	£5,000
Lord Chief-Justice of Queen's Bench	8,000	3,750
Lord Chief-Justice of Common Pleas	7,000	3,750
Master of the Rolls	6,000	3,750
Lords Justices (each)	6,000	3,750
Vice-Chancellor of England	5,000	3,500
Chief Baron of the Exchequer	7,000	3,750
Each Puisne Judge or Baron	5,000	3,500

gate at a brisk pace, without stopping to pay the toll, regardless of the remonstrances and threats of the turnpikeman, who, running after them, and believing them some highwaymen who had recently committed some depredations on the road, discharged the contents of his blunderbuss at their backs. Happily, he did no injury." Lord Eldon was a great lover of port wine. He and his brother William, afterwards Lord Stowell, used to dine together, on the first day of each term, in a tavern near the Temple. Mr. Jeaffreson tells a story of Lord Stowell's recalling, when an old man, these terminal dinners to his son-in-law, Lord Sidmouth. The latter observed, "You drank some wine together, I dare say?" Lord Stowell, modestly: "Yes, we drank some wine." Son-in-law, inquisitively: "Two bottles?" Lord Stowell, quickly putting away the imputation of such abstemiousness, "More than that." Son-in-law, smiling, "What! three bottles?" Lord Stowell, "More." Son-in-law, opening his eyes with astonishment, "By Jove, Sir, you don't mean to say that you took four bottles?" Lord Stowell, beginning to feel ashamed of himself: "More; I mean to say we had more. Now don't ask any more questions."

The following amusing tale of virtuous indignation may in this connection be repeated. Alexander Wedderburn's (Lord Loughborough) forte was never virtue. Though not a noted gambler, he was a constant frequenter of Brookes's and White's, and was well known to the world to be versed in all the mysteries of gambling and dicing. Sitting one day at *nisi prius*, he exclaimed with great warmth, "Do not swear the jury in this cause, but let it be struck out of the paper. I will not try it. The administration of justice is insulted by the proposal that I should try it. To my astonishment, I find the action is brought on a wager as to the mode of playing an illegal, disreputable, and mischievous game called 'hazard'—whether, allowing seven to be the main and eleven to be the nick to seven, there are more ways than six of nicking seven on the dice? Courts of justice are constituted to try rights and to redress injuries, not to solve the problems of gamesters. The gentlemen of the jury and I may have *heard* of 'hazard' as a mode of dicing by which sharpers win and young men of family and fortune are ruined; but what do any of us know of "seven being the main," or "eleven the nick to seven?" Do we come here to be instructed in this lore? and are the unusual crowds (drawn hither, I suppose, by the novelty of the unexpected entertainment) to take a lesson with us in these unholy mysteries, which they are to practise in the evening in the low gaming houses in St James street—pithily called by a name which should inspire a salutary terror of entering them? Again, I say, let the cause be struck out of the paper. Move the Court, if you please, that it may be restored; and if my brethren think I do wrong in the course I now take, I hope that one of them will officiate for me here, and save me from the degradation of trying 'whether there be more than six ways of nicking seven on the dice, allowing seven to be the main, and eleven to be a nick to seven,'—*a question, after all, admitting of no doubt, and capable of mathematical demonstration.*"

Speaking of cards, the eminent puisne Judge, Mr. Justice Buller, although he did not entertain progressive ideas on the law of libel, and gave evidence of former good character a curious turn against prisoners, was certainly right in his view of whist, that best of all games for a lawyer; for he used to say that his idea of heaven was to sit at *nisi prius* all day, and play whist all night. Had he been living, he would have appreciated an excellent repartee of Lord Chelmsford's. As Frederick Thesiger, he was engaged in the conduct of a cause, and objected to the irregularity of the opposing counsel, who, in examining his witnesses, repeatedly put leading questions. "I have a right," maintained the counsel doggedly, "to deal with my witnesses as I please." "To that I do not object," retorted Sir Frederick. "You may *deal* as you like, but you shan't *lead*.

The subject of the non-professional culture possessed by lawyers presents an interesting study. In older times, a large proportion of the best students from universities entered, what was then pre-eminently the profession of letters,—the Church. During the

last fifty years, however, the bar has so far invaded on the province of the clergy, as to occasion no little alarm to the ecclesiastics. "The number of men," says Mr. Jeaffreson, "now upon the books of Lincoln's Inn, who have won the 'high honors' of Oxford and Cambridge, is a suggestive fact." A list compiled from the last volumes of Foss's "Judges of England," is given, containing eighty-two names of the most distinguished judges of the last three reigns, some of whom are still living. Of these, it is stated that thirty-two received no education at Oxford, Cambridge, Edinburgh or Dublin; one was educated at Edinburgh, four belong to Dublin, eleven were trained at Oxford; and thirty-four came from Cambridge, twenty-three of these being from a single college,—that of Trinity, Cambridge, which can fairly boast of being, above all others, the nursery of English lawyers. Of the lawyers thus educated, among those who have taken very high honors, may be mentioned Lord Tenterden, of Corpus Christi College, Oxford, winner of the only two honors then open to competition,—the Chancellor's Medals for Latin and English Composition; Lord Langdale, of Caius College, Cambridge, senior wrangler, and senior Smith's prizeman; Sir J. Taylor Coleridge, Corpus Christi College, Oxford, first classman, winner of three Chancellor's prizes; Lord Lyndhurst, Fellow of Trinity College, Cambridge, second wrangler, Smith's prizeman; and Sir Edward Hall Alderson, Caius College, Cambridge, senior wrangler, Smith's prizeman, senior medalist. It was the latter whose classical ears were shocked, when Baron of the Exchequer, by the application of counsel for a *nolle prosequi*. "Stop, Sir," he said, "consider that this is the last day of the term, and don't make things unnecessarily long." A fellow story to this, of the late Lord Justice Knight Bruce, properly finds its place here. A barrister, lately called, who had been a double first classman at his university, was making a long and tedious argument before him, and quoted the maxim, "*Expressio unius est exclusio alterius*," giving the *i* in *unius* short. The Lord Justice, arousing himself from a sort of half slumber, said, "*Unius*, (*i* long) Mr. ——; *unius*. We always pronounced it *unius* at school."—"Oh yes, my lord!" replied Mr. ——; "but some of the poets make it short, for the sake of the metre."—You forget, Mr. ——," said the judge, "we are *prosing* here." In an anecdote told of Lord Campbell, the advantage was on the side of the counsel. In an action brought to recover for damages done to a carriage, one of the counsel repeatedly called the vehicle in question, a "broug-ham," pronouncing both syllables of the word *brougham*. Whereupon Lord Campbell, with considerable pomposity, observed, "*Broom*, is the more usual pronunciation: a carriage of the kind you mean is generally, and not incorrectly, called a 'broom.' That pronunciation is open to no grave objection, and it has the great advantage of saving the time consumed by uttering an extra syllable." Half-an-hour later, in the same trial, Lord Campbell, alluding to a decision given in a similar action, said: "In that case, the carriage which had sustained injury was an *omnibus*—"—"Pardon me, my lord," interrupted the counsel, with such promptitude that his lordship was startled into silence; "a carriage of the kind to which you draw attention is usually termed a *buss*. That pronunciation is open to no grave objection, and it has the great advantage of saving the time consumed by uttering *two* extra syllables." The interruption was naturally followed by a roar of laughter, in which Lord Campbell joined more heartily than any one else.

As an offset to the nice ear of these judges, the Latinity of Lord Kenyon may be noticed. "*Modus in rebus*," his lordship would remark if a trial was too long: "there must be an end of things." When a case of glaring fraud was brought before him, he exclaimed, The dishonesty is manifest; in the words of an old Latin sage, apparently '*Latet anguis in herba.*'"—Again he said, with a face of great wisdom, "In *advancing* to a conclusion on this subject, I am resolved *stare supra antiquas vias.*" Coleridge, in his "Table Talk," is authority for the story that, in a trial for blasphemy, he said to the jury, "Above all, gentlemen, need I name to you the Emperor Julian who was so celebrated for the practice of every Christian virtue, that he was called *Julian the Apostle.*" His knowledge of the poets was

certainly peculiar. "The allegation," he once exclaimed indignantly during the examination of an unsatisfactory witness, "is as far from truth, as old Booterium from the Northern Main,—a line I have heard or met with, God knows *where*;" and there is something unspeakably funny in the metaphor addressed by him to a prisoner convicted of stealing a large quantity of wine belonging to his employer, that "he had feathered his nest with his master's bottles," and in the magnificent bathos of this touching peroration: "Prisoner at the bar, a bountiful Creator endowed you with a powerful frame, a comely appearance, and more than ordinary intelligence; and through the care of your respectable parents you received at the outset of life, an excellent education; *instead of which you have persisted in going about the country stealing ducks.*"

RECENT ENGLISH DECISIONS.

Ship and Shipping — Charterparty—Bill of Lading—Liability of Owner of chartered Ship —Principal and Agent—Master and Shipowner — Carrier — Liability for stowage of Goods—Stevedore.—A ship was chartered for a voyage from Oporto to the United Kingdom, to load from the factors of the affreighter a full cargo of wine or other merchandise, at 18*s.* per ton; the captain to sign bills of lading at any rate of freight without prejudice to the charter; the ship to be addressed to charterer's agent at Oporto on usual terms. The ship was accordingly consigned to the charterer's agents at Oporto, and was put up by them as a general ship, without any intimation that she was under charter; the plaintiff shipped some casks of wine, and received bills of lading in the common form signed by the master.—The wine was stowed by a stevedore appointed by the charterer's agents and paid by them, the money being ultimately repaid them by the master. The wine having leaked from improper stowage:—

Held, that as the charter did not amount to a demise of the ship, and the owners remained in possession by their servants, the master and crew, the shipper was entitled to look to the owners as responsible for the safe carriage of the wine: inasmuch as he had delivered it to be carried in the ship in ignorance that she was chartered, and had dealt with the master, who was still the owner's master, as clothed with the ordinary authority of a master to receive goods and give bills of lading by which his owners would be bound.

Held, also, that the employment of the stevedore made no difference, at all events as regarded the shipper, as he was no party to the employment, and had a right to look to the owners for the safe stowage of the goods, as part of the carrier's duty, in the absence of any special agreement.—*Sandeman* v. *Scurr*, Law Rep. 2 Q. B. 86.

Principal and Agent — Foreign Market—Exigencies of Market—Order to purchase, Substantial compliance with—Money paid.—The defendant, who resided in Liverpool, gave to the plaintiffs, who carried on business at Pernambuco, an order to purchase 100 bales of cotton of a specified quality, on the following terms: "I beg to confirm my letter of the 23rd of February, and hope you will have executed fully all the cotton ordered, and consider it still in force. If executed, please regard this as a new order for 100 more." The plaintiffs acting on this order, purchased in the market, and paid for, ninety-four bales of the specified cotton. No direct evidence was given as to the then state of the Pernambuco market; but the circumstances of the case rendered it reasonable to infer that the plaintiffs, in purchasing ninety-four bales, had done all that was practicable. The defendant declined to pay for these bales on the ground that his order had been inadequately performed:—*Held*, that the order must be construed with reference to the state of market for which it had been given, and that it had been substantially complied with.—*Ireland* v. *Livingston*, Law Rep. 2 Q. B. 99.

Action — Staying Proceedings till Costs of former Action paid. — Where a plaintiff having failed in an action brings a second action for substantially the same cause, unless the plaintiff satisfy the Court that a real probable cause of action exists, the proceeding is so *primâ facie* vexatious and harassing that the Court will stay the second action until the costs of the former action have been paid.—*Cobbett* v. *Warner*, Law Rep. 2 Q. B. 108.

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

June 1,19,1867.

THE QUEEN *v.* JOHN PAXTON.

Reserved Case—Extradition Treaty—Forgery.

A fugitive from Canada was surrendered to the United States authorities on a charge of forgery: that being one of the offences enumerated in the Treaty. The prisoner was put on his trial and convicted on an indictment for feloniously uttering a forged promissory note for the payment of money. The case being reserved on an objection that the prisoner could not be tried for any offence but that for which he had been extradited:—

Held: That the charge of forgery included the lesser charge, and conviction maintained.

This was a case reserved from the Court of Queen's Bench, Crown side, by *Drummond, J.*, under the following circumstances:—

At the term of Queen's Bench, Crown Side, on the 24th September, 1866, the prisoner, John Paxton, was indicted for feloniously uttering a forged promissory note for the payment of money. On his arraignment, on the 10th of October, a special plea was filed by his counsel, setting out that the prisoner had been extradited from the United States, for a different crime, viz: forgery, and that he could not be called upon to answer any other charge.

To this plea there was a demurrer on the part of the Crown, the points urged being as follows:—

1st. That the plea does not allege any matter which by law constitutes any valid plea to the jurisdiction of the Court, or in abatement to the indictment, the offence charged being alleged to have been committed within the jurisdiction of the Court.

2nd. That the matters alleged in the plea did not constitute any legal ground for not answering the indictment, but could only be taken cognizance of by the Executive authority as involving a question of international policy.

3rd. That the crime charged against the prisoner was one of the offences included within the provisions of the Treaty.

4th. That the plea omits to specify the particular charge of forgery, and does not show affirmatively that the offence was not connected with the promissory note, upon which the indictment was framed.

5th. That the crime of forgery includes that of which the prisoner is accused.

At the March term, 1867, the demurrer was maintained and the plea rejected, the question of law raised by it being reserved.

The prisoner then pleaded not guilty, and the trial having proceeded, a verdict of *guilty* was rendered.

Sentence was deferred till the opinion of the Court had been obtained upon the points of law raised by the plea.

Quebec, June 19, 1867.

Judgment was rendered by DUVAL, C. J., CARON, DRUMMOND, and BADGLEY, JJ., maintaining the verdict.

E. Carter, Q. C., for the private prosecution.

B. Devlin, for the prisoner.

June 8, 1867.

MULLIN, APPELLANT, and ARCHAMBAULT, RESPONDENT.

Practice—Motion for leave to appeal.

An application was made on the last day of the Appeal term, for leave to appeal to the Privy Council from a judgment rendered five days previously:—

Held, that the motion came too late.

Mr. Dorion, Q. C., counsel for the Appellant, moved for leave to appeal to the Privy Council from the judgment rendered June 3rd. (*Ante*, p. 90).

DUVAL, C. J. I will not receive your motion on the last day of term. The case would thereby be locked up till September next, and the end attained.

Mr. Dorion. Notice has been given. Time was required to communicate with our client before making this motion.

DUVAL, C. J. The party should have been in Court when judgment was rendered. If we were to receive this application, we must re-

ceive all similar applications, and thus parties would obtain indirectly what they cannot obtain directly. Make your motion on the 1st September. We refuse a rule, because a rule would suspend proceedings in the meantime.

Laflamme, Q. C., counsel for the Respondent, represented that delay would be especially prejudicial in this case, the action being one in ejectment: further, that the amount of rent in question did not admit of an appeal.

Mr. Dorion. It is not a question of rent, but of damage caused to my client.

DUVAL, C. J. I entertain no doubt about it at all; it is not a question of property, but a question of lease or no lease.

Application rejected.

June 8, 1867.

EX PARTE FOURQUIN.

Practice—Interdiction—Curator.

Held, that the curator to a person voluntarily interdicted, must be brought into the proceedings to obtain *contrainte* for *folle enchère*, though the *folle enchère* was made before interdiction.

Fourquin, the prisoner, being detained in prison at Sorel, his counsel applied in the first instance for a writ of *habeas corpus*. The circumstances set out in the petition were, that Fourquin had been subjected to contrainte for *folle enchere*. Subsequently to the *folle enchere*, but before proceedings had been taken to obtain *contrainte*, the prisoner was placed under voluntary interdiction, and one Parent was appointed his curator. In the proceedings taken to obtain *contrainte* the curator had not been brought in.

An objection was raised that there was nothing to show that the prisoner had been interdicted. M. Girouard, counsel for the prisoner, contended that this was properly established by affidavit, and cited an English case in which the fact of the prisoner being a clergyman and exempt from imprisonment, had been established by affidavit in an application similar to this.

DUVAL, C. J. The curator should have been brought into the case. The Court cannot grant a writ of *habeas corpus*, but the judgment is that the writ of *contrainte* was illegally issued, and ordering that the prisoner be discharged, if there be nothing else against him.

DRUMMOND, BADGLEY, and MONDELET, JJ., concurred.

D. Girouard, for the Petitioner.

June 4, 1867.

MORRISON ET AL, APPELLANTS; and DAMBOURGES ET AL, RESPONDENTS.

Practice—Copy of Writ of Appeal.

Held, that the attorney for the appellant may certify the copy of a writ of appeal.

A motion was made in this case, and also in two others, (Charlebois *v.* Bertrand, and Boucher *et al*, *v.* Duhaut,) that the appeal be dismissed, because the writ was not signed by the clerk of Appeals or his deputy, but was certified to be a true copy by the appellants' attorneys.

MONDELET, J. The writ is properly signed, and the motion must be rejected.

BADGLEY, J. The practice of attorneys in certifying copies of writs has received the sanction of the Court during the last half century, and cannot be now overturned.

AYLWIN, J. There are but nine days in which the business of this Court must be transacted. Of these, two are frequently Sundays, and another is sometimes a holyday, thus occasionally leaving only six days for business.—The Court should open at ten a.m., but it is more often eleven before business is fairly commenced, and the moment four o'clock comes, the judges leave. Besides all this, in accordance with some American custom, it is now decided that there shall be a recess, and thus another three-quarters of an hour is lost. Then again, the Court has now to dispose of reserved cases, and other Crown business, which has precedence over all other business, and usually occupies three or four days.—Yesterday, the motion in the present case, to grant which would be to overturn the invariable practice during the forty years which have elapsed since I commenced my career, was argued during two whole hours, and the Court was treated to a *luxe d'erudition* on a matter established beyond all question. How

under these circumstances is the business of the Court to be transacted? I am prepared now to give judgment in every case heard last term, not only here but at Quebec, but nothing is done. Under these circumstances, I have this day sent in my resignation, because I am satisfied that justice cannot be properly administered.

DUVAL, C. J. The practice which we are now called upon to overturn, is one which has been followed for half a century, and has received the express sanction of all the judges during that period. The Court cannot now depart from that practice. The motion must be rejected.

Lefrenaye & Armstrong, for the Appellants.
Piché, for the Respondents.

MONTHLY NOTES.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

June 8.

DORION (defendant in the Court below) Appellant; and DOUTRE *ès qualité* (plaintiff in the Court below) Respondent.

Surety—Signification of Transfer.

This was an appeal from a judgment rendered by *Loranger*, J., in the Superior Court on the 30th of September, 1864, and confirmed in the Court of Revision on the 22nd of January, 1865, by Smith and Berthelot, JJ., (Monk, J., dissenting).

The facts of the case were as follows: On the 18th of January, 1860, Anne Aurélie Routier, by F. E. Dorion, her husband and attorney, made an obligation in favour of Pierre Doutre, advocate, for $360, payable in sixty monthly payments of $6 each, beginning from the 15th February, 1860, without interest, but in case three of said payments should not be paid at maturity, Pierre Doutre might demand the whole sum due. By the same deed, F. E. Dorion *ès qualité* transferred to Pierre Doutre the sum of $400 as collateral security. This $400 was due by one Richard under a transfer made to Anne Aurélie Routier by A. A. Dorion on the 31st December, 1859. On the same day, by a writing *sous seing privé*, the defendant, V. P. W. Dorion, became security of Anne A. Routier for the payment by Richard of the $400 transferred to Pierre Doutre. On the 23rd May, 1860, Richard settled with Anne A. Routier, instead of with the transferree. On the 8th of January, 1863, Mr. Joseph Doutre, the testamentary executor of Pierre Doutre, brought the present action against Anne A. Routier and V. P. W. Dorion for $200, balance of the obligation of 18th January, 1860.

Anne Routier made default, but the appellant Dorion pleaded that he had not become security for the payment of the obligation sued on; the only engagement contracted by him was that Richard would pay the sum of $400 transferred to Pierre Doutre; that the latter having neglected to signify his transfer, Richard had paid this sum to Anne A. Routier, on the 23rd May, 1860, and thus the appellant's suretyship terminated. The plaintiff answered that it was the duty of the appellant to signify the transfer.

Judgment was rendered by *Loranger*, J., in the Circuit Court, on the 30th of September, 1864, maintaining the action against the surety. The reasons assigned were that the absence of signification of the transfer could not be invoked by V. P. W. Dorion. This judgment was confirmed by the Court of Revision on the 25th January, 1865, *Monk*, J., dissenting. The defendant Dorion appealed.

DUVAL, C. J. The judgment must be reversed. We are all decidedly of opinion that it was for the creditor to signify the transfer. It has been said that this woman, Anne Routier, in receiving the money subsequently, has not done right. To this, it must be answered that the *caution* has nothing to do with that. The *considérants* of the judgment are:

Considérant que feu Pierre Doutre, représenté par le demandeur en Cour de Circuit, a négligé de faire signifier le transport fait au dit Pierre Doutre par Anne A. Routier, de ses droits, actions et hypothèques contre Richard; qu'en conséquence de tel défaut de signification, le dit Pierre Doutre a, par sa faute et négligence, perdu son recours contre le dit Richard, et s'est par là mis dans l'impossibilité de céder ses droits et actions à l'appelant, V.

P. W. Dorion, qui est déchargé de sa responsabilité comme caution, etc.

Judgment reversed and action dismissed.

DRUMMOND, BADGLEY and MONDELET, JJ., concurred.

Dorion & Dorion, for the Appellant.

Doutre & Doutre, for the Respondent.

WOODMAN ET AL., (defendants in the Court below) Appellants; and GENIER (plaintiff in the Court below) Respondent.

Sheriff's Sale—Last and highest bid.

This was an appeal from a judgment rendered in the Superior Court at Beauharnois, by *Loranger*, J., on the 28th of March, 1865. The facts of the case were these: On the 12th October, 1859, the plaintiff was the proprietor in possession of an immoveable in the District of Beauharnois. Hainault, one of the defendants, in his quality of Sheriff, took this immoveable in execution. The sale took place on the 12th October, 1859, when the property was adjudged to Bard P. Paige and Henry Woodman, for £573. The plaintiff charged the Sheriff with having made a fraudulent sale, as several parties were present willing to bid more, but were not allowed an opportunity to do so. He accordingly brought an action and inscribed *en faux* against the return of the Sheriff and bailiff, with prayer that the sale be declared null, and the plaintiff be reinstated in possession.

The defendants pleaded that the sale was regularly carried out. The most important evidence was given by one Cameron, who described the transaction thus: "I followed by a bid of £10, and after that it continued by bids of £5 or less, until it reached the sum of £570. This last amount being my bid, I asked the bailiff again if the property was mine, but he did not give me any answer. There was a stay again, and the bailiff sat down on the platform; then a gentleman whom I heard called Paige, said £3, and immediately I said £1. I gave my bidding £1, as quick as the £3 were out of Mr. Paige's mouth. The bailiff told me that I was too late and refused my bid."

The judgment of the Superior Court held that the bid of Cameron was in time, and should have been accepted, and that the sale was in consequence null. From this judgment the present appeal was instituted.

BADGLEY, J. This is an appeal from the Superior Court at Beauharnois. Woodman, one of the appellants, obtained judgment against Genier, and caused his real property to be seized under a *fi. fa.* At the time of the sale, the bailiff employed received bids up to £570. Shortly afterward, Paige, one of the plaintiffs, bid £573, which was simultaneously or almost simultaneously overbidden by Cameron, who bid £574. The bailiff refused to receive the last bid, and knocked down the property. Cameron was quite competent to pay his bid, and was within the allowed time. The last and highest bidder must be adjudged the purchaser, but the highest bidder cannot be ascertained till the close of the sale, and therefore there must be some formal intimation of that close. Under these circumstances the judgment of the Superior Court must be confirmed.

DUVAL, C. J., DRUMMOND and MONDELET, JJ., concurred.

Leblanc & Cassidy, for the Appellants.

Doutre & Doutre, for the Respondent.

SUPERIOR COURT.

October 5, 1867.

SHANNON *et al. v.* WILSON, *et al.*

Practice—Serment Supplétoire.

MONK, J. In this case a woman was sued as a widow upon an obligation. In the deed she declared herself to be a widow. Now when she was sued she came into Court and said that her husband was not dead. Another feature in the case was an intervention by the husband. The parties had joined issue upon the merits. The Court was of opinion that the evidence to show that the husband was living was not conclusive. The Court would, therefore, order him to come into Court for the *serment supplétoire*. If he came into Court, and said he was not dead but living, the Court must dismiss the case.

[On the 17th October, the husband appeared before the Court in person, whereupon the plaintiff's action was dismissed as against the wife, and judgment went only against the intervening party.]

Kelly & Dorion, for the Plaintiffs.

C. P. Davidson, for the Defendants.

Perkins & Ramsay, for the Intervening party.

The Canada Law Journal.

VOL. III. DECEMBER, 1867. No. 6.

SQUATTERS.

A case of great importance to proprietors of Eastern Townships lands will be found in the present issue. In *Ellice* v. *Courtemanche*, the Court of Appeal has decided that a person squatting upon unoccupied land, without a shadow of title, and clearing the land or building on it, is entitled to demand the value of his improvements before he can be ejected. This decision would afford much cause for regret, did not one or two of the circumstances connected with the case render it one of peculiarity. The question is one which does not require much knowledge of law for its decision. "Am I to put my hand in my "neighbor's pocket," said the CHIEF JUSTICE, "because he is a dishonest man?" But put this in another way. Is (not my neighbor but) some parasitical interloper to take advantage of my back being turned, to fasten upon my property, and then am I to be dragged into a troublesome litigation, and to be subjected to the annoyance and anxiety of an *expertise*, to determine in what sum I am to be mulcted for his voluntary and unasked for services, and then if I cannot pay this sum with heavy costs added, am I lose my property altogether? Surely this would be a monstrous proposition. In the case of *Courtemanche*, however, as Mr. Justice DRUMMOND pointed out, there were peculiar circumstances. The plaintiff had an agent who should have notified him that his land had been trespassed upon, but who, on the contrary, allowed the defendant to pay the taxes year after year for three years, and no steps were taken till the value of the land had been more than quadrupled.

THE LANDLORD'S PRIVILEGE.

The case of *Eastty* v. *Fabrique*, reported in this number, is of much interest to commission merchants and others who have to store goods in bonded warehouses, and who can now do so without fear of a seizure for rent due by the lessee of the premises, so long as the storage has been paid. The owners of goods are in fact placed in somewhat the same position as subtenants who have paid their rent to the party from whom they leased. No doubt of the propriety of the decision could arise, even if it were not fully borne out (as it is) by the authorities.

THE COURT OF APPEALS.

The December term of the Court of Appeals was characterized by unusual vigor on the part of the CHIEF and puisne Judges, and an unusual amount of business was dispatched. Thirty-five cases were taken *en délibéré*, and the old *délibérés* were disposed of. It is probable that some important changes will be made in the members of the Bench constituting this Court before the business of the March term is proceeded with. The Court has been adjourned for judgments to the 28th February next.

FIVE AND TWENTY YEARS AGO.

We have been favored with the perusal of a pamphlet, printed in this city a quarter of a century ago, containing the report of a committee of the Montreal Bar on the state of the administration of justice. It is curious to observe that some of the evils complained of at the present day were in existence in 1842, and specially pointed out in the Report. One of these was the obstruction to business, occasioned by the deficiency of judges in the Montreal District, and the infirmities of one of the judges sitting on the Bench. The Committee also made a sore grievance of the interruptions of counsel by judges during argument. "They "must enter their protest against the tone of "petulance and choler, heretofore assumed by "a part of the judiciary; and as a matter of "right they claim for the bar, both in cham- "bers and in court, entire immunity from of- "fensive language and demeanor."

The charge of offensive behaviour on the bench is one which a judge possessed of tact

and good sense will easily escape. It is true that some of the judges of our day do occasionally appear to forget that, though they may assume the mien of an irate schoolmaster, members of the bar are not to be awed into silence like schoolboys. But upon the whole there is not much to be complained of on this head.

Several of the suggestions of the Committee have since been carried out. One of these was that the judges should be held to record, in every judgment, the grounds of their decision. Also the very proper recommendation to change the tenure of the judicial office, and substitute the words, "during good conduct" for "during pleasure" in the commission of the judges.

Some of the evils pointed out have since disappeared, such as having bankruptcy commissioners or judges practicing before the Courts; exorbitant fees paid to prothonotaries and criers, a joint shrievalty obstructing business, &c. In connection with the office of sheriff, it may be worth while to remark that the Committee recommended "that the "office of sheriff *in civil matters*, should be "abolished, and that the duties of that office "should be performed by the prothonotaries;" and "that the functions of the sheriff should "be confined to the criminal side of the Court, "and he should himself receive a fixed salary."

SUPPLEMENTARY FACTUMS IN THE COURT OF APPEALS.

A rule was laid down by the Court of Appeal during the rendering of judgments on the ninth of this month, of which it is important that the members of the bar should not be ignorant. The Chief Justice called the attention of the bar to the practice of sending supplementary notes or factums to the judges during vacation, and observed that he took this opportunity to intimate, that unless the Court gave leave, during the term, to gentlemen to send in supplementary memoranda in vacation, they would not be received; and, further, notice of such supplementary notes must, in all cases, be given to the counsel on the other side. Mr. Bethune, Q. C., inquired whether this would apply also to lists of authorities, and whether the fact that the opposite party had received notice should be shown by his receipt of copy on the paper. The Chief Justice replied, that this would be the more regular course. The rule would henceforward be that all supplementary memoranda must bear the signature of the opposite party.

Mr. Justice Badgley added a few observations respecting the time of sending in the supplementary notes. He said that frequently after the judges had gone through the whole labour of the case, and had made up their minds, they were required at the last moment to go through a long list of new authorities, to the exclusion of other duties. If there were to be any supplementary notes, he said, let them be sent in immediately after the argument.

THE PATENT LAWS.

Some suggestions of importance to Inventors are put forth in a letter recently published by Messrs. Charles Legge & Co. The fact is pointed out that all the nations of the world, with the exception of Canada, Nova Scotia, Prince Edward Island, Switzerland, Greece, Turkey, China and Japan, grant letters patent for inventions to foreigners on the same terms as to their own subjects. New Brunswick and Newfoundland, among the British Provinces, have thrown off their exclusiveness and admitted foreigners to equal rights with their own citizens. "By this arrangement," says the letter before us, the inhabitants of these colonies, are permitted to obtain Patents in the United States, for the reduced fee of $35, in place of the discriminating fee of $500 charged to the inhabitants of Canada, Nova Scotia, and Prince Edward Island, in return for their exclusiveness in not permitting American citizens to obtain Letters Patent on any terms, even by the payment of an equally large fee. The United States Patent Law is so framed, that as soon as we cease to discriminate against their citizens in the granting of Patents in Canada, their fee at once drops from $500 to $35, without additional legislation." These facts are not very creditable

to us as citizens of that great nation which our 'great men,' are so constantly reminding us we have become. Even in a pecuniary point of view, it is evident that the field presented by the American States to Canadian inventors is far more inviting than that offered by Canada to American inventors. "A United States Patent granted to one of our clients," says the letter, "recently sold for $80,000 in gold, for the six New England States, and for $30,000 in greenbacks for each of several other States." It is recommended that articles patented under Patents issued to foreigners be kept on sale at a reasonable rate for eighteen months, otherwise the Patent to become void, and that no patent continue longer than fourteen years. This period it is proposed to divide into three terms: the first, of three years, to require a payment to Government of $25, the second term of four years, an additional payment of $50, and the final term of seven years $100. "All, or nearly all inventors," says Mr. LEGGE, "can afford the first payment of $25, and three years will test the value of the invention—if it prove a good one, the next fee can easily be raised, and so on. If it prove of no great value, the Patent may be allowed to become void, by non-payment of next fee, and consequently be open to the public." It is further recommended that all original Patents, already granted in each of the Provinces, be extended over the Dominion, with or without the payment of an additional fee. These suggestions appear to be dictated by experience and knowledge of the subject, and are consequently worthy of the most careful consideration.

NOTICES OF NEW PUBLICATIONS.

HARPER'S MAGAZINE. December.—A highly interesting article appears in the present number, respecting the nurseries on Randall Island. These 'Nurseries' are a Juvenile Department of the New York Almshouse, and afford a happy home and place of education for about a thousand children of all ages. The progressive and enlightened spirit of the present century has not been slow to perceive how much easier and better it is to prevent crime and disease than to punish the one or cure the other. The institutions on Randall's Island afford a most cheering illustration of the good effect of removing young vagrants from the filth and misery, the impure air, and impure associations of their haunts and homes, and educating both mind and body in a well chosen and well ordered retreat, in a salubrious atmosphere, with abundance of wholesome food, and liberty to indulge in the natural games and sports of childhood. Not a few of the hundreds who every year go forth from Randall's Island, to enter upon an honest and industrious career, will have reason to look back with gratitude to the months or years spent in that retreat.

PROCEDURE CIVILE, Vol. 1. By G. DOUTRE, B.C.L., Advocate, Secretary of the Bar, Province of Quebec. This is the most comprehensive and convenient manual of Civil Procedure which has yet appeared. The Preface is by a learned gentleman from whose instructions most of the younger members of the profession have derived no small benefit, we refer to Professor LAFRENAYE, of McGill University. The Preface is followed by an Introduction in which Mr. DOUTRE notices the various changes which have been introduced by the Code of Civil Procedure. These notes will at once direct the attention of the practitioner to a number of points which should not escape his notice. The Report of the codification commissioners is then given, together with the Text of the Code, and authorities cited by the commissioners. The book also includes the Insolvent Act of 1864 and amendments, together with the rules of practice of the various Courts. It is the intention of the editor, we believe, to issue a second volume which will include the Tariffs of Fees. In the meantime, the first volume is complete in itself, and is carefully indexed, the Alphabetical and Analytical Index alone extending over about one hundred and twenty pages. It is unnecessary to dwell further upon the merits of this work which is executed with Mr. DOUTRE's usual care and accuracy. What we have stated shows that it is well adapted for general use as a *vade mecum*.

BANKRUPTCY—ASSIGNMENTS.—PROVINCES OF ONTARIO AND QUEBEC.

NAME OF INSOLVENT.	RESIDENCE.	ASSIGNEE.	RESIDENCE.	DATE OF NOTICE TO FILE CLAIMS.
Armstrong, William		W. S. Williams	Napanee	Nov. 21st.
Atkinson, James	Township of Reach	Alex. McGregor	Galt	Nov. 6th.
Austin, Charles	Ottawa	Francis Clemow	Ottawa	Dec. 3rd.
Banbury, Charles		Jas. McWhirter	Woodstock	Nov. 20th.
Beath, Robert		S. B. Fairbanks	Oshawa	Nov. 26th.
Bedard, Augustin	St. George de Henryville	T. Sauvageau	Montreal	Nov. 20th.
Berthiaume, François	Boucherville	T. Sauvageau	Montreal	Nov. 4th.
Bogart, Irvin D.	Campbellford	E. A. Macnachtan	Cobourg	Nov. 29th.
Bostwick, John Price		Thos. Deacon	Pembroke	Nov. 4th.
Boswell, John S.	Cobourg	E. A. Macnachtan	Cobourg	Nov. 30th.
Boulton, John	Petrolia	George Stevenson	Sarnia	Nov. 2d.
Brown, James	Manvers	E. A. Macnachtan	Cobourg	Nov. 20th.
Capron, Walter	Paris	A. W. Smith	Brantford	Nov. 27th.
Cocker, George		John McDonald.	Montreal	Nov. 5th.
Cocker, George	Ottawa	Francis Clemow	Ottawa	Nov. 27th.
Colwell, William		W. Collins	Walkerton	Nov. 23rd.
Dale, John	Township of Tecumseth	Joseph Rogers	Barrie	Nov. 29th.
Dauplaise, Paschal	St. François du Lac	G. I. Barthe	Sorel	Nov. 15th.
Davison, Thomas		W. T. Mason	Toronto	Nov. 16th.
Davy, Benjamin Canning		W. S. Robinson	Napanee	Nov. 29th.
Denner, Theophilus P.		W. S. Robinson	Napanee	Nov. 14th.
Douglass, Henry Joseph		W. S. Williams	Napanee	Nov. 21st.
Edgar, Philip		W. S. Robinson	Napanee	Nov. 4th.
Edwards, R.	Almonte	John Whyte	Montreal	Nov. 7th.
Erritt, Richard William		William Staples	Millbrooke	Nov. 18th
Findlay, Thomas		Richard Monck	Chatham. O.	Nov. 7th.
Flagler, John R.	Brighton	E. A. Macnachtan	Cobourg	Nov. 22nd
Fleak, Henry C.		Jas. McWhirter	Woodstock	Nov. 20th
Flyn, Daniel		R. M. Rose	Kingston	Nov. 4th.
Forsyth & Pemberton		Wm. Walker	Quebec	Nov. 23rd.
Gauthier, Alexandre	St. Edouard	T. Sauvageau	Montreal	Nov. 29th.
Gilkes, George	Windsor	J. McCrae	Windsor	Oct. 18th.
Gimson, John Foster	Lindsay	Robert Watson	Montreal	Nov. 6th.
Grier, Thomas McKee	Pushlinch	Thos. Saunders	Guelph	Nov. 5th.
Guertin, François Xavier		Isidore Traversy	Ottawa	Dec. 4th.
Harris, Elisha Gustavus	West Oxford	Jas. McWhirter	Woodstock	Dec. 4th.
Hartill & Lockington		Thomas Clarkson	Toronto	Nov. 6th.
Hébert, Octave J.	Montreal	T. Sauvageau	Montreal	Nov. 12th.
Heney, David	Blyth	S. Pollock	Goderich	Nov. 18th.
Kelly, James		Thos. Saunders	Guelph	Dec. 14th.
Kergan, John D., & Co.	Paisley	W. F. Findlay	Hamilton	Nov. 4th.
Lalor, Thomas		Thomas Clarkson	Toronto	Nov. 20th.
Langlois, Léon	Windsor	J. McCrae	Windsor	Nov. 21st.
Lazier, Richard Léonard		J. P. Thomas	Belleville	Dec. 4th.
Lundy, John Stewart	Chingouacousy	John Lynch	Brampton	Nov. 29th.
Macartney, George	Township of North Gower	F. Clemow	Ottawa	Oct. 25th.
McBean, Archibald		E. A. Macnachtan	Cobourg	Nov. 11th.
McCarthy, John A.	Stratford	Thos. Miller	Stratford	Nov. 6th.
McDonald, John		Alex. McGregor	Galt	Dec. 2nd.
McGaffin, James		W. T. Mason	Toronto	Dec. 7th.
McGillivray, John	Ottawa	Francis Clemow	Ottawa	Nov. 29th.
McLaughlin, James	Ainleyville	S. Pollock	Goderich	Nov. 21st.
Mailloux, Isaïe	St. Timothé	T. Sauvageau	Montreal	Nov. 11th.
Methot, Joseph O.		Pemb. Paterson		Nov. 25th.
Mewburn, T. C.	Hamilton	J. J Mason	Hamilton	Nov. 25th.
Mitchell, William Hall		Thos. Churcher	London	Nov. 14th.
Mulville, Michael	Lennoxville	A. M. Smith	Sherbrooke	Nov. 12th.
Murray, William	Millbrook	James McWhirter	Woodstock	Nov. 20th.
Nelson, Charles	Ingersoll	Jas. McWhirter		Dec.4th.
Nye, D. T. R.	Phillipsburg	W. Mead Pattison	Frelighsburg	Nov. 27th.
Peebles, Andrew		George Easton	Brockville	Nov. 11th.
Pelletier & Co.	Montreal	T. Sauvageau	Montreal	Nov. 21st.
Phippen, Robert	Parkhill	Thos. Churcher	London	Nov. 20th.
Pillon, William Dunkon	Township of Hibbert	Thos. Miller	Stratford	Nov. 27th.
Pitcher & Sons, Luther	Compton	A. M. Smith	Sherbrooke	Nov. 15th.
Reeves, John I.	Montreal	T. S. Brown	Montreal	Nov. 27th.
Riendeau, Jean Bte	Boucherville	T. Sauvageau	Montreal	Nov. 28th.
Robinson, William	Township Fredericsburgh	W. S. Robinson	Napanee	Nov. 19th.
Rook, Robert		W. S. Robinson	Napanee	Nov. 4th.
Rowell, William		Thomas Clarkson	Toronto	Nov. 18th.
Sénécal, L. A., individually and as partner of Senécal & Weiss	Pierreville	T. Sauvageau	Montreal	Nov. 20th.
Vance, James John		Thomas Clarkson	Toronto	Nov. 6th.
Vézina, Louis D.		A. Fraser	Quebec	Nov. 27th.
Walker, James		William Heron	Ashburn	Nov. 1st.
Wilkes, James		A. W. Smith	Brantford	Nov. 19th.
Workman, George		S. C. Wood	Lindsay	Nov. 21st.

APPOINTMENTS.

Thomas Miller, Esq., of Berlin, Ont., Barrister-at-law, to be judge of the County Court for the County of Halton, in the room of Joseph Davis, Esq., deceased. (Gazetted, Nov. 30, 1867.)

Thos. McCord, Esq., Advocate, to be Law Clerk of the Legislature of the Province of Quebec. (Gazetted, Dec. 20, 1867.)

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

December 9th, 1867.

EASTTY, (Opposant in Court below), APPELLANT; and CURE ET MARGUILLIERS DE LA FABRIQUE DE MONTREAL, (Plaintiffs in Court below), RESPONDENTS.

Landlord's privilege—Bonded Warehouse—Coutume de Paris, Art. 161.

Held, that goods of third parties, traders, stored in a bonded Customs Warehouse, are not liable to seizure for rent due to the lessor by the lessee, under Art. 161 of the Custom of Paris.

This was an appeal from a judgment rendered by *Berthelot*, J., in the Circuit Court, at Montreal, on the 28th June, 1866. The plaintiffs in the Court below, now respondents, on the 14th June, 1865, issued execution against one Curry for $192.65, due for rent, and under this execution ninety-three crates of crockery, belonging to Eastty, the opposant, were seized. He filed his opposition on the 23rd June following, claiming to have them withdrawn from seizure on the ground that they had been put into Curry's warehouse as a Bonded Customs Warehouse, for a certain price or rate per package, and that this rate had been duly paid before the issuing of the seizure. The answer to the opposition set up that the goods were placed in the premises *pour garnir les lieux*; that the opposant was not a sub-tenant, and therefore his property was subject to the landlord's privilege. At *enquête*, the plaintiffs admitted that the premises were leased by defendant as a Bonded Warehouse for the temporary storage of goods *in transitu* to premises of the owners; that the goods seized had been but a few days in the premises, and the rent demanded, with the exception of a few days, had become due before the goods were placed there. Further, that the goods were placed there by the opposant simply for storage, and that the storage was fully paid at the time of the seizure.

The opposition being dismissed by the Court below, the opposant appealed.

BADGLEY, J. The question is one of landlord's privilege upon warehoused goods. It is well established that the landlord's privilege does not extend to all things, otherwise trading would be greatly interfered with. Whatever things are in the house in the way of trade are exempt. A common instance of these exceptions is an auctioneer who receives your property for sale, and who does not hold the goods for himself but for others. [His Honor referred to two decisions, one by Chief Justice Reid, and the second by Mr. Justice Pyke, by which oppositions claiming goods as exempt from seizure had been maintained]. These decisions were upon the ground of public convenience. I think the same principle applies to the goods claimed in this case. They were under the protection of the public Customs Law. The judgment, therefore, should be reversed.

DRUMMOND, J., referred to the lease by which it appeared that the second story of the premises was intended to be used by the lessee as a bonded warehouse. It was held under the old French law that it was merely the *meubles meublans* to which the privilege of the landlord extended; but afterwards it was held that it extended to all the things in the house which evidently did not belong to another person. But as to deposits and articles placed in a store or shop in the course of business by other persons, they were exempt. *Troplong* says, "Lorsqu'il est notoire que les meubles n'appartiennent pas au locataire, les tribunaux doivent, d'après les circonstances, et sans qu'il y ait signification

préalable, admettre que le privilége n'a pas eu lieu." Certainly no notification was required with respect to the property in the present instance, it being well known that it was property belonging to the public, temporarily deposited in the premises. A case has been cited from *Jour. du Palais, Savalette* v. *Moriseau*, which applies here. The *considerants* of that judgment were: "Attendu que le privilége s'étend sur tout ce qui garnit la maison; Attendu que ce droit de préférence est fondé sur la présomption que tous les objets sur lesquels il s'étend sont la propriété du locataire: qu'il suit de là, que le privilége doit cesser toutes les fois que le propriétaire a *du savoir* que son locataire n'avait aucun droit, soit par la suite de la connaissance que l'on lui en a donné, soit par la nature même de l'exploitation, &c., annulle," &c. I think therefore, that the goods in this case were exempt from seizure, and that the opposition should have been maintained.

DUVAL, C.J. At the time of the argument I was prepared to reverse this judgment, because it would destroy the whole of the bonded warehouse system. It is a privilege granted to the mercantile community, and it would be utterly unavailing if parties were to be told that their goods would be liable for the whole rent due. I concur in reversing the judgment.

CARON, J., concurred.

Judgment: Considering that the premises in which lay the goods seized in this cause were leased by the respondents for the purpose of being used, and were in fact at the time of the seizure used as a bonded warehouse established by law for the temporary storage of goods belonging to merchant and trader indiscriminately, and were not by the terms of the lease destined to be exclusively furnished with moveables belonging to the lessee: considering that the goods so seized belonged to the appellant, a trader in the city of Montreal, who had deposited them there for temporary storage a few days before the seizure thereof, and that they were so seized for rent, the greater part of which had become due before they had been so deposited: considering that the privilege granted to the proprietor by the 161st article of the *Coutume de Paris* over moveables found in the premises leased by him is founded on the presumption that such moveables are the property of the lessee: considering that such privilege does not extend to such goods as the proprietor must have known not to belong to the lessee: considering, therefore, that the said privilege did not extend to the goods seized in this cause, &c. Judgment reversed.

A. & W. Robertson, for the appellant.
Jetté & Archambault, for the respondents.

Dec. 9, 1867.

ELLICE, (plaintiff in the Court below) APPELLANT; and COURTEMANCHE, (defendant in the Court below) RESPONDENT.

Squatters Act—C.S.L.C. cap 45—*Improvements—Civil Code, Art.* 417.

The defendant squatted upon land of an absentee (who was represented, however, by an agent), cleared and improved the land and paid the taxes for three years:—

Held, in an action under C.S.L.C. Cap. 45, that the defendant was entitled to the value of his improvements, less the estimated value of the rents, issues and profits during his occupation.

This was an appeal from a judgment rendered by *Short, J.*, in the Circuit Court for the district of St. Francis, on the 15th of December, 1866. The action was instituted under C. S. L. C. Cap. 45, commonly called "the Squatter's Act," to recover possession of the south one-third of Lot. No. 13, in the 9th range of Clifton. The defendant admitted that the plaintiff was the proprietor, but urged that he, the defendant, had had peaceful possession from the 14th of February, 1860, during which time he had made considerable improvements, and had paid the municipal taxes, to the knowledge of the plaintiff, and he claimed to be paid the value of the improvements.

The Court below, *avant faire droit*, ordered an *expertise* to estimate the value of the improvements, and rents, issues and profits; and the *experts* reported the value of the improvements at $350, and the rents, issues and profits at $50. The report was homo-

logated, and judgment was rendered awarding to the defendant $300, with costs of the contestation. It was from this judgment the plaintiff appealed, submitting that the defendant, possessing in bad faith, could not recover from the proprietor compensation for improvements made by him unasked.

BADGLEY, J. Although I concur with my colleagues, my judgment is upon a different ground. I look upon the question of good or bad faith on the part of the defendant as immaterial here, because in either case, I think the judgment should be confirmed. It is a petitory action under the Squatters' Act, Cap. 45 C. S. L. C. The substance of the evidence is to the following effect: that Ellice owned a number of lots in the township, which were entered in the books of the municipality as his land. The taxes were paid by the defendant for three or four years. The present action was brought in 1864. The defendant had squatted upon this land without obtaining permission from any one; he set to work, ditched, and erected buildings upon it for his own convenience, but in fact casting upon the owner all the expense. The result after his six years occupancy is shown by the $300 awarded to him. The question is whether squatters have the right to act thus, and then demand the value of their improvements. If so, the only way to prevent it would be to warn them off, otherwise, the pockets of the owners would be depleted without their consent. In this case, Ellice, the landlord, was well known throughout that part of the country. Every possible facility existed for ascertaining the name of the owner; and in fact the defendant knew both one and the other, because he alleges in his plea that he paid the road and school taxes upon the land, which he could not have done unless he knew the lot on which he paid. From all this evidence, it is clear to my mind, that the defendant was in bad faith. The plaintiff has urged that the bad faith of the defendant is a bar to his demand, and has referred to the 417th article of our Code as having finally settled the law upon this subject. The objection of bad faith is not one to be proved by the land owner; the *onus* would be cast upon the occupant to prove his good faith. The defendant has not proved good faith, his evidence is almost exclusively upon the value of the improvements, and that he paid the taxes, which he would do for his own advantage. I have no hesitation in stating my conviction that he was a squatter to whom the Squatters' Act applies, and that Act was passed for the very purpose of obtaining possession of lands squatted upon in this way; further, I am convinced that he was in bad faith. The 417th article of the Code contains no explanation or definition of the meaning of the terms good or bad faith; this must, therefore, be sought in the common law. Assuming that the defendant was in bad faith, does the 417th article apply? The 416th article provides that the land owner who has constructed buildings with materials which do not belong to him must pay their value, but the owner of the materials has no right to take them away. The 417th article provides that when improvements have been made by a possessor with his own materials, the right of the proprietor to such improvements depends on their nature, and the good or bad faith of such possessor. The second clause says, that if the improvements were necessary, the proprietor of the land cannot have them taken away; he must, in all cases, pay what they cost, even when they no longer exist; saving, in the case of bad faith, the compensation of rents, issues and profits. The provisions of this article apply only to constructive improvements, and not to any other class of improvements whereby the land has been increased in value. Improvements which cannot be removed must be valued, and paid for by the land owner. The *experts* in this case made their report with great care, and I think the judgment was right and should be confirmed.

CARON, J., after stating the facts, said he did not think the defendant was in such bad faith as to be subjected to the provisions of the last paragraph of the 417th article.

DUVAL, C. J. A great deal has been said about good and bad faith. It is a rule that he who talks about bad faith on the part of his adversary should show good faith himself. Now, the plaintiff has not shown bad faith, but he is answerable for the actions of his agent. The defendant occupied this land in broad day and paid the taxes upon it for several years. The plaintiff's agent allowed the land to be improved and increased in value, and when he brings it into the market, he will get the increased price for it. Under these circumstances, should it be said that, because the defendant is in bad faith, the plaintiff should be allowed to put this money in his pocket? What was the agent doing all this time? The Roman law says that even in the case of bad faith, those expenses which really increased the value of the land, must be re-imbursed. Is this not a principle of equity? Am I to put my hand in my neighbor's pocket because he is a dishonest man? The plaintiff himself was not on the spot, but he is liable for the acts of his agent. If he does not choose to attend to his own interests, he has only himself to blame if he suffers loss.

DRUMMOND, J. What led me to come to the decision I have arrived at, and to feel sure that I was not committing an act of injustice, was the fact that for four or five years, the defendant was allowed to pay taxes on this land. Now, no more convincing proof that he was there with the consent of the proprietor could be given. Whether the plaintiff was absent or not, he was bound to know what were his duties in the municipality. It is true that some taxes were paid by Ellice, but the defendant had been paying the taxes for several years, and the mere fact of the defendant having paid the taxes is full proof to my mind that he was there with the knowledge and consent of the proprietor. There are many persons who hold back, and let squatters pay the taxes till the value of the property has been doubled or trebled. At the same time I should be sorry if this case should be confounded with the other case in which the land is taken possession of without the knowledge or consent of the proprietor.

Judgment confirmed.

Sanborn and Brooks, for the Appellant.

H. C. Cabana, for the Respondent.

November 28th, 1867.

WIGGINS *v.* THE QUEEN INSURANCE COMPANY.

Insurance—Making Claim in due form.

One of the conditions in a policy of fire insurance required that the claim should be made in due form. The plaintiff having sued on the policy to recover for loss by an accidental fire, the jury, in answer to special questions, found that the plaintiff had made his claim without fraud or false representation, but not *in due form*:—

Held, that the words *but not in due form* could not be treated as surplusage, and that the defendants were consequently, by law, entitled to judgment in their favor.

BERTHELOT, J. The plaintiff sues for $1000, on a policy of insurance dated 21st June, 1866, for loss by an accidental fire in his house on the 29th of November, 1866, which destroyed effects to the value of $1272. The plaintiff states that he put in his claim, accompanied by a statement under oath, of the amount of his loss as soon as possible after the fire, and that he was prepared to prove the amount by documents and papers or otherwise, according as the Board of Directors of the Company might reasonably require; and that within three months subsequent to the fire, he claimed from the Company the sum of $1000, the amount of his insurance, and that he has observed all the conditions of the policy.

The defendants by their pleas have invoked the 12th condition of the policy by which the insured was bound, within fourteen days subsequent to the loss by fire, to present a detailed statement of his loss duly sworn, or supported by proof, in such manner as the Company or their agents might require, and that if there was any fraud in the plaintiff's claim, he would lose the benefit of his policy. The defendants conclude by averring that the plaintiff had failed to satisfy the requirements of the 12th clause within 14 days after his loss; and that there was fraud according to the 12th condition, the plaintiff having claimed for effects not totally destroyed, and that he was

guilty of fraud which precluded him from recovering on his policy.

The case was submitted to a jury on a suggestion of facts. The questions that require attention are the 8th, 9th and 10th, which are in the following terms:—

8th. Did plaintiff forthwith, and within the delay required by said policy, to wit, the 12th of December, 1866, at Montreal, give notice to defendants, and deliver an account, giving particulars of the loss, under oath, and offer all information to defendants, and make claim to the payment of the sum of $1000 of and from defendants?—Answer. We consider the claim made, *but not in due form.*

9th. Did the plaintiff, by his claim in writing, claim from the defendants the sum of $1000, and was and is there fraud in said claim?—Answer. He did make his claim, and we consider there was no fraud.

10th. Was there a false statement in said claim?—Answer. *We think not.*

These three answers may be summed up as follows: The plaintiff did not commit fraud nor produce a false statement, but did not make his claim in conformity to the requirements of the condition of his policy. By their answer to the 7th question, the jury, or rather nine of them, replied that the loss sustained by the plaintiff was $900. The difficulty of reconciling these answers arises from the fact of the verdict not being general. The question which is usually the last, namely, "Do you find for the plaintiff or the defendant," was not put to the jury in this case. Two motions have been made on the part of the plaintiff, one that the words in the 8th answer "but not in due form," be struck out, as useless, and having no bearing on the contestation, contrary to evidence, and illegal, and a second motion for judgment for $900 on the verdict. On the part of the defendants three motions have been made; 1st, for a new trial; 2nd, in arrest of judgment; 3rd, for judgment in their favor, because the answers of the jury do not sustain the allegations of the declaration, and do sustain the allegations of the defendant's plea.

It is clear that the plaintiff's first motion cannot be granted, the jury having a perfect right to restrict the first portion of their answer by adding the clause in question. A similar motion was rejected in the case of *Clark* v. *Fitts.* When the suggestions of facts have once been settled, and submitted to the jury, they must have full effect. If the judgment of the 26th June, 1867, which determined the suggestion of facts, was erroneous in leaving it to the jury to say whether the claim was made in due form, the plaintiff should have complained of that judgment. It was, perhaps, a mixed question of fact and law which might have been reserved by the Court; but this was not done, and the parties did not complain. As I remarked in the case of *Racine* v. *The Equitable Insurance Company,* to what end was this question submitted to the jury if their answer is to be disregarded by the Court? It is, perhaps, an inconvenience of the system of suggestions of facts, that in all cases the jury are not asked lastly in favor of whom they find. The plaintiff's first motion must therefore be rejected, and for the same, or nearly the same reasons, the first two motions of the defendants cannot be granted. It is impossible to pretend that the evidence was insufficient, or illegal: on the contrary, it was sufficiently voluminous and contradictory on both sides, to permit the jury to decide the pretensions of the parties in one way or the other; and in fact we see that one of them wished to give $1000, two of them $800,—whilst nine fixed the loss at $900. Nor is it a case in which a new trial can be granted, for independently of the oral evidence, we have in the record the report made by the two *experts,* named by the parties the day after the fire to ascertain the amount of the loss, so that the jury on the proof made could have no difficulty in deciding on the judgment they should render and the amount of that judgment. Besides the jury found that there was neither fraud nor falsehood in the statements presented by the plaintiff.

These two motions being also rejected, the Court comes to the consideration of the second motion of the plaintiff, and the third motion of the defendants. The plaintiff pretends that the motion of the defendants is presented too late, but this pretension is unfounded. The defendants, contending that from the answers of the jury to the suggestion of facts—it result-

ed that judgment should be given in their favor—were at liberty to present the motion in question on the 26th of September, the same day that the plaintiff presented his to the same effect. Both parties have in this respect the same delay and the same right.

It is necessary, therefore, to consider the effect of the answer of the jury to the 8th question, as it presents itself, and to see whether the condition contained in clause 12, should have its full effect, not having been observed by the plaintiff, inasmuch as his claim (though in the opinion of the jury neither false nor fraudulent) was, nevertheless not made "*in due form*," before the 14th day after the fire, or even afterwards.

The presentation of the claim within the delay and according to the form prescribed by the conditions of the policy, is a matter required both by English and French law, and if these forms and conditions are not strictly observed and fulfilled, within the prescribed time, the result is a forfeiture, and a prescription in favor of the insurers, and the insured cannot bring his action. I have to repeat here what I cited from *Quenault*, when I rendered judgment in the case of *Racine* v. *The Equitable Insurance Company*, (6 JURIST 89). In France the conditions of insurance policies, of the same nature as that which creates the difficulty in this case, are regarded as strictly binding on the insured. Quenault, Assurance Terrestre, No 252. "Si les assureurs ne satisfont point à la demande que l'assuré leur fait à l'amiable, il doit intenter contre eux l'action en paiement de l'assurance avant l'expiration du delai fixé pour la prescription de cette action." Further on, in his translation of the work of Marshall, chap. 5, p. 377–384, he cites several judgments of the English Courts, which leave no doubt as to the necessity of the insured making proof of the production of his claim in due form before he can recover, even in the event of a *formal verdict* in his favor. It must be the same, and with a great deal more reason, in a case like this where the verdict is only special and qualified. It admits the claim and fixes the amount; but it expressly finds the fact that the insured did not make his claim in due form "according to the conditions of the policy," unless no meaning be attached to the answer to the 8th question, which is neither reasonable nor possible.—The Court cannot but give effect to this verdict, which, although as to the fact, and to a certain point is in favor of the plaintiff, is in law in favor of the defendants. I regret that it should be so, and that the plaintiff should fail on a point which may seem weak, after obtaining from the jury answers favorable to the real merits of the case, since the jury exonerates him from the reproach of fraud or false representation. But the mode in which I have viewed the case and framed my judgment, will have this advantage, that the case being reduced to a question of law, the plaintiff may have it reviewed at small cost without having recourse to a new trial. The second motion of the plaintiff is rejected, and the third motion of the defendants (for judgment) is granted.

Perkins & Ramsay, for the plaintiff.

Torrance & Morris, for the defendants.

SUPERIOR COURT.

November 28th.

DORWIN ET AL. v. THOMSON.

Promissory Note—Forgery of Endorsation—Proof.

Held, that the genuineness of the signature to or endorsement upon a promissory note ceases to be presumed the moment the defendant denies it in his plea supported by affidavit; and the plaintiff must make proof of the same.

Held, also, that in the circumstances the plaintiffs were guilty of negligence in accepting the note without sufficient caution.

MONDELET, J. This is an action for the recovery of $2500, being the amount of a promissory note dated 2nd March, 1866, signed by Daniel McNevin, to the order of Johnston Thomson, the defendant, payable at the Bank of Montreal. The defendant admits having signed as endorser a note which was then for $500, but adds that since he so endorsed it, it was made into a note for $2500, and pleads that this forged note is null and void. The defendant has supported his plea by a special affidavit embracing an absolute traverse and denial of the genuineness

of the note, which the defendant swears has been forged and altered as above mentioned in his plea, and has been so forged and altered since he endorsed it.

It is hardly necessary that I should premise by stating that in the investigation of this case, I have altogether, to use a familiar expression, thrown overboard whatever remained on my mind of the evidence and circumstances as they were proved before me in the Queen's Bench when the trial of McNevin took place in the Criminal Court, which I presided over. I am, as in duty bound, solely governed by the present case as it comes up.

The first question to be determined, and it is a very important one to the plaintiffs, is, whether in the face of defendant's plea, supported by his above mentioned affidavit, the genuineness of the note is still to be presumed, and as a consequence, whether the plaintiffs were or were not absolved from the obligation of proving their case, in all its bearings. Here is the section (86 of ch. 83, C.S.L.C.): "If in any such action (on a bill of exchange or promissory note, &c.,) any defendant denies his signature, or any other signature or writing to or upon such bill, note, *cedule*, check, promise, act or agreement, or the genuineness of such instrument or of any part thereof, or that the protest, notice and service thereof (if any be alleged by the plaintiff) were regularly made, whether such denial be made by pleading the general issue or other plea, such instrument and signatures shall nevertheless be presumed to be genuine, and such protest, notice and service to have been regularly made, unless with such plea there be filed an affidavit of such defendant, or of some person acting as his agent or clerk, and cognizant of the facts in such capacity, that such instrument or some material part thereof, is not genuine, or that his signature or some other to or upon such instrument is forged, or that such protest, notice and service were not regularly made, and in what the alleged irregularity consists." From the precise wording of the above recited section, it is evident that the genuineness of the note now in question ceased to be presumed the instant the defendant specially denied it in his affidavit. It is also evident that the plaintiffs had to prove that the note they sued upon is a genuine note, and not a forged one in part, as solemnly sworn to by the defendant. The defendant might have rested his case there. Our law is precise and imperative; there is no choice for plaintiffs, but to make out their case, the *onus probandi* being upon them, with respect to the genuineness of the note. Singularly enough, the plaintiffs have not considered their case in that light, and since they are advised to rest it upon what they have done, I presume, they either view the section of the statute to be in their favour, or that the defendant has made such admissions as to exonerate them from the obligation of proving their case. The Court is, therefore, called upon to adjudicate upon the case as it now presents itself for consideration.

In ordinary cases, when the signature is not denied, when the genuineness of a note or of any instrument is not gainsaid, the same are presumed to be genuine and true. It is also certain that in pleading to such an action as the present, the defendant might have made such admissions as would have taken the *onus probandi* off the plaintiffs. Principles governing such cases are as well known as they are obviously elementary. But to the application of such general principles, so sound, so reasonable in themselves, and so practically wise, our Provincial law has very wisely also, and most logically, appended an exception which is equally wise and logical; and by our own law and not by any other, and much less by decisions which are not under its provisions, is this case to be governed and decided. The Court must, therefore, in obedience to the law, declare that the plaintiffs have, in all respects, failed to prove their case, and that were there no evidence whatever adduced by the defendant, in support of his plea, supported by his affidavit, there would be no other alternative for the Court than to dismiss the plaintiff's action.

The features of this case, however, are

such, that the whole commercial public, the Banks, and individual members of the community are deeply interested in knowing what the Court is prepared to decide, and how such transactions as those disclosed by the evidence in he record, are to be viewed in a legal, as well as in a moral and social aspect.

It is clearly proved, not only by Dr. Girdwood, that the note in question has been tampered with, as will be shown, but by Daniel McNevin himself, and other evidence in the case, which has not and cannot be controverted, that this note has been altered and in part forged, since the defendant appended his signature as an indorser thereto. I should now properly observe that the very appearance of the note would naturally catch the eye of an observing, careful and prudent man, and although we have had statements made by most respectable and intelligent men to the contrary, I must be permitted to say, that it tells more for their confiding disposition, than for their discrimination. Cashiers of Banks, who have such enormous and diversified numbers of notes sent for discount, may either go over such arduous work hastily, liberally, if you choose to use such an expression, or they may be greatly influenced by the fact of the signature of such a person as the defendant being found on the back of a note, as endorser. This, however, does not alter the case, and surely any one who has no interest in the matter, cannot, in my opinion, so far be blind as not to see, even without the use of a miscroscope, that the word "twenty" was written at a different time from the words which immediately follow it, and at a period different and subsequent to the writing of the other words. It is plain to the eye that the word "twenty" is written on a higher level than the words "five hundred." As to the figure "2" at the head of the note, it appears to the eye to be written with a pen less full of ink than the figures "500" which fol the figure "2," and much lighter than the figures "500." The word "twenty" also appears to be written a little higher than the words which follow. I wish to be clearly understood as to what immediately precedes. The decision of this case does not, of course, rest upon what I have just above stated as to the appearance of the note. I have taken the trouble to make myself sure in that respect, and to justify my inference, that any careful, close-observing person may, at once, not precisely determine that the note has been tampered with, but suspect or suppose that such has been the case. This is not without its importance as to the application of what the plaintiffs have maintained to be the law with respect to negligence in such matters. Let us now probe the evidence and ascertain how the merits of this case stand. I start from this, that, as well by the evidence of Dr. Girdwood, who scientifically and with the assistance of a microscope, not only fully bears out what by the naked eye must be suspected, but actually reduces to the certainty of facts, such surmises,—as well, I say, by the evidence of Dr. Girdwood, as by other circumstances in this case, the note now before us has been interfered with, altered and forged, subsequently to the endorsation thereof by the defendant. This note was originally made for $500, by Daniel McNevin, it was endorsed as such by the defendant, and subsequently it was transformed into a note for $2500, by the insertion or addition of the word "Twenty," without the consent or knowledge of the defendant. It would not matter whether the forgery was or was not committed by Daniel McNevin, the maker of the note, since it turns out not to be the genuine note endorsed by the defendant, but a forgery. However, can any one doubt that it must have been so altered by Daniel McNevin? The note is signed by the latter, endorsed by the defendant, who is not proved, and is not presumed to have altered it, and who could not have effected such alteration, since it was taken away, kept and used by McNevin, who went to the plaintiffs whose endorsation appears on the back of the note, and who, of course, are not to be presumed to have altered and forged it, but who were guilty of gross negligence in readily and without suspicion,

taking and accepting of such a suspicious looking paper, especially as it was offered to them for discount by the maker of the note himself.

So far, it is made out that the note is not that which was originally endorsed by the defendant. The certainty of the alteration is more glaring when we come to the calm consideration of other circumstances, which are of a remarkable character. The maker of the note, Daniel McNevin, is examined, and what do we learn from him? We have it out of his own mouth, that all that was filled in in the note, at the time the defendant endorsed it, was what is therein written, as follows: the date, the words "five months," the letter "S," and the words "Johnston Thomson, Esquire," and nothing else; and that there never was pen or ink to the amount till after. There is an answer by McNevin to a question which has more significance than to a superficial observer would perhaps appear. He is asked: "When was the word twenty written in the body of the note?" He answers: "On the same day that the rest of the sum was filled in." He might have stopped and gone no further, though this answer is anything but satisfactory, since it may be true that he wrote the word "twenty" on the same day that the rest of the sum was filled in, and still it may be equally true that at a different hour of the same day, the word "twenty" may have been written, and thereby the forgery consummated. But, as if disturbed in his mind and troubled in his conscience, and possibly losing his balance, he verifies the adage, "*Mentitio est sibi iniquitas*;" he adds, "Sometimes it was on the same day; sometimes a week after." What does this indicate? It clearly shows what that man McNevin's mode of operation was. That is the key which leads us into the secret of his doings. What next? McNevin is shown a bill book produced in the case by his assignees, and he acknowledges that the entries have reference to the note presently sued upon. He adds that the notes do not precisely correspond, but that the entry refers to the same note. Now, let us see what the entry is in the bill book of which the blank sheets are cut out and marked B. It is as follows:

Date	Drawn	In favor of
March 3	D. McNevin	Johnston Thomson.
Time	When due	Dollars Remarks.
5 months, 1866	3-6 August	500 Dorwin

The same thing appears also on the sheet marked C, which McNevin identifies, and adds that the notes therein mentioned, (and the note in this case is one of them) are filled up for larger amounts than what appears on the said paper or sheet C. It is also acknowledged by McNevin that the figures "2,500," and the name "Dorwin," filled in on paper D, also identified by McNevin, are in his own handwriting. This last acknowledgment has reference to several entries in paper D, and amongst these, one concerning the note in this case, which is one of several notes acknowledged by McNevin himself in writing to have been by himself altered, after receiving the defendant's endorsation to the original amounts. An objection was made by the plaintiffs to the filing of this paper, which objection is unfounded. This paper is not the ground work of the defence, but is a piece of evidence proved by McNevin himself, which must assist us in coming to a right conclusion.

It is right I should give the plaintiffs the benefit they, at the hearing of the case, appeared to expect to derive from an explanation given by McNevin of a statement he made in his deposition, that the "defendant, when he endorsed his name on the said note, took a note of the amount thereof;" and what explanation does McNevin offer? The saying of Horace, "*In culpam ducit culpae fuga, et caret arte*," is quite in point. "I mean," says he, "that he [Thomson] took note of the amount that I verbally stated to him." What? Thomson took a note of the amount! And in the same deposition you tell us that the amount was filled up subsequently to the endorsation, and that "sometimes on the same day, and sometimes a week after," which must refer to others, and, no doubt, the notes enumerated in paper D, which you acknowledge to have altered as to the amount after you

had obtained Thomson's endorsation, and you would fain make us believe that the defendant, who is proved to be a cautious and intelligent man of business, would have followed a course which no man of sense would pursue even with respect to a single note? Why, the attempt is so flimsy, so absurd, that it requires only to be mentioned to be at once disregarded.

An ingenious, perhaps, but unavailing effort was resorted to, for the purpose of breaking down the conclusive evidence of Dr. Girdwood. That, again, defeated itself, inasmuch as Dr. Girdwood, without even the assistance of the microscope, and having but his own eye to enable him to examine and probe the writings submitted to him as a test, was mistaken solely as to one particular, and turned out to be right in every other respect. The process, to be on an equal footing, should have had as its medium, the same microscope which was used with respect to the note in question in this case. However, the fact that the unassisted eye of Dr. Girdwood led him to a correct conclusion in every particular but one, even according to the witness Clarke, who, by-the-by, is not a scientific man, tells highly in favor of the correctness of Dr. Girdwood when he states, as the result of his scientific probation, what by the naked eye any one may, with perfect safety, testify to. This is so plain, so glaring, that I think it useless to dwell any further upon it. I would merely remark that upon the whole, the evidence of the witness, Clarke, who, as already mentioned, is not a scientific man, and who has made no pretentions to science, is anything but satisfactory. At all events, it would be altogether out of place, to compare the evidence of Clarke to that of Dr. Girdwood.

Another line of warfare against the defendant has been resorted to, for the purpose of showing him up, either as wanting in memory, or in truth and honesty, when he stated he never endorsed for McNevin, for any amount exceeding a certain amount. Mr. Auldjo was brought up as a witness. His evidence amounts to this and no more: That he showed Thomson, who was ill, a note by him endorsed, purporting to be for $2,475, and one for $2,500, made by McNevin. Defendant looked at them, turned them over and refused to discount them. That is all. Auldjo was sent to ascertain merely if defendant's signature on the back of the note was genuine, and the way he went about it was to ask Thomson if he would discount them. Any inference drawn by Auldjo from Thomson having looked at the notes and refused to discount them, is altogether gratuitous, and is of no weight whatever. As to inferences, surmises, or suppositions, one not altogether unreasonable, judging from what we have already in evidence, is that these notes so shown to Thomson by Auldjo were not improbably also forged notes, and some of those which McNevin has acknowledged to to have altered, and that Thomson considered it prudent to be silent about that at the time.

It does not seem to me that I should advert to the mortgage any more than to state that it shows very clearly what the relative position of the parties was: $8,000 was the agreed maximum of defendant's assistance by indorsation, which amount was by the fraudulent acts of McNevin swelled to $40,000.

Much was said about the pretended negligence of the defendant in leaving a blank space before the words "five hundred," that it was an occasion and a temptation to people to alter the amount. To what end is this urged? Is it to palliate the enormous crime of forgery? Is it because an object is left lying any where, that the thief is excusable, and less a thief? Is it because an honest, obliging man, kindly assisting a supposed honest friend, by endorsing largely for him, leaves a blank space before the amount specified in the note, that this dishonest friend is to be the object of the commiseration and sympathy of others who either have loose principles, or who are to lose something from carelessness in discounting such notes? I cannot for a moment suppose, much less suspect, that there is amongst the highly respectable body of our merchants, in Montreal, a dis-

position to act upon such principles, not only opposed to all notions of right and decency, but highly dangerous to the interests of every man of business, and to those of the community at large. *Honesty is the best policy*, in theory nothing truer; practically no truth more glaring. This brings us at once to what has been presented as a question of law, the negligence of the defendant who, it has been pretended, should suffer. Thomson has acted like many others, as is proved in this case, who leave such vacant spaces before the amount specified in notes or checks, and are not the less men of business, and are not noted as negligent, careless men. If there has been negligence in this matter, it is brought home to the plaintiffs, who, from the appearance of the note presented to them, not by the endorser but by the maker himself, (thereby showing it was an accommodation note) should have looked into it, and inquired, instead of discounting it so readily, tempted, it is to be presumed, by the consideration they obtained therefor, from a man on the verge of bankruptcy, and fast drifting to his utter ruin.

The law is plain on this point, and the doctrine of Scacchia is, as is very judiciously remarked by Pothier, to be restricted to the case of the fault lying with the *tireur de la lettre de change*, but such a fault as that the falsification might deceive *une personne attentive et intelligente*. It is, moreover, to be borne in mind, 1st, that either from not having sufficiently reflected upon Scacchia's extreme propositions and equally extreme and forced deductions, most of those who have written after him, have crudely copied him. 2nd, Pothier, as we all know, was a great casuist, an admirable moralist, and essentially an honest man. We are all aware that many of his decisions apply more to the moral than to the strictly legal obligations. If, then, Pothier himself restricts the decision of *Scacchia*, to such falsification as was effected through the fault of the *tireur*, and that we apply the same principle, or rather, the same reason, to the endorser, how can we in justice, refrain from applying it against the Banker or Broker, or whoever he is or may be, from whom the discount is obtained, of a promissory note which bears the very plain and striking appearance of alteration? The plaintiffs have no excuse; it is their own fault, their own negligence, or their anxiety to derive a considerable discount or commission, which has blindfolded them. Is it for a moment to be seriously maintained that they must be preferred to, and more indulgently treated than a kind-hearted friend to an ungrateful and heartless forger, in whom he had placed such confidence as to endorse to the amount of $10,000 or $11,000, and every principle of justice and morality to be set aside, in order to victimize an honest man, and enrich imprudent lenders of money to such a man as the maker of the note in question, who has acknowledged himself to be a forger, and who so clumsily did alter the note, that any one but the money making (by loaning) plaintiffs should either have at once detected the alteration, or suspecting it, should have declined having any thing to do with McNevin and the note. There should have been hesitation on the part of the plaintiffs. The Court can entertain no doubt in this case, and could there be any doubt, the Court would follow the judicious rule laid down by Pardessus, *les tribunaux ne peuvent décider que par les circonstances*. This rule applied to the present case is decisive. Upon the whole, I am clearly of opinion that not only have the plaintiffs failed to prove their case, but that the defendant has made out his own case, and proved the forgery, and that plaintiffs' action should be dismissed.

Mackay, Q.C., & Austin, for the plaintiffs.

Bethune, Q.C., for the defendant.

[WOOD v. THOMSON.—The same decision applied to this case, in which a note for $500 had been altered to $2,500.

OGILVY v. THOMSON.—The same decision applied here also, in which the note had been changed from $447 to $3,447.]

PRIVY COUNCIL.

SCOTT v. PAQUET ET AL.

The decision of the tribunal of last resort in this celebrated case, pending for so many years, will be read with deep interest. The judges present at the re-argument on the 28th and 29th of June, and at the rendering of judgment, were Sir John Taylor Coleridge, Sir James William Colvile, Sir Edward Vaughan Williams, Sir Fitz-Roy Kelly, (the Lord Chief Baron,) and Sir Richard Torin Kindersley.

The Counsel for the plaintiff in Montreal were Cross & Bancroft, and for the defendants, Cartier & Berthelot.

Construction of Ordonnance 1639, *Art.* 6—*Marriage in extremis.*

Art. 6. of the *Ordonnance* of Louis XIII. (26th Nov. 1639,) in force in Lower Canada, is in these terms:—"Voulons que la même peine (de la privation des successions) ait lieu contre les enfants qui sont nés de femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie:" Held, first, that as the above article of the *Ordonnance* was a restrict of natural liberty, and penal in its nature, it was to be strictly interpreted, and only when the fact of a party being *in extremis* at the time of the solemnization of the marriage was clear and beyond doubt, could it be applied. Second, that although death had taken place two days after a marriage had been celebrated, such Article of the *Ordonnance* did not affect the validity of the marriage, unless the party was at the time sensible that he was in his last illness, and in immediate danger of dying.

Suit for nullity of marriage, and to set aside a marriage contract, on the ground that at the time of its celebration the husband was delirious and of unsound mind, arising from an attack of *delirium tremens*, from which disorder he died two days afterwards. The evidence in chief of one of his medical attendants being to the effect that he was unconscious, and, in his opinion, from the nature of the disease, incapable at any time of contracting such marriage:—

Held, on a general review of the evidence, to be rebutted especially by the conduct of the same medical witness in speaking of the probability of deceased's recovery; and by the evidence of the Priest, Notary, and witnesses at the marriage, of his capacity; and the judgments of the Courts in Lower Canada sustained.

This was an action brought by the appellant in the Superior Court, District of Montreal, against the Respondents, Paquet and others, the widow and children of William Henry Scott, late of the Village of St. Eustache, county of Two Mountains, merchant, deceased, to have the marriage of Scott with the respondent, Paquet, declared null and void, as regarded its civil effects, and also to set aside the marriage contract executed on the occasion thereof. The appellant claimed as his sister and heiress-at-law. The Superior Court, by its judgment, sustained the marriage and contract, and that judgment was confirmed on appeal by the Court of Queen's Bench in Lower Canada. Hence the present appeal.

The facts were these:—Scott, a member of the Presbyterian Church, had for many years cohabited with the respondent, Madame Paquet, a Roman Catholic, by whom he had a family of five children, whom he recognized and treated as his own children. In 1845 a marriage was contemplated and intended between Scott and Madame Paquet, which was to be celebrated according to the rites of the Roman Catholic Church, and all necessary preparations were made for that purpose, but the completion was prevented by Scott's refusal to give a preliminary engagement, required by the Priest before celebration, that he would cause his children to be educated in the Roman Catholic religion.

On the 15th of December, 1851, Scott went to the house of Madame Paquet, who resided in the village of St. Eustache, just opposite to his own, and there sent for a Roman Catholic Priest, for the purpose of proceeding to a marriage; and finding that no other engagement was now demanded of him than that he would leave his wife and children free in point of religion, he caused a marriage to be celebrated between himself and Madame Paquet on the evening of the following day, the 16th, according to the rites of the Roman Catholic Church. By the act of marriage, the consorts acknowledged as legitimate their five children. The marriage was accompanied by a contract or settlement prepared

by a notary. Scott was of intemperate habits, and had indulged in drinking during the course of a contested election which took place three days previous to his marriage. He was unwell at the time, and his physician, Dr. Jamieson, was with him during the greater part of the day of his marriage. His illness increased, and according to the medical testimony, although the nature of his disorder had not been originally understood, yet it ultimately declared itself to be *delirium tremens*. As late as the 17th of December, Dr. Jamieson considered that the disease, though of an aggravated character, would give way to the treatment which he and Dr. Fisher, another physician, recommended. But the prescribed treatment was not followed, and Scott sank and expired on the 18th of that month.

From the death of Scott to the period of the institution of the action, his children publicly enjoyed the character of being his legitimate heirs, and were judicially admitted to accept his succession with benefit of inventory. The respondent, Paquet, had also, since Scott's death, been in possession of the immoveable property which he by the marriage contract settled on her in case of her surviving him, and which contract was, in April, 1852, duly registered.

On the 4th of March, 1854, the appellant brought an action against the respondent, Paquet, and the five children of Scott, in the Superior Court for Lower Canada, District of Montreal. The declaration stated that Scott had died intestate, leaving three sisters, his only surviving relations and heirs-at-law, two of whom had renounced his estate, the appellant accepting it as sole heiress-at-law; that in December, 1851, he fell ill of the malady that caused his death; that his disease became so aggravated that, on the 15th of December, he was delirious, and so continued up to his death; and that, while in that state, he was quite incapable of entering into any contract or granting any valid consent; that he had lived many years in a state of concubinage with the respondent, Paquet, without marrying her or acknowledging her as his wife; that while in a state of delirium, and incapable of consent, she, profiting by his condition, on the 16th of December, 1851, procured a pretended marriage to be solemnized between her and Scott, and, on the same day, procured a pretended marriage contract to be executed; that by the register of the marriage it was endeavored to recognize as legitimate the children of the illicit connection and the provisions of the contract; that Scott was at the time of the marriage in a state of delirium, and *in extremis*, and afflicted with the malady whereof he died, and the pretended marriage was clandestine, celebrated without the knowledge or consent of Scott's relations, and was neither publicly solemnized, nor accompanied by the necessary formalities, nor followed by consent on his part, and that the respondent, Paquet, and the other respondents, had assumed to be the heirs of Scott, and had taken his estate into their possession, and the declaration prayed that the pretended marriage and contract of marriage might be declared null and void.

The respondents filed their pleas, consisting of two sets of exceptions *peremptoires* and a *defense en fait*. The first set of exceptions referred to the capacity of the appellant to maintain her action, and was, in substance, to the following effect: That the appellant being only a collateral relation, could not maintain such an action; that ever since the death of Scott, the respondents had assumed the character of his representatives, and that their right to that character had been publicly recognized, and had been acquiesced in by the appellant; that the appellant had recognized their right to such character by transferring to Barbara and Jane Scott her rights as one of the legatees of Scott's father, in a sum of money due on a judgment obtained by Scott's father, on the 24th April, 1824, against Scott and another, and that the appellant could not maintain her action without joining her sisters as co-plaintiffs. The second set of exceptions referred to the merits of the case, and was to the following effect: That for many years Scott and the respondent, Paquet, lived toge-

ther as husband and wife, under promises frequently reiterated by Scott, that he would marry her; that the appellant and her sisters were aware of this, and recognized the position of the respondent, Paquet, and her children: that about twelve years previously Scott had intended to fulfil his promise of marriage, and had assembled his friends and the priest for that purpose, but was prevented from so doing by understanding that the priest required him to make oath that he would allow his children to be brought up as Roman Catholics; that it was with the view of carrying this intention into effect that he contracted the marriage complained of; that such marriage was contracted legitimately and lawfully in the presence of a Roman Catholic Priest, duly authorized to celebrate such marriage; and that Scott was at the time sound in mind. The *defense en fait* put in issue all the statements contained in the appellant's declaration.

Witnesses were examined on behalf of the appellant and respondents. The appellant objected to the reception of the evidence of the respondent's witnesses, so far as it went to prove that a marriage had been celebrated, on the ground that verbal evidence of a marriage was inadmissible by law, and such objections were reserved, but the evidence was afterwards admitted. The evidence as to the capacity of Scott was conflicting. On the part of the appellant, Scott's medical attendants, Dr. Jamieson and Dr. Fisher, declared as their opinion, that in the case of a person suffering from *delirium tremens* there could be no lucid interval during which he could have the use of his faculties, or be fit to contract any kind of business, that Scott was in a state of *delirium tremens* just before and immediately after the alleged ceremony, and that it was a scientific fact that this disease never leaves the patient until it leaves him finally; that there may be times at which it is more intense than at others, but that the patient is never perfectly sane. The evidence for the respondent consisted of the depositions of the Notary, Priest, and others who were present at the marriage ceremony, and they deposed to the perfect sanity of Scott, at that time. It was proved that Dr. Jamieson had said, when attending the deceased, that he considered that the disease would give way to the treatment he and Dr. Fisher recommended. No medical evidence was produced by the respondents in answer to evidence given by Drs. Jamieson and Fisher.

The cause came on to be heard, and by the judgment of the Superior Court, delivered on the 30th May, 1856, the action was dismissed with costs, on the ground that the appellant had failed to establish the material allegations of her declaration. The appellant appealed from this judgment to the Court of Queen's Bench for Lower Canada. The appeal was heard before Aylwin, Duval, Caron, and Meredith, JJ., and on the 5th October, 1857, the Court delivered judgment, dismissing the appeal with costs. Duval and Caron, JJ., considered that all the questions raised by the pleadings ought to be decided in favor of the respondents, and Meredith, J., agreed with them so far as related to the questions put in issue by the declaration. Aylwin, J., dissented from the opinion of the rest of the Court, and considered that all the questions raised on the pleadings ought to have been decided in favor of the appellant. The present appeal was brought from this judgment of affirmance. It was twice argued.*

Mr. *Garth*, Q. C., for the appellant:—Three questions arise:—First, we insist that the marriage has never been celebrated with the forms and ceremonies required by the ancient law of France, in force in Lower

* This appeal was first argued in June, 1861, but their Lordships not being satisfied, directed the case to be re-argued. It was stated at the Bar that the re-argument was delayed by the poverty of the parties not enabling them to bring it on for hearing. On the case coming on, application was made by the Counsel for the appellant for the admission of fresh evidence said to have been obtained since the former hearing, relative to the mental capacity of Scott. A petition shortly after the first hearing had been lodged in the Council office for that object. The Respondent's Counsel objected to the affidavit in support of the application being read, or the reception of new evidence after the long delay, and their Lordships were of opinion that in the circumstances such an application could not be entertained.

Canada, so as to constitute a valid marriage. [The LORD CHIEF BARON. If there was a marriage *de facto*, it lies on you to show it was invalid in law.] To be valid it ought to have been performed by the Parish Priest: *Dagusseau, Tom.* v. pp. 150—153; *Pothier*, verbo "*Mariage*," Partie 1. Ch. i. No. 3; *Pothier, du Contrat de Mariage*, Partie IV. Ch. 1. sec. 3, Art. 1, par. 5, No. 350 [Ed. 1781]; *Danty*, p. 102; *Durand de Maillanne*, Dict. Can. *voce* "Clandestin," *Tom.* 1. p. 523 [Ed. *Lyons*, 1770]; De Hericourt, *Loix, Eccles.* Ch. v. Art. 1, No. 27, p. 474. [The Respondent's Counsel objected to this point being now raised, as in the declaration the appellant had admitted the marriage, and only sought to avoid it as being celebrated when Scott was *in extremis* and unconscious, and submitted that it was not for the respondents, to give formal proof of the *factum* of such marriage; but that if it were necessary, the proofs were sufficient according to the Provincial Statute, 35 Geo. 3, c. 4, sec. 4, which only requires the presence of two witnesses.] This point was not further argued. Second, the evidence of the medical attendants of Scott shows that at the time the marriage took place between Scott and the respondent, Paquet, which was only two days before his death, Scott was *à l'extremité de la vie*, so as to render such marriage null and void by the *Ordonnance* of Louis XIII. of 1639, Art. 6, and the Edict of the year 1697; depriving of civil effect marriages *in extremis; Pothier, Tom.* v. p. 238, *Partie* 5, Ch. II, p. 429; *Ib.* 239; *Merlin's Rep. de Jur, verbo* "*Mariage*," Tom. XIX. Sect. 9, Art. 3; *Ib. Tom.* VIII. Sec. 19, par. 1, No. 3, p. 47; [Quarto Ed.] Third, the evidence establishes the fact, that at the time of the pretended marriage Scott was delirious and unconscious from an attack of *delirium tremens*, and then incapable of entering into any valid contract.

The Counsel for the respondents were not called upon.

July 10th.

The LORD CHIEF BARON: This is an appeal from a judgment by the Court of Queen's Bench for Lower Canada, affirming a decision of the Superior Court of that Province, in an action brought by the appellant against the respondents, and in which the question to be determined was, whether a marriage between William Henry Scott, deceased, and the respondent, Marie Marguerite Maurice Paquet, on the 16th of December, 1851, was valid or void. Several questions were raised (but disposed of during the argument) upon the alleged non-compliance with the formalities essential to the validity of a marriage by the law of France, which prevails in Lower Canada. The objections to the marriage upon these grounds (which appeared when duly considered to be unsupported by the authorities) were abandoned by the Counsel for the appellant. Two questions alone remain: The first, whether this marriage was contracted while Mr. Scott was "*à l'extrémité de la vie*," within the meaning of the 6th article of the *Ordonnance* of 1639; the second is whether, at the time when the marriage was so contracted, Mr. Scott was of sound mind and in possession of his faculties. Both these questions have been decided in favour of the respondents, unanimously by the three Judges of the Superior Court, and by three Judges out of four of the Court of Queen's Bench in Lower Canada. And we think that this Court ought not, unless there be manifest error in the judgments under appeal, to over-rule these decisions so pronounced in the Country in which the law of France, by which the first question must be determined, prevails and must be known and continually acted upon by the Courts of Law; and in which, also, the witnesses on both sides reside, and may have been more or less known to, or seen, when under examination, by the judges, or some of them, who likewise are familiar with the usages and customs of the place in which all the circumstances which formed the subject of the evidence occurred. The language of the *Ordonnance* is this: "*Voulons que la même peine (de la privation des successions) ait lieu contre les enfans qui sont nés des femmes que les pères ont entretenues, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie.*" Pothier, (No. 430) says: "*Il faut que ceux qui attaquent ces mariages prouvent deux*

choses:—1. *Le mauvais commerce qui a précédé le mariage. 2. Que la personne était in extremis lorsque le mariage a été contracté. Le mariage est censé contracté in extremis lorsque la personne était au lit, malade d'une maladie qui avait un trait prochain à la mort, quoiqu'elle ne soit morte que quelques mois après.*" Several cases appear to have been decided upon this *Ordonnance*, the effect of which is well expressed in Merlin's "*Répertoire*," *verbo* "*Mariage*," sect. 19, par. 1, No. 3, p. 47, vol. VIII. in quarto:—"*Le véritable, l'unique cas d'appliquer l'Ordonnance est lorsqu'un homme se marie dans un temps où il se sent frappé de mort, ou la violence du mal et l'impuissance des remèdes lui fait sentir que la vie est prête à lui échapper.*" It seems from this commentary upon the law, that the patient must himself feel that he is dying, or that the violence of the disease, and the inefficacy of all remedies, impress him with the belief that life is about to depart. There is nothing in the evidence to show that Mr. Scott thought he was a dying man. Neither Dr. Jamieson nor Mademoiselle Paquet thought so—at least, until after the day of the marriage. Dr. Jamieson himself says:—"From the beginning of his disease, I expected that he would recover from his disease." "On the first, second, and third day, I did not look upon the disease as a decidedly mortal one."—"I never conveyed to Scott the idea that he was or might be in danger." And in another part of his deposition he says: "On the morning of the 17th, the defendant, Miss Paquet, inquired of me as to the state of the late Mr. Scott. I informed her that he was in a dangerous condition, and she appeared surprised that the disease was at all connected with danger." Besides, this law is in restraint of natural liberty, and it must, therefore, be clear, beyond doubt, that it is applicable to the particular case, before a Court of Justice can hold it to be of force and effect to avoid a marriage.

The great question in the case, however, is, whether Mr. Scott was in a state of mind, memory, and understanding, to enable him lawfully to contract marriage. On the one hand, we have the evidence of Dr. Jamieson who visited him first on the afternoon of the 15th of December, and found him suffering under erysipelatous inflammation in the face, arising, as it appears, from his having come in contact with a heated stove while dozing or sleeping in a chair. Strong aperients were administered, and at a late period of the afternoon, the Doctor concluded that *delirium tremens* was approaching. At this time he quitted the house in which he resided with his sister, and proceeded to the house of the respondent, Paquet, showing signs of great excitement and irritability, with delusions, as he went along. At a later hour he was again visited by the Doctor, who remained with him during the greater part of the night; saw him again the next morning, and left him about two in the afternoon, when, as he says, he was labouring under *delirium tremens*, developing itself by mental hallucinations. He then again left him in the house of the respondent for some hours, and returned in the evening; and from this time until the morning of the 18th, it is asserted he was wholly incapacitated by this disease from doing any act whatever requiring the exercise of his faculties; and in the night of that day, the 18th, he died. If Dr. Jamieson be correct as to the existence of *delirium tremens*, and the consequent incapacity of Mr. Scott, although he does not expressly declare that it was impossible he should have been competent to exercise his faculties in a rational manner, either on the afternoon of the 15th, or during an hour or more on the 16th, it is certainly to be inferred from the whole of his evidence, taken together, that no such intervals of capacity could have existed, and that it was only during the time necessary to answer one or two questions, or some other very short period of tranquility, that he can be said to have been capable of exercising his reason and understanding.

On the other hand, we have the testimony of at least three witnesses of unimpeached character, and having no interest whatever in the perpetration of a fraud, or in the misrepresentation or suppression

of the truth, who depose to a series of acts done by the deceased, which, if truly narrated and described, prove incontestably that Mr. Scott was, during the space of an hour and more, within which the marriage was solemnized, and the marriage contract prepared under his instructions and executed by himself, in a perfect state of capacity, memory and intelligence. We may pass by the communication between Ancey, the Roman Catholic Priest, and Mr. Scott, on the afternoon of the 15th, merely observing that the deceased, upon this occasion, expressed himself rationally while informing the Priest of his having had an altercation with his sister, that he was desirous that he should marry him to Mademoiselle Paquet, that he had sent to him for that purpose, and when told that a dispensation was necessary, he desired that a bishop should be written to immediately in order that it might be obtained. The following day, the 16th, upon the arrival of the dispensation, the Priest proceeded again to the house of Mr. Scott, and found him, as he positively and distinctly swears, in perfect possession of his understanding; and here begins a series of acts on the part of the deceased, which, if really done, prove to demonstration a state of perfect mental competency and capacity. He received the priest's explanation of the oath or engagement required, that his wife should be left to the free exercise of her religion, and that the children might be brought up in the Roman Catholic faith; he observed that at a former period, (and in this statement he is confirmed by Père Martin, the Priest), he was about to marry Mademoiselle Paquet, but objected to this engagement on the ground that he was required to pledge himself that the children should be so brought up, and not merely that he would permit them to use their own free will as to their religion; he gave the necessary information as to the names of his relatives, and the ages of his children, in order that the usual registration should be made; he took the pen in his hand and wrote the name of one of his parents, because the priest was unable to spell it; he sent for a notary and his clerk; he gave instructions for the marriage contract, informing the notary that his wife was to be required to give up the *communauté de biens*, and that in consideration of this renunciation he conferred upon her and her heirs all his immoveable or real estate, which he described as situate in the several parishes of St. Eustache, and St. Martin; he also gave to his wife, but in trust only, in equal thirds for two of his sisters, Anne Scott and Jane Scott, and his daughter by Paquet, Caroline Scott, a large sum of compensation money to which he was entitled by reason of losses sustained in the rebellion of 1837; and, besides disposing of the remainder of his property under this marriage contract, it is sworn upon the evidence of Archambault, the notary, that upon a suggestion that he should dispose of his property by will, he himself declared that he had determined to do so by a marriage contract; and the contract was drawn up and executed accordingly. All this, together with the celebration of the marriage itself, is confirmed by the independent testimony of Mr. Feré, a friend of the deceased, residing at St. Eustache. It is impossible, unless these witnesses are guilty of deliberate perjury, that the deceased was at this time otherwise than in perfect possession of his mind, memory, and understanding, and of perfect capacity to contract a lawful marriage. It is true that, during this proceeding, upon a noise being heard from the agitation of the shutters by the wind, he is proved to have cried out, "They are coming! they are coming!" If this were, as suggested by the respondents, an expression uttered under an idea that the intelligence of the result of his election had arrived, it requires no comment. But if it were, as insisted by the plaintiff, the manifestation of a delusion created by *delirium tremens*, it appears to have been dispelled, and to have ceased upon his being convinced, a few moments afterwards, that the noise was occasioned by the wind.

We think, therefore, on the whole, that whatever degree of suspicion may naturally arise from the very cogent and circum-

stantial evidence of Dr. Jamieson, coupled with the testimony of the witnesses who spoke to the wildness and excitement of his demeanour during certain portions of the three days in question, that all this together is insufficient to outweigh the positive and distinct evidence of so many witnesses to the whole scene of the solemnization of the marriage, and the preparation and execution of the marriage contract, or to warrant us in setting aside the united decisions of the Superior Court and the Court of Queen's Bench in Lower Canada, by which the judgment in favor of the respondents, and now under appeal, has been pronounced. Their Lordships will, therefore humbly report to Her Majesty as their opinion that the judgments of the Court of Queen's Bench of Lower Canada and of the Superior Court ought to be affirmed, and this appeal dismissed; but under all the circumstances of the case, without costs of this appeal on either side. Law Rep. 1 P. C. 552.

MONTHLY NOTES.

SUPERIOR COURT.

Oct. 5.

LEPROHON v. MCDONALD, *et al.*

Action for Compensation—Title.

MONK, J. This was a case of rather an extraordinary nature. It appeared that Mr. Leprohon, the father, owned a bridge. He died leaving five heirs, and one of these heirs, the present plaintiff, on the 4th November, 1864, sold one-fifth part of this bridge to the defendant. The consideration was $1000 and certain lands. On the 22nd of December, the parties entered into a written agreement, and in this the price was stated to be $2000, without any mention of lands. But the plaintiff immediately proceeded to say in his declaration that this was not the true consideration at all; that the real consideration was $1000 and lands which were worth $1200. Then he proceeded to say that McDonald was unable to convey these lands, because on the 12th October, 1864, previously, he had sold them to Col. Ermatinger. This was a fictitious sale for the purpose of qualifying Ermatinger to defend the frontier as a Police Magistrate.—The latter gave a *contre lettre* explaining it all. There was a sale from McDonald to Ermatinger, and from him to the plaintiff. But the latter now said that neither McDonald nor Ermatinger could give him a valid deed to the lands, as they belonged to the Land Company, and he now brought his action against McDonald and Ermatinger, claiming the value of the lands. In the first place His Honour had to determine what was the real consideration. He thought it was fair to say that it was probably $1000 and the land. The defendants pretended that it was $900 and the land; that the land was worth only $100, and that even if the plaintiff was entitled to be compensated to the amount of this $100, they held a note against him for $180. The next consideration was, could the Court determine upon the validity of the Land Company's title? Could it declare to the parties, you can never give a title, because it belongs to the Land Company? The Court could not do that. There was another difficulty; the plaintiff did not say that the deeds held by McDonald and Ermatinger were null and void, nor did he pray that they should be set aside. Therefore upon the one hand, His Honour could not adjudicate upon the validity of the Land Company's title, and on the other hand could not annul these deeds, but must leave them in force. It might be that the title of the Land Company was worthless; His Honour had some doubts of it. The Court therefore was in an embarrassing position. But, further, coming to the real consideration for the sale; supposing it was $1000 and the lands: What were these lands worth? Some of the witnesses said they would not take them as a present, and even if the Court could award compensation there was no real value proved. Of the $1000 notes for $900 had been paid; against the balance, the defendants had a note for $180, which was due before the plea was put in.—The Court upon the whole must dismiss the action, the plaintiff having titles which the Court could not annul.

Day & Day, for the Plaintiff.

J. J. C. Abbott, Q. C., for the Defendants.

BEAUDRY v. TATE, *et al.*

Contract—Putting en demeure—Diligence.

MONK, J. It appeared that the steamer *Iron Duke* had run aground a little below Longueuil in 1865. On the 11th August the plaintiff entered into an agreement with the defendants to have this boat launched or taken off the rocks. The contract was that the vessel should be removed within fifteen days from that date, the defendants to be allowed $500. This would bring the period for fulfilling the contract to the 27th. The defendants went to work in pursuance of this contract. Some of the witnesses said there were sufficient labourers at work, and some said there were not. Some of the witnesses stated that the boat was stuck in such a way on the rocks that it was impossible to get her off. Whether that was the case or not, the fact was that they did not get her off; and on the 28th the boat took fire, and was burned to the water's edge. It did not appear that after this they exercised any great diligence to get her off. The boat remained there till the month of December, when she was carried off by the ice, floated down, and sustained great damage. Mr. Beaudry now brought his action for the damage done. The only questions for the Court were, first, did the defendants do diligence? They contended that they had not been put *en demeure*. Mr. Beaudry had never protested them. Mr. Beaudry was there frequently, and if they were not doing what they should have been doing, they say he should have protested them. Now, this putting *en demeure* was generally necessary, but in this case there was a precise limit of time fixed, and this just happened to be one of those contracts where time was of the essence of the contract, and in all such contracts putting *en demeure* was not necessary. Again, it was contended on the part of the defendants, that Mr. Beaudry, being present while the work was going on, acquiesced in the manner in which it was proceeding. But it was not his business to interfere. It was not to be supposed that Mr. Beaudry could judge what was necessary. Then, the Court came to the question, whether in point of fact, the defendants did do diligence. It was pretty well established by the evidence which they had adduced, that they had three, five, ten men on the spot, and sometimes more. They found that they had made a hard bargain; but if the job was one of such difficulty, they ought to have employed more men. Powell, one of the witnesses, stated that they had all the men they could usefully employ; but the evidence of Lesperance was to the effect that thirty men at least should have been employed; that thirty men would hardly have been sufficient, and that there was no diligence done at all. The witnesses for the plaintiff concurred in saying that the number was altogether inadequate, and it might be easily understood that three or four men were not enough to raise a vessel. His Honour therefore came to the conclusion that the defendants did not do diligence, and that they did not employ sufficient force. The Court came now to another important point in the case, which was of real difficulty. His Honour did not know how far, as a matter of law, the parties employed to launch the boat would be considered to be in possession of her, but he did not think that for all purposes whatever they could be considered in possession of her, especially as Mr. Beaudry had a man in charge of the boat—a man who was described as an idle, drunken loafer, cooking his victuals there. It might be said that the plaintiff had possession of the boat through this man, and the boat having been burned while in his possession, the defendants were not responsible, the accident having rendered it impossible for them to fulfil the contract. On the other hand, if the defendants had launched the boat on the 27th, the fire might not have occurred. The fire, however, not being directly connected with the failure to launch her, the plaintiff could not claim damages for the loss by fire. Even admitting that it was more difficult to launch her after than it was before the fire, the defendants must be held liable for the damage caused by her being carried away, because they should have launched her before the 27th. But there was other evidence that this was not the case, and it stood to reason, inasmuch as nothing but the woodwork was burned and she did not sink any deeper on the rocks, that there could be no greater difficulty in getting her off before the fire than after it. The

defendants had referred to some trifling considerations, but they were not worth considering for a moment. They had from the 28th of August till late in December to launch her, and His Honour supposed that if they had launched her on the 1st September Mr. Beaudry would not have said anything about it.—But they seemed to be working a little at her from time to time till the ice carried her away. It was preposterous to say that the defendants were not liable, under the particular circumstances. They had shown a want of diligence and a want of skill. The only question, then, was what amount of damage was to be awarded? This was in the discretion of the Court; the evidence was conflicting, and His Honour was not disposed to be severe in the assessment of damages He would not be justified in condemning them to pay more than $1000 damages.

Jetté & Archambault, for the Plaintiff.

J. J. C. Abbott, Q. C., for the Defendants.

CIRCUIT COURT.

Waterloo, Sept. 24, 1867.

COLE v. WILLIAMS, and WOOD, Intervenant.

Landlord's Privilege—Insolvency of Tenant.

This was an action upon a Notarial lease for rent, instituted by process of *Saisie Gagerie*. The household furniture in use by defendant upon the leased premises was taken in attachment, and the intervening party filed an intervention claiming the property seized as guardian under T. S. Brown, the Assignee of defendant, who was an Insolvent, and had made an assignment with one William Wood to said Brown in 1865, the year previous to the lease of plaintiff to defendant.

Plaintiff contested this intervention upon grounds of insufficiency and irregularities, and, more particularly, for the reason that, by law, the plaintiff had a special *lien* and *privilege* upon the property seized, it being upon the leased premises and with the knowledge and consent of the intervenant, where it had remained over eight months previous to seizure. There was also a general denegation.

At the trial, the witness of the intervening party, his son, proved that the furniture seized was carried by intervenant's team, driven by his son, from West Shefford to Granby, and put into the house leased by defendant from the plaintiff.

JOHNSON, J. Judgment for intervening party, contestation dismissed with costs.

J. B. Lay, for plaintiff.

G. C. V. Buchanan, for intervenant.

(Authorities cited by plaintiff:—*Code Civil*, Art. 1619 and 1622: *Jones and Anderson*, 2 L.C.R. 154; *Aylwin et al.* v. *Giloran*, 4 L.C.R. 360; Pothier *Louage*, Nos. 233 and seq.)—(J.B.L.)

SINGULAR DIVORCE SUIT.—In the Rolla *Herald of Liberty* are published the proceedings in the suit of Aaron Van Wormer *v.* Margaret Van Wormer. The plaintiff is Judge Wormer of the Eighteenth Judicial District. He sat in his own case, and on the pleadings entered a decree dissolving the bonds of matrimony between himself and wife. The petition alleged "that the defendant, wholly disregarded her duties as wife of the plaintiff, offered such indignities to the plaintiff as to render his condition intolerable in this, to wit, that the defendant said she would stay in no such place as Rolla; that the defendant has frequently left the bed of plaintiff, and refused to lodge with him; that said defendant has, during most of the time since said marriage, been ill-tempered, and even at times malignant, and for three days at a time had the mad dumps silently." Margaret, in her answer, "admits that the matters and things as stated in said petition may be all true," and filed a written consent that the plaintiff might sit in this case; whereupon it was "considered by the court and decreed that the bonds of matrimony heretofore contracted between the plaintiff and defendant be dissolved, and that the plaintiff be restored to all the rights and privileges of a single person." The trial took place at a special term ostensibly called for the purpose of trying criminals.

TABLE OF CASES DECIDED IN THE PROVINCE OF QUEBEC, REPORTED OR NOTED IN THIS VOLUME.

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