DIARY FOR NOVEMBER.

2. Tues..Primary examinations.
5. Fri.....Resignation of Sir John A. Macdonald, Premier of Canada, 1873.
7. SUN..24th *Sunday after Trinity.*
3. Tues..H. R. H. Prince of Wales born, 1841. Intermediate Examinations.
11. Tues..Battle of Chrysler's Parm, 1813. Attorneys Examination. Caud. for call to pay fees and have papers.
12. Fri....Examinations for Call.
13. Sat....Examinations for Call with Honours.
14. SUN..25th *Sunday after Trinity.*
15. Mon..Michaelmas Term commences.
19. Fri....Paper Day, Q.B. New Trial Day, C.P.
20. Sat....Paper Day, C.P. New Trial Day, Q.B.
21. SUN..26th *Sunday after Trinity.*
22. Mon...Paper Day, Q.B. N. T. Day, C.P. Last Day to declare for Co. Ct.
23. Tues..Paper Day, C.P. N. T. Day, Q.B.
24. Wed..Paper Day, Q.B. N. T. Day, C.P. Last day for settling down and giving notice.
25. Thu..Open day, Q.B. and C.P. School Exam. (written).
26. Fri....N. T. Day, Q.B. Open Day, C.P. School exam. (oral). [Last Day to give Notice of Trial in the County Court of Superior Court cases.]
27. Sat....Open Day, Q.B. and C.P.
28. Sun...*Advent Sunday.*
29. Mon ..Paper Day, Q.B. New Trial Day, C.P.
30. Tue...Paper Day, C.P. N. T. Day, Q.B. St. Andrew's Day.

CONTENTS.

THE

Canada Law Journal.

Toronto, November, 1875.

WE had occasion to commend the promptitude with which Mr. MacMahon issued his annotated edition of the Insolvent Act of 1875; whilst, at the same time, suggesting that it might be at the risk of some inaccuracies. A rather awkward example of this is the omission of the form of affidavit to prove claims under sec. 104, given as Form P in the original act. This form has been accidentally omitted from the annotated edition. The forms numbered from 1 to 6, inclusive, are not given in the act itself; it would have been well to have stated, for the benefit of those not having the volume of statutes before them, that these were forms suggested by the editor.

THE usual crop of applications to change venues, which ripens previous to the spring and autumn assizes, has been gathered. We publish in another place a decision which is important as to the effect of "locality of cause of action" and "preponderance of convenience." The law, as now stated by the learned Clerk of the Queen's Bench, and upheld by the Chief Justice of the Common Pleas, is not exactly in accord with *Harper* v. *Smith*, decided by the former and reported in 8 C. L. J. N. S., 171. The important point is to have the practice settled as definitely as the peculiar circumstances of each case will warrant, and that is probably done for all practical purposes in *Gilmour* v. *Strickland.*

THE "Bench and Bar" is a common heading in legal journals. In this country it generally introduces, we are glad to say, something complimentary; but this cannot be always so. One correspondent calls

attention to an alleged difficulty in inducing a County Court Judge to pay his debts, and charges that "he does not show a good example in giving obedience to executions from neighbouring Courts." We do not publish the letter as it is rather strong in its language, and too indefinite in its charges; we think, moreover, that our generally correct informant must have been misled.

Another correspondent sends us the advertisement of an attorney, &c., who, after publishing his card, thus modestly blows his own trumpet:—"N.B.—All suits in superior courts of law attended to with promptness." We are sorry to think that a B.A., for such he advertises himself to be, should require to assure the public that he is not as he assumes other men to be. We could almost suppose that this advertisement was intended to counteract some verdict against him for negligence, but we really have never heard of his being accused of carelessness, and are prepared to believe that he is, notwithstanding his *nota bene*, quite as good as the rest of us, though somewhat tangled on the subject of professional etiquette.

The daily papers have in another case, however, shewn, if their report be correct, a much more objectionable proceeding on the part of a firm of attorneys in Toronto, who it is alleged endeavoured to intimidate certain gentlemen of a grand jury, who, in consequence, felt called upon to bring the matter before the judge. We trust it was not as bad as it looked, but we never saw any denial or explanation offered.

It is impossible to keep the standard of professional conduct too high. We are all concerned in this matter. Those who offend thoughtlessly only need a word of kindly warning or playful chaff, those who do so "of malice aforethought" should be dealt with by the strong hand of those in authority.

PROGRESS IN PLEADING.

Lord Hobart gave as a reason for special demurrers that "they existed in order that law might be an art." But this is a reason which, in the technical language of the craft, may be fairly styled "insufficient in substance." Professional ideas have in course of years gradually undergone changes, so that at length it is recognised that the determination of causes of action upon their merits is preferable to artistic precision on niceties of pleading. And so the practical conclusion has been reached, both by lawmakers in the legislature and law-expounders on the bench, that substance is not any longer to be sacrificed to form.

The slow growth of the law to such a consummation affords many illustrations of the conservative maxims, "*principiis obsta*" and "*quieta ne movere*," which were made use of as arguments against all changes or amendments. It is almost incredible to read that such men as Dunning defended the absurd trial by wager of battle, and that Lord Raymond opposed the sensible statute requiring all law proceedings to be in English. In like manner the barbaric process entitled "wager of law" was preserved till a period comparatively recent. The curious student may refer to the last reported case on this style of pleading in *King* v. *Williams*, 2 B. & C. 528, and after reading it may congratulate himself on the 90th section of the Common Law Procedure Act, which provides that "the signature of counsel shall not be required to any pleading, nor shall any wager of law be allowed."

A good story is told of Baron Parke, which manifests the delight that famous lawyer had in the intricacies of special pleading. Paying a visit to one of his colleagues, a man of great intellect and attainments and a sound lawyer, who was at the time very ill, Baron Parke told his

friend that he had brought him a special demurrer which had recently been submitted to the Court, which was so exquisitely drawn that he felt sure it must cheer up the sick man to read it!

Many of the hackneyed complaints touching the law's delays and the uncertainty of the law, arose from the studious cultivation of the science of special pleading, and the triumph of technicalities consequent thereupon. These complaints are still reiterated parrot-fashion, though the causes have ceased to exist; for nowadays such complaints have but scanty foundation in the legal system as such, and can hardly be said to indicate any real grievance. But there was a time in the history of the law when it was otherwise,—a time which gave point to the saying of Lord Loughborough that "no cause was desperate," and of Lord Abinger, that he had never known any case decided on every point from beginning to end on its merits.

The advantageous progress which has been made in matters of pleading, is admirably put by Vice-Chancellor Blake in a recent judgment. He says:—"The technical system of pleading formerly in vogue, with its extreme accuracy, precision and casting out of immaterial issues, possessed many advantages amongst professional gentlemen well versed in its mysteries; but when you had, as it frequently happened, the learner pitted against the learned, and the education of the former was literally carried on at the expense of the client, whose rights were pleaded into such a maze that he was obliged to give them up, it became necessary to abandon the higher standard of pleading and to bring it down to the comprehension of those who had not thought it worth their while to devote years to its study." He proceeds to lay down some rules which are valuable as shewing the touch-stone that will now be applied by the Court to test the sufficiency of pleadings on demurrer. These rules are also applicable to the system of Common Law pleading, as many of the authorities cited are decisions of the Common Law Courts. He states three propositions as to the duty of the Court on this head, as follows:—(1) To put a fair and reasonable construction on the pleading, to ascertain what is reasonably to be inferred from the language used; and if, as a whole, it presents a case entitling plaintiff to relief, to allow it to stand. (2) That even although there be some statements which if taken alone would render the case ambiguous, yet these should be taken in connection with the remainder of the pleading, so as to make, where practicable, a consistent story, entitling the party to relief. (3) That when the pleader is dealing with facts peculiarly within the knowledge of the opposite party, the same preciseness and particularity are not required as would be were the pleader dealing with matters known to both: *Grant* v. *Eddy*, 21 Grant 576.

Pleadings at law and in equity are becoming rapidly assimilated in this Province, though still distinct. In England the effect of the Judicature Act and the rules based thereupon will be to form one system of pleading for all courts. The leading principle of that system seems to be that each party shall state as distinctly and succinctly as possible the facts on which he relies. This is an approximation to that system of pleading-at-large of the Scotch courts which provoked the scorn of Lord Abinger, as being framed after the model of a popular pamphlet. But in truth modern judges on the English Bench view the advance with different eyes, and one finds Vice-Chancellor Bacon regarding without regret the disappearance of "the sublime mysteries of pleading, the days of which are numbered, and which we shall shortly think of as the phantoms of the past fabulous ages:" *Job* v. *Patton*, 23 W. R. 590.

The courts and judges must watch that this new system does not degenerate into license. The difficulty is cast upon them (as remarked by Blake, V.C., in the case cited) of defining the proper limit between too great certainty on the one hand and too great uncertainty on the other. The great desideratum is of course to ascertain the best and speediest method of hearing and determining matters in litigation, inasmuch as, in the words of Mr. Gladstone, "justice delayed is justice denied."

LAW SOCIETY.

Trinity Term, 39th Victoria.

The following is the *resumé* of the proceedings of the Benchers during this term, published by authority.

Monday, 23rd August.

The several gentlemen whose names appear in the usual lists were called to the Bar, and received certificates of fitness. The petition of Mr. McGillivray to be allowed to pass his second intermediate examination in Easter Term was granted.

Tuesday, 24th August.

The Treasurer laid on the table the abstract of balance sheet for the second quarter of 1875.

The report of the Examining Committee was read and adopted, and the Examining Committee for next term was appointed. Mr. Evans was appointed Examiner for Michaelmas Term, and his fee for this term was fixed and payment ordered.

The Hon. J. G. Currie was elected a Bencher in the room of Richard Miller, Esq., resigned.

The expenditure incurred in refitting and repainting the library was sanctioned.

The Library Committee were directed to have a new catalogue of the books in the library prepared, printed, and distributed.

The Report of the Committee on Reporting was received and adopted.

Mr. Maclennan gave notice that he will move on Friday next to vary standing order 132 in such a manner as to require the reporters to publish the judgments of the Courts without regard to priority, with all possible speed, and to print in the margin of each report the dates of the argument and of the giving of judgment.

Friday, 3rd September.

The report of the Library Committee on printing the new catalogue of books in the library was adopted.

Rules for the regulation of business during the term were adopted for submission to the judges by the Treasurer.

Mr. Harrison moved, pursuant to notice, that a committee, consisting of the Treasurer and Messrs. Harrison and McKenzie, be appointed to consult with the Attorney-General and the Municipal Councils of York and Toronto on the subject of building a new court house on the Osgoode Hall grounds.

Mr. Hodgins laid on the table a petition to the Ontario Legislature to pass an Act to amend the law relating to barristers and attorneys, and a bill to the same effect.

Ordered, that the said petition and bill be referred to a special committee, to be composed of the Treasurer, Messrs. Hodgins, Harrison, Bethune, Maclennan, and Read, to report thereon on the second day of next term; notice to be given by the Secretary of the intention of the Society to apply for such an Act.

Mr. Maclennan moved in pursuance of the notice given by him on Thursday, the 24th of August last, and his motion was carried.

MASTERS IN CHANCERY.

For the purpose of expediting the prosecution of suits, and of lessening the costs of winding up of estates, the Judges of the Court of Chancery have issued the following circular, which has been sent to the various Masters throughout the country:—

Toronto, 28th September, 1875.

Sir,—I am instructed by the Judges to call your attention to the fact, recently brought under their notice, that in taxing costs under the tariff lately promulgated, too little discrimination has, as a general rule, been used in the allowance of the exceptional fees there found.

You are particularly requested to notice the ground of the discretion given to you in dealing with some of the items. The larger fees which you have the power to allow are only to be given where they have been earned, and the work covered by them has been actually performed.

While notifying you of this matter, the opportunity is taken of making the following suggestions: General Order 240 seems to be too much disregarded. In proceedings before the Master it is frequently forgotten that it is his duty to devise the simplest, most speedy, and least expensive method of disposing of the references before him, and that he may dispense with proceedings ordinarily taken, or substitute a different course of proceeding from that generally pursued. It lies upon the Master to see that at the earliest moment, and at the least expense, the reference is concluded. The practice in his office should, so far as possible, be assimilated to that before the Court. An appointment should at once be given for taking up the reference, and on the return of the warrant the matter should be proceeded with, unless some insurmountable difficulty is made to appear in the way of so doing. Order 214 expressly lays down the practice which is to be pursued, and requires the matter to be proceeded with *de die in diem*. When an adjournment is granted the reason for allowing it should be noted in the Master's book, and made to appear in the bill of costs, in order that the taxing officer may judge of its sufficiency. Let the costs of these adjournments, instead of forming an item in the general bill of costs between party and party, be so far as possible disposed of at the time they are granted; and let them, including not only the fees of the Master but also of the Solicitor, be paid, as a general rule, by the person who asks for the indulgence.—*See General Order* 213.

Let the costs of all interlocutory matters—of creditors failing in proving their claims—creditors contesting unsuccessfully for priority, or attempting to establish a claim larger than that found due—be disposed of so far as possible according to the result, and be charged against the party failing, in place of allowing them to be items in the general bill of costs charged against the estate, the subject of litigation—*See General Order* 225. Where admissions that should have been have not been made, let the costs connected therewith be taxed and certified. —*See General Order* 234.

Let all costs arising from unnecessary proceedings, or from over caution, negligence, or mistake, be disallowed.—*See General Orders* 306 *and* 308.

In cases where persons are not originally before the court, and they are added or notified in your office, set out the names of such persons, and specify those upon whom you have dispensed with service, and give the reason for so doing.

In every case, whether the bill be *pro confesso*, or not, let the defendant be notified of proceedings in your office, unless some good reason for omitting such service exists.

Whenever an admission or consent is made in your office, let the same be at once entered in the Master's book, and be signed by the parties making it, or their solicitors.

Let the report set forth whatever may bear on the question of costs, and may enable the Court to deal therewith on the cause coming before it, such as the refusal of the defendant to account—the want of proper books of account—the improper keeping thereof—the attempt to prove sums disallowed—the allowance of sums on a surcharge—the period at which balances are found in the hands of the party accounting, or such other circumstances as may go to show the origin of the litigation, and who should be charged with the costs thereof.

Endeavour to make use of *Orders* 214, 584, 585, *and* 586, so as to expedite the proceedings in your office.

I am directed to ask that you will have the goodness to communicate with me by letter, stating what means occur to you for expediting, simplifying, or lessening the expense of proceedings in your office, or before the Court; and to beg that you will make such practical suggestions as your experience leads you to believe may prove beneficial in these respects to the

suitors; and, in order the better to do so, that you will kindly consult with the solicitors in your locality in order that the Court may have the benefit of their advice and co-operation.

The judges desire that within the first three days of each re-hearing term a return be made to the registrar of the Court, showing what references are pending in your office, how long they have been there, and where delay has occurred, giving such statements as will explain what the cause thereof has been, and why you have not proceeded *de die in diem* and closed the reference; or why you have not, under order 584, certified the case to the Court.

Your obedient servant,

A. Grant,
Registrar.

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

COURT OF ERROR & APPEAL.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

North Wentworth Election Petition.

Thomas Stock, *Appellant*, v. Robert Christie, *(Petitioner) Respondent.*

Before Hagarty, C.J. C.P., Strong, J., Burton, J., and Patterson, J.

Treating during polling hours—32 *Vict., cap.* 21, *sec.* 66—36 *Vict., cap.* 2, *sec.* 1.

The decision of the learned Chief Justice of the Court of Error and Appeal, reported at page 196 *ante*, confirmed on appeal.

[Sept. 16, 25, 1875.]

This was an appeal from the decision of the learned Chief Justice of the Court of Error and Appeal, finding the present appellant (the candidate) guilty of a corrupt practice. The petition was tried at Hamilton on 19th May last, and is reported *ante* p. 196, where the facts are fully stated.

J. H. Cameron, Q.C., *R. A. Harrison*, Q.C., and *Robertson*, Q.C., for the appellant.

James Bethune for the petitioner.

Hagarty, C.J. C.P.—The facts, as detailed by testimony friendly to the appellant, are very clear. Davidson's tavern was open for the sale of liquor during polling hours, although the form of closing the bar was observed. This was in direct violation of the statute. Several persons are assembled there. The appellant drives up, declares that he cannot and will not treat, and that some one must treat him. His supporter, Sullivan, accordingly does so, appellant takes a glass of beer, and two or three others join in Sullivan's treat.

It is forcibly argued for the appellant that these facts do not show a corrupt practice committed "by or with the actual knowledge and consent of the candidate." First, it is urged that the violation of the 32 Vict, cap. 21, sec. 66, can only mean an incurring of the penalty of $100 thereunder, and that the appellant cannot come within its provisions; (1st) in the strictest construction of it that it only applies to the inn-keeper; and (2nd) on the wider construction that he was not either the seller or the giver of liquor. Again, that sec. 3 of the Ontario Act of 1873 is divided into two sub-sections which must be read together, and that the corrupt practice brought home to the candidate's knowledge and consent in sub-sec. 2, must be read as only the corrupt practice mentioned in the preceding sub.-sec. 1, "Committed by any candidate at an election, or by his agent." That the facts before us may shew a corrupt practice in the inn-keeper, but that the latter was not the appellant's agent, or that even if a corrupt practice in Sullivan in giving the liquor, the latter was not appellant's agent.

It is pointed out that section 46 of the Act of 1871, for which the existing enactment has been substituted, provides that when any corrupt practice has been committed by or with the knowledge and consent of any candidate, his election, if elected, shall be void, and he shall be disqualified, &c. And an argument is founded on the effect of the two sub-sections substituted for this 46th section.

The legal construction of the existing clauses urged by the appellant, seems to have commended itself to the well-considered judgment of my brother Gwynne in a very recent case (*Lincoln Election Petition*).

I feel very great difficulty in bringing my mind to the same conclusion.

We have not much authority to guide us. It seems to me that we must simply try to satisfy ourselves as to the meaning of the words used by the Legislature. We have to ask ourselves what was considered the wrong to be remedied.

Next, the remedy to be applied. The wrong was very plain—the keeping open of public houses, and selling and giving away of liquor on polling days.

For the decision of this case we are not necessarily to decide some of the extreme cases suggested in argument, such as the drinking of a glass of beer at the private table of any person (not an innkeeper) at which an ordinary guest might be present and partake of such drink as the common beverage used by the family—the meal and the presence of the guest being wholly unconnected with any election or canvassing object. I am quite prepared to express an opinion on this whenever it may be necessary to do so.

To confine the section wholly to the innkeeper would prevent its reaching the case of a private person who might on the polling day broach casks of ale or spirits for the public use of all comers. It might perhaps not be easy to bring such conduct within the grasp of the law as bribery, or to connect the person with a candidate as an agent, or perhaps even as an avowed supporter of any candidate, and yet the mischief caused by such conduct might be enormous.

It is to be remarked that this clause appears in a statute that makes no provision against treating, except in the one case as to meetings called to promote the election.

We must always, in my judgment, try to construe a statute in the light of common sense, and always give full credit to the Legislature to have used words (not being words of art or of technical significance) in their ordinary meaning, as they would be naturally understood by those whose conduct they are intended to regulate.

There is a celebrated passage as to the construction of statutes in Plowden 204: "The judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded acts which were general in words to be but particular where the intent was particular. * * * The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

Sir Geo. Turner, L.J., cites this passage in *Hawkins* v. *Gathercole*, 6 De Gex, M. & G. 21, saying, "I have selected these passages as containing the best summary with which I am acquainted of the law upon this subject. * * * We have to consider not merely the words of the act but the intent of the Legislature to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject."

Knight Bruce, L.J., (p. 19) speaks of the propriety of reading the Act "with a due degree of attention to the nature of the subjects certainly embraced by it, to the state of our institutions and jurisprudence when the act was passed, to the judicial constructions that other statutes have by approved decisions received, and to the universally recognised canons by which the interpretation of laws is regulated."

The case is approvingly noticed in *Cope* v. *Doherty*, 2 De Gex & Jones 614, before the Lord Justices in 1858.

In the recent *South Essex Case*, 11 C. L. J., N. S. 247, the learned Chancellor held that "the partaking by Alfred Wigle, whom I find to be an agent for the respondent, of a treat given by J. M'Queen during polling hours in Lovelace's tavern, was a corrupt act within the statute which would avoid the election."

Here the candidate himself partakes of a treat under the same circumstances instead of his agent. If the *South Essex Case* were rightly decided (on which I express no opinion) it would seem to be impossible to uphold either this election or the non-disqualification of the candidate. If it is a corrupt act sufficient to avoid the election by the agent accepting the treat, it must be equally so in the principal, with the fatal addition of knowledge and consent. I think the present case raises a much more formidable question than that before the learned Chancellor.

It is pressed upon us that the evidence shows a direct participation by the candidate in what the Legislature has pointedly declared to be a corrupt practice—that if it be a corrupt practice

in Davidson to keep his tavern open and to sell liquor during polling hours, and the candidate knowingly goes thereto and drinks thereat, it is impossible to say he is not a consenting party to a corrupt practice.

A case was suggested in the argument. We will suppose Davidson closing his tavern according to law and refusing to give or sell drink to any one. The candidate appears and tells him not to act foolishly, but that it would be better to let people have drink who might desire it Thereupon the tavern is opened and the candidate accepts a treat from a friend. It was suggested that in such a case the candidate would be responsible, because he would thereby make the tavern-keeper his agent. I do not see that any question of agency would arise. The tavern-keeper acts on the suggestion or the reasoning of the candidate, but he does not thereby become his agent in any sense intelligible to me. If the candidate had in like manner suggested to all the other innkeepers in the constituency to do the same thing, I still do not think he would thereby make them his agents, but it would be most difficult to still hold that therefore the corrupt practice which is undoubtedly committed by them would not be so committed with his knowledge and consent.

In short, the only escape that I can see for the appellant from the stringent provisions of the act, must be our adoption of the argument that the corrupt practice committed with his knowledge and consent can only mean a corrupt practice actually committed by himself or by his agent.

I do not see what right we have thus to narrow the very clear words of sub-sec. 2. I do not consider that we in any way infringe on the rule a to the strict construction of statutes creating penalties and disqualifications. If we adopt the appellant's construction, I very much fear that we should be defeating the clear intent of the Legislature, as evidenced by the plain language used.

The sale of the liquors at the tavern during polling hours is declared to be a corrupt practice. The tavern keeper—the offender against the law—is not shown to be the candidate's agent. The latter is shown to have known of the law being broken, but nothing is proved to indicate his approval or consent thereto. But the moment we find him drinking at the offending tavern—perfectly well aware that it ought to have been closed instead of being open—then it is beyond my comprehension how I can place such a construction on the words as to hold that the corrupt practice was not committed with his knowledge and full privity and consent.

It was urged on us that the Legislature could not have intended to inflict such a penalty as eight years disqualification for Parliamentary honours or municipal offices, or offices in the gift of the Crown, for this slight breach of the law. We have considered the case in this aspect with most painful attention.

When a most severe punishment is made applicable to a case like the present—the acceptance of a glass of beer from a friend at a house illegally kept open—as to a case of the most flagitious and unprincipled bribery, the argument can never be unexpected that the Legislature could not have so intended the law to be. It is a cardinal principle in every good law that it should commend itself to the approval of all well disposed citizens. It is quite possible that at the passing of this enactment—honestly designed to remedy great evils—the applicability of its severest penalties to a case like the present may not have been directly anticipated.

I agree in the conclusion of the learned Chief Justice that the appellant acted at least in forgetfulness of the law.

It is for the Legislature to deal with these cases. We can only strive to interpret their meaning by the ordinary rules of construction.

Strong, J. concurred with the judgment delivered by the learned Chief Justice of the Common Pleas.

Burton, J. I see no way of avoiding the conclusion at which the learned Chief Justice and my brother Strong have arrived. One not unnaturally feels a repugnance to give a decision, the result of which is to inflict, for so slight an infraction of the law, so harsh a penalty upon a candidate, who, upon the evidence, appears to have been anxious to conduct the election fairly and in accordance with law. The Legislature probably never contemplated the occurrence of such a case as the present, and it is not unreasonable to assume that, had their attention been drawn to it, they would not have visited such an infraction of the provisions of the statute with the same penalties as are aimed at the more grave and disreputable offences of bribery, intimidation, and corrupt practices of that nature. We have, however, to interpret not to make the laws; and with every anxiety to relieve the appellant from the penal consequences which the decision of the learned Chief Justice of this Court has exposed him to, I can come to no other conclusion than that that decision is a correct one.

We may assume, for the purpose of the present decision, that the only person who is liable to the pecuniary penalty affixed to an infraction of the 66th section is the hotel, tavern, or shop-keeper who, in violation of that section, sells or gives to any person spirituous or fermented liquors or drinks within the limits of the municipality during the day appointed for polling. Previously to the Act of 1873 that was the only penalty provided; but that Act in addition makes any violation of it during the hours appointed for polling a "corrupt practice."

Assuming still that the only person who can be said to be acting in violation of the 66th section is the hotel or shop-keeper, and that he alone is guilty of the corrupt practice, by selling or giving liquor during polling hours, I do not see how it is possible to avoid the conclusion, that this act, which is, without reference to the intent or motive, declared to be a corrupt act, having been committed with the actual knowledge and consent of the appellant, not only avoids the election, but in addition subjects him to the penalty of disqualification for the period named in the statute.

It was very ingeniously argued that the 1st and 2nd sub-sections of section 3 must be read together; that the first sub-section declares that the election should be avoided *for any corrupt practice committed by the candidate himself or his agent;* and that the 2nd sub-sect. imposes, *in addition* to the avoidances so declared by the 1st sub-section, disqualification when the corrupt act which so avoids the election is done by or with the knowledge and consent of the candidate; but the argument is to my mind more ingenious than sound.

Under the 46th section of the Act of 1871 any corrupt practice committed by the candidate, or with his knowledge and consent, avoids the election, and disqualifies the candidate; but no provision is thereby made with reference to corrupt practices by agents without the candidates' knowledge; but the repealing Act of 1873, as I read it, in the 1st sub-section avoids the election for any corrupt practices either by the candidate *or his agent,* whether such act of the agent was committed with or without his knowledge.

And then the 2nd section declares that if *any* corrupt practice is not *such* corrupt practice as under the 1st sub-section would avoid the election, but any corrupt practice has been committed by (the candidate) or with the knowledge and consent of the candidate—then, in addition to the avoiding of the election (if he has been elected), he shall be subject to the disqualification mentioned in that sub-section.

To give effect to the contention of the appellant we should have to read the sub-section as if the words "the candidate" were inserted after "by," and the words "his agent" after "or," so as to read, "any corrupt practice has been committed by the candidate or his agent with the knowledge and consent of the candidate." But why should we be called upon to take any such liberty with the plain language of the section, apart from the disqualification. There is much good sense in the Legislature declaring that a tavern-keeper shall keep his bar closed, and shall be subject to a penalty for not doing so, and that a candidate who encourages him to break the law shall thereby avoid his election.

There are many other corrupt practices, besides the violation of the 66th section, which would not, unless committed by an agent, avoid the election; and yet it is manifest that if they were done with the knowledge and consent of the candidate, they would—and rightly so—have that effect, and would also have the effect of disqualifying him.

Besides, the 2nd sub-section is not confined to the candidate *who has been elected*, but applies equally to the defeated candidate, who, if found to have been an assenting party to this or any practice declared by the statute to be corrupt, is rendered ineligible to be elected, and to the other disqualifications mentioned in the statute.

The corrupt practice in this case was admittedly committed by Davidson, and was so committed with the actual knowledge and consent of Mr. Stock, and unless we are to import words into the 2nd sub-section which will entirely alter its plain and natural meaning, it is impossible, in my opinion, to hold that the decision of the learned Chief Justice is erroneous. For my part, I think no other rational conclusion could be arrived at, and that the appeal should be dismissed.

Patterson, J. The facts which, in my judgment, are material to the decision of this case, are not disputed.

There is no doubt that Davidson, a tavern-keeper at Carlyle, violated sec. 66 of the Act of 1868, 32 Vict., cap. 21, by selling and giving spirituous and fermented liquors and drinks to persons in his tavern on the polling day. There is no doubt that this was a corrupt practice in Davidson, under the Act of 1873, 36 Vict., cap. 2, sec. 1. There is no doubt that this corrupt practice was committed by Davidson with the

actual knowledge and consent of the appellant, who was one of those who received the liquor or drink, whether he invited the others in and treated them, as some witnesses say, or was treated himself along with the others by Sullivan, as it is put by Sullivan and by the appellant himself.

The question is whether under these facts the appellant's election is avoided, and himself disqualified under sub-sec. 2 of sec. 4 of the act last referred to.

The contention for the appellant is that sub-sec. 2 only applies when the candidate himself, or *his agent* with his knowledge and consent, commits a corrupt practice. It is argued that as sub-sec. 1 makes void the election by reason of any corrupt act committed by a candidate, or committed by his agent, either with or without the knowledge of the candidate, and as sub-sec. 2 does not say in direct words, as was said in sec. 46 of 34 Vict., cap. 3, that a corrupt practice, committed by or with the knowledge and consent of the candidate, *shall make his election void*, and also disqualify him, but merely says that, *in addition to the election being void*, he shall be disqualified—it must be read as saying, that in addition to the election being void—*if under sub-sec.* 1 *it would be void*—the candidate shall be disqualified; and that unless the election is avoided by sub-sec. 1, there is nothing in sub-sec. 2 either to avoid the election or disqualify the candidate. Besides hearing the argument addressed to us in this case, I have had the advantage of reading that part of the very ably argued judgment of Mr. Justice Gwynne in the case of the Lincoln Election, in which he discusses the construction of sub-sec. 2, and takes the same view which has been urged upon us, although I believe he decided the case on grounds which did not depend on his reading of this sub-section. With the greatest respect for the ability and authority of that learned Judge, and fully appreciating the reasoning which he so forcibly employs, I am unable to agree with him in the construction of the statute.

In 1871 the particular offence now in question had not been declared to be a corrupt practice; but section 3 of the Act of 1871 defined corrupt practices as including bribery and undue influence, and illegal and prohibited acts in reference to elections, or any of such offences as defined by Act of the Legislature. Under this definition many acts were included which were not necessarily committed by either the candidate or his agent.

Then section 46 of that act, which declared that where it was found by the Judge that any corrupt practice had been committed by or with the knowledge and consent of any candidate at an election, his election should be void and he should be disqualified, evidently applied to avoid an election and disqualify the candidate, by reason of the commission by any one, whether his agent or a volunteer, of any corrupt practice with the knowledge and consent of the candidate. What was not provided for by that act was the avoidance of the election in case the agent, without the knowledge or consent of the candidate, committed a corrupt practice. This omission has been supplied by sub-sec. 1 of sec. 3 of the Act of 1873; and the object of passing this sec. 3 probably was to supply this omission.

Having regard to the course of legislation with respect to purity of elections, which has tended constantly towards greater strictness in the provisions for repressing every act and contrivance by which the perfect freedom and honesty in the exercise of the franchise may be interfered with; and this policy being distinctly apparent in several of the provisions of the Act of 1873, particularly in the extension of the definition of corrupt practices by sec. 1,—there is no reason to suppose that the Legislature intended that any election which would have been avoided under the Act of 1871 should stand good under the Act of 1873; or that while a new ground for avoiding an election was added, viz., when an agent without the candidate's knowledge or consent committed a corrupt practice, it was intended to declare that a corrupt practice committed with the knowledge and consent of the candidate, but by one who was not his agent, should no longer either affect the seat or work any personal disqualification.

It would require language very clearly enacting such a change to have the effect contended for. We must not regard the question as relating only to the selling of liquor at taverns. It extends to bribery, undue influence, and all other prohibited acts which, according to the contention of the appellant, may now be committed or practised by volunteers, with the knowledge and consent of the candidate, without any further risk than the risk of destroying the vote that is influenced, and incurring the pecuniary penalty. If it is answered, that by the candidate's consent, the volunteer becomes *ad hoc* an agent, so does the tavern keeper.

The contention is founded on the assumption that the words in sub-sec. 2, "in addition to his election, if he has been elected, being void,"

do not carry with them a declaration that the election shall be void, and that there is nothing else in the sub-section which has the effect of avoiding the election.

Let us test this by reading section 3 as applying to a defeated candidate. He will not be touched by sub-sec. 1, as he has not been elected; and when we simply omit from sub-sec. 2 the words which do not concern him, viz., "in addition to his election, if he has bsen elected, being void," every word that remains is perfectly applicable to him. There is no doubt of his disqualification by reason of a corrupt practice being done with his knowledge and consent.

If it is still urged that the first sub-section, though not in terms affecting a defeated candidate, must nevertheless be read with the second, or that the second must be read in the light of the first, as if the words were, "by the candidate, or *by his agent*, with his knowledge and consent," I answer that instead of importing into sub-section 2 words which cannot be so introduced without doing some violence to the structure of the clause, it will be much more in accordance with the spirit and object of the act, if any change of reading is to take place, to read the first sub-section by a slight transposition, as if worded thus:—"When it is found * * * that any corrupt practice has been committed at an election by any candidate *who has been elected*, or by his agent, whether with or without the actual knowledge or consent of such candidate, the election of such candidate shall be void," which in no way changes the effect of the sub-section; while, as it seems to me, it removes any pretence for modifying the reading of the second sub-section by any reference to the first, at all events, as far as the defeated candidate is concerned.

Then, is a defeated candidate to be disqualified on grounds which do not affect a successful candidate? The sub-section cannot be so construed. And if we read the disqualifying clause we find that the candidate is made incapable not only of "being elected to," but "*of sitting in*, the Legislative Assembly" "during the eight years next after the date of his being so found guilty"—a provision which of itself vacates the seat without the aid of the preceding part of the sub-section.

I do not, however, see any necessity for resorting to any subtlety of construction. The plain words of the section are, in my opinion, easily intelligible as they stand—the natural meaning being that a candidate, if elected, shall lose his seat in case a judge reports that any corrupt practice has been committed by him or his agent; that if a candidate commits or consents to the commission of any corrupt practice, he shall be subject to the penal disqualifications, which, if he has been elected, include but are not confined to the vacation of his seat.

*Appeal dismissed with costs.**

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, ESQ., *Barrister-at-law.*)

GILMOUR V. STRICKLAND.

Change of venue—Preponderance of convenience.

The venue will not be changed, when there is no great preponderance of convenience, merely on the ground that the cause of action arose in the county to which it is sought to change the venue. The place where the cause of action arose is merely a circumstance in the discussion, and of no importance as compared with the preponderance of convenience.

[Oct. 6th, 1875.—MR. DALTON and HAGARTY, C.J. C.P.]

The defendant sought to change the venue from the county of Hastings to that of Peterboro'.

The action was in replevin for a quantity of timber alleged to have been taken from the plaintiff's limits in the county of Peterboro'.

Osler showed cause, and read an affidavit made by plaintiff's attorney, stating that plaintiff intended calling twelve witnesses, all of whom resided in or near the county of Hastings; that they had no witnesses resident in Peterboro', and that four or five of these would be required as witnesses in two other cases at the assizes in Belleville (the county town of Hastings), in which the plaintiff was concerned.

J. K. Kerr supported the summons. The cause of action arose in Peterboro'. Defendants' affidavit showed, moreover, that both defendants resided there, and that they intended calling fourteen witnesses, who also resided there.

MR. DALTON held that there was not any such preponderance of convenience shewn in favour of a trial at Peterboro' as should induce him to change the venue which the plaintiff had selected, and he accordingly discharged the summons.

From this decision defendants appealed, and

* The opinions above expressed were declared to be decisive in the *North Grey Election Case*, which was also before the Court on appeal from the decision of Mr. Justice Gwynne. His judgment in favour of the successful candidate, Mr. Scott, was therefore reversed, and the appeal allowed with costs.—REP.

the appeal was heard before Hagarty, C.J. C.P.

J. K. Kerr, for appellant, cited *Harper* v. *Smith*, 8 C.L.J. N.S., 171, in which the venue was changed from Haldimand to Wentworth on defendants' affidavit stating that the cause of action arose in Wentworth, and that nearly all the witnesses to be examined resided there. This decision was based on *Levy et al.* v. *Rice.* L. R., 5 C. P. 119, where Willes, J., ordered the venue to be changed, on the ground that, other matters being equal, the place where the contract was made, the breach took place, and the defendant resided, should be the place of trial.

Osler, contra, contended that there was no preponderance of convenience as far as regards the witnesses, for the numbers were almost equal, and it was the plaintiff's right to lay the venue where he pleased. He cited *Church* v. *Barnett*, 40 L.J., N. S, 138, where Willes, J., in delivering his judgment, said: "The plaintiff has a right generally to lay his venue where he thinks proper; and, when he has not exercised a capricious choice, it is to be considered that he has exercised a right, and it lies on the defendant to shew that the preponderance of convenience is in favour of trying the case where the cause of action arose, rather than at the place where the plaintiff has laid the venue. Defendants have not done so here," and the rule was refused.

Hagarty, C.J. C.P., following the rule as laid down in *Church* v. *Barnett*, dismissed the appeal; but at the same time he expressed his opinion that the question was one which could with propriety be brought before the full Court, so that some clear and definite rule might, if possible, be adopted.

*Appeal dismissed.**

* In a subsequent case which came before Mr. Dalton (*Gwatkin* v. *Evans*), the grounds upon which the venue was sought to be changed were very similar to those in *Gilmour* v. *Strickland*, the point as to the cause of action being mainly relied upon by the defendant in his application. In giving his decision Mr. Dalton said. "It appears that the number of witnesses to be called by either party is about equal. Prior to the Common Law Procedure Act, the place in which the cause of action arose was a very material matter in deciding upon a change of venue; but that Act specially extended the facilities of suitors by its provisions with respect to transitory actions. So that now, although the place where the cause of action arose is a circumstance in these applications, it is merely a circumstance, and if allowed to have much weight would have the effect of making many actions local which the Act intended to be transitory." Rep.

UNITED STATES REPORTS.

SUPREME COURT OF MISSOURI.

Heman Isabel v. Hannibal and Saint Joseph Railroad Company.

Liability of Railroad Companies for injuries to children on their track—Obligation to fence against children—Contributory negligence of parents.

1. *Railroads—Contributory Negligence—Duty towards Persons Wrongfully on Railroad Track.*—It is the duty of a railroad company to exercise ordinary care and watchfulness to avoid injuring persons wrongfully on its track.
2. *Use of Track—Presumption—Diligence.*—A railroad track is private property, and persons have no right to be upon it, except at the crossing of a high way. The company is entitled to a clear track, and it is not to be presumed that persons will go upon it, where they have no right to be; hence the same diligence is not required in running through the country that would be necessary in the streets of a town, or at the crossings of a public highway.
3. *Private Crossings—Infants—Persons on Railroad Track—Diligence.*—Where a railroad company constructs its road near a person's dwelling and its employes are aware that his family are accustomed to cross the railroad for water along a path leading from the house to his well, such employes ought, at this point, to exercise increased vigilance to avoid injuring children who have not arrived at the age of discretion; but, it seems, the rule would be otherwise as to adults, who should use their faculties and guard against danger.
4. *Contributory Negligence—Proximate Cause.*—If the plaintiff has been negligent, or is in fault, the defendant is only liable when the proximate cause of the injury was his omission, after becoming aware of the danger to which the plaintiff was exposed, to use the proper degree of care to avoid injuring him.
5. *Railroads—Infants—Diligence—Contributory Negligence of Parents.*—Where defendant's employes in charge of a train observe an object on the track which they might by close scrutiny perceive to be a child, in time to avoid injuring him, a failure to recognize the child and stop the train before running upon and injuring him, will make the defendant liable, even though those having the child in charge may have been negligent in permitting him to go upon the railroad.

[Cent. Law Jour., 591—May, 1875.]

Appeal from the Circuit Court of Caldwell county.

Wagner, J., delivered the opinion of the Court.

Action by plaintiff to recover damages for the negligent killing of his infant son, by defendant, while running and managing a locomotive and train of cars on its railroad.

The evidence tended to show that the plaintiff's wife being dead, he had placed the child in care of its grandparents, who resided about seventy-five yards distant from the road. The

house was built before the railroad was constructed; but there was no fence intervening between it and the railroad. The grandmother, who had the care and custody of the child, which was only about twenty-one months old, testified that it was not permitted to go upon the railroad track, but sometimes played about the yard with the other children; that she prevented it from going out of the house as much as she could; that she kept it pretty close, and never allowed it to go away. That it never had gone away before, and that on the morning on which it was killed, while she was temporarily absent, it slipped out of the house and went upon the track. It there sat down between the rails. The morning was bright and clear, and for eighty rods in the direction in which the cars were running, the track was straight and almost level.

The evidence of the plaintiff tended to show that the child might have been seen at least eight hundred feet from where it was run over and killed; and the testimony of the defendant's witnesses was that it was seen in time to have stopped the train, but that it was mistaken for another object; and it was not discovered that it was a human being till the cars had approached too near to avoid the catastrophe.

Under the instructions of the court the jury found a verdict for the plaintiff.

The fifth and sixth instructions given for the plaintiff are the material ones, and they alone will be noticed. The fifth instruction declared that though Isabel had no right to be on the track of the defendant's railroad, yet the fact that he was upon their property did not discharge them from the observance of due and proper care towards him; nor did it give defendants or their employes any right to run over him, if that could have been avoided by the exercise of ordinary care and watchfulness.

The sixth instruction told the jury that if they believed from the evidence that George A. Isabel, at the time he was killed, was a minor, under two years of age, that his mother was dead, that the plaintiff was his father, and that those in charge of defendant's train, by the exercise of ordinary skill and caution, might have observed the child on the railroad track, and recognised him as an infant, in time to stop the train before it reached and ran upon him, they would find for the plaintiff,—though they might believe from the evidence that plaintiff, or those having the child in charge, were guilty of negligence in not preventing the child from going upon the railroad track.

For the defendant the Court gave four instructions, and those numbered six, eight and nine are the only important ones. The sixth asserted that it was the duty of the parent or person having the custody of a child, at all times to shield the child from danger, and that duty was the greater where the danger and risk were imminent; and the degree of protection should be in proportion to the helplessness and indiscretion of the child, and the imminence of the danger.

The eighth declared that it devolved upon the plaintiff to show by the evidence that the death of the child was occasioned by the negligence of the employes of defendant, in charge of the train; and the fact that the child was killed at a point on defendant's railroad, shown in evidence, raised no legal presumption of negligence on the part of defendant or its employes.

The ninth told the jury that the use of a railroad track, except where a highway crosses it, is exclusively the right of the railroad company which owns it, and the company and its employes are under no obligation to anticipate that children will be sitting or playing on the track, but they have a right to presume that no one will be on the track, except where a highway crosses it; and if the jury should find from the evidence that the employes of the defendant on the train, as soon as they saw the child, did all in their power to stop the train, and that the child was killed on the road at a point where it was not crossed by a highway, and that the employes before and at the time they first saw the child were in the exercise of ordinary care and diligence, then the verdict should be for the defendant.

The instructions refused by the Court which the defendant asked for were objectionable; but the third may be noticed: That was, that if the jury believed from the evidence that the child was killed by reason of the negligence of the person in charge of it and had it in custody, and that the carelessness of such person materially contributed to the death of the child, then the finding should be for the defendant.

There can be no objection urged against the plaintiff's fifth instruction. No question is better established in this state than the principle it enunciates. Our decisions have been uniform, that although a person may be improperly or unlawfully on the track of a railroad, still that fact will not discharge the company or its employes from the observance of due care, and they have no right to run over and kill him, if they could have avoided the accident by the exercise of ordinary caution or watchfulness.

The sixth instruction is liable to some criticism, and is not as definite as it should be. It declares that if those in charge of defendant's train, by the exercise of ordinary skill and caution, might have observed the child upon the railroad track and recognised him as an infant, in time to stop the train before it reached and ran over him, then the verdict should be for the plaintiff. As an abstract proposition of law, this declaration in all cases would not be strictly correct. It might seem to cast upon the company a greater degree of diligence than is in all instances required; but when examined in the light of the evidence, we think the objection disappears. The track is private property; and, except in the case of crossing highways, persons have no right to be on it. The company is entitled to a clear track, and it is not to be presumed that persons will be on it when they have no right to be there. The same diligence will not be necessary in running trains through the country that would be required in the streets of a town or the crossing of a public highway.

In order to make a defendant liable for an injury where the plaintiff has also been negligent or in fault, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him.

Diligence and negligence are relative terms and depend on varying circumstances. An act may be negligent at a particular place, which would not be so at another place, and under different circumstances.

In the present case the house was built before the road was constructed. The company had run its road in close proximity to the house and had left the well, where the family got their water, on the other side of the track. Of this the employes were well aware. They knew that the track ran close to the house and that the family were accustomed to cross it to obtain water. This ought to have increased their vigilance. All these facts, perhaps, would not amount to much in the case of an adult who should exercise his faculties and guard against danger, but in the case of an infant who has no discretion the rule would be otherwise. Moreover, it clearly shown that the engineer and fireman discovered the infant, and had abundance of time to have stopped the train and saved its life; but they debated as to what it really was till it was too late. Might they not, by a close scrutiny and a proper observance, which it was their duty to make when they discovered an object on the track, have discovered that it was a child? The testimony is conclusive that the child was dressed in red, and that would have very easily distinguished it from a hog or a dog. The instruction, if it was intended to convey the idea that the employes by using ordinary skill and caution after they observed an object on the track, could have distinguished that it was a child, was entirely proper. It is surely susceptible of this construction, and we are not justified in supposing that it was given with any other intent, or that it was differently interpreted by the jury. When the facts of the case are applied to it, this conclusion follows.

The case presented, then, is, that the persons running the train saw something on the track in time to avoid collision or doing injury, and if, after they observed it, they could, by the exercise of that care and caution which the law imposes upon them, have perceived that it was a child in time to stop the train, and they were negligent, the company is liable. Whilst some negligence might have been attributable to those who had charge of the child, if it was not the proximate cause, a recovery is not barred.

People in the situation in life of those who had the custody of the child cannot always attend to it strictly; and if it escapes from them unawares, it must not be injured simply because it escapes.

The ninth instruction given for the defendant, after laying down the law very fairly as to the right of the defendant to the exclusive and uninterrupted enjoyment of its track, goes even further than plaintiff's instruction just commented on in reference to defendant's liability. That instruction declares that defendant is not responsible if its employes before and at the time they first saw the child were in the exercise of ordinary care and diligence. Plaintiff's instruction only required care and caution in recognising the child after some object was observed on the track; whilst the defendant's instruction made it obligatory that care and caution should have been exercised before the infant was seen. As this was defendant's own instruction, it cannot complain; it was a much better one for the plaintiff than the one he got.

The sixth instruction needs no particular comment. It lays down the duties of parents, or those having infants in custody, in affording them protection and shielding them from danger.

It is complained that the seventh instruction was refused; but everything that was contained in it was given in a more full and satisfactory form in the ninth instruction.

The third instruction was rightly refused. It told the jury the defendant was not liable, if the person who had the child in charge, by carelessness materially contributed to the child's death. This was incomplete; it did not make the negligence the proximate cause, nor did it say anything about the requirement of care and caution on the part of the defendant.

It is alleged as error, that plaintiff on the trial was permitted to introduce evidence to show that there was no fence along the road where the child was killed. It is argued that our statute in relation to fencing was intended to prevent cattle from straying from the track, but not to guard against children coming thereon. This same question arose in Wisconsin, in *Schmidt* v. *Milwaukee & St. Paul Railway*, 23 Wis. 186, and the case turned and decided upon the fact that the company had omitted to comply with the statute requiring it to fence. That case was like this: The company had built its road, cutting the man's farm in two; only the house there was further from the road than in this case. There was a path leading from the house across the road to the other portions of the premises, on which the child was injured, the same as there was here leading from the house to the well, near which this child was killed. In answer to the argument that the statute was not intended to apply to such a case, the Court said that it must in the first place be remembered that the statute imposed upon all railroad companies the positive duties of erecting and maintaining good and sufficient fences on both sides of their roads, with gates or bars therein, and farm-crossings for the use of the proprietors of the adjoining lands. That was a clear, distinct and precise duty imposed by the Legislature; and the failure to perform it in the case was the sole cause of the injury,—for it was found that a fence would have prevented the accident. The facts in the case showed that for more than a year the company had run its trains over the road, neglecting all the while to build a fence at the place—omitting to do not only what the law required but common prudence demanded should be done, as well for the protection of persons travelling on the road as for the security of the domestic animals of those residing along the track, and the safety of children exposed to its dangers who were incapable of taking care of themselves. When the company neglected to perform its duty, did it not necessarily assume responsibility for all damages which might result from that cause. Could the Court make an exception to this general liability, when an infant was injured solely in consequence of the want of a fence? Would it not be an unwarrantable restriction of the statute to hold the duty imposed upon the company of maintaining a fence along its road, had no reference to children?

The Court said that if the mere verbiage of the statute was looked to, it might be concluded that the obligation of the law was solely for the protection of domestic animals, and yet it had been held that the law had a broader application, and was intended as a police regulation to secure the safety of passengers. It had been extended to cases which, if not clearly within the letter, were certainly within the spirit of the law, and the conclusion was arrived at, that it was in direct harmony with the principle and reasoning of the cases, to say that the statute embraced the protection of children.

The same doctrine seems to prevail in England. In *Singleton* v. *Eastern Counties Railway Co.*, 7 C. B., N.S., 287, it is assumed by the judges, that if the children had strayed upon the railroad track through the fence, at a place where a rail was off, which fence the company was bound to keep in repair, this would be such an act of negligence as would render the company liable. Williams, J., in his opinion, said: "There was nothing to show how the children got on the railway. All was mere conjecture and surmise." The plain inference from the case, however, is, that if it had appeared that the child passed on the track through a defective fence which the company was bound to keep up, then the action might have been maintained.

It is unnecessary to go the length of the Wisconsin case in this decision, or to hold that the statute imperatively requires that a fence should be constructed for the protection and safety of children. Unquestionably when the law enjoins a duty, and commands a company to build a fence along the line of its road, where it runs through a man's farm, the omission to build is a breach of that duty which it owes to those for whose protection the fence was designed. While it may be primarily intended to secure one object, it may incidentally have an effect on others. All must go together in determining the measure of the obligation. But under certain exigencies, prudence would demand what was not positively enjoined by the strict letter of the law. Thus, exposing dangerous machinery where children are liable to play with it and get hurt by it, might render the owner liable, though the children had no right to touch or interfere with it. So, running a railroad close to a man's house where the family and children resided, would

require that certain safe-guards should be used to shield them from danger.

There was no instruction asked for or given on the question of fencing. It was merely introduced in evidence as an element conducing to show negligence; and under all the circumstances, as the company had built its road close to the house, and was aware that the family resided there, I cannot say that it was error. Owing to the danger at that particular place, made so by the company's act, a corresponding obligation devolved upon it.

Upon a full review of the whole record, I cannot see any such error as would justify a reversal.

Judgment affirmed: all the judges concurring.

(Note by Editor of Central Law Journal.)

The authorities bearing on the main question involved in the foregoing opinion, are far from being harmonious, but it is believed that the result there reached is in accordance with the weight of authority in the United States, and that the tendency of the decisions in states where a contrary doctrine has been held, is in that direction. In a very valuable note to *Railway Co.* v. *Bohn*, 12 Am. Law Reg. 756, Judge Redfield attempts to reconcile these conflicting decisions, by separating them into three classes. In the first class he embraces cases "where the child is found in a place where he had no right to be, and where there was no antecedent reason to expect he would come, and where the injury was inflicted before the other party had any knowledge or expectation that he was in peril." In the second class he places cases "where the child is very young, and by no means fully competent to guard against all the perils of the way, but where nevertheless he is properly suffered to be abroad and is lawfully where he is found, and where he suffers from injury from the negligence of others; but which he probably would have escaped if he had been of full age and discretion." The third class includes cases "where children are received as passengers on railways, and suffer injury by reason of the negligence of the servants of the company, and of their own want of wisdom and experience in escaping its consequences." In the first class, Judge Redfield says, "the primary and chief fault lies at the door of those who have the child in charge, and there can be no recovery, unless in excepted cases hereafter noticed." The "excepted cases" thereafter noted, are "where the defendant had reason to expect that children might come upon his works," and does not so construct and use his machinery that no detriment would be likely to accrue to them. As this class of cases is excluded by the rule itself, they cannot be properly stated as an exception. The second and third classes are given as cases in which a recovery would be proper.

The rule as stated by Judge Redfield, in regard to the first class of cases, rests in this country on the case of *Hartfield* v. *Roper*, 21 Wend. 615, and cases following it. In *Boland and wife* v. *The Missouri R. R. Co.*, 36 Mo. 484, Judge Wagner characterises the reasoning of Judge Cowen in *Hartfield* v. *Roper*, as "harsh and repugnant to justice." The facts in *Hartfield* v. *Roper* did not justify the verdict for the plaintiff, for there was no evidenoe of negligence on the part of the defendants. It was as Judge Cowen said, "a case of mere unavoidable accident." The injured child, an infant about two years old, was sitting in a public road in the country, unattended by any one, when he was run over by defendants, who were passing along the road in a sleigh. They were not driving very fast, and did not see the child until after it was injured. It was held that in such a case, where an infant of tender years was permitted to go unattended upon a public road, the parents of the child are guilty of gross negligence, and that the negligence of the parents is imputable to the infant, and that in such a case the defendants were liable for nothing short of voluntary injury or gross neglect.

The most revolting application of the rule in *Hartfield* v. *Roper*, which we have found in the books, was made in *Callahan* v. *Bean*, 9 Allen 401. A little boy two years and four months old, accompanied his father across the street from his home to a candy shop for candy, which having been obtained, the father, first looking out to see that the street was unobstructed, sent the child home across the street unattended, as he had done several times before. As the child reached the middle of the street on his way home, he was run over and injured by a baker's cart, driven by the defendant down the street on a gallop. *Held*, that the parent was guilty of such contributory negligence as would bar a recovery, and that the trial court properly directed a verdict for the defendant.

In *Wright* v. *The Malden, etc., R. R. Co.*, 4 Allen, 289, it was said that "the fact that a child two years old is passing unattended across a public street, in a city traversed by a horse railroad, is in and of itself *prima facie* evidence of neglect in those who have charge of it;" but that it is a fact open to explanation, and not conclusive.

And in *Mulligan* v. *Curtis*, 100 Mass. 512, a

more humane rule was recognised. Two boys, one three and a half and the other nine years old, were sent a short distance to a wood-yard to procure some wood, and as they were returning with the wood in their arms, the younger boy was run over and injured by a milk-cart, driven by the defendant. *Held*, that a non-suit on the ground of contributory negligence was improperly directed. The Court said, "It is undoubtedly true that more care might have prevented the accident. But little children have a right to go in the street of a city for air and exercise, and if reasonable provision is made for their safety, are under the protection of the law against wrong-doers who disregard their rights." It was accordingly held that it was for the jury to say whether reasonable provisions had been made for the safety of the child, and whether due care was taken of him.

And in *Lynch* v. *Smith*, 104 Mass. 52, the supreme court of that state drifted still further away from the harsh doctrine of *Callahan* v. *Bean*. This was an action against a hackman, for negligently driving over a child four and a half years old, who was crossing the street on his way home from school at the time of the accident. It was held that it was a question for the jury to determine whether his parents were guilty of negligence in permitting the child to go unattended on the street, and it being determined that he was properly on the street, he was only bound to use such reasonable care as school children of his age and capacity can; and that even though his parents were negligent in permitting him to go unattended on the street, yet if the child without being able to exercise any judgment in regard to the matter, does no act which prudence would forbid, and omits no act which prudence would dictate, the negligence of the parents would be too remote. "But," it was said, "if the child has not acted as reasonable care adapted to the circumstances would dictate, and the parent has also negligently suffered him to be there, both these facts concurring, constitute negligence which directly and immediately contributes to the injury, for which the defendant ought not to be required to make compensation."

The authority of *Hartfield* v. *Roper*, is still recognised to a certain extent in New York, in a liberalised form. In *Cosgrove* v. *Ogden*, 49 N. Y. 255, it was held that it was not negligence *per se* for a parent living on a quiet street where few vehicles pass, to permit a child six years old to go unattended on such streets, and that when a child of that age, so on such street, was injured by falling lumber, negligently piled in the street, it was for the jury to determine whether his parents had been guilty of negligence contributing to the injury.

And in *Ihl* v. *The Rail Co.*, 47 N. Y. 317, a case very similar to *Lynch* v. *Smith*, *supra*, the doctrine of the latter case was affirmed. The Court held that it was not negligence *per se* for its parents to send a child two years and three months old across an avenue, through which a street railroad ran, in charge of a sister nine and a half years old. In crossing the railroad track the younger child fell; the horses attached to the car struck him, and the wheels of the car passed over and killed him. The driver was not looking, and both the front and rear wheels of the car passed over the child. A motion for a non-suit was denied. It was held that it was for the jury to say whether the parent was negligent under the circumstances, and that in order to bar a recovery the jury must find that both parent and the injured child were guilty of negligence, which contributed to the injury. If the child exercised proper care, and the driver of the car did not, no amount of negligence on the part of the parent would relieve the defendant from liability; and although the child did not exercise proper care, unless the jury found that its parent was negligent in permitting it to be on the street, the defendant would, if negligent, be liable. And see *McMahon* v. *The Mayor*, 33 N. Y. 647; *Drew* v. *Sixth Avenue R. R Co.*, 24 N. Y. 49. Where an infant between three and four years old escaped through an open window, coming to within four feet of the floor, that being his only means of egress, and was run over and injured in consequence of the negligence of the defendant's car driver, it was left to the jury to say whether the parents of the child were negligent in permitting the child to escape, and it was held, as matter of law, that a child of that age was incapable of forfeiting his remedy against a wrong-doer by reason of his own personal negligence. *Mangam* v. *Brooklyn R. R. Co.*, 38 N. Y. 455. And to same effect see *Pittsburgh, &c., R. R. Co.*, v. *Pearson*, 72 Penn. St. 169; *Glassey* v. *Hestonville, &c., R. R. Co.*, 57 Penn. St. 172; *Kay* v. *Penna. Railw. Co.*, 65 Penn. St. 269.

The courts of Pennsylvania make a distinction between actions brought by the injured child and those brought by its parents. Where the infant sues it is held that the negligence of its parents cannot be imputed to him; but where the parent sues, his negligence contributing to the injury bars the action. *Rail. Co.* v. *Mahoney*, 57 Penn. St.; *Rail. Co.* v. *Pearson*, 72 Penn. St. 169.

The Pennsylvania rule is generally followed in those states that reject the imputability of the parent's negligence to the child, but adhere to the rigid application of the doctrine of contributory negligence. *Schmitt* v. *Milwaukee R. R. Co.*, 23 Wis. 186; *Karr* v. *Parks*, 40 Cal. 193; *Meyer* v. *M. P. R. R. Co.*, 2 Neb. 337; *Lynch* v. *Nurdin*, 1 Ad. & El., N. S. 28. The Pennsylvania rule is endorsed by Mr. Wharton. Wharton on Negligence, § 310, note 3. And see Shearman & Redfield on Negligence, § 48*a*.

It is held in Indiana, in accordance with the New York and Massachusetts rule, that the negligence of the parent or guardian is imputable to the child. *Rail. Co.* v. *Vinings, Admr.*, 27 Ind. 513; *Rail. Co.* v. *Huffman*, 28 Id. 287; *Rail. Co.* v. *Bowen*, 40 Id. 545. And such is the rule in Illinois in a very mild form. *Ross* v. *Innis*, 26 Ill. 259; *Chicago* v. *Starr*, 42 Ill. 174; *Pittsb., &c., R. R. Co.* v. *Bumstead*, 48 Ill. 221; *Chicago & Alton R. R. Co.* v. *Gregory*, 58 Ill. 526; *City* v. *Major*, 18 Ill. 360. And see *Brown* v. *Rail. Co.*, 58 Maine 384.

In England, to injure an adult, or what is sometimes an equivalent, an ass, or an oyster, in a place where they have no right to be, is actionable, if the defendant by the exercise of ordinary care on his part might have avoided the consequences of the neglect or carelessness of the plaintiff. *Tuff* v. *Warman*, 5 C. B., N. S. 585; *Davies* v. *Mann*, 10 M. & W. 549; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377. But not so of an injury to a child of tender years; it can be negligently injured with impunity, provided those who ought to guard it against harm fail in their duty. *Singleton* v. *E. C. Railw. Co.*, 7 C. B., N. S. 287; *Abbott* v. *Macfie*, 33 Law J. Exch. 177; *Mangan* v. *Atterton*, L. R. 1 Exch. 239. But see *Williams* v. *Great Western Railw. Co.*, L. R. 9 C. P. 157.

The doctrine of *Hartfield* v. *Roper* is wholly repudiated in Ohio, Vermont, Connecticut, Tennessee, Minnesota, Missouri and Pennsylvania. *B. & I. Rail. Co.* v. *Snyder*, 18 Ohio, 399; *Robinson* v. *Cone*, 22 Vt. 213; *Penna. R. R. Co.* v. *Kelly*, 7 Penn. St. 372; *Daley* v. *N. & W. R. Co.*, 26 Conn. 591; *Bronson* v. *Southbury*, 37 Conn. 199; *Whirley* v. *Whittemore*, 1 Head, 620; *East Tenn. R. R. Co.* v. *St. John*, 5 Sneed, 524; *City* v. *Kirby*, 8 Minn. 169. And see *East Saginaw R. R. Co.* v. *Bohn*, 12 Am. Law Reg. (N. S.) 745; *Meyer* v. *Mid. Pacific R. R. Co.*, 2 Neb. 337; *Boland and wife* v. *Missouri R. R. Co.*, 36 Mo. 484; *O'Flaherty* v. *Rail. Co.*, 45 Mo. 70; *Rail. Co.* v. *Gladmon*, 15 Wall. 401; *R. R. Co.* v. *Stout*, 17 Wall. 657; *B. & O. R. R. Co.* v. *State*, 30 Md. 47; *Lannen* v. *Albany Gas Light Co.*, 46 Barb. 264; *Bannon* v. *B. & O. R. R. Co.*, 24 Md. 108.

Where the parent or guardian has taken reasonable precaution to restrain an infant and guard it against danger, reference being had to all the surrounding circumstances, including the parents' condition in life, and the child escapes into a dangerous place, and is injured by the negligence of another, no negligence can be imputed to the parent or guardian, and if the child exercises ordinary care for one of his years and capacity, no blame attaches to him; If, on account of his tender years, the child is incapable of exercising any care or discretion, under such circumstances, none will be required. In this view all the authorities concur. *Kay* v. *Penn. R. R. Co.*, 65 Penn. St. 269; *Pittsburgh & C R. R. Co.* v. *Pearson*, 72 Penn. St. 169; *Philadelphia, &c., R. R. Co.* v. *Long*, 75 Penn. St. 257; *City of Chicago* v. *Major*, 18 Ill. 360; *Chicago & Alton R. R. Co.* v. *Gregory*, 58 Ill. 226; *Mangam* v. *Brooklyn, &c., R. R. Co.*, 38 N. Y. 455; *Lynch* v. *Smith*, 104 Mass. 52; *Schmidt* v. *The Milwaukee, &c., R. R. Co*, 23 Wis. 186; *O'Flaherty* v. *Union Railway Co.*, 45 Mo. 70; *Ihl* v. *Forty-second St. R. R. Co.*, 47 N. Y. 317.

Whether a child is personally negligent is to be determined by his age and capacity, and not by that of a person of mature years. *Kerr* v. *Forgue*, 54 Ill. 482; *Railroad* v. *Stout*, 17 Wall. 657; *Railroad* v. *Gladmon*, 15 Wall, 401; *Coombs* v. *New Bedford Cord Co.*, 102 Mass. 572; *Lynch* v. *Smith*, 104 Mass. 52; *Gray* v. *Scott*, 66 Penn. St. 345; *Brown* v. *Railroad*, 58 Me., 384; *B. & O. R. R. Co.* v. *State*, 30 Md. 47; *Mangam* v. *Brooklyn, &c., Rail. Co.*, 38 N. Y. 455; *Sheridan* v. *Brooklyn, etc., Rail. Co.*, 46 N. Y. 39; *Ihl* v. *Forty-second St. R. R. Co.*, 47 N. Y. 317; *Costello* v. *Rail Co.*, 65 Barb. 92; *Reynolds* v. *Stout*, 2 N. Y. Supreme Court, 644; *Birge* v. *Gardiner*, 19 Conn. 507. But see *Bellefontaine, &c., Rail. Co.* v. *Snyder*, 24 Oh. St. 670, where it was held by a majority of the Court that where an infant child, intrusted to the care and custody of her sister about 20 years old, was injured through the negligence of the defendant's employe, the parents could not recover for loss of the child's services, if the elder sister failed to exercise the highest degree of care and caution, and that, too, without regard to her age and capacity. Day, C.J., and White, J., dissented on the ground that there was no negligence under the circumstances on the part of the father in sending the little girl to school in charge of her sister, and that the question as to whether the elder sister was

guilty of negligence in taking care of the child should be determined by ascertaining whether she exercised due care for one of her age.

The conclusion reached by the majority of the Court seems to us to be against law, reason and humanity. Whether it was negligence to place the little child in her sister's charge, under the circumstances, is to be determined by her capacity to discharge the trust, and if that capacity was sufficient in law, and it was conceded to be, her failure to exercise a greater capacity was no fault of hers, or of the parent. It will not do to say that one may intrust a child properly to one of less than full capacity, but that it is negligence to do so where the person so in charge of the infant fails to exercise full capacity in guarding it against a negligent injury. Such a rule would not only debar the children of the poor from the privilege of schools, but from exercise in the open air as well. In large cities it would doom them to close confinement in dark tenement houses and filthy alleys.

And, as necessarily growing out of the above rule, that which would not be negligent towards an adult of full capacity, may be gross negligence as applied to a child. *Phila. &c., R. R. Co.* v. *Spearen*, 47 Penn. St. 300; *Pittsburgh, &c., R. R. Co.* v. *Caldwell*, 74 Penn. St. 421; *Sheridan* v. *Brooklyn R. R. Co.*, 36 N. Y. 39; *Meyer* v. *M. P. Railw. Co.*, 2 Neb. 319: *Squier* v. *Rail. Co.*, 36 N. Y. Superior Court Rep. 437; *Schierhold* v. *North Beach, &c., R. R. Co.*, 40, Cal. 447.

The doctrine of the principal case as to the exposure of dangerous machinery or structures in a place where meddlesome or thoughtless children may interfere with it to their injury, is fully sustained by the following cases:—*Railroad Co.* v. *Stout*, 17 Wall. 657; *Schmidt* v. *Milwaukee, etc., R. R. Co.*, 23 Wis. 186; *Lynch* v. *Nurdin*, 1 Q. B. 29; *Britton* v. *Great Western, etc. Co.*, L. R. 7 Exch. 180; s. c. 1 Eng. Rep. 381; *Directors Railw. Co.* v. *Wanless*, L. R., 7 House of Lords 12, 9 Eng. Rep. 1; *Williams* v. *Great Western Railw. Co.*, L. R. 9 C. P. 157. This last case was a suit by a child four and a half years old for injuries received on defendant's railroad at a point where by statute it was required to be enclosed. The failure to enclose was the only negligence shown against the company. There was no evidence to show how the child got on the track, or how he conducted himself. *Held*, that a verdict must be entered for the plaintiff upon the case reserved. Pollock, B., said:—"Now as to there being a non-performance of what was enjoined by the Act of Parliament, there is no doubt about it; and it is not for us to speculate on what was the precise intention of the Legislature. . . . It is sufficient to say that the defendants have neglected to comply with the enactment." And see further on this point, *Chicago* v. *Mayor*, 18 Ill. 360; *Robinson* v. *Cone*, 22 Vt. 213; *Kerr* v. *Forgue*, 44 Ill. 482, s. c. 5 Am. 146, *note*; *Birge* v. *Gardiner*, 19 Conn. 507. But see *Mangan* v. *Atterton*, L. R. 1 Exch. 239; *Abbott* v. *Macfie*, 33 L. J. Exch. 177; *Chicago* v. *Starr*, 42 Ill. 174; *Brown* v. *European, etc., Railw. Co.*, 58 Me. 384; *Flynn* v. *Hatton*, 4 Daly, 552, 43 How. Pr. 333; *Holly* v. *Boston Gas Light Co.*, 8 Gray, 123. M. A. L.

BIOGRAPHICAL SKETCHES.

HON. ROBERT ALEXANDER HARRISON,

CHIEF JUSTICE OF ONTARIO.

The Honourable Robert Alexander Harrison is the eldest son of the late Richard Harrison, a well-known resident of the city of Toronto, and was born at the city of Montreal, in the Province of Quebec, on the 3rd August, 1833.

He was educated at Upper Canada College. He there obtained honours and exhibited qualities that gave faithful promise of his future success. After leaving college he was placed under articles to Mr. James Lukin Robinson for the study of the law, and in this capacity he proved himself a most diligent and useful student. He was admitted to the Law Society in Hilary Term, 1850. Shortly after this he commenced the compilation of a digest of the Upper Canada Reports, which he published under the name of "Robinson's & Harrison's Digest," Mr. Robinson then being reporter to the Court of Queen's Bench. This digest is to the present time a standard book of reference, and has always been considered valuable for its accuracy and completeness. In 1853 he entered the office of the late Hon. John Crawford, in which the present Chief Justice of the Common Pleas was then a partner. There he remained but a few months, having been selected by the Hon. John Ross, then Attorney-General, to fill the office of Chief Clerk in the Crown Law Department. Mr. Harrison was on

his way to Quebec, then the seat of Government, to enter upon his duties, when a change of administration took place. Sir John A. Macdonald, however, confirmed his appointment, and had no reason to regret that he had secured so valuable an assistant.

In 1855 he entered the Faculty of Law in the University of Toronto, and obtained first-class honours; but he shortly afterwards "migrated" to the University of Trinity College, where, under the regulations of the Faculty of Law in that University, he obtained, in 1856, the degree of B.C.L., and subsequently the same University conferred upon him the degree of D.C.L.

In Michaelmas Term, 1855, Mr. Harrison was called to the Bar "with honours," a distinction conferred upon only two or three others. He then commenced a career which has culminated in his attaining the highest judicial position in Ontario. He was elected President of the Toronto Literary Society, and Vice-President of the Osgoode Debating Club, and he occasionally contributed leading articles on political and social subjects to the Toronto and London press.

On Mr. Harrison's retirement from the Crown Law Department, the Attorney-General presented him with his first brief in the trial of the celebrated case of Townsend *alias* McHenry, who was prosecuted for murder, and who, after a protracted trial, succeeded in baffling the Crown as to his identity. He was engaged for the Crown in the Norfolk Shrievalty case, and was one of the counsel in defence of the Ministers when proceeded against for violating the Independence of Parliament Act, they having voted in the House without being re-elected. He was entrusted with the *habeas corpus* case of John Anderson, the fugitive slave, and was one of the prosecutors, on behalf of the Crown, at the trial of the Fenian prisoners, in 1867. In fact, since 1859, when he entered into partnership with the late James Paterson, and Mr. Thomas Hodgins, and commenced his practice at the bar, there has been scarcely a case of public importance in which he has not been retained, and the number of briefs he yearly held must have entailed an immense amount of labour, anxiety, and thought. We believe no member of the profession in this country has held so many briefs as Mr. Harrison during the time he has been at the Bar. At many of the Assizes for York and the city of Toronto, Mr. Harrison has been retained in three-fourths of the criminal, and as large a proportion of the defended cases on the docket; during some terms, we have been informed, he has moved no less than 80 rules. The marvel is that, with this immense amount of work, together with a large office business, and his political duties when in parliament, Mr. Harrison found time to devote to his literary labours.

In 1855 he undertook the annotation of the Common Law Procedure Act, and issued it the following year. The merits of this book established his reputation, both in this country and in England, as a most able annotator and careful legal writer. It was deservedly commended by the legal press, both here and at home. As a work of high authority, it has never been questioned, and many of the opinions he hazarded in his first edition have since received the sanction of law. Mr. Harrison subsequently edited several little books of less importance, entitled: "Statutes of Practical Utility," a "Manual of County Court Costs," "Rules and Orders of the Superior Courts, with Notes, explanatory and practical," and "A Sketch of the Growth and present Importance of the Legal Profession in Upper Canada." In 1859 appeared the first edition of "The Municipal Manual," municipal law being a subject with which he was especially familiar. Intended as supplementary to this, he and Mr. Thomas Hodgins in 1863 edited a volume of reports of municipal cases, which however was not continued, as the manual so fully covered all the ground. In 1867 he published a second edition of this work; and, in 1870 issued an enlarged edition of his Common Law Procedure Act, the most complete work on the subject that has yet been or is likely to be published, and which, for the labour bestowed upon it, its completeness and usefulness, is the most valuable legal work that has yet appeared in this country. Owing to a consolidation and change in the municipal law in 1873, Mr. Harrison had almost entirely to re-write his Municipal

Manual, and it was issued the following year. So popular was this edition that it was out of print within six weeks of its publication. One of the most important works with which his name was connected was "Harrison & O'Brien's Digest," prepared by Mr. Henry O'Brien under Mr. Harrison's supervision in 1863.

Mr. Harrison's connection with the editorial department of this Journal has been already referred to. His industrious pen contributed numerous articles of great value to its pages, whilst the numerous cases reported by him, and to be found nowhere else, are still invaluable to the practitioner, and his labours have added largely to what measure of success this journal has attained.

To perseverance, industry, and downright hard work Mr. Harrison has attributed his success. But it is evident that there is something behind these. Perseverance may be followed by success, and industry may meet with reward, but apart from a constitutional ability to perform hard work, a brilliant career like his only attends those who have other and higher gifts. Earnest and impressive, he had great weight and astonishing success with juries, whilst his research, and industrious preparation of his cases, rendered him an opponent that none attempted to underrate. Mr. Harrison's powers of work, and the experience gained from a large and varied practice at the Bar, will stand him in good stead on the bench, whilst his reputation as a sound lawyer and successful counsel will give him the confidence of suitors. The brilliant names of Robinson, McLean, Draper and Richards are still fresh in the memory of his countrymen. He has the inspiration of their example, and we are confident that he will do no discredit to the fame of the oldest Court of this Province, over which we hope he may for many long years preside, with honour to himself and benefit to his country.

Mr. Harrison's career, from the time he was a boy at school, high up in his form, until he attained his present position, gives an example which students would do well to follow. He knew no such word as *cannot*; his motto was *try*. He had a thorough belief in his own future. He aimed high, and did not miss his mark.

He was made one of Her Majesty's Counsel on 28th June, 1867, and was elected a Bencher of the Law Society in 1871, when the election of Benchers was thrown open to the Bar. His last act in this capacity was to move a resolution appointing a committee to "consult with the Attorney-General and the Municipal Councils of York and Toronto, on the subject of building a new Court House for Assize and County business on Osgoode Hall grounds." We should have been glad had he been enabled to carry out so desirable a suggestion; a practical matter in which his common sense and energy would have been of great assistance.

In 1865 he was elected an alderman for the city of Toronto, and represented, in the Dominion Parliament, the west riding of that city, in the Conservative interest, from 1867 to 1872.

The elevation of Mr. Harrison to the Bench has been most favourably received throughout the Province, and the following address (one of many), presented to him by the Bar of the County of Oxford, at the recent Assizes at Woodstock, reflects the general sentiments of the profession in the country:—

To the Honourable Robert Alexander Harrison, Chief Justice of Ontario:

The presence of your Lordship at the Assizes now being held affords the members of the Oxford Bar an opportunity we gladly avail ourselves of to offer you, as we now do, our sincere and hearty congratulations on your elevation to the Chief Justiceship of Ontario; and that at so early an age as to promise your long continuance in that most important position.

When the announcement had been made that Chief Justice Richards was about to assume the Chief Justiceship of the Supreme Court, the attention of the profession was naturally directed to the appointment of his successor, and the liveliest satisfaction was felt when it was found that a gentleman had been selected of large experience, of great depth and variety of legal learning, and of untiring energy in the exercise of those qualities.

At no period of our legal history will the display of those qualities be more called for than during the next few years. The changes recently made in the practice of our Courts, and those that will come into force in England in a few weeks, will require a degree of labour and experience of the law in all its branches that

will tax severely the Judges of our Superior Courts, and on none will this labour press more heavily than on the Chiefs of those Courts.

It is therefore with the greatest satisfaction, as well on personal grounds as also in the interests of justice, we heard of your appointment and meet you here to-day ; and in saying this we are sure we express the opinion of the entire Brr of Ontario.

To the gentlemen throughout the Province who are concerned in the working of our municipal institutions we are also persuaded your appointment will be particularly acceptable. By your learned and laborious commentaries on a complicated system of municipal law you have smoothed the way over many difficulties, and have earned for yourself the entire confidence of our municipal bodies.

Trusting your Lordship may long be spared to fill your present position, satisfactorily we hope to yourself, and usefully, as we are convinced it will be. to the administration of justicee we bid your Lordship a hearty and affectionate welcome to the County of Oxford.

Woodstock, October 26th, 1875.

HON. THOMAS MOSS,

JUSTICE OF THE COURT OF ERROR AND APPEAL.

Mr. Justice Moss is the eldest son of the late John Moss, of the City of Toronto, and was born at Cobourg on the 20th August, 1836. His early education was at Knox' College, then called Gale's Institute. In 1850 he entered Upper Canada College, taking his place in the fourth form. Almost from the day he entered, it seemed to be conceded that his love of study, his facility for learning and his retentive memory, would enable him to attain the highest honours. The College has always esteemed him as the most distinguished of its alumni, and as yet no name appears on its roll of honour that deserves such preference, or has reflected such credit on that distinguished institution. Within four months from his entering College he obtained the first exhibition of the foundation, and was head of his form. This position he retained through the intermediate forms to the seventh, annually carrying off a number of prizes, and in 1854 was head boy of the College, obtaining its highest honour, the Governor-General's prize. In the fall of that year Mr. Moss commenced his studies at University College ; and on matriculating at Toronto University, obtained the first scholarships in classics and mathematics. In his first year he was awarded a prize for Latin prose, which he again obtained the following year, with those for Latin verse, English prose and French. In 1857 he obtained scholarships for classics. mathematics, and modern language, with the prizes for Greek prose and Latin verse, and in 1858 he graduated, being awarded the three gold medals for classics, mathematics and modern languages, being the only student who has as yet obtained a triple first-class degree in the University of Toronto. In 1859 Mr. Moss took his master's degree and the prize thesis of that year.

On leaving the University Mr. Moss immediately entered upon the study of the law, in the office of Messrs. Crooks & Cameron, in this city. Upon the dissolution of that firm, Mr. Moss, having been called to the bar in 1861, commenced practice with Mr. Hector Cameron. He afterwards formed a partnership with the Hon. James Patton and Mr. Osler; and in 1871 was established the extensive firm of Harrison, Osler & Moss, having for its senior partner the present Chief Justice of Ontario. Mr. Moss's career at the Bar, though rapid, was gradual. When he commenced practice in the Court of Chancery he had to contend against the ablest members of the profession ; and nothing but industry, close application to business, and brilliant talents could so soon have brought him into public notice. Calm and patient in the conduct of cases, an acute discerner of facts, clear and logical in his deductions, a close reasoner and a fluent speaker, he soon established his position as an able and reliable counsel and a formidable opponent, either on circuit or before the judges. Of late years Mr. Moss seldom held a brief at Nisi Prius, his great reputation at the Equity Bar, second only to and scarcely less than that of the talented and learned Minister of Justice, Mr. Edward Blake, giving him such an amount of important business as to preclude him from taking much common law work.

In 1864 he was appointed Equity Lecturer and one of the Examiners to the Law Society ; and he was several times Examiner in law, as well as in other departments, in the University of Toronto, in

which he also for many years held the office of Registrar. In 1872 he was created a Queen's Counsel, and in 1871 was elected a Bencher of the Law Society. He was one of the Commissioners appointed by the late Government of Ontario to report on the fusion of Law and Equity, and in 1872 was offered the Vice-Chancellorship of the Court of Chancery, which he declined.

Independently of his legal acquirements, perhaps a little of Mr. Moss's rapid success may be attributed to gifts of a personal nature. In the old college days he was what boys commonly call "a first-rate fellow," fond of the cricket field and manly sports; open-hearted and generous, with a pleasant, courteous manner, he has always been a general favourite; and whether at play or at work, whether at school or in the courts, he has done well and easily all that he attempted.

His personal popularity was evidenced at the recent election to fill up the members of the Senate of Toronto University, under the Act rendering them elective by the graduates. Out of 24 members that were elected, Mr. Moss's name stood first; and immediately on the assembling of the new Senate, he was unanimously chosen Vice-Chancellor of the University. Mr. Moss seems to have been equally a favourite with the members of the bar, for at the first election of benchers to the Law Society, he, with one exception, received the highest number of votes.

In 1873 Mr. Moss was returned to the Parliament of the Dominion as member for West Toronto, and was again re-elected two months afterwards at the general election. In accord with the existing Government, he was frequently consulted by them in matters pertaining to their legal measures, and rendered them material assistance in perfecting the new Insolvent Act and establishing the Supreme Court of the Dominion.

On the 8th October Mr. Moss received his present appointment. The resignation of Mr. Justice Strong rendered it all but imperative that a member of the Equity Bar should succeed him. To Mr. Moss the position was due, and was unhesitatingly offered, but we can readily understand that he might have hesitated at accepting it. He, and his friend and partner, the Chief Justice of Ontario, had probably the most lucrative practice at the bar; a brilliant future and an ultimate certainty of high political distinction were before him. His choice lay between a quiet life of lasting usefulness on the Bench and a more exciting career in public life—the profession, at least, will be glad that he made the former choice. The wisdom of his appointment has been already evinced by the addresses that have been presented to him by the members of bar attending his present circuit.

Advanced to a seat in the highest court in the province, at an age when most members of his profession have only commenced to establish their reputation. Mr. Moss owes his promotion to his own high attainments and personal worth. Unaided by patronage, unassisted by favour, relying solely on his own industry and superior endowments, he has in each sphere in life risen to the highest eminence.

He is now, by universal consent, in his right place. Admitted to be one of the best grounded and deeply read lawyers in the province, impartial, conscientious and patient, with an intellect clear and comprehensive, and a mind eminently judicial, we are satisfied that in his high and responsible position he will, with advocates, suitors and the public at large, retain what he has so long enjoyed—their respect and affection; and will so administer the laws of this land as to leave a memory of duty well and faithfully performed.

The Queen, upon the recommendation of the Earl of Carnarvon, has signified her intention to confer the honour of knighthood on Chief Justice Begbie, of British Columbia.

REVIEWS.

Blackwood's Magazine for October has been promptly republished by The Leonard Scott Publishing Co., 41 Barclay Street, N.Y. The contents are as follows:

I. The London Police Courts.
II. Wrecked off the Riff Coast.
III. Subordination.
IV. Sundry Subjects—Money.
V. The British Sea-Fisheries.
VI. Michael Angelo.
VII. The Dilemma. Part VI.

This number is of more than usual interest, as it contains several articles having relation to subjects now attracting a good share of attention in this country.

The first article explains the many and various duties of the police magistrates of London, and narrates a few of the incidents that occur in the police courts. The jurisdiction of the magistrate has of late years been largely extended, and in numerous cases he has the power of deciding summarily. There are some complaints as to the disposal of cases in our Toronto Police Court, and *Grip*, in a late issue, hits off one of the peculiarities of the presiding magistrate in its usual clever style.

"Wrecked off the Riff Coast" is one of the class of short stories for which *Blackwood* has always been famed.

In the third article we again meet with the vexed question of employer and employed; the old relations are breaking up; obedience is a word well-nigh without a meaning; assertion of equality is the order of the day; none are contented. The situation is full of difficulties, and no remedy presents itself.

The article on "Money" does not treat the subject in a dry, statistical way, but in familiar style shows how the vast hoards mentioned in history have disappeared; explains why we employ gold and silver as money; says of paper-money that it "wants but reality to be considerably more perfect than the metals whose place it takes;" and finishes with some remarks upon the moral influences exercised by money.

The periodicals reprinted by The Leonard Scott Publishing Co. (41 Barclay Street, N. Y.) are as follows: *The London Quarterly, Edinburgh, Westminster,* and *British Quarterly Reviews,* and *Blackwood's Magazine.* Price, $4 a year for any one, or only $15 for all, and the postage is prepaid by the publishers.

CORRESPONDENCE.

To the Editor of the Law Journal.

Dear Sir,—Was cap. 36 of 35 Vict., Ont., repealed by 36 Vict., cap. 135, 518; or was it the intention of the Legislature to repeal 35th cap. of 35 Vict. instead? See 36 Vict., cap. 135 (Ont.) s. 18, *lines* 10 *and* 11 (repealing clause). A reply through the Law Journal as to above, and as to effect of same if an error, will much oblige,

Yours truly,

E. M.

11th Oct., 1875.

FLOTSAM AND JETSAM.

Borrowing Law Books.

The Omaha *Republican* gives the following correspondence between two prominent lawyers of that city:

Omaha, Neb., Sept. 13, 1875.

Dear Judge,—I hold your receipt for Abbot's Nat. Digest, which was taken by you some four months ago. If you have no further use for the book, I should like it. I often wish to consult it, but still, if you are not through reading it, I can get along without it.

Yours truly,

G. W. Ambrose.

To Hon. E. Wakely.

Omaha, Neb., Sept. 14, 1875.

Dear Ambrose,—I hereby comply, under protest, with your untimely request that I should return your book.

You remark that you have held my receipt for it some four months. This is probably true. But if you will read the Statute of Limitations of Nebraska, you will observe that it does not bar a claim under any written instrument until the lapse of five years, leaving you about four years

and eight months still to reclaim your book. Why, then, this undue precipitancy?

Will you permit me, as a searcher after legal knowledge, respectfully to inquire if you can refer me to any respectable authority requiring the borrower of a law book to return it within four months? You remark that you often wish to consult the book. I highly commend that resolution. You would certainly find it beneficial to occasionally read some law; and if you should become accustomed to it, you would find it comparatively easy, only don't overdo it at first.

The only thing that I object to in that paragraph is an implication that I would not allow you to consult the book at my office. That is unjust. I have never refused the owner of a book that privilege, even when it occasioned inconvenience to myself. In conclusion, permit me to suggest that, if you really cannot afford to keep law books for other practitioners to use, it would be a philanthropic thing for you to sell them to some one who can.

Gratefully yours,

E. WAKELY.

CURIOUS LAW EXTRACTS.

That acute judge, Mr. Justice Maule, in summing up a case of libel, and speaking of a defendant who had exhibited a spiteful piety, observed, "One of these defendants is, it seems, a minister of religion: of *what* religion does not appear; but, to judge by his conduct, it cannot be any form of Christianity."

In a case in the Year Books, 22 and 23 ed. I., p. 448, a counsel makes a very apposite scriptural quotation. Metingham, Chief Justice, says: "If my vilein beget a child on my land, which is vileinage, and the child so begotten go out of the limits of my land, and six or seven or more years afterwards return to the same land, and I find him in his own rest, at his own hearth, I can take him and tax him as my vilein; for the reason that his return brings him to the same condition as he was in when he went." *Heiham* of counsel responds: "He fell into the pit which he hath digged."

Sir Walter Scott says of Baron Fortescue, that "*though* a lawyer, he was a man of great humour, talents, and *integrity*."

"If one be in execution, and if he has no goods, he shall live of the charity of others, and if others will give him nothing, let him die in the name of God." Montague, Chief Justice, *Dive* v. *Mannington*, 1 Plowd. 68, quoted in *McLain* v. *Hayne*, 3 Brevard, 296.

In a recent case, the Supreme Court of the United States animadvert upon the practice of introducing children as witnesses in an angry family quarrel, Mr. Justice Wayne quaintly saying that "it cannot be done without it being considered as a forlorn effort of parental obliquity." *Toby* v. *Leonards*, 2 Wallace, 425, 438.

LAW SOCIETY.

ALTERATION IN BOOKS FOR EXAMINATION.

The Committee on Legal Education recommend the following alteration in the subjects prescribed for examination:

In the subjects for the first intermediate examination add to "Consolidated Statutes, U.C., chaps. 42 and 44" the words "and amending acts."

In the subjects for the second intermediate examination, add to "chap. 88," and "Ontario Act, 38 Vict. c. 16, and substitute for "Insolvent Act," "Administration of Justice Acts, 1873 and 1874."

In the scholarship examination of the first year, for "Consolidated Statutes U.C., chap. 43," substitute "Consolidated Statutes U.C., chap. 42, and amending acts."

In the scholarship examination of the third year for "Story's Equity Jurisprudence" substitute "Taylor's Equity Jurisprudence."

In the final examination for articled clerks, substitute "Taylor on Titles" for "Watkins on Conveyancing" and "Taylor on Equity Jurisprudence" for "Story's Equity Jurisprudence."

In the final examination for call, substitute "Walkem on Wills" for "Watkins on Conveyancing," and "Taylor" for "Story;" and in the examination for call with honours, "Hawkins on Wills" for "Jarman on Wills."

The Committee recommend that the changes come into force at the examinations to be held in Hilary Term next.

The Senate of the University not yet having made the anticipated alterations in the subjects for matriculation, the Committee are obliged to defer the consideration of the subjects for the entrance examination.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Trinity Term, 38th Victoria.

During this Term, the following gentlemen were called to the Degree of Barrister-at-Law :

No. 1337—James Frederic Lister.
Nelson Gordon Bigelow.
Alexander Stronach Wink.
George Robert Howard.
No. 1341—Francis Edward Philip Pepler.

The above named gentlemen were called in the order in which they entered the Society, and not in the order of merit.

The following gentlemen received Certificates of Fitness :

J. Bond Clarke.
Albert Monkman.
John S. Fraser.
Walter D. Ebbels.
J. W. Liddell.
Francis Love.
Henry Hatton Gowan Ardagh.
John William Frost.
Thomas H. Pardon.
Angus M. Macdonald.

And the following gentlemen were admitted into the Society as Students-at-Law :

Graduates.

No. 2564—George Young.
F. W. Barrett.
George R. Webster.
Joshua A. Wright.
B. Edward Bull.
Robert W. Shannon.
John Moore.
David M. Snider.
Henry T. Beck.
John George Douse.

Junior Class.

Harris Buchanan.
Patrick McPhillips.
John Alexander McLean.
Frederick L. Rodgers.
Alonzo Hodges Manning.
William Bruce Ellison.
Patrick Joseph King.
Nehemiah Gilbert.
Duncan Arthur McIntyre.
Thomas E. Parke.
No. 2584—W. J. Delaney.

A change has been made in some of the books contained in the list published with this notice, which will come into effect for the first time at the examinations held immediately before Hilary Term, 1876. Circulars can be obtained from the Secretary containing a list of the changed books.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3 ; Virgil. Æneid, Book 6 ; Cæsar, Commentaries, Books 5 and 6 ; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams: Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. C. caps. 42 and 44.

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vict. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows :—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario. Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.