DIARY FOR NOVEMBER.

1. Mon. *All Saints.*
7. SUN. *24th Sunday after Trinity.*
12. Fri .. Examination of Law Students for Call to the Bar.
13. Sat .. Examination of Articled Clerks for Certificates of fitness.
14. SUN. *25th Sunday after Trinity.*
15. Mon. Michaelmas Term begins.
16. Tues. Examination for Osgoode Hall Scholarships.
17. Wed. Last day for service for County Court. Interim Examination of Law Students and Articled Clerks.
19. Frid. Paper Day, Queen's Bench. New Trial Day, Common Pleas.
20. Sat .. Paper Day, Common Pleas. New Trial Day. Queen's Bench.
21. SUN *26th Sunday after Trinity.*
22. Mon. Paper Day, Queen's Bench. New Trial Day, Common Pleas.
23. Tues. Paper Day, Common Pleas. New Trial Day, Queen's Bench.
24. Wed. Paper Day, Queen's Bench. New Trial Day, Common Pleas. Last day for setting down and giving notice for re-hearing.
25. Thur. Paper Day, Common Pleas.
26. Fri .. New Trial Day, Queen's Bench.
27. Sat... Declare for County Court.
28. SUN. *1st Sunday in Advent.*
29. Mon. Paper Day, Queen's Bench. New Trial Day, Common Pleas.
30. Tues. *St. Andrew.* Paper Day, Common Pleas. New Trial Day, Queen's Bench,

THE

Canada Law Journal.

NOVEMBER, 1869.

DEATH OF THE CHANCELLOR.

It is with feelings of extreme regret that we have to record the death of Phillip Michael Matthew Scott Van Koughnet, Chancellor of Ontario, at his residence in Toronto, on Sunday the 7th instant.

The Chancellor had been in bad health for some years, but none anticipated such a speedy termination of his brilliant, though short career. The blow was a sad one to his many friends in private life, whilst the Bench and the public can ill spare the vigorous intellect and well stored mind that presided with so much benefit in the west wing of Osgoode Hall. We shall hereafter refer more at length to the life and services of the late Judge.

The Court of Error and Appeal will sit for the dispatch of business on 3rd January, 1870.

The Toronto Winter Assizes have been fixed for the 10th January next. Mr. Justice Wilson will preside.

THE NEW LAW FOR THE MORE SPEEDY TRIAL OF PERSONS CHARGED WITH CRIME.

A short act passed in the last session of the Parliament of Canada makes an important change in respect to criminal procedure in the case of persons committed to gaol charged with crime. It is one of those gigantic strides in legislation, the full bearing and extent of which is not at first fully perceived, but when brought into use, and its value seen, we all are apt to wonder why it was not long before placed on the statute book.

The statute, entitled "An Act for the more speedy trial in certain cases of persons charged with felonies and misdemeanors in the Provinces of Ontario and Quebec," was introduced in the House of Commons by the Hon. John Sandfield Macdonald, Attorney-General for this Province, in a brief, incisive speech, explaining the nature of the change, the objects it was designed to accomplish and the evils it was intended to remedy. The measure attracted attention from all parties, and secured universal favor and support. Intended by the Premier of Ontario to apply only to the Province of Ontario, leading lawyers and members representing the views of the Government in the Province of Quebec claimed that it should be extended to that Province also, and so, finally, the act was passed.

Never was an act making so serious a change passed with less objection. We are not surprised at this, however, in respect to the Province of Quebec, where the system of trial by jury is not interlaced with its procedure civil and criminal, as it is with us; nor would the intrinsic merit of the proposition explain its ready acceptance even in the Province of Ontario, had not the public mind been for some years tending, in a measure, towards a more satisfactory, prompt and economical mode for the decision of questions of fact than trial by jury affords. Spurned at first, then listened to coldly, finally adopted, the partial disuse of trial by jury is now quite within the memory of the public men of the day; but since the first considerable inroad was made in that system, little or no progress has been made. Our apathy, or, it may be, our conservatism in legal matters stood in the way of further material progress until within the last few years, when modern enlightenment and the clamor for economy

and speed in administration, if not the steady tide of human progress has opened to us sounder and better ways of dealing with legal procedure. The first great step was in the establishment in Upper Canada of a complete system of local administration which provided crown prosecutors in every judicial district in the country, a body of officers, trained men, taken from the bar, appointed by the Crown, and directly under the Government, to conduct and direct prosecutions against persons charged with crime. Since the federation of the British American Provinces, trial by jury in Ontario has been seriously curtailed by two acts of Parliament, and the idea seems to be gaining ground, that the mode of disposing of cases both civil and criminal by a judge alone will be the rule rather than the exception, and that the Benthamite idea of "single seated justice" will supersede the jury tribunal, which many in the present day believe fails in most cases to answer any valuable purpose.

The design of the act before us, shortly stated, is this: to secure the trial of persons charged with crime with the least possible delay and at the least possible expense. Not that proceedings are intended to be hurried forward with reckless and indecent haste, or, to use the language of Mr. Justice Gwynne's address, elsewhere appearing, that "a slipshod mode of administering Justice, which is far from the intention and design of the act, and which would mar its provisions and deform its symmetry," should prevail. No; on the contrary, it was manifestly intended that the tribunal established under the act should follow a procedure suited to "single seated justice," and calculated on the one hand, to guard, as far as possible, against a failure of justice, and, on the other, to preserve to persons charged with crimes all proper safeguards against indefinite charges as well as to prevent too hasty proceedings against them. In explaining the powers and purposes of the new tribunals, we shall speak of them as their practice has been elaborated in detail, under a uniform code of rules in force in every county in Ontario. On another occasion, we purpose speaking in respect to these rules, devised by the three senior members of the Board of County Judges, and which, under the fostering approval of the Attorney-General, are now the law of the several courts.

It is a matter of regret, we think, that the new law has not force all over the Dominion that it has been extended only to this Province and the Province of Quebec. We do not know how the Maritime Provinces are circumstanced; but for this Province, as might be expected, the act has *a peculiar fitness*. Ontario is divided into thirty-six judicial districts, each composed of one or more counties, with a resident judge in each judicial district who presides over all the local courts, civil and criminal therein, each with a complete court establishment, with Sheriff and other ministerial officers, a court house, and gaol, as in English counties, and with, moreover, a local officer, whom they have not in England, *a local crown prosecutor*, to take charge of and conduct criminal prosecutions in each judicial district. In this Province, therefore, the act comes into full operation without complication or disturbance of existing institutions, and is, it seems to us, in one sense, the necessary compliment to the excellent system which was introduced by Sir John A. Macdonald by the County Crown Attorney Act.

By the act now under consideration, each local judge in Ontario sitting under the provisions of the statute, and for every purpose connected with or relating to the trial of offenders, is created a court of record. No regular sittings are appointed, but the court sits from time to time as occasion may require. The Clerk of the Peace is appointed to act as clerk of the court, and the sheriff acts in the same way as in other criminal courts.

The *jurisdiction* of the court, as respects the nature of the charge, extends to "all offences for which a prisoner may be tried at a General Session of the Peace," in other words, *to nearly every crime, short of a capital felony, known to the law*; and if convicted, "such sentence as the laws allows and the judge thinks right" may be passed upon the convicted person. The jurisdiction, however, is limited to persons committed to gaol on such charges and consenting to be tried by the judge.

The *procedure* is this: within twenty-four hours after a prisoner is committed to gaol for trial upon any such charge, the sheriff notifies the judge of the fact, and when the local prosecutor is ready to proceed (having received and examined the depositions and papers which the law requires to be laid before him

for the purpose) he informs the judge, and an order is at once issued, and under it the prisoner is brought before the judge in open court. A formal accusation in the nature of an indictment describing the offence (prepared in the meantime by the public prosecutor from the depositions, &c.) is then read to the prisoner by the judge, as the charge against him. The prisoner is then informed by the judge that he has the option of being forthwith tried by the judge without the intervention of a jury, or remaining untried till the next Court of General Session of the Peace, or Oyer and Terminer. If the prisoner, as he has a right to do, declines the jurisdiction and demands a jury, he is remanded to gaol. If he consents to be tried by the judge, he is at once arraigned and called upon to plead to the accusation. If the prisoner pleads "guilty," sentence is at once passed. If his plea be "not guilty," his trial is at once proceeded with, if the crown and prisoner are both ready, or if not ready, the proceedings are adjourned to an early day. On that day the trial is entered upon, but may be further adjourned in the discretion of the judge for the purpose of completing the evidence for the crown, that is, before the prisoner has gone into his evidence; or to enable the prisoner to produce other and further evidence, of which he was not aware at the time he entered on his defence, as being material thereto. The rule as to the other proceedings and as to evidence at the trial is the same as in ordinary cases, and before passing sentence upon the prisoner the same questions will be asked as in other criminal courts, and if the prisoner has anything to urge why judgment should be arrested, or why sentence should not be passed, it is to be heard and determined by the court. None but Barristers-at-law will be heard as counsel.

This, in very brief outline, is a summary of the constitution of the court and its procedure. We have heard objections to this new law by some "that the power is too large to be vested in a single individual." As regards the *law* in each case the judge has no greater or larger powers than the judge acting at the "Sessions" or "Assizes;" but in being sole judge of the *facts*, and substituting the judge for a jury, his powers are certainly new. . . . doubt the step is a bold and decided one, but it is offered as an effort in the way of rendering justice more expedient and satisfactory to the public at large. As such, we accept it, and believe, with proper care in administration, the new courts will be a great improvement in the criminal law of the country. We have heard again that certain of the judges shrink from the work as an unpleasant and painful task, but it is now a *duty* on their part to do all in their power to give beneficial effect to the law, and if only zeal and courage with discretion be brought to the work, the new law must be a success; and we argue most favorably from the fact that the judges, one and all, have joined with such harmony towards a settled procedure.

It was the saying of a profound thinker, that, in respect to alterations in the law, "it is good not to try experiments except the necessity be urgent or the utility evident." We agree in this, and will call attention to a few matters showing, we think, conclusively that some change was called for, and that the substitute for the old procedure is vastly superior to the latter, and more calculated to render, in the language of the Attorney-General, "the administration of criminal justice more expeditious and satisfactory."

Who will not admit that it is a matter of high concern that persons in prison should be speedily tried; if innocent, they have the earliest opportunity for showing it; if guilty, their prompt punishment is secured, a matter of almost equal importance. If the offence be trifling, the time of imprisonment between committal and trial will often be a far greater punishment than the offence calls for. Imprisonment in a common gaol, it will also be admitted, is calculated to injure and deteriorate the position and character of any man, whether he be innocent or whether about to enter on the career of crime; and with the young, the associations of a prison are commonly productive of the most disastrous results, for young persons are brought, it may be for the first time, in contact with criminals and tainted with intercourse with them, or the vicious youth becomes hardened in vice by association with old criminals, or criminals more hardened than himself.

The expense of supporting persons in the common gaols is very great, and is borne by the localities, and it was impossible to guard against lengthened imprisonment without trial,

while persons charged with crime could only be tried at the regular courts.

All these manifest evils—too manifest to need more than naming to shew that some remedy was necessary—the act under consideration is well calculated to remedy. Take the case of an innocent person committed for trial after the close of a criminal court. He might under the old law, however ready and anxious for trial, be obliged to remain in gaol some four months before being tried; now he can within a few days be tried before the County Judges' criminal court, and have the opportunity of at once establishing his innocence. As to the nature of the tribunal, what intelligent man, conscious of innocence, would not prefer being tried before an educated man, trained to the investigation of facts and above the reach of irregular influences rather than by a number of men, taken from the general community, utterly unacquainted with the investigation of facts, and with but little scope for the exercise of their reasoning powers.

Again, a trifling larceny or other offence is committed. The party arrested is perhaps unable to procure bail (as must often be the case in a moving population, or when it is recruited by emigration), and has to undergo months of imprisonment when probably his sentence would be only for a few days. We know of many instances of cruel hardships in cases of this kind without any means of relief. Under the present law it is quite possible that the prisoner can be tried and sentenced to appropriate punishment within forty-eight hours after his commitment. We need not enlarge upon the evils of protracted imprisonment, and the mingling of the young with the more hardened criminals. The point was well put by Mr. Justice Gwynne in his address to the grand jury at the "Frontenac Assizes:—

"Grand juries," said the learned judge, "will have reason to rejoice in the diminution of labor falling upon them when the act shall have come into perfect operation, and the accused parties will have equal reason to rejoice that an opportunity is presented them of relieving themselves from that confinement previous to trial, which the old mode of procedure necessitated: much of the evil incident to the incarceration of persons who may be innocent with those who may be guilty, and of those guilty of minor offences with those who may be guilty of more heinous offences and arising from the associations and intercommunications of vice thus introduced will be also avoided."

The saving of expenses is the lowest ground that can be taken, but is probably the ground that will be most operative with people in general—for what may be refused to the soundest argument will often be promptly conceded to a popular cry for economy or a business-like necessity. We do not desire to undervalue economy in administration, but would not give undue prominence to an argument upon it, when the proposition, as in this case, is plainly recommended by higher considerations; but that there will be an enormous saving in gaol accounts for the maintenance of prisoners under the new law cannot be doubted. We have heard it estimated at fifty per cent. or more, and from the enquiries we have made think the estimate not excessive. The diminution of cases for the regular courts will also effect a saving, and it must be a considerable one, seeing that some sixty jurors as well as the officers of the courts are under daily pay, and if a number of prisoners are to be tried the court must be necessarily delayed; all this without speaking of the loss and the delay to suitors and witnesses in civil cases. Not that the work of the new court is to be done for nothing,—the ministerial officers engaged must be paid, and it would be wise and just to pay them liberally,—but it would take the expense of a great many trials before the County Judge to equal the cost of a single day at the assizes or sessions.

The County Judge's criminal court will be, if we may be permitted the expression, *a court of perennial gaol delivery:* a key always at hand to open the prison doors to the innocent; and in this aspect alone *any* outlay necessary in making the tribunal thoroughly efficient and safe would be amply justified.

The new law has been most favorably received by the thinking men, and so far has been, again to use the language of Mr. Justice Gwynne, "eminently successful, and prisoners have largely availed themselves of the opportunity afforded them for a special trial; that success will continue to attend the measure commensurate with so good a beginning, there is every reason to hope and believe."

There are many considerations in respect to the new law upon which we shall have occasion to remark hereafter; at present we must bring

this article to a close by invoking the judges and officers connected with the new jurisdiction, and upon whom the duty of carrying out the act devolves, to be *earnest and zealous* in endeavouring to secure all the benefits it was designed by its author to accomplish, and which the government of this Province is bent on securing. The act at present may be said in a certain sense to be upon trial; it may, and with wise and careful administration must remain a permanent addition to our system of criminal jurisprudence, but it *may* be brought into disrepute and its vitality destroyed. Amongst all the wise utterances of Lord Bacon there is none more true than this, "that the life of a law lies in the due execution and administration of it," and it is well that it should be known and felt that with the County Judges and County Attorneys rests the administration of this, one of the most important criminal acts on the statute book of Canada.

COUNTY JUDGES' CRIMINAL COURTS.

The following is an extract from the address of the Hon. Mr. Justice Gwynne to the Grand Jury at the last Assizes for the County of Frontenac:—

"It is proper, gentlemen, that I should draw your attention to recent legislation, with a view to facilitate the administration of criminal justice. The legislature of United Canada had from time to time passed various acts having this object in view, which have very materially diminished the labours of grand jurors; but a further step in advance has been made by the Dominion Legislature in its last session by the enactment of a law entitled 'An Act for the more speedy trial in certain cases of persons charged with felonies and misdemeanours in the Provinces of Ontario and Quebec.' The idea of this enactment emanated, I believe, from the head of the government of this Province, who (the matter being within the jurisdiction of the Dominion Legislature) procured the introduction of the bill for the purpose into the house by the government of the Dominion, and it is gratifying to see that its provisions were approved and promptly adopted in reference to the Province of Quebec. By this act it is provided that any person committed for trial on a charge of being guilty of any offence which may be tried at a court of general sessions of the peace, may, with his own consent, be tried out of sessions, and if convicted, be sentenced by the judge of the county court. It is made the duty of the sheriff immediately upon the party being committed to his custody to communicate the fact and the offence charged to the judge of the county court who is thereupon required to have the accused brought before him, and to give him the opportunity, if he chooses to avail himself of it, of undergoing a speedy trial before the judge alone without a jury. During the short time that the Act has been in force it has proved to be eminently successful, and prisoners have largely availed themselves of the opportunity thus afforded to them. That success will continue to attend the measure, commensurate with so good a beginning, there is every reason to hope and believe. The Judge sitting upon any such trial, for all the purposes thereof, and the proceedings connected therewith or relating thereto, is constituted a Court of Record. As such, he will have the incidental power of establishing such rules for the regulation of proceedings under that statute as he shall deem expedient and best calculated to advance the object of the Act. Where there are so many courts it is obviously much to be desired that a uniform code of rules should prevail in all the courts; uniformity of procedure in all courts of co-ordinate jurisdiction is always desirable, but in matters of criminal procedure it seems to be essentially necessary, lest a slipshod mode of administering criminal justice, which is far from the intention and design of the act, should grow up, which would mar its provisions, deform its symmetry, and bring it into disrepute. It is pleasing to see, as I learn is the fact, that the gentlemen upon whom devolves the duty of giving effect to the Act, recognise the importance of the establishment of such a uniform code of rules, and that the county judges themselves have undertaken the task of agreeing upon a code which will be enacted by each court as the mode of procedure to be adopted in it so that the requisite uniformity may be preserved. As courts of record they no doubt possess this power, without any legislative provision for the purpose There is reason, then, I say to hope and believe, that under the co-operative action of all the learned judges of the county courts, the object of the Legislatute will be attained, and success will continue to attend the measure. Grand juries will have reason to rejoice in the diminution of labor falling upon them when the act shall have come into perfect operation, and the accused parties will have equal reason to rejoice that an opportunity is presented them of relieving themselves from that confinement previous to trial, which the old mode of procedure necessitated; much of the evil incident to the incarceration of persons who may be innocent with those who

may be guilty, and of those guilty of minor offences with those who may be guilty of more heinous offences and arising from the associations and intercommunications of vice thus introduced will be also avoided."

The rules referred to were originally prepared by Judges Gowan, Jones and Hughes, the three senior members of "The Board of County Judges" for use in their own counties, but, at the instance of the Attorney-General, Judge Gowan the chairman of the Board, sought the co-operation of all the County Judges in securing a uniform procedure under the act. Every County Judge in Ontario has, we are glad to learn, responded to Judge Gowan's suggestion by adopting the Rules, and now the "object so much to be desired, a uniform Code of Rules" prevails in all the Courts, a matter "essentially necessary in the administration of criminal justice."

LAW SOCIETY—MICHAELMAS TERM, 1869.

The following is the result for the examinations this Term:

CALLS TO THE BAR.

J. T. Garrow, Goderich; George Gibbons, London; Chas. Moss, Toronto; W. W. Fitzgerald, London (without oral examination). H. J. Woodside, Toronto: H. Lapierre, Ottawa; J. R. Wilson; Geo. Kerr, jun., Perth; Samuel Burdett, Belleville; J. H. King, B.A., Berlin; Wm. Davidson, B.A., Berlin: Wm. Watt, B.A., Brantford; W. G. Hannah, Toronto; W. Dudley, Newmarket; Charles E. Anderson (Quebec Bar).

CERTIFICATES OF ADMISSION.

W. G. P. Cassels, B.A., Toronto; J. R. Wilson, B.A., Alexandria; H. J. Woodside, Toronto; W. W. Fitzgerald, London; W. Fitzgerald, B.A., Toronto; George Gibbons, London; George Kerr, jun., Perth; J. W. Sharpe, Toronto (without oral examination). Henry Carscallen, Hamilton; A. Williams, B.A., Toronto; A. Keating, Barrie; G. Elliot, Toronto; Wm. Watt, B.A., Brantford; A. W. Francis, Toronto; H. C. Greene, Toronto; T. D. Delamere, M.A., Toronto; Peter Barker, B.A., Toronto; Wm. Davidson, B.A, Berlin; W. G. Hannah, Toronto; H. P. Hill, Ottawa; J. A. W. Hatton, Peterboro'; E. B. Sanders, Barrie.

SCHOLARSHIPS.

Fourth Year

Maximum number of marks 400.

Samuel R. Clark (Scholarship)	335

Third Year.

Maximum number of marks 320.

John Crevar (Scholarship)	288
G. W. Badgerow	279
Francis Chrysler	264
W. H. Bartram	245

Second Year.

R. M. Fleming (Scholarship)	286
John Akers	245

First Year.

Wm. Hogg (Scholarship)	290

Chief Justice Richards having been granted six months leave of absence, was not in Court since the first Friday of this Term. Mr. Justice Morrison, senior Pusine Judge of the Court of Queen's Bench, taking his place.

We sincerely trust that the cessation from his arduous duties, for at least two Terms, will have the effect of restoring, in a great measure, the health of the learned Chief Justice, which has been in a very unsatisfactory state for some years past. His absence will be a great loss to the Court, but none will grudge him a holiday, and all will welcome his return in renewed health and strength.

The Court of Queen's Bench, in giving judgment in a recent case, when discussing the right of Courts of Quarter Sessions to grant new trials, incidentally alluded to a practice which is as derogatory to the dignity of the Bench as it is alien to the traditions of the honorable profession to which we belong:

"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 make 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 administration

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

The duty of counsel is not to try "to make the worse appear the better cause," but to assist the Court in arriving at a proper decision. Attempts to mislead juries recoil on the heads of the perpetrators, who are sooner or later found out, and then woe betide their clients. Many are the advantages of our system of amalgamating the professions, let us try as much as possible to avoid the evils which may, unless restrained by close attention to professional ethics, readily spring from it.

BILLS BEFORE THE LEGISLATURE.

The following Bills are now under the consideration of the Local Legislature. The Act to Amend the law of Evidence, which we give below was introduced by Mr. Blake. There is also another to the same effect, brought in by Mr. Clarke, which having passed the second reading, after strong opposition from the Attorney General and others in the government, was, together with Mr. Blake's bill, referred to a select committee:—

An Act to amend the law of Evidence.

Whereas the inquiry after truth in civil cases in the Courts of Justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony, and it is expedient to amend the law of evidence in this Province: Therefore her Majesty, &c., enacts as follows:

1. No person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence either in person or by deposition, according to the practice of the Court on the trial of any issue joined, or of any matter or question, or on any enquiry arising in any civil suit, action or proceeding in any Court or before any judge, jury, sheriff, coroner, magistrate, officer or person, having by law or by consent of parties authority to hear, receive and examine evidence, but that every person so elected may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question or in the event of the trial of any issue, matter, question or enquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence.

2. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any civil suit, action or proceeding in any Court of Justice, or before any person having by law or by consent of parties having authority to hear, receive and examine evidence, the parties thereto and the persons in whose behalf, any such suit, action or proceeding may be brought or defended shall, *except* as hereinafter excepted, be competent and compellable to give evidence either *viva voce* or by deposition, and the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action or proceeding may be brought or instituted or opposed shall, *except* as hereinafter excepted, be competent and compellable to give evidence either *viva voce* or by deposition according to the practice of the Court on behalf of either or any of the parties to the said suit, action or other proceeding.

3. Nothing herein contained shall in any civil proceeding render any person compellable to answer any question tending to criminate himself or to subject him to prosecution for any penalty.

4. Nothing hereinbefore contained shall apply to any action, suit, proceeding in any Court of Common Law instituted in consequence of adultery or to any action for breach of promise of marriage, nor shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any proceeding instituted in consequence of adultery.

5. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

6. Sections three, four, five, and eighteen of the Act, chapter thirty-two of the Consolidated Statutes of Upper Canada, entitled, An Act respecting Witnesses and Evidence, are hereby repealed.

Mr. Blake also brings in the following Bill

An Act to make better provision for the realization of the debts of deceased persons out of their lands.

Whereas it is expedient, &c.: Therefore Her Majesty, &c., enacts as follows:

1. In this Act, the words, "the personal representative," mean the person to whom letters of administration of the estate, or letters probate of the will of any deceased person, are granted by any Surrogate Court of Ontario; the word "land" means any freehold, interest or estate, legal or equitable in any land in Ontario; the word "beneficiary" means any person interested as heir-at-law, or under the will of any deceased person in any

land, or any one claiming, by devise or descent, under any person so interested.

2. The personal representative or any one or more of the personal representatives may, at any time, file in the Surrogate Court by which the letters were granted, the following papers, all verified under oath:—

(1). A detailed inventory of the personal estate of the deceased, shewing the value of each item;

(2). A detailed statement of the debts and funeral and testamentary expenses of the deceased;

(3). A detailed statement of the lands of the deceased, showing the supposed interest of the deceased in each parcel, and the estimated value of such interest, and the amount of incumbrance, if any, on the parcel, and showing the order in which it would be most for the advantage of the beneficiaries that the lands should be sold;

(4). A statement showing such further particulars as shall be proper for the information of the Judge.

3 Any creditor of the deceased may, at any time after the expiration of six months from the date of the grant of letters, file in the Surrogate Court by which the letters were granted, an affidavit showing that he is such creditor; that he has applied to one of the personal representatives for payment of his debt; that it has not been paid, and that in his belief, the personal estate of the deceased is insufficient to pay the debts of the deceased, and may thereupon apply *ex parte* to the said Court for an order directing the personal representative to file in the said Court, the several statements mentioned in the second clause of this Act.

4. Upon such application, the Judge shall if the affidavit is satisfactory, make an order directing the personal representative to file the said statements in the said Court within fourteen days after the service on him of such order.

5. In case there is more than one personal representative and one or more of the personal representatives is absent from the Province of Ontario, or cannot be found, the Judge may dispense with service of any process, under this Act, on such one or more of the personal representatives.

6. The personal representative shall file the said statements, verified under oath, within the time limited, or such further time as, on his application made during the said fourteen days, on two clear days' notice to the creditor, the Judge may allow.

7. In case the personal representative makes default in complying with the said order, or the statements filed by him are unsatisfactory, the Judge shall, on the application of the creditor, order that the personal representative do attend before him, or before the Registrar of the said Court, with the books and papers of the estate for examination, at a time fixed by the order, and the personal representative, in upon due service of such order, shall attend, pursuance thereof, with such books and papers and may be examined on oath, on behalf of the creditor, before the Judge or Registrar touching the various matters to be comprised in the said statements, and shall answer all such relevant questions as may be proposed to him, and his examination shall be reduced to writing, and signed by him, and by the Judge or Registrar.

8. [Representative may be committed if he disobeys Judge's order.]

9. In case the statements made by the personal representative are incomplete, the creditor may file statements, verified under oath in completion thereof.

10. At any time, after the filing of the statements, the personal representative or any creditor of the deceased, may apply to the Judge for an order for the appointment of a real representative of the deceased, and the sale of so much of the lands of the deceased, as having regard to the value of the personal estate, may be necessary for the payments of the debts.

11. At least seven days' notice of such application shall be given by the applicant to one or more of the beneficiaries, and also to the personal representative, if he be not the applicant.

12. Upon the hearing of the application, the Judge may require any other or others of the beneficiaries to be served with notice thereof; and he may, in case it is made to appear to him that all the beneficiaries are absent from the Province of Ontario, or cannot be found, dispense with service of notice on any of them, and he may require further evidence on any of the questions before him, and he may adjourn the hearing of the application.

13. Every person notified shall be deemed a party to the proceedings; and any beneficiary, though not notified, may attend the proceedings as a party, and any beneficiary so attending, shall be deemed a party to the proceedings.

14. In case two or more distinct applications for any order authorised by this Act are made, the Judge shall have power to consolidate the applications, and to make such orders and give such directions as to the prosecution thereof, as shall seem best adapted for the speedy and economical disposal thereof.

15. Upon any application for any order authorised by this Act, the Judge may, at the instance of any of the parties, or for his own information, require the attendance of, and examine, or cause or permit to be examined, on oath or affirmation, as the case may be, any of the parties and witnesses *viva voce*, or by interrogatories; and the Judge may, by writ of *subpœna* or *subpœna duces tecum*, as the case may be, command such atttendance, and cause any deeds, evidences or writings to be produced before himself or otherwise.

16. [Powers of Judge to compel attendance, be the same as in other courts.]

17. The enquiry to be had before the Judge as to the value of the personal estate, and the amount of the debts and funeral and testamentary expenses, shall be of such general character as may be sufficient to enable the Judge to arrive at approximate results, and shall not involve an administration of the estate; and if, upon such general enquiry, the the Judge finds that there are complicated or contested matters without a determination on which he is unable to come to a conclusion as to the order to be made, he may direct that proceedings shall be taken in the proper Court for the administration of the personal estate of the deceased, and may in the meantime adjourn the application.

18. Upon the final hearing of the application for an order for the appointment of a Real Representative, and for the sale of lands, the Judge shall, if it appears to him that the personal estate is insufficient for the payment of the debts, make an order for the appointment of a real representative of the deceased, and for the sale of so much, and such part of the lands to be specified in the order, as in his judgment it may having regard to the amount of the personal estate, be necessary to sell, in order to pay the debts, funeral and testamentary expenses, and the expenses of administration, and the order shall be in the form contained in Schedule A to this Act.

19. In case the personal representative, or any one or more of the personal representatives, is or are willing to become the real representative, he or they shall have the *prima facie* right to be appointed, but it shall not be obligatory on the Judge to appoint him or them, if for any reason the Judge shall be of opinion that it would be inexpedient to do so.

20. The sale shall be by public auction, for cash, according to the standing particulars and conditions of sale contained in Schedule B to this Act, except in so far as the same may in any case be varied by the Judge.

21. Upon the same application on which the order is made, the Judge shall settle the particulars and conditions of sale, name the auctioneer, and settle the advertisement or advertisements of sale, which shall be signed by him, and which shall be published by the real representative for at least three months before the sale, in the *Ontario Gazette*, and in some newspaper to be named by the Judge in each county where the lands lie, and in such other ways, if any, as the Judge shall direct.

22. The advertisement shall contain the following particulars:—

(1). The style of the matter.

(2). That the sale is in pursuance of an order of the Judge.

(3). The time and place of sale.

(4). A short and true description of the land to be sold, and a statement of the interest therein which is to be sold.

(5). The manner in which the land is to be sold, whether in one lot or several, and if in several, in how many, and what lots, and in what order.

(6.) Any particulars in which the proposed conditions of sale differ from the standing particulars and conditions of sale.

23. [Judge may change auctioneer.]

24. Forthwith, after the making of the order, the real representative shall procure and forward to the proper Registry Office for registration, a duplicate thereof under the seal of the Court; and each such duplicate shall be registered by the proper Registrar, against every lot within his county comprised in it, on payment of the sum of fifty cents for each lot.

25. Every instrument executed by any beneficiary, after the registration of the order for sale, or executed before, and not registered in the proper Registry Office at the time of the registration of the order for sale, and every conveyance upon a sale under any execution against the lands of any beneficiary, executed by the Sheriff after the registration of the order for sale, or executed before, and not registered in the proper Registry Office at the time of the registration of the order for sale, shall be fraudulent and void, as against the title acquired upon a sale under the order.

26. Every instrument executed by any beneficiary, and registered before the registration of the order for sale, and every conveyance made by the Sheriff upon a sale under any execution against the lands of the beneficiary, and registered before the registration of the order for sale, shall be valid, void or voidable, as against the title acquired upon a sale under the order, according as the same would under the law in force at the time of the passing of this Act, have been valid, void or voidable at law or in equity, as against the claims of creditors of the deceased.

27. In case it appears that any such instrument or conveyance as is mentioned in the last preceding clause of this Act has been registered before the registration of the order for sale, or in case it appears that the title of the deceased is disputed by some person setting up an adverse claim, the real representative, or any of the parties may apply to the Judge for an order that the Real Representative shall take proceedings to establish the right to sell; and if the Judge so orders, the Real Representative shall file a bill or present a petition, under the Act for quieting titles, in the Court of Chancery for Ontario, for that purpose; and the said Court shall have jurisdiction at his instance to decide upon the validity of the instrument or conveyance, or of the adverse claim set up, subject to the same appeal as in other cases in the said Courts, and in the meantime the Judge shall adjourn the sale

under the order of the land which is the subject of the instrument or conveyance, or of the adverse claim.

28. After the sale is concluded, the auctioneer shall make an affidavit in the form contained in Schedule C to this Act.

29. After any sale under this Act, the real representative shall, within seven days (and in case of default by him, the purchaser or any other person interested, may, at any time after seven days,) file in the Court the auctioneer's affidavit, and affidavits proving the due advertisement, and proving the contract of sale.

30. At any time during the seven days next after the filing of such affidavits, any party to the proceedings, or any beneficiary, may apply to the Judge on notice to the real representative and the purchaser, for an order to set aside the sale, and for a re-sale, on the ground that the sale was not duly advertised, or was not made fairly, openly, or in a proper manner.

31. In case such application is made, the Judge shall, if it appears to him that the sale was not duly advertised, or was not made fairly, openly, or in a proper manner, set aside the same and order a re-sale.

32. In case such application is not made, or fails, the sale shall, at the expiration of seven days after the filing of such affidavits, stand confirmed.

33. The purchaser may, within seven days after the confirmation of the sale, demand an abstract of title from the vendor; and if he does not so make such demand, he shall be deemed to have accepted the title.

34. If the purchaser does so make such demand, the vendor shall forthwith comply with the same, and the purchaser may, within seven days, serve objections to the abstract, and if he does not so serve such objections, he shall be deemed to have accepted the abstract as sufficient.

35. If the purchaser does serve such objections, the vendor shall answer them within fourteen days from the date of service; and if the purchaser is still dissatisfied, any of the parties may obtain from the Judge an appointment to consider the abstract.

36. The Judge shall determine all questions upon the abstract, and the sufficiency thereof, and if desired by the purchaser may require the vendor to make the same as perfect as he can; and if the vendor neglects or refuses to do so, may permit the purchaser to supply defects therein, at the vendor's expense.

37. The Judge shall mark the objections allowed or disallowed, as the case may be, and when he finds the abstract perfect, or as perfect as the vendor can make it, he shall certify to that effect at the foot, or on the back thereof.

38. After the abstract is allowed, or is accepted by the purchaser as sufficient, no objection to the abstract shall be allowed.

39. After the abstract is allowed, or is accepted by the purchaser, the verification shall be proceeded with, and the vendor shall with all diligence, afford the purchaser all the means of verification in his possession, in the manner and according to the practice usual with conveyancers, and having done so he may serve a notice on the purchaser to make his objections or requisitions, if any.

40. The purchaser may, within seven days thereafter, serve his objections or requisitions; and if he does not so serve the same, he shall be deemed to have accepted the title.

41. If the purchaser does so serve the same, the like course is to be followed upon the same as is hereinbefore provided, in relation to the abstract.

42. After the title is accepted or allowed, no objection thereto shall be allowed.

43. At any time after the title is accepted or allowed, the vendor or any person interested, may apply to the Judge on seven days' notice, for an order for the payment by the purchaser of any part of the purchase-money which is due and unpaid, and the Judge may order payment thereof to the vendor; and in default of payment within seven days after the date of such order, writs of execution for the recovery thereof, may issue under the seal of the said Court, in like manner as such writs issue on judgments recovered in the Courts of Common Law.

44. At any time after the title is accepted or allowed, the vendor or any person interested may apply to the Judge on seven days' notice, for an order for the delivery of the possession of the lands to the vendor, by any beneficiary who may be in the possession thereof, in order to the delivery by the vendor of the lands to the purchaser; and the Judge shall order the delivery of such property to the vendor; and in default of such delivery, within seven days after the date of such order, a writ or writs of *habere facias possessionem*, may issue under the seal of the said Court, for the recovery thereof, in like manner as such writs issue on judgments recovered in the Courts of Common Law in actions of ejectment.

45. At any time after the title is accepted or allowed, and the purchaser has paid his purchase-money, he may apply to the Judge on seven days' notice for an order for the delivery to him of the possession of the lands by the vendor, if the vendor be in possession thereof, or by any beneficiary who may be in possession thereof, and the Judge shall order such delivery; and in default of such delivery, within seven days after the date of such order, a writ or writs of *habere facias possessionem*, may issue under the seal of the said Court for the recovery thereof, in like manner as such writs issue on judgments recovered in the Courts of Common Law in actions of ejectment.

46. At any time after the confirmation of

the sale, the real representative may, on payment of the purchase-money, execute a conveyance to the purchaser of the premises sold, and the Judge shall certify on the margin of the first page of such conveyance, under his hand, and the seal of the Court, that the sale thereby made has been confirmed.

47. The conveyance so executed shall vest in the purchaser and his heirs, all the estate which was of the deceased at the time of his death, in the land, as effectually as if such conveyance had been executed by all the beneficiaries, as granting parties; and it shall not be necessary for any person claiming under the conveyance to produce or prove, in order to establish the conveyance, anything beyond the order for sale, and the conveyance so certified as aforesaid.

48. In proceedings under this Act, the Judge shall have power to determine how the costs of the proceedings shall be borne and paid, and may order them to be paid out of the estate of the deceased or by any of the parties, or partly out of the estate and partly by any of the parties.

49. The proceeds of any sale under this Act shall be applied by the real representative in or towards the payment of any costs ordered by the Judge to be paid thereout, and of the costs of the sale, and thereafter in or towards the payment of the debts and funeral and testamentary expenses of the deceased, in the same manner as the same should be applied if the said proceeds were personal estate come to the hands of the real representative, and the real representative shall be liable to the creditors of the deceased in respect of the said proceeds in the same manner and to the same extent as the personal representative would be liable to such creditors in respect of personal estate come to his hands; but the said proceeds shall, subject to the application thereof aforesaid, be deemed and taken to be the proceeds of the real estate of the beneficiaries in the hands of the real representative as trustee for the beneficiaries.

50. [Real representative to give bond as security in form given.]

51. [Penalty in bond to be double the value of lands. Judge may direct as to bonds.]

52. [If condition broken, bond to be assigned by Judge's order for suit.]

53. [Real representative may be removed, &c., on seven days' notice, and new one appointed, &c.]

54. The Judge may allow to the real representative a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the discharge of the duties devolving on him as real representative, and therefor, may make an order or orders from time to time, and the amount so allowed may be returned by, and shall be allowed to the real representative in passing his accounts.

tion for the appointment of a Real Representative, and for a sale of lands, or to whom notice of such an application has been given, or who has appeared on such an application, may appeal to the Court of Chancery from the order made on such application within fourteen days from the date of such order.

56. Any beneficiary to whom no notice of an application for the appointment of a real representative, and for a sale of lands has been given, and who has not appeared on such application, may at any time before the sale apply to the Court of Chancery to reverse, vary, or suspend the order made on such application.

57. Any person affected by any order or ruling of a Judge made on any application, or in any proceeding other than an application for the appointment of a real representative and for the sale of lands, may appeal to the Court of Chancery for such order or ruling within seven days from the date thereof.

58. [Chancery may reverse, vary, &c.]

59. In case it appears that for any reason the proceeds of the land sold under any order for sale are insufficient to pay the debts, funeral and testamentary expenses and the expenses of administration, the real representative, or any other person who might have made the original application, may apply to the Judge on affidavits of the material facts for an order for the sale of other lands of the deceased.

60. The proceedings on such application shall be conducted as nearly as may be in like manner as proceedings on an original application under this Act, dispensing with all such proofs as have been furnished on the original application.

61. The Judge shall have like powers with reference to the subject matter of such application as are conferred on him in respect of the original application.

62. After this Act takes effect, no writ of *fieri facias de terris* shall issue on any judgment recovered against a deceased person in his lifetime and revived against his personal representative, or on any judgment recovered against the personal representative of a deceased person in his representative capacity.

63. Nothing in this Act contained shall in anywise affect or impair the jurisdiction of the Court of Chancery in the administration of the estates of deceased persons.

64. No order for the appointment of a real representative, or for the sale of lands of a deceased person, shall be made under this Act, after a decree for the administration of the real estate of the deceased person has been made.

65. [Judges of Surrogate Court to take fees, as in Schedule.]

66. [Registrars, Solicitors, &c., to have certain fees.]

67. [Judges in Chancery may make orders

68. All proceedings under this Act may be styled, "In the matter of the lands of (A.B.), a deceased debtor, and of the Deceased Debtors' Land Act, 1869."

69. [Judges, Commissioners, &c., may administer oaths.]

70. This Act shall come into force on the first day of February, in A.D. 1870, and may be cited as "The Deceased Debtors' Lands Act, 1869."

SCHEDULE A.

In the matter of (A.B.), a deceased debtor, and of the Deceased Debtors' Lands Act, 1869.

Upon the application of (C. D.) on notice to (E. F.), and in the presence of (C. D., E. F. and G. H.), I do hereby appoint (J. K.) real representative of the said (A. B.), and do order a sale of the following lands of the said (A. B.), that is to say (*insert short description*) ——.

(*Judge's signature*), [L. S.]
Judge of the Surrogate Court
of the County of ——.

SCHEDULE B.

1. No person shall advance less than $10 at any bidding under $500, nor less than $20 at any bidding over $500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser, and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3. The parties to the proceedings, and the beneficiaries, with the exception of the vendor, and (naming any parties in a fiduciary situation), are to be at liberty to bid.

4. The purchaser shall, at the time of sale, pay down to the vendor, if present, and if he be not present, to his solicitor, and if he be not present, to the auctioneer, a deposit in the proportion of $10 for every $100 of his purchase-money, and shall pay the remainder of the purchase-money within one month from the day of sale, and upon such payment the purchaser shall be entitled to the conveyance, and to be let into possession; the purchaser shall, at the time of sale, sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon shall be forfeited, and the premises may be re-sold, and the deficiency, if any, occasioned by such re-sale, together with all charges attending the same, or occasioned by the defaulter, shall be made good by the defaulter.

SCHEDULE C.

In the matter of (A. B.) a deceased debtor, and of the Deceased Debtors' Lands Act, 1869. I, (C. D.) of the —— of —— in the County of ——, and Province of Ontario, Auctioneer, make oath and say as follows:

1. At the time and place mentioned, and under the conditions of sale in the annexed particulars and conditions of sale in this cause, I offered for sale by public auction, the lands and premises described in the said annexed particulars of sale.

2. At the said sale, J. H. bid for the said lands the sum of ——, and being the highest bidder therefor, became and was declared to be the purchaser thereof, at the price or sum of ——.

3. The said sale was conducted by me in a fair, open and proper manner, and according to the best of my skill and judgment.

SCHEDULE D.

[Bond by real representative.]

SCHEDULE E.

Fees to Judge.

For every order upon personal representative to file statements	$0 50
For every order upon personal representative to attend for examination	1 00
For every order to commit or refusing to commit personal representative	2 00
For every order for appointment of real representative, and for sale of lands or for order that real representative take proceedings to establish right to sell, or for removing real representative	5 00
For every order directing what persons shall be served with notice	0 50
For every order consolidating applications	0 50
Every sitting for examination before the Judge of personal representative or of witnesses per hour	1 00
For every advertisement for sale	1 00
Every duplicate for registry of order for sale under seal of the Court	0 50
Every order made upon application to set aside sale	2 00
For appearing and indorsing every conveyance to be executed by real representative	1 00
For every bond executed by the real representative	0 50
For every order not previously provided for signed by the Judge	0 50
For hearing application of real representative for compensation	1 00

SELECTIONS.

BARON BRAMWELL'S OPINION OF TRIAL BY JURY.

The evidence given by Baron Bramwell before the Law Courts (Scotland) Commission as to trial by jury is worth attention. In answer to Mr. Shand's question, "In the majority of cases do you think that a trial before a jury or before a judge is to be preferred?" Baron Bramwell answers—"That is a very large question indeed. I think if I wanted the truth to be ascertained in that particular case, I should prefer an intelligent man who had been in the habit of exercising his faculties all his life on such questions to twelve men who had not been in the habit of exercising theirs, who might not be so intelligent men, who certainly have not been in the habit of exercising them together, farmers and others, who are very much fatigued from being taken and shut up in a hot court. If I wanted nothing but the truth in a particular case, I should prefer the verdict of the judge; and it seems to me impossible to doubt that he is the preferable tribunal. When I was first made a judge myself, I was very strongly in favour of trials being before a judge; but I am afraid that the jury is a crutch that I have been leaning on for so long a time that I have now got used to it, and I don't think I am as good a judge of the question as I was 18 years ago. Moreover, there is no doubt that trial by jury popularises the law. I remember a case before the House of Lords in which I was contending for a particular construction of a covenant, and my brother Willes was contending the other way, and the question put to me was, How was it possible that people should enter into so stringent a covenant as you contend for? I said, 'My lords, they will trust to that true court of equity, a jury, which, disregarding men's bargain and the law, will decide what is right in spite of all you say to them.' And it is so. I don't say that they do not regard the law, for I believe they do; but every man must feel that, although he may have the law on his side, he is in some peril if the justice of the case is not with him also. I think it would be difficult to discriminate between civil and criminal cases; and in criminal cases I think it is better that the judge should not be the man to find the prisoner guilty; but it is a very large question, and I feel some hesitation in offering an opinion about it."

In answer to a further question, "You have had no cause from your great experience to be dissatisfied with jury trials?" the learned baron answers—"No. There are cases in which juries go wrong; for instance, in an action against a railway company, they generally go wrong there; in actions for discharging a servant they generally go wrong; in actions by a tradesman against a gentleman in questions whether articles supplied were necessary to an infant or wife, they are sure to go wrong; in actions as to malicious prosecution, they are always wrong. You may say to them, 'The question is not whether the man is innocent, but whether there is absence of reasonable cause and malice, but in vain. They find for the innocent man."

In answer to Mr. Justice Willes' question—"And cases of running down?" Baron Bramwell replies—"There they generally find for the plaintiff, so much so, that a man who has run down another, if he is wise, will bring the action first. I remember one case particularly, in which the question was whether the man that recovered was free from blame, and there was blame in the other; and each recovered in the action where he was plaintiff."—*Law Times.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Davis v. Weller.

Staying proceedings until costs of former action paid.

An action was prosecuted to trial in name of a plaintiff, dead before the commencement of the suit, the attorney being ignorant of such fact, and the action having apparently been brought under a mistake of facts. The death of plaintiff being shewn at trial, the record was struck out by judge. An action was subsequently brought for same cause by the parties properly entitled to sue. *Held*, that this action was not vexatiously brought so as to entitle the defendant to stay proceedings in such second action until the costs of the first were paid.

[Chambers, October 16, 1869.]

An action was brought by Hosea B. Smith and William B. Smith, partners in trade, against the present defendant.

The defendant, Hosea B Smith, died between writ and declaration, and the suit was continued in the name of William B. Smith, as surviving partner.

The case was brought down to trial at the last Lindsay Assizes, but before the jury were sworn the defendant discovered that the plaintiff, William B. Smith, had been dead for some years. The judge thereupon declined to try the cause, and struck out the record.

The instructions for this action had been given by one William R. Smith, who had some connection with the firm, and who, as was contended on the part of the plaintiff in the proceedings hereafter referred to, had acted *bona fide*, though under a mistake as to the facts or as to the names in which the suit should be brought; though it was urged on the part of the defendant that he had attempted to personate William B. Smith, taking advantage of the similarity of the names.

An action was subsequently brought by the same attorney for the same cause of action as the former suit, in the name of the now plaintiff as the representative of the said Hosea B. Smith, as surviving partner of said firm. The defendant thereupon obtained a summons calling on the plaintiff to shew cause why all proceedings should not be stayed until the costs in the former

action of *Smith* v. *Weller* should be paid, and until security for costs should be given on the ground that the plaintiff resided in Montreal.

W. Sydney Smith shewed cause.

Hector Cameron supported the summons.

Hagarty, C. J., C. P.—I am of opinion that the suit of *Smith* v. *Weller* was carried down to the Lindsay Assizes in good faith, although clearly under a mistake. At these assizes the fact of plaintiff's death was discovered. Whether after such discovery William R. Smith acted in good faith or not does not affect my judgment. The learned judge declined to try the case, and it was struck out. There was no trial on the merits, and no legal determination of the suit. I think the security for costs in that suit must be practically unavailing to defendant. The subject is much discussed in *Hoare* v. *Dickson*, 7 C. P. 177. Wilde, C. J., says, "When a party has brought an action and has had an opportunity of trying that action on the merits, and has either failed upon the merits, or has withdrawn his case, and afterwards brings a second action for same cause, leaving the costs of the first action unpaid, the court will interpose its authority to prevent him from so harassing his opponent." Maule, J., says, "Can you find any case where a second action has been allowed to proceed after a decision *upon the merits* has been had and acquiesced in?" Counsel said, "There was no decision upon the merits here, the plaintiff was nonsuited." Maule, J., "Not upon a technical objection." In fact the nonsuit was upon the merits: *Melchart* v. *Halsey*, 3 Wils. 149; 2 W. Bl. 741, there cited is to same effect.

The late case of *Cobbett* v. *Warner*, L. R. 2 Q. B. 108, I think bears upon the same distinction as to whether the merits were tried in the first action; see the judgment delivered by Mellor, J., where he discusses the nature of the nonsuit in the first action.

As I am compelled to dispose of this motion to day, I have been unable to refer to some of the authorities cited. In a note to 2 Archbold's Pr. 1298, reference is made to *Dawson* v. *Sampson*, 2 Chit. 146, where the proceedings in the first action were set aside for irregularity, and the court refused to stay the proceedings in a second action; see also *Liversidge* v. *Goode*, 2 Dowl. P. C. 141.

In *Harrison's* C. L. P. Act, 448 (1st ed.), it is said in a note, "But a limitation of the practise is, that it is only exercised in cases where the previous ejectment has been tried, and not where the plaintiff in such previous ejectment abandoned his suit before trial, because in such cases there is little vexation and very little expense." Three of the cases cited seem hardly to support this distinction. I have not had time to refer to *Doe Blackburn* v. *Standish*, 2 Dowl. N. S. 26, and a manuscript case of our own Courts.

I decide the case on the general view of the law in *Hoare* v. *Dickson*, recognized in *Cobbett* v. *Warner*. I do not feel warranted on the state of the authorities, so far as I have had time to examine them, to stay proceedings, as asked, till the payment of the costs of a suit, never tried nor withdrawn by act of plaintiffs, nor by his attorney, determined and instituted, as I believe, in good faith, and only becoming unavailing in consequence of a mistake which destroyed (as it were) the whole proceeding as soon as discovered.

But I think the defendant is on other grounds entitled to security for the costs of this action, and proceedings must be stayed till such is given.

At plaintiff's suggestion I allow such security to be given by deposit of fifty pounds with the Master, to remain in court to abide the event of the suit, as a security to defendant, on the usual contingencies contained in the common order for security for costs.

Order accordingly.

MUNICIPAL CASE.

(Before His Honor James R. Gowan, Judge of the County Court of the County of Simcoe.)

In the matter of Appeal from the County Council of the County of Simcoe in Equalizing the Assessment Rolls.

Assessment Act of 1869, sec. 71—Equalization of Rolls—Procedure—Towns and Villages.

Held, in equalizing the rolls, although a difference is recognised by 32 Vic. cap. 26, sec. 71, between town and village property and country property, that as the valuation of the former is arbitrarily reduced by two-fifths, the duty of the County Council is to increase or decrease the aggregate valuations of townships, towns, and villages, as the rolls stand, as well as to make the statutory reduction with respect to the latter—town and village rolls being subject to equalization in the same way as townships.

Statement of the mode of procedure adopted in bringing the question for consideration in this case before the judge of the County Court under sub-sec. 3 of sec 71.

Remarks upon the difficulty, under the present system of assessment, of arriving at a fair equalization of the Assessment Rolls in different townships.

[Barrie, July 31, 1869.]

This was an appeal to the judge of the County Court of the County of Simcoe from the decision of the County Council of that County, under sec. 71 of the Assessment Act, of 1869, in equalising the assessment rolls for the preceding financial year. The facts of the case fully appear in the judgment of

Gowan, Co. J.—Finding no procedure laid down in the law by which the jurisdiction under sec. 71 of the Assessment Act of 1869 is given, I appointed a day to hear all parties interested and settle as to the course of procedure, having reference to the nature of the jurisdiction, and the time limited for hearing.

On the day appointed, the Reeves for the greater number of municipalities were present. The Warden also was present, but not as authorized for the purpose by the County Council.—Upon the appeal being lodged I stated my desire to hear the several municipalities, and that I was prepared either to hear them by counsel or by some member of the corporation, authorized to act for the body entitled to be heard, but that I could not listen to unauthorized advocacy or permit it before me. The appellants alone were represented by counsel. The reeves appeared in person on behalf of their several municipalities. I then required the appellants to hand in at once a full and specific declaration or statement of what was objected to in the equalization by the County Council, and what it was claimed ought to have been done; in fact, full particulars to

which they (the appellants) were to be confined in evidence, and I required similar declaration and claim from the other municipalities desiring to be heard and with the like object—these declarations were all put in—as the duty might be thrown upon me to equalize the whole assessment for the County. I further stated that I was prepared, so far as time would allow, to hear evidence submitted by any municipality to assist me to a just equalization, and I named the day when I would commence taking any evidence that might be submitted to me. In the course of the discussion as to the division of the time available for *viva voce* testimony, it was proposed to leave the matter in my hands upon the documentary evidence of a public character that I might call for, and that I was to proceed to hear and determine the matter of the appeal under the power and provisions of sub-sec. 8 of sec. 71, of the Assessment Act, it being understood that I might use my personal knowledge in such determination, and to this all the municipalities appearing assented.

The equalization made by the County Council, and the table upon which they acted, were put in evidence in the regular way and the rolls for 1868 were likewise produced, upon the call of the appellants, from the custody of the county clerk, who also subsequently furnished certain statements or abstracts from the rolls (the correctness of which I tested for myself).

No other evidence was given or tendered to me on behalf of any municipality in the county, and I have in fact been left to determine upon the same material that was or ought to have been before the County Council in making the equalization. And upon that material in the absence of any other evidence I have equalized the whole assessment of the county, and in so doing determined necessarily the specific matters appealed.

It was understood, I know, that I was not to go into the reasons why I had arrived at certain conclusions, why decided in a certain way—but simply to give judgment; yet, as I had necessarily to decide to the best of my ability the matter of law argued before me, I think it right to state the grounds which led my mind to a conclusion as to the proper construction of the law.

The assessments are made in each municipality by a local officer appointed for the purpose by the corporation of the town or township.

The work of twenty-three or more officers, each acting independently in performing a difficult duty, is not likely to present results showing a just relation between all the valuations throughout a county.

In respect to the question of value also, it is not easy to satisfy the judgment, and no two persons, I am sure, would be likely without conference or inter-communication, to arrive at similar results even upon similar material. In point of education, in soundness of judgment, and in fitness for the duty there must be a great diversity amongst the assessors.

The law not providing for the assessment for the whole county by a limited number of men, acting together and guided and governed by uniform principles, but by separate and independent valuators, it was obvious that great injustice might be wrought if every municipality was in effect, allowed to say how much it would contribute to a county rate, and so doubtless the provision in sec. 71, was made to enable the County Council so to deal with the valuations made by individual assessors, as to make them present a just basis in apportioning a county rate.

The section referred to shows how this is to be accomplished.

First. The rolls for the preceding year are to be examined by the Council of the County "for the purpose of ascertaining whether the valuations made by the assessors in each township, town or village bear a just relation to the valuation so made in all such townships, towns and villages."

Second. They must, according as justice may require, increase or decrease the aggregate valuations of property (of real and of personal property) in any township, town or village, by adding or deducting; so much *per centum* as may in their opinion be necessary to produce a just relation between all the valuations of real and personal estate throughout the county.

This duty it is made incumbent upon County Councils to perform, and the object to be accomplished is plainly indicated, viz:—That property set down in one or more townships or towns at half or one-tenth it may be of its value,—the valuations in other towns or townships being but 10 per cent, or some other figure under actual worth—may not be allowed to so remain, but by deducting from some, or adding to others, or otherwise by levelling up or down to some one standard, all may be brought into just relations of value over the whole County. In doing this, however, there is a restriction in the latter part of the clause, That the aggregate valuation for the whole county is not to be reduced; the figuring may be increased, but is not to be brought below the sum of the aggregate values on the rolls; the just relation in value spoken of in section 71, being produced by the action of the Council as stated therein.

Sub-section 2 discriminates between town and country property, declaring as I understand it, that town property as compared with country property, shall be arbitrarily reduced to three-fifths.

I am pressed with the difficulty of reconciling the language in the first and second sub-sections. But when I look at the obvious intention of the law, I cannot think the legislature invited and directed the Councils to do that which in the next line (if the sub-section is to be construed as leaving them, the County Council, only a ministerial duty as regards towns) they are prohibited from doing.

By the first sub-section, the council are to "examine the rolls of *towns*, villages, and townships." Why examine the rolls of *towns*, villages, and townships? Why examine the rolls of *towns* unless for the purpose after-mentioned? They are to see whether the valuations in the *towns* and villages (*towns* again) are in just relation to the valuations in all the *towns* and *villages* and townships in the county and they may *increase* or decrease the valuations in any, not a township only, but in any *town*, village or township adding or deducting, &c. Towns and villages are mentioned no less than four times in the clause, and in direct connection with town-

ships, and the power of the County Council to deal with them. If it was intended that County Councils should have no power to deal with towns and villages, I cannot think the language referred to would have been used. A strong argument against the construction contended for by the appellants, lies in this, that if section 2 is to be so read as to disable Councils from doing any more towards equalization than taking the interest on the amounts at 6 per cent and capitalizing at 10 per cent as the aggregate valuation for towns, it would be in the power of the assessor of any town or village, to fix the proportion payable by his municipality on a county rate, and the County Council would be bound simply to register the wrong. I can see neither reason nor justice in allowing councils to decrease or increase the aggregate valuations of township assessors, but disabling them from doing so in the case of town assessors. I thought, at first, that a solution might be found so as to give effect to every part of the clause, in a levelling down process, in this way, taking the town with the lowest aggregate valuation and decreasing the valuations in all other municipalities, so as to produce a just reduction in all the valuations; but then, this could not be done, for there is a plain and positive prohibition against reducing the aggregate valuation for the whole county as made by the assessors.

In the 3rd sub-sec. of same clause, *any local municipality* dissatisfied with the action of the Council in increasing valuation, may appeal. If the meaning of sub-sec. 2, be as contended for by the appellants, a town or village could not be affected by such a decision, but sub-sec. 3, plainly implies that they might be injuriously affected and on no other ground could the right of appeal given to them be justified.

The 72nd sec, plainly implies also that examination of the rolls of *all* municipalities is necessary in the process of equalizing the valuations in the several municipalities. For what purpose, if certain of them are to be taken at arbitrary valuations on the assessors' return? The question seems to me to answer itself.

Section 71 shows that a county rate is to be assessed equally on the whole ratable property of the County, and provides distinctly, that the amount of property returned on the rolls for the *townships*, towns and villages (as finally revised and equalized) is to be the basis upon which the apportionment is to be made, again implying the existence of the power to change the original returns.

I think to give effect to the intention of the Legislature the County Council should perform the duty in the order prescribed—first equalizing the valuations in the several municipalities, towns, townships and villages, as provided in first part of section 71—and then, after doing so, to make the deductions in respect to towns and villages directed in sub-sec. 2.

There is obviously a higher standard of value applicable to farm property than to village proderty, and so in the every day transactions of business it is estimated. Village property is subject to many incidents calculated to depreciate its value that property in the country is not liable to. A large share of town and village property is also perishable and in its nature subject to yearly depreciation. The land is not in general productive except when built upon, and cannot be turned to the profitable account that farm property can All these, it is true, enter into the element of value, and might well be considered in the first instance, but the Legislature has thought it right to fix arbitrarily a difference in value, and whether well-founded or not it must be acted upon.

The course which I think it was the duty of the County Council to follow, I myself have pursued in respect to towns. The County Judge acting in this matter of appeal is possibly invested with unrestricted power to equalize the assessment, as, in his opinion, may be just—the language is certainly broad enough to admit the view—"And such Judge shall equalize the whole assessment of the County." But I have thought it right and more in conformity with the true intention of the law, to be governed by the principle laid down in the law as to valuation respecting towns.

When this appeal was lodged I saw from the nature and extent of the enquiry, if *viva voce* testimony was to be submitted, and the short time allowed by law for making it, that it would be impossible to receive complete evidence from all interested, and evidence upon which I could with safety act, for I felt and I feel that if partial or incomplete testimony were laid before me, it would be worse than useless, and might possibly produce an impression upon my mind not calculated to assist me in arriving at a just equalization of the whole assessment of the County; nor could I have time to analyze and examine it properly, if at all. The costs, also, if the matter was gone into exhaustively, I knew would have been enormous, and these considerations and the wish expressed by all parties in the matter induced me to take it up in the way desired, and to endeavour to do justice to the best of my ability on materials submitted without insisting upon other evidence. I have endeavoured to justify the confidence placed in me, and nearly every day since the appeal was lodged I have been engaged in making, so far as time would permit, a thorough examination of all the rolls and documents before me. I cancannot help saying that the manner in which many of the rolls are got up is anything but creditable to assessors. I did not think it possible that such imperfect and slovenly work as some of the rolls exhibit could have been received from the hands of any assessor. And having made a most detailed examination of what each assessor has done, I must state my conviction that assessment under the present system forms, in my judgment, a most unreliable basis of action for county or other purposes.

I will not impose upon myself the painful task of expressing an opinion as to returns of value set upon property by men whose duties are plainly set down in the Act of Parliament, and who are required to verify on oath the full certificate necessary to be placed upon their completed roll; but I will say it is small wonder that year after year the County Councils find such difficulty in agreeing on an equalization, and that the equalization when made, is generally after a long struggle on the part of municipalities

to alter, and in the end is understood to be upon a compromise, or concession of some kind to secure the necessary majority. One can see in the probable conflict of opinion almost inevitable or the conflict of interests, in the possibility of combinations to secure results operating unjustly towards certain municipalities outside such combinations, and in other difficulties that surround the subject, suggesting obstacles to a just decision, a good reason for an appeal to some independent tribunal, beyond the reach of irregular influences; and, economy being an object, the County Judge was doubtless selected and empowered to decide, and however distasteful the duty, I must admit a right of appeal seems necessary under the present system of equalization.

For years past it would appear that no uniform course has been taken in respect to most of the municipalities in the County. I speak from a careful analysis I made of the apportionment by the County Council since 1861, exhibiting the proportion in each year both of aggregate valuations, and of the county rates in respect to each and every municipality in the County. I sought in vain for some clue therein to an apportionment, but could find none.

And now, after more than ten days of incessant labor in examining the assessment for the County and preparing tables therefrom and other work of the kind to assist me in reasoning upon the facts and figures before me, I have not entirely satisfied myself in the result arrived at, and I scarcely hope to satisfy the municipalities affected, but I know that what I have prepared approximates to a just equalized value for the whole County, and I think that whenever a reliable assessment is made of the whole County by persons acting on uniform principles and not subject to irregular influences or local direction, and with reasonable time for the work to be done, the figures I now present will, to a great extent, be justified.

In going over the work I found in the paper on which the County Council acted in equalizing many errors in addition, ranging from one dollar upwards, and in one case an error of no less than one hundred thousand dollars. These of course I set right.

The whole value for the County as equalized by me will be found increased from $11,702,285 to $14,809,739.86—and that is a valuation far under its real worth I incline to think, but did not consider I would be justified, as the matter stands before me, in raising it beyond the present figure.

The County Clerk, according to the direction of the Reeves, has furnished me with all the returns I called for, tabled from the public documents in his custody and he gave me some assistance in discovering where some of the errors in addition referred to were.

I believe a new rate may with facility be struck upon the figures I give, and I have spared no pains to work out all as fully in detail as is possible in minute and complex calculations.

Arrived at the close of a distasteful and very onerous duty, I have at least the consolation of knowing that the municipalities are saved a heavy outlay in the course that was taken; and as respects the payment for my labours in this protracted enquiry there certainly is much work given for a small sum of money—eight or nine dollars being all the Government will receive in stamps as an equivalent for my services in this matter of appeal.

LOWER CANADA REPORTS.

INSOLVENCY CASES.

In re Henry Davis et al., Insolvents v. E. Muir et al., Claimants.

Held:—That the nullity declared by paragraph 3 of section 8 of the Insolvent Act of 1864 is an absolute nullity, and a promissory note given in violation of the provisions of said paragraph is absolutely null and void *ab initio* even in the hands of a third party innocent holder before maturity.

[13 L. C. J. 184.]

This with two other similar cases, A. Milloy and M. Campbell claimants, came before the court in appeal from the award of the Assignee of the insolvent estate, James Court, rejecting the demand of the claimant, and denying his right to rank on the estate for the promissory note claimed on.

The facts of the case are as follows; About the month of June, 1867, the insolvents obtained from James Muir of Montreal, his accommodation notes in their favour for about $12,000, he taking from them at the time the ordinary receipts showing that they were accommodation notes.

About the 10th of January, 1868, seven days before the assignment by Davis, Welsh & Co., James Muir learning that they had suspended payment, with a view to protect himself from loss, as far as possible, on the above notes which were still outstanding, obtained from them in exchange for the receipts their notes made and antedated to correspond exactly both in amounts and dates with the accommodation notes for which the receipts were given and which had been got by them from Muir in June previous.

Three of the notes thus obtained by Muir, of about $2000 each, were transferred by him *sans recours* to the three claimants in question, viz., E. Muir, A. Milloy, and M. Campbell, who were at the time of the transfer his creditors, and as such took the notes by way of security for antecedent debt but before their apparent maturity and without any (positive) knowledge of their origin.

Shortly after the transfer of the notes by James Muir, as above, he himself became insolvent. Under these circumstances the holders of the accommodation notes got from him in June, and which were still outstanding, came in and ranked on Muir's estate as makers of the notes and on the estate of Davis, Welsh & Co., as the indorsers; and the holders of the notes got by James Muir from the insolvents in January, 1868, holding them as collateral security *sans recours* did not rank on James Muir's estate but filed their claims against the estate of the insolvents as the makers of these notes. Their right thus to rank is what was contested by the contestants in this case.

The grounds taken by the contestants were:

1. That the notes, being clearly given in violation of paragraph 3 of section 8 of the insolvent Act of 1864, were absolutely null and void *ab initio*.

2nd. That in any event the claimants could not be allowed to rank, as they had parted with no new consideration and incurred no new obligation on the strength of the notes, but had simply taken them as security for an antecedent debt, *causa lucrandi*, which did not constitute them holders for value as against the creditors of the estate.

The contestants cited Chitty, Bills 82, 88, 91, 94, Dorion and Macrae, 742. James' Insolvency Act of the United States, p. 153, 183.

The assignee held on both grounds that the claimants could not rank, and rejected their claims.

Torrance, J., without entering upon the second of these grounds, confirmed the judgment of the assignee in the three cases upon the first alone. After reading sub-section 3 of section 8, of the Insolvent Act, his Honour said that as to the transaction between James Muir and Davis, Welsh & Co., there was no doubt that it was an illegal attempt to create a security upon the estate of persons then insolvent. The judgment would therefore be confirmed with costs in all three cases.

Judgment of the assignee confirmed.

In re Catherine Morgan, Insolvent v. John Whyte, et al.

Held:—That the privilege of the landlord on the proceeds of the effects found on the premises leased, is not affected by the Insolvent Act of 1864, and has precedence over the privilege of the assignee and the insolvent for the costs of their respective discharges under the Act. [13 L. C. J., 187.]

In the case of Catherine Morgan, an insolvent, John Whyte, official assignee, prepared a first and final dividend sheet, in which he collocated himself for the sum of $45, for the costs of procuring his discharge as assignee, and also collocated the insolvent for a like sum of $45 for the costs of her discharge. The entire proceeds of the estate, with the exception of a balance of $31 61, were absorbed by these and other expenses of winding up.

The claimant, Biron, contested this collocation, claiming that the sum of $80, due him by the insolvent for rent, should have been collocated to him by privilege before the above mentioned two sums of $45, and praying that the dividend sheet be set aside, and a new sheet prepared, collocating him for $80, by privilege.

Both the assignee and the insolvent appeared by counsel and filed answers to the contestation, alleging, first, that it was not made within the six days allowed by law, and came too late; and, secondly, that the collocation of the two sums of $45 each as a first privilege had been made in accordance with law.

The parties went to proof before the assignee. The assignee filed an admission that the proceeds of the estate were the proceeds of goods and furniture found in the premises leased by Biron to the insolvent. The clerk of the assignee was examined to prove that the charge of $45 was the usual charge.

On the 2nd April, 1869, the assignee gave judgment both on his own claim for $45, and on the insolvent's claim for the same sum, holding 1st, that the contestation being fyled after the expiration of the six days allowed by law, was null; 2nd, that the assignee and the insolvent were respectively entitled by law to be collocated for the sum of $45, by privilege.

The contestant appealed from this decision.

Torrance, J.—The contesting creditor is the proprietor of the promises occupied by the insolvent. He has a claim for rent due, and objects to two items in the dividend sheet; 1st, the sum of $45 for the assignee's discharge; and, 2nd, a like sum of $45 for the insolvent's discharge. Sec. 5 of the Insolvent Act, sub-section 4, says, "in the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, which rank and privilege, upon whatever they may be legally founded, shall not be disturbed by the provisions of this Act." As to the costs of the insolvent's discharge, and the costs of winding up the estate, the Act simply says, that they shall be paid out of the assets. With respect to the time of fyling the contestation, it was not fyled too late. The Court is therefore of opinion to reverse the judgment of the assignee, and to maintain the contestation.

The judgment is as follows:

"I the undersigned Judge, etc., having heard etc., considering that the Insolvent Act, S. 5 S. S. 4, has declared that the rank and privilege of creditors shall not be disturbed by the provisions of said Act: considering that there is error in the dividend sheet prepared by the assignee John Whyte, of date 3rd March, 1869, inasmuch as the sum of $45 for assignee's discharge, and the sum of $45 for insolvent's discharge are made a first charge upon the assets of the insolvent, and before the privilege of the lessor, which privilege should have precedence, do annul and set aside said dividend sheet so far as concerns the said items, and do order that the said contestant be collocated by privilege and preference before the allowance and collocation of the said two items, with costs to the said contesting party, as well of his contestation before the said assignee as of the present appeal."

Judgment reversed.

UNITED STATES REPORTS.

SUPREME COURT, UNITED STATES.

Helme v. Life Insurance Co.

A custom among life insurance companies to allow thirty days' grace for the payment of premiums, notwithstanding a clause of forfeiture for non-payment on the day they become due exists in the policy, is valid to interpret the contract, and may be proven by the insured.

Evidence that the practice of the company was to give notice of the time at which the premiums fell due, and that they omitted to do so on the occurrence of the default in question, or that they so dealt with the insured as to put her off her guard, is admissable as evidence, from which the jury may draw the conclusion that the insured was misled by the company, the company cannot take advantage of a default which they have themselves contributed to or encouraged.

Error to the District Court of Philadelphia.

Opinion by Thompson, C. J.

The plaintiff below offered on the trial to prove a custom among life insurance companies to allow thirty days grace for payment of premiums due,

even when a clause of forfeiture for non-payment at the day exists. The rejection of the offer by the court forms the first bill of exceptions and assignments of error to be considered in this case.

It might have been a difficult thing to prove such a custom, but that was not a good ground on which to refuse the offer. It was the plaintiff's right to prove it if she could, and we are to take it, for the purposes of this investigation, that she could have proved it. Would it have been effectual proof for any purpose, had it been admitted?

We think it would, although generally a contract is the law of the transaction in which it exists and is not to be affected by anything but its terms; that is to say, it cannot be abridged or enlarged in its scope by anything else; yet there are many cases in which its execution is materially controlled by usage or custom. A familiar instance are days of grace on commercial paper. By a custom grown into law, it is not due until the expiration of three days after it purports to be; or rather the remedy is suspended against the parties for that period. So in agriculture, although the lease may fix the duration of the term, and when it is to end, yet the tenant by custom has rights on the premises after it is ended, to harvest and carry away his share of what the custom calls the way going crop. 5 Bin. 295; 2 S. & R. 14; Doug. 201; 1 Smith's Lead. Cases, 6th ed. 470. This custom seems to do more than control the remedy; it in fact delays the contract. But no custom is more perfectly established, or more completely stands on a solid foundation as law. There are customs which interpret marine contracts to the extent of apparent changes in them. In Peake's Nisi Prius 43, in the case *Charand* v. *Augerstein*, it was shown that by custom, a stipulation in a policy of insurance, that a vessel was to sail in October, meant that she was to sail between the 25th of the month and the 1st or 2nd of November.

While a custom as a general rule may not be heard to affect the terms of a statute, nor a contract, to the extent of delaying or abridging the force of it, it may interpret either. *Repp* v. *Palmer*, 3 W. 178.

The offer in this case was to control the generality of the clause of forfeiture in the policy in case of non-payment of premiums at the day, and to show that a forfeiture was not demandable at the day, nor at all, if paid within thirty days. If the plaintiff could have established this as a custom, her case would on this point have been clear of difficulty, for the testimony was that she had tendered the premium for the non-payment of which the forfeiture was claimed once and perhaps twice a month, after it was due by the terms of the policy. We do not know whether there is or is not such a custom. That is not our question at this time, the plaintiff offered to prove it, and the testimony should have been admitted in our opinion. This error is therefore sustained.

Besides this, we think there was evidence in the case for the jury on other aspects of it. If it was the practice of the company to notify the plaintiff of the times her premiums were due and payable, and they omitted it on the occasion of this default, or if they so dealt with her as to induce a belief that the clause of forfeiture would not be insisted on in her case in case of a dereliction of payment at the day, and it was declared that the only risk she ran in not paying at the precise time was death occurring in the interval of non-payment of over-due premiums, and thus put her off her guard, they ought not to be permitted to take advantage of a default which they may themselves have encouraged. That was an aspect of the case in proof, upon which the jury should have been allowed to pass. In transactions of this nature it is easy to mislead by a practice of liberality, if followed by one of entire strictness, and the only cure for this is the enquiry by the jury whether the party has been misled by the former. If so, it is a fraud upon her rights which ought to be condemned and redressed. The cases of *Buckley* v. *The United States Ins. Co.*, 18 Barb. 541, and *Reese* v. *Insurance Co.*, 26 Barb. 556, strongly sustain this view. In this manner a course of strictness may take place, and it is not to be doubted that the Company may waive a positive compliance with the rules of insurance. 9 Casey, 397; 2 Wr. 250; 4 Ib. 311; 6 Ib. 161; 7 Ib. 250; 8 Ib. 259; 10 Ib. 323. Forfeitures are odious in law, and are only where there is the clearest evidence that that was what was meant by the stipulations of the parties. There must be no case of management or trickery to estop the party into a forfeiture. If the strictness in this case was the result of a desire to wind up business, as we learn the company did, not long thereafter, and it was adopted to avoid a return of premiums, the least which could be said of it is, that it is a most discreditable transaction. We do not know how this was. At the same time it is singular that absolute strictness should be required in paying premiums, if the company had it in contemplation to cease insuring and to return the premiums to parties who had regularly paid them, as they would be obliged to do. There is undoubtedly a comity at least extended to all insurers in regard to the matter of paying premiums. No company would be worthy to receive the countenance of the public, which should establish a practice that would for every little dereliction forfeit the policies of the insured, even if it had the power.

We think the learned judges erred in awarding a non-suit, as well as in a rejecting the proffered testimony, and that the non-suit must be set aside and a *procedendo* awarded; which is done accordingly.—*U. S. Rep.*

Once Bishop Horsley met Lord Thurlow walking with the Prince of Wales. The Bishop said he was to preach a charity sermon next Sunday, and hoped to have the honor of seeing his Royal Highness present. The Prince intimated that he would be present. Turning to Thurlow, the Bishop said, "I hope I shall also see your lordship there," "I 'll be —— if you do; I hear you talk nonsense enough in the House of Lords; but there I can and do contradict you, and I 'll be ——if I go to hear you where I can't."—*Bench and Bar.*

Lord Thurlow's appearance when presiding in the House of Lords was very grave and imposing, and Fox once remarked that it proved him dishonest, for no person could *be* so wise as Thurlow *looked*.—*Bench and Bar.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR NOVEMBER AND DECEMBER, 1868, AND JANUARY, FEBRUARY, MARCH, AND APRIL, 1869.

(Concluded from page 278.)

RAILWAY.

1. A company were empowered by a statute, passed in 1832, to make and use a railway for the passage of wagons, engines, and other carriages. The company ran passenger trains drawn by locomotive steam-engines, having taken all reasonable precautions to prevent the emission of sparks. The plaintiff's haystack having been fired by sparks from an engine, *held*, that, as the company had not express powers by statute to use locomotive steam-engines, they were liable at common law for the damage.—*Jones* v *Festiniog Railway Co.*, Law Rep. 3 Q. B. 733.

2. A railway carriage in which the plaintiffs (husband and wife) were passengers to R., on reaching R. overshot the platform on account of the length of the train. The passengers were not warned to keep their seats, nor was any offer made to back the carriage to the platform. After several persons had got out, the husband did so without any communication with the railway's servants, and the wife, standing on the steps of the carriage, took his hands and jumped down, and in so doing strained her knee. There was a foot-board between the steps and the ground which she did not use, but there was no evidence of carelessness on her part in the manner of descent. It was daylight. In an action against the railway company for the injury: *Held* (Exch. Ch. *per* Byles, Mellor, Montague Smith, and Hannen, JJ.; Keating, J., *dissentiente*), that there was no evidence for the jury of negligence in the defendants, and that the plaintiffs' negligence contributed to the accident.—*Siner* v. *Great W. Railway Co.*, Law Rep. 4 Ex. 117.

See Negligence, 2; Vendor's Lien.

RAPE.

A woman permitted the prisoner to have connection with her, under the impression that it was her husband. *Held*, that in the absence of evidence that she was unconscious at the time the act of connection commenced, it must be taken that her consent was obtained, though by fraud, and that therefore the prisoner was not guilty of rape.—*The Queen* v. *Barrow*, Law Rep. 1 C. C. 156.

RECEIVER—*See* Lunatic, 1.

RECORD—*See* Evidence; Priority, 2.

REFEREE—*See* Award, 3.

REGISTRATION—*See* Evidence; Priority, 2.

RELEASE—*See* Principal and Surety, 2.

REMAINDER—*See* Cross Remainders; Tenant for Life and Remainder-man.

RES ADJUDICATA—*See* Divorce, 4.

REVOCATION OF WILL.

The 1 Vict. c. 26, s. 22, enacts that no will which shall be in any manner revoked shall be revived by a codicil, unless the codicil "shows an intention to revive the same." Where a testator made a will, and then made a second will revoking the first, *held*, that the first will was not revived from the mere fact that a codicil subsequent to both wills imported to be a codicil "to the last will and testament of me (the testator) which bears date" the date of the first will, if there is no other evidence of intention to revive the first will.—*Goods of Steele*, Law Rep. 1 P. & D. 575.

SALE.

1. The plaintiff, in England, sent an order to P., in Brazil, to buy cotton for him. P. bought cotton, and shipped it in the defendant's vessel; the invoice was made out as shipped on account and risk of the plaintiff, but the bill of lading was made deliverable to P.'s order or assigns. P. wrote a letter to the plaintiff, advising the shipment, saying that P. had drawn on the plaintiff for the amount in favor of P.'s agent, "to which we beg your protection." The letter purported to enclose the invoice and the bill of lading. The invoice was enclosed, but the bill of lading, indorsed in blank by P., was sent with the bill of exchange to P.'s agents in England. The agents sent the two documents to the plaintiff, who retained the bill of lading, but returned the bill of exchange unaccepted, on the ground that P. had not complied with his order. The plaintiff presented the bill of lading to the defendant, but he, being advised by P.'s agents, refused to deliver it to him, and said that he should deliver it to P.'s agents on a duplicate bill of lading. On a case stated, the court having power to draw inferences of fact: *Held*, that P.'s intention was that the property should not pass till the bill of exchange was paid, and that therefore the defendant was justified in his refusal.—*Shepherd* v. *Harrison*, Law Rep. 4 Q. B. 196.

2. On the 9th of May, the plaintiff, through his brokers, contracted to sell shares in a company to the defendants, stock jobbers, the set-

tling day being the 15th of May. Before the settling day the defendants, on a day called the name-day, in accordance with the custom of the stock exchange, gave to the plaintiff's broker the names of seventeen persons as ultimate purchasers. The plaintiff executed accordingly seventeen deeds of transfer, and on the settling day by his broker handed them and the share certificates to the defendants, who thereupon paid the agreed price. The company had, in the mean time, stopped payment, and was ordered wound up. The seventeen transferees had paid their purchase-money to the defendants and had received the deeds of transfer, but had not executed them, and the plaintiff was obliged to pay calls on the shares. On a bill by the plaintiff against the defendants, claiming indemnity against the calls; *Held* (reversing the decree of Malins, V.C.), that the contract must be interpreted according to the rules of the stock exchange, and that after the defendants had paid the purchase-money, and given the names of transferees to whom the vendor executed transfers, and after these transferees had received the transfers and paid the purchase-money, the liability of the defendants ceased, and that the bill should be dismissed.—*Coles* v. *Bristowe*, Law Rep. 4 Ch. 3; s. p. *Grissell* v. *Bristowe*. (Exch. Ch., reversing judgment of the Common Pleas.) Law Rep. 4 C. P. 36 See also *Hawkins* v. *Maltby*, Law Rep. 4 Ch. 200.

3. But the liability of the jobber does not cease, if the person named by him as ultimate purchaser is not a person who is bound to take the shares.—*Maxted* v. *Paine*, Law Rep. 4 Ex. 81.

4. When persons contract to buy or sell shares through brokers and jobbers on the stock exchange, they contract according to the custom of the exchange, by which the buyer or seller of shares undertakes to buy or sell from or to the person whose name is given to him on name-day.—*Hodgkinson* v. *Kelly*, Law Rep. 6 Eq. 496.

5. Plaintiff, on Nov. 2, through his brokers, sold one hundred shares to the defendants, stock-jobbers. The sale-note expressed that the sale was "subject to the rules of the stock exchange, and with registration guaranteed," also that payment was to be made on Nov. 15; shortly before this date defendants sent to the plaintiff's brokers the name of H. as transferee with the purchase-money, and the transfers were executed by the plaintiff to H. The transfers not having been executed by H., the defendants obtained a decree for specific performance by H. of the contract with them and for indemnity. Meanwhile the company had been wound up, and the plaintiff was placed on the list of contributories. He then filed this bill against the defendants for a decree for specific performance and indemnity. The plaintiff having died, his executor, having been placed on the list, revived the suit. The estate was insufficient: *Held*, (1) that the stock-jobbers were principals; (2) that the facts did not show a novation of the original contract, and that the plaintiff was entitled to the decree prayed for; (3) that the right to indemnity was not limited to the amount of dividend which the estate could pay, but that the executor had all the rights which his testator, if living, would have had.—*Cruse* v. *Paine*, Law Rep. 6 Eq. 641.

6. The plaintiff sold twenty shares on May 10, on the stock exchange to one P., a jobber for the settling-day, May 15. The defendant, on May 2, bought of P. twenty shares in the same company for the same day; and on May 14, having learned that the plaintiff was to supply the shares, instructed P. to give the name of C. as transferee. The transfer was made accordingly, and executed by the plaintiff and C. C. neither paid nor agreed to pay the defendant any sum in respect to the shares, and the defendant had authority to give the name of C. as transferee. The company being wound up, the plaintiff was obliged to pay calls, the liquidators refusing to register the transfer. *Held*, that the plaintiff was not entitled to be indemnified by the defendant against the calls.—*Torrington* v. *Lowe*, Law Rep. 4 C. P. 26.

See Custom; Estoppel; Mortgage, 8; Specific Performance; Stoppage in Transitu; Trust, 3; Vendor and Purchaser of Real Estate; Warranty.

Seduction.

The plaintiff's daughter, a minor, left his house and went into service. Her master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her. *Held*, that as soon as the service was put an end to by the master, whether rightfully or not, the girl intending to return home, the right to her services revived, and the plaintiff could maintain the action.—*Terry* v. *Hutchinson*, Law Rep. 3 Q. B. 599.

Sentence—*See* Criminal Law.

Servant—*See* Master and Servant.

Set-off—*See* Bills and Notes, 4.

SHERIFF—*See* ESCAPE.

SHIP.

1. A charter-party provided that the ship should proceed to a certain port, and there, or as near thereto as she could safely get, deliver the cargo in the customary manner, but said nothing as to the time to be occupied in the discharge. While the ship was unloading, the authorities, owing to a threatened bombardment, refused for several days to allow any of the cargo to be unloaded. *Held*, that the contract implied by law was that each party would use reasonable diligence in performing that part of the duty of unloading which fell on him, and was not that the discharge should be completed within the time usual at the port; and that therefore the ship-owner could not recover damages from the charterer for the delay.—*Ford* v. *Cotesworth*, Law Rep. 4 Q. B. 127.

2. A shipper can sue in admiralty the owners of the vessel for damage to his goods caused by negligence of the crew, though the vessel was under charter, if the shipper did not know of the charter, and if the master put up the ship as a general ship.—*The Figlia Maggiore*, Law Rep. 2 Adm. & Ecc. 106.

3. The plaintiffs were indorsees of the bill of lading of a cargo, which, according to the charter-party which referred to the bill of lading, was to be unloaded at S. "at the usual place of discharge." On arriving at S. the master put into the A. dock, when the plaintiffs ordered him to remove the ship to the B. dock, which the master refused to do until he had been paid the expense of entering the A. dock. Both docks were places of delivery for similar cargoes. In a suit for breach of contract for non-delivery of cargo: *Held*, that the master was justified in mooring in the A. dock, but having received directions to move to the B. dock was bound to obey them.—*The Felix*, Law Rep. 2 Adm. & Ecc. 273.

4. The payment of a fare is necessary to constitute a "passenger" whose presence on board imposes the obligation, under the Merchant Shipping Act, 1854, s. 354, of taking a pilot.—*The Lion*, Law Rep. 2 Adm. & Ecc. 102.

See BILL OF LADING; BOTTOMRY BOND; COLLISION; DAMAGES, 2, 3; FREIGHT; INSURANCE; PRIORITY, 2; STOPPAGE IN TRANSITU; WILL, 1.

SLANDER.

In an action for slander, a new trial will not be granted on the mere round of insufficiency of damages.—*Forsdike* v. *Stone*, Law Rep. 3 C. P. 607.

See INTERROGATORIES, 1; LIBEL.

SOLICITOR—*See* ATTORNEY.

SPECIFIC PERFORMANCE.

In a suit for specific performance, a purchaser will be forced to take a title which appears to the Court of Appeal to be good, though the judge of the court below was of a different opinion; that fact not being sufficient to constitute a doubtful title.—*Beioley* v. *Carter*, Law Rep. 4 Ch. 230.

See COVENANT, 2; PARTNERSHIP, 1; TRUST, 3; VENDOR AND PURCHASER OF REAL ESTATE, 1.

SPIRITUALISM—*See* UNDUE INFLUENCE

STAMP.

The Inland Revenue Department allowing a discount to persons purchasing a large amount of stamps, a clerk of the patents had been accustomed to buy stamps for the accommodation of the patentees, purchasing them at a discount, but charging the patentees their full value. *Held*, that he must account to the government for any profit made on stamps purchased with public moneys, but not for any profit made on stamps purchased with his own money.—*Attorney-General* v. *Edmunds*, Law Rep. 6 Eq. 381.

See BANKRUPTCY, 2.

STATUTE.

A contract entered into by a company which is *ultra vires* is not ratified by references to it in subsequent local and personal acts of Parliament, not expressing any direct intention to confirm it.—*Kent Coast Railway Co.* v. *London, Chatham, and Dover Railway Co.*, Law Rep. 3 Ch. 656.

STATUTE OF FRAUDS—*See* CONTRACT.

STATUTE OF LIMITATIONS—*See* TENANCY IN COMMON, 2.

STOCK EXCHANGE—*See* CUSTOM; SALE, 2–6.

STOPPAGE IN TRANSITU.

A., at Bahia, shipped a cargo by the order and at the risk of B., of Glasgow, in a ship chartered by A. The charter-party provided that the ship should proceed "either direct or *via* Falmouth, for orders to a port in Great Britain, and deliver the cargo in conformity with the bill of lading." The bill of lading stated that the ship was "bound for Falmouth for orders," and that the cargo was to be delivered "to order or its assigns." A. sent to B., the charter-party, the bill of lading, indorsed to "B. or order," and the invoice, which stated that the cargo was shipped "for the account and risk of B., for Falmouth, for

orders and a market." The ship arrived at Falmouth, and the master, in accordance with directions from A., announced its arrival to A.'s agents, and asked them for orders. The agents applied to B. for instructions as to the destination; but before any were given B. became insolvent, and A. stopped the cargo. *Held*, that the *transitus* was not over, and that the stoppage was effectual.—*Fraser* v. *Witt*, Law Rep. 7 Eq. 64.

SUNDAY.

A statute provided that no licensed victualler should sell wine or ale on Sunday, except "as refreshment for travellers." A. walked on Sunday to a spa, two and a half miles from his house, for the purpose of drinking the mineral water there for the sake of his health, and was supplied with ale at a hotel at the spa. *Held*, that A. was a traveller within the exception.—*Peplow* v. *Richardson*, Law Rep. 4 C. P. 168.

SURETY—*See* PRINCIPAL AND SURETY.

SURVIVORSHIP—*See* VESTED INTEREST, 1.

TAIL, ESTATE IN—*See* DEVISE, 3; VESTED INTEREST, 2.

TAX.

Commissioners were incorporated with powers to construct a bridge, and to borrow from the treasury £120,000 on an assignment of the tolls; they were authorized to take tolls, to be applied to pay the expenses of the bridge, and then in repayment of the sum borrowed. *Held*, that they were not liable to the poor-rate, as they were in occupation of the bridge as servants of the crown, deriving no benefit from the tolls, and were therefore exempt from the operation of 43 Eliz. c. 2, s. 1. (Exch. Ch.)—*The Queen* v. *McCann*, Law Rep. 3 Q. B. 677.

See INCOME TAX.

TENANCY IN COMMON.

1. Real estate, partly agricultural land and partly a quarry, was owned in undivided shares. The quarry was worked and the agricultural land let by one of the co-owners in behalf of the rest, and the net rents and profits in general divided among the owners. In some years, however, the profits were laid out in the purchase of other lands, partly agricultural and partly used in connection with the quarry. The purchased lands were conveyed to the managing owner for the time being, and managed like the original lands. *Held*, that the share of one of the owners passed on his death intestate to his heir, and not to his representative.—*Steward* v. *Blakeway*, Law Rep. 6 Eq. 479.

2. Two tenants in common were entitled to property, as they supposed, in the proportion of five-ninths and four-ninths, and the rents had been received by a common agent and divided accordingly. In 1827, the supposed owner of the four-ninths settled her share, describing it as a moiety; this description was treated as an error, and the rents were received and divided as before till 1864, when it was discovered that the tenants in common were really entitled in the proportion of three-fourths to one-fourth. *Held*, that there had been an ouster of one tenant in common by the other in 1827.—*In re Peat's Trusts*, Law Rep. 7 Eq. 302.

See NEXT OF KIN, 2.

TENANT FOR LIFE AND REMAINDER-MAN.

A tenant for life of leaseholds for years obtained, before his estate for life had come into possession, the grant of a reversionary term, to commence after the determination of the old term. He came into possession, and died, having had the estate during part of the term created by the new grant. *Held*, that the remainder-man, in respect to the fine and renewals, must pay an amount to be ascertained in reference to the actual enjoyment of the tenant for life; compound interest to be computed on the remainder-man's proportion up to the death of the tenant for life, and simple interest afterwards.—*Ladford* v. *Brownjohn*, Law Rep. 3 Ch. 711.

TRADES UNIONS—*See* INJUNCTION, 4.

TREASON—*See* INDICTMENT, 2.

TRESPASS—*See* MESNE PROFITS.

TRUST.

1. The Court of Chancery has inherent jurisdiction in an administration suit to appoint trustees where none have been appointed by the testator.—*Dodkin* v. *Brunt*, Law Rep. 6 Eq 580.

2. If persons holding funds have always dealt with them as if they were trust funds, they are liable for losses occasioned by improper investments, though they did not in fact know who the *cestuis que trust* were.—*Ex parte Norris*, Law Rep. 4 Ch. 280.

3. A married woman, one of several devisees in trust for sale, cannot bind herself to convey the estate, and a bill by the purchaser to enforce specific performance of a contract by such trustees was dismissed, but without costs, and without prejudice to any action.—*Avery* v. *Griffin*, Law Rep. 6 Eq. 606.

See CHARITY; CONVERSION; EXECUTOR AND ADMINISTRATOR, 2; EXECUTORY TRUST; HUSBAND AND WIFE, 1, 4.

Digest of English Law Reports.

Ultra Vires.

1. Money due to a bank on bills of exchange drawn and accepted by directors of a mining company, indorsed by the company and discounted by the bank, the proceeds of which were applied, in satisfying an overdrawn account (£200) of the company with the bank, and the balance (£900) for the benefit of the company; *held* not due as on a loan within the meaning of the articles which prohibited the directors from contracting any loan beyond £500 without the consent of the shareholders. *In re Cefn Cilcen Mining Co.*, Law Rep. 7 Eq. 88.

2. A bank (A.), unauthorized to accept as security shares in another bank, except by transfer to a third person, took a transfer of shares in a bank (B), in which they were named as transferees. This was executed not under seal, but by the signature of the manager. Bank (A.) received dividends on these shares. Bank (B.) being ordered wound up, *held*, that bank (A.) was a contributory.—*Royal Bank of India's Case*, Law Rep. 7 Eq. 91.

3. Though it be *ultra vires* in a banking company to buy shares in another company on speculation, yet it may take such shares on deposit as security, and have them transferred into its own name, and thus become subject to the liability attaching to shareholders in such company.—*Royal Bank of India's Case*, Law Rep. 4 Ch. 252.

See Company, 8; Statute.

Undue Influence.

A., a widow, aged seventy-five, within a few days after first seeing B., who claimed to be a "spiritual medium," was induced, from her belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of B., to adopt him as her son, and transfer £24,000 to him; to make her will in his favor; to give him a further sum of £6,000; and also to settle on him, subject to her life-interest, £30,000 (these gifts being without consideration, and without power of revocation). *Held*, that the relation existing between them implied the exercise of dominion and influence by B. over A.'s mind; and that as B. had not proved that these gifts were the pure voluntary acts of A.'s mind, they must be set aside.—*Lyon* v. *Home*, Law Rep. 6 Eq. 655.

Usage—*See* Custom; Sale, 2-6.

Vendor and Purchaser of Real Estate.

1. On a sale by order of court, the purchaser will not be compelled to take an equitable title without the legal estate being got in, except, perhaps, where a dry legal estate is in an infant.—*Freeland* v. *Pearson*, Law Rep. 7 Eq. 246.

2. The plaintiff contracted to purchase of the defendant a house described in the particulars of sale as "freehold," subject to certain conditions. Condition 5 was: "That abstract of title will commence with a conveyance of April 17, 1860, and no purchaser shall investigate or take any objection in respect of the title prior to the commencement of the abstract." Condition 9 was: "If any error or misstatement shall appear to have been made in the particulars of sale, it is not to annul the sale, but shall entitle the purchaser to compensation." The abstract of the deed of April 17, 1860, recited an indenture, and also other conveyances, by which the property was conveyed to the defendant's testator in fee, subject (so far as the premises were subject thereto) to the covenants and conditions in the said indenture. The plaintiff asked further explanations of what these covenants and conditions were, which was refused. *Held*, that the plaintiff was entitled to an unincumbered freehold title, under the deed of April 17, 1860, and was therefore entitled to rescind the contract.—*Phillips* v. *Caldcleugh*, Law Rep. 4 Q. B. 159.

3. The owner of an estate agreed to sell it to A., representing it as containing 1,580 acres. A. agreed to sell it to a company, and part of the price was paid by them to him, £75,000 in cash, and £75,000 in bonds of the company, and A. paid the vendor £50,000 as a deposit. It appeared that the estate contained only 1,100 acres, and A. thereupon wrote to the vendor declining to complete. The company afterwards rescinded the contract, and A. brought an action against the vendor, which was compromised by repayment of the deposit and rescission of the contract. The company filed a bill against A. and some other defendants, who had agreed to share with him, for a return of the £75,000, and of the bonds. *Held*, that the bill was maintainable, that the company might rescind for misrepresentation, though they might have been able to ascertain the extent of the estate, and that they were entitled to repayment of the £75,000, and to a return of the bonds, and had a lien on a portion of the £50,000 repaid to A., which had been paid into court.

The contract provided that the estate, as to extent of acreage, should be taken to be conclusively shown by certain deeds. *Held*, that this was merely conveyancing condition as to identity, and that, coupled with the represent-

ation as to the acreage, it did not estop the company from rescinding on the ground of deficiency of acreage.

The same relief was asked against the other defendants as against A. One made answer that the suit was improper, another that he was improperly made party. *Held*, that if they were not necessary, they were proper parties; that no relief, in the shape of repayment, could be given against them, but that as they had not merely submitted to any order that the court should make, they would not be allowed costs (reversing the decision of Malins, V.C.)—*Aberaman Ironworks* v. *Wickens*, Law Rep. 4 Ch. 101.

See Covenant, 1, 2; Priority, 1; Specific Performance; Trust, 5; Vendor's Lien.

Vendor's Lien.

A vendor of land to a railway company, who have used it for their railway, is entitled to a lien on the land for the unpaid purchase-money, and to have the lien enforced by a sale, though the railroad be made and ready for traffic.—*Wing* v. *Tottenham and Hampstead Junction Railway Co.*, Law Rep. 8 Ch. 740

Vested Interest.

1. Testator gave a fund on trust to pay the income to A. for life, and after the death of A., leaving issue, on trust to pay and transfer both principal and interest to the children of A., in equal shares, and if but one child, then to such child, to be paid to them, if sons, at twenty-one, and if daughters, at twenty-one or marriage, "with benefit of survivorship;" and in case there should be no children of A. at his death, or if all such children should die before twenty-one or marriage, then over. Of the five children of A., who attained twenty-one, two, B. and C., died in A.'s lifetime, while three, D., E., and F., survived him. *Held*, that B. and C. took vested interests, and that their representatives were entitled to shares with D., E., and F.—*Corneck* v. *Wadman*, Law Rep. 7 Eq. 80.

2. A testator gave his real and personal estate to trustees, on trust, to invest the annual proceeds of the real and personal estate during the time that any person beneficially interested in these estates should be under twenty-one, in order to accumulate the personal estate, and further to hold the whole property in trust for the first or eldest son then living of his daughter C., during his life, and after his death for his first and other sons in tail, with remainders over to C.'s other children. The will contained a proviso that such person as should be entitled to an estate tail in possession in the real estate should not be absolutely entitled to the personal estate till he should attain twenty-one; that the personal estate should absolutely belong only to such person as should first attain twenty-one, and become entitled to an estate tail in possession in the real estate, and that in the mean time the personal estate should remain subject to the trusts declared. In 1816, Lord Eldon declared the direction to accumulate void for remoteness. At that time C. had several children. H., the eldest son, was, under the decree, entitled to, and had been in possession of, the rents and proceeds of the real and personal estate, and was still alive. His eldest son had died under twenty-one, leaving two brothers surviving, the elder of whom, E., had attained twenty-one. *Held*, that E., who was in possession of the first estate of inheritance, was, subject to his father's life-interest, absolutely entitled to the personal estate.—*Holloway* v. *Webber*, Law Rep. 6 Eq. 523.

See Bond, 1.

Voluntary Conveyance.

A creditor under a voluntary *post obit* bond is as much entitled to the benefit of the statute of the 13 Eliz. c. 5, against fraudulent conveyances, as any other creditor.—*Adames* v. *Hallett*, Law Rep. 6 Eq. 468.

See Fraudulent Conveyance.

Voter.

1. At the election of town councillors there were four vacancies and five candidates. B., one of the four who had a majority of votes, was returning officer, and therefore ineligible. *Held*, that mere knowledge by the electors who voted for B. that he was returning officer, did not amount to knowledge that he was disqualified in law as a candidate, and that therefore the votes were not thrown away, so as to make the election fall on the fifth candidate.—*The Queen* v. *Mayor of Tewkesbury*, Law Rep. 3 Q. B. 629.

2. A man cannot be convicted of personating "a person entitled to vote," if the person personated be dead at the time.—*Whiteley* v. *Chappell*, Law Rep. 4 Q. B. 147.

Warranty.

A., a manufacturer, agreed to supply to B. a quantity of shirting according to sample, each piece to weigh seven pounds. The shirtings were delivered and accepted, but it was afterwards found that the weight was made

up by introducing into the fabric fifteen per cent. of clay, which rendered the goods unmerchantable. The presence of the clay could not be discovered by an ordinary examination of the sample. *Held*, that, had there been no sample, a warranty of merchantable quality would have been implied, that the sale by sample excluded such warranty only with respect to matters discoverable by the sample, and that an action on the implied warranty could therefore be maintained.—*Mody* v. *Gregson*, Law Rep. 4 Ex. 49.

Watercourse—*See* Action.

Way—*See* Injunction, 1, 2; Landlord and Tenant, 4; Negligence, 1.

Wife's Equity

A married woman is not entitled to any equity to a settlement, till her debts incurred before her marriage have been provided for.—*Barnard* v. *Ford*, Law Rep. 4 Ch. 247.

Will.

1. A will made by a seaman serving on board a naval ship, whilst she was permanently stationed in Portsmouth harbor, is the will of a seaman "being at sea," within 1 Vict. c. 26, s. 11.—*Goods of M'Murdo*, Law Rep. 1 P. & D. 540.

2. A. wrote out a will in the presence of M., read it aloud to him, and gave him a paper enclosed in an envelope, saying it was a copy of the will. On the same evening, A. wrote to M., that he had executed the will and appointed him executor. It was proved that A. executed a will about that time. The will could not be found at A.'s death. *Held*, that A.'s declarations at the time he made the will, and his letter to M., were admissible to prove its contents.—*Johnson* v. *Lyford*, Law Rep. 1 P. & D. 546.

3. A will contained several unattested interlineations, most of them single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink and at the same time as the rest of the will; but at the time of execution the body of the will was covered up by the testatrix, so that the witnesses could not see it. The court *held* that it was not bound to presume that these interlineations were made after execution, and it included them in the probate.—*Goods of Cadge*, Law Rep. 1 P. & D. 543.

4. The words in a will, "What is left, my books, and furniture, and all other things, I wish to be divided" among A., B., and C., are sufficient to carry the residue.—*Ib.*

5. A testator directed that all the charitable legacies given by him should be paid out of his pure personal estate, and he gave the residue of his real and personal estate to A. The only real estate was land in Madeira, which was sold under order of the court. *Held*, that the proceeds of the Madeira estate must be considered pure personalty, and that the pure personalty was exempted from contribution towards the payment of debts, of funeral expenses, and of costs of the administration suit. *Beaumont* v. *Oliveira*, Law Rep. 6 Eq. 534.

6. Testator gave the income of a fund to his wife for life, on her death the fund to be divided among his "children then living or their heirs." *Held*, that the "heirs" of the children who predeceased the wife (included two who were dead at the date of the will) were entitled to share along with children who survived her; (2) that by "heirs" were meant statutory next of kin; (3) that such next of kin were to be ascertained, in the case of children, who survived the testator, at the time of the death of each child, but in the case of children who predeceased the testator, at the time of the testator's death.—*In re Philps's Will*, Law Rep. 7 Eq. 151.

7. Testator gave his real and personal estate to his son D. (a lunatic), and to D.'s mother; "she to hold all in trust for him, with power to appropriate such sums as may not be necessary for her support and his, to her other son and daughter, J. and A., but so that they are employed for their support, and not to be risked in any way that would involve the destruction of the capital. And I direct that whatever may be preserved till the death of my wife be so placed in trust that D. may always be provided for, and J. and A., both of which I appoint trustees to this my will, together with my wife, that they may have a voice in such arrangements as may be needful; but in case of bankruptcy or insolvency, they to have no power over the property beyond its legal vestment for conveyance, &c., but to depend on their mother during her life to do for them what may be proper, and after her decease to receive its income, and after their decease their heirs." The wife died before the testator. *Held*, that (subject to making a due provision for D.), J. and A. were jointly entitled to the real estate in fee and to the personal estate for life. As to who was entitled to the personal estate after the death of J. and A., *quære*.—*Herrick* v. *Franklin*, Law Rep. 6 Eq. 93.

GENERAL CORRESPONDENCE.

Women's Rights.

To the Editors of the Law Journal.

Gentlemen,—I see from a paragraph in the *Chicago Legal News*, that a Mrs. Arabella A. Mansfield, A. B., a young married lady of about 24 years of age, was lately admitted to the bar and authorised to practice law in the State of Iowa, at the same time as her husband, Professor Mansfield.

This will gladden the eyes of John Stuart Mill; in fact, the philosopher is thrown away in benighted England, he should go to the land when the rights of married women are fully understood, and there learn a thing or two on the subject of his last hobby.

I presume the "Professor" will secure the services of his better half as a junior partner in a professional as well as in a domestic way, and I might suggest as a name for the firm "Mansfield et ux., Attorneys, &c."—this would have a legal smack about it, and at the same time be short and to the purpose. As we are told that Mrs. M. is a lady of strong mind, we trust the Professor will be able to hold his own in this complex partnership, otherwise it may result in his superintendence of the domestic department, which has hitherto fallen to the lot of the "*ladies*," (strange that there are no *women* in the United States, and that the men are all "Professors" or "Generals.") But really it is hardly fair to the rest of the profession in Iowa, to permit a charming fair one to pit herself against a learned brother in argument before a jury of twelve *men*. The latter would simply have no chance at all. His only possible salvation would be to have a jury composed of at least half of them, "*ladies*," if possible of twenty four years old and under.

Speaking of this suggests an idea which I have much pleasure in presenting to the learned Editors of the *Legal News*—that juries should be composed of women instead of men. Juries are so stupid now, that they cannot, humanly speaking, be any worse, and as women have a knack of often jumping to correct conclusions from wrong premises, a change in the sex would probably be highly beneficial. Yours, &c.,

B. B.

REVIEWS.

The Insolvent Act of 1868, with Tariff notes, forms and a full index, by James D. Edgar, of Osgoode Hall, Barrister-at-Law, Toronto: Copp, Clark & Co., King Street, Toronto, 1869.

Mr. Edgar and the publishers have lost no time in giving the public the benefit of this useful manual. It is in every respect an improvement of the edition of 1864, and will find a large sale. We have not space, however, to review it now, but shall return to it again hereafter.

APPOINTMENTS TO OFFICE.

DEPUTY CLERK OF THE CROWN, &c.

JAMES CANFIELD, of the Town of Ingersoll, Esquire, to be Deputy Clerk of the Crown and Pleas, and Clerk of the County Court of the County of Oxford, in the room and stead of Wm. A. Campbell (temporarily acting), resigned. (Gazetted 16th October, 1869.)

CORONERS.

ROBERT DOUGLAS, of the Village of Port Elgin, Esq., M.D., to be an Associate Coroner within and for the County of Bruce. (Gazetted Sept. 18th, 1869.)

WILLIAM RANDALL, of Wolfe Island, Esq., to be an Associate Coroner within and for the County of Frontenac. (Gazetted October 2nd, 1869.)

Items—To Correspondents.

A. H. PAGET, Esq., to be an Associate Coroner within and for the County of Wellington. (Gazetted October 2nd, 1869.]

JOHN A. STEVENSON, of the Village of Norwood, Esq., M.D., to be an Associate Coroner within and for the County of Peterborough. (Gazetted October 9th, 1869.)

The Riband Oath.—Just at this moment when there is so much plain speaking and plain writing upon the Irish land question, a perusal of the Riband Oath, may not be uninstructive to English readers. Some short time ago, a party of the Irish Constabulary made a raid upon a public-house, and in the course of a search, found the oath of which the following is a copy:—

"I (A. B.), hereby agree to become a true and loyal member of this society, and I solemnly swear before Almighty God to be true and loyal to the brotherhood, and to each member of the same; and I will be obedient to my committee and superior officers, and agree to all their articles, laws, rules, and regulations that have been since the commencement, and all amendments added thereto, and to perform all duties imposed on me with loyalty, faith, and fidelity; and I swear that neither hopes or fears, rewards or punishments, shall induce me to give evidence against any brother or brothers for any act or expression of theirs done or made collectively or individually. And, in pursuance of this obligation, I swear to aid as best I can, with purse and person, any brother or brothers who may be in distress; and I further swear to owe no allegiance to any Protestant or heretic sovereign, ruler, prince or potentate, and that I will not regard any oath delivered to me by them or their subjects, be they judge, magistrate, or else, as binding. And I swear to aid as best I can any brother or brothers who may be on trial for any act or expression of theirs, before magistrate, judge, jury, or else, and to be ready at all times to aid by every means in my power to assist in procuring his or their liberation, and, if myself a witness, to disregard any oath delivered to me on such occasions by judge, jury, magistrate, counsel, clerk, lawyer, official, or else; and that I will not regard such oath as binding. And in revenge for the sufferings of our forefathers, and protection of our rights, I further solemnly swear to aid as best I can in exterminating and extirpating all Protestants and heretics out of Ireland or elsewhere; to hunt, pursue, shoot, or destroy all Protestant or heretic landlords, proprietors, or employers; and also to hunt, shoot, pursue, and destroy all landlords or proprietors belonging to the Church of Rome should he or they evict his or their tenants from any house, land, home, or holding of theirs. And I further solemnly swear to aid as best I can in burning down, sacking, and destroying all Protestant or heretic churches or places of worship, and all houses used as such by members of different heretical denominations in this country, and to level the same to the ground.

I also solemnly swear to have no intercourse, communion or trade, neither to buy or sell, barter or exchange, give or take, or have any dealings whatever with said Protestants or heretics, unless on such occasions as cannot be avoided.

I also swear to defend the farmer, the poor man, the widow, and the orphans of any brother or former brother against the oppression of the landlords and the tyranny of Saxon laws; and I further solemnly swear to do all in my power to procure the independence of Ireland, and to aid as best I can, in allowing none but Irishmen to possess Irish land, and Ireland for the Irish.

I also solemnly swear to shoot, destroy, hunt, and pursue to death any former brother who may turn informer or traitor, or who may refuse to perform any duty ordered by his committees or superior officers, or any duty which may fall by lot or otherwise to execute. And I agree that my person shall be at all times at their service to go wherever required or do whatever sent, and also to aid by every means in my power any brother or brothers of this society executing the orders of other committees or officers belonging thereto, though not in my district; and to aid as best I can he or them in the performance of their duty.

And I most solemnly swear to keep all secrets, pass-words, signs, orders, or otherwise belonging to this society, and that I shall never divulge the same by word of mouth or otherwise; and I swear neither to mark, write, or indite with pen, pencil, stone, chalk, or any other mineral, or substance above or under wood, above or under water, above or under land, above or under air, on the sea or elsewhere, or to use therewith any substance whatever, above or under, &c., be it herb, shrub, tree, wood, liquid, mineral, or else, above or below this earth, above or under, &c., or to use therewith any liquid, marking fluid, ink, or any marking substance whatever, above or under, &c., in the sea or elsewhere, to betray or inform of any signs, secrets, passwords, orders, doings, actions, or expressions that have been, that are being, or that will be belonging to this brotherhood."—*The Law Journal.*

Curious Tenures.—Midelinton, County of Oxford.—Henry Fits William holds of our lord the King one piece of land in Midelinton, by the serjeantry * of finding one towel to wipe the hands of our lord the King, when he shall hunt in the forest of Witchwood, in the parts of Lankeleg, and that land was worth forty shillings.

Bray, County of Berks.—Hugh de Saint Philbert holds of our lord the King, in the town of Bray, fifty shillings of land, by the serjeanty of serving our lord the King with his boots.

Niwenton, County of Oxford.—Emma de Hamton holds of our lord the King, in the town of Niwenton, forty shillings of land, by the service of cutting out the linen clothes of the King and Queen.

* Serjeanty, a service due to the King only.

TO CORRESPONDENTS.

"A Student," "Student."

Letters received from above, but no names are given to verify them. We cannot, therefore, publish them under the rule which we have laid down for our guidance in such cases.