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# TABLE OF CASES

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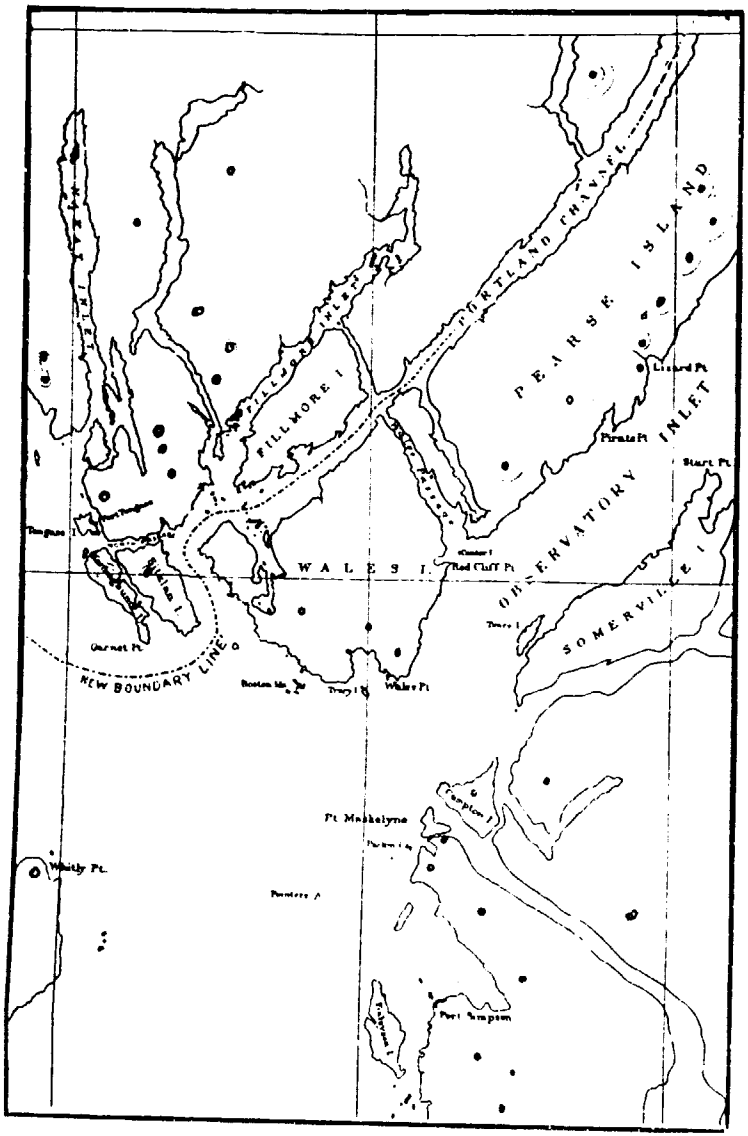


The "north passage" represents the true Portland Channel as agreed to between the British Commissioners.

# Canada Law Journal.

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Had we any desire to exhibit any editorial vainglory, we might publish some of the many complimentary things that have been told us from time to time as to the excellence and helpfulness of the *Canada Law Journal*, both as to matter and to method. Rather, however, would we thank the many friends who have, by their contributions and their suggestions, helped us to make the journal what it is. They have, perhaps unconsciously, put into practice the thought of Lord Bacon thus expressed long years ago :—

> "I hold every man a debtor to his profession, from the which as men do of course seek to receive countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help and an ornament thereunto."

Might we venture to lay upon some others of our readers the burden of his injunction. There are many among them capable of being "a help and an ornament" in the premises; and so let them make "amends" and cease to be "debtors" to the high and honorable profession to which they belong. We thank them in advance for this "countenance" to ourselves and "profit" to their brethren.

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It was said a great many years ago by a philosopher that the true lover of his country would always find more pleasure in praising than censuring its public institutions, although he was prepared to believe in the abstract that man is instinctively prone to cavil and must be morally educated in order to commend freely. However this may be, we are free to say that while we have felt it our duty to speak plainly about the shortcomings of the Supreme Court of Canada when we deemed occasion demanded it in the past, we did so with regret; and now that opportunity presents itself to speak to the credit of that tribunal, we are prompt to record our pleasure in the matter. It is the court's expedition in disposing of business last term upon which we desire to briefly comment at this juncture. The court opened its docket of appeals on October 6th last, when a total of 56 appeals stood for hearing. Of these appeals ten were from Ontario, thirteen from Quebec, eighteen from the

Maritime Provinces, five from Manitoba, eight from British Columbia and two from the far Yukon District. When the court adjourned on the 12th December arguments had been heard and judgment given in all but eleven of the inscribed appeals, and three of these had gone over to the February term. Only the remaining eight cases stood for judgment on the 12th December. This is a thoroughly satisfactory state of affairs both for the court and its suitors, and we extend our hearty congratulations.

As we have been speaking generally in laude judicii, it may not be amiss to quote here the pleasant words concerning one of its members dropped by Lord Macnaghten in delivering the judgment of the Judicial Committee of the Privy Council in *Chapelle* v. *The King* on 2nd December last: "The judgment of Davies, J., appears to their lordships to deal with the subject in a manner which leaves nothing to be desired. It is concise, clear and convincing. Their lordships are unable to add anything to it in the way of argument. They will therefore content themselves with adopting it without qualification." In the case referred to, which involved among other things, the validity of the royalty of 10% imposed on the output of placer mining claims along the Yukon River by order-in-council of 29th July, 1897, the judgment of the Exchequer Court was in part reversed by the Supreme Court, and an appeal therefrom, taken by the miners to the Judicial Committee, was dismissed without costs.

We may not wonder perhaps that the general public know but little about the Alaska Boundary question, but it startles one to see such ignorance as is displayed by the *American Law Review*, an excellent and generally well informed journal. If the writer, who there undertakes to enlighten his countrymen on the subject, had taken the trouble to inform himself on the subject, or had even looked at the maps which are published on the opposite page of the article referred to, he would not have fallen into several ludicrous errors; nor would he, founding his remarks on mistakes of fact, berate poor Canada in the way he does. We need scarcely inform our readers that Prince of Wales Island is almost the largest island on the Pacific coast, apparently about 100 miles long, and away

out in the ocean, whilst Wales Island, which he calls Prince of Wales Island, is an insignificant island some way in from the mouth of the Portland Channel. We copy the following:

"A glance at the map will shew that the boundary, as made by the Commission, does not leave the southernmost point of Prince of Wales Island and proceed towards the north by the Portland Channel, but that if it had done so it would have given Prince of Wales Island and Pearse Island to the United States. Instead of starting at the *southernmost* point of the Prince of Wales Island and proceeding to the north along the pass called Portland Channel, it is made by this decision to start at the *northern* point of Prince of Wales Island and to proceed towards the north along Pearse Channel. A more obvious mal-interpretation and perversion of the language of a treaty could not be imagined."

Comment is surely unnecessary. Moreover, if the writer had correctly understood the situation he probably would not have penned such a sentence as this: "The shrill shrieking of the Canadians over this decision assaults our ears with loudest vehemence." Nor possibly would he have expressed the disgust of certain Americans at their territory being given away, as the writer in view of his comical mistake assumes it was, by saying that, "some of them would have exercised their prerogative of going down to the tavern and cussing the judges." We do not reproduce these sentences as models of legal journalism but as apparently indicating the spirit which would have actuated our neighbours had the award been against them.

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## *THE ALASKA BOUNDARY.*

It was not well that a matter so important to this Dominion, and incidentally to the British Empire, as the award of the Commission which was appointed to adjudicate in reference to the Alaska Boundary should be discussed until all the facts and circumstances should, as far as possible, be known, and any necessary explanations given. In this view we withheld comment until such time should arrive.

That which was looked for with special interest was Lord Alverstone's explanation of his action in reference to his alleged change of opinion as to the location of the Portland Channel. He now states that he declines to justify or explain his conduct

because such a course would be "a death blow to the confidence reposed in the British Bench." As to this we regret that a careful review of the circumstances attending that part of the case compels us, with great reluctance, to come to the conclusion that no satisfactory explanation is possible, and, further, that the course he thought proper to take, doubtless with all honesty of purpose, is one that will prove not only injurious to the Empire at large, but one which has, to some extent at least, impaired the confidence which this Dominion has hitherto reposed in the British Bench.

We venture to think that if, instead of a treaty between nations, this had been an agreement between individuals, brought before a court for judicial interpretation, it would not have taken long to arrive at a conclusion, and a conclusion which would have been favourable in the main to the Canadian contention. Unfortunately, considerations, other than the interpretation of the treaty, have surrounded the question and complicated its settlement.

The first article of the treaty of 1903 gives the following directions to the members of the Commission:

"The Tribunal shall consist of six impartial jurists of repute who shall consider judicially the questions submitted to them; each of whom shall first subscribe an oath that he will impartially consider the arguments and evidence presented to the Tribunal, and will decide thereupon according to his true judgment."

The oath taken by the Commissioners was in the following form: "I , appointed a member on behalf of of the Tribunal for the decision of certain questions relating to the adjustment of the boundary between the Dominion of Canada and the Territory of Alaska under the Convention concluded at Washington between the United Kingdom and the United States of America on the 24th day of January, 1903, do solemnly swear that I will impartially consider the arguments and evidence presented to the Tribunal, and will decide thereupon according to my true judgment."

It is well known that the United States at first absolutely refused to leave the matter to the decision of any tribunal. Consent was, however, eventually given, but on the conditions that the interpretation of the treaty should be in the light of the subsequent acts of the parties, and that Messrs. Root, Lodge and Turner should be their three Commissioners; the first being Secretary of War and the two latter Senators. Mr. Root, a gentleman of high

personal character, occupies a position which, in the opinion of many, should have debarred him from sitting on such a tribunal, and the two Senators accepted the position pledged to support the United States' contention.* It will be seen, in view of the facts above stated, that a solemn farce was enacted in agreeing to leave the matter to the adjudication of six "impartial jurists of repute." As to the good taste or otherwise of these three American Commissioners accepting the position is a matter purely for their own consideration. If they could have been said to be impartial, they would not have been chosen.

The Canadian Government appointed as its two representatives Sir Louis Jetté, Lieutenant-Governor of Quebec, and Mr. Justice Armour, of the Supreme Court of Canada, formerly Chief Justice of Ontario. The lamented death of the latter left a vacancy which was filled by the appointment of Mr. A. B. Aylesworth, K.C. The Lord Chief Justice of England was the third of the British Commissioners.

It is quite evident from what has been said, that the United States so arranged the constitution of the tribunal that they could lose nothing This was so plain to us in Canada that our Government protested against the partisan jurists appointed by the United States Senate. The British Government, however, without regard to this protest, agreed to the terms proposed by the United States Government.

It may have been quixotic, perhaps, for the Canadian Government under such circumstances to have acted up to the letter and spirit of the treaty of 1903 by nominating representatives who were in every way "impartial jurists of repute": but the course they took will stand to their credit in international annals. It might have been well perhaps if they had, under the circumstances, refused to send any Commissioners. But, be this as it may, these six took upon themselves the burden of the enquiry. Theoretically, they composed a court of six judges, each member of equal authority with the others. As a matter of convenience, and out of courtesy to his position, the Lord Chief Justice of England was appointed Chairman.

The functions of the Court so formed are clearly and accurately set out in the dissenting judgment of Sir Louis Jetté: "The character of the functions which have been confided to us is clearly

* As to this see 39 C.L.J., p. 171.

defined. We have not been entrusted with the power of making a new treaty, and it was not in our province to make concessions for the sake of an agreement; we had simply to give a judicial interpretation of the articles of that treaty which were submitted to us, And this position, as I take it, was rendered still more clear by the fact that, if a majority could not be found to agree, no harm was done, the way being then still left open for the governments of both countries to do what would unquestionably be in their power, that is, to settle the difficulty by mutual concessions if they found it advantageous to each other. Finding, thus, that the line of demarcation between our duties and our powers had been very clearly defined, I took it to be my first duty, in passing on the different questions submitted to us, not to assume any more power than had been given to me by this first article of the Convention of 1903."

The case was fully presented to this court, all the evidence obtainable was adduced, and the arguments on either side were lucid and exhaustive. The result is known to our readers as being, except in some unimportant matters, favourable to the United States. But it is noteworthy in view of what hereafter appears that the main findings are manifestly not framed from the evidence advanced on either side, and do not follow the contention of either party.

As to the merits of the case, those who have the time can now easily satisfy themselves as to whether or not justice was done in the premises; whilst others who may not have this opportunity will very likely be inclined to accept as conclusive, in favour of Canada, the judgments of our two Commissioners, who entered upon an entirely unknown field of enquiry, and we may well believe from the character of the two men, with an honest intention to do justice in the premises. It was never questioned but that the Lord Chief Justice of England, who was appointed by reason of his holding that high position, would give his decision according to the evidence. On the other hand, it was naturally expected, from what has already been said, that the three American Commissioners would stand together in favour of the United States, no matter what the evidence might be, or what arguments might be advanced.

It was felt, therefore, that the best we could hope for, in view of the constitution of the tribunal, was a disagreement as to the main points at issue.

Much has been said in the public press, both of England and the United States, as to the feeling evoked in Canada by the result of the Commission—some pleasantries on the part of our friends to the south of us, and some patronizing condolences from the motherland. Most of these writers, however, entirely misconceive the point which has evoked criticism in Canada.

What then was the cause of complaint so far as Canada was concerned? To understand this it is necessary to see how the matter stood as between the British Commissioners, from Canada, and their colleague, Lord Alverstone; and to arrive at this we must refer to the questions submitted for adjudication by the Commissioners.*

The first was as to the point of commencement. As to this there was no difference of opinion, it being agreed by all to be Cape Muzon, on a small island at the south-westerly end of Prince of Wales Island.

The second question was "What channel is the Portland Channel?"

To understand the dissenting judgments, hereafter referred to, it must now be stated that when the vote was taken on the above subject this second question was divided into two parts:—

1. "Does Portland Channel run to the north of Wales and Pearse Islands?"

2. "Does Portland Channel run to the north of Sitklan and Kannaghunut Islands?"

The vote was accordingly taken seriatim on these two questions. Why the question was thus divided, and why it was not put in its simpler form, and in the form required by the treaty, we have no information; but light is thrown upon this division by subsequent events. The framing of these questions seems to have led up conveniently to the sudden change hereafter referred to by the four signing Commissioners.

The answer to the first question was in the affirmative by all the commissioners. The answer to the second was "No" by the three United States and Lord Alverstone, and "Yes" by Sir Louis Jetté and Mr. Aylesworth.

Just here two remarkable facts assert themselves, and demand investigation and explanation.

*These are given in full in 39 C.L.J., p. 181.

Up to the time when the Commissioners were called together to have their votes formally recorded, the three United States Commissioners had persistently held that Portland Channel ran to the *south* of all four islands and therefore *south* of Wales and Pearse Islands; and, up to that moment there had never been any variation from the opinion expressed in the original memorandum prepared by the three British Commissioners, (and read as embodying their views, to the whole Board, as stated in the protest of Jetté and Aylesworth) nor from Lord Alverstone's formal written reasons for his judgment, as subsequently made public, to the effect that Portland Channel ran to the *north* of all four islands and therefore *north* of Sitklan and Kannaghunut. In these documents it is also found, as a matter of fact, that the channel running north of the four islands issues into the Pacific at 54 d. 45 m which is the *exact point* at which the *true* Portland Channel commences as claimed by the British case. In the face of all this however, in the reasons of his judgment, published *after* the making of the award, Lord Alverstone says that the Tongas passage between Wales and Sitklan is Portland Channel (see 39 C.L.J. 690).

Of course, it was quite competent for these four judges to change their findings at the last moment; but the coincidence of their doing so at the same time, and without any suggestion to the other two judges they having all sat together when discussing the case, and giving a judgment, apparently made to fit in with an award, which, but for these changes, probably never would have been made—is so remarkable as to rivet attention.

This singular double somersault could scarcely have occurred as it did without there having been some such compromise as has been alleged, and it gives colour to the charge that the award was not a judicial finding and did not give the "true judgment" of either Lord Alverstone or of the United States Commissioners.

That part of the dissenting judgment of Mr. Aylesworth with which we are now concerned is as follows:—

"Upon the second question I quote the words of the President of this Tribunal. Among the facts relating to Portland Channel he finds:—'The latitude of the mouth or entrance to the channel called Portland Channel, as described in the treaty and understood by the negotiators, was 54 degrees 45 minutes. . . . Among the general considerations which support his conclusion he states that 'Russia and Great Britain were negotiating as to the point on the coast to which Russian dominion should be conceded. It is unnecessary to refer to all the earlier negotiations, but

it is distinctly established that Russia urged that her dominion should extend to 55 degrees of latitude, and it was in furtherance of this object that Portland Channel, which issues into the sea at 54 degrees 45 minutes was conceded and ultimately agreed to by Great Britain. No claim was ever made by Russia to any of the islands south of 54 degrees 45 minutes except Prince of Wales Island, and this is the more marked because she did not claim the whole of Prince of Wales Island, a part of which extended to about 54 degrees 40 minutes. The islands between Observatory Inlet and the channel to which I have referred above as the Portland Channel are never mentioned in the whole course of the negotiations.'

These extracts are from Lord Alverstone's memorandum expressing his considered judgment on this branch of the case. These conclusions have been arrived at after full discussion among ourselves of the answer which, upon the evidence, should be given to the second question—in which discussion each member of the Tribunal has stated at length his individual views. Concurring, as I do, in the findings of fact stated in this memorandum, I should have contented myself with differing from the conclusion reached but for the course our proceedings have taken.

Consideration of the second question has been to-day resumed, and by unanimous vote of the Tribunal it has been affirmed that each member, 'according to his true judgment,' believes the Portland Channel mentioned in the treaty to be the channel extending towards the sea from latitude 55 degrees 56 minutes, and lying to the north of Pearse and Wales Islands. But, notwithstanding the unanimous finding of fact, it has been, by the majority of the Tribunal, decided that the boundary line starting from Cape Muzon shall run to the south instead of to the north of Kannaghunut and Sitklan Islands, and so shall enter Portland Channel between Sitklan and Wales Islands. This course for the boundary is directly opposed to the distinct findings made and the whole line of reasoning adopted by the President in his memorandum of reasons for the decision. It is a line of boundary which was never so much as suggested in the written case of the United States or by counsel during the oral argument before us. No intelligible reason for selecting it has been given in my hearing, no memorandum in support of it has been presented by any member of the Tribunal, and I can therefore only conjecture the motives which have led to its acceptance.

It is admitted by everybody as absolutely clear and indisputable that, on the occasion of his naming Portland Canal, Vancouver, in his exploration of that channel, traversed it from its head inland to its entrance into the ocean in latitude 54 degrees 45 minutes—that in so doing he sailed down Portland Channel along the passage north of Pearse and Wales Islands and straight onward to the sea through the passage north of Sitklan and Kannaghunut Islands. Everyone knows and admits that Vancouver never traversed the passage between Sitklan Island and Wales Island through which the boundary line is now made to run. No more can it

be pretended that this passage (which is now called Tongas Passage) was ever named by Vancouver—was ever treated by him, or by any map-maker at any time, as in any way belonging to Portland Canal or was ever thought of by those who negotiated the treaty of 1825 as being any part of that channel. The Lord Chief Justice finds, as a fact which the maps and documents establish, that one entrance of Portland Channel was between the islands now known as Kannaghunut and Tongas. I concur entirely in this finding, but must add that this entrance to the channel is the only entrance to it ever known or in any way treated as part of the channel.

There is simply not the slightest evidence anywhere that I am able to find that either Vancouver or any subsequent explorer or map-maker ever considered or so much as spoke of Portland Channel as having two entrances to the ocean or as including the passage through which this boundary line is now made to run. But even if there were two or more such entrances Vancouver's narrative and maps absolutely fix the one he explored and named by giving its exact latitude to the minute, 54 degrees 45 minutes. And the President finds as a fact that this mouth or entrance is the one 'described in the treaty and understood by the negotiators.' By what right, then, can this Tribunal, sitting judicially, and sworn to so determine and answer the questions submitted, reject the channel so 'described in the treaty and understood by the negotiators' and seek for a totally different channel which, until now, no one ever thought of as any part of the Portland Channel mentioned in the treaty? 'I point to the additional circumstances so forcibly stated by my Lord. The whole negotiations were as to the 'point on the coast,' to which Russia's southern boundary should be carried. The treaty fixes as that point the promontory of the mainland immediately to the north of Kannaghunut and Sitklan Islands, the latitude of which is 54 degrees 45 minutes. The next point of mainland coast to the southward is Point Maskelyne, and it, of course, is undisputable British territory. The islands which lie between were never asked for by Russia. As the President's memorandum says, they were never so much as mentioned in the whole course of the negotiations; they lie wholly to the southward of 54 degrees 45 minutes, wholly to the southward of that entrance to Portland Channel which alone is 'described in the treaty,' or was "understood by the negotiators," that is to say, wholly to the southward of the true boundary, and yet the majority of this Tribunal is prepared to take two of those islands from Canada and transfer them to the United States.

How can such a determination be reconciled with our duty to decide judicially upon the question submitted to us?

It is no decision upon judicial principles, it is a mere compromise dividing the field between the two contestants.

The formal answer which the President's memorandum makes to the question submitted is alone sufficient to condemn the boundary the Tribunal is making. Question.—What channel is the Portland Channel?

Answer.—'The channel which runs to the north of Pearse and Wales Islands, the Islands of Sitklan Kannaghunut and issues into the Pacific between Wales Island and Sitklan Island.'*

This language simply disregards entirely the relative position of the islands in question. Wales Island lies due east of Sitklan. But the channel which runs to the north of Sitklan and Kannaghunut joins the ocean there, and therefore of necessity issues into the Pacific at that place, and it is the undoubted mouth of Portland Channel. The treaty makes Portland Channel the boundary, and if, as this answer formally states, Portland Channel is that channel which runs to the north of these two islands, such two islands are necessarily British soil.

The whole truth of the matter is simply this—that, as to Portland Channel, the case of Great Britain before us has been demonstrated to be unanswerable. By unanimous vote of this Tribunal it has been so declared. It was therefore impossible to avoid awarding to Great Britain the islands called Pearse and Wales. It is equally impossible upon any intelligible principle for a tribunal acting judicially to hold that Portland Channel immediately on passing Wales Island, makes a turn at right angles to itself and runs between the islands of Wales and Sitklan. The sole question presented to us for decision on this branch of the case was whether the Portland Channel of the treaty lay north of the four islands or south of the four, and until to-day it has been uniformly admitted by everybody that all four of these islands belonged, all together, either to Great Britain or to the United States. Instead of so finding, the majority of the Tribunal have chosen a compromise with the plain facts of the case, and, while awarding Pearse and Wales Islands to Great Britain, have determined to make those islands valueless to Great Britain or to Canada by giving to the United States the islands called Sitklan and Kannaghunut."

The appropriate part of the dissenting judgment of Sir Louis Jetté is also quoted as follows :—

"The contention of Great Britain is, to my mind, clearly supported by Vancouver's narrative of his voyage of 1794, when, after relating his movements in these waters, day by day, and specially from the 27th July to the 2nd August, he says: 'On the morning of the 2nd (August) we set out early, and passed through a labyrinth of small islets and rocks, along the continental shore; this, taking now a winding course to the south-west and west, showed the south-eastern side of the canal to be much broken, through which was a passage leading S.S.E. towards the ocean. We passed this in the hope of finding a more northern and westerly communication, in which we were not disappointed, as the channel we were then pursuing was soon found to communicate also with the sea, making the land to the south of us one or more islands. From the north-west point

* This language was, after signing of the award, changed by omitting the words "the Islands of Sitklan and Kannaghunut." See 39 C.L.J. 181."

of this land, situated in latitude 54 degrees 45½ min., longitude 229 degrees, 28 min., the Pacific was evidently seen between N. 88 W. and S. 81 W.' Adding finally (under date 15th August): 'In the forenoon we reached that arm of the sea whose examination had occupied our time from the 27th of the preceding to the 2nd of this month. The distance from its entrance to its source is about seventy miles, which, in honor of the noble family of Bentinck, I named Portland Canal.'

When this second question was put to the Commissioners, at the time of rendering the award, every one of them, as will appear by the official report, answered that Portland Channel was the channel that passed—contrary to the American contention—to the north of Pearse and Wales Islands. But on a sub-question being put, the majority of the Commission decided that after passing north of Pearse and Wales Islands, it should pass south of Sitklan and Kannaghunut Islands, which lie directly to the westward of Pearse and Wales Islands; should make a curve there, and, abandoning its northern course, should reach the sea through Tongas Passage instead of following the continuous straight line which, a moment before, had been found to be the proper one. I voted against this sub-proposition, because I found that it was totally unsupported either by argument or authority, and was, moreover, illogical. The Commission had, just a moment before, decided—and very properly, I believe—that Portland Channel, as described by Vancouver, was that channel indicated on all the maps as running straight to the sea; it had refused to accept the contention of the United States to have it leave its northern course, and, making a curve at Pearse Island, to run through Observatory Inlet, and all at once it is decided that this very channel shall make a curve lower down, that it will now leave its straight northern course and run into the sea through Tongas Passage. I can only say that if this decision is a correct and just one, I am very much afraid that the majority of the Commission has committed an injustice towards the United States in refusing to admit its contention that the channel ought to make that curve a little higher up, at the head of Pearse Island, which solution would appear to any one having studied the map, a much more sensible and reasonable one than that which has been adopted."

The Chief Justice, therefore, found, as a matter of fact, that, in his "true judgment," Portland Channel was to the *north* of the four islands; whilst the three American jurists had previously held that it was to the *south* of them; but these four join in a finding which, in defiance of the respective opinions, states that the Channel goes *north* of Wales and Pearse Islands, and *south* of Kannaghunut and Sitklan.

So much as to the Portland Channel. What about the mountain range?

Without going into this at length it may be shortly stated that

the line, as found by the award, was not the line contended for by either party. The contention on one side was that mountain peaks near the sea governed, and that they furnished a chain of summits within the treaty. On the other side, it was stoutly urged that there was no mountain range that could be found on the ground to answer the requirement, but that the line must be defined by the other alternative, the ten league limit from the coast. But by the award the majority selected peaks of isolated mountains, which had not been contended for by either party, and for the selection of which there was not a tittle of evidence and which mountains were, of course, unknown to the makers of the treaty of 1825.

We leave it to the intelligence of our readers to form their own opinion as to whether there was or was not a compromise as to this question, as well as to the one as to Portland Channel.

Is it possible to believe in view of these admitted facts that there was a "judicial finding" and a "true judgment" given according to "arguments and evidence presented to the tribunal."

If these two questions were settled by arrangement, why not a third. Are we sure that, even as to Lynn Canal, we have in the award the "true judgment" of the Chief Justice?

If it was a compromise award we may ask his Lordship what right he had to settle a boundary for Canada. That was no part of his duty. He was simply one of six judges. We cannot suppose he acted under instructions from the British Government. He would indignantly have resented any approach of that kind. But; if any arrangement was come to with the American Commissioners, and if it was proper so to deal with the subject, why were not the Canadian Commissioners consulted. They were much more interested in the matter than he was, and much more competent in every way to deal with the question. Possibly he had seen that his co-judges from Canada recognized (as expressed by Sir Louis Jettè) that they were all *judges*, and not diplomatic agents appointed to make a boundary.

Small wonder that when the successful Commissioners reported the result to their President he remarked "This award is the greatest diplomatic victory of our time?" Note well that he called it a *diplomatic victory*. Then, after all, it was *diplomacy* that won the victory; and the award was not a "*true judgment on the arguments and evidence.*" The President unwittingly let the cat out of

the bag, and so, from the other side also, comes evidence of an award by arrangement.

If the document, signed by the four Commissioners, was not a judicial finding within the terms of the treaty, neither was it a valid award by reason of want of finality, inasmuch as it left undetermined 120 miles of boundary. This is no mere legal quibble, but may be a very serious matter in the future, for it leaves the door open for further disputes. The object of the Treaty has not been arrived at. Lord Alverstone should, as Chairman, have refused to close the Commission until all its work had been done.

To prevent misunderstanding of this subject it may here be stated what must be perfectly evident to any unprejudiced person that neither the width or navigability of the channel north of the four islands, nor the distance of Sitklan and Kanaghunut from Port Simpson, nor whether they or Wales Island are of any strategic value, can have the slightest bearing upon the question as to "what channel is Portland Channel," or whether Lord Alverstone was justified in his action. Even he does not claim anything of the kind.

Statements such as the above have since been made, and it is also said that subsequent enquiry shows that the two westerly islands are comparatively insignificant. It is therefore suggested that possibly Lord Alverstone (being in some way aware of all this) thought the possession of them immaterial. But can this suggestion be said to fit in with the other circumstances connected with the finding, and if so why was not this phase of it discussed before the formal taking of the vote. We gladly give the Chief Justice the benefit of the suggestion, simply remarking however that it does not relieve him of the charge of extreme discourtesy, to say the least of it, towards his colleagues from Canada who had reposed entire confidence in his dealing with this branch of the case in the way that it had been settled between them.

To return for a moment to Canada's cause of complaint. It is, of course, felt that the award is not in accordance with the evidence, but, apart from that, the feeling of irritation did not arise because we lost Lynn Inlet; nor because we have been deprived of all harbours on the coast, and are shut out from access to our territory by water communication; nor because territory which we believed, and still believe, properly belongs to Canada has been taken from us. In short, there would have been no protest made

if there had been a "judicial" finding, according to the terms of the treaty, on all the questions submitted, even though in favour of our opponents. But what we do complain of is that we have been deprived of our territory *without* any judicial finding to that effect, and that a compromise has been made sacrificing our interests by one who had no authority in that regard ; by one who was only a judge—not an umpire—not an agent of the British Government or clothed with any authority to do what he did ; and who, moreover, to our detriment, made an arrangement without consulting the representatives of this Dominion, and behind their backs.

If the matter had between ordinary litigants, an award begotten in such a manner would be subject to be set aside by the courts. Even here it would have been competent, though possibly not politic, for the British Government to repudiate it as a miscarriage of justice. And so the award stands because there can be no appeal.

The English *Law Times* expresses the opinion that "the action of the two Canadian Statesmen," (why call them "statesmen"; they were not so in this connection, and Mr. Aylesworth has never been in public life ; but there seems to be a desire in England to give this Commission a diplomatic rather than its true judicial aspect) "in refusing to sign the award of the majority of the members of the Commission on the ground that the finding of the Tribunal is not, in their opinion, judicial, must be regarded as one of the most painful incidents in the history of international arbitration. It has even been suggested that the award has not been given on the merits of the case judicially considered, but on the merits of the relations between Great Britain and the United States in their diplomatic aspects. Lord Alverstone, who may be regarded as the non-political head of the English Judiciary, cannot be injured by an imputation of this character, which is calculated to reflect discredit on its authors."

The above was written early in the day, and not in the light that we now have. As it stands, it simply means that the Chief Justice of England can do no wrong, and therefore, Lord Alverstone, who happens to occupy that position, is above criticism : which is absurd. There is no desire on the part of any one in this country to injure the character of Lord Alverstone, and we are most heartily sorry that we are compelled in justice to the people of this Dominion and to their representatives on the Commission

to set the facts before our readers. If these facts, and the conclusions which apparently must be drawn therefrom, are not to the credit of Lord Alverstone, it is not our fault. His being the "non-political head of the English Judiciary" gives him no immunity from fair and temperate criticism. Beyond that we are incapable of going.

Sir Louis Jetté and Mr. Aylesworth joined in a protest against the award and gave dissenting judgments. This has given occasion to some adverse criticism. If their language was strong, or even possibly too strong, it was not without excuse, and certainly the course they took was not without ample precedent. Quoting again from the *Law Times* we read that Sir Alexander Cockburn, one of the greatest of England's Chief Justices, who "represented Great Britain under the Treaty of Washington at the Alabama Arbitration held in Geneva in 1872, dissented from the award and explained his reasons in an elaborate report. His language on that occasion was plain and pointed; he did not mince matters, and time proved that he was right. We venture to think that will be the case here.

The position of the British Commissioners from Canada was a most trying and difficult one, owing to the unexpected and extraordinary attitude taken by the British Commissioner from England. The latter appeared to forget that he was simply one of a Board of Judges and assumed the position of an umpire whose duty it was to decide between the representatives of Canada on one side and the United States on the other. This at least is the only solution of his action that occurs to us, and on this supposition we can well believe he acted with entire honesty of purpose. He seems to have been impressed with an incorrect idea that it would be an international calamity if there should not be an award of some sort, and that his mission was in that way to keep up cordial relations between England and the United States. So filled was he with this thought, that, imagining he was the best person to deal with the situation and knew much better than Canada's chosen representatives did, as to what was most in her interest, he ignored them completely, and took what we in this country (and we are best able to judge) believe to have been an entirely false position; and meeting men more competent to deal with matters of that kind than himself made what we regard

as a disastrous and irredeemable blunder. This, however, we gladly charge to his head rather than to his heart.

The best that Canada could have hoped for was a disagreement, but the advantage would have been that all the evidence and arguments would have become public property. Literature would have been collected and provided from which it would have been possible to have arrived hereafter at a fair compromise by diplomatic negotiations by men competent to deal with the question in that aspect. This advantage, however, has been lost by Lord Alverstone's conduct—most mistaken in conception and most unfortunate in results.

As to the representatives of the United States on this Commission, we have no quarrel with them as to the award. As sharp business men they are entitled to the credit of their clever handling of the matter, and have received, properly enough, the congratulations of the President and their people. But never again will there be a commission constituted as was the Alaska Boundary Commission for the settlement of any question affecting the territorial rights of the Dominion of Canada.

We recognize, of course, that the parties to the treaty are Great Britain and the United States, although it is Canada that is directly interested in the dispute. We also recognize that the general interests of the Empire, of which we form an integral part, are not to be ignored, either on moral grounds or grounds of expediency. And it may be claimed that for some reason which has not been made public it was necessary to submit to the demand of the United States for territory on the Alaskan border which, we say, belongs to us. But if this was the mind of the British Government, we have three things to say:—(1) Giving in to the demands of the United States, from time to time, and ignoring some very questionable diplomatic proceedings relating thereto*, is not the way to secure their respect and co-operation. They have naturally come to the conclusion that a very mild threat is all that is necessary to bring England to their terms; and the feeling among their politicians may be expressed in a remark which has

* In this connection reference might be made to a collection of historical facts in British and American diplomacy affecting Canada, 1782-1899, by Mr. Thomas Hodgins, K.C., Toronto, 1900, and to an unsavoury episode at the time of the Behring Sea arbitration, when there was produced as evidence, from the archives at Washington, a document which turned out to contain interpolated forgeries. It was, of course, subsequently withdrawn.

actually been made—"England is playing our game for us with Canada." (2) If it be necessary to secure their good-will, by giving up portions of our territory, it is not consistent with the dignity of British Statesmen to be parties in the solemn farce of joining in the formation of a Board of judges to adjudicate upon one of these territorial claims, under the conditions and circumstances, hereinbefore referred to. (3) If so necessary, as aforesaid, Canada can well say that she has the right to be consulted, and to be a party to the deed of gift. Her patriotism and loyalty to the Empire (proved on many occasions and sealed by the blood of her sons) will be equal to the strain.

In conclusion, let it be understood, once and for all, that Canada is an integral part of the British Empire. Let it be also understood that neither the permitted aggressiveness of any other nation, nor the apathy, indifference or desertion of those who for the time being control the policy of our Empire, or of those appointed by them, or of any one who improperly takes upon himself any authority in that behalf, can change our attitude to the motherland. All those things have happened to us in the past; but we recognize that our countrymen in the old land, though possessing the many sterling characteristics which make the Anglo-Saxon race what it is, are naturally somewhat inclined to be self-opinionated, and so, often appear indifferent to the rights of their kindred abroad. Assuming a knowledge of other people's affairs which they do not possess, they too often treat others with an assumption of superiority which is apt to be irritating and offensive. Some such characteristics as these lost to England the thirteen states of the Union.

But there is no danger of any such result so far as Canada is concerned. She is as much a part of the Empire as any portion of the British Isles. The thought of annexation with the United States is dead and buried long ago and beyond possibility of resurrection. The so-called colonies compose the larger part of the Empire and are rapidly becoming more and more important elements in its existence, and are necessary to England's future. The Duke of Wellington, a far sighted man, one said: "England can as well do without London as without Canada." This is equally true with regard to our other great possessions. There is as we say no shadow of a thought in this Dominion of any dismemberment; but simply that, should the occasion arise, we shall insist

upon our rights so far as they are consistent with the welfare of the Empire as a whole. A homely but apt illustration might be given of sons who have grown to manhood under the fostering care of the "old folks at home;" but the time comes, as come it must, when the latter need the support and advice of the former. It is given gladly and lovingly to the utmost limit of their powers, but those who are thus coming to the front and beginning to assume the burdens must have some say in the management of the estate.

We look forward hopefully and patiently to the time when those in the old homeland will understand more of this great Dominion and its vast possibilities, and the free, brave race of men developing therein: who (we say it unboastingly) more alert and of wider vision than themselves, are seeking to work out their desired destiny with loyal devotion and adherence to the worthiest traditions of the two little islands from whence came so many of the forefathers of Canada in the days gone by.

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## *CRIMINAL APPEALS AT COMMON LAW.*

In the course of a very thoughtful article in the *New York Independent* on the policy of abolishing appeals in criminal cases as a means of checking the barbarous practice of lynching—the merits of which we shall not now discuss—Mr. Justice Brewer, of the Supreme Court of the United States, makes a statement as to a matter of juridical history which invokes our criticism as to its accuracy. He says: "I have hitherto called attention to the fact that in England . . . up to the last few years there was no right of appeal in criminal cases." In order that there may be no misunderstanding of his meaning the learned judge thus explains himself: "What is meant by the right of appeal? It is the claim that every one defeated in a trial in one court may, if he wishes, compel a review of that trial before there is a final judgment against him." He also quotes a judgment of the Supreme Court of the United States which declares that "a review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law" (153 U. S. 684, 687.) We need not concern ourselves with an explanation of what is here meant by the words "a necessary element of due process of

law." Suffice it to say that Mr. Justice Brewer treats the case as an authority for his view that neither at common law, nor under the constitution of the United States, could a convicted criminal claim the right of appeal.

Now, with deference, we shall endeavour to shew that at common law there was a right of appeal in criminal cases, limited it is true, but still a right.

The privilege of a party in any legal proceeding, who feels himself aggrieved by the decision of the court of first instance, to appeal to a higher court carries us back to the very beginning of British institutions. "I may carry my plaint to the foot of the throne," was the proud boast of the mediæval suitor.

In the time of the Anglo-Saxon kings the Witenagemot was the highest court of justice in causes civil as well as criminal. The late Professor Freeman was able to shew (Norman Conquest, v. pp. 386, 387), with great clearness we think, that in respect of its judicial capacity the House of Lords not only grew out of the Witenagemot but is, practically, an extension of it. The curia regis of the Norman kings was but a committee of the Witan, the latter having been transformed into the magnum consilium, which, in turn, after the admission of representatives from the counties, cities and boroughs, became known as the "Parliament." The curia regis, which consisted of such ecclesiastics and barons as held high office in the royal household, together with such persons as were learned in the law, called justitiæ or justitiarii, was presided over by the King himself, or, in his absence, by the chief justiciar, and was the seat of supreme judicature, both original and appellate. Later on, when the curia regis had transferred its original jurisdiction to the Chancery and the three common law courts, the King, to whom as fountain of justice, the subject, on the failure of the regular tribunals, had a right of appeal, retained his supreme appellate jurisdiction, and exercised it sometimes through his ordinary or standing council (the inchoate House of Lords), and sometimes through the magnum consilium, or Parliament (cf. Dennison and Scotts' House of Lords Practice, xxv). Speaking of the appellate jurisdiction of the House of Lords, Blackstone says: "The House of Peers, which is the supreme court of judicature in the kingdom, has at present no original jurisdiction over causes, but only upon appeals and writs of error; to rectify any injustice or mistake of the law committed by the courts below. To this

authority they succeeded of course upon the dissolution of the aula [curia] regis." (Com. iii, c. 4, p. 56.)

In the earliest records of Parliament we find petitions to the King to remove causes from the ordinary common law courts into the House of Lords, but the only judicial proceeding by which matters of a criminal nature could formerly be brought there was by writ of error: Arch. Crim. Prac. 197. Proceedings in error, which ultimately became the regular medium of appeal from the inferior to the superior courts of common law, had their origin in the thirteenth century. In Bracton's "Note Book," pl. 1166, we find perhaps the earliest recorded instance of judicial proceedings in error. There we are informed that in the year 1235, at the instance of the Abbot of St. Augustine's, Bristol, a case in which, so the good abbot opined, the "Judges of the Bench" had been guilty of error, was brought "before the King" coram Rege). Thereupon, the judges having "pleaded ignorance," the judgment was set aside.

The early books shew that there was some doubt whether writs of error lay as of right, or were granted by the King ex gratia.

Lord Holt, in speaking generally of the writ, is reported to have said: "A writ of error may be against the King without petition, though anciently that was used, and was a decency; but since 1640 writs of error have been made out ex officio:" 1 Salk. 264. In *Christie* v. *Richardson*, 3 T.R. 78, a much later case, Lord Kenyon said: "If it were fit that parties should be restrained from bringing writs of error, the Legislature must interfere. But, by the constitution of this country, every subject has a right to have his cause reviewed by a court of error."

In 1705 the question was deliberately considered by the judges of the Queen's Bench. In 2 Salk. at p. 504 (*Reg.* v. *Paty*), we have the following report of the matter: "And now a new question was started and referred to the judges, whether the Queen ought to allow a writ of error in this or any other case ex debito justitiæ, or ex mera gratia? And ten of the judges were of opinion that the Queen could not deny the writ of error; but it was grantable ex debito justitiæ, except only in treason or felony." In commenting upon *Reg.* v. *Paty* in *R.* v. *Wilkes*, 4 Burr. at p. 2551, Lord Mansfield says: "This opinion in the 3rd of Queen Anne has made a great alteration as to outlawries in criminal cases under treason and felony. In a misdemeanor if there be possible cause, it ought

not to be denied: this court would order the Attorney-General to grant his fiat. But be the error ever so manifest in treason or felony, the King's pleasure to deny the writ is conclusive."

In chaper 30 of Book IV. of his Commentaries, Blackstone says, p. 392: "A judgment may be reversed by writ of error, which lies from all inferior criminal jurisdictions to the Court of King's Bench, and from the King's Bench to the House of Peers . . . These writs of error to reverse judgments in case of misdemeanors are not to be allowed of course, but on sufficient probable cause shewn by the Attorney-General, and then they are understood to be grantable of common right and ex debito justitiæ."

Under the modern English practice in criminal cases a writ of error lies to the Court of Appeal from the Crown side of the King's Bench Division of the High Court of Justice for every defect in substance appearing on the face of the record, for which an indictment might have been quashed, or which would have been fatal on demurrer or in arrest of judgment, provided such defect is not cured by verdict, and provided no queston of law has been reserved for the Court of Crown Cases Reserved, under 11 and 12 Vict., c. 78. (See 35 and 36 Vict., c. 66, s. 47). It must be a defect in substance appearing on the face of the record, and not contrary to the record, for the record is an estoppel: *R.* v. *Carlisle*, 2 B. & Ad. 362; *R.* v. *Newton*, 24 L.J.C.P. 148; and it must be a final judgment. But in no case can the writ be issued until the fiat of the Attorney-General therefor has been first obtained: Short & Mellor's Crown Office Rules, p 317. The Attorney-General has discretion to withhold a fiat: In re Piggot, 11 Cox. 311. An appeal from the Court of Appeal to the House of Lords on a judgment upon a writ of error can now only be had upon petition: The Appellate Jurisdiction Act, 1876, sec. 11.

So it will be seen that recent legislation instead of enlarging the old "right" of appeal at common law has rather been in the contrary direction; and that it is not in any sense correct to say "in England up to the last few years there was no right of appeal in criminal cases."

CHARLES MORSE.

## *FORMER STATUS, JUDICIALLY, OF CITIES.*

The profession in Ontario generally may not know that, less than half a century ago, Toronto, with her sister cities, Hamilton and Kingston, fulfilled under the law, all of the requisites of what is known as "a County of a City". The Act of Upper Canada, c. 81, s. 85, prescribes, in fact, that such cities shall, "for all municipal purposes as are herein or hereby specially provided, be counties of themselves".

The infallible test by which a city will be found to answer the description of "a County of a City" is the existence of a separate Quarter or General Sessions of the Peace. This criterion was furnished, although county justices were allowed to hold their sessions within the limits of a city.

A separate Commission of the Peace issued for the city, it being expressly declared "that justices of the peace for a county in which a city lies shall have no jurisdiction over offences commited in a city, and the warrants of county justices shall be required to be endorsed before being executed in a city, in the same manner as required by law when to be executed in a separate county." Commissions of 1866, appointing justices for Toronto, contain the expression "for the County of the City of Toronto."

The case of *Reg.* v. *Rowe*, 14 C.P. 307, is interesting as exhibiting the strictness with which the respective authorities of justices of the peace for a county and a city were interpreted. The prisoner had given evidence upon a charge before a magistrate, alleging the commission of a felony in the County of Middlesex. When administering the oath, and taking the evidence, the justices sat in the City of London. It was objected by counsel for defendant on his trial, that the justices had no jurisdiction or authority to administer the oath to the defendant inasmuch as they were then sitting within the City of London, where, as justices of the County of Middlesex, they had no jurisdiction. The objection, disallowed by Morrison, J. at the trial, was upheld by the Court in banc, judgment being delivered by the late Sir John B. Robinson.

The decision brings out, moreover, the difference between the old and new law in respect to the place of sitting. The law for sometime back has permitted justices of the peace for the county, directing an enquiry into an offence occurring within their juris-

diction to sit in a city within its limits. The change in the statute law in this respect formed the subject of Mr. Justice Rose's deliverance in *Reg.* v. *Riley*, 12 P.R. 98.

Besides the provisions to which reference has been made, a Recorder's Court was established in every city, which had, "as to crimes and offences committed in a city, and as to matters of civil concern therein, the same jurisdiction and powers as Courts of Quarter Sessions of Peace in the County." It will, therefore be observed that cities, during the greater part of the time of the union of the Provinces, were judicial entities, as, indeed, every city of importance in England is to-day.

Is not the point worthy of consideration whether, as regards the larger cities of the Province, it would not be well to return to the old state of the law?

J. B. MACKENZIE

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By the amendment of the Loan Companies Act (R.S.O. c. 205) made at the last session of the Ontario Legislature it is, amongst other things, provided by a section added to the principal act, viz: 49 A., that sections 41 to 49, both inclusive, shall in the respective cases equally apply to the purchase and sale of the assets of one trust corporation to another and to the amalgamation of trust corporations, etc. Sec. 46 of the principal Act was however repealed by 63 Vict. c 27. s. 8. which substituted other provisions therefor relating to the registration of the certificate of assent to amalgamation. It may, therefore, be a matter of moment to consider whether this latter revision comes within the new section 49A. It is possible that the Courts may be able to regard the substituted section as merely an amendment of the original s. 46. The Industrial Schools Act (R.S.O. c. 304), is also amended so that s. 16 now has two sub-sections numbered (2). See 2 Edw. VII, c. 37, s. 5.

## *LA BELLE DAME SANS MERCI.*

(D'après Keats.)

MONTAGUE v. BENEDICT: 3 B. & C. 631.

It is a "vulgar error," traceable apparently to this case, that "jewels are not necessaries"; yet the case only decides that in view of the defendant's social and financial circumstances, and his wife's fortune, the trinkets supplied to the latter by the plaintiff could not be considered part of her necessary apparel. Where a husband and wife are living together the term "necessaries" is defined by Willes, J. in *Phillipson* v. *Hayter* L. R. 6 C. P. 38 as articles "really necessary and suitable to the style in which the husband chooses to live, in so far as they fall fairly within the domestic department which is ordinarily confided to the management of the wife." When they are living apart, the presumption that the wife has her husband's authority to purchase "necessaries" does not always apply—but that, as Mr. Kipling says, is another story.

*O what can ail thee, Montague,*
*Alone and palely loitering?*
*The look is in thy hollow eye*
*Ill-hap doth bring.*

*O what can ail thee, man of pelf,*
*So haggard and so woe-begone?*
*For, certes, gold is to be had,*
*And patrons to be 'done'!*

*I see a paper in thy hand,*
*A judgment dight with stamp and seal:*
*It holds thee with a mystic spell,*
*Thy senses reel.*

"A lady visited my shop,
A *feme covert*—but not my wooing—
Her eyes full bright, and purse full light,
Were my undoing."

"A golden dagger for her hair,
And bracelets, too, and jewelled zone,
I wrought for my fair customer—
Their price I moan."

"Her promises lulled me asleep,
Her lord would pay—ah, woe betide!
The siren looked as she spoke true
The while she lied".

"Eftsoons I haled him to King's Bench,
(A fearsome thing—he practised there!)
But Benedict his wife's smooth speech
Did straight forswear".

"Ah, me! my trinkets rich and rare
He neither purchased nor had seen;
His wife must dress in modest guise,
Not like a queen".

"To give her sixty pounds a year
Was all he might (my bill was more!)
Beyond her station were these gauds—
All this he swore".

"Twas vain I urged '*implied assent*'
And all the burden that it carries;
The Court adjudged my jewels were
Not '*necessaries*.'"

"Then as they found no '*agency*'
Of wife for husband *re* my bill,
In law or fact, they handed down
A non-suit chill."

"And this the paper in my hand,
A judgment dight with stamp and seal:
It holds me with a mystic spell,
My senses reel."

CHARLES MORSE.

*The Law Times*, (England), in its Irish notes refers to an interesting case of a novel character. A paralized man desired to make his will, but was unable to speak or to move his hands. His intellect however, was clear and he had the power of opening and shutting his eyes. His solicitor ingeniously arranged that the closing of his eyes was to mean an affirmative answer to a question, and keeping them shut was to mean a negative. A series of exhaustive questions were then put to him, which he answered in the way above indicated. In this way the solicitor received instructions for the preparation of the will, and it was executed or assented to in the same manner. The will being contested by a legatee under a former will, it was held that this will, so singularly prepared and assented to, was properly executed, and probate was granted.

# REPORTS AND NOTES OF CASES.

## Province of Ontario.

### COURT OF APPEAL.

Full Court.] THE KING *v.* HARRON. [Oct. 26, 1903.

*Criminal law—Obstructing distress—Onus on Crown to prove legality of distress—Criminal Code, s. 144 (2).*

Sec. 144 (2) of the Criminal Code enacts that "every one is guilty of an offence . . who resists or wilfully obstructs any person . . in making any lawful distress."

*Held*, that it devolves on the prosecution under this section to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as for example, in this case, that there was rent in arrear. It was necessary therefore for the Crown to shew that rent was due and in arrear.

*J. H. Moss*, for prisoners. *Cartwright*, K.C., for the Crown.

Full Court.] THE KING *v.* BULLOCK AND STEVENS. [Oct. 26, 1903.

*Criminal procedure—Several charges—Hearing evidence on second before deciding first—Conviction.*

The prisoners were charged before the County Judge on two separate charges of receiving, on two separate days, stolen goods, knowing them to be stolen, and of house-breaking and stealing on the second of the two days. At the close of the case for the Crown on the first charge on Dec. 23, the judge found a prima facie case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On Dec. 30 he tried them on the third charge and acquitted them on it. On Dec. 31 he sentenced them on the first two charges. The judge certified that he came to his finding on the first charge before hearing the second, and was not conscious of having been biased on the latter, by the evidence given on the first.

*Held*, that, inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the person charged, and in respect to the principal witness, and also in view of what the learned judge stated, and notwithstanding the expediency of not mixing up criminal charges, the convictions should be upheld.

*Kelleher*, for prisoners. *Cartwright*, K.C., for Crown.

From Divisional Court.] [Nov. 4, 1903.

RANDALL *v.* OTTAWA ELECTRIC LIGHT CO.

*Accident—Live electric wire—Contact with—Negligence—Privity of contract—Contributory negligence.*

The defendants, electrical engineers and contractors, had contracted to illuminate certain buildings and for such purpose had arranged with an electric company for the supply of electric current. To enable such current to be transmitted the defendants had strung wires on existing telegraph and telephone poles, their wires being some distance below the other wires, and were fastened to glass insulators with tie wire, the ends of which were some two or three inches long and were not protected by any insulating covering. The plaintiff and two other employees of the electric company were engaged in putting up for the company an electric transformer for the transmission of electricity to adjacent premises, but as to which the defendants were in no way interested, and while working on the pole the plaintiff's hands came into contact with one of the ends of the tie wire, which, by reason of the absence of such insulating covering, had become a live wire, whereby the plaintiff received a shock and he fell to the ground and was injured. The plaintiff well knew of the dangerous character of the work and the likelihood of there being live wires, and that the rule of the company in such cases was that rubber gloves should be worn.

*Held*, that no negligence on the defendants' part was proved, for no duty was cast upon them with regard to the plaintiff who was not their employee, and the work, which was being done, was not on their behalf; and that even if negligence on the defendants' part could be assumed, the plaintiff was guilty of such contributory negligence as would preclude his recovering.

*Riddell*, K.C., and *Chas. Murphy*, for appellant. *H. M. Mowat*, K.C., and *Fripp*, for respondent.

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Full Court.] [Nov. 15, 1903.

WALKERVILLE MATCH CO. *v.* SCOTTISH UNION CO.

*Insurance—Signature by agent per procuratorem.*

Delegatus non potest delegari. Therefore defendants held not bound by a policy signed by the general manager and countersigned in the name of one who had been their agent, by one of his clerks, but without any authorization by him, even though the insured may not have known of the cessation of the agency. The policy contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company.

*A. H. Clarke*, K.C., for appellant. *O. E. Fleming*, for respondent.

Full Court.] [Nov. 15, 1903.

HINDS *v.* TOWN OF BARRIE AND REUBEN WEBB.

*Practice—Joinder of defendants—Rules 186, 187—Separate cause of action.*

Different defendants cannot be brought before the Court in the same action where the real causes of action that exist against them are separate.

In this case the plaintiff sued for the obstruction of a water course which passed through her property, causing it to be overflowed. The town was charged by the plaintiff with having increased the volume of water, while also obstructing the water-course. Webb was charged with having obstructed the water-course where it passed through his land. And it was charged that the natural effect of the concurrent acts of the defendants was to cause the water to become obstructed and to overflow the plaintiff's land. But it was not alleged that these acts were done in concert, or that the defendants were jointly concerned in their commission.

*Held*, that the plaintiff must elect against which of the two defendants she would continue the action.

*Douglas*, K.C., for appellants. *Creswicke*, for respondent.

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From Co. Court, Oxford.] [Nov. 16, 1903.

IN RE MCDONALD AND TOWN OF LISTOWEL

*Registry Laws—Amendment of registered plan—Petition to County Court Judge—Jurisdiction of Judge of another county—Local Courts Act—Evidence on petition—Affidavits—Merits—Order refusing to re-open—Appeal.*

A petition under s. 110 of the Registry Act, R.S.O. 1897, c. 136, for an order amending a plan of land in a town, by closing part of a street allowance, was presented to the Judge of the County Court of Perth, in which county the land lay.

*Held*, 1. The Judge of another County Court had jurisdiction, upon the request of the Judge of the County Court of Perth, to hear and adjudicate upon the petition. To hear such a petition is one of the judicial duties to be performed by the Judge of a County Court in any case where application is made him instead of to a Judge of the High Court; and he has jurisdiction by virtue of ss. 16 and 18 of the Local Courts Act, R.S.O. 1897, c. 54.

2. Although the application to amend the plan is by petition and is therefore interlocutory in form, the order to be made finally and conclusively settles the rights of the parties concerned; and the evidence upon the application, if the facts are in dispute, should, in the absence of agreement, viva voce. The Judge properly refused to receive affidavits in answer to the oral testimony of witnesses given in support of the petition.

3. Upon the merits, the order of the Judge amending the plan was justified, the portion of the street in question never having been opened

or used as a highway, and the lands abutting on both sides being owned by the petitioner.

4. No appeal lies to the Court of Appeal from a subsequent order of the Judge refusing to open the proceedings and receive further evidence.

Order of Judge of County Court of Oxford affirmed.

*D. L. McCarthy*, for the appellant. *Douglas*, K.C., for the respondent.

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From Meredith, C.J.C.P.] [Nov. 16, 1903.

EACRETT *v.* GORE DISTRICT MUTUAL INS. CO.

*Fire insurance—Policy on goods—Partial loss—Other insurance—Proportionate payment—Conditions of policy—Construction—Over-valuation.*

The insurance was upon goods valued in the application at $15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with the loss of $6,250. The defendant's policy was for $3,000; there was other insurance to the amount of $7,000, and the total value of the goods at the time of the fire was $9,274.62. Statutory condition No. 9 provided that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was endorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings if the property insured is found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application."

*Held*, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amounts of his loss in accordance with statutory condition No. 9.

Judgment of MEREDITH, C.J.C.P., affirmed.

*Riddell*, K.C., and *Rose*, for appellants. *Gibbons*, K.C., for respondent.

From County Judge.] [Nov. 30, 1903.

Maclennan, J.A.] RE VOTERS' LIST, TOWNSHIP OF RAWDEN.

*Voters' Lists—Notice to strike off names—Non-compliance with form—Amendment.*

It is not essential that the form given in Ontario Voters' Lists Act, R.S.O. 1897, c. 7, for objections to the names wrongly inserted on the voters' list should be followed with exactness, all that is required being that the nature of the objections to the names should be stated with reasonable clearness. Where, therefore, in giving notice of the wrongful insertion of names placed on the voters' list, the complainant used List No. 2 of Form 6 in the schedule, being the list for persons wrongfully named, instead of list No 3, being the list for those wrongfully inserted on the voters' list, but it was quite apparent what the grounds of the objections were, the notice is sufficient. An amendment in such case might be made if such was necessary.

*R. A. Grant*, for complainant. No one contra.

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From Osler, J.A.] [Dec. 7, 1903.

IN RE NORTH NORFOLK PROVINCIAL ELECTION.

SNYDER *v.* LITTLE.

IN RE NORTH PERTH PROVINCIAL ELECTION.

MONTIETH *v.* BROWN.

*Parliamentary elections—Controverted election petition—Application to fix day for trial—Delay—Extending time for trial—Grounds for—Discretion—Appeal—Form of order.*

The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from March 10 to June 27. On Nov. 5 applications were made by the petitioners to a judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other judges on the rota, and the difficulty of immediately communicating with them, the judge was unable then to fix dates, and the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th Nov. the petitioners moved before the same judge (one of the Judges of the Court of Appeal) for, and obtained orders extending the time for the commencement of the trials, upon affidavits shewing that the petitioners believed that the court would fix days for trial suitable to the judges' other engagements; that bribery was extensively practised on behalf of the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were made bona fide and not for delay.

*Held*, that the applications to the rota judge were in time to enable the trials to be commenced within six months from the date of the presentation of the petition (excluding the time occupied by the session) within the meaning of ss. 47 and 48 of the Ontario Controverted Elections Act; and the failure to fix days could not be attributed to the petitioners; ss. 16 and 47 of the Act and Rules 26 and 27 leave the fixing of days in the hands of the rota judges.

It was not open to the respondents to complaim of lack of diligence by the petitioners within the six months, no days for trial having been fixed.

Much of what was necessary to be shewn on the application to extend the time, transpired in the presence of the judge, and the facts were within his own knowledge; there was no reason why he should not act upon that knowledge in considering the applications.

And having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders; the judge rightly exercised his discretion upon sufficient grounds and for sufficient reason appearing before him, and his orders should not be interfered with.

The appropriate form of the orders would be to extend the time for fixing the days of trial, rather than the time for the commencement of the trial.

*Mabee*, K.C., *H. L. Drayton* and *Slaght*, for the appellants. *Baird* and *Ryckman*, for the petitioners.

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## HIGH COURT OF JUSTICE.

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Meredith, C.J.C.P.] IN RE SOMBRA PUBLIC SCHOOL. [Nov. 2, 1903.

*Public Schools—Selection of site—Arbitration and award.*

Under s. 34 of the Public Schools Act, I Edw. VII. c. 39 (O.), the arbitrator appointed in consequence of a majority of the ratepayers at a special meeting differing from the trustees as to the suitability of the site for a school house selected by the trustees can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site.

*Middleton*, for applicants. *Riddell*, K.C., and *Carscallen*, for respondents.

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Boyd, C.] BURDETT V. FADER. [Nov. 4, 1903.

*Injunction—Debtor disposing of property—Status of creditor—Verdict for damages—Fraud.*

The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the

defendant enjoined from disposing of his property, even where the plaintiff shews upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property.

*D. O'Connell*, for plaintiff. *R. D. Gunn*, K.C., for defendant.

Boyd, C.] [Nov. 5, 1903.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R.W.CO.

*Railway—Mortgage on undertaking—Bonds—Interest Coupons—Arrears—Real Property Limitation Act.*

The restrictions placed upon the right to recover arrears of interest charged upon land imposed by sub-ss. 17 and 24 of the Real Property Limitation Act, R.S.O. 1897, c. 133, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage deeds of trust. The coupons are in effect documents under seal—the bond under seal containing a covenant for payment of the coupons—and they, therefore, partake of the nature of a specialty, and are good for at least twenty years.

*G. T. Blackstock*, K.C., and *T. P. Galt* for the defendants Blackstock and Weddell. *J. H. Ross*, for defendant Ritchie. *D. L. McCarthy*, for plaintiffs.

Boyd, C.] FORBES v. GRIMSBY PUBLIC SCHOOL BOARD. [Nov. 5, 1903.

*Public Schools—Purchase of site and erection of building—Funds provided by council—Proceeds of old site and building—Title to land—Expropriation—Agreement with tenant for life.*

Although, as decided in *Smith* v. *Fort William Public School Board*, 24 O.R. 366, public school trustees should not undertake for building purposes an outlay in excess of funds provided by the council, they are not restricted to the debentures voted by the council under s. 76 of the Public School Act, 1901, but may also use other moneys they have under control in the shape of rent and the proceeds of the old school house and site. The Court should not lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality.

An agreement for purchase and possession of a new site made by a school board with the tenant for life is one that controls the remaindermen under s. 39 of the Act.

*Young* v. *Midland R.W.Co.*, 22 S.C.R. 190, followed.

*Marsh*, K.C., and *Pettit*, for plaintiff. *Lynch-Staunton*, K.C., for defendants.

Boyd, C.] TAYLOR v. TAYLOR. [Nov. 9, 1903.

*Writ of summons—Substitutional service—Motion to set aside—Status of applicant—Solicitor.*

Where a solicitor who was served with the writ of summons for the

defendant, under an order for substitutional service, applied in his own name, but on the defendant's behalf, to set aside the service :—

*Held*, that he had no locus standi.

The Court will not set aside substitutional service if it appears or can fairly be inferred that the defendant has notice of the proceedings.

*Semble*, that if the solicitor was not acting for and in communication with the defendant, he might have sent back the copy of the writ served, or might, as an officer of the Court, have advised the Court that an error had been committed in ordering service upon him ; and even a person who is not an officer of the Court may move to set aside the service if he is not an agent.

Decision of Master in Chambers, 39 C.L.J. 755, affirmed on different grounds.

*W. J. Elliott*, for solicitor. *H. D. Gamble*, for plaintiff.

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Boyd, C.] [Nov. 9, 1903.

IN RE OLIVER AND BAY OF QUINTE R. W. CO.

*Costs—Railway—Expropriation—Abandonment.*

The word "desist" in C.S.C. c. 66, s. 11, sub s. 6, has the same meaning as "abandon" in 51 Vict. c. 29, s. 158 (D)., i. e., to leave off or discontinue. Whether voluntarily or compulsorily makes no difference ; if the railway company ceases operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, and the company must pay costs to the landowner.

*Widder* v. *Buffalo and Lake Huron R. W. Co.*, 24 U.C.R. 234, applied and followed.

*Marsh*, K.C., for owner and mortgagee. *Middleton*, for company.

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Boyd, C.] CHITTICK *v.* LOWERY. [Nov. 9, 1903.

*Fi. fa. lands - Sale of equity of redemption—Purchase by execution creditor — Subsequent conveyance to debtor — Covenants — Incumbrances — Release.*

Under a writ of fi. fa. against the lands of the original defendant (the mortgagor) the sheriff sold the equity of redemption in mortgaged land, and conveyed it to the purchaser in 1896. The purchaser was at that time the assignee of the judgment upon which the fi. fa. was founded. After holding the interest acquired by the purchase for a year he sold it to the mortgagor, and made to him the usual short form conveyance under R.S.O. 1897, c. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd Aug., 1899, but was not then renewed. In 1902 the purchaser assigned the judgment (so paid in part) to one S., and there-

fore an alias writ of fi. fa. lands was issued and placed in the hands of the sheriff, and in respect of that execution S. was made a party in the Master's office to an action brought upon the mortgage.

*Held*, that the land was not affected by the judgment and execution. While the purchaser retained his interest, but the effect of his sale and conveyance to the mortgagor was to invest the latter with a new interest in the land, and that interest fell under the operation of the fi. fa.; and the statutory covenants, No. 4, as to encumbrances, and No. 8 as to the release of all claims contained in the conveyance by the purchaser to the mortgagor did not operate to release the judgment or the execution; and the latter was, therefore, a subsisting incumbrance.

*J. Bicknell*, K.C., for defendant Stovel. *Hewson*, K.C., for defendant Lowery and subsequent mortgagees. *D. L. McCarthy*, for plaintiff.

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Britton, J.] IN RE PAKENHAM PORK PACKING CO. [Nov. 7, 14, 1903

*Company—Winding-up—Action for calls—Counterclaim for rescission—Leave to proceed refused—Leave to appeal.*

Previous to an order for the winding-up of the company under the Dominion Winding-up Act, an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus.

*Held*, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim; and his application for leave to proceed in the action notwithstanding the winding-up order was refused, but leave to apply again was reserved.

Dictum of Strong, C.J., in *Re Hess Manufacturing Co.*, 23 S.C.R. 644, at pp. 665 6, explained.

Leave to appeal from the order of a judge in court affirming the dismissal by the referee of the application for leave to proceed was refused.

*George Bell*, for William Gorrell. *S. B. Woods*, for the liquidator.

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Ferguson, J.] [Nov. 11, 1903.

SMITH *v.* GRAND ORANGE LODGE OF BRITISH AMERICA.

*Life insurance—Medical examination—Misstatements and concealments—Materiality—Breach of warranty—Cancellation of policy.*

In the plaintiff's application to the defendants for a policy of life assurance he warranted, amongst other things, that the answers in the medical examination which formed part thereof, were full, complete, and true, and without any suppression of facts, so far as such answers were material to the contract of insurance to be based thereon.

In the examination the plaintiff stated, that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of la grippe, for three years next before his examination, whereas he had been ill for two months immediately before his examination, and had consulted two doctors, who had told him that he was suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing.

*Held*, that these statements and concealments were material and constituted a breach of warranty, and therefore the policy was void.

Judgment was given for the defendants in their counterclaim for delivery up of the policy to be cancelled.

*John MacGregor* and *East*, for plaintiff. *Worrell*, K.C., for defendants.

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Maclaren, J.A.] [Nov. 14, 1903.

IN RE CLARKE, TORONTO GENERAL TRUSTS CORPORATION *v.* CLARKE.

*Trusts and trustees—Investments—Realization—Tenants for life Remaindermen—Apportionment—Election—Rate of interest.*

A testatrix devised and bequeathed all her real and personal estate to trustees to sell and convert into money and to invest the money. She directed that the residue, after payment of debts, etc., should be divided equally among her four children, three daughters and one son; each daughter to receive the income of her share for life, and her children the capital after her death; the son to receive his fourth absolutely on coming of age. In 1887, after all the children had attained their majority, a deed of partition was made. The investments were divided into four equal parts, an undivided fourth of certain real estate which had belonged to the testatrix, being allotted to each of the children. By the deed the children ratified the acts of the trustees and continued them in the trust. At the time the son executed a deed to the trustees in which they were to hold his share in trust for him during his life, with remainder to his children. The real estate above mentioned was subject to a building lease, renewable. When the lease expired in 1893 it was renewed for 21 years at $1,850 a year. The lessee made default in 1894 and the trustees took possession of the land and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. In Nov., 1902, a sale was effected for $47,500.

*Held*, following *In re Cameron*, 2 O.L.R. 756, that the life tenants were entitled to some portion of this sum.

But in ascertaining what sum was to be allowed them, the period before the deed of partition in 1887 was not to be considered. The life tenants, then in effect, elected to treat this property as a satisfactory investment.

The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest.

*Walters* v. *Solicitors for the Treasury*, [1900] 2 c. 107, followed.

An inquiry was ordered to determine what sum invested on the 1st May, 1894, would have produced $47,500 on the 15th Nov., 1902, interest being calculated at four and one-half per cent. per annum with half yearly rents, and credit being given for the sums actually received by the life tenants from the rents accruing during that period.

*A. Fasken*, for trustees. *Riddell*, K.C., for life tenants. *Harcourt*, for infant remaindermen.

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Master in Chambers.] [Nov. 18, 1903.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

*Practice—Motion to set aside order for service out of jurisdiction—Stay of proceedings.*

A notice of motion to set aside an order for service of a writ of summons out of the jurisdiction, on grounds of irregularity, operates as a stay of proceedings until finally disposed of, so that time to enter appearance does not run in the meanwhile.

*Kilmer*, for plaintiff. *Middleton*, for defendant.

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Meredith, C.J., MacMahon, J., Teetzel, J.] [Nov. 21, 1903.

TRAVISS v. HALES.

*Husband and wife—Liability of husband for torts of wife.*

*Held*, affirming the judgment of STREET, J., that a husband is stil liable for the torts of his wife if the marriage takes place before July 1, 1884. The provisions of the Married Women's Property Act, 1884, 47 Vict. 19 (O.), applicable to persons married before that date, do not relieve him from liability.

*Earle* v. *Kingscote*, (1900) 2 Ch. 585, applied and followed. *Amer* v. *Rogers*, 31 C.P. 195, overruled. *Lee* v. *Hopkins*, 20 O.R. 666, approved.

*McDiarmid*, for defendant Richard Hales. *J. W. McCullough*, for plaintiff.

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Osler, J.A.] IN RE WILSON. [Nov. 21, 1903

*Assignments and preferences—Motion to remove assignee for benefit of creditors—Notice of motion—Grounds—Evidence—Proposed examination of assignee—Judicature Act and Rules.*

Where a summary motion is made under s. 8 (1) of the Assignments and Preferences Act, R.S.O. 1897, c. 147, to remove an assignee for the

benefit of creditors, the notice of motion should state the grounds, or they would at least appear in the material filed in support of the application.

The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application, under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it.

*A. C. McMaster*, for applicants. *D. L. McCarthy*, for assignee.

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Meredith, C.J.C.P., MacMahon, J.] [Nov. 26, 1903

MCCORMACK *v.* GRAND TRUNK R.W. CO.

*Railway—Carriage of goods—Liability for loss—Dog—Common carriers.*

The defendants are, by the Railway Act, 51 Vict. c. 29 (D.), common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railwayand. was not delivered to the plaintiff in accordance with the contract made with him.

Distinction between the English and Canadian Railway Acts pointed out.

Judgment of the County Court of Wentworth affirmed.

*J. W. Nesbitt*, K.C., for defendants. *Washington*, K.C., for plaintiff.

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## COUNTY COURT—HALDIMAND.

REX *v.* DEALTRY.

*Liquor License Act—Conviction for third offence—Enquiry as to previous convictions—Necessity for first finding as to subsequent offence.*

Sec. 101, sub-s. 2, of the Liquor License Act, which provides for the case of previous convictions, requires that the magistrate "shall in the first instance inquire concerning such subsequent offence only, and if the accused be found guilty thereof he shall then, and not before, be asked whether he was so previously convicted."

*Held*, following *Regina* v. *Edgar*, 15 O.R. 142, that the language of the section is peremptory, and therefore to give a magistrate jurisdiction thereunder to enquire as to previous convictions he must first find the accused guilty of the alleged subsequent offence. In this case, which was a conviction for a third offence, this was not done, but the previous convictions were enquired into and admitted by the defendant on cross-examination. The conviction was therefore quashed.

[Cayuga, Nov. 20, 1903. Colter, Co. J.

Appeal from a conviction made by Thomas Rice, police magistrate for the town of Dunnville, on Oct. 27, 1903. The defendant was tried before the above named police magistrate on a charge as a third offence of

having sold liquor during prohibited hours on Saturday, Sept. 5, 1903; the two previous convictions having been alleged for a similar offence, the first on Feb. 11, 1899, and the second on July 16, 1903. While the defendant was being cross-examined as a witness for the defence the counsel for the prosecution asked him whether he had been convicted as alleged in the information, which he admitted. A conviction was then recorded against the defendant as a third offence, and a fine of $80 and $36.92 costs imposed. The defendant appealed to the County Judge in Chambers.

*Haverson*, K.C., and *John C. Eccles*, for the appellant. *J. Murphy* and *J. F. McDonald*, contra.

The learned judge reserved judgment on the legal objections raised; the evidence to be taken de novo should the objections be overruled.

COLTER, Co. J.:—Several objections were taken to the conviction by counsel for the appellant and these were all serious. The Legislature has laid down certain rules and regulations to be observed in such cases. It is not the duty of the magistrate or judge to consider, nor has he any right to consider, whether these regulations are wise, prudent, or necessary; it is incumbent upon him simply to obey them. Sec. 101 of the Act is headed in large type, and prescribes not only what should, but what *shall*, be done in all such cases. Sec. 8 sub-s. 2, of the Interpretation Act (R.S.O. c. 1) says "the word *shall* shall be construed as imperative and the word *may* as permissive.

The language used in sub-s. 1 of sec. 101 of the Liquor License Act is as imperative as words can make it. Not only does the word *shall* occur therein, but the word *may* is also present there in the sixth line in a different sense. The word *then* in the third line of this sub-section is grammatically an adverb, meaning at that time. In the construction of statutes and wills it is sometimes interpreted differently. Its meaning in this section is, however, emphasized by putting immediately after it the words *and not before*, to indicate that in this section it is an adverb, meaning at that time, or subsequently, and not before. When the Legislature has prescribed the duties of the justices or police magistrate so positively and has gone to the extreme of being ungrammatical in the ordinary sense in order to make its wishes clearly known and understood, I am compelled to give effect to its directions. More particularly in cases of a criminal or penal character it is incumbent on the prosecution to conform exactly to the provisions of the statute. It is surely not too much to ask of the presiding magistrate or justice of the peace that he should read over carefully the section of the statute under which proceedings are taken, and that he should follow the directions prescribed as carefully as possible. It is not proper to substitute his own views for those prescribed.

If I were to give effect to this conviction I would be obliged to repeal for the purpose of this case the section in question. This of course I have neither the power nor the inclination to attempt to do.

In my opinion also it is dangerous to devote too much attention to fathoming the motives of the Legislature. Where its mandates are expressed clearly it is the duty of the court to follow them regardless of the consequences. If an amendment to the language of the Act is necessary it should be made by the Legislature and not by the Court.

The judgment in *Regina* v. *Edgar*, 15 O.R. 142, is, in my opinion, not only well considered but unanswerable. It is exactly to the point, and I am prepared to follow it unhesitatingly.

*Regina* v. *Brown*, 16 O.R. 41, goes off largely on another point. The language used at the close thereof indicates an expression of opinion, "it seems to me that sec. 101 is directory only." In this latter case the court's attention was not squarely directed to the issue involved in the case before me.

I therefore quash the conviction and allow the appeal without costs. The prosecutor may have a certificate of protection if it be deemed necessary.

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# Province of New Brunswick.

## SUPREME COURT.

En Banc.] MILLIGAN *v.* CROCKET. [Nov. 27, 1903.

*Cause called out of its turn on docket and jury empannelled in absence of defendant.*

This cause stood forth on the docket of the St. John Circuit. The first cause having gone over to a later circuit, and the second and third causes having been passed over, but not struck off, for the reason that the attorneys were not prepared to go on at the moment, the plaintiff's counsel moved for trial in this cause in the absence of the defendant, his attorney and counsel. The jury was empannelled and the examination of one witness concluded before counsel for the defendant appeared. The latter asked for his right of challenge, which the trial Judge said he could not grant without the consent of the plaintiff, who refused it.

The Court granted a new trial on the ground that the cause was called out of its turn on the docket and the jury empannelled in the absence of the defendant, his attorney and counsel.

*H. A. McKeown*, Sol. Gen., for plaintiff. *O. S. Crocket*, for defendant.

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En Banc.] MACRAE *v.* BROWN [Nov. 27, 1903.

*New trial on terms—Appeal as to costs.*

The jury on the writ de proprietate probanda in an action of replevin in the Northumberland County Court found for the defendant. On the trial

afterwards the finding was in favour of the plaintiff for the value of the goods. The defendant moved for a new trial, which the Judge granted on payment of costs. From this judgment defendant appealed.

The Court dismissed the appeal, holding that it involved only a question of costs.

*G. W. Allen*, K.C., for appellant. *A. R. Slipp*, for respondent.

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En Banc.] EX PARTE MCGOLDRICK. [Nov. 27, 1903.

*Review from inferior Court—Power to review on question of fact where debt under forty dollars.*

In an action in The Small Debt Court of Fredericton to recover a a balance on contra accounts between plaintiff and two defendants, who were partners, the defence being that the partnership was discharged by the plaintiff's acceptance from one of the members of the firm after its dissolution of his individual promissory note in satisfaction of the debt, the jury, found for the plaintiff. On review before a Supreme Court Judge the latter ordered a new trial. On the second trial the verdict was for the defendants. The plaintiff obtained an order for review from the County Court Judge and the latter set aside the verdict and ordered a verdict for the plaintiff for the full amount of his claim.

*Held*, on motion to make absolute a rule nisi to quash on certiorari, that, the amount of the claim being less than forty dollars, the County Court Judge had no power to review the finding of the jury, the issue being entirely one of fact.

Rule absolute to quash review order with directions to County Court Judge to dismiss the review with costs.

*O. S. Crocket*, in support of rule. *J. H. Barry*, K.C., contra.

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En Banc.] MCCOY *v.* BURPEE. [Nov. 27, 1903.

*Action for use and occupation—Eviction.*

Plaintiff let to defendant a farm of about 250 acres for one year, from May 1, 1901, at $250, payable half yearly, and in case of "a chance to sell" agreed to give him the refusal. Defendant went into possession and occupied the buildings for the whole year. In Sept. 1901, however, plaintiff sold the farm, all but 4 or 5 acres, on which the buildings were situated, to one H., who a few weeks later re-sold to the Dominion Government for a rifle range. Before the deeds were executed surveying parties went over the premises and laid out roads and other work for the location of the proposed range. Construction work was begun that fall and continued in the following spring before the expiration of the defendant's tenency. Defendant paid the first six month's rent but in an action to recover for the last six months he alleged that the acts referred to were done without

his consent. The County Court Judge held they were no answer to the action.

Appeal from this judgment allowed with costs.

*A. R. Slipp*, in support of appeal. *R. W. McLellan*, contra.

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En Banc.] HANSON *v.* CADWALLADER. [NOV. 27, 1903.

*Company promoters—Joint debtors—Action against one.*

In an action in the York County Court to recover a charge for land surveying defendant denied plaintiff's testimony that he (deft.) employed plaintiff, and deposed that the hiring was made by one, D. who was interested with him in the promotion of a mining company, in connection with which the land was surveyed. D. also testified that he, and not the defendant, made the contract, but both D. and the defendant swore that they were equally interested in the promotion of the company and had agreed together to share the expenses equally in case the company should refuse to re-imburse them. The County Court Judge, who tried the cause without a jury, found a verdict for the plaintiff without finding as to whether the contract was made by the defendant or by D. holding that it made no difference in law by which of the two plaintiff was employed, as they were joint debtors and the defendant would be liable in this action, there being no plea in abatement.

*Held*, on appeal, that the County Court Judge was right.

Appeal dismissed with costs.

*R. W. McLellan*, for appellant. *O. S. Crocket*,, for respondent.

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En Banc.] EX PARTE BRAMWELL. [NOV. 27, 1903.

*Review of judgment of Inferior Court—Certiorari.*

In an action to recover rent in the St. John City Court defendant set up that plaintiff's husband agreed to cancel the lease and relieve defendant from a date prior to the period for which the rent was claimed. Plaintiff alleged that her husband had no authority to do this, though he was authorized to collect rents and make repairs. The magistrate found for the plaintiff. On review before the St. John County Court Judge the latter reversed the verdict.

*Held*, on motion to make absolute a rule nisi to quash the review order on certiorari that there was no evidence of authority to the husband to make the agreement alleged; and that, even if there were any evidence, the magistrate must be taken to have found against it, and that the review Judge should not have disturbed the judgment.

Rule absolute to quash with directions to the review Judge to dismiss the review with costs.

*E. R. Chapman*, in support of rule. *S. Alward*, K.C. contra.

# Province of Manitoba.

## KING'S BENCH.

Dubuc, C.J.] VON DUSEN-HARRINGTON CO. *v.* MORTON. [NOV. 11, 1903.

*Principal and agent—Purchase of shares on margin—Sale by broker without notice—Acquiescence.*

Action to recover the amount of the plaintiff's loss on the purchase and sale of a number of shares on the New York stock exchange bought by them for defendant on a margin of three per cent. The contract between plaintiff's agent at Winnipeg and defendant was a verbal one, but the next day defendant received the usual notice in writing of the transaction in which some of its terms and conditions were thus stated. "All transactions for your account contemplate the actual receipt and delivery of the property and the payment therefor. On all marginal business we reserve the right to close transaction when margins are running out without further notice. We also reserve the right of substituting other responsible parties as principals with you in above trades at any time until closed in accordance with the rules of the Board of Trade or the Chamber of Commerce where the trades are made," which notice had at the foot the printed signature of the plaintiff's company. Shortly after the purchase the price of the shares began to fall and the margin became so small that the plaintiff's manager at Winnipeg telegraphed the defendant at Gladstone to send $500 additional margin, and later on the same day the margin being entirely lost, he telegraphed defendant to put up $1,000 further margin. Defendant replied to these telegrams, "Will attend message, down to-morrow." The manager waited until delivery of the mail from Gladstone the next morning when, not having heard from defendant, he telegraphed to have the shares sold which was done at a loss of $1,150. The original order for purchase was telegraphed to the plaintiff's head office in Minneapolis. From there it was telegraphed to the plaintiff's agents at Chicago who forwarded it to their agents in New York. These last telephoned the order to a firm of stock brokers who transmitted it to their agent on the floor of the stock exchange when the shares were purchased. The defendant was advised of the purchase and the price within an hour. The sale of the stock was made through the same agencies and defendant was verbally notified of it on the day after it took place.

*Held*, 1. There was an actual purchase of the shares for him, as it was shewn that the plaintiff's agents in New York from the time of the purchase until the sale, always had on hand the number of shares of that particular stock ready to deliver on payment of the full price, and it was not necessary that the shares should have been actually transferred on the books of the company either to the defendant or to the plaintiffs. It could not have

been intended that this should have been done because it was contemplated that the shares should be sold in the same market for defendant's benefit at a moment's notice in case of an increase in price satisfactory to him.

2. There was an actual sale of the said shares on account of defendant regularly made, according to the usage of trade in that behalf.

3. The plaintiffs were entitled under the terms of the notice sent to the defendant to sell the shares without notice to him when the margin was gone, as the defendant, not having made objection to these terms, must be taken after a reasonable time, to have assented to them.

*Stewart Tupper*, K.C., and *Phippen*, for plaintiffs. *Howell*, K.C., and *Phillipps*, for defendant.

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Perdue, J.] LOGAN v. REA. [Nov. 26.

*Fraudulent conveyance — Exemptions — Lien of registered judgment as against land — Proceedings to realize while debtor in occupation — Declaration of right without order for sale — The Judgments Act, R.S.M. 1902, c. 91, s. 9.*

This action was brought to have it declared that a certain parcel of land conveyed by the debtor to her son before the recovery of the plaintiff's judgment in reality belonged to the debtor, and that the son held the land only as trustee for the mother and had no interest in it, and that the judgment formed a lien or charge on the land, and asked that the land be sold to satisfy the judgment. Defendants admitted that the land was the mother's and that the son had no interest in it and that the conveyance had been made solely because the mother thought she might thereby prevent the sale of the land to realize the plaintiff's claim, but they set up and proved that it was her actual residence and home, and claimed that as it did not exceed $1,500 in value it was exempt from the proceedings, by virtue of R.S.M. 1902, c. 91, s. 9. It was urged on behalf of the plaintiff that the conveyance was fraudulent and void as against him, and that the debtor had by conveying the land to her son deprived herself of the benefit of the exemption, according to *Roberts* v. *Hartley*, 14 M.R. 284, and *Merchants' Bank* v. *McKenzie*, 13 M.R. 19.

*Held*, that the plaintiff was entitled to a declaration that the land was the property of the debtor, so that, if the exemption should at any time lapse, the judgment might be enforced against the land, but was not entitled to a present sale of the land to realize his judgment.

*Roberts* v. *Hartley* distinguished on the ground that there both the grantor and grantee united in asserting the reality of the transfer and no trust in favour of the grantor was alleged or proved by him. The right given by The Judgments Act to a debtor to claim exemption in respect of his actual residence is clear and positive and applies to his interest in the property so long as he continues to occupy it, whether that interest is

legal or only equitable; and if the debtor, having an absolute interest, converts it into an equitable one but still continues to hold and reside on the land, the exemption is not lost. Even if the debtor's object in making the conveyance was to obtain a protection which the law had already conferred on him, he does not thereby lose the right given him by the statute, as the placing of the property in the name of a trustee for him would not injure the present rights of the creditor as long as the trusteeship is admitted.

*Pitbaldo*, for plaintiff. *Taylor* and *Anderson*, for defendants.

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# Province of British Columbia.

## SUPREME COURT.

Full Court.] IN RE PROVINCIAL ELECTIONS ACT. [July 24, 1903.

*Elections Act—Application for registration—Affidavit—Official to take.*

Questions referred, under s. 98 of the Supreme Court Act, by the Lieutenant-Governor in Council to the Full Court for determination. Sec. 3 of the Elections Act Amendment Act of 1901 provided a form of affidavit or application for registration as a voter, the jurat of which being given thus: "Sworn (or affirmed) before me at in the Province of British Columbia this day of A.D. 19 ", and s. 4, provided that the affidavit might be sworn before (amongst others) any Justice of the Peace, Mayor, Notary Public, Postmaster, Government Agent, Constable or Commissioner for taking affidavits in the Supreme Court. The main questions argued were as to whether or not the affidavit could be sworn outside the Province and if it could, what officer could take it.

*Held*, 1. The affidavit might be sworn outside the Province, and the jurat altered to conform to the facts.

2. It might be sworn before a Commissioner for taking affidavits in and for the Courts of the Province, or before any of the officers named in s. 4 provided they derive their power from provincial authority, or ordinarily reside and perform their duties within the Province.

Per IRVING, J.: It might be sworn before a foreign Notary Public.

Per WALKEM and DRAKE, J.J.: Acts affecting the franchise should be construed liberally so as not to disfranchise persons having the necessary qualifications of voters.

The Lieutenant Governor in Council has power (under s. 210 A. of the Act, and s. 11 of the Redistribution Act) to make regulations providing that affidavits sworn outside the Province may be received by Collectors of Voters and the applicant's name be placed on the register.

*Duff*, K.C., and *Helmcken*, K.C., and *Belyea*, K.C., for the various parties.

Full Court.] [Nov. 9, 1903.

MORGAN *v.* BRITISH YUKON NAVIGATION CO.

*Merchants Shipping Act—Medical attendance—Duty of ship owner to provide.*

Appeal from an order of WALKEM, J. This was an action by a seaman for damages while in the discharge of his duties on the defendant's steamer, the Yukoner. After the statements of claim and defence had been delivered the plaintiff applied for leave to amend his statement of claim by adding an allegation that "under the provisions of the Merchants Shipping Act, 1894, s. 207, and s. 209 of the Criminal Code 1902, and otherwise at law the company were under a legal duty, without undue delay, to provide necessary surgical and medical advice and attendance and medicine and to maintain the defendant until cured, and to defray the expense of all necessary medical and surgical advice, attendance and appliances," and a claim thereunder for additional damages. On the hearing of the summons WALKEM, J., refused leave to make the proposed amendment.

*Held*, by the Full Court dismissing the appeal that a ship owner is under no duty either at common law or under s. 207 of the Merchants Shipping Act, 1894, to provide surgical or medical attendance for the ship's company.

*A. D. Taylor*, for appellant. *R. Cassidy*, K.C., and *C. McL. O'Brian*, for respondent.

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Hunter, C. J.] [Nov. 24, 1903.

CENTRE STAR MINING CO. *v.* ROSSLAND AND GREAT WESTERN MINES.

*Practice—Proceedings outside Victoria, Vancouver or New Westminster—Chamber summons returnable at one of these places—Must be issued at place returnable.*

The action was commenced in the Rossland Registry and the defendants issued a summons out of that Registry, but returnable in Vancouver, asking that the writ be set aside. S. 32 of the Supreme Court Act as amended in 1901 (c. 14, s. 13) provides that in proceedings commenced in any Registry other than Victoria, Vancouver or New Westminster, any application may be made in Victoria, Vancouver or New Westminster.

*Held*, that a summons under this section must be issued out of the Registry at which it is returnable. Summons set aside with costs.

*Davis*, K.C., for summons. *Tupper*, K.C., contra.

# North-West Territories.

## SUPREME COURT.

Scott J.] STIBSON *v.* ROSS. [Nov. 21, 1903.

*Security for costs—Agent—Affidavit of advocate insufficient.—Rule 520.*

*Held*, on an application for security for costs under Rule 520 which provides for obtaining a summons to shew cause when "the defendant by affidavit of himself or his agent alleges that he has a good defence on the merits to the action." That the agent must be some one having personal knowledge of the facts. That the allegation of the existence of a good defence must be positive. That an affidavit by the defendant's advocate that he verily believes the defendant to have a good defence to the action on the merits is insufficient.

*C.F. Newell*, for plaintiffs. *O.M. Biggar*, for defendants.

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Scott J.] SASKATCHEWAN LAND CO. *v.* LEADLEY. [Nov. 23, 1903.

*Action commenced in wrong subjudicial district—Transfer—Chamber summons—Irregularities—Rules 538 540.*

Where an action was entered in the office of the Deputy Clerk of the Northern Alberta Judicial District at Edmonton but the cause of action did not arise nor do any of the defendants reside in his subdistrict, some of the defendants residing in the remaining portion of the district under the jurisdiction of the Clerk at Calgary, in which also the lands in question are situate, and others residing in the Province of Ontario.

*Held*, on an application to set aside the writ of summons, injunction order and other proceedings, that although the entry of the action with the Deputy Clerk at Edmonton was unauthorised under s. 4. sub-s. 2. of the Judicature Ordinance (C. O. 1898 C. 21) it is not a nullity, but merely an irregularity and the defect might be cured under Rule 538 by transferring the cause to the office of the Clerk at Calgary.

*Held*, also, against the contention of the plaintiff, that an irregularity in the summons to set aside the proceedings, in not stating the objections relied upon, pursuant to the Rule 540 is not sufficient to discharge the same but will entitle the opposite party to an enlargement to answer the objections.

*Beck*, K. C. for plaintiff. *G. H. Greene* and *O. M. Biggar*, for defendants.

## COURTS AND PRACTICE.

### British Columbia.

*Appeal Books:* During the hearing of an appeal recently in the Supreme Court it appeared that the regulations in regard to the preparation of appeal books, issued by the judges on February 23, 1903, had been ignored. The Court announced that no costs would be allowed for the preparation of appeal books unless prepared in accordance with the regulations, and the Registrar was directed not to receive them in future unless so prepared.

### Ontario.

*Judicial Appointments.*—H. D. Leask, of Sturgeon Falls, barrister, to be Junior Judge of the District Court of the Provisional District of Nipissing, and to be Local Judge of the High Court.

### Quebec.

*Judicial Appointments.*—J. A. C. Madore, K.C., of Montreal, to be a Puisne Judge of the Supreme Court

## Book Reviews.

*Political appointments, Parliaments and the Judicial Bench of the Dominion of Canada.* Edited by N. Omer Coté, of the Department of the Interior, Ottawa.

Mr. Coté has issued a supplement to his very useful handbook on the above subjects. It is a continuation up to 30th June, 1903, of the work published in 1896 for the period extending from 1st July, 1867, to Dec. 31st, 1895. If our readers have not as yet got the two volumes they should do so at once. They contain a mine of information excellently arranged on subjects of every day interest.

*The Living Age.* Boston, U.S.A. There have been some excellent selections in this serial lately, keeping the reader well informed upon all the great important questions of the day and giving a range of thought expressed by some of the best writers of the day not to be found elsewhere. The only improvement we could suggest would be to give some fiction better than rubbishy French novels. Possibly however some people may like them.