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WHAT ARE THE FUNCTIONS OF A PROVINCIAL LEGISLATURE?—THE DISTINCTION BETWEEN PUBLIC AND PRIVATE PURPOSES.

To those who are conversant with constitutional questions, that which has appeared in the leading daily papers in relation to a subject which is said to be of general interest to large sections of this Province, and, incidentally, to the Dominion at large, is worthy of serious consideration. The discussion of this subject comes appropriately within the domain of a legal journal.

The Government of Ontario, in their laudable desire to promote the industries of the Province by providing them with the means of obtaining so-called "cheap power," appears, unfortunately, to have so acted as to bring about a state of affairs by no means conducive to the best interests of the country. Already, as has been pointed out in this journal, they have, by legislative interference with private rights, shaken public confidence in the stability of contracts, and the reliance to be placed in the judgment of the Courts. Now, in their dealing with the subject of electrical power, we find a further manifestation of this dangerous inclination to set aside all consideration for vested rights in order to carry out some object of supposed public utility, or some scheme which has attracted for the moment the support of popular opinion.

In order to effect the object of supplying electric power, the Government of Ontario set up a creation of their own called the Hydro-Electric Power Commission, a body which may be described as a combination of a Government department, a commercial agency, and a trading corporation. This body, which is endowed with all the powers and freed from all the responsibilities of a corporation, can only be brought to account for any

of its actions by virtue of a flat from the Attorney-General of the Government of which, to all intents and purposes, it is a branch. It has no assets which can be made liable for any mischief that it may do, and how much mischief it is capable of doing is clearly shewn by the way in which it has begun operations. It first of all made contracts with various municipal corporations for the supply of power for a fixed sum per horse power delivered to the municipality, and by-laws in accordance with these terms were passed by the ratepayers of several municipalities—the city of Toronto among the number. Subsequently the Commission making the discovery that it could not safely undertake to carry out its contracts changed its terms altogether without any reference to the ratepayers, and called upon them through their municipal councils to undertake an obligation which they had never agreed to, and which, from its nature, they probably never would have agreed to had it been laid before them in the first instance.

The mayor of Galt, one of the municipalities referred to, refused to sign the contract under the new terms, and a mandamus was applied for to compel him to execute it (*Scott* v. *Patterson*, ante, vol. 44, p. 621). Mr. Justice Anglin in giving judgment said: "I think the by-law of the town of Galt (authorizing the signing of the contract) could only be passed in breach of faith with the electorate and that the contract which it purported to require the mayor to execute would be illegal, and contrary to the requirements of the statute. . . . The mayor, in my view, was justified in refusing to become a party to the perpetration of their illegal acts." The learned judge goes on to say: "I cannot believe that it would be proper that the court should by a summary order of mandamus require the mayor to execute a by-law which cannot be passed without gross breach of faith with the electorate and to sign a contract which contravenes the statutes and contains a recital that it has the approval of the electorate when the established fact is that the terms approved by the electorate differ from those of the contract in most material particulars. To compel by mandamus the doing of that which the court would in subsequent proceedings declare to

have been invalid and wrongful would seem to me to be an abuse of the discretion which the court possesses in regard to the granting of this extraordinary remedy."

An Act was passed at the last session of the Ontario legislature (8 Edw. VII. c. 22, s. 4), which it was claimed validated these illegal contracts; but the same learned judge held that it had no such effect, or rather could not have been intended so to do.

The mayors of the other municipalities (Toronto included), without any authorization from the ratepayers they were supposed to represent, and for whom they were merely agents, signed the contracts on the altered basis in spite of their obvious illegality. It may be that reliance was placed upon the supposition that an Act of the provincial legislature would be passed to make that legal which had been declared illegal, but more of that hereafter.

In the meantime for the purpose of testing the legality of these proceedings, a suit had been brought by one of the ratepayers of Toronto for himself and other ratepapers, to set aside the contract entered into between the city and the Commission upon the broad ground that the contract was not in accordance with the by-law of the ratepayers in that behalf, and claiming that the city has no right to levy a rate upon their property under an illegal contract, also claiming that the contract had been induced by misrepresentation.

The city of Toronto then made application to Mr. Justice Latchford to set aside the writ and to stay proceedings on the ground that the action was not properly constituted as the Hydro-Electric Commission had not been joined as parties defendant; the learned judge postponed the argument to enable the plaintiff to apply to the Attorney-General for a fiat, as the second Hydro-Electric Commission Act, 7 Edw. VII. c. 19, s. 23, seemed to require this leave before the Commission could be sued. The section reads as follows: "Without the consent of the Attorney-General, no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office."

This matter was heard before the Premier, then the acting Attorney-General, who after argument gave the following pronouncement: "I am expected apparently on the mere statement of a plaintiff that the members of the Hydro-Electric Power Commission were guilty of fraud and deception, as set out in the statement of claim, to assume the truth of the statement, and, therefore, grant a fiat. Under this doctrine it would be simply necessary for a plaintiff to interject into his pleading any allegation calculated, if true, to justify the issue of a fiat, and a fiat would follow as a matter of course. As I cannot agree with this, and as under such circumstances fiats have been many times refused, I do not see my way clear to grant these applications. Apart from the question of fraud, the plaintiff's contention in each case rests upon the view that the municipal councils had not the power under the statute to finally enter into contracts with the Hydro-Electric Power Commission without submitting the terms of them to the ratepayers. I have personal knowledge that this was not the intention of the legislature, and I cannot divest myself of that knowledge. It may be that at its next session, which cannot now be long delayed, the legislature may make a declaration on the subject. In refusing the application now I reserve leave to the applicants to renew them after the opening of the session."

Comment on this somewhat extraordinary, and, under the circumstances as I venture to think, indefensible deliverance is needless. Surely no one individual member of the House could know what was in the minds of the other members when they voted on the section in question; and apart from this the refusal was an arbitrary and high-handed taking away of the right of every British subject to audience in the courts of justice and contrary to British usage in similar cases.

Judgment was given on this motion to stay proceedings by Mr. Justice Latchford who held that the action could not be stayed either as being frivolous and vexatious or because the Hydro-Electric Power Commission was not a party. In commenting upon s. 23 of the Act he said: "I do not feel called upon to attempt to determine upon a motion of this kind whether such

legislation—however extraordinary it may appear from a juristic point of view—is ultra vires or not. But I am asked to close the doors of the court against a litigant who questions the power of the legislature to free the commission from the liability which would otherwise be case upon it by law."

An appeal from the above judgment being taken to the Divisional Court (see post, infra, p. 164), the judgment of Mr. Justice Latchford was upheld, and the following suggestive remarks were made by Mr. Justice Anglin, who delivered the judgment of the court: "Whatever may be done towards validating these contracts by legislation, the court should, I think, assume that, pending litigation in which the power of the municipalities to make the contracts is questioned, the Lieutenant-Governor would not by Orders in Council declare them binding upon the Commission; and that, in the event of the courts declaring them to be ultra vires of the municipal corporations, such Orders in Council would not thereafter be passed."

But there is even a more serious matter to be considered than the apparent blunders of the Commission and its disregard of the rights of citizens or even the refusal of justice to an individual citizen. The one may be got over, and the other forgotten, but the damage to the financial standing of the province caused by such recklessness of proceeding, and such setting aside of the terms of contracts solemnly entered into, will not be so easily overcome.

It must also be remembered that through the operation of this Commission the provincial government is entering directly into competition with a company formed for a similar purpose in which a large amount of money has been invested and which had previously undertaken all the risks and successfully overcame the difficulties attendant upon carrying out a new and untried experiment. The capitalists who invested their funds in these ventures naturally ask how it is that the government which had pledged its credit not to do so entered into competition with them before their undertaking had fairly come into operation, but just after it had proved that what was a daring and costly experiment could be brought to a successful issue. Capitalists

will further ask what confidence can be placed in municipal bodies who, having the assent of the ratepayers to a certain contract, suddenly make another which render the ratepayers liable for something entirely different. What confidence will the money men in England, who have shewn a willingness to embark their capital in Canadian enterprises, think of the proceeding of the Power Commission—of its constitution—of its immunity from attack? What will they think of a community which, in pursuit of some possible gain, shows such disregard of the commonest rule of good faith in dealing with the rights and properties lawfully created and lawfully existing. The alarm has already been sounded and it may be that some of those who go to London borrowing will come away sorrowing.

As has been stated two of our judges have declared that these contracts are absolutely void. But now there arises another most important question. Can this legislature—can any legislature—step in to impose upon a municipality an obligation which not only it had never accepted, but which is at variance with one it had accepted? In other words, can the legislature, by any Act of theirs, force upon a municipality a contract—any contract, it matters not what—which the ratepayers had not agreed to. To the municipalities is given the power to say what obligations they will assume and what they will reject, but if the legislature can, in such a case as this, compel the municipality to assume an obligation without consent of the ratepayers—when the legislature has enacted that such consent is an absolutely necessity for the validity of the obligation—then the power of the ratepayers to exercise their constitutional rights in the matter of local taxation is taken away. It seems almost absurd to suppose that such a proposal is even contemplated by the legislature of this province; but there is popular clamour fomented by irresponsible newspaper writers and other interests, political and otherwise, that would be served by so doing. We have seen, moreover, enough of the readiness with which private rights have been interfered with by legislative action to feel any certainty that for the purpose of carrying out this particular scheme even the undoubted rights of any municipality may not be sacrificed. It

is to be hoped that this apprehension is not well founded, and that no consideration of present advantage will lead the Conservative administration at Toronto to perpetrate an Act so subversive of all Conservative principles.

Another suggestion might be urged upon the consideration of the Attorney-General. Admitting for the moment that a municipal council has the power to carry on such works as supplying the inhabitants of a city with water or with light or heat, where the whole population is served, and where the cost may be in excess of the charge made for the article furnished, and therefore assessed upon the ratepayers at large; and admitting also that in such a case a profit may properly accrue to the general funds of the municipality—admitting all this—can we go further and say that a municipal council has the power to carry on works whereby only a small part of the population are benefited? Can, for instance, a municipal corporation legally undertake as a corporate body to supply electric or any other kind of power which is only of use to a small minority of the population? If this can be done there is no limit to the extent to which a municipal corporation may become a trading corporation—a state of things which those who established our municipal institution certainly never contemplated, and which if adopted would lead to untold abuse. The illegality of such proceedings would be more apparent if any part of the cost of supplying the wants of a portion of the population were liable to be thrown upon the community at large. In the case of the supply of such an article as water—a necessity for the whole population—it may be right to tax the whole population, but to do so in regard to anything not of such a necessity would be clearly unjust, and, as far as the corporation is concerned, clearly illegal.

It may be proper for a municipal council to provide a park for the benefit of the inhabitants, and to use the machinery of the Municipal Act, and spend public money for that purpose; but would it be legal to do this for the purpose of providing a park, the use of which would be restricted to the inhabitants on certain streets only? What right has a municipality to levy a tax on all ratepayers for the purpose of private light and power for

the use of a few of these ratepayers and perhaps for some of those who are not ratepayers at all? Why should the real estate of all ratepayers be mortgaged for the benefit of a few of them, or for those who had no property to be mortgaged; and it is not material in principle whether this mortgage will eventually be paid out of the receipts from the ratepayers and others who use light and power. If it should happen (a very likely contingency) that there was a deficit, this deficit would have to be paid out of the general taxes. Surely this would be illegal. It might possibly fall upon the shoulders of the members of the municipal council.

There are no end of difficulties and dangers to be encountered in this perilous voyage in search of the golden fleece phantom of municipal cheap power. Let another of them be suggested. Sec. 92 of the B.N.A. Act says that "In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say, (13) property and civil rights in the province." If the power claimed by the legislature and the municipal councils does not come in under this section there is no such power. Upon what principle can a municipality, expressly created for other purposes, and with other objects, enter into business of a private commercial character? If there is a deficit, who is to pay the loss, and if there is a profit how is it to be applied? And going back further, what right has a provincial legislature with its limited jurisdiction to assume to give a municipality such power? There seems to be no answer to these questions.

The subject is one of vast importance and so far-reaching that the legislature may well pause before going further.

W. E. O'BRIEN.

Shanty Bay.

ONTARIO COMPANY LAW.

The Ontario Companies Act, 1907, with amendments made in 1908, needs recasting; or, better still, an entirely new measure should be enacted. The existing Act contains many sections copied from British legislation, and there can be little doubt that a measure closely following the British Companies Acts would be more satisfactory than any other. The advantage to be derived from decisions in the courts of England is very great, and could be fully enjoyed here if our legislature followed the British Acts more closely.

The following criticisms have occurred to the writer in the course of a study of the existing Act, and are offered with apologies, in the hope that they may prove interesting and stimulate discussion :—

The creation of two classes of corporations is provided for in the Act; those with and those without capital divided into shares. The title "company" is confined to corporations with share capital, and "companies" are sub-divided into those which offer or do not offer shares for public subscription. All companies "the number of shareholders of which is increased to a number greater by ten than the number of applicants for incorporation" shall file a prospectus, which seems to excuse companies not so increasing the number of their shareholders, but inasmuch as ss. 106 and 108 assume that any company offering shares for public subscription has issued a prospectus, the only companies not under necessity to do so are those not offering shares for public subscription.

The provisions of the Act as to the contents of prospectuses are copied from the Imperial Act, 1900, but that Act did not make the issue of a prospectus obligatory (it merely enacted that in a published prospectus certain things should be contained), whereas the issue of a prospectus is by the Ontario Act made a matter of necessity, even to a company not offering shares for public subscription, if its shareholders are increased by more than ten over its original number. Why should this be so?

Consider in this connection the effect of s. 97:

"(a) Every company, the number of shareholders of which is increased to a number greater by ten than the number of applicants for incorporation . . . shall file a prospectus."

(b) No subscription for stock, etc., induced or obtained by valid representations shall be binding upon the subscriber unless, prior to his so subscribing, he shall have received a copy of the prospectus." Presumably the necessity of issuing a prospectus arises when the eleventh shareholder is about to be added to the company's members. What then is the legal position of those ten additional shareholders who were induced by verbal representations to subscribe before a prospectus was issued or was legally necessary? Are their subscriptions binding? May they recover any instalments paid thereon? What, in any case, is the need or purpose of the limitation to ten new shareholders? It can be avoided by procuring the incorporation originally of any required number of dummy shareholders.

With reference to companies offering shares for public subscription, s. 106 enacts that no allotment of shares shall be made until certain conditions therein named have been complied with, and s. 108 enacts that a company shall not commence any business unless certain preliminaries have been observed. Inasmuch as these conditions are not binding on companies not offering shares for public subscription, it is of vital importance to know what is meant by "public subscription." The Act contains no definition. Commentators on the Ontario Act have assumed apparently that all shareholders other than those originally incorporated are obtained as the result of an offering of shares for public subscription, and, therefore, that ss. 106 to 112 both inclusive, apply to all companies obtaining shareholders after incorporation. In Palmer's Company Law, in commenting upon this phrase in the Imperial Act, it is said: "This only applies where there is an offer to the public for subscription. It is not, therefore, available in the case of a strictly private company, or where the shares are only offered privately for subscription, but

it is conceived that an offer made by circular to the public or some section thereof, will be an offer to the public."

The Ontario Act seems to contemplate a distinction between an offering to the public and an offering privately for subscription, after incorporation, for the Act requires that all companies increasing membership by more than ten over the original number shall file a prospectus, while it applies ss. 106 to 112, inclusive, to those companies only which offer shares for public subscription, seeming, therefore, to admit (a) that up to ten over the charter number new members may be added without so much as the filing of a prospectus, and (b) that after an increase of more than ten, and the consequent filing of a prospectus, other formalities are necessary only in the case of companies offering shares for public subscription, implying, therefore, that ten and more new subscribers may be had without offering shares for public subscription. The distinction between public and private subscription for shares is important in relation to meetings of shareholders, for s. 54 requires a general meeting of shareholders within two months of incorporation of companies not offering share for public subscription, while s. 111 requires a statutory meeting of shareholders of companies offering shares for public subscriptions within three months of the date at which the company is entitled to do business. It is suggested that offering by advertisement in newspapers, or by general distribution of copies of a prospectus, constitutes an offering of shares to the public for subscription, but that canvassing individuals, by hired canvassers or otherwise, accompanied even by the exhibition of a prospectus, is not such an offering to the public, and, therefore, that ss. 106 to 112, inclusive, of the Companies Act, do not apply to companies which confine their efforts to obtain shareholders to personal canvassing. This distinction strikes at the whole practice pursued in the formation of companies, and is, therefore, of special importance. The Act should be amended so as to set doubts at rest.

The provisions of the Act as to the election of directors is confusing. Read broadly, they seem to be intended to secure

(a) a Board of not less than three directors, (b) that provisional directors (named in the letters patent) shall hold office until successors are elected, (c) that the election of successors shall take place at the first general meeting of the company, and (d) that thereafter a Board shall be elected at each annual meeting. It should not be difficult to express such an intention exactly, but it has not been done.

As to the powers of provisional directors s. 80 says: "The affairs of the company shall be managed by a Board of not less than three directors." So far, good! But it goes on: "Who shall be elected by the shareholders in general meeting of the company." These words are surplusage or mischievous, for what about the right of the provisional directors to manage the affairs of the company; is there any limitation on their right? Sec. 79 says: "The persons named in the letters patent as provisional directors shall be the directors of the company." This seems to negative any distinction as to their powers. In Parker & Clark's Company Law it is said, on the authority of *Johnston* v. *Wade*, therein referred to, that "presumably the powers of provisional directors are of a limited nature," though the same case is also cited for the ruling that "this section is very broad in its terms, and its effect is probably to confer upon the provisional directors, for the time being, all the powers properly exercised by directors under the Act." Upon a reading uninfluenced by decisions prior to the adoption of the Act in its present form, it does not appear that there is any sensible distinction between the powers of provisional and elected directors, the term "provisional" serving no other purpose than to signify that the directors called provisional have been appointed by the letters patent, and not elected by shareholders. The word "provisional" should be stricken from the Act.

Two very brief sections would correctly express all that is meant, apparently, by ss. 79 and 80; first, "the affairs of the company shall be managed by a Board of not less than three directors"; second, "the letters patent shall name the persons

who shall constitute the Board until other persons shall be elected by the shareholders."

Then as to the tenure of office by provisional directors, s. 80, as it now stands, provides that the directors shall be elected at a general meeting, and s. 84 (1) says: "The election of directors shall take place at the annual meeting," wherefore it would be fair to assume that the election, to comply with both sections, should take place at the annual general meeting. But s. 34 (1) says: "The provisional directors of a company not offering shares for public subscription shall call a general meeting of the company within two months of the date of the letters patent for the purpose of electing directors," etc., while in the case of companies offering shares for public subscription there is no specific provision similar to s. 34, for the election of directors to succeed the provisional directors, though both ss. 80 and 84 (1)—contradictory as they are—apply to such a company. The statutory meeting of the shareholders of a company offering shares for public subscription (s. 111) is not held to elect directors or otherwise organize a company, but to receive and consider reports, etc. Prior to the enactment of the present Act the provisional directors of companies were bound to call a general meeting for organization within two months of the date of the letters patent, but the provision now applies only to companies not offering shares for public subscription. Reading broadly, it may be said that the intention of the framers of the Act is this: provisional directors shall hold office until successors are elected; at the general meeting for organization held by companies not offering shares for public subscription, and at a special general meeting by companies offering shares for public subscription, and subsequently, both classes of companies may only elect directors at annual general meetings. But if this be so, why does the Act not say so? Following after the revised sections suggested above, the following might appear: "The directors to succeed provisional directors may be elected at a general meeting called for that purpose, and thereafter directors shall be elected at each annual meeting."

Questions may also arise as to the qualifications of shareholders in a company offering shares for public subscription to elect successors to provisional directors. Sec. 79 says: "They shall be the directors . . . until replaced by . . . others duly elected." But when may an election take place? No "business" may be "commenced" by a company offering shares for public subscription (s. 108) until certain preliminaries have been complied with, and much has to be done before that can be obtained. Does "business" include the election of directors to replace provisional directors, and similar organization work? One would be inclined to say that it means "business as a company with strangers to the company," were it not for the fact that until the provincial secretary has issued a certificate that the company is entitled to commence business, all moneys received for shares must be held in trust, and no allotment of shares can be made until the amount named in the prospectus for a minimum has been subscribed, so that until the aforesaid certificate is issued the new subscribers cannot become shareholders qualified to vote at general meetings, and, therefore, cannot take part in the election of directors; so that until the company is organized the provisional directors must remain in office, or be succeeded by directors elected by those shareholders originally incorporated.

A question may also arise as to the number of directors who can be elected to replace provisional directors. Sec. 79 says: "The provisional directors shall be the directors until replaced by the same number of others." Sec. 86 says: "A company may by by-law vary the number of its directors." In *Manes Tailoring Co.* v. *Wilson,* 14 O.L.R. 89 (decided before s. 86 was enacted) it was held that the number elected must be the same, and to make this clear, apparently, s. 79 was amended by inserting "the same number" before "others" at the very time s. 86 was being enacted, and the effect has been to create greater doubt and confusion.

The result seems to be that if a company wishes to displace the provisional directors, and also to vary the number of its

directors, it must first elect successors to the existing Board, and then decrease the number by adopting a by-law and procuring some directors to resign, if decrease is aimed at; or, elect additional directors if the object is to increase the number; and 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.

Copying Imperial legislation (1890), the Ontario Companies Act provides most stringently against the issue or allotment of shares at a discount, except in the case of mining companies, which "may issue its shares at a discount or at any other rate." What is meant by any other rate? Why should this exception be made? Except to enable kite-flying, what purpose can the exception serve? What good argument can be made against discounts which is not equally valid, and, if possible, more forcible, in the case of mining companies. But in any case, if the exception is a wise one, and merits continuance, it is clear that the Act requires a definition of the title "mining companies," for as the Act is now framed, any company by being incorporated as a mining company, may issue its shares at any discount, yet carry on any kind of business.

Sec. 144 enacts a summary method of disposing of shares in "a company subject to the provisions of this part of this Act" in the event of calls remaining unpaid. When is a company subject to this part of the Act? How is its subjection indicated? There is no provision in the Act itself for indicating the subjection. In practice, is the character marked to shew such subjection, and, if so, by what authority is such marking made? Sec. 140 says: "No shareholder of such company shall be personally liable for non-payment of any calls beyond the amount agreed to be paid therefor," and s. 143 says that "no personal liability" shall appear after the name of the company wherever used, while "subject to call" must be marked on certificates of shares which are in fact so subject. These provisions seem a perfect jumble. The phrase "no personal liability" must mean by the company or by the shareholders; if it means by the company, it is absurd; if it means by the shareholders it

is untrue, when calls have not all been paid. Sec. 46 applies to all companies, and it provides that share certificates shall specify the amount paid thereon, s. 27 provides that the word "limited" shall appear after the name of a company, so that s. 143 seems wholly unnecessary.

Is a shareholder necessarily a "member" of a company with capital divided into shares, incorporated under the Ontario Companies Act? Does the Act contain any provision declaring when persons other than charter members become members? In many sections of the Act the words "member" and "shareholder" are used as though they were synonymous. In Parker & Clark's Company Law it is said "every subscriber to the memorandum becomes a shareholder on the incorporation of the company." This is not correct, in the sense that the incorporation makes the subscriber a shareholder, for he becomes so (if at all) by virtue of his agreement to take shares; it is the incorporation which makes "members" of those who have at the date of the letters patent agreed to become members and shareholders. "An agreement alone does not create the status of membership," said Fry, L.J., in *Nicol's Case*, 29 Ch. Div. 421. The Imperial Act, 1862, provides that "every person who has agreed to become a member of the company, and whose name is entered on the register of members, shall be deemed a member of the company." The Companies Act (Canada) provides that the petitioners and others who become shareholders shall be a body corporate. The Ontario Act incorporates the petitioners "and any others who have or may thereafter become subscribers to the memorandum a body corporate and politic," but inasmuch as it is provided that the memorandum, executed in duplicate, shall be deposited with the provincial secretary with the petition for incorporation, the incorporation may be confined to those who sign prior to the incorporation, for they cannot thereafter sign the memorandum, in duplicate, for one duplicate cannot, I take it, be added to after being deposited with the provincial secretary. If one duplicate be returned and be afterwards signed that would not be "executed in duplicate." In

Palmer's Company Law, it is said: "We have now to consider what it is which constitutes membership. It is a point of the first importance in the law of companies, and to answer it we must turn to s. 23 of the Act of 1862; that section provides as follows: 'The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned (s. 25, see infra, p. 101), and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company.'

"This section, it will be observed, deals with two classes: (1) Those persons who have subscribed the company's memorandum of association. (2) Those persons who have agreed to be members, and whose names are entered in the register. These and these only can strictly be called members in the sense of having acquired the full status of membership: *Nicol's Case* (1884), 29 C.D. 421.

"A person may, therefore, become a member or shareholder in any of the following ways: (1) By subscribing the memorandum of association before its registration; (2) by agreeing with the company to take a share or shares, and being placed on the register of members; (3) by taking a transfer of a share or shares, and being placed on the register of members; (4) by registration on succession to a deceased or bankrupt member; (5) by allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held out as a member.

"Where membership is constituted otherwise than by subscribing the memorandum of association, entry in the register of members is by s. 23, made a condition precedent to membership. The complete status of membership in such case is not acquired unless and until it can be predicated of the person that he is, within the words of the section, one 'who has agreed to

become a member of a company under this Act, and whose name is entered in the register.' In this respect there is an essential difference between the requisites of membership as regards persons who subscribe the memorandum, and those who otherwise agree to become members. The former, as we have seen (p. 80), become ipso facto on the registration of the company, members irrespective of entry in the register of members; but the latter do not become members until agreement, plus entry in the register. This distinction is recognized in *Nicol's Case*, 29 C.D. 421. In that case A. had agreed to take shares, and shares had been allotted to him; but his name had not been entered in the register. After some years, the agreement for membership not having been acted on, a winding-up order was made, and it was sought to place A. on the list of contributories, on the ground that he was a member. The learned judges were all of opinion that he had never become a member, that he had only agreed to be a member. Cotton, L.J., said that the question was, whether, under the circumstances, A. had become an actual member or had only agreed to become a member, and stated that 'there was in this case no actual membership, although it would have been possible, if proper proceedings had been taken, to render the membership complete'; and Bowen, L.J., said: 'It appears to me that A. never acquired the status of a member of the company. I think that he remained with contractual obligations to the company which the company had for a time a right to enforce against him. . . . According to the twenty-third section of the Act I think he had not become a corporate member'; and Fry, L.J., said that the section 'makes the placing of the name of a shareholder on the register a condition precedent to membership.' The result, therefore, in the case of an agreement to take shares not perfected by entry on the register, is that there is an agreement which the Court may or may not think ought to be specifically enforced, but there is no membership."

Similarly, having regard to s. 3 of the Ontario Companies Act, the agreement to take shares not perfected by subscribing

the memorandum which goes to the provincial secretary with the petition for incorporation does not constitute the subscriber a member of the company, perhaps not a shareholder.

And again, if subscription to the memorandum be necessary to fully constitute membership of the company, what is the status of those who acquire shares by transfer in one way or another. They become, perhaps, the equitable but not the legal owners of shares, but are they members within the meaning of the Act? If not, they cannot, perhaps, be sued for calls. The Act provides (s. 113) for keeping a share register, and (s. 116) for its rectification, but it is nowhere said that the register shall be proof of "membership" in the company; only (s. 119) that "such books shall prima facie be evidence of all facts purporting to be thereby stated."

It is provided by s. 73 that directors may by by-law issue bonds, debentures, or other securities, and by s. 78 that all the property of a company may be pledged to secure such bonds, etc. The latter section provides that a duplicate original of the charge shall be filed with the provincial secretary "as well as registered under the provisions of any other Act in that behalf," but there is no "other" Act providing for registration (Parker & Clark's Company Law, 208) and creditors are wholly unprotected from deception by the creation of charges.

In the particulars mentioned and in many others the Companies Act, therefore, is wholly insufficient for the needs of the day and a recasting of the Act, or a new one, is urgently necessary.

A. B. MORINE.

CHANGES IN THE SUPREME COURT BENCH.

The vacancy caused by the retirement of the Hon. Mr. Justice Maclennan from the Bench of the Supreme Court of Canada has been filled by the appointment of the Hon. Francis Alexander Anglin, one of the judges of the Exchequer Division of the High Court of Justice for Ontario.

It is rather more than twenty-one years since Mr. Justice Maclennan was raised to the Bench of Ontario going direct from the Bar to the Court of Appeal. From thence he was transferred in October, 1905, to the Supreme Court. At the time of his first appointment he was thus spoken of in the pages of this journal: "A man of the highest personal character, as our judges should be, without fear and without reproach. He is a sound and able lawyer, has a judicial mind with a large fund of common sense and is generally familiar with the business of the country." The expectations then formed by his fitness for the Bench have not been disappointed. He has well earned the rest which now comes to him, and he retires with the respect and best wishes of the Bar and his brethren of the Bench.

As to the appointment of his successor, Mr. Justice Anglin, we have nothing to say but words of commendation. It is a little more than five years since he was appointed to the Bench. On that occasion we said of him—then a young man and but little known to the Bar: "He is painstaking, industrious and clear-headed, with an ambition to fulfil any duties entrusted to him to the best of his ability. We look for excellent judicial work from him." Judge Anglin has more than fulfilled the expectations above expressed. This most praiseworthy "ambition" has helped to make him one of the very best and most satisfactory judges on the Ontario Bench.

To those who might be surprised that the vacancy at Ottawa was not filled by the appointment of Mr. Justice Osler, the senior puisne judge of the Ontario Court of Appeal, it is to be said that the position was very properly first offered to that eminent judge, and he was more than once urged to accept it. He, however, could scarcely have been expected at his time of life to pull up stakes and begin life again as it were in different surroundings, but, as we have reason to think, that which weighed most with him was his belief that a younger man should be appointed, who might look forward to many years of usefulness on the Bench and become a power in helping to establish such a settled course of jurisprudence and decision as would be consistent with the development of a growing community.

This is not, however, the first time that Mr. Justice Osler has been asked to take a seat in the final appellate court of this Dominion, for the position was offered to him in 1888, five years after his appointment to the Court of Appeal, by Sir John A. Macdonald, who recognized his fitness for the office, and whose appointments to the Bench were so generally judicious and acceptable. We venture to think that in his present appointment the Minister of Justice has not been less fortunate than his eminent predecessor; and the Bar of Ontario will be glad that the strength of its appellate court has not been weakened, as it would seriously have been had Mr. Justice Osler decided to go to Ottawa.

JUDICIAL CHANGES IN ENGLAND.

Sir John Gorell Barnes, who retires from the office of President of the Probate, Divorce and Admiralty Division, has been created a Baron of the United Kingdom. The *Law Times* says of him that "his sound common sense and freedom from prejudice mark him as an excellent President of that Division." Hon. Mr. Justice Bigham, of the King's Bench Division, has been appointed to take his place. Mr. J. A. Hamilton, K.C., takes the vacant seat in the King's Bench Division.

Lord Barnes' services in the past demonstrate that he will prove a tower of strength to the House of Lords and the Privy Council, which appellate tribunals have suffered a serious loss in the untimely death of Lord Robertson on Feb. 2nd last. James Patrick Bannerman Robertson was born in Perthshire in 1845. In 1888 he was made Lord Advocate of Scotland, and in 1899, on the death of Lord Watson, was appointed Lord of Appeal in Ordinary under the title of Baron Robertson of Forteviot.

The British public are to be congratulated upon these and other judicial appointments made by Lord Loreburn. The Lord Chancellor happily declines to be limited in his selection by political considerations, a limitation which in this country has too often proved detrimental to the reputation of the Canadian judiciary as a whole, and therefore injurious to the country at large. When will people learn the folly of sacrificing such important interests to the exigencies of party politics?

REVIEW OF CURRENT ENGLISH CASES.

LIFE ASSURANCE COMPANY—DEPOSIT WITH GOVERNMENT—SALE OF BUSINESS AND ASSETS—COMPANY WOUND UP—RIGHT OF VENDEES TO DEPOSIT—33-34 VICT. C. 61, S. 3—(R.S.C. C. 34, S.12).

In re Popular Life Assurance Co. (1909) 1 Ch. 80. A life insurance company having made the statutory deposit with the government under 33-34 Vict. c. 61, s. 3, (R.S.C. c. 34, s. 12), subsequently sold its business and assets to another company without having accumulated out of premiums any life assurance fund. The vendor company then passed a resolution for voluntary winding up and their property and policies had been transferred and all claims against the vendor company had been discharged and the company dissolved. The purchasing company now claimed to be paid the deposit, and Warrington, J., held that they were entitled to it, notwithstanding that the English Act provides for the return of the deposit only on an assurance fund for double the amount of the deposit, being f[illegible] accumulated out of the premiums.

SOLICITOR — LIEN ON DOCUMENTS — COMPANY — WINDING UP — LIQUIDATOR.

In re Rapid Road Transit Co. (1909) 1 Ch. 96. This was an application by the liquidator of a company to compel a solicitor to deliver up documents of the company which were in his hands, and on which he claimed a lien for costs. Prior to the order for winding up the company an action had been brought by the company against its directors for penalties for acting without qualification. Neely, the solicitor, had acted in that action for the company, and in the course of the action certain documents of the company came to his hands, pending the action the company was ordered to be wound up. The liquidator continued the action against the directors and retained Neely, but he afterwards discharged him and appointed a new solicitor, to whom he required Neely to hand over the documents of the company in his hands relating to the action. Neville, J., held that Neely had a good lien on all documents which had come to his hands prior to the winding-up order, but that he was bound to deliver up those acquired after the winding-up order.

WILL—CONSTRUCTION—GIFT TO CLASS—REVOCATION BY CODICIL—INTESTACY.

In re Dunster, Brown v. *Heywood* (1909) 1 Ch. 10[illegible]. In this case the construction of a will was in question. The testator by his will directed his trustees to divide his residuary estate into as many equal shares as he should have daughters who should survive him, or should have died in his lifetime leaving issue him surviving and to appropriate one share to each such daughter, each daughter's share to be settled on herself and her children. By a codicil he revoked the gift of a share to his daughter Lucy. All of his daughters, including Lucy, survived him. The question was whether Lucy's share lapsed and had to be distributed as upon an intestacy, or whether it went to swell the shares of the other daughters. Neville, J., held that the gift was to a class, and therefore there was no lapse as to Lucy's share, but the residue was divisible among the daughters other than Lucy in equal shares.

MORTGAGE—CONSOLIDATION—MORTGAGE IN NAME OF TRUSTEE—MORTGAGES MADE BY DIFFERENT MORTGAGORS—ASSIGNMENT OF EQUITY OF REDEMPTION IN SEVERAL MORTGAGES TO SAME PERSON.

In Sharp v. *Rickards* (1909) 1 Ch. 109 the plaintiff claimed the right to redeem a particular mortgage. The facts were as follows: One Stead made three separate mortgages on three leasehold houses to the defendants' testator, and assigned the equity of redemption therein to the plaintiff, who subsequently acquired the freehold of another house and granted a long lease of it to one Cooper, who executed a mortgage of it to the defendants' testator. Subsequently the plaintiff got rid of the reversion in this latter house and took an assignment from Cooper of the equity of redemption in the leasehold interest, and claimed to redeem that house. Cooper, it appeared, when he made the mortgage to the defendants' testator was trustee for the plaintiff. The defendants claimed that they were entitled to consolidate the Cooper mortgage with the three Stead mortgages, but Neville, J., decided against that contention, holding that in order to give a mortgagee a right to consolidate mortgages they must have been made by the same mortgagor; and that a mortgagee had no right to go behind the mortgagor to inquire into equitable interests, and the assignment of Cooper's interest to the plaintiff did not give the defendants any better right.

COMPANY—PROSPECTUS—MINIMUM SUBSCRIPTION NOT STATED—APPLICATION FOR SHARES—COMPANIES ACT, 1890 (63-64 VICT. C. 48) S. 4 (1)(4), S. 5—(7 EDW. VII. C. 34, S. 99(1)(*d*), S. 106 (O.)).

Roussell v. *Burnham* (1909) 1 Ch. 127. This was an action brought to cancel the allotment of certain shares made to the plaintiff in a limited company, on the ground that the prospectus had omitted to state the minimum subscription upon which an allotment would be made as required by the Companies Act. 1890, s. 4 (7 Edw. VII. c. 34, s. 99(1) *d* (O.)). It appeared that the prospectus on which the plaintiff relied was published in a French newspaper, but that an English prospectus had been issued containing the required information. It was contended on behalf of the company that the latter prospectus was a sufficient compliance with the Act, but Parker, J., held that it was not, and that the fact that the advertised prospectus on which the plaintiff relied omitted the necessary information entitled him to a cancellation of the allotment. He further held that the information required by the Act must be explicitly given and not be left to be gathered by inference from other statements in the prospectus.

EXPROPRIATION—LAND UNDER LEASE—RIGHTS OF LANDLORD AND TENANT—COMPENSATION—DAMAGES—ULTRA VIRES.

In *Piggott* v. *Middlesex County Council* (1909) 1 Ch. 134 the plaintiff as landlord claimed to recover possession of land under a condition of re-entry and also damages for breach of covenant contained in a lease, in the following circumstances. The plaintiff owned a parcel of land on which were two cottages, which he leased in 1867 for a long term to one Davenald. The lease contained covenants by the lessee to repair the cottages and cultivate the ground in a husband-like manner, with a proviso for re-entry for breaches of covenant. The defendants required part of the land for widening a road, and under statutory powers in that behalf expropriated a strip of it which comprised one-third of the site of the two cottages. The defendants then bought Davenald's interest as lessee in the rest of the premises and took possession of the whole property, wholly removed the cottages and leased the land for a stonemason's yard, and the tenant removed all the garden soil. The plaintiff gave notice of forfeiture under the Conveyancing Act, 1881 (see R.S.O. c. 170, s. 13) and brought the present action to recover possession, and also for damages for breach of covenant. Eve, J., who tried the action, held that the plaintiff was entitled to succeed and gave judgment for possession, and £100 damages for breach of coven-

ant. The case involved several knotty points. The plaintiff had conveyed the strip expropriated, and it was claimed that this operated as a severance of part of the premises subject to the lease, and the condition of re-entry was gone by reason of the severance, but the learned judge came to the conclusion that as the severance had taken place by act of law, the condition was apportioned. It was also claimed that if the plaintiff were entitled to any damages he must seek them under the Act authorizing the expropriation; but the learned judge held that the Act only applied to the lands actually expropriated by the defendants and did not extend to the interest of Davenald in the residue of the parcels as to which the defendants' statutory powers did not extend.

COMPANY—LIABILITY OF COMPANY ON BILL OF EXCHANGE—BILL ACCEPTED BY DIRECTOR IN NAME OF COMPANY WITHOUT AUTHORITY—PERSON ACTING UNDER AUTHORITY OF COMPANY —COMPANIES ACT, 1862 (25-26 VICT. C. 89), S. 47—(R.S.C c. 79, s. 32; 7 EDW. VII. c. 34, s. 18 (*l*), ONT.).

Premier Industrial Bank v. *Carlton Mfg. Co.* (1909) 1 K.B. 106. This action was brought on a bill of exchange accepted in the name of the defendant company by one of its directors. By the terms of its memorandum of association the company was authorized to accept bills of exchange, but by a resolution of the board of directors it was provided that all bills were to be signed by one director and countersigned by the secretary. The bill in question was signed by a director, but not countersigned by the secretary. The bill in question was not drawn for the benefit of the company nor did the company receive any consideration therefor. The liability of the company depended on whether the director who had signed the acceptance could be said to be acting under the authority of the company within s. 47 of the Companies Act. Pickford, J., decided that he was not and therefore that the defendant company was not liable. It would seem, however, that having regard to the provisions of R.S.C. c. 79, s. 32, that in a similar case arising under that Act this decision may be found inapplicable. How far in the absence of any provision similar to s. 47 of the English Act, the case would apply to companies incorporated under the Ontario Act, 7 Edw. VII. c. 34, seems also doubtful, see s. 18(*l*) of that Act. With all due respect to the learned judge his reasoning does not seem particularly conclusive, and the cases to which he refers seem rather to lead to an opposite conclusion.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Anglin, J., Trial.] [Jan. 8.

TORONTO, HAMILTON & BUFFALO RY. CO. *v.* SIMPSON BRICK CO.

Statute—Railway—"Farm crossing"—Heading and side-note—Use of crossing for business of brick yard—Agreement to provide and maintain crossing—Reservation—Easement—Interference with operation of railway—Severance of ownership—Cesser of right.

Sec. 191 of the Dominion Railway Act of 1888 is not restricted in its application to crossings for farm purposes merely, notwithstanding the heading and side-note "farm crossings," which may be taken as descriptive of the character of the construction of the crossing, and not restrictive of the purposes for which it may be used or of the uses to which the lands crossed by the railway may be put, and notwithstanding the words of the section itself, "convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles," which may be similarly interpreted.

The defendants, as lessees of S., occupied and operated a brick yard, in a city, on the north side of the plaintiffs' railway, and in connection with their business used a private lane over the property of M., lying to the south of the railway. This lane led to a street, and was the only means of access from the brick yard to a public highway. To reach this lane the defendants used a crossing over the railway, and their right to do so was called in question by this action. When the railway was built, the land leased by the defendants and that owned by M. were the property of the Messrs. B., who in December, 1894, conveyed to the plaintiffs a right of way through their property, and obtained simultaneously with their conveyance an agreement by which the plaintiffs covenanted to provide and maintain "a farm crossing" at the point now in question, which was

duly constructed. The Messrs. B. conveyed both properties to M. in 1901, and in 1903 F. acquired from M. the premises afterwards leased by the defendants. In his conveyance M. granted to F. a right of way over the lane opposite the crossing. S. acquired title from F. and subsequently leased to the defendants. The land leased by the defendants had been in use as a brick yard for 25 years before 1893, but lay idle from that year until 1903, when S. established a brick-making industry upon it. The plaintiffs were aware that S. bought with the intention of using the crossing and the lane to the south as the means of conveying from his yard brick for local trade, and with this knowledge they reconstructed and kept in repair the crossing in question, which was used by S. and the defendants for that purpose, without objection by the plaintiffs, until 1906, when they complained of its use, and began this action in July, 1907.

Held, that a railway company acquiring a right of way may take the land required subject to reservations in favour of the grantor of such rights of crossing or other easements as may be agreed upon, and are not inconsistent with the use of the right of way for railway purposes; an agreement for a crossing contemporaneous with the deed of the right of way is equivalent to a reservation in the deed itself; and, the vendors having made such an agreement, the character and extent of the right of crossing must be determined by the terms of that agreement. Subject to the question of severance, the covenant of the plaintiffs with "the vendors, their heirs, executors and administrators," enured to the benefit of the assigns or grantees of the vendors, including lessees of such grantees; and the use which the defendants were making of this crossing was within the rights conferred upon the Messrs. B. by the agreement of the plaintiffs, not being, upon the evidence, inconsistent with the safe operation of the railway, nor unduly increasing the burden of the easement created by the agreement.

Held, also, that, although when the right of crossing was created the lands on either side of the railway belonged to the same owners, and were now held by different owners, there was no such severance as would involve the cesser of the right of crossing. *Midland R.W. Co.* v. *Gribble* (1895) 2 Ch. 827 distinguished.

J. W. Nesbitt, K.C., for plaintiffs. *A. M. Lewis,* for defendants.

Anglin, J., Magee, J., Clute, J.] [Feb. 13.

BEARDMORE *v.* CITY OF TORONTO.
SMITH *v.* CITY OF LONDON.

Striking out statement of claim as shewing no cause of action—Staying proceedings to add party defendant—Con. Rule 261 *—Hydro-Electric Commission—*7 *Edw. VII. c.* 19, *s.* 23*—No action to be brought against the Commission without the consent of the Attorney-General—Refusal of fiat—Ultra vires—Refusal of Commission to become a party to the suit —Contract—Abortive attempt of plaintiff to bring all parties before the court—Right of plaintiff to relief.*

Appeal from order of Latchford, J., see ante, p. 82, where the facts are fully set forth.

Held, 1. A pleading should not be struck out on a summary application under Rule 261, unless it is, upon mere perusal, obviously unsustainable, and not merely demurrable — but plainly and incontrovertibly bad and insufficient—and unless the court is satisfied that the plaintiff clearly discloses no cause of action at all.

2. There being a provision in the contract that it should not came into force until an Order in Council had been passed to that effect, until such order is passed the contract is not binding upon either party. As to this, ANGLIN, J., who delivered the judgment, said: "Whatever may be done towards validating these contracts by legislation, the court should, I think, assume that, pending litigation in which the power of municipalities to make the contracts is questioned, the Lieutenant-Governor would not by Order in Council declare them binding upon the Commission; and that, in the event of the courts declaring them to be ultra vires of the municipal corporations, such Orders in Council would not thereafter be passed."

2. That under the above circumstances, the contract not being binding upon the parties, the Commission was not a proper party to the action.

3. The case of *Atlantic & Pacific Tel. Co.* v. *Dominion Telegraph Co.*, 27 Grant 592, and *Hare* v. *London North-Western Ry. Co.*, 1 J. & H. 253, are not applicable to the facts of this case. Whilst the Judicature Rules have not altered the legal principles with regard to parties to actions or the right of defendants to insist on certain parties being before the court, the court has now the discretionary power to grant or refuse such

an order and can deal with the matter in controversy so far as regards the rights and interests of the party before it. (Rule 206(1).) See *Robinson* v. *Geisel* (1894) 2 Q.B. 685; *Roberts* v. *Holland* (1893) 1 Q.B. 665; *Norris* v. *Beazley*, 2 C. & P. 80; *Laduc* v. *Ward*, 54 L.T.N.S. 214; *Kendall* v. *Hamilton*, 4 A.C. 504.

4. Notwithstanding the difference between the wording of our Rule 206 (1) and that of the English Order 16, R. 11 (the former omitting the words "or non-joinder" which appear in the English Rule), it is clear, upon the English authorities, that under our Rule mis-joinder must be deemed to include non-joinder, so that the authorities upon the English Rule are applicable, and therefore it is now discretionary with the court to proceed with the action in the absence of the party which the defendants claim ought to be before it.

5. The plaintiffs having done all in their power to bring the Commission as a defendant before the court, and the latter having refused to consent to be joined, it is in the position of a party outside the jurisdiction of the court, and although co-contractors are as a general rule regarded as parties who should be joined, yet a defendant cannot get a stay of proceedings under such circumstances, unless he can shew that the party to be added is within the jurisdiction of the court, and that he can be brought before it.

6. Assuming the validity of the statute declaring that no action shall be brought against the Commission without the fiat of the Attorney-General (the constitutionality of which was denied by the plaintiffs) it could never have been intended that the non-joinder of the Commission should be fatal to the action, for, if the plaintiffs are not allowed to proceed with their actions without joining the Commission as a defendant, whatever rights they may have against the present defendants would be denied them; and especially is this so when by leaving the matter open to be dealt with at the trials, the important questions involved in these actions might be carried on appeal to the Supreme Court or to the Judicial Committee of the Privy Council.

Johnston, K.C., and *H. O'Brien*, K.C., for plaintiff Beardmore. *McEvoy*, for plaintiff Smith. *Fullerton*, K.C., and *McKelcan*, for the city of Toronto, and *DuVernet*, K.C., for the city of London.

Anglin, J.] BLAYBOROUGH *v.* BRANTFORD GAS CO. [Feb. 20.

Lord Campbell's Act—Adopted child—Death of—No right of action to adopted parents.

Application under Rule 261 to strike out statement of claim in an action brought by the plaintiff on behalf of himself and his wife to recover damages for the death of their adopted son through an explosion of gas which was alleged to be due to the negligence of the company in laying their pipes. It was urged by the defendants that the statement of claim disclosed no cause of action under the statute as the child was an adopted one.

Held, that as the deceased was an adopted child and as the only right of action is by a statute which provides that the action shall lie for the benefit of the wife, husband, parent and child of the person who has been killed, there was no right of action to this plaintiff as claimed as he did not come within the statutory definition of parent which is defined to include father, mother, grandfather, grandmother, stepfather and stepmother. Even the mother of an illegitimate child is not within the terms of the statute. The law of England strictly speaking knows nothing of adoption and does not recognize any rights, claims or duties arising out of such a relation except as arising out of an express or implied contract.

L. F. Heyd, K.C., for plaintiff. *McInnes*, K.C., for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 23, 1908.

HALIFAX GRAVING DOCK CO. v. WILLIAMS.

Shipping—Authority of master in foreign port to borrow moneys for repairs—Agreement to pay out of particular fund—General average.

The Italian barque "Affezione" put into Halifax in distress and the master having no funds to enable him to effect repairs borrowed the sum of $2,000 from defendant, giving him an agreement in writing that the same would be repaid before the barque was cleared and that in case the master should, while the barque was in port, receive any money from the owners "on

account of advanced freight, general average or other charges, etc.," the same or a sufficient portion thereof should be applied first in repayment of said sum of $2,000, etc. The sum of money so borrowed was used in the discharge of cargo and for other expenses, the subject of general average. The master was unable to procure money from the owners or on bottomry to repair the ship and she was sold. F. acting for underwriters on cargo gave the usual average bond to S. the adjuster, and got possession of the cargo, and being unable to send it forward to its destination sold it, realizing the sum of $8,000. The master in anticipation of the contribution from cargo being collected by S. gave defendant an order on S. for the sum of $2,000 payable out of the proceeds of the sale of the ship and the general average contribution from cargo, which S. accepted "payable when in funds." The underwriters' agent F. had knowledge of the amount borrowed by the master and of the agreement and order.

Held, 1. The master, under the circumstances, being in a foreign port, had the right to borrow money from defendant and to give him the documents which he did. Also, that the contribution from cargo to the ship was sufficiently described and could be identified.

2. The words "moneys from the owner of the cargo on account of general average" constituted a definite and certain fund, and that even if words descriptive of other sums of money were too wide that would not prevent the court from enforcing the agreement as to the fund ascertained. Moreover that the agreement was clearly one to pay out of the particular fund and not an agreement to pay merely when the money was paid.

3. The underwriters' agent having notice of the trust created by the master in respect of this contribution and particularly of the order which is was contemplated would reach the fund when the adjuster collected it from him, could not pay it over to anyone but defendant and would be discharged by paying it to him.

DRYSDALE, J., dissented.

H. Mellish, K.C., for plaintiff, appellant. *W. B. Ritchie*, K.C., contra.

Full Court.] THE KING *v.* GAINES. [Dec. 23, 1908.

Intoxicating liquors—Sale by steward of incorporated club—Case stated—Set aside as defective.

Information charging defendant with having unlawfully, in said city, kept intoxicating liquors for sale within the space of

six months previous to the laying of the information. The defendant having appeared and pleaded not guilty the stipendiary magistrate, at defendant's request, stated a case for the opinion of the court upon the point whether the serving of liquor by the steward of an incorporated club to bonâ fide members (in which liquor the steward had no pecuniary interest, and which was bought by the funds of the club), amounted in law to a "keeping for sale" by said steward within the prohibition contained in s. 87 of the Nova Scotia Liquor License Act.

Held, quashing the case stated, that in order to give the court jurisdiction to hear the case there must be a conviction, order, determination or other proceeding heard and determined which the person aggrieved complains of, and it was impossible to say whether such was the case in the present instance, the point being stated at the defendant's request, and apparently before any determination by the magistrate.

2. In stating a case under the statute the findings and conclusion of the magistrate upon the whole evidence must be set forth and not merely the evidence.

3. The application for a stated case must be made in writing and that, as, in the present case, the inference was the other way, there was a defect going to the jurisdiction of the court and which could not be waived.

O'Hearn, for defendant. *Clancy*, for prosecutor.

Full Court.] RE PRIEST ESTATE. [Dec. 23, 1908.

Probate court—Security for costs not allowed in case of creditors.

It is not according to the genius of the Probate Court where there are many different parties that there should in the case of a creditor be security for costs. Security is compelled in the Supreme Court by staying the plaintiff's proceedings and after a fixed period dismissing the action for want of prosecution. In the Court of Probate creditors are not generally brought in until the final accounting and staying a creditor's proceedings then until he give a security might stay the proceedings of everyone and tie up the settlement of the estate for months.

Mellish, K.C., in support of appeal. *Tobin*, contra.

Full Court.] BANK OF LIVERPOOL *v.* HIGGINS. [Jan. 10.

Judgment recorded to bind lands—Effect of sale and release of portion of lands—Right of vendee to apportionment.

Judgment for debt and costs registered to bind the lands of H. on Feb. 11, 1891. Subsequently H. conveyed one lot of land

to S. for value and then conveyed a second lot to a trustee in trust for h' nself for life and on his death to his adopted daughter. H. died leaving a will by which he devised a third lot to his adopted daughter, and devised the remainder of his real estate to his executors with power to sell. On the death of H. the trustee of the second lot conveyed same to the adopted daughter. The next conveyance of H.'s land was a sale by the executors of H. of the remainder of H.'s real estate to B. for value, and shortly afterwards the adopted daughter conveyed the two lots held by her to W. and P. and the holder of the judgment at the request of the adopted daughter released from the judgment the lots purchased by W. and P. and after doing so made an application to the court for leave to issue execution against the real estate which was of H., such application being necessary by reason of the death of the judgment debtor. The application was opposed by B. and leave to issue execution having been given, B. appealed to the full court.

Held, dismissing the appeal without costs, that the judgment creditor was entitled to the order for leave to issue execution, but the court intimated that the judgment should be borne by all the lots rateably, and that if the judgment creditor should proceed to sell the land to B. under the execution he must give credit for an amount proportionate to the value of the lands released. DRYSDALE, J., dissented, holding that the judgment creditor by releasing the lands of W. and P. had lost his right to go against the other lands of H. which are now owned by S. and B. and that leave to issue execution should be refused.

Roscoe, K.C., for appellant. *Robertson* and *Savary*, for respondent.

Full Court.] THE KING v. CROSS. [Jan. 16.

Embezzlement—Case stated as to procedure—Power of judge to amend—Simultaneous trial of several charges—Crim. Code ss. 852, 853, 854, 856; 834, 839, 854.

Defendant was brought to trial before a County Court judge, charged with having between certain dates while acting as cashier in the freight and express office of the Halifax and Southwestern Railway, received various sums of money for which he was bound to account, but as to which he unlawfully and fraudulently converted the same to his own use.

Objection was taken on the part of defendant that each taking constituted a separate offence and the prosecuting counsel

thereupon by leave of the judge amended by substituting separate charges covering the amount specified in the original charge.

Defendant pleaded not guilty to each of said charges and was tried upon the first charge and found guilty of fraudulently not accounting, but acquitted as to so much of the charge as referred to his omission to pay. The prisoner was sentenced to one week's imprisonment on the first charge and the hearing of the remaining charges was adjourned until Nov. 27, when the learned judge directed the prisoner to be tried at the same time upon the 16th, 26th and 28th charges.

Held, overruling objections taken on the part of the prisoner, that the charge was sufficiently and legally set forth, it being clear that it was the object of the Code (s. 852, sub-ss. 2, 3; s. 853, sub-s. 2; s. 854, and form 64) to do away with all technical objections of this character, and that the count or charge should be valid provided it was sufficient, to indicate to the accused clearly the offence with which he was charged.

2. In view of ss. 834, 839, 854 and other sections conferring upon the judge ample power to amend and to substitute other charges, the trial judge had power to amend the original charge in the manner above set out.

3. The rules in the Code regulating procedure under the Speedy Trials Act, so far as applicable, gave the procedure in trials before the County Court judge especially as regards the sufficiency of the charges and the evidence, and in that view the provisions of s. 856 and following section on the subject must govern him.

4. In the present case the judge had full authority to try the whole 62 charges together, and s. 857 merely restricted his power in cases of theft except for special cause when alleged to have been committed within six months.

5. As the charges numbered 16, 28 and 38 shewed on their face that they were in no respect identical with the first charge upon which the prisoner was tried and convicted, but were for the theft of a different sum at a different date, and pleas of autrefois acquit and autrefois convict, which were disallowed by the judge, could not have in any way availed the prisoner.

6. The three several charges upon which the prisoner was tried were to be regarded only as separate counts of one general charge, namely, the continuous embezzlement of money from the one corporation during a specified period, and that it was therefore competent for the judge to try the prisoner upon all at the same time.

J. A. McLean, K.C., for the prisoner. *Power*, K.C., and *Paton*, for the Crown.

Full Court.] DAVIDSON *v.* REID. [Jan. 23.

Trial—Findings of jury—Construction by court—Sales—Warranty—Counterclaim.

The jury found that plaintiff warranted a cream separator which had been sold to defendant, for a year, and that there was a breach resulting in damages to defendant to the amount of $5.

They also found that defendant agreed to waive the warrants.

Held, that the court could look at the pleadings and evidence for the purpose of construing these findings and it appearing that the alleged waiver occurred after the breach and was without consideration and that it was conditional upon plaintiff putting the machine in good order, of the fulfilment of which there was no evidence, defendant was entitled to recover on his counterclaim for damages, and that his appeal must be allowed with costs.

Roscoe, K.C., for appellant. *J. J. Ritchie*, K.C., for respondent.

Full Court.] BURCHELL *v.* GOWRIE. [Jan. 23.

Vendor and purchaser—Commissions to agent—Failure of agent to complete sale.

Where the agent entrusted with the sale of a mining property upon certain terms involving the payment of a considerable portion of the purchase money in cash, for which he was to receive a commission of ten per cent., failed to carry out the object aimed at and his principals were subsequently approached by the parties with whom their agent had been negotiating and were induced to agree to a sale of the property for a different consideration from that originally contemplated, consisting wholly of bonds and preferred and common stock in the company by which the property was acquired, the latter proposition being one which was open to the vendors before the matter was placed in the hands of the agent.

Held, that the transaction was not to be regarded as substantially the same disposition of the property that the agent was employed to effect and the principle of law in regard to the payment of commissions when a sale is made of the same property to the same parties by the principals direct, did not apply.

W. B. Ritchie, K.C., and *Robertson*, for appeal. *Mellish*, K.C., *O'Connor* and *Burchell*, contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] HARTT *v.* WISHARD LANGON CO. [Jan. 10.

Vendor and purchaser—Agreement of sale of land—Rescission for want of title in vendor—Pleading—Removal of objections to title after action begun for rescission.

The plaintiff asked for rescission of certain agreements for the sale of lands by the defendant company to him, and for the repayment of the money already paid upon his purchases, on two grounds: (1) misrepresentation by Wishard, who negotiated the sale for the company, and (2) that the company had not and never had a good title to the lands sold.

The only title the company had was under an agreement for purchase from the Quill Plains Land Co. of a large tract of land of which the lands in question were part. Under this no assignment of it was to be valid unless it should be for the entire interest of the purchaser. The only title the Quill Plains Company had was under agreement of sale from the Canadian Northern Ry. Co. covering the lands in question, which were a portion of the lands set aside by the Crown for that company, but had not yet been patented to it. These agreements expressly provided that the consent of the company must be procured in case of any assignment of them. Each agreement in the chain of title provided is the usual form for payment, partly in cash and the balance in yearly instalments and for a conveyance on completion of the payments, and each contained very strict clauses as to forfeiture for non-payment of purchase money.

The final payment on the lands in question would be due to the railway company until Dec. 9, 1911, the final payment to the Quill Plains Co. would be due on 1st October, 1911, while the final payment to be made by the plaintiff would be due Sept. 1, 1911. There was an indorsement on the contracts given by the railway company to the Quill Plains Co., giving the purchasers the privilege of anticipating payment for any quarter section, and in the contract by the Quill Plains Co., the purchasers could obtain title to any quarter section at any time. The agreement under which the Quill Plains Co. held, contained a reservation of coal and other minerals, also of rights

of way 100 feet wide for the railway; and the agreement under which the defendant company held was subject to the same reservations and, also, a reservation of any land that might be required for the right of way and station grounds of the Grand Trunk Pacific Ry. Co. This reservation had been imposed by the Crown. There was also in both agreements a provision restricting the cutting of timber. None of these reservations were mentioned or referred to in the plaintiff's agreements from the defendant company which agreed to sell to him the whole land without exception.

At the hearing an instrument was produced, executed by the C. N. R. Co. and the Quill Plains Co. long after the commencement of the action, releasing the above reservations except that in favour of the G. T. P. Co. The trial Judge held that the plaintiff had failed to prove the misrepresentations relied on, which were that the defendant company was the owner of the land and that they were of a certain quality, and the plaintiff was nonsuited. On the argument of the appeal, plaintiff's counsel contended that the evidence disclosed an absence of title which entitled him to the relief claimed, but defendant's counsel protested that this point was not raised by the pleadings and could not now be considered.

Held, per HOWELL, C.J.A., and PHIPPEN, J.A., at the trial, the sole points at issue were two questions of fraud which were properly decided against the plaintiff; and it was not until the hearing of the appeal that the plaintiff took the position that he was entitled to rescind because the defendant's title was not good. Such a case was not made by the pleadings and it was too late to raise it now.

As to the reservation not released, viz., that in favour of the Grand Trunk Pacific Ry. Co., there was no evidence that any of the lands bought by the plaintiff were or would be affected by it, so that it was no valid objection to the title. The defendants were shewn to be the equitable owners of the lands with a right to get in the absolute title before they should be called on to convey, and the plaintiff was not entitled to the relief claimed: *Shaw* v. *Foster*, L.R. 5 H.L. 350; *Egmont* v. *Smith*, 6 Ch.D. 476; *Re Hood's Trustees*, 45 Ch.D. 310; *Want* v. *Stallibras*, L.R. 8 Ex. 175, and *Re Bryant*, 44 Ch.D. 219. The purchaser not having demanded an abstract of title or called on the vendor to make the title good, had no right to rescind the contract; and, as the title was apparently perfect at the date of the trial, the court should not now rescind it.

Per RICHARDS AND PERDUE, JJ.A.:—1. The court will not force a purchaser to take an equitable estate except where the vendor has the whole equity in the land and controls the legal estate in such a way that he can readily procure it, and the defendants had not, either at the time the contract was made or at the trial, such a title as the plaintiff was compellable to accept: *Craddock* v. *Piper*, 14 Sim. 310; *Esdaile* v. *Stephenson*, 6 Mad. 366; *Madeley* v. *Booth*, 2 De. G. & Sm. 718: Fry on Specific Performance, 4th ed., p. 586.

2. The defendants were too late in procuring the release of the reservations after the commencement of the suit, though it might be otherwise in an action for specific performance: Dart, 1005. The reservation in favour of the G. T. P. Ry. Co. was a fatal objection to the title, as it had not been, and could not be, removed.

3. The position taken by defendants in their statement of defence, setting up the various contracts under which they held, was a repudiation of their contract to furnish a title in fee simple, and an attempt to set up that the plaintiff had only bought the equitable interest they had in the land, which entitled the purchaser at once to treat the contract as rescinded: *Wrayton* v. *Naylor*, 24 S.C.R. 295.

4. The bringing of the suit for the return of the money paid, alleging that the vendor had not a good title, was a sufficient repudiation of the contract on the part of the plaintiff, and it was not necessary for him to give notice of rescission or demand the repayment of the money before commencing suit: *Want* v. *Allibras*, L.R. 8 Ex. 175. Neither was it necessary for the plaintiff to demand an abstract of title, as Wishard shewed the plaintiff the nature of the company's title before the action.

5. Although in Ontario the court may allow money to be paid into court to secure the purchaser against an outstanding incumbrance, as in *Cameron* v. *Carter*, 9 O.R. 426, that course is permissible under the Act respecting the Law and Transfer of Property, R.S.O. 1897, c. 119, s. 15, and there is no similar statutory provision in Manitoba.

6. So far as the question of pleading was concerned, the statement of claim was quite sufficient, for the plaintiff was entitled to join two grounds of relief as he had done and to rely upon either or both of them. The appeal should be allowed and relief given to the plaintiff as claimed.

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

Galt, for plaintiff. *Anderson* and *Moran*, for defendants.

KING'S BENCH.

Cameron, J.] VANDERWOORT *v.* HALL. [Jan. 27.

Specific performance—Delivery of deed in escrow—Part performance—Statute of Frauds.

Action for specific performance of a contract for sale of land to the plaintiff.

Plaintiff an defendant entered into a verbal agreement for the purchase from the defendant of a house and lot for $2 925, giving therefor as part of the consideration an assignment of an agreement to purchase certain farming lands and the balance in cash "by raising a loan on the property purchased" from the defendant. It was part of the verbal agreement that the farm lands were to be leased to one Bishop, and that Bishop should sign a lease from the defendant for them. A statutory conveyance of the house and lot and an assignment of the agreement for the purchase of the farm lands were drawn up and executed and left with the defendant's solicitors. At the same time, under instructions from the plaintiff, a lease of the farm lands was prepared for signature by Bishop. Bishop afterwards declined to enter into the proposed lease. It also appeared that the signature of Empey the vendor of the farm lands, was necessary as consenting to the assignment by the plaintiff, but that, prior to the trial, Empey had served notice of cancellation of the agreement on both parties to the action, and that the agreement had been thereby effectually cancelled and that the title had reverted to Empey.

Held, 1. The plaintiff's failure to secure Bishop as a tenant barred his right to specific performance, as did also the fact that the plaintiff had, at the time of the trial, no further interest in the farm lands.

2. The receipt by the plaintiff of a payment of rent from the tenant of the house without the consent or acquiescence of the defendant was not such a part performance of the contract as would take the case out of the Statute of Frauds.

Semble, the documents executed and left in escrow with the defendant's solicitor would not be evidence of the verbal agreement sufficient to take it out of the statute: *McLaughlin* v. *Mayhew*, 6 O.L.R. per OSLER, J.A., at p. 177.

Philip and *Kilgour*, for plaintiff. *Adolph* and *McKay*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Jan. 20.

LAIDLAW *v.* CROW'S NEST SOUTHERN RY.

Railways—Fire on right of way spread to adjoining property—Condition of right of way—Origin of fire—Burden of proof.

Fire was seen smouldering in a dry stump on a high bank, about level with an engine smoke stack, on defendant company's right of way. Evidence was given that one engine passed the place ten hours and another six hours previously. Evidence also went to shew that the right of way contained inflammable material, and that there were other fires, whose origin was unknown, in the vicinity of the right of way. The fire in question was first seen by some of plaintiff's workmen, when it was insignificant in extent, and the weather was calm, but the wind rising, the fire spread and burnt plaintiff's mill property and a large extent of timber area.

Held, on appeal (affirming the finding of IRVING, J., at the trial, dismissing the action), that there was no evidence to connect the setting of the fire by sparks from the defendant company's engines.

S. S. Taylor, K.C., and *Lucas*, for plaintiff, appellant. *MacNeill*, K.C., for defendants, respondents.

Clement, J.] [Feb. 9.

BISHOP OF NEW WESTMINSTER *v.* VANCOUVER.

Property injuriously affected—Lowering grade of street—Right of owner of abutting property to take arbitration proceedings—Vancouver Incorporation Act, 1900, *s.* 133, *sub-ss.* 5 *and* 9.

The owner of property abutting on a street, the grade of which has been lowered by the corporation, is entitled to take arbitration proceedings to determine whether such property has been injuriously affected.

L. G. McPhillips, K.C., for applicant. *J. K. Kennedy*, for corporation.