DIARY FOR JANUARY.

1. Thur..New Year's day.
2. Frid ..Christmas Vacation in Court of Appeal ends.
4. Sun. ..Second Sunday after Christmas.
5. Mon. ..Heir and Dev. Sitt. and County Court Term begin. Municipal Elections held.
6. Tues...Toronto and Hamilton Assizes. Christmas Vacation in Chancery ends.
8. Thur..Christmas Vacation in Exchequer Court ends.
10. Sat. ..Christmas Vacation in Supreme Court ends. County Court Terms end.
11. Sun. ..First Sunday after Epiphany.
12. Mon....Sir Chas. Bagot, Gov.-Gen., 1842.
13. Tues...Court of Appeal sittings begin.
18. Sun. ..Second Sunday after Epiphany.
19. Mon..First meeting Municipal Councils, exclusive County Councils.
20. Tues...Heir and Dev. Sittings end. First meeting County Councils.
25. Sun. ..Septuagesima Sunday.

CONTENTS.

Canada Law Journal.

Toronto, January, 15, 1880.

The Supreme Court of California has lately imprisoned an attorney for contempt of Court, because he refused to defend a prisoner, without compensation, after being requested so to do by the Court.

With this number our readers will receive the Index for last year and the Sheet Almanac. The latter was kept back in the belief that a change was anticipated in the days for the Law Society Examinations in accordance with the notice of Mr. Hodgins. No change has, however, as yet been made.

"*Not*" is a very important word, as the Courtiers of Charles II. rightly thought when they proposed to strike it out of the Seventh Commandment. It is a very awkward word, however, when it is inserted where it should not appear. This is the case in the head-note to *Re Ford:* 7 Pr. R. 457 where it is said that the surviving executor could *not* make a good title, whereas the Vice-Chancellor came to the opposite conclusion. We are informed that this was the printer's error in the first place, and will be noted by the reporter in the subsequent number.

In our October number we called attention to a gross breach of professional ethics on the part of an attorney in London. We have not yet heard of any enquiry having been made, or any action taken by the Benchers of the Law Society. If we understand the feeling of the profession aright, that body, now elected by their brethren at large, is looked to to express some opinion on the subject. We are satisfied

that *individually* they would not countenance conduct which would seem to come within the ruling of Chief Justice Draper as "unprofessional and illegal."

We recently stated that Mr. Barron was about to publish a book on the law of Bills of Sale and Chattel Mortgages. Two other law books are also announced by Carswell & Co.:—The Surrogate Courts Act, with the Rules and Forms, together, with notes by Mr. Howell—and an annotated edition of the Registry Act, by Mr. E. H. Tiffany. The subjects which are to be discussed by these gentlemen are of a very practical nature; the result will, we hope, prove valuable additions to the increasing list of Canadian law books.

Mr. O'Sullivan has issued a Manual of Government in Canada, which we shall notice hereafter.

Apropos of the recent contempt of Court case in which Mr. A. and Mr. B. figured, and considering the dignified and well-timed rebuke which the Chancellor administered, it is somewhat ludicrous to contrast the manner of converse which obtained among great and good men not long ago. We quote from Leslie Stephen's life of Dr. Johnson (a book by the way which every one should read). Adam Smith met Johnson at Glasgow, and had an altercation with him about Hume's death. The dispute ended by Johnson saying to Smith, "*You lie.*" "And what did you reply?" was asked of Smith. "I said, 'you are a son of a ——.'" On such terms, says Scott, "did these two great moralists meet and part, and such was the classical dialogue between these two great teachers of morality. We trust, however, that the aggressor in the Osgoode Hall will not look upon this as condoning his offence.

As we go to press we receive a copy of a draft Bill prepared by Attorney General Mowat, as the proposed foundation of "an Act for Consolidating the Superior Courts of Law and Equity; establishing a uniform system of pleading and practice therein; and making further provision for the due administration of Justice." It is stated to be printed for consideration only. A hurried glance would seem to show that it is based on the English Judicature Act, adapted to the peculiarities of our Courts; and besides various new provisions, weaves into the altered practice, such portions of our present practice as would seem applicable. As rumours of some such measure have been rife for some time, we may assume that much thought has been given to it by the Attorney General. At the same time, if it is intended to pass the Act this Session, we should regret that more time has not been given to the profession for the consideration of so sweeping a change. It would be much better to receive suggestions before the passing the Act than to make changes afterwards. In short, it is more desirable to "tinker" at a Bill than an Act.

LEAP YEAR.

One of the peculiarities in the law relating to Leap Year is, that though it contains 366 days, it is no longer than if it contained the usual number. In other words, the last two days of February are by force of an old statute rolled into one. The statute in question is 21 Hen. III, according to the old copies of the law, but is more correctly given in the English Revised Statutes as 40 Hen. III. (A.D. 1256). It is there enacted that the day increasing in the Leap-Year shall be taken and reckoned of the same month wherein it groweth, and that that day

and the next day going before shall be accounted for one day. In effect, then, the 29th of February is not to be included in the computation of legal time. Upon the effect of the statute, see *Rex* v. *Worminghall*, 6 M. & Sel. 351. There seems no reason to doubt that this Act has been incorporated with our Provincial law as part of the law of England in force when we adopted that system. But we are not aware of any cases in Canadian Courts actually deciding this. On the contrary, the head-note of a case in 4 Prac. Rep. would imply that the 29th of February would be reckoned—but the judgment does not seem to bear out the headnote.

SIR EDWARD COKE.

"The Institutes of the Laws of England" is a book now but little read by students of the law, although the title page bears the words, "Authore Edwardo Coke, Milite, J.C." In this paper we propose to give the results of a holiday ramble through the pages of the third part, "concerning High Treason and other Pleas of the Crown and Criminal Causes," shewing the treasures of wit, wisdom, piety, and literature, picked up here and there.

In the proem we are told that the former volumes of Coke's great work concerned chiefly, "common pleas and these two great pronouns *meum* and *tuum*," while in the book under consideration he treats *de malo*. "A worke arduous and full of such difficultie as none can either feele or believe, but he onely that maketh tryall of it. And albeit it did often terrifie" him, yet the love and honor of his country prevailed upon him "to passe through all labours, doubts, and difficulties: and thereby he opened such windowes, and made them (the Lawes of England) so lightsome and easie to be understood, as he that hath but the light of nature, (which Solomon calleth the candle of the Almighty God, Prov. 20, 17), adding industrie and diligence thereunto, may easily discerne the same." The gallant knight was not over-diffident, but then his knowledge of the law really "was exhaustive and complete: he knew all the law of his time." Law books then were few and far between: there were only twelve volumes of reports in existence.

What strikes the reader most is Coke's fondness for quoting Scripture, and exhibiting his knowledge of Latin, his curious learning, his philosophical reflections and his poetic effusions. Latin and Holy Writ are to be found on the first page and on the last, and on well nigh every intermediate one. His title page, besides containing the words of Eccles. 8, 11, from the Vulgate, has the maxim, "*Inertis est nescire quod sibi liceat;*" the list of chapters is headed by the wise-saw "*Multi multa, nemo omnia novit;*" the "proeme" has a dedication, "*Deo, Patriæ, Tibi;*" throughout the text Scriptural phrases, Biblical references, classical quotations, are as thick as the leaves on Vallombrosa; while the epilogue, after an expression of thankfulness that by "the goodnesse of Almighty God, *per varios casus, per tot discrimina rerum*," he had brought his work to a conclusion, ends with the ascription, "*Deo gloria, et gratia. Amen.*" No—no, we mean "*Finis.*"

That Coke—to adopt his own maxim—knew "many things" in law, history, poetry, philosophy, theology, and philology, is obvious from every line; that he did not know "everything" is almost equally patent from every page.

In his private life Coke "seems to have been sincerely and humbly religious, his last words being, 'Thy Kingdome come, Thy will be done!'" This trait

is clearly evident in the book we are looking at, it runs through it as a silvery thread. Where writing on Petit Treason, he contrasts the conduct of Radamanthus, "that cruell judge of hell," of whom Virgil saith :—

Castigatque, auditque dolos, subigitque fateri,

(First, he punished before he heard, and when he has heard his denial, he compelled the party accused by torture to confesse it), "with that of the Almighty, which he says, is far otherwise—1. *Vocat.* 2. *Interrogat.* 3. *Judicat.* And as authority for this statement he refers to Luke xvi. 1, 2, John vii. 51. In concluding the chapter he says, "It appeareth in the Holy Scripture, that traytors never prospered, what good soever they pretended, but were most severely and exemplarily punished: As Corah, Dathan, and Abiram, by miracle: *dirupta est terra sub pedibus eorum, et aperiens os suum devoravit illos.* Athalia, the daughter of Amri, *interfecta est gladio.* Bagatha and Thara against Assuerus, *appensus est uterq; eorum in patibula.* Absolon against David. *Suspensus in arbore, et Joab infixit tres lanceas in corde ejus.* Achitophel with Absolon against David. *Suspendio interiit,* he hanged himselfe. Abiathar, the traiterous high priest against Solomon. *Abiathar sacerdoti dixit rex, &c. Et quidem vir mortis es, sed hodie te non interficiam, &c. Ejecit ergo Solomon Abiathar, ut non esset sacerdos.* Shemei against David, *gladio interfectus.* Zimri against Ela, who burnt himselfe. Theudas *(qui occisus est, et circiter 400 qui credebant ei, dispersi sunt et redacti ad nihilum)* and Judas Galilæus, *ipse periit, et omnes quotquot consenserunt ei, dispersi sunt.* Lastly, Judas Iscariot, *secundum nomen ejus vir occisionis,* the traytor of traytors. *Et hic quidem possedit agrum de mercede iniquitatis [suæ, & suspensus crepuit medius, et diffusa sunt omnia viscera ejus.*" And, therefore, let all men abandon it (treason) as the most poisonous bait of the devill of Hell, and follow the precept in holy scripture. Fear God, honour the king, and have no company with the seditious."

Very religious is Sir Edward when he treats of felony by conjuration, witchcraft, sorcery or inchantment, "Thou shalt not suffer a witch to live. *Non est augurium in Jacob, nec divinatio in Israel,*" is in the text, while in the margin he refers, concerning "these devilish and wicked offenders," to Exod. ca. xxii., 17; Deut. ca. xviii., 10, 11, 12; Num. ca. xxiii., 23; 1 Reg. ca. xv., 23. "And it appeareth by our ancient books (The *Mirror, Britton* and *Fleta,*) that these horrible and devilish offenders which left the ever living God and sacrificed to the devil, and thereby committed idolatry, in seeking advice and aide of him, were punished by death." Burning was anciently the punishment. "The holy history hath a most remarkable place concerning the reprobation and death of King Saul, '*Mortuus est ergo Saul propter iniquitates suas, eò quod prævaricatus sit mandatum Domini, et non custodierit illud, sed insuper Pythonissam consuluerit, nec speraverit in Domino, propter quod interfecit eum, et transtulit regnum ejus ad David filium Isai.*'" David, we are told, killed Uriah with his pen. "The law concerning deodands is grounded upon the law of God. Exodus ch. ii., 28 *Si bos cornu percusserit virum aut mulierem, et mortui fuerint, lapidibus obruetur.*' He points a moral by quoting from the Vulgate the stories of Diana and Hemor, Ammon and Thamar.

His remarks on the subject of Prophecies might be read with advantage by Dr. Cumming, the Adventist and others of that ilk. "Certaine it is, that to fortell of things to come, is a prerogative appropriated to the Holy Ghost; and that the devill

cannot *prædicere*, fortell of things to come, which notwithstanding, S. Austin did sometime hold that he could. But afterwards justly retracted it in these words, *Rem dixi occultissimum audaciore assertione, quam debui, &c., certissimum est dæmones non præscire.* "Now for the predictions and foretellings of the Sibyls being Gentiles, so long before the incarnation of our Saviour Christ; and more directly and particularly, of those high mysteries of the incarnation and passion of Christ, the coming of Antichrist, the subversion of Rome, and the end of the World, they are by the true prophets of Almighty God, who spake by the Holy Ghost, well discovered; that while the church was in her cradle, these predictions were invented and fathered upon the Gentiles; to the intent to make the doctrine of the said high mysteries of the gospel the more credible amongst the Gentiles. And if any such predictions had been by the said Sibyls, out of question those great lights of nature amongst the Gentiles, Plato, Aristotle, Theophrastus, or some other of those great philosophers, that with great alacrity dived into the secrets of all kinds of learning, would have found them out, and made some mention of them. But besides the said discovery, such predictions by the Gentiles and heathen persons are against the word of God. (Eph. iii. 9; Col. i. 26.)

"Also predictions either of the time or end of the world, or that it is at hand, is not lawfull. For the first, see the first of the Acts, It is not for us to know the times and seasons which the Father hath put in his own power, &c. For the second, see the second epistle to the Thessalonians, I beseech you brethren, &c., that you be not shaken in mind, or troubled, &c., as though the day of Christ were at hand, let no man deceive you by any means.

"We have the rather said hereof thus much, for that we have heard divers men boldly and confidently upon their numerall calculations to have erred herein."

"Usury," he says, "is directly against the law of God."

"Monopolies," we are told, are "against the ancient and fundamental laws of this Kingdom. And the law of the realm on this point is grounded upon the law of God, which saith, *Non accipies loco pignoris inferiorem et superiorem molam, quia animam suam apposuit tibi.* Thou shalt not take the nether or upper milstone to pledge, for he taketh a man's life to pledge: whereby it appeareth that a man's trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a man's trade taketh away his life, and therefore is so much the more odious, because he is *vir sanguinis.* Against these inventors and propounders of evil things, the Holy Ghost hath spoken, *inventores malorum, &c. digni sunt morte.*"

"*Mendicus non erit intervos*, there shall be no beggar among you. Deut. xv., v. 4. Of Apparel he says, *Non induetur mulier veste virili, nec vir utetur veste fœminca: abominalis apud Deum, qui facit hoc.*"

Embring days, we are told, are so called because in former days when they fasted they put ashes or embers on their heads. Job ii. 12, Jer vi. 26, 2 Sam xiii. 19. "And as the naturall conversion of the flesh of the body is to dust so the sins of the soul (unrepented) are turned to fire. And this was shadowed under embers, that ever keep fire." He then wanders off to explain the meaning of Quadragesima Sunday, Quinquagesima, Sexagesima and Septuagesima. Then he returns to the subject of Diet and says, "But there is no act of parliament against excesse of diet, for it is known to be so hurtfull for man's body, and so obscureth the faculties of the mind, as the understanding, memory,

&c. as to men, specially to Christian men, there needeth no law at all to be made, ever being mindfull of that caveat '*Attendite autem vobis, ne forte graventur corda vestra in crapula, et ebrietate, &c.*," and to shew that "morall heathen men by the light of nature agree hereto," he quotes Cicero and Horace, two gentlemen who, by the way, by no means despised good living.

Apropos of building he cites Deut. xxii. 8, to shew that battlements should be built around the roof of a house for the purposes of safety.

He approved strongly of funereal monuments and says that the erection of them is lawful, "for it is the last work of charity that can be done for the deceased, who while he lived was a lively temple of the Holy Ghost, with a reverend regard, and Christian hope of a joyfull resurrection." And that they serve the good use and end of putting the living in mind of their end for all the sons of Adam must die. (Then comes the inevitable Latin.)

> Statutum est hominibus semel mori.
> Cum tumulum cernis, tum tu mortalia spernis:
> Esto memor mortis, sisque ad cœlestia fortis.

In chapter 99 our author waxes eloquent "De Assentatione, Fucologia, Pseudologia, Flattery," he says, "The occasion of making this law was, that king Canutus had been seduced by flatterers, who had shewed him his face and state in a falsee glasse, making too great a shew of his own parts, actions, and state, to the end to make him conceit himselfe to be better and greater than he was, and his adversaries lesse, then in truth they were. Nay, this king by wicked flatterers assumed to him divine power and honour; for coming from sea, he set his feet on the sea strand, as the sea was flowing, and commanded the sea not to rise to wet his lordly and majestick feet nor clothes: the sea keeping on his accustomed course, both wet his feet and thighs also: whereat being sore amazed repented his presumption (which he had undertaken by wicked flattery.) And well is the flatterer marshalled in this law with lyers, thieves, and raveners; for the divine described flatterers to be those, *Qui colunt aliquem, et auferunt ab eo aliquid temporarii boni.* So as it is *peccatum viscatum*, it getteth away much and giveth smoke. And the Holy Ghost hath styled flattery *oleum peccatoris*, that is, the oile of the sinner, that is, of him that exceedeth others in sinne, and doth affect greatness, that is the head, making it greater and more prosperous then it is, as you may reade in the prophet David: *Corripiet me justus in misericordia, et increpabit me, oleum autum peccatoris non impinguet caput meum.* Whereby he being both a king and a prophet, preferreth the reproofe, nay the sharp rebuke of the just and vertuous, before the smooth humouring of the flatterer (per nomen) of the sinner. This *oleum peccatoris* is *mel venenatum, et venenum mellitum*, and commonly affecteth greatnesse, and is called lordbane.

And again, David speaking of the flatterer saith, his words are smoother then oile, and yet they are very swords. *Hæc dicit Dominus Deus, Væ qui consuunt pulvillos sub omni cubito manus, et faciunt cervicalia sub capite universæ ætatis ad capiend' animas, &c.* Thus saith the Lord God, Woe to them that sow pillowes under all armeholes, and put kerchifes upon the heads of every age to hunt souls. They make the king glad with their wickedness, and the princes with their lyes. *In malitia sua lætificaverunt regem, et in mendaciis suis principes.*

The flattering mouth worketh ruine. And more kings and kingdomes have been overthrown by the means of flattery,

then by publick hostility. And this is the cause that we have mentioned the said ancient law for their punishment, they be lawfully banished from princes' courts, and subjects' houses.

Ut videat caeco sit simia præda leoni:
Rex cæcus cernit, cum sycophanta perit."

He justifies the cruel punishment for High Treason, the drawing, hanging, beheading, embowelling, &c., by reference to Holy Writ as follows: "Implied in this judgment is, first, the forfeiture of all manors, lands, tenements, and hereditaments in fee-simple, or fee-tail of whomsoever they be holden. Secondly, his wife to lose her dower. Thirdly, he shall lose his children (for they become base and ignoble.) Fourthly, he shall lose his posterity, for his blood is stained and corrupted, and they cannot inherit to him or any other auncestor. Fifthly, all his goods and chattels, &c. And reason is, that his body, lands, goods, posterity, &c., shall be torn, pulled asunder, and destroyed, that intended to tear, and destroy the majesty of government. And all these severall punishments are found for treason in Holy Scripture.

1 Reg. ii. 28, &c. *Joab tractus, &c.*

Esther, ii. 22, 23. *Bithan suspensus, &c.*

Acts, i. 18. *Judas suspensus crepuit medius, et diffusa sunt viscera ejus.*

2 Sam. xviii. 14, 15. *Infixit tres lanceas in corde Absolon cum adhue palpitaret, &c.*

2 Sam. xx. 22. *Abscissum caput Sheba filii Bichri.*

2 Sam. iv. 11, 12. *Interfecerunt Baanan et Rechab, et supenderunt manus et pedes eorum super piscinam in Hebron.*

Corruption of blood, and that the children of a traitor should not inherite, appeareth also by Holy Scripture.

Psal. cix. 9, 10, 11, 12, 13. *Mutantes transferentur filii ejus, et mendicent, et ejiciantur de habitationibus suis, et diripient alieni labores ejus, et dispereat de terra memora ejus."*

Thus much to prove Coke's fondness for indulging in Scripture words and citing scriptural authorities, and indulging in pious reflections.

(To be continued.)

SELECTIONS.

ARCHITECTS FEES.

In the case of *Footner* v. *Joseph*, nearly twenty years ago, the Court of Queen's Bench held that an architect suing for a commission, though no express agreement be proved, may establish the value of his services and recover as for a *quantum meruit*. The Court may adopt a commission as a convenient mode of remuneration, but not because an architect is by law entitled to a commission on the outlay. The case was very clearly put by the late Mr. Justice Aylwin: "It would be dangerous," he said, "to suppose that architects could establish their own tariff of prices within their own guild, and thus tax their own bills. That could not be sustained, and if the Court now adopted the standard of 2½ per cent, it was not because there was no proper evidence to show what was the value of the plaintiff's services. It was, therefore, necessary to take the evidence given, which seemed to establish 2½ per cent. as a fair remuneration. But he did not subscribe to the doctrine, that because a building costs £20,000, the architect was to have a certain percentage on that sum, on account, perhaps, of the introduction of a number of foreign novelties and luxuries, which in no way increased his responsibility or labour. His business was to see that the house was properly constructed, and the mere expenditure could form no basis of the value of his services. He agreed with the judgment because it did not adopt that basis." (5 L. C. J. 226.) The case of *Roy* v. *Huot et al*, before Mr. Justice Torrance, noted in this issue, is very much like that of *Footner* v. *Joseph*, and was decided in accordance with the principle there laid down.—*Legal News.*

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[December 1, 1879.

MAXWELL v. THE CORPORATION OF THE TOWNSHIP OF CLARKE.

Contributory negligence.

On one side of a travelled road, which the defendants were bound to keep in repair, was a declivity, down which a pile of wood, composed of blocks cut in two-feet lengths, had been thrown by a person living near the highway, and allowed to remain for about three weeks. Some of the wood was upon the bed of the road, but a portion, estimated at from 21 to 26 feet, was free from obstruction. The road itself was not defective.

In passing this pile of wood, on his way to a neighbouring village, the plaintiff's horse, which was a quiet one, shied, but no accident occurred. Returning, a short time after, at a canter, but holding a close rein, the plaintiff was thrown off by his horse, which again shied at the wood. The plaintiff swore that the wood had "interfered with his travelling when riding another beast."

Held, on appeal from the County Court of the United Counties of Northumberland and Durham, that the defendants were not guilty of a breach of the statutory duty to "keep in repair" the road; and a nonsuit was therefore directed to be entered in the Court below.

Per PATTERSON, J.A., that the findings (i.) that this place was a place of danger, and (ii.) that the plaintiff was not guilty of contributory negligence in allowing his horse to canter past were inconsistent.

J. K. Kerr, Q.C., and *D. B. Simpson*, for plaintiff.

E. Douglas Armour, for defendants.

QUEEN'S BENCH.

IN BANCO, MICHAELMAS TERM, DECEMBER 27, 1879.

IN RE GILCHRIST AND THE CORPORATION OF THE TOWNSHIP OF SULLIVAN.

By-law—Defects on face of—Validity—Practice.

Held, that although it appeared on the face of the by-law that the last instalment of principal and interest due under certain debentures issued by a municipal corporation would be payable beyond twenty years from the date at which the by-law was to come into force, the by-law was, nevertheless, good, as the provision in question must be considered as controlled by the the preceding one, which made the debentures payable in twenty years at furthest from the day appointed for the by-law to take effect.

The by-law showed the whole ratable value of the property of the municipality to be $668,293, and directed a rate of three and nine-tenth mills in the dollar, which it appeared would produce about $150 less than the total amount of the debt to be incurred. *Held*, no objection to the by-law.

The Court refused to receive affidavits in support of the rule produced by counsel for the first time on the return thereof.

Maclennan, Q.C., and *Moss* in support of the rule.

J. K. Kerr, Q.C., contra.

MARY ARMSTRONG, ARCHIBALD LITTLE, and JAMES ROBINSON, EXECUTORS, v. ROBERT G. ARMSTRONG, EXECUTOR.

Executor de son tort—Action against—Administrator.

An action will not lie against a party as executor *de son tort* when there is a legally appointed administrator of the estate, even though the latter may have conveyed the estate to the former on condition of his paying the debts of the deceased.

Ritchie for plaintiff.

Delamere contra.

Canty v. Clark et al.

Work and labour—Agreement to pay according to certificate of engineer.

Defendants agreed with plaintiff to pay him for certain work to be done by him according to the certificate of the engineer of a railway that the work had been fully completed, and not otherwise. *Held*, that the plaintiff was bound, in the absence of fraud or undue influence, by the certificate of the engineer, and could not dispute the same.

Idington, Q.C., for plaintiff.

R. Smith, contra.

Bridgman v. London Life Assurance Company.

Insurance—Untrue representation—"Brother"—Construction.

On an application for a life policy deceased stated, in answer to a question as to how many brothers he had, that he had three, whereas it appeared that he had seven, of whom four were half-brothers. *Held*, not such an untrue statement as to disentitle plaintiff to recover.

Rose for plaintiff.

Falconbridge contra.

Gauthier v. Waterloo Ins. Company.

Insurance—Subsequent risk without assent—Mistake.

Contrary to the statutory condition contained in a policy issued to him by defendants, plaintiff, under the mistaken idea, as alleged, that his policy had expired, effected another insurance on the same property with a different Company, who issued to him the usual interim receipt, good for thirty days, and acknowledging payment of the premium, for which plaintiff gave his note instead of paying in money. After the fire, the agents with whom plaintiff had effected the subsequent insurance, discovering that the policy issued by defendants had not in fact expired, withdrew plaintiff's application for the subsequent insurance, and got back the interim receipt from him. *Held*, that the statutory condition was, nevertheless, broken, and that plaintiff could not, therefore, recover; and that the question whether there had been in fact any subsequent insurance at all, by reason of the premium having been, contrary to the rules of the Company, paid by note instead of in money, could not be determined in this suit, particularly as the Company had admitted their liability by paying an insurance effected at the same time on plaintiff's furniture, the premium on which had been covered by the same note.

Crickmore for plaintiff.

Richards, Q.C., and *Clement*, contra.

Booth v. Walton.

Setting off judgments.

Held, that an order staying proceedings on a judgment obtained by plaintiff against defendant until after the trial of an action by defendant against plaintiff, and the subsequent setting off of a judgment in the latter suit against that in the former had been improperly made, and the order was therefore set aside, with costs.

H. Cameron, Q.C., for plaintiff.

Watson, contra.

Hebner v. Williamson.

Construction of deed.

When the words of a deed are doubtful, the intention of the parties will govern its construction, and not the wording alone. A. granted to B. a lot of land "with the exception of continuing Victoria Street of the Village of Centreville across the said lot." *Held*, Cameron J. dissenting, that this might be held to reserve sufficient land for that purpose, and not merely the right to continue the street, and that the evidence in this case shewed it was intended to reserve the land.

Per Cameron, J.—The words of the deed only contain a reservation of a personal right to continue the road, and unless it is expressly found by the jury that it was intended to dedicate the land for a way, the intention must be gathered from the instrument.

C. Robinson, Q.C., for the plaintiff.

Read, Q.C., and *Ball*, Q.C., contra.

Sauvey v. Isolated Risk Ins. Company.

Insurance—Conditions on face of policy—Title as owner.

Held, that the fact that certain conditions were inserted in the body of a policy of insurance did not make them less conditions than if they had been indorsed ; but that not having been headed either as "statutory conditions" or as "variations," the Company could not avail themselves of them as a defence.

Held, also, that it was no misrepresentation on the assured's part to state that she was owner when she was only tenant for life of the building insured.

Edwards for plaintiff.

J. K. Kerr, Q.C., contra.

Fitch v. Kelly.

Pro-note—Presentment—Alteration—Ratification—Evidence—Set off.

Held, 1, that there was sufficient evidence to warrant the jury in finding that there had been a sufficient presentment of the note in question ; 2, that even if the note had been altered after signature by the endorsers, that it was altered to conform to the original intentions and agreement of parties, or if not, that there was sufficient evidence to warrant the conclusion that the endorsers subsequently ratified the alteration ; 3, that a set off, consisting of a claim for moneys received by plaintiff, which it was contended one of the defendants, the maker, was entitled to, could not be allowed, as it was not a claim or demand arising out of the note in question.

McMichael, Q.C., for plaintiff.

McDougall and *Falconbridge* contra.

Armstrong v. Corporation of the Township of West Garafraxa.

Municipal corporation—Loan for ordinary expenditure—Resolution of Council.

Defendants, through their treasurer, borrowed from plaintiff certain moneys, giving him their promissory notes for the amount. No by-law was passed for the purpose ; but the money was borrowed on the authority of a resolution of the Council, which was not under seal, and was expended in the repair of certain bridges belonging to defendants. The jury found that the money was borrowed, received and used for ordinary expenditure, which the repair of bridges was. *Held*, that the plaintiff was entitled to recover.

Bethune, Q.C., for plaintiff.

Robertson, Q.C., contra.

Kingston Street Railway Company v. Foster et al.

Subscription for stock—Payment in goods.

Defendants subscribed for certain shares in the capital stock of the plaintiffs' company, promising and agreeing, each for himself and his assigns, with each other and with the plaintiffs, to pay the full amount of the shares as and where payable. *Held*, that this was an agreement to pay in money, and that a representation by the President of the Provisional Board that payment would be accepted in goods, was not binding on the company.

Cattanach, for plaintiff.

Foster contra

Regina v. College of Physicians and Surgeons of Ontario.

Medical practitioner registered in England—Refusal of College of Physicians to register in Ontario—Mandamus.

A medical practitioner duly registered in England under the Imperial Act is entitled, without examination, to practise medicine in Ontario on payment of the proper fees, and that though his registration in England was after July, 1870, and a mandamus upon the College of Physicians and Surgeons of Ontario will therefore be granted to register him, on payment of such fees.

Kingstone, for plaintiff.

Crooks, Q.C., contra.

Harrison v. Pinkey.

Trover.

Plaintiff leased certain premises from one D., agreeing, if D. sold during the term, to give up possession, with the right, if he had

any crop in the ground, of harvesting it, or if not, to be paid for the summer fallow. Before any crop was put in, D. sold to defendant, who refused to pay plaintiff for the crop subsequently put in by plaintiff and converted by defendant. *Held*, that plaintiff was entitled to recover in trover from defendant for the value of the wheat.

Fleming, for plaintiff.
Tilt, contra.

Madden v. Cox.

Bill of exchange addressed to President for Company—Personal liability.

A bill of exchange addressed to defendant thus, "The President Midland Railway," was accepted in these words: "For the Midland Railway of Canada, accepted H. Read, Secretary, Geo. A. Cox, President." *Held*, Cameron J. dissenting, that defendant was personally liable.

C. Robinson, Q.C., for plaintiff.
J. K. Kerr, Q.C., contra.

COMMON PLEAS.

IN BANCO.—Michaelmas Term.
December 26, 1879.

Conn v. Merchants' Bank.

Bank bills—Payment—Subsequent failure of bank—Tender back within reasonable time—Notice of dishonour.

The plaintiff, a regular customer of the defendants' bank at Stratford, on the forenoon of the 28th May, made a deposit, which included $1,000 of Mechanics' Bank bills, and was credited therewith in the bank books, the deposit being made in good faith and without any knowledge of the state of the Mechanics' Bank. At one p.m. of the same day, the defendants' agent received instructions by telegram from the head office in Montreal to be cautious about Mechanics' Bank bills. About an hour later he received a further telegram that the Mechanics' Bank had stopped payment, and to send in obligations promptly. Further communications passed between the head office and the agent, and on the evening of the 30th the agent told plaintiff that his instructions were to charge plaintiff with the amount of these Mechanics' Bank bills, which was accordingly done, to which plaintiff objected. The plaintiff, on the 28th, had drawn out $100, and on 29th, $700, so that if he were deprived of the $1,000 to his credit, his account would be overdrawn. On the 29th the notes had been sent down to the head office at Montreal. The notes were never tendered back to plaintiff. In an action to recover back the amount as money paid to defendants to plaintiff's use.

Held, that for the want of a tender of the notes on the 29th, the defendants made them their own, and plaintiff was therefore entitled to recover.

Held, also, that even if defendants had the right to send the notes to Montreal for presentment for payment, due notice of dishonour given on the 30th or 31st might have been sufficient, without tendering the notes back, but that no such notice was given.

Idington, Q.C., for the plaintiff.
R. Smith (of Stratford) for defendants.

Elliott v. Douglas.

Deed—Falsa demonstratio—Possessory title.

In ejectment, one of the deeds in plaintiff's possession was as follows: This Indenture made 11th day of October, 1821, at Quebec, in the Province of Lower Canada, by and between William Isaac Greig, Deputy Assistant Commissary General, of the one part, and William Howe, Esquire, accepting hereof for and on behalf of Alexander Thom, half-pay staff surgeon, of the other part, Witnesseth that the said William Isaac Greig for and in consideration of £50 of lawful money, &c., to him in hand paid by the said Alexander Thom, &c., doth grant, &c., unto the said Alexander Thom, his heirs and assigns for ever, all and singular, &c. To have and to hold the same with the appurtenances, &c., unto the said Alexander Thom, his heirs and assigns, to the sole and proper use, benefit, and behoof of the said Alexander Thom,

his heirs and assigns for ever. All the covenants, including the one for further assurance, were made with Alexander Thom, his heirs and assigns. The deed was signed and sealed by W. J. Greig and William Howe.

Held, that in order to give effect to the deed in every particular according to the plain intent of the parties, the words "William Howe accepting hereof for and on behalf of," must be struck out from the premises as surplusage and repugnant, and thereby the whole conveyance was made operative as a grant to Alexander Thom.

Held, however, on the evidence the plaintiff had a title by possession.

McCarthy, Q.C., for plaintiff.
H. J. Scott for defendant.

Re Kingston Election Case. Drennan v. Gunn. Gunn v. Macdonald.

Application for new petitioner after lapse of six months—Corrupt bargain—Meaning of.

The applicant alleging that there was a corrupt agreement for the withdrawal of the petitions in the above, applied to have himself substituted as petitioner in each case, and that the deposits made in each case should remain as security for any costs that might be incurred by him, and for a day to be appointed for the trial of the said petitions.

Held, that the application could not be entertained, for that the six months limited by the Act of 1875 for the trial of election petitions had expired prior to the application made herein.

Held, also, that in any event the deposit should not be directed to remain as such security, for although the agreement made herein that the petitions should be allowed to lapse, each petitioner withdrawing the charges by him respectively preferred, must in law be deemed to be a corrupt bargain; yet under the statute the proposed withdrawal must, in the opinion of the Court, be induced by a corrupt bargain; so that the motives and intent of the parties, as a matter of fact, must be considered, and the evidence, set out in the case, shewed that no corrupt bargain was intended.

Dr. Stewart, the applicant in person.
Bethune, Q.C., for Gunn and Macdonald.
Marsh, for Drennan.

Young v. Hobson.

Ejectment—Necessity of possession being taken under hab. fac. pos.—Statute of Limitations—Leave in term to supply evidence.

Where an action of ejectment was commenced against a person in possession of land before the statutory period had elapsed, and during the currency of the action, and under pressure thereof, on payment by the owner of a sum of money, possession was given by the owner with such person's consent, though after the lapse of the statutory period, and a written memorandum of the compromise was drawn up at the time,

Held, that this was sufficient to bar the statute, and that it was not necessary that the action should have terminated by the entry of judgment, and possession taken under a *hab. fac. pos.* issued thereunder.

On the argument in term of a rule *nisi* to enter a verdict for the defendant in this action, which was also ejectment, on the application of the plaintiff's counsel, the Court under the authority of R. S. O. ch. 49, sec. 8 *a*, 41 Vict. ch. 8, sec. 7 *a*, granted leave to the plaintiff to supply evidence of a search for the memorandum of the compromise, and also to put in the original writ of ejectment in the first named action, and the affidavit of service, a copy of such writ only having been filed at the trial.

J. K. Kerr, Q.C., for the plaintiff.
Osler, Q.C., for the defendant.

Bingham v. Bettinson.

Chattel mortgage—Absence of redemise clause—Seizure and sale before default—Action for preventing mortgagor redeeming—Trespass—Trover.

On 29th January, 1878, plaintiff gave defendant a chattel mortgage in the usual form on certain goods to secure the payment of $700 by half-yearly instalments, as

follows: $100 on 29th July, 1878, and the residue by instalments of $150 on 29th of January and July subsequently. There was no redemise clause; but it was provided that on default of payment, &c., or in case of the mortgagor attempting to sell or part with the possession of the goods without the mortgagee's consent in writing, &c., the mortgagee might enter and take the goods, and sell the same, and also that on default of payment the mortgagee might distrain; and further, that it should not be incumbent on the mortgagee to sell and dispose of the goods, but in case of said default should peaceably and quietly have, hold and occupy the said goods, without the let, &c., of the mortgagor. The mortgagor continued in possession. On 5th July, 1878, before any default was made, the mortgagee entered and seized and sold the goods, for which plaintiff, the mortgagor, brought an action, the 1st and 2nd counts being in trespass and trover respectively, and the 3rd count setting up the seizure and sale without plaintiff's consent before any default made, whereby plaintiff was deprived of his right to redeem and make the said payments as provided in the mortgage, and suffered loss, &c.

Held, that plaintiff was entitled to recover under the 3rd count.

Semble, *per* Wilson, C. J., disapproving of *Porter* v. *Flintoff*, 6 C. P. 340, and cases following it, that there was an implied right to possession until default, and therefore plaintiff was entitled to recover under the 1st and 2nd counts.

Bethune, Q.C., for plaintiff.

Drew, Q.C., for defendant.

Woodman v. Blair.

Breach of promise of marriage—Excessive damages—New trial.

In an action for breach of promise of marriage the jury found for the plaintiff with $4,500, the case being fully and fairly brought before them, and there being evidence to support their finding, the Court refused to grant a new trial on the ground of the damages being excessive.

B. L. Doyle, for plaintiff.

Bethune, Q.C., for defendant.

Longwith v. Dawson et al.

Conviction — Conviction made in county—Justice signing in city—Validity of—Evidence—Admissibility of.

The plaintiff was tried before the county justices in the township of Kingston for selling spirituous liquors without license, and convicted. The conviction on its face alleged that it was signed by both the justices in the township of Kingston. In an action of replevin for selling a horse of the plaintiff, under a distress warrant, issued under the conviction, alleging that the conviction was invalid, because, as was alleged, it was signed by one justice only in the township, the other signing in the city of Kingston, the defendant justified under the conviction.

Held, under R. S. O. ch. 5, sec. 3, and R. S. O. ch. 72, sec. 6, the justice had authority to sign in the city of Kingston; and also that the conviction being valid on its face could not be questioned in this action, and evidence tendered to shew it was so signed in the city was inadmissible.

Mudie (of Kingston) for plaintiff.

Bethune, Q.C., and *Falconbridge*, for defendants.

Severn v. Clark.

Chattel mortgage.

One F. owed the plaintiff, and one M. $200 and $100 respectively for goods supplied. The plaintiff had given a chattel mortgage on his property to one Flint on $600, and being pressed for payment applied to plaintiff and M. for the same, offering them a chattel mortgage therefor, as well as for the amount he already owed them, which they agreed to, but, not having the money on hand at the time, borrowed it from one J., giving him their note therefor endorsed by F., and Flint was paid off, and his mortgage discharged. F., on 21st February, 1879, gave plaintiff and M. the mortgage now in question, which was in the usual form, the expressed consideration being $900 money advanced to the mortgagor. The affidavit of *bona fides* was made by the plaintiff alone, described as "one of the mortgagees in the within mortgage named," and stated that

the mortgagor was justly and truly indebted to him and M. as the mortgagees therein named in the sum of $900 mentioned therein, &c., and on the renewal of the mortgage the affidavit was made by plaintiff in like manner. The plaintiff and M. were not in partnership, or in any way connected in business. The note given to J. was renewed several times, and there was still $100 due upon it at the time of the trial. F. was a party to only one of the renewals, and paid $150 on account of the note which was credited on the mortgage. The rest was paid by plaintiff and M. In June, 1878, the plaintiff and M., to protect themselves, bought in the goods at a bailiff's sale for rent and taxes. The goods were subsequently seized by the Sheriff under an execution at defendant's suit. On an interpleader, the plaintiff claimed as mortgagee and also as purchaser at the bailiff's sale, and defendant as execution creditor.

Held, that the plaintiff was entitled to recover; that the mortgage was valid; that it was given as a security for a present advance by the mortgagees, which the evidence shewed the transaction to be, and not merely that plaintiffs were accommodation endorsors of the note, so as to bring them within sec. 6 of the Chattel Mortgage Act.

Held, also, that the fact of part of the consideration, consisting of separate debts to plaintiff and M., did not prevent plaintiff making the affidavit of *bona fides*, in that the first section was not limited to cases of joint mortgages connected in business, &c.

Held, also, that plaintiff acquired a good title under the purchase at the bailiff's sale, and that such sales do not come within the Act so as to require the registration of a bill of sale on an actual and continued change of possession; but, *semble*, that the plaintiff, notwithstanding, could rely on his mortgage.

McMichael, Q.C., for plaintiff.

Ferguson, Q.C., for defendant.

Corby v. Clark.

This was a similar action, Corby, the plaintiff, being the assignee of M., referred to in the above suit, in which a similar judgment was given.

John Crickmore, for plaintiff.

Ferguson, Q.C., for defendant.

McQueen v. McIntyre.

Promissory note—Alteration of place of payment—Validity.

In action on a promissory note it appeared that the note, when made and signed by defendant, was made payable to plaintiff's order "at the Thomas Fawcett's Bank, Watford," which, without the defendant's knowledge or consent, was altered by making it payable, instead of as above, as follows: "at my," defendant's "place of business, Alvinston."

Held, that this was such a material alteration as avoided the note.

T. H. Spencer, for plaintiff.

McBeth, for defendant.

Moon v. Clark.

Lien for improvements—Land obtained under immoral consideration.

In ejectment the defendant set up a lien for improvements made by him on the land, which it appeared had been obtained under an immoral consideration of his marrying the plaintiff's, testator's, daughter, who was already married.

Held, that the lien could not be supported.

Hector Cameron, Q.C., for plaintiff.

Bethune, Q.C., for defendant.

Corporation of Peterboro' v. Hatton.

Police magistrate—Fees for services—Clerk' fees—Sec. 412 of Municipal Act.

Where in the absence of the appointment of a police clerk by the municipal council of a city or town, the police magistrate of such city or town does the clerk's work himself he is not entitled to charge the fees therefor.

The salary paid to a police magistrate of such city or town covers all cases that may come before him, except what may be called purely county cases, namely, where the

charge arises, and the parties reside out of the town or city, or for infringement of the Liquor License Act beyond the limits of the town or city, and cases of a similar character.

The 412th sec. of the Municipal Act applies both to cases arising under Dominion and Provincial Acts.

Bethune, Q.C., for the plaintiffs.
McMichael, Q.C., and *Hector Cameron*, Q.C., for the defendant.

Regina v. Piche.

Criminal law—Concealing birth of child—Evidence, sufficiency of.

On an indictment for concealing the birth of a child, the prisoner, who lived alone, had placed the dead body of the child behind a trunk in the room she occupied, between the trunk and the wall. The prisoner, on being charged with having had a child, denied it, but said she was suffering from cramps, and it was only after the doctor, who was called in, had informed her that he knew she had been delivered of a child, and on being pressed by one of the women present, that she pointed out where the body was, and the woman went and got it. Until pointed out the body could not be seen by anyone in the room.

Held, that the evidence, more fully set out in the case, was sufficient to be submitted to the jury, and the prisoner having been found guilty by the jury, the Court refused to interfere.

J. G. Scott, Q.C., for the Crown.
No one appeared for the prisoner.

CHANCERY.

Blake, V.C.] [Dec. 31, 1879.

Earls v. McAlpine.

Will, construction of—Devise on condition—Restraint of alienation.

Testator devised his farm to his two sons in equal moieties, subject to certain legacies to daughters, and also a comfortable support for his wife, or the sum of ten pounds to be paid by each of the sons annually during her life; and directed that the devisees should not sell or transfer the said property without the written consent of the widow during her life. One of the devisees, without obtaining the consent of the widow, mortgaged his portion of the estate.

Held, that the effect of giving the mortgage was to forfeit the estate the devisee took under the will.

Proudfoot, V.C.] [Jan. 7, 1880.

Meredith v. Williams.

Separation deed—Renewed cohabitation—Second separation.

A provision in a deed of separation that on a renewal of cohabitation the maintenance secured to the wife for life should cease; but that in the event of the parties again separating the provisions of the deed should revive, does not render the deed void, on the ground that it is contrary to the policy of the law, as being a provision for future separation. In such a case, the Court *held*, that where the wife again separated from her husband for cause, the provision for her maintenance revived.

Proudfoot, V.C.] [Jan. 7.

Burritt v. Burritt.

Executors—Discretion given by will.

The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real and personal property in Ontario, and also of personal property invested in the United States securities. By his will he named one resident of the United States (his brother-in-law), and two persons resident of Ontario, as his executors, to whom he bequeathed all his personal estate, upon trust as soon as conveniently might be, to sell, call in and convert into money such part of his estate as should not consist of money, and thereout to make certain payments and invest the balance of such moneys in or upon any of the public stocks or funds of the Dominion of Canada, of the Province of Ontario, or upon Canadian Government or real securities in the Province

of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid, or in or upon the shares, stocks or securities of any bank incorporated by Act of Parliament of Canada, paying a dividend, with power to vary the said stocks, funds, debentures, shares and securities: "And as respects my American securities, having the fullest confidence in the judgment and integrity of the said W.E.C., my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and re-investment thereof, or the permitting of the same to be and remain as they are until maturity thereof, and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby."

Held, that this did not authorise the re-investment of moneys, realized on the sale, or maturing of any of these securities in the United States, but that the executors were bound to bring them into this country, and invest them in one or other of the securities enumerated by the testator.

Proudfoot, V. C.] [Jan. 7.

Rogers v. Ulmann.

Principal and agent—Master and servant.

In consideration that the plaintiff would act as agent for the defendant in the purchase and consignment of furs to the defendant, and assume one-half of the losses to the extent of $3,000, the defendant agreed to pay plaintiff one-half the net profits of each year's transactions. The plaintiff impugned the *bona fides* of a settlement which he had been induced to make with the defendant, acting through an agent, and the Court, being satisfied that such settlement had been secured by the fraudulent misrepresentations of such agent, *held* the plaintiff entitled to an account of the transactions and an inspection of the books of the defendant, notwithstanding the provisions of the statute 36th Vict. ch. 25, s. 1; R. S. O. ch. 133, sec. 3.

NOVA SCOTIA REPORTS.

COUNTY COURTS.

Ames et al v. Ginty.

Statute of Frauds, sec. 5—Necessity of written order to bind purchaser—Constructive acceptance—Commercial travellers.

[Savary, Co. J., Annapolis, 1879.

Savary, County Judge.—This is an action to recover the sum of $236.86, being the price of a lot of goods; and the defence is based upon the well-known 5th section of chapter 83, Revised Statutes, commonly called the "Statute of Frauds," or more fully, as in the title to the chapter "for the Prevention of Frauds and Perjuries" which, following the English statute of the same character, enacts that "No contract for the sale of any goods for the price of forty dollars or upwards shall be good, unless the buyer accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part payment or that some note or memorandum in writing of the bargain to be made and signed by the parties to be charged by such contract, or by their agents thereunto authorized." There was clearly no memorandum in writing of the bargain, signed by the defendant at the time. A verbal order was given, which Mr. Foster, the plaintiff's agent, took down from the defendant's dictation on a loose piece of paper, throwing away the latter after carefully copying it into a regular order-book. The leaf of this book, containing the order, was detached from the margin, and sent to the plaintiffs at Montreal, the order having been given at the place of business of the defendant. I think this leaf comprising the whole contract was, when tendered, rightly received in evidence and, with the oral testimony, it fully establishes a strictly oral contract between the parties. But it is best to state the facts I do find on the evidence. I find that the defendant ordered the goods by word of mouth from plaintiffs through their agent, Foster, whose testimony I implicitly believe; that the defendant lived at Caledonia, about midway between Annapolis and Liverpool; that it would be equally convenient for the defendant to have them come to Liverpool by steamer from Halifax, or to Annapolis by the W. and A. R. R.; that the latter was the more natural and reasonable way to send them; that they were ordered to be sent in that way by the Intercolonial Railway, *via* Riviere du Loup, to Windsor Junction, "care of" W and A. R. R. to Annapolis, and were actually so sent and arrived there promptly; that they

were addressed to J. Mc.G., Caledonia, and properly so, because, as I find, a parcel previously addressed the same way was received by the defendant, and that he held out this address as the proper one, not instructing plaintiffs to address these goods differently; that no invoice or advice from the plaintiffs reached the defendant, none having been proved to have been sent to him, except by the very unreliable evidence of the plaintiffs' general custom; that the defendant, however, knew of their arrival by information received from the W. A. R. R. Co., through the coach driver between Annapolis and Liverpool, whom he made his agent for the purpose of enquiry, but did not notify the plaintiffs of his refusal to accept until the price of the goods became due and a bill had been drawn on him for their price five months after arrival.

It was contended that the letter of the defendant constituted a sufficient "note or memorandum" of the bargain to satisfy the statute, and in many cases such letters have been so held, especially in the notable cases of *Bailey* v. *Sweeting*, 9 C.B. N.S. 1843, and *Wilkinson* v. *Evans*, L. R. 1 C. P. 407, and the very recent case of the *Leather Cloth Co.* v. *Hiernomus*, L. R. 10 Q. B. 140, the latest case, I think, in which the clause of the English Act corresponding to this has occupied the attention of the English Common Law Courts, a case, by the way, very very similar to this one in some of its leading features. But all the cases referred to differ from this in the circumstance that the letters of the defendants referred to the voice furnished to the buyer in such a way that it could be read with them, or in some other manner indicated the entire contract, leaving nothing to be supplied *dehors* the writing. Here the letters contain nothing to show the particular articles purchased or their prices, either intrinsically or by reference to other documents, and point to a contract to send goods by a different mode of conveyance from that employed by the plaintiffs.

The only other point raised is whether there was an actual acceptance and receipt. Had the plaintiffs proved the sending of an invoice to the defendant, or a letter of advice that the goods were despatched as ordered, which would have placed him under an obligation to reply, accepting or repudiating them, I would have thought that the case came fully within those of *Bushel* v. *Wheeler*, 15 Q. B., p. 442, and *Morton* v. *Tibbett*, 15 Q.B., p. 428, the principle underlying which is illustrated by the cases of *Lucy* v. *Mouflet*, 5 H. & N. 229; *Richardson* v. *Dunn*, 2 Q. B. 218, and *Gaskill* v. *Skene*, 14 Q. B. 664. The authority of *Morton* v. *Tibbett*, and *Bushel* v. *Wheeler*, has been somewhat questioned in the Court of Exchequer; but the former has been very distinctly ratified and approved of in some important cases in the Queen's Bench, especially *Currie* v. *Anderson*, 2 E & E. 592, per Crompton, J., page 598; and both cases in *Meredith* v. *Meigh*, 2 E. & B. 364, per Campbell, C. J., on page 370. If the facts brought the case within that of *Bushell* and *Wheeler*, I should have felt bound to put to myself the question whether the defendant had not practically accepted the goods within the meaning of the statute, and whether under the circumstances the Windsor and Annapolis Railroad Company were not the defendant's agent to accept and receive the goods for him, on which point an affirmative decision would have no little colour from the course of dealing between the parties, the W. & A. R. Co. not being carriers to to the defendant's place of residence but to Annapolis only, and the goods not being ordered to be merely *carried* by them, but to be consigned to their *care*. The case of *Norman* v. *Phillips*, 11 M. & W. 211, relied on strongly by the learned counsel for the defendant, only goes to show that the question of an acceptance by a tacit acquiescence is one of degree; that although where the silence is long and unreasonable, a jury might be justified in inferring an acceptance, yet where it is otherwise there may be a scintlla of evidence, but not enough to sustain a finding. But in the absence of an invoice, or some other communication from the plaintiffs, informing him of the fulfilment of the contract on their part, I fail to see any obligation on the defendant to be otherwise than silent, and I can draw from his silence no inference of his acquiescence. Therefore, in the absence of a sufficient note or memorandum of the bargain signed by the defendant, and of sufficient evidence to justify the conclusion that the defendant in any sense accepted the goods, I think the plaintiffs must become non-suit.

I must confess to a disposition to uphold this contract if possible; but I believe I have consulted every case bearing on the subject in the English reports since 1850, and all the Nova Scotia and New Brunswick cases, and cannot bring myself to extend the doctrine of inferential or constructive acceptance beyond the case of *Bushel* v. *Wheeler*, which has, as I have indicated, an important and, I think, essential ingredient which this lacks. I do not think the Appellate Court would hold me justified in doing so. Judges are naturally anxious not to construe a statute designed for the prevention of fraud in such a way as to promote fraud; but I cannot give any statute an unnatural construction, and the policy of this one clearly

requires that an executory contract for the sale of goods over forty dollars should be evidenced by a writing. I must administer the law as I find it, leaving the responsibility with the legislators, and I have always thought, and still think, that the fifth section of our Statute of Frauds ought to be repealed, for I am of opinion that in the present state of society and commercial habits it causes more frauds than it prevents.

LAW STUDENTS' DEPARTMENT.

In our last number we published a letter from "A Student," complaining of a want of courtesy on the part of a Q.C. We have since heard from the gentleman referred to, and it is quite plain that our supposition was correct, namely, that he did not suppose that the student "was asking a *bonâ fide* question." It was looked upon by him as a joke, and so treated. The name of the Q.C., without more, would be a sufficient guarantee, not only that no discourtesy could have been intended, but that he was thoroughly competent to enlighten our correspondent, had times and circumstances been favourable for a dissertation on the points propounded.

Examination Papers. Mich. Term, 1879.

First Intermediate.

Smith's Manual of Equity.

1. Will the Court of Chancery restrain the publication of letters by the receiver of them where the sender has not assented to the publication? What is the principle upon which the Court acts in granting or refusing such injunction?

2. At whose instance may a bill to establish a will be filed?

3. Under what circumstances will the Court decree the cancellation and delivery up of void instruments?

4. Under what circumstances will the Court of Chancery make an allowance for maintenance of an infant out of his estate, notwithstanding that the father is able out of his own property to maintain him?

5. State clearly what you understand by the separate estate of a married woman.

6. A testator devises property worth $1,000 to A which belongs to B, and bequeaths to B the sum of $1,000. In case B refuses to comply with the will, can he claim the legacy?

7. What difference is there between the lien for costs which a solicitor has upon papers and money in his hands?

Second Intermediate.

Leith's Blackstone—Greenwood on Conveyancing.

1. After an agreement for a lease, is the lessor bound to show title on the request of the lessee? What is the consequence if he refuse to do so?

2. Whose duty is it to prepare the drafts and the engrossments of the instruments for the carring out of agreements for sales and leases?

3. What would be the proper form of the reddendum clause in a lease made by a mortgagor and mortgagee of real estate, the mortgage not being overdue?

4. What were the five different modes of ouster? Distinguish between them?

5. Apply the maxim *de minimis non curat lex* to lands acquired by *alluvion* or by *dereliction.*

6. What is ameliorating waste? To what extent is it not permissible?

7. Must a surrender be in writing? Answer fully, distinguishing between various circumstances and cases.

First Year Scholarship.

Williams on Personal Property.

1. Give the principal provisions of the Act (known as Lord Tenterden's Act) which require certain contracts to be in writing.

2. What is meant when it is said that certain contracts of insurance are contracts of indemnity? Explain fully, and give an example in which such a contract is one of indemnity, and one in which it is not.

3. In what different ways do the Courts of Equity and Law view the case of a bequest of personal chattels to A for life, with a bequest over to B upon A's death? What is the ground of the view taken at Law? In what form would you draw such bequests?

4. What is the difference between a legally constituted executor and an executor *de son tort* (1), as to their liability (2) as to their privileges?

5. What is the meaning of the maxim *actio personalis moritur cum persona!* What exceptions are there now to its generality?

CORRESPONDENCE.

Appointment of Deputy Judge at Hamilton.

To the Editor of The Law Journal.

Hamilton, Jan. 14, 1880.

Sir,—The members of the Law Association which has recently been established by the profession practising in this city and county have, at meetings lately called for the purpose, been warmly discussing the late appointment by the County Judge of a gentleman, a member of a firm in large practice, as Deputy Judge for the County Court of the County of Wentworth.

While the *personel* of the appointment is in every way satisfactory, the Association, by a very large and influential vote, have recorded their disapprobation of an appointment which is calculated to bring the administration of justice in this county into disrepute, inasmuch as we have to-day the very anomalous proceeding of a gentleman advocating the interests of his firm's clients on one occasion, and performing the functions of a judge in the same court on another occasion, and even in one instance of granting an order in a case in which his own firm was engaged.

It must be evident to every professional man that while a gentleman holding such a position may discharge his two-fold duties in a strictly impartial and upright manner, and I believe him incapable of acting otherwise, the impression left upon the mind of the layman cannot be otherwise than unsatisfactory, and attended with suspicion and doubt, and must tend to weaken that respect for the Bench which is so essential for the proper administration of justice.

The action taken by the members of the profession here is as much in the interest of the profession at large as for themselves, and the resolutions passed condemn in the most unmistakable language the system of appointing a practising barrister (who is a member of a firm in large practice, as is the case here) to the position of a deputy judge, and also conveys the expression of opinion on the part of the profession here, that if other judicial assistance is necessary, then a Junior Judge should be appointed.

Barrister.

FLOTSAM AND JETSAM.

The Law of Contracts.—Pomponius, a celebrated law teacher of Rome in the sixth century, entered into a contract with a Roman citizen to instruct his son in the law. This was the contract: So many coins if the pupil became learned in the law, the test to be that he should win his first case before the tribunal. Pomponius turned over his pupil as perfected in his studies. The father brought suit against the master to set aside the contract, and retained his son to plead this his first case. "If my son gains his case, the contract is made void. If he loses, I am not bound." Pomponius answers: "If I fail in my defence the son wins his case, and I am entitled to my money. If I gain, the court gives me the money by its decree." Which side had the law?

To Correspondents.—We have received several letters on important subjects which must, however, lie over until next issue. Amongst them is one from Halifax on the vexed question of the reconveyance of Insolvents' Estates. Another calls attention to a pamphlet recently issued by Mr. Sheriff McKellar; a remarkable document truly, which, as a specimen of vulgarity impudence, concealed official greed and ingenious misrepresentation, has seldom been surpassed. It takes an Official Assignee, a Registrar or a Sheriff to formulate his grievances (*i. e.* his desire for increased fees) and then to try to lobby a Bill through the Legislature to meet the views of his own class. There is a limit, however, to this kind of thing, as Sheriffs will probably find to their cost. Official Assignees have themselves to thank in a great measure for the storm of obloquy which has assailed the Insolvent Act. Registrars stated "grievances" until the Legislature was worried into paying attention to them. The result was that the country now gets the benefit of all the surplus which previously went to swell incomes out of all proportion to the work or responsibility involved. The same thing will probably happen to the Sheriffs. The threat of a statutory requirement that they should state the profits of their office under oath, and allow their books to be examined, would probably put an end to this agitation of Mr. McKellar and his official allies.

To "Barrister-at-Law" we would say, that, as the case he refers to has not been reported, his communication had better stand over. We think there were possibly some errors in the copy of the judgement seen by him. The subject referred to by "Rural" is touched upon at p. *ante*. The letter of "*Scriptor non Scriptum*" will appear in the February number.

Law Society of Upper Canada.

OSGOODE HALL,

MICHAELMAS TERM, 43rd VICTORIÆ.

During this Term, the following gentlemen were called to the Bar, the names are placed in the order in which they entered the Society, and not in the order of merit :—

James Cullen Lillie.

William John Franks.

James William Holmes.

John Sandfield Macdonald.

Gerard Holmes Hopkins.

William Joseph Delaney.

William McKay Reade.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks :—

Graduates.

Peter Sinclair Campbell.

Alexander Edward Ward Peterson.

James Andrew Thomas.

Edward Robert Cameron.

George Benjamin Douglas.

John Joseph O'Meara.

John Wilson Elliott.

William H. Barry.

Matriculants.

James Grace.

William Aitchison Proudfoot.

William T. Allan.

Henry Thompson Brock.

Albert Carswell.

Albert Ephraim Grier.

Adolph August Kraft.

William Edward Middleton.

Charles Potter.

John Clinie Drewry.

Frank Hedley Phippen.

Granville C. Cunningham.

Charles A. Grier.

John Wilfad.

John A. Richardson.

Flavius L. Brooke.

Marcus W. Russ.

William D. Innes.

Junior Class.

John Thomas Sproule.

Dyce W. Saunders.

Henry John Wickham.

George Hales.

Arthur Burwash.

John Alexander McIntosh.

George Corry Thomson.

Norman McMurchy.

Checkley Francis Johnston.

William James Church.

Hume Blake Elliott.

Sheriff Harkin.

James Miller.

Charles Franklin Farewell.

Alexander George Murray.

William Highfield Robinson.

John McNamara.

Frederick Thistlewaite.

Charles Morse.

Edward Augustus Wismer.

Joseph Alphonse Valin.

George Weir.

Walter Samuel Morphy.

Louis Hayes.

James S. Boddy.

Articled Clerk.

John Arthur Allright.