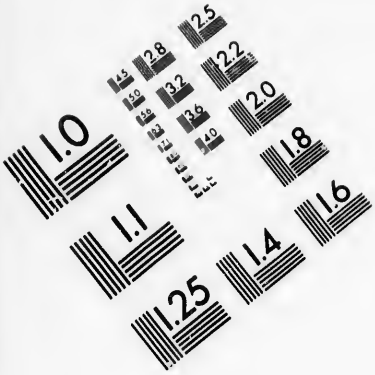

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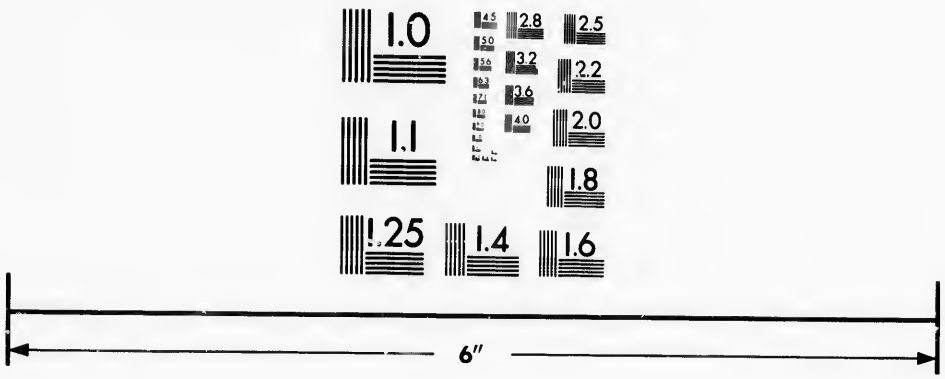

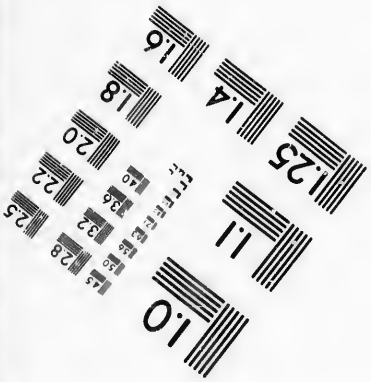

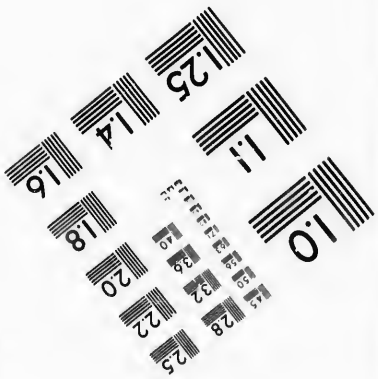

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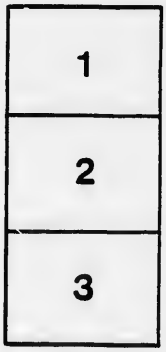
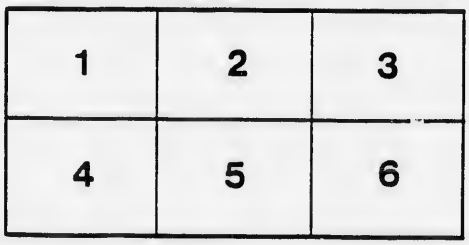




A LETTER

TO

JUDGE DUVAL

ON HIS OPINION,

AS PRINTED BY C. T. CARY, FOR

WILLIAM BROWN,

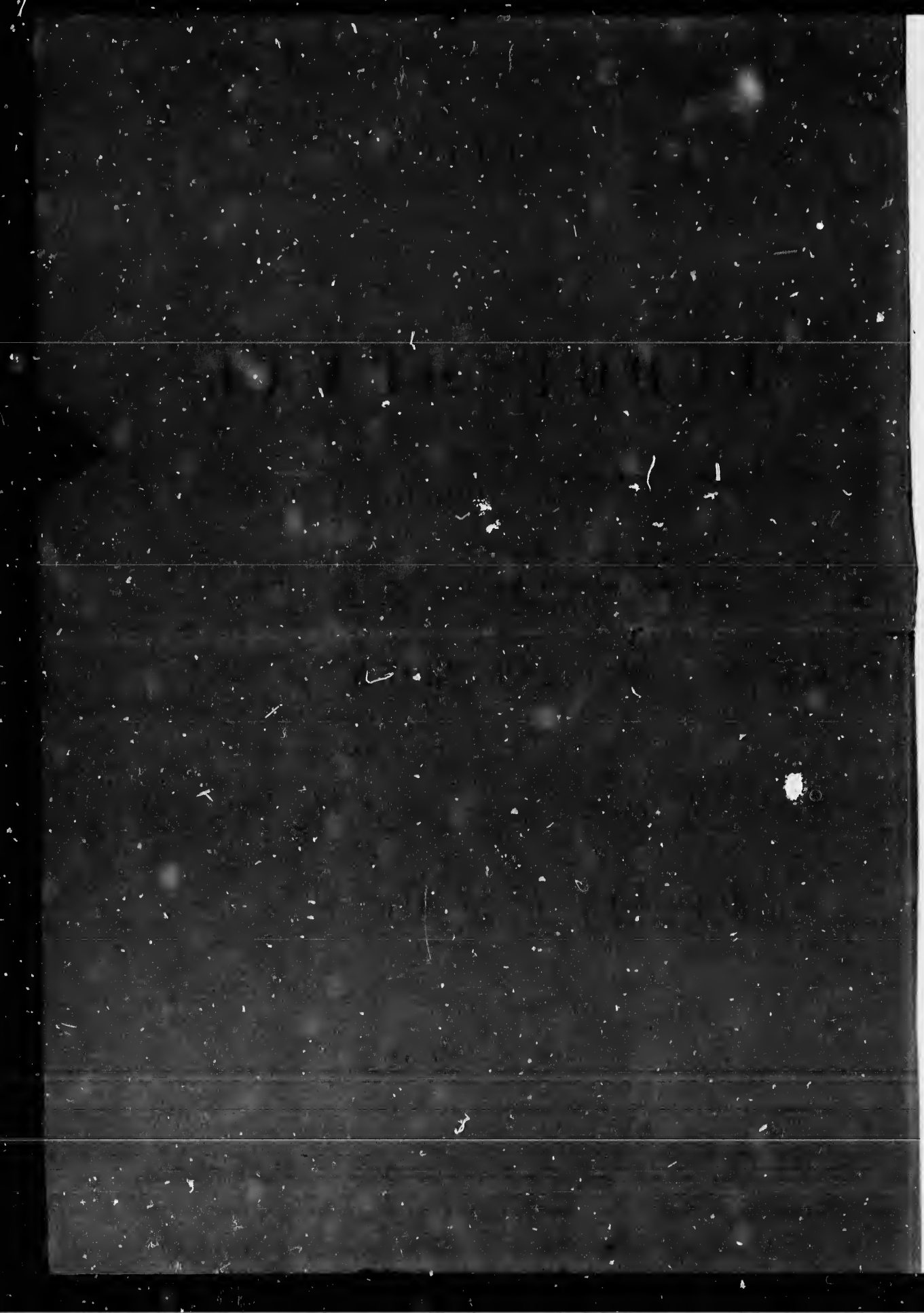
PLAINTIFF,

IN A CAUSE AGAINST

BARTHOLOMEW CONRAD AUGUSTUS GUGY,

BY

THE DEFENDANT.



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BY

THE DEFENDANT.

DEDICATED TO THE BOYS

OF THE

HIGH SCHOOL.

To the Honorable Mr. Justice DUVAL.

SIR,

It is now upwards of nine years since William Brown, of Beauport, miller, brought against me an action, in which he claimed to have suffered at my hands damages to the time of £300. Having failed in that action he appealed to the Court of Queen's Bench of which you are a member, and by its decision the judgment in my favor was confirmed. The Chief Justice, with Judges Meredith and Mondelet, concurred in the confirmation, but Mr. Justice Aylwin and yourself were, as usual, unfavorable to me.

Emboldened by the dissent of two judges, my adversary has appealed to the Queen in Council; a vexatious, if not an absolutely ruinous result, which could not have followed a unanimous judgment. Your opinion then is not a matter of indifference to me, nor indeed to any suitor. On the contrary, my interest in it may be estimated, in this case, at £1000, an amount which it will probably cost me to repair to England to sustain the judgment of the majority of the Court. I propose therefore to exercise my undoubted right to dissect your printed opinion, nor shall I hesitate, to remonstrate after the manner of the frogs in the fable, against a proceeding which, however, pleasant to you is or may be death to me.

On the occasion upon which the judgment was pronounced, you made only one remark that I can remember. You referred to a period at which you and I were students in the office of Mr. Vallières. You said that he had been denied his costs in a suit which, being plaintiff, he had conducted in person. I care not about the accuracy of the statement, nor is it in my apprehension of the least moment whether it be or be not true that he was so unjustly dealt with about forty years ago. Mr. Justice Aylwin always full of "wise saws and modern instances" always ready with a dictum to support an act, was pleased, in one of my cases, to declare that an "adverse practice of seven years was sufficient to defeat the express terms of an act of Parliament." It seems to me a *fortiori* that a *judge made* practice not only founded on no law but contrary to law, can be abolished by an uninterrupted series of adverse decisions pronounced by the highest judicial authority and a full Bench without a dissentient voice during a period of three times seven years! Now this *inter alia* is a fact of which you ought to be informed, more especially as you, yourself, so decided at least in one cause, that of Cannon vs. Henley.

The sole remark which you thus made related to the costs, and my comments published in the *Mercury*, were necessarily confined to that subject In the presence, however, of the judicial committee of the Privy Council, *sic volo, sic jubeo,* would be indecorous, and although you evinced no regard for the suitor with whose rights you dealt, you have since composed and permitted the plaintiff to print an elaborate opinion. Able, educated, ingenious and fluent Mr. Justice Aylwin thought that he could afford to admit his inability to pronounce an oral judgment. You may have been restrained by other considerations, but how deplorable the condition of a country in which two judges of the Supreme Court are incompetent to assign orally the reasons of their decisions.

Mr. Justice Aylwin caused his opinion to be printed, at his own expense and from whatever motive he sent me a copy. He thus disarmed criticism, but having, like Gilpin's wife, a frugal mind, you pursued a different course, and I obtained a printed copy of your work by mere accident. You will find it reproduced in one kind of type; the commentary appears in another, and they are meant to be read together. For obvious reasons I have added a number to each paragraph.

1. Paragraph. "The Appellant, Brown, instituted this action to compel the Respondent to demolish and remove a wharf erected "by the latter in the River Beauport, causing Brown very great damage, as he explains in his declaration, filed in the Superior Court."

The site of my wharf was the principal question. I maintained * that it was erected on a *bank* part of my own property. I alleged that it was intended to protect that bank from the injurious effects of the current of the water impelled against my land by a wharf built two years previously by my adversary.

Such was the main question, the damage could only be a consequence of the act. If the act was illegal, if I built a wharf *in* the river, damage might ensue. Now this is the state of the issue, a principal question and consequential question, and you decide both in the outset. You affirm that my wharf is built *in* the river, and that it causes Brown *very great* damage. These superlatives are yours, not Browns. The able Attorney, who framed the declaration, judiciously refrained from the use of terms so extravagant. Had they appeared towards the conclusion, had they followed the narrative, and an intelligible statement of fact, they might have been overlooked or condemned at most as at variance with good taste. But, if I understand English, your conviction is the result of the *explanations* contained in the declaration. You say, *as he explains in his declaration*, words which remind one of the letters Q. E. D. at the end of every problem in Euclid. As a judge, you are presumed to know something of the language in which you write. Had you said "as he complains," "as he alleges," you would have been understood to mean that the statement was Brown's statement. But to explain is "to make plain, manifest or intelligible, to clear from obscurity, to expound." Your use of the term *explains*, then implies the existence of a fact made manifest (not by the proof at which you have not arrived but) by the declaration! It is as if you had said Brown has *demonstrated by his declaration*, and you seem to assume that he is right without any enquiry. Thus the statement touching the site of my wharf and the effect of its erection is made, in your opinion, to rest not on the authority of

* I did more than *explain* for I proved.

Brown but on your authority. This will doubtless have struck every lawyer who read your opinion, but most laymen, judging by your language, would have formed a very erroneous estimate of the effect of the *explanations contained in a declaration*. It is a compendious method of arriving at a conclusion, which may account for many painful events, for the avowal of which, however, I was not prepared. Allow me to refer you to the maxim *secundum allegata et probata*, and to enquire whether the necessity for proof has been dispensed with by any recent statute? Poets habitually commence in *medias res*, but you have begun with the end.

2. "This action, well known in our Law by the name of *dénonciation de nouvel œuvre*, is taken from the Roman Law. The principles "on which it is founded, and the rules by which Courts of Justice are to be guided in adjudicating on the cases submitted to them, are "clearly laid down by the several jurists who have written on the subject."

3. "It is unnecessary for me here to state the facts of this case which are set forth in the factums of the parties and in the opinions of "some of the Judges; suffice it to say, that this Court is called upon to decide a question of Law and a question of fact."

Passing over the second paragraph, I shall devote a few moments to the third.

Were you disposed to disseminate any part of the particular kind of knowledge which you possess, you might enlighten the age by a specification of the causes in which "questions of law or questions of fact," are not involved. You say that it is "unnecessary for you to state the facts" (and judging from the context) because "they are set forth in the factums of the parties and in the opinions of some of the judges." You clearly mean at least that those who may be desirous of information upon the question of fact can and will obtain it in the quarter indicated. Now this would be quite satisfactory if the statements contained in the *Factums* were identical or similar. But they conflict, and one is at a loss to know which you hold to be true, which false. Where is a candid man to look for the truth? If you admit that some respect is still due to it you must acknowledge that you might, with advantage, have referred to the sources at which correct information could have been obtained.

But you couple "the opinions of some of the judges" with the statements contained in the factums! Which statements and which judges? Do you mean Judge Aylwin, who assesses what you call *very great* damage at one shilling? What is the public to understand you to mean? SOME is a term signifying a number greater or less, but indeterminate. Supposing *some* to apply to the majority of the Court we have three judges making statements the very reverse of those, on which founded "on the explanations contained in the declaration" your convictions would seem to rest. They all three maintain that my wharf was not built in the river and that it *caused* Brown no damage whatever. You surely can't mean that those judges make correct statements! Acknowledging that you have puzzled me, (not for the first time) I submit that if you should have intended to say that judging by their factums, the parties and the judges all agreed as to the facts of the case, then there can be in this case no question of fact. But you assert that there *is* a question of fact as well as a question of law! This passes my comprehension: but that may be my fault or my misfortune.

Clearly, *some* must be understood as contradistinguished from *all*. You yourself are not one of the *some* nor can *some* stand for Judge Aylwin or for any one of the others. Then all the others are apparently not agreed. *Some*, to use your very words, in their opinions set forth statements of fact. If some only make those statements, it follows that the others do not. Either you mean that the others do not in their opinions set forth any statement of fact whatever, or that the statements which they do set forth are not the statements on which you rely and to which the parties interested are to refer for information. Here I am driven to conclude that you mean that there is a difference between the statements set forth by *some* of the judges and the statements set forth by others of the judges. But this is a case of obfuscation and I can grope no farther.

4. "As to the question of Law, that is Brown's right of action against the Respondent, assuming the facts he alleges to be true, the right "appears to be beyond fair controversy, even admitting that the Appellant had sustained no pecuniary loss when he instituted his action."

5. "Troplong, who has written most ably on the subject, in his Traité de la Prescription, vol. 1, No. 313, says: "Ce n'est pas contre "un dommage *causé* qu'on voulait se prevenir mais contre un danger ou un tort à venir." The same doctrine will be found in the 7th "volume of Merlin's Repertoire de Jurisprudence, page 395, and the following.--Daviel des Cours d'eau, vol. 1, No. 471, et sec. To this "may be added the opinions of Garnier, Gremier and Proudhon."

Troplong, could he hear of it, would doubtless estimate at its just value the certificate of character which you give him. I would, however, contrast the words which you cite with those of my adversary. Referring, as you do, to his explanations, as you call them, you will doubtless allow me to cite his very words. The plaintiff is supposed to be well advised and to understand his case. He complains of the evil for which he seeks redress and he claims the interposition of the court upon specific grounds alleged in his declaration. These are the *allegata* by means of which the defendant is apprized of the pretensions of the plaintiff. The defendant, when he pleads, must confine himself to those *allegata*, that is to the terms in which the plaintiff clothes his complaint. The proof adduced must necessarily be restricted to that particular kind of complaint. In this country the power of the judges is enormous, but honestly and justly they cannot travel out of the record. They are bound to decide the case as presented by the plaintiff. They can't make a different case for him. Thus to make this plain to laymen I would say, by way of illustration, that if the plaintiff claims a horse, the court can't pronounce a judgment awarding him a cow! Again the evidence adduced must relate to the allegations—all other evidence is illegal.

Your citation from Troplong may be thus translated: "The object is not to provide against a "damage which one has suffered, but against a danger or a damage to come." I understand you then to mean that Brown's action was brought to recover £300, not for any actually existing damage, nor for any damage done before action brought, but for a prospective damage—a damage which might or might not occur years afterwards.

Admitting that my adversary might have brought that sort of action, I submit for your information that there is not in the allegations or "explanations" contained in the declaration one word which could justify the application of the authority from Troplong. Had the plaintiff declared so as to expose me to the kind of judgment which you would have pronounced, I could have demurred, and

the position of the parties would have been settled by the court. As it is, the plaintiff rested his claim upon the existence of a wrong done before he brought his suit, he made his own bed and I marvel that you will not allow him to lie upon it. Not to interrupt the narrative I offer for your perusal in the shape of a note as much of the declaration as is necessary.*

6. "The Appellant's right of action being established, the Court is called upon to decide a question of fact: "Has the Respondent erected "a wharf in the River Beauport, and does this wharf cause the Appellant the damage he complains of?"

7. "On this head I find it impossible to entertain the slightest doubt."

Taking the sixth and seventh paragraphs together I find that you *entertain not the slightest doubt* that "I have built a wharf in the river Beauport and that this wharf causes the Appellant the damage "he complains of." This result, the absence or exclusion of all doubt, you ascribe to the Harbour Master Lambly. Dealing thus with tangible matter of fact, you have descended to the level of intelligent, educated men of all classes, and brought to the bar of public opinion in a matter not susceptible of legal involutions and nice distinctions you will in your turn be judged. Now then for the grounds on which the decision that I invoke is to rest.

8. "Let it be borne in mind that this part of the River Beauport was, before the erection of the Respondent's wharf, navigable— "Schooners have sailed up as far as the Appellant's Mill. The evidence of the Harbour Master, Lambly, intimately acquainted with the "locality, leaves no doubt on the subject. Now let us look at the plans filed. It is doubtful if a skiff of the very smallest size could at this "day be brought to the Mill."

9. "These plans clearly show the Respondent's encroachments on the very bed of the river, and his utter disregard of the rights of others. "Surely the Appellant has a right to complain of these encroachments; until they are removed, how is he to get grain to his mill, and send "his flour to the market?"

10. "In my opinion these encroachments render the Appellant's Mill of little value, for, as he must resort to land conveyance, the expense "would be almost ruinous."

Your exclamation "let us look at the plans" amounts to a challenge to the whole world and to a permission to any one to contradict you, who in the legitimate exercise of his faculties arrives at a different conclusion. These plans you say, "clearly show my encroachments in the very bed of the "river and my utter disregard of the rights of others." The force of egotism and cynicism could no further go. Why what Donkeys the four Judges must be, who could not see what is so very clearly shown! As a suitor I must submit to your remarks, but those Judges all generally courteous have claims on your forbearance, and you might have been less arrogant. In giving publicity in print to opinions so much at variance with theirs in a tone so trenchant and offensive, you compel every reader to institute comparisons, between them and you. I pause not to describe the inevitable result. But whether they fail to see what is clear, or you imagine that you see what does not exist, the court of which you are a member must suffer and its usefulness be consequently impaired. Your fellow judges may or may not deign to notice the position in which you place them, but the judge whose decision you would have reversed is entitled to a large measure of respect. Having heard him deliver his judgment and understood him, as I have never understood you, I propose by reference to the plans to which you triumphantly refer to prove how inferior to him you are.

Pinning your faith on Lambly you will permit me to transcribe and to submit *without preface* his very words.

On the 16th of May, 1854, he testifies as follows. "I have not had occasion to visit the river "Beauport since the year 1841." Here we have a period of thirteen years during which most important changes by alluvion and otherwise may have taken place. His intimate acquaintance with the locality to which you seem to me to attach undue importance has thus been interrupted and for a long time. But he adds "my recollection is not sufficiently good at this period to enable me to state in "which direction the river flowed previous to the erection of the said wharf by the defendant." It will shortly appear that he has no recollection, no memory whatsoever.

On the 25th March, 1855, examined again at the instance of my adversary, he speaks as follows:

"I have already been examined in this cause. At that period I had not visited the premises in "question in this cause. I have since done so in company with the plaintiff, who took me there for "the purpose. † *I do not remember the time.* It was about six weeks or two months ago. I now "recollect that it is more than two months ago. We went there during the summer roads. During "the time that I was Harbour Master at Quebec, I frequently visited the river Beauport and the "premises in question in this cause. This may have been in the year of 1840 or 1841."

But these are the years during which he ceased to be Harbour Master!

"I have been higher up than the mouth of the river Beauport several times before the visit of "which I have spoken, *but never so high up as the mill.*" "The visits of which I now speak are "the visits (*sic* in the original) to the river Beauport of which I have spoken in my examination in "chief. (He had spoken only of one visit). On the occasion on which I went to examine the pre- "mises at the request of the plaintiff, he called for me at my house with his carriage and took me to "the premises. I staid there some time with him and he brought me home."

There are in the foregoing lines many proofs of the oblivion consequent upon age which might have excited suspicion. But you were a clerk in the same office with me, and you know individually that I was admitted to the Bar in August, 1822. But you have chosen *ex mero motu* to deny me fees on the ground that I was a practitioner. If you can judicially know a suitor, you are bound judicially to know an officer of the Court and the date of his admission to the Bar recorded in the Register. Now for Harbour Master Lambly.

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* The declaration is, upon reflexion, omitted as tending unnecessarily to swell these remarks, and as being of record and accessible to every body.

† The Italics are mine.

" I have known the defendant from about the year eighteen hundred and eleven, for I was " appointed Harbour Master about that time, and *I used to go into Court frequently where the defen-* " *dant was practising.*"

Here is a fact worthy of your attention. Your Harbour Master, whose "*evidence leaves no doubt on the subject*" swears that I was practising at the Bar in 1811! Why I was then a boy at school, in Upper Canada, and obtained my first commission in the army early in 1812. Judge Duval since this palpable misstatement made no impression upon your mind, what are we to think of you?

But he adds: " Although on the occasions already referred to I have not gone up as far as the mill, " I have gone to a distance within five hundred yards thereof. It altogether depended on the state of " the tide. From that point I could see the mill and both sides of the river; my object in going was " in performance with my duty and to see that there were no obstructions in the river."

I shall presently notice your judicial declaration that " schooners" have sailed up as far as the appellant's mill, meantime I would remark that the witness himself *never* went up that far.

On the 28th June, 1855, your Harbour Master deposes *inter alia* as follows:

" I shall be eighty-four years next August. I find that my memory is failing. I can remember " occurrences which took place when I was a youth better than those which are more recent, I do not " exactly remember the date of the last time that I visited the river Beauport; but I used to visit it " almost every year when I was Harbour Master, without *however going very far up*, for instance not " farther up than the point at which you can see the middle of the stream;" (To see the middle of a stream one need not be in it, and this expression seems to imply that he saw the middle from its mouth, or perhaps below it;) " I had never been on Mr. Brown's wharf until the period when, as I " have stated in my examination in chief, I went there to oblige him. It was very lately that I went " there, but *my memory does not enable me to specify the time.*" " Since the period when I ceased " to be Harbour Master, I had never visited the river Beauport until I went there to oblige the " plaintiff, as I have said. I am unable to say when that was. I must be stupid to forget it, but " so it is, I have forgotten it."

These admissions were assuredly sufficient to have neutralized that *intimate acquaintance with the locality* of which you saw fit to make such a parade, but you affect to rely upon that sort of evidence, and upon that sort of evidence I find that you would have ruined me!!!

Lambly had previously deposed as follows; " The plaintiff is my neighbor, I now see his house " from my window, I have known the family of the Lady of Mr. Brown for a great number of years."

Here we have the disclosure of a fact pregnant with consequences. It afforded my adversary daily opportunities for *talking over* an old man of 84 and moulding him to his purposes. The use which he made of those opportunities were it only in the drive in my adversary's carriage, is a matter of inference.

Now for the particular facts, the basis of your judgment against me as reported in your opinion:

1stly. "That this part of the river (meaning the part along my wharf) was before the erection of that wharf navigable." This is your judicial statement implying that owing to that wharf it has ceased to be navigable.

2ndly. That schooners have sailed up as far as the appellant's (Browns) mill.

3rdly. That it is doubtful if (whether would have been a more appropriate word) "a skiff of the " very smallest size could at this day be brought to the mill."

You pin your faith upon Lambly and can have no objection to my citing in relation to the navigation, his very words.

" The river Beauport I look upon as little more than a creek, the same as the river St. Charles. " I consider all rivers creeks which are dry at low water." Bearing in mind that Lambly was an Englishman, the word "creek" in his mouth has an english not a yankee signification. "The river " Beauport, he adds, is a small river, but is navigable at high water to near the mill for bateaux, " SMALL schooners and so forth."

You have a genius for amplification. The plaintiff complains only of damage but you set the judicial seal to it and it becomes very great damage. The witness upon whose testimony your judgment is founded indicates the size of the schooners, he uses the word *small*, but unless the possession of judicial power places you above the reach of criticism, I may remark that you omit, of course, purposely omit, the qualifying adjective. You probably know too that bateaux, a primitive sort of lighter or diminutive craft draw at most, when fully laden, from three to six feet of water. It was probably intended to represent them as being larger than the small schooners, in which case the " and so forth" might be intended to cover any thing down to a canoe. If on the contrary the witness be understood to have meant to depose in an ascending climax the ,'and so forth" may apply to a hundred and twenty gun ship! It was the business of my adversary to have proved his case by clearly intelligible and credible testimony, nor need I now speculate upon a part of his evidence not intelligible and therefore not likely to be taken into consideration by an impartial judge. " Schooners, you say, have sailed up as far as the appellant's mill," and you cite no other witness than Lambly. Now begging your pardon, Lambly does not say so. What Lambly says is that, " the river is nav- " igable to near the mill for bateaux, small schooners and so forth." But he himself on his own admission never was as high up as the mill. He therefore never saw any craft whatever sail up. His evidence then is merely inferential and not that of an eye-witness. Then inferential as it is, he

does not say *how near*, he infers that the small craft he describes did sail up, or could sail up. This is a point of which you make a great deal and it was the interest of my adversary to have proved it if he could! If any craft whatever, to use your words, sailed up *as far as the mill*, they could scarcely be phantom ships, they must have been manned by living men, and have been seen by some one or more of the multitudes daily resorting to the mill. Now any one of any crew, or any single spectator could have testified to the fact. In your view of the case this fact is decisive. It was not my business to prove it, why did not my adversary do so?

You are pleased further to draw an inference which seems in your estimation to be conclusive. "It is doubtful, you say, if a skiff of the very smallest size could be brought (that is floated) up to the mill." The use of superlatives in the preceding sentence is unlucky, for the plans to which you so triumphantly appeal show that at the spot in question the channel is 19 or 20 feet wide.

You speak of a skiff of the very smallest size and are evidently ignorant of the signification of the term. A skiff is a little boat so narrow that one man can pull two oars, one in each hand. They are indeed often made so narrow that the rowlocks are unavoidably attached to out riggers. Any one so inclined could have lately seen one in the harbor of Quebec, sixteen inches wide. As I believe it to be still within reach, I shall whenever the necessity arises produce it as an exhibit. Now, sir, you have upon my authority the breadth in inches of a skiff of the smallest size. Do you doubt that it could pass through a space 19 or 20 feet wide?

You distinctly and positively affirm that the *evidence* of Lambly *excludes all doubt* that I have erected a wharf *to* the river Beauport. Lambly avows that (until he visited the spot to oblige his neighbor the plaintiff) he "*had never been so high up as the mill.*" He specifies a particular distance to which he did go and that distance is "within five hundred yards thereof."

Now Judge Stuart is not the man to look at plans affecting the rights of parties, as a little girl gazes at Punch and Judy in a puppet show. He doubtless stretched the legs of a divider over the plans of which you speak; he thus found that 500 yards extended to low water mark a distance of 200 yards from the mouth of the river. If Lambly's evidence in reference to the distance, was correct, he never had even entered the river Beauport, but as he said that he had entered it, we will suppose the judge to have made an allowance of half the distance. This is certainly doing a great deal for Lambly. Lambly then who admits that he had "*never* been as high up as the mill" may be supposed to have entered the river (as he says in a boat) as far as a spot situated some 250 yards below the mill. Now between that spot and the mill there is, as you know, a sharp angle or turn in the river, making it quite impossible that Lambly could have ever seen the "locality" as you call it. The edifice which you have thus erected upon the evidence of Lambly is demolished by reference to the plans.

But incapable of yielding you will require more demonstration. Lambly says that from that point (at 500 yards) "he could see the mill and both sides of the river." "Now let us look at the plans;" Lambly never could have seen both sides of the river at the locality nor indeed either side, at 500 yards or even at 250 yards. What would you think of a tailor who should undertake to furnish you with a nether garment without taking your measure? Had you in your judicial capacity in a suit involving thousands measured the spot as you would expect a poor tailor to do you in a suit of no kind of importance you would have ascertained that no confidence could be reposed in the evidence of Lambly; I make this remark without impeaching his character and solely because he had reached an age before which "Swift had become a driveller and a show."

Permit me to submit another view of the subject.

In your contrast between a skiff of the very smallest size and a schooner you intend to exhibit on the one hand exiguity, on the other, bulk. You define it is true only the skiff but you expect the imagination to do the rest. This is your idea made manifest by the suppression of the adjective small. But as you were evidently ignorant of the possible proportions of a skiff, you are not informed of the characteristics of the schooner. It is not a question of tonnage as you probably without enquiry assumed, but of masts, spars and cordage, it is not the size but the rigging which constitutes the schooner. Now a schooner may be a large vessel of 300 tons and it may be a small vessel of ten tons. A small schooner may very well be only ten feet in breadth. The channel then in front of the natural bank on which my wharf is built might possibly have been and at high water may still be navigable, as Lambly says, for *small* schooners as far as the mouth of the tail-race. But though a *small* schooner should sail up to *near* the mill, it could not sail up (as you say) as far as the mill. Lambly may have known that the tail-race, only five feet wide, and the rise in the land would prevent it. Thus then, dealing with the testimony of a man, of good character tottering on the brink of the grave you have imputed to him negatively one untruth and affirmatively another. By suppressing the word *small*, you expose him to a very serious charge and by substituting the word "*as far as*" for "near," you subject him to another. The good old man deserved better treatment.

Lambly avowedly too old to remember, who had never been as far up as the mill, was assuredly no authority. Had he been in possession of his faculties, he could not have overlooked the bank upon which my wharf is built, nor could he have failed to remark that the bank, the natural bank was the lateral limit of the navigation as much as the wharf built on it.

It is however upon such ground that you venture to add that owing to my wharf the "Appellant "must resort to land conveyance, and that the expense would be almost ruinous." You thus assert by implication that he had before that period used water conveyance for which there is no authority, and could be no authority whatever. He has always used land carriage in that locality and found profit in it.

In the ninth paragraph you manifest a most alarming ignorance of the appellant's mode of transporting his grain and flour, and you ascribe to the plans a power effect and influence which I dare not characterize. The appellant has never moved grain or flour in that direction, nor has he any occasion to do so, or any interest in doing so.

11. "The Respondent at one time attempted to justify these encroachments by claiming title to the bed of the River, which, he said, he "acquired from the late *Seigneur* of Beauport."

12. "On reference to the Respondent's deed, it will be found he did not acquire his property from the late Mr. Duchesnay, as *Seigneur* "of Beauport; he therefore can claim none of the *Seigneur's* rights or privileges. Moreover, the Judges of Lower Canada have decided "the *Seigneurs* never had such a right. See Lower Canada Reports. *Questions Seigneuriales*, vol. A, page 130, à des Rivières Na-"vigables."

Questions of law are not to be discussed by the profane and I grant your infallibility in matters on which all the courts and all the Judges are proverbially unanimous. I complain, however, of a mistake or misrepresentation to my prejudice, contained in the 11th and 12th paragraphs, you say "that at one time I attempted to justify my encroachments by claiming title to "the bed of the river as having acquired it from the late Seigneior." You mean of course against all the world. Now I certainly did not do any such thing. My position was this, that in my adversary's own title in the deed of conveyance to him there was a reserve *in my favor*. In the third page of my factum I intimated that it *might not be well founded against* the rest of the world; but that, being a reserve in his own deed, in which I *was named as being in the rights of the late A. J. Duchesnay, Seignior of Beauport*, he, my adversary, who bought upon that condition, was estopped from controverting that position. If this should be, as I hope, intelligible to laymen, they will perceive that I thus raise between you and me a serious question, and that I distinctly deny having in the remotest manner admitted encroachments on my part. In the second page of my factum you will find the above mentioned condition of his deed, quoted, to establish this proposition, that my adversary could no more encroach on me than he could encroach on Mr. Duchesnay. In case you should revise your opinion I submit this statement for your guidance.

13. "As to the allegation that the Respondent was forced to erect this wharf to protect himself against the works of the Appellant, on the "opposite side of the river, it shows a clumsy attempt to justify an act done in open violation of the laws of the landand of neighbours' rights."

You condemn not the attempt alone but the manner of it. Had it been ingenious instead of clumsy would it have pleased you more? But in your mouth the word clumsy amounts to a compliment as denoting incapacity or inexperience or both in wrong doing. It was clumsy, you triumphantly declare and of course instantly detected by you. You deal, as is your wont, quite unceremoniously with four judges who thus receive under your hand a certificate of character for comparative obtuseness. This is surely an unnecessary "lifting up of your horn." But if the attempt was so clumsy why could not the three first Judges who heard the cause, detect it? Why did they order an expertise and in despite of my remonstrances founded on my opinion of you, refer the question to your stepson as an engineer and a practical man? How was it that forty seven persons, half of whom are men of high social position, men of education and principle, men distinguished for scientific attainments and professional ability, all of them in every way unconnected with and independent of me; how was it, I say, that so many persons could be so blind or so wicked as to give the evidence of record? You have thus forty-seven witnesses, three experts and seven Judges who could not see the clumsy attempt which is to you so very plain. The odds are great, but that is not all. I argued that the plaintiff could stop his mill at pleasure and ascribe the stoppage to me. I added that as I could not place any person in the mill to prevent his resorting to trickery or artifice in order to deceive the court, I was in his power. "Now let us read the testimony of one who had been four years his "clerk in the mill."

Patrick O'Brien, deposed as follows: "The plaintiff has not to my knowledge suffered any "damage in consequence of the erection of the defendant's wharf previous to the 29th Octobre, 1852," the day of the institution of the action. He adds: "In my examination in chief I stated that the "building of the wharf had caused a rise of the water which threw it back upon the mill race and put "the wheel in the water. I have since ascertained that this an error and I now know that this was "produced by a quantity of stone and rubbish that were in the mill race. These stones and rubbish "have since been removed and the mill race cleaned out, since which the evil has ceased."

The foregoing declaration covers the period from the date of the erection of wharf down to the day of his cross-examination (March, 1856). Here too is proof of the stoppage of the mill by means of rubbish, which but for an after thought would have been imputed to me, but the clumsy attempt which you see, is invisible to the witness.

Here too is proof of an attempt to my prejudice against which I was perfectly defenseless, nor will you consider it clumsy. It is nevertheless the plaintiff who intentionally elicited the evidence in chief, which but for the conscientious scruples of his clerk, would by means of a falsehood have established incontrovertibly, his right of action. But the clerk who speaks like a man of intelligence, who was clearly interested in supporting and bound to support his employer, whose attention was doubtless on the stretch, could not see the clumsy attempt which you so instantly detected.

14. "I have abstained from adverting particularly to the facts, because they are so minutely noted down and ably commented upon in the "report of the experts, Baillargé and Staveley, that I could do no more than uselessly repeat what they have well explained."

You declare in the 14 paragraph that you have abstained ~~for~~ adverting particularly to the facts because they are noted *down* and ably commented upon by the experts. You have thus three reasons for ignoring the facts, firstly, the factums of the parties, secondly, the opinions of some of the judges and thirdly, the noting down of the experts. What you mean by noting *down*, unless there be in your judicial opinion a noting *up* which has a different signification, I shall not pause to consider. That you should compliment your stepson Baillargé, whom you evidently believe to have been unfavorable to me is natural, but notwithstanding his relationship to you I hold him as a man of rare talent in great comparative respect, and feel strong enough to overlook the abortive efforts to which your commendation is to be ascribed.

Your stepson specifically admits that the bank (on which my wharf is built) forms a *natural* obstruction to the flow of the water. He reports that my wharf has not obstructed any channel, canal or passage, for none existed when my wharf was built. He adds, that the trees growing upon the above mentioned natural bank (on which my wharf is built) are pretty good evidence of themselves of the truth of the foregoing assertion, that my wharf does not (as the plaintiff pretended) traverse the river or any part of the river. What could you have more ?

15. " For the above reasons I must dissent from the judgment dismissing the Appellant's action. I would limit the Respondent's right of " property to high water mark, and order the removal of all works beyond this line."

Concluding this branch of the case, in the fifteenth paragraph, you judicially declare that for the *above* reasons you must dissent from the judgment; Above an adverb, and a preposition, not an adjective, would not have found such a place in a sentence written by any man of education. If when the reasons precede the deduction you can say the *above* reasons, when the reasons follow the proposition you can surely say *for the below* reasons or the *under* reasons : the one is not a whit more barbarous than the other. Thus when in the very first sentence you decide that my wharf has caused Brown *very great damage* you might have elegantly added " for the before or the after reasons." You have, however, I take it, assigned all your reasons for dissenting, and characteristic as they are, they are submitted for the consideration of a discriminating public.

OF THE COSTS.

16. " On the question of costs, I concurred with the majority of the Court, in refusing fees of office to the Respondent, who appeared " in person, and conducted his own case. This is in conformity with the jurisprudence in France. Costs were refused to Mr. Vallières de " St. Réal, a practising Barrister at Quebec, so far back as the year 1822, by the Court of King's Bench, the late Chief Justice Sewell " presiding. It has been said that subsequently the Judges had allowed the fees. But the three or four cases cited do not establish this. In " one of the cases referred to, the Judge has told me that he had not so decided, and that his opinion was against the claim for fees. Tousse, " in the 2nd vol. of Justice Civile, p. 460, No. 38, says :—' Les avocats qui écrivent ou président pour eux dans les affaires, qui les " interessent, ne peuvent se faire payer de leurs plaidoiries ou écritures ; sauf à demander s'il y a lieu, des dommages et intérêts à cet égard.' "

The rights of persons and the question of fees dependent thereon, are to be governed by the Public Law of England, which, in relation to that subject, is the Law of Canada. *Ex proprio motu* upon the ground of a supposed identity, never noticed at the Bar, to deny fees to an Officer entitled to fees, in the absence of any evidence, without trial, without complaint, and even after my adversary had acquiesced in my claim to fees, is manifestly arbitrary and illegal.

But my claim is sustained by several ordinances of the French Kings, by the practice of the French Courts, and, as the following extracts prove, by the rules on this subject, promulgated by Commentators of the highest merit and authority.

Paris, Edition 1623.—*Imbert.—De la condamnation des dépens, taxe et liquidation d'iceux.*

" Le juge en toute sentence doit condamner celuy qui perd sa cause, envers celuy qui la gagne ès despens. . . . . comme il est dit par " l'Ordonnance du Roi Charles VIII, art. cinquante."

" L'Ordonnance du Roi Charles IV, 1324, veut que celui qui succombe en cause doit estre condamné aux dépens envers sa partie adverse " suivant le droict. Aucun colligent [for some collect or understand] de l'Ordonnance de 1493, et de celle de Charles VIII, récitée au texte " de nostre auteur, que, quelques causes que ce soit, encore qu'elle soit juste et raisonnable, n'exempte point que la partie qui succombe ne " soit condamnée aux depens."

Le nouveau Proticien Francais, par M. René Gastier, Procureur en la cour du Parlement de Paris, Edition de 1665.

" Maximes établies par les lois et jugées par les arrests, concernant les dépens, dommages et intérêts, *pour servir d'instruction aux juges* " *qui en prononcent* la condamnation et aux procureurs et praticiens qui assistent à la taxe et liquidation d'iceux."

Titre de la taxe des dépens.

" C'est une règle générale en procès que celui qui a perdu sa cause, soit demandeur ou défendeur, doit être condamné aux dépens, envers " celui qui n obtenu ; *victus victori in expensis sumptus que litis condemnandus est, properandum* 13, *sine autem § C de judic.* C'est " l'Ordonnance de Charles IV, de l'an 1324, qui porte que celui qui succombera en cause sera condamné ès dépens envers sa partie adverse, " et ce, nonobstant qu'il y a coutume contraire, que le Roi déclare par ses ordonnances, abusive, au registre cotté *Ordinationes antiquæ*, fol. 3. " e que Justinien enjoint aux juges si estroitement et précisément que s'ils oublient ou négligent de ce faire ; *ipsi de proprio hujusmodi* " *pœnæ subjacebunt et reddere eam parti lasæ coarctabuntur.* Il prend la condamnation des dépens *pour peine*, qu'il veut *que les juges* " *portent et payent de leurs propres deniers*, qui n'auront condamné ès dépens celui qui aura perdu su cause. Aussi [for ainsi ?] a été jugé " par arrêt du Parlement de Paris, du deuxième janvier, 1569.

" *Quid de celui qui a lui-même conduit sa cause et ne s'est servi du ministère d'aucun advocat ni de procureur : je tiens que l'advocat* " *qui a écrit ou plaidé pour soi et obtenu les dépens peut requerir taxe de ses salaires ne pouvant être contraint de remettre son labeur et* " *quitter son travail à celui qui l'a vexé indument ; pour récompense de laquelle indue vexation et en rémunération de sa témérité il* " *obtiendra une immunité et exemption de dépens. Autrement serait astreindre les advocats de commettre leurs affaires entre les mains* " *d'autres personnes de semblable qualité, qui, vraysemblablement ne prendroit rien d'eux, ou de faire signer les écritures par eux ; car de* " *remettre leurs salaires en ligne de dommages et intérêts ce serait une chose infinie et qui d'ailleurs ne s'est jamais pratiquée.*

" La raison de Maistre Clément Vaillant est, *que qui peut et veut ne doit estre empêché d'écrire et de plaider pour soi.*

LA JURISPRUDENCE DU CODE.

Les coutumes et les décisions des cours souveraines. Par M. C. Ferrière, Livre VII, Paris, Edition of 1684.

" *Quoique celui qui a obtenu gain de cause ait fait lui-même toutes les écritures, toutefois il obtiendra la condamnation de dépens contre* " *sa partie, parce qu'il n'est pas juste que sa partie, qui a succombé*, profite de son travail, *et il faut qu'il y soit condamné comme si c'était un* " *autre qui les eût fait. Outre que cela serait injuste autrement*, parce que celui qui aurait obtenu gain de cause, aurait pu employer son " temps pour d'autres et faire le même gain qu'il doit avoir fait en travaillant pour lui-même, s'il ne pouvait pas en exiger le salaire."

Code Civil ou Commentaire sur l'Ordonnance de 1667, par M. Serpillon, Conseiller Civil, etc. Titre 31e [*Des Dépens.*] *Edition of* 1776.

" Toute partie soit principale ou intervenante, qui succombera même à un renvoi déclinatoire, évocations ou règlement de juges " sera condamnée aux dépens indéfiniment, nonobstant la proximité ou autres qualités des parties, sans que sous prétexte d'équité, partage " d'avis, ou quelque autre cause que ce soit, elle en puisse être déchargée ; Défendons, à nos cours de Parlement, Grands Conseil, cours des " aides et autres, nos cours, Requête de notre Hôtel et du Palais et à tous autres Juges, de prononcer par hors de cour sans dépens, Voulons " qu'ils soient taxés en vertu de notre presente ordonnance au profit de celui qui aura obtenu définitivement, encore qu'ils n'eussent été " adjugés, sans qu'ils puissent être modérés, lquittés ni réservés.

" *Quoiqu'une partie ait fait elle-même les écritures de son procès, les dépens ne lui en sont pas moins dûs*, parce qu'il ne seroit pas " juste que la partie qui a succombé, profitât de son travail. D'ailleurs, celui qui a obtenu gain de cause auroit pu employer son temps pour " d'autres et faire le même profit dont il seroit privé, s'il ne pouvoit exiger ses vacations."

Procédure Civile du Chatelet, Paris, Edition of 1779, *de l'Instruction, liv. II, partie II, par Mr. Pigeau, Avocat.*

" *Les procureurs peuvent exercer leur ministère pour eux*, leurs femmes, enfants, et parents, à la différence des huissiers et autres " officiers de justice."

Conférence de Bornier, Tome 1*er, Edition*, 1729, *Titre XXXI, Des Dépens.*

" Il faut encore observer, que quoique la partie ait omis de demander la condamnation des dépens, cette omission ne donne point d'atteinte " à la sentence, et n'empêche pas que la partie qui succombe n'y doive être condamnée, tout de même que si l'on les avoit demandez. La " raison est, parce qu'en matiere de contrats et de sentences on supplée aux choses, *de quibus verisimile est partes cogitasse. Gloss, in l.* 3 " *§ si rem, verbo Fortassis, de leg.* 3. *Anfrer. decis.* 5. *Mattenl. Singul.* 81. *Rebuff. trait. de Expens. art.* 2. *Gl. un. num.* 49. *Boer. decis.* 18 *G. P. qu.* 55. *& ibi Ravchi.*"

" Cette condamnation étoit si indispensable, que si le juge n'avoit pas prononcé sur les dépens, il étoit obligé de les payer en son nom " propre à celui qui avoit gagné le procès par son jugement."

The Judges of the Court of Queen's Bench being divided on the question of costs, directed the the Prothonotary of the Superior Court to certify the practice. That Officer accordingly certified that since Sir James Stuart became Chief Justice in October, 1838, the uniform practice had been to grant costs to Attorneys who conducted their own causes.

In proof of this practice during a period of twenty-three years, I would cite the cause No. 846, decided upon the 2nd June, 1846. The Plaintiff, "*James Motz, Advocate*," on that day obtained judgment against the two defendants, Lampson and Arnold, and although he had conducted his own case in person, the Court granted fees. That Court was composed of the four Judges, Chief Justice Sir James Stuart, and Justices Bowen, Panet and Bedard. A different course may have been previously pursued, but the practice was thus settled and adhered to from the above-mentioned date. It is inconceivable that you should ignore the existence of that practice. To prove it the case of Motz ought to suffice. But in April, 1839, three similar judgments were pronounced--Firstly. No. 632, in which J. U. Ahern was Plaintiff, another, No. 643, in which J. W. Lloyd was Plaintiff, and a third in which Félix Fortier was Plaintiff, all three practising Attorneys, as you know. I submit further that the case of a Defendant is more favorable than that of a Plaintiff. Then there were in 1856, No. 2133, Allen vs. Gilbride, in 1857, No. 1417, Pentland vs. Smith, in 1859, No. 1959, Pentland vs. Bell, and No. 2147, Pentland vs. Bell.

The series you see is unbroken and, as Judge Mondelet intimated, in the District of Montreal, the question has never been raised.

In conformity with that practice, you yourself Mr. Justice Duval have granted costs in such a case. It bore the No. 1085, and by the judgment dated 28th June, 1851, which you pronounced, fees were allowed to the Plaintiff, Lawrence Ambrose Cannon, who, suing as Advocate and Attorney, had appeared in person. In that case too the Attorney for the Defendant, a widow, had compassionately made the objection. The reason assigned for denying me fees was, however, that I conducted my own case—a point relative to which no kind of evidence was adduced.

I am in possession of office copies of your judgment, nor am I aware of any adverse decision, and the Court certainly cited none.

Judges who adjudicate upon the fact are apt to sneer at Juries. Jurors are certainly not perfect, but they are a check upon Judges. The latter are no better than other men, and I have known Judges much worse. To grant or deny costs at pleasure was in France a common mode of favoritism, and in that country the Legislative power seems to have been incessantly engaged in promulgating edicts for the repression of that abuse. You will have noticed that the successful suitor who was denied his costs had a right of action against the unjust Judge who pronounced the judgment, and it is my intention to institute against you an such action. Of course, we shall then hear a great deal of the immunities and privileges of English Judges, but on that occasion I shall have a word or two to say and wont anticipate.

You rely upon Jousse, and make light of Serpillon. The difference between them is this, that Jousse gives his own opinion, Serpillon the opinions of earlier writers confirmed by his own. But Jousse speaks only of the Avocat ? How does that apply to what from your judicial eminence you call a " Practising Attorney." Then Jousse admits the right of the *Avocat* to sue for compensation by a distinct action. The two authors then only differ as to the manner in which the claim should be enforced. According to Jousse I could bring an action to recover " des dommages et intérêts à cet égard," against my adversary. According to all the other authorities I am entitled to recover in the original action. Which course do you prefer, a single action decisive of the whole controversy or a series of them ?

17. " Were it required to cite any case to show the wisdom of the Rule, the present might very properly be selected. The zeal of the " Respondent, carried to excess, has not only caused angry discussions between him and the Experts, but it has led to violent altercations " with at least one witness, who has instituted against the Respondent an action of dommges for slander, lately submitted to this Court."

An Englishman, arrived in Canada for the first time in 1854. He reached the *Parish* of Beauport in December, and probably never saw the river free from ice and snow until May or June, 1855. Nevertheless produced as a witness by my adversary, this man undertook to describe the condition of the river in September, 1852, two years and three months before his arrival : and in your judicial capacity you would have interdicted such remarks in the exercise of the right of self-defense, as

would be naturally wrung from any defendant on such an occasion. "An if, and if says the Lawyer," had the case been yours would that have been your opinion? Your stepson in law seems to have imbibed some of your views, and he evidently imagines himself to be invested with some of your authority. He has accordingly made a report which has been severely animadverted upon by all the Judges, yourself only excepted. I am not however aware that, he complains of my personal deportment, and on the contrary I have understood, that all the experts had used in reference to my conduct in their presence complimentary language. It is certainly my earnest desire, and invariable custom to be civil. It is indeed with me a constitutional necessity, but then one occasionally meets people so coarse and swinish!

18. "Had the judgment awarded costs to the Respondent, how could a Judge in vacation have taxed, in favor of the party, the fees "of office allowed to the Attorney? Let it be remarked that the Provincial Statute authorises Courts of Justice to make a Tariff of Fees, in "favor of practising Attorneys, but does not authorise them to grant them to either party, Plaintiff or Defendant. The Court therefore "could not grant the Respondent any more than it would have awarded had he been a trader or a mechanic. This appears reasonable. "Were a different rule laid down, a practising Attorney might become the terror of his neighbours."

A practising Attorney waging an aggressive warfare might be obnoxious to the suspicion of terrorism which you suggest—but it cannot apply to an unhappy man, acting as I do, *purely on the defensive!* Then you know that there is a canon which settles the point, *cessante ratione cessat lex.*

The rule that you have laid down is, however, as a measure of precaution, so easy of evasion as to be quite inoperative. A practising Attorney who should desire to flourish in history as a "terrorist," would always find an accomplice ready to lend his name, and to sign all the requisite papers—the very case supposed by Gastier in 1665.

Could you but "*lay down a rule*" to prevent the rich suitor from grinding the poor—could you but interpose, by any means, between the pettyfogger and his victim—what a public benefactor you would become.

19. "Serpillon's opinion (cited by the Respondent), is of little weight. He refers to no decisions of the Courts, and his reasoning is "strongly against his opinion. He says a lawyer ought to be paid for his work. This granted, what answer could be given to a shopman "or mechanic, claiming to be indemnified for loss of time? What amount could the Judge allow? Certainly not the fees given by the "tariff, which were never intended to indemnify a party to the suit for his loss of time."

Your above written reasoning is not convincing nor indeed quite intelligible. Does the Statute exclude an attorney from being plaintiff or defendant? Is he less an Attorney because he is plaintiff or defendant? Is there not a tariff of fees for Attorneys and is there a like tariff for Traders and Mechanics? Is a practising attorney prohibited by law from holding real estate? And should he as holding real estate be dragged into court, and be kept there for nearly ten years, is he to be stigmatized as "the terror of his neighbors" because he defends himself successfully?

Mr. Justice Duval, the power of an Attorney for evil is controled by the power of the court for good. The Attorney can be at all times restrained by the court, always promptly and effectually restrained: but the Judge is scarcely within the reach of any human tribunal. Without the intervention of the Royal prerogative of mercy, Gray, whom you condemned to death at Montreal, would have been hanged! And the enquiry into the failure of justice in the case of Corrigan having been effectually stifled, the manes of that martyr are not yet appeased.

Your eyes then might have been profitably turned in another direction, but had I been a practising Attorney I durst not have compromised the interests of my clients by such an enormity as in dissecting your opinion you will hold me to have committed. I am not at all insensible to the losses, the difficulties and the dangers attending the vindication of my rights, but I am ashamed of the fear of the Judges exhibited in so many quarters, and having suffered prodigiously, being indeed without hope, I borrow courage from despair.

A. GUGY.