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Undue prominence has been given to an attack on the Bench by a newspaper writer in British Columbia, who, apparently desirous of bringing himself into notoriety, made some general charges of corruption against the Judges. He was very properly sentenced to a reasonably long term of imprisonment. He thought better of it when the sentence was being put in force, humbly apologized and was thereupon discharged. Speaking of the Judiciary in British Columbia, we are glad to hear that the appointment of Mr. Hunter as Chief Justice of that Province has been amply justified by the result.

We hear mutterings of discontent in the profession at the block of business in the Court of Appeal, of Ontario, and, as appears from the daily press, this has reached the ears of the public. We are satisfied that this condition of things does not arise from any want of industry or attention on the part of the Judges, but it is nevertheless much to be regretted, especially in view of the fact that the Court referred to is one of the ablest and most satisfactory in the Dominion. We trust it will very soon be enabled to dispose of the many cases now standing for judgment, many of them for a considerable length of time.

The judicial strength of the High Courts in the Province of Ontario will be reduced for some months by the absence on leave of the Chief Justice of Ontario, Mr. Justice Ferguson and Mr. Justice Robertson. The leave given to the latter doubtless foreshadows his early retirement from the Bench. Whether the same can be said of either of the other two learned Judges does not appear. They are both in need of rest, and will, we trust, receive much benefit to their health by cessation from work. Judge Ferguson goes to the Pacific Coast where, when a young man, he went as one of the venturesome spirits that sought their fortunes in the gold fields of the West. He will probably visit the mines at Rossland, en route, and there renew his acquaintance with the pick and the pan in their modern development.

We are glad to see that the House of Lords reversed the decision of the Court of Appeal in *Neale* v. *Gordon-Lennox*, referred to ante pp. 355, 394, because, we think, the result of that decision was to give an undue power to counsel. The law of England may therefore now be considered to be settled, that a counsel consenting to a judgment or order contrary to the express instructions of his client, cannot bind his client thereby—even though the limitation of his client's authority was not communicated to the other side, but we assume as a matter of course that the client must promptly repudiate the action of his counsel, otherwise he may be bound on the ground of laches and acquiescence.

We fear the falling off in litigation, to which we referred recently, may to some extent account for the fact that the first Court day at Osgoode Hall after vacation was signalized by no less than nine applications to suspend solicitors from practising; most of the applications being made on the ground that the offenders had been practicing without paying their annual fees to the Law Society. It is regrettable that solicitors should commit such breach of the law, even though it may be a more pardonable offence than a breach of duty to clients.

It must of course be the wish of all in authority from Kings down to Justices of the Peace to know what is thought of them by those who come before them, so that they may "See themselves as ithers see them" and, if necessary, mend their ways accordingly. With this in view, repudiating, however, the uncharitable sentiment contained in the following lines, we feel constrained to publish them. If the cap does not fit so much the better. This jeu d'esprit was recently found in one of the Courts of superior jurisdiction in the capital of one of the Provinces, written in pencil, on a piece of blotting paper. The document is now on file (though not on exhibit) in this office:

"How pleasant to know the C.J.
Hear him talk in his amiable way;
'Tis his innocent joy
To tease and annoy,
And make you pay costs of the day."

In another place will be found a very interesting and able article sent us for publication by Mr. Thomas Hodgins, K.C., Master in Ordinary of the Supreme Court of Ontario, on the subject of the Alaska-Canada boundary question. The learned author, who must be complimented on the judicial manner in which he has treated the subject, proves the righteousness of the British Canadian claim almost entirely by American authorities, amongst whom may be named such men as ex-President Cleveland, Mr. Secretary Blaine, Mr. Secretary Fish, Chief Justice Marshall, Mr. Justice Story and others. A careful perusal of these authorities fully justifies the writer's observation, wherein he speaks of the United States proposition as "a sample of the superb daring of American diplomacy." A much stronger expression would we fancy be used against us if the position of the two nations were reversed; but as "a soft answer turneth away wrath," we shall not pursue this phase of the subject, but simply express the hope that our neighbours will soon see the propriety of leaving this burning question to a fair arbitrament, which at present they are apparently disinclined to do.

It has been said by them of old time that unpleasant consequences result from setting a certain class of persons on horseback. One is reminded of this proverb by an incident which is reported to have taken place recently at Sydney, N.S. It would appear that Mr. Justice Meagher of the Supreme Court when leaving the Court House found his exit momentarily barred by a number of delegates to the annual convention of the Maritime Provinces Board of Trade, who had assembled on the steps of the Court House to have their pictures taken. The photographer had the delegates arranged nicely, and they did not care to be disturbed. After waiting a moment, the judge, as they did not get out of his way, ordered the sheriff to clear a way for him which was done, and the judge passed through the crowd. Why he could not have gone quietly through without any ceremony does not appear. Some of the delegates resented the interruption, and as the judge and sheriff started to walk away the crowd hissed. The judge immediately turned and demanded the name of the man who hissed, declaring he would hand him over to the sheriff, saying that he never saw such an exhibition of ill manners. The delegates subsequently discussed whether they should resent the

insult but eventually decided to take no further notice of it. This, however, was not the end of the matter, for in the afternoon of the same day one of the delegates met the judge at the Court House door. They had some conversation on the events of the morning, and the delegate concluded his observations, on the sidewalk, by expressing his opinion (in which all probably except Mr. Justice Meagher would concur) that the judge's conduct had been disgraceful. His Lordship thereupon ordered the sheriff to take him in to custody for contempt of court, which that officer promptly did. It may here be suggested that the manifest intention was to express contempt for an individual only; there was no court to insult and therefore there could be no "contempt." Upon a subsequent interview between the "Court," the sheriff and the delinquent, the latter was released from custody and the matter dropped.

One can hardly imagine any member of the profession (to say nothing of one occupying the high and dignified position of a judge) so far forgetting himself. It is not at all surprising that he was hissed. He would seem to have laid himself open to that, and more. There are apparently some judges who think that their position entitles them to act with a discourtesy and rudeness which would not be tolerated in private life. Fortunately the exception proves the rule that there are few such.

The authorities in Ottawa should take notice of the matter and prevent the occurrence of any such unseemly, and so far as the arrest was concerned illegal conduct in the future.

DOMINION LEGISLATION OF LAST SESSION.

The volume of legislation in the Dominion "mill" is naturally much less than in those of the Provinces. Such legislation, moreover, comes less prominently before the profession than that which takes place in the latter, where all of us are more or less familiar with what takes place. We would now refer shortly to such acts of the last session of the Dominion Parliament as are of interest to our readers.

An Act to amend the Bills of Exchange Act, 1890. Under the law as it stood a question was raised as to the acceptance of bills payable at or after sight. The drawee might accept such a bill on the date of its presentment or at any time within two days

thereafter, but there was a difference of opinion as to whether the acceptance should not be dated as of the date of actual presentment. Section 42 of the Act is therefore amended by providing that the drawee may accept the bills on the day of presentment or within two days thereafter, or if the acceptance is not so dated the holder may treat the bill as dishonoured. The new section also provides in the case of a bill payable at or after sight the acceptor may date his acceptance as of any of the dates above mentioned but not later than the day of its actual acceptance and if the acceptance be not so dated the holder may treat the bill as dishonoured.

An Act to amend the Exchequer Court Act. By section 2 of this Act an appeal is given from a judgment on a demurrer. Formerly there was an appeal only from final judgment; and judgment on demurrer was not final where the judgment overruled the demurrer. Sometimes the question of law raised by the demurrer is the principal defence to the action and it was desirable to carry the question to the Court of Appeal without going to the expense of a trial.

Section 3 authorizes service out of jurisdiction, whether the defendant is a British subject or a foreigner. Up to this time there was only a rule of Court providing for such service, which was probably ultra vires, and certainly was so as to foreigners.

Section 4 provides for an appeal on behalf of the Crown where the amount involved does not exceed $500, if the principle affirmed by the judgment may affect cases then pending or likely to be instituted wherein the amount claimed would exceed $500, or if, in the opinion of the Attorney-General of Canada, the principle affirmed by the decision is of general public importance; but the allowance of such appeal must be granted by a Judge of the Supreme Court.

An Act further to amend Canada Evidence Act, 1893. Some of the judges of the Superior Courts having represented that much time and expense was wasted to no purpose by calling a large number of expert witnesses, it is now provided by this Act that where in any trial or proceeding, criminal or civil, not more than five expert witnesses may be called upon either side, unless leave is given by the trial Judge; such leave to be applied for before the examination of the experts.

The above Acts which exhibit much care and accuracy in their drafting were prepared under the direction of the Minister of Justice, and by him carried through the House.

THE DEVOLUTION OF ESTATES ACT.

Pollock and Maitland in their erudite work, "The History of English Law before the time of Edward I." conclude the chapter on Intestacy with the following noteworthy passage: "It is in the province of inheritance that our mediæval law made *its worst mistakes*. They were natural mistakes. There was much to be said for the simple plan of giving all the land to the eldest son. There was much to be said for allowing the courts of the Church to assume a jurisdiction, even an extensive jurisdiction, in testamentary causes. We can hardly blame our ancestors for their dread of intestacy without attacking their religious beliefs. But the consequences have been evil. We rue them at the present day, *and shall rue them so long as there is talk of real and personal property.*" This difference as to the law of real and personal property the authors date about the year 1200.

By slow and cautious steps we have been gradually emancipating ourselves in Ontario from the inconveniences which the mediæval law entailed. In 1851 we abolished the primogenital rule of descent. We never had any Ecclesiastical Courts, but we perpetuated what the Ecclesiastical Courts stood for in the mediæval law, and for a long time we continued the rule whereby lands descended directly to heirs, or devisees, and the personal property in the first place devolved on the personal representative and through him to creditors, and legatees and next of kin. For a long time we experienced in an acute form all the evils of this divided system, and many good estates in Ontario in time past have paid heavy toll to lawyers in the process of administration. Some of the older generation of lawyers may remember the time when an administration or partition suit was in almost every case necessary before the estate of a deceased person could be wound up, and that many big bills of costs had to be paid before the operation was complete. This may have been thought advantageous to the legal profession, but we doubt very much whether such advantages are to be desired. The true interests of the profession can never be that of the leech preying on the public,

rather are they to be found in protecting the public from unnecessary law suits. To any one who really studied the question with a view to framing an adequate remedy, it soon became manifestly apparent that the real cause of the trouble was the simple fact that the personal representative had in most cases no power or authority over the deceased person's real estate, and that the only proper mode of remedying the grievance, for it was a most serious grievance to the public, was to vest the realty as well as the personalty in the personal representative. But the difficulty attending the administration of deceased persons estates was not the only difficulty land owners laboured under owing to the perpetuation of the mediæval law of descent ; there was the further difficulty of proving titles derived under heirs. At a considerable distance of time from the happening of the particular devolution, and after many changes in ownership had taken place, it might, and often as a fact did become necessary to prove that some prior owner was in fact heir, and the task of obtaining evidence was then often insuperable, or at all events attended with much expense.

In order to remove these objections and to simplify the law, and relieve land owners from the burthens which the old system indirectly entailed upon them, the Devolution of Estates Act of 1886 was passed. In its original form it in effect provided that the land of a deceased person should vest in all cases in his personal representative, and that the title of all devisees or heirs should be derived through him. By this means full power of administration over a deceased person's whole estate both real and personal was vested in the person charged by law with the payment of his debts; and instead of a question being left to be resolved at perhaps a long distance of time from the happening of the event as whether a given person was rightfully entitled as heir, the legal estate would in every case of intestacy be legally vested by the grant of the personal representative in the person to whom he conveyed. There would thus be established in him a legal title behind which it would not be necessary for any subsequent purchaser to go.

Thus, as the Act originally stood two enormous advantages were gained : (1) the facility for administering estates of deceased persons without the necessity of a law suit, and (2) the simplification of titles derived through intestates.

It would be hard to point to any piece of legislation which has worked more benefit to the land owning community in Ontario than the Devolution of Estates Act of 1886. Its beneficent operation has been of such a character that it has probably not attracted much public attention, and yet it in effect has been the saving to the land owners of the country of many thousands of dollars which would have been otherwise expended in legal proceedings.

If the Devolution of Estates Act had been left in its original condition, so that in all cases the title of beneficiaries of the land whether heirs or devisees must come through the personal representative all would have been well, and the full benefit of the Act would have been secured. Unhappily for the public the Legislative Assembly and Sir Oliver Mowat, the then Attorney General, were persuaded that it was "a great hardship" upon the people entitled to small estates that they should have to get a deed from the personal representative; and instead of devising some simple and inexpensive method of effecting a transfer from the personal representative to the beneficiaries, it was determined to commit what appears to be the utter and most unpardonable folly of reintroducing the old system and grafting it upon the new. Under this hermaphrodite statute as it now stands there need be no probate or administration taken out to an estate, and after the lapse of three years lands of a deceased person vest in the heir or devisee directly as prior to the passing of the Act in 1886.—If on the other hand probate or administration to the estate is taken out the personal representatives are put to the necessity of registering and re-registering cautions, and if they omit to do so the land automatically passes from them and becomes vested in the beneficiaries, though the debts may not have been paid nor the estate fully administered. By an Act of last session the property thus passing into the hands of the beneficiaries remains subject to debts, and we fear it will not be long before administration suits will again become the common and necessary mode of creditors protecting themselves.

We should have thought it abundantly clear that where a man dies leaving property it is not unreasonable to require that before it is distributed among heirs or next of kin or legatees or devisees it should be the duty of some one to see that his creditors are first paid, or at all events that there should be some person who should

assume the responsibility involved in distributing the deceased man's property without first making due inquiry as to his debts. This principle however is certainly ignored by the Act as it now stands, a man may die owing debts and leaving sufficient property to pay them—and yet that property may after three years devolve on a number of different people each of whom though responsible to creditors for his share of the property so received yet may be collectively hard to find and follow—and creditors may thus be put to the necessity of tracing them all up and perhaps of having to sue a score of people in order to recover their claims.

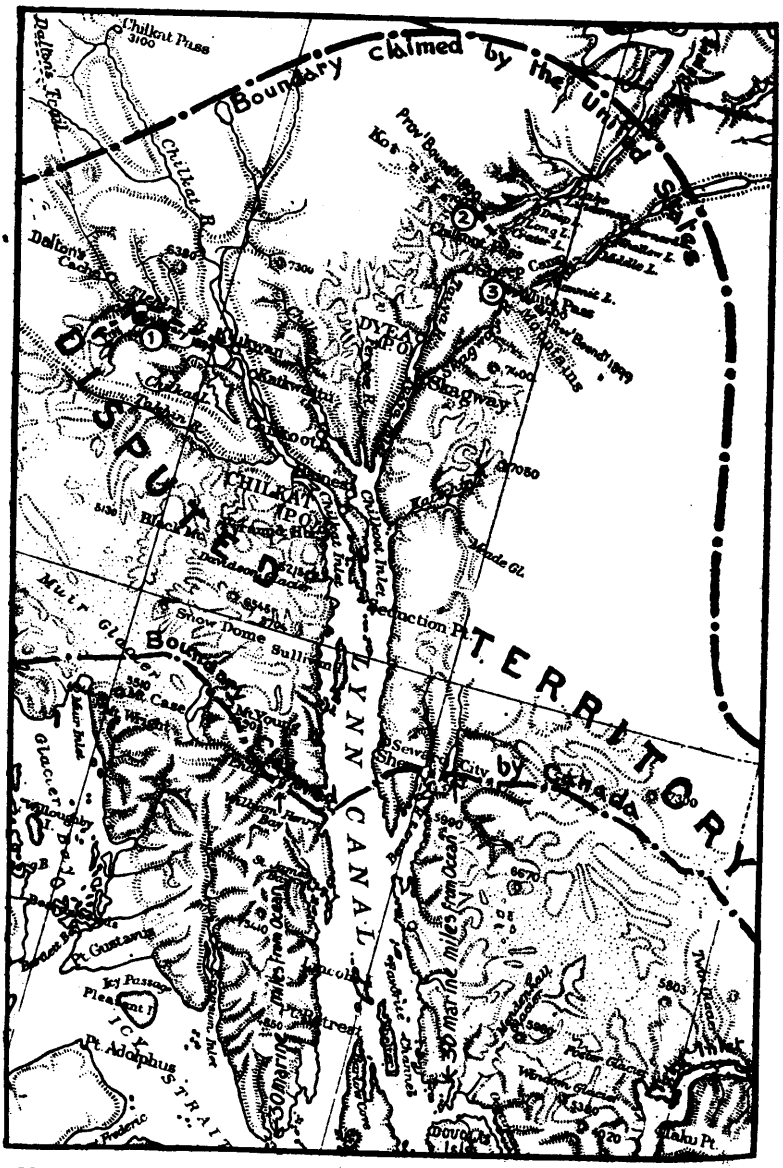
Even though a personal representative is duly appointed, a creditor cannot rely on the deceased's real estate remaining vested in him, for he may neglect to register a caution, and an heir or devisee may immediately on the land vesting in him sell it and make away with the proceeds for the due application of which he is not required to give any sort of security.

Those responsible for these changes in the Act we fear hardly realized all the consequences of their so-called "amendments;" we believe it will be found that they have succeeded in introducing all the evils which the Devolution of Estates Act in its original form was intended to, and did effectually cure.

The original scheme of the Devolution of Estates Act as we have said was that title could not be made to a deceased person's real estate unless probate or administration had been granted.

Before probate or administration can be granted an inventory must be filed, and means are thus afforded to creditors and other persons beneficially interested of tracing the property of the deceased, but under the law as amended, no probate or administration need be issued, no inventory need be filed, and no disclosure need be made in any public office of what the property of the deceased consists, his relatives may grab it and make away with it and the legislature has done its best to enable them to do so to the prejudice of creditors.

We have protested before and in the interest of the public we protest again, at the way this most beneficent Act has been ruined by ill-considered amendments. Section 13 of the Act and all its amendments should be repealed, and the law restored to its original condition, and we very seriously commend this matter to the attention of the Attorney General.



MAP SHOWING THE DIFFERENT LINES OF BOUNDARY CLAIMED BY THE UNITED STATES AND CANADA.

The numerals (1), (2), and (3) above Lynn Canal indicate the provisional boundary lines arranged between the United States and Great Britain in October, 1899. They are about 20 miles from tide-water, and bar Canada's right to the upper shores of Lynn Canal and her right of passage through what are claimed as British territorial waters, to and from the Pacific Ocean.

THE ALASKA-CANADA BOUNDARY DISPUTE.

The admission of British Columbia into the Dominion in 1871 caused Canada to become a party to the Alaska boundary dispute: and ever since 1872 urgent and almost yearly requests have been made by the British and Canadian Governments to the Government of the United States for an "expeditious settlement" of the disputed line of demarcation between the our Western Province and the Territory of Alaska. The passive resistance of the United States to these requests is inexplicable, unless on the unattractive assumption that the unsanctioned occupation by the United States of disputed British-Canadian territory, and the national insistence in defending that occupation, must ultimately, as in former boundary disputes, assure a diplomatic triumph over Great Britain, and secure to the Republic a further cession of Canadian territory for the enlargement of Alaska. The diplomatic disasters through which Canada has lost some of the best portions of her original heritage* explain why Canadians now look with intense anxiety for the just settlement of the Alaska boundary controversy; for, as was said by Sir Charles Dilke in his Problems of Greater Britain, "It is a fact that British Diplomacy has cost Canada dear."

Ex-President Cleveland, an authority on the diplomatic policy of the United States, has lately furnished in the Century what may be an apt foreshadowing of that policy in the Alaska case:—

> One or the other of two national neighbours claims that their boundary line should be defined or rectified. If this is questioned, a season of diplomatic untruthfulness and finesse sometimes intervenes, for the sake of appearances. Developments soon follow, however, that expose a grim determination, behind fine phrases of diplomacy, and in the end the weaker nation frequently awakens to the fact that it must either accede to an ultimatum dictated by its stronger adversary, or look in the face of a despoliation of its territory; and, if such a stage is reached, superior strength and fighting ability, instead of suggesting magnanimity, are graspingly used to enforce extreme demands, if not to consumate extensive spoliation.

And he added:—

> While on this point we are reminded of the shrewd sharp trader who demands exorbitant terms, and with professions of amicable considera

*See British and American Diplomacy affecting Canada, 1782-1899: Toronto, 1900.

tion invites negotiation, looking for a result abundantly profitable in the large range for dicker,—

a well-known specialty of his countrymen.

The Anglo-Russian Treaty of 1825, which described the now disputed boundary line of demarcation in Alaska, was the final settlement of a keen diplomatic controversy between Great Britain and the United States on the one side, and Russia on the other, over a Russian Ukase of 1821, claiming maritime sovereignity over 100 miles of ocean in Behring Sea. (This Ukase was suddenly revived by the United States in 1886, and under it about 20 British ships were confiscated or driven away, and some of their crews imprisoned and fined; but these proceedings the Behring Sea Arbitration of 1893 decided were a violation of the Law of Nations.)

The Treaty also settled the long-pending controversy about the territorial boundaries. As stated by Mr. Justice Harlan, of the Supreme Court, in the Behring Sea Arbitration:—

> The positions taken by the United States and Great Britain were substantially alike, namely, that Russia claimed more territory on the north-west coast of America than she had title to, either by discovery or occupation.

During the negotiations for the Treaty of 1825, Russia, while admitting that she had no establishments on the southerly portion of the coast, contended that "during the hunting and fishing seasons the coast and adjacent waters were exploited by the Russian-American Company, the only method of occupation which those latitudes were susceptible of;" adding, "We limit our requirements to a mere strip of the continent; and so that no objection be raised, we guarantee the free navigation of the rivers." The expressions used by Count Nesselrode, the Russian Minister of Foreign Affairs, in describing the strip of coast, were "étroite lisière sur côte;" "d'une simple lisière du continent;" "d'un médiocre espace de terre firme." The free navigation of the waters in the strip of coast was proffered, on several occasions, by Count Nesselrode, with assuré libres débouchés; and finally by the Russian Plenipotentiaries in these words:—

> His Imperial Majesty's Plenipotentiaries, foreseeing the case where in the strip or border of coast belonging to Russia waters (fleuves) should be found, by means of which the British establishments should be made to have free intercourse with the ocean, were eager to offer as a persuasive stipulation the free navigation of those waters.

The British instructions to the Minister at St. Petersburg were as follows:—

In fixing the course of the eastern boundary of the strip of land to be occupied by Russia on the coast, the seaward base of the mountains is assumed as that limit. But we have experience that other mountains on the other side of the American continent, which had been assumed in former treaties as lines of boundary, were incorrectly laid down on the maps; and this inaccuracy has given rise to very troublesome discussions. It is therefore necessary that some other security should be taken that the line of demarcation to be drawn parallel to the coast as far as Mount St. Elias is not carried too far inland. This should be done by a proviso that the line should in no case, i.e., not in that of the mountains (which appear by the map also to border the coast turning out to be far removed from it), be carried further to the east than a specified number of leagues from the sea. The utmost extent which His Majesty's Government would be disposed to concede would be a distance of ten leagues; but it would be desirable if your Excellency were enabled to obtain a still more narrow limitation.

The Russian contre projet omitted the mountain summit line, and proposed that the strip of border of coast "n'aura point en largeur sur le continent plus de 10 lieues marines à parter du bord de la mer." The British Foreign Secretary replied, "We cannot agree to this change;" adding:—

To avoid the chance of this inconvenience, we propose to qualify the general proposition that the mountains shall be the boundary with the condition, if those mountains should not be found to extend beyond ten leagues from the coast.

The following Articles, and the despatch of the British Minister to the Foreign Secretary, stating that "The line of demarcation along the strip of land assigned to Russia is laid down in the Convention agreeably to your directions," shew that the British conditions as to the limits of the boundary line were accepted by Russia, and incorporated into the Treaty:—

III. The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent, and the islands of North America to the north-west, shall be drawn in the manner following: Commencing from the southernmost part of the island called Prince of Wales Island, which point lies in the parallel of 54° 40', north latitude and between the 131st and the 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from the last-mentioned point the line

of demarcation shall follow the summit of the mountains situated parallel to the coast, as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and finally, from the said point of intersection the said meridian line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the north-west.

IV. With reference to the line of demarcation laid down in the preceding article, it is understood, first, that the island called Prince of Wales Island shall belong wholly to Russia; second, that wherever thesummit of the mountains, which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of 141st degree of west longitude, shall prove to be of a distance of more than ten marine leagues from the Ocean, the limit between the British possessions and the strip of coast (la lisière de côte), which is to belong to Russia as above mentioned, shall be formed by a line parallel to the windings of the coast, and which shall never exceed the distance of ten marine leagues therefrom (et qui ne pourra jamais en être éloignée que de 10 lieues marines).

VI. It is understood that the subjects of His Brittannic 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. or the present Convention.

Articles III. and IV. were incorporated into the Russian Treaty of 1867, by which Alaska was ceded to the United States.

And here should be noted the change of expression from "Sea" in the draft projets to "Ocean" in the Treaty. In the British draft the words were, depuis la mer; and in the Russian, du bord de la mer; in the Treaty they are, 10 lieues marines de l'Ocean,—a more accurate expression. The reason for the change may be found in the argument of Mr. Wheaton before the Supreme Court of the United States. "The sea, technically so termed, includes ports and havens, rivers and creeks, as well as the sea-coasts." And Mr. Justice Story in another case decided that only, the unenclosed waters on the sea-coast, outside the fauces terrae were high seas (altum mare, or la haut mer), or open ocean. The change of expression, therefore, made the Treaty line free of any possible doubt, and proves that the line of demarcation of the Russian strip of coast was to be 10 marine leagues from the ocean-coast, and not from the upper shores of inlets, bays or other arms of the sea

The following commentary on this Treaty, written by Mr. Secretary Blaine to the British Ambassador in 1890, is a diplomatic admission, on behalf of the United States, of "the intent and meaning" of this Treaty:—

It will be observed that Article III. expressly delimits the boundary between British America and the Russian possessions. The delimitation is in minute detail from 54° 40′ to the northern terminus of the coast. The evident design of Article IV. was to make certain and definite the boundary line along the strip of coast, should there be any doubt as to that line as laid down in Article III. It provided that the boundary line, following the windings of the coast, should never be more than ten marine leagues therefrom.

And as to article VI.:—

Nothing is clearer than the reason for this. A strip of land at no point wider than ten marine leagues running along the Pacific Ocean from 54° 40′, was assigned to Russia by the IIIrd article. Directly to the east of this strip of land, or as it might be said, behind it, lay the British possessions. 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.

And Senator Washburn, in the debate on the Alaska Treaty of 1867, acknowledged that Great Britain had a Treaty with Russia, "giving her subjects, for ever, the free navigation of the rivers of Russian-America."

The contention of the United States, as stated in a late Magazine Article by Mr. Ex-Secretary Foster is, that "Russia was to have a continuous strip of territory on the mainland around all the inlets or arms of the sea;" and that the boundary line was not to cross, as claimed by Great Britain, such inlets or arms of the sea at the distance of 10 marine leagues from the ocean. And he supports his contention by the argumentum ab inconvenienti, that "the purpose for which the strip was established would be defeated if it was to be broken in any part of its course by inlets, or arms of the sea, extending into British territory." Great Britain and Canada dispute this "rounding" theory, and contend that the terms used, the minute details as to mountain summits,

together with the expression ne pourra jamais, which imports an imperative negative and veto on any uncertainty as to the exact locus of the line separating the territories of the two nations, clearly indicate that the Russian territory was to be, in the words of the late Mr. Secretary Blaine, "a strip of land at no point wider than 10 marine leagues, running along the Pacific Ocean."* And that the Treaty line was to cross inlets and arms of the sea, at the 10 marine league distance, is clear from the Russian "persuasive stipulation," as well as from the 6th Article; otherwise the reciprocal concession of free navigation of all the rivers and streams which the boundary line should cross, would be meaningless.

The practical effect of the claim of "a continuous strip of territory around all the arms or inlets of the sea" would be to nullify the Russian pledge of libres débouchés through the inlets, or arms of the sea, along the Alaskan strip of coast. Taku Inlet is one-fifth of a mile wide at its ocean-mouth, and extends inland for about 23 miles. The United States claim the whole, and ten marine leagues inland, instead of seven miles. Lynn Canal has three ocean-mouths (owing to two islands) of four-and-three-quarters, one-and-three-quarters, and one-and-a-half miles wide respectively; and extends inland for about 70 miles; the United States claim the whole as territorial waters, and also ten marine leagues of inland territory. Glacier Bay is three-and-a-half miles wide, and extends inland for about 45 miles from the ocean. The United States claim the whole bay and also 10 marine leagues of inland territory. The 10 marine leagues are equal to 30 marine miles; and the upper waters, beyond that distance from the ocean are claimed by Great Britain and Canada as British territorial waters. The British territory and waters thus claimed by the United States, beyond the Treaty strip of coast, is 300 miles from north to south, and from 14 to 70 miles wide. These claims completely bar Great Britain's free access to the Pacific Ocean through these inlets and arms of the sea, guaranteed to her by the Treaty of 1825. By the Law of Nations all the above are territorial waters, and have all the legal incidents which

*This rounding claim proposes to cut the northern part of British Columbia into two parts, for the rounding boundary line drawn by the United States above Lynn Canal runs up to, and crosses, the 60th degree of north latitude, which is the northern boundary of British Columbia.

pertain to landed territory, except that their waters are subject to what is defined as the "imperfect right of free navigation."

By a strange discordance, however, the United States concede that the international boundary line crosses certain territorial waters, geographically designated "rivers;" but deny that it crosses certain other territorial waters geographically designated "inlets, bays and canals,"—although both classes of territorial waters are governed by the same general principles of International Law as to their territorial sovereignty. The existence of such inlets, bays and canals cannot therefore possibly sanction an increase in the inland breadth of the lisière de côte. A converse line also proves this. Were the 10 marine leagues to be measured seaward from the coast, they would be measured from the ocean-mouths, and not from the upper shores of inlets, or other territorial waters; for such waters had to be expressly mentioned in the Behring Sea Regulations, which prohibit seal-hunting within "a zone of 60 miles around the Pribilof Islands, inclusive of the territorial waters."

But the British contention may be further tested by the acknowledged authorities on International Law. From the many judicial authorities on the law, the following may be cited from the judgment of Mr. Justice Brett (afterwards Lord Esher) in the Keyn case: "By the law of nations,—made by the tacit consent of substantially all nations,—the open sea, within three miles of the coast, is part of the territory of the adjacent nation, as much, and as completely, as if it were the land of such nation."

Wheaton on International law says, "The maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea, enclosed by headlands belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore, along all the coasts of the State." An early illustration of this law was given by Mr. Justice Story: "Where there are islands enclosing a harbour, in the manner in which Boston Harbour is enclosed, with such narrow straits between them, the whole of its waters must be considered as within the body of the county. Islands so situated must be considered the opposite shores in the sense of the adjoining land down to a line running across." And, "in the sense of the common law, such waters seem to be within the fauces terrae,

where the main ocean terminates." And Daniel Webster argued that, by the common law, ports and harbours are within the body of the county, consequently not part of the high seas; and a navigable arm of the sea, therefore, is no part of the high seas, which is the open ocean, outside the fauces terrae.

These rules of International Law as to the sea-mouths of inlets have been incorporated into the municipal law of the United States. Some of their State laws enact: "The territorial limit of this Commonwealth extends to one marine league from its shore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width, between its headlands, a straight line from one headland to the other is equivalent to the shore line." These laws have been upheld by the Supreme Court; and in giving judgment the Court held that, "as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coasts; and bays wholly within the territory of a nation, which do not exceed two marine leagues, or six geographical miles, in width at the mouth, are within the limit, and are part of the territory of the nation in which they lie."

The historic evolution of the limit of shore-defence is given in Bluntschli's Law of Nations:—

> The sovereignty of States over the sea extended originally to a stone's throw from the coast; later to an arrow's shot; firearms were then invented, and by rapid progress we have arrived at the far-shooting of the cannon of the present age, But we still preserve the principle: Terrae dominium finitur, ubi finitur armorum vis.

But while the United States have sought to hold Great Britain bound by the six mile sea-mouth in Treaty, and other, disputes, they have claimed and exercised the rights of sovereignty over bays and inlets around their coast of much wider sea-mouths. In 1793 they claimed that Delaware Bay, having a sea-mouth of 10.5 miles from headland to headland, widening to 25 miles inland, was part of the maritime territory of the United States, and that the capture of a British ship by a French frigate "within its capes before she had reached the sea," was a violation of the territory and sovereignty of the United States. In 1807 Congress decided that Chesapeake Bay, having a sea-mouth of 12.7 miles from headland to headland, "was within the acknowledged jurisdiction of the United States."

Senator Seward during a debate in the Senate in 1852 declared that the contention of the United States that only bays six miles wide, or less, at the mouth, could be considered as territorial waters, proved too much, for it would divest the United States of Boston Harbour, Long Island Sound, Delaware Bay, Chesapeake Bay, Albemarle Sound, and others.

This six miles width, however, has been varied in some cases by Treaties which make the sea-mouth ten nautical miles, such as the Anglo-French Treaty of 1839, the Anglo-German Treaty of 1866, and the unratified Anglo-American Treaty of 1888. In the Netherlands Manual of International Law it is said :—

> The littoral sea, or territorial water, is reckoned to begin from a straight line drawn between the headlands, shoals or islands, which form the mouth, or entrance, of the closed bay or river, and between which the breadth is not more than ten sea miles.

These authorities shew that landward of the ocean coast, though indented by, and inclusive of, rivers, inlets, or arms of the sea, of the mouth width of six miles, is the territory of the nation which is sovereign of the coast, to the defined inland limit of its dominium eminens. It must therefore be conceded that, as inlets and land are the same in International Law as to sovereignty, the Treaty boundary line must cross each at the ten marine league distance from the ocean.

An American apologist has lately asserted that "no strenuous protest" was made by Canada; and he attempts to excuse the United States occupation of British-Canadian territory by suggesting that the United States may reply: "For some twenty-five years out of the thirty which have elapsed since our purchase of Alaska, it was not worth your while to make any serious effort towards a permanent boundary settlement." The history of the persistent efforts of the British and Canadian Governments to induce the United States to settle the boundary will prove the falsity of the suggested excuse.

[The author then gives in detail no less than fourteen protests, from March 1872 to December 1877, on the part of Canada against the action of the United States Government in enforcing their Customs' laws against Canadian settlers before any settlement of the dispute, and their inaction in refusing to take any steps toward settling the boundary; but as these protests are not material to the main question, we omit them from the article.]

Subsequent correspondence up to the Treaty-Convention of 1892 was much to the same effect. But the above facts seem to indicate that there has been no definite Cabinet policy on the part of the United States Government on the Alaska question, and that each department has been allowed to act on its own initiative.

Mr. Secretary Fish's despatch on the Martin case in 1877, may be cited as a rebuke to the ex parte action of his Government :—

The absence of a line defined and marked on the surface of the earth, as that of the limit, or boundary, between two nations, cannot confer upon either a jurisdiction beyond the point where such line should, in fact, be. This is the boundary which the Treaty makes the boundary; surveys make it certain, and patent, on the ground, but do not alter rights, or change rightful jurisdiction. It may be inconvenient, or difficult in a particular case to ascertain whether the spot on which some occurence happened, is, or is not, beyond the boundary line; but this is a question of fact, upon the decision of which the right to jurisdiction must depend.

And the remarks of the author of a work on American Diplomacy are a corollary to that rebuke :—

It is not competent for one of the contracting parties to import into a Treaty a construction based upon an ex parte interpretation of its text which is not accepted by the other party.

Some years earlier the United States acknowledged that "a generous spirit of amity" had guided Great Britain in the following declaration :—

It is, therefore, the wish of Her Majesty's Government neither to concede, nor, for the present, to enforce, any rights which are, in their nature open to any serious objection on the part of the United States.

There is, however, some hope, that by recent Treaty Conventions between the United States and Great Britain the controversy has been simplified; and that the boundary line of 1825 has been re-affirmed and restored to its original authority and international force, and freed of all contentions as to waiver or acquiescence by either nation.

By a Treaty-Convention of the 22nd July, 1892, approved by the Senate on the 25th of the same month, reciting that the United States and Great Britain—

Being equally desirous to provide for the removal of all possible cause of difference between their respective Governments in regard to the delimitation of the boundary line between the United States and Her

Majesty's possessions in North America in respect to such portions of the said boundary as may not in fact have been permanently fixed in virtue of the Treaties heretofore concluded.

the Convention proceeds :—

The High Contracting Parties agree that a co-incident or joint survey (as may in practice be found more convenient), shall be made of the territory adjacent to that part of the boundary line of the United States of America and the Dominion of Canada, dividing the Territory of Alaska from the Province of British Columbia and the North West Territory of Canada from the latitude of 54° 40′ north (Prince of Wales Island), to the point where the said boundary line encounters the 141st degree of longitude westward from the meridian of Greenwich (Mount St. Elias), by Commissions to be appointed severally by the High Contracting Parties, with a view to the ascertainment of the facts and data necessary to the permanent delimitation of the said boundary line, in accordance with the spirit and intent of the existing Treaties in regard to it, between Great Britain and Russia, and between the United States and Russia.

The High Contracting Parties agree that as soon as practicable, after the Report or Reports of the Commissions shall have been received, they will proceed to consider and establish the boundary line in question.

By a subsequent Convention the above was re-affirmed and the time for making the Reports was extended to the 31st December, 1895. The joint Reports were submitted to the respective Governments on that date, but as yet no settlement of the disputed line has been arrived at.

These Treaties re-affirm the boundary line of 1825, and are international acknowledgments that there was an unsettled boundary between Alaska and Canada; and they are also conclusive and binding admissions by the United States that there were no intervening rights as to settlements made, or towns located, by the United States on the disputed territory up to July, 1892, claimable under any rule of International law, or any alleged acquiescence of Great Britain or Canada.

On the 30th January, 1897, another Treaty-Convention between the two Governments was signed for the appointment of Commissioners to make the survey of the 141st degree of west longitude, with a conditional right to deflect slightly, in case the summit of Mount St. Elias did not lie on the said 141st meridian; but it has not yet been proclaimed.

Prior to this latter Convention the town of Forty-mile had been laid out by the United States on the Alaska side, as was

supposed, of the 141st parallel of longitude. A joint survey, made since this Convention, proved that the town was locally within Canadian territory; and the United States thereupon conceded that it was "subject to the jurisdiction and laws of the Dominion." No claim was made that it was "a town settled under the authority of the United States," and should therefore "remain within the territory of the United States."

To give effect to the conciliatory, and almost yearly, efforts of Great Britain and Canada, High Commissioners were appointed in 1898, inter alia, to establish a boundary line by a friendly diplomacy, or to refer the settlement of the boundary line of 1825 to Arbitration. Here unfortunately "diplomatic finesse," with no result except "damaging and dangerous delay," and indicating "a grim determination, behind fine phrases of diplomacy, to enforce extreme demands, if not to consumate extensive spoliation," so graphically described by ex-President Cleveland, became the policy of the High Commissioners of the United States. Though Great Britain was entitled, by the Convention of 1892, to hold the United States bound by their re-affirmance of the boundary line of 1825, she made a generous and conciliatory offer to waive, for the advantage of the United States, the absolute terms of that Convention, and to concede to the United States the benefit of the fifty-year occupation, or settlement, conditions, imposed by the United States on Great Britain in the Venezuelan Arbitration. The British conciliatory offer was nominally accepted, but was met by a contrecoup, which practically nullified the fifty-year limitation, by proposing, as a condition of arbitration, that "all towns and settlements at tide-water, settled under the authority of the United States, at the date of this Treaty, shall remain within the Territory of the United States,"—in effect a realisation of ex-President Cleveland's "extensive spoliation," and a reversal of the Forty-mile town case just referred to.

The proposition may be cited as a sample of the superb daring of American diplomacy. The most exhaustive eclectic in diplomacy would vainly search for precedents of a similar contrecoup in previous diplomatic protocols.

Lord Clarendon once said in a debate on the Oregon question:—

> If the United States did consent to negotiate, it would seem that it could only be upon the basis that England was unconditionally to surrender whatever might be claimed by the United States.

Ex-President Cleveland has aptly illustrated how unsanctioned occupations influence international diplomacy :—

> An extension of settlements in the disputed territory would necessarily complicate the situation, and furnish a convenient pretext for the refusal of any concession respecting the territory containing such settlements.

And again :—

> It is uncharitable to see, in reference to possession, a hint of the industrious manner in which [a nation] had attempted to improve its position by permitting colonisation, and other acts of possession since the boundary dispute began.

The condition in effect proposed that the United States should withdraw their Treaty-pledge of 1892, and that Great Britain should abandon all the sovereign rights, or territorial claims, she might be able to establish before the arbitral tribunal, respecting "towns and settlements at tide-water settled [even wrongfully on British territory], under the authority of the United States," up to the future date of the proposed Arbitration.

The proposal was entirely inapplicable to the cases of tide-water towns or settlements located by the United States along the ocean coast, or to those along the tide-water shores of the rivers, or inlets, within the ten marine leagues' strip of coast, described in the Treaties of 1825 and 1867. It could only be necessary for determining the fate of towns and settlements located by the United States on the tide-water shores, or inland waters, on the British side of the Treaty line ; and the United States in proposing it, evidently assumed that International Law would warrant the Arbitrators in deciding that such towns and settlements were wrongfully settled by the United States on British territory. Constructively, it proposed a condonation of the unlawful occupation of British territory, and the usurpation of British sovereignty by, and a consequent cession of a portion of the territorial domain of Great Britain in Canada to the United States.

The British Commissioners declined to consent to such "a marked and important departure from the rules of the Venezuelan Boundary reference," or "that an effect should be given to the occupation by the United States of land in British territory, which reason, justice and the equities of the case did not require." The dona ferentes proposal was thereupon jettisoned ; but arbitration unfortunately suffered shipwreck, and all that survived was a tabula ex naufragio of protocol sorrows.

And here it may not be unreasonable to consider how the United States would have treated such a condition had towns and settlements been located by Canada on the United States side of the Treaty line; and had Great Britain proposed that such wrongful occupation of United States territory should be condoned, and that the territory so located should be ceded to Great Britain without compensation.

The United States have acquired their present great territorial domain partly by Revolution, and partly by the voluntary gift of Canadian territory from Great Britain,* by purchase from France, Spain and Russia, and by conquests from Mexico and Spain. Under what guileless title should be placed the unsanctioned appropriation of the Canadian Naboth's vineyard, on the British side of the boundary line? Perhaps as an American sequel to the Fashoda incident. For it is now established, beyond question, that during the time Great Britain and Canada were urgently pressing for an expeditious settlement of the boundary line, and protesting against the irritating treatment of British settlers on Canadian lands, the United States were exercising the powers of sovereignty, and were making grants of land within the disputed territory.

If the British contention as to the boundary line shall be ultimately sustained by International Law, and the judgment of an arbitral tribunal, the United States cannot invoke, in support of their present occupation of what shall be found to have been British territory since 1825, any of the rules of that law which are applicable to military occupation, by right of war; or to insurgent occupation, by right of revolution; nor can the doctrine of mistake of title avail, for the British claim was early known, and had the support of conclusive American precedents.

Questions affecting the civil status and citizenship of persons born on, or married, or taking oaths of citizenship within, such territory; questions affecting the transfer or descent of property, and of titles acquired under forfeiture laws; questions affecting the administration of civil and criminal jurisprudence, and the imprisonment or execution of criminals; and questions affecting official

*The gift was that part of old French Canada, now the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and Minnesota, comprising about 300,000 square miles of the Canadian territory ceded by France to Great Britain in 1763.

appointments and municipal and other corporations, and the exercise of legislative and delegated powers of sovereignty, must arise respecting the civil rights, and public relations, and land titles, of the inhabitants of the territory which shall be adjudged to belong to the British Crown, and may lead to far-reaching and expensive litigation; and these questions Great Britain, in view of the urgent and continued protests made, and passively slighted, cannot justly concede.

Citizenship is determined by birth on the soil. The only exception to the universality of this rule was made in the cases of children born in Oregon during its joint occupation by the United States and Great Britain, under the Treaty of 1818. The Courts held that between 1818 and 1846 children born there of British parents were British subjects; and that children born there of American parents were citizens of the United States.

Legislative and Executive Sovereignty and Judicial power over territory are incident to the national ownership of the soil. The Supreme Court of the United States has so decided, and has furnished precedents affecting the rights of property within a similarly disputed territory. While Spain was sovereign of Florida, and prior to its cession to the United States in 1795, her Government had made grants of land within a certain disputed territory, which were subsequently impeached. In giving judgment, Chief Justice Marshall said:—

> There was no cession of territory. The jurisdiction of Spain was not claimed or occupied by force of arms against an adversary power; but it was a naked possession under a misapprehension of right. In such a case, the United States, within whose sovereignty the land was in fact situated, was not bound to recognize the grants of title by the Spanish Government. We think the Treaty settling the boundary an unequivocal acknowledgment that the occupation of the territory, now acknowledged to be United States territory, was wrongful. It follows that the Spanish grants can have therefore no intrinsic validity.

And in construing the Treaty by which Great Britain had ceded the Floridas to Spain, without any description of boundaries, he added:

> Great Britain could not, without breach of faith, cede to Spain what she had previously acknowledged to be the territory of the United States. No general words in a Treaty ought to be so construed. We think that Spain ought to have so understood the cession, and must have so understood it as being only to the extent that Great Britain might rightfully cede.

These remarks are equally applicable to the Russian-American Treaty of 1867, ceding Alaska to the United States.

In other cases, the Court has held that Patents of land dated before, but not delivered until after, the ratification of a Treaty ceding territory to the United States, were invalid. Similarly, where two States, under a mistake in surveys, granted lands which, on a corrected survey, were found to be within the territory of another State, their grants were adjudged nullities, and inoperative to vest any title in the grantees.

As is stated in Hall's International Law :—

> To infringe the rights of others remains legally wrong, however slight in some respects may be the moral impropriety of the action. If a State commits a trespass upon its neighbour's property, which may, or may not be, morally justified, it violates the law as distinctly, though not so noxiously, as a neighbour would violate it by making a track through a neighbour's field to obtain access to a highroad.

The moral accountability of the Government of a nation to a kindred nation necessarily involves the moral duty of imposing a reasonable restraint on its political actions, and of so acting in its international relations with such kindred nation as it would reasonably expect such kindred nation to act towards it. President Woolsey has tersely stated one of the rules: "A State is a moral person capable of obligations, as well as rights, and no acts of its own can annihilate its obligations to another." And Senator Summer in supporting the Alaska Treaty of 1867 used words specially pertinent to the Anglo-American Treaty of 1892:—

> It is with nations as with individuals: a bargain once made must be kept. I am satisfied that the dishonour of this Treaty, after what has passed, would be a serious responsibility for our country. As an international question our act would be tried by the public opinion of the world.

These principles of national responsibility logically affirm the general rule that the Government of a nation (and the same rule will be universally admitted to be obligatory on land-holding neighbours) is morally bound by the national honour of its sovereignty not to aggressively occupy territory the title to which is disputed, with some shew of Treaty right, by another nation. A passive resistance to, or a positive refusal of, a reference of the disputed claim to what ex-President Cleveland designates as "the honourable rest and justice found in Arbitration,—the

refuge which civilization has builded for the nations of the earth, and from which the ministries of peace issue their decrees," would warrant the judgment of the tribunal of nations that the nation so resisting, or refusing, was attempting a denial of international justice, and was thereby degrading its national honour.

Some writers in the United States advise against submitting the boundary dispute to Arbitration, because the United States "have nothing to gain and everything to lose;" others because "an adverse decision would greatly lessen for the United States the present and the future value of the Alaska lisière"—a morality illustrated by the maxim, nous avons l'avantage, profitons en. And a writer in an English periodical, whose notions of international justice seem equally tainted, has said: "In asking America to submit the whole question to arbitration, with evenly-balanced chances of success or failure, we are asking her to take chances which no democratic Government can afford to take." One fair inference from these avowals is that international justice and national rectitude are alien principles of action to democratic Governments. Another logical sequence is that a democratic Government may be the party litigant before itself, as judge and jury, and on its own view of its one-sided and biased evidence, may decide against the territorial rights of an unwarned, because a monarchial, though friendly, Government. The mere mention of such inferences should ensure their universal repudiation; for the people of the United States have not, even in their demagogic outbursts against England, lapsed from the principles of international justice and national rectitude which form the warp and web of their political responsibilty to other nations, and which have long been consecrated by the homage rendered to Christian ethics in their churches, and enforced by the teachings of moral and political science in their colleges.

In the Behring Sea case the United States conclusively shewed that "there is an International Law by which every controversy between nations may be adjudged and determined;" that its rules are moral rules, dictated by the general standard of natural justice, upon which all civilized nations are agreed; and that, though there are differences in the moral instincts, or convictions, of people of different nations, and no enactments in the ordinary sense of the term, for all members of the society of nations, nor indeed regulating the larger part of the affairs of ordinary life,—there are

always existing laws by which every controversy, national or individual, may be determined.

The United States have made themselves the champions of, and have declared their national faith in "the honourable rest and justice found in International Arbitration;" and at the Hague Peace Conference they pledged their nation "to use their best efforts to secure a pacific settlement of International differences;" and joined with Great Britain and other nations in affirming that, in questions of a legal nature, and especially in the interpretation "of International Conventions, Arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which Diplomacy has failed to settle." Diplomacy has failed to settle this boundary controversy because it proposed what ex-President Cleveland has denounced as "extensive spoliation."

After urging Great Britain into Arbitration over the Alabama claims, and the Behring Sea fisheries; and especially after driving her into arbitration over the Venezuelan Boundary Dispute (which in no way affected their territorial or national interests) will the United States refuse to recognize their own precedents, or to give effect to their compact with the nations as expressed in the Hague Convention?

THOMAS HODGINS.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

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PRINCIPAL AND AGENT—POWER OF ATTORNEY—CONSTRUCTION—EJUSDEM GENERIS—MONEY HAD AND RECEIVED.

Jacobs v. *Morris* (1902) 1 Ch. 817, was an appeal from a decision of Farwell, J. (1901) 1 Ch. 261, (noted ante vol. 37, p. 269). The action was brought to restrain the negotiation of certain bills of exchange given by the plaintiff's attorney in alleged excess of his authority, and the defendants, the holders of the bills, counter claimed to recover the amount of the bills from the plaintiff as money had and received by him to the defendant's use. The case

turned upon the construction of the power of attorney given to the plaintiff's agent Leslie Jacobs empowering him to buy goods in connection with the plaintiff's business for cash and credit, and "when necessary in connection with any purchase made on my behalf as aforesaid or in connection with my said business" to make, draw, sign and accept or indorse any bills of exchange, etc., which should be requisite in the business, and to sign the plaintiff's name or trading name to cheques on his banking account. Leslie Jacobs purporting to act under this power which he produced to the defendants but which they did not read, borrowed £4,000 from the defendants ostensibly for the plaintiff's business and accepted bills in the plaintiff's name for that amount. The £4,000 was paid into the plaintiff's banking account and drawn out again by Leslie Jacobs without the plaintiff's knowledge. Farwell, J. held that the borrowing of money was not authorized by the power, and that the plaintiff was not liable to the defendants for money had and received to their use because he did not know and had no means of knowing that the money had been paid into his account until after it was drawn out. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) affirmed his decision, agreeing that the power did not authorize borrowing, and that the primary cause of the loss was the neglect of the defendants in lending money to the agent to ascertain his authority, and that they were therefore estopped by their neglect, and also, by constructive notice that the agent had no power to borrow, from reclaiming the money as had and received by the plaintiff to their use.

VENDOR AND PURCHASER—PURCHASERS' LIEN FOR DEPOSIT—RESCISSION OF CONTRACT BY PURCHASER—NOTICE OF LIEN.

Whitbread v. *Watt* (1902) 1 Ch. 835, was an action by a purchaser who, pursuant to the conditions of sale, had rescinded the contract, claiming a lien on the land for the amount of his deposit as against a subsequent purchaser who had purchased with notice of the prior contract. Farwell, J. decided in favour of the plaintiff (1901) 1 Ch. 911 (noted ante vol. 37, p. 500) and the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) have affirmed his decision. The defendant contended that the lien could only arise where the contract is determined otherwise than by default of the purchaser and could not arise where, as in the

present case, the purchaser (without any default on the part of the vendor) had exercised an option to rescind—but the Court refused to give effect to that argument.

CHARITY—DEVISE OF LAND IN TRUST FOR SALE FOR BENEFIT OF CHARITY—"PERSONAL ESTATE ARISING FROM LAND"—RIGHT OF TRUSTEES TO RETAIN LAND UNSOLD—MORTMAIN AND CHARITABLE USES ACT, 1891 (54 & 55 VICT. C. 73) SS. 3, 5—(R.S.O. C. 112, SS. 3, 4).

In re Wilkinson, Easam v. *Attorney-General* (1902) 1 Ch. 841, Kekewich, J. decided a point arising under the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73) from which R.S.O. c. 112 is derived. Land was devised to trustees on trust to sell and hold the proceeds, after making certain payments thereout, in trust for a charity. The will contained a power to the trustees to postpone the sale as they might think proper. The question was whether, notwithstanding this testamentary power to postpone the sale, the trustees were nevertheless bound to sell the land within the time prescribed by the Act, unless the time was extended by the Court,—as provided by s. 5 (R.S.O. c. 112, s. 5). Kekewich, J. came to the conclusion that as the devise for the charity was not of the land itself, but the proceeds of land, the case was not within the statute. "Money secured on land, or other personal estate, arising from or connected with land," being thereby declared not to be "land" within the meaning of the Act (see R.S.O. c. 112, s. 3), therefore, a sale of it within the time mentioned in the Act, was not compulsory.

BONA VACANTIA—FUNDS IN ENGLAND BELONGING TO FOREIGNER WHO HAS DIED WITHOUT HEIRS—RIGHT OF SUCCESSION—"MOBILIA SEQUENTUR PERSONAM."

In re Barnett (1902) 1 Ch. 847, a somewhat novel point of law was involved. An Austrian entitled to funds in Court in England died in Vienna. He was a bastard and died unmarried, intestate and without heirs. The fund was claimed by His Majesty, and on behalf of His Majesty's Treasury, an application was made to the Court for payment of the fund, and it having been suggested that the Austrian Government might have some claim, notice of the application was given to the Finance Minister of Austria, who preferred a claim under the Austrian Code, whereby the Imperial Treasury becomes entitled to the estates of persons dying without heirs. The case was very learnedly argued, and eventually turned

on whether the maxim "mobilia sequentur personam" applied. The learned judge decided that it did not, and that the fund devolved on the Crown as bona vacantia. It is strange that the case does not appear to have been covered by any previous decision.

MORTGAGE—REDEMPTION—MORTGAGEE'S COSTS OF NEGOTIATING LOAN AND PREPARING MORTGAGE DEED.

In *Wales* v. *Carr* (1902) 1 Ch. 860, the short point was, whether a mortgagee's costs of negotiating the loan and preparing the mortgage deed, which the mortgagor refused to pay, are a lien on the mortgaged land, so as to entitle the mortgagee to tack them to his security as against a second mortgagee coming to redeem. Farwell, J. held that they were not a lien on the land, but only a debt from the mortgagor, and therefore that a second mortgagee could not be required to pay them as part of the price of redemption. As he points out these costs are usually deducted from the amount of the loan, and therefore the question can seldom arise in practice.

WILL - LEGACY—CHARITY—NON-EXISTENCE OF INSTITUTION NAMED AS LEGATEE —LAPSE—CY-PRÈS—CHARITABLE INSTITUTION.

In re Davis Hannen v. *Hillyer* (1902) 1 Ch. 876, a testatrix by her will bequeathed several pecuniary legacies to specified charitable institutions and inter alia a sum of £500 to "The Home for the Homeless, 27 Red Lion Square, London," and after providing that in the event of any question arising as to the designation of any of the charitable institutions, or as to which one or more of them it was intended to benefit, the decision was to rest with the executor, and after giving other legacies, the residue was directed to be "divided rateably among the various charitable institutions which are beneficiaries under this instrument." At the date of the will and at the time of the death of the testatrix there was not and never had been any such institution known as "The Home for the Homeless." The question was whether the legacy of £500 bequeathed to that institution lapsed. Buckley, J. held that it did not as the court was justified in drawing the inference of a general charitable intention with reference to that gift, and he therefore adjudged that it must be administered cy-près. He also held that the word "institutions" in the residuary bequest was large enough to include any person or authority to whom the administration of

the £500 should be committed, and that that authority or person would be entitled to the share of the residue which would have fallen to "The Home for the Homeless," if it had existed.

DONATIO MORTIS CAUSA—CHEQUE ON OVERDRAWN ACCOUNT NOT CASHED.

In re Beaumont Beaumont v. *Ewbank* (1902) 1 Ch. 889, the validity of an alleged donatio mortis causa was in question. The facts were as follows. On February 19, 1901, Beaumont the deceased, being in expectation of death signed and delivered to Mrs. Ewbank a cheque for £300 on his bank account which was then overdrawn. On February 23, 1901, the cheque was presented for payment, and dishonored. The court found as a fact that the manager of the bank on which the cheque was drawn was minded to "lend" the money to pay the cheque if he found that the signature was genuine. On February 25, 1901, Beaumont died, the cheque not having been cashed. Buckley, J. held, following *Hewitt* v. *Kaye* (1868) L.R. 6 Eq. 198, and *In re Beaks' Estate* (1872) L.R. 13 Eq. 489, that there was not a valid donatio mortis causa of the money for which the cheque was drawn. In doing so he distinguishes the case from *Bromley* v. *Brunton*, L.R. 6 Eq. 275, where a cheque was handed to the donee and presented before the donor's death, but the banker though admitting funds refused to pay until the donor's signature was confirmed. In the present case he found no promise to pay on confirmation of the signature, but merely an intimation on the part of the manager his willingness "to lend" which was not enforceable, and the death of the donor had revoked the cheque which was not an assignment of funds, because there were no funds to the credit of the account on which it was drawn, but a mere revocable mandate. The learned judge is of opinion that even if there had been funds to the credit of the account a cheque does not even in that case amount to an assignment, and *Bromley* v. *Brunton* he considers is based not on the cheque being in the nature of an assignment but on the fact that there was a constructive payment of the cheque before the donor's death.

EXPROPRIATION—COMPENSATION—INTEREST ON COMPENSATION.

Fletcher v. *Lancashire & Yorkshire Railway Co.* (1902) 1 Ch. 90, was an action brought to recover interest on a sum awarded for compensation on the expropriation of land. The expropriation took place under a private Act—which provided that if a mine owner should find that the working of his mine was likely to

prejudicially affect a canal owned by the defendants, he was to notify the defendants and they were then to be at liberty to give notice to expropriate so much of the mine as might be necessary for the support of the canal, paying compensation to be fixed by an arbitration, and after such notice the working of the mine was to cease. The plaintiff having given notice, the defendants gave a counter notice on November 19, 1892. An arbitrator was not however appointed until 1897, and he proceeded to fix the compensation on the footing of the plaintiff's mine having been purchased on November 19, 1892, and awarded interest on the amount allowed from that date until payment. The defendants contended that the minerals did not vest in them until payment of the compensation, but Buckley, J. decided that from the date of their giving the notice the plaintiffs were deprived of their use of them, and that on the ordinary principles applicable between vendor and purchaser as laid down by the House of Lords in *Birch* v. *Joy*, 3 H.L.C. 565, the plaintiffs were entitled to interest as claimed.

PRACTICE—PARTIES—ADDING DEFENDANT—DEFENDANT APPLYING TO ADD CO-TRUSTEE AS A DEFENDANT — JOINT AND SEVERAL LIABILITY — ACTION AGAINST ONE OF TWO TRUSTEES — CONTRIBUTION — RULE 133 — (ONT. RULE 206).

In *McCheane* v. *Gyles* (2) (1902) 1 Ch. 911, the plaintiff sued one of two trustees for breach of trust. The defendant applied to add the personal representative of his co-trustee as a defendant for the purpose of claiming contribution. He had previously filed a third party notice which had been set aside, without prejudice to an application to add the trustee as a defendant (see ante p. 344). The representative of the co-trustee resided in Ireland, and the plaintiff opposed the application, and Buckley, J. held that he had no power to add the representative of the deceased trustee as a defendant against the wish of the plaintiff. There are some cases in which a defendant may be added against a plaintiff's wish, as for instance in a representative action, where the plaintiff claims to represent a class, and one of the class comes forward and claims that the plaintiff does not represent him, in such a case the applicant may be added as a defendant though the plaintiff objects. In the present case the plaintiff had a right of action against one or both of the trustees. He had elected to sue only one, and he could not be compelled to sue the other also.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Armour, C.J.O.; Osler, Maclennan and Moss, JJ.A.] [June 28.

ATTORNEY-GENERAL *v.* SCULLY.

Mandamus—Malicious prosecution—Record of acquittal—Clerk of the Peace—General Sessions—Fiat of the Attorney-General.

The judgment of the Divisional Court in *Rex* v. *Scully*, reported 2 O.L.R. 315, was affirmed, Armour, C.J.O., dissenting.

Cartwright, K.C., and *Ford*, for the Attorney-General. *Arnoldi*, K.C., and *Panton*, contra.

Armour, C.J.O.; Osler, Maclennan, Moss and Garrow, JJ.A.] [June 28.

COUNSELL *v.* LIVINGSTON.

Bills of exchange and promissory notes—Notice of dishonour—To husband endorser, for wife, endorser—Of note given under agreement—Knowledge of husband—Form of notice—Agency of husband for wife.

Notice is merely knowledge and notice to an endorser who is also agent for another endorser at once becomes in law the knowledge of the principal with all its consequences.

In an action against husband and wife endorsers on a promissory note given as one of a series of renewals during some years under an agreement of which the husband had knowledge in which the notice of dishonour given was a letter in the words: "I beg to advise you that Mr. T. C. L.'s note for $3,500 in your favour, endorsed by yourself and wife, and held by our estate was due yesterday. As I have not received renewal, will you kindly see that the same is forwarded with cheque for discount as there is no surplus on hand," addressed and sent to the husband only.

Held, on the evidence that the husband was agent for the wife and that such letter was sufficient notice of dishonour to both the husband and wife. *Paul* v. *Jo* (1858) 3 H. & N. 455, followed. Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

Aylesworth, K.C., for appeal. *E. Martin*, K.C., contra.

Osler, Maclennan, Moss and Garrow, JJ.A.] [June 28.

TAYLOR *v.* GRAND TRUNK RAILWAY CO.

Railways—Passenger—Return ticket—Condition of identification—Neglect to comply with—Removal from train.

Plaintiff purchased an excursion ticket from Indian Head to Toronto and return, one of the conditions (which he signed) being that he should identify himself to an agent in Toronto before he set out on his return journey and obtain the agent's signature. On production of his ticket at Toronto he secured his sleeping berth, had his baggage checked, was admitted to the train and started on his return journey, but neglected to identify himself and was put off the train by the conductor after he had refused to pay his fare, although he offered to identify himself to the conductor. In an action for damages,

Held, that he could not recover. Judgment of LOUNT, J., affirmed.

H. T. Beck, for appeal. *W. Cassels*, K.C., contra.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B.] [March 27.

TAYLOR *v.* MCFARLANE.

Will—Devise of hotel premises to widow for life—Transfer by License Commissioners of license to widow—Absolute right of widow thereto—Devise of estate between widow and children.

A testator by his will devised certain real estate consisting of hotel premises to his wife during widowhood for the benefit of herself and four children, the income to be applied for their support and maintenance until the children became of age and in case of daughters until marriage. On the widow marrying the property was to go to the children, the widow being paid $1000. On the testator's death in 1896, the widow applied to the License Commissioners and obtained a transfer of the license to her for the remainder of the year, and for the subsequent years until 1900 the license was granted to her, she carrying on the business and maintaining herself and the children thereout, no money of the estate going into the said business.

Held, that after the testator's death the license and good will of the said hotel business belonged to the widow personally, and formed no part of his estate; and apart therefrom the income was devisable amongst the widow and children as directed in *Allen* v. *Furness* (1892) 20 A.R. 34.

Held, also, that creditors of the widow were entitled to attach the widow's interest in the property which could be reached by the appointment of a receiver.

Ritchie, K.C., for plaintiffs. *McMaster*, *D. L. McCarthy*, and *Raney*, for other parties.

Boyd, C.] BROWN *v.* CITY OF HAMILTON. [April 14.

Municipal corporations—By-law against setting off fireworks on streets—Non-liability of corporation to see to its enforcement.

The passing by a municipal corporation under the powers conferred by the Municipal Act of a by-law prohibiting the setting off of fireworks, fire crackers, etc., on the public streets does not cast any duty on the municipality to see to its enforcement.

Farmer, and *Stanton*, for plaintiff. *Mackelcan*, K.C., for defendants.

Maclennan, J.] MUSKOKA PROVINCIAL ELECTION. [June 30.

Ballots—Marking and initialling.

Ballots marked with a straight line only are improperly marked and cannot be counted, while ballots marked with a cross upon or above the upper division line, or marked with a cross made by three or four pencil strokes, or marked with what might be taken for a "c" are properly marked and should be counted.

In initialling the ballots a deputy returning officer at one sub-division put as his initials "H. G." instead of his full initials "H. C. G.," and a deputy returning officer at another polling sub-division put "McN." instead of his full initials "W. D. McN."

Held, that such ballots are sufficiently initialed within the meaning of the Act, the object of such initalling being merely the identification of the voter, which was effected here, there being no suggestion that the number of ballots cast at the polling sub-division was not correct; and, *semble*, that under these circumstances the ballots should not be rejected, even if not initialed at all.

Masten, and *Eric N. Armour*, for Mahaffy, the defeated candidate. *R. A. Grant*, for the returned candidate.

Meredith, C.J.C.P.] RE THOMSON *v.* STONE. [July 15.

County Courts—Jurisdiction—Equitable relief—Amount in controversy—Judgment creditor—Setting aside chattel mortgage—Prohibition.

Where the plaintiff, having recovered judgment for $92.05 and costs against the defendant in a Division Court, brought an action in a County Court to set aside as fraudulent as against him a chattel mortgage for $520 made by defendant:—

Held, on motion for prohibition, that the subject-matter involved was the amount due on the judgment—it not being alleged or proved that there were any other debts of defendant than that due to plaintiff; and the County Court had jurisdiction by virtue of s. 22 (13) of R.S.O. 1897, c. 55. *Forrest* v. *Laycock*, 18 Gr. 611, followed. *Dominion Bank* v. *Heffernan*, 11 P.R. 504, and *Re Lyons*, 10 P.R. 150, distinguished.

MacGregor, for defendant. *Swayzie*, for plaintiff.

MacMahon, J.] [July 17.

MORROW *v.* PETERBOROUGH WATER CO.

Company—Winding-up—Distribution of surplus—Shareholders—By-laws—Resolutions.

A municipal water company, incorporated under the Ontario Joint Stock Companies Act, sold their undertaking and franchise to the municipality, and passed a resolution providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares and for payment of the liabilities and the costs of winding-up, etc., and directing that the surplus should be distributed amongst the members according to their rights and interests in the company. By by-law of the company, holders of second preference shares were to be paid dividends at 6 per cent., and for a period of five years were not to participate further in the profits of the company. In case of default in payment of any dividend, the deficiency was to be paid out of the net profits of succeeding years, and no dividend was to be paid on the ordinary stock until such deficiency should be fully paid. Second preference shareholders also had the right, under the by-law, upon foregoing their secured dividend of 6 per cent., to surrender their shares and receive the par value thereof, or a corresponding number of ordinary shares, in which case they would have the same rights and privileges as the ordinary shareholders, but none of them exercised this option. The by-law also provided that, in the event of the company being wound-up, if any surplus of the capital assets of the company was to be returned to shareholders, the holders of second preference shares were to be paid the full amount of their shares and all dividends before the return of the capital of any ordinary shares, "and, subject thereto and to the first preference stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets."

Held, that the second preference shareholders were not entitled to share in the surplus assets.

Held, also, that the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares, not to the amounts paid on their shares.

Birch v. *Cropper, In re Bridgewater Navigation Co.*, 14 App. Cas. 525, followed.

Shepley, K.C., for plaintiff. *R. E. Wood, L. M. Hayes*, and *C. H. Bradburn*, for various defendants.

Meredith, C.J.C.P., and Lount, J.] [July 18.

STACK *v.* T. EATON CO.

Fixtures—Vendor and purchaser—Shop fittings—Gas and electric light fittings.

Shop fittings, consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole

being readily removable without damage either to the fittings or the building, and gas and electric light fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood.

Held, that these articles became part of the land and passed by a conveyance of it to the defendants.

Bain v. *Brand*, 1 App. Cas. 762, *Holland* v. *Hodgson*, L.R. 7 C.P. 328, *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, *Haggert* v. *Town of Brampton*, 28 S.C.R. 174, and *Ayles* v. *McMath*, 26 O.R. at p. 248, followed.

Judgment of MACMAHON, J., affirmed.

W. R. Smyth, for plaintiff. *Shepley*, K.C., for defendants.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [July 31.

IN RE WILLIAMS.

Trustees—Remuneration—Fixed annual sum—Solicitor—Trustee's profit costs.

Appeal by one of the trustees of an estate from the judgment of the Surrogate Court, fixing his remuneration. The Surrogate judge allowed 5 per cent. on the interest collected only, but nothing for any other services, on the ground that he had allowed 2½ per cent. in a former order, for the taking over of the corpus.

Held, under *Re Berkeley's Trusts*, 8 P.R. 193, that an annual allowance should be made for looking after the corpus of the fund, and that it should not depend upon the amount collected and invested, but should be a fixed annual allowance, based on the nature of the property and the consequent degree of care and responsibility involved.

Held, also, that the Surrogate judge, instead of allowing the trustees a percentage on the principal sum taken over, and nothing for the collection of the interest, should have allowed them nothing for the taking over of the estate, but a percentage on all interest collected and paid over, and an annual sum for the care of the estate.

Held, also, that the general rule is, that a trustee-solicitor is not entitled to charge the estate with any professional services, but that an exception, which is not to be extended, has been established by the decision of Lord Cottenham in *Craddock* v. *Piper*, 1 D.M. & G. 664, under which a solicitor-trustee who brings or defends proceedings in Court for himself and his co-trustee is entitled to recover profit costs, and therefore to charge such costs to the estate.

Shepley, K.C., for appellant. *Hutcheson*, for other parties interested.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [Aug. 6.

CROSBY *v.* BALL.

Insurance—Benefit Society—Suppositious wife—"Dependent."

Appeal by plaintiff from judgment of BOYD, C., directing certain moneys to be paid to defendant under an endowment certificate issued by The Supreme Tent of the Knights of Maccabees of the World. The plaintiff is the first wife of Philip Crosby deceased, having been married in 1860. In 1886 deceased went through a second ceremony of marriage with the defendant, who did not know that she was marrying a man whose wife was living. In 1900, deceased made an endorsement on his certificate of insurance, revoking his former direction as to payment, and directing payment to be made to "Mary Ball otherwise known as Mary Crosby." Defendant was the holder of the certificate, and claimed the money as a "dependent" of deceased.

Held, that the defendant Mary Crosby, having lived with the deceased, believing herself to be his wife, and being supported by him, was, under s. 174 of the rules of the K.O.M., entitled to the fund as a "dependent" of the deceased. Appeal dismissed with costs.

Douglas, K.C., for plaintiff. *Weir*, for defendant.

Province of Manitoba.

KING'S BENCH.

Full Court.] UNION BANK *v.* ELLIOTT. [July 12.

Appeal from County Court—Review of decision on indisputable evidence—Liability to account for securities, received as collateral security.

This was an appeal by defendants from the judgment of a County Court on their counterclaim against plaintiffs in respect of a number of securities that defendants had turned over to the plaintiffs as collateral for the note sued on in this action. The County Court Judge had allowed defendants $28.03, part of the amount claimed, but they contended that the evidence shewed that they were entitled to $65.00 more, made up as follows: Heppner's note, $13.50: Watson's, $16; McKellar's, $16; Knocker's, $13.50; balance of Dyck's note, $1; and balance of Lafrenier's $5. The bank did not produce these notes or give any account of them. As to the Heppner note, defendant Elliott swore that, before it was due, Heppner died and that he (Elliott) paid the note to the bank and took it out and afterwards received the money. As to Watson's note, he stated that the amount of it was paid to defendants and that they paid the money into the

bank, and trusted the bank to send out the note. Elliott also stated that McKellar's note was remitted for and the amount paid into the bank, and that Knocker's note had also been paid into the bank, and retired and given to the maker. No evidence was given as to any payments on the other two notes.

Held, that the bank was prima facie liable to account for the face values of the different securities which they had failed to account for or return to the defendants, in the absence of evidence to shew that they were not worth the respective amounts, and, therefore, that defendants were entitled to the whole amount claimed by them. The County Court Judge was of opinion that, when the defendants had shewn that the money for the four notes had been received by them, they should have given particulars of the dates of the alleged payments over of same to the bank, or in some other way brought home to the bank conclusively the receipt and non-credit of the several sums of money; but the Court above thought that he had not given sufficient weight to considerations of the bank's duty to produce or account for the securities and of the presumption to be drawn from its failure to do so, and that the Court could properly find that the alleged payments had been made to the bank notwithstanding the refusal of the County Judge to do so.

Appeal allowed with costs.

Wilson, for plaintiffs. *Aikins*, K.C., for defendants.

Killam, C.J.] [July 12.

DAVIDSON *v.* M. AND N. W. LAND CORPORATION.

Principal and agent—Commission on sale of land—Secret bargain between purchaser and agent of vendor.

The plaintiff's claim was for commission on the sale of certain lands sold by defendants to a purchaser introduced by him. Defendants objected to pay on the ground, mainly, that the plaintiff had made a bargain with the proposed purchaser by which the latter was to give the plaintiff $500 if he would procure a certain extension of the time within which the purchase might be made on the terms offered, and that plaintiff had secured the desired extension of time without disclosing the bargain he had made with the purchaser.

It appeared that defendant's manager at Winnipeg had agreed with plaintiff to withhold the land from sale for a certain period and sell it at a named price to the purchaser or purchasers whom the plaintiff should find and bring to him during that period; but the purchaser whom plaintiff had in view was not prepared to bind himself at once and wanted time to effect financial arrangements and at the same time to have the opportunity kept open for him. The plaintiff represented to him that do that might result in depriving him altogether of the sale, as his time

might expire before he could get another purchaser, and the proposed purchaser then promised to pay the plaintiff $500 if he would give him the desired time. Plaintiff then agreed to and did give the time, and reported to defendants' manager that he had done so; but he did not inform him that he expected to be paid for it. Plaintiff never received the $500 or any part of it from the purchaser, who completed his purchase after the expiration of the time originally allowed to plaintiff.

Held, (1) Although the secret arrangement between the purchaser and the plaintiff was a breach of his duty to the defendants, yet it was wholly collateral, and was not such as to disentitle the plaintiff to receive, for the services which he had fully performed, the stipulated commission.

(2) If plaintiff had received anything from the purchaser under the agreement he would have to account for it to defendants; but, as he had not received anything, he was entitled to his full commission.

A stipulation for or receipt of such a collateral advantage, even in fraud of the employer, is not necessarily a bar to recovery for the services rendered: *The Boston Deep Sea Fishing, etc. Co.* v. *Ansell*, 39 Ch. D. 539 followed.

Wilson and *Elliott*, for plaintiff. *Ewart*, K.C., and *Bradshaw*, for defendants.

Full Court.] HUGHES *v.* CHAMBERS. [July 12.

Chose in action—Assignment of book debts without writing—Limitation of actions—Appropriation of payments—Weights and Measures Act, R.S.C., c. 104—Burden of proof of illegality—Objections not raised at trial—Voluntary payment for goods supplied in violation of the Weights and Measures Act—Recovering back same—Burden of proof that purchaser was not aware of the illegality.

Appeal from a County Court judgment in favour of the plaintiff for $116.87. The account sued on was for a balance claimed to be due in respect of goods supplied to defendant during the years 1894 to 1901 by a number of different firms of which the plaintiff was a member throughout and which carried on the same business.

On the retirement in 1896 of one of the partners it did not appear that there had been any formal assignment of her interest in the book debts to the remaining partners, but the circumstances shewed that it was intended that her whole interest in the business should be transferred.

Held, that a formal writing was not necessary in equity to effect an assignment of the book debts, and that plaintiff's right to collect them was sufficiently established.

Defendant also objected that the claim for the goods sold in 1894 was barred by the Statute of Limitations; but the County Court Judge found that certain payments had been made in 1896 with regard to which no

appropriation had been made by defendant whilst the creditors had appropriated them to the whole account, and so that the items over six years old had been paid.

The questions of greatest interest and importance in the case were those arising under The Weights and Measures Act, R.S.C. c. 104, and some amending Acts. A large number of the items in the account were for lime charged for by the bushel. The seller's practice was to measure only quantities of ten bushels or less, and when greater quantities were ordered, to ascertain them by weight, allowing 70 lbs. to the bushel.

The defendants relied on s. 21 of The Weights and Measures Act, making every sale void unless it had been made according to one of the Dominion weights or measures ascertained by the Act, also upon the amending Act of 1898, c. 30, s. 2, requiring that on a sale of lime the bushel should be determined by weighing, unless a bushel by measure should have been specially agreed on, and fixing the weight of a bushel of lime at 80 lbs.

After this amendment and before the passing of the Act of 1899, c. 28, s. 1, restoring the weight of a bushel of lime to 70 lbs. several parcels of lime had been supplied by weight and charged for at 70 lbs. per bushel, and several parcels had been suppled by measure. The following decisions of the County Court Judge were upheld by the Court: -

1. As to the lime supplied by measure before the amendment of 1898, the onus was upon the defendant to prove that the bushel measure used was not stamped as required by the Act

2. As to the lime ordered by the bushel and supplied by weight before that amendment, the onus was on the defendant to prove that this had been done without his knowledge, for unless it was the sales would not be illegal.

3. As to the lime supplied by measure after the amending Act of 1898, it should be allowed for on the ground that defendant had not raised at the trial the objection that there had been no agreement for a determination by measure. So far as there was any onus upon the plaintiff to prove such an agreement, the point should have been taken at the trial, when an opportunity might have been given to supply the evidence.

4. As to the lime supplied by weight at 70 lbs. to the bushel between 1898 and 1899, the County Court Judge held that the sales were wholly illegal and that plaintiff could not recover for it at all; and her counsel conceded this on the hearing of the appeal; but defendant had paid in 1899 more than sufficient to discharge the balance of the debt incurred during that interval, and claimed to be entitled to recover back the excess. It was proved that these payments had been distinctly appropriated to the account of that year and not generally on the whole running account, and it was held that defendant was not entitled to recover back such excess, as his payments had been wholly voluntary. If made with notice of the illegality set up, the money could not be recovered back, as the payments

were the voluntary acts of the defendant. If they were made in ignorance of the illegality and of the facts which would have entitled the defendant to dispute the account, then the right to recover them would be grounded on mistake and not on illegality, and the onus was on defendant to prove the mistake, which he had not done.

Appeal dismissed with costs.

Coldwell, K.C., for plaintiff. *Kilgour*, for Defendant.

Killam, C.J. [July 12.

MANITOBA FARMERS' MUTUAL HAIL INS. CO. *v.* FISHER.

Mutual insurance—Assessment of premium notes—Cancellation of policy by request of insured—Presumption of continuance of policy after first year—Mutual Hail Insurance Act, R.S.M. c. 106. s. 26—Impossibility of performance of condition—Evidence.

This action was brought in a County Court by a company incorporated under "The Manitoba Hail Insurance Act," R.S.M. c. 106, to recover the amount of an assessment claimed to have been made upon the defendant as a member of the company. Defendant's application was for insurance against loss to crops by hail for five years from 9th June, 1899, and embodied an undertaking to pay an annual assessment not to exceed five per cent.. and to be governed by the letters patent and by-laws of the company. A policy of insurance was issued to the defendant on the application, but it was lost and its contents were not proved except that it contained some provision for its cancellation at any time between October 1st and April 1st.

One of the terms of the application was that the insurance might be cancelled in any year after the first, between October 1st and May 1st, by returning the policy to the company and paying what should then be due on it, if anything. The time of the issue of the policy, and the terms of the by-laws in force when it was issued did not appear.

In April, 1900, defendant wrote that he wished to withdraw from membership in the company, but the secretary replied that, as defendant had not returned the policy to the office, it would be impossible to cancel it.

The assessment sued on was made under a resolution of the directors passed in October, 1900, and was for the year ending 21st March, 1901.

The County Court Judge was of opinion that the loss of the policy having rendered it impossible for defendant to surrender it, he was excused from performance of that condition, and entered a verdict for defendant on the ground that he had ceased to be a member of the company.

The plaintiff appealed to the Court of King's Bench.

Held, 1. The defendant was not entitled to withdraw from membership in the company without returning the policy although it had been lost for

the happening of a circumstance rendering performance of a condition impossible does not entitle the party who was to perform it to have the agreement carried out by the other party: *Cookewitt* v. *Fletcher*, 1 H.& N. 893; *Cutter* v. *Powell*, 6 T.R. 320. But

2. The action should have failed for want of proof of the terms of the policy. According to defendant's evidence it differed in some respects from the application, and it could not be assumed that its terms agreed with the application in other respects. It depended upon those terms whether defendant was a member of the company when the assessment sued on was made, and it was for the plaintiff to shew the period of the insurance and other terms of the policy that the Court might decide whether defendant was still a member liable to assessment or not.

Appeal dismissed with costs.

Wilson and *Crichton*, for plaintiffs. *C. H. Campbell*, K.C., for defendant.

Killam, C.J.] HOFFSTROM *v.* STANLEY. [July 12.

Mechanic's lien—Lien upon interest of purchaser of land under agreement not carried out—Rights of workmen as against vendor who allows the work to proceed after the purchaser has made default.

Action to enforce a mechanic's lien for work done by the plaintiff for and at the request of the defendant Stanley upon land of the other defendants D. and M., which they had agreed to sell to Stanley. Stanley was allowed to take possession on the 15th June, 1901, without making any cash payment, but he was to commence building a house on 1st July and continue the work without delay and pay the whole of the purchase money on 15th August, 1901. Stanley failed to pay any part of the purchase money, and in September or October following discontinued work on the premises. The work was continued after August 15th with the full knowledge and concurrence of D. and M., who waited until October in order to give Stanley a chance. They then served Stanley with a written notice, the exact terms of which were not shewn, although Stanley stated that he understood it to be a notice that, as he had not complied with the terms of the purchase as to time, his interest had ceased. By the statement of claim, the plaintiff claimed a lien as against the interest of all the defendants, but at the trial his counsel asked to amend by claiming subject to the lien of D. and M. for unpaid purchase money, which amendment was allowed. D. and M. disputed the right of the plaintiff to any relief on the ground that Stanley's interest had ceased.

"The Mechanics' and Wage Earners' Lien Act, 1898," 61 Vict. c 29, provides in s. 11, sub-s. 2, that "In case of an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance made to the purchaser, the purchaser shall, for the purposes of this Act and within the meaning thereof, be deemed a mortgagor and the seller a mortgagee.

Held, that it did not sufficiently appear that the notice served on Stanley had put an end to any rights of his under the agreement, as the vendors had allowed him to continue the expenditure of money in making improvements after the expiration of the time for payment, and could not then cancel the agreement without giving some further time, and it became unnecessary to consider whether the clause placing the vendor and vendee in the position of mortgagee and mortgagor does not prevent the former from putting an end to the agreement of sale by giving such a notice as had been served on Stanley. The agreement was still subsisting when the plaintiff did his work, when he registered his claim to a lien, when he brought his action and up to the time of the trial, and he was, therefore, entitled to the lien on Stanley's interest as claimed by the amended statement of claim. *Flack* v. *Jeffrey*, 10 M.R. 514, followed.

The plaintiff having originally sought to charge the interest of D. and M. and they, after the amendment, having disputed the plaintiff's right to any relief, no costs were allowed as between them.

Order for judgment in the usual terms with costs against Stanley.

Taylor, for plaintiff.

Haggart, K.C., for defendants, D. & M.

Richards, J.] [July 22.

RE LOCAL OPTION BY-LAW OF WHITEWATER.

By-law—Necessity of seal of corporation and signature.

Application by a resident of that part of the present municipality of Whitewater which was included in the former municipality of that name to quash an alleged by-law of such former municipality forbidding the receiving of any money for a license to sell intoxicating liquors. The document purporting to be a by-law for that purpose did not bear the seal of the corporation, and the document purporting to be a by-law to submit the first mentioned by-law to the vote of the ratepayers had neither the seal of the corporation nor the signature of the reeve or person presiding at the meeting at which it was passed.

Held, that the by-law moved against was void and inoperative from the beginning by virtue of s. 336 of "The Municipal Act," R.S.M., c. 100, and that an order should be made to quash it so that the municipal council might know definitely how the matter stood.

Portions of the territory of the municipality as it stood at the date of the passing of the by-law in question were afterwards detached from it in forming new municipalities, which were not notified of the application.

Held, that the order to quash should be limited in its application to the present municipality of Whitewater, which had been duly served with notice of the application.

Perdue, for applicant.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] [June 10.

O'KELL MORRIS & CO. v. DICKSON ET AL.

Assignment of debt—Notice—Cause of action.

Action for a debt which had been assigned by way of mortgage to the Bank of Montreal by the plaintiff company now insolvent. No notice of assignment had been given by the bank to the defendant.

Held, that where a debt has been assigned by way of mortgage, but no notice in writing of the assignment has been given to the debtor, the cause of action still remains in assignor.

Harold Robertson, for plaintiff. *Thornton Fell*, for defendant.

Full Court.] [June 11.

MERCHANTS' BANK OF HALIFAX *v.* HOUSTON.

Costs—When allowed by Supreme Court of Canada—No power to stay taxation.

At the trial before MARTIN, J., the plaintiffs' action was dismissed, but the Full Court allowed an appeal by plaintiff. On appeal the Supreme Court of Canada allowed the appeal of the defendant Ward, and ordered plaintiff to pay him the costs of that appeal and also all costs in the court below, except in so far as Ward was to be regarded as the representative of the mortgagor in an action to realize a mortgage security, which costs were reserved till final decree. By the same judgment the action was dismissed as against Ward, except in so far as it was considered to be in the nature of a mortgage action for the purpose of enforcing a security.

Held, reversing IRVING, J., who made an order staying the taxation of Ward's costs of appeal to the Full Court until final decree, that there was no jurisdiction to make the order staying taxation. The application should have been made to a judge of the Supreme Court of Canada instead.

Duff, K.C., for the appeal. *Sir C. H. Tupper*, K.C., contra.

Full Court.] McCUNE *v.* BOTSFORD. [June 14.

Practice—"No order as to costs"—Meaning of.

Appeal from an order of IRVING, J., dismissing an appeal by the the defendant Botsford for a review of the taxation of the costs of the actions. This was an adverse action under the Mineral Act, and from an

interlocutory order made in the action an appeal was taken. Before the hearing of the appeal the plaintiff lost his interest in the case by allowing the mineral claim in question to lapse, and so the Full Court "struck out the appeal—no order as to costs." Subsequently the plaintiff's action was dismissed with costs, and the defendants claimed the costs of the appeal which the Registrar disallowed on taxation.

Held, by the Full Court, dismissing the appeal, and following *In re Hodgkinson* (1895) W.N. 85, that the statement "no order as to costs' means that each party must pay his own costs. So also where the court refuses to make any order as to costs.

Peters, K.C., for the appeal. *Martin*, K.C., contra.

Full Court.] HARRIS *v.* DUNSMUIR. [June 19.

Juror—Same juror sitting on former trial—New trial.

This action was originally tried in 1894 before a judge with a special jury, and plaintiff got a verdict for $19,377. On appeal a new trial was ordered, and at that trial in 1897, also with a special jury, a non-suit was entered. On appeal a new trial was ordered by the Full Court (affirmed by the Supreme Court of Canada, 30 S.C.R. 334). The third trial took place before a judge with a special jury in December, 1901, and on the verdict the plaintiff obtained judgment for $9,667.62. The defendant before the last trial changed her solicitors. At the first trial the defendant was in court, but on account of illness was not present at either the second or the third trial. James Muirhead was a juror on the first trial and also on the third trial, but neither the defendant nor her solicitors were aware of that fact until after the conclusion of the trial.

Held, refusing a new trial on this ground, that it was the duty of the solicitor to enquire who the first jurors were, an opportunity to do which is provided by sub-s. 5 of s. 59 of the Jurors Act.

Sir C. H. Tupper, K.C., and *Peters*, K.C., for defendant. *Bodwell*, K.C., and *Duff*, K.C., for plaintiff.

Full Court.] MCNAUGHT *v.* VAN NORMAN. [June 25.

Mineral claim—Seizure by sheriff of the interest of a co-owner—Lapse of debtor's mining license—Sheriff's right to renew.

Interpleader issue. McNaught and McKinnon were co-owners of mineral claims up till 31st May when McKinnon's miner's certificate expired. Under an execution the sheriff seized McKinnon's interest on 29th March, and on 5th June, he obtained a special free miner's certificate in McKinnon's name for the purpose of reviving McKinnon's interest

under seizure. McNaught claimed that under s. 9 of the Mineral Act the former interests of his co-owner were now vested in him. In an interpleader it was

Held, by the Full Court, affirming IRVING, J., that a sheriff in possession of a free miner's interest in a mineral claim has no power to take out a special free miner's certificate under s. 4 of the Mineral Act Amendment Act of 1899, in the name of the judgment debtor; neither has the sheriff power to renew a certificate before lapse.

Where some of the co-owners of a mineral claim allow their free miners' certificates to lapse, their interests at once vest pro-rata in their former co-owners.

Sir C. H. Tupper, K.C., and *Elliot*, for appellants. *Taylor*, K.C., for respondent.

Flotsam and Jetsam.

"Many a man complains dat he can't git jestice" said a colored philosopher. "But ef he seen jestice comin' down de big road he'd take ter de woods wusser'n a jack rabbit."

A man who had brutally assaulted his wife was brought before Justice Cole, of New York, and had a good deal to say about getting justice. "Justice?" replied the judge; "you can't get it here; this court has no power to hang you."

One of our contributors versed in legal literature in referring to the well-known ante-mortem epitaph of Lord Westbury, which on p. 560, ante, is attributed to Mr. Wickens (presumably the Vice-Chancellor of that name), says that in Nash's life of Lord Westbury, vol. 2, p. 78, it is said to have been composed by Sir Philip Rose.

Among the great Sir Walter's writings we find the following couplet:

"Yelping terrier, rusty key,
Was Walter Scott's first Jeddart fee."

Scott's first client was a burglar. He got the fellow off, but the man declared that he hadn't a penny to give him for his services. Two bits of useful information he offered, however, and with these the young lawyer must needs be content. The first was that a yelping terrier inside the house was a better protection against thieves than a big dog outside; and the second, that no sort of a lock bothered one of his craft so much as an old rusty one. Hence the couplet.