DIARY FOR NOVEMBER.

1. Thurs.. *All Saints.*
8. Satur... Articles, &c. to be left with Secretary Law Soc.
4. SUN.... 23*rd Sunday after Trinity.*
11. SUN.... 24*th Sunday after Trinity.*
14. Wed.... Last day for service for County Court.
18. SUN.... 25*th Sunday after Trinity.*
19. Mon..... Michaelmas Term begins.
23. Friday. Paper Day Queen's Bench. New Trial Day Common Pleas.
24. Satur... Paper Day Common Pleas. New Trial Day Queen's Bench. Declare for County Court.
25. SUN.... 26*th Sunday after Trinity.*
26. Mon.... Paper Day Queen's Bench. New Trial Day Common Pleas.
27. Tues.... Paper Day Common Pleas. New Trial Day Queen's Bench.
28. Wed.... Paper Day Queen's Bench. New Trial Day Common Pleas.
29. Thurs.. Paper Day Common Pleas.
30. Friday, *St. Andrews.* New Trial Day Queen s Bench.

The Local Courts'
AND
MUNICIPAL GAZETTE.

NOVEMBER, 1866.

MUNICIPAL ELECTIONS.

All concerned in Municipal matters are now brushing up their stock of Municipal lore under the old Act, and comparing the provisions of that Act with the present one.

It is to be remembered in the first place, that so much of the present Act as relates to the nominating of candidates, and the passing of by-laws for dividing municipalities or wards into electoral divisions, became law on the first day of this month. In cities and other populous localities this is of great importance, as only one day (except in case of a riot, &c.) is hereafter to be allowed for polling votes, and unless more than one polling place should be provided, it might be impossible to poll all the votes, and in any case there would be much greater fear of voters being crowded out and of riots or disturbances occurring than if there were two days.

Section 278 gives the necessary power to the Council of any city or town to pass by-laws for dividing the wards of such city or town into two or more convenient divisions for establishing polling places; and in like manner the Councils of townships and incorporated villages may divide them for the same purpose. The by-law which effects this, or a distinct by-law for such purpose, must also appoint a Returning Officer for each division, and the exact locality where the nominations and the pollings are to take place, must also be stated. The meeting for nominating candidates is to be held both in cities, towns, townships, incorporated villages, and police villages, on the last Monday but one in December; and the Clerks of township and village municipalities shall preside at the meetings.

This is sufficiently plain, so far as the last mentioned municipalities are concerned, as the *Clerk* of the municipality has to preside, whether it is divided into electoral divisions or not. But how is it in cities and towns in which the wards are divided into electoral divisions?

Section 101, sub-sections 1 and 2, which refer to this, are as follows:—

1. A meeting of the Electors shall take place for the nomination of candidates for the offices of Aldermen in cities and of Councillors in towns, at noon on the last Monday but one in December, annually, in each ward or electoral division thereof, at such places therein as shall from time to time be fixed by By-laws of the said City or Town Councils.

2. The Returning Officer for each ward or electoral division, in cities and towns, or in his absence the Chairman to be chosen by the meeting, shall preside, and the Returning Officer shall give at least six days' notice of such meeting.

The difference in these provisions will be seen at once, and the further questions naturally arise as to whether a nomination of each candidate in each electoral division is necessary, or whether a nomination in one of the divisions only is required? and if the latter be the proper course, in which of the divisions is it to be held, and which of the Returning Officers is to preside? There does not appear to be anything in the Act which helps one to arrive at a satisfactory conclusion on these points. On the one hand there does not seem to be any benefit to be derived from having two nominations in the same ward, and the reason which is very properly given for having two polling places does not apply. Such a proceeding would be quite at variance with all former practice, and in every view of it would appear to be unnecessary and absurd. But again, on the other hand, the words of the Act are very precise—"A meeting, &c., shall take place, &c., in *each* ward, *or electoral division*, (meaning, it is presumed, 'in electoral divisions where the ward has been so divided') at such places therein, &c., (and) the Returning Officer for *each* ward, *or electoral division*, &c., shall preside," that is, we presume, preside in

each electoral division, and each Returning Officer cannot preside unless there is a meeting in each division.

We throw together these observations on this point for the benefit of those whom they may concern. Without expressing any decided opinion, it is thought that the careful ones will provide for having a nomination meeting in each ward; this at least would secure the safer course. Six days' notice of the meeting is, it will be observed, to be given by the Returning Officer in all cases.

An attentive perusal of the Act discovers a variety of difficulties in construction and interpretation which we shall endeavour, from time to time, to speak of. Some of them have reference to the extent of the 427th section, where the words "qualification of electors and candidates are used." Are they to be understood as speaking merely of the *amount* of the personal property required, or do they include other matter which may be said to come within them in a more general sense—for example: has an elector, in a city or town, paying rates in different wards, a right to vote in each, under section 78; or has a person otherwise qualified, but who has not paid his taxes before the 16th day of December next preceding the election, a right to vote, or is he disqualified under section 75, as amended? But we must leave these matters and the continuation of our sketch on the proceedings at elections for a future article.

RETURNS OF EXECUTIONS BY BAILIFFS.

It has been suggested that it would be advisable to extend the time within which Division Court bailiffs must make returns of writs of execution placed in their hands. It is argued that an extension of time would enable them to do better for the execution creditor, without, at the same time, unnecessarily pressing or harassing the debtor; and that the time now allowed is too short, considering the obstacles which so often hinder bailiffs in the prompt discharge of their duties in the premises.

These arguments are, probably, to a certain extent founded upon experience; but only to a limited extent, so far as we are capable of judging; and it would require something very strong to induce any one who thinks upon the matter to wish for a change that would give greater latitude to officers in this respect.

It is to be carefully borne in mind, that Division Courts were constituted and are intended for the "more speedy recovery of small debts;"—speedy, not only in the process of adjudication, but also in that of collection through the process and by the officers of the courts. So far as the public outside are concerned, complaints are often made that these courts do not sufficiently and to as great an extent as might be expected, carry out the very wise and proper intentions of those who introduced the system. These complaints do not prove much certainly, but they occasionally have some foundation in fact, and it would be unwise to lend them any additional force by introducing a measure which would not, we think, upon the whole, answer any good purpose. Would not the effect of it be simply to give an excuse to bailiffs to idle over their duties probably to the loss of the creditor and without any compensating advantage to the debtor? In the large majority of cases it will be found that the money can be as well realised within thirty days as sixty. If it is right and proper that a debtor should have further time to satisfy the execution, he can obtain it from the judge upon showing sufficient grounds on affidavit. But it is the judge only who should have this discretionary power, and it is contrary to public policy that it should be in the power of a purely ministerial officer, such as a bailiff is, to do more or less than the law directs him to do.

There is one way, and only one way in which an alteration could be made, (and even that, taking into consideration the simplicity of procedure in Division Courts, would not be in every respect advisable,) and that is, to follow the analogy of the law in the Superior Courts, which enables the plaintiff, after a certain period and upon giving notice, to "rule" the sheriff to return the writ, together with the money that have been made upon it into court, under pain of being guilty of contempt, or such other penalty as might be devised.

SELECTIONS.

TESTIMONY OF DEFENDANTS IN CRIMINAL PROSECUTIONS.

BANGOR, ME, Feb. 24th, 1866.

MY DEAR SIR,—I received a few days ago a note from my friend Governor Cony, advising me that you were desirous of ascertaining the practical working of the change in the law of evidence, recently adopted in this state, by

which the accused in criminal trials are, at their own instance, made witnesses.

The opinions of individuals on this subject will be more or less influenced by their preconceived views as to the wisdom and expediency of the proposed change. I had no doubt that the interests of justice required that it should be made, and, so far as I had any influence, freely used it in favor of its adoption. Nothing has since occurred to change or even weaken my previous opinions. I have tried criminal cases in which the accused being innocent, owed his honorable acquittal in no slight degree to his own testimony, and the clear and frank manner in which it was delivered. In one case, notwithstanding the innocence of the prisoner, as was subsequently most abundantly established, and notwithstanding his own testimony, the jury found him guilty. So being guilty, and yet testifying to his own innocence, the jury in some cases have justly convicted, and in others have erroneously acquitted the prisoner.

But erroneous verdicts will occasionally be rendered, whether the accused are admitted to testify or not, as long as juries shall be composed of fallible men. No rules of admission or exclusion of evidence can be established which will prevent misdecision. The results may not vary in many cases, whether the prisoner is received or rejected as a witness, but in all trials there will be a greater assurance of correct decision, and a greater confidence that justice has been done, than where evidence, and that perhaps of the greatest importance, has been withheld.

But the expediency of the law in question cannot be determined by the results of particular cases. It cannot depend on the opinions of individuals. It must rest upon the general reasoning applicable to the subject. All judicial decisions should be based upon evidence. All the evidence attainable and needed for a full understanding of the case should be forthcoming, unless the evils of delay, vexation, and expense, consequent upon its procurement, should exceed those arising from possible misdecision.

The exclusion of evidence is the exclusion of the means of correct decision. The greater the mass of evidence excluded, the less the chances of such decision, until, if all evidence be excluded, resort must be had only to lot.

It is but a few years since the most strenuous opposition was made to those changes in the law of evidence by which, in civil cases, parties and those interested in the result have become admissible witnesses. Those changes when proposed, struck with horror that class of minds whose conservatism consists in the love of abuses, and in the hatred of their reformation; a love and a hatred the more intense in proportion to the atrocity of the abuses existing, of which the reform was attempted.

These changes have been made, and being made have received the general approbation of the entire judicial body in England; in this country with hardly an exception. Indeed, the wonder now is how any one ever could expect justice would be done when the very material—*pabulum justitiæ*—as Lord Bacon terms it, was withheld from those whose duty it was to decide.

The propriety of admitting parties being conceded, the question naturally occurs, Why should they not be received in criminal as in civil cases? The object in all trials is the same—the ascertainment of the truth. The greater the evils of misdecision in criminal than in civil cases, the greater the necessity of resorting to all available sources of information for the purpose of averting those evils.

The truth is wanted from any and every source. The prisoner knows it. The law presumes him innocent. If regard be had to the legal presumption applicable to each and every prisoner, he should, being presumed innocent, be received to testify. Being innocent, he would not resort to falsehood to establish such innocence. Being innocent, and no other evidence of such innocence being attainable from any source, his exclusion is the exclusion of all possible means on his part of making out his defence. Being innocent, and other proof of the fact attainable, who does not perceive the importance of his evidence to explain all doubtful circumstances, so that he may not only be acquitted, but that the acquittal shall leave no stain behind.

Of all exclusions, that of a man presumed innocent would seem to be the most monstrous. Is he innocent, and shall he not be heard to establish his own innocence? Every motive, if innocent, is averse to falsehood.

Is he guilty? His guilt is not proved. It may be that he is, but it is not to be assumed in advance, and the assumption made the ground of exclusion—an assumption at variance with legal presumptions.

If guilty, and he is a witness at his own instance, the objection will be made that receiving his testimony may lead to perjury. But the essential sin of perjury is the falsehood uttered, aggravated more or less by the occasion of its utterance.

The prisoner being guilty pleads not guilty. In so doing he utters a lie, just as much as when he makes a false answer as to any other fact about which he is interrogated. The prisoner being a witness denies in detail what before he had denied in the gross. In the one case, it is a lie without, in the other it is a lie with circumstances. It is idle to say that the falsehood in its generality is not equally a lie as when it is compounded of many particulars.

True, in the one case the prisoner is under oath, in the other he is not. But the falsehood is the essential sin, and it exists as much in the one case as the other. The superadded ceremony may affect the legal but it cannot the moral character of the falsehood.

The obligation to utter the truth is of universal application. Undoubtedly, the prisoner being guilty cannot defend without the utterance of a lie; but if he cannot it may be a

very good reason why he should not make the attempt, but a very poor one why he should lie. No one who would not deprive a prisoner of the right of self-defence, even by uttering a falsehood by way of plea, can consistently object to giving him the right of denying, explaining, or qualifying the charge as a witness.

The prisoner guilty, upon examination and cross-examination, may utter the truth. If so, justice is done. The great object of judicial proceedings is accomplishment.

Suppose the prisoner answers falsely, it by no means follows that his false answers will be credited. But the possibility of false testimony is no reason for exclusion. To exclude a witness because he may lie, is to exclude all witnesses, because there is no one of whom the truth can be predicated with assured certainty against the pressure of all conceivable motives acting in a sinister direction. The exclusion presupposes guilt which the law does not presume,—and probable perjury to sustain such guilt—two crimes: one committed; the other to be committed by the very person whom the same law presumes guilty of no crime whatever.

To exclude for presumed guilt is to determine in advance and before hearing, and adversely to the prisoner, the question in issue. It is, when the question of guilt or innocence is on trial, to exclude for guilt before guilt is or can be ascertained. The presumption of innocence logically requires the admission of the innocent.

But guilt is no ground of exclusion. The law admits the avowed accomplice, expecting a pardon, his pardon dependent upon the delivery of inculpatory evidence against the prisoner, whose innocence is a presumption of law. Admitted guilt received and heard; presumed innocence refused a hearing. Crime then constitutes no reason for the exclusion of a witness. The real ground of exclusion is that he is a party to the record. So that the participant in crime is heard, while the presumedly innocent party to the record is rejected, and for that reason alone. But the mere fact that a man's name is on the docket of a court, is no very good reason why his testimony, when required for the purposes of justice, should for such cause be rejected. In civil cases it has been deemed insufficient; much more should it be in criminal cases.

So, too, the law looks with great suspicion upon hearsay evidence. In the case of hearsay, whether confessional or other, there are at least two, and there may be more, witnesses whose conjoint testimony, original or reported, serves as the foundation of judicial decision. When the percipient and narrating witness are united in one and the same person, if he speak the truth and be believed, he determines the cause. In hearsay the narrating witness is not the percipient or effective witness: he speaks or purports to speak from the narration of others, and those others are the efficient witnesses. When the alleged confessions of a prisoner are received, *the efficient testimony consists in the statements thus reported.* But these confessions may have been misunderstood in whole or in part from inattention, misrecollected from forgetfulness, or misreported from design. They may be indistinct and incomplete, embracing but a portion of the truth; and the omissions which interrogation would have supplied, may produce the sinister effect of falsehood. The sanction of an oath and the securities to trustworthiness, afforded by examination and cross-examination, are wanting. Yet this very evidence thus seen to be inferior in trustworthiness is received, while the party present in court is not permitted to correct the errors of the narrating witness, whether arising from inattention, misrecollection, or design, nor if the confessions were indistinct or incomplete to supply the deficiencies arising from such indistinctness or incompleteness, and that too when under oath and subject to examination and cross-examination.

The securities against testimonial falsehood are the sanctions of religion, examination and cross-examination, and the fear of temporal punishment. These are all wanting in confessions, *as against the person whose confessions are offered to his prejudice.* They are attainable, and attained in all their strength, if the prisoner is examined.

The result is, that the *prisoner would be a witness in both cases.* In the one case without any of the securities for testimonial trustworthiness, *he testifies through the lips of the narrating witness by whom his confessional utterances are reported.* In the other case, when his testimony would be delivered under all the recognised safeguards against falsehood, it is rejected. Without any securities against falsehood, incompleteness, or indistinctness, the party is a witness; with every one attainable in their utmost efficiency he is excluded. Testimony recognised as inferior in every essential of trustworthiness is received, while the best evidence—the direct statements of the party under oath and subject to examination and cross-examination, are rejected.

The accused may lie, and the jury may be deceived thereby. While there is no witness whose statements may not be false, so there is no witness to whose statements, true or false, it can be made certain in advance that the just degree of credence will be given by the jury.

But what is the danger of deception? The prisoner is a witness at his own instance. Does he answer evasively, or, being cross-examined, does he refuse to answer? Silence may be equivalent to confession; evasion indicates that a true answer would endanger the person interrogated. Is the witness false in all his statements? Each particular falsehood endangers; the more numerous the falsehoods the greater the chance of detection and disproof. Is the answer partly true and partly false? Each truth is in eternal warfare with the accompanying lie. Truth and falsehood have no greater fellowship than has new wine

with old bottles. The truth uttered by the witness imperils the lie. Every truth he utters endangers himself. Every truth uttered by another, every true witness, increases his peril. The refusal to answer, the evasive, the false answer, the not less significant and expressive silence, are each and all circumstances of no slight force in leading the minds of those who are called upon to decide to a right conclusion.

The jury may, undoubtedly, place too great reliance upon the testimony of the prisoner, as they may upon that of any other witness. They are deemed competent to weigh and compare the various witnesses for and against the prisoner. Are they any the less competent to weigh his? Does his position add to his credibility? Are the circumstances which surround him such as to induce undue credence? Competent to weigh the testimony of parties in all civil cases, does that competency vanish when the prisoner on trial is called from the criminal bar to the witness stand? The appearance and manner of the prisoner, the probability of his statements, whether contradictory or contradicted, are all open to the consideration of the jury, and they are as competent to form a correct estimate of his testimony as of any other witness.

Hearing cases by the halves is but a bad way of getting at the truth. To receive the prosecutor and reject the prosecuted, to hear the accuser and refuse to hear the accused, would undoubtedly tend much to facilitate decision and relieve the judge of fact, of the difficulty of weighing and comparing conflicting testimony. Still greater would be the relief from labor and responsibility if no evidence was heard, and resort was had to the aleatory chances of the dice. This aleatory mode of deciding cases seems to have tickled the fancy of Rabelais, according to whom Mr. Justice BRIDLEGOOSE resorted to chance, "giving out sentence in favour of him unto whom hath befallen the best chance of the dice." But it is hardly worth the while accurately to adjust and carefully to determine the relative merits of trying cases by halves, and of deciding them by the throwing of dice.

In my judgment, the interests of justice require the admission of the party alike in criminal as in civil cases. The acquittal of innocence is thereby more probable; the conviction of guilt more assured. The prisoner, if innocent, will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of explanation, it is his fault, if by his own act he has placed himself in such a situation that he prefers any inferences which *may* be drawn from his refusal to testify, to those which *must* be drawn from his testimony, if delivered. If he testifies, and truly, justice is done. If falsely, and justice is done, however much he may complain, the public will little heed his regrets.

I have hastily called your attention to some of the considerations bearing on this question. They will be found most elaborately examined in the masterly work of Bentham on the "Law of Evidence," where the reasons for the proposed change are stated with a cogency of argumentation unanswered and unanswerable.

I am, with great consideration,
Yours most truly,
JOHN APPLETON.

John Q. Adams, Esq.,
House of Representatives, Boston.
Chairman of the Committee on the Judiciary.

We have received the foregoing copy of Chief Justice Appleton's letter, upon the propriety of admitting defendants in criminal cases to give testimony, on their own behalf, if they so elect. The letter was addressed to the Committee on the Judiciary, at their request, and its suggestions adopted by them, and reported to the House of Representatives, in the form of a bill, which is expected to become a law of the Commonwealth of Massachusetts.

The suggestions of the learned Chief Justice was received by the profession with great interest and respect, upon all subjects, but especially in regard to evidence, which he has made a specialty for many years. The author is an acknowledged advocate of Law Reform in the department of procedure and practice, and his thorough and conservative manner of handling these important questions, has attracted deserved attention and regard, upon both sides of the Atlantic. His able letter to Mr. Sumner, in regard to the Right of Equality before the Law, for all races and classes of men, was republished in the London Review of Jurisprudence, the leading law periodical in the British Empire: and many of his other articles have attracted more attention in Europe than those of almost any other American law writer. We have thought, therefore, that we could not do the profession a more essential service, than by reproducing this letter in our own pages.—*American Law Register.*

DELINQUENT JURORS.

In the month of July, 1865,* in commenting on the laxity of the attendance of jurors in London and Middlesex, we referred to an agency existing in London for the purpose of protecting jurymen from the penalty of non-attendance. Upon payment of a guinea the juryman is guaranteed against any penalty the Court which he is summoned to attend may impose upon him. That the agency now exists we are well aware, and it will be for the benefit of jurors, and greatly to the interest of the administration of justice, that it should be broken up. How any profit could be made out of a transaction which consists in receiving a guinea and undertaking a risk of ten pounds, was more than we were able to determine, but some little light is thrown upon the matter by a recent case which was heard at the Guildhall on the 10th instant.

* 9 Sol. Jour. 822.

One Charles Mayhew was brought up in custody before Alderman Abbis on a charge of perjury, in making a false affidavit to procure the remission of a fine imposed by the Lord Mayor's Court on a juryman who had failed to attend a summons to serve on a jury at that Court. The affidavit was to the effect that the juror had not received the summons as he was out of town, and did not return in time to attend. Mayhew's object in making the affidavit, which might, we apprehend, with greater propriety, have been made by the juror himself, does not very clearly appear although a letter from the prisoner to Mr. Brandon was read at the hearing referred to, in which he stated that the variance in the facts was owing to a mistake. It might, however, be of service in interpreting this point, if it could be ascertained distinctly what relations existed between Mayhew and the juryman which caused the juryman's summons to be sent to Mayhew. Why, again, did the latter pay the fees for the affidavit out of his own pocket, if, as he declares, he "got nothing by it?" Would he have paid the fine also had it not been remitted? It is to be hoped the City Solicitor will procure sufficient evidence to sift this case to the very bottom, and should it afterwards turn out that the agency we have alluded to procures the remission of fines on jurymen by such means as are charged against Mr. Mayhew, it will be some satisfaction that the trouble he has brought himself into will be the means of exposing a practical fraud upon the administration of justice. Whether those who pay a guinea to escape the performance of a plain duty are punishable we shall not now attempt to discuss. The result of their doing so is obviously to cast upon others the burden of a duty they are not entitled to do by proxy. When complaints are made by the judges that jurymen fail to attend, and when complaints are made by jurymen that many are continually summoned while others invariably escape, some explanation of the phenomenon may perhaps be found in the fact that for the payment of a guinea annually a juryman may neglect to attend any summons to serve, and may remain in his own country house without fear of being fined.—*Solicitors' Journal.*

CURIOSITIES OF TESTATION.

"Let's choose executors and talk of Wills."
King Richard II. Act. iii, sec. 2.

Some who, in life, would not have given a cup of water to a beggar, by their wills leave enormous sums to charities, to secure for themselves a kind of posthumous admiration. Others allow not their resentments to sleep with them in the grave, but leave behind them wills which excite the bitterest feelings and animosities among their surviving relatives. Some wills are remarkable for their conciseness and perspicuity; others for their unprecedented shapes and curious contents. One man provides for a college, another for a cat; one gives a legacy to provide bread and herring for the poor in Lent, and kid gloves to the minister; while others provide for bull-baiting, the welfare of maid servants, and the promotion of matrimony. John Hodge has kept his name out of oblivion by giving twenty shillings a year to a poor man to go about the parish church of Trysall, during sermon-time, to keep people awake and dogs out of church.

Henry Green, of Melbourne, Derbyshire, gave his property for providing green waistcoats for four poor women every year, such waistcoats to be lined with green galloon lace.

In the same neighbourhood, and inspired by a similar feeling, Thomas Gray, provided gray waistcoats and gray coats.

John Nicholson, stationer, of London, was so attached to his family mane, that the bulk of his property was given in charity for the support and maintainance of such poor persons in England, as should appear to be of the name of Nicholson.

David Marinett, of Calcutta, while giving directions to his executor, says:—"As to this fulsome carcass, having already seen enough of wordly pomp, I desire nothing relative to it be done, only its being stowed away in my old green chest, to save expenses." He then bequeathed to one man all the debts he owed, and to another his sincerity.

A Lancashire gentleman, in the last century, having given his body to the worms of the family vault, bequeathed an ounce of modesty to the authors of the London Journal and Free Briton, giving as his reasons for the smallness of the legacy, that he was "convinced that an ounce will be found more than they'll ever make use of."

Another testator, after having stated at great length in his will the number of obligations he was under, bequeathed to his benefactor ten thousand—here the leaf turned over, and the legatee, turning to the other side, found the legacy was ten thousand thanks.

A testator who evidently intended to thwart his relations and be a benefactor to the lawyers, gave to certain persons "as many acres of land as shall be found equal to the area inclosed by the centre of oscillation of the earth in a revolution round the sun, supposing the mean distance of the sun twenty-one thousand six hundred, semi-diameters of the earth from it."

An uncle left in his will eleven silver spoons to his nephew, adding, "If I have not left the dozen, he knows the reason." The fact was, the nephew had, some little time before, stolen the twelfth spoon from his relative.

Sir Joseph Jekyll left his fortune to pay the national debt. When Lord Mansfield heard of this, he said:—"Sir Joseph was a very good man and a good lawyer, but his bequest was a very foolish one; he might as well have attempted to stop the middle arch of Blackfriars Bridge with his full bottomed wig!"

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW

NOTES OF NEW DECISIONS AND LEADING CASES.

TEMPERANCE ACT OF 1864—28 VIC., CH. 22—EFFECT OF—ACTION AGAINST J. P.—QUASHING CONVICTION—C. S. U. C. CH. 126, SECS. 3, 17—PROOF OF CONVICTION.—"The Temperance Act of 1864," and the 28 Vic., ch. 22, for the punishment of persons selling liquor without license, are intended to stand together. The first is limited to municipalities where a Temperance By-law is in force, and suspends the second there during the continuance of such by-law, leaving it to apply elsewhere in U. C.

Therefore where defendant sitting alone as a magistrate convicted the plaintiff for selling liquor without a license in a township where such a by-law was in operation, *Held*, that he was liable in trespass, for the Temperance Act gives jurisdiction only to two justices.

Held, also, however, that the conviction, though void, must be quashed, under Consol. Stat. U. C. ch. 126, sec. 3, before such action would lie.

The warrant of commitment directed the plaintiff to be kept at hard labor which the Temperance Act does not authorize. The turnkey swore that the plaintiff "did no hard work in gaol." *Held*, not sufficient to negative that he was put to some compulsory work, so as to bring defendant within sec. 17 of the last mentioned act.

Semble, that a conviction returned under the statute of the Quarter Sessions and filed by the Clerk of the Peace, becomes a record of the court, and may be proved by a certified copy.—*Graham* v. *McArthur*, 25 U. C. Q. B. 478.

ACTION AGAINST J. P.—NOTICE OF ACTION—PROOF OF QUASHING CONVICTION.—Where a magistrate acts clearly in excess of or without jurisdiction, he is nevertheless entitled to notice of action, unless the *bona fides* of his conduct be disproved, but the plaintiff may require that question to be left to the jury, and if they find that he did not honestly believe he was acting as a magistrate he has no claim to notice.

A notice describing the plaintiff's place of abode as "of the township of Garrafraxa, in the county of Wellington, labourer," without giving the lot and concession, *held*, sufficient.

To prove the quashing of a conviction on appeal to the Quarter Sessions, it is sufficient to prove an order of that court directing that the conviction shall be quashed, the conviction itself being in evidence, and the connection between it and the other shewn. It is not necessary to make up a formal record, for the statute Consol. Stat U. C. ch. 114, enables the Court of Q. S. to dispose of the conviction by order.—*Neill* v. *McMillan*, 25 U. C. Q. B. 485.

RIGHT OF A MAGISTRATE TO ARREST ON VIEW.—B. entered a church during service, and, though offered a seat by the churchwarden, went into another seat allocated to a parishioner, and refused to leave it, whereupon C., who was a justice of the peace, and in the church at the time, took him in custody and kept him in custody until information could be sworn against him by the clergyman and churchwardens, and on B.'s failing to provide sureties committed him to gaol. In an action by B. for assault and false imprisonment, to which defendant pleaded the facts, it was held on demurrer that they did not justify the assault or even the false imprisonment, inasmuch as the defendant had not brought the charge within the provisions of the Act 6 Geo. 1, c. 5. It was left undecided and in doubt whether a magistrate has a right to arrest a person for a misdemeanour committed in his view, where there has been no breach of the peace actual or apprehended.—*King* v. *Poe*, 15 L. T. Rep. N.S. 37, Ir. Ex.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

PROMISSORY NOTE — MISTAKE IN AMOUNT — EQUITABLE PLEA.—Declaration by administratrix of A., on a promissory note for $140, made by defendant payable to A. or bearer. *Plea*, that at the time of making the note defendant owed A. $150, and said note was by mistake made for $140: that to correct the error defendant immediately made a second note for $150 at A's request, who received it in full satisfaction of defendant's indebtedness and of the note sued on, which was inadvertently left by defendant with A., and after his death came into the plaintiff's hands: that the plaintiff also became possessed of the note for $150, which she transferred to one F., who brought an action on it against defendant in the Division Court, which is still pending.

Held, on demurrer (reversing the judgment of the County Court), a good plea, notwithstanding that the $150 note was not averred to be negotiable.—*McHenry and Wife* v. *Crysdale*, 25 U.C. Q.B. 460.

ADMINISTRATION BOND — SURROGATE COURTS ACT—C. S. U. C. CH. 16.—The Surrogate Courts

Act, Consol. Stat. U. C., ch. 16, requires a bond from administrators, "conditioned for the due collecting, getting in, and administering the personal estate of the deceased," and enacts that such bond shall be in the form prescribed by the rules and orders referred to in the 18th section of the act. These rules were those made under the Surrogate Courts Act, 1858, which, by the section referred to, "are hereby continued." *Held*, that such rules being thus sanctioned by the legislature, a bond in accordance with the form prescribed by them must be held sufficient, though it was alleged not to comply with the statute.

Part of the condition of such bond was, that the administrator should, when lawfully called on, make and exhibit an inventory of all the estate and effects which had or should come into his hands. The first breach alleged was that the judge made an order upon him to bring in forthwith an inventory of the goods, chattels and credits, of the deceased, and that he did not make or exhibit an inventory of the goods which had come into his hands, or any inventory. *Held*, that admitting the order to be too large, it was nevertheless good to the extent of the condition, and that the breach not going beyond such condition, was also good.

Held, also, that it was unnecessary to shew the amount recoverable in respect of such breach.

Held, also, that the nonpayment of the plaintiff's judgment against the intestate could not be assigned as a breach of the bond, for the Surrogate Courts Act gives no new remedy for the recovery of debts.

Quære, however, as to the mode of carrying out the provisions of section 65.

Per DRAPER, C. J., after joinder in demurrer, the party demurring cannot without consent or leave alter or vary the grounds of demurrer.—*Bell* v. *Anne Mills, Robert Mills, and James Elliott*, 25 U. C. Q. B. 508.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT — LIABILITY OF MASTER—EVIDENCE.—Action against a railway company for the death of one D., an engine driver in their employment, alleging that they negligently employed one R., an incompetent person, as switchman, and that by his incompetency the collision occurred. It appeared that R. neglected to raise the semaphore at the east end of Stratford station, so as to prevent D.'s train going west from entering the yard while a freight train was coming from the west, and this caused the accident. According to the testimony on both sides, R. was an intelligent man, employed at work which one witness said could be learned in a day, another in two or three weeks, and after being a week about the yard he had performed this work regularly for two weeks without complaint until this occasion. A verdict having been found for the plaintiff—

Held, that there was no evidence to go to the jury that defendants negligently employed an incompetent person; that for R.'s *neglect*, he being D.'s fellow servant, the plaintiff clearly could not recover; and a nonsuit was ordered.—*Deverill, Administratrix of Deverill* v. *The Grand Trunk Railway Company*, 25 U.C.Q.B. 517.

CONVEYANCE OF PEWS — CHURCH TEMPORALITIES ACT — EJECTMENT. — Defendant, being the holder of certain pews situated in the gallery and aisles of the Church of St. James, in the city of Toronto, belonging to the Church of England, conveyed the same by deed to plaintiff, a member of that Church. It appeared that the deed, though made nominally to plaintiff, was in reality so made to him in trust for a corporation, to secure an advance of money by them to defendant, and, moreover, that several members of the corporation belonged to other religious denominations.

Plaintiff was not described in the deed as a member of the Church of England, but the evidence at the trial showed that he had been in the habit of attending the services of that Church.

Held, that there was sufficient evidence that plaintiff belonged to the Church of England, and that it was not necessary that he should have been so described in the deed.

Held, also, that the deed, even if clothed with an unexpressed trust in favor of a corporation, incapacitated under the Church Temporalities Act from being pewholders, by reason of their not belonging to the Church of England, was nevertheless not void *in the eye of a court of law*, because it was apparently good on its face, and it was therefore binding between the parties to it.

Semble, that a court of equity would not set aside the deed on account of the existence of such secret trust, but that a court of law could not recognize it, even if it were set out.

Held, also, that plaintiff could not maintain ejectment for the pews, because he was not entitled to the exclusive possession of them, his possession being limited to the special purpose of attending divine service, at which time alone he had the right to enter; and because such right was of an incorporeal nature, and possession of it could not be given by the sheriff.

Case, is the proper remedy for the disturbance of the right to occupy a pew.

Definition of the words "actual purchase," contained in sec. 7 of the Church Temporalities Act.

The court in *banc*, after verdict and exception taken, amended the record in ejectment, by adding the words "lands and premises" to the property sued for.—*Ridout* v. *Harris*, 16 U.C. C.P. 88.

INSURANCE — ACCOUNT OF LOSS — WAIVER — MISREPRESENTATION—RIGHT TO RECOVER BACK PREMIUM.—The condition of a Mutual Insurance policy on goods required the insured, in case of loss, forthwith to give notice, and within thirty days after deliver a particular account of such loss signed with his hand, and verified by his oath, also, if required, by his books of account and other proper vouchers. The account given consisted of his affidavit stating that the premises were occupied by him as a general merchant's store: that the whole value of the goods and merchandise destroyed was $800; and some accounts were attached of goods sold to him, shewing however only charges of "goods per invoice."

Held, clearly no compliance with the condition.

The defendant's secretary wrote to the plaintiff, after the fire, that the defendants declined paying his claim in consequence of the facts not being stated in his application for the policy; and the plaintiff relied on this as a waiver of the account. *Held*, that such waiver should have been specially replied, and *semble*, that if it had been, the latter was not evidence of it.

In this application the plaintiff untruly represented the building as furnished with a brick chimney. *Held*, that, on this ground, the policy never attached, and that the plaintiff therefore might recover back his premium.—*Mulvey* v. *The Gore District Mutual Fire Assurance Company*, 25, U. C. Q. B. 424.

RAILWAY TRAVELLING—NEGLIGENCE.—1. The ticket of a person in charge of stock on a railroad car was endorsed as follows:—"The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the Company shall not be liable, under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person, or for any loss or injury to the personal property of the party using this ticket."

Held, that it did not excuse the company for *negligence*.

2. Placing a platform between two tracks, leaving but a narrow space, is *negligence*.—*Penn. R. R. Co.* v. *Henderson*, Phil Leg. Int.

INSURANCE.—A covenant limiting insurance to two-thirds of value is a fundamental condition. Its violation is fatal, and forfeiture the necessary penalty.—*Mitchell, jor use*, v. *Lycoming Mutual Insurance Co.*, *Ib.*

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

BLAIKIE AND THE CORPORATION OF THE TOWNSHIP OF HAMILTON.

By-law—Remuneration to Councillors—C. S. U. C. ch. 54, sec. 269.

A by-law directing payment of $30 to each member of a township council, "being $20 for services as councillor, and $10 for services for letting and superintending repairs of roads—*Held* bad as not within the power given by the act, C. S. U. C. ch. 54, sec. 269.

[T. T., Q. B., 1866.]

The Corporation of the Township of Hamilton, on the 8th of January, 1866, passed a by-law, entitled "By-law to provide for the payment of councillors in the township of Hamilton, for the year 1865," as follows:

"Whereas it is necessary to provide for the payment of councillors for the past year,—Be it therefore enacted, and it is hereby enacted, by the Municipal Corporation of the township of Hamilton, that an order on the treasurer be granted to each councillor for the sum of thirty dollars, being twenty dollars for services as councillor, and ten dollars for services for letting and superintending repairs of roads."

Hector Cameron, in Easter term last, obtained a rule *nisi* to quash this by-law, on the ground that the township council had no authority to pass it, and that it provides for the payment of illegal and improper charges to the members of the council, and for services for which by law they are not entitled to any remuneration.

C. S. Patterson in this term, shewed cause, contending that the by-law was authorized under the Municipal Act, Consol. Stat. U. C. ch. 54, sec. 269, which enacts that "The council of every township and county may pass by-laws for paying the members of the council for their attendance in council, at a rate not exceeding one dollar and fifty cents per diem:" that all reasonable intendments should be made in favor of the by-law; and that for all that appeared the sums mentioned in it were in fact within the clause, and intended as compensation to the members for their attendance in council, at all events as to the twenty dollars.

Hector Cameron, contra, was not called upon.

DRAPER, C. J.—I am of opinion that this by-law is clearly bad, and I think it better that we should not seem to intimate any doubt in its favor by delaying to make the rule absolute. Such a by-law should shew upon its face that it is within the statutory power. Here it does not appear that the money directed to be paid is for the attendance of the members in council, nor if so at what rate; and as to the ten dollars, it is clearly intended as a remuneration not authorized.

HAGARTY, J. concurred.

Rule absolute.

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, *Esq., Barrister-at-Law.*)

HINGSTON v. CAMPBELL.

Insolvent Acts of 1864,1865—*Official assignee—List of creditors.*

A list of creditors of the insolvent, need not be appended to an assignment made to an official assignee.

A voluntary assignment must be made to an official assignee resident in the county in which the insolvent resides, and carries on his business; and the amending Act 1865, makes no change in this respect.

[Chambers, August, 1866.]

Osler obtained an interpleader summons calling on the plaintiff and Henry Charles Voigt, the claimant, their attorneys or agents to shew cause why they should not appear and state the nature and particulars of the respective claims to the goods and chattels seized by the sheriff of the County of Lennox and Addington under the writ of *fieri facias*, issued by the plaintiff in this cause; and maintain or relinquish the same and abide by such order as might be made therein.

The summons was obtained upon the usual affidavit of the deputy sheriff, setting forth the seizure by him of the goods in question on the 19th July, 1866.

Kerr, for the claimant, filed affidavits, shewing that on the 26th July, 1866, the defendant executed a voluntary assignment of all his estate and effects to the claimant as official assignee under the provisions of the Insolvent Act of 1864 and the amendment thereto.

C. W. Patterson for the execution creditor, objected that the assignment was irregular.

1. Because the requirements of the Insolvent Act of 1864 had not been complied with, in that a copy of the list of creditors or schedule of creditors of the assignor was not appended to the assignment as required by sec. 2, sub-sec 6, of that Act.

2. Because the assignment was not made to an official assignee resident within the County within which the insolvent had his place of business. He referred to the Insolvent Act of 1864, sec. 2. sub-sec. 4; and filed affidavits shewing that an official assignee has been properly appointed resident at Bath in the County within which the insolvent had his place of business, and that the claimant is an official assignee, resident at Kingston, in another County.

Kerr, in reply as to the first objection referred to the Insolvent Act 1864, sec. 2 sub-sec. 1, 2, 3, 4, and 29 Vic., Cap. 18, (amending the same), sec. 2; and argued that as under the latter Act, an assignment might be made without the performance of the formalities required by the above sub-sections of the Insolvent Act 1864, including amongst others, the production, at the first meeting of creditors, of a list of all his creditors; it follows that a copy of the list of creditors appended to the assignment was no longer necessary; for a copy could not be made of that which did not exist.

As to the second objection, he contended that under 29 Vic. Cap. 18, sec. 2, a voluntary assignment may be made to any official assignee in any County; arguing that the use of the words "any" shews an intention on the part of the Legislature no longer to limit the debtor to the particular official assignee, resident in his own County; but that he may select *any* official assignee provided he has been appointed under the Act of 1864. And that it is often more convenient to wind up the estate in a County, other than that in which the insolvent had his place of business. The majority of creditors and debtors may reside in another County. The bulk of his estate may be there, and as in the case when a creditor under the provisions of the old Act might be selected as assignee, resident in any County whatever, so the intention was to enable any official assignee wherever resident, to accept assignments. There are no words of limitation; the words "appointed under the said Act" are merely words of description, as is also the word "official." They were so used in the Insolvent Act 1864, sec. 12, sub-sec. 6.

DRAPER, C. J., overruled the first objection, holding that as the performance of the formalities, or the publication of any of the notices required by the Insolvent Act 1864, sub-sections 1, 2, 3, and 4 of sec. 2, are no longer necessary under the amendment act, if the assignment be made to an official assignee, a copy of the list of creditors produced at the first meeting of creditors, need not be appended to the assignment, for in fact no such meeting may be held. After considering the second objection, his Lordship delivered the following judgment:—

I grant the interpleader with some doubt. The claimant must be plaintiff, and will have to prove title, and the question of his right as assignee can be raised and decided in the full court. If the matter is left to me, I shall decide against the claimant, for I cannot satisfy myself that the execution debtor could make an assignment to the official assignee of another County than that in which he resided and carried on business.

As the question had been, by consent, left to be summarily disposed of by the Chief Justice, he granted an order barring the claimant.

Order accordingly.

INSOLVENCY CASE.

(IN THE COUNTY COURT OF THE COUNTY OF HASTINGS.)

IN RE FRANK STARLING & CO. AND RE STARLING AND ARKLE.

Insolvent Act—Application for discharge—Mailing notices.

On an application for a discharge under sec. 9, sub-sec. 10, of the Insolvent Act of 1864, *held* unnecessary to mail notices to creditors under sec. 11, sub-sec. 1.

[June 3, 1866.]

Application by petition on behalf of Starling and Arkle, insolvents, for a discharge in both matters, under sub-sec. 10 of sec. 9 of the above act.

Holden for assignees and opposing creditors, objected that notices of the applications had not been mailed, post-paid, as directed by sub-sec. 1 of sec. 11.

Dickson for petitioners, contra.

SHERWOOD, Co.J.—The Insolvent Act requires, by different clauses, notices of meetings of creditors and other notices to be given, without specifying what the name shall be, and there are only three cases in which the kind of notice is specially designated, viz.: in sec. 4, sub-sec. 13, in regard to the sale of real estate; and in sec. 9, sub-sec. 6, in regard to proceedings for confirmation of discharge given by creditors, and

sub-sec. 10 of same section, in regard to insolvents applying to the court for a discharge. Sec. 11, sub-sec. 1, provides, "that notice of meeting of creditors, and all other notices herein required to be given by advertisement (without special designation of the nature of such notice), shall be so given by publication for two weeks in the *Canada Gazette*.

It is quite clear that the notices referred to above, in which the nature of them is specially designated, are not included among those in which the notice mentioned in this clause is to be given. The clause after the description of the notice continues as follows:—"and in any case the assignee or person giving *such* notice shall also address notices thereof to all creditors," &c. and shall mail the same with the postage thereon, paid at the time of the insertion of the first advertisement.

Do the words "such notice" refer to the notices excepted by the first part of the clause? and the natural conclusion is, they do. These words seem to me to be used to distinguish one kind of notices from another; and to distinguish notices of meetings, and other notices, from these excepted in this clause, and whose nature is designated by the other clauses of the statute referred to by me. This clause could not have been intended to have been applied to all notices, because the sheriff, who is required by 8th sub-sec. of the 3rd sec. to give notice of a writ of attachment being in his hands, could not by any possibility know who the creditors of the insolvent were, and could not address them by mail.

The same remarks will apply to the 13th sub-sec. of the same section. It will be observed, too, that the necessity of mailing to each creditor, when the notice in the newspaper is only for two weeks, is much greater than when it is for the same number of months. A creditor might probably overlook an advertisement for the shorter period, from absence or otherwise, which would not be so likely in the case of the longer.

I grant the discharge.

UNITED STATES REPORTS.

SUPREME COURT OF MISSOURI.

HANNIBAL AND ST. JOSEPH RAILROAD CO. v. HATTIE HIGGINS, BY ELIZA HIGGINS, HER GUARDIAN.

Prima Facie Presumption of Cause of Injury to Passengers.—The statute of Missouri giving a remedy to the representatives of a passenger killed upon a railway train, goes upon the same principle which before obtained in regard to injuries to passengers, that such injury or death *prima facie* results from want of due care in the company.

Proof of the Cause of the Injury admissible.—This presumption is not conclusive under the statute, but may be rebutted by evidence of the cause of the injury.

Distinction between Employees of the Company and Passengers.—One who had been in the employment of the company as an engineer and brakesman, until his train was discontinued, a few days previous, and who had not been settled with or discharged, although not actually under pay at the time, and who signalled the train to take him up, and who took his seat in the baggage-car with the other employees of the company, and paid no fare and was not expected to, although at the time in pursuit of other employment, cannot be considered a passenger. If he would secure the immunities and rights of a passenger, he should have paid fare and taken a seat in the passenger-car.

Effect of Free Passage or Change of Position upon the Rights of Passengers.—It will not deprive of his remedy a passenger who comes upon the train in that character, and is so received, that he is allowed, as matter of courtesy, to pass free, or to ride with the employees of the road in a baggage-car. But as a passenger who leaves the passenger-carriages to go upon the platforms or into the baggage-cars, unless compelled to do so for want of proper accommodations in the passenger-carriages, or else by the permission of the conductor of the train, must be regarded as depriving himself of the ordinary remedies against the company for injuries received unless upon proof that his change of position did not conduce to the injury.

Appeal from the Hannibal Court of Common Pleas.

The opinion of the court was delivered by

HOLMES, J.—The plaintiff below, an infant and only child of Thomas G. Higgins, who was killed while riding in a baggage-car on the Hannibal and St. Joseph Railroad, on the 16th day of September, 1861, brings this suit; the widow having failed to sue within six months to recover the $5090 damages which are given by the second section of the act concerning damages (Rev. Stat. 1855, p. 647), where any passenger shall die from an injury resulting from or occasioned by any defect or insufficiency in any railroad.

The petition is evidently framed upon that act, though the statute is not named or referred to by any express words. It contains two counts: one founded upon the second section, and the other upon the third section of the act.

The verdict was for the plaintiff upon the first count, and for the defendant upon the second count; and the damages were assessed at $5000. The defendant's motion for a new trial was overruled. The case came up by appeal, and stands here upon the first count only.

The clause of the act on which this first count is founded relates exclusively to passengers, and to the cases of injury and death occasioned by some defect or insufficiency in the railroad. This statute makes the mere fact of an injury and death resulting from a cause of this nature, a *primâ facie* case of negligence and liability on the part of the defendant, as a presumption of law. It is not a conclusive presumption, but disputable by proof that such defect or insufficiency was not the result of negligence, nor does it preclude any other defence of a different nature. The act is to be interpreted and construed with reference to the state of the law as it stood before its passage. By the general principles of law, which were applicable to common carriers of passengers and to persons standing in that relation, the fact of an injury to a passenger, occasioned by a defective railroad car or coach or by a defect in any part of the machinery, makes a *primâ facie* case of negligence against the defendant sufficient to shift the burden of proof; and by that law carriers of passengers were held responsible for the utmost degree of care and diligence, and were liable for the slightest neglect. This act is evidently based upon the same principles: it is confined by its terms strictly to passengers and to injuries arising from cases of that peculiar nature only; and it must receive a construction in accordance with these principles. Viewed in this light, it is clear that the intent of this clause of the act was to provide greater security for the lives and safety of passengers as such, and to enable the representatives of a deceased passenger to pursue the remedy given by the act; and no other class of persons is intended within its purview.

The first question here presented, is whether the deceased person was a passenger within the

meaning of the act. The evidence showed he had been in the employ of the company as an engineer and brakesman for several years with some intermission; that for several months previous to the accident and down to the 4th day of September, 1861, when his train was stopped by guerrillas, he had been continually on duty as a brakesman; and that, about that time, the interruptions occasioned by actual hostilities in that neighbourhood had caused the train on which he was employed to cease running for a time; and that for several days before the day of his death he had not been on actual service on any train, but his name still remained on the roll of the company's employees as before. He had never been paid off and discharged; his account was unsettled; there were arrears still due him at the time of his decease. It appears brakesmen were paid monthly, but at the rate of so much per day for as many days as they actually worked during the month.

These facts would all go to show that his employment still continued, and that his relation to the company was still that of an employee. On the morning of the accident, he signalled the train to stop and take him up where he was; he took his place on the baggage-car among other employees; he appears to have treated himself as an employee, and was treated by the conductor as an employee who was passing from one point to another on the road in the usual manner. He engaged no passage, took no seat, in any passenger-car, paid no fare, and evidently did not expect to pay any: and none was exacted from him. He did not claim to be a passenger, nor was he treated otherwise than an employee by the conductor. Upon a careful examination of the evidence on this point, we think it tended to prove that he was an employee, and not a passenger within the purview of this act, and that under all the circumstances the conductor had a right to presume he was travelling as an employee of the company merely.

Such being the relation of the parties, the mere circumstance that he had been off duty as a brakesman for some days, or that he was then passing on his own private errand, and not immediately engaged on the business of the company or in running that very train, cannot be allowed to make any difference: *Gilshannon* v. *Stony Brook Railroad Co.*, 10 Cush. 228. The conductor knowing him only as an employee was not bound to inquire into his particular errand; and though informed by a casual conversation with him in the baggage-car, that he was looking for some temporary employment so as not to lose time: he still might be justified as treating him as an employee who had the privilege of free passage on the train as such. Under such circumstances it was his business, if he claimed to be a passenger, to engage or take a seat in the passenger coach, or at least in some way to make it known to the conductor that he claimed to be travelling in the character of a passenger.

Where a director was invited by the president to pass over the road as a passenger, without paying fare: *Philadelphia and Reading Railroad Co.* v. *Derby*, 14 How. U. S. 468; where a man was taken up by the engineer of a gravel-train, to be carried as a passenger, paying fare as the practice had been, and was allowed to go from the tender to the gravel-car: *Lawrenceburg and Upper Mississippi Railroad Co.* v. *Montgomery*, 7 Ind. 474; and where a man who had been a work-hand on the road, but had left the service of the company two weeks before the accident, because they did not pay him, got upon the train to be carried as a passenger: *Ohio and Mississippi Railroad Co.* v. *Muhlins*, 30 Ill. 9; and where a house-carpenter was employed to build a bridge, and was sent by the company on their cars to another place, to assist in loading timber for the bridge: *Gillenwater* v. *Madison and Indiana Railroad Co.*, 5 Ind. 340; the injured person was held to be clothed with all the right and character of a passenger and a stranger; and that he was not to be considered as standing on the same footing as ordinary employees and fellow-servants of the company.

If this party had been invited to go in the train as a passenger, or had taken a seat in a passenger-car, or had been taken on board the train in the character of a passenger, and the conductor had merely waived his right to demand fare as an act of liberality or courtesy, and had then allowed him to pass into the baggage-car to ride there, the case would have been quite different, and might have fallen within the reasoning and the principles of these adjudicated cases. The benefit of this act was plainly intended for those only who stand, strictly speaking, in the relation of passengers, and between whom and the carrier there exists the privity of contract, with or without fare actually paid, and the peculiar responsibilities which are implied in that relation and depend wholly upon it. Where the relation is properly that of master and servant only, this particular clause of the act has no application. We think this matter was not fairly nor correctly laid before the jury by the instructions of the court below.

Again, even if the deceased party would be considered as having been in any proper sense a passenger, there would not be the least doubt that he himself neglected all precautions and voluntarily placed himself in a position which he knew to be the most dangerous on the train for passengers. A baggage-car is certainly no place for a passenger, and as such the proof shows he had no business to be there at all. We are aware that it has been held in some cases, that if a passenger, who is travelling as such, is allowed to go into the baggage-car, or into a part of the baggage-car which is used as a post-office, where passengers are sometimes permitted to be, as in *Carrol* v. *New York and New Haven Railroad Co.*, 1 Duer 571, and while there an accident and injury occur, by reason of negligence on the part of the company, and under such circumstances that his being in that place cannot be said to have materially contributed to produce the accident or injury, the defendant would still be held liable. In many cases of this kind, it might be difficult to determine whose negligence had been the real cause of the injury.

But any question of this nature is removed from our consideration in this case, by force of another statute which finds an apt and just application here.

By the 54th section of the Act concerning Railroad Associations, Rev. Stat. 1855, p. 430, approved one day only after the act in question, it is expressly provided as follows:—

"In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood, or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger-cars then in the train, such company shall not be liable for the injury. Provided, said company at the time furnished room inside its passenger-cars sufficient for the proper accommodation of its passengers."

This provision is by the 57th section of the same act made applicable to all existing railroads in this state: Ibid., p. 438. Under this section the exemption of the company is made to depend upon a violation by the passenger of the printed regulations posted up in the passenger-cars only. They are not required to be posted up in a baggage-car: it is presumed that no passenger will ever be found there. There was evidence in the case tending to prove that the provision of the statute had been complied with on the part of the defendant; but the printed forms used had been changed since that time, and no copy of the former cards had been found, and on proof made of the loss of them, secondary evidence was offered to prove their contents. This evidence was excluded as irrelevant and having no bearing upon the case. In the view we have taken of this statute, the evidence was certainly very material and should have been admitted. It is true such notice would have given this party no information, for the reason he did not go in the passenger-car; the evidence tended to show that he was in fact well acquainted with these regulations; and this consideration, so far from weighing anything in his favour, would rather tend to strengthen the inference that he was not a passenger at all. This statute proceeds again upon the general principles of law in relation to contributory negligence, and it supposes that a passenger who has had the warning of this notice, and yet has placed himself in a situation so dangerous as a baggage-car, is to be considered as contributing by his own negligence to produce the injury, and therefore that the company is not to be held liable in such cases.

We think that the first and second instructions asked for by defendant should have been given, and that the fifth, sixth, and seventh instructions asked for by the plaintiff should have been refused It is not deemed necessary more particularly to notice the other instructions.

The judgment is reversed and the cause remanded.

The other judges concur.

(Note by Editor of American Law Register.)

The foregoing opinion seems to us to present several interesting practical points, in a very judicious and sensible light. It is sometimes difficult to determine with exact precision, when a person ceases to be an employee of the road and becomes a passenger. There is perhaps no fairer test than the one presented in this case, to allow his own claim and conduct at the time, and the acquiescence of the company, to determine that question. At the time, one who has recently been in the employment of the company, has a motive to claim the privileges of the employment, by passing without the payment of fare. And if he claims the privilege, and it is acceded to by the officers of the company, there is great injustice in allowing the person at the same time to hold the company up to the higher responsibility which it owes to passengers, from whom it derives revenue. It should, therefore, be made to appear, that one who passes in the character of an employee of the road, was really a passenger, before he can fairly be allowed to demand the indemnity which passengers may by law require. If the person assumes one character for advantage, and the company accede to the claim, he ought not to be allowed the benefits of any other character, unless it is very clear that such was his real position, and that this was understood by the company.

The effect of free passes, and of the passenger being out of his place in the carriages, is very fairly presented, as it seems to us, in the foregoing opinion, and the principal cases are referred to upon all the points.

I. F. R.

CORRESPONDENCE.

A few vexed questions on Division Courts practice.

To the Editors of the Law Journal.

Gentlemen, — By the amended Division Courts Act, passed in 1863, viz., 27 Vic. chap. 19, it is enacted, that it is desirable to lessen the expenses of Division Courts suits, and "that any suit cognizable in a Division Court may be entered and tried and determined in the court, the place of sitting whereof is *the nearest to the residence* of the defendant or defendants, and such suit may be tried and determined, irrespective of where the cause of action arose, and notwithstanding that the defendant or defendants may at such time reside in a county or division other than the county or division in which such Division Court is situate and such list entered."

I am aware that in your *Law Journal*, in 1864 (vol. x. p. 286), you published a valuable circular or comment upon this act, by Judge Hughes, of the county of Elgin, but yet I am also aware that some County Court Judges do not agree with him in his construction of the act; I mean particularly where he says that, on construing the word "nearest," we must understand distance as "the crow flies."

Some judges hold that the meaning is, by "the nearest travelled or available road." Thus it is quite possible for a court in a—to him—foreign county to be nearer the defendants residence than the nearest court of his own county, as the crow flies; yet if the distance be travelled by the only roads opened or available to the defendant, the distance to the first-named court would be much greater

than to the one in his own county. This may often occur in new townships and settlements, or where highlands or small lakes occur.

Unless, therefore, the defendant can travel through the forest, over highlands or through the lake, he would be compelled to go much further to the court in the foreign county, than to the court in his own county.

On the other hand, if two constructions are to be put upon this section, varying as to the nature of each locality, then an evil will arise. The question is, should the reading be "*the nearest available road*," or "*the nearest as the crow flies?*"

Another construction put upon this act is, that the words "writs, process, and proceedings," will not warrant the service or enforcement of ulterior proceedings on a judgment summons and order to commit issued on a judgment summons and order to commit, issued on a judgment obtained under the above section, and does not extend to interpleader process on the execution issued on such a judgment.

I have my own opinion on these questions, but they do not coincide, I happen to know, with at least one County Court Judge.

Another question, which is now very commonly raised in the practice of Division Courts, is whether, after the lapse of six years, judgments of Division Courts can be enforced, although executions may have issued or may not have issued?

The question may be asked in this manner, —Why should a question or fact once adjudicated on be again adjudicated; or upon what principle of natural justice should a man lose his debt, when, having obtained a judgment on it, and done all he could to recover it, yet has to wait simply because the defendant has no goods and runs away, or even if he gives time from motives of lenity? A judgment of a Division Court may not be a judgment of record, but it is a record on a book, and settled by the act of law. In this case, too, I happen to know there is a difference of opinion among County Court Judges.

Another question arises frequently in Division Courts as to the liability of bailiffs or clerks' sureties. Take first this case: The sureties are bound by covenant under seal. A bailiff returns an execution, *nulla bona*, when he either might have levied and made the money and did not, or he has actually made the money and concealed the fact. The plaintiff in the execution searches the office of the clerk and finds the return, supposes it correct, yet, after six years—perhaps ten years —finds out that the bailiff has been derelict in duty, has received the money, or been guilty of some gross misconduct. Are the sureties liable on their covenant after six years, or how long after?

Take, secondly, the question in such a case, or either of them, is the bailiff entitled to notice of action?

A third case occurs as to sureties, in this way:—Sureties covenant generally that the bailiff shall not misconduct himself to the injury of any person being a party in a legal proceeding. Suppose the bailiff receives the money of a defendant when he has no execution—after he has returned it or whilst he is suspended—are the sureties liable?

It seems a great hardship they should not be so, because often, in such cases, the bailiffs represent to the defendants that they are entitled to receive payments. I do not give it as my opinion that the sureties are liable, but there is room for grave doubts.

Another question often occurs as to the manner of reckoning time in services of notices in the Division Court. I have had occasion to differ very much, and consider several clients of mine have suffered greatly by the judgments or opinions of at least one judge on this point. In the services of notices of set-off, payments, and the Statute of Frauds and Limitations, one construction is to hold that the day of service counts, but not the court day. Another, and I think the true one, is to hold that, in all these cases, there should be six full or clear days' notice, as in the case of the service of a summons there must be ten clear days' notice. I contend that the words "at least six days before the sitting or hearing" means legally clear days. To support this opinion I refer to Arch. Prac. last ed. 131, and the case of *Young* v. *Higgins*, 6 M. & W. 49; 8 Dowl. P. C. 212. The words, "not less than six days," "at least six days," are the same as "at least six clear days."

As I do not desire to make this communication too long, I will not now allude to some other questions in my mind, but would feel happy to have the opinion of the Editors of your valuable Journal on these different questions.

CHARLES DURAND.

Toronto, Nov. 18, 1866.

[Our columns are always open to free discussion on all points of interest to Division Courts, and we shall be happy to hear further from our correspondent and from any others who may desire to express their views on these or other points of interest.—Eds. L.C.G.]

Insolvent Act—Assignees—Boards of trade.

To the Editors of the Law Journal.

Gentlemen,—Under the Insolvent Debtor's Act official assignees are to be appointed by boards of trade. In this county it is proposed to inaugurate a board, and no statutory enactment exists, that I know, affecting such organizations. Hence I take take it, if responsible parties meet and form a board, having rules, &c., a board legal enough to appoint official assignees would be created. Still I am in doubt whether a special act of incorporation ought not first to be procured, sanctioning, as it were, the board. Can yon enlighten me? Several deserving insolvents wish to avail themselves of the Act, but want to do so in this county, so as to avoid the expense of going abroad to foreign assignees, having little enough to live upon.

Please answer me in your excellent journal,

Yours,

A Subscriber.

Guelph, Oct. 15, 1866.

[The Insolvent Act of 1864, sec, 2. sub-sec. 4, and sec. 3, sub-sec. 10, meet the difficulty by providing that the Board of Trade in each County, or "the nearest Board of Trade," may appoint official assignees in and for each County.—Eds. L. J.]

New Municipal Act — Elections — Police Magistrates.

To the Editors of the Law Journal.

Dear Sir,—What is your view as to the provisions of the new Municipal Act, as to elections—say for towns? It seems to me clear, that next December the nominations for mayor, reeves and deputies must be made, and if various candidates are proposed, the election will take place in January. The 427th section seems to say so in the words that follow the words as to the time when the Act shall take effect, providing that so much of the Act as relates to the nominating of candidates for municipal office, &c., shall come into effect on the 1st day of November next.

There are doubts in many minds, also, under the 371st section. It seems that it is now obligatory, that, in all cities and towns having a certain population, a police magistrate shall be appointed, who, under the 372nd section, is to hold office during pleasure. The old Act made it a matter of choice with the municipal council, who, on recommending that a police magistrate should be appointed by the Governor, could have that privilege, having to pay for it themselves, however. Now, however, His Excellency seems to have the right, in fact must make the appointment; and the salary will, I take it, be defrayed out of the public purse. This seems just, for many cases coming before any police magistrate in a town really did not originate in the town, but abroad. There are many other reasons why this seems correct.

Please oblige with your views.

An Elector.

Galt, Oct. 13, 1866.

[The provisions, with reference to the qualifications of *both* candidates *and* electors, do not come into force until the 1st of September, 1867, section 427 having been amended by Cap. 52 of the same session.

Sec. 427 seems clear enough except as to the exact meaning of the word "qualification," and as affecting this it has been questioned whether or not an elector having property in several wards is entitled to vote in each at the coming election. It is generally thought that he cannot, but we should not endorse that view without further consideration.

Under the old act, police magistrates were paid by the corporation, but the present act does not, that we can discover, make any provision for their payment. This will be an interesting question for police magistrates to discuss until the next pay-day arrives.—Eds. L. J.]

REVIEW.

A Handy Book of Commercial Law for Upper Canada. By Robert Sullivan, M.A., Barrister-at-Law, and Charles Moss, Student-at-law. Toronto: W. C. Chewett & Co., 1866.

Information for the million has been one of the distinctive features of the 19th Century; the schoolmaster has been abroad, and there is scarcely a branch of law, physic, mechanics or any of the numerous ologies which has not had its Manual or Handy Book, to initiate the unlearned, or to give a condensation for those

desiring a *multum in parvo*. The law, particularly, has abounded in works of this kind in England—the book before us is a very creditable effort of Young Canada in the same direction.

One of the best text books ever written, Smith's Mercantile Law, has been taken as a model, and not only as a model, but the arrangement of that work, as the authors state in the preface, has been closely followed and the language often used.

The first chapter is devoted to brief outlines, (1) Of the laws in force in Upper Canada (2) Respecting collection of debts by suits; which will be found very useful to mercantile men in giving them a good general idea of how and when, and in what courts cases are to be tried, and when judgments can be obtained and executions issued and the means of enforcing them. (3) The acts respecting fraudulent preferences. (4) The married women's act. (5) Bankruptcy—a very useful sketch of the Insolvent Acts in force here. This will be particularly so to all foreigners desiring commercial dealings with this country, as they always look to the bankrupt laws with great care in such or similar cases. (6) Proceedings against representatives of deceased debtors—rather an abstruse subject by the way, which could of course only be treated of shortly.

Chapter 2 treats of Mercantile Property, which is divided into, (1) Of the good-will of a business, and (2) Shipping, as being "two classes of personal property with which merchants especially are concerned." Chapter 3 treats of Mercantile persons, that is to say, (1) Sole traders. (2) Partners. (3) Corporations and joint stock Companies, and (4) Principal and agent. Chapter 4 discusses Mercantile Contracts: (1) Bills and notes and other negotiable instruments. (2) Guaranty and suretyship. (3) Contracts with common carriers. (4) Contracts of affreightment. (5) Bottomry and respondentia. (6) Insurance. (7) Contracts of apprenticeship and of hiring and service; and (8) Contracts of sale. Chapter 5 speaks of Mercantile Remedies. (1) Stoppage in *transitu*, and (2) Lien.

It will thus be seen that a great deal of ground is covered, and though such a comparatively small work must of necessity be elementary and general, still, as the statements of the law on the various points touched upon are put concisely and clearly, a great deal of information is given on each in a small compass; and when we consider the great difficulty of condensing such important subjects as those treated, and of selecting for discussion the points of most importance and of greatest general interest, it cannot be denied that the task has been well done, and we hope that the public will shew their appreciation of it by availing themselves largely of the opportunity afforded them of obtaining so much information at so small a cost.

It is only, however, the professional man who can thoroughly appreciate that science of condensation which is so well exemplified in some of the Manuals published in England; and though the work before us will not be as useful to the profession as to the mercantile and business public, inasmuch as it gives no authorities for the propositions laid down, and is of an elementary character, it will nevertheless in the latter view be of utility to students, in giving them a general and, so far as we have seen, a correct idea of the most practical part of their future professional business, whilst merhants in the United States and in Lower Canada will for similar reasons find the book of much use to them in their transactions with this country.

The "get up" of the book is also good, and we notice that the style of cover used is similar to that introduced in Mr. O'Brien's Division Court Manual. The book contains 270 pages, and is supplemented by a full index, and the price has been fixed at $2.

APPOINTMENTS TO OFFICE.

CORONERS

GILBERT C. FIELD, of the town of Woodstock, Esquire, M.D., to be an Associate Coroner, for the County of Oxford. (Gazetted, October 6, 1866.)

PHILIP PARKER BURROWS, of Millbrook, Esquire, M.D., to be an Associate Coroner, for the United Counties of Northumberland and Durham. (Gazetted, October 6, 1866.)

NIEL DUNLOP, of Loughborough, Esquire, M. D, to be an Associate Coroner, for the County of Frontenac. (Gazetted, October 6, 1866.)

GEORGE W. JONES, of the Village of Prince Albert, Esq., M.D., to be an Associate Coroner, for the County of Ontario. (Gazetted, October 6, 1866.)

GEORGE WILSON, of Humberstone, Esquire, to be an Associate Coroner for the County of Welland. (Gazetted, October 6, 1866.)

WILLIAM JULIUS MICKLE, of Petrolia, Esquire, M.D, to be an Associate Coroner for the County of Lambton. (Gazetted, October 6, 1866.)

MELTON H STARR, Esquire, M.D, to be Associate Coroner for the United Counties of York and Peel. (Gazetted, October 20, 1865.)

NOTARIES PUBLIC.

JOHN McKEOWN, of Hamilton, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted, October 6, 1866.)

WILLIAM HORATIO RADENHURST, of Perth, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted, October 6, 1866.)

PEDRO ALMA, of Niagara, Esquire, Barrister-at Law, to be a Notary Public for Upper Canada. (Gazetted, October 13, 1866.)

ABRAM WILLIAM LAUDER, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted, October 13, 1866.)

JOHN HENRY ANSLEY, of Simcoe, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted, October, 13. 1866.)

TO CORRESPONDENTS.

"CHARLES DURAND"—"A SUBSCRIBER"—"AN ELECTOR"—Under "Correspondence."