DIARY FOR DECEMBER.

1. SUN .. *1st Sunday in Advent.*
2. Mon .. Paper Day, Q.B. New Trial Day, C.P.
3. Tues... Paper Day, C.P. New Trial Day, Q.B. Consolidated Statutes came into force 1859.
4. Wed... New Trial Day, C.P. Open Day, Q.B.
5. Thurs. Open Day. Re-hearing Term in Chancery commences.
6. Fri.... New Trial Day, Q.B. Open Day, C.P.
7. Sat.... Michaelmas Term ends. Open Day. Last day for Attorneys to take out Certificates.
8. SUN .. *2nd Sunday in Advent.*
10. Tues .. General Sessions and County Courts sittings in each County.
14. Sat.... Collectors rolls to be returned unless time extended.
15. SUN .. *3rd Sunday in Advent.*
21. Sat.... *St. Thomas.*
22. SUN .. *4th Sunday in Advent.*
23. Mon .. Nomination of Mayors in Towns, Aldermen, Reeves, Councillors and Police Trustees.
25. Wed... *Christmas Day.* Christmas vacation in Chancery begins.
26. Tues .. *St. Stephen.* Upper Canada constituted a Province, 1791.
27. Fri.... *St. John the Evangelist.*
28. Sat.... *Innocents.*
24. SUN .. *1st Sunday after Christmas.*

CONTENTS.

The Local Courts' AND MUNICIPAL GAZETTE.

DECEMBER, 1872.

TO OUR READERS.

The *Local Courts' and Municipal Gazette* became a distinct publication from the *Upper Canada Law Journal* in the year 1865. The reasons for that change were fully given in the first page of the January number of that year. It was there stated that, at first, a large measure of support came from County and Division Court officers, but that at that time (1865) this had somewhat altered, and professional men and County and Division Court officers stood nearly on a par as to numbers on the subscription list. This change has continued, so that now the support of the latter class has become so small as not to warrant the extra expense attendant upon a separate publication, whilst the number of our subscribers amongst the profession has increased in a most satisfactory and encouraging manner. The reason for all this is easily accounted for. In the first place, the business of the Local Courts has greatly fallen off, so that many who could well afford the luxury of a legal paper have been reluctantly compelled (we quote the words of many who have so expressed themselves) to withdraw their subscriptions; in the second place, officers now-a-days are pretty well versed in their duties, and do not require the same advice and information which it has been our province and our pleasure to give them. We think that for this result we may, without egotism, take some credit to ourselves. We think we have been enabled in many ways to induce a greater uniformity of practice, and to inculcate more sound views of the duties of local officers than obtained before we entered the field.

We do not, however, wish our readers to understand that we do not intend in future to do all in our power to supplement and continue what we have so far accomplished for the benefit of those who were at the first our principal supporters; but a due regard for our own interests compels us again to make a change, by discontinuing the publication of the *Local Courts' Gazette* after the end of

this year. We shall, however, reserve full space (and our borders will be enlarged for that purpose) for the discussion of all matrste affecting the Local Courts and County and Municipal officers, and we trust to receive the same support from our friends "of that ilk" as formerly. We must, moreover, owing to the increased price of printing and all other expenses, increase our annual subscription to the *Law Journal*, which we shall send to the present subscribers of the *Local Courts' Gazette* unless they express a desire to discontinue their subscription.

We thank our many kind friends among the County and Division Court officers for their support, and for many expressions of satisfaction and good-will. We trust they will be able to continue their support and encouragement when the *Local Courts' Gazette* shall have again merged in the *Canada Law Journal.*

The complications of modern society are now occasioning no small trouble in legal circles, in view of the possible and actual *status* of the softer sex. Take the case of a woman fully divorced. What is her proper "addition" in law? Is it "spinster"? Take the still more puzzling case of a woman not fully divorced, who has only a decree *nisi* for the dissolution of her marriage. How is she to be styled? In the Nisi Prius case of *Fletcher* v. *Krell*, the point was raised as to the effect of the word "spinster," if used as descriptive of a woman in a contract. The defendant maintained that it was in effect a warranty of her condition, and that consequently the plaintiff, who had entered his employment as governess under the title of "spinster," when in fact she was a woman divorced from her husband, had committed a breach of warranty, and was not entitled to recover for her services.

So in *Munt* v. *Glynes*, 20 W. R. 823, the Master of the Rolls refers to the anomalous position in which a lady is placed by a decree for judicial separation: "She is at once divorced and not divorced; no longer a wife, and yet not an unmarried woman." The *Solicitor's Journal* dives into the old cases on the subject, and inclines to the conclusion "that a divorcee (this is nearly as bold a coinage as the famous Bellevllle term, "*seductee*") might be properly styled 'single woman,' which in strict technicality is applicable to an unmarried woman who is not a virgin." Among other notable things is pointed out that a woman's degree would not be sufficiently stated by styling her "wife of A. B.," unless her husband's mystery or estate were alleged (*Re Gardner*, 1 C. B. N. S. 215), but that the curious description, "spinster, otherwise wife of A. B.," has been held sufficient: Anon. 3 New Prac. C. 19; Dyer, 88, *a.*

The English *Law Journal* is in favour of the extension of the equitable doctrine of "undue influence" to cases of testamentary disposition of property, in the same way and to the same extent as it obtains in gifts *inter vivos.* It lays down—and we think with great good sense—that when the relation between the testator and the legatee is that of doctor and patient, or priest and penitent, then if the bequest is disputed, the burden of proof should be cast upon the recipient of the gift. As the law now stands, the *onus* is the other way—upon the person who calls the will in question. But, as the *Law Journal* puts it, there is no hardship in calling upon the legatee to explain the precise character of the influence which he brought to bear upon the testator. Then, when he had cleared himself of any imputation of undue influence, the burden of proof would be shifted to the person attacking the will.

THE NEW VICE-CHANCELLOR.

Whilst discussing recently the probable successor of Mr. Mowat, we expressed a hope that the appointment might be made without delay, and that political considerations might not influence the selection. The seat has been filled with promptitude, and by the choice of a gentleman opposed in politics to the Dominion Government.

Whilst admitting that the appointment of Mr. S. H. Blake was to us, as we believe to a large number in the profession, somewhat a matter of surprise, we are bound to say that the feeling did not arise in the least from any doubt as to his capacity for the office. It was rather that it was thought that some older member of the Bar, having at least equal claims, would have been appointed; and, on the other hand, that Mr. Blake would scarcely resign his lucrative practice at his time of life, for the hard work and bad pay of a Vice-Chancellorship.

But though young in years, Mr. Blake has had, during all the time he has been in prac-

tice, the management of a very large business; and upon him has devolved, to a great extent, the immense counsel business of his talented brother, which the latter handed over to him when he withdrew for a time from the active pursuit of the profession of which he is so great an ornament. It is a sign of no inconsiderable ability that he has been able, in a great measure, even for a time, to take his brother's place; therefore, judging of the future from the past, though success at the Bar does not necessarily imply a fitness for a judicial position, we can give the appointing power credit for having made a good selection from the Equity Bar.

Mr. Blake was called to the Bar in Hilary Term, 1860. On the 16th March last, he was given a silk gown by the Lieutenant-Governor of Ontario, at the same time as Dr. McMichael, Wm. Proudfoot, C. S. Patterson, E. B. Wood, John T. Anderson and Thos. Moss received the like distinction. The legality of this action on the part of the Local Government was called in question at the time, and we are free to confess that the arguments against it seemed to us unanswerable.

In his private capacity Mr. Blake bears an irreproachable character, and his liberality in religious and charitable undertakings is well known.

On Wednesday, the 11th inst., the new Vice Chancellor was installed and took his seat on the Bench, after receiving the congratulations of the Chancellor and the senior Vice-Chancellor.

JUDGES RETURNING TO THE BAR.

In view of the resignation of the late Vice-Chancellor Mowat, and his acceptance of the office of Attorney-General for the Province of Ontario, which involves his return to the Bar, a good deal of attention has been directed to what the lay press has called "this unprecedented act." We give below, as promised in our last number, the examples which we have recollected or discovered, of Judges of the Superior Courts returning to practice.

By the aid of Mr. Foss's valuable volumes, one is able to make out a tolerably correct list of all such changes as have taken place at the English Bar. Instances of the kind were common during the troublous times of Charles I., the Commonwealth, Charles II., James II., and William III. Since then no example has occurred in English History, though there is a very noticeable one in Scotland, to which we shall advert.

The earliest example is that of Sir Robert Heath, who was made Chief Justice of the Common Pleas by Charles I. in 1631. Three years afterwards he was discharged from his office, apparently without reason, and next term he took his place at the Bar as junior serjeant: *Cro. Car.* 375. He continued in practice till the same monarch restored him to the Bench in 1641. His memory is to be freed from the charges of "bribery and corruption," which at one time were made against him. One of his own rules of conduct is memorable: "to do justice for justice' sake, to do *justum juste;* for it is very hard for an ill man to be a good judge."

Prideaux and Browne, who were Lords Commissioners of the Great Seal, appointed by the Commons in 1643, were removed in 1646, and the custody of the Seal transferred to the Speakers of the Houses. Both of them thereupon resumed practice at the Bar. Next in chronological order is the great name of Sir Matthew Hale. He was upon the Bench in 1658, but at the death of Cromwell refused a new commission from his son Richard. Thereafter the better opinion appears to be that he practised till the Restoration, when he was made Chief Baron of the Exchequer.

We may next group a list of comparatively or positively insignificant Judges, who, having been appointed to office by the Parliament or by Cromwell, forfeited their judicial position on the accession of Charles II. to the throne. These Judges were Fountaine (Commissioner of the Great Seal), Glynne, Newdigate, Parker, Widdrington, Archer and Wyndham. These, at the Restoration, all returned to the Bar. Of these Archer was replaced on the Bench in 1663, and Wyndham in 1670.

Next comes the memorable name of Pemberton. He was first appointed Judge of the King's Bench by Charles II. in 1679, but was dismissed from office in less than a year, owing, it is said, to the intrigues of Scroggs, C. J. He at once returned to practice, and in about a year he was selected to supersede Scroggs in the Chief Justiceship. He was afterwards, at his own request, transferred to the head of the Common Pleas; but in 1683 the King, apparently for political reasons, dismissed him from this Court. Upon this he returned to the Bar a second time, where he continued in practice for fourteen years, till

his death. The judgment of posterity upon this versatile judge may be expressed in the language of Macaulay (which Mr. Foss cites approvingly): that his memory is to be regarded with that respect which always accompanies moderation and independence.

In the time of James II. we have first Robert Atkyns. He was appointed Judge in 1672; but in 1680, being out of favour with the Government, he was either dismissed or he resigned. Afterwards he practised in the Courts till he was made Chief Baron by William III. in 1689. In 1687, Wythens, who had been appointed Judge of the King's Bench by Charles II., and continued in office by James II., was discharged because he had gone against the King's wishes. The very next day, it is told, he came to Westminster Hall and practised as a serjeant with immense popularity. About the same time (or rather in 1686) the Judge, Sir Creswell Levinz, so well known from his Reports, suddenly received a *supersedeas* from James II.; "whereto," in his own language, "he humbly submitted." He at once went back to the Bar, and continued in large and remunerative practice till his death in 1696.

We may now again form another group of Judges who forfeited their position at the Revolution. These were Lutwyche, Rotherham, Ingleby, and Jenner. Lutwyche not only returned to the Bar, but commenced a series of Reports, which have preserved his name from oblivion. The others also returned to the Bar, but none were ever replaced upon the Bench.

The last names of English Judges we have to mention are those of Anthony Keck and George Hutchins. They were both Commissioners of the Great Seal under William III. The former was discharged in 1690, and the latter in 1693, and both recommenced practice thereafter.

The one instance in Scotch history which we have been able to verify of a Judge returning to practice, is in the case of the Hon. James Erskine of Grange, brother of the Earl of Mar. He was in the high position of Lord Justice Clerk in Scotland prior to 1734. Walpole, in that year, introduced the statute (7 Geo. II. c. 19) which incapacitated Judges from being members of Parliament, with the view, it was said, of fixing Lord Grange to his judicial duties. When that became law, the exasperated Judge resigned his dignities and entered Parliament in order to oppose Walpole's Government. Obtaining small success in this direction, he returned to practice at the Bar, and without obtaining further preferment died in London in 1754, in the 75th year of his age.

It will be seen that all these were cases of constrained or enforced abandonment of office, during the period when the duration of the Judge's office was *durante bene placito*, and was terminated by the demise of the Crown,—with the exception of the last, in which we have a voluntary resignation on the part of the Lord Justice Clerk, at a time when the Judges held office *quamdiu se bene gesserint.*

We know of no other examples in any of the Courts of Great Britain or her dependencies, and we do not propose to cite any instances from the Courts of the adjoining Republic.

SELECTIONS.

THE PRESS AND THE BENCH.

At no period have the relations between that old and venerated institution the judiciary, and that young and vigorous institution, journalism attained such an importance, or excited so much anxiety as at the present. Modern civilization possesses no greater intelligent force than that which resides in the press; nor can modern civilization be preserved and perpetuated without the regulating, pacifying, conservative influence of the bench. Two such influences existing in society and in government, and capable of great mutuality and assistance, or of great antagonism and detriment, ought so be regulated as to produce the greatest cooperation and reciprocity and the least opposition and injury. To regulate and define the precise attitude which the press should sustain to the bench in a republic like ours is no easy task. Regulation and definition, in a scientific sense, are almost impracticable in a free government. On the one hand, we have the liberty of the press sanctioned and authorized in every constitution in the republic; on the other hand we have the sanctity of courts and the untrammeled admimistration of justice, provided for by the same fundamental law. So long as journalism assists and encourages the administration of justice and no conflict arises between the press and the bench, there is no cause for anxiety or dissatisfaction. But when journalism assumes to criticise judicial proceedings, define judicial powers, influence judicial action, the very grave question comes into prominence as to the extent to which journalistic criticism upon judicial proceedings may be allowed. The liberty of the press and the utterance of individual or editorial sentiments, are as inviolable as the sanctity

of courts and the judicial action of judges. In America no institution so thoroughly reflects the sentiment of the masses, represents the popular mind, embodies the idea of freedom, as the press. The American free press is pre-eminently a republican institution; and like all great social and political forces, of rapid growth and powerful development, like all great institutions which are the outcome of the age, and which represent the idea and sentiment of the period, the press is naturally intolerant, and defiant of restraint and opposition, and relies upon its humanitarian and populalar foundations for its strength and support. It has boundless faith, in its resources, permanence, power and triumph. It represents the spirit of popular ascendency, of change, of impulse, and of every thing which is denominated *reform*. Somewhat opposed to this element in society and the State is the bench which represents the systematic thought, logic, learning, stability and venerability of a nation: just as the legislature represents the temporary needs, the pressing desires, the corrective and reformative intuitions of the people; and just as the executive represents the efficient force and the discretion of the State. Hitherto few cases of journalistic antagonism to the judicary have developed themselves here. The press has largely contented itself with its peculiar province of furnishing news and collating and arranging valuable information. The party press has, of course, been occupied in the propagation of the particular views and interests of its leaders. And the editorial columns of the independent press have been devoted to the fair criticism of political and governmental matters, and the fostering of a scientific, artistic and philanthropic spirit among the people. But there is an occasional civil or criminal matter, properly belonging to the courts, but, at the same time, by its public and popular bearings, belonging also to journalistic criticism, from which the emergency of the antagonism of the press and the bench arises. The decision of the court being contrary to the public wishes or expectations, the popular clamor is voiced in the public press, and inuendos, charges, and villifications are heaped upon the head of the judiciary, the members of which are, probably, more entitled to veneration than any other class. The judicial power of the State can only be administered through individuals; justice can only be administered through judges, and when courts are assailed by the press, and their action dictated or practically impeded by the press, the remarkable condition occurs wherein the people assail the law and its administrators —justice and the judges. The semi-political trials, and the noted criminal trials of the past decade, are instances of this anomalous condition of public criticism. Courts of impeachment are told what they are expected to do; criminal courts are informed that they must convict and hang; civil courts are told that if a certain remarkable cause is decided in a certain manner justice is a mockery and money makes law. It is evident that when such things occur it is time that the judiciary was protected and jourualism restrained, and that the relations between the bench and the press were better defined. While it is well known among the profession that an ordinary newspaper editorial upon a legal question, or upon a judicial proceeding, is about as reliable and sensible as the criticism of a country singing-master upon the vocalization of a Wachtel or a Lucca, or the remarks of an organ-grinder on the performances of a Rubinstein or a Liszt, or the rough opinion of a sign-painter on the works of a Raphael, yet there *is* a legitimate department of journalistic criticism in reference to the judiciary. If a judge is known to have received a bribe, positively, no journal would be molested for publishing the fact, with its opinion of the effect it ought to have on his continuance in office. That is a public and political matter, about which the profession and the laity will agree. If a judge is known to be incompetent, positively, no journal should be prohibited from publishing that fact, and commenting on the circumstance that such a man is in a judicial position. If a case has been decided according to the principles which are deemed to be wrong and unfounded in law, no journal would be hindered from fairly going over the reasoning of the court, pointing out its defects, and showing how it would have been better decided. But the great complaint which the legal profession and all thoughtful citizens make against the press is that, in its swelling pride and boasted majesty, it affects to dictate judicial conclusions and influence judicial decisions. And not only this, the press by its ignorance of such matters (which are exceedingly technical), and by its lack of discrimination, attacks the bench as being responsible for orders and judgmen'ts which they are bound by law to make, which are directed by the very codes and regulations which the people and the press have helped to make for the guidance of their judges. If in a specific case of great public interest, the common law fails to do what the popular idea of justice demands, or if the statutes are defective, either as to substantive law or modes of procedure, so that the popular demand cannot be gratified, the great pompous press comes forth and lays the whole blame at the door of the judge or the court who decides the case. No professional mind can observe the senseless ranting of newspapers about judicial proceedings without vexation and even indignation. Such a press, always fickle, would make justice as fickle as itself, and the law as changing as the kaleidoscope of popular passion. And when to the simple expression of opinion is added arrogance and menace, in regard to the results of judicial decisions, then no court can fail to exert its latent power and vindicate that majesty and sanctity to which all else, even the press, is surbordinate. Whatever may be the place of the press in the social and political economy of our time and country, like all other institu-

tions it has its sphere, and when it intrudes upon the department of legislation, or of the executive, or of the judiciary, it must become amenable to punishment in such a manner as the department assailed has the power to use in vindicating itself. The mode which the judiciary always adopts in such cases is by proceedings against the guilty parties as for contempt of court, and this is the only protection which the courts have from journalistic insolence and abuse, the only protection save the cultivation of a better, grander and higher spirit in the press and its leaders.—*Albany Law Journal.*

"SOME GREAT ENGLISH LAWYERS."

The American publication, the *Galaxy*, in its December number, contains some gossip by Justin McCarthy, on "Some Great English Lawyers." Sir Alexander Cockburn is the chief figure in the group. "In personal appearance and in oratorical manner" his Lordship is considered to resemble Mr. Wendell Phillips. "Exceeding facility, grace, and strength; the light play and the rapid penetration of a rapier—these are the qualities with which one is chiefly impressed, who listens to the eloquence of Cockburn." Finally "Sir Alexander Cockburn's is indeed a nature profoundly sympathetic. In his sense law is made for man and not man for law; the principles of freedom and of humanity are to be the rulers and not the toys of governments and of nations. He will always stand high above the level of the mere lawyer. The very impulsiveness which sometimes seems unwise to drier minds is one of his titles to public admiration. It does not affect his judgment of a legal question; it only affects his tone and manner of expression. Moreau said he succeeded as a soldier only because he was before all things a citizen. I think Cockburn will be eminent as a judge, because he is before all things a citizen, and, let me add, a lover of liberty." The next portrait is that of Lord Selborne—"probably on the whole the greatest English lawyer now living. No one ever heard a word said against Sir Roundell Palmer." We fear, however, that Lord Selborne will hardly feel complimented by the American description of his oratory. "A stranger in the gallery," says this writer, "hearing him speak on some ordinary question, might very easily imagine, at first, that he was pronouncing a funeral oration over some dear departed being, and that his voice was choking with sobs. I sat one evening of last session in the gallery of the House of Commons while Sir Roundell Palmer was speaking, and I was so much impressed with this peculiarity, that I performed for my own amusement a curious little experiment. I drew back so far that only the tones and not the words of the speaker could reach me, and the effect was precisely as if I had been listening to somebody sobbing out a sad lament. Add to this that Sir Roundell Palmer looks particularly grave and even doleful, and dresses with the austere neatness of an undertaker, and it will be understood how the eye bears out the ear in keeping up the curious illusion." And finally, "His is indeed one of those finer temperaments in which intellectual power supplies the place of physical or animal courage, and forces weakness itself into enterprise." There will be difference of opinion as to the accuracy of this description.—*Law Times.*

NOMINAL DAMAGES IN ACTIONS FOR LIBEL.

The action brought by Mr. Hepworth Dixon against the proprietor of the *Pall Mall Gazette* is of somewhat more than merely literary interest. Several of our contemporaries have found it difficult to understand what is meant by a jury when they give nominal damages in an action for defamation, and it is not easy, at first sight, to understand a verdict for the plaintiff for a farthing damages in such a case. But the principles of law applicable to the subject are about as sensible as any which we possess.

The most obvious case calling for nominal damages only is where there is no actual injury resulting from the libel. In such a case it has been held that the jury may take into their consideration the question of costs—about the only instance in which costs are allowed to influence the minds of the jury. Again, where the defendant publishes a statement *bona fide*, and without malice, the jury has been held justified in giving nominal damages only. Then we come to what we conceive to have been the case under notice—namely, a true but malicious statement calculated to injury the plaintiff. It is sufficiently plain, we think, that the jury considered the plea of justification proved, but felt that there was some *animus* disclosed by the way in which the alleged libel was framed, which disentitled the defendant to a verdict which would carry costs. But any verdict for the defendant would carry costs, whilst a verdict for the farthing for the plaintiff did not, and the verdict therefore was about as sensible and equitable as any verdict ever delivered by a jury. It in effect says that the libel was true, but that the defendant ought not to have expressed himself in the way he did—a way which showed that the criticism was rather savage than honest and *bona fide*, which the law requires newspaper criticism to be.

So much for the case generally. There remain one or two points upon which some observations may be made. We have stated above that the *bona fides* of a writer may be a ground for inducing a jury to give nominal damages. By a singular perversion this doctrine was called in aid of Mr. Dixon, who claimed protection from the law on the ground that passages in his works, which had given rise to the libel, were written and published with a pure and lofty motive. What would Mr. Dixon say to a thief who sought to arrest judgment on the

plea that he stole out of pure motives of philanthropy towards some third person? The case, therefore, of *Dixon* v. *Smith* may go in aid of *Reg.* v. *Hicklin* as establishing the most wholesome doctrine that no motives, however pure, can excuse the publication of literature which in its nature is impure. It is well that it should be remembered what was the test of obscenity laid down by Lord Chief Justice Cockburn in the case of *Reg.* v. *Hicklin*. "I think," says his Lordship, "the test of obscenity is this—whether the tendency of the the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

One more observation as to the defence in *Dixon* v. *Smith*. Why, the plaintiff's counsel asked, was not the writer of the alleged libel put into the box to rebut the presumption of malice? There is a rule of law, which was laid down in an action against the publisher of a magazine, that no evidence can be given of the malice of a writer, who is not the defendant, and for whose motives the editor cannot be liable, though he is responsible by law for his acts (*Robertson* v. *Wylde*, 2 M. & Rob. 101). And this of course cuts the other way, and the evidence of the writer to prove that he entertained no malice towards the plaintiff could hardly be admissible in an action against the proprietor of the paper in which the alleged libel appeared.

Lastly, it will have been observed that, notwithstanding objection, Mr. Justice Brett allowed newspaper criticisms on Mr. Dixon's book to be read. This was perfectly correct. Mayne, in his work on Damages, observes that "it has been long established that other words or writings, not the subject of the present action, might be given in evidence to explain either the meaning or motive of the defamatory matter on which the action was founded." This refers to other utterances or publications by the defendant; but where a plaintiff, who is an author, raises the question of motive and intention on his part, it is difficult to see that there could be any objection to evidence being adduced to show or to disprove his *bona fides*, and the effect of his writings being challenged, to produce independent opinion to show what effect has actually been produced in the minds of others.

Whilst, however, we think that the verdict was right, and the law laid down perfectly sound, the result is that a rebuke has been administered to excessive freedom in criticism, which, though true, may be unnecessarily severe.—*Law Times.*

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

MUNICIPAL ELECTION.

Married women cannot vote at municipal elections under 32 & 33 Vict. ch. 55, § 9, which provides, that in the Municipal Corporation Act the phrases indicating the male sex shall embrace persons of the female sex, for all purposes of voting provided for in that Act; and the Married Woman's Property Act, 33 and 34 Vict. ch. 93, confers no political rights, by implication or otherwise.—*The Queen* v. *Harrald*, L. R. 7 Q. B. 361

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

ADMINISTRATION.

1. Administration will not be granted to a person having no interest in the estate, even though all the next of kin desire his appointment. Under 20 & 21 Vict. ch. 77, § 73, administration must be offered to each of the next of kin qualified successively, and afterwards to other persons interested.—*Teague et al.* v. *Wharton*, L. R. 2 P. & D. 360.

BAILOR AND BAILEE.

Plaintiff, a cab-driver, got a horse and a cab from a cab-master, the master to pay for the horse's feed, and the driver to pocket all he earned beyond eighteen shillings. The horse was unfit for the work, and threw the driver out and injured him. *Held* (WILLES, J., dissenting), that the parties were in the relation of bailor and bailee, and the master was responsible.—*Fowler* v. *Lock*, L. R. 7 C. P. 272.

CONTRACT.

1. Plaintiff entered the employ of defendants under a written agreement, dated April 13, 1871, stipulating that he should receive "a salary of £2 per week, and house to live in from the 19th of April, 1871." *Held*, a hiring from week to week, and that evidence of a verbal understanding, that the engagement was for a year, was inadmissible.—*Evans* v. *Roe et al.*, L. R. 7 C. P. 138.

2. The substance of a guarantee to plaintiff signed by defendants was as follows: "In consideration of your withdrawing the petition you have presented . . . we agree to pay you all costs you have incurred. . . . We further agree to guarantee to you the payment within 18 months . . . of . . . your

debt of £722." Plaintiff asked for leave to withdraw the petition in question, which the court did not expressly grant, but ordered plaintiff to pay the costs of the petition. Within 18 months plaintiff presented another similar petition. *Held*, that the consideration was good, that it applied to both parts of the guarantee, and that there had been performance of the condition by plaintiff.—*Harris* v. *Venables*, L. R. 7 Ex. 255.

3. Defendant wrote to plaintiff as follows: "Ship me 500 tons sugar, say 26*s.* 9*d.* for Nos. 10 and 12, to cover cost, freight, and insurance; 50 tons more or less of no moment, if it enables you to get a suitable vessel; provide insurance; draw on me for costs, as is customary. I should prefer option of sending vessel to London, Liverpool, or Clyde; but if not compassable you may ship to either London or Liverpool." In a telegram sent afterwards, "the ship" was ordered to call at a good port for orders. Plaintiff, in his reply, spoke of the order as for "a cargo about 500 tons," and of "your remarks regarding the destination of the vessel." Plaintiff procured 393 tons, and shipped it, intending to procure and ship the balance as soon as he was able to do so. *Held* (BYLES, J., dissenting), that defendant was bound to accept the cargo. Whether the relation of plaintiff and defendant was that of principal and agent, or of vendor and purchaser, *quære.*—*Ireland* v. *Livingston*, L. R. 5 H. L. 395.

COVENANT.

A legal and reasonable covenant in a separation deed will be enforced, although some parts of the deed are invalid. A husband cannot keep and use copies of his wife's private papers, which he has covenanted in a separation deed to give up.—*Hamilton* v. *Hector*, L. R. 13 Eq. 511.

CUSTODY OF CHILD.

The appellant was widow of a British subject in India, professing the Christian religion, and of their marriage the child in question was born. After the death of the husband, appellant lived with a man professing the Christian religion, and having a Christian wife. Subsequently appellant and the man with whom she lived professed the Mahomedan faith, and a Mahomedan marriage was alleged to have been performed. The child remained with her mother until ordered by the judge at Meerut to be given into the custody of a Christian guardian. She was then fourteen years of age, and professed the Mahomedan religion. *Held*, that the order be confirmed, and the appeal from it dismissed.—*Skinner* v. *Orde et al.*, L. R. 4 P. C. 60.

DAMAGES.

1. Defendant unlawfully washed his van in the street, and let the water run off into a grating twenty-five yards distant. The grating, unknown to defendant, was frozen over, and the water ran into the street and formed ice. Plaintiff's horse fell thereon and broke his leg. Damage *held* too remote to make defendant liable.—*Sharp* v. *Powell*, L. R. 7 C. P. 253.

DONATIO CAUSA MORTIS.

Deceased gave a cheque and his bank book to his nephew, intending to make the latter a present of the amount of the cheque. Next day, before the cheque was presented, the uncle died. *Held*, not a valid gift.—*In re Beale's Estate*, L. R. 13 Eq. 489.

EVIDENCE.

1. Where a man is indicted and tried with others, his wife cannot testify for them any more than he can himself.—*The Queen* v. *Thompson et al.*, L. R. 1 C. C. R. 377.

2. An arbitrator may be a witness as to the proceedings before him up to the time he made his award, in a proceeding to enforce the same, but cannot be asked how the award was arrived at, or what items it included, or what meaning or effect he intended to be given to it.—*The Duke of Buccleugh* v. *The Metropolitan Board of Works*, L. R. 5 H. L. 418.

LETTERS PATENT.

1. An American patented his invention in America, France, and England in the same year. The patent had run out in France, and was nearly out in America. *Held*, that it was not policy to renew it in England.—*In re Winan's Patent*, L. R. 4 P. C. 93.

2. On an application for an extension the judiciary committee required an intelligible statement of previous profits and losses on the patent to be filed, and without such statement refused to prolong the patent. Costs were awarded the *bona fide* opponents of the petition in the lump.—*In re Wield's Patent*, 4 P. C. 89.

OBSCENE PUBLICATION.

One George Mackay was tried for selling under the direction of a religious society a book called "The Confessional Unmasked," consisting of extracts from Roman Catholic theologians and divines. The book was condemned as immoral and obscene. The society then published a "Trial of George Mackay," in which said book somewhat expurgated, but still offensive, was set forth as part of the proceedings. *Held*, that the publication was not privileged from being part of a judicial trial, and that the new issue should be suppressed. *Steel* v. *Brannan*, L. R. 7 C. P. 261.

ONTARIO REPORTS.

QUEEN'S BENCH.

(*Reported by* CHRIS. ROBINSON, *Esq., Barrister-at-Law.*)

IN RE THE ELECTION FOR THE TOWN OF BROCKVILLE AND TOWNSHIP OF ELIZABETHTOWN.

Controverted Election — Corrupt Practices — "Illegal and Prohibited Acts in reference to Elections"—Selling and giving Liquor — Carriage of Voters — Right to reserve questions of law—32 Vict., ch. 21, 34 Vict., ch. 3.

Upon questions reserved by the rota Judge under "The Controverted Elections Act of 1871," it appeared that H. and B. voted for Respondent. H. kept a saloon, which was closed on the polling day, but upstairs, in his private residence, he gave beer and whiskey without charge to several of his friends, among whom were friends of both candidates. B., who had no license to sell liquor, sold it at a place near one of the polls to all persons indifferently. This was not done by H. or B. in the interest of either candidate, or to influence the election, B. acting simply for the purpose of gain; and the candidate did not know of or sanction their proceedings.

Held, (though with some doubt as to B.) that neither H. nor B. had committed any corrupt practice within sec. 47 of 34 Vict., ch 3, and therefore had not forfeited their votes; for they had not been guilty of bribery or undue influence, and their acts, if illegal and prohibited, were not done "in reference to" the election, which, under sec. 47 of 34 Vict., ch. 3, is requisite in order to avoid a vote.

The words "illegal and prohibited acts in reference to elections," used in sec. 3, mean such acts done in connection with, or to affect, or in reference to elections; not all acts which are illegal and prohibited under the election law.

The right to vote is not to be taken away or the vote forfeited by the act of the voter unless under a plain and express enactment, for it is a matter in which others beside the voter are interested.

One M., a carter, who voted for Respondent, at the request of P., the Respondent's agent, carried a voter five or six miles to the polling place, saying that he would do so without charge. Some days after the election, P. gave M. $2, intending it as compensation for such carriage, but M. thought it was in payment for work which he had done for P. as carter. The candidate knew nothing of the matter.

Held, that there was properly no payment by P. to M. for any purpose, the money being given for one purpose and received for another; but that if there had been it was made after P.'s agency had ceased, and there was no previous hiring or promise to pay, to which it could relate back.

If such payment had been established as a corrupt practice, it would have avoided P.'s vote, but not M.'s; and it would not have defeated the election, for it was not found to have been committed with the knowledge or consent of the candidate, but the contrary.

Quære, whether, under 34 Vict., ch. 3, sec. 20, the Judge has power, before the close of the case, to reserve questions for the Court.

This was a case stated under the Controverted Elections Act of 1871, as follows:—

CASE.

IN THE QUEEN'S BENCH.

Controverted Elections Act of 1871.

Election for the town of Brockville, with the Township of Elizabethtown thereto attached, holden on the fourteenth and twenty-first days of March, A.D. 1871.

Court for the trial of an Election Petition for the town of Brockville, with the Township of Elizabethtown thereto attached, between Samuel Flint, *Petitioner*, and William Fitzsimmons, *Respondent*.

At the above court, holden on the 26th, 27th, 28th, 29th, and 30th days of June, and on the 5th and 6th days of July, A.D. 1871, before me, the Honourable John Hawkins Hagarty, Chief Justice of the Court of Common Pleas, and one of the judges on the rota for the trial of election petitions, the above-named petitioner charged by his petition that the said respondent was not duly elected or returned, and that the said election was void, by reason that the said respondent and his agents, with a view of promoting the election of the said respondent, caused certain hotels, taverns, and shops, in which spirituous or fermented liquor or drinks were, at the time of the said election, ordinarily sold, to be opened and kept open on the day of polling votes at said election, in the wards and municipalities in which said polls were held, and caused spirituous and fermented liquors and drinks to be sold and given to divers persons within the limits of the said town of Brockville and the township of Elizabethtown during the day of polling votes at the said election; and hired certain horses and vehicles, and promised to pay for certain other horses and vehicles, and did pay for the same, to convey voters to, or near, or from the polls or polling places, or the neighbourhood thereof, at the said election; and also by reason that divers persons who were guilty of the above practices voted at the said election for the said respondent. And the said petitioner by the said petition prayed the said seat, or a scrutiny, and that on such scrutiny the votes of the said persons who were guilty of the above corrupt practices should be struck off the poll.

Upon consideration of the evidence adduced on behalf of the petitioner as to the said charges, I find as follows:—

1. As to George Houston. I find that George Houston, one of respondent's voters, was a saloon-keeper in Brockville: that on the polling day his saloon was closed and locked: that up stairs, in a room in his private residence, he had beer and whiskey on a table: that many of his friends, perhaps to the number of twenty to thirty, were that day, at different times, up in this room, and had liquor: that no pay was taken or expected, nor any charge made for this: he told any of his friends who were in the habit of coming to his saloon that they could have a drink up stairs: that friends of both candidates were there on his invitation, and some not voters: that he was under the impression that so giving this liquor was not violating the law: that this was not done to influence any vote or voter by means of liquor: that it was not done in the interest of either candidate, nor to produce any effect in the election or its result: and that the respondent did not know of or sanction these proceedings.

2. As to Samuel Burns. I find that Samuel Burns had no license to sell liquors: that he voted for respondent: that he sold liquor to all persons that asked and paid for it on the polling day, at a place near one of the polls in the township: that he sold to persons, voters and others, without reference to their side or politics: that this was not done in the interest of either candidate, or to affect the election or its result, but simply for the sake of gain; and that the respondent did not know of or sanction these proceedings.

3. As to the charge of conveying voters to poll. I find that William McKay, a carter in Brockville, and a voter for respondent, did, at the request of Thomas Price, an agent of re-

spondent, carry an old man named Paul, a voter for respondent, a distance of five or six miles to the polling place: that McKay was aware on the polling day that it was illegal to carry voters for hire, and had expressed his willingness to carry voluntarily and free of charge, being anxious to help the respondent: that when Paul was spoken of, Price asked McKay could he, McKay, not carry him to the poll, and McKay said he would do so without charge, and that no hiring or payment was then contemplated between them: that some days after the election Price gave McKay $2, considering that McKay was a poor man, and that he ought to give him something, and paid him the money intending it as a compensation for so carrying the voter: that McKay did not receive it as such, but received it thinking it was in payment for some work he had done for Price as a carter in his ordinary business, and that there was an account between them for work in or about the amount of that sum: that when the $2 were paid, nothing was said about carrying the voter: that the respondent knew nothing of this matter, and never authorized or sanctioned it.

The opinion of the Court of Queen's Bench is requested:

1st. What is the legal effect of the payment by Price, an agent for respondent, to McKay, as found by me: whether it was a "corrupt practice," and, if so, did it avoid the vote of Price or McKay, or of both, as voters for respondent, or does it avoid the respondent's election?

2nd. Whether the giving or selling of liquors, as found by me, in such cases as Houston or Burns, avoided the votes of the said persons, or either of them?

(Signed) JOHN H. HAGARTY, C.J., C.P.

In this Term, *Bethune* appeared for the petitioner. The question as to the votes of Houston and Burns, arises under the Ontario Act 32 Vict., ch. 21, sec. 66, which requires all hotels, taverns, and shops in which liquors are ordinarily sold, to be closed during the polling day, and forbids any liquor to be sold or given to any person within the municipality during such period, under a penalty of $100. The amending Act, 34 Vict., ch. 3, had two objects—to change the mode of trial, and more effectually to prevent corrupt practices at elections. In it, by sec. 3, a definition of corrupt practices is for the first time given, and it could hardly have been more comprehensive. It includes all "illegal and prohibited acts in reference to elections, or any of such offences, as defined by Act of the Legislature." The acts of both of them were clearly prohibited, and contrary to the statute, and were therefore corrupt practices: 1 *O'Malley* and *Hardcastle*, 134. Their votes are both bad, therefore, under sec. 47 of 34 Vict., which declares that any corrupt practice committed by an elector voting at an election shall avoid his vote. There is no clause expressly against "treating," as in the English Act, where it is provided for specially. Secs. 61 and 66 of our Act, 32 Vict., ch. 21, provide against it in effect, and are very stringent, making no exceptions even for medical purposes, though perhaps that might be implied. No question as to intention can arise under sec. 66, as under secs. 61, 63, 67, nor as to agency, as under sec. 71.

As to Price's conduct, the 34 Vict., ch. 3, sec. 47 avoids his vote. His act was one of agency on behalf of the respondent. The intent of the agent is of no consequence; and the principal is affected by his act, although the agent was not employed for the purpose in which he violated the Act: 1 *O'Malley* and *Hardcastle*, 107, 184, 201. His act was an offence against sec. 71. The payment he made after the election was intended as compensation for carrying the voter, and although the agency had terminated, yet such payment, being connected with the precedent act of the agent, related back to the time when the service was performed, by analogy to the doctrine of ratification: 1 *O'Malley* and *Hardcastle*, 261.

The statute, under the Interpretation Act, 31 Vict., ch. 1, sec. 7, sub-sec. 39, should be liberally construed, so as best to ensure the attainment of its object. Votes are given on certain conditions, which must be observed. [WILSON, J.—Is that so? Is it not rather a right, of which the se provisions are merely safeguards?] If a pr ohibited act be done by a candidate, it avoids the election; if it be done by a voter, it avoids his vote; if done by another, it subjects the person to a penalty.

J. H. Cameron, Q.C., contra. It is not pretended the election can be avoided excepting by reason of the payment by Price. As to the matters relating to Houston and Burns: the acts prohibited by sec. 66, before referred to, are not necessarily connected with elections at all. Hotels, &c., are required to be closed during the polling day, and no liquor is to be sold or given that day under a penalty. The election may be over early in the day; but at whatever hour the poll is closed, the hotels, &c., must be kept closed the whole of that day, from the earliest hour in the morning till midnight. The illegal or prohibited act, to be a "corrupt practice," and to avoid a vote, must be an illegal or prohibited act "in reference to elections," which these acts were not. The heading of "Prevention of Corrupt Practices at Elections," before sec. 67, cannot be held to govern all the sections down to 74; for sec. 72 defines what shall be deemed to be "undue influence." There is no necessity to hold any act to be a *corrupt practice* unless it be expressly declared to be so, because all prohibited acts have some penalty or other attached to them. Houston and Burns may be subject to a penalty under sec. 66; but their votes are good, and cannot be disallowed.

As to Price's case. Agency, if established at the time he employed the team, must be shown to have continued up to the time when he paid the money. There was no proof of hiring under 32 Vict., ch. 21, sec. 71; and the act of payment was a voluntary act of Price after the election was over, made not on account of the service rendered, but from charity, and not for the candidate, but for himself, and in his business. There was no agency existing then. A *payment* must be the act and intent of both; such intent was absent from the minds of both, but if absent from the mind of one, that is sufficient to make it no payment. Price's act, if within sec. 71, merely destroys his vote, and subjects him to a penalty; it does not defeat the election. Nothing will avoid the election unless under the 46th sec. of 34 Vict., ch. 3, a corrupt practice be

reported by the judge to have been committed by or with the knowledge and consent of the candidate. An election committee has much greater power in this respect under ch. 21, sec. 69. The argument may be thus shortly restated:—1. Price was not an agent at the time of the payment. 2. If he were, the payment was not with the knowledge and consent of the candidate. The election, therefore, cannot be avoided 3. Price did not *hire* any team; his vote, therefore, cannot be struck off. Houston's and Burns's votes are good; at most their acts were prohibited, and they may be subject to a penalty. Where the Legislature have declared that a vote shall be lost for a particular cause, it does not intend th t it shall be forfeited for any other cause.

Bethune, in reply. Selling or giving liquor does avoid the votes. As to what is undue influence, see *Huguenin* v. *Baseley*, 14 Ves. 272, and in 2 *White* and *Tudor*, L. C. 501, 3rd ed. It differs in its nature from an illegal or prohibited act. If the 47th section is not more extensive than the law was before, it is of no value.

Entertainment, it is not said shall avoid the election; but it does so because it is a prohibited act. The 43rd section of the Imperial Act, is the one which has not been adopted in our Act. As to Price's act, it avoids the whole election; but at any rate his vote is avoided by the 71st section. Most of the payments in such cases are made after the election. He referred to the cases already decided under this Act. The *Glengarry Case*, before Hagarty, C. J.; *North York Case*, before Galt, J.; *Simcoe Case*, before Strong, V.C., and the *South Grey Case*, before Mowat, V. C.; 8 C. L. J. N.S.; and see *East Toronto case*, 8 C. L. J. N.S. 115.

WILSON, J.—The particular cases referred to us by the learned Chief Justice of the Common Pleas, are—1stly, that of George Houston. He voted for respondent: was a saloon keeper in Brockville. On the polling day his saloon was closed and locked. Upstairs, in a room in his private residence, he had beer and whiskey on a table. He gave it to those who came without pay or expectation of it. It was not done in the interest of either candidate, nor to influence any vote or voter, nor to produce any effect on the election; nor did the respondent know of or sanction it.

2ndly. That of Samuel Burns. He had no license to sell liquors. He voted for respondent. He sold liquor on the polling day, near a poll in one of the townships, and charged for it. He sold it to persons without reference to their side or politics. In other respects, his case is similar to that of Houston.

These two cases may, therefore, be considered together.

The part of the 32 Vict., ch. 21, sec. 66, which applies to these cases, is the latter part of it: "And no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period," (*i. e.* during the day appointed for polling) "under a penalty of $100 in every such case."

And it was argued that because they had infringed the provisions of this section, the one by *giving* and the other by *selling* liquor, they had not only incurred a penalty, but had forfeited their votes: that such giving and selling were prohibited acts, and were within the provisions as to corrupt practices.

The deprivation of the right to vote, or the forfeiture of a vote already given, is not to be imposed as a penalty upon any one, unless under the express enactment of the legislature. There are other persons interested in and affected by that vote beside the voter. The candidate for whom he has voted is interested in it, and so are the whole body of electors who have voted for the same candidate. One vote has and may again influence or change the result of an election, and that is not to be brought about by merely inferential or argumentative legislation, or as to what the Legislature must have intended. There must be a plain enactment declaring that the vote shall be rejected if tendered, or shall be struck off if given, to justify the disallowance of it, and, as a consequence, to double the penalty on the voter, and so seriously to affect the rights, privileges and interests of others dependent on the vote.

What then has the statute said on this point?

32 Vict., ch. 21, sec. 70, declares that on its being proved before any election committee that any elector voting was *bribed*, his vote shall be null and void.

What *bribery* is under that Act, is explained by sections 67 and 68; the acts stated are not acts of bribery; the first of these sections has the caption of "Prevention of Corrupt Practices at Elections"

The 34 Vict., ch. 3, sec. 3, declares that "'corrupt practices' or 'corrupt practice,' shall mean 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."

The 47th section enacts that, "If on the trial of any election petition, it is proved that any corrupt practice has been committed by any elector voting at the election, his vote shall be null and void." It is under this section that the votes of Houston and Burns are said to be void. It is said they have each been guilty of a *corrupt practice*, not by reason of having committed bribery, but by reason of their having exercised undue influence, or from their having done illegal and prohibited acts, in consequence of the one having given liquor, and the other having sold it on the polling day.

It is quite plain that undue influence and illegal and prohibited acts in reference to elections must be corrupt practices when the Legislature has declared they shall be so.

Firstly. Were the giving and selling of liquor acts of *undue influence?* The meaning of that term is explained and defined by the 32 Vict., ch. 21, sec. 72, and it is quite manifest that the acts charged against Houston and Burns are not within that category.

Secondly. Were the giving and selling of liquor, as before stated, "illegal and prohibited acts in reference to elections?"

It is necessary to settle what the meaning is of "illegal and prohibited acts in relation to elections." Does the expression mean generally all illegal and prohibited acts *under the election law;* or does it mean illegal and prohibited acts when and because they are done in connection with, or to affect, or in reference to, elections?

In the one case, giving and selling liquor, however disconnected with the election they may be, will, if done within the municipality during the election, be illegal and prohibited acts, and as a consequence will be corrupt practices.

In the other case, such acts will not constitute corrupt practices, unless they are shown to have been done to influence or to affect the election, or in some way to have been done in connection with it.

The section in which the illegal and prohibited acts in relation to elections are named, contains the election law offences of bribery and undue influence, both of which acts have and must necessarily have a direct and inseparable relation to the actual electoral contest, and to the proceedings anterior to it. Bribery and undue influence in general are not prohibited, but bribery and undue influence in relation to elections only. Why then should any greater effect be given to the other words of the section, "and all illegal and prohibited acts," and more especially as the words "in reference to elections," have been superadded?

It will be found also that the offences of entertaining electors, furnishing colors or badges, and carrying or wearing them, relate in like manner to the elections.

The election law morality is very different from what morality is under the general law. The election law does not prohibit stealing, but itdoes prohibit the wearing of a party badge within the electoral division on the day of election or polling, or within eight days before such day, or during the continuance of the election. The thief may have on his person at the time he votes the watch of the returning officer, or of the candidate whom he supports, but he is an innocent man by the election law, and a good voter; while the elector who has worn a party badge but for five minutes anywhere in the electoral division, miles away from the polling place, within eight days before the election, is a criminal by the election law, and an illegal voter, although in fact a very honest respectable man. The vote of the one, though not his person, will stand the strictest scrutiny. The vote of the other must fail. The thief has been guilty of no corrupt practice, but the wearer of the badge has. This cannot then be a law to *be enforced, unless the enactment* be a plain and positive one.

I do not think we should call every illegal and prohibited act by this special statute, which is intended to operate for a limited time, on a peculiar occasion, and for a particular purpose, a *corrupt practice*, against the provisions of that law, unless the act be shown to have been done in some way or other with a view to the election, or to bear upon it, or as connected with it, or in relation to it, or as calculated or intended so to operate. If any other construction be given to the statute, it will be attended with very oppressive and needless consequences of punishment and forfeiture.

A general state of drinking and drunkenness at the time of the election among the electors and inhabitants of the locality, resulting from the dispensation of liquor, might well be deemed to be a dispensation of such liquor in relation to the election, although it were made without any special reference to the election. The state of mind, the influence and general condition of things it would induce, would tend naturally to disorder the proceedings, and to cause an untrue and improper expression to be given of the sober popular will. That was the case in *O'Malley* and *Hardcastle*, 85.

But the giving or selling of liquor in consequence of a horse trade, or in payment of an old bet, or from mere friendship, or to test the quality of it as a medicine, or to be shipped abroad, or for any other purpose not "in reference to the election," would not, in my opinion, be an illegal or prohibited act, so as to be a corrupt practice within the meaning of the statute. Nor do I think the giving or selling of liquor, though on the polling day, but after the poll was closed, and miles away from where the poll was held, would necessarily be an illegal and prohibited act in reference to the election, so as to amount to a corrupt practice: *Coventry Election Petition*, 20 L. T. N. S. 405.

The 61st section of the 32 Vict., ch. 21, permits the candidate and others acting for him, even with intent to promote his election, to furnish entertainment to the electors, so long as it is done at the usual place of residence of the candidate, or of those who furnish it for him. Such *entertainment*, it would be difficult to say, should not include even a single glass of wine.

The statutes contain many illegal and prohibitory acts besides the giving and selling of liquor on the day of the poll, and to hold them to be corrupt practices, although *not* done in reference to the election, would be hurtful to all parties, and utterly unreasonable.

By 32 Vict., ch. 21, sec. 57, sub-sec. 3, any person disturbing the peace and good order may be imprisoned by the returning officer or his deputy, for a time not later than the final closing of the poll. Is the vote of that person to be rejected, or afterwards struck off, although his act had no reference to the election, but was occasioned by some great wrong done or provocation given to him?

By sec. 60 every person convicted of a battery committed during any part of the election or polling day, within two miles of the place of election or poll, is to forfeit $50. Is that person also to forfeit his vote, although the battery had nothing whatever to do with the election, or happened after the election was over?

It appears to me these cases plainly answer themselves, and enable the matter with respect to the giving and selling of liquor to be as easily answered.

The penalties are already quite severe enough, without increasing them against the voter, and extending them to the candidate, and to the other electors of the constituency, who suffer as well as the voter by the disallowance of his vote, unless we are obliged by the most explicit enactment of the law to do so.

In my opinion, on the case stated with respect to these persons, we are not required, and would not be justified, in avoiding their votes.

The facts show that the giving and selling of the liquor were not acts done in reference to the election.

On this point, I may however say that I am more satisfied with my conclusion as to the act of Houston, as to the giving of the liquor, than I am with respect to Burns, who sold the liquor

in a place and under circumstances giving rise to some degree of suspicion.

The other part of the case relates to the act of Price.

His conduct is complained of on the ground of its having been an illegal and prohibited act in reference to the election, contrary to the 32 Vict, ch. 21, sec. 71. That section declares, so far as is applicable here, "that the hiring or promising to pay, or paying for, any horse," &c., "by any candidate, or by any person on his behalf," to convey voters at any election, shall be an illegal act, and the person offending shall incur a penalty of $100; and any elector who shall hire any horse, &c, for any candidate or for any agent of a candidate, for the purpose of conveying electors, &c., "shall *ipso facto* be disqualified from voting at such election, and for every such offence shall incur a penalty of $100."

The section, it will be observed, is in two parts. The first part affects the candidate and his agent, by subjecting them to a penalty. The second part affects the electors, and besides subjecting them to a penalty it disqualifies them from voting.

Price was an agent of the candidate, and so, as to the penalty, is within the operation of the first branch; but he was also an elector, and so he is within the operation of the second branch, as to the loss of his right to vote.

The case finds there was no hiring of McKay to carry Paul, the voter. McKay carried Paul at Price's request, but he carried him "voluntarily and free of charge." Some days after the election, Price, as compensation to McKay, gave him $2 for carrying the voter. McKay did not receive it as compensation, but in payment of work he had done for Price in his ordinary business as a carter.

I do not see how McKay can be within the operation of the section at all. The hiring, or promising to pay, or paying for any horse, &c., applies to the candidate, and to any person on his behalf. That will extend to Price if he hired, or promised to pay, or paid McKay for any horse, &c.; but it cannot extend to McKay, as he was at most the person hired, promised to be paid, or paid. Nor does the second branch apply to him, for that extends to the electors who hire others, and not to those who are hired.

The case has to be considered, then, with regard to Price alone.

At the time he voted—for I assume he did vote, as I gather so from the first question put in the case, and from the argument of counsel, though the case itself does not say he did,—he was under no disqualification; for he had not hired, promised to pay, or paid McKay, and there was no agreement or understanding to do so, but the contrary; the service was to be, as in fact it was at the time performed by McKay, free of charge.

In my opinion, the agency of Price terminated with the election,—the occasion and the purpose for which he was employed. His subsequent payment was an unauthorized act as to his principal. It can relate back to nothing, for there was no hiring or promise to which it could attach. But as a fact it was not a payment; that must be the act and by the assent of both parties. When Price gave the money for one purpose, and McKay received it on another account, and in respect of a different transaction, that was not a payment for the purpose that Price intended it for, more than it was a payment on the account for which McKay received it. It was properly not a payment to or for either one purpose or the other: *Thomas* v. *Cross*, 7 Ex. 728.

In no view of the case, as the learned Chief Justice has found that the respondent knew nothing of the matter between Price and McKay, and never authorized or sanctioned it, could it be possible to avoid the election, even if Price's act had been determined to be a corrupt practice. For under the 46th section of the 34 Vict., ch. 3, the learned Chief Justice, to affect the return, would have to find that "the corrupt practice had been committed by or with the knowledge and consent of the candidate," whereas he has distinctly negatived that fact.

I am not quite satisfied, as I stated during the argument, however convenient the practice may be, and however desirable it is that the law should be so, that the rota Judge has power, until he is in a position to grant his certificate, under the 34 Vict., ch. 3, sec. 20—that is, until the close of the case—to reserve a question for the Court.

Such question is to be reserved "in like manner as questions are usually reserved by a Judge on a trial at Nisi Prius," and no Judge at Nisi Prius can stop a case in the middle, and adjourn it until he has some intermediate difficulty cleared out of his way by a reference to the Court. If there be any doubt in this respect, the Act should be amended.

Assuming that the case is regularly before us, I shall answer the questions submitted as follows:—

1. That there was no *payment* made by Price to McKay. If it were a payment, it was made by Price at a time when he was not an agent for the respondent, and with respect to a matter to which it could have no proper relation, for there was no antecedent hiring or promise to pay. The matter was, therefore, not a corrupt practice.

If it had been a corrupt practice, it would have avoided Price's vote, but not McKay's vote, for he was the person hired, if there had been a hiring, and such a person is not deprived of his vote.

This act, if it had been established to have been a corrupt practice, would not have defeated the election, because it has not been found to have been "committed by or with the knowledge and consent of the candidate;" on the contrary, the very opposite fact has been found for the candidate.

2. That the giving of liquor, as found by the case, by Houston, does not avoid his vote. I have more doubt as to the selling of liquor by Burns, but I am not so free from doubt as to find against him, on the case submitted.

I am of opinion, therefore, that neither of their votes has been avoided.

MORRISON, J., concurred.

DRAPER, C. J. of Appeal, was not present during the argument, and took no part in the judgment.

In re Election for the Electoral Division of the County of Monck.

32 Vict., ch. 21, ss. 57—List of Voters not delivered in time—Wrong list used—Amendment of petition.

[32 U. C. Q. B., 147.]

The 32 Vict., ch. 21, sec. 7, and sub-sec. 1, enacts that the clerk of each municipality shall, in each year, make from the assessment rolls a list of the persons entitled to vote therein, and deliver it to the Clerk of the Peace on or before the 15th August. By sub-sec. 3, this period shall be directory only to the clerk, "and the said lists shall be valid and effectual for the purposes of this Act, even though not so completed and delivered by the said period of time;" and by sub-sec. 10, no person shall be admitted to vote unless his name appears on the last list of voters, delivered to the Clerk of the Peace "*at least one month before the date of the writ to hold such election.*"

The writ to hold the election was tested on the 25th February, 1871. The list of voters for one of the townships in the Electoral Division was made up from the assessment roll of 1870, and sworn to on the 13th August; but it was not delivered to the Clerk of the Peace until the 17th March, 1871. The list for 1869 had been delivered on the 19th August of that year.

Per *Richards, C. J.*, and *Morrison, J.*, the list of 1869 was the one which should have been used.

Per *Wilson, J.*, that of 1870 was properly used; for that the month should be construed to mean a month from the 15th August, when the roll should have been, or any earlier day when it may in fact have been, delivered; that the roll, though delivered too late, would not otherwise be "valid and effectual for the purposes of this Act;" and the neglect of the clerk should not be allowed to disfranchise voters.

There were 41 voters on the list of 1869 who were not on that of 1870, but it was not shown that the vote of any one entitled to vote by either list had been rejected; nor was it shown or suggested that the use of one roll instead of the other could have in any way affected the result of the election. *Held*, that the election was not avoided.

Held, also, that the Judge had power to amend the petition by allowing the insertion of an objection to the roll used.

ENGLISH REPORTS.

CHANCERY.

Bray v. Briggs.

Vendor and purchaser—Specific performance—Mistake.

Plaintiff offered for sale a plot of land fronting the street, 176 feet deep, possessing a frontage of about 40 feet, which he described as well adapted for bank or insurance buildings, a public institution, carriage factory, or any building requiring space, or two good houses or shops. The defendant contracted to purchase it as a site for a carriage factory, but subsequently discovered that he would not be able to build within 62 feet 3 inches of the street, by reason of the restriction placed on building beyond the general line of buildings in the street by the Metropolis Local Management Act (25 & 26 Vict. chap. 102), sec. 75.

Held, that the defendant was at liberty to resist a suit for specific performance on the ground that he had purchased under a misapprehension.

[20 W. R. 862—May 2, 1872.]

In December, 1870, the plaintiff was seized in fee simple of the messuage and premises, No. 157, Queen's road, Bayswater, consisting of a plot of ground 176 feet deep, and possessing a frontage of nearly 40 feet to Queen's road, with a house standing thereon, the front of which was distant 62 feet 3 inches from the street. Between this house and the street there was a forecourt. In the same month, the plaintiff circulated a handbill, offering the property for sale by private contract. The handbill contained the following paragraph:—

"In this wealthy and vastly increasing business locality, the site is well adapted for bank or insurance buildings, a public institution, carriage factory, or any building requiring space, or two good houses or shops, which would be fairly worth £160 per annum."

The defendant, who was in want of a freehold site for the erection of a carriage factory, saw a copy of this handbill, and had an interview with the plaintiff, who represented that the purchaser would be at liberty to build on the forecourt within five feet of the road, and the defendant ultimately agreed in writing to buy the property for £2,700. On the 25th of February, 1871, the defendant, accompanied by his surveyor, had another interview with the plaintiff. At this interview the plaintiff produced a plan, which showed that the general line of buildings, referred to by the Metropolis Local Management Act, 1862, 25 & 26 Vict. chap. 102 sec. 75, ran along the front of the existing house, and that in consequence no building above twelve feet in height, or thereabouts, could be erected on the space between the house and the street, unless with the consent of the Metropolitan Board of Works. Upon this the defendant repudiated the contract, and the bill was filed for specific performance.

The Metropolis Local Management Act, 1862, 25 & 26 Vict. chap. 102 sec. 75, provides that no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in the street in which the same is situate.

Fischer, Q C, and *W. Barber*, for the plaintiff. The situation and nature of the property fixed the defendant with notice of the restriction on building beyond the general line of buildings in the street: *Davies* v. *Sear*, 17 W. R. 390, L. R. 7 Eq 427. There was no misrepresentation on the part of the plaintiff, such as to avoid the contract: *Scott* v. *Hanson*, 1 Sim. 13; *Dyer* v. *Hargrave*, 10 Ves. 505; *Swaisland* v. *Dearsley*, 9 W. R. 526, 29 Beav. 430; *Adams* v. *Weare*, 1 Bro C. C. 567; *Webb* v. *Direct Portsmouth Railway Company*, 9 Ha. 129; *Stuart* v. *London and North Western Railway Company*, 16 Beav. 513. [On the subject of the general line of buildings, they referred to *Brutton* v. *Parish of St. George, Hanover Square*, L R. 13 Eq. 339.]

Southgate, Q C., and *C. Hall*, for the defendant, relied on the general law of the court with respect to mistake as a defence to a suit for specific performance, and cited *Wood* v *Scarth*, 3 W. R. 350, 2 K. and J. 33; *Wycombe Railway Company* v. *Donnington Hospital*, 14 W. R 359, L. R. 1 Ch. 268; *Malins* v. *Freeman*, 2 Keen 25; *Day* v. *Wells*, 30 Beav. 220; *Webster* v. *Cecil*, *Ib.* 62, 10 W. R. Ch. Dig. 70.

Fischer, Q.C., replied.

May 2.—Lord ROMILLY, M. R., said that he never saw a clearer case of mistake. How could the Court compel the defendant specifically to perform a contract which he admittedly entered into with the object of being able to build over the whole area of the plot of ground up to any height that he pleased, on the ground that he ought to have known better, and that if he had looked into the Metropolis Local Management Act he would have found out the restriction? It did not appear that he bought the property on the chance of obtaining the consent of the Metropolitan Board to his building over the whole area of the property. That distinguished the case from *Adams* v. *Weare* (*sup.*). In that case a man bought a plot of ground in the hope that the corporation, who had authority in the matter, would allow him to build a mill on it; and when the Corporation refused to allow him to build a mill on it, the Court held that he was, nevertheless, bound to perform his contract. But in that case the vendor said, "If you choose to enter into the contract, it must be absolute, and not conditional, on the Corporation allowing you to build;" and after that he was not at liberty to set up the defence that the contract was conditional. If that had been the case now before the Court, if the defendant had said, "I will take it if the Board will allow me to build over the whole site," and the plaintiff had said, "No; you must take it unconditionally, or not at all," in that case the defendant would have do defence. As it was, his Lordship thought that the defendant entered into the contract in the belief that he would be able to build over the whole site, and that this was clearly proved. He could not under such circumstances make a decree for specific performance The bill must be dismissed, but without costs, for the defendant ought to have ascertained whether the property was really available for the purpose for which he wanted it before contracting to buy it.

COMMON PLEAS.

GRIMWOOD AND ANOTHER v. MOSS.

Landlord and tenant—Ejectment—Forfeiture—Distress—Waiver.

Subsequently to Midsummer-day a lessor brought ejectment for breaches of covenant committed prior to that day, and he afterwards distrained for rent due up to the same day.

Held, that the ejectment operated as an election to determine the tenancy, and that the distress, whether lawful or not, did not vary that election.

Per Willes, J.—That the distress was an act of trespass.

Jones v. *Carter*, 15 M. & W. 718, followed.

[20 W. R. 972—June 18, 1872.]

This was an action in ejectment tried at Chelmsford before Hannen, J. It appears that the plaintiffs were lessors of a farm demised to defendant, and that breaches of covenant involving ferfeiture had been committed by the latter before the 24th of June. The date of the writ was the 21st July. In September the plaintiffs distrained upon the goods of the defendant.

No particulars were given in the action of ejectment till October.

The verdict was entered for the plaintiffs, leave being reserved to enter it for defendant.

A rule having been obtained,

Denman, Q.C., (*Dixon* with him,) showed cause. On citing *Jones* v. *Carter*, 15 M. & W. 718, he was stopped by the Court.

Garth, Q.C, and *Shaw*, in support of the rule.—There was no breach of covenant subsequent to the 24th of June, and by the distress in September for rent due up to the 24th of June plaintiff affirmed the tenancy up to that date. If defendant had brought replevin he would have failed: *Doe* v. *Williams*, 7 C. & P. 332. The plaintiff gave no particulars till October, therefore his act was not unequivocal. [WILLES, J. —Either the distress was lawful under Statute of Anne, or the tenant has his remedy by action of trespass, and if the landlord pleaded the tenancy the plaintiff could reply the ejectment.] They also cited *Doe* v. *Meux*, 4 B. & C. 606, 1 Sm. L. C. 30, *Dumpor's case; Croft* v. *Lumley*, 27 L. J. Q. B. 321; *Dendy* v. *Nicholl*, 6 W. R. 502, 27 L. J. C. P. 220.

Denman was heard in reply.—There is no case of receipt of rent or distress after ejectment being considered a waiver of forfeiture: *Bridges* v. *Smyth*, 5 Bing. 410.

WILLES, J.—Upon the ground urged so strongly by Mr. Denman, I am of opinion that this rule ought to be discharged. It appears that on 21st July, the plaintiff brought ejectment, which is, *primâ facie*, an action not upon title, but in affirmance of one of the state of things in which, according to the agreement, the landlord is entitled to re-enter. The action of ejectment differs from other actions in that it gives no reasons why the plaintiff claims and discloses no title. The law waives any particulars of demand unless they are called for by the tenant, who may have them if he calls for them, even before appearance. Until then, the action is at large, and is referred to the first breach upon which the landlord is entitled to enter, and of which there has been no waiver before action (see *Jones* v. *Carter*). I agree that the principle is that action by ejectment was substituted for ancient entry; but it is not an equivocal act if you consider it as an act asserting the existence of every cause which justifies the landlord in entering: *Grenville* v. *College of Physicians*, 12 Mod 386. It is quite clear that if instead of bringing his action the landlord had entered, such entry would have been justified by each act of forfeiture up to the time of trial. If so, the subsequent distress would be idle, and could not defeat a prior entry, but would be a simple act of trespass, unless it were justified by the Statute of Anne, as to which it is unnecessary to enquire; but even if it is valid under the Statute it is not so by reason of any term which is asserted to continue, for that is put an end to. The matter then comes to this—that you have an action which is equivalent to entry on 21st July—is that made wrongful by reason of a subsequent distress, which, if valid, is so by reason of the term being put an end to, and for which if it is not valid the tenant has his remedy in trespass I think in accordance with Lord Holt's opinion that the entry had relation to the first breach, in respect of which the landlord was entitled to enter. I also think, in accordance with the judgment in *Jones* v. *Carter*, that ejectment is equivalent to such entry, and that any subsequent act of the landlord is either void, or

if valid cannot operate as a waiver of the forfeiture. The rule must therefore be discharged.

BYLES, J.—I am of the same opinion.

KEATING, J.—I also concur in the opinion expressed by my brother Willes. It seems to me that the action brought in July was an unequivocal election to treat the tenant as trespasser, and that a subsequent distress in October could not re-affirm the tenancy.

CORRESPONDENCE.

Railway Bonus.

TO THE EDITOR OF THE LOCAL COURTS' GAZETTE.

DEAR SIR,—A County Council, after twice reading a by-law giving aid to a railroad company in P. E., submits it to a popular vote of the County. The bill is sustained by 70 of a majority.

Question: Is the Council obliged to read the bill a third time, and finally pass it, or may they reject it?

Please answer in your next number.

Yours, &c., WARDEN.

[We cannot, consistently with our rule, give an opinion on the question put by our correspondent. It is a matter which should be referred to the legal adviser of the Council.—EDS. L. J.]

EXTRACTS FROM THE BLUE LAWS OF CONNECTICUT.

No Quaker, or dissenter from the establised worship of this dominion, shall be allowed to give a vote for the electing of magistrates or any other officer.

No food or lodgings shall be offered to Quaker, Adamite or heretic.

If any person turns Quaker, he shall be banished, and not suffered to return but on pain of death.

No priest shall abide in the dominion; he shall be banished, and suffer death on his return.

Priests may be seized by any one without a warrant.

No one to cross a river but an authorized ferryman.

No one shall run on the Sabbath day, or walk in his garden or elsewhere, except reverently to and from meeting.

No one shall travel, cook victuals, make beds, sweep house, cut hair, or shave on the Sabbath day.

No woman shall kiss her children on Sabbath or fasting days.

The Sabbath shall begin at sunset on Saturday.

To pick an ear of corn growing in a neighbour's garden shall be deemed theft.

A person accused of trespass in the night shall be judged guilty, unless he clears himself by his oath.

When it appears that the accused has confederates, and he refuses to discover them, he may be racked.

None shall buy or sell lands without permission of the selectmen.

A drunkard shall have a master appointed by the selectmen, who are to bar him from the liberty of buying and selling.

Whoever publishes a lie to the prejudice of his neighbour, shall be set in the stocks, or be whipped ten stripes.

No minister shall keep a school.

Every ratable person, who refuses to pay his proportion to support the minister of the town or parish, shall be fined by the court 5ld., and 41s. every quarter, until he or she pay the rate of the minister.

Men-stealers shall suffer death.

Whosoever wears clothes trimmed with gold, silver or bone lace, above 1s. per yard, shall be presented by the grand jurors, and the selectmen shall tax the offender £300 estate.

A debtor in prison, swearing he has no estate, shall be let out and sold to make satisfaction.

Whosoever sets a fire in the woods, and it burns a house, shall suffer death; and the persons suspected of this crime shall be imprisoned without benefit of bail.

Whosoever brings cards or dice into this dominion shall pay a fine of £5.

No one shall read Common Prayer books, keep Christmas or set days, eat mince pies, dance or play cards, or play on any instrument of music, except the drum, trumpet and Jews's harp.

No gospel minister shall join people in marriage. The magistrate only shall join them, as he may do it with less scandal to Christ's church.

When parents refuse their children convenient marriages, the magistrates shall determine the point.

The selectmen, on finding children ignorant, may take them away from their parents and put them in better hands at the expense of their parents.

A man that strikes his wife shall pay a fine of £10.

A woman that strikes her husband shall be punished as the law directs.

A wife shall be deemed good evidence against her husband.

No man may court a maid in person or by letter without having first obtained consent of her parents: £5 penalty for the first offence, £10 for the second, and the third, imprisonment during the pleasure of the court.

Married persons must live together, or be imprisoned.

Every male must have his hair cut round according to his cap.

Upon the trial of a suit of divorce, one of the witnesses was asked whether he had spoken to any of the jury since the trial commenced. "Yes, sir, I spoke to Mr. ——," pointing to a juryman with a face as red as a blood beet. "What did you say to him?" Witness appeared reluctant to tell. The attorney insisted upon the answer. "Well," said the witness, "I told him that he had a pretty face to sit on a jury to decide whether a man was an habitual drunkard or not."—*Pittsburgh Legal Journal.*

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