DIARY FOR FEBRUARY.

1. Tues. Last day for Co. Tr. to furnish to Clks of Mu. in Coun's lists of land liable to be sold for taxes.
2. Wed. *Purification of B. V. M.* Meet. Gr. Sch. Board.
4. Fri... Exam. of Law Students for cali to the Bar.
5. Sat... Exam. of articled Clerks for certificate of fitness.
6. SUN. *5th Sunday after Epiphany.*
7. Mon. Hilary Term begins.
9. Wed. Last day for service for Co. Ct. York. Interim Exam. of Law Stnd. and Art. Clks. New T. Day, Q. B. Last day for setting down and giving notice for rehearing. New T. D., C. P.
11. Fri.. Paper Day, Q. B. New Trial Day, Common P.
12. Sat... Paper Day, C. P. New Trial Day, Queen's B.
13. SUN. *Septuagesima.*
14. Mon. *St. Valentine.* P. Day, Q. B. N. T. Day, C. P.
15. Tues. Paper Day, C. P. New Trial Day, Queen's B.
16. Wed. Paper Day, Q. B. New Trial Day, Common P.
17. Thur. P. D. C. P. Re-hearing Term in Chancery com.
18. Fri. . New Trial Day, Queen's Bench.
19. Sat. . Hilary Term ends. Dec. for County Ct. York.
20. SUN. *Sexagesima.*
24. Thur. *St. Matthias.*
27. SUN. *Quinquagesima.*
28. Mon. Last day for Notice of Trial County Court, York.

The Local Courts'

AND

MUNICIPAL GAZETTE.

FEBRUARY, 1870.

ISSUE OF WRITS OF ATTACHMENT IN DIVISION COURTS.

The simplicity so necessary to the working of Division Courts, has, in some cases, had the effect of allowing thoughtless or unscrupulous persons to work injuries, which are not so likely to occur in courts of higher jurisdiction. In the higher courts to which we refer, the preliminary steps must come before the judge, whereas in Division Courts many important measures are taken under the supervision of the clerks only, or even indeed before a justice of the peace. Of course when process is issued by the clerks, there is a strong element of safety and almost a certainty that the proceedings will be regular in form; but, in the case of justices no such security exists, as the records of the courts plainly show.

Our attention has been called more especially to the issuing of writs of attachment as well at the instance of thoughtless persons, who do not sufficiently consider the step they are about to take, as by unscrupulous creditors who use the ready machinery of the court as an instrument to terrify those with whom they have to deal into submitting to such terms as they may think proper to impose. The Board of County Judges in preparing their forms have studied to provide that all the requisites of the statute should be complied with, and have made it necessary that the party seeking to have the writ issued should swear positively to the fact and nature of the indebtedness and that the debtor has absconded, or has *attempted* to remove his property out of the Province or County, or that the debtor keeps concealed with intent to defraud the creditor of his debt; and the creditor must also swear that he does not act from a vexatious or malicious motive. Now if the requirements of the statute are carefully considered, and the affidavit carefully read over before swearing, much of the evil that has arisen would be avoided; of course this would not deter persons who were so disposed from wilfully using the writ as, we might almost say, an instrument of torture.

When looking over some cases recently decided in the Court of Queen's Bench, we noticed a case, *Hood* v. *Cronkite*, p. 98, which shews what serious trouble and expense a man may incur who improperly sets the machinery of the court in motion. In that case the defendant had a writ of attachment issued out of the Division Court, merely because he believed that the plaintiff *intended* to remove his goods out of the county. Upon it being proved that the defendant had no sufficient reason to believe that the plaintiff had made any *attempt* to do so, the court considered that the issuing of the writ was not warranted, and gave judgment against the defendant. In the same case it was also held that the defendant, having caused the writ to be issued for a larger sum than he afterwards obtained judgment for, was liable for having maliciously issued the writ for too large an amount. It will thus be seen that persons, unless they exercise a great deal of care, may find themselves saddled with an action, resulting in their being mulcted in a large sum in the shape of damages and costs, to say nothing of the expense and annoyance of defending a suit. We cannot expect that anything we could say in the matter, would have the effect of entirely suppressing a careless use of the facilities afforded by the machinery of the Division Courts in such cases as the present, but our object will be obtained if it causes a more general carefulness in those who find it necessary to use these facilities in order to accomplish a desired end.

OVERHOLDING TENANTS.

We publish in another place a judgment given by Mr. Hughes, Judge of the County Court of Elgin, under the Overholding Tenants Acts, which decides a point of interest.

This decision is at variance with the dictum of Judge Logie, County Judge of Wentworth, in *Nash* v. *Sharp*, 5 C. L. J., N. S., 73, though the latter case went off on another point than that expressly decided in *Re Sutton* v. *Bancroft*, to which we now refer.

A careful reading of the late Act in connection with the former statutes and decisions thereon would seem to shew that the construction placed upon the Act by Judge Hughes is the correct one.

JUDGE MALLOCH.

We learn from a local paper some particulars of the late judge of Leeds and Grenville, whose sudden death recently took place, at the age of 73.

He was born in Perth, Scotland, on the 13th of April, 1797. He came to Canada in 1817. He studied law with the late Levius P. Sherwood, and began to practice his profession in 1825. In 1837 he was appointed judge of the Bathurst District, and of Leeds and Grenville in 1842, which office he held till last year, when he resigned. Judge Malloch was one of the five Judges appointed in 1854 to frame Rules of Practice for the Division Courts—the Rules which were in force until a recent period.

We find also from one of the Blue Books that Mr. Malloch's period of public service dates from 1820, when he was appointed Registrar of the Surrogate Court of the then Johnstown District. For a period of half a century he enjoyed the confidence of the Crown and the public.

SELECTIONS.

THE JUDICIAL SYSTEM OF FRANCE.

France with a population of 37,000,000, is divided into 86 departments; each department is divided into districts, or, as they are called, arrondissements, of which there are 363, in each of which is a court, known as the Tribunal of First Instance, making 363 of these courts.

Each district is divided into cantons, of which there are 2847, each canton into communes or parishes, of which there are 36,819. In each canton there is a justice of the peace, who decides summarily, without the intervention of attorneys, all matters in contests of small importance, and has jurisdiction in criminal matters where the fine imposed does not exceed fifteen francs ($3), or where the imprisonment is for five days or less. The Tribunal of Justice of the Peace also acts with the consent of parties as a court of concilliation. There are 2847 justices of the peace. They are all salaried officers, and are professional men. The maires of communes also exercise, it would seem, some judicial authority. The appeal from the decision of the Tribunal of the Justice of the Peace, is to the Tribunal of the First Instance of the district.

Tribunals of First Instance.

The Tribunal of the First Instance is composed of from three to twelve judges, according to the population of the district. If the court has seven or more judges, is divided into two chambers, one of which has charge of criminal and the other of civil matters.

If the court has twelve judges, it is divided into three chambers, two civil and one criminal. The Tribunal of First Instance at Paris being very large it is divided into ten chambers. It has one procureur imperial, or attorney-general, with twenty-two deputies, and one registrar, with forty-two deputies.

The concurrence of *three* judges of a chamber, in this court in civil cases, and of *five* in criminal cases, is necessary for a decision.

One of the judges of this tribunal is appointed to act in the district for three years as a judge of criminal instruction. There is usually one to every criminal chamber, and attached to the Paris Tribunal of First Instance there are eleven. This judge, in conjunction with the procureur imperial (district attorney), examines every case of criminal accusation, and makes his report once a week to the criminal chamber of the Tribunal of First Instance, and that body, which must be composed of at least five judges, decides whether the party accused shall be discharged or not. If they decide that he shall not be discharged, they send the case to the criminal chamber of the Court of Appeal of the jurisdiction for further examination, and if that body think that a crime has been committed, and that it is of sufficient gravity, they send the case to the Court of Assize of the department to be tried by a jury.

The decisions of the Tribunals of First Instance are reviewable in the Court of Appeal of the jurisdiction.

The judges are appointed for life.

Courts of Appeal.

There are twenty-seven Courts of Appeal in France, now called Imperial Courts, each of which takes its name from the city or place where it is established. Each court is divided into chambers, corresponding usually with the number of departments over which the court has jurisdiction; so that in the twenty-seven courts, there are eighty-six chambers, that being the number of the departments in France.

Each Court of Appeal is composed of at least twenty-four judges, who are called counsellors, and is usually divided into three chambers, one having cognizance of civil cases, one of criminal accusations, and the other of appeals in police matters. In the civil chamber, seven judges must concur in a decision, and in the chamber of accusation, five. There is one general president, and a president for each chamber, who is selected by the judges of that chamber.

The Court of Appeal in Paris has six chambers, a first president, six presidents of chambers and fifty-nine judges.

In important matters, such as questions of state, or very difficult questions, two chambers, where there are more than one, are united and the decision must be concurred in by fourteen judges. This is termed the solemn hearing, and is called by the first president of his own motion or by him, upon the request of one of the chambers, in a matter which they deem of sufficient importance.

The appeal from this court is to the Court of Cassation, and must be brought within three months.

The judges are all appointed for life, but may retire or be retired upon a pension after thirty years' service, or in the event of permanent infirmity.

Court of Assize.

There is also a Court of Assize, composed of judges of the Court of Appeal in each department (or eighty-six in all), for the trial of criminal cases with a jury. Where the seat of the Court of Appeal is within the department, the Court of Assise of the department is held by three of the judges of the Court of Appeal, the senior judge being president, and when such is not the case the Court of Assize is held by one judge of the Court of Appeal, and two judges of the Tribunal of First Instance of the district where the Court of Assize is held; the judge of the Court of Appeal being president.

The Court of Assize is held every three months, usually at the chief town of the department. The one in Paris is held twice every month. The trial is public; the jury is composed of twelve; they pass only upon the facts, and a verdict by the majority is sufficient. The appeal from the judgment of the Court of Assize is to the Court of Cassation, and must be brought within three days.

Tribunals of Commerce.

There are in all the commercial towns and cities in France what are known as Tribunals of Commerce. The number or the locality of these courts is not fixed by law, but is determined by the government, according to the exigencies of each locality. This court takes cognizance only of disputes and transactions between merchants, tradesmen, bankers, or of matters connected with trade or commerce, in which is included bankruptcy. It is composed of a president, of judges and of supplemental judges. The number of the judges must not be less than two nor more than fourteen. The number of the supplemental judges is in proportion to the exigency of the public service. The number of each in each tribunal is fixed by a government regulation. The judges of this tribunal serve for two years, without compensation, and are elected by an assembly of the most eminent commercial men within the district, the list of electors being prepared by the prefect of the department, and approved by the minister of the interior. Any commercial man thirty years of age, who has exercised his calling with honor and distinction for five years, may be elected either as a judge or a supplemental judge. The president must be forty years of age, and be chosen from among those who has served as judges. Three judges, at least, must concur in a decision. If the amount involved is under 1500 francs ($300) there is no appeal, nor in any matter, if the parties give their consent to abide by the decision without appeal. In all other cases an appeal lies to the Court of Appeal within the jurisdiction, and takes priority in the court over other appeals.

In the Tribunal of Commerce in Paris, there were in the year 1853, 51,042 cases, of which 35,257 went by default, 10,465 were put at issue, 2663 were concillated, and 1985 were withdrawn. This tribunal has a general president, ten judges and sixteen supplemental judges. It is in session every day throughout the year except Sundays, and is one of the most useful courts in France.

Court of Prudhommes.

(*A Mechanic's or Workingman's Court*)

There is in the cities of Paris and Lyons, and in some of the other cities, a court called *The Court of Prudhommes* (literally good and true men, but meaning in this connection men well versed in some art or trade). It takes cognizance of all contests between manufacturers or master workmen, and their workmen and apprentices. It acts first as a court of conciliation, and if that fails, it has jurisdiction to the amount of 200 francs ($40), without appeal, and jurisdiction to any amount subject to appeal to the Tribunal of Commerce, if there is one in the district, and if not to the Tribunal of First Instance.

This Court of Prudhommes consists of a council composed of master-workmen or manfacturers, and of foremen, being six of each, equally balanced; one-half of each of which go out every two years, but are re eligible. They are elected by the members of their respective classes. To them is added a president, and two vice-presidents, appointed by the sovereign for three years, but who are re-eligible.

This is a very practical and most useful tribunal. It sits every day except Sunday, decides cases with great dispatch, with little expense, and generally to the satisfaction of both parties. They are usually settled by concilliation. There are in the Paris Tribunal

about 4000 cases in the year, two-thirds of them relating to wages. The judgments seldom exceed one hundred annually, and appeals are rare.

Court of Accounts.

The next court is the Court of Accounts. It is a court of exchequer, before which come matters relating to the public expenditures, all fiscal mstters, claims against government, the administration of poor-houses, hospitals, public charities, &c. It has a first president, three presidents, eighteen counsellors, or masters of account, and eighty referees, divided into two classes, a registrar and deputies and three chambers, each of which has separate duties. The appeal from this court is to the Council of State.

Court of Cassation.

The last and highest of the permanent courts of France, is the Court of Cassation. It is composed of fifty judges, called counsellors, and is divided into three chambers, one of request (matters arising upon petition), one civil, and one criminal and police. It has a first president and three presidents of chambers.

It is the final appellate court from all intermediate tribunals of last resort, such as the Courts of Appeal.

An appeal to it must be brought within *three* months after the judgment appealed from was rendered.

It does not, as the Courts of Appeal do, review the merits, but as its name imports, breaks the judgment, if the forms of procedure have been violated, or the judgment is founded upon an erroneous interpretation of the law, and sends the case back for another hearing, usually to a different tribunal, but one of the same rank, as the one that first decided it. The court to which it is sent, is not, as our inferior courts are, bound by the interpretation given to the law by the higher tribunal, but may make the same decision as the former tribunal, if it thinks that the decision of the Court of Cassation was erroneous, though, of course, great deference is paid to the opinion of the higher tribunal. Instances have occurred in which three different courts of appeal rendered the same judgment notwithstanding it had been twice declared by the Court of Cassation to be erroneous. Where such is the case, the question is no longer agitated, but the government (the Corps Legislatif), with the sanction of the emperor, makes a decree declaratory of the law, which is binding thereafter upon all judicial tribunals.

The applicant must deposit 250 francs ($30), which he forfeits to the other party if he fails, and is sentenced in addition to pay 300 francs ($60), to the state.

No chamber of the Court of Cassation can give judgment unless it is composed of seven judges, including the president.

Each chamber appoints its own president, and five members go out of each chamber every six months, but not until they have finished all the matters heard before them. The Civil Chambers sit every week day except during the months of September and October; the Criminal continuously throught the year, and the session is four hours a day.

In great or very important cases, the three chambers are called together by the first president of his own motion or upon the request of one of the chambers. The judges are robed in scarlet upon the occasion, and when they come together it is the most imposing and dignified judicial body in the world.

The judges of the Court of Cassation are appointed for life, and are retired in the same manner as the judges of the Courts of Appeal.

High Courts of Justice.

The highest court in Fraunce is the High Court of Justice, which assembles only when an imperial decree is issued for its convocation for the trial of offences against the life of the sovereign or the safety of the state. It is composed of five judges and five supplementary judges, chosen from the judges of the Court of Cassation, and of a jury of thirty-six chosen from the members of the councils general of the departments. The judges and the jury are appointed annually by the sovereign.

The foregoing is a concise but accurate and full statement of the whole judicial organization of France. It does not however embrace any changes that may have been made during the past ten years, as the writer has not had facilities for ascertaining what laws or decrees have been enacted within that period. It may be added that the civil judicial organization of France is regarded as very perfect, and that the jurists of no country have done more to advance the science of jurisprudence. —C. P. D.—*The American Law Register.*

THE NEW DEBTORS ACT.

On Saturday the first prisoner under the Debtors Act was lodged in Whitecross Street prison. He was committed by Mr. Justice Montague Smith for one month, in pursuance of the following provision in the new act (32 & 33 Vic. c. 62):—"When the plaintiff in any action in any of Her Majesty's superior courts of law at Westminster, in which, if brought before the commencement of this act, the defendant would have been liable to arrest, proves at any time before final judgment, by evidence on oath, to the satisfaction of a judge of any of those courts, that the plaintiff has good cause of action against the defendant to the amount of £50 or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he is apprehended, and that the absence of the defendant will materially prejudice the plaintiff in the prosecution of his action, such judge may, in the prescribed manner, order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England with-

out the leave of the court. When the action is for a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison." On Saturday the number of prisoners was 30, of which 21 were committants from county courts. When the new act came into force there were 134 inmates.—*The Law Journal.*

DISSOLUTION OF CONTRACT BY DEATH.

MASTER AND SERVANT.

Farrow v. *Wilson*, C.P., 18 W. R. 43.

The short point decided in this case is that the contract of service between a master and servant is put an end to by the death of the master. The general rule on the subject is laid down in the judgment of the court—viz., "that the death of either party puts an end to such contract for personal service unless there is a stipulation express or implied to the contrary."

The principle of the decision is not new, but has been frequently recognised before, as, for instance, in *Beast* v. *Firth* (17 W. R. 29), where a covenant of service in an apprenticeship deed was held subject to the implied condition that the apprentice should be in a state of ability to perform the covenant, and it was held that the illness of the apprentice was an answer to an action on the covenant. To the same effect also are the cases *Taylor* v. *Caldwell* (11 W. R. 726), and *Tasher* v. *Shepherd* (9 W. R. 476).

The precise point in question in *Farrow* v. *Wilson* seems, however, not to have been before decided.—*The Solicitors' Journal & Reporter.*

We are exceedingly glad to observe that the following notice has been posted in the Worship Street Police Court:—

"On and after January 1, 1870, no person will be permitted in any way to practise at this court except those entitled by law to do so, viz.: 1. Barristers-at-law; 2 Attorneys or solicitors; 3. Persons specially authorised by statute to conduct certain cases before magistrates. But the *articled* clerk to an attorney or solicitor will be allowed to represent his principal upon producing a written request that he may be permitted to do so, and upon his satisfying the presiding magistrate that the absence of such attorney or solicitor is unavoidable. This rule will be strictly adhered to.

(Signed) C. E. Ellison, R. M. Newton, } Magistrates."

This step deserves to be followed in all the police courts. The Worship Street magistrates deserve praise for having thus rid their court of those disreputable and very undesirable advocates who infest police courts, "touting" for leave to appear.—*The Solicitors' Journal & Reporter.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Illegal Contract.—Property pledged to the keeper of a brothel to secure payment for wine, &c., consumed in a debauch in said brothel, cannot be recovered by the pledgor of the pledgee. —*Taylor* v. *Chester*, L. R. 4 Q. B. 309.

Insurance.—1. Meat shipped at Hamburgh for London was delayed on the voyage by tempestuous weather, and solely by reason of such delay became putrid, and was necessarily thrown overboard at sea. *Held*, not a loss by perils of the sea, or within the words "all other perils, losses, and misfortunes," &c., in a policy of insurance on said meat — *Taylor* v. *Dunbar*, L. R. 4 C. P. 206.

2. An assurance company lent W. £1000 on a mortgage for that sum and on a policy on his life for the same amount, which he effected with them for the purpose. The policy contained a condition, that if W. should die by his own hands, &c., it should be void, "except to the extent of any *bona fide* interest therein which, at the time of such death, should be vested in any other person . . . . for a sufficient pecuniary or other consideration." W. committed suicide while insane, the policy being still in the hands of the company. *Held*, that the company came within the above exception to the condition, and that the policy was valid to the extent of the debt to them. The mortgage was ordered to be reassigned — *White* v. *British Empire Mutual Life Assurance Co.*, L. R. 7 Eq. 394.

Libel.—1. At a meeting of a board of guardians at which reporters were present, a member, E., said "he hoped the local press would take notice of this (the plaintiff's) very scandalous case," and requested the chairman, P., to give an outline of it. P. did so, and said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." There was other language to the same effect. A correct but condensed summary of the proceedings, containing remarks defamatory of the plaintiff, which were made at the meeting, was afterwards published in two local newspapers. *Held* (Exch. Ch. *per* Keating, Montague Smith, & Hannen, JJ.,

BYLES & MELLOR, JJ., *dissentientibus*), that there was evidence to go to the jury of publication of the libel in the newspapers by E. and P.—*Parkes* v. *Prescott*, L. R. 4 Exch. 169.

2. The defendant, in a privileged communication, described the plaintiff's conduct as "most disgraceful and dishonest." The conduct so described was equivocal, and might honestly have been supposed by the defendant to be as he described it. *Held*, that the above words were not of themselves evidence of actual malice. (Exch. Ch.)—*Spill* v. *Maule*, L. R. 4 Exch. 232.

NUISANCE.—A tenant from year to year obtained an injunction from MALINS, V.C., against the erection of a circus, which was to last only a short time, on the ground that it would draw together a crowd of disorderly persons. Defendant appealed, the land having meanwhile been covered with permanent buildings. *Held*, that there was not sufficient ground for an injunction, and this having been granted, the appeal was not only for costs.

But an injunction against a circus, the noise of which was so loud as to be distinctly heard in the plaintiff's house when the windows and shutters were closed, was upheld, without a trial by jury. Since *Sir John Rolt's Act*, 25 & 26 Vic. c. 42, this is not necessary if the evidence satisfies the court.—*Inchbald* v. *Robinson*. *Inchbald* v. *Barrington*, L. R. 4 Ch 388.

PROXIMATE CAUSE.—By an act of Parliament, a cut was to be built, and also a culvert under it, which was always to be kept open. In consequence of the negligent construction of the cut by the defendants, the waters of a neighboring river flowed into it, burst the western bank, and flooded the adjoining land. The plaintiff, owning land east of the cut, closed the culvert to prevent his land being flooded; but the owners on the west, believing that this would be injurious to their lands, reopened it, and the plaintiff's land was flooded in consequence. *Held*, that defendants were liable for the entire damage so caused to plaintiff's land, whether the reopening of the culvert was right or wrong.—*Collins* v. *Middle Level Commissioners*, L. R. 4 C. P. 279.

WILL.—On the back of a will was found a memorandum in the testator's handwriting, signed by him and witnessed. The witnesses could not remember whether the paper was signed when they attested it, and the testator did not say what the paper was. Probate of the paper as a codicil, on motion, was refused.—*Goods of Swinford*. L. R. 1 P. & D. 630.

2. A testator made a will in favor of his sister only, giving her "all my house and land and book debts," &c., "every thing on the said premises," "and all other chattels." *Held*, that the last words carried the general residue.—*Goods of Sharman*, L. R. 1 P. & D. 661.

WAREHOUSE RECEIPTS—CON. STAT. C. CH. 54—The plaintiffs on the 20th September received a note for $ 800, payable to, and endorsed by L., with L.'s warehouse receipt for wool attached, which they discounted on the 4th October, 1867. On the 21st October, $1179 only remaining due, they took a note for this sum from M., the maker of the previous note, with his receipt for some wool, in addition to a receipt from L. for what remained of the wool covered by L.'s previous receipt. It was not discounted however on that day, because M. did not pay the discount, and on the 5th December M. made another note for the same sum, at ten days, in place of it, which was discounted with the same two warehouse receipts attached. It was renewed on the 24th, with the same receipts, and not being paid the plaintiffs in April sold the wool, through a broker who was unable to get it; and they thereupon replevied on the 9th May.

Held, following *Bank of British North America* v. *Clarkson*, 19 C. P. 182, that the warehouse receipts being taken directly to the Bank, and not by endorsement, were not within the statute, Consol. Stat. ch. 54, sec. 8, and that the plaintiffs therefore could not recover.

Richards, C. J., and *Adam Wilson*, J., however, dissented from that decision, though following it in accordance with the established practice.

Held, also, that the transaction of the 5th December might be considered as a new one, and that the plaintiffs therefore had not held the wool more than six months, so as to defeat their title, under sec. 9.

If they had, defendants might shew that fact under a plea of not possessed.—*The Royal Canadian Bank* v. *Miller et al.*, 28 U. C. Q. B., 593.

LEASE — RENT PAYABLE IN CROPS — WHEN DUE.—Defendant leased a farm to the plaintiff for five years from the 31st March, 1866. He was to find the team and seed for the first year, "to receive as rent for the first year two-thirds of all the grain when cleaned, threshed, and ready for market, also one-third of the straw, turnips and root crops, and half of the hay; for the remainder of the term to receive one-third of all the crops, with the exception of the hay, of which one-half." Defendant having distrained on the 16th December, 1867, for the second year's rent.

Held, that the words "when cleaned," &c., applied only ot the first year, and that the

second year's rent did not become due until the end of the year, *i. e.*, 1st March, 1868. *Semble*, that otherwise the rent was sufficiently certain to warrant a distress, and that such distress might be sold.

Wilson, J., dissented, on the ground that the rent, being payable in kind, was due when the respective crops were ready for delivery.—*Nowery* v. *Connolly et al*, 29 U. C. Q. B. 39

Replevin—Statement of Locality—Pleading—C. S. U. C. ch. 29.—Defendants took timber made by the plaintiff on land of which he was in possession, and the plaintiff replevied. The declaration alleged the timber to have been taken from lot 12, and the defendants pleaded *non ceperunt*, and that the timber was theirs. At the trial, defendants having given evidence that the timber was not cut on lot 12, but on 13, claimed a verdict without shewing any title to 13, or that they were authorized to seize the timber there; but the learned judge ruled that the plaintiff, having proved possession of the timber, was entitled to recover.

Semble, that the ruling was right, for though in England the place of taking must be stated in replevin, and is material, it is different under our Replevin Act when the action is not founded on a wrongful distress.

A new trial was refused, the ruling of the learned judge at the trial not having been objected to, or his attention called to the distinction between replevin and trespass under the plea.

Wilson, J., dissented, on the ground that the locality, having been alleged in the declaration, was material, and the plaintiff was bound to prove it.—*Fitzpatrick* v. *Casselman et al.*, 29 U. C. Q. B. 5.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Selling Liquor without License—Application for Certiorari—Proof—Form of *Rule Nisi*.—On an application for a *certiorari* to remove a conviction of one J. B. for selling liquor without license.—

Held, 1. That the rule *nisi* was properly entitled "In the matter of J. B.;" and that it need not state into which court the conviction was to be removed, for that this was sufficiently shewn by the entitling it in the court in which the motion was made

2. That on such a charge it was for the defendant to shew his license, not for the informant to negative its existence. The *certiorari* was therefore refused.—*In the matter of John Barrett*, 28 U. C. Q. B., 559.

School Trustees—Loan to—Personal Liability—Change of School Site—C. S. U. C. ch. 64, sec. 30.—Two of the trustees of a school section, wishing to change the school site, called a meeting of the freeholders and householders, who rejected the proposal. The two trustees thereupon chose an arbitrator, assuming to act under sec. 30, Consol. Stat. U. C. ch. 64, but none was chosen by the freeholders and householders, and under the advice of the deputy superintendent the trustees called another meeting, at which a motion to appoint such arbitrator was rejected. The trustees' arbitrator and the local superintendent thereupon made an award changing the site. A special meeting was then called to consider how the money should be raised to carry out the change, at which the conduct of the trustees and the change were strongly disapproved of. The two trustees thereupon petitioned the township council, stating that the rate-payers were desirous of purchasing a new site, and asking for a loan of $400 "for which the trustees will bind themselves to pay the interest annually, and the principal when due." This was granted, and secured by two instruments, as follows:—

"We, the undersigned, Trustees of School Section No. 11, do hereby promise to pay the treasurer of the Corporation of Toronto Township, on,' &c

(Signed) M., D., } Trustees"

with the corporate seal affixed. The money was expended for the purpose mentioned. The township corporation having sued the two trustees individually on these notes, and on the common counts:

Held, that they could not recover on the notes, for, 1. They were payable to the treasurer, not to the plaintiffs, and were not negotiable; and 2. The defendants were not personally liable upon them.

Held, also, *Wilson, J.*, dissenting, that defendants were not liable upon the common counts either, for the intention of all parties plainly was that the trustees as a corporation should be bound, not the defendants personally; and there being no fraud or concealment on their part, the fact that they as a corporation had no authority to borrow, nor the plaintiffs to lend, could not, under the circumstances, make them personally liable.

Semble, per Richards, C.J. that under sec. 30, the difference of opinion as to the change of site

authorized a reference to arbitration; but that the refusal of the freeholders and householders to name an arbitrator did not enable the other two arbitrators to proceed, the proper course being to compel the appointment by mandamus.

Per Wilson, J., the difference of opinion must be as to the position of the new site, after a change has been agreed to by the rate-payers, not as to whether there shall be a change; and the arbitration therefore was unauthorized.—*The Corporation of the Township of Toronto* v. *McBride et al*, *Executors of William McBride*, 29 U. C. Q. B. 18.

ONTARIO REPORTS

QUEEN'S BENCH.

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

IN RE LINDEN AND WIFE v. BUCHANAN, IN THE DIVISION COURT.

Division Court—Set-off of judgments—Married women's Act, C. S. U. C. ch. 73

L. and his wife, who had married in 1865, recovered judgment in the division court against B., for rent due to Mrs. L. on land which she had inherited from her father in 1852, and B. on the same day recovered a judgment against L. for a larger sum.

Held, that Mrs. L. being entitled under Consol. Stat. U. C. ch. 73, to the rent as her own, and her husband joined in the action for conformity only, there could be no set-off against it of B.'s judgment against L.

Such set-off having been directed in the division court, a mandamus was granted to the clerk, to issue execution on the judgment recovered by Mrs. L.

[29 U. C. Q. B., 1.]

This was an application for a mandamus to issue execution upon a judgment recovered in the division court.

The facts appeared to be, that on the 18th of December, 1868, Linden and his wife recovered a judgment in the division court of the county of Middlesex, against Buchanan, for $17, for the share of the rent due to Linden's wife, on land which she had inherited from her father, who died in 1852 intestate, leaving her and Buchanan's wife co-heiresses of his estate. She was married to Linden in 1859. On the same day Buchanan recovered a judgment in the same court against Samuel Linden for about $80, on a note of Linden's.

On the 19th December, William Horton, Esq., the deputy judge of the said court, addressed an order to the clerk, directing him to deduct the amount of the judgment obtained by Samuel Linden and his wife against James Buchanan, from the judgment obtained by Buchanan against him, and collect the balance. Application was made to the deputy judge for an order to issue execution on the judgment recovered by Linden and his wife, and he refused to grant it, or to rescind the order made by him; and the clerk of the court also refused to issue the execution on the judgment, in consequence of the order of the judge.

In Hilary term last, *Osler*, on behalf of Linden and his wife, obtained a rule calling on James Buchanan and William Horton, Esq., deputy clerk of the said division court, to shew cause, judge of the county court, and W. R. Bernard, Esq., on the first day of this term, why a rule for a mandamus should not issue, directing the said judge to order the said clerk of the said court to issue execution upon the judgment recovered in the said plaint, in favor of the plaintiffs therein against the said James Buchanan; or why a writ of mandamus should not issue, directed to the said clerk, to issue such execution upon such judgment; and why the said James Buchanan should not pay the costs of this application.

During this term *Crombie* shewed cause: Has this court any power to interfere in the matter? The question of setting off judgments is one within the jurisdiction of the judge of the division court, and though he may have decided erroneously this court will not interfere: *Donnelly* v. *Stewart*, 25 U. C. R., 398; *McPherson* v. *Forrester*, 11 U. C. R. 362; *Berkley* v. *Elderkin*. 22 L. J. Q. B. 281; *Read* v. *Wedge*, 20 U. C. R. 456; Con. Stat. U. C. ch. 19, sec. 134. The county court judge has died since this rule issued, and his deputy ceases to have any authority, so that the mandamus cannot now go to him.

Osler, contra: The judge of the county court being dead, the writ cannot go to his deputy, but the mandamus can go to the clerk of the court, who is the proper officer to issue the writ. These judgments being in different rights could not be set-off. They are not cross judgments *between the parties*; nor are they substantially between the same parties: *Ch. Arch.* 12th ed., 723, and the cases there cited: *Regina* v. *Fletcher*, 2 E. & B. 279. Mrs. Linden was married since the 4th May, 1859, and this property, for the rent of which she sued, she inherited from her father, and under the Con. Stat. U. C. ch. 73, she is entitled to enjoy it as real or personal property free from the debts of her husband. The deputy judge has endeavored to make this judgment; which is hers in her own right, applicable to satisfy a debt of her husband.

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

The affidavits filed on behalf of Mr. Buchanan shew, that Linden was a man of idle and dissipated habits, was squandering his wife's and his own property, and was largely indebted to Mr. Buchanan, in addition to the note on which he had recovered judgment in the division court, and much of the indebtedness arose from necessaries supplied to him to support his family, and for indebtedness arising from becoming surety for Linden for goods he had purchased for his family; that Linden and his wife had sold their interest in the farm which had descended to her and others from her father, and unless he was able to set off the judgment which Linden and his wife had recovered against him, he would not be able to get anything from Linden from what he owed him.

In the affidavits filed on behalf of Buchanan, it is not denied that the verdict in the division court against him was for rent due on property inherited by Linden's wife from her father, or that he never had or pretended to claim any interest in the said rent, as alleged in the affidavits filed made by Mrs. Linden. But it is stated the amount was recovered against him, Buchanan,

for rent of some land before then owned by him in right of his wife.

In the argument, I understand, it was admitted that there could not, under the statute, be any set off. The 134th section of the Division Courts Act, Con. Stat. U. C. ch. 19. enacts, "If there be cross judgments between the parties, the party only who has obtained judgment for the larger sum shall have execution, and then only for the balance over the smaller judgment, and satisfaction for the remainder, and also satisfaction on the judgment for the smaller sum shall be entered; and if both sums are equal, satisfaction shall be entered upon both judgments. There is nothing in the affidavits showing that satisfaction has been actually entered on the judgment in favor of Linden and wife.

No question was raised in argument as to Mrs. Linden coming within the first section of Con. Stat U. C. ch 73, for the protection of married women. Then, being a woman who married since the 4th May, 1859, she acquired the property from whence the rent issued which was sued for in the division court from her father by inheritance, and if the rent be considered personal property, it has been acquired by her after marriage (and was not received by her from her husband during coverture). She has under that statute the right to have, hold, and enjoy it free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried.

In the action to recover the rent her husband's name was joined for conformity; and without her consent the judgment or demand is no more liable to be set off or applied to pay another judgment or demand against her husband, than it could be to satisfy the judgment of an entire stranger, and this we understand to be admitted on the argument. If this be so then the learned deputy judge of the county court had no jurisdiction in the matter.

It will not be pretended for a moment that he had any authority or jurisdiction, under the 134th section of the Division Courts Act, to set off a judgment of Mr. Buchanan against the uncle or grandfather of Mrs. Linden, if he had such a judgment, to satisfy Mrs. Linden's judgment, which stands in the name of herself and husband against him; and if he had no jurisdiction in such a case, he has none in the case before us, as we understand the facts.

If this be so, then the order he gave the clerk is inoperative and of no avail, and Mrs. Linden is entitled to have a mandamus to obtain execution to recover the amount of her judgment.

The case of *The Queen* v. *Fletcher* (2 E. & B. 279), referred to by Mr. Osler, seems to shew that the mandamus to issue the execution is properly directed to the clerk and not to the judge, when application has been made to the judge requesting him to order the clerk to issue execution, and when the clerk has himself been applied to issue execution.

We think therefore the rule should go to the clerk, but if within a week he issues the execution as prayed for, the rule will not be drawn up We give no costs.

Rule absolute.

YEARKE, APPELLANT, AND BINGLEMAN, RESPONDENT.

Quarter Sessions—Perverse verdict—New trial—Mandamus.

Where a conviction has been affirmed by a jury on appeal to the quarter sessions, that court has no authority to grant a new trial.

Quære, whether when such verdict has been rendered against the express direction of the chairman, that court would be bound, or should be compelled by mandamus, to enforce the conviction so affirmed.

[23 U. C. Q. B. 551.]

On the 25th May, 1868, at Charlotteville, in the county of Norfolk, Norman Yearke and John Nelson were convicted before John H. Spencer, a justice of the peace, for a trespass, on the land of John Bingleman, being lot nine in the sixth concession of Charlotteville, between the first of January and the last day of February, by falling timber from No. 8 upon his land and leaving the tops thereon, also cutting three pine trees of his timber; and he adjudged them for the offence to pay $10 for compensation to Bingleman, and also the further sum of $1 cash as penalty, to be paid and applied according to law, and also to pay the said John Bingleman the sum of $6 75 for his costs; and if the said several sums were not paid before the 1st of June, he ordered the same to be levied by distress and sale of the goods and chattels of Yearke and Nelson, and in default of sufficient distress he ordered them to be imprisoned in the common gaol of the county of Norfolk, to be kept at hard labour for the space of twenty days, unless the said several sums, and all costs and charges of the said distress and of the commitment and conveying them to gaol, should be sooner paid.

Against this conviction Yearke appealed to the next court of general quarter sessions of the peace, held on the 9th of June.

The matter came on to be heard before the court, and a jury was called and sworn, and the respondent entered on his case. It was proved, on cross-examination of the respondent's first witness, that the land on which the alleged trespass was committed was wholly unenclosed. On this the appellant's counsel submitted to the court, and the court held, that the conviction was bad on that ground. The respondent's counsel declined to submit to the ruling of the court, and called witnesses to prove the alleged trespasses and the damage done. The appellant's counsel, after the ruling of the court, called no evidence. The respondent's counsel then addressed the jury, and the appellant's counsel stated he would not offer any arguments to the jury, as the court had decided the conviction was bad. The court then charged the jury, that as it was proved the land in question was wholly unenclosed, they should quash the conviction. The jury retired and brought in a verdict for the respondent, with $15 damages. The court thereupon declined to receive the verdict, and directed the jury that their verdict must be either affirming or quashing the conviction, and as the court had already ruled that the conviction was bad on the grounds stated, it was their duty to quash it. The jury nevertheless rendered their verdict affirming the conviction.

Immediately after the rendering of the verdict and before any order of the court was made in the premises, the appellant's counsel moved for a new trial, at the same sessions, in presence of the respondent's counsel, which after due con-

sideration was granted by the court, the respondent's counsel protesting against the same and against the power of the court to grant the new trial. On the 12th of June, during the same sittings of the court, the appeal was again called on, when the respondent's counsel declined to appear. After proof of the service of the notice of the appeal and entering into the recognizance required, and after proof given by the appellant that the land was wholly unenclosed, it was ordered by the court that the conviction should be quashed with costs. The costs were taxed by the court at £10 4s. 9d.

A *certiorari* was ordered by Morrison, J., in Chambers, on the 27th of July, to bring up the proceedings. It was served on the 5th of August and a return made to the writ on the 18th.

In Michaelmas Term last, *J. A Boyd* as counsel for Bingleman, obtained a rule *nisi* on the chairman of the quarter sessions and his associate, naming him, two of Her Majesty's justices of the peace who were present at the same sessions in 1868, and Norman Yearke and John Nelson, to shew cause why the order and direction of the court of quarter sessions, at the said sittings, setting aside the verdict of the jury in favour of the respondent in the matter, and also the order and direction of the court that a new trial should be had in respect of the said appeal, and the said entry at the said sittings that the said conviction should be quashed, and quashing the same with costs, made after the said trial had been ordered, or some one of them, should not be set aside, and the said verdict of the jury ordered to stand in full force and effect by this court, for the following reasons:

1. A proper notice of appeal was not served.

2. A jury having been empanelled to adjudicate upon the appeal, their decision was conclusive, and not subject to be set aside and a new tr al ordered.

i3. The court acted illegally in setting aside the verdict and awarding a new trial in respect of the appeal, as they had no power to make any order or rule for such a purpose.

4. When the jury rendered their verdict it was the duty of the court to have ordered the verdict to be entered on record, and to have given judgment in accordance therewith in affirmation of said conviction, and the court had no jurisdiction to set the same aside and order the conviction to be quashed with costs or otherwise.

5. On the appeal of one party convicted the court has no power to quash the conviction as to another party convicted, who does not appeal.

The rule was enlarged until this Term when

F Read showed cause. The notice of appea was properly served by being left with the wife of the justice. The statute, Con. Stat. U. C. cap. 114, sec. 1, requires it to be given to the respondent or left with the convicting justice for him. In *Regina* v. *Justices of Yorkshire*, 7 Q B 154, the statute required the notice to be given to the justice, and it was held sufficient to deliver it at his dwelling house, though not to him personally. The statute authorizes any person aggrieved to appeal. Yearke, therefore, being aggrieved, though only one of two, had a right to appeal; and when the conviction was properly before the court, being illegal, it was right to quash it. The return does not show that any one applied for a jury, and a jury could not properly be empannelled unless required by one party or the other: Con. Stat. U. C. cap. 114, sec. 3. Though the verdict of the jury affirmed the conviction, no judgment of the court was given on it. It is true, in *Cavil* v. *Burnaford*, 1 Burr. 568, it is stated an inferior court cannot grant a new trial. The Court of Quarter Sessions, however, is not an inferior court: Per Lord Tenderton, C. J., in *Rex* v. *Smith*, 8 B. & C. 343, and this court will not interfere with its practice: *Rex* v. *Hewes*, 3 A. & E. 725; or review its decision: *Rex* v. *Justices of Monmouthshire*, 1 D. & R 334; *Rex* v. *Justices of Leicestershire*, 7 M. & S. 443. The conviction is bad on the face of it, because it gives a penalty and compensation both, which the statute 25 Vic. cap. 22, does not allow. *Victoria Plank Road Company* v. *Simmons*, 15 U. C. R. 303; *Regina* v. *Watson*, 7 C. P 495, seems to question if a *certiorari* will lie after conviction appealed to Sessions; but subsequent cases, both in the Court of Queen's Bench and Common Pleas, seem to hold that it will.

Boyd, contra. All that is desired is to put the matter in the Quarter Sessions, where it ought to have been left by the court. They have no power to grant a new trial in a matter of appea , nor to reserve a case under the statute: *Pomeroy*, app. and *Wilson*, resp., 26 U. C. R. 45. Both parties acquiesced in a jury, and having appeared and conducted the case before the jury, neither party can now object that they did not request it. When the new trial took place it was *ex parte*, and the respondent may even now show that a notice of appeal was not served on the proper party. Leaving it with the magistrate is not complied with by leaving it with his wife. The service must be personal on the party, or on the justice as his agent, *i. e.*, substitutional, and substitutional service, when allowed, must be strictly followed It cannot be on some one else as agent for the justice, who is himself only an agent. In the case cited the service was to be on the justice for himself. The proper service of such notice is a condition precedent to having the case heard: *Woodhouse* v *Woods*, 29 L J. M. C. 149; *Morgan* v. *Edwards*, Ib. 108. As to one of two parties appealing, the notice of appeal should at all events have been confined to the conviction as regards the appellant: Paley on Convictions, 350; but *Regina* v. *Justices of Oxfordshire*, 4 Q B. 177, seems an authority that a mere mistake in the form of notice as to whether the conviction is several or joint, is no ground for refusing to try the appeal. The appeleate jurisdiction of the Quarter Sessions is by statute, Con. Stat. U. C. cap. 114, which is silent as to new trials; and *Mossop* v. *Great Northern Railway*, 16 C. B 580, 17 C. B. 136, shows that as a general rule an inferior court cannot grant new trials. The case of *Cavil* v. *Burnaford*, 1 Burr. 568, is to the same effect Tidd's Practice, 9th ed. vol. ii. p. 905; *Rex* v. *Day*, Sayer, 202; Dickinson's Q. S. 651; *Heepeler and Shaw*, 16 U C. R. 108; *Regina* v. *Powell*, 21 U. C. R 215; *Regina* v. *Peterman*, 23 U. C. R. 576, and other cases in our own courts, show that a *certiorari* may issue to bring up a conviction from an inferior court after an appeal to the Quarter Sessions.

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

The case of *Pomeroy*, appellant, and *Wilson*, respondent (26 U. C. R. 45), decides that the quarter sessions had no power to reserve for the consideration of this court, under Con. Stat. U. C. ch. 112, a case which has been appealed to that court under the statute allowing appeals to the quarter sessions.

The first section of that act enacts that, when any person has been convicted of treason, felony or misdemeanor, before any court of quarter sessions, the justices may reserve any question of law which arose at the trial for the consideration of the justices of either of her Majesty's superior courts of common law. The act respecting new trials in criminal cases is the next in the Con Stat., ch. 113, and the first section is, whenever any person has been convicted of any treason, felony or misdemeanor, before a court of quarter sessions, such person may apply for a new trial The language in the two statutes seems identical, and if the court of quarter sessions, when a case has been appealed cannot reserve any question of law for the consideration of the judges of either of the superior courts, I do not think the court could grant a new trial in such a case, under the authority of ch. 113.

Then has the court of quarter sessions power, of its own original jurisdiction, to grant a new trial on the merits in a matter of appeal. In the case of *The Queen* v. *Bertrand* (L R. 1 P. C. 526), in argument it is stated, "Granting new trials is a practice of comparatively modern date. The history of its introduction is to be found in *The King* v. *Mawbey*, 6 T. R. 619, which was a case of misdemeanor only. In a note to the case of *The King* v *The Inhabitants of the County of Oxford*, 13 East, 410, 415, it is stated that there is no instance of a new trial being granted in a capital case. All the authorities upon the point are collected there." In the cases referred to, it is stated in argument, and apparently assented to, that granting new trials formed no fact of the common law jurisdiction of the court, nor was it given by statute, but arose out of the imperious necessity of doing justice. There was no remedy formerly in civil cases but the attaint of the jury, which, in its nature, was no satisfaction to the party wronged; but even this did not extend to criminal cases. The first instance recorded in the books of a new trial granted, was in 1648 (referred to in 1 Burr. 394), and then it was observed it had been done before. If a defendant were unquestionably guilty, and the jury acquitted him, though there is a palpable failure of justice, yet the court cannot grant a new trial. On the other hand, if the defendant be convicted of felony or treason, though against the weight of evidence, there is no instance of a motion for a new trial in such a case; but the judge passes sentence and respites execution till application can be made to the mercy of the crown.

The case of *The Queen* v. *Scaife*, 17 Q. B. 238, an indictment for robbery removed by *certiorari* into the court of Queen's Bench, and tried at the Hull assizes, before Mr. Justice Cresswell, is the only recorded case where a new trial was granted in England in Felony. That case is expressly overruled by the Privy Council in *The Queen* v. *Bertrand*, above referred to.

In a note to *The King* v. *The Inhabitants of the County of Oxford*, 13 East, 416, it is stated, the authorities are unanimous that an inferior jurisdiction cannot grant a new trial upon the merits, but only for an irregularity, and this even in civil suits. Many of the authorities are there referred to. The same case in *East.*, implied, shews what has never yet been successfully contended for, as far as I am able to see, that the court of Queen's Bench will not issue a *certiorari* to remove an indictment for a misdemeanor and proceedings thereon at the assizes, after conviction and before judgment, sought for the purpose of applying for a new trial on the judge's report of the evidence, upon the ground of the verdict being against evidence and the judge's direction. In that case the motion was refused. If the judge of assize could have granted a new trial, there would have been no necessity for that application, and so astute a judge as Lord Ellenborough would have referred to that fact in his judgment; and the reporter Mr East, who adds many valuable notes and authorities to the case, a learned criminal lawyer, would have referred to such a power if it had existed.

The Court of Oyer and Terminer and General Gaol Delivery are not courts of inferior jurisdiction as to granting new trials, more than the courts of general quarter sessions. If those courts could not grant a new trial on the merits, I fail to see how the quarter sessions could. The fact that neither of the learned gentlemen who argued this case have been able to refer us to a single authority shewing that the quarter sessions could, independent of our statute on the subject, grant a new trial on the merits, satisfies me that the law must be, as I have always understood it to be, against such a power.

If such a power existed in ordinary cases, it may well be doubted if it would exist in exercising a statutory jurisdiction by appeal, when no such power is conferred by the statute.

We therefore come to the conclusion that the court of quarter sessions had no power to grant a new trial, or to order the conviction to be quashed with costs; and that the order granting a new trial and quashing the conviction must be quashed.

We make no order as to the court below issuing any process to enforce the conviction, as that is not sought for by the application now made to us; and if we were asked to do so, before issuing a mandamus we should require express authority to shew us that the quarter sessions would be bound to give effect to a verdict pronounced against the express direction of the court.

We think the learned chairman of the quarter sessions would have been warranted by the established practice at the assizes, in refusing to allow the party to call further witnesses, or his counsel to address the jury, after the undoubted established facts had clearly shewn, in the opinion of the court, that he had made out no case. It is unseemly to allow a counsel to address a jury, and to urge them to find a verdict against the ruling of the court, when the court itself will be obliged to tell the jury to find the other way. In such a contest the juries are in truth made the judges instead of the court, and the judge enters the arena as a contestant with the advocate for a favourable decision. Such displays are not calculated generally to assist in the ad-

ministration of justice, or to induce respect towards those concerned in such administration.

Rule absolute.

COUNTY COURT CASE.

In the matter of Sutton, Landlord, v. Bancroft, Tenant.

Overholding Tenants Act—Assignee of reversion.

Under the Overholding Tenants Act, 31 Vic. cap. 26, the word "landlord" includes the assignee of the reversion.

The late Act affords a more extensive as well as a more expeditious remedy than any former statute.

[Hughes, Co. J., St. Thomas.]

The facts of the case were, that one Burtch demised the premises to this tenant for a term which had expired, but before the end of the term conveyed the reversion to Sutton, who claimed the possession as landlord.

Ellis, as attorney for the tenant, denied the relation of landlord and tenant within the meaning of the Act, upon which alone the County Judge had jurisdiction. Proof of title and of the lease having been made from Burtch to Bancroft, and no attornment shewn from Bancroft to Sutton, Mr. Ellis claimed to have the proceedings quashed and the application discharged for want of privity between the parties, and that the fact of his being in possession did not constitute Bancroft Sutton's tenant: nor did the assignment of the reversion constitute Sutton Bancroft's landlord. The notice to quit and demand of possession were admitted.

McDougall, counsel for the landlord, cited the 13th section of the Act as to the meanings of the words "tenant" and "landlord," whereby they have assigned to them interpretations which their ordinary signification do not import, and referred to *Nash* v. *Sharp*, 5 C. L. J., N. S., 73, as good authority under the former statute, but not under the Ontario Act, for by the interpretation of the 13th section no room whatever is left for doubt.

Hughes, Co. J.—In the Act, 4 Wm. IV. Cap. 1, I find an interpretation clause (sec. 59), but no such meanings attached to the words "landlord" and "tenant" as are assigned them by the 13th section of the Ontario Act, nor do I find them in the Con. Stat. of U. C. Cap. 27. The Act 27 & 28 Vic. cap 30, affords a more expeditious remedy for cases coming within the meaning of the previously existing statute, but I find no extension as to the kind of cases which might be reached by that remedy, so that up to the passing of the Ontario Statute, 31 Vic. Cap. 26, any decision of the Superior Courts as to the extent of the remedy and the class of cases coming within the purview of the then existing statutes would apply and be authoritative Not so, however, since the passing of the statute now in question, because the word "tenant" is thereby declared to mean and include an occupant, a sub-tenant, under-tenant (if there be any difference between "sub" and "under") and his and their assigns and legal representatives: and the word "landlord" is declared to mean and include the lessor, owner, the party giving or permitting the occupation of the premises in question, and the person entitled to the possession thereof, and his and their heirs and assigns and legal representatives. I think that *Bonser* v. *Boice*, 9 U. C. L. J. 213, does not apply as an authority in this case, for the statute in question affords not only a more expeditious but a more extensive remedy than was ever devised or contemplated by any previously existing statute, and no room is left for a well founded doubt that the word landlord includes the assignee of the reversion.

I therefore decide, 1st. That this is a case clearly coming within the meaning of the second section of the Act. 2nd. That the tenant, Bancroft, holds without color of right, and was tenant, &c., for a term which has expired, and wrongfully refuses to go out of possession thereof, &c.

Writ of possession ordered *

ENGLISH REPORTS.

QUEEN'S BENCH.

Fair v. The London and North-Western Railway Company.

Damages—Future prospect—Negligence—Railway company.

Where a plaintiff having been injured through the negligence of the defendant can show that, although only enjoying at present a small income, he has a reasonable prospect of increasing that income, such prospect ought to be a matter of consideration for the jury.

[Q. B. 18 W. R., 66.]

This was an action tried before the Lord Chief Baron at Hartford, and was brought to recover damages for injuries received in an accident on the defendants' railway; a verdict was found for the plaintiff, damages £5,000, with £250 for expenses.

The plaintiff was a clergyman of twenty-seven years of age, enjoying an income of £250, as a secretary to the Irish Mission, and it was shewn at the trial that he was a young man of great promise, and had reasonable expectations that he should increase his income hereafter.

It was admitted that he was totally incapacitated by the accident for the present, and that any improvement in his condition was a matter of great doubt.

Vernon Harcourt, Q C., now moved for a new trial, or to reduce damages on the ground that they were excessive. £5,000 is an exorbitant sum when calculating on £250. Such a sum would produce a larger annuity. How can the prospect of a man be proved? By calling friends on one side to give favorable evidence, and witnesses on the other to disparage? There should be some limit as in America, otherwise railway companies are made insurers at full amount without any means of ascertaining the value of what is insured. There should be some power to protect themselves by special contract, as there is in the case of horses, goods, &c.; cannot the principle in *Hadley* v. *Baxendale*, 2 W. R. 302, 9 Ex. 341 be applied here?

* See Editorial remarks on page 18.—Eds. L. J.

COCKBURN, C.J.—Certainly not. The argument of Mr. Harcourt calls on us to take upon ourselves the functions of the Legislature and to establish a new principle. True it is that to do full justice in some cases damages are so great as to cause serious inconvenience, but that is no reason for altering a principle. If a railway undertakes to carry a passenger, and is guilty of negligence, the passenger is entitled to bring an action, and in considering the case juries are to take into account two things: first, pecuniary loss in profession or business; secondly, injury to the person or health; for pecuniary loss the jury should consider not merely the amount of income but also the reasonable probability of acquiring larger income in future. It would be monstrous if when a man has reached a certain stage in his career, yet judging from the past you can see with reasonable certainty that he will increase his income, you should exclude such considerations from the jury. You would exclude a most important element and inflict the gravest injustice. The jury are bound to take into account not only income, but the destruction and annihilation of health and prospects. Here is a man at the outset of life, of great promise, with his prospects ruined and his health destroyed. I consider £5,000 within reasonable limits.

MELLOR, LUSH, HANNEN, J.J., concurred.

Rule refused.

CHANCERY.

GILLIATT v. GILLIATT.

Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48)—Employment of puffer—Reserved bidding.

Land was offered for sale by auction, subject to a reserved price, but a right to bid was not reserved.

Held, that the employment of a person to bid on the seller's behalf was illegal, and vitiated the sale.

[M. R. 18 W. R. 203.]

This was an adjourned summons. The facts were, that under the decree in this cause an estate in Sussex was offered for sale by auction by Messrs. Norton, Trist, Watney & Co., the eminent auctioneers, subject to conditions of sale, the second of which was: "The sale is subject to a reserved bidding, which has been fixed by the judge to whose court this cause is attached."

No right to bid was reserved on behalf of the owners.

The estate was knocked down to a purchaser for £29,000, which was the reserved price. The purchaser afterwards discovered that a puffer had been employed by the auctioneer, and accordingly took out the present summons to set aside the sale.

It was in evidence that one puffer had been employed who bid for himself, and made in all four biddings, but did not bid beyond £28,900.

The Sale of Land by Auction Act (1867), sec. 5, provides that the conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved. If it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person.

Jessel, Q.C., and *Whitehorne*, in support of the summons.

Sir R. Baggallay, Q.C., and *Langworthy*, for the owners, submitted that the employment of a puffer under the circumstances of the case was immaterial, inasmuch as he did not bid up to the reserved price.

Mortimer v. *Bell*, 14 W. R. 68, L. R. 1 Ch. 10, was referred to.

Lord ROMILLY, M.R.—The meaning of the Act is clear, that in every case of a sale of land by auction, the owner must state in the conditions of sale whether there is a reserved price, and if he also mean to employ a puffer he must say that a right to bid is reserved. This has not been done in the present case; the purchaser must therefore be discharged, and the deposit returned with interest at four per cent.

UNITED STATES REPORTS.

SUPREME JUDICIAL COURT OF MAINE.

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

The plaintiff was unlawfully seized by the defendants, carried thence three miles and confined in a room several hours, and thence to a town meeting, where he took an oath to support the Constitution of the United States, and was discharged. In the trial of an action of trespass, based upon these facts, the plaintiff claimed (1.) Actual damages resulting from his seizure and detention; (2.) Damages for the indignity thereby suffered; (3.) Punitive damages. *Held*:—

1. That the plaintiff was entitled to recover full pecuniary indemnity for the actual corporeal injury received, and for the actual damages directly resulting therefrom, such as loss of time, expense of cure, and the like:
2. That the declarations of the plaintiff, made prior to the unlawful arrest and tending to provoke the same, not being a legal justification thereof, are inadmissible in mitigation of the actual damages; but,
3. That such declaration made on the same day, and communicated to the defendants prior to such arrest, together with all the facts and circumstances fairly and clearly connected with the arrest, indicative of the motives, provocations, and conduct of both parties, are admissable upon the question of damages claimed upon the other two grounds.

The writ was dated June 15th 1867, and contained a declaration in trespass, substantially alleging that Elisha W. Shaw (a deputy sheriff), Putnam Wilson, Jr., Oliver B. Rowe, Hollis J. Rowe, and Daniel Dudley, on the 15th April 1865, at Newport, with force and arms, assaulted, beat, and bruised the plaintiff, thereby permanently injuring his hip and back, violently forcing him into and locking him in a room in the Shaw House, subjecting him to remain there five hours, violently taking him from thence into a carriage and carrying him against his will to the town-house in Newport.

The plaintiff introduced evidence tending to show that in April 1865, while he was at a blacksmith's shop in Newport, where he was having his horses shod, Shaw, Dudley, Wilson, and H. J. Rowe seized him, and forcibly putting him into a waggon, transported him a prisoner three miles distant, to Newport village, and confined him for a veral hours in a room in the hotel there; that secrowd of men accompanied the four defendants to the shop and from thence to Newport village; that the four defendants inflicted injuries upon the person of the plaintiff; and that threats of extreme personal injuries were made to the plain-

tiff, both at the blacksmith shop and at Newport village, by some persons.

There was conflicting testimony as to the extent of the injuries to the plaintiff's person.

The defendants, against the objections of the plaintiff, introduced evidence tending to show that the four defendants seized the plaintiff in the forenoon of the day on which the news of the assassination of President Lincoln was received; that when the plaintiff stepped into the blacksmith shop, he said, addressing one Gilman (who was a witness in this case): "He that draweth the sword shall perish by the sword, and their joy shall be turned into mourning;" that Gilman (alluding to the assassination of the President) said to the plaintiff; "I suppose there are some who are glad of it," that the plaintiff thereupon replied: "Yes; I am glad of it; and there are fifty more in town who would say so if they dared to;" that Gilman rejoined that the plaintiff would be glad to take those words back; that the plaintiff responded substantially that he would not; and that Gilman thereupon informed the plaintiff that he should report him.

On cross-examination, Gilman testified that he thought that the plaintiff, when speaking of the assassination, said it might stop the further effusion of blood.

Against the objections of the plaintiff, the defendants also introduced evidence tending to prove that the blacksmith shop was three miles from Newport village, where three of the defendants were; that Gilman, in about twenty minutes after his conversation with the plaintiff, told it to the defendant Wilson; that Gilman and Wilson went to Newport village and informed the four defendants of the plaintiff's declarations concerning the assassination; that, about two hours afterwards, the four defendants proceeded to the blacksmith shop and did the act proved by the plaintiff; that there was great excitement in the public mind upon the receipt of the news of the assassination.

The plaintiff reasonably objected to the admission of the alleged declarations of the plaintiff, made to Gilman that day: but the presiding judge ruled that the plaintiff's declarations made that day, concerning the assassination of the President, might be given in evidence *de bene esse*, it having been stated by the defendants' counsel that they should prove the same had been communicated to the defendants before their arrest of the plaintiff.

Against the objections of the plaintiff, the defendants also introduced evidence tending to prove that, after the confinement of the plaintiff in the hotel, he was taken by them, on the same day, to a public meeting of the citizens, called at the town-house, at which a moderator and a clerk were chosen, and acted officially; that, at the meeting, a vote was passed that the plaintiff be discharged upon his taking an oath to support the Constitution of the United States; and that the plaintiff voluntarily took such oath and was thereupon discharged.

The defendants also introduced evidence tending to show, that, before arresting the plaintiff, telegraphic communication, relative to the plaintiff's declarations concerning the assassination, was had with the provost-marshal at Bangor, who replied by telegraph, that he should be arrested and held; that thereupon the defendant Shaw, then an acting deputy sheriff, with three other defendants, acting under his orders, proceeded to make the arrest; and that they honestly believed that they had a legal right to do what they did, and had no malice towards the plaintiff.

As to the four defendants proved to have been present (and the other, if found to have participated), the presiding judge instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty; that the only question for the jury was the amount of damages; that the plaintiff claims damages on three grounds:—

1. For the actual injury to his person and for his detention;

2. For the injury to his feelings, the indignity, and the public exposure; and,

3. For punitive or exemplary damages.

That they were bound to give, at all events, damages to the full extent for the injuries to the plaintiff's person and for his detention.

That, as to damages for the second and third grounds, it was for the jury to determine, on the whole evidence, whether any should be allowed, and the amount.

The presiding judge explained to the jury the nature and grounds of such damage, and instructed them, *inter alia*, that they could only consider the evidence introduced by the defendants under the second and third heads above set forth, and in mitigation of any damages they might find under either or both of said heads, if, in their judgment, those facts did mitigate such damages; but that they could not consider them under the first head.

The jury acquitted O. B. Rowe, and found a verdict of guilty against the other defendants, and assessed damages in the sum of $6.46. Whereupon the plaintiff alleged exceptions.

W. H. McCrillis, for the plaintiff, contended, *inter alia*, that the language of the plaintiff was not a sufficient provocation. It was not personal to any of the defendants: *Corning* v. *Corning*, 2 Selden 97; *Ellsworth* v. *Thompson*, 13 Wend. 658.

Sufficient provocation cannot be proved in mitigation when the assault and battery were deliberately committed. The assault must accompany the provocation before the blood has time to cool. The question is, was there time for a reasonable man to reflect, and not whether the defendants continued in a state of passion: *Cope* v. *Sullivan*, 3 Selden 400; *Avery* v. *Ray*, 1 Mass. 11; *Lee* v. *Woolsey*, 19 Johns. 319; *Willis* v. *Forrest*, 2 Duer 318.

Words cannot constitute justification. Words can never be sufficient provocation. They may provoke extreme anger, and the anger be admitted in mitigation. But, if the blood has time to cool, the assault is regarded as deliberately done and cannot be mitigated. Any other rule would be subversive of the order of society.

L. Barker, for the defendants.

KENT, J.—The case, as presented to the jury under the rulings, was, in substance and effect, one where a default had been entered and an inquisition of damages had been allowed before a jury. The jury had no discretion allowed to them, except as to the amount of damages to be inserted in a verdict for the plaintiff. The main question is whether the directions given by the

judge to the jury to govern them in the assessment of damages were correct.

The plaintiff claimed damages for several distinct matters, and asked that the jury should found their verdict on these principles, viz.:—

1. The actual injury to his person and the detention and imprisonment.

2. The injury to his feelings, the indignity and public exposure and contumely.

3. Punitive or exemplary damages in the nature of punishment, and as a warning to others not to offend in like manner.

The judge very unequivocally instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty, and that the only question for them was the amount of damages,—that they were bound to give damages at all events for the injuries to the plaintiff's person, and for detention to the full extent of said damages; that they could not consider the testimony put in by defendants in mitigation of such actual damages, but must give a verdict for matters named under the 1st head to the full amount proved without diminution, on account of any matters of provocation, or in extenuation.

The judge further instructed the jury that they might consider the testimony put in by defendants under the 2nd and 3rd heads, above stated, in mitigation of any damages they might find the plaintiff had sustained under either or both of said grounds. These rulings present the question whether the evidence objected to was admissible for the special purpose to which it was confined. It was not in the case generally, but its consideration and application was restricted to the special grounds of damages set up beyond what may properly be termed the actual damages. It was entirely excluded as a justification, or as mitigating in any degree the actual damages.

The distinctive points of the rulings which perhaps distinguish them from some cases in the reports, and some doctrines in the text-books, are, first, that they exclude entirely this species of evidence in mitigation of actual damages,—and, secondly, that they admit it in mitigation of damages, claimed on the other grounds of injury to the feelings, indignity, and punitive damages, although the evidence related to matters which did not transpire at the instant of the assault, but on the same day, and manifestly connected directly with the infliction of the injury complained of.

It is unquestionable that many authorities can be found which seem to negative the proposition that acts or words of provocation, except those done or uttered at the moment, or immediately connected in time with the infliction of the injury, can be given in evidence in mitigation of damages. But most of these cases seem to be predicated upon the idea of mitigation of the positive, visible damages,—those damages to which the party would be entitled on account of the actual injury to his person or his property.

It is important to settle, as well as we can, the general principle which lies at the foundation of the law applicable to damages, occasioned by the illegal acts of the defendant. We understand that rule to be this—a party shall recover as a pecuniary recompense, the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. But, in the application of this general principle, there has been great diversity in the decisions, and in the doctrines to be found in the text-books touching the point of mitigation or extenuation.

In reference to injuries to the person, it was soon seen that this literal and limited rule, if applied inexorably, would fail to do justice. The case is at once suggested, where an assault and battery is shown to have been wanton, unprovoked, and grossly insulting; inflicted clearly for the purpose of disgracing the recipient, and at such a time or place as would give publicity to the act, and yet the actual injury to the person very slight, or hardly appreciable. Shall the law, in such a case of wanton insult and injury, give only the damages to the face or the person, as testified to by a surgeon?

On the other hand, a case is suggested, where the injury to the person was severe, a broken limb or grievous wounds, or permanent or partial disability, and yet the party suffering had been guilty of gross abuse, provoking the assault by insulting language or false accusations, or most offensive libels upon the defendant or his family, or had outraged the community in which he lived, by a series of acts or declarations which justly aroused and kept alive the indignation, which at last found vent in the infliction of some personal indignity, accompanied by force and violence, which resulted in the serious manner above stated. What is the rule as to such damages, applied to the aggravations in the one case, and the mitigations in the other?

If we take the case of such an assault, which has been provoked by words or acts at the time of the trespass, and so immediately connected therewith that all authorities would agree in admitting the evidence in mitigation, the precise question then is, for what purpose can it be used, and what damages can it mitigate?

(*To be continued.*)

REVIEWS.

THE INSOLVENT ACT OF 1869, WITH TARIFF, NOTES, FORMS &c. By James D. Edgar, Barrister-at-law. Toronto: Copp, Clark & Co., 1869.

This is in effect a second edition of Mr. Edgar's annotated edition of the Insolvent Act of 1864. Since then a number of cases have been decided both here and in England, which, the former particularly, are of special importance in construing the Act now in force, and will be found collected in their appropriate places throughout the work.

As this Act is applicable to the Provinces of Quebec, New Brunswick and Nova Scotia, as well as Ontario, we hope that a collection,

such as that before us, of the principal cases explanatory of the Act, may tend to assimilate the practice in the different Provinces, but this, as the author remarks, cannot *ensure* uniformity, which can never be attained without rules being made to effect that object. There should be rules applicable alike to Ontario, New Brunswick and Nova Scotia, and which might be framed by a joint committee of Judges from these Provinces, with such particulr rules for each as might be found necessary, owing to any peculiar administration in the individual Provinces; though it could scarcely be expected that the Province of Quebec could join in rules which might be framed for the other Provinces, owing to the peculiarity of her laws. This might be made one step towards the assimilation of the laws in the English-speaking Provinces, referred to in the British North America Act of 1867.

The book before us is in every respect superior to the edition of 1864, both as to the matter, and in its general appearance.

There are some useful forms in the appendix, as also the tariff of fees under 27, 28 Vic. c. 17, which, by the way, has strong internal evidence of being prepared with more reference to the value of money fifty years ago than at present.

CHANCERY SPRING SITTINGS, 1870.

As finally settled by the Court.

The Hon. Vice-Chancellor Strong.

Toronto	Tuesday	March 15

The Hon. Vice-Chancellor Mowat.

Stratford	Tuesday	April 5
Goderich	Friday	" 8
Sarnia	Tuesday	" 12
Sandwich	Friday	" 15
Chatham	Tuesday	" 19
London	Tuesday	" 26
Woodstock	Saturday	" 30
Simcoe	Friday	May 6

The Hon. the Chancellor.

Hamilton	Tuesday	April 12
Brantford	Thursday	" 21
Lindsay	Thursday	" 28
Guelph	Thursday	May 5
Barrie	Wednesday	" 11
Owen Sound	Wednesday	" 18
St. Catharines	Monday	" 23
Whitby	Friday	June 3

The Hon. Vice-Chancellor Strong.

Ottawa	Thursday	May 5
Cornwall	Tuesday	" 10
Brockville	Tuesday	" 17
Kingston	Friday	" 20
Belleville	Thursday	" 26
Peterborough	Wednesday	June 1
Cobourg	Monday	" 6

SPRING ASSIZES, 1870.

Eastern Circuit.—*Mr Justice Galt.*

Kingston	Tuesday	March 15.
Brockville	Tuesday	" 29.
Perth	Tuesday	April 5.
Ottawa	Tuesday	" 12.
L'Orignal	Wednesday	" 27.
Cornwall	Monday	May 2.
Pembroke	Tuesday	" 10.

Midland Circuit.—*Mr Justice Gwynne*

Lindsay	Monday	March 14.
Peterboro	Monday	" 21.
Cobourg	Friday	" 25.
Belleville	Thursday	" 31.
Whitby	Monday	April 11.
Napanee	Wednesday	" 27.
Picton	Monday	May 2.

Niagara Circuit.—*Mr. Justice Wilson.*

Milton	Monday	March 14.
St. Catharines	Wednesday	" 30.
Welland	Monday	April 11.
Barrie	Monday	" 18.
Hamilton	Monday	" 25.
Owen Sound	Tuesday	May 10.

Oxford Circuit.—*The Chief Justice of Ontario.*

Brantford	Monday	March 14.
Berlin	Friday	" 18.
Guelph	Wednesday	" 23.
Woodstock	Monday	April 18.
Stratford	Monday	" 25.
Simcoe	Tuesday	May 3.
Cayuga	Tuesday	" 10.

Western Circuit—*Mr. Justice Morrison.*

London	Monday	March 21.
St. Thomas	Wednesday	" 30.
Sandwich	Tuesday	April 5.
Chatham	Tuesday	" 12.
Sarnia	Tuesday	" 26.
Goderich	Monday	May 2.
Walkerton	Monday	" 9.

Home Circuit—*The Chief Justice of the Common Pleas.*

Brampton	Monday	March 15.
Toronto	Monday	March 21.

Curious Tenures.—Hugh de Saint Philbert holds the manor of Creswell, in the County of Berks, by the serjeanty of carrying bottles of Wine, for the breakfast of our lord the King, and it was called the serjeanty of the Huse, through the kingdom of England.

The Mayor and Burgesses of Oxford, by charter, claim to serve in the office of butlership to the King, with the citizens of London, with all fees thereunto belonging, which was allowed at the Coronation of King James II., and to have three maple cups for their fee. They had also, *ex gratia*, allowed a large gilt bowl and cover.

TO CORRESPONDENTS.

"T. A. A."—We regret we cannot insert your letter, as we have already expressly dealt with the subject spoken of, and, as we believe, in the right way.