The Legal News.

VOL. V. SEPTEMBER 2, 1882. No. 35.

JUDICIAL REFORMS.

The following letter has been addressed by Mr. Justice Ramsay to the Attorney General for the Province of Quebec, commenting on the Report of the Hon. Mr. Justice Loranger as Commissioner for the Codification of the Statutes :—

MONTREAL, 25th August, 1882.

SIR,

In compliance with the request of your circular of the 1st May last, I have examined the first report of the Commissioner for the codification of the Statutes, comprising a proposed law for the re-organisation of the Courts and the consolidation of the Code of Procedure, with all the care circumstances would permit of.

Criticism of such a work must necessarily appear somewhat ungracious, and its utility may possibly bear no fair proportion to the labour it entails.

In the remarks I deem it my duty to make, I do not purpose entering into the merits of the *redaction* of the various clauses of the proposed legislation ; but shall confine myself to considerations which appear to me to involve questions of general principle.

The chief objects sought to be attained by all systems of legal procedure are so obvious, that little or no difference of opinion exists as to them ; but the modes of arriving at the desired result are very various. Few subjects have attracted greater attention, and every system hitherto produced has been exposed to almost clamorous denunciation. Lawyers gain by protracted legislation, and the delays of justice, it is said, are due to their sordid speculations. I do not feel called upon to answer these wild accusations, which contain just that semblance of truth which is sufficient to capture the most foolish fish. Sham philosophers prose, and rhetoricians rave about the delays of justice. They might about as well expatiate on the time it takes to ripen an ear of corn. In theory, every impediment put between the creditor and the recovery of his lawful debt is a tortious delay. Forms of procedure are the penalty we have to pay to avoid surprise and ensure justice. Celerity in legal proceedings is therefore simply a question of degree.

In organizing a judicial system, while it is evidently wise to have before one's eyes the highest conceivable form of excellence, it is important not to be led away by abstractions, often fallacious, and even when theoretically right, too difficult of application. The new system should differ from the old as little as possible. All unnecessary changes in the law are bad, and before making a change it is proper not only to be sure that the old law is defective, but that there is a tolerably strong presumption that the proposed alteration is an amendment (1). By thus keeping up the traditions of civilization, alone, can true progress be secured. Obedience and respect are more willingly accorded to an old law than to a new one.

The report contains some useful suggestions; but, as a whole, it seems to me to have been dictated by ideas totally at variance with the rule of amendment just mentioned. It is a radical change of all our present notions—it introduces a system of procedure so different from the one existing, that lawyers will have to learn their profession anew, at the expense of their clients, it introduces some forms of absolutism totally foreign to the habits of the people of this country, and subversive of individual rights, and it alters the position held by the Judges in every British country, introducing a sort of subordinate surveillance over them, borrowed from some revolutionary source or other. Whether this up-turn of all our judicial system is the out-come of the Commissioner's own mind, whether he has copied it from any system actually in force, or whether he borrowed it from the writings of others, we know not. Hardly an authority is cited, and the occasional references to the English law show a very imperfect knowledge of that system, while the old French law is discarded as being unsuitable to our times and circumstances.

(1.) The danger of making changes of a radical kind is very real. This is particularly true as to matters of legal procedure. All changes untried by experience are little more than groping in the dark, and what, at first sight, seems a desirable simplification too often can be turned into a cause of delay, or it works injustice.

This compendious mode of discarding existing institutions is much in vogue with radical reformers in these days. It is easier to dogmatize than to reason, and those who fabricate new schemes rarely suffer from the almost invariable failure of their social experiments. Intuitively these philosophers recognize the wisdom of the fable.

What we have to expect from the heated imaginations of radical reformers we know very well from experience. The least we ought to exact from them, as a preliminary instalment, is a precise account of the source whence they obtain their novelties. The test of actual and successful trial is the best reason for introducing a new institution. The next is the concurrent opinion of writers of repute and of practical experience. A writer on the Roman bar says: "*Si les citations sont une sorte d'épouvantail pour une certaine classe de lecteurs, aux yeux des hommes d'étude elles passent pour la meilleure garantie de la conscience de l'écrivain.* (Grellet Dumazeau, Barreau Romain, VIII.)

For my part I have very little faith in complete systems either of law or politics, concocted in the retirement of the closet. Constitutions and systems of law are the accumulated growth of ages, and except under the pressure of the most imperious necessity, the attempt to remodel them, so as to turn them out spick and span new, appears to me to be an evidence of that presumptuous folly, which is the most common indication of intellectual decay. (1.)

The introductory chapter of the report deals *seriatim* with the following subjects: "Administration of Justice," "Decentralisation," "Court of Review," "Superior Court," "County Courts," "Advocate General." "The appointment of a second Chief Justice," "Appeal," "Privy Council," and "Trial by Jury." So far as possible I purpose following the order thus mapped out, and I shall conclude with some remarks on the proposed changes in procedure, and by the suggestion in outline of some modifications of our present system which, I think, might perhaps be advantageously adopted.

The delays of justice are the proverbial reproach to the administration of the law; but those acquainted with the subject, know what insurmountable obstacles prevent expedition in legal proceedings. The fault is not that of any particular system. The first impediment arises from the bad faith of one or other party. In the great multitude of cases the defendant does not desire a speedy termination of the proceedings, and by disingenuous appeals to unquestionable principles, he readily obtains the temporary relief he seeks, and thus justice is, to some extent, defeated.

Inexperience cries out, why not put a stop to these dishonest manœuvres? The answer is plain; it is only by the trial that it can be known which litigant is in bad faith.

The next cause of delay is the difficulty of establishing the fact.

Many plans have been tried, and countless ones have been suggested, to remedy these evils, but without much success or prospect of improvement. Extreme technicality, and the greatest latitude have proved equally unavailing, and it is probable that the least sum of evil will be found in the vigilant repression of each form of abuse as it arises.

The third cause of delay is the accumulation of cases which cannot be disposed of. This is an evil which, I conceive, it is easy to remedy by the most ordinary care and attention, and by the application of the plainest and most obvious dictates of common sense.

I am inclined to concur with the Commissioner as to the decentralisation of justice. It seems to me the measure of 1857 was greeted with an applause it did not deserve, and that it was far in advance of the wants and the means of the country. But after all, the extent to which decentralisation should be carried is a question of expediency, and, as the Commis-

(1) The mania of remodelling is alarmingly exhibited in the love of law-making. Not only does it seem necessary to tamper constantly with all the dispositions of the statutory law, a legitimate field of labour, under proper restrictions, but it is thought that no rule of the common law can be secure till it has appeared in the form of a Statute. This disposition to trust to only what is written i.e. to a text, as in primitive legislation, has been popularized by the French code, in one sense a great success. But people seem to forget that a general exposition of the leading subjects of the civil law had become very desirable in France, in order to destroy the multitude of provincial and local customs, and that the Revolution had rendered such a change possible. Its being copied in other countries, not similarly situated, does not say much for the discernment of their inhabitants. It is well to bear in mind the following passage from Bacon; "And sure I am, there are more doubts that rise upon our Statutes which are a text law, than upon the common law which is no text law." The sententious brevity inseparable from wholesale codification must be often ambiguous. This leads to doctrine burthened with a crabbed text.

sioner justly remarks, the evil of over decentralisation is gradually being cured. Another reason for not abolishing an institution once created, is that it interferes with the stability of positions, on which people have some right to count, and to acquire which, they may have made great sacrifices. Without placing such positions exactly in the category of vested rights, they have much analogy with them.

I cannot agree with the Commissioner in his hostility to the Court of Review. His objections seem to be, that it has all the inconvenience of an additional appeal, that it is not really an appeal, and that it is a retrograde step in restoring centralisation.

It is not absolutely correct to say that the Court of Review adds an extra step to litigation. It only does so when there is a conflict between the Court of first instance and the Court of Review. It has been a Court of appeal to all intents and purposes for nearly ten years. Even before that time, the judges, out of deference to the wishes of the bar, did not sit in Review on their own judgments, and since 1872 the judge *a quo* is by law disqualified to sit.

The last objection sounds strangely coming immediately after the following vivid picture of the evils of the decentralization of 1857 :

"But the excessive increase of these courts created too many jurisdictions, and placed the judges exercising their functions therein, in an isolated position which was prejudicial to uniformity in jurisprudence.

"This isolation was also prejudicial to the advocates, divided into numerous sections of the bar, strangers to each other, and without professional intercourse or any interest in common. It retarded the rise of the legal profession and deprived the country parts of that social influence which they had a right to expect from it. Thus, by disseminating beyond measure the operations of the judicial power, decentralization diminished its vigor and loosened its ties."

The Report suggests no remedy for these evils. The isolation of the judges would not be diminished by the adoption of any of its suggestions, nor can I understand what in anything proposed is to raise the legal profession, or to augment that social influence which it has not yet wielded, it appears, in the country parts. To speak of the domination of the great centres, and the interference with the judicial autonomy of the new districts, as being abuses, is declamation, misplaced in a work of this kind. There are the same reasons for the Court of Review sitting in Montreal and Quebec as exist for the Court of Appeals sitting there, and it is no more interference with the judicial autonomy (whatever that may mean) of the new districts in one case than in the other.

The embarrassment in enacting scientific laws, owing to the prejudices of the great mass of the people, who cannot possibly comprehend their recondite meaning, is the great danger to be apprehended from popular legislatures, and a commission to be useful, must carefully abstain from demagogic appeals.

If it is intended by the note to article 5 to intimate that the judges sitting in Montreal were more merciful to their judgments than to those of their country colleagues, the insinuation is gratuitous, and unsustained by anything but gossip. General appreciations of this sort ought to have no weight, particularly where it is so easy to show by results whether the rumour is founded, or is only the oft-repeated grievance of a disappointed lawyer or a chagrined judge. Nor would it justify such an insinuation to show that proportionately more country cases were reversed in Review than those from the Districts of Quebec and Montreal. It is antecedently probable that the decisions arrived at by a judge in a great centre will be more often correct than those delivered by the same judge in the isolation of the country. And this the Commissioner seems to admit.

The practical results of the Court of Review are the best answer to the objections of the report. Its main object is to give opportunity to all unsuccessful suitors to be heard by three judges for a very moderate outlay. The Court certainly answers that end. Last year there were in Montreal of cases inscribed 195, of which 143 were finally terminated by confirmation. In Quebec there were 74 inscribed, of which 46 were confirmed. There were thus 189 cases finally disposed of, all of which might have come to the Court of Appeal. If even half of these cases had been appealed, the Court of

Appeal would have been unable to prevent the arrears from increasing. An experiment which may have the effect of increasing those arrears is too dangerous to be thought of without dismay. During the last seven years, we have been only able to affect in a very slight degree the multitude of arrears which had then accumulated.

From what I have said of the Court of Review, it will be readily understood that I disapprove of the return to the three judge system. For the immense majority of cases the opinion of one judge is just as good as that of three, and the parties having the right to test in Review the correctness of the opinion of the single judge, it is difficult to understand what would be gained by occupying the time of three, until it is specially required.

The most obvious objection to the three judge system is its expense. This is a matter of moment to the whole country. It becomes impossible to pay a large body of judges salaries sufficient for their position, and unless the judicial office is to be run into the ground here, as it is in France, some means must be devised to raise the salaries of the judges of the Superior Courts of Law. This has been so strongly felt that in Ontario the local legislature has taken upon itself the charge of adding $1,000 a year to the salaries of the judges of that Province. This is open to serious objection, and the *constitutionality*, if I may use such a word, of the measure, has been vigorously attacked.

A wise legislator will bear in mind that the idea of our judicial position is English and not French, and so are the ideas and habits of expenditure. This has always been the case under the English rule, and it is somewhat curious to know that the judicial salaries were fixed, one hundred years ago, almost exactly at the rate they stand now.

In France there is no great respect for the individual judge. He is not trusted as he is in England, and society seeks to protect itself by numbers. I am strongly persuaded that numbers do not augment the chances of good judgments. I do not believe that any tribunal ever gained force by a number exceeding three or four judges. The reasons for this are very prosaic, and will at once be recognized by those whose duty it has been to deliberate with a greater number. Numbers stop deliberation and render the result shaky and uncertain. This is not peculiar to Canada. The same will be found in all countries in the world. If any one will scan with care the opinions of "all the judges" in England, he will see how intolerable would be the nuisance of such a combination of talents if it were frequent. The Seigniorial Court was, it is true, somewhat of a subterfuge—a tub to the political whale—and therefore little attention was paid to its composition; but I remember the late Chief Justice Rolland saying to me that it reminded him rather of a Committee passing resolutions than of a Court of Justice.

The very fact of judges being few in number adds to the chances of their being circumspect. The members of a select body are invariably more careful of their reputations than those of a numerous one. The thirty judges of England are known to every educated person in the country, and they have a reputation and a name to earn or to preserve. In France, except in the highest Courts, the thousands of judges are unknown, and none of them can expect to gain judicial celebrity.

Since the judges' salaries were first fixed in this country, their work, as a general rule, has enormously increased, and the cost of all the necessaries of life has augmented in quite as great a proportion. So have the habits of living —those things that come to be necessaries— and so also has taxation. Ministers have discovered this fact so far as they are personally concerned; they have greatly increased their own salaries, and have added to their surroundings everything that luxury could suggest. While the legislative branches of government have been stimulated, I might almost say, to extravagance, the judicial branch has been starved and inconvenienced in every shape and way. A reflecting mind will hardly come to the conclusion that this condition expresses the relative value of the two institutions. We probably could better afford to make no more new laws than to leave unexecuted those we have.

The number of judges of the Superior Courts of Law is immense for the population—two judges in the Supreme Court (our supposed representation), six judges of appeal, and 27 judges of the Superior Court, give a total

of 35, five more than for England, if you leave out of reckoning the Lords Ordinary, and the four paid members of the Judicial Committee of the Privy Council.

The augmentation of this mass of judges by a judge for each District of Lower Canada is appalling, and to give him something to do it becomes necessary to treble the judges at every point, and to oblige three to hear the evidence. What control can three have on the admission of evidence? The latitude allowed will be in the measure of the least quick-witted on every question, and thus one of the most formidable difficulties in the expedition of cases will be largely increased.

The pomp and circumstance, which should perhaps surround the judicial dignity, is the substantial return we are to have for all this expense and confusion. I do not think any thing in this direction will be gained by sending three judges instead of one to obscure villages where there is no decent accommodation to be procured, and where the whole *mise en scène* is the reverse of imposing. Before setting up a Court in any locality it would be perhaps a wise precaution to enquire whether there is a proper place of residence for the judges and advocates. When acting for the Attorney-General on one occasion, I discovered that I was to dine at the same table with a man I was going to prosecute for murder, and it was with some difficulty I avoided this impropriety. When an assistant judge of the Superior Court, I frequently experienced difficulty in making suitable arrangements, without rendering them conspicuous, and consequently offensive.

Again, it is not easy to understand how the three judge system is to overcome the evils of isolation, since the judges are to remain constantly (and this is vigorously insisted on) in their respective Districts, except while holding their Courts elsewhere. But the best answer to the objection to the three judge system is to be found in the report itself. It is noted that a great number of cases will still be left to the decision of one judge. In addition to this the judges have the power to send any case before one judge, when they think the interests of justice will not suffer. That is, the law gives the suitor a tribunal of three judges, and allows the judges to convert it into a Court of one judge. If the judges, to lighten their own work, may do just what the law now does, what is to become of the effect supposed to be produced by the three cocked hats on the Bench?

The novelty of such a free and easy system is not more striking than its imperfections. Tossing about a case from one jurisdiction to another would give opportunity for endless confusion.

We have pompous allusions to *l'hierarchie judiciaire*, as though it were of importance to observe it, yet the whole scheme of the proposed code seems to be devised in order to mutilate or destroy it. One of the means to be adopted is to give the County Court judge a right to sit as a judge of the Superior Court. This appears to me to be highly objectionable. If he is considered fit to do the Superior Court work one day, he is so the next, and it is to set at nought all ideas of judicial hierarchy to put him for an instant on a level with the judge of the higher Court.

It is quite possible the judge of the inferior Court may be an abler man, and a better lawyer, than the other, but this is not the presumption of the law, or the view usually sought to be impressed on the public mind, neither as a general rule will it be found to be correct. Men who accept inferior positions do so because they feel themselves unequal to greater fortunes, or, because they have got a timely hint that the public opinion points that way.

The objection to allow lawyers to hold civil Courts appears to me to be still greater. I am not aware that it is done in England, and an English example in this direction would be no guide to us. An English lawyer is a barrister, he has no permanent client; the lawyer here is advocate and attorney, and consequently he might be called on at any moment to decide an important question affecting some one from whom he had great favours to expect. However, it is hardly necessary to discuss this matter in dealing with the report. The appointment of judges cannot be regulated by a local law, and the device of giving the matter the appearance of a regulation of procedure does not alter the question.

I confess to a sense of bewilderment in reading the latter part of the Commissioner's commentary on Art. 1. Where does he find more than two degrees of jurisdiction besides the ap-

peal to the Supreme Court and to the P. C.? As I have already shown, the appeal from the decision of the Court of Review is only conditional, the condition being that the judgment of the Court of first instance is reversed. Evocation has no resemblance to appeal. Evocation does not increase the degrees of jurisdiction in number. It simply carries on in a higher court what has begun in a lower one. As well might it be called an augmentation in the number of degrees of jurisdiction to pass a case from the first to the second chamber, as is proposed by the report. It is impossible to conceive how so thoroughly trained a lawyer as the Commissioner should have confounded two things so dissimilar as evocation and appeal, and I can only account for it by supposing that he was carried away by his indignation that there should be tribunals to deal with particular matters exclusively. He exclaims—"The time has long passed in which certain Courts had privileged jurisdiction over special matters, outside of their pecuniary interest." The word *privilege* has a peculiarly exciting influence on some minds, owing to some, to me, inexplicable cause. My simplicity leads me to think that we are one and all living on privilege. But if privilege is so obnoxious, why, may I ask, should there be any privileged jurisdiction owing to pecuniary interest? In my weak abstractions I am inclined to think that the poor man's penny deserves as much protection (but absolutely and very particularly *no more*) as the rich man's pound. But there is the unattainable, and my *à priori* philosophy fails in the same way as does the theory of perpetual motion. The attainable is for society and not for the individual. Were there no friction we should all slip from our stools.

Soberly, the criterion is always interest, and money is not the perfect measure of interest. It is a conventional and a convenient one, but it does not furnish a measure for our tastes and for our affections. This is the principal reason why one rule is established for a small promissory note and another for real estate. The note states its value on its face, the land or the future right does not. These exceptions to the money value, if that be looked upon as the *general* instead of the *common* rule, stand therefore on principles identical to that of the Commissioner's sole exception, namely, when there is a question as to the constitutionality of a general or a local law.

Although the Commissioner thinks it undeniable, that where the capital of a rent or the interest in real estate is estimated at an amount within the jurisdiction of the County Court, that Court ought to have jurisdiction without evocation or appeal, still, he admits, there is difficulty when the capital is beyond the jurisdiction of the lower court.

His mode of getting over the difficulty is somewhat curious. He would leave the jurisdiction of the arrears to the local court, if within its jurisdiction, reckoned by the amount of the action, but he would have it declared by statute, that the thing should not be *chose jugée* as to the principal. So, having a rent of $60 on a capital of $1000, the plaintiff might perpetually be defeated of his interest without being able ever to bring his case before a Superior Court of Law. The distinction made for fees of office and sums due to the Sovereign stands on quite a different ground. It is not a protection to the right of the Sovereign or of the office-holder. It is established in jealousy of their rights, so that they may not impose small exactions on the authority of a subaltern judge, without appeal. I am, perhaps, less jealous of the rights of the Sovereign than most people in this country, but I trust this very wholesome safeguard of private rights will not be disturbed.

The title of the Court of Appeal, "Court of Queen's Bench," is historically not very well founded. Probably the name was given, without any very critical examination, and principally from an amiable desire to conciliate the English minority, when substituting the name of "Cour Supérieure" for that of "Court of Queen's Bench," for the great civil law court of the Province. Any change in the name would likely give rise to misinterpretation, and even if it were more open to objection than it is it would not be worth while. Besides, the proposed name of "Court of Appeal" would as little express all the functions of the court as the present one. It is the great criminal court of the country, and so far is as properly styled "Court of Queen's Bench" as "Court of Appeal." The reformer of nomenclature must therefore show more ingenuity than is exhibited in Article 2, before disassoci-

ating the name of the Sovereign completely from the administration of justice.

The County Court system, or what is analogous to it, already subsists; and if change for change's sake gives a feeling of satisfaction to anyone, I know no less dangerous mode of gratifying that taste than calling the Circuit Court henceforward "the County Court." I also think the jurisdiction should be enlarged and that its cases should only be subject to revision by three judges of the Superior Court. If County Court judges are to be named, I think it should only be gradually, and as the Superior Court judgeships are diminished in number. The Superior Court judges might then become resident in the great centres; and their deplorable isolation, which has sometimes caused scandal, and almost always annoyance, would be obviated.

When one comes to the proposition to create the office of Advocate-General, the exclamation of Napoleon when he heard Sieyes' proposition for the office of 1st Consul, is forcibly called to mind. For whose benefit, we cannot fail to ask, is this anomalous position created? We are twice assured it existed before the Union of 1841. In fact, no such office ever existed in British territory. There has often been an Advocate-General, and there is no reason why there may not be one now. The Advocate-General was the Sovereign's Attorney in Chancery. But the officer the Commissioner desires to originate has powers very different from those of an Attorney-General. The new officer is to confer with the judges, and he is to have the initiation of the conference. The explanations are so worded at times, as to leave the impression that the judges are to be the principal parties at the conference, but it is evident that this circumlocution is only in deference to the well-known and well-founded jealousy of official interference in judicial matters, and that the Advocate-General will be the real *arbitre*. The existence of this functionary is not necessary in order to allow the Provincial Government to intervene in cases where there is a question affecting the local legislative powers. But to make a rule that the Advocate-General is to be notified whenever a question affecting the validity of a local or federal act (for it must go so far) arises, is to invent the most perfect manner of creating obstructions and delays possible. If the local authority is to be admitted a party it is quite evident the Minister of Justice must also be notified, and private parties will be delayed in the prosecution of their rights. Besides, who is to divine that the constitutional question is to be raised? It arises incidentally in many cases.

The assurance that this office of Advocate-General will not add to the public charges will hardly obtain credence when we read Section 5 which is as follows:

"The annual salary of the Advocate-General shall not exceed the average amount of the fees paid yearly, during the five years previous to his appointment, to the advocates charged with the duty of representing the Crown before the Courts before which the Advocate-General shall himself represent it."

How can it be known beforehand in what Courts he shall appear? If he is to be paid by an "annual salary" it must be fixed when he takes office.

It is evidently intended that he is to take the place of the Grand Jury, or to control it, so that the initiation of prosecution is to be transferred from a popular to an official source, and to be confided to one subaltern officer—a sort of deputy Attorney-General. Did it ever occur to the learned persons who eagerly seek to destroy the Grand Jury, powerfully aided by the thoughtless or unpatriotic, who would joyfully sell an institution constituting a popular right in its truest sense, for a mess of pottage, that even judicial systems have their limits, and that if we destroy the Grand Jury, with any approach to consistency, the Coroner's Jury must also disappear. In countries like Scotland, where the prosecution is official, there is no Coroner. Perhaps the Commissioner desires the Advocate-General to absorb the functions of that "ancient officer." Such an interference with the criminal law is probably beyond the jurisdiction of the local legislature, and, therefore the Commissioner's recommendation need not be discussed at greater length.

It is not improbable that for reasons, not avowed, this, till now, unheard of office may be created by Statute; but if so I venture to prophesy two things:—1st, that its creation will be immediately followed by the nomination of a staff of secretaries and clerks to enable him to get through his labours; 2nd, that the judges

will not take part in his conferences, in which they are only to enjoy a formal pre-eminence.

And here I may take occasion to meet an aspersion gratuitously thrown out against the judges, that they habitually refrain from mixing themselves up in matters affecting their own position and the law, and particularly that they did not offer suggestions on the project of the civil code.

In the first place, the charge is not altogether founded. The judges have ceased, to a great extent, to offer suggestions, because when they have done so their suggestions have been rereceived, if not with absolute discourtesy, at all events with an official reserve almost offensive. For my own part, in spite of the cooling influence of official manners, I have three or four times, within the last few years, urged on the attention of the Attorney-General of the day, a change as to hearing cases in appeal in the district of Montreal, which could have been operated by the enactment of a very few words, but without producing any apparent effect, although the plan was approved of by the bar. I shall allude to the scheme later, in speaking of the Court of Appeals, as to some extent it is adopted by the report.

The particular charge as to the code seems to me to be specially ill-chosen. The judges had no opportunity afforded them to enter on a critical examination of a work of that kind. The work of the judges in the great towns was even then sufficient to prevent any of them undertaking the arduous manual labour of writing critical notes on the code. I have heard the work of the English judges compared with ours. It is well the attention of these statists, who delight in comparative depreciation, should be directed to the fact that the judges in this country have no assistance in the way of secretaries or clerks, as they have in England and Scotland. The Chief Justice of the Queen's Bench Division in England has a secretary and two clerks, at the cost of £1,000 sterling a year, and each of the other judges has two clerks. Each minister, not only of the Dominion Government but of the local Government, has found it necessary to have a private secretary in addition to the regular staff of his department. I wonder if it ever occurred to any of these gentlemen that our work, by comparison with that of our predecessors, has increased quite as much as theirs? In the country districts the judges had not the books necessary to enable them to criticize the draft of the code, if they had the leisure. On this point then the habitual amusement of carping at the judges fails. General accusations may be more successful. They have a double advantage; they look less vicious, and they are less easily answered. I have no objection that the judge should be called to as strict an account as any other official, but the Bench cannot control bungling laws. Burke says: "Where there is an abuse of office, the first thing that occurs in heat is to censure the officer. Our natural disposition leads all our enquiries rather to persons than to things." And so, perhaps, our national freak in this respect may be referred back to a human weakness, freely indulged.

There is a note beginning at p. 135, which it may be as well to notice here. It is as to the formation of family councils, and the mode of dealing with all such questions as the appointment of tutors and curators and granting authorisations to deal with the property of minors, absentees and incapables.

What the Commissioner says is strictly true. All those who have had to deal with these cases must have felt how dangerous were the powers to be exercised. But this may be said with equal truth of almost all non-contentious proceedings. The most vigilant judge can do little in such matters. Of course, he may exact, as the Commissioner suggests, an account of the family, and demand an explanation of the absence or presence of this or that person; but to do this effectively he must institute some sort of enquiry. In doing this he may ruin a small estate in his well-intentioned efforts to preserve it. It will be observed that it is the small estates that are most open to dilapidation. In the management of great ones the relations relieve the judge of all solicitude.

But all these alarms are as old as the hills. It is the cure that it is difficult to discover, and I doubt much whether we can mend our present system. In England the Chancery system, perfect in theory, became often disastrous in practice, and it fell, overwhelmed by the jeers and denunciations of satirists and of the public.

So far as I know, allowing the Prothonotary to act in the absence of the judge, has not given

rise to any abuse we had not before, and the pretension that the judge is never to be absent from his District is one in which the Commissioner can hardly be serious. No respectable person would accept an office which subjected him to the necessity of becoming a prisoner on parol, and those already appointed would have good reason to resist so monstrous an interference with their individual rights.

The report next proposes the appointment of a second Chief Justice for the Superior Court. This is deemed necessary because of the stupendously difficult and important duty of appointing *ad hoc* judges,—a duty rendered still more onerous, we are told, by the proposed changes of the code.

The displeasure this arrangement might cause the present Chief Justice is deprecated with care. Having calmed any susceptibilities he might be supposed to have, the Commissioner sees no objection to his measure but that it might appear contradictory to have two Chief Justices for one Court, and he sets himself gravely to explain the futility of this objection. A more formidable objection is that one Chief Justice is too much, as he, seriously speaking, has no special functions to perform. His appointments of *ad hoc* judges are generally supplied to the clerk in blank to be filled up as occasion may require. He is not even "Sir Oracle," and his privileges consist of precedence not acquired by seniority, and the pleasing douceur of $1,000 a year extra pay. Recently in England it was proposed to abolish the invidious and unnecessary distinction, but it was retained by Parliament, apparently to afford the Ministry of the day an opportunity to reward the ambition of retiring law officers. As we are assured by the Commissioner that it is necessary to have an Advocate-General because the time of the law officers here is absorbed by politics, there can be no sort of pretext for giving them judicial preferment (1).

When the Commissioner comes to deal with appeal, he is so beset by conflicting views that it is almost impossible to know what plan he recommends. We are impressively assured that faith in the counsel of a majority of judges has so possessed the public mind, that the possibility of a minority opinion prevailing diminishes confidence in the Courts. Having communicated this observation as to the mental condition of the public (without a shadow of proof), the Commissioner exclaims: "Despite legal fictions and abstract theses on the hierarchical relations of the Courts to each other, on the pre-eminence of the higher tribunals over the inferior ones, the public will never be convinced that, of the eight judges who render judgment, three can be better than five and that the party who has the least number of judges in his favour should gain his case against him who has the greater number!"

Mr. Veuillot says—"*un point d'exclamation ne saurait tenir lieu d'une pointe d'esprit.*" I know very well the learned Commissioner does not require that it should; but seriously will he tell us in what country the law exacts that the judges of appeal should be selected from a different body and under different conditions as to moral and legal fitness than the judges of the other superior courts of law? The truth is, that in the few sentences dealing with appeal, the essential vice of the whole of the Commissioner's system crops out. He sets forth on a revolutionary basis, and he denies the influence of authority. To him the authority of a Court of Appeal to reverse the decision of an Inferior Tribunal is based on a fiction and an abstract thesis. How it can be based on both I am not sufficiently a philosopher to understand. Left to my own intelligence, I should describe authority as a postulate in establishing the problem of civilization, and it is just as much required in support of the judgment of five or eight as of one. The right of a tribunal to condemn depends exactly on the same principle as the right of the governing body to legislate—that is on authority—and this is equally true whether the power be derived from an honest vote, a ballot-box fraud or inheritance.

Under the pressure of his heterodox and discontented ideas the Commissioner is evidently much perplexed. One curious device he suggests to disarm public opinion, is to silence the dissenting judges. Those who do not agree with the judgment are not

(1) It is hardly necessary for me to add that the force of my remarks is not very apparent at the present moment, both Chief-Justiceships being occupied by men who, in a very special degree, merit the honours they enjoy. But it has not always been so, nor have we any guarantee that in the future these dignities may not be conferred for very insufficient reasons.

only to say nothing, they are to conceal for ever their difference of opinion, and I presume, as it is necessary for the complete success of the plan, they are forever to affect to hold an opinion in which they don't believe. But if the opinion of the minority becomes that of the majority in another case, as may very well happen in a court of six judges, with a quorum of five, perhaps the Commissioner will inform us how the two dissenting judges in the first case are to act in the second? Are they to conceal their real opinion from the sixth judge? Another scheme is that the opinions of the judges of the Superior Court should be counted with those in Appeal. The result of this might be that the judges would be divided four and four, and the three judges in appeal be thus over-ruled by two. But the Commissioner suggests, that in such a case weight might be given to the judgment in Appeal. How is this to be accomplished without violating the rule as to silence? On what portion of these suggestions the Commissioner intends to insist does not appear, but it is plain they cannot all live together.

For a Court that is not final, the scheme of silence of the minority, besides its manifest dishonesty, misleads the final Court as to the gravity of the question. The result will be universal distrust; and as no one knows whether the case is carried by a bare majority, it will be supposed that all doubtful cases have been so. One of the great advantages of the English system of government over those of the Continental nations of Europe, is its publicity. By avoiding mystery, we escape suspicion. No fact, decisive of the interests of individuals, or of the state, should be permanently concealed.

The difficulty of having the decision of a majority of judges over-ruled by a minority, is much increased by the three judge system and by raising the quorum in appeal to five judges, and I purpose explaining later how it may be reduced to its smallest expression so far as the Court of Queen's Bench is concerned.

The question of appeal for this Province is one of great difficulty, and we may almost say that we cannot expect ever to have a satisfactory final appeal. The *raison d'être* of the Privy Council is not that given by the Commissioner. It is not founded on the right to petition at all, notwithstanding its forms. It is a recognition of the authority of the Imperial Parliament to legislate for all the Queen's Dominions. Having a right to make the law for them, it follows necessarily that there must be a Court of final appeal named by Imperial authority to give such law effect.

So far as principle goes, doing away with the statutory appeal to the Queen in Council is of no importance; practically it is open to this objection that it would nearly double the expense of the reference to a Court, the principal fault of which is its expense. The sole effect then of the proposed petulant legislation, would be to make it, more than it is now, a luxury, and a means of oppression, for the very rich.

The same reason that requires the existence of the P. C. as a constitutional and legal mode of giving effect to the Imperial authority dictated the idea of the Supreme Court in the Dominion organization, and a narrow jealousy, similar to that expressed in the report before us, suggested the suppression of the statutory appeal to the P. C. It nevertheless subsists, and the appeal not being organized, as reasonably it should have been, the anomaly of simultaneous appeals to two different Courts was produced.

Having cleared away this confusion in the report, let us now come down to the general principle and the limit of its applicability. I quite agree with the Commissioner in thinking that two degrees of jurisdiction are as likely to secure an approximation to truth as a greater number; and if I had to organize a system for a country so limited in extent that one Court of Appeal could despatch all the business, I would not have more. But when one comes to deal with large countries an obstacle presents itself in the multiplicity of affairs. The approach to the Court of Appeal, having jurisdiction over the whole country, must be interrupted to some extent by local appeals. This very evident difficulty is increased in countries where there are localities governed by laws differing from those of the majority, as is the case here and in Scotland, and where necessarily the last Court of Appeal is largely composed of persons ignorant of the details of the local law. But with this inconvenience we must make up our minds to accommodate ourselves for the present. It cannot be removed, and I don't well see how it can be modified.

I think any agitation to abolish the Supreme

Court, would be highly undesirable, although I have always thought its establishment premature, and the principle of its composition most unfortunate.

What is required in the Court of Queen's Bench is greater facility for hearing cases in Montreal, but it is quite unnecessary for me to enlarge on the method of accomplishing this, as I have given it in full detail in a former letter, with a calendar showing precisely how it would work in practice. It does not differ very materially from the scheme suggested by the report, although I hardly agree with the literal interpretation the Commissioner gives to a notable, if not a very inconvenient part, of the punishment for original sin. I see no resemblance between the labour of the hands and that of the head, and consequently I don't see any reason for the judges sitting on the Bench every day because a workman earns his daily bread by his day's labour. On the contrary, subjecting judges to the harassing rules the Commissioner desires to lay down, would prevent them from performing their duties. As a fact lawyers don't plead every day, nor can judges sit every day. A man of learning like the Commissioner must know that "The wisdom of a learned man cometh by opportunity of leisure."

I disapprove of further limiting trial by jury. It appears to me that juries, as a rule, deal more reasonably with the facts of every-day life than judges, except when misled by passion. When these rare instances occur, new trial affords a sufficient protection. I don't think there is a probability of twelve jurors ever misunderstanding the value of evidence so outrageously as it was misunderstood in the case of *Desilets* v. *Gingras*. As far as my experience goes, and I have had no inconsiderable opportunity of forming an opinion, I would say, that the people of this Province make excellent jurors. They appear to me generally to be honest, patient and intelligent, and they neither abdicate their functions from respect to the judge, nor do they think it part of their duty factiously to disregard what he says.

The Commissioner has criticized sharply several points of procedure, and, I think, with some success, although I cannot concur completely in his views.

The first of these matters I shall refer to is the proposition to take away the right of appeal from interlocutory judgments. He attacks Art. 1116 C. C. P., with reason. The "*procéduriers*" properly call the evil to be remedied a "*préjugé définitif*," and our article would have been much more defensible if it had been drawn something in this sense: "The Court of Appeal, on application, may in its discretion grant leave to appeal from any interlocutory judgment in an appealable case, which may be permanently detrimental to the party against whom it is rendered, as for instance—(1) When it in part decides the issue; (2) When it orders the doing of anything which cannot be remedied by the final judgment; (3) When it unnecessarily delays the trial of the suit."

This, however, is the interpretation which has invariably been given to the article. When a *défense en droit* is dismissed, leave to appeal has never been granted. Again, when a plea is dismissed on motion or *réponse en droit*, it is usually granted unless the plea is bad, or is covered by other pleadings. It is always granted when the effect of the judgment is necessarily detrimental, if wrong, except when it goes for moderate aliments.

The Commissioner admits that cases of the last mentioned class are only interlocutory in form, and that therefore, where the case is appealable, they should be appealable.

We have then only to examine his criticism of the two other categories. He remarks that the chief appeals from interlocutory judgments, except those just mentioned, are those dismissing pleas, and he goes on to ridicule the idea that adding a new incident can ever shorten litigation. He says that to obtain leave to appeal on the incident requires technical and complicated proceedings, and that when leave is granted the incident may take years to decide.

It seems to me that the Commissioner exaggerates the inconveniences of these appeals and underrates their advantages. Strange as it may appear, interlocutory orders are not unfrequently given that would be so lengthy and costly that they would put an end to the suit. We had once a case of an application for leave to appeal from a judgment requiring a recognized parishioner of St. Laurent to establish anew the limits of the Parish of Lachine before he

could get his child christened at St. Laurent. If the appeal is on a law issue, it cannot possibly require years to decide it; but an insufficient plea allowed to stand frequently leads to interminable evidence. Again, the procedure to obtain leave to appeal is as simple as it can be made,—a summary application backed with copies of such part of the record as is absolutely required to show the point.

It being part of the plan to do away with demurrers has nothing to do with the question, except in so far as it concerns the text of the article. Whatever other mode of settling the issue is adopted, will give rise to a parallel, if not to a similar judgment. But there is another class of cases not excepted as creating really a "*préjugé définitif*," and which might cause delay —*Inscription en faux*, an *enquête* or an *expertise*. The Commissioner admits that the opinion of the bar is that where one of these proceedings is wrongfully ordered, an irremediable injury is done. He contends that this view is wholly unfounded. "Cannot this judgment," he asks, "entirely overlook the report of the experts or the account so rendered . . . . set aside the evidence obtained in this irregular manner, and dismiss the pretensions of the party who had no other means of sustaining them?" Strictly speaking the evidence might be disregarded, and probably it would be if the party had *no* other means of sustaining his pretensions; but how would it be if the evidence were otherwise contradictory? The common sense of the bar answers the query. "However vigilant and dispassionate my judge may be, I don't think it discreet to allow him to hear illegal evidence."

The Commissioner evidently feels that his reasoning is not quite conclusive and he adds a make-weight. He asks again: "What, in such a case, will the party, who has obtained permission to take these irregular proceedings, do, when he sees himself deprived of all advantage from them? He will then do as he would to-day, if this proceeding had been refused by the interlocutory judgment, confirmed by the final judgment (for article 1116 gives no appeal when the thing asked for, and which the final judgment cannot remedy, has been refused);" &c. At most this would only be ground for a further amendment of art. 1116. But the illustration is faulty. The command not to do, and the refusal to permit one to do, are on the same footing, for the latter, although negative in form, implies an order to do something else.

It seems to me that there is little practical difficulty in leaving the question of appeals from interlocutory judgments as they stand. They are not very readily granted, nor are they very numerous. It may be possible in certain cases, where the incident is entirely detached from the principal suit, to carry on both concurrently. But, I fear, this would be a privilege of doubtful value. If the *capias* or *saisie-arrêt* is to be set aside, the judgment on the merits may be tolerably indifferent to the plaintiff.

The delays for summons and for pleading are mere matters of detail, and in some instances they may probably be curtailed without danger. As to what extent change in that direction may be safely carried, I am not well qualified to give an opinion.

The facilities for obtaining judgment at once in default and ex-parte cases appear to me to be reasonable, so far as they are based on writings; but to give a plaintiff the right on affidavit, to prove his own claim, no matter of what kind, especially in default cases, appears to me to be a certain way of favouring dishonest claims, and is the extension of a principle of evidence admitted with considerable hesitation in this country. Again, obliging the judge to *parapher* the judgment the day it is submitted to him is an absurdity and an impertinence. The judge knows best when he has leisure to examine the cases submitted to him, and no one can reasonably dictate to him when his mind is made up. Article 22, coming on the back of this extraordinary injunction to the judge, seems flighty. On one hand he is given no discretion, where discretion is an essential of the judicial function; on the other, a discretion without limit is given him to raise difficulties with which he ought to have nothing to do.

The changes suggested as to pleading seem to me to be troublesome and unnecessary. Our system, it is true, is not a logical one. The only thoroughly logical system is that of plea and demurrer; but it has been almost entirely abandoned in England on account of its technical difficulty. I remember the *Times* saying in its self-satisfied way, that if pleading had been reduced to a science, it had also become a nuisance. It is quite possible that a razor may be

ground too fine for practical purposes; but I should receive such an argument, as applied to intellectual labour, with doubt. What they have substituted for the old rules of pleading in England, I confess I do not know, but it would be well to learn what has been done there before proceeding to legislate here on the subject. It is evident the Commissioner is trying to arrive at the result of the old demurrer and plea by an articulation of facts. But why not make the pleadings articulate the facts? Instead of obliging the pleader to know his case and expose it succinctly in a logical manner, the articulation of facts is to extract what the parties mean, or ought to mean, from the rubbish of bad pleadings. But this process is open to all the objections of technicality urged against the plea and demurrer, if carried out; and if not carried out, it is worth no more than the present system.

The truth is people are very apt to flatter themselves, they have changed a system when really they have only altered its terminology, and this, I think, is the reason of our hearing so much about articulations of fact. Pleadings are really nothing more, or ought to be nothing more than articulations of fact. I do not insist on the system exploded in England, though I believe it to be the best, but I do say that what of technicality in pleading is abandoned, must be paid for in looseness of evidence, and consequent liability to great delay and expense.

The proposition to limit the scope of pleadings by a rigorous system of taxation, has often been suggested, and if carried out in detail, probably would make litigants pause before putting forth extravagant pretensions or denying facts they know to be true. This would be a great point gained, but its execution, with untechnical pleadings is almost impossible, and it would require a staff of taxing masters to carry it out, even under the most perfect system of pleading. It belongs to a system of taxation by items, wholly different in principle from the bill of costs, as known here. As matters stand, the judges do sometimes give special orders with regard to taxation, but, I admit, this is only done in very extreme cases, and its application is too fitful to be satisfactory.

The objections to the old *enquête* system are generally admitted, but I don't think the Commissioner fully appreciates the evil or its cure. The fault of taking evidence at *enquête* sittings consists in this, that the judge does not know the case, and consequently he can exercise no efficient control over the evidence. Then, if he made the necessary effort to understand the case, it would be labour almost always wasted, for it is the merest chance that he hears the case on the merits. Sir George Cartier saw this, and he applied the proper remedy. He made it the duty of the judge to take the evidence and hear the case, but unfortunately he made it optional with the parties to go on under the old system. Routine, as usual, won the day, and finally Sir George gave way. The only effective mode is to inscribe the cases on a Roll exactly as if they were to be heard by a jury and let the judge be seized with each case from the beginning, let him take the evidence (not necessarily with his own hand), and grant or refuse adjournments as justice may require. The judges are, I believe, opposed to this plan, but from experience I am certain there is no real difficulty in carrying it out. The Commissioner will say it is incompatible with the three-judge system, but I think the three-judge system is incompatible with any effective organization.

The report suggests abolishing all writs of appeal and error. I think all writs of summons should be abolished, and that the summons should be the old *exploit* as it was in France and as it is in Scotland. This simplifies immensely the work of the Prothonotary and of the Attorney. Instead of lodging a fiat and going back for a writ to be attached to a Declaration—the attorney draws his demand with words of summons and the public authority seals and registers it at sight. Where an affidavit or order of the judge is necessary, the Prothonotary will see that this form has been attended to before affixing the seal. Of course there will be a hubbub about the Queen's Writ. I am so absolutely monarchical in my opinions that I, probably, under-value such out-cries. I do not care for the form in which the Sovereign uses her authority. My only regret is that it is not more extended.

The sixth chapter of the Report, appears to me to contain observations as wise, as the language in which they are expressed is elegant and appropriate. The former tribunal, for the trial of contested elections, seems to me to have had every fault a court of justice is susceptible

of. I am not prepared to say so much against the present system; but I fully concur with the Commissioner in saying that the judgments of the Courts in contested election cases have not secured the respect with which their decisions in ordinary cases are usually received. I think this is enough to warrant us in saying that some other plan for deciding the merits of electoral contests should be devised, if possible. What plan will secure satisfactory decisions of the extraordinary issues which our involved election laws present, I am unable to conceive. Perhaps the disease has a deeper origin than the form of the tribunal, and that it is the outgrowth of an unwholesome system. Certain it is, we have a fabric of election laws which do not speak strongly in favour of the elective principle. These laws are evidently the product of jealousy and suspicion. They are sometimes carried out in the spirit in which they were framed. When an electoral offence is charged, it seems to be taken for granted that the party is guilty. So strange a violation of the principles of justice, naturally enough, is not applied uniformly, and the result of this wavering jurisprudence is distrust, perhaps calumny. The report only suggests a special tribunal. Those we have had were special enough. The difficulty is how to compose it. Whatever mode of dealing with these cases is adopted, it will be well to stick to known principles, and not to jump at uncertain conclusions.

The rapid augmentation of population, of commercial movement and of wealth, in these days, makes frequent change in the judicial organization necessary, and the government would be lacking in its duty, if it failed to supply sufficient opportunity for the despatch of legal business. But such changes should be by way of amendment, and not be made to air the vagaries of clever but unpractical people.

The condensed statistics prepared by Mr. Justice McCord form the sort of basis, on which changes should be supported. By his figures we learn that the great centres of legal business are Montreal, Quebec, St. Francis and Three Rivers. None of the other Districts has full work for a resident judge of the Superior Court.

It seems also that all the Superior Court work of the Province is under 4000 cases a year, or rather what is equal to that, for I count each case in review as being equal to three, as is done by Judge McCord.

This suggests the establishment of judges for that Court. Allowing 400 cases to each judge, ten judges should do the work of the Province; but as there must be a resident judge at Sherbrooke, and another at Three Rivers, and as the other judges must go on Circuit, if the resident judge system is abolished, I put the judicial establishment of the Province at 16 judges, instead of 27 as at present.

I should detach the smaller business from the Superior Court and leave it to be decided by District judges, who would be resident in their respective Districts.

Of the 16 Superior Court judges, eight should reside in Montreal, six in Quebec, one at Sherbrooke and one at Three Rivers. They should hold terms at the *chef lieu* of each district. By reducing the number of Superior Court judges to 16, a saving of about $33,000 a year would be effected, or nearly sufficient to pay for the District judges. By a proper understanding with the Dominion authorities, the local exchequer should benefit by this, or the charge of the salaries of the District judges should be borne by the Dominion.

Of course, this system could only be introduced gradually and as vacancies occur in the Superior Court; but this is a detail presenting no real difficulty.

With regard to Quebec and Montreal, I think the term system should be abolished both in the Superior Court and in Appeal. The vacation should therefore be made longer than it is, care being taken that matters requiring urgency should be provided for during vacation. To the tribunals it should be left to fix the time of hearing cases, so that the responsibility of arrears should primarily fall on them.

I think the Court of Review should be retained as it stands, and I would make it the only appeal in cases from $200 to $500.

The quorum in appeal should be left at four, and when there is an equal division the judgment of the Court below should be affirmed. There may be some difficulty in carrying this point, for there is a strong prejudice against it —a prejudice, be it observed—distinctly at variance with the Commissioner's presumed idea,

that the public has confidence in the opinion of a majority of judges.

I remember very well the outcry for a fifth judge in appeal. With a great many other inexperienced people I helped to swell the ridiculous cry against the true legal principle which the Commissioner styles a legal fiction and an abstract thesis. Sir Louis Lafontaine remonstrated strongly against the change, but his warning was disregarded, as it is the habit to disregard all advice from judges—at least while in office—and the fifth judge was added. Then came the spectacle of four judges in the Superior Court and two in Appeal being over-ruled by three judges in Appeal. Before, this could not have happened, for the opinions of the two judges would have secured a confirmation. We may beat about the bush, and moralize on changed days and altered circumstances, we may stick names to principles to make them look ridiculous, but they are not to be overcome, and until we recognize that an Appeal Court should never consist of more than four judges, we shall have the recurring unmeaning discussion as to appeal, and suggestions more or less extravagant to get over a self-created difficulty. With the quorum fixed at four it would be very rarely necessary to call in an *ad hoc* judge; but when necessary it is much better to take a judge from the Superior Court than to take one who does not, and perhaps may never, belong to the judicial order.

Fixing a period at which a case must be finished appears to me highly unpractical. A year may be a very long period for the instruction of one case, and totally insufficient for another. Besides, this is a matter in which the State has no interest, and with which, consequently, its interference would be unjustifiable.

I also disapprove of charging the Prothonotaries and Clerks with the initiative of Procedure. People capable of looking after their own business, should bear the responsibility of their neglect. Neither do I think should the judge be expected to invent defences for parties.

I regret being obliged to put my views on the important subjects treated of in the Report in a form so unfinished as that I have adopted. But the immense drudgery in the way of writing imposed upon the judges in this country, most unwisely, I think, suggests laconic expression, and must be my apology.

I have the honour to be, Sir,

Your obedient servant,

T. K. RAMSAY.

To the Honourable
The Attorney General,
for the Province of Quebec, Quebec.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 18, 1881.

DORION, C. J., RAMSAY, CROSS, and BABY, J J.

THE QUEEN v. BULMER.

Criminal Procedure—Defect in Indictment.

The words "feloniously and of his malice aforethought" were omitted in the averment of the intent, in a count of an indictment for wounding with intent to murder. Held, that the count was insufficient and that the offence was not described in the words of the Statute.

On a Reserved Case.

RAMSAY, J. The prisoner was indicted on six counts. He was convicted on a count in the following terms for an offence under Sec. 13 of 32 & 33 Vic., cap. 20: "William Bulmer on "the 15th day of August in the year of Our "Lord 1881, at the City of Montreal, in the Dis-"trict of Montreal, a certain revolver then "loaded with gun-powder and divers leaden "bullets, at and against one B. P., feloniously, "wilfully, and of his malice aforethought did "shoot, with intent thereby then the said B. P. "to kill and murder."

The question submitted is whether this is sufficient, it not being said that the intent to murder was "feloniously and of his malice aforethought." It seems to me the question is a very narrow one, and turns entirely on the interpretation to be given to Sec. 79 of the Criminal Procedure Act, 32 & 33 Vic., cap. 29. But the argument took rather a discursive turn, and it was maintained that the words "feloniously and of his malice aforethought" having been used to qualify the shooting, they were understood to qualify the murder.

I think this proposition is quite untenable. The word "murder" does not of itself define murder. This may seem to be an extraordinary conclusion, but there is no question it is the purport of the common law. See Hale, Pleas of the Crown 186-7; Foster, Crown Law Discourse 2, of Homicide, p. 302, chap VII. The words "with malice prepense" are sacramental. What Dwarris means when he says that being once used they need not be repeated, but were understood by the use of the conjunction *and*, is that they need not re-appear in the narrative. For instance, that having been used to qualify the shooting it was not necessary to repeat them when alleging that by the ar

shooting the person mentioned received a mortal wound, but that by the use of "and" with such words as these, "whereby then and there," the narrative would be sufficiently precise. Dwarris did not mean to say that by the use of the words "feloniously and of malice aforethought" before the allegation of the kind of assault, the pleader was dispensed with the necessity of repeating them when he came to describe the murder. This is plain if we look at the authority in support of his dictum, which is taken from Heydon's case, 4 Rep., p. 41. There the objection was as to the non-repetition in the narrative; the words were repeated to qualify the murder.

At common law, then, it appears to be perfectly clear that such a count as that submitted is insufficient. We have then to examine if the insufficiency is covered by any statute. This brings us to the consideration of Sec. 79. The latter part, which is alone in question, is in these words: "and where the offence charged is created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they be disjunctively stated, or appear to include more than one offence, or otherwise." The verdict submitted to us will be quashed solely on the ground that the words of the statute have not been strictly followed. Of course, I concur in this, for I do not think the words of the statute have been followed. But I go further: I do not think there is any substantial difference between *Carr's* case* and *Deery's* case.† It seems to me that the legislature never intended to sever the words "feloniously and of malice aforethought" from the description of murder. See the first form of schedule 32 & 33 Vic., cap. 29. If not in laying the crime purely and simply, why should they be cut off in laying it as qualifying another offence? No possible reason can be given for such a pretention. It is said the words are of no meaning, the prisoner cannot be injured by their omission, the jury cannot be misled. They were in *Deery's* case, for they rejected the count for the same act which alleged the premeditated malice, and they rendered a verdict of guilty on the count on which the words did not appear. Again, we are not helped by Section 27 which gives a legal effect to the forms of schedule A. That schedule has no form applicable to the present case. The third form applies to no offence; and besides this, these forms are only a guide to other cases in matters not necessary to be proved. Surely premeditated malice must be proved in murder. I am therefore of opinion that the count is insufficient.

The following is the judgment of the Court:—

"The Court, etc.

"Considering that it appears by the Case Reserved for the consideration of this Court, that the said Wm. Bulmer was tried at the term of the Criminal Court held at the city of Montreal, in the month of September last past, on an indictment containing six counts, the first whereof, being the only one on which the jury empannelled for his trial found a verdict of guilty, was as follows:—"William Bulmer, on the 15th "day of August, in the year of our Lord 1881, at "the city of Montreal, in the district of Mon- "treal, a certain revolver then loaded with gun- "powder and divers leaden bullets, at and "against one Benjamin Plow, feloniously, wil- "fully and of his malice aforethought, did "shoot with intent thereby then the said Ben- "jamin Plow to kill and murder."

"Considering that the said first count on which the said William Bulmer was convicted is insufficient to warrant the verdict in this cause rendered on the said count or charge;

"It is considered and adjudged and finally determined by the Court now here, pursuant to the statute in that behalf, that the said William Bulmer ought not to have been convicted on said indictment, and his conviction is therefore quashed and set aside, and the Court doth order that an entry be made on the record in this cause, to the effect that in the judgment of this Court the said William Bulmer should not have been convicted."

Conviction quashed.

C. P. Davidson, Q. C., for the Crown.

W. A. Polette for the prisoner.

*26 L. C. J. 61.

†26 L. C. J. 129.