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REVUE CRITIQUE

DE

Législation et de Jurisprudence.

THE JUDICATURE SYSTEM OF THE PROVINCE OF QUEBEC.

In the "Bulletin de la Société de Legislation Comparée," issued in Paris in the month of June, 1872, appeared a "Communication sur le Code de Procédure Civile du Canada et notamment sur le jury en matière civile," by M. Barboux, Avocat à la Cour d'Appel.

M. Barboux bases his communication on Mr. Gonzalve Doutre's work on the "Code de Procédure Civile."

The communication shows a great deal of study, a wonderful familiarity with our system, and a spirit of impartiality but rarely met with amongst advocates when discussing the merits of a foreign system of procedure.

M. Barboux divides his subject into the following heads: 1o. Organisation Judiciaire; 2o. Formalités générales de procédure et enquêtes; 3o. Procès par jury. He does not pretend to treat exhaustively all the matters provided for in the Code, he abstains from observations on the articles analogous to those of the Code Napoleon, restricting his remarks chiefly to the points of difference existing between the two systems.

The Judicature system of a country is the machinery by which its law is put into operation, and justice meted out to its citizens.

The meting out of justice in all civilized countries is one of the attributes of sovereign power. Exercised in the earlier ages of the world by the heads of families, as society increased in numbers and nations were formed, chieftains and kings became the judges of the disputes between their followers or subjects.

The judgments so pronounced were looked upon as of divine inspiration, and were carried into immediate effect by their own officers. But the labor so entailed, as the operations of society became more extensive, was too great for them to perform, and we then find judges named as deputies of the sovereign to discharge certain judicial duties.

In Rome, upon the establishment of the Republic, the duties of the supreme judicial office, up to that time discharged by the kings, devolved on the Prætor, to whom also "was transferred "the undefined supremacy over law and legislation which always "attached to ancient sovereigns and which is not obscurely rela-"ted to the patriarchal and heroic authority they had once en-"joyed." (*Maine's Ancient Law*, c. 3). The Prætor then became, so far as the judicial power was concerned, the representative of the sovereign power of the Republic.

Shorn to a great extent of legislative power in all civilized countries, judges now-a-days are restricted to the explanation, interpretation and application of existing law, created by the sovereign power of the country, to cases presented before them. It is true that in England, Courts of Equity still retain, nominally powers of legislation, but even there the principles of equity have become so fixed by precedent that the legislative power of those Courts has lost its elasticity and has settled into judge-made law.

Moreover, the tendency of modern opinion is to regard stability in judicial decisions as far preferable to the fluctuations in jurisprudence consequent upon the rendering of judgments according to the principles of what are called "equity and good conscience."

Very great differences exist between the judicature systems of France and England with respect to civil matters. In Quebec the English system, with respect to the organization of Courts has, in great part, been adopted. The chief differences between the Superior Court and the English Courts of Common Law lie in the system of Procedure, and in the fact that the Superior Court has jurisdiction in equity, not to be compared, however, in extent, so far as practice is concerned, with the Courts of Chancery in England. We have our Circuit Courts answering to the English County Courts; the Queen's Bench, Common Pleas and Exchequer to our Superior Court; and the Exchequer Chamber to our Court of Queen's Bench. In England there are no special jurisdictions, unless the Court of Equity may be so considered, whilst in France les Tribunaux de Commerce,

les Tribunaux d'Arrondissement et les Conseils de Préfecture et les Conseils de Prudhommes, dispense the law to particular classes of cases.

To the mass of society in Quebec the judicature system is unknown. Although of the very highest importance, men out of the profession care but very little for the perfection of the machinery to which they are indebted for the security of their lives and properties. So long as the individual is not personally injured and fails in obtaining redress, so long does his carelessness continue. It is only when the imperfections are brought home to him, by a personal loss, that he gives vent to his indignation at the supineness of the public.

We propose to sketch our system of judicature in this article and to point out its defects.

As already mentioned, the Superior Court is the Court of original jurisdiction over all cases not falling within the jurisdiction of the Circuit or Admiralty Court.

The Circuit Court has exclusive jurisdiction over all cases where the amount sought to be recovered does not exceed $100, and in all suits for school taxes or school fees, or concerning assessments for the building or repairing churches, parsonages and churchyards, whatever may be the amount of such suits. It has also concurrent jurisdiction with certain Justices of the Peace over certain classes of cases under the Municipal Act, and has also appellate jurisdiction over certain other classes of cases under the same Act.

It has also exclusive jurisdiction in the country districts, but subject to appeal, over all suits in which the sum or value of the thing demanded exceeds $100 but does not exceed $200, subject to the exceptions mentioned above, and over all suits for fees of office, duties, rents, revenues and sums of money payable to the Crown, or which relate to any title to lands or tenements, to annual rents or such like matters whereby rights in future may be bound over, though the amounts claimed be under $100; also, concurrent jurisdiction with the Superior Court over judgments or orders rendered or made within the limits of the District or Circuit for which it is held, by means of the writ of *certiorari*, and over suits in cases of illegal detention of lands held in free and common soccage, and it has, moreover, an appellate jurisdiction over certain classes of judgments rendered in the Commissioners Courts; and in certain special cases suits may be evoked from the Commissioners Courts.

The Court of Queen's Bench on the Appeal side has jurisdiction by Writ of Error or Writ of Appeal over all final judgments rendered by the Superior Court, save in cases of *certiorari* and in certain matters concerning municipal corporations or offices, as provided in art. 1033 of the Code of Civil Procedure.

The jurisdiction of the Court of Vice-Admiralty extends to suits for seamen's wages over a certain amount, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to Her Majesty's service at sea, salvage and droits of admiralty.

One Chief-Justice and nineteen Judges administer the law in the Superior and Circuit Courts, all of whom are styled Judges of the Superior Court. Six, nominally, resident in Montreal, three in Quebec, one in Three Rivers, one in Sherbrooke, and the others scattered singly in the country districts.

The Court of Queen's Bench is composed of one Chief-Justice and four Judges, whereof the Chief-Justice and one Judge are resident in Quebec, and three Judges reside in Montreal.

The Superior Court in *banco* is held by one Judge and sits in Montreal in three divisions, whereof one deals with motions, ex parte cases, and demurrers; the other two with inscriptions on the merits. The terms are held, for the Districts of Montreal and Quebec, monthly, save in January, July and August

The Circuit Court sits in Montreal and Quebec for five days in each month, save January, July and August, but the Judges also appoint other days in each month for the hearing of cases.

In the country districts the Terms are generally held quarterly, and days out of Term are fixed for enquête and enquête and final hearing.

The original system of taking evidence, followed exclusively until within fifteen years, save where a jury trial was ordered, is to examine the witness merely in presence of the parties and their counsel; questions are put and answered, and the counsel examining or cross-examining as may be, dictates to the clerk (a law student generally) the purport of such question and answer,—the judge presiding paying no attention to the evidence or to the witness, and merely deciding on objections made to questions.

The defects of this system are so many and obvious that it is wonderful it should have been persisted in for such a length of time. In the first place, the handwriting of the clerk employed, in eight cases out of ten, is so miserable that it is

exceedingly difficult for counsel and judges to decipher the depositions. 2o. The evidence of the witness is given in the words of the counsel examining him, consequently the most ignorant bumpkin, if examined by a well educated counsel, appears to give the evidence of a well educated man, whilst a learned man if examined by an uneducated counsel figures as ignorant of the rudiments of education. A Frenchman, unable to speak English save very incorrectly, if examined in English gives his evidence apparently with a perfect knowledge of the idiom and beauties of the English language, whilst a sturdy Yorkshireman, or fluent Irishman, appears to speak French with all the ease and correctness of a native-born Parisian. 3o. The Judge before whom the case is finally heard, not having seen the witnesses give their evidence, is unable to test their credibility by their looks, gestures, and manner. The way in which a witness gives his evidence always must and should produce a great effect on the judge who is to appreciate the value of his testimony. *It is impossible for any judye fairly and properly to weigh evidence who does not see and hear the witness deliver his testimony in his, the judge's, presence.*

When such is the case where the words of the witness are accurately taken down in the deposition, what is the position of the judge when in lieu of the natural expression, his ideas disguised in the words of Counsel, are placed before the Court to be appreciated. To judge of the degree of credibility to be attached to the depositions of witnesses so treated, is beyond the power of any judge. He is liable to be deceived and cheated at every turn. He is a seeker after truth, and the habiliments in which witnesses appear before him, are, it would appear, expressly calculated to hinder and impede him in his researches.

Sir George Cartier, when Attorney General for Canada East, struck by the wretchedness of the system in force for taking evidence, essayed to introduce the principle of the judge presiding at enquête, taking but one case at a time. He also introduced the system of enquête and final hearing. He essayed also to make the judges take notes of the evidence themselves. But the Bar had and has such a *vis inertiæ*, that between the judges and the lawyers, his amendments for a long time bore no fruit, and it is only within the last two or three years that the system of enquête and final hearing has been appreciated. The taking of notes by the judges, however, is no longer obligatory,

and the consequence is that of the great mass of evidence, three-fourths are taken under the old system.

So soon as the evidence taken under the old law is closed on both sides, the case is inscribed for hearing and is argued from the written depositions and exhibits before one judge, who previous to such hearing knows nothing of the case. After the argument he has to read through the record, apply the principles of law to the facts, and give the judgment.

It is almost impossible properly to estimate the loss of time, consequent upon the system, to suitors, counsel and judges. A case at Enquête drags its weary length along for weeks, months and years. Depositions of one hundred and fifty pages are not very unusual; thirty and forty witnesses have often been examined in one case; and a case was lately decided in Montreal, in which one hundred and seven depositions were taken. Fancy the unfortunate judge doomed to wade through a record wherein even twenty witnesses have been examined at moderate length. Imagine his efforts to decipher the writing, to arrive at the points established by each deposition, and it is then possible to appreciate the waste of life which our miserable system perpetuates. One, two, perhaps three months pass, ere owing to the right of precedence of other cases, that of A. *vs.* B. is taken up, the argument has disappeared from the judge's memory, he has to labor through the pages of the record, and when at last he makes up his mind, he has not the satisfaction of feeling that he has, in all probability, rendered justice to the suitors.

The mass of irrelevant matter which encumbers the depositions is enormous. The facilities for the perpetrations of fraud are very great. The labor entailed upon counsel and judges bears no proportion to the work they should be called upon to perform. Suitors and witnesses waste their time in attendance on the Courts. The evidence is presented in disguise to the judges.

The system of judicature which should alone be tolerated in a civilized country, should be one shorn of empty forms, simple in its practice, quick in its operation, bringing witnesses, parties, counsel and judges, face to face with each other as the actors, with the public as the spectators of the contest.

Our system is one encumbered with forms; declarations and pleas are drawn with a great deal of the needless special pleading of the old common law special pleaders, and the discursiveness

and argumentativeness of the French pleader of last century. It is, in fact, a cross between the two systems, with all the bad and with but few of the good, points of both. By abolishing the verbiage of a plea of payment or compensation, and of the general issue, and allowing a defendant to plead generally "payment," or "compensation by the account hereunto annexed," or "the general issue," an immense waste of time would be avoided. By the abolition of articulations of facts and answers, a useless expenditure of time and trouble would be put an end to. Declarations should not be lengthy documents, setting at defiance the unlearned, but should on the contrary be short and succinct statements of facts, capable of comprehension by all persons able to read. So far as pleas or even declarations are conceaned, conclusions might be abolished, the Court applying in all cases the conclusions flowing in law from the facts stated.

With a population of one million two hundred thousand souls, the Province of Quebec cannot furnish twenty-six first class judges, and the consequence is that even were the Government to make the best selection possible, one-half at least of that number would be second or third-class men. When it is taken into consideration that England, with twenty-one and a half millions, has only twenty-eight judges of the higher Courts, apart from the Law Lords and the paid Judges of the Privy Council, corresponding to our Judges of the Court of Queen's Bench and Superior Court, the folly of our not properly dividing the classes of judicial officers is apparent. But the great leaning of the French mind is to the creation of offices, in which any number of adherents can be maintained at the expense of the public. A Government office is a species, according to their ideas, of terrestrial paradise, and it is the duty of every man, in the interests of the human race, to create as many of those paradises as he possibly can. Who knows but in one of those charming creations of his own, the statesman, weary of his work, tired of the world, disgusted with society's refusal to acknowledge his blazing talents, may for years pursue the even tenor of his way at his country's expense, and reap in a work of his own, the reward of his labor in the cause of the poor, the blockhead and the lazy.

Thirty years ago there were but five districts in the now Province of Quebec. Ten judges of the Court of Queen's Bench, were then sufficient, aided by the Circuit Judges, to dispose of the legal business of the community. At that time the means of

communication were not to be compared with those in existence now. Railroads, save between Montreal and St. John's, were unknown. Steamers plying regularly to the villages on the St. Lawrence below Quebec, were undreamt of.

With the introduction of greater facilities for travel, it became necessary, according to our legislators, to decentralize, to place a court house and gaol within easy reach of every *habitant* in the country; and thanks now to the march of improvement, Quebec is split up into twenty Districts, in each of which justice is administered.

It being impossible to obtain twenty-five first-class men to act as judges, the Quebec Legislature at its last Session made provision for an increase in the number to thirty-one, on the principle, it is to be supposed, of making up the lack of quality by numbers. The judges have not as yet been named, but no doubt ere long the places will be filled up.

All final judgments, save in cases of *certiorari*, and certain classes of municipal matters, rendered in the Superior Court, can be taken into Review before three judges of that Court, if the amount claimed is not over $500, but the party in whose favor the judgment is rendered, by exercising an option, can force the party inscribing for Review to take the case into the Court of Queen's Bench; and all final judgments in the Superior Court can be taken directly into the Quren's Bench, with the above-mentioned exceptions.

The Court of Review, and the Court of Queen's Bench, appeal side, decide as well upon the facts as the law in each case. An appeal or an inscription in Review, is in fact a proceeding to secure merely a re-argument. We have therefore perpetuated in those Courts the weak points and absurdity of the system of taking evidence and hearing established in the Superior Court in cases taken according to the old practice. In cases which have been proved and heard under the enquête and final hearing at the same time system by the same judge, the Appeal Courts decide questions of fact on inferior evidence to that laid before the judge in the lower Court.

The writer of this article published on the 3rd December, 1857, a letter in the *Quebec Morning Chronicle* on some of the subjects treated upon in this article, and fifteen years' experience in practice have convinced him of the justice of the following remarks which appeared therein: "Let all cases be inscribed for

enquête and hearing at the same time, and for a particular day; let all the witnesses for plaintiff and defendant be examined one after the other; the Counsel immediately on the completion of the testimony to argue their cases; and if possible the judge then to render his judgment. . . . . And now with respect to appeals, that which I would suggest is a departure from the Act as at present it exists. I would abolish the present Writ of Appeal entirely, and substitute in its room and place a Writ of Error by which the Court of Queen's Bench would have authority, solely to decide on the law of the case, exercising however, the revising powers heretofore vested in the Superior Court with respect to jury trials, enabling them to order a new trial when the justice of the case would require it.

"My grounds for refusing to the Queen's Bench the right to decide upon the facts are the following: As I have already mentioned I believe that the system of judging of the facts of a case from written depositions is rotten and absurd, and consequently that no man, however experienced, learned, and talented he may be, can come to a just and true decision on the facts of a case without seeing the witnesses deliver their testimony. Such being my opinion, were the judges of the Queen's Bench to sit in Appeal on the facts of a case, they would, according to my premises, judge on written depositions, which are rotten and absurd means of arriving at the truth of a case. They would not have the advantage of seeing the witness deliver his testimony, without which they could not arrive at the truth and justice of the case, and they would judge on inferior information to the Court below. If a Writ of Appeals is to be allowed, I see no other way in which justice can be rendered to the parties, save by ordering the witnesses heard in the Superior Court, again to deliver their evidence before the Court of Queen's Bench."

Since the writing of the above article. the Court of Review has been established, which was and still is a species of intermediate Court of Appeal. The system by which Appeals are multiplied and encouraged is decidedly a bad one. In Quebec it was quite possible to ascend through three Courts of Appeal ere a judgment became really final, to wit, the Court of Review, the Court of Queen's Bench, and the Privy Council. To pass through two Courts of Appeal should satisfy the most litigious suitor. The Lord Chancellor (Lord Selborn) in introducing a measure to establish a Supreme Court of Judicature and a High

Court of Appeal, made use of the following expressions in the House of Lords:

"I will now remind your lordships of the present state of the appellate jurisdiction in this country. We have four Courts of Review —the Exchequer Chamber, the Court of Appeal in Chancery, your lordships' House, and the Judicial Committee of the Privy Council. These Courts give to the dissatisfied suitor, although not in all cases, the opportunity of a double appeal. In Admiralty cases there is only one appeal—to the Judicial Committee of the Privy Council. In Lunacy cases also there is only one appeal to the Judicial Committee. But all the cases of Common Law must go through a double appeal. They must first go to the Exchequer Chamber, and in every case where an appeal is taken to the Exchequer Chamber it may also be brought to this House. It is not so in Chancery. In Chancery cases there is an option generally for the appellant either to come to this House or, if he prefers it, to a Court of Appeal in Chancery, but every judgment of that Court is subject to an appeal to this House. Therefore, there is generally a system of double appeal for the suitor. I never concealed my opinion that this is not a good system. Where you have a good Court with sufficient judicial power to command the confidence of the country, it is better that there should be no double appeal. I would not exclude the power where you have an appeal heard by a small number of Judges of having it reconsidered by a larger number of Judges. But my opinion is that if you establish an adequate Court, it is desirable for the parties and for the general interest of the country that the decision of that Court should be final, and that you should not multiply appeals. You never can escape by going through any number of Courts of Appeal from the risk of differences of opinion in each and every one of them, and from doubts arising as to whether the last Court decided better than the one before it. What you want is to make as good a Court as possible, and to give it all the power and authority you can, and that, in my humble judgment, is best accomplished by making it final. I will now briefly review what was said in the useful discussion of the last few years, and I hope your lordships will pardon me if I first ask permission to read a passage from a speech delivered by myself in the House of Commons six years ago, when I moved this question. Your lordships will, at least, see that if I now express opinions on this subject they are not newly formed, and that they are indeed the same that I expressed at that time. Addressing the House of Commons on the 22d of February, 1867, I said—

"I will venture to state what has occurred to me as the best way of meeting all these difficulties before I say a word on the most difficult portion of the subject relating to the august tribunal of the House of Lords. Taking the three Courts I have mentioned alone—the Court of Error in the Exchequer Chamber, the Court of Appeal in Chancery, and the Judicial Committee of the Privy Council—I am of opinion, if the House agrees with the view I have expressed, that one Court of

Appeal is sufficient—that out of the Court of Appeal now existing in the Judicial Committee of the Privy Council you might, with some additions, form a most admirable Supreme Court of Appeal, capable of discharging the whole of the business, which is now done by that Court, and also by the Courts of Exchequer Chamber and of Appeal in Chancery. The constitution of the Judicial Committee of the Privy Council is most excellent, as far as it goes. I have no hesitation in saying that that Court, powerfully constituted, with a sufficient number of Judges to render it capable of subdivision, and comprising men conversant with different kinds of law—Common Law, Equity, and, it might be, Scotch law, as well as Colonial and Indian law—would be able to dispose of the appeals most beneficially to our jurisprudence, with great satisfaction to the country, and at no very great additional cost. You might have the Lord Chancellor, though, if the House of Lords retained its appellate jurisdiction, he would be required there frequently. You might also have the Lords Justices, and all the other eminent persons now constituting the Judicial Committee of the Privy Council. You might have two or three other permanent Judges with proper salaries, chosen with reference to qualities which are not ordinarly to be found in the Judges of the Court of Chancery. Some such measures as these have been suggested by high authority, as necessary to maintain in efficiency the Judicial Committee, even for its present purposes. I venture also to think that those who may hereafter fill the high office of Lord Chancellor might, considering the circumstances which often deprive the country of their services in that office, be called upon, *ex debito*, in consideration of their pensions (which are ample, though not too great), to give their services in the Supreme Court of Appeal, as they now voluntarily give them, from a sense of public duty, in the House of Lords. It would be thus quite practicable to form such a Supreme Court of Final Appeal as might unite the various jurisdictions now exercised by different Courts; and then I should certainly recommend that the Court should assemble in the same place as the other Law Courts—in the future home about to be provided for justice in the neighbourhood of those who practise the law, and not, as the Judicial Committee now does, in such an inconvenient place as the Privy Council Office in Downing-street. I do not conceive that there would be any constitutional objection, resulting from the relation of the Colonies to the Crown, to giving such a Court jurisdiction over Colonial and Indian appeals, because its Judges might be, and in practice would be, Privy Councillors, and, being so, would be qualified to advise Her Majesty on all matters of that kind."

The following passage occurs in "Memorials of his Time, by Henry Cockburn, one of the judges of the Court of Session of Scotland."—p. 189.

"On the general merits of the measure, the minds of good thinkers had come to nearly the result which after more discussion and delay, was at last actually adopted by Parliament.

1. The erection of an intermediate Court of Review would have failed in the chief object of relieving the House of Lords and would only have made the access to it more slow and expensive. It is very difficult for a small country divided into strongly opposed parties, to administer law to itself, solely by native Courts; especially after the people have been trained to expect purer justice from a higher and more distant tribunal. Much may be done for the protection of this tribunal by improving the native judicial system; but devices to obstruct the access to the great controlling power, though they may irritate, seldom satisfy."

In order to secure the proper administration of justice in civil cases, the judicature system must be recast; it may perhaps be here permitted to specify certain changes which should be made immediately. And first with respect to the taking of evidence in, and the hearing of cases in the Superior Court.

In 1870, a Committee appointed by the Montreal section of the Bar of Quebec, presented the following Report:

At a meeting of this Section of the Bar, held on the 21st day of February last the following resolutions were passed:

1st. On motion of E. U. Piche, Esquire, Q.C., seconded by W. H. Kerr, Esquire,

It was Resolved:

"That this meeting desires to affirm the principle, that the present system of taking Evidence before the Superior Court, in the Province of Quebec, is in the highest degree, unsatisfactory, to all persons concerned in the due administration of Justice, in that it does not even secure a faithful record of what the witnesses actually say, in that it also adds greatly to the labors of both the Bar and the Bench, is also in great measure the cause of delay in suits, and affords great facilities to persons desirous of committing fraud; and above all, that it deprives the Judge of the advantage of personally hearing and seeing the witnesses while under examination, and encourages perjury."

And on the motion of A. Cross, Esquire, Q.C., seconded by V. P. W. Dorion, Esquire,

It was Resolved:

"2nd. That the following persons be appointed a Committee, to suggest a remedy for the grievance complained of in the resolution just passed, viz.:

MM. A. A. Dorion, Q.C.
S. Bethune, Q.C.
E. Carter, Q.C.
T. W. Ritchie, Q.C.
W. H. Kerr.
A. Robertson, Q.C.
M. Doherty.
J. A. Perkins.
F. X. Archambault.
J. J. Day, Q.C.
C. A. Leblanc, Q.C.
F. P. Pominville, Q.C.
E. U. Piché, Q.C.
J. Doutre, Q.C.
R. Roy, Q.C.
L. O. Loranger.
H. F. Rainville.
Chs. Ouimet.

and to report to an adjourned meeting of the Bar, to be held on the tenth day of March next, at three o'clock P.M., and that this meeting do stand adjourned accordingly."

Your Committee have given the matter referred to them, their most careful consideration, and with all deference, would submit the following suggestions, as in their humble opinion, best calculated to afford the remedy sought for by the 1st Resolution of the Bar.

Your Committee, before proceeding however to state those suggestions, deem it proper to say, that your Committee in their deliberations, have been very materially assisted by Messrs. Bethune & Kerr, two of their members, who apparently, having previously given the matter deep consideration, came to the meeting of your Committee, prepared with their matured thoughts, which with some slight exceptions, were adopted by your Committee in the following suggestions which they have now the honor to submit for the consideration of the Bar:

1st. That all appealable cases in the Circuit Court, shall be removed to the Superior Court subject to present tariffs.

2nd. That all contested cases in the Superior Court, (except those of a summary character and those in which a trial by jury is claimed) shall be tried in open Court before a Judge, for which purpose, a Judge shall sit every Juridical day, from 1st September to 28th December, and from 10th January to 8th July.

3rd. That a Judge shall sit on the first two Juridicial days in each week, during said period, to decide questions of practice and all incidental proceedings prior to trial, and default and *Ex Parte* Causes; and the Evidence in all such cases, shall be taken down by a short hand writer and extended in the same way as in contested cases.

4th. An application for a *Commission Rogatoire* by any party to a case, shall be made within 8 days of the fyling of the answers to the articulations of Facts, unless the time be extended by the Judge.

5th. That the oral evidence in all contested cases, shall be given *vivâ voce*, in open Court before the Judge, and shall be taken down by a short hand writer, who, shall be a sworn officer of the Court, and on the demand of either party, and in all cases taken *en délibère*, if so required by the Judge, and on the Inscription of a case in Review, or the issue of writ of Appeal it shall be the duty of the short hand writer, to extend the evidence and certify the same as correct, and fyle the same of record.

6th. That the sum of 50 cents, shall be paid by Law Stamps on the deposition of each witness, after he is sworn, and before his examination is begun.

7th. That all contested cases (except those of a summary character and those in which a Trial by Jury is claimed, shall be inscribed when ready for Evidence) on the Rôle, after notice of at least 8 Juridical days.

8th, That each case shall be called, and tried according to its place on the Rôle, and the party on whom falls the burden of proof in the first instance, shall state his case and then adduce his Evidence, and the opposite party may either address the Court before or after adducing his Evidence; and the party commencing, shall in all cases, have the right to reply.

9th. That in all cases in which the oral evidence has been commenced under the old system, shall be inscribed on the Rôle after notice of at least 8 Juridicial days, and shall be further conducted to final hearing and Judgment, under the new system.

10th. That the Judge may render Judgement in all contested cases, on any day on which the same can be tried; and that, in any of the rooms set apart for the sitting of the Court.

11th. That in Trials before a special Jury, the oral evidence and the Judge's charge, shall be taken down by a short hand writer, who shall be a sworn officer of the Court, and shall be extended and certified by him as correct and fyled of Recood, on the demand of either part, or of the Judge and in case of notice for new Trial &c. &c.

12th. That the oral Evidence in all cases of a summary character, shall be taken down in the presence of the Judge who is to determine the same, by a short hand writer, who shall be a sworn officer of the Court, and shall be extended and certified by him on the demand of either party, or of the Judge, and in case of an inscription for hearing in Review or the issue of a writ or appeal.

13th. That each short hand writer shall be paid a salary of $2,000.00 *per annum* out of the consolidated Revenue funds of the Province.

All which is respectfully submitted.

Montreal, 2nd March, 1870.

JOHN J. DAY, *Chairman.*
L. O. LORANGER, *Secretary.*

At a meeting of this Section, held on the 10th day of March 1870, it was resolved:

That the above Report be received and printed both in French and English languages and distributed amongst the members of the Bar, to be taken into consideration at a special meeting to be held on the tenth day of May next, at 3 o'clock P.M.

J. O. JOSEPH, *Secretary.*

If the changes advocated in the report of the Montreal Bar were adopted, proceedings in Quebec would be very much assimilated to those now followed in Ontario, save that in the latter Province, the judge takes the notes of the evidence himself, whilst in Quebec that task would be confided to the short-hand reporter. (See Law Reform Act of 1868, S. 18, of Statutes of Ontario.)

With respect to the judges under the new system there would be no necessity for an increase in their numbers. In fact a smaller number could do the work, thereby increasing the efficiency of the Bench and restoring to the office a portion of its lost dignity. And here perhaps it may be permitted to suggest that there is a vast difference between the responsibility of the judges in the old Districts of Quebec, Montreal, Three Rivers and St. Francis, and those who appointed for the country districts. If we are to have a judge in each rural District, in many of them their duties will be very light. It is excessively unfair that they should be placed on an equality with the judges in the old districts whose duties are heavy. Their salaries at the present time are not the same; they do not perform the same amount of work; they do not incur like amount of responsibility why then give them the same title. Their position is inferior, give them an inferior title; call them Circuit or District judges, take from them the appellation of Judges of the Superior Court. It is unfair in the highest degree that a judge from a country district should be entitled, his commission being of older date, to outrank a judge in Quebec or Montreal.

With respect to the Court of Queen's Bench, the number of which it is composed is not good. Five being the number, a judgment of the Court below can be reversed by three judges of the Queen's Bench, against their two brethren siding with the judge of the Inferior Court, the opinion of three judges prevailing against that of three. There really is not any such difference between the judges of the Superior Court and those of the Queen's Bench, as to justify such an anomaly. And the system which renders such a thing possible should be changed. Reduce then the numbers of judges of the Queen's Bench to four, and the greatest possible majority would thereby be secured, three to one in that court for reversal; should the judges be equally divided in opinion, it would be merely ordinary courtesy to the judge who had given the judgment in the Superior Court, to confirm it.

The system of *delibéré* in the Queen's Bench is, as has already been remarked, a monstrous evil; three months elapsing as a general rule between the argument of a case and the rendering of the judgment, place suitors in a false position and aggravate the difficulties of persons seeking justice. The cumbrous mode, moreover, by which records are taken before the Queen's Bench and then prepared for argument should be done away with. In

lieu of the writ of appeal, the security bond, the reasons of appeal, answers to reasons, printed factums containing, now-a-days, an argument and the evidence of the parties, and the inscription for hearing, why not simplify matters by adopting the procedure made use of to take a case into Review? A simple inscription in appeal; a deposit of money to cover costs and factums. The inscription would be just as effective as the writ of appeal, the deposit would be far more satisfactory than the security bond, and the reasons and answers to reasons are useless forms, only embarrassing the record. Then it might be possible fifteen days after judgment in Superior Court to be heard in appeal, whilst now-a-days three months must elapse, as a general rule, ere the appeal record be ripe for hearing.

At present the Court of Queen's Bench, appeal side, sits four times per annum, both in Quebec and Montreal. The terms are trimestrial: commencing in Quebec on the first day of March, June, September, and December, and in Montreal on the eleventh day of the same months. Generally, the business of the Court is concluded in Quebec in six days; in Montreal in ten or eleven days. Two terms of the Court on its Crown side are held in Quebec and Montreal twice a year, each presided over by one judge, and occasionally a judge holds a term in one of the country districts. It may therefore be taken for granted that the Judges of that Court have, at least, six months a year to consider the cases argued before them and prepare their judgments. Here it may be remarked that their duties in Chambers are excessively light, so very trifling as to be hardly worth noticing.

It certainly would be but a very poor compliment to pay to the Judges of the Court of Queen's Bench to say that they are overworked. The fact is that they have a superabundance of time on their hands, and yet owing to causes, some known, others unknown, the business before that Court is got through with very slowly; arrears accumulate, time is wasted, and the patience of all parties is exhausted.

Let it not be supposed for one moment that it is the intention of the writer of this article to impute all the blame for this state of things to the judges. They are to blame to a certain extent, but the Bar is also justly open to censure for having allowed such a state of things to have lasted so long; to have submitted to a system so miserable in its plan, so defective in its details, so execrable in its operation.

In lieu of but eight terms of the Court of Queen's Bench, appeal side, a-year, four at Quebec and four at Montreal, which really make but four terms per annum, of eighteen days each, let that Court sit from the first to the thirteenth of each month in Quebec, and from the fifteenth to the thirtieth in Montreal, save in January, July and August. If there be no business before the Court, oblige the judges to remain in Quebec and Montreal during the whole of the time fixed for the sitting of the Court, in each of those cities. Time would thereby be afforded for the consideration of cases. One of the judges might be detailed to hold the Court of Queen's Bench, Crown side, at Quebec or Montreal, as might be necessary.

To sum up the changes advocated: 1o. The entire abolition of the present system of taking evidence in contested cases, and the substitution therefor of enquête before one and the same judge, the evidence to be taken in short hand continuously as in a jury trial, and the case to be heard on the merits, immediately on the closing of the evidence.

2o. The abolition of useless forms of pleading.

3o. The abolition of appeals on the facts of a case, giving in lieu thereof an inscription to the Court of Queen's Bench, appeal side, which Court should merely have the power of ordering a new trial or arresting the judgment as in a jury case.

4o. The appeal to be solely on the law of the case—the finding of the judge of the Superior Court as to the facts being special and final.

5o. The Terms of the Court of Queen's Bench to be more frequent and continuous during certain periods, and to be held by four judges.

If the profession but choose to exert itself, it is believed that we now have an Attorney General who has at heart the interests of the order to which he belongs, and who will, if he be sustained by the Bar and the Bench, strive so to shape the judicature system of the country as that it shall cease to be a reproach to all concerned in the administration of justice.

WILLIAM H. KERR.

CONSENT IN CONTRACTS.

It is declared by Art. 983 of the Civil Code of Lower Canada that "Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of law solely." By Art. 984, that there are four requisites to the validity of a contract: "parties legally capable of contracting; their consent legally given; something which forms the object of the contract; a lawful cause or consideration." By Art. 1058, that "every obligation must have for its object something which a party is obliged to give, or to do, or not to do."

In our Code there is really no definition of a contract. It would appear as if the Codifiers had become terrified at the onslaught made by Marcadé on the definition of a contract given in Art. 1101 of the Code Napoléon, and had thought that the best way to avoid all difficulties was to refrain from definitions. Consequently although contracts are given as one of the sources of obligations, there is really nothing to show what a contract is.

The Code Napoléon, on the other hand, thus defines a contract, "Art. 1101. Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose." By Art. 1126 it declares, "Tout contrat a pour objet une chose qu'une partie s'oblige a donner, ou qu'une partie s'oblige à faire ou a ne pas faire." Art. 1108 declares that "Quatre conditions sont essentielles pour la validité d'une convention; le consentement de la partie qui s'oblige; sa capacite de contracter; un objet certain qui forme la matière de l'engagement; une cause licite dans l'obligation."

Massé, No. 1430, thus defines a contract: "Une obligation est un devoir imposé à une personne de faire une chose. . . . Imposé par la volonté de l'obligé qui consent à se lier ou à s'obliger envers une autre personne, il constitue une obligation conventionelle, en d'autres termes, une convention ou un contrat." At No. 1434 he says, "Aujourdhui toute convention faite dans lu vue de s'obliger est un contrat."

Marcadé in his observations on Art. 1101 (4 vol. No. 383), says, "La definition que cet article donne du contrat et qui lui aurait convenu (à peu près) autrefois, est profondement inexacte

et beaucoup trop étroite dans le système du Code, qui a élargi singulièrement le sens du mot *contrat*, et l'a fait devenir synoyme du mot *convention*. Ceci demande quelques developpements.

"Toutes les fois que deux ou plusieurs personnes tombent d'accord entre elles, quel que soit l'objet de leur accord (pourvu bien entendu que ces personnes aient entendu faire un acte juridique) il y a dès lors union de volontés, *consensus in idem placitum ;* en un mot convention. La convention, en effet (*de venire cum*, se réunir, se rencontrer) n'est rien autre chose que l'accord des volontés." . . . . . "Les objets possibles d'une convention varient à l'infini ; mais ils rentrent tous dans un très petit nombre de catégories. Il y en avait autrefois deux, auxquelles notre Code en a ajouté une troisième. Dans le droit romain et dans notre ancienne jurisprudence la convention avait toujours pour objet ou 1o. de créer des obligations, ou 2o. d'éteindre des obligations préexistantes. "Une convention," disait Pothier, "est le consentement de deux ou plusieurs personnes pour former entre elles quelque engagement, ou pour en resoudre un précédent," mais aujourdhui la convention peut en outre avoir pour objet et pour effet immèdiat, 3o. de transferer la propriété (compare Austin post p. 174).

Larombière in the first volume of his treatise on obligations, No. 2, after giving the definition of a contract in Art. 1101 of the Code Napoleon, says, "Le contrat est une convention. . . Qu'est ce donc qu'une convention *duorum vel plurium in idem placitum consensus ;* un accord de volontés entre deux ou plusieurs personnes, et mot à mot, un rendezvous donné par elles dans la même pensée ; *nam sicuti convenire dicuntur qui ex diversis locis in unum colliguntur et conveniunt, ita et qui ex diversis animi motibus in unum consentiunt, id est in unam sententiam decurrunt.* . . . . . 3. Si tout contrat est une convention, toute convention n'est pas un contrat. Ce qui donne à une convention le caractère et ia force d'un contrat, c'est l'obligation qu'elle impose d'une côte et le droit qu'elle confère de l'autre ; obligation et droit, termes corrélatifs, idées inséparables, inconcevables l'un indépendamment de l'autre. Aussi l'article 1101, apres avoir dit que le contrat est une convention ajoute-t-il ; par laquelle une ou plusieurs personnes s'obligent, &c. Voilà le caractère essentiel du contrat ; il est essentiellement une convention obligatoire, c'est à dire susceptible d'être ramenée à exécution par les voies de droit.

"Une convention n'a de valeur réelle de même qu'elle n'a d'existence légale, que comme expression et résumé de volontés unanimes. Pour contracter, il faut donc convenir, consentir, *animo contrahendæ obligationis*, dans la ferme intention de s'obliger. Sans cette intention il n'y a pas de contrat, et la convention n'est pas seulement annulable, elle est réputée inexistante."

The Italian Civil Code (art. 1098) defines a contract as "the agreement of two or more persons to establish regulate or dissolve a juridical bond (*un vincolo giuridico*)."

The Indian Law Commissioners proposed to define a contract as "an agreement between parties whereby a party engages to do a thing, or engages not to do a thing." (2nd Rept. p. 11.)

Demolombe in his Treatise on Contracts thus defines an obligation: "L'obligation peut être definie: un lien de droit par lequel une personne determinée est tenue envers une autre personne determinée, à donner, à faire ou à ne pas faire quelque chose. (Comp. art. 1101).

Juris vinculum, dit Justinien, quo necessitate adstringimur alicujus rei solvendœ, secundum nostræ civitatis jura (Ins. lib. xiii princ.)

Telle est l'obligation qui fait l'objet de notre étude celle que, dans le langage juridique, on appelle l'obligation civile.

Deux éléments surtout la constituent, à savoir:

1o. Elle est, en effet, un lien de droit, *juris vinculum*, par suite duquel celui qui'en est tenu peut être actionné en justice afin d'être contraint, au nom de la puissance publique, d'en procurer l'exécution;

2o. Elle existe entre une ou plusieurs personnes déterminées et une ou plusieurs autres personnes déterminées; c'est à dire qu'elle est essentiellement individuelle et relative."

After giving at No. 12 the definition of a contract as it appears in art. 1101 of the Code Napoléon, M. Demolombe says "Or une convention en général c'est l'accord, le concours des volontés de deux ou plusieurs personnes sur le même objet: *duorum vel plurium in idem placitum consensus* (Ulpien b. 1, § 2, ff. de Pactis.)

D'on il suit que, si tout contrat est une convention; toute convention n'est pas un contrat: l'un est l'espece; l'autre est le genre.

Ce qui est caractéristique de la convention, qui constitue le contrat, c'est qu'elle est consentie, comme dit encore Ulpien

negotia contrahendi causâ (*loc. supra*) dans le but de créer une ou plusieurs obligations; et voilà bien aussi le sens de notre article 1101 que le contrat est une convention par laquelle une ou plusieurs personnes s'obligent."

In the ninth chapter of Mayne's Ancient Law, are the following observations: "A Pact was the utmost product of the engagements of individuals agreeing among themselves, and it distinctly fell short of a contract. Whether it ultimately became a contract depended on the question whether the law annexed an obligation to it A contract was a Pact (or convention) *plus* an Obligation. So long as the Pact remained unclothed with the obligation, it was called nude or naked.

What was an Obligation? It is defined by the Roman lawyers as "Juris vinculum quo necessitate adstringimur alicujus solvendæ rei." This definition connects the obligation with the *nexum* through the common metaphor on which they are founded, and shows us with much clearness the pedigree of a peculiar conception. (Compare 1 Demolombe Contrats .No. 8.) The obligation is the "bond" or "chain" with which the law joins together persons or groups of persons in consequence of certain voluntary acts (p. 313). The acts which have the effect of attracting an obligation are chiefly those classed under the heads of Contract and Delict, of Agreement and Wrong; but a variety of other acts have a similar consequence, which are not capable of being comprised in an exact classification. It is to be remarked, however, that the Pact does not draw to itself the obligation in consequence of any moral necessity; it is the law which annexes it in the plenitude of its power, a point the more necessary to be noted, because a different doctrine has sometimes been propounded by modern interpreters of the Civil Law who had moral or metaphysical theories of their own to support. The image of a *vinculum juris* colours and pervades every part of the Roman law of Contract and Delict. The law bound the parties together and the chain could only be undone by the process called *solutio*, an expression still figurative, to which our word "payment" is only occasionally and incidentally equivalent. The consistency with which the figurative image was allowed to present itself, explains an otherwise puzzling peculiarity of Roman legal phraseology, the fact that "Obligation" signifies rights as well as duties, the right, for example, to have a debt paid as well as the duty of paying it. The Romans kept, in

fact, the entire picture of the "legal chain" before their eyes, and regarded one end of it no more and no less than the other.

"In the developed Roman law, the Convention, as soon as it was completed, was in almost all cases at once crowned with the Obligation, and so became a contract; and this was the result to which contract-law was surely tending."

After describing the Verbal, the Literal and the Real Contracts, he thus proceeds "We now reach the fourth class or Consensual Contracts, the most interesting and important of all. Four specified Contracts were distinguished by this name: *Mandatum*, i. e. Commission or Agency; *Societas* or Partnership; *Emtio Venditio* or Sale; and *Locatio Conductio* or Letting and Hiring. A few pages back after stating that a Contract consisted of a Part or Convention to which an Obligation had been superadded, I spoke of certain acts or formalities by which the law permitted the obligation to be attracted to the Pact. I used this language on account of the advantage of a general expression, but it is not strictly correct unless it be understood to include the negative as well as the positive. For in truth, the peculiarity of these Consensual Contracts is that no formalities are required to create them out of the Pact. Much that is indefensible, and much more that is obscure, has been written about the Consensual Contracts and it has even been asserted that in them the *consent* of the parties is more emphatically given than in any other species of agreement. But the term Consensual merely indicates that the obligation is here annexed at once to the *Consensus*. The *Consensus*, or mutual assent of the parties, is the final and crowning ingredient in the Convention, and it is the special characteristic of agreements falling under one of the four heads of Sale, Partnership, Agency, and Hiring, that as soon as the assent of the parties has supplied this ingredient, there is *at once* a contract. The *Consensus* draws with it the Obligation, performing in transactions of the sort specified, the exact functions which are discharged, in the other contracts by the *Res* or Thing, by the *Verba stipulationis*, and by the *Literæ* or written entry in a ledger." (p. 323.)

Savigny in his Treatise on Roman Law at § 140, says: "Jusqu'ici, dans cette étude des faits juridiques, j'ai procédé du général au particulier, du fait à l'acte libre, et de l'acte libre à la déclaration de volonté (§104, sq.). Je vais maintenant faire encore un pas dans la même voie en cherchant à déterminer

l'essence du contrat qui parmi toutes les espèces de déclaration de volonté, est la plus importante et la plus variée. Le contrat même en dehors de la science, présente une notion familière à tout le monde, mais elle est si connue et indispensable au jurisconsulte, vu ses nombreuses applications, que l'on devrait s'attendre à trouver ici une définition exacte et généralement adoptée; neanmoins, il n'en est pas ainsi.

Je vais essayer de mettre en lumière les caractères essentiels du contrat par l'analyse d'un cas où il existe evidemment, le contrat de vente. La première chose que nous saisissons, ce sont plusieurs personnes en présence les unes des autres. Dans ce cas spécial, comme dans la plupart des contrats, ce sont précisément deux personnes; mais quelque fois aussi, dans le contrat de societé par exemple, le nombre des personnes est tout à fait indéterminé, et ainsi nous devons laisser subsister l'idée générale de pluralité. Il faut ensuite que ces personnes veuillent une chose, et une même chose, car tant qu'il y a indécision ou desaccord on ne peut admettre l'existence du contrat. Le consente, ment doit être manifeste, c'est a dire qu'elles doivent s'être déclare réciproquement leur volonté car une décision prise, mais tenue secrète ne saurait passer pour un des éléments du contrat. En outre, il faut avoir égard à l'objet de la volonté. Si donc deux personnes s'accordaient à se soutenir mutuellement par leurs conseils et leur exemple dans la poursuite de la vertu, de la science ou de l'art, la dénomination de contrat, donnée à un pareil accord serait tout à fait impropre. Cette convention diffère de la vente, qui est un contrat véritable en ce que, dans la vente, la volonté a pour objet un rapport de droit, et ici un but d'une nature différente. Mais il ne suffit pas que l'objet du consentement soit un rapport de droit. Quand les membres d'un tribunal, après de longs débats, tombent d'accord sur le prononcé d'un jugement, toutes les conditions énumerées ci-dessus se trouvent réunies, et l'objet de leur accord est un rapport de droit; néanmoins, ce n'est pas là un contrat; cela tient à ce que le rapport de droit ne leur est pas personnel comme dans le cas de la vente.

Ces diverses conditions peuvent se résumer dans la définition suivante; *Le contrat est l'accord de plusieurs personnes sur une déclaration de volonté commune destinée à régler leurs rapports de droit.* Ici nous voyons une application particulière de l'idee plus générale de la déclaration de volonté. Le contrat s'en distingue comme l'espèce du genre, en ce qu'il exige la réunion de

plusieurs volontés en une seule, tandis que la déclaration de volonté peut émaner d'une personne seule. . . . . Ainsi la tradition est un contrat veritable car elle renferme tous les éléments du contrat. (p. 317.)

(Translation of M. Ch. Guenous 2e. Ed. Paris 1856.)

In his Treatise on Obligations, Savigny at § 3 says "Le rapport de droit entre deux personnes que nous étudions ici, et dans lequel l'une d'elles apparait comme assujettie (en partie) est designé par l'expression technique romaine *Obligatio.* Cette expression embrasse par conséquent deux états distincts l'un de l'autre, et même opposés, et il est logique de l'appliquer aussi bien à l'extension de la liberté du créancier, qu'à la restriction de la liberté du débiteur; pour ce dernier état il y a une expression spéciale, *Oportet*, employée regulierement de toute antiquité. Ces deux états, placés l'un à côté de l'autre sont désignés par l'expression commune: *obligatio.*

En dehors de ce rapport de droit, il y'a encore beaucoup d'autres cas, où nous trouvons une necessité juridique; mais pour eux l'expression *obligatio* n'est pas l'expression technique. Ainsi la necessité de reconnaître la propriété d'autrui est l'opposé de *l'obligatio;* il en est de même de chacune des necessités établies par la libre puissance de l'autorité publique; il en est de même enfin de la néccssité qui résulte dans un proces de la libre décision du juge, sans que, pour y contraindre le débiteur, le créancier ait eu un droit d'action.

L'expression remaine indiquée concorde parfaitement avec les idées juridiques elles-mêmes. Il est d'autant plus important de la comprendre et de la saisir bien exactement, que, depuis longtemps, une théorie très différente, que nous allons exposer, avait obtenu une grande vogue. Voici les idées fondamentales sur lesquelles repose cette théorie. D'un côté figure le droit d'une personne, en tant que pouvoir ou domination reconnue, digne de protection sans distinguer entre ses différents objets et ses sources. En opposition à ce droit figure le devoir, appelé aussi bien engagement ou lien, en tant que necessité imposée à une ou plusieurs personnes de respecter ce droit et de ne pas le violer. Le droit s'appelle *jus*, le devoir *obligatio.* Ainsi correspond au *jus* du creancier *l'obligatio* du débiteur; de même qu'au *jus* du propriétaire correspond *l'obligatio* de tous les autres hommes de respecter sa proprieté. (Compare 1 Larombiere ou Obligations § 3, ante p. 163.)

Cette théorié est erronée et blamable par deux raisons différentes; d'abord en ce que l'analogie et la différence naturelle des idées juridiques en sont obscurcies; en second lieu, l'emploi de l'expression romaine *obligatio*, dans un sens complétement étranger aux Romains, nous enlève l'exacte conception des décisions de nos sources de droit. Le véritable sens de cette expression a été d'un part trop restreint, en ce qu'on ne veut l'appliquer qu'à l'état de l'obligé, et non à celui du créancier, c'est-à-dire à l'ensemble de la relation entre ces deux personnes; d'autre part, on lui a donné une trop grande extension en ce qu'on a du la transporter hors des institutions du droit des obligations (dans le sens que nous lui avons assigné plus haut) pour l'employer dans toutes les autres parties du droit privé, par exemple, dans le droit des choses; voire même hors des limites du droit privé; car on est venu à dire; une *obligatio* d'un particulier envers l'Etat.

L'expression: *obligatio*, telle que nous venons de l'expliquer, a pour principe l'image d'un lien; c'est pourquoi elle a été choisie pour mettre en lumière l'état d'une volonté assujettie ou enchainée. Elle correspond à une série d'expressions techniques analogues, qu'on emploie tantôt sous la forme de verbe, tantôt sous celle de substantif: *nectere* et *nexum*, *contrahere* et *contractus*, *solvere* et *solutio*."

At § 7 of the last cited work, Savigny says: "Au point de vue du caractère et du degré d'efficacité, il faut destinguer les obligations ponrvues et celles dépourvues d'action (civiles et naturales), cette distinction est la plus importante des trois et même si nous avons particulièrement développé les précédentes, c'est pour jeter une clarté plus vive sur tout l'ensemble de cette dernière.

L'essence de l'obligation consiste dans un état d'assujettissement (§2). La manière regulière pour forcer à l'execution cette liberté assujettie et contrainte, est l'action; aussi l'obligation pourvue d'action (protegée par elle) est-elle par excellence l'obligation proprement dite, la véritable obligation."

At § 52: "La convention considérée comme source des obligations (la convention obligatoire) ne forme qu'une application isolée de l'idée beaucoup plus générale de convention. J'ai déjà exposé sa nature avec détails dans un autre endroit (système t. 3, § 140, 141, ante p. 166); il me suffira ici de rappeler en quelques mots cette exposition.

Une convention est l'accord de plusieurs parties qui déterminent par une manifestation de volonté commune leurs relations juridiques. Ces relations juridiques peuvent concerner le droit international, le droit public, le droit privé; et l'idée de convention s'applique à tous ces cas. De plus dans le droit privé la convention peut s'appliquer déterminément à toutes les parties de ce droit; aux rapports de famille aussi bien qu'aux droits reels et aux obligations. Enfin dans le droit des obligations la convention peut servir tant à en engendrer des obligations qu'à les éteindre.

De tous ces cas d'application, nous ne parlons ici que de la convention qui engendre une obligation (convention obligatoire). Voici en quoi consiste l'idée de convention.

C'est l'accord de plusieurs personnes dans une même manifestation de volonté, de la quelle doit résulter entre elles une obligation.

Cette sorte de convention est la plus fréquente et la plus variée entre toutes dans l'application; aussi nos auteurs la confondent-ils tres souvent avec l'idée générale de convention, et l'adoptent ils partout où il est question de convention. Qoique cette confusion doive être absolument rejetée, et quoiqu'elle ait donne lieu à de graves malentendus, il faut reconnaître qu'à un autre point de vue elle se trouve pleinement justifiée; car c'est dans le cas de l'application qui nous occupe que la nature de la convention se trouve le plus complétement presentée et développée.

Les jurisconsultes romains emploient indifférement, pour designer les conventions obligatoires, les expressions: *conventio, pactio, pactum,* qui toutes ont la même signification générale."

The note appended to the heading of the paragraph from which the preceding citations are taken, by the learned translators M. M. C. Gerardin and P. Jozon is given in order to show clearly the distinction existing between the German words used by Savigny to designate Convention and Contract.

" Il n'y a pas en allemand d'expression correspondant exactement à l'idée de contrat. Pour rendre cette idée M. de Savigny emploie quelque fois le mot latin *contractus*, et presque toujours le mot allemand *vertrag* qui signifie proprement convention, traité soit international soit privé. C'est pourquoi il a soin, en plusieurs endroits, notamment dans le présent paragraphe, d'avertir le lecteur qu'il parle non des conventions (*vertraege*) en général, mais des conventions productrices d'obligations (*obligatorische*

vertraege), qui ne sont autres que nos contrats. Pour plus de clarté, nous traduirons, comme ici, le mot *vertrag*, employe seul, par *contrat*, chaque fois qu'il s'agira évidemment de conventions obligatoires."

Mr. Amos in his recent work "A systematic view of the Science of Jurisprudence" gives the following explanations and definition "In attempting a definition of the legal term *Contract* the modern Jurist is at once met by the difficulty he has to encounter at every point arising from the fact that the rise of juridical terms has undergone an indefinite amount of vacillation according as they have been employed by the Roman and middle-age Jurists, by modern speculation theorists, or by the authors of practical treatises on branches of positive Law. In view of the perplexity so arising, the best he can do is to find a definition which shall cover the most numerous and important uses of the term to be defined, and shall do as little violence as possible to popular usage. In order to frame such a definition of the word *Contract*, it must be recognised that the essential notion of a legal Contract contains the following ingredients:—

1. There is a complete and Joint Act of two or more persons, from which Act rights and duties take their rise.

2. Some of the duties so arising relate to the *future* (and not the *present*) acts of one, some, or all of the parties to the said Joint Act.

3. The said Joint Act may either be held by the State as alone sufficient evidence of such Act itself having been performed, or else other and different Acts may be required to be performed by way of providing evidence of the due performance of the Joint Act, and from which Joint Act the evidentiary acts are more or less clearly distinguishable.

The recognition of these principles justifies the following definition of a *Contract:*

A Contract is such a Joint Act of two or more persons, as is held sufficient in Law to determine the present and future Rights, and present and future duties of one, or some, or all of such persons: of which Act specific evidence is required by Law.

In the above definition the word future has been carefully introduced. This serves to distinguish the present definition from the celebrated one given by Savigny, which from its extreme comprehensiveness becomes almost valueless. His definition of a *Contract* is "an union of two or more persons resulting in an

accordant declaration of will, whereby their legal relations are determined." The omission of the word future here results in the inclusion of a number of Joint or accordant Acts which no known Legal System and no popular dialect have ever associated with the notion of a Contract. He admits, indeed, that the kinds of Contract which give rise to Obligations are the most important and frequent, but that simple Tradition or delivery of a thing is a true contract. It is here asserted, on the contrary, that Tradition, like Exchange, or a Sale for ready money, are nothing more than simple Acts by which with or without surrounding circumstances, rights of ownership are acquired. The essence of a Contract is the reliance on the promise of another as to his acts in the future; and it is in recognising the growing disposition on the part of citizens to entertain such reliance that the State evolves the strict legal notion of a Contract, and constructs a Law of Contract." (179-181)

Mr. Justice Markby in his "Elements of Law" after quoting Savigny's definition and his observations preceding it remarks § 168 "It will be observed that this definition of contract includes not only those agreements which are a promise to do, or to forbear from some future act, but those also which are carried out simultaneously with the intention of the parties being declared. English writers are not very clear upon this point. Whilst on the one hand they would seem in practice to treat as contracts only those agreements which bind us to do, or to forbear at some future time; yet we find, on the other hand, that in their definitions of contract they take the widest possible ground, rejecting all the limitations suggested by Savigny, and making in fact, the two words contract and agreement synonymous.

"Thus it has been proposed by the very highest authority the Indian Law Commissioners) to define a contract as "an agreement between parties whereby a party engages to do a thing, or engages not to do a thing.

"From some expressions in passages subsequent to that which I have quoted, Savigny appears to treat the performance of a contract as itself a contract. Thus, if I rightly understand him, he says that the agreement for the sale and purchase of a house is one contract, and the consequent delivery of possession by the vendor to the purchaser is another. This, with deference to so great an authority, I venture to doubt. I think there is here a confusion which is exceedingly common between contract and

transfer or conveyance which Austin has several times pointed out in the course of his Lecture.

170. Subject to this modification (and for our present purpose it is not an important one) I think Savigny's analysis of contract may safely be adopted. The essential distinction between it, and the definition current in those countries which have adopted the Code Napoléon is this; Savigny defines contract solely with reference to the contemplation of the parties; if the parties intend to declare their legal rights *inter se*, he calls it a contract, whether or no it has the effect intended is not considered. The Code Napoléon, on the other hand, makes it of the essence of the definition of contract, that an obligation is thereby created. For instance, if I were to promise a voter ten pounds for his vote, that would be a contract according to Savigny; but as no legal obligation would result from it, it would not be a contract according to the definition of the French Code. The Italian Code nearly accords with Savigny's definition."

"171. The advantage of Savigny's definition is, I think, that it keeps more clearly before the mind the true mode in which the legal relation arises. When the parties have expressed their desire to create the legal relation, then arises the totally distinct question, whether the sovereign authority will recognize it as such. Supposing the parties to the contract to be of full capacity and that the legal relation contemplated would not conflict with any command of the sovereign, express or tacit, it will generally result from the agreement. It is, however, required in some cases before the contract is made binding, that it should be accompanied by certain solemnities, as they are called. As for instance that it should be made in the presence of witnesses; that it should be in writing; or signed; or registered."

In the ninth edition of Chitty on Contracts p. 1 are the following remarks "The term Obligation is used by the Roman jurists, and by Pothier in the preliminary article to the treatise on Obligations, as denoting in its proper and confined sense, every legal tie which imposes the necessity of doing or abstaining from doing any act; and as distinguished from imperfect obligations, such as charity and gratitude, which impose a general duty but do not confer any particular right; as well as from natural obligations, which, although they have a definite object and are binding in conscience, cannot be enforced by legal remedy. English lawyers, however, generally use the word obligation in a

more strict and technical sense, namely, as importing only one particular species of Contracts, that is, *Bonds;* and they adopt the term "Contract" when they wish to convey the more extensive idea of the responsibility which results from the voluntary engagement of one individual to another, as distinguished from that class of liabilities which originate in torts, or wrongs unconnected with agreement. In the language of the law therefore the term *Contract* comprises in its full and liberal signification, every description of agreement, obligation or legal tie whereby one party binds himself or becomes bound expressly or impliedly, to another, to pay a sum of money, or to do or omit to do a certain act; but in its more familiar sense it is most frequently applied to agreements not under seal. The term *Agreement*, on the contrary, is rarely used amongst us, except in relation to Contracts not under seal; and this is evidently its proper use; for if considered in its strict and more critical meaning, it clearly imports a reciprocity of obligation; and in that point of view it does not include specialities, which in general requires mutuality."

The late John Austin says in his "Outline of the Course of Lectures" (3d Ed. p. 56) "Having defined the meanings of those leading expressions I shall consider particularly the nature of contracts. I shall distinguish contracts properly so-called, from certain facts or events which are styled contracts, but which virtually are alienations or conveyances." In his XIV Lecture p. 387 he says "Rights in rem sometimes arise from an instrument which is called a contract, and are therefore said to arise from a contract; the instrument in these cases wears a double aspect, or has a twofold effect; to one purpose it gives *jus in personam*, and is a contract, to another purpose it gives *jus in rem*, and is a conveyance. When a so-called contract passes an estate, or in the language of the modern civilians, a right *in rem* to the obligor, it is to that extent not a contract but a conveyance; although it may be a contract to some other extent, and considered from some other aspect. A contract is not distinguished from a conveyance by the mere consent of parties, for that consent is evidently necessary in a conveyance as well as in a contract. (Compare 4 Marcade Nos. 382-387 *ante* p. 162.)

For example, a contract for the sale of an immoveable in the French law is of itself a conveyance; there is no other; the contract or agreement to sell is registered and the ownership of the immoveable at once passes to the buyer.

By the provisions of that part of the English Law which is called equity, a contract to sell at once vests *jus in rem* or ownership in the buyer and the seller has only *jus in re alienâ*. But according to the conflicting provisions of that part of the English system called peculiarly *law*, a sale and purchase without certain formalities merely gives *jus ad rem* or a right to receive the ownership not ownership itself, and for this reason a contract to sell, though in equity it confers ownership, is yet an imperfect conveyance, in consequence of the conflicting pretensions of law. . . . . Considered with relation to this obligation which correlates to a right *in personam*, the so called contract is a contract; but if there were only one system of law in England and that law were the law administered by the Court of Chancery, it would not be a contract, but a mere conveyance. Briefly, no right to a thing, properly speaking, is ever given by a contract. Where a thing is the subject of the contract, the right is not a right over, in, or to the thing, but a right to an act of transfer, or assignment of the thing on the part of the obligor."

At pages 1001 and 1002 Austin after showing the difference existing between a sale according to English Equity and according to English Law as to the *jus* conveyed to the purchaser, says: "Speaking generally, the buyer even in equity has merely *jus in personam*. Or (borrowing the language of the Roman lawyers) the subject of the sale even in Equity 'continues *in obligatione*.'

"Speaking generally, the buyer in contemplation of Equity has dominion or '*jus in rem*.' And speaking *generally* the sale in Equity, is, therefore, a conveyance.

"But to the special intent or purpose which is mentioned above the buyer has '*jus in personam*.' Or changing the shape of the expression, the seller remains obliged. This right *in personam certam* and this corresponding *obligation* Equity will enforce *in specie*, and in respect of this right in *personam*, and of this corresponding obligation, the sale even in Equity is properly a *contract*."

Mr. Amos and Mr. Justice Markby would appear to have taken the definition given by Savigny in his Systéme 3 vol. § 140, 141 of "Convention" as a definition of "Contract". Neither of those writers appears to have noticed his remarks hereinbefore set out in his work on obligations expressly pointing out the difference between the Convention and the Contract. The Convention being "l'accord de plusieurs personnes qui diterminent par une

manifestation de volonte commune leurs rélations juridiques", the Contract on the other hand being "l'accord de plusieurs personnes dans une même manifestation de volanté, de laquelle doit resulter entre elles une obligation."

In Savigny's definition of Contract the creation of an 'obligation' not in its narrow but in its Roman sense figures as a *sine quâ non*. So soon as an "obligatio" must as a consequence result from an agreement such agreement becomes a contract. The sanction given by the law to an agreement, the *vinculum juris* existing between the parties thereto are indispensable to the formation of a contract, consequently to qualify as an illegal contract an agreement which cannot be enforced at law is excessively improper, involving a contradiction unsusceptible of explanation. Into this error fell our codifiers when in art. 989 of the Civil Code they say "A contract without a consideration or with a lawful consideration has no effect."

The imputation thrown by Mr. Justice Markby on Savigny that that great writer defines contract solely with reference to the contemplation of the parties is incorrect. And the instance given by him of a person promising a voter ten pounds for his vote constituting a contract according to Savigny is clearly wrong if no obligation was thereby created. Savigny in lieu of differing from the Code Napoléon thoroughly agrees with it on that point. Mr. Amos also attacks the definition of Contract given by Savigny in his Système as being from its extreme comprehensiveness almost valueless, but he takes no notice of the definition given in that writer's Treatise on Obligations. Mr. Amos also says "that tradition like Exchange, or a sale for ready money are nothing more than simple acts by which with or without surrounding circumstances rights of ownership are acquired." It would seem that tradition made in pursuance of a contract of sale is but the fulfilment of one of the obligations of the vendor, not that it constitutes a new contract or even convention, it is clear that no new obligation is created thereby all the obligations both of the vendor and the vendee taking their rise from the contract of sale. It may perhaps be considered as an act regulating *les relations juridiques* of the parties and in that sense coming within the bounds of Savigny's definition of "Convention." But so far as exchange and sale for ready money are concerned, it is difficult to understand how Mr. Amos can consider them but as acts not Contracts. Is a sale for ready money less a Con-

tract than a sale on credit? Does not the agreement in such sale for ready money produce obligations? Ere the money be paid over as the price must not the agreement be complete? Does not the agreement in such sale precede the performance of the obligations? Although no great space of time intervenes between the agreement and the acts discharging the principal obligations yet those acts are done in fulfilment of such obligations created by the contract. Incorrectly they may be styled as contemporaneous but really the agreement precedes the acts of delivery and payment.

Mr. Amos' definition it is submitted is also incorrect; to a certain extent it defines a "tort" "délit" or "quasi délit" as well as contract, when such "tort" "delit" or "quasi délit" is done by two or more persons. It also is subject to the charge brought by him against Savigny's of being too comprehensive.

Masse's definition of Contract is exceedingly imperfect and confounds Convention and Contract making no difference between the two terms. Marcade in his criticism of the Code is severe upon the definition of "Contract" given in art. 1101, and seems to think that because the contract of sale operates in certain cases as a conveyance that ceases to be according to the Roman idea a contract. Austin also in certain of the passages seems to partake to a certain degree of the opinion expressed by Marcade.

WILLIAM H. KERR.

(*To be continued.*)

THE BILL OF OATHS, THE PROROGATION, AND THE ROYAL COMMISSION.

Preliminary Observations.

The disallowance of the Oaths Bill, the recent prorogation of the Dominion Parliament, and the issuing of a Royal Commission to inquire into certain charges relating to what is now commonly designated the "Pacific Scandal," have given rise to several questions of Law of the very highest importance.

These questions have been discussed through the medium of the Press of the entire country, and have afforded the occasion of comments of a nature more or less disinterested, passionate, and vehement.

It is not the mission of "*La Revue Critique*" to serve any political party; its publication was started with the object of pointing out and combating errors and false principles wherever and whenever they were encountered in the domain of Law, and, thus far, its editors have strenuously endeavoured to maintain that object, whether in matters relating to public and international rights or to those involving questions of a more private character.

An honest and impartial public will not object, perhaps, under existing circumstances, that we should submit for its consideration and reflection the result of our labor in the examination of the grave questions of Constitutional Law which have, for some time passed, agitated the public mind.

In order to fully comprehend the subject, it is necessary, in the first place to refresh the reader's memory with a brief recital of the principal facts which gave rise to the celebrated discussion.

On the 2nd of April, 1873, the Hon. L. S. Huntington, M.P. moved the following resolution in the House of Commons:—

"That he, the said Lucius Seth Huntington, is credibly informed and believes that he can establish, by satisfactory evidence, that in anticipation of the legislation of last session, as to the Pacific Railway, an agreement was made between Sir Hugh Allan, acting for himself and several other Canadian promoters, and G. W. McMullen, acting for certain United States capitalists, whereby the latter agreed to furnish all the funds necessary for the construction of the contemplated railway, and give the former a certain per centage of interest

in consideration of their interest and position; the scheme agreed upon being ostensibly that of a Canadian company, with Sir Hugh Allan at its head.

"That the Government were aware that the negotiations were pending between the said parties.

"That subsequently an understanding was come to between the Government and Sir Hugh Allan and Mr. Abbott, one of the members of the Honourable the House of Commons of Canada, that Sir Hugh Allan and his friends should advance a large sum of money for the purpose of aiding the elections of Ministers and their supporters at the ensuing general election, and that he and his friends should receive the contract for the construction of the railway.

"That accordingly Sir Hugh Allan did advance a large sum of money for the purpose mentioned, and at the solicitation and under the pressing instances of Ministers.

"That part of the moneys expended by Sir Hugh Allan in connection with the obtaining of the Act of Incorporation and Charter were paid to him by the said United States capitalists under the agreement with him.

"That a committee of seven members be appointed to enquire into all the circumstances connected with the negotiations for the construction of the Pacific Railway with the legislation of last session on the subject, and with the granting of the charter to Sir Hugh Allan and others, with power to send for persons, papers and records, and with instruction to report in full the evidence taken before, and all proceedings of the said committee."

This resolution was lost by a majority of 35.

On the 8th of the same month, Sir John A. McDonald, the Canadian Premier, moved:

"That a Select Committee of five members (of which Committee the mover shall not be one) be appointed by this House to inquire into, and report upon the several matters contained and stated in a resolution moved on Wednesday, the second day of April instant, by the Honourable Mr. Huntington, member for the County of Shefford, relating to the Canadian Pacific Railway, with power to send for persons, papers and records, to report from time to time, and to report the evidence from time to time, and if need be, to sit after the prorogation of Parliament."

The last resolution was carried unanimously and was followed by the nomination of a special Committee of the House of Commons, which committee was composed of the Hon. A. A. Dorion, the Hon. Edward Blake (two leading members of the Opposition) the Hon. John Hillyard Cameron, Hon. James McDonald, of Pictou, and Hon. G. J. Blanchet, of Lévis—government supporters.

The Hon. Henry Starnes, who was supposed to be in possession of important documents relating to the matter, was summoned to the Bar of the House, and enjoined not to dispossess himself of the said documents until further instructed.

On the 3d of May following, Parliament passed a Bill which provided:

"That whenever any witness or witnesses is or are to be examined by any Committee of the Senate or House of Commons, and the Senate or House of Commons shall have resolved, that it is desirable that such witness or witnesses shall be examined on oath, such witness or witnesses shall be examined upon oath or affirmation, where affirmation is allowed by law."

On the same day, the Hon. H. Cameron moved the following resolution, which was carried unanimously:

"That it be an instruction to the said Select Committee to whom was referred the duty of inquiry into the matters mentioned in the statement of the Honourable Mr. Huntington relating to the Canadian Pacific Railway, that the said Committee shall examine the witnesses brought before it upon oath."

On the 25th of May the House adjourned to the 13th of August, to receive *pro formâ* the report of the Committee and prorogue Parliament.

A copy of the Oaths Bill was immediately transmitted to Her Majesty the Queen by the Governor General. The Bill was disallowed, a notice of which disallowance was published in an extra of the *Canada Gazette* on the 1st of July.

On the 2nd of July the Committee of Enquiry met at Montreal; but in consequence of the disallowance of the Oaths Bill the Committee adjourned to the 13th of August with the intention of asking for further instructions from the House, Messrs. Dorion and Blake, however, being of opinion that the Committee should proceed with the investigation without administering the oath to witnesses. They also refused to accept a Royal Commission offered them by Sir John A. McDonald.

On the 4th of July, the Montreal *Herald*, the acknowledged organ of the Opposition at Montreal—published a number of documents purporting to be, as alleged, "copies of some of the papers which were impounded by the Special Committee of Enquiry in the hands of Mr. Starnes. "The publication of these documents afforded an opportunity to the Press of arraigning Ministers and others inculpated in the scandal before the bar of public opinion. This *exposé* drew forth statements from Sir Hugh Allan, Mr. McMullen and others.

On the 13th of August, the House of Commons and Senate re-assembled at Ottawa, a number of members of both houses being present. Mr. McKenzie, the leader of the Opposition, had just commenced to address the Speaker of the House of Commons, when the Usher of the Black Rod suddenly appeared and summoned the members of the House to attend in the Senate for the purpose of proroguing Parliament.

In compliance with this summons, those members of the House who usually supported the Government, repaired at once to the Senate Chamber, and, *instanter*, the Governor General delivered his Address from the Throne, and prorogued Parliament, in spite of the numerous petitions which had previously been presented from various parts of the Dominion, and of the protest also of ninety-six Members of the House, eighty of whom, instead of turning to the right, in the direction of the Senate Chamber, proceeded to the Railway Committee Room and held an indignation meeting.

In the course of his Speech from the Throne, His Excellency said: "I have thought it expedient, in the interests of good "government, to order that a Commission should be issued to "enquire into certain matters connected with the Canadian "Pacific Railway, to which the public attention has been directed; "and the evidence should before such commission be taken on "oath The Commissioners shall be instructed to proceed with "the enquiry with all diligence, and to transmit their Report as "well to the Speakers of the Senate and House of Commons as to "myself. Immediately on receipt of the Report, I shall cause "Parliament to be summoned for despatch of business, to give "you an early opportunity of taking such Report into consider-"ation. Meanwhile, I bid you farewell."

On the 14th of August, a Royal Commission was issued by Her Majesty the Queen to the Honorable Messrs. Day and Polette—two Judges of the Superior Court in the Province of Quebec—and to J. R. Gowan, Esq. one of the County Judges in the Province of Ontario—in which after relating the foregoing facts, and referring more particularly to the charges made by the Hon Mr. Huntington, the Commission adds:

And *whereas*, it is in the interests of the good government of Canada not only that full inquiry should be made into the several matters contained and stated in the said above recited resolution of the 8th day of April aforesaid, but that the evidence to be taken on such

inquiry should be taken on oath, in the manner prescribed by the said resolution of the third day of May aforesaid, and the Governor-General in Council has deemed it expedient such inquiry should be made.

Now know ye, that under and by virtue and in pursuance of the Act of the Parliament of Canada, made and passed in the thirty-first year of our reign, intituled "An Act respecting inquiry into public matters," and of an order of the Governor in Council, made on this thirteenth day of August, in the year of our Lord one thousand eight hundred and seventy-three, we, reposing special trust and confidence in the loyalty and fidelity of you, the said Charles Dewey Day, Antoine Polette and James Robert Gowan, have constituted and appointed you to be our Commissioners for the purpose of making such inquiry as aforesaid, of whom you, the said Charles Dewey Day, shall be chairman. And we do authorize and require you, as such Commissioners, with all convenient despatch, and by and with all lawful ways and means, to enter upon such inquiry, and to collect evidence and to summon before you any parties or witnesses, and to require them to give evidence upon oath or on solemn affirmation, if they be parties entitled to affirm in civil matters, and to produce such documents and things as you may deem requisite to the full investigation, and report of the matters and statements as aforesaid. And we do hereby order and direct that the sittings of you, the said Commissioners, under this our Royal Commission, shall be held at the City of Ottawa, in our Dominion of Canada.

"And we do require you to communicate to us through our Secretary of State of Canada, and also to the Honourable the Speaker of the House of Commons of Canada as well, the said evidence as well as any opinions which you may think fit to express thereupon. And we do strictly charge and command all our officers and all our faithful subjects, and all others, that in their several places, and according to their respective powers and opportunities, they be aiding to you in the execution of this our Commission."

The Commission is signed: "John A. McDonald, Attorney-General of Canada," "J. C. Aikens, Secretary of State," and was published in the *Canada Gazette* on the 23d of August.

The Commissioners are to meet at Ottawa, on the 4th of September; and, on the 21st of August the Hon. Mr. Huntington was requested to supply them "with all convenient diligence, a list of witnesses whom he may wish to examine;" and further he was "requested then and there to proceed with his evidence in the premises."

In reply, on the 26th of August, the Hon. Mr. Huntington declined to acknowledge the jurisdiction of this tribunal, alleging among other reasons, the following:

"I feel that I should do no act which may be construed into an acquiescence in the attempt to remove from the Commons the conduct and control of the enquiry.

"I believe that the creation of the Commission involves a breach of that fundamental principle of the constitution which preserves to the Commons the right and duty of initiating and controlling enquiries into high pelitical offences; that it involves also a breach of that fundamental principle of justice which prevents the accused from creating the tribunal and controlling the procedure for their trial; that it is a Commission without precedent, unknown to the Common law, unsanctioned by the Statute law, providing by an exercise of the prerogative for an enquiry out of the ordinary course of justice into misdemeanors cognizable by the Courts, and consqeuently illegal and void."

This statement of facts suggests three leading topics for our consideration :—

1st. The Disallowance of the Oaths Bill,

2nd. The Prorogation of Parliament, and

3rd. The issuing of a Royal Commission.

Before entering, however, upon the consideration of these questions, we cannot refrain from recording our condemnation of the course pursued by all concerned in the publication of the impounded documents placed in charge of the Hon. Mr. Starnes. Such conduct, in our opinion, is not only highly reprehensible, but is derogatory to all Parliamentary usage..

Those documents were deemed to be in possession of the House when they were impounded, although not yet read; and one of the elementary principles of Constitutional Law, is, that no person, without violating a Parliamentary privilege (that of secrecy being sometimes of the highest importance) can publish copies of any of its private documents, lest by so doing, prosecutions of accused parties should be removed from the tribunal of the Commons, or of its Committees, to that of public opinion.

Such overturning of jurisdiction is all the more to be regretted in the present instance, considering the gravity of the charges made —charges which seriously compromise not only the honor of a number of our fellow-citizens but also the honor of the country in general. Nothing less than the verdict of a competent tribunal could justify the publication of the documents in question.

We will now pass on to the consideration of the three points of law indicated above.

I. The Disallowance of the Oaths Bill.

Section 56 of the British North America Act, 1867, declares that

"When the Governor General assents to a Bill in the Queen's "name, he shall, by the first convenient opportunity, send an au- "thentic copy of the Act to some one of Her Majesty's principal "Secretaries of State, and if the Queen in Council, within two "years after receipt thereof by the Secretary of State, thinks fit "to disallow the Act, such disallowance (with a certificate of the "Secretary of State of the day on which the Act was received by "him) being signified by the Governor General by speech or "message to the House of Parliament, or by Proclamation, shall "annul the Act from and after the day of such signification."

One cannot believe—if it be permitted to say so *en passant*—that so dangerous a Royal prerogative exists in our Constitution! Such a power places all legislation, whether Federal or Provincial, completely at the mercy of the Colonial Office, or that of its representatives in Canada.

Canadians are said to enjoy sovereign power as to the regulation of their own internal affairs. This may be true; but they do not enjoy that power in virtue of the superiority of their political institutions, but by Her Majesty's good will.

Again, if it be said that the veto power was reserved in order to guard against legislation having a tendency to violate any principle of public or general interest, its introduction into our Constitution might be excused. But the recollection of the passing of the New Brunswick Education Bill (which violates the great principles of liberty of worship and liberty of instruction) a Bill which the Federal Government refused to disallow—is yet too fresh in our memory to permit us to believe for a single moment that Imperial Legislators had any such object in view. Did not our Government authorities, on that memorable occasion, publicly declare that the Veto power had been introduced into the Federal system by which we are ruled, to assure the Constitutionality of the the laws? But is is not in the power of Her Majesty's Privy Council to declare a law to be unconstitutional, notwithstanding its being within the limits of the Constitution? Besides, in virtue of what principle of English public law does the Privy Council possess authority to interpret laws? Then, again, ever since 1867, the ordinary tribunals of the confederated

Provinces have frequently pronounced upon the constitutionality of our laws; and, strange to say not one of these laws has ever been disallowed! This proves clearly that neither the Federal nor Imperial Executives are the guardians of the Constitution of this country. Be that as it may, the Veto power is undeniable; it exists in our Statute Book; and it is to be hoped that it may not be abused in the future any more than it has been in the past—more particularly with reference to the case now under consideration.

The Governor General has been reproached by some persons as having shown extraordinary haste in transmitting a copy of the Oaths Bill to England. The Governor General was bound by the Constitution to act as he did; His Excellency doubtless felt convinced that the Bill in question was unconstitutional, his Prime Minister having moreover so pronounced it on the floor of the House when it was being passed.

The 18th section of the Act of 1867 provides that

"The privileges, immunities and powers to be held, enjoyed "and exercised by the Senate, and by the House of Commons, "and by the members thereof, respectively, shall be such as are "from time to time defined by Act of Parliament of Canada, "but so that the same shall never exceed those at the passing of "this Act held, enjoyed and exercised by the Commons House "of Parliament of the United Kingdom of Great Britain and "Ireland and by the members thereof."

Now, in 1867, the British House of Commons had not the power to administer an oath to witnesses summoned to appear before it or its Committees—with the exception of such as were authorized by statute to examine into contested elections.

It was only by a statute enacted posterior to 1867 that the English House of Commons was authorised to exact an oath from witnesses called to the Bar of the House, or to appear before its Committees, whereas, the House of Lords has exercised that power from time immemorial. Commentators have failed, as yet, to account for this incomprehensible distinction. Hatsell II. 158; Parl. Reg. XIII. 324; May 306, 312, Cushing (No. 956) on this subject, observes: "The House of Commons has "not, at any period, claimed, much less exercised, the right of "administering an oath to witnesses."

It has been stated that the Canadian House of Commons was competent to swear witnesses summoned to appear before it, by

the intervention of Members who might also be Justices of the Peace.

History informs us that during the 18th Century the English House of Commons, feeling its weakness in this respect, had recourse to this expedient—"a practice," says May (page 313)—"manifestly irregular, if not illegal." In fact, such a proceeding was positively illegal, seeing that the oath in such a case would be administered in a matter which did not come within the jurisdiction of a Justice of the Peace. May also adds, (page 314) "that since 1757 the most important enquiries have been conducted without any attempt to revive so anomalous and questionable a practice."

Hatsell II. 160; Cushing p. 380, No. 858.

It is evident that the Canadian Commons could not confer upon a Committee of Enquiry a power which it did not itself possess; neither could it call upon Parliament to adopt a Bill which, like the Oaths Bill, was intended to grant privileges which did not exist in the English Commons in 1867. The Oaths Bill passed by the Canadian Parliament is therefore clearly unconstitutional, null and void.

It is to be hoped that the Canadian Government will devise and adopt necessary means without delay whereby Constitution may be modified in this respect.

The laws of Great Britain, civil and criminal, deem an oath as an essential condition in the research of truth.

For more than half a century the guarantee of an oath in Parliamentary investigations has been fully recognised in the United States.

The Imperial Parliament itself has proclaimed this truth, by the Oaths Bill passed for the English House of Commons.

The Canadian Parliament has imitated Great Britain by passing the Oaths Bill which has been disallowed.

What more is wanted to induce the Imperial Authorities to fill up, without delay, the fatal gap which has been found to exist in our Constitution.

II.—The Prorogation.

Legally speaking, there can be no doubt that the Governor-General has the power of proroguing the Parliament of Canada at any time—even while a member may be addressing the House.

"A prorogation," says Blackstone (lib. 1, am. ed. vol. 1, page

144) "is done by Royal authority. Both Houses are necessarily "prorogued at the same time."

"It seems clear," says Chitty, (Prerogatives of the Crown, p. 71) "notwithstanding the opinion of Lord Coke to the contrary, "that a prorogation of one House necessarily and tacitly operates "as a prorogation of the other. This prorogation may be leg- "ally made, even at the return of the writ, and before the "meeting of Parliament. Thus the Parliament, after the general "election in the year 1790, was prorogued twice by writ before "it met; and the first Parliament in this reign was prorogued "four times by four writs of Prorogation."

In 1719 the following question was put to an eminent English lawyer: "Whether an Assembly *under adjournment or prorogation* may be prorogued without a meeting, according to such previous adjournment or prorogation?" to which he replied "I am clearly of opinion that it may."—Chalmers Col. Op. vol. 1, p. 232.

Mr. Todd, the distinguished Librarian of our Canadian Parliament, in a work of no small merit, just published on the "Parliamentary Government in England," vol. 1, p. 246, also observes that "the deliberations of Parliament may be cut short "at any moment, by the exercise of the Royal power of Proro- "gation."

This Royal prerogative is as ancient as the British Constitution. In the 17th century, Parliament was twice dissolved by James the First and Charles the First, before the House had time to pass a single Bill. In 1679 Charles the Second suddenly prorogued the House in order to avoid an enquiry which would have revealed the secret of a dishonorable alliance into which he had entered with a foreign power. In the same year, seeing that the House of Commons would not abandon the Exclusion Bill, this same Sovereign proceeded to the House of Lords, and without even consulting his Cabinet, prorogued the Parliament. In 1685, James the Second closed Parliament, in order to screen a devoted favorite from disgrace. And at a still later period, King William acted in a similar manner without even delivering the Speech from the Throne.

Without approving the modes of procedure noted in the foregoing instances, to which several others might be added, some of which betrayed an abuse of authority of the most revolting character—they nevertheless prove that, in England the prorogu-

ing power dwells in the will of the sovereign, whether it be arbitrary, unjust, or opposed to the will of both Houses of Parliament.

This prerogative, being deemed inherent in the Constitution, the House of Commons, in 1858, rejected an Address to Her Majesty praying that Parliament might be called together in the autumn of each year, so that its prorogation would be assured in the early part of the following summer.

The Governor of a British Colony, as representing Her Majesty, certainly has the power of proroguing and dissolving its Legislature—an opinion held by all writers on Colonial Law—(Clark Colonial Law, p. 30; Chitty, 34; Chalmers, vol. 1, p. 232). The same view is explicitly contained in the Statutes of Canada (C. S. C. ch. 3, sec. 2; Brit. North America Act, 1867, sec. 12). The 31st Vict. ch. 22, 1868, also provides that nothing contained in the above Act. "shall alter or abridge the power of the Crown to prorogue or dissolve the Parliament of Canada."

The exercise of this mighty prerogative is not peculiar to English law. In France, and over the entire Continent, the proroguing power is, generally, the exclusive privilege of the ruler of the nation. The French Constitutional Charter of 1814, Art. 50, says: "Le Roi convoque chaque année les deux chambres; il les proroge et peut dissoudre celle des députés." The Constitution of the Republic of 1848, Art. 46, declares: "Le Président de la République convoque, ajourne, proroge et dissout le corps législatif." Under the Empire a decree from the Emperor proclaimed the close of the session.

Like all Royal prerogatives, the power to prorogue Parliament is absolute. "In the exertion of lawful prerogative,"—says Blackstone, (lib. 1. c. 7, Am. ed. 1849, vol. 1, p. 187)—"the "King is, and ought to be, absolute; that is, so far absolute "that no legal authority can either delay or resist him."

The effect of a prorogation is to make void all pending proceedings. "Every Bill" says May, p. 43, "must be renewed after "a prorogation as if it had never been introduced, though the "prorogation be for no more than a day."—(See also May's Constitutional History of England, vol. 2, p. 390, note 3. Am. ed. 1871.)

Todd, vol. 1, p. 246, says: "The prorogation quashes all proceedings pending at the time, except impeachments by the Commons, Writs of Error and Appeals before the House of

Lords, and trials in progress before Election Committees. By a prorogation, all resolutions, bills and other proceedings pending in either House are naturally terminated, and cease to have any further effect, except in so far as they may be continued in operation under the authority of an Act of Parliament."

Writers, who have commented on the British Constitution, claim that it is the balance in which is preserved the just equilibrium of the three branches of the Legislature—the Commons, Lords, and Executive—that is, the People, the Nobility and the Sovereign. But may it not be said that the power possessed by the Sovereign is far greater than that held by the two Houses? If the Sovereign cannot alter the laws of the Kingdom, he can prevent the people from altering them by the exercise of his veto; he may cut short the deliberations of the national Assembly, and even prevent all legislation by the exercise of his proroguing power.

Story states that the power of prorogation exercised by the Crown in the American Colonies, previous to the Declaration of Independence, was cruelly felt by the population. "Under the Colonial Government, he says (Const. of V. S., § 424) "the "undue exercise af the same power by the Royal Governors, con- "stituted a great public grievance, and was one of the numerous "causes of misrule upon which the Declaration of Independence "strenously relied. It was there solemnly charged against the "King that he dissolved representative bodies for opposing his "invasions of the rights of the people; and, after such dissolution, "he had refused to re-assemble them for a long period of time."

It is true that a similar act of tyranny may not practically be exercised upon any portion of the British Empire; but does it not suffice that it is still possible under the Constitution to amend the same?

Long since, Acts of Parliament have limited the excercise of of the perogative alluded to. Parliament should be called together at least, once a year; but the length of each Session depends upon the will of the Sovereign; that is, in theory, the Sovereign may prevent the re-assembling of Parliament for the real and actual despatch of business.

Why may not Englishmen—who are as jealous of political liberties as any nation on the face of the globe—follow the example of the American people, and decree that prorogation shall be exercised through both Houses of Parliament, and that, in the event of disagreement, the preponderating voice of the Sov-

ereign shall decide? Such a mode of proceedure would prove even less dangerous to the Executive of Great Britain or of Canada, than to that of the United States, as the House of Lords and Senate of Canada are created by the Crown itself, and are not elected by the people.

Because the Governor-General, in proroguing Parliament, confined himself within the limits of his powers, is it to be concluded that he acted in a constitutional manner? No. He is further required to exercise the Royal prerogative in a constitutional manner, that is, for the public good. Blackstone lib. 1, ch. 7, Am. ed., vol. 1, p. 188, says: "In the exertion, therefore, of "those prerogatives which the law has given, the King is irresis- "tible and absolute, according to the forms of the Constitution; "and yet, if the consequence of that exertion be manifestly to "the grievance or dishonor of the Kingdom, the Parliament will "call his advisers to a just and severe account. *For prerogative* "*consisting*—as Mr. Locke has well defined it—*in the discretion-* "*ary power of acting for the public good, where the positive* "*laws are silent, if that discretionary power be abused to the* "*public detriment, such prerogative is exercised in an unconstitu-* "*tional manner.*" See also Bacon's Abrid. Vo. Prerogative.

The real point at issue, therefore, is whether in the exercise of the prerogative of prorogation, the Governor General has acted for the public good? The prorogation took place without consulting the House of Commons, nearly one-half of whose members (96 out of 200, present or absent) were utterly opposed to any kind of adjournment; it set aside Sir John A. McDonald's resolution, as well as that of the Hon. L. S. Huntington; it dissolved the Committee of Enquiry, which was entrusted with an investigation into the gravest charges ever made against Ministers; it cancelled the order of the House of Commons enjoining upon the Hon. Mr. Starnes not to dispossess himself of certain documents placed in his keeping; it may delay a full investigation into matters highly affecting the dignity of the Crown, the honor of many subjects and the material welfare of the nation. The House of Commons, or both Houses of Parliament, are the only authorities to demand the just and severe account alluded to by Blackstone, and to determine whether the effects of the prorogation tend to the good of the country. These important results involve a mere question of fact, the discussion of which, however interesting to political parties, would be out of place in a law review.

III.—The Royal Commission.

In order to form a correct opinion as to the efficiency of the two modes of enquiry under consideration, *i.e.*, the Parliamentary enquiry, and the enquiry by Royal Commission, the reader should glance at their respective privileges, powers and attributes.

1st. At a Parliamentary enquiry, the House of Commons, or its Committees, enjoy the utmost latitude, whether as to the subject matter or form of the questions put to witnesses; their investigations are in no wise restricted to matters specified in the Resolution appointing them. Cushing, 384; Hans, (2) ix, 493.

On the contrary, an enquiry by Royal Commission is limited to the subjects therein expressed.

In the course of an enquiry concerning the Duke of York, Mr. Whitbread states that "the Committee were not fettered by settled forms or principles of evidence as was the case in the courts below. If once such a limit was imposed upon the investigations of the House of Commons, there was an end to the inquisitorial power of Parliament" And Sir Samuel Romilly said: "The object was very different from that of Courts of Justice, and therefore the House could not be bound by the same ties."

Speaking of Royal Commissions, Todd says, vol. 2, p. 349, "The Sovereign, by a Commission issued under the sign manual, or by patent under the great seal, authorizes certain persons therein named, to enquire into a *specified* subject, and report to the Crown thereon."

2nd. In an enquiry before the House of Commons, a witness cannot refuse to answer under the pretence of rendering himself liable to penalty or to criminal prosecution, or under any other pretence whatsoever. Cushing, 389.

In the exercise of this immense privilege, the House may resort to imprisonment of the unwilling witness during the term of its session. Cushing, 390.

On the contrary, by 31st Vict. ch. 38 (1868), sec. 2, "No party or witness shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution."

3rd. Witnesses summoned before the House of Commons are protected against the consequences of the disclosures which they

make in their evidence. Cushing observes on this subject, p. 397: "While the law of Parliament thus demands the disclosure of the evidence, it recognizes to the fullest extent, the principle upon which the witness is excused from making such disclosure in the ordinary Courts of Justice, and protects him against the consequences which might otherwise result from his testimony; the rule of Parliament being, that no evidence given in either House can be used against the witness in any other place, without the permission of the House, which is never granted, provided the witness testifies truly." Hans (2) xviii, 968–974.

Witnesses summoned before a Royal Commission enjoy no more protection than that afforded to witnesses giving evidence before the ordinary tribunals.

4th. The sittings of the Commons, or of its Committees, are generally open to the public, and when they are not, the parties interested are allowed to be present. Royal Commissioners have the absolute power of regulating the proceedings of their own tribunal, and of admitting or excluding what persons they please from attendance during their sittings. Todd, vol. 2, p. 355.

5th. Finally, a Parliamentary enquiry is not conducted under oath, while that before a Royal Commission is.

The first clause of the 31st Vict. c. 38, declares that "The Governor may, by the Commission in the case, confer upon the Commissioners or persons by whom such enquiry is to be conducted, the power of summoning before them any party or witnesses, and of requiring them to give evidence on oath, orally or in writing, (or on solemn affirmation, if they be parties entitled to affirm in civil matters), and to produce such documents and things as such Commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

"2. The Commissioner or Commissioners shall then have the same power to enforce the attendance of such witnesses, and to compel them to give evidence, as is vested in any Court of Law in civil cases; and any wilfully false statement made by any such witness on oath or solemn affirmation, shall be a misdemeanor, punishable in the same manner as wilful and corrupt perjury."

It is evident that both modes of investigation—separately or collectively taken—are imperfect, seeing that they fail to secure with any certainty, full and complete enquiry. It is true the

House of Commons possesses extraordinary powers; but it lacks the most essential condition in the research after truth, namely, the sanction of an oath.

If witnesses summoned before the House or its Committees, were subject to the pains and penalties attaching to the crime of perjury (as is the case now in England)—having no claim to privileges of any kind whatever, the system of investigation might be considered perfect; but the known perversity of the human heart, and the difficulties experienced in attempting to elicit truth from the mouth of witnesses in ordinary Courts of Justice, in the daily affairs of life, should convince any one that an enquiry conducted without the administration of an oath —especially in regard to political offences, where political passions predominate over all other considerations—will never educe evidence of a conclusive character.

Meanwhile, until our Constitution is amended in this respect, it becomes not merely *à propos*, but an urgent necessity, in any enquiry affecting the public interests, to resort to a Royal Commission, as an aid to, or completing link in, the Parliamentary investigation.

From this point of view, then, a Royal Commission may be considered of unquestionable advantage, even though it be deemed unconstitutional; for a witness, in most cases, would prefer to take the oath and answer any question put to him, rather than test the constitutionality of the Commission, in the one case, or risk the consequences of a judgment of public opinion in the other.

Before concluding this article, there remains only to consider such cases as would justify the issuing of a Royal Commission.

It has been objected that the Royal Commission is unconstitutional, because the Hon. Judge Polette, one of the Judges of the Superior Court of the Province of Quebec, and holding that office, is one of the Commissioners.

In support of this objection, the 8th clause of the 78th chapter of the Consolidated Statues of Lower Canada is cited, which forbids (justly) any judge of the said Superior Court "*to hold any "place of profit under the Crown so long as he shall be a judge.*" But the position of Royal Commissioner is not essentially "a place of profit"—on the contrary it is usually a gratuitous office.

The most that can be exacted under this Statute, therefore, is, that Judge Polette shall exercise the office of Commissioner gratuitously.

It is also alleged that the Royal Commission violates a great principle in the Bill of Rights of 1689, to wit: "That freedom of speech and the debates and proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament." This privilege of either House has been recognized by legal authorities, in many instances, of which Hallam gives a summary in his Parliamentary History of England. But it cannot be seriously maintained that this maxim of Constitutional Law embraces anything more than full and entire protection of Members of Parliament against all civil or criminal prosecutions on account of their acts on the floor of either House.

This immunity has never had the effect of preventing the Crown from instituting enquiry—whether the matters to be enquired into had been discussed in Parliament or not. For instance, could the assertion be maintained for a moment, that the Governor General could not issue a Royal Commission to enquire into the administration of justice in Lower Canada, because the Hon. Mr. Dorion had attacked the Bench on the floor of the House? The debates and proceedings of the House of Commons, it is said, cannot be questioned in any way, out of Parliament. Then the House of Commons would over-ride the law—would be supreme over the British Constitution by which we are ruled. Have not the tribunals of the Mother Country, as well as those of the Colonies, time and again, maintained a contrary opinion—even claiming the right to decide upon the existence of their privileges?—Stockdale *vs.* Hansard, 7 A. & E. 1; Dill *v.* Murphy, 1 Moore N. S. 487; Kielly *vs.* Carson, 4 Moore, P. C. Cases, 63; Fenton *v.* Hampton, 11 Moore, ibid 347; Doyle & Falconer, 1, L. R. P. C., 328; The Speaker of the Legislative Assembly of Victoria *v.* Glass, L. R. P. C. On the 20th May, 1870, the Superior Court of Newfoundland replied as follows to a Committee of the Legislative Assembly:

"Both Houses of the Assembly possess, as incident to their existence, all rights necessary for the due discharge of their legitimate functions, but the judgment of the Judicial Committee of the Privy Council, in a case which arose in Newfoundland thirty-two years ago, *Kielly v. Carson*, and has been affirmed by several other decisions in the same High Court of Appeal, has denied and for ever set at rest the pretensions which once were raised by Colonial Legislatures, that, under the assumption that the Law of Parliament applied to them, their will was law, and their proceedings were unexaminable by the Superior Courts. It is altogether visionary to imagine that any

Legislature, Assembly, body or power, possess under British rule, supremacy over the law in any particular whatsoever. Even the prototype of Colonial Legislatures does not claim for itself any such power, for in a recent work of no ordinary ability upon Parliamentary Government in England, I find the following passage :

'No mere resolution of either House, or joint resolution of both Houses, will suffice to dispense with the requirements of an Act of Parliament, even although it may relate to something which directly concerns but one Chamber of the Legislature :' Todd's Parliamentary Government, 260." (6 Canada Law Journal.)

And is it true that the Canadian Parliament itself is supreme and sovereign? Are its acts not to be questioned before the ordinary Courts? Have not the tribunals of the Dominion over and over again set aside the statutes of our Legislatures as being unconstitutional? It is, therefore, not correct to say—in the sense proposed—that the debates and proceedings of Parliament cannot be questioned in any way out of Parliament.

Some writers have doubted the power of the Crown to issue Royal Commissions; but it has not been denied for a long time, even in England where it exists under the common law only. In Canada that power is consecrated by the Statutes. As far back as 1846, it was specially recognized by the old Canadian Legislature, in 9 Vict. c. 38, or ch. 13 of C. S. C.; and the provisions of that Statute have been reproduced verbatim by the present Parliament of Canada, 31st Vict. ch. 38, 1868. The first clause provides that: "Whenever the Governor in Council deems it expedient to cause inquiry to be made *into and concerning any matter connected with the good government of Canada, or the conduct of any part of the public business thereof*, AND SUCH ENQUIRY IS NOT REGULATED BY ANY SPECIAL LAW, *the Governor*," &c. &c.

The history of the country affords few precedents where occasion has been given for an interpretation of this Statute; notwithstanding, some instances are to be found. In 1863, when several members of the present Opposition were in power—the Executive including the Hon. Messrs. Dorion, Holton and Huntington—a Royal Commission was issued to enquire into "certain charges of malversation of office," which had been made "against the Joint Clerk of the Peace and Clerk of the Crown at Montreal." In the instructions given to the Commissioners, it was stated among other things, "that one of them (the said parties) had embezzled the Government monies," "That the said . . . .

every time he swore to the correctness of his accounts, committed perjury." A report of the investigation was called for, without giving the Commissioners the option of expressing their opinions thereon.

The learned Judge Aylwin being summoned to appear as a witness before the Commissioners, refused to take the oath, alleging that the issuing of the Commission was unconstitutional. This refusal was allowed to go unpunished.

The question of legality *quoad* the said Commission underwent a lively discussion at the time through the medium of the press, the Government party maintaining that it was issued in strict conformity with the spirit and letter of the Statute, while the party in Opposition—the men who are now in power—insisted upon a different and totally opposite view.

The Superior Court (Monk J.) being called upon to decide the point on a Writ of *quo warranto*, pronounced in favor of the Commission. Mr. Laflamme, Q.C. (the present member of Parliament for the County of Jacques Cartier), represented the Government interest in the case.

Mr. T. K. Ramsay, then an advocate practising at the Montreal Bar, and lately a supplementary Judge of the Superior Court of the Province of Quebec, wrote a vigorous pamphlet on the subject, from which the following is an extract:

"But although admitting to the fullest extent the right of the Crown to appoint commissions of enquiry, it would seem that this power must be so exercised as not to trespass on the rights of individuals, or to enter upon any investigation otherwise provided for by law. The power must be exercised in good faith for the purposes of obtaining information, and not with a view of dividing the responsibility of the executive with persons independent of the direct censure of Parliament. But so understood, this power is a common law right of the Crown, and perfectly independent of the 13th chapter of the Consolidated Statutes of Canada.

"That act may be taken as an exposition of the scope of this common law right, when it enumerates the causes for which commissions of enquiry may be appointed, with power to examine witnesses under *oath;* but it certainly did not originate the right which had been frequently exercised. The only effect then of that statute was to give the Governor power to appoint Commissioners having power to send for persons and papers, to examine witnesses under oath, and to compel them to attend and give evidence. This right of examining under oath, it is hardly necessary to add, the Crown did not possess at common law.

"The true doctrine, therefore, appears to be: 1st, that at common law the Crown has the right to appoint commissioners to inquire into, and concerning any matter connected with the good government of the state, or the conduct of any part of the public business thereof, or the administration of justice therein, when such inquiry is not regulated by any special law.

"2nd. That here the Governor has the further power, under the 13th chapter of the Consolidated Statutes of Canada, to authorize the commissioners so appointed in any of the above mentioned cases, to summon before them "any party or witnesses, and of requiring them to give evidence on oath orally, or in writing, and to produce such documents and things, as such Commissioners deem requisite to the full investigation of the matters into which they are appointed to examine."

"If this exposition of doctrine be correct, it would seem to result, 3dly, that neither by common law, nor by the general statute, does any such power extend to the investigation into anything purely of a private nature, or into the conduct of any person named, or to any accusation of any crimes or offences alleged against any particular person.

"Fortunately we are not obliged to have recourse to abstract reasoning in support of this proposition. In the 12 Coke 31, under the heading of Trin. 5 Jac. 1, we find the following: "Note; commissioners in *English* under the Great Seal directed to divers commissioners within the counties of *Bedford, Bucks, Huntington, Northampton, Leicester, and Warwick* to enquire of divers articles annexed to it: and the articles were also in *English*, to enquire of depopulation of houses, converting of arable land into pasture, &c. But the commissioners should not have any power to hear and determine the said offences, but only to enquire of them: and by colour of the said commissions the said commissioners took many presentments in *English*, and did return them into the chancery and after, *scil. Trin.* 5 *Jac.* it was resolved by the two chief Justices, and by *Walmsley, Fenner, Yelverton, Williams, Snigg, Altham*, and *Foster*, that the said commissions were against the law for three causes:

"1. For this, that they were in English.

"2. For that the offences enquirable were not certain within the commission itself, but in a schedule annexed to it.

"3. For this, that it was only to enquire, which is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy.

" For this, that it is not within the statute of 5 Eliz., &c.

"Also the party may be defamed, and shall not have any traverse to it.

"Such a commission may be only to enquire of *Treason*, felony committed, &c. And no such commission ever was seen to enquire only (i. e. of crimes)."

"This *dictum* then of Lord Coke fully supports our 3rd proposition. The commissions to the persons in these different counties, were commissions of enquiry only, as to offences, and as to *persons* "by whom" they were committed, and as Lord Coke says, "no such commission ever was seen." And this *dictum* is confirmed by *Hale & Hawkins.*

"But commissions for more than enquiry, that is to hear and determine, could not be addressed to commissioners, but to the judges of assize, for in *Magna Charta*, cap. xii., we find, "We, or if we be out of the realm, our Chief Justicer, shall send our Justices through every county once in the year, who, with the knights of the shires, shall take the aforesaid assizes in the counties." And the famous chap. xxix, declares: "No freeman shall be taken or imprisoned, or be disseised of his freehold, or his liberties, or free customs, or be outlawed or exiled, or *in any other wise destroyed*, nor will we pass upon him nor condemn him unless by the lawful judgment of his peers, or by the law of the land." And Coke interprets this to mean, "no man shall be condemned at the King's suit, either before the King in his Bench, where the pleas are *coram rege* (and so are the words *nec super eum ibimus* to be understood) nor before any other commissioner or judge whatever (and so are the words *nec super eum mittemus* to be understood.) And so the 16th Car. 1, cap. 10, which abolished the Star Chamber, declares "that from henceforth no Court, council, or place of judicature, shall be erected, ordained, constituted, or appointed within this realm or dominion of Wales, which shall have, use or exercise the same or the like jurisdiction as is or hath been used, practised or exercised in the said Court of Star Chamber." And the Bill of Rights establishes that all commissions and Courts, of a like nature to the late Court of Commisioners for ecclesiastical purposes, are "illegal and pernicious."

"It is therefore not only the positive law, but the very basis of all of that policy, of which British subjects are so justly proud, that no one shall be affected in his liberty, or in his goods, or in his character, but in the regular course of law.

"This proposition will be readily admitted. Indeed it would be no easy task to find any one bold enough openly to controvert it; and yet we find the principle it involves flagrantly contravened, without almost attracting a passing remark."

There is no doubt that the accusations made against the Ministers charge them with perjury, corruption and malfeasance of office, and also with corrupt practices at elections, contrary to the explicit provisions of our statutory law; and it is well known that whosoever wifully violates a statute commits a misdemeanor. 31 Vict. c. 71, s. 3. The Commissioners are even authorized to appraise the evidence, *and to express any opinion they may think fit thereon.* (See Pleas of the Crown, vol. 2, p. 21; 2 Rol. Ab. 164, p. 14; Comyn's Digest, vo. Prorogative D. 29; Bowyer's Const. Law, 496.

There is still another and perhaps a better reason for nullifying the Commission. According to all the leading authorities, the House of Commons, as the grand inquest of the nation, is fully and alone competent to investigate every case of ministerial abuse or misconduct. Nearly two centuries ago, Hales, J., said: "The Court of Parliament is the highest court, and hath more privilege than any other court of the Realm. Trewiniard's Case, 36 H. 8, D. 60."—Hales on Parliament, p. 75. Elsewhere, p. 14, the same learned Judge observes: "It is *lex and consuetudo Parliamenti* that all *weighty* matters in any Parliament, moved concerning the Peers or Commons in Parliament, ought to be discussed, determined and adjudged by the course of Parliament, and not by any other law used in any inferior court, which was so declared to be *secundum legem et consuetudinem Parliamenti*, concerning the Peers of the Realm by the King and all the Lords, *pari ratione* for the Commons for anything done or moved in the House of Commons."

In 1775, in a work of high standing published by de Lolme, on the *Constitution of England*, these remarks are to be found: "The Constitution has besides supplied the Commons with the means of immediate opposition to the misconduct of government, by giving them a right to impeach the ministers. . . . . .

"If, for example, the public money has been employed in a manner contrary to the declared intention of those who granted it, an impeachment may be brought against those who had the management of it. If any abuse of power is committed, or in general anything done contrary to the public weal, they prosecute those who have been either the instruments or the advisers of the measure. . . . . .

"But who shall be the judges to decide in such a case? What tribunal will flatter itself that it can give an impartial decision, when it shall see, appearing at its bar, the government itself as the accused, and the representatives of the people as the accusers?

"It is before the House of Peers that the law has directed the Commons to carry their accusation." De Lolme, pp. 110-112.

It was likewise in this sense that the Commons thus answered a *quœre* from the Lords in 1692:

"They thought it a strange and foreign supposition that a great and guilty Minister, finding himself liable to an impeachment in the next session of Parliament, should by his power procure himself to be tried

and acquitted by an inquest of persons appointed on purpose, and then by a plea of *autrefois acquit* prevent a second and true examination of his crimes in Parliament.

"There is no example of this kind; and if such an *unheard of proceeding* should happen, it is left to consideration whether a Parliament *would not vindicate the Kingdom against so gross and fraudulent a contrivance.*"

No precedent, in fact, can be found to justify the issuing of a Royal Commission in such cases. Parliamentary history does not furnish a single instance of bribery and corruption against a whole administration; it simply makes mention of a few trials of that description against one or two ministers, and they were all brought up before Parliament.—De Lolme, p. 92; Judge Hales, p. 195.

Referring again to the subject of Royal Commissions, Todd, vol. 2, p. 348, observes: "*It would be unconstitutional to refer to a Royal Commission subjects which are connected with the elementary duties of the Executive Government and with its relations to Parliament; or to appoint a Commission with a view to evade the responsibility of ministers in any matter,* or to do the work of existing departments of State, who possess all needful facilities for obtaining information upon questions of detail, *and who are directly responsible to Parliament, or to inquire into crimes and offences committed by particular individuals,* and which are cognizable by the ordinary courts of law. *Neither should a Commission be appointed unless the Government are prepared to give definite instructions to the Commissioners.*"

Todd refers to Hans Deb., vol. clxx, pp. 915-949; Ibid. M. Gladstone, vol. clxxv., pp. 1208, 1219; Toulmin—Smith on Commissions, pp. 150, 159. See also Cushing, p. 411.

The proof of the charges made being still, in part at least, held by the Hon. Mr. Huntington, it is not clear that Government can give the Commissioners any definite instructions in the matter. It is also evident that a common law exists which reaches the abuses of the Executive, so that the Statute does not apply here. In short, a Royal Commission can only issue to enquire into abuses committed outside of the Executive—the expression in the Statute: "the good government of Canada" being applicable only to certain relations of the Executive with the exterior of Parliament.

The Parliament of Canada possesses all the immunities and powers held by the House of Commons in England at the time

of the Confederation Act of 1867 (B. N. A. Act, 1867, s. 18; Stat. of Canada, 1868, 31 Vict. c. 23), but it does not enjoy the privileges of the House of Lords. Therefore no impeachment against ministers can be brought before either branch of the Parliament of Canada. The House of Commons may investigate the whole subject of complaint, pass a vote of censure or want of confidence, and after the formation of a new ministry, it may, perhaps, direct the Attorney-General to indict them before the ordinary criminal courts for malfeasance of office and corrupt practices at elections; but it has no more powers in this respect under the Constitution of Canada.

And now what is to result from this Royal Commission? Will the Hon. Mr. Huntington be summoned to appear as a witness? Will his presence be enforced by means which the law places at the command of the Commissioners? *i. e.* a commitment. It is not probable that recourse will be had to rigorous measures, the effect of which would be to place the Hon. gentleman in the position of a martyr to the people's rights and the national assembly; and yet, ordinary tribunals are the only authorities competent to decide whether the Royal Commission is constitutional or not. The House of Commons, although sole judge of the exercise of its privileges, has no jurisdiction to declare that the Commission is *ultrà vires* and beyond the provisions of the common law and of the Canadian Statute respecting inquiries into public matters (31 Vict. ch. 38). Was it not, therefore, the duty of the Hon. Mr. Huntington as private prosecutor, to raise the point on a writ of *quo warranto*, or *Habeas Corpus* by appearing before the Commission and there refusing to take the oath?

Whatever the future may develope, whether the Ministers are guilty or not, and we sincerely hope that they are not, the honor of the country imperatively demands that this Pacific Scandal be eradicated from our midst as speedily as possible. The friends and enemies alike of the Government earnestly desire to see the truth or falsity of the charges made, brought to the light of day. Let justice be done to Canada, and let the world know that she can at least give security for her honesty to capitalists who are anxiously solicited to invest their means in the vast undertakings of the country—the construction of Canals and Railways.

One word more in conclusion. This Pacific Scandal has demonstrated beyond the shadow of a doubt, that the ordinary pecuniary

means of Candidates are insufficient to meet the requirements of electoral constituencies; and that recourse is had to millionaires more or less interested in the greatest enterprises of the country —such as Canals and Railways. It is evident that a great evil is spreading over the entire area of our young Dominion, which can only be checked by an electoral law of a more repressive character than that now in force. It is true that several good measures have been proposed through the medium of the press and on the floor of the House with a view to remedy this state of things; and we sincerely hope that Parliament will at the earliest opportunity not only adopt them, but that it will proceed even further: 1st. Every elector should be compelled by law to cast his vote, and, 2nd. he should be prohibited from conveying any other elector to the polls; the whole inforced by distress or by imprisonment. It may be objected that such a law would violate the principle of personal liberty. True, as long as the present system of nomination is continued; but with the abolition of this formality, obligatory voting would only enforce the duty devolving upon all citizens to exercise their franchise at every election. Under such a law, Conventions might be held and candidates nominated by political parties, while every elector would be at liberty to vote for either one of the candidates so selected, or for any other individual of his own choice.

D. GIROUARD.

Montreal, 1st Sept., 1873.

ADMINISTRATION OF JUSTICE.

We publish extracts from some of the leading papers of the Dominion, as writers in legal periodicals in England and the United States seemed to doubt the correctness of the strictures published in this Review on the Court of Queen's Bench for the Province of Quebec.

LA REDACTION.

QUEBEC JUDICIARY.—In reply to Hon. Mr. Dorion, Sir John Macdonald said he did not know very well what to do with the petition from the Legislature of Quebec to inquire into the state of the Judiciary of that Province, because along with the petition was a request to grant more salary to the judges. The first part seemed to indicate that they had something to complain of in the judiciary, but the second part rather pointed the other way.

Hon. Mr. Dorion said the state of the Judiciary in Quebec Province was scandalous. The Legislature of Quebec told the country they had relegated the matter to the Dominion Parliament. The Minister of Justice told them that he did not know very well what to do in the matter. In this way there appeared at present to be no way of having redress, and he complained greatly that it should be so.

Hon. Mr. Huntington, referring to the things petitioned for by the Quebec Legislature, said there were a thousand things which the people would do rather than cast any doubt upon the character of the judiciary.

After a few remarks from Mr. Joly as to the undefined state of the powers of the Local Legislature in this matter,

Mr Blake said that the state of affairs in Ontario and Quebec were happily very different, but he argued that what was called a division of power between the Local Legislatures and the Dominion Parliament was merely a confusion of powers. The Minister of Justice had confessed his inability to deal with the question, and said that he had no means of knowing what took place nor how things were conducted in the courts of justice. He supposed that this latter was the cause which had led the Minister of Justice to surround himself with so many Queen's Counsel, as it was diffcult to see what else they were appointed for. He contended that in respect to this question the Constitution was defective. The position of the Minister of Justice in the matter was such as he could not maintain under the Constitution, and this Parliament must abandon the position they had taken upon the matter, because they could not take away from the Local Governments the constitution of the courts and the administration of justice.

Sir John Macdonald said he could not go round all the courts and see how they were conducted. It was for those who were unjustly dealt with to complain, and so far as he was aware all the judges of Quebec were good judges. He defended the appointments he had himself made, and said they were all good ones.

Hon. Mr. Dorion said it would be invidious for him to point out the appointments which were not suitable, and he called the attention of the hon. gentleman to the fact that not long ago four judges had been forced to resign. He would ask the hon gentleman which of his appointments were not of a political character, and had been made a resting place for some political friend. He reminded the Premier that in England only the best men were placed upon the bench, whilst in Quebec it was a fact that Government favourites were made Queen's Counsel, which nevertheless was made an excuse for creating them judges. The Minister of Justice was not the proper party to make these appointments, on account of not personally knowing the legal capacity of the gentlemen upon whom the distinction of Queen's Counsel was conferred. Some of these gentlemen had run away three months; some of them had not practised. He congratulated the Government on the appointment of Judge Sanborn, a gentleman chosen from the Opposition, and upon the appointment of Mr. Sicotte. Three petitions against judges had been filed this session, and he could call upon the lawyers of both shades of politics in Montreal to testify whether he was not correct in the general statements he had made in regard to the character of the judiciary in general. If the Minister of Justice only visited the Lower Canadian Court of Appeal, he would see such an exhibition as could not be witnessed in any other country. (Hear, hear)—(Globe Rept. Dominion Parliament.)

The Judiciary of Lower Canada.—A subject of the greatest importance occupied the attention of the House of Commons on Tuesday evening. If came up on the vote of money for the Judiciary, and was indeed the question of the fitness of the Judges of the Province of Quebec to discharge the duties which are committed to them. We may safely start with the propositions that the Bench of this Province is not held in the high esteem which should surround the magistracy, and that the respect entertained for it is deplorably lower than that which is felt in Ontario for the Judiciary of that Province. When Messrs. Dorion and Huntington invited the Minister of Justice to ascertain what was the opinion of the Bar and the public of Lower Canada, they encountered no risk of their previous statements being confuted as the result of his inquiry. The Bench here is not respected as the Bench ought to be; and, we believe we may say, has not been for many years. Perhaps this arises to some extent out of the division of races. This must always have its effect in limiting the number of men from whom the Minister can choose,

and it also inevitably prevents that frequent and free intercommunication between all the members of the profession, on and off the Bench, which produces an *esprit de corps* that at once serves to protect the body against Ministerial outrage, and to keep up kindly feeling between its members. We believe that in spite of the good understanding which prevails between advocates as individuals, this separation into two classes has much to do, in various and hardly explicable ways, with the unsatisfactory condition of our whole legal system. We acknowledge the vagueness of this head of our explanation of the very disagreeable fact, yet we believe it to be a just explanation. Another cause undoubtedly has been the impropriety of some appointments. No one likes to allude to individuals, who are admitted to be worthy men and some of whom after their promotion have not shown themselves to be the worst of the Judges. But it is notorious, as Mr. Dorion said, that more than one man has been placed upon the Bench for no other apparent reason than his connection with a minister or leading politican; because it was found necessary to provide for him outside of the Cabinet; or still worse, because he had done a great deal of electioneering service for the Government, and perhaps had to be consoled for losing his elections. Now appointments of this sort, even when they do not turn out so badly as might be expected, demoralize the Bench in public estimation, and create at the Bar the impression that the honours which should belong to careful study and laborious exertion, are carried off by those who neglect their proper duties, and give themselves to pursuits which neither inform the professional intellect nor exalt the personal character. The mischief, as Mr. Dorion pointed out, begins earlier than the appointment to a judgeship. We will say nothing about the Queen's Counsel, for though such distinctions, if they are to be kept up, cannot be conferred upon the noodles and blackguards who have sometimes received them, without serious evil, some of Sir George Cartier's nominations have been too farcical greatly to affect the composition of the Bench. Even he would not have had the impudence to put Mr. Paul Denis, Q.C., among the judges. But law officers of the Crown are of course after serving in those posts entitled to regular promotion as opportunities serve, until they reach the Bench. Now we have had a Solicitor-General who was little more than a boy, who could have had no experience in his profession, and who was probably tempted by this early promotion, into habits which closed his career, and prevented his inaptitude from being displayed at the expense of litigants. We do not know how far this course of promotion will be considered still to prevail, now that the Crown Law officers are nominated by the Local and the Judges by the Federal Government; but if Solicitors-General are to become Attorneys-General and Attorneys-General, Judges, the Bench of the Province of Quebec promises rather to become worse than better under the present *regime*. It is quite certain that we could not have had such an incapable Attorney-

General as Mr. Ouimet under the old constitution, since the Attorney-General had then some serious work to do. What kind of a Solicitor-General might have turned up we will not venture to assert. In Ontario, where the Bar is strong and united, and regards its own pursuits as of more importance within the profession than the faculty of making clap-trap harangues at elections, we do not believe that any authority would venture on such promotions as we have repeatedly seen here. When men of large practice and long experience have been passed over, merely because they abstained from politics, in favour of others of half their years, and with no public reputation, and whose sole merit was their politics, it is not wonderful that the Bench does not stand as high as it ought to do. And this is just where one important difficulty comes in. The Bar both of Montreal and Quebec have held meetings, in which they express the universal discontent with the condition of our Judiciary, and have recommended as a remedy the increase of salaries. The present judicial salaries are absurdly low; but well informed persons ask themselves *apropos* of this remedy, whether such judges as we get by the present system are worth more money than they receive—whether it is not notorious that several of our judges never earned at the Bar even the small salaries they receive on the Bench, and whether other men are not looking earnestly for judgeships with a view to the improvement of their financial position? We are not aware that there have been refusals of proffered judgeships on account of inadequate salaries; and though we should be the first to maintain that efficient judges should have double the existing salaries, we feel great difficulty in advocating that change without some better assurance than we have at present that the money would really procure for us the talent and the industry of which we are in search. Of course it would be difficult as well as disagreeable to go into particular examples of inefficiency and incompetence. But there can be no doubt that the sentiment with regard to the body is that which we have indicated and that this sentiment is exactly the reverse of that confidence in the Bench which prevails in Ontario. In general it is impossible to take up a particular decision and say this was certainly wrong, as there is usually something to be said for the worst opinion. But the extraordinary number of appeals from the Courts of Lower Canada certainly afford proof that decisions with us are looked upon as of very precarious authority; and this even after we have made all just allowances for the disposition of litigants in cases involving large values to push their chances to the very farthest. The public at large can appreciate these things, and they can also appreciate those scenes in the highest of our Provincial Courts, which Mr. Dorion alluded to, and of which he said justly that they could be witnessed in no other Court of Justice. The little courtesy which their Honours show to each other—the small respect which one exhibits for the opinion of the other, cannot but create the general impression that the opinion of none is of the highest value.

But, of course, this impression, except among men familiar with the Courts, can be only of a general character. Still, every now and then extraordinary proceedings force themselves to the notice of individuals, and sometimes become public. Not long ago in a case which turned mainly on the accuracy of accounts it fell to our lot to show that the leading motive of a judgment, which not only disposed of a large sum of money, but which also destroyed the character of a man of business, was demonstrably erroneous, and could have been given only by men who did not understand the nature of a balance sheet. Yet this motive was repeated more than once by different judges, and on more than one occasion, only one of them, Mr. Justice Badgley, perhaps because he had a commercial education, dissenting. In the case of Colonel Gugy, too, reprehensible as we find the spirit of his petition to be, there is matter, as we recently showed, which reflects grave discredit on some of the judges. We should be disposed, however, to dwell less upon erroneous decisions to which the best men are sometimes liable, bad as these are, when they indicate presumptuous ignorance of ordinary business matters, or gross carelessness, not to speak of partiality, than upon the general want of zeal in the public service which apparently lies at the root of the interminable delays, which are so much complained of by all who have business in the Courts. There again it is difficult to specify particulars, of what every one feels in the gross. Perhaps the traditions of our Courts, the system of our procedure, and the professional habits of our advocates, all have much to do with this crying evil. Let us, however, give an example of the sort of thing we mean. One of the Courts being about to close at four o'clock, and it being the last day of term, an advocate whose case is next in rotation rises to address the Bench, and is met by a question whether the case is likely to occupy more than five minutes, with the intimation that if it be, it is hardly worth while to begin as it cannot be got through that term. The advocate will not bargain for five minutes, but thinks that half an hour will be amply sufficient; but at last he has to hold his case over till another term, because he is either refused a hearing which will trespass on the sacred four o'clock line, or he is granted it in terms which make reasonable exhibition of the merits so embarrassing as to amount to a refusal. We know that both in England and in Upper Canada Judges occasionally sit long into the evening, rather than leave business undisposed of to another term or assize. In the same connection we must mention the universal *deliberes* and the frequent rehearings. It does seem to us that some cases might be disposed of without this postponement, and that in many the decision would be far more satisfactory without it. If a Judge hears arguments through a whole term, preserving in his memory only so much as his notes enable him to retain, and then goes to the deliberation of a mass of different cases, it is easy to see that the chances of misconception and consequent error are likely to be large. There are probably practical obstacles, at all events when

there are several Judges, to an immediate deliberation; but we cannot but think that there should be such arrangements as would admit of an attempt at least to arrive at a conclusion on each case within twenty-four hours after it is closed, and while the whole subject is fresh in the minds of the Judges. If they could dispose only of a few suits in this prompt manner, it would tend greatly to their own ease, as well as to the advantage of litigants, and, as we venture to think, to the surer administration of justice. In close connection with this subject, however, is that of the abolition of the present mode of *enquête*. Nothing can be less conducive to a sound decision—nothing so calculated to spin out a litigation than the present dislocation of the various parts of a suit, and the separation by long periods of times of the proof, the argument, and the deliberation, all of which ought manifestly to be consecutive and proximate, if the impressions made by the two first are to have any just relation to the third. We believe that it is in this last part of the subject of the present article that the greatest and most reasonable cause of dissatisfaction is to be found. We are far from thinking that the best appointments have been made to the Bench. Still, in judging of a Bench, we must average the capacities of the men upon it, and apart from one or two circumstances, the least disagreeable of which are the infirmities of men who in their time have done good service, but who ought now to be withdrawn, it would, perhaps, not be possible to sweep away the existing judges, and replace them from the Bar with a more competent body of lawyers. Yet it is not nearly so much the errors of the Bench as their want of method and energy in getting through the business—their want also of a decent show of zeal for the public and respect for each other, that the worst evils of our present condition are to be found. The whole system requires a thorough reform; and Sir John A. Macdonald, if his title be anything more than a show, ought to ascertain the truth, which he could readily do, without going into questions of personal character, by merely looking at the statistics of cases postponed from term to term, ordered several times for rehearing and reversed in England. It would be, of course, unfair to close an article of this kind without acknowledging that there are good men and efficient men on the Bench; but the men who are at once good and efficient are not in sufficient numbers to prevent our jurisprudence from having fallen to a condition, which is anything but creditable to the country—*Montreal Herald, April 10th*, 1873, (*Opposition Press.*)

THE JUDICIARY OF LOWER CANADA.—The *Herald* of this morning has a thoughtful article on this subject, which is now the more prominent from having been brought before the notice of the House of Commons last Tuesday evening. It is well known that the Bench of this Province does not command the respect which the judiciary should be entitled to, and in the article in question several reasons

are assigned for this. Amongst other causes, the division of races is thought to contribute somewhat thereto, by limiting the number of men from whom the Minister can choose, and preventing that free intercommunication between all the members of the profession, both on and off the Bench, which could produce an *esprit de corps* at once kindly between the members and protective against Ministerial influence. The impropriety of certain appointments to the Bench is held to be another cause. Men have been placed there simply for their political services and their connection with a Minister or a leading politician, or because it was needful to provide for them outside the Cabinet. Such appointments demoralize the Bench, and do not incite to careful study and laborious exertion as the way to professional promotion. Passing over some of the shameful appointments of Queen's Counsel, the *Herald* questions whether, under the new *regime*—whereby Crown law officers are nominated by the Local and the judges by the Federal Government—matters will not become yet worst. The present judicial salaries are admitted to be too low; but it is doubtful whether such judges as we get by the present system are worth more money than they receive. The extraordinary number of appeals from the Courts of Lower Canada is justly pointed to as proof of the precarious authority attached to the decisions of our Bench. And here it may be mentioned that Mr. Dorion, the other night in the debate in Parliament on this subject, said, if the Minister of Justice would visit the Court of Lower Canada sitting in appeal, he would see such an exhibition as could not be witnessed in a Court of Justice in any other country! But along with too frequent erroneous decisions, and positive want of needful, legal or commercial knowledge in some of the judges, is the want of zeal which would seem to lie at the root of the long delays so much complained of by those having business in the Courts. Judges are often culpably unwilling to prolong the sitting a little beyond the usual hour for adjournment in the afternoon, and frequently cases are thus forced to be held over to another term; whilst the habitual *deliberes* and the frequent rehearings cause continual postponements. The present mode of *enquête*, too, spins out litigation, and is a cause of great and very reasonable dissatisfaction. It is admitted that it would, perhaps, be impossible to replace the present judges with a more competent body of lawyers taken from the Bar; but the worst of the present evils is held to arise from a want of method and energy in getting through business, a lack of zeal, and a decent show of respect by the judges one for the other. A radical reform is needed.—*Daily Witness.*

L'ADMINISTRATION DE LA JUSTICE.—On discute beaucoup depuis quelque temps sur la signification de l'élection de l'hon. M. Dorion comme Bâtonnier général du barreau de la Province. Tout le monde reconnait qu'elle n'est pas due à la politique, mais la plupart des journaux qui ne sont pas obligés de défendre les nominations faites depuis quelques

années dans la magistrature, admettent que si elle ne constitue pas une approbation directe par le barreau de ce qu'a dit M Dorion en Chambre sur l'administration de la justice, elle prouve du moins que ceux qui sont à la tête de ce corps important, n'ont pas trouvé que le chef de l'opposition avait démerité de la profession en s'exprimant comme il l'a fait sur le compte des juges.

Ce que nous entendons dire tous les jours par les avocats de tous les partis que nous avons l'occasion de recontrer, nous porte à croire que le barreau tout entier partage l'opinion de M. Dorion sur une partie de la magistrature. Nous entendons constamment des plaintes, quelquefois même des accusations très graves. On dit que tel juge est trop agé pour continuer l'exercice de sa charge; on prétend que les infirmités de tel autre le rendent incapable de remplir ses devoirs On va jusqu'a prétendre que dans certains cas, le bandeau qu'ou a coutume de représenter comme recouvrant les yeux de la justice ne sert qu'à l'empêcher de voir la loi, et se relève trop facilement pour laisser voir quel est l'avocat qui plaide une cause, et même quelquefois quelles sont parties qui y figurent.

Ce qui indique mienx que toute autre chose la mauvaise opinion que beaucoup d'avocats ont d'une partie de la magistrature, c'est qu'ila n'osent pas lui dire en face, de crainte de nuir à leurs clients, ce qu'ils ne se gênent pas de dire partout ailleurs.

Y a-t-il quelque fondement à ces rumeurs? Il serait difficle de l'admettre, si les plaintes que nous entendons portaient sur toute la magistrature. Mais nous avons toujours été frappé de l'unanimité qui parait exister parmi les avocats à louer la conduite décente, la politesse, l'intègrité, la science et le travail de plusieurs juges, et particulièment des juges de la Cour Supérieure de Québec. La même unanimité existe pour condamner la Cour d'appel. A chaque terme, c'est un nouveau concert de plaintes, de critiques, d'accusations.

Bien loin que les choses améliorent, il parait qu'elles empirent, s'il faut en juger par des faits récents. D'aprés ce qu'on nous rapporte, le terme de la Cour d'appel qui vient de finir, aurait été accompagné de scenes qui dépassent tout ce qu'on a vu jusqu'ici. L'honorable jnge Taschereau aurait été obligé de protester contre la conduite d'un de ses collègues qui voulait empêcher un avocat de plaider sa cause.

Franchement, si la dixiéme partie de ce que l'on rapporte est vrai, il est grand temps qu'il soit apporté un remède énergique au mal, car il faudra peu d'années du régime actuel pour faire perdre toute confiance dans le plus haut tribunal du pays, et l'on sait que la confiance est une chose bien plus difficle à perdre qu'a regagner.

L'institution des magistrats de districts n'est pas destinée à nous faire retrouver dans la magistrature intérieure ce qre nous avons perdu dans les plus élevés de nos tribunaux. Sauf quelques exceptions, la plupart des magistrats que l'on a nommés font regretter aux justiciables les juges de paix et les commissaires pour la décision des petites causes. Il ne se passe pas de jour que nous voyions passer

devant notre bureau quelqu' avocat revenant de plaider devant un de ces magistrats qui siége à moins de dix lieues d'ici, et qui nous en rapporte des choses incroyables.

Si l'on veut achever de perdre la magistrature dans l'opinion publique, on n'a qu'a continuer de faire de pareilles nominations. L'institution des magistrats de district semble n'être qu'un bureau de placement pour les avocats sans cause du parti conservateur, qu'un moyen de récompenser des services d'élections.

Il vaudrait beaucoup mieux que le salaire de plusieurs de ces magistrats de districts fut converti en une pension alimentaire, et même qu'on l'augmentât, et qu'on les laissât dans leurs familles. La caisse publique ne s'en trouverait pas plus mal, et l'administration de la justice y gagnerait beaucoup.—*L'Evenement, June*, 1873.

Room for Reform, work for the Minister of Justice.—The Quebec *Chronicle* of Tuesday says: "There can be no doubt that the administration of Justice in this Province is at present in a very unsatisfactory state. The cause is certainly not a lack of judges. The Superior Court consists of twenty-five *puisnes* judges and a chief justice, the Court of Queen's Bench of four *puisnes* judges and a chief justice. The principal judges have recorders and judges of the sessions. Add to these the plentiful crops of district magistrates, now springing up over the Province, under the auspices of the Local Government, and it must be conceded that the cause of this unhappy condition of things is not attributable to numerical deficiency in the judges. The fact is startling but true, the Province of Quebec boasts as many judges as all England.

The complaints of the Bar and the public have been for the last few years especially directed against the Court of Queen's Bench, a court which, while possessing no original civil jurisdiction, is that to which go all appeals in civil matters. In cases exceeding in amount £500 sterling, a further appeal is admitted to the Privy Council, but as the vast majority of cases which come before it are for sums less than that amount, and as even in cases exceeding it, most suitors are deterred from proceeding further by the delay and expense; practically is a final Court of Appeal, its power for good and evil is immense, and it is of the last importance that its decisions should be regarded with respect and confidence.

Now, what is the condition of this Court, and how is it regarded? It has fallen so low that the judgments of its members command less respect than those of so many justices of the peace. On the simplest points, not only of law but of practice, judgments are given one day, the principle involved in which, if principle there be, is reversed the next and reverted to the day after. In hardly a single case are the judges ever unanimous, and their dissent from each other's opinions is, as a rule, expressed in the rudest terms. When counsel are engaged in arguing cases before them, the Court presents a curious

spectacle. One judge is busy writing a note, two others are engaged in private conversation, a fourth is perhaps walking up and down, and though a bystander might imagine the fifth to be listening, some absurd question soon proves that he has either not heard or misapprehended. Courtesy to the Bar or to each other is undreamed of. Scenes like this, which are, alas, anything but exceptional, might in some men be regarded as the eccentricities of genius, but when term after term, carelessly prepared judgments exhibit not only ignorance of law, but misapprehension of the most palpable facts of the cases submitted to them, they become intolerable.

The term of the Court of Queen's Bench, which closed in this city a few days ago, was marked by the usual scandalous scenes.

Immediately after the Court met, a motion was made by a barrister of this city, that the Chief Justice should be imprisoned in the common gaol till he made good several thousand pounds, to which extent the relator asserted he was wronged by the erroneous and corrupt judgments of the Chief Justice, in cases in which he was concerned. On the motion being made, the Chief Justice left the Bench, and Mr. Justice Drummond took his place with much dignity, the motion was gravely argued, received and fyled, and formally dismissed on the following day. We hardly expect this incident to be believed, but it is strictly true, and it shows what manner of man is the Chief Justice and what manner of Court is the Court of Queen's Bench.

Take another instance. An appeal was presented by a defendant from a judgment of the Circuit Court, condemning him to pay seventy-six dollars in a suit originally brought for one hundred and twenty. The Court at first unanimously refused to receive the appeal, on the ground that the judgment being for less than one hundred dollars, the appeal was barred. On the energetic remonstrance of counsel and the express words of the Code and Statute being pointed out, the Court, after a disgraceful altercation between its members, agreed to reconsider its determination, and actually held over its judgment till next term, a period of three months, on a question which we believe admits of no doubt and which must have been, and in point of fact has been, before it twenty times.

The case of Tanguay and Hoffman and another, reported in our columns a few days ago, in which a judgment was rendered last term, deserves special attention. This case had been heard on the merits before the Superior Court at Montmany, which, dissatisfied with the evidence on one head, ordered another proof, and reserved its decision till such proof was procured. The plaintiff appealed and asked that the interlocutory order be set aside. Only one defendant was made a party to the appeal, and he acquiesced in it, as he had a right to do, on the ground that he had been no party to, and disapproved of, the order of the Superior Court. The duty of the Court of Queen's Bench was obvious,—to set aside the order, if erroneous, and to remit the case back to the Superior Court for final judgment. In lieu of doing

so, in violation of the plain rules laid down both by Code and Statute, in opposition to the jurisprudence of thirty years, without hearing the defendant at all, with the whole of the evidence not before it, it not only reversed the interlocutory order, but deciding on the merits condemned the defendant to pay to the plaintiff two hundred and fifty pounds and the costs of both Courts. To settle the defendant, who was not before it at all, a clause was added to the judgment establishing his joint and several responsibility. In this most iniquitous decision the Court was for once unanimous. But the matter did not end here. The defendants' counsel remonstrated most vigorously, and their case was so good that it only required to be stated to be seen to be incontrovertible, and they therefore insisted that the judgment just rendered should be torn up and cancelled at once. And amidst the unrepressed and undisguised laughter and contempt of the Bar, torn up and cancelled it was, and the case now stands over till next term, "when the Court," to quote the words of the Chief Justice, "will make some order which the parties may or may not obey, "as they see fit"—*Evening Star, June*, 1873.

THE QUEBEC BENCH.—When the gentlemen who has since become the *batonnier* of the Quebec Bar first brought before the House of Commons the condition of the judiciary of that Province, it was hardly supposed that his statements would so soon be admitted to be within the truth. That they were true no one knowing the character of Mr. Dorion could for one moment doubt. But that is altogether a different matter from a public recognition of their truthfulness alike from political friends and opponents. When, on the second occasion, Mr. Dorion, with that sense of justice which has always distinguished him, desired in fairness to certain learned judges to exempt them from the charges he had made, he was set upon in the Premier's most approved fashion, and abused soundly for daring to question the impeccability of the men who, under the Macdonald-Cartier regime, were rendering the administration of the law contemptible and odious in the eyes of the people.

What, we should like to know, will Sir John A. Macdonald or his followers say to the article which has just appeared in a paper so conservative and cautious in its utterances as the Quebec *Morning Chronicle*? Here are some of its remarks on the Court of Queen's Bench, the court in fact, to which all appeals in civil matters in the Province must go, and whose decisions are final in all cases not exceeding in amount £500 sterling.

The *Chronicle* declares, so low has the court fallen into public estimation, that its judgments command less respect than those of justices of the peace. Principles laid down one day are set aside the next. The judges seldom agree, and express their dissent in the rudest terms to each other. When counsel address the Court, the judges pay little or no heed to the arguments. The judgments exhibit not

only ignorance of the law, but misapprehension of the most palpable facts. The *Chronicle* gives some astounding illustrations of proceedings before the Court. Here is one :—"The term of the Court of Queen's Bench, which closed in this city a few days ago, was marked by the usual scandalous scenes. Immediately after the Court met, a motion was made by a barrister of this city, that the Chief Justice of the Province should be imprisoned in the common gaol till he made good several thousand pounds, to which extent the relator asserted he was wronged by the erroneous and corrupt judgments of the Chief Justice in cases in which he was concerned. On the motion being made the Chief Justice left the Bench, Mr. Justice Drummond took his place with much dignity, the motion was gravely argued, received, and fyled, and formally dismissed on the following day. We hardly expect this incident to be believed, but it is strictly true, and it shows what manner of man is the Chief Justice, and what manner of Court is the Court of Queen's Bench."

The *Chronicle* may well doubt whether belief in such an incident, except it were actually witnessed, would be possible. Yet we beg to remind the reader that it happened in one of the Superior Courts of Law in the Dominion of Canada, whose Premier is, as Minister of Justice, specially responsible for the appointment of the judges and the efficient discharge of their duties. We take another scene :—

"An appeal was presented by a defendant from a judgment of the Circuit Court, condemning him to pay seventy six dollars in a suit originally brought for one hundred and twenty. The Court at first unanimously refused to receive the appeal, on the ground that the judgment being for less than one hundred dollars the appeal was barred. On the energetic remonstrance of counsel and the express words of the Code and Statute being pointed out, the Court, after a disgraceful altercation between its members, agreed to reconsider its determination, and actually held over its judgment till next term, a period of three months, on a question which, we believe, admits of no doubt and which must have been, and in point of fact has been, before it twenty times."

In a third case, a judgment was rendered so absurdly contrary to law, that, says the *Chronicle* :—

"The defendants' counsel remonstrated most vigorously, and their case was so good that it only required to be stated to be seen to be incontrovertible, and they therefore insisted that the judgment just rendered should be torn up and cancelled at once. And amidst the unrepressed and undisguised laughter and contempt of the Bar, torn up and cancelled it was, and the case now stands over till next term, *'when the Court,'* to quote the words of the Chief Justice, *'will make some order which the parties may or may not obey, as they see fit.'*

The *Chronicle* finally concludes its strictures as follows :—

"We believe the Court of Queen's Bench as at present constituted, to be the worst Court which has been assembled in any part of the

British Dominions for the last hundred years. It is bad collectively, and it is bad individually. Age and irritability of temper prevent one member of it from listening; almost total deafness prevents a second member from hearing; intemperate habits, exhibited but too often on the Bench itself, fatally disqualify a third. Worse still, in Montreal, corruption is openly imputed to it, falsely we hope and believe, for the honour of the British name. But this at least is true. The Court, as it now stands, has irretrievably and justly forfeited the confidence and respect of the community, and we call, therefore, upon its members to resign at once, and, in the event of their not doing so, for the prompt and immediate interference of Parliament."

Far distant may the day be when such charges as this can be made against any other Court in the Dominion. Only long neglect and the grossest mal-administration of a great public trust could have allowed matters to proceed to such lengths. The remedy will have to be applied sharply and effectually, or the public who are wronged and outraged will know the reason why.—*Toronto Globe (Opposition), June 20th*, 1873.

Court of Appeals.—On Tuesday, the 17th June inst, the Clerk of the Court called the roll as usual, and the cause of Dubois and the Corporation of Montreal came in its turn. Mr. Jette, attorney for Dubois, got up and said that, owing to the absence of his adversary, he would ask the Court to take up a case of Archambault and Archambault, which stood a little below. This was done and Mr. Jette began his argument about half-past eleven o'clock in the morning. The Archambault case is a long one, there being two wills opposed to each other, and each party pretending the other will to be a forgery. The argument went on until the Court adjourned at one o'clock for lunch, and it was resumed at a quarter to two. At half-past two Mr. Jette had been speaking for over two hours and was about to close, when Judge Badgley interrupted him to know what Dubois had done when the Corporation had determined the line for widening Notre Dame street! Judge Badgley believed arguments had all the time been going on in the case of Dubois, who claims damages for delays in widening the street around his property, after having forced him to remove ten or fifteen feet from the line of the street.

The public has the sincerest respect for Judge Badgley, and it is to be hoped that the law, which requires judges to hear the parties to a case, will be supplemented by provision for the retirement of those who have served their country as long as they are able.—*Montreal Witness, June* 20th, 1873.

The Judges.—Strange impressions are abroad respecting an article which recently appeared in the Quebec *Chronicle* on the subject of the Judges of the Court of Appeals. We have repeatedly expressed our opinion, which we know to be that of the Bar and of the general

public, that the Court of Appeals, as now constituted, neither has nor deserves the confidence of the public; and Mr. Dorion, in his place in Parliament, has repeatedly shown that "civic courage," as the French call it, which was necessary to announcing the same sentiment in Parliament. These remarks of the learned gentleman were, however, received by the Minister of Justice with the strongest censure, Mr. Dorion being held up to the public as a libeller of the Bench of his own Province, and his statements being distorted so as to give them a much wider scope than they really had. At that time there was a petition before the House from Colonel Gugy for enquiry into certain allegations therein contained; and, though the paper was drawn up in a manner which could not command approval, the allegations were of such a character, and so well sustained by *prima facie* documentary evidence, as to furnish fair ground for further proceedings. But Sir John A. Macdonald would, at that time, hear of nothing against the Judges of the Province of Quebec, and, on more than one occasion during the session, pronounced them to be, in his opinion, entitled to all respect. Now, however, he has just been on a short visit to Quebec, and the most severe attack which we have yet seen upon the Judges of the Court of Queen's Bench and Appeals of this Province appeared in the Quebec *Chronicle* just at the moment when he happened to be in that city. Of course that may have been simply a coincidence, but then a perusal of the article convinced most readers that though appearing as editorial matter, it was not written in the office of the *Chronicle*. Putting this fact together with the habits of the *Chronicle*, which are not those of very independent thinkers, and are those of an avowed organ of the Ministry, there is a widespread impression that the severe censure on the Bench is traceable to the direct inspiration of their late Parliamentary defender, the Minister of Justice. In the profession, indeed, the name of the writer is currently mentioned, and is that of a Quebec lawyer, thought to be extremely desirous of entitling himself to a judgeship, and very unlikely to compose a phillipic, in opposition to the previously expressed opinion of the dispenser of patronage. The article in question states that the Court, as now constituted, is the worst that has existed in the British Empire for a hundred years. Age and irritability of temper, it asserts, prevent one judge from listening, and almost complete deafness hinders another from hearing; habits of intemperance, too often manifested, even on the Bench, render another utterly unfit for his office, and what is worse than all, at Montreal, corruption is openly imputed to the Court. These are hard words, whether they have or have not the sanction of the Minister. Now the question presents itself whether it would not have been better to take the proper measures for putting an end to such well-known complaints while Parliament was sitting, rather than slur the matter over then and force a still more indecent discussion at a later day. Of course, those who assume that the Minister of Justice was the inspirer of the article,

compare it with his conduct during the session, and say that this tortuous course is characteristic of the man, and that he is now trying to effect by underhand practices, that which a few weeks ago he highly censured Mr. Dorion for attempting in an open and straightforward manner. That is not altogether an unimportant part of the affair; but perhaps it is less important than the question as to what is to be done about the Court. While we are writing we have received a letter in which it is stated that only the other day, in this city, one of our Judges, after an argument of an hour's length, on a will case, put a question to the advocate who had been speaking which showed that he supposed he had been trying to listen to a suit respecting the Corporation and the opening of a street. It is evident that something must be done, and it is to be regretted that it was not done in a regular and proper manner, when Parliament was in session.—*Montreal Herald, June* 21, 1873.

Nos Tribunaux.—Dans un pays où presque tout le monde est conservateur, au point de vue des institutions existantes, il devient banal d'insister sur la nécessité d'une bonne organisation judicature, comme base essentielle de l'ordre social. Sous tous les régimes une magistrature respectable est toujours nécessaire, joue toujours le role le plus important. Ici, comme dans tous les pays de libre discussion politique, des Juges capables et irreprocachables, des Juges forts et au dessus de tout soupçon sont la condition *sine quâ non* de notre existence politique et sociale. Souvent dans l'ardeur des luttes de parti, au milieu des passions soulevées par les discussions publiques, on s'attaque à tout, on ne respecte rien. Quelquefois même, dans les temps de grande agitation populaire ou électorale, la vie privée des citoyens est envahie, leur liberté menacée, du moins temporairement. Il y a alors désordre, perturbation dans les esprits et dans les cœurs, il en reste des haines, des ressentiments, des désirs de vengeance qui ont besoin de surveillance et de répression. C'est un état de choses déplorable, mais un peu inhérent à tous les systèmes de gouvernment constitutionnel et républicain.

Ces désavantages ont heureusement peu de mauvais résultats et durent peu quand, au-dessus de ces passions, plane l'idée d'une justice tout à la fois sage et énergique, impartiale et inflexible. Le citoyen paisible est sûr de trouver protection; le citoyen malhonnête est sûr de rencontrer la désapprobation et le châtiment. La boue que se lancent les partis n'atteint pas l'hermine du Juge. Là, pas de passion, pas de colère, pas de cet esprit de parti étroit qui rapetisse tant d' hommes et tant de choses.

C'est, pour nous résumer clairement, dans le prestige, l'honneur et l'influence salutaire de la magistrature que résident la protection et la sécurité des citoyens d'un Etat libre.

On est en train, depuis quelque temps, dans la province de Québec, d'oublier ces sages principes et de perdre confiance dans le plus haut

tribunal du pays, la Cour d'Appel. Cette branche, la plus importante de la magistrature bas-canadienne, n'a plus le prestige des anciens jours du temps des Rolland et des La Fontaine, pour ne pas remonter plus haut. Voici ce que nous écrit à ce sujet un membre ancien et distingué du Barrau de Montréal.

"Les journaux de toutes couleurs politiques s'occupent en ce mo-"ment de la composition de la Cour d'Appel. Le sujet n'est pas "nouveau; mais, jusqu'à présent, cette partie de la presse, que ses "rapports avec les antorités obligent à plus de discrétion et de moder-"ation, n'avait contenancé les clameurs de l'opposition qu'en s'abste-"nant de défendre les Juges attaqués. Leur silence, toutefois, aurait "dû être interprété d'une maniére plus intelligente par les parties in-"culpées. Le très-honorable Ministre de la Justice, en cela guidé par "une louable susceptibilité et par le sentiment de la responsabilité "de sa charge, a cru devoir, durant la dernière session, interposer le "poids de son influence entre les Juges et leurs accusateurs. Il a dû "être frappé du peu d'écho qu'eurent ses généreuses paroles parmi "ceux qui acueillent habituellement son opinion avec tant de défér-"ence.

"Le *Chronicle* de Québec, dont la discretion est connue et éprouvée, "vient de réditer à son compte les plus graves des reproches faits aux "Juges de la Cour d'Appel depuis longtemps. Sans nous prononcer "sur les griefs tirés du dernier terme tenn à Québec, nous devons "dire que le *Chronicle*, dans la partie de son article où il parle des in-"firmités permanentes et incurables de trois des Juges, a fait qu'ex-"primer une opinion arrivée à l'état de conviction chez l'universalité "des avocats et des citoyens qui approchent de la Cour d'Appel."

De telles accusations ne peuvent peser longtemps sur quelques juges sans discréditer toute la magistrature. Déjà quelques joureaux du Haut-Canada, toujours à l'affût de nouvelles dommageables au Bas-Canada, vilipendent tout le personnel de nos cours. Cela révèle une erreur qu'il faut combattre, un dauger qu'il faut éviter.

On peut sans hésiter affirmer que dans tout le Bas-Canada,—à Montréal, à Québec, dans tous les districts ruraux,—les juges de la Cour Supérieure sont ce qu'il y a de mieux. Ils sont capables, d'une honorabilité irréprochable et font une somme de travail énorme. C'est là le sentiment unanime du pays, du Barreau, de la presse et des hommes publics. Comme de raison, ils sont faillibles comme le reste des mortels. Tous n'ont pas un génie transcendant; plusieurs ont une intelligence d'élite et tous, par leur dignité, leur travail conciencieux et leurs études seonstantes, sont à la hauteur de leur position et seraient considérés comme de bons Juges et en France et en Angleterre. Il est donc important, comme il est consolant de constater que nos Cours de première instance, où viennent toutes les affaires, ne participent en aucune manière au blâme général qui semble s'attacher à trois des Juges de la Cour d'Appel.

Néanmoins, le peuple, et surtout le peuple plaideur, n'est pas

toujours en état, soit par ignorance ou par intérêt, de faire une telle distinction; quand il sera convaincu que la Cour d'Appel, le plus haut tribunal du pays, ne mérite plus sa confiance, il lui sera bien difficile de croire que les Juges de juridiction inférieure en sont plus dignes. Dans tous les cas, il pourra toujours se faire une reflexion bien triste, mais dictée par la logique du bon sens : à quoi sert d'avoir un bon jugement d'une excellente Cour, si un tribunal plus élevé doit mal le confirmer ou le casser sans raison?

Il y a donc, à part la nécessité intrinsèque d'avoir un tribunal en dernier ressort qui ne donne aucune pris, à la critique, des motifs d'intérêt public de l'ordre le plus élevé pour empêcher le même tribunal de devenir l'objet de la défiance ou du mépris des citoyens.

Maintenant, quelle est la solution à trouver, quel est la remède pratique à appliquer, pour faire cesser ces plaintes et ces défiances, pour donner satisfaction aux impérieuses exigences du sentiment public? Nous aurons le courage de donner la réponse, la seule réponse, qu'il convienne de donner, quand on écrit en journaliste consciencieux, moins préoccupé de flatter de misérables vanités que du devoir de veiller à ce que l'on ne déracine pos la principale colonne qui soutient l'ordre social.

La première solution appartient naturellement aux parties intéressées elles-mêmes. Les trois Juges en question ne peuvent rester sous le coup de telles plaintes! Le devoir et l'honneur, auxquels ils ne failliront certainement pas, leur commandent d'exiger du Gouvernement une enquête immédiate sur les plaintes formulées dans le Parlement, dans la Presse, au Barreau et dans le public.

Il y aurait encore mieux à faire de la part de ces messieurs : se retirer avec la belle pension de retraite que leur a faite le Parlement à sa dernière session, pension de retraite qu'ils ont noblement gagnée par de longs et précieux services rendus dans la politique et sur le Banc.

Si telle démarche n'est pas adoptée — ce que nous n'osons pas croire—tant pis pour ceux qui s'obstineront à ne pos voir ni prendre la voie que leur indique depuis longtemps le sentiment unanime du pays. Le Gouvernement devra alors prendre les devants et accorder l'enquête voulue par les circonstances et exigée par tout le monde. Le fera-t-il? Serait-il justifiable de le faire? nous croyons que oui. Toutefois, la chose est grave et l'on pourrait peut-être trouver dangereux le précédent d'un gouvernement prenant une telle initiative contre des Juges, les plus hauts fonctionnaires de l'Etat, qui participent du droit de souveraineté et que la constitution entoure de mille protections.

Si le Gouvernement ne juge pas à propos d'aller plus loin—nous savons qu'il a déjà fait et fait faire de respectueuses mais énergiques représentations à quelques-uns de ces messieurs,—ce sera le tour du Barreau. Ce sera à lui à montrer du courage, de l'énergie et du souci des intérêts publics et de la dignité de sa profession, comme de celle

du Banc. Jusqu'à présent, il n'a pas fait merveille dans ce sens ; son action s'est surtout bornée à murmurer quelques petits scandales de Cour et à formuler une requête indigeste, qui n'était pas viable et n'était pas même habillée assez modestement pour voir le jour au Parlement. Les avocats n'ont pas été créés et mis au monde seulement pour gagner l'argent de leurs clients, et trouver admirable ou maudire le Juge qui leur donne gain de cause ou les condamne. Non ils ont une autre destinée, de plus belles attributions, dont la principale est de veiller, avec un soin jaloux à ce que l'administration de la justice, dont ils sont l'un des principaux agents, ne tombe pas dans le discrédit, à ce que la magistrature garde toujours son prestige et et commande respect. Personne nous contredira, quand nous affirmerons que si les avocats, surtout ceux de Montréal, eussent concerté leur action et se fussent unis, comme ils ont commencé à le faire depuis très peu de temps, les abus dont ils se sont plaints tout bas trop longtemps auraient certainement disparu. Ils craignaient, et beaucoup craignent encore des jugements de représailles, qui éloigneraient leur clientèle ! ! ! Quelle misérable excuse, qui témoigne autant de la petitesse de l'avocat que du profond mépris qu'il a pour son juge. Le temps de ces lâchetés est fini. Il faut aux avocats, pour racheter le passé, montrer maintenant du courage, procéder à visage découvert et faire ouvertement ce qu'exigent d'eux le sentiment de leur honneur, leur propre intérêt et l'intérêt plus élevé et plus noble de la société tout entière. Autrement, si l on contnue à se plaindre des Juges et que les avocats restent muets quand il leur faut parler, on finira bien par dire : tel Barreau, tel Banc.

Nous espérons qu'ils seront à la hauteur de leur rôle quand viendra le moment d'action. Leur organisation en corporation leur met sous la main un mode tout prêt. Qu'au mois de september prochain si les mêmes Juges sont encore sur le Banc, toutes les sections du Bas-Canada se réunissent et qu'elles adoptent une série de résolutions uniformes, contenant un réquisitoire clair, précis des plaintes et des accusations à porter, nommant le Juge, spécifiant la nature particulière de la charge et tous les détails nécessaires. Une requête également uniforme de toutes les sections, comprenant ces résolutions, adressée au Gouvernment, au Sénat et aux Communes, avec un petit ajouté de demande d'enquête sur ces faits avant la mise en accusation (*impeachment*) devant le Parlement, aurait son effet immédiat et certain. Le Gouvernement et les Chambres n'auraient plus de prétexte pour reculer.

Nous nous flattons encore que cette dernière et triste alternative nous sera évitée par le tact et l'abnégation des Juges intéressés.—*L'Opinion Publique, July*, 1873.

ADMINISTRATION DE LA JUSTICE.—Nos lecteurs connaissent maintenant l'opinion d'un certain nombre de nos confrères sur le personnel

de nos cours de justice. Les faits et les documents cités sont d'une gravité immense, et trahissent quelque part un vice radical. Toutefois il n'est que juste de ne jeter le blâme que sur ceux qui le méritent. Nous allons donc préciser davantage, et rendre à chacun suivant son dû.

Nos cours civiles peuvent se diviser en 3 classes : 1o. Cour du Banc de la Reine ; 2o. Cour Supérieure ; 3o. Cour des magistrats stipendiaires.

La Cour du Banc de la Reine est composée de cinq juges, savoir : l'hon. Juge-en-chef Duval, les Hons. Badgley, Drummond, Monck et J. T. Taschereau. Cette cour ne siége au civil que comme tribunal d'appel. (Les termes criminels sont aussi présidés par l'un de ses membres.)

C'est surtout de cette cour qu'il s'est agi dans les remarques que nous avons publiées.

Nous avons vu avec plaisir que pendant que la presse demandait à grands cris la reconstitution de ce tribunal, qui a fréquemment à disposer en dernier ressort de la fortune des familles, elle adressait des éloges au plus jeune de ses membres, à l'Hon. Juge Taschereau. Connaissant la profonde science légale, le zèle infatigable et l'impartialité de cet honorable juge, nous pouvons affirmer qu'il mérite cette flatteuse appréciation.

Quant à l'Hon. Juge Duval, il nous fait peine de voir cette brillante intelligence, cette nature d'élite lutter en vain contre l'étreinte de l'inéxorable maladie. Mais à l'impossible nul n'est tenu. M. Duval a droit maintenant à une glorieuse retraite. Sa carrière a été abondamment remplie.

Une retraite volontaire, serait le plus beau couronnement de son passé. Nous avons l'espoir qu'il se rendra au désir général du public à ce sujet.

M. le juge Badgley est atteint de surdité. C'est un malheur, mais faut-il que le public en souffre ? Il y a longtemps, dit-on, qu'il n'entend pas un mot des plaidoiries ! mais, alors, à quoi bon ces plaidoiries ? Feindre, pendant des années, d'entendre les discours des procureurs, et ce de la part d'un juge dont la responsabilité est immense, constitue une moquerie, une insulte au bon sens et à la décence publique. Et dire qu'un tel juge a décidé de la vie de ses semblables, sans avoir entendu un seul mot des témoignages ! C'est à se croire dans un monde d'insensés ! Ces paroles sont dures, mais la conduite de celui qui s'est joué de la vie et de la fortune de ses semblables l'est encore plus. Il y a quelque chose qui révolte dans la persistance de cet homme, d'ailleurs doué de qualités remarquables, à occuper un poste pour lequel la nature le disqualifie.

"Sobre comme un juge," voilà un adage qui va bientôt disparaître, si l'un des juges de la cour d'appel persiste à rester sur le Banc. Que dire maintenant d'un homme accusé de trafiquer ses jugements comme une vile marchandise ?

Lecteurs, vous figurez-vous le dédain que vous ressentiriez s'il vous fallait convaincre des hommes, vêtus de soie il est vrai, mais dont l'un vous entendrait comme s'il était dans la lune, dont l'autre ronflerait en cuvant du mauvais whiskey ingurgité dans un carrefour, et dont le troisième apprécierait votre droit suivant la somme d'écus que vous lui donneriez!

Peut-être l'expression nettement formulée de la vindicte publique sera-t-elle un avertissement suffisant. Dans tous les cas, le remède ne peut manquer d'être apporté à la prochaine session fédérale.

La cour supérieure est composée d'un grand nombre de juges, dont trois siégent à Québec, cinq à Montréal, et les autres dans un ou plusieurs districts judiciaires. Ces messieurs forment aussi le tribunal de "revision," et président de plus à la cour de circuit. La somme d'ouvrage qui leur revient est immense. Quant à ceux que nous connaissons, nous déclarons avec satisfaction qu'ils sont à la hauteur de leur tâche. Nous pouvons mentionner l'Hon. Juge en chef Meredith, les Hon. Stuart et Tessier, qui siégent à Québec, les Hon. Bossé, Casault et Taschereau qui siégent dans leurs districts respectifs.

Sans vouloir prétendre que, dans ces cours, tout soit pour le mieux dans le meilleur des mondes, nous sommes certain d'exprimer l'opinion du barreau en disant qu'il s'enorgueillit du personnel de ces cours avec lesquelles il est constamment en relation. Des haines politiques ont bien poursuivi quelques uns de ces juges jusque sur le banc, mais elles ont bientôt été confondues et se sont trouvé impuissantes en face de la conduite impartiale et des décisions intelligentes de ces honorables juges. La cour supérieure compte actuellement parmi ses membres des gloires de la magistrature, des hommes dont l'opinion fera loi dans les annales de la jurisprudence.

Nous faisons ces remarques afin que le public ne se méprenne pas sur l'état réel de l'administration de la justice, et ne perde pas confiance dans ces tribuncaux qui jugent en premier ressort de toutes les affaires civiles. S'il se glissait plus tard des abus, nous serions les premiers à réclamer. Mais pour aujourd'hui, il nous est bien agréable de pouvoir décerner des louanges.

Le système de la magistrature stipendiaire n'existe pas depuis assez longtemps pour que nous puissions apprécier sûrement son efficacité. Le gouvernement a été très circonspect dans le choix des magistrats, et nous croyons que, dans plusieurs cas, il n'a qu'à s'en féliciter. Toutefois, un correspondant prenait dernièrement l'un de ces magistrats à partie; et censurait vertement sa nomination. Son écrit ayant été évidement inspiré par un besoin de blâmer tout ce que fait le gouvernement, nous croyons mettre le holà! Le moyen sera bien simple. Nous allons apprendre ou rappeler, au correspondant en question, que cette nomination si mauvaise, qu'il prétend avoir été faite pour récompenser un ami politique, ne l'a été que sur la recommendation pressante et par écrit de MM. M. A. Plamondon, J. Fournier, M.P., M. A. Hearn, J. Parkin, F. M. Guay, R. C. Tanguay, et

au delà de cent autres citoyens. Il nous semble que cela clôt la discussion au point de vue politique.

Le gouvernement n'a fait que suivre l' inspiration des coryphées de l'opposition. Celle-ci tient-elle si peu à honorer sa signature?

La majorité de la cour d'appel exceptée, le public peut donc se déclarer satisfait du personnel de nos cours. Espérons qu'avait peu nous aurons à constater le remainiement qui fera disparaître de trop justes plaintes.—*Le Courrier du Canada, July*, 1873.

ADMINISTRATION OF JUSTICE.

By perm'ssion of the learned writer, we re-publish Mr. Justice Torrance's letter to the Attorney General of Quebec on the administration of justice.

TO THE HONORABLE GEORGE IRVINE,

Attorney General for the Province of Quebec.

SIR,—It is usually the person occupying the high and honorable post of Attorney General, who initiates in the Legislature measures of reform in the constitution of the Courts of law, and in matters of procedure in these Courts.

Public opinion complains loudly of the administration of justice in this Province. At the last session of the Dominion Parliament, a leading advocate and ex-Attorney General expressed himself from his place in the Commons, in language that was painfully plain and outspoken. A return asked for in Parliament has declared that in three years there have been 21 appeals from the Province of Quebec to the Privy Council in Britain, against 2 from Ontario, 2 from Nova Scotia, and 1 from New Brunswick, to the same high tribunal.

At the last term of the Court of Appeals in June, out of 40 judgments rendered on two consecutive days, there were 22 reversals, and on the last day there were 17 reversals out of 24 judgments. In one particular case, the appellant had failed in the Superior Court and in the Court of Review, and succeeded in the Court of Appeals by a majority of one, the result showing that out of nine judges who heard his case six were against and three in his favor.*

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* Lafond et al. v. Rankin, No. 2739, Superior Court, Montreal.

In another case decided in 1870, on a pure question of fact, the Court of Appeals, by a majority of *one* reversed a judgment which had been given in favor of the plaintiff in the Superior Court and in the Court of Review. In this case five judges were in favor of the plaintiff and four against, and the four prevailed.

In another case, decided in 1872, the Court of Appeals, by a majority of *one*, dealt, in a similar manner, with a pure question of fact, with this difference that *six* judges were in favor of the original judgment, and only *three* against, and the *three* prevailed. *

I am obliged to say more. I have the painful conviction, founded upon observation and enquiry extending over a period of years, that there is a striking contrast between the Provinces of Ontario and Quebec as regards the estimate in which the judiciary is held in the opinion of the Bar and the public. In Ontario I have good reason for affirming that there is perfect harmony between the Bench and the Bar, and the utmost respect is there entertained for the judges in their administration of justice.

I fear greatly that I shall not be accused of misrepresentation or exaggeration when I say that a very different feeling characterises the relations of the two orders in more than one locality in the Province of Quebec.

I deeply regret that a reproach should be cast upon individual judges as the cause of uncertainty and confusion in the administration of justice.

The cause of the public grievances is to be found elsewhere. We possess as noble a code of laws as has fallen to the heritage of any civilized people, but our system of administration is at fault.

I would specify for instance, as a striking defect, the want of a proper sub-division of labour in the administration of justice in civil matters. I doubt whether there be another city and district of the magnitude of Montreal in the British dominions where the same judges are required in turn to try and adjudge the highest and the smallest causes—to day to adjudge a cause involving a million of dollars and to-morrow a case involving five shillings. It may, indeed, be said of some few men that they do all things well. It was probably a belief that the abilities of

* Vincent v. Hamelin, No. 1355, Circuit Court at Coteau Landing.

the highest judges should be applied to try the smallest causes, which brought about the abolition of the Commissioners' Court in Montreal some 30 years ago; but I affirm that without a proper division of labor in this matter, justice cannot be done in the one class of cases or in the other. If you distract the attention of the judge with a great variety of different duties, you prevent that harmony of action which in the administration of justice as well as in other classes of labour is essential to the labour being well and faithfully done. A different kind of training is required in the one class of cases from the other. In the highest courts, science and logic and precision of an exceptional character should be perpetually in operation.

In Montreal, there were decided in 1872, 462 contested appealable causes. On the other hand, there were decided 3884 non-appealable causes (under $100), of which 1447 were contested, and the large majority of them were under $25.*

Twenty of these non-appealable cases are disposed of in the course of a day by a kind of rough justice under the law which directs that the judge in causes involving less than $25 shall decide according to equity and good conscience—not according to strict law. †

It requires little reflection to see that a different kind of training is demanded for the despatch of business in small causes from the training required in those involving hundreds and thousands of pounds. What would be thought of a system which would throw upon the Judges of the Superior Court the decision of the numerous police cases which occur in the cities of Montreal and Quebec? Yet that is the very system which throws upon the Judges of the Superior Court the trial of petty causes in civil matters in these cities.

There should be two orders of judges for the trial of civil causes.

A very little modification of the class of district magistrates who have jurisdiction up to $50, would furnish the required remedy.

Another defect in our system, which I would signalize, is a complete and utter violation of the rule that the best proof of which a case is susceptible should be produced. ‡

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* Quebec Official Gazette, 28th February, 1873.

† C. C. P., 1104. ‡ Bonnier des preuves, tom. 1, p. 29.

Secondary, or inferior, proof should not be received unless it be first shown that the best, or primary proof, cannot be produced. C. C. 1204.

I allude here to the practice which prevails of deciding causes on written depositions (*muta et surda testimonia*) without the judge hearing or seeing the witness.

A different rule was made law in 1860 (23 Vic. c. 57, s. 27), but it was not acted upon, and passed into desuetude until—*mirabile dictu*—it became lawful for the parties, by consent, to produce before the Court, and without leave, depositions of witnesses who were not sworn until the depositions had been written out.*

I believe that if the judge were obliged by law to take the evidence, or have it taken, under his own eyes and in his hearing, and to follow the case from the beginning of the inquiry to the end, as at a jury trial, the judgments of our Courts would be much more stable and certain; they would not be so liable to be reversed on questions of fact, for two simple reasons. In the *first* place, the personal attention given by the judge to the examination of the witnesses would inevitably make his decision much more accurate and reliable on questions of fact. In the *second* place, having seen the witnesses with his own eyes, he would stand on a vantage ground as regards the higher Courts reviewing his decision. They could not see the witnesses, though they might read the depositions. The consequence would be that his judgment would not be reversed on a matter of fact, unless it was plainly erroneous.

Under this head of the subject, I would add that there is a failure of justice, because its administration is not public. The examination of the witnesses is not public. The witness sits at a small table in the Enquête room with only the writing clerk and lawyers, and sometimes the parties listening. The witness has not that pressure put upon him to speak the truth which would exist if his statements were made in the witness-box, under the eyes of the judge and a hundred spectators—"the observed of all observers." The witness examined in open Court would be under trial as to his veracity no less than the parties as to their contestation. The publicity of the trial would be further attended with this advantage, that a pressure would be put upon the judge

* 33 Vic., cap. 18 (Quebec), 1st February, 1870.

to do his best to further the ends of justice. The judge, as well as the witness, would be on his trial. Public opinion, through the public which had heard the evidence and seen the witnesses, would pass judgment upon the judicial aptitude and acumen of the judge to a far greater degree than is possible with a judgment based upon written depositions.*

I would add, in the interest of the bar and of the suitors, that an argument is much better appreciated by the Court after the hearing of the evidence than before, and its pertinency much more easily seen when the facts have been placed before the judge.

There is further the consideration that, if the judge, as under the old system, should make his first acquaintance with the case through the *viva voce* argument of the counsel without its being at once followed up by the proof, he may contract a bias or prejudice in the case which will lead him insensibly to read the depositions not simply to discover the truth, but in some cases rather to find a confirmation of his first impression. The scales of justice are disturbed.

It is further to be said that a case tried under a system which required the judge to hear the evidence throughout, would be decided with much more expedition than under a system under which the parties, counsel and judges, are sometimes changed by death or otherwise before a final decision can be pronounced. At present under the enquête system, a case may drag its slow length along by a dilatory sluggish process, in which it would be surprising if the interest of the parties and advocates and Court were not to flag before it was ended. I know of a case instituted in 1859, and only terminated by a final judgment in 1873. Over one hundred witnesses were examined without the judge deciding the case seeing one of them, and the judge had to read over 1200 folio pages of depositions. If one judge had tried this case by a continuous process, it could have been easily disposed of by a final adjudication within a month after the hearing of the first witness. †

I would not disguise the fact that these changes would require for their success the hearty co-operation of Bench and Bar. As an obstacle to reform, Toullier hints at the *ennui* experienced by judges who are obliged themselves to hear witnesses by a process

* Best. On Evidence. London, A.D, 1866. P. 139, 140, § 106.

† *Vide* case of De Beaujeu v. Bienjonnetti et al. No. 1090 : Superior Court, Montreal.

which while it accelerates the course of justice prolongs the sittings of the courts; and he also alludes to the complaints of the counsel of a loss of time to themselves personally, "quoique bien hors de propos."*

My personal conviction founded upon some experience of both systems, is that the enquête by written depositions fosters men of routine, whereas the public *viva voce* testimony of witnesses would render the administration of justice at once prompt, animated and interesting.

If we look further to the testimony of history, the weight of authorities as well as of principle is overwhelmingly in favour of the public examination of witnesses.

In the Roman empire, the witness gave his evidence publicly in Court, and was examined by the parties. Written depositions were not absolutely prohibited, but little faith was placed in them.†

In France, until the revolution in 1789, they had the written deposition as in the English Court of Chancery, but the revolution like a flood swept away for a time all old usages.‡

By the law of 7 fructidor, year III, (24th August, 1795,) it was ordained, (Art. 1.)

"A l'avenir, en toutes matières civiles, dont la connaissance appartient aux tribunaux de district, et sans aucune distinction, les temoins seront entendus à l'audience publique, en presence des parties interessées, où elles dument appelées."

Toullier tells us that the law of 27 Ventose, year VIII, having re-established the "avoués," whose suppression had been pronounced by the decree of 3 brumaire, year II, revived for the enquêtes, the formalities of the ordinance of 1667.

By the code of Civil Procedure (Napoleon) Tit. xii., the written deposition was preserved.

Toullier gives no uncertain opinion as to the value of the public examination of the witness. "En attendant cette réforme salutaire, le magistrat demeure privé du moyen le plus puissant pour juger, dans le cas de collision de temoignages, quels sont ceux aux quels il doit accorder sa confiance."

I would add to the opinion of Toullier, those of Bonnier,

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* Toullier, tom. 9, p. 517.

† Bonjean des Actions, tom. 1, p. 37, § 23. Digest Lib. xxii. Tit. 5. l. 3.

‡ Toullier, tom. IX, p. 522 & seq.

Boncenne, Gabriel, Boitard and Lavielle.* The last ends an emphatic protest against the written depositions, in these words:

"Ainsi ce titre des enquêtes pèse à tous; il n'y a qu'une voix pour en demander la suppression. Ceux là même qui, par état, en retirent quelque profit, ont la loyauté d'en signaler les abus et les dangers, et de répeter avec nous que *jamais réforme legislative n'aura été plus nécessaire et ne sera mieux accueillie.*"

In England the common law courts have always required the public examination of witnesses, and one can easily imagine how intolerable the perusal of written depositions would be to jurymen. In Chancery and the ecclesiastical courts, the written deposition prevailed until 15 and 17 Vic., c. 86, and 17 and 18 Vic., c. 47, and 20 and 21 Vic., c. c. 77 and 85.† But it would appear that it is only by the British Judicature Act of this year that the last blow in England has been struck at the *surda et muta testimonia* of written depositions. The judge in these courts is at last obliged to hear and see the witness himself, and Lord Cairns, the great chief of the Conservative party in the House of Lords, heartily approves of the change. He said: "This bill provides—and I think rightly—for I am a strong advocate of the system, that the evidence in the Court of Chancery shall be taken *viva voce.*"‡

Before leaving this question of evidence, I cannot refrain from expressing my regret that we have not yet adopted a system of administering justice by which, in the minds of the judges as well as of the public, questions of fact are not more entirely and distinctly separated from questions of law. In the system of the ancient Romans, there was a distinct line of demarcation between law and fact—between the function of the prætor and that of the judex or juryman. It has been so in the English common law courts, and it is so in our jury trials in civil matters where the functions of judge and jury are defined and separated.

M. Bonjean,§ who was lately President of the *Cour de Cassa-*

* Bonnier des preuves, tom. 1, p. 320. Boncenne, tom. 4, p. 218, etc. (Procédure Civile). Gabriel des preuves, p. 297. Boitard, Procédure Civile, tom. 1, p. 448–452. Lavielle: Revue Critique, tom. 12, p. 320—331, Paris, A.D. 1858.

† *Vide* Best on Evidence, s. 107.

‡ The "Times," 2nd May, 1873.

§ Was a hostage of the Commune in April and May, 1871, with the Archbishop of Paris (Mgr. Darboy), and like him was shot by the *canaille*.

tion in France, regrets that the jury system was not adopted in France in civil as well as in criminal matters. He is of opinion that the juryman is a much better judge of fact than the judge of the court could be, and strongly argues that the blending of the two functions of judge and jury in the French magistrate is injurious and enfeebling to his mental constitution.* He points with satisfaction to the history and stability of the Supreme Court of France, the *Cour de Cassation*,† which amid all the violent revolutions of the country has held up its head honoured and unstained. He believes that its stable position in the nation, is owing to the separation by its constitution of law from fact, its functions being exclusively to expound and interpret the laws. M. Bonjean would introduce the jury system into France in civil matters, but he does not see why the jury should not as in the selection of *experts* be limited to 3 persons chosen by the parties if they will.‡

In view of the fact that a separation of questions of law from those of fact would tend to the better administration of justice, and that our citizens are called upon to take a part in the management of the immensely important matters which occupy our municipal councils requiring our citizens throughout the country to understand the municipal code; considering also the moral and intellectual elevation which a share as jurymen in the administration of civil justice would naturally tend to communicate to the citizens of our country, it might become a grave question whether the establishment of the jury system in matters of fact be unworthy of the consideration of the Local Legislature.

There is another portion of our procedure which is at present entirely useless. I allude to the articulation of facts. It could be utilized in connection with the *viva voce* system of trial, by making it imperative upon the judge to settle the articulation as in a jury trial, and by compelling the narrowing of the issue of fact by making the cost of proof fall upon the party who might inconsiderately require its production. If the judge was obliged to follow the enquête from beginning to end, it would become strongly his interest to strike out useless articulations.

In conclusion, I would sum up my observations by pressing upon yourself and your fellow-legislators whether suggestions such as the following be not worthy of consideration:

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* Bonjean, pp. 42, 211. † *Ibid*, 42, 211, 237. ‡ *Ibid*, 42, 211, 237.

The functions of the judges of the Superior Court should be limited in civil matters to the trial and decision of causes in that Court.

Let the District Magistrates take exclusive cognizance of the Circuit Court cases.

Let the law require the judge to hear and see the witnesses in person.

The jurisdiction which the Court of Review originally had in all cases ought to be restored to it, but in connection with this, it ought to be made the final Court in the Province as to questions of fact. The judges of the Superior Court would not likely complain of this work, for it would be a finality, though they have complained in the past of doing work in Review which was not a finality by an appeal to the Queen's Bench. The Court of Review might be empowered either to give the judgment which the Superior Court ought to have given or to order a new enquête on any particular fact.

The judges of the Superior Court ought to be allowed to reside at Montreal or Quebec, as the case might be; such residence would permit of mutual conference, and tend to establish more uniformity of jurisprudence.

If the present system is carried out, of having a Superior Court judge in each of our twenty districts, without intercourse with one another, in a state of isolation, the effect will be in a great measure to establish twenty different systems of jurisprudence in Lower Canada. The only corrective would be an occasional appeal. I can easily conceive a practice introduced by error by an isolated resident judge, the practice perpetuated during a long series of years, and the error only discovered after a length of time by a reversal in appeal, but when discovered, disquieting and unsettling public opinion in the district as to the particular jurisprudence in question. Mutual conference and residence together would have the effect of toning down and moderating the idiosyncrasies or eccentricities of individual judges. It is to be remembered that it is quite possible for a district to be at the mercy of an irremoveable resident judge during the whole term of a long life.

Another alternative is open to the legislature, if it be decided that the system of resident judges cannot be departed from, as regards the Superior Court.

Let the Superior Court in the District in term be composed of two or three judges to decide the case on the merits, one of the judges being, as a general rule, the judge who shall have seen and heard the witnesses in the cause. That plan has been already tried except as to the Enquête and was found pleasant alike to judges and to suitors.

Finally in constituting the Court of Review as a final Court in matters of fact, (which has the merit of agreeing with the system in France) the Court of Queen's Bench in civil matters might be converted into a *Cour de Cassation* to review the decisions of the Courts below, (the Courts of Review in Quebec and Montreal,) in matters of law.* The Court of Queen's Bench, would in this way be relieved from the labour of deciding on questions of fact.

I am sure I need make no apology for addressing you on the state of the administration of justice in the Province. The condition of that administration in some branches is painful in the extreme to every right-feeling individual.

It does not merely affect certain individuals in high positions. It is a national calamity when the decisions of the chief officers of justice in the State give no confidence. The uncertinaty of decisions is demoralizing alike to the community and to the magistrates, whose judgments are condemned and annulled.

If such a condition of matters should continue, the office of judge must cease to be an object of ambition. Already has it been hinted in professional circles that one of our highest and ablest judges, from a profound feeling of dissatisfaction at the organization of our Courts and the failure of justice in the Province, while yet in the prime of his life and in the full vigour of his judicial powers, abandoned his office so soon as a pension became open to him. The instance I have alluded to, will be frequently repeated, if an office so responsible and honorable in itself should cease to be an object of ambition from the failure of its occupants to fulfil the mission to which they have been appointed.

Something has been said of the misconduct or incapacity of individual judges. I make bold to say that the administration of justice will continue to be a failure, if the system of administration be not radically altered. If the present system were a sound and efficient one, the short-comings of individual judges would not

* Loi du 1er Déc. 1790.

and could not be the cause, and the sole cause of the miscarriage of justice, which is loudly and universally complained of.

Upon the legislature of the Province is devolved the responsibility of devising the changes which will give to the country the necessary reforms in the administration of justice. It is to be hoped that the needful remedies will be applied, but it is also to be hoped that no hasty or ill-considered legislation will take the place of existing laws. The Imperial Parliament has lately had under its consideration a bill, which proposed radical and almost revolutionary changes in the British Courts of Justice, and in the administration of justice, and that bill has become law, after its provisions had for several years been the subject of careful inquiry by experienced judges and able jurisconsults. I trust that our legislators will maturely consider the matters to which this letter has made reference, and that the fruit of its labours will be seen in future years in the possession of a judiciary and of a system of administration of justice against which no obloquy shall be cast, but which will be the valued heritage of a law-abiding and contented people.

If the government of which you are a member, should devise the remedies which are required to remove the present disorders, it will earn a title to the lasting gratitude of the country.

I have the honor to be,
Sir,
Your most obedient servant,

F. W. TORRANCE.

Montreal, 8th August, 1873.

ARE PROPRIETORS OF TUG STEAMERS, COMMON CARRIERS?

Under the common law of England in force in all the Provinces of British North America and in the United States, Quebec and Louisiana excepted, common carriers are the insurers of the things entrusted to them against accidental fire, and all events, except "acts of God," such as storms and lightning, and "the enemies of the King." But, according to the principles of the Roman law prevailing in the Province of Quebec and in the State of Louisiana, and on the European continent generally, common carriers are not responsible for acts of *force majeure;* and by this is meant not only "act of God, or the public enemy," but any fortuitous event or irresistible force. Pothier, Pandectes, ed. Bréard-Neuville, vol. 9, pp. 336, 351, 362. Speaking of carriers by land or by water, article 1784 of the Code Napoleon says: "Ils ont responsables de la perte et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent qu'elles ont été perdues on avariées par cas fortuit ou force majeure." This provision has been reproduced word for word in the Civil Code of Lower Canada, art. 1675: "They (carriers by land or by water) are liable for the loss or damage of things entrusted to them, *unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force,* or has arisen from a defect in the thing itself."

All the French text-books which I have had occasion to consult are perfectly silent upon the subject of carriage by towing. However, the Courts of Louisiana have repeatedly held that owners of tug steamers are common carriers, and are responsible as such, their responsibility therefore being only limited by unavoidable accidents or uncontrollable events. *Smith v. Pierce,* 1 La. 354; *Adams v. N. O. Steam Tow Boat Co.,* 11 La. 46; *Millaudon v. Martin,* 6 R. 534; *Davis v. Howren,* 6 R. 255; *Frank v. Adams' Express Co.,* 18 A. 279; *Clastrier v. Sun Mutual Ins. Co.,* 18 A. 621. If these decisions be correct, the *onus probandi* is on the Defendant to establish that the tow boat used due diligence and acted without any fault or negligence, in fact, that the loss or damage was caused by the dangers of navigation or any other fortuitous event.

With due respect to the ruling of the Courts of this State, it seems probable that the Quebec Courts would arrive at the opposite conclusion, because within the meaning of the Code of that Province, a common carrier means a person who has entire possession of the articles conveyed. Article 1672 says "that carriers are subject *with respect to the safe keeping of the things entrusted to them*," etc. Art. 1673: "They are obliged to *receive* and convey, at the times fixed by public notice, all persons applying for passage, etc., *and all goods offered for transportation*," etc. Art. 1674: "They are liable not only for what has been *received in* the carriage or vessel, but for what has been *delivered* to them at the port or place of deposit, *to be put in* their vessel or carriage," Art. 1675: "They are liable for the loss or damage of things *entrusted* to them etc." In fact, all the articles of the Code of Lower Canada and of the French Code, bearing upon the subject of common carriers, convey the idea that they have actual, absolute and exclusive possession of the things carried.

Finally, in almost every country, commercial words have the same legal meaning. In the United States, Great Britain, and on the continent generally, a common carrier is defined to be a person who commonly transports for hire, goods and effects in ships, boats, barges, cars, carts, waggons, etc.; and it is remarkable that in every State where Courts of Justice have adjudicated upon the pointe under consideration, they have almost unanimously (Louisiana excepted) pronounced in favor of owners of tow boats. I refer especially to numerous American cases, which now form what appears to be the settled jurisprudence of several States of the Union, and of the State of New York in particular. According to these high authorities, proprietors of tug steamers are not common carriers, and are only bound to ordinary care and skill. *Caton v. Rumney*, 13 Wend. 387; *Alexander v. Greene*, 3 Hill 9; 7 ibid, 533; *Penn, etc., Steam Nav. Co. v. Dandridge*, 8 Gill & Johnson, 248, 320; *Leonard v. Hendrickson*, 18 Penn. 40; *Wells v. Steam Nav. Co.*, 2 Comst. 204; *Wells v. Steam Nav. Co.*, 4 Selden, 375; *Abbey v. Stevens*, 22 Howard, 78; *Parmalee v. Wilks*, 22 Barbour, 539; *Merrick v. Brainard*, 28 ibid, 574. See also Parsons *on Contracts*, vol. 2, p. 170; id. on *Shipping and Admiralty*, vol. 1, p. 247; Angell on *Carriers*, § 86. Chambers J. observed in the case of *Leonard v. Hendrickson*: "The law of liabilities of common carriers is one of public policy, and is so to be maintained. Does this extend

to the towing of boats and rafts on navigable or other waters? This exercise of power is peculiar and limited. It is generally for short distances, under the eye and observation of the owner, who may, and often does, accompany, by himself or his agents, the property that is towed for him. If there is peril from the sudden rise of the water, or other unforeseen danger, he may terminate the conveyance at any point of safety in his opinion. The cargo on a canal boat towed is property in the care of the conductors of such boat as common carriers, of which they have the exclusive possession, and for which they are responsible, knowing its value or quality. The captain or owner of a boat undertaking to tow a loaded canal boat, we presume neither inspects the cargo nor overhauls it. His contract has reference to size, tonnage and obstruction, to which the power of his boat is to be applied, and the connection of his boat by the chain or rope with the vessel and rafts to be conveyed at a fixed point, is the limited control he has over the property thus transferred. It was an apt illustration of the learned judge who delivered the opinion of the Court below, in saying: 'Wherein does this case differ in principle from that of a railroad company, or the State furnishing locomotive engines for drawing the cars of individuals over the road? The application of steam power to towing boats, &c., is only distinguishable from horse power where it can be used in the extent of the power. Would it be pretended that a man who furnished horses and a driver, to tow a boat or raft, was an insurer or a common carrier for the boat to be towed and its contents?'

In conclusion, it seems that proprietors of towing lines are to be considered as *locatores operis*, ordinary lessors of services for hire, *simples locateurs d'ouvrage*, and are subject not to the rigorous responsibility of common carriers, but to that *d'un bon père de famille*, that is ordinary care and due diligence.

D. GIROUARD.

Montreal, 18th October, 1873.

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Règne Militaire en Canada. Administration de la justice de ce pays par les anglais du 8 *Septembre*, 1760, *au* 10 *août* 1764. Imprimerie de la Minerve, 1872.

La Société Historique de Montréal continue de se rendre utile à l'histoire du pays en rééditant les *Six Lettres sur le Régne Militvire* de M. le Commandeur Jacques Viger et de ses habiles collaborateurs: MM. Louis Plamondon, le Dr. Labrie et Dominique Mondelet, qui parurent en 1827 dans la *Bibliothèque Canadienne*. Peu de membres du Barreau ont des notions exactes sur cette partie obscure de l'histoire judiciaire du Canada. Plusieurs sont sous l'impression que pour la décision des procès civils qui étaient portés devant eux, les tribunaux militaires ne suivaient d'autres régles que celles du code martial ou de l'arbitraire. D'un autre coté, le seul historien, Raynal, qui parle de l'administration de la justice en Canada durant cette période de quatre années affirme qu'à Montréal, elle y était confiée à des citoyens, tandis qu'à Québec et aux Trois Rivières elle était exercée par des officiers de milice on des troupes régulières de Sa Majesté. M. Viger et ses savants collaborateurs sont descendus dans les greffes, ils en ont sorti de la poussière les registres de ces cours anciennes et ils ont démontré jusqu'à l'évidence même, que quoiqu' occupé militairement durant tout ce temps, le pays n'a pas cessé d'être régi d'après les lois, formes et usages qui y avaient prévalu sous les Français, au moins quand au civil, et que ces *Chambres de Justice*, car tel etait le nom des tribunaux de cette époque, quoique présidées et composées d'officiers militaires, n'avaient de militaire que le nom. La justice s'y rendait toujours en français entre les parties d'origine française.

Au point de vue historique la brochure que nous avons sous les yeux est du plus vif intérêt et tout en offrant à la *Société Historique* nos plus sincères remerciements pour l'envoi de ce tome de la *Saberdache* ou des documents recueillis et annotés par M. Viger, nous attendons avec impatience la suite de cette intéressante publication.

The Spirit of Laws, by M. de Secondat, BARON DE MONTESQUIEU, translated from the French by Thomas Nugent, L.L.D. a new editon in two volumes carefully revised by ROBERT CLARKE & Co., Cincinnati, 1873.

The author of *L'Esprit de Lois* has been justly termed the legislator of political liberty. Taking the English constitution as a model of good government and it is well known that it has served as the fundamental basis of the Constitution of the United States and of all modern constitutions of limited monarchies in Europe, this great philosopher has laid down and fully developed the doctrine of separation of the three powers of government. For the first time he demonstrated beyond the shadow of doubt that there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates, or if the power of judging is not separated from the legislative and executive powers. "The oracle," as Madison remarks "who is always consulted and cited on this subject is the celebrated Montesquieu." His reasoning has been adopted by Blackstone and used by Story. *L'Esprit des Lois* is therefore considered as a standard book in every country ruled by the political institutions of Great Britain and should be found in the library of every lawyer and statesman. The first edition was published in French in 1748. Almost immediately afterwards, England had its edition carefully prepared by M. Nugent, a member of the London Bar. Of his translation, Montesquieu said that it "has no blemishes but those of the original." The American and Canadian public are therefore much indebted to Messrs. Robert Clarke & Co. for the neat and elegant American edition which these enterprising law publishers now offer to them.

A Treatise on Criminal Law as applicable to the Dominion of Canada. By S. R. CLARKE, of Osgoode Hall, Barrister-at-Law. Toronto: R. Carswell.

By the statutes, chapters 18—36, 32 and 33 Vict., the law relating to Crimes and Criminal Procedure, theretofore in force in the several Provinces of the Dominion, was to a very great extent, in the words of the preambles of certain of those statutes,

assimilated, amended and consolidated. It is to be regretted that the assimilation, amendment and consolidation partake very much of the nature of scissors legislation, and that the opportunity then afforded was not improved by the introduction of a Criminal Code.

Mr. Clarke in this Treatise has collected all the reported and some of the unreported cases on Criminal Law decided in the several Provinces, and all the cases on Criminal Law in "The Law Reports." Mr. Clarke has thus provided for a great want felt by the profession, as previous to the appearance of his work there was no treatise in existence by means of which the carrying into effect of the Criminal Law in the several Provinces of the Dominion might be compared.

Mr. Clarke's treatise, however, is to a very great extent like nearly all works published on legal subjects in England, a text book, a guide to reports of cases. The author rarely ventures to hazard an opinion of his own; he has collected the cases, but he leaves to the reader the task of discovering which are to be followed.

Mr. Clarke's chapter on Extradition is a valuable addition to our legal literature, but it is to be regretted that he should have noticed Mr. Justice Badgley's opinion given in a species of stage aside whisper in the case of Reg. *v.* Bennett H. Young 9, L.C.J. 48. Mr. Justice Badgley did not sit in that case, so that his opinion is of no authority, and as for Mr. Justice Smith's judgment that the 24 Vic. c. 6 did not require an order of Her Majesty in Privy Council to give it effect, there can be no doubt that it was erroneous, and Judge Coursol's decision that such order in Council was requisite, correct.

The cases referred to at page 71 as defining the meaning of the term crime fail utterly in giving a proper definition. In citing Atty. Gen. *vs.* Radloff, 10 Ex. Baron Martin's definition is given, but the definitions given by Parke B. at p. 105 and Pollock, C.B. at p. 109 are not referred to. The references to Bancroft *v.* Mitchell L.R., 2. Q.B. 549, and Reg. *v.* Master, as supporting the assertion in Mr. Clarke's book that the test of an act being a crime, is whether an indictment will lie for it, are erroneous, as in Bancroft *v.* Mitchell directly the reverse was held, and in Reg. *v.* Master, Mellor J. refers to Bancroft *v.* Mitchell, as showing that the assertion in question was disallowed in that case.

But there can be no doubt that Mr. Clarke's treatise will be

useful to practising lawyers. It has been very favorably received and well spoken of in various quarters, and although we doubt the success pecuniarily of any law book published in Canada, we trust that Mr. Clarke will not lose money by his treatise.

Commentaire sur le Code Civile du Bas-Canada, par T. J. J. LORANGER, juge de Première Instance, Commandeur de l'Ordre de Pie IX, ex-Ministre. A. E. Brassard, Editeur, tome 1er. Des presses à vapeur de la Minerve, 1873.

Le nom seul de l'honorable juge présidant la Cour Supérieure du district de Richelieu, est une garantie que ce qui en émane doit être marqué au coin du talent juridique. "Poussé," dit le savant commentateur, "par l'amour d'une science qui a été la principale, sinon l'unique préoccupation de ma vie; vers laquelle, en debors du devoir, m'entraine un penchant naturel; d'une science qui a été l'objet de culte des plus belles années de mon existence; animé du désir d'en propager la connaissance; j'ai voulu faire de mon livre un monument de ma prédilection."

Si le volume que nous avons sous les yeux peut nous faire augurer de l'œuvre complète, nous pouvons prédire qu'elle sera en effet un monument digne du nom de l'auteur et de la patrie. La tâche qu'il s'est imposée, n'est pas ordinaire; elle dépasse même celle du commentateur français. Toutefois, l'horizon de ce dernier n'est pas aussi retréci que le fait entendre l'auteur; le commentateur français remonte toujours aux premières sources, au droit romain, aux anciens auteurs et souvent aux législations étrangères. Il est vrai que c'est par pur amour de la science qu'il pousse ses études jusques là. Son rôle stricte n'est pas de chercher en debors du texte du Code, des lois sur les quelles sont fondées ses explications, la matière de son commentaire. Comme l'observe judicieusement l'editeur, "il n'est pas ainsi pour l'auteur d'un ouvrage du même genre, écrit sur le Code Civil du Bas-Canada. Outre le droit canon, le droit public et privé de l'Angleterre, surtout son droit commercial, la législation statutaire de la mère patrie et la nôtre, aux quels il doit recouvrir, le commentateur canadien doit puiser aux sources du droit romain, et tenir en conférence continuelle le Code Napoléon, qui a servi de modèle au nôtre, sans négliger aucun texte de l'ancien droit." Cette situation particulière du juriste canadien est habilement décrite dans l'introduction du commentateur, qui couvre 94 pages. Elle contient un résumé succinct et éclairé de l'histoire du droit de la province de Québec, fait avec cet entrain et cette élégance de style qui distinguent tous les écrits du savant juge. Cette introduction est, sans contredit, la partie la plus intéressante du premier volume d'un ouvrage, qui, s'il faut en juger par son titre, demande à lui seul la vie de plusieurs jurisconsultes, fussent-ils dégagés de la responsabilité d'un juge de première instance.

LA RÉDACTION.