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Toronto, January, 1876.

THE following is the result of the Scholarship examinations at Osgoode Hall, for Michaelmas Term, 1875 :—

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THE *Law Times* tells of a case in the Clerkenwell Police Court, which illustrates the vitality of ancient customs handed down by tradition among the lower classes. A person had died owing his landlord a few pounds, and the latter refused permission to the relatives to remove the corpse till the debt was paid. It was once the custom in England to defer the burial of a person dying in debt. But the law is abundantly clear, that so far from being able to detain the body, the person in whose house a poor man dies is bound to give the remains a decent burial. The cases cited are *Reg.* v. *Stewart*, 12 A. & E., 779; *Reg.* v. *Fox*, 2 Q. B., 246; and *Jones* v. *Ashburnham*, 4 East 460.

HOWEVER desirable, from the wife's point of view, the privilege of sueing and being sued independently of her husband may be, cases may arise which will cause the husband to look upon it as anything but a privilege. Indeed, in a recent argument in the Court of Chancery, such a

case was referred to with much feeling by a learned Queen's Counsel, as having actually transpired in one of our counties. It appears that a married woman applied to a shopkeeper for goods, informing him however, that she was acting contrary to her husband's instructions. The merchant, nevertheless furnished the goods, and charged the woman personally with their price. He then shortly after sued her alone in the Division Court. The result was that the woman was kept a whole day in attendance at Court, and the equally unfortunate husband was kept at home to take care of the children. To assist him in his onerous duties he had to subsidise a neighbour of the gentler sex at an outlay which he begrudged. He now complains that the Legislature entirely neglects the interests of the unprotected male. The case had its parallel in another—in Wyoming county—cited by the same counsel, where the husband spent the day in walking about outside the court house with the baby in his arms, while the wife performed her duty to the State on the jury.

Probably no stronger illustration could be given of the fact that law does not profess to be co-extensive with morality, than the state of the law relating to drunkenness. It is said by Galt, J., in *Reg.* v. *Blakely*, 6 Prac. R. 244, that there are certain vices which, in the eye of the law, are punishable only when practised publicly, and that drunkenness is one of these. A man cannot, when drunk in his own house, be forcibly removed therefrom, even at the request of his own family, unless his conduct be such as would constitute him a nuisance to the public, that is, by creating a public disturbance. A case of similar import recently came before the Belfast Police Court. Ann Ryan, a licensed publican, was summoned for being drunk on her own premises. It was sought to subject her to a penalty under the 12th section of the recent Licensing Act, which inflicts a penalty upon "every person" "found" drunk in any licensed premises. The magistrate, however, held that the Act was not intended to deprive licensed publicans of the privilege of getting drunk in their own public house, but only reached the casual visitor or customer.

The *Solicitors' Journal* notes the cases on the question as to the right of the prosecuting counsel in a Crown prosecution to reply when no evidence is called on behalf of the prisoner. When the Attorney-General appears officially on behalf of the Crown he is entitled to reply: *Reg.* v. *Marsden*, M. & M., 439. A similar right has been conceded to the Solicitor-General: *Reg.* v. *Tonkley*, 10 Cox C. C., 406, and *Reg.* v. *Barrow*, 10 Cox C. C., 407. By the rules made by the judges in 1837, regulating the practice in trials for felony (7 C. & P., 676), it is taken for granted that the counsel who represent the law officers of the Crown are also entitled to reply in such cases: see *Reg.* v. *Gardner*, 1 C. & K., 628. But in *Reg.* v. *Christie*, 1 F. & F., 75, the Court refused to extend the privilege to the Attorney General for the County Palatine of Lancaster,—Martin, B., there remarking that the practice was a bad one. In *Reg.* v. *Beckwith*, 7 Cox C. C., 505, Byles, J., refused the alleged right to the counsel prosecuting in a matter originating with the Poor Law Board. The claim of the Crown counsel to reply in a prosecution conducted by the Solicitor of the Treasury was, after discussion, recently allowed by Mr. Justice Field. The *Solicitors' Journal* regrets that any exception should have been established in prosecutions on behalf of the Crown, and deprecates any extension of the anomaly: 19 Sol. J., 893.

EFFECT OF ADMINISTRATION OF JUSTICE ACT.

When speaking recently of the effect of the Administration of Justice Act we alluded, among other results, to an apparent falling off in Chancery business. That was the general belief in the profession, but there seems to be some doubt as to the correctness of that opinion——an opinion which could not then be verified. Complete statistics are not as yet procurable, but, so far as we have been able to ascertain, they show that a much larger number of bills were filed in the year that has just closed than in any previous year; and that more bills were filed in 1875 than in 1869. The impression may partly have arisen from the Tuesday's work in Chancery having almost disappeared, owing mainly to the fact that in ejectment suits at Common Law equitable defences may now be set up, and that injunctions to restrain suits at law are now things of the past. We shall endeavour at an early day to lay before our readers as full information on this subject as we can obtain.

It is difficult of course at present to judge fully of the probable effect of the Administration of Justice Act in its bearing on the relative amount of business done in the various Courts, especially as the judges of the Common Law Courts are for the first time working under a system which is new to them, though it has been in successful operation in the Court of Chancery for some fifteen years. Speaking of this reminds us of the act introduced by Mr. Hodgins, which is reprinted on another page, which would provide for business being sent from one Court to another so as to equalize the work. There could be no objection to this as between the two Common Law Courts, but it seems too soon to be able to judge of its propriety as between a Common Law Court and the Court of Chancery. Whilst the Act alluded to contains much that we approve of, there is in the mind of the Bench and Bar an abhorence of those never ending changes that drives the practitioner to despair, and prevents a fair trial of that which may or may not have been wisely conceived, or may or may not have been carefully enacted.

WANTS AT OSGOODE HALL.

This is an age of Club. The Law Society is in the nature of a club; but, though not a club established for "social purposes," its members are bound together by well understood ties and associations. We do not propose that it should change its mission, but it is quite evident that it might have those few advantages of a social club which are not inconsistent with its main objects. For instance, why should not the initiated of Osgoode Hall have some place provided for washing their hands? How can those who frequent the western wing be expected to appear there at all hours, in conformity with one of the best known maxims of equity, without some provision of this nature? The out offices, moreover, are scarcely equal to those of the lowest tavern between here and Lake Shebandowan. Again, when "grub" is scarce we flatter ourselves we can go on short allowance as well as most men, and make up for it with the accommodating stomach of a "noble savage" when opportunity offers; but we are satisfied that it would be a great accommodation to those whose duties compel them to remain at Osgoode Hall from early in the day until late in the afternoon, if there were some place in the building where they could obtain a plain luncheon. We understand that some of the Judges have set their faces against anything of this kind, for the same reasons that led to the attempts to close the saloons of the Parliament Build-

ings. Though not very complimentary to the profession, there is probably some force in the objection; but there could be no objection whatever if the liquids were "something soft" instead of "hard." (We use these words advisedly, as they are now familiar to ears judicial, and, in fact, have acquired a technical meaning by reason of the evidence in the *South Ontario Election* petition and other kindred cases). There is, in truth, no necessity for more than such mild refreshments as have made "Coleman's" a popular resort to those adventurous spirits who, in their desire for a cup of coffee, sometimes find their cases struck out on their return to court. These things could be rectified at once; but when the scheme of taking the Court House to the north side of Osgoode Hall is carried out, we may expect to see other improvements, in the way of extra rooms for consultations and arbitrations, also a room for the reporters, and for witnesses when excluded from court or when waiting for the case in which they are to testify. Possibly there may, even now, be some spare rooms that could be used for these purposes.

DEFECTIVE LEGISLATION.

"If the framers of Acts of Parliament," said the Lord Chief Justice of Ireland in the course of a recent argument, "had an opportunity of listening to the arguments in Courts of Justice which they sometimes involved, it might have the effect of leading to some improvement in the phraseology of enactments, and in preserving their consistency; and they would then perhaps learn how much time and money are wasted in endeavouring to make out what these acts were really intended to mean."

The subject of the defects in forms of Acts of Parliament is as old as the earliest Act of Parliament itself. In England it is found that the provisions for the revising of bills which are apparently analogous to those in this province, do not by any means insure accuracy and lucidity in the acts. The Statute Law Commissioners in England report in favour of the appointment of an officer or board, with a sufficient staff of assistants, whose duty it should be to advise on the legal effect of every bill which either House of Parliament should think proper to refer to them,—in a word, as the Irish *Solicitor's Journal* puts it, "a minister who shall really be responsible for the administration of the law and its amendment, with power to procure such learned assistance as will enable him to cope with the task of throwing the wishes of the Legislature into intelligible shape, and expressing them in intelligible language."

The expenses of governing this province are already such as to preclude the hope that any plan equal to the requirements of the case should be adopted. As long as Ontario enjoys the privilege of making local laws, so long must we expect these laws to be hard of interpretation. But errors such as those to which a correspondent, "E. W.," has called our attention, might surely, by the exercise of ordinary care, be avoided. 36 Vict. cap. 135, (Ont.) the Act respecting the Property of Religious Institutions, professes by sec. 18 to repeal 35 Vict. cap. 36, which is "An Act for the Prevention of Corrupt Practices at Municipal Elections." The act intended to be repealed is obviously 35 Vict. cap. 35. Our correspondent, if he had pursued his inquiries further, would have found another blunder in the same sec. 18. It purports to repeal 27, 28 Vict. cap. 43, "An Act to amend the Law in *qui tam* Actions in Lower Canada," instead of cap. 53. The general principle applicable to the construction of statutes is that the courts, in a clear case of clerical error or misprint, may read the statutes so as to

effectuate their obvious intention: (see the observations of Richards, C.J., in *Brown* v. *Dwyer*, 35 U. C. Q. B., at p. 364); and we presume that these mistakes are within the rules there spoken of.

GARNISHMENT OF EQUITABLE DEBTS.

It has been clearly laid down in many cases under the garnishment clauses of the Common Law Procedure Act, that only legal debts—debts for the recovery of which an action at law could be maintained—could be attached. Thus in *McDowall* v. *Hollister*, 25 L.T.N.S. 185, it was held that a creditor cannot attach a legacy given by a testator to the judgment debtor while in the hands of the executor, unless there has been such an account stated with the executor as would enable the legatee to maintain an action at law; and that the consent of the executor to pay, if the Court should so order, did not avail to warrant the attachment.

An attempt to give equitable extension to the doctrine of garnishment, which signally failed for the foregoing reason, is to be found in the series of cases, *Gilbert* v. *Jarvis*, 16 Gr. 265; *Blake* v. *Jarvis*, ib. 295; *Blake* v. *Jarvis*, 17 Gr. 201, and *Gilbert* v. *Jarvis*, 20 Gr. 478, wherein the Court of Appeal in this Province overruled the previous decision (favourable to such extension) of the *Bank of British North America* v. *Matthews*, 8 Gr. 492.

One of the cases which went as far as the law permitted before the new departure to which we shall presently advert, was that of *The Warwick and Worcester Railway Company, Prichard's claim*, 2 De G. F. & J. 354, wherein the Court permitted the proceeds of a call made under the Winding-up Acts to provide for the payment of a debt of the company, to be attached in the hands of the official manager, to answer a judgment recovered against one of the creditors of such company. But Turner, L.J., is careful to explain that this does not amount to the attachment of an equitable debt: "the attachment," he observes, "is against the company, upon a debt due from the company to their creditor, and the official manager had the money in his hands wherewith to pay the debt independently of any question as to how the fund arose."

The effect of the English Judicature Act seems to have altered the law of garnishment, so as to embrace cases of equitable debts. In *Wilson* v. *Dundas*, 20 Sol. J. 99, an application was made by Wilson, the judgment creditor, to attach half a year's salary due to Mackenzie, the judgment debtor, from his trustees, Dundas and Stevenson. It was contended for the garnishees that this was a trust debt, and therefore not attachable. Mr. Justice Quain (sitting in Chambers, Nov. 29), in giving judgment, is reported to have said: "Ord. 3, r. 6, expressly says that there may be a special endorsement of a trust debt. If Mackenzie brings an action against his trustee, he can recover his half-year's salary. It is submitted for the garnishees that there cannot be an attachment of an equitable debt; but there is no distinction now between a legal and an equitable debt. I should be contravening the very object of the Judicature Acts, if I were to hold otherwise. If, sitting here, we could not now attach an equitable debt, we might as well be under the *ancien régime*." As, however, the garnishees disputed their liability, he ordered a special case for determining the question.

If the view of the learned judge is well founded, his line of argument is quite applicable to the provisions of the Ontario Administration of Justice Act of 1873.

The second section of that act gives the right to sue at law in case of a pure money demand, although the plaintiff's right to recover may be an equitable one only. We have already called attention to the desirability of amending the law in this direction; the judges have on more than one occasion called attention to the imperfection of the law under the Common Law Procedure Act; and we trust it may be found that one result of the Act of 1873 is to remedy this defect, so as to enable the court to realise equitable debts by process of garnishment for the benefit of execution creditors.

*THE ENGLISH JUDICATURE ACTS.**

More than twenty-five years ago, the great revolution in the administration of justice in England, which has culminated in the Supreme Court of Judicature Acts, received its first impulse. The commission appointed in the year 1850 to inquire into the constitution of the Common Law Courts, reported that it appeared to them that the Courts of Common Law, to be able satisfactorily to administer justice, ought to possess, in all matters within their jurisdiction, the power to give all the redress necessary to protect and vindicate Common Law rights, and to prevent wrongs, whether existing or likely to happen unless prevented. They also urged that a consolidation of all the elements of a complete remedy in the same Court was obviously desirable, not to say imperatively necessary, to the establishment of a consistent and rational system of procedure.

The commissioners appointed in 1851 to inquire into the constitution of the Court of Chancery made suggestions of a similar character. They dwelt upon the necessity of a transfer or blending of jurisdiction, so as to render each Court competent to administer complete justice in cases falling under its cognizance. The labours of these commissions, as is well known, effected vast improvements in procedure, but their recommendations touching the blending or consolidation of the distinct jurisdictions remained to gain the approbation of a later day.

In the year 1867 a royal commission was again nominated, to inquire generally into the constitution of the Superior Courts. In their instructions the subject of a union or consolidation of courts, or an extension of jurisdiction where one court did not possess as full powers as another, had a prominent place. That commission, after forcibly pointing out the evils of the distinct and, in many cases, conflicting jurisdictions, reported that in their opinion the first step towards meeting and surmounting these evils would be the consolidation of the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty into one court, in which all the jurisdictions of the several courts so consolidated should be vested.

In 1870 Lord Hatherly introduced a bill into the House of Lords to give effect to these suggestions. This bill was withdrawn. In 1873 Lord Selborne, who had succeeded to the Chancellorship, framed and introduced a bill which, with but little alteration became law as the Supreme Court of Judicature Act, 1873. In 1874 Lord Cairns introduced an amending Act, postponing the opera-

* The Supreme Court of Judicature Acts, 1873 and 1875, with notes, by Arthur Wilson, of the Inner Temple, Barrister-at-Law. London: Stevens & Sons. Toronto: R. Carswell.

The Supreme Court of Judicature Acts, 1873 and 1875. Edited by William Downes Griffith, of the Inner Temple, Barrister-at-Law, late Her Majesty's Attorney-General for the Cape of Good Hope. London: Stephens & Haynes. Toronto: R. Carswell.

tion of the original Act till November 1875; the remainder relating chiefly to the formation of a Court of Appeal. These two statutes are known as the Supreme Court of Judicature Acts, 1873 and 1875.

In the schedule to the Act of 1873, the outlines of a system of procedure were laid down. These were to be binding until altered by the body of the judges after the Act came into operation. This Act also empowered the Queen in Council, on the advice of the judges, to issue rules to complete the system of procedure. Rules were accordingly framed and approved by the judges, and issued in the summer of 1874. These rules have been pronounced by one of our own judgei, well fitted to form an opinion, to be models of drafting. In the schedule to the Act of 1875 all the rules —both those comprised in the schedule to he first Act and those framed by the udges—are inserted in a consolidated form, while power is still reserved for the creation, by the judges, of additional rules.

Such is a brief history of the legislation which has made so sweeping a change in the administration of law in England. Let us now glance at the main provisions of that legislation.

The High Court of Chancery of England, the Courts of Queen's Bench and Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes are, by these Acts, united and consolidated together, and now form one Court, the Supreme Court of Judicature in England. The Supreme Court, however, as such, will exercise no jurisdiction. It is divided into the High Court of Justice and the Court of Appeal.

To the High Court of Justice now belongs the whole of the original jurisdiction of the Courts we have just enumerated.

This Court is subdivided into five divisions, perpetuating, in accordance with the advice of the Commissioners, the names of the Courts of Chancery, Queen's Bench, Common Pleas, Exchequer, and Probate, Divorce, and Admiralty, the last named courts forming one division. Any judge may sit in a court belonging to any division, or for any other judge.

The great evil attacked by the Judicature Acts was the possibility that a suitor in one Court might fail of obtaining the relief to which the law recognised his right, although in another Court, had he applied there, he would have procured that relief. To obviate this contingency there are several express provisions. Each branch of the High Court is empowered, nay is required, to give any appropriate relief or remedy which could heretofore have been given by any Court to all or any of the parties to the action.

There are rights which equity recognises and enforces and of which the Common Law takes no notice, rights, for instance, arising out of estates which are recognised in equity but entirely ignored at law. Under the new system, subject to the power of transfer, equitable grounds of claim are to be fully recognised in each division and fully enforced. At the same time, each division is to give due effect to legal rights. Furthermore, as to cases where there has been an actual conflict of doctrines between courts, the Judicature Acts enumerate a number of the points on which such a conflict has existed, and declare what the law shall be for the future. Equitable doctrine is to prevail in cases not specially provided for.

But it must not be supposed that a plaintiff is at liberty to prosecute his action to its close, irrespective of its nature, in any division of the court. The acts assign to each division certain causes of action analogous to those over which,

before the acts, the several courts corresponding to the several divisions had exclusive cognizance. There are at the same time provisions for the transfer of actions, when expedient, from one division to another, when actions have been commenced in the wrong division. In such cases the plaintiff will be allowed the full benefit of his proceedings up to the transfer.

Questions have already arisen under the sections referring to the transfer of actions. For instance, where a suitor commenced an action in the Chancery division for salvage, the Master of the Rolls lost no time in sending all the parties to the Probate, Divorce and Admiralty division.

Great changes have been made in the system of pleading, changes aiming at the reduction of expense, more especially in preliminary proceedings. A simple writ of summons will in future commence the action in every division. Even the special form of writ in ejectment has been done away with. But the writ is to be "endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action." An exact and detailed statement of the claim is not required, the rules providing that "it shall not be necessary to set forth the precise grounds of complaint or the precise remedy or relief sought." Out of a large number of forms prescribed by the rules we extract a few at hap-hazard. It will be seen that the initiation of a suit in Chancery, or in the Chancery Division, as will be said in future, is a less elaborate piece of business than it still remains with us.

The plaintiff's claim is to have an account taken as to what, if anything, is due on a mortgage dated , and made between *(parties)*, and to redeem the property comprised therein.

The plaintiff's claim is to have a deed dated , and made between *(parties)*, set aside or rectified.

The plaintiff's claim is for specific performance of an agreement dated , for the sale by the plaintiff to the defendant of certain freehold hereditaments at

The plaintiff's claim is for the warehousing of goods.

The plaintiff's claim is for damages for assault.

There are also provisions for special endorsements in certain cases, analogous to the enactments of the Common Law Procedure Act.

The rules in reference to the commencement of actions are aimed at the saving of expense in the large number of cases which never get beyond the initial stage, the commencement of proceedings bringing the defendant to terms. But, where the defendant appears, it is enacted that unless with his appearance he states that he does not require the delivery of a statement of complaint, the plaintiff shall deliver one, in reply to which defendant shall deliver a statement of defence, set-off, or counter claim. Such statements, it is directed, shall be as brief as the nature of the case will admit, and the Court, in adjusting costs, may inquire into any unnecessary prolixity and inflict payment of costs as a penalty therefor.

A new set of rules of pleading is substituted for all those in force at the coming into operation of the Acts. Every pleading is to contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs. Dates, sums and numbers are to be expressed in figures, and not in words. Forms of pleading to serve as models are appended to the Act of 1875. We venture to set out in full a form of statement of plaintiff's claim, equivalent to the declaration at Common Law or the Bill in Chancery, which will serve to show what a determined assault upon prolixity has been made:

In the High Court of Justice.

Chancery Division.

(Name of Judge.)

Writ issued 22nd December, 1876.

In the matter of the estate of A.B., deceased, between

E. F., Plaintiff,

AND

G. H., Defendant.

STATEMENT OF CLAIM.

1. A. B., of K., in the County of K., died on the 1st of July, 1875, intestate. The defendant, G. H., is the administrator of A. B.

2. A. B. died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered into possession of the real estate of A. B., and received the rents thereof. The legal estate in such real estate is outstanding in mortgagés under mortgages created by the intestate.

3. A. B. was never married; he had one brother only, who predeceased him without being married; and two sisters only, both of whom also predeceased him, namely, M. N. and P. Q. The plaintiff is the only child of M. N., and the defendant is the only child of P. Q.

The plaintiff claims:

1. To have the real and personal estate of A. B. administered in this Court, and for that purpose to have all proper directions given and accounts taken.

2. To have a receiver appointed of the rents of his real estate.

3. Such further or other relief as the nature of the case may require.

We may add that no pleading beyond a replication seems to be contemplated.

Improvements have been made in the method of obtaining discovery, as well of facts as of documents, and fetters which formerly embarrassed a party in getting discovery have been removed.

There are a great number of other matters dealt with by these Acts, such as the trial of actions, references, evidence (evidence in the Chancery Division will be given orally at the trial, as in Common Law causes), judgment, motions for new trial, execution, appeals and costs, which we can merely indicate.

We may mention, however, specially, a provision recommended by the Commission and carried into effect. We mean the enactment that in cases where the judge has reserved leave to move, there should no longer be a motion for a rule to show cause, but that upon notice given to the opposite party the question should be disposed of. In a late case of *Lindsey* v. *Cundy*, the Lord Chief Justice caused some surprise by asserting that it was difficult to say what the Legislature meant, and that nothing would be gained by this innovation.

The Court of Appeal consists of five ex-officio and three ordinary judges. The ex-officio judges are the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer. The first ordinary judges are to be the present Lords Justices and one other person, who has since been appointed, namely Mr. Justice Bagallay. Power is also given to the Lord Chancellor to call for the attendance of one judge from each division except the Chancery division as additional judges of the Court of Appeal.

This Court has jurisdiction to hear an appeal from any judgment or order, whether final or interlocutory, of the High Court, or any judges or judge of that court, except where it has been made by consent, or relates to costs only, when discretionary, and except judgments in criminal appeals, and in appeals from inferior courts, unless in the last mentioned cases leave to appeal is given.

By the Judicature Act of 1873, the decisions of the Court of Appeal were to be final, and all recourse to any higher court was taken away. The Act of 1875 has suspended for a year the operation of the sections affecting this, and for that time a further appeal to the House of Lords is preserved.

The Acts themselves, with the body of rules promulgated by the Judges (to whom was left the working out of the Acts in detail—a work equal in extent and import

ance to the original legislation), form a mass of provisions with which we have not attempted to deal, except in the most cursory manner. We have selected what have appeared to us the salient features of the Acts. We have noted them almost without comment, believing that to Canadian lawyers they could not fail to be of interest, engaged as we are, in one province at least, in working out the same problem.

Already a score or more of works of various plans and of various degrees of merit, have appeared on the Judicature Acts in England. From the two named in connection with the title of this article we have drawn our information. Mr. Wilson's book is lucid in its arrangement, and contains under each section of the Act and rules all the necessary references to other sections relating to the same subject. In addition it contains a summary which will be useful to those who read to acquire a general knowledge of the Acts rather than for practical use. Mr. W. D. Griffith, the author of the other work referred to, held the office of Attorney-General at the Cape of Good Hope for some eight years, and has recently recommenced practice at the English Bar. He has had a large amount of leisure on his hands, which he has devoted assiduously to the annotation of the Judicature Acts. Add to this the experience no doubt gained in the tenure of an important office, and people will be ready to place a good deal of confidence in his book, as one likely to be accurate and to contain some valuable comments on the changes effected.

AMENDMENTS TO ADMINISTRATION OF JUSTICE ACT.

The following is the Bill introduced by Mr. Hodgins, to amend the Acts respecting the Administration of Justice:

1. Except in the Counties of York and Wentworth, and in the County Towns in which no Chancery sittings are appointed to be held, there shall be two sittings of the Court of Assize and Nisi Prius, and General Gaol Delivery and of Chancery, during each Spring and Autumn Assize, one of which sittings shall be for the trial of criminal cases and of civil cases to be tried by a jury, and the other sitting for the trial of Chancery cases, and civil cases to be tried without a jury, and each of such sittings shall be at least one month apart, and shall be presided over and held by a Judge of the Court of Appeal, Queen's Bench, Chancery or Common Pleas, as may be named for that purpose.

2. In the places excepted by the preceding section, the non-jury cases shall be entered upon a separate list from the jury cases and shall be tried after all the jury cases are disposed of, unless the Judge presiding at the Assize otherwise order.

3. In case on the application of either of the parties, or otherwise, it shall appear to the Judge presiding at a sitting or Assize for the trial of jury cases that any cause entered for a jury trial at such sitting or Assize, should be tried by the Judge without a jury, such Judge may order such cause to stand over to be tried with the non-jury cases, or he may appoint a time after the jury cases, or otherwise, for the trial of such cause.

4. All records for trial at Nisi Prius, to be tried by a jury, and non-jury cases to be tried under section two of this Act, shall be entered with the proper officer not later than the last day for giving notice of trial, according to the present practice of the Superior Courts of Law.

5. All records for trial in non-jury cases to be tried with Chancery cases shall be set down, and notice of trial given not later than fourteen days before the commencement of the sittings at which they are to be tried.

6. In cases where no jury has been demanded or no order has been made for the trial of the issues or assessments of damages by a jury, at least sixteen days before the commencement of the sittings of an Assize for the trial of non-jury cases, no jury shall be granted unless the Court or Judge otherwise order on a special application, and subject to such terms as to costs or otherwise as may be just.

7. No countermand of notice of trial or hearing in any civil cause or Chancery case shall be valid unless given at least eight days before the day of the commencement of the Assize or sittings for which notice of trial or hearing has been given.

8. In case it shall at any time appear to the Court or Judge that it will be conducive to the ends of justice that a suit or action depending on the Superior Courts of Law or Equity, or certain issues therein, should be tried and determined before a Judge sitting in open Court, under section nineteen of the Administration of Justice Act, 1874, the said Court or Judge may direct such suit or action or issues where the venue is laid in the County of York or City of Toronto, to be set down or entered for trial, and notice of hearing or trial to be served upon all proper parties; and thereupon such suit or action, or the issues therein, shall be tried and witnesses examined before such Judge without a jury, and such Judge shall possess in respect of such trial all the powers, authority and jurisdiction of a Court of Assize and of a Judge presiding thereat; and such decree or judgment shall be pronounced or verdict entered as shall be just; and such further or other proceedings shall thereafter be taken thereon, as if such suit or action had been tried or heard at a Court of Assize or sittings of the Court of Chancery.

9. The Court of Chancery, during each rehearing term or at any sitting of the full Court, shall have and possess all the powers and jurisdiction of the Superior Courts of Common Law to hear and dispose of applications for rules for new trials in cases depending in the said Superior Courts of Common Law; and all such proceedings in relation thereto shall be entitled in the Court in which the action is depending, and in the said Court of Chancery, and the Judges and officers of such Court shall have the same powers and perform the same duties in relation thereto until rules as hereinafter provided are promulgated; and the practice and rules of the said Superior Courts of Common Law shall, as nearly as may be, apply to such applications as if the said Court of Chancery was the Court of Common Law in which such suit or action had been commenced: But the said Court of Chancery shall have power to make rules regulating the practice of such Court in respect of such applications.

10. It shall be lawful for the Chancellor, and the Chief Justices of each of the Superior Courts of Common Law, or in case of their absence or inability to act, then of the senior Vice-Chancellor, or senior Puisne Judge of each Superior Court of Law, or a majority of them, as the case may be, in case of pressure of business in Courts of Queen's Bench, Chancery or Common Pleas, and to transfer causes or motions for rules for new trials standing on the new trial list of any one of the said Courts, to another of the said Courts, to be heard and disposed of by such Court; and such causes or motions or rules for new trials shall be heard and disposed of by the Court to which the transfer is made, and such Court, and the Judges and officers thereof, shall have the same powers and jurisdiction, and shall perform the same duties in respect of such causes or motions or rules for new trials, as the Court from which such transfer has been made.

11. No term of the Superior Courts of Law, shall end on the day fixed by law, nor until all the rules *nisi* for new trials granted during the first week of such term are disposed of by argument or otherwise, unless the Judges of the Superior Courts, or a majority of them, otherwise determine not later than the second Monday in such term.

12. Trinity Term shall commence on the last Monday in August, and the Courts of Queen's Bench and Common Pleas shall dispose of all business, whether enlarged from previous terms or not, which may be brought before them; but the said Courts may, by general rules, from time to time determine the business to be done in the said Courts during such term.

13. So much of section 17 of the Administration of Justice Act, 1874, as provides that there shall be no appeal to the Court of Error and Appeal from the judgment, decree, rule or order of a single Judge, until after a rehearing before the full Court is hereby repealed, and it shall not hereafter be necessary to rehear any cause or matter in law or equity, or any judgment, decree, rule or order of a single Judge, prior to an appeal to the Court of Error and Appeal, but nothing herein shall be construed to repeal section twenty of the said Act.

14. Where, in any suit or other proceeding, it is made to appear that a deceased person who was interested in the matters in question has no legal personal representative, the Court or a Judge may either proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court may think fit, either specially or by public advertisement, and notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to perform by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate where representation is sought; and the order so made, and

any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly appointed legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and had submitted his rights and interest to the protection of the Court.

15. The Law Society may from time to time appoint shorthand reporters to attend the several Courts to take notes of the evidence and report the judgments and proceedings thereat; and *the Judges of the Superior Courts may from time to time, by general rules or orders, prescribe a tariff of fees to be paid by parties to suits, actions, matters or other proceedings in said Courts, towards forming a fund to provide for the allowances or salaries of such short-hand reporters, and may from time to time prescribe the duties of such short-hand reporters as officers of the said Courts.*

16. ["Superior Courts" to include the Court of Error and Appeal.]

17. The Practice Court constituted under section nine of chapter 10 of the Consolidated Statutes of Upper Canada is hereby abolished, but the powers and jurisdiction of the said Practice Court may be exercised by a Judge sitting in open Court, under section nineteen of the Administration of Justice Act, 1874.

18. Section 88 of the Administration of Justice Act, 1874, is hereby amended so as to read as follows:—

(88.) Except where the County Council of any County has made contracts for the printing of official advertisements in any newspaper, and except where a judge's order, or the execution creditor having a writ against lands in the Sheriff's office, directs the said Sheriff as to advertising the lands for sale under the same, the Lieutenant-Governor in Council may direct through any department of the Government, that all Sheriff's advertisements and other legal and official advertisements shall be published in such newspapers as the said Lieutenant-Governor in Council may from time to time direct, but nothing in this clause shall apply to notices or advertisements required to appear in the *Ontario Gazette*, or to be published in public offices.

19. All inconsistent enactments are hereby repealed, and this Act shall be known and cited as the "Administration of Justice Act, 1876," and this Act and the Acts heretofore passed with a similar title shall be known and cited as the "Administration of Justice Acts."

SHORT-HAND REPORTERS.

During last term a special committee, consisting of Messrs. J. D. Armour, Thomas Hodgins and D'Alton McCarthy, was appointed by the Benchers of the Law Society to consider a system of short-hand reporting in connection with the Courts. On the 28th December last they reported to the Benchers of the Law Society, in convocation assembled, as follows:—

1. That in 1860 a system of short-hand reporting was adopted by the courts in the state of New York, under which stenographers were appointed to each of the courts at a per diem allowance, which subsequently was altered for an annual allowance on a very liberal scale.

2. That subsequently a similar system was adopted in the states of Illinois and Maine, and it has been found to work so satisfactorily that the system is now being introduced into the courts of other states in the American Union.

3. That in 1871 an Act was passed by the Legislature of Quebec (35 Vict., cap. 6, sec. 10) authorizing the appointment of short-hand reporters in the courts of that Province. The stenographer there is engaged by the prothonotary in any case desired by the litigants, and the costs of the short-hand reporter's notes of the evidence are paid in law stamps, and go into the public treasury, the short-hand reporter receiving his fees from the prothonotary according to the number of folios. Your committee are informed that as the merits of the system have become known, and as a great saving of time to the courts has been effected by it, stenography is now being used in nearly every case of importance in that province.

4. In the Dominion Controverted Elections Act of 1874, authority is given to the Judge presiding at any election trial to employ a short-hand writer to take down the oral evidence given by witnesses at the trial, and the expense of such short-hand writer is made costs in the cause. A similar practice, your committee believe, has been adopted in election trials in England.

5. In many of the election trials held during this year, affecting the elections to the Legislative Assembly, short-hand reporters have been employed, and the Courts have been enabled to get through the trial more rapidly than in the

cases where the evidence has been taken in long-hand by the judge.

6. Your committee find that where the system of short-hand reporting in the courts has been adopted, the advantages of the system may be thus classified :—

(1.) It largely promotes the despatch of business, by lessening the time occupied in the trial of causes. The Judge is not called upon to take more than a mere summary of the evidence for the purposes of his charge to the jury, or his own finding, and he is enabled to give greater attention to the demeanour of the witnesses, and the substance of their evidence. The witness can tell his story or answer questions more promptly, and is not interrupted while important parts of his evidence are being written down in the Judge's notes ; and he is not, as in Chancery cases, compelled to wait and hear his evidence read over—sometimes questioned as to its accuracy—before being signed by him. The experience of learned judges and counsel in cases where short-hand reporters have been employed shows that fully one-third of the time usually devoted to the trial of a cause is saved by the employment of a short-hand reporter.

(2.) It ensures an accurate record of the evidence and proceedings at the trial. In many cases, owing to the rapidity of human utterance, and the inability to write down rapidly the evidence in long-hand, or because the learned Judge may not consider some facts material, an accurate record of the evidence is not preserved ; and counsel at the trial have no means of knowing what the Judge's notes of the evidence contain until moving in term, after the opportunity of rectifying imperfections has passed away.

(3.) It avoids disputes as to the statements of witnesses, and enables a witness to make a consecutive statement of what he knows, without the danger of losing the thread of his narrative by waiting for the Judge to write down *in extenso* his statement of facts ; and it denies to an untruthful witness the time he would otherwise have to reflect upon the answers he should give while undergoing cross-examination.

(4.) It largely diminishes the burdens which are of necessity imposed upon suitors, witnesses, and jurors, by lessening the time they are compelled to attend court by fully one-third, thus saving witness' fees, and enabling the parties, sooner to return to their ordinary avocations.

(5.) It also largely diminishes the expenses of the courts and jury-fees by lessening the duration of the courts.

(6.) In criminal cases it puts the Appellate Court, or the Executive, in possession of a full and complete record of the proceedings and evidence at the trial of the parties in whose behalf new trials may be moved for, or the prerogative of clemency invoked.

7. Your committee believe, in view of the facts hereinbefore stated, that the proposed system of short hand reporting will prove a measure of economy of time and money, as well as a means of expediting the administration of justice.

8. Your committee therefore suggest that the Government be requested to give effect to these recommendations by establishing a system of short-hand reporting in connection with the courts, and your committee recommend the following as the basis of the system :

(1.) That a staff of short-hand reporters be employed to attend with the Judges at each Court of Assize and Chancery sitting, to take full reports of the evidence and other proceedings at the trial — except the addresses or arguments of Counsel.

(2.) That of this staff two short-hand reporters be employed to attend at Osgoode Hall and the Toronto Assizes, to take notes of evidence at trials or *viva voce* judgments in term, and special examinations and such other business as may, from time to time, be assigned to them by the Judges.

(3.) That the short-hand reporters be appointed by the Law Society, and their duties regulated by a Committee of Benchers specially appointed for that purpose, and that they be subject to such general rules as may, from time to time, be promulgated by the Courts.

(4.) That the salaries of such short-hand reporters be fixed at fair and reasonable rates, and the reporters be allowed a fee of ten cents a folio where copies of the evidence are demanded by the parties to the suit, and to be paid for by said parties.

(5.) That short-hand reporting be made a department of legal education, and that prizes be offered by the Law Society for proficiency in stenography, with a view of training skilled legal reporters for the future carrying on of the system.

9. With reference to the ways and means of providing for the expenses of the proposed system, your committee have to make the following statements :

(1.) They find from the public accounts of the province of Ontario that there has been col-

lected in law stamps, and paid into the public treasury, the following sums during the years mentioned:

1870 - - - -	$78,477
1871 - - - -	77,650
1872 - - - -	87,165
1873 - - - -	95,249
1874 - - - -	75,164

These sums have been paid by the members of the legal profession, who have had to act in this matter as public tax-gatherers for the province.

(2.) A portion of these moneys—$14,500 a year—has been appropriated towards liquidating the debt incurred by the Law Society, under Con. Statutes U. C. c. 35, to the Provincial Government for the erection of the Law Courts at Osgoode Hall; but by an agreement made between the Government and the Law Society in 1873, and approved by the Legislative Assembly on the 19th March, 1873, the Law Society was released of its covenant to furnish accommodation for the Superior Courts, and the building for which the debt was incurred, together with a large tract of land which was the exclusive property of the Law Society, were surrendered to the Crown. By this surrender the liability to pay the debt was cancelled, and the necessity for the collection of the fees to pay that debt then ceased. Under these circumstances, your committee find that the Government are yearly receiving large sums of money through the collections of the legal profession, on which your society may lay reasonable claim.

10. Your committee recommend, in view of these facts, that application should be made to the Government to appropriate out of the funds derived from law stamps a sum of about $15,000 a year towards providing for and maintaining the proposed system of short-hand reporting—a sum which your committee consider will be sufficient at present for the purposes contemplated in this report.

We have already called attention to this subject, and last year (p. 127) shortly stated wherein some scheme of this sort would be beneficial. We are glad to see this report brought before the Benchers, as it puts the matter in a shape sufficiently tangible to invite an intelligent discussion. The estimated expense is less than we should have supposed would be necessary, and vastly less than the sum named by the Attorney General.

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

NORTH MIDDLESEX ELECTION PETITION.

CAMERON v. MCDOUGALL.

Treating—Meetings—36 Vict. cap. 2, secs. 2, 3.

After the nomination of the candidates in a rural constituency, and on another occasion after a meeting assembled "for the purpose of promoting the election of a candidate," the electors dispersed to various taverns, mostly to where their vehicles were put up, and then, according to the usual custom, treated each other before starting. The respondent himself partook of a treat.

Held, That this was not a contravention of 36 Vict. cap. 2, sec. 2, and that the respondent was not disqualified under sec. 3, ss. 2 of same Act.

Treating *per se* is not, except when made so by statute, a corrupt act, but the intent of the party treating may make it so, and this intent must be gathered from the circumstances attending it. Where, therefore, it was sought to disqualify a candidate who had treated during his canvass, though to a much less extent than was his habit previously, and who did not seem to have treated for the purpose of ingratiating himself with the public: *held*, that such treating was not a corrupt act.

Held also, following the decision of the Chancellor in the *Dundas Case* (not reported), that the meeting of electors at the nomination of candidates is a meeting "for the purpose of promoting the election of a candidate," within the meaning of 36 Vict. cap. 2., sec. 2.

[September 28, 1875.—SPRAGGE, C.]

This petition was tried at London.

J. K. Kerr, for petitioner.

R. A. Harrison, Q C., for respondent.

The facts sufficiently appear in the judgment o

SPRAGGE, C.—One point taken by the petitioner was, that there were meetings of electors within the meaning of s. 61, of 32 Vict. c. 21, (Ont.) as altered by 36 Vict. cap. 2, sec. 2, at which there was treating within the meaning of that section; and that the same being with the actual knowledge and consent of the respondent, he thereby lost his seat and was disqualified.

Mr. Kerr's contention upon this point is that it is immaterial whether the treating was by the candidate himself, or by an agent, or by a stranger, and that the motive and intent are, under the section as amended, immaterial: that all that is necessary to bring the case within the section is, that the treating is to a meeting of electors such as is described in this section, and that it is with the actual knowledge or consent (which Mr. Kerr reads, knowledge *and* consent) of the candidate: see 36 Vict. cap. 2, sec. 2, ss. 2.

I incline to agree with this interpretation of the section, and in the *Dundas Case* I acted upon a like construction then put upon it by myself; with this difference, that in that case the treating was by an agent of the candidate, not by a stranger; but I thought in the *South Essex, Case*, 11 C. L. J. 247, that a corrupt practice participated in by an agent, the agent being by his participation a party thereto, would avoid the election. This was under the second provision of section 66 of 32 Viet. cap. 21, (and this construction has now, I understand, been affirmed by the Court of Appeal); but my difficulty in this case is upon the question whether the treatings in question were to "meetings of the electors" within the meaning of the section. I take the meeting on nomination day and at Elson's as examples. I take the meeting held on that occasion (the nomination) to have been a meeting within the section.

The meeting at Elson's, while of a different character, was still in my opinion a meeting of electors assembled for the purpose of promoting the election; and if the treating had been in any proper reasonable sense a treating to electors so assembled, I should hold it to be a corrupt act. But there are these material circumstances to be taken into account. North Middlesex is a rural constituency; the electors attending these meetings were for the most part from a distance; their horses and conveyances would be put up in the stables and driving sheds of the taverns of the place. The meetings were in January, and the weather is described to have been very cold. Then there is the custom of the country, not to be commended but still to be taken into account, to take drink in the bar-rooms of taverns, and to do so in the shape of treating some or all of those assembled with them in the room—"the crowd," as it is often called.

Now what was done upon the occasions in question was this in substance. After the business for which the electors had assembled was over, they left the building in which the meeting had been held and went, some to one tavern some to another—generally, as I infer, to those at which their vehicles were put up, and before leaving for home took drink in the bar rooms, in the usual mode, that of treating one another. I cannot think that doing this is, in any proper or reasonable sense, giving drink or other entertainment to a meeting of electors assembled for the purpose of promoting an election. It is indeed at least doubtful whether there was treating on any of these occasions by any agent of the respondent, and it does appear that there was not any treating by the respondent himself, but the respondent himself partook of the drink on one at least of these occasions in a bar of a tavern.

I am not in the least disposed to sanction any evasion of the law, or to insist upon too rigid a construction of the provisions of the section. It would indeed be a rare case—if a possible one—that treating should be given literally to a meeting of electors. It was not so in the *Dundas Case*, in which I applied the act: but what was done in this case is not in my judgment within the spirit and meaning of the act. To apply it to what was done in this case, would be in my opinion straining the provisions of this section beyond their legitimate meaning and intent.

Upon another branch of the case I have entertained considerable doubt. I mean in regard to treating by the respondent at various taverns in the course of his canvass, which occupied about three weeks before the polling day. The respondent is a farmer, and has for the last sixteen years followed the business of a drover. He says that it is the practice of drovers to go to taverns as the best places for meeting with farmers and hearing of cattle; that such has been his own practice; and that he has always been in the habit of treating at taverns in the course of his business; and this is confirmed by the evidence of other witnesses. He states that when he became a candidate, he canvassed personally through the Riding, and went to the taverns as good places to meet with the electors; that on these occasions he sometimes treated; sometimes friends who were with him treated; and the treating was sometimes by others who were not friends; and the treating was general to all who might happen to be present. As to its extent, he says it was much less than was his habit in the course of his business—not more, he says, than one-fifth as much. He denies emphatically that he treated with any view of influencing voters; that he made no distinction as to whom he treated; that he had not taken legal advice; that he meant to obey the law; and thought that in what he did he committed no infraction of the law. As to which last, I will merely observe, that if what he did was really an infraction of the law, his being advised, and his entertaining the belief that it was not so, would be no excuse in the eye of the law.

The treating upon these occasions stands upon a different footing from meat, drink, &c., furnished to a meeting of electors, to which I have already adverted.

The law upon this branch of the case differs from the law prescribed in England in this,

that we have not in this Province any enactment equivalent to section 4 of the Corrupt Practices Prevention Act (Imperial Act of 1854,) which makes corrupt treating a statutory offence. Treating, therefore, not to a meeting of electors can only be reached by the common law, and must be of such a character as to amount to bribery.

It is not contended by Mr. Kerr that the case comes within the old treating act 7 & 8 W. & M. cap. 4, which forbids treating within certain times specified, "in order to be elected or for being elected." I do not know whether it has been decided that the Act is in force in Canada; but it appears to be interpreted in *Hughes* v. *Marshall*, 2 C. & J. 118, to be in affirmance of the common law, inasmuch as treating "in order to be elected" is only a species of bribery. The same may be said, I think, of the Act of 1854; for to bring a case within that Act, the treating must be with a corrupt intent, *i.e.*, to influence electors to give their votes to the person treating them.

My doubt has been whether the treating by the respondent in the course of his canvass, as described by himself, and to which I have referred, does not come within the definition of corrupt treating given by Mr. Justice Blackburn in the *Wallingford Case*, 1 O'M. & H. 59, that "whenever a candidate is, either by himself or by his agents, in any way accessory to providing meat, drink, or entertainment for the purpose of being elected, with an intention to produce an effect upon the election, that amounts to corrupt treating. Whenever also the intention is by such means to gain popularity and thereby to affect the election, or if it be that persons are afraid that if they do not provide entertainment and drink to secure the strong interest of the publicans, and of the persons who like drink whenever they can get it for nothing, they will become unpopular, and they therefore provide it in order to affect the election—when there is an intention in the mind either of the candidate or his agent to produce that effect, then I think that it is corrupt treating."

I think that the respondent in doing what he did was treading upon dangerous ground; but before holding that his seat is thereby avoided and himself disqualified, I must be satisfied that what he did was done with a corrupt intent; and in judging of this, the general habit of treating in the country and the respondent's own practice may properly be considered.

In the *Kingston Case*, 11 C. L. J. 23, the Chief Justice of Ontario observed: "The general practice which prevails here amongst classes of persons, many of whom are voters, of drinking in a friendly way when they meet, would require strong evidence of a very profuse expenditure of money in drinking to induce a judge to say that it was corruptly done, so as to make it bribery, or come within the meaning of "treating," as a corrupt practice at the common law."

In the *Glengarry Case*, Chief Justice Hagarty has referred to the language of English judges upon the question, as to what in their judgment would amount to corrupt treating. I find the case reported in Mr. Brough's very useful little work, "A Guide to the Law of Elections," at p. 21. I quote from the passages given in the judgment of the Chief Justice. "In the *Bewdley Case*, 1 O'M. & H. 19, Blackburn, J., says, '*corruptly* means with the object and intention of doing that which the Legislature plainly means to forbid.' In the same reports (p. 195) in the *Hereford Case*, the same judge says that corrupt treating means 'with a motive, or intention by means of it to produce an effect upon the election.' In the *Lichfield Case* (ib. 25) Willes J., says treating is forbidden 'whenever it is resorted to for the purpose of pampering people's appetites, and thereby inducing voters either to vote or to abstain from voting otherwise than they would have done if their palates had not been tickled by eating and drinking supplied by the candidates;' and again that the treating must be done 'in order to influence voters' (p. 26). And so in the same reports in the *Tamworth Case* (p. 83). His lordship also cited the *Coventry Case* (ib. 106) and the *Wallingford Case* (ib. 58), in which it was said by Blackburn, J., that 'the intention of the Legislature in construing the word *corruptly* was to make it a question of intention.' Also the *Bradford Case* (ib. 87) where Martin, B., as to the meaning of *corruptly* says: "I am satisfied it means a thing done with an evil mind and intention; and unless there be an evil mind or an evil intention accompanying the act, it is not *corruptly* done. *Corruptly* means an act done by a man knowing that he is doing what is wrong, and doing it with an evil object * * * There must be some evil motive in it, and it must be done 'in order to be elected.'"

Without subscribing to every word contained in the passages quoted, they contain no doubt, upon the whole, a sound exposition of the law.

The extent of the treating, the quantity of drink given, should also be taken into account. It was said by Willes, J., in the *Lichfield Case*, 10 M. & H. 25, "It may be doubted whether treating in the sense of ingratiation by mere

hospitality, even to the extent of profusion, was struck at by the common law;" but he goes on to say in effect that it is now forbidden by the Act of 1854, whenever resorted to with the corrupt intent of influencing voters.

In the treating in question there was the reverse of profusion; there was not more, but much less, than the usual hospitality practised by the respondent, so that there is really no room for saying that the respondent was actuated by the intention of ingratiating himself with the electors by profuse hospitality. I will upon this head quote the language of two learned judges not quoted in the *Glengarry Case*.

In the *Wallingford Case*, 1 O'M. & H. 59, Mr. Justice Blackburn considers that the amount of treating is an element of consideration upon the question of intention, and observes, "When we are considering as a matter of fact the evidence to see whether a sign of that intention does exist, we must as a matter of common sense see on what scale and to what extent it was done. "So Mr. Justice Willes in the *Tamworth Case*, ib. 83, says that it is "obvious that the Legislature did not intend that every bit of bread or sup of drink given to a voter in the course of an election, should have the effect of defeating that election;" and the same learned judge, in the *Westbury Case*, ib. 50, took occasion to explain what he had done in a previous case, desiring it not to be supposed "that treating by a single glass of beer would not be treating if it were really given to induce a man to vote or not to vote. All that he had ever said was, that that was not sufficient to bring his mind to the conclusion that the intention existed to influence a man's vote by so small a quantity of liquor."

It seems all to come to this. Treating is not *per se* a corrupt act. The intent of the act must be judged of by all the circumstances by which it is attended. If in this case the evidence led me to the conclusion that the respondent did what he did in order to make for himself a reputation for good fellowship and hospitality, and thereby to influence electors to vote for him, I should incline to think it a species of bribery which would avoid the election at common law; but upon a careful consideration of the evidence, it does not lead me to that conclusion. There was nothing wrong in the eye of the law in the respondent making his canvass by meeting the electors at taverns, and he does not seem to have abused the occasions of so meeting them, by seeking to obtain their votes by pampering their appetites for drink or by other undue means. I apprehend that I must be able to see with reasonable certainty that he has done this, before I can set aside the election.

COMMON LAW CHAMBERS.

Bacon v. Campbell et al.

Administration of Justice Act, 1873, *sec.* 24—*Examination of defendant—Ejectment.*

One of two defendants in an action of ejectment allowed judgment to go by default. *Held*, that he was nevertheless liable to be examined under Administration of Justice Act, 1873, Sec. 24.

[December 14, 1875.—Mr. Dalton.]

This was an action of ejectment. The plaintiff claimed title to the lands by reason of a breach of a covenant in a lease not to assign or sub-let without leave. Campbell was sued as the sub-lessee of his co-defendant Hayes, to whom, when served with the writ, he handed it, saying "you must help me out of the difficulty." Hayes defended for the whole of the land, but no appearance was entered for Campbell, against whom judgment was signed by default. Subsequently to this the usual *ex parte* order to examine Campbell was taken out; but by advice of counsel he refused to be sworn when attending before the special examiner. A summons was then taken out to set aside the order to examine.

Mr. Armour (Crawford & Crombie) showed cause: The order was perfectly regular. The cause was at issue as to the other defendants, and the Act is broad enough to cover this case. Campbell did not necessarily admit the title of plaintiff by allowing judgment to go against him by default. He was still in possession, and it was such a case as was contemplated by the 36 Vict., cap. 14, (Ont.) which enables a plaintiff to recover costs against a defendant who does not defend an ejectment suit, on an affidavit of actual adverse possession. The case is somewhat analogous to that of a defendant in equity who disclaims, and who, if costs are asked against him, cannot avoid giving discovery by disclaiming: Daniell Ch. Pr., 5th Ed., 613. Even if the defendant's possession is not adverse, his interest is adverse to the plaintiff's, and this is all that is necessary under the Act. He plainly identified his interest with that of Hayes, by stating that he would have to help him out of the difficulty. Even if Campbell were considered as a mere witness, he could not evade discovery on that ground: Daniell, p. 255.

Monkman, in reply: The Act contemplated the cause being at issue with the particular defendant sought to be examined. The plaintiff could not say that he had a good cause of action against Campbell on the merits, for the action as regarded him was ended. Unless the plaintiff could make such an affidavit he could not obtain the order to examine.

Mr. Dalton—I think the summons should be discharged. The point fixed by the Legislature after which the order may be obtained is merely a matter of procedure, and is meant to prevent the plaintiff from "fishing" in order to frame his next pleading. I do not think the Act intends to restrict the plaintiff to the examination of a party who actively defends the suit. It does not expressly provide, nor even intimate, that the cause should be at issue with the defendant sought to be examined. If the defendant's contention were well founded a defendant might collude with a co-defendant and allow judgment to go against him by default, thus evading discovery, while at the same time he might be the only person in possession of the facts of the case. As the case is a new one the costs will be costs in the cause to the plaintiff.

Summons discharged.

Metcalfe v. Davis et al.

Writ for service within jurisdiction.—Amendment.

[December 23, 1875—Mr. Dalton.]

A writ for service within the jurisdiction was served on two of the defendants at a place out of the jurisdiction. An application was made to set aside the service on the ground of this irregularity.

Brough showed cause.

Osler contra.

Mr. Dalton refused to make the order asked for, as the plaintiff had not been in fault, the domicile of the defendants being within the jurisdiction; but he gave leave to issue, *nunc pro tunc*, a concurrent writ for service out of the jurisdiction, amendment of the copies served to be made in accordance therewith. Costs to be costs in the cause.

Worden v. Date Patent Steel Co.

Common Counts—Amendment of particulars.

[December 28, 1875—Mr. Dalton.]

In this case plaintiff delivered particulars under the common counts, the last two items of which were for salary from March 1875 to March 1876, and from March 1876 to March 1877 respectively. A summons was taken out to amend the particulars, the ground taken being that under the common counts a claim could not be made for wages not yet due.

J. B. Read showed cause.

Mr. Scott, Robinson and O'Brien contra.

Mr. Dalton held that the particulars were incorrect and that the defendants were entitled to have them amended. An order was therefore made to amend the particulars by striking out the last two items and inserting in their place a claim for salary from March 1875 to the time when this suit commenced. Costs to be costs in the cause.

NEW BRUNSWICK.

SUPREME COURT.

Marsh, Assignee of McGuiness, an Insolvent v. Sweeny et al.

Insolvent Act of 1869—Fraudulent preference—Transfer of property by debtor unable to meet his engagements to creditor in payment—Assignee.

A transfer of goods by a party afterwards becoming insolvent to a creditor in payment of his claim is a fraudulent preference and void, if the necessary result of the transfer is to cause the debtor to close up his business and prevent him from paying his other creditors; and the words of the Insolvent Act, "in contemplation of insolvency," do not necessarily mean contemplation of an assignment under the Act.

When an official assignee becomes the assignee of the creditors in case there should be any defect in election, he may rely on his position of assignee by operation of law.

[2 Pugsley Rep. 454,—Feb. 1875.]

McGuiness, being a trader and indebted to various persons, made an assignment under the Insolvent Act of 1869 to John L. Marsh, Esq., Official Assignee for York County, on the 23rd of May, 1873. On the the 24th of February preceding, the defendants' clerk called upon him at his place of business and required either immediate payment of his indebtedness to the defendants, or a return of the goods—a quantity of boots and shoes which he had purchased of the defendants on credit. McGuiness then informed the clerk that he could not pay defendants, and that if they took the goods he would have to close his business. The defendants' clerk took the goods, consisting of all the boots and shoes in his store, and a few days after McGuiness was obliged to close his business. Beside the goods taken by the defendants,

McGuiness only had $9.50 worth of stock remaining, while his liabilities were $1475. The plaintiff, as assignee of McGuiness, now brought trover for the value of goods so transferred to defendants. At the trial at the York Sittings, before Allen, J., the learned Judge directed the jury that under the 89th section of the Insolvent Act, the transfer of the goods to the defendants would be void, if at that time McGuiness believed that the necessary result of making the transfer would be to close up his business and prevent him from paying his other creditors; and that the words of the Act, "in contemplation of insolvency," did not necessarily mean, contemplation of an assignment under the Insolvent Act. The jury found that McGuiness knew that the effect of delivering the goods to the defendants would be to compel him to close his business; and that the defendants had probable cause for believing at the time that McGuiness was unable to meet his engagements. Verdict for plaintiff.

A rule *nisi* was subsequently obtained for a nonsuit, pursuant to leave reserved, or for a new trial.

The ground for a nonsuit was that there was no sufficient evidence of the plaintiff's having been properly appointed assignee; that, though he was also official assignee, and, if there was no election, would, by operation of law, become assignee to the estate, yet, as the plaintiff had claimed as an elected assignee, he could not rely on his position of official assignee.

Ground for new trial: Misdirection as to the transfer.

Fidgeon v. *Sharp*, 5 Taunt. 539; *Bell* v. *Simpson*, 2 H. & N. 409; *Atkinson* v. *Brindall*, 2 Bing. N. C. 225; *Hartshorn* v. *Slodden*, 2 B. & P. 582; *Crosby* v. *Crouch*, 11 Ea 225, were cited.

Gregory shewed cause. There is nothing in the objection that plaintiff was not shewn to have been properly elected assignee, as, even if he was not, then, there being no valid election, he became assignee by operation of law. [Ritchie, C.J. The law clearly must recognise him in one capacity or the other.] It was properly left to the jury to say whether the defendants believed, or had good reason to believe when they took the goods, that it would have the effect of causing the debtor's business to suspend. [Ritchie, C. J. Is not the question put to the jury in England thus: "If the preference is made as the voluntary act of the debtor, it is fraudulent; while, if made through pressure of the creditor, it is not so?"] Sections 86 and 89 of our Act are different from the English Acts, and warranted the direction in this case. "In contemplation of insolvency," does not mean in contemplation of actually going into the Court, but only in contemplation of the debtor's insolvent circumstances: *Gibson* v. *Muskett*, 4 M. & G. 169; *Poland* v. *Glyn*, 4 Bing. 22, note; *Aldred* v. *Constable*, 4 Q. B. 674; *Gibbins* v. *Phillipps*, 7 B. & C. 529, 534; *Flook* v *Jones*, 4 Bing. 25; *Belcher* v. *Prittie*, 10 Bing. 408.

It will probably be contended that this was not a transfer but a payment, and therefore, not having been made within thirty days of the assignment, was valid under Section 90. But the payment contemplated by that section must clearly be a payment in money. The case of *Young* v. *Fletcher*, 3 H. & C. 732, is an additional authority that an assignment by an insolvent trader to a creditor of a part of his property is fraudulent, if the necessary effect is to stop the trader's business, if the assignee is aware of that consequence.

E. L. Wetmore, in support of the rule. The plaintiff having claimed all through the case as an elected assignee, he was bound to establish his election, and cannot fall back on his position of official assignee. Then, as to the transfer. [Ritchie, C. J. If the debtor makes a transfer which makes him insolvent, must it not be presumed to have been made in contemplation of insolvency?] Not, when it is made more than thirty days before the assignment: then there is no presumption. In *Crosby* v. *Crouch*, where the defendant, having reason to believe his debtor in bad circumstances, and so believing required and obtained from the debtor security by deposit of goods, the debtor having afterwards become bankrupt, the plaintiff, who as his assignee brought trover for the goods, was nonsuited. That case is very similar to this. Here, as in that case, the transfer was made at the request of the creditor. *Fidgeon* v. *Sharpe* is a strong case for the defendants: there, where a part of the stock in-trade was actually delivered, it was held that though the debtor contemplates that his trade must cease, and that he cannot pay his creditors unless they give him time, he does not therefore necessarily contemplate bankruptcy. So in *Bell* v. *Simpson*: A sale by a trader in insolvent circumstances, and on the eve of bankruptcy, of his stock-in-trade and the bulk of his property to one of his creditors, the consideration being in part an old debt, is not *per se* an act of bankruptcy, though the effect is to stop the trading. The learned Judge should have left it to the jury to say whether the transfer was made in contemplation of McGuiness making an assignment under the Act. That would have been according to the direction

in *Atkinson* v. *Grindall*, in which case Williams, J., told the jury that to entitle the plaintiff to recover, the debtor must have had a bankruptcy in contemplation at the time of the payment; that it was not enough that he was in insolvent circumstances and contemplated insolvency, and the direction was held to have been correct. But, in addition to the support of the defendants' position derived from these authorities, here the debtor actually swore that he did not contemplate going into the Court. (Ritchie, C. J., referred to *Smith* v. *Cannan*; 2 E. & B.35. *Allen* v. *Bonnett*; L. R. 5 Ch. App. 577. In this case the defendants have subtracted so much of the insolvent's property as to make him more insolvent and giving no advantage to the bulk of the creditors. Where, as in the present case, the insolvent said to the defendants' agent, "If you take the goods, I must close my business," and the defendants take them, must they not both be held to contemplate bankruptcy?) If a transfer, no matter at what time given, may be set aside on the debtor going into the court, in every case where the assignment may be traced to the transfer, creditors would have no security. The burthen, it is submitted, is on the creditors to show that the transfer was made in contemplation of going into the court. [Ritchie, C. J., referred to *Stewart* v. *Moody*, 1 C. M. & R. 777; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Stanger* v. *Wilkins*, 19 Beav. 626.]

Cur. adv. vult.

The judgment of the court was now delivered by:

Ritchie, C. J.—The first question in this case is, whether the plaintiff proved his appointment as assignee of the insolvent's estate. It was admitted that he was the Official, or Interim Assignee; and it therefore becomes immaterial whether there was any proper appointment by creditors or not; because by the 6th Section of "The Insolvent Act of 1869," it is declared that, "if no assignee be appointed at the meeting of the creditors; or if the assignee named refuses to act; or if no creditor attends at such meeting, the interim assignee shall be the assignee of the estate of the insolvent." If the creditors were not duly represented at the meeting, and no one was authorized to vote in the choice of an assignee, the plaintiff became assignee by virtue of the Act, and had a right to maintain the action.

The other question is, whether the Judge misdirected the jury in telling them that, under the 89th section of the Insolvent Act, the transfer of the goods by McGuiness to the defendant, would be void, if at that time McGuiness believed that the necessary result of making the transfer would be to close up his business, and prevent him from paying his other creditors; and that the words of the Act, "in contemplation of insolvency," did not necessarily mean contemplation of an assignment under the Insolvent Act.

The words of the section are:—"If any sale, deposit, pledge or transfer be made of any property, real or personal, by any person in contemplation of insolvency, by way of security for payment to any creditor; or if any property, real or personal, goods, effects, or valuable security, be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, &c., shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment under the Act, it shall be presumed to have been so made in contemplation of insolvency."

In this case the transfer of the goods was made more than thirty days before McGuiness executed the deed of assignment under the Act; therefore the onus was upon the plaintiff to prove that it was made in contemplation of insolvency; and we think he did prove it by the evidence of McGuiness, who told the defendants' clerk, at the time he took the goods, that he (McGuiness) would have to close his shop, as half his stock was gone. It was undisputed that McGuiness could not pay the defendants, who were pressing him, and required an immediate arrangement, either by payment, or return of the goods; and as McGuiness had then no means of payment, his only alternative was, to give up the goods to the defendants, the consequence of which was, that he had not property enough to pay his other creditors, and was obliged to close his business a few days afterwards. He said that he knew at that time that he could not pay his debts, but thought that if he had been allowed time till the summer, he could have paid them, or made arrangements which would have been satisfactory to all parties. He admitted, that a short time before he gave up the goods to the defendants, he had stated that unless business improved, he would be obliged to close; but he said that before he arranged to give up the goods to the defendants, he did not contemplate going into insol-

vency. The jury expressly found that McGuiness knew the effect of delivering the goods to the defendants would be to compel him to close his business; and that the defendants had probable cause for believing at the time that McGuiness was unable to meet his engagements.

We think the jury were fully warranted by this evidence in finding as they did: indeed we think they would have been justified in finding that he contemplated going into insolvency. But the question is, whether contemplation of insolvency, means contemplation of making an assignment under the Insolvent Act. In *Gibbins* v. *Phillips*, 7 B. & C. 533, Bayley, J., says, in answer to the argument of the counsel, "You seem to treat contemplation of bankruptcy, as the contemplation of a commission of bankruptcy, which is not the legal meaning of that expression." And in giving judgment in the same case, he says, "If the party securing the debt, knew himself to be in such a situation that he must be supposed to have anticipated that a bankruptcy would in all human probability follow, then we think it was fraudulent within the meaning of the 6 Geo. 4 c. 16. In this sense, contemplation of bankruptcy has always been considered evidence of fraud, although the party may not have expected the actual and immediate issuing of a commission." In *Aldred* v. *Constable*, 4 Q. B. 674, where the question was whether a warrant of attorney given by a debtor was a fraudulent preference under the Bankrupt Act, Lord Denman, delivering the judgment of the court, says: "We cannot conceive that a particular act of bankruptcy must have been in contemplation to make a preference fraudulent and void. We do not find that bankruptcy must have been regarded as absolutely unavoidable. * * * If the debtor at the time of giving the warrant of attorney, considered that he was likely, from the condition in which he then stood, to become a bankrupt, and that he gave the warrant of attorney with the intention of securing his father's debt, when he knew that his assets were inadequate to the payment of all his creditors, the proof of fraudulent preference would be complete."

In the present case, the insolvent knew, before he gave up the goods, that he could not pay his debts, and anticipated that he might be obliged to close his business, and when he delivered the goods to the defendant, all doubt on that point seems to have been removed from his mind, because, as he said, "half his stock was gone," and he knew that the remainder of his assets, even if he could have collected the debts due him, were insufficient for the payment of his other creditors. The necessary consequence of the transfer of the goods was to make McGuiness insolvent; because a man must be taken to intend that which is the necessary consequence of his act: *Stewart* v. *Moody*, 1 C. M. & R. 780.

The defendants knew, through their agent by whom they dealt with McGuiness, (the knowledge of their agent being their knowledge) that the effect of their taking the goods would be to stop McGuiness' business, and prevent him from paying his other creditors; it was therefore clearly an undue preference given to the defendants over the other creditors of the insolvent, and being so, it was void under the Act.

Rule discharged.

UNITED STATES REPORTS.

SUPREME COURT OF VERMONT.

JOHNSON v. TOWN OF WARBURGH.

Sunday Travelling.

One travelling upon the Sabbath, without excuse, cannot maintain an action against the town for any damage he may suffer, through defects in its highway.

[Am. Law Register, 545.]

Case for injuries received while travelling on a highway within the defendant town. The facts sufficiently appear in the opinion of

ROSS, J.—The necessity which will excuse one for travelling on the Sabbath must be a real and not a fancied necessity. The statute reads: 'No person shall travel on the Sabbath or first day of the week, except from necessity or charity:" Gen. St. ch. 93, sect. 3. It is not an *honest belief* that a necessity exists, but the *actual existence of the necessity*, which renders travelling on the Sabbath lawful.

The jury, under proper instructions, have found, that the travelling of the plaintiff on the occasion when he received his injury was not from necessity, and therefore unlawful. They have also found, that he has suffered damage from injuries received by reason of the insufficiency of a highway which it was the duty of the town to keep in good and sufficient repair. One this verdict the defendant moved for judgment in its favour, which the court below *pro forma* overruled and rendered judgment for the plaintiff against the exception of the defendants. Thus the question is distinctly presented for decision, whether a town is liable for damages sustained through the insufficiency of a highway

which it is legally bound to keep in repair, to one who is unlawfully travelling on such highway or travelling on the Sabbath without a legal excuse. The question is not whether the plaintiff is barred from recovering damages, which he would otherwise be entitled to recover, because he was at the time he received the injury committing an unlawful act, or travelling at an unlawful rate of speed, but, whether the town was under a legal duty to furnish him a safe highway to travel over, when at that precise time he was forbidden by law to travel over the highway?

The precise question is now for the first time presented to this court for decision. In *Abbott* v. *Walcott*, 38 Vt. 666, a question somewhat analogous was decided. The plaintiff in that case was injured from the springing of a bridge while he was trotting his horse upon it. The bridge was of such construction that, by law, the plaintiff was forbidden to drive faster than a walk thereon. The plaintiff might lawfully travel on the bridge, but not at the rate of speed he used. It was held he could not recover. The decision is put upon two grounds. First, that the plaintiff's illegal act in driving faster than a walk must have contributed to the springing of the bridge, and so contributed to the happening of the accident which caused the injury. Second, if this was not so, that inasmuch as it was conceded that "the bridge was good and sufficient except in the matter of its springing when driven upon on the trot," and as the plaintiff had no right to use it in that manner, the town was under no legal obligation to provide a bridge for such use; in other words, that the town had fully discharged its duty towards the plaintiff, in that it had provided as good a bridge as the law required, and that the accident happened, and the injury was occasioned, by the unlawful act of the plaintiff, or of one Carlysle who was at the time also trotting his horse on the bridge, and not from any failure of the town to discharge its duty in the premises.

The question at bar has arisen in other states, but the courts of those states have not been so fortunate as to arrive at the same solution of it. The courts of Massachusetts and Maine have repeatedly decided that a plaintiff could not recover under such circumstances: *Jones* v. *Andover*, 10 Allen 18; *Bosworth* v. *Swansey*, 10 Metc. 353; *Hinckley* v. *Penobscot*, 42 Me. 89; *Bryant* v. *Biddeford*, 59 Me. 193. In some of the other states, it has been held that the fact that the plaintiff was travelling on the Sabbath in violation of law, did not relieve the town from its liability for damages sustained through the insufficiency of its highway. So far as I have had access to such decisions, they assume that the town was liable to the plaintiff for the insufficiency of its highway, and proceed to consider whether the unlawful act of the plaintiff relieved the town from such liability. *Sutton* v. *Wauwatosa*, 29 Wis. 21, is one of the latest decided cases of this kind, and one on which the plaintiff especially relies. It therefore, demands some consideration. In the opinion which was delivered by C. J. Dixon, very many of the cases are reviewed. It assumes that the decision of the cases against the right of the plaintiff to recover, rests either upon the ground that the plaintiff's illegal act of travelling on the Sabbath contributed to the happening of the accident, and for that reason deprived him of the right of recovery, or, that the fact that he was engaged in an unlawful act at the time he received the injury bars his right of action.

Both of these grounds are combated earnestly, and I think successfully.

It is difficult to maintain that the traveller's illegal act, in such cases, contributed to the happening of the accident. The insufficiency of the highway remaining the same, and the traveller being at the place of the insufficiency under the same circumstances, on any other day of the week, the same accident and injury would have befallen him.

A contributory cause is one which under the same circumstances would always be an element aiding in the production of the accident. The fact that the traveller is unlawfully at the place of the accident does not contribute to the overturn of his carriage, or to the production of the accident. The same forces and causes would have overturned the carriage or caused the accident as well on a week-day as on the Sabbath, as well when the traveller was lawfully at the place of the accident as when unlawfully there. It is sometimes asserted that if the injured party had not been unlawfully travelling he would not have been at the place of the insufficiency and would not have received the injury. The same is true of all injuries on highways. The same causes and forces produce the accident in the one as in the other case; and the fact that the injured one is present unlawfully is not a factor which contributes to the happening of the accident. Hence the decisions against the traveller's right of recovery must rest upon some other basis than that his

unlawful act, or travelling unlawfully, was a contributory cause to the happening of the accident within the legal meaning ordinarily attached to these words.

Neither, as I think, can the fact that the party receiving the injury was at the time of the injury engaged in an unlawful act, deprive him of the right of recovery. If the plaintiff, at the time of the injury, had been profaning the name of the Deity, he would have been engaged in an unlawful act; but no one would hold that such an act would bar him from recovering of the town if it were otherwise liable for the injury sustained. The town could not relieve itself from the consequences of its own wrong or neglect by alleging the illegal act of the plaintiff. Punishments are provided for all unlawful acts, but their administration is not committed to the discretion of towns; neither has a town the right to add to the prescribed penalty the injuries resulting from its own wrongful act or neglect. The travelling by the plaintiff without excuse on the Sabbath was not an offence against the town, and it cannot excuse its wrong done to him, if wrong it be, by recrimination. The allegation of a wrong done by a plaintiff to a third party never furnished a defendant a good legal answer for a wrong done by himself to that plaintiff. Several of the cases cited by the plaintiff sustain and illustrate this proposition. There may be cases in which a party injured through the insufficiency of a highway while engaged in an unlawful act, could not recover, and in which the unlawful act would be the remote cause of his inability to recover. It may be questionable whether a criminal party, like a thief, robber or kidnapper, who should be injured while using a highway in transporting and securing the fruits of his crime, could recover for such injuries (though occasioned by the insufficiency of the highway) of the town ordinarily responsible for such insufficiency. In all such cases, I apprehend, his unlawful act would not bar the criminal party from sustaining an action which had once attached against the town, but that no such right of action would arise, because the town would be under no obligation to furnish him a safe highway for any such purpose. I think it is quite clear that the decisions against the right of the plaintiff to recover in such cases, if sustainable, must rest upon some other ground. While I am quite ready to yield my assent to the reasoning of the learned judge who delivered the opinion in the case last cited, I am not so well satisfied that the opinion meets the real point raised for decision. As heretofore remarked, the question is not, Is the plaintiff debarred from recovering for injuries sustained through the insufficiency of a highway, and which he would otherwise be entitled to recover, because he was at the time he received the injuries engaged in an unlawful act? but, Was the town under a legal liability to furnish *him* a safe highway to travel on, at a time when he was, by law, forbidden to travel on it? The liability of towns for the sufficiency of their highways is wholly imposed by statute. The right of the traveller to recover for injuries sustained through self insufficiency is also conferred by statute. No such liability or right existed at common law. The duty and liability of towns in regard to their highways are due only to travellers, to that class who have the right to pass and repass thereon, and continue only so long as they are in the exercise of that right. When one ceases to use a highway for the purpose of passing and repassing thereon, the duty and liability of the town toward him in regard thereto cease. This has been repeatedly decided: *Spencer* v. *City of Salem*, 3 Allen 374; *Richards* v. *Enfield*, 13 Gray 344; *Blodgett* v. *City of Boston*, 8 Allen 237; *Stimson* v. *Gardiner*, 42 Me. 248; *Orcutt* v. *Bridge Co.*, 53 Me., 500; *Baxter* v. *Winooski Turnpike Co.*, 22 Vt. 124; *Abbott* v. *Walcott*, 38 Vt. 666; *Sykes* v. *Pawlet*, 43 Vt. 446; *Hayward* v. *Rutland*, unreported.

We do not think any good lawyer would contend that a town would be liable for damages sustained through the insufficiency of one of its highways, by a circus performer who might chance to pitch his tent and establish his ring on the highway, and who should happen to be injured while performing his feats of horsemanship or of lofty tumbling. In such a case a town would not be liable, because it would not be under any legal duty to provide him a highway for any such purpose. Many cases might be supposed in which the town would not be liable to one injured through the insufficiency of one of its highways, because the one receiving the injury would not be using it for a purpose contemplated by the statute, and hence the town would be under no duty toward him. As a town is liable for such injuries only by force of the statute, its liability must be limited to those cases in which the statute has imposed the duty upon it to provide a safe highway for the injured party in the particular use to which he was, when injured, putting it. It is competent for the legislature when creating this duty and liability, or subsequently, to prescribe the limitation thereof. It may be limited to a par-

ticular class of individuals, or to special occasions. Is it reasonable to suppose that the statute was intended to impose this duty and liability in behalf of a person who was forbidden to use all highways for the purpose of travel, and at a time when he was so forbidden to use them? Can he be a traveller within the purview of the statute, who is forbidden to travel? The question is its own answer. The statute imposing this duty and burden was first enacted March 3rd, 1797: Tolman's Compilation of St., vol. 1, 452, sec. 13. The same has continued in force, with some immaterial modifications so far as regards this question, to the present time. On the same March 3rd, 1798, was enacted the statute against travelling on the Sabbath, not exactly in its present form, but in substance the same: Tolman's Compilation, vol. 1, c. 27, §§ 1 and 6. Thus at the same time the duty was imposed upon towns to provide safe highways, and they were rendered liable for injuries sustained through the insufficiencies of such highways, all persons were forbidden to use them on the Sabbath, except for certain purposes. The statute limiting their use furnishes the measure of the duty and liability imposed. In other words, the duty and liability imposed are co-extensive with the purposes for which persons can legitimately use the highways, and no greater. A statute which forbids the use of highways for certain purposes, or on certain days, or in a certain manner, would limit the duty and liability of towns in regard thereto. The statute has limited the amount of load one may carry on a highway to 10,000 pounds. He who attempts to draw a greater load, does it at his own risk, because when he puts himself in such a position the town owes him no duty and is under no liability for injuries received through the insufficiency of its highways. The plaintiff, when injured, was forbidden by law to use the highway, and by reason thereof the defendant town owed him no duty to provide him any kind of a highway, and therefore was under no liability for any insufficiency in any highway. So far as the town was concerned, he had no business to be at that place at that time, and hence he was there at his own risk. If he has sustained damages they fall upon himself and not upon the town, because the statute has not made the town liable for them. The judgment of the County Court is reversed, and judgment is rendered for the defendant to recover its costs.

(*Note by Editor of American Law Register.*)

This case presents no inconsiderable difficulty, and at first view there certainly are many decisions which look as if this decision should have been the other way. The English statute 29 Ch. II. requires that "no tradesman, artificer, workman, labourer or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings, upon the Lord's day (works of charity and necessity only excepted)," and the English courts have decided that work which is not done in the exercise of one's ordinary calling, although of a secular character, is not within the statute: *Dury* v. *Defontain*, 1 Taunt. 131; *Scarfe* v. *Morgan*, 4 M. & W. 270; *Bigbee* v. *Levi*, 1 Car. & P. 180. In Newhampshire it has been decided that a person travelling on Sunday may recover, if injured by a fault in the road which the town was bound to repair: *Dutton* v. *Weare*, 17 N. H. 34. But the Newhampshire statute contains a provision that no one shall labour or recreate on Sunday to the annoyance of other persons. The United States Supreme Court have decided that, where a railroad company employed contractors to build a bridge, and for that purpose drove piles in a river, and owing to the abandonment of the contract, the piles were left in the river, in such a condition as to injure a vessel when sailing on her course, the railroad company were responsible for the injury; and that the vessel so injured was prosecuting her voyage on Sunday is no defence for the railroad company: *Phila. &c., R. Co.* v. *Phila. &c., Towboat Co.*, 23 How. 209. And in the course of his opinion Mr. Justice Grier remarks: "It is true that cases may be found in the state of Massachusetts (see *Bosworth* v. *Swansey*, 10 Met. 373, and *Gregg* v. *Wyman*, 4 Cush. 322), which on a superficial view might seem to favour this doctrine of set-off in cases of tort. But those decisions depend on the peculiar legislation and custom of that state, more than on any principle of justice or law." And in another part of his opinion, Mr. Justice Grier refers to *Mohney* v. *Cook*, 26 Penn. St. 342, in the conclusion of which he concurs, and in that case Mr. Justice Lowrie lays down the law, that a private individual or corporation is liable to a person travelling on Sunday, if such person is injured by an obstruction which the defendants have placed in the highway, on the ground that "it would work a very doubtful assistance to morality if we should allow one offender against the law, to the injury of another, to set off that he too is a public offender;" and the same principle is laid down in *Etchberry* v. *Levielle*, 2 Hilton (N. Y.) 40.

But Mr. Justice Lowrie remarks, extra-judicially indeed, that the case may be different when the state or any of its subdivisions is the

defendant. In the principal case the question is presented in a somewhat different aspect. And the cases do not seem altogether consonant with each other, as to how far one travelling the highway in violation of some statute is thereby barred of all remedy for injury through defects in the road. It has been held that the violation of the statutes directing which side of the road one must take, as that in passing another team one must turn to the right, or a statute directing the rate of speed, as that one must not drive faster than six miles an hour, where the violation of the statute does not injure another person, or contribute to the injury received by the plaintiff, will not preclude his recovery for an injury through defect of the highway: *Baker* v. *City of Portland*, 10 Am. Law Reg. N. S., 559, 563, where this general question is considerably discussed: *Gale* v. *Lisbon*, 52 N. H. 174. We have already mentioned that it has been decided in Newhampshire that the Sunday law is of this character. But the Massachusetts courts have decided that a violation of the Sunday law is such a breach of faith towards the state, that the offender cannot come to her courts to obtain reparation for the injury received during the time he was committing the offence: *Bosworth* v. *Swansey*, 10 Metc. 363. The statute prohibiting travelling on Sunday in Massachusetts is identical with the one in Vermont, and is made more sweeping than in other states, and will bear the construction which the Massachusetts courts have put upon it. And the decision in this case follows their construction. But as the Massachusetts courts have in *Hall* v. *Corcoran*, 107 Mass. 251, receded from the ground taken in *Way* v. *Foster*, 1 Allen 408, and in *Gregg* v. *Wyman*, 4 Cush. 322, that no action will lie for an injury to a horse from immoderate driving if he has been intrusted to the defendant to be driven in violation of the Sunday law, it is possible that they may modify still farther the effect of this statute. But, at present, the effect of the extreme view taken of the Sunday law by the Massachusetts courts, and others following in their wake, seems to be, to render all violators of that law, for the time being, virtual outlaws, as to all injuries they may happen to suffer, through the illegal conduct of others, whether by way of omission or commission. It seems to be applying the rules of equity to those who complain of the illegal conduct of others, that he who would have equity must first do equity, or that he would thrive by the law must first be sure to live by it.

REVIEWS.

DE LAUDIBUS LEGUM AGNLIÆ. A treatise in commendation of the laws of England, by Chancellor Sir John Fortescue. Cincinnati: Robert Clarke & Co., 1874.

The edition of this fine old work of Sir John Fortescue now before us is a reproduction of the translation by Francis Gregor, as edited by Andrew Amos in 1825, together with a life of Sir John Fortescue by his descendant, Lord Clermont. Lord Clermont's edition was printed for private circulation and some important public libraries only; but hearing that these publishers were reproducing this well-known "legal classic," he kindly placed his edition at their service. The result is the most perfect and complete edition that has yet appeared. It is a very interesting book now, even to the general reader. As to the matter of the work itself, we cannot do better than quote what is said about it in *Kent's Commentaries*:

"It displays sentiments of liberty and a sense of limited monarchy, remarkable in the fierce and barbarous period of the Lancastrian civil wars, and an air of probity and piety runs through the work. This interesting work of Fortescue has been translated from the Latin into English, and illustrated with the notes of the learned Selden; and it was strongly recommended in a subsequent age by such writers as Sir Walter Raleigh and Saint Germain. And while upon this author, we cannot but pause and admire a system of jurisprudence which, in so uncultivated a period of society, contained such singular and invaluable provisions in favour of life, liberty and property, as those to which Fortescue referred. They were unprecedented in all Greek and Roman antiquity, and being preserved in some tolerable degree of freshness and vigour amidst the profound ignorance and licentious spirit of the feudal ages, they justly entitle the common law to a share of that constant and vivid eulogy which the English lawyers have always liberally bestowed upon their municipal institutions."

The publishers have done their duty in presenting a volume which is most creditable in its typographical appearance and arrangement.

DIGEST OF ONTARIO REPORTS, by C. Robinson, Q.C., and F. J. Joseph, barrister-at-law; Rowsell & Hutchison.

Part V. concludes the title "County Courts," and brings us aptly to "Demurrage." One of the most important

subjects in this number is that of criminal law. It is divided into no less than fifty-one heads, given in alphabetical order. Each succeeding number makes the necessity of the work to every practitioner more apparent. We trust every effort will be made to complete it with as little delay as possible.

CORRESPONDENCE.

Deputy Clerks of the Crown and Masters in Chancery acting as agents.

To the Editor of the Law Journal.

What is your opinion as to the propriety of Deputy Clerks of the Crown or Masters in Chancery acting as agents for country practitioners,—issuing writs, signing judgments, making searches and process, filing bills and other proceedings, and generally doing the work of an attorney or town agent and solicitor? To my old-fashioned notions of propriety and law, and the proper duty of these officials, they have no right to act in such capacity. The reasons are too obvious to need mention. Would you kindly say a word in reply? Lex.

[Our opinion quite coincides with that of our correspondent; and we are satisfied that if such conduct were represented to the proper authorities, it would be at once prohibited. As to Deputy Clerks of the Crown, Reg. Gen. 145, was evidently intended to prevent such irregularities.—Ed. *L. J.*]

Division Courts—Garnishing Debts—Jurisdiction.

To the Editor of the Law Journal.

Sir,—A case of some novelty and interest has recently arisen under the clauses in the Division Court Act relating to the garnishment of debts. The point is whether, when the garnishee is indebted to the primary debtor in a sum exceeding the jurisdiction of the court, there can be an order made on behalf of the primary creditor to garnish to the amount of his claim, the same being within the jurisdiction. E. G., the garnishee, owes the primary debtor $400. The latter is indebted to the primary creditor in the sum of $75. Can an order be sustained against the garnishee to pay the $75 as part of the $400 due the primary debtor?

Before the judge can make a garnishee order, he is required to decide on the indebtedness of the garnishee, and in this particular case he must adjudicate on the whole $400; which being beyond the jurisdiction of the court, it is submitted he has no right to do.

In the case I speak of, a summons has been obtained for a prohibition, and the question will shortly be argued. It must be confessed that the point is not free from doubt; and the writer has not been able to discover any case in point. It seems strange if a primary creditor is to be debarred from proceeding in the Division Court to garnish a claim owing the primary debtor, in every case in which that claim exceeds $100. In what court would he proceed in such case? What determines the jurisdiction?—the amount of the primary creditor's claim, or the amount of the garnishee's indebtedness? We should be glad to know if any of your readers in other counties have heard of the point being raised.

Yours truly,

Barrister.

Examinations—The old law and the new.

To the Editor of the Law Journal.

Dear Sir,—Will you kindly answer the following question through the columns of your journal: When the law as now established in Ontario differs from the law as laid down in the text-books—as, for instance, the difference between the law as to the descent of real property now prevailing in Ontario and the law on the same subject as laid down in "Williams on Real Property"—is a student presenting himself for examination at Osgoode Hall liable to be questioned both as to the former and lat er state of the law?

Yours truly,

Second Year.

[We should say decidedly yes, not only from the fact that you are supposed to be thoroughly familiar with the books appointed for examination, but also because the only thorough way to learn the new law is by understanding the old.—Eds. Law Journal.]

FLOTSAM AND JETSAM.

A friend sends us the following laudatory notice of a citizen of Storm Lake City in Iowa, published in a newspaper there. It opens up a new field of thought for some of our young practitioners in the country where litigation is slack, especially about Christmas times, when "notions" might be expected to be in demand:—"Mr. Chamberlin is one of Storm Lake's oldest citizens, having located here even before the present town site was planted. He is a hard worker and has built up an extensive practice and business. He is a young man of good abilities and will succeed in the world He has recently built a large office, and in addition to his law and insurance business has fitted up a portion of his room for the sale of *notions*, &c. He employs a clerk, Mr. Garrett, who will be found ready to show customers what he has for sale."

The Long and Short of Fusion.—It seems that there is a grave omission in the Judicature Act, which has been detected in the legal offices, on the subject of writs. To the ordinary reader the Act of Parliament appears to provide everything necessary. It prescribes how this unwelcome document is to begin in the name of Queen Victoria, and to end with an attestation by the Lord Chancellor, and in what ungentle terms the threats in the middle are to be conveyed. But, by a strange oversight nothing is said on the important point of its shape. The old common law writ, as most people know, although some might be unwilling to confess the information, was a long slip of parchment with the "threatening letter" written longwise across it. Those who have ever reached the dignity of being served with a copy of a bill in Chancery will remember that the menace of imprisonment and other horrible penalties which appeared upon it were conveyed by words written the short way of the paper. Here, then, was a difficulty. It is true that the Chancery and Common Law officials are now, in theory, merged into one; but to ask either body to abandon its peculiar mode of writing writs would be the same as asking a soldier to give up the banner under which he fights. To give way would be, perhaps, to admit that Common Law is narrow, or that equity is broad, or some other allegorical meaning hidden under these symbols. The officials are gallant gentlemen, and they would rather die first. Accordingly, Chancery officials repudiate longitudinal writs, and refuse to seal them, while Common Law officials reject latitudinal writs with equal scorn. Some murmuring, no doubt, has taken place among lawyers who have not mastered the distinction, and even the words "red tape" and "the difference between tweedledum and tweedledee" have been heard; but this is mere ignorance. It is remarkable that neither Lord Selborne nor Lord Cairns appreciated the difficulty. Great enterprises have often been foiled by a hitch in a matter of detail, and the fusion of Law and Equity seems endangered unless something can be done. The Chancery officials cannot be expected to adopt the practice of Common Law, nor *vice versa*. The only thing possible is a compromise; and if an order of the Supreme Court, or, better still, an Order in Council or an Act of Parliament, were to provide that writs shall be written diagonally across the paper, perhaps the long and the short of the matter might be arranged by a mutual concession.—*Hour.*

"The common law system of special pleading," said the late Mr. Justice Grier, "matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestion of sciolists, who invent new codes and systems of pleadings to order. But this attempt to abolish all species and establish a single genus, is found to be beyond the power of the legislative omnipotence. The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the Court, delaying and impeding the administration of justice." *McFaul* v. *Ramsey*. 20 Howard, 523. And in a later case the same learned judge observed: "It is no wrong or hardship to suitors who come to the courts for a remedy, to be required to do it in the mode established by law. State legislatures may substitute, by codes, the whims of sciolists and inventors for the experience and wisdom of ages; but the success of these experiments is not such as to allure the Court to follow their example. If any one should be curious on this subject, the cases of *Rankin* v. *Toby*, 11 Howard, 517; of *Bennett* v. *Butterworth*, 11 Howard, 669; of *McFaul* v. *Ramsey*, 20 Howard, 523, and *Green* v. *Custard*, 23 Howard, 483, may be consulted." *Farni* v. *Tesson*, 1 Black, 315.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 39th Victoria.

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

No. 1342—Kenneth Goodman.
Thomas Horace McGuire.
George A. Radenhurst.
Edwin Hamilton Dickson.
Alexander Ferguson.
Dennis Ambrose O'Sullivan.

The above 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 :

Thomas C. W. Haslett.
Angus John McColl.
Dennis Ambrose O'Sullivan.
Daniel Webster Clendenan.
George Whitfield Grote.
Charles M. Garvey.
Albert Romaine Lewis.

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

Graduates.

No. 2585—Goodwin Gibson, M.A.
John G. Gordon, B.A.
Walter W. Rutherford, B.A.
William A. Donald, B.A.
Thomas W. Crothers, B.A.
John B. Dow, B.A.
James A. M. Aikins, B.A.
William M. Reade, B.A.
Edmund L. Dickinson, B.A.
Charles W. Mortimer, B.A.

Junior Class.

Robert Hill Myers.
William Spencer Spotton.
William James T. Dickson.
William Elliott Macara.
James Alexander Allan.
Walter Alexander Wilkes.
William Andrew Orr.
Alfred Duncan Perry.
James Hartey.
Herbert Bolster.
John Patrick Eugene O'Meara.
Charles Augustus Myers.
Charles Crosbie Going.
David Havelock Cooper.
Emerson Coatsworth, Jr.
William Pascal Deroche.
Frederich Wm. Kittermaster.

Articled Clerk.

John Harrison.

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, and amending Acts.

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, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

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 Wills, Taylor'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, Hawkens 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, Taylor on Titles, Smith's Mercantile Law, Taylor'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 :—

1*st 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. 42, and amending Acts.

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

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

4*th 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.