certainly has neither varied nor reversed the decision of the Court of Review.

As to the question itself, as at present advised, we do not think it would be found to present any great difficulty, and if the city assessors or the Court of Revision had put the two annual values into one, as forming the whole valuation of the "land," though there might have been an appeal to the County Judge on the question of excessive valuation, and he must have confirmed or reduced it, we do not see how, under the statute, his decision could have been brought in question.

But for the purpose of determining this case as presented, we have no objection to state our opinion that the judge of the County Court has confirmed the assessment as revised by the Court of Revision, and we think this court cannot review or annul his adjudication.

Judgment for the plaintiffs.

COMMON PLEAS.

Reported by S. J. VANKOUGHNET, Esq., M. A., *Barrister-at Law, Reporter to the Court.)*

MCCURDY V. SWIFT, ADMINISTRATRIX.

Temperance Act of 1864, 27 & 28 *Vic. c.* 18, *ss.* 40, 41—*By-Law—Liability of innkeeper—Right to sue before prosecution for felony—Death of party assaulted—C. S. U. C. c.* 78 *—Pleading.*

Declaration, that defendant by his servant *wrongfully and in violation of the Temperance Act of* 1864. *in the township of A., then and there being fully in force*, furnished and gave one W. while in defendant's inn intoxicating liquors, whereby he became and was intoxicated, and while so intoxicated did assault the intestate, whereby he was immediately killed;

Held, on demurrer, that it was not necessary to allege a by-law of any municipal body as in operation in A. under the Temperance Act, but that the declaration could be sufficiently maintained under the 41st section of that Act, under which the action was brought, as being one of the express provisions in force everywhere, irrespective of local prohibition, without holding that *fully* in force meant that the *full* Temperance Act was in force in A., which would have required a by-law to have been first passed for the purpose. But,

Held, that the declaration was defective, in not shewing that W. drank *to excess in the inn*, which was necessary to fix the innkeeper with liability under the 40th sec. of the Act.

Held, also, (1.) That the Temperance Act may be construed as giving the civil remedy, at any rate against the innkeeper, notwithstanding a felony may have been committed which has not been prosecuted for, although it does not, like the Imperial Act, contain any express provision to that effect. (2.) That, as the legal representative is by sec. 41 expressly authorized to sue for an assault upon the deceased, the action may, under the construction of the act be brought, though such assault has resulted in death. (3.) That this case was within the terms of C. S. C. ch. 78, the death of a person having been caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the injured party (by virtue of the Temperance Act) to maintain an action and recover damages in respect thereof; and that, therefore, defendant, who would have been liable by that act if death had not ensued, was still liable, notwithstanding the death of the person injured, and though caused under such circumstances as amounted to felony; and, therefore, the case was within that act.

Semble, that the allegations in the declaration, that the intestate was killed within twelve months next before action brought, and that plaintiff sued as well for the benefit of herself, as the wife of deceased, as for that of their infant children, were necessary allegations.

[C. P., T. T., 1866.

The *declaration* stated that in the lifetime of Angus McCurdy, the deceased and intestate, the defendant was in the possession and occupation of a certain inn, tavern, or house of public entertainment, in the township of Ashfield, and while so using and occupying the same, which was under the charge of a servant of the defendant, the defendant, by his servant, wrongfully and in violation of the Temperance Act of 1864, in the township of Ashfield, then and there being fully in force, furnished and gave one William Wooley, while in the said inn, &c., intoxicating liquors, whereby Wooley became and was intoxicated, and while so intoxicated did assault, beat and ill-treat the said Angus McCurdy, whereby he was immediately killed, within twelve months next before the commencement of this suit; and the plaintiff, as administratrix, pursuant to the statute in that behalf, as well for the benefit of herself, as the wife of the said Angus McCurdy, as for the benefit of the three infant children [naming them] of the said Angus McCurdy, born of the body of the plaintiff, brought this action, and claimed $5,000.

The defendant demurred to the declaration on the following grounds: —

1. No by-law was shewn to have been passed, prohibiting the sale of intoxicating liquors in the township of Ashfield.

2. No facts were shewn from which it could be ascertained that the furnishing of intoxicating liquors to William Wooley was in violation of the Temperance Act of 1864.

3. The plaintiff could not, by the rules of pleading, allege generaly that the furnishing of intoxicating liquors was in violation of the act, for it involved an allegation of law,

4. No proper issue in fact could be taken on such allegation.

5. There were various provisions of the act against furnishing liquor, and the particular facts relied upon should have been shewn, so that it might have been known whether the facts were within any of the provisions of the act.

6. No facts were shown from which Wooley became or ever was liable to an action by the said Angus McCurdy for or in respect of the alleged assaulting, &c., and therefore defendant was not liable in this action.

7. McCurdy having been immediately killed, Wooley never was liable to McCurdy for the assault, &c.

8. It appeared a felony had been committed, and there could be no right of action by McCurdy against Wooley.

9. It was not shewn that Wooley had been acquitted or convicted of the felony, or of the assaulting, &c.

10. The statute did not apply when the party assaulted was killed by the assault.

11. It was not shewn the defendant's servant had any power, permission or authority from the defendant to furnish the liquor to the deceased.

In Easter term last, *S. Richards*, Q. C., for the demurrer:—

It was not stated, nor can it be inferred, that there was a sale of spirituous liquors by the defendant in violation of law. The exceptions in sec. 12 of the 28 Vic. ch. 18, the Temperance Act of 1864, should have been negatived.

(The Chief Justice referred to *Van Buren's* case, 9 Q. B. 669.)

The case appears to have been a felony on the part of Wooley, and therefore no action can be brought against him until after he has been prosecuted for the felony, which has not been done: *Crosby* v. *Long*, 12 East. 409; Hales' P. C. 546; but even then this plaintiff could not sue Wooley: the action against him could only be brought by