Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gugy v. *Brown, from Canada; delivered* 1*st February*, 1867.

Present:

Sir James W. Colvile.
Sir Edward Vaughan Williams.
Sir Richard Torin Kindersley.

THIS case is an Appeal from the Decree of the Court of Queen's Bench for Lower Canada, dated the 19th of December, 1862. By this Decree a Judgment dated the 2nd of November, 1861, of the Superior Court of the District of Quebec was reversed. That Judgment was pronounced by a single Judge (Taschereau) on a motion made by the present Appellant to review the Prothonotary's taxation of a bill of costs which had been submitted to him to be taxed by the Appellant, under a prior Judgment of the last-mentioned Court upon a proceeding called "an opposition," awarding him costs as against the Respondent generally by the words "avec dépens." The question, and the only question, raised and decided in the two Courts was, whether the Appellant, who was an advocate and attorney duly admitted therein, and had appeared personally in Court and conducted his own case as attorney on record, was entitled under the said Judgment to charge in his bill of costs, and to have allowed, on the taxation thereof against the Respondent, certain fees claimed and charged by him in respect of his character of attorney. Judge Taschereau decided in the affirmative; the Court of Queen's Bench in the negative.

The rule for deciding this question, as it was said by C. J. Fontaine, in Brown *v.* Gugy (11 Lower Canada Reports, 407), must be furnished by reference to the French and not to the English law, because the then existing French law was dominant in Lower

Canada when it was conquered in 1759, and consequently that law continues to be dominant there, subject to any alterations which have been introduced by Legislative Acts or other competent authority.

It is necessary, therefore, to inquire what the old French law was, with reference to this subject.

On behalf of the Appellant several authorities were cited, the principal of which are, "Le Parfait Procureur" (Edition 1705), Pigeau, Ferriere, and Serpillon. These are for the most part stated in the Appellant's case, and referred to by Mr. Justice Taschereau in 11 Lower Canada Reports, 484-485. And their Lordships are of opinion, in accordance with the opinions of Mr. Justice Meredith and Mr. Justice Taschereau, that the passages cited from these books constitute a preponderance of authorities in the French law for allowing fees to an attorney who appears as such in his own case.

But it was argued for the Respondent, that the old French law has, at all events, been displaced by modern authorities. It is certainly true that although in the case which is the subject of appeal, when in the Superior Court of Quebec, Judge Taschereau adhered to the old French law, and decided the case accordingly in favour of the attorney's claim (see 11 Lower Canada Reports, 493), yet on three earlier occasions the Court of Queen's Bench decided the contrary, in disregard of that law, and held that an attorney conducting his own case is not entitled. Two of these cases were decided by a majority of three to two Judges in Brown *v.* Gugy (11 Lower Canada Reports, 401), and Gugy *v.* Ferguson (ibid., 409); and a third case of Fournier *v.* Cannon was cited by Mr. Justice Meredith, in his Judgment in the present case (see Record, p. 22), in which he himself and all the other Judges of the Queen's Bench appear to have concurred.

In the Judgment now under appeal, Mr. Justice Meredith, although he thought it right to agree with the majority of the Court, declared that his own contrary opinion (expressed in Gugy *v.* Ferguson) still remained unchanged; and Mr. Justice Monstrelet agreed in that unchanged opinion, and differed from the other Judges of the Court.

Mr. Justice Aylwin appears to rest his judgment

mainly on the argument that the Tariff gives fees to attorneys only, and thus in effect denies them to parties who are not attorneys, and that a person who appears in person cannot call himself an attorney. In answer to this it may be observed, that an attorney who conducts his own case, and describes himself on the face of the proceedings not as a party suing or defending in person, but as attorney on record, accepts by that very act all the duties and responsibilities which the practice of the Court imposes on attorneys acting for ordinary clients. Mr. Justice Meredith founds his Judgment merely on the propriety of a Judge's deferring to the authority of adjudged cases. Mr. Justice Badgley, in substance, takes the same view as Mr. Justice Aylwin, with the addition that he relies on the circumstance that in the case of an attorney appearing for himself, inasmuch as in the proceeding by way of "inscription en faux," the law requires a special procuration from the party to his attorney, as the foundation of the proceeding, there would be an absurdity in taking such a special power of attorney from a man to himself; and further, that the proceeding by way of "distraction et dépens" would not be practicable, because the occasion for it could never arise. But their Lordships are constrained to observe that they cannot understand how these are good reasons for disallowing to the attorney his fees for services performed in the cause as an attorney.

It will be observed that in no one of these Judgments is there any dealing with the authorities cited on behalf of the Appellant from the old French law books in favour of the attorney's right. The Judges do not at all deny that there are such authorities, or attempt to distinguish them. Mr. Justice Duval alone, in his Judgment in the earlier case of Brown *v.* Gugy (printed in the Appellant's case, page 4), says that the opinion of Serpillon on this point is of little weight, being founded on faulty reasoning only, and quotes a passage from De Jousse, as to the rights of avocats, as a conflicting authority. But Mr. Justice Meredith observed (11 Lower Canada Reports, 412), "That authority (De Jousse) is not applicable here in Canada, where advocates are also attorneys. It must be recollected that in France the right of action for fees was not only denied to advocates, but such as claimed them were struck

from the Rolls." And this appears to be the only authority which has been cited on behalf of the Respondent from the French law books in denial of the attorney's right to fees.

With respect to the argument founded on the Tariff of Fees, the Court of Queen's Bench of Lower Canada is authorized by several Statutes to make and establish Tariffs of Fees for the counsel, advocates, and attorneys practising therein. But the object of such a Tariff appears to us to be, not to confer fees on any one, or to deprive any one of them, but simply to fix the amount of them for particular services done by such officers. If at the time of making the Tariff an attorney acting for himself in a cause was, according to the authorities cited by the Appellant, entitled to such fees as would have been payable to another attorney acting on his behalf, it surely was not meant by the Tariff to alter the law, and deprive him of such fees altogether, but merely to regulate the amount to be paid to him. On this point their Lordships concur with the view taken by Mr. Justice Meredith in Gugy *v.* Ferguson (11 Lower Canada Reports, p. 418), where that learned Judge says, "It is undeniable that the Appellant is an attorney, and that he has performed certain services in this cause for which, when performed by an attorney, the Tariff allows certain fees; and I really cannot see anything in the law, or in reason, to prevent the Appellant, an attorney, from receiving the fees usually incident to the services which he performed."

But it is intimated in the Judgment of C. J. Fontaine, in Brown *v.* Gugy, and asserted in the Judgment of Mr. Justice Aylwin in the present case, that the practice has been to disallow fees to attorneys conducting their own cases. And if this practice had been shown to be uniform and long-established it would certainly have gone far to prove that the old authorities were not to be relied on.

But there appears to be some mistake on this subject; for it is said by Mr. Justice Meredith, in Gugy *v.* Ferguson (11 Lower Canada Reports, 418), "The practice in this country may, I think, be said to be favour of the attorney. The Prothonotary of the Superior Court, an officer of great experience, informs us that in the time of Chief Justice Sewell fees in such cases were not allowed; but that in the

time of Sir James Stuart the practice was to allow them; that the last-mentioned practice has continued ever since; and he has given us a note of four cases in which attorneys appearing in their own cases have been allowed their fees. Under these circumstances I think it doubtful whether any change in the practice as to this matter ought to be made, and that if a change were determined on, it ought to be made so as not to affect pending causes."

Whether the Court of Queen's Bench might lawfully alter the law under the statutory power conferred by the Consolidated Statutes, cap. 77, sec. 15, "to make and establish such rules of practice as are requisite for regulating the due conduct of the causes, matters, and business before the said Court," it is unnecessary to decide; for the Court has in fact made no such rule, nor has the law been altered by any legislative Act, or other competent authority.

We therefore think it was the duty of the Judges of the Court to administer the old French law, and that they could not alter it, or decline to apply it, on grounds of supposed expediency, as they appear to have done in the Judgment in the present case, and the preceding cases on which that Judgment was founded.

For these reasons, their Lordships will advise Her Majesty that it should be reversed.

Their Lordships do not think it should be reversed with costs, because the Appellant had a full opportunity of bringing the point before this Committee, and of obtaining their Judgment when the former case of Brown *v.* Gugy was before them (2 Moo. N. S., 341). Had the present Appellant then prosecuted his cross Appeal, the question which is the subject of the present Appeal would have been then decided. His neglect to do so has been the occasion of the costs of this Appeal having been incurred; and their Lordships therefore think he ought not to be allowed them.