The Legal News.

VOL. I. MARCH 30, 1878. No. 13.

UNANIMITY OF JURIES.

We reproduce in the present issue an article from the London *Law Times*, on the inconveniences resulting from requiring unanimity in juries. The case of *Regina* v. *Truelove*, referred to by our contemporary, was one in which no determination was reached, simply because one of the jury would not accept from the Court the law applicable to the case, but preferred to act upon his own view of what it ought to be. This is an incident by no means of rare occurrence, though it seems on the present occasion to have excited more than usual attention. Possibly the result may be a modification of the existing law. We notice that a bill has been introduced in the Legislature of New York, providing that the verdict of nine jurors shall be sufficient in civil cases. It may be interesting to our contemporaries in that State to know that a similar law has long existed in Lower Canada, now the Province of Quebec. The verdict of nine jurors is received, and as soon as that number are agreed, the jury return into Court. We are not aware that this modification of the English rule has occasioned any particular inconvenience or dissatisfaction. But it must be remarked that the profession of the Province do not favor jury trials at all as a mode of getting their cases decided. Jury trials are only allowed by law in matters of a commercial nature or in actions for personal wrongs, or injuries to moveable property. Yet, although thus restricted, members of the bar are by no means eager to avail themselves of the option permitted in these classes of actions. As a rule they prefer to leave their cases to the determination of a single Judge of the Superior Court, who has both to find the facts as a jury would do, and to lay down the law applicable to the facts so found. The exceptions are actions against insurance companies, and actions for the recovery of damages resulting from personal wrongs, such as breach of promise and the like. In these classes of actions there seems to be a strong conviction that a jury is more generous than a Judge, and the plaintiff usually declares his option to have his case tried by jury. Yet, so few are the cases which actually come to trial, that in Montreal, the commercial metropolis of Canada, the jury trials, during the last twenty years, have not amounted to half a dozen per annum, and in the country districts jury trials in civil cases are almost unknown.

Reason seems to dictate that unanimity ought not to be required in civil cases. Why compel twelve citizens to be unanimous in their appreciation of damages, when, as in this Province, three or five Judges, having to pass upon the same facts, are permitted to differ, and to state their reasons of difference at length? We are curious to know on what grounds such an anomaly could be defended. Where the jury have to award a specific sum of damages, there is much greater probability of a fair award if the verdict of nine is sufficient. For where unanimity is exacted, one obstinate and ill-disposed juror can override the votes of the other eleven, or else prevent a determination. But where nine can give a verdict, the voice of such a man, or of two or three such men, sinks into insignificance. They are rendered harmless, and the majority are generally able without much delay to arrive at a figure which meets their views, and gives as much satisfaction as can be hoped for in litigated matters.

ASSAULTS UPON JUDGES.

It appears that Dodwell, the disappointed suitor who attempted to assassinate the Master of the Rolls a few weeks ago, is a clergyman. According to the *Solicitors' Journal*, he is the ex-chaplain of a workhouse in Sussex, who was dismissed from his position by the guardians. He presented a petition of right with a view to his being reinstated, but this was summarily dismissed by Vice-Chancellor Malins, and also by the Court of Appeal. Soon afterwards he was heard of at Bow Street Police Office, where he made application for a summons against Lord Justice James and other Judges for calling him "a perjured man."

Judges, as a matter of every day duty, have to give decisions which involve perhaps the whole fortunes of suitors, or at least materially affect their prospects. It is creditable to the gentlemen discharging this responsible duty, and creditable also to human nature, that so few disappointed litigants are moved to wreak

vengeance upon those whose words have so important an influence upon their fortunes. Although police magistrates and others filling subordinate positions are from time to time menaced or actually assaulted by refractory prisoners, serious attacks upon Judges holding high judicial office are almost unheard of. One has to go back to the seventeenth century for precedents. In the year 1616, Sir John Tyndal, one of the Masters in Chancery, was killed by a shot fired at him while entering his chambers at Lincoln's Inn, the assassin being a man named Bertram, against whom Sir John had given a judgment. Bertram shortly afterwards committed suicide. This is the only instance of assassination on record. In 1631, Chief Justice Richardson, who was holding the Assizes at Salisbury, was assaulted by a convict who threw a brickbat at him. Those were days when prompt justice was meted out. The right hand of the prisoner was forthwith struck off, and affixed to a gibbet, on which he was afterwards hanged in presence of the Court. These two cases seem to be the only instances furnished by the judicial history of more than two centuries. Anonymous letters of a threatening character have probably been more common.

DOUBLE APPEAL.

In the case of *The City of Montreal & Devlin*, a singular anomaly has presented itself. Each party being dissatisfied with a judgment of the Court of Queen's Bench in appeal, the *City of Montreal* desired to appeal to the Privy Council in England, while *Devlin* wished to take the case to the Supreme Court of Canada. While the motion for an appeal to England was pending, Devlin obtained leave from a Judge in Chambers to appeal to the Supreme Court. Subsequently the motion for an appeal to England had to be disposed of, and the Court held that although leave to appeal to the Supreme Court had been properly and of necessity granted, yet the other party was equally entitled to obtain leave to appeal to the Privy Council. Thus there would be simultaneous appeals in the same case to two different tribunals, and perhaps contradictory decisions. We print the observations of Chief Justice Dorion, calling attention to this singular anomaly.

SHOULD UNANIMITY BE REQUIRED IN JURY TRIALS?

The case of Reg. *v.* Truelove, tried in the Queen's Bench the week before last, raises this much debated question once more to that prominent position amongst questions of legal reform which it has often before occupied. So much has been written and spoken in praise of the institution of trial by jury, that it has become a sort of habit to look upon it as it now exists as an institution almost free from imperfection, and one to meddle with any part of which would be a dangerous tampering with those liberties, the possession of which we in a great measure attribute to it. None indeed of our institutions have been described by writers in terms of such unbounded panegyric as this, from the time of the authors of our earliest law books down to that of Blackstone, who, in reverence for what he declares to be "the palladium of British liberty, the glory of the English law, and the most transcendent privilege which any subject can enjoy or wish for," stands foremost of all. The effect of all this has been to cause attempts at reforming any part of the institution to be looked upon with disfavor and suspicion, however apparent the necessity for improvement may have shown itself; and such few reforms as have been made have been of such slow growth as to have been brought about almost imperceptibly. Still, however, it has not remained in all respects unchanged from its commencement. In fact, the rule requiring unanimity is one which came into existence long after trial by jury became an established fact. According to Lambard, in a jury of twelve the verdict of eight was to prevail, and from Bracton and Fleta it would appear that the practice in their time was for the judges, when the jury could not agree, to add to their number until twelve out of the entire number could be got to concur in a verdict. In the time of Edward I., the judge exercised the option of doing this or of compelling the original twelve to agree by starving them into it. Later it would appear that the option was always exercised in one way—the latter—and so the practice of starving a jury into unanimity became established. A note to Hale's Pleas of the Crown, vol. 2, p. 296, states that the ancient practice

was to take the verdict of the majority. If that was so, one of the amendments most in favor in these days would simply be a returning to the ancient practice. This practice of forcing unanimity seems to have commended itself with peculiar favor to the minds of our ancestors. Whether it arose from a consciousness of their strong propensity to indulge in excess, and a fear, consequently, that if jurors had access when impanneled to food and drink, they would render themselves incapable of deciding the question put for their decision, or whether the issues to be tried in early times were so simple as a rule that any difference of opinion was to be attributed to mere obstinacy which a little hard usage might overcome, the practice did come into being, and, once recognized, retained such a hold on the favor of the people that it continued in spite of repeated attempts at reforming it in almost all its ancient harshness down to very recent times. Lord Campbell once said to a jury on discharging them: "At the assizes, according to the traditional law, a jury which could not agree were to be locked up during the assizes, and then carried in a cart to the borders of the next county, and there shot into a ditch." All this harshness has now, however, been mitigated. The statute 33 & 34 Vict. c. 77, sect. 23, gives the judges the power which, according to Winsor *v.* The Queen (L. Rep. 1 Q. B. 308), there is no satisfactory authority for saying they had previously, of allowing the jury, after they had been sworn, at any time before giving in their verdict, the use of fire when out of court, and reasonable refreshment at their own expense. Thus, the reproach with which Bentham stigmatized the rule, that it was a "system of perjury enforced by torture," has lost its sting, for it will never happen that a judge will so use the discretion given by the above statute as to cause anything which can be described as like torture, to be brought to bear on a jury for the purpose of securing unanimity. But though the old method of enforcing it has been abolished, and the only pressure that is brought to bear on a jury now-a-days is the locking of them up so that they may deliberate together, the rule itself remains unaltered, and the arguments which used formerly to be urged against its retention possess now almost the same weight as they always had. Why should we then require unanimity on the part of juries when in no other tribunal and in no other deliberative assembly do we require it? Elsewhere the decision of the majority prevails. The questions which juries have to dispose of are of the most difficult, doubtful and complicated nature; questions about which the opinions of men differ considerably. Is it not then contrary to all reason and experience to expect that there can be any real agreement of opinion on the part of twelve men selected at random to decide upon them? Is it not in accordance with all experience and reason that many a unanimous verdict pronounced upon such questions must have been brought about by improper compromise among the jurors of their respective opinions? These are the chief arguments which are urged in support of a change in the rule, and they are unquestionably very powerful, and at first sight seem almost conclusive. They have, indeed, influenced some of our most eminent lawyers to advocate some change in the rule. The Commissioners appointed in 1830, to report on the Courts of Common Law, stated in their report that "the interests of justice seem manifestly to require some change in the law upon this subject." Lord Mansfield's experience of trial by jury, in civil cases, caused him to say, "Trial by jury in civil cases, could not subsist now without a power somewhere to grant new trials," and Lord Campbell's opinion was that the old maxim that no one should be found guilty of crime, unless the jury were unanimously of opinion that he was guilty, should still be maintained; but in civil causes that a verdict might be given either by a majority or a certain number of the jurymen. On the other side there are still stronger array of legal authorities who, while admitting that in many respects the rule does not always work without producing evil results, contend that in civil as well as criminal cases it should be retained, on the ground that the evils which would be produced by the changes proposed would be far greater than are now or can be caused by any abuse of it. The Common Law Commissioners of 1853, amongst whom were the present Lord Chief Justice, Baron Martin, Baron Bramwell, and the late Mr. Justice Willes, had the rule under their consideration,

and, in their report, while recommending that the means of coercing into unanimity then in practice should be altered, recommended that the rule itself should be retained as well in civil as in criminal trials. They rejected altogether the argument derived from the principle, that in deliberative bodies the decision of the majority must prevail, on the ground that the questions submitted to them involve matters of opinion rather than of fact. "Every divided verdict," said they, "would be urged on the courts as a ground for a new trial, and might not unreasonably be entertained as such. But perhaps the strongest argument in favor of the present system is that by requiring unanimity in the verdict, full and complete discussion is insured. Under the present system, the minority, instead of yielding too readily to the view of the majority, and purchasing ease and release from further trouble, are naturally led to resist conclusions from which they differ, and for which their sense of duty makes them unwilling to be answerable. Hence arise full discussion and deliberation, and if the one section of the jury yields to the other, it is only because the prolonged discussion has led to altered convictions. We are, therefore, of opinion that the present rule, requiring the jury to be unanimous, should be maintained." These arguments retain their force to this day, after having successfully resisted all attempts to overcome them; and, much as we regret the miscarriages of justice which now and then occur, which may, perhaps, be attributed to the rule, we shall continue to hold the view they support, until evidence is brought to prove that such miscarriages occur far more frequently than our experience and observation lead us to believe they have occurred or are ever likely to occur. Cases like Reg. *v.* Truelove will always occur, whatever rule be adopted for obtaining the decision of a jury, so long as men are to be found, whose sense of the moral obligation of the oath they take when they get into the box is unequal to the obstinacy or conceit which causes them to decide upon the facts presented to them, upon what they consider the law ought to be rather than upon what the judge tells them it is. Hence it is that such cases furnish but weak arguments against the rule of which they are an abuse, and we trust that the rebuke administered by the learned judge to the offender in this case, will teach men of his kind a lesson they frequently require to be taught before they are brought to a proper sense of their duty and responsibility.—*London Law Times.*

AGENCY—LIENS OF PARTICULAR CLASSES OF AGENTS.

First, as to the lien of auctioneers:

An auctioneer has a special property in the goods sold by him and a lien on goods in his possession, or on the proceeds thereof, for his commission and expenses. He may retain his commission and expenses out of any deposit or sale proceeds which have been paid to him on account of his principal: Drinkwater *v.* Goodwin, Cowp. 256; Hammond *v.* Barclay, 2 East, 227; Story Agency, S. 27.

If by reason of a defect in the title, the auctioneer is compelled to repay the deposit, his action is against the vendor: See Spurrier *v.* Elderton, 5 Esp. 1.

Secondly, as to bankers:

Bankers have a general lien upon all notes, bills, and other securities deposited with them by their customers, for the balance due to them upon the general account: Paley by Lloyd, 131; Story Agency, s. 330; Bolland *v.* Bygrave, 1 Ry. & Moo. 271.

Thirdly, as to brokers:

Brokers do not, as brokers, possess a general lien. Insurance brokers are an exception to this rule, inasmuch as a custom exists to entrust them with the possession of policies of insurance effected by them: See Phillips on Insurance, vol. 2, p. 575; Snook *v.* Davidson, 2 Camp. 218.

As to insurance brokers in the city of London, see Hewison *v.* Guthrie, 3 Scott, 278.

In Jones *v.* Peppercorne (28 L. J. 153, Ch.) a number of bonds payable to bearer had been deposited with bankers for safe custody. The bankers fraudulently deposited them with their brokers for the purpose of raising money upon them. The brokers accordingly raised money upon them, and it was held that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers; and not merely for the advances made on the security of these particular bonds.

Fourthly, as to factors:

Factors have a general lien for the balance of the account: Kruger *v.* Wilcox, 1 Amb. 253.

Fifthly, as to common carriers:

A common carrier has a particular or specific lien at common law which empowers him to retain goods carried by him until the price of the carriage of those particular goods has been paid: Butler *v.* Woolcott, 2 N. R. 64.

A claim to a general lien can be supported only by proof of general usage, special agreement, or mode of dealing supporting such claim: Rushforth *v.* Hadfield, 6 East, 519, s. c. 7 East, 224; Wright *v.* Snell, 5 B. & Ald. 350.

Sixthly, as to the master of a ship:

The master of a ship has a maritime lien both for his wages and disbursements, and his claim is to be preferred to the claim of a mortgagee: The Mary Ann, L. Rep. 1 A. & E. 8, 24 Vict. c. 10, s. 10.

Formerly the master had no lien upon the ship for his wages: Smith *v.* Plummer, 1 B. & Ad., 575. By the 16th section of the 7 & 8 Vict., c. 112, he first acquired the same rights of lien for the recovery of his wages as a seaman, but only in the case of a bankruptcy of the owner, but this restriction was taken off by the 191st section of the Merchant Shipping Act, 1854, which enacts that, "every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, which, by this act or by any law or custom, any seaman, not being a master, has for the recovery of his wages." The seaman, however, could not recover wages in the Admiralty Court, if there was a special contract respecting the same; and as the master's wages are almost invariably determined by special contract, his position was not greatly improved by the Merchant Shipping Act. This difficulty was put an end to by the 10th section of the Admiralty Court Act, 1861, 24 Vict., c. 1, which enacts that "The High Court of Admiralty shall have jurisdiction over any claims by a seaman of any ship, for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any lien by the master of any ship for wages earned by him on board the ship." The claim of a seaman for his wages over-rides that of a mortgagee, hence the claim of the master in respect of his wages is also preferred to that of a mortgagee: per Dr. Lushington, The Mary Ann, *ubi sup.*

The master's maritime lien on the freight for his wages and disbursements, in priority to the claims of the mortgagees, is not affected by the fact of his being also part owner of the vessel: The Feronia, L. Rep., 2 A. & E., 65.

A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there can be no lien where there is no possession, actual or constructive, but to express, as if by analogy, the nature of claims which neither pre-suppose nor originate in possession. This, it has been said, was well understood in the civil law, by which there might be a pledge with possession, and a hypothec without possession, and by which, in either case, the right travelled with the thing into whatsoever possession it came. Having its origin in this rule of law, a maritime lien is defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process. That process is explained by Mr. Justice Story (1 Sumner, 78,) to be a proceeding *in rem.* "A maritime lien," in the language of the judicial committee of the Privy Council in Harmer *v.* Bell, 7 Moo. P. C., 284, "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing into whatsoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

Maritime liens are to be distinguished from claims, the payment of which the court has power to enforce from the ship and freight. The former spring into existence the moment the circumstances give birth to them, such as damage, salvage, and wages. But it does not follow that because a claim may, by Act of Par-

liament, be enforceable against the respondent, that it is therefore created a maritime lien: The Mary Ann, L. Rep., 1 A. & E., 11.

Seventhly, as to solicitors. Kinds of lien:

A solicitor has two kinds of lien:

1. A retaining lien, which is a right to retain possession of another's property until a debt due to the solicitor has been satisfied.

2. A charging lien, which is a right to charge property in the possession of another.

Liens are also divided into particular and general.

A particular lien exists when the claim arises in respect of the very property retained.

A general lien exists where the debt results from a general balance of account.

The retaining lien is both particular and general; whilst the charging lien is only particular: Stokes on Liens, p. 1; Lush Practice, vol. 1, 323; Chitty Pract., vol. 1, 133.

A retaining lien is defeasible; a charging lien is absolute: Ib.

To what the right attaches:

The retaining lien of a solicitor attaches to all deeds, papers, money, and chattels in his possession, belonging to his client, and which have come to his hands in the course of, and with reference to, his professional employment, unless there has been some agreement to the contrary, or unless the right is inconsistent with the solicitor's employment: Chitty Pract., vol. 1, 133; Lush, vol. 1, 323.

Thus the right has been held to attach to:

1. Account books, ledgers, journals, and cash books; Re Leah; Ex parte Jabet, 6 Jur. N. S., 387.

2. Letters patent: Ex parte Solomon, 1 Gl. & J., 25.

3. Policy of assurance: Richards *v.* Platel, C. & P., 79.

4. Papers relating to a manor, Reg. *v.* Williams, 2 H. & W., 277.

5. Articles delivered to the solicitor for the purpose of being exhibited to witnesses on the trial of an action: Friswell *v.* King, 15 Sim., 191.

6. Bills of exchange: Gibson *v.* May, 4 D. M. & G., 512.

7. An award: Jones *v.* Turnbull, 5 Dow., 592.

8. Money received by way of compromise: Davies *v.* Lowndes, 3 C. & B., 823.

"If the money," said Lord Mansfield, in Welsh *v.* Hole, Doug., 238, "comes to his hands, he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it."

The papers, etc., must be received by the solicitor in his professional character.

Hence there was no lien recognized in the following cases:

1. Where the deeds came to him as mortgagee: Pelly *v.* Watken, 18 L. J., 281, Ch.

2. Where the work is done in character of town clerk: Rex *v.* Sankey, 5 A. & E. 423.

3. When a deed was delivered to the solicitor for the purpose of being shown to another by way of satisfaction: Balch *v.* Symes, 1 T. & R., 87.

4. Where papers are received as steward of a manor: Champernown *v.* Scott, 6 Mad., 93.

5. Where money is invested in his name as trustee: Re Robinson, 5 Jur. N. S., 1024.

6. Where A gave deeds to B for the purpose of satisfying himself of their sufficiency to secure an annuity, and B gave them to C for the purpose of investigating the title, and the treaty for the annuity went off, not from any objection to the title. The court refused to allow C to retain them until the cost of investigating the title was defrayed: Hollis *v.* Claridge, 4 Taunt., 807; see Ridgway *v.* Lee, 25 L. J., 584 Ch.

7. Where a solicitor in a cause in chancery had, without the authority of that court, received rents: Wickens *v.* Townshend, 1 B. & My., 361.

The lien must not be inconsistent with the solicitor's employment. Hence the lien does not attach to an original will given to him to be proved: Georges *v.* Georges, 18 Ves., 294.

Or to money placed in the hands of the solicitor for a specific purpose: Re Callen, 27 Beau., 51.—*Wm. Evans, in the London Law Times.*

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, Feb. 28, 1878.

TORRANCE, J., DUNKIN, J., RAINVILLE, J.

[From S. C., Joliette.

In re MARSAN et al., Insolvents, MAGNAN, Assignee, and BROUILLET et al., Contestants.

Remuneration of Assignee—Guardianship of Estate.

The judgment appealed from maintained the

contestation by Brouillet et al., hypothecary creditors of a dividend sheet prepared by Adolphe Magnan, Assignee to the insolvents' estate.

TORRANCE, J. The facts are as follows: On Jan. 9, 1873, the assignee gave notice of a first and final dividend sheet. By this sheet the assets of the estate in question, in re Louis Marsan & al., consisted of:

1.	Stock		$20	
2.	Collections of debts		37	31½
3.	Price of land	$575 00		
4.	Interest on same	85		
5.	Interest in bank	$35 50	$611	35
			$668	66½

Distributed as follows:

1.	Remuneration to assignee as guardian	$225.00
2.	Costs	148.56
3.	Bill of Assignee in the liquidation of the estate, discharge, &c.	158.74
4.	Discharge of Insolvents	49.45
		$581.75
		$86.91

This residue of $86.91 was divided between the two hypothecary creditors, as follows:

1.	G. Brouillet	$48.03
2.	O. Arbour	38.88
	Total	$86.91

The creditors contested this collocation, alleging that it was unjust to take out of the proceeds of the sale of land hypothecated to them, $225, as remuneration to the assignee for the care of property which only produced $20.

The Court below took the same view. Hence the appeal.

It appears that the assignee applied to the judge in Chambers at Joliette for taxation of this bill, after notice to the parties that he would make the application on the 14th October, 1872. Whether the application was then made does not appear, but the Judge taxed the bill at this amount on the 17th October, 1872, as appears by his certificate on the bill. It was the same Judge, familiar with the circumstances of the case, who gave the judgment now complained of. No additional parole or other evidence has been placed of record. It was the opinion of the Judge that one allowance to the assignee of $158.74 was sufficient to compensate the assignee for his trouble and disbursements in an estate of which the moveables under his care only produced $20, and that he should not be allowed an additional sum of $225, the amount in contestation. The Judge has here exercised his discretion in a matter of fact. We are not disposed to interfere with that discretion, and the judgment is therefore confirmed.

Godin & Co. for assignee.

Olivier & Baby for contestants.

SUPERIOR COURT.

Montreal, March 20, 1878.

TORRANCE, J.

SIMMS v. THE QUEBEC, MONTREAL, OTTAWA & OCCIDENTAL RAILWAY CO., and Hon. A. R. ANGERS, Atty. Gen. pro Regina, opposant.

Attorney General, Change of—Official Gazette—Evidence.

Held, that the Court will take notice of change of person holding office of Attorney General, as published in the Quebec Official Gazette.

In the above case, in which the Attorney General *pro Regina* was opposant, the plaintiff moved, inasmuch as the Hon. A. R. Angers had ceased to be Attorney General, that proceedings be stayed upon the opposition until the Hon. David Ross, the present Attorney General, should have taken up the instance.

TORRANCE, J., granted the motion, holding that the Court would take notice of the publication in the *Quebec Official Gazette* of the fact that the Hon. A. R. Angers had ceased to be Attorney General.

Motion granted.

F. Keller for plaintiff.

De Bellefeuille for opposant.

COURT OF QUEEN'S BENCH.

Montreal, March 22, 1878.

Present:—DORION, C.J., MONK, RAMSAY, TESSIER, CROSS, JJ.

THE CITY OF MONTREAL, Appellant, and DEVLIN, Respondent; and *E Contra.*

Concurrent Appeal to Supreme Court and Privy Council.

Leave to appeal to the Privy Council from a judgment of the Court of Queen's Bench, Quebec, will be granted, although the opposite party has already obtained leave to appeal to the Supreme Court of Canada.

DORION, C. J., in rendering the judgment of the Court, made the following observations:

Upon an action instituted by Mr. Devlin, the Superior Court has condemned the City of Montreal to pay to the plaintiff a sum of $11,000. Both parties being dissatisfied with this judgment, each of them brought a separate appeal. This Court on the 13th instant reduced the amount of the judgment rendered by the Superior Court, and dismissed the appeal of Mr. Devlin, who was condemned to the costs of both appeals.

On the same day, the City obtained a rule for leave to appeal to the Privy Council. This rule was returned on the 16th instant. In the meantime Mr. Devlin presented in Chambers two petitions to be allowed to appeal to the Supreme Court from the two judgments rendered on the 13th, and the appeals were allowed.

Yesterday Mr. Devlin showed cause upon the rule obtained by the City for leave to appeal to the Privy Council, and has objected to its being granted, because an appeal having been allowed to the Supreme Court, no appeal can be taken to the Privy Council, at least pending the appeal to the Supreme Court.

The law with reference to such a case as this, is most unsatisfactory.

By section 17 of the Supreme Court Act, an appeal lies to the Supreme Court from every judgment rendered by this Court, in every case wherein the sum or value of the matter in dispute amounts to $2000, or more. This appeal must be allowed by the Court or a judge within 30 days from the pronouncing of the judgment. The Act contains a provision that the judgment of the Supreme Court shall be final, and that no appeal shall be brought from such judgment to her Majesty in Council, except by virtue of the exercise of Her Royal Prerogative. The Act contains no such provision as regards appeals from the judgments of this Court to Her Majesty in Her Privy Council, and Article 1178 of the Civil Code, giving such right of appeal, has not been revoked, but has been considered as still in force, both by this Court and by the Privy Council, in several cases which have been taken to appeal and adjudicated upon since the establishment of the Supreme Court.

We have therefore two laws, the one granting an appeal from judgments of this Court to the Supreme Court, and the other granting an appeal to the Privy Council, and both applicable to this case.

It is evident that the judge in Chambers, to whom the application was made to allow an appeal to the Supreme Court, had no right to deny to the party making the application, an appeal which the law gave him. The judge in such a case exercises a ministerial duty, and has no discretion to refuse an appeal in those cases where the law allows one, or to grant it in cases where it is denied.

Art. 1178 of the Civil Code is as imperative as the Supreme Court Act, and says:—"An appeal lies to Her Majesty in Her Privy Council, from final judgments rendered in appeal or error by the Court of Queen's Bench..... 3rdly, in all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling."

The present case, involving several thousand dollars, is one in which an appeal clearly lies to the Privy Council, and the question arises whether this Court has any authority either to deny altogether or to suspend the exercise of a right of appeal to which the parties are entitled by law.

To suspend the adjudication upon the rule for leave to appeal until the case is determined by the Supreme Court, would be equivalent to a denial of the appeal, for the judgment of the Supreme Court would be final, and were it not final it could not be in the power of this Court to grant an appeal to the Privy Council from a judgment of the Supreme Court superseding the judgment rendered by this Court.

Whatever may be the inconveniences resulting from the allowing in the same case a double appeal, one to the Supreme Court and the other to the Privy Council, and we admit they cannot be inconsiderable, yet it seems that under the present state of the law it is impossible for this Court either to refuse the application of either party, and thereby select the tribunal to which the parties shall be bound to carry their appeal, or even to suspend the application of one of them, which in reality would have the same effect. We cannot say that the City of Montreal shall be deprived of its appeal to the highest Court established for revising judgments of this Court. And, if one of the parties must be deprived of his appeal to one of the Courts, it seems it should not be the party who

made the first application and sought to appeal to the Court of last resort. We have not to reform the law, but to apply it.

On the other hand, we have no authority to say that Mr. Devlin cannot appeal to the Supreme Court merely because his adverse party wishes to appeal to the Privy Council.

Under these circumstances, the majority of the Court considers that it cannot do otherwise than to allow both appeals.

In the exercise of that extended jurisdiction which is conferred on the Supreme Court and on the Privy Council, they will, no doubt, be able to adopt such a course as may reconcile these discordant dispositions of the law by such order as may meet the justice of the case and be consistent with the rights of the parties. And if this be impossible, it will be for the Legislature, to adopt such measures as may prevent for the future the serious inconvenience resulting from the antagonistic right of appeal given to two separate tribunals, whose decisions are by law held supreme and final.

As regards this Court, it is bound by a precise text of law to grant this appeal to the Privy Council, as the Judge in chambers to whom Mr. Devlin applied, was bound to allow his appeal to the Supreme Court.

The appeal is therefore granted.

MONK and TESSIER, JJ., dissented.

R. Roy, Q. C., for the City of Montreal.

Devlin for the respondent.

CURRENT EVENTS.

GREAT BRITAIN.

RAILWAY COMPANIES AND PASSENGERS' LUGGAGE.—That railway companies carry passengers' luggage as insurers may be considered as settled by *Macrow* v. *Great Western Railway Company*, L. R., 6 Q. B. 612, although the question has never been expressly decided by a Court of Appeal. But in *Talley* v. *Great Western Railway Company*, L. R., 6 C. P. 44, it was held by the Court of Common Pleas that if luggage be placed in a railway carriage with the passenger, with his assent, and he retains control over it, the company's liability as insurer ceases, and they become liable for negligence only; and this view of the law has been affirmed by the Court of Appeal in the recent case of *Bergheim* v. *Great Eastern Railway Company*. The facts were these: The plaintiff went with his wife to the Liverpool street station of the defendants' railway, intending to go to Yarmouth, and the bag which was the subject of the action was placed in a first-class carriage in which the plaintiff and his wife were to travel, with his assent. He asked a porter whether the bag would be safe while he and his wife went to luncheon, and was told that it would be. The travellers, having lunched, returned to the carriage, and just as the train was starting discovered that the bag was lost. The jury found that the porter had acted within the scope of his employment in putting the bag into the carriage, that neither the plaintiff nor the company had been guilty of negligence, and Mr. Justice Manisty directed a verdict for the company. The plaintiff appealed from this ruling, and the Court of Appeal took time to consider. Lord Justice Cotton, in delivering judgment for the company, appears to have rightly distinguished the case of a passenger retaining control of his luggage and the ordinary case of luggage being consigned to a van. But the strong point for the plaintiff appears to have been, that the porter promised him that his bag would be safe. With regard to this, however, it seems that the porter would have no authority to give such a promise, so that the judgment appears to be quite correct. The case is rather an important one, not so much from the difficulty of the question of law involved, as from the frequency with which railway passengers absolve the companies from their liability as insurers. And there are few lines upon which a railway porter will not, on the slightest hint from a passenger, place luggage in a railway carriage.—*Law Times.*

UNITED STATES.

PREDATORY HOGS—In *Ussery* v. *Pearce*, which came up on error from Live Oak County, the Court of Appeals of Texas (White, J.) thus stated the law as to a person's right to kill his neighbor's hogs on the plea of their destructive propensities:—

"This was a suit in the lower court by the defendants in error, against the plaintiffs in error, to recover damages for the killing of their hogs.

"In their answer, defendants admitted that they had killed two of the hogs; but pleaded justification upon the grounds that the hogs 'were

an intolerable nuisance, both to defendants and the public.' This latter plea the court struck out, which action is assigned as error.

"In *Morse* v. *Nixon*, where, in a case somewhat similar, the judge in the lower court had charged the jury, 'that, if they believed the hog was of a predatory character, and had the character of a chicken-eating hog, then they should find for the defendant, as any man has a right to abate a public nuisance, and it mattered not whether the plaintiff knew of the habit of the hog or not,' the Supreme Court of North Carolina, Pearson, C. J., delivering the opinion, said: 'We do not concur in the opinion of his Honor as to the right of killing hogs that are in the habit of eating chickens. The position that such a hog is a public nuisance, and may be killed by any one, is not supported on principle or authority; and, if recognized, would lead to monstrous consequences. Allow such a right, and the peace of society cannot be preserved; for its exercise would stir up the most angry passions, and necessarily result in personal collisions. * * * It may be the killing will be justified by proving that the danger was imminent (to another chicken), making it necessary 'then and there' to kill the hog in order to save the life of the chicken, or prevent bodily harm; but we are inclined to the opinion that, even under these circumstances, it is not justifiable to kill the hog. It should be impounded or driven away, and notice given to the owner, so that he may put it up. At all events, this course is dictated by the moral duty of good neighborship.'—*Morse* v. *Nixon*, 6 Jones (N.C.), Law, p. 293.

"*Champion* v. *Vincent* was a case similar to the one at bar. In that case, Wheeler, Justice, said: 'There was nothing to justify or palliate the act; it was just such an act as necessarily tends to violence and breaches of the peace, and neighborhood animosities, which destroy the harmony, peace, and good order of society; and was eminently a case for damages by way of punishment and prevention. In trespass, where the party wantonly violates the law, the jury should not be sparing in damages.' Lord Abinger, 1 Meeson & Welsby, 342; 20 Tex. 811.

"The case we are considering is, in short, this: The appellants were endeavoring to keep and 'run a hotel,' in the town of Oakville, without having a fence or enclosure around their house. There being nothing to prevent their free egress or ingress, the hogs of their neighbors, as was quite natural, finding the kitchen door open, would at times enter, eat, and dispose of such provisions as they found lying around loose, and sometimes break up the dishes and destroy the furniture. Defendants alleged in the plea, which was stricken out, that by these unwarranted ravages, the hogs had, first and last, during the year, damaged them in the sum of one thousand dollars. It is astonishing, if not altogether incredible, that defendants would have witnessed, and patiently suffered, all this great and serious loss, when they could, for a few dollars perhaps, have purchased the hogs, and then killed them, or could have fenced in their house with a substantial enclosure, which would have been hog-proof. If they did not wish to go to this trouble or expense, to say the least of it they might have kept the kitchen door shut and securely fastened against these destructive intruders. There was no sufficient excuse for killing the hogs; and, under all the circumstances detailed in the statement of facts, we think the verdict and judgment extremely mild."

NEW BRUNSWICK.

Sir James Carter.—Sir James Carter, formerly Chief Justice of the Supreme Court of New Brunswick, died on Sunday, March 10, aged 73.

RUFUS CHOATE.

The following letter, addressed to a biographer of the late Rufus Choate, by the Hon. Geo. W. Nesmith, formerly one of the Justices of the Supreme Court of New Hampshire, contains some interesting particulars respecting that distinguished lawyer:

Franklin, January 31, 1878.

My Dear Sir,—I confess it would be a hopeless task for me to delineate the character of Rufus Choate. You have given, in your own finished style, a concise, yet comprehensive view of what he was and did, and you have been aided by those who saw and heard him more frequently than myself. Yet I will place my memory at your service.

I knew him while at college. Our acquaintance commenced in 1816. He was one year in advance of me in collegiate standing, and in age. I belonged to the same literary

society with him for three years, and remember with pleasure his leadership there. During my last year at college he was a tutor.

After graduation we lived a hundred miles apart. I frequently saw him when I visited Boston, had interviews with him, and occasionally heard him in courts of justice. I was with him in the Whig Presidential conventions at the nominations of Gen. Taylor, at Philadelphia, and Gen. Scott, at Baltimore. At both conventions we supported Mr. Webster as a candidate. I afterward heard his famous eulogy upon Mr. Webster. A short time before his death I had an interesting conversation with him, in which he announced the unwelcome intelligence that his physicians had notified him to quit all labor and to take a sea voyage as affording the only hope of recruiting his feeble bodily frame.

The only reminiscence of his college life which occurs to me as not already narrated by your correspondents, was an amusing practical joke perpetrated by him and some others in the exchange of potatoes for apples, in the sole remaining sack in which the latter were offered for sale by a farmer of the name of Johnson, from Norwich, and then getting Johnson to offer them for sale at the college. A purchase was made by the students, who had been notified of his approach by Choate, and then, upon opening the sack, an outcry raised against Johnson for attempted imposition. Protestations of innocence were met with ridicule, and suggestions of the interference of the Evil One. Choate, standing in front of Johnson, and amused at the perplexity depicted upon his countenance, exclaimed, "Would that Hogarth were here!" Johnson caught at the name, with suspicion, and afterward offered to reward us if we would tell where Hogarth was to be found.

One of Choate's most eloquent and effective speeches was delivered in his senior year at college, in the autumn of 1818, while acting as president of our literary society. It was upon the occasion of the introduction of many members from the Freshman class. The custom of presidents of the association had been to make a brief formal speech, setting forth the objects of the society and the duties of its members, and that was all we expected. We were surprised by a well prepared and eloquent address of considerable length. At that time he was in vigorous health and full of energy. The silvery tones of his voice, resounding through our little Hall, kept the assembly spell-bound, while he discoursed upon those elements of character essential to the formation of the ripe scholar and the useful citizen. The late Chief Justice Perley was one of the young men then made a member of the society of "Social Friends." In after life I often heard him allude in terms of high commendation to that performance. On the following day I undertook to note down in a little scrap-book some of the thoughts to which he had given utterance, although I could not reproduce the brilliant language in which they were expressed. I give some of these memoranda:

"To make the successful scholar, patient, constant, well-directed labor is an absolute requisite. * * He must aim at reaching the highest standard of excellence of character. Good mental endowments must be allied to conscience, truthfulness, manliness. In the affairs of life brains are essential, but truth, or heart, more so. * * Not genius so much as sound principles, regulated by good discretion, command success. We often see men exercise an amount of influence out of all proportion to their intellectual capacities, because, by their steadfast honesty and probity, they command the respect of those who know them. George Herbert says, 'A handful of good life is worth a bushel of learning.' Burns' father's advice to his son was good—

> 'He bade me act the manly part,
> Though I had ne'er a farthing,
> For, without an honest, manly heart,
> No man was worth regarding.'

"A critic said of Richard Brinsley Sheridan, that if he had possessed *reliableness* of character he might have ruled the world, but, for want of it, his splendid gifts were comparatively useless. Burke was a man of transcendent gifts, but the defect in his character was want of moral firmness and good temper. To succeed in life we must not only be conscientious; we must have also energy of will, a strong determination to do manly work for ourselves and others. The strong man channels his own path, and easily persuades others to walk in it. * * When Washington took command of the American army the country felt as if our forces had been doubled. So when Chatham was appointed Prime Minister in England great confidence

was created in the government. * * After General Green had been driven out of South Carolina by Cornwallis, having fought the battle of Guilford Court House, he exclaims 'I will now recover South Carolina or die in the attempt.' It was this stern mental resolve that enabled him to succeed. * * Every student should improve his opportunities to cultivate his powers. He owes this duty to his friends, his instructors, and his country. Our learned men are the hope and strength of the nation. 'They stamp the epochs of national life with their own greatness.' They give character to our laws and shape our institutions, found new industries, carve out new careers for the commerce and labor of society; they are, in fact, the salt of the earth, in life as well as in death. Constituting as they do the vital force of a nation and its very life-blood, their example becomes a continual stimulant and encouragement to every young man who has aspirations for a higher station or the higher honors of society. Now, my brethren and young friends, we beseech you to strive earnestly to excel in this honorable race for just fame and true glory, and in your efforts to mount up upon the fabled ladder, do not be found, in the spirit of envy, pulling any above you down, but rather, in the exercise of a more liberal spirit, holding out a helping hand to a worthy brother who may be struggling below you. Be assured you exalt yourself in proportion as you raise up the humbler ones."

The second part of his discourse was specially devoted to the pleasure and rewards derived from an intimate acquaintance with classical learning. His suggestions were valuable and impressive, and urged home upon our attention with great rhetorical force. If this speech had been published it would have furnished the young student with a profitable guide in his pursuit of knowledge.

Not far from the year 1845, the Hon. Levi Woodbury was invited by the literary societies of Dartmouth College to deliver an oration at the annual commencement in July. Going thither I had a seat in the stage coach with Mr. Webster, Mr. Woodbury and Mr. Choate. A good opportunity was presented of witnessing their conversational powers. Mr. Webster and Judge Woodbury had for many years resided in Portsmouth, N. H., and topics relative to men and scenes there were much discussed by them. Of course I could not but be an interested listener. The early history of our State, the character of the settlers, their leaders, their privations and sufferings by reason of Indian warfare, the character of our early governors, and the growth of the State, with historical reminiscences and anecdotes, were introduced. I was surprised to find that Mr. Choate was so familiar with our early history as to give dates and events with accuracy. By easy transitions they passed to the judiciary of the State and the members of the bar, discussing their respective merits. On these local subjects the New Hampshire men, of course, had the vantage ground. Wishing to give a new direction, therefore, to the conversation, I asked Mr. Choate as to his later reading. He answered that he had recently been occupied in the perusal of Milton's prose and poetry. Mr. Webster said to him, "As you are so recently out of Paradise, will you tell us something about the talk that Adam and Eve had before and after the fall?" Mr. Choate asked "Do you intend that as a challenge to me?" Webster answered "Yes, I do." Choate hereupon recited promptly portions of the addresses of Adam to Eve, and Eve to Adam, much to the edification of his audience. Webster rejoined with the description of the conflict between Gabriel and Satan from the sixth book of "Paradise Lost." His recitation was received with applause. John Milton himself, had he been present, would have been satisfied with the performers on that occasion. We have seen celebrated actors on the stage but none like those in the stage.

At my last interview with Mr. Choate in Boston, after alluding to his incessant and severe labor at the bar for many years, he said he was literally worn out, and added in a melancholy way, "I have cared much more for others than for myself; I have spent my strength for naught." I reminded him that he had gained high reputation in his profession, and also as a scholar, and this was his reward. He said, "We used to read that this kind of fame was but an empty bubble; now I know it is nothing else." Such was Mr. Choate's estimate of human glory when consciously near the termination of his eventful and honored life. He added, "My light here is soon to be extinguished. I think often of the grave. I am animated by the hope of that glorious immortality to be enjoyed in a kingdom where sin and sorrow cannot come."

I remain, very respectfully, etc.,

GEO. W. NESMITH.