# Canada Law Journal.

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## DIARY FOR FEBRUARY.

1. Wed.... Final Examination for Attorney.
2. Thurs.. Final Examination for Call.
5. Sun.... *Septuagesima Sunday.*
6. Mon.... Hilary Sittings begin. Hagarty, C.J.,C.P., sworn in, 1856.
10. Fri. .... Queen Victoria married, 1840.
11. Sat. .... Lord Sydenham Gov.-Gen. of Canada, 1840. R. E. Caron, Lieut.-Gov. of Quebec, 1873.
12. Sun.... *Sexagesima Sunday.*
13. Mon.... Last day to move against Municipal Elections.

*TORONTO, FEB. 1, 1882.*

SIR GEORGE BRAMWELL, late one of the Lord Justices of Appeal, has been raised to the peerage under the title of Lord Edenbridge. As the *Law Journal* says:—He is a lawyer peer in the truest sense, having earned his honours solely through eminence as a lawyer and for past services."

SIR JOHN HOLKER, Q.C., who was Attorney General in the Beaconsfield administration, has been appointed by Mr. Gladstone to the seat rendered vacant by the death of Lord Justice Lush. He is a very able lawyer, and will it is believed be an ornament to the Bench.

SIR MONTAGUE SMITH, who was a paid member of the Judicial Committee of the House of Lords, has retired from the Bench. The vacancy thus created will not be filled, but instead, a Lord of Appeal in the House of Lords will be appointed. Sir Montague Smith was an eminent judge, with an acute mind, and a man of great learning. He entered the profession as a solicitor.

THE Taxing Masters will be both pleased and interested to hear that there is now judicial authority for the proposition that they exist for the purpose of being troubled. In the recent case of *Warner* v. *Mosses*, 45 L. T. N. S. 360, Lord Justice Brett observes: "Taxing Masters exist for the purpose of being troubled, just as Judges exist for that purpose; and therefore it is nothing to tell us that it will give the Master great trouble; we have no feelings about trouble. They must take the trouble; they must inquire in every case." There is a good honest ring about this, which no doubt will be appreciated even by Judges and Taxing Masters.

Two rather interesting letters on the subject of insanity as a defence and excuse for criminal action are published in a recent number of our contemporary, the *Irish Law Times*. One curiously enough is written by the late President Garfield to Judge R. F. Payne, with reference to a certain trial in which the latter charged strongly against the plea of insanity, and was read by Judge Porter at Guiteau's trial. It is as follows:—

"Dear Judge,—Allow me to congratulate you on your splendid charge to the jury at the close of the Gelentine case, The whole country owes you a debt of gratitude for brushing away the wicked absurdity which has lately been palmed off on the country as law on the subject of insanity. If this thing had gone on much further, all that a man would need to secure himself from the charge of murder would be to rave a little and tear his hair a little, and then kill his man. I hope you will print your excellent charge in a pamphlet form and send it to all the judges in the land."

The other betrays its authorship unmistakably by its style, and was originally written by Mr. Ruskin to the *Pall Mall Gazette*. Whether the sentiment is altogether commendable or not may be questioned, but at

all events, it shows an honest detestation of crime :—

"Sir,—Toward the close of the excellent article on the Taylor trial in your issue for October 31, you say that people never will be, nor ought to be, persuaded 'to treat criminals simply as vermin which they destroy, and not as men who are to be punished.' Certainly not, sir! Whoever talked or thought of regarding criminals 'simply' as anything (or innocent people either, if there be any)? But regarding criminals complexly, and accurately, they are partly men, partly vermin; what is human in them you must punish—what is vermicular, abolish. Anything between—if you can find it—I wish you joy of and hope you may be able to preserve it to society. Insane persons, horses, dogs or cats, become vermin when they become dangerous. I am sorry for darling Fido, but there is no question about what is to become of him. Yet, I assure you, sir, insanity is a tender point with me. One of my best friends has just gone mad, and all the rest say I am mad myself. But if ever I murder anybody—and, indeed, there are numbers of people I would like to murder—I won't say that I ought to be hanged; for I think that nobody but a bishop or a bank director can ever be rogue enough to deserve hanging; but I particularly, and with all that is left me of what I imagine to be sound mind, request that I may be immediately shot."

## *PROCEDURE IN IMPEACHING RETURN TO MANDAMUS NISI.*

### Napanee v. Napanee.

The proper procedure to follow, if it is desired to impeach the return made to a mandamus nisi is a subject of some little complexity, and we propose briefly to discuss the matter. Formerly, if the return were good upon the face of it, but false in fact, the prosecutor had no means of traversing it, *and no remedy at all*, except by bringing an action on the case against the defendants for their false return; but if he succeeded in obtaining a verdict and judgment in that action, the Court then awarded a peremptory mandamus. But by Stat. 9 Anne. c. 20, sec. 2 (which related only to municipal offices and officers; but which has since been extended to writs of mandamus in all cases,—in England by Imp. 1 Wm. IV, c. 21, sect. 3, and here by 28 Vict. c. 18, sect. 3, now R. S. O. c. 52, sect. 11)—it is enacted that where a return has been made to a writ of mandamus, it shall be lawful for the prosecutor to plead to or traverse all or any of the material facts contained therein. The effect of the above mentioned more recent statutes has been to make this applicable to all cases, although an action for a false return might not lie at common law. (*R.* v. *Fall*, 1. Ad. & El. N. C. 647; Archbold, Cr. Pr., p. 301. Ed. 1844.)

On the other hand, if the prosecutor wished to object to the return for any inconsistency or other defect *appearing upon the face of it*, he used formerly to move for a concilium, and have the matter set down in the Crown paper for argument, when the Court decided upon it; and if they held the return to be bad, they ordered it to be quashed, and awarded a peremptory mandamus. In very plain cases they sometimes decided as to the sufficiency of the return upon a motion to quash it, (*R.* v. *St. Catharines' Dock Co.*, 4 B. & Ad. 360), but as the decision in these judgments was final, and no writ of error lay upon it, the practice was unsatisfactory. To remedy this it was enacted in England by Imp. 6 and 7 Vict., c. 67, sect. 1, and here by 28 Vict., c. 18, section 7, (now R. S. O., c. 52., sect. 15), that in all cases in which the prosecutor of a writ of mandamus wishes to object to the validity of any return made thereto,—"he shall do so by way of demurrer to the same in such and the like manner as is now practiced and used in the said Courts respectively in personal actions, &c." (Archb. Cr. Pr. p. 298). For, as recited in Imp. 6–7 Vict. c. 67, by neither of the former statutes was any power given to the prosecutor to *demur* to the return, so that the decision of the Court as to its validity could be reviewed by a Court of Error. It

was during this latter state of things and before the passing of the 25 Vict. c. 18, sect. 7 that *Reg.* v. *Wells*, 17 U. C. R. (1859) came before our courts. The defendant there demurred to the return, and moved to quash it, and the Court held (i.) that in this country there could be no demurrer to a return, the Imp. 6–7 Vict. c. 67 not being in force here, and (ii.) that the return was insufficient and must be quashed.

It appears from the above that in cases where the return was good upon the face of it, but false in fact, the prosecutor *never had a remedy on motion to quash for this reason:* on the contrary before Imp. 1 Wm. IV. c. 20, (Ont. 28 Vict. c. 18, sect. 3) he had in cases not included within 9 Ann c. 20, no remedy at all under such circumstances, except by bringing an action on the case against the defendant for their false return. Where, however, the return was objected to for any inconsistency or defect *appearing upon the face of it*, it appears that the Court did sometimes, *before* Imp. 6–7 Vict. c. 67, sect. 1 (Ont. 28 Vict. c. 18, sect. 7) in very plain cases decide upon the sufficiency of the return upon a motion to quash it. The question remains whether the Court still has the power to squash a return in such cases?

An application to quash a return to a mandamus nisi, as being on the face of it invalid and frivolous, inasmuch as the cause shown against the mandamus being made absolute, raised points of law already decided against the defendants on the application for the mandamus nisi,—recently came before the Chancery Division in the case of the *School Board of Napanee* v. *the Municipality of Napanee*. The mandamus nisi in this matter was granted by Proudfoot, J. on Nov. 16th ult. as noted in our number for Dec. 1st, p. 452. On Dec. 7th, as noted in our number for Dec. 15th, p. 474, an application was made before the same learned Judge to quash the return made by the defendants on the above grounds, but he refused the application with costs, holding that the mode of procedure, when a return has been made to a mandamus nisi and the plaintiffs are not satisfied with it, is to demur, plead to or traverse the return, to which the defendants may reply, take issue or demur. As appears from his notes, he cited 3 Bl. Com. 264. *Rex* v. *Borough of Lancaster*, 7 Dowl. & Ry. 708, (1826); and *Rex* v. *Payn*, 6 A. & E. 392 (1837). The object of citing the first of these cases was apparently to show that questions already determined on the application for the rule *nisi* may also be again discussed after a return is made. This is all that appears from the case as reported in 7 Dowl. & Ry., while it appears from the report of the same case in 4 B. & C. 876, note (a), that the Court did quash the return in this case, apparently on the ground that the point raised on the return had already been decided on the rule to show cause. But this case was decided in 1826, before either Imp. 1 Wm. IV. c. 20, or Imp. 6-7 Vict. c. 67, and the case was not one that came under 9 Ann. c. 20, and therefore, so far as the question of quashing is concerned, it is no authority as to the present practice. In the other case cited by Proudfoot, J., *Rex* v. *Payn*, 6 A. & E. 392, the Court refused to quash the return. The reasons are not given, but in a subsequent application in the same case reported, 9 L. J. N. S. (Q. B.) 286, Lord Denman. C. J. is reported as saying: "In refusing to order the return in this case to be taken off the file, we did not mean to give any judgment as to its validity. The question before us was, whether it was evasive and frivolous, and that is all we intended to decide. The Court has undoubtedly the power to quash a return summarily on motion; and it is a power with which we do not intend to part; but where it merely decides that a return is not contemptuous, such a decision does not involve the consequence of a judgment on argument that it is good in law." And he held, on that occasion, that the prosecutors were still at liberty to traverse the facts of such return.

But it must be remembered that this case

of *Rex* v. *Payn* was decided in 1837, before the Imp. 6–7 Vict. c. 67 introduced the system by which a prosecutor demurs in such cases.

The passage in Blackstone, referred to by Proudfoot, J., is apparently contained in the last edition by Stephens, vol. 3, p. 617, but nothing is said there as to whether the Court will even now ever quash a return on motion, when insufficient in point of law. In Corner's practice, ed. 1844, p. 230, "it is apprehended that the power of the Court to quash a return of the description referred to," (*i. e.*, where it is clearly bad, or so evasive and frivolous as to amount to a contempt) "is not taken away by Imp. 6–7 Vict. c. 67." No cases are cited, however, to support this, nor is there anything to support it in Selwyn's N. P. ed. 1869, p. 1040 sq., where the procedure is discussed. Moreover neither does there appear to be in Fisher's Digest or elsewhere any English case since Imp. 6–7 Vict. c. 67, —nor in Robinson & Joseph's Digest any Canadian case since our 28 Vict. c. 18, in which a return to a mandamus nisi has been quashed on motion as deficient on the face of it,—and as above shewn it never could have been so quashed *as deficient in point of fact.*

*Prima facie* it would appear unlikely that after Imp. 6–7 Vict. c. 67 (28 Vict. c. 18 C.) the Courts would still quash on motion a return as insufficient on the face of it, for two reasons (i.) because 6–7 Vict. c. 67 specially recites that it was intended to remedy defects in the former procedure, and to enable the prosecutor to demur in such cases ; and (ii.) because its language is peremptory, and says that in such cases the prosecutor *shall* demur.

It thus appears that there are three courses now eligible if a return is unsatisfactory :—

(i.) If the return is good upon the face of it, but false in fact, the prosecutor can—

*(a)* Bring an action on the case against the defendant for his false return ; (as to which see Selwyn's N. P. ed. 1869, p. 1041 ;)

*(b)* Proceed under 9 Anne c. 20, sect. 2, as extended by R. S. O. c. 52, sect. 11, and plead to or traverse all or any of the material facts contained within the said return, etc.; (as to which see *ib.* p. 1043, and *Reg.* v. *St. Luke's Chelsea*, 5 L. T. N. S. 744.)

(ii.) If the return is defective upon the face of it he can demur under R. S. O. c. 52, sect. 15.

Thus in *Re Perth*, 39 U. C. R. 53,—a similar application for a mandamus to the one in the recent Napanee case—a mandamus nisi was granted in order "that the legal question involved might be formally raised by demurrer or plea," per Harrison, C. J.

What form the pleadings will take now in such cases still remains to be considered. R. S. O. c. 52, sect. 10, dealing with application for writs of mandamus on motion says that the preceding provisions of that Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by either of the Superior Courts of Law, which could, before the enactments giving a right to proceed by action for a writ, grant such writs.

Sect. 6 of the Act says: "the pleadings and other proceedings in any action in which a writ of mandamus is claimed shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in any ordinary action for the recovery of damages."

But the pleadings in any ordinary action for the recovery of damages have been changed by the Judicature Act. (O. 15, r. 1), and there appears no specific provision as to these proceedings on the return to a mandamus nisi. It is true O. 58, r. 1, provides that nothing in these rules shall be construed as intended to affect the practice or procedure in Criminal proceedings on the Crown or revenue side of the Q. B. or C. P. Division. But it is a question whether the proceedings we are considering can be held any longer in this Province to be proceedings on the crown side of the Q. B. or C. P. Division. It has been held by Proudfoot, J., followed by the

present Chief Justice of Appeal, that the Court of Chancery has jurisdiction in these matters, since the administration of Justice Act (R. S. O. c. 49), as stated in the judgment on the application for the mandamus nisi in the Napanee case, (Ch. Div. Nov. 16, 1881); and in *Re Stratford & Huron Ry. Co.*, 38 U. C. R. 112 (1876) Moss, C.J., said the writ of mandamus was not invested with any prerogative character in this Province in his opinion: "It is not attached to any particular Court, but may issue out of either of the superior courts of common law." In England, on the contrary, it has been held that ever since the Judicature Acts an application for the prerogative writ of mandamus must be made to the Q. B. Division (per Brett, L. J. *Glossop* v. *Hesten*, L.R. 12 Ch. D. 102). The Master in Chambers, however, on Dec. 23 ult. held in the case of *Campan* v. *Lucas*, *ante* p. 42, that the pleadings in replevin were not altered by the Judicature Act, and probably on the same principle the special nature of the proceedings in the matter of a return to a mandamus nisi would be held to exclude them from this operation of the Act.

## *RECENT DECISIONS.*

Proceeding with the December numbers of the Law Reports, we have now to deal with 7 Q. B. D. pp. 501-619; 6 P. D. pp. 125-156, and the very voluminous number of Chancery Division cases, 18 Ch. D. pp. 297-710.

CONTRACT.—DAMAGES.

In the first of these *Lilley* v. *Doubleday*, p. 511, requires notice. The defendant contracted to wharehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place, where without any negligence on his part, they were destroyed. The Court held that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of goods, For said Grove, J.—"if a bailee elect to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself." "*Hadley* v. *Baxendale*, 9 Ex. 341," said Lindley, J. "is wide of the mark, because the question here is whether the defendant was responsible for the goods, and if so the damages must be their value."

RECOVERY OF MONEY PAID UNDER ILLEGAL CONTRACT.

Next we may mention *Wilson* v. *Strugnell*, p. 548. In this case a Justice of the Peace remanded a prisoner to the next meeting of of the Justices of the County, and admitted him to bail, taking the recognizance of the defendant in £100 for his appearance. The accused paid the defendant £100 to indemnify him against liability under the recognizances. The accused failed to appear, but the defendant's recognizance was neither forfeited or discharged, nor did he pay anything under it. In this condition of things the accused was adjudicated a bankrupt, and the plaintiff, as trustee, sued to recover the £100 from the defendant. Stephen, J., held that the money was paid in pursuance of a contract which was contrary to public policy, and as the contract had not been executed, the plaintiff was entitled to recover. All the cases, he said, are consistent and reducible to plain and familiar principles; "The principle is, that where money has actually been paid upon an immoral or illegal consideration fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid; but that where money has been paid to a person in order to effect an illegal purpose with it, the person making the payment may recover the money back before the purpose is effected;" and in this case, said he, "I do not think the matter can be said to have been fully completed until the same has been *actually and finally applied to the purpose of repayinng him for a loss actually sustained by him*" (the defendant).

RECENT DECISIONS.

PRODUCTION.

The next case, *Wilson* v. *Raffalovich*, p. 553, is on the subject of the production of documents, and seems an instance of *summum jus summa injuria*, though Cotton, L.J., declares (p. 560) that "no man can be said to suffer an injustice if, when he comes to sue in a Court, the rules of the Court applicable to suitors who seek to enforce their rights are enforced in his case." The facts were these —The underwriters, having paid R. & Co., the insured firm, for a total loss of cargo, commenced an action against the shipowners in the name of R. & Co., to recover the value of the goods. A *consent* order was made for an affidavit on production by the plaintiffs, and a further order having been made that both members of the firm of R. & Co. should put in a further and better affidavit, the solicitor of the underwriters deposed that the members of the firm of R. & Co. were abroad, and would not give any further discovery, and that the real plaintiffs had done all they could do to comply with the order. The Court of Appeal, nevertheless, held that the case must be treated as if the nominal plaintiffs on the record were suing for their own benefit, and that the making a further affidavit could not be dispensed with. This reversed the decision of the Court below, which had held that under the above circumstances the real plaintiffs ought to be relieved from the necessity of a further compliance with the orders, Pollock, B., observing that the defendants suffered no injustice, for that if the underwriters had taken an assignment and sued in their own names under the Jud. Act, 1873, sec. 25, sub-sec. 6 (of R. S. O., c. 116, sec. 7) no Court could possibly have made an order against them for production of documents not in the possession of themselves or their agents. The Court of Appeal, however, agreed in taking a different view. "It is the misfortune of the real plaintiffs," said Brett, L.J., "that, being obliged to bring the action in the name of the parties to the contract who are abroad, they cannot get those persons, in whose name they are bound to sue, to obey the procedure of the Court. It is a misfortune, but it may be a misfortune without a legal remedy. The order that the plaintiffs on the record should make the further answer is a proper order; they have not made that answer, and under those circumstances I think that the order made by the Divisional Court cannot be supported." Counsel for the respondent then asked that the words "plaintiff or plaintiffs" should be inserted in the order, but Cotton, L.J., said he thought this unnecessary, for that "if an attachment is moved for against the plaintiff who does not make an affidavit, and it is shown that he is not in a condition to make one, no Court will grant an attachment."

MANDAMUS—CONTROVERTED ELECTION ACT.

The next case it seems expedient to notice is *The Queen* v. *Hall*, p. 575. In this case the Court of Appeal held that where the Commissioners appointed to inquire into corrupt practices at a parliamentary election have, with reference to a witness before them on such inquiry, exercised their judgment as to the right of such witness to receive their certificate, designed to protect him against future consequences of answers to criminating questions, under sect. 7 of the Imp. Corrupt Practices Prevention Act, 26 and 27 Vic., c. 29, their decision refusing such certificate is conclusive, and cannot be reviewed by *mandamus*, thereby shewing a tendency to dissent from *Reg.* v. *Price*, L. R. 6 Q. B. 411. There is a very similar section in our Controverted Elections Act, R. S. O., c. 11, sect. 53. Our Act, however, seems to shew more clearly than the Imperial Act, that whether the witness has answered truly is for the discretion of the Court to decide. For it speaks of "full and true answers, *to the satisfaction of the judge or judges*," whereas the Imperial Act merely says that "where any witness shall answer every question," he shall be entitled to a certificate. Bramwell, L. J., says, p. 588, "It seems to me that this statute must be read: Provided always that where any witness

'in the judgment of the Commissioners or Committee,' and that those words must be put in. There is no one so reluctant as I am to put words into an Act of Parliament or into an agreement, and I think it would be altogether unreasonable to do so, except for the most cogent consideration, but I think such consideration exists here. It is quite certain that some words must be introdced into the Act." And at p. 588, Cotton, L. J., draws a distinction, saying, that under certain circumstances he thought the Court might interfere with the discretion exercised by the Commissioners; "if, for instance, it was admitted by the Commissioners that facts existed which would entitle the witness to a certificate, and they refused it, then they would not have exercised they discretion which in my opinion was given to them by this section. . . But in this case the Commissioners have come to the conclusion that the witness had not performed the condition necessary to entitle him to a certificate, and they have therefore declined to grant him one." Brett, L. J., draws the same distinction, p. 585.

REMOTENESS OF DAMAGES.

The next case, *McMahon* v. *Field*, is an interesting one on the question of damages recoverable. An inn-keeper after contracting to provide stabling for the plaintiff's horses, in breach of his contract, let his stables to another person. The latter turned out the horses, which had been put into the stables by the plaintiff, without their clothing, and the remained in the defendant's yard exposed to the weather for some time, until the plaintiff could find suitable stables for them elsewhere. Owing to this exposure several of them caught cold, which depreciated their value in the market. The Court of Appeal held that the damage in respect to such cold was recoverable, and it was the probable consequence of the defendant's breach of contract, and was not, therefore, too remote. Bramwell, C. J., though expressing doubts on the point, concurred with the other judges, saying: "Here the damage would not have happened if there had not been a breach of contract, and although that breach may not have directly caused the damage, yet it was the only event without which the damage could not have happened." Brett, C. J., says, p. 595:—"The question as to the remoteness of damage has become a difficult one since, according to the case of *Hadley* v. *Baxendale*, 9 Ex. 341, it is for the Court and not for the jury to determine whether the case comes within any of the following rules, viz.:—(i.) Whether the damage is the necessary consequence of the breach; (ii.) whether it is the probable consequence; and (iii.) whether it was in the contemplation of the parties when the contract was made. Those two last are rather questions of fact for a jury than of law for the Court to determine. Now the question in this case is whether the fact of some of these horses taking cold is within any of these rules. It was not the necessary consequence of the breach of contract, but I have no doubt that it was the probable consequence, and if so, it follows that it was in the contemplation of the parties within the meaning of the third rule." He also expresses some doubt as to the correctness of the decision in *Hobbs* v. *London and S. W. Ry.*, to L. R., 10 Q. B., 111 Cotton, L. J. observed: "It is said that the rule is that the damage to be recoverable should be such as would be fairly in the contemplation of the parties at the time the contract was made as the probable result of a breach of it; but in my opinion the parties never contemplate a breach, and the rule should rather be that the damages recoverable is such as is the natural and probable result of the breach of contract."

IMPLIED WARRANTY OF QUALITY OF CHATTEL.

The case of *Robertson* v. *The Amazon Tug Co.*, p. 598, concerns the subject of implied warranty as to condition by the owner of a chattel which another hires or contracts for the use of. Brett and Cotton, L.JJ., held that as the contract in question related to a *specified* vessel of the defendants, there was no implied undertaking by them that it should

be reasonably efficient for the purposes of the voyage which the plaintiff had contracted to take with it, and that, therefore, the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possesion of the vessel than they were at the time of the contract. "The vessel," said Brett, L.J., "was named to the plaintiff at the time of the contract, and, although I do not think it material, the plaintiff had an opportunity of seeing it. That at once makes the contract a contract with regard to that specific vessel." The distinction he draws is between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing; in the former case there is an implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used, in the latter case there is no such implied contract. "I wish to put my view as plainly as I can," he says, p. 607:—"If there had been evidence in this case that, after the contract was made, the machinery, from want of reasonable care by the defendants, had become in a worse condition than it was at the time of the contract, I should have thought that there would have been a breach of contract for which the defendants would have been liable." Cotton, L.J., draws a similar distinction between cases where the vessel is at the time of the contract ascertained and known to both parties, and cases where it is not, but he draws a further distinction between the present case, in which the plaintiff had contracted with the defendant for a sum to be paid by them to take a vessel and barges to South America, with liberty to use the vessel as a tug, and cases of hiring and letting of an ascertained chattel, saying that "there is at least a doubt what warranty the law implies from the relation of hirer and letter to hire of an ascertained chattel." Bramwell, L.J., dissented from his colleagues, holding that the defective state of the engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective. This judgment seems an example of the habit of the learned judge referred to in the letter written by him, and printed in our number for Nov., 1st ult., where he says:—"I am prone to decide cases on principle, and when I think I have got the right one, (I hope it is not presumption) like the Caliph Omar, I think authorities wrong or heedless." "For," he says:—"The case seems to me the same as a contract of hiring, and as all contracts when one man furnishes a specific thing to another, which that other is to use. The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but he does undertake for the condition being such that it can do what its means enable it to do." And then goes on frankly to confess that he cannot find this rule plainly laid down any where, and that he is afraid the nearest authority is the dictum of Lord Abinger in *Smith* v. *Marrable*, 11 M. W. 5: "No authorities were wanted; the case is one which common sense alone enables us to decide." Summing up he concludes that "when the article is specific it must be supplied in a state as fit for the purpose for which it is supplied as care and skill can make it." A brief note as to a similiar implied warranty of quality on the sale of a chattel may not be out of place. That there is such a warranty where the vendor is the manufacturer, is well settled, (Saunders on Warranties, p. 57; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Randall* v. *Newson*, L. R. 2 Q. B. D. 102.) It would also appear to exist in cases where the vendor is not the manufacturer; in fact the point does not seem to turn on this, but on whether the vendee relied on the skill and judgment of the vendor or whether he did not: (see *dicta* in *Jones* v. *Wright*, 5 Bing. 544; *Brown* v. *Edgington*, 2 Man. & Gr. 279; *Bigge* v. *Parkinson*, 7 H. N. 955; *Jones* v. *Just*, *supra*; and in our Courts, *Bigelow* v. *Boxall*, 38 Q. B. 452; *Church* v. *Abel*, 1 S. C. 442.)

POWERS UNDER TWO ACTS OF PARLIAMENT.

Of the cases in 6 Prob. Div. pp. 125-165, we may refer to *Prehn* v. *Bailey*, p. 127, for the purpose of noting the principle advanced it it, that where a public body has powers under two Acts, it must be taken to have proceeded under that which gave it most advantages.

PRIVATE INTERNATIONAL LAW.

In the case of the Leon, p. 148, an action in *personam* was brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, and the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel, it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain. Sir Robert Philimore held, on demmurer, that this plea was bad, for that the law governing the liability of the defendants was the general maritime law as administered in England.

We must hold over our review of the Chancery Division cases in the Law Reports for December, as also the January numbers of the Law Reports, and the Law Journal reports just received.

## NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

### QUEEN'S BENCH DIVISION.

Wilson, C. J.] [Jan. 24.

UNION FIRE INSURANCE COMPANY v. LYMAN.

*Statement of defence—Contents of paragraph in Rule 128—Calls on stock—Allotment —Vesting of shares.*

Though each paragraph of statement of defence should under Rule 128, as nearly as may be, contain a separate allegation, it need not contain a separate defence.

Claim: Calls upon shares for which the defendant's testator had subscribed, and upon which he had paid ten per cent. at the time of subscription. Defence: By a by-law of the plaintiff company no subscriber of stocks should be a shareholder until the same had been allotted to him by order of the board; the testator subscribed for fifty shares, or any portion thereof which might be allotted to him, but no allotment was ever made.

*Held*, on demurrer, bad; for the by-law did not extend to a case in which a person on subscribing paid the necessary deposit, in whom the shares would vest under 39 Vict. ch. 93, sec. 2, (O.) the plaintiff company's Act of incorporation.

*A. C. Galt*, for defendant.

*Maclennan*, Q. C., contra.

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Wilson, C. J.] [Jan. 10.

RE MISENER v. TOWNSHIP OF WAINFLEET.

*Municipal Act—Drainage by-law—Withdrawal of petitions—Alteration in work petitioned for.*

A petition was presented under section 529 of the Municipal Act for the draining of certain lands, by construction a drain in a certain direction and deepening a stream. The petition was signed by eighteen persons, being a majority of those shewn by the assessment roll to be benefitted by the work, viz., thirty-three. A resolution of the council was passed under which surveys and estimates were made. Subsequently five of the petitioners withdrew, some by petitioning for a simple clearing of the bed of the stream, and some by informing the council that they would dig their own drains. By a subsequent petition three more desired to do the work themselves. By another petition seven interested persons desired to add their names to those who were in favour of the work. The names of six of the original petitioners remaining were not in the schedule to the by-law of those to be benefited. This left the number of petitioners at eleven. The council having procured a second estimate, showing that by diverting the direction of the drain the work could be done at less expense, passed a by-law reciting that a majority of those to be benefitted had petitioned, and providing for the construction of the work according to the altered plans. No debentures had been issued, nor contracts let, when a motion was made to quash the by-law.

*Held*, that the by-law should be quashed : for (1) The council had no power to authorize the undertaking of any work other than that petitioned for, but if that was impracticable or too costly they should have refused the petition ; (2) The petitioners had the right to withdraw at any time after subscribing the petition and before the contracts were let or the debentures negotiated, *i.e.*, while the council had control of the matters—the preliminary surveys and estimates being as much for the information of the petitioners as of the council ; (3) A sufficient number of petitioners, having withdrawn to reduce the number below the majority of those to be benefited, the by-law untruly recited that a majority, &c., had petitioned.

*Clement*, for motion.

*Bethune*, Q. C., and *Rykert*, contra.

## COMMON PLEAS DIVISION.

Wilson, C. J.] [Jan. 21.

BERRY v. ZEISS, ET AL.

*Married woman—Separate business—Personal liability.*

*Held*, that debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is, without regard to separate estate.

*Bethune*, Q.C., for the plaintiff.

No one appeared for the defendant.

## CHANCERY DIVISION.

Proudfoot, J.] [Nov. 9.

FARRELL v. CAMERON.

*Trustee and cestui que trust—Marriage settlement.*

The plaintiff, in 1854, being about to marry, conveyed certain lands to trustees—one of whom was her intended husband—upon trust to suffer her to receive the rents, etc., to her own use during her natural life, and upon her death, if she should have a child or children surviving her, in trust to convey the lands, etc., unto such child or children, their heirs, etc., for ever, freed and discharged of the trusts mentioned in the deed ; and in case of her death before her husband without any child, in trust to permit him to receive the rents, etc., for life, and after his death, or in case he should die before the plaintiff, she leaving no child, then in trust to convey the said lands to her right heirs, freed and discharged from the trusts thereof. The deed gave the trustees power to sell or lease, and also to borrow on the security of the lands.

The husband died in 1879, there never having been any children of the marriage, and the plaintiff, who was then 53 years old, requested the trustees to reconvey the trust estate to her, which they declined to do without the sanction of the Court, as the trust for children was not confined to the issue of the then contemplated marriage, but was wide enough to include the children of any other marriage : but

*Held*, that as there were no children, and it must be assumed that the plaintiff never could have any children, she was entitled, as equitable tenant in fee simple, to call upon the trustees for a conveyance ; the costs of the trustees to come out of the estate.

*McMichael*, Q.C., for plaintiff.

*McCarthy*, Q.C., for defendant.

Boyd, C.] [Jan. 11.

TRUDE v. PHŒNIX INSURANCE COMPANY.

*Practice—Trial by Judge—Rehearing—Divisional Court, jurisdiction of—Judicature Act.*

A cause having been heard and a decree pronounced therein on the 19th of May, 1881, and subsequently set down for re-hearing before the Divisional Court, after the coming into force of the Judicature Act :

*Held*, that Rules 274 and 317 restrict the jurisdiction of the Divisional Court after judgment to cases in which the findings of fact have been undisputed, and it is only sought to modify or set aside the conclusion drawn by the judges therefrom ; but if the appeal is on the whole case, as to both facts and law, it must be to the Court of Appeal.

*Plumb* for plaintiff.

*Foster* for defendant.

Boyd, C.] [Jan. 16.

IN RE SOLICITORS.

*Solicitor and Client—Costs, right to receive—Onus of proof.*

C., who was in active practice as a lawyer, had obtained a mortgage on a valuable leasehold estate, and having taken such proceedings as resulted in a forfeiture of the mortgagor's term, procured from the owner of the property a renewal of the lease to himself. The mortgagor instituted proceedings to redeem, but C., feeling that he was absolute owner of the interest, instructed the solicitors to defend the suit. They expressed to C. some doubt as to his right to resist the claim of the mortgagor, whereupon he, with one of the solicitors, went to an eminent real estate counsel, who, being pressed for time, advised them that the suit should be defended. C. drafted his answer, his solicitor adding one clause. Counsel at the hearing told C. he would undoubtedly fail in the litigation, and the usual decree for redemption was pronounced, C. being ordered to pay such costs as had been occasioned by his resisting redemption. It was alleged against the solicitors that they had advised C. that he would be entitled to costs in any event; that they had refused to consider or submit to him an offer to pay the mortgage money and costs, on the ground as they alleged that C. claimed about three times the sum offered; that they had colluded with the mortgagor's solicitor in having proceedings instituted which they had wrongly advised him to defend; and that he had had a good defence but the same had been negligently managed. There was a written retainer which did not express any special arrangement as to costs or the terms on which the defence was to be conducted. The Court being of opinion that C. had failed to make good his charges against the solicitors, affirmed the order made by Spragge, C., reversing the finding of the Taxing Officer that the solicitors were not entitled to recover the costs of the litigation.

*S. H. Blake*, Q.C., for solicitors.

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Boyd, C.] [Jan. 18.

RUMOHR V. MARX.

*Pleading—Practice—Amended statement of claim—Partial demurrer.*

The defendant having filed his statement of defence, the plaintiff replied thereto by amending his claim, by adding to the statement two new paragraphs which would have been demurrable if pleaded as a reply. The matters thereby set up, when separated from the rest of the statement, did not disclose any distinct cause of action. Thereupon the defendant served an amended statement of defence and demurred to the two paragraphs which had been so added. In view of the fact that the paragraphs which had been so added did not disclose any separate or substantial cause of action, and that the demurrer, however decided, could not advance the cause, the Court (Boyd, C.) over-ruled the demurrer without costs, as it was the first occasion the point had arisen under the Judicature Act.

The propriety of partial demurrers which do not bring up the whole or even a substantial question between the litigants, thus tending to increase costs, considered and remarked upon.

*Moss*, Q.C., for plaintiff.

*Wm. Douglas*, for defendant.

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## CHAMBERS.

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Boyd, C.] [Jan. 17.

LOWSON V. CANADA FARMERS INS. CO.

*Leave to appeal from Master's order—Rules 414, 427, 462.*

Where an appeal from an order of the Master in Chambers should have been set down on the 29th of December, but owing to an announcement by the Registrar that cases set down for that time would not be heard until the 9th of January following, the case was not set down till the 9th of January.

*Held*, that rule 414 O. J. A. did not apply and that leave under Rules 427 & 462 O. J. A. must be obtained from the Master in Chambers before the appeal could be heard.

*Cattanach*, for the appeal.

*H. Cassells*, contra.

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Boyd, C.] [Jan. 16.

RE DOWLER.

*Husband and wife—Administration.*

A widow married a second time and then administered to her first husband's estate. She lent moneys received by her as administratrix to her second husband, who died leaving her sur-

viving. The administration and loan were both after 1872.

*Held* that her right to recover against her second husband's estate was not affected by the Statute of Limitations.

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Mr. Dalton, Q.C.] [Jan. 17.

FREED v. ORR.

*Making certificate of judgment an order of High Court.*

This was a motion to make the certificate of judgment of the Court of Appeal an order of the High Court of Justice.

*H. Cassels* for the motion.

MR. DALTON.—I have seen Mr. Holmested who agrees with me that any order in Chambers is unnecessary. All that he could do with my order he can do with the certificate from the Court of Appeal. I should say that Mr. Holmested has a doubt whether the process should not now issue from the Court of Appeal; this is founded on section 14 of the Judicature Act. I do not partake in that doubt. I think that the section 14 merely confers an additional power on the Court of Appeal without interfering with the practice under the Appeal Act.

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Boyd, C.] [Jan. 16.

RE BLEECKER & HENDERSON.

*Costs—Taxation—Appeal.*

A solicitor's bill had been taxed by the local Master at Belleville, at the instance of the client, who now moved to have it referred to the Taxing Officer at Toronto for revision.

*Held*, that there was no right of revision under Rule 439 which applies only to taxations between party and party; that the practice in appealing from certificates of taxation between solicitor and client is unaffected by the O. J. A., and that the appeal should have been made under R. S. O. cap. 140, sec. 49.

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Mr. Dalton, Q. C.] [Jan. 17.

BARRETT v. BARRETT.

*Settlement by parties to deprive Solicitor of costs.*

Plaintiff and defendant met and agreed upon a settlement of the suit without providing for payment of plaintiff's costs. The defendant's solicitor refused to act in the matter when he saw the agreement. The parties then went to another solicitor who told them that in any settlement provision ought to be made for the payment of costs. No settlement was arrived at then. Subsequently the parties went to another place and employed a solicitor to draw an agreement between them. The plaintiff's solicitor refused to recognize the agreement and attempted to force on the trial. The parties again met at another place and the plaintiff employed a solicitor to draw written papers in which no provision was made for costs. The plaintiff was insolvent to the knowledge of the defendant.

*Held*, on the evidence adduced, that there was a combination between the defendant and plaintiff to defeat the claim of the latter's solicitor for costs, and an order was made for the payment thereof by the defendant as between solicitor and client.

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## REPORTS.

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## RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

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SCHNEIDER v. BATT.

*Imp. O. 16, rr. 18, 21—Ont. O. 12, rr. 20, 23, (Nos. 108, 111.)—Third party—Notice.*

B. ordered goods of a certain quality from P. and directed him to deliver them to S., who had ordered goods of the same quality from B. When the goods were delivered, S. complained of them to B. as being of inferior quality. B. subsequently wrote to P. that the goods had been examined by his agent, that they were of inferior quality, and that he should not accept them. S. having commenced an action against B. for the return of the purchase money, B. obtained leave to serve P. with a third party notice, under Imp. O. 16, r. 18, (Ont. No. 108); P. entered an appearance, and pleadings were delivered to and by him. Upon an application to a Master by B. under Imp. O. 16, r. 21 (Ont. O. No. 111) for directions as to the mode of trial; *Held*: that the letter written by B. to P. being evidence against him, but not against P., it would be unjust that the liability of B. and P. should be determined at one trial, and that no direction should be given.

[May 19, C. of A.—45 L. T. N. S. 370.

The above head-note sufficiently shows the facts. The Master refused to give any direc-

tions; and on appeal his decision was affirmed by Denman J., whose decision was affirmed by the Q. B. D.

From this decision the defendants now appealed.

*F. O. Crump*, for defendants, suggested that the Court might direct that the question between the plaintiff and the defendants and that between the defendants and P. should be tried by different juries. He cited *Benecke* v. *Frost*, L. R. 1 Q. B. D. 419; *Swansea Shipping Co.* v. *Duncan*, L. R. 1 Q. B. D. 644.

THE LORD CHANCELLOR:—The last suggestion of Mr. Crump seems to me really to dispose of this case. He suggests that the true way of doing justice in this matter would be that the Court should direct two trials by two distinct juries. That would be altogether contrary, in my opinion, to the intentions of these rules. The real truth is that these two contracts are not so connected with one another as to make it appear that a question in the action should be determined as between the plaintiff, the defendant and another person. I do not say that under the rules a third person might not be brought in even though the two contracts were not more connected than they are in the present case. But, assuming that the rules do empower the Court to order, in a case like the present, that a third person shall be a party to the action, that is only to be allowed where it appears that justice will best be done by having a common question tried at one time between all the parties. In the present case a letter has been written by the defendants, which would be evidence against them, but not against the third party P. He would be prejudiced by the admission that the defendants have made, if his case was tried with theirs. The plaintiff, S., would also be prejudiced, as he could not then rely on the admission alone. Justice will not, therefore, best be done in this case by having but one trial. I may add that a very strong case would be required for us to overrule the judgment of three tribunals in a matter of discretion

BAGGALLAY, L. J., concurred.

BRETT, L. J., in his judgment said:—P. ought to have resisted the order making him a third party, but he appeared. We cannot, however, do injustice because the parties have blundered. The question is, are we to make any order by which P. will take a part at the trial of this action. It seems to me that to answer that involves no decision on any rule or on any order; it is a question as to how to do justice in the particular case. I am of opinion that we ought not in this case to order one trial.

[NOTE.—*Imp. O. 16, r. 18 and Ont. O. No. 108 are identical except that the latter does not require the leave of the Court or Judge before service of a third party notice, nor does it require the notice to be "stamped with the seal with which writs of summons are sealed." Imp. O. 16, r. 21 and Ont. O. No. 111 are identical except that the latter empowers a Court or Judge to determine as to the costs of the proceedings. A subsequent application in this matter, arising out of the one here noted, is noted in 17 C. L. J. 369.*

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HARTMONT v. FOSTER.

*Imp. Jud. A. 1873. s. 49. O. 1. r. 2.—Ont. Jud. A. s. 32. O. 1. r. 2.*

No appeal lies from a judge's order dealing with the costs of an interpleader issue, made as between the parties.

[Nov. 24, C. of A.—45 L. T. N. S. 429.

A verdict having been directed for the claimant on the trial of an interpleader issue, the execution creditor took out a summons that the claimant might be directed to pay costs.

The summons came before Caves, J., who referred it to Hawkins, J., before whom the parties attended when he was sitting at Westminster.

Hawkins, J., then made an order directing the claimant to pay the costs of the execution creditor and of the sheriff.

Denman and Williams, JJ., having held that no appeal would lie from this order, the claimant now appealed to this court.

BRETT, L. J., after deciding that Hawkins, J. was sitting in a legal sense, not in Court but in Chambers, and therefore had jurisdiction to make the order proceeded to deal with the contention that O. 1, r. 2 gives an appeal in interpleader. He said:—

"To make out this proposition, the party desiring to appeal must show not only that O. 1. r. 2 applies (which it certainly does), but further that the practice before the Jud. Act was to entertain appeals from orders made as to costs in interpleader proceedings as between the par-

ties." He then observed that it did not appear that there was any case reported in which any Court ever did entertain an appeal from a judge's order as to the costs of interpleader proceedings as between the parties, while *Teggin* v. *Langford*, 10 M. & W. 556, does not bear out the argument put forward in support of the appeal in the present case, and if it had done so would be open to review, and moreover, "when a question of this kind is raised, one case does not make a practice." He concluded thus:—

O. 1., r. 2. does not give any power to entertain appeals, but even if it did I should try to construe it so as not to contradict the express provisions of the Imp. Jud. Act, 1873, s. 49 (Ont. Jud. Act, s. 32.) I think the rule is not inconsistent with this section; and the section contains an express enactment that appeals shall not lie as to costs, and this applies to interpleader as well as to other proceedings. It would be strange if this were otherwise, it would be an anomaly that there should be no appeal as to the costs of an action, which often comes to a very large amount, and there should be an appeal only where the costs are of minor consideration, as is the case in interpleader. I do not think the case of *Hamlyn* v. *Batteley*, L. R. 6 Q. B. D. 63, interferes with this decision. That case was as to the carrying out of an interpleader order, and there was not an express enactment relating to the question as there is here.

COTTON, L. J., concurred, and added that *Dodds* v. *Shepherd*, L. R. 1 Ex. D. 75, does not decide the point.

LINDLEY, L.J., also concurred, and added that if the section of the Act and the order were inconsistent he should say the rule must give way to the statute.

[NOTE.—*Imp. Jud. Act, 1873, s. 49, and Ont. Jud. Act, s. 32, are identical: as also (mut. mut.) are the Imp. and Ont. orders.*]

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# *ONTARIO.*

## CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

## REGISTRAR'S OFFICE.

### REID v. WILSON.

*Mortgage—Interest.*

Where no interest is reserved by a mortgage, none is recoverable until after day appointed for payment

Effect of proviso in mortgage for payment of amount secured "without interest if paid when due."

[Nov. 15, 1882.—Mr. Holmested.

The plaintiff had issued a writ on a mortgage, and had endorsed the writ for $400, and interest from 16th Sept., 1871.

The defendant paid into Court $400 and interest from 16th Sept., 1881, to the date of payment, and had filed a note disputing that any more was due.

Notice of taking the account before the Registrar of the Chancery Division having been served,

*T. Langton* appeared for the plaintiff.

*G. M. Rae*, for the defendant.

Coote on Mortgages, 4th ed., p. 867; *Farquhar* v. *Morris*, 7 T. R. 144; *Carey* v. *Doyne*, 5 Ir. Chy. R. 104, were referred to.

The facts are sufficiently stated in the judgment of

The REGISTRAR:—This action is on a mortgage. The proviso is for payment of several instalments to different parties, one of which is in default, and for non-payment whereof the action is brought. The defendant has paid into Court the amount of this instalment and the interest which has accrued thereon since it fell due, and disputes the right of the plaintiff to interest prior to the instalment falling due. The mortgage is dated 16th September, 1871. The proviso is as follows: "Provided this mortgage to be void on payment of $2,400 of lawful money of Canada, as follows, that is to say; 1st, to pay unto the said Ellen Gilmor $400 in ten years after the date hereof." It then enumerates five other payments, and winds up: "all without interest, if paid when due to the above parties." There is the usual covenant to pay "the mortgage money and interest and observe the above proviso."

It is contended by the plaintiff that there having been default in payment, interest runs from the date of the mortgage notwithstanding the words, "all without interest, if paid when due to the above parties." It was urged that if nothing had been said about interest in the mortgage the several instalments would have borne interest from the date of mortgage, and that the stipulation "all without interest, if paid when due to the above parties," only exonerates the mortgagor from his *prima facie* liability to pay interest, provided he pays at the days appointed. Two cases are referred to in support of this proposition: *Farquhar* v. *Morris*, 7 T. R. 144, and *Carey* v. *Doyne*, 5 Ir. Chy. R. 104.

As it appears to me, neither of the cases do in fact establish that where the proviso is for payment of a sum certain at a future day without any mention of interest, that the law annexes to that proviso an obligation to pay interest also from the date of the instrument. Interest was allowed in both the cases referred to, because the debt for which the security was given was *presently payable*, and the security in no way postponed the payment. They are authorities for saying that after the debt secured becomes payable according to the instrument, interest may be recovered from that date.

No other case that I have been able to find supports the plaintiff's contention. In *Thompson* v. *Drew*, 20 Bev. 49, where the mortgagee agreed to reconvey on payment of principal, no interest was allowed, and I think that governs this case. Since the case of *Cook* v. *Fowler*, 7 E. & I. App. 27, it must be held to be settled that interest can only be recovered after the time fixed by a contract for payment of money with interest (in the absence of an express agreement to the contrary) by way of *damages*, and not upon any inplied contract to continue paying the stipulated rate of interest, or any interest at all, after the day appointed by the contract for payment. If there is no implied contract to pay interest *after* the day fixed for payment, I do not see how there can be any implied contract to pay interest *before* the time appointed for payment when the contract of the parties is silent on the point.

It appears to me where the parties to a mortgage stipulate for the payment of a sum certain at a future time, and no mention is made of interest, no interest can be recovered until after that time has elapsed, (see *McDonell* v. *West* 14 Gr. 492).

The question remains whether the words, "without interest if paid when due" can alter the case. I do not think they can. What penalty, if any, the parties intended should be imposed if the money were not paid "when due" does not appear from the mortgage. The plaintiff says the intention of the mortgage is to oblige the mortgagor to pay interest on the amount in default from the date of the mortgage, (a period of ten years), but I think I might as reasonably hold that he is to pay $1,000 penalty for his default as that he is liable to pay the ten years' interest claimed. I therefore disallow the plaintiff's claim to the extra interest claimed by him.

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## CHAMBERS.

### BURRITT V. MURDOCH.

*Motion for judgment in default of appearance,—Service of notice of motion—Rules 406, 131.*

[Dec. 21, 1881.—Jan. 16, 1881.—Proudfoot, J.

*Walter Read*, for plaintiff, moved for judgment in default of appearance. The action was against a trustee for an account. The defendant did not appear and judgment was awarded in accordance with the prayer of the statement of claim On coming to draw up the judgment, it appeared that the notice of the motion for judgment had not been posted up or served on the defendant, and the question was submitted to the learned judge whether, under the circumstances, the judgment should be entered. *Gillot* v. *Ker*, W. N. (1876) 116; *Dymond* v. *Croft*, 3 Ch. D. 512; *Parsons* v. *Harris*, 6 Ch. D. 694; *Rules* 406 and 131 were referred to.

PROUDFOOT, J.—After consultation with the other members of the Chancery Division, held that the practice as laid down in *Dymond* v. *Croft*, and *Parsons* v. *Harris* must be followed, and that although the defendant had not appeared to the writ of summons, notice of motion for judgment must be served. Such service might be effected by posting up a copy in the office under Rule 131, and as notice had not been served in the present case the judgment ought not to be entered.

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## COUNTY COURT.—COUNTY OF ONTARIO.

(Reported for the LAW JOURNAL.)

### OSHAWA CABINET CO. v. NOTE.

*Practice—Devolution of cause of action—Continuance of suit.—Rules 164 & 385, O. J. A.*

Where a cause of action has devolved upon a third party, the proper course is to take out an order upon *præcipe* to continue the action, under Rule 385, and not to proceed as directed in Rule 164.

[November 12, 1881.—Dartnell, J.J.

Action on a promissory note, to which the defendant appeared and filed pleas, which were afterwards struck out. The defendant asked leave to plead, that the note in question had been transferred to the plaintiffs to secure a debt of the payee, one T. N., to them, which note, since the commencement of the action, had been satisfied by T. N., and, that he thereupon became the beneficial plaintiff. The plaintiff admitted these as facts, and the defendant swore he had a good defence upon the merits, as against T. N. The question then arose as to the proper practice to pursue.

DARTNELL, J. J.—I think there has been such a devolution of the cause of action as to entitle T. N. to an order to continue the action in his own name, under Rule 385. Under the old practice the plaintiff could admit the truth of a plea, *puis darrein continuance*, and discontinue his action. He would be entitled to his costs up to that time. This in effect continues to be the practice under Rule 157.

It is contended that Rule 164 applies to this case. I do not think it does. I think the new plaintiff should take out an order, under Rule 385, and that the former plaintiffs should have their costs. Judgment having been entered, this will be set aside upon payment of these costs; T. N., the new plaintiff to file a new statement of claim, to which the defendant may plead as he may be advised.

## *DIGEST OF RECENT DECISIONS IN UNITED STATES COURTS.*

DURESS.

A threat of suicide by the husband to induce his wife to sign a note will not amount to duress. *Remington* v. *Wright.*—Central L. J., Jan. 13.

MECHANICS' LIEN.

A foreman engaged in directing the work in a mine performs "work and labour" in the mine within the meaning of the Mechanics' Lien Law, and is entitled under it to a lien upon the mine for services. *Flagstaff & Co.* v. *Cullins.*—Ib.

NEGLIGENCE—MASTER AND SERVANT.

The introduction by the employer of new and unusual appliances involving unanticipated danger to the employee, without giving notice to such employee of the character of the new appliances, is negligence. *O'Neil* v. *St. Louis, etc., R. Co.*—Ib.

NEGLIGENCE—RAILWAY FIRES.

In an action for damages for injuries to property by fires caused by sparks from the defendant's locomotive engine, evidence having been admitted on behalf of the defendant, that the spark arrester was examined at the end of the return trip and was found to be in good condition. It was *held*, that evidence that property had been set on fire in the same neighbourhood upon this return trip was admissable. *Loring* v. *Worster, etc., R. Co.*—Ib.

BILLS AND NOTES—ALTERATION.

When one of the signers of a promissory note adds to his signature the word "surety" and the others do not, the presumption is that the note was given for value by the other makers, and that they are the principal debtors, and the erasure of the word "surety" was a material alteration of the instrument and avoided the note. *Rogers* v. *Tapp.*—Ib.

BILLS AND NOTES—ENDORSEMENT IN BLANK.

1. An indorsement in blank of a negotiable promissory note is a complete commercial contract, and not in any sense an unpaid contract. Consequently evidence of a prior agreement between the parties at the time, that it should merely have the effect of an indorsement "without recourse," is admissible.

2. When the maker of a note is insolvent, a failure on the part of an indorsee to prosecute it to judgment against him will not prejudice his claim against the indorser. *Martin* v. *Call.*—Ib. Jan. 20.

MASTER AND SERVANT.

The relation of master and servant is such that the servant will be restrained by injunction from making use of the knowledge and information of his master's affairs acquired in his service, to engage in a business enterprise (during the continuance of the contract of service) which will have a tendency to place him in a position of antagonism to the interests of his employer. *Gower* v. *Andrew.*—Ib.

AGENT—ACTING FOR BOTH PARTIES.

The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involves, *prima facie*, inconsistent duties, and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other, which

would naturally affect his action, and assented to the double employment. But when such knowledge and consent are shown he may recover from each party. *Bell* v. *McConnell.*—Ib.

(See also *Kersteman* v. *King*, *ante infra*, vol. 15, p. 140.

BILLS AND NOTES — AGREEMENT AS TO LIABILITY.

An accommodation indorser cannot set up, in a suit against him by his indorsee, that there was an agreement between them at the time of putting their names on the paper that such indorsement should constitute a joint, and not a successive, liability. *Johnson* v. *Ramsay.*—Albany L. J., Jan. 14.

MUNICIPAL LAW—DEFECTIVE STREETS.

The council of a city had exclusive power over the streets, highways, bridges, etc., in the city, and to make repairs thereof. The council held stated meetings once in two weeks, and special meetings were authorized at any time upon the call of the mayor or five councilmen. *Held*, that notice to a councilman of a defect in a bridge in the city was notice to the city rendering it, in case of a neglect to repair, liable to one injured by the defect. *Logansport* v. *Justice.*—Ib.

PUBLIC OFFICER—BOND—SURETIES.

An action cannot be maintained against a constable and his sureties on his official bond, for a trespass committed by him in taking the goods of a stranger on an execution issued against the property of another person. The remedy in such case is by an action of trespass or trover against the officer personally, and against the plaintiff in the execution if he be a party to the trespass.

For any breach of official duty by a constable, his official bond is responsible; this is the extent of liability assumed by the sureties. If he commit a wrong, not in the discharge of his official duty, he is personally liable, but his sureties cannot be held responsible therefor; it is not within the terms of their contract. *State of Maryland* v. *Brown.*—Ib.

CONTEMPT—JUSTICE OF THE PEACE.

A justice of the peace sitting in the court for the trial of small causes, engaged in the trial of a civil cause, has no power to commit to prison as a punishment for a contempt committed in open court. *Rhinehart* v. *Lance.*—Ib.

WOMEN MAY BE ARBITRATORS.

Under a statute making no provision that men only shall be appointed arbitrators, *held* that a married woman could be appointed third arbitrator by the other two arbitrators and that the fact that the appointment was made in the absence of one of the parties would not invalidate the award as to that party. *Evans* v. *Ives.*—Ib.

LIBEL—INDICTMENT.

A publication is libelous if, without charging on indictable offence, it falsely and maliciously imputes conduct tending to injure reputation, to cause social degredation, or to excite public distrust, contempt or hatred. An indictment is good if it charges the publication as matter not libelous *per se*, but charges such publication with proper inducement and inuendoes to set forth and explain the deformatory statements of the publication. *State* v. *Spear.*—Crim. Law Mag., Jan. 1.

MURDER.

The word "deliberately," as used in the statute defining murder in the first degree, means in a cool state of the blood as contra distinguished from a heat of passion. But the term "passion" in this connection is not limited to that heated state which comes from and is produced only by some legal provocation. *State* v. *Lewis.*—Ib.

## CORRESPONDENCE.

*Bylaws—Imprisonment with hard labour.*

*To the Editor of the* LAW JOURNAL.

SIR,—A by-law of the Town of Woodstock was passed in 1866, which provided that any person convicted of an offence under it, might in default of payment of fine, be imprisioned in the common jail with hard labour.

Under the Municipal Law then in force, 29 30 Vict., chap. 51, section 246, sub-section 8, this by-law was legal, and within the power of the municipality to pass, and has never been repealed or changed.

In 1881, a person was convicted under it, and the conviction, was appealed on the ground (amongst others) that the by-law was now bad for imposing imprisonment with hard labour, (see *Regina* v. *Nancy*, 46 U. C. R., 153), but the point was not decided by the learned chairman, as the conviction was bad upon other grounds.

Now, are by-laws, valid at the time of passing, imposing hard labour, still valid; and can this punishment be inflicted under them; and if so, could the Ontario Government require such by-laws to be rescinded? If these by-laws are valid, the result is, that one municipality may inflict the punishment of imprisonment with hard labour, while a municipality created since the passing of the British North America Act, in the same county, cannot inflict the same punishment, for the same offence. This point is mentioned in the argument of Mr. Hodgins, in the case quoted obove.

WOODSTOCK

CORRESPONDENCE.

*Practice in County Courts.*

*To the Editor of the* LAW JOURNAL.

SIR,—There appears to be a difference of opinion agongst the County Court Judges as to the proper practice to be observed in making Chamber applications in the County Courts, some judges holding that such application should be made on notice and others being of opinion that they should be on summons.

Rule 490 applies the practice for the time being of the High Court to the County Courts.

Rule 412 provides that every application at Chambers in Toronto shall be made in a summary way on notice, instead of by summons, while Rule 425 provides that every application to a County Court Judge or Local Master shall, where notice of the application is necessary, be made in a summary way by summons.

On the one hand it is contended that the ordinary practice is laid down in Rule 412; and that it is the ordinary practice that is to be followed and not the exception. On the other hand, it is argued that the reason for making the distinction between the methods of bringing on an application before a County Court Judge, and an application in Chambers in Toronto, is that the County Judge, from the nature of his duties, cannot possibly be in Chambers every day, and that if a notice of motion were given for a particular day there might be no judge present in Chambers to hear it, while Chambers being held regularly in Toronto, no such difficuly would be likely to arise there. And that this reason applies with equal force to applications in County Court matters as to applications in such High Court matters as are competent for County Court Judges, after the 1st of January last, to dispose of. As this is a matter of public interest to the whole profession, I would be glad if you would favour us with your opinion upon it.

Yours, etc. J. R.

[Rule 425 seems clearly to show that in all cases of application to a County Court Judge or Local Master *under the Act or Rules*, must, where notice is necessary, be by summons.

In the case of applications, *other than those under the Jud. Act and Rules*, Rule 490 seems to show the question to be, whether the former practice of the County Court corresponded with the High Court *in this* respect, and if so, then notice should be by summons, for Rule 425 shows such is the proper course in cases of applications at Chambers, authorized by the Jud. Act or Rules, out of Toronto.

If the practice of the County Court in these latter cases differed from that of the practice of the Superior Courts, the Jud. Act does not appear to make any express provision, and therefore it will presumably continue as before.

—EDS. L. J.]

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*Surrogate business and the uncertificated. —Commissioners.*

*To the Editor of the* LAW JOURNAL.

SIR,—I do not wish to add anything to the apparently fruitless discussion anent the unlicensed conveyancing evil, as the subject has already been thoroughly ventilated in your columns, but I would call the attention of your Journal to a grievience which is the outcome of that evil, and the remedy for which fortunately does not require any exertion on the part of indifferent benchers, or any intervention by a too politic legislature. I allude to the steady increasing practice of these unlicensed ones in the Surrogate Courts of the Province. Nothing is more common in the country sections than to see probate papers and letters of administration endorsed with the name of some one of these gentry, as the person who procured their issue, with probably an advertisement superadded of the Insurance Company he represents, or the Loan Company for which he is an agent. Now unless my rendering of the Surrogate Court Act is incorrect, the proceedings therein can only be undertaker by a solicitor or attorney, or by the applicant in person, and the practice of which I complain is not only unauthorized, but is in open defiance of the Act. And yet our Surrogate Court clerks, who are, or ought to be, familiar with the provisions of the statute under which they act, recive and file these papers, and our Surrogate Court Judges in adjudicating under the Act, pronounce them sufficient, stamped though they be with an avowal that one section of the Act, which is certainly entitled to some notice, has been utterly set at naught. Thus another fruitful source of income is taken away from the country practitioner, and that with official and judicial sanction. We may become enured to the idea, that the payment of our annual fees is a self-compensating privilege, or that our certificates confer an imaginary protection, and cease to disturb the masterly inactivity of our repre-

sentatives at Toronto, or to embarras a Government by asking for legislation odious to many of its supporters; but it is little to ask that a section of a statute, designed for our protection, should not be totally disregarded by those appointed to administer its provisions, and that the officials who exercise a supervision over the Surrogate Court offices should advise the clerks of those offices that a breach of any of the provisions of the statute regulating the procedure of of the Court should be fatal to the reception of papers on the face of which that breach is manifest. Otherwise we have no security as to where the invasion may stop, for it appears that it is only an *attorney* who practices without a certificate that is liable to a penalty.

While writing I would draw your attention to another point which, though not actually a grievance, is still a serious inconvenience, viz.: the fact of an attorney's commission to administer oaths being confined to the limits of one county or union of counties, while appreciating the reasons for such a limit being placed in the case of non-professional man, it is difficult to understand the motive in the case of one who is entitled by virtue of his certificate to practice anywhere within the jurisdiction of the Court which grants the commission, and who is entitled to that commission upon the mere production of the certificate. To those who find it necessary in consequence of the competition with Magistrates, Division Court clerks, etc., to open offices in two or more counties, and to those who for the same reason are forced to change their field of practice, the restriction is more than an inconvenience, and I would like to be informed what was the reason for its adoption, and what is the necessity for its retention.

Hoping that the above remarks may find a place in your columns, I remain,

A DULY CERTIFIED ATTORNEY.

[We have already called the attention of the County Judges to the matter firstly referred to by our correspondent. It is surprising that this well founded grievance should be allowed to continue. We understand the County Judges meet occasionally to discuss matters affecting their duties, rights and privileges. This surely would be an appropriate object for discussion, and it cannot be said that some of them at least have not heard of it before.—EDS. L. J.]

*Removal of County Judges—Powers of Local Legislatures.*

*To the Editor of the* LAW JOURNAL.

SIR,—An able contributor in your 1st Dec. No., on the subject of the removal of County Judges, rightly claims that the power to remove must be held to reside with the same executive authority that has the right to appoint; and it seems to be a corollary to this proposition that no Parliament but the one of which this executive forms a part, can direct the mode of the exercise of this power. But it is not accepted as law in this Province that neither the appointment or removal of a Judge is any part of the constitution, maintainance or organization of a Court, as the writer at page 447 suggests. On a kindred topic, the appointment of Justices of the Peace, the local statutes, giving authority to the Lieutenant Governors, are open to much discussion; but it is submitted that they are practically, and ought to have been entitled, "Acts to provide for the maintainance and organization of the offices and Courts of Justices of the Peace." If these acts are all *ultra vires*, then all the every day local legislation making such functionaries as aldermen, &c., *ex officio* Justices of the Peace is equally as bad. A local statute having assumed to authorize the Municipal Councils to select from among the Justices of the Peace stipendiary Magistrates for distinct "police divisions," the question of the validity of such legislation was decided at Digby in the case of the *Queen* vs. *Bakin* by Savery, County Judge, a copy of whose judgment I subjoin.

Nova Scotia, LEX.
December, 1881.

The following is the judgment of Judge Savery above referred to:—

"The question is substantially the same as that discussed in *Ganong* v. *Bailey*, 1 P. & B. (New Brunswick) p. 324, and the lucid reasoning and clear exposition of legal principles in the dissenting judgment of the Chief Justice in that case demand great respect as well as careful consideration. It is undoubtedly true that a legislature of which the Sovereign is not a part cannot ordinarily legislate on a matter affecting a prerogative of the Crown, as the appointment of Judges and Justices of the Peace undoubtedly is; but it is claimed that the Parliament of the Empire has by the British North America Act delegated to the local legislature the power to do so to the extent involved in this statute. No Act of Parliament can be held to take away or

diminish or authorize the taking away or diminishing of a royal prerogative unless the intention to do so appears by "express words or necessary implication," or by terms that make the "inference irresistible." But the strictness of construction required must depend largely on the nature and importance of the prerogative affected, and as to the appointment of Magistrates of this class, I think it sufficient that on reading the statute, and comparing the sections *in pari materia* together in the light of the manifest scope and policy of the whole, the intention should be clear to the judicial mind, as a reasonable and common sense deduction. Subsection 14 of sect. 92 of the B. N. A. Act assigns to the Provincial Legislatures not only the constitution but the 'organization" of Courts ; and section 96 prescribes what judges are to be appointed by the Governor General. "Organization" is defined by Webster as "the act of distributing into suitable divisions and *appointing* the proper officers, as of an army or a government." The language of sub-section 14, if this definition be correct is therefore fully as strong as that of sub.-sec. 4, by which the local legislature is enabled to legislate in relation to the "appointment" of Provincial officers, which it must not be forgotten is equally a branch of the royal prerogative. See Blackstone's Com. p. 272. But sec. 96 limits and curtails what would otherwise be the "sweeping" effect of sub.-sec. 14, by defining what judges shall, nevertheless, be appointed by the Governor General, naming only those of certain Courts of peculiar dignity and jurisdiction; and as a qualifying clause controlling the general terms of sub.-sec. 14 of sec. 92 it would be a gratuitous violation of a sound principle of construction not to apply to it the maxim "*expressio unius est exclusio alterius.*" This is said in Broom's Legal Maxims to be a "general principle of law," which applies "where in an instrument there are general words first, and an express exception afterwards," p. 507. "A statute, it has been said, is to be so construed, if possible, as to give sense and meaning to every part; and the maxim was never more applicable than when applied to a statute that *expressio unius est exclusio alterius.* "The sages of the law, according to Plowden, have ever been guided in the construction of statutes by the intention of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and sound discretion:" Broom, p. 515. Here then we have the Provincial Legislature in express terms authorized generally to make laws in relation to the "organization of the Courts," language which includes one of the prerogatives of the Crown, viz.: the appointing of judges, as the greater includes the less; and further on we have what operates as an exception or prohibition to this power of legislation so far as it affects the appointing of a certain class of judges specially mentioned and not including those under consideration. If the term "organization" does not include the appointment of the judges, it is difficult to see what "sense" or "meaning" it can have after the word "constitution"; and that the framers of the Act must at all events have so understood it, is evident from their having found section 96 necessary; and if section 96 were intented to embrace such Courts as these, its language would have been "all the judges," instead of "the Superior District and County Judges"; for one cannot imagine a Court that is not territorially or in some sense a "District Court." I think therefore that the local legislatures may establish a local and inferior Court, and provide for the appointment of its judges otherwise than by the Crown ; a privilege which if sought to be abused, or exercised to an anomalous degree or in a manner inconsistent with British principles, can be checked by the veto power residing in the Dominion Executive. I think that while the judges mentioned in sec. 96 must be appointed by the Queen's representative, all others may be appointed as the proper legislative authority prescribes ; and in the absence of legislation on the point then by the Queen's representative, as I decided in the case of Justices of the Peace."

## FLOTSAM AND JETSAM.

Sir Richard Malins, formerly Vice-Chancellor of England, died on the 15th ult. He was born in 1805 and called to the Bar in 1830.

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We learn from the Halifax papers, that a meeting of the Barrister's Society was held recently, at which the salary of the Equity Judge was considered. It was orininally $5,000, but an Act was passed several years ago that upon the death or resignation of the present incumbent it should be reduced to $4,000. A resolution was unanimously adopted by the meeting asking the Dominion Government to allow the salary to remain the same as at present. It was also resolved to request the Government to make a considerable increase in the salary of Judge Johnston, of the Halifax County Court, in consideration of the large amount of labor devolving upon him.

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"Without prejudice," is a phrase often used, and has a good legal ring about it. We all remember Mr. Guppy, the lawyer's clerk in Bleak House, who expressed his admiration for Miss Summerson, and was careful to ask that his suit was to be "without prejudice." A decision of Mr. Justice Fry, *Law Times*, Dec. 10, gives a rather restricted meaning to these oft-used words. He held that, when added to letters they only mean that in the event of the negotiations carried on by those letters not resulting in any agreement, nothing is to be taken as an admission. Where letters written "without prejudice" contained an undertaking upon certain terms which were agreed to by the other side, and afterwards the parties giving the undertaking wished to introduce a fresh condition the original undertaking was enforced.—*Law Times.*