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LEGAL EDUCATION—A CRITICISM OF METHODS.

It is now thirty-nine years since Prof. Langdell, on the occasion of his installation as Dean, began the use of the "case-system" with his own classes in the Harvard Law School. This inductive method of teaching, so commonly employed in the various branches of natural science, is peculiarly fitted for use in teaching law, because an accurate statement of the rule which governs any particular state of facts can be reached only after careful study of the decisions involving the points raised. Apart from statutes, the decisions of courts are the only true source of law, and Prof. Langdell decided that his students should familiarize themselves while in the law school with the law as it is found at the fountain head, and should commence at once what must always be done in active practice, an accurate and comprehensive study of the cases.

The instruction which was at that time provided in the American law schools consisted of lectures, and the study of the treatises of learned authors. Yet the validity of a rule of law, and its weight with a court must depend, not on the approval of text-writers, but on whether it is laid down and followed by the courts; and the work of a writer is valuable only in so far as it is based on the decisions. Prof. Langdell therefore made for his classes collections of cases which demonstrated the development of legal doctrine. He cut off the head notes and had his students come to class prepared to state the rules of law which from their own analyses they conceived to be involved in the decision. These and kindred hypothetical cases were elaborately discussed, and by the Socratic method the students were made to defend both their version of the actual decision of the court and their view of its soundness. When the student has thoroughly reviewed his notes, he has in effect compiled a text-book of his own, and

has gone through the identical processes of reasoning by which accurate text-writers reach their conclusions.

Prof. Langdell encountered serious opposition among his colleagues and students, and still more from the profession. His attitude toward the time-honoured treatises was considered almost sacrilegious. Happily he was not discouraged by opposition, and the correctness of his ideas has been vindicated by their complete success. There are very few important law schools in the United States to-day which do not use his methods in part, and many of them adopt them outright.

One vice of the lecture system lies in the opportunity it affords the student to cram his notes and synopses of text-books, and in the encouragement, if not compulsion, to do vast amounts of memorizing. The professor who employs the case-system will mention the names of any text-books which are particularly accurate, for use as a reference, but the student will use them but little. He is thrown "in medias res" and asked at once what the first case decides and whether it is rightly or wrongly decided, with the reasons for his opinion. He proceeds in the discussion of the cases, from one principle to another, during which process he successively takes with his own mind the various steps whereby the law was developed. Instead of memorizing, he reasons. In this regard, the system is psychologically correct, for it has been demonstrated that once the mind has performed a logical sequence of reasoning, it will naturally follow the same course when the point arises again.

What was the effect of this change of method on the condition of the Law School at Harvard? From a school, in 1870, with three professors delivering ten lectures a week to one hundred and fifteen students, it has grown so that now there is a faculty of ten professors (who devote their entire time to their teaching), and several lecturers, giving more than fifty lectures a week to over seven hundred and fifty students. The entering classes are all college graduates. The financial condition has improved in forty years, so that a deficit was converted into a surplus of $500,000, from which the school has provided a

library fund of $100,000 and also the money necessary for a second building much larger than the one built in 1883. Both buildings are now in constant use. The library, which is an indispensable feature of the Langdell system, now numbers 105,000 volumes. The students of the law school are as a body admittedly unsurpassed by those of any other school, undergraduate or professional.

It has been suggested that Dean Langdell and his followers succeeded in spite of their system. Critics admit that their pupils are among the most successful practitioners and judges, but claim that they would have been equally successful, or more so, under the old system. The gradual but unchecked spread of the Langdell method, once Langdell's pupils become known, and the fact that no school which has once tried it has given it up, seem to speak otherwise. And the loyalty and enthusiasm of all who have employed it, either as students or professors, are strong testimony to its merits. It is not a mere coincidence that the two law schools, Columbia and Harvard, which are the most successful and draw to their halls the most distinguished college graduates as students were the earliest and most ardent exponents of the case-system.

The Province of Ontario bids fair to lead the Dominion in all departments of education. Its engineering schools are crowded beyond the maximum of usefulness; its arts and medical colleges rank high on this continent and in Europe; and in the departments of agriculture, domestic science, education and forestry it is well in the lead. In law the position of the province is particularly advantageous, because in its civil law Ontario closely resembles the other jurisdictions of the Dominion, while Quebec, its natural rival, is radically different. From its past record and present prominence the Ontario Provincial Law School commands the largest influence in the Dominion and will naturally become the resort of the most promising students from every province.

In addition to the introduction of the case-system, experience in the United States would point to changes in two particu-

lars. First, the requirement of a degree at entrance. The time may not have come for this as yet, unless the course at Osgoode Hall is altered so as to provide one curriculum for degree holders and a simpler one for other students. Second, the separation of law study from office experience. The body of law which has to be mastered by the modern law student is so extensive, as to require all his time during a three years' law school course. Most students are so exhausted by nine months' work that they require complete rest during the other three. Constant interruptions make effective studying impossible in an office, and a day in an office does not leave the brain fresh and ready for an evening of hard work. Of course, if the law school term is limited to seven months, three or more months' office work could be done in each vacation, and sufficient additional experience may be required at the close of the course to ensure that the student is properly prepared to practise.

The case-system undoubtedly, by its thoroughness, makes greater demands on the students. So also does it mean increased demands on the time of the teacher, for his work must be performed with greater care and accuracy, and he may be precluded from active practice entirely. The Ontario Bar have wisely set the standard high in requiring candidates for admission to spend at least three years in law study and office work. If there exists, however, a method of teaching law which arouses much greater enthusiasm among the students, conduces to greater thoroughness in pupil and teacher, and on the whole produces much more capable lawyers, such a method of instruction, it is submitted, deserves most careful consideration from the Ontario Bar.

H. MAURICE DARLING.

Albany, N.Y.

We are glad to publish Mr. Darling's article. The writer is no novice nor unacquainted with the system of legal education in vogue in the Province of Ontario, which Province produces the largest crop of lawyers of any in our Dominion, and has as its Principal one so eminently qualified for the position—N. W. Hoyles, K.C., LL.D.

Our contributor, Mr. Darling, is a Canadian who graduated in Arts at the University of Toronto and in that city commenced his legal education. He completed his education at Harvard where he became familiar with, and apparently enamored of the Langdell system. He has done well, and is entitled to our thanks, for thus bringing forward for discussion a matter of so much importance both to teachers and learners of the law.

Whilst the system advocated in the above article undoubtedly possesses many great advantages it is not one which could, we think, be adopted here, at least in the present condition of things. In the first place the attendant expense would seem to be a bar, as it requires the publication of numerous books of "case law" for the use of students as necessary school books—books for which there would be no sale outside of the student class. This would also be in addition to the standard treatises which could not be dispensed with.

This brings us to another point, and that is, that excellent as the system is, it is said, by those who perhaps are best able to give an unbiased opinion of value, that the complete mastery of a subject cannot be acquired by the study of the underlying principles of law as set forth in recognized case text-books.

The *Law Quarterly Review*, edited by that great master of the law, Sir Frederick Pollock, has some observations on the subject in a recent issue, which will be read with interest in this connection. In a review of Prof. Lorenzen's "Cases on the conflict of laws selected from decisions of English and American courts," the reviewer writes as follows: "There are branches of law—and the so-called conflict of laws is certainly one—the complete mastery of which cannot be acquired by the study of cases alone. The Harvard system of catechetical instruction is almost beyond

praise, but its success is due less to the merits of a sound method than to the inspiring influence of a body of professors, who are endowed at once with a genius for teaching and with surpassing knowledge of the law. Moreover, any student who is to profit by catechetical instruction based on the knowledge of cases must be encouraged to read the leading works which discuss underlying principles. It is the old story that scientific knowledge can be gained only by combining the results of experience and of theory. Case books being the records of decisions actually pronounced by real courts, determining problems which have in fact arisen supply a student with knowledge. Speculations such as those of Savigny supply him with the ideas which explain the real bearing (or sometimes want of bearing) of the cases which are records of experience. Further, it is of the greatest consequence that readers should never be induced to suppose that anything can be gained from a merely fragmentary study of the works of eminent thinkers." The writer concludes his review with the following observations: "No learner should expect to have a serious opinion about any ultimate problem of jurisprudence, municipal or cosmopolitan until he knows a good deal more not only of law, but of the world, than any case book can teach him."

The Editor of the *Green Bag* in a note on preparation for the Bar puts the case as follows: "The Case book method and Text book method of teaching law alike have their defects. It is undesirable that the law should be learned by rote simply because it can be more quickly mastered by a process which does not cultivate the powers of legal reasoning and independent research; it is likewise disadvantageous to plunge a student into the chaos of adjudged cases—in the language of the late Edward J. Phelps—'to grope his way through it as best he may,' with the object of supplying him in that manner with adequate preparation for the practical requirements of his profession."

In the last volume of the *Law Magazine and Review* (p. 489), a writer in speaking of the "American Case books" says: "We notice that the general editor of the series tilts against the de-

livering of lectures to students by law professors, and claims that the system is doomed. We conclude that his remarks are intended to be confined to the United States for, without laying ourselves open to the charge of insular prejudice, it does seem that that system is preferable to the one which hurls a mass of undigested information at the head of an unfortunate student, and expects him to use his own precautions against a severe attack of intellectual indigestion."

The subject is an interesting and important one and deserving the most careful consideration. We should be glad to hear from some of our friends in the Maritime Provinces as to what they think of the matter. The views of such men as Professor Weldon, of the Dalhousie Law School and of Mr. Justice Russell, who lectured there, would be invaluable.

Our own thought in the matter would be that the Text book method would be best for the first and larger portion of the student's preparation time, with a training in the Case book method to finish with; but even this would, as we have said, be impossible in this country by reason of the expense involved.

THE BRITISH COLUMBIA BENCH.

The Act respecting the Court of Appeal of British Columbia was brought into force by royal proclamation on the 19th ult. The constitution of the court dates from Nov. 23, 1909. The judges for the court were appointed on the 30th ult., their appointment appearing in the *Canada Gazette* of Dec. 4. The names are as follows: John Alexander Macdonald, formerly Liberal leader of the province; Mr. Justice Archer Martin and Mr. Justice P. Æ. Irving, promoted from the Supreme Court Bench, and Mr. W. A. Galliher, K.C., of Vancouver. The vacancies thus made in the Supreme Court Bench have been filled by the appointment of Mr. F. B. Gregory, K.C., of Victoria, and Mr. Denis Murphy, of Ashcroft. The new Chief Justice was born in the County of Huron, Ontario, commencing his study

of the law in the office of Fullerton, Cook & Wallace, Toronto, of which firm he subsequently became a member. He removed to Rossland, B.C., in 1896. He was elected to the Provincial Legislature in 1903, soon afterwards becoming the leader of the Liberal party in that province.

We fear it can scarcely be said that all of these appointments will meet with the universal approval of the Bar of British Columbia. But however that may be, there is every reason to believe that Mr. Macdonald will make an excellent Chief of the court. Whilst in Toronto he shewed that he was a thoughtful man, of intense application, quickly obtaining a clear grasp of the facts and legal aspect of the case before him, as well as a well-read lawyer. Whilst reserved and perhaps somewhat cold in manner he is, in a marked degree, self-reliant and self-contained, and possesses many qualifications which would fit him for his new position.

JUDICIAL RESPONSIBILITY.

The Lord Chief Justice of England in his recent speech at the Mansion House said: "There is a determination among all His Majesty's judges to devote the whole of their energies to their judicial work." Lord Alverstone was evidently not aware that one of the judges of the Supreme Court of Judicature of Ontario, who is, of course, one of His Majesty's judges, does not devote the whole of his energies to his judicial work, but devotes part of his time to the affairs of a trust company, of which he is a director. The Lord Chief Justice of England would also be surprised to know that, although by a Dominion statute no judge of any Superior Court in Canada shall either directly or indirectly act as a director of any company or engage in any occupation other than his judicial duties, and shall devote himself exclusively thereto, the learned judge referred to whilst devoting perhaps most of his time to adjudicating whether or not others have obeyed the law of the land devotes part of his time to disobeying a statute which concerns himself. We know

not whether there is any excuse or technical right claimed by the judge in question; and it is quite possible that Mr. Justice Britton was a director before the above statute was passed and very probably has a large interest in the company, and is much interested in its wefare; but so also were Chancellor Boyd, Chief Justice Meredith and Mr. Justice MacMahon interested in the companies of which they were directors; but they thought it proper to obey the law, and relinquish the emoluments which came to them as such directors. Surely it would be well if their example were followed. A judge occupies a very exalted position, and that position has commensurate responsibilities and obligations. We venture to think that the profession at large recognizes the propriety of the enactment in question, and will endorse the sentiment so strongly expressed by such a one as the Lord Chief Justice of England.

THE FALLACY OF THE DOCTRINE OF PUBLIC POLICY.

A member of the Maryland Bar, W. Irvine Cross, gives the readers of the *Central Law Journal* his views on this subject in an interesting article, which we reproduce. This is a very timely warning. In the conclusion of the article he speaks of the "judicial outrages that have disgraced our history in times of excitement." In this country we have not been afflicted in that way. The outrages have been, so far as the Province of Ontario is concerned, by the legislature. We would commend the following criticism to their attention so that there may, if possible, be no more such outrageous legislation. The article is as follows:—

The doctrine of Public Policy bears about the same relation to the law that the vermiform appendix does to the body—a vestigial doctrine having little function but to start trouble.

The essence of the doctrine, so far as formulated, seems to be that a judge should not simply pass upon the rights of the parties before him, but should be considering, also, how his decision will affect the public, or how it will be looked at by it. Chief Justice Wilmot, an earnest believer in the doctrine, puts it in these

words: "It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even in the administration of commutative justice." In other words, the judge is to have one eye on the rights of the parties and one eye on the public —strabismus, of course, inevitable.

Greenwood on Public Policy, states the doctrine thus: Rule II. "But if such contract bind the maker to do something opposed to the public policy of the state or nation, or conflicts with the wants, interests or prevailing sentiment of the people, or our obligations to the world is repugnant to the morals of the times, it is void, however solemnly the same be made." This would seem to be a broad charter. The most dangerous working of this principle, however, has not been where it has been openly invoked, but where it has been the silent inspiration of the court's action.

Eminent jurists have looked with disfavour upon the doctrine of public policy, and have suggested limitations that would practically substitute for it a few definite rules. Some of them have treated it as not so much a rule of legal action as a chance for the judge to indulge his individual bent, one of them making the inquiry: "Public Policy? Whose?" Baron Alderson says, in the case of *Hipplewhite* v. *McMorine,* 5 M. & W. 467: "I disclaim deciding on the ground of public policy. The policy of one man is not the policy of another, and such a consideration only tends to introduce uncertainty into law." Baron Parke, in the case of *Egerton* v. *Earl of Brownlow,* 4 H. of L. Cases 123, says: "It is a vague and unsatisfactory term, and calculated to lead to uncertainty and error when applied to the decision of legal rights. It is capable of being understood in different senses; it may, and does in its ordinary sense mean 'political expedience' or that which is best for the common good of the community."

I have used the expression "Public Policy" to denote a persistent tendency in the popular mind, and in the judicial mind, in other words, in the human mind, to regard the judicial function as ancillary to the legislative and executive working out any result desirable or greatly desired at the time. This feeling is

older than our legal system —as old as human nature. It is the perennial enemy of the pure law.

An established right in the individual is a limitation upon the power of the majority. People are willing to leave an individual his rights so long as they have no value. When they assume a value, the tendency is to appropriate them. So far as the law has endeavoured to curb this tendency, it has had a hard fight. That the individual should have any rights as against the public interest, as against the state or the government, is a modern conception. It would have been inconceivable to many of the best men of an earlier day. We are shocked when we find Machiavelli, one of the most patriotic men of his time, calmly discussing the occasions when assassination and similar methods should be used. But the avowed view of Italian statesmen in his day was that the public interest was so paramount that a public man must not be limited by the moral restrictions that govern a private man.

The same feeling, lurking, persistent, often unconscious, that the rights of the individual must give way when there is any strong public interest opposed to them, governs the decisions of many of our judges. An interesting example of this tendency is found in the disposition of some of our courts to get rid of the constitutional limitations of our organic law by elastic definitions of the police power. Many of us felt a rather quaking sensation when so great a lawyer as Elihu Root lent all the force of his great name to the statement that the National Government needed greater powers, and that they must be secured by construing the constitution so as to give them.

The curbing of this tendency to ignore the rights of the individual was a prime object of those who framed our constitution. The constitutional limitations which they embodied therein are limitations which the people have set to their own hasty use of power. The people in their calmer mood set limits upon what they may do in moments of excitement. They are limitations upon what the majority may do to the individual. The principle upon which they were framed is finely stated by Mr. Justice

Brewer in his address to the graduating class of the Yale Law School in 1891. "The wisdom of government is not in protecting power, but weakness; not so much in sustaining the ruler, as in securing the rights of the ruled. The true end of government is protection to the individual, the majority can take care of itself."

Set up as a defense of the individual against the majority, the constitutional limitations have had a steady fight with the old tendency. The old bottles would not hold the new wine. That the omnipotent people, state, government, should not be able to do a good thing when they wanted to do it, because of the rights of an individual, is as foreign to the idea of government held by many of our public men and some of our judges, as it would have been to Peter the Great. The fine expression I have quoted from Justice Brewer does not appeal to them. Their idea would be expressed somewhat thus: "It is a weak government that admits limitations upon its own power. It is dangerous to take away from the powers of the government in the interest of an individual."

This persistent old tendency works its way out by taking a large, we might say an exaggerated view of what is called the police power, "that power by which the state provides for the public health and public morals and promotes the general welfare." By making this broad enough we can get rid of the constitutional limitations altogether. We can realize Secretary Root's plan. If the state wants to violate the reserved rights of the individual, all it has to do is to say that its action is in the interest of the public welfare, and therefore an exercise of the Police Power.

We miss the simplicity of the old Bill of Attainder, but we accomplish the same result and on the same principle. Our courts, in the same zeal for the public welfare that led to the use of Bill of Attainder in earlier days, are gradually recovering for the state this valuable attribute of sovereignty relinquished by our constitution. Let me here again quote from the address of Justice Brewer: "It (the Police Power) is the refuge of timid judges to escape the obligation of denouncing a wrong, in a case

in which some supposed general and public good is the object of legislation. The absence of prescribed limits to this power gives ample field for refuge to any one who dares not assert his convictions of right and wrong."

The Dreyfus scandal was a clear case of the working of the doctrine of public policy. All conservative France looks upon the army as the one security against revolution. The strongest kind of Public Policy demanded that the rights of a single man should not be allowed to imperil its prestige.

If the courts are to be influenced by what Greenwood calls "the prevailing sentiment of the people," how far shall they go? How quickly responsive shall they be to this influence? In other words, where does the doctrine of public policy leave off, the yielding to clamour or "playing to the gallery" begin? Shall we defer only to a long continued public opinion; or act promptly on its freshest forms? In my opinion it is only a difference of degree, and the judge who allows himself to be led away from his grand, though simple function, by consideration either of general morality, the public interest or public opinion is only weakening himself against the day when he may have to face popular clamour or resist political influence.

I am sure that the strongest safeguard we can have against the recurrence of the judicial outrages that have disgraced our history in times of excitement and may do so again, is the maintenance in the minds of judges, the strengthening in the minds of people, of the idea that the law is a controlling system, in the administration of which the judge shall be deaf to popular opinion and powerless to carry out his own views of general morality, "political expediency" or the public interest.

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—SHIP—COLLISION—FOG—SIGNAL NOT HEARD—NEGLIGENCE—INEVITABLE ACCIDENT.

The Nador (1909) P. 300 was an action in the Admiralty Court for damages for a collision. The facts were that the defendant vessel was proceeding down the Thames when she suddenly entered a dense fog. Steps were immediately taken to bring the vessel to anchor, and in doing so the collision with the plaintiff's vessel took place. Those on board the defendant vessel testified that the plaintiff's vessel could not be seen, nor were any sound signals made by her heard until it was too late to avoid the collision. In these circumstances Bigham, J., held that the accident was inevitable and the defendant vessel was not liable.

TRUSTEE—INNOCENT BREACH OF TRUST—MISAPPROPRIATION OF TRUST FUND BY SOLICITOR OF TRUSTEES—PAYMENTS BY SOLICITOR TO TENANT FOR LIFE—ACKNOWLEGMENT—EVIDENCE—ENTRIES IN BOOKS OF SOLICITOR—TRUSTEE ACT, 1888 (51-52 VICT. c. 59), s. 8(1) (*a*) (*b*)—(R.S.O. c. 129, s. 32(1) (*a*) (*b*)).

In re Fountaine, Fountaine v. *Amherst* (1909) 2 Ch. 382 is one of those unhappy cases in which two innocent persons are disputing as to which of them is to suffer in consequence of the defalcation of a rogue. The defendants were trustees of a settlement and the plaintiffs were tenant for life and remainderman under the settlement. In October, 1887, a sum of £15,000 was received by one Cheston, the solicitor of the trustees, and misappropriated by him. On March 16, 1893, £10,000 was also received and misappropriated by him, and on 29th July, 1894, a further £6,000 was received and also misappropriated by the solicitor; and the action was brought to recover these sums and also certain balances of the trust fund uninvested. The action was commenced in August, 1906, and the defendants set up the Statute of Limitations, 51-52 Vict. c. 59, s. 8 (R.S.O. c. 129, s. 32), which defence, by the terms of the statute, would be only applicable to the claim of the tenant for life. On behalf of the latter this defence was sought to be defeated by an alleged acknowledgment

and payment of interest. The only evidence tendered in support of this were the entries contained in the books of the firm of which the defaulting solicitor Cheston was a partner, of payments from time to time made to the tenant for life. These entries, it was claimed, were against the interest of Cheston and therefore admissible for all purposes. Warrington, J., came to the conclusion that they were not admissible as against the defendants, because they were not books kept by the solicitors, by the trustees' direction, but their own firm books, shewing the state of account between the solicitors and their clients, and not the accounts between the trustees and their cestuis que trustent; and even if they were admissible, they would prove no more than payment by the solicitors of interest on debts owing by them to the trustees, and not payment of interest on a debt of the trustees themselves. He therefore held that as against the tenant for life the statute afforded a valid defence and though ordering the defendants to make good to the trust estate the three sums above mentioned, and also all the balances appearing due for six years prior to the commencement of the action, he declared that during the life of the tenant for life the trustees would be entitled to the interest on the £31,000 they were ordered to make good; and this decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.).

PRINCIPAL AND SURETY—INDEMNITY—ACTION QUIA TIMET—NO DEMAND BY CREDITOR FOR PAYMENT—RIGHT OF PRINCIPAL TO COMPEL SURETY TO DISCHARGE DEBT.

Ascherson v. *Tredegar Dry Dock Co.* (1909) 2 Ch. 401. This was an action by one of several co-sureties to compel the principal to discharge a debt which the sureties had agreed to pay. The creditor had made no demand for payment. The debt consisted of the amount of an overdraft due to a bank for which the plaintiff was liable and against the payment of which the defendants had agreed to indemnify the plaintiff. The defendants contended that the action was premature, until the bank had made a demand for payment, or the surety is in danger of being damnified; but Eady, J., who tried the action held that as the creditors had a present right of action which they were entitled to enforce, it was immaterial that they had not actually done so, but the liability of the principals being admitted,

the surety was entitled to compel payment. He therefore ordered the defendants to discharge the debt in question, and in case of default with liberty to apply for further relief. In a similar case in Ontario the surety was ordered to pay the money into court to be applied in discharge of the debt: see *Cunningham* v. *Lyster*, 13 Gr. 575.

COMPANY—DEBENTURES—CHEQUES FOR INTEREST—INDORSEMENT BY TRUSTEES—NON-PRESENTMENT OF INTEREST CHEQUES FOR PAYMENT—CLAIM OF TRUSTEES FOR INTEREST AS REGISTERED HOLDERS.

In re Defries, Eichholz v. *Defries* (1909) 2 Ch. 423. In this case certain debentures of a limited company had been transferred to trustees upon trust for Mrs. Defries for life, and after her death for her children. Cheques for interest were issued to the trustees and indorsed by them to the tenant for life, and others were issued to her direct by consent of the trustees. These cheques, at the request of her son, who was the managing director of the company, the tenant for life did not present for payment, and while they were still outstanding and unpaid, the company was ordered to be wound up. The trustees now claimed to prove for the aggregate amount of the interest represented by these cheques and the amount of the debentures. It was contended that the giving the cheques was a conditional payment so as to release the security as to them; but Warrington, J., held that such was not the case, and that the trustees, notwithstanding the issue and indorsement of the cheques, were entitled to rank as secured creditors for the full amount claimed.

WILL—CONSTRUCTION—LEGACY TO INFANT—INTEREST ON LEGACY PAYABLE AT TWENTY-ONE—POWER TO TRUSTEES TO APPLY LEGACY FOR BENEFIT OF LEGATEE BEFORE VESTING—GENERAL INTENTION TO PROVIDE MAINTENANCE—MAINTENANCE OF INFANT.

In re Churchill, Hiscock v. *Lodder* (1909) 2 Ch. 431. In this case a testatrix had bequeathed a pecuniary legacy to an infant, and she directed that the legacy should vest at twenty-one, and she empowered the trustees "to apply the whole or any part of the share to which any beneficiary hereunder may be contingently entitled in or towards the advancement in life or other-

wise for the benefit of such beneficiary whether male or female, and whether under the age of twenty-one years or not." The trustees having applied to the court to determine whether they had power to apply the interest of the legacy in question for the maintenance of the infant legatee, on behalf of the infant it was claimed that though the testatrix did not stand in loco parentis to the legatee, yet there was to be gathered from the will a general intention to maintain. On the other hand it was urged that as the legacy did not vest until the legatee attained twenty-one, the legacy would not bear interest until that time. Warrington, J., held that the will shewed a general intention to maintain, and that the legacy therefore should bear interest from the death of the testator and that the trustees had power to apply the interest in or towards the maintenance of the legatee during his infancy.

MORTGAGOR AND MORTGAGEE—FORECLOSURE NISI—CREDITOR OBTAINING EXECUTION PENDENTE LITE—APPLICATION OF INCUMBRANCER PENDENTE LITE TO BE ADDED AS DEFENDANT—EXTENSION OF TIME TO REDEEM—COSTS.

In re Parbola, Blackburn v. *Parbola* (1909) 2 Ch. 437. After a judgment nisi for foreclosure a creditor of the mortgagor obtained the appointment of a receiver by way of equitable execution, he then applied to be added as a defendant to the foreclosure action and that the period of redemption should be extended. Warrington, J., made an order adding the applicant as a defendant, and directing him to pay the costs of the application, but refused to extend the time for redemption, holding that a party acquiring an interest pendente lite is bound by the proceedings as they stand at the time he acquires his interest.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF GROWING TIMBER—MUTUALITY—LICENSE—REVOCATION.

Jones v. *Tankerville* (1909) 2 Ch. 440. This was an action by the purchasers of standing timber under a contract contained in letters for an injunction restraining the vendors from hindering or interfering with the plaintiffs in cutting and removing the timber under the contract. The defendants contended inter alia that the claim for an injunction was equivalent to a claim for specific performance, and that that relief could not be granted in

respect of such a contract, and that in order that the court may grant specific performance there must be mutuality, and here the plaintiff could not be compelled to cut the timber, and that the utmost the plaintiffs had was a mere license which was revocable. Parker, J., held that assuming the plaintiffs had a license it was not revocable because coupled with an interest, and that under the Sale of Goods Act, 1893, s. 52, the court had power to grant specific performance, and he therefore granted the injunction as claimed. Section 52 of the Sale of Goods Act, it may be noted, is new, and is not a re-enactment of prior existing law, and has not been adopted in Ontario. On the other hand in Canada such a contract has been held to be a contract for an interest in land, and on that ground specifically enforceable: see *Mitchell* v. *McGaffey*, 6 Gr. 362, where Blake, C., founds his decision on the cases of *Buxton* v. *Lister*, 3 Atk. 383; *Sevrell* v. *Boxall*, 1 Y. & J. 396; *Clavering* v. *Clavering*, Mosely 224; and *Arkwright* v. *Stoveld*, Coop. Temp. Cottenham 499; see also *Summers* v. *Cook*, 28 Gr. 179, and per Osler, J., in *Hoeffler* v. *Irwin*, 8 O.L.R., at p. 745-6.

SETTLEMENT—REALTY—APPOINTMENT—VALIDITY—"POSSIBILITY ON A POSSIBILITY"—EQUITABLE INTERESTS—ELECTION.

In re Nash, Cook v. *Frederick* (1909) 2 Ch. 450, raises questions of some interest to conveyancers and other real property lawyers, viz., (1) Can equitable interests be limited on a double possibility; and (2) where an assumed exercise of a power by will fails on the ground of its offending against the rule against double possibilities, are those who benefit by such failure put to an election whether they will confirm such appointment, or accept the benefits given them by the will. Eve, J., answers both questions in the negative. The first point arose in this way. By a marriage settlement of real property vested in trustees, the husband was given a power of appointment by deed or will in favour of the children of the marriage or their children. By his will he made an appointment in favour of his children's children, and it was held that the power was invalid as to them as involving a double possibility, viz., that the husband should have children, and, secondly, that such children should also have children. The property, therefore, passed as on a default of appointment. It was then contended that those who took in default of appointment must elect between so taking, and the benefits conferred on

them by the husband's will; and it was held that no question of election arose.

PRACTICE—COSTS—THREE COUNSEL—SCIENTIFIC EVIDENCE—EXPERT—QUALIFYING FEE.

In *Great Western Ry.* v. *Carpalla United China Clay Co.* (1909), 2 Ch. 471, the action raised complicated questions of fact and law involving at the trial the examination of varied scientific theories and imposing a large amount of labour and responsibility on those conducting the defence. Eve, J., held that in these circumstances three counsel might properly be allowed to one set of defendants, notwithstanding that their co-defendants, whose interests up to a certain point were the same, were represented by two counsel. The learned judge considering that each defendant is entitled to fight his own case and is not bound to be dependent on counsel employed by his co-defendants. He also held that where a personal view of the locus in quo was essential to enable a scientific witness to make his evidence of most value, a proper qualifying fee should be allowed, although he was not actually called as a witness.

COMPANY—WINDING UP—SALE OF BUSINESS OF COMPANY—"COMPANY"—COMPANIES ACT, 1908 (8 EDW. VII. c. 69) ss. 192, 285—(7 EDW. VII. c. 34, s. 188 (O.)).

Thomas v. *United Butter Companies* (1909) 2 Ch. 484. The English Companies Act, 1908, contains a provision for the sale of the business and undertaking of a company in liquidation to "another company." The Ontario Act, 7 Edw. VII. c. 34, s. 188, has a similar provision, but the words in that Act are "another corporation." In this case it was sought under that provision to sell the business of a company in liquidation to a French company. The plaintiff, a shareholder of the company in liquidation, claimed an injunction to restrain the carrying out of the proposed sale on the ground that the sale to a foreign company was not authorized by the statute, and Eve, J., upheld the plaintiff's contention and granted the injunction as prayed.

MORTGAGE—FORECLOSURE—EQUITABLE MORTGAGE OF ADVOWSON—NO PAYMENT OR ACKNOWLEDGMENT FOR 48 YEARS—LACHES.

Brooks v. *Muckleston* (1909) 2 Ch. 519 deserves attention as illustrating the fact that laches altogether apart from any

Statute of Limitations is a bar to equitable relief. In this case the action was brought to foreclose a mortgage of an advowson. The mortgage was made in 1860 to secure £1,000, the report omits to state what appears to be a material point, viz., the date fixed for redemption, but no payment or acknowledgment had ever been made, but in 1863 the mortgagor was adjudicated bankrupt, and in 1892 the defendant had purchased the advowson from the official receiver. Joyce, J., held that all legal claim on the mortgage was barred, and though no Statute of Limitation applied, yet, according to the well-established rule in equity, laches constituted a bar to equitable relief quite irrespective of statute. The action was therefore dismissed.

DENTIST—COMPANY ASSUMING TO CARRY ON BUSINESS OF DENTIST DENTISTS' ACT, 1878 (41-42 VICT. C. 33) S. 3—(R.S.O. C. 178, S. 26)—INJUNCTION.

Attorney-General v. *Smith* (1909) 2 Ch. 524. This was an action to restrain an alleged violation of the Dentists' Act, 1878 (41-42 Vict. c. 33), (see R.S.O. c. 178, s. 26). The facts were, that a dentist named Smith had been struck off the register for unprofessional conduct, and thereupon a company was formed to take over the business previously carried on by him. Eady, J., held that although a company was not a "person" within the Dentists' Act, the court would prevent a company from representing that they carry on the business of dentists in succession to a man who has been struck off the register, or taking any name implying that they are registered under the Dentists' Act. We may note that by the Ontario Interpretation Act, 7 Edw. VII. c. 2, s. 7(13), the word "person" in a statute includes a body corporate.

WILL — CONSTRUCTION — ABSOLUTE TRUST FOR CONVERSION — POWER TO RETAIN INVESTMENTS MADE BY TESTATOR—TRUSTEES UNABLE TO AGREE—INVESTMENT CLAUSE—COMPANIES "IN THE UNITED KINGDOM"—COMPANIES REGISTERED IN ENGLAND BUT OPERATING ABROAD.

In re Hilton, Gibbes v. *Hale-Hinton* (1909) 2 Ch. 548. The will in question in this case contained an absolute trust for conversion, but with power to the trustees to retain investments existing at the date of the will. The trustees were not unanimous as to the retention of certain investments of this character, and asked the opinion of the court as to what was to be done, and

Neville, J., decided that the trust for sale prevailed, and that the investments must be sold, although they were within the investment clause of the will. He also held that under a trust for investment in the shares of "any company in the United Kingdom," an investment in the shares of a company registered in, and having its head office in England, would be authorized, although the operations of such company might be carried on abroad.

LANDLORD AND TENANT—RENT DUE ON SUNDAY—DISTRESS FOR RENT—SUNDAY WHEN NOT DIES NON.

Child v. *Edwards* (1909) 2 K.B. 753. We are so accustomed to regard Sunday as a dies non for all purposes, that it will come as a surprise to many to learn that it is not a dies non at common law, and save so far as it has been expressly made a dies non by statute it is to be regarded as an ordinary day. In this case the question arose as to the validity of a distress made on Monday for rent which fell due on the previous Sunday. The plaintiff contended that as the rent fell due on Sunday he had the whole of Monday to pay it, and that a distress made on that day was illegal; but Ridley, J., who tried the action, came to the conclusion that though the right to enforce payment of debts by civil process on Sunday was taken away by 29 Car. II. c. 7, s. 6 (see R.S.O. c. 324, s. 3), he thought it was clear that but for that statute it would have been lawful to issue and enforce process on a Sunday; and so with regard to the Bills of Exchange Act which makes special provisions as to Sundays being non-juridical days for the purposes of the Act (see R.S.C. c. 149, ss. 42, 43), which he thought indicated that but for such provisions bills, etc., might become due and payable on Sundays; he was therefore of the opinion that Sunday was not a dies non at common law, and therefore, except as provided by statute, acts may be validily contracted to be done on that day, that a contract for payment of rent on that day is valid, and the distress in question was therefore legal and the action was accordingly dismissed.

NEGLIGENCE—MUNICIPAL CORPORATION—PUBLIC SCHOOL—OBLIGATION TO MAINTAIN SCHOOL PREMISES IN REPAIR—INJURY TO SCHOLAR CAUSED BY DEFECT IN SCHOOL PREMISES.

Ching v. *Surrey County Council* (1909) 2 K.B. 762 was an action by a pupil at a public elementary school against the

municipal corporation, to recover damages for personal injuries sustained by the plaintiff caused by the defective state of the asphalt pavement of the playground attached to the school attended by the plaintiff. By statute the duty of keeping the playground in proper repair was cast upon the defendants, and Bucknill, J., therefore held they were liable to the plaintiff.

FALSE IMPRISONMENT—RAILWAY COMPANY—SPECIAL CONSTABLE—ARREST ON SUSPICION OF FELONY—WANT OF REASONABLE AND PROBABLE CAUSE—LIABILITY OF COMPANY FOR ACTS OF SPECIAL CONSTABLE—(R.S.C. c. 37, ss. 300-305).

In *Lambert* v. *Great Eastern Ry.* (1909) 2 K.B. 776, the plaintiff sued the defendant company for damages for false imprisonment. The plaintiff had been arrested on a suspicion of felony without any reasonable or probable cause by a special constable who had been appointed at the request of the defendants and was in their service and employment. Grantham, J., who tried the action was of the opinion that the special constable was in the same position as an ordinary constable and was not acting as the servant of the company, and he therefore dismissed the action; but the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) unanimously reversed his decision, holding that the constable was the servant of the railway company and that the company could only claim protection for his acts to the extent that he himself could claim protection and no more.

EMPLOYER AND WORKMAN—WORKMAN SUFFERING FROM ANEURISM—SUDDEN DEATH OF WORKMAN WHILE ENGAGED IN HIS WORK.

Hughes v. *Clover* (1909) 2 K.B. 798 is only mentioned to shew the lengths to which the English Employers' & Workmen's Act has gone. In this case a workman was suffering from aneurism, and in consequence of exerting himself at his work a rupture of the aorta caused his death, and his employers were held liable to make compensation to his representatives. It may be well open to doubt whether such legislation does not really have an ill effect on the class it is intended to benefit; for if it excludes all men who in any way are suffering from any physical defect from employment as it seems calculated to do, it can only in the long run have a tendency to add to the army of the unemployed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] [Oct. 5.

AHEARN & SOPER, LIMITED *v.* NEW YORK TRUST COMPANY.

Privileges and hypothecs—Tramway—Operation on highway—Title to land—Immobilization by destination—Sale of tramway by sheriff as "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Contract—Priority of claim—Collocation and distribution.

A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the principal and interest of an issue of its debenture bonds, hypothecated its real property, tramway, cars, etc., used in connection therewith, to trustees for the debenture-holders, and transferred the movable property of the company and its present and future revenues to the trustees. By a provincial statute, 3 Edw. VII. c. 91, s. 1 (Que.), the deed was validated and ratified. On the sale, in execution, of the tramway, as a going concern,

Held (GIROUARD, J., expressing no opinion), that whether, at the time of such sale, the cars in question were movable or immovable in character, the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, that unpaid vendors thereof were not entitled, under article 2000 of the Civil Code of Lower Canada, to priority of payment by privilege upon the distribution of the moneys realized on the sale in execution.

Per GIROUARD, J.—DUFF, J., contra.—After the cars in question had been delivered to the tramway company and used by it in the operation of their tramway they became immovable by destination.

In the result, the judgment appealed from (Q.R. 18 K.B. 82) was affirmed.

G. F. Henderson, K.C., and *Cannon*, for appellants.

G. G. Stuart, K.C., for respondents.

Alta.] PETERS v. PERRAS. [Nov. 3.

Jurisdiction—Appeal to Privy Council—Stay of proceedings.

When, as provided by s. 58 of the Supreme Court Act, a judgment of the court has been certified by the registrar to the proper officer of the court of original jurisdiction, and the latter has made all proper entries thereof, the Supreme Court has no power to stay proceedings for the purpose of an appeal from said judgment to the Judicial Committee of the Privy Council. *Union Investment Co.* v. *Wells*, 41 Can. S.C.R. 244, overruled. Motion refused.

Guthrie, for motion. *Maclaren*, contra.

Province of Ontario.

COURT OF APPEAL.

Full Court.] RODD v. COUNTY OF ESSEX. [Nov. 15.

Municipal law—Office of Crown Attorney and clerk of the peace —Provision for outside of county town.

Appeal by defendants from judgment of FALCONBRIDGE, C.J.K.C., who held that the plaintiff was entitled to an office in the city of Windsor, which is the same county, but is not the county town. His judgment required the defendant to provide a proper office for the plaintiff, who is clerk of the peace and Crown Attorney for the County of Essex at Windsor.

Held, 1. There is no authority for saying that the Crown Attorney or any other officer connected with the courts of justice can compel the county council to provide offices in Windsor. The clerk of the County Court, the deputy clerk of the Crown and the registrar of the Surrogate Court in each county are required to hold their offices in the Court House or at some convenient place in the county town, but in the case of the County of Essex each of these officers may keep "an" office at some convenient place in the city of Windsor: R.S.O. 1897, c. 51, s. 156; c. 55, s. 7; c. 59, s. 13. Appeal allowed.

Wigle, K.C., for plaintiff. *A. H. Clarke*, K.C., for defendants.

Full Court.] [Nov. 22.

GRAND TRUNK RY. CO. v. CITY OF TORONTO.

CANADIAN PACIFIC RY. CO. v. CITY OF TORONTO.

Appeal to Privy Council—Leave to allow security—Matter in controversy—Jurisdiction.

This was an action to declare that an order of the Railway Committee of the Privy Council dated Jan. 14, 1904, and an order of the Governor-General in Council approving the same were made without jurisdiction and therefore invalid.

At the trial ANGLIN. J., dismissed the actions. An appeal from his judgment was heard Sept. 17, 1907, by the Court of Appeal and was dismissed. The present motion was by the plaintiffs for the allowance of security upon a proposed appeal to the Judicial Committee of the Privy Council. Judgment was delivered by

OSLER, J., who said that an appeal did not lie as of right under R.S.O. 1897, c. 48. The controversy was not as to a pecuniary amount or of a pecuniary nature. It was simply as to the validity of an order of the Railway Committee. If it were a matter involving directly the value of property affected by the adjudication in the action that value might be shewn by affidavit as pointed out in the *Falkners Gold Mining Co.* v. *McKinnery* (1901) A.C. 581. This was an action of a very different nature, and the decision of the Supreme Court of Canada in *Toussignant* v. *County of Nicolet*, 32 S.C.R. 353, though not binding upon the Court of Appeal on an application like the present, proceeded upon reasoning quite applicable to the Ontario Act above cited. See *Gillett* v. *Lumsden* (1905) A.C. 601, and *City of Toronto* v. *Toronto Electric Light Co.*, 11 O.L.R. 310. The applicants must be left to apply for leave to appeal and their application for the allowance of security refused.

MEREDITH, J.A., dissented, saying that he found it impossible to agree that the matter in controversy did not exceed $4,000. The applicants had been ordered to erect a bridge, which would cost them tens, if not hundreds, of thousands of dollars. The legislature meant the substantial matter in controversy, and the substance of the controversy was the bridge.

R. C. H. Cassels, for the Grand Trunk Ry. Co. *Armour*, K.C., for Canadian Pacific Ry. Co. *Chisholm*, K.C., for City.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P.] MARCILLE *v.* DONNELLY. [Nov. 18.

Landlord and tenant—Duty of landlord to repair—Liability of landlord to stranger injured by non-repair.

Action by plaintiff, who was a guest at an hotel, for injuries sustained by him owing to his having fallen through an opening in the floor of the verandah of the hotel. The jury found that this verandah was dangerous to persons using it; that the defendant had notice of its condition before the plaintiff was injured; that he was injured owing to the condition of the verandah, and was not chargeable with contributory negligence.

Held, the plaintiff, a guest, had no cause of action against the landlord.

The plaintiff's case was based upon the theory that as between the defendant and his tenant the defendant was under obligation to make repairs, but

Held, following *Cavalier* v. *Pope* (1905) 2 K.B. 757, (1906) A.C. 428, and *Cameron* v. *Young* (1908) A.C. 176, that the plaintiff could not recover, because, even if there were a sufficient covenant, the plaintiff was a stranger to it, nor could he recover on the theory that by reason of the covenant the plaintiff was to be considered as in possession of the premises and in control of them.

German, K.C., for plaintiff. *McCarron,* for defendant.

Divisional Court, Chy.] [Nov. 25.

GRAHAM *v.* LAIRD CO.

Sale of goods—Injury in transit—Delivery to carrier f.o.b.—Passing of property.

Action for price of a number of barrels of apples sold by plaintiff to the defendant and delivered to the Grand Trunk Ry. Co. at Belleville, to be forwarded to plaintiff at Regina. The apples were damaged by frost in transit. BRITTON, J., the trial judge, gave judgment in favour of the plaintiff. The apples were to be carried to Regina and to be paid for c.o.d. there. The goods were sent with contemporaneous bills of lading made out to the seller, or his agent, the Bank of Montreal, to be held

against the arrival of the goods. Drafts at sight were also forwarded with the bills of lading, to be accepted and paid by the defendants, and upon payment the bills of lading were to be handed over to the defendants. The invoice did not say that the goods were shipped on account of, or at the risk of, the buyers, whereas the bills of lading did shew that the goods were shipped as the property of the seller, or of his agents, the Bank of Montreal.

Held, 1. The shipment "f.o.b." at Belleville was not a constructive delivery to the carrier for the purchasers; it was a delivery of possession to the railway company pursuant to the bill of lading, and for the seller or his agent, the bank, at Regina; and no delivery of possession to the purchaser was contemplated till he accepted and paid for the apples at Regina. Till then possession and property were alike withheld by the seller, and, in this view, the property was to be divested from him and lodged in the purchasers first and only when payment was made.

2. When the seller selected the apples called for by the order and placed them in barrels on the cars "f.o.b. Ontario," he had to that extent appropriated the apples to the particular contract, but he had not done so unconditionally by reason of the terms of the bill of lading. By these he had retained for himself and the bank the power of disposal or control till payment at Regina.

McGregor Young, K.C., and *W. S. Morden*, for plaintiff. *H. Cassels*, K.C., for defendants.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] FOSTER *v.* STIFFLER. [Oct. 26.

Vendor and purchaser—Right of purchaser to recover after conveyance in respect of incumbrances then discovered—Transfer under Real Property Act—Mistake as to amount of incumbrances—Caveat emptor—Misdescription in particulars of sale.

The plaintiff agreed to purchase from the defendant certain Winnipeg city property for $11,200, "assuming the sum of

$5,500" on it and to pay for it by conveying to the defendant two farm properties valued at $10,500, subject to an incumbrance of $200, the difference, $4,600, to be adjusted by the defendant giving two mortgages on the farms. The plaintiff then accepted transfers of the city property under the Real Property Act, and conveyed one of the farms to the defendant, who gave a mortgage for $2,000 upon it, the proceeds of which were paid to the plaintiff. The plaintiff then discovered that the total incumbrances on the city properties exceeded the amount assumed by $950. He then postponed the conveyance of the other farm to the defendant and brought this action to recover the $950 and for other relief.

Held, that, in the absence of any express provision for compensation or any warranty or any false or fraudulent representation as to the amount of the incumbrances, and of any covenant against incumbrances in the transfer to the plaintiff, express or implied, he could not recover in respect of the $950.

Joliffe v. *Baker*, 11 Q.B.D. 255; *Besley* v. *Besley*, 9 Ch. D. 103, and *Clayton* v. *Leech*, 41 Ch. D. 103, followed.

Hoskin, K.C., for plaintiff. *Montague*, for defendant.

Macdonald, J.] [Nov. 8.

ADCOCK v. MANITOBA FREE PRESS CO.

Costs—Security for costs—Libel—Dismissal of action.

Held, 1. An order made under s. 10 of the Libel Act, R.S.M. 1902, c. 97, requiring a plaintiff residing in the province to give security for the defendant's costs of a libel action, may, by virtue of the special provisions of that section, contain a direction that, in default of compliance with the order, the action shall be dismissed unless the court or judge upon special application for that purpose shall otherwise order, just as in a case when an order is made under Rule 978 of the King's Bench Act against a person not resident in the province.

2. Notwithstanding s. 1 of c. 12 of 7 & 8 Edw. VII., security in an amount exceeding $300 may be ordered when the circumstances justify it, as that section provides that the trial judge shall have, in certain cases, a discretion to order the allowance of any amount of costs greater than $300 within the limit of costs ordinarily taxable.

Blackwood, for plaintiff. *Ormond*, for defendants.

Macdonald, J.] SALTMAN *v.* MCCALL. [Nov. 22.

Mortgagor and mortgagee—Redemption after sale by mortgagee —Setting aside sale for gross under-value.

Held, 1. After sale proceedings regularly taken by a mortgagee of land under the Real Property Act, R.S.M. 1902, c. 148, pursuant to ss. 108 to 112 inclusive, whereby the property is sold to a bonâ fide purchaser, who makes the first payment called for by the terms of sale and binds himself to complete the purchase, it is too late for the mortgagor to apply for redemption even if the purchaser has made default in strict compliance with his agreement.

2. The fact that, in such a case, the purchaser has not yet received his transfer from the mortgagee makes no difference.

3. A sale by auction for $4,850 of a property valued at $7,200 is not a sale at such a gross under-value that equity should interfere to set it aside.

Baker, for plaintiff. *Galt*, K.C., and *Hughes*, for defendants.

Full Court.] [Nov. 29.

SCOTT *v.* CANADIAN PACIFIC RAILWAY CO.

Negligence—Railway company—Brakeman injured whilst going between ends of moving cars to uncouple—Defective apparatus—Railway Act, R.S.C. 1906, *c.* 37, *s.* 264(*c*).

At the new trial granted by the Court of Appeal, as noted ante p. 522, the jury found a verdict for the plaintiff.

Held, that, upon the facts there stated, there was evidence sufficient to warrant the verdict of the jury, and that it should stand.

Macneill, for plaintiff. *Curle*, for defendants.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] WILSON *v.* KELLY. [Nov. 10.

Practice—Workmen's Compensation Act, 1902—*Plaintiff pursuing his common law and statutory remedies concurrently—Dismissal of common law action—Assessment under Workmen's Compensation Act—Costs—Discretion.*

When the plaintiff fails in his common law action, the court

has power in its discretion to deal with the costs of the action or of proceedings under the Employers' Liability Act.

Held, in the circumstances in this case, the plaintiff having been awarded compensation under the Workmen's Compensation Act, that he should have costs following the event upon the dismissal of the action.

C. B. Macneill, K.C., for plaintiff. *Craig,* for defendant.

Morrison, J.] KENDALL *v.* WEBSTER. [Nov. 19.

Company—Winding up—Action by liquidators—Sanction of court—General manager—Duty as servant or agent—Transaction on his own behalf similar to those of company—Liability to account for profits—Trustee.

In an order for the winding up of a company, it was provided that the liquidators, with the consent and approval of the inspectors, appointed to advise in the winding up, might exercise any of the powers conferred upon them by the Winding-up Act, without any special sanction or intervention of the court instituting or defending an action constituted one of the powers. Sec. 38 of R.S.C. c. 144, enables the court to provide by an order subsequent to the winding-up order that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the court.

Held, that it is necessary to obtain an order, subsequent to the winding-up order, so as to get the benefit of s. 38.

Defendant, as general manager of a company, engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber which he disclosed to defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the company. Defendant drew a cheque on the funds of the company for the Government dues on this timber, but did not cash the cheque, and the transaction appeared in the books as "Kitimat Limits."

Held, in an action to account for the proceeds of the sale of this timber, that defendant was not acting as the representative of the company, and was not a trustee; and that the making of the entries in the books did not estop him from explaining the circumstances.

Burns and *Walkem*, for plaintiffs. *L. G. McPhillips*, K.C., and *Laursen*, for defendant.

Obituary.

HENRY HATTON STRATHY, K.C.

The profession in Ontario will have heard with much regret of the death of Mr. Henry Hatton Strathy, K.C., who passed away at his residence in Barrie in the County of Simcoe on the 20th ult. Having so recently spoken of his career (see ante, p. 217), it is unnecessary to repeat what was then said. Had his life been spared he would probably have followed the example of many of the profession who have moved to Toronto and there taken a foremost place at the Bar. His wise counsel and careful attention to his duties as a Bencher of the Law Society will be felt as a great loss; whilst in his own town and amongst his large circle of personal friends his presence will be greatly missed.

Book Reviews.

The Law and Practice relating to Letters Patent for invention. By THOMAS TERRELL, K.C., 5th ed., by Courtney Terrell, Barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane, W.C. 1909.

A revised and enlarged edition of a standard book. As is well known to all who have to deal with patents of invention this treatise is recognized as the best on the market and the one most in use in this country. The fourth edition was published only four years ago, but the present one is justified on the ground that the Act of 1907 has since come into operation. The appendix to this volume contains some useful hints for the preparation of agreements and deeds most commonly used in patent conveyancing. It also contains a report of the trial of the application to revoke the Hatschek patents decided in March last, which related to patent operations carried on exclusively outside the United Kingdom. This addition will be specially useful to those connected with patents who cannot readily obtain access to the English Reports. Much of the work has been re-written, and a chapter on "Subject Matter" has been added.

Bench and Bar.

JUDICIAL APPOINTMENTS.

James Alexander Macdonald, of Rossland, British Columbia, K.C., to be Chief Justice of the Court of Appeal for the said province, with the style and title of Chief Justice of the Court of Appeal, so long as the present Chief Justice of the Supreme Court of British Columbia continues to hold such office, and thereafter with the style and title of Chief Justice of British Columbia.

Hon. Paulus Æmilius Irving, a puisne judge of the Supreme Court of British Columbia, to be a Justice of Appeal of the Court of Appeal for British Columbia.

Hon. Archer Martin, a puisne judge of the Supreme Court of British Columbia, to be a Justice of Appeal of the Court of Appeal for British Columbia.

William Alfred Galliher, of the city of Vancouver, B.C., Barrister-at-law, to be a Justice of Appeal of the Court of Appeal for British Columbia.

Denis Murphy, of Ashcroft, B.C., Barrister-at-law, to be a puisne judge of the Supreme Court of British Columbia vice Mr. Justice Irving, promoted to the Court of Appeal.

Francis Brooke Gregory, of the city of Victoria, B.C., Barrister-at-law, to be puisne judge of the Supreme Court of British Columbia, vice Mr. Justice Martin, promoted to the Court of Appeal. (Nov. 30.)

The Living Age, Boston, Mass., U.S.A.—Those who do not take this publication cannot grasp the extent of its utility in presenting to its readers the cream of the various reviews and selections from some of the best of the many magazines now published. There is such an amount of trashy literature in these days, that it is refreshing to have laid on our table, week by week, so much of the best learning and research on a variety of subjects. We have had lately several articles in relation to Canada and other parts of the Empire which have been read with great interest. Space does not permit to give the titles of these in detail, but our readers would do well to subscribe and see for themselves.

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