Canada Law Journal.

VOL. LIII. TORONTO, APRIL, 1917. No. 4

RENEWAL OF WRITS BY DEAD SUITORS.

The case of *Mahaffy* v. *Bastedo* has now been published in the regular reports (38 O.L.R. 192), and having perused the report carefully, our view of the case is unchanged, and we think it somewhat strange that the very clear and convincing judgment of the Chief Justice failed to carry weight with the other members of the Court.

The judgment of the majority of the Court appears to be based on the following reasoning. Because a writ of execution issued in the lifetime of a suitor and delivered to the sheriff may be executed by the sheriff after the suitor's death, so long as the writ remains in force, therefore a writ so issued may be kept in force after the suitor's death by renewal in his name—such reasoning appears to be fallacious: because while the death of the execution creditor may not determine the authority of the sheriff to act under the execution, it does determine the power of the suitor to keep it alive, and if anything is necessary on his part to keep it in force, then his death puts an end to his power to take that proceeding, and it must be taken by some person in esse, who must first make himself a party to the record, and thereby acquire the right to take the proceeding.

To hold that such a proceeding can be validly taken in the name of a dead man, seems to violate a fundamental principle of litigation. A dead man cannot come into Court and ask to have a writ renewed, and if he can't act in person how can he act by attorney?

We see that Mr. Justice Middleton suggests that the renewal of the writ in the name of a dead man is a mere irregularity, which a stranger to the record cannot take advantage of: but a

proceeding in the name of a dead man is a nullity, not a mere irregularity. The application to renew a writ, though (by the practice of the Court) made to an officer of the Court on præcipe, must really be treated as if made to the Court itself. The officer is merely the instrument of the Court. If the Court itself cannot entertain applications on behalf of deceased suitors, how can its officer? If the application in this case, instead of being made to the officer of the Court, had been made to the Court itself, what would the Court say: or what ought it to say?

"*Counsel for deceased plaintiff.* I apply to renew a writ of execution.

"*Court.* For whom do you apply?

"*Counsel.* I apply on behalf of the plaintiff, who is now dead.

"*Court.* We are only authorised to administer justice to the living. The application is refused."

But what will the Court have to say hereafter in such a case? By s. 32 (1) of the Judicature Act it is provided that "the decision of a Divisional Court on a question of law or practice, unless overruled or otherwise impugned by a higher Court, shall be binding on all Divisional Courts, and on all other Courts, and Judges, and shall not be departed from in subsequent cases, without the concurrence of the Judges who gave the decision," therefore, henceforth all Provincial Courts will have to decide that writs of execution may be validly renewed in the name of a dead suitor and, so renewed, may be validly executed.

The moment you depart from well settled principles there is no knowing where you may get. If you may validly renew a writ in the name of the dead man, you may as validly issue it in his name. If you may issue a writ of execution in a dead man's name, why not also a writ of summons, or any other writ? If the solicitor may validly take proceedings in a dead man's name, then he is under no legal responsibility for so doing, and the suitor, being dead, is not responsible, and consequently any person injured by the taking of such proceedings is without remedy.

See, however, *Yonge* v. *Toynbee*, 1909, 1 K.B. 215; *Simmons* v. *Liberal Opinion*, 1911, 1 K.B. 966; 104 L.T. 264.

The death of a client of necessity puts an end to his solicitor's authority to act for him, and according to ordinary principles of law governing the relation of principal and agent, if the solicitor should take proceedings in his deceased client's name, he would be personally liable for so doing to the person against whom such proceedings were taken. Is that law intended to be upset?

STAYING EXECUTIONS ON APPEALS TO PRIVY COUNCIL.

In *Mitchell* v. *Fidelity & Casualty Co.*, 11 Ont. W.N. 371, the second Divisional Court has solved what appeared to be a somewhat difficult point of practice in a very satisfactory way, if one may be permitted to say so. The defendant had obtained from the Judicial Committee of the Privy Council special leave to appeal to His Majesty in Council, and desired to stay execution pending the appeal, and they applied to Mr. Justice Riddell in Chambers for that purpose. That learned Judge thought that the case was not governed by the Privy Councils Appeal Act (R.S.O. c. 54, s. 10) because that section only relates to appeals as of right, and consequently that where special leave to appeal is granted it is only the Judicial Committee of the Privy Council who have power to stay execution pending the appeal. The Divisional Court, while agreeing with Riddell, J., that s. 10 did not apply to such cases, came to the conclusion that the Court of first instance has an inherent jurisdiction to stay proceedings, and that by virtue of that jurisdiction it was competent to stay the execution as asked. It might have possibly proved a practical denial of justice in some cases, if it had been held that the jurisdiction to stay execution in such cases rested solely with the Judicial Committee; to say nothing of the expense of any application, however trifling, to that august body.

SUBPŒNAING A PARTY FOR IDENTIFICATION.

In a divorce suit of *Farvli* v. *Farvli*, 116 L.T. 18, the respondent was subpœnaed by the co-respondent for the purpose of being identified and Shearman, J., held that she could not be required to stand up for the purpose of identification. His Lordship also held it to be an abuse of the use of a subpœna to bring persons into Court by that method in order that they should be asked to stand up for the purpose of identification. It is possible this is merely intended to apply to the Divorce Court and to Divorce proceedings; but if in such proceedings it is an abuse of the use of a subpœna, why may it not be said to be so in any other case?, and yet the identification of a particular individual may be a most important element in a case, and if it is an abuse to compel him by subpœna to attend the Court for the purpose of identification, it becomes a serious question by what other method, which is unobjectionable, that end may be attained.

THE LATE SIR THOMAS WARDLAW TAYLOR.

Sir Thomas Wardlaw Taylor, whose death took place at Hamilton on the 2nd March last, was formerly a well known practitioner and official in the Courts of the Province of Ontario. He was a native of Scotland, being the son of the Rev. Dr. John T. Taylor, of Busby, County of Renfrew. He graduated at the Edinburgh University in 1852, and subsequently took the degree of M.A. at the Toronto University in 1856. He was admitted a solicitor in Ontario in 1858, and called to the Bar in 1858.

He practised his profession until he was appointed Secretary to the Judges of the old Court of Chancery in 1866. This office was subsequently converted into that of Referee in Chambers in 1871. In this capacity he discharged in the Court of Chancery similar duties to those now performed by the Master in Chambers, until December, 1872, when he was appointed Master in Ordinary of the Court, which office he held until 1883, when he was appointed a puisne Judge of the Court of Queen's Bench in Manitoba. The occasion of this appointment was marked by his friends of

the Ontario Bar by a suitable address and the present of a service of plate. In 1887 he was promoted to be Chief Justice of the Court, a position he filled with distinction until 1899, when he resigned. In 1897 he received the honour of Knighthood.

The late Chief was the author of several useful works, which in their day were in general request. Taylor's annotated Edition of the Chancery Orders was a *vade mecum* of Chancery practice, and his Commentaries on Equity Jurisprudence, founded on Story's work, and his little book on Titles were highly useful to students; and he in conjunction with Mr. J. S. Ewart published an annotated edition of the Ontario Judicature Act and Rules.

He was one of the committee appointed to prepare the third volume of the R.S.O. 1897, which was probably one of his last services rendered to the public.

After retiring from the Bench he returned to Toronto, where he resided for a short time, subsequently removing to Hamilton, where he died.

The late Chief was an able and accomplished lawyer, and acquitted himself in the various posts of honour and dignity to which he was called, to the general satisfaction of all who had business before him. His Scotch accent never forsook him and no one could ever mistake his nationality, but in every walk of life he proved himself a worthy representative of the men of North Britain.

UNCERTAINTY OF LAW.

Why is Law so uncertain? That is a question which has been asked a great many times, not only by those who have suffered from its uncertainties, litigants for instance, but even by those who practice it and who in the eyes of the public are the chief instruments of its ill-doings, namely: lawyers' themselves. I think it will be found on a fair examination that most of the uncertainty is inevitable, and that is the result of a combination of circumstances for which neither lawyers, litigants nor Judges are responsible. Medicine, too, is uncertain, and yet medicine is dealing with fixed, unchangeable laws, the laws of

Nature. True, the particular doctor dealing with the particular case may not know them, but they are there to be known by those who have eyes to see and ears to hear.

How is it with Law? Every case that comes before a Judge is either one of pure law, as where there are no facts in dispute, or of facts only as where there is no question of law in dispute or, as generally happens, is one where there are questions both of law and fact involved. Let us take a case involving only a question of law. Here we are brought face to face with one of the peculiar difficulties of those whose laws are written in the English language, namely this, that our glorious English tongue is, above all those of the modern world, ambiguous. It is copious and that very copiousness leads to minute differences in meaning, so that it needs great care to embody any important proposition in the form of English without running the risk of being misunderstood. Now questions of law are largely questions of language, such as the construction of a statute or of inferences to be drawn from a certain decision. What does the statute mean? What does the decision mean? In answering these questions may arise dissensions, differences of opinion, appeals, and yet more appeals, and the long train of after consequences which sometimes gives law so ill-omened a name among those who have had to invoke its aid.

But there is something more. Lawyers and Judges are perhaps struggling with the construction of a statute in an honest effort to interpret the meaning of those who have promulgated it, and yet the fact may be that those who have promulgated it had no clear idea of what they themselves meant. The intention may have been to remedy some evil, but just what the evil was and how far it could be eradicated by legislation, and how best to frame the necessary legislation, these things may not have been considered by those who proposed and drafted the Act in question, or, if considered, the legislators were unable to embody their ideas in language, and so the law comes before the public and the Courts, like the famous leg of mutton that Dr. Johnson partook of in the Highlands, "ill-fed, ill-killed, ill-kept and ill-dressed." The Judge, therefore, in deciding a point of law in your case or

in mine has sometimes to wrestle (1) with the intention of the legislature, and (2) with the intricacies of the language in which this intention is clothed. Now, in speaking of the intention of the legislature, I have not forgotten the dictum of the English Judge (Willes it was, I think) who said that it was for the Courts to decide not on what the legislators meant but, on what they said they meant as set forth in some statute, and if the two could be kept entirely distinct—the principle of the Act and the language in which it is clothed—it might be well, but is not the dictum rather a counsel of perfection, good in theory and unattainable in practice? With these difficulties confronting him is it any wonder that a Judge's view may be different from that of the next Judge who has to do with the question, this other Judge being equally capable and equally industrious, or that a Court of Appeal, composed of four or five Judges, may differ from both? or that you, one of the litigants, may think them all wrong? Who is to blame? Assuming, as we may fairly do, that the Judges are capable and that the counsel representing the various parties are industrious, and yet seeing as we do that these differences of opinion exist, must we not bow to the fact that they are inevitable—inevitable at any rate until we have done two things—reformed the legislature and reformed the language. If any one wishes to see how easily ambiguity may arise, let him look at one of the last numbers of the Supreme Court Reports, vol. 51, p. 539, in the case of *Coffin* v. *Gillis*, on the question at issue as to certain fores. Six Judges took one view and three another. What would have happened if the case had gone to the Privy Council? Who can tell?

So much then for questions of law, and now for questions of fact. In nearly every case the disputed questions of fact come down to two or three, however many may have appeared on the pleadings. It is something like a foot race, where many start and few come in at the end, for the majority fall out by the way. So in a lawsuit; by tacit or formal admissions, or as the result of cross-examination, a number of facts that were disputed at the beginning of the case are established at the end, but even so there are generally one or two left to perplex the Court. Three

credible witnesses have sworn one thing and three credible witnesses have sworn another to the contrary. None of them perhaps is wilfully telling an untruth—the contradictions are due to the imperfections, physical and moral, of humanity. Some of the witnesses are dull of sight, some are hard of hearing, some are stupid, some are careless, and some, almost unconsciously, are biased, and as in the case of a street brawl, for instance, or an accident, events happen so rapidly that the most acute observer may well err. Now, how can such difficulties be altogether overcome? Can you blame your solicitor or counsel if the case has turned out otherwise than he or you expected, unless indeed he has given you a positive assurance as to how it would result, an assurance that is very, very seldom given. The blame in that case would be for asserting anything positively, and in nearly all cases the wise lawyer will not do so. But there may be a time in the life of anyone where honour or reputation may force them into the Courts. He must

"Greatly find quarrel in a straw
When Honour's at the stake,"

even at the risk of losing in the quarrel, not because he is wrong, but because the case cannot be proved to the satisfaction of a disinterested party who is trying it.

Then there are questions of mixed law and fact—where the problem may be—what is reasonable? What would a prudent man do under the circumstances? What is negligence? What is a probable cause? Sometimes the burden is placed on the jury, but it may happen that the Judge has to determine them himself. Take a case of negligence. There are two questions involved: What is negligence? and does this case fall within the definition. It is hardly necessary to say there is room for great difference of opinion on such questions. I have suggested that to adjust those that depend on the interpretation of the law, we should reform the legislature and reform the language—two hard tasks truly, but to overcome the difficulties caused by the conflict of testimony we would have to eliminate such a conflict, and this could only be done by reforming or indeed making over humanity itself, so that every man would henceforth be Argus-eyed, with

the brain of a Gladstone and the inflexibility of a Solon. An extreme instance of the disagreements that may arise in a judicial proceeding is found in the famous Maybrick case. Mrs. Maybrick, some twenty-five years ago, was tried for the murder of her husband by the administration of arsenic and the first thing the prosecution had to do was to determine that he had died from arsenic poisoning. Thereupon two witnesses of the highest eminence in the world of Science said that he did so die, and two equally eminent said that he did not. Now, if men of Science, within whose province it is to determine such matters, cannot say positively, how can a Judge or a jury? There, then, was a case involving questions of the highest importance, and yet it is one in which the essential facts could not be proved by earthly skill. Judge, jury and counsel did not know, and apparently the doctors did not know either.

One of the difficulties in dealing with the facts at all is that very often we cannot look at them abstractly—we do not dissociate them from irrelevant surrounding circumstances. We think of the trappings, when we should be thinking of what underlies the trappings, and so follow the Philosophy of Herr Teufelsdröckh as set forth in the pages of Sartor Resartus.

We have all, at one time or another, seen a group of boys settle points that arise in their games, such as, Who is entitled to the blue ally and who to the green? whose turn is it? and so on. I daresay these points of ownership and of precedence involve questions that may be complicated, but there is always a swift consensus of opinion among the boys that settles the matter on the spot. Why? Because the boys are going straight to the point, unembarrassed by what I have called irrelevant and collateral matters. I have sometimes thought that if we were to reduce the law problems which are presented to us in the guise of contests over many dollars, to contests over marbles, we might find them more simple, and our findings would be at any rate as equitable as if the dollars were in dispute. In the abstract a question involving millions should not be more complex than one involving the possession of a marble, but few of us can look at

things in that way and with most of us the very largeness of the issues involved tends to becloud our minds.

While, as I have indicated above, it is not probable that law in its practical workings can ever become an exact science, yet one mode of improvement seems feasible—to have all statutes carefully drawn by the most experienced hands. That would not render law certain, but it would remove some difficulties that lie in the path of the practitioner and would remove some of the odium under which he sometimes suffers.

J. H. BOWES.

WOMAN SUFFRAGE AND WOMEN SOLICITORS.

The "lords of creation (men they call)" are receiving nowadays some startling shocks which go to prove the truth of the old couplet that "they are much mistaken after all, for they are under the women's control." It took a war of the magnitude of the one that is now devastating Europe to stop, for a time, the suffragists' campaign in England. That movement is not necessarily at an end, and may break out again when people have more time to listen to them.

In this country both political parties appear to have been brazenly coquetting with the women's right leaders, and notably so in Ontario, where female suffrage is now an assured fact. In England, Lloyd George has promised the women a limited franchise, but details are not to be discussed until after the war. Without wishing to be disrespectful to politicians of either sex, anything may happen when the rickety shandrydan of party politics is driven by the nervous hands of those who have, as our grandmothers would have said, ceased to mind their own business which is to attend to their families and do their duty in that station of life to which they were born. Some say that they have in these latter days somewhat fallen from the higher estate and purer atmosphere of womanhood to the lower level and more sordid and grosser atmosphere of masculinity.

But, however, that may be, women (sharing some young men),

have done such splendid service and shewn such bravery, devotion and self-sacrifice during the war that the inclination is to give them anything they ask for. But here it may be noted that the best of these have not clamoured for the franchise.

Turning now to the legal profession. Lord Chancellor Buckmaster recently introduced in the House of Lords a bill entitled "Solicitors qualification of women bill" which was shortly discussed and passed its second reading in the Upper Chamber without a division. The Lord Chancellor, though he introduced the bill, stated that he was opposed to it and regarded the proposal as a step in the wrong direction. Lord Halsbury supported this view, but on the other hand, Lord Sumner and Lord Loreburn were in favour of it. The proposal was to admit women to the ranks of the solicitors only, the reason being that in England admission to the Bar depends not on statute but on the Benchers of the Inns of Court. The profession in England are, on the whole, strongly opposed to the measure and it may not become law, and certainly not until fuller discussion, probably at the next session of Parliament. This certainly is not an appropriate time to introduce the bill.

In this matter we are in advance (if that is the right word to use) of our brethren in England, for in several of our provinces women are both barristers and solicitors; in connection with which we notice that Miss Carthart of Moosejaw, having just passed her final law examination, will be the first lady barrister in the Province of Saskatchewan.

After all, this opening of the door of the profession to women may not prove to be a matter of much practical importance, and so far the competition of our professional sisters has not at all troubled our professional brothers. Nor do we think the right to vote being given to women will do much more in the realm of politics than cause considerable expense and troublesome detail, and perhaps be an occasional disturbing factor; but, on the other hand, we may hope this franchise may in certain matters exercise a beneficial influence.

ANIMALS ON HIGHWAYS.

Perplexity may well be felt by the ordinary person as he studies the decisions on this subject. Why, he is inclined to ask, is a farmer who drives domestic animals along, or allows them to stray on to a highway to be regarded with so much favour, and at the expense of those who may have suffered damage thereby? The classical decision of *Cox* v. *Burbidge* (13 C.B.N.S. 430) affirmed, or perhaps it would be more accurate to say reaffirmed, this immunity on the part of the owner of domestic animals unless, indeed, *scienter* can be proved. The same was laid down afresh in *Heath's Garage* v. *Hodges* (115 L.T. Rep. 129; (1916) 2 K.B. 370), a case of damage to a motor-car by a sheep which had been allowed to stray on to the highway. Despite a finding by the County Court Judge in that case that it is the natural tendency of sheep which are untended to run across or otherwise endanger vehicles in the road the Divisional Court and the Court of Appeal both came to the conclusion that the owner of the sheep was not liable. There it was said by the Master of the Rolls that "an animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor-car, and the owner of the sheep cannot be held liable on that footing." In view of the County Court Judge's finding, the ordinary reader might think that with sheep running about a highway this would not be so unlikely a contingency as the Master of the Rolls imagined; and in this view he would find support in the decision of the Divisional Court in the case of *Turner* v. *Coates* (*post* p. 77) where the owner of an unbroken colt, which was being driven along a highway in the dark and collided with and injured a cyclist, was held liable on the ground that in the case of an unbroken cold such an accident was likely to happen. This may be, and we think it is, excellent sense, but it seems hard to reconcile with *Heath's Garage* v. *Hodges* (*supra*). The rule that in the case of an ordinary domestic animal the owner is not liable for such an accident is qualified by this decision, and seems now only to apply where the animal has reached years of discretion!

The Law Times.

VENDOR AND PURCHASER—CONTRACT BY LETTERS.

The question whether certain letters amount to a contract for the sale of land within the Statute of Frauds is often a difficult one. One of the leading cases on the point is *Hussey* v. *Horne-Payne* (41 L.T. Rep. 1; 4 App. Cas. 311). There Earl Cairns, L.C., referring to a contract by letters, thus laid down the law: "It is one of the first principles applicable to a case of the kind that where you have to find your contract, or your note, or your memorandum of the terms of the contract, in letters you must take into consideration the whole of the correspondence which has passed." That, however, was only a dictum, and must be read with reference to the fact that in that case there were, prior to the date of the two letters which were relied upon as satisfying the Statute of Frauds, certain terms which had been discussed, but had not been settled between the parties. In *Bristol, Cardiff, and Swansea Aerated Bread Company* v. *Maggs* (62 L.T. Rep. 416; 44 Ch. Div. 616) Lord Justice Kay (then Mr. Justice Kay) followed and approved of that dictum, observing that it obviated the danger of the Statute of Frauds being used as a trap to catch an unwary vendor or purchaser and bind him by a contract when the real intention was negotiation only. But in *Bellamy* v. *Debenham* (63 L.T. Rep. 220; (1891) 1 Ch. 412; affirmed on appeal, for other reasons, 64 L.T. Rep. 478; (1891) 1 Ch. 412) Mr. Justice North considered that the remarks of Mr. Justice Kay in *Bristol, Cardiff, &c., Company* v. *Maggs* went too far, and Mr. Justice North decided that, though when a contract is contained in letters the whole correspondence should be looked at, yet if once a definite offer has been made and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiations. When once it is shewn that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at. The point came before Mr. Justice Sargant in the recent case of *Perry* v. *Suffields Limited*

(115 L.T. Rep. 4; (1916) 2 Ch. 187), and he considered that *Bellamy* v. *Debenham* was valuable on the question of law as correcting the too sweeping remarks of Mr. Justice Kay in *Bristol, Cardiff, &c., Company* v. *Maggs*, and decided that when once it is shewn that there is a complete contract by letters, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at. That decision was affirmed by the Court of Appeal (Lord Cozens-Hardy, M.R., Pickford, L.J., and Neville, J.), who approved of the criticism of Mr. Justice North in *Bellamy* v. *Debenham* upon the observations of Mr. Justice Kay in *Bristol, Cardiff, &c., Company* v. *Maggs*. Both Mr. Justice Sargant and the Court of Appeal referred with approval to the law thus laid down in Fry on Specific Performance, par. 551: "The effect of subsequent letters may perhaps be thus stated. If the subsequent correspondence leads to the conclusion that, at the date of the letters relied on as the memoranda of the contract, there was no contract in fact, then the plaintiff must fail; if, on the other hand, the whole evidence shews that at that date there was a consensus between the parties, upon the terms expressed in the letters relied upon, then the subsequent correspondence, unless amounting to a new contract, or an agreement for rescission, can have no effect upon the existence of the contract."—*The Law Times*.

MISTAKE OF LAW—OVERPAYMENT.

It is often stated that money voluntarily paid under mistake of law cannot be recovered. There is no doubt, however, that the Court has power to relieve against mistakes in law, as well as against mistakes in fact. But, as pointed out by Lord Justice Turner in *Stone* v. *Godfrey* (5 De G.M. & G. 90), when parties come to the Court to be relieved against the consequences of mistakes in law, it is the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done. That principle was

approved of by Lord Justice Mellish in *Rogers* v. *Ingham* (35 L.T. Rep. 667; 3 Ch. Div. 357), where he refers to it and explains it thus: "That is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it." The principle was also followed and applied by Lord Justice Stirling (then Mr. Justice Stirling) in *Allcard* v. *Walker* (74 L.T. Rep. 487; (1896) 2 Ch. 369). As long ago as *Livesey* v. *Livesey* (2 Rus. 2) it was decided by the then Lord Chancellor (affirming a decision of the Master of the Rolls) that an executrix who had, by mistake, made payments in respect of an annuity for two years before A. attained twenty-one was entitled to retain them out of the future payments of the annuity. But in *Re Horne*; *Wilson* v. *Cox Sinclair* (92 L.T. Rep. 263; (1905) 1 Ch. 76) Lord Justice Warrington (then Mr. Justice Warrington) decided that, where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, and died before any adjustment had been made, the executors of such deceased trustee were not entitled to recover from the other beneficiaries the amount so overpaid or to have accrued or future income impounded till the shares were equalised, as their testator himself was the person responsible for the mistake that had been made. In *Re Ainsworth; Finch* v. *Smith* (113 L.T. Rep. 268; (1915) 2 Ch. 96) Mr. Justice Joyce, while not disapproving of the decision in *Re Horne*, thought that the judgment therein went beyond anything required for the purpose of the decision. In *Re Ainsworth*, where executors had paid the legacy duty payable in respect of a life interest out of a wrong fund, the decision was that what had in this way been overpaid to the tenant for life must, upon all proper adjustments being made, be retained out of future payments of her income. The point has recently come before Mr. Justice Neville in *Re Musgrave; Machell* v. *Parry* (115 L.T. Rep. 149). There the testator gave certain annuities, which he directed to be paid "without deduction." The trustees, by mistake, paid them for some time without deducting income tax. Mr Justice Neville held that this was not in the ordinary sense a mistake of public law, but an

honest, and not unnatural, mistake of construction, and that the trustees might recoup themselves by deducting the amounts so overpaid from future instalments. In the course of his judgment he said: "Since I have known anything of the Courts of Equity it has been, in my opinion, the practice of the Court when administering the estate of a deceased person, in cases where the trustees have under an honest mistake overpaid one beneficiary, in the adjustments of the accounts, so to speak, between the trustees and the *cestuis que trust*, to make allowance for the mistake, and to hold that the trustee may, so far as possible, be recouped the money which he has so inadvisedly paid." words which, we think, accord with the experience of, and represent the views of, the profession generally.—*The Law Times*.

ORDERS DISMISSING ACTIONS—ONTARIO.

In September last, a regulation was made by Meredith, C.J.O., and Middleton and Kelly JJ., whereby it was directed that "Orders made in Chambers dismissing actions shall be entered as orders and not as judgments." In the case of *Gilbert* v. *Gosport*, 1916, 2 Ch. 587, 115 L.T. 760, it has recently been decided by Sargant, J., that an order dismissing an action for want of prosecution is a judgment, and the learned Judge is of the opinion that there is no difference between an order dismissing an action for want of prosecution, and a judgment obtained on default of appearance by the plaintiff at the trial.

If this is a correct view of the nature of such orders, then it might be well to consider whether, in order to prevent any misconception as to their nature and effect, it would not have been better to have directed that all such orders should be drawn up and entered as "judgments," instead of as "orders," and particularly for the reason that judgments are entered in one set of books of the Court, and orders in another set of books, and it is obviously desirable that all judgments should be entered in the same set of books.

REVIEW OF CURRENT ENGLISH CASES.

ILLEGITIMACY—CORROBORATION—EVIDENCE OF OPPORTUNITY—35-36 VICT. c. 65, s. 4—(R.S.O. c. 154, s. 2 (2)).

Burbury v. *Jackson* (1917) 1 K.B. 16. This was an application against the putative father of an illegitimate child, and the sole question was whether proof of the defendant having had an opportunity for illegitimate intercourse with the complainant was sufficient corroboration under 35-36 Vict. c. 65, s. 4. (see R.S.O., c. 154, s. 2 (2)), and it was held by a Divisional Court (Lord Reading, C.J., and Ridley, and Low, JJ.) that it was not.

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—CORROBORATION—CROSS-EXAMINATION OF PRISONER AS TO ANOTHER OFFENCE—CRIMINAL EVIDENCE ACT, 1898 (61-62 VICT. c. 36) s. 1—(R.S.C. c. 145, s. 5).

The King v. *Kennaway* (1917) 1 K.B. 25. This was a prosecution for forgery of a will, and on the trial two accomplices were called as witnesses for the prosecution who deposed that the will was forged by the accused, in pursuance of a scheme whereby they were to endeavour fraudulently to obtain an advance from third parties to a legatee named in the will on the faith of his legacy; and they also deposed that one of them was to be named legatee and the executor, and that the accused told them he objected to being named executor, because he had forged a will under a similar scheme some years before, on which occasion he played the part of the executor, and that if he did it again he might be suspected. The accused gave evidence in his own defence and denied the accomplice's statement as to the earlier forgery. In cross-examination counsel went into details as to the earlier forgery and asked questions tending to shew that he had committed it. The question raised before the Court of Criminal Appeal (Lord Reading, C.J., and Darling, and Avory, JJ.) was whether the cross-examination was rightly made, and admitted, and the Court held that it was, and that it might afford corroboration of the evidence of the accomplices, and consequently it was relevant to the issue being tried, and was not open to objection under the Criminal Evidence Act, 1898, s. 1, (see R.S.C. c. 145, s. 5).

SHIP—CHARTERPARTY — DEMURRAGE—PERIOD OF DEMURRAGE NOT SPECIFIED—DETENTION OF SHIP BEYOND A REASONABLE TIME—DAMAGES.

Inverkip S.S. Co. v. *Bunge* (1917) 1 K.B. 31. This was an action to recover damages for detention of a ship, in lieu of demurrage, in the following circumstances. The charterparty provided for the payment of demurrage at a specified rate if the ship should be detained any longer than five days, but did not specify any limit to the period of detention. After the termination of the lay days, the charterers had not commenced to load the vessel, whereupon the shipowners gave notice that they would no longer accept payment of the specified rate of demurrage, but would claim damages. The vessel having been detained beyond a reasonable time, the action was brought by the shipowners to recover damages for the detention, but Sankey, J., who tried the action, held that the plaintiffs could only recover for demurrage at the specified rate.

BANKRUPTCY — COMPANY REGISTERED IN ENGLAND — BRITISH DIRECTORS—ALIEN ENEMY SHAREHOLDERS—ENGLISH COMPANY CARRYING ON BUSINESS IN ENEMY COUNTRY—RIGHT OF PROOF.

Re Hilckes (1917) 1 K.B. 48. This was a bankruptcy proceeding. The bankrupt was indebted to a registered English Company, all of the directors of which were English, and the bulk of the capital thereof was held by British subjects, though a considerable number of shares were held by Germans. After the war began, the bankrupt, who was a German, was interned in England, and was adjudicated a bankrupt; the company carried on its business in a rubber plantation situate in what, at the beginning of the war, was a German colony, and the question was whether in such circumstances the company was entitled to prove its claim against the bankrupt. Horridge, J., held that the company was at the time of the outbreak of the war carrying on business in an enemy country, and therefore, according to the sixth proposition of Lord Parker's summary of the law in *Daimler Co.* v. *Continental Tyre & Rubber Co.* (1916) 2 A.C. 307, 346, must be regarded as an alien enemy; but the Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.) held that the mere fact that a British company did business up to the time of the outbreak of the war in an enemy country, through a properly appointed agent, did not constitute the com-

pany an alien enemy, and, therefore, that it was entitled to prove its claim.

SHIP—BILL OF LADING—EXCEPTIONS—GENERAL SHIP—LOADING AT DIFFERENT PORTS—RIGHT TO RE-STOW CARGO—DAMAGE OCCASIONED IN COURSE OF RE-STOWING.

Bruce Marrion Co. v. *Houlder Line* (1917) 1 K.B. 72. This was an action by owners of a part of a cargo, for damages occasioned thereto in the following circumstances. The cargo in question was shipped on a general ship which carried cargo for various ports. She took on part of her cargo at Antwerp, and then proceeded to London, and took on the plaintiff's cargo. The bill of lading therefor excepted, *inter alia*, damages arising from breakage. The vessel then proceeded to Newport to take on more cargo. It was found necessary for the safe voyage of the ship that two large cylinders of the plaintiff's cargo should be taken out of the hold where they have been placed, and restowed in another hold. For this purpose they were temporarily placed on the quay, and while there were damaged. The evidence shewed that this method of dealing with the cargo in case of a general ship was quite usual. Rowlatt, J., who tried the case, thought that the defendants were not entitled to take the cylinders out of the hold for the purpose of re-stowing them, therefore, that the defendants were not protected by the exception in the bill of lading; but the Court of Appeal (Eady, and Bankes, L.JJ., and Lawrence, J.) unanimously reversed his decision, and the action was dismissed.

CRIMINAL LAW—HIGH TREASON—AIDING THE KING'S ENEMIES—ADHERENCE WITHOUT THE REALM—TREASON ACT, 1351 (25 EDW. 3, STAT. 5, C. 2).

The King v. *Casement* (1916) 1 K.B. 98. This will probably hereafter constitute one of the leading cases on the subject of high treason. The accused was indicted under the Treason Act of 1351. His alleged offence being, that being a British subject he had gone to Germany in time of war, and there endeavoured to induce certain subjects of His Majesty, there prisoners of war, to join the armed forces of the enemy. It was contended that this act having been committed out of the realm was not treason within the Act, and not triable in England, but the King's Bench Division (Lord Reading, C.J., and Avory, and Horridge, JJ.) and the Court of Criminal Appeal (Darling, Bray, Lawrence, Scrutton, and Atkin, JJ.) unanimously agreed that the offence

was within the Act, and triable in England; and that the acts of which the accused had been guilty, were an adherence to the King's enemies, and also a giving aid and comfort to them.

CONTRACT — CONDITION—SUSPENSION OF DELIVERY—PREVENTING OR HINDERING DELIVERY—WAR—SHORTAGE OF SUPPLY —RISE IN PRICE.

Wilson v. *Tennants* (1917) 1 K.B. 208. This was an action to enforce a contract for the supply of magnesium chloride. The contract was subject to a condition that deliveries might be suspended pending any contingencies beyond the control of the sellers or buyers (such as war), causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture, or delivery of the article. Owing to the war there was a shortage of supply, and the price rose, and the defendants claimed under the clause above mentioned a right to suspend deliveries during the war. Low, J., who tried the action, gave effect to this contention, but the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford, L.J., and Neville, J., the latter dissenting), held that the mere shortage of supply, which did not in fact prevent or hinder the delivery of the goods, was not within the condition, and that the condition referred to a physical, or legal prevention, and not to an economic unprofitableness, arising from a rise in price.

LANDLORD AND TENANT—LEASE UNDER SEAL—OVERHOLDING TENANT—LIABILITY OF TENANT OVERHOLDING—RIGHT OF LESSOR TO SUE OVERHOLDING TENANT ON EXPRESS COVENANTS IN LEASE—CONVEYANCING ACT, 1881 (44-45 VICT. c. 41) s. 10—(R.S.O. c. 155, s. 5).

Blane v. *Francis* (1917) 1 K.B. 252. This was an action by an assignee of the reversion against an overholding tenant for breach of a covenant to repair. The covenant was contained in the lease under which the lessee had entered. It was contended that under the Conveyancing Act, 1881, s. 10 (see R.S.O. c. 155, s. 5) the tenant, notwithstanding the lease had expired, still remained liable under the covenants in the lease, and that the plaintiff, as assignee of the reversion, was entitled to recover for the breach thereof; but the Court of Appeal (Eady, and Bankes, L.JJ., and Lawrence, J.), agreed with the Divisional Court that the Act did not apply to a lease not in writing, and that the plaintiff, as assignee of the reversion, was not entitled

to sue the overholding tenant for breaches of an express covenant in the expired lease, nor could he demand that the tenant should execute a lease so as to enable him to sue upon that covenant. The action therefore failed. It should be noted that the defendant paid into Court a sum sufficient to satisfy the breach of her implied covenant to keep the premises wind and water tight, which was accepted by the plaintiff as sufficient.

PRIZE COURT—NEUTRAL VESSELS—CONTRABAND CARGOES—SHIPOWNER'S CLAIM TO FREIGHT.

The Jeanne (1917) P. 8. The simple point decided by Evans, P.P.D., in this case is, that the owners of neutral vessels carrying contraband cargoes which have been taken in prize and condemned, have no claim which will be recognised in the Prize Court for freight in respect of such cargoes except as a matter of grace or discretion.

SALVAGE—FREIGHT SUBSEQUENTLY EARNED ADDED TO VALUE OF SALVED VESSEL.

The Kaffir Prince (1917) P. 26. This was a claim for salvage. The vessel salved was on her way in ballast to an English port under a charter party to take a cargo of coal to Alexandria. By reason of being salved she was enabled to earn the freight for carriage of the coal, and Evans, P.P.D., held that the freight thus earned must be added to the value of the ship, for the purpose of computing the amount to be paid for salvage.

PRIZE COURT—PASSING OF PROPERTY IN TIME OF WAR—GOODS SENT BY PARCELS POST FROM ENEMY COUNTRY—SEIZURE UNDER REPRISALS ORDER IN COUNCIL OF MARCH 11, 1915.

The United States (1917) P. 30. This was a proceeding in the Prize Court in respect of certain parcels seized on board the ship the United States under the above-mentioned Order in Council. The vessel was a neutral Dutch vessel: and the parcels in question contained goods made in Germany, and intended for customers in America; the goods having been bought and paid for, before the passing of the Order in Council. It was contended on behalf of the purchasers that the goods when seized were neutral goods, as the property in them passed to the purchasers when the goods left the German factories, from which they were sent. Evans, P.P.D., held that in time of war goods shipped from an enemy country to a neutral country, or from a neutral

to an enemy country, are, when captured, to be regarded as enemy property, and that they, or their proceeds if sold, must be detained till the conclusion of peace.

PRIZE COURT—COMMERCIAL DOMICIL—GOODS OF ENEMY FIRM IN NEUTRAL COUNTRY—ENEMY PARTNERS—NO PARTNER RESIDENT IN NEUTRAL COUNTRY—ENEMY PROPERTY.

The Hypatia (1917) P. 36. This is another case of prize. Goods belonging to a German firm carrying on business in Buenos Aires were shipped before the war on a British ship for carriage to Hamburg. None of the members of the firm was domiciled in Buenos Aires, or any other neutral country. The cargo was seized as prize, and this was a suit for its condemnation. Evans, P.P.D., held that although a subject of a belligerent State may acquire a domicil in a neutral State which will protect his goods captured at sea from condemnation as prize, residence in the neutral State is essential, and that a mere commercial domicil, unaccompanied by actual residence, will not suffice, therefore the goods in question were condemned.

PRIZE COURT—"GOODS" OR "COMMODITIES"—GERMAN GOVERNMENT BONDS—SEIZURE FROM LETTER MAIL—REPRISALS ORDER IN COUNCIL OF MARCH 11, 1915.

The Frederik VIII. (1917) P. 43. In this case some German Government Bonds sent by a bank in Berlin to Copenhagen to be transmitted to a bank in Chicago, were sent by letter mail from Copenhagen to Chicago, and were captured at sea in course of transmission. The simple question was whether the bonds were "goods" or "commodities" within the Order in Council above referred to, and Evans, P.P.D., held that they were.

WILL—CONSTRUCTION—GIFT TO NEPHEWS AND NIECES AND THEIR CHILDREN—INCLUSION OF CHILDREN OF ILLEGITIMATE SISTER.

In re Helliwell, Pickles v. *Helliwell* (1916) 2 Ch. 580. The question in this case was whether certain illegitimate relatives of a testator were included with legitimate relatives in a gift of residuary estate. The gift in question was in favour of the testator's nephews and nieces, and the issue of such of them as were dead, and was followed by a declaration that John Feather, a son of "my sister Mary Wright" and William Hey the "son" of my brother John Helliwell, shall be entitled to share equally with my other nephews and nieces. His sister Mary Wright was

in fact illegitimate, and William Hey was in fact an illegitimate son of John Helliwell. Besides Mary, the testator had also an illegitimate sister named Sarah, who had died leaving legitimate children, and the question was whether these children were entitled to participate. Sargant, J., held that the will contained sufficient indication of the testator's intention to include them, as well as the legitimate relatives, and so decided.

ACTION AGAINST PUBLIC AUTHORITY—DISMISSAL FOR WANT OF PROSECUTION—ORDER WHETHER A "JUDGMENT"—COSTS—PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56-57 VICT. c. 61), s. 1 (*b*)—(R.S.O. c. 89, s. 13 (2)).

Gilbert v. *Gosport & A.U. District Council* (1916) 2 Ch. 587. This was an action against a public authority which was dismissed for want of prosecution, and the simple question was whether the costs should be paid as between solicitor and client. The action was brought in respect to an alleged trespass by the defendants on land claimed to belong to the plaintiff, but over which on behalf of the public the defendants claimed a right of way, and the question turned upon whether the order dismissing an action, was a "judgment." This point could hardly arise under R.S.O. c. 89, s. 13 (2), Sargant, J., held that an order dismissing an action is equivalent to a judgment for the defendants, and that the defendants were entitled to costs as between solicitor and client. Notwithstanding the recent Regulation of 25th September, 1916, of the Supreme Court of Ontario, providing that orders dismissing actions are to be entered as orders, and not as judgments, the legal effect of such orders is probably not affected.

COPYRIGHT—UNIVERSITY EXAMINATION PAPERS—ORIGINAL LITERARY WORK—INFRINGEMENT—INJUNCTION—COPYRIGHT ACT, 1911 (1-2 GEO. V. c. 46), s. 1 (1), s. 2, SUB-S. 1 (*i*); s. 5, SUB-S. 1 (*b*); s. 35 (1).

University of London Press v. *University Tutorial Press* (1916) 2 Ch. 601. In this case Peterson, J., held that examination papers set for an university examination are an "original literary work" within the meaning of the Copyright Act, 1911 (1-2 GEO. V. c. 46), s. 1 (1), and that the copyright vested in the examiners who composed them; and that the examiners were not "in the employment" of the University under "a contract of service within" the meaning of s. 5, sub-s. 1 (*b*); but as the Examiners were appointed subject to a condition that any copyright in the examination papers should belong to the University, the examiners were

bound to assign their copyright to the University, or to whom it might direct; and the University having assigned its rights to the plaintiff company, the plaintiff company was equitably entitled to the copyright; and two of the examiners having been joined as co-plaintiffs, it was held that the plaintiff company was entitled to an injunction to restrain the infringement of the papers set by the two examiners who were co-plaintiffs; the defendants having failed to bring themselves within the protection of s. 2, sub-s. 1 (*i*).

LIFE ASSURANCE POLICY—ASSIGNMENT SUBJECT TO CONDITION OF ASSIGNOR PREDECEASING ASSIGNEE—NO CONSIDERATION—TESTAMENTARY DISPOSITION—INVALIDITY.

In re Williams, Williams v. *Ball* (1917) 1 Ch. 1. In this case the facts were that an owner of a life assurance policy on his own life, gave it to his housekeeper with the following signed indorsement thereon, "I authorise" (*naming her*) "my housekeeper and no other person to draw this insurance in the event of my predeceasing her, this being my sole desire and intention at time of taking this policy out, and this is my signature." The assignor paid the premiums until his death, which took place in the lifetime of the assignee. There was no consideration for the assignment, and the question was therefore whether, in the circumstances, it was a valid gift, and Ashbury, J., who tried the action, held that the gift was inoperative, on the ground that the assignment contained no present words of gift, and being without consideration, and conditional, did not pass the chose in action. The Court of Appeal (Lord Cozens-Hardy, M.R., and Warrington, and Scrutton, L.JJ.) affirmed his decision, but on the ground that the assignment was an incomplete gift, and was either a revocable mandate, revoked by the death of the assignor; or if intended to take effect on his death, it was a testamentary document not validly executed.

REAL ESTATE—CONVERSION—OPTION TO PURCHASE—EXERCISE OF OPTION—DEATH OF PURCHASER INSOLVENT—INABILITY TO CARRY OUT PURCHASE PURSUANT TO OPTION—RE-ENTRY OF VENDOR.

In re Blake, Gawthorne v. *Blake* (1917) 1 Ch. 18. This was a case to determine whether or not there had been a conversion of realty into personality in the following circumstances. At the date of the testator's death in 1897 he was owner in fee of certain real estate which was the subject of a building agreement

containing an option to the proposed lessee to purchase the reversion in fee. After the testator's death the proposed lessee, having become entitled to a lease, in 1899 gave notice of exercising his option to purchase the fee; but he died in 1899 insolvent, and without having carried out the purchase, and the testator's trustees had subsequently, pursuant to the terms of the agreement, re-entered on the premises. By the testator's will the testator's residuary real and personal estates were disposed of to different persons, and consequently it became of moment to determine whether or not there had been a conversion of the realty included in the agreement into personalty, by reason of the notice to exercise the option, and Eve, J., held that the giving of the notice of exercising the option worked a conversion, and the subsequent failure to carry out the purchase, and the re-entry by the trustees of the will, had not the effect of reconverting the property into realty as against the legatees of the personal estate.

WILL—BEQUESTS TO CHILDREN—ADVANCES TO SON—DIRECTION IN CODICIL TO BRING INTO HOTCHPOT ADVANCES APPEARING IN BOOKS—ENTRIES BEFORE AND AFTER CODICIL.

In re Deprez, Henriques v. *Deprez* (1917) 1 Ch. 24. By the will in question dated in 1899, and a codicil dated in 1909, the testator made bequests to his children, and provided by the codicil that the advances to his son appearing in his books of account should be brought into hotchpot. The testator died in 1915 and it was then found that his books contained entries, made before and after the codicil, of advances to his son. Neville, J., who tried the action, held that the entries of advances made prior to the codicil were incorporated in the will, and were conclusive, but the subsequent entries were not receivable as part of the will, or as evidence, and as to them there must be an inquiry.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—PARTIAL RELEASE OF RESTRAINT ON ANTICIPATION BY CESTUI QUE TRUST WHILE DISCOVERT—DIRECTION TO TRUSTEES.

In re Chrimes, Locovich v. *Chrimes* (1917) 1 Ch. 30. This case, we believe, is one of first impression, at all events no previous authority is cited on the point in question. The facts were simple. The plaintiff was entitled to a reversionary share under a will bequeathed to her while a spinster, but subject to a restraint against anticipation in case she married. She subsequently

married, but before she married, she executed a deed poll, whereby she declared that the said reversionary share should, in the event of her marriage, belong to her for her separate use, and that for the purposes, and subject to the conditions therein mentioned, she should have full power to dispose of, or charge the said share by way of anticipation or otherwise as she might think fit, but, except as therein provided, nothing therein contained should prejudice the continuance of the said restraint. This deed was duly communicated to the trustees of the will; after her marriage three mortgages were made by her pursuant to the conditions of the deed. This was a summary application to determine whether the mortgages were valid, and whether the plaintiff had power to make any further mortgages for the purposes declared by the deed poll. Sargant, J., held that the deed was valid and operated by way of direction to the trustees, and thus amounted to a complete and effectual transfer of the plaintiff's share upon a new and modified trust, and that for the purposes, and subject to the conditions imposed by the deed poll, she had power to deal with her share by way of anticipation during coverture.

LIEN—PRINCIPAL AND AGENT—INDEMNITY FOR LIABILITY FOR DAMAGE FOR ACTS DONE BY AGENT FOR PRINCIPAL—COLLIERY —SUBSIDENCE — EQUITABLE LIEN — POSSIBLE FUTURE DAMAGES.

Dyson v. *Peat* (1917) 1 Ch. 99. In this case the plaintiffs were the surviving executrix and trustees of the estate of a lessee of certain coal mines, subject to a liability to indemnify owners of the surface in case of subsidence from working the mines. This lease was assigned to a company who undertook to indemnify the assignor and his estate against liability under covenants in the lease, and the company charged its undertaking with the performance of the covenant for indemnity, and authorised Dyson, the executrix, in case of default in performing the covenant, to appoint a receiver and manager of the company; the company having made default, the defendant Peat was appointed by Dyson receiver and manager of the business, and he carried on the colliery, and after satisfying the expenses, and claims for subsidence actually made, there remained a balance in his hands to which the plaintiffs claimed to be entitled, but which claim was resisted, on the ground that further subsidences might take place for which the defendant would be liable, and he claimed to retain the balance to indemnify him against such possible future liabilities; but Eve, J., held that he had no lien on the

money in his hands for that purpose, and he ordered payment of the balance to the plaintiffs, without any provision for indemnity to the defendant against future liabilities. *Sed quære* ought not the plaintiffs to have been required to give the defendant a bond, on the principle that he who seeks equity must do equity?

LANDLORD AND TENANT—COVENANT TO INSURE AGAINST "LOSS AND DAMAGE BY FIRE"—INSURANCE AGAINST FIRE "EXCEPT WHEN CAUSED BY ENEMY."

Enlayde v. *Roberts* (1917) 1 Ch. 109. This was an action by a lessee against his lessor, for breach of a covenant to insure the demised premises against "loss or damage by fire," and to expend the money received from the insurance in the restoration of the premises. The defendant had insured the premises against fire, but the policy excepted fire occasioned by a foreign enemy—invasion by foreign enemy—and military or usurped power. The premises had been destroyed by fire occasioned by an enemy bomb. The insurance which had been effected against fire did not cover the loss by reason of the exception, and the defendant claimed that there was a custom that policies against fire should except losses occasioned by enemies. Sargant, J., who tried the action, held that the words "loss or damage by fire" in the lease must be construed in their strict and primary, and not in their secondary, sense, and that the lessor was liable on her covenant for the loss which had occurred. He also was of the opinion that the fact that the loss which took place had been occasioned by circumstances not in the contemplation of either party when the covenant was made, was immaterial.

Correspondence.

LORD'S JUSTICES.

The Editor, CANADA LAW JOURNAL:

SIR,—I notice in your issue for January a discussion of the propriety of the expression "Lords Justices."

There seems to me no doubt of its propriety, but none of the reasons given appear to me to be conclusive. It does not depend on legal authority, statutory or otherwise, nor yet on any technical

rules of grammar. It cannot be argued that the form of the expression is correct, or incorrect, because we do, or do not, say "Lords Chancellors" or "Chiefs Justices." As a statute cannot determine what is good English, neither can it be determined by analogy to the structure of similar expressions. We must be guided by the mental conception imparted by the expression. The "Lords Justices" are a body of men created for the purpose of sitting as a body, or a certain number of them as a body, for a certain purpose. We say "their Lordships decided" so and so. If asked by a layman to say more definitely who decided so and so, we should answer, without thinking of the name applied by statute, in language indicating that a body of men styled Lords—not the peers—but the Lords "Justices" decided so and so, the appellation "Lords" being the most prominent word and indicating that they were one body, the term "justices" being added when the position and title were created, to indicate what Lords as a descriptive appellation. We say "Lords Commissioners" for the same reason, that is, to satisfy the mental conception of one body of "Lords" acting as Commissioners of the Great Seal, and no rule of grammar as to the plural of compound words or any statute, affects the question, or is ever thought of. We say "Lord Chancellors" because we think of them as isolate individuals each styled "Lord Chancellor," the word "Chancellor" being the principal substantive word, and there being no two "Lord Chancellors" at once, no body of "Lords Chancellors." We say "Chief Justices" for the same reason, and though there may be more than one in existence at the same time there is no body of "chiefs." We say "Masters of the Rolls" though there is only one at a time—no body like "Lords Justices"—because the mental conception is of a "Master" of something, referred to as "the Rolls," and "of the Rolls" is thought of as descriptive, and not like "Chancellor" as the distinctive part of his title. Besides, euphony would not permit us to pluralise "The Master of the Roll" as one word or appellation. The case is the same in both respects with "Barristers-at-law." No technical rules of grammar or the authority of any statutes applies to any of these questions.

The statute says "Lords Justices" because it is right for the above reasons. It is not because the statute uses the expression in that form that it is right.

Edmonton, March 6, 1917. A.S.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

B.C.] [Feb. 6.

BOYD v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND ATTORNEY-GENERAL FOR ONTARIO.

Succession duties—Partnership property—Owners not domiciled in province — Interest of deceased partner — R.S.B.C. 1911, c. 217, s. 5.

By sec. 5 of the Succession Duty Act of British Columbia, R.S.B.C. 1911, ch. 217, on the death of any person his property in the province "and any interest therein or income therefrom . . . passing by will or intestacy" is subject to succession duty whether such person was domiciled in the province or elsewhere at the time of his death. M.B. and his brother were partners doing business in Ontario and owning timber limits in British Columbia. The firm had no place of business nor man of business in that province and never worked the limits. The partnership articles provided: "8. If either partner shall die during the continuation of the partnership his executors and administrators shall be entitled to the value of his share in the partnership assets. 9. On the expiration of such partnership a valuation of the assets should be made and after providing for payment of liabilities the value of such property, stock and credits shall be divided equally between the partners, etc." M.B. having died while the partnership existed, his share in the partnership assets passed by his will to executors. The Province of British Columbia claimed that his interest in the timber limits was subject to succession duty.

Held, Davies and Anglin, JJ., dissenting, that under the terms of the articles of partnership M.B., at the time of his death, had an interest in the land in British Columbia which passed by his will and such interest was subject to duty under sec. 5 of the B.C. Succession Duty Act.

Held, also, that the imposition of the duty, if taxation, was "direct taxation within the province" and within the competence of the Legislature of British Columbia.

Appeal dismissed with costs.

Lafleur, K.C., and *David Henderson*, for appellants.

J. A. Ritchie, for the Attorney-General of British Columbia.

Wallace Nesbitt, K.C., for the Attorney-General of Ontario.

Ont.] [Feb. 6.

TORONTO SUBURBAN RAILWAY CO. v. EVERSON.

Expropriation—Railways—Date of valuation of lands—Deposit of plan—Notice—Benefit to lands not taken—Set-off—Excessive compensation—Appeal—6 Edw. VII., c. 30 (Ont.)—3 & 4 Geo. V., c. 36 (Ont.)

Where the expropriation of land is governed by the provisions of the Ontario "Railway Act" of 1906, the date for valuation is that of the notice required by sec. 68 (1). It is the same under the Act of 1913, if the land has not been acquired by the railway company within one year from the date of filing the plan, etc. The compensation for the land expropriated should not be diminished by an allowance for benefit by reason of the railway to the lands not taken, the Ontario "Railway Acts" making no provision therefor.

On appeal in a matter of expropriation the award should be treated as the judgment of a subordinate Court subject to re-hearing. The amount awarded should not be interfered with unless the Appeal Court is satisfied that it is clearly wrong, that it does not represent the honest opinion of the arbitrators, or that their basis of valuation was erroneous.

Where the land expropriated is an important and useful part of one holding and is so connected with the remainder that the owner is hampered in the use or disposal thereof by the severance, he is entitled to compensation for the consequential injury to the part not taken. *Holditch* v. *Canadian Northern Railway Co.* (50 Can. S.C.R. 265; (1915) A.C. 536) distinguished.

To estimate the compensation for lands expropriated, the arbitrators are justified in basing it on a subdivision of the property if its situation and the evidence respecting it shew that the same is probable.

Held, *per* Fitzpatrick, C.J., and Anglin, J., that to prove the value of the lands expropriated, evidence of sales between the date of filing the plans and that of the notice to the owner is admissible and also of sales subsequent to the latter date if it is proved that no material change has taken place in the interval.

Brodeur, J., dissenting, held that the damages should be reduced; that the arbitrators should have considered only the market value of the lands established by evidence of recent sales in the vicinity.

Appeal dismissed with costs.

R. B. Henderson and *O'Connor*, for appellants. *Tilley*, K.C., for respondent.

Ont.] BOOTH v. LOWERY. [Feb. 19.

Negligence—Driving lumber—Rights on navigable waters—River improvements—Contract with Crown—Rights of contractor—Reckless driving—"Rivers and Streams Act" (Ont.)—B.N.A. Act, 1867, ss. 91 (10), 92 (10).

In 1910, Parliament voted money for "Montreal River Improvements above Latchford" and the Crown, through the Minister of Public Works, gave a contract to L. in connection with the work. In performance of the work L. placed a cofferdam on each side of the river, leaving an opening between them some 200 feet wide. In the spring of 1911, the cofferdam on the north side was covered by three feet of water and the logs of B., being driven down through the opening, came against a pier a few hundred feet below, forming a jam, the rear of which was over the cofferdam. The breaking of the jam, in the ordinary mode, caused the logs to press more heavily on the cofferdam and it was destroyed.

Held, Fitzpatrick, C.J., and Duff, J., dissenting, that B. was responsible for the injury so caused; that with more care in driving the formation of the jam might have been avoided: that, if breaking the jam in the ordinary way was likely to cause damage, another mode should have been adopted, even if it would cause delay and greater expense; and that the employees of B. acted with a wilful disregard of the contractors' rights and caused "unnecessary damage."

Held, per Davies, Anglin and Brodeur, JJ., that the rights of lumbermen under the Ontario "Rivers and Streams Act" (pre-confederation legislation), are not subordinate, but equal to those of persons acting for the Dominion Government in matters respecting navigation.

Per Davies and Duff, JJ.—Anglin, J., *dubitante*. The cofferdam was a "structure" and subject to the provisions of sec. 4 of the "Rivers and Streams Act."

Per Davies and Anglin, JJ.:—Even if not a "structure," as it was placed in the river under sanction of Dominion legislation, B.'s rights were restricted practically as they would be under sec. 4.

Held, per Fitzpatrick, C.J., and Duff, J.:—A vote for "River Improvements" does not of itself authorise an interference with the rights of lumbermen under the "Rivers and Streams Act." These rights were exercised in the usual and proper manner, and as no breach of duty by B. to avoid "unnecessary damage"

was proved he could not be held liable for the damage to the cofferdam.

Judgment of the Appellate Division (37 Ont. L.R. 17), reversing that at the trial (34 Ont. L.R. 204), affirmed.

Tilley, K.C., and *Wentworth Greene*, for appellant. *McKay*, K.C., for respondent.

Ont.] [Feb. 19.

JOHN A. MARSHALL BRICK CO. v. YORK FARMERS COLONIZATION CO.

Mechanic's lien—Loan company—Agreement for sale—Advances for building—"Owner"—Request—Privity and consent—Mortgagee—R.S.C. 1914, c. 140, ss. 2 (1), (3) and 14 (2) Mechanics' Lien Act.

The owners of four lots in Toronto executed an agreement to sell them to one I., who was to make a cash deposit and undertake to build four houses on the lots, the vendors to advance $6,400 for building purposes. On completion of the houses and on receipt of the balance of price and amount of advances, the vendors to execute a deed of the lots. I. gave contracts for the building which was partly completed and $3,400 was advanced by the vendors when I. became insolvent and the vendors, under the terms of their agreement, gave notice of forfeiture and took possession of the property. Prior to this liens had been filed for labour and materials supplied and the lien-holders brought action for enforcement thereof against the vendors.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 542), Davies and Brodeur, JJ., dissenting, that the vendors were not owners of the property according to the definition of the term "owner" in sec. 2 (*c*) of the "Mechanics' Lien Act" and, therefore, were not liable to pay for the labour and materials supplied for the building of the houses for I.

Per Anglin, J.:—To make the vendors "owners" because the work was done with their privity and consent, a direct dealing between them and the materialmen was requisite and of this there was no evidence.

By sec. 14 (2) of said Act, the vendors, under the agreement for sale, became mortgagees of the land sold with their rights as such postponed to those of the lien-holders in respect of any "increased value" given to the land by erection of the houses thereon.

Held, that, though they had refused it at a former stage of the

proceedings, the lien-holders should, if they wish, have a reference to permit of revision of their claims on the basis of the vendors being mortgagees and any amount found due to them on such reference to be set-off against the costs payable by them in the Appellate Division and on the present appeal.

Appeal dismissed with costs.

Raney, K.C., and *C. Lorne Fraser*, for appellants. *B. N. Davis*, for respondents.

Province of Ontario

FIRST DIVISION COURT—COUNTY OF WATERLOO.

REIJH v. ULROP.

Medical Act—Infringement.

The diagnosing of a disease, or the manual manipulation of bones and nerves is not, nor is the combining of them, a "practising of medicine" within the meaning of the Medical Act.

[READE, J.J., Kitchener. Feb. 8, 1917.

READE, J.J.:—The plaintiff was not, and did not, claim to be a practitioner within the meaning of the Medical Act, but charged for services rendered in diagnosing diseases and treating them by manual manipulation of the patient, but without the administering of drugs or medicine.

It does not appear upon the evidence, nor is it otherwise known to me, that what the plaintiff did or claimed to do encroached upon any of the methods adopted by the medical profession for the cure of disease, either according to the extended interpretation of the words "practicing medicine" given by some jurists, or the more contracted one requiring the use of drugs and medicines, though in my view the more contracted meaning is the proper one. I cannot understand how the intention of the legislature can be taken to extend the meaning of the words beyond their natural signification so as to enable the medical profession to adopt and confiscate from time to time new methods of restoring health resorted to by others, without the sanction of legislative enactment, nor has it anywhere been held that diagnosis alone constitutes practicing medicine, it being always

coupled for that purpose with the prescribing and administering of a remedy in accordance with the medical pharmacopœia, as in the case, for instance, of a druggist diagnosing a disease and then prescribing and selling a proposed remedy, which would clearly be an infraction of the Medical Act. Nor can I see how it can be said that, because the plaintiff coupled the diagnosis, which in itself does not constitute practicing medicine, with the application of manual treatment, which also in itself does not constitute practicing medicine, that he was therefore guilty of practicing medicine, and I do not so find. There will therefore be judgment for the plaintiff as claimed.

See *In re Ontario Medical Act*, 13 O.L.R. 501; *Regina* v. *Howarth*, 24 O.R. 561; *Regina* v. *Coulson*, 27 O.R. 59; *Queen* v. *Velleau*, 3 Can. C.C. 435; *Reg* v. *Hall*, 8 O.R. 407.

War Notes.

THE AWAKENING OF AMERICA.

On the second day of the month of April, the President of the United States read to Congress his long delayed message on the subject of the war. It was a masterly, complete and convincing vindication of the Allies and a damning arraignment of German brutality and bad faith. It was in effect taking up the gage of battle thrown down by Germany by their atrocious breaches of international law and solemn promises and disregard of the dictates of humanity, whereby they had put themselves outside the pale of civilised nations. The Senate on the 4th inst. accepted the President's message and adopted a war resolution by a vote of 82 to 6. On the 6th inst. Congress took the same action by a vote of 373 to 50. The formal document, signed by the President, under the seal of the Republic, declares that a state of war exists between Germany and the United States of America by reason of the acts of the former power and is in effect a declaration of war.

There had been a growing feeling of regret, if not of resentment, in this country, that Great Britain should be left to fight the battle of freedom and liberty, without the active co-operation of a country of the same language and largely of the same race as ourselves and which claimed preeminence as the exponent of freedom and liberty. There have been those who went so far as

to say that the land of Washington and of Lincoln had lost its soul in the mire of money and luxurious ease. But the soul was not dead, but slumbered, and now it is awake—very much awake in its activities. We are glad for their country and for ourselves and for the world at large that it is so.

It must be remembered, that there is in the United States a large native German element, wealthy and influential, which had to be reckoned with by the President, and he had in this, and in other ways not made public, great difficulties to contend with, which took tact and time to surmount; so that there is some excuse for the delay in the action which has now happily taken place. It is possible, moreover, that the presence of these disturbing elements may result in outrages and acts of violence traceable to an alien race which, by the awful malignity and cruelty they display, seem to be under the influence of satanic possession. This is to be deplored, but may be expected.

BATTLE OF ARRAS AND VIMY RIDGE.

At the fighting near Arras beginning on Easter Sunday, the Canadian divisions were given the post of honor at the storming of Vimy Ridge, and led the assualt. This strong position was captured and held. Over 12,000 German prisoners were taken and about 200 guns. The King's congratulatory message to our men reads as follows:—

"The whole Empire will rejoice at the news of yesterday's successful operations. Canada will be proud that the taking of the coveted Vimy Ridge has fallen to the lot of her troops. I heartily congratulate you and all who have taken part in this splendid achievement."

"WELL DONE, CANADA!"

The *New York Tribune* of the 11th inst. contains the following eloquent tribute to our men at the front. We take pride in what others say of those who have gone to fight for the right, but shame when we think of those who refuse to take the places of our fallen heroes:—

"Every American will feel a thrill of admiration and a touch of honest envy at the achievement of the Canadian troops about Arras on Easter Sunday and the following day.

"The glory of the Canadian fight at the Ypres salient has been too little appreciated on our side of the northern frontier. Rarely in history have troops, volunteer troops, suddenly exposed

to a flank attack, through no fault of their own, but by the collapse of their neighbours, had to bear a more terriffic blow than that which followed the first gas attack. Yet, in the midst of confusion, assailed by the appalling poison of German making, the Canadian volunteers stood and died as the British regulars had stood and died in the greater battle of Ypres, of 1914.

"And now the Canadians have swept up the famous Vimy ridge, which halted the French veterans of Foch and proved too great an obstacle for the genius of the greatest offensive fighter France has yet produced in the war. After the long months of waiting the Canadians have had their hour. They have had a chance to avenge their comrades, crucified by German brutes in Flanders; they have had the opportunity to write the name of Canada upon the war map of Europe and their imprint will be remembered—in Germany quite as much as in America.

"We shall know later at what price this achievement was accomplished, but no price will be too high, and for Canada this day of victory will have a lasting value. For Canada, too, its value will be less than for the British Empire.

"Nearly three-quarters of a million of Canadian and Australian troops have responded to the call of the British Empire, more than half of them wearing the Canadian Maple Leaf. German plotting, German scheming, the wise plans of the professors on paper and of the German soldiers on the map have been answered in the only fashion in which it is possible to speak to Germans now.

"Americans will feel a certain envy in the thought that Canada has outdistanced us in reaching the battle line, which is the frontier of our common civilization. We shall take what comfort we may from the knowledge that among the Canadian forces are a considerable contingent of citizens of the United States, an unofficial vanguard, we shall trust, of that American army which is, in due course, to take its place along the French front. They are serving in worthy company.

"No praise of Canadian achievement can be excessive. From the plains and from the mountains, from the cities and from the prairies, Canada has poured out her thousands and her hundreds of thousands; she has sent across the ocean an army greater than Napoleon ever commanded on any battlefield; her volunteer regiments have shewn that same stubborn and tenacious quality which is the glory of the British army. Canada's sons have won for liberty not merely a few square miles of French territory, but a victory which makes answer to the German idea that the

world can be reconstructed without regard to the spirit of man, merely by material force. Our entrance into the war should make a new bond between the Canadians and ourselves."

THE IMPERIAL WAR CONFERENCE.

On the 20th ultimo. the British War Cabinet, together with the representatives of the Dominions, with the exception of Australia, whose members were unable to be present, met for the first time with full executive powers and responsibility to consider the future policy of the Empire to be followed in the war and afterwards. This meeting marks a definite epoch in the history of the Empire and of its constitutional development. The result of its deliberations will be looked for with great interest.

Bench and Bar

ONTARIO BAR ASSOCIATION—PROCEEDINGS AT THE ANNUAL MEETING.

Report of Committee of Legal History.

Not the least interesting part of these proceedings was the paper read by Lieut.-Col. Ponton, Chairman of the above Committee, and Historian of the Association.

After referring to the war and the suspension of some of the matters of general interest by reason thereof, he said: "It cannot be doubted but that the history of these three great years of stress, of testing, and of revelation of power (of might and of right), will record a greater developing influence and transforming and transmitting effect upon the laws of nations and of individuals, than has been attained during even the past century of progress. The profession of the Law, that great bond of the Commonwealth and of the "larger liberties," will rise to its opportunity, and its members, whether as private citizens (sharing burdens and privileges), as Judges on the Bench (truly the men behind the Flag), or as statesmen at the helm, guiding with even keel, as they have so often done, the ship of state, may be trusted, as in the past, to do their duty for the common weal, zealously and loyally. In the relationship of the subject to the State; in the determination and the limitation of property rights and

their subordination to the general good: in the guarantees and sanctions of that international police which must preserve the world's peace after justice has been adequately vindicated and victory won; in the adaption of new conditions following the release of new forces hitherto undreamed of, there must, and will be, a profound upheaval, and the gravest solicitude for that *salus reipublicae* which has always been *suprema lex;* and every fibre that can strengthen the hand of stable government, every cement that can reinforce the unity of the community, will be needed. But no reader of history need be a pessimist, for if we, who worship at the shrine of law, are true to ourselves and our traditions, then the steadying power is ours to exercise. Truth and law are great and will prevail . . . In the foreign fields of France and Flanders there are some spots that will be for ever Canada, for there our brethren sleep, and, as at Paardeburg, we may on their behalf inscribe this epitaph:—'Tell England, ye who pass this monument, that we, who died serving her, rest here content.' Or where specific landmarks are obliterated and no identification possible, 'Somewhere hereabouts lies a very gallant gentleman.' Of such are Mercer and Moss, and scores of others, whose names and service must be commemorated in worthy tablets at Osgoode Hall—our radiating centre—as they will be in the hearts of their countrymen."

The Chairman then referred to and gave the names of a number of the members of the Bar and Bench who had passed off the scene since the last meeting of the Association. He also spoke of the Library of Canadian Books given by Mr. Justice Riddell to Osgoode Hall. We have ourselves referred to this timely gift.

As to laws that will demand special consideration, growing out of the issues that overshadow the country, he spoke of the Naturalization Act, the Treason enactments, and the enforcement of the Militia Act or some other provision for Universal National Service for home defence, but as to "home defence" he properly says that its frontiers are wherever our boys are fighting for us. He spoke as a citizen of the Greater Britain and not as a "little Canadian."

Col. Ponton gave as an appendix to his report an interesting

remembrance of the members of the legal practitioners who signed an agreement, dated June 21, 1865, to close their offices during the summer vacation at 3 p.m. These names are as follows:—Blake, Kerr & Wells; Crooks, Kingsmill & Cattanach; Cameron & McMichael; Ross, Lauder & Patteson; Gwynne, Armour & Hoskin; Robinson & McBride; C. Gamble & G. D. Boulton; Carroll & Paterson; Jarvis & Edgar; Hodgins & Chadwick; Bacon & Taylor; Murphy & Kingstone; Beatty & Chadwick; Smith & Wood; Morris & Smith; Bull & Boyd; Mackenzie & Freeland; Whitley & Esten; Read & Boyd; Jones Bros; J. Sawrin McMurray; Barrett & Evans; Atkinson & Boswell; Vance & Canavan; Bell, Crouther & Tilt; John Hector; Patton, Osler & Moss; O'Connor & Blevins; P. McGregor; Galt & Henderson; D. Blain; Van Koughnet & Warmoll; Geo. Martin Rae; Cameron & Harman; Cameron, Harman & Murray; C. Robinson; Helliwell & O'Brien; Ed. Fitzgerald; S. J. Van Koughnet; J. H. Doyle; Brough & Snelling; James Maclennan; Donoven & Hayes; Duggan & Burns; Boomer & Stephens; Cameron & Scott; D. Mitchell McDonald; Boyd & Stayner; Crawford & Crombie; Macdonald & Howard; Geo. B. Nicol; John Crickmore; Morrison & Sampson; John Leys; A. MacNabb; S. H. Strong; Paterson, Harrison & Paterson; George Brooke; Robert Sullivan; Columbus H. Green; Cameron & Smart; Alex. Lieth.

An analysis of the above list shews that twelve of these practitioners were subsequently appointed to the Bench; ten to the Superior Court, and two as County Court Judges. Only fourteen of the above list are living at this date. The list comprises most of the practitioners in Toronto at that time, but not all; notably Paterson & Beatty, successors to the firm in which the well known names of Robert Baldwin and Adam Wilson appeared.

Flotsam and Jetsam.

THE "GIN" STORY—A TRUE STORY.

R., a hotel-keeper, was convicted of selling gin after hours and appealed to a District Court Judge of Ontario, of Irish extraction. Counsel for the accused was of the same extraction. The complainant, a provincial constable, testified that the offence had been committed and that he had personally tasted the gin. The following cross-examination ensued:—

Counsel: You are positive that the bottle contained gin?

Witness: Certainly.

C.: Then you are an expert on the subject of gin?

W.: Well! No, not exactly.

C.: But you know the bottle contained gin? *W.:* Positive.

C.: What kind? *W.:* Beg pardon!

C.: What kind, I said. *W.:* I don't understand you.

C.: Now, sir, if you know gin so well, how many kinds of gin are there? *W.:* I don't know, but I know that bottle held gin.

C.: Now, sir, remember you are on your oath. Do you know the difference between that brand of gin commonly called "Holland gin" and that other kind of gin called "Oxy gin?"

W.: (Hesitatingly)—No.

C.: I thought not! Then it might have been oxygen?

W.: It might.

C.: Of course—Now are you familiar with another kind of gin called "hydro gin?" *W.:* No, I am not.

C.: Then the contents of that bottle might have been "hydrogen" for all you knew?

W.: It might, but I am sure it was gin.

C.: Now, sir, there is still another kind of gin called "Nitro gin," do you know anything about it? *W.:* No, sir.

C.: So that although you swear that the bottle contained gin, you cannot tell whether it was oxygen, hydrogen, nitrogen or plain De Kuyper gin? *W.:* I cannot.

C.: I thought not, I thank you.

The Judge:—This Court has listened with very considerable interest to the cross-examination of the complainant which has perhaps ensnared him into a "gin" not referred to by counsel. It might appear from this examination that the complainant was remarkably ignorant of the distinction between the various kinds of gin particularly enumerated and described by the defendant's counsel. But this Court, while disclaiming any thought of being an expert on the subject of gin, is able to differentiate between that kind of gin which so often furnishes the slings of outrageous fortune, and these other various brands of gin referred to by counsel, nor is this Court unfamiliar, as might be conjectured, with that by-product of oxygen commonly called "hot air." Relying therefore upon the evidence before it, and its own limited knowledge, the Court dismisses the appeal and upholds the conviction. The Court however has no disposition to be unduly severe upon the accused, notwithstanding the cross-examination, and only imposes the ordinary costs.