DIARY FOR AUGUST.

1. Tues.. *Lammas.*
4. SUN.. *10th Sunday after Trinity.*
11. SUN.. *11th Sunday after Trinity.*
14. Wed.. Last day for County Clerks to certify County rates to Municipalities in Counties.
18. SUN.. *12th Sunday after Trinity.*
21. Wed.. Long Vacation ends. Last day for setting down and giving notice for re-hearing in Chancery.
25. SUN.. *13th Sunday after Trinity.*
29. Thurs. Re-hearing Term in Chancery commences.

CONTENTS.

THE

Canada Law Journal.

AUGUST, 1872.

The Philadelphia *Legal Gazette*, referring to the congress of lawyers held not long since in Germany, is struck with the thought that this is the age of conventions and assemblies. The suggestion is then made that Pennsylvania should commence to form Bar organizations, should call upon the other States to do the same, and then when a complete organization has been effected, that a national congress of lawyers should be summoned, and through it that the *Bar of the whole world* should be invited to send delegates to an international congress of lawyers to be held at Philadelphia during the Centennial Exhibition of 1876.

The English law officers of the Crown are now to a certain extent salaried officers. That is to say, the Attorney-General is to receive £7,000 a year, and the Solicitor-General £6,000 for non-contentious business, *i. e.*, in lieu of patent fees and honorary briefs. As to contentious business the law officers are to receive, as before, fees therefor, and for opinions connected with it, according to the ordinary professional scale. It is to be observed also that these new regulations do by no means interfere with the private practice of these eminent officials.

Mr. George Richardson, elected Mayor of Salisbury last year, refused to qualify, and was thereupon fined £100. One of our U. S. exchanges manifests considerable astonishment—remarking that it never heard of any person who had been elected Mayor of any of the cities of America refusing to qualify.

Under the title of "A Sweeping Reform," the English *Law Journal* publishes a letter from a correspondent, timidly recommending that every solicitor who has been certificated and in practice three years, should have the privilege of taking all oaths and affidavits in all the courts. There are still a few things in which we are a-head of our professional brethren in England.

ON JUDICIAL EXPRESSION.

While borrowing an idea from the treatise of the late Mr. Coode, on "Legislative Expression," we have no intention of dipping more deeply into legal matters than is warranted by the state of the thermometer. We fully appreciate being in the midst of vacation, which some miserable sinners in England think should be abolished, because banks, &c., have no such seasons of intermitted exertion. Against this short-sighted view, we quote the opinions of Alderson, B., expressed with his usual felicity, though in a somewhat extra-judicial manner:

"My holidays, my holidays!
'Tis over, and now I am free
From the subtle draughtsman's tangled maze,
As he weaves the vacation plea.
My holidays, my holidays!
Now beneath the tranquil night,
And the twilight walk, and the upward gaze
At those distant orbs so bright;
While the swelling wave 'mid the pebbles plays,
And breaks with a gleam of light."

Let subtle draughtsmen weave their mazes, pending vacation; all sensible lawyers will hail this time of emancipation.

True to our severe legal instincts, we have managed to find, even in professional reading, some matters not unsuited for the relaxation of holiday hours. In looking over our recent exchanges, we note a few remarkable utterances of the United States Bench, that have suggested some possages from the sayings and doings of English judges; and our *olla podrida* is now before our readers.

In *Everhart* v. *Searle*, the Supreme Court of Pennsylvania, on the 13th May, 1872, decided the question that a person who is the agent for the sale of certain land cannot also act as agent for the purchase of that land, and by consequence cannot recover anything for his services in purchasing. This, by the way, is in principle the same thing as was decided by Wilson, J., in *The Ontario Bank* v. *Fisher*, 4 P. R. 22, where he held that a city principal could not represent as agent in the same case attorneys on opposite sides. However, in the Philadelphia case, Thompson, C. J., announces his judgment by saying:

"The case before us is rather novel. It involves a question, whether the same person may be an agent in a private transaction for both parties, without the consent of both, so as to entitle him to compensation from both or either. We have the authority of Holy Writ for saying that 'no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.' All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principle in every system of enlightened jurisprudence."

This sort of citation appears to be much relished by the American judges. Thus, in *Henshaw* v. *Foster*, 9 Pick. 317, Parker, C. J., after referring to the maxim, "*Qui hæret in literâ hæret in cortice*," says "'The letter killeth, but the spirit maketh alive,' is the most forcible expression of Scripture." In England and Canada such a practice is now-a-days unknown, and we are rather glad it is so. But in olden times, the judges of England, not unmindful of dedications and the like, whether they were styled *très Sage et très Reverend*, deemed it becoming to their dignity to garnish their deliverances with Scripture texts. For example, Mr. Justice Fortescue cites a very old precedent in support of the doctrine that a man should not be condemned before being heard: "I have heard it observed," he says, by a very learned man, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam, where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shoudst not eat?' And the same question was put to Eve also." This passage was cited by Maule, J., in *Alley* v. *Dale*. Another case, before the Quarter Sessions at Philadelphia, merits notice for the peculiar way in which the judge (Ludlow, J.) charged the jury, in an indictment under the Sunday law, for liquor sold on that day in the hostelry of one Jacob Valer. He first recommends the jury "to discard every outside consideration, and to rise above the surrounding atmosphere in their deliberations upon the questions presented, with an earnest effort to seek for and discern the truth under the law of our land." Then, after reading out the statute to the jury, he proceeds thus:

"The testimony in this case is, that on a Sunday night, by a sort of prearrangement, these four persons, the witnesses, went into the house of one Jacob Valer; that they saw the lights burning, the tables around the room, and that they asked for whiskey, lemonade and segars; and that thereupon the whiskey, or that which

seemed to be whiskey—it is for the jury to say whether the fact is established—was presented to one person. It is not indictable to drink lemonade on a Sunday, or to smoke, but to drink liquor is indictable. It is alleged that these articles were furnished, and one of the witnesses swears that one of the articles produced was whiskey, for he smelled of the article, and so determined that it was whiskey.

"Upon the question of what day it was, you have the testimony of these witnesses—it was Sunday. In the second place, as to what they drank, you have the testimony of these witnesses. It is for you to determine what they ordered, and what they drank—and paid for, by the way.

"Lastly—and this is the most important point of all—who sold this article, if it was liquor? Who furnished it? Well, it is alleged that a man named Jacob Valer furnished it; that a person named Jacob Valer has a license for that house; that he had it considerably before this prosecution was instituted; that he, Valer, took out that license, and entered a bond, which is signed Jacob Valer. There is no testimony here, speaking as I now do with the utmost possible accuracy, as to whether this man Jacob Valer, *this* Jacob Valer, signed the bond. The question is, however, for you to decide, whether he, that is, this defendant, did or did not take out a license for that house—whether he is the identical man."

The learned judge, in his eagerness to secure his re-election by a *publican* vote, forgets that the identity of name (especially when that name was not "John Smith") is evidence of identity of the person. The judge then proceeds to bring down the case to the level of the commonest understanding, by explaining what is meant by *prima facie* evidence—it being noteworthy, however, that *all the evidence* before him was against the defendant:

"The presumption of law is, that in the ordinary and usual line of business, the employees of an establishment act under the direction and by the permission of the chief of the establishment. That, however, is only *prima facie* evidence, that is, evidence in the first place, evidence at the outset, at first blush: that is the general meaning of the words *prima facie*. If it is established as a fact, *prima facie*, in the first place, it then devolves upon the defendant to disprove the fact, either by the circumstances surrounding the case, or by positive evidence. I will illustrate what I mean by *prima facie* evidence. A receipt is said to be *prima facie* evidence of the payment of a debt. Suppose I owe a man one hundred dollars, and when I pay him he gives me a receipt; that receipt is in the first place evidence of payment. But he may show that I have not paid the debt after all. So here, where business is carried on in the ordinary and usual way, it is, in the first place, evidence that it was carried on with the consent of the owner or proprietor of the house. But the proprietor may rebut that assumption by evidence, either direct and positive, that he prohibited the business, or by evidence of all the surrounding circumstances of the case tending to prove the fact.

"Here the testimony is, that this business was carried on, and carried on in the absence of Valer; that is, there is no proof that he was there when the liquor was sold, if it was liquor. Now, it is for the jury to say whether these servants in the room acted by his (Valer's) order, and with his consent; or whether they can, from all the circumstances surrounding the case, draw an inference which rebuts that presumption, and which inclines the jury to believe that it was against his (Valer's) desire that the place was kept open and articles sold."

We are glad that our lot has fallen in a country where a Judge Ludlow has not taken root. But even this curious specimen falls far short of the familiar charges and quaint illustrations with which that good, old-fashioned, honest judge, Mr. Justice Burrough, was wont to elucidate the technicalities of counsel for the benefit of the jury. He once began an address to them after this fashion: "Gentlemen, you have been told that the first is a *consequential issue*. Now, perhaps you don't know what a consequential issue means, but I dare say you understand ninepins. Well, then, if you deliver your bowl so as to strike the front pin in a particular direction, down go the rest. Just so it is with these counts;—knock down the first, and all the rest will go to the ground. That's what we call a consequential issue."

The third and last specimen of judicial expression we cite is taken from an Illinois case, decided by Williams, C. J., in the Circuit Court of Cook County, in June of this year. Therein it became necessary to decide whether a cemetery was a nuisance, so that the State could interfere with a cemetery corporation, and the court thus rhapsodizes on the theme:

"Cemeteries are not only a necessity, but the civilization and culture of this age demands cemeteries ample and attractive, selected with reference to natural scenery as well as convenience; where art many vie with nature, and taste supplement capital in rendering the spot a beautiful home for our dead. Such places cannot be secured except by the lavish expenditure of

money, and the employment of skilled labor, and this necessitates the creation of cemetery corporations.

"The cemeteries in the vicinage of our large American cities, beautified and ornamented as as they are by the application of taste and capital, have become favourite resorts, not only to the many who have deposited in them their dearest treasures, but to other thousands who visit them to enjoy their scenery and be refreshed in their shade. On Sundays and holidays they serve as public parks for the lovers of natural beauty, while others are drawn to them by a stronger love. Instead, therefore, of interfering with the health, welfare and comfort of society, they actually greatly enhance these, serving also for the necessary object for which they were more immediately designed."

One would search in vain through the English or Canadian reports to find a passage at all equal to this in rhetoric. Something approaching it might be culled from the Irish Bench. But the only thing we happen to know fit to be cited in the same page is another effusion of another American judge.

"None but themselves can be their parallel." Strange to say it was suggested by a similar funereal subject, and may be found reported in *The Commonwealth* v. *Viall*, 2 Allen 512, upon an indictment against the defendant for cutting down trees in a burial-ground. Mr. Justice Hoar, in delivering the opinion of the Court, observes, "The growth of these trees may have been watched with affectionate interest by friends and relatives of the departed, whose last resting-place has been made more pleasant to the imagination of the survivors, by the thought that it might become a resort of birds, and a place for wild-flowers to grow; that waving boughs would shelter it from summer heat, and protect it from the bleak winds of the ocean. The fallen leaf and the withered branch are emblems of mortality; and in the opinion of many, a tree is a more natural and fitting decoration of a cemetery than a costly monument."

It is time to close our rambling observations. If judges would more closely follow the lead of Williams, C. J., and Hoar, J., we should find that the favourite sea-side authors, companions of summer stollers, would cease to be Tennyson and the rest of the poetical tribe in blue and gold; the reporters in law-calf arrayed would come into well-deserved pre-eminence. Let the American judges imitate Baron Alderson. If they feel poetic stirrings, let them exhale the divine afflatus into other receptacles than "the judgment of the Court."

LAW OF EVIDENCE.

There is this session before the English House of Commons a bill for the amendment of the Law of Evidence, many provisions of which will prove suggestive to Canadian lawyers and legislators. By it, accused persons would be competent, but not compellable, to give evidence. As we lately noted, such laws are becoming common in the States, and with certain limitations they may possibly work well.

It provides also that husbands and wives, in every proceeding, both civil and criminal, are to be competent and compellable to give evidence for or against each other, provided that any communication made by husband or wife by the other during marriage shall be privileged. We would call attention to the decision, *Storey* v. *Veach*, 22 C. P. 164, where, in an action by husband and wife for an injury sustained by the wife (the husband being joined merely for conformity), it was held that the mouths of both plaintiffs were shut, while the defendant could, under our statute, give his evidence against them. In view of this decision, some amendment of the law of evidence, as it relates to husband and wife, would seem to be called for in this Province.

Another matter in the English bill is that a barrister, solicitor, attorney, or clergyman of any religious persuasion, shall not be bound to disclose any communication made to him confidentially in his professional character. Upon this, some correspondence has lately appeared in our columns. As regards privilege of clergymen, we understand there is a very important case now pending in the Court of Chancery (*Keith* v. *Lynch*), where one of the defendants, a Roman Catholic clergyman, refuses to disclose matters communicated to him in the confessional. It is not improbable that some of the questions raised, but not decided, in *Cullen* v. *Cullen*, and adverted to by Strong, V. C., in *Elmsley* v. *Madden*, 18 Gr. 389, touching the Treaty of Paris and the Quebec Act, will have to be decided in *Keith* v. *Lynch*.

Among other changes (some of which have evidently been suggested by Parliamentary

Election Law, the Tichbourne *cause célèbre*, and the practice in Chancery), we further note the following in the bill we have referred to:

"A witness is not to be excused from answering on the ground of criminating himself, but no answer so given shall be used against him in any criminal proceedings, or in any proceeding for a penalty or forfeiture. The improper admission or rejection of evidence shall not be ground of itself for a new trial or for the refusal of any decision in any case, if it shall appear to the court before whom such an objection is raised that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision. A witness shall not be bound to produce any document in his possession not relevant or material to the case of the party requiring its production, nor any confidential writing or correspondence which may have passed between him and any legal professional adviser. An impression of a document made by a copying machine shall be taken *prima facie* to be a correct copy."

SELECTIONS.

LIABILITY OF RAILWAY COMPANY—FIRE COMMUNICATED BY LOCOMOTIVE.

No invention of modern mind or appliance of modern civilization has been more prolific in results or more fruitful in litigations than railroads. Railroad cases constitute, in fact, the largest single department of litigation to which the attention of our higher courts is called. Upon the particular subject of the liability of railway companies in case of fire communicated by locomotive engines, more than a quarter of a hundred cases have been decided in the higher courts of England and the United States. Soon after the introduction of railways in England the question arose as to whether railway companies were not liable *absolutely* for any damage that might occur in consequence of fire from locomotives (*King* v. *Pearse*, 4 B. and Ad. 30), but it was early decided that the legislative body of the State, in conferring privileges and franchises on railways, did not thereby impose any such absolute liability upon them. But it appears that this principle demanded reiteration even so late as 1860, when the full court of exchequer, in *Vaughan* v. *Taff Vale R. R. Co.*, 5 Hurlst and Norm. 679; s. c. below, 3 id. 743, decided that a railway company was only responsible for the negligent use of fire in locomotives. Chief Justice Cockburn, in this case, said: "The defendants used fire for the purpose of propelling locomotive engines, and no doubt they were bound to to take proper precautions to prevent injury to persons through whose land they passed; but the mere use of fire in such engines does not make them liable for injury resulting from such use without any negligence on their part." The following cases, however, well establish the doctrine in England that it is only in cases of negligence that the railway companies are liable for damages by fire from engines: *King* v. *Pearse*, *supra*; *Aldridge* v. *The Great Western R. R. Co.*, 3 Man. and Gr. 515; s. c 42 E. C. L. 272; *Piggott* v. *Eastern Counties R. R. Co.*, 3 Man. Gr. and Scott; s. c., 54 E. C. L. 228; *Gibson* v. *The South-Eastern R. R. Co.*, 1 Fos. and Fin. 23; *Vaughan* v. *Taff Vale R. R. Co.*, *supra*; *Freemantle* v. *The London & North-Western R. R. Co.*, 10 C. B. N. S.; s. c., 100 E. C. L. 89; *Smith* v. *London, etc., R. R. Co.*, L. R. 5 C. P. 98. In the United States, in the absence of statutory regulation, the same doctrine prevails as in England. Negligence alone subjects the company to liability in case of damage.

In Massachusetts by general statutes, chapter 63, section 101, it is provided that "every (railroad) corporation shall be responsible in damage, to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines; and it shall have an insurable interest in the property along the route for which it may be so held responsible, and may procure insurance thereon in its behalf." The wisdom and policy of such a statute is, of course, purely a matter for the legislature of the State to be affected thereby; but the Massachusetts law is undeniably arbitrary, and fails even of suppressing litigation upon the precise point under discussion. See *Hart* v. *Western R. R. Co.*, 13 Metc. 99; *Ingersoll* v. *Stockbridge & Pittsfield R. R. Co.*, 8 Allen. 438; *Ross* v. *Boston & Worcester R. R. Co.*, 6 id. 87; *Perley* v. *Eastern R. R. Co.*, 98 Mass. 414, and others. The rule that railway companies are liable for negligent use of fire in locomotives having been thoroughly established, it becomes expedient next to consider the nature and scope of the negligent consequences to which the liability extends. The cases naturally divide themselves into three classes: 1. Where the negligence is solely that of one of the parties. 2. Where the negligence is contributory. 3. Where there is a distinction between direct and remote damages. There is one other limited class of cases which will be noticed at the close of this article, relative to damages, by fire from locomotives, to goods in the possession of the company. Under the first division it is first observable that railway companies are bound to use screens, caps or other requisite appliances to prevent the escape of fire or sparks from the smoke pipe. In *Bedell* v. *The Long Island R. R. Co.*, 4 Am. Rep. (44 N.Y. 367) it appeared that a "spark arrester" had been used upon the smoke pipe of the engine from which fire had communicated to plaintiff's house, but it had been removed, and this alone was held

sufficient to go to the jury on the question of negligence. See, also, *Albridge* v. *The Great Western R. R. Co., supra; Piggott* v. *Eastern Counties R. R. Co., supra; Gibson* v. *The South-Eastern R. R. Co., supra.*

The omission of all these appliances and precautions, and the fact that premises are set on fire by engines thus driven, would be a *prima facie* case of negligence. 1 Redfield on Railways 452. In *Gibson* v. *South-Eastern R. R. Co., supra,* it was shewn "that sparks flew out of the engine and fell upon the herbage and pasturage, and set it on fire;" and Watson, B., said: "That is sufficient evidence according to the cases." In some cases the negligence is not entirely in the management or construction of the locomotive. In *Smith* v. *The London and South-Western R. R. Co., supra,* the company's servants had been employed in cutting grass and trimming hedges at the side of the track, and had heaped together the cuttings, and allowed them to remain fourteen days. This heap caught fire from a locomotive, and was carried across a stubble field and a public road 200 yards to the cottage of plaintiff, which was burned. The Court held that there was evidence for the jury on the question of negligence, although there was no suggestion that the engine itself was improperly constructed or driven. The jury found for plaintiff, and the court on appeal refused to interfere. See, also, *Gibson* v. *The South-Eastern R. R. Co.*, 1 Fos. & Fin. 23; *Vaughan* v. *Taff Vale R. R. Co.*, 5 Hurlst. & Norm. 679. Under the Massachusetts statute, several cases of this character have arisen. In *Perley* v. *Eastern R. R. Co.*, 98 Mass. 414, a wood lot half a mile distant from the track was ignited; the sparks set fire to the grass in the open field, and spread without any break in the direction of the wood lot, over the premises of several different proprietors, and finally burned the wood lot in suit. The court held the company liable. In *Hart* v. *Western R. R. Co.*, 13 Metc. 99, the fire was communicated from the engine to a carpenter's shop, thence, by wind driven sparks, sixty feet to plaintiff's dwelling, which was consumed, and the company was held liable. In *Ingersoll* v. *Stockbridge and Pittsfield R. R. Co.*, 8 Allen 438, the fire was communicated from the locomotive to a barn, thence through a shed to plaintiff's barn, and the company was held liable. See, also, *Ross* v. *Boston and Worcester R. R. Co.*, 6 Allen 87. We come now to the second class of cases wherein the injured party contributes to the loss.

These cases have arisen usually where fire has been communicated to grass, etc., or any combustible material lying near the track. In *Ill. Central R. R. Co.* v. *Mills*, 42 Ill. 407, which was an action to recover for a stack of hay burned in consequence of fire communicated through grass and weeds from the locomotive of the company, the court said: "The company were bound to use the same diligence in removing dry weeds and grass and all other combustible material, from exposure to ignition by the locomotive, that a cautious and prudent man would use in reference to combustible materials on his own premises if exposed to the same hazard from fire as dry grass upon the side of a railway." And it is a question for the jury whether the company has exercised this care, and whether the injured party has contributed to the injury by leaving combustible material upon his own land adjoining the railroad. See, also, *The Ohio & Miss. R. R. Co.* v. *Shanefelt*, 47 Ill. 497; *Ill. Central R.R. Co.* v. *Frazier*, id. 505; overruling *Bass* v. *Chi. Bur. & Qu. R. R. Co.*, 28 id. 9; *Chicago & N. R. R. Co.* v. *Simmons*, 54 id. 504. In this last case above mentioned the court said that "land owners contiguous to railways were as much bound, in law, to keep their lands free from an accumulation of dry grass and weeds as railroad companies were; so when a fire is ignited on a company's right of way, and is communicated to fields adjoining, the negligence of such owner will be held to have contributed to the loss, and, unless it appears the negligence of the company was greater than that of such land owner, the latter cannot recover for injuries thus arising."

In *Vaughan* v. *The Taff Vale R. R. Co., supra,* which was an action to recover for a wood lot consumed, as was alleged, by fire from a locomotive of defendant company, it appeared that at the time the fire was discovered the wood was burning, but the dry grass on the railway bank had been already burned. Chief Justice Cockburn intimated that if the fire was carried indirectly by the dry grass on the bank to the wood, the defendant would be liable, but if it arose from the sparks not being carried to the bank but direct to the wood which was full of dry combustible material, the defendant would not be liable. It is thus well established, that one who owns land along a railway has a duty to perform in dry seasons when grass and weeds are liable to ignition. But by far the most important part of the discussion is included under the next and third division of cases, wherein the distinction between the direct and remote damages is made. A *resumè* of the discussion, and an observation of the course of decisions, both in England and the United States, will reveal the fact, that not until recently has this distinction been advanced in the courts. In fact the decisions of England do not furnish a single instance of the distinction. So late as *Smith* v. *The London and South-Western R. R. Co., supra,* (decided in 1870), in which fire was carried across a stubble field and a public road 200 yards to a cottage, it was held, without limitation, the plaintiff could recover, the jury having found negligence. In the United States the distinction has not been contended for or judicially recognized except in New York, Pennsylvania, and possibly in

Illinois. In Massachusetts it has been ignored under their statute. *Berley* v. *Eastern R. R. Co.*, 98 Mass. 414. The leading case (and in fact the only case) in New York, which recognizes this doctrine is, *Ryan* v. *New York Central R. R. Co.*, 35 N. Y. 210. In this case it appeared that, by the negligent management of the engine, fire was communicated to a wood-shed of the company, and thence to the house of plaintiff which was destroyed; *held*, that the burning of the house was too remote a consequence of the company's negligence to render it liable therefor.

This case was followed and approved in *Penn. R. R. Co.* v. *Kerr*, 1 Am. Rep. 431 (62 Pa. 353). In this case a warehouse, situated near the railroad track, was set on fire by sparks from one of the company's locomotives, and the fire was communicated from the warehouse to a hotel which was also consumed. *Held*, that the company was not liable for the destruction of the hotel by reason of the injury being too remote. In *Toledo, P. and W. R. R. Co.* v. *Pindar*, to appear in 5 Am. Rep. (53 Ill. 447), it appeared that a building belonging to the company was set on fire negligently by a locomotive, and from the burning building fire was blown across the street, and then communicated to the house of the plaintiff. *Held*, that the question whether the injury was too remote was for the jury. This is the extent of the reported adjudication on this most interested and complicated question of direct and remote damages. At common law, if a man built a fire on his own lands and allow it negligently to escape, he will be liable for the injury resulting thereby to his neighbors. *Turbenville* v. *Stamps*, 1 Ld. Raym. 264; s. c., 1 Salk. 13; *Pantam* v. *Isham*, id. 19; Com. Dig. Actions for Negligence, A. 6. But there must be a line somewhere, where the liability ends, else private individuals and corporations run hazards of which they little dream; and our courts, universally, may find an emergency in which they will be compelled to recognize some such doctrine as has been laid down *positively* in New York and Pennsylvania, and *conditionally* in Illinois.

Finally, we come to the adjudications upon the liability of railroads for damage from fire communicated by locomotives to goods in their charge as common carriers or warehousemen. In *Steinwig* v. *Erie R. R. Co.*, 3 Am. Rep. 673 (43 N. Y. 123) the plaintiff shipped goods over the defendant's railroad. By a clause in the bill of lading, the defendant was released from liability "from damage or loss of any article from or by fire or explosion of any kind." The goods were destroyed while on one of defendant's trains, by fire, which caught from a spark from the engine of the train. *Held*, that the defendants were not, by the stipulation in the bill of lading, released from liability for loss arising from its own negligence. In *Barron* v. *Eldridge*, 1 Am. Rep. 126 (100 Mass. 455), it appeared that flour in sheds and grain in elevators in the possession of defendant railroad company were burned by fire communicated by a locomotive of the company. It appeared further that the flour sheds were situated near the track and were of combustible material, that the fire was communicated first to these sheds and then to the warehouse or elevator, a distance of 250 feet. *Held*, that the company were guilty of negligence as to the grain in the elevators, but that it was a question for the jury whether they were guilty of negligence as to the flour in sheds. These latter cases are governed somewhat by the special contract or relation of carrier or warehousemen and patron. The great question which arises, however, on the liability of railroad companies for fires communicated by their locomotives has been when the relation is that of corporation to individuals independent of special contract, which we have already fully discussed. — *Albany Law Journal.*

FIRES COMMUNICATED BY LOCOMOTIVES — PROXIMATE AND REMOTE DAMAGES.

In a recent article (*ante*, p. 309) we took occasion to discuss in a general way the liability of railway companies for losses by fire, communicated from locomotives. We now propose to consider more definitely and thoroughly the question of proximate and remote, or direct and indirect injuries, in connection with the liabilities of railway companies. As we stated in the article above referred to, the adjudication upon this precise point is exceedingly limited, there being only three cases* reported in which the question (independent of statutory regulations as in Massachusetts) has been presented for judicial determinination in America, and not a single case in which it has been so presented in England. As Judge Hunt remarked in *Ryan* v. *N. Y. Central R. R. Co.*, 35 N. Y. 210, "it will not be useful further to refer to the authorities," and an examination of the subject upon principle, will be the only method which can evolve the true rule of law regulating cases of this character. It is true that the question cannot be called an *open one* in New York or Pennsylvania, nor possibly in Illinois; but in England, and in the great majority of the American States, it is not only novel, but unadjudicated—not only new but *open*. In New York and Pennsylvania not only has the distinction between proximate and remote injuries from fires communicated by locomotives, and a corresponding limitation of liabllity been recognized, but the courts have taken it upon themselves to declare where the line of demarcation shall be drawn. See cases cited *supra*. In Illinois, the Supreme Court, while acknow-

Ryan v. *New York Central R. R. Co.*, 35 N. Y. 210; *Pen. R. R Co.* v. *Kerr*, 1 Am. Rep. 431, (62 Pa. 353); *Toledo, etc., R. R., Co.* v. *Pindar*, 5. Am. Rep. (53 Ill. 447.)

ledging that such a distinction exists, holds that the question whether the damages are too remote is for the jury, thus leaving it to the judgment of these twelve men to determine the point at which the liability of the railway company shall cease. The order of the investigation will, therefore be this: 1, to determine whether the maxim, *causa proxima non remota spectatur* has any application whatever to cases like those under consideration; and, 2, to determine whether—conceding that the distinction between proximate and remote damages is admissible—the question whether the damages are too remote is for the court or the jury.

The existence of the maxim in the common law, *causa proxima non remota spectatur*, does not necessarily imply that it is universally applicable. It may or may not be applicable to railroads, found in the negligent commission of injuries. It is the general rule that a bailee of goods is responsible only for a *degree* of care and prudence in the execution of his trust. But railroads, as common carriers, are liable absolutely for the goods committed to them for carriage, with the dual exception of loss by the act of God or the public enemy. The rule, therefore, that private individuals are responsible only for the direct and proximate, or immediate consequences of injuries inflicted on others is only a *prima facie* argument that railroad companies are only so liable. Railroad companies are so constituted, and occupy such a peculiar and powerful position in the economy of life that special laws may be, and often are, demanded for their control and for their punishment. The special and enormous franchises, privileges and powers conferred upon these corporations, naturally require a correspondingly special and enlarged duty and liability to the public. And when railroads were first established in England, the question arose whether they were not liable *absolutely* for loss by fires communicated by locomotives. This liability was sought to be enforced on the ground of this special and enlarged power and privilege, which the legislature had conferred on railway corporations, but it having been judicially determined that they were only liable for the *negligent* use of fire in locomotives at an early date (*King* v. *Pearse*, 4 B. & Ad. 30), the liability of these corporations has continued thus modified until the present. But it must be conceded that the question of the extent of the liability, when it is once determined that the extent of the liability exists, is quite a different question from that of the existence of any liability at all.

A division of the damages consequent upon a careless or negligent management of a locomotive engine into proximate and remote, necessitates another modification of the rule of liability. Railroads may be the cause of injury to adjoining property in two modes, considered in reference to care or the want of it. For injuries to adjoining property, resulting from want of care, they are liable, according to the well established rule; for injuries occurring, notwithstanding the exercise of care, they are not liable, according to an equally well-established rule. Now, it has been proposed, and, as we have seen, in some states determined, to further divide the injuries occasioned by want of care into two classes—those which are remote and those which are proximate, for the former of which they shall not be liable, and for the latter of which they shall be liable, thus multiplying divisions, and throwing upon our courts the determination of a multitude of new questions arising from unprecedented distinctions. Inasmuch as the distinction sought to be enforced in reference to railways is comparatively new, it seems that those who advocate it ought to assume the burden of proof. But the only argument of any potency and pertinency used by either Judge Hunt in *Ryan* v. *New York Central R. R. Co.*, *supra*, or Judge Thompson in *Penn. R. R. Co.* v. *Kerr*, *supra*, is the rule of the common law, *causa proxima non remota spectatur*, as if all the force of this maxim had not been destroyed by long continued acquiescence both in England and America, in the negation of this distinction in cases of damage by fire from locomotives. The force of this maxim has been neutralized by this continuous acquiescence in the absence of the distinction, and the question is at present in the state in which it would be had the distinction been one altogether new in law, if the distinction contended for were thus new in law, it must be admitted that courts would be exceedingly loath to admit its pertinency in cases of negligent injuries by corporations possessing such immense powers and franchises as have been conferred upon railroads. Such corporations would doubtless be the very last to receive the benefit of the proposed distinction and the corresponding limitation of liability. It becomes, therefore, a grave question whether, admitting that the distinction is expedient and lawful in ordinary cases of injury by private persons, it is also expedient and lawful in cases of injury by corporations; and inasmuch as the rule of unlimited liability for negligent injuries has been almost universally acquiesced in for half a century, or since the advent of railways, and the rise of cases such as are comprehended within the scope of this discussion, some exceedingly potent reasons must be advanced to change the rule of liability. It is said that "a railroad terminating in a city might, by the slightest omission on the part of one of its numerous servants, be made to account for squares burned, the consequence of a spark communicated to a single building."*

Again, it is said: "To sustain such a claim as the present" (for remote damages) "and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet

* Judge Thompson in *R. R. Co.* v. *Kerr*, *supra*.

which no private fortune would be adequate.* But it appears that the argument of the learned judges is directed to the hypothetical consequences of the rule which they oppose. They also seem to consider that there is no difference in principle between the cases of a railroad company and of a private individual. Both of these modes of reasoning we deem unsound. The latter has been sufficiently referred to in the previous portions of this paper. Of the former we have to say that the realities of half a century of railway existence, the exigencies of great injuries occasioned by railroads to property adjoining, and the pecuniary answerability of railway companies, have never warranted any such hypothesis.

In establishing a rule, such as is proposed by what is called the consequential argument, it is acknowledged to be a great fallacy to refer to consequences which only by the most extraordinary coincidences could happen, or to events which are only in the range of possibility. It is *possible* that a spark from a locomotive should become the first of a series of causes which should burn a city, but the hypothesis has nothing to do with the formation of a rule of legal liability; because the nature of things and an observation of the past shows that such a result is *extremely improbable*. And when such a hypothesis is resorted to, to save a railroad company from liability for the indirect burning of a hotel or of a dwelling house, it seems like a misuse of the mode of calculating chances in establishing a rule of law. Railroads have existed, thriven and become the most potent and opulent agency in the whole domain of commercial —and we might add, political—life, under the operation of a rule of law which excludes any distinction between proximate and remote damages, or any limitation of responsibility based on these distinctions. Then why invoke a hypothetical and extremely improbable exigency in the process of establishing a rule of liability for those powerful corporations ?†

But, for the purposes of the discussion, we have decided to concede that such a distinction as proximate and remote damages is admissible in fixing the liability of railroads for losses occasioned to adjoining property by fires communicated from locomotives. We shall then have arrived at the second part of the discussion. We have contended that the courts as a matter of law, ought to hold that the liability of railroads for negligent injuries to adjoining property, should be coextensive with those injuries. But it will be observed that the high courts of New York and Pennsylvania have gone to the other extreme. They not only hold that there is a limit to the liability, which is based on remoteness of result, but they go so far as to declare, in a given case, where that liability ends. *Ryan* v. *New York Central R. R, Co.. supra; Penn. R. R. Co.* v. *Kerr, supra.* This leaves nothing for the jury to do but to assess the amount of the damages. The Supreme Court of Illinois, however, takes a medium ground and holds that the question of remoteness also is for the jury. The question of the admissibility of the distinction between direct and indirect losses, and the line of demarcation between the two ought to be very well settled to warrant a court in judicially determining what is direct and what is indirect. The line of demarcation seems to be too complex and obscure and not sufficiently arbitrary to warrant a judge in taking the question of remoteness away from the jury entirely and putting his own version upon it. "Remote consequences" is a relative phrase just as "reasonable care" is relative; and the question of negligence in a railroad company, in case of injury to persons or property, is seldom or never taken from the jury, except in cases where a positive enactment has been violated.

The boundaries of proximate consequences have been very properly defined to be the natural, necessary and probable consequences arising from any act. Now the natural, necessary, and probable consequences of fire escaping from a locomotive may and must differ according to circumstances and periods. In a dry time with a high wind, the necessary, natural and probable consequences of the escape of fire from a locomotive would be not only the destruction of buildings immediately adjoining the tract of the company, but also buildings and other property situated at a distance and separated from (say 39 feet, as in *Penn. R. R. Co.* v. *Kerr, supra,*) the buildings immediately set on fire by the passing locomotive. Again, immediately after a rain, with no wind, the escape of fire from locomotives in large quantities would scarcely consume a thatched roof adjoining the track, in accordance with this established law of necessary, natural or probable consequence. And inasmuch as the jury is allowed to determine whether there has been a due regard and care in the management and structure of the locomotive when fire escapes and does injury, it seems altogether proper that they should be also allowed to determine what proportion of the consequences of a want of regard and care in such management and structure is necessary, natural and probable.—*Albany Law Journal.*

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*Judge Hunt in *Ryan* v. *R. R. Co., supra.*

†In those extraordinary and exceptional instances where immense conflagrations should ensue from so slight a first cause as a spark from a locomotive negligently managed or constructed, the hardship of the rule of unlimited liability could be easily modified under some general principle like that which excuses a party from the performance of a contract or the discharge of a liability in case of war, superior force, public calamity and the like. So even the assumed necessity for the rule laid down in *Ryan* v. *New York Central R. R. Co.,* and *Penn. R. R. Co.* v. *Kerr, supra,* is merely suppositious and has no substantial existence or force.

OWNERSHIP OF SOIL OF HIGHWAYS.

It is a well-known presumption of law that the soil of a highway *prima facie* belongs to the owner of the land intersected by it; and where the land on either side belongs to a different proprietor, each will be entitled to the soil on his side *usque ad medium filum via*, or, in plain English, up to the middle of the road (*Doe* v. *Pearsey*, 7 B. & C. 305), whether it be a private road or a public road (*Holmes* v. *Billingham*, 7 C. B. N. S. 329). The presumption has been said to be founded on the supposition that the right to the use of the road was granted by the owner of the soil at some former period, and that his ownership extended originally up to the middle of the road (*White* v. *Hill*, 6 Q. B. 487), a convenient but bold assumption, so that we are not surprised that Lord Denman should have thought in *White* v. *Hill*, that presumptions of this nature were put too high.

It has been recently doubted whether the rule of law as to this presumption applies to the case of a street in a town, or of a site for cottage granted by a land-owner on the side of a public road (*Becket* v. *Corporation of Leeds*, 20 W. R. 454), but this does not go beyond *dicta*. It is, however, settled that the presumption does not arise where the land intersected by the road originally belonged to one person, and part has been granted to one owner and part to another (*White* v. *Hill*, *sup.*); nor does it arise where the highway is one which was originally laid out, under the provisions of an Inclosure Act, across the waste of a manor (*R.* v. *Edmonton*, 1 Moo. & Ray. 24); for there the soil of the highway is considered as remaining vested in the lord of the manor, subject to the right of the public to pass and repass over it (*Poole* v. *Huskisson*, 11 M. & W. 827). Nor does the soil of highways vest in turnpike trustees, where such are appointed under the provisions of the general Turnpike Acts, without a special clause for the purpose, for they are only considered as having the control of the highway (*Daxison* v. *Gill*, 1 East, 69). For this reason, in a case where the trustees of a turnpike road were empowered to lower the level of a road going over a hill, and they moved to restrain the adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct future improvements of the road, Lord Langdale, M.R., declined to interfere (*Cunliffe* v. *Whalley*, 13 Beav. 411). In general, the question whether the soil of a highway has passed by a conveyance of the adjoining land, will depend on the intention of the parties, as manifested by the conveyance. In *Berridge* v. *Ward* (9 W. R. C. L. Dig. 20, 10 C. B. N. S. 400), where a piece of land had been conveyed to a purchaser with general words, the court presumed that the soil *usque ad medium filum viæ* passed by the general words inserted in the the conveyance as appurtenant to the piece of ground specifically granted, though it was in terms excluded by the measurement and colouring of a plan to which reference was made in the conveyance. So, too, in *Simpson* v. *Dendy* (8 C. B. N. S. 433), the conveyance of a field, described as "Chamberlain's Field, containing by admeasurement 3a. 3r. 35p., be the same more or less, abutting towards the west on Hall's Lane," was held to vest in the purchaser a moiety of Hall's Lane. On the other hand, in *Marquis of Salisbury* v. *The Great Northern Railway Co.* (7 W. R. 75), where the defendant company had purchased of the plaintiff a piece of freehold ground abutting on a highway, partly for a site for their line of railway, and partly for the purpose of diverting a portion of the existing highway, it was held that the conveyance to the defendant company did not by implication or otherwise pass that part of the old road which had ceased by the diversion to form part of the highway.

The ground of this decision was the presumable intention of the plaintiff not to part with his freehold in the soil of the road. The circumstance that he had acquiesced in the defendant company's taking possession of and enclosing the disused portion of the old road, might have had more weight with a Court of Equity than it had with the learned judges who tried the case. Any how, the case may be viewed as establishing that the presumption does not arise on the occasion of a sale by a land-owner to a railway company or public body of a piece of ground adjoining the highway.

The next and more important question is, what are the rights of the owners of the soil of a highway with relation to the soil of it, and what are such rights worth? As such owner he is entitled to all profits arising therefrom, both above and underground, subject to the rights of the public (Comyn. Dig. Chimin, A 2), yet such profits, above ground at all events, can seldom be worth much, for obvious reasons. And here it may be observed, first, that where there has been a public highway, no length of time during which it may not have been used will prevent the public from resuming the right if they think fit (*Vooght* v. *Winch*, 2 B. & A. 662); and, secondly, that the public have a *prima facie* right to the entire space between the two hedges, provided it be not of an extraordinary width (*Groove* v. *Wist*, 7 Taunt. 29), and are not confined to the metalled road in actual use by the public, and as such kept in repair (*Rex* v. *Wright*, 3 B. & Ad. 681).

As regards underground profits, the owner of the soil of a road is of course entitled to the mines and minerals thereunder, and must support the surface. No more need be said as to this. As regards profits above ground, his rights are necessarily very restricted. Of all trees, for instance, growing on the side of the highway, he is legally the owner (*Goodtitle* v. *Alken*, 1 Burr. 133); yet if such trees be, in the opinion of the surveyor, an obstruction, he may fell and remove them, although when

felled they belong to the owner of the soil. In a singular case (*Turner* v. *Ringwood Highway Board*, 18 W. R. 424, sec. 14 Sol. Jour. 976), it appeared that a public road had been set out in 1811 by Inclosure Commissioners, with a width of fifty feet. About twenty-five feet only of the fifty feet thus allotted had been used as the actual road; the sides had become covered with heath and furze, through which fir trees had grown up of themselves. In 1858 the Highway Board cut down some of these fir trees, and advertised them for sale; and on bill by the owner of the adjoining land to restrain such cutting, it was held, on the authority of *Reg.* v. *Wright* (*sup.*), that the right of the public was to have the whole width of the road, and not merely that part which had become used as the *via trita* preserved from obstructions; and that such right had not become extinguished by the fact that the trees had been allowed to grow up for the period of twenty-five years; it being the right of the public to have such trees removed on the ground that their growth by the side of the highway was a nuisance. Yet it seems that the adjoining owner had a right to the timber of the trees when so cut down. In *Reg.* v. *United Kingdom Telegraph Co.* (10 W. R. 583), which was an indictment against the defendant company for setting up telegraph posts so as to obstruct the highway, it was distinctly laid down by the Court of Queen's Bench, that where there is a road running between fences, the public have a right to the whole space lying between the fences, and are not confined to the metalled road. No doubt, as Crompton, J., who delivered the judgment of the court, observed, part of the land lying between the fences may be a rock, or from some other cause inaccessible to the public; but such a piece of land would be excluded by those very circumstances, as it could not be called a road or part of a road in any sense. In a case under the 59th section of the 5 & 6 Will. IV. cap. 50, a road was nine feet wide; and there being a piece of uninclosed land at the side of it, also nine feet wide, which land was so rough and uneven that no carriage ever did or could go over it, the owner of the adjoining field took it into his field and put a fence round it. The surveyor of the highway having taken down this fence, it was held that he was not justified in so doing, inasmuch as the fence was not on the road (*Evans* v. *Oakley*, 1 C. & K. 125).

It only remains to add, that the owner of the soil of the highway is entitled to the herbage on the roadside, and may maintain an action of trespass against a stranger who suffers his cattle to depasture along the road (*Devaston* v. *Payne*, 2 H. B. C. 527). It has been held, in a singular case, that there may be trespass in pursuit of game, within the meaning of 1 & 2 Will. IV. cap. 31, where the person charged has never quitted the highway (*Reg.* v. *Pratt*, 3 W. R. 372, 24 L. J. Mag. Cas. 113).

For an instance of a bill to restrain parties from attempting to obtain proprietary rights in the soil of a highway in derogation of the plaintiff's proprietary right in such soil, see *Attorney-General* v. *The United Kingdom Electric Telegraph Co.* (10 W. S. 167), where the alleged injury consisted in the defendant company having laid down telegraph wires in a trench along the greater part of the plaintiff's frontage to the highway.—*Solicitors' Journal.*

LIABILITY OF AN EXECUTOR *DE SON TORT* AND HIS REPRESENTATIVES.

If a person who is neither executor nor administrator intermeddles with the goods of of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what, in our law, is called an executor of his own wrong, or more usually an executor *de son tort*. It is not intended to enumerate the acts which will make a person executor *de son tort*; they may be referred to in Williams' Executors, p. 247, *et seq.*, and the tendency of modern cases will perhaps appear to be to depart from the strictness of some of the old cases which prohibited the exercise of many acts, trivial in themselves, and attributable often to motives of kindness, by a stranger, in reference to the preservation of the property of a deceased person without risk of incurring the responsibilities of a personal representative (see *Serle* v. *Waterworth*, 4 M. & W. 9). It will be seen, however that there is still need for great caution in intermeddling with the affairs or property of a defunct, in order to avoid the unpleasant consequences of finding oneself clothed with this undesirable character. It is well to bear in mind, however, the general rule, that the question whether certain acts were done, is a question of fact for the jury; but whether those acts, if done, make the person doing them an executor *de son tort* is a question of law for the Court (*Padgett* v. *Preist*, 2 T. R. 99).

The unenviable position of an executor *de son tort* has been described by Lord Cottenham as one in which he has all the liabilities but none of the privileges of an executor (*Carmichael* v. *Carmichael*, 2 Phill. 103). This is strikingly illustrated in the matter of the important privilege which a lawful executor has of retaining his own debt against others of equal degree, and even although the debt may be barred by the Statute of Limitations (*Hill* v. *Walker*, 4 K. & J. 166, 6 W. R. Ch. Dig. 25). On the contrary, an executor *de son tort* can not only not retain for his own debt, but he cannot, as against the rightful executor, plead in mitigation of damages payments made in due course of administration, unless the assets be sufficient to satisfy all the debts; for otherwise the rightful executor would be precluded, not only from his undoubted right of giving preference to one creditor over others of equal rank, but also from his equally clear privilege of retain-

ing his own debt in priority to all others of equal degree (*Ellworthy* v. *Sandford*, 12 W. R. 1008, 3 Hurls. & Colt. 330). However, abstracted from the personal liability of an executor *de son tort* as against the lawful executor, it seems that rightful acts of the executor *de son tort*—as *e. g.*, payment for delivery of goods in a due course of administration, if he be really acting as executor, and the party dealing with him has fair reason to suppose he has authority to act as such—will bind the property of the deceased (*Mountford* v *Gibson*, 4 East, 441; *Thompson* v *Harding*, 2 Ell. & B. 630).

One of the consequences of an executor *de son tort* being fixed with all the liabilities of an executor is that he is guilty of a *devastavit* by reason of misapplication of any of the assets of the deceased; but by the operation of that ancient maxim of our law, *actio personalis moritur cum personâ*, the liability, in this case, being in the nature of a tort, terminated (as it also did in the case of a rightful executor, at least, unless his own representatives, by becoming the personal representives of the original testator, continued the privity of contract) with the life of the wrong-doer. To remedy this it was enacted by Statute 30, Car. 2, c. 7, s. 2 (made perpetual and enlarged by 4 & 5 W. & M., c. 24, s. 12), that executors and administrators of executors of their own wrong, or administrators who have wasted or converted the assets of the deceased to their own use, shall be chargeable in the same manner as their testator or intestate would have been if living. Doubts have arisen on the preceding clause, whether it extended to executors and administrators of any executor of *right* who, for want of privity, were not answerable for debts due from their first testator or intestate, although such executor or administrator of right had been guilty of a *devastavit* or conversion, it was enacted by Statute 4 & 5 W. & M., c. 24, s. 12, that the executors and administrators of such executor or administrator of right who shall waste or convert to his own use the estate of his testator or intestate, shall be chargeable in the same manner as their testator or intestate would have been.

In pleading the liability of an executor *de son tort*, the same form must be observed as in the case of a rightful executor, because there is no other form in the register, and a long course of practice has given this the sanction of law (*Wood* v. *Kerry*, 2 Com. B. 515; the defendant, if he seek to take advantage of the fact, must show, by pleading, that the imputed character of executor, in the given case, was not lawfully assumed.

In cases where privity of contract is preserved by the chain of representation being duly continued, it is clearly shown by the case of *Wells* v. *Fydell* (10 East, 315) that a contract is enforceable against the executors of the executor of the contractor, without any averment of a *devastavit*, and that the liability cannot be successfully avoided by the defendant pleading merely that he has not any goods or chattels *of the original testator* in his hands to be administered, but he must also plead either that the first executor fully administered, or that he, the defendant, has no assets of the first executor out of which he can satisfy any *devastavit* committed by the first executor. "In such a case as this the plaintiff is entitled to recover his debt in either of two events: if the defendants have received assets of the first executor, and the first executor had received assets of *his* testator and not duly applied them." The form of a plea of *plene administravit* by an executor of an executor will be found in Bullen & Leake's Practice of Pleading, p. 580.

With regard to an executor *de son tort* of a rightful executor, in which case there is of course, no chain of representation, and therefor no privity of contract between the original testator and the executor *de son tort* it has, however been held that such an executor *de son tort* may be made answerable for the debts of the original testator upon the principle that the rightful executor must be taken to have possessed himself of all the assets of the original testator; and the defendant, the executor *de son tort*, being estopped from saying he is not the executor of the rightful executor, must be taken to have had the assets of the original testator, if any, which his executor left unadministered, transmitted to him; for the defendant, in his assumed character of executor, must be taken to have possessed himself of such assets of the original testator. But if in fact, as was said, "there were none such transmitted, and the executor of the original testator committed no *devastavit*, and the defendant have duly administered all the assets of the rightful executor, he will have a good defence to the action." "The plaintiffs ought not, if there be assets of the original testator, either independent of *or* in consequence of any *devastavit* of *his* executor, to be deprived of their remedy against those assets because no one thinks proper to take out administration *de bonis non* to the original testator; nor ought they to be driven to take out such administration themselves, when another person the (defendant) professing to be the executrix of the rightful executor, has possessed herself of those assets" (*Meyrick* v. *Anderson*, 14 Q. B. p. 272).

On the other hand, in the somewhat converse case of a rightful executor to an executor *de son tort*, it has been held in a recent case by the Court of Exchequer (*Wilson* v. *Hodgson*, 20 W. R. 438) that unless there be an averment of a *devastavit* by the executor *de son tort* so as to bring into play the beforementioned statute of Car. 2, the rightful executor of an executor *de son tort* will not be liable to answer the contract of the original intestate or *quasi*-testator, and in such a case it will, it seems, be a sufficient

answer to plead, as was done in that case, that the defendants' testatrix was only an executrix *de son tort*, and that defendants had no notice that their testatrix had ever rendered herself liable to be charged, in the matter in question, as executrix *de son tort*. The action was on an agreement by the intestate or *quasi*-testator to take a house and furniture of plaintiff and to keep same in good repair and deliver same up; alleging entry on the premises after the death of the original contractor by the alleged executrix *de son tort*, and breaches, both by the original contractor and the executrix *de son tort*. The defendant, the rightful executor of the executrix *de son tort*, pleaded such a plea as above indicated, and it was held to be a good answer to the action; the *ratio decidendi* is indicated by the following passages in the judgment of Kelly, C.B.:—"The executor of an executor may be presumed to have assets until he has pleaded a plea of *plene administravit*. But the case of an executor *de son tort* is quite different. He has no power to possess himself of effects of the original testator, for to them the executor *de son tort* had no title. So that *primâ facie* there is no reason for saying that the executor of such an executor *de son tort* is liable for the debts of the original testator The statute 30 Car. 2 was passed to remedy the evil of the executor of such an executor not being liable for *devastavits*. But here *there was no allegation of a devastavit*, and as the statute did not apply, the defendant's plea that his testatrix was only executrix *de son tort* was good."—*Solicitor's Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Ross v. McLay.

Notice of trial before issue—Issue book, service of.

Held, following *Ginger* v. *Pycroft*, 5 D. & L. 554, that a notice of trial given before issue joined, except under Reg. Gen. Pr. No. 36, is irregular, and, following *McBean* v. *Duffy*, 4 P. R. 338, that the issue book must be delivered before or with the notice of trial.

[Chambers, May 13th, 1872.—*Mr. Dalton.*]

O'Brien obtained a summons to set aside the issue, issue book, and notice of trial on the grounds (1) that the notice of trial was given before issue joined and before plea pleaded, and (2) that it was given before the issue book was served. It appeared from the affidavits filed that cross-actions of libel were pending between these parties, in both of which the writs were issued on the 18th April, and the declaration filed on the 30th April, 1872. Tuesday, the 7th May, being the last day for pleading, the plaintiff in this case served a notice of trial for the Walkerton Assizes to commence on the 14th May; but defendant not pleading until the morning of Wednesday, May 8th, issue could not be joined, or the issue book made up until that day.

Luton (*Paterson, Bain & Paterson*) shewed cause:—The defendant's time for pleading expired on the 7th, which was also the last day on which notice of trial could be given for the Walkerton Assizes; and the delay in joining issue and serving the issue book was occasioned by his withholding his plea until the next morning. The Court will not suffer him to profit by his own wrong, or give effect to his subterfuge by setting aside the proceedings: *Farrell* v. *Fagan*, 11 Ir. L. Rep. 76. It has been decided that in such a case the plaintiff may give notice of trial at his own risk: *Lowry* v. *Robinson*, 11 Ir. L. Rep. 57; *Lindsay* v. *Dowling*, Ib. 59. As to the service of notice of trial before issue book, in *Carruthers* v. *Rykert et al.*, 7 U. C. L. J. 184, Chief Justice Robinson held that a notice of trial is not irregular, although the issue book is not delivered until the following day.

O'Brien, contra: — The defendant has been guilty of no subterfuge, for the declaration in each of the cross-actions having been filed on the same day, he could have gone to trial as well as the plaintiff, and it is exceedingly desirable that both these cases should be tried at the same time. The plaintiff, however, has proceeded under a mistaken notion as to the practice. Except under the circumstances mentioned in Reg. Gen. Pr. 36, notice of trial cannot be given before issue joined: *Ginger* v. *Pycroft*, 5 D. & L. 554. The rule of court does not apply here. The case of *Carruthers* v. *Rykert*, has been overruled by *McBean* v. *Duffy*, 4 P. R. 338, following *Reeves* v. *Eppes*, 16 C. P. 137; and the practice is now settled that the issue book should be delivered before or with the notice of trial. He referred also to *Riach et al.* v. *Hall*, 11 U. C. R. 356, and *Young et al.* v. *Laird*, 2 P. R. 16.

Mr. Dalton.—A perusal of the Irish cases which have been cited shews that the practice there differs materially from ours, which on this point is well settled. The defendant has taken no advantage to which he is not legally entitled. The only question for me is whether issue was joined before the notice was served. It appears it was not; and as the case does not come within the rule of court, I must make the order asked—costs to be costs to defendant in any event.

QUIETING TITLES ACT.

(Reported for the Canada Law Journal by Thomas Langton, M.A., *Student-at-Law.)*

Re Street.

Quieting Titles Act—Evidence of Possession and Deeds—Notice to persons in possession.

To complete the chain of the paper title to the land in respect to which a certificate of title was prayed production or proof of a power of attorney from the patentee to one Johnston was required. Search had been made for it without success. Its existence was not sworn to positively by the petitioner and the only evidence of it was an affidavit of one Page, who did not swear that he had ever seen it, and did not state his means of knowledge of its existence.

There were also some suspicious circumstances with regard to a deed executed apparently in pursuance of the power.

The only evidence as to possession was a statement in the

petitioner's affidavit that one Hicks, to whom the petitioner agreed to sell the land in 1866, was still in possession, and that possession had always accompanied the title.

No notice appeared to have been given to the person who was in possession.

No affidavit was put in as to adverse claims served upon the person directed to receive them.

The evidence as to possession and the existence of the power of attorney was *held* insufficient, and a certificate of title was refused until further evidence should be given to clear up the suspicious circumstances in the deed, said to be executed in pursuance of the power of attorney, and affording positive proof of the existence of the power, or else shewing the exercise of acts of ownership, which would justify the presumption that a conveyance of the legal estate had been made by the patentee.

Notice was directed to be given to the person in possession, and an affidavit as to adverse claims ordered to be furnished.

The facts sufficiently appear in the judgment.

Mr. Taylor, Inspector of Titles. The Master has certified that the petitioner is entitled to a certificate of title as prayed by his petition, but in my opinion the petitioner has wholly failed to show his right to such a certificate. It must be borne in mind that there is no evidence of possession except a statement on this petitioner's affidavit, that one Edward Hicks, to whom he, in 1866, agreed to sell the land, is in possession, and that possession has always accompanied the title under which he (the petitioner) claims. Whether there is now or has at any time been actual occupation of the land does not appear.

The paper title on which the petitioner relied was as follows: the Crown to Wm. B. Brown, Wm. Johnston to Josiah Page, and Josiah Page to the petitioner. No conveyance from Brown, the patentee, to Johnston is produced, indeed it is said there was none. Brown, it is said, sold to Johnston, and instead of a conveyance, gave him a power of attorney to sell and convey. In pursuance of this power, Johnston sold and conveyed to Page. The deed to Page is not, however, the deed of Brown at all. He is not once named in it; Johnston is the granting party. It is true the deed is executed by Johnston as attorney for Brown, but there are two suspicious circumstances apparent. The name of the patentee as given on the patent is "William B. Brown." The deed is signed, and so is the receipt for purchase money "Wm. W. Brown, William Johnston, attorney." Then it is quite evident both from the position of the words and also from the difference in colour of the ink that the words "Wm. W. Brown" "Attorney" were in both places written at a differerent time from the signature "William Johnston."

Then there is no evidence of Brown having ever given any power of attorney to Johnston, except Johnston's own evidence, and he does not swear positively to the fact. He only says that Brown "gave me to the best of my knowledge and belief, a power of attorney, &c." It is true in another paragraph of his affidavit he says the power of attorney under which he conveyed was valid, and of full legal effect, but no one except himself gave any evidence as to his power of attorney, or of over having seen it. He and another person have searched among his papers and cannot find it. Page, the grantee, and another have also made vouchers, and have also been unable to find it. When I say there is no evidence of the power of attorney except Johnston's own, I exclude the affidavit of Page. He says Johnston bought from Brown, who instead of a conveyance gave him a power of attorney, and he believes it was in existence at the time Johnston conveyed to him, but this evidence is valueless. He does not say he ever saw the power of attorney, and he does not state his source of knowledge. He lives in another part of the country from both Brown and Johnston, and the transaction he is speaking of is one which took place before he had any connection with or interest in the property.

Perhaps the petitioner may be able to give such evidence of the purchase by Johnston from Brown to account for the difference of name—Wm. B. Brown and Wm. W. Brown, and to give such positive proof of the existence and due execution of the power of attorney as to establish a good equitable conveyance to Page of the patentee's estate in the land. He may also be able in addition to shew such possession, and the exercise of such acts of ownership, payment of taxes for a long series of years, &c., as would justify the court in assuming a conveyance of the legal estate to have been made, but in the absence of very clear and distinct evidence on those points, it is impossible for the petitioner to obtain a certificate of his title under the Act.

I may mention two more points. No notice appears to have been given to Hicks, who is in possession. If the petitioner should proceed further this would be essential. There it no affidavit from the person named in the advertisement as the person upon whom notice of claim is to be served, showing that no notice of any such claim has been received by him.

ASSESSMENT CASES.

(Before the Judge of the County Court of the County of Prince Edward.)

In the Matter of the Assessment of David Downey and others.

Assessment Act of 1869, (Ont.)—Time for service of notice of appeal.

The three days allowed for service of notice of appeal from assessment counts from the time of the decision of each case by the Court of Revision, and not from the day the court closes.

[Picton, June 13th, July 3rd, 1872.]

The appellants, on the 6th day of May last past, served the Municipal Clerk with notices of appeal from the decision of the Court of Revision, respecting the assessment of the above parties. The Clerk refused to receive the notices or consider them as filed in these cases, on the ground that they were served too late, as the Assessment Act of 1869, (Ontario,) required them to be served within three days after the decision of the Court of Revision; the Court of Revision held its first Session on the 25th day of April, 1872, adojurned until the following day; adjourned until and again met on the 29th of the same month, disposed of balance of cases on list, then adjourned until the 6th day of May last, upon which day the minutes of the previous session were approved and the roll confirmed.

Appellants considered the notices were served in proper time—that the three days commenced

from the day the Court of Revision confirmed the roll.

On June 13th the appeal was heard before His Honour, D. J. Macarow, Deputy Judge.

W. H. R. Allison, appeared for appellants.

Low, Q.C., *contra.*

The Clerk being sworn, admitted the service of the notice in this and all other cases above referred to on the 9th day of last May. He did not give the usual notices to the parties appealing, because he believed that they were not in time as all the cases were decided upon by the Court of Revision more than three days before the 6th of May. The minutes of the Court of Revision—as produced to the Court—shewed that the Court sat on the 25th, 26th and 29th days of last April and the 6th of last May, and the decision given in this and the other cases named were not disturbed or reconsidered before the Court closed its labors.

Low, Q. C., argued that the notices, in order to be properly served, should have been in the clerk's possession within three days after the day each case was decided, and not the day when the Court closed.

Allison, contra. the three days counted from the day the Court confirmed the Roll.

No authorities were cited.

His Honor said that as the points raised were of serious importance, he would adjourn the Court to consider the matter, and to ascertain if any decision had been given by other County Court Judges on the points raised in this case.

3rd July.—Macarow, D. J.—I have ascertained from the Judge of the County Court of the County of Simcoe (Judge Gowan), that it is his opinion that the three days should be counted from the day the decision is actually given in each case, and not from the day the Court of Revision closed.

I am of opinion that the three days must be counted from the time the decision is given. I am glad to find this view confirmed by the opinion of Judge Gowan—for whom I have a very high respect—and in this view I have no alternative but to administer the law as I find it.

My decision is, that the time for the notice counts from the time of the particular decision, and not from the day of the close of the Court of Revision, as contended for by *Mr. Allison* and I dismiss this and the other cases without costs.

ENGLISH REPORTS.

CROWN CASES RESERVED.

Reg. v. Payne.

Evidence—Joint charge—Incompetency of fellow prisoners as witnesses for one another.

After several prisoners jointly indicted are given in charge to the jury, one, while in such charge, cannot be called as a witness for another.

The 14 & 15 Vict., ch. 99, does not apply to criminal proceedings.

[C. C. R., Jan. 27, 1872. 26 L. T., N. S., 42.]

Case reserved by Keating, J., for the opinion of the Court for the Consideration of Crown Cases Reserved, and directed by that Court to be argued before all the Judges.

John Payne, George Owen, Isaac Owen, and Joseph Curtis, were indicted before me at the Winter Assizes for the County of Worcester, 1871, for that they to the number of three or more, armed with offensive weapons by night, did enter in, and were on land belonging to Earl Dudley, for the purpose of taking or destroying game.

It appeared that at one o'clock on the morning of the 4th October, 1871, the keepers of Earl Dudley discovered a number of poachers upon the Earl's lands taking game. They were armed with stones, bludgeons, &c , and advanced upon the keepers, with whom they had a desperate struggle. Ultimately the keepers were forced to retire, one keeper being dangerously and another severely wounded.

The prisoner Payne and the two Owens were first apprehended, and on being brought before the magistrates each set up an *alibi* by way of defence, and called witnesses in support. Amongst the witnesses called by Payne was the prisoner Curtis, not then in custody, and he proved having been with Payne at the time in question at a place so distant from the scene of the affray, as to render it impossible he could have been one of the poachers. Curtis with the other witnesses for the prisoners, were bound over by the magistrates, under 30 & 31 Vict., c. 35; but having been afterwards identified as one of the party of poachers he was committed, and indicted with the other three prisoners.

On the trial all four prisoners were sworn to, by various witnesses, as having formed part of the gang of poachers on the night in question. The defence by each was, as before the magistrate, an *alibi*, and the counsel for Payne proposed to call the prisoner Curtis to prove what he had deposed to before the justices. I held that he was incompetent, and could not be called. All the prisoners were convicted and sentence passed.

I desire the opinion of the Court of Crown Cases Reserved, first, whether a prisoner jointly indicted with another can, after they have been given in charge to the jury, be called as a witness for the other without having been either acquitted or convicted, or a *nolle prosequi* entered: *Winsor* v. *The Queen*, 35 L. J. 161, M. C.; 14 L. T. Rep. N. S. 195; *Reg.* v. *Deeley*, 11 Cox C. C. 607. Secondly, whether upon the present form of indictment, and under the circumstances of the case, the prisoner Curtis was competent, and ought to have been called as a witness for the prisoner Payne: (See Russell on Crimes, by Greaves, 626–7, 4th edit.; Taylor on Evidence, 1178–9.)

If the prisoner Curtis was a competent witness, and might have been called on behalf of Payne in the present case, then the conviction is to be quashed or the prisoner to be discharged, otherwise the judgment is to stand.

H. S. Keating.

T. S. Pritchard (*E. H. Selfe* with him) for the prisoner.—The question mainly depends on the construction of the 14 & 15 Vict., c. 99, s. 3. Sec. 1 of that Act repeals so much of the 6 and 7 Vic., c. 85, as provides that that Act shall not

render competent any party to any suit, action, or proceeding individually named in the record, &c. Then sec. 2 enacts, that on the trial of any issue joined, or of any matter or question, or on an inquiry arising in any suit, action, or other proceeding in any court of justice, &c., the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall except as hereinafter excepted, be compelled and compellable to give evidence. And then sec. 3 provides that nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. Now, under the 1st section the prisoner Curtis was a competent witness for the prisoner Payne, and there is nothing in the 3rd section which prevents him from being a witness. Since that Act in *Reg.* v. *Deeley*, 11 Cox, C. C. 607, where three prisoners were jointly indicted for robbery with violence, and were given in charge to the jury, Mellor, J., allowed two of the prisoners to be called as witnesses for the other one. And in a case at the Shropshire Assizes, Pigott, B., also allowed one prisoner to be called as a witness for another on a joint indictment after they were given in charge to the jury. The same course has also been followed by Lush, J. The reason for the incompetency was the ground of interest, and not of being a party to the suit or proceeding: 1 Phil. on Ev. 68, 8th edit. In *Worrall* v. *Jones*, 7 Bing, 395, Tindal, C. J., says that a party to the record would be an admissible witness if he were not interested. [Martin, B.—Suppose two persons jointly indicted for murder, what legal interest has one in the conviction or acquittal of the other? Was not the rule that parties to the proceeding were excluded? Bramwell, B.—If it was on the ground of interest, that was an objection for the benefit of the party interested which might be waived and the party called, but did anyone ever hear of such a thing being done?] It may be that the rule is qualified to the extent that a party to the immediate inquiry is not admissible. [Blackburn, J.—If a prisoner is competent to give evidence for a fellow prisoner, on cross-examination he may be forced to give evidence against himself.] He would be privileged from answering questions tending to criminate himself. In Taylor on Evidence, 1096, it is said that the 14 & 15 Vict., c. 99, which was intended to remove a doubt, has instead created one by the words "Except as hereinafter is excepted" in section 2. [Bramwell, B.—My brother, Cleasby, B., suggests that that exception points to section 4. Is not the rule of construction, that where the Crown is not referred to in Acts of Parliament they do not apply to the Crown, for the Crown is the prosecutor? Cockburn, C. J.—The words "other proceeding" in the statute must be construed as *ejusdem generis* with the words preceding "suit, action," and would mean other civil proceeding. The exception in the proviso was introduced (probably in committee) *ex abundanti cautelâ*, and was not intended to enlarge the enactment.] The words of section 2 are, "any suit, action, or other proceeding in any court of justice, or before any person," &c.; and then, section 3 goes beyond civil proceedings. The learned counsel then referred to 1 Russell on Crimes, 625. In *Reg.* v. *Smith*, 1 Moo., C. C., 289, the wife of one prisoner was held inadmissible to prove an *alibi* for another prisoner with whom her husband was jointly indicted, on the ground that by shaking the evidence of a witness who had identified both prisoners, she would weaken the case against her husband. But in *Reg.* v. *Moore*, 1 Cox, C. C. 59, Maule, J., said, of course a wife could not be examined for her husband, but for another prisoner jointly indicted with him for a burglary she might, and admitted her as a witness. And Wightman, J., so held in *Reg.* v. *Bartlett*, 1 Cox, C. C. 105. The modern legislation encourages the calling of witnesses for prisoners; and to facilitate this the 30 & 31 Vict., c. 35, s. 3, provides for their being bound over, and section 5 for the allowance of their expenses. It would be a dangerous rule to exclude co-prisoners as witnesses, as evidence might be shut out by vindictive persons procuring their committal as accomplices. [Cockburn, C. J.—This danger may be obviated by asking permission to have the prisoners tried separately; and then there would be no objection to calling one prisoner as a witness for another with whom he was jointly indicted.] It ought to be a matter of right for a prisoner to be enabled to call a joint co-prisoner as a witness. The giving of the prisoners in charge ought not to raise any difficulty, for the issue is joined when the prisoners plead: *Reg.* v. *Winsor*, 35 L. J. 121, M. C.; 10 Cox, C. C. 270. [Blackburn, J. — The material thing is when the prisoners are given in charge to a jury who are to say whether they are guilty or not guilty. They are the persons who are to determine the issue as well as to hear the evidence. If one prisoner is admissible for another, he must also be admissible against him. The competency of one prisoner as a witness for another is one thing—the privilege not to answer questions tending to criminate himself is another. The refusal to answer only goes to the credit of the witness. Taylor on Evidence, 627 (note), and *Reg.* v. *Jackson* and *Cracknell*, 6 Cox C. C. 525, were then referred to.

Streeten (*Jelf* with him) for the prosecution.—The witness was properly rejected. In *Hawksworth* v. *Showler*, 12 M. & W. 47, Lord Abinger says: "Nothing is clearer than this, that a person cannot be a witness who is a party to the record, and affected by the determination of the issue, and that the wife of such a person is equally incapable of being a witness." And Alderson, B., said, "The rule is, that a party upon the record against whom the jury have to pronounce a verdict, cannot be a witness before that verdict is pronounced." The modern statutes have not altered that principle. The 14 and 15 Vict., c. 99, only applies to civil proceedings; and sect. 3 was introduced, lest it should

otherwise be thought to extend to criminal proceedings. If Curtis had been allowed to be called as a witness, every word that he said must have been in his own favour as well as in favour of Payne. If a co-prisoner is admissible at all, his fellow-prisoner or the prosecutor may compel him to be a witness. [Lush, J.—If he was allowed to be called, he must be cross-examined, and if he declines to answer on the ground that his answers would tend to criminate him, that might have the effect of leading to his conviction. Cockburn, C. J.—Or he might be cross-examined as to his past life, and the result might seriously injure his case. Brett, J.—Is it not a fundamental rule of the law of England that when a prisoner is on his trial, he shall not be examined or cross-examined for or against himself?]

Pritchard in reply, cited *Reg.* v. *Stewart*, 1 Cox, C. C. 174.

Cockburn, C. J.—We are all of opinion that the witness was properly rejected at the trial; and we all agree that the proviso in the 14 & 15 Vict., c. 99, on which the prisoners' counsel relied, was only intended to prevent the statute being supposed to contradict or alter the rule of law as it has existed from the earliest times, according to which rule a party on his trial could not be examined or cross-examined as a witness for or against himself. It is impossible that the Legislature could have intended by such a proviso to do so. And the old law of England in that respect still remains unaltered.

Conviction affirmed.

EXCHEQUER CHAMBER.

The Queen v. Reeve and Hancock.

Evidence—Admissibility of confession.

The prisoners, two children of about eight years of age, having been apprehended on a charge of misdemeanour, the mother of one of the prisoners, in presence of a policeman, and of the mother of the other prisoner, said, "You had better, as good boys, tell the truth." Thereupon both prisoners confessed.

Held, that the confession was admissible against the prisoners on their trial.

[20 W. R. 631.]

Case stated by Byles, J.

The prisoners were children. One was eight years of age and the other a little older. They were convicted at the Worcester Assizes of an attempt to commit a misdemeanour by obstructing a railway train.

The evidence was that Hancock's mother, Reeve's mother, and a policeman being present after they had been apprehended on suspicion, Mrs. Hancock said, "You had better, as good boys, tell the truth," whereupon both the prisoners confessed, and on this confession were both convicted.

The question for the Court of Criminal Appeal is whether the confession was admissible against both the prisoners or either.

No counsel appeared for the prisoners.

Streeten, for the prosecution contended that the words used by the mother of the prisoner Hancock were nothing more than an exhortation to the prisoners to be good boys and tell the truth, that they amounted only to moral suasion, and contained no promise of favour or menace which could operate as an inducement to the prisoners to confess, and so render inadmissible what was subsequently said by them. He cited *Reg.* v. *Jarvis*, L. R. 1 C. C. R. 96, 16 W. R. 111.

Kelly, C. B.—I am of opinion that this conviction must be affirmed. The cases have already gone quite far enough for the protection of guilt, and the doctrine of the inadmissibility of confessions ought not, I think, to be extended. The last authority upon the subject, *Reg.* v. *Jarves*, (*ubi sup.*) May act as a guide to us on the present occasion, and there the inducement to the prisoners to confess was certainly stronger than it was here, where the words used were such as any mother might very properly say to her son in similar circumstances. The confession which was made by the prisoners was, I think, strictly admissible against them.

Willes, J., Cleasby, B., Grove, and Quain, JJ., concurred.

QUEEN'S BENCH.

Richards v. Gellatly.

*Practice—Inspection—*14 & 15 *Vic.* 99, *s* 6.

Action by a passenger against the agents of a ship for fraudulently misrepresenting her condition in consequence of which he quitted her and took his passage on in another vessel.

Inspection was refused to the plaintiff of letters written to the defendant by other passengers who left the ship at the same time as he did, and also of letters written by the captain and the owner to the defendants *post litem motam*.

[20 W. R. 630.]

The first count of the declaration was on a contract by the defendants to provide the plaintiff with a passage in a ship called the *Ferdinand de Lesseps* from London to Madras; that the ship was tight, staunch, &c., sufficiently equipped for the voyage, appropriate for the conveyance of passengers, and capable of steaming throughout the entire voyage. Breach, that she was not tight, staunch, &c.

The second count was on a fraudulent representation that the ship was about to undertake her first voyage, that she was good and substantial, fit to perform the voyage in an efficient manner, and capable of steaming throughout the entire voyage; whereby the defendants induced the plaintiff to take his passage.

The date of the writ was the 28th of June, 1871, and issue was joined on the 10th of August following.

Martin, B., made an order for the defendants to answer interrogatories, and the affidavits disclosed the following facts:—

The *Ferdinand de Lesseps* was owned by a Mr. Lambie, of Glasgow, and the defendants, with whom the plaintiff effected the contract for his passage, were shipbrokers and agents for Lambie. The plaintiff embarked at Gravesend on the 16th of December, 1870, and finding much fault with the ship and her accommodation, disembarked with other passengers at Cowes, on the 21st of the same month, and took his passage on in another vessel. In a schedule annexed to the affidavit was set out a list of documents in the defendants' possession, including letters

from other passengers by the same ship to the defendants, a letter of the 13th of February, 1871, from the captain of the ship to the defendants, and a letter of the same date from Lambie, the owner, to the defendants.

A summons was then taken out for inspection of these documents, and Cleasby B., granted inspection of all of them, "except letters of other passengers, and letters of the captain and owner subsequent to the 21st of December, 1870, without prejudice to application to court in respect of letters of other passengers."

Murphy moved for a rule to vary the above order, by adding leave to inspect the documents which Cleasby, B., had excluded from his order.

Willes, J.—I see no ground for interfering with respect to the letters of other passengers to the defendants, which have nothing to do with the contract between the plaintiff and the defendants and which are not shown to relate to some common matter in dispute between all the parties. The letters from the captain and from the owner to the defendants are after litigation, and fall within *Woolly* v. *The North London Railway Co.*, 17 W. R. 797, L. R. 4 C. P. 602.

Byles, J.—I am of the same opinion. The letters which were written after the commencement of the action or *post litum motam* are clearly not admissible; nor are the letters from other passengers who were claiming compensation from the defendants.

Brett, J.—It is not suggested that the passengers' letters could be admissible on the first count of the declaration, but it is said that they are admissible under the count for fraudulent misrepresentation. The plaintiff will have to make out that the representations were false to the knowledge of the defendants when made; and can it be said that the letters of other passengers complaining of the state of the ship are admissible to prove that? They never could be put in evidence by the plaintiff to prove any one thing he has to prove: and if they are wanted to cross-examine the defendants on, that is not an orthodox purpose for inspection. I can, however, see an unworthy purpose for which these letters might be wanted, viz., for prejudice, to infer the defendants' consciousness of guilt from their paying claims made upon them, whereas, in fact, they may have paid merely because the claims were small. The other letters were written after the dispute had arisen, and were from the captain and from the owner, and would clearly not be written in the ordinary course. They therefore fall within the cases in which communications made to railway companies by their servants have been held privileged.

Rule refused.

CHANCERY.

Lancefield v. Iggulden.

Practice—Evidence—Affidavits—Cross-examination of plaintiff—Subsequent affidavits.

Affidavits filed by the defendant subsequently to the cross-examination of the plaintiff, are under certain circumstances allowed, but the plaintiff must also be allowed to file fresh affidavits to meet them.

[20 W. R. 621.]

This was an application adjourned from chambers on the part of the plaintiff to prevent the defendants from using against him the affidavits filed by them subsequently to his cross-examination. The chief clerk had allowed such a course of proceeding.

Collins, for the plaintiff, cited *Mayes* v. *Mayes*, 14 W. R. 169.

Yate Lee, for the defendants.—15 and 16 Vic. c. 86, s. 40; Consol. Order, xxxv. Rule 40; Order 1865, Rule 7. As to the discretion of the Court, *Besemere* v. *Besemeres*, 2 W. R. 124, 1 Kay, App. 17; *Morey* v. *Vandenburg*, 14 L. T. N. S. 542. *Mayes* v. *Mayes*, is neither law nor practice.

Collins, in reply.

Bacon, V. C.—*Mayes* v. *Mayes*, is a binding authority. An investigation in chambers is like a trial at law, the defendants have to meet the evidence of the plaintiff. In this instance the defendants did not file their affidavits before cross-examining the plaintiff, which they should have done. The plaintiff must have an opportunity now of filing fresh affidavits, but the defendants also will have a right to reply by affidavits notwithstanding cross-examination.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Adam Dietrich *v.* Pennsylvania A. R. R. Co.

1. A railroad ticket "good for one seat from Philadelphia to Pittsburgh" entitles the holder to one continuous passage from Philadelphia to Pittsburgh in the train into which he enters to be carried, and not by train after train and by broken stage day after day.
2. If the passenger chooses voluntarily to leave the train before reaching his destination, he forfeits all his rights under the contract.
3. One who buys a ticket is bound to inform himself of the rules and regulations of the company in running its trains.

Having left the train in which he started, the fact that he subsequently entered another train and travelled over a portion of the route without being required to pay fare by the conductor in charge of the train, will not prejudice the company or renew the contract.

Error to the Court of Common Pleas of Lancaster County.

May Term, 1872.

Opinion of the Court by Agnew, J.

This was a judgment of non suit, and the question is, whether the plaintiff's evidence disclosed a case for the jury. Dietrich, the plaintiff, was a drover, residing in Lancaster County. On the 11th of March, 1867, he purchased a drover's ticket from Philadelphia to Pittsburgh, and took passage on the fast line on the defendant's railroad. At Lancaster he got off, and next day (the 12th,) he resumed his journey. When the conductor, Young, came along collecting fares, he declined the plaintiff's ticket on the ground that he had "stopped off," and informed him that such were his orders. Young told him he must get off at Landisville, after passing Landisville, finding him still on the train, Young told him he *must* get off at Mount Joy. At Mount Joy the brakesman put him off, but Young, who observed the brakesman taking him across the track, halloed to him not to put him off in that way; and told Dietrich to get on again. He was then carried to Altoona,

where Young's portion of the route ended. After leaving Altoona, Hankins, the conductor from Altoona to Pittsburgh, came around, and the plaintiff exhibited his drover's ticket. Hankins refused it, and put him off at Gatlitzin, at the next end of the mountain tunnel. The plaintiff got on without leave, and Hankins again refused his ticket, the plaintiff paid his fare from Altoona to Pittsburgh.

On his cross-examination, the plaintiff stated that Hankins was not rude or unkind, and told him it was his duty to collect the fare or put him off. Dietrich said to him, I want this tested and I want you to put me off gently. The question is, therefore, simply upon a breach of the contract for carriage, and depends on its terms. Before examining the terms of the ticket, it is proper to clear the case of some immaterial matters. Stress is laid on the statement of Wimer, that the restriction as to stopping off was not intended for such men as he, who shipped stock over the road every week. This clearly has no influence whatever, in ascertaining or interpreting the terms of the ticket he afterwards purchased from the proper ticket agent. Wimer was a mere freight agent, whose duty had no relation to the sale of tickets, but was confined to giving the required certificate to entitle Dietrich to a drover's ticket. When Dietrich went to Franciscus, and asked him to make the ticket so as to stop off at Lancaster, Franciscus said, "No, sir." He admits that he knew of the restriction as to stopping off, which his request implies, and that he had seen Young refuse another drover's ticket for this cause, and that in consequence he had been in the habit of buying a ticket from Philadelphia to Lancaster, when he wished to stop off. The restriction, and his knowledge of it, if this were necessary, are plainly proved by himself. It is evident therefore, that the plaintiff is thrown upon his ticket and the terms it imports or recognizes, as the evidence of his right of transit over the defendant's road. The ticket is in these words: "Drover's ticket. Not good on the Philadelphia Express. Good only in the hands of Mr. A. Dietrich for one seat from Philadelphia to Pittsburgh. This ticket good only until March 16th, 1867. Issued March 11th, 1867. S. H. Wallace, Agent." On the back is stamped Penn'a R. R., March 11th, 1867, Philadelphia. Such tickets are evidence of the payment of the fare, and of the right of the holder or party named, as here, to be carried according to its terms. So far as they are expressed the terms are binding of course, but such tickets are not the whole contract, which must be gathered, so far as not expressed, from the rules and regulations of the company in running its trains. This is the generally received doctrine; with the qualification, however, that these rules and regulations must be reasonable and not contrary to the terms expressed. See *Johnson* v. *The Concord R. R. Co.*, 46 New Hampshire Rep. 312 and cases there cited. *The State* v. *Overton*, 4 Zabriskie, 435. *The Clev. Col. & Cin. R. R. Co.* v. *S. H. Bartram*, 11 Ohio St. Rep. 457. *Chenney* v. *The Boston & Maine R. R. Co.*, 71 Metcalf, 121. With the same qualifications of reasonableness it is also well settled that one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains. Thus he must ascertain the train in which he is to go, the time of its departure and arrival, its stopping stations, his right to get off and get on, to resume his trips, &c. See the cases *supra*. If the law were otherwise a railroad company could not regulate the running of its trains to suit the interests of the public or of themselves. For this purpose some trains must be fast with few stoppages, others must be slow with frequent stoppages, some must be through trains and others local. It is very clear that a passenger with a through ticket cannot require a local train to carry him through. Nor can he require a through train to stop at a way station not in its time-table. His even having a stop-off ticket would not increase his right to require the train to stop at a station not in its time-table.

It is evident that if in such cases the holders of tickets can compel the trains to alter regulations, they would be governed by the passengers and not by the company. An excursion party on this principle, stopping off at will, would overcrowd a subsequent train to the discomfort of the proper passengers, and to the prejudice of the interests of the company. The authorities, as well as the reason of the thing, shews that the company must make its own regulations, and that passengers purchase their tickets subject to these reasonable rules, and that it does not lie on the company to bring home notice of them in order to establish the terms of the contract of carriage. In this case the testimony of the plaintiff himself clearly shows that his ticket did not entitle him to stop off at Lancaster, and if notice were necessary that he knew that fact. This brings us now to the question, whether the face of the ticket, by its terms imports a right to stop off. The first noticeable and very obvious thing is, that the terms on the face of the ticket are very restrictive. It is expressed to be a "Drover's ticket." It cannot be used by any other than a drover. Then it is not good on the Philadelphia Express; it is "good only in the hands of Mr. A. Dietrich;" no one else can use it—then, "this ticket is good *only* until March 16th, 1867." It is therefore not good after that day. It is restrictive from the beginning to the end, and is wholly unlike a general ticket, which any holder may use, within any reasonable time; and yet even as to such tickets the authorities are clear—the right to stop off at intermediate un-named points does not exist unless by means of stop-off tickets, or the customary rules of passage. The express terms of a drover's ticket being all restrictive without exception, it gives no countenance to an implied right to stop off. The reason is obvious also—the ticket is sold at less than half price—that is, this was for five dollars instead of eleven. Its purpose is special, and the restriction in time (until the 16th of March) was to prevent abuse of the benefit intended to be conferred on a particular class of persons. With all these restrictions on the face of the ticket, and in full view of the purpose of the ticket, it is obviously impossible to interpret the words, "good *only* until March 16th," into an enlargement of the contract, so that it shall read, contrary to the regulation of the company,

"good to travel every day, from day to day, from the 11th to the 16th of March, by as many trains from and to every station at which the trains stop, and by as many stages as A. Dietrich may elect to make." Then when we come to the marrow of the ticket, to wit: Good for "*one* seat from Philadelphia to Pittsburgh," it does not change the purpose and the restrictive character of it. There is nothing in the words "*one* seat" which enlarges the meaning so that the holder may take seat after seat, train after train, day after day, and from station to station, especially in contravention of the known regulations of the company as to the travel on such tickets. It necessarily follows that the contract for "*one* seat from Philadelphia to Pittsburgh" must mean in the train which the holder of the ticket enters to be carried, and not by train after train, and by broken stage day after day. That this is the true interpretation of the contract is decided in *State* v. *Overton*, 4 Zabriskie, 438; *Cl. Col. & Cin. R. R.* v. *Bartram*, 11 Ohio St. Rep. 462; *Johnson* v. *Con. R. R. Co.*, 46 N. H. 213, and *Chenney* v. *Bos. & M. R. R. Co.*, 11 Metcalf, 121: Angell on Carriers, Ed. 1808, § 609. No cases are cited to the contrary, and we remember none. The language of C. J. Green, on this point, in *State* v. *Overton* is so much to the purpose we quote it. "The question (he says) is obviously a question of contract between the passenger and the company. By paying for passage and procuring a ticket from Newark to Morristown, the passenger acquired the right to be carried directly from one point to the other without interruption. He acquired no right to be transported from one point to another upon the route at different times and by different lines of conveyance, until the entire journey was accomplished. The company engaged to carry the passenger over the entire road for a stipulated price. But it was no part of the contract that they would suffer him to leave the train and resume his seat in another train at any intervening point upon the road." "If the passenger chose voluntarily to leave the train before reaching his destination he forfeited all rights under his contract. The company did not engage and were not bound to carry him in any other train, or at any other time over the residue of the route." This is the clear legal effect of the contract between the company and the passenger in the absence of any evidence to the contrary. If the passenger insists that under his contract, by virtue of general usage, or the custom of the road, he is entitled to be carried at his pleasure, either by one or different trains, the burthen of proof was upon the State. That is to lay on a passenger, the case being an indictment against a conductor for a battery in putting off a passenger unlawfully. In adopting this language of the learned Ch. Justice of New Jersey, we should not omit to guard our meaning, by saying there may be exceptions, where from misfortune or accident, without his fault, the transit of a passenger is interrupted, and where he may resume his journey afterwards. In the present case the ticket of Dietrich gave him no right to stop off, and the company, when he took his seat in the train at Philadelphia, having entered upon the performances of its contracts, had a right to continue its execution without interruption. Another reason is that fare covers the ordinary luggage of the passenger, entitling it to be checked through to the point of destination. But if the passenger may stop off he may demand his baggage at each stoppage, or if it go on he will not be at the end of the journey to receive it. The contract was therefore broken by Dietrich himself when he stopped at Lancaster without permission. When he came upon the train the next day, he began a new journey, and on refusing to pay his fare he became a trespasser, and was rightfully put off at Mount Joy. But it is argued that as he was permitted by Young to re-enter the train and was carried to Altoona he acquired a right to be carried to Pittsburgh. This is erroneous. When Dietrich stopped at Lancaster his right of transportation under his ticket ended, as we have seen. Consequently, when he began a new passage the next day he was bound to pay his fare. He knew this, and that he was put of at Mount Joy because he would not pay it. Therefore Young, as conductor, being bound by the rules of the company, not only had no authority, but acted against his orders in permitting him to return upon the train without payment of his fare. The ticket having lost its title to be recognized, all that Young did thereafter was unauthorized, and the plaintiff knew this. Clearly no title to be carried through to Pittsburgh could be acquired by Young re-offering him to ride without payment of his fare. Young could not carry him, and could not by his omission to collect the fare, send him forward without payment of any. His violation of duty in carrying a passenger without payment of fare clearly could not bind his successor upon the remainder of the route. It is very clear that when Hankins took his place on the train, between Altoona and Pittsburgh, it was not only his right, but his duty to demand the fare between those places. He found Dietrich without a ticket imparting a right of passage and without any evidence of payment of the fare. The fact that the company had lost the fare from Lancaster to Altoona, by Young's violation of duty, conferred no right of further transportation, while Dietrich, at every step afterwards, was travelling without right, and with full notice that he was doing so. As remarked in *Beebe* v. *Ayres*, 28 Barbour, 278; the conduct of one conductor in violating the rules of his employers could not prejudice another employee, more faithful than himself, who has adhered to his instructions and discharged his duties under them.

The judgment of the court below is therefore affirmed.

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