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.

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PARLIAMENTARY ELECTIONS.

Next to the excitement which more or less attends every election contest, the important question whether the successful candidate will retain his seat, is certainly, to one individual at least, a subject of very anxious consideration. The good old days, as it is the fashion to call them, in which any candidate who was successful enough to find his way into the House, no matter by what corrupt means, and who might, if he was on the proper side, retain his seat for two, if not three or four years, until a grateful ministry had rewarded his fidelity, have long since passed away. The candidate who is now successful at the polls, in the event of a petition being filed against his return, finds that the real difficulty of an election contest is not in obtaining, but in retaining his seat. It is not alone that he himself must be blameless in every particular which the Act specifies, and, so to speak, have it and its penalties constantly before his eyes, but that his agents, those terrible necessities of an election contest, whose rash and intemperate zeal, in most instances looks only to the end, indifferent to the means by which it is to be attained, should likewise have exercised a careful supervision not only over their own acts, but those whom they have employed under them. The recent trials under the Controverted Elections (Ontario) Act of 1871, have demonstrated so far, that if it is a hard task to obtain a seat in Parliament, it is also an easy matter to lose it.

Of fifteen petitions against the return of members declared elected at the recent contest for the Legislative Assembly of the Province of Ontario, three only have been disposed of. In two of these, Prescott and Carleton, the former tried before the Chief Justice of Ontario, the latter before Mr. V. C. Mowat, the election has been declared void.

In Glengarry the successful candidate has retained his seat. Stormont and Brockville have not been finally disposed of, the former being adjourned until the 12th of September next, the latter until the 9th of January.

The others come on at various times after Vacation, the latest being North Simcoe, on the 16th of October.

That branch of the law relating to the election of members of Parliament is, in a general way, very much misunderstood, not only by those who do not belong to the profession, but by the majority of the members of the profession itself; the prevailing opinion in most cases being that the Ontario Act of 1871 is a compendium of the whole law on election matters, whereas in fact it only establishes the tribunal and the procedure by which election petitions are to be tried, and imposes certain penalties for acts defined not in it alone, but in the various Acts of Parliament which precede it and on which it is based.

There seems also to be a general impression, chiefly outside the profession, that those Acts of Parliament which govern the law relating to election matters in the Province of Ontario, are so nearly identical with the laws of England in that respect, that the decisions of the English Judges should be the rule of guidance in this country. A careful comparison, however, of the Imperial and Ontario Statutes will show, that although in some instances the different sections of the separate Acts are word for word the same, yet, as will be hereafter shown, they do differ in some points so very materially, that they might be said to alter the whole scope of the Act in that respect.

Before going into the question, therefore, of the various points already decided in the late trials under our own Acts, it will be important to notice the Imperial Acts of Parliament affecting the question of Election Petitions, and point out, as briefly as possible, the distinction between the Imperial and the

Ontario Statutes, in those cases more especially where the Ontario Statute has in a great measure, and so far as circumstances admitted, been copied from the Imperial Act.

Various statutes were, from time to time, passed in England in order to supply the deficiencies of the Common Law, or law of Parliamentary usage. These were consolidated in the "Corrupt Practices Prevention Act, 1854," 17 & 18 Vic. c. 102, and from this statute the Ontario Act, 32 Vic., cap. 21, has copied many of its provisions.

Sections 67 and 68 of the Ontario Act, 32 Vic., defining bribery, correspond very closely with Sections 2 & 3 of the (Imperial) Corrupt Practices Prevention Act of 1854, and section 72 of the same Ontario Act defining undue influence, is identical with section 5 of the Imperial Statute.

Sections 63 and 64 of the Ontario Statute as to the furnishing or carrying party ensigns, flags, &c., either before or during the election, are materially the same as the Imperial Statute, and section 66 of the Ontario Statute, as to the closing of taverns on the polling-day, is substantially the same as the Imperial Act.

The distinction between section 4 of the Imperial Statute, defining the offence of treating, and the only section of the Ontario Act which at all corresponds with it, is so marked, that it will be as well to give both sections in full.

By sec. 4 of Imp. Stat.: "Every candidate at an election who shall corruptly by himself, or by or with any person, or by any other ways or means, on his behalf at any time, either before, during or after any election, directly or indirectly, give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay wholly or in part any expenses incurred for any meat, drink, entertainment or provision to or for any person in order to be elected, or for being elected, or for the purpose of corruptly influencing such person, or any other person, to give or refrain from giving his vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be deemed guilty of the offence of treating, and shall forfeit the sum of £50 to any person who shall sue for the same, with full costs of suit; and every voter who shall corruptly accept or take any such meat, drink, entertainment or provision, shall be incapable of voting at such election, and his vote, if given, shall be utterly void and of none effect."

Section 61 of the Ontario Statutes is as follows—"No candidate for the representation of of any county, riding, city, town, or other electoral division, shall, with intent to promote his election, nor shall any other person, with intent to promote the election of any such candidate, either provide or furnish entertainment at the expense of such candidate or other person, to any meeting of electors assembled for the purpose of promoting such election, previous to or during the election at which he is a candidate, or pay for, procure or engage to pay for any such entertainment; except only that nothing herein contained shall extend to any entertainment furnished to any such meeting of electors, by or at the expense of any person or persons, at his, her, or their usual place of residence."

In secs. 2, 3 and 5 of the Imperial Statute (Act of 1854), bribery, treating, and undue influence are defined; and by section 36 of the Act, it is declared that any candidate who has been found guilty by a Committee of the House of Commons of either bribery, treating or undue influence by himself or his agents, shall be incapable of being elected or sitting during the then existing Parliament.

In the Ontario Statute (Act of 1868,) sections 67 and 68 define the offence of bribery, and section 69 declares that if any person be proved guilty before an election committee of using any of the means defined in those sections to procure his election, his election shall thereby be declared void.

Section 61 of the Ontario Act, already quoted, forbids the treating of meetings of electors, and section 65 of the same Act imposes a penalty of one hundred dollars, to be incurred by any person offending against the provisions of said section 61.

Section 72 of the Ontario Act of 1868, defines the offence of undue influence, and imposes a penalty of two hundred dollars, to be incurred by any person offending against its provisions.

So far, therefore, as the Ontario Act of 1868 is alone concerned, it would appear that the offences of treating contrary to section 61, and undue influence, merely impose a

penalty on the person offending, and that bribery either by the candidate or his agent is the only offence that will void an election.

The distinction, therefore, between the Corrupt Practices Prevention (Imperial) Act of 1854, and the Ontario Act of 1868, which (for the purpose of a comparison between them) may be called the corresponding Act, is very important. By the Imperial Act, bribery, treating,—either of an individual or a meeting,—and undue influence either by the candidate or his agent, will void an election. By the Ontario Act only the offence of bribery by the candidate or his agent will have the same effect.

It will now be important to consider the Imperial Statute 31 & 32 Vic. cap. 125, to which the Ontario Statute, 34 Victoria, commonly called the Controverted Elections Act of 1871, corresponds, and note the distinctions between the two Acts, in so far as they affect the conclusions arrived at above with reference to the Imperial Act of 1854, and the Ontario Act of 1868.

By the Imperial Statute, 31 & 32 Victoria, section 3, bribery, treating and undue influence are declared to be corrupt practices; and by section 46 of the same Act it is declared that for the purpose of disqualifying a candidate in pursuance of section 36 of the Corrupt Practices Prevention Act of 1854, (a candidate guilty of corrupt practices other than bribery within section 43 of the 31 & 32 Victoria), the report of the Judge, before whom the election petition is tried, shall have the same effect as the report of a Committee of the House of Commons.

Section 43 of the same Act enacts that wherever it is proved that *bribery* has been committed by or with the knowledge or consent of the candidate, he shall be deemed guilty of personal bribery, and imposes certain very severe disqualifications for seven years.

By the Ontario Act, 34 Victoria, the Controverted Elections Act of 1871, section 46, it is declared that when any *corrupt practice* has been committed by or with the knowledge and consent of any candidate at an election, his election, if he shall be elected, shall be void, and he shall during the eight years next after the date of his being so found guilty, be incapable of being elected to, and of sitting in the Legislative Assembly, and various other disabilities. Section 3 of the same Act defines "corrupt practices," or "corrupt practice," to mean bribery and undue influence, and illegal and prohibited acts in reference to elections—or any of such offences—as defined by Act of the Legislature.

It will be remembered that section 61 of of the 32 Victoria, prohibited the treating of electors, and imposed certain pecuniary penalties on any person guilty of the offence, but did not void the election, and that section 72 of the same Act defined the offence of undue influence, and imposed a penalty on any person committing the offence, but also did not void the election.

The 34 Vic. section 3, as we have seen, defines "corrupt practice" or "corrupt practices" to be bribery and undue influence, *and illegal and prohibited acts* in reference to elections,—or any of such offences—as defined by Act of the Legislature.

It is presumed that this definition will be held not to include every trifling act, but only such as partake of the same nature essentially as bribery and undue influence.

It will be seen, therefore, that by the joint operation of these two Ontario Acts, 32 & 34 Vic., bribery, undue influence, and perhaps the treating of meetings of electors, contrary to section 61 of the 32 Vic., by or with the knowledge or consent of the candidate, will void the election, but that the only offence that will affect the seat, when committed *by an agent*, is the offence of bribery.

What will avoid an election, therefore, under the existing law of the Province of Ontario may be generally stated to be:

Bribery, and it may be treating, under section 61 of 32 Vic., or undue influence by or with the knowledge or consent of the candidate himself, and also, possibly, general bribery, general treating, or general rioting throughout the constituency, although the candidate may have been wholly unconnected by himself or his agents with such general bribery, treating or rioting; but that bribery only *by an agent*, in the parliamentary sense of the term, will avoid the election, differing in this respect apparently from the law of England, for there, not only bribery, but also treating and undue influence by the act of the agent will have that effect.

As to what will render void a vote.—By section 47 of the 34 Vic., it is declared that "if

on the trial of any election petition it is proved that any corrupt practice has been committed by any elector voting at the election, his vote shall be null and void." The meaning of "corrupt practice" has been already referred to, and will include bribery, undue influence, and treating meetings of electors, contrary to section 61 of 32 Vic. cap. 21.

In regard to the disabilities imposed by both the Imperial and Ontario Statutes, on parties offending against their provisions, it will be sufficient to state generally, that by the Imperial Act, section 43, bribery committed by or with the knowledge and consent of the candidate, will incur the severe disabilities provided by that Act, and which extend to a period of seven years against the offender. By the Ontario Act, section 46, *any* corrupt practice (which will include not only bribery, but also undue influence, and possibly treating contrary to section 61) committed by or with the knowledge and consent of any candidate of an election, will incur the disabilities provided by the Act, and which in the Ontario Statute extend to a period of eight years against the offender.

The subject of bribery is too vast to enter upon in an article necessarily so restricted as the present, but in fact section 67 of the 32 Victoria defines the offence so minutely that any remarks on the subject generally, or any allusions to the numerous cases are to a certain extent unnecessary.

The subject of agency, however, forms so important a feature in all election matters, and especially that of bribery under our Act, that it will not be out of place here to notice a striking peculiarity in the law of elections on this subject, and that is, the great distinction which exists between the principles of agency, as ordinarily acted upon by courts of law, and those which have been followed in election inquiries. The relation between a candidate and his agent is not the same as that which is understood to exist by the ordinary use of the terms principal and agent; for a candidate is held to be responsible for the wrongful acts of his agent for election purposes, not only when they have been committed without his consent, but even when done contrary to his express command.

On the subject of agency, generally, see the *Taunton Case*, 1 O'M. & H., 182, also the *Coventry Case*, *Ib.*, 107. It has been compared to the relation of master and servant in the *Westminster case*, 1 O'M. & H., and to sheriff and deputy-sheriff in the *Taunton Case*, *Ib.*, 1 O'M. & H., 182.

Treating, so far as section 61 of the 32 Vic., chapter 21, is concerned, has been already referred to. The law as to treating, independently of that section, is in a very unsettled state, but probably in this Province no corrupt treating, which does not amount to bribery by means of meat and drink, will affect the seat. It is possible that general treating, which would have avoided an election at common law, will have the same effect here, but no branch of the law of elections is, as has already been stated, in a more unsettled state than this.

As to undue influence, section 72, of the 32 Victoria, declares, "every person who shall directly or indirectly, by himself or by any any other person on his behalf make use of or threaten to make use of, any force, violence or restraint, or inflict or threaten the infliction by himself or by or through any other person, of any injury, damage, harm or loss, or in any manner practise intimidation upon or against any person in order to induce or compel such person, to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall, by abduction, duress, or any fraudulent device or contrivance, impede, prevent or otherwise interfere with the free exercise of the franchise of any voter, or shall thereby compel, induce or prevail upon any voter either to give or refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence, and shall incur a penalty of two hundred dollars."

This clause seems almost identical with section 5 of the Imperial Act of 1859.

In the *Westbury case*, 1 O'M. & H., before Willes, J., a manufacturer named H. who had been asked by a candidate for his vote and interest, canvassed his workmen and dismissed some because they voted against his wishes. He became a member of the candidate's committee and canvassed for him. He told some of his men who were going to vote the other way that if they did they should have no more employment from him. They did in fact leave his employ before the elections.

The Judge, commenting on the words of the Act, says, "they are large enough to include every sort of intimidation, every sort of conduct which would operate upon the mind of another and terrify or alarm him into doing what the person misconducting himself willed of his own free will. * * * There was terror, whether it be more or less, still a terror amounting to intimidation at H.'s factory for some time before the elections, and a strong feeling that men would be dealt with differently according as they voted one way or the other, which feeling, produced by illegitimate means, is to be prevented, and the persons who are likely to feel it are to be protected by law."

In the *Northallerton case*, 1 O'M. & H. 167, Willes, J., says, "a mere attempt on the part of an agent to intimidate a voter, even though it were unsuccessful, would avoid an election."

In the *Galway case*, *Ib.* 303, Keogh, J., says, "The landlord has his vote, and his tenants have their votes, and is it to be said that the landlord is to use no influence with his tenants? I deny the proposition altogether. I say that it is right and becoming that a landlord should use his influence with his tenants, and so long as he does not exercise that influence in an illegitimate way, no steadier or safer or more legitimate influence can be used."

Again, in reference to priestly influence, he says, "It has been found that in various churches the celebration of the mass was suspended after the first gospel, in order to lecture the people upon the conflicting claims of the different candidates. I think it well that the house of God should not be made a place for delivering political discourses in at all, but I pass that by as a matter of trifling importance. I recognize the full right of the Catholic clergy to address their congregations, to tell them that one man is for the country, and another man is against the country. Nay, more, I would not hold a very hard and fast line as to language which, in excited times, may be used by Catholic ecclesiastics, or by civilians. They may be impatient and zealous and wrathful, provided they do not surpass the bounds of what is known to be legitimate influence."

In the *Longford case*, 2 O'M. & H. 6, Fitzgerald, J., says. "The Catholic priest has, and he ought to have, great influence. * * In the proper exercise of that influence on electors, the priest may counsel, advise, recommend, entreat and point out the true line of moral duty, and explain why one candidate should be preferred to another, and may, if he think fit, throw the whole weight of his character into the scale, but he may not appeal to the fears, or terrors or superstitions of those he addresses. He must not hold out hopes of reward here or hereafter, and he must not use threats of temporal injury or of disadvantage, or of punishment hereafter. He must not, for instance, threaten to excommunicate or to withold the sacraments, or to expose the party to any religious disability, or denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter. If he does so with a view to influence a voter or to affect an election, the law considers him guilty of undue influence. As priestly influence is so great, we must regard its exercise with extreme jealousy, and seek by the utmost vigilance to keep it within due and proper bounds."

In the *Tipperary case*, *Ib.* 31, Hague, B., says, "A priest's true influence ought to be like a landlord's true influence, springing from the same sources, mutual respect and regard, sympathy for troubles, losses, sound advice, generous assistance and kind remonstrance, and when these exist a priest can exercise his just influence without denunciation, and a landlord can use his just influence without threat or violence."

In the *Lichfield case*, 1 O'M. & H. 22, Willes, J., says, "The law cannot strike at the existence of influence. The law can no more take away from a man who has property, or who can give employment, the insensible but powerful influence he has over those, whom, if he has a heart, he can benefit by the proper use of his wealth, than the law could take away his honesty, his good feeling, his courage, his good looks, or any other qualities which give a man influence over his fellows. It is the abuse of influence with which alone the law can deal. Influence cannot be said to be abused because it exists and operates."

Again, referring to our own cases:

The *Stormont Election case*, tried before the Chief Justice of Ontario, so far as it has already proceeded, consisted entirely of a scrutiny. The recriminatory charge of bribery was not pressed, and, as counsel intimated, will most likely be dropped.

It will be unnecessary here to notice more than a very few decisions in regard to it (as a full report of the case is given in this number), and these more particularly as showing a business relationship (if it can be so expressed) which is peculiar to Canada, viz.: that of father and son living together on the father's property; the son, in consideration of working the place and supporting his parents, being entitled to a certain share of the proceeds, over which he exercises, or assumes to exercise, a power of disposition uncontrolled by any one; and in many instances, this being extended to the whole of the father's property being made over to the son, on the consideration already stated, of the son supporting his parents.

Nothing seems more natural than for a parent, as he grows old, to desire that his declining years should be provided for by his son, not alone from a feeling of natural affection on the part of the son, but from a sense of gratitude to the father for his generosity in giving up to the son that which he might have retained during his own life. In most cases, of course, everything would eventually belong to the son, but the desire of proprietorship is natural to all, and the son would feel under a stronger obligation to be kind and affectionate to his parents from their trusting him with a management, than if he had been kept in a subordinate position, until in the course of nature he should inherit the property.

No doubt, in most cases, such an arrangement is productive of a very affectionate relationship between the father and the son, more especially in those cases in which the arrangement is made under a sense of right and justice on the part of the father, to mark his acknowledgment of the filial care of the son, and his industry and zeal in improving the place. But every arrangement of this kind could not in the course of nature be expected to be formed on so satisfactory a basis, and it often happened that the son received from the father only what the latter could not avoid giving if he wished to retain the services of the former.

The agreement in general was a mere verbal one; and in consequence the evidence of the father as to the son's right of proprietorship in many cases materially differed from the son's view of the same subject; the father's understanding of the agreement in general being, that part of the proceeds, or the whole place (as the case might be), was to be absolutely the son's, so far as that ownership was consistent with the father, on his son's displeasing him, immediately resuming complete control of everything. The son's understanding in most cases being, that either as to a share of the proceeds, or as to ownership generally of a part or whole, it was complete and, as he understood it, indefeasible.

To lay down any general principle under these circumstances, as to what interests on the part of the son did or did not constitute a vote, might well be considered difficult.

The rota judges, however, seemed to have been quite prepared for the state of things which the evidence in the Stormont and Brockville petitions showed to exist in the country, and they had decided to adhere to certain rules as to what would govern them in determining the franchise, securing in this manner uniformity, so far as this could exist in a matter where the evidence, although in a general way similar, yet in each case presented some peculiarity distinguishing it from the others.

Thus, in the *Stormont Election Case*, the learned Chief Justice held, that where father and son lived together on the father's farm—and the father was in fact the principal to whom money was paid, and who distributed it—and the son had 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 received what the father's sense of justice dictated, the son had no vote.

And 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, it was 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.

And where the father had made a will in his son's favour, 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 learned Chief Justice held that the son worked the place merely for the support of the family, and his own expected possession under his father's will, and that he was not entitled to vote.

In the *Brockville Election Case* the learned Chief Justice of the Common Pleas held, that where there was an agreement between the father and the son that the son should have one-third of the crops as his own, and such agreement was *bonâ fide* carried out, the son was entitled to vote.

Again in another case the same learned judge held, that where, for some time past, the owner had given up the entire 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 of them to his own use—the vote was good.

The same learned judge also determined that where a jury would on the evidence be warranted in finding that the crops (say in the year preceding the last assessment) were the property of the voter, the vote would be good.

The general principle guiding these decisions seems to have been that where the agreement between the father and the son was as to a share of the crops, the son should have an actual existing interest in the crops growing and grown, and a power of disposition over the whole or a portion of them, to entitle him to a vote.

And in those cases where the agreement was as to the farm itself or a portion of it, the son should have an occupation, whether as tenant or otherwise, distinct from the father and independent of him, in order to entitle him to a vote.

In the *Glengarry Case*, before Hagarty, C.J. it was alleged, *inter alia*, in the petition, that that the respondent had been guilty of treating contrary to 32 Vic. cap. 21, sec. 61.

It was shewn in evidence, that the respondent had represented the same constituency during the last parliament: that he was a man of liberal habits; that he had on two occasions after addressing a meeting of electors and others, treated all persons present to liquor; that at the time that he so addressed the meetings he had not determined to stand again for the constituency; and that his object in addressing the meetings was, to explain his conduct during the late parliament. His lordship in delivering judgment said: "Under the 61st section of the Act of 1868, I should have had little doubt in deciding that the only consequences under that statute would have been the penalty of $100. The late Act, however, has raised a question as to whether this comes under the head of a corrupt practice, as being an illegal and prohibited act in reference to elections. If it comes under that description, it not only avoids the election, but renders the candidate liable to the grievous personal disabilities set forth in the Act, for the period of eight years. If the case before me turned upon the naked question. whether the matter prohibited by section 61 was under the present law as to corrupt practices, with all its heavy consequences, I should reserve the legal point for the consideration of the court; but, for the purposes of this case, I shall treat it as such, subject to the modification that I think by all fair rules of statutable construction, I am bound to hold that the evidence must satisfy me that what was done, was done corruptly. When the statute says the candidate shall not do a thing with intent to promote his election, I think it must mean something beyond the literal meaning of the words. If he contemplates being a candidate, every step he takes, the issuing of handbills, canvassing of electors, the mere act of travelling to any given point, and a hundred other things, may literally be said to be done with intent to promote his election. When, therefore, a charge like the present is made, I think the evidence must satisfy the judge, beyond reasonable doubt, that the giving of the entertainment was intended directly to influence the electors, and to produce an effect upon the electors. If not so, why were those words introduced? They are quite useless, if it was intended to prohibit the mere giving of entertainmeut to a meeting of electors, absolutely without reference to the giver's intention and design in the act of giving. In short, if the legislature make it a corrupt practice to give entertainment with intent to promote his election, it must, in my judgment, compel a decision that the intent to promote must be a corrupt intent, in the legal sense of the term as hereinafter explained. I am dealing with a statute avowedly in its preamble aimed at corrupt practices, which Act at the same time pointedly omits all mention of treating from

its language. Whenever therefore, the act prohibited is not in its very nature necessarily corrupt, such as bribery, I feel an almost insuperable difficulty in holding it to be a corrupt practice involving such momentous consequences, unless it be done corruptly."

His lordship then cited a number of English cases upon the meaning of the term "corruptly," among which were the *Bewdley Case*, 1 O'M. & H. 19; *Hereford*, *Ib.* 195; *Lichfield*, *Ib.* 25; *Coventry*, *Ib.* 106; *Bodmin*, *Ib.* 125, and then continued, "On both the occasions when entertainment was given, the respondent, according to his uncontradicted evidence, was still undecided as to his becoming a candidate. When the meeting breaks up, he offers, and does treat all persons there: the amount expended was, on the first occasion $5; in the second $12. I feel bound to say that the evidence given by the respondent seemed given with great candour., and favorably impressed me as to its truth, and I feel wholly unable to draw from it any honest belief, that he provided this entertainment, consisting apparently of a glass of liquor all round, with any idea that he was thereby seeking to influence the election, or promote his election in any of the senses referred to in the cases. He was unaware of the state of the law upon this subject, as he says. He is not to be excused upon the ground of his ignorance; but the fact (his ignorance), is not wholly unimportant as bearing on the common custom of the country, too common as it unfortunately is, of making all friendly meetings the occasion or the excuse of a drink or treat. The strong impression on my mind, and I think it would be the impression of any honest jury, is that the treats in question were just given in the common course of things, as following a common custom. In the appropriate language already cited, the judge must satisfy himself, whether that which was done, was really done in so unusual and suspicious a manner, that he ought to impute to the person a criminal intention in doing it."

And in connection with the above remarks of the learned Judge, we will quote the language of Mr. Justice Willes, in the *Westbury Case*, 1 O'M. & H. 50, where he says that "he did not wish it to be supposed (as had been supposed by some people from some expression of his in another case) that treating a single glass of beer would not be treating if it were really given to induce a man to vote or not to vote. All he had ever said was that that was not sufficient to bring his mind to the conclusion that the intention existed, to influence a man's vote by so small a quantity of liquor."

It will be unnecessary here to follow further the judgment in this case, but merely to state that the learned Judge held that the respondent had been duly returned.

In the *Carleton Election Case*, tried before V. C. Mowat, certain acts of bribery were proved, and the counsel for the respondent admitted that bribery had been committed by an agent, but without the knowledge or consent of the candidate. The election was declared void.

It will be important to notice, in reference to this election petition, one or two decisions given by the learned Judge who tried it.

In reference to section 3 of the 32 Vic., which declares that "no returning officer, deputy returning officer, election clerk, or poll clerk, and no person who at any time, either during the election or before the election, is or has been employed at the said election, or in reference thereto, or for the purpose of forwarding the same, by any candidate, or by any person whomsoever, as counsel, agent, attorney, or clerk, at any polling place at any such election, or in any other capacity whatever, and who has received or expects to receive, either before, during, or after the said election from any candidate, or from any person whomsoever, for acting in any such capacity as aforesaid, any sum of money, fee, office, place, or employment, or any promise, pledge or security whatever, therefor, shall be entitled to vote at any election," it was held that where a voter had voted without having received any money or offer of money, or without the expectation of receiving any money, and after he had voted he was employed as paid agent, the vote was good.

In reference to the question of the reception of evidence of what took place at a former election, it was held that evidence might be given of any circumstances connected with any former election, when that circumstance, threw, or tended to throw any light upon the election, the subject of the petition in question.

In the *Brockville Case* evidence has been given intended to show that undue influence

was used to affect the election, but no decision has been given in the case as it was necessarily adjourned to a future day, and any remarks would of course be premature and useless at the present stage.

In the *Prescott Case*, tried before the Chief Justice of Ontario, evidence of bribery on the part of an agent, but without the knowledge and consent of the candidate, was given, and the counsel for the respondent admitted that sufficient evidence was proved to void the election. The respondent, in his evidence, having distinctly denied any act of bribery whatever, and no act being proved against him, the counsel for the petitioners stated that they did not wish to pursue the matter further.

The learned Chief Justice, in delivering judgment declaring the election void, made the following remarks:—

"I have some doubt whether I ought not to direct that notice be given to the parties under the statute guilty of corrupt practices, that they may have an opportunity of being heard, so that I may decide and report to the Speaker on that subject under sub-section 6 of section 17 of Controverted Elections Act of 1871. The Act, however, having been passed so recently before the election, the practice under the Act being new, the Judges being much pressed for time in carrying out the Act, the delay which must ensue if these proceedings are adjourned to give the proper notice to the parties who are apparently the most active in the corrupt acts, the inconvenience to all parties concerned, and the fact that the parties may still be prosecuted for penalties, induces me to consent to the matter not being prosecuted further."

The Act has been passed too recently to make any remarks on its general merits. The penalties are certainly very severe on any party offending against its provisions; and although it may be admitted that a strong reform was needed in election matters generally, it must be conceded that to enforce at the present time such harsh penalties and disabilities as the Act provides, on persons who were, in most cases, completely ignorant of its provisions, would be unjust and unnecessary. No doubt the Act will be very beneficial as to the future purity of election contests, but in view of the fact that it has been so recently passed, it seems only reasonable that justice should be tempered with mercy in dealing with offenders.

An enormous amount of extra labor has been thrown on the Judges by the Act, and those of them who have been on the *rota* for the present elections, have had a very great responsibility in deciding the various points that have come up on the trials of the election petitions, so far as they have already gone, and been decided, on most of which the decisions under the English Acts (those which in a measure correspond to our own) have been of little or no service.

There is no doubt but that some machinery is required to relieve the Judges of the interminable process of a scrutiny, but any remarks on the manner this is performed in England, and the work of revising barristers generally there, or as to the propriety of making the assessment rolls conclusive, except in cases of personation, &c., must be left for future discussion.

ELECTION PETITIONS.

We devote most of our space in the present number 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 this issue of the *Journal* have been struck off, and may be obtained from the publishers.

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 Quinte district, and had held the posi-

tion 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.

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.*

GRAND JURIES.

The Grand Jury lately sitting at the Central Criminal Court, impressed with their uselessness, expressed a wish for their own destruction. They made a presentment to the effect that "in our opinion the office we have been called upon to occupy is useless, and ought as speedily as possible to be abolished. We consider that the ends of justice are not served by the presentation of indictments before us, after the decision of the magistrates who have had the advantage in the hearing of each case of the legal assistance engaged by both parties. The evidence adduced in all the cases shows how carefully the matters are investigated, and the necessary endorsement of a grand jury under the present system appears to involve a reflection on the decision of the magistrates, and a useless sacrifice of valuable time on the part of the jurymen. We, therefore, beg respectfully to express our hope that steps may speedily be taken to abolish altogether the said office." There can be very little doubt that when a case has once been investigated by a qualified magistrate, a secondary preliminary examination before a grand jury is not much better than a waste of time. And it probably rarely happens in cases coming before the Central Criminal Court that an innocent man is committed for trial through any incompetence or default on the part of the committing magistrate. It will easily be conceived too by any one who read the evidence taken before the House of Commons Select Committee on juries, two or three years ago, as to the constitution of London grand juries, that their investigation of the charges brought before them has not always been of the most searching or intelligent nature. But though we are not disposed to quarrel with the general estimate which the late grand jury form of the value of their own services in reviewing the decisions of magistrates, and though we quite sympathise in their complaint of the loss of time which they have themselves to incur, it does not follow that the case is to be met by the pure and simple abolition of the grand jury without either qualification or the provision of a substitute. It must be remembered that, notwithstanding the Vexatious Indictments Act, indictments may still in many cases be preferred without any preliminary investigation before a magistrate. There are many offences, for instance, to which the Act does not apply at all, and of which an accusation may be brought without any previous investigation; and in such cases it would, we think, be very undesirable that a prosecutor should be able to call upon an accused person to stand his trial before a petty jury without some previous security that there is at least a *prima facie* case against him. Again, prisoners may be and are committed for trial on the verdict of a coroner's jury. And, assuming a coroner and his jury to be as fit a tribunal for investigating charges of crime as a magistrate, it must be remembered that the object and character of the magistrate's inquiry and the coroner's are wholly different. The magistrate examines directly the very question which has afterwards to be tried by the petty jury—the guilt or innocence of the accused person. The coroner inquires generally into the cause of death of the person on whom the inquest is held; the question of guilt or innocence in any particular person arises only incidentally, and the inquiry into the latter question is

conducted under manifest disadvantages. In case of a committal on the verdict of a coroner's jury it is very desirable that some further preliminary inquiry should intervene before the accused is put upon his trial; and other examples might easily be cited in which something of the kind is equally desirable. While therefore we in the main agree with the London grand jury in their complaints to the existing system, we cannot think that the simple abolition of grand juries is the true remedy. The grand jury, as at present constituted, may not be the best tribunal for the purpose required; but that in many classes of cases such work as grand juries now do ought to be done by some tribunal we cannot doubt.—*The Solicitors' Journal.*

Bills to Perpetuate Testimony.

Re Tayleur, 19 W. R. 462.

The Act for Perpetuating Testimony in Certain Cases (5 & 6 Vict. c. 69) enacts (section 1) that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, dignity, title, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to file a bill to perpetuate any testimony which may be material for establishing such claim or right. Before the passing of this Act it was held that the party filing such a bill must have a present estate or interest. The small value of the interest, or the remoteness of the possibility of enjoyment, was not a sufficient objection to the Court's interference, neither was it material whether the estate or interest upon which the interference of the Court was sought, was, in its legal character, vested or contingent (*Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251). But an expectation, however proximate and valuable, by virtue of which the plaintiff had not a present interest, did not give a title to the Court's assistance. Thus, it was held that the next of kin of a lunatic could not maintain such a bill in the lifetime of the lunatic, for that they had no interest in the property (*Smith* v. *Attorney-General*, cited 6 Ves. 260), though the lunatic might be intestate and in the most hopeless condition mentally and physically, for the fact that the Court requires them to object or consent in the application of the property does not confer on them an interest in it. By a sort of analogy an heir-apparent cannot have the writ *de ventre inspiciendo* in the lifetime of his ancestor. But it seems that persons so situated may contract upon their expectations, and may perpetuate testimony with reference to the interest so created, though they cannot qualify themselves as to any interest in the subject itself (*Lord Dursley* v. *Fitzhard. sup.*)

In the last-mentioned case it was held that any interest, however slight, was sufficient. But the interest, besides being present, must also be incapable of being destroyed without the consent of the person interested. In *Allan* v. *Allan* (15 Ves. 130), a demurrer was allowed to a bill by issue inheritable under an entail, on the ground that they were at the mercy of the tenant in tail in possession; and in the leading case of *Earl of Belfast* v. *Chichester* (2 Jac. & W. 439), a demurrer was allowed to a bill by the eldest son of a peer for the purpose of perpetuating evidence of his father's marriage, on the ground that a peerage is capable of alienation by forfeiture, and that, although virtually granted in remainder, the person in remainder is never supposed to have any present interest. Lord Eldon suggested a doubt whether the Court had jurisdiction to entertain a bill filed to perpetuate testimony in support of a claim to a dignity, and advised an appeal to the House of Lords from his decision allowing the demurrer. It appears (Hubback on Successions, p. 110 n.) that the plaintiff never did appeal, but obtained a private act to remove the doubt as to his legitimacy. The doubt as to the competency of the Court to entertain the bill when the question was as to the right to succeed to a dignity was removed by statute 5 & 6 Vict. c. 69.

In *Re Tayleur* it was in contemplation to institute a suit to perpetuate testimony as to the validity of two wills made by the lunatic. The Lord Justices, in ordering that such costs as the Master in Lunacy might think proper of the suit, if instituted, might be paid out of the lunatic's estate, avoided expressing any opinion as to whether the bill, if filed, would be demurrable. Before the passing of the Act such a bill would have been clearly demurrable, for the devisee under the will of a living person can be no better off as to present interest than the next of kin of an intestate living person (*Smith* v. *Attorney-General*, *sup*). Whether, since the passing of the Act, such a bill will lie has not been decided. The Act is intended to extend the means of perpetuating testimony in certain cases (in what cases is not stated). Remedial Acts are in general to be construed liberally; yet we have it on the authority of the Lord Chancellor (*Campbell* v. *Earl of Dalhousie*, L.R. 1 Sc. App. 462), that proceedings under this Act ought to be jealously watched. Upon the whole, it seems very doubtful whether such a bill would lie as it was proposed to file in *Re Tayleur*. Before the Act the bill would not have been demurrable.—*Solicitor's Journal.*

It is no reason for a new trial in a case of felony that the reasons of the absence of a witness, who should have been present, were investigated while the jurors who were to try the case were in the court room.—*U. S. Reports.*

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

(*Reported for the* Law Journal *by* Rusk Harris, Esq., *Barrister-at-Law.*)

Stormont Election Petition.

Petition—Practice—Writ of Election—Qualification—Mistake in entry of votes on the Roll—Recriminatory Charges—Scrutiny—Aliens.

1.—*Held*, 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 opponent's votes, and the same practice followed in this case.

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 by mistake having his name on the roll and list, but entered as tenant instead of owner or occupant, or *vice versa*: *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.—*George N. Stewart's vote.*

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*, the son has no vote.—*Wm. P. Eamon's 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.—*Robert Bullock's 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.—*John Raney's 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* owner, 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.—*Owen Baker's vote.*

[The learned C. J. 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. See as to this judgment, the case of *Duncan Cahey*, post.]

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.—*Joshua Weort's 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.—*Duncan Cahey's vote.*

[A question being raised in this case as to the sufficiency of the notice of objection, 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 C. J. remarked, "The respondent's counsel does not say that he is prejudiced by the way in which the objection is taken, if he had, I would postpone the consideration of the case. It is objected that the case of Owen Baker 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 put on originally merely for the purpose of giving a vote, and that was the vote questioned, it would have been bad, but being continued several years after he really became the occupant for his own benefit, he was entitled to vote, though originally the assessment began in his name merely to qualify him.—*Benjamin Gore's vote.*

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.—*Donald Blair's 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 not assessed for it, he was not entitled to vote.—*Samuel Hill's 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.—*Joshua Rupert's vote.*

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.—*Wm. J. Gollinger's 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.—*Wm. Place's vote.*

[Richards, C. J., June 12, 13, 14, 15, 16, 17, 1871.]

The following was the form of the petition in this case:—

In the Queen's Bench.

The "Controverted Elections Act of 1871."

Election for the County of Stormont, holden on the fourteenth and twenty-first days of March, in the year of our Lord one thousand eight hundred and seventy-one.

The Petition of James Bethune, of the Town of Cornwall, in the County of Stormont, at

present in the City of Toronto, in the County of York, esquire, whose name is subscribed.

1. Your petitioner was a candidate at the above election, and claims to have a right to be returned at the above election.

2. Your petitioner states that the election was holden on the fourteenth and twenty-first days of March, in the year of our Lord one thousand eight hundred and seventy-one, when William Colquhoun and your petitioner were candidates, and the Returning Officer has returned the said William Colquhoun as being duly elected.

3. And your petitioner says that the votes of divers persons, being within the age of twenty-one years, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers at the various polling places within the townships comprising the said county, at the said election, for and on behalf of the said William Colquhoun at the said election.

4. And your petitioner says further, that the votes of divers persons, not being subjects of her Majesty by birth or by naturalization, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

5. And your petitioner says further, that the votes of divers persons, not being at the time of the last final revision and correction of the assessment rolls for the respective townships in which the said persons respectively voted, being the respective rolls on which the voters' lists for the said election were respectively based, actually and *bonâ fide* the owners, tenants, or occupants of the real property in respect of which they were respectively entered on the said respective rolls, were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

6. And your petitioner says further, that the votes of divers persons, not being at the time of the last final revision and correction of the assessment rolls for the respective townships in which the said persons respectively voted, being the respective rolls on which the voters' lists for the said election were respectively based, actually and *bonâ fide* the owners of the real property, in respect of which they were respectively entered on the said respective rolls, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

7. And your petitioner says further, that the votes of divers persons, not being at the time of the last final revision and correction of the assessment rolls for the respective townships in which the said persons respectively voted, being the respective rolls on which the voters' lists for the said election were respectively based, actually and *bonâ fide* the tenants of the real property in respect of which they were respectively on the said respective rolls, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

8. And your petitioner says further, that the votes of divers persons, not being at the time of the last final revision and correction of the assessment rolls for the respective townships in which the said persons respectively voted, being the respective rolls on which the voters' lists for the said election were respectively based, actually and *bonâ fide* the occupants of the real property in respect of which they were respectively entered on the said respective rolls, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers aforesaid, at the polling places aloresaid, for and on behalf of the said William Colquhoun at the said election.

9. And your petitioner says further, that the votes of divers persons not duly registered or entered on the then last revised and certified list of voters for the said county, according to the provisions of "The Election law of 1868," were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

10. And your petitioner says further, that the votes of divers persons who had respectively previously voted at the said election, were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

11. And your petitioner says further, that the votes of divers persons who had respectively been guilty of bribery, and of divers persons who had respectively been bribed within the meaning of "The Election law of 1868," were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

12. And your petitioner says further, that the votes of divers persons who had respectively been guilty of corrupt practices within the meaning of "The Controverted Elections Act of 1871," were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election

13. And your petitioner says further, that the votes of divers persons who were not by law entitled to vote at the said election, were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

14. And your petitioner says further, that if the said votes of the said persons respectively mentioned and referred to in the foregoing paragraphs of this petition as having respectively illegally voted for the said William Colquhoun at the said election, had not been received or re-

corded for or on behalf of the said William Colquhoun, the number of votes taken and recorded at the said election for and on behalf of your petitioner would have exceeded the number taken and recorded for the said William Colquhoun at the said election.

15. And your petitioner says further, that a greater number of persons legally entitled to vote at the said election voted for your petitioner than for the said William Colquhoun.

16. Wherefore your petitioner prays that it may be determined that the said William Colquhoun was not duly elected or returned, and that your petitioner was duly elected, and ought to hove been returned.

(Signed) James Bethune.

The particulars of the petition showed that 159 votes were objected to, on the ground that the voter was not the owner, tenant, or occupant of real property within the meaning of section 5 of the Election Law of 1868, 17 votes of aliens, 7 under 21 years of age, 11 of voters unduly influenced, intimidated and compelled, 45 of bribery within the meaning of section 68 of the Election Law of 1868, 45 of bribery within the meaning of section 67 of the Election Law of 1868, 3 of personation, 44 of corrupt practices within the meaning of section 3 of the Controverted Elections Act of 1871, and 8 of unduly influencing, intimidating, and compelling voters to vote for respondent and against petitioner.

The respondent gave notice, that under section 56 of the Controverted Elections Act of 1871, he intended to give evidence that the election of the petitioner was undue, and assigned bribery by petitioner and his agents, undue influence, intimidation, corrupt practices, treating, providing entertainment, &c.

On behalf of the respondent, the particulars showed 6 cases of voters under the age of 21 years, 14 of aliens, 119 of bribery and undue influence, 13 not on last revised assessment roll sufficient to qualify, 5 at the time they voted not owners or tenants respectively of the property in respect of which they voted, 114 not at the time of the final revision of the assessment roll in which their names appear, the *bona fide* owners, occupants or tenants respectively of the property in respect of which they were assessed and voted, 2 disqualified by reason of their being employed and paid for their services at the election.

The respondent also gave full particulars under his notice, objecting to the return of the petitioner pursuant to section 56 of the Controverted Election Act of 1871.

Harrison, Q. C., and *Bethune* appeared for the petitioner.

J. H. Cameron, Q.C., and *D. B. McLennan* for the respondent.

Harrison, Q.C., in opening the case for the petitioner, stated that he intended going into the question of scrutiny first, and proposed to follow the practice of the English cases, viz: for the person in a minority to first place himself in a majority, then the person thus placed in a minority to strike off his opponent's votes.

Richards, C. J.—We had better follow the same practice here.

The petitioner having placed himself in a majority, the respondent struck off a sufficient number of votes to place him in the same position as when he commenced.

Cameron, Q.C., took the objection, that the writ of election was necessary before any evidence of the election could be given, and that the writ and return should be produced.

Harrison, Q.C., replied, and cited the *Coventry case*, 20 L. T. N. S. 406, where Willes, J., was reported to have said, "I shall not require the election to be proved in any of these cases. The poll books are here, and they tell me an election was held."

Richards, C. J.—I consider the proceedings somewhat analogous to an interpleader issue. The matter is sent down here now to be tried, and it seems to me that after a petition has been presented asserting an election and return, and parties have appeared demanding particulars, &c., and have themselves made recriminatory charges, and delivered lists of votes objected to, it would be very inconsistent now to assume that there had not been an election and return. If it were so, we should probably have had an appeal long ere this showing that fact. I think the *dictum* of Willes, J., in the *Coventry case* reasonable, and it ought to be followed.

Harrison, Q.C., then urged that the respondent should first dispose of the recriminatory charges of bribery.

Cameron, Q.C., stated that as to the recriminatory charges, there were only three which affected the petitioner's *status* under the statute, and as to them, he was not prepared to go on; as to the others, that they did not charge personal knowledge of the corrupt practices by the petitioner, and in his opinion there must be personal participation in the corrupt practice by the petitioner to disqualify him.

Richards, C. J.,—I do not think he ought to be compelled to go on with the first three now.

Harrison, Q.C., contended that the onus of proving a qualification was thrown on the voter, or on the party who wishes to sustain the vote.

Richards, C. J.—I think the vote being on the poll book is *primâ facie* evidence of his right to vote. If the party objecting to it resolves to attack it, he may call the voter if he please, or give any other evidence he has on the subject.

Counsel on both sides then requested the ruling of the Court on the question of a voter, properly qualified, but who by mistake was entered on the roll as tenant, instead of owner or occupant, or *vicê versa*.

Richards, C. J.—The *rota* Judges have determined to hold that when a voter is duly qualified in other respects, and his name is on the roll and list, but is by mistake entered as tenant instead of owner or occupant, or *vicê versa*, he, really having the qualification, is not disfranchised, merely because his name is entered under one of the heads, instead of under another.

SCRUTINY.

The petitioner now proceeded with his scrutiny:

Gilbert Stewart was called to attack the vote of *George N. Stewart*. It appeared by the evidence that the witness was the owner of Lot 6, in the

township of Osnabruck, and 4 or 5 acres of Lot 7, for the latter of which George N., his son, the voter, was assessed. The son had been assessed on this for 3 or 4 years. The taxes were paid the same as the rest of the taxes on the place. The son had no more interest in these 4 or 5 acres than in the rest of the farm. He was accustomed to use what he required for necessaries, clothing, &c., but did not own anything as of right on the farm.

Cameron, Q. C., contended that under the Assessment Law, the voters list is final as to qualification, and cited 32 Vic. chap. 21 sec. 10.

Richards, C. J.—The *rota* Judges have had this question under consideration, and have arrived at the conclusion that under the statute the only question of qualification which was considered settled by the Court of Revision, was the one of value. The others are open for investigation on a scrutiny. Vote held bad.

Joseph Eamon (called to attack the vote of *Wm P. Eamon*).—"I live in Osnabruck. I live on the East ½ of 7 and West ½ of 6 in that concession. I have lived there about 23 years. I own the land. Wm. P. Eamon is my son. We have possession. He lives in the same house with me, a member of the family. He makes his living off it. I gave him a privilege of half what we raise—the bargain is verbal. It has been going on that way for some years. There was no bargain in particular made about it Never made division of the crop, except when sold. I gave him more than half of it. There never was any bargain made between us. He is the only son I have. I expect him to have the place after I die. He has a family. There is no distinct share agreed on between us. He, when the grain is sold, gets better than half of the money. I gave it to him, because he does more than half the work. I allow him to give in 50 acres of the land. He has no title of it. That is not cultivated any different from the rest. He does the chief part of the work. We paid the taxes and did the road work between us. I allowed him to give in the 50 acres to satisfy him. I don't know if it was to give him a vote—it might have been. I don't recollect its being talked over for that purpose. The house and barn on that part I gave in myself. The grain is all put in the same barn—used at the same time. My son has three children. I have my son and a daughter. He has always lived with me. I told him when he was married, he could bring his wife there, and remain with me. He expects, of course, to get all my property. This arrangement continued since he was married. He has a part of the house considered his own, but we all eat together. When anything is sold he receives a part of it. The practice has grown up between us since he was married, to give him a share of the proceeds, and that has taken place every year since he was married. He still hands me the money, and I give him his portion. Sometimes it amounts to more than others, according to what he sells. He manages the whole farm for me. I have been in the habit of considering him as jointly in occupation of the farm.

Cross-examined. — His proportion is more or less—as the grain will sell. We can't divide the grain—we divide the money. I generally give him more than half. He has got half ever since he was married. We keep no accounts. I just handed him what I had a mind to, and that was the only arrangement, and he was satisfied. He had no writing to him made out. If he was not satisfied with what I gave him, he could not compel me to give him any more. I did not intend to make any arrangement with him so that he could compel me to give him any share. If we should at any time disagree, I could turn him out at any time. He has no right to remain there. I am master myself."

Cameron, Q. C., contended that the vote was good, and cited the Assessment Act of 1868-9 sec. 27, Election Act 1868-9 sec. 5 sub. sec. 2, followed by the interpretation of the term "occupant" sec. 6 sub. sec. 2.

It appeared in this case that the assessment roll showed both father and son rated for the land—two quarter lots. On the voter's list the father is rated for one quarter, the son for the other.

Richards, C. J.—The rule applicable to this case, and which I think is in accordance with the view of the *rota* judges, is that when the father and son live together on the father's farm, and the father being in fact the principal, as in this case, to whom moneys are paid over, and who distributes them as he thinks proper, and the son has no agreement or understanding binding on the father, either to compel him to give him a share of the proceeds of the farm, or to allow him to cultivate a share of the land, and he merely receives what he gets from the father's sense of justice and right, that then the son has not such an interest as qualifies him to vote under the election law.

Robert Knight Bullock (called to attack the vote of *Robert Bullock*).—"Robt. Bullock is my son. I own lot No. 8 in 1st Con., Osnabruck. I have owned it 30 years and upwards. I have been in possession of it, and am still in possession of it. My son Robert was born on the land. He has not always been there with me. He has been with me the last four years. He occupies the mill on the west part of the lot. I own the mill. My son runs the mill for his benefit and mine. There is only a verbal agreement between us about it. It was made four years ago. The agreement was that he should have a fair proportion—whatever was considered as fair. I think the agreement was made in presence of the whole of the family. He keeps the accounts. We have never had a settlement. He had all he required. He charged himself with what he took. Cannot say what he charged himself the last four years. He handed over the proceeds every week, save what he kept for himself, to his mother or me. He is a miller—runs the mill. The business is carried on in my name and his. The invoices are generally made out in the name of R. K. Bullock. I have seen some made out in his name. He lives at my house, with the rest of the family. The agreement was to last as long as it suited him and me I think he has kept more than was reasonable to clothe him and furnish pocket money. We have had losses in the business. He gave no money towards them, but was more moderate in what he drew. He is not married.

I cannot tell what he got in any one year. He was to have a liberal allowance, having charge of the mill—more than most young men.

Cross-examined.—It is a grist mill, with three run of stones; he has no wages; he runs this mill jointly with me, and has done so for four years. I could not put him out of the mill as I thought proper. I have had no settlement with my son as to our transactions. He will be 28 next birthday. I thought him entitled to a good liberal allowance—once or twice I thought he drew more than required for the business we were doing just then. Sometimes the profit was very small. He is a miller—understands the trade. I presume there would be some trouble in putting him out of the mill—some time to give him notice. The understanding between us was, when he returned from the West, if he would stay, he would have a good liberal allowance for his work. There was a man employed about the mill at so much a month; he was paid in cash; Robert hired him; he took what he chose; sometimes I presume what he took was more than sufficient for his ordinary expenses. The share he took would amount to more than £50 a year. He was differently situated from my other sons. He did all the collecting of the debts; is still there on the same terms. Before he took charge this was rated in my name. Immediately after he came there we made the arrangement; there was a change. I think he sent the money for the taxes. I know I did not. I am not there a great deal: he is, and he attends to those things. He does not get $300 in cash from the mill—not much less than $200. He boards at home. I have a first-class miller at $500 a year and the house, and they board themselves.

Re-examined.—I have bought some of his clothing since he came back. I did not charge him with it; sometimes he pays for it, sometimes not. I have paid for a good share of his clothing for the last four years. When he wants to go away from home, and the horses are there, he generally takes one. I am certain he took more than $100 in cash in each year for the last year or two."

Richards, C. J.—I think in this case the original agreement between the parties shows an intention to give the son something more than a mere gratuity such as the father might choose to allow him. The father says he told him if he would stay at home and take charge of the mill, he would give him a share of the profits; no specific share was agreed on, and the son took out of the proceeds what he thought right; the father sometimes thought it too much, but did not mention this to the son; did not close the business or the connection. I think here the son had something more than a sum of money out of the premises at the will of the father; he was entitled to a share; had an interest in the business, and, as such, while the business lasted, an interest in the land, and was at all events a partner in the profits, and might be considered as having an interest in the land. Bullock says, I understood we were to be partners in the milling business under this arrangement, and he was to have a fair proportion of the profits."

I therefore think this vote good.

John Raney, the voter called as to his own vote —"I voted in Stormont as the owner of the east half of twenty-five, in the third concession, Roxborough. My father owns it. I have no title or lease of it. I live on it. Have lived on it eighteen or twenty years. Father lives on it with me. We both live in the same house. I was married about two years ago. Father has told me he would give it to me. He has offered me a deed of half the lot. Mother is dead. I have a sister living. My sister managed the household until I was married. My father is about seventy. I always remained there with him. I thought he would give it to me. No writing between us. I have remained in the expectation of getting the whole when he dies.

Cross-examined.—My father is not able to work. We live together. He said he would give me a deed of half at any time and that the whole place was for me. My brother left five years since or more. He is younger than I. There are a hundred acres in the lot, thirty-five or forty acres cleared. I sell if I am there, he sells if he is there. I do pretty much all the business. When he sells grain he gets the money. I am relying on what he said to me in staying with him. It has been assessed to me eight or nine years. Sometimes my father and sometimes I myself give it in. Father pays if he is there when the assessor comes; and when I am there I pay. I keep the store account in my name and pay the necessaries for the house. He directs the place to be assessed in my name. I don't know who is master of the house. We are both there. He built it. I consider I ought to obey his orders as a son ought to do towards his parent. I tell him what I do with regard to the business of the place. One of the horses I bought this winter I claim. My sister and sister's daughter claim most of the horned cattle. When I sell anything I consult him if he is there; if not there I sell and tell him. The cattle are assessed in my name—everything My father when able gets about and sees to odd things about the house but can do no hard work. I consider it my duty to consult him about what I sell. If he was about to assist a neighbour and consulted me about it, I don't think I would be justified in objecting to his doing so. I consider him the owner of the place. Before I was married we were living together. I would give in he was boss of the house. My sister was also living there, and also a niece of mine seventeen or eighteen years of age."

Harrison, Q.C., contended that the voter has a right to enforce specific performance of the agreement with his father, and cited *McDonald* v. *Rose*, 17 Grant.

Richards, C.J.—This case has much in it to shew a kind of occupancy distinct from the father, and if the father had received from him a certain share, or he himself a certain share, or there had been any agreement between them, either expressed or implied, that he should receive the profits of the place, and the father lived with him, it might have been different. But the case seems to me, to be really that of a man and some of his unmarried children, and grandchildren living together, *en famille*, the hard work being done by the younger branches who

are able to work, the old man not being able to do so, but in fact, being the head of the family nevertheless. It is true the place is assessed in the name of the son, but so were the cattle and other loose property, as I understand from the witness, and he did not claim to own them. On the whole I think this vote bad.

Owen Baker, the voter, was called as to his own vote.—The evidence in this case was very similar to that in the case of Robert Bullock.

It appeared on the evidence of the voter that he and his elder brother had entered into an agreement with their father, that they were to carry on his (the father's) mercantile business in the village of Aultsville for three years, the sons to leave the business at the expiration of that time in as good condition as when they commenced — the sons to have all the profit Shortly after the agreement the elder brother left the country, and the voter continued to carry on the business with the aid of his father. The voter was assessed on ten acres of the farm (one hundred acres) which was managed in the same manner as the mercantile part of the concern.

The books were kept and purchases made in the father's name, who could also sell what he pleased out of the concern or the produce of the farm.

On cross-examination he stated that he thought his father could not compel him to leave, if he was unwilling, before the expiration of the three years. When the agreement was entered into stock was taken. The son could sell a team if he thought fit without speaking to his father about it, could sell stock as he pleased and appropriate the money. The ten acres was worth about $30 an acre.

To attack the same vote Simeon Baker was called. The witness was the father of the voter Owen Baker. The assessment on the roll for the son was ten acres, value $240. He was entered as freeholder. Was not certain if he gave it in as occupant. No one lived on the farm, but the son worked it. Had promised the interest of it for three years. The understanding with the son was he was to keep it as good as when they started. Would consider it wrong to take $20 out of the produce of the farm, but could do it if he thought proper. Could buy and sell in the store, but could not say that he could take anything without the son's leave. The ten acres was considered sufficient rating to give the son a vote. There was no agreement in writing as to the land or anything else.

On cross-examination this witness stated that the object in making the arrangement was to benefit the son. He was working in Matilda, and the witness wanted him and his brother at home. They thought of going West, which he, the father, did not desire. They took up the business on the arrangement that they were to have all the profits for three years—the stock to be returned to witness as good as when they commenced—the personal expenses of the witness to be the same as the rest of the family.

Cameron, Q.C., objected that the voter had no interest in the land. He was not a joint occupant with the father; and if he were, the assessment was not sufficient in amount to qualify for both: Election Act, 1868-9, sec. 5, sub-sec. 2.

Richards, C. J.—I consider the father and the son have a substantial interest in the business and its proceeds, and in the proceeds of the farm, and in the land; but perhaps not strictly a term. I think the interest the son has is in the nature of a joint one with the father.

Harrison Q C., contended that the objection taken to this vote does not touch the point. The objection is in schedule No. 6.

(Form of objection in the schedule referred to: "List of voters who voted for the petitioner at the said election, objected to on the ground that they were not, at the time of the final revision of the assessment roll in which their names appear, and on which the respective voters' lists were based, the *bonâ fide* owners, occupants, or tenants respectively of the property in respect of which they were assessed and voted.")

Cameron, Q C., said that the objection came fairly up, under the objection that he is not a *bonâ fide* owner, occupant, or tenant of the property in respect of which they were assessed and voted. This means that he was not assessed to the value to qualify him: see *Wolferston*, p. 98.

Richards, C. J.—I do not consider that the notice as given points to the objection, that if the parties were joint occupants, they were insufficiently rated to qualify the voter. I therefore hold this vote good, on the ground that the objection taken does not point to the real difficulty, viz, the joint interest being insufficient.

The learned Chief Justice intimated that if the objection had been properly taken, or if the counsel for the 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.*

Joshua Weort—called as to his own vote.

"I live on part of 16 in 7th Concession of Osnabruck; my father lives with me. I have no lease or deed. He made his will to me last January. Some seven years ago, my father told me if I would stay and reclaim the place and support him and my mother and my sister, and if I worked the place he would give it to me. I did work the place, but made very little out of it. It was pretty well run down; and so involved, that the loose property would not come near paying the demands. I worked on and made money, and redeemed the place, and father made a will in my favour in January last. I am married; have been four years. My wife and all live together in the same house. I think my father is about 77.

Cross-examined.—I was to have the use of the place in the meantime. From that time I have had the use of the place just as I liked; used it as my own; contracted and paid all debts as my own—I have used the place just as if I had had a deed of it for the last four years. He then became so old that he could not assist me. He has not been able to do anything of any value. I bought and sold stock on my own responsibility. There was some stock on the place when I went on; it was understood it was

* See judgment in case of Duncan Cahey.

to be mine if I paid off the debts. I have paid off between four and five hundred dollars. There was a change in matters after that; I became the master there, and he consented to it. My father used to apply to me for money within the last two or three years. I am managing this business as my own, on my own account, and for my benefit. and that is the understanding between us. I presume it is so generally understood in the neighbourhood. It is assessed for four or five years last in the name of myself and my father; the cattle all assessed in his name.

Re-examined —I did this to clear off the place; to get it in the end for myself. That was the motive with which I made the agreement. My father and the family were to have their support in the meantime, and whatever I made was to go to pay off the debts; they are not wholly paid yet. I had confidence in my father that he would will it to me, and did not make any agreement as to what I would have in the event of his not willing it to me."

Richards, C. J.—The arrangement is, in fact, such as shews the use and occupation for the benefit of the estate in paying off the debt. I consider that the real understanding is, that he works for the benefit of the estate, and beyond what is used in supporting the family is to go to that purpose. If he had had a right to it for his own benefit, it would be possessed for his own use and benefit. What he really works for and the profit of the estate goes to is his expected possession of his father's estate under his will. I think this vote bad.

Duncan Cahey, called by the petitioner as to his own vote.

I live in Roxborough, 1st Con., part of 17 and 18. My father's name is Edward. My father lives on the lot; has lived there 30 years; owns part of it. I own the south part of west half of 17. I have a deed for it; I have it with me: I got it last August, the day it was dated; its date is the 16 August, 1870. I did not own the lot until I got the deed. I had no claim to it before that. I voted at the election; I am called McCahey. I don't own any other property; the property has been assessd in my name for the last 5 or 6 years. My father is over 70. I have generally paid the taxes."

Harrison, Q.C.,—This man is not a voter within the meaning of section 5 of the Election Act 1868–9 He is not rated for the lot—if he was, he is not a voter under the section. The true meaning of the section is, that he was so possessed at at the time of assessment. See the form of oath to be administered to voter under section 41 of the Act.

Cameron, Q.C., *contra*—There is nothing to show, that the roll might not have been revised after he got his deed—nothing in the 5th section of the Act to declare that the person should have the title, and nothing in the section referred to, to call attention to the particular objection now raised, and it is only by referring to the oath that the point comes up.

Harrison in reply—The statute only permitted appeals to 15th July under the Assessment Act, 32 Vic. cap. 36, section 63, sub-section 6. The general form of objection was sufficient: if the parties thought it not sufficiently specified, they should have demanded better or further particulars.

Richards, C. J.,—I think this vote bad, because he did not possess the qualification at the time he was assessed, or before the final revision of the roll. The respondent's counsel does not say that he is prejudiced by the way in which the objection is taken. If he had been, I should postpone the consideration of the case. It is objected that the case of Owen Baker 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.

Benjamin Gore, called by the respondent as his own vote.

It appeared by the evidence of the witness, that he lived with his father, and had voted on his, the father's property. His father had made a will in his favor, but he had no title but a verbal agreement with the father. The agreement was made at the time the will was made, about 1865 or 1866. The son was to take the proceeds after supporting his father and himself; did not account to his father for the proceeds. Witness was assessed for 10 acres, value $250. The assessment was made in his, the witness' name, before the arrangement with the father. It was done to give him a vote. The father paid the taxes before the agreement, the son pays them now.

Cameron, Q.C., contended that the arrangement was a colorable one, merely to give the son a vote. The ten acres was not specially mentioned.

Richards, C. J.—If the name had been put on originally (before 1866) merely for the purpose of giving a vote, and that was the vote questioned, I should probably hold it bad; but being continued after he really became the occupant for his own benefit (since 1866), I cannot say that he is not now properly a voter, even though the name was continued there to enable him to vote. I think the vote good.

James Blair—called to attack the vote of *Donald Blair*:

"I live on the West ½ of Lot 26 in the 6th Con. of Roxborough. I am the father of Donald Blair. He lives with me. He has no written agreement, lease, or instrument. When it was purchased he sent me the money to pay for it, about four years ago, and I took the deed in my own name. He was then in the States, and came back a year after. He is living with me as the other son. He is the oldest. He is not married. By means of that lot he has bought another last spring. He paid only $300 for the lot. We are all working the place. He has got a deed for 32 in same Concession. Bought it last spring. I own my own place. The N. W. ¼ of 26 in the 6th Con. is the lot the boy voted on and which he sent me the money for. My sons and me are working and occupying it since about a year ago. He had not any interest in it beyond this, that his money bought it."

Cross-examined.—I bought lot 26 more than thirty years ago. I bought 25 for Donald. I wrote him I could buy the place for him cheap. I mentioned $300, if he could send me the money.

I bought the place about four years ago. Took the deed in my own name, as he was not at home (he is about 27), and when he returned he went to live with me. Neither of us lives on 25. He works it. It all comes in together, and is worked the same as my farm. By the labor and assistance of myself and his brother, we made money which enabled him to buy another place. I consider it his, and it is his. He thought it would be too little to give his vote on the lot he bought, and he was assessed for three years for lot 25. He was assessed the first time the assessor came round after I bought it. The other son is 20. I have three daughters unmarried and two married. My son never asked me for a deed for it, nor did we ever speak of it. Nothing separate from what was raised on 25 for my own. No building now on 25. We all worked on the three lots assisting one another. Before we bought the last lot we all worked on the two, assisting one another. We make no shares. The young boy expects my lot. It is so understood. The homestead is 130 acres with buildings. The oldest son 150 acres—no buildings. The girls are to have the loose property. We are working harmoniously, assisting and aiding each other. It is understood in the neighbourhood that he is the owner."

Cameron, Q.C.—The father is trustee for the son. They are not rated for enough to have them both qualified And as to the ownership, the father is in possession, and has the profits to his own use, and therefore is literally the owner.

Richards, C. J.—I think the father is in fact the owner, but not in his right as owner in fee, but as occupant with the assent of his son. I think, on this evidence, the son is the equitable owner, and rated as owner, would have a right to vote, notwithstanding the deed to his father, and hold that the mistake in that respect, being rated as tenant instead of owner, does no harm. I therefore for the present hold the vote good, but, if necessary, may reserve it.

Samuel Hill called as to his own vote.

It appeared, on the evidence of the witness, that he and his son had leased certain property. the lease was drawn in the son's name alone, and when he and his son reaped the crops, the son claimed that they belonged to him solely. The witness owned other property, but when the assessor called on him he requested him to assess this particular property to him, and on this he voted

Harrison, Q.C.—As he was on the roll, and had the necessary qualification, though not assessed for it, the vote should stand.

Cameron, Q.C.—He voted in right of this property, and had it assessed to him in preference to the other by his own desire, and cannot in consequence now claim to vote.

Vote held bad.

Joshua Rupert, called by the petitioner as to his own vote.

It appeared on the evidence of the voter that he voted on part of lot No. 6, eighth concession, Osnabruck. Did not own it; his father-in-law did. Had occupied it for five years, paying rent to his father-in-law. Lease expired in November last. Left it about a year ago—on first of last April. After he left, it was let by his father-in-law, with his consent, to a man named Stewart, for a larger sum than he paid, and the father-in-law paid him the extra rent. Was a witness to the lease to Stewart, which was dated 28th March, 1870.

On cross-examination he said that it was agreed at the time of the lease to Stewart that the father-in-law should pay him, the voter, the increased rent, which he did.

Richards, C. J.—I think after the surrender by the lease, to which he was a subscribing witness, he ceased to be a tenant. I am of opinion that the party must have the interest that qualifies him at the time of the last final revision. If he has it then, though not at the time of the election, he could properly vote if he were still a resident of the electoral division, but not unless he had the interest at the time of the revision of the roll. The roll was completed 30th March, two days after the new lease. I think the vote bad.

George M. Gollinger called to attack the vote of *Wm. J. Gollinger*.

I made a deed to Wm. J. Gollinger of East half 31, fifth concession, Osnabruck. It was made on or about 12th September, 1870. There was a verbal agreement between him and me about 10th or 12th January, 1870. I was to give him the property. He left home and went to Wisconsin a few days before the holidays of 1869. About 10th January I sent him word if he would come back I would give him a deed of this lot. He came back immediately with the person by whom I sent the message. He was not then married. In September I made him the deed. We had some understanding about it before I made the deed. My son William got the proceeds of the place wholly and solely. I never got a fraction of the proceeds of this.

Cross-examined.—We had three farms. We worked together. It was understood he was to have the produce of this farm to himself separately This was the understanding between us in January, 1870. His share was put by itself, and kept separate from the rest. I worked 100 acres in the 7th concession, and 50 acres in the 4th concession also. Of these he had no share. We lived together at that time in the dwelling on this lot, until I gave him the deed. When I gave him the deed I was to leave. It was his privilege to let me remain. I had no management of this part. I did on the others, but let him do as he liked about this. I think my son was twenty-three years old in May or June. This understanding was not varied in any way after. It was part of the understanding that he was to have control of the place last summer. I suppose he went away because he wanted some property and I would not give it to him, but I changed my mind.

Re-examined.—When he came back the agreement was that if he would stay at home and work the farm, I would give him a deed at any time he chose to ask for it. He would rather I should stay with him and give him a deed, so that he could have control. I would rather have control myself, and so I would not stay there. He was anxious for the deed, and so I gave it to

him. I thought he would have been willing I should stay there if I would give him the deed. I would prefer to stay elsewhere. I did not have any control. I never wished to stay there from the time I made the verbal bargain. His own hand worked it. I gave him a team, span of horses, for stock farming in September. I promised that in January, and transferred it in September. I told him I would give him seed to sow the place. I promised him no help. I helped him some. He did not pay me for his board, nor did I pay him for the rent of the house. The teams pastured on the place. His lot and mine remained together, not separated by fences. I could not tell how many bushels of grain I gave him that year. He did not promise to work for me. We worked as before—beginning at one field and finishing that, and then at another, and so on, as before; but this was upon an understanding. In September I went to a lot I had in the 7th concession. He remained on the lot. I gave him the deed and property I promised him, and the cattle, and I went to the 7th concession. Until he got the deed it was understood he was to go and work the farm—the east half of 31—if he should think proper. I was to give him a span of horses, waggon, harrow, four cows, six sheep, four hogs, and two pigs, and he was to have one half of the house furniture. He was to have these at any time he wanted. This was to be done at the same time with the deed, and at the time of the deed I did give them to him. He went on then under these terms, and went to work. He never said he wanted them until September. He took possession of them in January—of the horses and cattle, and these things. We never drove them off. I pointed out the four cows and the horses, and he took possession of them then. He was to get six sheep out of the flock. He was to have four of the hogs in the fall. He attended to these horses himself, and my son to the other team. He groomed and fed them as his own. I said to him in the spring, if he would help us to put in a crop in the other land, we would help him. He agreed to do so, and we went and did it. There is only one barn on 31. It was on his part. There were no crops on mine. The stuff was put into the barn on the place as before. He took control of it after, and used it. I had nothing to do with it after. I did not take anything off the place since or before."

Richards, C.J.—I think this vote good, according to the rule we have acted on.*

William Place, (class 2 "Aliens"), called as to his own vote. It appeared from the evidence of the witness that he was informed by his mother he was born in Ogdensburgh, in the United States. Both father and mother were born in Canada. He left Ogdensburgh when he was nine months old, came to Canada, and had resided in Canada ever since.

F. H. Shaver called as to same vote.—Witness was a cousin of the voter. Knew him and his family. The voter's grandfather came originally from the United States. Drew land from Government, as did also voter's father as a U. E. Loyalist. Understand that the voter was born in Ogdensburgh. The father of the voter moved to Ogdensburgh about three months before the voter was born.

Richards, C.J., thinks the vote is good.

[The trial of this petition was adjourned until Monday, the 12th of September next.]

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* *The following points arising on Scrutiny, were also decided in Brockville Election Petition, tried by the Chief Justice of the Common Pleas, and may be conveniently referred to in this place.*

1. Any 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, even 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 the taking the oath, the vote will not be struck off on a scrutiny.

When a voter, properly assessed, who was accidentally omitted from the 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 voters' list, should vote be received? of course if questioned at the poll, it could not have been received, not being on the voters 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 product of the place, the son dealing with the crops as his own, and disposing of them 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 be 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. *Quære*:—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.

ENGLISH REPORTS.

CHANCERY.

Lambe v. Eames.

Will—Construction—Whether trust or absolute gift

A testator bequeathed to his wife a freehold house and all his personal property, "to be at her disposal in any way she may think best for the benefit of herself and family."

Held, (affirming the decision of Vice-Chancellor Malins), that this was an absolute gift to the wife.

[19 W. R. 659.]

This was an appeal from a decision of Vice-Chancellor Malins (18 W. R. 972).

By his will dated 13th March, 1833, John Lambe, who was a tradesman carrying on his business at No. 29, Cockspur Street, of which house he owned the freehold, and who was then a man not much advanced in years and having a young family, willed and bequeathed to his wife, Elizabeth Lambe, his said freehold house, and also all his personal property, consisting of stock-in-trade, book debts, and household furniture, and property of every description belonging to him, the whole of the aforesaid property "to be at her disposal in any way she may think best for the benefit of herself and family."

The testator died in 1851, leaving his wife surviving. She, by her will dated the 28th April, 1857, devised her "freehold messuage No. 29 Cockspur Street" to trustees, upon trust for her daughter Elizabeth Eames for her life, subject to and charged with the payment of an annuity of £70 to her grandson, Henry Lambe, during the life of her daughter, and on her death the testatrix directed her trustees to divide the rent between her grandchildren, Henry Lambe and Charles Eames (son of the daughter Elizabeth Eames) in equal shares during their joint lives, and upon the death of either of them she devised the house in fee to the longest liver of them. The testatrix died in January, 1865, and thereupon the daughter Elizabeth Eames entered into possession of the house. The grandson, Henry Lambe, was an illegitimate son of a son of the testator and his wife. He was born during the life of John Lambe, but after the date of his will. This suit was instituted by Henry Lambe against Elizabeth Eames and her husband and the surviving trustee of the will of the testator, to enforce payment of the annuity given to the plaintiff by Elizabeth Lambe's will.

The Vice-Chancellor held that the plaintiff was entitled to his annuity, and Mr. and Mrs. Eames appealed.

Bristowe, Q C., and *W. Barber* for the appellants.—The gift to the testator's widow is, we contend, an imperative trust, with a discretion only as to the mode of division among a certain class, in which class the plaintiff is not included. It is, in fact, a life estate to the widow with a power of appointment after her death; *Woods* v. *Woods*, 1 My. & Cr. 401; *Raikes* v. *Ward*, 1 Hare, 445; *Crockett* v. *Crockett*, 1 Hare 451, 2 Phil. 553; *Salusbury* v. *Denton*, 5 W. R. 865, 3 K. & J. 529; *Scott* v. *Key*, 13 W. R. 1030, 35 Beav. 291; *Godfrey* v. *Godfrey*, 11 W. R. 554; *Brook* v. *Brook*, 3 Sm. & G. 280; *Audsley* v. *Horn*, 8 W. R 150, 1 De G. F. & J. 226; *Gully* v. *Cregoe*, 24 Beav. 185; *Shovelton* v. *Shovelton*, 32 Beav 143; *Reeves* v. *Baker*, 2 W. R. 354, 18 Beav. 372. Even if the widow was at liberty to dispose of part or the whole of the capital during her life, still, whatever was left at her death was subject to a trust for her family, a class to which the plaintiff does not belong. As to the meaning of the word "family," they referred to *Lucas* v. *Goldsmid*, 8 W. R. 759, 29 Beav. 657; *Wood* v. *Wood*, 3 Hare, 65; *Parkinson's Trust*, 1 Sim. N. S. 242; *Griffiths* v. *Evan*, 5 Beav. 241; *Alexander* v. *Alexander*, 5 W. R. 28, 2 Jur. N. S. 898, 2 Jarman on Wills (3rd ed.) 82 *et seq.*

In the course of the argument, *M'Leroth* v. *Bacon*, 5 Ves. 159; *Robinson* v. *Waddelow*, 8 Sim. 134; *Doe* v. *Joinville*, 3 East, 172, were also referred to.

Cotton, Q. C., and *Warner* for the plaintiff.—There is no obligation or trust that can be enforced in this Court. That a trust may be enforced there must be a defined property affected and definite objects. Here the property is indefinite, for the widow might clearly have spent any part of it she pleased in her lifetime, and the objects of the trust are not ascertained, for the word "family" is too indefinite. The words which are said to create a trust or obligation are really nothing more than a statement of the testator's motive in making the absolute gift to his wife. He wished that after his death she should occupy his position as head of the family.

They referred to *Morice* v. *The Bishop of Durham*, 10 Ves. 535; *Knight* v. *Knight*, 3 Beav. 148; *Green* v. *Marsden*, 1 W. R. 511, 1 Drew. 646; and also to *Dickenson* v. *Wright*, 8 W. R. 418, 5 H. & N. 401, 6 H. & N. 849; as showing that a provision for an illegitimate child will support an instrument otherwise voluntary as against a subsequent purchaser for value.

Bristowe, Q.C., in reply, referred to *Smith* v. *Smith*, 2 Jur. N. S. 967; *Barnes* v. *Patch*, 8 Ves. 604; *Williams* v. *Williams*, 1 Sim N. S. 358.

Heath for the trustee.

James, L.J., was of opinion that the decision of the Vice-Chancellor was perfectly right. If this will had to be construed independently of any authority whatever he thought its meaning would not be open to any reasonable doubt. The will was that of a tradesman who was carrying on business in Cockspur Street. He was when he made it in the prime of life, and had a wife not advanced in years, with a young family. He made his will in these terms:—[His Lordship read them]. The question was whether those words created any trust affecting the property. On hearing case after case cited, which had been referred to, his Lordship could not help feeling that the officious kindness of the Court of Chancery, in interposing trusts in many cases where the testator never intended anything of the sort, must have been a very cruel kindness indeed. In the present case his Lordship was satisfied that the testator would have been shocked had he been told that any one of his infant children could have instituted immediately after his death a suit in this court by a next friend for what was called the administration of the trusts of his will. His Lordship was satisfied that no trust was intended, and that it would have been a violation of the wishes of the testator if his

wife was to be anything else but his successor in every respect, the head of the family just as he himself had been. Suppose the gift, instead of being to the testator's wife, had been to his three sons, the share of each son to be at his disposal as he should think best for the benefit of himself and his family. In such a case the words would clearly have meant that the testator had not the vanity to think that he himself could deal with his property better than his successors could. And the case appeared equally strong when the gift was made to the widow, who would be the natural successor of the testator with respect to his family. It was, however, said that the question was governed by authority. But the cases cited were in many ways distinguishable from the present case. First of all, there was here an absolute gift to the widow, which must be cut down in some way. It was argued that the difficulty in the way of saying that there was a trust because, before you could say there was a trust the property to be affected must be ascertained, and the nature of the trust defined, existed in the decided cases, and yet the Courts in those cases said that there was some interest in the children, as for instance in *Crockett* v. *Crockett* though they did not decide what that interest was, and it was urged that the Court might now say that there was an obligation to do something for the children, and that the plaintiff, who was illegitimate, could not be allowed to take anything But even if there was in this case such an obligation it was impossible to extend it to more than the providing maintenance for the children. It was impossible to say that the words could be construed to mean a trust for the widow for life with remainder after her death to the children, either all of them, or one or more exclusively of the others, in such proportions as the widow might appoint. But if the trust was not that, what was it? Mr. Bristowe said that whatever she did not spend during her lifetime was to be in some way for the benefit of the family. His Lordship did not see how to derive such a meaning as that from the will in the present case. In *Crockett* v *Crockett* it was only decided that the children took some interest in the property, and if the widow had in this case honestly satisfied such an obligation his Lordship did not see how more could be required of her. Then it was said that the case of *Godfrey* v. *Godfrey* was like the present. But there the present Lord-Chancellor, then Vice-Chancellor, did not define what the interest of the children was. He began his judgment by saying that there was clearly a trust; that was the *ratio decidendi* there. It was impossible in the present case to say that there was a trust. In *Godfrey* v. *Godfrey* the Vice-Chancellor went on to say—"Where there were strong expressions indicating an intention that the devisee or legatee should hold the property free from control, the words denoting a wish, request or recommendation were considered to be controlled, and it was held that no trust was created; but there was no such indication here. The only difficulty arose from the words 'as to her seemeth best;' but it was not necessary to determine now to what extent the children were interested. It might be that those words were merely a direction as to the control and management of the property." Therefore that case differed from this unless it could be said that the words used in this will "to be at her disposal in any way she may think best for the benefit of herself and family," implied simply a reasonable discretion in the widow as to the control and management of the property. That, however, would be quite inconsistent with the words of the testator, for it was clear that he intended that she might employ the property and risk it all in the trade. Those were the principal cases relied upon; the other cases cited were only illustrations of the rule; and his Lordship thought that they did not enable the Court to escape from the difficulty which resulted from the indefiniteness of the word "family" in a case where there was given to the woman a general power to do what she pleased with the property. It seemed to his Lordship impossible here to put a restricted meaning upon the word "family;" it might include sons, daughters, sons-in-law, daughters-in-law. The property too, which was to be subject to the supposed trust, was equally indefinite, for it could not be said how much the widow was at liberty to spend in her lifetime. His Lordship was, therefore, of opinion that there was no such trust as the Court could enforce. If there were any obligation at all, he was of opinion that it had been fully satisfied by the widow when she made the will, giving part of the property to one member of her family, and part of it to an illegitimate child of another member of the family whom she might honestly think came within the words of her husband's will. The decision of the Vice-Chancellor was therefore right, and the appeal must be dismissed.

Mellish, L. J., was of the same opinion. In order to reverse the decision of the Vice-Chancellor, the Court must see that the widow exceeded the authority given to her by the testator. The Court must see what the words used by the testator really meant, and must not be influenced by a desire to find a trust in them, but must see what was the fair construction of the words. And the Court was also entitled to look at the state of his circumstances at the time when he made his will. The will began with an absolute devise to his wife. [His Lordship read the words of the gift.] In the first place, what was the meaning of the property being not, at the disposal of the widow, but "at her will and disposal?" It was clear to his Lordship's mind that the testator meant her to have the power of disposing of the *corpus* of the property as she pleased for the benefit of the family. If unfettered by any decision, his Lordship would have been disposed to hold that the words "to be at her disposal in any way she may think best for the benefit of herself and family," were merely intended to express the testator's object or motive in making the devise to his wife. He had such confidence in her, and he knew that the very best way of disposing of his property might be to commit its distribution to a sensible person. This might be very preferable to creating a trust which might possibly lead to a Chancery suit. His Lordship agreed with his learned brother that it would be a cruel thing to put such a construction upon the words as might entirely defeat the intention of the testator. But to a certain

extent, no doubt, a difficulty might arise, by reason of the decided cases, in giving to the words "the benefit of herself and family" the meaning which his Lordship would naturally give to them, and it might be that the family would take some interest under the words of the bequest. But what was that interest? It was impossible to give the meaning which Lord Cottenham gave to the words which occurred in *Crockett* v. *Crockett*—namely, a life estate to the widow, with remainder to the family. If the widow was at liberty to spend the *corpus*, that would be quite inconsistent with her having only a life estate. If she had not a life estate, then the interest of the family would be taken by them as the same time as she took her's, whether it was a joint tenancy, or whatever else it might be called. But the widow was to determine what amount each child was to have, and his Lordship could not see how the Court could execute a trust where a testator said, "I have such confidence in my wife, that I intend that she is to determine how my property is to go." The most the Court could do would be to prevent the widow from giving the whole of the property away from the family, though even for that his Lordship should have thought that the words were too vague. But if that were so, his Lordship could not see how the widow had exceeded the authority given to her, and it was very difficult to see why she might not provide for the illegitimate child, for whom, though he was not a member of the family, it still might be evidently for the interest of the family to provide. With regard, then, to the principal cases cited. In *Woods* v. *Woods*, the words of the gift were: "I do constitute and make Elizabeth my wife and Thomas Woods my executors whom I do appoint to sell and dispose of all my estates and chattels in such manner and form as they shall jointly agree upon or not to sell if it seems most advisable to keep them or in any way that they shall think proper and that every creditor have his money and if sold all overflush to my wife towards her support and her family if any there be after paying my brother for his trouble and all other debts whatsoever." Until, therefore, the "overflush" was ascertained, no power of disposal by the testator's wife arose at all. In *Crockett* v. *Crockett* the words were, "my last desire is that all and every part of my property shall be at the disposal of my most true and lawful wife Caroline Crockett for herself and children, in the event of any unforeseen accident happening to myself, which God forbid." The property was to be simply at the disposal of the wife for herself and children; there was no gift to her as in the present case. How then did Lord Cottenham deal with it? He said (2 Phil. 561), "It remains to be considered what are the rights and interests of the widow and children in the fund—a question which, if to be decided upon the terms of the will, would be one of great difficulty, and upon which the authorities and opinions of judges have widely differed. I have, however, the satisfaction of finding that I am not in this case called upon to decide this question. The mother, according to my construction of the will and the authorities above referred to, had a personal interest in the fund; and as between herself and her children she was either a trustee, with a large discretion as to the application of the fund, or she had a power in favour of the children subject to a life estate in herself." His Lordship could not help observing that if the thing were so difficult to decide by reason of the vagueness of the words which the testator had used, and which he probably used for the purpose of preventing the difficulty from being decided, it could not be right to decide it at all. In the present case the words used were much stronger in favour of the power of the widow to deal with the property. Then, in *Godfrey* v. *Godfrey*, the words were—"I do hereby bequeath to my wife the whole of my property, and it is my dying wish that the property which I now bequeath to my wife shall be used as to her seemeth best for her own and her children's welfare." But there the Vice-Chancellor Wood, after saying that the words clearly implied a trust, went on to say that the only difficulty arose from the words "as to her seemeth best," and that it might be that those words were merely a direction as to the control and management of the property. That showed strongly that if the words giving a power of disposal were such that you could not refer them merely to the control and management of the property, it would be most difficult to say that the wife took only a limited interest in the property. In the present case his Lordship thought that the words could not be referred merely to the control and management of the property, for the wife had power not merely to manage, but to expend the *corpus* of the property. It was sufficient to say that there was not here enough to satisfy his Lordship that this lady had exceeded the authority given to her by the testator's will. The appeal must be dismissed, and with costs, as the appellants were seeking to get the property free from the annuity with which it was charged.

Bowen v. Cobb.

Mortgage—Notice—Priority—Vendor's lien for unpaid purchase money—No receipt on the purchase deed.

Where a purchase deed contained a recital that the purchase money had been paid or accounted for, but there was no receipt for the purchase money on the back of the deed.

Held (affirming a decision of Vice-Chancellor Malins), that the vendor, in respect of his lien for unpaid purchase money, was entitled to priority over a mortgagee of the purchaser.

[19 W. R. 614.]

This was an appeal from a decision of Vice-Chancellor Malins, which is reported 18 W. R. 911, where the facts are stated. The defendants appealed.

Cotton, Q.C., and *Speed*, for the appellants, contended that, whatever might be the case where a deed was in the common form, expressing the property to be conveyed to the purchaser in consideration of a sum of money paid, yet where, as in the present case, the deed contained an express recital that the purchase money had been paid or accounted for by Hopkins, the purchaser, the absence of a receipt on the back of the deed for the purchase money was not enough to put a subsequent mortgagee upon inquiry whether the purchase-money had

been actually paid or not. They referred to *Rice* v. *Rice*, 2 W. R. 139, 2 Drew. 73.

Glasse, Q C., and *Berkeley*, for the plaintiff, were not called upon.

James, L. J., said that the Vice-Chancellor, in his judgment, had gone so fully and elaborately into the matter that it was not necessary to say much. It was quite clear that when the legal estate in the property was conveyed to Hopkins it was within the knowledge of Mr. J. R. Cobb, who was acting as solicitor to his father, that the purchase-money had not been paid or secured to the vendor, and it was not sufficient to say afterwards that as the deed had been handed to Hopkins he was entitled to assume that the purchase-money had been paid. His Lordship agreed with the Vice-Chancellor that it was an act of the grossest negligence on the part of Cobb not to have gone to Hopkins to inquire whether any receipt had been given for the purchase-money.

Mellish, L J., also agreed with the judgment of the Vice-Chancellor, and in the reasons which he gave for it.

CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—I desire to report, through the Law Journal, 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*, *Spragne* v. *Hammond*, 1 Bro. & Bin. 59, *Stubbs* v. *Parsons*, 3 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 *primâ 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. J.

To the Editors of the Law Journal.

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. J.]

Recent Legislation—Tinkering with Acts of Parliament.

To the Editors of the Law Journal.

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.

REVIEWS.

A Treatise on the Statutes of Elizabeth against Fraudulent Conveyances, the Bills of Sale Registration Act, and the Law of Voluntary Dispositions of Property independently of those Statutes: with an Appendix, containing the above Acts and the Married Womens Property Act, 1870; also some unpublished Cases (1700-1733), from the Coxe and Melmoth MS. Reports. By Henry W. May, B.A., Ch. Ch., Oxford, and of Lincoln's Inn, Barrister. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar.

This treatise has not been published before it was wanted. The statutes of Elizabeth against fraudulent conveyances have now been in force for more than 300 years. The decisions under them are legion in number and not at all times consistent with each other. The incongruity of the decisions arises in great part from the cause that many of them depend rather upon the finding as to the facts than as to the law, and very many of them are decisions of Courts of Equity, which, unaided by juries, find facts and decide the law applicable to the facts. An attempt to

reduce the mass of decisions into something like shape, and the exposition of legal principles involved in the decisions, under any circumstances, must have been a work of great labor, and we are pleased to observe that in the book before us there has been a combination of unusual labor with considerable professional skill.

This is the first exhaustive work on the subject of which it treats that has been published within the past seventy years. We have often wondered that no one was found able and willing to bring out a new edition of Roberts' Treatise on the Statutes of Elizabeth, which, when published in 1800, was looked upon as a very able work. Mr. May, rather than edit a new edition of that work, has, we think, considering the multitude of cases on the statutes, very wisely decided to give us a new treatise, which we have in the book before us. There are some imperfections in the book, but this could not be otherwise than expected when we consider the difficulty of the subject But the imperfections (attributable to humanity) are few.

The work is divided into six parts. The first treats of the general operation of the statutes of Elizabeth against fraudulent conveyances and the general distinctions between them. It is shown that while the Statute of 13 Elizabeth protects creditors, the Statute 27 Elizabeth protects purchasers; that both statutes were re-enacted in Ireland, and have been substantially re-enacted in New York; that the Statute 13 Elizabeth is declaratory of the Common Law, which in this respect is declaratory of the Civil Law; that its principles have been adapted from the Civil Law by Holland, Spain and France, but that both in principle and in practical operation the statute is distinct from the bankrupt laws; that deeds void in bankruptcy are not always void under the Statute of Elizabeth, while every conveyance void against creditors under the Statute of Elizabeth is an act of bankruptcy. The second part treats of the rights of creditors under 13 Elizabeth. It is sub-divided into eight chapters, treating, respectively, of property within the statute, voluntary conveyances as against creditors at the time, voluntary alienations as against subsequent creditors, conveyances for value as against creditors, badges of fraud in conveyances for value, continuance in possession a badge of fraud, the Bills of Sale Registration Act, 1854, and who are entitled to rank as creditors under 13 Elizabeth. Each of these topics is dealt with exhaustively; references are made to the very latest cases, and the law enunciated, when possible, in the very words of the Judges. This part embraces no less than 150 pages of the work, and is the most important part of it. The arrangement is so good that each chapter appears to flow from its precursor, and when the last chapter is read the reader feels that all has been said that can be said on the subject. The third part treats of the rights of creditors under the twenty-seventh Elizabeth. Being a much less expansive branch of the law than the preceding, there are only two chapters in this part of the work. These discuss, respectively, the conveyances which are void against purchasers and show who are entitled to be treated as purchasers. It is explained that voluntary gifts are not void simply because voluntary, but because opposed to the interest of fair purchasers; that knowledge of the voluntary conveyance in no manner affects the purchaser so that an artificial fraud has grown out of the interpretation of the statute in this—that where there is no fraud or fraudulent intention whatever, the deed is declared fraudulent for the purposes of the Statute. But the purchaser must be shown to be a purchaser for money or other valuable consideration. The many cases as to when a man can or cannot be said to be such a purchaser, are given, and so given as to make them to some extent intelligible parts of a whole, but which standing alone are not easily understood. The fourth part of the work treats of the important question, what is a valuable consideration under the Statutes of Elizabeth? This is done in five chapters. The first deals with consideration generally, the second consideration between husband and wife, the third voluntary conveyances made good by considerations arising subsequently, the fourth the nature and extent of the consideration of marriage, which even in our metallic age is said to be "the best consideration that can be," the fifth, post-nuptial settlements, where the consideration of marriage does not extend, and other considerations are found necessary to support them. The fifth part treats of voluntary dispositions of property independently of the Statutes of Elizabeth, and as the subject,

though not heavy, is necessarily diffuse, no less than four chapters are devoted to it. The first deals with voluntary agreements enforceable in equity, voluntary limitations in assignments for value, and shews how far formal defects are aided. The second deals with the abstruse branch of the law—gifts *inter vivos*—and is subdivided as follows: I. Attempts by legal owner to transfer the legal interest in property transferable at law. II. Gifts, without attempting to disturb the legal title. III. Attempts by legal owner to transfer legal interest not legally assignable; and IV. Legal obligation incurred without legal transfer. It is to be hoped that the reader of this chapter will, when through it, have some correct idea as to what is "a complete gift," a thing supposed to be easily understood, but most difficult of definition. The third chapter deals generally with the questions when and to what extent the absence of a valuable consideration will invalidate dispositions of property. The fourth chapter shews when gifts may be treated as void between the parties for fraud practised by the donor. The sixth part of the work treats of points of practice and costs under the Statutes of Elizabeth the first chapter dealing with practice and the second with costs. The book would not have been complete without this. In it we find points of much interest to the practical man, which are not so succinctly found in any other treatise. The appendix, as mentioned in the title page, contains the acts and some unpublished cases from the Coxe and Melmoth MS. Reports—thirteen in number—of more or less interest, as bearing on the topics in hand.

We cannot conclude our notice of this work without saying that it reflects great credit on the publishers as well as the author. The facilities afforded by Messrs. Stevens & Haynes for the publication of treatises by rising men in our profession are deserving of all praise. We feel assured that they do not lightly lend their aid to works presented for publication, and that in consequence publication by such a firm is to some extent a guarantee of the value of the work published. Few young men have the means to publish works at their own risk. Men of means do not, as a rule, take the trouble to write books for publication. We do not know to which class Mr. May belongs, but this we can say, that he has produced a book the perusal of which has given us sincere pleasure, and the use of which will lighten the labours of men who, like ourselves, are engaged in the active practice of an arduous and responsible profession.

Legal Notes—England.—We take the following from the "Summary of Events," in the *American Law Review*:—

"Three acts passed in the course of last session have been the means of calling public attention to the importance of providing a better machinery for the drawing and revising of our statutes, a subject which has been ably dealt with in a book recently reviewed by you—Mr. Holland's 'Essays on the Form of a Law.' One of these—the Married Woman's Property Act—originated in the House of Commons, was then greatly cut about and modified by the House of Lords, and eventually passed, rather in a hurry, in the shape which the timid conservatism of the Lords had given it. Although it was the product of the wisdom of several eminent lawyers in the upper house, it now turns out to have brought the law into an infinitely more perplexed and doubtful condition than it was before, and produced various anomalies which can hardly have been intended. For instance, it gives a married woman the right of suing in her own name on certain contracts made by her after marriage without exposing her to the corresponding liability of being sued; and while making her separate property liable for debts contracted by her before marriage, it relieves a husband from all liability for a wife's antenuptial debts, even in cases where the wife may have no separate estate to answer them. A second statute, the Juries Act of 1870, has proved so unworkable that a bill has already been carried through Parliament, and received the royal assent, by which some of its enactments are repealed. When such things can happen, it is clearly time that steps were taken to provide for the examination of every bill by a body of competent lawyers, who should be held responsible for its technical correctness, and the consistency and definitely of its provisions. It is some comfort to know that neither of these unlucky acts proceeded from the office of the Government draughtsman, Mr. Thring, who has rendered so much service by introducing a more uniform method of statute-drawing. The fate of the third act illustrates the perils of consolidation."

"The Lord Chancellor's bill for the fusion of legal and equitable procedure, is, it seems, to be introduced first into the Commons, and not, as last year, into the Lords.

Erskine rarely received a rebuff, in which particular he was more lucky than Dunning (Lord Ashburton), who, in his cross-examinations, though he sometimes gave good shots, as often got as good as he sent. Asking a witness why he lived at the very verge of the court, the ready reply was, "In the vain hope of escaping the rascally impertinence of Dunning."