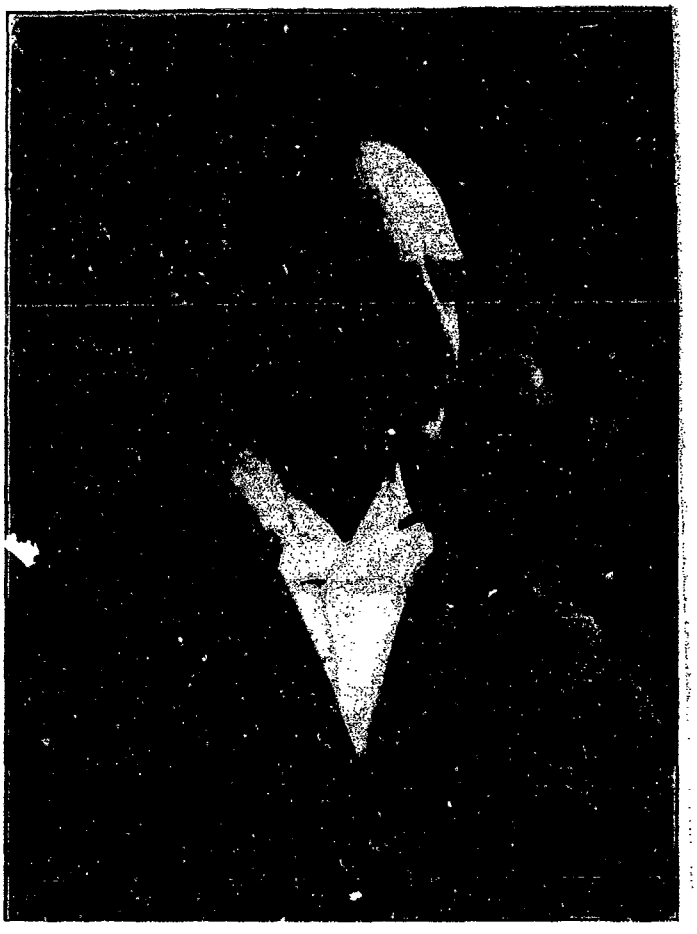

HENRY HATTON STRATHY, K.C.

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HENRY HATTON STRATHY, K.C.

Mr. Strathy is a son of the late John Strathy, a Scotch Writer to the Signet and afterwards called to the Bar of Upper Canada; his mother was a daughter of the late Henry Hatton Gowan (a member of a well-known Irish family) and a sister of the late Honourable Sir James R. Gowan, K.C.M.G., so well and favourably known in Canadian public life.

Mr. Strathy studied for his profession under the late Hon. Sir Mathew Crooks Cameron, and was called to the Bar in 1871. After being called he returned to Barrie, his native town, where he began practice in partnership with the late Judge W. D. Ardagh and the present Judge J. A. Ardagh.

He was created a Queen's counsel by the Marquis of Lansdowne in 1885, and has been elected a Bencher of the Law Society at each of the four elections since 1891; on more than one occasion the profession having paid him the great compliment of returning him at the head of the list.

He is and has been president of the county of Simcoe Law Association for upwards of twenty years; and, at its last annual meeting he was also elected first vice-president of the Ontario Bar Association.

Mr. Strathy is recognized as a sound lawyer and an able counsel, though not as yet much known outside his own county. Those who saw his masterly treatment of the many difficult subjects which came before him in the suit of *Patriarch* v. *Town of Orillia* had but one opinion of his judicial capacity. In this case he was appointed to take the place of the Judge of Assize. His findings were afterwards upheld on appeal.

Always a liberal-conservative in politics he was for about twenty-five years president of the county of Simcoe Liberal-Con-

servative Association and has on several occasions been tendered the nomination by his party as a candidate for the House of Commons and provincial legislature, but has always declined.

He has been and is associated in various ways with many philanthropic works and has been identified with almost every local enterprise which has been organized in his native town; is president of the Royal Victoria Hospital and of the Children's Aid Society for the county of Simcoe, and a director of various companies.

Mr. Strathy was married in 1878 to Marian Isabella, youngest daughter of the late Revd. S. B. Ardagh, first Rector of Barrie, and is a member of the Church of England.

Mr. Strathy's only son, Gerard B. Strathy of Toronto, is also a practising barrister, making the third in succession who have entered the legal profession.

THE LATE SIR JAMES ROBERT GOWAN, K.C.M.G.

On the 18th ult. there passed off the scene one of Canada's great men. His loss is not confined to his many friends in this and other lands, but is that of the country at large.

This journal has special reason for referring to the loss which the country has sustained inasmuch as its inception was due to the enterprise and industry of the deceased gentleman.

Of him it may truly be said, "he passed away full of years and of honour." He died in his 94th year, having received marks of distinction and appreciation not only from his adopted country but from his Sovereign. For over 40 years he was a judge, and might have attained, if he so desired, the highest judicial position in the gift of the Crown in this country; he was the trusted adviser of many of Canada's greatest statesmen on both sides of politics: a man of wisdom, of unusual discernment and knowledge of public affairs, he was the framer of many important public measures, introduced by others, which became the law of the land; as a member of the Senate of Canada, he was a legislator of ripened experience and great sagacity; on intimate and friendly terms with many of

those whose names are on the roll of history, he was esteemed by them and by all as a man without reproach, a true and a trusted friend.

We have in this journal from time to time referred to the main incidents of his life and to his career until the time of the retirement and rest preceding his decease. It is unnecessary therefore to do more than refer to former pages for this information (see ante, vol. 19, pp. 339, 355; vol. 36, p. 513, and vol. 44, p. 817).

His funeral took place at Barrie on the 20th ult. We may appropriately in conclusion refer to the estimate of his character from a personal standpoint formed by his own clergyman and expressed by him at the memorial service held in the town where the deceased had lived for over 65 years. "Sir James was loyal and self-sacrificing in his friendships. The honour of a friend was as dear to him as his own honour, and the reputation and good name of a friend were always safe in his keeping. No amount of trouble was too great for him to take on behalf of a friend,—and in his friendship as in everything else, when he deliberately committed himself to any course of action or line of conduct, he followed it, without flinching and without deviation, to the very end, and no power on earth could change him, or turn him from his purpose. Any man who enjoyed the privilege of Sir James Gowan's friendship, might devoutly thank Heaven for the friendship of a man who was true as steel, and commanded the fullest confidence, respect, and love of those who knew him, and could claim him as their friend. In his courtly, gracious manners he represented a generation, alas! dead and gone—an old school which has passed away; an age in that respect much to be regretted in these busy days of bad manners and parvenu customs. He was of the old school of gentlepeople, which I can remember dimly in the days of my earliest childhood, and those of that school have ever appealed to me, as being most charming and attractive, in their grace of manner and grave courtesy of bearing. 'Man goeth forth to his work and to his labour until the evening.' Sir James has done his day's work, and a magnificent day's work it has been."

ONTARIO COMPANY LAW.

Criticism of the Ontario Companies Act although delayed is welcome. The draft of the Act was widely circulated for a year before being enacted and it was not discussed during that time nor while it was before the legislature. Now nearly two years have elapsed and Mr. Morine's recent article is the first serious comment. This article appears in your issue for March 1st (ante, p. 145).

The Act is an attempt to unify the company laws of the Province. It is merely a consolidation of the twenty-five and upwards Acts respecting companies and following, as closely as possible, the former legislation. It was not to create innovations. Whether it is a perfect piece of legislation is not in discussion. Undoubtedly it may be improved; but that it should be recast and follow the Imperial Act more closely is a question which should not be answered without a full consideration of the differences between the Acts and the business consequences of such a change.

In the year 1837, the first Ontario Companies Clauses Consolidation Act was passed. In 1850, was passed an Act to provide for the formation of Incorporated Joint Stock Companies for manufacturing, mining, mechanical or chemical purposes (13 & 14 Vict. c. 38). These Acts have been amended and extended from time to time; many of their sections are found in the Act of to-day.

The Ontario company is a hybrid, having some of the characteristics of an English common law company, being created by letters patent; of an English statutory company, being limited in respect to its powers and of a company under the laws of some of the neighbouring states, having many of its regulations set out in the statute and therefore unchangeable except in so far as the statute permits and not variable as is the Imperial company, under articles of association. Our company system has developed to keep pace with business needs of the community. It has followed and expanded upon its original underlying principles, and has become fairly certain by judicial decision.

Whether it is a good thing to cast aside our experiences and judicial decisions of the past fifty years and conform our Act to the Imperial Act is a serious question for consideration and one which should not be concluded by its mere statement.

From the standpoint of the lawyer, it may be a good thing to adopt in its entirety the Imperial Act. If, as has been suggested, that Act were adopted by the whole British Empire, advantages might accrue to the Ontario business man which would recompense him for the business annoyance which would follow. It should always be borne in mind that the Act is for the convenience of the business man not of the lawyer.

A short contrast of the main differences between the Imperial and Ontario statutes may assist in the discussion. Roughly, the letters patent may be contrasted with the memorandum of association and the by-laws together with parts IV., V., and VI. with the articles of association. A simple, expeditious and inexpensive method of incorporation and amendment thereof, to serve the needs of a growing community appears to be the object of the Ontario Act. The memorandum of association must be printed; it must set out in detail all the objects of the company. The business transacted is strictly limited to that set out in the memorandum. Changes may be made only when a resolution for that purpose has been passed at a special general meeting, by a three-fourth vote and confirmed at another special general meeting held not less than fourteen days thereafter. The resolution must then be confirmed by the court. On the other hand, the letters patent may be obtained simply and without delay. The average accountant or an intelligent secretary of a company has sufficient knowledge to prepare the application. The wording of the objects may be concise, as they are supplemented by the general powers given by the Act, and general by-laws are not necessary, sufficient machinery for the management of the company being provided by the Act itself. Amendments by supplementary letters patent are simple, expeditious and inexpensive. These documents may be further contrasted in the light of the judicial comments. Lord Hatherly, in *Mahoney* v.

East Holyford Mining Co., 1875, L.R. 7 H.L. 869, says as follows: "Every joint stock company has its memorandum and articles of association open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents." The distinction is brought out by Lord Halsbury, in *County of Gloucester Bank* v. *Rurdy Merthyr*, 1895, 1 Ch. 629: "Persons dealing with joint stock companies are bound to look at what one may call the outside position of the company—that is to say, they must see that the Acts which the company are proposing to do, are acts within the general authority of the company, and if these public documents, which everyone has a right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint stock company, which has apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted with in dealing with the company would only shew this, that, by some regulations of their own, what Lord Hatherly described as their indoor management, they were capable, if they had thought right, of making any quorum they pleased; and an outside person, knowing that, and not knowing the internal regulations, when he found a document sealed with the common seal of the company, and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorized to execute an instrument of that description."

Under the Imperial Act the memorandum and articles are the public documents, in Ontario, the letters patent alone. A ready suggestion is, that the Ontario Act might approach the Imperial by directing that all by-laws should be filed. The advisability of this is questionable. The articles of association may provide that many matters of management of the company may be regulated by resolutions, which are not made public, and it should be so. Many such regulations are of a private character and the public is not jeopardized by

their privacy. The company might be, if they were made public.

The Imperial Act makes elaborate provision for the registration of mortgages securing charges and debentures. This is necessary when provisions similar to the Ontario Registry Act have no general application in the United Kingdom. With the exception hereinafter referred to such provisions are not required in the Ontario Act.

It should be borne in mind that many provisions of the Imperial Act have been adopted in Ontario from time to time. In 1892, the provisions relating to directors' liability in the Act of 1890. In 1906, the prospectus clauses in the Act of 1900, and in the Act of 1907, the provisions regarding share warrants of the Act of 1867, and the clauses relating to public subscription of the Act of 1900. These in no way related to the main differences between the Acts. Moreover the whole system of the Imperial Act has been adopted with respect to corporations without share capital. The letters patent and the memorandum of agreement correspond respectively to the memorandum of association and the articles. The greatest elasticity is provided. This is a field in which an approach to the Imperial Act may be made without causing business annoyance. A uniform method of incorporation is adopted; the internal affairs of the corporation may be regulated to suit those interested and these regulations may be of the greatest variety. Numerous examples may be cited. It is, however, sufficient to say that any corporation within the limitations of the Act which can be created by private bill may be constituted under these sections.

The first criticism of the article in question is of the prospectus clauses, and the learned writer after pointing out that these clauses are copied from the Imperial Act of 1900, shews that the Ontario Act requires companies, which are not offering shares to the public, to file a prospectus, while the Imperial Act merely requires a published prospectus to contain certain information. In answer to the question put "why should this be so?" I have merely to say, that the Imperial Act of 1900, in so far as it

related to the prospectus, was an utter failure. This was shewn from time to time, by the English financial journals from the time of its enactment to its repeal in 1907. This failure was well known to the legislature, while the Act was under discussion, and as the Imperial Act of 1907 had not yet come to hand, an endeavour was made to pass an effective measure. The simple device of making every company, the number of shareholders of which is increased by ten, file a prospectus was adopted. The Imperial Act applied only to an offering by the company itself and the provisions of the Act were avoided by the company entering into a contract with a broker for the whole amount offered. The broker then advertised untrammelled by the Act. This cannot be done under the Ontario Act. When the broker sells to ten persons, the company must file a prospectus. This is not as drastic as the Imperial Act of 1907, which compelled all companies, except private ones, to file a prospectus and it cured the defects of the Act of 1900. See s. 82 of the Imperial Act of 1908.

Every arbitrary rule, such as this, may be shewn to be illogical under some circumstances, but it is scarcely fair to say, for this reason alone, it should be changed. On the other hand, it is fair to say, in view of the recent police court proceedings against mining company promoters, that the clauses have served their purpose, when the Imperial Act of 1900 utterly failed. It is not possible to prevent fraudulent promotions, but a great deal has been done when investors are provided with a means of investigating the true inwardness of companies offering shares for subscription. It would be a fair criticism of the Act to shew that its provisions do not accomplish this; to shew that, under some circumstances, which are difficult to foresee in practice, some question may arise with respect to a subscriber, before the number is increased by ten, can scarcely be said to be so.

The criticism continues by pointing out that there is no definition of "offering shares for public subscription" and argues that this term does not cover the case of shares offered for subscription by canvassers.

The wisdom of the comment, the logic of the argument and the correctness of the statement that "Commentators on the Ontario Act have assumed apparently that all shareholders, other than those originally incorporated are obtained as a result of an offering of shares for public subscription" are all questionable. Whether, in each particular case, shares are offered for public subscription, is a question of fact. If the statute defined particular methods, it is a certainty that the astute promoter would readily find means to put himself outside the Act. To say that these words do not cover an offering by canvassers and that they cover every offering, seems to give no definite meaning to plain words. These views appear to be supported by s. 97, s-s. 3, which refers to subscriptions induced by verbal representations and by s. 97, s-s. 1, which provides that when the number of shareholders is increased by ten, a prospectus must be filed. Until that number is attained, there appears to be no need of a prospectus. The plain meaning of the words covers an offering to the public, to whomsoever may apply, and the offer is by the usual means by which the public is approached.

The difficulties with which the criticism surrounds the distinction between companies offering shares for public subscription and those which do not, are not in practice very great. When incorporation is sought, the promoters are well aware whether they must go to the public for subscriptions. If they intend doing so, their course is plain. They must file a prospectus and refrain from doing business until the minimum allotment is subscribed. A seeming difficulty arises where it is intended to proceed by private subscription and sufficient funds cannot be procured by that method. If the company has commenced business in the meantime, Part VIII. cannot apply. When business has been commenced, there is no section of the Act requiring it to cease and commence again; but the prospectus which then must be filed, should shew as required by s. 99, all circumstances connected with the flotation of the company. The company would be bound not to allot till the minimum allotment was subscribed. The provisions of s. 106(4), respecting return of payments made

and of s. 109, requiring moneys to be held in trust, would not be applicable; but all moneys paid are recoverable from the company. The prospectus read with the Act should disclose this to all applicants for shares.

It is difficult to follow the discussion with respect to the election of the directors. The seeming incongruities of the Act in this respect, fall away on a fair reading of it. The quotation from Parker and Clark's book "that presumably the powers of provisional directors are of a limited nature" overlooks the decision of our own court, that provisional directors have no powers except to call a meeting to organize a company: *Monarch Life* v. *Brophy*, 1907, 14 O.L.R. 1. No doubt this is a decision under another Act, but the trend of judicial comment on the Ontario Act was in the same direction.

This was an unreasonable limitation and in the case of companies offering shares for public subscription, it would block the organization of the company. It appears to have been considered advisable to retain the word "provisional" and to extend the powers of "provisional directors." In practice therefore there are two cases:

1. Where the company does not offer shares for public subscription. In such case, the provisional directors should call a meeting of the shareholders, under s. 34, for the purpose of organizing the company.

2. Where there is such an offer. The provisional directors conduct the business of the company until the statutory meeting, provided by s. 110, when, as it is "a general meeting of the shareholders" they may be replaced by the same number of directors.

The learned critic does not read the Act in the light of its apparent intentions. He characterizes as an absurdity the authority which the Act undoubtedly gives to change the number of directors from time to time. He says, "The absurdity of this machinery appears by the fact that it can all be done at one meeting if done in due form and order." The Act should not be designed to restrict. The chief aim should be to provide simple and elastic machinery with which to conduct ordinary

business. It should also be certain. If a board of directors has a proper object to serve in reducing and again increasing its number at one meeting, it would be an absurdity to prohibit such action. There should be perfect freedom of management and change thereof so long as there is no confusion. In practice, when the number of directors is desired to be different from that of the number of provisional directors, the number is fixed by the letters patent, under s. 4, s-s. (4). This comment appears to apply also to the discussion of the sections relating to election of directors. There is no conflict between ss. 80 and 84. Sec. 80 applies to the election of first directors and s. 84 to those subsequently elected.

The provisions of the Act respecting mining companies are indefensible from a legal and perhaps from a strict business point of view, but the mining men demand these provisions and they will have them by incorporation in Arizona or some state where sale of shares at a discount is permitted. Under these circumstances, is it not better to make some provision for regulation? Mr. Morine thinks it necessary to define a "mining company" which is subject to the provisions of this part of the Act. He overlooks s. 139, which in effect directs that mining companies for the purposes of that part of the Act are those which the letters patent make subject to it. The letters patent in each case shew whether the company is a "mining company."

This appears to be an improvement on the old Act. Formerly, the Ontario Mining Companies Incorporation Act, R.S.O. c. 197, was applicable to all mining companies. All such companies were subject to its provisions and therefore "no personal liability companies" irrespective of the wishes of the incorporators. Now there may be mining companies not subject to Part XI. These are in the same position as other companies with respect to sales of shares at a discount and need not have the words "no personal liability" as part of their name.

Mr. Morine's statement that "any company, by being incorporated as a mining company, may issue its shares at any discount, yet carry on any kind of business" is difficult to understand coming from a lawyer, and therefore difficult to

answer. If it means that a company subject to the provisions of Part XI. with the powers usually given such companies, may carry on say, a printing business exclusively, a perusal of following cases will shew that the statement is untenable: *Haven Gold Mining Co.*, 1882, 20 Ch.D. 151; *German Date Co.*, 1882, 20 Ch. Div. 169; *Amalgamated Syndicate*, 1897, 2 Ch. 600; *Stephens* v. *Mysore Reef Co.*, 1902, 1 Ch. 745; *Pedlar* v. *Road Block Co.*, 1905, 2 Ch. 427. If a different statement is intended, I cannot follow the argument.

The practice of the department is to limit the powers of companies, under Part XI., to mining and dealing with ores and minerals. The decisions, above referred to, shew that while the company is mining and dealing with ores and minerals, it may carry on any other business which is profitable to its undertaking. Put when it ceases to be a mining company, no ancillary business may be carried on. If such were attempted, there might be a sad awakening for the directors, when in winding up, it was declared that such business was ultra vires and carried on by the directors personally.

Moreover, the statement that the words "no personal liability" are untrue, if it means no liability on the part of the shareholders, when calls are unpaid, is difficult to understand. A short investigation will shew that it is in fact true. Under the Act, mining companies may proceed in two ways. (1) By issuing shares at a discount. In such cases a call is not made. The shares are sold at the full amount of the discount price and the shareholder is liable for the amount agreed to be paid. (2) By issuing shares not at a discount, but at par and subject to call. In such a case, where a call is subsequently made, the shareholder is not liable therefor. The only recourse of the company is under s. 144.

It is difficult to see how s. 46 can support the argument contended for. Undoubtedly that section requires the amount paid on shares to be set out in the share certificate. Moreover, s. 55 provides for the making of calls and demanding the amount thereof from the shareholders, but s. 140 expressly provides that no shareholder (in companies subject to Part XI.) holding shares

(as provided by that part) shall be personally liable for non-payment of any calls made upon his shares beyond the amount ... paid to be paid therefor. This section must be read with s. 144.

Nicol's Case, 1884, 29 C.D. 421, is discussed at considerable length and is represented as being applicable to a company under the Ontario Act. *In re Haggart Bros.' Manufacturing Co.*, 1892, 19 A.R. 582, is overlooked. This case which considers and distinguishes *Nicol's Case* decides that an applicant for incorporation becomes a shareholder on the issue of the letters patent, without further allotment. The words in question in s. 3 which raises the difficulty are "constituting such persons and any others who have or may thereafter become subscribers to the memorandum of agreement hereafter referred to a body corporate and politic."

The corresponding words of s. 10 of R.S.O. 1897, are as follows:—"Constituting such persons and any others who have become subscribers to the memorandum of agreement hereafter referred to a body corporate and politic."

I do not think that it was ever contended that R.S.O. c. 191, limited the shareholders to those who subscribe to the memorandum of agreement, and the present Act extends the scope of the section. If these added words have the effect which the *Haggart Case* may be argued to give them, the shares subscribed for in the memorandum of agreement after the application for incorporation has been made and the letters patent issued may be allotted by force of the letters patent alone. If this be so it is a convenience to the company and to promoters who may desire to proceed with the sale of shares pending the application for incorporation while the company is unorganized and before shares may be allotted by by-law. Moreover, the suggested interpretation of this section would render meaningless many following sections which refer to the allotment and transfer of shares.

The criticism of ss. 72 and 78 does raise an important difficulty which first appeared in *Johnston* v. *Wade* (see ante, p. 25). In that case, debentures were issued secured by a

"floating charge" and not by mortgage of specific property. This form of security has always been possible under Ontario company law and it is well known in the United Kingdom. It attaches on all property of the company on the happening of a definite event set out in the debenture. In the meantime, the company may deal with its property as the directors may deem advisable even by specific mortgage. Such a charge is not within the Bill of Sale and Chattel Mortgage Act and is not required to be registered in the registry office. It is, however, subject to be displaced by specific registered mortgages. Under the former Ontario Act no notice of such a charge was required to be registered. The present Act requires a statement of such charges to be given with the annual return under s. 131. This, however, does not appear to give sufficient notice to creditors. A debenture given on January 2 need not be declared till February 8 of the following year.

The regulation of such charges is one of difficulty, as appears from the Imperial legislation on the subject. The Act of 1900, s. 14(*d*) provided that every floating charge on the undertaking or property of the company shall be void against the liquidator and any creditor of the company, unless filed with the registrar (of joint stock companies) within 21 days after the date of its creation. That this afforded no substantial relief is shewn in *Re Renshaw & Co.*, 1908, W.N. 210. In that case a floating charge was made payable in two weeks, renewable from time to time, for periods of two weeks. After many renewals, a winding-up order was made and the charge was held valid as against the liquidator. The Act of 1907 went to the extreme on the subject, making such a charge void as against the liquidator if the charge was made within thirty days prior to the winding-up order, unless the holder could shew that at the date of the charge, the company was solvent. Such a stringent provision necessarily made this class of security unsaleable. This section does not appear to have been carried into the Consolidated Act of 1908. Sec. 93 of that Act, requires a floating charge to be registered within twenty-one days; the provisions of the Act of 1900

are reverted to and the device resorted to in *Renshaw & Co.* (supra), may again be adopted.

The difficulty therefore, is to provide regulations which will protect creditors and render such a security available. Undoubtedly, the Act should be amended in this respect. However, it should be pointed out that there was no mortgage in *Johnston* v. *Wade*. If there had been it should have been filed with the Provincial Secretary, and if it covered chattels or lands, it should have been registered as required by the Bills of Sale Act or the Registry Act which are the "other Acts" referred to in s. 78. This Mr. Morine appears to have overlooked.

THOMAS MULVEY.

THE EVILS AND ADVANTAGES OF PUBLICITY.

The publication of the evidence given in a divorce case recently tried in Edinburgh has given rise to much discussion in the English press, and among men of eminence in the legal profession. The question at issue is whether the giving to the public such reading matter as is contained in the proceedings of the divorce courts, and in a certain class of criminal cases, is not productive of greater evil than would be caused by its suppression. At a dinner of the Sphinx Club, where the Chief Justice of England, several of the judges, and other men of distinction were present, this subject formed the principal topic of the speeches given on the occasion. Lord Alverstone was very outspoken in his opinion, and his remarks are well worthy of reproduction, being as applicable to ourselves as to the press and the public of Great Britain. He said he had no objection whatever to the fullest and freest publicity in the press. He believed that everyone, in whatever profession or walk of life, whether a politician, lawyer, doctor, engineer, or man of business, if they had to discharge any public duty, ought to be courageous enough to expect and to invite criticism, and, provided that that criticism was not bitter and venomous, it would do them good. It was not publicity in the sense of discus-

sion or criticism that he deprecated. On the contrary, he invited it. He recognized also the absolute necessity in these days of the press, whether from the point of view of public knowledge or from the point of view of business, but he would venture to submit to them that in three or four matters the way in which their lives had to be lived and conducted had rather called into existence certain abuses which might properly be described as some evils of publicity. He did consider that the publication and publicity given to the proceedings of the Divorce Court was a public evil. He could quite understand that, from a business point of view, the newspapers were obliged to meet the wishes of their readers, but he would like to see the leading journals of the day made a stand and say, "We will not publish these details." He could not imagine anything worse for public morality than those terrible details sent down from Edinburgh. It was a matter of serious consideration by those who were interested in the administration of justice, and in the high standard of moral character in this nation whether the time had not come when they ought to put a stop to the publication of proceedings in the Divorce Court. His experience for twelve and a half years as Attorney-General, having to do the work of King's Proctor, was that the harm done by the knowledge of what could be done in the Divorce Court and what could be obtained from its procedure was far greater than most people knew. To his mind there was no journal which would not ultimately gain credit if its managers said, "We will not publish one single detail beyond the names of the parties, which should be published in the interests of justices."

He also spoke of the prevailing fashion in a certain class of society of getting their names into the newspapers on every possible occasion as a craving for notoriety which was little short of a disaster, and dwelt upon the pain and annoyance caused by the unwarrantable use of names in order to gratify public curiosity.

A subject of a more directly legal character was brought forward at this gathering as stated by the chairman in the

following words, which we quote as a matter of importance for both the press and the profession: "But there was a very much graver, more serious, and more important side of this question, and that was the evils which followed the publicity of newspapers dealing with facts or things that were eventually to come before the courts. It was a very difficult question to decide, and there seemed to be a well-grounded idea among our legislators and others that some attempt should be made to correct it. In a circular issued that morning by the local government board, explaining the Local Authorities (admission of the press) Act, it was stated that every properly-accredited newspaper man had a right to attend the meetings of these bodies, but should a majority of any one of these bodies decide by vote that the subject to be discussed should not be printed in the public interest, these men were to be excluded. Where was that going to lead to? It seemed to him that if that Act had been enforced when the Mile-end guardians had had their turn nothing ever would have been heard about it. And if they looked abroad to-day they found that the lack of publicity, not the evils of it, was shaking an empire to its centre. There was a question of just how far these things ought to go, and on that they hoped to get some light from the very distinguished gentlemen who were their guests."

Thus it would appear that the evils of publicity on the one hand are, to some extent at any rate, counterbalanced by benefits on the other. That the publicity afforded by the press has been the means of bringing many transactions into light that otherwise would remain undetected cannot be claimed, but is it not possible that all such useful work could be effected without the mischief caused by pandering either to the vanity which delights in seeing one's name in print, or to the prurient desires of those who delight in reading the details of evidence necessarily given in the proceedings of the court, but the publication of which does not further the ends of justice, while it spreads far and wide the seeds of depravity and licentiousness.

The following amusing story was told by one of the speakers: "What particularly distressed him was the exaggerations and

imbecilities of the press. As for magistrates, he could best give an example by a story of a police magistrate which he knew to be true. The magistrate was leaving his court one day in the dead season of the year, and it was pouring with rain. He was making his way in an omnibus to his club, when, looking out of the window, his eye was attracted by a news sheet, on which he saw his name in enormous capitals, 'Mr. Jones on Peace.' He was a sensitive person, and he allowed himself to think of what had passed in his court, but he could remember nothing that was not sordid and commonplace. There was what was called a cloud on the horizon, international relations were strained, and everybody was expecting statements from important politicians. He felt, therefore, hot and uncomfortable to see his name connected with peace. When he reached his club he rushed to the file, seized a newspaper, and saw that that morning there had been a quarrel between two sisters over a dead rabbit and that he had said, 'You had better make it up for the sake of peace.' (Loud laughter.) That was hard on the magistrate."

English legal journals again call attention to political considerations in the appointment of men to high judicial offices. An exception to the excellent and praiseworthy rule laid down by Lord Loreburn is remarked upon by the *Law Times* which thus comments: There can be only one opinion throughout the profession concerning the appointment of Mr. E. G. Hemmerde, K.C., to be Recorder of Liverpool in the place of the late Mr. H. G. Shee, K.C. For the past few years Lord Loreburn has shewn us that, so far as he is concerned, proved capacity and experience will outweigh any political considerations in making judicial appointments, and it seems a great pity that the Home Secretary in the present administration should have allowed himself to depart from the excellent example set by the Lord Chancellor. We can state without fear of contradiction that, if Mr. Hemmerde's majority in East Denbighshire had not been what it was, he certainly would never have been appointed to this important recordship, over the heads of the many eminent men on the Northern Circuit who were eligible for the post.

REVIEW OF CURRENT ENGLISH CASES.

VENDOR AND PURCHASER—PRACTICE—SALE OF REAL ESTATE—VENDOR'S ACTION FOR SPECIFIC PERFORMANCE—TITLE ACCEPTED A) CONVEYANCE APPROVED—FORM OF JUDGMENT.

In *Cooper* v. *Morgan* (1909) 1 Ch. 261, Warrington, J., decides that when a vendor brings an action for his purchase money before conveyance, the judgment ought to provide for delivery of the conveyance to the defendant on payment of the purchase money interest and costs and damages, if any, see contra *Vivian* v. *Clergue*, 15 O.L.R. 280; affirmed by the Court of Appeal, 16 O.L.R. 372, where the judgment was simply for payment of the purchase money; but there the proper form of the judgment does not appear to have been considered.

MARRIAGE SETTLEMENT—COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY—COVENANT INCAPABLE OF PERFORMANCE—REGISTRATION OF TITLE.

In re Pearse, Pearse v. *Pearse* (1909) 1 Ch. 304. By a marriage settlement the wife covenanted to settle her after-acquired property upon the trustees of the settlement. After the settlement she acquired freehold lands in Jersey, where it appears a system of registration of title prevails and no one but the registered proprietor can deal with land. Under this system it was not possible to vest the lands in question in the trustees of the settlement as trustees, because no entry of any trust could be made upon the register. On this ground Eve, J., held that the property in question was not caught by the covenant, because of the impossibilty of vesting the land in the trustees as trustees.

LANDLORD AND TENANT—COVENANT RUNNING WITH THE LAND—COVENANT BY SUB-LESSOR WITH SUB-LESSEE TO PERFORM COVENANTS OF HEAD LEASE—COLLATERAL COVENANT.

Dewar v. *Goodman* (1909) A.C. 72. This was an action brought by the assigns of an underlessee against the assigns of the underlessor for breach of covenant by the underlessor to perform the covenants to repair contained in the head lease. Jelf, J., held that the covenant did not run with the land, and therefore that the action failed, and the Court of Appeal agreed with him

(1908) 1 K.B. 94 (see note vol. 44, p. 196). The House of Lords (Lord Loreburn, L.C., and Lords Robertson and Collins) have affirmed that decision, and for the same reason given by the courts below, viz., that the covenant in question did not exclusively relate to the land demised by the covenantor, but to other lands besides those demised to the underlessee.

BILL OF SALE—CARRIER'S LIEN—AGREEMENT TO GIVE CREDIT FOR FREIGHT, COUPLED WITH RIGHT OF LIEN—GOODS ON LAND OF TRADER—DETAINER OF GOODS—BILLS OF SALE ACT, 1878 (41-42 VICT. C. 31)—LICENSE TO TAKE POSSESSION.

Great Eastern Ry. v. *Lord* (1909) A.C. 109 is a case which has given rise to a difference of judicial opinion which has extended even to the House of Lords. The facts were that a railway company by what was called "a ledger agreement," opened a credit account with a coal merchant for the carriage of his coal, whereby it was agreed that the company was to have a continual lien upon the coal conveyed on their lines, or being on the ground rented by the merchant from the company, for all charges due them, and were to be at liberty to sell and dispose of any of the coal to satisfy the lien, with the right to close the account at any time on a day's notice. By separate agreements the railway company let to the merchant allotments within the railway yard where the coal was stacked, and dealt with by the merchant. The account being in arrear the railway closed it, and took possession of the coal and sold it, and the merchant consequently was declared bankrupt; and the present action was brought by the trustee in bankruptcy for damages occasioned by the railway so acting. Phillimore, J., dismissed the action, (1908) 1 K.B. 195 (noted ante, vol. 44, p. 227). The majority of the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J.) reversed his decision, on the ground that the agreement in question amounted to a bill of sale, and was void for want of registration (Moulton, L.J., dissenting). (1908) 2 K.B. 54 (noted ante, vol. 44, p. 485). The majority of the House of Lords (Lords Loreburn, L.C., and Lords Macnaghten and Atkinson) have restored the judgment of Phillimore, J., but Lords Collins and Robertson dissent. In the result therefore there were five judges in favour of the defendants and four in favour of the plaintiffs. The majority of the Lords regarded the agreement as in effect one for the continuance of the carriers' lien, notwithstanding the delivery of the goods. The minority, on the other hand, considered that the carriers' lien

was at an end as soon as delivery was made, and that any agreement for a lien thereafter must be regarded as in the nature of a bill of sale.

MASTER AND SERVANT—CONTRACT OF SERVICE—REPUDIATION OF CONTRACT — WRONGFUL DISMISSAL — UNDERTAKING NOT TO TRADE.

In *General Bill Posting Co.* v. *Atkinson* (1909) A.C. 118, the plaintiffs agreed with the defendant to employ him as manager to hold office subject to termination on a twelve months' notice by either party, and subject to a restriction against defendant's right to trade after the termination of the employment. The plaintiffs wrongfully dismissed the defendant without notice. The present action was brought to enforce the agreement against trading. Neville, J., who tried the action, held that the plaintiffs were entitled to enforce that agreement notwithstanding the wrongful dismissal; but the Court of Appeal reversed his decision (1908) 1 Ch. 537 (noted ante, vol. 44, p. 350), and this latter judgment is now affirmed by the House of Lords (Lords Halsbury, Robertson and Collins), and on the same grounds, viz., that the dismissal was a repudiation of the contract by the plaintiffs, and a release of the defendant from the stipulation restricting his right to trade on the termination of his engagement.

BRITISH NORTH AMERICA ACT—LEGISLATIVE JURISDICTION—CONFLICT BETWEEN DOMINION AND LOCAL LEGISLATION ON SAME SUBJECT MATTER.

In *La Compagnie Hydraulique* v. *Continental Heat & Light Co.* (1909) A.C. 194 the Judicial Committee of the Privy Council (Lords Robertson and Atkinson and Sir A. Wilson and Sir H. E. Taschereau) have re-affirmed the principle more than once laid down by the Board as a rule for the construction of the British North America Act, viz., that where a given field of legislation is within the competence of both the Dominion Parliament, and a local legislature and both legislate, in case of any conflict, the legislation of the Dominion Parliament must prevail. The judgment of the Quebec Court of King's Bench, based on that rule, was accordingly affirmed. In this case the conflict arose between two companies, the one incorporated under a Dominion Act, and the other incorporated under a later Provincial Act purporting to give them exclusive powers in a locality chosen by the

company incorporated under the Dominion Act, and it was held that the Provincial Act could not take away or restrict the powers conferred by the Dominion Act.

WILL—CODICIL—CONSTRUCTION—PERIOD OF DISTRIBUTION.

Hordern v. *Hordern* (1909) A.C. 210 is an appeal from the Supreme Court of New South Wales touching the construction of a will whereby the testator gave an annuity to his widow till death or re-marriage, and created other fixed charges in favour of all his children during minority and of his daughters after attaining majority, and directed that on his youngest child attaining majority his two sons, if alive, should become absolutely entitled to the residue in equal shares. By a codicil he provided that if all of his children should die without issue his brother should take the whole residue. The testator also provided that the executors in their discretion might increase the annuity to the widow. The testator left two sons and three daughters all of whom were now of age. The two sons claimed that they were entitled to an immediate division of the residue, the widow waiving all claim to any further increase in her annuity. The New South Wales Court considered that the period of distribution had not arrived because of the gift over by the codicil in case all the children died without issue; but the Judicial Committee of the Privy Council (Lords Atkinson, Robertson and Collins) were of the opinion that on the youngest child attaining majority the right of the two sons became absolute and indefeasible, and the widow waiving any claim to any increased allowance, the executors were bound to divide the residue between the two sons as claimed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] WEST PETERBOROUGH ELECTION CASE. [March 29.

Controverted election—Service of petition—Extension of time—Substitutional service.

The provision in s. 18, sub-s. 2 of the Controverted Elections Act, R.S.C. 1906, c. 7, for substitutional service of an election petition where the respondent cannot be served personally, is not exclusive and an order for such service on the ground that prompt personal service could not be effected as in the case of a writ in civil matters may be made under s. 17.

The time for service may be extended, under the provisions of s. 18, after the period limited by that section has expired. *Gilbert* v. *The King*, 38 S.C.R. 207, followed. Appeal dismissed with costs.

Watson, K.C., for appellant. *J. E. Jones*, for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] REX *v.* GARVIN. [March 4.

Company—"Prospectus"—Advertisement—Director — Penalty.

A mining company incorporated on Nov. 17, 1908, pursuant to the Ontario Companies Act, 7 Edw. VII. c. 34, filed a prospectus with the provincial secretary on Nov. 27, 1908, and subsequently inserted in certain newspapers an advertisement, for which the defendant, one of the directors, was responsible, giving particulars about the organization of the company, the mining lands owned by the company, and the operations of the company, and stating that shares were for sale at a named price, but not complying in all respects with the requirements of the

Act as regards a prospectus, and not filed with the provincial secretary.

Held, that the advertisement was a "prospectus" within the meaning of s. 99 of the Act, being an advertisement designed to accomplish the purpose mentioned in s. 95 (1), and that the defendant was liable to the penalty imposed by s. 100.

Semble, that an advertisement merely stating that a company are offering shares for sale, and that a prospectus can be obtained upon application, would be a "prospectus" within the meaning of the Act.

Poussette, K.C., for defendant. *Mulvey*, K.C., and *Corley*, K.C., for the Crown.

Meredith, C.J.C.P.] ROBINSON *v.* MILLS. [March 30.

Security for costs—Newspaper editor.

Appeal by defendant from order of Master in Chambers dismissing an application for an order for security for costs, the defendant being the sporting editor of the Hamilton *Times*. The Master in Chambers held that s. 10 of R.S.O., c. 68, which provides for security for costs in action of libel contained in a newspaper, applies only in the case of an editor, where the defendant is an editor, and is responsible for the general management of the paper and its policy in regard to matters of every kind.

Held, that there is nothing in the Act or in any of the authorities cited which makes it necessary to uphold that the editor of a department of a newspaper is not entitled to avail himself of the protection given by the above provision. Appeal allowed, costs to be costs in the cause.

King, K.C., for defendant, appellant. *W. Aylesworth*, for plaintiff.

DIVISION COURT—COUNTY OF ELGIN.

Ermatinger, Co.J.] [March 19.

CRAIG *v.* TOWNSHIP OF MALAHIDE.
LIDDLE *v.* TOWNSHIP OF MALAHIDE.

Sheep Protection Act—Mode of determining value of sheep killed.

The plaintiffs were farmers residing in the township of Malahide in July, 1908. Both farmers had a number of sheep killed

and others badly worried by dogs. They made the usual application to the council under s. 18 of the Act for the protection of sheep, R.S.O. 1897, c. 271, for payment of two-thirds of the value according to their own valuation of the sheep killed and injured. The council refused to accede to their demands but offered to pay two-thirds of the value as estimated by the inspector appointed by by-law under s. 537 of the Consolidated Municipal Act, 1903, for the purpose of valuing and appraising the damages for sheep killed and worried by dogs. The plaintiffs refused to accept the cheques tendered them by the council, and entered suit in the First Division Court to enforce their claims.

On behalf of the township it was contended, (1) that so long as the by-law under which the inspector had been appointed was in force, there was no appeal from his valuation, and that all parties were bound by it, (2) that the council was not bound in any event under s. 18 of the Sheep Protection Act to pay two-thirds of the value, and that payment of two-thirds or a smaller sum was discretionary with the council.

Held, that the latter point was well taken and dismissed both actions with costs.

W. E. Stevens, for plaintiffs. *Miller*, for defendants.

ELECTION COURT.

Meredith, C.J.C.P.] [March 11.

RE NORTH PERTH DOMINION ELECTION.

Controverted Elections Act—Presentation of petition after office hours on last day—Extension of time.

This was a motion by the petitioner for an order extending, nunc pro tunc, the time for presenting the petition until Dec. 7, 1908, and for an order confirming and declaring the petition as presented within the time so extended, and confirming, nunc pro nunc, the service of the petition and all subsequent proceedings thereon. The petition was delivered to the registrar on the last day upon which, according to the provisions of s. 12 of the Controverted Elections Act, a petition against the return of the respondent could be filed. The petition was not delivered at the office of the registrar, but at his residence, and after office hours, 3 hours and 12 minutes after his office had been closed (on a Saturday). Upon receiving it and the prescribed deposit, the registrar indorsed on the petition the following memorandum: "Received at 4.12 p.m. on 5th December, 1908 (after office

closed), at my house." The petition was treated and was marked by him as filed on 7th December, 1908. The respondent objected that the petition was not presented within the time limited by s. 12, and it was conceded by the petitioner that if it were to be treated as presented on 7th December it would be too late, and that the objection was entitled to prevail unless the court had power now to enlarge the time for presenting it, and the time extended by the court.

Held, 1. The above delivery did not comply with the statute, and therefore the petition was not presented within time limited by s. 12.

2. Sec. 13 does not give an alternative mode of presenting the petition. The language of the section is imperative and the court can exercise no discretion in the matter, its jurisdiction being purely statutory. The *North Bruce Case* (1891) 27 C.L.J. 538 distinguished.

3. There is neither law nor practice authorizing the extension of time for presenting a petition. The practice now is the same as it was when the House of Parliament itself dealt with election petitions: Rogers on Elections, 9th ed., 429.

4. As the petition never was in court, s. 87 does not apply as that provision has reference only to procedure: *Farquharson* v. *Imperial Oil Co.* (1899) 30 S.C.R. 188; *Glengarry Case* (1888) 14 S.C.R. 453.

Motion refused with costs.

Shepley, K.C., and *Harding*, for respondent. *Bicknell*, K.C., and *Bain*, for petitioner.

NOTE.—At p. 203, ante, the case of *Milligan* v. *Toronto Ry. Co.* was incorrectly cited as *Milligan* v. *Grand Trunk Ry. Co.* and on p. 204, 10th line, for "following" read "falling."

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [March 9.

CHAMBERS ELECTRIC LIGHT CO. *v.* CANTWELL.

Rates chargeable to consumers—Act requiring schedule to be filed—Compliance.

By the Acts of 1907, c. 4, all companies supplying light were required, on or before July 1st of that year, and of each succeed-

ing year to file with the provincial secretary a schedule of the prices then charged for light and energy, which were to be the charges collected unless altered by the Governor in Council after a hearing in that behalf.

Held, that July 1st being a statutory holiday, it was a sufficient compliance with the Act to file the statement required on the following day.

Also that a statement addressed to the provincial secretary and signed by the chief officer of the company stating the charges made by the company at that time, was a certificate within the meaning of the Act.

Semble, that the only effect of the Act was that after the filing of the certificate the company could not, at least before the date of a new filing, increase the charges as specified, and perhaps not even then, without the consent of the Governor in Council.

Prior to July 1st, 1907, the plaintiff company charged and collected a rate per M.K.W., making no charge for "readiness to serve," but subsequently to that date they adopted a new system, reducing the charge per M.K.W., and adding a readiness to serve charge based upon the requirements of the place using the light.

Held, that the two rates taken together, being simply a method of arriving at a fair rate for the energy supplied, based upon a different calculation as to the cost of supplying it, it was open to the plaintiff to make the change and to charge defendant for power or current ready for service but which in fact was never supplied.

RUSSELL, J., dissented on the ground that the statement filed in compliance with the Act was not sufficiently clear and that the change in the schedule was capable of being made use of to increase the charges named in plaintiffs' letter of July 1, 1907.

Mellish, K.C., and *J. B. Bill*, in support of appeal. *S. D. McLellan*, contra.

Full Court.] [March 9.

EASTERN HAT & CAP CO. *v.* WALMSLEY.

Patent—Action for infringement—Device held not patentable.

Plaintiff company applied for and obtained a patent for an improvement in the manufacture of caps, the object, as stated, being to provide a cap containing on its interior an efficient and comfortable covering for the ears, which, when turned out-

ward and downward could be used for that purpose without in any way changing the proper fit of the cap. The specification shewed that the object was attained by the attachment of an elastic band to the interior of the cap as illustrated in accompanying drawings.

There being nothing in the specifications to indicate that there was any peculiarity of shape in connection with the band which would have the effect of improving upon ear coverings already in use in caps, or that would indicate to a maker of caps what peculiarity of shape he must avoid so as not to infringe upon plaintiff's patent, and the attachment of a band of flexible material to caps to serve as a protection for the ears being an old and well-known device.

Held, setting aside the judgment of the trial judge in plaintiff's favour that the device claimed to have been infringed was not one of a patentable character.

Mellish, K.C., *J. B. Bill*, *J. J. Ritchie*, K.C. and *W. B. A. Ritchie*, K.C., for the various parties.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Feb. 8.

McDONALD DURE LUMBER CO. *v.* WORKMAN.

Mechanics' lien—Costs—Commission of 25 per cent., on what to be calculated, when there are several successful lien claimants.

Under s. 37 of the Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, when there are several successful lien holders besides the plaintiff, the maximum of costs, exclusive of disbursements, that can be allowed to the plaintiff is twenty-five per cent. of the total amount awarded to him and the other lien holders, reduced by the total sum of costs awarded to the other lien holders, so that in no event shall the defendant have to pay in costs exclusive of disbursements a sum greater than twenty-five per cent. of all sums awarded against him to lien holders in the action.

Kemp, for plaintiffs. *Deacon*, for defendant.

Full Court.] COTTER *v.* OSBORNE. [March 15.

Trades unions—Conspiracy to injure plaintiffs—Picketing and besetting—Injunction—Damages—Striking out defence for disobedience of order to produce.

Appeal from judgment of Mathers, J., noted vol. 44, p. 508, dismissed, but without costs because the plaintiffs were wrong in entering interlocutory judgment against certain persons not before the court by reason, merely, of the default of two of the defendants, who represented those persons, in not obeying an order to produce documents.

O'Connor and *Blackwood,* for plaintiffs. *Knott,* for defendants.

Full Court.] BENT *v.* ARROWHEAD LUMBER CO. [March 15.

Principal and agent—Commission on sale of land—Warranty of authority as agent.

Appeal from judgment of Mathers, J., (noted vol. 44, p. 550), who had entered a verdict in favour of plaintiff for $25,000.

Appeal allowed with costs and action dismissed and also held that the plaintiff could not recover against Meredith who had assumed to act for the company as for a breach of warranty or representation of his authority from the company to enter into the alleged contract.

Galt, for plaintiff. *Wilson* and *Robson,* for defendants.

Full Court.] MANITOBA WINDMILL CO. *v.* VIGIER. [March 15.

County Court—Jurisdiction—Conferring jurisdiction by agreement of parties.

It is not competent to the parties to a contract to agree to confer jurisdiction upon the County Court of any judicial division other than the one in which, under s. 73 of the County Courts Act, R.S.M. 1902, c. 38, any action arising out of a breach of the contract may be brought, and, if such an action is brought in any other County Court, the judge should refuse to try it on the ground of want of jurisdiction. *Farquharson* v. *Morgan* (1894) 1 Q.B. 552 followed.

This decision applies only to courts created by statute and not

to courts of original jurisdiction or to the rights of parties to agree as to the jurisdiction of such last named courts.

Kilgour, for plaintiffs. *Knott*, for defendants.

Full Court.] COUTURE *v.* DOMINION FISH CO. [March 18.

Administration—Lord Campbell's Act—Action against resident of province for death happening out of the jurisdiction—Necessity for administration granted by authorities of place where cause of action arose—Amendment.

Action by plaintiff as administrator of his deceased wife to recover damages for her being burnt to death in a fire which occurred on a steamer owned and operated by the defendant company while such steamer was at Warren's Landing in the North-West Territories of Canada. The statement of defence admitted the truth of the allegation in the statement of claim that the plaintiff was the administrator of the estate and effects of his deceased wife, but such administration had only been granted in and for the Province of Manitoba, and the defendants applied for leave to amend their defence by setting up that the plaintiff had not been appointed such administrator by or under the authority of the North-West Territories of Canada wherein the plaintiff's alleged cause of action had arisen and that the plaintiff had no status or right to bring the action and the alleged cause of action is not and never has been vested in him.

The court allowed the amendment to be made.

Blackwood, for plaintiff. *Heap* and *Stratton*, for defendants.

Full Court.] [March 18.

TIMMONS *v.* NATIONAL LIFE INS. CO.

Practice—Examination for discovery—Particulars—Action for libel.

Decision of Mathers, J., noted vol. 44. p. 666, varied as follows:—

Ordered that the plaintiff do forthwith attend, at his own expense for examination for discovery and that the order for the delivery of particulars by the defendants forthwith should be limited to particulars of the grounds of the defendants' belief that the words complained of were true.

Deacon, for plaintiff. *Robson*, for defendants.

Full Court.] BATEMAN *v.* SVENSON. [March 15.

Examination of judgment debtor as to means of paying debt—Commitment for contempt in refusing to give satisfactory answers.

The defendant, on her examination as a judgment debtor under Rule 748 of the King's Bench Act, R.S.M. 1902, c. 40, admitted that she had upon her person more than enough money to pay the judgment, but refused to answer whether she would pay it or to say why she would not. Afterwards upon the plaintiff's application, under Rule 755, the defendant was ordered by Mathers, J., to be committed to gaol for twelve months on the ground that, within the meaning of that rule, she had not made satisfactory answers to the questions.

On appeal to this court.

Held, per HOWELL, C.J.A., and PERDUE, J.A., following *Merrill* v. *McFarren*, 1 C.L.T. 133, and *Metropolitan Loan Co.* v. *Mara*, 8 P.R. 360, that the order was justified and should not be set aside.

Per RICHARDS and PHIPPEN, JJ.A., that the word "satisfactory" in Rule 755 only means "full and truthful" and that as Rule 748 does not provide for any questions as to the debtor's willingness to pay or as to his reason for refusing to pay, there should be no order to commit under Rule 755 for refusal to answer such questions.

The court being equally divided, the appeal was dismissed without costs.

Subsequently an order was made on consent providing for the release of the defendant, pending an appeal to the Supreme Court, on terms satisfactory to the plaintiff.

Hull, for plaintiff. *Bonnar*, for defendant.

KING'S BENCH.

Cameron, J.] MAJOR *v.* SHEPHERD. [Feb. 23.

Specific performance—Vendor and purchaser—Statute of Frauds—Delay in giving possession—Time for payment uncertain.

Action for specific performance of an agreement by defendant to purchase from plaintiff a quarter section of land "for the sum of $5,000, payable as soon as a loan can be arranged and title found satisfactory." It was understood that the defendant would have to raise part of his purchase money by mortgage of the pro-

perty to some third person in order to carry out the purchase. It also appeared that the property was subject to mortgages and registered judgments for amounts in the aggregate exceeding the sale price and that the plaintiff would have to negotiate with the judgment creditors in order to get discharges for payment of about 75 per cent. of these claims; and that, although the plaintiff had endeavoured to make such arrangements, he had not up to the commencement of the action been able to get them definitely concluded, and the trial judge found that at that time the plaintiff was not in a position to offer to the defendant a title to or a conveyance of the property free from incumbrances; and further that the plaintiff could only pay off the incumbrances out of the money defendant was to pay for the property. The written agreement was silent on the question of when the purchaser was to have possession and the plaintiff remained in possession. The defendant during the negotiations for completion, which lasted about nine months, claimed that if the sale went through he was entitled to an allowance for being left out of possession of the property and at the trial he claimed that the long delay in getting possession was another reason for refusing specific performance.

Held, that specific performance should be refused on the following grounds:—

(1) The plaintiff had failed to shew a title or his ability to give a clear title.

(3) Such failure caused such delay in the defendant getting possession that it would be a great hardship on him to enforce the contract now and specific performance is purely a discretionary remedy available according to the equities of each case: Fry on Specific Performance, 183, 185, *et seq.*

(3) The provision in the agreement as to when the purchase money was to be paid, viz., "as soon as a loan can be arranged," was too indefinite and uncertain to satisfy the Statute of Frauds: A. & E. Ency., vol. XXVI., p. 37.

Action dismissed with costs.

Crichton and *McClure,* for plaintiff. *Wilson* and *J. F. Fisher,* for defendant.

Mathers, J.] AMERICAN ABELL CO. *v.* MCMILLAN. [Feb. 26.

Dominion Lands Act—Charge on land created by homesteader before recommendation for patent—Declaration of Minister of Interior as to effect of such charge—Estoppel.

The plaintiffs sold the defendant McMillan a threshing outfit and as security therefore took a charge or lien on the land in

question which was McMillan's homestead. He had not yet received a recommendation for patent. The sale had been made and the security obtained for the plaintiffs by the defendant Doig who was then their agent at that point. After Doig gave up the agency and after the issue of the patent to McMillan Doig obtained from McMillan a conveyance of the land in payment of a debt McMillan owed him. This action was brought for a declaration that the plaintiffs had a charge on the land as against Doig. McMillan entered no defence but Doig set up s. 142 of the Dominion Lands Act, R.S.C. 1906, c. 55, which provides that "except as herein provided, unless the Minister (of the Interior) otherwise declares, every assignment or transfer of homestead or peremption right or any part thereof, and every agreement to assign or transfer . . . made or entered into before the issue of the patent, shall be null and void; and, unless the Minister otherwise declares, the person so assigning or transferring . . . shall forfeit his homestead or pre-emption right." To meet this the plaintiffs relied on a letter from the secretary of the Department of the Interior stating that, as it appeared that McMillan had executed the lien without any intention of fraud or injury to the Crown, the forfeiture which might otherwise have been incurred . . . had been waived.

Held, 1. Following *Harris* v. *Rankin*, 4 M.R. 115, and *Cumming* v. *Cumming*, 15 M.R. 640, that the charge attempted to be created by McMillan was null and void and that this defence could be set up either by him or by any one claiming under him as Doig did.

2. Even if the letter from the secretary of the Department could be taken as a declaration of the Minister, it shewed only a waiver of this forfeiture and was not a declaration that the plaintiffs' charge was not to be null and void.

The plaintiffs contended that Doig was estopped from setting up his title as against the charge which as their agent he had obtained for them.

3. The instrument under which the plaintiffs claimed, being void under the Act, could not be validated by estoppel and that, in any case, there was nothing in the circumstances of the case to create an estoppel.

A. B. Hudson and *A. Anderson*, for plaintiffs. *Johnson* and *Bergman*, for defendant.

Mathers, J.] JOHANSSON *v.* GERDMUNDSON. [Feb. 26.

Infant—Agreement for sale of land—Specific performance — Damages in lieu of.

The plaintiffs, being infants, brought this action by their father as next friend for specific performance of the defendant's agreement to sell land to them and, in the alternative, for damages in lieu of specific performance. At the trial plaintiffs' counsel admitted that, as the plaintiffs were infants, they could not have specific performance, but they claimed that they might have damages in lieu thereof, contending that the contract had been entered into by their father as their agent and that they had ratified the contract afterwards.

Held, that an infant cannot appoint an agent or enforce during infancy, a contract made by an agent, nor can he, during infancy, ratify or adopt such a contract. Simpson on Infants, p. 10; Eversley on Domestic Relations, p. 755, 751, followed.

Held, also, that, in an action framed as this was a plaintiff is not entitled to recover common law damages for breach of contract. *Hipgrave* v. *Case*, 28 Ch.D. 356, followed.

A. B. Hudson and *A. Anderson*, for plaintiffs. *Johnson* and *Bergman*, for defendant.

Mathers, J.] MINER *v.* MOYIE. [Feb. 26.

Principal and agent—Commission on sale of land—Secret agreement to divide commission with agent of vendor.

Action to recover commission on sale of a saw-mill and timber limits in British Columbia. Payment was resisted on a number of grounds depending on questions of fact which were all decided by the trial judge in the plaintiffs' favour, also on the ground that the plaintiffs had made an agreement with the defendants' manager, who had employed the plaintiffs, for an equal division with him of whatever commission would be payable on the sale and that the defendants knew nothing of such agreement.

Held, that the plaintiffs were not, nor was the defendants' manager, by such agreement placed in a situation where their interests would be in conflict with their duty to their employers in getting the best possible price for the property, and therefore such agreement was no bar to the plaintiffs' right to recover. *Roland* v. *Chapman*, 17 L.T.R. 669, and *Scott* v. *Lloyd*, 35 Pac. Rep. 733, followed.

Held, however, that, unless the defendants knew of and acquiesced in the arrangement for a division of the commission with their manager, they could recover the half from him if he received it, and therefore the plaintiffs should only have judgment for one half the commission.

Ferguson and *McKay,* for plaintiffs. *Wilson,* for defendants.

Macdonald, J.] BANK OF NOVA SCOTIA *v.* BOOTH. [March 1.

Private international law—Comity—Assets within jurisdiction of foreign insolvent—Appointment of receiver by foreign court—Service outside jurisdiction.

The appointment by a court of a foreign state of a receiver of the assets of an insolvent corporation domiciled in such state does not necessarily effect a transfer to such receiver of assets of such corporation in Manitoba and, upon the plaintiffs shewing that a resident of Manitoba was indebted to such corporation in a sum exceeding $200 which could be garnished, they were held entitled, under Rule 202 of the King's Bench Act, to an order allowing service of the statement of claim outside the jurisdiction.

In re Maudslay Sons & Field (1900) 1 Ch. 602; *Woodward* v. *Brooks,* 128 Ill. 222, and Smith on Receivers, pp. 50, 145, followed. *Brand* v. *Green,* 13 M.R. 101, distinguished.

Burbidge, for plaintiff *Robson* and *Coyne,* for defendants.

Macdonald, J.] CURTIS *v.* RICHARDSON. [March 1.

Mechanics' lien—Certificate of lis pendens—Commencement of action to enforce lien.

Under s. 22 of the Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, in order to preserve a mechanic's lien, it is necessary, besides commencing an action, to register a certificate of lis pendens in respect thereof, according to form No. 6 in the schedule, in the proper registry or land titles office within the time prescribed, and a certificate that some title or interest in the land is called in question, without any reference to a mechanic's lien, is not a sufficient compliance with the statute.

Although the lien may be registered before commencing or during the progress of the work, yet an action thereon cannot be commenced before completion.

A. C. Williams, for plaintiff. *F. G. Taylor,* for defendant.

Macdonald, J.] FORREST *v.* WINNIPEG. [March 1.

Negligence—Municipality—Liability for non-repair of sidewalk —Municipal Act, R.S.M. 1902, *c.* 116, *s.* 667—*Winnipeg charter, s.* 722.

The plaintiff was injured in consequence of stepping on the end of a loose plank in a comparatively new sidewalk and so being thrown down. There was evidence that the plank had been loose for two or three weeks before the accident, but none to shew that any of the city's servants or officials had knowledge of it and many persons, including an inspector of sidewalks in the employ of the city, had walked over it without noticing that there was any defect there.

Held, that the defendants were not liable, as negligence on their part was not proved.

Iveson v. *Winnipeg*, 16 M.R. 352, distinguished.

Rothwell, for plaintiff. *Hunt, Theo. A.*, and *Auld*, for defendants.

Mathers, J.] [March 2.

BRYSON *v.* RURAL MUNICIPALITY OF ROSSER.

Wages—Priority of wages over garnishing and other orders.

Sec 4 of the Builders' and Workmen's Act, R.S.M. 1902, c. 14, making a proprietor directly liable for payment of the wages of workmen employed by a contractor doing any work for him, effects what may be termed a statutory assignment to the workmen, to the amount of their unpaid wages, of the moneys payable by the proprietor to the contractor, so that the workmen are entitled to priority over the claims of creditors holding garnishing or other orders against the proprietor in respect of such moneys, and such creditors are entitled to be paid out of any balance in the order in which notices of their several claims were given to the proprietor.

In such a case it makes no difference that the proprietor has made a payment to the contractor which diminishes the amount available for such other creditors.

McLaws, Tarr, Mackenzie and *Kemp*, for various parties.

Mathers, J.] MUNROE *v.* HEUBACH. [March 16.

Practice—Entry of judgment—Review by judge after entry— Correction of errors in judgment as entered.

Until the judgment pronounced in an action is entered the court has full power to rehear or review the case; but, after

the judgment has been entered, the judge who pronounced it has no power to amend or alter it if it correctly represents the actual decision, even although based on a misapprehension. *In re Sheffield & Watts*, 20 B.D. 693; *In re Lyric Syndicate*, 17 T.R. 162, and *Preston* v. *Allsop* (1895) 1 Ch. 141 followed.

Clerical mistakes or accidental slips or omissions may, however, be corrected under Rule 638 of the King's Bench Act.

Hudson, for plaintiff. *Galt*, for defendant.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] ALEXANDER *v.* WALTERS. [March 16.

Lease—Breach of covenant.

Action by lessee against lessor for re-entry for breach of a covenant in a farm lease.

Held, that a covenant by a lessee to "do all plowing, reaping, and harvesting of all crops . . ." is not obligatory in a season when this is shewn to be inadvisable and impracticable; nor does a failure to seed constitute a breach of such covenant. Clauses of this kind in an agricultural lease should be precise: *Duke of Marlborough* v. *Osborne*, 33 L.J.Q.B., N.S. 148.

Reid, K.C., and *R. M. MacDonald*, for plaintiff. *J. A. Russell* and *Hannington*, for defendant.

Morrison, J.] KENDALL *v.* WEBSTER. [March 16.

Company—Profits made by manager—Rights as to.

Action by liquidator of company against its former general manager for an account of profits made by him in dealing in timber limits while employed by company.

Held, following *Dean* v. *MacDowell*, 8 Ch.D. 354; *Kelly* v. *Kelly*, 7 W.L.R. 543; *Sheppard* v. *Harkins*, 9 O.L.R. 505, etc., that as these transactions of the defendant's were not secret, were not properly within the scope of the authorized business of the company, were not founded on information to which the company had any right and were not carried through by any use of

the company's property, and as the defendant did not acquire the information or property by means of his fiduciary position or owing to his connection with the company, he is not accountable to company for profits made in such transactions.

Burns and *Walkem*, for plaintiff. *L. B. McPhillips*, K.C., *Laursen*, for defendant.

Martin, J.] IN RE TIE & TIMBER CO. (No. 2). [March 24.
COLAN *v.* THE SHIP RUSTLER.

Practice—Winding-up Act (D.) s. 22—Action by seaman for wages—Proceedings in Admiralty Court—Arrest of vessel—Leave to proceed in admiralty—Irregularity.

Where a company is being wound up pursuant to the Dominion Winding-up Act, in the Supreme Court, proceedings in the Admiralty Court on a claim for seaman's wages, taken without leave of the court having charge of the winding up, are not void, but only irregular.

In the circumstances here that leave should be granted without the imposition of terms.

A. M. Whiteside, for the liquidator. *Reid*, K.C., for plaintiff.

Irving, J.] [March 24.
ATWOOD *v.* KETTLE RIVER VALLEY RY. CO.

Practice—Postponement of statutory sittings—Fresh notice of trial—Whether necessary in consequence—Rule 440.

It is not necessary to give fresh notice of trial in consequence of the postponement of the statutory sittings.

S. S. Taylor, K.C., for plaintiff. *Lennie*, for defendant.

United States Decisions.

The right to an injunction to restrain a waterworks company from pumping water from artesian wells on its premises in such quantities as to reduce the level of the water in a well on other premises below its normal height was denied in *Erickson* v. *Crookston Waterworks, P. & I. Co.* (Min.) 117 N.W. 435, 17 L.R.A. (N.S.) 650.

The fact that money is obtained by fraud is held, in *Boyd* v. *Beebe* (W. Va.) 61 S.E. 304, 17 L.R.A. (N.S.) 660, not to prevent the running of the Statute of Limitations, against an action to recover it back, from the consummation of the transaction, unless investigation is prevented by affirmative efforts on the part of the wrongdoer, mere silence not being sufficient.

In the absence of fraudulent concealment, it is held, in *Goodyear Metallic Rubber Shoe Co.* v. *Carpenter* (V.) 69 Atl. 160, 17 L.R.A. (N.S.) 667, that the Statute of Limitations began to run against a claim upon an attorney for money collected by him from the time the money should have been paid over, which is within a reasonable time after the collection, under the circumstances of the case.

The liability of a landlord for injuries to his tenant caused by shutting off the heat from the tenement after the tenant is in arrears for rent, is denied in *Howe* v. *Frith* (Colo.) 95 Pac. 603, 17 L.R.A. (N.S.) 672, where the lease provides for forfeiture in case of non-payment of rent, and for re-entry by use of such force as is necessary, in which event no action shall be brought by the tenant.

Although one driving along a street ahead of a street car which is running so slowly that he has time to cross the track without being struck is negligent in making the attempt, it is held in *Smith* v. *Connecticut R. & L. Co.*, 80 Conn. 268, 67 Atl. 888, 17 L.R.A. (N.S.) 707, that his act is not the proximate cause of his resulting injury if upon seeing his design the motorman because of his inexperience becomes confused, releases the brake, and causes the car to increase its speed, so that it strikes the wagon, which it would not do if he used ordinary care.

The operation by a municipal corporation of an elevator in a police station is held, in *Wilcox* v. *Rochester*, 190 N.Y. 137, 82 N.E. 1119, 17 L.R.A. (N.S.) 741, to be part of its governmental duty, for negligence in which it is not liable to an individual injured thereby.

The abutting property owner is held, in *Kampmann* v. *Rothwell* (Tex.) 109 S.W. 1089, 17 L.R.A. (N.S.) 758, to be liable for injury to a pedestrian in falling over a covering which con-

stitutes an obstruction to footmen, placed by an independent contractor over a repaired sidewalk, without signals or guard to protect the public from injury after dark.

The liability of a master for injury to his employee, due to the master's negligence in failing to furnish a suitable number of servants to do the work required of them, is sustained in *Di Bari* v. *J. W. Bishop Co.*, 199 Mass. 254, 85 N.E. 89, 17 L.R.A. (N.S.) 773.

The liability of a railroad company for the negligence of an independent contractor in setting out a fire guard along the railroad right of way is sustained in *St. Louis & S. F. R. Co.* v. *Madden* (Kan.) 93 Pac. 586, 17 L.R.A. (N.S.) 788.

The right of a telegraph company to refuse to transmit a message which is not libellous or obscene, on the theory that it is improper, is denied in *Western U. Teleg. Co.* v. *Lillard* (Ark.) 110 S.W. 1035, 17 L.R.A. (N.S.) 836.

Flotsam and Jetsam.

A former member of the House of Commons, now a Senator, has evolved a cure for the level crossing evil. He proposes to fine the people who risk getting killed. Farmers and others who attempt to cross a railway track on the level without first stopping their conveyances at a safe distance from the rails and looking carefully both ways, will be subject to a penalty. Also they must listen; so that if their eyes are poor, their "ear-sight" will make up the deficiency. Just who is going to accuse the farmer when there is no one present but himself and the fence posts, how they are going to collect the fine after he has been smashed to pieces, or to what extent a fine will frighten a man who will risk his life, is not explained. He ought to add a clause to his bill making it a penal offence for any man to cross a level track without putting his ear to the rail first, as vibrations carry a long distance through metal.—*Ex.*