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.

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The Local Courts'
AND
MUNICIPAL GAZETTE.

AUGUST, 1872.

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.

PUBLIC RIGHTS AND PRIVATE INJURIES.

Public convenience is of so much importance in the eyes of the law that private rights have not infrequently been invaded, and often this is so necessary and unavoidable that, whilst we may feel that a hardship has been done, we must admit that there was no escape from the dilemma of injuring one, or of, on the other hand, injuring many. But this principle must not be pushed too far, and, at least, the individual must, as far as possible, be remunerated for the injury he may sustain for the public good.

A recent case is instructive on this subject. The authorities of a township corporation, in the discharge of their duties, cut and deepened certain ditches on the side of one of the public roads, and the result was that part of the plaintiff's land was flooded and his crops injured. The defendants pleaded that they had a statutable duty to keep the roads in repair and in discharge of this duty the alleged grievance was committed. To make the plea a good answer to the action it would be necessary to hold that a municipality, for the purpose of repairing or draining their road, may

commit any injury to a man's land in throwing water upon it, without being obliged to give him any compensation; that they may collect all the water and throw it on his land as a reservoir, so long as they do it for the purpose of improving the road.

No power is conferred upon them to do any such injurious act. No provision is made for compensating any person injured by this performance of their statutable duties. In the absence of any such power the court held it impossible to accede to the defendants' argument—the Chief Justice saying: "It may be quite possible that the defendants have the right to raise or lower the level of this road, and that no remedy is given to persons injured or inconvenienced thereby; but it is a totally different matter when the acts complained of amount to an interference with the natural flow of water, or to the gathering of scattered waters into one course, and causing them to flow upon adjoining lands."

Another case had already been tried between the same parties, the declaration there charging the injuries almost in the same language as in this case, except that negligence is also charged in this action. The defendants pleaded not guilty by statute, and after verdict for the plaintiff, the court affirmed the right to recover. Wilson, J., says: "I cannot conceive what right they can have to drain all the surface water of any particular area against the land of another, and to drain it in part or altogether to the destruction of plaintiff's farm, although they may have done their work in the most skilful and scientific manner, and though it may have been absolutely necessary to drain in this manner for the making of a good road."

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 passages 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 shouldst 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 Tichborne *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 H. and N. 679; s. c. below, 3 ib. 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 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. 28; *Vaughan* v. *Taff Vale R. R. Co.*, 5 H. & N. 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*, ib. 505; overruling *Bass* v. *Chi. Bur. & Qu. R. R. Co.*, 28 ib. 9; *Chicago & N. R. R. Co.* v. *Simmons*, 54 ib. 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 build 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*, ib. 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 determination 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 liability 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 acknowledging 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

* *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.)

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 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 build-

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

† 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.

ings 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.*

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 resum-

ing 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.*

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

ASSESSMENT FOR STREET WATERING.

There must be a *by-law* for the necessary assessment, for the watering of a street, passed *subsequent to, and consequent upon*, the presentation of the required petition therefor, and after the fullest opportunity given to any ratepayer to object to its passage, and a *resolution* for that purpose, passed by a municipal corporation, under a by-law antecedently made, and which authorized this mode of proceeding, instead of by by-law, was therefore quashed, but without costs, as the applicant had been one of the petitioners, was well aware of its object, had enjoyed the benefit of the resolution, and had been dilatory in complaining.—*In re Morell* v. *City of Toronto*, 22 C. P. 323.

COUNTY JUDGE DRAWING PAPERS.

The Consol. Stat. U. C. ch. 15, sec 5, as amended by 29 Vic. ch. 30, enacts, that no County Court Judge shall directly or indirectly practice in the profession of the law as counsel, attorney, solicitor, or notary public, or as a conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, under the penalty of forfeiture of office and of $400.

The declaration alleged that defendant, being such Judge, did in certain proceedings in the

Surrogate Court prepare certain papers and documents to be used in said Court, to wit, the petition of one G., &c., describing the papers. Defendant pleaded that he did not practice in the profession of the law as an attorney for said G., or as such attorney prepare any papers or documents to be used in said Surrogate Court.

The evidence shewed that defendant prepared *gratuitously* for G., who was a widow in poor circumstances, the petition, bond, and affidavits required to enable her to obtain administration to her late husband.

Held, that the second plea was proved, and a verdict was therefore entered for defendant on the leave reserved.

Per *Draper, C. J. of Appeal*, and *Morrison, J.*, the evidence did not bring defendant within the spirit of the act or the mischief against which it was directed, which was the doing the acts prohibited *for profit.—Allen qui tam* v. *Jarvis*, 31 U. C. R. 56.

HIGHWAYS.

Held, on demurrer to the pleas set out below, that a municipality cannot, for the purpose of repairing or draining a highway, commit an injury to private property, by collecting and conveying water to it, and shelter themselves from liability under their statutable obligation to keep the road in repair:

Held, also, that a similar statutable duty of opening the road upon which they grew, was no answer to an action for injury caused to plaintiff's land by the felling of trees, accompanied by the allegation that in so opening the road a portion of the trees, in being cut and felled, necessarily reached to and fell upon plaintiff's land, but doing said land, &c., no unnecessary and no material injury, &c.—*Rowe* v. *Corporation of Rochester*, 22 C. P. 319.

INSOLVENCY.

Held, on exceptions to the plea set out below, that a deed of composition and discharge, made without any proceedings in insolvency (before or after), without any assignee being appointed, and apparently wholly outside the Insolvent Court, cannot be a bar to non-assenting creditors.—*Green* v. *Swan*, 23 C. P. 307.

SALE FOR TAXES

Under the 13 & 14 Vic. ch. 67, land was sold in 1852, for taxes of several years, including 1851, for which year the collector's roll had been returned to the treasurer, with his affidavit that the reason for not collecting the amount was that the land was non-resident. It was proved clearly, however, that from the 6th February, 1851, until long after the sale, the land had been occupied by defendant's father, who lived upon it with his family.

Held, that the sale was illegal.

It was objected also that there was no proof of want of distress on the land, nor of the advertisement of sale: that the affidavit of the collector was insufficient: that the assessment was not proved: that sections 45 and 46 of the Act had not been complied with: and that the sheriff did not sell that part of the lot most beneficial to the owner; but these objections, upon the evidence set out below, were overruled, except the last, which was not decided.—*Street* v. *Fogal*, 22 U. C. R. 119.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

MILITIA BAND INSTRUMENTS.

In replevin for certain instruments forming part of the band of a militia band, brought by the commanding officer, it appeared that the instruments had been purchased partly by money voted by the city corporation, partly by general subscription, and partly by donations of the officers and men of the battalion. Some difficulty having arisen amongst the officers, one defendant refused to give up the instrument, alleging his right to hold possession as being president of the band committee, and the other defendant acted with him.

Held, 1. That under sec. 48 of 27 Vic. ch. 3, the instruments became the property of the commanding officer, who might maintain replevin for them; and that this section, as to such property, was in no way controlled by section 47.

2. The defendants were not entitled to notice of action under 31 Vic. ch. 40 sec. 89, for that statute had no application; but that if it had there could be no right to such notice in replevin; and the finding of the jury, that defendants did not honestly believe that they had the power under the statute to do what they did, would also disentitle them to the notice.

3. Following *Deal* v. *Potter*, 26 U. C. R. 578, that the plaintiff was entitled to recover as damages the value of any of the goods which could not be replevied.—*Lewis* v. *Teale and McDonald*, 31 U. C. R. 108.

PROMISSORY NOTE—STAMPS—PLEADING.

To an action by payee against maker of a promissory note, the plea was that there was not affixed thereto, at time of making, an adhesive stamp, or stamps of the required

amount, or any stamps whatever, as required by the statute in that behalf:

Held, on demurrer, plea good.—*Escott* v. *Escott*, 22 C. P. 305.

QUIETING TITLES ACT.

To complete the chain of the paper title to 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 circumcumstances 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.—*Re Street*, 8 C. L. J. N. S. 197.

RAILROAD TICKET.

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 distinction, 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.—*Adam Dietrich* v. *Pennsylvania A. R. R. Co.*, 8 C. L. J. 202.

RAILWAY PASSENGERS' LUGGAGE.

The plaintiff, a carpenter, had with him, as a passenger by defendants' railway, a box containing a concertina, *a rifle, a revolver, two gold chains, a locket, two gold rings, a silver pencil case*, a sewing machine, and a quantity of tools of his trade, such as chisels, planes, &c. The box having been lost at the Toronto station while in defendants' care:

Held, that the articles in italics were ordinary personal luggage, for which defendants were responsible, but that the others were not: Wilson, J., dissenting as to the concertina.

Held, also, that the fact of the other articles being in the box could not prevent the plaintiff from recovering for such as were personal luggage.—*Bruty* v. *The Grand Trunk Railway Company of Canada*, 31 U. C. R. 66.

ONTARIO REPORTS.

COMMON PLEAS.

STEWART *v.* TAGGART.

Sale of land for taxes—Whole lot previously assessed—Subsequent assessment of half, and apportionment of taxes between both halves—Collector not bound to search for distress—32 Vic., ch. 36—Treasurer's list: its contents and time of furnishing—Quantity need not be described—Party assessed may purchase.

A lot, previously assessed as to the whole, was, on claim made to half of it, assessed as to this half, and the taxes of previous years apportioned between both halves: *Held*, that there was no objection to this.

Where land is assessed and taxes imposed, an omission by the collector to demand and levy the amount from property on the premises, cannot, since 32 Vic., ch. 36, avoid the sale.

The treasurer's list, under secs. 110 and 131 of the above act, is sufficiently furnished at any time during the month of February.

This list need not contain the amount in arrear.

A designation, in the list, thus "N. W. or W. ½ 14," *held* sufficient.

It is not necessary at a sale of land for taxes to describe particularly the portion of the land to be sold, and therefore a sale of "89 acres" of a particular lot was held sufficient.

The party assessed may become the purchaser of the land sold for taxes.

(22 C. P. E. T. 284.)

Ejectment for 89 acres, west-half lot 14, 9th concession of Wawanosh.

Plaintiff claimed under a tax title; defendant, as tenant to one Owens.

At the trial, at Goderich, before Gwynne, J., plaintiff proved a deed from the warden and treasurer to him (dated 1st December, 1870,) of the land claimed, setting out a warrant, dated 3rd August, 1869, and a sale, 30th November, 1869, for $54.59, arrears of taxes up to 31st December, 1868. The warrant was admitted, as

stated, to have been for taxes claimed for 1865, 1866, 1867, and 1868; that proper advertisements had been made; that the whole lot, 200 acres, had been assessed in 1865 and 1866 on the non-resident roll; that in 1867 and 1868 the west-half had been assessed to plaintiff, as owner, but that he was not residing on the lot, but lived about one and a-half miles distant, in the next township; that the collector had returned the taxes for 1867 and 1868 as unpaid; that the collector made no demand for these taxes; that in the return made by the treasurer to the township clerk, in 1869, the lot was described thus: "S. or E. ½ of 14, and N. or W. ½ 14," and no amount was stated as due; and for 1869 this west half was assessed on the non-resident roll.

The treasurer was called, and proved the sale and non-redemption. At the sale his entry was: "W. ½ 14, 9th con., 100 acres, $54.59. Nov. 30, Mr. Stewart, 89 acres, $54.59." He had not before, or at the sale, ascertained or determined what portion should be sold as most advantageous; but it was some days after the sale that he did so, according to the best of his judgment. He did not know of any clearing or improvement on the land sold. On the 30th of January, he mailed the list to the township clerk in Wawanosh. This clerk had subsequently died, and he could not say whether it would reach that day. In 1867, the treasurer divided the taxes of preceding years between the east and west halves. The west half was returned in 1867, with taxes not collected, the reason given being "non-resident." In 1868 the same was the entry in the resident roll.

For the defence, the defendant swore that he had been living on the west half for four years, to May, 1871, and had improved it; that he had built a house in 1867; and that there was ample property out of which the arrears could have been made; that no taxes had ever been demanded of him; that in 1870 he had his name put on the lot; that part of his house might be on the road; that he was a squatter without title.

There was other evidence on this.

It was also shewn that, in course of mail, a letter posted January 30th would be at the post-office in Wawanosh about 7 p m, 1st February

For the defence it was objected, 1st, that the lot should not have been divided in 1867, and the taxes of that year were not sufficiently in arrear; 2nd, that there was a distress in 1868 sufficient to cover the taxes; 3rd, that no demand had been made for the taxes; 4th, that no proper list had been furnished to the township clerk, nor proper half designated, and no amount stated; 5th, list not proved to have been forwarded by 1st February; 6th, the sale was void, because the treasurer did not select the land actually sold, *i.e.*, there were no particular 89 acres sold; 7th, that plaintiff, being assessed as owner, could not purchase, and arrears should have been collected out of his property in Ashfield, being within the county; that there was no proper return under sec. 111 of the Act.

There was a verdict rendered for plaintiff, subject to the opinion of the Court on these objections.

In Michaelmas Term, *Harrison*, Q C., obtained a rule on these grounds, to which

A. Richards, Q C., shewed cause, citing 29 and 30 Vic., ch. 53, secs. 95, 96, 112, 131; *Laughtenborough* v. *McLean*, 14 C. P. 175; *Payne* v. *Goodyear*, 26 U. C. 448; *Allan* v. *Fisher*, 13 C. P. 63: *Raynes* v. *Crowder*, 14 C. P. 111; *Hall* v *Hill*, 22 U C 578; *Cotter* v. *Sutherland*, 18 C. P. 395; 32 Vic., ch. 36, sec. 120 (O.)

Harrison, contra, cited *Knaggs* v. *Ledyard*, 12 Grant, 320; *Harbourne* v. *Bushey*, 7 C. P. 46; *Munro* v. *Gray*, 12 U. C 647; *Mills* v. *McKay*, 15 Grant, 192; *Warne* v. *Coulter*, 25 U. C. 177; *Townsend* v. *Elliott*, 12 C. P. 217; *Doe Upper* v. *Edwards*, 5 U. C. 594; *Quackenbush* v. *Snider*, 13 C. P. 196; *Grant* v. *Gilmour*, 21 C. P. 18; *Charlesworth* v. *Ward*, 31 U. C. 94.

HAGARTY, C.J., delivered the judgment of the court.

We do not see how the treasurer could have done otherwise than divide the lot in 1867. It is not for him to examine critically each man's claim to land. The claim of plaintiff in 1867 was made to this west half, and, without reference to the goodness or badness of such claim, the division was made in good faith. Under secs. 24, 25, and 27, in the Act of 1866, we think no objection can be urged to the course taken. The assessments for 1865 and 1866 were equally divided between the halves, and from thenceforward they were assessed separately. No injustice was done to any one by this proceeding.

Then, as to the existing distress. These proceedings were under the Act of 1866, and with this point we may conveniently consider the other objections as to the absence of any demand of the taxes.

Sec 95 directs the collector to call at least once on the party taxed, if within the local municipality, and if the person (sec. 96) whose name is on the roll reside outside the municipality, he shall notify by post. These are preliminary requirements to a distress.

By sec. 98, where a non-resident has required his name to be put on the roll, the collector shall notify by post, and may distrain anything on the land

Here the name on the roll was that of Stewart, who lived in another township, and the defendant, in 1867, had nothing to do with it, and in 1868, when he alleges he had the property there, was still not on the roll. The collector might, on taking the proper steps, have levied the arrears by distress on the lot.

When the treasurer (sec. 127) knows there is distress, he may levy it. The Act of 1868–9, 32 Vic cap. 36, sec. 130, directs that the treasurer need not make enquiry as to distress before selling; and if any tax shall have been due for the third year preceding the sale, and no redemption within the year, the sale, if openly and fairly conducted, shall be final and binding, "it being intended by this Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the treasurer's sale thereof."

I am of opinion that if the land was assessed, and the taxes in fact unpaid, an omission by the collector to levy the amount from property which, by due diligence, he might have found liable

thereto, cannot, in the present state of the law, avoid the sale.

It cannot be, in my judgment, that the validity of the sale is to depend on the diligence or want of diligence in a collector in some previous year. The want of a demand may be a good reason to avoid a distress, but one very insufficient for the purpose it is now used. The clause of the Act above cited seems to throw the onus on the owners or parties interested in lands "to pay the arrears of taxes due," and not to lie by, trusting to some irregularity or omission on the part of assessors or collectors.

We see no reason to doubt the fact of this land being assessed for and chargeable with these four years' arrears of taxes. I fully agree with the views expressed by Draper, C. J., in *Allan* v. *Fisher* (13 C. P. 70): "It appears to me impossible to hold that the collector's neglect to search for goods which, with diligence, he might have found, or to enquire with sufficient care for the address of the party assessed on his roll, in order to transmit a statement to him by post, can have that effect," viz, to avoid the sale. This is quoted approvingly by the present Chancellor, in *Bank of Toronto* v. *Fanning* (17 Grant, 517).

Allan v. *Fisher* certainly held that when the lot was occupied, and A. B. known and recognized as the owner, and full distress thereon, it was the duty of the assessor to enter A B.'s name as owner, and the name also of a known occupant. Instead of this, he inserted the lot on the roll as land of a non-resident, without any name. The result was, that during that year no officer but the treasurer could receive the rates; he would be the only officer who could distrain; and the court held the assessment for that year invalid, and the sale avoided. This decision was in 1863, under (apparently) 16 Vic. cap. 182.

The present case is very different. The assessments for 1865, 1866 and 1867 are, I think, regular, for reasons stated. In 1868, the first year that distress is alleged to have been on the lot, Stewart was the person assessed, and was on the resident roll, and returned as not collected on the absentee list. Therefore it seems to me to fall within the doctrine of *Allan* v. *Fisher*, as being merely a case of neglect to search for distress, or to notify the absent owner. The omission of duty did not, as in the case cited, cause the land to be placed on the non-resident roll, and thus take the collection out of the hands of the local officer. Several of the judges in the Court of Appeal, in *Bank of Toronto* v. *Fanning* (18 Grant, 391), consider everything cured if any part of the taxes be in arrear for the statutable period.

We hold this objection to fail without the aid of this view of the law.

As to the treasurer's list to be furnished to the clerk, section 110 (1869) directs him to send a list of all the lands in respect of which any taxes shall have been in arrear for three years preceding the first day of January in any year, such list to be furnished on or before the first day of February. Section 131 forbids the sale of any lands not included in the lists furnished to the clerk in the month of February preceding the sale.

Even if we found it clearly proved (which it is not) that the list here was not furnished till after 1st February, we should hold that its being furnished any time during February would be sufficient under these two sections. The section gives the heading that is to be on the list; it does not say in terms that the amount of taxes in arrear shall be stated in the list.

It is objected that the list sent 30th January, 1869, gave no amounts of arrears, but merely the list of the lands liable to be sold for arrears of taxes in the year 1869.

This land appears as "9th con., S. or E. ½ 14; N or W. ½ 14." The land probably lies north-west or south-east, and nothing was shown that the description would not sufficiently identify it.

The effect of sections 111, 112, 113 and 114 seems to be that the fact of the land being in arrear, and liable to be sold, shall be communicated by the treasurer to the township clerk, who shall give copy of the list to the assessors, who shall ascertain if any of the lots named are occupied, and notify the occupants, and the owners, if known, that the land is liable to be sold for arrears of taxes, and enter in a column, "occupied, and parties notified," or, "not occupied." The clerk is then to ascertain if any lot on the list is entered as occupied. He shall notify the treasurer thereof, and the latter, by the 1st July, shall return to the clerk an account of all arrears of taxes due in respect of such occupied lands, and the clerk shall then put the amounts in the collector's roll for the year, to be collected, &c.

The objection that the treasurer's list, filed at the trial, as sent in January, does not therefore avail.

I hardly understand the force of the objection that there was no proper return under section 111. The only return there spoken of is that by the assessor to the clerk.

No evidence was given or enquiry made respecting this matter when the witnesses were being examined, and we do not see how we are to assume anything to be wrong.

As to the objection that at the sale no particular 89 acres was sold, it is cured by the statute of 1868-9, section 138: "It shall not be necessary to describe particularly the portion of the lot which shall be sold, but it shall be sufficient to say that he will sell so much of the lot as shall be necessary to secure the payment of the taxes due." By section 141, after selling, the treasurer shall give a certificate stating distinctly what part of the land has been so sold, &c.

We see nothing in the objection that the plaintiff could not purchase, having been assessed for the land.

We think the rule should be discharged.

Rule discharged.

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.

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. *Jarvis*, (*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.

APPOINTMENTS TO OFFICE.

ASSOCIATE CORONERS.

THOMAS SWAN, Esquire, M.B. for the County of Waterloo.

DAVID BURNET, Esquire, M.B., for the United Counties of Northumberland and Durham.

JOHN DOUGALD McLEAY, Esquire, M.D., for the County of Middlesex. (Gazetted June 1st, 1872.)

J. HENRY WIDDIFIELD, Esquire, M.D., for the County of York.

JOHN JAMES KINGSTON, Esquire, M.D., for the County of Elgin. (Gazetted June 8th, 1872.)