from invoices and partly from recollection, but not verified by his account books or other vouchers, which he had but did not produce, nor by his affidavit.

*Held*, clearly no compliance with the condition.—*Greaves* v. *The Niagara District M. F. I. Co.*, 25 U. C. Q. B. 127.

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RAILWAY COMPANY—FENCES—C. S. C. CH. 66, SEC. 13.—The obligation of a railway company, under section 13 of "The Railway Act," to maintain fences on each side of their track involves the duty of a continuous watchful inspection, and they must take notice of its state at all times.

*Held*, therefore, in an action by an adjoining proprietor, for injury to his horses getting upon the track through defect of fences, that it was a misdirection to tell the jury, that if the fences became out of repair, and before the plaintiff notified the defendants, or before a reasonable time for the defendants to repair it had elapsed, the horses got through, the defendants would not be liable.

*Quære*, as to the liability if the fence, being sufficient, had been prostrated by an extraordinary tempest and repaired without unnecessary delay.—*Studer* v. *The Buffalo and Lake Huron Railway Co.*, 25 U. C. Q. B. 160.

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RAILWAY COMPANY—DAMAGE BY FIRE FROM LOCOMOTIVE—NEGLIGENCE.—However clear the rule of law may be, that a party may kindle, or finding it kindled, may permit fire to burn on his own land, that right is restricted to the condition that his neighbour is not injured thereby; and if it is likely by spreading to injure him, he is bound to put it out, or exert himself so to do; otherwise, he will be liable for any damage sustained.

In this case, whilst a locomotive of defendants was passing over their railway track, some coals of fire dropped therefrom upon the track, and spread into the plaintiff's land. The evidence shewed that defendant's trackmen, though they exerted themselves in saving defendant's fence, made no exertions to extinguish the fire or prevent it from extending to plaintiff's premises, which were in consequence considerably damaged.

*Held*, that defendants were liable.

Held, also, that the authority of *Vaughan* v. *Taff Vale R. Co.* 5 H. & N. 679, that where there is no negligence either in the construction or the management of the locomotive of a railway company, the company are not liable for an injury resulting from the mere emission of fire therefrom into the adjoining lands.—*Ball* v. *Grand Trunk R. Co.* 16 U. C. Q. B. 252.

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INSURANCE.—Where a fire policy provided that the same should be void if a new policy was effected without the consent of the Insurance Company, and an assignment was subsequently made of the policy to a mortgagee of the property with concurrence of the Company, after which the mortgagor effected another insurance without the consent required the policy: *Held*, on the premises being burnt down, that the policy was not void in equity as respected the mortgagee. [SPRAGGE, V. C., dissenting.] *Held*, also, that on paying the amount of the debt the company was entitled to an assignment of the mortgage.—*Burton* v. *Gore District M. F. I. Co.*, 12 U. C. Chan. 156.

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EQUITABLE ASSIGNMENT OF DEBT.—Where a person having a demand against another, gave to a creditor of his own an order on his debtor for a portion of his demand, notice of which was duly given to the debtor, but this order the debtor did not accept.

*Held*, notwithstanding, that the order and notice formed a good equitable assignment of the portion of the claim which it covered.—*Farquhar* v. *The City of Toronto*, 12 U. C. Chan. R. 186.

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DEEDS—INTEREST.—An instrument under seal may be varied in equity by an agreement, for valuable consideration.

A written promise by a mortgagor, after default, to allow more than the six per cent interest reserved by the mortgage, was held to be binding on the authority of *Alliance Bank* v. *Brown*, 10 Jur. N. S. 1121; though there did not appear by the writing to have been any consideration of forbearance or otherwise for such promise.—*Brown* v. *Deacon*, 12 U. C. Chan. R. 198.

## UPPER CANADA REPORTS.

### QUEEN'S BENCH.

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

#### CLISSOLD V. MACHELL AND MOSELY.

*Action against Magistrate—Separate damages against each—Exemplary damages.*

In an action against two justices for one act of imprisonment, charged in one count as a trespass and in another as done maliciously, the jury found $800 against one defendant and $400 against the other. *Semble*, that the damages could not be thus severed; but *Held*, no ground for a new trial, as the finding might be treated as a verdict for $800 against one defendant, the other being let go free by the plaintiff. *Quære*, as to the proper mode of entering the judgment.