1881
*Nov. 17.
1882
*May 13.

THE QUEEN.....APPELLANT;

AND

JOSEPH DOUTRE .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Counsel fees, Action for—Retainer for services before Fishery Commission—Jurisdiction.

The suppliant, an advocate of the Province of *Quebec*, and one of Her Majesty's counsel, was retained by the Government of *Canada* as one of the counsel for *Great Britain* before the Fishery Commission which sat at *Halifax* pursuant to the Treaty of *Washington*. There was contradictory evidence as to the terms of the retainer, but the learned judge in the Exchequer Court found "That each of the counsel engaged was to receive a refresher equal to the retaining fee of $1,000, that they were to be at liberty to draw on a bank at *Halifax* for $1,000 a month during the sittings of the commission, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The amount awarded by the Commissioners was $5,500,000. The suppliant claimed $10,000 as his remuneration, in addition to $8,000 already received by him.

Held 1. Per *Fournier*, *Henry* and *Taschereau*, J. J.: that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that $8,000 awarded him in the Exchequer Court was a reasonable sum.

2. Per *Fournier*, *Henry*, *Taschereau* and *Gwynne*, J. J: By the law of the Province of *Quebec*, counsel and advocates can recover for fees stipulated for by an express agreement.

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*PRESENT—Sir William J. Ritchie, Knight, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

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3. Per *Fournier* and *Henry*, J. J.: By the law also of the Province of *Ontario*, counsel can recover for such fees.

4. Per *Strong*, J.: The terms of the agreement, as established by the evidence, shewed (in addition to an express agreement to pay the suppliant's expenses) only an honorary and gratuitous undertaking on the part of the Crown to give additional renumeration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered; and the suppliant could therefore recover only his expenses in addition to the amount so paid.

5. Per *Ritchie*, C. J.: As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at *Ottawa*, in *Ontario*, for services to be performed at *Halifax*, in *Nova Scotia*, it was not subject to the law of *Quebec*: that in neither *Ontario* nor *Nova Scotia* could a barrister maintain an action for fees, and therefore that the petition would not lie.

6. Per *Gwynne*, J.: By the Petition of Right Act, sec. 8, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in *England*, under similar circumstances. By the laws in force there prior to 23 and 24 *Vic.* cap. 34 (Imp.) counsel could not, at that time, in *England*, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover.

APPEAL from of the Exchequer Court of *Canada*.

The respondent filed a petition of right claiming from Her Majesty a sum of $10,000 as being the balance of the value of his work and labor, care, diligence and attendance in and about the preparation of and conducting Her Majesty's claim before the *Halifax* Commission, which sat under the Treaty of *Washington*, in the summer of 1877, at *Halifax*, to arbitrate upon the differences between *Great Britain* and the *United States* in connection with the value of the inshore fisheries, etc., and for money by respondent paid, laid out and expended in travelling and remaining at divers places on Her Majesty's business connected with the said claim.

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The respondent had been paid the sum of $8,000, and the Crown defended on the ground that the amount paid was accepted in full by the suppliant.

That if not accepted in full by the suppliant, the amount paid was a sufficient remuneration for his services, and that a petition of right did not lie to enforce a claim for counsel fees under the circumstances of this case.

The other facts and pleadings are fully stated in the judgments. The cause was tried before Mr. Justice *Fournier*, Mr. *Lash*, Q.C., and Mr. *Hogg* appearing on behalf of the Crown and Mr. *Haliburton*, Q.C., and Mr. *Ferguson* for the suppliant.

On the 13th January, 1881, Mr. Justice *Fournier* delivered the following judgment in favor of the suppliant:

"On the 1st day of October, 1875, the suppliant, an advocate and a Queen's counsel, residing in the city of *Montreal*, was retained by the then Minister of Justice, to act as counsel for the Government of *Canada* before the Fishery Commission, charged by the treaty of *Washington* between Her Majesty and the *United States* of *America* (8th May, 1871,) with the duty of deciding the amount to be paid by the Government of the *United States* for the privilege given to their citizens of using the fisheries of *British North America* in accordance with the XVIII Art. of the treaty. The letter retaining the services of the suppliant as counsel in the matter is as follows:—

DEPARTMENT OF JUSTICE, CANADA,
OTTAWA, 1st October, 1875.

SIR,—The Minister of Justice desires me to state that the Government being desirous to retain counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at *Halifax* under the Treaty of Washington, he will be glad to avail himself of your services as one of such counsel in conjunction with

Messrs. *Samuel R. Thomson*, Q.C., of *St. John, N.B.*, and *Robert L. Weatherbe*, Barrister, of *Halifax*. The Minister will be glad to know whether you are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject.

Your obedient servant,

(Signed) *H. BERNARD,*
D. M. J.

Jos. Doutre, Esq., Q.C.
Montreal.

"The suppliant alleges that from that time (1st October 1875) he held himself at the disposal of the officers of the Crown, and was thereafter in correspondence with the Department of Marine and Fisheries, to whom the management of the Fishery Commission and the carrying out of the fishery clauses of the said treaty had been delegated. That he received most voluminous communications at different times, with request to make himself familiar with the contents thereof, and that in order to fulfil his duties he was obliged to frequently travel from *Montreal* to *Ottawa*, &c. That when the commission was organized, he was requested to repair to *Halifax* to attend the sittings of the commission, commencing on the 15th June, 1877, and lasting until 23rd November following.

"That the sittings of the commission having been considered to last about six months he removed to *Halifax* with his family, and was there during the whole of that period attending day by day to the duties of his office.

"That by the award rendered by the commissioners the 23rd November, 1877, an indemnity of $5,500,000 was granted to Her Majesty's Government in return for the privileges accorded to the citizens of the *United States* under article XVIII of the said Treaty. That for more than two years he was employed in preparing and supporting the claim of Her Majesty.

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"That the expenses incurred by him in the performance of his duties exceeded eight thousand dollars and that he had not received anything as remuneration for his services.

"That considering the magnitude of the case, involving a claim of over fourteen millions of dollars, and resulting in an award of five millions and one half, and considering also the importance of the questions in dispute, which engaged the policy of the empire on most delicate subjects of international law, the moral responsibility of the petitioner, his prolonged studies and anxiety of mind were taxed to the extent of bringing heavy and lasting loss in his professional affairs, and to disarrange and entirely alter his family and domestic arrangements, the whole at heavy consequential expense and cost.

"That on the eve of leaving his home for *Halifax*, to wit: in May (1877), the petitioner made with the Department of Marine and Fisheries a temporary and provisional arrangement under which the petitioner should be paid one thousand dollars a month for current expenses while in *Halifax*, leaving the final settlement of fees and expenses to be arranged after the closing of the commission.

"That soon after the closing of the commission the suppliant, with the view of facilitating an immediate and amicable adjustment, limited his claims to $8,000, over and above the amount previously paid to him.

"That he was entitled to a much larger sum, and that in consequence of the expenses and loss of time incurred in travelling, corresponding, and otherwise endeavoring to obtain a settlement of his claim, with interest upon the amount thereof, he was entitled now to demand and receive $10,000 over and above the amount provisionally paid to him. Then follows two other allega-

tions, one claiming the same amount as a *quantum meruit* for his services, and the other that Her Majesty's representatives had recognized his rights to the indemnity claimed.

"The answer of the Attorney General admits that the suppliant acted as one of the counsel for the Crown, but denies all other statements, and concludes as follows:

"'I submit that the suppliant as such counsel cannot enforce a claim for counsel fees, and that no action lies for the recovery thereof, and I claim the same benefit from said objection as if I had demurred to the said petition.'

"The suppliant then joined issue on all the paragraphs of the defendant's statement of defence, and as to paragraph 6 he specially replied that he is an advocate of the province of Quebec and as such fulfils the duties of solicitor, barrister, &c., and that it was as such advocate that he was retained by the Crown by the letter from the Department of Justice dated the 1st October, received by him at *Montreal*, from whence he wrote his reply agreeing to act for the Crown as requested, and that, as such advocate of the province of Quebec, he is by law of that province entitled to claim and recover from the Crown the amount claimed by him.

"On this issue a portion of the evidence relating to the value of the suppliant's services was taken at *Montreal*, and the balance was taken before me in open court, as well as the evidence, much more important, relating to the agreement as alleged by the suppliant in reference to his remuneration as counsel.

"Although the parties have argued several questions of importance there is really only one point upon the determination of which the decision of this petition rests: it is to determine whether a contract was in fact

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made between the parties, as alleged in the 9th paragraph of the petition, and whether, under that contract, the suppliant is entitled to recover by petition of right, the value of the services he rendered as an advocate and a counsel engaged by the Crown to act for it before the Commission at *Halifax* on the fishery question? I will not now refer to the question raised as to the place where the contract was entered into, as it is of importance only as regards the admissibility of the suppliant's evidence on his own behalf. I will express my opinion on this point at a later stage, when I will refer to the evidence relating to the contract, its conditions and other circumstances which affect its character.

"The fact that there was a contract to pay a certain sum of money disposes of the objection made to the jurisdiction of this court by the counsel for the Crown for the first time on the argument. The Exchequer Court in *England*, having jurisdiction in all cases of demand by a subject against the Crown for money due or land claimed, the Exchequer Court of *Canada* having jurisdiction in similar cases, I need not add anything on this point, which does not seem to me to offer any difficulty.

"The evidence given in support of the alleged contract is both written and oral. The first consists of letters filed by the suppliant and the written memorandum of *Mr. Whitcher*, Commissioner of Fisheries, taken at the time of the interview which took place between the Minister of Marine and Fisheries and the suppliant, and at which interview the amount of remuneration to be paid to the counsel engaged before the commission at *Halifax* was settled upon; and the second consists of the oral testimonies of the Minister of Marine and Fisheries, Sir *Albert Smith*, that of his deputy, *Mr. Whitcher*, and that of the suppliant. An unfortunate

circumstance has deprived the suppliant of the possibility of producing the original of a letter addressed by him to the Minister, Sir *Albert Smith*, in which letter he explicitly stated the amount of remuneration that was to be paid to him and his colleagues. Although every effort has been made in the department to find this letter, the receipt of which is acknowledged, it has not been found. A press copy of the letter was sent by the suppliant to his colleagues at *Halifax*, and handed over from one to the other in order to let them know what was their position as to fees, and this copy also could not be found. Under such circumstances the suppliant is entitled to offer secondary evidence of the contents of the letter containing the agreement arrived at between himself and the Minister of Marine and Fisheries. This evidence was received, and consists of the statements made by the petitioner, and of his letters on this subject to his colleagues—and the evidence of the Commissioner of Fisheries, Mr. *Whitcher*. Mr. *Doutre*, referring to the lost letter, says in his evidence:

I had a press copy of it, and in order to show my colleagues the ground on which we stood in *Halifax* it passed from one to another, and as I thought that I had fulfilled all the objects for which we had to go to *Halifax*, I never kept it. In that letter I stated to the Minister that the period of time during which I was going to be absent being so long, I did not think I could go there without taking my family with me, that the distance was so great that I could not expect to come home during the six months that the commission was expected to sit, that I could not leave my base of supplies without feeling that I would not be embarrassed for want of money in *Halifax*. I went further, and suggested that we should each receive a refresher of one thousand dollars, and that we should, while in *Halifax*, be able to draw on the bank at *Halifax* for $1,000 per month to meet our expenses. On this I received a telegram from the Minister to come to *Ottawa*. I came and had a conversation with him and Mr. *Whitcher*. The three of us were alone, and this was the only interview that I had on the

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subject. I insist upon this, because afterwards Sir *A. J. Smith* pretended that Sir *A. T. Galt* and Mr. *Ford*, the British Agent, and Mr. *Bergne*, Secretary of the Commission, at *Halifax*, knew something of the arrangement made with me. That could not possibly be, because that was the only occasion on which I had a conversation with the Minister on the subject, and the only person present then was Mr. *Whitcher*. The Minister had my letter in his hand, and he said: "I would like to know what you mean by future arrangement as contained in your letter." I had stated that we would settle finally the amount of remuneration and expenses after the commission would be over. I said: "I mean that I am too ignorant of the adventure into which I am entering to state precisely what the remuneration should be. I do not know how we will come out of that commission. I have no power to bind my colleagues, and I am making such arrangement as will suit them temporarily until the commission is over, and then it can be settled finally." I stated that for those two reasons—that I could not bind my colleagues, and that I was too much in the dark to determine anything precisely—I insisted upon making some temporary arrangement, which would relieve us from money embarrassment while we were away."

Then Sir *A. J. Smith* said: "Do you mean that if we obtain nothing from the Commission you will be lenient or have mercy upon us, and if we obtain a good award you will expect to be treated liberally?" I said: "You may put it on that basis if you like, but it "is only then that we will be able to settle the matter." This ended the conversation. The $1,000 were expected to meet our expenses, and we were going to live in a place where we did not know how the expenses might run.

Q. You proposed then that you should receive $1,000 refresher and $1,000 a month while in *Halifax*?—A. Yes.

Q. And subsequently to settle for your expenses and fees?—A. Yes.

Q. About what time was the date of that interview?—A. That interview must have taken place about the 23rd or 24th of May, because on the 25th I wrote to my several colleagues, telling them what had been done, and in each of these letters they stated to me—it was particularly mentioned—that the arrangement was purely a temporary one——

Objected to as secondary. Evidence allowed under reserve of objection.

A. (Continued.) The letter which I now produce and fyle as Exhibit No. 4 was written to Mr. *Thomson* on the very day that

I wrote that letter which is missing. There are two letters, dated the 7th May, one to Mr. *Thomson* and the other to Mr. *Weatherbe*. The one to Mr. *Thomson* was written on the 7th May, and on Saturday I wrote to Mr. *Weatherbe* to the same effect. Here is a letter written on the 30th of May to Mr. *Davies* living at *Charlottetown*, who was, at the time, Attorney General in his province.

This was after that interview, so that the letters written immediately after my letter to the Minister agree together, and all show the agreement between the Minister and myself.

"According to Sir *Albert Smith's* statement of what took place at that interview, the nature of the agreement arrived at would be totally different from what is alleged by the suppliant. Instead of being, as alleged by Mr. *Doutre*, a provisional understanding that the amount of fees to be paid him would be only definitely settled upon when the final award of the commissioners was given, the arrangement, as remembered by Sir *Albert Smith*, was a final arrangement, and was such as stated by Mr. *Doutre*, except as to the latter part, which leaves the question of the amount unsettled.

"They are both in direct contradiction on this important point. I will therefore also read the evidence given by Sir *A. Smith*. He says:

My memory of the conversation is this: they had already received $1,000 which I understood to be a compensation for services up to that time. After that we were to give them $1,000 a month while in *Halifax*, and Mr. *Doutre* suggested that in case we succeeded in obtaining a handsome award, it would be a matter for the Government to consider if they were to get a gratuity after the case was over; that was my understanding.

Q. Then $2,000 would be the amount in full up to that time?—A. Yes, that was my understanding; Mr. *Doutre* said, I recollect distinctly, something about gratuity if we succeeded in getting a handsome award. That then it would be a matter for the Government to consider whether they would make gratuity.

Q. But the contract for payment was limited to $1,000?—A. Yes.

Q. And anything further than that was to be a gratuity?—A. That was my understanding of it, and that is what I communicated to my colleagues and to Mr. *Ford*. I know that Mr.

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Ford and I discussed the question. Mr. *Doutre* knows that too. I told him more than once that I would have to communicate the matter to Mr. *Ford*.

Q. That a $1,000 a month while in *Halifax* was to cover the services and expenses?—A. I understood it so. I remember that Mr. *Doutre* stated on this occasion that he intended to take his family to *Halifax*, but that was a matter I did not think the Government would be justified in paying his expenses. That was personal to himself.

Q. You certainly did not agree to pay the expenses of his family?—A. As a member of the Government I could not assume any such liability as that.

"I find here two contradictory statements. The suppliant swears the amount of fees was to be settled upon after the final determination of the proceedings of the commission, whilst Sir *Albert Smith* states that the payment of $1,000 per month so long as the sittings of the commission would last was all that he agreed to pay. The suppliant also adds that his expenses as well as those of his family were to be paid above the amount to be paid him for his fees. Sir *Albert Smith* does not contradict this statement, but says that as a member of the Government he could not have assumed that responsibility.

"The witnesses who have made such contradictory statements are both men of honor and of equal respectability—neither one nor the other can be suspected of wishing to mislead the court. It can only be a question of memory, so that if no corroborative evidence was given I would have, independently of the fact that the suppliant's evidence is that of an interested witness, come to the conclusion that he had not proved the contract on which he has based his claim. But it appears that there was a third party present at the interview in question, whose testimony must be taken into consideration, and it induces me to adopt one version in preference to that of the other. It was Mr. *Whitcher* who was then present in his official capacity,

and who, as Commissioner of Fisheries, attended under the direction of the Minister to almost all matters connected with the Fisheries Commission at *Halifax*. There was no matter of importance concluded without his knowledge, and his evidence in his position must therefore have great weight in deciding what agreement was arrived at.

Mr. *Whitcher's* evidence:

Q. You have heard the letter written by Mr. Doutre, May, 1877, with regard to the remuneration of counsel?—A. Yes.

Q. Had you that letter in your possession?—A. There were several discussions with regard to the remuneration of counsel. On one occasion I remember the Minister asked Mr. *Doutre* to put the demand of the several counsel in writing. This letter, I suppose, would be the result of that. I saw it in the hands of the Minister and it formed the subject of a discussion with the Minister. The last place that I saw that letter was in the hands of Mr. *Ford*, with whom the Minister was consulting with regard to the rates to be allowed. I searched the records to make sure that it had not escaped attention. I looked not only in the records but also among the semi-official letters which are not on record in the department, but could not find it.

Q. Subsequent to the receipt of the letter Mr, *Doutre* had an interview with the Minister in reference to this question, had he not?—A. Yes, Mr. *Doutre* was there quite a number of times, but I remember one particular instance when he pressed for a decision as well for the other counsel as on his own behalf. That was the occasion, if I recollect rightly, when this letter was discussed, but there had been other discussions at intervals prior to that.

Q. What took place at that interview?—A. It would be difficult to say what occurred, there was so much conversation.

Q. Who was present?—A. I was present, but took no part in the conversation.

Q. Who else was present?—A. The Minister and Mr. *Doutre*.

Q. This letter, you say, was discussed, was any definite arrangement arrived at?—A. The general character of the conversation was that the Minister seemed a little unwilling to have the thing open, and was pressing for some definite terms, as I understood it. It ended in an understanding that this would be a temporary arrangement so far as it was not specified, that is to say, there was to be $1,000 paid for retainer, $1,000

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for refresher, and $1,000 per month while the commission sat. There was some difference as to the junior counsel, but that is not pertinent to this. Further remuneration to these amounts was to form the subject of after consideration. I do not pretend to recite the words, there were so many conversations that it would be impossible to remember them all.

Q. Did you make a note of the conversation?—A. Yes. As I was paymaster throughout the whole commission I kept memoranda of all agreements.

Q. Have you a memorandum of that agreement?—A. I have memoranda of all discussions which took place, but of course these are to a certain extent official records, and I have no authority for laying these before the court. They contain other matter not at all pertinent to the case.

Q. Have you the memorandum here?—A. I have, there is an entry on the 10th May, 1877. I may statethat there were discussions constantly going on as to the counsel, Professor *Hind*, Mr. *Miall* and others engaged upon the commission. This entry is amongst others, and is as follows:—"Counsel want $1,000 each as refresher and all expenses paid at *Halifax*." This, if I recollect it rightly in my memory, was the occasion when the Minister asked Mr. *Doutre* to reduce the proposition to writing. Further on I find amongst a number of other entries dated 23rd of May, the following:—"Agreed with counsel another $1,000 refresher and $1,000 per month during session of commission, all expenses of travelling and subsistence and a liberal gratuity on the conclusion of business."

I do not say that these are the exact words, but they are the substance of what I was to consider my directions.

Q. You have repeated one expression that you said you thought was used in the interview between Mr. *Doutre* and the Minister, that is "gratuity"?—A. I took the liberty of saying that those were not the words used, but the substance of them.

Q. What did you understand by the use of that word?—A. In connection with it being a temporary arrangement, it would be the final remuneration, you use the word "gratuity" when the money is not definite. If I go out on special service I would receive so much, and if, according to the issue of it I would get so much more, I would consider it a gratuity because it is not specified.

"This evidence, corroborated by the memorandum taken at the time of what took place during the interview between the Minister of Marine and Fisheries and the suppliant, confirms on every point the statement made

by Mr. *Doutre*, and if we add to this the evidence to be gathered from the letters written by the suppliant to his colleagues, there is no doubt what conclusions ought to be arrived at.

"It must also be remarked that Sir *Albert Smith* admits that the only person he spoke to about the fees counsel were to receive was Mr. *Doutre*, and that he made no agreement whatever with the other counsel, Mr. *Doutre* acting officiously as senior counsel for his colleague. He had no authority to bind them, a fact which he states positively, and which Mr. *Thomson* one of the counsel corroborates. Then what was his first duty after he had concluded this agreement with the Minister? To communicate these conditions to his colleagues, and I find he did so as may be seen by the following letters:

"Letter to Mr. *Thomson*:

I have just written to Honorable *A. J. Smith* a confidential letter, in which I tell him that yourself and Mr. *Weatherbe* had left in my hands the question of our remuneration as counsel, but that I did not feel like taking the responsibility of committing us to any definite thing deprived as I was of your advice; that, however, I owed it to you and myself to take the necessary measures to provide for the present and the approaching session of the commissioners, that I thought we were entitled, as a mere temporary arrangement, to a refresher of $1,000 each, and that provisions should be made in your bank in *Halifax* where we could each draw one thousand dollars a month, beginning on the first of June. Adding that our sojourn in *Halifax* would necessarily be expensive, and that cut as we would be from our base of supply, we should feel at ease in this respect. This leaves the thing intact for further arrangements.

"Letter to Mr. *Davies*:

I have been in *Ottawa* at different intervals, and at a time I met there Mr. *Thomson* and Mr. *Weatherbe*. We understood you were prevented from coming by your parliamentary duties; we had spoken together of the advisability of coming to some understanding in regard to our fees with the Government, but Mr. *Thomson* and Mr. *Weatherbe* left without coming to anything in this respect. After their departure I went again to *Ottawa* with Messrs. *Galt*, *Ford* and *Bergne*,

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and I submitted the following proposition, viz: That each of us should receive a refresher equal to the original retainer, and that we should be allowed to draw on some bank in *Halifax* a similar amount to such retainer every month while being there, leaving a final arrangement to be made after the award, giving me to understand that if we were not very successful we would ask little or nothing.

This last part, however, is verbal only; what is written is that the above proposition would be a temporary arrangement, as I had no time to bind my colleagues. This was agreed upon. You may therefore draw upon *W. F. Whitcher*, Esq., Commissioner of Fisheries, for an amount equal to your first retainer.

"In addition to these letters the suppliant wrote on the 25th May, 1877 to Sir *A. J. Smith* informing him that he communicated to Messrs *Thomson* and *Weatherbe* the substance of their agreement in respect to the remuneration of counsel, viz: "I wrote to Messrs. *Thomson* and *Weatherbe* the substance of our arrangement as regards counsel."

"On the same day, in writing to Mr. *Whitcher* on various matters concerning this business, he says: "I wrote to Messrs. *Thomson* and *Weatherbe* the substance of the arrangement concerning the counsel. I think you should write to Mr. *Davies*." It appears from the date of two of these letters that they were written immediately after the letter he sent to Sir *Albert Smith*, as regards counsel fees, and in both of which he repeats the agreement made with the Minister, and states that it was provisional.

"Here also we find that immediately after sending this letter to the Minister he writes on the 30th May, to the Hon. *T. H. Davies*, informing him that the proposal he made had been accepted, summing up the result of his proceedings, viz: "I submitted the following proposition that, viz: each of us should receive a refresher equal to the original retainer, and that we be allowed to draw on some bank in *Halifax* a similar amount. Such retainer every month while there,

leaving a final arrangement to be made after the award, giving me to understand that if we were not very successful we would ask little or nothing. This last part, however, is verbal only, what is written is that the above proposition would be a temporary arrangement, as I had no right to bind my colleagues. This was agreed upon. You may, therefore, draw immediately upon *W. F. Whitcher*, Esq., Commissioner of Fisheries, for an amount equal to your first retainer."

"It is clearly established by these letters, the two first being written on the 7th May, 1877, before the interview with the Minister, that Mr. *Doutre* referred to this arrangement as being a provisional arrangement. Now, relying upon the evidence of the suppliant, the evidence of Mr. *Whitcher*, and the notes he took down during Mr. *Doutre's* interview with the Minister, the letters addressed by suppliant to his colleagues, and taking into consideration the important fact that Sir *Albert Smith* has not in his possession any letters or notes referring to this matter to corroberate his statement, I have arrived at the conclusion that the proposal made to the Minister by Mr. *Doutre* by the letter which the Crown has been unable to produce, but the terms and conditions of which have been proved by the suppliant and other letters, was accepted by the Minister at the interview which took place between them on the 23rd May, and at which interview Mr. *Whitcher* was present taking notes, and that the terms of the agreement were as follows: That each of the counsel engaged would receive a refresher equal to the first retainer of $1,000, that they could draw on a bank at *Halifax* $1,000 per month while the sittings of the commission lasted, that the expenses of the suppliant and of his family would be paid, and that the final amount of fees or remuneration to be paid to counsel

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would remain unsettled until after the award of the commissioners.

"From the evidence adduced I find that these are the terms and conditions of the contract entered into between the suppliant and the Minister of Marine and Fisheries.

"It was at *Ottawa* the contract was concluded during the interview which Mr. *Whitcher* attended, to which Mr. *Doutre* had been specially called.

"Being of opinion that the contract was concluded at *Ottawa* and not at *Montreal* as contended for by the suppliant, the question which was raised as to the admissibility of the suppliants' evidence on his own behalf must, therefore, be decided in accordance with the law in force in *Ontario*.

"The law in *Ontario* allows a party to a suit to be heard on his own behalf, I, therefore, find that the evidence of the suppliant which would not be admissible in this case according to the laws of *Quebec*, forms part of the record and is legal evidence.

"I do not think there is any weight in the observation made by Sir *Albert Smith* that he had no right to assume the responsibility of paying the expenses of Mr. *Doutre's* family.

"Sir *Albert Smith* had, over this question of expenses, which was only one of the several points to be considered, when determining the amount of remuneration to be paid counsel, the same authority he had to agree to pay the amounts specified as refreshers and the other sums payable monthly, it being a matter of agreement. I am of opinion that the evidence shows the payment of these expenses was one of the stipulations of the contract. Moreover, his authority to enter into such an agreement has not been denied by any of the pleas set up by the defence, he alone has referred to it. Now, whether the suppliant could bring an action before a

Court of Justice to recover the amount due him under an agreement for his services as advocate, counsel, &c., is a point which cannot admit of a doubt after the decisions which have been given by courts of justice in the province of *Ontario* and *Quebec*. See *McDougall v. Campbell* (1). *Beaudry v. Ouimet* (2).

"Moreover, in this case the right of action is based on a contract made by the Government under the authority, first of the treaty of *Washington*, 8th May, 1871, and then of 35 *Vic.* c. 2, which incorporated as part of the law of *Canada*, the fishery articles of the treaty. It is under article 25 of the treaty which imposes upon each of the high contracting parties the obligation to pay the counsel retained by them to prepare and support their case before the commission, that this contract has been made.

"This obligation, independent of the decisions of the courts, gives to the counsel engaged a right of action to recover a remuneration for their services. This right of action, in the present case, as I have just stated, is founded on a statutory enactment, and as I am of opinion that the suppliant's right to recover is based on the law and the agreement entered into between the parties, I have not deemed it necessary to examine the point raised, whether on a simple case of *quantum meruit*, the suppliant could have recovered the value of his services in the present case, as they were rendered outside of the *forum* of courts of justice. I am of opinion that the facts of the case do not allow me to consider this question. But as I have shewn above, the contract has not determined a fixed amount of remuneration to be paid; on the contrary, it was agreed upon between the parties that the amount would be settled only after the award of the commissioners. Since that time the parties have been unable to arrive at a settlement, and

(1) 41 U. C. Q. B. 345. (2) 9 L. C. Jur. 158.

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it is therefore now the duty of the court to determine the amount from the evidence adduced in the case.

"In order to arrive at a proper and equitable conclusion on this point, it is necessary for me to take into consideration, not only the amount of professional work done before the commission which sat for six months, but also the enormous amount of work bestowed in preparing the case, the magnitude of the amount involved, estimated by the Canadian Government at $12,000,000, the importance of the questions in dispute, the responsibility of the counsel and the result of the award. In order to give an exact idea of this I cannot do better than cite a part of the evidence relating to this branch of the case.

"It will be seen that the suppliant did not act only as counsel to argue the case and give his opinion, but acted also as solicitor and advocate by preparing and conducting the procedure before the commission.

Immediately after my letter of acceptance I received most voluminous correspondence from *Ottawa*, all marked "Confidential," which I could not read or study at my office without running a risk of breaking the seal of confidence which was impressed upon every paper transmitted to me, so I had to work at home and at night giving opinions on all those papers, as I was requested to do. Almost every time that I received papers from the department I. was requested after reading them to give my opinion or impression on the subject. If it were not loading the case with too voluminous papers, I could show what I received gradually from the department, but it is an immense mass of paper and I do not know that it is of any use putting it in.

I had many interviews with the Department of Marine and Fisheries, generally with the Minister himself, or the Commissioner of Fisheries, Mr. *Whitcher*. At times I spent three weeks in *Ottawa* in consultation, in order to see what kind of questions we would bring before the Commission, it was a most intricate matter, unknown to any member of any bar, and unknown also to the department in which it had originated, we were in complete darkness * * * I have referred now to the only two meetings, one in *St. John, N.B.*, and the other in *Ottawa*, that we had of the counsel together. In addi-

tion to that, I was very often called upon to come up from *Montreal* to *Ottawa* to consult with the department; I was also charged by Mr. *Ford* to prepare rules of procedure for the commission and I spent here some eight or ten days in selecting books in the Parliament Library to support the contention that we were interested in—books on international law, some sixty or seventy volumes, which I requested to be sent to *Halifax* for the use of the commission—I could not designate those books without knowing whether they would be suitable, and so to make that selection of sixty or seventy volumes I had to handle some two hundred volumes first.

In the interval between my appointment in the fall of 1875 up to the meeting of the commission I received many papers, some of which are fyled. I received them periodically and several times during the week at times, but at other times at greater intervals.

"We can imagine the amount of work performed by counsel by referring to Mr. *Whitcher's* answer to the following question:

Q. During the two years prior to the meeting of the commission, or from October, 1875, when Mr. *Doutre* was retained, until the Commission sat, you say that Mr. *Doutre* made numerous visits to *Ottawa* in the preparation of the case?

A. Yes, there was an immense mass of material to be dealt with and digested, and there was a very indefinite proceeding before us with regard to what portions of this could be used for legal effect, and what form the case should take and what evidence was necessary, and we communicated to the counsel all the materials accumulated there for use as it might be determined by the British and Canadian Government. All this was referred to them, and they were asked to examine it carefully and pronounce their opinions upon it, and from my own knowledge of the labor involved in getting it up I think they must have had a hard time of it going through it.

"If we remember that the matter in dispute relates back to the American War of Independence of 1775, and that it was discussed at length at the treaty of *Paris* 3rd Sept., 1783, then again at *Ghent* at the treaty of December 24th, 1814, but not included in that treaty, because the high contracting parties could not agree, and that it was only after overcoming many difficulties, after the seizure of vessels, and the exchange of lengthy correspondence between the interested parties, that the

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question was finally referred to International Commissioners, who passed the convention of 1818, by which both countries were guided until 1847, when the parliament of *Canada* initiated the proceedings which resulted in the treaty of reciprocity of the 5th June, 1854, between the United States of *America* and *Canada*, and remember that after and since the expiration of the treaty of the 17th March, 1866, this question remained unsettled up to the time of the Washington treaty, which adopted as the proper mode of settlement of this much vexed question the reference of the whole matter to the commission at *Halifax*; and if we consider the large field of study and the amount of researches necessary to grapple this case properly, I think it is impossible to over estimate its importance, and it will be easier to value the large amount of work done by counsel in preparing this case, which cannot be said to be of less importance than the *Geneva* arbitration under the some treaty, and in supporting the claim of Her Majesty before the commission at *Halifax*, and I do not think it can astonish us, if Mr. *Doutre*, in his evidence, says that he has been exclusively engaged working for the Government of *Canada* for 240 days. I will again give an extract of the evidence on this point.

I was engaged in this matter during eight months. I consider constantly, that is to say six months in *Halifax*, one month that I devoted to coming here to *Ottawa*, and putting together all the time that I spent at home on the papers and writting letters, I put at one month, and I think it is a very moderate estimate. This would make out that I was engaged in this matter 240 days. I put this down at $50.00 a day which is the remuneration which I generally charge to other clients, and my expenses at the rate of $20.00 a day, that is exclusive of travelling expenses going to and coming from *Halifax*, which I put at $275.00. The expenses in *Montreal* during my six months absence I put at $250.

When I go to *England* and on my return make out the account of my expenses I find that they average $20.00 a day. I have been coming to *Ottawa* and returning to *Montreal*, but that is included in the 240 days.

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"During a short adjournment of the commission Mr. *Doutre* was absent from *Halifax* for six or eight days, during that time he was engaged on other business for two days. I would be disposed to deduct them from the 240 days during which he says he was at work on matters relating to the Fishery Commission, but it appears to me that he credited that short absence when he computed the number of days he was employed at home as when he puts the time he devoted at home to this work he states it is a very moderate estimate. If I entertained any doubt that Mr. *Doutre* was getting paid twice for these few days I would order him to be interrogated *de novo* on this point, but believing he has given the exact number of days I will not do so, and I will adopt that number of days during which he says he was employed at the work for which he had been retained.

"Now is the sum of $50 per day which the suppliant claims, a reasonable amount? Mr. *Doutre* tells us that it is the price he gets ordinarily when he is obliged to absent himself from his office, exclusive of his expenses, which he always demands.

"His evidence on this point is corroborated by that of a number of distinguished members of the bar of *Montreal*, who being called as witnesses in this case prove that the sum of $50 per day, exclusive of expenses, is the ordinary amount charged by them in important cases which entail the absence of the lawyer from his office. Some extracts of the evidence on this point prove this conclusively

"*W. H. Kerr*, Q.C., after referring to two cases, in one of which his fees were $3,500 and the other $4,000, says:

I have received on many occasions for trials, here, at the rate of one hundred dollars to one hundred and fifty dollars a day for attendance in court. In a recent case, in the case against Sir *Francis*

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Hineks and other directors of the Consolidated Bank, I received twelve hundred dollars. I think it lasted six days and one day in the Court of Queen's Bench on the reserved question.

"In the case of *Hon. A. Angers, Attorney-General for the Province of Quebec*, and *The Queen Insurance Company*, which lasted one day and a-half, his fee as one of the three counsel employed was $500, the other two counsel, *J. C. Abbott*, Q.C., and Mr. *Doutre*, the suppliant, received a similar amount.

"In the case of the *Hamilton Powder Company* for insurance, the trial having lasted four and one-half days, his fee was $600, and that of Mr. *Carter*, Q.C., for the defence, $1,000. Among other cases, he cited the cases of *Worms, Caldwell* and *Foster*, extradition cases, in which the *United States* were interested, and his fee in each of these cases was $1,000. The time given to each of them was not more than 3 or 4 hours.

"Mr. *Laflamme* Q.C., received $4,000 fees in the case of the *Bank of Toronto* and *The European Insurance Company*. In the case of *Simpson* v. the *Bank of Montreal*, his fee was over $5,000. These cases did not oblige him to leave the city, and one of them did not take more than three or four months of his time. In the case of the *St. Albans* Raiders, his fee was $1,500. In the case of *Fraser*, which, without including the time he spent in preparing the argument, lasted about two months, his fees were $6,000.

"In the case of the explosion of the ferry boat at *Longueuil* he got $1,000 for one day he was engaged on the case.

"In the matter of the seignorial indemnity claimed by Mr. *DeBeaujeu*, in which Mr. *Laflamme* was occupied for a few months, but with the understanding that he could attend to his business at the office three days in the week, his fee was $5,000.

"Mr *F. X. Archambault* says that in his practice, which is both civil and criminal, the retainers or extra fees

vary from $500 upwards and sometimes $1000, it depends on the importance of the case and its difficulties.

"In a case against one *Henault*, although there were three *cap. ad resp.* it was practically only one case, which took about one month of his time, he charged $2,800. In the case of *Martin* v. *Gravel* which was appealed to the Privy Council, he received $2,000. He cannot remember all the cases in which he received such large fees, but mentions these as examples. He states that in all important cases, either civil or criminal, a retainer of from $400 to $500 is generally charged. As to the sum of $50 per day, exclusively of expenses, claimed by Mr. *Doutre*, Mr. *Archambault* says: "I think a charge would not be looked upon in *Montreal* (and in *Quebec* also, I suppose, although I have not practised there) as at all exaggerated fixed at the rate mentioned by Mr. *Doutre* in his evidence $50 00 a day and expenses. That is what I charge when I have to go to *Quebec* to look after charters. That is my usual charge. I charged up to $1,500 to obtain a charter during last session, and it did not take more than a fortnight of my time.

"Messrs. *Duhamel* and *Walker* with Mr. *Archambault*, state that $50 per day and expenses is a reasonable charge for the services rendered by the suppliant.

"Messrs. *W. Robertson*, Q.C., and *W. Ritchie*, Q.C. spoke of the fees received by the lawyers of the city of *Montreal* in the like manner as the other barristers who had been examined as witnesses.

"Mr. *Thomson*, Q.C., the eminent lawyer of the bar of *St. John*, whose untimely death shall long be regretted, and who was one of Mr. *Doutre's* colleagues, in his evidence said that $100 per day would have been a reasonable enough remuneration. All lawyers agree in saying that under such circumstances it is not only necessary when estimating the value of the service of

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counsel to take into consideration the amount involved in the case, the difficulties and the novelty of the question to be treated, but also the length of time the counsel may be absent from his office, which absence always very seriously affects his business.

"This was certainly the case for the suppliant, and for Mr. *Thomson*—by their absence, which lasted six months, they almost ruined their professional business. It is in evidence that the income of the suppliant, owing to his absence, was reduced from $16,000 to $4,000. Although the disastrous consequences of this absence cannot be taken into consideration in estimating the amount of his fees, and the suppliant must console himself for this loss with the thought that he has achieved together with his colleagues a remarkable success, yet the absence anticipated, which was considered would last six months, must be borne in mind as being one of the elements upon which the remuneration is to be determined. All the lawyers who have been examined as witnesses have drawn a considerable distinction between the fees charged for services rendered at the ordinary place of business of counsel, and those for services rendered which necessitate an absence, thereby leaving it impossible for them to direct and watch over the business of their office.

"Although this evidence seems to be irresistible, we can also, in order to ascertain whether the amount demanded is not exaggerated, compare it with the amounts paid by the unsuccessful party to this celebrated case.

"The Government of the *United States* paid its agent and counsel, Hon. *Dwight Foster*, for his services in the same case, $9,000, exclusive of all his expenses and those of his family. The other two counsel engaged with him and who commenced to take part in the proceedings before the commission only on the 15th of

August, received each $5,000, exclusive of all their expenses and those of their family. It is clear from this that Mr. *Doutre's* demand is far from being excessive.

"For these various reasons I am of opinion that the sum of $50 per day as a remuneration and the sum of $20 per day for his expenses, including the expenses of his family, would be a reasonable amount as a remuneration for the services rendered, and that the agreement entered into between the parties was to that effect. In adopting these figures, it will be seen that the Crown is not made to pay more to the suppliant than what the suppliant and a great number of other lawyers would have charged to their ordinary clients in important cases, the importance of which would never equal the importance of the case which the suppliant conducted before the commission at *Halifax*. By taking these figures in computing the amount of the remuneration and adding thereto certain sums for travelling expenses, &c, mentioned in the suppliant's deposition, it will be found that the total amount exceeds $16,000. The Government have paid suppliant $8,000, which leaves a balance in favor of the suppliant of over $8,000, but as he has by letter, dated May 16th, 1878, reduced his demand to $8,000, I will adopt that sum as being the amount due.

"The suppliant by his petition claims, outside of the amount due him for his remuneration and expenses, a sum of $2,000 damages for the loss of time and expenses incurred while endeavoring to effect an amicable settlement with the Government which had retained him and with the present Government of the day.

"To obtain this settlement he made several trips to *Ottawa*, entertained a lengthy correspondence with divers Ministers and Members of Parliament in order to avoid the necessity of having recourse to a petition of right to obtain his due, which he thought would be

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a scandal, as it related to a matter of international rights of great importance.

"Whilst recognising the honorable motives which induced the suppliant to act in this manner, and admitting that he has, no doubt, been put to large expenses, I cannot entertain such a claim. It cannot be recognized as a legal claim. It is very true that the suppliant, hoping to obtain an amicable settlement, delayed the filing of his petition of right. This delay took place for the benefit of the Government, and in justice and equity, the Government ought to pay him interest. But, under the peculiar circumstances of this case, the obligation to pay interest is a moral obligation and not a legal obligation which a court of justice could enforce. The suppliant, therefore, must rely on the spirit of equity and justice of the Government.

"On the whole, I am of opinion that the suppliant is entitled to receive from the Crown the sum of $8,000, as a remuneration for his services with interest on that amount since the 29th August, 1879, the date upon which the petition of right was received by the Secretary of State, the whole with costs."

The usual motion to revise the judgment was made, but it was refused.

The case was thereupon appealed to the Supreme Court of *Canada*.

Mr. *Lash*, Q. C., and Mr. *Hogg* with him, for appellant:

The suppliant's services, for which he now sues the Crown, were rendered as one of the counsel in the British interests before the "*Halifax* Commission," which sat under the Treaty of *Washington*. The services were to be rendered at *Halifax*, in *Nova Scotia*; therefore the law of the place of performance governs as to the right of the parties under the contract (if any) entered into between Her Majesty and the suppliant.

Story, on Conflict of Laws (1), lays down the law as follows on this point:

"Where the contract is either expressly or tacitly to be performed in any other place (than where it is made) there the general rule is in conformity to the presumed intention of the parties that the contract as to its validity (except as to form), nature, obligations and interpretation, is to be governed by the law of the place of performance."

This statement of the law is adopted by *Dicey*, on Domicile (2); same doctrine in *Von-Savigny*'s Private International Law (3); see also *Beard* v. *Steele* (4); *Lloyd* v. *Guilbert* (5).

Now whether the contract should be governed by the law of *Ontario*, where it was made, or by the law of *Nova Scotia*, where the services were performed, the suppliant cannot recover for his fees. The case of *Baldwin* v. *Mongomery* (6) has decided that the English rule on this subject is in force in *Ontario*.

In *England*, *Kennedy* v. *Broun* (7) decides that:

"The relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation." The case, therefore, decides that there is an absolute incapacity to contract. A physician's case is different; there, there is no incapacity, and an express contract is binding. According to usage, no action lies for their fees, and unless there be an express contract, they are presumed to be governed by the usage.

Now the services rendered by the suppliant in this case were "advocacy in litigation," within the meaning of that term as used in *Kennedy* v. *Broun*. The proceedings in *Halifax* were proceedings such as are

(1) 6 Edt. p. 354.
(2) P. 152.
(3) Pp. 151-2-3 and 163.
(4) 34 U. C. Q. B. 54.
(5) L. R. 1 Q. B. 122.
(6) 1 U. C. Q. B. 283.
(7) 13 C. B. N. S. 677.

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usual in a court. The suppliant himself in his evidence admits it, for he says :—"It was a court like this court; there was only one witness examined at a time, so only one lawyer was employed at a time, &c;" and, again, he says: "The proceedings were the same as in a court of law."

The language used in *Kennedy* v. *Broun* (1) covers exactly suppliant's position.

But it is contended that, in addition to services as an advocate, the suppliant performed other services, such as coming to *Ottawa*, preparing case, &c., for which he can recover. There are two answers to this. First, the sum paid him is sufficient to cover all such expenses; and, secondly, these services were merely auxiliary to the service as an advocate, and if the principal service could not be the subject of a contract, neither could any service which was merely accessory thereto, and of no value without the principal. I do not contend that a counsel should act for nothing, or that he should be satisfied with what his client may seem fit to give, for the moment I am dealing with the naked legal question as to his right to recover by action for his fee, and on this point the law is clear, and the rule laid down in *Kennedy* v. *Broun* has been extended in 1870 to non-litigious business by *Moystyn* v. *Moystyn* (2), so that even if this court were of opinion that the services rendered were not advocacy in litigation, the suppliant cannot recover. See also *Veitch* v. *Russell* (3), and *Hope* v. *Caldwell* (4). As to *McDougall* v. *Campbell* (5), relied on by the judge of the court below, it was held that the plaintiff there could enforce a claim for counsel fees upon an express promise to pay an amount fixed by a third person. The claim here is on a *quantum meruit*,

(1) Pp. 737 & 738.
(2) L. R. 3 Ch. App. 457.
(3) 3 Q. B. 936.
(4) 21 U. C. C. P. 241.
(5) 41 U. C. Q. B. 332.

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and in that respect *McDougall* v. *Campbell* does not apply. Moreover, I submit, that the decision of the majority of that court, which is not binding on this court, is erroneous and contrary to the law of *England*, in force in *Ontario*, on this subject.

The learned counsel then referred to the contract as gathered from the evidence, and contended that by the terms of the contract, the suppliant could not recover, as he expressly agreed to accept a gratuity, leaving it entirely in the hands of the Government what it should be; and also contended, upon the evidence, that, even admitting the suppliant's view of the contract, it was proved beyond all doubt that suppliant had been paid at the rate of $30 per day and his expenses for the actual time he had been employed as counsel, and that the amount paid was a sufficient remuneration.

I will now take up suppliant's contention that because he is an advocate of the bar of *Quebec*, the law of *Quebec* governs, and that by that law he is entitled to recover upon this petition.

To this we submit, 1st. That by sec. 19 of the Petition of Right Act, the law of *England* must be looked to, and that if in *England* no action lies against the Crown for counsel fees, in *Canada*, no such action can be taken against the Crown by petition of right. 2nd. That if the law of *Quebec* governs, suppliant's evidence is inadmissible.

The principal cases in *Quebec* on the subject are. *Devlin* v. *Tumblety* (1), *Grimard* v. *Burroughs* (2). The head note to this case is: "A barrister or attorney cannot recover, on a *quantum meruit* and verbal evidence of value of services, the amount of a fee claimed by him over and above the amount of his taxed costs from his client." *Amyot* v. *Gugy* (3), *Larue*

(1) 2 L. C. Jur. 182.

(2) 11 L. C. Jur. 275.

(3) 2 Q. L. R. 201.

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v. *Loranger*, appeal side Q. B. reported in legal news of 4th Sept., 1880.

My last point is: the Crown is not liable to pay interest on the suppliant's claim. The statutes relating to interest do not apply to the Crown. *Re Gosman* (1).

Mr. *Laflamme*, Q. C., for respondent:

The rights, privileges, liabilities and remedies of the members of legal profession in *England* are very different from those of the members of the same profession in *Canada*.

In *Ontario* the professions of barrister and attorney may be united in one person, and so in *Quebec* and in *Nova Scotia* and *New Brunswick*, whilst in *England* they cannot. In *Ontario* a barrister, who is also an attorney, and even if not an attorney, may deal directly with the client, and recover his counsel fees and other costs by action from his client. This principle is sanctioned by legislation in *Ontario*, in giving powers to courts to make tariffs, &c., providing for counsel fees, &c., also by decisions of the courts.

See *McDougall* v. *Campbell* (2) and other decisions and statutes there referred to.

This right of action of a barrister to recover counsel fees by suit, whether according to a tariff (if there is one) if the proceedings in respect of which the services were rendered were in a suit, or in other cases to recover upon a *quantum meruit*, has long been recognized in *Quebec*.

The cases of *Larue* v. *Loranger* (3) and *Devlin* v. *Tumblety* (4), cited by the counsel for the Crown in this case, do not negative this right of action. The point which they decide, and notably the

(1) 17 Chy. D. 771.
(2) 41 U.C. Q.B. 345.
(3) In Review, Vol. II of Legal News 155 and Vol. III Legal News 284.
(4) 2. L. C. Jur. 182.

latest case, *Larue* v. *Loranger* (in appeal), being, as will be seen on close examination, that where there is a tariff recognized fixing the fees for certain classes of work, an action upon a *quantum meruit* will not lie, but the counsel must either be satisfied with what the tariff allows, or be in a position to prove a distinct agreement with the client for a sum certain in excess of the tariff allowance.

Where, however, there is no tariff applicable and no special agreement made, an action on the *quantum meruit* will still lie in *Quebec*, and such is this case, and such was also the law of *Quebec* prior to 23 and 24 *Vic.* See *Amyot* v. *Gugy* (1).

In *France* I find also that, where there is no tariff, the counsel alone is the judge of the value of his services, and if he charges too high, the client can appeal to the council of law. See *Morin, Discipline des cours* (2). *Duchesne* and *Picard, Manuel de la Profession d'Avocat* (3). *Journal de Palais* (4).

Our civil code also recognizes the right of a barrister to sue for services rendered by Art. 2260, that applies to all kinds of professional services.

It has been contended that because the services were performed at *Halifax*, the principles of our law should not govern this case. Now by the pleadings, and it is also proved by the evidence in the case, the contract was made in *Montreal*, the respondent undertook, as a counsel of the bar of the province of *Quebec*, to represent Her Majesty wherever the Commission sat. If it had sat in *New York*, it would not have been the law of *New York* that would have governed. It was an accident that *Halifax* was chosen as the seat of the Commission. When Mr. *Doutre* was arguing the case,

(1) 2 Q. L. R. 201.
(2) P. 815.
(3) P. 150.
(4) 16 Vol. p. 815.

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he was not acting as a *Nova Scotia* barrister, in fact he would have no *locus standi* as such. When a counsel is acting before an arbitration, or say the Supreme Court, or even the Privy Council, he is entitled to all the rights and privileges of the profession to which he belongs.

Now with respect to the contract, I submit it is first of all established by the treaty, for in it we find a provision that counsel were to be employed, and surely when one party requests the services of another, and the latter agrees to give them, there is a complete contract. What were the conditions of the contract in this case? On this point I rely upon the finding of the Judge who tried the case, and contend that the evidence clearly establishes that the money received by the suppliant was in accordance with the provisional arrangement made, viz: Counsel was to receive a retainer, a refresher and expenses, and a reasonable sum at the conclusion of the business. It is contended on the other side that the word "gratuity" should be construed in its technical sense. Now there can be no doubt that what was meant here was, the fee, the *honorarium*, which cannot be valued in money. It was an obligatory gratuity and is synoymous with *quantum meruit*.

Mr. Doutre stood on his professional dignity and relied on the rule of the French law, and said I exact so much for expenses and I exact a gratuity at the end. Sir *Albert Smith* admits it was to be proportioned to the result, and the result in this case was an award of over $5,000,000.

The case of *Devlin* v. *The Corporation of Montreal* is is not reported, but, as Mr. Justice *Taschereau* remembers, in that case our Court of Appeal held that Mr. *Devlin* was entitled to certain fees for professional services rendered to the corporation and for which there

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was no provision in the tariff. With reference to the value of the services in this case, there is no evidence on the part of the crown.

The only other point raised is as to the jurisdiction of this court.

The pleadings of the crown gave no intimation of the question which it intended to raise as to the right of a Canadian counsel to bring a petition of right for services as counsel rendered to the crown.

The only reference to the right of the petitioner to bring a petition of right is in paragraph 3, which is confined to denying that petitioner was employed for more than two years, and that the expenses incurred by him exceeded eight thousand dollars as alleged, and concludes as follows: "and I submit that the expenses incurred by the suppliant in connection with his family and the loss alleged in connection with his professional affairs and family and domestic arrangements, form no part of any claim which can be enforced against Her Majesty in the premises by petition of right."

The respondent, by the pleadings, having confined this objection to expenses, admitted the right of the petitioner to bring a petition of right for services rendered as counsel.

The Court of Exchequer in *England* had and still has jurisdiction in all suits by subjects to recover lands or money from the Crown in *England*, or as it is sometimes termed, the "Imperial Crown."

If therefore the suppliant has a remedy at all against the Crown in *Canada* in respect of his claim in this case, the Court of Exchequer in *Canada* must have exclusive jurisdiction in that behalf, as the claim of the suppliant is of such a nature as would have come within the jurisdiction of the English Court of Exchequer (Revenue side) in consequence of it being for the recovery of money from the Crown by a subject; section 58 of S. and E. Act.

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The next question to be considered is whether a subject has, under the circumstances and for the causes in the petition of right alleged, any remedy at all against the Crown.

Section 19, clause 3, of the Petition of Right Act, declares that "nothing in said act contained shall give to the subject any remedy against the crown in any case in which he would not have been entitled to such remedy in *England* under similar circumstances by the laws in force there prior to the passing of the Imperial Statute 23 and 24 *Vic.* c. 34," and counsel for the Crown contend that prior to 23 and 24 *Vic.* a subject would not have been entitled to any remedy against the Crown by the laws in force in *England* prior to the passing of the said 23 and 24 *Vic.* under similar circumstances to those under which the suppliant seeks relief in this case, and that therefore the suppliant's petition of right will not lie.

The suppliant contends that this is not really a question of jurisdiction, because section 58 of the Supreme and Exchequer Court Act virtually declares that this court shall have exclusive jurisdiction in all cases in *Canada* for the recovery of money from the Crown, and the clause of the Petition of Right Act above quoted merely declares that the Petition of Right Act "shall not give any remedy, &.," and does not declare that the court shall not have jurisdiction in such a case if a remedy or right already existed. The real question then to determine is whether the suppliant would have been refused relief as against the Crown prior to 23 and 24 *Vic.* if he had been proceeding against the Crown in *England* for similar causes of action incurred under and affected by circumstances similar to those affecting his claim in this suit.

To decide this question the phrase "under similar circumstances" must be properly construed, as upon the

construction of this the solution of the question depends.

There have not been cited on behalf of the Crown any authorities, nor can such be found, deciding that if a British subject, being a member of the legal profession in *Canada*, had been employed by the Crown in *England* under the circumstances and for purposes similar to those set forth in the suppliant's petition, he would have had by the laws then in force in *England* no remedy against the Imperial Crown for the value of his services performed pursuant to such retainer or employment.

The only argument on the part of the Crown upon this point is one of inference drawn from the fact that it was decided prior to 23 and 24 *Vic.*, that an English Barrister had no right in *England* to sue for his counsel fees earned in a suit or matter in litigation in any of the English courts of justice.

The English cases cited by the counsel for the crown only decide the question of the right of English barristers to sue in *England* upon a *quantum meruit* for their remuneration as counsel in suits or proceedings in courts, the judgment in the case of *Kennedy* v. *Broun* (1) being distinctly and clearly limited to this point.

The suppliant therefore contends that there was no decision against the right of even an English barrister to recover for services such as are claimed for in this suit, the services claimed for having in no sense been rendered in connection with litigation or proceedings in any of the courts of justice.

"Similar circumstances" therefore did not exist in the cases cited by the crown; and the argument deduced from section nineteen of Petition of Right Act and the English cases referred to does not apply to plaintiff's remedy by petition of right in this country.

(1) 13 C. B. N. S. 677.

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But even if an English barrister could not have recovered for services performed in *England*, such as have been performed for the crown in *Canada* by the suppliant, as he is not an English barrister, but a *Quebec* counsel (including in that term the terms advocate, attorney and proctor) it does not follow that he could not recover.

RITCHIE, C. J.:

The contract relied upon by the respondent in this suit has to be gathered from the evidence of Messrs. *Doutre*, *Whitcher* and Sir *Albert Smith*, and I will therefore cite such portions of their evidence as in my opinion show where the agreement was entered into and what the nature of that agreement was.

Mr. *Doutre*, in his evidence, after stating that he had written a letter to the Minister of Marine and Fisheries, which contained the basis of the terms upon which he was willing to go to *Halifax* and act as one of Her Majesty's counsel before the Fishery Commission, says:

I received a telegram from the Minister to come to *Ottawa*. I came and had a conversation with him and Mr. *Whitcher*. The three of us were alone, and this was the only interview that I had on the subject. I insist upon this, because afterwards Sir *A. J. Smith* pretended that Sir *A. T. Galt* and Mr. *Ford*, the British agent, and Mr. *Bergne*, Secretary of the commission at *Halifax*, knew something of the arrangement made with me. That could not possibly be, because that was the only occasion on which I had a conversation with the Minister on the subject, and the only person present then was Mr. *Whitcher*. The Minister had my letter in his hand and he said: "I would like to know what you mean by future arrangement as contained in your letter?" I had stated that we would settle finally the amount of our remuneration and expenses after the commission would be over: I said, "I mean that I am too ignorant of the adventure into which I am entering to state precisely what the remuneration should be, I do not know how we will come out of that commission. I have no power to bind my colleagues, and I am making such arrangements as will suit them temporarily until the commission is over, and then it can be settled finally." I stated that

for these two reasons—I could not bind my colleagues, and that I was too much in the dark to determine anything precisely—I insisted upon making some temporary arrangements which would relieve us from money embarrassment while we were away. Then Sir *A. J. Smith* said: "Do you mean that if we obtain nothing from the commission you will be lenient, or have mercy upon us, and if we obtain a good award you will expect to be treated liberally?" I said: "You may put it on that basis if you like, but it is only then that we will be able to settle the matter." This ended the conversation. The $1000 was expected to meet our expenses as we were going to live in a place where we did not know how the expenses might run.

Q. You proposed then that you should receive $1,000 refresher and $1,000 a month while in *Halifax*? A. Yes.

Q. And subsequently to settle for your expenses and fees? A. Yes.

Q. About what was the date of that interview? A. That interview must have taken place about the 23rd or 24th of May, because on the 25th I wrote to my several colleagues telling them what had been done, and in each of these letters, they stated to me, it was particularly mentioned that the arrangement was purely a temporary one.

The letter which I now produce and fyle as exhibit No. 4 was written to Mr. *Thomson* on the very day that I wrote that letter which is missing. There are two letters dated the 7th May, one to Mr. *Thomson* and the other to Mr. *Weatherbe*. The one to Mr. *Thomson* is as follows:—"I have just written Hon. *A. J. Smith* a confidential letter in which I tell him that yourself and Mr. *Weatherbe* had left in my hands the question of our remuneration as counsel, but that I did not feel like taking the responsibility of committing us to any definite thing, deprived as I was of your advice; that, however, I owed it to you and myself to take the necessary measures to provide for the present and the approaching session of the commissioners, that I thought we were entitled as a mere temporary arrangement to a refresher of $1,000 each, and that provision should be made in your bank in *Halifax* where we could each draw one thousand dollars a month, beginning on the first of June, adding that our sojourn in *Halifax* would necessarily be expensive, and that cut as we would be from our base of supply, we should feel at ease in this respect. This leaves the thing intact for future arrangements." This was written on the 7th of May, and on the same day I wrote to Mr. *Weatherbe* to the same effect. Here is a letter written on the 30th of May to Mr. *Davies* living at *Charlottetown*, who was at the time Attorney-General in his province. It is as follows:- "I

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have been in *Ottawa* at different intervals, and at a time I met there Messrs. *Thomson* and *Weatherbe*. We understood you were prevented from coming by your parliamentary duties. We had spoken together of the advisability of coming to some understanding in regard to our fees with the Government, but Messrs. *Thomson* and *Weatherbe* left without coming to anything in this respect. After their departure I went again to *Ottawa* with Messrs. *Galt*, *Ford* and *Bergne*, and I submitted the following proposition, viz:—That each of us should receive a refresher equal to the original retainer, and that we be allowed to draw on some bank in *Halifax* a similar amount to such retainer every month while being there, leaving a final arrangement to be made after the award, giving to understand that if we were not very successful we would ask little or nothing. This last part, however, is verbal only; what is written is that the above proposition would be a temporary arrangement, as I had no right to bind my colleagues. This was agreed upon. You may therefore draw upon *W. F. Whitcher*, Esq., Commissioner of Fisheries, for an amount equal to your first retainer." This was after that interview so that the letters written immediately after my letter to the Minister and the letter written after the interview with the Minister agree together, and all show the agreement between the Minister and myself.

Then Mr. *Doutre* produces the following letter which he received from Mr. *Whitcher*:

The entry in my note-book is perfectly correct. Sir *A. J. Smith's* agreement with you was also discussed before Mr. *Ford*. If Mr. *Weatherbe* has made any note different from mine such as makes it appear to be an arrangement acquiesced in by Sir *A. J. Smith* or Mr. *Ford* it is incorrect. Your arrangement was made with the Minister, and Mr. *Ford* assented as agent of the British Government. My memorandum book shows two entries, one dated 10th of May, 1877, and reads: "Counsel want $1,000 each as refresher and temporary arrangement for $1000 per month and all expenses paid at *Halifax*," the other is dated 23rd May, 1877: "agreed with counsel another $1,000 refresher and $1,000 per month during the session of commission, all expenses of travelling and subsistence, and a liberal gratuity on the conclusion of the business." These are records of my interviews with the Minister.

And as to the junior counsel, Mr. *Doutre* says:

Mr. *Davies* and Mr. *Weatherbe*, who were retained as junior counsel, were treated as we were—that is, received $1,000 retainer and $1,000 refresher, and $1,000 a month while in *Halifax*.

Q. Is Exhibit No. 12, now fyled, a letter sent to you from Mr. *Weatherbe*? A. Yes; on the 10th of April, 1879, Mr. *Whitcher* sent to Judge *Weatherbe* the following memorandum:

"My recollection is clear that Mr. *Doutre's* letter for self and *confrere*, stipulating for retainer, refresher and personal expenses, was temporary, and that the final settlement was not to take place until the result of the commission. This was acquiesced in by Sir *Albert Smith* and Mr. *Ford*. I was present at the discussion. My note book contains the following: "—

Then follow the entries that I have already read.

Mr. *Whitcher* stating what took place after the receipt of Mr. *Doutre's* letter, with regard to the remuneration of counsel, gives the following evidence:

I remember one particular instance when he pressed for a decision as well for the other counsel as on his own behalf. That was the occasion, if I recollect rightly, when this letter was discussed, but there had been other discussions at intervals prior to that.

Q. What took place at that interview? A. It would be difficult to say what occurred, there was so much conversation.

Q. Who was present? A. I was present but took no part in the conversation.

Q. Who else was present? A. The Minister and Mr. *Doutre*.

Q. This letter, you say, was discussed: was any definite arrangement arrived at? A. The general character of the conversation was, that the Minister seemed a little unwilling to leave the thing open, and was pressing for some definite terms, as I understood it. It ended in an understanding that this would be a temporary arrangement so far as it was not specified, that is to say, there was to be $1,000 paid for retainer, $1,000 for refresher and $1,000 per month while the commission sat. There was some difference as to the junior counsel, but that is not pertinent to this. Further remuneration to these amounts was to form the subject of after consideration. I do not pretend to recite the words used; there were so many conversations that it would be impossible to remember them all.

Q. Did you make a note of the conversation?

A. Yes; as I was paymaster throughout the whole of the commission, I kept memoranda of all agreements.

* * * * * * * *

Q. Have you the memorandum now here?

A. I have. There is an entry on the 10th May, 1877, I may state that there were discussions constantly going on as to the counsel, Professor *Hind*, Mr. *Miall*, and others engaged upon the commission.

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This entry is amongst others, and is as follows:—"Counsel want $1,000 each as refresher and temporary arrangement for $1,000 per month and all expenses paid at *Halifax*."

This, if I connect it rightly in my memory, was the occasion when the Minister asked Mr. *Doutre* to reduce the proposition to writing. Further on I find, amongst a number of others, entries dated 23rd of May, the following:—"Agreed with counsel another $1,000 refresher, and $1,000 per m. during session of commission, all expenses of travelling and subsistence and a liberal gratuity on the conclusion of business."

I do not say that these are the exact words, but they are the substance of what I was to consider my directions.

* * * * * * * *

Q. Were all the counsel to get the same remuneration?

A. No; The first arrangement was that Mr. *Doutre* and Mr. *Thomson* were to receive $1,000 each, and Mr. *Weatherbe* and Mr. *Davies* $600 each, but at the conclusion, in consequence of this successful issue, and the amount of labor, I suppose, all the counsel were put upon the same footing. I paid them the advanced rate by the authority of the Minister.

* * * * * * *

Q. The next arrangement was that of the 23rd of May? A. Yes.

Q. Where was that made? A. In the Minister's room.

Q. Who was present? A. I recollect Mr. *Doutre*, the Minister and myself.

Q. With whom was the arrangement made—with the Minister or with you? A. It was not with me.

Q. You took no part in making the arrangement? A. I took no part in it.

Q. Did the Minister seem anxious that a final arrangement should be made? A. He preferred it.

Q. And Mr. *Doutre* preferred that a final arrangement should not be made? A. He preferred for the satisfaction of himself and the other counsel that it should be settled afterwards.

Q. Did the Minister suggest a final arrangement? A. I do not recollect the Minister suggesting anything, but the result of it was a temporary arrangement.

* * * * * * * *

The liberal gratuity was to be included. I may not have been very accurate in punctuating the entry. The words are—"And $1,000 per month during session of commission, all expenses, travel and subsistence, and a liberal gratuity on conclusion of business."

Sir *Albert Smith's* evidence as to this agreement is as follows:

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Q. Will you state what arrangement was made?

A. My memory of the conversation is this: they had already received $1,000 retainer, and we were to give them $1,000, which I understood to be a compensation for services up to that time. After that we were to give them $1,000 a month while in *Halifax*, and Mr. *Doutre* suggested that in case we succeeded in obtaining a handsome award it would be a matter for the Government to consider whether they were to get a gratuity after the case was over. That was my understanding.

Q. Then $2,000 would be the amount in full up to that time?

A. Yes, that was my understanding. Mr. *Doutre* said, I recollect distinctly, something about some gratuity, if we should succeed in getting a handsome award, that then it would be a matter for the Government to consider whether they would make a gratuity.

Q. But the contract for payment was limited to $1,000? A. Yes.

Q. And anything further than that was to be a gratuity?

A. That was my understanding of it and that is what I communicated to my colleagues and to Mr. *Ford*, I know that Mr. *Ford* and I discussed the question. Mr. *Doutre* knows that too, I told him more than once that I would have to communicate the matter to Mr. *Ford*.

I think it cannot be doubted that everything that had taken place up to the time of the making of the alleged contract was considered as fully paid up and satisfied, and that the arrangement at *Ottawa*, which forms the basis of this suit, was without regard to the past but solely in reference to the sittings of the commission at *Halifax*. In negotiating this arrangement, authorized or not, Mr. *Doutre* unquestionably at *Ottawa* acted for the other counsel as well as for himself in reference to the remuneration for services to be performed at *Halifax*. That he did so, his letters to these gentlemen place beyond question. Whether authorized or not, he acted for them and in their name, he communicated to them that he had done so, and, so far from any repudiation on their part, they unquestionably not only acquiesed but in the most unequivocal manner adopted his act and in accordance with it drew the money thereby arranged to be paid.

If this arrangement was not made in *Ottawa* to be carried out in *Nova Scotia*, but is to be treated as a *Quebec*

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contract as regards Mr. *Doutre*, I should like to understand how it is to be treated as regards the other counsel, for by one and the same arrangement, arranged by one and the same person, at one and the same time, and at one and the same place, viz., at *Ottawa*, the services of one and all of the counsel were to be remunerated, and by which, it cannot be doubted, that one and all were finally to be placed on the same footing—though it was at first contemplated that the remuneration of the juniors was to be on a smaller scale, which, however, was subsequently rectified, and it was finally arranged that all should fare alike. In addition to which this cause was tried and decided as on an *Ontario* contract, and Mr. *Doutre* was examined and proved his case as the principal witness, which he could not have done in the province of *Quebec*.

I am of opinion that the arrangement between the suppliant and the Minister of Marine and Fisheries, relied on in this case as a binding contract, took place at *Ottawa*, in reference to services to be performed by Mr. *Doutre*, as a barrister and Queen's counsel in *Nova Scotia*, and not in *Quebec*, and is not to be governed by the law of *Quebec*. In my opinion, the law in *Ontario* and *Nova Scotia* is the same as to the right of a barrister to maintain an action for counsel fees, and therefore it is immaterial whether the law of the place where the arrangement was entered into, viz., *Ontario*, or where the services were to be performed, viz., *Nova Scotia*, is to govern.

I concur in the views as enunciated by Chief Justice *Robinson* in *Baldwin et al.*, v. *Montgomery* (1), and by Chief Justice *Harrison* in *McDougall* v. *Campbell* (2), and as held in the Supreme Court of *New Brunswick in re Bayard* (3), and in *Keir* v. *Burns* (4), viz: that independent

(1) 1 U. C. Q. B. 283.
(2) 41 U. C. Q. B. 332.
(3) 6 New Brunswick R. (1 Allen) 359.
(4) 9 New Brunswick R. (4 Allen) 604.

of statute counsel fees are not the subject-matter of debt to be recoverable in an action by a barrister as a remuneration for his services; that the same rule applies in the provinces where the common law prevails, as in *England*, and must govern until altered by the legislature, as was done in *New Brunswick* in the case of physicians by the act 56 Geo. III. c. 16.

Chipman, C. J., in the Supreme Court of *New Brunswick, in re Bayard* (1) says:

Although fees to counsel are considered honorary, that is, not the subject-matter of debt to be recoverable in an action by a barrister, as a remuneration for his services, yet the reason of this is not that the barrister is supposed to bestow his services gratuitously, but that he should always be paid beforehand, because counsel are not to be left to the chance whether they shall ultimately get their fees or not—their emoluments are not to depend on the event of the cause. This is fully set out in the case of *Morris* v. *Hunt* (2). In this case *Bayley*, J. says: "It is the duty of counsel to take care if they have fees that they have them beforehand, and therefore the law will not allow them any remedy if they disregard their duty in that respect. The same rule applies to the case of a physician, who cannot maintain any action for his fees." Such is the state of things in *England*, and although in this province, as in most of the other British colonies, the position of the profession differs much from that in *England*, from the necessity which exists of uniting in the same person the office of barrister and attorney, the duties of which are frequently much blended, and the attorney is often, as it would appear to have been in the present case, the only counsel for his client, we do not think that the lien of the attorney here on the money in his hands can go beyond what it is in *England*. The same rule must govern in both countries until it is altered by the legislature, as has been done in this Province in the case of physicians by the Act 56 Geo. III. c. 16.

In the case of *Baldwin et al.* v. *Montgomery* (3), Chief Justice *Robinson* in *Ontario* then *Upper Canada* says:

The principle of law will apply which denies to counsel and physicians the right to sue for their professional services; a principle which, it is thought in *England*, for the advantage as well as for the

(1) 6 New Brunswick R. 361. (2) 1 Chit. 544.
(3) 1 U. C. Q. B. 284.

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honor of the profession, should be maintained in force, and for reasons which apply here equally as in *England*.

In the case of *Kerr* v. *Burns* (1), *Carter*, C.J., delivering the judgment of the court, to which I was a party, says:

> On the other question arising in this case, namely, the right of a barrister to maintain an action against his client for professional services, we entertain no doubt whatever. The only cases cited in favor of this right were from the courts of the *United States*, and in those very cases it is admitted that the decisions are at variance with the law of *England*. We feel ourselves bound by the law of *England*, even if we doubted its policy, a matter on which, however, we are entirely free from doubt. The system under which the bar of *England* has existed for centuries, and maintained its acknowledged character of independence and honourable usefulness, ought to be sufficient for the bar of a British colony; and we think we should be materially injuring the position and efficiency of the bar, were we to change that system, and enable them to recover as for ordinary work or labour, on a *quantum meruit*. That dignity and standing in court which is supposed to appertain to a barrister, would hardly be raised by his appearance as a witness in his own case, to rate his own forensic talent and learning at his own estimate, to hear them depreciated by his own client and his professional rivals, and to have them finally judged by a tribunal, not perhaps very adequately qualified to appreciate his real merits.

Since the cases of *Baldwin* v. *Montgomery, in re Bayard* and *Kerr* v. *Burns* were decided, we have the celebrated case of *Kennedy* v. *Broun* (2), in which it was distinctly held that the relation of counsel and client rendered the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation, and that a promise made by a client to pay money to a counsel for his advocacy, whether made before, during, or after the litigation, had no binding effect; and in the equally celebrated case of *Swinfen* v. *Lord Chelmsford* (3), *Pollock*, C. B., delivering the judgment of the court, says:

(1) 6 New Brunswick R. 609. (2) 13 C. B. N. S. 677.
(3) 5 H. & N. 920.

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We are all of opinion that an advocate at the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express, or implied. Cases may indeed occur where on an express promise (if he made one) he would be liable in *assumpsit*, but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty in the proper discharge of which, not merely the client, but the court in which the duty is to be performed and the public at large have an interest.

In *Kennedy* v. *Broun* (1), *Erle*, C.J., delivering the judgment of the court, says:

He is entrusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech, which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy proportioned to the magnitude of these interests. If the law is that the advocate is incapable of contracting for hire to serve when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's right, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right.

If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamour and powerful interest, speaking with a boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to his client; and such men are the guarantees for the maintenance of his dearest rights; and the words of such men carry a wholesome spirit to all who are influenced by them. * *

Such is the system of advocacy intended by the law requiring the remuneration to be by gratuity. * * * *

On principle, then, as well as on authority, we think that there is a good reason for holding that the relation of counsel and client in

(1) 13 C. B. N. S. at p. 737 *et seq.*

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litigation creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant, and the services of the plaintiff created neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise. * * * * * *

With respect to the claim for compensation for leaving *Birmingham* and coming to *London* and for services in issuing publications for the purpose of creating a prepossession in favour of the defendant, there are several answers, of which two will suffice. The first is that these services were auxilliary to the service as an advocate; and, if the principal service could not be the subject of a contract, neither could any service which was merely accessory thereto, and of no value without the principal. * * * *

Of the judgment in the case of *Kennedy* v. *Broun*, Chief Justice *Harrison* of *Ontario* thus speaks in *McDougall* v. *Campbell* (1):

It has in *England* from time immemorial been considered essential to the honor and dignity of the bar that there should be no traffic about counsel fees, no power to make contracts of hiring and service in reference to them. This has become a well understood and generally respected canon of English law. Under its operation there has existed in *England* for centuries as able, learned and distinguished a bar as ever existed in any, or does exist in any part of the world. If the preservation of the canon be necessary in *England*, it is, in my opinion, none the less necessary in this province, where the professions of barrister and attorney are often united in the same person, and where the dignity and zeal of the barrister, if not carefully guarded, is in danger of being lost in the mere zeal of an attorney. The bar of this province has not suffered from the limited operation of the English rule. Personally, I deplore that there has ever been any encroachment on the integrity of the English rule. And if there is to be any further encroachment, the work will not be mine or with my assent. If the days should ever come when barristers, instead of being paid their fees when retained, may contract for future payment, and sue in the event of non-payment, and be sued for non-performance of contract, as in the case of an ordinary contract for hiring and service, I do not think the public will gain anything, and I am sure the profession will lose by the change.

The public and the profession have in truth a common interest in maintaining the honor and dignity of the bar. In a country like ours,

(1) 41 U. C. Q. B. 359.

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where honor and dignity depend more on personal conduct than on trappings of office, nothing should be done which would have a tendency in personal conduct to lessen the honor and dignity so essential to the maintenance of a high standard of professional rectitude at the bar. As said by *Erle*, C. J., in *Kennedy* v. *Broun*, 13 C. B. N. S. 677, 738: "If the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words, sold and delivered according to contract for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates would be degraded."

The same distinguished judge in the same instructive judgment (p. 737) also uses these works: "The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz.: the administration of justice."

I confess I never read this inspiriting judgment without, if possible, having increased veneration and increased love for the profession to which I owe so much.

It may be a weakness on my part, but it is a weakness in which I believe I shall glory as strength as long as I have any being.

I am not unimpressed with what my brother *Gwynne* says as to the effect of the Petition of Right Act in this case, but as I have a strong opinion on a ground raised and argued at the bar which is an answer to the case, I prefer resting my judgment on this point, which to my mind is clear. As the question suggested by my brother *Gwynne* has not been as fully argued before us as I should like it to be, without a full discussion of this important point, I should not like to express an opinion.

I think the appeal should be allowed with costs.

STRONG, J.:—

I am unable to aquiesce in the judgment just delivered by the Chief Justice, for I cannot bring myself to the conclusion that the suppliant, an advocate of the Province of *Quebec*, practising and having his domicile in that Province, is disentitled to recover fees for pro-

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fessional services, for the reason that he performed such services at *Halifax* in *Nova Scotia*, under an agreement made with the Government of the Dominion, having its seat at *Ottawa*, in the Province of *Ontario*, through the intervention of a minister of the Crown. For, assuming that by the law of both the Provinces of *Ontario* and *Nova Scotia* no action can be maintained for counsel fees, I doubt if the law of those Provinces is applicable to the present case, for I incline to think the right to recover depends on the law of *Quebec*, which recognizes a legal liability to pay counsel fees upon a *quantum meruit* as well as under an express agreement. Denial of the right to recover counsel fees in *England* is, as I gather from Lord C. J. *Erle's* most learned judgment, in *Kennedy* v. *Broun* (1), not based on any principles of policy applicable to the public at large, but merely on the long usage of the English bar, and on principles of policy established in the interests of the profession. I consider therefore, that the decision referred to merely establishes that an English barrister, who, by the rules of his profession, is presumed always to render his professional services for honorary fees only, cannot maintain an action for them, and not that such a rule would apply to a foreign advocate who was not prohibited, either by the law of his domicile, or by the usages governing the profession to which he belonged, from enforcing a legal remedy for his remuneration.

Further, even if the laws of *Ontario* or *Nova Scotia* were applicable, I should hesitate long before I acceded to the proposition, that a rule, which seems to me to be founded principally on historical reasons and others incidental to the professional status of the bar in *England*, was a part of the common law of *England* which had been introduced

(1) 13 C. B. N. S. 677.

into the provinces in question, in both of which the distinction which is so carefully preserved in *England* between the professions of barrister and attorney is entirely disregarded, the great majority of the profession practising in both characters. I am aware that there are decisions in *Ontario* adverse to this view, but I consider the late case of *McDougall* v. *Campbell* (1) as throwing so much doubt on these cases that they are no longer to be relied on.

Whilst, however, expressing these doubts as a reason for not being able to rest my judgment on the same grounds as those expressed by the Chief Justice, I desire to be understood as giving no opinion upon the questions referred to, which it is unnecessary I should do, since it appears to me, after a very careful consideration of the evidence, that by the terms of the agreement between the suppliant and Sir *Albert Smith*, as proved by the suppliant's own evidence, and that of his witness, Mr. *Whitcher*, as well as by the testimony of Sir *Albert Smith*, the suppliant is precluded from setting up any legal right to recover fees for the services rendered by him to the Government, beyond the amount which has been admittedly paid to him. The passages in the evidence to which I refer, are as follows:

Mr. *Doutre*, in his evidence, says:

> I insisted upon making some temporary arrangements which would relieve us from money embarrassment while we were away. Then Sir *A. J. Smith* said: "Do you mean that if we obtain nothing from the commission you will be lenient, or have mercy upon us, and if we obtain a good award you will expect to be treated liberally?" I said "you may put it on that basis if you like, but it is only then that we will be able to settle the matter." This ended the conversation. The $1,000 were expected to meet our expenses, as we were going to live in a place where we did not know how the expenses might run.

(1) 41 U. C. Q. B. 332.

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Mr. *Whitcher:*

Q. Have you the memorandum here? A. I have. There is an entry on the 10th of May, 1877. I may state that there were discussions constantly going on as to the counsel, Professor *Hind*, Mr. *Miall* and others engaged upon the commission. This entry is amongst others, and is as follows:—"Counsel want $1,000 each as refresher and temporary arrangement for $1,000 per month and all expenses paid at Halifax."

This, if I connect it rightly in my memory, was the occasion when the Minister asked Mr. *Doutre* to reduce the proposition to writing. Further on I find amongst a number of other entries dated 23rd of May, the following: "Agreed with counsel another $1,000 refresher and $1,000 per m. during session of commission, all expenses of travelling and subsistence and a liberal gratuity on the conclusion of business."

I do not say that these are the exact words, but they are the substance of what I was to consider my directions.

Q. You wrote to Mr. *Doutre*, I believe, giving a copy of those memoranda, look at the exhibit produced and say whether it is a correct copy of the entries that you have read? A. It is my handwriting, but I am inclined to think that it was written subsequently to one for the use of the Department of Justice, at the time that Mr. *Doutre* and the other counsel were appealing for a consideration of their claims. We communicated them officially to the Department of Justice, after having been asked to report the substance of the agreement with the counsel. This having been called in question, I find that I wrote a note to Mr. *Doutre* stating that the entry in my note-book was perfectly correct, and giving him the memorandum.

Q. You had previously sent memoranda of those discussions to the Department of Justice? A. Yes. This note that you have produced was marked "private," and should not have been produced in this case. My time was very much occupied with the duties of my office and I would naturally communicate the information asked from me more freely than I would have done if I had supposed that it would be produced as evidence in a legal case. The note corresponds in substance with the entries that I made in my note-book.

Q. Were these memoranda made at the time? A. Yes.

Sir *Albert Smith:*

Q. Do you remember having an interview with Mr. *Doutre* with reference to the compensation that he was to receive as counsel? A. Yes.

Q. Will you state what that interview was? A. I think that Mr.

Doutre and I had several conversations on the subject, but I do not recollect of having any conversation with the other counsel at all as to their compensation. A short time before the commission opened at *Halifax*, Mr. *Doutre* was in my office. He referred to it in his evidence, and Mr. *Whitcher* did also. I think Mr. *Whitcher* was present on that occasion.

Q. Will you state what arrangement was made? A. My memory of the conversation is this: they had already received $1000 retainer, and we were to give them $1,000, which I understood to be a compensation for services up to that time. After that we were to give them $1,000 a month while in *Halifax*, and Mr. *Doutre* suggested that in case we succeeded in obtaining a handsome award it would be a matter for the Government to consider whether they were to get a gratuity after the case was over. That was my understanding.

Q. Then $2,000 would be the amount in full up to that time? A. Yes, that was my understanding. Mr. *Doutre* said, I recollect distinctly, something about some gratuity, if we should succeed in getting a handsome award that then it would be a matter for the Government to consider whether they would make a gratuity.

Q. But the contract for payment was limited to $1,000? A. Yes.

Q. And anything further than that was to be a gratuity? A. That was my understanding of it, and that is what I communicated to my colleagues and to Mr. *Ford*. I know that Mr. *Ford* and I discussed the question. Mr. *Doutre* knows that, too. I told him more than once that I would have to communicate the matter to Mr. *Ford*.

Q. That $1,000 a month, while in *Halifax*, was to cover both the services and expenses? A. I understood it so. I remember that Mr. *Doutre* stated on this occasion that he intended to take his family to Halifax, but that was a matter that I did not think the Government would be justified in paying the expenses. That was personal to himself.

The effect of this evidence is, in my opinion, to establish beyond question that the engagement entered into by Sir *Albert Smith* on behalf of the Government to pay any fees in excess of the $1,000 per month during the sittings of the commission was purely honorary.

This I take to be the plain meaning of Mr. *Doutre's* own statement, when he says that Sir *Albert* put the question to him:

Do you mean that if we obtain nothing from the commission you will be lenient or have mercy upon us, and if we obtain a good award you will expect to be treated liberally?

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To which question Mr. *Doutre* replied:

You may put it on that basis if you like, but it is only then we will be able to settle the matter.

Therefore had we nothing but Mr. *Doutre's* own statement, I should consider that, so far from there having been any express contract to pay a reasonable remuneration for the services of counsel in excess of the $1,000 per month, there was an express engagement on his part to trust to the honour and liberality of the Government. But the evidence of Mr. *Whitcher*, the Commissioner of Fisheries, a witness called by the claimant, puts this beyond all doubt, for in the memorandum made by him at the time of the interview of the 23rd May, 1877, between Sir *Albert Smith* and Mr. *Doutre*, it is in so many words expressed, that any sum to be paid at the conclusion of the arbitration in excess of the $1,000 per month, was not to be a matter of right but a "gratuity." It is to be observed that this memorandum is not objected to by Mr. *Doutre*, but is expressly recognized by him as containing a correct record of the arrangement come to by him with the Minister. Mr. *Whitcher* says he believes he made the memorandum in question, in the usual way, the moment he returned from the Minister's room to his desk. A copy of this memorandum also appears to have been sent by Mr. *Whitcher* to the Department of Justice as containing a correct record of what had passed at the interview in question.

Mr. *Whitcher* having stated that his memorandum correctly embodied the substance of the conversation between Mr. *Doutre* and the Minister, and having represented it in the way I have mentioned, as correctly embodying the substance of the conversation, I cannot consider the signification which, in a subsequent part of his evidence, he attaches to the word "gratuity," as meaning an unascertained sum or remuneration to be subsequently fixed, as materially

varying its force and effect, more especially as the memorandum appears to have been adopted by Mr. *Doutre* in the terms in which it was expressed, and is, as regards the use of the word "gratuity," in its ordinary signification, entirely corroborated by Sir *Albert Smith's* testimony and not inconsistent with that of Mr. *Doutre* himself.

Sir *Albert Smith* states that the arrangement was that, if a handsome award was obtained, it would be for the Government to consider whether they would make a gratuity. This evidence, in my opinion, clearly shows that Mr. *Doutre* agreed to trust to the honour and generosity of the Government to pay any fees in excess of the $1,000 per month The consequence must be that, not only is such an honorary and gratuitous undertaking no foundation for an action, but it excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered, assuming that the law is as the suppliant contends, that such an action would, in the absence of an express agreement, have been maintainable. That this is the legal effect, if the view I take of the evidence is correct, is manifest from numerous authorities, of which I may mention one or two. Mr. *Pollock*, in his learned work on Contracts (1), after referring to the case of *Taylor* v. *Brewer*, which I will presently mention more fully, thus clearly states the principle:

> Moreover, a promise of this kind, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back on any contract to pay a reasonable remuneration, which would be inferred from the transaction, if there was no express agreement at all.

In *Roberts* v. *Smith* (2),

> There was an agreement between A and B, that B should perform certain services, and that in the event (let us say No. 1) A should

(1) Ed. 2. p. 43.

(2) 4 H. & N. 315.

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pay B a certain salary, but that in another event (No. 2) A should pay B whatever A might think reasonable. Event No. 2 having happened, the court held there was no contract which B could enforce. Services had indeed been rendered, and of the sort for which people usually are paid and expect to be paid, so that in the absence of express agreement there would have been a good cause of action for a reasonable reward. But here B had expressly assented to take whatever A should think reasonable, which might be nothing, and had thus precluded himself from claiming to have whatever a jury should think reasonable.

In *Taylor* v. *Brewer* (1) the bankrupt, of whom the plaintiff was the assignee, had performed work for a committee under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right." Lord *Ellenborough*, C. J., in giving judgment says:

But here, I own it, I think there was an engagement accepted by the bankrupt on no definite terms, but only on confidence that if his labour deserved anything he should be recompensed for it by the defendants. This was throwing himself upon the mercy of those with whom he contracted, and the same thing does not unfrequently happen in contracts with several of the departments of Government.

Grove, J., said:

I consider the resolution to import that the committee were to udge whether any or what recompense was right.

LeBlanc, J.:

It seems to me to be merely an engagement of honor.

Bayley, J.:

The fair meaning of the resolution is this: that it was to be in the breast of the committee whether he was to have anything, and if anything, then, how much?

The case of *Roberts* v. *Smith*, cited in the extract given from Mr. *Pollock's* work, followed this case of *Taylor* v. *Brewer*, and is, as already stated, to the same effect; and the case of *Bryant* v. *Flight* (2), in which a contrary

(1) 1 M. & S. 290. (2) 5 M. & W. 114.

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opinion was held by a majority of the court, Baron *Parke* dissenting, must be taken as overruled by *Roberts* v. *Smith* (1).

It appears to me very clear, therefore, that the suppliant performed the services for which he sues under an agreement with the government which disentitles him to maintain his petition of right.

He must be taken to have relied exclusively upon the honour, good faith and liberality of those who employed him, and not on any binding legal obligation to pay.

There was, however, in addition to the arrangement about the gratuity for services to be rendered, an express agreement to pay Mr. *Doutre's* disbursements for travelling in going to and returning from *Halifax*, and his expenses at *Halifax*, which seems to me to depend on different considerations. I know of no authority deciding that, even in *England*, a counsel leaving home to perform professional services may not legally stipulate that his client shall pay his expenses. No instances of such a question having ever arisen is to be found in the books, it is true, but this is probably for the reason that the etiquette of the bar there forbids such an agreement. However that may be, such agreements are not unusual in this country, and I find nothing to warrant me in holding that they are not valid.

I am therefore of opinion that the suppliant is entitled to recover his travelling expenses, and also his personal expenses of living at *Halifax*. I should have mentioned that Sir *Albert Smith* denies that any such arrangement to pay expenses was come to, but I think I must adopt Mr. *Whitcher's* memorandum, which was a written record of the agreement made at the time, as

(1) See also Leake on Contracts, p. 14; Story on Agency, sec. 325, 11th edit.; Wharton on Agency, sec. 324; Pothier on Obligations, No. 47.

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correctly stating the terms which were arrived at, and this clearly states that the expenses were to be paid extra.

The evidence does not contain sufficient material to enable me to fix the amount of these expenses, and I therefore think there should be a reference to the registrar to take an account of the claimant's reasonable personal expenses whilst travelling to and from *Halifax*, and whilst in attendance upon the Commission under his retainer at *Halifax*.

FOURNIER, J., adhered to the judgment delivered by him in the court below.

HENRY, J. :—

I am of opinion that the appeal should be dismissed.

I agree in the conclusion that there was an agreement entered into between the Government and the respondent that "the final amount of fees or remuneration to be paid to counsel would remain unsettled until after the award of the commissioners." Mr. *Whitcher*, in his evidence, used the word "gratuity," but it is clear that term was not used in its technical sense, but that all parties intended that some reasonable amount should be given in addition to the sum agreed to be paid down.

The first objection was that the counsel could not recover for his fees at all in a petition of right. I have satisfied myself that a counsel should recover for his fees in this country. Here a counsel stands on a very different footing from that of an English barrister. The duties of professional gentlemen here are very different from those of the English counsel, and I am of opinion, therefore, that it would be improper to introduce in this country the rule which prevails in *England*, viz. : that a counsel

fee is a mere honorarium and cannot be recovered by action. Here counsel act as attornies, solicitors and advocates at the same time, and their duties are not separated, and they ought not to be denied the right to recover the value of their services as such. It has been decided in *Quebec*, and it has been all but decided in *Ontario*, and I take it to be the policy here, that everybody should be paid for the services he renders. I have, therefore, come to the conclusion that counsel can recover here for any fees that they have contracted for in exchange for their services. I do not see why the law should be otherwise in this country. The only difficulty I had was, that inasmuch as the statute says that a subject can recover against the Crown only in such cases as a subject could recover in *England*, whether under the petition of Right Act the suppliant could recover against the Crown, as in *England* he could not recover in a similar action.

I have arrived at the conclusion that where there is a contract between the subject and the Crown, and the subject alleges a breach of that contract, a petition of right will lie. Although an English counsel could not recover in *England* on a similar contract, yet the intention of Parliament was that all contracts entered into with the Dominion Government could be enforced in the Exchequer Court.

As to the damages, I do not think that the amount awarded is unreasonable. We all know that parties are put to extraordinary expense when they are obliged to leave their homes and reside in a strange city attending a matter of such importance as the one on which the suppliant was employed. In the old country a much larger bill would have been charged and paid, and in such matters it is usual to provide liberally.

Under all the circumstances I am in favour of dismissing the appeal.

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TASCHEREAU, J. :

J'en suis aussi venu à la conclusion, avec mon honorable collègue qui vient d'opiner, que cet appel doit être rejeté, quoique sur des motifs un peu différents des siens.

Je suis d'avis que cette cause doit être régie par le droit de la province de *Québec* ; en premier lieu, parce que c'est à *Montréal* que l'Intimé a reçu la lettre du ministre de la Justice demandant ses services, et c'est à *Montréal* que l'Intimé a accepté cette demande, et s'est engagé à donner ses services comme un des avocats du gouvernement canadien devant la Commission des Pêcheries. Et en second lieu, et surtout parce que je considère qu'un des membres du Barreau de la province de *Québec* qui accepte la charge d'une affaire quelconque comme *avocat*, le fait, ne peut le faire, que comme avocat de la province de *Québec*, comme membre du Barreau de la province de *Québec*, et que tout ce qu'il fait comme *avocat*, quel que soit le lieu où il exerce sa profession, soit en *Angleterre*, devant le Conseil Privé, ou ailleurs, quel que soit le lieu où ses services ont été actuellement demandés et retenus, il le fait à titre d'avocat et de membre du Barreau de la province de *Québec* et avec ses droits et privilèges comme tel. De fait, il n'est avocat qu'à ce titre. Il peut, en certaines circonstances, exercer sa profession en dehors de cette province, mais c'est toujours à titre d'avocat de cette province qu'il le fait. Le client qui retient ses services pour être exercés en dehors de la province se met, dans ses relations avec lui, sur le pied ordinaire d'un client vis-à-vis d'un avocat de la province, dans la province. Par exemple, si pendant que M. *Doutre* se trouve à *Ottawa*, un client le retient pour aller plaider une cause devant le Conseil Privé, ce ne sera pas la loi d'*Ontario*, quoique le contrat y ait été fait, ni la loi Impériale quoique les services soient rendus en *Angleterre*, qui régiront les relations

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entre M. *Doutre* et son client, mais bien la loi dans la province de *Québec;* parce que ce client ne l'a retenu et engagé que comme avocat, et que M. *Doutre* est avocat de la province de *Québec*, et je le répète n'est avocat qu'à ce titre.

De la part de Sa Majesté, il est d'ailleurs admis, quoique nié d'abord, que la cause de la présente action a pris naissance dans la province de *Québec*. A la page 3 du factum, au soutien de l'appel, je lis:

It is submitted that a new trial should be ordered on the ground of the reception of improper evidence, viz:

(1) The Suppliant's own evidence—the cause of action having arisen in the Province of Quebec, and the suppliant's evidence therefore not being admissible.

Etant posé le principe que la loi de la province de *Québec* régit cette cause, la question de savoir si une action en justice compète à M. *Doutre* pour le recouvrement de ses honoraires comme un des avocats de Sa Majesté devant la Commission des Pêcheries se trouve tranchée. Car, sous le régime de cette loi, cette question ne souffre pas de doute. Voir *Amyot* v. *Gugy* (1) et les autorités y citées aussi *Devlin* v. *Tumblety* (2), *Beaudry* v. *Ouimet* (3), *Grimard* v. *Burroughs* (4), *Vandal* v. *Gauthier* (5), *Larue* v *Loranger* (6). Aussi, dans le même sens, *Grimard* v. *Burroughs* (7). Voir aussi l'arrêt de la cour de Cassation du 16 décembre 1818 mentionné à *Favard* (8).

Dans une cause de *Devlin* v. la *Corporation de Montréal*, la Cour d'Appel, le 13 mars 1878, accorda à M. *Devlin* $2,500 pour ses honoraires comme avocat de

(1) 2 Q. L. R. 201.
(2) 2 L. C. Jur. 182.
(3) 9 L. C. Jur. 158.
(4) 3 L. C. Jur. 84.
(5) 5 Rev. Lég. 132.
(6) 2 Leg. News 155 and 3 Legal News 284, where the claim for fees was not maintained by the Court of Appeal, but because there was a tariff regulating those fees, and no special agreement to pay any extra remuneration had been proven by the plaintiff.
(7) 11 L. C. Jur. 275.
(8) V. dépens, page 55, 1ère col.

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la Corporation sur les expropriations requises pour le Parc (*Mount Royal Park*) sur une preuve de la valeur des services du demandeur faite dans la cause, aucun tarif existant pour tels services, confirmant le principe du jugement rendu en Cour Supérieure par le juge *Johnson*, le 30 mai 1877, quoique réduisant le montant qu'il avait accordé. Le passage du jugement de la Cour Supérieure,—sur la partie de la demande pour honoraires sur les expropriations pour le parc, est comme suit :

Considering also that from the professional and other evidence adduced by Plaintiff, it was proved that the said mentioned services were worth the sum of ten thousand dollars ; and further that in the Judgment of this Court, after duly weighing such evidence, the said Plaintiff is entitled to receive from the Defendant for such last mentioned services four thousand dollars.

Le jugement de la Cour d'Appel dit :

Considering also that in the Judgment of this Court after duly weighing such evidence the said Respondent (*Devlin*) is entitled to receive from the Appellants (The Corporation of *Montreal*) for such last mentioned services (on Mount Royal Park expropriations) two thousand five hundred dollars.

C'est bien là, admettre dans les deux Cours, qu'un avocat peut recouvrer la valeur de ses services sur le *quantum meruit*, quand ses services sont rendus hors de cour ou ne sont pas prévus par le tariff.

Grimard vs. Burroughs et *Larue vs. Loranger* ont été invoqués de la part de Sa Majesté comme contraires à la réclamation de l'Intimé. Mais, en y référant on verra que les décisions dans ces causes vont à dire que quand il y a un tarif d'honoraires l'avocat et procureur ne peut exiger de rémunération plus élevée que le tarif, quand il n'y a pas eu engagement spécial de la part du client de lui payer plus que les honoraires accordés par le tarif. Il est évident, en conséquence, que ces causes n'ont pas d'application ici. Il n'y avait pas de tarif pour les avocats engagés devant la Commission des Pêcheries.

Je réfère aussi aux articles 1722 et 1732 C.C. Aussi à l'art. 2260 C.C. qui dit que l'action de l'avocat est prescrite par cinq ans. Avant les cinq ans, il y a donc action.

Aussi à *Troplong*, Mandat Nos. 223, 249, 253, 630, 643, 644, 645; 27 *Laurent Nos.* 334 à 343; 6 *Boileux* 148, 574, 575; et au 2e vol. Rapport des Codificateurs (sixième rapport) pages 7 et 8.

Il en est de même dans l'*Ile Jersey* et la *Louisiane*, dont les lois dérivent en grande partie des lois françaises ou leur sont semblables. Voir la plaidoirie de sir *Roundell Palmer* (maintenant lord *Selborne*) dans la cause "*The Jersey Bar.*" (1) Et pour la *Louisiane*, les causes de *Hunt* v. *The Orleans Cotton Press Company* (2), *Re Succession of Macarty* (3), *Brewer* v. *Cook* (4), *Edelin* v. *Richardson* (5), *Re Succession of Lee* (6).

Je n'aurais pas cru devoir tant appuyer sur une proposition qui ne me semble plus discutée ni mise en doute dans la province de *Québec*, si ce n'eût été de la négation de cette proposition dans cette cause par les savants avocats de l'appelante.

J'en viens maintenant à la preuve faite dans la cause, remarquant d'abord que, d'après les lois de la province de *Québec*, M. *Doutre* ne pouvait être entendu comme témoin à l'appui de sa demande, et que son témoignage produit au dossier comme témoin entendu pour lui-même, ne peut être pris en considération dans l'examen de cette cause. La section 63 de l'acte qui constitue la Cour de l'Echiquier, 38 Vict., ch. 11, énacte spécialement que :

Issues of fact, in cases before the said Court, shall be tried according to the laws of the Province in which the cause originated, including the laws of evidence.

(1) 13 Moo. P. C. C. 263.
(2) 2 Robinson, 404.
(3) 3 Louisiana An. Rep. 517.
(4) 11 Louisiana An. Rep. 637.
(5) 4 Louisiana An. Rep. 502.
(6) 4 Louisiana An. Rep. 578.

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Et la section 13 de l'acte 39 Vict., ch. 27, étend cette clause aux *petitions of right.*

Avant d'entrer dans l'examen des témoignages produits au dossier il faut constater quelle est la contestation liée entre les partis, *the matters in issue*, tel qu'appert au dossier. D'abord, quelle est la demande du pétitionnaire ?—Purement et simplement une action bâsée sur le *quantum meruit* pour services professionnels rendus pour Sa Majesté et à sa demande devant la Commission des Pêcheries, et pour la préparation de la cause de Sa Majesté devant la dite commission, avec en outre une obligation réclamant les dépenses encourues par le pétitionnaire dans l'exécution de ses devoirs comme tel avocat, et donnant ses dépenses comme se montant à plus de $8,000, et un autre alléguant que le pétitionnaire a été employé pendant plus de deux ans à l'exécutiou de ses dits devoirs. Le pétitionnaire ajoute qu'il a reçu une somme de $8,000 sur le paiement de ses services, pour laquelle il crédite Sa Majesté. Il allègue aussi que par un arrangement provisoire avec le département des Pêcheries, il avait été convenu, avant son départ pour *Halifax*, où la Commission devait siéger, que le gouvernement lui paierait $1,000 par mois pour ses dépenses courantes durant son séjour à *Halifax*, laissant le règlement définitif, tant des dépenses que des honoraires du pétitionnaire, à être fait après la clôture des travaux de la Commission. Tels sont les allégués essentiels de la demande.

Pour Sa Majesté, le procureur-général de la Puissance a plaidé en réponse à cette demande comme suit :

In answer to the said Petition, I, the Honorable James McDonald, Her Majesty's Attorney General for the Dominion of Canada, on behalf of Her Majesty, say as follows :

1. The admissions herein contained are made for the purposes of this matter only.

2. I admit that the suppliant acted as one of the Counsel for the Crown before the Fishery Commission referred to in the said petition

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of right, but I have no knowledge of the alleged retainer or of the terms thereof and I deny the same and put the suppliant to such proof thereof as he may be advised to make.

3. I deny that the suppliant was for more than two years employed in preparing and supporting the claim of Her Majesty as alleged in said petition, and that the expenses incurred by him in the performance of the duties of his said office, exceeded eight thousand dollars as alleged; and I submit that the expenses incurred by the suppliant in connection with his family and the loss alleged in connection with his professional affairs and family and domestic arrangements, form no part of any claim which can be enforced against Her Majesty in the premises by Petition of Right.

4. I am informed and therefore allege that the arrangement made with the suppliant referred to in his petition under which he was to be paid one thousand dollars a month while in Halifax, was not a temporary and provisional arrangement as alleged, but that the said one thousand dollars per month, was with other moneys previously paid to the suppliant, to be accepted by him in full for his services and expenses; I am informed and therefore allege that the sum of eight thousand dollars paid to the suppliant as mentioned in his petition included the moneys payable under such arrangement, and I submit therefore that the suppliant has no further claim against the Crown in the matter. Even if it should be held that no final arrangement as to the amount to be paid the suppliant was come to, I submit that the suppliant cannot recover more than the said sum of eight thousand dollars for his expenses and for the services rendered.

5. I deny that the Dominion Government have recognized the suppliant's right to be paid his said claim.

6. I say that the suppliant was, when acting in connection with the matter referred to in his petition, one of Her Majesty's Counsel learned in the law, and that the services rendered by him in the said matter, were rendered as such Counsel. The eight thousand dollars paid him, more than covered any expenses to which he was properly put, on behalf of Her Majesty. I submit that the suppliant as such Counsel cannot enforce a claim for Counsel fees, and that no action lies for the recovery thereof, and I claim the same benefit from this objection, as if I had demurred to the said petition.

I pray that the suppliant's petition may be dismissed with costs.

Le pétitionnaire a répliqué à ce plaidoyer comme suit:

1. The Suppliant joins issue on paragraphs Nos. 2, 3, 4 and 5 of Defendant's statement of Defence.

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2. And as to paragraph 6 of said statement of defense, Suppliant saith that he is an advocate of the Province of Quebec, and as such, was retained by the Crown as set forth in his petition; that the letter of the Department of Justice retaining him, and the amount of his retainer were received by him at Montreal, in the province of Quebec, from whence he wrote his reply agreeing to act for the Crown as requested; that as such advocate of the Province of Quebec, he is by the law of that Province entitled to claim and recover from the Crown the amount claimed by him as such advocate, under the facts set forth in his petition; and he further saith that the sum of eight thousand dollars paid him did not more than cover the expenses that he was properly put to in the premises in behalf of Her Majesty; and he claims the same benefit from this replication as if he had demurred to the said sixth paragraph of statement of defence.

Voyons maintenant quelle est la preuve au dossier sur les issues ainsi jointes.

D'abord, tant qu'au fait que le Ministre de la Justice a retenu les services de M. *Doutre* comme un des avocats et conseils pour Sa Majesté devant la Commission des Pêcheries, la lettre même du Ministre de la Justice sur le sujet a été produite. Cette lettre est en termes des moins équivoques et le pétitionnaire ne pouvait faire une meilleure preuve. Mais cette preuve lui était-elle nécessaire? Il a agi aussi ouvertement et publiquement que possible dans l'exécution de ses devoirs comme tel avocat pour Sa Majesté: le gouvernement lui-même lui a payé $8,000 sur ses dépenses, et cependant, le Procureur-général vient plaider ici qu'il ne sait pas et nie même que M. *Doutre* ait été retenu tel qu'il l'allègue comme avocat pour Sa Majesté!!! N'a-t-on pas lieu de s'étonner d'un tel plaidoyer de la part du Procureur-général? Tant qu'au troisième plaidoyer, de la part de Sa Majesté, il n'est qu'une admission que le pétitionnaire a été employé au moins deux ans dans l'exécution de ces devoirs, et que ses dépenses se montent à au moins $8,000. Que la Couronne puisse prétendre que les $8,000 qu'elle a payées à M. *Doutre* la libère complètement vis-à-vis de lui cela se comprend mais

qu'après lui avoir payé ces $8,000 comme son avocat devant la Commission des Pêcheries, elle vienne devant une Cour de Justice nier que M. *Doutre* ait été son avocat devant cette Commission, démontre bien que ceux que la Couronne charge de défendre ses intérêts devant les tribunaux oublient quelquefois la dignité et le caractère de leur client.

Tant qu'à la partie niant que Sa Majesté soit obligée de payer les dépenses encourues par le pétitionnaire pour sa famille à *Halifax* durant la Commission, d'après la preuve, telle qu'elle me semble être au dossier, cette partie de la cause est sans importance.

Tant qu'au 4me plaidoyer de la part de Sa Majesté, allant à alléguer que les $8,000 déjà payées à M. *Doutre* ont été acceptées par lui comme paiement entier de ses services et dépenses, la preuve sur cette partie de la cause est contradictoire. D'après le témoignage de Sir A. *Smith*, alors Ministre des Pêcheries, il en serait ainsi, et l'arrangement qu'il aurait fait, pour Sa Majesté avec M. *Doutre* est que les $8,000 seraient acceptés par lui comme réglant entièrement sa réclamation tant pour ses dépenses que pour ses honoraires. Mais M. *Whitcher*, le Commissaire des Pêcheries pour la Puissance, et le paie-maître de la Commission à *Halifax*, jure positivement que l'arrangement fait entre M. *Doutre* et le Ministre des Pêcheries n'était que provisoire, et qu'un arrangement final au sujet du paiement des services de M. *Doutre* ne devait avoir lieu qu'à la conclusion des travaux de la Commission. M. *Whitcher* prit un mémoire par écrit de la conversation entre le ministre et M. *Doutre* et dans ce mémoire, il se sert du mot "*gratuity on the conclusion of the business.*" Mais il explique qu'en prenant cette note, il ne s'est pas servi des mots mêmes du ministre et de M. *Doutre*, mais qu'il n'a fait que noter la substance de leur convention. Il jure positivement que :

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It ended [l'entrevue de M. *Doutre* avec le ministre] in an understanding that this would be a temporary arrangement so for as it was not specified, that is to say, there was to be $1,000 paid for retainer, $1,000 for refresher and $1,000 per month while the Commission sat. Further remuneration to these amounts was to form the subject of after consideration.

Une note de M. *Whitcher* à M. *Weatherbe*, un des avocats retenus avec M. *Doutre*, dit:

My recollection is clear that *Doutre's* letter for self and confrères stipulated that the agreement about retainer, refresher and personal expenses was provisional and that settlement for professional services was deferred till the result of the Commission. This was acquiesced in by Sir *A. Smith* and Mr. *Hind.*

Comme je l'ai dit, Sir *A. Smith* contredit ce témoignage et jure que le paiement des $1,000 par mois ajouté à celui des $2,000 fait antérieurement devait être en satisfaction pleine et entière des services de M. *Doutre.*

Le juge en cour inférieure a adopté la version de M. *Whitcher*, et je suis d'avis qu'il ne pouvait guère faire autrement.

Et Sir *A. Smith* et M. *Whitcher* sont certainement deux témoins des plus respectables, mais il fallait ici accepter le témoignage de l'un et exclure celui de l'autre, il fallait choisir. Le juge *a quo* a cru que celui de M. *Whitcher* devait prévaloir, vû que lui seul avait pris note par écrit de la convention des parties, tandis que M. *Smith* ne se fiait qu'à sa mémoire qui pouvait lui faire défaut. J'ajouterai que le témoignage de M. *Whitcher* est entièrement corroboré par les lettres de M. *Doutre* aux autres avocats dans la cause, écrites lorsqu'il s'agissait de fixer avec le gouvernement leur rémunération commune pour leurs services sur la Commission des Pêcheries Celle à M. *Thomson* est prouvée par lui-même entendu comme témoin. Il est de règle certainement qu'une partie ne peut se faire une preuve par les lettres, qu'elle peut écrire, mais ici, c'est comme

faisant partie du *res gestæ* que l'on pourrait peut-être prendre ces lettres de M. *Doutre* en considération.

D'ailleurs, avec la preuve qui existe au dossier, la cour inférieure aurait eu le droit de déférer le serment supplétoire à M. *Doutre* (1), et si la cour inférieure avait ce droit, cette Cour, siégeant en appel d'une cause régie par la loi de la province de Québec l'a aussi. *Ferrier* v. *Dillon* (2), *Daley* v. *Chévrier* (3).

Or, comme le témoignage de M. *Doutre* se trouve déjà au dossier, quelle objection peut-il avoir à le lire comme donné sous serment supplétoire sur cette partie de la cause. Si la cour en voyait, il n'y aura qu'à déférer régulièrement le serment supplétoire à M. *Doutre*, et après avoir eu ses réponses, à donner le jugement final dans la cause. Le résultat sera bien le même. Et prenant pour certain que M. *Doutre* ne jurera pas autrement qu'il l'a fait, la cause me semble tranchée, et la preuve me semble parfaite du fait que les $8,000 payées n'étaient qu'un paiement provisoire, et que le règlement définitif ne devait avoir lieu qu'à la conclusion de la Commission. Il ne faut pas perdre de vue que si cette cause, qui, il est admis, a été prise comme un *test case* pour définir les droits non-seulement de M. *Doutre*, mais aussi de tous les autres avocats qui ont agi conjointement avec lui pour la Couronne devant la Commission des Pêcheries, eût été intentée au nom d'aucun autre des dits avocats, M. *Doutre* eût alors comme témoin ordinaire prouvé que l'arrangement fait avec le gouvernement n'était que provisoire.

Tant qu'à la preuve faite du *quantum meruit*, elle est des plus parfaites dans une cause de ce genre, où cette preuve est toujours difficile. Je n'ai rien à ajouter là-dessus aux remarques du savant Juge *a quo*, qui a

(1) Arts. 1246, 1254 C.C. (2) 12 L. C. Jur. 202.
(3) 1 Dorion, Q. B. Rep. 293.

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analysé les témoignages et démontré clairement que la somme de $8,000 qu'il a accordée au pétitionnaire lui est bien et justement due par le gouvernement. De fait, au lieu de $50 c'est $100 par jour que j'aurais accordé au pétitionnaire Si l'on considère la gravité des intérêts que M. *Doutre* était chargé de représenter devant la Commission des Pêcheries, l'importance et la nouveauté des questions qu'il a eu à y traiter : si l'on considère que des millions étaient demandés et des millions ont été obtenus pour le gouvernement : si l'on considère la preuve faite par M. *Whitcher* et M. *Walker* du travail préparatoire qu'a dû s'imposer et que s'est imposé M. *Doutre* pour l'exécution des devoirs de la charge importante que le gouvernement lui avait confiée : si l'on prend en considération, que pour remplir ses fonctions, il a dû passer six mois à *Halifax*, et laisser complètement son bureau et sa clientèle, que la preuve établit être une des plus considérables de la ville de *Montréal*, l'on est surpris que sa Majesté ait été avisée de le forcer à recourir aux tribunaux de justice pour obtenir le paiement de la somme qu'il demande pour ses services.

[TRANSLATED.]

TASCHEREAU, J :—

I also have arrived at the conclusion, with my learned colleague *Henry*, that this appeal should be dismissed, but for reasons somewhat different from his.

In the first place, I am of opinion that this petition should be decided according to the law of the Province of *Quebec*, because it was at *Montreal* that the respondent received the letter of the Minister of Justice requesting his services, and that it was at *Montreal* the respondent consented to be retained and agreed to give his services as one of the Canadian counsel before the Fishery Commission; and also, and more particularly, because I

consider that when a member of the bar of the Province of *Quebec* agrees and undertakes to give his services as an advocate, he does, and he can only do so, as an advocate of the Province of *Quebec*, and as a member of the bar of the Province of *Quebec*; and that in all the services he performs as such advocate, in whatever place he acts, whether before the Privy Council or elsewhere, and whether he was retained in one place rather than another, it is always as an advocate and a member of the bar of the Province of *Quebec* that he is acting, and as such he is entitled to all their rights and privileges. In fact he has no other right to act. He can, no doubt, exercise his profession in certain cases outside of his province, but it is always in the capacity of a barrister of his province that he acts. The fact of a person retaining a counsel to give his services outside of his province creates the ordinary relationship which exists between client and counsel in that province to which the counsel belongs.

For example, suppose that while Mr. *Doutre* is in *Ottawa*, he is retained by a client to go and argue a case before the Privy Council, it will not be the law of *Ontario*, although the contract was made in *Ontario*, or the law of *England*, where the services are to be rendered, that will regulate the rights of the parties, but rather the law of the Province of *Quebec*, because the client has retained and engaged him as advocate, and Mr. *Doutre* is an advocate of the Province of *Quebec*, and, I repeat it, he has no other right or title to act, except as such.

Her Majesty has, however, admitted, although at first denied, that the cause of action has arisen in the Province of *Quebec*. At page 3 of the appellant's factum I find the following passage:

> It is submitted that a new trial should be ordered on the ground

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of the reception of improper evidence, viz : (1) The suppliants own evidence, the cause of action having arisen in the Province of *Quebec* and the suppliant's evidence, therefore, not being admissible.

It being admitted that this case should be decided according to the law of that Province, the question whether Mr. *Doutre* has a right of action to recover his fees as one of Her Majesty's counsel before the Fishery Commission is found to be solved. Under that law this question does not admit of doubt. See *Amyot* v. *Gugy* (1) and authorities there cited. *Devlin* v. *Tumblety* (2), *Beaudry* v. *Ouimet* (3), *Grimard* v. *Burroughs* (4), *Vandal* v. *Gautier* (5), and *Larue* v. *Loranger* (6), where the claim for fees was not maintained by the Court of Appeal, but it was because there was a tariff regulating those fees and no special agreement to pay any extra remuneration had been proven by the plaintiffs. The decision in the case of *Grimard* v. *Burroughs* (7) was in the same sense. See also *Cour de Cassation arrêts du* 16 *decembre*, 1818 vo. *Depens* (8).

In the case of *Devlin* v. *The Corporation of the City of Montreal* the Court of Appeal on the 13th March, 1878, granted to Mr. *Devlin* $2,500 for his fees as the corporation lawyer on the Mount Royal Park expropriations, after weighing the evidence given in the case of the value of his services, there being no tariff regulating fees for such services, and thereby affirming the principle upon which the judgment of Mr. Justice *Johnson* in the court below had been given (30th May 1877), although reducing the amount.

The *considerants* of the judgment of the Superior Court on that portion of this claim which related to his

(1) 2 Q. L. R. 01.
(2) 2 L. C. Jur. 182.
(3) 9 L. C. Jur. 158.
(4) 11 L. C. Jur. 275.
(5) 5 Rev. Leg. 132.
(6) 2 Leg. News. 155; and in appeal 3 Leg. News. 284.
(7) 11 L. C. Jur. 275.
(8) P. 55. 1 Col.

fees as counsel on the expropriations of the park, are as follows:

Considering also that from the professional and other evidence adduced by plaintiffs, it was proved that the said mentioned services were worth the sum of ten thousand dollars; and further, that in the judgment of this court, after duly weighing such evidence, the said plaintiff is entitled to receive from the defendant for such last-mentioned services four thousand dollars.

The Court of Appeal gave as one of its *considerants*:

Considering also, that in the judgment of this court, after duly weighing such evidence, the said respondent (*Devlin*) is entitled to receive from the appellants (*The Corporation of Montreal*) for such last-mentioned services (on Mount Royal Park expropriations) two thousand five hundred dollars.

This is certainly an affirmance by both courts of the principle that an advocate can recover the value of his services on a *quantum meruit* when his services are given out of court, or their value not fixed by the tariff.

Grimard v. *Burroughs* and *Larue* v. *Loranger* were relied on by Her Majesty's counsel as contrary to the respondent's pretension. But on reference to these cases, it will be found that all that has been decided is that when there is a tariff of fees and there has been no contract on the part of the client to pay more than what the tariff allows, the advocate or counsel cannot claim more than what is allowed in the tariff. It is quite evident that those cases have no application to the present case, for there was no tariff of fees in force for the counsel who were engaged before the Fishery Commission. See also the following articles of the code: Arts. 1722 and 1732, and Art. 2260, which enacts that an action for fees is prescribed by five years. Before five years the action will lie. See also *Troplong* vo. *Mandat* (1), 27 *Laurent* (2), 6 *Boileux* (3), and the Report of the Codifiers (4).

(1) Nos. 223, 249, 253, 630, 643, 644, 645.
(2) Nos. 334, 335.
(3) Nos. 145, 574, 575.
(4) vol. 2, 6th Report, pp. 7 and 8.

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The law is the same in *Jersey Island* and in the State of *Louisiana*, the laws in force there being in great part derived from the French law, or are similar. See the argument of Sir *Roundell Palmer*, now Lord *Selborne*, in the case of *The Jersey Bar* (1). In *Louisiana* see *Hunt* v. *The Orleans Cotton Press Co.* (2), *Re Succession of Macarty* (3), *Brewer* v. *Cook* (4), *Edelin* v. *Richardson* (5), *Re Succession of Lee* (6).

I should not have thought it necessary to dwell at length on a proposition which I believe is no longer denied or even doubted in the Province of *Quebec*, if the learned counsel representing Her Majesty had not urged the contrary.

I will now refer to the evidence given in the case, and will state at once that, according to the laws of the Province of *Quebec*, Mr. *Doutre* could not be heard as a witness on his own behalf, and that the evidence of Mr. *Doutre*, which is of record as evidence on his own behalf, cannot be taken into consideration in determining this case. Sec. 63 of the Act 38 *Vic.* c. 11, which establishes the Exchequer Court of *Canada*, expressly enacts :—"Issues of fact, in cases before the said court, shall be tried according to the laws of the Province in which the cause originated, including the laws of evidence." And sec. 13 of 39 *Vic.* c. 27, makes this clause applicable to petitions of Right.

Before considering the evidence which is of record in this case, it is necessary to determine what are "the matters in issue" between the parties as appears by the record.

In the first place, what does the suppliant claim in his petition? It is simply a claim based on a *quantum meruit* for professional services rendered for Her Majesty

(1) 13 Moo. P. C. C. 263.
(2) 2 Robinson 404.
(3) 3 Louis. An. Rep. 517.
(4) 11 Louis. An. Rep. 637.
(5) 4 Louis. An. Rep. 502.
(6) 4 Louis. An. Rep. 578.

and at her request by the suppliant before the Fishery Commissioner, together with an allegation claiming the expenses incurred by the suppliant in the execution of his duties as advocate, and stating that these expenses amounted to more than $8,000, and an averment that the suppliant was engaged for over two years in performing his duties. The suppliant also states that he has received a sum of $8,000 on account of his services, and for which sum he credits Her Majesty. He alleges also that by a provisional agreement, made with the Department of Marine and Fisheries, it was agreed, before his departure for *Halifax*, where the commission sat, that the Government would pay $1,000 per month during his stay in *Halifax* for his current expenses, leaving the amount to be paid for his fees and expenses to be determined after final settlement of the matters before the commission. These are in substance the material allegations of this petition.

In answer to the petition the Attorney-General, on behalf of Her Majesty, pleaded as follows:

[His Lordship read the statement in defence (1)].

The suppliant replied as follows:

[His Lordship read the replication (2)]

Now let us examine the proof adduced in support of the issues joined.

In the first place, as to the fact, whether the Minister of Justice retained the services of Mr. *Doutre* to be one of the advocates and counsel of Her Majesty before the Fishery Commission, the letter of the Minister of Justice on the subject was fyled, and no better proof could be given by the suppliant in support of this allegation. But was it necessary for him to prove this fact? He acted publicly and openly in his said capacity of advocate of Her Majesty. The government has paid him $8,000 towards his expenses, and we find the Attorney-

[(1) See p. 404.] [(2) See p. 405.]

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General, in his statement of defence, stating that he does not know, and denying, that Mr. *Doutre* was retained, as he alleges, as one of Her Majesty's advocates!! Have we not reason to be surprised at finding such a plea on behalf of the Attorney-General?

As to the third plea, it is simply an admission that the suppliant was engaged for at least two years in the performance of his duties, and that his expenses were not less than $8,000.

That the Crown should allege that the payment of $8,000 to Mr. *Doutre* was in full of all claims by Mr. *Doutre*, I can quite understand, but after having paid him $8,000 for such services, that the Crown should, in a court of justice, plead that Mr. *Doutre* was not retained as an advocate by Her Majesty before the Fishery Commission, shows clearly that those whom the Crown entrusts with the duty of defending its interests before the courts sometimes forget the dignity and character of their client. To that portion of the statement of defence which alleges that Her Majesty was not bound to pay the expenses of Mr. *Doutre* and of his family while the commission sat at *Halifax*, I may state that I do not attach much importance, and the reason I do not, is on account of the nature of the evidence, which is to be found in the record on this point.

The fourth plea alleges that the $8,000 paid to Mr. *Doutre* were accepted by him as a payment in full for his services and expenses. The evidence on this part of the case is contradictory. According to Sir *A. Smith*, then Minister of Marine and Fisheries, it would seem that such was the case, and that the arrangement made by him on behalf of Her Majesty was that the $8,000 should be accepted by Mr. *Doutre* as settling in full his claim for his fees as well as for his expenses. Mr. *Whitcher*, however, the Commissioner of Fisheries for the *Dominion*, and paymaster of the commission

sitting at *Halifax*, swears positively that the arrangement made between Mr. *Doutre* and the Minister of Marine and Fisheries was provisional, and that a final settlement as to the amount to which Mr. *Doutre* would be entitled for his services would be determined only after the conclusion of the business. Mr. *Whitcher* took down in writing a memorandum of the conversation between Mr. *Doutre* and the Minister of Marine and Fisheries, and in that memorandum he made use of the following words, "a gratuity on the conclusion of the business." But he goes on to explain that when taking down the memorandum he did not take down *verbatim* what was said between the Minister and Mr. *Doutre*, but he merely put down the substance of their conversation. He swears positively "That it ended" (that is to say, the conversation between Mr. *Doutre* and the Minister) "on the understanding that it would be a temporary arrangement; so far it was not specified, that is to say there was to be $1,000 paid for retainer, $1,000 for refresher, and $1,000 per month while the commission sat. Further remuneration to these amounts was to form the subject of after consideration."

In a note addressed by Mr. *Whitcher* to Mr. *Weatherbe*, one of the counsel retained with Mr. *Doutre*, the former states:

> My recollection is clear that *Doutre's* letter for self and *confrères* stipulated that the agreement about retainer, refresher and personal expenses was provisional, and that settlement for professional services was deferred till the result of the commission. This was acquiesced in by Sir *A. Smith* and Mr. *Ford*.

The judge sitting in the Exchequer Court has adopted Mr. *Whitcher's* version of the arrangement, and I am of opinion that he could not well have arrived at another conclusion. No doubt both Sir *A. Smith* and Mr. *Whitcher* are witnesses of the highest respectability, but it was necessary to adopt one version and to exclude the other—a choice had to be made. The judge

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a quo has thought that Mr. *Whitcher's* version should prevail, as he had noted in writing at the time the conversation of the parties, whilst Sir *A. Smith* relied entirely upon his memory, which may have failed him. I may add that Mr. *Whitcher's* testimony is corroborated by letters written to the other counsel engaged in the case by Mr. *Doutre* at the very time he was making an arrangement for them all with the Government for their services before the Fishery Commission. True, the letter to Mr. *Thomson* is proved by himself, heard as a witness, and it is a well-known rule that a party cannot make evidence for himself by letters which he has written, but here this letter can be taken into consideration as forming part of the *res gestæ*.

Moreover, with the evidence which is of record, it would have been quite competent for the court below to have examined Mr. *Doutre* under oath (1), and if the court below had that power this court, sitting as a Court of Appeal in a cause to be determined according to the laws of the Province of *Quebec*, has the same power (2).

Now, as we find Mr. *Doutre's* testimony of record in the case, what objection could there be to read it as if given under the oath put by the court officially? If the court were of opinion that it could not look at the evidence, then all that need be done would be to examine Mr. *Doutre* under such oath, and, after having taken down his answers, to render judgment. The result would be the same. But being positive that Mr. *Doutre* would not swear to anything else than what he had already sworn to, there is complete proof to my mind that the sum of $8,000 paid was simply a provisional payment, and that the final settlement should take place after the closing of the business, and this virtually settles the

(1) Art. 448 C. C. P.

(2) *Ferrier* v. *Dillon*, 12 L. C. Jur. 202. *Daley* v. *Chevrier*, 1 Dorion's Q. B. Rep. 293.

case. It must also be borne in mind that if this petition (which has been admitted to be a test case in order to determine the rights, not only of Mr. *Doutre*, but also of the other counsel employed by the crown before the Fishery Commission) had been fyled by any of the other counsel, then Mr. *Doutre's* evidence would have been admissible, and he would have proved that this arrangement with the Minister of Marine and Fisheries was a provisional arrangement.

As to the evidence on the *quantum meruit*, it is as complete as it was possible to make it in a case of this kind, and it is always difficult to make proof of a *quantum meruit*. On this point I can add nothing to what has been said by the learned judge of the court below, who has analyzed the evidence, and has clearly established that the amount of $8,000 which he awarded to the suppliant was well and justly due him by the Government. I would have granted the suppliant $100 per day instead of $50. If we take into consideration the important interests which Mr. *Doutre* was representing before the Fishery Commission, the important and new points which he had to master and deal with; and we must not lose sight of the fact that millions of dollars were claimed and millions were awarded; and if we remember the amount of preparatory work which Mr. *Whitcher* and Mr. *Walker* have proved Mr. *Doutre* had to perform in order to fulfil satisfactorily the important services which he had been asked by the Government to render, and if we take into consideration that he was obliged to pass six months at *Halifax*, and to be away from his office and his clients—and there is evidence that his practice was one of the largest in *Montreal*—I must admit that I am surprised to find that Her Majesty has obliged Mr. *Doutre* to have recourse to a court of justice to get paid the amount which he claims for his services.

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GWYNNE, J.:—

If the contract upon which the suppliant is sueing had been a contract entered into by him with the Minister, who did enter into the contract sued upon, for professional services to be rendered to himself personally, within the Province of *Quebec*, by the suppliant in his character of an advocate practising at the bar of that province, it may be admitted, that by the law of the Province of *Quebec*, the suppliant could have sued his client upon such contract in the courts of that province. *McDougall* v. *Campbell* (1) is an authority in support of the proposition that in the courts of the Province of *Ontario* also an action will lie at the suit of a barrister against his client for professional services rendered by the former to the latter, under a contract in that behalf; the authority of that judgment is, in some degree, weakened by the dissenting judgment of the Chief Justice of the court. Whether there is any difference between the law of *Nova Scotia* and that of *Ontario* upon the subject, and whether the same considerations which influenced the majority of the court in *McDougall* v. *Campbell* would prevail in the courts of *Nova Scotia*, upon the same question arising there, and that case being brought to the notice of the courts, may be open to doubt.

As to the contract with which we have to deal, it must, I think, be held to have been entered into in the Province of *Ontario* for professional services to be rendered in the Province of *Nova Scotia*, in a court of justice established under the authority of the Treaty of *Washington* for adjudicating upon a litigious matter of a national character, in controversy between the two nations of *Great Britain* and the *United States of America*. The contract, therefore, in my opinion, cannot be affected by the law of the Province of *Quebec*, or

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by the circumstance that the suppliant is an advocate practising at the bar of that province, and as such could maintain in the courts of that province a suit against a private client to recover remuneration for his services; and in the view which I take, it is not necessary for us to decide whether the case of *McDougall* v. *Campbell* was well or ill-decided, for this case cannot be governed, as it appears to me, by the law as affecting private contracts between a client and his counsel or advocate, whether that law be the law as it prevails in the Province of *Quebec*, or in *Nova Scotia*, or in *Ontario*.

As to the terms of the contract, we must, I think, adopt the evidence of Mr. *Whitcher*, and hold it to have been to the effect that, in addition to the retainer, then already paid, the suppliant should receive a further sum of $1,000, which was called a refresher, and also $1,000 more per month, during the session of the commission at *Halifax*, and, on the conclusion of the business, all expenses of travel and subsistence, and a liberal gratuity. Whether the term "liberal gratuity," as here used, should be received in the strict sense of the word "gratuity," is a question which, in view of the circumstances under which Mr. *Whitcher* says it was promised, namely, as a something to be given to the suppliant for services to be rendered after they should be rendered, when their value could be better estimated, seems to me to be open to doubt. Certainly if, as I understand Mr. *Whitcher*, the suppliant was led to regard it as a something, which, although undefined in amount, was to have in it the element of liberality, which he was induced by the promise to expect to receive as a return or recompense for his services, it could not properly be called a gratuity, which involves the idea of the absence of any equivalent or consideration being given for it; but this is a question also, which, in the view I take, it is unnecessary to decide.

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The suppliant's remedy against the Crown is prescribed by the Petition of Right Act, 38 *Vic.* c. 12. That act constitutes the suppliants sole *locus standi*. His right to the benefit of this remedy against the Crown must be governed wholly by the provisions of that act, and if it does not give to the suppliant the remedy of which he is seeking to avail himself, he cannot prevail as against the Crown, notwithstanding that he might maintain an action against a private client upon a similar contract. The object of that act, as its title indicates, is "to provide for the institution of suits" against the Crown by petition of right, and it enacts in its 8th sec. that "nothing in this act shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in *England*, under similar circumstances by the law in force there prior," &c.

It was argued, that the proper construction of this clause was merely that the 38 *Vic.*, c. 12 did not *give* the remedy asserted in the present case, and it was contended that it was not necessary that it should, for that the remedy was *given* by the 58th sec. of the Exchequer Court Act, which was passed upon the same day, viz., 38 *Vic.* c. 11, but a reference to this 58th sec. shows this contention not to be well founded, for it merely enacts that the court, besides certain concurrent original jurisdiction given to it, not comprehending the present case, "shall have exclusive original jurisdiction in all cases in which demand shall be made or relief sought in respect of any matter which might in *England* be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown." Now, relief under this section is also limited to cases in which relief might be sought against the Crown in the Court of Exchequer in *England* on its revenue side, so that, whichever

statute we refer to, we must conform to the law prevailing in *England*, and as it would be administered there, in a similar case; nor does the amendment of the 58th sec. of 38 *Vic.* c. 11, which is effected by 39 *Vic.* c. 36, sec. 18, make any difference, for the amendment only gives to the Exchequer Court additional jurisdiction in all cases in which demand shall be made or relief sought in respect of any matter which might in *England* be the subject of a suit or action in the Court of Exchequer on its plea side against any officer of the Crown. Now it is clear beyond all doubt, that in *England* no counsel could maintain an action against a client to recover any sum of money promised to be paid by the client to such counsel for his advocacy, whether the promise should be made before or during or after litigation. The case of *Kennedy* v. *Broun* (1) is sufficient authority for this proposition. It is clear, therefore, that no counsel in *England* could, in like circumstances, have any remedy against the Crown by Petition of Right.

But it is contended that the expression in the above 8th sec. of 38 *Vic.*, c. 12, "under similar circumstances by the laws in force there," that is, in *England*, makes it necessary to import into the consideration of the case the fact that the suppliant is an advocate of the bar of the Province of *Quebec*, and that, in that province, he could maintain an action at law against a private client, and that, assuming the law of *Ontario* to prevail as the province in which the contract was entered into, he could, upon the authority of *McDougall* v. *Campbell*, also maintain an action in the courts of *Ontario* upon a like contract against a private client. It is contended, therefore, that the question arising upon the application of the 8th sec. of 38 *Vic.* c. 12, is not whether a counsel in *England*, upon such a contract made in *England* as

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was made here with the Dominion Government, could have a remedy by petition of right against the Crown, but whether the suppliant, assuming him to be entitled to maintain an action at law in the courts of the provinces, against a private client for professional services rendered to such client, is not *therefore* entitled to this remedy by petition of right against the Crown. In this manner only, as is contended, can effect be given to the words "under similar circumstances," &c., &c., in the Dominion Act.

Viewing that contention in the most favorable light possible for the suppliant, the question raised by it in substance amounts to this: if the contract which was entered into by the Minister of Marine and Fisheries with the suppliant had been entered into with him by a person duly authorized to act for and to represent the Imperial Government, and if the Imperial and not the Dominion Government had been the superior with whom through such agent the contract now relied upon by the suppliant was made, could the suppliant in such case proceed by petition of right in *England* against Her Majesty? And, to my mind, it appears to be clear that he could not. He would, in such case, be in no better position than an English counsel entering into a like agreement for his professional services. Whether the suppliant could, or could not, maintain an action at law in the provincial courts against a private client for professional services, would not enter into the consideration of the case. The question whether he could proceed by petition of right in *England* must be regulated solely and exclusively by the law of *England*, which does not give to the subject such remedy in such a case, and the effect of the 8th section of the Dominion Act, in my opinion, is, that the subject shall have no remedy by petition of right against the crown in the Dominion of *Canada*,

if he would not have been entitled to the like remedy in *England* in similar circumstances by the law as in force there. The effect of the statute, as it appears to me, is, that (whatever may be the difference between the law of *England* and the laws of the respective provinces of the Dominion, as to the right of a counsel to maintain an action against a private client for professional services,) as affects the public represented by the crown, the law of *England* and that of the Dominion of *Canada* is the same, and it excludes a counsel in the case of a contract with the crown for his advocacy from all remedy by petition of right, to enforce such contract, thus placing all subjects of the crown in the like position under similar circumstances.

The appeal, therefore, in my opinion, should be allowed.

Appeal dismissed with costs.

Attorneys for appellant: *O'Connor & Hogg.*

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