DIARY FOR FEBRUARY.

1. Sat. .. Clergymen to make yearly return of Marriages to County Registrar.
2. SUN.. *4th Sunday after Epiphany.*
3. Mon.. Hilary Term begins.
5. Wed.. Meeting of Grammar School Boards.
7. Frid... Paper Day Q.B. ; New Trial Day C.P.
8. Sat. .. Paper Day C.P. ; New Trial Day Q.B.
9. SUN.. *Septuagesima Sunday.*
10. Mon.. Paper Day Q.B. ; New Trial Day C.P.
11. Tues.. Paper Day C.P. ; New Trial Day Q.B.
12. Wed.. Paper Day Q.B. ; New Trial Day C.P. Last day for service in County Court.
13. Thurs. Paper Day C.P.
14. Frid.. *St. Valentine.* New Trial Day Q.B.
15. Sat. .. Hilary Term ends. Last day for County Treasurer to furnish to Clerks of Municipalities in counties lists of lands liable to be sold for taxes.
16. SUN.. *Sexagesima Sunday.*
22. Sat. .. Declare for County Court.
23. SUN.. *Quinquagesima Sunday.*
24. Mon.. *St. Matthias.*
25. Tues.. *Shrove Tuesday.*
26. Wed.. *Ash Wednesday.* Appeals from Chancery Cham.
29. Sat. .. Sub-Treasurer of School Moneys to report to County Auditors. School Reports to be made. Superintendent of Separate Schools to give notice to Clerks of Municipalities.

The Local Courts'

AND

MUNICIPAL GAZETTE.

FEBRUARY, 1868.

MALICIOUS INJURIES TO THE PERSON.

It may be all very true that there are things more precious to man than the safety of his person, or even the preservation of his life, nor do we at present intend to question the truth of this proposition, nor to cavil at this very proper sentiment; but it will scarcely on the other hand be denied, that the right of personal security is not the least of "the absolute rights of every Englishman."

Blackstone, in speaking of the three principal rights of mankind, classes them thus:—1. The right of personal security. 2. The right of personal liberty; and 3. The right of private property. And in particularising what is comprised under the first head he says:—"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." And he further says, that "whatever is done by a man to save either life or member is looked upon as done upon the highest necessity and compulsion."

Now these are views which doubtless most persons are quite prepared to accept without any further reasoning, either by the learned commentator or ourselves, but it is nevertheless, astonishing that so many men have really exceedingly small regard for the enjoyment of the life, limbs, body, health and reputation, of *others*. And here we do not allude to those who maliciously, or in moments of passion inflict injuries, but to those who are appointed by their fellows for the protection of the public in the full enjoyment of those rights.

This is a subject which has lately attracted the attention of some able writers in England, and some of their remarks we have re-produced for the benefit of our readers. The principal ground of complaint there has been the leniency of judges and magistrates in the infliction of sentences for injuries to the person. Complaints of a similar kind have occasionally been made in this country, but it is a different phase of the subject, which has lately directed our attention to it.

Mr. Justice Hagarty, during the recent Assizes for the City of Toronto, in passing sentence on a prisoner who had been found guilty of a common assault, where the evidence was of a most unprovoked and brutal attack with a murderous weapon, deplored the growing tendency of juries to treat the most aggravated and brutal attacks upon men and women as common assaults. In fact it appeared to him, according to their frequent findings, that feloniously stabbing and wounding and half killing a peaceable citizen, was not that which the law of the land looks upon it, a very grave and serious crime, but simply a common assault; the jury thus taking the decision of the law, as well as of the facts, into their own hands.

One of the evil effects of the glaring perversion of justice in the case he alluded to, was not long in shewing itself, for it was only a few days afterwards, that the following scene occurred in the Police Court at Toronto, on an examination into the facts of an aggravated and brutal assault upon an inoffensive old man, from the effect of which he lost the use of his right eye. The close of the case is thus detailed in one of the daily papers:

"Counsel for defence was going to call evidence, when

The Magistrate stated that he was not going to dispose of the case. It was clearly, he said, a case of assault with intent to disfigure or maim; and they have maimed him. It is for a jury to say whether he was accessory either before or after the fact. His Worship held that the evi-

dence showed Aird to be the principal, and he was therefore responsible for the consequences.

Counsel thought his Worship could dispose of it, as it was only a common assault; he quoted the late assault cases tried in the City Assize Court—a most unfortunate reference.

His Worship said the action of the juries last week in the assault cases, was no rule to go by. These brutal assaults were becoming entirely too numerous of late. He referred to the decided opinions of Judge Hagarty in addressing a jury last week, who, in the case of a peaceable man being dangerously wounded by a loaded stick in the hands of a drunkard, returned a verdict of common assault. He would not like to have been on that jury when his Lordship said—'Thank God, gentlemen, the responsibility of that verdict rests upon you, and not with me.' The action of juries, and especially of such juries, was no guide.

Counsel then asked if bail would be taken.

His Worship said he could not take bail when the evidence was so clear. He would send the evidence over to the County Attorney, where he might succeed in getting an order for bail."

The reference of the counsel for the prisoner to the case at the Assizes was certainly "most unfortunate," and not, by the way, an evidence of very great tact on his part, and it was met as it deserved; and, so far as judges and magistrates are concerned, we may be pretty safe that *they* will not, be guided by what mistaken or stupid jurymen may do. But the evil to be dreaded is of a more serious character, and one likely to spread amongst the masses: — habituating their minds to violence of this kind, and leading them to imagine that the law looks upon depriving a man of the use of his limbs, or members, or destroying his health, as an offence on a par with merely shaking a fist in another's face, or committing a petty larceny; and if this idea once becomes prevalent who can tell what will be the end thereof.

The words put in the mouth of a philosophic detective by a clever novelist, a lawyer, are so apropos, that we may be excused in quoting them. In speaking to a forger he said: "You may smash a man's skull in, so as you don't quite kill him, for twelve months (and for much less since this book was written), but if you forges his name you catches it hot." It has been said that the only way to bring a railway company to a sense of its duties, in protecting the lives and limbs of their passengers, is by the occasional immolation of one of the directors. Perhaps a somewhat similar mode of cure might be beneficial in arresting the malady which occasionally afflicts judges and juries in the matter alluded to.

The evil however is too serious for jesting, and requires that the public should be impressed with a sense of the injurious results arising from the frequent failure of justice in cases where not only personal injuries of a serious nature have been inflicted, but life itself endangered by the hand of some ruffian, whose only punishment is often the mere infliction of a small fine or a temporary imprisonment.

We trust that the remarks of the learned judge, who has thus by his timely and forcible remarks drawn attention to the evil alluded to, will not be thrown away upon those for whom they were intended, and that those whose duty it may be to adjudicate upon crimes of this nature will in future do so with a full appreciation of the right of personal security, one of those rights which are, as Blackstone proudly says, "in a peculiar and emphatical manner the rights of the people of England."

THE GOWN IN THE DIVISION COURTS.

We subjoin some extracts from an article in the December number of the *County Courts Chronicle*, the organ of these Courts in England. The views expressed are in complete accord with our own, and we have more than once brought the subject before our readers.

A great many years ago we heard one of the oldest County Judges in Upper Canada, say, that when he first entered on his duties, he asked the opinion of the late Chief Justice of Upper Canada, as to whether it would be proper to wear the gown, sitting in the Division Courts. The Chief Justice's reply was to this effect, "Yes by all means—as a barrister you received your appointment as County Court Judge, and as County Court Judge you are *ex officio* Judge in the Division Court." And we have always thought that a judge was as much bound to wear it in the one Court as in the other.

If on no other ground, a mark of respect to those who attend the Courts should not be omitted in the inferior Courts, because the class of suitors are, it may be, humbler, or the matter to be adjudicated upon, less in amount in the Division Court than the County Court. It is, as it were, saying, "It is all very well to take the trouble of dressing appropriately and

in one's best for the County Courts, but anything will do in the Division Courts; it is not worth while dressing for the class of persons resorting to these Courts." It really and practically amounts to this and is altogether wrong. The clerk and bailiff always dress respectably on court days, and suitors and witnesses almost invariably dress in their best on such occasions.

It is an instinctive respect for all that concerns the adminstration of justice, thoroughly British, that lies at the bottom of this, and no one connected with the system by appointment from the Crown should, by act or omission, do ought to weaken the principle, or assist the drift towards the "free and easy" American ideas on this point.

"Justice and dignity ought to go together—so people say. Why then do some of the County Court Judges wear the robes proper for their high office, and others merely the ordinary dress of everyday life? Surely these latter gentlemen forget that outsiders—the laity—attach no small importance to the appearance of a judge in his robes and wig, and nothing which tends to raise him in the eyes of the people ought to be omitted. We will hope that those judges, who have apparently despised outward form, will think for a moment, and in future don the robes and wig which is specially appointed for them to wear. * * * * It is the custom perhaps, but that is no reason why it should be retained, if it is a bad one, and when we read of a County Court Judge addressing the suitors and witnesses on the subject of their dress, surely those who administer the law ought to take the matter home to themselves."

The allusion in the above article is to an English County Judge who refused to allow witness fees to parties who came to Court *in their working dress.*

DEATH OF JUDGE SALMON.

We have to record the death of Mr. Salmon, Judge of the County Court of the County of Norfolk, on the 8th instant, aged 63. He was appointed on 26th May, 1845, under Lord Metcalfe's administration.

ACTION FOR DIVIDENDS.

We draw attention to a late decision under the Insolvent Act, by His Honor Judge Macdonald, of Wellington. It is a subject with which he is familiar, and he is thoroughly competent to express an opinion upon it and the point is in itself interesting and important.

An action was brought by a creditor against the assignee of the insolvent for a dividend on a claim which had been collocated by the assignee and advertised, but unobjected to by any one. It was objected that the assignee could not be sued for a dividend, but the learned judge held that the action could be maintained.

SELECTIONS.

OUR JUDGES, OUR PERSONS, AND OUR PURSES.

If the judge is to be a terror to evil-doers the administration of the criminal law must be vigorous, effective, and consistent. The latter property is perhaps the most important, and indeed the most excellently framed law loses all efficacy when inconsistently administered.

Common sense and common law agree in the principles regulating the penalties against life and limb, and crimes against mere inert property. Coke, Hale, and Blackstone all recognize the superiority of the former's claim to protection, and such claim was recognized by the ancient Anglo-Saxon code. Property may be recovered or reinstated in validity; life never can, and limbs but seldom if ever in their pristine vigour. It is in highest degree essential that health and strength of body and members, the health and strength on which depends the acquisition of property, should be guarded with the greatest vigilance, and all injuries to them punished with the sternest and sharpest retribution. And if the reader is astonished at the enunciation of such trite truths, such mere elementary truisms, a perusal of many cases lately adjudicated on in the criminal courts will remove all cause for astonishment, and prove the need there is that some of our judicial functionaries should be awakened from the lethargy or hallucinations respecting the several rights of person and property into which they have fallen.

The evil of leniency in cases of injury to the person is one of those that has attained enormous proportion of late. It is one whose fruits are seen in the savage assaults and bloody affrays which must be checked, if it need be, by the bitterest pains of servitude and the lash. The next Session of Parliament will not have fulfilled all its duties if it ends without the enactment of a brief measure, fixing severer punishments for specified acts of violence. What such an Act should be will presently be shown.

Here let us consider the present code of criminal law and the various cases of misplaced "discretion" which are culled from a file of newspapers. They deserve the most earnest consideration from every judge and member of Parliament who may happen to see them, and their lamentable effect is to produce that curse to any system of law—*a belief in its hazards*

and its chances as dependent on individul administrators.

The Consolidation Act, 24 & 25 Vic. cap. 100, is the present code regulating the punishment dealt out by the law of England to the commission of crimes against the person. The annexed table shows the penalties attached to the different species of violence which it is the aim of this paper to diseuss.

SUMMARY CONVICTIONS.

Common assault	£5 fine or two months' hard labour.
Aggravated assault on women.....	£20 fine or six months' hard labour.

INDICTABLE OFFENCES.

Grevious bodily harm..	Penal servitude for life.
Common assault.....	12 months' imprisonment.

Now there is no exaggeration in saying that dozens of cases are adjudicated on by magistrates under the first of these two headings which ought to be tried under the second. And, when so adjudicated, not even the full summary penalty—often not even half of it—is inflicted. Indeed, it is enough to provoke the most phlegmatic person into anger, to see the kind of apathy with which some of the London magistrates regard the cases of assault brought before them, and the ridiculously slight fines with which they punish them. The larceny of petty articles is visited with months of hard labour, while (to give instances reported in the newspapers) knocking a womans's tooth out and cutting her face, pulling a handful of hair out by the roots, indecently assaulting a servant, striking a woman with a rake in the face, and wounding her that she faints, and other similar brutalities, have all been punished of late by the infliction of trumpery fines.

What is the consequence?—The savage spirit animating the ruffianism of London, and fostered by the Forcible Feebles at some of the courts, has full swing. Eyes blackened, noses broken, ears bitten off, frightful wounds, contusions, and lacerations are the fruits of the magisterial leniency. One magistrate in particular seems, since his appointment, to be utterly blind and deaf to the complaints made for mere bodily injuries. In his court have been reported shocking assaults, not one of which has been visited with that bitter imprisonment which alone cures brutality.

Is it that the air of a London magistrate's has some enervating effect? Are the scenes and instances of shameful assaults and savage ferocity so numerous as to deaden the magisterial sensibility? Why is not the two months' penalty rigidly enforced in every assault where any bodily disfigurement or laceration—aye, be it the slightest—results, and why is not a minimum of fourteen days given to every other proved savage attack? *Because the magistrates forget the precious value of limb and bone while perceiving that of watches and purses!*

Of the strange perversity of judgement in this matter, which distinguishes many of the London magistrates, enough has been said in a former number, under the title "Crimes of Violence and their Punishment." Rather is it intended in this paper to point out the pernicious leniency which extends to some courts of far higher than Metopolitan police courts. Not merely at the Middlesex Sessions have have the heavy sentences passed off for offences against property, and the light ones for offences against the person. A sentence of four months for manslaughter with the knife was passed by an eminent judge not long since. Such a manslaughter is divided by the thinnest line from murder, and how paltry does it seem when compared with the heavy sentences of penal servitude inflicted at every assize and quarter sessions for robberies of articles of property.

Manslaughter, rape, assaults with intent, infliction of grevious bodily harm, and assaults resulting in *any* personal mutilation, ought by every rule of common sense to meet with most exemplary punishment. Yet they only seem to rank, in the minds of many administrators of the criminal law, with robberies, thefts, and forgeries, and generally *below* these last in heniousness. A lamentable perversion of judgment this, and most terrible in its consequences. The brutal violence of our English savages is, in effect, a result more or less of a pernicious idea that the person may be injured with little risk, while the pocket is guarded by the most terrible rigour of the law. Unless this idea is forthwith exploded by the infliction of very heavy punishment (with no remission) for violence, the lawlessness which has temporarily grown up among the dangerous classes will have terrible results. Already rowdyism and ferocity seem to have infected the mobs in many places in an unusual degree, and the sooner the lesson is taught that the Law is above all in England, the better for everyone's welfare.

Property is as nothing compared with life and limb. Who does not regard the robber of his watch as a far less culpable offender than the villian who stabs or beats him to death's door. The sharp sting of the lash, the terrors of the hulks, and the rigour of prison life are the only fit reprisals for crimes of brutal violence committed for mere savagery and love of inflicting pain. The wife beater, the villains who offer violence to women, the smashers of bones with pokers and hobnailed boots, the cannibals who bite off ears and noses, the ruffians who use quart pots as lethal weapons, and the vitriol throwers, are the worst criminals in England. By their side, the shoplifter, the watch stealer, the pickpocket, and the swindler are trifling offenders. And until the judges and the magistrates adopt this classification, we shall continue to shudder and sicken at the devilish brutality and cruelty which crop up at every gaol delivery.

It cannot be denied that the London stipendiary magistrates have done much, by their leniency towards mere acts of violence, in deadening the minds of criminals towards the

nature of ruffianism; and one or two whom we could name, to judge from the *Times* reports of their courts, to show the most ridiculous ignorance of their functions as repressive agents of brutality as well as of theft. At one court several savage assaults have been punished with trumpery fines. It makes one regret that the option of a fine was ever retained in the 42nd section of the 24 & 25 Vic. c. 100, which rules common assaults. It is a source of miserable weakness in some magisterial decisions.

The moment the dreadful theory gains distinct shape, that the integrity of life and limb are little valued by the law, all security and cohesion of society ceases. Mercy, or rather weakness. in such cases is very cruel to the criminal classes as well as to their victims, because sooner or later it engenders a fierce and pitiless reaction; and more than that, leniency to offences of this class intensifies more than ever the commercial taint which runs so much through English law. Every consideration must point towards the far severer punishment of offences against person than of those against property.

What then are the suggestions for ameliorating the misplaced lenity which sows such dragon's teeth:—

1. (As before advised) a circular from the Home Office pointing out the imprisoning powers of the Act regulating offences against the person. This applies to magistrates' courts only.

2. A short and tersely drawn Act, punishing every common assault with any *wilful mutilation* with a maximum two years hard labour, and in the case of a male, twenty lashes. Committal for trial *peremptory*.

3. Intensified punishments on proof of previous convictions for assaults.

Severity is needed. The lash has been so admirable a medicine for the disease of garotting, that we cannot doubt its efficacy in that of the brutal assault and battery. *And the lash has terrors for the brute.* Let a little consideration for the wives beaten almost to death, and the bitten, smashed, and kicked victims temper the philantrophy which looks after the perpretators and shudders at the cat-o-nine tail's name.

To sum up the events of the case briefly, it is only necessary to reiterate that property can be fully reinstated; life, limbs, and teeth cannot. Attacks on the purse injure the bank-book, attacks on the body injure the constitution; and while offences against property shorten only the assets, attacks on the person often shorten life.

One word more. Every proved assault, either with intent or indecent, and every proved rape, ought to meet with the full terms of punishment. Nothing more demonstrates a weakness in a State than the insecurity of its women's safety, and nothing can be a bitterer satire on civilization than to see women unable to walk alone on the high road.

The sooner the judges, chairmen of Quarter Sessions, and magistrates decide on punishing greivously all crimes of unredeemed brutality the better for our national character and our social and individual safety. Not only for our own benefits but for those of the weak and defenceless in the lowest classes in the great town, ought we swiftly, sternly, and surely to teach the lesson that all violence ensures the heaviest retribution from the law. Impossible it is to overrate the importance of such a lesson, and it is earnestly hoped that the considerations imperfectly pointed out in this paper may at once find some place in the minds of those who have the great and awful responsibility of the just administration of the criminal law.

—*Law Magazine.* WILLIAM READE.

HORSE HIRE.

A decision of considerable interest to livery-stable keepers and their customers was delivered by George Russell, Esq., judge of the Derby County Court, on December 17. The circumstances of the case are fully set forth by the judge himself, who said:—'In this case many points arise which are of great nicety and importance, but after some consideration and doubt I have come to the conclusion that the plaintiff is entitled to maintain this action. Exercising my functions as a jury I found that the contract was one of hiring for a horse and gig to go to Belper, and that the defendant, instead of driving to Belper, drove in a contrary direction, to or near Sandiacre. I by no means say that this was done with a deceitful or fraudulent intention, nor do I find that the road to Sandiacre was more difficult or dangerous than the road to Belper; but I do find that when the defendant drove the horse and gig to Sandiacre he did not do so by virtue of his contract for there was no power given in that contract to drive to Sandiacre instead of to Belper. Whilst on the road to Sandiacre the horse met with an accident which rendered it necessary to destroy it. I have no evidence before me that the injuries arose from any negligence of the defendant. After some research I have been unable to discover any authority, or even analogous authority, bearing upon the case; I am therefore compelled to decide it according to what I conceive to be the principles of law affecting the point in dispute. The contract for hiring, or, as it is termed, *locatio rei*, renders it necessary that the hirer should use the same diligence in relation to the hired goods as he would to his own (*Coggs* v. *Bernard*, 1 Smith's Leading Cases, 99). But if a horse or other chattel be injured whilst held under the bailment of hiring, the burden of proving negligence in the hirer rests upon the owner if he complain of such injuries, and he must give some affirmative evidence that the damage sustained by the chattel resulted from the negligence of the hirer (see notes to *Lean* v. *Reate*, 3 Campbell, p. 4). Here there is no such proof; but neither is there the pro-

tection of the bailment, for I find that having hired a horse to go to one place, the defendant wrongfully (in its legal sense) drove the horse to another. The effect of this, in my opinion, is to render the defendant in the same position as a wrong-doer. It is a somewhat similar position to that of a bailment causing a lien. If the bailee do anything to destroy the bailment, by improperly letting or selling the goods, the lien which sprung from the bailment is gone. So here the permission contained in the contained in the contract of hiring, to drive the horse to Belper, was gone as soon as the defendant drove to Sandiacre. Being a wrong-doer, the defendant therefore seems to be in the same position as if he had wrongfully taken the horse from the plaintiff's stable. If he had done so in such a manner that an action for trespass could be maintained thereon, and whilst he was driving the horse it fell, who can doubt that the defendant would be liable for any injuries it might sustain. I think you cannot estimate degrees of moral wrong doing, so to mitigate the position of a legal wrong-doer; and therefore finding, as I do, that the defendant is not protected by the contract of bailment, and that he is a wrong-doer, I give judgment in favour of the plaintiff. In considering the case I have been much struck by the argument that there is no evidence that the injury arose by reason of the wrongful act of driving to Sandiacre. In one sense this is so, for if the horse had gone to Belper the accident might have happened; but on the other hand, if the defendant had not taken the horse to Sandiacre or Belper, no injury could have been caused by him; and inasmuch as the defendant is a wrong-doer, it is no answer for him to say, "Whilst I was a wrong-doer the damage accrued, but inasmuch as it might have happened if I had acted rightly, I am not liable." I also have had to consider how a count could have been framed if this action had been brought in a superior Court, and a pleading test is generally a good one. If the facts were set out with several averments there may at first sight be some difficulty; but I incline to think that a general count in trespass, or a count alleging that the defendant wrongfully took the horse to Sandiacre, and whilst in his possession was injured, would suffice. As I have said, my judgment is for the plaintiff, and I assess the damages at 4*l*." —*Law Journal.*

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW

NOTES OF NEW DECISIONS AND LEADING CASES.

Insolvency.—The Judge in Insolvency refused an insolvent his discharge on the grounds, (1.) That he had made a preferential assignment in the year 1857; (2.) Because he had kept no books of account shewing receipts and disbursements of cash, and such other books as were suitable for his trade.—*Held*, as to the former ground, that it was not sustainable, for there was no law against it when made; and that as to the latter, considering the short period which had intervened between the passing of the Act of 1864 and the application for discharge (some three months only), and the inconsiderable nature of the business in which he was engaged, the insolvent should not have been so severely dealt with, though this was a matter wholly in the discretion of the Judge in Insolvency. But as the judge, though doubtful as to it, had not enquired into the *bona fides* with which the assignment of 1857 had been made, and of the disposition of his property under it, the case was referred back to him for re-consideration on those points.

Semble, as to this assignment, that it could be impeached under sub-sec. 6 of sec. 9 of the Insolvent Act only upon the ground that by it the insolvent had fraudulently retained and concealed some portion of his estate, or had been guilty of evasion, &c., in his examination as to his effects.

Quære, whether fraud committed before the Insolvent Act is fraud "within the meaning of the Act," so as to make it a valid ground of opposition to a debtor's discharge, so long as he fully complies with all the other requirements of that Act.

The Insolvent Act does not require the petition in appeal to be signed by the insolvent or his attorney.

Notice must under that Act be served on the Assignee of the day on which the petition will be presented to the Court.

The petition must be addressed to the Court, and to the Chief Justice: the latter is an irregularity, which, however, may probably be corrected.

The neglect on the part of the Assignee to file the papers on or before the day of presenting the petition is no reason for rejecting the appeal, though it may be a reason for enlarging the hearing, and proceeding against the assignee for his neglect or contempt.

Points not taken in the Court below are not open to parties before the Appellate Court.

Semble, that the more proper mode of raising technical objections to the proceedings in cases of this kind is to move a rule to set the proceedings aside, instead of urging the objections on the argument of the merits.—*Re Parr, an Insolvent*, 17 U. C. C. P. 621.

Criminal Law—Indictment for Perjury—Sufficiency of.—An indictment for perjury charged that it was committed on the trial of an indictment against A. B. at the Court of Quarter Sessions for the County of B., on the 11th of

June, 1867, *on a charge of larceny: Held*, sufficient, and that it was not necessary to specify the property stolen, the ownership thereof, or the locality from which it was taken; nor to allege that the indictment was in the name of the Queen, as the Court must take judicial notice of the fact that Her Majesty alone could prosecute on a charge of larceny.—*Regina* v. *Macdonald*, 17 U. C. C. P. 635.

SURVEY—C. S. U. C CH. 93, SEC. 28—DOUBLE-FRONT CONCESSIONS—DESCRIPTION.—The 12 Vic. ch. 35, sec. 37 (Consol. Stat. U. C. ch. 93, sec. 28) which prescribes the rule for drawing the side lines in double-fronted concessions, applies to townships theretofore surveyed.

Held,—following *Warnock* v. *Cowan*, 13 U. C. Q. B. 257, and *Holmes* v. *McKechin*, 23 U. C. Q. B. 52, 321—that the lands having been described in half lots is made by that section part of the definition of a township with double front concessions.

Held, also, that the rule prescribed applies to all lands in such concessions, not to the grants of half lots only, and that it is brought into application by the granting of any half lots.

Semble, however, that the section is on both points open to doubts, which it is desirable to remove by legislation.

Where land was described as commencing at a post planted four chains and fifty links from the north-east angle of a lot—*Held*, that the post (the existence and position of which were satisfactorily established) was the point of commencement, though its distance from the true north-east angle was inaccurately given.

The declaration charged the trespasses, breaking down fences, &c, as committed on divers days and times. Defendant pleaded leave and license, which the plaintiff traversed. It appeared that part of the fence was removed under a license, and the remainder after it had been revoked, the interval from the first to the last removal being two or three years.

Held, that the plaintiff was entitled to succeed, though it would have been otherwise if the declaration had only charged the trespasses as committed on the same day, for the defendant could then have applied the license to the only trespass charged.—*Marrs* v. *Davidson*, 26 U. C. Q. B. 641.

INSOLVENCY—PREFERENCE—BOARDS OF TRADE.—Sub-sections 1, 2, 3 and 4, of section 8, of the Insolvent Act of 1864, do not prevent a debtor conveying lands to a creditor either in payment of, or a security for, his claim.

A. having manufactured a quantity of goods (a number of oil barrels) for a customer, drew upon him for the price, and applied to a banker to cash the bill, which the banker agreed to do upon receiving a lien on the goods, which was given, and the bill cashed accordingly. On the day following the debtor made an assignment to an official assignee.

Held, 1. That the transaction was not within either the terms or the spirit of the Insolvent Act.

2. That if it were within the terms of the Act, the creditor was at liberty to rebut the presumption that the transaction was carried out in contemplation of insolvency.

The provision in the Insolvency Act which authorises Boards of Trade to appoint official assigness, applies as well to unincorporated, as to incorporated Boards of Trade; and that whether such Boards of Trade were in existence at the time of the passing of the Act or were subsequently created.—*Newton* v. *The Ontario Bank*, 13 U. C. Chan. R. 652.

FENCE VIEWER'S ACT (C. S. U. C. CH. 57)—NON-COMPLIANCE WITH AWARD—RESTRICTION TO STATUTORY REMEDY—PLEADING.—The declaration was against the defendant as owner of a lot adjoining the plaintiff's land, alleging the existence of a large quantity of surplus water upon both lots; that both parties disputed as to their respective rights and liabilities under the Fence Viewer's Act (C. S. U. C. ch. 57), and steps were thereupon taken to procure an award under said Act, which was accordingly done, and an award made in the presence and with the assent of both parties. The declaration then went on to recite the award verbatim, which directed two ditches to be made by the parties, one by each, and concluded thus, "said ditch to be made before the 1st October, 1865." Plaintiff then averred performance of the award on his part, but a neglect and refusal to perform it on the defendant's part, and claimed damages for such neglect and refusal: *Held*, on demurrer, that the declaration was not bad as failing to disclose a case which gave the fence viewers jurisdiction, which did not fix the time each party should have within which to perform his share of the ditching, or direct where such ditching should be made; and also for not shewing that a demand in writing had been made on the defendant to perform the award, the non-compliance with which would have entitled the plaintiff under the Act to have completed the ditch and sued for the price fixed, instead of bringing an action for damages, which could not be maintained.

The eleven sub-sections of section 16 of the above act refer to ditches and water courses as well as to fences.—*Murray* v. *Dawson*, 17 U. C. C. P. 588.

SALE FOR TAXES—MORTGAGE—REDEMPTION.—The five years for which lands are to be in arrear for taxes, before they are liable to be sold, must be before the delivery of the treasurer's warrant to the sheriff.

Land having been sold for taxes, a party interested therein as mortgagee applied to the vendee of the sheriff to be allowed to purchase, on the ground of his having an interest in the land, and which he was permitted to do, his only interest in the land being as mortgagee.

Held, that the purchaser could not afterwards set up this title in opposition to the mortgagor's claim to redeem.

Although a mortgagee may, as well as a stranger, purchase lands of which he is mortgagee, still, if he purchases as mortgagee, and makes his interest in the land a ground for being allowed to purchase, he cannot afterwards set up the title thus obtained against the mortgagor's right to redeem.—*Kelly* v. *Macklem*, 14 U. C. Ch. Rep. 29.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

RAILWAY CO.—FORCIBLE REMOVAL BY CONDUCTOR—LIABILITY.—Where the conductor of a Railway Company forciby, and without excuse for so doing, removes from a train a passenger who has paid his fare, he is liable for the assault, and the doctrine of *respondeat superior* applies to the Company. But, where in the course of such removal, and while in the act of leaving the car, plaintiff slipped and was injured. *Held*, that defendants were not liable for the injuries sustained by him, as his removal was not the proximate, but the remote cause of the accident, and the damages awarded were, therefore, too remote. —*Williamson* v. *Grand Trunk Railway Co.*, 17 U. C. C. P. 615.

HARBOUR COMPANY—PIER LIGHTS—ACTUAL NOTICE — DAMAGES — PLEADING. — In an action against a harbour company, charging that it was their duty to keep a sufficient light upon the end of one of their piers, as they had been in the habit of doing, to enable vessels to enter with safety, and that they had wrongfully removed such light without giving sufficient public notice, by reason of which the plaintiff's vessel, while endeavouring to enter the said harbour, had been lost, *Held*,

1. That the arbitrator, to whom the matters of fact had been referred, having found that it was necessary that such a light should be maintained for the proper use of the harbour by vessels entering in the night time, and that the immediate cause of the loss was the absence of the light, the defendants were *prima facie* guilty of a negligence, for the consequences of which they were liable.

2. That even if the defendants would under certain circumstances be justified in closing their harbour to vessels and removing the light, they were bound to give reasonably sufficient notice of the same, and that the notice given was not of that character.

3. That in addition to the value of his vessel, the plaintiff was entitled to recover a further sum expended by him in good faith, and with a reasonable expectation of success, in attempting to raise the vessel, for the purpose of repairing her.

4. That an Insurance Company which had a risk upon the vessel, was not entitled to recover, in the name of the plaintiff, moneys expended by them in a similar attempt.

Semble, that a plea of *not guilty* put in issue the negligence only, and not the duty alleged.

Remarks upon the extent to which the possession of means of knowledge furnishes evidence of actual knowledge.—*Sweeney* v. *The President, Directors and Company of the Port Burwell Harbour*, 17 U. C. C. P. 574.

DEMURRER—FERRY—FRONTIER.—*Held*, on demurrer, that the words "provincial frontier," used in section 5 of 20 Victoria, chapter 7, refer to the provincial frontier opposite the United States, and not to the boundary line of division between Upper Canada and Lower Canada.—*Smith* v. *Ratté*, 13 U. C. Ch. Rep. 696.

CARRIER.—A carrier may by special contract limit his liability, except as against his own negligence.

Where a person delivers goods to a carrier, and receives a bill of lading expressing that the goods are received for transportation, subject to the conditions on the back of the bill, by one of which the carrier's liability is limited to a certain rate per lb., this constitutes a special contract by the parties, and the carrier, in the absence of proof of negligence, is only liable at the rate agreed upon.

Goods were received by defendants, a railroad company, under a special contract as set forth in the preceding paragraph, and were safely carried to their wharf in New York, and placed on the wharf ready for delivery, but before the plaintiffs had notice of their arrival, or opportunity to remove them, a fire broke out on board a steamer of the defendants lying at the wharf, which entirely consumed the boat, and also the wharf and the goods thereon. There was no evidence as to

the origin of the fire. *Held*, that plaintiffs could not recover more than the special rate agreed upon, without proving negligence of the defendants.—*Farnham, Kirkham & Co.* v. *The Camden and Amboy Railroad Company*, 7 Am. Law Reg. 172.

ONTARIO REPORTS.

COMMON PLEAS.

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

EATON v. SHANNON

Insolvency — Substitutional service of attachment — Judges power to rescind his order for.

A Judge in Insolvency has power to rescind an order made by him for substitutional service of a writ of attachment; and in this case the Court, on appeal, refused to interfere with an order for such rescision.

[17 C. P. 592—M. T. 1867.]

Appeal in Insolvency from the decision of the Judge of the County Court of Perth.

The judge on the 6th of December, 1866, made an order that the writ of attachment issued against Shannon as an insolvent, should be served by sticking up a true copy of the same in the office of the Clerk of the County Court of the County of Perth, and by leaving another copy with Mrs. Duffie, of St. Mary's, the mother-in-law of the defendant, and that true copies of this order should be served in like manner, and that such service should be deemed good service of the attachment and order.

The affidavits on which this order was made stated that the defendant had left Canada in the year 1862, and had from that time continued to reside in the United States, and, it was believed, in some part of the State of Pennsylvania, but that his residence could not be discovered, although efforts had been made to find it out, and that the only relation he had, who was known in Canada, was Mrs. Duffie, of St. Mary's, his mother-in-law, and that she had been asked where the defendant's residence was and, although it was believed she knew where it was, she refused to divulge it, and further, that the defendant owned a lot of land in the township of Logan, in the said County.

On the 26th of July, 1867, Shannon petitioned the Judge to set aside the writ of attachment, or the service of it on various grounds, stating, after alleging several irregularities in the proceedings, that he had never received value for the promissory notes on which the attachment had issued, and that they were barred by the Statute of Limitations; and that he had for the last two years been the owner in fee of lot number 19, in the 14th concession of Logan, and had been for several years before that the lessee of the lot from the Canada Company, and that the property was worth $1,500: that one Nicholson had been in charge of the lot for him ever since he had left Canada, and had constantly been cognizant of his address in the State of Pennsylvania: that his last place of residence in Canada was on the said lot, where he had resided several months with his family previously to his leaving Canada: that he had visited the farm at least once a year, and sometimes oftener, since his residence in Pennsylvania, and had been at St. Mary's on nearly every occasion of his coming here: and that he had seen and conversed with the plaintiff in his store at St. Mary's, and had done so about two years ago: that his place of residence while absent from Canada had been in the Town of Newcastle in Pennsylvania, where he was well known, and he could easily have been found if enquired for: that he did not think Mrs. Duffie knew where his residence was, as he had not been on good terms with her: that he had not been aware any proceedings had been taken against him till the day before his petition, and that he had not left Canada or remained from it with intent to defraud or delay the plaintiff, or any other person or persons, of any claim he or they had against him.

Upon this application, the Judge, on the 26th of July, 1867, issued a summons calling on the assignee to shew cause why the attachment or the service thereof, and all proceedings under it, should not be set aside for the reasons aforesaid; and upon hearing the parties on the 15th of September he made an order that the order which directed the service of the writ of attachment, the services of the said writ, and all subsequent proceedings, should be set aside for irregularity, and he reserved the question of the costs of such application until the determination of the suit.

Against this order the creditor petitioned, upon the following grounds:

1. That from the paper which he submitted to the Judge he was entitled to the order for substitutional service.

2. That the order could not be rescinded, and especially after the proceedings which had been taken upon it, and after the time which had elapsed since it had been made.

3. That the Judge might appoint any method he might see fit for effecting service of the writ, and having exercised his discretion, it could not be set aside, unless the order for such service had been obtained by fraud.

In Michaelmas Term last, *C. Robinson*, Q C., shewed cause:—The Judge's order appealed from setting aside the service of the writ was on a matter of practice only, and this Court will not interfere with the decision in such a case: *Tadman* v. *Wood*, 4 A. & E. 1011. The facts fully justified the order which is appealed from.

J. A. Boyd, contra:—This appeal lies against th order, for an appeal lies generally against all orders, and matters of practice may be the subject of appeal: *Whitaker* v. *Crocker*, 2 L. M. & P. 76; *Ensor* v. *Griffin*, 7 C. B. 781.

The original order of the Judge cannot be impeached or contradicted by new facts: *Kilkenny Railway Company* v. *Fielden*, 2 L M. & P. 125. The appellant has not established a full case, for he only shews that his last place of abode was in Logan, and not that was his last known place of abode.

A. WILSON, J., delivered the judgment of the Court.

The defendant left the Province in 1862, and he was not proceeded against as an insolvent till about the end of 1866.

The Judge had power under the Act of 1865, s. 4, to make the order he issued for service to be made in the manner he had directed; but the suggestion is that these proceedings were not fairly, though regularly, taken.

It is laid down in Arch. Pr., 11 ed., 204, that the order made by a Judge permitting the plaintiff to proceed upon a summons which has not been personally served, upon its being shewn to him that reasonable efforts have been made to effect personal service, which have not been successful, will not be set aside upon affidavits contradicting the facts disclosed in the affidavit on which the order was made.

In *Lewis* v. *Padwick*, 14 Jur. 226, it was intimated that as the Statutes had declared that "in case it shall be made to appear by affidavit to the satisfaction of the Judge, &c.," the Judge shall order a *distringas* to issue, that his order should not be interfered with, if it had been made to appear to him, although the affidavit was false in fact and that the only remedy the party had was by an indictment.

In *Whitaker* v. *Crocker*, cited on the argument, and reported also in 15 Jur. 385, it was said by the Court in a similar case, "This point has been decided in *Lewis* v. *Padwick*: there may be inconveniences on both sides, but the law has elected between them."

In this case the proceeding was commenced against the defendant, for that "being out of the Province he remained out of it with intent to defraud his creditors, or to defeat or delay the remedy of his creditors, or to avoid being arrested or served with legal process."

There may be great inconveniences in setting aside proceedings after the appointment of an assignee and the transfer of all the debtor's estate to him, especially if the proceedings have gone any length, such as the declaration and payment of dividends, or even further; but proceedings have been set aside in this Province when taken against persons as absconding debtors, who were not so in fact; as for instance, when taken against those whose residence was not in Upper Canada, but who had been for a short here on business and had returned to their own homes; and so the whole preceedings in bankruptcy, in former times, rested upon the fact and the sufficiency of the petitioning creditor's debt, and often failed because of some objection to the debt; and it might be a very serious matter if no relief could be given against a proceeding in insolvency, however unfounded it might have been, if it was only formal enough to comply with the Statute.

We are not prepared to say a Judge is precluded from entertaining an application to set aside the proceedings, so as to let in the party to dispute the validity of the writ, upon a proper case being made out in his opinion for that purpose.

Even after outlawry the party was afforded relief, "the Court having of late years gone further than heretofore upon motion, the more effectually to expedite justice, save expense, and preserve the credit and character of the defendant:" Tidd's Prac 9 Ed. 139. The power must be cautiously exercised and will at all times be open to revision.

The Judge, upon hearing the parties, thought the order should be superseded, because the defendant was not fraudulently abroad, and because the plaintiff was aware the defendant had a tenant upon his land in Logan, who might have informed the plaintiff of the defendant's residence, if he had been applied to, and who might, if he had refused to give information, have been more properly served with the writ than the mother-in-law of the defendant.

If on such grounds the Judge had declined to interfere, we are not all sure we should have over-ruled his decision: discretionary matters are better left with those who have firstly to dispose of them, and their decision should be maintained unless it can on safe grounds be impeached. There are other circumstances in this case which shew that the discretion was not properly exercised; the debtor disputes the validity of the promissory notes in respect of which the claim is rested, and the notes themselves are not proper provable securities, being more than six years old at the time of the issuing of the writ.

It has not been necessary to consider the very numerous technical preliminary exceptions which were argued for the respondent and were answered by the other side, because we are not of opinion the order appealed from was wrongly made.

The appeal must be dismissed with costs.

Appeal dismissed, with costs.

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

McINNES v. DAVIDSON.

Insolvent acts—Order by judge to produce books—Insufficient compliance—Contempt—Punishment, nature of.

An insolvent was ordered by a county judge to produce certain books and papers. These were at the time at Bruce Mines, and the insolvent did not feel called upon to go there for them, and an order was made *ex parte* for his committal for disobedience of the order. The insolvent had, however, in the meantime, taken the books to Montreal and given them to one H. to hand to the assignee. He was then arrested, and subsequently applied for his discharge, which was refused. The books were afterwards handed over to proper person, though in a mutilated condition, which the insolvent said must have been done at Montreal. He then again applied for his discharge on the ground that he had complied with the order, and that the imprisonment was for compulsory purposes only. The county judge, however, made an order refusing the application, and the insolvent then appealed from this last order to a Judge in Chambers in Toronto.

It was urged that the warrant of arrest was insufficient on its face; that no demand was made of the books, or refusal to give them shewn, and therefore no contempt; and that the power of imprisonment was only to enforce compliance with the order, and not *in pœnam*.

Held, 1. That the judge at Toronto had no right to enquire into the legality or propriety of the warrant for arrest, or as to the nature or object of the imprisonment authorised by the statute, or whether the warrant was an order and so an appealable matter under the acts.

2. That the last order of the county judge was not improperly made, and the appeal was merely an appeal from that order.

The purposes for which imprisonment is imposed enumerated.

Quære, whether in this case the imprisonment was coercive or punitive.

[Chambers, November 15 1867.]

Notice of appeal, dated the 10th of October, 1867, was served by the defendant (an insolvent) that he would appeal to one of the judges of Common Law at Toronto against the order and decision of the judge of the County Court of the County of Wentworth, made on the 16th of September last, refusing and discharging the petition of the insolvent, wherein he prayed to be discharged from further imprisonment under the

warrant of the said judge of the County Court of the 17th August last; and, the appeal having been allowed, notice was further given that the insolvent would present a petition to the presiding judge in Chambers at Osgoode Hall, and that the insolvent would (amongst other things) insist on the following ground of appeal, namely, that he had complied with the order of the said judge of the County Court, on the 26th of June last, fully, or as fully as it was in his power to do, and therefore should have been discharged by the said judge—the power of imprisonment conferred on the said judge being intended for compulsory purposes only, and not for purposes of punishment.

The petition stated that the insolvent, who had been carrying on business as a country merchant at the Bruce Mines, assigned on the 16th of November, 1866, all his property and assets to John Whyte, an official assignee, then and now of Montreal, in trust for the payment of his debts, and his estate having been subsequently placed in compulsory liquidation, such proceedings were had that the appointment of John Whyte as such assignee was confirmed:

That on the 26th of June, 1867, the said judge of the County Court, acting in Insolvency, made an order requiring the insolvent to deliver to the said assignee, or such agent as he should name, all letters, books containing copies of letters in any way connected with his late business, and all letters, vouchers, notes, deeds and documents relating thereto, which order was served on the insolvent, in Hamilton, on the same day:

That at the time of serving the said order the insolvent had only some letter books, some registered deeds for lands, and a bundle of old letters, retired notes and accounts, or invoices of no use in ascertaining the state of his affairs, all of which at that time were at Bruce Mines, some hundreds of miles from Hamilton, and much further from Montreal, where the assignee lived:

That the insolvent was never after the service of the said order asked for the said books and documents by the assignee, or by any one professing to be authorized by him to receive them, but nevertheless, on the 17th of August, 1867, a warrant was issued by the said judge of the County Court, on the *ex parte* application of the plaintiff, ordering the insolvent to be committed to the common gaol of the county of Wentworth for six months, under which warrant he was arrested in Montreal, and conveyed thence to Hamilton, and lodged in the common gaol, where he is now incarcerated under the said warrant:

That on the 24th of August, 1867, the insolvent applied to the said judge of the County Court to be discharged from imprisonment under the said warrant, which application was refused by the judge:

That the insolvent did not understand that the order for the delivery of the books and documents imposed on him the obligation of going or sending to Bruce Mines for them, or of carrying or conveying them to the assignee at Montreal, as the insolvent was informed the said judge in effect held in refusing the application of the insolvent: and that if it did impose upon him such an obligation, it was absolutely beyond his power to comply with it, having not a dollar of his own, nor any means of defraying the expenses thereof, the assignee having received all his property and assets; but having been gratuitously provided by some relatives with the means of going to Bruce Mines, no part of which was furnished either by his creditors or by the assignee, he conveyed the said books and papers to Montreal, and left them at the counting house of Messrs. Hingston, Telfer & Co. in Montreal, and the assignee received notice thereof, and the books and papers were shortly after, as the insolvent has been informed and believes, offered to the assignee by Mr. James Hingston, of the firm of Hingston, Telfer & Co., but he declined to receive them:

That after the refusal of the application of the insolvent to be discharged, he procured the said books and papers to be forwarded from Montreal and delivered to Miles O'Reilly, Esq., who, as the insolvent was informed delivered them to Messrs. Burton & Bruce, the assignee having, as the insolvent was informed, authorized such delivery to them as a delivery to himself:

That on the 30th of August, 1867, the insolvent applied to the said judge to be discharged from further imprisonment, setting forth in his petition for that purpose the previous sentiments, which application was refused on the 16th of September last:

That the insolvent complied with the said order of the 26th of June last to the utmost of his power before making the last-mentioned application, and his further imprisonment can be of no use to any one, except thereby to coerce some of his friends or connections into assuming the payment of his debts, but, on receiving the said letter books from Montreal (which contained the insolvent's private as well as his business letters), he found that some leaves had been removed from the one of most recent date, and although he was unable to set forth what was contained on the said missing leaves, he is able to say, and does say, that they did not contain any matter of any use to the assignee or his creditors in ascertaining the state of his affairs or otherwise howsoever; and that he is unable to say how the missing leaves were removed, but they were removed without the insolvent's knowledge or consent, and against his will; and until he received the affidavit of James Hingston, of the 11th of September, and of Edward J. Lindsay, of the 10th of September, he was under the belief that they were removed while the said books were lying in the counting house of Hingston, Telfer & Co., in Montreal.

The insolvent, therefore, prayed that he might be allowed to appeal from the last-mentioned decision of the said judge, and that the said decision might be reversed, and he discharged from further imprisonment under the said warrant, being fully persuaded that he could not live the said six months if retained in his present place of confinement.

W. Sydney Smith shewed cause.

The warrant of imprisonment is not an order appealable by the statute, and the sentence of imprisonment when awarded cannot be remitted. *Ward* v. *Armstrong*, 4 U. C. Prac. Rep. 60; Insolvent Act of 1864, sec. 8, sub-sec. 7; Insolvent Act of 1865, sec. 29.

Jas. Patterson and *Curran* supported the petition.

The insolvent may proceed in case of a wrongful imprisonment either by way of appeal under

the statute, or by *habeas corpus* at the common law; Deacon's Law of Bankruptcy, 727; *Ex parte Jones*, 1 Mont. D. & D. 145.

The warrant should have stated that the insolvent had the books and documents in his possession which he was committed for not delivering; *Crowley's case*, 2 Swan. 1.

No jurisdiction is shown on the face of the warrant.

No demand of books was ever made of the insolvent, nor was any refusal by him to deliver them shown. There was therefore no contempt. It is not mere disobedience that is punished—it is *wilful* disobedience, and none is shewn here; *Miller* v. *Knox*, 4 B. N. C. 574.

That the power of imprisonment is conferred only to enforce compliance with the orders of the Court, and when that has been secured the imprisonment should no longer be continued. It was not intended strictly to be a proceeding in *pœnam: Ex parte Oliver*, 1 Rose 407, 2 V. & B. 245; *Ex parte James*, 3 Jur. 538.

Adam Wilson, J.—The clause under which the original order of the 26th of June, 1867, for the delivery by the insolvent of his letter books to the assignee or to any agent he might name, is sec. 29 of the Act of 1865. But the judge must have possessed such power, independently of that clause, under sec. 3, sub-secs. 9, 11, 22, of the Act of 1864, although what his power of punishment would have been in the absence of the express provision contained in the act of 1865 is not quite certain.

No complaint has been made in this present appeal against the order of the 26th of June, for the delivery up of the letter books, nor has any complaint been made against the warrant of commitment dated the 17th of August last, imposing six months' imprisonment upon the insolvent, "or until this Court (the County Court judge) shall make order to the contrary." Nor is any complaint made that the petition of the insolvent to the judge of the County Court, dated the 22nd of August last, praying to be discharged from custody under the warrant of commitment was improperly disposed of, the judge having been of opinion "that the insolvent was disobeying the order of the 26th of June," and "refusing to rescind or set aside the order for commitment, or to make any order for discharge of the insolvent, unless he complied with the order requiring him to deliver up these books and papers."

The appeal is merely against the order of the Judge of the County Court of the 16th of September last, refusing to grant the application of the insolvent, of the 30th August, to be discharged from further imprisonment, because he had complied with the order for the delivery up of the letter books, &c., so far as it was in his power to do.

In disposing of that application, the learned judge said that he considered sec. 29 of the Act of 1865 both compulsory and punitive, because the time fixed by it was definite and not "until further order:" that the term of imprisonment awarded under the Con. Stat. U. C. ch. 24, sec. 41, was of the same nature, and the punishment under it had been considered as final when it had been ordered: That he had before thought the insolvent had wilfully disobeyed the order of the 26th of June, and he was not satisfied the insolvent had done all in his power since to comply with it. "It was his duty to hand the books and letters to the assignee, but instead of doing so he hands them to the person whose claim upon the estate is, apparently with good reason, disputed by the assignee, and whose interest it was to destroy any letters tending to shew that his account is incorrect. Certain letters have been removed apparently by Mr. Hingston, for the insolvent swears that the letters were in the book when it was handed to him. He also says that the books and letters were handed to Mr. Hingston to be delivered to the assignee; he was therefore the agent of the insolvent for the purpose of delivery, and the insolvent is bound for his acts and omissions. For all that appears, these missing letters may still be in the hands of his agent, Mr. Hingston, and until the insolvent shews how these letters were abstracted and what has become of them, or produces them, he does not come into Court with clean hands to ask for his discharge. . . . I refuse to grant the prayer of the petition for the discharge of the insolvent." In pursuance of this, the order of the 16th of September now appealed from was drawn up.

As I have before stated, I do not consider I have to determine on the regularity, legality, or propriety of any of the proceedings prior to the application of the 30th August, and the order made thereon, unless so far as the grounds of appeal necessarily extend to them, and bring them within the operation of the appeal—and a ground of appeal, that the judge should have discharged the insolvent because the insolvent, as he maintained and now maintains, had complied with the order of June, so far as it was in his power to do so, will not, in my opinion, let in objections to the validity or invalidity of the warrant because it was *ex parte*, or because it does not set out a full enough cause for commitment, nor because the insolvent could not or should not have been required to go to the Bruce Mines without a tender of his expenses for the purpose of getting the books and taking them to the assignee. Nor have I to consider whether the warrant is an order, and so appealable or not, because the warrant has not been appealed from. Nor am I required to determine whether the 29th section of the Act of 1865 makes the imprisonment unconditional for the term awarded, or whether its purpose and object are not just as the warrant in this case is in fact, punishment in substance, but determinable on submission made—"six months imprisonment or until this court shall make order to the contrary."

Imprisonment is imposed for different purposes—for *prevention*, as by a constable to hinder a fray, or by any person to restrain a misdemeanor or prevent a felony: for *security*, as in cases for debt or other civil demand before judgment or in criminal cases before investigation or trial, or until sureties for the peace are given; by way of *satisfaction* as upon a *capias ad satisfaciendum*: in *coercion*, to ensure the performance of some particular act, as in cases of actual contempt, until the contempt be purged; and in cases of supposed contempt, as for not making a return of legal process: or for not paying over monies raised by such process by officers of the court, until return or payment is made, and to enforce the payment of pecuniary fines: and *punitive*, as in criminal sentences.

In cases of contempt the warrant of commitment is properly expressed, that the party be kept until further order; *Green* v. *Elgie*, 5 Q B. 99.

Whether the imprisonment here is coercive or punitive it is not for me at present to express an opinion, nor is it for me to say which it is in cases arising under ch. 24, sec. 41, before referred to.

When a party is "recommitted to close custody for any period not exceeding twelve months and to be then discharged," under the Con. Stat. U. C. ch. 26, sec. 11, because it appears to the court or judge that the debt was contracted by fraud, &c., is a case, I should think, of plain and direct punishment, nothing can be done or is to be done compensatory or in mitigation of it. Whether the same can be said where the principal purpose is to procure the delivery of books, or the giving of full information which may benefit the creditors, and when the refusal is sure to be persisted in if the imprisonment is to be maintained, is not very clear; that it may be till answer made or until further order is perhaps quite probable: *The King* v. *Jackson*, 1 Q. B. 653; *Groome* v. *Forrester*, 5 M. & R. 61.

The reason I am not called upon to consider what the nature of the imprisonment which has been awarded under the 29th section before mentioned is, that on the merits of the application, assuming the judge could review and alter his former decision, I think the learned judge was quite right in treating the delivery over of the books in a mutilated form, and which mutilation to some extent might not unfairly be attributed to the insolvent, and at any rate that it had not been satisfactorily accounted for or explained, or what had become of the missing leaves, was not conduct which amounted to a compliance by him of the order of the 26th of June, so far as it was in his power to comply with the same.

If I had been of opinion that the insolvent had truly complied with the order referred to, I should have been obliged to have considered whether it was or was not within the jurisdiction of the learned judge to have re opened the question and term of imprisonment.

Because I conceive the order of the learned judge of the 16th of September was not improperly made discharging the application of the insolvent of the 30th of August, I must dismiss the appeal with costs. to be paid by the appellant to the present plaintiff.

Appeal dismissed with costs.

INSOLVENCY CASE.

(Before His Honor ALEXANDER MACDONALD, Esq., Judge of the County of Wellington.)

SIMPSON v. NEWTON.

Insolvent Act 1864, *sec. 5, sub-sec. 10—Action against assignee for dividend.*

Held, that an action may be brought against an assignee in insolvency for a dividend on a duly collocated and advertised claim which has not been objected to.

[Guelph, January, 1868.]

This was an action brought in the Division Court at Guelph, against the defendant as official assignee of the estate of Hockin & Hockin.

The particulars of the plaintiff's claim were for $100 (abandoning the excess of $117.50 over the sum of $100) proved before the assignee in due form of law, for three months arrears of wages due from the insolvents to him, for money payable by the defendant, as such assignee, to the plaintiff, for money received by the defendant as assignee for the use of the plaintiff, &c.

From the evidence it appeared that the plaintiff had made and filed an affidavit on the 2nd of March, 1867, with the defendant, official assignee of Hockin & Hockin, in which he stated that the insolvents were indebted to him in the sum of $117.50, for work done by him as their hired servant.

The plaintiff's claim was collocated in the dividend sheet as a privileged claim for $117.50 for wages under the 10th sub-section of section 5 of the Insolvent Act. 1864. This dividend sheet was duly advertised. No objection was made by any creditor under the Insolvent Act.

The assignee objected to the claim, but he did nothing further than to inform the plaintiffs that it was objected to, until the plaintiffs applied for the amount of his claim, which was after the expiration of six days from the last publication of the advertisement, when the assignee required further particulars respecting the claim. A second affidavit was then furnished by the plaintiff, sworn on the 3rd of October. The assignee made an appointment in writing dated the 19th October, for the 21st October, to hear and examine the parties, and hear evidence as to the claim of the plaintiff. The plaintiff's solicitor, upon whom the appointment was served, attended and acted for him; but without further notice to the assignee this action was commenced.

It was objected for the defendant at the trial, that the defendant, as assignee, could not be sued for a dividend.

But it was held by the learned judge that such an action could be maintained, as the plaintiff had complied with the Act in proving his claim before the assignee, who collocated it on the dividend sheet as a privileged claim, and it having been duly advertised, and unobjected to by any creditor.

Evidence was taken to shew that the plaintiff was not entitled to hold his claim, subject to the plaintiff's objection that the assignee could not dispute it under the circumstances.

MACDONALD, Co. J., having taken time to consider, delivered the following judgment:—

Sub-section 10 of section 5 of the Insolvent Act provides "that clerks and other persons in the employ of the insolvent, in and about his business or trade, shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them at the time of the execution of the deeds of assignment, &c., not exceeding three months of such arrears."

Sub-section 11 provides that "as soon as a dividend sheet has been prepared, notice thereof shall be given by advertisement, and after the expiry of six judicial days from the day of the last publication of such advertisement, *all dividends* which have not been objected to within that period *shall be paid*."

By the 16th sub-section of section 4, assignees are made subject to the summary jurisdiction of the court or judge in the same manner as other

officers of the court are made subject to its jurisdiction, but a creditor's remedy by action is not taken away, as under the Bankruptcy Acts in England, wherein the remedy by petition for redress against an assignee who refuses to pay a dividend is substituted for the former remedy by action. It is there expressly provided that no action for any dividend shall be brought against assignees by a creditor who has proved under a commission.

By the interpretation clause the word "collocated" means ranked or placed in the dividend sheet for some dividend or sum of money, so that the amount for which the plaintiff was collocated for wages is included in the term dividend, and is subject to objection like any other dividend, and if not objected to by a creditor in the words of the Act "must be paid."

As there is nothing in our Insolvent Act to deprive a creditor of his action of debt for a dividend, in the face of the positive enactment that all dividends not objected to shall be paid, my opinion is that an assignee cannot resist the payment of a dividend on the ground that the debt was not due or entitled to rank as collocated on the dividend sheet.

In *Ex p. Hodges*, Buck. 524, it was held that an application by petition against an assignee could only be resisted by the assignee, on the same grounds that he might have availed himself of, as a defence to an action before the remedy by petition was instituted for the former remedy by action. On such a petition the assignee cannot dispute the debt, but he might under the Bankruptcy Acts make it the subject matter of a distinct petition to impeach the creditor's proof and debt. See *Ex p. Loxly*, Buck. 456, and *Ex. p. Whitside*, 1 Rose, 319.

In *Ex p. Alexander*, 1 Deacon & Chitty, 514, in which the creditor petitioned the Court to compel the official assignee to pay his dividend, which the assignee disputed on the ground that the creditor had funds of the estate, Sir G. Rose said: "It appears impossible to contend that an official assignee can remit an *order* for the payment of a dividend. It is unquestionable that before the 39 Geo. III. c. 121 (the first statute which took away the right of action from a debtor against assignees for the recovery of his dividends), a creditor at his own option might bring an action for the recovery of a dividend, or present a petition to the Lord Chancellor, and that it was enough for him to shew the order of the commissioners for the payment of the dividend, the amount of which was considered as so much money had and received to the creditor's use. In an action of assumpsit brought against the assignee it was not competent to him to shew that the debt ought to be expunged. An improvement was made in this branch of the bankrupt law, and now no action will lie against an assignee for a dividend, but all claims of this description were transferred to the jurisdiction of the Lord Chancellor. "The difficulty we have to contend with is, that the resistance is made to the payment by a party who has no right to come into Court to litigate that question. An official assignee is an officer purely ministerial, and the Act of Parliament holds out no pretence for his coming into Court to dispute the payment of a dividend."

The majority of the Court agreed with that view of the case.

It appears to me that the positive enactment that the dividends not objected to "shall be paid," is quite as forceable and binding as a commissioner's order under the Bankruptcy Act in England, and that an assignee having collocated a claim on the dividend sheet duly advertised, his duty is fulfilled, unless the claim is disputed by a creditor when he becomes the arbitrator between the parties; but if the dividend is not objected to, it must be paid.

There was no objection upon which the assignees appointment of the 19th of October to hear the parties could be founded, the claim not having been objected to by a creditor. The plaintiff was not therefore bound to attend upon that appointment. No doubt the $117.50 was due to the plaintiff. It is not necessary to determine now how much should have been ranked as a privileged claim, having determined that the defendant, as assignee, cannot dispute a claim or dividend collocated by himself in a dividend sheet advertized and unobjected to by a creditor.

Judgment for the plaintiff $100 and costs, to be paid in ten days.

Judgment for plaintiff.

ENGLISH REPORTS.

QUEEN'S BENCH.

PLAYFORD v. THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY.

Contract — Privity — Negligence — Breach of duty, causing damage — Public duty — Private duty.

The receiver of a telegram cannot maintain an action for a mistake which has caused him damage. The person who pays for the transmission of a message is the only one who has a right of action in case he is damnified by the negligence of the company or its servants.

Semble, that where a telegraph company is required by Statute to send messages, and empowered to make a maximum charge, the company imposing such maximum charge is bound to use reasonable care in the transmission of messages, and cannot, by imposing any condition on the sender of a telegram, escape the obligation to use reasonable care, as such a condition would be inconsistent with their statutable duty, and would be also unreasonable.

[Q. B. Nov. 19, 1867—16 W. R. 219.]

This was an action brought by a person to whom a telegram had been sent from one of the stations of the United Kingdom Electric Telegraph Company, and who, in consequence of a mistake in the transmission of it, was so misled that he was damnified.

The 1st count of the declaration stated, that before and at the time of the grievance hereinafter mentioned, the defendants carried on the business, amongst other things, of transmitting and giving effect, by means of the telegraph and apparatus of the defendants and otherwise, to intelligence and messages, for certain hire and reward in that behalf; and the plaintiff, being the owner of a cargo of ice on board a ship lying off Grimsby, Messrs. Rice & Holbyer, of Hull, instructed the defendants, at their office in Hull, to transmit to the plaintiff, to wit, under the name or style of J. Northcote, at his office in London, a telegraphic message, to the purpose and effect that the said Messrs. Rice & Holbyer could give the plaintiff under the said name 23s.

per ton for the said cargo then at Grimsby, and, although the defendants, for certain hire and reward paid to them in that behalf, undertook to transmit the said message to the plaintiff, yet the defendants wholly neglected to, and did not transmit the said message, but they transmitted to the plaintiff a message to the effect that the said Messrs. Rice & Holbyer would give the plaintiff 27s. per ton for the said cargo, and the plaintiff thereupon accepted the said supposed offer of 27s. per ton, which was then the market value thereof, and directed the captain of the said ship containing the said cargo to proceed to Hull to be unloaded by the said Messrs. Rice & Holbyer; and, although the said Messrs. Rice & Holbyer refused to pay more than the price they had offered of 23s. per ton, the cargo being of a perishable quality, the plaintiff was compelled to sell the said cargo at Hull aforesaid at the said price of 23s. per ton, which was below the market value thereof, and the plaintiff lost and was deprived of the difference between the market value of the said ice and the price which the said cargo realised, and was put to further losses and expenses, to wit, £— &c., for demurrage and melting of cargo, by reason of the misfeasance of the defendants aforesaid.

The 2nd count charged that, by the negligence of the defendants in working the telegraph, an untrue message was sent, causing the damage specified in the 1st count.

The 3rd count alleged a contract on the part of the defendants, and its breach, causing the damages alleged in the 1st count.

The 4th count alleged a retainer of the defendants by the plaintiff, creating a duty on their part, and its breach causing the damages alleged.

The defendants pleaded—

1st. That they did not undertake to transmit the said message to the plaintiff, as alleged.

2nd. As to the 1st count, that they undertook to transmit the said message upon and subject to a certain condition, and not otherwise, that is to say, "In order to provide against mistakes, and more effectually to insure delivery, every message of consequence ought to be repeated, by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged in addition for repeating the message. The company will not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of unrepeated messages, from whatever cause arising, either upon its own lines or those of any other company or government which may be employed to forward the message to its destination. Nor will the company be responsible for mistakes or delays in the transmission of, nor for the non-delivery of a repeated message to any extent above £5, unless it be insured at the rate of £1 per cent."

Averments:—That the said message was not repeated, and that the alleged grievance was a mistake in the transmission of an unrepeated message.

3. That they were not employed to send and transmit the said message to the plaintiff by the plaintiff.

4. As to the 2nd count, that they undertook to send and transmit the said message to the plaintiff, subject to the condition mentioned in the 2nd plea, and not otherwise (averments as in 2nd plea).

5. As to the 3rd count, that the plaintiff did not become, nor was he a sender of messages, as alleged.

6. As to the same count, that the said message was sent by the plaintiff, and received and transmitted by the defendants subject to the condition in the 2nd plea mentioned, and not otherwise (averments as in the 2nd plea).

7. That they were not retained or employed as alleged.

8. That they were retained and employed subject to the condition in 2nd plea mentioned, and not otherwise (averments as in 2nd plea.)

There was also a demurrer to 1st, 2nd, and 4th counts.

1. Issue taken on the defendants' pleas.

2. Replication as to 2nd and 4th pleas that plaintiff was not privy to the alleged condition, nor did he assent thereto, and as to 2nd, 4th, 6th and 8th pleas that the negligence complained of was gross negligence, and was such that the condition in these pleas set forth did not exonerate nor in any wise protect the defendants from liability in respect thereof.

3. Demurrer to 2nd and 4th pleas as not shewing that the agreement and condition was with the plaintiff.

The defendants demurred to the replications to 2nd and 4th pleas on the ground that it was immaterial whether the plaintiff was privy or assented to the condition; and to the replication to the 2nd, 4th, 6th and 8th pleas, on the ground that the conditions set forth in these pleas exonerated and protected the defendants from liability in respect of gross negligence.

Littler, for the plaintiff.—Though there may be no contract with the plaintiff, yet he has an action for the damage done to him in consequence of the defendants' negligence. There is a public duty cast on the defendants, by the Act of Parliament by which they are incorporated, to convey messages, and a person injured by a breach of that duty sustains both a *damnum* and *injuria*. One section of the Act provides that any telegraphic apparatus erected under its provisions for receiving or sending messages shall be open for the sending and receiving of messages by all persons alike, without favour or preference. This imposes the statutable duty of sending messages with reasonable care, and a person who suffers by a breach of that duty may maintain an action. I contend that, under this Act, the duties of a telegraph company are very like the duties of a railway company. [Cockburn, C. J.—Any one paying the company a reasonable price for sending a telegram can maintain an action in case of mistake; but the duty is only owing to the sender, not to the person to whom it is sent. Suppose a person takes a document to be copied by a stationer, who makes a mistake in copying it, could any one else except the person who engages the stationer maintain an action in case his mistake caused him some damage?] There are many cases where the party injured can maintain an action even in a case arising out of contract, though the contract is not with him, as in the case of a surgical operation. [Lush, J.—In that case there is a consideration on the part of the patient

(independently of any consideration moving from some one else) binding the surgeon to show reasonable care and skill. That consideration is the patient's consenting to allow the surgeon to operate on him.] But here there is a duty created by statute to send messages with reasonable care. [COCKBURN, C. J.—A duty towards the sender only.] [MELLOR, J.—Suppose you send a letter by the mail-train, and it misses its destination, can the person to whom it is sent maintain an action against the railway company?] There a public department intervenes, which complicates the case. As to the condition, it is inconsistent with the statutable obligation and the duty arising out of it. It is, moreover, unreasonable. He cited the following cases:—*Peak*, v. *The North Staffordshire Railway Company*, 10 H of L. cas. 473; 11 W. R. 1023, 32 L. J. Q. B. 24: *Williams* v. *The Lancashire and Yorkshire Railway Company*, 28 L. J., Ex. 353; *MacAndrew* v. *The Electric Telegraph Company*. 17 C. B. 93; *Butt* v. *The Great Western Railway Company*, 1 C. B. 132; *Alton* v. *The Midland Railway Company*, 13 W. R. 918, 34 L. J. C. P. 299; *Allday* v. *The Great Western Railway Company*, 5 B. & S.; *Godwell* v. *Steggall*, 5 B. N. C. 735; *Langridge* v. *Levy*, 2 M. & W. 519; *Longmeid* v. *Halliday*, 6 Ex. 761.

C. Pollock, Q.C. (*Hannen* with him), was told that he need only address himself to the second point, viz., the reasonableness of the condition. He contended that it was not unreasonable.

Cur. adv. vult.

Nov. 19. COCKBURN, C. J.—We think that we have not the facts of the case sufficiently before us to enable us to give judgment on it, and that it had better be stated in the shape of a special case. At present, we are with the defendants on the first point, and think that the demurrer to those pleas which state the message to have been sent by third parties is supported, because there is no privity of contract between the plaintiff and the company. It was said that, as the Act imposed the duty of sending messages for all persons, subject to certain conditions, any one injured by a breach of this duty sustains an actionable injury. But, though it is true that this duty is imposed by the Act, yet that is only towards those entitled to have messages sent, and does not create any obligation towards a person who is not entitled to have a message sent. Therefore, on these counts, the defendants are entitled to our judgment. But, with regard to the pleas which set up the condition as an answer to the action, a twofold question arises:—1st, whether the condition does not cover gross negligence, and is not, therefore, unreasonable; 2nd, whether, apart from the question of its covering gross negligence, it is unreasonable? As to this it occurs to us that the company is not in the position of companies which exercise powers arising out of ordinary rights of property. They exercise powers granted by statute. The defendants are empowered to erect structures *in solo alieno* without the consent of the owners; and then, apparently in consideration of this, the statute obliges them to keep their stations open for all persons desirous of sending messages, for certain charges, and subject to reasonable regulations. The statute having imposed this duty, which seems to involve that of using reasonable care, and having, in consideration thereof, empowered them to make a maximum charge, they annex a condition, to the effect that they shall not be answerable for negligence; in other words, that they will not observe due care in the performance of a statutable duty. Is that consistent with the statute, as being a reasonable regulation? If there was nothing more than an ordinary contract for the transmission of messages, there would be the ordinary obligation of using reasonable diligence. The statute says they shall transmit messages, and it surely must be understood that the obligation thus imposed carries with it also that of using reasonable care. The defendants say they will transmit messages for the maximum charge, but they will not use reasonable care. I am of opinion that, if the plaintiff were otherwise entitled to maintain this action, this condition would be no impediment to him. But we should prefer to have the facts stated fully, for then we should be better able to determine whether, on these facts, the plaintiff is entitled to recover, having reference chiefly to the condition; and also whether, supposing the company make the maximum charge, the obligation of reasonable care does not necessarily attach to them so that it cannot be evaded by the imposition of any condition? The facts had better be stated in the form of a special case, in order to enable us to decide these questions.

APPOINTMENTS TO OFFICE.

NOTARIES.

JAMES HARSHAW FRASER, of the City of London, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

RICHARD H. R. MUNRO, of the City of Hamilton, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

JOHN EDWARD ROSE, of the City of Toronto, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

ELIJAH WESTMAN SECORD, of the Village of Madoc, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

LOUIS BERNARD DOYLE, of the Town of Goderich, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

JOHN BURNHAM, of the Town of Peterborough, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

CORONERS.

WILLIAM JOHNSTON, of the Town of Brampton, Esquire, M.D., to be Associate Coroner in and for the County of Peel. (Gazetted 18th January, 1868.)

JOHN GRANT, of the Town of Brampton, Esquire, M.D., to be Associate Coroner in and for the County of Peel. (Gazetted 18th January, 1868.)

THOMAS GRAHAM PHILIPS, of the Village of Grahamsville, Esquire, M.D., to be Associate Coroner in and for the County of Peel. (Gazetted 18th January, 1868.)

CHARLES E. BONNELL, of the Village of Bobcaygeon, (o be Associate Coroner in and for the County of Ontario. Gazetted 18th January, 1868.)

TO CORRESPONDENTS.

"SCARBORO" will appear in next issue.