1847.

NEW SOUTH WALES.

DIVISION OF THE LEGAL PROFESSION ABOLITION BILL.

REPORT FROM THE SELECT COMMITTEE

ON

DIVISION OF THE LEGAL PROFESSION ABOLITION BILL,

WITH

MINUTES OF EVIDENCE.

ORDERED, BY THE COUNCIL, TO BE PRINTED,

23rd *September*, 1847.

Sydney:

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BENT-STREET.

1847.

EXTRACTS FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE COUNCIL.

VOTES No. 7, TUESDAY, 18 MAY, 1847.

12. Division of Legal Profession Abolition Bill Committee:—Mr. Wentworth moved, pursuant to notice, That the Select Committee on the Division of the Legal Profession Abolition Bill, appointed on 24th September, 1846, "to inquire into and report upon "the best means of reducing the expenses of the Law in all its branches; and in the "event of their Report being against the amalgamation of the profession by the said "Bill contemplated, that it be a further instruction to such Committee, to inquire "into and report upon the best mode of providing for the admission of youth educated "in the Colony, to practise as advocates in the different Courts of the Colony," be re-appointed.
Moved as an amendment by Mr. Brewster, That the House do proceed by ballot in the appointment of this Committee.
Debate ensued.
Question on the amendment put and negatived.
Original question put and passed; the Committee consisting of—

Mr. Wentworth,	Mr. Cowper,
Mr. Murray,	Mr. Lamb,
Mr. Windeyer,	Mr. Robinson,
The Attorney General,	The Colonial Secretary,
Mr. Darvall,	Mr. Lowe.

VOTES No. 76, TUESDAY, 21 SEPTEMBER, 1847.

6. *Legal Profession Bill:—Mr. Wentworth having moved for and obtained leave to bring in "*A Bill to enable practising Attorneys and other persons, under certain limitations, "to be called to the Bar of the Supreme Court of this Colony; and also to give to "Barristers of that Court the option of being disbarred and practising as Attorneys.*" Bill read a first time; to be printed, and read a second time on Friday next.

VOTES No. 78, THURSDAY, 23 SEPTEMBER, 1847.

Report from Committee on Division of the Legal Profession Abolition Bill:—Mr. Wentworth, as Chairman, brought up the Report and laid upon the Table the Evidence taken before the Select Committee re-appointed on the 18th May last, to inquire into and report upon the best means of reducing the expenses of the Law in all its branches; and, in the event of their Report being against the amalgamation of the Profession by the said Bill contemplated, that it be a further instruction to such Committee to inquire into and report upon the best mode of providing for the admission of youth educated in the Colony, to practise as Advocates in the different Courts of the Colony.
Ordered to be printed.

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*NOTE.—Mr. Wentworth's motion for the second reading of this Bill superseded by the *Previous Question* as shewn in the following extract from,—

VOTES No. 79, FRIDAY, 24 SEPTEMBER, 1847.

5. Legal Profession Bill.—Moved by Mr. Wentworth, That this Bill be now read a second time.
Debate ensued.
The Colonial Secretary moved, That the Question be now put.
Debate continued.
Question put—"Shall the Question be now put!"
Council divided.

Ayes, 3.	Noes, 13.
Mr. Lowe,	Mr. Berry,
Mr. Brewster,	Mr. Lord,
Mr. Robinson, (Teller.)	Mr. Cowper,
	Mr. Wentworth,
	Mr. Lamb,
	The Collector of Customs,
	Captain Dumaresq,
	Mr. Parker,
	The Colonial Secretary,
	Mr. Grant,
	The Auditor General,
	The Colonial Treasurer, (Teller.)

LIST OF WITNESSES EXAMINED.

1847.

NEW SOUTH WALES.

PROGRESS REPORT FROM THE SELECT COMMITTEE

ON THE

DIVISION OF THE LEGAL PROFESSION ABOLITION BILL.

THE SELECT COMMITTEE of the Legislative Council, appointed on the 24th day of September, 1846, and re-appointed on the 18th May, 1847, "*with an "instruction to enquire into and report upon the best means of reducing the "expenses of the law in all its branches; and in the event of their Report "bring against the amalgamation of the Profession by the said Bill contem-"plated, that it be a further instruction to such Committee, to enquire into "and report upon the best mode of providing for the admission of youth, "educated in the Colony, to practise as Advocates in the different Courts "of the Colony,*" have agreed to the following Report.

Upon the question referred to your Committee, as to the amalgamation of the two branches of the Legal Profession contemplated by the Bill submitted to them, your Committee have examined a great many witnesses, consisting of Judges, Barristers, and Attorneys, among whom considerable diversity of opinion exists. The Chief Justice, and Mr. Justice a'Beckett, consider that little or no saving, in point of expense, would accrue to the public from such a measure. The Master in Equity, Mr. Donnelly, and the greater number of the Attorneys examined, consisting of the older and more experienced of that body, are of the same opinion: while Mr. Michie, a Barrister, and some of the juniors of the Attorneys, assert that the saving to the public would be very considerable. According to Mr. R. Johnson, the most sanguine of this class of witnesses, "in all ordinary actions "the saving would be fifty per cent.; preparing special pleadings about sixty per "cent.; obtaining Counsel's opinion, about sixty per cent.; conferences with Coun-"sel, the same; and in the other ordinary expenses the saving would be, at least, twenty-five per cent." Now, as the soundness of this gentleman's opinion is most material, as affects the question at issue between the profession of the law and the public, whose interests should form the paramount object of consideration, it is important to ascertain how far the conclusions of this witness are borne out. There can be no doubt, that whilst the amalgamation, which is now sought to be re-established, did exist, the expenses of law suits were not smaller, nor even so small, as they have been since the division of the profession was finally established by the Judges of the Supreme Court in 1834. The evidence of Mr. Gurner, and the table of costs, before and since the division, compiled by that gentleman from the records of that Court, establish this fact to the satisfaction of your Committee, although it has been contended by some of the witnesses, on the other side of the question, that the selection thus made by Mr. Gurner was too small to give a fair average, and, moreover, that no such comparison of bills of costs, however extensive the selection, would lead to a correct conclusion. Your Committee, however, do not admit the force of this objection; they conceive that Mr. Gurner's selection was large enough to give an average, which, if not mathematically correct, is still more worthy of reliance than any hypothetical opinions or reasonings, which have been addressed to the Committee by any of the advocates for amalgamation. It must be recollected that on this particular subject, the opinion of a gentleman who was for upwards of fifteen years the taxing officer of the Supreme Court, and who has been conversant with the comparative working of both systems for the best part of a long life, would of itself be entitled to very great weight. And seeing that this gentleman's opinion is backed by the statement which this tabular comparison affords,—by all the older and more experienced practitioners among the Attorneys,—and by the Judges, who have been examined, your Committee cannot hesitate as to which class of opinions the preponderance inclines. It is, indeed, clear to your Committee, that the opinion of the principal witness, Mr. Johnson, is based on an obvious fallacy,—that the profession of the law is not a

division of labor, but a multiplication. His proposition is,—that the "division "of practitioners into a number of branches is strictly a division, whereas the "accumulation of practitioners in each branch is strictly a multiplication. No "doubt it would be extremely beneficial, if there were business sufficient, for "practitioners to confine themselves wholly to one branch; but it is palpable, that "the necessity of employing one legal practitioner to instruct another in the same "suit, causes a multiplication of labor."

Let us examine how far his premises warrant his conclusion. The multiplication of labor which he adverts to, arises, it is alleged, from the necessity which exists, in the present state of the profession, that one practitioner should instruct another. But would there be any less labor, if the Barrister were to receive his instructions direct from the client? He must be instructed by some one; and if he had to gain the information in this way, which he at present derives from the Attorney, the labor of so obtaining it would, probably, be greater than at present, and must be paid for in addition to his brief. What matters it, therefore, to the client, whether he pay the Attorney or the Barrister for preparing a brief, since a brief it is evident must be prepared (whether the profession be amalgamated or not,) in all cases, except on ordinary motions in Chambers. And as to such motions, they can be made by Attorneys now, if they choose to argue them in person. It appears indeed, that several of the Attorneys, impelled, doubtless, by a laudable spirit of emulation, are in the habit of arguing such motions, instead of pursuing the more lucrative course of giving a brief to Counsel. If it be true, therefore, that a saving of fifty per cent. to the public would arise from this course,—after the proposed amalgamation of the Profession, the public can effect it now by employing those professional gentlemen only, who are not in the habit of giving their Chamber practice to the Bar. The above reasoning, it wil be seen, equally applies to a case for an opinion or a conference. The facts on which an opinion as to the state of the law arising out of them is required, must be collected from the client either by the Attorney or the Barrister, and the labor attending this operation must be paid, in either case, by the client, independently of the fee for the opinion itself. And as to the alleged saving in the preparing of special pleadings without the intervention of Counsel, that is a saving which any Attorney competent to draw such pleadings may effect for his client now. But the fact is, that special pleading is so difficult a science, that most of the Attorneys wisely abstain from drawing pleadings where any great nicety is required. It seems evident, therefore, upon the whole, that the alleged multiplication of labor which is complained of as the cause of such increased expense to the public, has no foundation; and that the division of the profession which now exists is strictly a division of labor, and attended with the usual results of such a division—superior skill and cheapness. This is well exemplified in the evidence of Mr. Ross Donnelly, who, in answer to this question,—"Supposing an Attorney chose to do all the busi-"ness himself, and not to be in partnership with a Barrister, would there be a "saving of expense in that case?" says, "I think not, because he would have to "perform the duties of both Attorney and Barrister, and that would, of course, "require more labor than if he did the duty of one only. Indeed it would not, even "then, pay him so well, because it would give him much more trouble to look up "cases, and to perform the business of a Barrister, than it would one who was "accustomed to it. I know in my own case that if I have Common Law business "to do, it does not pay me, as I do not understand it so well as Equity business, "and it takes me much longer to look up cases. If, therefore, the Attorney were "to perform both his own duties and those of the Barrister, he would be justly "entitled to the double fee."

Mr. Donnelly being subsequently asked whether "the client would be benefitted on the whole, by the saving of the attendances on the Barrister, which are now allowed on the taxation of costs?" answers "no; because the Solici-"tor would require better pay as he would have to neglect his business while he was "in Court, and he must either have a partner or a confidential person to attend to it. "But the two branches of the profession are so widely different that I do not think "they could be amalgamated. The Solicitor has principally to talk to, and receive "instructions from, his client, and to arrive at the facts of a case. The Barrister "has to search out authorities, and requires to be quiet and undisturbed in con-"ducting his business out of Court." And again this witness observes on the same subject, "that a person acting as both Barrister and Solicitor would have no chance "when opposed to a party acting exclusively as a Barrister, and that in fact if an "amalgamation were allowed, there would still be a practical division of the pro-"fession."

In this opinion many of the other witnesses, and particularly the Chief Justice and Mr. Justice a'Beckett, concur. The former states that in Van Diemen's Land, "where each of the branches is entitled to practise alike in both, the practical "result there has been among others, that a separation has actually taken place "for purposes of convenience and utility; that the most trusted Attorneys regu-"larly confined themselves to their own branch of the profession, never interfering

"with

"with that of the Bar. That, generally speaking, those who practised in both "branches were the least distinguished in each, and that they were driven to eke "out an income by trespassing on the province of the second branch." That as to the saving of attendances on Counsel, "that is a paltry item;" that as regards the preparation of briefs "there will be no saving whatever;" that the Attorney or his clerk will prepare his brief and charge for it accordingly, and that he (the Chief Justice) does not see how the Attorney could conduct a case without one; that in fact the proposed amalgamation would come to this:—"An Attorney, am-"bitious of display, will address himself as much as possible to the business of the "Bar; but as he cannot do everything himself, he will (as an Attorney) simply see "his clients, while the practical part of the business will be conducted by a clerk; "the clerk being the Attorney, and the Attorney the Barrister. I cannot see any "benefit in this. The Barrister will do the same. He will see the clients; but the "Attorney will be the Barrister's clerk. The consequence will be, that you will "have inferior men in each branch. Certainly a few pounds may be saved in some "cases. But these will be very few; while the expense is likely to be greater in "the aggregate, from a variety of circumstances. Mistakes and neglect are con-"tingencies not to be lost sight of, where incompetent persons are employed. And "who can ever ascertain, which of the duplex party employed, is to blame?—the "moiety that is Barrister, or the moiety that is Attorney? I think it important, how-"ever, to maintain the separation, in reference to higher ends and objects than the "mere subtraction of a pound or two occasionally from an Attorney's bill. It is of vast "importance to have a learned, efficient, dignified, and able Bar. But the Colonial "Bar has until of late years had a low reputation. And one great cause of this "has been, the allowing of half educated men to practise in both branches of the "profession. There is not sufficient, under such a system, to reward a man of "greater amount of talent, and higher station in society, for undergoing severe "study; and acquiring the many accomplishments which adorn the Bar of Britain. "A man of inferior capacity and stamp of character, by uniting the two branches, "gains a livelihood, though scarcely enough to make him respectable; while the "fees which he abstracts, from those who would otherwise practise exclusively as "Barristers, deducted from the income of the latter, injure these immeasurably."

Being asked whether it is not in fact one great objection to the proposed amalgamation that it would be injurious to the junior Bar? the Chief Justice replies, "I think it will destroy them; which, in other words, is to say, that it will "put an end to the Bar itself. For you cannot make a perfect Barrister in a day. "There must be experience; and, for experience, there must be a *nursery*. We "have nurseries for seamen:—we require one for the Bar."

Being asked his opinion as to the effect of the measure on fees? The Chief Justice replies—"that the tendency will be, if anything, to increase them. I con-"sider that, in many instances, the fees in this Colony have been extremely inade-"quate. The fees in Van Diemen's Land were larger. I have known three hun-"dred guineas given to defend a prisoner. I have have heard of one Advocate, (but "I do not know the fact myself) getting a flock of sheep for his services."

Mr. Justice a'Beckett's opinion as to the surmised saving of expense to the public, is quite in concurrence with the Chief Justice's. He says, "I feel satisfied "that by the proposed change the expense would be little, if at all, less than it is "now of carrying a case into Court. The experience of the past in this Colony is, "at all events, against the supposition. I have reason to believe that the fees now "marked upon briefs fall far short of what they used to be when endorsed by one "Attorney for the purpose of being delivered to another. One of the most popular "then in practice I remember remarking to me, in allusion to what he called the "unjust division of the Bar, 'We don't give Barristers such fees as we used to give "'ourselves; that brief you now hold for three guineas would have been marked "'ten if it had been given to me.' But, assuming that in some trifling respects "the expense of particular proceedings would be less, the client, I feel assured, "would have to bear the cost of a great many experiments and failures that would "never be attempted or risked by the Bar as at present constituted. It must be "borne in mind too, that the proposed change will not necessarily protect parties "from the charges incident to the employment of different persons as Barrister and "Attorney; neither will be bound to act in both capacities, and in point of fact it is "more than probable that all those who are of any standing in either profession will "continue to practise only in the vocation which they have hitherto respectively fol-"lowed. Conceding, however, that the object of diminishing expense would, in some "degree, be gained by the proposed change, I still think the small extent of benefit "that would accrue to the public in this way would be more than counterbalanced "by the numerous and more general evils which the system would in other respects "promote and induce. If diminution of expense be a desideratum, there is a "much more certain and direct road to its attainment, viz., by framing some more "equitable and satisfactory regulations than those which now prevail, in regard to "the Attorneys bills of costs; another means of further protection to the suitor "would be to give the Judges the power of ordering the Attorney to pay the costs "of all motions and summonses dismissed on the ground of technical objections

"arising

" arising from his ignorance or negligence. These objections are a very fertile " source of expense and delay—of profit only to the Attorney—of no service to " one party, and of great injury to the other. These are, however, suggestions " which belong to wider considerations than I desire to enter into here; suffice to " say, that I think law expenses will, in the main, be very little diminished by " altering, in the manner proposed, the present state of the Colonial Bar."

This testimony, it appears to your Committee, is conclusive that there would be little or no saving of expense to the public from the proposed amalgamation of the profession; while on the other hand the attendant evils would be numerous and unequivocal.

Among them may be enumerated,—

1st.—The removal of all that legal responsibility for negligence and ignorance which now attaches to the profession of Attorney, and which, it is conceived, would merge in the office of Advocate, which would then belong, indiscriminately, to all practitioners.

2nd.—The great stimulus such a change would afford to speculative actions, and actions arising from the feelings of clients, against both of which the check now offered by the Bar will have been removed.

3rd.—The decreased skill and efficiency of the professors of the law generally, attended, probably, with a corresponding decrease of character and respectability.

4th.—The inevitable tendency of this degeneracy in the profession to degrade the Bench, and ultimately to impair the efficient and dignified administration of justice.

Upon the whole, then, your Committee, after the most careful examination of the Evidence adduced, see no reason to recommend the adoption of that amalgamation of the legal profession which is provided for by the Bill referred to them. Your Committee, however, are of opinion, that some impediments are thrown in the way of the due administration of criminal justice, by an insufficient attendance of the Bar on Circuits of the Supreme Court, and at Quarter Sessions; and with a view to remedy this inconvenience, recommend that, in future, Attorneys should be allowed to act in the joint character of Advocates and Attorneys in both these Courts.

Your Committee have also come to the conclusion, that young men, born or educated in the Colony, of competent character and attainments, should be admitted to the Bar of the Supreme Court without being under the necessity of leaving the Colony and studying abroad.

It is also considered but just to give those young men, who not having had an opportunity of being called to the Bar, have become Attorneys as it were from compulsion rather than choice, an option of still joining the higher branch of the profession.

It has lastly been deemed expedient by the majority of the Committee present at the consideration of the heads for this Report, to give to all practising Barristers the option of being disbarred, and joining the lower branch of the profession.

Such are the recommendations which your Committee would substitute for the proposed amalgamation of the two branches of the profession. They conceive that by the adoption of this plan, the skill, the efficiency, and the respectability of the legal profession will be maintained or improved, whilst from the alterations proposed there are strong grounds for anticipating, that though the profession would be in every way deteriorated—deteriorated in competency—deteriorated in character—deteriorated in its influences on the Bench, and on society at large, the single object aimed at by the reformists, the diminution of the costs of the law, would not be achieved; but that these costs would, on the contrary, as the past experience of this Colony, and the present experience of the Sister Colony of Van Diemen's Land, abundantly shew, be on the whole augmented. And that the only result of this radical change would be, that the Attorney will be raised to the rank of the Barrister, and the Attorney's clerk to the rank of the Attorney; that there would, and must of necessity, be in place of the ancient and well defined division of the profession which now exists, a practical division, less obvious indeed to the public, but still a real division, accompanied with all that miscalled multiplication of labor, which is the sole objection entertained against the continuance of the Bar in its present form, and involving an additional and irresistible element of expense to the public, viz.—the tendency to increased fees, the regulation of which, after the amalgamation, would be left to the partial discretion of the partner or clerk of the Advocates *de facto*, whom it is proposed to associate with the class of Advocates *de jure* who now exist. It is true that it has been contended that the taxing officer would remedy this abuse; but the past history of the Colony is a sufficient answer to this surmise. There is in the whole body of lawyers an *esprit du corps*, the natural and inevitable leaning of which is against the public, and in favor of their own class. And there can be no well founded expectation, that this check which in past times was found, and indeed admitted by the very advocates of the change, to have been inadequate for the due protection of the public, would be more efficacious in time to come.

Your

Your Committee, in reference to this subject, have only further to observe, that it is not by degrading the Legal Profession in the way proposed, that the expense of litigation can be reduced. This evil, if it exist to the extent complained of, would not be mitigated, but increased by the introduction of measures tending thus to degeneracy in the Bar and the Bench; since it is upon their learning, their character, and their integrity, that society is, and must ever be, mainly dependent for the vindication and conservation of all that is most dear and valuable in social estimation. The sure way of attaining this great end—the cheap, as well as the due dispensation of law is, after making provision "to secure," in the words of that eminent jurist, Judge Storey, "the upright and enlightened administration of justice, "by encouraging talented advocates to fit themselves for eminence at the Bar, and "by supporting with liberal salaries the dignity, the virtue, and the independence of "the Bench;"—is to cut down the oppressive fees which are exacted by the Government from suitors;—to get rid of the senseless jargon and prolixity of some of the forms of law;—to do away with those subtleties and niceties which are the groundwork of so much technical and expensive argument in Court on matters not at all, or but slightly connected with the real merits of cases;—to abolish all useless forms;—to cut off all sources of delay;—to establish a larger summary jurisdiction in the Supreme Court in cases sounding in debt;—to regulate bills of costs in all departments of the law, and subject them, in every instance, to due taxation;—to give the Judges a summary power of saddling the practitioners of the Court with the payment of all costs resulting to clients from negligence or ignorance;—and, above all, to thoroughly cleanse out that Augean sty—the Court of Equity, and, instead of the prolix, dilatory, and expensive system which prevails there at present, to introduce a concise, simple, and expeditious mode of proceeding suited to the wants and means of the community at large. Such, it appears to your Committee, are the main sources of the expenses, against which the public voice has been raised, and such the most prominent of the remedies which these grievous abuses require. To devise a complete system of reform for those abuses, is a labor which your Committee have been unable, notwithstanding the hope expressed in their last Progress Report, to undertake or grapple with this Session. But they have collected a large mass of valuable Evidence on this important subject, by the careful consideration and analysis of which—most of the reforms above suggested may, eventually, be worked out. The subject, however, referred to your Committee, as the main ground of inquiry, viz., the best mode of lessening the expenses of the law in all its branches,—is so wide, cumbrous, and complex, that it would probably require a paid Commission of Lawyers to elaborate all its details, and to produce a new and perfect code of proceedings—in the various jurisdictions of the Supreme Court, which could be at once substituted for the code now extant. By what mode this great object can be best effected, is a consideration which must necessarily stand over for the determination of your Honorable House in a future Session. The object itself is of such vast and paramount importance to the public, that it cannot be allowed long to slumber, but must be revived either by the appointment of a new Committee to take up and bring to a close the labors of the present Committee; or, as before suggested, by the appointment of a paid commission, the necessary elements for which, according to the testimony of some of the witnesses examined, exist in our community, in sufficient abundance.

W. C. WENTWORTH,
CHAIRMAN.

Legislative Council Chamber,
Sydney, 23rd September, 1847.

1847.

APPENDIX TO THE REPORT

FROM

THE SELECT COMMITTEE

ON

DIVISION OF THE LEGAL PROFESSION ABOLITION BILL.

LETTER *from* His Honor Chief Justice Sir Alfred Stephen, *enclosing Letter from* His Honor Mr. Justice A'Beckett.

Berrima, 2nd September, 1847.

Sir,

Having requested my friend Mr. Justice A'Beckett, the present Resident Judge at Melbourne, to favor me with his views on the question on which I was, in June and July last, examined before the Committee of the Council of which you are Chairman, I have recently received from him the enclosed paper, with permission to forward it to the Committee. I have great pleasure, therefore, in presenting it to them through you: and I have the honor to subscribe myself,

Sir,

Your obedient Servant,

ALFRED STEPHEN.

W. C. Wentworth, Esq., M. C.

LETTER to His Honor Chief Justice Sir Alfred Stephen, *from* His Honor Mr. Justice William A'Beckett, Resident Judge at Port Phillip, *dated Melbourne*, 10th *August*, 1847.

After the best consideration that I have been able to give to the question of the amalgamation of the two professions of Barrister and Attorney in this Colony, I have come to the conclusion that the measure is, in no point of view, desirable. The grounds upon which it has been chiefly urged by those who are its advocates are, I believe, these: 1—The facilitation of the administration of justice; 2—The diminution of expense to suitors; 3—The destruction of an unfair and injurious monopoly. I will consider these grounds in the order I have stated them.

1.—The facilitation of the administration of justice is so obviously a matter of public benefit, that if any such result could be fairly anticipated from the introduction of the measure in question, I should think that alone a sufficient reason for its adoption; but in what manner this is to be effected by combining the two characters of Barrister and Attorney in one person, I confess I am unable to perceive. In the first place, the *administrators* of the law would derive no peculiar or additional assistance from a Bar so formed. In the next place, the suitors would not be more effectively represented. In the third, it would lead to no improvement either in the machinery of practice, or the forms to which it is subject; neither in nor out of Court would the proceedings be less technical or more expeditious.

I have said the Judges would derive no extra assistance from the proposed measure: on the contrary, I think they would miss much of the aid which they now derive from the experience of the Bar, and, consequently, that their decisions in general would be attended both with greater difficulty and greater delay. I am aware that this measure is not intended for the ease of the Judges; but the question is, whether the public be not interested in opposing it, if it be likely not only to increase the labors of the Bench, but also to impede them in the efficient and dignified discharge of their duties? Now an enlightened Bar has always been considered one of the best guarantees for the enlightened administration of justice; and any thing, therefore, which tends to degrade or impair the efficiency of the former, must exercise an injurious influence upon the latter. "We must be content," says Judge Story, "since we cannot realize "these Utopian dreams of human excellence, to secure the upright and enlightened administration of "justice, *by encouraging learned Advocates to fit themselves for eminence at the Bar*, and by supporting, "with liberal salaries, the dignity, the virtue, and the independence of the Bench." With such an authority to cite in favor of the view I have taken of the connexion between the Bar and the Bench, and the influence of the former over the latter, I shall say no more; but proceed at once to show how, in my humble opinion, this connexion and this influence is likely to be affected by the proposed measure.

In the first place, the nature of the questions which are entrusted to Barristers to discuss, in the superior Courts, requires, for their appropriate treatment, very different talents, both in kind and degree, from those which an Attorney has either the leisure or means for enabling him to display. The multifarious description of business on which he is engaged, and the number and variety of clients who seek daily and almost hourly conference with him, preclude the possibility of either his own regular attendance at Court for the purpose of obtaining experience, or of his preparing himself properly to argue any particular case. It is, moreover, highly probable that he is altogether without those means of reference which a Barrister's library usually affords; and if so, it is impossible that, in any but the most ordinary matter, he can efficiently represent his client's interests. But in nine cases out of ten—certainly in this Colony—it will be found that the Attorney's law library is confined to a few treatises and books of practice; neither is an extensive library necessary. An acquaintance with the general principles of law will enable an Attorney to advise his client on all ordinary exigencies; and there are many actions and suits which may be conducted by him, until they come on for trial, without the intervention of a Barrister. On the other hand, there are a variety of questions, as to which no prudent Attorney would risk the responsibility of his own opinion; and suits and actions involving a nicety and research in pleading, both in the frame and substance, to which no Attorney would be equal, even if he had time for the performance of the duty. The skill, the care, and the knowledge requisite on such occasions, are not of that kind for which he has been educated; and, at the same time, that kind of information and experience, combined with readiness and activity, which are so useful in an Attorney, are not wanted or expected in the Barrister. The mingling of the two professions is certainly not impossible, but it could hardly be effected without considerably impairing the usefulness of both.

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The Bar, from its constitution, and the habits and education of those who compose it, is peculiarly fitted to be the medium between the Bench and the profession, in the discussion of legal questions: and this not only in the matter, but in the manner of argument, if decency and dignity, as well as ability, be desirable exhibitions in a Supreme Court of Judicature. A Barrister of any standing and experience, and few others are often employed, will take care to lay before the Court both the law and facts of his case, in such a way as to bring, clearly and lucidly before them, the point for their determination From a well stocked library of Reports, which it is almost his hourly habit to consult, he is enabled to put them at once in possession of all the cases that bear upon the point; and he generally does so in an ingenuous and unreserved, as well as a distinct and concise manner. Instead of deceiving himself, and misleading the Court, by a superficial view of a text-book citation, he will seldom adduce a case without such a previous examination of its bearings, and principles, as will enable him not only to understand it thoroughly, but to meet any suggestions or observations from the Bench, which his reliance upon it may call forth. He will abstain from reference to facts not before the Court; he will neither pedantically parade, nor presumptuously assail, a train of well-known authorities on established points; he will avoid personal allusion and idle declamation where the topic is one of pure law; and, above all, he will not press an assent when it has been once fairly stated and apprehended, after an adverse opinion has been decidedly elicited from the Court. In short he will, in all respects, so present his arguments, as, in many instances, to enable the Court to arrive at an immediate decision; whilst, in those which are of importance enough to require further deliberation, he will have left little to be discussed, and still less to be investigated

It may be said, perhaps, that the foregoing is a picture rather of what the Bar ought to be, than what it is; or that it is, at least, more applicable to the Home Bar than that of New South Wales. I believe the picture, as respects both, to be in the main correct. With the latter I have myself been associated for upwards of ten years—and I do not hesitate to say, that both at Sydney and here, it is composed of gentlemen whose education, abilities, and deportment, are, as a body, fully adequate to the realization of a Bar such as I have described. But if that description be thought too favorable in its present state, mere am I that after its alteration and extension by the proposed measure, whatever marks of resemblance it may now bear to its parent root, will grow gradually if not speedily fainter, and at last, altogether disappear.

I am far from insinuating that this degeneracy would arise from the mere fact of Attorneys being at liberty to practise as Barristers. From the respectable part of the former branch of the profession, the Court would have nothing to fear. Few of these would even take advantage of the privilege, or only on such occasions, and in such a manner as would leave the Court no reason to desire that the client had been otherwise represented. It is from the pettifoggers—the tricksters and hucksters—the flawhunters and sharpshooters—the bloodsuckers of costs, the fruits of their own chicane or the errors of others—the pert and pragmatical charlatans—the champions of chamber practice and chamber points—it is from these—the cunning—unprincipled—conceited—shallow, noisy portion of the profession that the Court would suffer, and by whom the administration of Justice would be degraded.

It may be said that, in the event of any improper conduct in their capacity of Advocates, on the part of the class of persons above designated, the Court would have the remedy in its own hands But the remedy is more easily suggested than applied: gross and palpable contempts might be punished and put down, but vulgarity, conceit, pertinacity, and bad taste, however annoying and offensive, would have to be endured, even whilst they were complained of and condemned. Now it is precisely this sort of nuisance,—

> "The froth of words, the schoolboy's vain parade,
> "Of books and cases—all his stock in trade—
> "The pert conceits, the cunning tricks and play
> "Of low Attorneys, strung in long array,
> "The unseemly jest, the petulant reply,
> "That clusters on, and cares not how, or why."

that the Court would be exposed to, from an influx to the Bar, of the class of practitioners I have been describing I will not deny that the Bar itself may not sometimes be disgraced by similar exhibitions, but the instances are rare, and hardly ever to be met with among that portion of its members who are held in any respect, either by themselves or their own profession There is moreover that kind of mutual understanding and feeling between the Bench and the Bar, that prevents any unseemly manifestation on either side, and if rebuke be needed from the former, a word or even a hint, is often sufficient to convey it. But if the Bar is to be altered in the manner proposed, this reciprocation of respect and forbearance will exist no longer. That refined delicacy with which the language of disapprobation or reproof is now accompanied, would be altogether lost upon the class of Advocates to which I am alluding. The consequence would be, that the Court must either submit to the sort of treatment I have described, or be engaged in a constant succession of undignified, and perhaps, ineffectual struggles, to put down the nuisance.

2.—The expense to the suitors, as to this, the eyes of the Committee appointed to inquire into the subject by the Legislative Council, have probably, by this time, been pretty well opened to the truth. I feel satisfied that, by the proposed change, the expense would be little, if at all, less than it is now, of carrying a case into Court. The experience of the past, in this Colony, is at all events, against the supposition. I have reason to believe that the fees now marked upon briefs, fall far short of what they used to be when endorsed by one Attorney, for the purpose of being delivered to another. One of the most popular then in practice, I remember, remarking to me, in allusion to what he called the "unjust division of the Bar," "We don't give the Barristers such fees as we used to give ourselves; that brief you are now holding for three guineas, would have been marked *ten* if it had been given to *me*." But, assuming that in some trifling respects, the expense of particular proceedings would be less, the client I feel assured would have to bear the cost of a great many experiments and failures that would never be attempted or risked by the Bar as at present constituted. It must be borne in mind too, that the proposed change will not *necessarily* protect parties from the charges incident to the employment of different persons as Barrister and Attorney, neither will be *bound* to act in both capacities, and in point of fact, it is more than probable that all those who are of any standing in either profession will continue to practise only in the vocation which they have hitherto respectively followed. Conceding however, that the object of diminishing expense would, in some degree, be gained by the proposed change, I still think the small extent of benefit that would accrue to the public in this way, would be more than counterbalanced by the numerous and more general evils which the system would in other respects promote and induce. If diminution of expense be a desideratum, there is a much more certain and direct road to its attainment, viz., by framing some more equitable and satisfactory regulations than those which now prevail, in regard to the Attorneys bills of costs; another means of further protection to the suitor would be to give the Judges the power of ordering the Attorney to pay the costs of all motions and summonses dismissed on the ground of technical objections arising from his ignorance or negligence. These objections are a very fertile source of expense and delay—of profit only to the Attorney; of no service to one party—and of great injury to the other. These are, however, suggestions which belong to wider considerations than I desire to enter into here; suffice to say, that I think law expenses will, in the main, be very little diminished, by altering, in the manner proposed, the present state of the Colonial Bar.

3.—I now come to the question of monopoly, and here I feel but little need be said; I can hardly, indeed, imagine any person of intelligence to be in earnest who would quarrel with the constitution of the Bar on this ground. The principle, if a sound one, is not only a reason for opening the Bar to Attorneys, but to any and every description of persons who may imagine themselves fitted to become Advocates; for if only Attorneys are to be admitted, then the Bar will be a monopoly still, and the Advocates of free trade will have gained nothing by the change. But what is this so called monopoly?—a profession to which every parent in the land may bring up his son, if he choose to take the requisite means. The Supreme Court is not open only to a certain number of Advocates who

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pay a certain price for the privilege of exclusive audience, as was formerly the case in the Palace Court—that was a monopoly, and has been got rid of. But it will be said—"any body may take a shop and why not a brief?" The answer is simply this—that law is much too serious and sacred a commodity to be purchased with the same indifference as to the seller, as we should feel in buying a pair of boots or a pound of meat. Bad law, though it may be saleable, is not returnable upon the vendor's hands. It is for the protection of the public, not to uphold the privileges of the Bar, that the present class of Advocates are alone entitled to be heard. Why are the medical and clerical profession recognised only in those persons who have undergone a course of regular training, and taken certain degrees, as a voucher for their title to the character which they assume? Is it that a monopoly of their professions may be secured to a particular class, or that the public may have some guarantee for the respectability of those who are permitted to follow them. People may prefer, certainly, if they please, a field preacher to a pulpit divine, and a quack doctor to a university physician; but is it, therefore, desirable that our hospitals and churches should be thrown open to the admission of such persons, merely upon the principles of free trade, even if they should be willing to undertake the cure of our souls and bodies at a less expensive rate than we can get it now performed for! Where individuals, however, are rash enough, of their own accord, to trust their lives in the hands of a quack, the latter is responsible, though a verdict of manslaughter is, certainly, but poor satisfaction to his deluded victim. What sort of 'slaughter' that ought to be called, which results from the ignorance or unskilfulness of law quacks, I will not stop to inquire, but if people choose to patronize this sort of quackery, as well as others, that is no reason why those who practise it should be accommodated with a stage for their exhibitions on the floor of the Supreme Court. Monopoly, however, has really nothing to do with the question; but, as I observed before, if the objection on that head be applicable at all, it is an argument not only against the exclusion of Attorneys, but for the admission to the Bar of any and every body who may desire to figure there.

The above are my reasons—not all—but the principal ones for thinking that the amalgamation of the profession, in the way proposed, would be rather an injury than a benefit to the public, and a detriment to the administration of justice.

WILLIAM A'BECKETT.

Port Phillip, August 10, 1847.

1847.

NEW SOUTH WALES.

DIVISION OF THE LEGAL PROFESSION ABOLITION BILL.

MINUTES OF EVIDENCE TAKEN BEFORE

THE

SELECT COMMITTEE

ON

DIVISION OF THE LEGAL PROFESSION ABOLITION BILL.

TUESDAY, 25 *MAY*, 1847.

Present:—

WILLIAM CHARLES WENTWORTH, Esq., IN THE CHAIR,

THE ATTORNEY GENERAL,	THE COLONIAL SECRETARY,
CHARLES COWPER, Esq.,	TERENCE A. MURRAY, Esq.,
JOHN B. DARVALL, Esq.,	RICHARD WINDEYER, Esq.

Robert Johnson, Esquire, called in and examined:—

R. Johnson, Esq.
25 May, 1847.

1. You are a Solicitor of the Supreme Court of New South Wales? I am.
2. How long since were you admitted? About five years ago.
3. I suppose you were conversant with the practice some years previous to that? Yes; I served my articles in the Colony.
4. Can you recollect when the profession was amalgamated? The division of the profession took place very shortly after my arrival in the Colony.
5. You do not know then how the old system worked—when the two branches of the profession were united? I have had no personal experience of the working of that system.
6. Have you at all considered the subject of the amalgamation of the two branches of the profession? I have given the subject great consideration, and my opinion is, that the re-union of the two branches would be advantageous.
7. In what respect? In diminishing expense, and in bringing forward talent in this country.
8. How do you imagine it would operate in the way of diminishing expense? I think that in all the common class of cases, such as actions upon bills of exchange, promissory notes, goods sold and delivered, and other cases of no great complexity, where no intricate legal questions are likely to arise, it would reduce the expenses about fifty per cent.
9. How do you suppose that in these cases the expenses would be so much reduced? By its being rendered unnecessary to employ Counsel in all that class of cases. The expense of arguing a summons in Chambers by an Attorney is, compared with the expense of arguing by a Barrister, about the proportion of four pounds to ten or fifteen pounds.
10. But if Attorneys were *de facto*, as they would be in the event of an amalgamation of the profession, Barristers, do you think they would be satisfied with merely the Attorneys' fees? I do not think they would be; but no Attorney would require a brief in Chamber practice. Although he might not be satisfied with six shillings and eight-pence, which is now allowed, he would be satisfied with a guinea, and at present he has to pay two guineas to Counsel, and to prepare a brief.
11. What reason have you to suppose that Attorneys would dispense with briefs? There would be no necessity for them.
12. Would not a brief be allowed on taxation? I should think not; it is not now where an Attorney argues a case.
13. You assume then, that the brief would be dispensed with in all cases where the Attorney conducted a case himself? Not in all cases, but in all common cases; for example, there would be no necessity for a brief upon a common promissory note case.
14. I suppose the brief now given in such cases is a very short summary sort of thing? It is the shortest we can give a Counsel; it is the minimum of allowance; I think the cost is thirty shillings.

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R. Johnson Esqr.

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61. You think then that something might be done in this way to lessen the expenses of law? I think some reduction might be made—double replications I think ought never to be allowed.
62. Is there any other part of the practice of the Court that might be dispensed with? Supposing the profession to remain in its present state, I think there might be a considerable reduction of expenses, by abolishing common motions, and by transferring them to Chambers; cases ought to be allowed to be tried by a jury of twelve persons, as a matter of course, without being asked for.
63. What is the fee on motions of course? One guinea; and two shillings and sixpence to Counsel's clerk.
64. That is double the fee allowed in England? No; I do not refer to motions of course, properly so called, which are in fact not motions at all, being merely Counsel's signature, for which the fee is half a guinea in England; these are abolished here by a Rule of Court.
65. What is your opinion as to the practice of demurrers? A demurrer is the least expensive proceeding we have.
66. Do you not think when persons demur they ought to abide by the demurrer? I think under special circumstances, where a case is made out for it, parties ought to be allowed to amend; but as a general rule persons who stake their case on demurrer, ought to be bound by it.
67. Can you state, as matter of fact, whether the expenses of law are greater or less now than they were sometime ago? I think upon contested cases they are heavier than they used to be, but upon undefended cases they are less.
68. Is not the facility with which motions for new trials are granted, one cause of the great expense to the client? I think it is owing to the vicious system upon which motions for new trials are made; I do not approve of its depending upon Counsel's certificate, as it makes him in some sort a Judge in his own case.
69. Would it not be better to have the old method of applying for a *Rule Nisi*, than the present practice of a certificate? Decidedly; I may state, that although the applications for new trials are more numerous than they were, I think there is a growing indisposition on the part of the Judges to grant them; they were more readily obtainable some time ago than now.
70. What is your opinion of the system of double taxation; do you think there is anything erroneous in taxing the costs between party and party, and between Attorney and client? That is a very difficult question. There must always be a right to make some disallowance of costs, because occasionally clients who are extremely fastidious, will make you go to expense which you would not be justified in charging the other party, but subject to such special exceptions, I am of opinion that the taxing of costs, as between party and party, ought not to exist.
71. Would you allow any farther charge to be made as between Attorney and client, if the costs of the suit were taxed? I would not, unless some special case were made out; for instance, if a client insisted upon something unusual to be done,—only in such cases; in forming this opinion, I assume that all proper and reasonable charges would be allowed against the unsuccessful party.
72. Would that system increase or decrease litigation? I think its tendency would be to increase it; there is a considerable amount of litigation prevented by the dread of extra costs.
73. You think there would be generally a considerable saving in common actions by an amalgamation of the profession, have you considered what would be the effect of allowing Attorneys to make their own bargains in these matters. Of course, the law against champerty would have to be altered? I think if it were abolished, and such bargains allowed, it would lead to the most monstrous compacts. I think it is now felt, that the repeal in this Colony of one of the ancient laws, with reference to buying choses in action, will lead to most injurious results; there are very curious proceedings frequently taking place under the Act to which I allude.
74. In this Colony? I believe it only exists in this Colony. The Act to which I allude, provides that parties obtaining judgment may sell (among other things) choses in action, belonging to the party against whom such judgment is recovered, and the consequence is, that the judgment creditor can put up for sale any debt owing to the other party, so that by collusion between the party who owes such debt, and the judgment creditor, the debt is put up for sale by the Sheriff, and bought at a nominal price, and should the Act be construed to extend to rights of action for tort, the consequences will be much more injurious.
75. What do you think would be the effect of introducing a sort of Small Debts jurisdiction in the Supreme Court? I think a very advantageous alteration might be made, by giving the Supreme Court a small costs jurisdiction, in actions sounding in contract up to a certain amount, and allowing Attorneys to practise as Barristers up to that amount. I recommend this of course, only in the event of the amalgamation not taking place; that being in my opinion the most desirable reform.
76. What amount would you name? I think fifty pounds would be the extent, and that should be confined to things sounding in debt, not extending to actions of tort.
77. You think a jurisdiction of that kind could be carried out with benefit to the public? I do.
78. On the principle of the Small Debts Court? I would not at all alter the principle of the Supreme Court; I think a Court of conscience jurisdiction ought not to extend to cases above ten pounds.
79. I mean that a more summary practice should be adopted? Nothing can well be more summary than the practice of the Supreme Court, excepting the delay on motions for new trials, and that delay arises from causes which might be remedied.
80. Do you not think that the forms of proceeding in a Court of that kind, might be very much abridged, as under the Small Debts Act? I think very little, if any, abridgement can be effected in the forms at present used in the Supreme Court, in common actions. We get to issue in the Supreme Court, in a much shorter time than would be occupied in filing a plaint, and waiting for trial or hearing, in a Small Debts Court; and in all cases which are

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not defended, we get judgment in a few days. There is now little delay in getting to trial; the great clog upon the proceedings in the Supreme Court, is the time that elapses before a new trial motion can come on and be decided. R. Johnson, Esq. 25 May, 1847.

81. *By the Attorney General:* How long have you known motions for new trials to be pending? From nine to twelve months.

82. *By the Chairman:* In this common class of cases, such as promissory notes, goods sold and delivered, &c., is there any amount under which you would not allow an application for a new trial? I would not interfere with that, except by increasing the amount to which the present rule applies; I would make the principle which now applies to twenty pounds apply to fifty pounds.

83. You would not allow a new trial where the amount was under fifty pounds? I would under the same circumstances that it would now be allowed in an action under twenty pounds.

84. Do you think in cases under twenty pounds or fifty pounds, where these applications for new trials are granted, that the client who recovers gets anything? He does not now perhaps get much, on account of the difference between costs as between party and party, and between Attorney and client.

85. If the practice of the Court were not altered in the matter of taxation, you would not allow a new trial under twenty pounds? I think the door of justice should no more be shut to the suitor for twenty pounds, than to one for a larger amount.

86. It is not shut—it is open for one trial? But there might be some misdirection, and he should not in consequence, be deprived of justice; and although under such circumstances he might not ultimately receive much, yet he would avert the injustice of not only losing his just claim, but of being compelled to pay all costs on both sides.

87. In matters of goods sold and delivered, and common cases of that kind, there could be no misdirection? Then a rule *Nisi* would not be obtained.

88. But they might get a certificate? I do not think, generally, certificates would be granted in any such cases; indeed I have known certificates to be refused in very important cases; but as I before said, I think it ought not to depend upon such a certificate.

89. *By the Attorney General:* Supposing an amalgamation of the profession took place, what class of cases do you think would be conducted without employing a Barrister? Actions upon promissory notes where the handwriting was denied, most cases for goods sold and delivered, and a variety of other cases that I can hardly specify now—all that class of cases now tried in the Court of Requests—I might almost say all cases which are now conducted by one Barrister. When I speak of employing a Barrister, in the event of an amalgamation of the profession, I of course mean a second practitioner as Advocate, either Attorney or Barrister.

90. Would it be with a view of substituting the Attorney for the Barrister and Attorney? Nothing more than that; it would be the saving of the expense of one.

91. What would that save? The attendances on Barrister, and attendance at Court, and in some cases, briefs.

92. Supposing the case to last an hour or two, what would be the expense now? If a case lasts the whole day, the fee for attendance is two guineas, and however short a time it may last it is one guinea.

93. What would be the fee under the change? I apprehend certainly not more than the fee now given to the Barrister; the amount would depend upon the taxing officer, as now; the Attorney's fee would not be allowed at all.

94. What would you fix in your own mind? It would depend upon the nature of the case.

95. Where you now get one guinea for attendance, what would be your fee do you suppose if you acted in the double capacity? I think it would probably be two guineas, or perhaps three.

96. In all heavy cases, do you think a Barrister would still be necessary? I think more than one person would be required to conduct a heavy case, whether Barrister or Attorney; it would be quite impossible for one Advocate to conduct a heavy case satisfactorily.

97. In a heavy case do you think the expense of a brief could be saved, when the Attorney acted as junior Counsel? I do not contemplate that it would.

98. Then the saving of expense you speak of has only reference to trifling causes? I think I before stated, that in heavy cases the saving would not be so great as in others. In the lighter cases the saving would perhaps be fifty per cent, and in the heavier, twenty or twenty-five per cent. There is one expense of all law suits that nothing can diminish, that is, the expense of witnesses, travelling expenses, and so forth.

99. *By the Chairman:* I should think Circuit Courts would diminish them? Yes; but unfortunately the expense of professional men travelling, is as great as that of bringing witnesses down to Sydney.

100. *By Mr. Darvall:* Both Attorneys and Barristers? Both Attorneys and Barristers.

101. *By the Attorney General:* Are you aware that on the Circuits, and in the Criminal Courts, it is not the practice to put briefs into Counsel's hands, but merely to give them the depositions? I have heard it so stated; and it appears to me to be a very unsatisfactory way.

102. Do you not know that that is the general and almost universal practice? I do not, but I may observe, that if the only practical use of an Attorney in such cases, is to obtain a copy of the depositions and to hand it over with a fee to a Barrister, that the client must be grievously taxed, who is compelled to employ and pay an Attorney for such a purpose; while I was under articles, I was extensively concerned in criminal proceedings, but since I have been in practice myself, I have been very little engaged in that way; when I have a case of that kind, I always make out a brief with as much, or more, care than for a civil suit.

103. Do you know that there is one Attorney who acts as a Barrister in some Courts of Quarter Sessions? Yes.

104. Are his fees less than those received by members of the Bar? I should say not; I have given him as much as I should have given to a Barrister, but it is notorious, that the services

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of the gentleman to whom you allude, are much more sought after than those of any Barrister who is in the habit of attending the Quarter Sessions.

105. Do you not know, as a matter of fact, that his fees are generally larger? I know he has received very large fees as an advocate in Courts of Quarter Sessions. These have been received in cases where he has had to leave Sydney. I do not think he is in the habit of receiving large fees at the Quarter Sessions, in Sydney. A case has been referred to, in which he is said to have received one hundred pounds, to go to Berrima to defend a man, and in which the fee paid to the Barrister was only ten guineas. He had no doubt to leave his business in Sydney, specially to attend to that case, (which the Barrister most likely had not) and probably he lost more than he gained by it; at all events if the profession had been amalgamated, the client would have saved the ten guineas, as but for the division he would have dispensed with the Barrister's services altogether.

106. *By Mr. Windeyer:* Have you read the evidence of Mr. Garnor, given before this Committee last year? Yes, sometime ago, but I do not now well recollect it; I attended here to-day without any previous notice, or I would have come better prepared.

107. You probably recollect that it tended to shew that under the old system, when there was an amalgamation of the two branches, the expenses were greater than they have been since the division? My own impression is not that he seemed to me to think there was not much difference in point of expense between the old system and the new.

108. I think his evidence tended to shew that upon a comparison of bills of costs, the average expenses are less at present than they were heretofore; how do you reconcile that, with the notion that the expense would be diminished by the amalgamation of the profession? I cannot conceive how the opposite conclusion can be come to; that there must be *some* reduction is palpable, unless the taxing officer were so remiss, as to allow practitioners fees in both capacities at the same time. The difference of expense might depend upon the difference of the Rules of Court. I believe in the old time, parties were obliged to go into Court upon a promissory note where there was no plea; all that class of cases would make a difference as about seven pounds to twenty-one pounds, and would be quite unconnected with the subject of amalgamation.

109. Have you at all considered, or do you know anything about the practice in America? I have read somewhat of it.

110. Do you think there the effect of the amalgamation is to make the cost of cases less? I have no means of ascertaining what are the expenses of American proceedings.

111. Your opinion is in favor of amalgamating the profession? Decidedly.

112. Do you not think the same causes would operate to occasion a reduction of the expenses, if the principle were carried farther, and anybody were allowed to practise? I think not. I believe it would be beneficial to those who now conduct legal cases in a pecuniary point of view, as it is not probable that persons unacquainted with legal forms and technicalities, could compete with those who had made them their especial study.

113. But may we not suppose, that the public would not select incompetent men, but would employ men of talent? No doubt they would occasionally obtain men of talent.

114. If they took the whole range of the community, would they have any difficulty in obtaining men of talent? No amount of general ability would make a man competent, if he were deficient in point of technical knowledge.

115. Might you not leave it to the public to select men who were qualified? I do not think in the long run, you would reduce expenses by that means.

116. Then why in the long run, should letting a particular portion of the community practise reduce expenses? I have not said that it would; what I say is, that rendering it competent for one person to conduct a suit, instead of making it incumbent to employ two, would reduce the expenses.

117. Are you aware, that at Home there is a sub-division among Attorneys? No doubt, and that I consider strictly a division of labor.

118. When you suggest, that Attorneys should be let in to conduct cases up to fifty pounds, have you considered whether up to fifty pounds, Barristers should be allowed to act as Attorneys? I should have no objection to that; but I have not at all considered it. In fact, my mind was carried more to the analogy of Sheriffs' Courts, where Attorneys are allowed to practise as Barristers or as Attorneys; and where Barristers are allowed to practise as Barristers but not as Attorneys.

119. Are you aware whether there is any feeling among Attorneys, that renders them reluctant to give evidence before this Committee? I have heard one gentleman express an opinion not of reluctance, but that it might be prejudicial to him.

120. Are you aware whether there is a reluctance to give evidence, respecting the practice of the Court generally, on account of the liability to encounter an adverse opinion on the part of the Judges? I do not know of any instance.

121. Is it not rather a general opinion, that certain persons who have given evidence are in disfavor with the Judges? I cannot say.

122. Your own opinion is, that the summary control the Judges have over the Attorneys has no influence? I do not say that; my own opinion is, that it has that tendency, but I cannot speak to any instances.

123. You think then that it may even deter them doing what would in itself be proper? It may possibly do so.

124. In the amalgamation you contemplate, would you propose that all practitioners should be under the summary control of the Judges? That would require a good deal of consideration to answer. My opinion is, that if it were practicable the Bench should have summary authority over practitioners, and that there should be some other tribunal to deal with them. The objection I feel to the present power of the Court over its practitioners is, a general objection to all summary powers to be exercised without the intervention of a jury, and without examination of witnesses *viva voce*; but I confess I do not see to what tribunal this power could satisfactorily be transferred.

125.

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125. Then I understand that the summary power possessed by the Judges at present is not conducive to the freedom of speech on the part of this portion of the profession? I do not think it is *conducive* to it; but the same remark applies with equal force to Barristers under the present system, as they are equally liable to be prohibited from practising by the Court for the same sort of misconduct as that for which an Attorney would be struck off the roll. It is true a Barrister cannot be disbarred, but the difference is merely nominal; he is equally affected by being prohibited from practising, and as the only cases in which the Court exercises the power, either in respect to Barristers or Attorneys, is for gross misbehaviour, affecting the moral character of the practitioner; the amalgamation of the profession would not affect this question. In fact the first practitioner who was so dealt with here since the division of the profession was a Barrister-at-Law, who was struck off the rolls for misconduct, on the application of the present Attorney General.

126. Do you not think it would be advantageous to the public, that any person acting as an Attorney should have the same freedom of speech as the party employing him? Yes; but if the profession were amalgamated, all practitioners would have precisely the same degree of freedom of speech as Barristers have now. I have never heard it suggested that before the division of the profession any class of practitioners felt any restraint upon their freedom of speech.

127. Whilst you were serving your articles you had considerable criminal practice? Yes, for about two years.

128. Are you aware why it is that Barristers here do not receive briefs direct from the parties themselves in criminal cases, or from their friends, as at the Old Bailey in London? I am not aware why it is, but I believe it is considered low practice.

129. You do not think it arises out of delicacy to the other branch of the profession? It never struck me so; it is not considered reputable practice for Barristers to communicate with prisoners.

130. You are aware that that is the practice in the Old Bailey? I know it is, but I am not aware that it is the universal practice among the Bar at Home; we know from the newspapers that the thing is done, but I believe that "Old Bailey practice" is another name for what is considered not the highest practice.

131. With respect to leaving parties free from being subject to taxation, as between Attorney and client, you are of opinion it would operate ill? I think so.

132. What difference can you point out between the case of an Attorney and his client, and the surgeon and his patient? The nature of the business seems to me to be essentially different. On the one hand a vast amount of trouble may arise in a lawsuit which cannot be foreseen, and on the other the client would be ignorant as to what bargain he ought to make.

133. Why should not the relation of Attorney and client be put upon the same footing as the relation of surgeon and patient—why should not a party be left to make a bargain or not, and if no bargain were made, why should it not be left to a jury of the country to say whether or not the charges were reasonable? I conceive such a system would be impracticable, and if practicable, that it would not be desirable either for the public or the profession.

134. Do you not think a jury would be apt to cut down many of the charges that are usually in an Attorney's bill of costs? No doubt.

135. Do you think they would tolerate, in the case of the surgeon, a charge for writing out label of phial,—putting on the same,—delivery of same? That would depend upon whether it was necessary that the surgeon should do it.

136. Can anything be more necessary? I believe the surgeon never does it himself; if, however, it were necessary that he should go to the chemist himself, you would not pay him as you would a common porter.

137. Then you would not like to subject an Attorney's bill to the same scrutiny that you would a surgeon's? I would not.

138. Will you state your reason? There is a very unfounded prejudice against all branches of the law; one is, that Attorneys' fees are extortionate; another, that their bills are nearly all fiction. The services of lawyers are much less appreciated than those of doctors.

139. Do you not think that many of the charges that get into bills of costs get there solely because there is a list of allowed charges, and they being allowed, business is done for the purpose of getting them into the bill? It may be so, occasionally, with unconscientious practitioners, but not generally. I think charges come to be allowed because it is necessary that the business should be done.

140. You think the effect of leaving the matter to a Jury instead of to the taxing officer, would be to reduce bills of costs? I think so, but not justly.

141. Do you not think the effect of allowing contracts to be made, fixing the amount to be paid to the Attorney for conducting a case and bringing it to a satisfactory conclusion, would be to cut down two-thirds of the present proceedings—to annihilate them—If you undertook to conduct a case for ten pounds, would you not do it with the least possible expense and trouble? I believe under present circumstances Attorneys generally incur no expense that they can avoid.

142. I thought I understood you to say, that charges were put into bills of costs because they were allowed by the taxing officer? I said it might be so to a certain extent, but the question was, whether under a different system considerable unnecessary expense would be avoided.

143. Do you not think a great number of the items in bills of costs which are allowed, are considerably overcharged? No doubt some of the items are overpaid, looking to the trouble, but there are many items much underpaid; upon the whole, professional men are by no means overpaid.

144. They are very like charging for tying the label to the bottle? No doubt, there are many charges for matters done by an Attorney, which a porter could do as well, for instance, carrying a brief to a Barrister.

145.

R. Johnson, Esq.

25 May, 1847.

145. And which in fact Attorneys do not do? Where Attorneys keep clerks the clerks do them, and where no clerk is kept, the Attorney does them himself.
146. Do you not think that a man who places his health under the keeping of a surgeon, puts as much confidence in him, as one who has recourse to law does in a lawyer? No doubt.
147. Do you not know that in some countries the same odium attaches to the practice of a surgeon, as attaches here to the practice of law? No doubt in some countries of Europe there is that feeling.
148. Do you not think that the freedom from that odium, which the profession of surgery enjoys, is attributable to their charges being subject to the revision of juries? I am not aware that it is attributable to that cause, as in the countries to which I have referred there are legal tribunals to which parties may go.
149. In Italy and Spain the same imputations of malpractice and extortion are cast upon the medical profession, as are cast upon the legal profession here—to what do you attribute that? I should attribute the absence of such a feeling in England, to the fact, that the people are more enlightened.
150. Do you not attribute it to the existence of stricter principles of medical honor in England? No doubt.
151. Is not that attributable to the supervision and control of public opinion? I admit that.
152. Is not the jury the means by which public opinion is brought to bear upon the profession? That is going a long way; I have no doubt that public opinion operates as much upon the jury, as upon the medical profession; I do not think the question of a jury would affect the matter at all, as I believe a Judge in Spain, would be as much affected in the matter, as a jury in England, if public opinion were as enlightened and influential in Spain, at it is in England.
153. What are the evils you think likely to arise from leaving Attorneys and clients to agree to what should be the limits of expense in a suit? I think it would be liable to this evil, that the Attorney would have a direct, a personal interest in settling a cause as speedily as possible.
154. Is that an evil? I think it would lead to unfair means being resorted to for bringing a cause to a conclusion; it would be the interest of the Attorney to snap up his opponent, and to have recourse to any species of chicanery, to say nothing of grosser things, such as subornation and perjury.
155. Can you point out how perjury and subornation of perjury would arise then, that may not arise now? The Attorney has very little temptation to anything of that sort now, because he has to conduct his case fairly, and is paid in proportion to his labor.
156. But is not the client now exposed, in a greater degree than the Attorney could possibly be, to the temptation of subornation? No doubt; but he is not so able to put it into effect as he would be if he were to conduct his own case.
157. You think Attorneys would give way to the temptation of suborning witnesses, if they could thereby put an end to a suit? I do not say that; but the tendency would be to degrade the profession.
158. The same tendency exists with regard to the surgical profession, to aggravate and keep open wounds; but such imputations are not made in English communities, although they are in Foreign communities? My own impression is, that there is a vast difference between the practice of surgery and of law; the same opportunity does not exist, of doing injury secretly, in the case of a surgeon, as in that of an Attorney.
159. Do you not think it is easier for a person to attain a knowledge of law than of surgery; and that, therefore, it is more easy to detect malpractices in law than in medicine? I have no doubt that a party might more easily detect, not malpractice, but improper treatment in a law suit, than he would in a case of surgery.
160. Then what is the difference between the practice of surgery and of law, that makes it more dangerous to the community to leave the country to judge between an Attorney and client, in cases where there is no agreement, than to decide in medical cases? It seems to me that there would be a greater temptation to a legal practitioner to terminate a case unfairly, than there could be to a medical man to protract a patient's illness.
161. Would not the character of a man who did so soon become known? No doubt good character would eventually succeed against bad character; but a course of that kind might be pursued for a length of time; but in the case supposed, the client would not be dissatisfied, because his interests and that of his Attorney would be identical after the bargain was made, viz., to beat his adversary *per fas aut per nefas* There is also this insuperable objection to such compacts; that the adverse party would not be bound by them, and the client would always lose whatever he gave his Attorney beyond what should be recovered from his opponent; of course no one would make such a bargain, who understood it.
162. With respect to the present practice of granting new trials, I presume you are aware that at Home, where there is no certificate granted, you cannot get judgment till the first four days of the following term? Yes; but the Judge has power to order immediate execution, and it is rarely that more than four or five weeks elapse in England before the day of trial and time for moving for a Rule *Nisi* for a new trial.
163. What is the proportion of causes in which certificates are given by Counsel to those tried? It is impossible for me to give a satisfactory answer to that question.
164. Has the number of cases put down for new trial exceeded twenty each term; I should think they have been under twenty.
165. How many do you think have been the causes tried? It would be quite a guess if I were to answer the question. I would observe that I do not think there have been, by any means, more certificates granted than the circumstances justified; but I think many, where certificates have been given, would be refused a Rule *Nisi*, and I think there are some cases where a Rule *Nisi* would have been granted, where Counsel have refused. I think injustice has been done both ways.

166.

166. The delay of bringing causes to hearing on argument has arisen from the arrears of business on the paper? There has been an accumulation of arrears. R. Johnson, Esq.

167. There were no arrears of new trial cases I believe before the Bank case and the long criminal case which ran into the term? I do not think the arrears are wholly owing to that. I think the Court, from the multiplicity of other duties, is not competent to dispose of all the new trial motions put down for it;—for instance, last term there were not more than three or four disposed of. I do not think it is necessary there should be the delay that now takes place; I think the causes might be tried immediately before the term, and an application be made for a new trial within a week afterwards. 25 May, 1847.

168. In the event of the two branches of the profession being amalgamated, do you consider that the Barrister should undergo any such examination as Attorneys are now subjected to It appears to me, that it matters very little whether parties who practise as advocates are examined or not, because they are under the supervision of the Judges and of public opinion; and if they were incompetent they would not be employed.

169. Are you aware that there is at present a very strict examination of Barristers, before a Commission in the Inns of Court? I am aware that there is the power to examine them, but I believe it is not enforced; that, however, is prior to their entering as students, and of course is not supposed to have reference to law. I am not aware that Barristers undergo an examination of any kind upon legal subjects.

170. You have spoken of its not being fair to Attorneys to bring them at once into competition with Barristers, at Quarter Sessions? Not occasionally; that is to say, they may have to conduct a case or may not, according to the paucity or abundance of Barristers.

171. Do you think no advantage arises to the public, from the party who receives the fee with the brief, not being the party who marks it? I do not think there is any advantage in that. I am in the habit of receiving fees in Courts where Barristers are not required, and I do not think I ever mark less for a Barrister than I should retain for myself.

172. Are you not aware that there was, under the old system, a tendency to larger fees than there is now? I do not know practically, but I believe that was not the case.

173. Are you not aware, that it is said that one practitioner used to mark briefs for another, who in return did the same for the former; so that it was understood each should mark large fees for the others, so playing into each others hands? I do not know; I never heard of such a practice; I think the taxing officer would render such arrangements abortive.

174. Would not such a system as you describe be open to that abuse? I do not think that abuse would follow, the taxing officer would rectify that.

175. You prefer the taxing officer to the liability of going before a Jury? Yes; I do not think a Jury would be at all competent.

176. Do you think it requires a knowledge of law to tax an Attorney's bill? I think it requires an intimate knowledge of the practice.

177. Of the practice? Yes, a man must have an intimate knowledge of the practice of the law to know how to tax.

178. Why should there be more difficulty in taxing an Attorney's bill, than in deciding upon a surgeon's charges? I think the questions of *quantum meruit* are less complicated upon a surgeon's bill than upon an Attorney's. The surgeon's work is all done by himself; when he charges for an attendance, it is known whether he has attended or not, but it is not so in the case of an Attorney; and there are some who seem to think, that an Attorney's attendances are merely imaginary.

179. That is an existing impression, do you not think that has arisen from its being the fact, that they are so in many cases? I do not.

180. Do you not think it would be competent for him, to give evidence before a Jury by skilled persons, that the business charged for was necessary to be done? I think the trial of an Attorney's bill would be an interminable one, if you were to go into these questions.

181. Do you not think such trials would have the effect of reducing Attorney's Bills, just as tailor's bills are now reduced? I do not think so; there is a great difference between the two sorts of suits.

182. A tailor's bill might be made just as long, if there were separate items for putting in sleeves, selecting buttons, and tacking on same, and so forth? But if there were a necessity for an attendance, to ascertain how the sleeves should be put in, or the buttons tacked on, there would be more analogy in the two cases.

FRIDAY, 28 *MAY*, 1847.

Present:—

WILLIAM CHARLES WENTWORTH, Esq., IN THE CHAIR.

THE ATTORNEY GENERAL, | ROBERT LOWE, Esq.

Randolph John Want, Esq., further examined:—

1. Have you any suggestions to offer as to the best mode of curtailing the expenses in Common Law? I would, in the first place, abolish the fees of Court altogether; in the next, I would abolish the mileage of Bailiffs, which becomes rather a severe tax upon the service of processes. More Bailiffs should be appointed, with salaries, whose duty it should be, not only to serve all civil processes, but all criminal subpœnas. R. J. Want, Esq. 28 May, 1847.

R. J. Want, Esq.

28 May, 1847.

2. You would pay them by a salary? They are paid by a salary now; but they get mileage when they travel beyond a certain distance, they now receive right-pence a mile. Instead of that, Bailiffs ought to be appointed, having a larger circuit than they now have, and be obliged to serve all summonses, and perform all other duties within that circuit. I have frequently had to pay from five to fifteen pounds for the service of a summons, which, I am informed, is often made in the following manner; the Bailiff writes a letter to the defendant, enclosing a copy of the summons, and requesting him to acknowledge the receipt of it; which being done, the Bailiff then returns the writ as served, and charges his mileage without travelling a mile from his own door.

3. Have you any other suggestions to make? I would also abolish the poundage fees in the Sheriff's Office, which are a grevious and oppresive tax upon a poor man: I would abolish the new rules, relating to special pleading, entirely; I think they cause very great and unnecessary expense.

4. What would you substitute in their stead? The old rules of Sir Francis Forbes.

5. You would allow the plaintiff to give a particular statement of what he claimed, and then allow the defendant to give a particular statement of his defence; and make the one adhere to his plaint, and the other to his defence? Yes; if you look through the bills of costs printed in the appendix to my last evidence before this Committee, you will find that much of the expense is occasioned by the pleadings, especially in the costs, marked B; there are pleas, replications, double replications, rejoinders, sur-rejoinders, and demurrers almost without end; and these give rise to endless trouble and expense, but few persons thoroughly understand the new rules of pleading, and it is not probable that they will be understood generally in a young Colony like this for many years. With reference to this point, I find there is an article in "The Jurist" of January 2nd, 1847, which coincides so much with my views that I will, with the permission of the Committee, read it; it is from the review of "A letter to the Lord Chancellor on the Reform of the Law," by John George Phillimore:—"The parties might, "if they chose, agree beforehand as to the points in dispute, and bring them ready drawn up "for the Judge's signature; in short, instead of a declaration, which tells the defendant "nothing, and a bill of particulars, to which he looks for information, a bill of particulars "would be sufficient; and instead of a demurrer drawn out on paper, and the points intended "to be argued stated in the margin, to point the attention of the Judges to the real issue of "the case, the statement of the points would be enough, to the infinite relief of the suitor, "and the manifest benefit of substantial justice. It is very common for the Judges to com-"plain that the points intended to be argued are not specifically stated, but that they are left "to collect them from the demurrer itself, at a considerable cost of time and trouble. Now "if it is not necessary for the sake of the Judges that the demurrer should be formally drawn "out, what purpose does the formal statement answer? to whom is it intended that it should "give information? what object does it effect that would not as completely be accomplished "by the statement, to which the demurrer is, for all practical purposes, except oppression and "expense, a mere appendage? To be sure if this system were adopted nobody would be "obliged to pay money he did not owe, or lose money due to him because his pleader had "put "this he is ready to verify" instead of "this he prays may be enquired of by the country;" "because no averment had been made of the matter *not* necessary to sustain the action, (as "in Hayter v. Moat, 2 Mee., and W. 56, and Smith v. Cox, 11 Mee., and W. 45,) and which, "at the trial, it would have been *impertinent* to prove; or because, though a good cause of "action was stated clearly, formally, and correctly, it was described as one kind of breach of "duty instead of as another, (Harrison v. Matthews, 10 Mee., and W. 768,)—as a debt instead "of a damage—(the claim being for money only); or because a plea was bad for duplicity, "(Dietrichsen v. Giribilei, 14 Mee., and W. 645,) or for any other mistake in the unspeakably "absurd jargon in which the Lawyers of former days displayed their ignorance of jurispru-"dence, and the wantonness of their awkward ingenuity. But the professed purpose of spe-"cial pleading would be attained, and this abundant source of iniquity and oppression would "be choked up—a calamity which, as Lord Eldon is not alive to avert it, society sooner or "later must undergo. Instead of two statements in trespass, one of which is almost always "purposely misunderstood, and therefore leads to a new assignment, as it is called, the fruit-"ful mother of numberless iniquities, one interview, in which the date of the charge or "charges meant to be relied upon was distinctly given, would be sufficient. Let any one "cast his eye over the reports, ancient or modern, and see whether, if such a system were to "prevail, the most revolting folly and flagrant injustice would not be repeatedly avoided." He concludes with this sentence, "'Give me matter and motion' said Descartes, 'and I will "'make a world.' 'Give me special pleading' said the Norman Lawyer, 'and I will take "'care that the weak is, in a Court of Law, as well as out of it, the victim of the strong; I "'will take care that the rich man has at least a chance of getting anything he has a mind "'to ask from the poor; I will take care that justice is no sure protection, and injustice a "'certain cause of defeat.' And can the deformity of such a state of things be exaggerated? "Drawing lots—the inspection of a chicken's stomach—the flight of a bird—the neighing of "a horse—nay, trial by battle—all these ways of decision give justice at least an equal "chance. The caprice of a King—the passion of a woman—the will of a Priest—do not "always preclude all possibility of obtaining it. Bridoge, in the fine satire of Rabelais, "flings dice to know how he must decide; but with us *the dice are loaded* in favor of "chicane—fraud has an advantage."

6. I see that Mr. Phillimore is for allowing demurrers—would you allow demurrers at all? There would be no special demurrers if you abolished the rules of special pleading.

7. He does not seem to think that it would be necessary to do away with all demurrers? I would let the general issue put all matters at issue at once, as was the case in Sir Francis Forbes' time.

8. You would have the general issue with a notice; in fact, you would adopt Sir Francis Forbes' rules? Yes; I do not think general demurrers objectionable, because by their means

actions

actions are frequently more expeditiously determined, without the expense and delay of trial. It is to the special demurrer I principally object. R. J. West, Esq. 28 May, 1847.

9. Would you allow a party to amend and plead afterwards, or would you bind him down to the demurrer? I think amendments after argument of demurrer should seldom be allowed, except in cases where the law is extremely doubtful.

10. But why, when the point of law is doubtful, should a party stake his case upon it? Because it would be a cheaper way.

11. Not if it were to be tried afterwards? I would allow him to amend only when the law is very doubtful, but where the point is tolerably clear, and the demurrer is clearly either speculative or for delay, I would not.

12. *By the Attorney General:* You would allow him as of recourse, as in the present practice of the Court; is it not almost a matter of course, that in every case of demurrer parties are allowed to amend? Not in every case.

13. Do you know any case in which it has been refused? I do not recollect any by name, but I am under the impression that they are occasionally refused; the general practice however is to grant leave to amend.

14. *By the Chairman:* Is there any other suggestion you would make as to this branch of the law, with regard to diminishing costs? I think in many cases considerable expense would be saved by repealing the 18th and 19th sections of the Administration of Justice Act, 5th Victoria. These are the sections which give the Judges the power of forcing parties to a reference of the action, against their consent.

15. But are there not cases which it is almost impossible for a Judge and Jury to deal with? I think not; there may be occasional inconvenience in a few cases; but the violation of our greatest constitutional privilege, namely, trial by Jury, and the being compelled to have one's case decided by one of the clerks, or an officer of the Supreme Court, is not to be balanced against the possible inconvenience of a Judge and Jury being occupied a little longer in the determination of a few cases of disputed accounts. There are a number of cases collected in page 107, of Sir Alfred Stephen's work, on the practice of the Supreme Court, in which he says—"The power conferred on the Court and Judges, by the 18th section, is of a novel "character; and numerous applications have been made for its exercise. From these a few "are selected, with the result in each case, for more easy reference. The enactment—which, "no doubt, if narrowly interpreted, would have failed to effect the good reasonably expected "from it—has been sought to be extended, much beyond its fair meaning. The provision "embraces, only, claims which arise out of, or *involve*, matters of account in dispute between "the parties. These terms, it will be seen, have received *a sufficiently liberal construction*, which "will probably not be extended." He then proceeds to give the particulars of the cases, in which the Court have referred actions under the Act. I believe that in England, the Commissioners for the amendment of the Law, recommended that this power should be given to the Judges, but their recommendation was not sanctioned or carried out by Parliament.

16. *By Mr. Lowe:* The Court grants a reference wherever there is a set off? Yes, generally.

17. *By the Chairman:* Do you imagine, that the practice which has grown up under these sections, of the Administration of Justice Act, is detrimental to suitors? I do. I will give you the case of ——————— *versus* ———————; that case went to trial, and at the trial the Judge without my consent, and against my wish, referred it to the Master; it was a case in which one partner sued another for money due in respect of the partnership; the only question therefore that could arise was, whether there was or was not a final account stated between the partners, and whether the plaintiff could recover the amount sued for. It was referred to the Master; the Master reported in favor of the defendant, the plaintiff applied to set aside the award, and it was set aside; the case was then again set down for trial, tried, a verdict was given for the plaintiff, and there is now an application pending for a new trial, and we shall most probably have to go over the same ground again. I give this as an illustration of the expense, occasioned by the compulsory power of reference; by repealing the 18th and 19th section of this Act, I think that a considerable saving in the expense of litigation might be effected.

18. You think these references generally increase the expense to suitors? Yes; they are unsatisfactory both to the clients and to the profession; upon this point I scarcely think you will find a dissentient opinion.

19. It saves the Judges a great deal of trouble, and lightens their duties very considerably? To a certain degree no doubt.

20. Is there any other suggestion you would make with reference to diminishing expenses? Yes, I would abolish our rules relating to applications for new trial, and adopt the English practice of Rules *Nisi*, by which considerable expense would be saved.

21. *By Mr. Lowe:* Do not the Court always grant Rules *Nisi*? Certainly not always, but I think that although the Judges may be inclined to grant Rules *Nisi*, still that if the English practice of applying for a Rule *Nisi* for a new trial, were adopted in this Colony, the Court would not grant it, unless a strong *prima facie* case were made out.

22. You think there is now hardly a *prima facie* case made out? If you allude to the notice filed under our rules for new trials, it operates as a stay of proceedings, without reference to any case that may be made to appear on the face of it.

23. *By the Attorney General:* Under Sir Francis Forbes a Rule *Nisi* was applied for? I am not sure. I know not whether it be attributable to the present system or not, but I feel satisfied that unless some alteration be made, none of the cases tried at the last sittings, and where notice of motion for new trial has been filed, will come to a hearing for twelve or eighteen months.

24. *By the Chairman:* What is to prevent it? The enormous arrear.

25. How has this arisen? It is difficult to account for it.

26. *By Mr. Lowe:* Do you approve of requiring Counsel to certify? If the English practice were to be adopted there would be no necessity for certificates.

27.

R. J. Want, Esq.

24 May, 1847.

27. Do you not think it a bad practice, inasmuch as it makes the Counsel in some sort a judge in his own case? It is required in England, in appeals before the House of Lords, and not only so, but it must be signed by one of the Counsel who appeared in the Court below; I think in some instances it may operate injuriously. I have known some cases where Counsel have refused to certify for me, when I thought they should have signed the certificate; it operates however, beneficially in many instances, in preventing vexatious applications being made, for the mere purpose of delay.

28. *By the Chairman*: And I suppose in some cases have signed, where they ought to have refused? I do not know.

29. *By the Attorney General*: You have known Counsel refuse to certify? Yes.

30. And you think they have done so in some cases where they ought to have certified? I think so.

31. Does not that shew that they are not proper judges in those cases? I could hardly say that; it would rather show their independence than otherwise.

32. *By the Chairman*: Have you any further suggestions to make upon this branch of the subject? I think a great part of the expense of Common Law arises from the delay in obtaining decisions, and that a great deal of that expense would be saved, by the appointment of one or two additional Judges; these Judges might undertake the duties of the Court of Quarter Session, and of the Court of Requests; it would make very little difference in the expenditure of the country, and I think by that means, decisions would be easily obtained.

33. Do you not imagine that in any of the Courts in England where there are four Judges, that they have an immense deal more to do, than the three Judges have here? I can hardly judge of that. I may give an instance of the delay that takes place here; the case of ——— was tried on the 29th May, 1846; a verdict was given for the plaintiff, and a notice of motion for a new trial was filed by the defendant; the motion for a new trial did not come on until the 13th April, 1847—we did not get a decision till the 19th of May now instant.

34. Was that a case of great difficulty? It did not come to its turn, and after the argument some time elapsed before the judgment was pronounced; the judgment came however, too late to enable me to set the case down for last sittings, and it cannot therefore be tried again until August, and I dare say that more than two years will have passed, before a final decision be come to. In this case the defendant is a pauper, receiving the rents of the property all the time, to the prejudice of the parties who claim it.

35. How do you imagine that the appointment of another Judge or two, of so low a grade as you propose to appoint, or such as you would be likely to have if you were to put them over the Court of Requests and Quarter Sessions, would bring up the arrear of business—do you think a gentleman of any eminence in his profession would allow himself to be put in the Court of Requests? I did not propose any Judge of low grade, and if there should be any objection to a Judge of the Supreme Court sitting in a Court of Requests, this might be obviated by calling it a Small Debts Court.

36. Do you think any Judge of the Supreme Court of New South Wales ought to be so treated? Perhaps he might object to preside over a Court of Requests; but I cannot see why there should be any distinction between a Court of Quarter Sessions and the Supreme Criminal Court.

37. *By the Attorney General*: Would you propose that he should travel? Yes.

38. *By the Chairman*: Do you consider the salaries the Judges have here sufficient? I do not think the salaries are sufficient.

39. What salary do you think might induce a Queen's Counsel to accept the office of a Judge in this Colony? I should say, at least, £2,000 or £2,500.

40. What salary would you say for the Chief Justice? At least £3,000, or £4,000 perhaps; and £2,500 for the other Judges.

41. You think the number ought to be increased? I do—I think there ought to be two more. If one Judge could devote his time entirely to Equity, and the other to criminal practice, they might find full employment for their time, leaving the other three Judges to settle the *Nisi Prius*, and Common Law business, and Appeals.

42. Would they not have too little to do? I do not think so. I am taking the present state of the paper; persons however prefer any mode of compromise now rather than sue, in consequence of the expense of legal proceedings, and the very great delay in obtaining a final decision.

43. Speaking of the Judges, would it not be highly desirable to have on the Equity branch of the Court, an Equity Lawyer, a man brought up to that branch of the law? It would.

44. *By Mr. Lowe*: Would you abolish the appellate jurisdiction? I should not like to say; but I think it would be dangerous.

45. *By the Chairman*: Have you any other suggestion for the diminishing of costs? Yes; there is another which I would suggest: but it is one which could not be entertained in the present state of the profession; it could only be entertained in the event of the Council coming to a decision that the profession should be amalgamated; it is that all ordinary motions should be made in Chambers, such as motions for juries, judgment as in case of nonsuit, judgment against the casual ejector, and such like.

46. Do you not think that juries should be granted without any expense at all? So they would, pretty nearly, if the application were made for them in Chambers; there would be only a summons to shew cause why the motion should not be granted.

47. Why should even that expense be incurred? Some expense must be incurred if it be necessary to apply for a jury.

48. Special juries are attended with considerable expense? No, there is only a difference of four pounds over that of a common jury.

49. Does not an injustice arise from that, namely, that special jurors are not sufficiently paid? They are not. I think special jurymen are only allowed five shillings a day, and that only if they reside beyond a certain distance.

50. Is not that an evil which ought to be redressed; and if it were, would not special juries be more expensive than at present? I think the practice should be the same as it was under the old law; that is, if the Judge did not certify that the case was a proper case for a special jury, the expense fell upon the party who applied for it. R. J. Want, Esq. 28 May, 1847.

51. *By Mr. Love:* Do you not think these certificates, after trial, give the Judges a very unnecessary power? I think in this instance it is proper; at least, I think it would be a sufficient safeguard against applications for juries in trifling cases.

52. *By the Chairman:* Which do you think the preferable mode of trial, that by special jury or by common jury? A special jury.

53. Is not a special jury very frequently what Mr. Justice Burton called a packed jury? Under the old system it might be so. You had a list of forty-eight jurymen, out of which each party had to strike out fifteen names, thus reducing the jury to eighteen; you might, however, carry the list of forty-eight in your pocket, and probably ascertain the views they entertained, and then strike out the names you did not like.

54. Do you not now know who they are beforehand? Not exactly.

55. You think the special jury, struck as it is now, is the best tribunal in the country for trying cases? I think the special jury is the best; but I do not think the present mode of striking it is, because you are taken by surprise.

56. Do you not think you ought to be taken by surprise? I think in a small community like this, where much bias may exist, it is necessary you should know something of those who are likely to sit.

57. *By the Attorney General:* Respecting your suggestion that all ordinary motions should be made in Chambers, why is it necessary for that purpose, that the profession should be amalgamated? Because the fees derived from them are the only ones the junior Barristers have, and if you were to deprive them of those, you would have no junior Barristers at all, and you would be unable to feed your Bar.

58. What fees are paid upon these motions? From one to five guineas, according to the importance of the motions.

59. *By the Chairman:* Are there any such things as motions of course? There a few, but I have been alluding not only to them, but to ordinary motions, such as motions for Juries, motion against casual ejectors, for time to plead, for setting aside proceedings for irregularities; all these matters which take up the time of the Court, and prevent decisions in important cases, might be done in Chambers, but I do not think it could be done, unless the profession were amalgamated.

60. Why not? I think it would drive a great many junior Barristers from the Bar.

61. Who gets that business now? The junior Barristers; if the profession were amalgamated, Attorneys might make all these applications in Chambers, provided rules were made to that effect.

62. *By Mr. Love:* Does it not pay Attorneys better to make these motions in Chambers, by Barristers than by themselves? It does.

63. *By the Chairman:* Supposing the amalgamation were to take place, would not Attorneys make the same charges then as now? They might charge, but they would not be allowed the fees for acting at one time in both capacities.

64. But the Attorney would do the double duty? Yes, but it does not follow that he should be allowed the fees of both; he is now only allowed six shillings and eight-pence for attendance in the capacity of Advocate and Attorney, and if he were to act as Barrister, in Chambers, I presume he would not be allowed any more.

65. Then the amalgamation instead of feeding the junior Barristers, would destroy them? No, because they might then practise in the double capacity of Attorneys and Barristers.

66. Can you mention any other reduction in the expenditure, that would be occasioned by the amalgamation? The observations I have made with reference to doing away with these motions, apply with equal force to special pleading.

67. *By Mr. Love:* Is it not the interest of the Attorney to employ two Barristers where only one is necessary, merely for the sake of the briefs and attendances? No doubt.

68. *By the Chairman:* Are two Counsel allowed, on taxation, where only one would be sufficient? We are allowed two in most cases.

69. Supposing more than two are employed, is a certificate necessary? It used to be, but is not now.

70. Who judges of the propriety of employing them? The Prothonotary.

71. *By the Attorney General:* If the profession were amalgamated, do you not suppose that the same number would be employed, the Attorney taking the place of the junior Counsel? The same number would be employed, but the attendances of the Attorney in Court, and upon himself as Barrister would be struck out.

72. *By the Chairman:* Some gentlemen have imagined that in all cases the Attorney could act as junior Barrister, and that he would not require a brief? I think not, if he act as junior Barrister he cannot do without his brief.

73. Is it possible for a man in a large way of business, to remember every fact and circumstance connected with a case? It is almost impossible.

74. You do not think that charge could be saved by amalgamation? No.

75. Can you suggest anything as to the Equity branch? The whole system is extremely expensive, and requires to be entirely remodelled. To do this properly it would be necessary that a Commission should be appointed for the purpose, and as it would occupy at least several months; the gentlemen forming the Commission should be paid. In my opinion the Equity system here, which is an adoption of the English practice, is entirely unsuited to a young Colony; all unnecessary forms and pleadings should be abolished, such as reference to the Master—Reports—Rules *Nisi* to confirm Reports—Exceptions—Warrants—Bills of Revivor—Supplementary Bills—the absurd length of proceedings—and innumerable other forms, which by a judicious system might be entirely abolished. Another cause of great

 expense

R. J. Want, Esq.

28 May, 1867.

expense is the immense delay that takes place; eight weeks are given to answer, and if you apply again then probably another eight weeks will be granted, and then in the time that elapses, somebody dies and then you have to get a Bill of Revivor; then perhaps somebody else goes into the Insolvent Court, and you have to get another Bill of Revivor.

76. *By Mr. Lowe:* Might not a good deal be done in Equity by substituting motions for bills? I think it might be be brought into a very simple form; I am quite certain that the expenses in Equity might be lessened by at least one-half if not more, by a properly devised system.

77. Might not motions and petitions be used instead of bills? No doubt, in cases of foreclosure a reference can be obtained to take the accounts at once without answer.

78. What would you think of a form of proceeding like this—that instead of a bill of complaint, a statement should be made, containing no more allegations in the case than the plaintiff or complainant could swear to—in fact, an affidavit? That would be entering into the minutiæ of the matter, and I think it would be dangerous to attempt any patchwork innovation without entirely remodelling the whole system.

79. *By the Chairman:* You think the whole Equity branch is so expensive and cumbersome that it requires complete remodelling? Yes, and the only way that it could be done properly would be by means of a paid commission.

80. Do you think there are the materials in this Colony for such a commission? I think so.

81. What sort of persons would you recommend? The commission should be composed of Barristers and Attorneys.

82. As you propose to abolish all fees in the Common Law branch of the profession, I presume you would do the same in this? I would.

83. Have you anything to state with reference to the Ecclesiastical branch of the profession? My opinions with reference to that subject have been stated before another Committee of the Council.

84. Have you anything to state as to the Criminal branch? I have had no experience in that branch; I do not practise in it.

85. What is the first process in commencing a Common Law suit—have you to get any certificate from the Bar that there is a probable cause of action? No, you issue your summons.

86. Do you not imagine that there would be more speculative actions if the profession were amalgamated, than there are now? I do; I have stated that already in a previous examination.

87. The fees that must be given to the Bar act as a restraint upon that class of actions? Yes.

88. Supposing the profession were amalgamated, what do you think of the proposition of Mr. Brewster, that parties should be allowed to make bargains with Lawyers for conducting suits, in the same way that they might bargain with a tailor for making a coat? The idea is monstrous; it would tend to bring the profession to the lowest state of degradation. The tailor who makes a coat knows the price of the cloth, and the expense of the labor, and can tell to sixpence what it will cost, but a Solicitor would have to make a bargain either for conducting a particular suit, or for a whole year, without knowing what expense might be incurred. I may mention in illustration of this, that some years ago I undertook a case, and shortly after I did so the defendant died; I had then to revive against his executors; shortly after another defendant died, and I had to revive against his executors; some time after that the plaintiff became insolvent, another bill of revivor; then another became insolvent, and so on with a fourth and fifth, and in each case there was a bill of revivor.

89. How long did this process of bills, and bills of revivor, and supplementary bills last? About eight or ten years, and the case is going on now.

90. What was the result of all these bills? They resulted in enormous expenses and costs.

91. Have they led to an increased probability that there will ever be a conclusion arrived at in the matter—have they tended to simplify the case or to involve it in confusion? They tend to involve it in confusion.

92. What state does that case stand in at present? It is waiting for an answer to the last bill now.

93. What is the nature of that suit? To recover money against an executor.

94. *By the Attorney General:* Is the sum large? About ten thousand pounds.

95. *By the Chairman:* What do you suppose will be the costs? I think they cannot be very far from two thousand pounds.

96. *By the Attorney General:* If the amount had been one thousand pounds would the expenses have been the same? Yes; if the amount had been one hundred pounds all the forms would have been the same.

97. *By the Chairman:* Has the original defendant or his representative yet put in an answer to the merits of that bill? The first defendant died before he put in an answer.

98. Are there many such cases as that? Yes, many.

99. *By Mr. Lowe:* What do you think of an examination in Equity *viva voce* of the defendant instead of his putting in an answer? I do not think that would be desirable.

100. Why not? Because a person unused to appearing in Courts of justice, and coming before a Judge frequently becomes confused, and answers incorrectly; I think it would be better that he should have time to consider what he swears to.

101. Does not that apply to all witnesses? No doubt it does to a certain degree; but witnesses are generally called on to state one or two simple facts, whereas a defendant is called upon to answer a great number of questions, and perhaps to go into long and intricate accounts.

102. *By the Chairman:* If you had made a bargain in the case to which you have referred you would have been something out of pocket—or if you had not been out of pocket you would have tried to bring the case to a conclusion? I could not; I could not help people dying or becoming insolvent.

103. Do you suppose if a person had undertaken to conduct that case for two hundred pounds he could have gone on with it? No; he must either have done an injustice to himself or to his client.

104.

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104. If it were possible for a Solicitor to undertake the management of a party's legal affairs, say by the year—do you not think wherever there was the possibility of an action being sustained it would be raked up? Yes; a man would not care how many actions he brought if he had only so much per annum to pay; there is, however, a vast difference between the case of a Lawyer and of a Physician, as suggested, as few persons would make themselves ill because the assistance of a Physician might be obtained for nothing.
105. Then you do not think it desirable to abolish the laws against champerty? No, although they seem to have been so to a certain degree by the Act of Council which authorises the selling of choses in action—it is under the 31st clause of the Administration of Justice Act, 5 Vic., No. 9, which enables a Sheriff to sell equities of redemption and choses in action. I, some time since, sued a man myself, and got a verdict; that man, in the meantime, had sued a person for his wages, and recovered a verdict for forty pounds, in respect of which a motion for a new trial was pending; under this Act I put up his interest in the verdict for sale by the Sheriff, and bought it for nine or ten pounds, of course nobody thought of buying so precarious a debt. Shortly after the Court came to a decision that a purchase of such an interest passed the whole of the defendant's claim, so I found that I had got about one hundred and forty pounds costs besides the debt; but as I did not wish to deprive the Solicitor of his costs, I said "If you like to pay me what is really owing to me I will give you my claim, and you will get your costs"; he did so.
106. Could you have had the costs that belonged to the Solicitor? Yes.
107. But is it not held that an Attorney has a lien? Yes; but it has also been held that a client may order his Attorney to discontinue; and standing in the shoes of his client, I might have ordered him to discontinue, and made my arrangements with the defendant. The present state of the law opens a door to fraud; suppose a fraudulent person, about to become bankrupt, and his creditor choose to collude; all the debtor has to do, is to get the judgment creditor to put up all his book debts for sale; they are, of course, bought by the creditor; the next day the debtor walks into the Insolvent Court—gets his certificate, and immediately after, perhaps is in the possession of all his former choses in action.
108. *By the Attorney General:* Do you think any alteration ought to be made in the Sheriff's Department? Yes; by the appointment of more Bailiffs in various parts of the Colony.
109. *By the Chairman:* What do you think of the Act that relieves the Sheriff from his responsibility? I think it requires alteration.
110. *By the Attorney General:* Do you think it is desirable to make any change in the appointment—to have more than one? No; I think there should be Bailiffs in different parts.
111. *By Mr. Lowe:* Do you think we might take a little off the Sheriff's salary and give it to them? I think not, if the Sheriff's Act were altered and he had the responsibility.
112. *By the Attorney General:* Do you think District Sheriffs would be an improvement? I do not see that any advantage would be likely to arise from that.
113. *By the Chairman:* Similar to the County Sheriffs of England? I do not think they would be attended with any benefit.
114. *By Mr. Lowe:* Is not the Sheriff of a county a mere form? Yes; it is the Deputy who does all the business.
115. *By the Chairman:* Do you not think the remuneration of Bailiffs, in country parts, would necessarily be so small, that you would find a difficulty in getting proper security? I think not.
116. Have you any means of giving information respecting the comparative expense of the law, now and in the old time? No.
117. You were familiar with the rules of Sir Francis Forbes? Yes; they were in force during the period I was under articles.
118. *By Mr. Lowe:* Do you think there is anything objectionable in special cases? No; I think they are the cheapest and most expeditious way of settling a question, if the parties can agree in stating one.
119. The difficulty is that you cannot get Counsel to agree; can you suggest any way in which that could be remedied? I think the practice in England is to refer to some Barrister to draw up a special case from the statement of parties.
120. In most cases of difficulty a special case could be stated? Yes.
121. *By the Chairman:* How are you to compel them? I do not think you could compel them.
122. *By the Attorney General:* I see that in your former examination you spoke of the rules respecting retainers—which of those rules do you object to? The whole that I mentioned.
123. Are you aware that the English rules, as to retainers, were acted upon here till 1842? I think so until the meeting of the Bar at which those rules were passed, in June, 1842.
124. I was not in the Colony at the time—how were they notified to other members of the profession? Copies of the rules were delivered to those parties who asked for them.
125. Was there any remonstrance against them by your branch of the profession; Yes; a letter was written by myself, at the request of the Law Society to the Attorney General (now Mr. Justice Therry,) calling his attention to them; and requesting him to call the attention of the Bar to them, as they acted injuriously to the public.
126. Are you aware that the Bar have reverted to the English rules? I have been told so.
127. Have you any objection to the English rules? They are not free from objection; although they are far less objectionable than those passed by the Bar here.
128. Do you not think it necessary for the interests of the public that the Bar should be guided by some code of rules? I think so.
129. What fault do you find with the English rules? It is only with some; for instance, the taking a retainer on one side, and afterwards taking a brief from the other.
130. Are you aware that that objectionable rule passed in 1842, making a retainer last but for twelve months, was taken from the rules of Van Diemen's Land? I am not.

R. J. Want, Esq. 24 May, 1847.

131. Have you ever seen the rules of the Bar at Van Diemen's Land respecting retainers—that Bar which is composed of Barristers and Attorneys? No.
132. Do you know what the retaining fee is at Van Diemen's Land? I do not at all know the practice at Van Diemen's Land.
133. You do not know that the retainer is five guineas for the first year, three guineas for the second, and that the common retainer is two guineas for every case? I do not.

WEDNESDAY, 2 JUNE, 1847.

Present:—

WILLIAM CHARLES WENTWORTH, Esq., IN THE CHAIR,
THE ATTORNEY GENERAL. | ROBERT LOWE, Esq.,
CHARLES COWPER, Esq.

James Martin, Esquire, called in and examined:—

J. Martin, Esq. 2 June, 1847.

1. You are a Solicitor, Attorney, and Proctor in the Supreme Court? I am.
2. What is your opinion of the proposed amalgamation of the Legal Profession—do you think it would work beneficially, or otherwise? I think it is highly desirable, not only because it would diminish, to some extent, the expense of litigation, but also because it would afford to people educated in this Colony the means of practising at the Bar, which they do not now possess.
3. Might not that latter object be accomplished without the amalgamation? It might; but I have not yet heard any person offer any positive opinion as to the way in which it should be done. Some persons might be disposed to do it upon very liberal terms; others, as for instance, members of the Bar, might propose a mode of accomplishing it which would prevent from coming to the Bar many gentlemen against whom no reasonable objection, either as regards character or competency, could be made.
4. Supposing the decision of the Committee were against amalgamation, but in favor of admitting any persons qualified in the country to practise at the Bar, what would be the test that you would propose they should be submitted to? I know of no better means of educating people for the Bar in this country than the course which an Attorney now has to go through, and I believe that that course is, at all events, quite as likely to give students a knowledge of the law as the course prescribed for the admission of a Barrister in England. I think every Attorney admitted in this Colony ought, in the event of the Council refusing their assent to Mr. Brewster's Bill, to be allowed to elect, if he thought proper. Of course he would incur great risk by so doing, but that would be his own affair.
5. If that election were permitted, do you think the amalgamation of the profession afterwards would be desirable? That question supposes that the amalgamation would be refused altogether, and that this will be substituted for it.
6. Supposing the privilege of making their election were conceded to the profession, do you think amalgamation would still be desirable—would amalgamation be better than this right of election? I think it would be better.
7. In what respect? I think, as I before stated, that there are two reasons why amalgamation is desirable; one is, because it would enable people educated in this Colony to come to the Bar; and the other, that it would tend to diminish the expences of litigation. With reference to the latter branch amalgamation would be desirable. Besides, the division of the profession of the law into two distinct branches is, in my opinion, wholly unsuited to the circumstances of a young community like this, where litigation is not, and cannot for years to come, be sufficiently extensive to maintain more than a dozen Advocates, and where, consequently, the inducements to the youth of the Colony to adopt that branch of the profession must, while that division is continued, be extremely limited. It is, in my opinion, of the utmost importance to this Colony that a considerable number of its educated youth should become Advocates, for it is upon this body, in the Colonies especially, that the maintenance of public liberty chiefly depends, and it is to them that the people must look for its leaders in every great political struggle which may arise. The larger this body is, the better will it be for the community, for the greater will be the influence of those who, by education, ability, and experience, are best qualified to direct and control. By admitting gentlemen to the Bar in this Colony some improvement would, doubtless, be made upon the present system, and some few persons would become Advocates who otherwise could not. But an amalgamation would give the Colony the choice of a much larger, and I believe a much abler, body of Advocates, for by enabling persons to practise in both capacities, the emoluments of clever practitioners would be increased, and the number of practising Advocates would be greatly augmented. There can be little doubt that such a state of things would have an immediate and highly beneficial effect upon the education of our youth, many of whom would have their minds cultivated, and their abilities drawn forth, by the new prospects which would be opened up to them. Under this system of amalgamation some of the most distinguished men that the world ever saw—the men who planned, and successfully accomplished, the American Revolution, grew up; under this system were called into existence those great men who framed the declaration of independence, and the noble constitutions which resulted from it. It cannot be that the same system would be unable to produce similar beneficial results in this Colony. Though no longer colonies, the Americans still preserve this system, with but one or two exceptions. This, and two or three other Colonies, are the only British dependencies in which a division of the Legal Profession exists. Independently, therefore, of the

the matter of expense, which I look upon as altogether a secondary consideration, I think that an amalgamation ought immediately to take place, and I am firmly convinced, that we should then soon have abler Advocates than experience has given us any right to expect from a continuance of the present most objectionable system. J. Martin, Esq. 2 June, 1847.

8. In what way would the amalgamation diminish expenses? I could not state without going through the details, but there are many attendances which might be saved, and many things are done by Counsel now which an Attorney might do as well.

9. You mean to say then that some few attendances on Counsel would be saved? Yes; there are several things done now by Counsel which neither require skill nor learning, which are mere matters of course, and which might be as well done by the Attorney.

10. Would not the better way be to do away with these matters of course? There are many things which are not technically called motions of course, yet of so simple a character that any person could manage them.

11. At present it is competent to an Attorney to make applications and to argue cases in Chambers before the Judges? Yes, but still there are many cases where parties are not satisfied with the decisions of the Judges in Chambers, and will go to the full Court, when, of course, the Barristers must be retained.

12. Do you not think that in most of these, which are a sort of appellate cases, Counsel would be employed—that in cases where there was such difficulty as to require an appeal to the full Court, an Attorney, even if he could appear himself, would also have Counsel with him? I do not; some Attorneys now make a point of taking Counsel into Chambers in all cases however simple; in such cases it may be that they have little confidence in their own knowledge, or perhaps they have a desire to make as much costs as they can; if they attend themselves they only get six shillings and eight-pence, but if a Counsel attends they are allowed for making out a brief, besides the attendance. There are, however, many Attorneys who never take Counsel in toChambers, and who have to argue matters of much importance; such parties, I appprehend, would not take Counsel into Court in the event of the amalgamation taking place.

13. *By the Attorney General:* How many Attorneys are there who never take Counsel into Chambers? I cannot state accurately; I never take Counsel into Chambers myself; neither, I believe, does Mr. Want, Mr. Nichols, nor Mr. Johnson.

14. *By the Chairman:* You think there are many who would, in cases where an appeal was deemed necessary, argue in full Court without the assistance of Counsel? I have no doubt that in many instances Attorneys would argue before the full Court.

15. That in those cases an Attorney would act as Counsel? No doubt he would act as Advocate.

16. What would the client save by that? If it were a matter that did not require the preparation of a brief, then the expense of the brief would be saved; in addition to that the expense of instructions for brief, and attendance upon Counsel with it, would be saved. No doubt the Attorney would be allowed the fee for attending as Advocate, but if he went with a Counsel he would get that.

17. You think then the Attorney would be allowed the double fee? No; but he would be allowed a fee for attending Chambers, and the fee for preparing and attending with brief would be saved.

18. What is your reason for imagining that an Attorney acting as Counsel would dispense with his brief? Because whenever we go into Chambers now we are not in the habit of preparing briefs—we are satisfied with the drafts of the affidavits, and do not prepare briefs.

19. Because they would not be allowed now I suppose? They would not be allowed now, and that may be the reason why they are not prepared; but the fact that they are not now prepared, and would not be allowed, leads me to suppose that they are unnecessary, and would not be allowed if amalgamation were to take place.

20. Is it the fact that an Attorney in large practice could do without briefs, would it be possible for him to carry in his head all the facts connected with the hundred or hundred and fifty cases in his office? You were speaking of Chamber applications; and in the first place no one has a hundred or even a dozen Chamber applications in a week.

21. I said "in his office"? I can see no difficulty in the matter, because in Chamber practice you have a couple of affidavits to refer to; you have also the Judge's summons, and all you have to do is to look up a few authorities, write them down with pencil on a piece of paper for reference, and there is no difficulty in carrying that in your head into Chambers.

22. That is the course now, because if you made out a brief it would not be allowed—but if you were acting as Counsel or Advocate I presume it would be allowed? Then you suppose that the taxing officer would allow an abuse? If we can do without a brief now, as experience proves we can, I cannot see why it should be allowed when we act as Counsel.

23. That might be answered by the question why is it tolerated now that Barristers should in all cases have briefs, because in many cases they are entirely unnecessary, and in others might be reduced to one-tenth of their present expense? There is a reason for the delivery of a brief to a Barrister which would not operate if Attorneys were allowed to practise as Advocates, which is that the Attorney, from his previous knowledge of the case, could conduct it without a brief, but a Barrister derives the whole knowledge of the cause from his brief alone.

24. *By Mr. Cowper:* It has been stated to the Committee, that briefs are now often sent to Barristers as mere matters of form, without containing any information of importance to the case? No doubt, in promissory note cases, all that is required, is to copy the pleadings and to state the names of some witnesses, to prove the making or endorsing of the note.

25. *By the Chairman:* You seem to think that the judgment and integrity of the taxing officer must be the principal check upon what you term the "abuse" of an Attorney acting as Counsel preparing a brief for himself? The taxing officer is supposed now to be a check upon the preparation of briefs; if he finds a brief running over fifty sheets, it is supposed to be his duty to look over it, and to see whether the circumstances of the case justify it.

J. Martin, Esq.

2 June, 1847.

26. How is the taxing officer to know whether an Attorney acting as Counsel, has, or has not, such a quantity of business in his office as will enable him to carry the facts of every case in his head? I do not think it depends upon the quantity of business, but upon the importance of the case; there are some cases in which the points are so numerous that it would be impossible for an Attorney to carry them in his head, whether his business were large or small. In promissory note cases, I do not, however, see the necessity for a brief.
27. You conceive then that in most cases a saving would accrue to the suitor from this circumstance—that an Attorney would conduct a case without a brief? My answer to that question had reference to Chamber proceedings; and in those cases I think a brief ought never to be allowed, in the event of an amalgamation taking place.
28. What do you say of proceedings in Court—supposing an Attorney acted as junior Counsel, would you not consider him entitled to a brief, or would you debar him from a brief in those cases? There are a great many cases in which a brief could be dispensed with, as in promissory note cases, and cases which go by default. In other cases, I think briefs ought to be allowed; but as to whether you would allow the cost of any brief that an Attorney might make out, that must be left to the taxing officer.
29. Supposing the profession were thrown open in the way you recommend, do you consider that the greater portion of the Attorneys would do their own Chamber business, that business which arose in their own office, instead of employing Counsel? I do not see why any change should take place; we have now the privilege of attending Chambers; and I do not see why those Attorneys who now employ Counsel in Chambers, should not do so then.
30. You do not think then that there would be among the profession generally a saving; but only on the part of a few aspiring young men who are anxious to train for the Bar? With this exception, that if briefs are not allowed at all for Chamber business, Attorneys would probably attend themselves.
31. *By Mr. Lowe:* What is to become of the junior Bar if you take away this business? I cannot say. I do not think that they profit much by Chamber business as it is.
32. *By the Chairman:* Your proposal would have the effect of giving the Attorney a monopoly of the practice; because the Barrister, as you have said, can know nothing of the case except what he derives from his brief? If the amalgamation were to take place, the Barrister could act as an Attorney and receive instructions direct from his client.
33. But where a Barrister did not choose to act as an Attorney he would be excluded? Unless the Attorney thought proper to retain a Barrister with the certainty of not being allowed for a brief, he would, no doubt.
34. Do you not think that another consequence might arise that would interfere very much with this economy that you think would result from this proposal, that one Attorney would employ another to act as his junior in a matter, without going to the Bar at all? That is very possible; but I cannot see that any evil is likely to arise from that.
35. Supposing that practice arose, would not the Attorney employed as junior Counsel in a case which had not arisen in his own office, require a brief as much as a Barrister does at present? I said that in all cases that went into Court except promissory note or default cases, a brief ought to be allowed.
36. I am speaking of Chamber practice? I am almost certain no such case would take place.
37. You have stated already that there are many Attorneys who always employ Counsel in Chamber cases? Yes.
38. Would not these same persons very probably employ as Counsel in these cases, Attorneys who did not belong to their own office? If the cost of preparing a brief were not allowed in Chambers, I do not think they would.
39. Then the other consequence suggested by Mr. Lowe, would arise, that the Bar would be excluded from appearing in Chambers at all? I cannot see how they would be excluded if they were allowed to act as Attorneys.
40. Supposing the amalgamation to take place, does it follow that every Barrister would be competent to act as an Attorney? I see nothing in his previous education to prevent his acting as an Attorney.
41. His total want of knowledge of all the forms of proceedings? He is constantly discussing those forms either in Chambers or in Court, and ought to have some knowledge of them.
42. How do you think they would figure as accountants? I believe they were pretty able to keep accurate accounts of their fees when they sent in their bills quarterly; at least they understood compound addition.
43. *By Mr. Lowe:* I have been requested by Mr. Windeyer, to put a few questions to the witness, which he would have proposed had he been present—Have you read Mr. Gurner's evidence? Yes.
44. It appears from that evidence that the expense was as great when the profession was amalgamated, as it is now that it is divided? I do not think Mr. Gurner was accurate in so stating.
45. He referred to returns of the costs of cases under both systems? Yes, in a very unsatisfactory way; indeed so far as I remember, it appeared to me that he was not positive about the matter.
46. *By the Chairman:* As a matter of fact, do you know anything about the working of the system when the profession was amalgamated? I do not. It is possible that many things might have been tolerated then by the taxing officer, that would not now; there might have been a different system of taxing in those days.
47. Your opinion about the saving that would arise from the amalgamation appears to be this, that some few briefs might be saved and some attendances? Some attendances, and all retainers might be saved.
48. When you employed Counsel would you not give them a retainer? I think retainers might be struck off, because if a client could go at once to a Barrister and employ him, there would be no necessity to retain him.

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49. I assume that notwithstanding the amalgamation, a great many Barristers would not act as Attorneys—you would not exclude them from retainers? I do not see why retainers should be allowed under those circumstances.
50. Do you know any other way of securing the services of Barristers? Yes. I do not see why a Barrister should not consider himself retained by a note, stating that he would be required to act in a case, without a fee of a guinea.
51. *By Mr. Louce:* Supposing one man sent him a note with a guinea, and another sent him one without, which would he take? No doubt the guinea; but by the same argument, if one person sent him one guinea, and another two, he would send back the one guinea and keep the two.
52. *By the Chairman:* Supposing this plan were to take place, what would be the effect upon the character of the Bar—would there be an efficient Bar when it was starved to death? I do not think it would operate upon the character of the Bar. I think that man, whether a Barrister or an Attorney, would have the most business, who was most competent; it would probably have the effect of weeding the profession.
53. Do you think a competent Bar would spring up under such a system of starvation as you propose? I do not think it a system of starvation; but one more likely to bring forward talent, because, then, young men would not be so dependent upon the favor of others.
54. It appears to me that your proposal would sweep away the greater portion of the fees of the Bar—do you think that a system under which an efficient Bar is likely to arise? I do not see how it would sweep away the greater portion of the fees.
55. You sweep away the briefs in Chamber practice? Chamber practice is of very little importance to the members of the Bar.
56. *By Mr. Louce:* What do you think of the proposition of doing away with taxation altogether, and of substituting a system of allowing any one to make his own arrangement with an Attorney or Barrister? That system is utterly impossible to be carried out. In proposing that question, it appears to me to be forgotten, that in addition to the plaintiff and his Attorney, there is also a defendant in a case; and that the latter may have to pay the costs. Supposing a party to go to an Attorney, and to agree to pay four hundred pounds for the management of a particular case; if he succeeds in the action and the costs are taxed down to fifty pounds, he would lose three hundred and fifty pounds; if, on the other hand, there were no taxing officer, the defendant would be compelled to pay the sum agreed upon by the plaintiff, behind his back, and thus he would suffer to that amount.
57. Supposing such a system could be carried out, do you not think it would reduce the expenses of law if the costs were not subject to taxation; would not the system of taxation naturally lead to the charging higher prices in the first instance; thus if a tailor knew that his bill would be subject to taxation, do you not think he would charge much more for a coat? I do not see that the two cases are parallel.
58. Do you think it is worth while, in order to give the successful party his costs, to keep up the principle of the losing party paying the costs, if it is to lead to more money being spent in litigation? I think it is absolutely necessary to keep up the system of making the losing party pay, because, if a party is compelled to go into Court for the redress of some grievance, or for the recovery of some debt, it is only just that the party who compels him should pay for it, and I do not know that there is any additional expense caused by the system of taxation. I think that the system of making the losing party pay costs, should be extended even farther than at present: that is to say, to every matter that comes before the Court or a Judge in the progress of a cause. At present, in a great variety of cases, the Judges have a discretion to give or refuse costs; and the way in which this discretion is frequently exercised, is such, as not only to give great dissatisfaction to the parties concerned, but to shake the confidence of many persons in the impartiality of the Judges, who, rightly or wrongly, are sometimes thought to punish certain gentlemen against whom they are supposed to entertain some antipathy, by generally refusing them costs where they succeed, and granting costs against them when they fail. The way to remedy this would be to give the successful party costs in all cases, and leave the Judges no discretion; and thus save them from being subject to what may be a groundless imputation. In this as in every other instance where it can be done, I would have all discretionary power taken away from them.
59. Supposing an enactment were made, that each party should pay his own costs? Then there need be no taxation; but I think it would be most unfair to the successful suitor.
60. *By the Chairman:* If a system were adopted, that each party should pay his own costs, and people were allowed to make their own bargains with Attorneys, would they undertake to do the work cheaper than they do now? It is impossible to say what would be done under those circumstances.
61. *By Mr. Louce:* Would they not be able to afford to do it cheaper? I think, in many cases, the costs of actions would be greater than they are now, and, in many, less. In an important case, an Attorney might demand almost any sum he pleased.
62. *By the Chairman:* Do you think the Attorney could ever have the requisite knowledge, in such a bargain, as would enable him to make a proper and reasonable charge? I am quite certain he could not. It is impossible to say, when a case is commenced, that there may not be fifty Chamber applications in it, and each of these would cost, on an average, £10.
63. Would not an Attorney be very apt to make a liberal allowance for all these contingencies? Of course; and by that means the expense would be greatly increased.
64. He would keep a good margin on his own side? Yes.
65. *By Mr. Louce:* Is there not a good deal of competition in the profession; and, if one man allowed a liberal margin, would not another undertake the case for less? I do not think so.
66. Do you not think it would reduce the quantity of labor in legal proceedings; for instance, would these long briefs be made if the management of cases were charged by the job? No doubt, the work would be done in as slovenly a way as possible.

67.

I do not think there are a great many useless, unless you were completely to alter the practice.
92. *By Mr. Lowe:* What do you think of special demurrers? I think they might be done away with altogether.
93. *By the Chairman:* What do you think of general demurrers? I do not think they ought to be done away.
94. Supposing parties joined in demurrer, do you think they ought afterwards to be allowed to go into the question of fact? I think they ought, because both parties might be very confident that the law was with them.
95. Why should not parties who had any doubt try the question upon the merits, upon the facts, instead of the demurrer? That might lead to more new trials, in consequence of misdirections of the Judge, or directions which the unsuccessful party might think misdirections.
96. *By Mr. Lowe:* Does not a demurrer frequently simplify the issue, and points of law being sifted, prevent the calling of many witnesses? No doubt.
97. Do you not think if parties were not allowed to demur, that there would be repeated instances of applications to the Court for judgment *non obstante veredicto*? I think that would be the result of it.
98. You must take the law some time or other? Yes.
99. *By the Chairman:* You would allow parties to amend after general demurrer, and allow the Judges to have the discretion now placed in their hands? Yes.
100. *By Mr. Lowe:* Demurrer is often as much for the benefit of the party who succeeds as for the party who fails? Yes, it clears up the law, and the Court then know better what they are going to try.
101. What do you think of the system of special pleading—some witnesses have recommended a return to notices? I have had no experience of Sir Francis Forbes' rules, but I think the present system is better than that; there is a great deal saved in witnesses' expenses by the present system.
102. *By the Chairman:* As to the expenses of the witnesses, do you not think that considerable discretion in that matter ought to be allowed the taxing officer? He has the whole discretion now.
103. Suppose witnesses are called who are not examined? The Attorney makes an affidavit that he verily believes all the witnesses who were subpœnaed were necessary: states the number of miles they reside from the Court, and that they were present at the trial; whether they are examined or not it is the practice for the Prothonotary to allow the expenses, if the Attorney swears that he believes they were material and necessary.
104. Do you think that ought to be so? I do not.
105. What ought to be the course of practice with regard to witnesses not examined? It is difficult to say; there must be a discretion reposed in some person, and there is no other person but the Prothonotary to attend to the matter.
106. Would it not act beneficially, in lessening litigation, if witnesses who were not examined were not allowed their expenses in the taxation of costs? It is impossible to say; a witness may be subpœnaed from a long way up the country to prove some particular fact which may be admitted, or the case may take some turn which may render it advisable, in the opinion of Counsel, not to call a particular witness.
107. Do you not imagine that in such cases where an Attorney, from prudential motives, will not call a witness, because the evidence of that witness would militate against himself, he adopts that course to prevent the administration of justice, and to get a one-sided decision? He may, but it is difficult to ascertain from what cause a witness may be omitted.
108. *By Mr. Lowe:* Where the plaintiff is nonsuited there is, of course, no necessity to call a witness? Of course not.
109. *By the Chairman:* I am speaking of cases that have been gone through on both sides, where a number of witnesses have been subpœnaed and not examined? There are many reasons which may weigh with an Attorney or Counsel totally irrespective of the circumstance to which you have alluded.
110. Do you think the system of crowding cases with unnecessary witnesses ought to be tolerated? It is not supposed to be tolerated; the Prothonotary only allows them upon affidavit that they are necessary.
111. That affidavit of the Attorney, that he "verily believes," amounts to nothing—do you not think the party ought to swear, before the costs are allowed, that the witnesses were actually necessary? They do swear, in nine cases out of ten, that the witnesses were material and necessary.
112. As a matter of fact, do the costs of witnesses form a material portion of the costs of a suit? In the majority of ordinary cases witnesses' expenses are a mere trifle.
113. Can you suggest any mode of lessening the expenses of suits at Common Law besides those you have spoken of already? No, I do not see any means of diminishing expenses, nor do I think they ought to be diminished materially.
114. Do you not think there are many attendances allowed to Attorneys which might be altogether dispensed with, or refused—those formal attendances which Attorneys generally perform by their clerks, such as taking a brief to a Barrister? The attendance must take place.
115. Might not the charges be reduced where they are thirteen shillings and four-pence to six shillings and eight-pence, and where they are six shillings and eight-pence to three shillings and four-pence, in all those cases where no mind is employed, and the labor can be performed by clerks or porters? No, I think not, because there are many things done which imply some knowledge and labor which are not well paid, and if you cut down all these attendances, and only allow the present rate of charges for other labor, the profit of the Attorney would be very small; you would then run the risk of making the profession hardly worth following, and do a greater evil than the good you contemplate would counterbalance.

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67. Would anything more than was necessary be done? Perhaps not.
68. *By the Attorney General:* Do you not think there would be some probability that the success of a cause would be endangered by it? I think so.
69. *By the Chairman:* For instance, if an Attorney had made a bad bargain, would he not get rid of the case as soon as possible? Perhaps he would.
70. *By the Attorney General:* Supposing the taxing officer were done away with, and the matter were left to a jury, do you think many Attorneys' bills would be paid without a second action? I think very few costs would be paid without going before a jury.
71. Do you think a jury would be the proper tribunal to judge of the costs, as to *quantum meruit*, on the part of the Attorney? I do not think they would answer in any way. Juries are not competent to decide in such cases; they would not understand the labor bestowed on the conduct of the case, and, from the general prejudice that exists against the legal profession, they would reduce the amount to the lowest possible sum. If there is to be a taxing officer, it must be a person who understands the work which he has to perform.
72. *By Mr. Lowe:* Would not a legal gentleman guard against the danger you apprehend, by making his bargain beforehand? Yes, if he could.
73. Would it be a fairer way that a man should see, beforehand, what an action would cost, than it is now, when he is totally in the dark? It is impossible to devise any plan by which he might know how much it might cost.
74. *By the Chairman:* Supposing a wholesale system of remuneration to the profession of this kind were adopted—that an average were struck of what the costs of actions in law ought to be, that parties, in bringing actions, were required to pay that sum into Court, and were then allowed to choose their own Attorney and Barrister, and the Barrister and Attorney were compelled to take, as a remuneration for their trouble in the case, the sum allowed—what is your opinion of such a scheme as that? I think that plan utterly impossible to be carried out, because there are some suits that could be conducted for £10, and others which could not be conducted for £2000; so that, unless you classify cases, and I know of no means of classifying them, it is impossible to say what sum ought to be paid.
75. Supposing it were left to the discretion of the Court to say when an extraordinary case arose, and to apply to it the present system of taxation, and the scheme I have suggested were applied to the ordinary run of cases? What is the ordinary run of cases?
76. Actions for goods sold and delivered, promissory notes, and money counts? Even in a case of goods sold and delivered, you may have to bring a witness a thousand miles, or the account may run over twenty years, and occupy days in the trial, while some actions would not occupy five minutes.
77. Then it would appear if the costs were too small in the one case they would be too large in another, so that upon the average of cases—? The extremes are so wide that it is impossible to take an average; in some actions for goods sold and delivered the cost might amount to five hundred pounds, and in another they might not exceed ten pounds, so that no average could meet the justice of all the cases.
78. This would be a sort of profit and loss concern, in which the public would embark—this money must be paid out of a general fund, and it might happen, after all, that if only a proper portion of this fund were given to Attorneys, although in particular instances there were losses, yet in others there were gains, so that the State would be no loser upon the cases in the year? Professional gentlemen in some cases would be overpaid, and in others ridiculously underpaid; and thus you would lose sight of the principle that a man should be paid a fair price for his work.
79. You do not think such a system as that would answer? I do not.
80. Do you imagine that it would be very palatable to the profession? I do not think it would be palatable to any one.
81. *By Mr. Lowe:* Would there not be this inconvenience in it, that all the better men would get the hard cases, and those with the most interest, whether better men or not, would get the easiest? Yes, I think so.
82. *By the Chairman:* It strikes me that a similar result will arise from an amalgamation of the profession? I do not think so.
83. Will not the Attorneys take all the easy business into their own hands, and give the difficult business to the Bar? Perhaps so; but no doubt the Bar will be well pleased to have all the difficult business, as they will be well paid for it—as they are now.
84. Do you not think the amalgamation would lead to an inconvenience in increasing the number of speculative actions? No, I do not think it would; I do not think there are any Attorneys at all disposed to bring speculative actions; there are very few actions brought unless there is a reasonable chance of succeeding, and if there is a reasonable chance of succeeding I do not see why an action should not be tried.
85. Do you not think the fees given to Barristers operate as a check to speculative actions? I do not see that they can operate to a great extent; the fees given to Barristers are not a very large proportion of the costs in an ordinary Common Law suit, and I cannot conceive such a case as a speculative Equity suit.
86. *By Mr. Lowe:* What is the common cost of arguing an ordinary demurrer? Fifteen or twenty pounds.
87. That is between party and party? Yes.
88. How much of that would go for Counsel's fees? Six or seven pounds.
89. *By the Chairman:* Do you know anything about the practice which goes under the name of Sir Francis Forbes' Rules? I know nothing about the working of it.
90. You are not able to offer any opinion as to whether that is a preferable mode of practice to what prevails in the Court now? I have had no experience of it.
91. Do you think that in the present mode of practice there are many useless forms that might be dispensed with? It is impossible to say what forms are useless and what are not;

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116. Do you not think your suggestions tend to the same point, the placing of the other branch of the profession in incompetent hands? I do not, because competent persons will always have the largest practice, and if there are incompetent persons they will, in time, be beaten out of the profession.

117. But many of your suggestions tend to reduce the remuneration of the profession? Not materially.

118. Do you think it is desirable to the public that law should be rather dear than cheap? I think it ought to be as cheap as is consistent with the fair remuneration of the legal profession; if you wish to keep the profession in the hands of respectable people they must be well paid.

119. *By Mr. Lowe:* Do you not think it would be better to pay them for what they actually do than for these attendances? Then you would have to increase the present charges, and advance the one as much, if not more, than you diminish the other.

120. *By the Chairman:* What do you think of a method of this kind, that a party should come before competent Judges, such as we have now, and state his case *ore tenus*, the other party making his reply *ore tenus*, and coming to judgment *instanter*? I think it would be utterly impossible to carry it out, because Counsel would not know what law they would have to look up, and would be left in the dark till the last moment.

121. Would it not be a cheap and expeditious plan? It might be, but still not a very desirable one.

122. We hear nothing of these pleadings when cases are brought before the Cadis in the East? No: but it is not generally supposed that the proceedings in the East are so well calculated to promote the ends of justice as our own system.

123. *By Mr. Lowe:* Do you not think it is advantageous, in a constitutional point of view, that we should have some record of the grounds upon which judgments are decided? No doubt.

124. Would not the effect of the system proposed be to put the Judge in place of the law? Yes.

125. *By the Attorney General:* Do you not think there would be frequently applications for new trials on the ground of surprise? In almost every case.

126. *By Mr. Lowe:* Are not applications frequently dismissed on account of some trifling informality? Every day.

127. Might not all these trumpery rules be swept away? There is a reason for every one of these rules, particularly with reference to erasures in affidavits; this rule was doubtless made to prevent erasures after the affidavits were sworn.

128. Is it not very hard that a client should be compelled to pay because his Attorney had made a mistake? I do not think an Attorney ought to be obliged to pay, in any case, except for gross negligence.

129. *By the Attorney General:* How many Attorneys are there in Sydney? Perhaps about sixty.

130. How many of that number conduct their own cases in Chambers at present? Perhaps not more than one-third of these have anything to do with Chambers.

131. Are there more than five or six who attend? I should say more; sometimes their clerks go.

132. I presume you would not extend the privilege so far as to allow clerks to attend in the Supreme Court, and to represent Attorneys there? No.

133. *By Mr. Lowe:* What objection would you have to allow any one to appear in the Supreme Court to conduct a case? I think there ought to be some guarantee that those who practise in the Supreme Court know something about the law.

134. *By the Chairman:* That is the client's business? It is also the business of the public, in order that the time of the Judges and of the Court should not be unnecessarily taken up.

135. You would not propose a complete free trade in law to that extent? No; I think the practice ought to be confined to persons who have had some legal education, and who are of some respectability.

136. *By the Attorney General:* Do you think the present education of the Attorney here is sufficient to qualify him for the Bar? I think it is as good as any education that can be given in the Colony.

137. Do you not think that attendance, in some of the offices of practising Barristers, would afford a good opportunity to the student to learn? If a person were disposed to learn, I think more could be learned, in one month, in an Attorney's office, than in a Barrister's chambers in twelve months; because there he has the whole practice before him, and has a better opportunity of making himself acquainted with everything connected with law, except special pleading, than he would have in the chambers of any Barrister.

138. Have you been long in practice? Upwards of two years.

139. Were you serving under articles before the new rules came into operation? No.

140. You said that retainers would be unnecessary in case the profession were amalgamated? I think you could do away with the necessity of retainers altogether, by abolishing the fees. It would be merely necessary to give an intimation to the Barrister that his services would be required.

141. Supposing he were not employed, would not that be an injury to him? Only to the extent of a guinea more than if he were not employed now, after receiving his retainer.

142. Do you think a retaining fee really increases the emoluments of a Barrister at all? Nothing worth mentioning.

143. Is not the retaining fee taken into consideration in marking the brief afterwards? I do not think so.

144. *By the Chairman:* Are you conversant with conveyancing? Yes.

145. Do you not consider the expense of conveyancing to be enormous? No; in nine cases out of ten Attorneys take considerably less than they are authorised to charge.

146. Do you not think these bills should be subject to taxation? I should have no objection to that. J. Martin, Esq. 2 June, 1847.

147. *By the Attorney General:* What scale of charges do you follow at present? Attorneys very seldom make out bills for conveyancing. They are allowed 1s. a folio for drawing out, and 4d. a folio for copying, which would make an ordinary conveyance, now charged £5 5s., come to £12 or £15.

148. *By the Chairman:* Do you not think 4d. a folio is too much for copying a conveyance? It is not charged in that way generally, although there are some Attorneys who do make out bills. I think the charge is reasonable.

149. You think bargains are made in that branch of the profession? In that way.

150. But, if the charges that are allowable were made, you admit that the expenses of conveyancing would be enormous? No doubt they are rather large.

151. Have you not often heard of £400 or £500 being paid for a single series of conveyances relating to one property? I have heard of one instance where £200 or £300 were charged for an abstract.

152. That is part of a conveyance; the preliminary step? There was a case in which an Attorney in Sydney was employed in which a large sum was charged, but there the properties were very numerous, and there were several title deeds in each case.

153. *By the Attorney General:* Do you know anything of the working of the superior Courts in America? No.

154. You do not know whether law expenses are cheaper there than here? I do not; but I remember reading that Mr. Webster, on one occasion, when dining with Lord Brougham, stated that he had received a fee of 17,000 dollars, which was larger than any English Barrister ever had; so, if that is to be taken as a criterion, it would appear that fees are not much less there than in England.

155. *By the Chairman:* Suppose the profession were not amalgamated, and Attorneys were given this election, how many do you think would elect to go the Bar? Not more than two or three, I think; nor do I think a great many would practise at the Bar in the event of an amalgamation; not more than half-a-dozen, perhaps.

156. You think they would employ Counsel or Advocates? Yes.

TUESDAY, 15 JUNE, 1847.

Present:—

WILLIAM CHARLES WENTWORTH, Esq., IN THE CHAIR,
CHARLES COWPER, Esq., | ROBERT LOWE, Esq.

James Martin, Esquire, called in and further examined:—

With reference to a question that I was asked when I was last examined, as to special pleading, I beg to refer the Committee to an extract from the appendix of Stephen on pleading, which is of much more value than anything that I or, I believe, any person in this Colony could say upon the matter. It is from the Common Law Commissioners' Report, and I think the reasons there given for extending the system of special pleading, even farther than it is now extended, are unanswerable. They are the reasons too of very competent men, who took considerable time to make this enquiry and to frame this Report. The extract to which I refer, commences at page 60 of the appendix and goes to page 66. [*The Witness handed in the same. Vide Appendix A.*] There is also another extract to which I would wish to draw the attention of the Committee, describing what special pleading is, showing that it is not merely a modern invention, but that it is strictly consistent with a practice of great antiquity, even so far back as the time of the Romans, the extract is from page 31 to 35. [*Vide Appendix B.*] J. Martin, Esq. 15 June, 1847.

1. You think the system of special pleading that is extant ought not to be done away? I should say certainly not. The Commissioners advise the abolition of the general issue in almost every case, and I think they ought to be done for the reasons which they state.

2. *By Mr. Lowe:* What advantage do you think arises from having a system of pleading at all? I think in a system like that of the English law, where no person can be supposed to carry at his fingers' ends all the cases that may be referred to, where the ablest lawyer must take time to look up arguments, it is of the first importance that the Advocates should be informed of the points that will have to be tried, for if they should go into Court, not knowing what facts they will have to argue upon, they will necessarily conduct their cases in a much more slovenly manner than that in which they are now conducted.

3. *By the Chairman:* Are you alluding to points of law or to points of fact? In every case the law and the fact are so mixed up together that it is impossible to separate them. It depends upon the facts that are in dispute what points of law will arise, and if it is ascertained in the first instance what facts are in dispute, the parties will be prepared to argue upon them, but if there are a vast number of facts of which they do not know anything beforehand, it is impossible they can be so prepared.

4. Would not the system recommended by Bentham as a preliminary process be better than any system of pleading for eliciting the facts. You come into Court with your client, I come with mine, you cross-examine my client, and I cross-examine yours, and no witnesses are called? I do not think that system at all advisable; it would lead to endless perjury. There would be a contradiction not only upon one point but upon almost all, and thus there would be the greatest difficulty in fixing the parties to any definite issue.

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5. There would be no difficulty, because if they both admitted certain facts, then a single issue would arise? But there might be a hundred different issues unless you tied the parties down to one particular fact, for the parties might not agree upon any one statement.

6. There cannot be more issues than the case is susceptible of? You might have a great number of propositions which would be denied;—I do not think it would answer at all; it would, in my opinion, be better to have the present pleadings, the drawing of which does not form a very considerable item in the expenses of a suit, to leave the parties to agree between themselves what plea they will put in issue, than to allow any other party to do so. It may require a great deal of care and consideration to determine on which point it may be best to rely, as a person may have a dozen points to rest his claim or defence upon, and would not be prepared at a moment's notice to select any particular one to the exclusion of the rest.

7. *By Mr. Louse:* Do you not think it is an evil that people should be allowed, in special pleading, to set up false defences? It may be very objectionable, but is impossible to be prevented; because the only way in which you can constitutionally determine whether a defence is false or true, is by the verdict of jury; that is, at the termination of the trial. A previous determination of the truth or falsehood of a plea, would be an usurpation of the province of the jury.

8. Would not the sanction of an oath, and the power of cross-examination, be of great efficacy in preventing false defences? It would not in many instances. Experience does not warrant us in supposing the sanction of an oath to be so efficacious.

9. *By the Chairman:* How do you think it would answer, in trials, to examine both parties, the plaintiff and the defendant? That is a very difficult question to answer—in simple cases it might be beneficial; but there are many cases where, in consequence of the extreme nicety of the law, a person perfectly honest might be led to make some admission which would very unjustly put him out of Court.

10. Have you not often found that the circumstances of the case have been only known to the parties? In many instances; but in most commercial cases the material facts are known to other parties. But if you adopt this system, the parties will no longer see the absolute necessity of any evidence besides their own, and it will lead to endless perjury. It was, I apprehend, to prevent this evil, that the rule was made that persons should not give evidence in their own cases.

11. *By Mr. Louse:* Is it a regular and inflexible rule of law, that parties shall not give evidence in their own cases? It is not in Equity. This system, of allowing the parties to be examined in simple matters, has long been in practice in the Court of Requests, and those who have been longest conversant with that Court say that it is most unsatisfactory; and although the Commissioner has the power to examine the parties, under the thirty pounds jurisdiction, in the County of Cumberland, he never does so, because they almost invariably contradict each other; and one party must, in that case, perjure himself; though they must know more of the matter than any third party, they do not make the Court more acquainted with it. If then, this is the case where the amount in dispute is under thirty pounds, I have no reason to suppose that it would not be so where the amount is larger

12. Do you consider that the calculations given by Mr. Gurner, in his evidence before this Committee, relative to the average amount of costs, both before and since the division of the legal profession, are correct? I do not think the records, from whence they are taken, are a fair means of ascertaining whether the costs under the old system were greater than they have been since; and for these reasons: in the first place, we have Mr. Gurner's own admission to the effect that costs were not taxed so stringently then as they have been since; and he tells us, with reference to the bill of costs, to which his attention was drawn, that there were many items in it which, if he had taxed the bill, he should have struck off.

13. Was that in an Equity case? No. I may state further, that I do not think that he has taken a sufficient number of cases in each period for the purpose of forming his average; nor do I think that he could make any satisfactory or correct calculation, by striking any average at all, after taking any number of cases, for when we find the extremes so very wide, one case being conducted probably for twenty pounds, and another for one thousand pounds, it would be impossible to take any average which would give a just notion of what the costs in an ordinary action would come to. The proper way, in my opinion, of ascertaining the comparative expense, is to take any particular action, and calculate what the costs would be, under the present system, and what they would be in the event of an amalgamation; and if that be done, it will at once be seen that there must necessarily be a diminution in expense, because there are many attendances which are necessary under the present system, and which will be no longer necessary, if we go back to the system which existed before the division of the legal profession.

14. *By the Chairman:* Do you not think there may be some counteracting expenses to act as a set-off? I am not aware of any.

15. For instance, if the Bar was not divided, would there not be more liberal fees marked on the briefs? It is impossible to say what might be done in that way, but I do not imagine the taxing officer would allow larger fees then than now; on the contrary he would look more jealously on the marking of fees.

16. Does it always happen, as a matter of fact, that bills are taxed as between Attorney and client? Not always

17. Is it not very seldom that they are taxed at all? There are instances.

18. Is not the general rule against taxation? The general rule is, that there are no costs between Attorney and client. These cases are only exceptions; in almost all cases where persons sue for book debts, and on promissory notes, there never need be costs between Attorney and client.

19. Has not a system sprung up, which will be very likely to exist under the amalgamation, of bills being taxed between Attorneys, without the intervention of the Master at all? That is very seldom done.

20. Have you not heard, as a matter of fact, that during the amalgamation of the profession, there were much more liberal fees marked on briefs than there have been since? I have seen a great many briefs that were marked at that time, but I do not think they were larger than those given now.

21. *By Mr. Love:* Was not the business much simpler then than it is now? No doubt; difficult cases were not so numerous in those days, promissory note cases, and actions for goods sold and delivered were of constant occurrence, now these are all settled before the Prothonotary, either by computation or affidavit; they do not come before the Court at all; in former times they formed the bulk of the business. J. Martin, Esq. 15 June, 1847.

22. *By the Chairman:* Are there not many actions tried now for goods sold and delivered? Very few, compared with the number that never come to trial.

23. What is the nature of the business that goes before juries now—what sort of actions are they? There have been several actions of replevin, ejectment, and upon special contract lately.

24. *By Mr. Love:* Supposing the Committee should be, on the whole, of opinion, that an amalgamation of the profession is not desirable, is there any other course open to them? I think Attorneys should be allowed to elect whether they would become Barristers or not.

25. When you say that, do you mean all the Attorneys of the Supreme Court? It is a difficult question to answer; probably all Attorneys of the Supreme Court would not be fit to become Barristers, and if there was a division of the profession probably some test of qualification ought to be adopted.

26. Do you think a gentleman who had made his election, and been admitted as an Attorney in the Courts of England, ought after he came to this Colony, to be allowed this privilege? I can offer no opinion on that point. I believe some people think that this privilege ought to be confined to persons who had been educated in this Colony, and who have not had the opportunity which the English Attorneys possessed, of being called to the Bar.

27. Are you prepared to recommend that any gentleman educated in this Colony, and admitted into the Supreme Court as an Attorney, ought to be allowed the privilege of practising as a Barrister if he chose? I should have no objection to a check being placed upon that, of this kind, that there should be some examination as to the party's competency, his knowledge of the profession, and his character. It is difficult to say in whose hands this power of examination should be placed; if it were given to the Bar they would exclude everybody.

28. *By the Chairman:* What leads you to think the Bar would act so illiberally? I have never seen anything of the Bar that has led me to a contrary conclusion; for instance, they not only set their face against the amalgamation of the profession, but also against the admission to the Bar, under any circumstances, of those who had been educated in this Colony, until Mr. Brewster's Bill passed its first reading, when, for the first time, they displayed a little decent liberality.

29. *By Mr. Love:* You would not leave this matter with the Bar, would you leave it with the Judges? That I look upon as quite as objectionable; perhaps more so.

30. What are your objections to the Judges? I think they are even more illiberal than the Bar. They are always displaying the most marked predilection for that branch of the profession to which they themselves belong; a predilection which is indulged in without the slightest discrimination, and which, as far as my experience enables me to judge, is warranted neither by the superior education, learning, nor ability of the body in whose favor it is exhibited. Partiality for the one branch of the profession, in my opinion begets a prejudice against the other, and I do think it possible that an Attorney as able, as well educated, and as respectable as any gentleman who had eaten a few dinners at an Inn of Court, might be excluded by Judges whose *esprit du corps* might overcome that sense of justice and strict impartiality by which they ought always to be characterized.

31. *By the Chairman:* Do you think the Judges would not admit any persons educated in this Colony? It is impossible to say how either the Judges or the Bar would act; I can only say that I should doubt the impartiality of persons whose high estimate of the position of a Barrister, because he happens to be a Barrister, is so ludicrously extravagant.

32. Can you give the Committee any suggestion as to the course to be adopted, if they should decide that parties educated here, should have the privilege of admission to the Bar? Five or six of the leading Barristers might be nominated as a Board by an Act of Council, for the purpose of examining parties, and on any person who had been admitted an Attorney in this Colony, producing a certificate signed by any two of them, that his general education and character were sufficient in their opinion, then he should be admitted as a Barrister as a matter of course.

33. Be admitted by the Judges? Yes, as a matter of right.

34. *By Mr. Love:* Supposing the Barristers refused his certificate? I would then allow an appeal to the Judges.

35. By way of Mandamus? By way of Appeal.

36. You would not give the Judges a veto? No; the plan I propose would be something analogous to that of the Inns of Court, except that the Judges might admit where the certificate was refused.

37. But the Judges may know of some very dishonorable conduct on the part of the applicant, which might be unknown to these Benchers or Barristers? I do not see why they should go out of their way, for the purpose of ascertaining whether the party were a man of bad character or not, I assume that if he were so, it would be tolerably well known to a small community like this. When students are admitted into the Inns of Court, they get two persons to certify that they are of good character, which in nine cases out of ten is a mere farce, and I know of no other obstacle which stands in the way of their call.

38. It is not a mere farce they enter into a bond? For £100, which is not a very great matter.

39. *By the Chairman:* Why would you out of this body composed of five or six individuals, make it necessary only to obtain the certificate of two—why not require the certificate of all? I think it very possible that a highly respectable and competent man might find it difficult, for fifty reasons, perhaps from personal enmity, to obtain the certificate of all; they might refuse to sign it without giving any reason; and besides there are some gentlemen at the Bar, whose certificate an applicant of decent qualifications might justly consider it an insult to be compelled to ask for.

40. Would you propose that the regulation should extend to any person in this Colony, (except an Attorney admitted at home) desirous of being admitted to the Bar, or would you limit it merely to the Colonial youth. Supposing a young man came out here who had not been admitted as an

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Attorney in England, and he applied himself to the study of the Law here, would you allow him to be admitted? Probably such a person ought not to be excluded.

41. *By Mr. Lowe:* Would you require the service of articles, the same service as you now require before the admission of an Attorney, prior to the admission of a person as a Barrister? Yes, because I think no person ought to be admitted without possessing a knowledge of the Law.

42. *By the Chairman:* Is that the only apprenticeship you would require to qualify for the Bar? I know of no other apprenticeship that would be so efficient for gaining a knowledge of the profession.

43. If a young man were to go to a conveyancer, an Equity draftsman, or a special pleader, would not that be as good a school for the Bar as the other? I do not think so, because although the student might gain some knowledge of conveyancing, or of equity, that would be but a very small share of knowledge to enable him to succeed at the Bar. I think a person who really wishes to make himself acquainted with the law, can learn as much in an Attorney's office as he can any where.

44. *By Mr. Lowe:* Do you think if an option were given, that many would make it? Not many; perhaps three or four.

45. Would you give Barristers the power of choosing the other way? I should have no objection, if they wished it; although, if the English Attorneys were excluded from making the election here, it would be but right that the Barristers should be excluded also.

46. How many articled clerks is an Attorney allowed to have? Three—many have none

47. Do you think that a good check? I see no objection to it. I think, however, the best check would be to compel articled clerks to undergo a stringent preliminary examination, as to their education, before they were articled. If steps were taken to compel them to be well educated, no other check would be necessary; at present this point is too little regarded.

48. Do you not think there are a great many more persons educating for the profession of Attorney, than can possibly succeed? I have no doubt there are more than will be required for years to come.

49. Is it not desirable to keep up a wholesome competition? Yes—if you take care, in the first instance, that none but well educated men shall be admitted Attorneys, the more there are admitted, the greater benefit it will be to the public. Although the Attorneys may not derive large incomes from their profession, there will then be a considerable number of well educated men in the community who are acquainted with the law.

50. *By the Chairman:* Do you think such a body would be advantageous to the community at large? I think it would be very advantageous; indeed it would be desirable for every body to have some acquaintance with law; to make it, in fact, a branch of public instruction.

51. *By Mr. Lowe:* You would recommend that persons should go under examination before they were allowed to be articled? Yes; in point of fact they are now supposed to know something of Latin, Greek, and Euclid. The Judges did intimate, some years ago, that they would require all parties desiring to be articled, to have read the first six books of the Æneid, the Greek Testament to the Gospel of St. John, and to have gone through the first six books of Euclid; but they never examined the parties themselves, and were satisfied with any body's certificate.

52. Have you any further remarks to make? I would wish to observe, that although I have ventured to offer a few suggestions as to the manner in which persons might be called to the Bar in this Colony, I do not for an instant suppose, that any plan which may be adopted for such purpose, will be so beneficial to the legal profession, and to the community generally, as the amalgamation proposed in Mr. Brewster's Bill. In addition to the reasons before given by me, in favor of this amalgamation, I think that the superior control which would thus be obtained over the proceedings of the Bench, should not be overlooked. At present the Bar of this Colony consists of a very small number, and a small minority only of that number can be said to be leading Lawyers; and a much smaller minority can be considered as thoroughly independent men, the majority being persons of little or no note in their profession or out of it. And when it is considered how large an amount of legal patronage there is in the hands of the Colonial Executive, as compared with the number of our Barristers, and how much more likely it is for servility to be preferred to independence, by a Government which has no responsibility to dread, it cannot be expected that the Bar, as a body, will be likely to prove very efficient in watching the proceedings of Judges, on whose good opinion and recommendation they may probably be depending for an appointment. Barristers who have but small knowledge of their profession, and are constantly looking out for some Government situation, cannot be much regarded by the Bench, and the opinion of the Attorneys is, of course, considered to be a matter of no consideration. This is an evil which ought to be immediately remedied, for if in England where the Judges are so greatly superior to the Judges in this Colony, where they hold their offices during good behaviour, and not, as here, at the will of a Secretary of State; and where they have a people—the most jealous of their liberty, and a press, the most intelligent, most fearless, and most honest in the world, constantly watching their proceedings, the control of an able and independent Bar is found necessary for the due administration of justice, how much more is such a control required in New South Wales? This control can only be given by an amalgamation of the profession, which will immediately enlarge the number of advocates, and bring the Bench in constant and close contact with a body sufficiently powerful to hold it in check, for then there will be numbers of advocates who will care but little either for the frowns of the Bench or the smiles of the Government. It may be that for some time after the amalgamation this control might not be perceived, but the opening up of this inviting field to the ambition of the Colonial youth, and to many who now belong to what is often most superciliously termed the inferior branch of the profession, would, there can be little doubt, bring forth Advocates as able as the ablest of those which we now possess. And this is a matter which concerns the public in more ways than the mere point of control over the Judges, for the Bar is, I believe, now generally admitted not to be such an efficient one as the wants of the Colony require, and it is not likely to become much more efficient unless our Advocates be allowed to receive the emoluments of both branches of the profession. Another result of this amalgamation, I think, will be an immediate weeding out of the profession of the incapables and the transfer of

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nearly all the business to those who are best able to conduct it. At present it is possible for an Attorney, who is extremely illiterate and thick-headed, who knows nothing of law nor anything else, to manage a considerable practice by doing everything through the instrumentality of a Barrister, thereby most improperly increasing his own profits and putting his clients to needless expense. This class of practitioners would be, as they ought to be, speedily disposed of, and the competent men in both branches would profit by the change, and business would be better done than ever. It should also be recollected that by increasing the number of Advocates a greater chance would be afforded the Government than it now possesses to obtain competent men for situations under the Crown, and we should no longer have occasion to be disgusted by such an exhibition as that of persons receiving large incomes from the public funds who if left to the practice of their profession, would hardly be able to support themselves at all. When any Government patronizes such people it necessarily incurs the displeasure of the public, and that selection which probably was unavoidable is very apt to wear the aspect of corruption. There has been already too much of this in this Colony, and the sooner an amalgamation takes place the better will it be for the Government. That the Judges and the Bar generally should oppose this amalgamation is not surprising; their prejudices in this matter are too strong for their sense of what is right, but I cannot but venture to hope that in this, as in every other matter which concerns the public, the people's representatives will adopt that course which they consider best, however strenuously it may be opposed by Judges who do not wish to be too closely watched, or by Barristers who may consider their professional dignity to be endangered. Little respect will, I trust, be shewn to that spurious dignity which is derived neither from learning nor from talent, and which dreads a wholesome and fair competition with both.

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A.

We conceive that considerable misapprehension popularly prevails upon the subject of special pleading. That system was characterized, no doubt, at former periods of our legal history, by a tendency to prolix and tautologous allegation, an excessive subtlety, and an overstrained observance of form; and notwithstanding material modern improvements, it still exhibits too much of the same qualities. These its disadvantages, are prominent and well understood; its recommendations are perhaps less obvious, but when explained, cannot fail to be recognized as of far superior weight. Special pleading considered in its principle, is a valuable forensic invention, peculiar to the Common Law of England, by the effect of which, the precise point in controversy between the parties is developed, and presented in a shape fit for decision; if, that point is found to consist of matter of fact, the parties are thus apprised of the exact nature of the question to be decided by the Jury, and are enabled to prepare their proofs with proportionate precision; if on the other hand, it turns out to be matter of law, they have the means of immediately obtaining the decision of the cause, without the expense and trouble of a trial by demurrer, that is, by referring the legal question so evolved, to the determination of the Judges. But where, instead of special pleading, the general issue is used, and under it the defendant is allowed to bring forward matters in confession and avoidance, these benefits are lost. Consisting as that plea does, of a mere summary denial of the case stated by the plaintiff, and giving no notice of any defensive allegation on which the defendant means to rely, it sends the whole case on either side to trial, without distinguishing the fact from the law, and without defining the exact question or questions of fact to be tried; it not unfrequently therefore happens, that the parties are taken by surprise, and find themselves opposed by some unexpected matter of defence or reply, which, from the want of timely notice, they are not in due condition to resist. But an effect of more common, and indeed almost invariable occurrence is, the unnecessary accumulation of proof, and consequently of expense; for as nothing is admitted upon the pleadings, each party is obliged to prepare himself, as far as it is practicable, with evidence upon all the different points which the nature of the action can by possibility make it incumbent upon him to establish, though many of them may turn out to be undisputed, and many of them may be such as his adversary, if compelled to plead specially, would have thought it undesirable to dispute. With respect to matters of law, the inconvenience experienced, though of a different kind, is not less remarkable; for when points of law arise upon the general issue, instead of being developed by way of demurrer, for adjudication by the full Court in *banco*, they are of necessity, left to the decision of the single Judge before whom the cause is tried, and the decision, upon his sole authority, deprived, as he generally is, of the advantage of any previous intimation of the matter to be argued, and unable to refer to books, is often found to be unsatisfactory and inconclusive. It may even happen (and that is not an unfrequent occurrence) that the controversy under this form of plea turns entirely upon matter of law, there being no fact really in dispute, and in that case the mode of decision by jury is not only defective, but misplaced, and the trial might have been spared altogether, if the parties had proceeded by way of special pleading, and raised the question upon demurrer. Another ill consequence attendant upon the general issue is, that as the true point for decision has not been evolved in the pleading, it becomes the business of the Judge to extract it from the proofs and allegations before him, to sever correctly the law from the fact of the case, and, again, the facts admitted from those in controversy, and to present the latter in a distinct shape to the jury for their consideration; an analysis which the rapidity and tumult of a trial at *nisi prius* renders extremely difficult, and which is often defectively conducted. Of the state of things here explained, it is the natural effect, that when the general issue is pleaded the trial fails in numerous instances to accomplish the purposes of justice, or even to terminate the legal dispute, and is followed by the application of the defeated party to the full Court in *banco* for a new trial. This proceeding involves the necessity of recapitulating, for the information of that Court, the whole of what passed *viva voce* at *nisi prius*, of which there is no admissable report, except that of the presiding Judge, upon whose alleged error in point of law the application most commonly is founded. The motion for new trial is, for this reason, beset with peculiar difficulties, the effect of which is, that it ultimately fails in many cases (as there is reason to apprehend) where in justice it ought to succeed, and succeeds in many cases where there is in reality no sufficient ground for the application. It may be added, that even where successful, it gives no redress beyond that of awarding a new and expensive inquiry upon the matter of fact, and that with respect to the matters of law, of which it may involve the discussion, they are less distinctly, and less satisfactorily decided upon the motion for a new trial than when raised by special pleading, and so brought before the Court in the first instance, by way of demurrer, for determination. But these considerations give an inadequate idea of the extent of the inconvenience now produced by the great and growing frequency of the motions in question. Indeed we know of no existing abuse of which the influence is so wide, and the pressure so intolerable. They have, in a considerable degree, impaired the value of a verdict, which, according to the ancient and true principle of law, was of a final and conclusive character, but is now in so many instances subjected to the revision of the Court in *banco*, and with so much facility set aside, that the party in whose favor the opinion of the jury is declared has comparatively little reason to rely on the permanency of the advantage he has obtained. He too often finds that it is but one successful struggle in an arduous and expensive contest, which is to end at last in defeat. But an effect still more serious, is the enormous extent to which

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which this branch of practice has encroached upon those portions of the public time properly destined to other employment. As an illustration of this, we may refer to returns received from the King's Bench and Common Pleas, by which it appears that in Michaelmas Term, 1839, ninety-nine motions for new trials were made in the former Court, and forty-nine in the latter; that in the King's Bench Rules *Nisi* were granted upon fifty-three of these applications, and not more than four rules for new trial ultimately disposed of in the course of the term; and that in the Common Pleas there were thirty-nine Rules *Nisi* granted, of which ten only were disposed of. To such accumulations addition of course is made in each succeeding term; and were it not for the assistance obtained from the sitting of the three Judges out of term (a jurisdiction which in other respects has appeared to us objectionable, and to require abolition) the result, as far as regards the Court of King's Bench, would be a total obstruction of the current of ordinary business, by the growing masses of arrears upon motions for new trials. The tendency of the general issue to give occasion for such applications we have already attempted to explain; and we have no hesitation, therefore, in attributing to the use of that plea the far greater part of the evils to which we have thought it our duty to advert, as connected with motions of that description. We think, too, that its disuse would supply the only practicable and effective remedy; other inconveniences, though certainly of less moment, result from that method of pleading. It often happens that points of law arising at the trial receive no decision from the Judge, but are reserved by him for the opinion of the Court in *banco*; or with a view to a more distinct and solemn argument before that Court, the facts proved are thrown by consent of parties into the form of a special case. Neither of these methods is comparable, in point of certainty, of despatch, or of cheapness, with that which is afforded by demurrer; and their substitution for the latter operates like the motion for a new trial, though in a less degree, to the prejudice of both the parties, and to the delay of public business. In comparison with those disadvantages, resulting from the general issue, the inconveniences of special pleading are insignificant. It is found difficult, no doubt, to set forth the matter of defence or reply in a form which shall be at once sufficient in point of law, and accurate in point of fact; and the occasional consequence of this difficulty is, the defeat of the party upon formal defects not connected with the justice of the case. But this evil is not like those arising from the general issue, either of ordinary occurrence or inevitable in its nature. It may in general be averted by the diligence and skill of the pleader, and is materially alleviated by the practice of allowing amendments upon demurrers. It is also true that special pleading tends to prolixity of statement on the record, which is a source of expense to the suitor; but that expense bears no proportion to the vast increase of costs resulting from the adoption of the general issue. It seems to be commonly supposed that it is in the length of the pleadings and the correspondent amount of office fees, or fees to pleaders or Counsel payable upon them, that the expense of an action at law chiefly consists; but this is a great mistake, and one that it is very important to correct. By far the heaviest items in the Bill of costs are those which relate to the proofs, and more particularly to the conveying of witnesses to the Assizes and maintaining them there; and next to these, the most costly charges arise from the transaction of any kind of business in open Court, upon motion; the fees upon pleading being (comparatively speaking) upon a petty scale. In illustration of this, we may refer to the bills of costs contained in the Appendix to our first Report. It may easily be conceived, therefore, that the general issue, from its tendency to an unnecessary accumulation of evidence, and to motions for new trials, must often ultimately lead to a much greater expense than could have been produced by any probable prolixity in special pleading. The preference due to the latter method will become still more evident, when it shall be cleared, by such regulations as we have suggested in other parts of this Report, and hope hereafter to suggest, from some of its principal inconveniences and abuses, more particularly from those which relate to the variety and prolixity of counts and pleas, and the doctrine of variance. On the whole, therefore, we entertain no doubt of the expediency of making such alterations in the existing practice as will introduce special pleas in almost every case, and in some actions abolish altogether the use of the general issue.

B.

Nothing has been here attempted but a *practical* explanation of the manner of coming to issue. If considered in a view to its *abstract principle*, it will be found to consist in an application of that analytical process by which the mind, even in the private consideration of any controversy, arrives at the development of the question in dispute. For this purpose it is always necessary to distribute the mass of matter into detached contending propositions, and to set them consecutively in array against each other, till, by this logical conflict, the state of the question is ultimately ascertained. This ranks, in the present day, among those ordinary logical operations which it is easier to practise than to define, and which it would be superfluous to attempt to reduce to scientific rule. It was, however, as applied to the purpose of forensic disputation, a very favorite topic with the ancient writers on dialectics and rhetoric; and there was no subject connected with these sciences on which they bestowed more elaborate attention. *Status excogitandi* (says Sigonius), atque eo probationes omnes conferendi, artificium, in libris oratoriis, multis verbis est demonstratum; neque enim in aliis præceptis antiqui rhetoris, tam Græci, quam Latini, plus studii aut operæ consumpserunt. The *question in controversy* is described among these writers by the different terms χρινομενον, summa quæstio, res de qua agitur, quæstio ex qua causa nascitur, judicatio, and others of similar import, all expressive of the same general idea, though slightly distinguished from each other in their particular application. When this question was developed, there was said to be a *status*, or *constitutio causæ*. Of these status there were many classes, according to the different kinds of questions which might arise, involving not only the distinction recognised in our pleading, between questions of *fact* and of *law* (status conjecturales et legales), but additional distributions into status finitivæ, translativæ, and many others, corresponding with the various logical divisions under which the different subjects of civil dispute may be considered. As a specimen of this obsolete but curious learning, and, at the same time, as the best illustration of what is the natural progress of the mind in effecting that development of which we have spoken, the following passage of Quinctilian deserves attention. In that part of his work which relates to the dispositio, or the art of oratorical division and arrangement—after noticing the importance of a prudent selection of the point of argument, and a discreet statement of the general question, and observing that the choice should be determined by the nature of the case which the orator was to support—he proceeds:—"I will explain my own "method in this particular, which I attained partly by precept and partly by the natural "deductions of reason, and of which I never attempted to make a mystery. In all forensic "controversies I took care, in the first place, to inform myself of all the different matters "involved in the cause. I say, in forensic controversies, for, as to the disputes of the schools, "the operation is unnecessary, as they consist merely in the discussion of a few questions distinctly

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" distinctly discriminated at the outset as the subjects for declamation, and denominated " *Στασεις* by the Greeks; by Cicero, *propositæ*. After thus placing, then, the whole matter of " the controversy distinctly in my view, it was my habit to *analyse* it, as well on the part of " my adversary as on my own. And, first, I applied myself to that which, though easily " described, requires a peculiarly attentive performance; I mean, I ascertained what case it " was the object of either party to make, and by what allegation such cases might be respec- " tively supported. With this view, I began by considering what might be alleged by the " plaintiff. This statement would, necessarily, either be admitted or denied on the part of " the defendant. If admitted, no question could at that stage arise. I therefore proceeded " to consider what would be the defendant's answer, and to this I applied the same dilemma " of admission or denial by the plaintiff. Accordingly, sometimes, the matter of the answer " would be admitted; but at all events there would, at some period of the process, arise a " contradiction between the parties: and it is then that the question in the cause is first " ascertained. For example: *You killed such a man*. Admitted. We proceed. The " defendant must now assign some reason for this act: *It was lawful to kill him, as surprised* " *in adultery with my wife*. There is no doubt of the law: we must therefore seek, in some " other point, the subject of contention. *The parties surprised were not committing adultery.* " *They were*. This then is the question, and it is a question of fact," (conjectura, *i. e.* status conjecturalis). " In some cases, however, there might be a further admission: *They were in* " *adultery, but you had no right to kill him, for you were an exile and infamous person:* and " here arises a question of law. On the other hand, if to the first allegation, *you killed*, it " had been answered, *I did not kill*, the question had been ascertained at the outset. By " this kind of process is the matter in dispute, or main question in the cause, to be investi- " gated." This oratorical analysis of Quinctilian exhibits exactly the principle of the English pleading; and when it is considered that the logic and rhetoric of antiquity were the favorite studies of the age in which that science was principally cultivated, and that the Judges and pleaders were doubtless men of general learning, according to the fashion of their times, it is perhaps not improbable that the method of developing the point in controversy was improved from these ancient sources. On the other hand, however, it seems not to have been wholly derived from them; for the same method will appear, in one of the following notes, to have been substantially in the possession of the barbarous Franks and Lombards, with whom it was, presumably, a native invention:—" Whatever merit," says Gibbon, " may be discovered " in the law of the Lombards, they are the genuine fruit of the reason of the barbarians, who " never admitted the Bishops of Italy to a seat in their Legislative Councils."

FRIDAY, 18 *JUNE*, 1847.

Present:—

WILLIAM CHARLES WENTWORTH, Esq., IN THE CHAIR,
THE ATTORNEY GENERAL, | CHARLES COWPER, Esq.
ROBERT LOWE, Esq.

Robert Johnson, Esq., called in and examined:—

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1. Are you prepared to make any suggestions with reference to the diminution of expense in Equity suits? It is a very complicated and difficult enquiry—too complicated to be entered into by any person without great consideration. I can only point out a few palpable instances in which the proceedings appear to me to have no other object than to cause expense.
2. Will you have the goodness to state what proceedings in Equity might be shortened or abolished? I can give a few instances where, I think, the proceedings might be altogether abolished: for instance, a bill for obtaining a discovery from a party in a suit at law. I think either party might file interrogatories which the other should be compelled to answer, without any suit in Equity at all. At present, the minimum expense for a bill of discovery, on both sides, is about £40 or £50, and I apprehend that the substitution I propose would not cost one-fifth of that sum. I am also very much inclined to think that a petition might be substituted, with good effect, for the present voluminous bill. No answer should be necessary unless the plaintiff required it.
3. Does not the plaintiff always require it? In many cases he does not. In a common foreclosure suit, all the plaintiff would require would be to state shortly the execution of the mortgage, that the time of payment had elapsed, and to pray a foreclosure. He could prove his case by producing the mortgage and calling one witness, without requiring an answer. Where an answer is required, it will be necessary to have interrogatories, which could be added to the petition. I think, also, the common law principle of taking all allegations as proved which are not denied, might with advantage be adopted in Equity suits; so that, where no answer or defence should be filed within the time prescribed for that purpose, the plaintiff should have a decree as prayed, as of course without further delay or trouble.
4. It has been suggested that, instead of a bill, a petition should be adopted in all cases, and that, where an answer was required, the party should be examined *ore tenus*; what do you think of that system? That course would, no doubt, be the most economical one, but it would give to clever rogues an advantage over honest people who were not equally clever, and, for that reason, I do not think it would be desirable.
5. But simple people, who are honest, would not manage these matters; both plaintiff and defendant would have their legal advisers? We have had some experience of a similar system in

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in the Sydney Court of Requests since the change of its jurisdiction made by the Small Debts Act. The Commissioner now rules that either party may call the other to give evidence. I think that has operated, in some respects, beneficially; there is, however, this difficulty, that ignorant people may be entrapped by an examination *viva voce*.

6. Entrapped into speaking the truth? He may not put his case in the best aspect, which I think a suitor is entitled to do, and he requires the careful assistance of his professional adviser to see that he does so.

7. Do you think that plan would be better than the plan of interrogatories added to the petition? It would be much less expensive, but I do not think it desirable. If it should be adopted, I think it should be incumbent on the party examining his adversary to put the examination in evidence; and that the course which is now adopted, by which the plaintiff may read the answer or not, or particular parts of the answer only, should be abolished; in other words, if the proposed examination should be adopted, each party should be allowed to make the other a witness in the cause, as is now done in the Sydney Court of Requests.

8. *By the Attorney General:* In what description of cases in Equity do you think *viva voce* examination might be adopted? I am not of opinion that it would be beneficial at all; but, if it were adopted, it should be universal.

9. *By the Chairman:* What do you think about demurrers in Equity? I think if the Court were to hold the parties to their demurrers, it would be extremely beneficial. Nothing is so simple as to get the decision of the Court upon the statement of facts admitted upon the record; but if you first argue the demurrer, and afterwards get leave to amend and go into evidence, and on hearing upon the facts, the benefit of the demurrer, as far as expense is concerned, is lost.

10. You would bind the parties to the demurrer? I would, as a general rule, but there must be exceptions. I would never allow leave to amend, unless a strong special case were made for such leave; I would make it so strict that it should be an effectual check upon speculative demurrers.

11. Are these speculative demurrers of frequent occurrence in this Court? Not in Equity.

12. Have you any farther suggestions as to the diminishing of expenses in Equity suits? One very great cause of the expense in Equity is, the immense time allowed to the defendant to answer.

13. Is not that necessary in many cases? It is not in many cases, although ten weeks are allowed in a country case, and eight weeks in a town case; in point of fact parties very seldom put their shoulders to the wheel till the last fortnight or so.

14. Does the mere delay cause expense? It does not absolutely render further expense necessary, but it does practically; for the client is constantly waiting upon his Solicitor, and his doubts and anxieties have to be satisfied: this, of course, increases the number of attendances. It also creates additional, and sometimes very great expense, in consequence of deaths, marriages, insolvencies, and other circumstances occurring during the vast delays of an Equity suit, which require bills of revivor or supplemental bills to be filed, and fresh answers, &c., &c. The Term fees alone create some additional costs.

15. *By the Attorney General:* Was not the system of *viva voce* examination tried here? The *viva voce* examination of witnesses, not of the parties.

16. *By the Chairman:* That is in force now? Not upon the same system; the evidence is taken *viva voce* before the Master, and not before the Court now.

17. *By the Attorney General:* That was a complete failure? I think it was.

18. Were not those cases often continued for a fortnight? That arose from the bad arrangement; the adjourning of the cases from week to week, instead of from day to day; but the other duties of the Equity Judge rendered that unavoidable.

19. *By the Chairman:* Do you think examination before the Master answers? I think it is admirably adapted for all cases in which there is no necessity to direct an issue. But I would observe, that as a Court of Equity is not competent to decide on disputed facts of a complicated nature, issues to be decided by the constitutional tribunal of a jury ought to be granted in all cases where it is necessary for the decision of a writ, to arrive at a conclusion upon such disputed facts.

20. Can you suggest any other matters in which the expense of an Equity suit might be reduced? With respect to Orders *Nisi*, I would observe, that they are of no possible use, and cause considerable expense and delay; for example, an Order *Nisi* to confirm a report; no report can be confirmed until such an order has been obtained. The substance of the order is, that unless cause be shewn in a given time, the report shall stand absolutely confirmed; and if no such cause be shewn, another order is requisite for the purpose of confirming the report absolute. To illustrate the absurdity of this I will mention a case. I was concerned in a cause in which the Master made a report to which both parties were desirous of excepting, upon different points; I was for the plaintiff, and found it necessary, before I could file exceptions, to take out an Order *Nisi* to confirm the report to which I was anxious to except. I therefore took out an order which in terms directs that the report shall be confirmed unless the opposite side shewed cause to the contrary, upon which I filed my own exceptions, the other side filing theirs, and unless I had done that I could not have effectually filed exceptions at all.

21. You think these Orders *Nisi* might be got rid of, except they were argued? I think they might be got rid of in all cases. I would allow parties the same time to except to a report after it is signed, as he now has after the Order *Nisi* is confirmed.

22. These orders all have a fee attached to them? Yes, and the fees of Court are heavy.

23. Is it the course now when an Order *Nisi* is granted to confirm a report that the party who wishes to except can argue the matter without any further ceremony? No, he must file exceptions. Another unnecessary expense is that of requiring objections to be filed preparatory to filing exceptions. The objections are precisely the same in form and substance as the exceptions, the only difference being, that the one is called objections, and argued before the Master,

Master, and the other exceptions, and argued before the Court. No person can file exceptions unless he first file and argue objections. These objections are almost a matter of form, for it is extremely rare that the Master's opinion varies, and they are therefore filed for the purpose of enabling the party objecting to file exceptions. The expense of filing objections is considerable. In the case to which I before referred, the point to be decided was one single point of law, and yet, I believe, with the expense of the double set of objections and exceptions, it will not cost less than £50 to get a decision, and the delay is dreadful. R. Johnston. Esq. 18 June. 1847.

24. There are at present warrants for every attendance? Yes.

25. *By Mr. Cooper:* What is the expense of that? I think not less than half a guinea. With respect to the warrants, I would have none. I would have an appointment in the first instance, and adjournments from time to time, till the matter was disposed of.

26. *By the Chairman:* Are there any other forms that might be dispensed with? I think subpœnas to rejoin and to hear judgment might be abolished; I have mentioned some of the most prominent causes of unnecessary expense, but I have no doubt persons more acquainted with Equity practice than I am would be able to point out a great many more.

27. *By the Attorney General:* What are the rules now in force in Equity? The English practice up to a certain period, modified by our local rules; it is frequently a matter of great embarrassment to know what is the practice of the Court; there are very few, if any, practitioners in the Colony in either branch of the profession who are thoroughly acquainted with the details of Equity proceedings.

28. Have you any suggestion with respect to that—do you think it desirable to have one code of rules? That would be very desirable; but it would require much consideration of persons well acquainted with the subject to frame such a code. The difficulty of carrying on an Equity suit here is much greater than in England, as there if you have any doubt upon a particular point of practice, there are various public officers at hand, each having his particular department, where you may at once get the information you require.

29. *By Mr. Cooper:* Then instead of amalgamation you want division of the profession? No, the division of practitioners into a number of branches is strictly a division, whereas the accumulation of practitioners in each branch is strictly a multiplication. No doubt it would be extremely beneficial if there were business sufficient for practitioners to confine themselves wholly to one branch; but it is palpable that the necessity of employing one legal practitioner to instruct another in the same suit causes a multiplication of labor.

30. *By the Attorney General:* How often does the Equity Court sit? Twice a week in vacation, and occasionally in term.

31. Do you think it desirable it should sit oftener? Yes, and that the Judge who sits in Equity should not have so many other duties to perform, as in consequence of his not having time to prepare his judgments they are much delayed, and the Equity business is very much retarded.

32. *By the Chairman:* You think we want more Judges? I think we want a Judge who should be exclusively confined to Equity business.

33. Would you allow an appellate jurisdiction from him to the full Court? I am inclined to say not, provided we could get a thorough Equity lawyer, but I have not formed a decided opinion upon this subject.

34. *By the Attorney General:* Do you think it would tend to reduce expense if one Judge were confined entirely to Equity? No doubt it would, although it is difficult to point out specifically in what way the mere delay increases expense.

35. *By the Chairman:* The term fees alone are a source of some expense? Yes, and there are little things constantly turning up, although there is nothing going on in Court, which involve expense; and, as I before observed, suits often abate by deaths and other causes during those delays. I would observe that it would be much more beneficial to the profession themselves to be more employed upon the merits of a case than upon unnecessary matters of form.

36. You think then that the mere lessening the number of forms would not detract from the profits of the profession? I think it would increase them, because suitors are willing to pay liberally for that from which they see they derive benefit; but they are extremely reluctant to pay for matters the use of which they cannot comprehend.

37. Have you any other suggestions to make with reference to the Equity branch of the Court? I think it would require a commission, to go into the question satisfactorily.

38. Are there materials in this country for a commission? I think so; it would not be necessary to have an extensive number of Commissioners.

39. I suppose they would require to be well paid? No doubt.

40. What remuneration do you think they ought to have—how much per diem? I am hardly prepared to answer that question; I believe the Real Property Commissioners in England were paid liberally.

41. Do you think those who are eminent in their profession would give their time to such a commission? I think they would.

42. Would they not be better paid by carrying on their profession? I apprehend they could so arrange as not materially to interfere with their business.

43. *By the Attorney General:* Have you any suggestions to offer with regard to lessening the expense of conveyancing? I am not at present prepared to make suggestions for lessening the expense.

44. Is there not an Act of Parliament for taxing conveyancing bills? There is in England; I think that Act ought to be adopted here, both for the benefit of the profession and of the public; it is an Act by which unprofessional persons are prevented from acting as Conveyancers, and by which Attorneys' bills for conveyancing are subject to taxation.

45. Are you not aware that an Act prepared by Lord Brougham has been passed at Home which has the effect of materially shortening conveyances? I am aware that an Act has been passed at Home, called Lord Campbell's Act, with that object; independently of that Act.

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Act modern Conveyancers have shortened them most materially. With reference to the subject of conveyancing, I may state that it appears to me that this branch of the profession furnishes an example of the benefit that arises from an amalgamation of the profession. At present, in conveyancing it is competent for an Attorney to do the whole of the business without the intervention of a Barrister; but if it were compulsory in conveyancing, as in law suits, to employ both Attorneys and Barristers the expense would be double.

46. *By Mr. Lowe:* Are you aware that there is a provision in the Act to which you have referred, giving a certain statutory effect to particular words? I am.

47. Would you use those words? I would not. It is well known to the profession that in one of the Registry Acts for the County of York, which has been in force ever since the reign of Queen Anne, the provision is made that the word "grant" shall imply or be equivalent to all the common covenants for title, unless the deed shall otherwise express; notwithstanding the length of time that Act has been in operation, Conveyancers have scrupulously avoided taking advantage of it in any shape.

48. Are you aware that it is the same in all Railway Acts? In almost all public companies, the consequence is, that nobody can peruse one of these conveyances, without perusing the Act, which is generally a long and complicated one. Conveyancers have done more to shorten conveyances, than any legislative enactment could, unless the fictions arising out of the feudal system should be altogether abolished, and some other system substituted.

49. *By the Attorney General:* I believe the charges of Conveyancers are regulated by Palmer's costs? To some extent; but the English practitioners do not attend to them much, and we follow the English practice as nearly as we can in this Colony.

50. *By Mr. Lowe:* Can any satisfactory mode be devised of shortening conveyances without altering the law of real property? I think without altering the fundamental principles of the law of real property, no great reduction can be made in the expense.

51. *By the Chairman:* I believe there is some short form adopted in America? I am not aware that there is. In America the efficacy of conveyances depends upon registration, and that circumstance, together with the different feelings of the community there, as to primogeniture entails, and the complicated family arrangements common in our marriage settlements and wills, naturally tends to shortening such instruments. I would observe, that the forms now used are at least one-fourth shorter than they were twenty years ago, and these forms have been altered without any statutory compulsion; and the bias of the profession is now in favor of short deeds.

52. *By the Attorney General:* What is the ordinary expense of a common conveyance? About seven guineas.

53. *By Mr. Lowe:* You allude to a conveyance from a grantee to a purchaser? Yes.

54. Does that charge include investigating the title prior to the grant? No.

55. Is it safe to take a title from a grantee of the Crown without ascertaining that no estoppel was created prior to the issuing of the grant? In consequence of decisions of the Supreme Court, that if a grantee from the Crown has conveyed the land to a purchaser by a deed, prior to the date of the grant, with a covenant that he was seized in fee, (a case of very common occurrence) the grantee is estopped from disputing the title of the parties claiming under such conveyance; it is impossible to be perfectly safe in any case, without searching the register from its commencement, and this would be so expensive that it never is done, unless on the face of the grant some prior title is referred to. I beg to observe, that the expense of conveyancing is caused more by the defective state of the titles here, than by the mere length of the new conveyance. The expense of searching the register, in cases where the parties through whom the title has passed, have dealt largely in land, is very great, and the search after all does not afford any very great security, by reason of the defective system adopted by our Registry Acts.

56. *By the Chairman:* You do not think the registering of any public benefit? I think its benefits are far more than countervailed by its inconveniences; it considerably increases expense, and, after all, affords very little additional security.

57. *By Mr. Lowe:* Here, I apprehend, very few deeds are registered strictly in compliance with the Act? There has been very little litigation heretofore arising out of that subject; but my impression is, that most of the earlier registrations are informal.

58. Do you think the registration of deeds ought to be deemed notice? I think not.

59. You do not disapprove of the present law with respect to the doctrine of notice? I do not.

60. *By the Chairman:* Would you allow the client, in general, to communicate with Counsel? That would be an amalgamation; if parties could communicate with Counsel direct, they would not go to an Attorney.

61. Still there would be Attorneys' business which would always have to be done? Which Counsel could do.

62. That would imply that Counsel were competent to act as Attorneys? Yes. According to the practice of the Old Bailey, clients do at present communicate with Counsel, and nothing but professional etiquette prevents it in any instance. If clients could go direct to the person who is to conduct their case in Court, they would very rarely go to an intermediate person; they would see at once that doing so would be unnecessary, and cause useless expense; and I believe, upon the whole, cases would be got up and conducted much more satisfactorily, if the party conducting the cause were responsible (I do not mean legally, although I think that ought to be so,) for getting up the case properly. At present there is a divided responsibility: the Counsel conducts the case according to the materials furnished by the Attorney, and, if the cause is lost on account of some error in getting up the case, no blame can attach to the Counsel; and I believe it is not uncommon for a client to be unable to ascertain, when his cause is lost from some blundering, whether the fault is that of his Attorney or his Counsel. If the Counsel were employed to advise on and get up the case, the client would know where the blame of any such blundering rested, and I think the effect would be, that cases would be got up more carefully. If the Advocate were responsible for getting up the case properly, the

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the public would soon have the means of judging who were competent practitioners, and who were not. The main art of an Advocate, at present, is to make the best of the case as got up by the Attorney, who instructs him; but if the Advocate were exposed to the censure of his client for losing the case, in consequence of negligence in getting it up, the obvious result would be that only competent practitioners would get business, and the whole practice of the bar would be conducted by men who really understood their profession, which is by no means the case at present.

63. *By the Attorney General*: Do you not think it desirable that there should be some third party between the client and Advocate? No doubt; one of the advantages is, that the Advocate is less likely to be imbued with the feelings of the suitor; but I believe the danger to be apprehended on that score is more imaginary than real.

64. Do you not think it is likely to prevent misunderstanding? No, I do not. At present the conferences between an Attorney and his client are confined to those two persons, and I never heard it suggested before that it was necessary, as a general rule, to have a witness to what passes between them, to prevent subsequent misunderstandings. There are, no doubt, some clients with whom it is necessary to be particular, to be able to prove what their instructions and statements are, and a cautious practitioner, in such cases, guards himself, by taking written instructions. The present division of the profession scarcely affects this subject, as the client rarely attends his Counsel with the Attorney. In reference to what I have before observed as to the multiplication of labor caused by the necessity of employing an Attorney to instruct a Barrister I would remark, that I have read the evidence given by Mr. Milford before this Committee, and that his statement that if he were an Attorney he should not feel justified, when instructing Counsel, in leaving out anything his client stated, proves that if such be the duty of an Attorney he is a mere machine, whose functions are useful for no other purpose than to create expense, as the client could just as well make the statement to his Counsel at once, and with less risk of inaccuracy. The Counsel could "pump" him as well as the Attorney, and the request, not now uncommon, from the Counsel to the Attorney to "pump" the client further would never be necessary. One obvious effect of amalgamating the profession would be, to clear both branches of all incompetent practitioners. The public would then soon find out those who really understand their profession, and those who are only competent to convey instructions to a Barrister. The division is a cloak to all sorts of ignorance and incapacity in Attorneys. It enables any person with the smallest smattering of law, if from adventitious circumstances he can command a connexion, to carry on his business, by calling in the aid of Counsel on every occasion—a mode much more profitable to the Attorney than dispensing with such assistance, as the employment of Counsel not only saves the Attorney trouble, and protects him from responsibility, but adds to his emolument. As, for instance, an Attorney who understands his business usually draws his own pleadings; one who does not, sends instructions to Counsel to do it for him. The result is this:—the Attorney who actually draws a declaration, for instance of twenty folios, gets £1 for his trouble; an Attorney who does not, gets paid for drawing and copying the instructions, usually as much as the plea, say £1; for drawing the declaration (which the Counsel in fact does) £1; attending the Counsel 6s. 8d., thus more than doubling the Attorney's emolument, in addition to putting the parties to the further expense of the Barrister's fee, (about two guineas more.) The lower branch of the profession is now becoming overrun, and if the present system is continued, will, I have no doubt, soon be completely inundated, as it is the only respectable profession practically open to the colonists. I would also observe, that the administration of justice would be much facilitated if additional Judges were appointed in the Supreme Court, and the Court of Quarter Sessions and the Court of Requests were abolished.

65. What is your objection to the Court of Quarter Session? I think two establishments are kept up for one object. A Judge of the Supreme Court could travel as frequently as the Chairman of Quarter Session, and would give more satisfaction to suitors. I can see no one object that is attained by the Court of Quarter Session, and I see many objections, of which not the least is, that a number of lay gentlemen may overrule the opinion of the Chairman.

66. Would you have a Circuit Judge to travel every quarter? As often as was necessary to deliver the gaols; but I would not have any particular Judge to travel; each Judge should do so, excepting the Chief Justice, who, from his superior dignity, should not be expected (unless he chose) to take that duty. With respect to the Courts of Requests, I think it would be most desirable that they should be altogether abolished, and a jurisdiction in matters of debt up to £10 be conferred on Magistrates, to be exercised according to equity and good conscience, as is now done in the Small Debts Act, as it is called, but I would confine that jurisdiction to debts. I also think a *cheap* jurisdiction should be established in the Supreme Court in matters of debt from £10 to £50. The advantages of the universal jurisdiction of the Supreme Court, and its machinery to enforce its judgments, are infinitely superior to any that can be conferred on inferior Courts. The expense which would be saved by abolishing the Courts of Requests and the Courts of Quarter Sessions would much more than countervail that of appointing two additional Judges in the Supreme Court, and the advantages of such a change are manifold and obvious to every person who understands the subject.

67. *By Mr. Lance*. Do you approve of the system of special pleading? Most decidedly.

68. With regard to several counts, can you give an opinion about that? I think a person ought not to be allowed to have more than one count, or one plea, except where a special case could be made out for the allowance of more.

69. Would you allow a man to set up inconsistent pleas? I would not, unless a special case could be made out for leave to do so.

70. Would you require an affidavit, in order to obtain leave for several counts in respect to one cause of action? I would.

71. Do you think it would be proper to require an affidavit to verify a declaration? Not to verify it.

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72. Why not? Because I think a dishonest suitor would always swallow an affidavit, when a man of tender conscience would hesitate to swear at all, from not understanding the effect of it.

73. Is it not now required to verify certain pleas by affidavit? Yes; pleas in abatement.

74. Is it not an evil that parties should put forth false statements on the record? No doubt, but that is an evil inherent in all litigation; both parties cannot be right. If it were not for fraud, or dishonesty, there could scarcely be any litigation. The essence of special pleading is to bring the parties to a fact, asserted on the one side and denied on the other; of course, both statements cannot be true: it is the province of a Jury to decide which is true.

75. Have you ever considered the system proposed by Bentham, of the issues between the parties being settled by a Judge? I have, but I do not think it at all desirable. My impression is, that the verification of pleadings by the parties would always give an artful, dishonest suitor, an immense and unfair advantage over an opponent of a different character. I conceive the present system, of allowing parties to state the case they rely on, without swearing to such statement, much superior to that suggested by Bentham; and if the system of Bentham were adopted, there seem to me insuperable difficulties in carrying it out.

76. Can you suggest any amendment with reference to demurrers? The suggestion I would make is, that a party should not be allowed to demur specially and generally at the same time. If he wishes to rely upon the defective mode of his adversary's statement of his case, I would allow him to do so, but not, at the same time, to object that it discloses no cause of action or defence; or I would allow him to contend that no cause of action or defence is disclosed, but not, at the same time, to rely upon technical objections.

77. You would take the power out of the hands of the Court of giving leave to amend? No; I would not take it away, but would only allow it to be granted where a strong special case was made out, upon a special application for leave to amend.

78. Merely special demurrers are very rare? I think they are not very rare; merely general demurrers are very rare, because a party who wishes to demur, generally, will fall back upon any defect, of a mere technical kind, for fear he should fail in the general demurrer.

79. With regard to judgment on special demurrer, would you object to the same rules as those which are applicable to general demurrer? I would make the rule more inflexible, because if a party would stake his case upon technical objections, I would grant him no indulgence.

80. But if he does make it out, ought he to have judgment in his favor? I think he ought, if the other party will insist that his pleading is correct; but I would always allow a party, whose pleading is objected to, for mere defects in form, to amend, on payment of costs, before argument. We have a rule to that effect now, which I conceive is perfectly correct in principle, but it requires some alteration to prevent its being made the means of creating improper delay, to which objection that rule is open.

81. Would you allow motions in arrest of judgment, *non obstante veredicto*? I would not allow any point to be taken advantage of, after the verdict, which could have been taken advantage of before. There are cases in which these motions must be allowed, because the points upon which they arise may occur at the trial, as in the case of an inconsistent verdict.

83. *By the Chairman*: Would it not answer the same purpose if you were to do away with demurrers? No; because all the expense would be gone to before the point of law would be argued. It is much more desirable that any argument, as to the law of the case, should precede any trial as to the fact. Indeed, such a course, in most cases, would render unnecessary any trial as to the facts. Upon the present system, when judgment is arrested, or given *non obstante veredicto*, all the expense of the trial is wasted.

With the permission of the Committee, I will point out some of the most prominent causes of unnecessary expense in the proceedings of the Supreme Court, and which, I conceive, ought to be got rid of, whether the profession continues divided or not. One of the most grievous causes of expense, outlay, and uncertainty, is the footing on which the Sheriff is placed; this is a cause, not only of great expense and delay, but frequently amounts to a practical denial of justice to suitors. I think the Sheriff ought to be compelled to execute all the process of the Court; and that surcharge fees and poundage (the latter a direct and heavy tax upon poverty) should be abolished. The liability of the Sheriff should remain, but he ought to be indemnified (in all cases in which he was not blameable) by the Government. It is almost impossible to conceive a system more objectionable than that upon which the business of the office of Sheriff is at present conducted. The power at present possessed by the Court, of withdrawing cases from a trial by jury, and compulsorily referring them to the arbitration of an Officer of the Court, ought, I think, be abrogated, as it not only is extremely objectionable in principle, but it creates very great expense and delay. I also think that double pleas should be much more charily granted than at present; and that double replications should be abolished. The expense of the similiter might be saved by compelling the party who tenders issue, to add it, subject to the right of the other side, to strike it out and demur, as may be done now, if the parties choose. The filing of pleadings might also be dispensed with, as well as the signature of Counsel to special pleas; and many common motions which are now disposed of in Court, such as judgment against the casual ejector, judgment as in case of a nonsuit, motions for juries (which, I think, ought not to be required at all, except for special juries) motions for Commissioners to examine witnesses, and to postpone trials, and many other motions of a similar sort, might, with a great saving of expense, be disposed of by a Judge in Chambers. These matters (although, by themselves, not very expensive) are those which greatly contribute to run up bills of costs to their present enormous amount. I have before remarked Court fees ought, in all cases, to be abolished, and the administration of justice, like every other department of Government, provided for out of the General Revenue. Such alterations as I have suggested, would very considerably diminish the expense of legal proceedings, even if the present division of the profession should be continued; but if that division should be abolished, not only the reductions I have specified, but much greater ones would take place, as a matter of course. There is no item in a lawyer's bill,

bill, under the present system, which could possibly be increased by an amalgamation of the profession; and much of the present expense would necessarily be got rid of altogether. I have carefully gone over a great many items continually occurring in bills of costs under the present system, and will state the difference which would be caused by the amalgamation of profession in a few of them. In all ordinary motions the saving would be fifty per cent.; preparing special pleadings, about sixty per cent.; obtaining Counsel's opinion, about sixty per cent.; conference with Counsel, the same; and in the other ordinary expenses the saving would be at least twenty-five per cent. Nothing can illustrate the difference in the expense of employing a Counsel and Attorney, and that of employing one practitioner only, better than the costs of matters argued before a Judge in Chambers, and of conducting cases at the Police Office and other Courts where Attorneys practise as Counsel. The expense in those cases where an Attorney only is employed, averages from three to five guineas; if a Barrister is employed the cost is at least three times that amount. I would also beg to state my opinion that under the proposed amalgamation, although the cost to the client would be lessened, the profit to the practitioner would not be diminished, but rather the contrary, as one practitioner would, in most cases, get all the profit of a case instead of dividing it with another. At present, although law expenses are enormous, the profits of the profession are by no means so large as generally supposed; indeed, few Attorneys make money, on account of the great outlay to which they are at present subject, and the great consequent loss by bad debts. The scale of remuneration to an Attorney is at the same nominal rate now as it was three or four centuries ago, when the fees of 6s. 8d. and 13s. 4d. (which I believe had their origin from the circumstance of nobles and marks being the coins then in use,) were paid for the same services as an Attorney has now to perform for them, although money now is worth so much less than it was then. The costs in equity as now allowed on taxation are such as no Solicitor could live by. With reference to Mr. Garner's evidence, I beg to say that I have carefully read it, and it seems clear to me that his calculation as to the comparative costs before and since the division of the profession cannot be relied on;—in the first place the selection of bills is so small that no accurate result could be expected, as bills of costs vary so extremely. Indeed I believe no such comparison of bills of costs would lead to a correct conclusion. The only way to ascertain the relative costliness of law then and now is by analysing particular bills of costs, and seeing what would be the amount of each bill, if the business were done under an amalgamation or a division of the profession. In the next place, many cases since the division of the profession are cheaper than similar ones before, on account of the abolition of the assessment of damages in default cases, which was by the old practice requisite in all cases. In the next place, what Mr. Garner gives as the *average* expense of trying a case now (about £20) is the *minimum*, as no case, however simple, can now be tried for less than that sum. In the next place he does not point out any item which was necessary under the old system, and which is rendered unnecessary by the division; and many which are necessary, under the present one, would obviously be unnecessary if the profession were amalgamated. I have also carefully gone over the bill of costs referred to in Mr. Garner's evidence of M. v. W. That was a case in which there were twenty-four witnesses, whose expenses amounted to £148 18s. 4d., and the brief was one of most unusual length, the cost of which was £27 10s; the Court fees were £21; and yet the total expense was only £251 4s. 5d.; thus leaving for Attorney and Barrister (both being comprised in one), including the extremely unusual charge of £27 10s. for brief, the sum of £81 only. If such a case were tried now—I mean a case with twenty-four witnesses on one side, and a brief of fifty-five sheets—the expense would be much more than double that sum. The monopoly of the Bar at the Circuit Courts, and the Quarter Sessions in the country, is a most grievous hardship, as the suitors must either confide their cases to one or two junior Barristers, in whom they may have no confidence, or pay out of their own pockets (whichever way the case goes) large fees to take down some other Counsel specially. In addition to the other reasons I have given as to the desirableness of an amalgamation of the profession, I will add, that an Advocate who has received his client's instructions direct, and has conducted all the prior proceedings, must necessarily have a more intimate knowledge of his case than could possibly be conveyed to a third person by means of a brief. The facts of a case become, as it were, engraved on the mind of a practitioner, during the progress of a suit, in such a way as it is impossible to effect by merely reading a brief; and it very frequently happens now, that a Counsel, during the trial of a cause, requires some information which is not conveyed by his brief, and which cannot be at once transferred from the mind of the Attorney to the mind of the Barrister. I believe, also, that if the profession were amalgamated, the practitioners would form a more independent body than it is possible for a few Barristers, who come out here with no intention or desire of remaining, can ever be. I believe no Bar can ever be thoroughly independent, unless the members composing it have their interests permanently connected with the community. In conclusion, I would beg leave to call the attention of the Committee to the fact, that this is almost the only Colony in which a division of the profession exists. The only exceptions that I can discover are Jamaica and Barbadoes. In Upper Canada, according to Mr. Montgomery Martin, the profession (which was there once divided) is now amalgamated; and, from the same writer's work, it would appear to be the same at the Cape of Good Hope, or, at all events, to be optional with Attorneys to practise in both capacities; and in Granada, Dominica, Tobago, the Bahama Islands, Antigua, St. Christopher's, Nevis (in this island there is a singular exception—Barristers practise in both capacities in all the Courts, except the Queen's Bench and Common Pleas, in which Courts there are four Attorneys who may practise as Barristers also), the Virgin Islands, St. Vincent's, Lower Canada, New Brunswick, Swan River, South Australia, and Van Diemen's Land.

R. Johnson, Esq.

18 June, 1847.

FRIDAY,

FRIDAY, 25 *JUNE*, 1847.

Present :—

WILLIAM CHARLES WENTWORTH, Esq., IN THE CHAIR,
THE ATTORNEY GENERAL, | CHARLES COWPER, Esq.

Ross Donnelly, Esq., called in and examined :—

R. Donnelly, Esq.

25 June, 1847.

1. You are a Barrister, practising principally on the Equity side of the Court, and in conveyancing? Yes.
2. *By the Attorney General :* You are an English Barrister? Yes.
3. Of how long standing? About nineteen years.
4. *By the Chairman :* I believe, on the Equity side of the Court here, the practice of the Court of Chancery in England prevails principally? Yes.
5. The same forms are used in pleading? Yes.
6. You have the bill, the answer, the plea, the demurrer, the rejoinder, and all those things? There is no rejoinder now; there is a subpœna to rejoin.
7. Do you think these forms are suited to the circumstances of an infant colony like this? I think so.
8. You think they are neither too cumbersome, nor too expensive? That is my opinion.
9. Are you not aware that the expenses of suits in Equity form a subject of very general complaint among the suitors? I have not heard many complaints.
10. Could you suggest any system of pleading that would be more concise, and less expensive? I think not; I do not think it is the system, but the pleader that is in fault.
11. You think then the proceedings in Equity are unnecessarily long, and therefore unnecessarily expensive, but you attribute that not to any defect of the system, but to the fault of the pleader? Yes; the proceedings might be a great deal shortened, in general to a quarter of their present length.
12. Do you think that object could be accomplished by Legislative enactment, or how would you suggest that it might be accomplished? By limiting the fee for drawing bills and answers to a certain amount in every case.
13. *By the Attorney General :* What fee do you mean? The fee for drawing a bill, and drawing an answer, and so on. I would limit both the Barrister's fee and the Solicitor's charges to a certain amount in all cases.
14. You think that would cure the evil of prolixity? I do.
15. Would a Rule of Court accomplish that? No doubt the Court might do that.
16. *By the Chairman :* Without Legislative enactment? Yes.
17. Are you aware whether a suggestion of that kind has ever been made to the Court? I am not aware.
18. Will you state what, in your opinion, would be a good general average fee for a Barrister in all cases for drawing a bill? About five or six guineas.
19. What is the smallest fee you receive now for drawing a bill? In bills of foreclosure sometimes three guineas, that is the lowest I receive; I have sometimes seen a fee of two guineas marked.
20. What sort of bill was that? I think it was a bill of foreclosure for some very small estate.
21. What is the highest fee you have known marked? About eight or ten guineas.
22. Not beyond that? I think not in this Colony; in England I have seen a much higher fee marked.
23. There are higher fees given in England than in this Colony? Yes.
24. You think five guineas would be a fair average fee in all cases, long and short? Yes; the pleadings do not, however, generally pay a Barrister.
25. He reaps his harvest afterwards, in the course of a cause? Yes.
26. It is pretty much a matter of course that the party who draws the bill holds a brief afterwards? Always.
27. As you think five guineas would be a fair average fee for a Barrister, what do you think would be a fair average charge for a Solicitor? I am not able to say; I do not know what they charge at present.
28. Do you think they ought to have more for copying than the Barrister has for drafting? Perhaps so, for there are many things to be taken into consideration; the Solicitor has losses, and is exposed to risks, which the Barrister is not, so that there is some reason why he should receive as much, or perhaps more, than the Barrister.
29. *By the Attorney General :* In point of fact, do not Solicitors draft the small or unimportant bills themselves? In very few instances; I have had to settle bills drawn by Solicitors; they have been principally bills of foreclosure.
30. If they draft them, they send them to you for settlement? Yes.
31. And you charge as much for settling a bill as for drafting it? Yes. Sometimes, I believe, they draw the bills themselves, and get a Barrister to put his signature to them; but these bills have often been very expensive in the end.
32. *By the Chairman :* It is not the general practice then, for Solicitors to draw their bills themselves? No.
33. You think if such a system as that were introduced, the pleader would put the pleadings into the most concise shape, and that the advantage of that conciseness would follow in all the after stages of the suit? Yes, it would affect the briefs and everything; and would save a considerable expense to the suitor.
34. What, in your opinion, would be a sufficient average fee for an answer? An answer is nearly

nearly as difficult to draw as a bill; perhaps a guinea less than the sum I have named for a bill would be sufficient, that is, as far as the pleader is concerned. R. Donnelly, Esq.

35. What for a demurrer? Say two guineas.

36. What for a plea? About the same. 25 June, 1847.

37. Then there is the replication—that is a mere matter of form? Yes, and altogether useless.

38. The subpœna to rejoin, you think, might be dispensed with? Yes; it is of no use at all, except for the purpose of determining when a cause is at issue, and that period might be otherwise fixed.

39. In what way do you think a restriction of this kind would affect the pleadings; to begin with a bill, do you think the stating part is generally too long? It is; and the charging part, and the interrogatories might be greatly shortened (that is to say) by omitting many of them.

40. In the charging part of bills, it is usual for some pleaders to introduce every conceivable matter they can cram in? It is so very often.

41. The charging part of a bill you consider necessary? Yes, and very material.

42. Because it frequently anticipates defences that might otherwise be made? Yes, and explains them, and prevents pleas and demurrers.

43. You think, however, that both parts of a bill would be very much shortened by fixing this five guinea fee? Yes.

44. Do you think the answer would be proportionally abridged? I think so, supposing the useless interrogatories to be omitted—very often one-third of them are useless;—for instance, the questions whether the plaintiff did not consider so and so; then the defendant is obliged to answer that he does not know whether he considers it; then there is the question whether the defendant ought not to convey to plaintiff, and so on; then the defendant says he does not know, but he submits to the judgment of the Court, and such like questions.

45. You think all those absurdities might be omitted? I do.

46. *By Mr. Cooper:* Are these introduced from a negligent way of doing the business, or for the purpose of making the expenses heavier? I am unable to answer this question.

47. *By the Chairman:* I suppose some Solicitors would not be obliged to you for a very concise bill? Some—and some the reverse; but they do not, generally, trouble their heads about it.

48. As a matter of fact, the prolixity of the proceedings is not considered an objection in the profession? I never heard it objected to.

49. You think the prolixity to be one of the fruitful sources of the expenses attending upon Equity suits? I think so; but the fees in the Master's Office add greatly to the expense.

50. Could you apply the principle of making a fixed charge apply to the interrogatories? Do you refer to the examination of witnesses?

51. Have you written interrogatories now or a *viva voce* examination? A viva voce examination before the Master.

52. Have they abolished written interrogatories in the Court of Chancery in England? No.

53. Do you think that system more or less expensive than the *viva voce* examination that prevails here? I can hardly form a correct opinion, but I should think the briefs would be very much shortened by written interrogatories, because there would not be so many speculative questions.

54. You think then that the system prevailing here, is an improvement upon the Chancery practice in England? In some respects it is an improvement, in others it is not; it is more likely to elicit the truth; but I think it lengthens the briefs a good deal.

55. It has been suggested that this system of bill and answer that is in force here might be altogether dispensed with, and that instead of a bill a petition might be substituted succinctly stating the facts, and that instead of the answer the defendant might be brought before the Court, or the Master, and be made to answer the allegations in the petition *viva voce*, there being a Counsel to represent the plaintiff and to cross-examine on his part, and Counsel to represent the defendant and to cross-examine on his part,—how do you think that would answer? I do not think it would answer at all; it would greatly increase the expense, and could not be carried out in many instances. If a defendant lived at his station a long way from Sydney he would be brought up at a great expense to be examined, and after his examination the plaintiff would probably amend his bill; in the meantime the defendant must stop in Sydney, or probably a few days after his return to his station he would be brought up again to answer the amended bill or amended petition; then the same process of Counsel and briefs would have to be gone through as in the first instance. Then after he had returned again to his station he might be brought up upon some other amendment; besides there must be some sort of answer put in to shew what defence the defendant has to the bill.

56. There is an obligation, whenever there is an amendment, to put in a further answer? Yes, a further answer, but the party is not obliged to come to Sydney, he can do it before a Commissioner.

57. Are there Commissioners who can take these answers? Yes.

58. But who is to prepare the answer in a country district? The Solicitors have agents in the country and they sometimes prepare the answers, and if they are signed by the Commissioners that is sufficient, or the answer might be drawn by Counsel in Sydney, and sent to the parties.

59. But you cannot draw a speculative answer? No; the defendant writes his answer to each interrogatory in his own way in the margin of the copy bill, and Counsel is enabled to prepare the answer from the defendant's notes; he then adds the defences to the bill.

60. You think the system I have suggested would not answer at all? No, it would greatly increase the expense; indeed it might ruin a defendant.

61. How? By bringing him backward and forward to Sydney, supposing he had a station a long way up the country.

62. Then I collect from your evidence, that there is nothing on the equity side of the Court you

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you would abolish except the replication and the subpœna to rejoinder? Yes, and perhaps the common forms in a bill and answer which are very short, for instance, in an answer the defendant begins "This defendant saveth and reserveth to himself," &c., that might be omitted; then at the conclusion "This defendant denies all manner of combinations," &c., that might be left out; then in the bill there is "May it please your Honors, the said defendants combining and confederating together, and with divers other persons, &c.," that might be left out.

63. *By the Attorney General:* What would you substitute for that, supposing the parties were out of the jurisdiction of the Court? In that case you cannot file a bill against an absent defendant, except in very few instances; where there are agents you can sometimes file a bill by means of substituted service upon the agent.

64. Must you not shew a reason for not bringing him before the Court? You have merely to shew that he is absent from the Colony, and pray subpœna against him when he shall return.

65. *By the Chairman:* Are you conversant with the proceedings before the Master? I go before the Master occasionally.

66. It has been stated here that there are an immense number of warrants which might be dispensed with in attendances before the Master? I cannot speak to that.

67. Do you think there are no references to the Master that might be dispensed with? That depends upon the Court—it is entirely in the power of the Court; if they think it necessary to refer to the Master it is a delegation of their power by the Court.

68. Do you think many things are referred to the Master which might be settled by the Court without such reference—has it occurred to you in the routine of your practice that many or any unnecessary references are made? I know of one which I think was unnecessary, which might have been decided without reference, it was the case of Macintosh v. Macintosh, and Brown v. Norton; these are the only ones that occur to me.

69. You think then that there could not be much saving effected in that matter? No; in fact the system here is much less expensive than in England in the Master's Office, because there, only one hour is allowed for each case; and when a case is gone into it is stopped at the expiration of the hour, as the parties on the next warrant insist upon coming in, so that the Master probably has forgotten all the circumstances of a case when it is brought before him a second time; besides there is not warrant "on leaving" in this Colony.

70. Do you think then that references to the Master here are not so numerous nor so expensive as they are in England? I think they are more numerous, but not so expensive.

71. You are a Conveyancer I believe? I am.

72. Can you suggest to the Committee any mode of lessening the expense of that branch—it is a matter of universal complaint now that is becoming very expensive? I believe that few complaints are made in the conveyancing department. The length of a deed depends greatly upon the Conveyancer; and it is generally found that a client prefers a long deed to a short one, because there is very little difference in the expense, and he would rather be safe.

73 Do you think the validity of a deed depends upon its length? A deed may be unnecessarily long, or it may be too short, and thereby subsequent expense be incurred.

74. *By the Attorney General:* Have you given any attention to Lord Brougham's Act upon this subject? No, I have scarcely had time to examine it, but I find from late English publications that the system does not answer.

75. Is it popular with the profession? I think not.

76. *By the Chairman:* Do you think these Acts are of any benefit? I do not think the Solicitor or Barrister would receive less. The only parties who would be injured would be the copying clerks; the expense of a conveyance would be as much, or perhaps more, than it is at present, because Solicitors would have to get Counsel's opinion upon the construction of that sort of deeds.

77. The system would give rise to many doubts and difficulties which would require frequent applications to Court? Yes.

78. You think upon the whole nothing would be saved by it? I do.

79. *By the Attorney General:* But if the practice were settled? Before the practice is settled a great many cases would go into the Court, and a Solicitor would not undertake to advise without referring to Counsel to give his opinion upon the construction.

80. *By the Chairman:* Whatever might be the after results of these statutory conveyances the persons who immediately adopted them would save nothing? No; somebody would have to go to law to determine the points, so that the profession would gain by them.

81. *By the Attorney General:* You do not think it desirable that the system should be adopted here? I think not; it does not seem to answer in England. It might, however, possibly be adopted here after it has been sometime in operation in the Mother Country, as we should have then the advantage of the decisions, and avoid the expense of that—still that would not save the expense of the opinions of Counsel.

82. *By the Chairman:* What do you consider to be the principal cause of the expense of conveyancing here? I think the expense of conveyancing here is, as compared with England, very small.

83. Is not the property generally speaking, much more valuable there than here? We have small allotments here worth £20 or £30, which is not the case in England; but in other respects the property is much the same.

84. But you do not mean to say that the titles are so complicated here as in England, generally speaking? I think the titles are more difficult, because in England the title from the beginning has been properly managed and inspected, but in this Colony there are new points constantly arising from the bad conveyancing of former days, and from the peculiar nature of the titles of this Colony.

85. You do not think the property so valuable and so able to bear these charges here, as in England? I have had to draw conveyances here for property to a very large amount; last week I drew one where the consideration was £10,000. With respect to small allotments worth £20 or £30, it seems very hard that so large a sum should be paid, but then a man may

may build a house upon the allotment worth £300 or £400, and the party would of course, before he laid out that sum, wish to have the property secured to him, not so much on account of the land as of the improvements. The enrolment or registration of deeds increases the expense greatly. H. Donnelly, Esq. 25 June, 1847.

86. Do you, or do you not approve of that provision which requires a copy of all deeds to be registered? I do not see of what use it can be, except to satisfy the curiosity of persons, because a short statement of it is sufficient notice to a party interested; it increases the expense of a conveyance greatly: indeed it makes it nearly double.

87. You think anybody who has a right to know the contents of a deed can get that from the abstract? That would give him notice, and he could then call upon the vendor or mortgagor to explain the conveyance, and the possessor of the deed may then be asked what claim he has upon the property. The object of the registration is to give notice, but I do not see the use of having the whole of the covenants of a deed registered.

88. *By the Attorney General:* I believe that is not required any where but here? Yes, in the West Indies, and I believe it is proposed to do so in England

89. *By the Chairman:* Do you not think what they call abstracts in this country, are great sources of abuse—that is to say, the giving entire copies of deeds? They are certainly not *abstracts*.

90. That is the sort of abstract the Solicitor furnishes you with here? That is only done in one office that I am aware of, and I am informed that the Solicitor does not charge more than for an abstract.

91. Do you know what the charge is for this abstract, and the attested copies—how much per folio? I do not know.

92. I believe the charges for conveyancing in England, as far as Solicitors are concerned, are regulated by Palmer's costs? I do not know the practice of Solicitors.

93. You do not think if people complain of the costs of conveyancing that the complaint is well grounded? I think not There are people here, who draw conveyances for £1 or £2, and if a person chooses to build a house upon a piece of ground, and get a conveyance drawn for £1 or £2, he can get it done, but generally speaking, parties wish to have the business done properly, and do not object to the payment of a higher charge.

94. You are aware that a law has lately been introduced into England for taxing Attorney's bills for conveyances? Yes.

95. Do you think that law might be advantageously introduced here? It might.

96. I believe that law also provides that none but persons who obtained certificates shall be empowered to convey? Yes.

97. Do you think a regulation of that kind would be beneficial to the public here? I think it would; it would prevent advantage being taken of aged and simple persons having property, who are now sometimes induced to employ persons not qualified.

98. Can you suggest any mode of lessening the expense of conveyancing in any other way than that you have referred to? The actual conveyance could be of course shortened, but then the expense in other ways would be increased.

99. Could you apply a fixed fee for conveyances as you would for bills? I think that might be done; in fact there are several offices in Sydney, which have a fixed price for deeds. I think that has tended to shorten conveyances a good deal, but I do not think the client benefits so much by that as in the case of the bill, because when a deed is drawn there is an end of the matter, but when a bill is shortened it affects the whole of the after proceedings. In cases where small purchases have been made, the parties frequently bargain with the Solicitor as to what he shall charge for a conveyance, but in large purchases these bargains are seldom entered into.

100. What would you consider a fair average fee to a Barrister for drafting a conveyance? About two or three guineas; it is very difficult to say: that would hardly pay, though the Colony could not bear more; the Solicitors would run the risk of drawing the conveyances themselves rather than pay more. Where the properties were large, of course they could give larger fees.

101. *By the Attorney General:* By what branch of the profession is conveyancing chiefly done? By the Solicitors; in fact, very little is done by Counsel

102. Do not the Solicitors generally keep the conveyancing department to themselves, except where there are very complicated titles? They do generally; what they cannot do themselves they get Counsel to do for them, but they will run the risk of doing it themselves if the Counsel's fee is too high.

103. Do you think if there were an amalgamation of the profession, it would at all affect the expense in this respect? No, I think not. I think it would be just the same, excepting that many Solicitors might be thrown out altogether, as they would not have the benefit of consulting Counsel.

104. Is there anything to prevent Attorneys from consulting with each other upon conveyances? No; but it is a difficult thing to give an opinion in an off-handed way, and unless a party were regularly employed, he would not be likely to give a safe opinion; he must examine his case carefully, and I do not think an Attorney would be likely to give an opinion, unless it were submitted to him in the shape of a case and accompanied by a fee.

105. *By the Chairman:* I suppose Solicitors are not more willing to work for nothing than other persons? No.

106. Do you think there are any cases in which the client might be allowed to go to a Barrister, without the intervention of an Attorney? I think not, because if a client goes direct to the Barrister, the Barrister will require a much larger fee. he would require the fee of the Solicitor as well as his own, as he would have to reduce the statement of the client into writing, and perform all the other duties of a Solicitor. Now this work is all done for the Barrister, and comparatively little time is occupied, but if the client were to call upon the Barrister, he would make long, and frequently irrelevant, statements, and probably discuss the news of the day, and take up the whole of his time.

107. The Barrister would require a higher fee, and nothing would be saved by the client? I think

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think it would be impossible for the Barrister to perform the business, as the client would be constantly calling, and be very troublesome.

108. Do you not think a Conveyancing Barrister might be allowed to draft a will from the instructions of a client? I think not, unless he received the fee of the Barrister and Solicitor too.

109. Then you are opposed to the system of admitting a client to communication with a Barrister, without the intervention of an Attorney? I think so; a Barrister would not know how to manage a client; it is a practice which is acquired, and peculiar to a Solicitor, which many Barristers would not understand, and his whole time would be taken up in taking instructions.

110. Supposing the amalgamation of the profession were permitted, do you think there are many Barristers who would practise in the double capacity of Barrister and Attorney? I think not; some might go into partnership with Attorneys, but I should hardly think they could practise as Attorneys themselves.

111. Do you think they would be competent, generally speaking? I think not, it is so different a profession.

112. Do you suppose the Bar would be obliged to adopt that course in self-defence if the amalgamation were permitted? Yes, they might practise as Barristers in partnership with Attorneys, or they would have to get good clerks who could manage that part of the business for them.

113. Do you think such persons are to be met with as competent clerks; do they abound in this country? It might be rather difficult to obtain them; they would require high salaries, but no doubt they could be found.

114. This competent clerk must be an Attorney? Yes, there are a great many clerks who have served their articles, but have not been admitted, and others who have been admitted.

115. Do you think any saving would accrue to the public from the amalgamation? I think not; on the contrary, I think the expenses would be rather increased.

116. How? The Attorney could mark his own fee, and he would probably be more liberal to himself than he would be to a Barrister; or if he had a Barrister for a partner he would probably mark a higher fee than if he had no interest in the matter, and might oftener take the opinion of Counsel.

117. Supposing an Attorney chose to do all the business himself, and not to be in partnership with a Barrister, would there be a saving of expense in that case? I think not, because he would have to perform the duties of both Attorney and Barrister, and that would, of course, require more labor than if he did the duty of one only. Indeed it would not, even then, pay him so well, because it would give him much more trouble to look up cases, and to perform the business of a Barrister than it would one who was accustomed to it. I know in my own case that if I have Common Law business to do, it does not pay me, as I do not understand it so well as Equity business, and it takes me much longer to look up cases. If, therefore, the Attorney were to perform both his own duties and those of the Barrister, he would be justly entitled to the double fee.

118. But even if he had the double fee, it is contended that many of the fees at present charged would be saved, such for instance as attendance on Barrister with brief; that attendance is now allowed on taxation of costs, but if there were an amalgamation of the profession it would be unnecessary, and would therefore be saved to the client—I suppose that is a proposition which you cannot dispute? I cannot.

119. Do you think the client would be benefitted on the whole by that? No, because the Solicitor would require better pay, as he would have to neglect his business while he was in Court, and he must either have a partner or a confidential person to attend to it. But the two branches of the profession are so widely different that I do not think they could be amalgamated. The Solicitor has principally to talk to, and receive instructions from, his client, and to arrive at the facts of a case. The Barrister has to search out authorities, and requires to be quiet and undisturbed in conducting his business out of Court.

120. You doubt whether one person could perform the double function of an Attorney and Barrister satisfactorily? I do not think he could.

121. You would infer that even if one person did perform the double function, that what the client saved in one way he would lose in another, by the want of skill? Yes, I think a person acting both as Barrister and Solicitor would have no chance when opposed to a party acting exclusively as a Barrister. In fact if the amalgamation were allowed, I believe there would be a practical division. I think it would be found to be impossible to practise in both professions.

122. What do you think of admitting young men, educated in this Colony, to act as Advocates? At some future time, when the population of the Colony shall have reached a million or so, the senior members of the Bar might, perhaps, form themselves into a Bench to admit Barristers, but the profession is too small at present.

123. Might not the senior members of the Bar now form themselves into a Bench, as you propose—might not an Inn of Court be established on a small scale? I think the profession is almost too limited.

124. It is a question for these young men whether they are competent to meet an English Barrister or not, I only ask whether you see any objection to their being admitted? If there were a sort of Bench to admit them.

125. If it were deemed desirable to admit them you would recommend a Bench? Yes.

126. How would you compose such a Bench? As in England, it should be composed of the Judges and the senior members of the Bar.

127. Parties undergo no examination in England? It is unnecessary, I think.

128. Would you require any examination here? I think not. Originally, I believe, Barristers were examined, but it was found to be useless, for a Barrister could not practise unless he understood his profession—nobody would employ him. The examination of a Barrister takes place every day in Court; he is before the public, and if he be incompetent it is discovered, and he is not employed.

R. Donnelly, Esq.

25 June, 1847.

129. You think if a Bench were formed here young men might be admitted by that Bench without examination? I think so.
130. Would you have no examination as to character? I think the Bench should have control over them as to character; as in England, the Bench should have power to disbar them.
131. I refer to an enquiry into character previous to admission? It should be the same as in England, where it is necessary to have the certificates of two householders and two Barristers.
132. The examination as to competency you would entirely dispense with? Yes, for the reasons I have stated.
133. *By Mr. Cooper:* Would you allow any gentleman, after he had been admitted to the Bar, to go back again and practise as an Attorney? Yes, but he must first serve articles.
134. If gentlemen who are now Attorneys were to make their election for the Bar, would you allow them afterwards to go back to the profession of the Attorney? That would depend upon how they are to be admitted—what they must do to qualify themselves to become Barristers—whether they should serve in a Solicitor's office or not.
135. *By the Chairman:* Would you suggest any course of education for young men here previous to their admission to the Bar? I think not; I would leave it entirely to their own judgment; they would, of course, go to professional men, and choose the best masters.
136. *By Mr. Cooper:* The Inn of Court would lay down certain rules which would provide for this? I think it would not be advisable to lay down any particular mode of training for the Bar, but would leave the parties to take the course they thought best.
137. *By the Chairman:* In England parties seeking to be admitted are obliged to be members of an Inn of Court a certain number of years, would you require anything of that kind here? I think so.
138. You would require them to give a certain number of years notice that they mean to be called to the Bar? Yes.
139. With respect to Solicitors, the immediate aspirants to the Bar, you would not require that they should have their names three or four years upon the rolls—persons who may be presumed to be competent? I think not; but there is a rule in the English Bar that a Solitor must be off the rolls two years, and I believe the reason is this, that otherwise he would have the means of making business for himself preparatory to going to the Bar.
140. *By Mr. Cooper:* A Solicitor then must discontinue practising two years before he can become a member of the Bar? Yes.

WEDNESDAY, 30 *JUNE*, 1847.

Present:—

W. C. WENTWORTH, Esq., IN THE CHAIR.

THE ATTORNEY GENERAL, | T. A. MURRAY, Esq.

His Honor the Chief Justice, Sir Alfred Stephen, called in and examined:—

His Honor Sir A. Stephen.

30 June, 1847.

1. You are, of course, aware that a measure is now before the Legislative Council, with a view to abolish the division which has hitherto existed in practice, between Barristers and Attorneys of the Supreme Court? I am.
2. Will you favor the Committee with your opinion, as to the expediency of such a measure; and of its probable results, if carried into effect? I am decidedly of opinion, that the amalgamation of the two branches of the legal profession would not, in the end, benefit either; while it would deteriorate the character of both, and certainly not be attended with advantage to the public. In Van Diemen's Land, (in which, as the Committee may be aware, I practised at the Bar for above twelve years,) each of the two branches is entitled to practise alike in both. The practical result there has been, amongst others, that a separation has actually taken place, for purposes of convenience and utility. Thus: an Attorney, now no more, having a peculiar faculty for public speaking, and the other duties of a Barrister, confined himself exclusively to the practice of the Bar. After the first year, (in which, although a Barrister, I practised also as an Attorney,) I did the same. A third, a Barrister, practised exclusively in that branch also. Others practised occasionally in both; but those were rather exceptions from the general rule. The most trusted Attorneys in Van Diemen's Land confined themselves regularly to their own branch of the profession; never interfering with that of the Bar. I know of a Barrister, knowing little of the practice of an Attorney, and an Attorney, knowing little of a Barrister's duties, having united themselves in partnership; and, in this form, they united respectively the two branches. Generally speaking, those who practised in both branches, were the least distinguished in each. They were driven to eke out an income, by trespassing on the province of the second branch. Such, I conceive, would be the results of the system, if introduced into this Colony. And the fact shews, that the separation of the profession is in strict accordance with the convenience and wants of the community. In the West Indies,—I can state as a fact—that the same process of separation ordinarily took place. My father was Solicitor General there; and he carried on the business of an Attorney, by means of an assistant. The then Attorney General of St. Kitts had a nephew in his office, who transacted all Attorney's business for him. I am not quite aware what the practice is in Canada, or the United States; but I think it probable that it is the same there. I do not believe that such eminent men as Judge Story, and Chancellor Kent, could have devoted their time to the practice of an Attorney, as well as Counsel. In the larger West Indian Colonies, the division of the two branches is maintained. I refer to Jamaica and Barbadoes. In some of the United States, I believe, (but certainly in the populous State of New York,) the division also exists.

His Honor Sir A. Stephen.

30 June, 1847.

exists. In the Canadas, the circumstances of which I am not fully acquainted with, but where the litigation is (I believe) of a paltry character, and in the small West Indian Islands, where from the paucity of litigation, or an imperfect and petty system of jurisprudence, it is difficult to obtain a livelihood by pursuing one branch only, the amalgamation prevails. I think that the business of both branches, undertaken by one and the same person, is likely to be badly done in both; but certainly in one. Neither do I think that expenses will be diminished by the proposed amalgamation. They were not diminished by it, in Van Diemen's Land.

3. Have you any observation to offer, as to attendances on Counsel? As there will be no attendances on Counsel, no doubt, there will be a saving in that respect. That is a very paltry item.

4. Will there not be a saving, also, as regards the preparation of Briefs? I think that there will be no saving whatever. I imagine that the Attorney will prepare his own Brief, and charge for it accordingly. I do not see how he could conduct any case without one. If he does not prepare the Brief himself, he will have a clerk who will do so. In fact it will come to this:—that an Attorney, ambitious of display, will address himself as much as possible to the business of the Bar; but, as he cannot do everything himself, he will (as an Attorney) simply see his clients; while the practical part of the business will be conducted by a clerk:—the clerk being the Attorney, and the Attorney the Barrister. I cannot see any benefit in this. The Barrister will do the same. He will see the clients; but the Attorney will be the Barrister's clerk. The consequence will be, that you will have inferior men in each branch. Certainly a few pounds may be saved in some cases. But these will be very few; while the expense is likely to be greater in the aggregate, from a variety of circumstances. Mistakes and neglect are contingencies not to be lost sight of, where incompetent persons may be employed. And who can ever ascertain, which of the duplex-party employed, is to blame?—the moiety that is Barrister, or the moiety that is Attorney? I think it important to maintain the separation, however, in reference to higher ends and objects, than the mere subtraction of a pound or two occasionally from an Attorney's bill. It is of vast public importance to have a learned, efficient, dignified, and able Bar. But the "Colonial Bar" has until of late years had a low reputation. And one great cause of this has been, the allowing of half educated men to practise in both branches of the profession. There is not sufficient, under such a system, to reward a man of a greater amount of talent, and higher station in society, for undergoing severe study; and acquiring the many accomplishments, which adorn the Bar of Britain. A man of very inferior capacity and stamp of character, by uniting the two branches, gains a livelihood, though scarcely enough to make him respectable; while the fees which he abstracts, from those who would otherwise practise exclusively as Barristers, deducted from the income of the latter, injure these immeasurably.

5. Is it not in fact one great objection to the proposed amalgamation, that it will be injurious to the junior Bar? I think that it will destroy them; which, in other words, is to say, that it will put an end to the Bar itself. For you cannot make a perfect Barrister in a day. There must be experience; and, for experience, there must be a *nursery*. We have nurseries for seamen:—we require one for the Bar.

6. What is your opinion as to the effect of the measure, on fees? I think that the tendency will, if anything, be to increase them. I consider that, in many instances, the fees in this Colony have been extremely inadequate. The fees in Van Diemen's Land were larger. I have known three hundred guineas given to defend a prisoner. I have heard of one Advocate, (but I do not know the fact myself,) getting a flock of sheep for his services.

7. Assuming the amalgamation of the two branches to take place, can you form an opinion whether the number of speculative actions would increase or diminish? From my own experience, I am unable to state anything on this point. I should not be surprised, if there were an increase. If there were, I think it would generally be from ignorance. In a few instances, it might arise from less creditable causes. But there would be one extensive source of increased litigation. The Attorney, from seeing clients personally, is apt to imbibe prejudices, and acquire feelings, against which the check afforded by the Bar will have been removed. I entertain no doubt, that if the projected change take place, there will be found Attorneys, who, either from an honorable ambition, or from mere conceit, will devote themselves exclusively to the Bar. And I ought to add, that there are in Sydney some Attorneys, quite as competent to act as Barristers, as many admitted to the higher branch. But you will certainly find, that in proportion to a man's recognised competency for the honorable duties of an Attorney, his desire to intrude on the province of the Bar will be diminished. An able and experienced Attorney, or an able and experienced Barrister, will each find enough to do in his own appropriate profession. I entertain no doubt that the leading men amongst the Attorneys, in this City, will not be found desirous of being Barristers; much less, of being both Barristers and Attorneys too. But, however this may be, I feel convinced that the same man could not practise in both branches, with credit to himself and advantage to others. I am informed, and I believe, that where Attorneys practise also as Barristers, there is not that propriety of demeanour and general conduct, which ordinarily characterises the Bar. This is no reflection on Attorneys generally. It is to be explained by the fact, that the most flippant and most forward,—those the least competent, but the most fond of display,—will be found invariably the most anxious, to tread in what they regard as the higher path of their profession.

8. It appears that you are opposed to the amalgamation, as regards the Supreme Court; but what is your opinion as to Circuit Courts, or Courts of Quarter Sessions; where few Barristers are found to attend—and in some instances, none but Attorneys? There are difficulties as to this; undoubtedly. The senior members of the Bar do not generally attend those Courts. But I think it important to give junior Barristers the opportunities of practice, which such Courts afford. If they bring less experience or knowledge than their seniors, they would compensate for the inferiority, (if the Briefs were delivered in time,) by more study of

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the particular case. The country Attorneys, who would take such cases, are not superior, at all events, (if by any means equal,) to the junior Barristers. I see less objection to the amalgamation, as regards these Courts: but, on the whole, I doubt whether the measure even as to these would be a wise one. His Honor Sir A. Stephen. 30 June, 1847.

9. In the event of the non-attendance, or of a deficiency of Barristers, at the Sessions or on Circuit, would you have any objection to the admission of Attorneys *pro hac vice*? That rule, I believe, already exists. I apprehend that the Court might, and would, allow Attorneys to plead under such circumstances. I know, indeed, that this has been done. The rule as to Quarter Sessions in England is, that Attorneys are allowed to practise, unless a certain number of the Bar ordinarily attend; and it is competent to the latter, to intimate their intention to do so.—It occurs to me to mention, here, one strong argument against the amalgamation of the two branches; namely, the very great preponderance of opinion and practice against it in other countries. In the Colonies in which the amalgamation exists, separation it is admitted would be an improvement, but it is simply impracticable; because the petty practice there would not support a Bar, without the Attorney's practice added. Such is the statement of Chief Justice Stokes, in his work, in the passage which I will now read to the Committee. I believe that one celebrated writer, (Mr. Bentham,) has no respect for the rule separating the two branches; and that he has opposed, by turning it into ridicule. But I have never heard of any plan of Law Reform, from any practical man, (or from any one but the writer just mentioned,) comprising the union of the branches. The principle of the division, is that of the division of labour; the advantages of which are universally recognised. I see no ground for saying, that the profession of the law should furnish an exception.—The division has existed in England, I believe, from the earliest ages. It exists in Ireland, and in Scotland. It exists also, I believe, in France. The division of duties was carried still farther in Rome; where the Advocate was distinct from the Chamber Counsel. This is the case, I believe, in Paris; at this day. As to America, reasons favoring democracy may have led, in many of the States, to a contrary rule. But, as I have already said, in New York the division of the two branches is maintained; and I should not be surprised to hear, that it equally exists in other parts of the Union.

10. Will you favor the Committee with your views as to the most proper course of education for Colonial youths, in the event of their admission to the Bar here being sanctioned, without requiring them to be previously admitted in England. Will you also be good enough to state whether, in your opinion, Attorneys might not be allowed to make their election as to practising in one or other of the two branches? I have for some time entertained the opinion, that a measure of the nature referred to might not be inexpedient. And, if youths may be educated in the Colony for the Bar, I see no objection to Attorneys similarly educated, and who have already acquired a considerable amount of legal knowledge, becoming Barristers. I would stipulate, however, that previously to their application for admission, they should have ceased to be Attorneys; and that, before admission, they should undergo an examination as to their attainments generally, and their proficiency in the various branches of legal knowledge—especially such as more peculiarly belong to the province of the Counsel. I doubt whether any individual should be admitted to the Bar, without going to England for some portion of his time. The objection to the present rule, which requires three years residence in England at the least, is mainly that of the expense. This is an insuperable one to many, who would otherwise be eligible candidates for the Bar. The existence of such a regulation might exclude many young men of talent, and possessing also all other adequate attainments. If the term were reduced to one year, however, (half that time to be spent in attendance on the Courts, and the other half in the office of a Pleader, Equity Draftsman, or Conveyancer,) and the necessity of entering one of the Inns of Court were dispensed with, I think that few parents or young men would be deterred, on the grounds of either the expenditure of time or money, from submitting to such a course. The advantages of such a residence, in enlarging the sphere of observation, in the opportunities of introduction to men whom these students might make their models, in witnessing the tone of English society, and seeing how business is conducted in the highest tribunals of the Empire, would in my opinion be very great. There is another objection to a residence in England, however, which is of far greater moment than one founded on money. It is, the dissipation and habits of vice into which young men may be led, away from all control. This I would endeavor to counteract, by requiring the residence to be after the age of twenty-one; when habits, whether for good or evil, are usually already formed. Sending a lad to College, at eighteen or nineteen, among a herd of youths about the same age, is a very perilous thing. The Law Student would go at a more advanced age, and amongst grown men. To secure the requisite time for education, I would not allow a man to be called to the Bar, under any circumstances, before the age of twenty-three.

11. What examination of candidates would you require, preparatory to their admission to the Bar? There should be an examination, as to their classical and literary acquirements, generally, as well as their knowledge of law. I am not prepared to state the particular course or subjects of examination. That would be matter for consideration hereafter; either for the Legislature, or the Judges, if the task should be consigned to them.

12. To whom would you give the power of calling to the Bar. Would you confer it upon the Judges, or institute a Tribunal similar to the Inns of Court? The power of calling to the Bar resided, anciently, in the Judges; and was transferred by them to the Inns of Court, subject to an Appeal to themselves. I would here give the power to call, as naturally incident to them, to the Judges; and they should either themselves examine the Candidate, or appoint two Barristers, to be associated with one of them, to conduct the examination. If a Public College existed in the Colony, accessible to the Candidates, it would be well to require them to reside there for a certain time, for classical and mathematical instruction, as part of their necessary course of study. Unless some such regulation be made, or great care be taken by those on whom the duty shall be devolved, you will have a Bar sadly uneducated; instead of a body of gentlemen, accomplished and learned as their English brethren—and fitted to adorn the Senate and the Bench.

His Honor Sir A. Stephen. 30 June, 1847.

Bench. By rendering a competent standard of education necessary, in order to attain to the honours of the Bar, you may compel and force men to be educated. I would make it one of the temptations and rewards (we have at present few, or rather none,) of a liberal education; and there will then exist, for the sons of our gentry and wealthy settlers, accessible within the Colony, something better than bullock driving.

13. Are you aware of the rule which prevails in England, in reference to the admission of Attorneys to the Bar? Before an Attorney can be admitted to the Bar in England, he must first be struck off the rolls as an Attorney; and, I believe, he must have been struck off before he even begins his three years' probation, at an Inn of Court. Here, I should require him to take his name off the rolls, and to draw pleadings, at law or in equity, with a Barrister, for six or eight months, as well as to go through the examination. Or, he might give a term of twelve months to study, without entering a Barrister's Chambers.—On the subject of this examination, and of education for the Bar, I take the liberty of suggesting to the Committee, that the best and most complete scheme for one, both classical and legal, would probably be supplied to the Committee, by my friend and colleague Mr Justice Dickinson; whose attainments, unquestionable knowledge of the law, and practical experience in tuition as a Pleader, eminently qualify him for the task.

14. After Attorneys had been admitted as Barristers, would you allow them to fall back on their original profession? Certainly not.

15. It should be a case of "for better for worse"? Yes, I think so.

16. Have you any further observations to offer, in reference to the question of amalgamation? I have merely to add, that I conceive the measure would be scarcely just, to the Barristers now on the roll. Many of them came from England, in the expectation that they would be allowed to benefit by their expensive education, and years of labour, without competition from Attorneys:—and it strikes me forcibly, that it would be hardly fair towards them now, to let in a host of rivals, who would deprive them of all the more lucrative fees, and so in fact impoverish them, without any adequate benefit whatever to the public. For ordinary and routine matters, an Attorney has only to superadd a facility of talking, to do the duties of a Barrister. But a Barrister, with ten times the learning, would require peculiar habits, and considerable study, before he could convert himself into a tolerable Attorney. The Attorney would take care to give the Barrister all the heavy business, and he would run away with the light work himself.

THURSDAY, 1 JULY, 1847.

Present:—

W. C. WENTWORTH, Esq., IN THE CHAIR.

ROBERT LOWE, Esq.,
JOHN LAMB, Esq.,
JOHN BAYLEY DARVALL, Esq.,
THE ATTORNEY GENERAL.

His Honor the Chief Justice examined, in continuation of previous evidence:—

His Honor Sir A. Stephen. 1 July, 1847.

1. Are you able to suggest any mode, by which the expenses of Common Law proceedings may be diminished? I am not aware that the expenses of a Suit at Law, or of Common Law proceedings generally, could be materially diminished:—that is to say, if the business is to be properly done. Those expenses in this Colony are already less, I believe, than in England. I have endeavoured to ascertain what is the fact on this point; and I have no doubt, that the expenses here are less than at Home. The Fees to Counsel, in heavy cases, are certainly very much less than in England. In some instances (cases of difficulty, and involving much labour,) they have been grossly inadequate. The expenses in the Supreme Court Office, I think, are trifling. The Court Fees in particular, as compared with those at Home, are one third less.

2. Do you mean inclusive of Stamps? No—exclusive of Stamps. There are, however, one or two fees in the Prothonotary's Office, which I think should be reduced; especially the Fees on Writs of Execution, which, by the recent Acts abolishing arrest, fall on the Plaintiffs. But the expenses of a suit, if suits are to be decided with care, and according to law, must always (except in small or uncontested cases) be considerable. It is an object of importance, nay it is necessary, to have educated, able, and upright men, as law practitioners. But to get and keep such men, you must remunerate them: and men of a superior description must be paid handsomely. If you present no market for talent, and learning, they will disappear. Pay your lawyers like common Labourers, and they will in the next generation be no better than common Labourers. Much expense, I should observe, in this Court, is saved by the Rule which requires Causes to be set down for different days. In England, fifty or a hundred are entered for the same day—Here, only a limited number can be set down for each day. The chief expense of a suit, therefore, which is for the attendance of witnesses, is thus greatly curtailed.

3. Do you consider that any of the Common Law forms could, with propriety, be dispensed with? The present forms are generally as simple, and as short, as they can well be made. Occasionally there are cases, no doubt, where an extended and complicated series of pleadings become necessary. This, of course, increases expense; but it is not easy to devise a remedy. Such cases are rare.

4. What is your opinion of the Rule, which allows double Replications? The Rule, allowing only one Replication to a Plea, was attended frequently with very great hardship; and, occasionally, it produced irremediable injustice. The only objection to a second is, that it may occasionally be allowed, without adequate cause or reason. This should be guarded against, by the vigilance and care of the Judges.—It ought never to be allowed, except for good cause shown; and to avoid injustice. Where *one* Replication will suffice, a second should of course not be sanctioned.

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5. Could not some means be devised, to prevent false matter from being introduced into pleadings? The only mode, I apprehend, would be, the requiring them to be on oath. I have myself required (in some instances) an affidavit, as to facts sought to be denied, that they were *bond fide* in dispute. On the whole, I think that the power of allowing a second Replication should be sparingly exercised; but that it is a useful power, conducive (when so exercised) to the ends of justice.

His Honor Sir A. Stephen. 1 July, 1847.

6. What is the practice, as to Demurrers? Our Rules require, that every ground of Demurrer should be specially assigned. The opposite party is then at liberty to amend his pleadings, (if it be a case susceptible of amendment,) as a matter of course, without any Order, or even an application to a Judge. This saves time and expense; and I think it a great improvement on the English practice.

7. But as to allowing amendments, after argument? As a general rule, they are not allowed. Where the Court thinks, however, that the point raised was a fair one, and especially where it appears that, on the whole, justice is probably with the failing party, in point of *fact*, the amendment becomes almost a matter of right. The losing party pays costs, as a condition precedent to amending.

8. Would you think it expedient, to prohibit amendments in such cases inflexibly? Such a rule would lead, occasionally, to great injustice. It would also be inconvenient: because a party may have some reason to think, that he is entitled to succeed in point of *law*, even though the facts be as alleged by his adversary. He therefore admits the facts, and by his Demurrer takes the opinion of the Court on the law. The course has this convenience; that, should the Court decide in his favor, further litigation is avoided. Should the Court decide against him, he may then show that he has good grounds for denying the *facts*. In that event, he ought not to be deprived, as an inflexible rule, of the opportunity of disputing them. The general rule, I have already said, is against the party demurring. It is relaxed, only, in a doubtful or difficult case; to meet the ends of justice.

9. Would there not be more convenience, in going to a jury first; and then falling back on the point of law? I certainly think not. That is the very thing, which our Rules endeavor to avoid. I think that it should be prohibited, as much as possible. In my opinion, objections on points of law, especially those on mere points of *pleading*, should be raised at once, or not at all. The Rules which I refer to were framed with this object. It seems to me a most undesirable course, on every account, to allow a party (if you can prevent him) to proceed to trial, and lull his adversary into the belief that the claim or defence is valid, and the proceedings are regular; and then, when heavy expense has been incurred, and much time lost, —having been defeated on the *facts*—turn his adversary round on some defect, which might otherwise have been easily remedied. Our recent Rules in Equity have been framed on the same principle, of compelling legal objections to be taken at an early stage.

10. Are you acquainted with the system of Pleading, established by Sir Francis Forbes? The so-called system of Chief Justice Forbes, was really and in truth no system at all. His Rules were directed against the then cumbrous system of Special Pleading. But, in fact, they only introduced Special Pleading under another name. They substituted for a *Plea*, another written form called a *Notice*. The Rules soon became inoperative; for in the year 1839, when I arrived here, I found them abandoned in practice, by common consent. The new and improved system of English Pleading, (than which, no system can be more admirable,) was introduced, in 1840, at my instance. Sir Francis Forbes's Rules said, that any defendant might plead the General Issue, and give Notice of his intended defence. But this cannot be done, without a statement of some kind; and the principal difference between the two plans is, that ours—with more distinctness and precision—requires the statement to be on the record.

11. What, in your opinion, would be the probable effect of bringing the two parties together, and receiving their statements before a Judge, before pleading? You would require an additional Judge, to get through such a duty. It could hardly be entrusted to an Officer of the Court; because the points to be raised could not be settled, without a knowledge of the law to be applied to them. Anciently, no doubt, all Pleadings were oral; Demurrers included. But the parties pleaded as they thought fit; and the proceedings terminated, by an "*issue*" being evolved, by the mutual altercation. This, it will be observed, was the result of the process, by its own inevitable operation. The Judge interfered, only, to keep the parties to the point. But if, instead of this, he is to enter into facts, and construct a defence from them, he may as well try the case at once. If the statements be made on oath, all the inconveniences will be introduced of a compulsory examination. If not on oath, they will be useless. A Client can scarcely be induced to tell his story truly, even to his Attorney.—He will never do it, voluntarily, to the Judge. And how are objections on points of law to be taken? In my opinion, such a plan would be impracticable. The Judges have the English Rule, allowing parties to agree on the facts, and state them in (what is termed) a *Special Case*: thus avoiding all expense, beyond the argument of that Case. But it is remarkable, that parties cannot be got (either clients, Attorneys, or Counsel,) to agree upon facts. I have known but one such Special Case, in eight years. In some instances, the Judges have recommended a reference to the Court by Special Case; but in vain. In one instance, that of the Banks, Mr. Justice Dickinson urged a reference to a Barrister, to state the facts for the parties. This was objected to. There is a general tendency, in short, as I have always thought, on the part of litigants, (and, I regret to say, in some instances, of those who professionally assist them,) to fight cases out to the last. They admit nothing; and will voluntarily yield nothing.

12. What do you think of examining the parties on oath? If you require a defendant to state facts on oath, you should, in my opinion, equally compel plaintiffs so to state them. Such a system might tend, on the whole, perhaps, to further the ends of justice; provided the Judge, or some competent Officer, examined the parties—and did so, separately and alone. I would permit no interference in such cases;—certainly not by professional advisers. The examination, I think, should be before pleading; or the chance of perjury would be increased, by the parties being tempted to adhere to their previous statements. The plaintiff, however,

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however, would have to furnish allegations in the first instance, as the ground-work for examination. But, whether before or after pleading, the stories will generally be found to conflict; and who is to decide between them? You will be driven, therefore, to the plan of examining the parties at the trial; just as you would an ordinary witness. Whether this be desirable, is a question of expediency, and not of law.

13. Do you not think that, without such an examination, the real facts may in some cases never be come at? Undoubtedly there are such cases. It is nevertheless, however, a question of great difficulty. I should like to know how this system works, in Courts of Requests or Conscience. If perjury be not very common there, in such cases, I might be in favor of the principle in the Supreme Court. The power of examining the parties, I am aware, is supposed to be a great advantage in Arbitrations. There, however, we find people swearing directly in opposition to each other; and sometimes great injustice is done by it. If you make a man confess facts, against himself, it would seem that he ought to be examined in his own favor. But, notwithstanding, I would only allow each party to call his adversary. I incline to think, that the system of compulsory examination might, in many cases, be useful on Interlocutory Proceedings—especially in Chambers. The *affidavit system* is a bad one. We ought to have power to compel men to give evidence on applications, either to the Court or a Judge; and to be cross examined, in every case where they volunteer evidence.

14. It has been stated, that the present mode of moving for New Trials, *on Certificate*, is productive of delay and expense? Much difference of opinion exists on this subject. Understanding, last year, that a majority of the Bar was against the present system, I was about to propose a change; when Mr. Windeyer, in open Court, stated that he believed the opinion of the Bar to be in favor of that system. My own opinion is in its favor. The system, I should observe, is not mine. It was introduced by Sir Francis Forbes, and has been the practice for twenty-one years.

15. Does it not tend to delay? I think not. On the English system, Judgment cannot be obtained, in any case, until the next Term. A Judge, it is true, can authorise immediate Execution. He never does so, however, except in the simplest or clearest cases. But, in this Colony, in every case, (unless stayed by the interposition of a Notice, from the losing party, of a *bond fide* intention to apply for a New Trial,) Judgment is obtained in four days. That Notice states, specifically, the points of objection to the Verdict, or the Judge's Charge; and it must be accompanied by a Barrister's Certificate, which of course is given on honor,—that the points taken are worthy of argument. Owing to the mass of business, of a very heavy character, which came before the Court in the last two years, the Motions for New Trials have largely accumulated. Under ordinary circumstances, however, the New Trial Motions would come on for argument in the next succeeding Term after the trial. In England, the Rule *Nisi* must be asked for, within the first four days of the next Term. To afford opportunity for such Motions, as I have already stated, no Judgment can be given till then. But a Rule *Nisi* is frequently granted, on rather slight grounds; and, in the Queen's Bench, this invariably ties up the cause for a year and a half; or, occasionally, two years. In the other Courts, the delay is about two Terms; or three:—which is greater than our average, until of late.

16. Is there any reason to complain of delays in the Term business? The New Trial Motions, from the press of other business, have got into arrear. I know of no other delays. These will in future be removed, by gradually working that class of business through. But we are introducing other means; such as sitting later during the Term, and extending the Terms. We have recently added seven days to each of the four. In future, also, whatever days can be taken from the Jury days, it is the intention of the Judges to give up to New Trial Motions. The unparalleled length of the two trials, in the case of the Banks of Australia and Australasia, and of the Arguments in the Marquis of Ailsa's case, and the cases of Brown *v.* Norton, and Attorney General *v.* Brown, not to mention the Factory case, and some others, will sufficiently account for the arrears spoken of.

17. As matter of fact, are not Motions for a New Trial frequently interposed, for purposes of delay;—to stave off execution? Have they not, also, been very frequent of late? They are, certainly, very frequent. They are given, I should say, in two-thirds of all the strongly litigated cases. I cannot say that any of the notices have been given for delay. Occasionally, the Judges have not thought the points taken, quite worth the time expended on them. But the Counsel, I am sure, have thought otherwise. The remedy is, the power of *speedy execution*; which, notwithstanding the Certificate, resides in the Judge. That power, of late, has been exercised in several instances; and it would have been exercised in more, had application been made. For, it will be observed, the points taken are still left open for argument. When taken by the parties, however, for delay only, the granting of Execution puts an end to them, in all the cases I have seen.

18. Are the expenses greater than on the English system? They are not more, I think, on the whole: unless it be that, where a Rule *Nisi* is refused, the expense of Briefs and Counsel, on the prevailing side, would be saved. The Judges would alter the present system, I have no doubt, if the opinion of the Profession was, in fact, against it.

19. Does not the English system lead to the taking of fewer points? Probably it does. The Bench, however, has been so much in the habit of paying respect, (I think properly,) to deliberately expressed opinions of the Bar, that I think the Judges would be very loath to shut out a Counsel, from any point on which he might assure us that he confidently relied.—Counsel, however, do occasionally entertain too confident a reliance, on points raised by them. The anxiety of the Bench, to hear every point discussed, which our very able Bar think proper to be argued, opposes that rigorous system of excluding arguments, which prevails in the Courts at Westminster. Perhaps we have erred, in the exhibition of too much patience:—but this is a fault easily mended.

20. Would there not be an advantage secured, on the English plan, in a better memory on the part of the Judge?—As far as my observation extends, there is little value in this. For

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my own part, I take very full notes; which would recal the facts of any case to my mind, accurately, after the expiration of years. I do not find that contests arise between the Bench and the Bar, as to the facts at a trial. At all events, the instances are very rare. Hon Honor Sir A. Stephen, 1 July, 1847.

21. Is there not a certain pecuniary limit, which restrains the Court in granting New Trials? The ordinary rule is, not to grant a New Trial where the sum is under twenty pounds. But, as the sum recovered, or sought to be recovered, is not the true test of the value in dispute, in a great variety of cases, this rule is by no means without exception. It is the rule not to grant a New Trial, unless the importance of the cause or question justifies it. In cases where money is the sole criterion of value, twenty pounds is the limit.

22. What would be the probable effect, of increasing the amount of that limit? I can hardly say. There is, undoubtedly, a very reprehensible spirit of litigation in this Colony. And I think that that spirit is increased, by the facilities afforded to people of going to law, in the most trivial cases, or to the extent of thirty pounds, in a cheap and familiar Court; where the parties personally litigate, without the fear of costs, and the decisions rest on no certain rule. Pecuniary amount is, however, in very many cases, no test of the importance of a case; and twenty pounds will often be of great importance to a poor suitor, although of very little moment to a litigant of greater means. It is one leading principle, that the misdirection of a Judge should be corrected, in almost all cases; and this may sometimes lead to an undesirable New Trial. The error of a Jury, however, is seldom interfered with; unless it be a serious one, and manifest.

23. Of what use is continued litigation to the parties, in small cases? I dare say, that the sum in contest is absorbed, by the *extra* costs. But it makes all the difference, whether the complaining party shall pay his own costs, merely, or those of both sides. And, should he succeed, he will receive costs from his adversary:—having to pay the *extra* costs *only*.

24. Can you offer any observations, as to the costs of actions generally; and particularly in cases of a common description? I have already stated that, in strongly litigated cases, I do not think the amount of costs too much. Nor are *costs* the crying evil of a Court. Injustice may be had, I dare say, cheap enough. What you want is, to put down quirks and quibbles; to destroy needless and unmeaning forms; to prevent justice from being defeated, or impeded, by technicalities. As to Common Law costs, I can state as an undoubted fact, that strongly contested actions are not profitable to the Attorney. Such cases never were profitable, and never will be. I know one Attorney, who invariably rejects every such case, where he can. The only advantage of Common Law proceedings, to the Attorney, was this; that a heavy suit brought in smaller ones. The easy cases paid him well; and taking the small cases, with the great and the heavy, he earned an income. The Legislature, however, have taken away cases of the former class; or the greater proportion of them. I venture to say, that no Attorney would now gain a livelihood, by Common Law proceedings alone, (supposing most of them to be of the highly litigated class,) if he had in his own office all the litigated cases of the Colony. You may select, indeed, some few heavy cases, chiefly depending upon documentary evidence, or where the facts are easily accessible, and the parties on both sides are well able to pay, which may be exceptions from this rule. But speaking of litigated cases in the mass, I am sure that I am right.

25. Should you approve of a Summary Jurisdiction being attached to the Supreme Court? I should. It has always been my opinion that if cheap law be really wanted, you should make the Superior Tribunal administer it. A summary process is easily contrived. I see no difficulty in attaching a Court of Requests jurisdiction, and the Court of Conscience method and rules of proceeding, to the Supreme Court. I mean, of course, for cases properly the subject of cheap and summary proceedings. In the mass of cases, I do not think the Supreme Court costs heavier than they ought to be. Common cases, for debts not exceeding Ten pounds, should be sued for elsewhere. But, where any amount above that sum was sued for, up to twenty pounds, there might be a Summary Jurisdiction in the Supreme Court. These should be, however, debts properly so called; or cases of that nature. I tried a case of *Trespass* lately, where the damages given were trifling; but the questions were of great importance to the parties, and the case lasted two days. By the authority of the Legislature, (or perhaps that of the Court, by Rules for that purpose,) three distinct scales of costs might be established, according to the amount in dispute. The smaller cases, on the reduced scale, would not pay the Attorney; but the two lower classes together, and the third unitedly, would. The Judges would, I think, not frame Rules of this kind, without specific authority. We do not know how far the exercise of our powers is palatable; and we are not disposed to do anything, pending the uncertainty which exists, whether they may not be taken away. I should myself wish all such matters, after what has passed on the subject of our Rules, to rest with the Legislature.

26. What amount of jurisdiction would you be inclined to recommend? I would confine the jurisdiction of Courts of Requests to ten pounds; and to cases of debt, or contracts of a simple kind. I do not think such Tribunals competent, generally speaking, to investigate complicated questions, or questions of special damage and wrong. It would be better that paltry cases of this description should not be investigated at all. Ordinary questions of debt and contract, most men understand; and very many people are involved, frequently, in such matters. But where questions, beyond that boundary line of unavoidable and daily occurrence, arise between parties,—in their nature difficult and unusual, but not really of importance, to the parties or the public,—people should not be encouraged by cheapness to litigate them. If not worth correct and legitimate decision, such matters should not be decided at all. I would discourage and check litigation, in such cases, by depriving the party of costs, where he did not recover more than a given sum. To prevent injustice, however, I would allow the Judge to certify, that notwithstanding the damages, the case was of sufficient importance to justify the action. But even then, I would only give him reduced costs. I would have one scale of costs, for cases not exceeding £20: another scale for sums ranging between £20 and £50; and a third scale, for sums above £50. I think, however, that it would be desirable, in order to do complete justice, to give the Judge a power of putting a case into either scale, according

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according to its real importance. For this, I must again and again observe, cannot be measured in all cases by the amount awarded by the Jury. As to the details of any such plan, I am not prepared with them at present. Those, however, whose duty it is to legislate, can find no difficulty in framing them.—I think that costs might be restrained, by some system compelling parties to avoid going to trial, where there is no question of fact really in contest; or, in small cases, compelling them to resort to the system of speedy Trial, before a Commissioner. I have found by experience, that it is useless to create any system, *enabling* parties to avoid expense. The system must be compulsory; or litigants will not resort to it. I would deprive parties of the expense of a Supreme Court trial, in every case where they ought to have resorted to a trial before a Commissioner. There is a provision resembling this, in force in England.

27. Has the Supreme Court the requisite machinery for a Summary Jurisdiction? I think it has. But, considering how fully the time of the Judges is already occupied, it is a question how far it would be proper to impose such an additional duty upon them. With an additional Judge, the duty might be done easily.

28. Will you oblige the Committee with a statement of your views, as to the abolition of Supreme Court Fees? That is a question of political expediency; upon which others are quite as competent to form an opinion as I am. It is this; whether the community at large shall wholly defray the expense of administering justice for litigants:—of whom very many become so by their own folly, vice, or knavery. There is this further question; whether the imposition of Fees does not operate, though in a small degree, as a wholesome check on the resort to unnecessary steps in a suit. Whether, also, those who fail in a suit from their own fault, should not specially contribute, by Fees, towards the expense of the Judicature. These two latter questions, I think, have not had their due importance assigned to them.

29. What is your opinion, as to the practicability of a *fixed sum* being paid by each litigant? Such a system would undoubtedly be quite practicable, for no law would be easier. Its recommendation would be, its novelty. Its condemnation is, in my opinion, its glaring injustice. The peaceful would here be confounded with the litigious; the innocent with the guilty. A man would be punished, because some rogue did not, without compulsion, yield him his just claim. The plan, in one respect, would be impracticable; that is, if it were necessary to establish a just rate, for every case. On the other hand, if all cases are to be paid for alike, the short and the protracted, the simple and the most complicated, by one undiscriminating rule, that difficulty of course vanishes. For my part, I do not see how any medium rate could be hit upon. Cases vary infinitely: and a litigious man generally takes many unnecessary steps in a cause. This leads me to mention, that I have often thought a great check on formal, vexatious, paltry, and technical objections, would be afforded, by never *allowing costs* to a party, who succeeds by any such objection. In the majority of cases, I believe that technical difficulties are interposed, not merely without regard to the justice of the cause, but without any view to its final disposal:—and, if costs were invariably refused, I think that such difficulties would seldom be made. Many Judges, however, give costs in such cases, (and very often they are given unavoidably, as the law now stands,) in order to encourage regularity and precision.

FRIDAY, 2 JULY, 1847.

Present:—

W. C. WENTWORTH, Esq., IN THE CHAIR,

CHARLES COWPER, Esq., | THE ATTORNEY GENERAL.

His Honor the Chief Justice examined in continuation of previous evidence:—

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1. The Committee are desirous of hearing your Honor's opinion, as to proceedings and expenses on the Equity side of the Court; and more particularly as to Bills? I think that, in the great majority of cases, a Bill will be found indispensable. In many instances, however, I am of opinion that a Bill is altogether unnecessary. I have no doubt, moreover, that the expenses in Equity Proceedings might be materially diminished. It has often been suggested, that a Bill might be advantageously shortened, by the omission of the Interrogatories. But, under the present system of *answering*, Interrogatories could not be dispensed with; at all events, in some cases. With a new system for taking Answers, they would be superfluous in every case. The chief defect in Equity Proceedings is, the mode of Answering. I conceive that a system more effectual for evading justice, and concealing or mystifying the truth, could hardly have been devised. The first reform, if any be adopted, should be the entire subversion of that system. The proceeding is this—The plaintiff states his own case, and he suggests or pretends one for the defendant. He then requires the defendant to state fully the truth on all the matters thus alleged. The obvious course would thereupon have been, one would think, after giving the defendant reasonable time for consideration, to call him in accordingly before an Officer of the Court, or a Judge, and examine him *viva voce* on those allegations. Instead of this, the plan is as follows—The defendant states the facts to his Attorney; and that Attorney, by the aid of Counsel, then constructs a skilful Answer, in due form; which, avoiding all risk of Perjury, tells as little of the case as possible:—or rather, admits as little as the defendant can, and puts the client's case in its most favorable light. It is a complete art, to draw an Answer well. Care is taken, as far as possible, to let no admission stand alone, without some addition or qualification to impair its effect. Answers so drawn are of course occasionally insufficient and defective. That is the natural result of such a system; though checked, of course, by the fear of heavy costs. Then there follow Exceptions to the Answer; and these are argued by Counsel. If allowed, the defendant has thereupon to answer more fully. This, however, he again does by the aid of Counsel, and by

by a newly concocted written defence. I do not mean, nor would I have it inferred, that the concealments are the suggestions, or the work of the professional men. I mean, only, that where a defendant is resolved to give trouble, or evade the truth, the assistance afforded by them in preparing the Answer, from his instructions, is well calculated to ensure him success. It is not for *them* to cross-examine; and if the Attorney finds a discrepancy, he of course points it out to his client, before the Answer is completed. Such a system, in spite of the wisdom of ages, is surely a very complex, inadequate, and inconvenient one; to say the least of it.

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2. What is your opinion, as to the necessity of the defendant's attending for examination; and its consequent expense? I think there is no reasonable objection to such a course. The defendant must come to town, at all events, to see his Attorney:—Or, if he does not, he endangers his defence. I believe that he does, almost invariably, come to town for the purpose.

3. Would this be necessary in all cases? In some few cases it might not be. It would be no difficult matter, however, to have the defendant examined before a Commissioner. I still think that the defendant, generally, could easily come to town; just as he comes now, or ought to come, to instruct his Attorney. But anything is better, if the mere truth be desired, than allowing the defendant to concoct his own written Answer, at his leisure, and with professional aid. The whole truth is seldom gained, even from a witness (that is, where he is not cross-examined,) by written evidence. We allow such evidence in cases of necessity, but not otherwise.—But what sort of examination is that, which is conducted by Answers from the defendant, to letters from his own Attorney? I know, from experience, how difficult it is to extract facts from a client, even by personal communication. With no bad design, men are frequently very obtuse, in seeing the points to which they ought to direct their attention. How must this difficulty be increased, where personal communication does not take place! The defendant may misunderstand the statement; or be too full on some points, and too scanty on others. The Attorney, on his part, may make mistakes, in putting his client's Answer into legal shape. So that, between the two, it appears clear to me that anything but the ends of truth would be served, by such a proceeding. I feel equally persuaded of this:—that were a new system to be now devised for getting facts from a defendant, (in the absence of any existing practice, to which men become wedded who are used to it,) no reflecting or experienced man would hit upon such a system as the present; with the view of extracting truth fully by it, from an unwilling, cunning, or dishonest defendant.

4. But, as to defendants who fall within neither of those descriptions? In all such cases, *viva voce* examination might be dispensed with; and, to meet such cases, the plaintiff should be allowed to accept a written Answer. In fact, the present system of answering is equally embarrassing, to an honest and well-disposed defendant. But, in most cases of that kind, you might dispense with making such men defendants at all. These suggestions, I should state to the Committee, are not original, but rest on authority of more value than mine. I am merely adopting the opinions of an experienced Equity Pleader, of twenty years' standing; whose pamphlet on Equity reforms, I hold in my hand. Its author is Mr. Garratt; a man of distinguished talent, now retired from the Equity Bar; but who had a very large and extensive practice, in my time, as a draftsman. His thorough acquaintance with the subject, and complete freedom from all influence or interested views, induce me to consider his opinions as entitled to very great respect. His plan, for dispensing with certain classes of defendants, is this. In all merely formal cases, and particularly where persons have only remote or contingent interests, Mr. Garratt would have them simply served with a *Notice*; leaving them at liberty to come in, and object to the suit, if they think fit. The Court here has already, at my instance, acted on the suggestions contained in this pamphlet, by altering the mode of taking the evidence of witnesses. Now every man must be sensible that, at the commencement of any new system, there will always be difficulties. But, in cases like this, the Attorneys and the Bar suffer inconvenience by the change; and no new system, therefore, can be palatable, or ever will be, to them. The Officers of the Court, too, are put out of their old paths by it. Yet these are the persons, by whom it has to be worked out. Nevertheless, on the whole, I believe that the changes have worked well. And if men would only strive to perfect, or improve the system, instead of carping at or abusing it, because it is new, or gives trouble, I am confident that it would soon obtain unanimous approval, and be attended with even greater benefits than at present. Lord Langdale says, speaking of the objectionable form of Equity Pleadings—"There are "Bills so framed, and relating to matters so complicated, and as to which it is so difficult to "ascertain, and express, the state of the defendant's knowledge and belief, that the Counsel "hardly knows how to frame an Answer, which shall express the truth, and yet not be "objectionable, either for its insufficiency or redundancy."—I cite this from Mr. Garratt's pamphlet, p. 52. In an Injunction suit, the defendant is frequently very anxious to answer fully; but I knew a man, in such a case, in this Court, kept many months out of his money, after a Judgment obtained at Law, by successful Exceptions to two Answers—in each of which, I believe, he meant to answer fully.

5. How long has the system been in operation, of examining, and cross-examining witnesses, *viva voce*? The present one has been in force just two years. A system similar in principle, however, was introduced at the suggestion of Mr. Justice Willis, (himself an Equity Lawyer, and the author of a work on Interrogatories in Equity,) in the year 1838. That plan was both expensive and inconvenient; because it required the witness to be personally examined, at the Hearing. This, with the discussion of objections on the evidence, wasted the time of the Court, and was attended with great expense; as all the Counsel, on both sides, took part in the arguments—and the main questions were thus delayed. On the present plan, the examinations are before the Master. It therefore merely substitutes a *viva voce* examination, in the presence of both parties, for the old method of written Interrogatories, answered secretly before the same officer, in the absence of the parties.

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6. How are objections to the evidence disposed of? By the Master; subject to an Appeal to the Equity Judge.

7. Is not that Appellate Jurisdiction a fruitful source of expense? Certainly not. I have not heard, in fact, any complaint respecting the receipt, or rejection of evidence before the Master. I recollect, at least, no such instance. But the Equity Judge is more competent to answer this question.

8. Is it not manifest that, if parties want delay, the Appellate Jurisdiction affords the means of procrastination? No. There is no distinct or separate Appeal on such points; but the Master's decision is impugned, if at all, at the Hearing. The rule is, for the Master to receive the evidence tendered, where there is any room for doubt; and thus, whether the evidence be hold inadmissible, at the Hearing, or whether it be then admitted, no mischief is done. I do not think that a single cause has been postponed, hitherto, on account of any objection to evidence. But, even had difficulties been experienced, or admitting that difficulties exist, I may observe that no system is at once discovered, and made perfect. The question is, which is the best system, on the balance of difficulties.

9. Have there been many causes decided, to which the system of which you speak has been applied? I should say a great many—the greater number of causes, certainly, during the last two years.

10. To revert to your Honor's suggestion, as to dispensing with defendants. Where a person receives *Notice*, how is he to come in and defend? In ninety-nine cases out of a hundred, such persons will not want to come in; for they can have nothing to gain by it. Where they do, however, I would allow them (at their own instance) to be made parties, by Amendment of the Bill. But I would give them no costs, unless the Judge saw that they had good cause for coming in; and if they came in vexatiously, I would make them pay the costs of the Amendment.

11. How would you class Trustees? I am quite unprepared to go into every detail of such a system. It would require much thought and labor. I am now merely suggesting the outline. There are cases, where a Trustee is the substantial party; and, having the legal estate, he might be a necessary party on the record, in all cases. I am not quite sure, however, as to this.

12. Would not your system be an entire abandonment of the rule in Equity, which requires all parties interested to be present? All that a Court of Equity need require is, that all parties who may be affected by the Decree should have notice. This is the reason assigned, for such persons being made parties on the record. The same object would be kept in view, but be sought by different means. There can be no adequate reason, for their coming before the Court. The only use of their being there is, to increase expenses, by some two or three Counsel holding what is called a Consent Brief.

13. How is the Court to know who the parties interested are? There may be a difficulty, in some cases, in providing against possible surprise on parties; and, without fuller consideration, I am not prepared to say how this may be met. I will assume, however, that this difficulty exists equally in all cases. If so, it is not got rid of by the present system. If the Pleadings, under the present system, do not disclose the interests of a third party, the Court can know nothing of them now. There would be no difficulty introduced, therefore, by the new system. The plaintiff would have to disclose his case, under the new system, quite as fully as he has to disclose it now.

14. What form of Notice should the parties receive? That is a matter of detail. It should be ample for the purposes of Notice.

15. Should they not receive a copy of the Bill? In general, I think not. In most cases, every requisite amount of information might be comprised in a sheet of foolscap. I do not shut my eyes, however, to this consideration; which forms the main difficulty, inherent in every plan of reform in law proceedings;—namely, that in proportion as you diminish *expense*, so do you (as a general rule) incur the risk of diminishing security, for the rights of either the litigants, or other persons. The more that law proceedings exhibit caution, and care, in guarding against every possible risk of injustice, or injury, direct or contingent, the greater is their expense. The question is, whether the existing Equity system has not erred on the side of excessive caution: whether less would not attain the ends of justice; whether, at all events, we might not attain the same ends by less costly means.

16. Would you be good enough to give some instances, in which Bills might be dispensed with? I think that they might be dispensed with, in all common cases:—in cases of Foreclosure, for instance. Until of late years, a person having conflicting claims upon him, could purchase safety at the expense, only, of a Bill of Interpleader. Now, however, the end is attained by a simple Common Law process; compelling the respective claimants to appear before a Judge, who summarily adjudicates between them. I know no reason why the same process, or system, should not be applied to cases of Foreclosure. I would say, indeed, that I think this Common Law mode of inquiry, (by Summons before a Judge, or before the Master,) might be extensively introduced, with great advantage, into the practice in Equity. The plan is this.—A party obtains a Summons from a Judge, upon affidavits,—or, sometimes, without any affidavit,—stating his case, and the grounds on which he applies. The opposite party, or the parties interested, are then summoned to shew cause, on a given day, why the particular thing should not be done which is asked for. If the parties oppose the application, they appear on that day with their Attorney or Counsel, and shew cause against the Order; and it is granted or refused forthwith, accordingly. If they do not appear, the Judge, (on proof that they have had Notice,) proceeds *ex parte*. On the Common Law side of the Court, we dispose of questions in this manner, at an expense of £10 or £15, which, on the Equity side of the Court, would cost £80 or £100. I will mention a recent instance. The simple question arose, in a suit on the Equity side of the Court, whether it was for the benefit of the infants interested, that a certain mortgage should be renewed or not, at a less rate of interest.

interest. By the Common Law process suggested, this question might have been settled satisfactorily, after Notice given to every possible party, in ten days, at an expense of certainly not more than £15. It was not disposed of, on the Equity side of the Court, until after an inquiry which lasted some weeks, and at a cost exceeding £100. The whole system in the Master's Office, (being strictly the English system,) of Warrants, and Reports, Attending on draft Reports, Bringing in Proposals, and Counter Proposals, and States of Facts, and taking Evidence thereon, admits of large reform.

His Honor Sir A. Stephen. 2 July, 1917.

17. As to Bills of Revivor, and Supplemental Bills. Are they not attended with great expense and delay? They are. I am not prepared to say, however, that they can in all cases be dispensed with. But certainly in many, the object could be just as well attained by a Suggestion, or Memorandum on the record. A provision to this effect has been made, in the case of a plaintiff or defendant becoming *insolvent*, or an Assignee, and certain other Representative parties, being changed during a suit. I do not see why, in all similar cases, the necessity of a new Bill or Answer should not be dispensed with. The introduction of an Executor, Administrator, or Heir, I conceive, should be effected by similar means.

18. Would you not substitute a Petition for a Bill, in some cases? I would in some instances. I see no reason for requiring a Bill, in many cases, before appointing a Guardian. But the general rule is, to require a Bill to be filed before you appoint one. It is dispensed with, where the property is small. But if it can be dispensed with in one case, I do not understand why it might not be in all. The Court could direct a Bill to be filed, in cases where they should think one really necessary.

19. Is there any other case, where you think a Petition might be substituted for a Bill? No other instance occurs to me at this moment. The changing of Trustees, or appointing of casual and formal Trustees, might in all instances, perhaps, be on Petition. But, in many cases, I suspect that the *Petition* would merely be a Bill, under another name.

20. Is your Honor of opinion, that if a fixed fee were allowed to the draftsman, in all cases, the Pleadings would be much curtailed, and considerable expense be saved? I can only answer the question in this way. I think any system a bad one, which pays a man (whatever his employment,) by the mere length of his operations, without reference to their difficulty, skill, and value. However honorable a man may be, there should be no such temptation to prolong his work. There should be none to the Counsel, or the Attorney, to prolong Equity Pleadings, any more than to prolong Trials—in Equity or at Law. A draftsman, therefore, should not be paid merely according to the length of his Pleadings. I have always thought, that the system of payment *per folio* was a bad one. But I do not see the justice, or the policy, of an unvarying *fixed fee*. Gordian knots should not be cut, when they can be untied. The Master should consider the nature of the case; its difficulty, and the skill exhibited; and the fee should be large or small accordingly. The length of the operation would thus not be put aside. It would be a matter to be considered; but not the only matter. The same as to Conveyancing. The Attorney is at present paid by the folio:—so that, where he has to draw a difficult Conveyance, he must make it lengthy, or it will not remunerate him. It is the system which is in fault; not the Attorney. I mean not the most distant reflection on Counsel, when I say, that (for the reason and on the principle explained,) the system of Refreshing Fees, or *Refreshers*, as they are termed, is equally objectionable. It is a very great mistake, to be niggardly to a learned and pains-taking Advocate. His fee with the Brief should be liberal:—in proportion to the difficulty of the cause, its importance, and also its probable or proper duration. But, whether the trial lasted a greater or a less time, in fact, the fee should remain the same.

21. Does your Honor think it would be of advantage, should an additional Judge be appointed, that his time should be wholly devoted to Equity business? If an Equity Judge were appointed, (especially one from the Equity Bar,) who would also take the Insolvency and Ecclesiastical Jurisdictions, exclusively of the other Judges, it would in my opinion be an advantage, to give the remaining three Judges the Common Law duties only. The difficulty is, as to Appeals. If you allowed Appeals to the four Judges unitedly, or to the three Common Law Judges, these last would not obtain much relief by the arrangement. With the very best Judge, you must expect dissenting and complaining suitors; and my opinion on the whole is, that they should in Equity suits appeal to England. No doubt, the delay and expense will be great: but litigation will be restrained by it; and the decision will be more satisfactory. For you must recollect, that the Appeal here would be, from a Judge familiar with Equity, to others who for the most part know only its principles, and will generally be deficient on points of Pleading and Practice. The Equity Judge might take some other duty in addition; a share of the Criminal business, or of the Circuits. The appointment of a fourth Judge will be necessary, if an additional Circuit be established, or if other additional duties be given to the Court. With a fourth Judge, no doubt additional duties might be discharged. I must frankly say, that there is too much labor imposed, at present, on the Judges—more than is fairly remunerated by their incomes; and more, indeed, than is compatible with due regard to their health.

22. What is your opinion, as to the taxing of charges for Conveyancing? I think that such a plan might be desirable, provided you introduce the principle of paying men, not according to mere length, but to necessary or proper length—in other words, according to actual labor, skill, and value. I would also introduce the short forms of conveyance, provided in the recent English Acts.

23. What rule would you prescribe as to the licensing of Conveyancers? Every Attorney is presumed to have a competent knowledge of Conveyancing; and, for some years past, questions in that branch have been always put to Clerks, before admission on the Roll. I think that Conveyancing should, by law, be restricted to duly qualified persons. I know few measures, which would eventually be found more beneficial to the Community. I would allow none to practise Conveyancing, or prepare any Deed or Instrument, for reward, but competent

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competent and reputable persons:—Barristers, Attorneys, and others (if such there be) who can shew, on examination, that they possess the requisite qualifications and knowledge. The latter class should be obliged to take out a License, renewable annually. I would prohibit all others from practising. I am sure that frauds are occasionally perpetrated, and mistakes often, by ignorant and unfit persons; and the chief mischief in these cases is, that the misconduct or ignorance of the party is not discovered, until the application of a remedy has become impracticable.

TUESDAY, 20 JULY, 1847.

Present:—

WILLIAM CHARLES WENTWORTH, Esq., IN THE CHAIR,

CHARLES COWPER, Esq.

James Norton, Esquire, called in and examined:—

J. Norton, Esq. 20 July, 1847.

1. What is your opinion of the proposed amalgamation of the legal profession? I think if a Bar, to be composed of learned and intelligent men of sufficient strength to prevent combination unfair to the interests of the suitors, could be supported, the proposed amalgamation ought not to take place.
2. Do you think the country can support a Bar? I am inclined to think that the practice is not at this time sufficient to support a Bar; and, beyond Chamber practice for two or three Equity and Conveyancing Barristers, I do not apprehend that the practice is likely to increase for some years.
3. There is so little practice? The practice has fallen off very much, and I believe that many of the issues which are now in course of trial, have arisen out of a loose state of Colonial engagements, that has for a time, at least, passed away.
4. Do you suppose that the present state of things is attended with any great additional, or any additional expense to the public? If the Attorney were, in the absence of a Bar, to charge the fees of the Barrister in addition to his own, and if the pleadings now used were to be continued, an expense would not be saved by the abolition of the Bar. But if it should be found that a Bar could not be supported, or, in other words, that the expense was beyond the means of the suitors, then, by an adaptation of the practice to the means of the Colony, I have no doubt that much expense might be avoided.
5. What do you mean by a different kind of pleading,—do you suppose the Judges would alter their rules? I think that a system of pleading, and rules of a less artificial character must, in such case, be established for the government both of the Bench and Practitioners.
6. Do you think that there should be a Bar even though it entailed some additional expense? I have no doubt that a Bar would be desirable if the country could afford it.
7. What do you consider constitutes the importance of the Bar? The education and independence of its members, and the division of labor by which Barristers are exempted from the laborious details which belong to the practice of Attorneys.
8. You think the importance of the Bar consists in its greater efficiency? They are able to devote their attentions to matters of law.
9. It is your opinion that if the profession were amalgamated, business would not be conducted with as much precision and efficiency as at present? It is.
10. What alteration do you suppose would necessarily take place in the practice of the Courts in the event of an amalgamation of the profession? I think that pleadings must be introduced, possibly but little differing from the pleadings used in England twenty years ago.
11. Do you imagine that the old system of pleading,—that which formerly prevailed in England,—was simpler than the present? I do. The issue was not narrowed down to one or two simple questions as by the pleadings now in use, which in effect dispose of the greater part of the questions between the parties; and if conducted by incompetent pleaders might be productive of the greatest injustice.
12. The general issue for instance admitted any defence? Yes, with some exceptions.
13. Was it not the result of that state of things that the opposite party was apt to be taken by surprise? No doubt; and, therefore, it was important in England to raise, and as far as possible dispose of, the questions on the pleadings. It was also of great importance in England, where the Judges have so many causes to try, that the issues should be limited to the narrowest possible point. But it is of vast importance that the pleaders who reduce the questions to this point should be highly qualified to discharge their duty. I do not think that plaintiffs have much ground to complain of the surprise the defence may occasion them. They ought to know the grounds on which they claim, and they proceed with their cases at the time they are best prepared with evidence to support the facts within their knowledge, or on which they rely. I have also known a defendant, under the present rule,—that a party shall not plead several matters without the leave of a Judge,—to be much embarrassed by the refusal of a Judge to allow him to plead the several matters which his Counsel and Attorney had advised to be necessary for his defence, under the evidence that was likely to be offered at the trial. And I do not think that a Judge ought to be called upon, or entitled to look sufficiently into a case during the pleadings, to determine what pleas are necessary or proper.

14. You think the country will not long be able to support a Bar? I see nothing to warrant the opinion that the country will, within any reasonable time, be able to support an efficient Bar. J. Norton, Esq.

15. What would you substitute for a Bar? Nothing can, I think, be substituted, but the adaptation of the rules and practice to the skill and qualification of the general practitioner. 29 July, 1847.

16. By a more circuitous course of proceeding? By less technically disposing of the question on the pleadings.

17. Do you think, by the present system of pleading, the costs have been increased or diminished? I do not think the costs are so much as they were fifteen years ago.

18. You think the system now in force cheaper than the old system? I do; the expense of witnesses is certainly less.

19. Suppose the Bar were done away with, do you think the costs of suits would be greater or smaller? If the pleadings were suited to the qualifications of the practitioners, I think the costs would be less.

20. Do you recollect the system that was introduced here by Sir Francis Forbes? I do.

21. Would you recur to that system, the system of notices, or would you recur to the old system of special pleading? I think a system of pleading might easily be constructed on the late English system. It must be remembered that that system existed in England when there was a most competent Bar, and it would possibly never have been altered but for the necessity occasioned by the increasing engagements of England of adding to the number of the Judges, or reducing that of the questions to be brought before them. It obviously takes less time for a Judge and Jury to determine whether the defendant paid the debt, or performed a contract, which is admitted in the pleadings to have existed, than to ascertain first whether there was a debt or a contract, and afterwards to dispose of the various matters urged in defence.

22. No doubt it would be more difficult for a Judge to try, for if beaten from one point you might take up another, and change your ground, like men upon a field of battle, who when driven from one part fly to another, and do not acknowledge themselves to be vanquished until beaten from all? Certainly.

23. Do you not think narrowing the field of battle would be of advantage to all parties in saving the expense? Most desirable with a qualified Bar. It is obvious that the questions to be submitted to a Jury can neither be too few nor too simple, but the issues for their determination in the present pleadings, if not very clearly put, may lead to great misapprehension on their parts.

24. Do you think it would act beneficially if we had a Bar equally skilful with the Bar in England? Not without you had the Bench of England also.

25. Do you not think in the present practice it would be advantageous to train up a Bar? If the Colony could support a Bar, it would be extremely unjust towards the rising generation that they should be disqualified to act without an English education.

26. How long is it since there has been any complaint that the business of the Court is decreasing? In 1840, upwards of five thousand actions at law were commenced in the Supreme Court; in 1841, upwards of nine thousand seven hundred; in 1842, six thousand; in 1843, seven thousand; while in 1845, two thousand only were commenced; and in 1846, not above one thousand five hundred.

27. But the years of insolvency created a great deal of business? No doubt they did; but the business is now abridged, by the extreme caution of all parties in entering into engagements; and if credit be given, they rather bear with grievances than have recourse to law.

28. *By Mr. Cowper:* Have you not frightened people from going to law, by the great expense attendant upon it? People now endeavour to avoid not only unreasonable expense, but all expense.

29. *By the Chairman:* Is not that the cause—that it is a very general impression with the public that the expenses are enormous? The impression is erroneous, however general it may be. The unwillingness of parties to litigate is attributable to their diminished means and increased caution. Where £100 was formerly paid, without an observation, the sum of £40 is, for the same work, now considered extravagant and ruinous. Parties who formerly directed ten or fifteen actions to be commenced, now hesitate about one; they issue and countermand instructions, and generally settle or compromise a suit in its first stage.

30. You do not think it is the increased expense which deters people from going to law? No; the caution, not the expense, has increased.

31. *By Mr. Cowper:* Do you think there is less money spent in law now than there was two years ago? I do not believe that one quarter of the amount is now spent in law proceedings.

32. But in other branches? I believe this to be the case in every branch of the profession.

33. *By the Chairman:* Is it not notorious that the Equity business has increased very much of late years? Three or four years ago many suits of foreclosure were brought, but as all mortgages now contain powers of sale, such suits are almost at an end. The suits which arise out of trusts, and under wills, have, no doubt, increased, and the necessity which frequently occurs of making a vast number of persons parties to the suit, occasions the expense of the whole proceeding to be considerable, and, in some cases, heavy; but when it is considered that very many several interests are in such cases settled and determined, I do not apprehend that the costs payable in respect of each several interest are generally too heavy. I do, however, think that the Equity practice may be, in many respects, beneficially altered; I think that disputed questions of title may be settled on agreed facts, without Bill or Answer. This might be done on Petition, and the practice would greatly facilitate the transfer of real property, and dispose of questions peculiar to the Colony. I also think, that instead of the present mode of objecting to evidence, its admissibility might be argued with the merits of the case, by which great loss of time and heavy costs would be avoided.

34. You think the expenses in Equity are outrageous? The expense is greater than the country can afford, and, in some cases, than the benefit to the suitor can warrant; and not

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less objectionable is the delay. In a recent case, that of the appointment of a Guardian for Rosina Wilson, an infant of the age of thirteen years, the inquiry, and the argument of exceptions, and the judgment, occupied two years, during which period this young person was left under the care of a party whom the Court determined not to be a proper party to have charge of her person, and to direct her education; she, in the meantime, having lost the years most important to her future well-being.

35. It was a very simple inquiry, I believe,—whether A or B were the fittest person to be trustee to an infant? The inquiry ought to have been simple.

36. You think this case might have been disposed of easily in a month? It ought to have been determined within that period.

37. As a matter of fact it has lasted eighteen months? The inquiry lasted two years. Another inquiry is now before the Court, and this young person is still under the care of the party with whom she resided at the time the inquiry was originally instituted.

38. And the appointment is not finally made? An appointment has been made for some weeks, but no order directing a compliance with it.

39. What was the value of the estate of that infant? I think about £300 a year.

40. What do you suppose will be the expense of this inquiry? Upwards of £800.

41. Will that be paid out of the infant's estate? The Court has expressed an opinion that the costs should be paid out of the estate.

42. Supposing the profession were amalgamated, and supposing the present system were persevered in by the Judges, do you think suits would cost the suitors less? Perhaps not, but I have no doubt that the suitors would in fact pay a less sum to their own Attorneys.

43. Supposing the Bar were done away with, and the old system of pleading were recurred to, would suits then cost less than they used to do? I think they would be fairly capable of being taxed at a great deal less.

44. Then whether they would cost more or less would depend upon the efficiency of the taxing officer? The taxing officer would be bound by the rules and judgment of the Court, and on exceptions to his taxation the Court would settle the allowance.

45. As a matter of fact, when Attorneys and Solicitors acted as Barristers, did they charge less than the Bar now receive,—did they mark less upon a brief for instance? The Attorney considered and made up his mind upon the case, and that without any extra charge. His views have now to be communicated to, and considered by Counsel, for which a consultation fee is paid. These consultations are often numerous, and occasion the advance of heavy fees which are in many cases disallowed on taxation against the losing party, and therefore fall on the successful one.

46. He would charge a great many more attendances than he does now? I do not see why. The charge also for attendances is generally small, and affords but a slender remuneration for the time they really occupy.

47. *By Mr. Cowper:* I believe the Attorney is very well paid for conveyancing? I do not think that Attorneys are generally well paid for conveyances. Certainly not in those cases in which the costs are heavy, which are always cases of unappreciable trouble and care, and it would be utterly absurd to contend that their reward is at any time commensurate with the risk to which their legal responsibility exposes them.

48. *By the Chairman:* Are you not aware that the public are of opinion that that branch of the profession is frightfully expensive? The public are incapable of forming a correct opinion upon the subject. In cases of difficulty the Attorney is often occupied for weeks, and even months, in making tedious and expensive searches and inquiries, and curing innumerable defects in the title; and many days are generally occupied in disposing of the matters disclosed by the Registry Office. It may not here be out of place to offer a few observations on a subject on which a great deal of misapprehension prevails. It is very generally believed that the expense of conveyances is wholly dependant on the tautology and verbiage generally found in the old deeds; and that by reducing deeds to the simplest forms, which, in the opinion of those who entertain this belief, may be sufficient to effect the transfer intended, the great expense of conveyances would be avoided. This opinion results from the profoundest ignorance. That the forms used in conveyances may be improved and abridged, I have long been persuaded; their prolixity however adds but little to the expense, and has, like the Latin prescriptions of physicians, the advantage of concealing from persons who are incompetent to the task of preparing transfers of land, the real operation of the instrument, and to a great extent of preventing them from meddling with things they cannot deal with, and from preparing imperfect and inoperative deeds, whereby they would make a large addition to a real, and not an imaginary grievance. Materially to abridge the expense of conveyances, you must deprive parties of their right to deal with their own property. You must compel mortgagees to lend on insufficient security; and though last, not least, you must prevent unqualified persons from dealing with matters they are unacquainted with; and, as a necessary consequence, offer to gentlemen of education and character, the compensation their labors and services give them a just claim to. Who, I would ask, is entitled to say that a person seized of an estate has not a right to mortgage it three, four, or five times over—that he is not at liberty to make it the subject of a marriage or other settlement, and that (subject to such mortgages) each of the mortgagees has not a several right to mortgage or sell his mortgage—that if any such mortgage be paid off by a third party it would not be absolutely necessary for the security of such party that the mortgage taken up by him be kept up to prevent the claims of other parties from taking an undue precedence? And who shall guard against the conflicting interests which arise out of the insolvency of all or any of the parties claiming such various interests in the property? Is this difficult duty to be performed by persons ignorant of the meaning and operation of common forms? And I would again ask, what are those objectionable forms but the achievement of most learned and able English lawyers, gentlemen who have felt compelled to sacrifice elegance of expression to certainty of

of meaning. Lawyers who have laboriously, I admit, but successfully prevented in conveyances the necessity of that constant application to the Court of Chancery, which has been ever occasioned by the simple language used in the construction of Wills; and which will ever result from the preparation of documents by parties too ignorant to comprehend the operation and meaning of the instrument submitted to their examination. J. Norton, Esq. 20 July, 1847.

49 You think if the Bar were amalgamated, and the old system were recurred to, there would be a great saving in consultations—would there be a saving in anything else? I believe that without a Bar, the Attorneys would bring their causes to issue at much less than the present expense, and that they would be better paid than they now are. Their losses also (always considerable) would be comparatively light, as they would not include the heavy advances now made by them to Counsel.

50. What do you think would be the effect of this altered state of circumstances on the public—do you not think that what the suitor might gain by reduced charges, would be lost by mistakes—would the public on the whole be gainers or losers? It is not easy to say how far the suitors might be affected, even if mistakes were made. The practice must be governed by what the country can afford. I have no doubt that the system of the Americans is inferior to that of the English, but who can question the propriety of their continuing, under their circumstances, their present practice.

51. As a matter of fact there is virtually a Bar in America? This was in some measure the case in this Colony, before the creation of the Bar. Practitioners held Briefs in cases in which they did not act as Attorneys.

53. I mean to say that there are in America, many eminent men who do the Bar business only? No doubt such is, and will be the case in every country or place that can afford it; but there is this difference between such a state of things and a fixed Bar—that qualified parties practise chiefly or solely at the Bar when their services are so required, and they fall back on their general practice at other times. The demand of the public operates, as the atmosphere upon a barometer, and calls them into one or other kind of practice.

53. Would you think it desirable that Conveyancing Bills should be subject to taxation—that the Act in force in England, should be introduced here? It would be very difficult to tax Bills for Conveyancing. Respectable practitioners will not charge too much—and those who are not respectable, may easily devise attendances and work, which will evade the powers of the taxing officer. The direct effect also of such taxation would be, to prevent attendances and inquiries really necessary for the protection of the client's interest. In the practice of the Common Law and Chancery, the work, the subject of taxation, is performed under the eye of a public officer, who is perfectly acquainted with that which is, or ought to be, performed by the Attorney, and his taxation, instead of being, as is vulgarly supposed, the exposure of the villany of the Attorney, is really a certificate that he is fairly entitled to receive the sum allowed by the taxing officer. It is obvious that the taxing officer can have no such knowledge of the labor and performances of the Conveyancer. Even now, when a charge appears in a general Bill for preparing a Conveyance, the taxing officer is obliged to adopt the explanation offered by the Attorney. I see no greater propriety in the taxation of Bills of Costs for Conveyancing, than there would be in the taxing of the Bills of Parcels of merchants, shopkeepers, and tradesmen, which might, no doubt in many cases, be fairly entitled to revision. And I am quite sure that if the labor of the Conveyancer could be duly appreciated, he would have very little occasion to fear any inquiry that could be made into the amount of his charges.

THURSDAY, 21 *JULY*, 1847.

Present:—

WILLIAM CHARLES WENTWORTH, Esq., IN THE CHAIR,
CHARLES COWPER, Esq., | THE ATTORNEY GENERAL.

Archibald Michie, Esq., Barrister at Law, called in and examined:—

1. What is your opinion of the proposed amalgamation of the legal profession? I think, and have always thought, that the amalgamation of the profession in this Colony, would be advantageous to the public; whether it would be advantageous to the profession generally, I am not prepared to say. A. Michie, Esq. 21 July, 1847.

2. In what way would it be advantageous to the public? I believe it would make legal proceedings cheaper; and I feel satisfied that it would increase the security which the public at present have, in the responsibility of their legal agents; because all legal practitioners under the new system, as I apprehend, would have to be responsible for the due discharge of their duty to their clients.

3. You do not mean to say that a man who was acting as a Barrister would be responsible? I mean to say that it is my opinion, that a Barrister, as much as an Attorney, should be responsible for the conscientious and proper discharge of any duty to his principal; and especially of a duty that involves intelligence. I do not mean that he should be responsible for freedom of speech, because I consider *that* to be incidental to the proper discharge of his barristerial duty; but that every agent should be responsible for a proper and sufficient performance of his duty to his principal.

4. You mean that if he were guilty of negligence, he should be punished in his pocket? Yes.

5. You know that the principle of law is directly the reverse of that as regards Barristers? No doubt.

6. Therefore you would recommend a Legislative provision upon the subject? No doubt. I know that in the present state of the law, a Barrister is not liable to an action, even where there has been the grossest negligence.

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7. And I suppose you know this also, that if the two offices were combined according to the doctrine of merger, the lower office would be absorbed in the higher, and not the higher in the lower? You may state the result either way,—that the lower is absorbed in the higher, or the higher in the lower. The public will not care about this, nor need they. They will look only to the substantial good resulting from the arrangement; and if that is in their favor, they will have no objection to your *describing* the change as you please.

8. Is it not a principle of law that the lower is always merged in the higher;—for instance, if an Attorney becomes an Advocate he is relieved from the responsibility which now falls upon the Attorney, inasmuch as no responsibility belongs to the higher. Would not the responsibility which now attaches to the lower, be merged in the higher and be lost? I do not see the use of discussing this, when I am assuming that there is a Legislative provision, which will prevent any consequence of merger, and make all who undertake clients' business, responsible to their clients as they ought to be.

9. There must then be a Legislative provision making those responsible who are not responsible now? Of course there must. In stating my own conviction, I would be considered as speaking rather as a citizen, than as a lawyer; as one having to pay money for legal services, not as one to receive money for the same kind of services. I would at once then, although I am aware my evidence on this point is opposed to a cherished privilege of my class, abolish the distinction in this Colony which at present exists between Attorneys and Barristers; the Attorney at present being liable both to the Court in one direction, and to the client in another, for misconduct or negligence, whilst the Barristers are exempt; and I would make the Barrister equally with the Attorney, exposed to this liability. I think if he were an honest man he would not object to it. I have heard some of my learned brethren say, that they thought it objectionable, that Barristers should be exposed to the reprehension of the Court; but I cannot see the matter in this light, for if the Barrister when properly and conscientiously discharging his duty, were to be censured by the Court, he could always fall back upon that which is stronger than any Court—public opinion. If a practitioner is only honest, he may always be as bold as any occasion may require.

10. You think the public would benefit, in a pecuniary point of view, in legal proceedings, by such an amalgamation, because it would reduce the expense? Yes.

11. What do you think would be the efficiency of the profession after such an amalgamation—do you think its efficiency would be increased or decreased—do you think there would be the same skill when men were called upon to do anything, as there is now when they are confined to one department only? I do not think the efficiency of the profession would be diminished by the change, that is to say, the efficiency of those, whom I recognize as the efficient men. They substantially transact all the business now—they would have to do the same thing then. The only difference, as it appears to me, being this—that under the present system, the public are not allowed any choice, but must go, whether they like it or not,—whether necessary or not,—to an Attorney, as the only medium of access to those of the Barristers, whom the public are in the habit of regarding, and employing, as efficient men.

12. You mean to say that those who have acquired skill now would not lose it; but what would be the effect upon the Bar as a school of law? I do not think the effect would be at all injurious, because at the present time those men who are the efficient men, are called upon from the moment they arrive here, to discharge duties which they would never be called upon to do in England;—for instance, a Common Law Barrister who would never think of taking a case into a Court of Equity, would do it here; and if he is tolerably well grounded in his knowledge of law, he soon acquires facility in performing his new task.

13. That is to say, that *ex necessitate* he has done it in a bungling and inefficient manner? That may have been in respect to some of those minute and ridiculous forms of practice, which, even in England itself, enlightened law reformers have swept, and are sweeping away as nuisances, which have been too long tolerated. But I thoroughly believe, that in the main, the plaintiffs and defendants cases have been in Equity suits in this Colony, substantially brought before the Court, and justice done to them on their merits.

14. You seriously do not mean to say that the division of labor which exists in England in the profession, where Common Law, Equity, and Conveyancing are made distinct branches does not superinduce great skill, which could not be acquired without it? No doubt, but it involves, as a consequence, an expense which is more than skill is worth. I believe a greater amount of justice is done in this Colony, in the bungling inefficient style you refer to, than in England at the higher rate that is paid for the higher, and mere technical skill.

15. Do you think, as a general proposition, that too much skill can be applied to a profession so important to the human species as the legal profession? As an abstract proposition, I do not think too much skill can be employed in it, but, generally, when people talk of skill, upon this subject, precision is the thing they really mean; and, practically speaking, I am quite satisfied that you may for the purpose of getting slightly superior skill of this kind, that is, additional precision, run the risk of paying more for it, than it can ever be really worth, in any case, to the client. A single example drawn from the old and vicious, and now abolished system of English pleading, will completely illustrate what I mean. Formerly, and until the new rules of pleading, (founded on the Uniformity of Process Act) were made, which of themselves constituted a great reform in the law, plaintiffs were obliged to state their cause of action frequently in as many as fifteen or sixteen different ways, (each merely varying in a slight degree from the others) and in as many different counts, because if the evidence at the trial varied in the smallest appearance of substance, from the allegations in the Declaration, the plaintiff was nonsuited, as not having proved the precise thing he had set forth in the counts of his Declaration; and this although it would be apparent to every person in Court, that neither the defendant, nor any one else, could have been misled. The very lawyers themselves at length became ashamed of this trifling and injustice, and yet there were very great skill, and ingenuity, and precision, constantly exhibited by the pleaders, in anticipating by almost every possible form of expression, the shape the case would really

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assume in the evidence at the trial, skill which swelled up briefs in the commonest and most trumpery cases, to the thickness of an ordinary octavo volume, for all of which the client had ultimately to pay. And yet nothing was more common than a nonsuit at that time, despite all this skill and precision. At length the simple and sufficient remedy was thought of, of allowing only one count for one cause of action, and one plea for one ground of defence, giving to the Judge at the trial, the power of directing the most liberal amendments of the record, to make it agree with the evidence, and thus a previously fruitful source of nonsuit and consequent injustice was cut off; and clients were saved the cost of these masses of briefs containing the *skill and precision* which this reform I have mentioned has shewn to have been not merely superfluous and unnecessary, but a public mischief, and a nuisance.

16. That is merely the imperfect machinery of the law; but can a man without that division of labor in England, be sufficiently skilful in the principles of the law? I am quite satisfied that he can. Many of the Chancellors taken from the Common Law Bar, have proved as able Equity Judges as ever sat on the Woolsack.

17. You say that this greater precision, which you admit is arrived at by the division of the profession, may be too dearly paid for; but, as a matter of fact, is it too dearly paid for? I think it is; the instance I have given shows it; society in England is rising upon it, and has risen, to put it down. I think, as a matter of fact, it is much too dearly paid for. In England, within the last eighteen months, they have passed an Act for County Courts, in which I see they have introduced a clause, refusing to allow Counsel to go into these Courts, unless upon special motion that they should be employed. I take this as a pretty clear indication, that even in England, it is considered to be a monstrous infliction upon a client, that he cannot be allowed to approach a Court of justice, but with Barrister and Attorney, and the joint precision of both.

18. What has been done in England amounts to this—they considered that litigation, under a certain amount, should be submitted to a summary process, but I take it that the proceedings in the higher Courts, and for larger amounts, are not a bit less expensive than they used to be? I dare say that, with the exception of the big briefs which the old and unreformed system of pleading involved, expenses are not much less; the public outcry is not so great upon them, because the fund out of which these heavy expenses have to come, is almost always much larger; the evil is not then felt in the same degree, and there is not, therefore, so much fault found; but the public sense must always, sooner or later, rise upon a state of things, in which an amount at issue, perhaps £50 or £100, is nearly, sometimes wholly, absorbed by the process of recovering it.

19. This summary jurisdiction that has been created had no doubt become absolutely necessary—but to revert to the supposed benefits of this want of division of labor which you are advocating—as a matter of fact, this want of division of labor exists in this Colony—for a Barrister does everything in every Court here—he does not confine himself either to Equity, Common Law, or any other particular branch—is it not so? Yes; but it is not so much so now as it used to be a few years ago, because we have ampler means now than formerly of distributing the work amongst the men, according to the particular departments, in which they chiefly practise.

20. In consequence of the amalgamation that exists here of the different branches of the Bar, though the skill is undoubtedly less, are the fees smaller? I think the fees are less. Of course I can merely speak historically with reference to the period before the division; but within my own experience, I should say they have become less even since the Equity men, you have mentioned, came out.

21. Then the slight division of labor which has been occasioned by that circumstance has been followed by a diminution rather than increase of the expenses? If you call it division of labor, and look no further, it may appear so.

22. Then the fact is directly opposed to your own conclusion? Only apparently, and that from causes other than those you appear to me to substitute for the real ones. We must ascend to a higher cause to explain the change. The very circumstance that these and many other Barristers have, within the last few years, come out, has greatly increased the positive number of the Bar; and, therefore, although what you call the division of labor, and which I and others call accumulation and multiplication of labor, has always the effect of increasing expense, intrinsically considered; yet, by reason of the much greater number of Barristers in the Colony (in proportion to the work to be done) now than formerly, there is a competition at work, of which the public and the Attorneys may, and do, avail themselves. Attorneys may always make Equity practitioners take less than would have been considered formerly as compensating an Equity practitioner, by reason of the Attorney being able in effect to say,—"I do not value your additional skill so much but that I can go to Mr. So-and-so, who will take so much less than you." So that there is an actual competition at work; and Common Law men are frequently, as one consequence thereof, taken into the Court of Equity. There was a case lately, in which five Common Law men were engaged, and in which neither of the two leading Equity men were employed at all, in the suit, on either side.

23. What do you infer from that? That the fees are lower by virtue of that very competition, which enables the public to get the work done cheaper, not merely by giving from Barrister to Barrister, but from Equity to Common Law Barristers, if the former were to demand larger fees, for what you call their superior skill.

24. I believe there are only two Equity Barristers in the Colony? Only two who consider themselves exclusively Equity Barristers.

25. Would the accession of two mere Common Law Barristers to the Bar here, have produced the same result in the diminution of fees? I cannot, of course, answer that question with any degree of positiveness.

26. Do you think it would? It is impossible for me to say whether it would have produced the same result, unless you can shew me the men.

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27. Would the most efficient Common Law Barristers that could have been selected from the English Bar have produced the same result of lowering the fees in Equity? The same cause would have been in operation, and, although it might not have produced precisely the same result, it would have tended to do so. If you increase the Bar even by one man, who can do his work, you bring into additional operation, that principle of competition I have described.

28. No doubt. You say the Equity fees have manifestly decreased since these two gentlemen came here? I do not think I used the word "manifestly"; your question was, did I think the Equity fees now were lower than formerly? I answered, that I thought they were lower than they had been within my experience, and that I believed this had been caused by the Attorneys being able to say, "we will not submit to a monopoly of Equity practitioners, and "rather than employ them at higher than the usual fees, we will employ Common Law "Barristers;" and I say, that if two of the best Common Law Barristers that could have been selected had come out here, the same principle would, probably, have operated in much the same way.

29. Would two men who were not skilful in that particular branch have produced the same results as two men who are skilful—could they have worked as expeditiously, or as cheaply? The unskilful could not work as expeditiously, but they could, and must, work as cheaply as the skilful; for competition, and the poor circumstances of clients, operating upon a redundant Bar, keep fees always down to a reasonable amount.

30. They must do it now, because there are two men to regulate the fees; they are the standard, and therefore others must conform to the standard? I deny that these two men merely do regulate the fees. I was going on to say that I see the principle I refer to in operation in my particular practice, and have seen it for the last four or five years. Although the Common Law Barrister may not have done Equity business so expeditiously as the man who has been confined to that particular branch for years, yet he has been obliged to do it as cheaply, for this reason, that there is that kind of competition at this Bar as there may be at any Bar where there are more men than there is work for them. On the other hand, monopoly and high fees are prevented in the two Equity practitioners, by reason of the competition of the Common Law Bar, to some of the more skilful and competent of whom Attorneys can always, and frequently do, resort for assistance in Equity suits. A Common Law Barrister finds here that he is occasionally called on in Equity practice, and therefore he soon acquires a knowledge of Equity—not a very difficult labor, if he is only tolerably well grounded in a general knowledge of law. I do not, therefore, think that any particular two men regulate the scale of fees, they contribute to the general competition, and they can hardly do more, unless they *exclusively* possess some knowledge which the public cannot do without. The public have the benefit of the general competition, so far as mere pleading and Barristerial charges go. I have frequently, with a sigh, marked a pleading two guineas, which I felt, from the labor involved in it, ought to be five, but which I have thus marked partly, perhaps, from a reflection that the nature of the suit would not bear anything heavier, and partly because if I had marked a higher fee my client would have been obliged to leave me, and find one who would be content with lower fees for this kind of service. Many such cases arise, of course resulting from our highly technical system of pleading, of the goodness or badness of the principle of which I need not now stop to inquire: but cases, and many of them too, do arise, in which a man has five, or six, or ten guineas worth of labor, in ascertaining whether he shall plead only the general issue, or whether it is necessary to plead specially. In deciding in this respect you are steering between Scylla and Charybdis. If you err in using the general issue, you shut out your client's defence at the trial; if you err in pleading specially, where the general issue is sufficient, your pleading may be demurred to, as amounting to the general issue. The nicest discrimination is frequently necessary to keep you right, and perhaps many cases, in different volumes of Reports, must be carefully considered, and compared. But as the general issue, when drawn, consists of not more than five and thirty words, no one but a pleader can understand, why a high fee should be charged for it; yet in such cases a fee of three guineas may be a very moderate fee for the general issue, and one of the ablest men at our Bar, and a Member of Council, has told me that he has charged three guineas for this shortest of all pleas; wherever he has done so, I have no doubt he has fully earned it; but, at the same time, I have no doubt that he has not been troubled with many general issues in consequence. The competition has compelled others to charge much less, and to do injustice to themselves.

31. Still you have not answered my question—whether there would have been the same diminution of Equity charges if these two gentlemen had not been Equity Barristers? It is quite impossible, it appears to me, that I, or any one else, could answer whether, if some event had not occurred which has occurred, and some other event which has not occurred had taken place, the same results would have followed. It appears to me that Equity charges would have been regulated by the facility of getting Equity proceedings transacted and carried out, with reference to the number of competent men engaged in the work, and to the competition which I have shewn to be always steadily in operation.

32. No doubt; but the actual amount of labor which the bungler bestowed would have been charged for, whereas, now, a party knows that he can go to Mr. Donelly or Mr. Gordon, who make this peculiar branch their sole practice, and would do the business more efficiently, and quite as cheaply, as the bungler? I think the actual amount of labor would not be charged for, for the same principle I have referred to would always interpose. You seem to me to assume that all Common Law Barristers must be equally qualified, or equally ignorant of Equity.

33. I am assuming that a Common Law man is necessarily ignorant of Equity? Then I think, upon such an assumption, treating it as a mere assumption, that the business would be charged for as so much clerical work, and the charges would be lower, because there would not be much skill exercised in framing the particular draft; and the competition in operation would always keep down mechanical, as well as other charges, to the lowest point.

34.

34. It would tend to keep down, to the lowest point, the charges of men who were unaccustomed to the labor, that is to say, to the lowest point that they could perform the labor for? No doubt it would, and of others too, as I think I have shewn. A. Michie, Esq. 21 July, 1847.

35. If I go to a first-rate carpenter for a door, he will make me one for half the money that a rough carpenter or bungler will make it for, and in half the time; the mere jobber would never be able to make such a door as the first-rate carpenter, and yet would charge me more for it? As I have never had any experience in testing their relative skill, I can neither assent to, nor deny your proposition.

36. Is not that a fair illustration of the matter under discussion. You say that there are more Barristers in the country than are wanted, that this over number has a tendency to reduce the rates of fees, and that if the number be increased fees will be reduced still lower; you add, that since these Equity men have come here, there has been a marked reduction in Equity charges, but you have not yet said whether the same reduction would have arisen from the accession of two Common Law Barristers? I would first observe that I did not say "marked" reduction, but that there had been a reduction. I cannot say whether such a result would have taken place in the case supposed; I might, no doubt, theorise upon the subject, and arrive at a conclusion, which would be more or less satisfactory to myself, but I would not give my mere theorising as evidence.

37. If such has been the result of the amalgamation of the different branches of the Bar, what would be the result of an amalgamation of the lower branches of the profession with the higher, giving to the lower branch the power of performing the acts which pertain to the higher, and *vice versâ*? I think one result, and the primary result, would be this,—that it would at once throw all the business that is to be performed in the Colony, into the hands of the efficient men, whether Barristers or Attorneys. I look upon the performance of any legal duty, as, of course, any one else would do, as a duty involving intelligence. By the present system, it is quite evident, that there may exist, in this which is a liberal and learned profession, a class of mere mechanics, with no intelligence whatever.

38. They must be intelligent in their own branch, and be acquainted with their own forms? It depends upon what may be considered an intelligent agent, I cannot imagine any intelligence in filing a declaration, in copying a plea, in sending a little boy with a writ or a brief.

39. Is there no intelligence in taking instructions in a case, in finding out in what consists its strength or its weakness? There is some little intelligence in taking instructions; there is more in finding out the strength or weakness of a case.

40. Is there no intelligence involved in instructing Counsel? Yes, more intelligence probably than is manifested by many Attorneys.

41. Then it is a branch to which intelligent agents belong? It is a branch to which intelligent agents belong; and I never said that it is a branch to which intelligent agents do not belong; what I say is this,—that, by the present system, a class of men may exist in our profession who are, to all intents and purposes, mere mechanics. That is the conclusion I have to vindicate, and it is not at all destroyed by the fact, that in or among this class of men may be many intelligent acts to be performed requiring intelligent agents. Unquestionably there are, and I believe that in this Colony exist a class of men as Attorneys, who, take them generally, are superior in information to the large majority of the same class of men in England—men who differ from able Counsel in little more than name. But I think it quite possible that, at the same time, there may be among that same class mere mechanics, some of whom it might not be difficult to particularize, who have nothing approaching to the degree of intelligence I speak of. Then how are these persons to supply their deficiency? Clearly in no other way than by running backwards and forwards, either to the more skilful of their brother Attorneys, or to the Barrister whom they may generally employ.

42. But the Barrister cannot do some of the duties? He can take instructions, or point out the strength or weakness of a case surely.

43. If he be properly instructed in a case? There are very many little circumstances which take place in the course of a cause upon which a man of deficient intelligence requires to be enlightened, but in which cases no fee is paid to the Barrister; and in that class of cases the Attorney runs backward and forward from his own office to that of a Barrister, to get information upon certain points; the same thing occasionally takes place in England, where the Attorney runs into the special pleader's office without paying fees, and in that way the deficiency of parties is made up. Therefore, I say, that if the arbitrary line of demarcation between these two branches was done away with, it appears to me that the whole business as far as it involves intelligence, would be thrown into the hands of the intelligent, whether Barristers or Attorneys. Unintelligent men would find no place in the new state of things, it would be utterly impossible for them to carry on their business but at a cost for extraneous assistance, which the client, in the long run, being put upon comparisons, would soon be disgusted with paying.

44. We have had stated, by one who is certainly an intelligent person of that class, not that the state of things is desirable that you recommend, but that he feels it to be inevitable, he thinks it most undesirable, but he also thinks that the country cannot support that division of labor which now exists in the legal profession,—what do you think upon that point, do you think the country can support a Bar? I see that the country does support a Bar, but before I answer your question, I would ask what you refer to, when you say that it is inevitable.

45. That there must be an amalgamation of the profession: that it cannot be avoided; that the country is too poor to support a Bar? I cannot assent to that gentleman's opinion—that it cannot continue; anything will continue, so long as the country can, and will bear it.

46. Perhaps the country will not bear it, or cannot bear it? As I have never had any opportunity of testing the feeling of the country in that respect, I can say nothing about that; but I may say this, that, progressively, opinion will grow to the point which the gentleman you refer to apprehends, and that, eventually, there will be an amalgamation of the profession in this Colony.

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47. He says there *must be?* *I* do not say so. As yet the people, generally, have not, perhaps, thought much about the matter; they feel, and grumble, a long time before they beg a to think.

48. His view is, that it is most undesirable that it should happen, but that it must happen, as the country is too poor to support a Bar? I cannot understand that, or how it is that a thing which is most undesirable *must* happen. It appears rather to me, that the country being too poor to support a separate Bar, it is highly desirable, instead of most undesirable, that the country, like an individual, should at once adapt the nature and expense of its establishments, to its actual means.

49. You think the result of the amalgamation of the two branches of the profession would be, that the inefficient would be unemployed, and that the efficient would obtain all the business; that would be the result as far as the profession were concerned; what do you think would be the consequence to the public—do you think that after the amalgamation the present Barristers, if allowed to act as Attorneys, would go into Court with smaller fees than they now receive, they marking their own fees? If only the efficient were employed, the business would be better done; and as to the practitioners, I think it very possible if they had the power of marking for themselves, which I cannot see they would have necessarily, very likely they would mark higher fees than they are now in the habit of receiving.

50. Do you think that item would be cheaper? I think that *all* the duties which involve intelligence, would be charged at a higher rate than they are charged now; and that those acts which merely require mechanical labor, would be considerably diminished in number and in cost. Upon the whole, I consider that in striking the difference between the increase on one side, and the diminution on the other, the advantage would be greatly in favor of the public. A case has been put to me, by a friend of mine, a man of great experience, who has considered the subject as a legislator as well as a lawyer, and who is a Member of this House,—if the two branches of the profession were united, he has said, might not offices favor each other in this way, giving briefs to each other, with high fees marked upon them, but not actually paid, and only mutually allowed in their accounts? To such a suggestion it appears to me to be sufficient to say, that the taxing officer would be always able, and bound to repress, supposing any professional men so improperly acting, any abuse arising, or likely to arise, from such a practice. But, further, the public would have the means of their protection in their own hands. If one practitioner or firm, were to attempt to charge a client thirty, or fifty guineas,—to take an arbitrary sum,—in a case where five or ten would appear to be a sufficient and more reasonable fee, the client so charged would either approve or disapprove of this. If he disapproved of it, he would leave his Attorney and seek another, which would strongly tend to stop any such improper practice. But if the client approved of the charge, and was content to pay it, it would only appear to me that he thought one lawyer's services better worth the thirty, or fifty guineas, than the services of another worth the five or ten. Then if the client chooses to put up with the apparent overcharge, let him do it; he is, or ought to be, the best judge of the service for which he pays.

51. In the point of view in which you put it, it is not an act of his; he suffers it, but he does not authorize it? If it were done once, what would be the natural operation of the client's mind? either that it was a gross overcharge, or that it was not. If he were to regard it as an overcharge, he would say "I will go to that man no more; I will go to Mr. C, or Mr. D, "who, though not so efficient as Mr. B, will not charge me so exorbitantly; I will rather give "Mr. C five guineas for the inferior skill he may bring to the performance of the business, "than thirty guineas to Mr. B." The practice to which you refer, of allowing Barristers to mark their own briefs, is carried out at South Australia, and with reference to it, I had some conversation with Mr. Justice Cooper; he said that he had felt some difficulty upon this subject, and also stated that practitioners had sometimes claimed Barristerial and Attorneys' compensation too. In some instances, I believe, it had been attempted to charge for what is called the attendance of an Attorney in Court, as well as for the performance of the Barristerial function. Thus making not only a division of the profession, but a division of the man's identity, for the nonce, into the two characters of Counsel and Attorney.

52. What is the principal use of an Attorney in Court? It is to instruct, to remind, and to prompt the Counsel, (who, in most cases, has never seen the client) and to keep the witnesses together.

53. How is he to keep the witnesses together if he hold a brief, or act as Barrister? Why cannot a clerk or the client keep the witnesses together in the neighbourhood of the Court?

54. I think it requires an intelligent agent to keep witnesses together? I think he need not be very intelligent, if there be any efficacy in a subpœna—the Court would vindicate its authority.

55. When do you see these vindications? I have seen them in the Supreme Court of this Colony.

56. If men will not keep together, they will not be kept by the terror of the process of the Court. I would, therefore, ask whether since there are duties which must be performed by some agent, the Attorney should not be at liberty to charge this attendance? It seems to me that the chief duty of the Attorney in Court, is not to keep witnesses together, but to watch the cause; generally speaking, in practice, I believe, Attorneys have a clerk or two in attendance, who keep the witnesses together. I think, as a matter of practice, a clerk with no great degree of intelligence might do this. I speak under submission to the learned Chairman of this Committee as a man of much longer, and more extensive experience than myself in this matter. I merely express my opinion that a clerk of no extraordinary intelligence could perform this duty and perform it very well. And I cannot subscribe to the opinion that men will not keep together, by what is called the terror of the process of the Court. I observe them doing so every day, on which the Court sits for the trial of causes.

57. We will suppose the principal duty of an Attorney to be to prompt the Barrister, to point his attention to matters which he might have overlooked—do you not suppose if the

profession

profession were amalgamated, that Mr. Windeyer, for instance, or any other leading Barrister, would still confine himself to that branch of the profession—must he not have either a clerk or partner to do the business of the Attorney, to sit with him in Court—would he know anything of his case, except what was in his brief, and if the brief were not full, would he not require the suggestions of the party acting as Attorney? In some cases he might, in others he would not. In many cases the Barrister would so far have possessed himself of the knowledge of his client's case, as to be enabled to conduct it by merely making an occasional reference to his client, who, in most instances, would be in Court; and very frequently, in the easier cases, he might conduct a case, from beginning to end, without such reference. Under the present system it seems to me not merely that there is a multiplied—by others called a divided—labor; but there is also a divided or dissipated responsibility; frequently, indeed, no responsibility at all. The Attorney getting rid of his responsibility by consulting the Barrister, who, on his part, is under no legal responsibility at all.

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58. *By the Attorney General:* You assume that the client would be always present? I say, generally speaking, the client is present; where he is present, the professional man conducting a case in Court, will find it quite sufficient to refer to him; and that in a numerous class of cases he will not require to be instructed in Court at all, from having effectually possessed himself of the case before going there, and that from his client direct.

59. *By the Chairman:* It appears to me that persons who are in the habit of doing a great multiplicity of business, are apt to know nothing of a case except what they find upon their briefs; and the moment they have done that piece of business, it naturally goes off their mind, and they fasten upon the next work they have in hand. I think that is the state of mind, which generally belongs to the Bar? I think it is so, with respect to a Bar as now constituted.

60. How can you imagine then that a Barrister who has this multiplicity of business to attend to, can recollect the new circumstances of every case, or if there is something in his case which the brief does not point out, how can you expect him to know anything of it? We are speaking, as I consider, of a case where a man is conducting a limited number of cases that come from his own clients, or from an office in which he may be a partner. With such cases it appears to me, he must be familiar and efficiently conversant.

61. Do you not suppose if the Bar were amalgamated that Mr. Windeyer, for instance, would get briefs besides those which sprung out of the business of his own office? Very likely.

62. There would be nothing to alter a person's habits in this amalgamation, supposing it to be his habit to know nothing of a case except what he found in his brief, if any supplementary information were necessary, he must get it from some extrinsic source. Supposing that to be the case, would it not be as necessary that a Barrister should have a prompter after the amalgamation, as it is now? It might be necessary at times, doubtless. But this is an imaginary difficulty, suggested by the present state of the profession. Barristers now look wholly to their briefs for their instructions. They do not communicate with the clients at all. If the amalgamation were to take place, the great bulk of the business,—which does not present any great legal difficulties,—would be, as in South Australia, performed by the professional men who have been first applied to by the client, and who have derived an intimate knowledge of the case, from this, the only source competent to give it. A professional man so instructed, would not require as a Barrister now does, another professional man to be stuck to his side (during a common trial about goods sold and delivered,) to supply that information which the brief, by itself, so commonly fails to convey. Occasionally, no doubt, and in heavy cases especially, the men acting as Barristers would require, and would be able (as in other Colonies under like circumstances) to obtain the assistance of some one or more of the same profession.

63. Why do you imagine then that one of the savings which would accrue from this amalgamation of the profession, would be that the attendances of Attorneys in Court, would be disallowed? These attendances should be disallowed in all cases in which a party initiated and carried on a case to a trial, and where he attempted to divide his identity by charging for his attendance as an Attorney, when he is charging at the same time for his services as a Barrister.

64. Notwithstanding that he must have his partner in Court? Even though he had his partner in Court, if in Court unnecessarily. It should be a matter of taxation, otherwise serious abuses might creep in; there might be two or three partners in Court, and it might be contended that they were all necessary.

65. *By the Attorney General:* Do you not think the parties would make up in fees what they would lose in attendances? They might, and probably would expect higher fees when attendances were cut off. But there is nothing, in my opinion, to be dreaded here. The public would be willing to pay these higher fees if a great saving were effected upon the whole. Clients seldom object to pay, and to pay well, for an actual service rendered. And these would be the services charged for, when lawyers had no interest in needlessly running up expenses for merely mechanical acts. The Attorneys are now, by their position, shut out of most of the intellectual duties of the profession; and if they live at all, they must live by charging, and accumulating their charges, for merely mechanical duties. From this cause arise the extraordinary variety, and particularity of the contents of an Attorney's bill, which is frequently quite a work of art, and not uncommonly beats many epic poems, for the power of imagination contained in it. But the particular charge of which we are now speaking is merely one of many such charges distributed over the whole history of the cause; many attendances would necessarily be altogether got rid of which are at present charged for, and some of which may be in some proportion necessary.

66. *By the Chairman:* Would not all these mechanical charges still exist, all these attendances by clerks and others? In a very large proportion of cases I should say they would not exist; and I could demonstrate this from my own experience. In a very large class of cases, which involve no legal difficulties, which are purely matters of evidence,—the complicated and elaborate mechanism—the "pride, pomp, and circumstance" of law—the

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manufacturing of large masses of paper in the shape of briefs, might be almost altogether got rid of. I would illustrate what I have said by reference to a case, although only a Police Office one, which I lately conducted. An Attorney came to me to defend a man upon a charge of obtaining money under false pretences. After a short consultation, at which the client was present, the Attorney gave me a sheet of paper, containing my instructions. After two or three hours before Mr. Windeyer, the Police Magistrate, the case was dismissed. The unsuccessful prosecutor, dissatisfied with Mr. Windeyer's determination of the case, afterwards applied to the Supreme Court for a criminal information against the party complained of. For the purpose of showing cause against this application, two thick briefs were delivered to Mr. Richard Windeyer and myself, containing only the same facts which had been communicated orally to me by the client (in consultation) in a quarter of an hour. This second application met with the same fate as the former one—it was discharged. The first proceedings in this case, the instructions being given upon this sheet of paper, and in consultation with the client, would, in all probability, not exceed altogether six or eight guineas. In the latter, the costs could not be less than twenty-five or thirty, perhaps forty pounds, as there were two briefs furnished to Counsel, well spun out with instructions upon a matter, the facts of which lay in a nutshell.

67. It has been stated, by different members of the profession, that it is the mechanical portion of the business alone that pays; that the profession could not exist if these charges were not allowed? Very likely it is only the mechanical portion of the business that pays the Attorneys at present, for by the present system they have but little opportunity of participating in, or profiting by, the more intellectual duties of the profession. This seems to me to be one of the very evils of the present system, that Attorneys must, one and all, accumulate mere mechanical charges to be able to live. But if the Attorneys who make this statement, mean that the profession could not exist by merely charging for that which should alone be charged for, I think they are in the wrong. Every profession or business necessary to the public weal must, of necessity, receive as much support as will keep it in existence. I am satisfied in my own mind that a diminution of thirty-five, or even fifty per cent. of the expense of legal proceedings, would bring into existence a prodigious increase of wholesome litigation (such as actions upon breaches of contract, and other matter,) which exists in society, but which does not develop itself into legal proceedings, on account of the apprehension of expense among the parties concerned. In the case that I put just now, it appears to me, and did appear at the time, that supposing the state of the profession had been in this young Colony as it is in Canada, or in South Australia, at the present time, with the same kind of instructions with which a party went before the Magistrate in the first instance, the same lawyer might walk into the Supreme Court, and bring about the same result by the same means; whereas by clapping on this new kind of machinery in the Supreme Court, a prodigious additional expense is involved,—briefs, attendances, wages of engrossing clerks, &c., &c.

68. The case you have put appears to me to be one of most unusual occurrence; it is, as I understand, a case in which a Barrister goes into Court wholly uninstructed; such a practice, I think, is not safe to the client, and ought not to be allowed? Not wholly uninstructed, nor by any means is it a case of unusual occurrence. My instructions were derived from personal conference with the client, and were in substance contained in the sheet of paper to which I have referred. It must be an extraordinary case if a man cannot so state it that it may be contained in a sheet or two of paper; although, no doubt, under the present system, it is still easier, and much more profitable, to thinly spread the same matter over a quire, or even over a ream.

69. I understood you to speak of a blank sheet of paper as the outside of a brief? No, I did not mean that; I used the word "instructions," not the words blank sheet of paper.

70. Do you not think what occurred in this country under the state of things you are advocating, would be likely to occur again if this state of things were reverted to? I do not know, except from hearsay, what occurred in this country before I came here; I have heard of learned Counsel sometimes taking hay-stacks, and other agricultural looking fees for their services.

71. We had the profession amalgamated here formerly—do you think that the same saving which accrued to the public then would be likely to accrue again? I should require, before I answered such a question as that, to know accurately what was the real state of the profession at that early period—not merely as to the amalgamation of the profession, but as to the number of practitioners engaged in it; because, although amalgamation will always tend to cheapness, yet the smaller the number of efficient practitioners, in proportion to the general business to be transacted, must always, on the other hand, make legal services dear. In the times you speak of there were not, if I have been correctly informed, above three or four really able practitioners in the Colony. These, therefore, could pretty well make, and I have been informed that they frequently did make, their own terms. They were paid at a much higher rate then than the same kind of men are paid now, and not improperly so paid. If there are very few in any society who possess certain talents, they can put a high price upon these talents, and have a right to do so. A man has a right to get the highest payment for any effort of his intellect that he can get. If there were only then five or seven Barristers, with as much work as could employ fourteen, either of them had a right to say "I will not "defend that man for less than £50." In the same way that an author whose works are in request would have a right, if asked to write an article for a magazine or review, to put his own price upon it, and get it if he can.

72. I think you are wrong in imagining that there was that large amount of legal business in those days in proportion to the candidates for it; I believe there is as much now as then? I think there is not so much legal business for Barristers, because the late alterations that have been made in this Colony, have taken a large proportion of civil business away from the Supreme Court, and transferred it to the Court of Requests. I have not applied myself to

ascertain

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ascertain what amount has been taken away from the Supreme Court, but I should say that a very large proportion of the subject matter of employment for Barristers, has been taken to a Court where Barristers do not usually resort; so that I should say there is not anything like the amount of business for Barristers now, proportionate to what existed at the time to which you refer; added to which, the competition has increased, with the very large increase of practitioners in both branches of the profession, since that time.

73. There was a course of practice existing then, which, no doubt, would occur again; all the easy and matter of course business that arose in the Attorney's office, would be performed by themselves, or given to other Attorneys; and the junior Bar would lose that which is now the support of it? First, I would say, what have the public to say to that; and in the next place, I do not think such a practice would again prevail; because it seems to me, that upon an amalgamation of the profession again taking place, so far from this kind of undue and illiberal favoritism of Attorneys towards each other, prevailing—most of the Attorneys would resort to the superior information of Counsel, in matters of law; and it would therefore be incumbent upon Attorneys, to a certain extent, to give Counsel some proportion of what is ordinarily called favor business. If the present system of pleading were continued, you could not by amalgamating the profession, prevent the men who now draw the pleadings, from doing so then.

74. That is to say, the Barrister would do it, if the Attorney could not do it himself? I do not think three per cent. of the Attorneys could do this kind of work themselves; and then the consequence would be, that the man who could do it, would be much higher paid, for a very difficult and highly responsible work, for which he is now frequently very inadequately paid. I believe that much of the odium incurred by the legal profession, arises from the public seeing but too clearly, the abuses of the *charging* part of it.

75. Have you ever gone through a bill of costs, and calculated how much of these costs would be saved, by the amalgamation of the profession, which you propose? I have.

76. Will you state what per cent of saving would be effected? I had an opportunity a short time ago, of going through a very elaborate bill of costs, in a libel case, in which there was a verdict for the defendants—an application for a new trial,—a new trial granted, and the action ultimately abandoned. In this bill of costs, Mr. Fisher and myself, were referred to as Counsel for the defendants; and it struck me upon paying particular attention to the bill, as I went along, that fifty per cent might have been saved easily at least—I think I speak within compass when I mention this amount. Knowing so well as I did, everything that had really been done, I was both amused, and astonished, at the sort of charges running through bills of this description; many of the charges of six shillings and eight-pence, and three shillings and four-pence, were just so many assaults upon any ordinary man's common sense. Yet the Attorney who thus charged was a highly respectable man—the charges were usual ones, and were only the result of the system.

77. In looking over that bill, you did not, I presume, find fault with the fees marked for Barristers? Yes, I did. They were enough to make one weep.

78. You did not consider them to be too high? I did not find fault with them for that. Amongst the rest of the items in the bill, the Counsel's feef figured like Falstaff's halfpenny worth of bread, amidst the monstrous quantity of sack.

79. Then if you had had the marking the fees, probably you would have made them a little higher? I should have made them considerably higher.

80. I think I may infer generally upon this subject, that as the fees of the Bar are now very low, you do not think that after the proposed amalgamation of the profession, they would be any lower? I really do not think they would or could be, unless in the present scientific age, some new and cheaper mode of feeding and nourishing Barristers, could be discovered and applied.

81. Then the public would not gain in that direction? I do not think they would.

82. Then it is entirely upon the other side that the public would be gainers? Entirely upon the other side; it appears to me the tendency would always operate the other way, in cutting down the expense of the mechanical, and increasing the cost of the intellectual, but not to such an extent, but that the public would gain fifty per cent upon the whole equation.

83. Then you infer that the profession would be able to exist, under the new state of things, by the increased quantity of business that would arise out of it? Yes; by increased quantity of business, and by the diminished cost of carrying that business on. I cannot see, however, when we profess to be legislating for the people, why we should feel so solicitous about due provision for the profession. But waiving this, I am satisfied that if you considerably diminish the cost of law, you will proportionately increase the demand for it; and that if you diminish the motives which even the most efficient Attorneys now have, for running up and accumulating the expenses of mere mechanical operations connected with law,—the costs of copying, and briefing, &c., will be much diminished too. If an efficient man could be adequately paid for what actual service he does for his client, he would not be under the necessity, nor would he have any motive for running up mechanical expenses. But in difficult and complicated cases, long briefs will sometimes be necessary. I dare say, that in the new state of things, there would not be so many good looking, and handsomely engrossed briefs, as we are in the habit of seeing now. But this would not occasion much regret to the public who pay for them. I have known briefs, in simple cases, most extravagantly spun out,—and frequently in cases, where an elaborately engrossed brief was scarcely necessary at all.

84. Do you think anything of the statement which has been so generally made to this Committee, by the other branch of the profession, that they are not paid by the difficult and complicated cases you allude to? I can conceive that there may be such cases as you refer to, and I think that the parties who made these statements, must have had individual cases in their memory when they said this,—cases which had been pending perhaps eighteen months or two years, or where the Attorney had been out of his money for a very long time. In such cases perhaps, no allowed amount of charges would be a proper compensation, but I think

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think these are exceptional cases, and that generally the cases cannot fail to be paying. Such a case as I have referred to, must have been a paying, and a very paying case.
85. Mr. Want, in his evidence, has given a number of cases, in which the costs are classified in this way; there is the amount of Attorney's costs in a cause, the fees received by Counsel, the fees charged by the Court, the amount of expenses of witnesses, and from these cases I thing it appears that the Counsel received a larger amount of fees than the Attorney,—do you think that a usual state of things? I should say that it is decidedly the exception and not the rule; it is possible that he may adduce some two or three cases of that kind, but I should think they must be very few indeed, and must disgust him very much, in contrast with the general run of his cases.
86. He has given them in support of his statement, that his branch of the profession is not paid? He ought certainly to be the best judge of his department of the profession as to costs and charges, but as far as I can infer anything from the apparent style of living of Attorneys in good practice, I should say that they are either much better paid, or must succeed in obtaining much more extensive credit than Barristers.
87. What the Barrister gets is not subject to any deductions? No, but even subject to the taxation to which Attorneys' charges are liable, I should say the costs, which Attorneys are allowed on the average of causes, besides their conveyancing, must pay them well. There is no doubt that there may be cases, and it is easy to put a case of any description, there may be cases of such peculiar complication and difficulty, as to require a constant resort to members of the higher branch of the profession for assistance. In such cases the fees of Counsel and of the Court, may mount up to a very high rate, so as upon the nett result, to shew a larger proportion of Counsel's fees than Attorney's costs; but most decidedly such cases are rare exceptions. There is a very small proportion of such cases.

WEDNESDAY, 11 *AUGUST*, 1847.

Present:—

WILLIAM CHARLES WENTWORTH, Esquire, in the Chair,
THE ATTORNEY GENERAL, | JOHN BAYLEY DARVALL, Esq.
ROBERT LOWE, Esq.

The Honorable J. N. Dickinson, Esq, Senior Puisné Judge of the Supreme Court, called in and examined:—

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1. Will you favor the Committee with your opinion with reference to the education that young men should undergo before their admission to the Bar in this Colony? I think I can venture to express a competent opinion upon the subject, whatever it may be worth, as for eight years I was a Special Pleader in London, and during the whole of that time I received pupils in my chambers, and gave them oral instruction daily. With respect to the education of young men for the Bar, I would wish to confine my observations to the Common Law, that being the branch of the profession I practised in London, and which I am more conversant with. In the first place I would say that young men should undergo a course of reading and study for five, or at least four, years; I would propose that the students should begin with a course of instruction with reference to real property, and that course would be this,—in order that they might acquire such an acquaintance with the old feudal system as would enable them to enter upon the study of the law of Real Property, I would suggest that they should peruse the first volume of Robertson's Charles the Fifth, and Hallam's Middle Ages, so far as the latter goes into the feudal system; having gone through these two portions of introductory reading, I would suggest that they should read that portion of Stephen's Commentaries that treats of Real Property; having properly studied that, and felt that they were masters of that subject, I would suggest that they should read Saunders on Uses.
2. That is rather stiff reading? It is stiff reading; I would then suggest the study of Fearne on Contingent Remainders; that is a book which not only conveys a knowledge of its subject, but also exhibits to the student a specimen of legal argumentation of the most subtle, profound, and elaborate quality. Then I would suggest that the student should go to a Barrister who practises Conveyancing, and unless he intend to confine himself to Conveyancing, six months with the Barrister would be sufficient; having left the Conveyancing Barrister, he should enter upon the study of Common Law, and in the first place he should read Stephen on Pleading; secondly, the following titles in Selwyn's Nisi Prius, viz, Assumpsit, Covenant, Debt, Distress, Replevin, Ejectment, Use and Occupation, Trespass, Trover, Consequential Damages, Libel and Slander, False Imprisonment, and Malicious Prosecution; then I think he had better study, under a Barrister, the practice of Special Pleading for twelve months; after that I would recommend him to read Greenleaf on Evidence, some book on Practice, Smith's leading cases, and Saunders' Reports. If five, or at any rate, four years were spent in such a course of study I think a young man would be in a very fair way to begin practice.
3. Your Honor recommends that he should be a year with a Special Pleader? Yes, if he is to be a Common-Law Barrister. I may add that the materials do exist here for carrying out this course of study, because I believe more than one Barrister practises Conveyancing, and if Barristers do not practise to a great extent there are Solicitors who do, although it would not certainly be so advantageous that a young man should study under a Solicitor as under

under a Barrister; I should, however, suggest that a year with a Special Pleader is absolutely essential, or else the pleadings would probably be improperly drawn, would be demurred to, and the client would have to pay the costs. There are several Barristers here, Messrs. Darvall, Fisher, Broadhurst, Lowe, Michie, and others, in whose chambers young men might obtain most valuable instruction in the art of Special Pleading. The Honorable J. N. Dickinson, Esq. 11 Aug., 1847.

4. You have not made any remarks with reference to the Equity branch of the profession? No; I have confined myself to the Common Law—to the preparatory instruction necessary for the practice of that branch of the profession. For this purpose I recommend a leisurely course of reading. The books I have recommended are few, but I think a great deal more of reading one book twice, than of once reading two books.

5. What is your opinion with reference to the proposed amalgamation of the profession? I think it would not work well. In the first place, I think it would have a great tendency to disturb the present efficiency of the profession. We have a very able Bar here, a far superior one, I believe, to that of India; indeed, from all I have heard, I believe we have a better Bar here than in any part of the British Dominions out of England, Scotland, and Ireland, and we have also a very able body of Attorneys. Of the Barristers whom I have the pleasure of seeing practising before me daily, there is not one who would not have succeeded in England, provided he had friends to push him on. Possessing, as the Colony enjoys, such able practitioners in both departments of the legal profession, I think the amalgamation of the profession would work disadvantageously in the first place by distracting the attention of the practitioner. A Barrister, for instance, who had a difficult case to answer, who had to refer to Comyn's, to Viner's, to Bacon's and Harrison's Digests, and to a variety of cases and other authorities, and who had not merely to search, but also to employ much thought, would have his attention distracted by serving notices of motion, by consulting his clients, and by attending to the various and necessary incidents of a suit, which are now attended to by the Solicitor. And, on the other hand, a Solicitor would feel himself much impeded in his communication with his clients, and in that proper attention and speedy action required in the conduct of his business, were he obliged to bestow much time in the investigation of authorities, and in determining their applicability to the circumstances of his clients' cases.

6. There appears to be an opinion here that our Bar is too good for us—that we are not able to support such a costly body? I am not sufficiently conversant with the question of expense to enter into that; but if there is anything in what I have ventured to state about the attention being distracted, then the attention of the Attorney-Barrister, or Barrister-Attorney, being distracted, blunders would probably occur; those blunders would have to be amended; those amendments would be attended with expense; and the extra costs upon those amendments might be equivalent to the extra costs of the two functionaries at present, unless the practitioner were made liable, and if so, the profession would not be so attractive as at present, and an inferior class of men would probably step in. I would mention, as an instance of the distraction of mind which occurs from the union of two branches of the profession, that an eminent Special Pleader in London, who had a very large business, and seldom had any of his pleadings demurred to, went to the Bar, and was heavily engaged in practice; and he stated that he experienced serious inconvenience from his old clients coming to him to draw their pleadings at times when he should have been studying his briefs, and the fact was, that after he emerged from his Chamber practice as a Special Pleader, and was constantly occupied in Court, though a first-rate Special Pleader he, to my own knowledge, frequently committed very serious mistakes in the pleadings which his clients (against his desire) insisted he should draw. If that was the case with a thorough master of the art of Special Pleading, it is not hazardous to conjecture that the same thing might occur here from a combination of the two branches of the profession.

7. Has it ever occurred to you what is the reason that the division of the profession which exists in England has not been transferred to countries of more recent origin, as America, and the West Indies? It has been transferred to Jamaica; the Attorneys there are a separate class from the Barristers. I believe it is so also in Barbadoes, but I am not certain as to that; I think also in Trinidad. Though in the West Indies Barristers practise as Attorneys, Attorneys never practise as Barristers. With regard to America, it is a fact that a legal practitioner is called an Attorney and Barrister-at-Law; but I think that such eminent men as Marshall, Kent, Storey, and Greenleaf, although they may have had the privilege of practising as Attorneys, did not actually do so, but that practically a division of the profession exists in America; that there are some men who attend especially to one branch of the profession, and others who attend to the other, in the same way as in England one Barrister may be a Special Pleader, another an Equity Draftsman, and a third a Conveyancer.

8. No doubt there is substantially a division of labor in America, still that division has not been formally established? It appears, from history, that the division of the profession is of very great antiquity; it existed at the time of the Roman Commonwealth, and also in the Roman Empire; and it has existed time out of mind in England, or for so long that the report books do not furnish an instance to the contrary. I think it never could have existed in the various old countries, as for instance, England, France, Germany, and Italy, for such a number of years, or centuries I may say, if it had not been found convenient in practice.

9. Have you ever had occasion to turn your attention to the complaint so prevalent with reference to the expenses of law proceedings here? Not here; I have at Home.

10. Do you conceive that these expenses could be reduced by any means—by any alteration in the state of the pleadings? I do not see that any alteration could be made in the state of pleading, because the effect of the system of special pleading is, that by narrowing the issues to be tried, the parties are absolved from the necessity of speculating upon what points may possibly be raised, and, therefore, do not summon unnecessary witnesses, which was, under the late unscientific system, a source of considerable expense. With regard to the other proceedings in a cause, I cannot answer in the gross; if I had a bill before me I could state

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what items I considered unnecessary. *(The Chairman handed His Honor the bill contained in Appendix E to Mr. Want's Evidence, given before the Committee 9th October, 1846.)* "Instructions to proceed."—If a man goes to an Attorney's Office, and occupies the time of an Attorney, it is very fair that he should pay for that; it certainly appears to be necessary, for the safe conduct of a cause, that the Attorney should be instructed to proceed; whether six shillings and eight-pence is the proper sum I do not pretend to say; but as an Attorney should be a gentleman, both by his station in life and by education, I think it is not too much. "Instructions to retain Mr. Foster,"—I do not understand that. "Drawing retainer and copy."—A retainer being necessary, it appears to me that the Attorney should be paid for drawing it. As it takes up some portion of that time, by employing which he earns his livelihood; he should also be paid "for attending Mr. Foster with same." Then, "Instructions for case."—There is a little difficulty in my mind with reference to this item; the propriety of the item being charged would depend upon whether the instructions were different from the instructions to proceed.

11. I understand "Instructions for case" to mean instructions for a case to be submitted to a Counsel for his opinion? If "Instructions for case" were essentially different from "Instructions to proceed" no doubt this would be a fair charge. "Drawing same and copy."—I think these are both fair charges, because the Attorney receives the instruction, which takes some time, and it is highly beneficial for all parties that he should put it in a good shape; he should therefore be paid for receiving instructions, and for drawing.

12. Do you think there is any stage in that proceeding that might be omitted? I do not profess to offer an opinion upon the amount of the charges. There are some items upon which I cannot give an opinion, as I do not know the circumstances of the case; as for instance, "Attending Captain Wilson, instructing him to prepare a plan of the land, shewing the different encroachments"—and the items immediately following, "Instructions for declaration." This appears to me rather an objectionable item, provided it be not a way of remunerating the Attorney for some other service, in the same way that apothecaries are paid for attending upon their patients by the charges for physic. "Drawing declaration and copy"—As a matter of practice, I know that the Barrister draws the declaration.

13. But the Attorney instructs him to draw it? Yes, and that is a fair charge; but, I think, unless he does draw the same that is not a good item, unless that is a mode of paying for other work, which I think an objectionable principle, because each piece of work should be paid for according to its value. There is nothing in this bill that I would object to, with the single exception for drawing the declaration. There does not appear to me to be an operation which might not be advisable.

14. You do not think the present practice of pleading occasions any unnecessary expense? I do not.

15. There are a great many interlocutory applications arising out of the new practice that did not exist under the old practice of the Court of King's Bench? Yes, there are interlocutory applications; but I think the advantages arising from them much more than counterbalance the expense. In the first place, points of law are more precisely raised, and Counsel come into Court much better prepared to go into a case; parties have not to speculate upon what defences it will be necessary to set up, and therefore do not come with a cloud of unnecessary witnesses. Besides, under the present system of pleading, it is impossible for any Judge, even if so inclined, to lump a whole case up to the jury, throwing all the law and the facts together, and saying, "upon the whole I am of opinion so and so;" that appears to me to be a great advantage. Then if it be said that the public will take care that that is not done, I can only say with regard to that, that the public in England are tolerably alive to their rights, and they did allow that state of things to go on for some years.

16. Has this system been productive of expense, or has it diminished expenses? It is supposed to have diminished expenses in England.

17. That is to say the expense of witnesses? Yes.

18. It does not appear that this item is very considerable, as I find from a table handed into the Committee by Mr. Want, in which he has stated the total amount of costs, the Attorney's charges, costs out of pocket, fees to Counsel, witnesses expenses, and Court fees, in a number of cases, that the proportion paid for witnesses' expenses is very small? Those cases may have arisen since the introduction of the New Rules. You ask me whether interlocutory applications have not increased by reason of the new pleadings. They have; but assuming that in certain cases they do swell the necessary expenses of a cause, that expense is more than counterbalanced by the greater precision with which a cause is brought into Court, it diminishes the risk of a new trial, and makes the questions more simple; for instance, the attention of Counsel is more specifically directed to the points of law that occur in the trial, and the Attorney's attention is directed more to the facts to be proved, and thus fewer witnesses are necessary.

19. *By Mr. Darvall:* Might not, in your judgment, these interlocutory applications be diminished in number, by granting no costs where the question was as to a mere matter of form? I do not know that, because if costs are awarded against the defaulting party, others may be more careful. I think the question of costs should be determined upon the merits of the particular case.

20. *By the Chairman:* It has been suggested, by an intelligent witness who has been examined before this Committee, that the system of pleading which has been introduced into this country was devised more for the accommodation of the Judges, than for the public convenience, that, in fact, if the present practice had not been adopted, the Judges in England could not get through the mass of business that comes before them? I have not seen the Reports of the Common Law Commissioners for some years, but I have a tolerably good memory, and I think I could undertake to say that that was not taken into account as a reason for adopting the present practice; but, as you have suggested this point, I may say that I think it a most especial convenience to the Judges, for the reasons detailed by the Common Law

Law Commissioners of England in their famous Report on the subject of restoring the ancient practice of pleading, and demolishing the modern innovation of adducing all matters in evidence under the General Issue. The Commissioners were the late Mr. Justice Bosanquet, the present Barons Parke and Alderson, Mr. Justice Patterson, and Mr. Serjeant Stephen. In that part of their Report in which (what are called) the New Rules, (adopted I have heard in several of the United States of America,) were founded; the aforesaid Commissioners say "Another ill consequence attendant upon the General Issue is, that as the true point for de- "cision has not been evolved in the pleading, it becomes the business of the Judge to extract "it from the proofs and allegations before him, to sever correctly the law from the facts of "the case, and again, the facts admitted from those in controversy, and to present the latter "in a distinct shape to the jury for their consideration, an analysis which the rapidity and "tumult of a trial at Nisi Prius renders extremely difficult, and which is often defectively "conducted." I submit that a system of Special Pleading which facilitates the proper presentment of a case by the Judge to the jury, is necessarily a very great advantage to suitors and the public.

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21. *By Mr. Darrall:* If it were to enable the Judges to get through more business, it must have the effect of shortening the proceedings, and must therefore lessen the expense? The expense of those interlocutory proceedings is more than counterbalanced by the decreased risk of a new trial. There is much less risk under the new system of pleading than under the old, and after all, these interlocutory applications are often for favors, which are generally granted upon the party applying for them paying the costs. For instance, if a person wants to add a plea, he applies for it; it is granted, and as he asks for it as a favor, he pays the costs; if he wants to have a plea taken off the file, that is also granted upon the application, and the costs are paid by the party applying; if he has committed a blunder, and wants to get it amended, on payment of costs the Judges generally grant the application.

22. You say these interlocutory applications are frequent, would they be so if the causes were conducted with a reasonable amount of skill and care on both sides? Not if they were conducted with a reasonable amount of skill.

23. Would you state generally, as the result of your experience and consideration, that the amalgamation of the profession would render the administration of justice cheaper to the public? I do not think it would; it might in some actions, but taking the average of actions throughout the year I should say not. Even if the present division should cause some increase of expense, I think the public would be fully compensated by the superior manner in which the business would be conducted. I do not think that under the system of amalgamation there would be either such good Attorneys or such good Barristers as at present; I think we have now both good Barristers and good Attorneys. I may illustrate this by referring to the state of the profession at Home, where it is known that those gentlemen who practise simply as Conveyancing Barristers are much more eminent in that branch of the profession than those who practise both as Conveyancers and as Equity Draftsmen. I am not aware of any first-rate Equity Draftsman who practises also as a Conveyancer; nor, on the other hand, am I aware that any one of the first-rate Conveyancers practises also as an Equity Draftsman. I think, moreover, that pleadings at Home are more carefully drawn by the Special Pleaders under, than by those at the Bar.

24. *By the Chairman:* Did not Sugden practise as both? No; he gave up his Conveyancing practice when he took to the business of a Chancery Barrister.

25. Preston? He never practised in any Court generally, but merely went in on special occasions to argue those questions of Real Property Law with which he, as a Conveyancer, was particularly conversant.

26. The question with us appears to be, whether a cheaper article, even though it might be of an inferior quality, would not suit us? To view the matter in another light, if the practitioners should become inferior men to what they are at present, of course there would not be so good a body as you now have to select Judges from.

27. *By Mr. Darrall:* Do you think the existence of a third body, distinct from the Attorney, interposes any check to dishonesty, or that it is any safeguard to the interests of the community? I am not prepared to speak upon that.

28. Might not the employment of a body of men who had no direct interest in the result of a suit, do away with the apprehension that any indirect means might be resorted to for gaining the end desired? The Barrister should never identify himself with his client; his legitimate business is to present arguments to the Court and jury, and to see that the Court and jury have the case properly brought before them.

29. *By the Chairman:* Still the Barrister presents the case which the client has furnished him with, through the Attorney? No doubt; the Attorney is the agent between the public and the Barrister.

30. The Barrister can know nothing of the case but what he gains from the brief furnished by the party? I think it is an advantage that the Barrister should not be mixed up with the party himself, and if he have direct intercourse with the client, and be a man of generous sentiments, he may enter into his client's feelings, and come into Court identifying himself with the party, which is objectionable. There is another circumstance to which I would advert, which is, that if the profession of Attorney and Barrister were one, I do not think the profession of the Attorney would be advanced in social estimation. I think in that case the profession of the Bar would not be so attractive as it is at present, and therefore that young men of talent and station would not be so apt to take it up as a profession as they would under the existing system; and I think it important that men of education should enter the Bar, because it is from the Bar that the Judges are selected, and it is also highly desirable that a portion of our Legislators should be taken from the Bar; it is so in England, and the Members of the Bar are certainly not thought the least useful in the House of Commons.

31. *By Mr. Darrall:* Is there any advantage derived from the practice of not allowing Barristers to come into direct communication with witnesses? I think so; for the reason I have stated

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stated with reference to clients, that the Barrister should never identify himself with his client.

32. *By the Chairman:* In the commencement of your evidence you stated the course of legal study which you think a young man should undergo, before he should undertake the business of the public, will you have the goodness to state what course of education he should adopt previous to his entering upon his legal studies? I am not sufficiently acquainted with the condition of academies in this Colony, or with the feelings and views of the inhabitants, to say what course should be here adopted. But I have considered how the existing materials of English University education might be disposed so as to train a student's mind for the acquisition of legal knowledge, and the accomplishment of public speaking. At Oxford, the course of study consists of the Classics, Logic or Mathematics, and Divinity. At Cambridge, the Classics, Mathematics, and Divinity. If only one of the two studies should be adopted, to all but the highest order of minds I would recommend the study of Mathematics in preference to that of Logic, because the amount of the former I would suggest, would be found a much easier task than the latter. By my mathematical course the student's mind would be occupied by pure demonstration, his attention would be exercised by long trains of continuous reasoning, he would undergo mental labor, but would obtain clear ideas at each step of his progress, and he would stop at the very point where mathematical science imparts to most minds very confused notions, viz., at the application of the doctrine of limits. The transcendental mathematics are all important to the natural philosopher, but appear to me quite useless as a mental discipline for the legal student. The mathematical course I would recommend would consist of the first six books of Euclid, Algebra as far as Quadratic Equations, those elementary propositions in Mechanics and Hydrostatics which are contained in Whewell's Mechanical Euclid, and Whewell's book on the first three books of Newton's Principia, and the doctrine of limits. The classical studies I would recommend would be Greek and Latin prose composition, and the careful study of the whole of the orations of Demosthenes and Cicero. As auxiliary to the understanding of the orations, the history connected with them should be minutely studied. As auxiliary to the acquisition of the art of public speaking I would recommend that students should acquire a great body of English words and modes of expression, from the study of the Bible, Barrow's and South's Sermons, the Spectator, Shakespeare, Milton, and (for their pure and *unmixed English*) the writings of William Cobbett. Let the student then be daily exercised, by the tutor, in presence of his class, by translating orally the Greek and Latin orations above mentioned immediately from the dead languages into English, as if he was reading aloud from an English book. The classic orators would furnish the student's mind with thoughts and arguments, which he would be thus trained to express immediately into the good English he would have imbibed from the British works I have before mentioned. I do not say that the student would thus become an orator, but he would be more likely to become a ready speaker, than by attending a debating club, and at all events his academical studies would not be neglected in attempting to become a speaker. For a knowledge of Ethics, so useful to the scientific lawyer, I see in the University course *Cicero de Officiis*, and Paley's Moral and Political Philosophy. For probable reasoning, *so indispensable* to the lawyer, should be studied Paley's Natural Theology, Evidences, and *Horæ Paulinæ*. From the above materials of English University education, it has occurred to me that a young man (with an expenditure of not much more than half the labor required to obtain the place of a first class man at Oxford, or a wrangler of rank at Cambridge) might be specially trained for the legal profession, in demonstrative and probable reasoning, in Ethics, in valuable points of history, and in the graces of diction. From the observations I have so defectively offered, some hints may possibly be derived by those in this community who take a laudable interest in the instruction of youth.

33. *By Mr. Darrall:* Is there any explanation you would give, with reference to the state of the profession in America—is there anything in the peculiar way in which society has sprung up there, which would account for the actual position of affairs, without conceding that there is any advantage in the system? The honorable Chairman has put a similar question to that, and my answer is, that I have no knowledge of America, or of its social and political habits, except what every body knows and reads from the newspapers; but I could easily understand that they would not recognise two ranks at the Bar, as the existence of separate bodies of Barristers and Attorneys makes the Bar an aristocratical profession, and in a democracy that would of course be in opposition to the political feelings of the people. They may also be influenced by a desire for cheapness; but I do not believe that the principle of amalgamation is practically adhered to, as I do not think such men as Kent, Marshall, and Storey, have ever been employing their time in an Attorney's office. It may possibly be that those gentlemen have associated with themselves some inferior persons whom they have employed in performing the business of the Attorney; but I do not see that any advantage would arise from that, as the business must be paid for, whether it were done by one or by two persons. With reference to admission to the Bar, I would suggest that gentlemen should be subjected to the same ordeal here, as Attorneys are submitted to in England; it would not only be for the benefit of the public, but for the interest of the party himself, because he would then find in what consisted his strength or his weakness.

34. *By the Chairman:* You would have the examination similar to that which Attorneys undergo? Yes, upon the same principle, running over the course I have referred to.

35. *By the Attorney General:* Would you confine your examination to legal knowledge, or would you include the classics and mathematics? I would confine the examination to the knowledge of their profession, because a young man might not have had the advantages which are possessed at Home, and at twenty might be a very poor classical scholar, and yet, by pursuing the legal course I have recommended from twenty to twenty-five, might make a very good lawyer.

36. Previous to a party entering his name as a candidate for the profession, would you recommend that he should undergo an examination? If it should be now settled that

gentlemen

gentlemen should be called to the Bar here by the Judges, I would not have a preliminary scholastic examination to take place till some distant period, of which due notice should be previously given, so that young men might be specially instructed for the examination, preliminary to their being admitted as legal students.

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Since the above Evidence was given, Mr. Dickinson has transmitted to the Committee an extract of that part of the Report of the English Common Law Commissioners, on which the existing Rules of Pleading were founded.

" One of the most important questions which has presented itself in the course of our " inquiries is, whether it is expedient to continue to any, and to what extent, the use of that " kind of plea denominated the *General Issue*. Under this plea, which is in its shape a sum- " mary form of denial of the allegations in the declaration, or some principal part of them, a " defendant is at present allowed, in certain actions, to put the plaintiff to the proof of every " thing alleged in the declaration, and in some not only to do this, but at the same time to " prove in his own defence, almost any kind of matter in confession and avoidance; that is " matter which, admitting the truth of the plaintiff's allegations, tend to repel or obviate their " effect. On the other hand, there are some kinds of actions, in which, if the defence consists " of any matter in confession and avoidance, it must be specially pleaded, and cannot be " admitted in proof under the general issue; and there are others, in which, properly speaking, " there is no general issue, and in which all the pleading may be considered as special.

" That the present state of the practice on this subject requires alteration seems to be " universally felt; but with respect to the kind of alteration required, the views taken by " different persons are surprisingly dissimilar: one set of opinions pointing to the restriction " of the general issue, and another to its wider application, and to a corresponding extinguish- " ment of special pleading. It will be found, however, on reference to the written communica- " tions addressed to us, that there is a decided preponderance of authority in favor of the former " course; and we do not hesitate to declare our own strong conviction, that it is the right " one, and that its adoption would be attended with highly beneficial results.

" We conceive that considerable misapprehension popularly prevails upon the subject of " *special pleading*. That system was characterized, no doubt, at former periods of our legal " history, by a tendency to prolix and tautologous allegation, an excessive subtlety, and an " overstrained observance of form; and notwithstanding material modern improvements, it " still exhibits too much of the same qualities. These, its disadvantages, are prominent, and " well understood; its recommendations are, perhaps, less obvious, but when explained, can- " not fail to be recognized as of far superior weight. Special pleading, considered in its " principle, is a valuable forensic invention, peculiar to the Common Law of England, by the " effect of which, the precise point in controversy between the parties is developed, and presented " in a shape fit for decision. If that point is found to consist of matter of fact, the parties are " thus apprized of the exact nature of the question to be decided by the jury, and are enabled " to prepare their proofs with proportionate precision. If, on the other hand, it turns out to be " matter of law, they have the means of immediately obtaining the decision of the cause, without " the expense and trouble of a trial by demurrer, that is, by referring the legal question so " evolved, to the determination of the Judges.

" But where, instead of special pleading, the general issue is used, and under it, the " defendant is allowed to bring forward matters in confession and avoidance, these benefits " are lost. Consisting, as that plea does, of a mere summary denial of the case stated by " the plaintiff, and giving no notice of any defensive allegation on which the defendant means " to rely, it sends the whole case on either side to trial, without distinguishing the fact from " the law, and without defining the exact question or questions of fact to be tried. It not " unfrequently, therefore, happens, that the parties are taken by surprise, and find themselves " opposed by some unexpected matter of defence or reply, which, from the want of timely " notice, they are not in due condition to resist.

" But an effect of more common and indeed almost invariable occurrence, is the un- " necessary accumulation of proof, and consequently of expense; for as nothing is admitted " upon the pleadings, each party is obliged to prepare himself, as far as it is practicable, " with evidence upon all the different points which the nature of the action can by possibility " make it incumbent upon him to establish, though many of them may turn out to be undis- " puted, and many of them may be such as his adversary, if compelled to plead specially, " would have thought it undesirable to dispute.

" With respect to matters of law, the inconvenience experienced, though of a different " kind, is not less remarkable, for when points of law arise upon the general issue, instead of " being developed, by way of demurrer, for adjudication by the full court in bank, they are of " necessity left to the decision of the single Judge before whom the cause is tried, and their " decision, upon his sole authority, deprived as he generally is of the advantage of any pre- " vious intimation of the matter to be argued, and unable to refer to books, is often found to " be unsatisfactory and inconclusive. It may even happen (and that is not an unfrequent " occurrence) that the controversy under this form of plea turns entirely upon matter of law, " there being no fact really in dispute, and in that case the mode of decision by jury is not " only defective, but misplaced, and the trial might have been spared altogether, if the parties " had proceeded by the way of special pleading, and raised the question upon demurrer.

" Another ill consequence attendant upon the general issue is, that as the true point " for decision has not been evolved in the pleading, it becomes the business of the Judge to " extract it from the proofs and allegations before him; to sever correctly the law from the " fact of the case, and again, the facts admitted from those in controversy, and to present the " latter in a distinct shape to the jury for their consideration, an analysis which the rapidity " and tumult of a trial at *nisi prius* renders extremely difficult, and which is often defectively " conducted.

" Of the state of things here explained, it is the natural effect that when the general " issue is pleaded the trial fails in numerous instances to accomplish the purposes of justice,

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"or even to terminate the legal dispute, and is followed by the application of the defeated "party to the full Court in *banc* for a new trial. This proceeding involves the necessity of "recapitulating, for the information of that Court, the whole of what passed *viva voce* at "*nisi prius*, of which there is no admissible report, except that of the presiding Judge, upon "whose alleged error in point of law the application most commonly is founded. The motion "for new trial is, for this reason, beset with peculiar difficulties, the effect of which is, that it "ultimately fails in many cases (as there is reason to apprehend) where, in justice, it ought "to succeed, and succeeds in many cases where there is in reality no sufficient ground for the "application. It may be added, that even where successful, it gives no redress beyond that "of awarding a new and expensive inquiry upon the matter of fact; and that with respect "to the matters of law, of which it may involve the discussion, they are less distinctly, and less "satisfactorily decided upon the motion for a new trial, than when raised by special pleading, "and so brought before the Court in the first instance by way of demurrer, for determination.

"But these considerations give an inadequate idea of the extent of the inconvenience "now produced by the great and growing frequency of the motions in question; indeed we know "of no existing abuse of which the influence is so wide, and the pressure so intolerable. They "have, in a considerable degree, impaired the value of a verdict, which, according to the ancient "and true principle of law, was of a final and conclusive character, but is now in so many instances "subjected to the revision of the Court in *banc*, and with so much facility set aside, that "the party in whose favor the opinion of the jury is declared, has, comparatively, little "reason to rely on the permanency of the advantage he has obtained. He too often "finds that it is but one successful struggle in an arduous and expensive contest, which is "to end at last in defeat. But an effect still more serious is the enormous extent to which "this branch of practice has encroached upon those portions of the public time properly "destined to other employment. As an illustration of this, we may refer to returns "received from the King's Bench, and Common Pleas, by which it appears that in Michaelmas "term 1829, ninety-nine motions for new trials were made in the former Court, and forty-"nine in the latter; that in the King's Bench, rules *Nisi* were granted upon fifty-three of "these applications, and not more than four rules for new trials ultimately disposed of in the "course of the term; and that in the Common Pleas there were thirty-nine rules *Nisi* granted, "of which ten only were disposed of. To such accumulations, addition of course is made "in each succeeding term; and were it not for the assistance obtained from the sitting of the "three Judges out of term, (a jurisdiction which in other respects has appeared to us objec-"tionable, and to require abolition,*) the result, as far as regards the Court of King's Bench, "would be a total obstruction of the current of ordinary business, by the growing masses of "arrears upon motions for new trials. The tendency of the general issue to give occasion for "such applications, we have already attempted to explain; and we have no hesitation, there-"fore, in attributing to the use of that plea, the far greater part of the evils to which we have "thought it our duty to advert, as connected with motions of that description. We think, too, "that its disuse would supply the only practicable and effective remedy.

"Other inconveniences, though certainly of less moment, result from that method of "pleading. It often happens that points of law, arising at the trial, receive no decision from "the Judge, but are reserved by him for the opinion of the Court in *banc*; or, with a view to "a more distinct and solemn argument before that Court, the facts proved are thrown by "consent of parties into the form of a special case. Neither of these methods is comparable, "in point of certainty, of despatch, or of cheapness, with that which is afforded by demurrer, "and their substitution for the latter, occasions, like the motion for a new trial, though in a "less degree, to the prejudice of both the parties, and to the delay of public business.

"In comparison with these disadvantages resulting from the general issue, the incon-"veniences of special pleading are insignificant. It is found difficult, no doubt, to shape the "the matter of defence or reply in a form which shall be sufficient in point of law, "and accurate in point of fact; and the occasional consequence of this difficulty is the defeat "of the party, upon formal defects not connected with the justice of the case, and which usually "is not, like those arising from the general issue, either of ordinary occurrence, or inevitable "in its nature. It may in general be averted by the diligence and skill of the pleader, and "is materially alleviated by the practice of allowing amendments upon demurrers. It is also "true that special pleading tends to prolixity of statement on the record, which is a source of "expense to the suitor; but that expense bears no proportion to the vast increase of costs "resulting from the adoption of the general issue. It seems to be commonly supposed, that "it is in the length of the pleadings, and the correspondent amount of office fees, or fees to "pleaders or counsel, payable upon them, that the expense of an action at law chiefly consists; "but this is a great mistake, and one that it is very important to correct. By far the heaviest "items in the bill of costs are those which relate to the proofs, and more particularly to the "conveying of witnesses to the assizes, and maintaining them there; and, next to these, the "most costly charges arise from the transaction of any kind of business in open Court, upon "motion; the fees upon pleading being (comparatively speaking) upon a petty scale. In "illustration of this, we may refer to the bills of costs contained in the Appendix to our First "Report. It may easily be conceived, therefore, that the general issue, from its tendency to "an unnecessary accumulation of evidence, and to motions for new trials, must often ulti-"mately lead to a much greater expense than could have been produced by any probable pro-"lixity in special pleading. The preference due to the latter method will become still more "evident, when it shall be cleared, by such regulations as we have suggested in other parts of "this Report, and hope hereafter to suggest, from some of its principal inconveniences and "abuses, more particularly from those which relate to the variety and prolixity of counts and "pleas, and the doctrine of variance.† On the whole, therefore, we entertain no doubt of the "expediency of making such alterations in the existing practice as will introduce special pleas "in almost every case, and in some actions abolish altogether the use of the general issue."

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* It was afterwards abolished by 11 G. 4, and 1 W. 4, c. 70, s. 5.

† Regulation has been made on both these subjects, v. sup. 277, 80.