DIARY FOR FEBRUARY.

1. Friday Clergymen to make yearly return of marriages to County Registrar.
2. Satur. *Purification of B. V. M.*
3. SUN... *4th Sunday after Epiphany.*
4. Mon. .. Hilary Term commences.
6. Wed. .. Meeting of Grammar School Boards.
8. Friday Paper Day Q. B. New Trial Day C. P.
9. Satur. Paper Day Q. B. New Trial Day Q. B.
10. SUN... *5th Sunday after Epiphany.*
11. Mon. .. Paper Day Q B. New Trial Day C. P.
12 Tues... Paper Day C P. New Term Day Q. B.
13. Wed. .. Paper Day Q. B. New Term Day C. P. Last day for service for County Court.
14. Thur... *St. Valentine's Day.* Paper Day Common Pleas.
15. Friday New Term Day Queen's Bench. Last day for County Treasurers to furnish to Clerks of Municipalities in Counties list of lands liable to be sold for taxes.
16. Satur. Hilary Term ends.
17. SUN... *Septuagesima.*
23. Satur. Declare for County Court.
24. SUN. .. *Sexagesima.*
27. Wed. .. Appeals from Chancery Chambers.
28. Thurs. .. Sub-Treasurer of School Moneys to report to County Auditors.

NOTICE.

Subscribers in arrears are requested to make immediate payment of the sums due by them. The time for payment so as to secure the advantages of the lower rates is extended to the 1st April next, up to which time all payments for the current year will be received as cash payments.

The Local Courts'
AND
MUNICIPAL GAZETTE.

FEBRUARY, 1867.

REMOVAL OF PROPERTY SEIZED UNDER EXECUTION FROM DIVISION COURTS.

A very important case upon the removal of goods (seized on an execution from a Division Court out of the division in which the seizure was made, has lately been decided before the Court of Queen's Bench.

The 155 section of the Division Courts' Act provides that a bailiff, after seizing goods under execution, shall put up notices of sale "at three of the most public places in the division where such goods and chattels have been taken, of the time and place *within* the division when and where they will be exposed to sale." In the case referred to (*Campbell* v. *Coulthard*, 25 U. C. Q. B. 621), executions had been issued against Campbell's goods for about $200. A large quantity of lumber was seized thereunder at Campbell's mill, and a sale was attempted there without success. Under direction from one of the execution creditors, the bailiff removed some $288 worth of lumber out of the division in which it was seized to the County Town, some thirty miles off, at a cost of $160. And eventually it was sold at the County Town for an amount barely sufficient to pay the costs of removal. Campbell brought an action of trover against the purchaser, and although it was held that the sale in another division to a *bona fide* purchaser would pass the property, and Campbell in consequence failed, yet the case as respects the liability of bailiffs is very important.

The learned Chief Justice of Upper Canada, after commenting in severe terms on the case as one of cruel hardship on Campbells, speaks thus of the 155 section: "As we read the section, it makes no provision for selling goods taken in execution in any division but that in which they were taken, &c.," but he remarks, "we are not however, as at present advised, prepared to hold a sale made in another division to a *bona fide* purchaser void. We incline to think it might be upheld; and *that either the plaintiff* or defendant in the Division Court execution *who sustained loss or damage by such removal and sale, might recover compensation from the bailiff*, assuming of course that they neither directed or assented to the removal."

In view of this case and the liability bailiffs incur by a removal of goods, they should be particularly cautions in following out the directions in the statute. And yet there are cases in which both execution plaintiff and defendant would be benefited by taking property seized into another division for sale. Such stuff as was seized in *Campbell* v. *Coulthard* does not bear the expense of removal, and to transport lumber a distance of thirty miles with the professed object of faithfully executing the writ was a grossly stupid, if not a wantonly wicked act. But grain, horses, sheep, cattle, and the like, may be conveyed to a reasonable distance and at a trifling cost.

The difficulty in effecting a sale in the division in which property is seized especially if the division is a partially or newly settled country, arises in some cases from the inability of people to pay in cash, or their not requiring the property put up for sale; in other cases, it arises from an unwillingness "to buy a neighbor's goods at a bailiff's sale;" and from these and other like causes a bailiff has either to sell at a nominal price, probably to some one who buys in for the execution debtor to protect the goods for him, or to abandon a

sale altogether. It is not easy for bailiffs in such cases to discharge their duties properly, and they are under a cross fire from the plaintiff on the one hand, and the defendant on the other if any slip is made. Officers generally know the places where a difficulty will be experienced in effecting a sale to advantage within the division, or where a sale to good advantage, beneficial alike to plaintiff and defendant, might be made by bringing the property seized to a town, village, or place of public resort in an adjoining division. Under circumstances of this kind we would submit to bailiffs the following practical suggestions: Before making a seizure, see the execution creditor, explain to him the position of things, and get him to sign a writing, authorizing the removal for sale, the execution debtor consenting. Then, when the seizure is made, explain to the party whose goods are seized the benefits to be derived from a sale (if one has to be made) at the particular place out of the division, and get from him also a request in writing to take the goods out of the division to a named place in the county, there to sell the goods under the execution. The instruments taken had better be styled in the cause, and should refer distinctly to the execution held by the bailiff, and in the instrument from the execution debtor the particular property intended to be removed should be specified.

SELECTION.

THE RIGHT OF PUBLIC MEETINGS.

We have heard a great deal lately of the "right of public meeting," and it has been put very plainly by Mr. Bright at the recent reform meetings. It has been put boldly and plainly as the right of gathering together hundreds of thousands of men, and marching in procession to a place of assembly, not for the purpose of discussion, but, as he expressly said, for the purpose of "demonstration." That there might be no possible mistake, he went on to explain, that what he meant was, that their numbers might convey an idea of their determination, and what they *might* do if their demands were not acceded to. And in language which approached as nearly as possible to actual incitement of sedition, he hinted that the exertion of popular force might well be excused by the denial of popular rights. And this way of putting it has, at all events, the merit of frankness. Not that it would have been much use to disguise the matter. No man of sense can suppose for an instant that a hundred thousand men were ever got together for the purpose of *discussion*, or for anything else but *demonstration*. And demonstration of what? Not merely of the physical force of numbers. The mere fact that a hundred thousand men are got together "demonstrates" nothing but their number. But the fact, that they are got together to *display* their numbers for the purpose of enforcing an acquiescence in their demands, is a demonstration indeed. But a demonstration of what? Simply of their readiness for rebellion. For if a hundred thousand men met together to say, as Mr. Bright plainly said on their behalf, "You see our numbers; if you don't grant us what we demand, *beware of our numbers*"—what is that but a *threat of rebellion?* And of what use can the assembling of a hundred thousand men be *but* to convey that threat? The mere desire for a measure could be conveyed far better by petition. That would be the expression of their opinion. Their meeting together in vast numbers can be meant only as a demonstration of their determination, and of their force. But to threaten the Legislatnre with physical force, in order to compel a change of measures, and, still more, to coerce them to an organic change in the constitution, is more than sedition, and approaches very near to treason. So far from there being any *right* to convene such assemolies for the purpose of "demonstration," it is undoubtedly an indictable offence to do so, even *without* the design thus suggested. There is a right of public meeting for the purpose of *discussion*, provided the matter discussed is lawful, and provided there is no breach of the peace, nor violation of law and order, or the place or manner of meeting. But the right like all others, is only to be exercised so far as it can *lawfully* be exercised. And in the first place, men must meet where they have a right to meet. They have no right to hold meetings anywhere, without the express or implied license of the owner of the soil. For instance, they have no right to meet upon the highways, or in the places and thoroughfares of a town or city. Not on the highways, for it has been held again and again, that no one has a right to use a highway, except for the purpose of ordinary transit. Men have no right to collect in large numbers upon the highway, blocking it up, and obstructing it as they did around Hyde Park, and thus causing public confusion and disturbance. Neither have they a right to gather together in places of public recreation. But waving these minor difficulties, or supposing that they have licence from the owner of the soil to assemble, they by no means render their meeting lawful. That only purges it of *one* species of illegality—the lesser degree of it which consists in the disregard of the right of property. There is a far graver offence involved; it is that of endangering the public peace. No man has a right (as one of the police magistrates said) to assemble together in a mass all the scum and offscouring of a large city under the cover and disguise of a "popular demonstration." No man has a right, in short,

to assemble a hundred thousand men for the purpose of a "demonstration." The law deems the assembly of such vast multitudes as illegal, from their serious tendency to disturb society. When a hundred thousand men are got together, no one can tell what they may do or not do. Such assemblages are not *meetings;* they are *mobs;* and all history tells us how dangerous mobs are. They are sure to contain a large proportion of the reckless and the worthless, who on such occasions are always ready for mischief, and likely to give one of those sudden impulses by which numerous masses of men are so easily led. No one can foresee what such mobs may do, and no one has a right to incur the risk, and put the public peace to such fearful peril. Some trifling provocation —some casual excitement, and this vast mob becomes a tremendous engine of mischief which may in a few hours produce consequences one sickens to contemplate. We who write, and those who read these lines, are old enough to remember the disastrous riots of Bristol, and have read of those of Birmingham; and we shall never forget the terrible pictures we have had put before us of the Lord George Gordon riots, when half London was in flames. All these terrible disturbances arose in the simplest possible way; merely by getting large masses of people together. There are myriads in all large cities who eagerly swarm to such assemblages in the *hope* of a disturbance, and eagerly seize any chance of creating one. Every one knows this, and therefore no one has a right to gather such multitudes together; and any one who does so is doing an act wilfully illegal. All this has been established within the last twenty years in the criminal courts of England and Ireland. It was established in the Chartist trials. It was established in the trials of the Irish agitators. It was established, above all in the case of O'Connell. (Vide *O'Connell* v. *Reg.*, 11 Cl. & Fin. 156). It is true, the indictment was held there too general, but there was no doubt as to the law. The offence for which he was tried, and of which he was convicted. was that of exciting public terror, and disturbing the public peace, by the assemblage of vast multitudes of men, and the indictment failed as a mere matter of pleading. His monster meetings were, it will be remembered. studiously peaceful. He studiously protested against any violence; in that respect far more cautious than Mr. Bright; who distinctly hints at it, as, at all events, a possible future measure, whereas the great Irish agitator always denounced it as criminal, and on that account he flattered himself that what he did was lawful; but it was not, and the House of Lords affirmed that it was not. The judgment was reversed upon grounds quite distinct from the merits, as we all know. The House of Lords never doubted that the offence committed *was* an offence against the law of this country; and since then, in *O'Connell's case*, it was not disputed, that to stir up the Queen's subjects to disaffection is an indictable offence. (*Reg.* v. *O'Conner*, 13 L. J., M. C., 33). If it were not so, it would be at the will of every popular agitator to keep this country constantly on the brink of a revolution, until one day, intentionally or unintentionally, *revolution came*, and overwhelmed the nation like a torrent. It will not do to live on the brink of a revolution, and the holding of monster meetings has been always the *beginning* of revolution. Vast assemblages of men are of no possible use except for the purpose of *threatening* revolution, and if they are allowed to continue *threatening* it, they will one day, by some accident, go a long way towards realizing these threats. That in this country they could ever succeed, of course, we do not believe; but they would produce an immense amount of disaster to the nation and to themselves. No doubt, there is no *intention* of producing this mischief. Probably all that is meant is to produce just so much of public alarm and disquietude as shall enforce the passing of a popular measure. But, then, that is just what is illegal and criminal. It is illegal to attempt to coerce or intimidate Parliament or the Government in that way. The lawful and constitutional way of shewing popular desire for a measure is by petition. If the people are agreed in its favour, there is the less need for meeting to discuss it, and a hundred thousand men never did meet for discussion. If they meet for demonstration, it is in effect for intimidation, and that is illegal. Indeed, popular intimidation is the beginning of revolution, and the worst kind of revolution—*mob* revolution—which means anarchy, dissolution of society, and universal ruin. Men have no right to provoke such peril, or dally with such danger. It matters not what their intentions may be; if they take measures calculated to produce such peril, they are legally responsible for their acts, whatever the results; and even though no ill results actually arise, they are legally liable for the illegality of their acts. It is the *peril* of such results which makes the illegality, not their actual occurrence. The offence is the *endangering* the public peace, not its actual destruction—its disturbance and disquietude by the presence of danger. The object, no doubt, is to *produce* that sense of danger, and that object is unlawful, and, in a legal and moral sense, it is criminal.—*Jurist.*

THE DUTIES OF CORONERS.

The death of Mr. Swann, a county coroner for Nottinghamshire, during the pendency of an inquiry into the circumstances attending the murder of Mr. Raynor at Carlton, has given rise to some remarks which affect the present condition of the law concerning coroner's inquests. The state of facts, we believe, is unique: we can find no precedent. The inquisition instituted by Mr. Swann was never brought to a finding. Could the Newark coroner, who was summoned to conduct the inquiry continue the proceedings, and take a verdict from the jury?

Now, the office of coroner is a judicial office, and one coroner can no more take up an

inquiry begun by another than can a judge sitting at Westminster, without a new trial, conduct to judgment a cause opened before a brother judge. We may bring all doubts under leading principles. If a coroner takes an inquisition without view of the body, he may take a second inquisition *super visum corporis*, and that second inquisitisn is good, for the first was absolutely void: (2 Hale P. C. 589.) But if a coroner takes an inquisition *super visum corporis*, and after that another coroner takes an inquisition on the same matter, the second inquisition is void, because the first was well taken: (Fitz. Abr. tit. Coron. 107.) The inquisition begun by Mr. Swann is absolutely void, and therefore the only course open to his temporrary successor is to take a second inquisition *super visum corporis*.—Taking an open verdict, such as Mr. Newton took, is simply recording an expression of opinion which has no legal effect. Had the first inquisition been concluded, but defectively, it might have been quashed, and a second taken by another coroner—not, be it observed, *mero motu*: (*Reg.* v. *Seager*, 29 L. J. 257, Q. B.—*Law Timee.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW

NOTES OF NEW DECISIONS AND LEADING CASES.

INSOLVENT, SALE BY—PREFERRING A CREDITOR—A person in insolvent circumstances made a bill of sale of his property to one of his creditors, the consideration therefor being a pre-existing debt, and a sum of money in addition sufficient to make up the price agreed upon as the value of the property sold; the amount of money so received by the debtor being by him paid over with the knowledge of the purchaser, to another creditor; and three months after this sale was completed, the debtor made an assignment of his assets under the Insolvent Debtors' Act. On a bill filed by a creditor for that purpose the sale was set aside and a resale of the property ordered, the proceeds to be applied in payment of the plaintiff's claim, and the residue, if any, to be paid over to the assignee in insolvency.—*Coates* v. *Joslin*, 12 U. C. Chan. Rep. 524.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

CHATTEL MORTGAGE—SALE BY MORTGAGOR—WAIVER.—E. mortgaged a horse to the defendant in April, 1864, and the mortgage contained a proviso that if he should attempt to dispose of the property, the defendant might take possession and sell E. did dispose of the horse to the plaintiff within a few weeks. This mortgage was not refiled, but the defendant took another in February, 1865, for the same money, with other advances. In July, having first discovered the sale, he seized under the proviso.

Held, that having neglected to refile the mortgage and taken another, he had lost his right to seize.—*Curtis* v. *Webb*, 25 U. C. Q. B. 576.

ARREST — AFFIDAVIT TO HOLD TO BAIL — APPLICATION FOR DISCHARGE. — An affidavit on which an order to hold to bail had been issued, stated that defendant was indebted to the plaintiff in $2,615. being the amount of four several promissory notes made by defendant, bearing date the 6th of February, 1866, for $653 75 each, payable respectively at forty days, sixty days, three months, and four months after date; and that said notes were given by defendant for goods purchased by defendant from the plaintiff. On motion to set aside the arrest, it was objected that this affidavit did not shew to whom the notes were made payable, nor in what character the plaintiff held them—but, *Held*, that it was sufficient.

The defendant swore that he had not at the time of his arrest, or of making his affidavit, any intention of quitting Canada with intent to defraud the plaintiff of his debt, but he did not deny or explain any of the facts sworn to by the plaintiff on obtaining the order; and the court, holding that these facts justified the arrest, refused to order his discharge.—*Jones et al.* v. *Gress*, 25 U. C. Q. B. 594.

WILL—DISPOSING MIND—MENTAL CAPACITY OF TESTATOR.—A testator was in an extremely low state at the time of giving instructions for and signing his will, and died soon afterwards; but it appeared that he was considered of testamentary capacity at the time, and seemed to understand and approve of the document; that it was prepared in good faith, in supposed accordance with his wishes and directions; that no question had been suggested as to the validity of the will for more than a year after probate; and his widow, to whom he had devised a life estate in part of his lands, died in the interval; the court sustained the will notwithstanding some doubts suggested by the witnesses at the hearing, as to the mental condition of the testator, and the exact conformity of the will with his wishes.—*Martin* v. *Martin*, 12 U. C. Chan. Rep. 500.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

The Corporation of the County of Lincoln v. The Corporation of the Town of Niagara.

By-Law—Equalization of Rates—C. S. U. C. ch. 54, secs. 28, 32, 70, 73.

Declaration on a county by-law to levy money for the general purposes of the year, alleging non-payment by the defendants of the proportion to be raised by them. *Plea*, that in capitalizing the real property not actually rented but held and occupied by the owners in the towns of N. (the defendants) and C. and the village of D., and in capitalizing the ratable personal property there for the year, the plaintiffs capitalized at ten instead of six per cent., as directed by law, and apportioned thereon among the several municipalities, whereby $1,000,000 was omitted from the capitalization, and the aggregate value of the ratable property in N., and the amount directed to be raised there, was erroneously and illegally made up.

Held, on demurrer a good defence, for such capitalization was contrary to the statute, and though it lessened the defendants' assessment they were not precluded from objecting for the plaintiffs could only create a debt by complying with the act. *Held*, also, that it was unnecessary to quash the by-law, for the court in their discretion might decline to do that, though they could not deny the defendants' right to contest their liability on any legal ground

[Q. B., T. T., 30 Vic. 1866.]

The declaration contained two counts. The first set out a by-law passed by the plaintiffs on the 27th of May, 1863, which recited, among other things, that it was necessary to raise $8,865, for general purposes for the current year, and enacted, that such sum should be levied and collected upon all the ratable property in the county, and should be apportioned among the several municipalities therein, according to a schedule set forth, in which the proportion to be paid by the town of Niagara was $588; that the plaintiffs by the said by-law required the defendants to raise, levy, and pay over to the plaintiffs, within the year 1863, such sum of $588. Averment of notice to the defendants, and that the clerk of the peace did before the 1st of August, 1863, certify to the clerk of the defendants the total amount directed to be levied in the town of Niagara for that year for county purposes. Breach, non-payment of that sum.

The second count set forth a similar by-law passed in 1864, reciting the necessity of raising $11,291, and stating the proportion to be paid by the town of Niagara at $479 for that year for county purposes; and after similar averments, concluded with a similar breach

Plea—To the first count—that before the passing of the said by-law in the first count mentioned, the said plaintiffs, in capitalizing for the purpose of assessment for the year 1863 the real property not actually rented but held and occupied by the owners thereof in the towns of St. Catharines and Niagara, and in the village of Port Dalhousie, municipalities of the said County of Lincoln, and also in capitalizing the ratable personal property for the said year 1863, in the said towns and village, capitalized the same at ten per cent instead of at six per cent, as directed by law, and that in making the said apportionment in the said by-law among the townships of the said county and the said towns and village, the said plaintiffs made such apportionment upon the said capitalization of ten per cent herein mentioned, whereby the large sum of money of one million dollars was omitted from the amount of the said capitalization, and the aggregate value of the ratable property of the said town of Niagara was thereby wrongly and illegally made up by the said plaintiffs, and the amount by the said by-law directed to be raised and levied as the ratable property of the said town of Niagara was also erroneously and illegally made up in the said apportionment, and was another and different amount than the amount should and would have been if the plaintiffs had capitalized the said real and personal property in the said towns and village at six per cent, directed and authorized by law—whereby the defendants say that they have incurred no liability to the plaintiffs under the said by-law as in said first count alleged.

Similar plea, *mutatis mutandis*, to the second count.

Demurrer, on the grounds—1. That the facts stated in the said pleas would not, if true, render the said by-laws invalid or illegal.

2. That the mode adopted by the plaintiffs in capitalizing the ratable property of the said towns and apportioning the same, the amount to be levied and raised by the defendants would be much less than if the said real and personal property had been capitalized at six per cent., and it does not lie with the defendants to make the objection

3. That the defendants should have moved to quash the said by-law, and cannot take the objections by way of plea.

4. That if the defendants were damaged by the said mode of capitalizing, it should have been shewn and pleaded by way of equitable plea.

W. Eccles and *Robert A. Harrison*, for the demurrer, cited *Fisher* v *The Municipal Council of Vaughan*, 10 U C Q B 492; *Gibson and the Corporation of Huron and Bruce*, 20 U. C. Q. B. 120; *Secord and the Corporation of Lincoln*, 24 U.C Q B 142; Consol Stat U C. ch. 54, secs. 10, 19, 28, 29, 32, 70, 71, 73, 75, 76, 77.

J. H. Cameron, Q. C., contra.

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

The defence set up to the declaration is in effect that the amount claimed by the plaintiffs by each of these by laws has not been legally arrived at according to the directions of the Assessment Act, by which both parties are bound: that as to real property not actually rented, but held and occupied by the owners, as well as to personal property generally, it was "capitalized" at ten per cent instead of six, upon its annual value, whereby a sum of $1,000,000 has been omitted from the proper aggregate valuation of all the property in the county liable to be rated and assessed: that the aggregate value of the ratable property in the town of Niagara was illegally made, and the sum of money directed by the by-law to be raised was illegally arrived at (*i. e.*, not according to the statute) and was different from what it would have been if the plaintiffs had capitalized the real and personal property in the towns and incorporated villages in the county at six per cent And on this ground the defendants say they have not become indebted to the plaintiffs, for a debt of the nature claimed could only be created in the manner and form prescribed by the Assessment Act.

The method of capitalization alleged in the plea to have been adopted is to the advantage of towns and villages, for if the taxable value had been ascertained as the statute directs, the aggregate sum upon which the rates should be calculated would be larger than it is in the mode adopted. The defendants have not any overcharge to complain of, but broadly deny liability to pay anything until the amount of liability has been settled as the law directs.

We do not understand the plaintiffs to contend that they have followed the 28th and 32nd sections of the Assessment Act, but it has been argued that the 70th section gives to the county council an unfettered discretion to increase or decrease the aggregate valuation of real property in any township, town or village, so as to produce a just relation between all the valuations of real estate in the county so long as they do not reduce the aggregate valuation of real estate for the whole county.

As to this, the authority given is to be exercised for the purpose of ascertaining whether the valuation made by the assessors in each township, &c., bears a just relation to the valuations so made in all the townships, &c.; and for the purpose of county rates the county councils may increase or decrease the aggregate valuation of *real property*, not reducing the aggregate valuation thereof for the whole county This latter restriction renders it necessary, if the valuation made by the assessors for any township, &c., is decreased, to increase the valuation in some one or more of the other townships, &c.,—in other words, they must take the aggregate value of real property in each municipality ascertained in the manner the statute directs, and then, in order to produce the "just relation" spoken of, they may decrease or increase such aggregate value in such of the several municipalities as they judge to be necessary, still preserving the same sum as the aggregate valuation for the whole county as was the result of the assessors' valuation in their several municipalities. Moreover, the authority thus given does not extend to personal property, the yearly value of which is, by section 32, fixed at six per cent of its actual value, the latter value being declared by the assessors subject to appeal, but which is not subjected to a change by the county council. This 70th section does not therefore, in our opinion, afford an answer to the plea as far as real property is concerned, and certainly does not justify the substitution of ten per cent for six per cent in converting yearly into actual value in any case.

The sum total of the *rentals* assessed in towns and villages, as distinguished from the local value of other real property and of personal property, is the subject matter dealt with by the 73rd section. These rentals are to be calculated in making the apportionment of the county rate at ten per cent on the capital represented. The plea observes the distinction thus created, by not objecting that real property actually rented is capitalized at ten and not at six per cent.; the objection is limited to real property held and occupied by the owners, and ratable personal property.

Although we do not enquire into the *modus operandi* by which the county council endeavour to produce a just relation between all the valuations of real estate in the county, we do not think we are at liberty to uphold a violation of the express provision of the statute as to the manner in which the actual values are to be ascertained The plea does not assert either increase or decrease of the aggregate valuation of real property in the town of Niagara, which, so far as the assessors were concerned, would have been expressed in the form of a rental or annual value of each separate parcel.—(See sec. 19. sub-sec 4.) What the plea relies on is that the county council, while adopting the assessors' return of rental and yearly value, have converted the same into capital or actual value in a different manner from that directed by the statute, and this is admitted by the demurrer. We do not agree in the argument that the 73rd section overrides the 28th. The two can well stand together, and must be construed accordingly.

There are two other objections taken as grounds of demurrer, to which it is only necessary to make brief allusion:—First, that by the mode of capitalization adopted the defendants are assessed upon a much less sum than would be the case if the statutory direction had been followed, and it does not lie with them to take the objection. The answer is obvious. Except under the statute the County Council could not impose a rate at all on the defendants, and the mode in which they shall exercise the power conferred being expressly designated, they cannot substitute a different mode leading to a different result. The plaintiffs claim a debt and must show the obligation lawfully created; the foundation of their claim is their by-law. and that depends for its validity on the statute, which it is admitted has not been followed. If there is no legal by-law there is no debt

Secondly.—It is said the defendants should have moved to quash the by-law. On such motions the courts have a discretion to exercise, but here the plaintiffs come into a court of law to recover under their own by-law; the court have no discretion to deny to the defendants the right of contesting on any legal ground their liability to pay

On the whole, we are of opinion the defendants are entitled to our judgment. In *Secord* v. *The Corporation of Lincoln*, 24 U C. Q B 142, we intimated very plainly the leaning of our opinion on this very question, and the present case confirms us in what we then threw out as to the exercise of the powers of the County Council.

Judgment for the defendants on demurrer.

In the matter of McLean and the Corporation of the Township of Bruce.

Temperance Act of 1864.

Upon the affidavits in this case, substantially stated below, the court refused to set aside a by-law passed under "The Temperance Act of 1864," on the ground that the reeve did not "preside" at the meeting at which it was adopted, but the clerk. There was no doubt that he opened and closed the poll, but the affidavits were contradictory as to the length of and reason for his absence in the meantime.

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

In Easter Term, *Robert A. Harrison* obtained a rule to quash By-law No. 29, for preventing the sale of intoxicating liquors in the township of Bruce, on three grounds. 1. That no notice of holding the poll was posted up in at least four public places in the municipality. 2. That

neither the reeve, nor any member of the council, nor any municipal elector presided at the meeting for the purpose of receiving votes. 3. That the poll was closed at three p. m., before all the electors had polled their votes

In this term *S. Richards* Q. C., shewed cause.

The case turned entirely upon the affidavits filed on both sides, the contents of which are sufficiently stated in the judgment of the court, delivered by

HAGARTY, J.—We think the first and third objections are completely answered by the affidavits filed, both as to the giving the notices and as to the closing the poll.

The second, as to the reeve not presiding, has produced a large amount of testimony not completely reconcilable.

The witnesses for the relator swear that when they voted the reeve was not there. The witness McKay says, that from half past ten to half past twelve he was engaged in business with the reeve "at some distance from the place where the poll was held." This statement may have several meanings, and it might be very difficult to assign a definite meaning, on which perjury could be charged. If the reeve had noticed and explained this statement, there would have been nothing to argue. His omission so to do is the only point in the case requiring much consideration. If his affidavit stood alone in answer, we might be inclined not to accept it as sufficient. But the evidence is overwhelming, that he duly opened and closed the poll, and a number of witnesses swear that, "except for a short time on two or three occasions, when he was necessarily out of the room," he presided in the usual manner. It may be probable that the relator's witnesses when voting may have come in on these two or three occasions, and so not have seen him

We must not too rigidly construe the statutable direction, that the reeve, &c., shall preside. In the case made out for the defendants, we can not say that the clause in the act was not substantially complied with. An overstrictness of construction would open the door to innumerable objections of a technical character to almost every township meeting held by the ratepayers, who, generally without legal advice, are obliged to perform the many duties and go through the many forms prescribed by the municipal act.

There seems no reason to suspect that there was any unfairness in the conduct of the voting, and we think, on the whole evidence before us, we must discharge the rule.

Rule discharged.

CAMPBELL v. COULTHARD.

C. S. U. C. ch. 19, *secs.* 151. 157—*Division Court—Sale under executions.*

Executions for about $200, issued against the plaintiff from the first division court of the county, under which lumber was seized at his mill, within that division. A sale was attempted there without success, and by direction of one of the execution creditors the bailiff had the lumber removed to the county town thirty miles off, in the fifth division, which cost $160. It was there bought by G., the deputy sheriff, for $160, and the defendant purchased from him. The plaintiff having brought trover, the jury were asked only to find the value of the lumber, which they assessed at $285, and a verdict was entered for that sum.

Upon motion on leave reserved, a nonsuit was ordered for though section 151 provides only for sale in the division where the goods have been seized, yet a sale in another division to a *bonâ fide* purchaser would pass the property, leaving the party injured to recover compensation from the bailiff: that G. must be assumed on the finding to be such a purchaser, and defendant could not be made liable for purchasing from him.

Quære, whether on the evidence, stated below, the jury might not have found that G. was in fact purchasing for defendant, who was a division court bailiff; and, if so, under section 157, the sale would have been void.

Remarks upon the hardship of the case upon the plaintiff.

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

Trover, for 66,792 feet of sawed lumber.

Pleas—1. Not guilty. 2. Not plaintiff's property. 3. Leave and license.

The case was tried at Lindsay, in April last, before *Hagarty*, J.

It appeared the plaintiff had a saw-mill in the township of Eldon, and that three precepts or executions were delivered to one Hungerford, bailiff of the first division court, against the plaintiff's goods. The saw-mill was within the limits of the first division court, and the judgments were recovered there. One Edwards was the plaintiff on two writs, the joint amount of which was $122 06. The defendant was the plaintiff in the other, which directed the levy of $76 11. All three came to the bailiff's hands at one time. He seized a quantity of sawed lumber, not less than 64,000 feet, in June, 1865, and advertised a sale at the plaintiff's mill, but could not get a bid, and adjourned the sale, and at a subsequent day tried again, but no one bid.

Then Edwards directed that the lumber should be removed to Lindsay, which was in the fifth division, and about thirty miles from the plaintiff's mill, and Hungerford employed a man to remove it, whose charge was $160, and who was paid $80 on account. There Hungerford sold it for $160. The defendant was at the sale; only a few persons were present; and one James Gallon bought it, and he paid the $80 for hauling it, which money he received from the defendant. Gallon was called, and swore that the defendant had nothing to do with his making the purchase, that he bought on speculation; only three persons were there. After the sale the defendant agreed to go shares with him in the profits, and lent him money to pay for it, and afterwards bought the whole. Gallon gave up the purchase to him for $10. The defendant at that time was a division court bailiff in that county, and Gallon was a deputy sheriff. A witness for plaintiff swore that he went to the plaintiff's mill yard to attend the bailiff's sale, and was willing to have given $4 per thousand for the lumber. It was sworn it was worth $5 or $6 per thousand at the mill.

Hungerford swore that Edwards, one of the execution creditors, directed the removal of the lumber to Lindsay, and that the plaintiff said nothing as to moving it, but the man who drew it away swore that the plaintiff forbid him and Hungerford from taking it away; that he objected several times, and said it ought to be sold on the place.

It was insisted for the plaintiff that the lumber could not be sold out of the division where it was seized; that the defendant could not buy at a division court sale; and that the sale was at so low a price as to afford evidence of a fraudulent and void sale.

For the defence, it was objected that the sale to Gallon passed the property, and that neither

property in the plaintiff nor a conversion by the defendant were proved

The learned judge thought there was no evidence of fraud to vitiate the sale to Gallon, and asked the jury to assess the value of the lumber; and it was agreed that the verdict should be entered for the plaintiff for the amount assessed, with leave reserved to the defendant to move to enter a nonsuit.

In Easter Term, *C. S. Patterson* obtained a rule to shew cause why a nonsuit should not be entered on the leave reserved, on the ground that the goods were lawfully sold, and that the defendant was not shewn to have converted the goods, having done no act affecting them, and there having been no demand made upon him for them. He cited *Burroughes* v. *Bayne*, 5 H. & N. 296.

In this Term *Hector Cameron* shewed cause, citing *Carroll* v. *Lunn*, 7 C. P. 510; *Grainger* v. *Hill*, 4 Bing. N C. 212; *Billiter* v. *Young*, 6 E. & B. 1 Add. on Torts, 271.

Consol. Stat. U. C. ch. 19, secs. 79, 135, 136, 155, 157, were also referred to.

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

The 157th section of the Division Courts act, provides that no clerk or bailiff, or other officer of any division court, shall directly or indirectly purchase any goods or chattels at any sale made by any division court bailiff under execution, and every such purchase shall be absolutely void. If therefore the defendant was through Gallon indirectly the purchaser of the lumber in question at the sale by Hungerford, he acquired no title, and could not hold it against this plaintiff Whether, looking at the whole case, he was not indirectly the purchaser, was not submitted to the jury, the case having been withdrawn from them by the consent of both parties, except as to the question of the value of the lumber, which they found to be $288 Gallon denied that there was any understanding before sale between him and the defendant, though other parts of his testimony are calculated to lead to an opposite conclusion, and if, on considering the whole together, the jury had adopted such conclusion, I am not at present prepared to say it must necessarily have been set aside.

The case seems to be one of cruel hardship for the plaintiff His property to the value, according to the verdict, of $288, has been rightly taken in execution, but it has been removed from his mill-yard into another division of the county, and the mere expense of the removal ($160) absorbs the whole sum for which it was sold. There is positive evidence that the plaintiff forbid its removal, and Hungerford, the bailiff who seized and removed, only asserts the direction of Edwards, an execution creditor, for the removal, adding that the plaintiff said nothing as to moving it, did not object to him. Thus the plaintiff's property, enough to satisfy the debts, amounting to less than $200, (to which of course interest and costs should be added), for which it was seized, has been disposed of, and not a penny of the debts paid, nor even the bailiff's fees on the execution. It may well be asked if the law permits this?

The seizure was warranted under the 151st section of the act, and the 155th section directs how he is to proceed. He shall immediately after seizing, and at least eight days before the time appointed for sale, give public notice by advertisement put up at three of the most public places "in the division where such goods and chattels have been taken, of the time and place *within the division*, when and *where* they will be exposed to sale." As we read the section, it makes no provision for selling goods taken in execution in any division but that in which they were taken, and the facts of this case do not favour a less limited interpretation. We are not, however, as at present advised, prepared to hold a sale made in another division to a *bonâ fide* purchaser void. We incline to think it might be upheld; and that either the plaintiff or defendant in the division court execution who sustained loss or damage by such removal and sale, might recover compensation from the bailiff, assuming of course that they neither directed or assented to the removal

But assuming, as we presume we are bound to do, from the manner in which the parties have agreed the case shall be presented, that Gallon was a *bona fide* purchaser, the defendant could not be made liable for purchasing from him. Lord Ellenborough's dictum, in *McCombie* v. *Davies*, 6 East. 538, would not cover the case, and that dictum has been repeatedly questioned, and the judgment of the court only upheld on the ground mentioned by the other judges, the want of demand and refusal. If Gallon had bought for defendant in fact, though in his own name in form, we think the defendant, being the bailiff of another division court within the same county as that from which the execution issued, would come both within the spirit and the letter of section 157, and that the sale to him being void, if he had the goods in his possession trover would lie with previous demand.

We cannot, however, hold that the plaintiff is entitled to the verdict, without the fact having been found that the defendant was, though indirectly, the purchaser at this sale. Assuming that Gallon purchased for himself, the rule must be made absolute.

Rule absolute.

MASSACHUSETS HOSPITAL v. THE PROVINCIAL INSURANCE COMPANY.

Covenant to pay in N. Y.—Depreciation of Currency.

Defendants in Toronto covenanted to pay $516 in New York on the 20th August, 1858, which they failed to do, and when sued here in 1865, they claimed to pay in American Currency at par, though in the meantime it had become very much depreciated. *Held*, however, that the plaintiffs were entitled to the equivalent of the $516 at New York on the day of payment, with interest.

[Q. B. T. T. 30 Vic., 1866.]

Declaration on a covenant, dated 21st June, 1858, to pay $515 89, sixty days after date, at the Bank of the Republic, New York. Breach, non-payment.

Plea, that on the day when said money was payable defendants provided funds, and had the same to meet this claim at the Bank of the Republic, but said deed was not then there, nor was it presented there on the day it became due, nor were the plaintiffs there to receive it, nor was any claim made on defendants till the 10th of November, 1865; that the money is payable in New York in American currency, and defendants are and have been always ready to pay in

lawful United States currency, and before action tendered the same to the plaintiffs in such lawful currency, which the plaintiffs would not accept, and on the day of tender the amount in United States currency was worth $212 38 in Canada currency, and which last sum is paid into court. Issue.

At the trial, at Toronto, before *Draper*, C. J., a statement of facts was put in by consent, as follows:—

The covenant being, as alleged, in form a promissory note under seal of the defendants, payable at the Bank of the Republic, New York, was presented for payment on the 20th of June, but the defendants treated it as a promissory note, and allowing three days' grace, went to the place of payment and tendered the full amount, but neither the covenant nor any one authorised to receive payment was there. This was three days after it was due. Shortly after, defendants wrote to plaintiffs, asking them to present the covenant to their named New York agents for payment. Soon after the funds held by their agents for payment were returned to defendants in Toronto.

Some weeks after, this deed of covenant was presented at the New York agents by plaintiffs for payment, but it was not paid, and on the same day the plaintiffs also demanded payment at the Bank of the Republic, but without success.

Some years afterwards, in November, 1863, some correspondence took place between defendants and a person claiming to be the assignee of this claim. In October, 1864, the assignees wrote to defendants demanding payment, but no answer was sent. In November following, it was placed in a Toronto solicitor's hands for collection. On the 10th of the same month, defendants' attorney tendered to the plaintiffs' attorney $518 in United Sta es currency, reckoned at par, which was declined.

It was further admitted that the covenant was made in Toronto, where defendants then and now are domiciled, and that on the day it became due it was not presented at the Bank of Republic, nor had defendants any funds there to pay it.

On these facts the learned Chief Justice ruled that the plaintiffs were entitled to recover the full amount claimed, viz., $757, including interest, and for this the plaintiffs had a verdict

In Easter Term, *Burns*, for defendants, obtained a rule to set aside or to reduce the verdict, the damages being excessive, or why at least it should not be reduced by the amount paid into court.

During this term, *S. Richards*, Q. C., shewed cause, citing *Judson* v. *Griffin*, 13 U. C. C. P. 350; *White* v. *Baker*, 15 U C. C. P. 293.

Burns supported the rule, and cited *Jones* v. *Arthur*, 8 Dowl. 442; Stor. Confl. L. secs. 318 b. 318; *Jones* v. *Arthur*, 4 Jur. 859; *Cooch* v. *Maltby*, 23 L. J. Q. B. 305.

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

We do not see any thing in this case to take it out of the operation of the ordinary rule, that the plaintiffs should recover such damages as will put them in the same situation as if the contract had been duly performed. The defendants were bound to have paid the plaintiffs on the 20th of August, 1858; no valid excuse for their not having done so has been offered. At all events, as they did not attend to pay the money at the place named on the proper day, it was their duty to find the plaintiffs and pay them. We therefore think that the plaintiffs are entitled on the face of the contract to an amount equivalent to the value of the sum at the place of payment on the 20th of August, 1858, besides interest from that date. We understand the parties to admit that at that time the dollar in New York and in Toronto was of the same value.

Assuming, as we do, that the delay in payment was the fault of the defendants, we cannot understand why the plaintiffs are now to lose one-third of their claim because their own currency has become depreciated in value. The defendants, on the other hand, have only to pay what they originally contracted to pay, viz., the same amount (apart from interest), which on the 20th of August, 1858, would have satisfied their covenant. The point seems expressly decided by our Court of Common Pleas in *White* v. *Baker*, 15 C. P. 293. The damages should be reckoned with reference to the time fixed for payment.

As to reducing the verdict by the amount paid into court, this is a mere formal matter, as it is conceded that defendants are of course entitled to credit for that sum. The plaintiffs have taken issue on defendants' plea, thereby denying the fact of the payment into Court. As, however, the defendants have raised other questions by the rule, we think the proper course is to direct the verdict to be reduced by the amount paid into court, neither party to have the costs of the motion or arguing in Term.

Rule accordingly.

COMMON PLEAS.

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

MCCURDY v. SWIFT, ADMINISTRATRIX.

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

(Concluded from p. 11.)

While the Temperance Statute is chiefly for the regulation of morals, I think it may well be said that there has been a violation of it by the acts above mentioned; and perhaps it might not unsuccessfully be contended there had also been a violation of law generally.

Does this declaration, then, allege what the act declares shall be a violation of its provisions?

The declaration states that the defendant was in the possession and occupation of a certain inn, &c., as a house of public entertainment, then being under the charge of his servant, by his servant "wrongfully and in violation of the Temperance Act of 1864, in the said township, furnished and gave one William Wooley, while *in* the said *inn*, &c., *intoxicating liquors*, whereby he became and was intoxicated, and while so intoxicated did assault, &c., the said Angus McCurdy, whereby," &c.

The statute requires that the party shall, 1st, have drunk *in* the inn, &c.; 2ndly, to *excess* of intoxicating liquor; 3rdly, *therein* furnished to him; and 4thly, that while in a state of intoxi-

cation from such drinking, the injurious act shall have happened

The declaration says the defendant, by his servant, 1st. furnished and gave Wooley in the inn, &c., intoxicating liquors; 2ndly, whereby he became and was intoxicated; 3rdly, and while so intoxicated he did assault, &c.

The furnishing and giving to Wooley intoxicating liquors in the inn is not the same as Wooley having *drunk in the inn to excess of intoxicating liquors.* The declaration shews that the liquor was *therein* furnished, and I think it shews, also, under the statement, that while *so* intoxicated Wooley did the act when he was in a state of intoxication *from such drinking.*

But in consequence of the omission above mentioned, I think, the plaintiff has not shewn a state of intoxication in Wooley, brought about by a violation of the act in question; for it is quite plain that the act requires not only that the liquor shall be *furnished* in the inn, but that that it shall be *drunk* in the inn, and drunk there *to excess*, to constitute responsibility in the innkeeper under the 40th section; it is the drinking to excess *in the inn* that is the culpable act of the innkeeper; an act which, it is presumed, he sees and knows of, and against which he may and ought to guard, while he cannot prevent the excessive drinking beyond his own precincts; and for anything that appears Wooley may have been furnished in the inn with the liquor on one day, and have drank it to excess 50 miles off on another day, and there have become intoxicated, and then have assaulted McCurly, for which it could not be reasonable to hold the defendant liable; or, for anything to the contrary, the defendant may have sold to Wooley five gallons of liquor at one time, who may have taken it wholly away to his own house and there have become intoxicated, for which the defendant would not have been answerable under the statute.

The words, that the defendant did what it is said he did wrongfully and in *violation* of the Temperance Act, mean nothing without shewing how and in what manner it was wrongful and in violation of the act to do so.

The declaration, therefore, though not in the manner argued, we do not think contains a sufficient statement of facts, from which it may appear that cause of action has accrued against the defendant.

But it was argued that no action of the kind could be maintained, however the declaration was framed, It was contended that no action would lie by the representatives, unless an action would, also, have lain at the suit of the party injured against the person who did the injury; and that no such action would have lain in this case, first, because the assault and its consequences constituted a felony, and therefore no civil action was maintainable until after the public offence had been first prosecuted; and secondly, because, in consequence of death ensuing, the person intoxicated never became liable to a civil suit at the instance of the deceased.

Under the 40th section it is quite plain the civil action is maintainable against the innkeeper; but his act is not one of felony in any respect, nor a misdemeanor.

Under the 41st section it is very probable the legislature did not contemplate death resulting in such a manner as to amount to a felony.

The act, however, provides for the representatives of the deceased suing; for provision has been made for this purpose Now this is a new remedy against the innkeeper, and I do not think the legislature intended to postpone all redress against him until after a criminal prosecution had been had against the person intoxicated.

By ch. 78, before mentioned, and the corresponding act in England, the general rule and policy of the law in all cases within that statute have in this respect been altered.

So by the Carriers' Act (11 Geo. IV. and 1 Wm. IV. ch. 68) sec. 8, the plaintiff may reply that the carriers' servant feloniously broke the goods in respect of which the action is brought; which will, if shewn, entitle him to recover against the carrier, although the servant has not been prosecuted criminally.

The Temperance Act has not been so carefully framed as the Imperial Act alluded to, which expressly gives the civil remedy notwithstanding a felony has been committed which has not been prosecuted for; but I think the Temperance Act, at all events as against the innkeeper, may in like manner be acted on.

The remedy which has to be pursued in a case of the kind is said to be governed by the words, that the person who furnished the liquor "shall be jointly and severally liable to the same action by the party injured as the person intoxicated may be liable to." This probably means the same *kind* of action; and then, it is said, that only such an action as the person injured could have brought against the person intoxicated he may also bring against the innkeeper; and that although the representatives of the deceased may sue, yet they must bring one of the same kind of action the deceased could have brought if he had been living; and that they cannot sue for damages for the death of the deceased, because this is not the kind of action the deceased manifestly enough could have brought.

No doubt if the deceased had not been killed, or had not died, he must have sued the innkeeper in the like manner as he might have sued the person intoxicated, because the statute says they should be liable "to the same action," or, as we read it, to the same form or kind of action, jointly and severally; and in such an action the person injured could have recovered to the full extent of the injury he had sustained, if that injury had been short of the total loss of life itself In such an action there would have been a perfect measure of damage for the loss and injury actually sustained

If the argument of the defendant prevail, there can be no such measure of damage when death is occasioned, and the action is brought by the representatives; because if the same, or the same kind of action is to be brought by the representatives, and the same kind of action only which the deceased could have brought, the loss and injury which have been really sustained cannot be compensated: the damage felt is for the life taken, but the deceased if suing for his own personal injury must have claimed in a different manner and at a lower standard, yet at a perfectly definite scale; but what is the representative to state as the limit of his or her cause of action, or the extent of the damage, if it be not for what is actually the cause and occasion of the action and the amount of the loss?

The representative cannot stop short with the detail of an assault and beating, bruising and wounding, which confined the person assaulted to his bed for two or three weeks, when that beating, bruising and wounding led directly to the death of the person.

The person injured might have done so, for his statement would have been the fact and all the fact; but it is different with the representative, when the person assaulted has been killed. In such a case the representative must either tell the story as it is, or conjure up something which is not the true narrative. I do not know where the complaint is to end, if it is not to state the death which has happened.

I think it follows that, as the legal representative is expressly authorized to sue for an assault committed upon the deceased, he or she may do so, under the construction of this statute, although that assault has resulted in death. The 40th section gives the representative the right of action when death has been occasioned by suicide, the 41st section, in this view, when life has been taken by another. The case, too, is, I think, brought within the terms of ch. 78 of the Consolidated Statutes for Canada; for in the words of that statute the death of a person has been caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the party injured [by virtue of the Temperance Act] to maintain an action and recover damages in respect thereof; and therefore the defendant, who would have been liable by the Temperance Act, if death had not ensued, is liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony.

I have had doubts—very great and frequent doubts—upon this subject, and I have felt and feel very strongly the enormous responsibility which is cast upon persons in the situation of this defendant; but I know of no other way of construing the provisions of the statute, which contains and was intended to contain provisions of the most stringent nature against persons who violated it.

The legislature must have considered, as many persons do, that the person who intoxicates, or suffers or encourages another to become intoxicated, when it is the interest of such person to make as large a sale of liquor as the other will or can be made to buy, is far more to blame than the unfortunate inebriate, and should therefore be answerable for the acts and conduct of the person who has been deprived of his senses and rendered a really dangerous being.

If there were fewer taverns and tippling houses there would be less intoxication, and it may not be unreasonable in some respects and to some extent to place the landlord and his guest on the same footing. A person, who makes and turns out a drunken man, may be thought to be quite as bad as the person who lets loose a dangerous animal, or exposes a dangerous substance or machine, *Scott* v. *Sheppard*, 2 W. Bl. 892; 3 Wils. 403.

I think, therefore, on the merits, that the action is maintainable, and I think this is so, although the only expression in the statute on which this action is founded is the word *assault*.

An assault is described in Terms de la ley 56, to be a violent kind of injury offered to a man's person of a more large extent than battery, for it may be committed without offering a blow * *

In *re Thompson* 6 H & N 198 Pollock, C B, said: "An *assault* may be accompanied by violence from which death ensues, and then the offence would be either murder or manslaughter; or, the assault may be accompanied with the violation of the person of a woman against her will, in which case it would be a rape; or, though the purpose was not effected, the circumstances might be such as to leave no doubt of an assault, with an attempt to commit a rape; therefore, an assault may amount to a capital felony, or a felony, or a misdemeanor, according to the circumstances with which it is accompanied"

The allegations that McCurdy was killed within twelve months next before the commencement of this suit, and that the plaintiff sues as well for the benefit of herself, as the wife of the deceased, as for the benefit of their three infant children, are perhaps necessary. I think the case, by the general language of the Temperance Act, is brought within the provisions of ch. 78 of the Consolidated Statutes for Canada.

For the defect of the declaration judgment will, however, be for the defendant on the demurrer.

Judgment for defendant on demurrer.

ENGLISH REPORTS.

Feltham v. England

Master and servant—Negligence of fellow-servant—Foreman—Superior authority.

The rule that a servant cannot recover for injuries sustained through the negligence of a fellow-servant in their common employment, unless the latter be shown to be a person unfit for his employment, is not altered by the fact that the servant to whom negligence is imputed was a servant of superior authority, whose lawful direction the plaintiff was bound to obey.

This was a case tried at Middlesex before the Lord Chief Justice, in which a verdict was returned for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

A rule having been obtained, *D Seymour*, Q. C., and *Daly* showed cause, and *Hanse* appeared in support of the rule.

The facts of the case and the arguments are set out fully in the judgment.

The Court,* having taken time to consider, the following judgment was delivered on the 24th November:—This case stood over on the suggestion that another case was pending for argument before us, which involved the same points. The case referred to on the hearing a few days ago was found not to involve any question applicable to the present. We therefore give our judgment upon the facts which appeared on the trial of this case.

The defendant was a maker of locomotive engines, employing a great number of men In the course of the work a travelling crane was used to hoist the engines, and convey them to tenders for their carriages. The crane moved on a tramway resting on beams of timber, and supported by piers of brickwork. The piers had been recently partly repaired and partly rebuilt,

* Cockburn, C. J., Mellor, and Shee, J J.

and the brickwork was fresh. It appeared that at the time of the accident the piers first gave way, and then the beams broke from the strain thus cast upon them. The accident occurred on the first occasion of using the crane, and it was the first time that the plaintiff had been employed upon it. There was no evidence that there was any defect in the crane, or negligence in the mode in which it was used, or that the engine was of unreasonable or improper weight. There was no evidence of any personal privity or interference by the defendant; but his forman or manager was present and gave the directions to hoist the engine.

The traveller was worked by six men, three at one end and three at the other. As the crane moved along it oscillated, and the foreman thinking that the men were not working it properly directed them to stop, which they did for a minute or so. He then ordered them to move on again, which they did; just before that he had ordered the plaintiff to get on the engine and clean it. The plaintiff did so, and was on it whilst in motion for the purpose, and whilst so engaged some mortar fell, the pier gave way, and the engine fell, and the plaintiff's arm was broken. Upon objection by the defendant's counsel, that there was no case to go to the jury, to fix the defendant with liability, either personally or for the act of his manager or foreman, the Lord Chief Justice reserved the question for the Court and the case went to the jury, who found for the plaintiff, with two hundred pounds damages On the argument before us it was contended that the defendant was liable on two grounds. Firstly it was urged that the foreman or manager was an *alter ego* of the master, and not a fellow servant of the plaintiff, and that he was guilty of negligence in not ascertaining the sufficiency of the piers before he ordered the plaintiff to get upon the engine to clean it as it travelled along. Secondly, it was urged that there was evidence to fix the defendant personally with negligence, in permitting the engine to be removed by means of the piers when he might, and ought to have known, that the piers were not sufficient for the purpose. We are of opinion that the plaintiff is not entitled to succeed on either ground. We think that the foreman or manager was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow servant of the plaintiff, although he was a servant having greater authority. As was said by Willes, J., in *Gallagher* v. *Piper*, 12 W. R. 988, 33 L. J. C. P. 33,9 "a foreman is a servant, as much as the other servants, whose work he superintends." There was nothing in the present case to show that he was an incompetent or improper person to be employed as foreman or manager. We are unable to distinguish the case on this point from that of *Wigmore* v. *Jay*, 19 L. J. Ex 360, 5 Ex. 354; *Gallagher* v. *Piper* and *Skip* v. *The Eastern Counties Railway Company*, 23 L J. Ex. 223. We think that this case ranges itself with a great number of cases by which it must be considered as conclusively settled, that one fellow servant cannot recover for injuries sustained in their common employment by the negligence of a fellow servant, unless such fellow servant is shown to be either an unfit or improper person to have been employed for the purpose: *Morgan* v. *The Vale of Neath Railway Company*, 12 W. R. 1032, 33 L. J. Q. B. 250, in error, 14 W R. 144, 35 L J. Q B. 23. And this rule is not altered by the fact that the servant to whom the negligence was imputed was a servant of superior authority, whose lawful direction the plaintiff was bound to obey. It is difficult in the present case to discover any evidence that the forman was guilty of any negligence; but it is not necessary to determine that, inasmuch as the conclusion at which we have arrived renders it unnecessary to do so.

With regard to the second ground relied upon on the part of the plaintiff, we can find no evidence of personal negligence to fix the master. There was nothing to show that he had employed unskilful or incompetent persons to build the piers, or that he did know, or ought to have known, that they were insufficient for the use to which they were to be employed. He was a maker of engines, and therefore in that sense an engineer, but not in the sense that he possessed special knowledge as to the strength or sufficiency of brickwork We cannot, in the absence of such evidence, say there was any case fit to be submitted to the jury as to this ground of liability, and we therefore think that the rule to enter a nonsuit ought to be absolute.

Rule absolute.

CORRESPONDENCE.

Bailiffs and their fees.

To the Editors of the Local Courts' Gazette.

Sir,—A great deal has been already written about the duties, emoluments, &c., of the bailiffs of the Division Courts, and as you have courted discussion on this point, will you permit me to make a few remarks, thereby adding my mite to the many suggestions furnished your valuable and useful publication.

In the first place, I would allow each bailiff a fixed salary, say $300 per annum, *in lieu of all mileage*, which will thereafter be credited to the fee fund, with a forfeiture to the bailiff of the amount of mileage if return in any case is less than the actual distance. Bailiff to be paid also upon each and every service of summons 25 cents, on executions 75 cents, and when returned *nulla bona* 50 cents; notices of sale 10 cents each, as at present; 5 per cent. commission on sales under fifty dollars, 2½ per cent. for sums over that amount, attendance at sittings of court one dollar per day. I would strongly recommend that all services of summons be domicilian, irrespective of amount of claim. I think it will be a great boon for all parties, if the domiciliary service can be effected. At present, defendants evade the service, and thus add extra expense to themselves and great inconvenience to plain-

tiffs and others, besides entailing a large amount of labour upon the bailiff, who receives no pay for mileage if service is not effected. Some persons have remarked that the Division Court bailiffs, *in this country*, are generally farmers. I beg to contradict this assertion, and will guarantee that fifteen bailiffs out of twenty have no other occupation than the duties appertaining to their office; all have to keep a horse and vehicle, and, if the government intend there should be respectable and responsible persons employed, let the tariff of fees be such as will insure it. I feel confident, if the above plan be adopted, it will afford general satisfaction.

In conclusion, let me add one word in behalf of the clerks. I think it unjust, with the present low tariff, to compel clerks to furnish books, forms, stationery, &c.. Surely the fee fund ought to afford this disbursement, and then leave a good margin for the judges salaries.

Your obedient servant,

CLERK.

Charge of an indictable offence before J. P. —Power to hear evidence for defence.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

Gentlemen,—Will you kindly answer the following question which is one of importance to our local magistracy:—Have Justices of the Peace, before whom a party charged with an indictable offence is brought for commitment, power to hear evidence for the defence?

To give you a case in point: A person is brought before two or more Justices of the Peace charged with the crime of rape: there is no question as to the crime having been committed: the prosecutrix swears positively as to the identity of the accused, but his counsel however offers to prove an *alibi;* have the magistrates any authority to go into such a defence?

Con. Stat. Canada, Cap. 102, sec. 57, says, "When all the evidence offered *upon the part of the prosecution against the accused party* has been heard," that then the Justices are to proceed to decide, &c.

I am yours, &c.,

CIVIS.

Port Hope, 14th Jan., 1867.

[At present we do not think evidence for the defence can be adduced, but the point is an important one and requires further consideration.—EDS. L. C. G.]

Payment of Fees to Registrar of Surrogate Court.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

By the 64th Rule under the "Surrogate Courts' Act," "the fees payable to the Fee fund, and to the Judge and Registrar on business and proceedings in the Surrogate Courts, as well as postages, when necessary, *shall* be paid to the Registrar *in the first instance* by the party on whose behalf such proceedings are to be had, *on or before* such proceedings." Now, if fees are not paid in first instance, will the above rule prevent the Registrar from recovering the same through the Division Courts? And because he was good or simple enough to credit a party, has he no remedy? Your opinion in the next *Gazette* will much oblige

A REGISTRAR.

Berlin, 18th Jan., 1767.

[We think that the provision as to payment of fees *in the first instance* was made for the benefit of the officer and not to prevent him from recovering them afterwards if not paid, when he had a right to insist that they should have been.—EDS. L. C. G.]

Judge Hughes' Circular — Residence of defendant.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

SIRS,—I have observed from time to time several remarks and criticisms upon my circular to the clerks of Division Courts of this county, dated 26th August, 1864, published in your 10 vol. fol. 237. Amongst others, I find that Mr. Durand has made allusion to what I consider a very important point in the letter; *i. e.*, where I make reference to the words, *nearest to the residence of the defendant*, which occur in the Stat. 27 & 28 Vic., cap. 27, sec. 1. The position which I took was supported (as I thought) by the case of *Lake* v. *Butler*, 30 E. L. & Eq. R. 264; 5 Ell. & Bl. 91. I thought that the judgment of the late Lord Campbell, C. J., made the case quite plain, and I never could entertain a doubt of the complete application of that decision to the words quoted; a perusal of the arguments of counsel and judgments of the judges will point out various other instances in which a similar position had been previously taken and successfully maintained.

There were points in the circular to which allusion has been made by others, but none of any great importance; for instance, exception

was taken somewhat cautiously to the expression in the last paragraph but one, I made use of the words "*such as an order for a new trial, or to change the venue or the like.*" I was asked by a correspondent of yours (who I observe was ashamed to give his own name) to indicate where it is found that a Division Court judge has power to change the venue? I find at page 58 of Judge Gowan's Index of the Division Court Act, 13 & 14 Vic., cap. 53, the words: "*Venue—To be where defendant resides, or where liability incurred, unless otherwise ordered by judge*, 25;" and I find in Con. Stat. of U. C., cap. 19, sec. 72, an authority for a county judge to make what I call an order to change the venue, which for all practical purposes is the best name you can give it, and one which the clerks who had been using Judge Gowan's useful Index would readily understand. Judge Gowan (who is many years my senior) seems to consider the expression a proper one, in so far as his Index shews it, or he would not, I am sure, have made use of it.

I may explain here, in reference to the fourth paragraph of my circular (which was criticised by your correspondent, "A. B.," of 24th September, 1864), that a case has occurred in actual practice, which illustrates exactly what I referred to:--I hold the 5th Division Court of Elgin, in Aldborough, 12 miles from Morpeth, where the 3rd Division Court is held in the county of Kent—defendant resides where a cause of action accrued in the township of Orford, in that county—at a distance of eight or nine miles from the place where I hold the 5th Division Court in Aldborough, and nine or ten miles from Morpeth—Orford is part of the Division Court district of the 2nd Division Court held at Morpeth. The 6th Division Court of Kent is held at Bothwell, six or seven miles from where the defendant resides and where the cause of action accrued; Bothwell is in a different Division Court district in the county of Kent, but nearest to the residence of the defendants. The suit was brought in the court at Aldborough, because it was nearer to the residence of the defendants than the place where the 2nd Division Court is held in the division of which Orford forms a part; but I held, and still maintain, that whilst under the 1st sec. of the Amendment Act, 27 & 28 Vic., the suit might have been "entered and tried and determined" at *Bothwell*, that being "*the court, the place of sitting whereof is the nearest to the residence of the defendant*, and because it was so, and because the cause of action did not accrue, and the defendant did not reside in Aldborough, I had no jurisdiction; so that I maintain, notwithstanding the criticism of "A. B.." the sentence of the fourth paragraph of my circular was right. I have never yet felt myself embarrassed by the circular, because I am not afraid to recede from a position which is not tenable, when I am convinced I am wrong; and my desire to try and get my clerks and bailiffs to work upon an uniform plan was the reason for sending the circular.

Yours truly,

D. J. HUGHES.

St. Thomas, 26th Jan., 1867.

Bailiffs, and their Fees.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—Having noticed in your Dec. No. of the *Local Courts' Gazette* some remarks from an *Observer*, perhaps it would not be out of place to reply to some of them. Your correspondent seems to consider bailiffs generally as an inferior class of beings, and therefore only entitled to be paid accordingly, and at the same time speaks of the superiority of clerks, and their capabilities. Taking his figures, I hold both he and his bailiff have good situations, and are far above the average of Division Court officers generally; but there are expenses attending a bailiff's duties, such as travelling expenses, wear and tear, besides the fatigue from cold and storm, which if deducted from his fees, would leave a large surplus in favour of the clerk. How he can show that on the same number of suits the bailiff of his court made more money than he did, I cannot understand (*as the tariff now stands*). Clerks fees will average *over one dollar* on each suit throughout the country generally, and the bailiff's fees will not go over from fifty to seventy-five cents each; then take travelling expenses out of his fees, and the clerk recives at least double as much as the bailiff; however, if clerks generally are satisfied with the slight alterations he speaks of in the tariff, I certainly think it but just they should be furnished with books and stationery by the Government, as they really are court property, and not that of the clerks, who have to provide them. No doubt you and every other person who knows the duties pertaining to each office will admit that few clerks would make good or efficient bailiffs, and that in many cases as it requires

more than education to fulfil the duties of a bailiff properly, while the clerk's duty is simply the same thing over and over again, consequently requiring only a good common education, such as all bailiffs should have, and I believe generally have; on the other hand, most bailiffs would make good clerks, although your correspondent classes them as inferior; I think, take them as a whole, they will compare favourably with the clerks, as good, active, general business men, and consequently entitled to as good a salary. Even if the tariff adopted by the bailiffs, and reported in your September number, was established, and became law, the fees of bailiffs would not be as large as those of clerks. On each suit where a fee is asked, service has been rendered for it; and as there are some alterations in the tariff positively necessary, and it is agreed on by all that the labour should be paid for, I say the aforementioned tariff seems to me to be just and reasonable, in proportion to the fees allowed to all other officers of like responsibility. Who would give large bonds, and ask friends to become their surety from $5,000 to $10,000, as bailiffs have in this county, unless receiving ample remuneration? This is not the case as the tariff now stands. Your correspondent speaks of bailiffs occupying their spare time to advantage, &c.; if so, I do not think it should have anything to do with their fees or duties as a bailiff. I think it is a general rule that both clerks and bailiffs do so, which proves the necessity of better remuneration for their services. Clerks are always in their office, while attending to their duties, comfortable, and free from expense; while bailiffs are away from home, and necessarily exposed to the inclemency of the weather and every day expenses.

Yours respectfully,

A Subscriber.

Galt, Feb. 6, 1867.

Act for protection of sheep.

To the Editors of the Law Journal.

Gentlemen,—Your opinion is asked for on the 8th and 9th sections of chapter 55 of the 29 & 30 Vic., "An act to impose a tax on dogs, and to provide for the better protection of sheep."

1st. If the owner of a flock of sheep comes to his barn yard or field on any morning, and finds a number of his sheep killed or injured, sees no dogs, and, after diligent search and inquiry, has been unable to discover the owner or keeper of the dog or dogs, if any, have the magistrates jurisdiction to award damages to the owner of said sheep, on suspicion that his, the owner's sheep, were killed by a dog or dogs.

2nd. Is the owner, who must be interested, a competent witness to swear into his own pocket from ten to one hundred dollars, and also to be his own valuator, to put whatever value he, the owner, likes on his own sheep; or must his damage or loss be sustained by disinterested evidence.

An answer to the above will set at rest a good deal of dissatisfaction which prevails at present in this township.

I may just add from information and claims to the municipal council, that there has been more damage done to sheep since the above act has been in force than there was in years previous.

Yours,

An Old Subscriber.

Toronto Tp., Feb. 12, 1867.

[1. A careful reading of the sections referred to would seem to shew that the magistrates have such powers as spoken of. Of course it is for them to be satisfied that the sheep were killed by dogs. The question is purely one of evidence, and though suspicion merely is not sufficient, it does not necessarily follow that the dog must be caught in the act; in fact, nothing is more difficult, as these depredators are said to be peculiarly cunning in their doings. In many cases, doubtless, it will be impossible to ascertain the owners of the dog or dogs. The provisions of the 9th section are specially intended for cases where the owner cannot be discovered.

2. Interest is not a sufficient reason for excluding testimony, and in this act it is expressly enacted that "the *owner* of the sheep and witnesses (*if any*) are to be examined on oath" by the magistrates. The value must apparently be decided by similar evidence, and if the owner is the only person that can speak as to the value, and the magistrates choose to believe him, his evidence will decide the matter. The magistrates, however, are the judges of this, and should exercise a sound discretion in the premises, with a due regard on the one hand to the difficulty of proof by the owner, and on the other being watchful against a fraudulent attempt to extort money from the municipality.—Eds. L. C. G]

REVIEW.

THE SCOTTISH LAW MAGAZINE AND SHERIFF COURT REPORTER.—Glasgow, Jan. 1867.

We duly receive the numbers of this periodical, containing a variety of articles of general, and others of local interest. The issue before us, in the leading-article, draws a contrast between the English and Scotch law respecting concealment of pregnancy and childbirth

The law in Scotland is peculiar and as is argued, and fairly enough, not at all efficient for the purpose of protecting infant life. In Scotland, concealment of pregnancy and not calling for and making use of help at the birth constitutes the offence, whilst in England, as we know, concealment of the birth in the corresponding crime; and in the former country there is no offence unless the child be found dead or be missing. The writer strongly condemns the existing law and favors that in force in England, which certainly would appear to be the best and most practical method of awarding punishment for what is in a great measure the same offence.

The reports of cases are doubtless of much interest to those who are concerned in the administration of law in Scotland, but we confess "*Les termes de le ley*" would be rather a stumbling block in our way, except indeed where they might be as suggestive as the use of the word "pursuer" for plaintiff.

APPOINTMENTS TO OFFICE.

COUNTY JUDGES.

JOHN BOYD, of Osgoode Hall, Esquire, Barrister-at-Law, formerly Junior Judge of the County Court of the United Counties of York and Peel, to be Junior Judge of the County Court in and for the County of York. (Gazetted January 5, 1867.)

NOTARIES PUBLIC.

JOSEPH BAWDEN, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted 19th January, 1867.)

EDWARD ALLEN, of Mono Centre, Esquire, to be a Notary Public in Upper Canada. (Gazetted 19th January, 1867.)

CORONERS

JOHN BINGHAM, of Orono, Esquire, M.D, to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted 19th January, 1867.)

GEO. LLOYD MACKELCAN, of Stoney Creek, Esquire, M.D., to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted 19th January, 1867.)

WILLIAM McGILL, of Oshawa, Esquire, M.D., to be an Associate Coroner for the County of Ontario. (Gazetted 19th January, 1867.)

TO CORRESPONDENTS.

"CLERK"—"CIVIS"—"A REGISTRAR"—"D. J. HUGHES"—"A SUBSCRIBER"—"AN OLD SUBSCRIBER"—Under "Correspondence." "LEX" in our next.

SPRING CIRCUITS, 1867.

EASTERN CIRCUIT.

The Hon. Mr. Justice A. Wilson.

Kingston	Monday	Mar. 18.
Brockville	Tuesday	April 2.
Perth	Tuesday	April 9.
Cornwall	Tuesday	April 23.
Ottawa	Wednesday	May 1.
L'Orignal	Thursday	May 9.
Pembroke	Tuesday	May 14.

MIDLAND CIRCUIT

The Hon. Mr. Justice J. Wilson.

Whitby	Monday	Mar. 18.
Belleville	Monday	Mar. 25.
Napanee	Tuesday	April 2.
Cobourg	Tuesday	April 9.
Peterborough	Tuesday	April 16.
Lindsay	Monday	April 22.
Picton	Wednesday	May 1.

NIAGARA CIRCUIT.

The Hon. Mr. Justice Hagarty.

Hamilton	Monday	Mar 18.
St. Catharines	Monday	April 1.
Barrie	Monday	April 8.
Welland	Monday	April 15.
Milton	Tuesday	April 30.
Owen Sound	Monday	May 13.

OXFORD CIRCUIT.

The Hon. Mr. Justice Morrison.

Guelph	Monday	Mar. 18.
Berlin	Monday	Mar. 25.
Brantford	Monday	April 1.
Cayuga	Monday	April 8.
Stratford	Monday	April 15.
Woodstock	Monday	April 22.
Simcoe	Monday	April 29.

WESTERN CIRCUIT.

The Hon. The Chief Justice of Upper Canada.

Walkerton	Tuesday	Mar. 19.
Goderich	Thursday	Mar. 21.
St. Thomas	Thursday	Mar 28.
London	Wednesday	April 3.
Chatham	Tuesday	April 30.
Sandwich	Tuesday	May 7.
Sarnia	Monday	May 13.

HOME CIRCUIT

The Hon the Chief Justice of the Common Pleas.

Brampton	Monday	Mar. 18.
City of Toronto	Monday	Mar. 25.
County of York	Monday	April 8.

A journalist honestly believing that he is exposing and denouncing an abominable system of quackery and puffery, and not being actuated by personal or professional malice, or any other than an honest desire to discharge his duty to the public in whose interest he is writing, may be justified in the use of strong language, if it be warranted by the facts: (*Hunter* v *Sharpe*, 15 L. T. Rep. N. S. 421. N. P.