DIARY FOR MARCH.

1. Tues. *St. David. Shrove Tuesday.* Sub-Treasurer of school moneys to report to County Auditors.
2. Wed. *Ash Wednesday.*
6. SUN. *1st Sunday in Lent.*
8. Tues. General Sessions and County Court Sittings County York
13. SUN. *2nd Sunday in Lent.*
17. Thur. *St. Patrick's Day.*
20. SUN. *3rd Sunday in Lent.*
25. Fri.. *Lady Day.*
27. SUN. *4th Sunday in Lent.*

The Local Courts' AND MUNICIPAL GAZETTE.

MARCH, 1870.

CRIMINAL LAW CONSOLIDATION.

A good work was done last Session by the Minister of Justice in placing on the Statute Book of the Dominion a series of Acts assimilating and consolidating with valuable amendments the whole body of the Criminal Law. Something was accomplished the previous Session, and something yet remains to be done in respect to minor outlying enactments to make a perfect whole, but we can even now boast of a more complete consolidation than they have in England, and we refer to cap. 29 of 32 & 33 Vic., "An Act respecting procedure in Criminal cases and other matters relating to Criminal Law," in proof of the assertion. All the leading acts are founded on the Consolidated Criminal Statutes passed in England as models, with such alterations and modifications as were required to suit these enactments to the condition of Canada, and such as were necessary to suit the tribunals and mode of procedure in courts of the several Provinces.

These measures were all prepared after the most careful consideration by the Minister of Justice and upon conference with leading jurists and public men from the several Provinces, and were put into shape under the direction of the Minister of Justice by that very able lawyer and most experienced legal draftsman Mr. Wicksteed, the Law Clerk of the House of Commons, assisted by the Deputy Minister of Justice. Other able and experienced men, on the Bench and at the Bar, are understood to have given their advice and assistance. Indeed nothing was left undone by the Minister of Justice to secure to the Dominion a valuable and complete code of Criminal Law.

The bills were introduced in the Session of 1868 and passed the House of Commons, but owing to influences that ought not to have prevailed with any man in a matter of science, the bills were for the most part thrown over till last Session. Although great disappointment was felt at the time, the postponement had this good effect, that the bills were all again gone over by the Minister of Justice with the most searching care to discover any error and test their correctness and completeness in every particular. The bills thus prepared, matured and perfected, finally became law and came into force on the 1st day of January last.

As already observed, the standard for most of them is the English Criminal Law Consolidation, and the value and importance of this is obvious to every professional man, and indeed must be so to any intelligent person who takes the trouble to consider the subject. Such a course opens to us at once the whole of the English cases decided on these Statutes, and the learned light they cast upon the enactments will be of the greatest possible value in assisting the numerous tribunals throughout the Dominion in determining any question that may arise upon our own enactments.

We are led to make these remarks by seeing the notices given by members for amendments to the Criminal Law—laws just come into force, and we cannot but think that any attempt to alter a code only just completed, and before even a single assize has past or sittings of the Court of Sessions taken place, untimely and uncalled for. If any positive error has been discovered let it be pointed out to the Minister of Justice, and let him, as the responsible Minister, amend it. But for independent members who have not had the whole system in view to be allowed to cut and hack at a bit here and a bit there because they may deem, or their constituents may deem some alteration expedient or necessary, is not defensible on any ground, and we trust it will not be allowed. If for no other reason the move is premature, and if the door be once opened to a "tinkering" legislature, the value of the consolidation will soon be lost. We trust that the House, in the public interest, will repress those adventurous members who endeavour to make up in courage what they lack in knowledge, training and experience.

STATISTICS.

We were, some time age, in common with other Editors of newspapers and periodicals in Ontario, requested to call the attention of our readers to the requirements of the Acts, 1868-'9, cap. 30, and 1869, cap. 22, respecting the registration of Births, Marriages and Deaths in Ontario. Probably, however, our delay herein has not been prejudicial to the cause so strongly advocated by the Registrar-General for Ontario in his circular, as the class of readers that we reach has sufficient intelligence to be fully alive to the importance of having a complete and accurate record of every birth, marriage and death occurring throughout the Province. In fact lawyers and public officials, more than others, necessarily see from actual experience of every-day business, the trouble and difficulty frequently arising from the want of authentic information on these subjects. In a variety of ways this information is required, and can only be obtained with much trouble and expense, and often without that certitude which alone makes it of value. Whilst urging the importance of a faithful compliance with the provisions of the statutes for the numerous purposes for which these statistics may be useful, it does not appear that the returns are to be looked upon as legal evidence, nor would it be proper that they should be at least without sufficient safeguards to prevent mistakes or frauds. At the same time, these returns will often be used for purposes where something less than legal evidence will suffice.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

GUARANTEE.—The defendant gave to the plaintiff, a cattle dealer, this guarantee: "50*l.* I, J. M., of, &c., will be answerable for 50*l.* sterling that W. Y., of, &c., butcher, may buy of Mr. J. H., of, &c." It appeared from the circumstances under which the guarantee was given, that the parties contemplated a continuing supply of stock to W. Y. in his trade as a butcher. *Held*, a continuing guarantee to the extent of 50*l.*—*Heffield* v. *Meadows*, L. R. 4 C. P. 595.

The following: "In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole 1000*l.*, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months;" is a continuing guarantee.—*Laurie* v. *Scholefield*, L. R. 4 C. P. 622.

CHEQUE.—If there are not effects in a bank on which a cheque is drawn sufficient for its payment when presented, and it is presented at the time when the drawer has reason to expect it will be, and he has no ground to expect that it will be paid, he is not entitled to notice of dishonor; although at the time of drawing it, but before the agreed time of presentment, there were sufficient effects.—*Carew* v. *Duckworth*, L. R. 4 Ex. 313.

FIXTURES.—A lessee of rolling mills made an equitable mortgage of the same, and afterwards became bankrupt. On a case stated between the mortgagees and the assignees, *held*, (1) That duplicate iron rods, which had been fitted to the machine and used, were fixtures, and passed to the mortgagees; (2) so were straightening plates embedded in the floor; (3) but rolls which yet had not been fitted to the machine; and (4) weighing machine, which were placed in bricked holes, the weighing plate being level with the ground, but which were not fixed to the brickwork, were not fixtures, and passed to the assignees.—*In re Richards*, L. R. 4 Ch. 630.

A steam-engine and boiler, annexed to the freehold for the more convenient use of them, and not to improve the inheritance, and capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold (Exch. Ch.)—*Climie* v. *Wood*, L. R. 4 Ex. 328; s. c. L. R. 3 Ex. 257; 3 Am. L. Rev. 271.

RITUALISTIC PRACTICES—CHURCH OF ENGLAND—COMMUNION SERVICE—"KNEELING."—A clerk in holy orders having been admonished not to kneel during the prayer of consecration in the communion service, and it having been afterwards his practice to bend one knee in sign of reverence at certain parts of the prayer, in such a manner that occasionally his knee momentarily touched the ground, though without any intention on his part that it should touch the ground, and the genuflexion being such that the congregation could not distinguish whether his knee touched the ground or not.

Held, that there was a disobedience of the monition, there having been a literal non-compliance, or, if a literal compliance, such an evasive compliance as must be treated as a non-compliance.—*Martin* v. *Mackonochie*, 18 W. R. 217.

TRESPASS TO GOODS—EVIDENCE—MALICIOUSLY ISSUING ATTACHMENT IN DIVISION COURT—EVIDENCE TO SUPPORT CLAIM FOR RENT—EXCESSIVE DAMAGES—LETTER—SECONDARY EVIDENCE.—The plaintiff took his vessel to defendant's ship yard at Oakville, to be repaired there by defendant, in accordance with a previous arrangement. The ways were occupied when she arrived, and the plaintiff went away, having said that he did not wish her hauled up in his absence. Defendant nevertheless took her out, and it was proved that a day or two after he said he would keep her on the ways against the plaintiff's will; but the repairs were proceeded with under the plaintiff's supervision, and were paid for by him.

Held, that there was no evidence to sustain a count in trespass for seizing and detaining the vessel, and that upon this evidence, and the facts more fully stated below, the plaintiff clearly could not maintain detinue.

The defendant having sued out an attachment from the Division Court, and seized under it certain materials employed in repairing the vessel —*Held*, that such attachment could not be warranted by any *intention* on the plaintiff's part to remove the property, the statute requiring an *attempt* to remove (Con. Stat. U. C. ch. 19, sec. 199); and there being no evidence of such an attempt, or of any reasonable ground for supposing it to have been made, that the defendant was liable for issuing the attachment without reasonable or probable cause.

The fourth count was for maliciously attaching for $96, when the plaintiff owed defendant only $22. *Held*, a good count, without shewing, as in the case of a distress for rent, that the goods were sold to satisfy more than the $22.

The defendant had claimed $74 for the rent of the ship-yard, which had been disallowed by the Division Court. The evidence in support of the claim was, in substance, that after defendant had worked on the vessel some time, a difficulty arose between him and the plaintiff, in consequence of which he refused to go on, and the plaintiff desired him to do nothing more. The vessel then remained in the yard for more than a month, until the plaintiff got her ready to launch, the defendant having notified the plaintiff that he must pay in advance; but there was no evidence of any letting or agreement. *Held*, that on these facts the jury were warranted in finding that the defendant had no reasonable ground for attaching for the rent.

The damages being in the opinion of the court, excessive, a new trial was ordered, unless the plaintiff would consent to reduce the verdict to a sum specified.

A letter written by defendant to plaintiff before issuing the attachment, saying that he was still willing to settle amicably, but that if the plaintiff refused to meet him in the same spirit he would push the matter to the utmost.—*Held*, not provable by secondary evidence, without a notice to produce.—*Hood* v. *Cronkite*, 29 U. C. Q. B. 98.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

SUSPENSION BRIDGE—ASSESSMENT OF—DECISION OF C. C. JUDGE, HOW FAR CONCLUSIVE.—The suspension bridge across the Niagara Falls at Clifton, with the stone towers, &c., supporting it, is land and real property, within the Assessment Act, 29 & 30 Vic. ch. 52, sec. 3.

The judge of the county court, on appeal from the court of revision, by which the assessment of such bridge as land at $150,000 was affirmed, reduced the assessment to $1000, on the ground that all except the land on which the towers stood was personal property: *Held*, that his decision was final, though clearly erroneous, and could not be questioned in an action; for he had jurisdiction to reduce the assessment, and the wrong reason given could not make his judgment less binding. — *The Niagara Falls Suspension Bridge Company* v. *Gardner*, 29 U. C. Q. B. 194.

ORIGINAL ROAD ALLOWANCE—ROAD USED IN LIEU THEREOF—BY-LAW TO OPEN ALLOWANCE, 29-30 VIC., CH. 31, SECS. 334, 338.—The original allowance for road between two concessions had never been opened across seven lots, though it had been to the east and west of those lots, and for more than sixty years had been enclosed with those lots, another line of road having been for the same period travelled in lieu of it, and used as the main highway. The township corporation passed a by-law to open the original road allowance, which the proprietor of one of these lots moved to quash. It was sworn that the travelled road had originally been given by the proprietors of these lots in place of the original allowance without compensation, and two patents were put in, issued in 1803, which apparently included such allowance; while on the part of the corporation it was alleged that such road had been opened by the then proprietors of these lots for their own convenience merely; that it was too narrow, on low ground, and insufficient for the the public convenience, for which the original allowance was required; and that the corporation, though frequently applied to, had always

refused to convey such allowance to the owners of the lots.

Held, that if the travelled road had been given in lieu of the original allowance as alleged, the owners of the lots who had taken possession of such allowance would have a title to it, under sec. 334, 338 of the Municipal Act, 29-30 Vic. ch. 51; that there was evidence which would well warrant a jury in finding that it had been so granted; and that the by-law should therefore be quashed, leaving the question to be determined by action.

WILSON, J., dissented, on the ground that the applicant was bound to make out a clear case to deprive the public of their right to the original allowances and that he had failed to do so.—*Burritt and the Corporation of the Township of Marlborough*, 29 U. C. Q. B. 119.

INLAND REVENUE ACT—31 VIC. CH. 8, SEC. 130—RIGHT OF APPEAL TO Q. S.—*Held*, that no appeal would lie to the Quarter Sessions from a summary conviction under the Inland Revenue Act, 31 Vic. ch. 8, sec. 130, for possessing distilling apparatus without having made a return thereof: for that such conviction was for *a crime*, and therefore not within Con. Stat. U. C. ch. 114. —*In re Lucas and McGlashan*, 29 U. C. Q. B. 81.

ONTARIO REPORTS

QUEEN'S BENCH.

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

WRIGHT V. GARDEN AND WIFE.

Married women—Contract by—C. S. U. C. ch. 73.

Held, that a married woman having separate real property is not entitled by Consol. Stat. U. C. ch. 73, to contract debts for its improvement so as to make herself liable individually, *Adam Wilson*, J., dissenting, or jointly with her husband.

The declaration alleged that the woman married before the 4th May, 1859, without a settlement, and having separate real estate, and after her marriage employed the plaintiff to repair a house on it, for which neither she nor her husband would pay.

Held, on demurrer, that the action would not lie.

[28 U. C. Q. B. 609.]

Declaration—For that whereas the defendant Elizabeth Sarah Garden was before and at the time of the making of the agreement hereinafter mentioned, and still is the wife of the defendant John George Garden, and was married before the 4th of May, 1859, to the said defendant J. G. G., without any marriage contract or settlement. And whereas the defendant E. S. G., before the said 4th day of May, 1859, became possessed to her separate use of certain real estate on which a house is now situate, being, &c. (describing the land), and which has not been taken possession of by her said husband, by himself or his tenants. And whereas the defendant E. S. G., continued so possessed of said lot of land and premises up to and at the time of the making of the agreement hereinafter mentioned, and still is so possessed. And the defendant E. S. G. being so possessed of said property to her own use, and in the management and enjoyment of her said property being desirous of improving the house on said premises, applied to the plaintiff, being a carpenter, to make such improvements. And thereupon, in consideration that the plaintiff, at the request of the defendant E. S. G., would make certain repairs and improvements upon and to the said house so belonging to the said E. S. G. as aforesaid, according to her directions, so as to enable her, the E. S. G., more fully to have and enjoy her said property, she, the said E. S. G., promised the plaintiff to pay him the reasonable value of the work so to be done by him upon the said house. And the plaintiff, relying upon the said agreement, and in a reasonable time in that behalf, did do and execute divers works, repairs, and improvements, to and upon said house, in all respects in accordance with the directions of the said E. S. G., which said works, repairs, and improvements, were reasonably worth a larger sum, to wit the sum of $1000; and all conditions were fulfilled, and all things happened and were done, and all times elapsed necessary to entitle the plaintiff to maintain this action, yet the defendants J. G. G. and E. S. G. have not, nor has either of them paid the plaintiff the value of the said works, or any part thereof, but the same and every part thereof remains due and unpaid.

Demurrer, on the grounds, 1. That the said defendant being a married woman at the time of making the said contract, as appears by the said declaration, could not by reason of her coverture legally make a contract such as in the declaration is alleged. 2. That it is not shewn what work was done, or the nature of the work done by the plaintiff for the defendants.

The case was argued during Hilary term last.

Bell, Q. C. (of Toronto), for the demurrer, cited *Royal Canadian Bank* v. *Mitchell*, 14 Grant, 413; *Emrick et ux.* v. *Sullivan*, 25 U. C. Q. B. 105; *Kraemer* v. *Gless*, 10 U. C. C. P. 470; *Chamberlain* v. *McDonald*, 14 Grant, 447.

Harrison, Q.C., contra, cited *Johnson* v. *Gallagher*, 4 L. T. Rep. N. S. 72, 7 Jur. N. S. 273, 30 L. J. Chy. 298; *Hall* v. *Waterhouse*, 12 L. T. Rep. N. S. 297, 11 Jur. N. S. 361.

RICHARDS, C. J.—The question arising in this case is whether a married woman having separate real property which, under the Consol. Stat. U. C. ch. 73, she is entitled to have, hold and enjoy, "free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried," can contract, either expressly or by implication of law, a debt for the improvement of that property, without the consent of her husband, so as to make them jointly liable in an action for the debt so contracted, or to make her individually liable to be sued at law for the debt so contracted after marriage, though such improvements may enable her to enjoy such property in a more full and ample manner than she could have done had they not been made.

No express authority is given under the statute to a married woman to contract debts after marriage, and it seems conceded from the different

provisions of the act, taken together, and of the Consol. Stat. U. C. ch. 85, that she cannot convey her land except by a deed executed jointly with her husband, and acknowledged in accordance with the terms of the last-mentioned act.

The statute 22 Vic. ch. 34, sec. 14, as originally framed, might imply a power to contract debts on the part of a wife after marriage, for which she would be liable, in the event of no ante-nuptial settlement, to the extent and value of her separate property, in the same manner as if she were sole and unmarried. But by the Consolidated Act, ch. 73, sec. 14, the word "hereafter" is omitted after the word contract and before the word made, so that the section now reads, "Every married woman having separate property, whether real or personal, not settled by any ante-nuptial contract, shall be liable upon any separate contract made or debt incurred by her before marriage (such marriage being since the 4th May, 1859), or after this act takes effect, to the extent and value of such separate property, in the same manner as if she were sole and unmarried."

The object of this section as it now stands, taken in connection with sec. 18, seems to be to make the property of the wife liable for debts contracted by her before marriage, and to relieve the husband from the common law liability which he would incur by the marriage to pay his wife's debts; and sec. 15, makes him liable for her debts before marriage to the extent or value only of the interest he may take in her separate property on a contract or settlement of marriage.

Sec. 18, refers to proceedings at law or in equity by or against a married woman upon any contract made or debt incurred by her before marriage, and enacts that her husband shall be made a party if residing within the province, but if absent therefrom, the action or proceeding may go on for or against her alone; and in the declaration, bill, or statement of the cause of action, it shall be alleged that such cause of action accrued before marriage, and also that such married woman has separate estate; and the judgment or decree therein, if against such married woman, shall be to recover of her separate estate only. The remainder of the section refers to the effect of the husband pleading a false plea.

Surely, if the legislature contemplated an action or proceeding against the married woman on any contract made or debt incurred by her after marriage, provision would have been made for it. The absence of such provision seems a strong argument in favor of the view that no such liability could arise. The third section makes the separate property pecuniarily liable on an execution against her husband for her torts.

The cases decided under the statute seem to me to dispose of the question raised under this demurrer.

In *Kraemer* v. *Gless*, 10 U. C. C. P. 470, it was held that the statute did not enable a *feme covert* to bind herself as a *feme covert* to a greater extent than she could do before the passing of the act.

The 13th section of the act declares, that any estate which the husband may by virtue of his marriage be entitled to in the real property of his wife, shall not during her life be subject to the debts of the husband. This the court, in *Emrick et ux.* v. *Sullivan*, 25 U. C. Q. B. 105, seemed to think implied that the estate which the husband had by the marriage in his wife's realty was, being jointly seised with her during the coverture in her right in her real estate, and then he would be a necessary party to the conveyance of such an estate, and at common law he alone could lease for a term. If the husband has an interest in the wife's real property by virtue of the marriage, I do not see how she can by her own individual act, without his consent, affect that interest so as to render that property liable to be sold under an execution at law, which would be the effect if this action can be maintained.

Scouler v. *Scouler*, 19 U. C. Q. B. 106, decides that under the statute a married woman cannot sue alone to recover possession of real estate acquired by her before the coverture, when she married since 1859.

The very able judgment of Vice-Chancellor Spragge in *Royal Canadian Bank* v. *Mitchell*, 14 Grant, 412, takes up the doctrine of equity as to the separate estate of a married woman being liable for her debts, and shews how it is acted on in England and under the general rule in equity which prevails. He sums that branch of his argument up as follows: "The principle of the decisions is, that a married woman entering into a contract, having separate estate, and having as incident to it a right to dispose of it, and being *not personally liable* upon her contract, is presumed to contract with reference to her separate estate, and to intend to charge it. But such presumption cannot arise where she cannot charge her real estate; where, even if she had done so in express terms, it would have been unavailing. It would infringe the maxim that a person cannot do indirectly that which he cannot do directly."

The learned Vice-Chancellor further observes, "The general scope and tenor of the act is to protect and free from liability the property, real and personal, of married women; not to subject it to fresh liabilities, except in the case of her torts and of her debts and contracts before marriage. The change made in the 14th section applies with peculiar force to the case before me. It is an unmistakeable manifestation of intention that the separate estate of married women shall be liable only upon debts incurred or contracts made before marriage."

In *Chamberlain* v. *McDonald*, in the same volume of the Upper Canada Chancery Reports, at page 448, the learned Chancellor of Upper Canada declared that he agreed with the judgment of Vice-Chancellor Spragge in the view he took of the Married Women's Act in *Royal Canadian Bank* v. *Mitchell*. Vice-Chancellor Mowat suggested that as to personal property, the wife might have a power of disposing of it independent of her husband, but as to real estate he thought there was more reason for denying it.

The case of *Hall* v. *Waterhouse*, before Vice-Chancellor Stuart, 24th April, 1865, reported in 12 L. T. Rep., N. S., 297, and *Taylor* v. *Meads*, before Lord Chancellor Westbury, 11th February, 1865, reported in the same volume at p. 6, with the exhaustive judgment of Lord Justice Turner, on the 15th March, 1861, in the case of *Johnson* v. *Gallagher*, reported in 4 L. T. Rep. 75,

shew what the rule of the Court of Equity is as to charging the separate property of a married woman with the payment of her debts, when it is held free from the control of her husband. In all these cases it is expressly declared that the married woman, whether living separate from her husband or not, is not personally liable on the contract, and that only her estate is liable for her debts. See also the observations of Mr. Justice Gwynne in *Balsam et ux.* v. *Robinson*, 19 U. C. C. P. 269.

I think the decided cases under our own statute are binding on this court, and I should feel bound to follow them until reversed, even if I doubted their correctness on the point now under discussion, which I do not.

I think there must be judgment for the defendants on the demurrer.

MORRISON, J., concurred.

(To be continued.)

REGINA v. WIGHTMAN.

Forcible entry—Restitution.

The defendant having been convicted at the quarter sessions on an indictment for forcible entry, was fined, but that court refused to order a writ of restitution, and the case was removed here by *certiorari*.

Held, that it was in the discretion of this court either to grant or refuse the writ; and under the circumstances, the verdict being against the charge of the learned chairman, and the prosecutor's case not one to be favored, it was refused. [29 U. C. Q. B. 211.]

O'Brien obtained a rule during last Michaelmas Term, calling on the defendant to shew cause why an order of restitution should not be issued to restore one Fields to the possession of lot 17 in the first concession on the River Thames, in the township of Harwich, in the county of Kent, upon which the defendant illegally entered and forcibly detained Fields from the possession thereof. The rule was drawn up on reading the *certiorari* issued herein and directed to the chairman and justices of the court of general quarter sessions of Kent, and the return thereto, &c.

It appeared from the schedule returned with the *certiorari* that the defendant had been indicted at the court of Oyer and Terminer for the county of Kent, in April, 1867, for a forcible entry, &c., upon the premises in question, which indictment (a true bill being found) was transmitted to the quarter sessions to be tried: that the same was tried in December, 1857, and the defendant found guilty, and fined in the sum of $50.

The prosecutor, Fields, whose name was on the indictment, was sworn as a witness before the grand jury, but not called on the trial. Several witnesses were examined on the part of the prosecution, and at the close of the case for the Crown the defendant's counsel submitted there was no evidence to connect the defendant with the charge. The learned chairman of the quarter sessions having expressed himself in favor of the defendant, no evidence was adduced on the defence, and he told the jury that the evidence was not sufficient to convict, and recommended them to acquit. The jury, however, found the defendant guilty, and the court imposed a fine of $50 The counsel for the prosecution then applied for a writ of restitution, which the learned chairman declined to grant, saying that the application might be made to the court.

A copy of the notes of the evidence taken on the trial was returned with the *certiorari*, and from it it appeared that the taking possession of the premises, or rather the house, was in fact done by others and not by the defendant. What the evidence shewed was, that the defendant was at the place shortly after the occurrence, and afterwards got possession of the same. Taking all the testimony, the probability seemed to be that the jury were of opinion that the defendant, who was interested in obtaining possession, procured the other parties to do what they did.

From the affidavit of the defendant filed on shewing cause, it appeared that Fields, the prosecutor herein, brought a suit against the defendant to recover possession of the premises, which was tried in 1866: that he failed in the action, and judgment was given in favor of the defendant: (See the case reported, 17 U. C. C. P. 15): that Fields commenced another action of ejectment, which action had been stayed until security for costs should be given by him. The defendant also swore that he purchased the land in good faith, and at its full value: that he had been in continual possession since 1856, except for the few weeks that Fields had possession of the house, and which possession he swore that Fields procured by collusion with his, defendant's tenant; and he also stated that the parties through whom he claimed had undoubted possession since 1841.

Hector Cameron, during this term, shewed cause, citing *Regina* v. *Harland*, 8 A. & E. 826; *Rex* v. *Jackson*, Dra. Rep. 53; *Regina* v. *Connor*, 2 P. R. 139, *Fields* v. *Livingston and Wightman*, 17 C. P. 15, 27; *Russ.* C. & M., Vol. I. p. 431; *Woolrych* Crim. L. 1125-6.

O'Brien, contra, cited *Hawk*, P. C. Book II., ch. 27, sec. 31; 4 *Bl.* Com. 148; *Rex. Williams*, 4 M. & R. 471; *Sir Godfrey Kneller's* case, 1 Salk. 151; *Bac.* Ab., vol. III., p. 716.

MORRISON, J., delivered the judgment of the court.

Upon an examination of the circumstances connected with this case, it is quite evident that the prosecutor and the defendant claim title to the property in question, the defendant and those through whom he claims having had possession of the premises for more than twenty years, with the exception of the few weeks that the prosecutor by some means obtained possession for him, and those parties were expelled, as it is alleged, by the defendant. The jury, contrary to the recommendation of the learned chairman, have found the defendant guilty. What title in fact the prosecutor has, or pretends to have, does not appear, but it seems he obtained possession of the premises through a tenant of the defendant, probably with a view of driving the defendant to an action of ejectment to recover possession, or to try the title; he, the prosecutor, having already failed in an action of ejectment brought by him against the defendant to recover the premises; and, as it is sworn, he has another suit pending for the like purpose, but which is stayed until security for costs is given to the defendant.

Considering all these circumstances, we are not disposed to assist the prosecutor. The court below punished the defendant by a fine of $50 for the offence against the public peace, and it was

for that court to say whether a writ of restitution should go, and they declined so to order.

It was contended for the private prosecutor that this court is now bound to order the issue of a writ of restitution. No authority was cited shewing clearly that such is the law. *Rex* v. *Williams*, 9 B. & C. 555, also reported in 4 M. & R. 471, was relied on as an authority. What Bayley, J, says is, "When it is considered that a *certiorari* only substitutes this court for the court below, whatever ought to have been done there, had the case remained there, it must be the duty of the court here to do when the case is removed." The point was not strongly pressed in that case, nor did the decision directly involve the question whether the court was bound to order the writ.

In the case in our own court, *Rex* v. *Jackson et al.*, Dra. Rep. 53, a case in some of its circumstances analogous to this, and also removed by *certeiorari*, the court declined to grant the order for restitution.

We do not think that this is a case in which we should interfere, and the rule is therefore discharged without costs.

Rule discharged.

COMMON LAW CHAMBERS.

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

THE QUEEN v. MURDOCH MCLEOD

Change of venue in criminal cases—32, 33 Vic., cap. 29 sec. 11.

Held, that 32, 33 Vic., cap. 29, sec. 11, does not authorize any order for the change of the place of trial of a prisoner, in any case where such change would not have been granted under the former practice, the statute only affecting *procedure*.

[Chambers, Jan. 5, 1870.]

The prisoner in this case was under recognizance to appear at the next Assizes, at Kingston, in the county of Frontenac, to answer a charge of manslaughter.

W. Mortimer Clark, on behalf of the prisoner, applied under the provisions of 32, 33 Vic., cap. 29, sec. 11, entitled "An Act respecting procedure in criminal cases, and other matters relating to criminal law," for an order to change the venue from the county of Frontenac, to the county of York, upon an affidavit in which the prisoner stated that he was informed and believed that all the witnesses intended to be examined on behalf of Her Majesty at his trial, resided at the City of Toronto: that any witnesses to be examined on his own behalf at his trial, resided at or near the City of Toronto, and that he was unable to pay the expense of the attendance of witnesses on his behalf, and the counsel he desired to retain at his trial, if it should take place at the City of Kingston.

Leith, shewed cause for the Attorney-General. It would be a bad precedent to allow a change of venue on the grounds disclosed. The Act gives no jurisdiction to a judge to change the venue on these facts and the mere poverty of the prisoner is no sufficient reason.

The statute is not intended to give any new ground for changing the venue, but merely to simplify procedure, and to prevent the necessity of proceeding under the old and inconvenient practice of removing the case into the Queen's Bench by certiorari, and then moving to change the venue. The affidavit at all events is insufficient, as it does not shew the particulars as to witnesses, &c., required by the practice on applications to change the venue.

Clark, contra.

It is a mere matter of discretion with the judge, and owing to the poverty of the prisoner "it is expedient to the ends of justice" that the place of trial should be changed.

GALT, J.—Section 11, is as follows: "Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice, that the trial of any person charged with felony or misdemeanor should be held in some district, county, or place, other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court at which such person is, or is liable to be indicted, may at any term or sitting thereof, and any judge who might hold or sit in such court, may at any other time order, either before or after the presentation of a bill of indictment, that the trial shall be proceed with in some other district, county, or place within the same Province, to be named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereof caused to the accused, as the court or judge may think proper to prescribe." In the affidavit there is no allegation that the accused is apprehensive that a fair trial cannot be had in the county of Frontenac, as was the case in *The King* v. *Holdew*, 5 B. & Ad. 347, and *The Queen* v. *Palmer*, 5 El. & Bl. 36 In the former case the application was refused, but it was granted in the latter on the consent of the Attorney-General.

It appears to me that the contention of Mr. Leith in this case is the correct view of the intention of the Legislature, namely, to substitute proceedings like the present for the old practice of removing the case by certorari into the Queen's Bench, and then moving to change the venue, and that an order such as prayed for, should be made, only in cases when under the former practice, a change of venue would have been granted; in other words, "when it is expedient for the ends of justice that the trial should be held in some other place than that in which the offence is supposed to have been committed." It is quite clear that no such change would have been made in this case, and therefore the present summons should be discharged. There is no saying to what inconvenience the granting of applications like the present might not lead.

Summons discharged.

CURIOUS TENURE.—Blechesdon, County of Oxford.—Anno. 1339, 13th and 14th Edward III. An inquisition was taken on the death of Joan, widow of Thomas de Musgrave, of Blechesdon, wherein it appears that the said Joan held the moiety of one messuage and one carrucate (carcucate of land, as much as a plow can plow in a year) of land in Blechesdon, of the King, by the service of carrying one shield brawn, price two pence, to the King, whenever he should hunt in the park at Cornbury, and do the same as often as the King should so hunt, during his stay at his manor of Wolestoke.—*Oxford Journal.*

UNITED STATES REPORTS.

SUPREME JUDICIAL COURT OF MAINE.

GEO. W. PRENTISS v. ELISHA W. SHAW ET AL.

(*Continued from page* 31.)

All agree that these facts cannot be a legal justification, and be used in bar of the action. The plaintiff is undoubtedly entitled to a verdict, with damages. It is said these facts may be used to mitigate the damages. But what damages? If the assault was illegal and unjustified, why is not the plaintiff, in such case, entitled to the benefit of the general rule, before stated—that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act? Admit that the defendant was provoked, insulted, irritated, and justly indignant at the acts or language of the plaintiff. If those provocations did not reach the point of a legal justification of the assault, then, so far as the question arises for which party the verdict shall be given, they are immaterial, and out of the case. The assault was wholly legal or wholly illegal. There can be no such thing as apportioning the guilt; making the act half legal and half illegal. It is not one of the class of cases where the suffering party contributed to the injury, and thereby lost his right of action. The contribution, to work that effect, must be co-operation in the doing of the act itself, which is complained of,—*i. e.*, the assault and battery; or whatever the alleged specific act may be.

If then the act is confessedly an illegal one, and unjustified in law, why must not the defendant answer for and pay the actual damages to the person? On what principle of law can he be exonerated?

In the case before us the presiding judge took this view. He made a distinction which has not often been attended to, between a recovery for the actual personal damage and loss of time and other direct injuries, and a recovery for other damages based on injury to the feelings, indignity, insults, and the like, and also on the claim for punitive damages.

Is there not such a distinction in law and common sense? Take the simple case of the meeting of two men in a public street. One addresses the other with opprobrious and insulting language, calling him a thief or a liar. The other, at the moment, naturally excited to almost uncontrollable anger, strikes a blow which breaks the arm of his antagonist. The law says the words were no legal justification for the blow. It was therefore a trespass and a wrong. What damages shall be awarded? Can they be more or less, according to the provocation on one side or the natural anger on the other? There is the broken arm, neither more nor less, with the pain and suffering and expense of cure, and the loss of time, all which are open and appreciable, and are the direct and immediate consequences of the legal wrong. If the law holds, as it does, sternly and unwaveringly, that the words are no excuse or justification, why should it "keep the word of promise to the ear but break it to the hope," by allowing a jury to evade the law, whilst in form keeping it by a verdict for nominal damages, which is in effect one in favor of the defendant? Why not say rather that the provocation might be shown in defence of the action, and that if the plaintiff morally deserved to suffer the injury by reason of his language, that should be a legal excuse? It seems to be a legal anomaly to say,—true, it is an undefended, naked trespass and wrong, but no real damages or recompense shall be given. It is giving the benefit of a justification to what the law expressly says is no justification. The restriction of the rule to the provocation given at the time of the assault, does not obviate the objection that it is against a well-settled principle which gives real and substantial redress for every unjustified trespass. Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, in the case before stated, must not the defendant be held to pay the full value of the horse thus rendered useless? Or in case of trespass on land, can the actual damage be mitigated by showing that it was provoked by unfriendly or unneighborly words? Or in case of a damage at sea, could an intentional and unnecessary collision be mitigated, so far as the actual injury was in question, by proving that the navigator was insulted and irritated by taunting and exciting language from the deck of the injured vessel?

But there is no doubt that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show on one side aggravation, and on the other, mitigation of the damages claimed. Verdicts for heavy damages have been sustained where the actual injury to the person was very slight or merely constructive, and other verdicts for merely nominal damages have been confirmed where the actual injuries were shown to have been serious. In the first class of such cases the plaintiff has not been restricted to proof of the injury to the person, but has been allowed to show the circumstances attending the act, and to have damages for the insult, indignity, injury to his feelings, and for the wanton malice and unprovoked malignity of the deed. And it is now settled, certainly in this state, that he may be allowed, in addition, exemplary damages in the way of punishment or warning to the transgressor and others.

Now this opens a wide field for uncertain or speculative damages for matters not tangible or susceptible of accurate estimation, but based upon principles and considerations different from those which determine the actual injuries as before described. These are such as lie patent, and require only a calculation of time lost, pain suffered, or the value of a permanently injured limb, or the like. But when the injury to the feelings, the insult, the mortification, the wounded pride, or, to sum up all in one word, the indignity, are pressed as grounds for pecuniary indemnity, superadded to the claim for punitive and exemplary damages, they evidently and necessarily require a consideration of all the facts in any way clearly and fairly connected with the trespass, and bearing upon the motives, provocations, and conduct of both parties in the controversy, which has culminated in an assault by one upon the other. How otherwise can a jury fairly estimate what should be awarded by way of punish-

ment, or as a reasonable satisfaction for injured feelings? These damages, as our law now stands, are made up of injuries partly private and partly public in their nature. If evidence of this nature, admitted to enhance the actual damages to the person, may be given, why should not the same kind of evidence be given by way of mitigation of damages claimed on such grounds?

If the plaintiff restricts himself distinctly to the single claim for the actual damages to his person, and the direct, tangible results therefrom, and expressly waives all claim beyond, it would seem that the defendant should be limited to matters strictly in defence or justification of his act, as in other cases of trespass. But if, as in this case, he claims beyond this, for injured feelings and for punishment, the question arises (which is the main question made by the plaintiff), what is the limit of the evidence which may be admitted in mitigation or extenuation? It is not denied that some evidence of this nature is admissible. The precise question is whether it is to be confined to what transpired at the time of, or in immediate connection with the act. If a party claims damages not merely for the naked assault, but for his wounded feelings, and seeks to inflame them by showing that he had been publicly insulted by opprobrious language used with the evident intent to degrade him in the eyes of his fellow-citizens, may not the defendant be allowed to show that the complainant had himself been guilty of using like words, or by his conduct and by insults and provocations had really been the cause of the assault? The plaintiff may have been passive and silent at the moment of the assault, whilst the defendant was violent and denunciatory, and, if no facts can be shown beyond those transpiring at that meeting, the plaintiff would present a case, apparently calling for exemplary damages, whilst, if the whole truth was brought out, the defendant would appear the least in fault, so far as regards provocation.

And so, if the plaintiff claims for damages of this nature, for an assault, not by a personal enemy, but by those whose indignation had been aroused in matters of a general and public nature, may not all damages, beyond those actually suffered in his person, be modified or affected by evidence of his acts or declarations, calculated to arouse a just indignation and disgust? Why should the man who has intentionally and grossly outraged decency, or aroused indignation by his violation of common humanity, be allowed to recover for his injured feelings, and the public degradation to which he has been subjected? Or rather, why should not a jury be allowed to know all the facts, directly connected with the act, although not transpiring at the moment, and from them determine, whether any, and if any, what damages should be allowed beyond the actual injury to the person or property? If facts beyond the act are to be allowed to aggravate, why should not like facts be allowed to mitigate this class of damages? Where, for instance, a man had been guilty of frequent, indecent exposures of his person in public streets, accompanied by obscene language and gross insults to females, and had persisted in such a course, until a body of his townsmen, indignant and outraged, seized him and inflicted punishment, and carried him away and confined him for a day, or other like proceedings; and for this assault and battery and imprisonment an action is brought and a claim set up for recompense for injured feelings, indignity and for punitive damages. At the trial, he proves these acts,—rough handling, and degrading treatment, and personal imprisonment, and makes out a case of apparently inexcusable interference with his liberty and his person, and his sense of self-respect. The defendants cannot show that he did or said anything at the time of the arrest. But are they to be precluded from showing anything in mitigation of such a claim? The law is fully vindicated when it gives such a man his full, actual damages. When he asks for more, he opens a new ground for his opponent, who may well say,—you have no fair claim for damages on this ground, for your own conduct and language aroused the indignation which led to the acts complained of.

There is an instinct, or, if not quite that, a dictate of common sense, which it is neither wise, or hardly possible for the law to disregard,—that a man should not have pecuniary recompense for injured feelings or public degradation, when he has himself outraged the feelings of another, or so conducted as justly to excite public odium by open contempt of the decencies of life. The old legal requirement, that he that asks for redress "must come into court with clean hands," at once occurs to us. The law will protect the hand from actual violence upon it, although it may sadly need ablution, but beyond this will require "a show of hands" before it will adjudge damages for an alleged defilement.

The ruling of the judge, in this case, was peremptory and unqualified, that the evidence made out no legal defence, and that the verdict must be for the plaintiff "to the full extent of the damages sustained by the injuries to the plaintiff's person, and for detention."

If, after this ruling, the defendant had consented to a default, and the case had come before a judge to determine the damages, and the same claim for cumulative and exemplary damages had been made and pressed, would any judge have excluded, in the hearing before him, the evidence offered in this case? If he had, how could he determine the degrees of aggravation or extenuation, or come to any satisfactory conclusion on the matter of damages? As before said, the jury in this case were in the same condition, after the ruling, as a judge would have been after default.

When we consider the nature and the grounds of this claim for exemplary or punitive damages, it is difficult to see why the evidence of provocation or mitigation, if allowed at all, should be restricted to the time of the overt act. What happened then may, and generally would, give a very partial and insufficient view of all the circumstances which in truth belong to the matter in question, and serve to aggravate or diminish the injury to the feelings, or the malice of the act. Every one sees this at a glance.

We think it will be found, on a careful examination of the cases, that where this rule, limiting the evidence to what transpired at the moment, has been enforced, the claim was to diminish the damages for the actual corporeal injury and loss of time, and no distinction was made between those and exemplary damages. The reasoning to be found in this class of cases is very similar to that found in the decisions a common law, where the degree of guilt is les

sened, and a different and distinct offence, of a less degree, is found by reason of proof of sudden and provoked anger; as where a homicide is reduced from murder to manslaughter. But, in such trials, these matters of provocation and sudden anger are introduced, not to mitigate a crime found or admitted, but are strictly matters in defence, and modify or give character to the act, in determining what crime has been in fact committed, and are used for that purpose. In such case it becomes important to know whether the act was the result of sudden passion, or whether there had been time for the passions to cool. But in a civil action for trespass the liability of the party for actual damages does not depend upon the intent or state of mind of the trespasser. He may be liable, if his act was unlawful, although he did not intend to injure any one, and had no anger or ill-will towards the party whose person or property was affected by his illegal act. It is not the motive, or the feelings under which the legal wrong is committed, which determines the character of the act, or the amount of the actual damages resulting from it. It cannot be excused, if legally unjustified, by proof of sudden passion, or the absence of malice or wrong intent.

The analogy, if any, between civil actions and criminal prosecutions, is to be found in the determination of the extent of punishment in the one, and the amount of exemplary or cumulative damages in the other. Although in the trial of criminal cases the evidence may be limited to the time of the occurrence, yet every judge is aware that, in fixing upon the sentence to be awarded, he does not hesitate to hear evidence or statements as to facts and acts and declarations made or done anterior to such time—in order to ascertain, as well as he can, the mitigating or aggravating circumstances connected with the offence. So, in determining the amount of damages in a civil suit, beyond the tangible, as before explained—when there is no question as to the fact that a trespass has been committed, a limitation of the examination into what transpired at the moment would seem to fall far short of what reason and common sense would prescribe. It seems hardly just to require any tribunal to act and determine such questions, and to award damages in the nature of punishment, and withhold from it all knowledge of the facts which may fairly be said to give the moral character of the act, and the actual guilt of the respondent.

We are aware that great care must be taken to confine the examination to such matters as are clearly and directly connected with the acts, or give color or character to it. Mere evidence of general bad character,—or unpopularity, or of acts or declarations of ancient date, or not clearly and really part and parcel of the matter in question, must be excluded. But time is not of the essence of the principle, but fairly established direct connection, as cause or effect. It is impossible to accurately define the limits, so as to reach every case. But there can be no greater difficulty in the application of this than of many other rules of law.

In the case at bar, the evidence was limited to the transactions of the day on which the assault was committed, and very evidently was of matters connected directly with the acts done. If it had been excluded, after the evidence on the part of the plaintiff had been heard, how could the jury have properly or understandingly determined what punitive damages should be given in vindication of outraged law, or for the indignity and injury to the feelings? They had a right to know, and the defendants had a right to place before them the true relations of the parties, and to show how far the act was wanton, malicious, vindictive, or unprovoked, or how far extenuated by the conduct, declarations, or provocations of the complaining party.

On the whole, after a full consideration of the case, and the cases, we think that the rulings of the judge were not erroneous, but give the rules on this subject which are practical, and in accordance with common sense and the general principles of the law. *Exceptions overruled.*

CUTTING, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

(*Note by Editors American Law Register.*)

This is one of that class of cases, where there existed at the time it occurred, and even at the present time, to some extent, there exists, a degree of unfairness, in judgment and opinion, which renders it extremely difficult to say anything which will be kindly received, or candidly weighed. But we feel compelled to say, that the facts of this case, placed beside the verdict of $6.46, certainly do indicate a substantial failure of the suit, if not of justice. The jury must have treated the evidence given in mitigation of damages, as a substantial justification of the assault, battery, and false imprisonment, with all its incidents of humiliation and outrage. The verdict very clearly manifests an opinion in the mind of the court and jury, that the plaintiff was more in fault than the defendants—in short, that the conduct of the plaintiff was reprehensible, and that of the defendants excusable—and that, therefore, it was proper for the court to place its stigma upon the action. This is not said, indeed, in so many words, but it is fairly implied.

This is a result to which courts of justice should never come, except in the most unquestionable cases, where there is no pretence of anything more than a nominal breach of the law, and where the action is therefore clearly vexatious. And it is especially unbecoming for courts to fall into this view, out of respect for, or sympathy with, or dread of, an intensified partisan public opinion. It is the duty and the business of courts, to hold the scales of justice evenly and firmly between the most embittered partisans of contending factions in the state, when such become suitors before them.

We might better have no courts, than to have them echo the varying surges of an ever-changing and baseless public sentiment. In a case like the present, it would be far better to have the court instruct the jury, in so many words, that the plaintiff's disregard of the common courtesies and decencies of life, justified the defendants in inflicting such punishment upon him, as would teach him not to repeat the offence, and to conduct with more circumspection in the future, than to have left the case to the jury, in such a slipshod way, as to bring about the same result exactly, but without any technical violation of the rules of law. And we must say, it seems to us that the charge of the court below, and the opinion of the full court, although clearly not so intended, must have operated in that direction.

Possibly some may claim, that upon a nice construction, there was no error in law, and all agree that courts cannot be expected always to control the waywardness or the prejudices of juries. But this is generally urged, where courts desire to throw their own responsibility upon the irresponsibility of the jury. And it seems to us the charge to the jury, in this case, afforded the jury an excellent opportunity to punish the plaintiff, and at the same time to compliment the defendants for taking the plaintiff in hand, and applying the rules of Lynch law to him, in the summary mode they did. This was all very well, provided it were the business of courts to administer Lynch law, or to moderate the strictness of the existing law. But as that is not the fact, but the contrary, it seems a peculiarly unfortunate distinction which the court have attempted to make in this case, between compensatory and exemplary damages, and to allow of the mitigation of one and not of the other.

If there be, in fact, any such distinction in the law, it should certainly be differently stated from what it seems to have been in the trial of this case, or it would be very likely to be misapplied by the jury, as it certainly was here.

The error in the charge seems to be in treating "the injury to the plaintiff's feelings, the indignity and the public exposure," as forming no part of the *actual damages* in the action. Nothing could be further from the truth; since these things not only constitute a portion of the actual damages, but the principal portion. It is scarcely possible to conceive any proposition more unjust or unreasonable—not to say absurd—than to suppose that in a transaction like that, through which the plaintiff was dragged by the defendants, that the actual "injury to his person and his detention" embraced all for which he was entitled to compensation under the head of actual damages.

It is not probable, indeed, that the plaintiff was of that delicate organization, that he would be likely to suffer any irreparable damage merely from the insult and indignity, for if so, he could not have said what he did. But there are many persons who, from similar treatment, might have been ruined for life; and the rule of law is the same in all such cases. And there is no case, except the present, so far as we have noticed, which attempts to discriminate between corporeal and external injuries, and those which affect the sensibilities. These latter, are those which form the chief ingredient of damages in this class of actions. If these latter are to be excluded from consideration, or justified by *public sentiment*, there might better come an end of all pretence of the administration of justice. It is the direct and sure mode of encouraging a resort to force for remedy and redress.

We know that some very able writers, and among them the late Professor Greenleaf (2 Evidence, s. 253 and n. *et seq.*), contend for the rule, that in no case are exemplary or punitive damages to be given, but that in all cases they should be confined to making *compensation* to the plaintiff. But no writer, or judge, to our knowledge, has ever before attempted to limit the actual damages to which the plaintiff was in all cases entitled *by way of compensation*, to loss of time and injury to the person, in cases of trespass and false imprisonment. Mr. Sedgwick (Dam. 665, n. 1), says, that "all *rules*, or rather definite principles of damages in civil actions, must be referred either to compensation or punishment." No one, we suppose, would for a moment deny that the plaintiff, in an action of this character, is entitled to recover damages for "the injury to his feelings, the indignity, and the public exposure;" and it would seem to be equally improbable, that any one should hold, that such damages were in the nature of punishment to the defendant, and only recoverable under that head.

The truth unquestionably is, in the present case, that the court have mistaken the application of their own rule, and thus, as it seems to us, have presented the whole case in a most unfortunate aspect—very much in that of an excuse and an apology, if not a full justification of Lynch law, than which nothing could have been further from its intention.

We hope no one will be simple enough to suppose that we feel any other than the most unqualified disgust and contempt for such sentiments as were expressed by the plaintiff, on the occurrence of the most disgraceful, as well as the most unfortunate event, which has ever occurred in our past history. The only possible mode of accounting for such folly, in speech, is that folly on one side naturally leads to counter folly upon the other, and despotic public opinion naturally provokes foolish words. But we trust it is not needful to inform the profession, and especially the courts, in this country, that the high privilege of free speech is not created, or maintained, for the exclusive, or the chief benefit of wise and discreet men. They will do very well without any such protection. But it is intended for the protection of every class of the most ranting fools, and the vilest blackguards, and the most infamous blasphemers, except as they are liable to some restraint by the firm and wise administrators of the criminal and civil law of the land. These are the only men who require protection at the hands of the administrators of the law; and when we allow ourselves to be cheated with the delusion that the simple and degraded, or the offensive and coarse-grained, do not deserve the highest protection of the law, we approach a point of timeserving, which is but one degree removed from actual corruption, of which we already begin to hear charges, in some quarters, but we trust wholly without foundation.

We regret, in this case, the affirmation of the principles of the charge in the court below by a court of such high character, although done in a mode, and for reasons, which show the high dignity and purity of the tribunal, and do also show, as it appears to us, that an unfortunate misapplication of the very principle upon which the case is decided, must have occurred in the court below. We know the learning and ability of the court from which the decision comes; and we are always proud to welcome its members among our most esteemed friends; but we cannot shut our eyes to the fact, that the substantial damages in this action were blinked out of sight, and disregarded by the jury, upon grounds which are flagrantly in violation of the leading doctrine of the decision, viz., that actual and compensatory damages cannot be denied upon any ground of provocation short of an actual justification of the assault, battery, and false imprisonment, which was not attempted in this action.

The testimony offered and received in miti ga-

tion of damages in this action, might well enough have been received, upon the question of punitive or exemplary damages, but it was not of a very satisfactory character even upon that head. The only portion of it which seems to afford any just apology for the flagrant misconduct of the defendants, was the stupid blunder of the provost-marshal in directing the plaintiff to be "detained." This had some fair tendency to vindicate the good faith of the defendants in arresting the plaintiff. But what can be said of their after-conduct in forcibly carrying the plaintiff three miles, and dragging him before a town meeting, and sentencing him to take an oath to support the Constitution of the United States? They might, with the same propriety, have sentenced him to be hanged, or burned to death. And if they had done so and carried the sentence into execution, and been indicted for murder, they should, so far as we can see, upon the principle of this decision, have been permitted to show the plaintiff's provoking bravado talk in mitigation of punishment—or possibly to reduce the verdict from murder to manslaughter.

It does not seem to us that such evidence should have been permitted to go to the jury, upon either the first or second point made in the plaintiff's request to charge, and not upon the third, except so far as it tended to show that the defendants acted under a misapprehension of the law, and in good faith; for punitive or exemplary damages are not given with any reference to the plaintiff's misconduct, within the limits of the law, but solely on account of the malice and wanton misconduct of the defendants, and to admonish them, and others in like case, not to repeat the misconduct. Is there anything in the plaintiff's folly and bravado, naturally calculated to induce the defendants to believe they had any legal right to deal with him in the manner they did? Was not then the charge of the court, and the result of the trial, directly calculated to encourage such abuses of right, such flagrant breaches of the law? Was not the conduct of the defendants malicious, wanton, and intentionally insulting and abusive? Can there be more than one opinion on these subjects? And was not the charge in the court below, the verdict of the jury, and the overruling of the exceptions, all calculated to encourage such conduct, and to discourage such actions? If so, can we fairly expect parties suffering like indignities to appeal to the tribunals for redress? And will not the result of such experiences, in courts of justice, sooner or later, end in a resort to force in all such cases? These are plain questions, but they are fundamental to the very existence of free states and private liberty, both of person and speech.

I. F. R.

—*American Law Register.*

KEEGAN v. MCCANDLESS.

A juror, before verdict, being entertained by or receiving any benefit or gratuity from the plaintiff, however trivial, is sufficient cause for a new trial.

[December 27, 1869.]

This was a rule for a new trial.

Opinion by HARE, P. J.

It appears from the testimony taken in support of the rule, that after the court adjourned and before the case was given to the jury many of the persons who had been in attendance during the trial withdrew to a neighboring tavern for refreshment. Men so placed are seldom silent, and the conversation naturally turned on what had taken place in court. From accident or design, one of the groups contained the plaintiff, a juror, and one of the witnesses to the plaintiff. The juror had a list of prices in his hand and was making a calculation upon it with reference to some of the matters given in evidence in the suit. They eat and drank together and the plaintiff paid the bill. This seems to be indisputable, because the juror does not know who paid; and the plaintiff, who knew the fact, and might have contradicted the statement made by a bystander, declined to be put on oath.

It may be that there really was no intention to do wrong, and it was very possible the calculation was intended to demonstrate that the plaintiff was not entitled to a part of his demand. It would, however, be contrary to the doctrine of trial by jury if a verdict rendered under such circumstrnces were allowed to stand.

A juror is for the time being a judge, and his conduct must be tested by the rules applicable to judicial action. It has long been the wise policy of the common law to require that every communication with regard to the suit shall take place in open court. In this the English practice differed from that of the continent of Europe, where a party might state his case wherever he could obtain a hearing. The object of this precaution is not so much the exclusion of the grosser forms of influence, as to guard against those appeals to kind and sympathetic feeling which bias the judgment through the heart It is, accordingly, gross misbehaviour for any person to speak to a juryman, or for a juryman to permit any one to converse with him respecting the cause in hand at any time after he is summoned, and before the verdict is delivered; *Blaine's Lessee* v. *Chambers*, 1 S. & R. 169, 173.

The wrong is greater in a party than in a stranger, as affording a stronger inference of design; and will be heightened if it appears that the juror was entertained free of expense, or received any benefit or gratuity, however trivial, that might tend to prevent him from rendering an impartial verdict. Such misconduct is a misdemeanor at common law, punishable with fine and imprisonment: 3 Bacon's Abr. 786; *The Commonwealth* v. *Kauffman*, 1 Philada. R. 534. I do not mean, however, to assert that there is matter here for an indictment. To make the offence criminal there must be a malicious or corrupt intent, which does not necessarily appear in this instance. It is enough, as between the parties, that the plaintiff did that which may have prejudiced the defendant by depriving him of the fair and unbiassed hearing to which he was entitled: *Ritchie* v. *Hobrooke*, 7 S. & R. 450.

The rule for a new trial is made absolute.

CURICUS TENURE.—Henry de la Wade holds ten pounds (a pound of land is commonly supposed to contain 52 acres) of land in Stanton, in the County of Oxford, by the serjeanty of carrying a Gerfalcon every year before our lord the King, whenever he shall please to hawk with such falcons, at the cest of the said lord the King.—*Oxford Journal.*

CORRESPONDENCE.

Division Courts.

To the Editors of the Law Journal.

Gentlemen:—As you are thoroughly acquainted with the procedure and practice of the Division Court Act and the new rules lately promulgated, would you kindly favor your numerous readers with an early reply to the following queries:

1.—Is it the duty of the clerk of a Division Court to deliver an execution to the bailiff of his Court when ordered to issue execution by a party in whose favor it is due;—or is it incumbent on the party to deliver it to the bailiff himself?

2.—Can an execution be said *to be issued to a bailiff*, by the clerk merely filling up the blanks in it, without giving or sending it to a bailiff of his court?

3.—Does a clerk comply with the requirements of the Act and Rules who neglects to deliver an execution to a bailiff of his court when at the instance of the plaintiff he has been ordered to issue execution?

4.—What are the hours a clerk should keep his office open for business; is there any enactment or rule of court on this point?

5.—Has a plaintiff a right to demand and himself receive from the clerk a writ of execution against goods and chattels of defendant?

6.—In case a clerk had been ordered to issue an execution and he delayed issuing it for twenty days and until after the defendant's goods had been exhausted on a *fi. fa.* from one of the Superior Courts issued ten days after the execution in the Division Court was ordered to be issued; would it be a good answer for the clerk (on an action against him for negligence in not issuing the execution) to say that it was not his duty to deliver it to the bailiff, and to say that no damage was caused by not issuing but by non-delivery to a bailiff; the execution not having been issued till after the levy by the sheriff on his *fi. fa.*?

7.—Is it necessary that any orders given to a clerk of a Division Court in his office, in reference to a case in his court, should be in writing?

As bearing on the above queries allow me to refer you to sections 36, 42, 52, 79, 135, 189, of the Division Courts Act, and new rules Nos. 92 and 150, also form 4 of the Procedure Book in the new rules.

Having already extended this beyond my original intention, I remain, yours truly,

Inquirer.

[The clerk is to have an office at such place within the Division, for which he is clerk, as the judge may direct. His duties are to be performed *in* and not *out* of the office (see rule 76, *et seq.*); and neither the Act nor the rules prescribe office hours, but the judge can do so; when hours have not been prescribed by the judge, the clerk should be in his office at all reasonable hours and times, as occasion and emergencies may require. We see nothing in the Statutes or Rules which requires him to travel to the bailiff, wherever that officer may happen to be, or to send to him in order to procure execution of process; it is his undoubted duty, however, to deliver process to the bailiff at his own office, when the latter goes there for the purpose of delivering process for service or execution.

Executions are issued at the request of the party prosecuting the judgment, and if the plaintiff wishes to avoid any risk from delay, he should sue out the process, and he has the right to take it to the bailiff, or see that it is delivered to him at his own option: see sec. 135.

An execution cannot be said to be issued to a bailiff by the clerk merely by filling up the blanks in it: (see *O'Brien's* D. C. Act, p. 63, note *f*, and p. 65, note *g*.) It ought, also, to be signed by him, and sealed with the seal of the court, and endorsed; and then it should be delivered to the bailiff at the clerk's office. We find no rule like that in the English County Courts (No. 23), which requires the bailiff to attend once, at least, every day at the office of the Registrar of the court for the purpose of receiving process for service or execution; and there is no provision made here for the clerks sending process to the bailiff, except upon the request, and at the expense of the party prosecuting the judgment. Any failure or neglect to deliver an execution to the bailiff on the first opportunity, would subject the clerk to the loss of all fees in the suit, and the payment of any loss or damage resulting from the delay (see Rule 98).

It is better for all orders to be given to the clerk in writing, as that precludes a possibility of denial or doubt on either side. Some methodical clerks keep order books, as well for the purpose of preventing plaintiffs from denying their having given orders for execu-

tions to issue as a *guide to* duties to be performed every day.

We have answered our correspondent's long string of questions, assuming that he asks with the single motive of eliciting the information asked for, and that there has been no suppression of any specific fact proper to be communicated to us or our readers. If the matter has been the subject of judicial consideration we must presume our correspondent would not omit to mention it. While we are willing to give our readers the benefit of our views on questions of general interest in the workings of the Division Courts, we, of course, cannot speak with confidence in the absence of judicial decision, and if there be any case in point before any of the local judges known to a correspondent, but withheld from us, we would not hesitate to expose the party, if any sinister motive existed.—EDS. L. C. G.]

Treasurer's Bond.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

GENTLEMEN,—I am instructed by the Municipal Council of the Township of Clinton, to ask the following question:—

When the Treasurer of the Township has given bonds, and the same person appointed from year to year, does it require a new bond every time the appointment is made, when the condition of bonds, say if the above bounden A. B. shall from time to time, and all times, hereafter faithfully perform the duties devolving upon him, or which ought to be performed by him as Treasurer.

An early reply will oblige,

Yours truly,

ROWLEY KILBORN,
Township Clerk.

[It is impossible to give any definite answer without seeing the bond. The Township Council had better submit the bond to their legal adviser.—EDS. L. C. G.]

Taxes—Sale of Land.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

Gentlemen,—Suppose A. purchases a piece of land from B. in the month of July, 1869, and a deed is given for the same, or an agreement in writing and a deed given afterwards: The same land being assessed for seven years in the name of B. as owner, but when the collector's roll is made out, (in October generally) and when the collector calls for the taxes, the same land is in possession of A., and A. knowing that the taxes must be paid, pays the collector and calls upon B. to refund him the amount so paid. B. replies:—there were no taxes due against the land when I sold to you, consequently I do not think I am liable for any of said dues.

Please say in the next number of the Gazette which of the said parties is bound by law to pay the said taxes.

A SUBSCRIBER.

[Our correspondent had better consult a lawyer. The question does not come within our province to answer.—EDS. L. C. G.]

REVIEWS.

THE AMERICAN LAW REVIEW. January, 1870. Boston: Little, Brown & Co. Subscription price $5 per annun. Quarterly.

The second number of Vol. iv. of this well-conducted quarterly is before us. The articles are, I. Proximate and Remote Cause—rather metaphysical than practical: II. Warranty of Seaworthiness in Time Policies: III. The Law of Insanity: IV. Lord Campbell's Lives of Lyndhurst and Brougham.

The article on the Law of Insanity, which were it not for our limited space, we should like to reproduce for our readers, is thus introduced:—

"When Lord Hale laid down his famous rule of law that some kinds of insanity furnish no excuse for crime, he unquestionably reflected the most advanced opinions on the subject, both of lawyers and physicians. For more than one hundred years its correctness passed unchallenged; and no person on trial for a criminal act was acquitted on the ground of insanity, whose disease had not entirely deprived him of reason and reduced him to the condition of an idiot or a wild beast. Science could enter no protest against the rule, for the materials necessary to give such a protest any support were not in existence. Medical men may sometimes have had a vague apprehension that all was not right, when a convict proclaimed the grossest delusions from the gibbet; but they were never properly shocked by the barbarity of such scenes. Coincident with the signal reforms in the treatment of the insane and the increased attention to the study of insanity, which marked the close of the last century, the suspicion began to be entertained by lawyers that the rule excluded from its protection many classes of the insane that were justly entitled to it. But they

never, to this day, have decided that insanity, in whatever shape it may appear, is necessarily an excuse for crime. The advanced step which they took was to regard certain forms of what is now called partial insanity, as having this legal effect; but precisely which they were, was a point not so easily settled. The exact question was, what mark, quality, or attribute of insanity should make it an adequate excuse for crime, and this led to definition of insanity and tests of responsibility. At one time, the question seemed to be satisfactorily answered by saying that it was a delusion, without which the patient conld not be considered so insane as to be irresponsible for any criminal act. It was not too long, however, before it began to be suspected that this was giving too large a sweep to the excuse, and then its application was restricted by various limitations. From time to time other tests were offered which, though intended to meet a present exigency, were fondly believed to cover every possible requirement. One was that if the patieut retained his knowledge of right and wrong, he continued to be accountable for his acts. Another was that if he knew the act to be contrary to the laws of God and man, he could not avail himself of the plea of insanity. Again, it was said that if he showed contrivance and forethought in regard to the criminal act, he was sufficiently sane to be accountable therefor. It would be a waste of time to mention all the rules of law on this subject, which the ingenuity of courts has devised, and which, one after another have been found too narrow for general application. But they will continue to be offered, and new ones no better to be made, so long as false theories of insanity prevail in the community, and the indubitable facts of science are treated as matters of speculation and fancy; and no improvement will be made, so long as it is believed in the high places of justice that the effect of insanity on the thoughts and feelings, the appetites and impulses, may be thorougly discerned by a hasty examination and the slightest acquaintance with the mental phenomena."

The writer then proceeds to give the following passage from the charge of a learned American judge (Edmonds), to the jury, in the case of *The People* v. *Kleim*, as illustrative of what he argues is the more enlightened doctrine of the present day:—

"To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. If some controlling disease was in truth the acting power within him, which he could not resist, or if he had not sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible. In order then to constitute a crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that if he commit the act he will be subject to punishment; and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he has not intelligence and capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent and is not a punishable for criminal acts."

We notice in the *Bench & Bar*, an article on the same subject, which will also repay perusal. The subject has an ephemeral interest, over and above that attaching to it from its intrinsic importance, from a divorce case in the English courts lately brought prominently before the public. Whilst, however, admitting that humanity requires that all care should be exercised for the protection of those suffering under the dispensations of Providence, the public must be guarded against the abuse to which the *humane* doctrine is open.

Of the specimen of petty spite in high places, exhibited by Lord Campbell in his Lives of Lyndhurst and Brougham, we have almost had enough. But, as a final shot at the author, and as an interesting sketch of the salient points of character of the great men now dead, that Lord Campbell unsuccessfully attempted to malign in his own peculiar style, the article in this review is most interesting, and we hope on a future occasion to find room for it.

We have the usual Digest of English and American Cases, Book Notices, A List of Law Books published in England and America since October, 1869, and a summary of events.

We heartily commend this Review to our readers, and advise them to subscribe to it at once; the price is a mere nothing for the interesting and instructive matter always to be found in it.

THE ALBANY LAW JOURNAL: Weekly. Weed, Parsons & Co., Publishers, Albany, N. Y. $5 00 per annum.

This is a new weekly Law Publication of much promise. It does not purport to be a collection of miscellaneous reports of cases, of which there are enough and to spare in the United States, but is more of a Magazine of matter interesting to the profession, culled from various sources, and containing leading articles on important topics. We have now received several numbers, and they evince good taste and much literary attainment.

A very interesting sketch of "Law and Lawyers in literature," by Mr. Irving Browne, runs through the numbers that have hitherto come to hand. With many of the incidents and extracts we are of course all more or less familiar, but many are new to the general reader, and may here be found collected and arranged in an accessible shape.

We notice also an address to law students by Hon. J. W. Edmonds, containing some excellent advice; the Administration of Justice, by the same author; on the Study of Forensic eloquence; Law of Arrest without Warrant, &c. We anticipate good success for this publication.

SUMMARY CONVICTIONS. — Mr. Denman has brought in a bill endorsed by Mr. Cross and Mr. Hibbert, to amend the law relating to first convictions for certain offences. The purport of the bill is not apparent on the face of it, inasmuch as it in terms only affects the operation of an Act therein cited. The first and practically the only section of the bill is in these words:—

Where any person shall, after the passing of this Act, be summarily convicted before a justice of the peace of any offence under 18 & 19 Vict. c. 126, and it shall be a first conviction, the justice may, if he shall so think fit, discharge the offender from his conviction upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

The effect of this measure seems to be that, when a person is charged before a police magistrate or before justices in petty sessions with simple larceny, or stealing from the person, or larceny as a clerk or servant, and the case is one which may properly be disposed of in a summary way, and the accused has not been previously convicted, the offender may be permitted to make a monetary reparation to the party aggrieved, instead of being sent to prison. So far as concerns the party aggrieved, this plan may be regarded as advantageous. So far as concerns society at large, it seems to add one more to the cases in which the criminal who has or can command money is placed in a widely different position from the indigent criminal. In practice we suppose that it will be very satisfactory to juvenile clerks or servants who rob their employers of petty cash in order to indulge in betting or the minor vices. These youths generally have a kind-hearted mother who prefers being sold up to seeing her son go to gaol, and their employers are not always able to resist the combined arguments of pecuniary amends and parental entreaties. However, we suppose that Mr. Denman has some good reason for the introduction of the bill.—*The Law Journal.*

The law's delays have ever been a favourite topic with public writers and speakers; the law's despatch and promptiude rarely find a chronicler. A remarkable instance, however, of the rapidity of the movements of the Court of Chancery, occurring only a few days since, ought not to be unrecorded. Some property of the Landed Estates Company, distant about twelve miles from London, was, in the course of one forenoon, invaded by a body of men, who commenced digging up a portion of it, in assertion of the supposed right of their employer. At two o'clock information was received at the London offices of the company of these proceedings, and at three o'clock instructions were given for the filing of a bill for an injunction to restain the defendant. With the assistance of several shorthand writers a bill was written from dictation and placed in the hands of the printers, together with a plan of the estate, and an affidavit. These were printed off with the utmost speed; the bill was filed the same afternoon in the court of Vice-Chancellor Malins, and the learned judge, after hearing counsel, granted the injunction. By seven o'clock in the evening a messenger, accompanied by a body of police served a copy of the injunction upon the parties who were still upon the ground, and who were forthwith removed. Such a rapid movement is perhaps unparalled.—*Solicitors' Journal.*

There is a well-known story of a jury who returned a verdict of "guilty, with some doubt as to the identity of the prisoner," after convicting, and of another who recommended the prisoner to mercy, "because they didn't think he was the man who did it." These are usually considered too good jokes to have actually occurred. If, however, the report in the *Times* of Wednesday last is correct, the first of the above verdicts has been equalled by one given by a jury at the Central Criminal Court on Tuesday. One George Woolgar, a policeman, was indicted for highway robbery in taking by force some money from a woman in the street. The jury, after three hours' deliberation, found a verdict of guilty, "with a strong recommendation to mercy *on the ground of discrepancies in a portion of the evidence.*" Such a verdict requires no comment, but it is still more remarkable that, according to the report, the Recorder took that recommendation into his consideration in deciding on the sentence which ought to be passed.

That a jury should sometimes be illogical is not, perhaps, surprising, but a judge should know better. We must hope that there has been some inaccuracy in the report.—*Solicitors' Journal.*