DIARY FOR AUGUST.

1. Tues. *Lammas.*
6. SUN. *9th Sunday after Trinity.*
13. SUN. *10th Sunday after Trinity.*
14. Mon. Last day for County Clerks to certify county rates to municipalities in counties.
20. SUN. *11th Sunday after Trinity.*
21. Mon. Long Vacation ends.
23. Wed. Last day for setting down and giving notice for re-hearing in Chancery.
27. SUN. *12th Sunday after Trinity.*
28. Mon. County Court Term (York) begins.
31. Thur. Re-hearing Term in Chancery.

The Local Courts' AND MUNICIPAL GAZETTE.

AUGUST, 1871.

FORGERY AND THE QUARTER SESSIONS.

Our attention has again been called to this matter by a correspondent who sends us an extract taken from a local paper, of the proceedings at the General Sessions of the Peace for the County of Waterloo. It appeared that a person charged with forgery had given bail to appear at the next court of competent jurisdiction. He attended at the Sessions, and the witnesses for the Crown and the prisoner were also in attendance. The County Attorney, although entertaining the opinion that the crime could be tried at the Sessions, as the matter was one of grave doubt, asked the Chairman to decide whether the Court would try the case or not in order that he might know whether to go before the Grand Jury with an indictment. He referred at length to the remarks in the CANADA LAW JOURNAL (7 C. L. J. N. S. 31) bearing the subject.

His Honor Judge Miller, after going into the matter very fully, and while agreeing with the Crown Attorney as to the power of this Court to try cases of forgery, stated that the Court had decided not to try the case in consequence of the *dictum* of Chief Justice Robinson in *Reg.* v. *Dunlop*, 15 U.C. Q.B. 118. and in view of the fact that the question of the jurisdiction of this Court in such cases was, as he was informed, under the consideration of one of the Superior Courts, and when the jurisdiction appeared to be involved in so much doubt, the Court would not now try the case, especially since the accused was out on bail and could appear for his trial at the next Fall Assizes.

We must refer our correspondent and readers generally to the case of *Reg.* v. *McDonald*, which was reserved by the Chairman of the General Sessions of the County of Elgin, at the last December sittings, and wherein the Court of Queen's Bench decided last term that the Courts of Sessions have no jurisdiction in cases of forgery. The published report of the case will probably show that the question of jurisdiction in cases of perjury was also considered and authoritatively determined.

ELECTION PETITIONS.

We devoted most of our space in the August number of the *Law Journal* to the consideration of matters arising under the recent Election Acts. The report of the Stormont case, so far as it has gone, and the notes of decisions in the Brockville case, have been carefully prepared, and will be read with interest, especially by those engaged in working up the election cases which are yet to be tried.

An extra number of copies of the August issue of the *Journal* have been struck off, and may be obtained from the publishers.

We take from the report of the *Stormont Case* the following summary of the points of law decided by Chief Justice Richards on the scrutiny:

1. That the writ of election and return need not be produced or proved before any evidence of the election is given.

2. On a scrutiny the practice in the English cases is for the person in a minority to first place himself in a majority, and then the person thus placed in a minority to strike off his opponents' votes.

3. The name of a voter being on the poll book is *primâ facie* evidence of his right to vote. The party attacking the vote may either call the voter, or offer any other evidence he has on the subject.

4. A voter being duly qualified in other respects, and having his name on the roll and list, but entered by mistake as tenant instead of owner or occupant, or *vice versâ*: *held*, not disfranchised merely because his name is entered under one head instead of another.

5. The only question as to the qualification of a voter settled by the Court of Revision, under the Assessment Act, is the one of value.

6. Where father and son live together on the father's farm, and the father is in fact the principal, to whom money is paid, and who distributes it, and the son has no agreement

binding on the father to compel him to give the son a share of the proceeds of the farm, or to cultivate a share of the land, and the son merely receives what the father's sense of justice dictates: *held*, that the son had no vote.

7. In a milling business, where the agreement between the father and the son was, that if the son would take charge of the mill, and manage the business, he should have a share of the profits, and the son, in fact, solely managed the business, keeping possession of the mill, and applying a portion of the proceeds to his own use: *held*, that the son had such an interest in the business, and, while the business lasted, such an interest in the land, as entitled him to vote.

8. Where a certain occupancy was proved on the part of the son distinct from that of the father, but no agreement to entitle the son to a share of the profits, and the son merely worked with the rest of the family for their common benefit: *held*, that although the son was not merely assessed for the real, but the personal property on the place (his title to the latter being on the same footing as the former), he was not entitled to vote.

9. Where the objection taken was, that the voter was not at the time of the final revision of the Assessment Roll, the *bonâ fide* occupant or tenant of the property in respect of which he voted, and the evidence shewed a *joint* occupancy on the part of the voter and his father on land rated at $240: *held*, that the notice given did not point to the objection that if the parties were joint occupants, they were insufficiently rated.

[The learned Chief Justice intimated that if the objection had been properly taken, or if the counsel for petitioner (whose interest it was to sustain the vote) had stated that he was not prejudiced by the form of the objection, he would have held the vote bad.]

10. Where the father had made a will in his son's favor, and told the son if he would work the place and support the family, he would give it to him, and the entire management remained in the son's hands from that time, the property being assessed in both names, the profits to be applied to pay the debt due on the place: *held*, that as the understanding was that the son worked the place for the support of the family, and beyond that for the benefit of the estate, which he expected to possess under his father's will, and that he did not hold immediately to his own use and benefit, and was not entitled to vote.

11. Where the voter had only received a deed of the property on which he voted on the 16th August, 1870, but previous to that date had been assessed for, and paid taxes on the place, but not owning it: *held*, that not possessing the qualification at the time he was assessed, or at the final revision of the roll, he was not entitled to vote.

[A question being raised in this case as to the sufficiency of the notice, that the voter was not actually and *bonâ fide* the owner, tenant or occupant of real property within the meaning of sec. 5 of the Election Law of 1868, the learned Chief Justice remarked, "The respondent's counsel does not say that he is prejudiced by the way in which the objection is taken; if he had done so, I would postpone the consideration of the case. It is objected that the case, No. 9, *supra*, should be subject to the same rule, and if the question had been presented to me in that view, I think I should have felt at liberty to go into the case, giving time to the petitioner to make further inquiries, if he thought proper."]

12. Where the voter had been originally, before 1865 or 1866, put upon the Assessment Roll merely to give him a vote, but by a subsequent arrangement with his father, made in 1865 or 1866, he was to support the father and apply the rest of the proceeds to his own support: *held*, that if he had been originally put on merely for the purpose of giving him a vote, and that was the vote questioned, it would have been bad, but being continued several years after he really became the occupant, he was entitled to vote, though originally the assessment began in his name merely to qualify him.

13. Where the voter was the equitable owner, the deed being taken in the father's name, but the son furnishing the money, the father in occupation with the assent of his son, and the proceeds not divided: *held*, that being the equitable owner, notwithstanding the deed to the father, he had the right to vote. *Held*, also, that being rated as tenant instead of owner did not affect his vote.

14. Where the voter and his son leased certain property, and the lease was drawn in the son's name alone, and when the crops were reaped the son claimed they belonged to him solely, the voter owning other property but being assessed for this only and voting on

it: *held*, that although he was on the roll and had the necessary qualification, but was not assessed for it, he was not entitled to vote.

15. Where the voter was the tenant of certain property belonging to his father-in-law, and before the expiration of his tenancy, the father-in-law, with the consent of the voter (the latter being a witness to the lease), leased the property to another, the voter's lease not expiring until November, and the new lease being made on the 28th March, 1870: *held*, that after the surrender by the lease to which he was a subscribing witness, he ceased to be a tenant on the 28th of March, 1870, and that to entitle him to vote, he must have the qualification at the time of the final revision of the Assessment Roll, though not necessarily at the time he voted, so long as he was still a resident of the electoral division.

16. Where a verbal agreement was made between the voter and his father in January, 1870, and on this agreement the voter from that time had exercised control, and took the proceeds to his own use, although the deed was not executed until September following: *held*, entitled to vote.

17. Where the voter was born in the United States, both his parents being British-born subjects, his father and grandfather being U. E. Loyalists and the voter residing nearly all his life in Canada: *held*, entitled to vote.

In the *Brockville Case* the following points were decided on scrutiny by Chief Justice Hagarty:—

An error in assessing as owner, tenant or occupant, is immaterial, if the voter be qualified in any of these characters.

If a man be duly assessed for a named property on the roll, though there was a clerical error in describing such property in the voter's list, or erroneously setting down another property on the voter's list, if no question or difficulty arose at the poll as to taking the oath, the vote will not be struck off on a scrutiny.

When a voter, properly assessed, who was accidentally omitted from voter's list for polling sub-division No. 1, where his property lay, and entered in the voter's list for sub-division No. 2, voted without question in No. 1, though not on the list—vote held good.

Quære, Even if accidentally omitted from voter's list, should vote be received? of course if questioned at the poll, it could not have been received, not being on the voter's list.

When it is proved that an agreement exists (verbal or otherwise), that the son should have one-third or one-half the crops as his own, and such agreement is *bona fide* acted on, son being duly assessed—vote held good—the ordinary test being, had the voter an actual existing interest in the crops growing and grown.

Where it is proved that for some time past the owner has given up the whole management of the farm to his son, retaining his right to be supported from the produce of the place, the son dealing with the crops as his own, and disposing thereof to his own use—the son's vote held good.

A clearly established course of dealing or conduct for years as to management and disposition of crops, and acts done by son in management of farm, held sufficient to establish an interest in the crops in the son, though the evidence of any original agreement or bargain not clear.

If the evidence would warrant a jury finding the crops (say in the year preceding the last assessment) to have been the property of the voter—the vote is good.

No question of actual title is to be entertained. Occupancy to the use and benefit of the occupant being sufficient.

Where the owner died intestate, and the estate descended to several children, only the interest of the actual occupants is generally to be considered. Unless the occupant be shewn to be receiving the rents and profits, and on account of a party interested, though not in actual possession, a mere liability to account is not to be considered.

The widow of an intestate owner continuing to live on the property with her children, who own the estate, and work and manage it, should not, till her dower be assigned, be assessed, nor should any interest of hers be deducted from the whole assessed value, she not having the management of the estate.

We are requested to state that Mr. C. A. Brough, barrister, of this city, is preparing a manual on the existing Election Law, with notes of the decisions in England and Canada, and an introduction treating of the subject of agency as affecting Parliamentary Elections.

We trust the work may be attended with that success which the ability of the author warrants us in predicting that it will deserve.

JUDGE FAIRFIELD.

We regret to record the death of David L. Fairfield, Esq., Judge of the County Court of the County of Prince Edward, which took place on the 8th instant.

The deceased gentleman, who was in his 69th year, was one of the earliest settlers of the Bay Quinté district, and had held the position of County Judge for nearly a quarter of a century. Dignified but courteous in his bearing, a man of unimpeachable integrity and excellent judgment, his loss will be very deeply felt in the community of which he has been so long a useful and respected member.

SELECTIONS.

CONTRACTS IMPOSSIBLE OF PERFORMANCE.

A new case of importance confirms a rule which, however, has been far from invariably assented to. *Robinson* v. *Davison* excited some interest when it was first heard at the assizes, and in its form in the Court of Exchequer (24 L. T. Rep. N. S. 755) it loses none of that interest for lawyers. It will be remembered that the defendant was the husband of the famous Arabella Goddard, and he undertook that she should perform at a particular concert. She was unable to do so owing to illness. Could damages be recovered for the breach of the contract? The Court of Exchequer said, No.

It was argued in *Thorburn* v. *Whitacre* (2 Lord Raym. 1164). that there are three descriptions of impossibility that would excuse a contractor—legal impossibility, as a promise to murder a man; natural impossibility, as a promise to do a thing in its nature impossible; and, thirdly, that which is deemed as "*impossibilitas facti*," "where, though the thing was possible in nature, yet man could not do it, as to touch the heavens, or to go to Rome in a day." All must agree with Chief Justice Holt that these may be reduced to two—impossibilities in law, and natural impossiblity. Without discussing all the cases relating to impossible contracts, which will be found collected in a note to Mr. Benjamin's work on the Sale of Personal Property, p. 428, we will confine ourselves to the effect of illness.

One of the leading cases on this subject reveals one of the delightful differences of judicial opinion with which we are familiar. In *Hall* v. *Wright* (1 L. T. Rep. N. S. 230) a plea to an action for breach of a contract to marry, was that before breach the defendant became afflicted with dangerous bodily illness, and was thereby incapable of marrying without danger to his life. The Court of Queen's Bench was equally divided; and the Exchequer Chamber was also divided, four Judges holding the plea bad, three holding that it was good. Judgment was therefore entered for the plaintiff. The contract of marriage is peculiar, and likely to be affected by bodily illness on the one side or the other; and as Baron Watson said, unless stated to be otherwise, a contract to marry must be taken—as it was stated in the declaration—to be of the ordinary kind, with all its usual obligations and incidents. It is difficult to speak of this case with any confidence one way or the other, but the view put by Mr. Justice Willes seems to be consistent with common sense—that a marriage that cannot without danger be consummated by either contracting party ought to be voidable only at the election of the other. "If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. . . . I might put the case of a real attachment, where such illness as that stated in the plea supervening might make the woman more anxious to marry, in order to be a companion and the nurse, if she could not be the mistress, of her sweetheart." Not even a lawyer can regret that the plaintiff had a verdict.

Such a case as *Hall* v. *Wright*, puts in a clearer light the accuracy of the decision in *Robinson* v. *Davison*, for the services of the performer are required for one single purpose, which purpose she was unable to accomplish; whereas, in *Hall* v. *Wright*, some of the objects of the contract might be attained, and performance of the conlract was not impossible, but only dangerous. But it is to be observed what the nature of the contract is of which the law will excuse the performance, on the ground that it is impossible. The rule and the exceptions are carefully stated by Mr. Justice Blackburn in *Taylor* v. *Caldwell* (8 L. T. Rep. N. S. 356), where he says—"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible." He then goes on to say: "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible

from the perishing of the thing without default of the contractor."

Now it is clear that no ordinary contract would contain a warranty as to the continuance of health on the part of one of the contractors, and where there is no such warranty it is hard to see how it is possible to enforce a personal contract, or to recover damages for its breach where illness prevents its performance. And there is only one further question in connection with the subject, and that is raised by Baron Cleasby, who would seem to suggest that a performer was not bound to appear and carry out her contract unless it is possible to fulfil it in all respects according to its terms. His Lordship said: "This was a contract to perform as a pianist at a concert; in truth, to be the sole performer, and to do what requires the most exquisite taste and the greatest artistic skill, and which, unless well done, would disgust the audience, who naturally expect a great deal from so celebrated a performer. That being so, the question arises, can this be done by the person engaged unless well and in good health?'

No such considerations as are here stated, can, in our opinion, be accepted as weighing on one side or the other. If a performer can scramble or struggle through an engagement even discreditably, and even, we would add, disgusting the audience thereby, and is not absolutely disabled, he is bound to go on with his undertaking. If a skilful person contracts to do a certain thing requiring the utmost skill, he cannot be excused on the ground that he is by reason of ill health incapable of fulfilling his contract as skillfully as he would have done had he been in health. It would be vain to give greater latitude to a plea of impossibility arising out of natural incapacity than has hitherto existed. The incapacity, as in *Hall* v. *Wright*, should be total for all intents and purposes, and in no degree merely partial. If it is ever held otherwise, a wide gate would be opened to the fraudulent evasion of contracts.—*Law Times.*

An interesting case affecting the rights of unprofessional advocates to appear in court was heard in Easter Term by the Queen's Bench in Ontario. The application to the court was for a prohibition to restrain certain unprofessional persons from conducting suits in the Division Courts, which are tribunals analogous to our County Courts. Looking at the Canadian statutes, the court came to the conclusion that it was manifest that the Legislature intended that only barristers and attorneys should be authorised to conduct or carry on in any court, any kind of litigation; and that consequently unprofessional persons were not entitled to have audience in the prosecuting or defending suits in the Division Courts. It was observed by Mr. Justice Wilson, that "It can only be a case of great necessity which will warrant a departure from the general, approved, and settled practice of the courts. The policy of the Legislature on this subject has plainly been to exclude all unqualified and non-professional practitioners, and Judges should give effect to that legislation." Although it was held in *Collier* v. *Hicks* (2 B. & Ad. 662). that "any person, whether he be a professional man or not, may attend as a friend of either party, may take notes and quietly take suggestions and give advice," the Judges in *Tribe* v. *Wingfield* said that "they could never lend their authority to support the position that a person who was neither a barrister nor an attorney, might go and play the part of both; and that in such a case there was none of that control which was so useful where counsel or attorneys were employed."—*Law Times.*

BENCHERS.

In another page will be found a letter from Mr. Charley, M.P., in reference to the notice of motion which he has given that "he will call attention to the existing state of the legal profession, and to move a resolution 'that the existing state of the legal profession is not satisfactory and needs reform.'" If the House has the time and is in the humour an interesting discussion is likely to ensue. There is a proneness with all sorts of people to talk about the *personnel* of the profession. We do not think that Mr. Charley's motion is likely to lead to any practical, and certainly not to any immediate result. Indeed, the terms are almost too vague for the House of Commons to discuss.

It may, perhaps, interest our readers to be told that our fellow-subjects in Canada have consummated a radical reform in respect to the benchers. An Act has been passed to make the benchers of the Law Society of Ontario elective by the bar. All members of the bar who are not in default as to their bar fees are eligible. Besides the thirty to be elected, there are seven *ex-officio* benchers, being the gentlemen who have held the office of Attorney or Solicitor-General.

How the experiment works we shall know some day, but already there is a little discontent with the scheme. The *Canada Law Journal* remarks that only one of the *ex-officio* members is resident in Toronto, and "in distributing the thirty elective benchers between Toronto and the country it would seem proper to give about one-half to Toronto." Our transatlantic contemporary observes that county judges, clerks of the Crown and Pleas in Toronto, the master in Chancery, and referee in Chambers, and other barristers who pay no bar fees, have been decided to be ineligible. Our contemporary says, "We are sorry for this, as many of the persons who are thus held ineligible would make excellent benchers; but whilst their services are lost for the present, it may result in an amendment of the law whereby some of them may be appointed *ex-officio* benchers." Thus even

before the first election there is a desire to increase the number of non-elective members.

It is of the utmost importance that the rulers of a profession should be men of the highest repute and character. We have no election and practically no selection. The men who by their ability and character succeed in their profession and take silk, are made benchers, though there is a power reserved to the benchers not to invite, a power very rarely exercised. It may be said that the Lord Chancellor by selecting the Q.C.'s, virtually selects the benchers; but this is not true in fact. The men whose standing and position entitle them to silk are never refused. Perhaps the position of the bar in Ontario may be so different as to justify a different system. We hope that the election plan will succeed at least as well as our system does. Its greater success might dispose us to entertain a project of elective benchers in England.—*The Law Journal.*

The Courts of America are in conflict concerning the liabilities of married women, one having held that a note signed by a wife as surety for her husband, there being no consideration other than the pre-existing debt of the husband, is void; whilst another has held that indorsing notes as surety for a husband is a sufficient charge upon her separate estate. In the latter case it was said to be sufficient to allege, in addition to the ordinary allegations, the coverture of the defendant, a separate estate in her, and her intent to charge such estate. In the former case the court regarded the Act as intended solely for the benefit of married women and their children. "The statute" it was said, "neither in terms authorises a married woman to make herself liable personally for the debt of another, nor, where no consideration moves to her, can it be presumptively for her benefit. It was no part of the design of the statute to relieve her of common law disabilities for any such purpose. Those disabilities are removed only so far as they operated unjustly and oppressively, and beyond that they are suffered to remain. Having been removed with the beneficent design to protect the wife in the enjoyment and disposal of her property for the benefit of herself and her family, the statute cannot be extended by construction to cases not embraced by its language nor within its design." It will be desirable to avoid these difficulties when we come to practical legislation.—*Law Times.*

DIFFERENCE BETWEEN A RECEIPT AND A RELEASE UNDER SEAL.

A passenger who was injured in a railway accident accepted a sum of money by way of compensation, and signed a receipt which was expressed to be in discharge of his claim in full upon the railway company for all loss sustained and expenses incurred by the accident. After signing this receipt he became worse and applied for further compensation, which the railway company refused to give him; and he commenced an action at law against them, in which he claimed heavy damages. The company pleaded the common plea of payment and receipt of the sum of money in satisfaction of the plaintiff's claim, upon which the plaintiff, instead of replying to the plea, filed his bill, alleging that he had not replied because he was advised that the plea was a full and complete answer at law to his cause of action, and praying that the defendants might be enjoined from relying on the plea at the trial of the action, and from setting up the receipt as a satisfaction of the damages claim ed, except to the extent of the sum already paid. The judgment of Vice-Chancellor Malins, who granted the injunction, is not reported, but the judgment of the lords justices, who reversed the decree of the vice-chancellor, and dismissed the bill with costs, is fully reported. *Lee* v. *Lancashire and Yorkshire Railway Co.*, 19 W. R. 729.

It is, or was, a common but reprehensible practice with railway companies, after an accident had occurred, to get the sufferers to sign a receipt, accepting a sum of money down for the injuries they have sustained, before they well knew the extent of those injuries. See the remarks of the Lord Justice Mellish (19 W. R. 732) on this practice. In cases of this description a bill will lie to restrain the railway company from relying on the plea that the plaintiff in the action received the sum in accord and satisfaction (*Stewart* v. *Great Western Railway Company*, 13 W. R. 907), by reason of the fraud involved.

The bill in *Lee* v. *Lancashire and Yorkshire Railway Company*, *sup.*, was probably filed on the authority of *Stewart* v. *Great Western Railway Company*, *sup;* but in *Stewart* v. *Great Western Railway Company* fraud was alleged on the part of the company's agents, and that the company intended to rely on the receipt thus obtained as a defence to the action. This allegation gave the court jurisdiction, and enabled the lord chancellor to overrule the demurrer, although the bill did not go on to pray compensation. In *Lee* v. *Lancashire and Yorkshire Railway Company* no case of fraud was made by the bill or proved at the hearing, and the bill was dismissed on the ground that, in the absence of fraud, the plaintiff could not want the aid of a court of equity. In fact, the plaintiff did not want the aid of the court to set aside the receipt. This is apparent when we consider what the true nature of a receipt is, as distinguished from a release under seal. A release under seal extinguishes the debt (*Coppin* v. *Coppin*, 2 P. Wms. 295), or rather acts as an estoppel, and can only be set aside on bill filed, or under the equitable jurisdiction of a court of law. But a receipt, according to Abbot, C. J., in *Skaife* v. *Jackson*, 3 B. & C. 421, is nothing more than a primary acknowledgment that the money has been paid, or as Littledale, J., said in the same case, it is not an estoppel, and amounts to nothing more

than a parol declaraton of payment. In *Graves* v. *Key*, 1 B. & Ald. 313, 318, where the holder of a bill had written on it a receipt in general terms, and the question was whether the receipt was conclusive evidence that the bill had been satisfied, the following reasons were prepared by the court for delivery: "A receipt is an admission only, and the general rule is that an admission, although evidence against the person who made it, and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition. *Straton* v. *Rastal*, 2 T. R. 366; *Wyatt* v. *Marquis of Hertford*, 3 East, 147; *Herne* v. *Rogers*, 9 B. & C. 586. A receipt, therefore, may be contradicted or explained, and there is no case, to our knowledge, in which a receipt upon a negotiable instrument has been considered to be an exception to the general rule."

Lord Ellenborough's dictum in *Almer* v. *George*, 1 Camp, 392, that a receipt in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition, operates as an estoppel and is binding on him, means, according to Pollock, C. B., in *Bowes* v. *Foster*, 6 W. R. 257; 2 H. & N. 784, where the receipt in full is given as for a real receipt and discharge. *Almer* v. *George*, moreover, is distinctly overruled by *Graves* v. *Key*, *sup.*, and is not law. As Martin, B., explained in *Bowes* v. *Foster*, the fact of a release may be pleaded; but a receipt cannot be pleaded in answer to an action, it is only *evidence* on a plea of payment; and where the defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment was made. Thus, the effect of a receipt is destroyed on proof that it was obtained by fraud; (*Farrer* v. *Hutchinson*, 9 A. & E. 641), or that it forms part of a transaction which was merely colorable (*Bowes* v. *Foster*, *sup.*), and a receipt indorsed for the purchase-money, although signed by the seller is of no avail in equity if the money be not actually paid (*Coppin* v. *Coppin*, *sup.*; see *Griffin* v. *Clowes*, 20 Beav. 61), though the receipt in the body of the deed, being under seal, amounts to an estoppel, and is binding on the parties at law. *Rountree* v. *Jacob*, 2 Taunt. 141.

The question between the plaintiff and the defendant company in *Lee* v. *Lancashire and Yorkshire Railway Company*, *sup.*, was, whether the receipt covered future and consequential injuries or not. The receipt was in terms a discharge of the plaintiff's claim in full upon the company, but the plaintiff alleged that he signed it on the express condition that he should not thereby exclude himself from further compensation if his injuries eventually turned out to be more serious than was then anticipated. A receipt, as we have seen, is an admission only, which may be contradicted or explained (*Graves* v. *Key*, *sup.*), and it was accordingly open to the plaintiff to traverse the plea by denying that he received the money paid him in satisfaction and discharge of his injuries, except the injuries then known; in which case it would be properly left to the jury to say whether or not he received the money in full satisfaction and discharge. But if the plaintiff had given a release under seal in similar terms, and the defendant company had pleaded it, his evidence could not have been received to explain the instrument. In that case, if fraud had been imputed to the defendant company, two courses would have been open to the plaintiff, viz.: either to meet the plea of the release by a replication of fraud at law, or to file a bill charging fraud, and praying that the defendants might be restrained from relying on the plea. Such a bill will lie, although it does not go on to pray for compensation or any other relief (*Stewart* v. *Great Western Railway Company*, *sup.*), although there is a concurrent remedy at law. But in *Lee* v. *Lancashire and Yorkshire Railway Company*, *sup.*, fraud was not imputed, and there was no relief in respect of the receipt, which the court could give plaintiff, which he could not equally well obtain at law by rectifying the plea, and adducing evidence to show that the receipt was not intended to exclude him from further compensation.—*Solicitor's Journal.*

PROSECUTIONS AND THE POLICE.

The police have been severely censured for their conduct of the prosecution in the Eltham murder. It is said, that having constructed a theory at the commencement of the case, they devoted their entire attention to the procuring of evidence to confirm their suspicions. They believed they had got the right man, and, so believing, they could recognise no evidence that did not fall in with their preconceived views.

Undoubtedly there was much in the conduct of the case for the prosecution that proved the need for a professional public prosecutor. The proper business of the police is to gather together every fact affecting a crime, and place it in the hands of some competent solicitor, by whom all may be sifted—what is worthless put aside, and the clue followed up where the evidence is weak. The Greenwich police are not lawyers, and they were not advised by a lawyer. On the first aspect of the facts, there were strong grounds for suspicion. It must be remembered, in their justification, that they were informed of a great deal that was not legal evidence, and that in the pursuit of justice it is necessary to pick up every thread that may guide to discovery. The commentators on the conduct of the case appear to forget that the police were in possession of a great deal which, though not admissible in the witness box, is yet what is called "moral evidence"—that is to say, evidence which *influences* the judgment, though not legally controlling it. It is right to exclude such evidence at the trial, because it is open to a certain amount of ques-

tion as being in some cases unreliable; but no individual would dream of excluding those facts from his consideration on any matter, when his object was to form a fair judgment of the truth. The communications of the murdered girl to her friends as to her relationship with the accused, were properly excluded from the witness box, because it would be most dangerous to condemn a man to punishment upon statements made by some person behind his back. But the police were bound to take these statements into consideration for the purpose of investigation, and to help their own judgments in the pursuit of legal evidence. It was, to say the least of it, a remarkable coincidence that she should have said so much before the murder about a man who that very evening who was found to be going, in a muddy state, in a direction from the very spot where she was killed. Extraordinary coincidences do occur, and from the evidence adduced for the defence this appears to be one of them. But the police must act according to the usual human experience, and they would have no right to treat concurrent facts as mere coincidences until they are proved to be so, and no proof of this was given until the trial produced the witnesses who answered the probabilities by the facts. What the poor girl had said about Pook could not, without gross injustice, have been put in evidence against Pook; but it could not fail to make an impression on the mind, and to direct the suspicions of the police, and they are not to be blamed for acting upon those suspicions and following up the clue which had thus been given to them. Their error lay in not putting before the jury all the facts they had found. But, then, their answer to this is that the case was out of their hands, and had passed into the possession of the lawyers. Thus much is due to them.—*Law Times.*

There are few who know anything of courts of justice who will not agree that to sit in them continuously for even a few hours is extremely fatiguing. The newspaper critics and the public understand very little how exhausting it is to undergo an unrelaxed mental strain in a vitiated atmosphere for the greater part of an entire day. And when the subject upon which the mind is intent remains unchanged, and monotony is added to the other evils, we can believe that to endure it without flinching requires a strong constitution. But it is also to be remembered that success of the first order in the legal profession implies that he who attains it possesses not only great mental capacity, but very considerable physical strength also. When these qualifications are transferred to the Bench, and are paid for at a high rate, the country has a right to expect that they may be taxed to any limit within reason without eliciting a protest.—*Law Times.*

[True enough, provided the "high rate" is paid; in England it is, but not in Ontario.—Eds. L. C. G.]

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Fence-viewers—Award—Right of Appeal—The right of appeal to a County Court Judge against an award of fence-viewers, under 32 Vic. ch. 46, sec. 8, is not restricted to an award made under sec. 6, sub-sec. 2 of the Act, when the land benefited is in two municipalities, but extends to an award made by three fence-viewers under C. S. U. C., ch. 57, which the latter Act amends and is made part of.—*In re McDonald et al and Cattanach et al*, 5 Prac. Rep., 288.

Division Court—Interpleader—Equitable claim.—On an interpleader in the Division Court the jurisdiction of the Judge is not confined to the question of legal property: he may determine the claimant's right to an equitable interest.—*McIntosh* v. *McIntosh*, 8 Grant 58.

Alteration of School Sections—Notice to Parties Affected.—Section 40 of the Common School Act, Con. Stat. U. C. ch. 64, enacts that a township council may alter the boundaries of a school section, in case it clearly appears that all parties to be affected by the proposed alteration have been duly notified of the intended step or application.

In this case the only notice given was by the trustees of the section from which certain lots were taken by the alteration, to the trustees of the section to which such lots were added—that being the notice which it was alleged had been customary in the township in similar cases. *Held*, insufficient, and the by-law making the alteration was quashed.

The by-law was passed in February, 1870, but the clerk of the corporation did not notify the trustees of it until August—*Held*, that a motion to quash in M. T. 1870 was in time.—*Patterson and the Corporation of the Township of Hope*, 30 U. C. Q. B. 484.

Arrears of Taxes — Levy. — Where lands, which had been assessed as non-resident, became occupied, and assessed as such, *Held*, not competent for the treasurer, under section 126 of 32 Vic. ch. 36, Ont., to issue his warrant to levy arrears accrued when the lands were non-resident, the 111th to the 117th sections of the Act providing for that event.—*Snyder* v. *Shibley*, 21 U. C. C. P. 518.

Warrant of Commitment—Mandamus against Justice.—The issuing of a warrant of

commitment, under 32 & 33 Vic. ch. 31 sec. 75, is discretionary, not compulsory, upon a justice of the peace, and the Court will therefore, on this ground, as well as upon the ground that the party sought to be committed has not been made a party to the application, refuse a mandumus, if this be the proper remedy, which, in this cases, it was *held* not to be, but that the application should have been under C. S. U. C. ch. 126, sec 8.

Quære, whether an order of the Sessions, simply ordering costs of an appeal to be paid, without directing to whom they are to be paid, &c., under sec. 74 of the above Act, is regular. —*In re Delaney* v. *MacNabb*, 21 U. C. C. P. 563.

By-Law — Hucksters, etc.—A by-law of a municipal corporation, purporting to be passed under 29 & 30 Vic. ch. 52, sec. 296, sub-secs. 11 and 12, and 31 Vic. ch. 30, sec. 32 (Ont.) prohibiting any huckster, butcher, or runner, from buying or contracting for any kind of fresh meat or provisions on the roads, streets, or any place within the town on any day before the hour of 9 o'clock, a.m., between 1st April and November, or before 10 a.m. during the remainder of the year, was held bad, and ordered to be quashed.—*Wilson* v. *The Corporation of the Town of St. Catharines*, 21 U. C. C. P. 462.

Taxes—Distress—Trespass.—One N. S., the plaintiff's son, was assessed in 1868 as a freeholder, for $450 on real estate and $200 on personal property, and was on the collector's roll for county rate $9.95, school $7.02, township rate $2.60, and dog tax $2—in all $21.37. The rate did not appear on the collector's roll, and the collector was not aware how much was for real and how much for personal property. He demanded the taxes from the plaintiff, to whom N. S. had made an assignment in August, 1868, and the plaintiff offered to pay him the tax on the real estate only, but he tendered no money and required a receipt in full for the real property. The defendant thereupon seized on the premises goods which had belonged to N. S., and the plaintiff brought trespass.

Held, that he could not recover, for it was not shewn, and the Court would not assume, that any part of the amount seized for was for personal property, except the $2 dog tax; and this sum being severable, and the other sums not tendered, his seizing for it with the rest would not vitiate the whole distress.

Held, also that a demand upon the plaintiff was sufficient.—*J. L. Squire* v. *Mooney*, 30 U. C. Q. B. 531.

Division Courts.—*Held*, following *Jones* v. v. *Williams*, 4 H. & N. 706, that under the Division Courts Act, C. S. U. C. ch. 19 sec. 175, the Court has no power to stay proceedings in an action brought after the adjudication by the County Court Judge.—*Schamehorn* v. *Traske*, 30 U. C. Q. B. 543.

Vagrant Act—Form of Conviction under—Certiorari.—A conviction under 32-33 Vic. ch. 28, D., for that V. L., was in the night time of the 24th February, 1870, a common prostitute, wandering in the public streets of the City of Ottawa, and not giving a satisfactory account of herself, contrary to this statute: *Held*, bad, for not shewing sufficiently that she was asked, before, or at the time of being taken, to give an an account of herself, and did not do so satisfactorily.

Semble, proceedings having been taken under 29-30 Vic. ch. 45, D., that the evidence might be looked at; and if so it was plainly insufficient, in not shewing that the place in which she was found was within the statute, or that she was a common prostitute.

The conviction having been brought up by *certiorari*, when, under the 32 & 33 Vic. ch. 31, D., no such writ could issue—Per *Richards*, C. J., and *Morrison*, C. J., it could not be quashed, but the Court could only discharge the defendant. *Semble*, Per *Wilson*, J., that being before the Court it might be quashed.—*Regina* v. *Levecque*, 30 U. C. Q. B., 509.

Prohibitory Liquor Law.—*Held*, that the municipal council of a village, incorporated in and separated from a township, in which before and at the time of said incorporation a by-law existed prohibiting the sale of intoxicating liquors in shops and places other than houses of public entertainment within said township, could not, by a by-law not submitted for the approval of the electors of the village corporation, repeal the prohibiting by-law so far as it affected the village municipality, but that the by-law must be passed upon by the electors under 32 Vic. ch. 32, sec. 10 (Ont.)—*In re Cunningham* v. *the Corporation of the Village of Almonte*, 30 U. C. C. P., 459.

School Sections—Boundaries of—Construction of By-Law—Map.—The question being whether the plaintiff's lot, 23 in the 8th Concession of Thurlow, was within school section 16, a by-law defining the limits of sections in the Township was proved, which declared the section to be composed, among other lots, of "50 acres of the east side of lot No. 16, all of No. 17, S. ½ of No. 18, all of 19, 20, 21, 22, 23, and 24,"

(not giving the concession), excepting such portions of last mentioned lots as included in sections 13 and 19." Section 18, by the same by-law, was made to comprise parts of lots 16, 18, 21, and 22, in the 8th concession; and section 17 the N. ½ of 24 in the same concession. *Held* that the whole by-law taken together sufficiently shewed the plaintiff's lot to be in section 16.

Held, also, that the map prepared by the Township Clerk, under section 49 of the School Act, C. S. U. C., ch. 64, shewing the division of the Township into sections, was admissible as evidence.—*The Chief Superintendent of Education for U. C. (now Ontario), Appellant; in the matter between William Anson Shorey, Plaintiff, and Joseph Thresher, Thomas Davey, and Albert Jones, Defendants*, 30 U. C. Q. B., 504.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES

PARENT AND CHILD.—The Court has an absolute right in its discretion to give the custody of a child under twelve years of age to the mother.

The Court exercised this right where the only evidence that the parents were living apart through the fault of the husband, was the evidence of the wife; holding, that the Court might, in its discretion, in the interest of the child, direct the custody to be given to the mother in cases where the cause of her living apart is, on her own statement, justifiable; and the Judge is not prepared to say that he disbelieves such statement.—*Re Davis*, 3 Chan. Cham. Rep. 277.

CHATTEL MORTGAGE—MISTAKE—TRUE COPY.—An immaterial variation between a chattel mortgage and the copy subsequently filed does not invalidate the re-filing.

A mistake in the number of the lot where the chattels were, was held to be immaterial under the circumstances.

The statement annexed to the affidavit filed with the copy of the mortgage, did not give distinctly all the information required by the Act, but the affidavit and statement together contain all that was necessary: *Held*, sufficient.—*Walker* v. *Niles*, 18 Grant, 210.

PROMISSORY NOTE—SIGNED IN BLANK—LIABILITY.—Where the defendant signed, as maker, a printed form of a promissory note, and handed it to A., by whom it was filled up for $855, and the plaintiffs afterwards became endorsees of it for value without notice; *Held*, that the defendant was liable, though it might have been fraudulently or improperly filled up or endorsed. —*McInnes* v. *Milton*, 30 U. C. Q. B. 489.

TENDER—DEMAND OF RECEIPT.—Where on tendering payment of money due upon mortgage a receipt was required, and the plaintiff did not object on that ground, but gave a different reason for refusing to receive the money. *Held*, that the tender was good.

The above tender was made on the 14th April, the day when the money fell due, and on the following day it was again tendered, and refused because a receipt was insisted upon.

Held, not to support the plea of tender on the 14th, for it was after the day; but that, to avoid the effect of the previous tender, the plaintiff should have demanded the exact sum before offered.

Per Morrison, J. and *Wilson*, J., a person tendering money is entitled to require a receipt; *Richards*, C. J., doubting.—*Lockridge* v. *Lacey*, 30 U. C. Q. B. 494.

ONTARIO REPORTS.

MUNICIPAL CASES.

REGINA EX REL. PATTERSON V. VANCE.

Municipal election—Two relations—First collusive—Right of second relator to attack it.

A stranger to the proceedings in a *quo warranto* matter may, if otherwise qualified, attack them on the ground that they have been initiated in collusion with the defendant, but he cannot set up irregularities, as such, unless indeed the relator has committed them purposely, as for example, to secure the failure of his own proceedings.

[Chambers, Feb. 10, 1871.—*Mr. Dalton.*)

The relator obtained from Mr. Justice Wilson a writ of summons in the nature of a *quo warranto*, returnable before the Judge of the County Court of York, to set aside the election of the defendant as one of the aldermen for the city of Toronto. Another summons was shortly afterwards issued by Mr. Dalton (in ignorance of the application to Mr. Justice Wilson), on the relation of one Riddel, the unsuccessful opponent of the defendant at said election, to unseat the defendant and to seat the relator Riddel in his place. This latter writ was returnable before one of the judges of the Superior Courts in Chambers.

Harrison, Q. C., on behalf of Vance, applied to set aside Dr. Riddel's writ, or to make it also returnable before the County Judge, and

K. Mackenzie, Q. C., also obtained a summons to set aside Patterson's writ, on the ground of collusion between him and Vance, and for various alleged irregularities, which, however, it is not necessary to refer to, as the case went off on other grounds.

Both summonses came on for argument together, the latter being heard first, the former depending upon the result of it.

MR. DALTON.—The objection taken to the summons, which is indeed the only cause shown to it, is, that Dr. Riddel, on whose behalf it is

moved, cannot be heard to object to proceedings to which he was no party. Dr. Riddel is an elector of the ward, and was a candidate at the election.

I agree in this objection to a certain extent. One who is no party to a proceeding cannot generally be heard to object to irregularities in it, even where he has the right to complain that the proceeding is in bad faith, and affects himself.

A man may be heard to say that a proceeding between others is fraudulent against him, and injurious to him, and he may attack it on that ground; but he cannot be allowed to interfere between others, and set up errors of practice, even though they be such as a *party* could successfully urge. I liken this case in my mind to that where a creditor attacks a judgment of a third party against his debtor. He can show that it is a fraud against himself, but he cannot show, though it may be the fact, that every step to judgment in the cause has been irregular: Brent v. Perry, 5 U. C. R. 538; *Armour* v. *Carruthers*, 2 Prac. Rep. 214; *McGee* v. *Baird*, 8 Prac. Rep. 9; *Cochrane* v. *Scott*, 3 Prac. Rep. 82; *Nicholls* v. *Nicholls*, 3 Prac. Rep. 201.

So here, Dr. Riddel being a voter and a candidate at the election, can set up, if it be true, that the proceedings of the relator are not in good faith—not what they appear to be, but are intended really to favor the sitting member; because he thus shows that his interests are unfairly prejudiced,—but he cannot object to irregularities in the relator's proceedings. But, to be accurate, when I say that this applicant cannot set up irregularities, I mean strictly as irregularities; for I do not suppose that it is not open to Mr. Mackenzie to argue, if he can make it out, that the irregularities have been purposely and fraudulently committed by the relator to insure the failure of his own proceedings. Whether the neglect or omission to file any statement of the relator is of such a nature that a third party can set it up, I need not discuss, as it turns out those documents *were* filed. They had been, I am told, carried to his office by the attorney of the relator, after having been filed, but have now been restored. That I look at them now, under the circumstances, I hope no one will regard as a precedent.

The one point that I notice on this application is, whether the proceedings of the relator are *bona fide*, or are, as is suggested, intended to embarrass the cause that they affect to help.

Several circumstances connected with these proceedings have been relied on by Mr. Mackenzie which I shall not detail. The relator supported the sitting member at the election, and I quote the language of one of the affidavits as to his conduct since he has commenced these proceedings, where it is stated: "He the relator herein claimed that he had voted at the election in question for Hynes, Adamson and Vance; and although his vote was not recorded for Vance, he would still have it made right by having it entered for Vance." In another affidavit, that of the person who served this summons, occurs this passage:—"A few minutes after I served the wife of the said relator with a copy of the annexed summons, I met the said Patterson near his residence, and informed him that I had served his wife with the said summons, when he said, with an oath, that he was not going to attend until he got his pay."

The relator makes no answer to these things, so it is hardly necessary to discuss his conduct further; and I now set aside the *quo warranto* summons issued by the relator Patterson.

In doing so at the suit of Dr. Riddel, it is not under the supposition that any result of these *quo warranto* proceedings could be an estoppel against him. They, however, do affect his own proceedings, and he has therefore, it seems to me, a right to be heard upon the ground on which I now decide.

Regina ex rel. Patterson v. Clarke.

Municipal election — Contract with corporation — Lease — 29–30 Vic. cap. 51, sec. 73.

A municipal corporation, by by-law, granted to defendant, upon certain conditions, a right to build a dam and bridge across a river, in consideration of which he agreed to keep it in repair for forty years at his own expense; but if he should make default, the privilege granted by the corporation was to cease. The dam and bridge were built and duly kept in repair by defendant.

Held, 1. That the defendant was interested in a contract with the corporation.

2. But that he was not disqualified as a municipal councillor, the contract amounting to a lease from the corporation of upwards of twenty-one years.

(Chambers, Feb. 21, 1871.—*Mr. Dalton.*)

This was an application to unseat the defendant, founded on his alleged interest in a contract made with the defendant by the corporation of the township of Caledon, for which he had been elected a councillor.

The alleged interest arose from the grant to the defendant by by-law of the corporation, of the right to erect a dam across the river Credit. The by-law, which was passed in December, 1863, recited, that whereas defendant had applied to the council for liberty to build a breastwork and dam opposite lot 24, on the 4th line, west, where the Credit crosses said road, and that defendant had agreed, for himself, his heirs and assigns, to build a good and substantial bridge on the breastwork (describing its dimensions), to be made perfectly safe for travel, and had agreed to keep the same bridge in good repair, and to rebuild the same when necessary, at his own expense, and so to keep it in repair for forty years from the 1st of January, 1864, upon the council granting him the privilege of erecting and keeping up the breastwork and dam for the same time, and advancing to him $80 to assist in building the bridge: it was enacted by the corporation that the defendant, his heirs and assigns, should be granted the privilege of erecting and keeping up the said breastwork and dam for that time, upon the terms and conditions above mentioned. And it was provided that if at any time during the forty years the defendant, his heirs or assigns, should make default in the conditions, or any of them, the privilege granted should cease.

This by-law was at once acted on; the grant contained in it was accepted by the defendant; the $80 was paid; and the dam and bridge were built, at an expense of $400, by the defendant, and have been, as it appears, duly kept in repair, and everything was satisfactory between the parties themselves; the defendant holding the right to continue the dam for the specified time, with the obligations to keep all in repair.

Fleming showed cause.

1. There is no such contract shown to exist with the corporation as disqualifies the defendant;

[Mr. Dalton.—He has, however, a very strong interest to keep up the bridge, and it is this interest which the statute was intended to guard against.] There is nothing obligatory on Clarke, nor could any contract be enforced against him at law; there can be no legal difficulty between him and the corporation. Neither is there any equitable or even moral obligation on Clarke to repair the bridge: it is simply a question for his discretion as to whether best for himself to do so or not.

2. If, however, it should be held that there is a contract, it is in the nature of a lease for forty years, and the defendant is not disqualified.

Beynon, contra, cited *Regina* v. *Francis*, 13 U. C. R. 116; *Regina ex rel. Mack* v. *Manning*, 4 Prac. Rep. 73.

Mr. Dalton.—Upon the facts above set forth, it was objected that the defendant could not be a councillor for the municipality, as he is a person having an interest in this contract with the corporation. There was no other objection to his election, and he seems to have been elected by a large majority.

The defendant's counsel has strenuously argued that defendant has *not* an interest in a contract with the corporation within the meaning of the statute. It seems to me to be quite beyond question that he has.

But the defendant also contended that he is within the exception to section 73, which provides that no person shall be held to be disqualified from being elected a member of the council by reason of his having a lease of twenty-one years or upwards, of any property from the corporation; and I agree with him that he is.

The question is, whether the defendant's interest, under the above by-law, comes within that definition.

Under the by-law the defendant has the right to maintain his dam upon the property of the corporation for forty years from 1st January, 1864, upon his keeping always in repair, during that time, the road over it. Upon his failure in this, the right is to cease.

Upon examining the authorities, I think this is a lease.

First, then (Shep. Touch. 266), "A lease doth properly signify a demise or letting of lands, rent, common, or any hereditament, unto another, for a lesser time than he that doth let it hath in it." And as to the manner of making a leose, I think this by-law, accepted and acted on by defendant, is a sufficient and proper way for granting this interest, and that it binds the corporation.

Secondly, as to the nature of the interest granted. It is said in Platt on Leases, p. 24: "The subjects of demise are various, and, generally speaking, comprehend incorporeal as well as corporeal hereditaments. Thus, not only land, but advowsons, corodies, estovers, ferries, fisheries, franchises, rights of common, rights of herbage, rights of way, titles, tolls, and other things of a similar kind, may be leased for lives or years;" and in Sheppard's Touchstone, p. 268, the law is thus stated: "Leases for life, or years, or at will, may be made of anything, corporeal or incorporeal, that lieth in livery or grant; and also leases for years may be made of any goods or chattels."

This is a valuable right, granted upon the property of the corporation, and it lies in grant, being incorporeal.

Then, as to the formal words of a lease, I cite again Sheppard's Touchstone, p. 272: "Albeit the most usual and proper making of a lease is by the words, demise, grant, and to farm let, and with an *habendum* for life or years, yet a lease may be made by other words; for whatsoever word will amount to a grant will amount to a lease, and therefore a lease may be made by the word give, betake, or the like."

But there is here no rent reserved, nor any duty, unless it be the duty to repair. Upon this (*Ib.* p. 268) it is said: "Whether any rent be reserved on a lease for life, years, or at will, is not material, except only in the cases of leases made by tenant in tail, so as to bind the issue under the statute of 32 Henry VIII. cap. 28; husband and wife, so as to bind the wife and her heirs; and ecclesiastical persons and infants."

Thus, there is a valuable right in the land of this corporation granted to the defendant, by competent means, for a period of years having a determinate beginning and ending, the reversion being in the corporation. Then, if this is not a lease, under the authorities cited, what is it? It is surely a grant, but a grant of an incorporeal hereditament with all these conditions *is* a lease.

I am glad that the authorities warrant me in saying that the case is within the words of the exception, for it is completely within its spirit. I see that the grant is made to the defendant, his heirs and assigns; but it is a chattel interest, and would go to the executors.

The position of the defendant in this matter, having been created by by-law several years ago, was perfectly well known. The relator had no fact to discover by means of this application, and I think, therefore, should take the ordinary consequences to an unsuccessful party, of payment of costs.

Judgment for defendant, with costs.

Regina ex rel. Philbrick v. Smart.

Municipal law—Qualification of candidate—Incumbrances.

The amount of real property rated to a candidate on the assessment roll is so far conclusive as to his qualification, that incumbrances cannot be taken into consideration to reduce it.

The distinction between the assessment of real and personal property discussed.

[Chambers, February 24, 1881.—*Mr. Dalton.*]

The relator complained that the defendant was not qualified to sit as a councillor for the municipality of the village of Yorkville, in this, that he did not possess the necessary property qualification. The real property rated to the defendant on the roll was sufficient in amount, but it was shewn that there was a mortgage on the property for a sum which would reduce the interest of the defendant in the property to an amount below that required by the statute: and it was contended that the defendant had not, therefore, the required qualification.

M. C. Cameron, Q.C., shewed cause, citing *Reg ex rel. Flater* v. *Van Velsor*, 6 C. L. J. N. S. 151.

Anderson (*Tilt* with him) shewed cause.

Mr. Dalton.—The question in this case as to the property qualification of the defendant depends upon the construction of the 70th section of the Municipal Act. But, for the understand-

ing of that section, it is necessary first to refer to the assessment law.

There is this distinction between the assessment of real and personal property. In the case of real property it is the *land itself* that is assessed, always at its full fee-simple value without regard to charges or incumbrances, and not a man's estate or interest in the land. If the owner has mortgaged to more than the whole value, the land will still be assessed against him at the value of the fee, just as though the mortgage did not exist. And if the owner's estate is less than a fee, the rating against him is still the same, the full fee-simple value.

As to personal property, it is different. The theory of law as to this is, that a man's real interest in the property is to be taxed; not the property. There is excepted from assessment "so much of the personal property of any person as is equal to the just debts, owed by him on account of such property." So that if I buy land worth £100, and mortgage it for that full amount, I am nevertheless taxed for it at £100. Whereas if I buy goods to £100, and do not pay for them, I cannot be taxed in respect of those goods at all. It is necessary to bear this distinction in mind in reading the 70th clause of the Municipal Act as to the qualification of Mayors, Aldermen, Councillors, etc.

By this section they are declared to be such persons "as are not disqualified under this Act, and have at the time of the election, in their own right, or in the right of their wives, as proprietors or tenants, a legal or equitable freehold or leasehold, rated in their own names on the last revised assessment roll" to at least the several sums particularly specified in the clause.

Now if I am right in what I have said above, there is no such thing under the assessment law as rating a man's legal or equitable freehold or leasehold, unless those words are taken to apply to the land in which the freehold or leasehold exists, without reference to the holder's interest or estate in it; and they must necessarily be held to refer to a "freehold or leasehold" in *land*, that is, "*rated* in their own names," etc. *Land*, understood, is the substantive that "rated" agrees with in clause 70; for it is only *the land* that is rated, and that in but one way, at its full value in fee simple, without any regard to the quantity or quality of any man's estate or interest in it.

Looking at it in this light, the word "rated" in the clause must apply to the *land in which the estate is*, and not to the *estate in the land*, for no man's estate can by law be rated as such; nor is in fact so; only the fee simple of the land itself. And to apply this construction to the present case, the defendant may be held to be qualified, because he is an equitable freeholder in his own right in *land*, that is, *rated* at the proper amount in the defendant's name on the last revised assessment roll, which interest he continued to hold at the election; and this without any reference (for the statute says nothing about it) to the real value of the defendant's estate.

But, it is said, this construction makes it unnecessary for a councillor to have any qualification in real estate at all, if he be but the holder of land assessed against him on the last assessment roll at the proper amount; for such a freeholder, say to $600, who has mortgaged to that amount, if he did but continue to hold the equity of redemption, would, under this construction of the statute, be qualified as a candidate; and this is true. But take another view of the clause. In every case a leaseholder for a term not less than a year is held to be qualified by a holding of property to double the amount of a freeholder in the same case. In *this* case, then, for example, a leaseholder of property, rated in his own name on the last revised assessment roll, at $1200 in respect of the leased premises, would be qualified as a candidate. Observe, the statute says nothing about the rent paid, and the rating is the only possible test. That rent might, and probably would be, the full value for the occupation of the premises. The very statement of this case shews that his interest as lessee would be of no pecuniary value. But he would be qualified as a councillor.

The interest of such a lessee seems to me, for the present purpose, very like that of the owner in possession of the equity of redemption in fee, where the property has been mortgaged to the full value. Neither of them has an interest of any value in a commercial sense; but, under the statute, it is plain that every municipality in the country might be represented by such lessees, whose united interests in their leases could not be sold for a dollar. Look, too, at the case of the life tenant: he has a freehold, and, if the land is rated at a proper value, is qualified by the express words of the Act; but if the life on which the estate depends be near its close, the life tenant's interest may be merely nominal in value. Why then should it seem inconsistent or extraordinary that a freeholder should be held qualified who has incumbered (or holds an estate previously incumbered) to an amount which reduces the actual value of his *interest* below the prescribed rated value of the land.

The statute may perhaps have reference to other things than the real value of the interest of the candidate. It may regard the payment of taxes, or may assume something for the social position of those who are the possessors of property of the prescribed value, whatever the money value of their real interest in it. In *Reg. ex rel. Blakeley* v. *Canavan*, 1 U. C. L. J. N. S. 188, some instances in the statute law are pointed out in the judgment of Mr. Justice Morrison, where this real interest in the party is stipulated, and the plain and direct language by which the value in those cases is directed to be over and above all charges and incumbrances, is very observable. Unmistakeable words are there used to show that it is the balance left to the party, after deducting all claims, that is intended. Such language is entirely wanting in this statute. The value of the rating is all that is specified; and it is plain that, in the case of tenants for life and leaseholders, the qualification of the candidate does not require an interest in him of any money value whatever. The declaration to be made by the elected officer, before taking his seat, has been pointed out to me; but by that he merely declares himself to be seised and possessed, to his own use and benefit, of such an estate as qualifies him to act in the office *according to the true intent and meaning of the municipal laws*, which leaves the matter just where it was.

In *Reg. ex rel. Flater* v. *Van Velsor*, 6 U. C. L. J. N. S. 151, I had occasion to decide a point very similar to the present. The decision was not appealed against, and is consistent with my present opinion.

I can only understand the word "rated," in clause 70, to mean rating under the assessment law; so that, whatever the statute may mean, I think it does not mean to prescribe the real value of the interest of the candidate in the land on which he qualifies. I shall, therefore, without further endeavouring to speculate upon it, follow the grammatical construction of section 70; and, applying it to this case, it appears that the defendant has an equitable freehold in land rated at the proper amount, in his own name, on the last revised assessment roll, and that he had the same estate at the time of the election, and I therefore think he is qualified.

*Judgment for defendant, with costs.**

* This decision was subsequently upheld by Mr. Justice Galt, on appeal from Mr. Dalton's order.—*Rep.*

ENGLISH REPORTS.

QUEEN'S BENCH.

R. v. STANGER.

Criminal information — Libel — Affidavits — Evidence of publication.

The affidavits in support of a rule calling on a defendant to show cause why a criminal information should not be filed against him for publishing a libel in a newspaper must supply legal evidence showing that the defendant is printer or publisher of the newspaper. It is not enough, therefore, to annex the newspaper to the affidavits and to show that it was bought at the office of the newspaper, and that it contains in a foot-note the name of the defendant, and a statement that he is publisher and printer, and that the deponent believes that the defendant is such printer and publisher.

Quære, can the deficiency be supplied on the argument of the rule by a statement in the affidavits of the defendant.

[19 W. R. 640.—Q. B.]

A rule *nisi* was obtained in a former term calling upon the defendant to show cause why a criminal information should not be filed against him for printing and publishing in a newspaper a certain false and scandalous libel.

The following were the affidavits in support of the rule connecting the defendant with the newspaper in which the alleged libel was printed.

1st. The affidavit of W. H. D. Longstaffe, who swore:

1. That, on the 30th May last past, I attended at the publishing office of the newspaper called *The Newcastle Daily Chronicle*, situated in Westgate-street, in the borough and county of Newcastle-upon-Tyne, and purchased and paid for a copy of number 3839 of the said *Newcastle Daily Chronicle*, dated the 30th of May, 1870, which then and there I received from William Gray, a clerk or salesman in the said office, and which said newspaper is now produced and shown to me and marked with the letter A.

2. That, on the 31st of May last past, I attended at the publishing office of the *Newcastle Daily Chronicle*, situate as aforesaid, and purchased and paid for a copy of number 3833 of the said newspaper, dated the 23rd of May, 1870, which I then and there received from the said William Gray, and which said last-mentioned newspaper is now produced and shown to me, and marked with the letter B.

2nd. The affidavit of W. Crossman, who swore:

1. That I have referred to the newspapers mentioned in the affidavit of W. H. D. Longstaffe, and verified by him, and which said newspapers are respectively marked A and B, and I say that, by a foot-note printed at the end of the said respective newspapers. John Stanger is stated to be the printer and publisher of the said newspapers respectively, and I say that the said John Stanger is, as I believe, the printer and publisher of the said papers.

Digby Seymour (*Udall* with him) showed cause against the rule.—There must be a complete case on the affidavits. Such evidence must be given as would enable a grand jury to find a true bill; *R.* v. *Willett*, 6 T. R. 294. If statutory proof be not given, strict legal proof must be produced; Cole on Criminal Information, pp. 55 and 62; *Ex parte Williams*, 5 Jur. 1133. Belief is not enough. Here there is only the name at the foot of the newspaper annexed to the affidavits, and there is no legal proof that the office at which the paper was bought is the office of defendant. Nor can the defect be supplied from the affidavits of the defendant himself; Corner's Crown Practice, 172. *R.* v. *Baldwin*, 8 A. & E. 168; *R.* v. *Woolmer*, 12 A. & E. 442.

The Solicitor-General (*Sir J. D. Coleridge*) *Beresford* with him.—Statutory proof has been rendered unnecessary by 32 & 33 Vict. c. 24. Such proof as the common law allows is, therefore, sufficient. *Primâ facie* proof is enough, and indeed it is impossible in many cases to supply more. In *R.* v. *Baldwin*, Patteson, J. makes this statutory proof the ground of his decision, but by the statute cited that proof is rendered unnecessary. In case of publication there is a well-known definite mode of proof which the Court has insisted on, but the rule is purely technical. If, however, the affidavits on the defendant's side have supplied what is wanting, that is enough for the purpose. *R* v. *Mein*, 3 T. R. 596. Here the affidavits do not attempt to deny that the defendant is the publisher.

BLACKBURN, J.—This rule must be discharged, on the ground that there is no evidence that the particular person against whom the rule was moved is the publisher of this paper containing the alleged libel. There is no further evidence than this: a paper is referred to and and annexed to the affidavits in which there is the name of John Stanger, in a foot-note, as of the publisher, and there is an affidavit in which the deponent states that he verily believes that the defendant is the same person as is referred to in the paper. Now there is no more than that. Is that sufficient evidence to show that Stanger was the person who published the alleged libel? I think not. There might be evidence of some statement or acts on his part which would directly connect him with the office or paper, but there is none such in the affidavits. In *R.* v. *Witlett*, 6 T. R. 294, it was ruled nearly eighty years ago that such evidence as this was not sufficient. That was a rule for a criminal information for sending a challenge, and the person who brought the challenge (one Hatherly) refused to make an affidavit. The Court refused to grant the rule because the affidavit on which it was prayed for was not legal evidence. They said "that in those cases they were placed in the room of a grand jury. The affidavits or

oaths of these persons of what Hatherly had said would not be legal evidence against the defendant;" and that this court could only grant an information on evidence that would support a bill of indictment. That case seems to have been acted upon in *Ex parte Williams*, 5 Jur. 1133. Secondly, comes another point. Can the deficiency, if it does exist, be supplied by the affidavits on the other side? In *R.* v. *Mein*, 3 T. R. 596, there was an application for a *quo warranto*, and it was permitted to look into the affidavits on the other side. Cole cites it and attempts to distinguish it [Cole on Criminal Information, p. 52], from the later case. He says that the distinction is that in one the case is civil, in the other criminal—but such distinction is not sound. There is the same Act applied, whether to a civil or a criminal case. The question is the same as to the satisfaction of the Court on the same fact. I own that it seems to me that the rule in *R.* v. *Mein* seems sounder, but in *R.* v. *Baldwin* quite a contrary course is taken. Here, however, it is not necessary to decide this point, for the facts are solely that the defendant does not answer the affidavits as to the deponent's belief of his being the publisher—he is not bound to answer, *R.* v. *Willett*. There is, therefore, no statement in his affidavits which can supply what is wanting in the affidavits of the prosecutor. The rule must be discharged.

MELLOR and HANNEN, JJ., concurred.

Rule discharged.

CORRESPONDENCE.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

GENTLEMEN,—I desire to report, through the L. C. GAZETTE, the particulars of a suit lately decided in the Division Court of Peterborough, before Judge Dennistoun, and to ask your opinion upon it.

During the year 1861, the defendant went into occupation of the plaintiff's shop as a sub-tenant of another tenant of the plaintiff, whose term expired in May, 1862, and who was bound to pay all taxes assessed during his term. The assessment is always made before the month of May. In October, 1861, defendant took a lease of plaintiff of the same premises for three years from May, 1862, covenanting to pay, as in the previous lease, all taxes assessed during his term, as well as all taxes then assessed. At the termination of defendant's lease, in May, 1865, after the assessment for that year, he left, giving plaintiff his note for a portion of the rent then due, which note was placed in suit for a balance due thereon. To this the defendant claimed to set off the taxes on the premises paid by him between May, 1865, and the end of that year, $29 32. On the trial the Judge allowed this set-off. Plaintiff thereupon applied for a new trial, which application the Judge refused.

In his judgment upon the trial of the cause the Judge says—"I cannot believe that defendant ever had intention of paying four years' taxes of premises held by him under a demise for three years." The covenant in defendant's lease was, as already stated, to pay all taxes, &c., assessed *during his term*, as well as all taxes *then* assessed upon the premises. The taxes for 1862 were assessed during the continuance of the former lease, and under which the then tenant was bound to pay them for that year. If defendant paid any portion of these taxes, that was a matter between him and his immediate landlord, and with which the plaintiff had nothing to do. The defendant's taxes did not begin under plaintiff's lease until the year 1863, and, of course, he was bound to pay them for that and the two following years. Yet, notwithstanding these express covenants on the part of defendant and of the former tenant, the Judge says that defendant did not intend to pay these taxes. It will be observed that defendant had no taxes to pay under plaintiff's lease until the year 1863, the previous tenant being bound to pay them up to that year. In the same manner the taxes of the tenant who went in after defendant did not commence until the year 1866, the rule as to taxes being the same with all the tenants, each getting the benefit of the first year's taxes.

I make no comments upon this case, leaving them to the judgment of an impartial public.

A SUITOR.

Peterborough, June 16, 1871.

[We publish this letter as requested, but are not prepared to say that the learned Judge may not have decided the case according to an interpretation of the contract agreeable to equity and good conscience, though possibly not construing it with legal strictness. The notes in Smith's Leading Cases to *Lampleigh* v. *Brathwait*, *Sprague* v. *Hammond*, 1 Bro. & Bin. 59, *Stubbs* v. *Parsons*, 8 B. & Ald. 516, and *Wade* v. *Thompson*, 8 U. C. L. J. 22, are all authorities upon the question. The giving and taking a promissory note would *prima facie* seem to indicate a waiver of a previously existing right of set-off, if any such existed. More than this we cannot say from the above material, even were we inclined (which we are not) to sit in judgment on decisions given after

proper consideration and with a desire to act impartially and fairly, and this we must take for granted unless the contrary appears most clearly beyond the possibility of explanation. —Eds. L. C. G.]

To the Editors of the Local Courts Gazette.

Gentlemen,—Under the Assessment Act of 1869, and cap. 27, 33rd Vic., "The stipend or salary of any clergyman or minister of religion, while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of one thousand dollars, and the parsonage or dwelling-house occupied by him, with the land thereto attached, to the extent of two acres, and not exceeding two thousand dollars in value, are exempt from taxation."

A minister of religion, within the meaning of the 4th sec. of cap. 27, 33rd Vic., above quoted, desiring to exercise the right of franchise, waives the right to have his dwelling-house or parsonage exempt from taxation, and requests the assessor to assess the same at its value, $800. The assessor accordingly assesses the property at that sum, and puts the minister upon the assessment roll.

Query.—Can he legally do so?

If with the consent of the minister he can, what would be the effect if a municipal elector, under sub-sec. 2 of sec. 60 of the Assessment Act, object that the minister has been "wrongfully inserted on the roll," and appeal to the Court of Revision?

An answer in the next number of the Law Journal will oblige

A Subscriber.

Simcoe, 21st June, 1871.

[There can be no doubt if the person assessed declines the exemptions which the law makes in his favour, and the assessor returns the property or income assessed for a sufficient sum, the person is entitled to his franchises founded upon the assessment. He cannot be held to be "wrongfully inserted," if it was done at his own request, and upon waiver of his rights of exemption.—Ed. L.C.G.]

Recent Legislation—Tinkering with Acts of Parliament.

To the Editors of the Local Courts Gazette.

Gentlemen,—By the Superior Courts Acts, Con. Stat. U. C., caps 10 and 12, the Courts of Queen's Bench, Common Pleas and Chancery had names assigned to them respectively, designating them to be Courts of "Upper Canada." The Court of Queen's Bench was to be presided over by "the Chief Justice of Upper Canada." The Court of Chancery was to be presided over by a chief judge to be called "the Chancellor of Upper Canada;" but by the recent Act of Ontario, 34 Vic. cap. 8, the Court of Queen's Bench for Upper Canada is to be called during the reign of a king, "His Majesty's Court of King's Bench for *Ontario*," and, during the reign of a queen, "Her Majesty's Court of Queen's Bench for *Ontario*," and the Court of Chancery for Upper Canada is to be called "The Court of Chancery for *Ontario;*" so that the 5th sec. of the Act first hereinbefore named, and the 3rd section of the Act secondly hereinbefore named being unrepealed, the Queen's Bench for *Ontario* will be presided over by the Chief Justice of *Upper Canada*, and the Court of Chancery for *Ontario* will be presided over by the Chancellor of *Upper Canada.*

Would it not be a good thing when Acts of Parliament are to be amended that the person who prepares Bills to be submitted to the consideration of the Legislature should have some reasonable knowledge of the provisions of Acts he is dealing with, and shew some precision in their preparation? Yours, &c., Union.

In criticising the rules of law set forth in the Washington Treaty, we expressed our doubts as to their novelty. In an exhaustive article in a Canadian publication, entitled *La Revue Critique de Législation et de Jurisprudence du Canada*, we find that our view is shared in by the writer. He says: "The three rules acknowledged by the treaty form an integral part of international law, not because the high contracting parties have been pleased to promulgate or proclaim them, but because they are founded on natural law. From the first, the United States maintained them both by the decisions of their courts and by their diplomatic correspondence; and for centuries past jurists of the highest authority have proclaimed them as rules of international law. They are immutable and eternal truths; and to say that they were not in force in 1861 and down to the end of the American Civil War, is to admit in a disguised way that they were unknown to the English Crown law officers; it is to make a new mistake in disregarding the fact that international law everywhere is and always has been the same. A formal declaration that, at the time above referred to, the duties of neutrality were not understood in the manner laid down in the three rules in question would have been more exact and to the point. And finally, the consent given by Great Britain to the proposal that these three rules should be applied to all claims submitted to arbitration is a further proof of want of that frankness so honourable in every one, but especially so in a great nation." —*Law Times.*