DIARY FOR JULY.

1. Sat. *Dominion Day.* Long Vacation begins. Last d. for Co. Coun. to equ. assessm. rolls. Last for Co. T. to cet. taxes due on occup. lands.
2. SUN. *4th Sunday after Trinity.*
3. Mon. Co. Court Term (ex. York) begins. Heir and Devisee Sittings commence.
4. Tues. Last day for notice of trial for Co. Court, York.
8. Sat. County Court Term (except York) ends.
9. SUN. *5th Sunday after Trinity.*
11. Tues. Gen. Sessions and County Ct. Sittings of York. Last d. for Master and Reg. in Chan. to remit fees to P. T.
15. Sat. *St. Swithin.*
16. SUN. *6th Sunday after Trinity.*
18. Tues. Heir and Devisee Sittings end.
23. SUN. *7th Sunday after Trinity.*
25. Tues. *St. James.*
30. SUN. *8th Sunday after Trinity.*

The Local Courts'

AND

MUNICIPAL GAZETTE.

JULY, 1871.

LAW OF EVIDENCE IN ONTARIO.

A great change in the law of evidence has been made in this Province, and, so far, the result seems to have been, on the whole, satisfactory. It is to be hoped that the evils which were anticipated by many will not necessitate what could only be looked upon now as a retrograde movement; but it is perhaps too soon to form any opinion on the subject from the little light as yet given by the experience of the working of the act in this country.

The advance has been in the direction of abolishing all exceptional cases, and making the admissibility of all evidence the rule, and leaving the credibility of that evidence to constitute the true test of its value. The technical rules as to amount of interest are no longer in force. Being a party upon the record is no longer an objection. Plaintiffs and defendants may examine themselves and their opponents, their co-plaintiffs and their co-defendants to the hearts' content of each and all of them. There seems good hope that in the long run the cause of truth and justice will be served by the late legislative action, which has been taken in the direction indicated.

There are yet, however, five classes of exceptions, preserved by the Ontario Act, 33 Vic. chap. 18 sec. 5, as to some of which we propose to make a few observations—but do so only on the assumption that the change has been a step in the right direction, which however we do not propose further to discuss.

Sub-division *a* provides that nothing in the Act shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. In other words, the law, as it stood before this statute, is not interfered with. And that law was the old common law rule that neither husband nor wife is competent to give evidence for or against the other, that other being a party, plaintiff or defendant. This rule was avowedly founded on principles of public policy. It was to secure, as has been well said, "the maintenance of peace and union in domestic life, whose quiet would be disturbed, and whose whole order and economy would be overthrown, if the confidences that exist between man and wife were to be rudely dragged before the public eye." The rule was well expounded by Mr. Serjeant Best in arguing *Monroe* v. *Twisleton*, Peak. Add. Cas. 219, "When two persons are placed in the situation of man and wife, the law precludes every inquiry from either, which might break in upon the comfort and happiness of the married state, and therefore it will not suffer one to give evidence which may affect the other, because such evidence might, as Lord Hale expresses it, create implacable quarrels and dissensions between them."

This rule, however, has, of late, been infringed upon in England to this extent, that husband and wife are now competent witnesses for or against the other except in so far as regards *communications* between them during coverture, which are held privileged. This may, perhaps, be the correct limit of the rule so far as it is founded on reasons of public policy, and the further extension of the privilege may be of doubtful propriety. A subsequent Parliament of Ontario may possibly re-consider the point whether it is necessary for us to retain the rule as at common law; thereby rendering the husband or wife of a party in any suit a totally incompetent witness for such party in that suit.

It has been held at common law that the disability to give evidence as to matters occurring during coverture continues, even after the marriage has been dissolved by death. Thus in *Doker* v. *Hasler*, 1 Ry. & Moo. 198, Best, C.J., held that in an action by an executor, the testator's widow could not be called for the defendants to give evidence of a conversation between herself and her husband. So

in *O' Connor* v. *Marjoribanks*, 4 M. & Gr. 435, where in an action of trover for goods by the husband's executor, it was held that his widow was not admissible as a witness to prove that she had pledged the property in question with the defendant by her husband's authority. So it has been held under the old law that if a woman, who was once legally the wife of a man be divorced *a vinculo matrimonii* by Act of Parliament, she cannot afterwards be called as a witness against him to prove any fact which happened during coverture, though she is competent to give evidence of transactions, which took place subsequent to the divorce. See *Pea. Evid. p.* 183, *Munroe* v. *Twisleton*, Peak. Add. Cas. 221.

These authorities shew the precise value of another exception in the Ontario Statute. We refer to sec. 5 sub-div. *c*:—"Nothing herein contained shall render any husband compellable to disclose any communication made to him by his wife during coverture, or shall render any wife compellable to disclose any communication made to her by her husband during coverture." This clause cannot refer to any period during the continuance of the coverture, for then it is to embraced in the more extensive language of sub-div. *a* of this section. It must mean that after the death of either husband or wife, the survivor (widow or widower) is competent to give evidence of communications made during the coverture, but is not compellable to do so, and as to such communications may plead privilege in respect thereof. This clause will, no doubt, be held to apply also to a case of divorce. If our intepretation be right, then husband or wife, after death, or divorce, or either, may be compelled to give evidence of matters that occurred during coverture, where the knowledge of such matters does not arise, from any communication between husband and wife.

The sub-sections we have referred to afford a curious illustration of the compromise character of this statute. It is, we think, a sort of transitional Act of Parliament, half-way between the retention and the abolition of privilege in matters of evidence. Sub-division *a* maintains the old rule of common law; sub-division *c* greatly encroaches thereupon, and in so far assimilates our law to that of the present statute law of England.

Similar uncertainty of principle obtains as to the last sub-division of this section; whereby it is provided that parties to actions by or against personal representatives of a person deceased, are not competent witnesses as to any matter occurring before the death. To be consistent the Legislature should have extended the prohibitions to actions by or against the real representatives as well. But here again it is a matter for grave consideration whether the best course is not, as in England, to erase this clause from the statute book and let the evidence be given for what it is worth. The Courts in England have laid down a rule which perhaps, if we agree to the principle of the change, affords a sufficient safeguard here in cases within this subsection: namely, that no one shall take a benefit or succeed against the estate of any deceased person upon a case resting solely on his own unsupported testimony.

SELECTIONS.

THE ECCLESIASTICAL COURTS.

Supposing that I had exhausted the humorous phases of the law, I have been for several months cultivating a spirit of dullness and heaviness that has evoked praise from our English legal cousins. But these transatlantic friends must not complain at any breaking out again, like the last words of the late Dr. Baxter, for, in this instance, their own peculiar laws and law reports furnish the occasion.

I know of no more humorous reading than the reports of the ecclesiastical cases, as given in the columns of the Law Journal Reports by those facetious gentlemen, George H. Cooper and George Callaghan, Esquires, barristers at law. We have nothing like them among ourselves, owing to the infidel separation of church from state, which prevails to some extent in this country. Let it not be understood, however, that we are without the blessings of ecclesiastical councils. We have them, but they are a law unto themselves, and our law courts are forced to get on as well as they can without the presence or countenance of the clergy. Perhaps our immunity is not to be regretted, for, of all the assemblies of mankind upon the face of the earth, from the earliest days down to the present time, the most reckless and unregardful of the laws of God and man is an assembly of clergymen. An assembly of women is conservative in comparison. Even a moot court of school boys has more regard for the rules of evidence. And for ingenious malice, tricky evasions and a cruel spirit of rivalry, I imagine that nothing on earth affords a parallel. If I were a clergyman, and should have to be tried for any imaginable offence, I should prefer a tribunal of the Camanches, or even the Sioux, to one composed of my fellows, for the injustice

inflicted by these Indian tribes would not be perpetrated under the forms and pretence of religious charity.

The recent advent of ritualism in the English church has given rise to considerable interference on the part of the ecclesiastical courts, and I am not sure but that it has demonstrated the utility of such institutions. It is certain that a court of law cannot be imposed on by such evasions as would succeed in a clerical court; and it is controlled by legal rules of evidence and interpretation. Consequently, those English clergymen who have lately gone into the millinery business, and have been evincing an undue fondness for the ways of the scarlet woman, are having a hard time of it before the Lord High Chancellor and those other lords who constitute the Privy Council, to say nothing of the clear and inexorable logic of Dr. Phillimore, Dean of the Court of Arches.

The Reverend Alexander Heriot Mackonochie, clerk in holy orders in the church of England, and incumbent of the parish of St. Albans, seems to be a tough customer. He was charged by a round head fellow, named John Martin, with having, during the prayer of consecration in the order of the administration of the holy communion, knelt or prostrated himself before the consecrated elements, and also with using lighted candles on the communion table during the celebration of the holy communion, when such candles were not needed for the purpose of giving light; also with elevating the paten and the cup above his head, with using incense, and with mixing water with his wine. The court below "monished" him in respect of all the enormities, save the kneeling and the candles, but declined to give costs. 37 L. J. R. (N. S.) Ec. Cas. 17. From the refusals to monish, the puritan Martin appealed to the Privy Council, mainly, it is to be suspected, on the question of costs. The report of the decision on appeal is full of good reading. 38 L. J. R. (N. S) Ec. Cas. 1. The court held, first, that the priest is intended by the rubric to continue in one position during the prayer of consecration, and not to change from standing to kneeling, or *vice versa;* and that he is intended to stand, and not kneel. Second, that the candles, as a ceremony, are unlawful, having been abrogated. Thirdly, that the lighted candles are not ornaments, within the meaning of the rubric. Counsel struggled hard for the candles, claiming that they had been used ever since the year 1100, but the court held the doctrine of ancient lights inapplicable to the case. And their lordships, with due regard to the dignity of the law, advised Her Majesty that the clergyman should pay the round head's costs.

One would suppose that the Rev. Alexander Heriot Mackonochie was now pretty stringently tied up, but, "for ways that are dark and for tricks that are vain," this particular clergyman is "peculiar." He ceased to "elevate the elements above his head," but merely elevated them as high as his head: he put out the candles just before communion, still allowing them to stand; and, instead of kneeling, he bent one knee, occasionally touching the ground with it. The hard-headed Mr. Martin followed him up, and moved the privy council to enforce obedience to their monition. 39 L. J. R. (N. S.) Ec. Cas. 11. The ingenious reverend gentleman made a very pretty argument, in person, in his own defence, which deserves rehearsing, as to the kneeling, at least. He says: "It is defined in Bailey's Dictionary, 'to bear oneself upon the knees.' I maintain, as regards the charge of kneeling, that kneeling is a distinct posture. The body must rest upon the knees. It is true, Dr. Johnson gives a different definition, but all his four examples fall within Bailey's definition; 'to perform the act of genuflexion,' 'to bend the knee.'

'When thou dost ask my blessing, I'll kneel down,
And ask of thee forgiveness.'—*King Lear.*

'Ere I was risen from the place that shewed
My duty, kneeling, etc.—*Ibid.*

perfectly before the court, but declared that they should hold, if it ever became proper for them to do so, that "any elevation, as distinguished from the raising from the table," is unlawful. One would suppose that, having cornered him on the charge of kneeling, the court would have shown some respect for their own decrees by punishing the infringement, but this clerical flea was not so easily caught. He had, like the prudent man, foreseen the evil, and hidden himself behind an affidavit that "he had never intentionally or advisedly, 'A certain man kneeling down.' Matt. xvii, 14. 'At the name of Jesus every knee should bow.' Phil. ii. 10. Bowing the knee is a distinct act from kneeling. Bishop Taylor says, 'As soon as you are dressed, kneel down.' *Guide to Devotion.* In every instance, in the prayer book, 'kneeling' is used to express the going upon the knees. Two things are necessary to a kneeling, first, that the body should rest upon the knees; secondly, that it should be for an appreciable time." He did not claim that his genuflexions were the result of any weakness in the knees, but boldly said, "I bend the knee as an act of reverence." This, of course, put the matter beyond any doubt, and, in respect to the kneeling, the court held that his peculiar evasion left him but one leg to stand on in physics, and none at all in law, and monished him not to do so any more. In respect to the candles, they expressed their disapprobation of the trick, but held that the reverend blower-out was, technically, within the monition. As to the elevation of the elements, the same may be said, the court holding that the point was not in any respect, disobeyed or sanctioned any practices contrary to the provisions of the monition;" *i. e.*, he supposed he had successfully evaded them. Their lordships thought themselves bound, as christian gentlemen and lawyers, to give the affiant the benefit of this christian-like and gentleman-like, if not lawyer-like, affidavit, and so declined to punish

him further than "to mark their disapprobation of such a course of proceeding"—to wit, the kneeling—"by directing that he should pay the costs of the present application," which, after all, I dare say, is no light punishment in England. This ingenious clergyman, who thought to evade the decree of the court against kneeling by bending one knee only, should have remembered the fate of "Peeping Tom," of Coventry, that

> "one low churl, compact of thankless earth,
> The fatal by-word of all years to come,"

who, when Lady Godiva was riding by, "clothed on with chastity," risked one eye at an auger hole, and whose

> ——"*eyes*, before they had their will,
> Were shrivelled into darkness in his head,
> And dropt before him."

But if he had possessed that acquaintance with the scriptures which I have (through the medium, in this instance, of Webster's Unabridged Dictionary) he would, on leaving the presence of this tyrannical court, have hurled at them this parting text: "And he *kneeled down* and cried, with a loud voice, Lord, lay not this sin to their charge." Acts, vii, 60.

But we have not yet done with the reverend caviller. In November, 1870, the Privy Council were invoked to punish him for fresh disobedience to the monition, in respect to prostration and elevating the paten and cup. It was alleged and admitted that he had removed the wafer bread from the paten, and elevated the bread, instead of the paten; and it appeared that the upper part of the cup was elevated above the head. The accused claimed that the elevation was accidental and unintentional; but, as he admitted that he had carefully scanned the monition with the determination to yield only a literal obedience to its precise letter, the court held that he must suffer for even a literal violation, on the principle that they that take the sword shall perish by the sword. The accused, also, having met with such bad fortune in his genuflexions, notified his curates that he intended thenceforth to bow without bending the knee, at that part of the prayer of consecration where he had formerly knelt, and so, instead of kneeling, he made a low bow, and remained in that position several seconds. This the court held to be an unlawful prostration of the body. He was amerced in costs, and suspended from office for three months, and thus left with nothing to hold up but his hands, and with full liberty to bow his head if he had any shame left.

In January, 1870, "the office of the judge was promoted"—whatever that may be—"by the bishop of Winchester against the Rev. Richard Hooker Edward Wix, vicar of St. Michael and All Angels, Swanmore, in the Isle of Wight." The vicar was charged with ecclesiastical offences, namely, with having caused two lighted candles to be held on either side of the priest, while reading the gospels, and with having lighted candles on the communion table, or on a ledge or shelf immediately above it, having the appearance of being affixed to and forming part of it, during the celebration of the holy communion, at times when they were not needed for light; also, with using incense, etc., etc. In respect to the first charge, the vicar admitted and defended the practice, but the court held it unlawful, and "monished" him. In regard to the second charge, Wix becomes a dangerous rival to Mackonochie, in the science of evasion, for, although he admits the lighted candles, yet, he says they were not on the communion table, on the ledge or shelf behind it, but on a separate table, called a re-table, not appearing to form a part of the communion table. I think, on the whole, he is rather superior to Mackonochie, for the latter had to put his candles out just before communion, but Wix defiantly kept his burning by means of the convenient re-table. But, it appearing in evidence that the re-table was placed directly behind the holy table, and had a shelf or ledge, which looked like a mantel-piece over the holy table, the court held that this would not answer, and so Wix and his candles were put out. As to the incense, Wix claimed that the censing was done only during the interval between morning prayers and communion, accompanied by processions and tinkling of bells, and that the censing was not within the prohibition of the law, because it was not done during any service. But the court thought there was no sense in this argument; Wix might as well claim that a slice of ham is no part of a sandwich, because it is between two slices of bread; and he was monished against this practice also, and condemned to pay costs, which last probably incensed him most thoroughly. 39 L. J. R. (N. S.) Ec. Cas. 25.

In the same report, at page 28, is found the case of *Elphinstone* v. *Purchas*, in which the matters of vestments, mixing water with the wine, administering the bread in form of wafers, etc., were gravely and elaborately considered. The defendant did not appear, and so the plaintiff, who was a colonel in the army, had a clear field. After eleven pages of discussion and examination, Dr. Phillimore concludes that Mr. Purchas might wear all the regalia which he was accused of wearing, except "a cope at morning or at evening prayer; also, with patches, called apparel; tippets of a circular form; stoles of any kind whatsoever, whether black, white or colored, and worn in any manner; dalmatics and maniples." The "biretta" or cap appeared to the doctor "as innocent an ornament as a hat or a wig, or as a velvet cap." Processions and incense were pronounced illegal. Blessing the candles was forbidden. So, as to announcing "a mortuary celebration for the repose of a sister," and interpolating a prayer for the rest of her soul. Wafers were not disapproved of, nor was mixing water wine so long as it was not done at the time of the celebration. Placing on the table a

veiled crucifix, and unveiling it and bowing, and doing reverence to it, was deemed objectionable. But flowers on the holy table were approved. It was held, for the sake of protestantism and good manners, that the priest must not turn his back on his people, except during proper prayers. It only remains to remark, that placing a figure of the infant Saviour, with two lilies on either side, and a stuffed dove, in a flying attitude, over the credence and the holy table, respectively, was reprehended. All this occupies twenty-five double-columned pages of the report. But, on appeal, all the "eucharistic vestments," including the innocent "biretta," were held unlawful, and the clergy were restricted to the poverty of cope and surplice; the use of the mixed chalice and wafer bread was also pronounced illegal.

So much for rites and ceremonies. But, when we come to the efforts of the courts to keep the ritualists straight in doctrinal matters, we are lost in amaze Take the case of *Sheppard* v. *Bennett*, for instance. 39 L. J. R. (N. S.) Ec. Cas. 68. The charge was, that the defendant inculcated the doctrine of the visible presence of our Lord in the elements, and the adoration of the elements themselves. The language used was: "Who myself adore and teach the people to adore Christ, present in the sacrament, under the form of bread and wine, believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ." The language at first was, "to adore the consecrated elements, believing Christ to be in them," but this was corrected as above. The court held that this amended language does not necessarily imply a belief in the actual presence, and an adoration of the elements themselves. The words by which it is preceded, however, would seem to render this judgment extremely charitable, to say the least: "I am one of those who burn lighted candles at the altar in the day-time; who use incense at the holy sacrifice; who use the eucharistic vestments; who elevate the blessed sacrament."

If, after believing and doing so much, he does not believe what he is accused of, he must be remarkable. If a man should tell us, "I am copper-colored; I go nearly bare and paint my body, and wear rings in my lips and nose; I live in a wigwam; I sail in a birch-bark canoe; my weapons are bow and arrow, knife and club; I am in the habit of scalping my enemies, and of getting intoxicated on whisky; but I am not an Indian,"—the natural inquiry would be, What are you, then? And if you should believe him, for the reason that a great many other Indian disclaimants had told you the same story, you would use exactly the reasoning that Dr. Phillimore uses to arrive at his conclusion, at the end of fifty-three pages of fine print, in double columns. Peter, the patron saint of all these credulous theologians, persisted in denying *his* Master, although his "*speech* bewrayed him." The learned Doctor hopes that nothing that he has said may further tend to

——"make this banquet prove
A sacrament of war, and not of love."

He says he does not sit "as a critic of style, or an arbiter of taste, or a censor of logic," and has "not to try Mr. Bennett for carelest language, for feeble reasoning, or superficial knowledge." And he concludes that Bennett is saved from harm by the fact, that, in sentencing him, he should be passing sentence "upon a long roll of illustrious divines who have adorned our universities and fought the good fight of our church, from Ridley to Keble; from the divine whose martyrdom the cross at Oxford commemorates, to the divine in whose honour that university has just founded her last college." And he showed his leniency toward freedom of religious opinion by making no order as to costs. I must do the doctor the justice to say that he does not seem to regret his enforced decision, and even cites the decision of the privy council, that the words "everlasting fire" might be treated by a clergyman as not denoting the eternity of punishment.

But the humour of the matter consists in the necessity of having a court to adjudge what religious opinions a man may or may not teach, and what rites and ceremonies he may or may not observe. Of course, it is the theory of government that renders this necessary, but the humour of it is none the less apparent on that account. If *our* clergymen take leave of their senses, we soon find a way to restore their wits—we cut off their temporal supplies. If we disagree with *our* clergyman, we dont let him turn us out—we turn him out. Our theory is that the clergy and the Sabbath are made for man, not man for the clergy and the Sabbath. All judicial inquiries into one's religious opinions and ceremonial preferences strike us oddly. We do not see, of course, why the lord high chancellor should not be just as well invoked at the complaint of the Royal Geographical Society, to monish a man against saying and publishing that the world is flat, or, at the instance of Mr. Froude, to warn a rival historian against pretending that Henry VIII was not a conjugal saint. In short, affairs proceed in this country upon the principle of the menagerie-keeper, who, when asked whether a certain animal was a monkey or a baboon, replied: "Whichever you please—you pays your money, and you takes your choice."—*Albany Law Journal.*

THE ELECTION BILL AND THE PROFESSION.

The ballot makes personation easy and detection difficult; it vastly facilitates the process of bribery, by removing the fear of discovery and punishment.

Bribery will not be prevented by merely moral influences—that is proved by all experience. No party hesitates to resort to it when necessary to success. No man, however virtuous in profession, was ever known to vote against his party because they were

winning by corruption; he is content to share the spoils of victory and ask no questions. In very truth, nobody really looks upon it as a crime or upon a man who gives or takes a bribe as he views a thief. Everybody would prefer to win an election by honest means, but he would prefer to win by bribery rather than be beaten. Nothing but fear of the penalties really operates to deter, and even they go no further than to introduce more contrivance and caution in the conduct of the business. Whatever reduces the risk of discovery enormously increases the temptation alike to give and to take bribes.

It is scarcely denied that the ballot makes bribery comparatively easy and safe; but its advocates contend that, though it will not make men less willing to take bribes, it will make them less ready to offer bribes, because they cannot secure the fulfilment of the corrupt contract. Voters, it is said, will accept bribes from all, and promise all, and can only give to one; a man who will take a bribe will not hesitate to break his promise. This argument, however, assumes much that is not true in fact. The truth is, as our readers very well know, the great majority of the voters who take bribes perform their contracts faithfully. There is a strange point of honour among electors in this matter. They do not look upon the taking of a bribe as a moral, but only as a legal, offence; in their estimation there is nothing wrong in it, and it is only a question of safety from penalty. They think it very wrong to break a promise, and not one in twenty of those who accept a bribe without shame and without the most severe pricking of conscience vote otherwise than they had agreed to vote for the consideration given.

It must not, therefore, be hoped for that bribery will be dimished under the ballot, because the buyer will be unable to secure the vote he has bought. Even if individual votes could not thus be counted on, another form of bribery, practised largely in America, will certainly be adopted here. Wherever the ballot exists, bribery is conducted thus: Clubs, workshops, societies of men, sell themselves, not individually, but in the mass. The negotiation is conducted between a trusted man on both sides. It is intimated that the society will vote together; what one does all do; little is said, but much is understood; signs are more expressive than words: under a stone in a field, in a hole in a hedge, the representatives of the society after the conference with the Man in the Moon find a certain sum of money. It is divided among the members, and the ballot of all is for the same man. If it be asked how they can be trusted, the answer is, that they well know that if they were to prove false they would soon spoil the market. But if there is a fear of such a consequence, the last resort is to buy conditionally that the buyer is returned,—the purchase-money not being paid till after the election.

This is not a theoretical evil, but one rampant at every election in the United States, and as familiar to the people there as was the head money to the electioneerers of twenty years ago in this country.

The ballot will practically extend the area of corruption by providing facility for concealment of the facts. It will create a new and large class of corrupt voters.

Our readers experienced in elections are well aware that there are many voters who would gladly take a bribe, but dare not do so for fear of discovery. They have been partisans their lives through; they are connected with some church or chapel; they have always worn one colour, or called themselves by one name; and they know well that, if they were to vote against the party they had been associated with, all the town would be assured, as if it had been done before the eyes of all, that they had been bought. But these men, and they are many, would gladly put money into their purses if they knew that they could do so without discovery, and this the Ballot will enable them to effect without possibility of danger.

But it is said the penalties for bribery will continue as before; why should they be less effective to deter or to punish?

For this reason—that the means of detection are immensely diminished. Bribery is usually discovered now by this; that certain persons who had promised one party, or who were usually attached to one party, are seen to vote for the other party. It is then well known what was the inducement, and every detective engine is set in motion to obtain proof of the fact. But where the vote is not known, this is impossible; the clue to the act of bribery is lost, and in practice there is perfect impunity.

This, too, is confirmed by the experiences of the Ballot in all countries. If bribery is to be employed, the Ballot makes it easy and safe, as, indeed, its advocates do not deny; they assert merely that no man will think it worth his while to spend money in purchasing votes which he cannot secure. The answer to this is given above, and as it is contended it will be here so is it actually found to be in the United States.

Thus we encourage increased bribery and extended personation, for what?—to prevent one elector in a hundred from being influenced to vote against his will. To protect one coward twenty honest men are demoralised. Surely this is paying dear for a trifling benefit.

We have already shown that the much desired object of the promoters of the Ballot—the exclusion of the profession from the conduct of elections—is impracticable. The considerations here suggested with respect to the encouragement and protection it will provide for bribery, fully support that view.—*The Law Times.*

A noteworthy instance of promptitude in the redress of a wrong occurred last week in the Lord Mayor's Court. A defendant had his goods and chattels seized late on Saturday night by the Sheriff of Surrey, under a *fi. fa.* of that Court. The defendant was entirely ignorant of any proceeding having been taken against him until he found the sheriff in possession, and the original debt of about £8 had been nearly doubled by the addition of costs. On Monday the defendant searched the file of the Court and found an affidavit by a process-server of personal service of a writ of summons in the City. The defendant then made an affidavit to the effect that he had no knowledge whatever of any proceedings having been taken against him previous to Saturday night, and the Registrar thereupon ordered a special Court to be held on the following morning to hear the defendant's application to set aside the proceedings. Notices were served that day on the plaintiffs and their attorneys, and on Tuesday the Recorder, after hearing all parties treated the alleged service as a case of mistaken identity, and set the proceedings aside on the defendant undertaking not to bring any action for trespass or otherwise, and the plaintiff undertaking to give the defendant until Saturday, the 14th inst. (the ordinary court day), before taking any further proceedings for the recovery of their debt. At mid-day the same day the sheriff had withdrawn. This mistake of the process-server costs the plaintiffs or their attorneys something like £20, and might cost them much more but for the terms stipulated by the Recorder to prevent other proceedings being taken.

It may be as well to note in recording this case, that there is no provision to meet similar cases in the county courts, except in the largest of them, where the judges sit very frequently. In many of the smaller courts a judge would not be available for weeks to rectify a similar error, to the serious loss of the victim. Could not some provisions be made in the new County Couts Bill to meet cases of the kind?—*English Paper.*

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Tax Sale in 1855—Objections to—13 & 14 Vic. ch. 67.—33 Vic. ch. 23 O.—An action of ejectment to try the validity of a tax title having been begun before the 33 Vic. ch. 23, O., was passed, the Court, under sec. 4, determined the objections taken to the sale, in order to settle the right to costs, in the same manner as if the act had not been passed.

The Sheriff, at a tax sale, on the 26th of December, 1855, notified the purchasers that if they did not pay in two or three weeks he would sell the land again. The defendant having purchased portions of certain lots did not pay, and the lots were put up again as whole lots, not by the acre. The defendant then asked those present not to bid, as he had a title to the lots bid off by him at the first sale, which he wished to perfect. Accordingly no one bid against him, and he obtained the lots. What his title was did not appear. *Semble*, that the sale under such circumstances could not be supported; but no opinion was given on this point, as the plaintiff might, under *Raynes* v. *Crowder*, 14 C. P. 111, be compelled to go into Chancery for relief on such a ground.

Held, that the 13 & 14 Vic. ch. 67, secs. 46 and 47, did not make the list of taxes directed to be prepared by the Treasurer binding; and that if the tax was not legally imposed, but merely debited against the lot by the Treasurer, it was not made valid by being entered in such list.

Semble, that the advertisement was bad, for not specifying whether the lands were patented or held under a lease or license of occupation.

It was objected also that the land was sold for taxes which had accrued for more than twenty years, and that the sale was adjourned illegally, though a large number of bidders were present. *Semble*, that these objections could not be supported.—*McAdie et al Corby*, 21 U. C. C. P. 349.

By-law to divide a School Section—Seal—Delay in moving.—Application to quash a by-law passed on the 14th of August, to divide a School Section, on the ground that it was not under the seal of the Corporation, and that it did not appear that all parties to be affected had been duly notified of the intended step or alteration.

Upon the affidavits on both sides, set out below, the Court were satisfied that the seal had been duly affixed.

As to the notice, the applicant swore he had received no notice of the intention to divide the section or pass the by-law, and believed the Corporation gave none, and this was confirmed by the local superintendent. On the other hand, it was sworn that the Council in February received petitions, numerously signed, for the division, which they directed to stand over until their next meeting, on the 14th of August, and instructed the Clerk to give the necessary notices that such petitions would then be considered, and that such notices had been seen in a hotel, in the post-office, and in the school-house. In reply the Clerk denied receiving such instructions, and a person who had lived at the hotel, and the Postmaster, swore that they had never seen the notices.

The Court refused to quash the by-law, for the affidavits only denied notice of intention to divide the section or pass the by-law, not of the application; the Council had acted upon reasonable assurance that all parties had notice of such application, which no inhabitant of the section had denied knowledge of; and the objections being technical should have been taken promptly, without allowing a term to elapse.—*Taylor and the Township of West Williams*, 30 U.C.Q.B. 337.

School Trustees—Alteration of Sections—Mandamus to levy Rates.—The plaintiff recovered a judgment in March, 1858, against the school trustees for a debt due to him for building a school-house for the section, and made several unsuccessful attempts to obtain payment of it from the trustees and their successors in office. The trustees always refused to levy a rate, or to pay the judgment. To an application for a *mandamus* to compel the trustees to levy a rate for payment of the judgment,

Held, no answer that since the recovery of the judgment two alterations had been made upon the limits of the section, and that many changes had taken place among the ratepayers originally liable; or that the merits of the claim upon which the judgment was founded were capable of being impeached.

Johnston v. *The School Trustees of Harwich*, 30 U. C. R. 264, distinguished.—*Scott* v. *School Trusees of Burgess and Bathurst*, 21 U. C. C. P. 398.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Mortgaged Chattels—Removal by Stranger—C.S. U. C. ch. 45, s. 9.—Goods covered by chattel mortgage were removed from the County, either on an alleged sale by mortgagor, or against his will, or stolen from him, and were sold in another County to the defendant, mortgagor being, at all events, no party to the removal. Just over two months from removal, mortgagee, on hearing where they were, went and demanded them from defendant:

Held, that such a removal was not within the statute, requiring a copy to be filed within two months of the permanent removal of the goods from the County.

The mortgagor had agreed to deliver lumber to plaintiff, at specified prices, up to September, 1870, which plaintiff was only bound to pay for as delivered, and not to make advances; but at the date of the mortgage plaintiff had advanced about $250 beyond the value of the lumber delivered, and to assist him still further he advanced $450 more, on his agreeing to execute the mortgage to secure both amounts, which were to be repaid by lumber or money in two months, the security covering the goods in dispute as well as the lumber.

Held, that the mortgage was an independent contract, an advance of money to be repaid at an earlier date than that named for the delivery of the lumber, that it was not invalid, as not shewing the true dealing between the parties, and that the affidavit, which was in the common form, was sufficient.—*Clarke* v. *Bates*, 21 U. C. C. P. 348.

Sufficiency of Affidavit under 17 & 18 Vic. c. 36.—A bill of sale was attested by one T. S., described as "clerk to W. F.;" the affidavit required by the Bills of Sale Act was made by T. S., described as a "gentleman."

Held, that the affidavit was insufficient and the bill of sale therefore void as against an execution creditor.—*Brodrick and another* v. *Scale*, 19 W. R. 386.

Will—Construction—Gift of "All the rest."—Gift of "all the rest," following a list of bequests of sums of money.

Held, to pass real estate.—*Attree* v. *Attree*, 19 W. R. 464, Feb. 9, 1871.

Newspapers—Publication of Proceedings—Contempt.—Where proprietors of newspapers publish an account of and comments on pending proceedings, they are guilty of contempt of Court; but a motion to commit them at the instance of a party to the suit, when it can be proved that in one case he had supplied the materials with a view to an article being written, and, in the other, that every reparation possible had been made, will be refused.—*Vernon* v. *Vernon*, 19 W. R. Chy. 404.

Bankers—Deposit of Check—Dishonor.—The plaintiff having a banking account with defendant's agency at St. Catharines, deposited with them on Saturday morning, about 11.30, a cheque of one C. on another bank, in the same place, for $350, payable to the plaintiff or bearer, and not endorsed. The sum was credited in the plaintiff's pass book as cash, and the cheque stamped with a stamp used by defendants as "The property of the Quebec Bank, St. Catharines." On Monday morning it was presented for payment and dishonoured; but it would have been paid if presented on Saturday before the

bank closed, which was about one o'clock. The defendants having charged the amount of the cheque to the plaintiff, he sued them for money had and received and money lent.

Held, that he could not recover, for defendants were not guilty of laches; and *semble*, that they could have recovered back the amount from the plaintiff, even if they had paid it to him.—*Owens* v. *The Quebec Bank*, 30 U. C. Q. B. 382.

ARTIFICIAL CHANNEL—PENNING BACK WATER.—The plaintiffs owned land on the River Humber on which there was a mill, the water from which flowed through *an artificial channel* of about 700 feet into the river. Defendant having built a dam by which the water was penned back in this channel, so as to obstruct the working of plaintiff's mill and the natural flow of the stream.

Held, that the plaintiffs were clearly entitled to maintain an action therefore.—*Wadsworth et al* v. *McDougall*, 30 U. C. Q. B. 369.

LIABILITY OF HUSBAND—MARRIED WOMAN'S ACT.—Defendant, during several years prior to, and for part of the year 1862, had a shop which he and his wife, who lived with him, attended, the shop being divided into two parts, in one of which defendant carried on a confectionery and saloon business, and in the other a fancy goods business, the latter being under the personal superintendence of the wife, who always gave the orders for the goods, which he, however, paid for. In 1862 defendant gave up the confectionery, &c., business, and then, as he stated, sold out the other business to his wife for a certain sum, she agreeing to pay him $5 a week, which, however, she failed to do. She continued, with his permission, to carry on the fancy goods business, still living with him as before. There was no change either in the exterior or in the interior of the shop, except that the defendant no longer carried on the confectionery, &c., business there, though he was frequently seen on the premises. In 1869 the wife gave an order for the goods in question, just as she had always previously to 1862 been in the habit of doing. *Held*, that the business must be considered defendant's, and that he was liable to the plaintiff for the goods ordered in 1869.

Held, also, that the Married Woman's Act (C. S. U. C. ch. 73) had no application to the case.—*Foulds* v. *Curtelett*, 21 U. C. C. P. 368.

ONTARIO REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, ESQ., Q.C., *Reporter to the Court.*)

BROWN v. THE CORPORATION OF THE TOWN OF BELLEVILLE.

Corporation—Contract not under seal—Liability.

The defendants wished to dredge their harbour, and the plaintiff had a dredge, then in the State of New York, which, after negotiations with the chairman of the committee on harbour and town property, he offered to lend to the corporation on certain terms, one of which was that the corporation should pay the cost of its transport to Belleville. The committee reported and recommended this offer to the council, and it was adopted, and the chairman then told the plaintiff to bring the dredge to Belleville, which he did, at the cost of $373. The committee afterwards decided to let out the dredging by contract to another person.

Held, that the corporation were liable to the plaintiff for the cost of bringing the dredge, although there was no contract under seal.

[30 U. C. Q. B. 373.]

DECLARATION. First count, on an agreement that if the plaintiff would bring to the town of Belleville, from Broome county, in the State of New York, a certain dredging machine which the plaintiff had there, to be used by the defendants in the work of dredging the harbour within the limits of the town of Belleville, which dredging was about to be undertaken by the defendants, and in consideration that the plaintiff would allow the said machine to be used in the work of dredging the said harbour, the defendants agree to pay the plaintiff all expenses incurred in the transportation of the machine from Broome county to Belleville, and to keep the same in good repair, and to return the same in as good order as the defendants received it, and to pay the plaintiff for the use of the said machine by the defendants ten per cent. per annum upon the sum which the plaintiff had paid for the machine. And the plaintiff alleged that, relying on the promise of defendants, he caused the machine to be transported from Broome county to Belleville, and placed the same upon wharves in the said harbour, of all which the defendants then had notice. Yet the defendants, in violation of their agreement in that behalf, refused to receive the said machine, although requested so to do, and refused to employ the same in the work of dredging the said harbour, but, on the contrary, employed another dredging machine for the said work, and refused to pay the plaintiff the expenses, costs, and charges, in transporting the said machine to Belleville, whereby the plaintiff has suffered great loss and damage.

Common counts were added, for work and materials, &c.

Defendants pleaded, to the first count:—

1. That they did not agree as alleged.

2. That the plaintiff did not bring the machine to the town of Belleville as alleged.

And to the second count never indebted.

The cause was tried at the Spring Assizes for 1870, at Belleville, before Gwynne, J.

The evidence shewed that, in 1868, A. Diamond, Esq., was appointed chairman of the committee on harbour and town property. Under the by-law to regulate proceedings and establish rules of order in the town council, by the 41st clause, committees appointed were to report on any sub-

ject referred to them by the council a statement of the facts, and also their opinion thereon, in writing, and it should be the duty of the chairman to sign the report and bring up the same.

By sec. 53, no money appropriation should be finally entered upon by the council until it should be referred to the standing committee on finance and assessment, and no money should be paid nor any expenditure be authorized by any member of the council, without a resolution of the council ordering the same and specifying the amount.

During the early part of the summer of 1868, apprehensions were felt that steamers and other vessels would not be able to get into the harbour in consequence of the filling up of the same with saw-dust, and the committee on harbour and town property had communications with the plaintiff on the subject, and a plan was discussed between the chairman of the committee, Mr. Diamond, and Mr. Brown, by which they expected to clean out the harbour. On the 6th of May, 1868, a report was made to the council, which, after reciting their inability to induce the government to aid them, stated they had put themselves in communication with Alexander Brown, Esq., of Belleville, who owned a dredge in every way suitable for the purpose, as the committee were advised, which was then in the State of New York, and which Mr. Brown had consented to loan to the corporation to use for dredging the harbour, and on condition that the corporation would pay the cost of transport to Belleville, and pay him for the use of the dredge a sum not exceeding ten per cent. per annum on the actual cash value of the dredge and the scow whilst the same was employed by the corporation. * * * The corporation to keep the machinery in good order, and to return the dredge in good condition, ordinary wear and tear alone excepted. The agreement to be subject to a vote of the people to raise funds for dredging the harbour, and all expenses connected therewith.

The committee considered the offer a very favourable one, and recommended the same for acceptance by the council.

The report of the committee was presented to the council and adopted. The clerk of the council said the usual practice was for the report to be read in council after it was presented by the chairman; then a motion was made for its reception, and, that being carried, a motion for its adoption was made. If adopted, it was customary for the council to proceed on the report without any further resolution of the council. If a report were made requiring a specific sum of money, it would go into a committee of ways and means. The invariable practice was, when report was adopted by resolution of the council, and committee having charge of the matter reported upon proceeded with it.

After the adoption of the reported, Mr. Diamond, the chairman, saw the plaintiff and concluded the arrangement with him, and told him to bring the dredge. The chairman had some difficulty in then getting him to consent to do so, in consequence of his having taken offence at something said in the council. The amendment to the report, that the agreement was to be subject to the vote of the people to raise funds for dredging the harbour, having been made in council, Mr. Diamond called the plaintiff's attention to it, and the risk he ran of the by-law passing. He assured him he thought it would pass. Thereupon the plaintiff sent for the dredge, and had it brought to Belleville. The expense of bringing it, $373.50, was the amount of the verdict.

On the 17th of June, the harbour committee again reported that they had had under consideration the cheapest and best mode of carrying out the work of dredging the harbour, and had consulted persons of experience, and heard recommendations as to the propriety of letting the same out by contract at so much a cubic yard, or at a round sum for the whole work. The committee were not prepared to recommend the conclusion of any negotiations until the by-law for raising the money for the work was confirmed and finally passed.

At this time the by-law, which was passed on the 15th July, had been advertised, but not passed.

The preamble of the by-law stated that the council had resolved to erect and put in efficient repair the bridges in the town, and also to dredge or deepen the harbour, and it had been ascertained that the same would require an expenditure of $12,000, *i. e.*, $6,000 for bridges, and $6,000 for the harbour; and it was deemed advisable to borrow the same on the credit of the town for the period of 20 years, and to issue debentures for the same. Then followed the clauses authorizing the borrowing of the money, &c. The votes of the electors were to be taken on it on Monday, 6th July, and it was passed by the council on the 15th July.

On the same day the harbour committee reported they had unanimously decided that it was desirable that the work of dredging the harbour should be let out by contract at a certain sum per cubic yard, measured on the scow after the same had been excavated, the work to be executed as the committee might from time to time direct, duly reporting to the council as the work progressed. The committee desired to be authorized to advertise for tenders for the work, requiring those who tendered to state at what price per cubic yard they would perform such work, providing the dredge, scow, and all necessary apparatus, and also requiring the parties tendering to state at what time they would be enabled to commence operations in case the tender should be accepted. This report was also adopted by the council.

The committee in the meantime had seen a plan of a dredge which it was thought would be better for working in saw dust than the plaintiff's, and they finally decided to let the contract for dredging the harbour to Mr. Hayden, who used the new style dredge, and a contract, under the seal of the corporation, was entered into with Hayden. In the meantime the plaintiff's dredge had been brought to Belleville, at the expense of over $300, and was not then required for the use of the corporation. There was evidence given to shew that the corporation had recognized the contracts of the committee after their reports had been made, and paid for the work done in the same way that this was, though there was no written agreement or contract under seal: that sidewalks, involving a large expenditure, had been constructed in this way, and a bridge also built for the corporation, though there was no contract under seal.

Another by-law was passed in December, but that was to remedy some technical defects in the former one, and seemed to be of no particular importance as far as the matters in question in this suit were concerned.

The plaintiff had a verdict for $373.50, with leave reserved to the defendants to move to enter a nonsuit.

In Easter Term last, *Flint*, for defendants, obtained a rule *nisi* to enter a nonsuit or verdict for defendants, pursuant to leave reserved, on the following grounds:—

1. That the agreement mentioned in the report of the 6th May, 1868, was to be subject to a vote of the people to raise funds for dredging the harbour, and all expenses connected therewith, which never having been done under that report, there was no concluded agreement with the plaintiff.

2. That on the 15th July, 1868, the council adopted a report breaking off the negotiations with the plaintiff, the same day that the vote was taken on the by-law.

3. That the plaintiff had no right to act until the vote was taken and the by-law passed.

4. That by the report of the 6th May, 1868, the agreement was to be subject to a vote of the people, and the agreement of the plaintiff could not have been concluded, from the terms of the report, until the vote had been taken, and on the same day the vote was taken the agreement was rescinded.

5. The agreement under which the plaintiff sues is not under the seal of the corporation, and is not binding on them.

6. That the by-law passed on the 15th July, 1868, was bad, and no other by-law to carry out the terms of the report of the 6th May, 1868, was passed until the 7th December, whereas the agreement with the plaintiff was rescinded on the 18th July, 1868, before the by-law of December, 1868, and yet all the expenses were incurred, and dredge brought, in May, 1868, before the time allowed by the report of 6th May, 1868.

John Bell, Q. C., of Belleville, shewed cause. The matter done or to be done under the agreement was within the power of the corporation to do, and being reduced to writing in the shape of a report adopted by the council, the agreement was binding on the corporation to the extent that it was performed by the plaintiff: *Perry* v. *The Corporation of Ottawa*, 23 U. C. R. 391.

Flint, contra. The evidence shews that the engagement to bring over the dredge was made in the middle of April, whilst the report was not made until the 6th May, and is then to be subject to a vote of the ratepayers. The next report of the committee was on the 17th of June, and the by-law passed on the 15th July was bad, and the only operative by-law was that passed in December, long after the bargain was made: *Wingate* v. *The Enniskillen Oil Refining Co.*, 14 C. P. 380; *McLean* v. *Corporation of Brantford*, 16 U. C. R. 347; *Nicholson* v. *Guardians of Bradfield Union*, L. R. 1 Q. B. 620; *Add.* Con. 700; *Calvin* v. *Provincial Ins. Co.*, 20 C. P. 21, 267; *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815; *Arnold* v. *Mayor of Poole*, 4 M. & G. 860; *Diggle* v. *London and Blackwall Railway Co*, 5 Ex. 442; *London Dock Co.* v. *Sinnott*, 27 L. J. Q. B 129. Here the defendants received nothing from the plaintiff. He merely brought his own property from the United States to Canada at his own expense. As far as he is concerned, no part of it comes within the rule laid down in L. R. 1 Q. B. 620.

RICHARD, C. J., delivered the judgment of the Court.

It is not suggested that it was not within the scope and authority of the defendants as a corportion to enter into an agreement of the kind which the plaintiff contends was made with him. The only ground urged is, that they did not execute the agreement under their seal, and, being a corporation, are not bound by it.

The Courts of England, from time to time, have been inclined to hold that when the contract is within the scope and powers of the corporation it is good, though not under seal. Many of the cases are in relation to trading corporations and their contracts, and in one of the recent decisions Chief Justice Cockburn speaks of the rule requiring the corporation to execute contracts under seal as "a relic of barbarous antiquity."*

Though many of the cases arise out of contracts with trading corporations, they are not all so. But as to other corporations, when they have received the benefit of the agreement which has been executed, the Courts have held them bound by it to the extent of paying for that which has been performed. Most of the cases are referred to in *Nicholson* v. *The Guardians of the Bradfield Union*, L. R. 1 Q. B 620; *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; S. C. in Ex. Ch., L. R. 4 C. P. 617.

In *Pim* v. *The Municipal Council of Ontario*, 9 C. P. 304, the Court of Appeals in this country, ten years ago, in relation to municipal corporations, carried the law as far, if not farther, than it has gone in England in relation to the liability of similiar bodies there on contracts not under seal.

Perry v. *The Corporation of Ottawa*, 23 U. C. R. 391, seems to me to be a strong authority in favour of the plaintiff. There a committee of the corporation was authorized to treat with and recommend to the council an engineer for making surveys, &c., for supplying the city with water, and making application to the government for the site of a reservoir. The chairman of the committee employed the plaintiff to make plans, which the Commissioner of Public Works required to see, and one of the committee wrote to the plaintiff to come to Quebec to assist in pressing the application for a site, which he did; the chairman also told him to go; and the report of the proceedings was approved by the council. The Court held the plaintiff entitled to recover.

Here the harbour committee had been apparently specially charged with looking after the harbour, and endeavouring to obtain a dredge to clean it out, and devising other means to get rid of the saw-dust that was filling it up. The expense attending these other proceedings appear to have been paid by the defendants without question.

Having failed to obtain a dredge from the Board of Works, or any other material aid from the government, they wisely concluded they had better help themselves. Learning that the plaintiff was the owner of a dredge which was

* *South of Ireland Colliery Co.* v. *Waddle*, L.R. 4 C.P. 618.

then in the United States, the committee persuaded him to offer to send for it. and to let them have it on certain terms; the first stipulation in the agreement being, that he shall send for the dredge and bring it to Belleville, doubtless that there may be no delay in the matter. The evidence shews that the committee were under the impression that it would be for the interest of the town to have the dredging done before the water in the river was low, or the current slackened. The committee report the offer to the council, say they considered it very favourable, and recommended the same for acceptance by the council. The council adopt the report of the of the committee, and the chairman informs the plaintiff of it, and persuades him to send for the dredge at once, which he does, and expends money to the extent of over $300 in bringing it to Belleville.

In the meantime the committee think a more favourable arrangement can be made for the interest of the town, and after the arrival of the dredge advertise for proposals to do the dredging, the contractor furnishing the dredge and all the implements, &c. They do not carry out the arrangement to use the plaintiff's dredge, and finally decline paying him the money he has expended in good faith in carrying out the arrangement he entered into with their express approval.

The agreement was to be subject to a vote of the people to raise the funds, if that would make any difference, and that vote was obtained long before this action was brought.

There may be some nice distinctions drawn between this case and some of the decided cases, but we think the law now has gone so far that when a contract has been entered into by the express direction of the corporation, and has been performed by the party, and the corporation has received the advantage of it, the corporation cannot set up as a defence that the contract was not under seal, always assuming, of course, that what was contracted for was a matter within the scope and powers of the corporation to contract for.

Now here the plaintiff did bring his dredge to Belleville to be used by the defendants. It is highly probable that the bringing of it was of real advantage to the defendants. The article is an expensive one to construct and there are not many of them in use, and in seeking offers for the work they require done, the fact that there was a dredge in the town, the use of which could be had for the work, would be likely to induce more favourable offers than if it had not been there. The corporation having received the advantage of the expenditures made by the plaintiff at their request, ought not, according to the modern rule which has been laid down in the decided cases, to be allowed now to set up the want of the seal to relieve them from repaying the money which the plaintiff spent in good faith at their request, in accordance with his agreement, from which they have apparently derived benefit.

We think the rule should be discharged.

Rule discharged.

COMMON PLEAS.

Reported by S. J. VanKoughnet, Esq., *Barrister-at-Law, Reporter to the Court.*)

Regina v. White.

Selling liquor on Sunday—32 Vic. ch. 32, sec. 23 (Ont.)—Medicinal Purposes—Qualification of Magistrate.

A conviction for selling liquor on a Sunday, in contravention of 32 Vic. ch. 32, sec. 23 (Ont.), omitted to state that the liquor was not supplied upon a requisition for medical purposes: *Held*, bad, and the conviction was quashed.

The only evidence offered in proof of the magistrate, before whom the recognizance in this case had been taken, not being properly qualified, was a certificate, purporting to be under the hand and seal of the Clerk of the Peace, that he did not find in his office any qualification filed by the magistrate; *Held*, insufficient.

[21 U. C. C. P. 354.]

C. S. Patterson, obtained a rule *nisi* to quash a conviction, made upon the 4th day of January, 1871, by the police magistrate of the City of Toronto, for, among other grounds taken, "That it does not appear that the liquor was not supplied upon a requisition for medicinal purposes.

The conviction was in these words: "For that he the said George White, then being a licensed tavern keeper in and for the said City of Toronto, did on the 11th day of December, 1870, the said day being Sunday, in his house and premises situate on King Street west, within the limits of the said City of Toronto, and licensed under the provisions of 'The Shop and Tavern License Act, 1868,' and in the premises licensed and specified in and by such license, unlawfully and knowingly sold to one Henry Reeve a certain quantity of wine, beer, and other spirituous and fermented liquors, to wit, one glass-full of brandy mixed with soda water, contrary to the form of the Statute in such case made and provided, this being adjudged to be his first offence against the provisions of the said Act, and George Albert Mason being the informant in the premises."

Morgan shewed cause, citing *In re Barrett*, 28 U. C. Q. B. 559.

Patterson (*Green*, with him), contra, cited *Rex* v. *Stone*, 1 Ea. 639; *Paley* on Convictions, 178; *Regina* v. *Boyes*, 4 Pr. Rs. 195; *Rex* v. *Jenkins*, 1 T. R. 82.

Galt, J.—The clause of the Act under which this conviction was made is the 23rd sec. of Ont. Stat. ch. 32 of 32 Vic, which is as follows: "In all cases when by the laws of the Province of Ontario intoxicating liquors are or may be allowed to be sold by wholesale or retail, no sale or other disposal of the said liquors shall take place therein or on the premises thereof, or out of or from the same, to any person or persons whomsoever, from or after the hour of seven of the clock on Saturday night till the hour of six of the clock on Monday morning, thereafter, and during any further time on the said days, and any hours on other days during which, by any by-law of the Municipality wherein such place or places may be situated, the same, or the bar-room or bar-rooms thereof, ought to be kept closed, save and except in cases where a requisition for medicinal purposes, signed by a licensed medical practitioner, or by a justice of the peace, is produced by the vendee or his agent; nor shall any such liquor be permitted or allowed to be drunk in any such

places, except as aforesaid, during the time prohibited by this Act for the sale of the same."

It is stated in *Paley* on Convictions, p. 232, that when the enacting clause of a Statute constitutes an act to be an offence under certain circumstances and not under others, then, as the act is an offence only *sub modo*, the particular exceptions must be expressly specified and negatived; but, when a Statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso or exception in favour of particular cases, or in the same clause, but not in the enacting part of it, by words of reference and otherwise, then the proviso is matter of defence or excuse which need not be noticed in the information or conviction. See also *Van Boven's* case (9 Q. B. 669), *Thibault* v. *Gibson* (12 M. & W. 88). In the clause of the Statute under which this conviction took place, there is an express exception, "save and except in cases where a requisition for medicinal purposes" is produced by the vendee. In my opinion this exception ought to have been negatived in the conviction. In the *King* v. *Jukes* (8 T. R. 542) Lord Kenyon says, "This is not an objection of form but of substance, and the reason is well given by Hawkins why a conviction should negative all the exceptions in the enacting clause, because the party cannot plead to such a conviction, and can have no remedy against it, but from an exception to some defect appearing on the face of it; and all the proceedings are in a summary manner. Therefore the conviction itself should shew that the party accused had not the defence which the Act gives to him, if true."

HAGARTY, C. J.—I agree with the result of the judgment just delivered.

The offence is wholly created by the statute, and may be described as a selling of liquor on Sunday in any case, except in cases where a requisition for medicinal purposes is produced To commit a man for selling on a Sunday, may be no offence whatever under the Act. The omission to negative the existence of the requisition for medicinal purposes, seems clearly fatal on all the authorities.

I at first thought that the statutable form given in the general Act, referred to in sec. 25, might help, or something in the Act itself (Con. Stat. C., ch. 103).

Sec. 44 enacts: "If the information or complaint negative any exemption, exception, proviso, or condition in the statute, on which the same is framed, it shall not be necessary for prosecutor or complainant to prove such negative; but defendant may prove the affirmative thereof in his defence," &c. But nothing is said as to the conviction.

The form of conviction allowed to be used contains the directions in the blank, "stating the offence, and the time and place when and where committed." See also the Act of 1869, ch. 31. This leaves the statement of the offence just where it was.

The same provision as to regulating exemptions appears in the Act of 1869, ch. 31, sec. 44.

Great latitude is allowed for variances between the information and the evidence; and sec. 24 of the Act of 1869, ch. 31, allows information in many cases, "without oath or affirmation as to the truth thereof."

But we cannot refrain from expressing great surprise at the proceedings in this case.

One G. A. Mason lodges a sworn information against defendant for selling liquor on Sunday without a license. The charge and conviction are shewn to be untrue; for on the same information a conviction is made of a totally different offence, viz., having a license and selling liquor on Sunday.

It can hardly increase public confidence in the administration of justice, if an informer, who swears a man is doing an act without a license, when the fact of his having a license was so readily ascertainable, be allowed, on the same information, to share a penalty imposed on the defendant for doing an act made penal on the express grounds of his having a license. I do not think it necessary, in the view we take, to discuss the question as to the cumulative penalties on second and third convictions. It would be only reasonable to suppose that the leading idea of this increased punishment was, that if a person be once convicted of an offence, his repetition thereof, after experiencing the power of the law, should justly ensure to him a more severe penalty.

Lodging on the same day information for distinct offences, committed on previous distinct days, and then adjudicating on the second and third offences as being offences committed after previous convictions, all three convictions being made on the same day, and probably at the same time, may possibly be within the letter of the law (as to which we express no opinion), but can hardly be within its spirit, and not likely to answer the purpose of warning and correction, which we think the Legislature intended.

An objection was taken by Mr. Morgan, that the recognizance was insufficiently taken before an unqualified Magistrate. If this objection be open to him, he has offered no legal proof thereof. He has simply filed a certificate, purporting to be under the hand and seal of the Clerk of the Peace, that he does not find in his office that any oath of qualification has been filed by "Nathaniel Dickey." The recognizance appears to be taken before, and is signed by "N. Nickey, J. P."

Even if this novel method of proving the matter desired to be brought before us be correct, we have no means of knowing that the certificate in any way refers to the same person whose name is attached to the recognizance.

GWYNNE, J., concurred.

Conviction quashed.

ELECTION CASES.

WEST TORONTO ELECTION CASE.

(ARMSTRONG v. CROOKS.)

Controverted elections Act, 1870, 32 Vic., Cap. 21, Sec. 52—Return to writ—Time for filing petition—Holidays—Form of petition—Treating.

Held, 1. That the twenty-one days limited for filing an election petition after the return of the writ are to be reckoned from the time of the receipt of the return by the Clerk of the Crown in Chancery, and not from the time of mailing by the returning officer.

2. Good Friday and Easter Monday are holidays within the meaning of the Act, and they are not to be reckoned in computing the twenty-one days.

3. The joint effect of Stat. Ont. 32 Vic., cap. 21, and the Ontario Interpretation Act, 31 Vic., cap. 7, sec. 1, is,

that when the word "holiday" is used it includes the above days as "set apart by Act of the Legislature."
4. The word "treating" refused to be struck out of the petition though not specifically prohibited by the Act

[Chambers, May 17, 1871.—*Hagarty*, C. J., C. P.]

The respondent was the member elect for the West Riding of the City of Toronto. On the 4th April the returning officer mailed his return to the Clerk of the Crown in Chancery, under sec. 52 of 32 Vic. cap. 21; and on the following day this return was received and filed by that officer. On the 1st May the petition was filed, which in general terms charged the respondent or his agents with bribery, treating, and undue influence, following the form recited in the case of *Beal* v. *Smith*, L. R. 4 C. P. 145.

Bethune, on behalf of the respondent, obtained a summons calling on the petitioner to show cause why the petition should not be struck off the files, on the ground that it was filed after the period of twenty-one days from the return to the writ of election; or if filed in time, to amend it by striking out the allegation of "treating" or otherwise, so as to state an offence contrary to the statute in that behalf.

The points mainly relied on were:—that the twenty-one days commence to run from the date of the return, or from the date of mailing: that the first and last of the twenty one days are inclusive, and that Good Friday and Easter Monday, which intervened during that period, are not holidays within the meaning of the act, not having been "set apart by the Legislature."

R. A. Harrison, Q. C., showed cause.

The intention of the Legislature was to give twenty-one clear business days within which to file the petition.

The time runs from the receipt by the Clerk of the Crown in Chancery, and not from the date of or from the time of mailing the return. If never received in the Chancery, great difficulties would arise from holding that the mere mailing of the return was sufficient.

The day on which the return was made is to be excluded: *Pugh* v. *Duke of Leeds*, Cowper, 714; *Wilson* v. *Pears*, 2 Camp. 294; *Ammerman* v. *Digges*, 12 Irish C. L. Rep. Appendix I; *Isaacs* v. *Royal Insurance Co*, L. R. 5 Ex. 296; *Pegler* v. *Gurney*, 17 W. R. 316; *Ib*, L. R. 4 C. P. 235.

As to holidays, the Ontario Interpretation Act and the Election Act must be read together. The latter excludes days set apart as public holidays by the Legislature of Ontario, and in the former the word "holidays" includes, among other days, Good Friday and Easter Monday.

As to striking out the allegation of treating, see *Beal* v. *Smith*, L. R. 4 C. P. 145; Rogers on Elections, 8th edn.; Clarke on Elections.

Crooks, Q. C. (in person), and *Bethune*, supported the summons:

Rule 166, under the Common Law Procedure Act, should apply, and both days are included: *Morell* v. *Wilmot*, 20 U. C. C. P. 378; *Morris* v. *Barrett*, 7 C. B. N. S. 139. Proceedings on a petition are similar to suits, and the rules applying to the latter should apply to them. As to the rule of computation at common law, see *Regina* v. *Justices of Derbyshire*, 7 Q. B. 193; *Regina* v. *Justices of Middlesex*, 2 Dowl. N. S. 719; *Rex* v. *Justices of Middlesex*, 17 L. J. M. C. 111.

The returning officer was *functus officio* from the time he made his return, and had completed a perfect act as soon as he executed the return. The Clerk in Chancery was not a public officer, and was under no obligation to show his papers or to give any information; and the public and the candidates would not be injured by the returning officer failing to send the return to the clerk, as the returning officer had to file his returns also in the Registry office, and had to send a copy to each candidate.

As to the holidays, the statute is explicit, and our Interpretation Act should not be referred to except in case of doubt or the silence of the particular act. The act excepted public holidays "set apart" by the Legislature of Ontario. No such holidays, and in fact no holidays, had been so set apart; and these words, "set apart," mean *hereafter* to be set apart. What was meant was a non-working day—a day like Sunday. Coke, 2 Inst. 264, shows that there is a distinction between the kinds of holidays; and the Legislature had this in contemplation when in the one act they declared Good Friday and Easter Monday "holidays" merely, and in the other act they excepted "public holidays." And see Tomlin's Law Dictionary, "Holiday," Lush's Prac. 352.

HAGARTY, C. J., C. P.—It is first contended, for respondent, that the twenty-one days are to be reckoned from the time of the returning officer making or mailing his return, and not from the time of its being received by the Clerk in Chancery. This depends on the meaning of section 6 of the Controverted Elections Act of 1871. The words are: "The petition shall be presented within twenty-one days after the return has been made to the Clerk of the Crown in Chancery of the member to whose election the petition relates," &c. By section 52 of the 32 Vic. cap. 21, the returning officer, as soon as he receives all the poll-books, adds them up, &c., "and shall within ten days thereafter make and transmit his return by mail to the Clerk of the Crown in Chancery; and he shall also, upon application, deliver to each of the candidates or their agents, or if no application be made, he shall within the same period transmit by mail to each candidate a duplicate of such return, which duplicate shall stand in lieu of an indenture." Section 56 provides that "the returning officer shall forward to the Clerk of the Crown in Chancery, with his return to the writ of election, the original poll-books and lists of voters used at that election, duly certified as such by him."

The respondent contends that when the returning officer makes and mails his return, his duty is completed; that the return has then been made to the Clerk in Chancery, and that the twenty-one days then begin to run. I am of opinion that the time is to be reckoned from the return, *i. e.*, the actual return into the Clerk in Chancery's office or custody, and that the mere act of the returning officer in making his return and mailing it to the Clerk is not what is meant by the words used. It appears to me that the idea is, that the return under section 52, and the original poll-books and lists of voters, are to be finally placed on record, as it were, in the Clerk's office, where all such records are to be collected and kept; and when it is said "after the return has been made to the Clerk of the Crown in Chancery," it is the same as if the words were "after the writ of election and return thereto, &c., have been returned into Chancery," which

latter words I think must clearly mean, then actually being in the Clerk's custody.

The respondent argues that there is no provision for inspecting the records in the Clerk's office, and the petitioners have no legal right to search there. Be that as it may, I do not think it can affect the decision. If the returning officer making and duly mailing the return commences the twenty-one days, then if by a post-office blunder the papers went astray and did not reach the Chancery till the lapse of twenty-two days, the time would have expired, and the return had never been actually made to the Clerk in Chancery in the sense of giving that officer custody of the record. If we were speaking of a writ of execution, and either by statute or rule of court a party to a suit had the right to take some further proceeding within twenty-one days after the return of such writ made by the sheriff to the court from which the writ issued, my strong impression is that the twenty-one days would certainly count from the actual receipt of the returned writ into the court, and not from some day when a sheriff in Ottawa or Sandwich wrote his return and put it into the post office properly addressed to the clerk of the court, even though, as here, he was by law directed to make and mail such return to the court. If the writ or return here had been lost or destroyed in transmission, and never reached its address, there would of course be a remedy, and another return must be made, as best could be done, and the twenty-one days would count from the actual receipt in Chancery of the substituted return. The provision in section 56 for the simultaneous return of the original poll-book, &c., to the Clerk in Chancery, affords another reason, I think, to show that the time should count from the actual depositing of all these records in the proper department, where any objection apparent on their face could be properly examined.

I notice in the Controverted Elections Act of Canada, Con. Stat. Can cap 7, sec. 3, a provision that "if the day on which the return upon such election is brought into the office of the Clerk of the Crown in Chancery is a day on which Parliament is not in session, or is one of the last fourteen days of any session, then the petition shall be presented within the first fourteen days of the session of Parliament commencing and held next after the day on which such return has been so brought into the office of the Clerk in Chancery," &c. The preceding statute had provided for the returning officer making an indenture with the electors as to the return, and section 70 provided for his transmitting the original poll-books with the writ of election and his return to the Clerk of the Crown in Chancery. I cite this as merely illustrative of the meaning Parliament has placed upon somewhat ambiguous words. My opinion on this point is against the respondent.

It is next objected that the petitioners have no right to exclude Good Friday and Easter Monday from the twenty-one days. Section 52 of our late act says, "In reckoning time for the purposes of this act, Sunday and any day set apart by any act of the Legislature of Ontario for a public holiday, fast or thanksgiving, shall be excluded." The respondent contends that the Legislature has never in fact set apart any day for a public holiday. This is true in terms; there has been no specific setting apart of any such day. But the petitioners rely on the Ontario Interpretation Act, 31 Vic. cap. 1. Section 7 says, "Subject to the limitations in the 6th section (which provides that 'unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction,' &c.), in every act of the Legislature of Ontario to which this section applies, * * * (13thly,) the word 'holiday' shall include Sunday, New Year's Day, Good Friday, Easter Monday and Christmas Day, the days appointed for the birth-days of her Majesty and her Royal successors, and any day appointed by proclamation for a general fast or thanksgiving." Now, as it appears to me, the weight of respondent's objection is that our late act says "any day set apart by any act of the Legislature, &c., for a public holiday;" and that, as a matter of strict construction, the Legislature never has in terms set any day apart. Had the words been "Sunday and any public holiday, fast or thanksgiving," I do not think there could be any serious question but that the Interpretation Act would require us to read it so that the word "holiday" should include Good Friday, Easter Monday, &c. If respondent's contention be right, there can be no holiday in Ontario on this Election Act, unless and until an Act be passed expressly setting certain named days apart. We must of course read the two clauses together. It would then read in popular language thus, "Whenever we, the Legislature use the word 'holiday,' we declare that by that we mean Good Friday, Easter Monday, &c., and any further days appointed by proclamation, &c. Then we tell you in the Election Act, in reckoning time, not to include any day which we, the Legislature, set apart as a public holiday, fast or thanksgiving. We have already declared that by holiday it means these days in question."

It is to be noted that the "fast or thanksgiving" is not fixed or to be fixed by Act of the Legislature, it is by proclamation. So that by respondent's argument a proclaimed fast or thanksgiving could not be excluded from the reckoning, as it was not so set apart by any Act of the Legislature. But I consider the "setting apart by Act of the Legislature" has in this cause been already defined in the case of a fast or thanksgiving, where it shall be proclaimed as such. I think in the same manner the words "public holiday set apart by Act of the Legislature" is answered. The joint effect of the two clauses read together is that when the word "holiday" is used, it includes these two days as being set apart by Act of the Legislature.

I observe in the Election Act of 1868-9 the word "holiday" does not occur, but section 30 declares that the day of polling shall not be a Sunday, New Year's Day, Good Friday, Christmas Day, First of July or Birthday of the Sovereign. In the Interpretation Act of Canada, 22 Vic. ch. 5 sec. 12 defines what the words "holiday" shall include—Sunday, New Year's Day, Epiphany, Annunciation, Good Friday, &c., omitting Easter Monday and any day appointed by proclamation, &c. In the Dominion Interpretation Act, 31 Vic. ch. 1 sec. 15, it says the word "holiday" shall include Sunday, Good

Friday, &c., &c., Easter Monday and any day appointed by proclamation. It should be observed that in these interpretation Acts the word is "holiday," not "public holiday." I do not consider the respondent has succeeded in making any valid distinction between the words for the purposes of this application.

I decide against the objections. I think, in so doing, I obey the directions of our Interpretation Act in giving the words before me, "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment according to their true intent, meaning, and spirit".

The remaining questions are as to amending the petition by striking out the allegations of "treating" or otherwise so as to state any offence contrary to the statute. The petition is drawn in the widest and vaguest terms. It charges simply "bribery, treating and undue influence." This general form seems sanctioned by the English Practice (See *Beal* v. *Smith*, L. R. 4, C. P. 145), where the allegations seemed precisely similar. Bovill, C.J., in giving judgment, says:—"It seems to me that it sufficiently follows the spirit and intention of the rules, and no injustice can be done by its generality, because ample provision is made by the rules to prevent respondents being surprised or deprived of an opportunity of a fair trial by an order for such particulars as the Judge may deem reasonable."

Our statute does not specifically prohibit "treating" by name, and certain provisions in the English Acts as to giving meat or drink to individuals are omitted. Our statute, section 61, prohibits the furnishing of entertainment to any meeting of electors assembled for the purpose of promoting such elections, or pay for, procure or engage to pay for, any such entertainment, except at a persons residence. Now, I do not feel at liberty to insist in an alteration in the form of the petition, as possibly under the general term of "treating" some matter may be gone into, coming within our law.

*Summons discharged.**

CORRESPONDENCE.

To the Editors of the Law Journal.

School law—Hiring of teachers.

Gentlemen,—Would you kindly give your opinion of the following case through the columns of the next issue of the Law Journal, the question being one of general interest, especially to school trustees and teachers:

A school teacher is engaged by trustees to teach for one year from, say 1st January; and the day before the summer vacation commences, the teacher, at his own request, is released from his agreement, in order that he may engage in some other business, being desirous of quitting teaching, for the time at least. Can he, under these circumstances, compel the trustees to pay him for the summer vacation, and if so, would the teacher, who is engaged by the trustees to complete the term be also entitled to be paid for the same vacation, although engaged during the vacation or after it has expired. I understand that the opinion is held in the Educational Office in Toronto that both teachers would be entitled to be paid by the same trustees for the summer holidays, which view of the case seems so unreasonable and inequitable that I have taken the liberty of asking your opinion on the matter.

Your attention will confer a favor on

Respectfully yours,

Trustees.

Clinton, 26th July, 1871.

[We understand, from the best authority, that it was never "held in the Education Office in Toronto that both teachers would be entitled to be paid by the same Trustees for the summer holidays." As a matter of law, we should say that employment for a year obliges the teacher to continue in his employment for twelve months, and any abandonment of his employment during that period, with however the assent of the trustees, entitles him to payment of the proportionate part of his salary. He would of course be entitled to all the holidays which are allowed during the period of his engagement, if he keeps it; and his successor, when he takes employment, is entitled to those holidays which occur during his period of service.

Some trustees, who have a love of change, employ teachers for short periods, and *economically* manage to be without teachers during holidays. Such economy saves money, but sacrifices the best interests of the school under their charge. Changing teachers is the bane of every school which is so mismanaged.]—Eds. L. J.

A written promise to pay a certain sum of money at a certain time, and to a certain person, is a negotiable promissory note, and no words added after the promise which facilitate the collection of the note in case of default, unless they contain some condition in the happening of which the note is not to be paid, affect its negotiability.—*Zimmerman, et al.* v. *Andersen.* [*Penn. Legal Gazette*].

* From the above judgment the respondent appealed to the Court of Queen's Bench, but the decision was upheld.—Eds. L. J.