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THE FORMAL OPENING OF THE TERMS, AT WESTMINSTER HALL—LINCOLN'S INN AND THE COURTS OF CHANCERY—CHANCERY APPEALS—APPEALS TO THE HOUSE OF LORDS—RAILWAY MANAGEMENT—DIVIDENDS PAYABLE ONLY OUT OF NET EARNINGS—COURTS OF EQUITY WILL ENJOIN DIRECTORS FROM PAYING THEM OTHERWISE—PRIVILEGE OF PARLIAMENT—HOW FAR EDITORS AND PUBLISHERS PRIVILEGED, AS TO REPORTS AND LEADING ARTICLES.

I. It is not, perhaps, generally known to the American Bar with what degree of formal ceremony the different terms of the superior courts are opened, at Westminster Hall. The judges, all in full court dress, small-clothes and dress sword, and *chapeau bras*, and full-bottomed wigs, and the counsel of every grade, from the Queen's Advocate and the Attorney-General, down through the several degrees of sergeants and Queen's Counsel, to the humblest barrister, called to the bar but yesterday, all repair to the dwelling of the Lord Chancellor, to make their respects to the highest judicial dignitary of the realm. After a formal breakfast, near mid-day, in solemn procession, they take possession of the old hall, where the Aula Regis held its sessions almost from the time of the Conqueror. After formal opening of the several courts, an adjournment for the day follows, and all prepare for business on the next morning, at ten o'clock, or earlier if need be. The late Lord Justice Knight Bruce never attended these ceremonious openings of the term, from an invincible aversion to appearing in

small-clothes. We conjecture some of his successors are coming to have similar feelings.

It is at Lincoln's Inn, where, after the ceremonious opening of the term by the Lord Chancellor at Westminster Hall, the Courts of Chancery continue their ordinary sessions, and where all chancery causes are heard and determined. It may not be known to all American lawyers, that all the Courts of Chancery, with the exception of that of the Rolls perhaps, are but departments of the Court of Chancery, where the Lord Chancellor's authority is the paramount one. For instance, the three Vice-Chancellors are, in contemplation of law, sitting merely as assistants to the Lord Chancellor. So too, in the Court of Chancery Appeal, which, in point of fact, is generally held by the Lords Justices, the Lord Chancellor may preside and claim the assistance of the two Lords Justices. But in that case the Lords Justices sit in the Lord Chancellor's court-room, having another court-room in which they hear appeals by themselves. The mode in which the point is determined, how many of the judges of Chancery Appeal shall sit upon any particular appeal, seems rather singular and unique to all Americans. It seems to depend upon the choice of the appellant. He may carry an appeal from one of the Vice-Chancellors, or the Master of the Rolls, to the full Court of Chancery Appeal, when the Lord Chancellor will call to his aid the Lords Justices, to hear the appeal in the Court of Chancery, when the three judges will be present during the hearing and more commonly give judgments *seriatim*. Or if the appellant, in such cases, for any cause, prefer his appeal should be heard by the Lord Chancellor only, he may take it into that court, to be heard by him alone. So also he may elect to bring his appeal to hearing before the Lords Justices alone, which is the more common course.

Appeals to the House of Lords may be taken direct from the Vice-Chancellors, or the Master of the Rolls, or the party may go first, to any one of the Courts of Chancery Appeal, but he cannot appeal from one Court of Chancery Appeal to another, or from the Lord Chancellor, or Lords Justices, to the full Court of Chancery Appeal, or from the Lord Chancellor to the Lords Justices, or *vice versa*. Each of these courts, in contemplation of law, being considered identical with the others, and hence it has recently been determined that one Lord Justice may hear appeals,

and this is now becoming quite common. The English bar seem to have much less confidence in the number of judges, than is common with us.

Appeals are taken too, as is well known, in a very different manner, and with very different effect, in the English Courts of Chancery, from what is allowed in most of the American states. All interlocutory decisions are appealable, and the proceedings in the case are not necessarily thereby interrupted. In theory, in a chancery cause pending before one of the Vice-Chancellors, or the Master of the Rolls, an interlocutory decision may be appealed to the Lord Chancellor, or the Court of Chancery Appeal, and may be thus progressing, while the cause itself is at the same time making progress in the original court. And at the same time another interlocutory decision may be appealed direct to the House of Lords, and may be there on trial, while other portions of the cause may be on trial in two or more different courts. But this is not the usual course perhaps. This is accounted for partly by the fact that different members of the Chancery bar practise in different courts, and it is not unusual to have a cause argued in different courts by entirely different counsel; but this is by no means always the case. Senior counsel of eminence, like the present Lord Cairns, or Sir Roundell Palmer, more commonly follow an important cause through all its stages—and by consequence the proceedings in the court below are more commonly stayed by consent, during the pendency of the appeal.

II. Some very important questions have, within the last few weeks, come before the superior courts in Westminster Hall and Lincoln's Inn. The astonishing discoveries, in regard to railway management, or, perhaps more properly, mismanagement, within the last few months, have brought out the question of the right of the directors to declare and pay dividends, out of anything but the net earnings of the company.

In countries where joint stock companies are owned to a considerable extent by mere speculators and adventurers, it would be not unnatural to expect, that the shareholders would more readily acquiesce in having dividends paid out of capital—and even out of capital borrowed for the express purpose—than in countries where such stocks are held, to a large extent, by those who desire to retain them, as a means of investment, and for permanent income. In the latter case—and this seems the only view with

which any such stocks could fairly be created—it would at once destroy the credit of the stocks and defeat the just object of their creation, if dividends, to even the slightest extent, were permitted to be paid out of capital, whether borrowed for the occasion or not. There cannot be a practice more disingenuous, or fraudulent in its character, than this. If permitted, in any case, or to the slightest extent, it would at once subvert the entire system of fair dealing, in the shares of joint stock companies. So far has this cardinal principle of finance been carried, that any state, or government, which allows the interest upon its capital, or funded debt, to be paid by new loans—which is but another name for new capital—will at once lose credit; and cannot expect the confidence of capitalists to be continued under such a practice.

But this practice in the case of a government, or state, might be justified under some special crisis or emergency. For the payment of interest, in such cases, is not so exactly the measure of the resources of the debtor, as in the case of a joint stock company. The state, or government, in one sense, possesses unlimited resources—or such as are measured only by the productive industry of all its inhabitants. In this case the fact of paying interest by new loans, is only a symptom of bad management and thoughtlessness; or of unwillingness to impose the just weight of the due and exact responsibility and current cost of the government upon the resources of the state. And the opposite course, of raising current interest annually, is indispensable as an undoubted expression of willingness, on the part of the state, in its aggregate capacity, to meet its just responsibility, in the present tense.

But in the case of a joint stock company, the resources of the company are of necessity limited, and can only be measured by the sole and unerring standard of its net earnings, that is, the income remaining over and above all outgoes. If the directors are allowed, under any pretence or excuse, to tamper with this cardinal measure of character, there is no longer any standard or measure of character remaining. The payment of dividends and interest upon its capital, whether in shares—ordinary or preferred—or in bond and mortgage, or in any other form, is as indispensable to determine the success or failure of joint stock companies, as the prompt meeting of one's promises is with a natural person. And, while the flexible morality of trade allows

some discretion to the unfortunate dealer, in calling in the temporary aid of friends, in order to defer the inevitable day of ultimate failure, or, if possible, to help escape from its disheartening disaster, no such discretion is, or can be, allowed to the managers and directors of a joint stock company, like a railway.

There are, unquestionably, some uncertainties in regard to railway management, whereby it becomes difficult, if not impracticable, in all cases, to know precisely how much to charge to current expenses. The repair and renewal of permanent structures—like the roadway, bridges, and, to some extent, stations and machine-shops, which are constantly deteriorating, and must ultimately be renewed by an outlay far beyond the cost of ordinary repairs, calculated on the most liberal scale—these, and some other perplexities and uncertainties, naturally attending railway management, in the most competent and watchful hands, will always plead for some allowance for occasional failures and shortcomings. But beyond this there is an invariable and inflexible rule of railway management, from which the English courts will allow no departure.

In a recent case before Vice-Chancellor WOOD, where the minority of shareholders sought for an injunction, restraining the directors and other shareholders, in whose interest they were acting, from borrowing money on a temporary loan, or applying money already borrowed, to the purposes of paying the regular semi-annual dividends upon the shares, in advance of realizing some suspended sources of income, the learned judge granted the injunction without hesitation. And the principle is so unquestionable, that an appeal would offer no reasonable hope of obtaining any modification of the order, and was not attempted, we believe.

But we fear there has been a very great amount of railway management, both in England and America, which would be found, on careful examination, far more flagrant than this. It is to be feared that, in the great majority of instances, dividends have been paid, without any very strict regard to the precise rule of measuring them by the exact amount of net earnings. And that if any surplus has been laid by for extraordinary expenses, it has been sometimes for the very questionable purpose of "legislative expenses," which, if not wholly illegal and inadmissible, were clearly so, when carried to the enormous extent, and for the

questionable objects, which too many recent developments indicate. And in other cases dividends have been paid, out of borrowed capital, for the mere purpose of misrepresenting the real state of the productiveness of the business, when afterwards it was found that the disclosure of the exact facts of the case must seriously have reduced the price of the shares in the market, thus in effect making the directors accessory to the false representations under which the stock would be or might have been offered for sale. Such conduct, while it might be quite innocent on the part of sellers, is scarcely less than felonious on the part of the directors, and should be visited with condign punishment.

We have been accustomed to commend the fairness and faithfulness of English railway management, but it now appears that rust and rottenness have been gathering at the heart of it for many years, and that it is, if possible, even more hollow and fallacious than that in our own country. And it has been done so covertly and under the guise of such fair pretensions, that it has misled even the most wary. It seems baser, if possible, for one whose reputation stands at the highest point, to abuse this accumulated capital of credit and fair repute to the accomplishment of some nefarious scheme of iniquity, than for one who is new in the market, and has only his fair promises to draw upon, to attempt the same thing. And it is certain the former will be much more sure of success than the latter. It is this which seems to create such fierce indignation against almost all the English railway directors just at the present moment. For as one after another comes to be probed the same disgusting rottenness at the core is brought to light, so that, at present, there is really no firm ground to stand upon, so far as the credit of railway capital is concerned. It is to be hoped we shall profit by the example of our English cousins, and while we imitate their excellences avoid their errors.

III. The trial of the case of *Wason v. Walter*, before the Lord Chief Justice of England and a special jury, at the sittings after Michaelmas Term, was one of considerable interest to the proprietors of the press. The defendant is the proprietor of the *Times* newspaper, the chief organ of popular sentiment in England, which, like one leading paper in America, is always sure to echo popular sentiment, if sufficiently developed to be comprehended. The plaintiff is a member of the English bar, and a former member of Parliament from one of the country constitu-

encies, where the election, thirty or more years ago, was contested by Sir FITZROY KELLY, the present Chief Baron of the Court of Exchequer. At the time of his promotion to the bench, his former competitor saw fit to present a petition to Parliament against the appointment, charging that Sir FITZROY KELLY, in some trial before a committee of the House of Commons, had been guilty of perjury, in denying all knowledge of or acquaintance with one person, who had canvassed for him during the election, and in doing so had been guilty of bribery—on which ground the return had been avoided. But the charge was promptly met by the Lord Chancellor and Lord ST. LEONARDS, who effectually vindicated the Lord Chief Baron from all suspicion of guilt, on account of the charge, showing, beyond all question, that the charge had been preferred, and clearly refuted, at or near the time the offence was said to have been committed, and that Mr. Wason had remained silent during all the previous stages of the learned Baron's promotion to be solicitor and attorney-general, until his call to the bench; and that the charge was now brought forward at a time and under circumstances, as it was claimed by those noble Lords, clearly indicating some wrong motive, and stating many facts and circumstances in confirmation of their views, which Mr. Wason naturally regarded as libellous.

But as members of the House of Lords were privileged for all words spoken in debate, the aggrieved party could obtain no redress in that quarter. But as the Times had published detailed reports of the speeches made by the noble Lords, and had inserted also leading editorial articles, extensively discussing the same grounds of defence against Mr. Wason's charges, and repeating, to a considerable extent, the charges which Mr. Wason regarded as libellous, he very naturally sought redress against the proprietor of the Times, to whom he did not suppose the privilege of Parliament could extend; or if by possibility it might be claimed to extend thus far, for any purpose, he expected it would, at all events, not be carried beyond that of giving a report of the actual proceedings in that body. What then must have been his disappointment, not to say consternation, to hear and feel the learned Lord Chief Justice hewing down and cutting away the very last timber in the platform upon which he felt that he stood so securely. One cannot help feeling a certain degree of sympathy,

if not of actual commiseration, for the sad condition in which the plaintiff thus unexpectedly found himself. And it seems, so far as we can judge from the newspaper reports in the case, to have operated so severely upon the plaintiff, at the time, as nearly to deprive him of that iron, not to say leaden, self-possession, which he preserved so imperturbably, until that critical moment—when all he could utter was, that he did not expect his Lordship to have given the jury any such charge, and he trusted it would not be regarded as disrespectful or out of place, that he should take exception to the same, and ask to have it revised, in banc.

But here again the redoubtable suitor, who seemed to have verified the truth of the maxim, applied to counsel who conduct their own causes, was so seriously embarrassed by the peculiar juncture of affairs, that he failed to make up any bill of exceptions to the charge (as given), which could fairly be construed as any objection to its most damaging and destructive current. For, after the learned judge had utterly demolished the entire superstructure of the plaintiff's case, the jury, instead of retiring and remaining out a reasonable time, so as to show at least some compunctious regrets at the utter lawlessness of the liberties accorded by the learned judge to the press—not only in the matter of parliamentary reports, but of commentaries thereon, however damaging or offensive to personal pride and self-respect: instead of this only decent regard for the plaintiff's embarrassed position, the jury did not retire at all, but after a deliberation of less than two minutes announced themselves as ready to give a verdict in the case, for the defendants, of course. All this transpired in less time than is required to write it, and long before the plaintiff had sufficiently recovered from his very natural surprise, not to say horror, at the perplexing circumstances by which he found himself surrounded.

And now, to cap the climax of his embarrassment, the noble and distinguished Lord Chief Justice of all England, instead of allowing the perplexed suitor time to recover himself, and draw up formal and effective exceptions to the terrific charge, required it to be done, *instantly*, and before the verdict should be delivered. This was, indeed, to require a man to go through the detail of a dress parade, not only in the face of the enemy, but at the very mouth of a battery of cannon, from whose fatal and

destructive discharge there could be no escape, either by advance or retreat. What wonder then that the exceptions should be found fatally defective ?

This is the more to be regretted, since the men of the press, although well satisfied to find in the chief judicial officer of the common-law bench of England so decided and unwavering a champion, would certainly feel more sure of their ground if the question had been so placed upon the record, as to enable the defeated party to carry it to the court of last resort. And it is even now competent for the learned judge to certify the main features of the charge, for revision by his brethren of the same court, where, if regarded as involving serious doubt, it would be sure to be ordered into the Court of Exchequer Chamber, and might readily be brought to the House of Lords, for final indorsement or reversal.

The main features of the charge were : That any publisher of a daily paper, or any other publisher, was justified in giving fair and faithful report of the proceedings and debates in either house of Parliament, and that no action of libel could be maintained for anything contained in such report, provided it were honestly and fairly put forth, for the *bonâ fide* purpose of giving information of what passed in Parliament. And that, as to leading articles, newspaper publishers had, to a certain extent, privilege of discussing such public questions, as they might fairly consider the public felt an interest in hearing discussed ; and in doing so they might put forth such views and maintain such constructions as they deemed just and right, and that they were not responsible for the entire and absolute truth and justice of all they might utter, provided they acted in good faith and without malice.

In the present case, the defendants having pleaded the general issue, and there being nothing before the court to show the truth of all the matters of fact contained, either in the report of what passed in the House of Lords, or in the defendant's comments in his leading articles thereon, it must be assumed that any portion of the same which was libellous might also be false. It could only therefore be justified upon the ground, that the defendant's privilege extended to the publication of all which passed in Parliament, and to such comments thereon and such repetition and amplification of such charges as come fairly within the scope of an editor and publisher, actuated by the honest and *bonâ fide*.