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THE

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SUPREME COURT
OF CANADA

LOWER CANADA

Law Journal.

VOL. I.

Edited by James Kirby, Advocate.

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JULY 1865.

PROEM.

'The first number of a new publication is never so good as its successors, and consequently not a fair specimen,' said an English reviewer, noticing the first issue of a new work. There being several reasons why the first number of the Law Journal is hardly an adequate representative number, we have thought proper on laying this issue before our readers, to say a few words in explanation of the design and objects of the work. *In limine*, let us say, a glance at the contents of this number will serve to dispel a misconception, which, we understand, existed in the minds of a few, outside of the profession, who probably had not seen our prospectus,—that the Journal was likely to come into competition, or interfere in the slightest degree, with the Lower Canada Jurist, which for so many years has enjoyed the high and well deserved esteem of the profession. So far is this from being the case that the learned editors of the Jurist have been among the earliest and warmest supporters of this publication.

In the first place, then, we trust to see the LAW JOURNAL become a medium in the pages of which members of the bar and others can communicate their opinions, and advocate such improvements and amendments in the law as they may desire to see carried out. It is unnecessary to say that no personal reflections, or remarks passing the bounds of fair criticism, will find a place in these columns. Though the JOURNAL is not designed for a Reporter, we propose to publish condensed reports of the proceedings and decisions of our courts, paying particular attention to the courts of Review and Appeal. Interesting points arising in the course of criminal trials, and all important criminal cases, so far as they can be procured, will be noted and commented upon. New books issuing from the Provincial and British Press, will be reviewed and criticised.—Correspondence, legal appointments, calls to the bar, biographical and obituary notices, and compilations, will also find a place. The remainder of each number will be devoted to interesting matter selected from English and American periodicals.

As to the form of the JOURNAL, it was not without some hesitation that a quarterly issue was decided upon. But reflection has served to convince us that while some ends would have been more efficiently served by a weekly or monthly publication, the form we have adopted is better calculated to ensure success, being more adapted to this our day of small things. We propose, however, to issue the publication monthly as soon as circumstances will warrant the change.

Having said so much by way of explanation, it only remains to record our gratitude to those who have aided our humble efforts. *Bis dat qui cito dat*, is especially applicable to encouragement of a literary undertaking, and to those who came forward with expressions of good will and promises of assistance at the first announcement of this Journal, a double acknowledgment is due. Begun with no little diffidence, the labours of the editor have proceeded with growing confidence. *Heureux commencement est la moitié de l'œuvre*, and our beginning has equalled the most sanguine anticipations, and given a fair promise of continued vitality and progress.

COMMISSION TO THE BAR OF LOWER CANADA.

The law now in force, regulating commissions to the bar of Lower Canada, is to be found in section 27, chap. 72, of the C. Statutes of Lower Canada, and is drawn from the 12 Vic., c. 46, s. 27,—16 Vic., c. 130, s. 6, and 22 Vic., c. 104.—As it now stands the law constitutes three classes of persons who may be admitted to the bar of Lower Canada *:—

1. Five years clerks; i. e., any one who has studied regularly and without interruption, under a notarial agreement, as a clerk or student, with a practising advocate, during five consecutive and whole years.

2. Four years clerks; i. e., those who, previous to their clerkships, have gone through a regular and complete course of study in any incorporated college or seminary.

3. Three years clerks, who are of two sorts: a. Any one who has gone through a regular and complete course of study in any incorporated college or seminary, and also through a complete course of law in any incorporated college or seminary;—b. Any one who has followed a regular and complete course of law in any incorporated university or college in which a Law Faculty is established, as provided by the statutes or regulations of said university or college, and has taken a degree in law there, and such course of study may be followed simultaneously with his clerkship under articles.

These regulations are intended to be very stringent, but practically they are almost useless, and this for two reasons. First, the examinations as to capability are left to the examiners of each section of the bar; and second, what constitutes a regular and complete course of study, or a regular and complete course of law, is not defined. Now the results are what might fairly be expected. The bar examinations are a sham, and the tendency of competition between the different colleges, seminaries and universities, each of which has the unfettered power to fix its own course of study, is to lower more and more the standard of learning necessary for admission to the bar. If the bar examinations were something more than a form, colleges and universities would be obliged to keep their course up to the mark, to avoid the disgrace of seeing their students plucked; but I contend that no mere professional examination, and more especially an oral one, will ever continue for any length of time to be serious, or that it offers any guarantee of capacity whatever. This is so well known that admission to the bar in France, so far as the action of the bar is concerned, is simply an enquiry into the respectability of the candidate, of his having decent chambers for consultation, and something of a library; and the bar of Paris is a model admirably suited for our imitation.

With a view of improving our system here, Mr. Irvine, member for Megantic, introduced a bill, during last session of Parliament, containing the following amendment:—

Section 27, c. 72, C. S. L. C., is hereby repealed, and the following substituted therefor:—27. No person shall be admitted as an advocate, barrister, attorney, solicitor, and proctor at law, unless he has attained the full age of 21 years, and has studied regularly and without interruption, under a notarial agreement as a clerk or student with a practising advocate during four consecutive and whole years, and has gone through a regular and complete course of study in an incorporated college or seminary, or is admitted under chap. 75 of the C. S. of Canada.

2. Except that if any candidate for admission to the bar has followed a regular and complete course of law in any incorporated university in Lower Canada in which a law faculty is established, as provided by the statutes or regulations of the said university, and has taken a degree in law in such university, he shall be admitted as a member of the bar on presentation of his diploma to the council of any section of the bar; Provided, That the said course of study extend over three years at least, and comprise not less than 150 lessons a year, and include instruction in Roman law—the civil code of L. C., criminal law and procedure. But the bar shall not be obliged to admit any one whose moral character is bad.

The effect of this amendment would

* Of course without counting barristers of Upper Canada who may be admitted under cap. 75, C. S. C.

be to introduce two classes: 1. The university man who, having taken his degree in law, would pass in three years. He could not be excluded by the bar, except for character; but again: the university would be obliged to give the amount of instruction fixed by law as the *minimum*. 2. The student who had gone through a regular and complete course in any incorporated college or seminary. He would pass with four years clerkship, on two examinations, as at present, with this difference, that he would be under the necessity of bringing his certificates from the incorporated college or seminary before being admitted to study. The expression used in section 26, "a liberal education" would therefore come to mean the education of our incorporated colleges or seminaries, that is, of the public schools of superior education.

This amendment would not, perhaps, give all the guarantee desirable; but it would be at all events a step in the right direction, and would prepare the way for that separation of the attorney and advocate practice, the necessity of which is becoming more and more felt daily.

R.

LAW REFORM SOCIETY.

An effort is being made with the concurrence of some of the first practitioners to found a society having for its object the suggestion of needed reforms in the law.

Such a society is greatly needed. That there should be a body which will discuss projected legislation "*avec connaissance de cause*" cannot be denied. In England such a society exists, and its influence is extensive and beneficial. In Upper Canada, we believe, such a society is organised and works well.

Merchants have their Board of Trade, where questions of moment affecting the commerce of the country are discussed, and reforms suggested. Why should not the same interest be shewn amongst lawyers? Bacon tells us that "every man owes a debt to his profession."—How many of us are paying the debt which we owe to the noble profession of the law?

Can we effect any good by withholding our active sympathy and practical co-operation with sincere efforts to elevate the profession? Many of our old lawyers shrug their shoulders and scout the idea of success to any effort of this kind. At the same time these gentlemen are loud in their praise of the *olden times* when there were giants in the profession. We question if any giants in the profession were ever made by vain regrets for a former state of things. We must do the best with the present material, which we believe to be as good as any which formerly existed. Energy and perseverance will rescue us from the slough of despond into which we have apparently fallen.

A Reform Society will be the initiatory step. By bringing the members of the bar into closer relations, the Society would gradually evolve an *Esprit de Corps*, which at present seems to be in a quiescent state.

In the discussion of new *projets* of law, due caution being observed in the publication of the result of the deliberations thereon, the society might lead public opinion. Its decisions, if promulgated after careful discussion, would have great weight with those outside of the profession.

The younger members of the society would have the advantage of listening to the discussion of grave questions, and they would be enabled to benefit by the experience and learning of their more illustrious *confreres*. A spirit of emulation would thus be encouraged, and the profession would be elevated.

Lawyers have no place at present where existing errors or abuses may be criticised. Such a society will afford every member an opportunity to discuss any of these if they exist. At present it is frequently asserted that the Montreal *Bar has no influence*. If this is true the blame rests with every one who contents himself with repeating the assertion without a single personal effort to remove the stigma.

This can only be done by a united effort, "*l'union fait la force.*" A Law Reform Society cannot be carried on by any individual member of the Bar alone.—There must be a combined effort. If the

Society is successful, the influence of the profession must be increased.

GEO. W. STEPHENS.

REMARKABLE TRIALS IN LOWER CANADA.

No. 1. CASE OF DR. SABOURIN.

Under this heading we propose to bring together some of the most interesting and important trials that have taken place in the lower province, and, divesting them of legal forms and technicalities, present them in the style of simple narrative. The records of these trials are not easily accessible to the public, and a brief account, without comment of our own, containing the leading features of these cases, must possess some interest, though, perhaps, not of much practical use to practitioners, occasionally the facts related may involve interesting reminiscences of celebrated members of the bar, and also historical events in the life of remarkable personages.

The trial of the celebrated case of Dr. Charles Sabourin, of Longueuil, before the Court of Queen's Bench and a mixed jury, at Montreal, on the 14th and 15th April, 1858, is probably fresh in the memory of many of our readers, being generally known as the "Note Swallowing Case." Dr. Sabourin, a gentleman of respectable reputation, residing in Longueuil, was charged with having on the 16th February, 1858, stolen a promissory note for $5,600, due to one Pierre Lucien Malo, a money lender, of Montreal. The judges presiding were the late Chief Justice Lafontaine and the Hon. Judge Aylwin. — The case excited great interest, and a formidable array of counsel was retained on either side. Mr. Monk, Q. C., (now assistant judge,) represented the Crown. Messrs. V. P. W. Dorion, Doherty, and Papin, appeared for Mr. Malo, the private prosecutor. For the prisoner, the case was conducted by Messrs. Drummond, Q. C., (now Judge Queen's Bench,) Carter and Devlin.

The charge against the prisoner was that on the 16th February, 1858, he entered the office of Mr. Malo, and having got possession of the note, tore it into pieces, chewed the pieces, and swallowed them in Mr. Malo's presence. The principal witness was of course Mr. Malo, and the defence rested mainly on the excellent character borne by the prisoner, contrasted with the ill repute of his accuser. Having premised this much, we shall enter into fuller detail of the trial, and present an abstract of the testimony of Mr. Malo. In opening the case for the Crown, Mr. Monk observed that he had known the prisoner himself for ten or fifteen years, and had formed a high opinion of his personal worth. Judge Aylwin having inquired whether it was understood that the note was not to be produced, Mr. Devlin, in reply, said the defence denied the existence of any such note, and, therefore, they could not produce it. Mr. Drummond objected at the outset to the admission of any evidence about a note not produced, but the objection was not entertained by the Court. Pierre Lucien Malo was then placed in the witness box, and proceeded to recount the extraordinary facts attending the alleged abstraction of the note.— He said:

"I live in St. Gabriel Street, Montreal, and have been in the habit of transacting business with the prisoner. On the 13th Nov., 1857, I received his note for $5,600. This note was payable at the Banque du Peuple. It was dated 13th Nov., 1857, and was made payable to the order of Toussaint Daigneau, of Longueuil, three months after date. It was signed by the prisoner, C. Sabourin, and endorsed by Toussaint Daigneau, E. Page, A. Thurber, and P. E. Picault. When this note became due, 16th February, the prisoner came to my office about half-past eleven in the forenoon. My office is on the second flat. I met the prisoner at the door in the street, and we went up stairs together. The prisoner took a seat seven or eight feet from my desk. I asked him if he had brought any money with him. The prisoner answered, very little. I said, —'Such a course will not do; you have been using me in this way a long time. You always tell me you will bring me something, but you never keep your word. It seems you mean to humbug me, so if you don't pay up soon, I will have this note protested, for I don't want to let it go to such an amount that neither you nor your endorsers can pay it.' To this the prisoner answered nothing. I then put the note upon a table near my desk, to see if the prisoner would

give me any money, for I had determined to take what money I could get, and take another note. While the note was still on the table, my attention was drawn to the door. I rose from the table on which the note was placed, and on which I had been leaning with my elbow, for the purpose of shutting the door. When I had closed the door, I remarked that the prisoner had moved nearer the note in my absence. He then took it up and told me he was going to settle it. He then began to tear it up, and when he had torn it, he put the pieces into his mouth and chewed them. I was so astonished at this that I didn't know how to act, but my second thought was to let the prisoner escape, as I might have no evidence against him; but at last the consideration of the amount outweighed everything else. I then went to the office of Mr. Bedwell, the lawyer, which is in the same building with my own, and told him of the circumstances, but neither of us strove to hinder the prisoner from chewing the note. I then left the prisoner in the custody of Mr. Bedwell and went down stairs to look for a policeman. Having found one, the prisoner was removed to the station. The officials there seemed to laugh at me rather than to pity me. When at the police office I wanted the prisoner to take an emetic, but he would not comply, saying he was not sick, but in good health, (Laughter.) I swear that the only paper on the table in my office was this note, and that I have never seen it since the prisoner put it in his mouth. About two hours after the prisoner had been lodged in the police station, I got the note protested. The note was in my possession from the time I purchased it to the time it was destroyed."

There is a little obscurity in the report from which the above is condensed as to the time the note came into Mr. Malo's possession, but this is of minor importance. On cross examination, Malo said he thought he paid about $500 for the note, but was very doubtful about the amount. He kept no books for his business.

Mr. Bedwell was called to corroborate Malo's statement. His evidence amounted to this—That he was in his office at the time, and heard a great outcry. Having opened his office door, he saw Malo standing in the passage, and heard him cry, "Mr. Bedwell, the prisoner has stolen my note for $5,600." Bedwell having entered Malo's office, noticed that the prisoner appeared to be chewing and trying to swallow something, which he apparently succeeded in doing. The prisoner seemed anxious to get away. Malo said, "he has eaten my note and has it in his belly." Bedwell heard the prisoner protest that he owed Malo nothing.

Some of the persons whose names were on the note, stated that they had endorsed notes for the prisoner, and some of them had such perfect confidence in him, and found him so punctual in his payments, that they endorsed for him without taking any interest.

The trial being continued on the 15th April, a number of witnesses were called for the defence, the object being mainly to establish that the prisoner had enjoyed a high character for honesty and integrity, while the accuser was known to be a hard man who endeavored to extort as much as possible from his debtors. Dr. Davignon stated he had often remarked that when Dr. Sabourin was excited he appeared to be making attempts to chew or swallow something. This peculiarity was corroborated by other witnesses, several of whom, moreover, swore that they would not believe Malo on oath. There was also evidence of the improbability of Dr. Sabourin requiring the loan of so large a sum of money.

In rebuttal, the Crown called several witnesses who, while admitting that Malo passed for a hard man and a shaver, nevertheless were of opinion that he was to be believed on oath.

Judge Aylwin, in reviewing the evidence, commented with some severity upon the unfavourable character attached to the private prosecutor, and expressed the opinion that his statement could not be credited in the face of the evidence adduced by the defence. A verdict of Not Guilty was then found by the Jury without retiring from the box, a verdict which was received with applause in the Court.

ANALYSIS OF THE JUDGMENTS RENDERED IN THE COURT OF APPEAL—JUNE TERM—MONTREAL.

Judgment was rendered in twenty-two cases, and of the twenty-two judgments of the Court below:—9 were confirmed;

11 were reversed; 1 was reformed; 1 was modified.

AGAIN:—8 were confirmed unanimously; 2 were reversed unanimously; 1 was modified unanimously. In 8 there were two dissenting Judges; in 3 there was one dissenting Judge.

Thus out of 22 judgments, 11, or exactly half, were unanimous, probably a larger proportion than usual. In 8 cases there were two dissenting judges, thus rendering the decisions of the three forming the majority of little value as precedents, especially when the remarkable fact is taken into consideration that of the 8 judgments in which there were two dissenting judges, 6 were reversals, and one a reformation of the judgment of the court below. Thus, including the judge of the court below with the two dissenting judges who thought the judgment should be confirmed, we see the vote stand 3 to 3 in all these 7 cases.—Several of these involved questions of fact only, and Mr. Justice Meredith intimated his regret that judgments should be reversed where it was simply a question on which side very evenly balanced evidence preponderated.

A DARING FORGERY.

The forgery mentioned in the case of Wenham *v.* Banque du Peuple, reported in this number, is such an extraordinary instance of daring and successful crime, that it may be interesting to advert to some particulars not mentioned in the judgment. During the summer of 1863, Joseph Wenham, Esq., broker, of Montreal, had occasion to be absent from town for several weeks. On his return, having drawn cheques upon two banks at which he had deposits, he was surprised to learn that there were no funds. On enquiry it appeared that during his absence three cheques, purporting to be signed by Mr. Wenham, had been presented at the banks and had been paid. One of these cheques was on the London and Colonial Bank, for $94, dated 4th August, 1863; the other two were on the Bank of Upper Canada, one for $491.15, and the other for $49.13, both dated 17th August, 1863. The signature to these cheques was so exact an imitation, that those who had been for many years acquainted with Mr. Wenham's hand writing could not with certainty distinguish the forgeries from genuine signatures. It was observed as a rather curious circumstance that certain figures occurred in these and all the forged cheques mentioned below. The matter was referred, we believe, to the manager of the Commercial Bank and the cashier of Molsons Bank, who caused an advertisement to be inserted in the daily papers, requesting information from any person through whose hands the cheques might have passed. Mr. Wenham's high personal character caused his assertion that the cheques were forgeries to be readily received. The money was paid over; and there the matter rested, no information being obtained to clear up the mystery.

It was subsequent to this that a second series of forgeries took place, giving rise to the legal proceedings. In the fall of 1864, Mr. Wenham happened to have deposits at four banks. These deposits were merely temporary business deposits, his standing account being at a fifth bank. On the same day a cheque was presented at each of these four banks, purporting to be signed by Mr. Wenham, payable to the order of his associate, Mr. Simpson, and in each case for a sum very nearly the same as that on deposit. The cheques were all paid without any suspicion being awakened, and all turned out to be skilfully executed forgeries.—The carrying out of this daring scheme required an exact knowledge of the contents of four different bank books, within a brief interval before the presentation of the cheques. After the first forgery, Mr. Wenham adopted the precaution of making his cheques payable to the order of Mr. Simpson, his associate or partner in his brokerage business, but on the second occasion both names were forged with equal adroitness. The heaviest sufferer by the second forgery, the Banque du Peuple, thought proper to resist payment, and allowed an action to be brought by Mr. Wenham for an amount equal to that of the forged cheque. It was in this case that Mr. Justice Monk pronounced the decision reported elsewhere.

The case has since been taken before the Court of Review.

REVIEW.

A DIGESTED INDEX TO THE REPORTED CASES IN LOWER CANADA, contained in the reports of Pyke, Stuart, Revue de Législation, Law Reports, Lower Canada Reports, Lower Canada Jurist, Stuart's Vice-Admiralty cases, and Canada Appeals brought down to January, 1864; to which is added an appendix, comprising Perrault's Précédents de la Prévosté et du Conseil Supérieur, with Tables of Reference, Names of Cases, and a Concordance,—also, Numerous Notes, and References, including several important cases not yet reported, by T. K. RAMSAY, Esq., advocate, QUEBEC. Printed by George E. Desbarats, 1865.

We have here a work which may serve as a corner stone of legal literature in Lower Canada—a work not inferior in its kind to anything issued from the American or British Press, and which affords satisfactory evidence that the science of jurisprudence is not in a languishing state amongst us. Dr. Johnson, with that gloomy delight in viewing the dark side of the picture peculiar to him, says the writer of dictionaries has been "considered not the pupil but the slave of "science, the pioneer of literature, "doomed only to remove rubbish and "clear obstructions from the path "through which learning and genius "press forward to conquest and glory, "without bestowing a smile on the "humble drudge that facilitates their "progress." But Johnson himself is an example that genius and industry often go hand in hand, and that the greatest results may be looked for when the two are conjoined.

The design of Mr. Ramsay's work will be best understood by reading the preface which we give entire :—

"I hold every man a debtor to his profession."
—BACON.

"Reporting is perhaps the most valuable portion of legal literature; but its usefulness for all ordinary purposes becomes impaired, if the reports are not carefully indexed and arranged, from time to time, as their bulk increases. Five years ago our reported cases having swelled in the ten preceding years from five to twenty-one volumes, I began to prepare an index for my own use. Since then I have added the contents of the later volumes, as they appeared, down to the end of 1863; and in part liquidation of the debt claimed by the great English Chancellor, I now offer the compilation thus made, to my brethren of the legal profession, in the hope that, amidst the toil of practice, it may relieve them from the necessity of many a weary and often unsuccessful search.

"In publishing this Index, I am not blind to the many defects of its classification; but after having re-arranged it four times in manuscript, and twice in type, I feel persuaded that it is impossible, within the limits of one volume of a reasonable size and cost, so to dispose the matter as not to give ample room for easy criticism in this respect.—However, I have endeavored as far as possible to obviate any inconvenience which may arise from imperfect classification by adding three tables—one of reference, a second of the names of parties, and a third of the principal words of the Index wherever they occur. The last table, so far as I know, is a novelty in works of this class, but I think it will be found the most useful of the three.

"I have also condensed and added in an appendix the cases decided in the old Courts of Prevosté and *Conseil Supérieur*, reported in the two small volumes published in 1824, by the late Mr. Perrault, one of the Clerks and Prothonotaries of the Court of Queen's Bench. The judgments in many of these cases will be found to contain very interesting and valuable precedents, and as such, not less binding now, than they were under the old *régime*. Indeed it is to be regretted that, in determining the jurisprudence of the country, recourse had not been oftener had to the records of the older courts, and even now it may not be too late to enquire how our predecessors practised and administered the law. In England the Year Books have never been despised, and in France now studious men are beginning to perceive that wisdom is not of any one age, and that no people can with impunity ignore its history and traditions. Are our *olim* unworthy of a thought?

"I need hardly say that the Index comprises the cases in Pyke's Reports, Stuart's Reports, Stuart's Vice-Admiralty Cases, La Revue de Législation et de Jurisprudence, the Law Reporter, the Lower Canada Reports, and the Lower Canada Jurist. I have,

however, omitted the Bankrupt cases, which had only interest under the operation of the old Act. Some cases which are not reported are mentioned in the Index, and I have also added a few notes, the last of which gives the judgments in appeal, which affect the cases referred to in the Index, and which are reported in vol. 8, of the Lower Canada Jurist, and vol. 14 of the Lower Canada Reports."

It only remains for us to say a word respecting the manner in which the work has been executed. After a careful examination we are satisfied that the design has been carried out in a way that will not disappoint the expectations which Mr. Ramsay's well known ability and industry may have excited. As Macaulay says of Johnson's Dictionary, a leisure hour may always be very agreeably (and profitably) spent in turning over its pages. We lay the work down, confident that it will long serve as a worthy monument of Mr. Ramsay's zeal and assiduity.

CORRESPONDENCE.

THE MONTREAL CIRCUIT.

To the Editor of the L. C. Law Journal:

SIR,—Among the subjects which I hope to see taken up by the Law Journal is the system of conducting the Circuit business in this city. Every member of the profession, I presume, is aware of the pressure of business in the Circuit Court. To take a recent instance, the Roll for the 14th June was not commenced till the morning of the 16th. Had not the Court sat on the 16th, all the cases inscribed for the 14th, would have gone over to September. What vexatious delays, what enormous waste of time and annoyance to court, counsel and witnesses, result from this state of things! I trust, Sir, some one better able to handle the subject will bring it prominently forward, and discuss the best means of remedying an evil which is continually increasing in proportion to the increase of business. Some persons have suggested the appointment of a Commissioner, to sit every morning, or three times a week, for the disposal of all cases under £10. Others would desire simply to have the term extended, say from the 9th to the 16th, both inclusive, with a term in January and July. (I may also mention that the disbursements in small cases are excessive. A poor man cannot attempt to collect a dollar unjustly withheld from him, without disbursing 50 cents for the summons, 80 cents for the return, and 60 cents for the execution, besides bailiff's fees, &c.) With reference to the pressure of business, I trust some method may be speedily adopted to put an end to what is considered an intolerable nuisance by

A YOUNG ADVOCATE.

LOWER CANADA LAW REPORTS.

To the Editor of the L. C. Law Journal:

SIR,—I beg to avail myself of the columns of your welcome and much needed Journal to say a few words on the subject of our law reports. How is it, Sir, that the Government continues its support to the Lower Canada Reports, and this in the face of the steady advance made by the Jurist, supported only by the revenue derived from its subscription list? As the subject of the amount which the Government agreed to contribute to the L. C. Reports, is explained at some length in the preface to the first volume of the Jurist, I need not trespass upon your space by entering into particulars. It would appear from that statement that the outside figure for which the Government became liable was £162.10 per annum. But in 1855 the amount drawn from Government had already swollen to £347.18.9 for the year. And turning to the public accounts for 1861, I see that the amount paid by Government "for editing and publishing the Lower Canada Reports," was $2,151.53! In 1862 it was $2,231.94, and in 1863 it had increased to $2,510.95, or about four and a half dollars a page! The publishers might well afford to circulate the Reports gratuitously at this rate. Pray where is this expenditure to end? Is the Government always to pay the bill regardless of the amount? It would seem so; for it has allowed the sum to be doubled since the establishment of the Jurist, the continued issue of which, even in the face of what must be considered as an absurd competition by the Government, has proved that the profession is able and willing to pay for its own reports.

A. H. B.

THE STATE OF ENGLISH LAW: CODIFICATION.

[From the Westminster Review, April, 1865.]

1. Speech of the Lord Chancellor on the Revision of the Law.
2. Address of Sir J. P. Wilde, delivered before the National Association for the promotion of Social Science.

Nearly half a century has passed away since Bentham wrote his celebrated "Papers relative to Codification," which, though in some respects crude and imperfect, may be regarded as having given the first impetus in this country to the modern ideas on this the most important branch of law reform. And although up to this time but little of tangible result has been obtained, yet symptoms are not wanting that the views propounded by Bentham, and enforced and developed by Sir S. Romilly, J. Austin, and H. S. Maine, are gradually forcing themselves upon the attention of our leading lawyers and jurists. The seed has fallen on a soil not altogether barren, and after a long period of germination, has at length given signs of bursting into blossom. The conviction is getting more and more universal that something must be done to rescue the law from its present chaotic condition, and to control its future growth. It is felt to be a reproach that the country which assumes to be the leader in civilization can point to nothing for her laws but some 1100 volumes of well and ill-decided cases, supplemented by a huge pile of partly operative, partly repealed statutes, the whole arranged on that worst of all possible plans—a chronological one. It is seen that legal principles and legal rules which are daily enunciated by counsel at the bar and by judges on the bench must, from the nature of the case, admit of being expressed in intelligible language, and of being grouped in an accessible form. On the other hand, the real difficulties to be overcome in recasting the law are, perhaps, not sufficiently appreciated by many of those who feel most strongly that the law ought not to remain in its present shape. It is not uncommon for those who have had no practical experience, who have never tried their hands at framing a rule of law, to suppose that the task is a simple one, and to suspect that the difficulties are created by those whose interest it is that the law should not become too readily *cognoscible*. Those who think thus would do well to ponder the words of the late Mr. Austin, whose competence as an authority will not be questioned. Mr. Austin ("Jurisprudence," vol. ii, p. 370,) writes:—

"Whoever has considered the difficulty of making a good statute will not think lightly of the difficulty of making a code. To conceive distinctly the general purpose of a statute, to conceive distinctly the subordinate provisions through which its general purpose must be accomplished, and to express that general purpose and those subordinate provisions in perfectly adequate and not ambiguous language, is a business of extreme delicacy and of extreme difficulty, though it is frequently tossed by legislators to inferior and incompetent workmen. I will venture to affirm that what is commonly called the *technical* part of legislation is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law than so to construct that same law that it may accomplish the design of the lawgiver."

Such is the opinion of one of the acutest of thinkers and most ardent of law reformers, and there can be little doubt that every practical draughtsman will add his testimony on the same side. Indeed, it is probable that a sense of the magnitude and difficulty of the undertaking has operated fully as much as any other cause to deter our lawyers from attempting the consolidation and re-arrangement of our statute and case law. However, there are signs—and among them none more noteworthy than the remarkable addresses which form the subject of this paper—that the attempt will be made, and at no distant period. The present, therefore, seems a suitable time for drawing attention to the subject, and for giving a fair consideration to the arguments of those who are opposed to codification. For it is the fact that some lawyers of eminence have doubted and still doubt the possibility of success in this work. It is argued that a code will introduce greater evils than those it cures; that the wisest legislator can foresee only a small part of the combinations to which human affairs will give rise; and that the infirmities of language will not allow him adequately to provide for the cases he does foresee. Appeal is made, in confirmation, to the actual working of existing codes, all of which, it is said, are in fact supplemented by a mass of comment and traditional interpretation far exceeding in bulk the codes themselves. We shall examine in due course the value of these arguments. We believe it will be found that the objections raised apply rather to a code in the form in which it is commonly proposed that it should be cast, than to a code in the best form in which it is possible to cast it. We think the error of most codifiers has been to rely on the exclusive use of tersely-worded abstract propositions, each intended by force

of the language used to indicate with accuracy its own scope—to strive against the imputation of repetition—to be sparing of illustration—to dispense almost entirely with explanation, and generally to render their productions dry and colourless collections of formulæ, rather than clear statements of principle expounded and explained by comment and by example.

In order to substantiate our position, as well as to convey some idea of the real work which has to be done and the advantages which will result from its accomplishment, it is necessary to exhibit the actual state of our law, the process by which it has been developed into its present shape, and the mode in which the vast and intricate storehouses of legal knowledge are made available. We shall therefore, in the first place, offer such a sketch as is necessary to the comprehension of the questions to be discussed, avoiding as far as possible the use of technical language, and availing ourselves freely of the materials which the Lord Chancellor and Sir J. P. Wilde have provided.

The law of this country may be divided into two classes:—the law which has been expressly enacted by the Legislature, called the written or statute law; and the law which has grown up without express legislative sanction, and which is sometimes called the unwritten law. The latter class comprises what is designated the Common Law, and also a body of law known as Equity or Chancery Law, of comparatively modern origin, and intended to supplement and correct the Common Law. The origin of the Common Law is thus described by the Lord Chancellor:—

"Of the Common Law, much, no doubt, consisted originally of customs and usages, recorded only in the memories of men; much of rules embodied in acts of the Great Council, of which no record now exists: much was derived from the Civil law, relics of the old Roman jurisprudence, which remained so long through the land; and much was deduced from general maxims and principles handed down from one generation of lawyers to another. Thus, the sources of the Common Law were in ancient times of the most indefinite character, and the power or liberty of judicial decision was equally unlimited."—P. 5.

In the reign of Edward I. the practice of reporting the decisions of the judges began, and thus was added a fresh authority which might be referred to as evidence of what the Common Law was. Gradually arose the habit of appealing to a reported decision as a sufficient ground for deciding a parallel case in like manner, and precedent was allowed to rule, in some cases to the exclusion of justice. ....

We will now leave the Common Law and direct our attention to Equity or Chancery Law. The growth of Chancery Law is a striking illustration of the means to which recourse is had when the Legislature neglects its obvious functions. At a period when the nation had outgrown the old Common Law, and the judges of the Common Law Courts were too narrow or too timid to assume the requisite legislative powers, the Chancellors, as keepers of the King's conscience, undertook to supply what was wanting, and to correct what was amiss out of the reserve-fund of Equity supposed to reside in the royal breast. It was in the nature of things that the establishment of this right of interference should introduce uncertainty. The effect was thus described two centuries and a half ago:—(Selden's "Table Talk," Singer's edition, p. 49.)

"Equity in Law is the same that the Spirit is in Religion—what every one pleases to make it. Sometimes they go according to Conscience, sometimes according to Law, sometimes according to the Rule of Court. Equity is a roguish thing; for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a Foot, a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot; 'tis the same thing in the Chancellor's Conscience."

So defective, however, was the Common Law, that it is impossible to doubt that the interference of the Chancellors has, on the whole, been salutary; and the authority of Chancery precedents having long been fully established, the uncertainty of which Selden complained has ceased to exist. The Courts of Common Law did not adopt the Chancery doctrines, and the only mode the Chancellor possessed of enforcing his decrees was to imprison those who refused to submit to them. Thus arose the remarkable anomaly of two legal systems in many respects antagonistic, existing side by side in the same country. To this day a man may win his cause at Westminster and lose it at Lincoln's Inn. To this day a person with an unquestionable right may have no means of asserting it except by asking the Court of Chancery to prevent another from disputing it. Truly a singular spectacle in this 19th century, a Lord Chancellor restraining a subject, under pain of imprisonment, from appealing to the ordinary Courts of Justice!

To complete the picture of our legal system, we have the Statute Law or Parliamentary legislation commencing with the 20th Henry III., and contained in some forty-five thick quarto volumes. "The sta-

tutes are printed without the least regard to order; there is no system or arrangement. They are printed just as they have been passed, chronologically. There is of course a great variety of subjects, and enactments on the same subjects are dispersed and scattered over an immense extent of ground." P 22. Many of the Statutes were temporary in their nature, or have been wholly or partially repealed, some by express enactment, others only inferentially, so that it is often a work of difficulty to discover what provisions are in force on a particular subject. When the provisions still in operation have been ascertained, there remains the task of interpretation, which requires for its performance a competent knowledge of the Common and Chancery Law, and also of the particular judicial decisions on the construction of the clauses under consideration. Every decision on the construction of a Statute is virtually incorporated with the Statute to which it refers, and in this way many Statutes have become so loaded with commentary that their original features can with difficulty be recognized.

Such then is England's code. We have the *lex scripta*, or Statute Law, and we have the *lex non scripta*, consisting of a body of rules nowhere stated in express terms, but to be inferred from the many thousand decisions contained in the reports. There can be no doubt wherein lies the most palpable defect in our legal system. It is that our laws are accessible with difficulty even to the trained lawyer, while to the public they are almost a sealed book. When a case is laid before a lawyer for his advice he has no authoritative text to which he can refer for the principle which is to guide him. Beyond the maxims with which, through long experience, his mind has become impregnated, he can rely on nothing but such light as the decided cases may afford. Frequently he will have to wade through the tedious details of twenty or thirty cases in search of a single rule—cases, be it remembered, not manufactured for the purpose of illustrating legal principles, not reduced to their simplest possible forms, but presented with all the complexities with which matters of actual experience are commonly surrounded. Not unfrequently, in order that the precise grounds of a single decision may be understood, it is necessary to peruse also the cases cited in the judgment or referred to in the argument. Not until the lawyer has gone through the laborious process of comparing case with case, eliminating and rejecting what is immaterial from each, can he arrive at a satisfactory conclusion. But his labour is not confined to the mere examination of specified cases. He has, as a necessary preliminary, to find out what cases are worthy of being consulted with reference to the subject in hand, and must satisfy himself that every case of importance has been included in his examination. This part of the task alone would be well nigh impossible but for the assistance he derives from treatises—that is, from the labours of unauthorized codifiers. And valuable though the help obtained from these sources is, yet no treatise can relieve the lawyer from the necessity of consulting the original records. The dictum of a text-writer has no authority binding on a judge; it can only be regarded as the opinion of the author—an opinion, in many instances, entitled to high respect, but still an opinion only. Even the propositions laid down by writers accounted of almost judicial authority require to be explained and limited by reference to the cases from which they have been extracted before they can be acted on with confidence. A text-book is, therefore, little more than an elaborate index to the cases, accompanied by suggestions, often of the greatest value, as to the rules and principles which the cases may be made to yield up.

The difficulty of discovering the law which is felt by the experienced lawyer, nay, even by the judge on the bench, weighs with tenfold force upon the student. To him the area of the law is indeed a "tangled thicket," requiring the application of unceasing energy and untiring industry before it can become in any sense a "district set out in order." After he has mastered a few elementary treatises, sufficient to put him in possession of the technical terms, and of a certain number of rules of every-day application, he can do little beyond watching the course of business in the chambers of a practitioner, and reading the fresh decisions as they make their appearance. These he has to arrange and classify for himself as best he can, trusting to time and experience to weld together into a harmonious whole the accumulated fragments. Can it be wondered that with these drawbacks many should abandon in despair the attempt to grasp the law as a science, and should content themselves with committing to memory isolated precepts, and with mastering the petty details of every-day practice?

In short, the process of discovering and acquiring the law is one which involves a wasteful expenditure of time and labour—wasteful because admitting of enormous reduction. That which should be settled and proclaimed by authority once for all, has to

be worked out by hundreds of individuals, each for himself. Did we possess a systematized body of law, we should have more earnest students, more skilful lawyers, and better and cheaper justice. That the acquisition of the law can ever be an easy task, or its administration otherwise than burdensome, it were folly to expect; but there can be no reason why an effort should not be made to aid the practitioner and to ease the suitor. The two results go hand in hand; whatever tends to simplify the law and to render it cognoscible and easy of access, tends also to diminish the heavy fees, the vexatious delays, and the occasional miscarriages which are now so justly complained of.

[The Reviewer, after commenting upon the conflicting systems of Common Law and Chancery Law, and the cumbrous laws regulating transfers and mortgages in England, proceeds :—]

We have given evidence, we trust of a sufficiently cogent character, in support of the view that inaccessibility is the mastervice of our legal system. It remains to be added that the mischief is multiplying at an alarming rate, and bids fair at no distant date to expand into truly formidable dimensions. The Case Law is stated by the Lord Chancellor already to occupy between 1100 and 1200 volumes, and is growing with constantly increasing rapidity.

"At this time there are at least forty or fifty distinct sets of reports pouring their streams into the immense reservoir of law, and creating what can hardly be described, but may be denominated a great chaos of judicial legislation."—P. 8.

Sir J. P. Wilde also bears testimony to the vast increase of reported cases in modern times :—

"I do not stop to inquire into causes, but the fact is that the present century has added more decided cases to the law than are to be found in the records of the five preceding centuries put together. This vast agglomeration breeds not only confusion in those who are bound by the law, but inconsistency in those who administer it. No power of assimilation can keep pace with such production, and the tribunals, occupied to the full with the business before them, have little time to master the results of contemporary decisions."

A second defect in the law as it is, though in our view one of which the extent is somewhat overrated, is want of certainty. The system of precedent, which on the whole tends to fix the law even down to minute details, works in some instances in the contrary direction, and instead of removing doubt, introduces it. The result is brought about through the agency of vicious precedents. Judges are not infallible, and though actuated by the purest intentions, they sometimes decide wrongly. Such decisions are nevertheless available for citation, like all other precedents. Now, when an erroneous decision in the past comes to be pressed upon a judge in the present, one of two things must happen—either the precedent must be followed, or it must be disregarded. The traditions of the profession point in one direction, while the instinct of justice exercises its influence in the opposite. The result is oftentimes a compromise. The decision is in effect disregarded, but its authority is saved by recourse being had to some shadowy and fictitious distinction. This practice was recently satirized by a living judge, who, on a case which we will call "Brown *v.* Robinson" being cited in argument, informed the bar that he should not feel himself bound by that case unless a suit were before him in which the facts were precisely similar; "indeed," added his lordship, "unless the plaintiff's name were Brown, and the defendant's Robinson."

In this way an erroneous judgment, though outwardly treated with respect, may get undermined with distinctions which render it practically inoperative, and at this crisis it commonly happens that some judge, bolder than the rest, deals a death-blow to the tottering structure by declaring that "that case has long since been overruled." A striking instance of an important modification of the law by a single decision occurred quite recently. Five years ago it was universally believed among lawyers that, if A lent B a sum of money to be employed by him in business, A's remuneration for the loan being a certain share of the profits, that agreement rendered A liable to the creditors of the business to the last farthing of his property; in other words, that in favour of creditors, participation in profits was a criterion of partnership. Such was the distinct tenor of a long series of cases, "because," as it was sagely said, "the profits are the source to which the creditors look for payment; and therefore, he who shares the profits must also share the losses." However, the House of Lords, by a recent judgment, has gone far towards demolishing the old doctrine and substituting the reasonable principle that partnership or no partnership is simply a matter of agreement between the parties, that creditors have no concern with the question except so far as they have been induced to believe that a partnership really subsisted, and that participation in the profits is only to be regarded as *primâ facie* evidence of a contract of partnership. Here we have an example of

a sudden and unexpected change of the law. More commonly, however, the elimination of a well-rooted but vicious precedent is effected by slow degrees, and while the process is going on the point of law under treatment is necessarily to some extent in a state of uncertainty.

It is, then, impossible to deny that on many points there is a conflict of authority, and also that there is danger in trusting too implicitly to decisions of which the propriety may appear doubtful. Still, on the whole, it cannot be said that the uncertainty due to these causes is practically felt to any great extent. The able and experienced lawyer who is willing to devote the necessary time and labour to the consideration of the points submitted to him, can, generally speaking, arrive at a trustworthy conclusion. The cases are comparatively rare in which he will find it difficult or impossible to decide with confidence on the relative values of competing authorities.

How, then, it may be asked, is it that the "glorious uncertainty of the law" has passed into a proverb? The answer is not difficult. In one-half of the cases in which the phrase is used the meaning is simply the glorious difficulty of proving a disputed fact, and in the other half the impression as often as not has reference to the large discretion which is necessarily entrusted to juries. How, for instance, would it be possible to lay down a body of rules which should be applicable without fail to the measure of damage in any instance? Manifestly a discretion must be reposed in the jury, and their verdict must often be a matter of uncertainty. Nor should it be forgotten that points of real doubt and difficulty must frequently present themselves, and that such cases are precisely the ones which are litigated. It would therefore be unfair to judge the law, as is often done, solely by the litigated cases, without taking into account the overwhelming majority of cases in which its work is done effectually, though in silence and secrecy. Much, then, of the uncertainty of the law is in the nature of things inevitable. It is found under every legal system, and will remain even though our code were as perfect as human ingenuity could make it. On the other hand, there can be no reason why such of the uncertainty as is due to the conflict of authority should be permitted to remain. The suppression of erroneous precedents is plainly a desideratum, and can be attained only by means of such a survey of the entire field as, for other and more important ends, we desire to see undertaken.

We have endeavored to depict the principal inconveniences to which our legal system gives rise; it remains to consider whether a remedy can be found. Is it possible to recast the existing law in a more intelligible, more certain, and more accessible form, without sacrificing anything that is valuable in the present system? We do not hesitate to answer this question in the affirmative. The rules of law exist, though they are only to be discovered by a process of comparison and inference. It must therefore be *possible* to extract them from the mass in which they lie imbedded, and to arrange them systematically. In the words of Mr. Austin, "Jurisprudence," vol. ii. p. 377,—

"Rules of judiciary law are not decided cases, but the *general* grounds or principles (or the *rationes decidendi*) whereon the cases are decided. Now, by the practical admission of those who apply these grounds or principles, they may be codified or turned into statute laws. For what is that process of induction by which the principle is gathered before it is applied, but this very process of codifying such principles, performed on a particular occasion, and performed on a small scale? If it be possible to extract from a case or from a few cases the *ratio decidendi*, or general principle of decision, it is possible to extract from all decided cases their respective grounds of decision, and to turn them into a body of law abstract in its form and therefore compact and accessible. Assuming that judiciary law is really law, it clearly may be codified."

"Not so," reply the opponents of codification; "it is impossible to frame rules which shall with certainty catch just all the cases which the legislature intends to include and no more. Language is not sufficiently definite for the purpose, and rules which seem perfectly plain and satisfactory to the draughtsman (who, of course, knows his own meaning), will be found open to numerous doubts and susceptible of a variety of interpretations when they come to be tested before the judges." Now we are perfectly willing to admit that, so long as a code consists only of general rules, formidable difficulties of interpretation will assuredly present themselves, but we contend that this objection may be effectually surmounted by the simple expedient of appending to the rules a sufficient sample of the special instances which suggest them. Rules so illustrated carry their own interpretation; the illustrative cases are, in fact, precedents, and the rules no more than a statement of that which the cases involve. No greater difficulty could therefore be felt in applying the rules than in applying the precedents, as at present, apart from the rules. Indeed, we have positive proof of

the ease with which illustrated rules are applied. For what are the dicta of eminent judges and text-writers but illustrated rules? Many of these dicta have the authority of settled law, and no serious difficulties are found to arise in the process of interpreting them. Why? Simply because such dicta are always viewed with reference to the cases which give birth to them. Manifestly the same result would follow if the rules were laid down by an authority higher than either judge or text-writer—provided, that is, the rules were still united to the illustrative cases, and interpreted by reference to them. But, it is argued, granted that by means of the free use of illustration the legislator can include all the cases he has in his mind, how is he to frame his rules so that they may be applicable to *unforeseen* combinations of facts? So long as a rule of law exists only by implication in a series of decided cases, it possesses more or less of an undefined or elastic character, and in applying such a rule to new cases a judge has present in his mind the principle of expediency by which the rule is justified, and thus a safeguard is provided against a too rigid adherence to the rule in cases which might fall within it if it were reduced into set terms. However carefully the codifier may frame his abstract propositions, there is perpetual danger that his words, legitimately interpreted, will extend to cases which, if they had originally fallen within his contemplation, he would certainly have excluded. In the words of an able writer, ("The Jurist," New Series, vol. IX, part ii, P. 341)—

"We defy the ablest extractor of principles to codify any single branch or subject of judiciary law in such a manner as to anticipate and provide for future cases with a tithe of the completeness and certainty with which they are anticipated and provided for by the uncodified precedents; and this for the reasons already given—that the precedents are not bound in the fetters of set terms, and that their full import and application are inexhaustible and unknown even to those who make them, and can only be brought out step by step as new cases arise." ..... (Ibid, Page 340.) "The history of every head of judiciary law is, that first a case arises in which a general principle is established and applied; then cases arise which determine the limitations and exceptions. A principle caught by a codifier in the first stage of its development would be enacted in all the generality of a neat rule, without qualification or exception, and capable of none save by very rough nursing in the courts."

This argument is certainly plausible, and has appeared to many conclusive. We conceive the answer to be that no code should attempt to provide for unforeseen cases by means of detailed rules. It is perfectly obvious that any such attempt must be unsuccessful. It would, no doubt, be practicable to include all possible cases in a set of highly general principles or maxims, but such maxims would be valueless from their vagueness. In order that the rules of law may be useful, they must enter into considerable minuteness of detail; and, as a necessary result, much must be left unprovided for, because unforeseen. But, it will be asked, if the code does not provide rules which will take in unforeseen cases, how are such cases to be decided? We reply, in the same way as they are now decided, namely, by an appeal to considerations of equity and expediency. At present every judge holds himself justified in resorting to these fundamental principles so long as his decisions are not inconsistent with the general spirit or the details of the settled law, and we are unable to see that this liberty would be in any degree interfered with by a new arrangement of the settled law on a different plan. So long as the spirit of the law as shown by the illustrative cases is taken as the guide to interpretation, there can be no danger that a code will give rise to narrow and hurtful decisions. It may be urged that in addition to the mere decisions our books contain the reasonings of the judges, and that the study of these is of material assistance towards grasping the true spirit of the law. To this we fully assent, and we would therefore add to the code wherever needful and practicable, the reasons by which the rules are justified. We cannot but think that this element would be found of great value, both as affording an indication of the limits of the various rules, and as guiding to the decision of unforeseen questions. The maxim, *cessante ratione legis cessat ipsa lex*, would be applicable then as now, and the judges would still retain the liberty they now enjoy of resorting to first principles when occasion required.

We think, then, it is clear that the sacrifice of the power of development—so far, that is, as development consists in the application of old principles to new instances—is not a necessary consequence of a re-arrangement of the law in the form of a code. We are aware that there is another kind of so-called development—namely, that which consists in the actual alteration of established rules. To this species of development a code would, no doubt, prove a serious obstacle. This we are far from regarding as a mischief. On the contrary, we count it not one of the least advantages of a code that it proclaims the law as it is, be

it good or be it bad, throwing the responsibility, where it ought to fall, on the Legislature. Among less advanced communities Fiction and Equity may be the appropriate modes of counteracting hurtful laws. In this country their day is well nigh over, and for the future direct legislation may be looked to as the only source of improvement.

To recapitulate: a good code should, in our view, comprise three elements—rules, illustrative cases, and comments or reasons; the rules serving to formulate the law and to give it expression in concise terms; the cases and comments serving to explain the rules and to secure to the law the attribute of elasticity. We would incorporate into our code such of the reported cases as appeared to be of value as precedents—not, indeed, in their present shape, but stripped of all unnecessary complexities and trimmed into manageable dimensions. We would add such further cases as might suggest themselves and as were calculated to throw light on the text. We would exhibit the reasons of the various rules, their origin and inter-dependence, wherever such a course seemed necessary for enabling their meaning and spirit to be fully grasped; and for this purpose we would avail ourselves of the labours of our judges and of our text-writers. In short, our code should be modelled after the fashion of the best treatises, equalling them in point of clearness and logical arrangement, and far surpassing them in authority and in completeness. The plan of codification here suggested coincides substantially with that proposed by Sir J. P. Wilde, as we understand him. He is in favour of an authorized text, illustrated by the whole of the cases, arguments, and judgments in our books, except such as may be authoritatively condemned. Now, while thoroughly agreeing with this scheme in its essential features, we cannot but think that far better, and far more concise illustrations could be given than those contained in the reports. As a general rule, the pith of a reported case—all that is really valuable in point of illustration of legal principles—can be set down in one-tenth part of the space that the report occupies. To retain, then, the main bulk of our cases would be, as we conceive, to maintain one of the most prominent and rapidly growing evils of the present system.

The idea of an illustrated text is not a new one. It was first brought prominently forward by the framers of the Indian Penal Code. . . . . There is one argument against immediate codification which we have not yet mentioned, but which calls for notice as it has apparently received the sanction of no less an authority than the Lord Chancellor. It is this: that codification cannot be successful until the body of the law has been purged of the grave inconsistencies by which it is now disfigured. On this ground Lord Westbury advocates for the present no more than the weeding of the statutes and cases, and the re-arrangement of the purified material, without alteration in point of expression, according to the subjects—that is, the formation of a digest. . . . . We do not dispute the utility of Lord Westbury's plan, but we are unwilling that the work of codification should be postponed, as it appears to us, unnecessarily. We consider that a preliminary digest would be a good thing, but a preliminary code a better, and for this reason, that a code tells us what the law is, and in the shortest form compatible with clearness, while a digest still leaves the law to be inferred, and still leaves the mass of material bulky, complex, and, save to the initiated, incomprehensible. The example of text-writers proves conclusively that a digest is not *essential* as an intermediate step, since all the best text-writers attempt, and many of them with marked success, to discover and arrange the rules and principles which are involved in the decided cases.

That which has been done successfully by text-writers, we desire with Sir J. P. Wilde to see attempted on a large scale and by authority, and we concur with him in thinking that the work may be accomplished piecemeal. It would be necessary to repeal nothing expressly, though of course some existing precedents would be rendered nugatory by the adoption of others inconsistent with them. On the completion of any section it would be sufficient to enact that its provisions should be conclusive as to all matters falling within their scope, leaving all matters not falling within the provisions of the completed sections to be decided in the same way as they are decided at present. Step by step every branch of the law could be added, except such—constitutional law, for example—as it might be considered inexpedient to meddle with. When all the sections were completed, we should have an authority sufficient for all ordinary purposes. The first question for the lawyer would be, Can the point under consideration be solved by an appeal to the code? If, as would occasionally happen, the provisions of the code proved insufficient, then, and then only, should recourse be allowed to other authority. In this way the law would be rendered easy of access, while an efficient safeguard would be pro-

vided against the consequences of unavoidable imperfection or intentional omission.

It forms no part of our present purpose to enter into a minute discussion of the precise machinery by which the work of codification may be carried on. It is sufficient to state that it would certainly be necessary to secure the exclusive services of six or eight highly skilled, and of course highly-paid, men to prepare the necessary measures for Parliament. To such a body might fitly be assigned the permanent duty of a general superintendence of the form of our legislation, and of a periodical revision of the fresh cases, so as to keep the code on a level with the later developments.

LAW REPORTING IN ENGLAND.

(*From Fraser's Magazine.*)

At the numerous and influential meeting of the bar, convened by the Attorney-General on the 2nd December, 1864, a large majority affirmed Mr. Daniel's resolution—'That the present system of preparing, editing, and publishing the reports of judicial decisions in this country requires amendment;' and a committee of gentlemen, fairly representing the different grades and interests of the profession, was appointed to consider and report to a future meeting the best means of improving the system.

Pending the labours of that committee, it may not be out of place to lay before our readers some observations upon the subject of the present system of law reporting, and the objections which are urged against it—a subject which does not concern the bar alone, but is one in which the community at large have, though they may not take, a deep interest; is also one on which those who are not lawyers by profession are, in many instances, without very definite ideas or very accurate information. In the first place let us explain what Law Reports are. Law Reports are a collection of permanent records of the material facts, proceedings, arguments of counsel, and judicial decisions of Courts of justice, in cases brought before those Courts for decision, purporting to be made by persons present at the argument and determination of the cases. (The necessarily ephemeral and incomplete accounts of the proceedings of the Courts which appear in the daily newspapers do not deserve the name of reports, and, as a rule, cannot be referred to as such by counsel. Thus, for instance, in the *Alexandra* case, counsel were not permitted by the Court of Exchequer to read from a report of a case in the *Times*.) The judicial decisions thus recorded are applications, by the Courts, of the law to the facts of the cases reported. In theory, though not always, it is to be feared, in practice, they are enunciations by the judges of the law which already exists, not of a law then first promulgated; the judges being bound *jus dicere* not *jus dare*. The Reports, then, are chronicles of determinations of points of law, not of points of fact. It may be added that a great majority of the law reports are records of the decisions of full Courts, not of individual judges of the Courts. .... The reporters in the different Courts below generally follow cases appealed into the Courts of appeal, and include the decisions of those Courts upon them in their reports; some reporters thus following a case no further than into the first Court of Appeal; others tracing it to its ultimate fate before the House of Lords, if thither it goes. Reports of the decisions of the House of Lords in appeal cases are also published in a series by themselves, as are those of decisions of the Judicial Committee of the Privy Council, in cases in which an appeal lies to that body.

Thus far, then, we have seen that Law Reports are embodiments in a permanent form of the material facts, proceedings, arguments of counsel, and judicial opinions of our Courts upon the law applicable to the facts, in cases heard and determined in the Courts of original and appellate jurisdiction in this country. When we have said that the decisions of the superior Courts, and Courts of high jurisdiction only are in practice reported—that no one, for instance, now puts into print the decrees of a County Court judge—we have said enough to indicate the extreme importance of the subject matter with which the Reports are concerned. In them will be found the muniments of the rights and the measure of the obligations of all classes of the community.

(After describing the process of reporting the writer proceeds to remark:—)

Thus, then, are the Law Reports prepared and edited by private individuals, wholly independent of State or judicial control. And as they are prepared and edited, so are they also published by private enterprise. The irregular reports are regular in their irregularity, some of them appearing in weekly, others in monthly parts; the regular reports are so far irregular in their regularity, that they appear in parts at fitful and uncertain intervals, as it suits the convenience of their authors to issue them.

There are many who deprecate a system of jurisprudence in which 'case-law' finds a re-

cognized place. They sigh for a code, to whose procrustean sections they may refer every complicated knot in human affairs for solution. Failing this, they would disentangle every such knot by an appeal to first principles only, not also by researches into the manner in which deft fingers have before untwisted similar strands. We shrewdly suspect the majority of such objectors are not gifted with that faculty so useful to the working lawyer, a memory for cases, and that their want of this faculty has much to do with the vehemence with which they disparage it. Be this as it may, it is certain that the law of England is, and will long continue to be, based on a respect for precedent, that is, previous decisions. For instance, the works of eminent writers on the law are often referred to in argument, as throwing light upon the subject before the Court; but the opinion of any such writer is as dust in the balance against the weight which the Court will attribute to the decision of a Court of co-ordinate jurisdiction, provided it is unreversed and can be appealed from. In the language of Chief Baron Pollock, 'The rule is this: that wherever there is a decision of a Court of concurrent jurisdiction, the other Courts will adopt that as the basis of their decision, provided it can be appealed from. If it cannot be appealed from, then they will exercise their own judgment.'

Such being the respect paid by our law to authority, one of the chief matters into which our Courts inquire, in all questions of law which come before them, is whether or not the point at issue has been before decided in a manner which is binding upon the Court where it is now mooted. If it has, the point is said to be concluded by authority, and the Court gives judgment accordingly.

The labours, then, of the law reporter not only furnish the chief staple of forensic argument, but upon them mainly hinges all judicial determination. Whence it is obvious that it is of the highest importance to the community at large that the law reports should be accurate and authentic; also, that they should be published with all possible expedition. The present system of reporting is charged with a failure to secure these desirable results. Accuracy and authenticity, it is said, are rendered impossible both by the number of reports of the same cases and the method by which they are produced. Judges are enabled to disclaim having used the expressions attributed to them, and no one can predicate whether they will follow this, that, or any version.

Those who thus condemn the present system have a panacea to suggest for all its alleged mischiefs. The State, say they, is bound to take the duty of law-reporting upon herself. Let, therefore, a staff of barristers be appointed for each Court, as its official reporters, with fixed salaries, paid by the country; and let them give up private practice at the bar, devoting themselves entirely to their official duties. Let there be some revision of the reports which they draw up, before publication, whether by the judges of the Court, or by a permanent board, to be appointed as editors. Let the judges revise all judgments which are to go forth under the sanction of their names; and let them deliver none but written judgments in all cases, as is now the practice of the judges of the Roman rota, and of our own judges in India. Let the Courts allow only the official reports to be cited as authoritative and authentic. Let a complete report of each decision be published, written, at most, three months after the Court pronounces it, and a short abstract of it be issued by the reporters at an even earlier period. Let, lastly, the price of the Reports be such as to bring them within the reach of the most moderate means.

Many, on the other hand, take exception to these proposals. In their opinion, the system now prevailing best secures faithful and impartial reports. *Nescit vox missa reverti*, as now uttered by the judges in the ears of independent chroniclers: if revocable after utterance, would it not cultivate an *animus revertendi*? Again some, at all events, of a multitude of independent chroniclers must chronicle aright; all of a paucity of official chroniclers may often chronicle wrongly. Indolence, distaste, and carelessness are ever plants of rapid growth in an official bosom; and can such plants put forth healthful printed leaves?

For our own part, we doubt whether the discrepancy of the reports, as at present compiled, *inter se*, is not much exaggerated. That they necessarily vary greatly in precision and completeness must be admitted. The advantages of a single authentic version, prepared by gentlemen in whom the profession—and therefore the public—could feel confidence, would be undeniably great. We doubt, however, whether reporters ought not to remain, as at present, independent of the control of judges; and we should assuredly hesitate long before approving their conversion into mere officials, debarred from that private practice which is not only their best teacher, but their strong incentive to excellence. (Reporters have often been elevated to, and proved distinguished ornaments of the Bench. We may instance the names of Jervis, Cresswell, Alderson, amongst the past; of Crompton and Blackburn amongst present Judges. Also Sir C. H. Scotland, Chief Justice of Madras.) Again, it appears to us that the business of the Courts could scarcely be carried on, were

judges required to put their judgments into writing in all cases; and that in very many cases written judgments are not called for.

In conclusion, let us point out what appear to us to be two great and crying evils in the present system. The first and foremost is the indiscriminate publication, now permitted, of each and every case that is decided. The other evil is the undue haste with which some, and the undue delay with which others of the Reports record the decisions of the Courts.

LAW JOURNAL REPORTS.

COURT OF REVIEW—JUDGMENTS.

MONTREAL, May 31, 1865.

PRESENT: Badgley, Berthelot, and Monk, J.

CHAMPAGNE *vs.* LAVALLE, AND TRIGG, *et al*, CONTESTING.—BADGLEY, J.—This was an appeal from a judgment of the Superior Court which maintained the opposition of Trigg, a hypothecary creditor. The real estate of plaintiff's husband being sold after a *separation de biens* had been obtained by her, she was collocated, for the amount established in her favour in the report of the *praticien*, on the proceeds in preference to Trigg, a hypothecary creditor, who contested her claim. The contestation was maintained by the Court. The Court of Review were of opinion that this judgment must be confirmed, as there was nothing to entitle the plaintiff's claim to priority before that of Trigg.

AMIOT *et vir*, *vs.* MARTINEAU.—BADGLEY, J.—The plaintiffs in this case sued on a contract made at Verchères, the action being brought to recover $112, the balance of moneys which they had advanced to the defendant to purchase grain. The latter wished to fyle a declinatory exception, alleging that the summons was wrongly issued here, because the contract was made in the district of Richelieu. But this exception, owing to irregularities, was not in the record at all. This ground was also irregularly taken in the plea to the merits, and of course could not stand there; but in fact the objection could not hold, because the whole cause of action was in this district, the contract was made at Verchères, and the unemployed money sought to be recovered back was handed to the defendant there by the plaintiff. There was another objection, that the judgment was null because there were no *motifs*. But the judgment was sufficiently *motivé* because it adopted a full and circumstantial report of M. Labadie, to whom the matters in contest between the parties and the establishment of the balance between them had been referred. The judgment must be confirmed.

MONK, J. said he had a good deal of difficulty in concurring in the judgment. First, as to the form, it was true that there was no declinatory exception produced regularly, but in the *défense en droit*, the issue was clearly raised—that the contract did not arise in the district of Montreal, but in the district of Richelieu. The plaintiff instead of moving to dismiss this plea as irregular, joined issue and alleged that the contract did arise in the district of Montreal. When one party tendered an issue, and the other joined issue, it became a question whether the Court would not recognize it. Again, on looking into the evidence, his honor found that the main portion of the evidence turned upon that question—whether the contract arose in the district of Montreal or in the district of Richelieu. It was after great hesitation that his honor felt justified in saying that no declinatory exception had been produced. It would be the duty of the Court, if it found that the cause of action arose in the district of Richelieu, to say that it had no jurisdiction. The Court was, therefore, brought directly to the question of the contract. His honor, after reviewing the details of the contract, came to the conclusion that defendant was rightly sued in this district.—Judgment confirmed.

DUGUAY *vs.* SENECAL.—BADGLEY, J.—The defendant, Senecal, made his promissory note in favor of Jubert. The note was not paid at maturity, and Jubert did not protest it, but some time after the note became due, he purchased from Duguay, the plaintiff, certain effects, and endorsed this overdue note to plaintiff in part payment. The note not being paid, the plaintiff sued the defendant (the maker,) for the amount. The plea was, freedom from liability owing to want of protest. Now there was nothing to prevent the payee of a note from transferring it after it became due. The only difference was that the maker would have a right to plead against the endorsee all the equities that might have arisen in the meantime between himself and and the payee. The judgment of the Court below, which was in favour of plaintiff, must be confirmed.

HALL *vs.* BRIGHAM.—BADGLEY, J. said the record in this case had become considerably complicated, but the Court was disposed to confirm the judgment as far as it went now. It was merely for the purpose of enabling an *ex pertise* to take place.

MONK, J. said the objection to this judgment was that in a case of ejectment there was no such thing as an *expertise* to determine the rights of the parties. This was laying down a general principle which was scarcely sound. Every rule of law had its exceptions, and the one above cited in no wise bound the Court. It would manifestly interfere sometimes with proceedings before the Court. The Court did not feel disposed to disturb the judgment, though a careful analysis of it would be curious and might be edifying.—Judgment confirmed.

FLETCHER *vs.* PERILLARD.—BADGLEY, J.—

* Many of the reports inserted here are intended principally for present perusal, and not for future reference, being merely notes of the judgments taken in Court condensed into the smallest possible space. The reports, we may add, have all been submitted to the Judges for correction.

After the death of his first wife with whom Bedard was *commun en biens*, he made a donation of a *conquêt* of the community, with onerous conditions attached. It appeared that several children survived from the first marriage, so that Bedard had only a right to half the *conquêt*. He gave it as having a right to the whole. The donation was made in consideration of the sum of 3,000 livres, and certain alimentary charges to be paid during the life of Bedard himself and of his second wife. 1,200 livres were paid at the time of the passing of the deed. Only 1800 remained to be paid. The action was brought for the recovery of the balance. The defendant pleaded that the plaintiff was never the proprietor of the whole lot, and that being entitled to only half, he could be entitled to only half the consideration money. This would be 1,500 livres, of which 1200 were actually paid to him, as shewn by the deed. The defendant, the donee, alleging subsequent payment to the donor of other 300 livres, and, moreover, the want of property in the donor except for half, pleaded that of the other half, being the property of the children, he had purchased out the rights of all except two of them. He contended, therefore, that the plaintiff's claim should be reduced to half, and that he, the defendant, had already paid more than the half. The Court thought that the circumstances of the action were clearly proved, and that Bedard had not only received more than his share, but that he had no right to transfer any part of the 1500 livres consideration money to the plaintiff. The judgment dismissing the action (at Vaudreuil) would therefore be confirmed.

CHARTRAND *et al vs.* JOLY, AND WHITLOCK, T. S., AND DESJARDINS *et al.*, intervening. BADGLEY, J.—This contestation arose out of the construction of a Church. The plaintiffs by *saisie-arrêt* attached a quantity of planks and boards, &c., at the mills of the *tiers-saisi*, Whitlock. The defendant was the contractor for the erection of the Church. The intervening parties were his sureties for the construction of the building. The defendant was to furnish all the materials, and the Syndic had simply to pay the price as stipulated in the contract. But the sureties stipulated that the price to be paid by the Syndic should be paid to them, and that all the materials on the premises should be held for them. Consequently they not only controlled the price, but everything that was put upon the premises. The defendant caused part of the timber to be put on the premises, and this was not in controversy at all. The rest of the timber was taken to Whitlock's Sawmill, where it was laid down. It was certain that this timber was never upon the church premises, and never came into the possession of the sureties at all. This timber was seized. The question then was, had the sureties acquired this sawed timber, and was it in their possession? The proof was clear that the defendant purchased this timber from one McCabe, and transferred it to Whitlock. Moreover that he was sued by Whitlock himself, and confessed judgment to Whitlock for the amount demanded. Whilst this timber was in Whitlock's hands, the seizure was made. An hour after, the defendant and one of the intervening parties arrived for the purpose of securing the timber. Whitlock refused to give it up. There was a form of delivery from defendant to the intervening party, but the wood remained in the possession of Whitlock, the *tiers-saisi*. The defendant and the intervening party stood upon the top of a hill overlooking the timber, and the former said to the latter, I give it to you. But this was no delivery nor was the wood taken out of the hands of the *tiers-saisi*. The judgment in consequence must be confirmed.

MORKILL *vs.* HEATH.—BADGLEY, J.—This was a petitory action. The defendant asked for the revision of a judgment maintaining plaintiff's demurrer to the defendant's plea, and dismissing the plea with costs. The plaintiff brought a petitory action to recover possession of the North-East half of lot 27, in the fifth range of the township of Stoke, founding his action upon a deed from the Secretary-Treasurer of the Municipal Council of the County of Richmond, dated 17th September, 1861. The land in question, 100 acres, with some other lots, equal to 300 acres in all, was sold for taxes on the 6th February, 1860, and purchased by plaintiff for the small sum of $9.30. The defendant pleaded that he had acquired the property from the British American Land Company by location ticket on the 10th of April, 1862, for $200, of which $50 was paid cash. The British American Land Company were then, and had been for more than ten years, the proprietors in possession of the land, and the plaintiff never had posession of it. That the sale of the land for taxes in February, 1860, was illegal, no taxes having been due, the Land Company having paid all the taxes to the Secretary of the Municipal Council of Windsor and Stoke, and the proceedings of sale to plaintiff were null. Further, that the plaintiff's deed was executed before the time allowed by law, inasmuch as it was granted before the expiration of two years from the date of sale for taxes, contrary to the provisions of the Statute. To this plea the plaintiff demurred on the following grounds:—First, that the validity of the deed of the Secretary-Treasurer, upon which the action was founded, could not be legally tested in the present suit in which neither the Corporation of the County of Richmond, nor of the Township of Windsor and Stoke were parties. Second, that by the common and Statute law of the Province, the plaintiff could not be dispossessed of the lot of land in question, nor could his title thereto be annulled, till after the judgment of a competent tribunal (pronounced against the Municipality, the Secretary-Treasurer of which received or was entitled to the purchase money), ordering such Municipality to repay the sum either with or without damages, or declaring the sale null and void. Third, that no such action was ever instituted, or was alleged to have been instituted against the said Municipality. This demurrer was maintained in the Court below.

The defendant contended that it was erroneous on the following grounds :—First, because the subsection of the statute cited above had no application to the present case. It simply defined the mode of proceeding which would be adopted by a person whose property had been illegally sold for taxes, where the purchaser had got actual possession and the owner had been dispossessed. The choice of actions did not rest with the defendant. He clearly had a right to defend himself, to dispute the title of the plaintiff, and to show, that he, defendant, held the land under a good title. Second, because on its face the plaintiff's deed was null, and the defendant had a right to plead such nullity. Third, because the defendant's plea was a legal and valid defence to the plaintiff's action, and defendant had a right to show that the deed granted by the Secretary-Treasurer was null. His Honor thought the judgment should be reversed. The Secretary-Treasurer had a right to transfer only the expectancy of the land after the two years had elapsed. Consol. Stat. L. C., Chap. 24, Sec. 61, Subsection 6, enacted that the owner might redeem within two years, on paying the price and 20 per cent more. Judgment reversed and proof ordered.

MONK, J., said the demurrer was quite untenable. If the parties had gone to *enquête*, and the defendant proved his plea there would be no difficulty as to the fate of the action. The Court should have ordered proof.

MOLLEUR, *fils vs.* FAVREAU.—BADGLEY, J.—In this case, which was in ejectment upon a verbal lease, the Court was of opinion that the *motif* of the judgment could not be sustained. The *motif* was that the plaintiff had made no legal proof of a *mise en demeure*. The question was as to occupation of a farm under a verbal agreement, and whether at the expiration of the year the defendant had sufficient notice to leave and quit the property. The judgment was grounded upon the *motif* that there was no *mise en demeure*. Now the Court of Review was of opinion that the notice was sufficient. It was proved that a verbal notice was given, and that fact was admitted by the defendant.—The judgment must be reversed.

DUBORD *dit* LAFONTAINE *vs.* COUTU.—BADGLEY, J.—This was an action on a promissory note by the payee against the maker. Defendant pleaded that the note was got from him by surprise and fraud; and he tried to throw the liability on a brother-in-law of the plaintiff. It appeared manifest that plaintiff was too well acquainted with his relative's credit to have anything to do with him, and therefore he would only have to do with defendant.—The judgment of the Court below must be confirmed with costs.

GIARD *vs.* GIARD.—BADGLEY, J.—The only question in this case was with reference to a promissory note, and whether that was the same as the note mentioned in the proceedings. The judgment of the Court below must be confirmed.

CORDNER *vs.* MITCHELL.—

Plaintiff leased a house, with a clause prohibiting sub-letting without his express consent in writing. Held, that the verbal consent of plaintiff's agent to a sub-lease, and the plaintiff's acquiescence in such sub-lease, during its entire term, was equivalent to a consent in writing.

BADGLEY, J.—

This was an action to resiliate a lease for three years from plaintiff to defendant. Mr. Tuggey acted as agent for the leasing of plaintiff's house, and held a power of attorney to transact all business with respect to the house. Defendant leased the house under a notarial lease which prohibited sub-letting unless with the written consent of the proprietor. Defendant on giving notice was to have the privilege of keeping the house for two years more. On the 3rd Feb., 1863, the defendant sub-let the house to Dr. David, for the remaining term of two years, taking security for the rent, and paying Mr. Tuggey $10 as his commission for obtaining a sub-tenant. The agreement was between Messrs. Mitchell & David. All that Mr. Tuggey had to do with it was putting an advertisement in the papers and receiving his $10. Dr. David entered into and continued in possession for two years. In February, 1865, the defendant gave plaintiff notice of his intention to continue the lease for two years more. This alarmed the plaintiff who did not wish to allow a professional man to continue in the house, and the present proceedings were instituted to have the lease resiliated. During the two years that Dr. David remained in the house Mr. Tuggey, as the plaintiff's agent, received the rent from him, the receipts being worded, "on account of Mr. Mitchell." The plaintiff was aware of this fact, and certain letters from him were produced in connection with the fact. Being brought up as a witness, he admitted that he was aware of the fact that the house was occupied by Dr. David in 1863, and that he expressed neither approval nor disapproval, not wishing to cause any trouble. The Court below resiliated the lease on the ground that there was *no sufficient evidence that the plaintiff acquiesced either directly or indirectly in the sub-lease.* The majority of the Court of Review were of opinion *there was acquiescence on the part of the plaintiff*, hence the judgment must be reversed.

MONK, J. had come to the conclusion that the judgment should be reversed with very great hesitation. Here was a gentleman who leased a first class house, and took the precaution to insert a clause (not necessarily connected with the lease,) that the house should not be sublet without his express consent in writing. It was a principle of law that in cases of this description the lease must be adhered to. But plaintiff had an agent who transacted all his business. This agent had a general authority, and although it might be said that for the purpose of granting a consent, there should be an express authority to the agent, yet it was perfectly plain that the plaintiff knew what was going on. Instead of giving a semi-acquiescence, he should have told his agent at once, there is a clause in the lease which forbids sub-letting

without my express consent, and I will not consent. He did not do this. Two years went by, and on the 3rd February an action was brought. Taking all the circumstances together, the Court must consider them as equivalent to an express consent, and that this express consent was equivalent to one in writing.

Mr. Justice Berthelot, who rendered the judgment in the Court below, dissented.—Judgment reversed.

LANGELIER *vs.* MCCORKILL.—BADGLEY, J.—This was an action for a part of the purchase money of a piece of land. The defendant pleaded that he was not liable. The judgment must be revised by dismissing the action, recourse reserved to plaintiff.

BEAUDET *vs.* MARTEL and ETHIER, intervening party.—

Held—When a *demande* in intervention has been allowed by the Court, it must be served on the proper parties and return made within three days, otherwise it becomes null *ipso facto*. C. S. L. C. cap. 83, sec. 71.

BADGLEY, J.—This was a proceeding upon an intervention. No intervention was fyled at the time the application was made. A motion was made to enable Ethier to fyle an intervention. The motion was received. Three days expired, and no return was fyled according to the Statute. No notice was given to the other parties, and, by law, the expiration of the three days rendered the intervention *ipso facto* null and void. The intervening party after that made application to be allowed to fyle his *moyens* of intervention. The judgment granted further delay, and it was upon the judgment on this motion that the revision had been applied for. The Statute seemed to be clear enough upon this point. The law said that a demand in intervention being fyled, a party may move for its allowance. After it has been allowed by the Court on motion, if it is not served on the proper parties and return of service made within three days, then the demand in intervention becomes null *ipso facto*. This objection was fatal; hence the judgment must be overruled.

SUPERIOR COURT.—JUDGMENTS.

MONTREAL, May 31, 1865.

BADGLEY, J.

LOCKHEAD *vs.* GRANT.—In this case a rehearing had been ordered. Owing to some misunderstanding apparently, a notice had been fyled for revision of the judgment. Now there was no judgment to revise, as it had not been recorded, owing to an error on a point of fact. The action was on a farm lease for six years, with power to cancel it at any time after six months' notice, when the landlord was to take at a valuation the drawn manure in excess of usual quantity left by outgoing tenants. The notice was given by the defendant, the landlord, and the plaintiff sued to recover the value of the manure in excess. The Court now rendered judgment in plaintiff's favor for £78.

MILLER *et al vs.* DUTTON, and DUTTON, Petitioner.—The plaintiffs arrested the defendant under a *capias*, on account of his intention to leave the Province, and because he was said to be disposing of and making away with his effects. The petitioner denied the allegations of the plaintiff, and came up in the usual way with an application for quashing the writ. Some testimony had been adduced as to his intention to leave the Province and dispose of his effects. There were contradictions in this testimony. One of the witnesses said she went to defendant's house, and there saw that his carpets, furniture, &c., had been taken away. The plaintiff wished to produce evidence in rebuttal of this fact, but had been prevented by a ruling at *enquête*. The motion for revising this decision must be granted, and the decision reversed, because the evidence in rebuttal should have been allowed.

BERTHELOT, J.

IRELAND *vs.* MAUME and DUCHESNAY, *Tiers Saisi*.—Judgment dismissing the contestation of the declaration of the garnishee, with costs against plaintiff, the contesting party.

TABB *vs.* LANCASHIRE FIRE AND LIFE INSURANCE CO.—Judgment entered up on defendant's motion, on the verdict of the Jury, and action dismissed.

Ex parte PELTIER, for *certiorari*.—Writ allowed.

Ex parte MORIN, for *certiorari*.—Writ allowed.

GILLESPIE *vs.* SPRAGG.—A motion was made in this case, that the contestation of the collocation of Mr. Dorwin by Mr. Lavicount be rejected from the record, the intervention fyled by Mr. Lavicount having been previously rejected. Motion granted and judgment of distribution confirmed.

MONK, J.

QUIN *vs.* EDSON.—This was an action for rent. Thinking his rights jeopardized, the plaintiff took out a *saisie-arrêt*, on the ground that the plaintiff was secreting his estate, debts and effects. The foundation for this belief was that defendant had advertised his moveable property for sale. Defendant answered, true, but that shows no fraud. He said that he was in community with the members of his family, and an inventory was taken. It was true that this inventory was taken at rather a suspicious time, but the Court had nothing to do with that. It might have suited his convenience to take the inventory at that time. It was also a little singular that the defendant did not advertise the sale at Longue Pointe, where the plaintiff, a creditor, was supposed to have lived. But these two circumstances were not sufficient to justify the Court in saying that anything had been proved to sustain the plaintiff's allegations, and the *saisie-arrêt* must be quashed, with costs.

WRAGG *vs.* RITCHIE.—This was an action for the recovery of rent. The defence was that the house had been leased by the defendant to be used as a house of prostitution; that plaintiff was aware of this; and therefore he could not in law recover. The defence endeavored to prove plaintiff's knowledge by establishing

that he had visited the premises; that the defendant's wife told him it was necessary to have twelve bedrooms, and that this must have made plaintiff aware of the real state of the case. But he replied that he supposed the house was to be used as a hotel. There was nothing to shew positively that plaintiff was aware of the use to which the premises were to be applied, and whatever surmises might exist, they could not be entertained by the Court. Judgment would go for $390, nine months' rent.

CROWLEY *vs.* DICKINSON.—This was an action brought by the plaintiff, Crowley, against the defendant, a forwarder, to recover the sum of $2,200, for the use of certain barges, and also for damages to the same. The statement of the plaintiff included a number of allegations respecting the barges and the various accidents which befel them. On the 18th of June, 1863, the defendant acting by Ross, his agent, leased from the plaintiff a barge lying in the canal basin, at the rate of $3 per day. The plaintiff said that subsequently the barge was run upon the rocks at the Chute near Chatham, on the Ottawa River. The barge, which at the time was loaded with wood, was much injured, and the defendant sent her to Lachine, where she was abandoned. In the Spring she was unloaded, and abandoned again. On the 15th of August, 1863, the defendant hired another barge, the *Hope*, at $6 per day. She also met with an accident while running the rapids, and sank. It was contended on the part of the defendant that there was no want of care; that the barges were old and unfit for the service. The evidence was conflicting to a degree rarely parallelled, and the Court found great difficulty in coming to a decision. Taking all the circumstances into consideration it would award £50 to plaintiff.

WENHAM *vs.* THE BANQUE DU PEUPLE.—His Honor was about to give judgment in the above case when Hon Mr. Dorion, of counsel for the defendants, rose and said that they had come upon the traces of the man who presented the cheque. The defendants had been informed the previous day that he had been seen in town. He therefore suggested that the judgment should be postponed in the expectation of procuring further evidence.

Mr. A. Robertson, on behalf of the plaintiff, opposed the granting of any delay.

His Honor said that the application being opposed, the Court must proceed to render judgment.

The action was brought to recover about $1,500, the amount of a cheque which the plaintiff had drawn upon the People's Bank, and which that Institution had refused to pay on the ground that there were no funds to meet the same. The case was a very singular one. In November last, the plaintiff had a deposit at the Bank of over $1,500. Nearly the whole of the amount was drawn out on a cheque purporting to be signed by the plaintiff and endorsed by Mr. Simpson (his associate.) At this time, the plaintiff had deposits with four different Banks, and on the same day all these deposits, within a small fraction of their respective amounts, were drawn out by similar cheques purporting to be signed by the plaintiff and Mr. Simpson. The plaintiff denied that the signature was genuine, and the present action was brought to test the matter. The singularity of the case was that it was almost impossible for any man to say that the signatures were not genuine. The imitation was so perfect with respect to Mr. Wenham's, that his Honor could not see any difference at all except that the writing of the forged one was a little stronger. Mr. Wenham and Mr. Simpson had been examined, and they both swore positively that they never signed the cheque. It was a very singular circumstance that the man who drew the four cheques must have had a very intimate knowledge of the state of Mr. Wenham's account with four different banks, because he drew within a trifle of the amount at each bank. It could not have been done by a person in the employ of any one of the banks, for he could not have ascertained the state of the plaintiff's account with the other three. The Court had to fall back upon the supposition that it must have been done by some one who had access to Mr. Wenham's bank books. The case altogether was exceedingly strange, and might be susceptible of a great deal of curious speculation. But the Court would not enter into any speculations on the subject. It would simply pronounce that the signature of the cheque paid was a forgery, and the defendants would be condemned to pay the amount now demanded by the plaintiff.

DEVALTAMIER *vs.* MCCREADY *et al.* —

D. used insulting and exasperating language to McC., and attempted to pull him from the waggon in which he was seated. McC. having then committed a violent assault on D —Held that the provocation did not justify the violence, and $100 damages awarded.

This was an action of damages against Councillors McCready and Homier for violent assault on the plaintiff, the gardener of Viger Square. It appeared on the 15th August, 1863, Mr. Homier was overtaken in Notre Dame Street by Mr. McCready, who asked him to take a drive. They arrived at one of the gates of Viger Square where the plaintiff came out of the garden and politely welcomed them. Mr. Homier introduced Mr. McCready as one of the City Fathers. Some remarks were made as to flowers, when Mr. McCready said rather disparagingly that the plaintiff had nothing but sunflowers in his garden, and that he, Mr. McCready, had better himself at home. The gardener thereupon became very much exasperated, in fact, almost furious. There was nothing in the conduct of Mr. McCready to justify the gardener's furious language, however his professional pride might have been hurt. Mr. Homier endeavoured to pacify them but in vain. The plaintiff took Mr. McCready by the collar. It is not very clear what Mr. McCready was doing at the time. He seemed to have been in rather a passive state. The plaintiff challenged him to fight, and seized him by the collar to drag him out of the carriage for

this purpose. So far it was perfectly clear that that plaintiff was the assailant. Now, however, Mr. McCready becoming exasperated seized his whip and struck the plaintiff with the butt, inflicting severe injuries. He then drove off.—The wounds, though extremely serious, were not dangerous, and the plaintiff recovered. He proceeded to have Messrs. McCready and Homier arrested and indicted. The Grand Jury threw out the bill against Mr. Homier. Mr. McCready was indicted but acquitted by the Petit Jury. Subsequent to the criminal proceedings the plaintiff brought the present action for damages against both. Now Mr. Homier seemed to have acted very properly throughout the whole affair. It was impossible to attach the slightest blame to him. The action against Mr Homier was perfectly unjustifiable and would therefore be dismissed. With respect to Mr. McCready, the Court could easily understand that the language of the plaintiff must have been exasperating, and if Mr. McCready had struck the plaintiff with the lash of his whip merely, there might have been nothing to say. But he resisted the assault in an unjustifiable and violent manner. He exceeded the measure of resistance which the occasion called for, and the Court must therefore award the plaintiff some damages. Under the circumstances, it was impossible to award less than $100 damages, with costs as of an action of the lowest class in the Superior Court.

CIRCUIT COURT.

MAILLET *vs.* DESILETS.—

An action of damages for injurious language. The parties, shoemakers, had been in the habit of abusing each other. $10 only awarded.

BADGLEY, J.—

This was an action for $200 damages brought by a shoemaker against a brother shoemaker, for injurious language. It appeared that Maillet had employed the defendant for nine or ten years back. On one occasion, the 26th February, 1864, the defendant took some work to the plaintiff's store on Jacques Cartier Square. The plaintiff refused to receive it, saying it was not properly done. The defendant said he would do it over again. One word led to another, and the defendant called Maillet a thief. It appeared that this was the sort of language ordinarily used between the parties for ten years back while arranging the account between them. They always called each other *voleur*. It was all leather and abuse between them. But on this occasion there was unfortunately a witness present who was the busybody who made all the mischief. This man said to plaintiff, "you are not going to let him use you thus?" The plaintiff set out these facts in his declaration, stating that he had always borne an honest and irreproachable reputation, and stood high in the esteem of all who knew him. The defendant made answer that they were in the habit of joking with each other while regulating their accounts. That on the occasion referred to, the plaintiff refused to pay him for 25 pairs of shoes. Defendant laughing answered: "*C'est bien, M. Maillet, vous ne voulez pas me payer; et bien! vous ne pouvez pas faire vos Pâques avec ces 25 paires de chaussures; car en me faisant perdre toute cet ouvrage et mon cuir, ce n'est pas bien.*" The defendant farther asserted that then the plaintiff in a furious tone replied, "*Desilets, écoute; il y a long temps que tu devrais le savoir, mais c'est moi qui te l'apprends. Sache que tous ceux qui entrent chez toi pour y apprendre le métier de cordonnier finissent toujours par être des sacrés voleurs comme tu en es un toi-même.*" Thus had they amused themselves for ten years back. But the only question for the Court now was, did Desilets apply the term thief to plaintiff? There was no doubt that he did. Had he any provocation? There was no doubt that he had. But all the witnesses concurred in saying that Maillet never sank in their estimation on this account. Under these circumstances judgment would go for plaintiff for only $10 damages.

COURT OF QUEEN'S BENCH—APPEAL SIDE—JUDGMENTS.

PRESENT: Chief Justice Duval; Justices Aylwin, Meredith, Drummond and Mondelet.

Montreal, June 6th, 1865.

HON. JUDGE LAFONTAINE, (Defendant in the Court below), Appellant; and CUSSON, (Plaintiff below), Respondent.—

An action for the price of a carriage sold and delivered.—A question of evidence only.

DUVAL, Ch. J.—

This is an action brought by a carriage maker of Montreal, against the Defendant, a Judge residing in Ottawa, for the sum of £80, the price of a covered four-wheeled carriage, sold and delivered to him in June, 1860. At the time the carriage was sold, at the plaintiff's place of business in Montreal, the last coat of varnish had not been put on, and it was agreed that this should be done, and then the carriage was to be shipped to Ottawa. The plea was that the carriage which was delivered to defendant had been made in an unworkmanlike manner; that the painting, varnishing and the stuffing were so inferior, and had been done in such a slovenly manner, that it was quite impossible for the defendant to accept the carriage, which he accordingly sent back to Montreal, where it was put into one of Dickinson's sheds. This is altogether a question of evidence. No question of law comes up. The Court has, therefore, only to determine whether the carriage delivered to defendant was the carriage which he purchased, or whether it was another carriage. The judges are all decidedly of opinion that it was the same carriage. The defendant saw this carriage in the shop of the carriage-maker when it was almost completed. It had to get another coat of varnish and the wheels had to be put on. As defendant wished to see how it would look with the wheels on, the carriage-maker told him he had sold one precisely similar to a carter in Montreal, called St. John, and

that he might examine that, and, if he liked it, have his own finished off precisely similarly. Defendant went down to see this carriage, and in fact rode in it twice, and was quite satisfied with it. Now it is proved that, if anything, the carriage delivered to defendant was in painting and varnishing superior to that sold to St. John, with which defendant was satisfied. What is the objection now made? It is that it was not such a carriage as should be delivered to a person in the position of the defendant. Now if the defendant had made his bargain without seeing the carriage, he might have some grounds for making this objection. But having seen the carriage, and having thought proper to take it at a price (£80) which the witnesses said was a price less than that charged St. John, the defendant with *pleine connaissance* made the purchase. It appeared to have been first suggested to him by Mr. Aumond of Ottawa, who after examining the carriage said that it would never do for a Judge. It may be that the defendant should have purchased a superior one, but that is entirely a matter of taste. The judgment of Mr. Justice Monk in the Superior Court, maintaining the plaintiff's action, must be confirmed.

DRUMMOND, J., concurring, said: I have much respect for the opinion of Mr. Aumond, and cannot but allow it much weight. But the evidence on the other side is too strong. Besides the defendant should have sent back the carriage at once, instead of allowing it to remain in a place where it received great injury. £80 was a low price for which to expect to get a first class carriage, though it does seem rather singular that an £80 carriage should be stuffed with hay.

Judgment confirmed unanimously.

R. & G. Laflamme, for Appellant; Leblanc & Cassidy, for Respondent.

MAHONEY, (Defendant in Court below,) Appellant, and HOWLEY *et al.*, (Plaintiffs below) Respondents.—DUVAL, Ch. J.—This was an hypothecary action upon an obligation for £150 brought by Bridget Howley, widow of Michael Howley, and tutrix to her minor children. Want of consideration had been set up. The widow was the only witness examined in the case. Her admissions or statements, it was contended by the defendant, proved that the original consideration money was only £40, instead of £150 as alleged in the deed. It was evident that the widow could not by parol testimony destroy the obligation to the prejudice of the interests of the minors. The evidence of the widow, moreover, was not conclusive. She spoke only of what took place subsequent to, and not of what occurred at the time of the obligation. It was a question how far the widow, tutrix, could bind her minors. Her deposition was no more than the deposition of an ordinary witness. If not conclusive it would not bind the minors. The tutrix binds her minors for the affairs of her administration, but the widow, plaintiff in this case, by no means spoke in that conclusive manner which would justify the Court in reversing the judgment of the Court below, which held that the admissions of the widow (as to the original consideration being only £40), could not avail in law against the children. — Judgment confirmed unanimously.

R. & G. Laflamme for appellant; B. Devlin for respondents.

FLECK (Plaintiff in the Court below) Appellant; and BROWN (intervening party below) Respondent.—DUVAL, CH. J.—This was an appeal from a judgment of the Superior Court quashing a seizure, corporeally made by the Sheriff, of a quantity of railroad iron, *in the hands of a third party*, under an ordinary writ of *saisie-arrêt* after judgment. Respondent, who claimed to be the owner of the iron, intervened, and moved, inasmuch as a corporeal seizure of the iron in the hands of the third party was illegal, (the exigency of the writ being fulfilled by the service of the writ on such third party), that the seizure be quashed. Appellant answered that according to the Sheriff's return, the iron was seized in the *possession of the Defendants*, and until that return was got rid of, the Court was without evidence that the iron was seized in the hands of a third party. His honor said the Sheriff's proceedings were extraordinary, but the intervening party had been premature. At the time he made his motion, there was no issue joined. The Court had no evidence to show that the property really belonged to Mr. Brown. The judgment must therefore be reversed.—Judgment reversed unanimously.

Cross & Lunn, for Appellant; S. Bethune Q.C., for Respondent.

BARRE (one of the Defendants in the Court below), Appellant; and DUNNING (Plaintiff in the Court below), Respondent.—The appellant in this case was the endorser of a note, and the appeal was from a judgment of the Circuit Court condemning him, jointly and severally with the maker of the note, to pay respondent $142, amount of the note. The plea of the endorser was that part had been paid, and the balance was tendered with the plea.

DUVAL, C. J., dissenting, thought the judgment should be reversed. It was purely a question of evidence, and he thought the weight of evidence was in favor of the appellant.

DRUMMOND, J., also dissenting, said the question of imputation of payments also came up. The money paid by the defendant should have been imputed on the most onerous debt, viz, the note in question, instead of on certain other notes held by the payee. The judgment should be reversed on this ground apart from the evidence.

MEREDITH, J.—Held the law to be this:—Where the debtor does not indicate how the payments are to be applied, the creditor may impute them on whichever debt he prefers. Besides defendant had failed to produce certain evidence which he had an opportunity of doing. He thought the preponderance of evidence in favor of the judgment. Moreover, upon doubtful questions of fact, when according to his view, the evidence was evenly, or very nearly

evenly balanced, he was not disposed to reverse. Judgment confirmed. Duval, C J., and Drummond, J., dissenting.

Perkins & Stephens for Appellant; Leblanc & Cassidy for Respondent.

BROUGH (plaintiff contesting opposition in Court below) Appellant; and MCDONELL, (Opposant below) Respondent.—DUVAL, CH. J.—This was an opposition on the part of Respondent, claiming the moveables seized in the cause. The bailiff had made an improper return, that the money had been paid, whereas no money had been paid. The contestation of the opposition (which opposition was founded upon a fraudulent confession of judgment given by one brother to another) must be maintained. —Judgment reversed unanimously.

Aylen & Perkins for Appellant; J. Delisle for Respondent.

COUPAL, (Defendant in the Court below) Appellant, and BONNEAU, (Plaintiff in the Court below) Respondent.

Excessive damages for seduction reduced. £100 only allowed, plaintiff to pay costs in appeal.

DRUMMOND, J.—

This was an action *en déclaration de paternité*, instituted by Suzanne Bonneau on the 9th April, 1862. The plaintiff was a minor at the time the action was instituted, but having attained her majority while the action was pending, the *instance* was taken up in her name. The plaintiff set up that she was chaste and was generally esteemed up to the time her fault became known. That defendant for two years before she yielded, visited the plaintiff as a lover, and continually promised her marriage. On the 16th April, 1861, a child was born. Plaintiff claimed $8,000 damages. The Court below awarded $2,000 damages, $60 per annum till the child should attain the age of 7, and $120 per annum from 7 to 14, with interest. His Honor had been much surprised at the amount awarded. The affair which led to the action was unfortunately not very uncommon in the country, and though the plaintiff's family was no doubt highly respectable, yet his Honor could not but regard the damages as excessive for persons in their position in life. The sum was quite a fortune in the country, the £30 per annum allowed to the child from 7 to 14 being almost sufficient to support a large family. The child, however, had died since the judgment of the Court below, and the Court would not disturb this part of the judgment. But the amount of damages would be reduced to £100, and the plaintiff would be condemned to pay the costs in the Court of appeal.

AYLWIN, J.—The declaration of the Respondent shews that this unfortunate girl had indulged in her illicit intercourse as long as she could without producing the natural result. With such *libertinage*, I should have been of opinion to award her no damages, leaving vice to be its own reward.. The condemnation of costs, however, would be a reward on the side of the debauched young man, the Appellant, unless it were repressed by a mulct. I hope that such exorbitant verdicts will be checked by the reversal, *omni voce*, of this extravagant judgment of the Superior Court. It is a sad thing that with our legislation, erring females have power to imprison their debtors, upon action of breach of promise of marriage or seduction, while honest women are left to get their damages as best they can, and the honest wife is left without redress against a rascally husband. It is a scandal to our legislation — Judgment modified, damages $400, with costs of Court of Appeal against Respondent.

Doutre & Doutre for Appellant; Mag. Lanctot for Respondent.

LACROIX (Plaintiff in the Court below), Appellant, and MOREAU (Defendant *en garantie* below), Respondent.—AYLWIN, J.—In this case I dissent from the judgment about to be rendered by the Court. I shall only say I am of opinion that the judgment of the Superior Court is wrong, and that the pleas of the Appellant should be maintained; that the fraud set up is sufficient to annul the *décret* pleaded by the Respondent; and that the pleas of prescription, and the plea of *impenses et améliorations* of the Respondent are sufficiently answered again by the fraud proved by the Appellant.

MONDELET, J.—This was a petitory action claiming a lot of land occupied by defendant. The controversy was as to the sufficiency of the special answers fyled by the Appellant rejected in part by the Court below. His Honor was of opinion that the judgment should be confirmed.

Judgment confirmed, Mr. Justice Aylwin dissenting.

E. Barnard for Appellant; Leblanc & Cassidy for Respondent.

WATSON (plaintiff in Court below) Appellant: and SPINELLI (defendant and plaintiff *en garantie* in Court below) Respondent; and FULLUM (defendant *en garantie*) Respondent.

F. wished to buy a small strip of land, of little value to any one but himself, and offered £15 for it. The price asked by W. was £20, which F. refused to pay. Afterwards, F. sold this land to S., who built on it. A petitory action being brought, it was held that F. must pay the £20 asked for the land, and costs of both courts.

DRUMMOND, J., said the Court would have shrunk from the decision to which it had come in this case if it had not found precedents to justify it. It was one of the cases where *summum jus* would be *summa injuria*. The circumstances were these. The Corporation had acquired a lot of land for the purpose of opening Craig Street, and having taken as much as they required, the remainder (a small strip only six feet wide at one end and terminating in a point at the other end) was sold, and Watson became the purchaser. It was about the possession of this strip of land that the difficulty occurred. This strip of land could be of no use to any one but Fullum whose land it adjoined. The purchaser, Watson, being absent from the city, Fullum went to his brother and offered him £15 for the strip of land. Watson declined to sell at that price, but said he would sell for £20 or £25. Fullum would not accept this offer, but some time afterwards, probably relying on Watson's absence, and thinking he would oust him from

this strip of land, he sold land to Spinelli, giving him a front covering Watson's strip. When Watson returned he instituted the present petitory action against Spinelli, who in turn sued Fullum *en garantie*. The judgment of the Superior Court ordered the defendant *en garantie* to pay £20 for the land, which then would become his. The Court of Appeals did not agree with the reasons of this judgment, though they considered the *dispositif* good. It would do no one any good to order the demolition of the buildings, and, therefore, the Court thought proper to exercise a rather unusual power in dealing with the case, so as not to interfere uselessly with the interests of the parties. The Respondent Fullum would have to pay £20, with costs in both Courts.—Judgment reformed. Justices Duval and Aylwin dissenting as to costs.

Day & Day for Appellant; T. S. Judah for Respondent.

McFAUL (defendant below) Appellant; and McFAUL (plaintiff below) Respondent.—DRUMMOND, J.,—This was an extraordinary case. The parties had made an amicable settlement some years ago, while their counsel were still proceeding with the case in Court. The appeal was from a judgment of the Circuit Court at Aylmer, on a motion for the appointment of a surveyor to determine the line *de novo*. The judgment was based upon the fact that since the institution of the action, a *bornage* had been made between the properties.—Judgment confirmed unanimously.

J. Colman for Appellant; Aylen & Perkins for Respondent.

QUINTIN (plaintiff) Appellant; and BUTTERFIELD (defendant) Respondent.—DUVAL, C. J.—The judgment in this case must be confirmed. Defendant had reason to fear that he might be troubled in his possession of a property sold him by one Lafrenière, a mortgage being held on the property by a man named Beauregard, and therefore he had a right to withhold payment of part of the purchase money which Quintin claimed as the *cessionaire* of Lafrenière, though Butterfield had accepted notice of the transfer. Lafrenière could not confer on plaintiff any rights against defendant which he, Lafrenière, did not possess.

Judgment confirmed unanimously.

Doutre & Doutre for Appellant; Leblanc, Cassidy & Leblanc for Respondent.

DUPLESSIS (Defendant below) Appellant; and DUFAUX (Plaintiff below) Respondent. This was a case arising out of the sale of a quantity of brick, and the only point was a question of evidence as to whether one Pelloquin acted as agent of the plaintiff in the sale, or whether he was the proprietor.—Judgment reversed, Duval and Meredith, J., dissenting.

Lesage & Jetté for Appellant; D. Girouard for Respondent.

BOWKER AND FENN.—DUVAL, CH. J., said as this was a case of importance, in which the Court was called upon, for the first time, to put an interpretation upon a part of the Promissory Note Act, it would have to stand over to next term.

FOLEY (defendant below) appellant; and GODFREY (plaintiff below) respondent.—DUVAL, C. J.—This was a hypothecary action, and judgment was obtained *ex parte* by the plaintiff. There were two objections raised to the judgment by defendant. First, that the certificate of registration was not upon the copy of the deed, but was a distinct and separate paper. The Court did not think it necessary that it should be upon the deed. Second, that the interrogatories had not been properly drawn. The Court thought they were sufficient.—Judgment confirmed unanimously.

A. & W. Robertson for appellant. C. Bedwell for respondent.

BUNTIN (defendant below) appellant; and HIBBARD, (plaintiff below), respondent.

Held,—That, under the circumstances stated, the defendant used due diligence in tendering back the goods found not to correspond to sample.

This was an action to recover the balance due on the price of a quantity of rags sold by the plaintiff to the defendant. On the 16th May, 1863, the appellant purchased from respondent 86 bales of cotton and linen rags at 5½ cents ℔ lb., deliverable in Montreal, and payable $1200 in cash when part of the bales were delivered, and the balance at a subsequent date. The sale was according to two samples of rags deposited with defendant. At the time of the delivery, the defendant was at his paper mills at Valleyfield, and the reception of the goods was conducted by one of his clerks. Fourteen of the bales were found to be damaged by salt water, and an understanding was come to between defendant's book-keeper and the plaintiff, that these 14 bales should be shipped to Valleyfield with the rest, and the damage by water be subsequently adjusted by the clerks who had seen them. When the bales arrived at the mills and were opened, the defendant pronounced them inferior to the samples, and he ordered his foreman not to use them, but to keep them, till he (defendant) brought up the samples, and compared them with the contents of the bales. The $1,200 was paid by defendant's book-keeper, before defendant's return to Montreal. After his return, he complained verbally to the plaintiff that the quality of the rags was not according to sample, and they spoke of an arbitration to determine both the quality of the rags and the amount of damage. The survey not being carried out, the defendant tendered back the 86 bales, and demanded the $1,200 which had been paid. The plaintiff took out an action for the balance, and the judgment of the Court below was rendered in his favor.

MONDELET, J., dissenting, thought the judgment should be confirmed.

MEREDITH, J., also dissenting, thought it was proved conclusively that the rags sold by the plaintiff were not of so good a quality as the sample, but the defendant should not have neglected to examine the bales at the Grand Trunk Station. When they arrived at Valleyfield, he said at once they were not of the same

quality, but his samples were at Montreal, so that he could not compare them. When he arrived at Montreal he should have notified plaintiff at once that the rags were not of the same quality. This was the more necessary because the rags had been removed after a part of the sum had been paid on account. The law of the case was clear. If the appellant wished to return the rags he should have returned them without delay. In his opinion the appellant had not used due diligence. The price of rags in the meantime went down to the extent of ten per cent. The judgment, he thought, should be confirmed.

DUVAL, C. J. said it was a question of responsibility, and not one of good or bad faith, because both parties were in good faith. But it was a sale according to sample. The rags were wet and inferior, and therefore the vendee had a right to reject them. The only question was this, did the vendee use due diligence in notifying plaintiff? His honor thought he did. The delay took place by the consent of the parties, who were proposing an arbitration. The observance of the Queen's Birth Day also interfered.—Judgment reversed, Meredith, J. and Mondelet, J. dissenting.

S. Bethune, Q.C., for Appellant; A. & W. Robertson, for Respondent.

LAVOIE (defendant below) Appellant; and GAGNON (plaintiff below) Respondent.—The question in this case was whether an amount of 768 livres, amount of a transfer dated some twelve years back, had been included in an obligation subsequently given, and which had been paid. The decision of this question depended upon the further question— whether there was a *commencement de preuve par écrit*, so as to render parol evidence admissible. The Court below, although admitting that there were strong grounds for believing that the money had been paid, was yet of opinion, that there was no *commencement de preuve par écrit*, and, rejecting the parol testimony of payment, condemned defendant to pay the amount.

MEREDITH, J., said there was a *commencement de preuve par écrit* in the receipt signed by the plaintiff himself, and that the parol evidence based upon that receipt, in the opinion of the Court, fully established the pretensions of the appellant.

Judgment reversed, Mondelet, J., dissenting.

D. Girouard for Appellant; A. & W. Robertson for Respondent. [In another case between the same parties judgment also reversed.]

FALLON (defendant below), Appellant; and SMITH, (plaintiff below), Respondent.—The action was brought in the Court below for $100, the price of a combined Mowing and Reaping Machine. The plea was that the machine was only taken on trial, to be kept only in case it should prove a perfect instrument in every respect, and that on trial the machine was found unsuitable. Defendant notified plaintiff accordingly, and called upon him to take away the machine. The Circuit Court gave judgment in favor of plaintiff.

MONDELET, J., and MEREDITH, dissenting, were of opinion that the judgment should be confirmed. The reaping machines made by plaintiff were proved to be made on good principles. It was the duty of the defendant to give the machine a fair trial, and he refused to allow this to be done. All new machinery required a little time to settle into good working order.

DRUMMOND, J., said it required no scientific knowledge to see how a mowing machine worked. It appeared that this machine cut only a third of the hay. His Honor thought the evidence was strongly in favor of the pretensions of the defendant. These machines were always sold with a guarantee. The action should have been dismissed.

DUVAL, C. J., said our rule of law was more favorable to the purchaser under such circumstances. We had a *garantie de droit* as well as a *garantie conventionnel*. And accordingly, every workman must guarantee his work, unless the purchaser takes all the responsibility upon himself. The defendant, who was an extensive farmer, gave the machine repeated trials. Why did not the plaintiff point out where the defect was?—Judgment reversed, Meredith, J, and Mondelet, J., dissenting.

Perkins & Stephens for Appellant; M. Doherty for Respondent.

MASSUE (Defendant below); and DANSEREAU *et al* (Plaintiffs below) Respondents.—AYLWIN, J, dissenting.—The action on the part of the Respondent was *condictio indebiti*, and claimed the *repetition* of the sum of $540 unjustly taken by the Appellant and improperly paid by the Respondents, that is to say $192 on 2nd July, 1856, $96 in July, 1856, $116 on the 5th July, 1857, $136 on the 9th March, 1859. By two obligations before Notaries, the Respondents were indebted to Mr. Aimé Massue, the father of the Appellant, in the sum of £800, payable with interest at the rate of 6 per cent. It is alleged that the Appellant was not authorized by Aimé Lafontaine, the father, to receive or take anything beyond the legal interest of 6 per cent. Respondents pretended the said sum of $540 was excessive interest beyond the 6 per cent, as if it had been taken by the father; whereas in truth it was pocketed by the Appellant for his own benefit and without the knowledge of the other. The son acting throughout the whole transactions as attorney, received in his own name the whole of the money, both principal and interest, together with the $540, the excessive interest.

The defendant pleaded an exception, by which he alleges, *que c'est au défendeur en sa qualité de procureur du dit Aimé Massue que les dites obligations ont été payées ainsi que les intérêts sur icelles, mais qu'il est faux que le Défendeur se soit jamais fait payer en sa qualité de procureur du dit Aimé Massue aucune somme de deniers excédant l'intérêt à raison de 6 par cent par an sur le montant des dites obligations.*

This plea is bad upon the face of it. Firstly, it amounts to no more than the general issue, but besides it only states what the Respondents have stated in their declaration. Both the plaintiff and defendant consent in stating "*qu'il est faux que le Défendeur ne soit jamais fait*

payer en sa qualité de procureur du dit Aimé Massue aucune somme de deniers excédant l'intérêt à raison de 6 par cent par an sur le montant des dites obligations." The allegation was that the Appellant falsely pretending to be the attorney, received from them, not for Aimé Massue, but for himself, the Appellant, a sum of money that was not due to him. That Appellant has not admitted the receipt of any money at all for himself, and has therefore not justified the taking. Examined upon oath, the Appellant has admitted that the sum of £96 over and above the legal interest then due and exigible on the amount referred to in the said declaration was received by him. The Appellant has said upon his oath, "*Et en sus des intérêts cidessus, je reçus des demandeurs en l'année* 1857, *une somme de* £48, *et en l'année* 1858 *une somme de* £24, *lesquelles dites deux sommes me furent ainsi payées par les demandeurs à moi personellement, en consideration des nouveaux delais que j'accordais aux demandeurs pour le paiement des dites obligations, et aussi de m'indemniser de mon trouble, frais de voyage et dépens.*" He has attempted an excuse by an "*arrangement avec les demandeurs, ayant été entendu entre ces derniers et moi que si je pouvais rencontrer soit par billet ou autrement les engagements que j'avais contractés, ils, les demandeurs, me paieraient cette somme pour m'indemniser du percentage que j'avais moi-même à payer.*" But this attempt not being alleged, it is not to be noticed, and therefore it is not proved. The Respondents properly speaking ought to have objected to the statements made by the Appellant, and there would have been nothing at all put upon the record; but although it has been taken in the deposition it must be rejected. To render a judgment in favour of the Appellant, it must be assigned as a reason that the arrangement has been proved. But there is no allegation to admit such proof; hence there being no allegation, and no proof of what ought to have been justified, the declaration is fully proved. The judgment contains a correct statement of the facts. It is as follows: The Court having heard the parties by their counsel upon the merits of this cause, examined the proceedings and proof of record, and having deliberated thereon, considering that the said plaintiffs have proved and established that the said defendant did exact and receive from the said plaintiffs, while acting for and on behalf of the said Aimé Massue, the father of the said defendant, in transacting the business of his said father in relation to the obligations referred to in the declaration, the sum of £96 over and above the legal interest then due and exigible on the amount referred to in the said declaration, and for which the said plaintiffs received no value whatever, or any consideration given; and considering that the said defendant applied the said sum of £96 to his own use, and which is admitted by the said defendant in his deposition as witness in this cause, the Court doth condemn the said defendant to pay to the said plaintiffs the sum of £96, with interest from 12th August, 1862. It might have been added as a *considérant* that the defendant having denied the fact of payment, and not having pleaded in avoidance, no evidence adduced by him was admissible as not being alleged, and that having admitted the fact, he became liable to repetition by *condictio indebiti*. The Appellant swears: *J'ai perçu des demandeurs en sus des intérêts payés a mon père, une somme totale de* £96. *Pour ce qui m'a été payé personellement, c'est-à-dire pour la dite somme de* £96, *je n'ai pas donné de reçu aux demandeurs.*" This case is precisely such as is stated in the Dictionnaire du Digeste of Thevenot-Dessaulles, Vol. 1, p. 103, No. 427, *Condition de la chose non due.* "*Celui qui prétend avoir payé indument doit prouver qu'il ne devait pas.*" Leg. 25, ff. De probationibus et praesumptionibus. "*Car la présomption est contre. Ibidem,* "*lors du moins que le défendeur convient avoir reçu. Mais si, au contraire, le défendeur avait commencé par denier qu'il eut reçu, et que le demandeur eut prouvé le fait du paiement, alors ce serait au défendeur à prouver que ce qui lui a été payé, lui été réellement du.* '*Peretenim absurdum est, eum qui, ab initio negavit pecuniam suscepisse, postquam fuerit convictus eam accepisse, probationem non debiti ab adversario exigere.*'" As to the fact that there has been no excessive interest over 6 per cent, I hold that it does not touch the case at all, and that it has no application to the case of Nye & Malo. I am, therefore, of opinion to confirm the judgment, and must therefore dissent.

DRUMMOND, J., also dissented, concurring with Mr. Justice Aylwin.

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

MEREDITH, J.—Thought it was only necessary to look at the declaration to see that the question of usury was the only question intended to be raised, and in point of fact it was the only question discussed before the Court at the argument. It was the point raised by the pleadings. In the plea, the defendant admitted having received the capital of the two obligations and legal interest, but denied that he had received anything more than legal interest. The parties themselves understood the case in this way, as was evident from their own statements. Defendant said he charged the extra amount as his commission. It was unnecessary for him to speak of usury, because plaintiff had made that the basis of his action. Where the plaintiff alleges a fact, the defendant is not bound to repeat it. Having made it apparent beyond the possibility of a doubt that usury was the basis of the action, the real question was, whether this interest having been exacted under a contract passed after 16th Vic., Cap. 80, it could be recovered back. His honor reviewed the legislation on the subject. The usury laws having been abolished, the amount was not recoverable. The judgment must be reversed.

DUVAL, CH. J. said the only witness plaintiff had was the agent, and he denied the fact that more than six per cent was charged. He said he devoted considerable time to the business, and the extra amount paid was to remunerate him for his trouble. It could not be interest

because the money did not belong to the agent, but to his father. The plaintiff therefore found himself not only without evidence, but with evidence that disproved the allegations in his declaration. If this young man charged five per cent commission instead of two or three, the Court had nothing to do with that. Persons exacted more for their time or the use of their money according to the demand. The judgment must be reversed, and the action dismissed.

Dorion & Dorion for appellant. C. Archambault for respondent.

June 7, 1865.

LEGENDRE *et al*, (defendants below) appellants, and FAUTEUX (plaintiff) respondent.—This was action brought to recover the sum of $866, amount of a promissory note. The defendants pleaded that some hours before the institution of the action, the plaintiff offered to take $200 in cash, and notes for the balance; that defendant offered this amount, but that then plaintiff wished to charge interest at the rate of twenty per cent on the notes accepted. Defendant refused to pay any interest at all, but after plaintiff had instituted his action he offered interest at the rate of six per cent. This offer was rejected, and judgment having been rendered in plaintiff's favor in the Court below the defendants appealed.

MEREDITH, J., dissenting, thought the judgment should be confirmed. Though nothing appeared to have been said about interest, yet it must be presumed that the plaintiff intended to charge 6 per cent. It could not be presumed that a trader, dealing with a view to profit, intended to give up the interest which the law allowed him. If there had been a tender of 6 per cent. in time, it would have been all right, but the tender was not made till costs had been incurred.

MONDELET, J., also dissented.

DUVAL, C. J., thought it was quite clear that the understanding was there should be no interest charged. He thought the plaintiff's conduct in charging interest was a violation of that understanding.

DRUMMOND, J., concurred in the opinion that the convention between the parties as proved contained not a word about interest.

Judgment reversed, Meredith, J., and Mondelet, J., dissenting.

D. D. Bondy for Appellant; R. & G. Laflamme for Respondent.

GREGORY (defendant below), Appellant; and IRELAND (plaintiff below), Respondent; and the same party, appellant, and the Boston and Sandwich Glass Company, Respondent. DUVAL, C. J.—The first of these cases turned upon the sufficiency of the affidavit for *capias*, and the second as to whether the debt was contracted in a foreign country. As to the sufficiency of the affidavit, the words wanting in one part were supplied in another, where the same allegation was repeated. As to the place where the contract was entered into, the Court was of opinion that it was in Montreal. As to the grounds which the plaintiff had for making the affidavit, there could be no doubt that the facts fully justified him in doing so. The defendant had previously run away from the Province. Not only was he insolvent, and without means of paying his debts, but he carried off $400 belonging to his partner in Montreal, which sum he applied to the purchase of a grocery business in New York.

DRUMMOND, J., had been inclined to dissent on the ground of insufficiency of the affidavit, and probably would have done so, had it not been so clear a case of fraud on the part of Appellant.

Judgment confirmed in both cases unanimously.

Leblanc & Cassidy for Appellant; J. L. Morris for Respondent.

MONETTE (defendant below), Appellant; and PHANEUF (plaintiff below), Respondent.—This was an appeal from a judgment condemning defendant to pay $237. due on a note. The defendant contended that the note had been altered in two places, *deux cents* having been substituted for *cent*, and the words *à douze par cent* having been added.

MEREDITH, J., dissented in part. He agreed with the majority of the Court in thinking that the words *à douze par cent* had been added.

DRUMMOND, J., said it was quite evident the words *à douze par cent* had been added after the words *avec intérêt*, and he considered that there was positive proof that the words had been added after the note was made. The pretext of the plaintiff that he did not do business on a Sunday was absurd, it being the custom in the country parishes after mass to settle accounts &c., and his scruples of conscience did not prevent him from altering the note.

Judgment reversed, Meredith, J., and Mondelet, J., dissenting.

Dorion & Dorion for Appellant; Doutre & Doutre for Respondent.

HANOWER (plaintiff below), Appellant; and WILKIE (defendant below), Respondent.

Held,—That there is nothing incompatible between the allegation of a verbal lease and a count for use and occupation.

This was an action for rent under a verbal lease, with a count added for use and occupation. The action was dismissed in the Court below, on the ground that the plaintiff had not proved the verbal lease, and that the count for use and occupation could not avail him.

MONDELET, J., dissenting, was of opinion that judgment should be confirmed.

DRUMMOND, J., thought the form of action for use and occupation one of the most useful we had, and he accepted it accordingly. There was nothing incompatible between the allegation of a verbal lease and the count for use and occupation. The latter ought to follow the former.

Judgment reversed, Mondelet, J., dissenting, and judgment given in favor of plaintiff for $70, balance of rent.

James Armstrong for Appellant; Johnson & Piché for Respondent.

QUEEN *vs.* ELLICE.—Peremptory exception rejected.

COURT OF REVIEW.

June 22d, 1865.

Present :— BADGLEY, BERTHELOT AND MONK, J.

Atty-Gen., *pro Reginâ*, and The Grand Trunk R. R. Co.

Held—That the Court has a discretionary power to give precedence to any particular case, notwithstanding 27-28 Vic., Cap. 39, Sec. 29 says : "the case shall be *heard in its order* on the first day in term on which it can heard."

H. Stuart, Q.C., for Atty-General.
T. W. Ritchie for Grand Trunk.

[The same decision was given on the same day in Cairns *v.* Hall.]

THE COLENSO APPEAL CASE.

The following is a letter of the Metropolitan's Counsellor as to the effect of the Judgment of the Privy Council in the Colenso Case on the Metropolitan's powers :—

MONTREAL, 6th June, 1865.

MY LORD,—My attention having been drawn to a letter, purporting to emanate from "A Canadian Churchman," which is published in the last number of the "Echo and Protestant Episcopal Recorder," copied from the London *Record*, I take the liberty to offer the following remarks in answer thereto :—

As a matter of fact, it is not true, that the late judgment of the Privy Council in the case of the Bishops of Cape-town and Natal, either deprived you of the title and office of Metropolitan, or declared your appointment as Bishop of Montreal illegal and invalid, nor is there anything in the remarks of the Judicial Committee who pronounced that judgment to justify such a statement.

The opinion expressed by their Lordships on the occasion in question was, that although Her Majesty, "as legal head of the "Church, has a right to command the con- "secration of a Bishop, yet that the Crown "has no power to assign him any diocese," and that "no Metropolitan or Bishop, in "any Colony having legislative institutions, "can, by virtue of the Crown's Letters Pa- "tent alone, exercise any coercive jurisdic- "tion, unless such action on the part of the "Crown be confirmed by a Colonial Sta- "tute."

With this statement of the law, as enunciated by the Judicial Committee of the Privy Council, on the occasion under review, it will not be inconvenient to indicate the precise facts connected with your Lordship's appointment as Bishop of Montreal, and the action of our Provincial Legislature in connection therewith.

On the 14th of July, 1850, (being in the 14th year of Her Majesty's Reign,) by Royal Letters Patent, under the Great Seal of the United Kingdom, the then Diocese of Quebec was declared to be divided into two Dioceses, whereof the Diocese of Montreal (according to certain limits therein defined) was declared to be one, and your Lordship was named and appointed to be Bishop of such Diocese, and the Lord Archbishop of Canterbury was commanded to ordain and consecrate you accordingly.

The Ordination and Consecration having been duly solemnized, your Lordship was duly inducted and instituted as Bishop of the Diocese of Montreal in the month of September, 1850.

In the following year the Provincial Legislature, by the Act 14th and 15th Vic., ch. 171, in which the Letters Patent of the 14th of July, 1850, are expressly referred to, enacted that there should be a separate Church Society for the Diocese of Montreal, as constituted by these Letters Patent, and that such society should be composed of "the Lord Bishop of the Diocese of Montreal," (namely your Lordship) and the several other persons indicated in the act, and that the said Bishop of Montreal and his successors should be "a Corporation sole" and "be deemed to have been so from the time when the Letters Patent aforesaid *took effect*." And in the Act, ch. 176 of the same period, the Letters Patent, and the division of Dioceses thereby created, are again expressly alluded to, and the *status* of the then Bishop of Montreal fully recognized, and in other subsequent acts of our Legislature the legal existence of the Diocese of Montreal and of the Bishop of Montreal is clearly admitted.

Whatever doubt, then, may exist in the mind of any captious person as to the strictly legal right of the Crown in the first instance to erect the Diocese of Montreal, and to appoint your Lordship to be its Bishop, there can be no room for doubt as to the action of the Crown in this respect having been confirmed by the Canadian Legislature in the most ample form that could be desired.

In the judgment under consideration it is also conceded that "pastoral or spiritual authority," is "incidental to the office of Bishop," and that the Crown may also legally appoint a metropolitan, with right of pre-eminence and precedence, although anything like power of coercive jurisdiction is denied to him in a colony such as this.—Being thus appointed, your Lordship, in ordaining and consecrating the Bishops o

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Ontario and Quebec, under the special delegation to that end from Her Majesty, cannot therefore be held by reason of anything contained in the judgment in question, to have transgressed the authority admittedly vested in you in your pastoral or spiritual office of Bishop and Metropolitan.

Before bringing these remarks to a close, it may not be improper to remind Your Lordship that in a letter addressed to you by Sir Robert Phillimore, Doctor of Civil Law, and the Queen's Advocate, (whose opinion ought to be pre-eminent in such matters,) after the rendering of the Colenso Judgment, and which I had the privilege of perusing, that distinguished jurisconsult unhesitatingly endorsed the opinions of Mr. Cameron and myself, on the validity of Provincial Synod proceedings, and further stated, that in his opinion the Canadian Bishoprics stood wholly unaffected by the Judgment which "a Canadian Churchman" has erroneously thought to have produced the sadly chaotic results he so triumphantly proclaims.

I have the honor to be,
My Lord,
Your most obed't servant,
STRACHAN BETHUNE, Q.C.

OBITUARY.

The Hon. J. S. McCord, one of the Justices of the Superior Court for Lower Canada, died at Montreal early on the morning of June 28th, 1865. The *Montreal Gazette* gives the following notice of his life:—

He was born near Dublin on the 18th day of June, 1801. His father came here in 1806 on business, and settled in this country.—Judge McCord was sent to school to the Rev. Dr. Wilkie, at Quebec, where he was a schoolfellow of the Hon. Henry Black and the late A. C. Buchanan, Q. C., two of the most eminent of Lower Canadian lawyers. He afterwards was for some time a student at the Seminary of St. Sulpice in this city, where he gained a perfect mastery of French. He studied law in the office first of the late Chief Justice Rolland, and subsequently in that of the late Mr. Justice Gale, and was called to the bar in 1822 or '23. He continued to practice his profession until the outbreak of the rebellion in 1837, when he entered the volunteer service, raising a cavalry corps and becoming commandant of a brigade of cavalry, and for a time also of the whole Militia force in Montreal. On the re-organization of the courts by the Special Council, he became a District Judge and Judge of the Court of Requests, and subsequently Judge of the Circuit Court. Later on the reorganization of the Judiciary in 1857, he became a Judge of the Superior Court. He has thus been on the Bench for 23 or 24 years, and in that time has done judicial duty in every portion of the old District of Montreal, embracing about half the population of Lower Canada. Although not standing foremost among the jurists who have won celebrity among the members of our Bench and Bar, he has yet proved an eminently useful and painstaking judge, whose decisions have uniformly stood the test of appeal more successfully than those of most other men upon the Bench. Few or none of them have indeed been altogether set aside. He was not content to be a jurist simply, or devote himself exclusively to that jealous mistress, the Law. Besides his soldiering for several years, he was for years a zealous student of natural history, and one of the founders of the Montreal Natural History Society. He was an ardent lover of Horticulture, too, and alike in the choice of a site for his residence at Temple Grove, and in the laying out and culture of his grounds, showed his love for the beautiful in nature and the art which, by culture, so enhances her beauties. He was also a promoter of some of our best charities, and was for years a Director of the Montreal General Hospital. He was an ardent Free Mason, several times Master of St. Paul's Lodge, and attained all or nearly all the dignities attainable in Canada under the Grand Lodge of England. But the work into which he threw most of his heart and soul during his later years—next after his judicial duties, if not equally even with them—was the promotion of the interests of the religious community to which he belonged. A zealous, true-hearted member of the English Church, he was also a warm friend and admirer of the present Bishop of this diocese, and an ardent fellow-laborer with him in everything which could promote the interests or welfare of the church. He was successively Vice-Chancellor and Chancellor of the University of Bishops' College, Lennoxville, which office he held at the time of his death. He was the active promoter of the establishment there of the Grammar School, now such an eminently successful feature of the institution. In the Church Society he took a most active part with the late Mr. Moffatt and others in the work, more especially of the Central Board and Lay Committee, of which he was for several years chairman. He was also one who labored most zealously in putting the funds for widows and orphans of deceased clergymen on a satisfactory basis,

and to promote the formation of a sustentation fund for the partial endowment of the clergy of the Diocese. He performed a great deal of patient drudgery in making up a schedule or cadastre of the properties belonging to the several parishes and missions in the Diocese in order to show where and what more was needed to be done, and investigated the titles, and set those which were imperfect right. He was a leading member of both the Diocesan and Provincial Synods, where he will be much missed. The last public business he transacted was to rise off his sick bed against the remonstrances of his family to appear in his place in the Diocesan Synod to see some business carried through which he deemed of importance. When remonstrated with about his imprudence, he replied "What matter? It is duty: and sooner or later I must die in harness." His last judicial business was undertaken in the same self-sacrificing spirit. Owing to the illness and over-tasking of several of the Judges, the Beauharnois circuit had been on several occasions neglected, and the matter was brought up in Parliament by the representatives of that district. When urged by the Attorney-General to take the duty there for one term, and the difficulties of the Government pointed out to him—the blame, in fact, cast upon them by Parliament for neglect,—he replied, "I will go if it kills me." He held the last term there, and returned home ill. It will be thus seen how continuous and multifarious have been his labors for the public, in how many places his presence, and counsel and assistance will be missed. But not alone in the public places he was wont to labor in will he be missed. Gifted with refined tastes, fond of pictures, statuary and books, as well as flowers, of a most happy and genial disposition, affable and courteous in his manners, he made himself beloved in private and social life, and leaves behind him almost numberless friends in different parts of the country, who will read of his departure hence with heartfelt and unqualified regret. He was married in 1832 to Miss Ross, (daughter of the late David Ross, Q.C.) who survives him, and by whom he leaves a family of three sons and two daughters.—The funeral ceremonies took place on the 1st of July.

SINGULAR CHARGE.—The Times' Paris correspondent, May 13th, cites a passage from the charge of Judge Metzinger, at a recent trial, before the assize court of Paris, of a man who attempted to murder a married woman with whom he had had a *liaison*:—"What is this man who is exposed to face it, (the guillotine)? You have witnessed his attitude during the trial. You wished to draw something from him. I have sounded him in every sense, but there was no response. I have found in him only weakness, cowardice and fear, and this desolating spectacle has doubtless inspired you, as it has me, with disgust and contempt." "These words," adds the *Gazette des Tribunaux*, the special organ of the law courts, "exercised great influence on the decision of the jury, who, after a quarter of an hour's deliberation, brought in a verdict of guilty."

CALLS TO THE BAR—DISTRICT OF MONTREAL, SINCE JAN. 1, 1865.

2nd January, 1865.—Napoleon Legendre, Adolphe Nadeau, Magloire Desjardins, Chs. Auguste La Rue.

6th February, 1865.—Prisque Letendre, Louis Renaud.

3rd April, 1865.—Honoré Mercier, Joseph A. McLaughlin.

1st May, 1865.—F. X. Desplaines.

5th June, 1865.—J. A. Simard, H. A. Turgeon, Louis H. Collard, W. R. Kenney, F. E. Gilman, J. C. Gagnon, J. Napoleon Mongeau, Pierre P. Daunais.

L. W. SICOTTE, *Secretary*.

APPOINTMENTS, CHANGES, &c. — T. K. Ramsay, Esq., Q. C., to be Crown Prosecutor for the District of Montreal, in the room of F. G. Johnson, Esq., promoted to the Bench. F. G. Johnson, Esq., to be Assistant Judge of the Superior Court. Mr. Justice Smith, of the Superior Court, has obtained eight months' leave of absence, dating from 1st June, 1865.

CHANGE OF SURNAME.—Since the celebrated Jones—Herbert case, the change of surname by mere publication of an intention to do so, seems common. Can any of your readers inform me whether this act does or does not *legally* change the name of children *living at the time* when their father indulged his innocent fancy by giving himself a new name? It strikes me they retain the one to which they were born.—CAMBRIAN.—*Notes and Queries.*