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The Governments of England and Canada have well and honourably carried out that part of the treaty that devolved upon them in the selection of those who will have in charge the interests of the Empire in relation to the Alaska Boundary dispute. There can be no question that our Commissioners, Lord Alverstone, Lord Chief Justice of England, Hon. John Douglas Armour, one of the Judges of the Supreme Court, and formerly Chief Justice of Ontario, and Sir L. A. Jettè, Lieutenant-Governor of Quebec and formerly a distinguished Judge of that Province, are "impartial jurists of repute" of whom any country might be proud. A writer of learning and research in another place enables our readers to form their own opinions as to the three named by the Government of the United States. The services of Mr. Christopher Robinson, K.C., and of the Hon. Edward Blake, K.C., have been secured as counsel, admittedly the best men that could have been chosen for the position either in England or Canada. Mr. Aime Geoffrion will be junior counsel.

THE OLDEST CIVIL CODE.

The recent discovery, by the celebrated archæologist, M. de Morgan, of the Code of Hammurabi, King of Babylon, (circa 2250 B.C.) puts us in possession of the earliest of all codes of law devised by man. According to the New York *Independent*, which publishes an English rendering of the German translation, by Hugo Winckler, and from the cuneiform inscription, the Code was set forth on a stone stele by Hammurabi, the biblical Amraphel, of Abraham's time, in Sippara, city of the Sun-god Shamash, and was carried to Susa (where it was discovered by M. de Morgan) as a trophy by an Elamite invader. The Code is a compilation of some 282 distinct provisions, and bears remarkable testimony to the enlightened jural conceptions of Babylonian civilization. It may also be said to afford very striking disproof of the eighteenth century theory that all customary law had its origin in legislative enactment, (see *Collins* v. *Blantern*, Wils. pt. ii, pp. 348, 351); and,

conversely, to establish that the origin of every system of positive law inheres in discrete decisions, or case-law, rather than in an homogeneous embodiment of principles and rules promulged by some creative lawgiver at a particular time. In this Code, King Hammurabi collected the themistes, or decrees of the judges, as they came down to his time from a still greater antiquity. The various articles of his Code bear upon them the indelible stamp of judicial origin. An examination of the document will shew that the ancients exacted great excellence from their judges. Art. 5 says: "If a judge try a case, reach a decision and present his judgment in writing; if later, error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgment." Modern civilization has relaxed the rigour of judicial constraint, and, taking everything into consideration, wisely, we venture to think. As regards the conception of contractual obligation, the ancient Babylonians would seem to have been more advanced than the English of three thousand years later in the world's history. In the Code of Hammurabi, we have a fairly complete system of conventional law; while, as Professor Maitland tells us in his introduction to "Bracton and Azo" (Selden Soc. Pub. vol. 8, p. xix), Bracton was obliged to go to the Institutes of Justinian for the general principles of a law of contract. In short, it may be frankly confessed that nowhere does the philosophy of the common law become so tenuous as in the domain of contract.

We are assured that the authenticity of this remarkable body of archaic law is beyond cavil, and its importance to the student of comparative jurisprudence is incalculable.

THE ALASKA BOUNDARY COMMISSION.

Under apparently fair and carefully expressed articles the Alaska-Canada Boundary Dispute is by a Treaty-Convention signed at Washington on the 24th January, 1903, to be referred to a tribunal of six impartial jurists of repute who shall consider judicially seven questions which involve the true course of the boundary line described in the Anglo-Russian Treaty of 1825. With but three matters to which we shall refer, the Treaty, if loyally worked out according to its express terms and true mean-

ing, should fulfil the purpose declared in the recital—"the friendly and final adjustments of the differences" respecting this boundary line. And if—as is yet hoped—"impartial jurists of repute" who can be so ranked according to the true meaning of that term as understood by the tribunal of nations—such as, in a real sense, are the admitted qualifications of the Justices of the Supreme Court of the United States,—are appointed, who will be absolutely loyal to international law and its well recognized principles, and allow none of the tainting influences of partizan zeal, unjust innuendos against, and persistent misrepresentation of, the British-Canadian claims; nor "allow any rubbish in their minds," as Lord Holt once put it, to seduce them from their allegiance to the law and its principles, the decision should result in an improvement of Canada's position on that question, if not in her fair success; but even if adverse, and well sustained by legal reasoning and authority, it will be accepted in a placid spirit by the Canadian people.

I. AMERICAN "IMPARTIAL JURISTS OF REPUTE."

One of the matters which has thrown doubt on the loyalty of the Goverment of the United States in giving effect to this Treaty is its assumed action respecting the term "impartial jurists of repute." Ex-President Cleveland has told us of the "customary disfigurement" treaties receive at the hands of the United States Senate; but it is stated, and not denied, that, in assenting to this Treaty, there was a condition attached by the Senate to its approval that the "jury should be packed."

And there appears some color for this, for it is announced that the President of the United States, as the head of one of the two great sovereignties which is a party to this treaty, and therefore the trustee of the national honor and political justice of his sovereignty in their dealings with kindred nations, proposes to appoint Mr. Secretary Root and Senators Lodge and Turner to the Commission as the best representative types of the "impartial jurists of repute" which the United States are able to furnish. But we ask the legal reader to say, after reading our "indictment of disqualifications," whether each of them would not be promptly ordered to stand aside by a judge of any court as disqualified from serving on even a common jury in his court. And let him also say how far the proposed appointment satisfies the great and high

trusts and responsibilities of international justice, and the express Treaty terms as to the impartiality of the jurists.

Mr. Secretary Root is a member of the executive of the national government which has taken possession of, and exercised the powers of sovereignty over, the disputed territory claimed by Great Britain and Canada. He has also lately advised his government, and obtained their approval, to establish a military district in Alaska at Lynn Canal, taking not only admittedly United States territory but also the claimed British Canadian territory to the (so called) international boundary; and he has furthermore stationed a garrison at Skagway, which is also within the claimed British Canadian territory, thereby committing the United States to a hostile and military occupation of the territory in question. If a private citizen's action respecting a state title to their territory was pending before a United States Court he would, in his capacity as a member of the executive, be a party-defendant, though not named; and would by the acknowledged rules of universal justice be disqualified from being a juror, and a fortiori from being a competent judge to try such action. One of the maxims of the common law which prevails in the United States and England is that "No one ought to be judge in his own cause; for it is not allowable for him to be both judge and party." (Co. Lit. v. 1 p. 15.)

Mr. Senator Lodge appears to have long nurtured a hostile judgment on the British-Canadian interpretation of the treaty; and in political speeches last fall he anointed his denunciations by so many tainting adjectives as to destroy before his audiences even the smell of justice in the British-Canadian claim. He denounced it as "a preposterous claim set up in complete contradiction of the Treaty of 1825." He further declared that "a more manufactured and baseless claim was never set up," and that it was one which "the United States could not accept, and which no nation with an ounce of self-respect could have admitted." And he added the threat that "while Canada insists upon its manufactured and baseless claim there will be no Reciprocity Treaty."

Having given this hostile judgment in advance of both argument and law, and in contempt of the common law maxim "Listen to what may be said on both sides," the Senator appears to have brought himself within Lord Holt's denunciation that "it is abominable to decide a man's case before hearing him."

But on another point Mr. Senator Lodge has inexcusably mis-

represented the action of Great Britain, in alleging that for 70 years the question of boundary was never raised until gold was discovered in the Klondyke about 1897. The published documents of his own Senate completely negative this charge. In Senate Executive Document No. 146 of the second session (1888-9) of the 50th Congress, he will find the discussions and correspondence of the United States and Canadian officers who then tried to settle upon a line satisfactory to both countries. They had before them the report on the Alaska boundary made in 1885 by the Imperial officer in charge of the International Boundary Survey, in which he clearly, and in precise terms, set forth the British claim of boundary in these words: "In the second clause of the fourth article [of the Anglo-Russian Treaty of 1825] provision is made for the case of the mountains being found more than ten marine leagues inland; and it is there laid down that the measurement shall be made, not from the inlets, but from the Ocean." And to this he added: "The word Ocean is wholly inapplicable to inlets, consequently the line, whether marked by mountains or only by a survey line, has to be drawn without reference to inlets."

Mr. Senator Turner has played the same role as his brother Senator on this question. In his speech before the Senate, he declared himself hostile to the Canadian claim of boundary, and asserted "there was nothing to arbitrate about," and voted for the Senate's rejection of the Treaty.

It has long been a rule of Parliament that no member who has spoken against the body or substance of any business proposed in the House "should be of a Committee for that business." And in Cushing's "Law and Practice of Legislative Assemblies in the United States," § 1862, it is stated: "The rule seems quite as much intended to operate upon the members themselves, and to restrain them from taking part in the business of committees to which they are opposed." And as to juries it is an old, but universal, rule of the common law, that no man shall be allowed to be of a jury in a case who has treated of the matter in dispute, or has declared his opinion on the matter beforehand. ("Law relating to Jurors" (1751) p. 32.)

But the rules of the common law as to judicial impartiality were illustrated by Lord Coke in a case where a Chief Justice besought Henry VII not to desire to know the opinions of judges in advance on the case of a state prisoner, "for they thought it would come before them in the King's Bench judicially; and they would then

do that which of right they ought." Lord Coke adding: "And so that the trial may be the more indifferent, seeing that justice to the party consisteth in the indifferency of the Court, the judges ought not to deliver their opinions beforehand of any case that may come before them judicially. Therefore the judges ought not to deliver their opinions beforehand upon any case and proofs urged of one side, in the absence of the party to be tried, especially in cases of a high nature. For how can judges be indifferent who have delivered their opinions beforehand, when a small addition or subtraction may alter the case." (3 Co. Inst. p. 29.) And further: "That, in the absence of the party accused, nothing upon any case put, or matter shewed, should privately pre-occupate the opinion of the judges."

Neither the Crown of the British Empire, nor the sovereignty of Canada, claims, nor is either entitled to, any higher right of fair trial of this boundary line dispute before a tribunal composed of those who, in a most real sense, may be justly ranked under the treaty term "impartial jurists of repute," than the right which is absolutely assured to, and is lawfully claimable by, every citizen of the United States in a trial between himself and his neighbor citizen over their boundary line dispute. And the fact that the law of challenge of jury, or judge, which may be invoked in their own courts, may not be invokable in the challenge of any member of this proposed tribunal of "impartial jurists of repute," ought not to deprive these outside sovereign litigants of a similar absolute right to a fair and impartial tribunal and trial.

Over this international boundary dispute each "impartial jurist of repute" appointed to the tribunal, becomes a trustee of the justice to which the litigant national sovereignties are entitled by the Treaty of 1825, and this Treaty. Can any leading member of the judicial bench, or of the legal profession, in the United States fairly maintain that either Senator is of that unchallengable "indifferency" as would qualify him to act as either a juror or a judge in any case in their courts in which they had previously expressed hostile opinions affecting such case?

If these Senators are jurists of repute they know the rules of professional etiquette and judicial practice, and will decline to act; for having decided to give their services to local political interests they have thereby disqualified themselves from rendering service to

international public law; for it is an old moral and legal maxim that "no man can serve two masters."

II. ARTICLE ON RIVERS CROSSING THE BOUNDARY.

A second matter for comment is the absence from the new Treaty of the following article VI of the Treaty of 1825, which has more bearing on the construction of the boundary articles than article V.

"VI. It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the Ocean, or from the interior of the continent, shall, for ever, enjoy the right of navigating freely, and without any hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean may cross the line of demarcation upon the strip of coast (sur la lisière de la côte), described in Article III. of the present Convention."

Our surmise about the absence of this article may be the English recognition of the opinion given by the Law Officers of the Crown in 1877, that by the Treaty of 1867, ceding Alaska to the United States, Russia virtually revoked the grant to Great Britain of the free navigation of all the rivers and streams which, in their course to the Pacific Ocean, crossed the line of demarcation upon the Russian strip of coast; but that whatever had been the nature of that right it had been lost by the 26th clause of the Treaty of Washington of 1871, which gave rights of navigation in the three rivers, Yukon, Porcupine and Stikene "for the purposes of commerce." Lord Herschell expressed to the writer of this article in 1898, his entire dissent from that opinion. The Canadian Government had previously expressed an equally emphatic dissent from it in 1877 (Sessional Paper No. 125 of 1878, pp. 97 and 153). And it is in direct conflict with the following judicial decisions, and the opinions of American and other authorities on International Law.

In the action of *United States* v. *McRae*, L.R. 8 Eq. 69 (1869), in which the United States claimed to succeed to the property of the previous Confederate States, after the civil war of 1861-65, it was declared to be "clear public universal law that any government which de facto succeeds to any other government, whether by revolution, or by restoration, conquest, or re-conquest, it succeeds to all the public property, and to all rights in respect of the public property, of the displaced power, whatever may be the

nature or origin of the title of such displaced power. But this right is the right of succession, is the right of representation, not paramount, but derived, not under but, through the suppressed and displaced authority; and can only be enforced in the same way, and to the same extent and subject to the same correlative rights and obligations, as if that original authority had not been suppressed and displaced.

And as early as 1818, the United States announced the same doctrine, "No principal of international law can be more clearly established than this: That the rights and the obligations of a nation in regard to other states are independent of its internal revolutions of government. It extends even to the case of conquest. The conqueror who reduces a nation to his subjection, receives it subject to all its engagements and duties toward other nations, the fulfillment of which then becomes his own duty." "An alliance between two nations cannot absolve either of them from the obligations of previous Treaties with third parties." (Wharton's International Law Digest, § 5.)

The Alaska Treaty of 1867 ceded to the United States "all the territory and dominion now possessed" by Russia within the strip of coast. By the Treaty of 1825, Russia had granted to Britain forever the franchise right of "navigating freely, and without any hindrance whatever, all the rivers and streams" in that strip; and by the Treaty of cession, the United States succeeded to the Russian sovereignty cum onere. In discussing the effect of the cession of Louisiana to the United States in 1819, Mr. Bancroft, in his History of the North West Coast, says: "Therefore with the rights acquired in 1819, the United States necessarily succeeded to the limitations to which they were defined, and the obligations under which they were to be exercised. From these obligations and limitations, as contracted by Spain towards Great Britain, Great Britain could not be expected gratuitously to release those countries, merely because the rights of the party originally bound had been transferred to a third power. (v. 2, p. 372.)

Similar were the opinions expressed by American statesmen when the Alaska Treaty was approved by the Senate of the United States in 1867; Senator Summer said: "We have three different stipulations on the part of Russia: one, opening seas, gulfs, and havens on the Russian coast to British subjects for fishing and trading with the natives; the second, making Sitka a free port to

British subjects (both for ten years); and the third, making the British rivers which flow through the Russian possessions, forever free to British navigation."

And Senator Washburn agreed that the Anglo-Russian Treaty of 1825 had given British subjects forever, "the free navigation of the rivers of Russian-America." This was also the opinion of Mr. Secretary Blaine given in the emphatic admissions he made to the British Ambassador in 1890: "To shut out the inhabitants of the British possessions from the sea by this strip of land, would have been not only unreasonable, but intolerable to Great Britain. Russia promptly conceded the privilege, and gave to Great Britain the right of navigating all rivers crossing that strip of land from 54° 40′ to the point of intersection with the 141st degree of longitude. Without this concession the Treaty could not have been made. It is the same strip of land which the United States acquired in the purchase of Alaska; the same strip of land which gave to British America, lying behind it, a free access to the ocean."

But independently of this Treaty right of free navigation, International law concedes to the sovereign and subjects of an upper country "the imperfect right of free navigation," through the territorial waters of the lower, or sea coast, sovereignty. And Mr. Senator Sumner admitted in his speech that this Article VI. was "nothing but a declaration of public law, as it had always been expounded by the United States, and then recognized, on the continent of Europe."

III. ACTION OF THE REPRESENTATIVES OF SOVEREIGNTIES.

The third matter of moment arises over the object or aim of the apparently interjected clause at the end of Article III, of the new Treaty. It seems to play a lone hand; for it is not allowed to be a party in the play of "questions and answers" under Article IV. It reads as follows:

"The tribunal shall also take into consideration any action of the several governments, or of their respective representatives, preliminary or subsequent to the conclusion of the said Treaties, so far as the same tends to shew the original and effective understanding of the parties in respect to the limits of their several territorial jurisdictions, under and by virtue of the provisions of the said Treaties."

The clause is loosely framed and ambiguous; and if there were

patent ambiguities in the Treaty it might be useful. But as there are apparently no such ambiguities, our present surmise is that the object of the United States in inserting this clause is to put before the tribunal some foreign and English and Canadian map-tracings of Alaska boundary lines which have lately played a prominent part in the discussion of the boundary question. How they are to be made admissible evidence of the action of the sovereignties of Great Britain, Russia and the United States, or of the authorized representatives of these sovereignties as tending to shew any "original and effective understanding of the parties in respect of their several territorial jurisdictions," is rather difficult at present to speculate upon. Prior to 1884 there appears to have been no settlements on this Disputed Territory. During that year a shanty was built by a trader at Dyea; and in 1888 another shanty was built by another trader at Skagway. In 1898 (the year of the Joint High Commission) the United States commenced making grants of land within the Disputed Territory.

Map-traced boundary lines cannot be of legal value except in extremely rare cases, of which this does not seems to be one. The historic experience of Great Britain respecting mountain boundary lines, inaccurately traced on maps, brings up the North-Eastern or Maine boundary disputes; and in the following extract from the British Minister's despatch to the Ambassador at St. Petersburgh in 1824 he advised him of the inaccuracy of such tracings that: "mountains laid down on a map in a certain given position, and assumed in faith of the accuracy of the map as a boundary between the possessions of England and the United States, turned out to be quite differently situated, a discovery of inaccuracy which has given rise to the most perplexing discussions. It is therefore necessary that some other security be taken," than any such map-tracings of mountains.

And in 1886, Mr. Secretary Bayard effectively discredited even modern map-tracings of boundary lines: "The line traced on the Coast Survey map of Alaska, is as evidently conjectural and theoretical as were the mountain summits traced by Vancouver. It disregards the mountain topography of the country, and traces a line on paper about thirty miles distant from the general contour of the coast, with no salient landmarks or points of latitude or longitude to determine its position at any point. It is in fact such a line as it is next to impossible to survey through a mountainous

region; and its actual location there by a surveying commission would be nearly as much a matter of conjecture as tracing it on paper with a pair of dividers."

But "conjectural and theoretical boundary lines traced on paper with a pair of dividers" (to paraphrase Mr. Bayard's observations) may possibly be asked to play some part as evidence in this Boundary dispute; and the following are given as some of them:

(1) Russian map by Admiral Krusenstern "publie par ordre de sa Majeste Imperiale," 1827, runs the boundary line around the upper shores of the inlets and bays.

(2) Russian map by Functionary Piadischeff, 1829, has a heavy smudgy line of a similar character.

Even if these were official Russian documents they would not be binding on, or admissible as evidence against, the sovereignty of Great Britain respecting her previously defined and acquired treaty territory. And it would be beneath the dignity of the British Crown to notice them, or to protest to the Russian Emperor against their publication.

(3) French map of 1844, copying the same boundary line. Though absolutely inadmissible as legal evidence it was published in support of the United States claim by Mr. Ex-Secretary Foster in 1899.

(4) Canadian map of 1831 by Joseph Bouchette, Deputy Surveyor General of Lower Canada.

(5) Arrowsmith's map of 1832, "by permission dedicated to the Honorable Hudson's Bay Company," gives three lines of boundary, two sustaining the above Russian tracings and one partly sustaining the Canadian line, though rounding Lynn Canal.

(6) Devine's Canadian map of 1867 "by order of the Hon. Joseph Cauchon, Commissioner of Crown Lands, Toronto."

Neither the Provincial Government of Lower Canada, nor the Provincial Government of Canada (the western limits of whose jurisdiction did not then extend beyond the Lake of the Woods), was in any sense "the representative" of the sovereignty of Great Britain, nor could any of their map-tracing "show the original and effective understanding" of that sovereignty over this northwestern territory.

(7) Hudson's Bay Company's map, 1857, "ordered by the House of Commons to be printed." This gave the boundary line

as published in the prior maps; and was printed as part of the evidence given by the Chairman of the Company before a Committee of the House of Commons. At that time the Company held a lease from the Russian-American Company, for commercial purposes, of the coast (exclusive of the islands) and the interior country belonging to the Emperor of Russia, situated between Cape Spencer, forming the north-west headland of the entrance of Cross Sound, and latitude 54° 40′ or thereabouts. The Hudson's Bay Company being only a subject-trading company, never acquired the position of a "representative" of the British Crown; and could not therefore affect the sovereign territorial rights of Great Britain within this disputed territory.

(8) British Columbia map, 1884, drawn by E. Mohun, C.E., by direction of the Hon. W. Smithe, Chief Commissioner of Lands and Works, B.C. The boundary line on this map starts from the south end of Prince of Wales Island, and ascends "to the north" through Behm canal to 56 north latitude, thence inland along a narrow fringe of coast to the Stikene river, which it crosses, rounding Taku inlet and Lynn canal, then bending to the coast at Mt. Fairweather, thence inland again, and rounding Bering bay to Mt. St. Elias. This, if admissible, must be taken for the whole line, but cannot be taken in part and rejected in part. But in any event it must be conceded that no survey officer of a Province, or of a State, could, by map-tracings of boundary lines, be held to be the "representative" of either Great Britain or the United States under Article III of this Treaty; or that maps issued by either Province or State Governments could "shew the original and effective understanding of the Original Sovereignties in respect to the limits of their several territorial jurisdictions under and by virtue of the Treaties of 1825 and 1867."

(9) British Admiralty Chart, No. 787, "published under the superintendence of Captain F. J. Evans, R.N., 1877, 1898, and 1901. This adopts substantially, but with some variation, the prior traced boundary lines. The difference between a map and a chart will show the effect to be given to this printed document. A Chart is an hydrographical or marine map, a draft on paper of some part of the earth's sea-coasts, with the coasts, isles, rocks banks, channels, harbors, rivers and bays, so as to regulate the courses of ships in their voyages. A map is a draft on paper of some portion of the land surface of the earth.

But to offer such materials as evidence affecting sovereignty would be to ask the tribunal that sovereign territorial rights acquired by treaty, or conquest, may be affected, impaired, or limited, or destroyed, by the tracing art of draftsmen or chartographers exercising their art and trade without any interference of the Crown, whose sovereignty they are assumed to affect. That thereby "conjectural and theoretical boundary lines traced on paper with a pair of dividers" may be classed as legal evidence to displace the rightful sovereignty to a territory; to change the natural allegiance of its inhabitants; to dispense with, or exile, the common and statute laws operative over them, and otherwise to destroy rights of sovereignty acquired within such territory.

Such novel effect of such tracings on maps and charts cannot surely have been contemplated by the lone clause at the end of Article III.

IV. QUESTIONS TO BE ADJUDICATED UPON.

The questions which are to be adjudicated upon by the tribunal closely follow the phraseology used in Articles III, IV and V of the Anglo-Russian Treaty of 1825, and are limited to the legal meanings of the specific terms of International Law used in those Articles, and are as follows:

IV. Referring to articles 3, 4 and 5 of the treaty of 1825, the tribunal shall answer and decide the following questions:

(1) What is intended as the point of commencement of the line?

(2) What channel is the Portland Channel?

(3) What course should the line take from the point of commencement to the entrance to Portland Channel?

(4) To what point on the 56th parallel is the line to be drawn from the head of the Portland Channel, and what course should it follow between these points?

(5) In extending the line of demarcation northward from said point on the parallel of the 56th degree of north latitude, following the crest of the mountains situated parallel to the coast until its intersection with the 141st degree of longitude west of Greenwich, subject to the condition that if such line should anywhere exceed the distance of ten marine leagues from the Ocean, then the boundary between the British and the Russian territory should be formed by a line parallel to the sinuosities of the coast, and distant therefrom not more than ten marine leagues. Was it the intention and meaning of said convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe or strip of coast on the mainland, not exceeding ten marine leagues in width, separating the British possessions from the bays, ports, inlets, havens and waters o

the ocean and extending from the said point on the 56th degree of latitude north to a point where such a line of demarcation should intersect the 141st degree of longitude west of the meridian of Greenwich?

(6) If the foregoing questions should be answered in the negative, and in the event of the summit of such mountains proving to be in places more than ten marine leagues from the coast, should the width of the lisiere which was to belong to Russia be measured (1) from the mainland coast of the ocean, strictly so-called, along a line perpendicular thereto, or (2) was it the intention and meaning of the said convention that where the mainland coast is indented by deep inlets, forming part of the territorial waters of Russia, the width of the lisiere was to be measured (a) from the line of the general direction of the mainland coast, or (b) from the line separating the waters of the ocean from the territorial waters of Russia, or (c) from the heads of the aforesaid inlets?

(7) What, if any exist, are the mountains referred to as situated parallel to the coast, which mountains, when within ten marine leagues from the coast, are declared to form the eastern boundary?"

The answers involve the interpretation of the leading terms "ocean," "coast," and "summit of mountains," and others, as defined by International Law, and the effect of the appended words of the sentences in which they occur. There does not appear to be much necessity for evidence except that which may be obtained from the Despatches preceding the Treaty of 1825.

THOMAS HODGINS.

A writ of injunction is a very useful weapon of defence and its uses are manifold. One of the queerest of these is referred to in a news item from Columbus, Ohio: "Isaac Tenant has been suppressed by the United Brethren of Mount Gilead for calling out 'Amen' too loud at revival meetings. Isaac was always seated close to the front and in the excess of his piety his ejaculations reverberated through the church. His voice grated on the ears of other members of the flock and they put a stop to it by injunction. The Court allowed a restraining order, but later modified it in such a manner that Tenant had the privilege of attending meetings, but had to worship in silence." One certainly feels disposed to admire such fervour as the average Sassenach does the bagpipes—at a distance.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

WILL—CHARITABLE LEGACY—GENERAL OR LIMITED CHARITABLE PURPOSES—"CHARITABLE PURPOSES AGREED ON BETWEEN" TESTATRIX AND LEGATEE—EVIDENCE.

In re Huxtable, Huxtable v. *Crawfurd* (1902) 2 Ch. 793. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) have reversed the decision of Farwell, J., (1902) 1 Ch. 214 (noted ante vol. 38, p. 298). A testatrix bequeathed £4,000 to Crawford "for the charitable purposes agreed on between us." Farwell, J., held that the gift was for a limited charitable purpose, viz., those agreed on, and that parol evidence was admissible to shew what that purpose was. On this point the Court of Appeal agreed with Farwell, J., but the parol evidence shewed that the testatrix had intended only the income of the fund to be devoted to charitable purpose, which evidence Farwell, J., received and acted upon, but the Court of Appeal decided that the parol evidence was inadmissible in so far as it contradicted the will, and that it could not be received for the purpose of cutting down the gift, which on the face of the will was a gift of the capital, and not merely of the income.

POWER OF APPOINTMENT GENERAL TESTAMENTARY POWER—COVENANT TO EXERCISE POWER BY WAY OF SECURITY FOR LOAN—EXERCISE OF POWER—APPOINTED FUND MADE ASSETS GENERALLY—PREFERENCE.

In re Lawley, Zaiser v *Lawley* (1902) 2 Ch. 799, an interesting point on the law of powers is discussed. A testator having a general testamentary power of appointment over a fund, borrowed money and covenanted with the lender that he would exercise the appointment for his benefit to secure the loan. He accordingly by his will appointed that his trustees should out of the fund pay the amount of the loan which he desired to be a first charge thereon. The testator having died, the lender's representatives claimed priority on the appointed fund, but the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) agreed with Joyce, J., that they

were not entitled to any priority, but must rank equally with other creditors, because a covenant to exercise a testamentary appointment cannot be specifically enforced, as that would be an interference with the intention of the donor of the power, and enable the donee to do by deed what the donor has provided shall only be done by will, and secondly because the effect of the exercise of a general testamentary power is to make the property appointed assets generally, and that it is not competent for a testator to give one creditor priority over another.

COMPANY—PROSPECTUS—PROMOTER—NON-DISCLOSURE OF SALE BY PROMOTER TO COMPANY—SECRET PROFIT—MEASURE OF DAMAGES.

In re Leeds and Hanley Theatres (1902) 2 Ch. 809, was a winding up proceeding in which the liquidator applied to the Court for a declaration that the promoters of the company in liquidation were liable to contribute to the assets of the company the amount of the secret profit made by them on a sale to the Company of certain property, or in the alternative that they were liable in damages for misfeasance in inducing the company to purchase the property in question without proper disclosure of facts and at a fraudulent over-value. The facts were that the promoters of the company had through one Rands as their trustee, purchased the property in question in two parcels for £24,000. They sold the property to the Company for £75,000. The prospectus referred to the contract for the sale of the property by Rands to the Company, but omitted to disclose that Rands was merely a trustee for the promoters The property was sold to the company subject to mortgages for £16,000 which was credited on the purchase money. The mortgagees had enforced their mortgage by sale, and rescission of the contract was consequently impossible. Wright, J., found as a fact that the promoters had never intended to buy the property for themselves or to pay for it out of their own money, but had always intended to act for the intended company, on whom they had imposed directors of their own nomination, and through these directors had caused the company to agree to pay an excessive price for the property by concealment of material facts. Under these circumstances he held that the promoters occupied a fiduciary position which rendered them liable to account to their cestuis que trust for their ill gotten gains. He also held them liable to the company for falsely holding out Rand, who was really an

impecunious clerk, as a person of substance which might have been an inducement to the more innocent directors to adopt the purchase, and he held the promoters liable for £10,000. The Court of Appeal (Williams, Romer and Stirling, L.JJ.) did not see their way to adopt the view that the promoters had made the purchase originally as trustees for the intended company, at the same time Williams, L.J., is careful to say that he does not deny that it is impossible that a person can be a trustee for a company not yet in existence. The Court of Appeal preferred to rest their judgment on the ground that the vendors were promoters, and that as promoters they stood in a fiduciary relation to the company, not to its directors whom they nominated, and some of whom they qualified to act, but to the company and its future allottees of shares, and that the company was entitled to a remedy against the promoters for the fraud they had practised, but that the remedy was in the nature of damages for breach of their fiduciary duty. The judgment of Wright, J., was therefore held to be correct, though his reasons for it were not wholly adopted.

ADMINISTRATION—MARSHALLING ASSETS—PECUNIARY LEGATEES AND SPECIFIC DEVISEES.

In re Roberts, Roberts v. *Roberts* (1902) 2 Ch. 834, was an administration suit, the testator whose estate was being administered had by his will directed that all his just debts should be paid. He had then given specific legacies and bequeathed two pecuniary legacies, and had made specific devises of some of his real estate. It turned out that the personal estate not specifically bequeathed and the undisposed of real estate were insufficient to pay the debts and funeral and testamentary expenses, and accordingly the question arose whether the pecuniary legatees were entitled to have the assets marshalled so as to stand in the place of creditors against the specifically devised real estate. There was a decision of Kay, J., *In re Bate* (1890) 43 Ch. D. 600, adverse to this claim, but there were contrary decisions of Stirling, J., *In re Stokes*, 67 L. T. 223, and of Chitty, J., *In re Salt* (1895) 2 Ch. 203, which Kekewich, J., held must be taken to have overruled *In re Bate* and he accordingly directed the assets to be marshalled as claimed. It may be remarked that the prior authorities on which Stirling, J., relied *In re Stokes* were not cited to Kay, J., *In re Bate*, in which moreover, he did not give a considered judgment.

MORTGAGE—MORTGAGEE DYING IN POSSESSION OF MORTGAGED ESTATE—SUBSEQUENT EXTINGUISHMENT OF MORTGAGOR'S TITLE BY POSSESSION OF REPRESENTATIVE OF DECEASED MORTGAGEE—DEVOLUTION OF MORTGAGED LAND—REALTY OR PERSONALTY.

In re Loveridge, Drayton v. *Loveridge* (1902) 2 Ch. 859, although a case which turns on the vital distinction between realty and personalty which formerly prevailed, may possibly still have a bearing on cases coming under the recent amendment of the law relating to the devolution of real estate. Though land now devolves like personalty, yet for the purpose of specific devises or bequests they are still perfectly distinct classes of property. In this case a mortgagee of a freehold estate had entered into possession of the mortgaged estate and died while in possession but before the mortgagor's equity of redemption had been extinguished. By his will he bequeathed his residuary real and personal estate to his wife during widowhood, subject to certain annuities, and subject to these gifts he died intestate. He went into possession in 1861. He died in 1864, and his widow then went into possession and so continued until her death in 1900. During her possession and by reason thereof the title of the mortgagor was extinguished. On this state of facts the question to be determined was whether on the widow's death the mortgaged lands devolved as realty or personalty of her deceased husband's estate. Buckley, J., decided that the property being at the date of the mortgagee's death personalty, continued to be personalty in the hands of his widow, notwithstanding the extinguishment of the mortgagor's title, and as personalty the widow's personal representatives were entitled as upon an intestacy of the mortgagee to one half, and his next of kin to the other half, and the claim of the heirs of the mortgagee was rejected.

FORGED TRANSFER OF STOCK—INNOCENT PRESENTMENT OF FORGED TRANSFER FOR REGISTRATION—IMPLIED CONTRACT TO INDEMNIFY—INDEMNITY.

In *Sheffield* v. *Barclay* (1903) 1 K.B. 1, Lord Alverstone, C.J., has decided that where a person claiming to be a transferee of shares in a joint stock company, under a forged transfer, believing in the genuineness of the transfer, bona fide presents it to the company and procures the company to act thereon, and transfer the shares, he impliedly undertakes to indemnify, and is bound to indemnify the company against any loss which it may sustain by reason of its acting upon such transfer. In the present case the

true owner whose name had been forged had compelled the plaintiff company to replace the stock, and the defendants who had presented the forged transfer were held liable to recoup the plaintiff company for the full amount they had been compelled to pay to replace the shares in question.

GAMING—PLACE USED FOR BETTING—BAR OF PUBLIC HOUSE—BETTING ACT, 1853 (16 & 17 VICT., C. 119) S. 3.—(CR. CODE S. 197.)

Tromans v. *Hodkinson* (1903) 1 K.B. 30, was a case stated by justices. The appellant was a bookmaker, and was in the habit of resorting at certain hours to the bar of a public house for the purpose of carrying on a business of ready money betting with other persons who also frequented the place. He did so with the consent of the landlord, but did not occupy any specific portion of the bar. The justices convicted the appellant of using a place for betting within the meaning of the Betting Act, 1853, s. 3. On the part of the appellant it was contended that the bar was not "a place"; and that his use of it was not a "use" thereof by the appellant for betting within the meaning of the Act: (see Cr. Code s. 197). The Divisional Court (Lord Alverstone, C.J., and Wills, and Channell, JJ.,) following *Belton* v. *Busby* (1899) 2 Q.B. 380, (noted ante, Vol 35, p. 679,) upheld the conviction.

LIFE INSURANCE—PREMIUM PAYABLE IN INSTALMENTS—DAYS OF GRACE—DEATH OF ASSURED AFTER INSTALMENT OF PREMIUM DUE, BUT BEFORE EXPIRY OF DAYS OF GRACE—PAYMENT OF PREMIUM AFTER DEATH OF ASSURED BUT WITHIN DAYS OF GRACE.

In *Stuart* v. *Freeman* (1903) 1 K.B. 47, the action was brought to recover on a policy of life insurance. The policy was for a year, and the premium on the policy was payable in quarterly payments, the first quarterly payment being made at the date of the policy. The policy provided that it should be of no effect, if at the time of the death of the assured any quarterly payment should be more than thirty days in arrear. At the time the assured died a quarterly payment was due, and after the death and within the days of grace the premium was paid. Ridley, J., who tried the action, held upon the authority of *Pritchard* v. *Merchants Life Assurance Society*, 3 C.B. (N.S.) 622, that the payment of the premium after the death of the assured, though made within the days of grace, was not binding on the defendants, and he dismissed the action. The Court of Appeal (Collins, M. R., Romer, and Matthew, L. JJ.) however, thought that as the

policy was for a year, subject to a defeasance on non-payment of any quarterly premium, the policy was not revived by payment of the premium during the days of grace, but that the policy continued in force and was prevented from lapsing by such payment. *Pritchard* v. *Merchants Life Assurance Society*, is "distinguished." Matthew, L.J., referring to that case, and *Simpson* v. *Accidental Death Insurance Co.*, 2 C.B. (N.S.) 257, says: "The observations of the learned judges in those cases must be treated with respect; but I find myself unable to agree with the dicta in the second case (*i. e.* Pritchard's case), that allowing days of grace means only that during those days there was to be a continuing offer to renew the policy, and that unless that offer was accepted and payment made while the life of the insured was in existence the policy was void. That appears to be the view glanced at rather than decided." This may probably be considered as the first stage in the overruling of the Pritchard case.

CRIMINAL LAW—CONVICTION INSUFFICIENTLY DESCRIBING OFFENCE—CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875 (38 & 39 VICT. C. 86) S. 7. (CR. CODE S. 523)—SUMMARY JURISDICTION ACT, 1879 (42 & 43 VICT. C. 49) S. 39, SUB.-S. 1.—(CR. CODE S. 611.)

In *Smith* v. *Moody* (1903) 1 K.B. 56, an application was made to quash a conviction on the ground that it insufficiently described the offence. The conviction purported to be under The Conspiracy and Protection of Property Act, s. 7 (see Cr. Code, s. 523), which provides that a person commits an offence who "with a view to compel any other person to abstain from doing . . . . any act which such person has a legal right to do . . . . wrongfully and without legal authority . . . . injures his property." The conviction stated that the appellant on February 4, 1902, 'with a view to compel' the respondent to abstain from working for Messrs. J. B. & Partners, Limited, at F. Colliery, which he had a legal right to do, wrongfully and without legal authority did injure the property of the respondent—without stating what specific property was injured. It was objected that the offence was not sufficiently described, and the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.) held that the act which the appellant sought to compel the respondent to abstain from doing, following as it did the words of the statute, was sufficiently described in the conviction; but that the conviction was bad on its face and must be quashed in that it did not specify what property

of the respondent had been injured: and that s. 39, sub.-s. 1 of the Summary Jurisdiction Act, 1879 (see Cr. Code, s. 611), which provides that in proceedings before Courts of Summary Jurisdiction "the description of any offence in the words of Act . . . . creating the offences or in similar words shall be sufficient in law," does not do away with the necessity of setting out in a conviction the facts which are a necessary ingredient of the offence for which the conviction is made.

HUSBAND AND WIFE—WIFE'S AUTHORITY TO PLEDGE HUSBAND'S CREDIT—GOODS SUPPLIED ON ORDER OF WIFE—JOINT LIABILITY—ALTERNATIVE CLAIM—ELECTION TO SIGN JUDGMENT AGAINST ONE OF TWO DEFENDANTS AS AGAINST WHOM ALTERNATIVE RELIEF CLAIMED—RULE 119.—(ONT. RULE, 665.)

Morel v. *Westmoreland* (1903) 1 K.B. 64, was an action brought against husband and wife to recover the price of goods supplied by the plaintiff on the order of the wife. The plaintiff claimed that the husband and the wife were jointly liable for the claim. The wife did not appear, and judgment was signed against her by default. The action having proceeded to trial against the husband, it appeared in evidence that the plaintiff's claim was for goods supplied before July, 1899, and also for goods supplied after that period; that the husband and wife were living together and the goods were supplied for the use of the household. There was no evidence that the husband had supplied his wife prior to July, 1899, with a sufficient allowance for household expenses, or had forbidden his wife to pledge his credit; but it did appear that after July, 1899, he had made her a sufficient allowance and had forbidden her to pledge his credit. The jury found that the husband was liable for the goods supplied before July, 1899; and as to goods furnished since that date they found they were necessaries and that the husband had given his wife a sufficient allowance and prohibited her from pledging his credit; that in ordering the goods the wife had acted for herself and husband jointly and that credit was given by the plaintiffs to the husband in the name of the wife. Phillimore, J., on these findings, gave judgment for the plaintiffs against the husband for the goods supplied both before and after July, 1899. On appeal from this judgment it was contended on behalf of the husband that the plaintiffs' claim was against the defendants as being jointly liable; that the evidence had failed to shew any joint liability, consequently the provisions of Rule 104 (Ont. Rule 575) did not apply, and the plaintiffs having elected to

take judgment against the wife had precluded themselves from now recovering against the husband, as there was only a case of alternative liability made out, and they could not therefore get judgment against both. The plaintiffs asked for leave to amend in order to obviate this objection. The Court of Appeal (Collins, M.R., and Romer, and Mathew, L.JJ.) came to the conclusion that the evidence supported the finding of the jury that as regards the goods supplied before July, 1899, the husband was alone liable, and as to the goods supplied after that date that the wife had no authority to pledge her husband's credit. That the claim of the plaintiff that the defendants were jointly liable failed, and could not be cured by an amendment allowing them to set up an alternative claim against the defendants, because the judgment recovered against the wife prevented them thereafter recovering another judgment for the same debt against the husband also. That if a joint liability had been established Rule 119 (Ont. rule 605) would have applied, but that rule had no application to a claim of alternative liability.

PARTNERSHIP—PRINCIPAL AND AGENT—TORTIOUS ACT OF PARTNER FOR BENEFIT OF FIRM—LIABILITY OF PARTNER FOR TORTIOUS ACT OF CO-PARTNER—BRIBING SERVANT TO DISCLOSE HIS EMPLOYERS' SECRETS—PARTNERSHIP ACT, 1890, (53 & 54 VICT., C. 39) S. 5.

Hamlyn v. *Houston* (1903) 1 K.B. 81, was an action against two partners to recover damages for one of the partners having, for the purposes of the business of the firm, bribed the plaintiff's clerk to disclose the business secrets of the plaintiff as to contracts and tenders made by him. The action was tried by Kennedy, J., who gave judgment for the plaintiff for £750 against both partners. The Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) affirmed his decision, holding that the obtaining of the information in question was within the scope of the partners' authority, and as a principal is liable for the fraud or other illegal act committed by his agent within the general scope of the authority given him, so also a partner is in like manner liable for the act of his co-partner when acting within the general scope of his authority.

FIXTURES—MACHINERY AFFIXED TO FREEHOLD—HIRE AND PURCHASE AGREEMENT—MORTGAGE—LICENSE BY MORTGAGOR TO REMOVE FIXTURES—MORTGAGEE IN POSSESSION.

Reynolds v. *Ashby* (1903) 1 K.B. 87, reveals a danger which the sellers of machinery on hire and purchase agreements are liable to incur. In this case the mortgagor of leasehold premises entered into an agreement with the plaintiff for the purchase of machinery, which was furnished by the plaintiff on a hire-purchase agreement. The machinery was affixed to the floor of the premises by nuts and bolts. The agreement provided that the machinery was not to become the property of the purchaser until the purchase money should be paid; and that in default of payment of any instalments of the purchase money as they fell due under the agreement the plaintiff was to be at liberty to enter and remove the machinery. Default having been made in the mortgage the mortgagee entered into possession and refused to allow the plaintiff to remove the machinery, and the present action was brought against the mortgagee to recover the value thereof. Lawrance, J., who tried the action, on the authority of *Hobson* v. *Gorringe* (1897) 1 Ch. 82 (noted ante, vol. 33, p. 311), held that the action failed, and dismissed it, and the Court of Appeal (Collins, M.R., and Romer, and Matthew, L.JJ.) affirmed his decision; that court holding that prima facie the machinery by being affixed to the freehold became a fixture, and that the presumption could not be displaced by any evidence of any agreement between the plaintiff and mortgagor, or any motive or intention on the part of the plaintiff; but a contrary intention could only be shewn by the circumstances of the degree of annexation, and the object of such annexation so far as patent for all to see. "The fact that the person who affixed this machinery did so for the purposes of a manufactory on premises of which he himself was the owner for a term of 99 years, affords no evidence in support of the view that the annexation was intended to be only temporary for the better use of the machines as chattels; on the contrary it is rather in favour of the view that the intention was that they should be attached to the factory, and be used as part of it, for the purposes of the business there carried on, as long as the business should continue to be carried on." See *Haggert* v. *Brampton*, 28 S.C.R. 174; *Miles* v. *Ankatell*, 25 Ont. App. 458; *Goldie* v. *Bank of Hamilton*, 27 Ont. App. 619; but see R.S.O. c. 149, s. 10.

PRACTICE—COSTS—DETINUE—RETURN OF SUBJECT OF ACTION PENDENTE LITE —TORT.

Du Pasquier v. *Cadbury* (1903) 1 K.B. 104, was an action for detinue for certain pictures, and for damages for tortious conversion of the plaintiff's goods, and also for a claim on a contract. After writ issued the pictures were returned to the plaintiff by the defendants. They were of the value of £20 and upwards. The action went to trial on the claim on the contract, and the plaintiff recovered a verdict for £33. It then became a question on what scale the plaintiff was entitled to costs. The Court of Appeal (Collins, M.R., and Mathew, L.J.) held that the question of the scale of costs must depend on the rights of the parties at the commencement of the action, and could not be affected by the return by the defendants of the chattels sued for pendente lite, and that the plaintiff's action as regards the claim in detinue was founded in tort in which they had recovered in effect a sum not less than £20, and that the plaintiff was therefore entitled to costs on the higher scale.

BILL OF LADING—HARTER ACT (ACT OF CONGRESS OF U.S.A., 1893)—"FAULTS OR ERRORS IN MANAGEMENT OF VESSEL."

In *Rowson* v. *Atlantic Transport Co.* (1902) 1 K.B. 114, the plaintiff sought to recover against the defendant damages for injury to butter shipped upon the defendant's steamship from New York. The bill of lading incorporated the provisions of the act of U.S. Congress known as "the Harter Act," which provides that, subject to the conditions therein named, the owner of a ship shall not be held responsible for damage or loss resulting "from faults or errors . . . . in the management of the ship." The butter in question was carried in insulated chambers with refrigerating machinery; it was damaged on the voyage by reason of the negligence of the crew in the management of the refrigerating apparatus, whereby the temperature of the chambers was allowed to rise too high. Kennedy, J., held that this was an error in the management of the vessel within the meaning of the bill of lading, and that the plaintiff therefore could not recover.

INDUCING BREACH OF CONTRACT—CONSPIRACY—INTENT TO INJURE—BONA FIDE ADVICE.

Glamorgan Coal Co. v. *South Wales Miners' Federation* (1903) 1 K B., 118, was an action against a Workman's Union and its officer to recover damages for their having maliciously induced the

plaintiff's workmen to break their contracts with the plaintiffs and quit their employment. Bigham, J., on the evidence found that the defendants had only bona fide given advice to the men at their request, as to what course they had best pursue in their own interests and without any malicious intention to injure the plaintiffs, and therefore held that the plaintiffs were not liable.

PARENT AND CHILD—DOUBLE PORTIONS - GIFT BY PARENT TO CHILD AFTER DATE OF WILL.

In re Scott, Langton v. *Scott* (1903) 1 Ch. 1, serves to shew that a gift by a parent to a child after the date of the parent's will is not necessarily to be deemed in the nature of an advancement, or a satisfaction pro tanto of a legacy bequeathed to such child by the will. In this case the testator was a very wealthy man; before his will he had given £5000 to each of his two daughters to whom, with his two sons, he bequeathed his residuary estate, with a gift over to their children in case they should predecease him leaving issue, and he expressly declared that these two sums were not to be brought into account in ascertaining the shares of the daughters in the residuary estate. After the date of his will he gave £5000 to his son Alfred, and gave his daughters to understand that this sum also was not to be taken into account in ascertaining Alfred's share. He subsequently made a codicil to his will making some slight alterations, but in all other respects confirming the will. After this the testator transferred from his own capital account in the books of the firm of which he was a partner, with his son John, the sum of £5000 to his son John, who was then in pecuniary difficulties, and a further sum of £1500 to pay off a mortgage; at the time of the advance, John wrote to one of his sisters, saying that he had persuaded his father to give him £5000, "the amount you all have had." John predeceased his father, leaving a daughter. On the evidence Kekewich, J., held that the presumption that the advances to Alfred and John were intended as advancements of the shares coming to them under the will was rebutted. He thought, however, that even if John would have been liable to bring the £6500 into account his daughter was not, because John never took under the will. The Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.,) agreed with Kekewich, J., that the sums in question were not to be brought into account, but they

disagreed with him as to the position of John's daughter. They being of opinion that she could only take that which her father could have taken, and if he would have been liable to bring the advances to him into account, so would she.

Correspondence.

JUDICIAL SALARIES.

To the Editor of THE CANADA LAW JOURNAL:

Sir,—In yours of February 15, speaking of the claim of the Ontario Judges to an increase of salary, you intimate that they may be hampered by a demand for a like increase for the Judges of Quebec and the Maritime Provinces, who, you say, have less to do. Now I know but little of the Province of Quebec, in this particular, but as for the Judges of the County Courts of New Brunswick, they have always had concurrent jurisdiction with the Supreme Court of the Province in all criminal cases, except those involving the capital penalty; and the judicial district of one Judge embraces four counties, one of which necessitates two hundred miles of travel every term he holds. I do not refer to speedy trials, but to ordinary Criminal trials with Grand and Petit Jury. Each Court, the Supreme and County Court, as it sits, is a Court of general gaol delivery, and as the County Court sits oftener than the Supreme Court, it does the bulk of this very responsible work; work that requires superior legal attainments and ability, and cannot be done by a second class man. And yet the judge alluded to only gets $2,400, and the very inadequate allowance of $200 for his exceptionally heavy travelling expenses. Put out of question that special and extra work of the Ontario judges, for which they are paid from the provincial revenue and local sources, they probably have no more work to do than their brethren of the Maritime Provinces, who are not paid a cent for such work as that of Masters of the Supreme Court, Judges of Probate, and the like. The Maritime Provinces cost the Dominion less per head for their judiciary than Ontario does.

JUSTITIA.

[This subject was discussed in reference to the salaries of judges of the Superior Courts and not of County Judges.—ED. C. L. J.]

THE BRIBERY COMMISSION.

To the Editor, CANADA LAW JOURNAL:

Dear Sir,—I have nothing to say as to the most pitiable spectacle now on exhibition at the Ontario Parliament Buildings except to express what I believe to be the general regret of the profession and of thoughtful laymen that the judiciary of the Province should be thereby, in a measure, dragged through the filthy mire of politics. That the pedestal on which the Canadian judiciary stands is lower than it was in days gone by can scarcely be denied. There are probably several reasons for this. Is not one of them the fact that judges have had cast upon them the duty of trying election petitions? Party politics are unhappily a species of moral pitch; and none seem to escape the proverbial defilement, no matter how pure motives or conduct may be. It is unfortunate that the political atmosphere cannot be cleared without the judiciary being called upon to attempt it. A Royal Commission composed of two judges (why not three and let the majority in case of disagreement give the finding of the Court without the expression of any dissenting opinion) may be the proper, appropriate or most desirable tribunal. But, without discussing that, would it not be well for the learned judges who have been named as commissioners to pause before entering on a task which in view of any result must lead to heart burnings, insinuations and suspicions which, though without foundation (as they doubtless would be) will still further tend to lower the judicial pedestal, and thereby do a serious injury to the country at large. It is not wise to put the judiciary in such a position. The dignity of the office and the confidence and respect of the public therein and therefor is of more importance than a vain attempt to satisfy the public in such a matter as this. Would it not be better to let the politicians wash their dirty linen themselves.

BARRISTER.

[We agree with much that our correspondent says, and trust that in some way the judiciary may be kept out of it.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] [Nov. 17, 1902.

THE KING on information of Attorney-General *v.* TURNBULL REAL ESTATE COMPANY.

Expropriation of lands—Prospective value for purposes other than present use—Assessed value.

Where lands at the time of the expropriation had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy purposes such prospective value was taken into consideration in assessing compensation.

In assessing compensation in this case the Court looked at the assessed value of the lands, not as a determining consideration but as affording some assistance in arriving at a fair valuation of the property taken.

McAlpine, K.C., for plaintiff. *Alward*, K.C., for defendants.

Burbidge, J.] McGOLDRICK *v.* THE KING. [Nov. 17, 1903.

Expropriation of lands—Leasehold property—Tenant's improvements—Expense of removal to new premises—Compensation.

Petition of right. The suppliant was tenant of certain buildings and wharves erected upon the lands of which he had acquired possession as assignee of two leases. He there carried on business as a junk dealer. The terms for which the leases were made had expired at the time of the expropriation of the said lands by the Crown; but the leases contained a proviso that the buildings and other erections put on the demised premises should be valued by appraisers, and that the lessor or reversioner should have the option of resuming possession upon payment of the amount of such appraisement, or of renewing the leases on the same terms for a further term not less than three years. No such appraisement had been made, and the suppliant continued in possession of the property as tenant from year to year. The evidence showed that the lessor had no present

intention of paying for the improvements and of resuming possession of the property.

Held, that in addition to the value of his improvements, the suppliant should be allowed compensation for the value under all the circumstances of his possession under the leases at the date of the expropriation.

L. A. Curry, K.C., for the suppliant. *McAlpine*, K.C., for the respondent.

Burbidge, J.] [Dec. 5, 1902.

IN RE THE DOMINION OF CANADA AND THE PROVINCE OF ONTARIO.

Disputed accounts—Award of arbitrators—Interest on award—Agreement as to date from which interest is to be computed.

In certain arbitration proceedings between the Dominion of Canada and the Provinces of Ontario and Quebec the first mentioned province was found to be indebted to the Dominion in the sum of $1,815,848.59 on Dec. 31, 1892. While proceedings before the arbitrators were pending, correspondence between the Dominion and the two provinces, concerning the rate per centum and the time from which interest was to run on the amount of the award, was opened by the Deputy Minister of Finance for Canada in a letter to the Treasurer of Quebec of Dec. 21, 1893, in which, among other things, he asked that the Province of Quebec should agree to pay to the Dominion, from Jan. 1, 1894, simple interest at five per cent. upon the balances in account standing in favour of the Dominion on Dec. 31, 1892. Quebec declined to accede to this proposal, and the correspondence in the matter was eventually closed by a letter from the Assistant Treasurer of Quebec to the Deputy Minister of Finance, July 6, 1894, in which he, in effect, stated that the interest to be paid by Quebec upon any balances found by the arbitrators to be due on Dec. 31, 1892, and existing on July 1, 1894, should be at the rate of four per cent. Similar correspondence between the Dominion Government and the Province of Ontario was concluded by a letter of Aug. 18, 1894, from the acting Deputy Attorney-General of that province to the acting Deputy of the Minister of Finance stating, in effect, that Ontario accepts the same conditions as Quebec in respect of the payment of the subsidy. Prior to the date of this letter the Premier of Ontario had addressed a letter to the Premier of the Dominion, dated July 26th, 1894, as follows:—

"I understand that your Government has paid to Quebec the subsidy due July 1st inst., on the consent of the Government to pay four per cent. on any balance of account that might be found between the province and the Dominion, such interest to be reckoned from and after the said 1st of July, 1894. I presume this means the balance of account in respect of the

items which have already been brought before the arbitrators, and which now stand for judgment. This Government is willing to accept the subsidy on these terms."

Upon a case stated to determine whether interest was payable by the province from Dec. 31, 1892, when a balance was struck in favour of the Dominion, or from July 1, 1894, only.

Held, that the correspondence shewed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned.

Hogg, K.C., for the Dominion. *Irving*, K.C., and *Shepley*, K.C., for the Province

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Burbidge, J.] [Jan. 26.

ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY *v.* THE KING.

Costs—Application for security by Crown—Limited company—Practice.

Petition of rights. Sec. 69 of The Companies Act, 1862 (25-26 Vict. (U.K.) c. 89,) provides that, where a limited company is plaintiff in any action, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

By s. 7 of the English Petition of Right Act (23 & 24 Vict. c. 34,) it is provided that the statutes and practice in force in personal actions between subject and subject shall, unless the Court otherwise orders, extend to petitions of right. The practice in the Exchequer Court is in this respect the same as the practice in England.

In a proceeding by a petition of right in the Exchequer Court application was made for security for costs under the provision first mentioned. There was nothing to shew that it had ever been acted on in a proceeding by petition of right ir England.

Held, that the question of the application of the provision first mentioned to such cases was not sufficiently free from doubt to justify the granting of the application.

Newcombe, K.C., for the motion, *Hogg*, K.C., contra.

Burbidge, J.] SPILLING BROTHERS *v.* C. A. RYALL. [Feb. 14.

Trade-mark—Cigars—Infringement—Representations of the King and the Royal Arms—Validity—User before registration—Declaration signed by agent.

A label, as applied to boxes containing cigars, bearing upon it in an oval form a vignette of King Edward VII, with a coat of arms on one side,

and a marine view on the other surmounted by the words "Our King" and with the words "Edward VII" underneath, to be applied to boxes containing cigars, constitutes a good trade-mark in Canada, and may be infringed by the impression, upon boxes containing cigars, of a fac simile of the Royal Arms surmounted by the words "King Edward."

The English rule prohibiting the use of the Royal Arms, representations of His Majesty, or of any member of the Royal Family, of the Royal Crown or the national arms or flags of Great Britain, as the subjects of trade-marks is not in force in Canada.

It is not essential to the validity of a trade-mark registered in Canada that the person registering the same should have used it before obtaining registration. The registration must, however, in such a case, be followed by use, if the proprietor wishes to retain his right to the trade-mark. In this respect there is no difference between the law of Canada and the law of England.

The declaration required from the proprietor of a trade-mark by s. 8 of The Trade-marks and Design Act (R.S.C. c. 63) may be signed by his duly authorized attorney or agent.

R. G. Code, for plaintiffs. *A. H. Clarke*, for defendants.

Province of Ontario.

COURT OF APPEAL.

From Boyd, C.] [Dec. 5, 1902.

GRAND HOTEL COMPANY, RE WILSON AND RE TUNE.

Trade mark—Infringement—Caledonia water—Caledonia mineral water—Water from new springs at Caledonia.

The plaintiffs for many years had been the owners of mineral springs in the township of Caledonia, the waters of which they had caused to be registered under certain trade marks, and the names "Caledonia water" and "Caledonia mineral water." The water which was used medicinally and as beverage had, through the plaintiff's exertions and the expenditure of large sums of money, become very widely known as water from Caledonia springs, and around the springs, a village, laid out on the ground many years ago, had actually come into existence, and where the plaintiffs had erected an hotel, and had procured a railway station and post office to be located under the name "Caledonia Springs." In 1898 L. & Co., who had purchased a lot about a quarter of a mile distant from the plaintiff's place, had, by sinking an artesian wall, tapped springs from which water flowed, similar in some respects to the plaintiff's, which they supplied in barrels to their agents, as water from the new springs at Caledonia, which these agents bottled and sold. The bottles used were similar in shape and size to the plaintiff's. One of the agents T. & Co. had, at the time of the com-

mencement of the action, been using labels thereon resembling the plaintiff's, and selling the water as Caledonia water, but this had never been sanctioned by L. & Co. and was at once abandoned.

Held, by the Court of Appeal, Moss, C.J., dissenting, that the defendants could not be restrained from using the word "Caledonia" as they did in designing the water sold by them, and that the injunction granted herein should be dissolved with costs, except as to T. & Co., and, as against them the plaintiff should only be allowed the costs of entering judgment by default.

Middleton, for appellants. *Arnoldi*, K.C., for respondents.

MacMahon, J.] KEITH *v.* OTTAWA AND NEW YORK R.W. [Dec. 5, 1902.

Railway—Alighting from train while in motion—Negligence—Contributory negligence.

The fact of a passenger getting off a train while it is in motion is not in itself evidence of negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances.

Where a train scheduled to stop at a named station did not, on arriving there, stop a sufficient length of time to enable the passenger to get off, and a passenger in attempting to do so, after the train had started, stumbled and fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the Court will not interfere with their finding.

Riddell, K.C., for appellants. *W. H. Blake*, K.C., for respondents.

Falconbridge, C.J.K.B.] DAVIS *v.* WALKER. [Dec. 5, 1902.

Donatio mortis causa—Solicitor and client—Absence of independent advice—Invalidity of gift.

Where at the time of the making of an alleged donatio mortis causa, the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to any one, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the deceased, such gift cannot be supported.

There is no distinction in this respect between a gift inter vivos and a gift mortis causa.

Riddell, K.C., for appellant. *Wigle*, for respondents.

Moss, C.J.O.] [Dec. 5, 1902.

OTTAWA GAS COMPANY *v.* CITY OF OTTAWA.

Solicitor—Payment by salary—Costs—Taxation—Leave to appeal.

The solicitor of a municipal corporation was appointed under the terms of a by-law which provided for his receiving a yearly salary of $1,800 for

all services performed by him including costs of litigation incurred on behalf of the corporation, and any costs awarded to the corporation were to be paid over to the city treasurer. This by-law was amended by a by-law providing that all costs payable to the corporation in any action should be paid to the solicitor as part of his remuneration, in addition to his salary. After the passing of the amending by-law the corporation claimed to have the right to tax profit cost in an action against the corporation which had been dismissed with costs prior to the passing of such amending by-law.

Leave to appeal to the Court of Appeal from judgment of a Divisional Court refusing to allow such profit costs having been moved for,

Held, that having regard to the litigation and the decisions on the subject leave should not be granted.

Semble, that the date of the judgment governed the liability of the plaintiff's liability to costs.

H. T. Beck, for the motion. *J. H. Moss*, contra.

Falconbridge, C.J.K.B.] [Dec. 5, 1902.

MCCLENAGHAN *v.* PERKINS.

Executors and administrators—Matters occurring before death of deceased—Corroboration—R.S.O. 1897, c. 67, s. 10—Devise to executor—Whether in lieu of compensation—Negligent mismanagement—Compensation.

The executor of a deceased person's estate was also the executor of an estate in which the deceased was beneficially interested. In proving his accounts in the last named estate, and which was after the deceased's death, the executor credited himself with having received for the deceased on account of her share such last named estate a specified sum of money. On subsequently proving his accounts in the deceased's estate, and being charged with this sum, as having been received by him for the deceased, he claimed that he had not then received it, but had in fact paid it out in small sums to the deceased during her life time.

Held, that this was not a matter occurring before the death of the deceased and therefore the evidence of the executor to establish his contention did not require to be corroborated under s. 10 of the Evidence Act, R.S.O. 1897, c. 61.

A testatrix by her will devised to her brother certain lands free from incumbrance, with a direction for the payment out of general personal estate of any incumbrance thereon, and she appointed him her executor.

Held, that the devise was not given to him in his capacity of executor, but in his personal capacity, and therefore did not preclude him from claiming compensation for his services to the estate. *Compton* v. *Bloxham* (1845) 2 Coll. 201, distinguished.

The fact of an executor being guilty of acts of negligence, mismanagement and breach of trust in his management of the estate; but there being nothing of a dishonest or fraudulent character, and the losses resulting therefrom being capable of being compensated for, and made good in money, the executor is not thereby deprived of compensation.

Beament, for appellants. *Code*, for respondents.

From Britton, J.] [Jan. 26.

DILLON *v.* MUTUAL RESERVE FUND LIFE ASSOCIATION.

Insurance—Life—Misstatement in application—Age—Evidence of bona fides.

In an action on a policy of life insurance the main defence was that the insured in his application, made in 1891, stated he was 41 years of age, whereas in fact he was 44. The evidence shewed that 44 was his actual age at the time. Evidence of statements made by the insured many years before the application tending to shew his belief that he was born in 1850, was rejected.

Held, that the evidence should have been admitted for the purpose of shewing that the statement in the application as to age was made in good faith and without intention to deceive.

In answer to questions the jury found that the statement in the application that the insured was born in 1850 was untrue and was material, and also that the insured did not make the misstatement in good faith believing it to be true and without intention to deceive.

Held, that on these answers judgment should have been entered for the defendants, and that it was not correct to say that the onus was on them to shew want of good faith and an intention to deceive, but that it lay upon the persons seeking to uphold the contract to prove the contrary. New trial ordered.

E. D. Armour, K.C., and *R. B. Henderson*, for the appellants, defendants. *I. B. Lucas* and *W. H. Wright*, for the plaintiff.

From Falconbridge, C.J.K.B.] [Jan. 26.

BLAIN *v.* CANADIAN PACIFIC R. W. CO.

Railways—Assaults on passengers—Negligence—Duty of conductor.

Action for damages for negligence of the defendants or their servants in failing, after due notice, to properly guard and protect the plaintiff against assault on one of their trains. There was ample evidence that the plaintiff was assaulted and ill-used on the train, and that the conductor was told of the conduct of the assailant and of his threats to continue it.

Held, that it was for the jury to decide whether, with the knowledge the conductor had, he acted reasonably and diligently, or whether after

being told, as he was by the plaintiff and others, of the assailant's drunken condition, and of the assaults he had already committed upon the plaintiff and other passengers before the train started, the conductor acted unreasonably and negligently in refusing and failing to take reasonable steps to prevent the subsequent assaults; and appeal from the judgment at the trial upon a verdict of the jury in favour of the plaintiff awarding him $3,500 damages, dismissed.

Riddell, K.C., *D. O. Cameron*, and *O'Donoghue*, for plaintiff. *Johnston*, K.C., and *Shirley Denison*, for appellants.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B.] [Dec. 22, 1902.

HAY *v.* BINGHAM.

Libel—Pleading—Whole article—Producing and reading at trial—Words tendering immaterial issue—Embarrassing—Striking out.

The very words complained of in an action of defamation must be set out by the plaintiff in order that the Court may judge whether they constitute a cause of action—it is not sufficient to give the substance or purport with innuendoes—it is sufficient to set out the libellous passages provided that nothing be omitted which qualifies or alters the sense; and, as the libel itself must be produced at the trial and the defendant is entitled to have the whole of it read,

Held, that the plaintiff was entitled to set out in the statement of claim the whole article complained of. But

Held, also, that certain words in another paragraph which tendered an issue not material but which might be embarrassing should be struck out.

Deyo v. *Brundage* (1856) 13 Howard P.R. (S.C. N.Y.) 221, referred to.

Judgment of a Local Master varied.

McVeity, for the appeal. *Glyn Osler*, contra.

Boyd, C., Meredith, J.] DUNLOP *v.* RYCKMAN. [Dec. 22, 1902.

Practice—Action by English Co.—Counter-claim for breach of contract against defendants out of jurisdiction—Conspiracy to defraud.

The plaintiffs, an English company, brought an action against the defendants in Ontario to restrain them from exporting goods to and interfering with their business in Australia in breach of a certain agreement, and the defendants, besides setting up as a defence certain breaches of the agreement by the plaintiff company, counter-claimed against the plaintiff company for damages for such breaches; for a declaration of their rights as to trade with Australia and other countries; and a rectification of the agreement to make it conform to the representa-

tions of the plaintiff company. The defendants also counter-claimed against the plaintiff company. G. & P., two persons not parties to the action, one resident in Ontario and one in Australia, and an Australian company, alleging a conspiracy by them to defraud and cheat the defendants out of certain rights to trade marks they were entitled to in Australia under the agreement by the plaintiff company assigning said trade mark to said G. & P., who with the Australian company fraudulently put in force the trade mark laws of Australia and prevented the defendants exporting their goods to Australia and obstructing them in their business.

Held, that the claims made in the counter-claim against the plaintiff company alone were proper subjects of a counter-claim in the action; but

Held, also, that there was no such intimate connection between the subject of the action and the subject of the counter-claim against the four parties, only one of whom was resident within the jurisdiction or had admitted the jurisdiction of the Court, as to oblige the Court to require both to be disposed of in the same action.

South African Republic v. *La Compagnie Franco-Belge* (1897) 2 Ch. 487, followed.

Judgment of STREET, J., reversing in part the judgment of the Master in Chambers, affirmed.

Shepley, K.C., and *C. W. Kerr*, for appellants. *Aylesworth*, K.C., *Douglas*, K.C., and *John Greer*, for the respondents.

Trial—Street, J.] SMITH *v.* HUGHES. [Jan. 7.

Specific performance—Sale of land—Contract by agent of purchaser—Action by agent—Delay of purchaser—Resale by purchaser—Right of sub-purchaser to join vendor as party.

Where an agent makes a contract for the purchase of land in his own name, the vendor knowing that the agent is acting for another person, whose name is not disclosed, the agent cannot maintain an action in his own name against the vendor for specific performance of the contract.

Where the value of land is uncertain and speculative, the purchaser thereof must act upon his rights with reasonable diligence and promptitude upon pain of losing them.

The owner of land of that character on the 1st May, 1900, contracted to sell it to H., but was never paid anything upon the purchase money, although $50 was to be paid down, and $200 in six months, to be secured by his note, which never was given. On the 29th August, 1900, H. contracted to sell the land to the plaintiff, acting for an unnamed principal, and the owner was willing to carry out the resale. In September and October, 1900, there was some correspondence about the title, but after that, until the 3rd April, 1901, the plaintiff's principal did nothing. On that day he sent the owner a conveyance of the land for execution, but the owner tore it up and said that owing to the delay he would not carry

out the contract. On the 9th April, 1901, the plaintiff's principal brought this action, in the name of the plaintiff, for specific performance of the contract for resale, against H. alone, but took no other steps until the 24th October, 1901, when he obtained an order adding the owner as a defendant, and then served the writ on both defendants. There was such further delay in the prosecution of the action that it was not tried till December, 1902.

Held, that the whole course of proceedings on the part of the plaintiff's principal shewed that he had been endeavoring to keep alive his claim to the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy it, in case it should depreciate, and the action should be dismissed as against both defendants.

Held, that the owner was properly joined as a defendant; the foundation of the right against him being that the plaintiff, or his principal, was equitable owner under his contract with H. of H's rights against the owner of the land, and might join the latter upon offering to perform H's contract.

Aylesworth, K.C., and *J. E. Irving*, for plaintiff. *McFadden*, for defendant Hughes. *Riddell*, K.C., and *P. T. Rowland*, for defendant Plummer.

Street, J.] KING *v.* MATTHEWS. [Jan. 8.

Municipal corporation—Local improvement—Reconstruction of sidewalk—Payment for out of general funds—Illegality—Liability of councillors sanctioning payment Trustees—Breach of trust—Excuse—Relieving statute.

By a special Act of the Legislature of Ontario incorporating a town it was provided that all expenditure in the municipality for improvements and services for which special provisions were made in ss. 612 and 624 of the Consolidated Municipal Act, 1893, should be by special assessment on the property benefited and not exempt by law from taxation; and the construction of sidewalks upon the local improvement plan was one of the matters provided for by s. 612. In 1886 a board sidewalk was laid upon one of the streets of the town, in accordance with a by-law, and paid for by a special assessment upon the properties fronting upon it. A portion of the sidewalk so laid was not much used, and had never been repaired, and in 1902 was out of repair and dangerous. The remainder had been more used, had been repaired from time to time by the council at the general expense, and in 1902 was in a good state of repair. In that year the agent of the owners of the property fronting on the part of the sidewalk that was out of repair threatened proceedings to compel the council to put it in repair, and as there was pressing need that it should be put into a state in which it would not be dangerous to the public, the chairman of the Board of Works directed the corporation foreman to proceed at once to

put it in a good state of repair, and this was done by taking up the old sidewalk altogether, laying down new stringers, using such of the boards of the old sidewalk as were good, and replacing those which were bad with new ones. This work was paid for out of the general funds of the town.

In an action by a ratepayer, on behalf of all ratepayers other than defendants, against the members of the council who sanctioned the payment for this improvement, and against the corporation of the town, the claim was that the individual defendants might be ordered to pay to the corporation the moneys expended in the construction of the sidewalk, and that the defendants might be enjoined from paying any further moneys in respect thereof.

Held, that the members of the council who were sued, having acted in good faith and under the bona-fide belief that they were doing their duty as trustees for the body of ratepayers in paying out of the general funds of the municipality for what was practically a new sidewalk, even if they had misconstrued the meaning of the statutes, which was by no means clear, at all events acted honestly and reasonably and were entitled to be excused for the alleged breach of trust.

Semble, that 62 Vict. (2) c. 15, s. 1, applied to these defendants; but if it did not, they should not be more hardly dealt with than ordinary trustees, and should be treated as within its equity.

H. L. Drayton, and *D. Mills*, for plaintiff. *Rowell*, K.C., and *Langworthy*, for defendants.

Meredith, C.J.C.P.] [Jan. 16.

IN RE RATHBUN COMPANY AND STANDARD CHEMICAL COMPANY.

Arbitration—Directing special case—Question of law arising in course of the reference—R. S. O. 1897, c. 62, s. 41.

Application by the Standard Chemical Company, under the Arbitration Act, R.S.O. 1897, c. 62, s. 41, for a direction to arbitrators to state a special case. The arbitrators had been appointed under the arbitration clause in an agreement between the two Companies, whereby the Rathbun Company agreed to lease to the Standard Company certain buildings, machinery, and plant for the production of charcoal, and to provide the Standard Company for daily use with a maximum of 66 cords of wood, of which not more than 30 per cent. should be soft wood, and the Standard Company agreed to employ competent men to work the kilns and properly carbonize the wood into charcoal, and deliver charcoal to the Rathbun Company to a maximum quantity of 85,000 bushels per month.

The 22nd clause then provided that "in case of any dispute, or disagreement, or difference of opinion, arising between the parties in regard to the meaning or construction of this agreement, or any part thereof, or of the mutual obligations of the parties or of the subjects to be referred to arbitration as hereinafter mentioned, or of any other act, matter or thing

relating to or concerning the carrying out of the true spirit, intention or meaning of these presents, the same shall be determined by arbitration," etc.

Disputes did arise under the agreement, and amongst others as to the following points:—

(1) Whether upon the true construction of the contract the applicants were, for the 66 cords of wood delivered daily, bound to deliver 85,000 bushels of charcoal per month, or whether it was sufficient if they delivered what was or might have been with proper care and skill and without waste, produced from the wood.

(2) Whether there had been such a breach of the agreement, on the part of the Standard Company as entitled the Rathbun Company to take possession of the leased premises under the terms of the agreement.

(3) Whether the claim of the Rathbun Company against the Standard Company that the latter had used more wood than 66 cords per day, was a proper subject for reference to arbitration under clause 22 of the agreement.

Held, that, as to the first point in dispute, which involved the claim of the Rathbun Company for damages for short delivery of charcoal, such shortage being claimed whatever might be taken as the meaning of the agreement,—this left the question as to the proper construction of the agreement open, which was a question of law "arising in course of the reference," within the meaning of section 41 of the Arbitration Act, therefore a special case may properly be directed as to it.

The special case having been thus directed as to the first and principal question it might properly be made to include also the two other questions in dispute, whether the arbitrators had or had not ruled upon them (a point which was disputed), and even though had they been the only questions which the applicants desired to have stated, it would not have been proper to direct a case as to them under the circumstances.

A party to a reference is not entitled ex debito justitiae to have a special case directed whenever a question of law has arisen in the course of a reference. It is a matter resting in the discretion of the Court.

Laidlaw, K.C., and *Bicknell*, K.C., for the applicants, the Standard Company, Toronto, Limited. *Armour*, K.C., and *Masten*, for the Rathbun Company, Limited.

Street, J.] IN RE O'SHEA. [Jan. 30.

Will—Construction—Devise of land—Direction that devisees were bound to keep their sisters in a suitable manner free of expense—Maintenance.

A testator devised his farm to his two sons, share and share alike, but directed that they should be bound to keep their two sisters until they married, in a suitable manner, free of expense.

Held, that while the sons were bound to give their sisters a home while the latter lived with them, they were not bound to furnish their sisters with money on which they could live apart from them.

Edmison, K.C., for executors and beneficiaries, except O'Shea. *R. R. Hall*, for O'Shea.

Britton, J.] McKELVEY *v.* CHILMAN. [Feb. 9.

Costs—Cause of action in High Court—$1.00 paid into Court accepted by plaintiff—High Court Scale—Con. Rule 425.

In an action for trespass to land valued at over $200 in which the plaintiff claimed $2,000 damages and no question of title to land was raised, the defendant paid $1.00 into Court and the plaintiff accepted it.

Held, that the plaintiff was entitled to his costs on the High Court scale. *Babcock* v *Standish* (1900) 19 P.R. 195, followed.

Dickson, for plaintiff. *Counsell*, for defendant.

Britton, J.] HUTCHINSON *v.* MCCURRY. [Feb. 16.

Foreign Law—Code of civil procedure in Quebec—Recovery of costs—"Distraction"—Attorneys right to recover without intervention of client.

"Distraction of costs" as provided for in section 553 of the code of civil procedure in the Province of Quebec is the diverting of costs from the client or party who, in the ordinary course would be entitled to them and their ascription to his attorney or other person equitably entitled.

Plaintiffs were the attorneys on the record for one R. against whom no action was brought in the Province of Quebec by the defendant and an interlocutory motion therein had been dismissed with costs, taxed at $238.20, and judgment entered therefor in the Superior Court at Montreal.

Held, that the plaintiffs were entitled to recover such costs from the defendant in their own names in Ontario without the intervention of their client.

Quære, as to interest on the amount.

Middleton and *Cavell*, for plaintiffs. *Hewson*, for defendant.

Britton, J.] FLETT *v.* COULTER. [Feb. 17.

Negligence—Horse on highway—Injury to boy.

Defendants' horse was on the highway when a boy of twelve years of age approached to catch him by taking hold of a rope then around his neck when he was kicked and injured. There was no evidence that the defendant knew the horse was accustomed to stray or had any vicious propensity, or that the horse had any such fault, and there was evidence that the horse had been interfered with by several boys, of whom the injured

boy was one, and that the latter had more than ordinary intelligence and fully understood the risk he ran. In an action for injury by the boy and his father,

Held, that they could not recover. *Patterson* v. *Fanning* (1901) 2 O.L.R. 462, distinguished.

O'Donoghue, for plaintiffs. *Woods*, for defendant.

Meredith, J.] CAMPBELL *v.* SCOTT. [Feb. 17.

Examination of party for discovery—Attendance before special examiner —Absenting himself after lapse of time waiting—Attendance again.

A party to an action subpœnæd for examination for discovery before a special examiner and paid his conduct money for the day, may be compelled to attend and testify in the same manner as a witness.

One of four defendants, all of whom were subpœnæd for half past ten in the morning and attended, after being excluded from the Examiner's Chamber, waited while the others were being separately examined until after three in the afternoon when, without communicating with the examiner, he went away and did not attend for examination.

Held, that a Local Judge's order requiring him to attend again for examination was right.

Judgment of the Local Judge of the County of Perth affirmed.

Mabee, K.C., for appeal. *J. H. Moss*, contra.

THIRD DIVISION COURT—COUNTY OF ELGIN.

Hughes, Co.J.] [Jan. 23.

CANADIAN FREE INSURANCE SYSTEM *v.* MAYELL & SON.

Unregistered insurance business—Right of insurance company to sell blank policies payable to bearer—Wagering and illegal contracts.

The plaintiffs organized a system ostensibly for the insurance of persons in case of accident or death. They took from merchants a contract agreeing to purchase from the System certain so-called policies, as per specimen, on certain conditions, at $60 per thousand, and to accept the same when forwarded, to be issued within a period of one year. The plaintiffs under the so-called policy were not bound to do anything, for underneath their name and address as printed on the document is the following undertaking of an incorporated insurance company:

"The Ontario Accident and Insurance Company will pay $500 to the legal representatives of the holder, or compensation at the rate of $5 per week in accordance with and subject to certain conditions printed on the back hereof. Signature of holder ——————. Witness ——————"

The defendants as holders signed one of these undertakings, but if was delivered to them as an escrow, conditioned only to have force it certain other traders adopted the same system, which was that for every $3 worth of goods purchased for cash by a customer one of these so-called policies was to be given to the purchaser guaranteeing the payment of $500 to his or her legal representatives whose death should, independently of all other causes, directly result from an accident caused by external violence and accidental means occurring within fourteen days from the date of the instrument, or of $5 per week to such person whilst totally disabled for a period not exceeding ten weeks.

There was no such insurance system registered in the insurance inspector's returns or authorized by law.

Held, 1. The plaintiffs are not a company authorized to issue currency payable to bearer. They only profess to be a medium for circulating and wagering in the name of an incorporated insurance company, an illegal traffic in the sale of so-called life and accident assurance policies. It is in the nature of a gambling arrangement for the performance of an illegal act. It is therefore void. Any insurance in the nature of a wager is illegal, and sanctioning claim of the plaintiff would be to sanction an illegal device.

2. The plaintiffs promised nothing for the $60 per 1,000, and the Ontario Accident Insurance Company are not parties to the contract, and no consideration passed between them and the holder, and there was no mutuality of contract. The whole transaction was illegal and could have no force or effect.

3. The Ontario Accident Insurance Company, although a duly registered corporation for the transaction of insurance against accident or sickness, has no right to sub-let or delegate its franchise to any other corporation or person, much less to an inanimate aggregation without personal responsible existence.

Action dismissed with costs.

J. A. Robinson, for plaintiffs. *T. W. Crothers*, for defendants.

ELECTION CASES.

Britton, J.] SMITH *v.* CAREY. [Jan. 6.

Penalties—Ontario Election Act—Person voting knowing that he had no right to vote—Wilfully voting without qualification—Agent at poll—Voting under certificate—Neglect to take oath of qualification—Reduction of penalty.

The defendant, having shortly before an election for the Legislative Assembly of Ontario removed from his farm in the neighbourhood of a city into the city itself, applied for and obtained registration as a city voter,

not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he had agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situated, at a polling place other than that for the subdivision in which he had formerly resided, and received from the returning officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, and voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could not vote.

Held, 1. The defendant was not liable to the penalty imposed by s. 168 of the Ontario Election Act, R.S.O. 1897, c. 9, for voting knowing that he had no right to vote. *South Riding* v. *County of Perth*, 2 Ont. Elec. Cas. 30, followed.

2. The defendant was not liable to the penalty imposed by s. 181 of the Act for wilfully voting without having at the time all the qualifications required by law. "Wilfully voting" as in this section, and applying it to the facts of the case, was practically the same as voting knowing that he had no right to vote.

3. The defendant was liable to the penalty of $400 imposed by s. 94, sub-s. 5, of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate; but, as the defendant was not asked to take the oath, the deputy returning officer not having been aware that it was necessary, and the plaintiff himself was present when the defendant voted, and did not object, the provisions of R.S.O. 1897, c. 108, should be applied, and the penalty reduced to $40.

McIntyre, K.C., and *E. H. Smythe*, K.C., for the plaintiff. *Whiting* K.C., and *J. M. Mowat*, for the defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] HARRISON *v.* WESTERN ASSURANCE CO. [Jan. 17.

Fire insurance—Construction of policy—Representations—Materiality—Arbitration words "value of the property insured"—Burden of conditions in policy.

One of the conditions of a fire insurance policy issued by the defendant company provided that notwithstanding anything in the contract the question of materiality as to any representation in the application should be a question for the Court.

Held, 1. The Court were precluded by this condition from holding statements contained in the application to be "warranties" in the strict sense that they must be absolutely true, or absolutely complied with. Such statements were mere representations which, if untrue, must be material in order to avoid the contract.

2. If there was anything in the contract which placed these statements in a different category from ordinary representations it was contrary to the statutory conditions and inoperative, the 4th section of the Act, R.S.N.S. (1900) c. 147, with respect to the variation of conditions by the insurer, not having been complied with.

3. The intention of the statute could not be defeated by putting different stipulations, generally known as conditions, in the body of the contract itself.

One of the substituted conditions provided that "in the event of disagreement as to the amount of the loss the same shall be ascertained in the manner following." Then followed a provision for the appointment of arbitrators to estimate the loss, stating separately sound value, damage, etc.

Held, 1. The arbitrators appointed under this provision exceeded their duty in attempting to fix the value of the property at the time the insurance was effected, the words "value of the property insured," meaning the value at the time of the fire and not the value at the time the insurance was effected.

2. With respect to the question of value, that the onus was upon the company, relying upon overvaluation, to prove it.

3. One of the questions asked in connection with the application for insurance was: "5. State fully applicant's interest in the property, whether owner, trustee, etc." This was answered "owner."

This answer was correct, the evidence shewing that the plaintiffs were husband and wife, and that one part of the property insured was owned by the husband and the remainder by the husband and wife jointly.

If particulars of title were required a different question would be required, and should have been asked. The 11th and 12th questions were intended to elicit information as to whether the applicants had ever had any property destroyed by fire, and, if so, the date of the fire, and, if insured, the name of the company interested. The applicants replied in the affirmative to the first question, and in reply to the second question said "1892, National, and London and Lancashire."

These questions were correctly answered, the evidence shewing that the applicants had a house destroyed by fire in June, 1892, and a barn in September of the same year, and that the company last named were the insurers of the house and barn, and the company first named the insurers of the furniture in the house.

The questions were not material to the risk, and that if further information was desired more definite enquiries should have been made.

Defendants claimed that plaintiffs, in their proofs of loss, falsely stated the value of the property insured and that this, under the statutory conditions, was a false and fraudulent statement which vitiated the claim.

Held, 1. The words of the condition meant a statement false to the knowledge of the person making it and not a statement of the value in excess of that fixed by the arbitrators, this being a matter in respect to which there was room for diversity of opinion.

2. As soon as plaintiffs proved the policy, the fire and the submission and award, their case was complete and the onus then rested upon defendants.

3. Evidence of one of the plaintiffs as to the amount of damage sustained was immaterial.

4. The action was one in which the plaintiffs were entitled to sue jointly and recover, notwithstanding the fact that they had separate interests in the property covered by the insurance.

Roscoe, K.C., for appeal. *Drysdale, K.C.*, contra.

Full Court.] ATTORNEY GENERAL *v.* POWER. [Feb. 21.

Will—Discretion of executors to withhold and accumulate income—Reasonable and desirable time—Failure of object—Scheme ordered—Costs.

Testator directed his executors to invest the residue of his estate in good and sufficient securities and to apply a portion of the income arising therefrom to certain objects named, and "to pay and apply semi-annually the remaining portion of such income to the introduction and support of the Jesuit Fathers in said City of Halifax." The executors were given an "uncontrolled discretion" to withhold the application of the whole or part of said income from "any or either or the whole of the purposes mentioned —for any period not exceeding the time limited by law (if any such limitation exists)," but in that case it was provided that the unapplied income should be accumulated, and that such accumulations, subject to the like powers, etc., should form part of the capital. Finally the executors were given the power, notwithstanding anything before expressed, to apply the whole of the income, including accumulations, to the promotion and support "in the City of Halifax or its vicinity, of such charitable institutions and religious orders in connection with the Roman Catholic church as my said executors, or the survivor of them, shall think proper." Efforts extending over a number of years were made to induce the Jesuit Order to establish a College in Halifax, with a view to the carrying out of the testator's wishes, but, for various reasons, they declined to do so. Negotiations were still carried on and, at a later stage, they reconsidered their determination and expressed a willingness to accept the offer made to

them, but in the meantime the Archbishop of the Diocese declined to give his consent to the introduction of the Jesuit Order, and, in the absence of his consent, it was impracticable to carry out the testator's intentions. The period of 21 years having elapsed since the testator's death and the fund being still unapplied, under the circumstances mentioned,

Held, 1, affirming the judgment of Townsend, J., that the discretion of the executors to withhold and accumulate could only be exercised until such time as, in the opinion of the Court, a "reasonable and desirable time" had elapsed.

2. That in view of the lapse of time, and the refusal of the Archbishop to admit the Jesuit Order into his Diocese, and the fact that such refusal was not arbitrary but was supported by ground which appeared to him to be strong, and that no appeal had been taken from such refusal, although sufficient time had elapsed to have enabled the executors to have done so, the executors should be directed to frame a scheme for the disposition of the income in accordance with the wishes of testator as expressed in the clause of his will relating to charitable institutions and religious orders in connection with the Roman Catholic Church.

L. G. Power, and *H. Mellish*, for appellants. *Ritchie*, K.C., and *Chisholm*, for respondents.

Province of Manitoba.

KING'S BENCH.

Richards, J.] GEBBINS *v.* METCALFE. [Jan. 29.

Examination for discovery—Disclosure of names of witnesses—Questions not relating to the matters in question in the action.

This was a motion on behalf of a defendant to compel the plaintiff to answer certain questions which, on his examination for discovery, he had refused to answer.

RICHARDS, J.: The first four questions are, I think, within the rule that a party is not compellable on such examinations to disclose the names of his witnesses. The remaining questions relate to whether the plaintiff has received from persons or corporations, not parties to this action, assistance or promise of assistance or indemnity as to the costs of the suit, or as to whether the plaintiff before action consulted with such other persons as to his bringing this suit.

I am unable, after careful search, to find any authority holding such questions admissible as "touching the matters in question in this action," on any other ground. The concluding words of Rule 379 of the King's

Bench Act merely states, I think, the manner in which the examination shall be conducted, but does not enlarge or affect the meaning of the words, "touching the matters in question in this action."

Motion dismissed with costs to be costs in the cause to the plaintiff in any event.

North-West Territories.

SUPREME COURT.

McGuire, C.J.] [Dec. 29, 1902.

COLONIAL INVESTMENT AND LOAN CO. *v.* KING AND LEWIS.

Mortgage—Action—Land titles—Foreclosure—Consolidation—Right to sue on covenant.

Action on covenant in a mortgage given by defendant King to plaintiffs June 4, 1895, for $2,600. A prior mortgage for $400 had been given by defendant to same mortgagees on a different parcel of land, of which the plaintiffs are assignees. In March, 1894, defendant Lewis, under an agreement for sale, bought the land covered by the $400 mortgage and paid the full consideration mentioned in agreement of sale. Under the $400 mortgage there was a clause whereby King agreed with the mortgagees giving a lien upon all shares of the capital stock of the mortgagees then held or thereafter to be subscribed for by him, and whereby he agreed to assign the shares he then held to the mortgagees forthwith. A similar clause was also in the $2,600 mortgage. The plaintiffs, after both mortgages were in default, took proceedings to enforce the security under the $2,600 mortgage as against the lands therein mentioned. The plaintiffs claimed the right to consolidate the mortgages and refused to allow the $400 mortgage to be paid off without the $2,600 one being satisfied. They also claimed that the $2,600 mortgage gave them a lien as against King on the 4 shares of stock mentioned in the $400 mortgage.

Held, as regards the defendant Lewis he was not a holder or subscriber for any stock of the mortgagees and is not concerned in how far the stock held by King, mentioned in the $400 mortgage, may be subject to a lien for the payment of the $2,600 mortgage. He bought the land prior to the $2,600 mortgage with a knowledge of only one mortgage thereon, namely, for $400. Lewis cannot be affected by the terms of the $2,600 mortgage as he is not a party to it in any way, and the mortgage was not in existence until long after his purchase and was not made in pursuance of any covenant on the $400 mortgage and there is nothing in the $400 mortgage which makes the land or stock mentioned therein security for the payment

of any subsequent mortgage, and the subsequent mortgage does not in any way give the mortgagees a lien on any land but the land mentioned therein. As far as Lewis is concerned, any question affecting King's does not affect him. The outside he can be called upon to pay is the $400 and interest. As regards King, it appears that the mortgagees took proceedings to enforce their security under the $2,600 mortgage on August 24, 1899, as against the land herein and obtained a certificate vesting the title. Under our Land Titles Act the mortgage does not operate as a transfer of title but as a security. The mortgagor remains the owner of the legal estate. The mortgagee merely has a lien until payment or in case of default he can proceed to get an order for to sell the land or have the title thereto vested in himself. Upon getting a final order vesting the title in himself he can obtain from the Registrar of Land Titles a certificate which gives him an absolute title free from all claims by the mortgagor. It was, therefore, by their own deliberate acts that a judgment was obtained, vesting the title in them instead of having the property sold. The result was the same as if the mortgagor had given them a transfer. Had he given them a conveyance they could not have sued him on this covenant in the absence of evidence to shew contrary intent. There is no evidence to shew that the plaintiff intended to reserve the right to sue on the covenant. The conveyance by a mortgagor to the mortgagee of his legal estate is strong evidence that the mortgagee did not intend to reserve the right to sue on the covenant. The plaintiffs are not entitled to succeed. Action dismissed with costs of both defendants to be paid by the plaintiffs.

Norman MacKenzie, for plaintiff. *C. T. Jones*, for defendants.

Flotsam and Jetsam.

A Cow in Court:—It is not often that a cow appears in a court room. In the wild and wooly west, however, all things are possible. Not long ago there was a replevin suit in Omaha respecting the ownership of a jersey cow. The plaintiff, a woman, desired that the animal might be brought into court to which, after some consideration, the court assented. The cow having made its appearance accordingly, the plaintiff called her by her pet name whereupon co-bossy crossed the court room and rubbed her nose lovingly in the plaintiff's face. This experiment being thrice successfully repeated the court declared the plaintiff to be the owner of the cow. Solomon could not have done better.

A revising barrister, in England, recently received from the widow of a deceased person, whose vote was objected to, a postcard to the following effect: "As my husband died on the 26th Dec. last, he will not trouble you about Parliamentary electoring. I remain, yours respectfully, The Widow."