LIBERIA TRADING CORPORATION and the widow and heirs of S. DAVID COLEMAN, deceased, represented by ETTA COLEMAN and OTHELLO COLEMAN, Appellants, *v.* SAMUEL B. COLE, Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued May 4, 1972. Decided May 19, 1972.

1. Though the trial judge in his capacity as presiding judicial officer has broad powers in controlling the conduct of a trial, he must not only be circumspect in his language and conduct, but should not usurp the functions of counsel under the requirement that he must always refrain from actions which may prejudice the rights of parties.
2. Proceedings in arbitration must be conducted strictly in accord with their statutory requirements.
3. Where the trial record indicates, as in the present case, confusion and uncertainty in the facts elicited so that the appellate court finds no factual base upon which to predicate its opinion, the case will be remanded to the lower court for proper clarification.
4. The trial court may not arbitrarily refuse issuance of letters rogatory.

An action in ejectment was commenced by appellee against lessee of property claimed by him, years after the agreement to lease was first signed. The heirs of the lessor intervened after this first suit in ejectment as defendants. It appears that the common grantor first conveyed the acreage at issue in 1931 and 1935, subsequent to which the grantee protested in 1952 that a survey indicated an insufficiency of land according to description and that the conveyance lacked three lots of the four and three-quarter acres sold. It was out of the same acreage apparently that the common grantor fifteen years later conveyed two lots to plaintiff, on which structures of the lessee allegedly encroached. The first action in ejectment commenced in 1961, and resulted in a verdict for plaintiff, including damages. An appeal was taken and

the Supreme Court reversed the judgment for failure to permit intervention and remanded the case for retrial. In 1964, another action in ejectment was commenced, and in connection therewith a board of arbitrators was appointed. Again, a verdict for plaintiff was returned and an appeal was taken. The Supreme Court reversed the judgment, based on the inconclusiveness of two reports of the board and the case was remanded to be retried again. In 1967 the case was tried for the third time. No further survey had been made and the board of arbitrators was apparently never reconstituted. The same irresolution, therefore, resulted by virtue of the same two reports. In addition, the defendants contended, and the Supreme Court agreed therewith, that the trial judge at times did not appear impartial, favoring the plaintiff's case by his advocacy. A verdict was again returned for plaintiff, including damages, and an appeal again was taken from the judgment. The Supreme Court *reversed* the lower court's judgment and remanded the case to the lower court to be retried with explicit instructions for a new board of arbitrators to conduct a new survey to resolve the prior inconclusiveness.

Morgan, Grimes and Harmon for appellants. *Samuel B. Cole, pro se.*

MR. JUSTICE AZANGO delivered the opinion of the Court.

Prior to 1931 litigation had occurred between C. C. Burke of the City of Monrovia and the heirs of Johnson-Moore Worrel, concerning a certain parcel of land situated in the City of Monrovia, in the area now called Sinkor.

C. C. Burke was represented by the late counsellor S. David Coleman. After the successful determination of the suit, C. C. Burke, out of gratitude for the able

legal services rendered by counsellor Coleman, sold to Coleman three and three-fourths acres of land in 1931, and in 1935 another one acre of the same property, totaling four and three-fourths acres of land sold to S. David Coleman, for which warranty deeds were executed, probated, and registered without objections.

In 1952, S. David Coleman executed a lease agreement to the Liberia Trading Corporation for one-half acre of said land, on which the company constructed two buildings. On one acre of land S. D. Coleman constructed another house for himself, leaving the balance of three and one-quarter acres. On September 10, 1964, appellee, Samuel B. Cole, entered an action of ejectment against the Liberia Trading Corporation, claiming that the corporation had encroached upon the beach portion of the two lots purchased from C. C. Burke by him. But prior to the inception of the action Cole, having learned in 1952 that Coleman was about to lease a portion of the land he had purchased from C. C. Burke which included the beach portion of the land owned by Cole, sent a letter to the Harmon law offices.

"The Harmon Law Offices,
Carey Street,
Monrovia.
"Gentlemen:

"The undersigned have been creditably informed from very reliable sources that a Lease Agreement has been drafted and about to be signed and entered into between Hon. S. David Coleman and the Manager of the Liberia Trading Company of Monrovia, for a block of land situated within the vicinity of Sinkor and adjoining the block owned by Hon. G. L. Dennis now occupied by the Spanish Minister.

"The undersigned wish to herewith inform your office that Hon. S. David Coleman does not hold a deed for that portion of land and therefore cannot legally lease said land to anyone. Three lots from said block

of land were bought and the deed probated by Samuel B. Cole, one of the undersigned and the other portion inherited by operation of a Will by Miss Etta Cassar, heir of the late Mrs. C. C. Burke, the other of the undersigned.

"In order to satisfy yourself of the real owner of the parcel of land referred to, we will be glad if you will convene a conference and examine our titles and that of Hon. S. D. Coleman and see who has title to this parcel of land before signing any lease agreement.

"Very truly yours,
ETTA CASSAR, heir of
the late C. C. BURKE,
SAMUEL B. COLE."

According to Cole, a conference was arranged between him and Coleman at which the latter told him that he did not know that Cole owned land within the vicinity, but assured him that he would investigate and if found to be true he would delete such portion before signing the agreement. In 1958 Cole learned in the course of inspection before leasing his beach land to a prospective lessee, that a portion of appellant's building was erected on his parcel of land. In 1961, he instituted an action of ejectment against the Liberia Trading Corporation.

According to appellant's counsel, Cole produced an undated deed given to him by C. C. Burke in 1950 for two lots in the same area covered by Coleman's deeds. This deed was probated in 1952. After trial Cole was awarded $8,000.00 for the many years defendant encroached upon his land. An appeal was announced and prosecuted and argument was held before this bar. As a result of the Circuit Court's denial of the Coleman heirs' application to intervene as party defendants, the case was remanded with instructions that the Coleman heirs be joined as party defendants and that the parties replead and the case be tried *de novo*. The case was thereupon refiled by the plaintiff against the company and

the heirs of S. David Coleman, starting with a new complaint in 1964, in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County. Defendant filed an answer attacking the complaint which necessitated its withdrawal and the filing of an amended complaint by Cole, but in doing so he failed to pay the entire costs which defendant noted in their amended answer. Pleadings progressed as far as the rejoinder.

Several issues of law were raised in the amended answer and rejoinder. They included: (a) the failure of plaintiff to reimburse defendant for their costs; (b) that the plaintiff's deed was fraudulent on the face of the records; (c) that acquisition by purchase of the land in question was first made by defendant; as well as, (d) plaintiff's failure to venue his reply in any term of court as is required by the statutes in such cases made and provided.

According to appellants, the trial judge, Hon. James W. Hunter, entered a ruling on the issues of law, leaving the issues of fact undisposed of, contrary to law.

After the court had entered the aforesaid ruling, the parties proposed the appointment of surveyors to go on the spot and conduct an investigation to determine whether the defendants had encroached upon the plaintiff's land and if so, to what extent, as well as such other facts relating to the land in question which would be pertinent to the issues involved in the ejectment suit. Three surveyors were appointed, who, after having gone to the spot, reported to court their findings. They all took the stand and were examined and cross-examined on their report. Whereupon the defendants filed written objections to the findings made by the surveyors, setting up that the findings were inconclusive. The Court conceded this, and ordered the surveyors to reinvestigate and to prepare a conclusive report. But they never returned to the field and merely prepared another report. They again, however, took the stand, and were examined and

cross-examined but failed to introduce the report. The plaintiff who had taken the original of the second report from the surveyors, retained the document in his brief bag.

Despite this, the case was submitted to the jury, and a verdict was brought in favor of plaintiff and final judgment rendered. The case was appealed to this Court and on June 16, 1967, we ordered the case remanded for failure to introduce into the record the two reports, which rendered the proceedings inconclusive.

In keeping with the mandate of this Court, the case again came up for trial at the June 1967 Term of the Civil Law Court for the County of Montserrado, with Hon. Joseph P. H. Findley presiding.

According to appellants, upon the call of the case, although there were no indications in the record that the Board of Surveyors was ever reconstituted for the purpose of determining the facts in keeping with the mandate from the Supreme Court, a new trial was ordered. Nor was there any evidence of the Board of Surveyors giving notice to the parties to be present for a determination of the facts in the field survey. The trial was, however, commenced by the reading to the jury of the plaintiff's complaint and the so-called arbitrators' report which the plaintiff had been keeping in his brief bag.

Thereafter, plaintiff was called to the stand to testify. When defendants protested against this and sought to show that the report was new to them, without any comment from the plaintiff who obviously conceded this, the court interrupted and declared that since defendants had not objected to the report they were estopped from contesting it.

Appellants have contended that the trial judge appeared to be biased and played the part more of counsel than of judge, submitting some illustrations from the record of rulings without prior objections.

According to the record the parties agreed that the

deeds held by the Colemans comprised, in all, title to four and three-fourths acres of land and that the Colemans had possession of the land prior to 1950 and up to the present. What is obviously inconsistent therewith is the assumption of the surveyors that plaintiff should be given priority to the land in the face of what they found, as set forth.

> "When we made our first report we said that the point of commencement does not agree with the place in question. Mr. Cole's lots which are disputed commenced from his first lot, and Mr. Cole's first lot commenced at the Northeastern corner of Carey Thomas; and the Northeastern corner of Carey Thomas's lot is on the Old Congo Town Road. If we commence our survey from Mr. Cole's first lot then his three lots would not reach the beach; that is the reason why we said the place of commencement of Mr. Cole's lots do not correspond with marks shown to us by him on the ground, but we did our survey according to points shown to us on the ground. The whole area in question, Mr. S. David Coleman's land, commenced from the Johnson's heirs and this we could not locate—that is to say, the place of commencement. And also Mr. Coleman's one acre we could not locate because Mrs. Coleman failed to show us the one acre of land deed given to us when we went on the scene for the survey; she only showed us the place for the three and three-fourths acres of land according to her deed given us."

The two reports of the surveyors submitted by appellants reflect more completely the same inconclusiveness of their findings as shown in the portion quoted above.

It is obvious, the appellants contend, that the original deed of the mutual grantor was never consulted to determine the area in question, nor was consideration given to the prior acquisition of the property by the late S. David Coleman from the grantor, nor to defendant's prior pos-

session of the premises. It is also significant that the trial judge appeared to be resistant to any evidence which related to the merits of the claims to title.

In their efforts to prove the inconsistencies and defects in the testimony of the surveyors who took the stand to justify their reports, the defendants applied for letters rogatory to obtain from Othello Coleman maps and diagrams previously made of the area, showing the exact starting points and metes and bounds, Othello Coleman at the time was employed in the United States where he then resided. This application was denied by the trial judge. The map and diagram are now in the possession of appellants, Othello Coleman having returned to Liberia, but they were deprived of their use at the trial.

The proceedings culminated in a verdict against the appellants, and a final judgment in which plaintiff was not only declared the owner of the land, but was awarded damages in the sum of $12,000.00. A motion for a new trial was filed and denied. Hence, this appeal based on a bill of exceptions containing twenty-three counts duly approved by the trial judge, without any reservations, despite the caution urged on trial judges by this Court in *Cooper* v. *Alamendine* in the November 1971 Term, reported in 20 LLR 416.

From our point of view when on June 16, 1967, this Court adjudged that by virtue of the circumstances in the court below, in respect of the admissibility and admission into evidence of the two surveyors' reports and their plats, it found that the record before it was inconclusive and, therefore, made it impossible to arrive at a proper determination of the issues presented. In the circumstances this Court found itself compelled to remand the case for a new trial of the issues of fact. It meant, in clear language, reexamination of the entire issues of fact in the same court by trial. And obviously, this included examination of all of the issues, according to the law of the land, of the facts or law put in issue in the cause

for the purpose of determining the rights of the parties.

According to the record before us, when the case was on Thursday, August 3, 1967, called for hearing, it disclosed this opening entry.

> "Plaintiff's complaint and the Report of Arbitrators were ordered read to the jury for their benefit. Thereafter the plaintiff outlined the theory of his case and asked for the qualification of his witnesses. This having been done, the trial proceeded with his testimony."

He was examined and cross-examined. But peculiarly, even though Samuel B. Cole had alleged in his complaint that he brought the suit against the defendants for the recovery of property, and respectfully prayed that the court would render judgment placing him in possession of his property, and award him such damages as justice demanded for his deprivation thereof by defendants, yet at the trial there is no indication that he insisted on the recovery of the property. Rather in his testimony to the jury, he only requested them to compensate him for the many years he had been deprived of the property. What is not prayed for and proven at the trial shall not be granted, is an old legal maxim that should not have been overlooked in this case. We note further from the record that almost if not all of the questions that were propounded under cross-examination to Cole were disallowed by the court, as was observed earlier in this opinion.

It would seem from the attitude and conduct of the trial judge at this point that the exposition of the facts that would have led to the adequate determination of the rights of the parties in this case was not likely.

It is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined, but the state, the community, is con-

cerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind.

> "When a witness has been examined in chief, the other party has the right to cross-examine for the purpose of ascertaining and exhibiting the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motive, his inclinations, his prejudices, his means of obtaining a correct and certain knowledge of the facts to which he has borne testimony, the manner in which he has used those means, his powers of discernment, memory and description. The purpose of this, of course, is to break down the testimony of the witness favorable to the opposite side and to bring out facts and circumstances favorable to the examiner. . . . If the opposing party is deprived of the opportunity of a cross-examination without fault upon his part . . . it is generally held that he is entitled to have the direct testimony stricken from the records. This doctrine rests on the common law rule that no evidence should be admitted but what was or might be under the examination of both parties and that *ex parte* statements are too uncertain and unreliable to be considered in the investigation of controverted acts." 28 R.C.L. 600.

The trial judge should have borne in mind that one of the issues highly emphasized by appellants in these proceedings has been that of superiority of title or better title. That is to say, appellants have contended that as far back as 1931 and 1935 they have been in actual occupation of the property at issue and have openly and continuously been in possession under deeds describing it by metes and bounds.

Moreover, on August 2, 1952, counsellor S. David Coleman made it known to Samuel B. Cole, in a letter from the Harmon law office, that even though C. C.

Burke sold him a parcel of land in the Sinkor area, yet his surveyors could not find sufficient land in the area surveyed to account for the deeds and that the shortage was more than four and one-half lots. He demanded the land or he would institute appropriate action in court for recovery thereof in case he did not get it.

The question that would occur to any reasonable person is, if as far back as 1931 or 1935, C. C. Burke's conveyance by deed fell short four and one-half lots on survey by Coleman, how could, fifteen years later Burke have sold to Cole three lots from that same parcel?

Hence, in our opinion, to have disallowed questions on cross-examination which tended to show who the first purchaser was of the land now in dispute, as well as to establish all the facts and circumstances at the trial, was most irregular, and the judge, therefore, erred in ruling as he did.

Continuing our examination of the record, we note that the next witness to testify for plaintiff was William J. McBorrough. He stated in answer to questions on direct examination that he was employed by the Government of Liberia in the capacity of surveyor; that he was acquainted with the plaintiff in this case; that he was a member of the Board of Arbitrators in a matter between plaintiff and the Liberia Trading Corporation. He testified that the Board made a report and identified the signatures of J. Pleh Reeves, J. K. T. Scotland, and himself appearing thereon and stated that that report was rejected. Other questions were put to him on direct examination.

"Q. I pass you this document, please look at it and say what you recognize it to be?

"A. This plan accompanied the subsequent report which was presented to this court and carried the signature of the members of the Board. I observed that the second plan does not carry the report which was submitted alone.

"Q. Please say, if you can recall whether or not a deed submitted by the heirs of the late S. David Coleman and that submitted by Samuel B. Cole, called for the same tract of land?

"A. As far as I can remember, the heirs of the late S. David Coleman presented a deed for one acre of land, whereas Mr. Samuel B. Cole presented a deed for half of an acre, and were for the same place."

In view of the last answer of McBorrough, how can we possibly accept as true the testimony of plaintiff when he said, "in conclusion, I beg to submit to court the deed in support of what I have stated, a deed showing my title to said land is genuine and that my said parcel of land is separate and distinct from these claimed by the heirs of S. David Coleman and L.T.C. (Liberia Trading Corp.)"

Moreover, questions were also propounded by the court to McBorrough.

"Q. I pass you these documents marked by court PNT/3 and PNT/4. Please tell this court and jury whether you are saying that PNT/4 is your real report and not PNT/3?

"A. The report marked PNT/3 was first submitted by the Board and objected to by the defendant and rejected by court on grounds that it did not give the court enough evidence to act on. The Board was ordered to return and make another report. This report is the one marked PNT/4.

"Q. May I suggest, sir, that you have things absolutely mixed up and you are mistaken. Now jog your memory and say if PNT/4 is not the document objected to by defendants in keeping with the objections filed October 26, 1965, to this your very report of count one of which objection you comment on the Coleman heirs' deed: 'This board finds it difficult to say whether or not this deed covers the area in question. . . .'

upon which you were redirected to make a subsequent report after the court had rejected this report?

"A. It has been a long time and I would like to look at PNT/3 again.

"Q. Here is PNT/3. Please explain.

"A. When we were recalled to this court, I only found PNT/4 in my file and not PNT/3.

"Q. But you admit that you signed PNT/3. Not so?

"A. Yes. I did sign PNT/3 as well as PNT/4 and examining both documents I have found PNT/4 to be the subsequent report which was presented by the Board."

At this juncture we would like to remark that, admittedly, the judge conducting a jury trial is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and the fair and impartial administration of justice between the parties to the litigation. The wide discretionary powers vested in him are to be exercised so that abuses of justice shall not be accomplished under forms of law. He may, within reason, take all steps necessary to see that the trial is conducted in an orderly manner and kept within bounds prescribed by decency and ordinary rules of good conduct. Statutes which tend to restrict the powers of the judge in controlling the trial are usually given a strict construction.

We admit also that a trial judge has power within proper limits to impose limitations upon the number of witnesses, and to propound questions to, and examine, witnesses for the purpose of eliciting facts material to the case at bar. That he may in a particular case be justified in examining some witnesses at considerable length, in an effort to bring out the true facts for consideration by the jury; but he should not by the form, manner, or extent of his questioning indicate to the jury his opinion as to the merits of the case. For upon him rests the responsibility

of striving for an atmosphere of impartiality. His conduct in trying a case must be fair to both sides, and he should refrain from remarks that may injure a litigant. He should not usurp the function of a counsel in the case. He should be cautious and circumspect in his language and conduct before the jury. He should and must be fair to both sides, and the extent to which he may go in comments and remarks during the trial is governed by the fundamental principle that nothing should be said or done by him which will prejudice the rights of the parties litigant. Especially should he refrain from any remarks that are calculated in any way to influence the minds of the jury or to prejudice a litigant.

The jury has great respect for him and can be easily influenced by the slightest suggestion coming from the court, whether it is a nod of the head, a smile, a frown, or a spoken word. It is therefore imperative that a trial judge conduct himself with the utmost caution in order that the unusual power he possesses shall not be abused. All judges should take note of the foregoing. We shall continue.

The last of the witnesses for plaintiff was J. Pleh Reeves, another member of the Board of Arbitrators. He identified documents marked by the Court PNT/3 and PNT/4 as being the reports made by them. He admitted that at the time he and the committee went on the property in question to conduct the survey concerning which a report was made, the plaintiff and defendant each presented their deeds. But when reminded on cross-examination that his report stated, *inter alia,* in count 4 thereof that the heirs of S. David Coleman could not present any deed of the area in dispute, this question was promptly disallowed by the court on the ground that it was asked for the purpose of entrapping the witness. The area in question was the *res* of the proceedings, so the report therefore found for Cole. He admitted also that there was only one survey made of the area. When

asked, "Isn't this the only report you have submitted to this Court?" he answered, "no." But when further asked on cross-examination how many reports had they submitted to court, the question was again disallowed by the court on the grounds of immateriality and irrelevancy.

As said earlier in this opinion, we believe that every opportunity should have been given the defendants in developing the cross-examination to the extent that the whole truth appertaining to these ejectment proceedings would have been made crystal clear before the jurors in aiding them to arrive at a just verdict.

Another unusual aspect of the trial is that J. K. T. Scotland, the third surveyor and a constituted member of the Board of Arbitrators, did not testify.

Since it is the award by which plaintiff's claim to title was maintained and judgment rendered in his favor for $12,000.00, it is important to determine if the statutes applicable to arbitration were adhered to.

> "The award of arbitrators appointed by the court must be in writing and signed by the arbitrators or a majority of them." Civil Procedure Law, 1956 Code 6:1282.
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> "A copy of an arbitration award shall be served on the parties to the arbitration, who shall have not less than four days thereafter to file written objections to the award. The objections may be based on any one or more of the following grounds only: corruption of the arbitrators; gross partiality; want of notice of the time or place of the proceedings; or error of law apparent on the face of the award. Written objections except to errors of law shall be verified by affidavit." *Id.*, § 1283.
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> "The court shall appoint an early day for hearing objections to an arbitration award, giving reasonable notice thereof to the parties. They shall be heard in a summary manner without a jury and the issues decided by the court on the evidence adduced. The

court may either confirm the award or set it aside, as it deems just. If the court sets it aside, it may send the case back to the same or to other arbitrators with or without instructions or it may cause the case to be tried by a jury." *Id.*, § 1284.

"If at the end of four days after service of a copy of the award on each party no exceptions or objections have been filed or objections thereto have been overruled, it shall be confirmed. Whenever an award is confirmed, judgment may be entered thereon at any time." *Id.*, § 1285.

"In any action upon an award in an arbitration had on order of a court the reference and signature of the arbitrator must be proved.

"After judgment has been entered upon an award, it shall have the same status as a verdict and shall be proof of the facts stated therein against all parties to the arbitration." *Id.*, § 1286.

Carefully reading the record of the trial in this case, we see there is no evidence before us to show that a copy of any report or award was served upon appellants in this case, and that they were notified that within four days they should file any written objections thereto if they so desired, and that a day was designated by the court for the hearing of the objections to the arbitration award, thus giving them reasonable notice. Nor is there any indication that, after the four days provided, no objections or exceptions having been filed and overruled, the award was confirmed by the court.

Further, there is no evidence before us to show that the signatures of the arbitrators were ever proven.

From our point of view, to uphold the reports of the surveyors concluding that "the disputed area belonged to Samuel B. Cole, because the dimensions stated in appellee's deed agreed with their findings on the ground," without strict compliance with the statutes relating to arbitration awards would be depriving parties of prop-

erty without due process of law. It would be unconstitutionally conferring judicial powers on private individuals; it would be violating constitutional provisions vesting judicial power in constituted courts; and would be ousting the courts of their jurisdiction. And above all, it should be remembered that the object of the statutes on arbitration proceedings is not to impair, but rather strengthen, the obligations of contracts.

The contention of appellants to the effect that the two reports submitted by the surveyors reflect bias and prejudice because the conclusions reached by them are patently inconsistent with the deeds, maps, and facts in this case should be upheld, especially so when there is no evidence that the Board of Surveyors was ever reconstituted for the purpose of determining the facts in keeping with the instruction of this Court that a new trial be had. Nor is there any indication that appellants were notified to be present when the survey was being conducted. Further, there is no evidence indicating that the two reports were legally introduced into evidence in keeping with trial procedure.

What is more, from a further scrutiny of the record before us, no evidence produced by appellee has disclosed the quantum of his land allegedly encroached upon by appellants and continued to be wrongfully occupied. This has not even been shown by a report of the surveyors; neither is there any indication of the quantity of the beach portion of the two lots allegedly taken by the appellants.

Appellants have contended further that they were denied an application for letters rogatory to be served on one of the defendants, a material and indispensable witness, in the person of S. Othello Coleman, who was outside the country and had knowledge pertinent to appellants' defense.

"If the witness whose testimony is desired resides

or is out of the Republic of Liberia, the party desiring his testimony shall file with the clerk of the court in which the case is pending written interrogatories with an application for a commission to be directed to some person residing at the same place as the witness, naming the commissioner in the application; and he shall serve copies of the interrogatories and the application on the other parties. The opposing parties have four days to file cross-interrogatories in writing and name their commissioners. If they fail to do so, the judge shall issue a commission to the commissioner of the first applicant, and such commission shall be forwarded to him without cross-interrogatories. A commission may by consent be issued to one commissioner." Civil Procedure Law, 1956 Code 6:761.

"If the witness resides in a country where the execution of commissions is not allowed, the court or judge may send interrogatories and cross-interrogatories with a letter rogatory addressed to the proper authority requesting such authority to take the depositions and answers of the witnesses." *Id.*, § 762.

The requirement to issue letters rogatory being imposed by statute, the denial thereof was error, nor was there any inhibition in the court's power.

". . . it has frequently been asserted that the power to issue such letters is inherent in courts of justice, without distinguishing in this respect as between courts of law and courts of equity. . . . The power inherent in a court to issue letters rogatory can be exercised only in aid of a cause or proceeding pending in the court which issues the letters." 16 AM. JUR., *Depositions,* § 27.

In view of the foregoing, the judgment is hereby reversed and the case remanded for a new trial in accordance therewith. We are also ordering that a new survey of the lands in question be made by a new board

of arbitrators, made up of three Government surveyors other than those who served before, to be appointed by the parties and by the court.

Costs shall abide the final determination of this case. It is so ordered.

Reversed and remanded.