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FOUND MONEY—IS IT CAPITAL OR INCOME?

The name of this article was suggested to me by a bank manager. Having adopted his designation, more for convenience than anything else, I will in the first place define, or rather illustrate, its meaning.

Let us suppose A. to be the owner of one hundred shares in a company, either a bank or other private corporation. The company, through its directorate, or otherwise, adds to its capital by increasing the number of its shares by one-fifth: so that for every one hundred shares there will be an increase of twenty new shares. These new shares are offered by the company to the registered shareholders at a certain price, usually or always, a price below the market value. A. being the owner of one hundred shares is entitled to twenty new shares. He is not bound to accept them or any of them. He may accept them, and if he pays for them he becomes the owner. Let us now suppose that the original par value of each share was one hundred dollars, that the market value of each share is now one hundred and fifty dollars, and the company offers its new shares for one hundred and forty dollars each, thus allotting to A. twenty new shares, or rather the right to purchase twenty new shares at the price stated. A. finds a purchaser for his twenty new shares, who pays him ten dollars a share for his rights in these twenty new shares. A. transfers these rights to the purchaser, receives two hundred dollars, and if no one is interested in the transaction but himself, puts the money in his pocket, and it matters not whether he puts it in the *income* or *capital* pocket. The above will shew what I mean by the words "found money."

Now, let us suppose that A. instead of being possessed of these shares in his own name and for his own personal use and

benefit, holds them as a trustee for others, and that it is in the interest of one or more of the cestues que trust that this "found money" should be considered as income, and in the interest of others that it be considered as capital. Now, the trustee must decide which pocket he will put it in. Let us, in order to be more easily understood, suppose one of the cestues que trust to be the widow of the testator who has the interest of a life tenant, and the other a child or children, who have the interest of a remainderman. Let us then look squarely at the question, and answer it if we can, and tell the trustee to whom he shall pay the found money, whether to the widow as tenant for life, or to the children having the interest in remainder. If the money belongs to income it goes to the widow ,t belongs to capital it goes to the children.

I may as well at this point state that the decisions in the United States, and there are many of them directly on the point, preponderate in favour of capital, and this preponderance is not confined to the courts of many of the individual States, but is found in the decisions of the Federal Courts, including the Supreme Court of the United States.

Cook on Corporations, 6th ed., sec. 559, expresses with sufficient clearness the trend of American decisions on this subject in the words following: "The right to subscribe for new shares at par upon an increase of the capital stock, which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but such increment must be treated as capital, and be added to the trust fund for the remainderman. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust, or sells the right to subscribe for a valuable consideration. In either event the increase goes to the corpus." And again, in the same section 559, Cook states what he believes to be the law in his country in the following succinct language: "Where new stock is issued and the *right to subscribe* therefor is sold, the proceeds of such sale belong to the remainderman and not to the life tenant." If this were the law in Canada or in England (except by statute), we would not need to make

further enquiry. My contention, however, is that this is not the law either in Canada or in England, and Cook does not hold otherwise, but clearly defines the English law on the subject in section 557 of his work, when he quotes from a recent English decision as follows: "An English Court has recently said: 'The true rule to be inferred from the cases as between tenant for life and remainderman, seems to me to be that the tenant for life is entitled to all payments out of profits made by the company, unless they have been validly capitalized by the company by resolution or otherwise,' *Re Piercy* (1906), 95 L.T. Rep. 868." I venture to say that there is no English decision that contravenes in the slightest degree the decision in the *Piercy* case, and that the dictum of Mr. Justice Neville, above quoted, is good law in Canada to-day. At this point I may refer to and discuss the celebrated case of *Bouch* v. *Sproule*, 57 L.T. Rep. 345, 12 App. Cas. 385, which has so often been invoked on behalf of remainderman and capital, and which was relied upon in the *Piercy* case, but without success, because the two cases were not only not parallel, but had no similarity so far as concerned the essential points.

The *Bouch* case came first before a single judge, Mr. Justice Kay, and was decided by him in favour of capital. It then went to the Court of Appeal consisting of three Lord Justices, and was there decided in favour of income. Thence it was taken to the House of Lords consisting of four Lords of Appeal and was there decided in favour of capital, reversing the decision of the Court of Appeal, and upholding that of Mr. Justice Kay. I need hardly say that in a like case the decision in *Re Bouch* must govern throughout the British Dominions, unless it were affected by statute; and if the law and the facts in that case were paralleled by the law and the facts in the case of "found money," the question would be settled beyond dispute in favour of capital as relating to the latter. I now propose to review this celebrated case, which has so often been quoted and so much relied on; and to shew that it has no similarity to, and no bearing upon, the matter in hand.

The disputed money in the *Bouch* case was claimed by two different interests, one of which contended that it was capital, the other that it was income. I cannot do better than to quote, at this point, the words of Lord Herschell in his reasons for judgment. "William Bouch, who died on the 19th of January, 1876, by his will bequeathed all the residue of his personal estate to Sir Thomas Bouch upon trust to convert the same into money, or with the consent of Jane Bouch (the testator's wife), to allow the same to remain unconverted; and upon further trust to permit his said wife to receive the interest, dividends, and annual income of said personal estate during her life; and subject thereto, he bequeathed the residue of his personal estate to Sir Thomas Bouch absolutely. Part of the residuary personal estate of William Bouch consisted of 600 shares of ten pounds each in the Consett Iron Co., upon which £7 10s. per share had been paid."

Let it be borne in mind that the original price, or par value of each share was just £7 10s. The company, as they were legally entitled to do, decided to increase, and did increase the number of shares by one third, by which transaction the Bouch estate was now entitled to become the holder of 800 shares, 200 of them being the newly allotted shares. Let me digress just now for a moment from the immediate history of the transactions, while I refer to the value of the shares previous to and subsequent to the increase above mentioned. Lord Watson in his reasons for judgment, 12 A.C. at page 404, says: "Before the proposal to issue new shares was made, the old shares were selling at a premium of £21 per share, but after the allotment of new shares the premium fell to £14," and he goes on to say: "If the company had offered to its members a choice between the bonus dividend and new shares with £7 10s. paid on each no sane shareholder would have elected to take the dividend." This "dividend" *so called* was the money in dispute. Let us figure this out a little more thoroughly. The original par value of each share was, as I have stated, £7 10s. Adding the premium in each case as mentioned above by Lord Watson and it will be seen

that the value of a share before the allotment was £28 10s., and after the allotment was £21 10s. So that before the allotment the Bouch estate owned 600 shares worth £28 10s. each, equal to £17,100; and after the allotment it owned 800 shares worth £21 10s. each, equal to £17,200. This comparatively trifling difference of £100 between the old value and the new is scarcely worth considering. It might be accounted for by the fluctuation of the money market, by the introduction of fractions of shares where the number was not a multiple of 3 or from the fact that the exact figures were not considered necessary. However this may be it plainly appears that the value of the stock owned by the *Bouch* estate was practically the same before and after the new shares were created. I hardly need to add that the same principle would apply to all other shareholders unless they were *insane*, as Lord Watson says "no *sane* shareholder would have elected to take the dividend." In other words, no stockholder in his right mind would sell or dispose of to the company, or to any one else for £7 10s. a share, when he could get £21 10s. for that share by going around the corner and offering it to a money-broker. Now let us return to the history of the case, and it can be very briefly concluded. Stripped of all unnecessary verbiage it may be correctly stated thus. The company after having allotted the new shares (now worth £21 10s. per share, according to both Lord Herschell, page 391, and Lord Watson, page 404), offered to pay the shareholder £7 10s. per share therefor. That is to say, they would give him £7 10s. for £21 10s. The offer was more than absurd. It was ludicrous. When understood, no wonder Lord Watson said "no sane man would accept it," and I think one is justified in coming to the conclusion that no sane man did accept it, and unless there were lunatics in the Consett Co. not one shareholder accepted the flim-flam offer of one dollar for that which was worth a fraction less than three dollars, for that was what the offer of the company to its shareholders amounted to.

Let us follow the history of the case a little further. After this wonderful scheme was matured the registrar of the com-

pany sent what was called a "bonus dividend warrant" to each shareholder asking him to "be good enough to sign and return the same when the amount will be applied in payment of £7 10s. per share on your above named new shares." The "bonus dividend warrant" was, of course, returned. The shareholder, the Bouch estate, was now the owner of 800 shares worth £21 each and amounting to £17,200, in lieu of the 600 shares which it held a few days before, worth £28 10s. each, amounting to £17,100. The result was nothing more nor less than a watering of the stock, to the extent of one-third minus a fraction. Nobody made any money. There was no "found money." No one was richer or poorer. The property was more bulky, but not a penny more valuable. When you add a gallon of water to three gallons of wine you have a larger quantity of liquid, and may make a bigger show; but you have no more wine than you had at first.

I have referred at length to the *Bouch* decision because it has been so much relied on in relation to "found money," and I am more than surprised to find that any one should consider it to be an authority in a case of "found money." To my mind after studying the decision carefully I cannot see that it has the slightest relation to or bearing upon the matter now under consideration. If any one differs from me in this regard I trust that he will look into the *Bouch* case with exhaustive care, and not merely glance at it, as those seem to have done, who in my humble opinion have misapplied it. There may be other English decisions which have been misunderstood and misapplied in support of the view that "found money" is capital not income, but a thorough analysis of them will shew that they, like the *Bouch* case, are inapplicable and valueless in support of that view.

Now, I will revert to the *Piercy* case above mentioned, which as I have already said correctly states the English law and, therefore, the law in Canada on this subject, and which has not been and is not contravened, or in any way affected or weakened by the *Bouch* case or any other English decision. It is, therefore, good law to-day. This is my first premise. Let us then see if the dictum of Mr. Justice Neville applies to "found money."

Let us enquire, first of all, whether or not this money is a "payment out of profits made by the Company," and, secondly, whether or not it has "been validly capitalized by the company by resolution or otherwise." Let us look carefully at my definition at the beginning of this article and discover, if we can, where this "found money" has its origin, then follow it into the shareholder's pocket. By its allotment a company offers a new share for one hundred and forty dollars which is worth one hundred and fifty dollars. In other words, it offers the shareholder a bonus of ten dollars. This ten dollars to the shareholder is "found money," as soon as he can procure a purchaser. He goes to his broker, conveys to him the right to purchase the new share, the broker accepts the right, pays $140 to the company for the new share, obtains the new share in his own name, and pays ten dollars to the shareholder. Where does the ten dollars come from? It comes out of the company and is a payment by the company when it conveys to the broker a share in the company for ten dollars less than its value, that is to say, a share for $140 which is worth $150. It is hardly necessary to say that it comes out of the "profits made by the company," as all payments, whether in the shape of dividends or bonus or otherwise, are of necessity payment out of profits of the company. They cannot be paid from any other source unless they are misappropriated from capital. In the second place let us make the more important enquiry as to whether or not this ten dollars has been validly capitalized by the company. It has found its way into the shareholder's pocket and its history is concluded, so far as it relates to this discussion. The company has paid it indirectly, it may be said, but paid it all the same. It never receives it back. It never finds its way again into the exchequer of the company and has never been capitalized. It is like the ripe fruit that falls from the tree. It grows out of and comes from the tree. It never goes back to the tree. It never becomes capitalized. Let me emphasize here a most significant fact that in the *Bouch* case, and in every other English case dealing with the question of capital and income, whenever and wherever the disputed money was

declared to be capital this disputed money when it left the hands of the company was paid out of profits made by the company and was returned to, and validly capitalized by the company.

The decision in *Re Armitage* (1893), Chan. Div., vol. 3, page 337, does not in the least contravene the principle that I have just stated. There the disputed money was the difference between £9 5s. 6½d. and £8 and this difference £1 5s. 6½d. per share was claimed both by the remainderman and by the tenant for life. The court decided that it was capital and belonged to the remainderman. Mr. Justice Lopes, at page 347, says: "It is admitted that if these shares had been sold by the executors for £9 5s. 6½d. per share before this sale *en masse* of all the shares of the new company, the excess of £1 5s. 6½d. per share would have been regarded as capital and would not have gone to the tenant for life." This being *admitted* the case for the life tenant, of course, fell to the ground, on the well known principle that the whole includes all its parts.

I beg to refer briefly to the only Canadian case that I have been able to find on this important question. It is in *Re Estate of Jairus Hart*, vol. 5, Eastern Law Reporter, page 93, in which the learned Chief Justice of Nova Scotia has decided that what I have designated "found money" was capital and not income. In arriving at a decision in this case the Chief Justice seems to have relied upon Cook on Corporations and the two English decisions that I have herein discussed. How he could find any support for his decision in the two English cases mentioned or in any other English case I am at a loss to know. The opinion of a jurist so learned in the law, and of such broad legal experience is entitled to great respect; but I cannot but differ from him after studying the authorities with all the care and research that I can give to the subject.

At the close of his reasons for judgment the Chief Justice says: "The rights of parties in cases of this kind have always been regarded as a difficult question, and in deciding in favour of the remainder interest, I do not feel all the confidence I could wish to have on such an important point." I am not surprised at the learned Chief Justice's "want of confidence."

An upright judge and an honest lawyer should always experience a lack of *confidence* when they come to an erroneous conclusion. I sincerely hope that the question at issue may come before the highest tribunal in the land and that at some early date we may have a decision upon the point, which will govern us in Canada, and set the matter at rest. If and when that decision comes, I believe, and feel with all the *confidence* which the Chief Justice of Nova Scotia did not feel, that it will confirm the opinion which I have arrived at and endeavoured to establish, namely, that "found money" is not capital belonging to the remainderman; but is income and belongs to the tenant for life.

Ottawa. H. H. BLIGH.

THE OPEN COURT.

An important decision has just been given in England by the House of Lords on the subject of trials in camerâ. Their Lordships held in the case of *Scott* v. *Scott*, that "Courts of justice have no power to hear cases in camerâ, even by consent, except in special cases in which a hearing in open court might defeat the ends of justice; and in any case an order for a hearing in camerâ extends only to the hearing, and it is not a contempt of court to publish the facts subsequently, if it is done bonâ fide and witnout malice; and such publication is not a criminal cause or matter in which no appeal lies under sec. 47 of the Judicature Act, 1873. The rule as to hearing in open court does not apply to the jurisdiction of the Court of Chancery over wards and lunatics, nor to cases affecting property not status in which the parties agree to go before a judge in camerâ as arbitrator."

In commenting upon this judgment the *Law Times* uses the following language: "On the first, and perhaps the most important point, once and for all the House of Lords has demolished the idea that any judge has a right to conduct proceedings in private, save where justice could not be done at all if it had to be done in public—as in the case of a secret process—or

where, to use the words of Lord Haldane, "in the two cases of wards of court and of lunatics, where the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction." These are the only apparent exceptions to the broad and excellent principle that the courts of this country must, as between parties, administer justice in public, and this principle has been well enunciated by Lord Justice Fletcher Moulton (as he then was) in the Court of Appeal and by Lord Shaw in the House of Lords in the present case. The former said: "The courts are the guardians of the liberty of the public, and they must be doubly vigilant against all encroachments on that liberty by the courts themselves. The judges are not the tribunal to decide on the proper limitations of public rights. . . . Nothing would be more detrimental to the administration of justice in the country than to intrust the judges with the power of covering the proceedings before them with the mantle of inviolable secrecy." Lord Shaw said: "I will venture to enter my respectful protest against the assumption of any general power by the present English courts of law . . . to hold any courts of justice with closed doors," and, again, with reference to the order to hear in camerâ and the attempted suppression of the report: "They appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties and an attack upon the very foundations of public and private security." And he concluded:—

"I may be allowed to add that I should most deeply regret if the law were other than what I have stated it to be. If the judgments (first declaring that the cause should be heard in camerâ, and, secondly, finding Mrs. Scott guilty of contempt) were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country,

and I do not think it has any warrant in our law. Had this occurred in France I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned."

Strong words, but expressions of opinion which will be generally approved.

The same writer in speaking on another matter closely allied with the proposition in *Scott* v. *Scott*, expresses the hope that no extension of trials in camerâ in criminal cases will be admitted. He says, "Our view is that the interests of justice are best served by legal proceedings in all courts being conducted in open court. Clearly the general publication of indecent details should be sternly suppressed, and power might well be given to exclude persons of tender years on the hearing of cases dealing with matters contrary to decency or morality. A full public hearing ensures the proper administration of justice."

SOVEREIGNTY OVER THE AIR.

Sir H. Erle Richards's public lecture on "Sovereignty over the Air" (Oxford, Clarendon Press, 27 pp., 1s. 6d.) is an opportune exposition of what may fairly be called the Common Law point of view. Continental jurists for the most part (not all, for Prof. Zitelmann at any rate goes with us, see the note ad fin.) assume that there is some objection in principle to allowing territorial sovereignty to extend upwards. They postulate an analogy between the air and the high seas which, as our learned colleague rightly notes, might be correct if the bottom of the sea were inhabited. At the same time, they contradict the analogy of municipal law, so far as existing and applicable. Sir H. Erle Richards's points are, in summary abridgment, as follows:

International law gives no support to the doctrine of "free air." States have exactly the same ground—namely, self-protection—for claiming sovereignty over the superjacent air as for claiming it over adjacent territorial waters. Nor can any

limitation analogous to the range of guns, actual or conventional, be applied; for the mischief of bodies falling by accident or design from an airship (not to speak of a whole wreck) only increases with the height from which they drop. Military dangers, too, are obvious. And "in fact, States have always exercised sovereignty over the air so far as they have wanted to do so."

As to municipal law, dominion "usque ad caelum" is recognized by the better opinion here, and by the law of most countries, though sometimes with a restriction on the annexed remedial rights determined by the limit of effective occupation or substantial interest. Where an individual owner's rights are, there must also the public sovereignty of his State be. Then, if the air is free, why is it not free at a hundred feet above ground, or ten, or five? And what about freedom to land?

The most plausible counter-suggestion is sovereignty limited by a right of innocent passage. It might be expedient to establish such a right by convention; but in fact the law of nations does not recognize any corresponding positive right on land. Then there is the proposal of limiting State control over aerial navigation to a vertical zone of say 1,500 metres. But "it seems impossible to draw any real distinction between different zones of air space"; we may add that nobody knows what the limits of aerial navigation will ultimately be.

Further, and this appears to be a fatal objection, the doctrine of "free air" would allow belligerent air-vessels to fly at will over the territory of neutral States. Even aerial warfare above neutral ground could be forbidden only by special convention. In fact, the "free air" theory will not work without exceptions of such extent as to make the rule absurd, and it is simpler to admit State sovereignty at once.—*Law Quarterly.*

THE COURTS OF ONTARIO.

We must ofte.i look abroad to understand ourselves, and "see oursels as ithers see us"—at least to know the value, comparatively, of our own institutions and the faults or benefits of administration. The observations we quote below are made by one very competent to form an opinion on the subject, and especially as a large sum of money was devoted by a patriotic American to obtaining information as to the best modes of administering justice in his country and the most desirable forums for that purpose, and this Mr. Harley, a lawyer of eminence, was selected to make enquiries on the subject, and report thereon. We do not perhaps appreciate how much we in the English-speaking provinces of the Dominion have to be thankful for in connection with this most important subject. A perusal of the whole paper, which we regret not having space for in full, would make this fact abundantly apparent.

In this excellent paper read by Mr. Herbert Harley at the annual meeting of the Illinois State Bar Association held last month at Springfield, Ill., he spoke of the administration of justice in the Courts of Ontario. The following extract will be read with interest by members of the Ontario Bar, and gives a good idea of the adaptability and flexibility of the system adopted in the English-speaking Provinces of the Dominion, for speaking generally the procedure is much the same in all of them when administered by a judge who is familiar with its scope and has the intelligence and the nerve to use the power given him. We quote as follows:—

"But Ontario is not remote from Illinois, either geographically or socially. When England acquired Canada Ontario was unsettled. Its immigrants were English, Scotch and Irish, and they planted there the English common law while Quebec retained the civil law of its French habitants. There has been more recently in Ontario a sprinkling of German, Scandinavian and Italian immigrants, so that to-day the people are racially identical with those of the typical northern state of the Amer-

ican Union. They have the same climate, the same resources, the same industries, the same substantive law, the same customs, literature and traditions as the people of the northern states. The unities of social and political and industrial life on both sides of the Niagara river are everywhere apparent. The differences are hard to detect, except in this field of the administration of law.

It has been suggested that Ontario's success lies in the fact that it is of a homogeneous nature and not subject to the stresses of a swift evolution. This is hardly true. On her frontier Ontario has always had the rough and ready types that are found in the lumber camps. In recent years Ontario has developed a great mining field and has done it without letting down the bars of civilization. Her railroad and manufacturing development has been swift and her mines have swelled litigation. Her capital city has had a growth hardly rivalled on this continent during the past decade. Toronto is to-day a boom city of nearly 400,000 people. Building lots five miles from her city hall are held as high as property five miles from the Chicago postoffice. Platted lots ten miles from the centre are probably bringing a higher price than lots the same distance from the Chicago loop. And in this typical Canadian province there is one standard of justice applying with mathematical equality to the labourer who sues for a single day's wages and the trust company which brings suit for a million dollars.

Now before we come to the painful comparison of Illinois and Ontario justice let us consider the machinery of Ontario's department of justice. First the bar. Except in point of organization and some mere external peculiarities the bar is the same as in Illinois. The terms barrister and solicitor are retained, but practically every solicitor is also a barrister. And barristers are free to form partnerships, to accept annual retainers and to refuse any retainer. They wear gowns in court, and there is the honorary rank of King's Counsel with the privilege of a silk gown, but for all practical purposes the bar of Ontario is very nearly like that of Illinois and very far from that of England.

Its real difference from the Illinois bar lies in its organisation. When a young man is admitted to the bar in Ontario he is admitted by the bar after having taken the course of study prescribed by the bar. He is then presented to the court and signs the roll. This is a formality. He is accountable directly to the bar and the bar is directly responsible for his conduct.

The better element of the Ontario bar, with public opinion and the courts back of it, controls absolutely the conduct of every Ontario lawyer. You know that this is at the very heart of the matter. The Illinois Bar Association includes less than one-fourth of the practising lawyers of the state. As a means for governing the bar, or of even exerting any considerable influence, it is impotent. Here lawyers are in theory responsible to the courts. But by virtue of your political traditions and the dependence of your judges, the court is in reality responsible to the bar. The very lawyers whom you would like to disbar for professional and patriotic reasons, if they play their cards cleverly, can exert a greater influence upon judges than the high-minded and responsible lawyers enrolled in your association. The Ontario bar is a responsible, self-governing body. The Illinois bar is a privileged class practically without responsibility and without the means for governing itself.

One of the things that we most need on this side of the line is self-government by the bar. It can come through thorough organisation first and autonomous authority by statutory delegation second.

Of course Canada had the immeasurable advantage of profiting by the mistakes, the excesses of transcendental theory, which have characterised our political structure. In England and all her dependencies, during the development of the democratic ideal, office has been considered a means to an end. With us office came to be a plum for every patriot to hustle for. In Canada office has always been assumed to be public service rather than a personal perquisite. And it has been steadfastly held that the public servant deserves adequate compensation both in rate of salary and in tenure of office.

In the past generation or two the American bar has undergone a significant change. The judicial office has suffered from encroachments but private practice has become more and more lucrative. The bar has in a measure divided between those who could afford to accept the uncertainties of the judicial position and those who scorn public service. In Ontario judicial tenure is for life and the salary is such that practically no lawyer in the Province could afford, from a mere pecuniary standpoint, to refuse to commute his probable earnings at the bar for a life salary of $8,000 on the bench of the High Court of Justice. Even county judges are paid more than the justices of supreme courts in certain American states in which perverted democratic ideals have been most rampant.

The one central feature of the Ontario judicial establishment by which we can profit most readily is its unification. It was not always so. Of course Ontario never went as far as England, where at one time there were four score separate courts, and it was easy and natural to copy England's great unification of 1873. The change reached Ontario in 1881 when her various tribunals were amalgamated in the Supreme Court of Judicature. This court has the fullest jurisdiction, both as to trials and appeals.

When one comes to think of it he realises that the sole purpose of advocacy is to see that no fact and no point of law is overlooked. It should be the court's prerogative to see that neither side oversteps ethical boundaries. Judges who have nothing to fear from counsel or clients do this unfailingly. The thing which will most strike you as peculiar when you attend your first trial in Ontario is the utter informality in examining witnesses. Let me quote Mr. Justice Riddell who said the following to the New York Bar Association in 1912:—

"We do not have much bother about admission or rejection of evidence in our courts; unless we can see that the exclusion of evidence or the admission of evidence has led to some injustice, then we pass it by. Matters of law as a rule are the determining factors in the appellate court; although there are occa-

sionally cases in which appeals succeed upon the ground of the non-admission of evidence or the admission of evidence which ought not to have been admitted. If a case is tried before a judge, and he has improperly admitted evidence—and I may say that that is the rarest of all contingencies, because as a rule we admit the evidence subject to objection, and then we never allow it to influence our minds, of course—if a judge has refused the evidence improperly, the Divisional Court does not as a rule send the case back for a new trial, but the court often says, 'We will sit on such a day; you can bring the evidence you desired the judge to hear and we will hear it here.' We hear the evidence and determine the case then and there, without sending it back with all the risk, expense, inconvenience, annoyance, and trouble of a new trial. If there is a row about the pleadings—because even yet we have some people who talk about pleadings, though pleadings are pretty nearly defunct in our courts, we know them by name and know them by sight, but we pay very little attention to them—if there is any row about the pleadings we say: 'Very well, we will amend the pleadings.' If a lawyer says: 'If that amendment had been made in the court below, we should have had other evidence,' we may say: 'Very well, what day will suit you? We shall hear your witnesses.' One of our substantial rules, and one of the rules more beneficial than perhaps fifty of the other rules is this, all amendments are to be made which are necessary in order that judgment shall be given according to the very right and justice of the case. No case in Ontario fails from defect of form—that is one of our rules. Again, no disregard of forms laid down, or disregard of the time under which proceedings should be taken, no disregard of terminology, according to our practice, bars a man who has a right, of his right."

The foregoing statement by Mr. Justice Riddell implies great freedom in interpreting rules of evidence. The leading question is employed until the witness arrives at the nub of his story. Witnesses are treated as though they had human feelings and the judge obviates a great deal of silly cross-examination by

construing the testimony if possible so that the witness will be considered both truthful and rational. When a case is called the judge scans the pleadings much as you go over the headlines of your newspaper. As the barristers advance to the bar the judge demands: "What is this all about, anyway?" He has already formed some idea and noted the names of the parties. In a minute or two the plaintiff's counsel informs the court of the matter in controversy. The defendant is then permitted to confess what is not in dispute and frequently it is possible at the outset to dismiss most of the witnesses. The trial will be half over in the time it takes to cross-examine one witness in an Illinois court. And why not? The lawyer in his office gets the testimony from several witnesses in an hour or two at most. Why should it take more than twice as long in open court to accomplish the same thing?

Coincident with the examination of witnesses there may be a comparison of precedents between counsel and judge and not infrequently these informal discussions so fully cover the case that argument after evidence is in is quite unnecessary. If there be no jury the argument is not likely to exceed five minutes. It will commonly be confined to consideration of the application of a precedent. Throughout the trial there can be no wearisome reiteration of questions, no horsing between counsel, no bombast, no rhetoric, but there is usually a matching of wits and knowledge of the law which makes a trial an intellectual treat to a visiting lawyer. Some of the older barristers find it hard to forget the practice of their youth, but the younger men and the more clever of the older ones have abandoned the old dramatic way of trying law-suits

Sitting with Mr. Justice Riddell in the Toronto Assize I heard a case which typifies the informal and flexible procedure of Ontario courts. The plaintiff, Mary Smith, sued a certain broker. She had bought mining shares over a period of five years and on final accounting believed that she had been defrauded. Following the usual custom the broker had held the certificates in his vault and plaintiff had never had them in

actual possession or even seen them. At the start it was explained that plaintiff's sister, Kate Smith, had also dabbled in stocks, had employed the same broker, and had begun suit in her own behalf in the county court of the same county. Counsel for defendant said that the controversy had arisen from a confusion of the two accounts, that his client had bought all the shares ordered by either or both of the customers, but could not say whether certain orders had been joint or individual, or whether he had delivered to each plaintiff the shares which each had intended to buy individually.

"I will move the case of Kate Smith from the county court to this court," said his lordship. "During the lunch hour you will get the record of the case of Kate Smith and have it ready here at two o'clock. I will also join Kate Smith as a party to this action—with consent. Is it so understood?"

At two o'clock the court was prepared to ascertain the rights of all three. "It is understood now that Kate is a party to this action, and I have taken jurisdiction of the suit which she started in county court. Proceed." With this foundation it was disclosed in less than an hour that a misunderstanding had arisen because one sister had at times acted for the other in buying shares. The broker had supposed these purchases to have been made jointly. The accounts had become so confused that it would have been impossible to ascertain the rights of the parties in two separate actions. The judgment was that Kate should transfer certain shares to Mary. No costs were allowed the broker, because, as the learned justice said, he should refuse to deal with women, or take the natural consequences.

You know better than I what would have been the result of endeavouring to unravel this snarl in two distinct jurisdictions in the State of Illinois.

Another instance of the flexibility and informality which seems strange to a lawyer from the States. I was listening to argument on appeal. In the afternoon, approaching time for the court to rise, it was found that the record did not disclose a certain fact which had become essential. Under our system

nothing could have been done but remand the case for retrial. The chief justice turned to one of the barristers and asked if he could ascertain the point in question.

"I can tell by asking my partner," he replied. The partner was at some distance in another city.

"Wire your partner at once," the chief justice directed, "and when the court sits to-morrow morning be prepared to give us the information." And on the following morning I attended court again, expecting to hear the opposing barrister emit a lusty roar. But instead two telegrams were handed to the judges, the decision was announced in accordance therewith, and there was not a single word of objection."

Ontario has settled down to the theory of one trial and one review. Either party has it in his power to accomplish both steps in a comparatively short time. On our side of the line one of the most potent causes of delay and expense lies in appeal. So much so that many reformers would have the right of appeal limited as in federal practice. They observe that abuse of the appeal privilege is used for injustice; that it is a club which the powerful litigant uses on his weaker opponent if need be to gain his ends. But to limit appeal is to put a premium on pettifogging in the trial court and to give added incentive to overcontentiousness, which is at present the great evil of our system, and seems inseparable from a political judiciary. At first glance these reformers would doubtless say that ease and celerity of review would mean the appealing of every suit.

Not so, most emphatically. When appeal is simple and swift it cannot be used for sandbagging the weaker litigant. It results instead in a mutual desire on the part of both to make trial in the first instance complete and thorough. Ontario trials are in fact thorough in the first instance and though appeal is free there are fewer appeals than in the average American state. Difficulty of appeal, successive appeals, interminable delay, and the opportunity for reversal and retrial, which is the curse of law administration in Illinois, puts a premium on chicanery so that the litigant without a just cause bends every effort to make

the first trial defective. Only rarely can justice be done if there is more than one trial at bar. Inevitably time charges the relationship of the parties, the first trial shews the conscienceless suitor how to shape his case for retrial, and justice delayed is usually justice defeated.

The success of Ontario lies in the fact that the ablest lawyers in the province are available for the bench, that selection is by an expert agency, that there is an efficiency organisation, and that the judicial department is free to regulate procedure."

A RETIRING AGE FOR JUDGES.

The question of fixing a certain age, on attaining which Judges should retire from the Bench, has often been discussed, but there being, as in most controversies, a good deal to be said on both sides, the question has never been settled. In England for some time past a Royal Commission has been enquiring into the causes of delay in the King's Bench division, and the evidence taken before it has been published. The capacity of the Judges was one of the first subjects dealt with, and questions were asked as to whether a limit of age should be fixed for their retirement. The first witness called was Lord Alverstone, the Chief Justice, whose opinion being asked as to the retirement of Judges, said: "I should certainly not retire a Judge as long as he can do his work. I am quite satisfied that the best years of the Judges' lives in my lifetime have been the last ten years of their work. You want to learn to be a Judge. It is astonishingly difficult; a man may be a great lawyer and yet not a great Judge, and a man may be a poor lawyer and yet be an excellent Judge. Judges are appointed much younger now than they used to be, but the great men I have known have done their best work between the ages of 65 and 80, or certainly between 65 and 75."

The Chairman (Lord St. Aldwyn): "What I am now going to say has, as far as I know, no present application, but have not you known in the course of your professional life Judges

whose infirmities have certainly delayed business? Physical infirmities, yes, and I induced one most distinguished Judge to retire on that sole ground. His mind was as clear as a bell and his judgment excellent, but he was decrepit, and when I pointed it out to him he saw that the public could not disconnect apparent decrepitude and inability. You will see what I mean. He retired and lived for ten years afterwards, and up to the time of his death I would have taken his opinion on any point of law against the opinion of any man."

The Chief Justice was then asked whether it would be practicable to name a time at which the Lord Chancellor, the Chief Justice, or the Master of the Rolls, should be able to say to a Judge: "This is the time at which you may be required to retire, but you may be continued if we think it right in the public interest that you should be continued," just on the same principle that a civil servant in a high position may be required to retire or may be continued if it is well for the public service?

The Chief Justice replied that such a plan might be feasible, but he contended that as long as a Judge was able to do his work he should not be retired. It would be lamentable to take off the Bench some of the Judges now over a certain age.

Mr. Justice Phillmore was asked if he thought a Judge should retire at the age of 65. "I do not," he replied. "I am more than 65 myself. People's vitality had increased enormously since his childhood. Judges often did good work at 70. One man was old at 65. Another was not old at 75."

THE EFFECT OF A CODICIL CONFIRMING A WILL.

As is well known, a codicil almost invariably concludes with the following words: "And in all other respects I confirm my said will" [as altered by the said former codicils thereto]. But practitioners do not always bear in mind the force of such words. The effect of them is thus defined by Lord Justice Stirling in *Re Fraser: Lowther* v. *Fraser*, 91 L.T. Rep. 48; (1904) 1 Ch. 734, referring to several codicils: "The effect of this is to bring the will down to the date of the codicil and effect the same disposition of the testator's estate as if the testator

had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced by the various codicils." Even that lucid definition is not free from difficulty. What is the meaning of the same dispositions?" Does it mean the same words of disposition, or the same subject of disposition? In cases of ademption the point may be of great importance. The question seems to have arisen in *Macdonald* v. *Irvine*, 38 L.T. Rep. 145; 8 Ch. Div. 108. There a testator being possessed of Egyptian Nine per Cent. Bonds specifically bequeathed them to various legatees. After the date of his will he married, and by a codicil, after making various dispositions, he confirmed his will. Between the dates of his will and of his codicil the testator sold his Egyptian Nine per Cent. Bonds, and with the proceeds of the sale and other moneys purchased other Egyptian Bonds, called Khedive Bonds; and it was held by Vice-Chancellor Hall that the specific legacies of the Egyptian Bonds were adeemed and that the Khedive Bonds formed part of the residue. The Vice-Chancellor said: "Where he confirms the will you must repeat .. only in this sense, that you repeat the disposition in the will giving the thing which he gave by the will and not a different thing. I cannot make the codicil pass a different thing from that which was effectually disposed of by the will and would have passed by it" (see observations on that case in *Re Donald; Moore* v. *Somerset*, 53 S.J. 673); but suppose that instead of selling the Egyptian Nine per Cent. Bonds they had been merely converted into bonds for smaller amounts, such as from £100 to £5 the question would have been more difficult. Even without the words of confirmation in question, it was decided as long ago as *Barnes* v. *Crowe*, 1792, 4 B.C.C. 11, note (c.) that a codicil attested by three witnesses was a republication of the will, drawing down the date of the will to that of the codicil, unless a particular intent is shewn to the contrary (and see *Yarnold* v. *Wallis*, 4 Y. & C. Ex. 160). The point came before Mr. Justice North in *Re Champion; Dudley* v. *Champion*, 67 L.T. Rep. 344; 94 L.T. Jour. 57; (1893), 1 Ch. 101. There a testator by his will dated in April, 1873 devised a freehold cottage, with all the land thereto belonging,

described as "now in my own occupation," to two trustees upon certain trusts. In September, 1873, the testator bought two fields adjoining the cottage and occupied them with the cottage till his death. In 1877, he made a codicil by which he substituted new trustees for those named in the will, and confirmed his will in other respects. One of the questions was whether on the true construction of the will and codicil the two fields passed to the trustees with the cottage, and it was held that they did on several grounds, one of which was the effect of the word of confirmation in the codicil. After referring to the authorities Mr. Justice North said: "By these cases it seems to me perfectly well settled that, if there were nothing else in favour of the plaintiff, the codicil makes the will take effect as if it had been executed at the date of the codicil, and in that case it is conceded and there can be no doubt that the land coloured pink [that is, the two fields in question] would have passed under the will." That decision was affirmed on appeal in a very short judgment delivered by Lord Justice Lindley. It was followed in *Re Rayer; Rayer* v. *Rayer*, 87 L.T. Rep. 712; (1903), 1 Ch. 685. There a testator by his will made in 1882, gave certain annuities after the death of H. to her three children and charged the same on his real estate, and directed that they should be paid "without any deduction except for legacy duty and income tax." By a codicil made after the passing of the Customs and Inland Revenue Act, 1888, he made certain dispositions, and in all other respects he confirmed his said will. By that Act (sec. 21), legacy duty on legacies charged on real estate was abolished, and the duties under the Succession Duty Act, 1853, and certain additional duties, were made chargeable in respect of legacies (whether given by way of annuity or in any other form) charged on the real estate of any person dying after the 1st July, 1888. The testator died in 1892, and H. died in 1900, and thereupon estate duty and succession duty became payable in respect of the annuities given to her children, and the question arose, who was liable to pay the same? It was held by Lord Justice Farwell (then Mr. Justice Farwell) that the

effect of the codicil was to republish the will as from the date of the codicil, and that the testator, when he republished the will, must be taken to have known that there was no legacy duty, and that he intended the annuitants to pay the duty which at that date was in fact chargeable in respect of the annuities, but that the estate duty was payable out of the testator's residuary estate. In *Re Fraser*, before cited, the facts were shortly as follows: A testator by his will made in 1886 bequeathed all his personal estate, except what he otherwise disposed of by his will or any codicil, and except chattels real, to trustees upon certain trusts. And he devised and bequeathed "all real estate and chattels real in England to which I may be entitled at my death, except what I have otherwise disposed of by this my will," to his brother absolutely for all his estate and interest therein. The testator made seven codicils to his will, the last of which was made in July, 1898. In that codicil he stated that his brother was dead, but he did not revoke the bequest to him, or the general bequest of personalty, though he made some alterations in his will and the previous codicils. In other respects he confirmed his said will as altered by the prior codicils. It was held by the Court of Appeal, affirming the decision of Mr. Justice Byrne, that as the will and codicils must be read together, and the will treated as if made at the date of the last codicil, it could not be taken that the testator had excepted chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and that consequently there was an intestacy as to chattels real, and that they did not fall into the general bequest. The case was distinguished from *Blight* v. *Hartnoll*, 48 L.T. Rep. 543; 23 Ch. Div. 218, because in that case the excepted property was specifically bequeathed, and as such bequest failed it fell into residue; but in *Re Fraser*, in events which happened, there was no disposition of the excepted property, because the apparent bequest of it was on the face of the instruments themselves ineffectual. *Re Fraser* is a strong case in support of the rule that the effect of a codicil confirming the will is to bring the will down to the date of the codicil.—*Law Times*.

REVIEW OF CURRENT ENGLISH CASES.

ADMIRALTY—SHIP—SEAMEN'S WAGES—SHIP BECOMING UNSEAWORTHY BEFORE COMPLETION OF VOYAGE—DISCHARGE OF SEAMEN—MERCHANT SHIPPING ACT (57-58 VICT. C. 60), SS. 158, 162.

The Olympic (1913) P. 92. This was an action by seamen for wages. The plaintiffs had been engaged for a voyage from Southampton to New York and other ports for a year. The day the vessel left Southampton she came into collision with another vessel and became unseaworthy and had to put back for repairs, and on the following day the plaintiffs were discharged with three days' pay. The plaintiffs claimed that they were also entitled under s. 162 of the Merchants Shipping Act, 1894, to a further sum of a month's wages by way of compensation for the damages caused them by being discharged otherwise than in accordance with their agreement. The majority of the Court of Appeal (Williams and Buckley, L.JJ.), however, held that under s. 158, by reason of "the wreck of the ship," the services of the plaintiffs had terminated, and that they were properly discharged with three days' pay actually earned. Kennedy, L.J., dissented and thought the plaintiffs were entitled to a month's pay in addition as claimed.

INFANT—MAINTENANCE—NECESSARIES—REVERSIONARY INTEREST OF INFANT IN REAL ESTATE—CHARGING INFANT'S ESTATE.

In re Badger (1913) 1 Ch. 385. In this case an infant ward of Court, who was entitled to a reversionary interest in fee, and was without any means, applied to the court for authority to charge her reversionary interest with sums to be advanced for her maintenance; and that she might be bound, on attaining her majority, to ratify and confirm the charge. Joyce, J., refused to make the order asked, and the Court of Appeal (Buckley, and Hamilton, L.JJ.) affirmed his decision, holding that *In re Hamilton*, 31 Ch.D. 291, and *Cadman* v. *Cadman*, 33 Ch.D. 397, were authorities binding on the court, and that an estate of an infant not in possession could not be charged by the order of the court for the maintenance of the infant, because such interests cannot be delivered in execution. But it is possible that what was asked in this case might be done in Ontario: see 9 Edw. VII. c. 47, s. 32.

EVIDENCE—NON-PAROCHIAL REGISTERS—SOCIETY OF FRIENDS—DIGEST OF REGISTER KEPT BY SOCIETY OF FRIENDS—CERTIFICATE OF RECORDING CLERK.

In re Woodward (1913) 1 Ch. 392. In an inquiry before a Master as to next of kin of a deceased person, in order to prove marriages, births, and burials, the certificate of the entries in a digest of the registers of the society which had been deposited at Somerset House under a statute, were tendered, and held by Eady, J., to be inadmissible as the original registers were in existence. The registers of the society kept before July 1, 1837, when 6-7 W. 4, c. 26, came into force, were not admissible at common law, but under that Act on being deposited at Somerset House they were made evidence.

BUILDING SOCIETY — WINDING UP — PENSIONS—VOLUNTARY ALLOWANCE—ULTRA VIRES.

In re Birkbeck Benefit Building Society (1913) 1 Ch. 400. This was a winding up proceeding. The Building Society, in addition to its authorized business as a building society, had also carried on the business of banking and other businesses, all of which were carried on in one building and managed by the same board. The society was ordered to be wound up in 1911, and the business of banking was declared to have been ultra vires of the society. In 1903 a correspondence clerk of the society retired at the request of the society and was promised a pension, and in 1906 a clerk in the banking business also retired at the request of the board and was promised a pension. Both pensions were duly paid up to the making of the winding up order. Both pensioners claimed to prove as creditors for the capital value of their respective pensions; but Neville, J., held that the correspondence clerk's pension was a purely voluntary allowance, not founded on any contract, and therefore he could not recover; and that the clerk in the banking business, having been employed in a business which was ultra vires of the society, could not prove against the assets of the society.

WILL—DEVISE—TRUST WHICH MIGHT, BUT DID NOT IN FACT, OFFEND AGAINST RULE AGAINST PERPETUITIES—RULE AGAINST PERPETUITIES.

In re Fane, Fane v. *Fane* (1913) 1 Ch. 404. The question in this case was whether a disposition by will offended against the rule against perpetuities. The testator devised that upon his

wife's death the trustees should raise certain sums of money and subject thereto should assure the estates "to such uses for such estates and with and subject to such powers and provisoes as under and by virtue of" two deeds of July 5, 1854, and February 26, 1859, "and all mesne assurances, acts and operations of law" should at the time of the wife's death be subsisting and capable of taking effect. The widow died in 1912, and at her death there was nothing in the then subsisting uses, powers and provisoes of the estate in question which would, if inserted in the testator's will, have offended against the rule against perpetuities. Eve, J., however, thought that as there was a possibility that the rule might have been infringed, the devise was invalid, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Hamilton, L.JJ.) reversed his decision. Buckley, L.J., says that *Dungannon* v. *Smith* (1846), 12 Cl. & F. 546, on which Eve, J., rested his decision, is not an authority for the proposition that uncertainty of the testator's death, whether the limitation introduced by reference will exceed the rule or not, is a ground for saying that the rule against perpetuities has been infringed.

MONEY HAD AND RECEIVED—PAYMENT UNDER COMPULSION OF LAW —LEGAL PROCESS OF FOREIGN COURT—ACTION TO RECOVER MONEY PAID UNDER COMPULSION OF PROCESS OF FOREIGN COURT.

Clydesdale Bank v. *Schroder* (1913) 2 K.B. 1. In this case the plaintiffs were mortgagees of a ship, and the plaintiffs notified the mortgagors that on arrival of the ship at a Chilean port they intended to take possession under the mortgage. She arrived at the port named and the plaintiffs took possession, and while in that port the defendants instituted proceedings against the vessel in the Chilean Court, claiming a lien for advances made to the ship, and the vessel was at their instance arrested under an order of the court. In order to obtain her release the plaintiffs paid the defendants' demand under protest, and stated that they reserved their right to open up the matter in England, and the present action was brought to recover the money so paid; but Bray, J., who tried the case, held that the rule of law which prevents the recovery of money paid under compulsion of law, applies to money paid under the compulsion of the process of a foreign court, and that therefore the action would not lie. The learned Judge points out that the plaintiffs' proper course in the circumstances was to have applied to the

Chilean Court for leave to pay money into court to release the vessel, and to have obtained leave to contest the defendants' claim in that court.

BILL OF EXCHANGE—IRREGULAR INDORSEMENT—INDORSEMENT BY WAY OF SECURITY—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61), SS. 20, 55, 56—R.S.C. 119, S. 31, 130, 131.

Starr v. *Holland* (1913) 2 K.B. 15. In this case a similar question was in issue to that in *Robinson* v. *Mann* (1901) 31 S.C.R. 464; and *Duthie* v. *Essery* (1895) 22 App. R. 291, and the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) have come to a contrary conclusion. The plaintiffs drew a bill on a company to whom they had sold goods for the price, payable to their own order, there being an agreement that the defendants, who were directors, should indorse the bill. This they did before any indorsement of the bill by the plaintiffs as payees. In this condition the bill was returned to the plaintiffs, and in the present action they claimed to recover against the directors as indorsers. Section 56 (R.S.C. c. 119, s. 131) on which Strong, C.J., founded his judgment in *Robinson* v. *Mann*, in this case is held not to be applicable to such a state of circumstances, because, as the court holds, the bill not having been indorsed by the payees, it was never really negotiated. Their Lordships followed *Jenkins* v. *Coomber*, 1898, 2 K.B. 168, which decided that the principles laid down in *Steele* v. *McKinlay*, 5 App. Cas. 754, are not affected by the provisions of the Bills of Exchange Act. Before parting with this case it may be noted that while *Robinson* v. *Mann* was followed by the Court of Appeal in *McDonough* v. *Cook*, 19 O.L.R. 267, the Divisional Court on an appeal from a County Court, as being the final Court of Appeal in such cases, refused to follow *Duthie* v. *Essery*, and followed *Jenkins* v. *Coomber*, supra; see *Canadian Bank of Commerce* v. *Perram* (1899) 31 Ont. 116; and see also *Clapperton* v. *Mutchmor* (1899) 30 Ont. 595. As the Appellate Division is now the tribunal for disposing of appeals from County Courts, it will probably consider itself bound by *Robinson* v. *Mann*, rather than *Canadian Bank of Commerce* v. *Perram*, notwithstanding its being a final court in such cases. One cannot but fail to see, however, that if the question ever reaches the Judicial Committee of the Privy Council, there are very considerable chances that *Robinson* v. *Mann* might be overruled.

HOMICIDE — MURDER OR MANSLAUGHTER — PROVOCATION BY WORDS—PARTIES ENGAGED TO BE MARRIED—CONFESSION BY INTENDED WIFE OF IMMORALITY.

The King v. *Palmer* (1913) 2 K.B. 29. The defendant was indicted for the murder of a young woman with whom he had been keeping company for two or three years, and to whom he was engaged to be married. According to his own statement the defendant had been to Canada and on his return met the deceased and told her that he had decided to give up his trade and return to Canada, to which she replied that if he did she would go on the town, and he then asked if she really meant it, and she said she did, that she had done it before, and would do it again, and thereupon took off her ring and threw it in his face. The defendant thereupon seized her and cut her throat with a razor which he had in his pocket. The Judge told the jury that "no provocation by words, however opprobrious, in a case where a deadly weapon is used, can, in law, reduce the crime from murder to manslaughter." The prisoner was convicted, and applied for leave to appeal on the ground of misdirection, but the Court of Criminal Appeal (Channell, Bray, and Coleridge, JJ.) dismissed the application, the court being of opinion that though the sudden confession of a wife of her past adultery might be sufficient provocation to reduce the crime of a husband in killing her to manslaughter, yet that principle could not be extended to persons as between whom the relation or quasi-relation of husband and wife does not exist, although the court agreed that it would perhaps have been more accurate if the judge had said that words cannot constitute sufficient provocation, except in very special circumstances.

ARBITRATION—SPECIFIC QUESTION SUBMITTED—AWARD—ERROR IN LAW—APPLICATION TO SET ASIDE AWARD.

In re King v. *Duveen* (1913) 2 K.B. 32. In this case a specific question was submitted to arbitration. The arbitrator made an award finding that Duveen was not liable to pay damages in respect of a nuisance he had occasioned to King, by buildings erected on Duveen's own premises, which adjoined King's. King moved to set aside the award as being bad in law on its face. On the part of Duveen it was contended that as the specific question was left to the arbitrator, his decision was final, even though it were shewn to be erroneous in point of law, and with that view Channell and Bray, JJ., concurred.

LANDLORD AND TENANT—SURRENDER OF TENANCY—TENANT REMAINING IN POSSESSION AFTER TERMINATION OF TENANCY—EXECUTION—CLAIM OF LANDLORD FOR RENT—8 ANNE, C. 14, SS. 6, 7—COUNTY COURTS ACT, 1888 (51-52 VICT. C. 143), S. 160—(LANDLORD AND TENANT ACT (1 GEO. V. C. 37), SS. 40, 55, ONT.)

Lewis v. *Davies* (1913) 2 K.B. 37. In this case the defendant was the tenant of a farm house and land and agreed with his landlord to give up possession on March 25, 1912. He gave up possession of the land, but was permitted by the landlord to remain in possession of the house without payment of rent until the landlord should require him to give up possession of it. The defendant remained in possession of the house and was so in possession on July 9, 1912, when goods in the house were seized under execution against the tenant. The landlord under 8 Anne. c. 14, ss. 6, 7, and the County Courts Act (see 1 Geo. V. c. 37, ss. 40, 55, Ont.), claimed to be paid out of the proceeds of the execution rent which had become due on 25th March under the tenancy of the farmhouse and land. An interpleader issue was granted and was decided by the judge of the County Court adversely to the landlord, on the ground that a new tenancy had been created on the 25th March, 1912, and that therefore the right to distrain after the termination of the tenancy under the statute of Anne, supra, had ceased; but the Divisional Court (Channell and Bray, JJ.) held that the mere permission of the landlord to the tenant to continue in possession did not create a new tenancy in the sense meant in *Wilkinson* v. *Peel* (1895) 1 Q.B. 516, so as to bar the landlord's right of distress for the previously accrued rent.

GUARANTY—INDEMNITY—ORAL PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—GUARANTY OF DEBT OF COMPANY BY DIRECTOR—DEBENTURE CONSTITUTING LIEN ON COMPANY'S ASSETS HELD BY GUARANTOR—STATUTE OF FRAUDS (29 CAR. 2, C. 3), S. 4—(R.S.O. C. 338, S. 5.)

Davys v. *Buswell* (1913) 2 K.B. 47. In this case the defendant counter-claimed against the plaintiff for the price of goods supplied by the defendant to a company of which the plaintiff was a director, and of which the defendant claimed that the plaintiff had guaranteed payment. The plaintiff had advanced moneys to the company and held a debenture which was a floating security on all the assets of the company. The de-

fendant had been in the habit of supplying goods to the company for the purposes of their business, and a balance being due in respect thereof, he threatened not to supply any more goods unless it were paid, whereupon the plaintiff orally promised, as the jury found, that he would be answerable for the price of the goods to be supplied if the company made default. The jury found that the plaintiff was induced to make the promise because he had the debenture. The plaintiff set up as a defence the Statute of Frauds, and the question was raised whether in the circumstances the promise in question was a guaranty or a promise of indemnity. Lord Coleridge, J., who tried the action, came to the conclusion that the case was not within the Statute of Frauds because of the ownership by the plaintiff of the debenture, which he considered brought the case within the principle deducible from what was said in *Harbury India Rubber Comb Co.* v. *Martin* (1902) 1 K.B. 778 (see ante vol. 38, p. 538); but the Court of Appeal (Williams and Kennedy, L.JJ., and Joyce, J.) reversed his decision, holding that the case was within the statute as being a promise to answer for the debt of another, and that the ownership of the debenture was immaterial.

CREDITOR—RETURN OF GOODS TO CREDITOR—FRAUDULENT PREFERENCE.

In re Ramsay (1913) 2 K.B. 80. This was a bankruptcy case, and the question was whether a return of goods made by the bankrupt to a creditor was a fraudulent preference. The bankrupt being in financial difficulties, wrote to his principal creditor, whose claim amounted to £3,000, and who held current bills for £1,000, two of them for £521 just falling due, asking to have one of the bills renewed. The creditor replied that they must be met, and the account considerably reduced. On the following day the creditor saw the debtor and demanded a substantial payment or a return of goods, otherwise he would make it hot, for the debtor. The debtor agreed to return goods and in the next few days returned goods to the value of £1,808, being more than three times the amount of the overdue bills. Within three months thereafter the debtor became bankrupt. The trustee applied to have the return of goods declared to be a fraudulent preference, and Phillimore, J., who heard the application, held on the evidence that the return of the goods was not caused by any real pressure on the part of the creditor, and was a voluntary act of the debtor, and therefore was a fraudulent preference as claimed.

ACTION BY OFFICIAL RECEIVER—DISMISSAL OF APPLICATION—PERSONAL ORDER FOR PAYMENT OF COSTS BY RECEIVER.

In re Williams (1913) 2 K.B. 88. In this case an official receiver of a bankrupt firm's estate, made an unsuccessful application for an order adjudicating that a person alleged but denied to be a partner, was a partner of the firm. The registrar dismissed the application and ordered the receiver personally to pay the costs. The official receiver appealed, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Hamilton, L.JJ.) held that in such a case the court has jurisdiction to order the official receiver personally to pay costs, and that the registrar had properly exercised the jurisdiction.

TRIAL—APPLICATION FOR NONSUIT AT CLOSE OF PLAINTIFF'S CASE—EVIDENCE SUBSEQUENTLY CALLED ON BEHALF OF DEFENDANT—APPEAL—CONSIDERATION OF ALL EVIDENCE GIVEN AT TRIAL.

Groves v. Cheltenham and E. G. Building Society (1913) 2 K.B. 100. In this case a question was raised which often arises at the trial of actions. At the close of the plaintiff's evidence counsel for the defendants moved for a nonsuit, which was refused. He then adduced evidence on behalf of the defendants and judgment was given at the trial in favour of the plaintiff. The defendant appealed and on the argument contended that if the court found that on the plaintiff's evidence there ought to have been a nonsuit, the subsequent evidence given on behalf of the defendant ought to be disregarded; but Lush and Rowlatt, JJ., held that in such a case the evidence given by the defendants cannot be disregarded, but that the court, according to the modern practice, is bound to look at all the evidence—and, doing so in the present case, they allowed the appeal.

CHARTER PARTY—LUMP SUM FOR FREIGHT—LOSS OF SHIP BY EXCEPTED PERIL—LOSS OF PART OF CARGO—DELIVERY OF PART OF CARGO—RIGHT OF SHIP OWNER TO FREIGHT.

Harrowing Steamship Co. v. *Thomas* (1913), 2 K.B. 171. This was an appeal from the decision of Pickford, J. (1912), 2 K.B. 321 (noted ante p. 69), in which the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) held, affirming the decision of Pickford, J., that the ship owners having delivered so much of the cargo as they were not excused by excepted perils for not delivering, had performed their contract and were entitled to recover the lump sum for freight agreed on.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Chancellor Haldane, Lords Dunedin, Atkinson, and Moulton.] [Feb. 19.

GORDON v. HOLLAND.

HOLLAND v. GORDON.

CONSOLIDATED APPEALS FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Partnership—Fiduciary relation of partner—Wrongful sale of partnership assets—Repurchase from bonâ fide purchaser without notice.

These were cross-appeals from a judgment of the Court of Appeal for British Columbia (Macdonald, C.J., and Galliher, J., Irving, J., dissenting) varying a judgment of Gregory, J., at the trial, which had granted to Gordon, the plaintiff in the action, a portion of the relief for which he prayed.

A member of a partnership, in violation of the express terms of the partnership agreement, without the knowledge of his co-partner, sold land the property of the partnership to a *bonâ fide* purchaser for value without notice, and afterwards repurchased the land from him.

Held, that he stood in a fiduciary relation to his partner, and came within the exception laid down in Barrow's case (42 L.T. Rep. 891, 14 Ch. Div. 432) to the rule which protects a purchaser with notice taking from a purchaser without notice, and must account for all profits made by subsequent dealings with the land.

Judgment of the Court below varied.

Knox v. *Gye* (L. Rep. 5 H.L. 656) and *Piddocke* v. *Burt* (70 L.T. Rep. 553; (1894) 1 Ch. 343), distinguished.

Buckmaster, K.C., and Hon. *M. Macnaghten,* for Gordon. *E. P. Davis,* K.C., *Atkin,* K.C., and *C. H. Sargant,* for Holland.

Lords Atkinson, Shaw, and Moulton.] [March 14.

NATIONAL PROTECTOR FIRE INSURANCE COMPANY v. NIVERT.

Fire insurance—Policy—Construction—Provision that interest of insured in property should not be transferred—Provision that other policies should be declared and mentioned.

This was an appeal from a judgment of His Majesty's Supreme Court for the Ottoman Dominions in favour of the respondent, the plaintiff below, in an action brought by him against the appellant company to recover 1200*l.* under two policies of fire insurance in respect of the loss sustained by him through the destruction of the insured property by fire.

A policy of insurance against damage by fire provided that a transfer by the insured of his interest in the property should render the policy void.

Held, that a lease of the property for one year, the lessor continuing to pay the insurance premium, did not amount to a transfer of interest within the meaning of the conditions.

The policy further provided that the existence of other insurances should be declared to the insurers and mentioned in the policy or by indorsement on it.

Held, that the fact of the existence of further insurances was all that need be mentioned, and that the names of the insurers with whom they were effected need not be stated.

Judgment of the Court below affirmed.

E. F. Spence and *J. F. Collinson,* for the appellant company.
F. D. Mackinnon, for the respondent.

Dominion of Canada.

[SUPREME COURT.]

Ont.] [May 6.

STONE *v.* CANADIAN PACIFIC RY. CO.

Railway—Negligence—Foreign Car—Protection of Employees —R.S.C. (1906), *c.* 37, *s.* 264, *s.-s.* 1 (*c*).

The Canadian Pacific Railway Co. had received a car with freight from the Wabash Co., and before returning, used it in a

shunting operation. A brakesman on top of this car which was approaching another with which it was to be coupled, saw that the knuckles of the coupler on each car were closed, and, being unable to signal the engineer to stop, climbed down a side ladder, none being on the ends, and tried to reach round to the lever of the coupler. In doing so he held on with his left hand to a rung of the ladder only twenty inches above where his left foot was placed. There was no room for his other foot, and as the train went over a crossing he was jolted off and fell with his right arm under the wheels of the car, injuring it so that it had to be amputated. In an action against the company, the jury found that the latter was negligent in not having end ladders on the Wabash car nor levers of sufficient length. A verdict for the plaintiff was set aside by the Court of Appeal (26 O.L.R. 121).

Held, reversing the latter judgment, that the company was liable for non-compliance with the provisions of sec. 264, subsec. 1 (*c*) of the Railway Act.

FITZPATRICK, C.J., dissented on the ground that the plaintiff's own negligence caused the accident.

Appeal allowed with costs.

Creswicke, K.C., and *C. C. Robinson*, for appellant. *Hellmuth*, K.C., and *MacMurchy*, K.C., for respondents.

N.B.] [May 6.

WEST *v.* CORBETT.

Negligence—Railway—Prescription — Damage or Injury "by Reason of Construction"—Contractor — Transcontinental Railway Commissioners—Railway Act, s. 306.

Section 15 of the National Transcontinental Railway Act provides that "the Commissioners shall have, in respect to the eastern division, . . . all the rights, powers, remedies and immunities conferred upon a railway company under the Railway Act."

Held, FITZPATRICK, C.J., and IDINGTON, J., dissenting, that the provision in s. 306 of the Railway Act, that "all actions or suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be commenced within one year, etc.," applies to such an action

against the Transcontinental Railway Commissioners and also against a contractor for construction of any portion of the eastern division.

Held, per ANGLIN, J., that it applies also to an action against a contractor for constructing a railway for a private company incorporated by Act of Parliament.

Appeal dismissed with costs.

F. R. Taylor, for appellant. *Teed*, K.C., for respondents.

Ont.] [May 6.

ROBINSON *v.* GRAND TRUNK RY. CO.

Railway Co.—Carriage of Passenger—Special Contract—Notice to Passenger of Conditions—Negligence—Exemption from Liability.

P. at Milverton, Ont., purchased a horse for a man in another town who sent R. to take charge of it. P. signed the way-bill in the form approved by the Board of Railway Commissioners, which contained a clause providing that if the consignee or his nominee should be allowed to travel at less than the regular fare to take care of the property, the company should not be liable for any injury to him whether caused by negligence or otherwise. R. was not asked to sign the way-bill, though a form endorsed provided for his signature and required the agent to obtain it. The way-bill was given to R., who placed it in his pocket without examining it. On the passage he was injured by negligence of the company's servants.

Held, that R. was not aware that the way-bill contained conditions.

Held, also, Fitzpatrick, C.J., dissenting, that the company had not done all that was incumbent on them to bring notice of the special condition to his attention.

Judgment of the Court of Appeal (27 O.L.R. 290) reversed, and that of the trial judge (26 O.L.R. 437) restored. Appeal allowed with costs.

McKay, K.C., and *Haight*, for appellant. *D. L. McCarthy*, K.C., for respondent.

Ont.] [May 6.

FLEMING v. TORONTO RY. CO.

Negligence—Street railway—Explosion—Defective controller—Inspection.

S. was riding on the end of the seat of an open street car in Toronto when an explosion occurred. The car was still in motion when other passengers in the same seat, apparently in a panic, cried to S. to get off, and when he did not do so, endeavoured to get past him, whereby he was pushed off and injured. In an action for damages the jury found the company negligent in using a rebuilt controller in a defective condition and not properly inspected, and the motorman negligent in not applying the brakes.

Held, affirming the judgment of the Court of Appeal (27 O.L.R. 332) that the evidence justified the jury in finding that the controller had not been properly inspected and that a proper inspection might have avoided the accident.

Per Idington and Brodeur, JJ., Anglin and Davies, JJ., contra, that the motorman should have applied the brakes.

Appeal dismissed with costs.

D. L. McCarthy, K.C., for defendants appellants. *Gamble*, K.C., for respondent.

Ont.] [May 6.

MERRITT v. CITY OF TORONTO.

Riparian rights—Interference—Evidence.

M., claiming to be a riparian owner on the shore of Ashbridge Bay (part of Toronto harbour), claimed damages from, and an injunction against, the city for interference with his access to the water when digging a channel along the north side of the bay.

Held, affirming the judgment of the Court of Appeal (27 O.L.R. 1), by which an appeal from a Divisional Court (23 Ont. L.T. 365) was dismissed, that the evidence established that between M.'s land and the bay was marsh land and not land covered with water as contended, and therefore M. was not a riparian owner.

Appeal dismissed with costs.

Mowat, K.C., for plaintiff appellant. *Geary*, K.C., and *Colquhoun*, for respondent.

Province of Ontario.

SUPREME COURT.

Middleton, J.] [May 5.

RE DORWARD.

Will—Construction—Residuary devise—Ignorant use of printed forms—Intention gathered from will.

Motion by the executrix for an order declaring the construction of the will of Walter Dorward, who died on the 22nd February, 1911.

MIDDLETON:—"The country conveyancer" and "The man who makes his own will" are favourite toasts at lawyers' gatherings. "The man who invented printed will-forms" will soon be equally popular. As excellent as these forms often are, so many errors arise in filling them up, that already a formidable list of cases can be found dealing with the problem prescribed. This testator used the same form as that considered in *re Conger*, 19 O.L.R. 499, and filled it up in the same way, save that he inserted his wife's name in the clause for the appointment of executors, and left the space blank in the residuary devise. So the will reads: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto and I nominate and appoint Mrs. Isabella Dorward to be executrix of my last will and testament." This can, I think, be read as an awkward sentence by which the wife is made residuary devisee as well as executrix. Dorward did not mean to die intestate, and I think that from the will itself his intention can be gathered, and that intention was to give his property to his wife.

May v. *Logie*, 27 O.R. 505 and 23 A.R. 785, shews that the intention may be gathered and given effect to, even when the actual words used do not form a sentence, and are quite incapable of grammatical analysis.

Shirley Denison, K.C., for the executrix and for William and David Dorward. *H. M. Ferguson*, for the other next of kin.

Mulock, C.J.Ex., Clute, Riddell,
Sutherland, and Leitch, JJ.] [May 13.

RE ROYSTON PARK and TOWN OF STEELTON.

Registry Act—Subdivision of lands—Plan—Approval by Municipal Council or by County Judge—Jurisdiction.

By 10 Edw. VII. c. 60, s. 80 (18) it is provided that "The registrar shall not register any plan upon which any street, road or lane is laid out unless there is registered therewith the approval of the proper municipal council or the order of the judge of the County or District Court . . . approving of such plan made upon notice to such council." The contention was as to the construction to be placed on this section in reference to the respective jurisdictions of municipal councils and county judges.

Held, 1. That although the word "or" was to have its ordinary alternative meaning and should not be read "and," there being two courses prescribed by the statute, either of them might be adopted by the owners of the land, and the fact of their having chosen one of the alternatives did not preclude a resort to the other.

2. The refusal of the council to grant the approval of the plan was not a judicial determination of the rights of the parties, and such refusal was no bar to application for approval by the County Judge. See *Elliott* v. *Turner*, 2 C.B. 446; *Birley* v. *Toronto, Hamilton and Buffalo Ry. Co.* (1898) 25 A.R. 88; *Town of Aurora* v. *Village of Markham* (1902) 32 S.C.R. 457.

A. R. Clute, for the applicants (appellants). *H. S. White*, for the town.