DIARY FOR MAY.

1. Wed... *St. Philip & St. James.* Grammar and Common School Funds appertioned. Co. Treasurer to make up books and enter arrears.
4. Sat. ... Articles, &c., to be left with Secretary of L. S.
5. SUN... *2nd Sunday after Easter.*
12. SUN... *3rd Sunday after Easter.*
15. Wed... Last day for service for County Court.
19. SUN... *4th Sunday after Easter.*
20. Mon... Easter Term commences.
24. Friday Queen's Birth-day.
25. Sat. ... Declare for County Court.
26. SUN... *Rogation.*
29. Wed... Appeals from Chancery Chambers. Notices for Chancery re-hearing Term to be served.
30. Thurs. *Ascension.*
31. Friday Last day for Court of Revision finally to revise Assessment Roll.

The Local Courts'

AND

MUNICIPAL GAZETTE.

MAY, 1867.

LIABILITY OF MUNICIPAL PROPERTY TO TAXATION.

A decision has lately been given by the Court of Queen's Bench as to whether property owned by a municipality, but leased by them to an occupant for his own use, unconnected with corporation purposes, is liable to taxation. The point is one of great importance, and, in the case we refer to (*Scragg* v. *The City of London*, 26 U.C. Q.B. 263), came up under section 9, sub-section 7, of the Con. Stat. U. C. ch. 55.

The wording of the late Act of 1866 it will be seen is the same, section 9 declaring that—

"All lands and personal property in Upper Canada shall be liable to taxation, subject to the following exemptions, that is to say:"

Sub-sec. 7, "The property belonging to any county, city, town, township or village, *whether occupied for the purposes thereof, or unoccupied.*"

On behalf of the plaintiff it was contended that the exemption in fact applied to all corporation property and that it would be absurd for a municipality to tax itself, and that the word "whether" in sub-sec. 7 should be read "although" or "notwithstanding," and that in the case of corporation property the ultimate remedy by sale for unpaid taxes could hardly be applicable, and that *primâ facie* it could not have been intended that a municipal body, having to raise a certain sum for its statutable requirements, should go through the form of taxing its own property.

To this it was answered that the words which follow the word "village," must be held to have some meaning, otherwise they would not have been used, and that the interpretation put upon them by the plaintiff would render them inoperative.

That the subject was one of considerable difficulty is evident from the fact that one of the learned judges dissented from the judgment of the majority of the court, which was in favor of the contention of the defendants, to the effect that property owned by a city (in this case), but leased by them to an occupant for his own private purposes, is liable to taxation.

In the judgment of the majority of the court, it is said—

"We are bound to give effect if possible to all the words used. The sentence is very inexactly worded. It leaves the general exemption stated in the beginning of the sentence limited to property answering the description of "occupied for city purposes or unoccpuied." It is not easy to see any other way of reading it, so as to give full effect to all the words than thus, "The property belonging to any county, city, &c.. occupied for the purposes thereof or unoccupied." We cannot hold that the insertion of the word "whether" widens the exemption. The definition of this word is generally given "*which of two, or several.*"—(Richardson's Dictionary, Imperial Dictionary.) Adopting such a definition of the word "whether," the sentence might be read, "The property belonging to any county, city, &c., in either of these positions viz., occupied for the purposes thereof or unoccupied."

As to the suggested difficulty with reference to the taxation of municipal property by the municipality it was remarked that—

"Corporations generally possess some landed property, obtained by grant from the Crown or by purchase, &c. A building used for corporate purposes may be destroyed or pulled down, and the ground be no longer required; in such case the natural course would be either to sell or lease it. While unoccupied it would be clearly exempt. When leased and improved by a tenant the taxes could be generally collected from the occupant. We may assume that the Legislature knew that corporations often possessed land not actually required for their immediate purposes, and framed these exemption clauses accordingly.

By granting leases to tenants for building purposes the area of assessable property would be widened, and the municipal revenue increased, first, by the rent, secondly, by the assessment. It may be said that the same end could be obtained

by holding the land as exempt from taxes, and thereby a higher rent would be obtained from a tenant. But an increased rental would hardly ever equal the amount of annual assessment derivable from the land in its improved state on a yearly valuation."

LAW OF EVIDENCE.

There appears to be some misconception abroad as to whether wives can give evidence for their husbands in suits brought in Division Courts.

As a general rule, the Law of Evidence is the same in Division Courts as in the Superior Courts. There are some changes made in favor of admitting certain evidence in the former which would not be allowed in the latter; and the question arises whether there has been any change in this respect as to the evidence of a wife in behalf of her husband.

It is quite clear that in the Superior Courts a wife is precluded, and the only reason which would appear to suggest itself to found a contrary rule in Division Courts, is the wording of section 101 of the Division Courts' Act, that "on the hearing or trial of any action or in any other proceeding, the parties thereto and *all other persons* may be summoned as witnesses and examined either on behalf of the plaintiff or defendant, upon oath (or affirmation), to be administered by the proper officer of the Court; provided always, that no party to the suit shall be summoned or examined except at the instance of the opposite party or of the judge."

Now the words "all other persons" do not, in our opinion, include the wife of either party to this suit. The provision is simply intended to empower parties to subpœna and examine all lawful witnesses (including, *in certain cases only*, the parties to the suit. The section does not, we think, operate to make any change in the general rule of law.

It has even been held in *Van Norman et ux.* v. *Hamilton*, 25 U. C. Q. B. 149, and that apparently without any shadow of a doubt, that when a husband and wife are co-plaintiffs (in this case being joint claimants in an interpleader issue), the wife, though in fact a party to the suit, could not be called as a witness by the opposite party. The wording moreover, of sec. 2 of ch. 32, of Con. Stat. U. C. is very distinct against the admissibility of any such evidence, and that section would appear to apply to Division Courts.

The judgment in *Hammond* v. *McLay*, given on the first day of this Term in the Court of Queen's Bench, decides that the dismissal from office of the plaintiff by the John Sandfield McDonald administration was illegal, and that Mr. Hammond is, notwithstanding, entitled to the fees of the office. It is not likely that the office will be given up without a further struggle, and the decision will doubtless be carried to the Court of Appeal.

SELECTIONS.

Some of our readers might be edified by the discussion of the knotty point presented to them in a case taken from an old volume of Reports, entitled,

STRADLING V. STILES.

Le report del case argue en le common banke devant touts les justices de le mesme banke, en le quart. An du raygne de roy Jacques, entre Matthew Stradling, plant. and Peter Stiles, def. en un action propter certos equos coloratos, Anglice, pied horses, post. per le dit Matthew vers le dit Peter.

Sir John Swale, of Swale Hall, in Swale Dale, fast by the river Swale, knt. made his last will and testament; in which, among other bequests, was this, viz.:

"Out of the kind love and respect that I bear unto my much honored and good friend, Mr. Matthew Stradling, gent., I do bequeath unto the said Matthew Stradling, gent., all my black and white horses." The testator had six black horses, six white horses, and six pied horses.

The debate therefore was, whether or no the said Matthew Stradling should have the said pied horses by virtue of the said bequest.

Atkins apprentice pour le pl. moy semble que le pl. recovera.

And first of all it seemeth expedient to consider what is the nature of horses, and also what is the nature of colors; and so the argument will constantly divide itself in a twofold way; that is to say, the formal part and the substantial part. Horses are the substantial part, or thing bequeathed; black and white the formal or descriptive part.

Horse, in a physical sense, doth import a certain quadruped or four footed animal, which by the apt and regular disposition of certain proper and convenient parts, is adapted, fitted and constituted for the use and need of man. Yea, so necessary and conducive was this animal conceived to be to the behoof of the commonweal, that sundry and divers acts of Parliament have from time to time been made in favor of horses.

1st Edw. VI. makes the transporting horses out of the kingdom no less a penalty than the forfeiture of forty pounds.

2nd and 3rd Edward VI. Takes from horse-dealers the benefit of their clergy.

And the statutes of the 27th and 32nd of Henry VIII. condescend so far as to take care of their very breed; these our wise ancestors prudently forseeing that they could not better take care of their own posterity than by also taking care of that of their horses.

And of so great esteem are horses in the eye of the common law, that when a knight of the Bath committeth any great and enormous crime, his punishment is to have his spurs chopped off with a cleaver, being, as Master Bracton well observeth, unworthy to ride on a horse.

Littleton, section 315, saith:—

"If tenants in common make a lease reserving for rent a horse, they shall have but one assize, because saith the book, the law will not suffer a horse to be severed."

Another argument of what high estimation the law maketh of a horse!

But as the great difference seemeth not to be so much touching the substantial part, horses, let us proceed to the formal or descriptive part, viz., what horses they are that come within this bequest.

Colors are commonly of various kinds and different sorts; of which white and black are the two extremes, and, consequently, comprehend within them all other colors whatsoever.

By a bequest, therefore, of black and white horses, gray or pied horses may well pass; for when two extremes or remotest ends of anything are devised the law, by common intendment, will intend whatsoever is contained between them to be devised too.

But the present case is still stronger, coming not only within the intendment but also the very letter of the words.

By the word black, all the horses that are black are devised; by the word white, are devised those that are white; and by the same word, with the conjunction copulative and, between them, the horses that are black and white, that is to say, pied, are devised also.

Whatever is black and white is pied, and whatever is pied is black and white; ergo, black and white is pied, and, vice versa, pied is black and white.

If therefore black and white horses are devised, pied horses shall pass by such devise; but black and white horses are devised; ergo, the plaintiff shall have pied horses.

Catlyne, Serjeant,—

Moy semble al' contrary, the plaintiff shall not have the pied horses by intendment; for if by the devise of black and white horses, not only black and white horses, but horses of any color between these two extremes may pass, then not only pied and gray horses, but also red and bay horses would pass likewise, which would be absurd, and against reason. And this is another strong argument in law—*Nihil, quod est contra rationem, est licitum;* for reason is the life of the law, nay the common law is nothing but reason; which is to be understood of artificial perfection and reason gotten by long study, and not of man's natural reason; for *nemo mascitur artifex*, and legal reason *est summa ratio;* and therefore if all the reason that is dispersed into so many different heads were united into one, he could not make such a law as the law of England; because by many successions of ages it has been tried and retried by grave and learned men! so that the old rule may be verified in it,—*Neminem oportet esse legibus sapientiomer.*

As therefore pied horses do not come within the intendment of the bequest, so neither do they within the letter of the words.

A pied horse is not a white horse neither is a pied a black horse; how then can pied horses come under the words of black and white horses?

Besides, where custom hath adapted a certain determinate name to any one thing, in all devises, feofments and grants, that certain name shall be made use of, and no uncertain circumlocutory descriptions shall be allowed; for certainty is the father of right and the mother of justice.

Le reste del argument jeo ne pouvois oyer, car jeo fui disturb en mon place.

Le court fait longement en doubt' de c'est matter, et apres grand deliberation eu.

Judgment fuit donne pour le pl. *nisi causa.*

Motion in arrest of judgment that the pied horses were mares; and thereupon an inspection was prayed.

Et sur ceo le court advisare vult.

TESTIMONY OF PARTIES IN CRIMINAL PROSECUTIONS.

Mr. Chief Justice Appleton, of Maine, under date of February 22nd, 1865, wrote a letter to the Hon. D. E. Ware, of Boston, which appeared in the *Register* of August following, wherein he states that the Legislature of Maine, in 1859, passed an act, by which any respondent in any criminal prosecution for "libel, nuisance, simple assault, and assault and battery," might, by offering himself as a witness, be admitted to testify; and that, in 1863, the law as to admission of testimony was further extended, and it was enacted that, "in the trial of any indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, and not otherwise, be deemed a competent witness—the credit to be given to his testimony being left solely to the jury, under the instructions of the court."

Chief Justice Appleton also wrote a second letter, bearing date the 24th February, 1866, to John Q. Adams, Esq., Chairman of the Committee on the Judiciary of Massachusetts (*vide Law Register* for October last), wherein he gives his views at length upon the change in criminal evidence, and argues with much legal acumen and plausibility the justice of the new law in his State. The opinion emanating

from a gentleman who has made the subject of evidence a specialty for many years, demands at least a candid consideration by the profession, and all who desire the administration of equity and justice.

As the suggestion of the Chief Justice was adopted by the Judiciary Committee, and reported to the House of Representatives in the form of a bill, and which may, from present appearances, become a law of the Commonwealth of Massachusetts, it is desirable that the question be fully discussed and digested; and we therefore deem it not ill-

The Chief Justice admits, that when the accused is permitted to testify, he will be pressed with question upon question, and that evasion would be suspicious, and silence be tantamount to confession. "All this," he remarks, "may be disastrous to the criminal, but justice is done." We would ask, wherein? If disastrous to the party arraigned, how is justice done? It would assuredly be disastrous to the accused, and justice would not certainly be done, if the party, being allowed to testify, should tell such a confused, incoherent story (as is usual with an ignorant person in such cases), through embarrassment and fright (as it is with those who, circulating in good society, are arraigned for crime), that the minds of the jury would take his incomprehensible answers as evasions, and his testimony, in the main, as implicating and condemning himself. Nothing could be said of avail in palliation of his conduct. And how often do we see instances, even in civil matters, where men cannot make a statement on the stand, with clearness enough to be understood by a lawyer, much less by those who comprise an average panel of jurymen; and how much more is this confusion and incoherency aggravated naturally, in criminal cases, thus militating in an incalculable degree against the prisoner. And it is fair to presume, a man having the right to be heard, whether innocent or guilty, if he remains silent, the suspicions of the jury would at once be keenly aroused.

These we deem cogent reasons why it is safer, and wherein justice will be administered and subserved better, by not allowing parties to be heard in their own defence. The same objections cannot, of course, be equally pertinent in civil cases. We do not, therefore, agree with our advocate, in thinking that the guilty would be "less likely to escape," or the danger of unjust conviction of the innocent "diminished;" for the history of criminal law proves, the *guilty* person, having committed a crime, steels his mind and heart to the "sticking point," and never fails to tell a plausible story; while the innocent usually breaks down under the rigid, perhaps confounding examination.

The time-honored maxim, *Stare decisis et non quieta movere*, has been revered in all ages as the bulwark of safety in jurisprudence; and while we are not among those who cry out *Stare decisis!* (with as much emphasis as the elder Cato ejaculated *Delenda est Carthago*, on all occasions) whenever a reform in law is proposed, and not unmindful that society is constantly being educated, growing in truth, yet, we hold the reform, or rather change in the code of Maine, to be too radical, untimely, and we can but predict a speedy repeal of the law, as was done in Connecticut. And thus we essay to take issue with the Chief Justice, and against any State adopting said rule, for these obvious reasons.

To wisely prune and graft the law has in every age been considered beneficial; but true timed to offer a few reasons why, in our opinion, the establishment of such rule would not only fail to prove practicable, but be far from subserving the public good. The proposed rule, as yet being almost wholly untried, can be argued only upon general principles of propriety.

The honorable advocate of the change concedes the principle of evidence, that the accused is deemed innocent, and all trials for crime proceed with that presumption. "Yet during the trial," he observes, in speaking of the established rule, "when the question of guilt or innocence is to be determined, the party injured or alleging he is injured, is admitted to testify, while the respendent, presumed innocent, is denied a hearing. *Audi alteram partem.* Hearing both sides of a controversy is so obvious a dictate of impartial justice, that one may well marvel that its wisdom and propriety should ever have been called in question, much more that it should have been denied."

It may be observed here, that one of the principles upon which the rule of law disallowing a party in criminal proceedings to testify, is, it redounds to the benefit of the accused, and thus carries out the fundamental legal presumption of innocence. The guiltless is thus protected. Taking into consideration the overwhelming shock which a man of nervous and delicate sensibilities must realize upon being arraigned for some heinous crime, before a judge, perhaps, who has the reputation of being not only severe in his manner of trying a case, but unmerciful in convicting and passing sentence; and considering, also, the liability of such person being not only overcome, and therefore incoherent in his testimony, but of actually criminating himself, the rule can but work great hurt and injustice. The human mind, under the pressure of calamity, is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitation may prevail. Taking advantage of his confusion, in the cross-examination, subtle or designing counsel might make out a much stronger case than if the party had not testified, as was found to be the injurious result of the rule in Connecticut. And the honorable gentleman admits that he has known cases where, notwithstanding the innocence of the prisoner, "as was abundantly proved," and *notwithstanding his own testimony, the jury found him guilty.* Our time-honored and time-tried rule, therefore, upon this showing and aspect

of the case, may be said to be wiser, and safer for the accused (and that is the aim of the law), in the majority of cases, than by the rule adopted in Maine.

Although in France, and some other countries, the accused is allowed to testify, yet in England, for centuries, going back before William of Normandy conquered that island, the rule of the common law has been adhered to, and been found to subserve justice. The rule has obtained time out of mind.
reform, since the Spartan law-giver's time, has never been accomplished by ploughing too deeply or planting too abundantly. For, as the prince of reformers, Bacon, somewhere remarks, "The work which I propound tendeth to pruning and grafting the law, and not to ploughing up and planting it again: for such a remove I should hold indeed for *a perilous innovation.*"

And thus to plough up the prime root and element in criminal jurisprudence, which is made the more worthy of veneration from its duration and time-tried wisdom, would indeed be perilous. And Lord Erskine thus eloquently and eulogistically says of evidence: "The principles of the law of evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." (24 Howell's State Trials, 966.) And likewise observes Chief Justice Story, in the case of *Nichols* v. *Webb* (8 Wheat. 326–332): "The rules of evidence are of great importance, *and cannot be departed from without endangering private as well as public rights.*"

It is peculiarly fitting to consider and ponder these wise opinions, when a proposition is made to undermine and overthrow a charitable rule of law, whereof the mind of man runneth not to the contrary.

Some jurists have held that confession alone is a sufficient ground for conviction, even in the absence of independent evidence. (Best on Pres. p. 330, and cases there cited.)

But by the established law of England, a voluntary and unsuspected confession is not sufficient to warrant conviction, unless there is independent proof of the *corpus delicti.* This rule is certainly more in accordance with the principles of reason and justice. Those who would hold a confession competent for conviction, would doubtless advocate the rule which is adopted in Maine. The voice, whether bold or timid, of the accused, would doubtless turn the scale for conviction or acquittal, in the minds of disciples of that school.

By an ordinance of France, passed in 1667, the testimony of relatives and allies of parties, even down to the children of second cousins inclusively, is rejected in civil matters, whether it be for or against them. This institution has, in modern times also, been considered sound and reasonable (1 Seld. 1497, Wilk. ed.); for it becomes not the law to administer any temptation to perjury. By the civil law, relatives could not be compelled to attest against those to whom they were allied; thus showing that fundamentally the law has not favored the testimony of prisoners, or of their friends and relatives.

The able and pointed contributor, "B.," in the *Register*, of January, 1866, avers that it is owing to prejudice in the minds of men, which prevents their acquiescence to give fair scope for the experiment of allowing parties in criminal prosecutions to testify, and states that, Connecticut having passed an act, wherein the Legislature inadvertently made the provision so broad as to cover criminal proceedings, it was repealed from "prejudice." It is true, mankind are naturally opposed to innovation, but especially so when it is aimed to root up a fundamental principle; and, too, when the injustice and iniquity of such innovation is palpable, and been so proved to the satisfaction of a state or people. In the State of Connecticut, where the "new rule" had a fair trial, it was found to work incalculable hurt to innocent persons; for adroit and cunning lawyers were prone either to hold up to the minds of the jury the fact—the astounding fact!—that the prisoner at the bar had not testified, as was his privilege, or had evaded questions, and therefore suspicion should attach. So that, whichever position the accused might assume, he placed himself in a critical and unfavorable aspect. Like the very ancient custom among the Romans, to prove a man's guilt, or indebtedness, by the "water test"—if he floated, he was guilty; if he sunk, he was innocent: so that he lost his life, or case, in either event.

The contribution referred to by "I. F. R.," in his editorial remarks upon Chief Justice Appleton's judiciary letter aforementioned, which was apparently written by an able member of the bar of Connecticut, says, in so many words, that "prejudice had nothing to do with the repeal of the act in that State, but that after one year's trial, the impression with the profession and judges was, that *mercy to the accused demanded its repeal;*" and then proceeds to say, he thinks "those usually denominated criminal lawyers * * * were loudest in calling for a repeal of the act." The repeal was therefore the result of one year's experiment, and not from mere "prejudice," as charged in the January article referred to.

It was in the early part of the session of the Connecticut Legislature of 1848, that a bill, which was substantially drawn by Judge McCurdy, and introduced by the Hon. Charles Chapman, was passed, in these words: "No person shall be disqualified as a witness in any suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credit."

The introducer of that bill informs the writer that it was not intended to make a man indicted for crime a competent witness in his own case, and that he presumes Judge McCurdy had no such purpose. At the first

term of the Supreme Court after the passage of the act, it may be seen, the presiding judge held that by said law the accused was made a competent witness, and the decision was concurred in by all the judges.

At the following session of the Legislature it was, that an act was passed to the effect that, "so much of the 141st section of said act (it being the feature in question) as authorizes a party to testify regarding the same, be and is hereby repealed."

The presumption of law, that an accused person is innocent until proved guilty, becomes a mere mockery when such traps are set for guilty men as the one in Connecticut, in 1848, and the one now being used in the State of Maine.

It is a shameful fact that, practically, in Massachusetts and Maine, every person arraigned for a criminal offence is presumed to be guilty until he is proven innocent, in contradistinction to the theory of the common law. If the rule advocated by Chief Justice Appleton were to become the law in Massachusetts, "it would be the last turn in the screw," says our informant, "and few men would ever after be successfully defended there." A cross-examination of a person arraigned for crime is indeed a terrible test, and the skilful trier who conducts it might well say, with Hamlet,

> "If circumstances lead me, I will find
> Where truth is hid, though it were hid indeed
> Within the centre."

We think it is abundantly shown, the trial of the rule in Connecticut proved—as doubtless will be proved in Maine—that innocent persons were more likely to be convicted thereby, than under the old common-law rule of England; for it works in contravention of the wise maxim in criminal law, that "it is better that ten guilty persons should escape, than that one innocent man should suffer." A citation or two may not be ill-timed in this connection.

The notorious trial of Eugene Aram, which took place at the York assizes in 1759, is a strong case illustrative of our theory, that more certainty of conviction follows when the prisoner is allowed to speak or testify. Readers of criminal law and history will agree, that the testimony adduced in Aram's case was entirely inadequate and insufficient to convict him.

The body of Daniel Clarke, the murdered man, was found in a cave, fourteen years after the deed was committed. Richard Houseman, who was indicted, turned "king's evidence." and Aram was named as the principal perpetrator of the crime. The skull of the murdered man was produced in court, but the only medical testimony was that of Mr. Locock, who deposed that "no such breach as that pointed out in the skull could have proceeded from natural decay; that it was not a recent fracture by the instrument with which it had been dug up, but seemed to be of many years' standing." The prosecution proved, in fact, nothing, and Aram called no witness in his defence. The sage principle in English law, that no man can be condemned for murder, unless the body of the person supposed to have been murdered be found and identified, was entirely ignored in this case; the *corpus delicti* was not proved; no satisfactory proof that the skeleton was that of Clarke. Neither the age, the sex, nor any of the many points of identity which at the present day would be required, were proved.

Trusting to his genius, eloquence, and ingenuity for defence, Aram delivered a written speech of great power, denying any knowledge of the bones exhibited, and presented weighty arguments to prove they belonged to some hermit, who had in former times dwelt in the cave, "as the holy Saint Robert was known to have done." Although Aram's argument was most powerful, the jury failed to be convinced of his innocence. It is confidently believed that the astonishing abilities he exhibited on his trial, contributed only to the clearer establishment of his guilt. The celebrated Dr. Paley, who was present at the trial, was afterward heard to say that Eugene Aram had "got himself hanged by his own ingenuity." If he had remained silent, the jury could not have convicted him upon the evidence presented.

There is little doubt, from different authorities on the subject, that he unwittingly pleaded for his own conviction. He doubtless did more to throw light (or what was considered light) upon the gossamer-threaded evidence, and prove "unknown facts of guilty acts," than a dozen witnesses. And it is conceded that the jury not only indulged in conjectures, and magnified suspicions into proof, but weighed probabilities in *gold scales*.

We have cited this case as tending to show that when a prisoner undertakes to exculpate himself, the nature of man is such, that it begins to distrust and finally rebels against his words of exculpation, even if the accused does not entangle himself in some link or chain of the evidence, as is most likely to be the case.

Other and parallel cases might be cited to show that when a party in criminal prosecution speaks in his own behalf, he usually has "a fool for his client," and that it invariably fails at least to improve his position before the court.

We conceive that, for any State to adopt the act or rule, which Connecticut found unwise and impracticable, and repealed, as working great injustice to the innocent; which Maine has adopted, and which is urged upon Massachusetts, would not only be a "perilous innovation," but be instrumental in furthering the acquittal of bold and desperately bad men, and convicting those who are timid and wholly innocent.

Our time-revered rule not only obviates the possibility of the accused criminating himself, but prevents perjury. And who can doubt, if we were to adopt the proposed rule—this unhingement of the law—in the State of New

York, that persons guilty of the crime with which they are arraigned, would on every occasion commit perjury; and whether they did or not, the jury would believe they did, and so be *loth to accredit the testimony of any one.* Thus the rule would inevitably become an engine of self-conviction. The act of administering the oath to a prisoner, and, likewise his testimony, would be deemed futile, idle words. At the present time the accused is at liberty to say whatever he pleases, after the case is submitted, and his statements are taken for what they are worth.

So that, under the old-established law, there is as much efficacy in hearing the prisoner, as there could possibly be were the proposed rule adopted. And, finally, in all candour to Mr. Chief Justice Appleton and those who adhere to his school, we can only account for their earnest advocacy, and the people's opposition (where it has been tried) to the new rule, upon the principle of the old proverb, that *a looker-on seeth more than a gamester.*

F. F. B.

—*American Law Register.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

CRIMINAL LAW—FENIAN RAID.—The prisoner was convicted upon an indictment under C. S. U. C., ch. 98, containing three counts, each charging him as a citizen of the United States; the first count alleging that he entered Upper Canada with intent to levy war against Her Majesty; the second that he was in arms within Upper Canada, with the same intent; the third, that he committed an act of hostility therein, by assaulting certain of Her Majesty's subjects, with the same intent.

The prisoner's own statement, on which the Crown rested, was that he was born in Ireland, and was a citizen of the United States. It was objected that the duty of allegiance attaching from his birth continued, and he therefore was not shewn to be a citizen of the United States—but

Held, that though his duty as a subject remained, he might become liable as a citizen of the United States, by being naturalized, of which his own declaration was evidence.

Held, also, upon the testimony set out below, that there was evidence against the prisoner of the acts charged.

Held, also, that even if he carried no arms, on which the evidence was not uniform, being joined with and part of an armed body which had entered Upper Canada from the United States, and attacked the Canadian volunteers, he would be guilty of their acts of hostility and of their intent; and that if he was there to sanction with his presence as a clergyman what the rest were doing, he was in arms as much as those who were actually armed.

Held, also, that the affidavits, tendered showed no ground for interference.

A rule *nisi* for a new trial was therefore refused. —*Regina* v. *McMahon*, 26 U. C. Q. B, 195.

In this case, the charge being the same as in the last, it was shewn that the prisoner had declared himself to be an American citizen since his arrest, but a witness was called on his behalf, who proved that he was born within the Queen's allegiance. *Held*, that the Crown might waive the right of allegiance, and try him as an American citizen, which he claimed to be:

The fact of the invaders coming from the United States would be *primâ facie* evidence of their being citizens or subjects thereof.

The prisoner asserted that he came over with the invaders as reporter only but *Held*, that this clearly could form no defence, for the presence of any one encouraging the unlawful design in any character would make him a sharer in the guilt.

Held, also, that the affidavits afforded no ground for interference.—*Regina* v. *Lynch*, 26 U. C. Q. B. 208.

HIGHWAY—EVIDENCE— ADOPTION BY CROWN OF ORIGINAL SURVEY AND CONSEQUENT INABILITY TO ALTER—GRANT TO PRIVATE INDIVIDUAL.—In the year 1826 the original town-plot of London was surveyed under instructions from the Crown, and the plan of such survey, with the field notes, shewed that two of the streets, for obstructing portions of which the defendent was indicted, were extended to within four rods of the river Thames which runs through that town. The overseer of highways for the years 1829, 1830, 1831, stated that he had traced the streets in question all through; that the posts were there; that he opened the streets by the posts; that there was a road reserved four rods along the river bank; that one of the streets ran down to the river, and the posts where then four rods from the river when he opened that street.

In 1832 one R. was duly instructed to survey a mill site in the town, and to lay off for the purchaser such ground as might be necessary, and he thereupon ran a line which crossed these two streets as designated upon the original plan, and cut off portions of several town lots laid out upon this plan.

In 1839 a mill site was sold by the Crown Land Agent to one B. (under whom the defen-

dant claimed), not according to R.'s survey, but according to a small plan obtained from the original surveyor, and the patent which issued in 1846 appeared to grant the land designated on this plan, making no reservation of streets, but including the extensions to the river of the streets in question, as laid out upon the original plan.

Previously, also, to this sale, lots had been sold on these streets by the proper authorities; the streets had been worked and improved, and one in particular was open to the river, and the other as far as where the obstruction stood;

Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 145, that the evidence conclusively established that the streets in question had been laid out in the original survey of the town to within four rods of the river, and that this space was left open for public use; that the existence of these streets as public highways was shewn by the work on the ground at the original survey, and by the adoption, on the part of the Crown, of that work as exhibited on the plan thereof returned, which adoption was established by the disposition of lands according to that plan and survey; that thereby these streets became public highways; and although prior to such adoption the Crown would not have been bound by either plan or survey, after such adoption there was no power of making such an alteration as would be necessary to establish the defence set up. — *Regina* v. *Hunt*, 17 U. C. C. P. 443.

CONVICTION AT QUARTER SESSIONS UNDER CON. STAT. U. C. CAP. 75—CERTIORARI.—A. engaged B. and his hired man C. to build a house for him, and agreed to pay B. his ordinary wages, and $1 per diem for C. A. making default was convicted before a magistrate under the Master and Servants' Act, and ordered to pay B. $15 50 for C.'s services. A. appealed, but the appeal was adjourned to another Sessions, when the conviction was quashed. B. then obtained a summons to shew cause why a *certiorari* should not issue to return the order quashing conviction, etc., into the Queen's Bench.

Held, 1. That the applicant had a right to the *certiorari*, but

Semble, that the proceedings to reinstate the conviction were unnecessary.

Held, 2. That the agreement referred to did not come within the second branch of Con. Stat. U. C. cap. 75, sec. 3, and

Semble, that the terms used in the first branch of same section refer to agreements where master, journeyman and laborer belong to the same calling, and one engaged the other to work for him in its exercise.

Quære, as to power of Quarter Sessions to adjourn such a case.—*In Re Doyle's Conviction on Complaint of McCumber*, 4 Prac. Rep. 32.

NEGLIGENCE — MUNICIPAL CORPORATION. — Where a corporation is sued for an injury growing out of negligence of the corporate authorities in their care of the streets of the corporation, they cannot defend themselves on the ground that the formalities of the statute were not pursued in establishing the street originally. *Mayor* v. *Sheffield*, 4 Wallace.

If the authorities of a city or town have treated a place as a public street, taking charge of it, and regulating it as they do other streets, they cannot, when sued for such injury, defend themselves by alleging want of authority in establishing the street. (*Ib.*)—A. L. Reg. 441.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

BANKS—INTEREST.—*Held*, affirming the judgment of the Court of Common Pleas, Draper, C. J., VanKoughnet, C., and Mowat, V. C., *dissentientibus*, that the 29 and 30 Vic. ch. 10, sec. 5, exempts Banking Corporations not merely from liability to the pecuniary penalty imposed by Con. Stat. C. ch. 58, sec. 9, but from the loss or forfeiture under that Statute of the security received by them for the moneys advanced.—*The Commercial Bank of Canada* v. *Cotton et al*, 17 U. C. C. P. 447.

VOLUNTARY DEED—ASSIGNMENT OF PERSONAL ESTATE—PROMISSORY NOTES NOT INDORSED—SET-OFF.—An assignment in general terms of personal estate will pass promissory notes in the possession of the settlor, although not endorsed to the donee.

Therefore, where A. assigned her personal estate to B., and certain promissory notes drawn by C., which were at the date of the settlement in her possession, were afterwards given by her to B., who by his will give a legacy to C., the executors of B., were held entitled to deduct from C.'s legacy the amount due on the notes.—*Richardson* v. *Richardson*, 15 W. R. 690.

RAILWAY COMPANY — NEGLIGENCE. — Where the defendant (a railroad company) has, by its own act, obstructed the view of travellers upon the public highway by piling its wood so

that the approach of the train to the crossing cannot be seen until the traveller is upon the track, one who has driven upon the track with due care, and looked for the train as soon as looking could be of service, will not be deemed guilty of negligence in not first stopping his team to ascertain if a train might be approaching. If in such case the traveller is killed or injured by a collision with the cars upon such crossing, the company will be deemed guilty of negligence, and held answerable therefor.—*Mackay* v. *Railroad Co.*, A. L. Reg. 413.

Sale of Chattels — Delivery. — The ostensible nature and purpose of a change of possession, as well as its duration, should be considered in determining whether it was so manifest and substantial as to be unprejudiced by a return of the property to the control and possession of the original owner. 39 Vert. Rep.

In March, R. delivered all his assets, including two waggons, to H., to enable H. to realize out of their avails the payment of certain debts. H. sells part of them, and applies on his debts. In June, therefore, he allows the waggons to return to R.'s possession, although the debts were not fully paid, H. believing that he could not lose any rights by so doing. *Held*, that the waggons, after their return to R.'s hands, and while in his possession, are attachable as R.'s property. (*Id.*)

The attachment would not be less valid because H. had been previously summoned as R.'s trustee on account of these waggons at the suit of the creditor who makes the attachment; nor would its validity be altered by H.'s having become responsible for the debt, unless R. was also discharged. (*Id.*)

Property exempted from execution—Sale of, by debtor.—The owner of property which is exempt from execution in Kentucky has the right to sell such property at his pleasure, and such sale passes the absolute title to the purchaser, without rendering the property liable to execution for the debts of the owner. (*Anthony* v. *Wade*, Ct. of Appeals of Ky.)

Such a sale is no fraud upon the creditors of the owners of the property, because the property gave no delusive credit to the owner, the law of exemption being sufficient notice to all creditors that the property was not subject to their demands. (*Id.*)

The exemption laws of Kentucky were passed for the benefit of the families of housekeepers; and a man who is in good faith a housekeeper in one county in Kentucky, does not lose that character by removing with his family and carrying exempted property from one county to another in this State. (*Id.*)

He does not lose his character as a housekeeper by "packing up" his goods for the purpose of removing with his family, and carrying the exempted property from Kentucky to the State of Tennessee. (*Id.*)

Property which is exempted from execution because the owner is a housekeeper, is also exempt from seizure under execution while *in transitu* from one county to another; also while *in transitu* from Kentucky to Tennessee. (*Id.*)—A. L. Reg. 438.

UPPER CANADA REPORTS.

CHANCERY.

(*Reported by* S. G. Wood, Esq., *Barrister-at-Law.*)

In re Dillon's Trusts.

New Trustees—Two appointed in place of one—Vesting order—Imp. Stat. 13, 14 *Vic. cap.* 60—*C. S. U. C. cap.* 12, *s.* 26—*Practice.*

Where it becomes necessary to apply to the Court for the appointment of a new trustee, it is only under very special circumstances that the Court will be satisfied with *one*; therefore

Where the trustee appointed by a will had died, and he who was named by the testator to succeed him was out of the jurisdiction, and shewn to be an unsuitable person to act in the trust, the Court appointed, in substitution for him, a *cestui que trust* under the will, whom the testator had named as a trustee thereof under certain contingencies which had not occurred; but under the circumstances, directed another to be associated with him, although the will provided for one trustee only acting in the trust at one time.

[Chancery, Feb. 18, 25, April 8, 1867.]

This was a petition presented *ex parte* on behalf of the *cestuis que trustent* under the will of the late G. G. Dillon, setting out the will of the deceased, whereby, after devising his real and personal estates to J. G. Bowes, in fee, to be held by him in trust for the *cestuis que trustent* therein named (being the petitioners and J. Dillon, jun.) the testator directed as follows: "Provided also that in case my said trustee shall die, or become unable from any cause to act, then I will and direct and hereby appoint John Hall to be the trustee of this my will, in the place of the said J. G. Bowes; and in case the said John Hall shall die, or refuse to accept the said appointment, in such case I nominate and appoint my father to act in this behalf; and failing either, then I request the said J. G. Bowes, John Hall, my father, or either of them, to name some trustee to act in the matter of this my will; and failing this, I desire my brother John to act as my trustee in this behalf; hereby vesting in such one trustee as shall consent to act all the trust estates, moneys and premises, which shall be then vested in the trustee so dying or refusing or becoming incapable to act as aforesaid."

The petition further alleged the death of Mr. Bowes, the departure from Canada of Mr. Hall, his residence out of the jurisdiction, and other circumstances which rendered it desirable that a new trustee should be appointed, and prayed that John Dillon, jun., the testator's brother, named in the will, should be appointed trustee thereof, and that the trust property might vest

in him for the estate devised by the will to the trustee thereof, to be held by him upon the trusts of the will or such of them as were subsisting and capable of taking effect.

S. G. Wood for the petitioners.

As to the jurisdiction of the Court. Under C.S.U.C. cap. 12, sec. 26, the Court of Chancery for U. C. has the power conferred upon the Court in England by Imp. Stat. 13, 14 Vic. cap. 60 (Trustee Act 1850), secs. 32-40.

Application should be by petition, not by bill. —Tripp's Forms, 212; Morgan's Acts and Orders, 91; *Thomas* v. *Walker*, 18 Beav. 521; and should be made in Court, not in Chambers.—*In re Lash*, Chy. Cham. Rep. 226. (As to cases where application in Chambers is proper, see Tripp, 212; 2 Set. 812; Morgan, 526.)

Service on former trustee not necessary when he is out of the jurisdiction.—Tripp, 95, 96, note *f*; Lewis on Trusts, 4th Edit. 687, note *c*. *In re Sloper*, 18 Beav. 596, the old trustees appear to have been within the jurisdiction.

A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act, within the terms of a power to appoint new trustees, and an application to the Court is proper. —*Re Harrison's Trusts*, 22 L. J. N. S. Chy. 69; following *In re Watt's Settlement*, 20 L. J. N. S. Chy. 337; S. C. 15 Jur. 459.*

As to misconduct of trustee affording ground for the application.—Lewin, 547, 548. As to bankruptcy.—*Re Bridgman*, 1 Drew. & Sm. 164, see 170; *Harris* v. *Harris*, 29 Beav. 107.

As to the appointment of a *cestui que trust*— As a general rule, such an appointment is considered objectionable. —*Wilding* v. *Bolder*, 21 Beav. 222. Yet in this case, the *cestui que trust* is the nominee of the testator (although the precise circumstances under which the trust was to devolve upon him have not occurred); and *cestuis que trustent* were appointed in *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W.R. 458; *Re Clissold's Settlement*, 10 L. T. N.S. 642.

As to the appointment of one trustee. The testator, by his will, manifested an intention that only one trustee should act at one time, and where one trustee only was originally appointed the Court will appoint one.—*Re Roberts*, 9 W.R. 758; *Re Reyneault*, 16 Jur. 233; and in *Re Tempest*, 1 L.R. Chy. Appeals, 485; S.C. 35 L.J. N.S. Chy. 682, it is said that "the Court will regard the wishes of a testator expressed or demonstrated" in regard to the appointment of trustees.

By consent of parties concerned, a trustee will be appointed without a reference—*In re Battersby's Trusts*, 16 Jur. 900; *Robinson's Trusts*, 15 Jur. 187; *In re Tunstall*, 15 Jur. 645, 981; S.C. 4 De G. & Sm. 421.

The proposed trustee being a nominee of the testator, the Court in appointing him will be merely giving effect to the testator's wishes and intentions, and therefore he will take all the powers conferred by the will on the trustee thereof for the time being; the decisions in *Lyon* v. *Radenhurst*, 5 Gr. 544, and *Tripp* v. *Martin*, 9 Gr. 20, not being applicable to the present case.

* But see contra, *Mesnard* v. *Welford*, 1 Sm. & Giff. 426; S. C. 22 L. J., N. S. Chy. 1053; Morgan, 89.—REP

MOWAT, V. C.—I think the petition and affidavits make out a case for the appointment of new trustees, but not of one trustee. The testator had a right to appoint one if he chose; but when it becomes necessary to apply to this Court for an appointment in a case not provided for by the testator, it is only under very special circumstances that the Court of Chancery will be satisfied with one trustee. The circumstances here are not sufficient for this purpose. The petitioners must therefore procure another to be associated with Mr. Dillon, and, on proper affidavits of the fitness of the trustee so proposed, the two will be appointed.*

Upon a consent by another proposed trustee, and affidavits of fitness being filed, his Lordship afterwards granted a fiat for the order as prayed, appointing the two trustees proposed and vesting the trust estates in them.

ENGLISH REPORTS.

ROOTH *v.* THE NORTH EASTERN RAILWAY COMPANY.

Railway Company—Carrier—Special Condition—Reasonableness—Delivery.

A railway company carried cattle upon special conditions The first condition stipulated that "the owner undertakes all risk of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or from imperfection in the station, platform, or place of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatsoever." A subsequent condition stipulated that "the company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them."

Held, that the first taken by itself was unreasonable and void.

Held, secondly, that, even assuming the first condition to be severable, the subsequent condition could not have the effect of making it reasonable, so far as it related to risks over which the persons sent under the subsequent condition had no control, such as defects of stations.

Semble, (per Channel, B.)—Such conditions relating to a single subject-matter are not severable, and cannot be good in part and bad in part.

[Ex., Jan. 25, 1867.]

This was an action for not duly delivering cattle carried for the plaintiff by the defendants from Boroughbridge to Chesterfield.

The first count alleged a bailment upon the terms that the defendants should safely and securely carry the cattle from Boroughbridge to Chesterfield, and there deliver them to the plaintiff. It alleged a breach of this duty whereby some of the cattle escaped on to the railway and were destroyed.

The second count alleged a bailment on the terms that the defendants should safely and securely carry the cattle from the one place to the other and there deliver them to the plaintiffs at a safe and proper place. It alleged for breach that they delivered them at an unsafe and improper place, whereby they escaped as in the first count.

The defendants traversed the bailments and the breaches.

The case was tried before Mr. Justice Smith at the last Summer Assizes at Derby, when the facts proved were as follows:—

* See 2 Set. 824; *Re Tunstall*, 4 De G. & Sm. 421; S. C. 15 Jur. 645; *Re Dickinson's Trusts*, 1 Jur. N. S. 724.

The plaintiff resided at Chesterfield, and was in the habit of sending cattle by the defendants' line. On the 27th April he delivered ten heifers and five cows to the defendants at Boroughbridge to be carried to Chesterfield. The defendants had no line to Chesterfield themselves; but the station there belonged to the Midland Company. The plaintiff received a ticket for the beasts and signed the counterfoil. The ticket contained conditions as follows;—"This stock is received by the company subject to the following conditions: That the owner undertakes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station platform or place of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatsoever. That the company will not be responsible for the non-delivery of the stock within any certain or reasonable time. The company will grant free passes to persons having the care of live stock as an inducement to owners to send proper persons with and to take care of them." The plaintiff sent a drover with the cattle, and he sent his nephew to meet them at the Chesterfield station. They arrived there late in the evening, and the night was dark. At that station there was a wharf for landing cattle, but it was only large enough for one truck to come alongside at once. There was no pen to put cattle in, and no fence round the wharf, but it was open to the line. The heifers were in one truck and the cows in another. On arriving at the station the drover gave up his ticket. The truck with the heifers was first brought to the wharf, and a porter and the plaintiffs nephew opened the doors of the truck and let them out; the drover stationing himself at what was admitted to be the proper place for preventing their escape. The other truck was then brought up and unloaded, and while this was being done some of the heifers out of the first truck escaped up the line. They were only missed as the others were being driven out of the station-yard, when search was made for them, and they were found to have been killed by a train.

Upon these facts it was contended that there was no evidence of any bailment on the terms alleged, the conditions being inconsistent with it; and secondly, that there was no evidence of any breach.

The learned judge left it to the jury to say, first whether there was a complete delivery; and secondly whether the delivery was in a safe and proper place.

The jury found for the plaintiff upon both points, with £67 damages; leave being reserved to the defendants to move to enter a verdict for themselves if the Court should think that the condition exempted them from liability.

Field, Q. C., in Michaelmas Term obtained a rule *nisi* to enter a verdict for the defendants pursuant to the leave reserved; or for a new trial on the ground that there was no evidence of non-delivery, or of delivery at an unsafe place, and that the verdict was against the evidence.

Cave now showed cause.—As to the conditions, they can afford no protection to the defendants, for they are clearly unreasonable. It could not be disputed that the first part of the condition repudiating all responsibility would be unreasonable if it stood alone. Such a condition has often been held to be so; *M'Manus* v. *The Lancashire and Yorkshire Railway Company*, 7 W. R. 547, 4 H, and N. 327; *Peek* v. *The North Staffordshire Railway Company* 11 W. R. 1023, 10 H. L. C. 473; *Gregory* v. *The West Midland Railway Company*, 12 W. R. 528, 2 H. & C. 944. The contention on the other side will be that the subsequent condition entitling drovers to free passes makes the first reasonable; and *Pardington* v. *The South Wales Railway Company*, 5 W. R. 8, 1 H. & N. 392 will be relied upon. But it is not in point. No doubt a company may reasonably decline liability of any particular kind, if they offer a reasonable alternative security instead; *Peak* v. *The North Staffordshire Railway Company*, *supra*; *Robinson* v. *The Great Western Railway Company*, 14 W. R. 206, 35 L. J. C. P. 123. But the alternative they offer must itself be reasonable; *Lloyd* v. *The Waterford and Limerick Railway Company*, 15 Ir. C. L. R. 37. In *Pardington* v. *The South Wales Railway Company*, *supra*, the condition exempted the company in respect of "damage on the loading or unloading, or from suffocation in transit." and free passes were to be given for drovers. The loss there was from accidental suffocation in the transit, one of the very matters which the drovers were sent to guard against. But here the exemption is in respect not only of loading and unloading and other things which the drovers might well be responsible for; but defect of carriages, negligence of the defendants' servants, defect of stations and so on, against which the presence of drovers can afford no security. There is no consideration for the exemption claimed. The presence of the drover is for the benefit of both parties, for it diminishes the risk of both. Therefore the owner sacrifices his time, and the company his carriage. As to the breaches, the question was one for the jury, and their verdict is fully supported by the evidence. There was nothing here amounting to a delivery at all; and at all events, it is clear that the place was not a safe one. *Roberts* v. *The Great Western Railway Company*, 4 C. B. N. S. 506, may be cited on the other side, but it does not apply. There the plaintiff alleged an absolute obligation to fence the station-yard, and it was held that no such obligation existed. But it was admitted that the company was bound to provide a safe landing-place, per Williams, J., p. 523. And that is all we contend for here.

Field, Q. C. and *A. Wills*, in support of the rule.—First, there was a complete delivery. The drover had given up his ticket, and he and the plaintiff's nephew had received the cattle on the wharf. And secondly, the place was a reasonably safe one. It was the place where the plaintiff intended them to be delivered; and he knew the station, and knew that it did not belong to the defendants. Nothing has been shown that the defendants ought to have done to make the place safer. And if it had been attempted to bind them to take any special precaution, *Roberts* v. *The Great Western Railway Company* (*supra*) would have been an answer.

But, at any rate, the defendants are protected by the condition. The condition is severable, and may be good in part, though bad in another part. This is so with bye-laws: *Rex* v. *Fishermen of Faversham*, 8 T. R. 352. And so far as

it relates to loading and unloading, this condition is perfectly reasonable. At any rate, it is made so by the subsequent clause with respect to drovers: *Pardington* v. *The South Wales Railway Company* (*supra*).

KELLY, C.B.—I am of opinion that our judgment must be for the plaintiff. Several points have been raised, and I shall first consider that relating to the conditions. The condition is as follows. [His Lordship read the conditions.] Now, it is admitted that the first clause of the condition taken by itself is unreasonable in part, so far as it relates to risks of carriages and defects of vehicles. But it is said first that it is severable, and is good as to the remainder. I shall not undertake to say whether such a condition is partible or not. It is said, secondly, that the subsequent clause with respect to drovers cures any defect in the first and makes it binding. Now, the authorities no doubt show that a condition, which would otherwise be bad, may become good if a reasonable alternative be offered to the public. But to have this effect it must be left to the choice of the party to accept or decline that alternative. And here it is not so. Therefore, if the oppurtunity of sending a drover could have removed the effect of the condition, it has not that result here, for no choice was offered.

But even suppose there were no such rule as this, this condition is admitted to be bad as to the greater part of it. In part it may be good, namely as to loading and unloading. If the company leave the loading and unloading to the owner, and the owner chooses to undertake it, I do not see why a stipulation exempting the company from risks of loading and unloading may not be good. But Mr. Field must go the length of saying that this applies also to defects of the station; and the owner's undertaking the unloading cannot affect the company's liability to provide a safe and proper place for the purpose. Therefore upon no view can the conditions protect against risks from defect of stations.

Then as to the other points. It is said that the delivery was complete. Suppose it to be so, that still leaves the obligation to provide a safe exit. And whether the plaintiff's servant contributed to the loss or not, the only substantial question was whether the defendants had discharged their duty of giving a safe means of transit and exit. As to this there was evidence on both sides; the jury have found for the plaintiff, and there is no reason to disturb their verdict. The case of *Roberts* v. *The Great Western Railway Company* which has been cited, has no bearing upon this. The pleader there alleged an absolute duty to fence the station yard and it was held that no such duty existed. Upon all points the defendants have failed.

MARTIN, B.—I am of the same opinion. It will be convenient, in the first place, to consider the case without reference to the conditions. [His Lordship stated the facts.] Now, I think it is a fallacy to call what took place a delivery at all. Cattle are not like goods which can be put into the hand. In this case they were merely turned loose upon the defendants' own premises. Then, at common law, what would be the consequence of a man being sent in charge? I think it would be very like the case which has arisen of a nurse and child. If any injury occurred through the negligence of the drover, the company would not be liable; if by the negligence of their own servant, they would.

Then, look at the condition. It is clearly unreasonable as it stands. But assuming it to be divisable, and to be rendered reasonable in part by the stipulation as to drovers, still it can only be rendered reasonable so far as it relates to accidents arising through default of the drovers; and therefore it leaves the common law liability exactly as it was before. Either at common law or under the condition thus construed, if a man is sent in charge, whether his fare be paid or not, the company are not liable for injury arising from negligence in his department, but for other injuries they are.

CHANNELL, B.—I am of the same opinion. The defendants' counsel would have done much, if they could have shown that there had been such a delivery as to put an end to their liability at common law, for they would then have displaced my brother Martin's view. But I do not think there was any such delivery as to determine their liability and exclude all question of safe delivery, and delivery in a safe place. I think, therefore, the verdict was right.

Then, as to the conditions. The question arises on a traverse of the bailment; and if the conditions be reasonable, the declaration is not proved. It is admitted that the first condition is bad as it stands; but it is said that it is rendered reasonable in either of two ways. First, it is said that we may strike out a part of it—that which relates to risks of carriage, and look only at the remainder, and that the remainder is then good. If it were necessary to decide, I should strongly think that such a condition is not severable. If it applied to several subject-matters, it might be otherwise, but not as to one subject-matter. But even if risks of carriage could be struck out, the condition would still remain unreasonable. But it is further said that the third condition cures the first. Now it cannot be better for the company than if it had come first, and been prefaced by "inasmuch as." Then reading it so, the whole remains clearly unreasonable if risks of carriage are included. Otherwise, loss from a collision, through the defendants' negligence, would be protected. And if risks of carriage be struck out, the defect is not cured, for there still remain defects of stations and places of unloading, against which the presence of drovers can afford no protection. And this is the actual cause of loss in the present case. On all points, therefore, I think the rule must be discharged.

PIGOTT, B., concurred.

Rule discharged.

—*Weekly Reporter.*

CORRESPONDENCE.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

Actions for use and occupation.

GENTLEMEN,—Can an action for use and occupation be brought in the Division Courts?

This may appear a strange legal question to put, but it is nevertheless one that may very properly be asked. Recently two cases were brought and tried at the Richmond-hill Divi-

sion Court (York) exactly in this way, accompanied by these circumstances:—

A. was a freeholder, and had a good title to a quantity of cleared land, near Maple Village, Vaughan; he had a tenant in possession of it in fact,—that is, living in a house on the same land. B. takes possession of several fields of this land, perhaps twelve acres in all, pastures it, occupies it, rents it to others, and makes use of it as his own for several years, without the shadow of a title, being a mere trespasser or usurper.

A. brings an action for use and occupation for an amount within the jurisdiction of the Division Courts, say $20 or $40, or even for $100. B. by an attorney appears at the trial, and without producing any proper title whatever, or any proof, asserts that he is the owner and asks the Judge to turn A. out of the court, on the ground, that "title to land will come in question." A pretended title, set up by himself, as a mere trespasser or illegal occupant, to cover his illicit profits. The Judge, without making B. shew any title, refuses to try the case, merely upon his *ipse dixit* that he has a title, whilst A. stands ready with a surveyor's certificate, his deed, his tenant, and other proof to show that B. has no title whatever, and that his alleged title is all a fraud.

Now A. (if this ruling be law) must submit to a continual occupation of his land by B., or sue for say $20 in the Queen's Bench. Suppose the trespasser to be worthless, he has no remedy in fact, without incurring a great deal of costs. He cannot sue in the County Court, for in that court title to lands cannot be tried any more than in the Division Courts. It is true that in the County Court, B. would have to plead title to land in question, and swear to the truth of the plea.

I find upon looking at the English cases that the ruling of the Judge at Richmondhill was at least wrong to a certain extent. In England, Division Courts (or rather County Courts as they are there) cannot try questions or suits where lands *bona fide* come in question. But it must be *bona fide*, not a sham title. The judge (it is held) has a right to go so far into the title that he can see some reasonable or plausible title made out by the defendant; he will not take his mere word for it, and if the defendant cannot produce some title to satisfy him, the judge, he will give judgment for the use of the land.

Remember A. did not sue for trespass, but waiving that, he sued for the use of the land, accepting B., as it were, as a tenant at will. It is true an action for use and occupation may arise when an occupant has entered the land originally as a tenant, or under an agreement to purchase, but it will lie also where any one occupies land not his own with the tacit consent of the true owner.

If A. had produced a title in court and B. had done the same, be it ever so defective in form, provided it was a *bona fide* claim by documents or proof, then the judge upon hearing it, just so far as to ascertain that title would have to be decided by him, should of course dismiss it. At Richmondhill this was not the case.

The cases in England in the County Courts, and in Ireland under the Civil Rights Bill, all go to show that he, the judge, should go into some evidence, to see if he has jurisdiction. The decision of each case must depend upon its own circumstances. I refer to a leading English case, *Lilley* v. *Harvey*, reported in No. 14 County Court cases, page 102, decided by Mr. Justice Wightman, on an application for a writ of prohibition, and commented on by Mr. Jagoe, page 195.

The same principle is laid down and applied to Justices of the Peace, where lands come in question before them in summary trials, see *Rex* v. *Wattesley*, 1 B. & A. 648; also in *Owen* v. *Pierce*, No. 14 County Court cases, 282, July 1st, 1848; Jagoe's work, 197; also see a case, *In re Knight*, 12 Jurist, 101; *Lloyd* v. *Jones*, 11 L. T. 182. When speaking of an action for use and occupation it must not be forgotten that the action is founded not on the common law but upon the statute 11 Geo. II. chap. 19. It is also laid down in cases that an action for use and occupation cannot be supported where the holding is and has always been adverse, but in such a case trespass or ejectment is the remedy: Lord Raymond, 1216; Bacon Ab. assumpsit A.; 2 Strange, 1239; 1 Camp. 360. This, however, does not affect the question first discussed.

CHAS. DURAND.

Toronto, April 25, 1867.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

Assumpsit.

GENTLEMEN,—The name of E. S. appears on the assessment roll for the township of B. for the year 1866, as owner of part of Lot No. 11, in Concession 5th of said Township. The

same name of E. S. appears on the voters list for 1866 for the same lot and concession. The said E. S. actually lives and owns part of lot 11 in the 6th concession, the error in the roll being made by the assessors. The township has lately been divided into two electoral sub-divisions, and the dividing line is the line between the 5th and 6th concessions, the five first concessions forming electoral sub-division No. 1, and the remainder No. 2. I expect soon to be called on to make out a list for each division from the said voters list for the use of the Deputy Returning Officers at the coming elections, and in making the said lists I will have to put the name of E. S. in the list for division No. 1. The 8th section of cap. 13, 29 & 30 Vic. enacts, that electors shall only vote at the polling place established for the sub-division wherein the property on which they are qualified to vote is situated, consequently, as E. S. actually lives and the property on which he is entitled to vote is situate in division No. 2, he will go to the polling place of No. 2 for to vote, and as his name will not appear on the voters list for the said division, he will be deprived of the privilege. Suppose he then goes to the polling place of No. 1 and offers to vote there, and the returning officer feels disposed to record his vote, should it be received in the poll book as owner in the 5th concession, or as it really is, viz., in the 6th concession. I think in justice he should be allowed to vote, and on reading note *u*, p. 61, of Harrisons's new Municipal Manual, I think he would be entitled by law to vote, but where he should vote or how to manage it correctly I am at a loss to know.

Please give your opinion in what way the error should be corred or arranged.

Yours, &c., A Township Clerk.

[Will be discussed next month.—Eds. L.C.G.]

To the Editors of the Local Courts' Gazette.

Bailiffs' Fees.

Gentlemen,—Some difference of opinion having lately arisen in this quarter as to the meaning of that portion of the Tariff which allows Bailiff's 20 cents for "drawing and attending to swear to every affidavit of service of summons when served out of the division."

Some Clerks hold that it refers *only and to all* services of *foreign summonses*, whether the Bailiff does or does not travel out of *his* division to serve the same.

Others think the words of the Tariff can only be construed to mean for service of summons (*home* or *foreign*) when the Bailiff has actually travelled beyond *his* division to serve.

Is it the general rule, and is it correct, to charge the extra 20 cents on *all* foreign summonses, and also for those issued out of the home court when the Bailiff travels beyond his division? In other words, are both parties right?

Please give us your opinion in the next number of the *Local Courts' Gazette.*

And oblige

A Clerk.

Co. Renfrew, May 13th, 1867.

[We cannot do more than refer our correspondent to page 33 of vol. V. of the *Upper Canada Law Journal.*—Eds. L.C.G.]

To the Editors of the Local Courts' Gazette.

Evidence of wives of parties to suits in Division Court.

Gentlemen,—Section 101 of the Division Courts Act provides, that "on the hearing or trial of any action, or in any other proceeding. the parties thereto and *all other persons* may be summoned as witnesses, and examined either on behalf of the plaintiff or defendant, upon oath (or affirmation), to be administered by the proper officer of the court; Provided always, that no party to the suit shall be summoned or examined except at the instance of the opposite party or of the judge."

Under this provision, 1st. Can the plaintiff in a Division Court suit call his wife as a witness for him?

2nd. Can he call the defendant's wife?

VanNorman et ux. v. *Hamilton*, 25 U. C. Q. B., shows that where husband and wife are co-plaintiffs the wife cannot be called as a witness by the defendant. Section 102 of the Division Courts Act provides as follows:—"The judge holding any Division Court may, whenever he thinks it conducive to the ends of justice, require the plaintiff or defendant in any cause or proceeding to be examined under oath or affirmation." Under this has the judge at the trial of a Division Court suit the power to require a wife, who is a co-defendant with her husband, to be examined on behalf of the plaintiff? I have known it to be done, and think it improper under Con. Stat. U. C. cap. 32, sec. 5, and the decision

above referred to. What is your opinion on the above points?

Yours truly,

A BARRISTER.

Kingston, May 17, 1867.

[See editorial remarks on page 66.—EDS. L. C. G.]

REVIEWS.

THE MUNICIPAL MANUAL FOR UPPER CANADA. By Robert A. Harrison, D.C.L., Barrister-at-Law. Second edition. Toronto: W. C. Chewett & Co. $4 00.

(From the *Leader*, May 11, 1867.)

We acknowledge with pleasure the receipt of the above, containing as the title inform us, "The new Municipal and assessment act, with notes of all decided cases, some additional statutes and a full index."

As compared with the learned editor's first manual, the present is much more complete and valuable, in the first place from the more consolidated form in which the legislation affecting municipal matters, has been put under the new act; in the next place from the number of doubts as to construction and interpretation which have been removed by the court, and which have been carefully collected and noted; and again from the increased experience of the editor and the greater thought and research displayed, and lastly owing to the improved appearance and "get up," so to speak of the volume before us.

The subject of contested elections is treated in an exhaustive manner and the experience of the editor, being constantly retained in cases of contested elections, renders his notes and collection of cases on this subject all the more useful.

Our readers can perhaps better judge of the value of the work by a few extracts taken at random; for example—section 73 as amended by chapter 52 of the same section, regulates the subject of disqualification of candidates for municipal honors, enacting amongst other things that no person interested in a contract with a corporation shall be qualified as a member of such corporation. In one of the notes to this section, he says:—

"The object of this part of the section, like that of sec. 28 of the English Mun. Cor. Act of 5 & 6 Wm. IV. cap. 76, is clearly to prevent all dealings on the part of the Council with any of its members in their private capacity, or, in other words, to prevent a member of the Council, who stands in the situation of a trustee for the public, from taking any share or benefit out of the trust fund, or in any contract in the making of which he, as one of the Council, ought to exercise a superintendence. (Rawlinson's Mun. Man. 53.) The evil contemplated being evident, and the words used general, they will be construed to extend to all cases which come within the mischief intended to be guarded against, and which can fairly be brought within the words, *Ib.* The words of our enactment are that "no person having by himself or his partner an interest in any contract with or on behalf of the corporation shall be qualified, &c.;" and the words in the English Act are that "no person shall be qualified, &c., who shall directly or indirectly, by himself or his partner, any share or interest in any contract *or employment* with, by, on or behalf of such Council, &c." The difference deserves to be noticed. Under an old act, of which the section here annotated is a re-enactment, it was held that a person who had executed a mortgage to the corporation containing covenants for the payment of money, was disqualified. *The Queen ex rel. Lutz* v. *Williamson*, 1 U. C. Prac. Rep. 91. Where defendant, before the election, had tendered for some painting and glazing required for the city hospital, and his tender having been accepted, he had done a portion of the work, for which he had not been paid, but afterwards refused to execute a written contract prepared by the City Solicitor, and informed the Mayor of the city that he did not intend to go on with the work, he was notwithstanding held to be disqualified. *The Queen ex rel Moore* v. *Miller*, 11 U. C. Q. B. 465. So where the person elected had tendered for the supply of wood and coal to the corporation. *The Queen ex rel Rollo* v. *Beard*, 1 U. C. L. J., N. S. 123. In such a case it is immaterial whether there is or is not a contract binding on the corporation, *Ib.* So where it was shown that the candidate elected was at the time of the election surety for the Treasurer of the Town and acting as the Solicitor of the Corporation, he was held to be disqualified. *The Queen ex rel. Coleman* v. *O'Hare*, 2 U. C. Prac. Rep. 18. So a surety in any sense to the Corporation. *The Queen ex rel. McLean* v. *Wilson*, 1 U. C. L. J., N. S, 71. Whether the contract be in the name of the party himself or another, is immaterial, at all events in equity. *Collins* v. *Swindle*, 6 Grant, 282; see also *City of Toronto* v. *Bowes*, 4 Grant, 489, S. C. 6 Grant 1. But an agent of an insurance company paid by salary or commission, who both before and since the election, had, on behalf of his company, effected insurances on several public buildings the property of the corporation, and who at the time of the election had rented two tenements of his own to the Board of School Trustees, for Common School purposes, was held not to be disqualified. *The Queen ex rel. Bugg* v. *Smith*, 1 U. C .L. J., N. S., 129.

"*Quære*, is insolvency a ground of disqualification for election? It is not made so in express terms, but as hereafter declared a forfeiture of office. See sec. 121; see also *The Queen* v. *Chitty*, 5 A. & E. 609."

To make this note more complete we find in the "additions and corrections" at the end of the volume, reference to late cases of *Reg. ex rel. Piddington* v. *Riddell* and *Reg. ex rel.*

Mack v. *Manning*, which were not decided been until after the first part of the book had printed.

Great changes have been made in the law by the last act, most of which however are by this time so familiar to our readers that it is unnecessary to refer to them at length. The one which principally affects ratepayers, at least in cities, towns and villages, at the present time, is making *actual value* the basis of assessment. Ratepayers in counties, and townships who have been used to this do not feel the same difficulty. The perplexity which has evidently taken possession of the minds of the former class on this subject, is great, and time only can accustom persons who will not take the trouble, or who are not capable of thinking over the matter in a reasonable temper, to the change.

In connection with this we may quote the note to section 30 of the Assessment Act.

"There is nothing that men so much differ about as the value of property. It is, to a great extent, a matter of opinion. Men's opinions on such a subject are very materially affected, more so than they are perhaps aware of, by the point from which they consider it. A man who is impressed with a consideration of how much a thing is worth, will entertain a widely different opinion from him who simply looks at it as a thing to be purchased in expectation of profit whether by the employment of it or selling it again. Per Draper, C. J. in *McCuaig* v. *The Unity Fire Insurance Company*, 9 U. C. C. P. 88. Perhaps, after all, the best standard of value is that mentioned in this section—'actual cash value,' such as the propriety would be appraised 'in payment of a just debt from a solvent debtor.' (See further notes to sec. 179.) But it is no defence to an action for taxes, that the property was excessively rated. *The Municipality of London* v. *The Great Western Railway Company*, 17 U. C. Q. B. 267. The only remedy in such a case is by appeal to the Court of Revision. (Ib.)"

The powers and duties of assessors, collectors and Courts of Revision are also fully treated of, and the information as to the various points arising under the assessment law especially recommends the book to all those not only connected with the administration of the law, but to all persons complaining of improper assessments, and this may be taken note of in these days of complaints innumerable.

The appendix of additional statutes adds to the practical use of the book and leaves scarcely anything unnoticed which affects the municipal laws of Ontario; whilst a well arranged index gives the key wherewith to unlock the store of knowledge contained in the preceeding pages.

The price of the book, well printed on good paper and substantially bound in full law sheep is only $4 00, and as the edition is limited we should recommend parties wishing to purchase to do so speedily.

THE CANADIAN CONVEYANCER AND HAND-BOOK OF LEGAL FORMS, WITH INTRODUCTION AND NOTES. By J. Rordans. Second Edition. Toronto: W. C. Chewett & Co., 1867. $2.

This is a second edition of the useful little compendium issued by Mr. Rordans in 1859.

To the professional man who can provide himself with the elaborate works of Davidson and others on Conveyancing, &c., this volume might not be of much value; but to others it is found of much practical benefit, and all will find in it many forms which are not otherwise attainable without the loss of time and trouble. The size of the volume before us is more compact than the former edition, and appears to contain more information.

The Introduction gives a sketch of the laws relating to real property in the Province of Ontario, and may be read with advantage by students and others desiring elementary information on the subject.

APPOINTMENTS TO OFFICE.

CLERKS OF COUNTY COURT.

CLARENCE C. RAPELJE, Esquire, to be Clerk of the County Court, in and for the County of Norfolk, (Gazetted April 27, 1867.)

NOTARIES.

ANGUS MORRISON, Esquire, Barrister-at-law, to be a Notary Public for Upper Canada. (Gazetted April 13, 1867.)

JOSEPH ROOK, of Clarksburg, Esquire, to be a Notary Public for Upper Canada. (Gazetted April 13, 1867.)

FREDERICK HENRY STAYNER, of Toronto, Esquire, Attorney-at-law, to be a Notary Public for Upper Canada. (Gazetted April 27, 1867.)

STEPHEN FRANCIS GRIFFITHS of the Village of Oilsprings, Esquire, Attorney-at-law, to be a Notary Public for Upper Canada. (Gazetted April 27, 1867.)

WILLIAM McKINLAY, of the Village of Thamesville, Esquire, Attorney-at-law, to be a Notary Public for Upper Canada. (Gazetted April 27, 1867.)

GEORGE MILNES MACDONNELL, of Kingston, Esquire, Barrister-at-law, to be a Notary Public for Upper Canada. (Gazetted April 27, 1867.)

CORONERS.

CHARLES SCHOMBERG ELLIOT, of Orillia, Esquire, M.D., to be an Associate Coroner for the County of Simcoe. (Gazetted April 6, 1867.)

HENRY USSHER, of Walkerton, Esquire, M.D., to be an Associate Coroner for the County of Bruce. (Gazetted April 6, 1867.)

DANIEL CLINE, of the Village of Belmont, Esquire, M.D., to be an Associate Coroner for the County of Middlesex. (Gazetted April 6, 1867.)

J. P. KAY, of Belmore, Esquire, M.D., to be an Associate Coroner for the County of Bruce. (Gazetted April 6, 1867.

JAMES MURPHY, of the Village of Teeswater, Esquire, M.D., to be an Associate Coroner for the County of Bruce, (Gazetted April 27, 1867.)

TO CORRESPONDENTS.

"CHARLES DURAND"—"A TOWNSHIP CLERK"—"A CLERK" "A BARRISTER"—under "Correspondence."