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THE JUDICIARY OF CANADA.

It is but a few weeks since we remarked upon the inadequacy of the salaries paid to our judges, and the unreasonableness of expecting first-class work from men who are accorded only the remuneration paid elsewhere for mere clerical labor. We are glad to find Lord Dufferin, our eloquent Governor-General, in the magnificent address which he delivered on the 24th ultimo, at the opening of the Toronto Exhibition, lending the influence of his great name, ripe statesmanship and sound judgment in the same direction. This is the wise advice which His Excellency, in what he solemnly terms his "parting counsels", tenders to the people of the Dominion:

"With regard to the independence of the judges I will say nothing; notwithstanding what has been done elsewhere, I do not think that the Canadian people will ever be tempted to allow the judges of the land to be constituted by popular election. Still, on this continent there will always be present in the air, as it were, a certain tendency in that direction, and it is against this I would warn you. And now that I am on this topic, there is one further observation I am tempted to make in regard to the position of the judges. I should hope that as time goes on, as the importance and extent of their work increases, and as the wealth of the country expands, it may be found expedient to attach somewhat higher salaries to those who administer the laws. Pure and righteous justice is the very foundation of human happiness, but remember it is as true of justice as of anything else—YOU CANNOT HAVE A FIRST-RATE ARTICLE WITHOUT PAYING FOR IT. In order to secure an able bar, you must provide adequate prizes for those who are called to it. If this is done, the intellectual energy of the country will be attracted to the legal profession, and you will have what is the greatest ornament any country can possess—an efficient and learned judiciary."

Canada is under a great debt to her departing Governor, and we feel sure that no acknowledgment will be more acceptable to him than a timely attention to his farewell words.

THE RAILWAY INJUNCTION CASE.

The report of proceedings in our last issue in the *cause célèbre* of *Macdonald* v. *Joly et al.*, read almost like a page from the notorious Erie Railway battle of a dozen years ago. Happily this strife is likely to end soon, if, indeed, the end has not already been reached. A compromise, it is stated, has been assented to, and the war of injunctions will cease.* It seems a proper time, therefore, without expressing any opinion on questions which may still come before the Courts, to review briefly the proceedings which have taken place.

Mr. Macdonald, the party applying for the injunction, had entered into a contract with the Quebec Government for building the M. O. & O. Railway. The time fixed for the completion of the road was the 1st October, 1877. The line was not completed at this date, and Mr. Macdonald continued to hold possession, and for several months back has been running trains from Montreal to Hull, and carrying passengers and baggage over the road. He also claimed that a large sum was due to him under the contract.

Under these circumstances, the Government of Quebec determined to take possession of the railway. The authority under which they acted is the Public Works Act of 1869, 32 Vict., cap. 15. Sections 179, 180 and 181 of this Act are as follows:—

"179. The Lieutenant-Governor may at any time order the Commissioner to re-enter into possession of any public work or building, in consequence of the termination of any lease, charter or agreement whatever, of the taking effect of a resolutory condition, as well as for non-fulfilment of any contract or for any other cause of rescision, or for public purposes.

"180. Such Order in Council must be served on the holder of such public work or building, or on his representatives on the spot, and immediately after such service the Commissioner, or any person authorized by him for such purpose, may, without any other formality, take possession of the public work or building specified in the Order in Council; without prejudice to any recourse for indemnity by the party dispossessed if he deems himself aggrieved thereby.

"181. Should the holder or his representatives refuse or neglect to deliver up such public work or building to the Commissioner of Public Works, or to

*Since the above was in type, the reported compromise has been contradicted.

any person deputed by him, the sheriff of the district in which such public work or building is situated, shall, immediately after the service of the Order in Council aforementioned, under a warrant signed by the Lieutenant-Governor, be bound to seize such public work or building and to maintain the Commissioner or any person deputed by him in the possession thereof."

It was contended on the part of Mr. Macdonald that the Government could not avail themselves of this Statute, as the railway was a federal work, and the authority of the Federal Legislature would be necessary to permit the Government to take possession.

The warrant having issued, Mr. Macdonald, by his counsel, applied in Chambers to Mr. Justice Rainville, of the Superior Court, for an injunction to stop the proposed seizure of the road. The Judge ordered the injunction to issue. It is said, but we do not know on what authority, that His Honor's attention had not at this time been called to the clauses of the Statute cited. The injunction was disregarded by the Government, and Mr. Macdonald was dispossessed by force. It was at this stage that an application was made by Mr. Macdonald to have the Government Engineer and the Sheriff, the officers executing the orders of the Provincial Government, committed for contempt. Mr. Justice Johnson granted the application as far as Mr. Peterson was concerned, but relieved the Sheriff (*ante*, p. 446). At the same time His Honor rejected an application from the other party to revise the order for the injunction, the ground being that while the party was in contempt he could not be heard on the principal case. From this decision the Government obtained leave to appeal to the Court of Queen's Bench (*ante* p. 448). This did not of itself suspend the proceedings in the Court below (see Injunction Act of last session); but the Court of Appeal, on a proper application being made, exercised the discretion accorded to it by the Act of last session, and suspended all proceedings until December 14, (*ante* p. 461).

This outline of the proceedings, imperfect perhaps in some respects, will serve to make the judgments which we have published clearer to the general reader. The story breaks off here, and, happily, there is no "to be continued" at the end of the chapter. It must be an immense satisfaction tous, amid the noise of strife of this nature, to know that we have a Bench that may be depended on. If ever we are able to appreciate an untrammelled, incorruptible, and thoroughly independent judiciary, it is when large interests are at war, and the extreme remedies of the law are brought into play on one side or the other. It is a time when unshaken adherence to principle shows in bright contrast with judicial action influenced by personal or partizan feeling, such as might perhaps be looked for in an elective judiciary, but of which, under the superior institutions which we enjoy, not a trace exists—at least, let us think so.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Sept. 9, 1878.

RAINVILLE, J.

KNOX v. LAFLEUR.

Procedure—Faits et Articles—Commission Rogatoire—Art. 221 *C. P.*

Held, 1. A party has not the right to examine his adversary *sur faits et articles* before trial.

2. Where the plaintiff has inscribed the case for proof and final hearing, a notice served by defendant upon the attorney of his absent adversary two days before the date fixed for trial, for *faits et articles* on the day of trial, is in time; and if there is no apparent attempt to retard the trial, the court will grant such application, notwithstanding the words in Art. 221 C. P.,—"Without retarding either trial or judgment."

3. When the attorney of an absent party, upon whom an order for *faits et articles* has been served, indicates the residence of his client (Art. 223) and his option to have him examined by commission at such place, the commission will be at the diligence and expense of the party requiring the interrogatories.

R. A. Ramsay for plaintiff.

Doutre, Doutre & Robidoux for defendant.

CIRCUIT COURT.

Montreal, Sept. 13, 1878.

PAPINEAU, J.

PERRAULT v. ETIENNE.

Community—Renunciation—Medical Attendance—Liability of heirs for Community Debt notwithstanding Renunciation.

A claim for medical attendance, though in its nature a debt of the community, may be recovered from the personal heirs of the wife deceased, notwithstanding their renunciation of the *communauté de biens*.

The plaintiff, a physician, sued the tutor to a minor, heir by will of his deceased mother, for professional services rendered to the latter. The tutor had accepted for the minor the personal property of the deceased, but had renounced to the community which existed between the deceased and her husband.

The claim was resisted on the ground that the debt was a debt of the community, to which the minor had renounced.

The plaintiff's counsel cited C. C. 1994, 2003; 2 Bourjon, p. 688; Bacquet, p. 294.

PER CURIAM. The debt is undoubtedly a debt of the community, but it is also a natural debt of the child who has been constituted heir. I might dismiss the action *sauf recours*, and let the plaintiff sue the husband, who is the head of the community. But of what use would that be, seeing that by the inventory and renunciation produced, the community is worth nothing? The plaintiff must have judgment.

A. W. Grenier for plaintiff.

Duhamel, Pagnuelo & Rainville for defendant.

COURT OF QUEEN'S BENCH.

Montreal, Sept. 18, 1878.

Present: DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

CORNELL (plaintiff and contestant in the Court below), appellant; and RHICHARD (defendant and opposant in the Court below), respondent.

Opposition—Payment on Account not Proved in Original Suit.

A defendant, after he has contested an account, and judgment has gone against him, will be permitted, on an opposition to the seizure under judgment, to prove a payment which he had failed to prove in the principal suit, owing to his having been in error as to the date when he made such payment.

The appeal was from a judgment partially maintaining an opposition filed by the respondent. The appellant had obtained a judgment against the respondent for a balance of principal and interest due under an obligation and mortgage. Execution having issued, the respondent put in an opposition alleging that he had not received credit for certain payments on account, made by him before he was sued, and that he had been unable to prove these payments owing to an error of date, which he had only recently discovered. Respondent established by the evidence of plaintiff himself that he had paid $1,270 at certain dates specified, and his opposition was maintained to this extent, and a deduction of this sum made. The plaintiff appealed, contending that these sums had been accounted for in a settlement made in 1872, and objecting also that the defendant was re-opening under the opposition the *enquête* in the original suit.

RAMSAY, J., dissenting, thought the judgment was incorrect. There had been a suit in which the payments had been in question, and after the respondent had had an opportunity to prove all he could, judgment went for a certain sum, with 12 per cent. interest. There was hardship for the respondent to have to pay such a rate, but the Court had nothing to do with that. The issue was clearly raised as to a general indebtedness. On that there had been a solemn enquiry and a judgment. But now the defendant came in by opposition and said the judgment was wrong because he forgot that he had paid a certain sum. Whether the evidence on this point was explicit or not, it appeared to his Honor that what had been decided in the previous case could not be put in issue again. It was *res judicata*.

CROSS, J., remarked that when the parties went to evidence on the opposition, the respondent proved two payments, one of $900, and the other of $370, and he proved them by the oath of Cornell himself. The latter tried to evade the consequences, but still he admitted that there were two payments, for which Rhichard had not got credit. As to the objection of *chose jugée*, there was not identity of demand. What the respondent set up in his defence to the original action was not identical with what he

set up in his opposition. Therefore, the case did not come under the objection of *chose jugée*. The principle had been laid down that when there came to be uncertainty whether it was *chose jugée* or not, the Court should lean in favor of the doubt. The Court below had given the respondent the benefit of the two payments, and the Court here did not think that judgment should be disturbed.

DORION, C.J., did not think this was a case of *chose jugée*. The point in issue here never came up before. The question was whether a party who had made certain payments on account would be allowed afterwards, on an opposition, to plead what he should have pleaded at first. The general rule was that this would not be allowed, but there were exceptions. Here the Court had proof by the plaintiff himself that he had received more money than he had given credit for. It would be the height of injustice to say that because a man put a wrong date to a payment he was not to be allowed afterwards to correct the error of date. Courts would not encourage parties in such a course, but where there would be great injustice done, as here, the Court would exercise its discretion, and allow the defendant the benefit of the sums which were undoubtedly paid.

MONK, J., said if the judgment in the Court below had pronounced on the two items in question, the plea of *chose jugée* might have been urged, but these items had not been gone into, and the question of *chose jugée* did not arise. Judgment confirmed.

E. Carter, Q.C., for Appellant.

Davidson & Cushing for Respondent.

JOHN KERRY et al. (plaintiffs in the Court below), Appellants; and LES SŒURS DE L'ASILE DE LA PROVIDENCE (defendants in the Court below), Respondents.

Trade Mark, Name of a Substance Cannot Constitute—Charitable Corporation's Right to Trade.

The term "Syrup of Red Spruce Gum," being only the name of a substance, does not properly constitute a trade mark, and the sale of another preparation, differing essentially in external appearance and composition, under the name "Syrup of Spruce Gum," is no violation of such mark.

This was an appeal from the judgment dismissing the suit brought by MESSRS. Kerry & Co. against the Nuns for infringement of their trade mark, by selling an imitation of Gray's Syrup of Spruce Gum. The Judge of the Superior Court held that there had been no violation of plaintiffs' trade mark, and that the words "Syrup of Spruce Gum" could not properly constitute a trade mark, involving, as they do, only the name of a substance, and plaintiffs had no monopoly of such words. The Judge held that the Nuns had been competing improperly in the market with the plaintiffs, but it was for the Crown alone to prosecute corporations for exceeding their powers, and added that the plaintiffs themselves proved no license or privilege possessed by them to trade. The defendants had brought an incidental demand for damages against the plaintiffs for interference with their sale of Spruce Gum. This was also dismissed, on the ground that although the interference was held to be proved, yet the defendants had drawn the trouble upon themselves by trading in excess of their charter rights.

DORION, C. J., said he found that his firm had formerly acted as counsel for the Nuns in connection with this matter, and he could not take part in the judgment; but as the other four judges were unanimous, the judgment would be rendered.

RAMSAY, J., said the action substantially was brought for the violation of a trade mark—that was the principal object. The plaintiff in the court below brought his action against the Nuns for having used a trade mark, and he sought to obtain damages, and also asked for an account from the Nuns, and that they be restrained from further selling goods marked with this mark. The first question the court had to examine was whether there was a trade mark in the possession of the appellants, and then whether that trade mark was violated or not. With regard to the question whether there was a trade mark validly in the possession of the appellants, the question did not come up so much in this court as it did in the court below, because in the court below there was a cross demand by the Nuns against the appellants for having violated their trade mark. The cross demand was rejected, and there was no appeal taken from that dismissal. The ground on which the incidental demand was dismissed

was, that the Nuns were not a trading corporation, and had no right to have a trade mark. The question now was whether Kerry & Co.'s trade mark was violated by the action of the Nuns in selling a particular kind of spruce gum. What was violation of a trade mark? It was taking the trade mark of another and using it. There was another kind of violation; you might take something that was similar, and present it in such a shape that it would deceive the public, and thus defeat the object of the trade mark. That was precisely what the appellants pretended the respondents had done in this case. They said: You have taken not exactly our trade mark; but you have gone and made another thing like our syrup of spruce gum, and make people buy it instead of ours. The question whether the things were exactly the same did not arise here. If it appeared that the Nuns had made a bottle for the same object, with a sufficient resemblance to deceive the public, they would have been within the law. In this instance, the things were of convenient size, and they had been produced to speak for themselves. [Here the learned Judge held up two bottles, one of each of the syrups, which differed greatly in color and external appearance.] The Court was asked, as reasonable human beings, to say that these bottles could be mistaken for one another. The external appearance was different, and the internal contents were different. That disposed of the most important branch of the case, that is, the special wrong which Messrs. Kerry & Co. had alleged against these ladies. His honor continued, that unless his attention had been particularly drawn to the declaration, he would not readily have observed that there was another branch of damages alleged here of a very peculiar character. The allegation was to this effect: that these ladies being a charitable corporation, and having been incorporated for purposes of charity, could not be subjected to any taxes, and yet carried on the business of apothecaries, and did so to the injury of plaintiffs, and that the plaintiffs had a direct action against the ladies to compel them to pay damages for having thus carried on business. Taking it for granted for a moment that damages had been established, did such an action lie? The code says an action may be brought where injury has been caused by another's fault. His Honor could not see that the respondents had done the appellants any harm by the selling of this Spruce Gum. It was a remedial preparation, and charitable corporations had never been precluded from making such things. Governments in France interfered when such things came to be an abuse. But the Court was asked here to say to what extent these people were to use their privileges. His Honor did not feel disposed to enter upon this ground at all. He could not conceive that these ladies had at all violated their charter. There was a difference in the things. It was well known there were two trees—one *épinette blanche*, and the other *épinette rouge*. Messrs. Kerry & Co. called their's, syrup of red spruce gum. There was little gum in the red spruce, while the *épinette blanche* was full of gum. Mr. Justice Cross had made some historical researches, and found that this was a very ancient remedy, and Jacques Cartier, in his first voyage, spoke of having cured the scurvy by an extract of *épinette* —a remedy which had been learned from the Indians. Perhaps it was in allusion to this that Mr. Gray had a wild Indian, half clad, sitting on a stone, in his trade-mark. The judgment appealed from was a good one, and must be confirmed.

CROSS, J., cited from Canadian history to show that the remedy sold by the Nuns was well known formerly. He remarked that in his individual opinion the question whether these ladies had the right to trade was sufficiently raised in the case, and as the Court below had decided against them on this point the plaintiffs ought to be allowed the costs on the incidental demand. But this was only his own opinion. Judgment confirmed.

Doutre, Doutre, Robidoux, Hutchinson & Walker for appellants.

Trudel, Taillon & Vanasse for respondents.

DAME EMERANCE CHAPLEAU *et vir*, (plaintiffs and defendants *en faux*, in the Court below,) appellants; and ARSENE CHAPLEAU (defendant and plaintiff *en faux*, in the Court below), respondent.

Will—Testator laboring under Delirium Tremens.

A will made while the testator was laboring under

the effects of *delirium tremens*, of which he died a few days afterwards, *held*, invalid.

This was a contest between a brother and sister over the will of a deceased brother, who died unmarried. The sister had been appointed universal legatee, under the will, but the brother attacked the validity of the testament, alleging three fatal defects:—1. That at the date of its execution, the deceased was unable to articulate. 3. That he was not then of sound mind. 3. That the will was the result of suggestions, and did not express the will of the testator. The Court below sustained the attack on the will, and set the instrument aside, on the ground that it had not been made and received in the presence of the witnesses, or dictated by the deceased, as required by law.

DORION, C. J., said the Court here would not pronounce on the question of execution of the will. But the evidence showed that the deceased had been laboring under *delirium tremens*, and was affected at the time by cerebral fever, which prevented him from making a will. He had been brought to the house of his relative for the purpose of getting a will made, and he died three days after. The document prepared by the notary under such circumstances could not be held valid. The judgment would be confirmed, but the *motif* would be changed.

Lacoste & Globensky for appellant.

Doutre & Co. for respondent.

WHITMAN (plaintiff in the Court below), appellant, and CORPORATION OF THE TOWNSHIP OF STANBRIDGE (defendant in the Court below), respondent.

Front Road—Liability of Township to Fence—Demurrer.

An action by a proprietor claiming damages because the Corporation of the Township had opened a public road through his property and left it unfenced: *Held*, improperly dismissed on demurrer.

Damages to the amount of $197 were claimed by the plaintiff in his action, on the ground that the Corporation of the township had opened a public road through his property and had not fenced it, thus allowing cattle to stray on his land. The defendants demurred, on the ground that by law they were not bound to fence any front road which they opened, and that there was no ground of action. The demurrer was sustained, and the plaintiff appealed, contending that the municipality of Missisquoi was especially exempted from the operation of the clauses relied on by the defendants, and, further, that the Court had no right to assume that the road in question was a front road.

CROSS, J., dissenting, thought the judgment should stand. The question was whether the Corporation was bound to fence the road. The Corporation, by taking land for their road, had come to be the neighbor of the plaintiff, and the latter did not complain of them for having taken his land. The plaintiff might have complained that they should pay half the cost of the fences.

DORION, C. J., said there was an indistinctness of statement as to the position of the road. If the land of the plaintiff was not touched, he would, of course, have no claim to damages. But he alleged that his land was left unfenced, and it was not on demurrer that defendants could get rid of the action. The fact was alleged that the Corporation of Stanbridge had opened a front road for the second range, plaintiff's lot being in the first range. By the demurrer all the allegations were admitted, and the plaintiff alleged that cattle had been allowed to run over his land, and that he had suffered damage. There was no allegation that the road opened was a front road for the plaintiff's lot. The declaration was sufficient, and the judgment must be reversed, the *considérants* being to the following effect:—Considering that appellant complained in his declaration that the officers and agents of the respondents, acting under the orders and instructions of the respondents, did illegally and without any right or authority, as required by law, open a road to public travel, being a front road for lots 5, 6, 7 and a portion of lot 4 in the second range of the Township of Stanbridge, and that the respondents, by their officers and servants, unlawfully tore down appellant's fences on lot 4 in the first range, and that in consequence of the respondents' wrong, his land is run over by cattle, and that it does not appear by the declaration that the road is a front road for the appellant's land on which the fences were removed, viz., lot 4 in the first range, and that the appellant was obliged to erect new fences.

MONK, J., remarked that when the parties came to the merits, it might appear that the road did not cross the plaintiff's land.

Judgment reversed.

E. Carter, Q.C., for Appellant.

J. O'Halloran for Respondent.

TAKING EVIDENCE IN FOREIGN STATES.

The following paper upon the law and practice in regard to the taking of evidence in foreign States, for use in English courts, was read at the recent Frankfort conference of the Association for the Reform and Codification of the Law of Nations, by H. D. Jencken, an eminent English barrister, who occupies the position of Ho norary General Secretary of the Association :—

A question has recently arisen in our Courts as to the admissibility of evidence taken before a British Consul in Berlin, but not on oath; incidentally a remark made by the Master of the Rolls, Sir George Jessel, as to whether perjury would lie in case of false statements made by deponents before a consul abroad, has prompted inquiry, and it has induced me to look into the question of the mode and effect of oaths and declarations made before British consuls abroad, and likewise as to affidavits taken by consuls of foreign States in Great Britain.

The result of my inquiry into this subject has been far from satisfactory; indeed, on closer examination of the practice, as authorized by official directions to consuls-general, consuls, and others holding official positions, it will be found that, underlying all this surface show of authoritative *dictum*, a grave judicial error will be discovered; one of which the jurists of Prussia (the Minister of Justice) at once detected upon the matter of the validity of oaths and declarations taken by and before consuls of friendly States in Prussia being brought before him.

The difficulty which appears to have occurred to the Prussian jurist was one which would present itself to any lawyer. Unless an oath is taken before a competent recognized legal authority, it is self-evident, no offence against the law can be committed in the place where such oath was administered; it matters not how false, how untrue the statements purporting to be on oath might be, the wrong-doer cannot be punished. To render a person liable for prosecution on the charge of perjury, the rule in all countries is, that the statement so made on oath must be made in the course of a judicial proceeding, before a competent authority, and be (according to our law) material to the issue before a court having competent jurisdiction. To constitute a competent authority, however, the sanction of the State within the territory of which such authority is constituted is necessary. In other words, the magistrate, or authority before whom an oath is made, must be recognized as a competent one by the law of the place where the oath is administered. The essential characteristic, on closer enquiry, will be found to fail in the case of affidavits taken and depositions made before ambassadors, consuls, etc., residing in foreign countries; it follows from this, that an oath administered by such persons has, in fact, no legal force in the country where it is made. One of the primary principles of criminal law is, that crimes are local, that is, they must be inquired into and punished according to the practice of the courts and the law of the land where the crime is committed. As a necessary sequel, in the case of the crime of perjury, committed by false swearing before an ambassador or consul, or their deputies, in foreign countries, the tribunal before which such false evidence is produced has no jurisdiction over the wrong-doer. The person committing the crime of perjury cannot, from what has been stated, be punished under the laws of the State where the alleged perjury has been committed, for the reason that the oath has not been administered by the proper, lawfully constituted authority in such foreign country. Depositions, hence, taken abroad, for use in our courts, do not partake of that solemn character which alone can give them the weight of evidence.

Having thus far stated the difficulties which have presented themselves on investigating this question, it may be convenient to render a brief summary of the law as it now stands.

In the admirable work of Alex. de Miltitz, "Des Consulats à l'Etranger" (1639), an epitome will be found of the law and practice

regulating the duties of consuls abroad; but, strange enough to say, the important question of jurisdiction is not even referred to by this able writer, nor by E. W. A. Tuson, in his "British Consul's Manual" (1856); in fact, these authorities assume the competency of a consul to administer an oath. All writers concur that consuls may take affidavits (administer oaths), issue passports, solemnize marriages, and do all necessary notarial acts; but that the State sanction of the country in which these acts are done is necessary, is not even suggested. That lawyers have not been free from doubt is apparent from the many acts of Parliament by the aid of which an endeavor has been made to clothe these consular acts with the sanction of law. Thus we find the 6 Geo. IV, c. 87, s. 20, granting authority to consuls-general, consuls, etc., to administer oaths abroad. This enactment was followed by the 8 & 9 Vict. c. 113, called the "Documentary Evidence Act of 1845;" superseded and enlarged by the 18 & 19 Vict. c. 42. The first section of this latter act provides: "that it shall be lawful for every British ambassador, general consul, consul, vice-consul, etc., to administer in such foreign country or place any oath or take any affidavit or affirmation from any person whomsoever;" and with singular disregard as to the principle underlying statements made on oath, the act further provides: "that every such oath, affidavit, or affirmation, had or done by or before such ambassador, minister, chargé d'affaires, general consul, consul, etc., shall be as good, valid, and effectual to all intents and purposes as if such oath, affidavit, or affirmation or notarial act respectively had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature."

The Common Law Procedure Act, the 15 & 16 Vict. c. 76 (1852 act) contains a clause (§23) providing for the mode of proving depositions and affidavits, etc., made before a British consul abroad. This mode of proof thus legalized, Mr. Taylor has not hesitated to describe as "absurd." This section provides: "that every affidavit, so sworn by virtue of this act, may be used and shall be admitted in evidence, saving all just exceptions, provided it purports to be signed by such consul-general, consul, vice-consul, consular agent, upon proof of the official character and signature of the person purporting to have signed the same."

The well-known act entitled: "Lord Brougham's Evidence Act" (18 & 19 Vict. c. 95) likewise deals with this question; but even in this important statute no mention is made as to the competency of a consul to administer an oath in a foreign country so as to render a deponent criminally liable in case of his making false statements. Taylor on Evidence, p. 1308, 7th edition.

The error of our legislation in thus giving so informally administered oaths and affidavits the force or effect of lawfully had and taken oaths and affidavits is indeed startling. In November, 1876, the minister of justice for Prussia issued directions that no foreign consul in Prussia should in future be allowed to administer any oath, or take any affidavit in any matter had before him, for use in any proceedings in any foreign tribunal, or for other purposes. These directions only, however, apply to Prussia; in the other States of Germany, for instance, Saxony (Leipzig), a foreign consul may administer such oaths and take such affidavits. In Russia, France, and many other countries, consuls have this right.

That the gravest complications may arise out of this state of things is self-evident. For instance, in the case of the transfer of a British ship it is necessary to make a declaration of ownership under the Merchant Shipping Act, 1854. Maclachland on Merchant Shipping, pp. 73, 81.

This act (17 & 18 Vict. c. 104, s. 76 *et seq.*) provides: "that such affidavits may be made in foreign countries before a British consul," etc. But in Prussia a British consul is forbidden to take such affidavit; and as far as I understand this act, no provision is contained granting validity to any declaration, affidavit, etc., made before a magistrate or other competent person in such foreign country.

So little attention has been paid to this subject that, on examining some of the principal conventions between the different States of Europe regarding the effect of oaths and affidavits taken by consuls, it will be found that no provision is contained in them for the punishment of a person guilty of perjury. Even the

admirably framed convention between the United States and France (1833), regulating the rights and duties of consuls in the respective countries, is silent on this head. The sixth article of this consular convention provides as follows:

"Les consuls généraux, consuls, vice-consuls ou agents consulaires auront le droit de recevoir dans leur chancellerie, ou bureaux, au domicile des parties, ou à bord des bâtiments, les déclarations des capitaines, équipages, passagers, négociants ou citoyens de leur pays et tous les actes qu'ils voudront y passer."

It will be observed that ample powers are given under this convention; but it is silent as to the legal effect of oaths, etc., so administered and taken, that is, in regard to the consequences which attach to a person making false statements under oath.

Another phase of this inquiry is in regard to depositions before a commissioner appointed by order of a foreign court of law to examine witnesses residing abroad. The foregoing remarks respecting the validity of an oath, affidavit, or affirmation done or made before a commissioner appointed by order of a court of law. The admissibility in our courts of evidence so taken is a matter of everyday practice, but the legal weight of evidence so deposed to may, I think, be gravely questioned.

To remedy the evil complained of, the intervention of State authority will be needed; and I venture to suggest that an inquiry be instituted as to the law and practice in different countries in regard to taking oaths and affidavits before consuls and other persons not being magistrates in the country where such are deposed to, and that for that purpose a committee be appointed to gather information and report at the next annual conference of this Association, with instructions to advise this Association as to the best mode of remedying the defect complained of.

CURRENT EVENTS.

CANADA.

THE LEGALITY OF ORANGE PROCESSIONS.—The persons arrested in Montreal on the 12th of July last, on the charge of being members of the Orange Association, and of being about to walk in procession, (*ante* p.371), have been committed by the Police Magistrate for trial before the Court of Queen's Bench. The September Term of that Court opened at Montreal on the 24th ultimo, when Mr. Justice Ramsay, the presiding Judge, made the following observations in reference to the case in his address to the Grand Jury:

The duties of grand jurors are now so well understood that it is hardly necessary the Court should do more than call your attention to the terms of the oath you have taken. In a few words, it comprises the whole of your special obligations to society which you represent, and to the persons accused before you. You shall leave none unpresented from fear, favour, affection or reward, and you shall present none for envy, hatred or malice; but you shall present all things truly. Simple as the duty comprised in these words may appear, solemn is the undertaking to perform that duty; there are times when it becomes of the greatest importance to be on the watch lest we are led inadvertently by our feelings to deviate from these precepts. Such a time, unfortunately, is the present. The case to which reference has been already made, and to which it is the duty of the Court specially to draw your attention, is of a nature to enlist sympathies or to arouse antipathies that may divert your attention from the real question submitted to you—the question you have sworn impartially to decide.

In the second year of the Queen's reign, considerable discontent prevailed in this Province, which led to proceedings of a character so alarming that it was thought necessary to publish an ordinance "for more effectually preventing the administering or taking of unlawful oaths, and for better preventing treasonable and seditious practices." By the preamble of that Act it was declared that:

"Whereas, divers wicked and evil-disposed "persons have of late attempted to seduce divers "of Her Majesty's subjects in this Province from "their allegiance to Her Majesty, and to incite "them to acts of sedition, rebellion, treason and "other offences, and have endeavoured to give "effect to their wicked and traitorous proceed-"ings by imposing upon the persons whom "they have attempted to seduce and incite the "pretended obligation of oaths unlawfully ad-"ministered; and whereas divers societies and "associations have been of late instituted in

" this Province, of a new and dangerous nature, " inconsistent with the public tranquility and " with the existence of regular government."

So far as the scope of the Act is to be gathered from the preamble, it appears that the object of the legislature was two fold; 1st, to prevent the administration of illegal oaths, by which effect might be given to traitorous proceedings; and, 2nd, to render illegal divers associations lately instituted in this Province, and of a new and dangerous nature, inconsistent with the public tranquility, and with the existence of regular government. The ordinance, therefore, enacts that, " Any person or persons who " shall in any manner or form whatsoever, ad- " minister or cause to be administered, or being, " aiding or assisting at, or present at and con- " senting to the administration or taking of any " oaths or engagement, purporting or intending " to bind the person taking the same to com- " mit treason or murder, or any felony punish- " able by law with death, or to engage in any " seditious, rebellious or treasonable purpose, " or to disturb the public peace, or to be of any " association, society or confederacy, formed for " any such purpose, or to obey the order or " commands of any committee or body of men " not lawfully constituted, or of any leader or " commander, or other person not having " authority by law for that purpose, or not to in- " form or give evidence against any associate, " confederate or other person, or not to reveal " or discover any illegal act done or to be done, " or not to reveal or discover any illegal oath or " engagement which may have been adminis- " tered or tendered to or taken by such person " or persons, or to or by any other person or " persons, or the import of any such oath or " engagement, shall, on conviction thereof, by " due course of law, be adjudged guilty of felony, " &c."

" And every person who shall take any such " oath or engagement, not being compelled " thereto, shall, on conviction thereof, by due " course of law, be adjudged guilty of felony, " and may be transported for any term not ex- " ceeding seven years "

Section 1, therefore, makes it a felony to administer or take an oath binding any one to do or leave undone any of the things just enumerated. If, then, the accusation be presented to you, drawn under this section, it will be necessary that you should have proof before you that an oath to leave undone one of the things enjoined by the statute, or to do one of the things forbidden by the statute, has been taken, and that the accused administered or took such oath.

Section 5 of the ordinance enacts than any engagement or obligation whatever, in the nature of an oath shall be deemed an oath, in whatever form it shall be taken, and, if taken, whether actually administered by any person or not.

These dispositions of the ordinance are copied substantially, it might almost be said, textually, from two Acts of the Parliament of Great Britain—the 37 Geo III., c. 123, and the 52 Geo. III., c. 104—and their interpretation offers no serious difficulty. But the ordinance has a further disposition, which calls for more minute consideration.

Section 6 enacts that:

" All and every society or association now " established or hereafter to be established, the " members whereof shall, according to the rules " thereof, or to any provision or any agreement " for that purpose, be required to keep secret the " acts or proceedings of such society or associa- " tion, or admitted to take any oath or engage- " ment, which shall be an unlawful oath or en- " gagement within the intent and meaning of the " foregoing provisions of the ordinance, or to " take any oath or engagement not required " or authorized by law; and every society or " association, the members whereof, or any of " them, shall take or in any manner bind them- " selves by any such oath or engagement in " consequence of being members of such society " or association; and every society or associa- " tion the members whereof or any of them " shall take, subscribe or assent to any engage- " ment of secrecy, test or declaration not re- " quired by law: and every society of which " the names of the members, or any of them, " shall be secret from the society at large, or " which shall have any committee or secret " body so chosen or appointed that the mem- " bers constituting the same shall not be known " by the society at large to be members of such " committee or select body, or which shall have " any president, treasurer, secretary or delegate, " or other officer so chosen or appointed that " the election or appointment of such persons

"to such office as shall not be known to the "society at large, or of which the names of all "the persons and of the committee or select "bodies of members, and of all presidents, "treasurers, secretaries, delegates and other "officers, shall not be entered in a book or "books for that purpose, and to be open to the "inspection of all the members of such society "or association; and every society or association "which shall be composed of different divisions "or branches, or of different parts acting in any "manner separately or distinct from each other, "or of which any part shall have any separate "or distinct president, secretary, treasurer, de-"legate or other officer elected or appointed by "or for such part, or to act as an officer for "such part shall be deemed and taken to be "unlawful combinations and confederacies; "and every person who, from and after the "passing of this ordinance shall become a "member of any such society or association, at "the passing of this ordinance, shall after-"wards act as a member thereof, and every "person who, after the passing of this ordinan-"ce shall directly or indirectly maintain cor-"respondence or intercourse with any such "society or association or with any division, "branch, committee or other select body, Treas-"urer, Secretary, Delegate or other officer or "member of such society or association, whe-"ther within or without the Province, as such, "or who shall by contribution of money or "otherwise, aid, abet or support such society, "or any members or officers thereof as such, "shall be deemed guilty of an unlawful com-"bination or confederacy."

This enactment has been reproduced in the C. Sts. L. C., cap. 10, with no alteration, except the correction of one or two errors of construction. Now, this law is taken in part from section 1 of the 39 Geo. III., c. 79, and although on a superficial examination it may appear that the ordinance of L. Canada only reproduces the terms of the English Act, it really differs from it essentially. In the first place it is not confined to certain named societies and every other society of a like kind, but it extends to every society or association whatever, "the members whereof shall, according to the rules thereof, or to any provision, or any agreement for that purpose, be required to keep secret the acts or proceedings of such society or association." These words are not in the original Act, and if strictly interpreted they lead us necessarily to the conclusion that if two or more persons agree to keep secret any act or proceeding of theirs, however innocent, they shall be guilty of felony. This is evidently not within the intention of the Act, and unless something more than this is established your duty will be a very easy one. But what, substantially, you will have to enquire is whether the five persons accused, or any of them, have taken an oath to do an illegal act, or to leave undone anything they are bound by law to do; or whether they have become members of a society or association whose rules require or admit the taking of an illegal oath, or of an oath not required or authorized by law, or whose rules require the members, or any of them, to take, subscribe, or assent to any test or declaration not required by law, or, further, whether they are members of a society the names of whose members are kept secret or not entered in a book to be kept for that purpose, or in which there shall be any secrecy as to the persons forming the association, its governing body, or its objects.

Having read to you the statute, and having explained in less technical language its general import, the Court trusts you will have little or no difficulty in discriminating whether any case presented to you appears to fall fairly within the scope of the law or not. You will observe that it is not your duty to decide on the merits of the law, or whether it may be exceptionally or unduly severe. Neither are you to arrive at any conclusion unfavorable to the accused, or the reverse from any preconceived opinion as to the nature of an Orange Lodge, or the nature of an Orange Society, Before sending any one here for trial, it is your duty to have reasonable *prima facie* proof that an Orange Lodge is illegal under the Act, and that the accused is a member of it. It is right the Court should draw your attention to the fact that acting as a member brings the party within the law. On the other hand, you will remember that there is no presumption of guilt to be drawn from the fact that any witness has refused to answer with respect to the Orange organization for fear of criminating himself. That refusal is justified under the law, sanctioned by the highest legal authority in

this Province, and any attempt to get round or diminish the effect of that decision will be a disrespect of this Court, which you will be justified in repressing. It will also lead to a waste of your own time.

In these observations the Court has only looked at the question of Orange Association from a strictly legal point of view, but there are other considerations affecting this organization not unworthy your attention, not beyond the limits of your functions, considerations not unworthy your attention, although you may perhaps arrive at the conclusion that the evidence does not show it to be an illegal association. It tends to a breach of the peace, and not the less so, because the object of the members is not to commit an assault. Its latent mischief consists in this that it is provocative. It is the commemoration of the victory of one party over another in a civil war. Now it may be fairly asked if it is wise, if it is generous and noble to celebrate a triumph over one's fellow countrymen for an event which took place nearly two hundred years ago, and more than three thousand miles away. If it is wise, it is a species of wisdom unpractised by the great conquering nations of the world. Roman triumphs were celebrated not in Britain or in Gaul but at Rome, to gratify the victors, not to humiliate the vanquished, and when a Russian Prince visited the English arsenals the Crimean trophies were veiled. If Irishmen would take the place their many great and generous qualities fit them for among the progressive races of the world, they must make up their minds to abandon the pastime of nagging each other. Probably a false shame prevents either party giving up its pretentions, like school-boys engaged in a foolish quarrel, but the more manly will always be the first to cease to give offence. As an excuse for persistence it is sometimes said that if Orange processions are given up religious processions like that of the Fete Dieu should be abandoned also; but there is no parallel between the two. There is no harm in a procession properly conducted. It is of course possible that a procession might become so inconvenient as to necessitate the constant intervention of the police, just as is the case with ordinary traffic in the crowded thoroughfares of Londen, but such an interruption of the streets of Montreal is a theoretical difficulty at the present moment. To put a religious procession on the same fooling as a procession to commemorate the 12th of July is simply to display intolerance, and surely those who almost ostentatiously insist on their Protestantism will hardly think it worth their while to throw overboard the doctrine of toleration when it is practically triumphant in the world. One might as well say that a funeral procession should be forbidden.

There is one other consideration which ought to have some weight with Orangemen, and it is that the Queen has discountenanced Orange demonstrations for exactly the reasons now put forth. Naturally the sovereign of Saxon, Norman and Celt can feel no delight in the perpetuation of differences of this sort, and no man truly loyal can feel otherwise than the Queen does on this matter. The present moment, when the daughter of Our Sovereign is about to take up her abode amongst us, in order to draw more closely together the ties of love and affection which unite us to the empire, would seem to be peculiarly appropriate for abandoning a distinction which, I am persuaded, marks no real difference in the sentiment of loyalty which animates the great mass of Her Majesty's subjects, whatever their creed may be.

GENERAL NOTES.

THE LORD CHANCELLOR. — Intelligence has been received by cable that the Lord Chancellor of England has been advanced a step in the Peerage, under the title of Earl Cairns and Viscount of Garmoyle.

RETIREMENT OF THE REGISTRAR-GENERAL.—The first and only Registrar-General of Great Britain, Major Graham, is about to retire. A noble man and meritorious is the gallant Major; and he will take with him from Somerset House honor more than falls to the lot of ordinary civil servants. To him is due the organization of the most perfect vital statistical system in the world; and the great census operations from 1841 to 1871, both inclusive, were under his able superintendence.

The death of Judge Keogh, whose mental derangement was recently noticed, has been announced. It took place at Bonn.