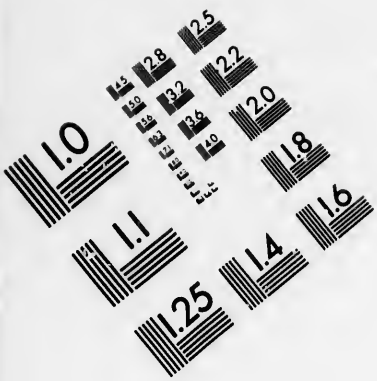

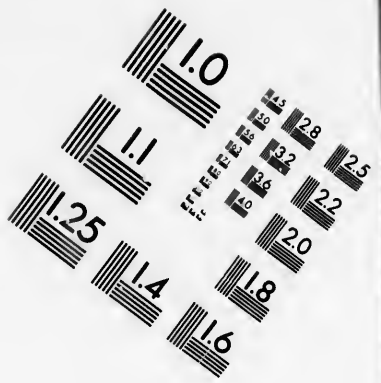

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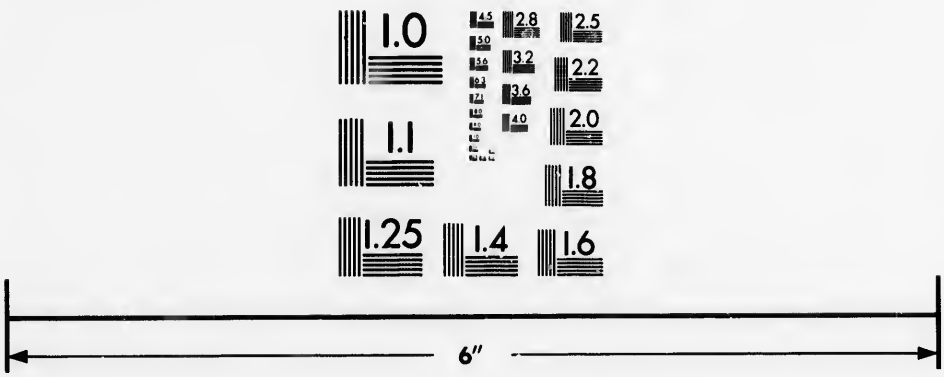

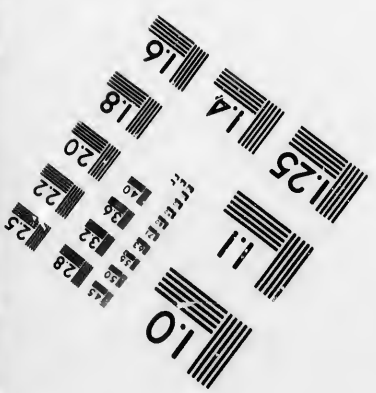

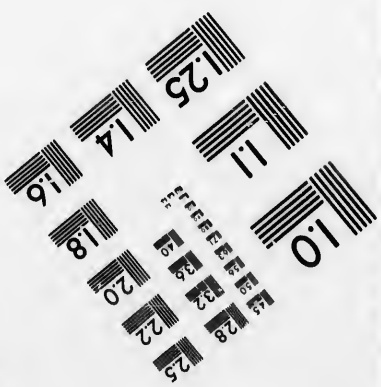

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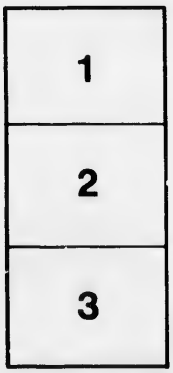

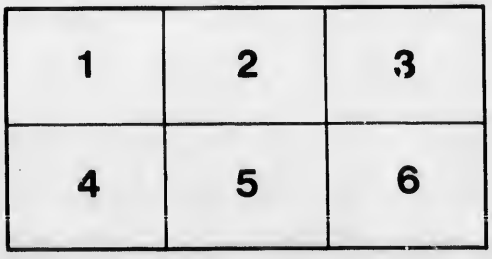

THOUGHTS

ON

LAW REFORM.

BY

JOHN H. HAGARTY, ESQ.,

BARRISTER-AT-LAW.

TORONTO:
SCOBIE & BALFOUR, ADELAIDE BUILDINGS, KING STREET.

1850.

THOUGHTS ON LAW REFORM.

At a period when the defects, both real and imaginary, of the administration and machinery of the Canadian Law Courts have assumed an unusual prominence in public discussion, it may not be deemed out of place to offer a few remarks and suggestions in plain, untechnical language, on the alleged abuses and their possible correction.

A ten years tolerably extensive connexion with the Common Law Courts enables the writer to speak with some practical knowledge and experience, and he prefers that his remarks, be they sound or idle, shall go forth under his own name rather than in any anonymous shape.

That abuses exist requiring prompt removal, it is idle to doubt—that the pruning-knife be applied judiciously and calmly is, I conceive, a matter equally important to the public and to the legal profession.—Thousands a year can, I believe, be readily saved to the former, without impairing the efficiency or diminishing the respectability of the latter; and, so long as a class of men exist as agents for the explaining of legal difficulties, or the advocates or vindicators of individual rights, so long I may fairly assume, is it an object of almost equal importance with the economical administration of the laws, that such a class should stand as high as is practicable in point of character for integrity, ability and uprightness.

Such a class must ever exist in every country where property, life, liberty and reputation are protected by clear and positive laws, and when they become as a body corrupt, venal, time-serving and faithless, it will be a sign of fearful significance that both the morals, the fortunes, and the liberties of the country have arrived at, or are hastening to a period of degeneracy, danger and prostration.

There are many points that suggest themselves to me on this particular subject, but preferring the charge of abruptness to that of prolixity, I come at once to the suggestion of certain changes which I am satisfied can be made with great public advantage.

I pretend not to discuss the machinery of the Court of Chancery, having had but little experience of its practical working: however, I may share in the feelings entertained by a large body of my professional brethren on the subject of a court, which, designed on the purest principles of honour and equity, and the liveliest regard for the public interests, and indispensable as I deem it in every British land, has in its unhappy management been the cause of most of the odium and reproach latterly cast on the whole profession of the law. Under its present able and upright management, we may confidently look for

efficient and thorough reform; so that hereafter, people may venture to seek for equitable relief, without the risk of incurring expenses wholly disproportionate to the wealth and prosperity of the country.

I am an advocate for freeing the Superior and the County Courts from the decision of a large class of cases in which the interests involved are of a very small pecuniary amount, and for the determination of which the machinery of writs, pleadings, issues, juries and judgment-rolls are necessarily out of due proportion, expensive. It is said in the country that the Division Courts are too expensive. The lawful costs of a suit are only a few shillings, and those who have found the costs at all serious, may depend upon it that the law was violated and illegal charges demanded.

I suggest the transfer to the Division Courts of all trespasses, torts and injuries of all kinds to personal property in which no title to lands or annual rents &c. &c. are involved, and where property injured or damage done, amounts to any sum under £10. This would at once free the Courts of Record from a very large class of cases which now occupy a very large portion of their time, and in the discussion of which Counsel argue, Judges charge and Juries listen, and mourn their lost time for long hours and days.

By the law, as it now stands, an action can be brought in the Courts of Record for the loss of an article value sixpence; and too many cases are occurring in which a sap-trough, a buffalo skin, a sheep' value ten shillings, &c. &c., form the splendid prize for which advocates contend, and clients spend their hard earned money. I would transfer all such cases to the Division Courts. One sensible Judge, practically conversant with legal rights, could validly dispose of them in a cheap and summary way, and thus save to the country a sum which, I have reason to believe, would defray a very large portion of the whole costs of our Judicial system. No man not thoroughly acquainted with our Assize and County Courts can be at all aware of the great mass of business which would be affected by this change. The great decrease in the County Court business would more than balance the extra time required of the Judge presiding in the Division Court for such cases.

I now propose to consider in what rational way a considerable saving, both in time and expense, can be effected in suits for the collection of debts. I think much can be effected in this department, especially by simplifying the machinery, and reducing the amount necessarily disbursed to various officials. The public are not generally aware that in almost every case in which amounts of £3, 4, 5, 8 or £10, costs are incurred in legal proceedings, almost invariably 33 and often 50 per cent. of the whole bill has been actually disbursed to various officers by the attorney in the suit. But *all* is supposed to be *his* profit, while in fact a very large proportion is paid to the Government, the various clerks of Court, and especially to the Sheriff, and hence the emolument of the attorney is regarded as exorbitant and oppressive on the public. The tendency of the Legislature and of the orders of the Courts for the last few years has generally been to increase the amounts disbursed to the various officials, and to reduce the amounts retained as profits by the attornies.

Some four years ago the Legislature issued £6000 of debentures to the Law Society to provide accommodation for the Courts in Osgoode Hall, and to create a fund for its repayment imposed a very heavy tax on law

suits, adding 50 per cent to the former cost paid for a writ, and 2s. 6d. on every judgment entered, and so on for some other steps in the cause. About the same time their lordships the Judges, for reasons doubtless satisfactory to themselves, ordered a new tariff of Sheriff's fees, by which the disbursements paid by the attornies to those functionaries, and the fees receivable by them on executions, were practically raised from 25 to 33 per cent. The well known fact that the net income of some Sheriffs, with purely ministerial duties to perform, was already equal to, if not exceeding, the income of the ablest and most hard-working members of the Bar, and in one District, at least, exceeding that of the Puisne Judges, might have induced a doubt of the necessity for any alteration of the tariff in an upward direction.

For every case tried at every assize in the Province the attorney pays one pound to the Judge's clerk, for performing a duty of the most purely mechanical and easy kind, and thus often enabling a clerk of assize on a good circuit to return home, after a pleasant lounge of a few weeks, with a heavier purse than the ablest counsel on the circuit; £1 is paid to him in many cases in which the fee allowed to the counsel who conducts the case would be only £1 5s. or £1 10s., and nearly an equal amount is paid to the same functionary in criminal trials. When it is considered that this fee, always paid by the attorney and only one out of a dozen other disbursements, is often a tenth of the whole costs of the cause, the public may begin to understand that the attorney does not pocket *all* the alleged exorbitant law costs.

It will be for our Law Reformers to consider whether such disbursements as those last mentioned, with many others, could not be advantageously reduced to one-fourth of their present amount. Some idea may be formed of the magnitude of these disbursements from the fact that about three thousand pounds are paid every year into the Crown Office at Toronto by the attornies, without reckoning the Deputy Crown Offices in every County and the various County Courts. But it is beyond the bounds prescribed to these remarks further to pursue this fruitful theme. I now pass to those reforms which directly effect the attorney's own fees.

Without pretending to anything beyond an approximation in the way of figures, I have no doubt that I am more likely to be below than above the mark, when I state that the Upper Canada attornies disburse to the various Government Officers, Clerks of the Crown and County Courts, Sheriffs, Clerks of Assize, Clerks in Chambers, &c., &c., annually twenty thousand pounds. This amount is, of course, charged in their bills of costs, without being in the least degree a benefit to themselves. They are thus made the collectors and accountants for the Crown and its Officers, and have to bear all the odium of receiving the whole of this very heavy sum to their own use, while the *real* receivers are wholly withdrawn from the public gaze.

Last term an order was made by the Judges, under the acts of last session, abolishing the notices on processes served on defendants. This change deducted fully *one-fourth* off the attorney's fees on every writ he issues, and its magnitude can be understood when I state that it makes a difference to the public of at least two thousand pounds a year, or more than the whole expense of the new Court of Common Pleas, with its extra Judge, Clerks and Officers.

I propose that all the parties to a note, bill or bond, for any amount over £100, may be joined in one action, as they now are in cases under that amount.

I propose that it shall be *imperative* on Attornies to take the cheaper and speedier course of computing all notes, bills, bonds, &c., &c., before the Master, instead of leaving it in their power to do so, or to assess the damages before a Jury, as is now their option. This alteration would relieve the Assizes of much useless trouble, and save a very large amount of costs.

I consider it to be highly advisable, and quite practicable, to effect a very large saving to the public, and materially to ameliorate the whole process of collection of debts by devolving on the Judges in Chambers a very large portion of the duties now performed, at a heavy sacrifice of time and cost, by the combined action of Courts and Juries at the Assizes and County Courts.

At present, if a suit be brought for goods sold, money paid, lent, work done, &c., &c., both where the defendant enters no defence, and where he puts in a plea of denial, merely to gain time, it is absolutely necessary to assess the damages and prove the amount due before a Jury. The same course is necessary where a plea for time is filed to a claim on a note, bill or bond. This is, in my judgment, a most thoroughly useless waste of time and money. I propose to expedite all such cases, and reduce their costs in a most important ratio, by allowing a plaintiff in all such cases, after defendant's plea is filed, or where he makes no defence, to apply to a Judge in Chambers, on an affidavit, stating his cause of action, and that in his belief there is no real dispute between him and defendant *as to the facts.* The Judge could then issue his summons, calling on the defendant to show cause forthwith why he (the Judge) should not, on a day named, proceed to take evidence of the plaintiff's claim for the amount due, and sign judgment and issue execution for the amount. If the defendant can, in answer to the summons, show any reasonable grounds for believing that there is any *fact,* bona fide in dispute between him and the plaintiff, *then* the case should go in the ordinary way to a Jury ; if not, the plaintiff's witnesses could attend the Judge in Chambers, give their testimony, and the judgment could be readily signed for the proper amount. By the adoption of this course I would relieve the Juries at the Assizes and County Courts of more than half the business on which they are now employed, and would effect the double object of expediting the progress of a suit and saving the defendant from a large amount of cost now necessarily expended in going through the useless routine of Clerks of Assize, Counsel, Sheriffs, Juries, &c., &c.

I can conceive no valid objection to this most important change. I would transfer the decision of no real dispute as to facts from the good old English tribunal of twelve sworn Jurymen to one Judge ; but I would trouble Juries *only with cases where bona fide disputes as to facts existed.* The practical result would be, to reduce the number of cases at our Toronto Assizes from their ordinary number of 200 to half, if not one-third of that number. Then as to the time of the Judges, it would surely consume less of their individual time to take the necessary evidence in Chambers than at the Assizes.

My professional brethren residing in this country may object that this change would not practically benefit the suitors in the Superior Courts residing out of the County of York, as witnesses could not readily attend the Judge in Chambers in Toronto. I think this *prima facie* objection can be met by two suggestions. The first is,—after the Queen's Bench or Common Pleas Judge has ordered the evidence to be taken in this summary manner, the County Court Judge in each County could take the evidence and return it duly certified to the Superior Court. Evidence on affidavits could very properly be resorted to; it is still permitted in the most hotly contested cases where an English merchant sues a Canadian. The old Act of George II. allows depositions taken before the Mayor of any corporate town to be used in suits in the "Plantations." Such evidence is also allowed to be taken in contested cases on Commissions. Surely in cases *where no real dispute as to facts exists*, there can be no difficulty in adopting it. The second is, some change or modification of the circuit system, by which the superior Judges could arrange to attend at stated intervals, to decide such cases in the several Counties. The last suggestion is naturally open to certain objections, but I look upon the change suggested to be far too important and beneficial to be refused adoption from any supposed difficulty in finding the necessary machinery for carrying it into effect. It would effect a sweeping, but perfectly safe and cautions change in the whole system of collecting of debts—it would be a great boon to plaintiffs in point of time—it would save a formidable amount of costs to debtors—and would sweep away all the very costly and tiresome process of waiting sometimes for months for the sitting of a Jury to decide on oath what really was never actually in dispute.

All "privilege" in favour of attornies, by which they were enabled, in suits brought in their own name, to put a defendant to greater costs than would be incurred were he sued by an "unprivileged" plaintiff, is now by law at an end, and a fruitful cause of well merited reproach against Canadian practitioners is thus happily extinguished.

I have thus—too briefly and hastily perhaps for clearness—endeavoured to suggest some most important "Law Reforms." They may be thus classed :—

1st. The transferring to the Division Courts of all claims for injuries to personal property under £10.

2ndly. The transferring of the decision of all collection suits, *where no facts are really in dispute*, from the slow and costly process of trial by Jury, to the more rapid and far cheaper decision of a single Judge.

3rdly. The reduction of some of the present most exorbitant and unfair disbursements in the progress of causes.

Any man conversant with the course of law in this Province will at once perceive the deep importance of the proposed changes, and the vast amount of costs which could be saved by their adoption.

That abuses exist, it is impossible to deny, and every practitioner who feels an interest in the reputation of his ancient and honourable profession, must be keenly alive to the propriety of judicious reform. Much of the outcry which has arisen against "Law and Lawyers," in my humble opinion, owes its origin to the *abuse* and not to the legitimate

working of the system. Nearly if not all the cases brought before the public to illustrate the argument for Law Reform, are traceable to the very heavy costs of Chancery proceedings—to the abuse of "privilege" (now abolished) by which attornies sued in the superior Courts in their own name on small demands, or where costs of a large amount were improperly demanded, which the law would not sanction, and which would have melted away in the purifying fire of the "taxing office."

Every professional man, who has had a few years experience in Canadian practice, is well aware, that any change in the legal system which would reduce the costs of a contested law suit to any trifling sum, would, beyond a doubt, increase sixfold the quantity of litigation, and that the dread of expense oft-times exercises a salutary influence in settling trifling disputes, which would otherwise rapidly blossom into hotly contested actions. I do not, of course, advance this as any argument against a sound and thorough reform, whenever the same is found necessary.

I respectfully present these suggestions to the calm consideration of all those who have turned their attention to the question of "Law Reform." I should not have thought of laying them before the public had I found any disposition among those whom I readily admit may be far better qualified than I pretend to be, to enter into the discussion.

I have written far too hastily for precision of style or felicity of expression, but the suggestions made have engaged my gravest and best consideration—and I may, without presumption, assert that I have seen quite enough of the practical working of our legal system to feel a strong conviction that they can be carried into operation with perfect safety to the due administration of the law, and with an abiding advantage to all those who may have to seek its aid or protection.

TORONTO, April, 1850.

SCOBIE & BALFOUR, Printers, King Street, Toronto.