The Canada Law Journal.

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ADMISSIONS TO LEGAL STUDY.

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

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

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

JUNE 1867.

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

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

SEPTEMBER, 1867.

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

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

JUDICIAL PENSIONS.

To the Editor of the Canada Law Journal:

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

Yours,

X. E. B.

LAW REFORM IN ENGLAND.

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

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

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

NOTICES OF NEW PUBLICATIONS.

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

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

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

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

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

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

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

APPOINTMENTS.

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

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

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

BANKRUPTCY—ASSIGNMENTS—PROVINCES OF QUEBEC AND ONTARIO.

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

THE UNANIMITY OF JURIES.

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

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

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

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

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

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

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

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

The French and German rule, and, I be-

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

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

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

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

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

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

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

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

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

ing many opinions of the minority of our supreme benches?

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

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

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

FRANCIS LIEBER.

NEW YORK, *June 26th*, 1867.

MICHAELMAS TERM IN ENGLAND.

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

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

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

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

* This was written in November of last year.

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

A BOOK ABOUT LAWYERS.*

(*From the American Law Review.*)

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

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

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

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

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

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

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

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

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

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

LAW JOURNAL REPORTS.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

MONTREAL, June 8th, 1867.

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

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

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

Held, that his intervention was properly received.

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

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* To be concluded in next number.

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

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

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

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

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

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

Drummond, and Mondelet, JJ., concurred.

Judgment confirmed, Duval, C. J., dissenting.

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

A. & W. Robertson, for the Respondents.

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

Retaining fee—Action for services rendered as advocate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* Not reported.

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

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

The *motifs* of the judgment are:—

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

Leblanc, Cassidy & Leblanc, for the Appellant.

Cross & Lunn, for the Respondent.

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

Negligence—Contractor—Damages.

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

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

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

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

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

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

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

DRUMMOND, J., concurred.

Torrance & Morris, for the Appellant.

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

June 3.

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

Notice to terminate lease—Transmissible right.

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

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

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

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

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

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

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

Judgment confirmed.

B. Devlin, for the Appellant.

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

MONTHLY NOTES.

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

June 8th, 1867.

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

Will—Donation—Substitution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dorion & Dorion, for the Appellants.

E. Barnard, for the Respondents.

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

Action for Slander—New Trial.

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

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

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

Chapleau & Rainville, for the Appellant.

John Monk, for the Respondent.

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

Will—Propre fictif.

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

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

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

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

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

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

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

Drummond, and Mondelet, JJ., concurred.

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

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

Lafrenaye & Armstrong, for the Appellants.

Leblanc, Cassidy, & Leblanc, for the Respondents.

RECENT ENGLISH DECISIONS.

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

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

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

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

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

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

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

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

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

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

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

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