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A MAGAZINE OF JURISPRUDENCE.

Edited by James Kirby, Advocate.

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The Canada Law Journal.

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

PROEM TO VOLUME THE THIRD.

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

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

QUEEN'S COUNSEL.

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

MONTHLY NOTES OF CASES.

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

INDIAN MARRIAGES.

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

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

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

THE RETIREMENT OF MR. JUSTICE AYLWIN.

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

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

THE CODE OF CIVIL PROCEDURE.

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

REGISTRATION IN THE PROVINCE OF QUEBEC.

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

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

DRUMMOND COUNTY.

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

APPOINTMENTS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. F. W. TORRANCE ON ELOQUENCE.

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

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

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

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

First.—The composition of an oration or speech.

Secondly.—Its delivery.

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

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

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

*St. Andrews.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with that received from an excellent piece of music."

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

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

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

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

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

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

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

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

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

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

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

BANKRUPTCY—ASSIGNMENTS.—PROVINCES OF QUEBEC AND ONTARIO.

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

BANKRUPTCY—ASSIGNMENTS.—*Continued.*

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

LAW JOURNAL REPORTS.

SUPERIOR COURT.

April 12.

LACOMBE ET AL. *v.*

DAMBOURGES ET AL.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The following is the judgment recorded:

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

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

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

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

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

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

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

July 9th, 1867.

CONNOLLY *v.* WOOLRYCH.

Marriage—Indian Territory—Domicile.

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

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

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

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

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

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

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

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

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

Perkins & Stephens, for the plaintiff.

Cross & Lunn, for the defendant.*

MONTHLY NOTES.

SUPERIOR COURT.—July 9.

MILLER *v.* FERRIER.

Prothonotary's Certificate—Putting in Bail.

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

CAMERON *v.* CUSSON.

Accountant's Report.

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

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

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

LALIBERTE *es qual. v.* MORIN.

Seduction—Damages.

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

LAROCQUE *v.* THE MERCHANTS' BANK.

Deed of Sale—Assessment.

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

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

BEAUDRY *v.* BROUILLET *dit* BERNARD.

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

MULLIN *v.* RENAUD.

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

DURNFORD *v.* FAVREAU.

Informality in Warrant.

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

DURNFORD *v.* ST. MARIE.

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

DURNFORD *v.* CYPIOT.

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

RECENT ENGLISH DECISIONS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE U. S. JUDICIARY.

(*From the American Law Register.*)

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

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

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

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

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

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

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

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

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

(*To be concluded in next number.*)

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

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