

COMMON SENSE

*versus*2
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JUDICIAL LEGISLATION;

BEING THE REVIEW OF A LAW RECENTLY
ENACTED BY THE SUPREME COURT
OF MASSACHUSETTS.

BY A LAYMAN.

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COMMON SENSE

versus

JUDICIAL LEGISLATION.



Not long since I had occasion to consult a lawyer in regard to making my will. I have not much to devise, but among my assets were a few shares of stock in a railroad. These I decided to put into the hands of trustees, with instructions to pay the "whole income" thereof during his life-time to Richard Roe, and transfer the shares on his decease to John Doe.

My professional adviser rather startled me by suggesting that the words "whole income" would not carry out my intentions with regard to my nephew Richard, if I wished him to enjoy all the earnings and profits divided by the corporation. Whereupon, thinking to clinch the matter, I replied, "Well, add the words 'and all lawful dividends.'"

My adviser shook his head. "'Whole income and all lawful dividends' would seem pretty strong," said he, "to the uninitiated, but we lawyers know better."

"Then add 'of every name and nature.'" Still my adviser was not content, nor was he satisfied till the clause read: "Whole income and all lawful dividends, whether the same be made in stock, scrip, or cash, and whether the same be styled capital by the Supreme Court of Massachusetts, or otherwise."

I was naturally curious to know why my professional friend found it necessary to employ so much rigmarole to express what Dr. Johnson and Dr. Webster told us could be expressed in two words. Turning to the first of the Doctors, I found that he defined "income" as follows: "Revenue; *produce* of anything." The second Doctor is a little more diffuse, but not less satisfactory. He defines "Income" as the "gain which proceeds from labor, business, or property of any kind; the produce of a farm; the rent of houses; the proceeds of professional business: the profits of commerce or of occupation; the interest of money or stock in funds, etc.; revenue; receipts; especially the annual receipts of a private person, or a corporation, from property; as a large income; a limited income."

So the word dividend is defined by Dr. Johnson,— "A share; the part allotted in division." McCulloch in his Dictionary of Commerce describes it as a word applied, among other things, to the "divisible profits of railways and other joint stock undertakings."

In using the words "whole income," therefore, I expressed the whole gain, revenue, produce, proceeds, profits, receipts from my railroad stock; and in using the words "all dividends," I expressed everything that might be "allotted in division" by the corporation, all its "divisible profits."

Armed with these authorities, which corresponded with the every-day use of the words in question, I called again upon my legal adviser, and begged him to explain to me why a man in his will and testament could not convey his ideas in the language that Johnson and Webster would have used to express them.

"My dear fellow," replied my friend, "those gentlemen were great lexicographers, but they were not

great lawyers or great judges. If the courts used words as they are used in the Dictionaries it would play the deuce with the lawyers — it would cut off more than half our business. You may think income means income — a pure mistake, my dear sir; half the time it means capital. You think dividend means divisible profits or divided profits or earnings, no doubt; but it means no such thing. Dividend sometimes means dividend, but sometimes it ‘accrues as capital.’ Mark the word; it is not capital, perhaps, absolutely, but ‘it accrues as capital,’ beyond a peradventure.”

Proceeding to enlighten me in the premises, he took down from his shelves a volume in sheep-skin, and opening it read me the following judicial exposition of words that I had been using so improperly: —

“If a fund, held in trust to pay the *income* to one until his death and then convey the *capital* to another, includes *shares* in the stock of a corporation, *shares* of additional stock *distributed* to the trustees as a *lawful dividend* thereon accrue as *capital*, although they represent *net earnings* of the corporation.”

My friend removed his glasses, and shutting the volume brought it down with a slap on his writing-table, exclaiming: “It’s of no use talking; this is the judgment of the Supreme Court of Massachusetts, and you see that as far as “income,” “earnings,” “dividend,” “capital,” “allotted shares,” and “distribution” go, it knocks Johnson, Webster, and McCulloch high and dry. Dictionaries, sir, are of no authority in a court of justice. Study this case, sir (and it’s well worth studying) and you’ll find that income is capital, earnings are capital, dividends are capital, allotted shares are capital, distributions are capital — and in-

deed, sir, I challenge you to find any word in the language that is intended to apply to the proceeds of capital, that under this decision may not mean capital, and nothing else."

"Well, this is odd," said I. "Pray lend me that book and let me read over this remarkable decision at leisure."

I took the volume home with me, and, sure enough, I found that my friend had read with due accuracy what the lawyers call the "marginal note," though it does not appear in the margin at all, but forms a sort of heading to the case. I have read somewhere that the best writers have been "perplexed with *notes* and obscured with illustrations," and I suppose this may happen to the best of judges. Leaving the marginal note, therefore, let me look a little into the case that thus upsets dictionaries and revolutionizes language, and for this purpose I have borrowed the use of my friend's library, and the aid of one of his students in placing the authorities before me. To these authorities I intend to apply only the light of such common sense as may remain to me after their thorough examination.

The case referred to is that of *Minot v. Paine and others*, reported in 99 Mass. 101, and decided by the Supreme Court of Massachusetts in the year 1868. The opinion of the court was delivered by the Chief Justice, and as there is no dissentient opinion it must be assumed that all the other judges were his accomplices in this conspiracy against the English language.

In this case a gentleman, acting as trustee under a will, found himself embarrassed with regard to certain stock dividends that had been made on shares of the

Western Railroad, and of the Chicago, Burlington, & Quincy Railroad. He could not for the life of him tell whether these dividends were income or capital, and instead of looking into his English Dictionary, or going into State Street to consult some clever man of business, he must needs post off to the Supreme Court, and ask six gentlemen on a bench to aid him in coming to a correct conclusion on a question that no human being, who understands English, ought to entertain any doubt about. The result is that a very easy question has become a very hard one, and the common sense of the rest of mankind is at variance with that of the Supreme Court of Massachusetts.

The plaintiff states in his bill that he is "in doubt whether said dividends of said shares, in said two corporations, are income of the trust fund to be paid to the *cestui que trust* or are capital to be retained by him and accounted for in the settlement of his trust." And he prays the court to direct him as to the true nature of said dividends of stock, and whether they are capital or income of the said trust fund, and as to the manner in which said trust in the particulars aforesaid may be safely and properly executed.

It was admitted by the pleadings that both "dividends" were lawfully made from the "net earnings" of the roads in question; so that there was no element in the case of watered stock or fraudulent distribution of capital. It was a question, pure and simple, of a *division of net earnings, made in stock, and not in cash*. Who on earth except these six judges could have decided that *net earnings lawfully divided* did not accrue to the party who was entitled to receive the income of this railroad stock?

Now I shall give the whole of the reasoning, inde-

pendent of authorities, by which the court arrive at this extraordinary conclusion, and I will then consider the authorities.

“The court,” says the Chief Justice, “do not regard the fact that the dividends were made from the net earnings of the road as material.”

Why not? If the net earnings of a corporation, divided among the stockholders, are not income to the stockholders, WHY NOT?

The court proceed to assign their reasons.

“The net earnings of a railroad corporation remain the property of the company as fully as its other property, till the directors declare a dividend.”

Granted. The court continue:—

“A shareholder has no title to them prior to the dividend being declared.”

Granted. The court continue:—

“In most of our prosperous railroad corporations, the directors apply a considerable portion of their net income to the laying of additional tracks, the building of new depots, the increase of their rolling stock, and sometimes to the purchase of land which they deem important to the accommodation of their business, or to other permanent improvements of the road; and they have discretionary power to do so.”

Granted again. The directors have a discretionary power to invest net earnings in permanent improvements; and they have also a discretionary power to issue acknowledgments of indebtedness, and to make dividends in stock, to represent and repay the money thus borrowed and invested.

“It is true that they may abuse their power, and refuse to make any dividends, though their net income may be large; and apply their funds to the permanent improvement of the road, and thereby deprive a life tenant of all benefit from the shares, and reserve the whole income for the benefit of the remainderman.”

But when they do not abuse their power, but make

lawful dividends of their net earnings like honest men, does the fact that the directors might commit an abuse and do not commit it — justify the court in committing the abuse themselves ; that is, in interfering to “deprive the life tenant of all benefit from the shares” and “reserve the whole income for the benefit of the remainderman.” What would have been an abuse of “discretionary power” becomes thus an abuse of judicial power, and the tenant for life is robbed under color of law. The court continue : —

“But in the present case it is not alleged that there has been any abuse of power ; and it need not be decided whether, in case of such abuse, the trustee can protect the interest of the tenant for life in any other manner than by selling the shares and investing the trust fund in some other way by which he can obtain a reasonable income.”

A question that does not arise in a case not only “*need* not be decided,” but with due deference to the six judges, we have always understood that such a question *cannot* be decided. But if it does not arise in the case, how does the discussion of it help to the court’s conclusions ?

But now we are coming, I suppose, to a question that does arise in the case : —

“It is obvious that, if the directors had made no stock dividend, but had invested the income in permanent improvements, making no increase of the number of shares, the improvements would have been capital, belonging to the legatees in remainder.”

No. We have not yet reached the questions that arise in the case. We admit that income *not divided* but applied to improvements, becomes capital, and goes where the capital goes. But we are having to do now with *income that is divided*, and we contend that income *divided* belongs just as clearly to the beneficiary of the income, as income *capitalized* accrues

to the beneficiary of the capital. But we shall get to the questions in the case by and by. The court continue: —

“So, if they had thus *invested* it, and, instead of increasing the number of shares, had increased their par value, the shares would have been mere capital and not income, as to the shareholders, though increased in value by the application of the net income of the road to that purpose.”

Certainly. Nobody has ever pretended that profits *not divided* could in any manner become *income* to the life-tenant. But how it follows from this that profits lawfully divided cease to be income, taxes our ingenuity to see. But that we shall find in the next sentence.

“So, when they increase the number of shares, each share of all the stock in the corporation is *in its nature* capital.”

The reasoning indicated by the “so” culminates in this absurdity. If the directors had not divided their net earnings, those earnings would have been capital; but inasmuch as they have divided them, they remain only in the *nature* of capital. But things change their nature, and division changes the nature of capital — making income of it. Here it is net earnings — so admitted. It is lawfully divided — so emphatically declared. Now if we are to talk of the “nature” of things instead of talking of things themselves, would it be putting too fine a point on it to say that net earnings lawfully divided are infinitely more in the nature of *income* than in the nature of capital? But let us continue to quote what in deference we must call the *reasoning* of the court: —

“The new shares take their place among the old ones; and each of the old shares thereby becomes a less proportion of the whole stock than it was before, and is entitled to a less proportion of

dividends declared than it was before. It may be that dividends are less per cent. than they would otherwise have been, and in such case the old stock is diminished in value, and the interest of the remainderman is injuriously affected. But, on the other hand, the effect may be, by increasing the business of the roads, to increase the dividends and the market value of the old stock."

Now let us see how much substance there is in all this talk about "proportion" and "number?" What matters it to me if my share is one out of one hundred, or one out of two hundred, if the value of the share remains the same? If I am interested in a capital of one hundred shares, how does it injure me to have that capital increased one hundred shares, while my interest represents the same amount of property? If I receive one hundred dollars a year from railroad stock, what difference is it to me what fraction denominates it — whether it is one half of two hundred or one tenth of a thousand? Here is something that is intended to represent argument, or reasoning, and people who busy themselves with words instead of substance may be imposed on by it. It amounts to nothing, and the court admit it; for while they throw out these ideas about "proportion," they confess that the "proportion" is immaterial, for after all the disturbance of proportion the dividends may be larger than ever, and the market value of the old stock increased.

"But," the court continue, "neither courts nor trustees can investigate *such matters* with accuracy; and in many cases no investigation can be made."

What matters? The matters immediately referred to are the relative amount of dividends, whether they are increased or diminished, and the market value of the stock. Now if there is anything that a trustee might ascertain without much very laborious investi-

gation, it is the amount of dividends and the market value of the Western Railroad, or the Boston & Albany, or of any other such corporate security as would find its way into a trust. But why should trustees or courts investigate such matters at all? Why should not they be content with the action of directors, without going behind it, and accept their "lawful dividends" of "net earnings" as conclusive? If there is fraud, that can be reached in another way.

But the court continue:—

"A trustee needs some plain principle to guide him; and the *cestuis que trust* ought not to be subjected to the expense of going behind the action of the directors, and investigating the concerns of the corporation, especially if it is out of our jurisdiction."

Well, what plainer principle to guide him could a trustee have than that which prevailed before this upset of the law? What could be plainer than the rule to give to the beneficiary of railroad income the *lawful dividends* made by the corporation? But now we are coming to the gist of the matter, and the *new law*.

"A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital."

"A simple rule!" The rule is indeed a simple one, and the court are right in claiming for it no other merit. But there are some elements in a rule of law more valuable than mere simplicity. It is more important that a law should be wise than that it should be simple. The simplest of all governments is an absolute despotism. The simplest mode of dealing with a Gordian knot is to cut it. But would it not have been equally simple to say that all lawful dividends of a corporation shall go to the beneficiaries of its income? The remainderman will enjoy the benefit of

all the cash and stock dividends made in his day — why should not the life tenant have the same privilege? Why insist upon accumulation for a remainderman, when the intent of every devisor who leaves the “whole income” of a property to a life tenant is unquestionably that he shall enjoy all the “lawful dividends.”

“A simple rule!” A very terse, crisp, laconical statute! And this is what has carried away the Chief Justice and the court. A rule that is capable of being expressed in such a clever, antithetical way, if it is not law, ought to be law, or there is no virtue in well-balanced periods.

“Cash dividends, *however large*,” are income. A corporation may sell half its property and make a cash dividend of fifty per cent.; the trustee must shut his eyes and hand it over to the tenant for life. It is cash. “Neither courts nor trustees can investigate such matters.” It is a very suspicious case. The rights of remaindermen are in the way of being annihilated, and everybody knows it. The trustee knows it, without inquiry or investigation. And yet in order that the trustee may enjoy the benefit of a “simple rule” he has nothing to do but pay up. This is simple enough, but is it wise, or is it just?

“Stock dividends, *however made*,” are capital. Let us see how that works practically. For a series of years the Reading Railroad, one of the most substantial corporations in the country, used its net earnings in the purchase of new lands and new roads, and made its regular semi-annual dividends in stock. A widow lady of my acquaintance, who unfortunately lives within Judge Chapman’s jurisdiction, has no other provision for her support than that derived from

a legacy of Reading stock, left in trust by her late husband, the income to be paid to her during her lifetime, with remainder to a remote relative of the testator. Her only interest is in the income, and the stock is left specifically to the remainderman so that there can be no change of investment. The following table from "Poor's Railroad Manual" will show the pecuniary condition of this lady since the passage of this law:—

DIVIDENDS OF THE PHILADELPHIA AND READING RAILROAD.

	Cash.	Stock.	Optional.
January, 1863		7	
December, 1863		7	
November, 1864		15	
December, 1865			10
July, 1866			5
December, 1866			5
July, 1867	5		
January, 1868		5	
July, 1868		5	
January, 1869		5	
July, 1869		5	
January, 1870	5		
December, 1870	5		

Down to January, 1868, the trustee as a matter of course cashed the stock dividends, and paid over the proceeds to the beneficiary of the income. But before the July dividend was payable, Mr. Chapman and his associates had made their new law. If the trustee of this lady followed the mandate of this law, he withheld the July dividend, promising of course to account for the income of the dividend on the next payment. But in January, 1869, there was nothing in the way of income, for the dividend was only stock on the stock, and no better luck next time! In July 1869, there were stock dividends three deep, but no

cash. For a year and a half there was no income for the widow — the rule of the court was inflexible — “stock dividends, however made, capital!” In January, 1870, she began to see daylight again. Meanwhile the capital has been increased two or three hundred shares, and the shares are at a market value larger than they were in 1866: hence the remainderman will receive an amount of property that was never bequeathed to him, and the widow will struggle on through the inevitable embarrassments occasioned by the loss of a year and a half’s income, taken from her most unjustly by a decision of the court that deprives her of the intended bounty of her husband.

But there is a column in this table that will teach our court that the “simple rule” to which they consider the trustee entitled has only plunged him into difficulties where even the court cannot help him. Supposing it plain enough, the direction to keep the stock, and pay over the cash, — what is our trustee to do with the third column of the table? It seems that railroads sometimes make their dividends payable in stock *or* in cash at the option of the stockholder. Now what is the trustee to do? If he takes the dividend in stock, he must retain it for the remainderman. If he takes it in cash, he must pay it over to the beneficiary of the income.

Here is a real difficulty introduced by the new law. Mr. Minot will have to make up another case, to know what is to be done under these circumstances. Pray, Mr. Chapman, how do you understand your own rule? Cash, income; stock, capital. But you can have it either way; how is it then? The trustee is no more bound to take it one way than another; he is not called upon to exercise his option in

favor of either one or the other of the "successive takers." Is such a dividend in the "nature" of capital or in the "nature" of income; or does it beat all nature to tell what the nature of it is? Can Mr. Chapman tell?

Laconics and antitheses are very good things in their way, but a statute book of laconics and antitheses would probably prove the greatest of curses, as far at least as we can judge from this notable attempt of the Supreme Court of Massachusetts. The jingle was irresistible; "cash dividends, *however large*, as income; stock dividends, *however made*, as capital." Clever as a play on words, but as law not much. Again, however, to the opinion:—

"The court are of opinion that this rule is more in conformity with the legal and equitable rights of stockholders than any other that has been suggested. It is also in conformity with the decisions of this court, so far as the subject has been considered."

I have stated a case under each branch of the rule, which shows that its operation is by no means uniformly equitable either to the remainderman or the life tenant. As to the prior decisions of the court, a single word. *Reed v. Head*, 6 Allen, 174, decides that the dividends of a land company, although they are composed partly of capital, belong in all cases to the tenant for life. *Minot v. Paine*, the case now under review, decides that lawful stock dividends of a railroad corporation, though they are composed exclusively of net earnings, belong in all cases to the remainderman. In the one case, capital is treated as income; in the other, income is treated as capital. How far such cases may be said to be in "conformity" with each other casuists may discuss. In the case of *Atkins v. Albree*, 12 Allen, 359, there was no ques-

tion of "net earnings" or "lawful dividends." It was a mere question of the increase of shares, and of the right to take the shares; a division not of *accumulations*, but of *possibilities* or *opportunities*. At all events it is not this case but another case, or the court would have had nothing to do but to rely on it.

Passing over the review of the authorities in the Opinion, I will proceed to the winding up, which is "illustrated" by the principle of the case of *Pratt v. Pratt*, 33 Conn. R. 446. In that case, the court held that where the directors were about to invest their income in the erection of new buildings and machinery, and enlarge their business within the limits of their chartered authority, a case was not made for equitable interference by injunction in favor of a minority of dissenting stockholders. Chapman, C. J., continues:—

"This case [*Pratt v. Pratt*], illustrates the principle applicable to the present case. The money in the hands of the directors may be income to the corporation; but it is not so to a stockholder till a dividend is made; and, where the company invest it in buildings and machinery, or in railroad tracks, depots, rolling-stock, or any other permanent improvements, for enlarging or carrying on their legitimate business, it never becomes income to the shareholder. The investment becomes an accretion to the capital; and it is equally so whether they increase the number of shares, or the par value of shares, or leave the shares unaltered. Or if the number of shares is increased for purposes merely speculative, it is an increase of capital stock, and not of income; and it would be practically unwise for courts to go behind the action of the company and attempt to ascertain how they came by the funds out of which they declare either cash or stock dividends."

That is to say; if the Boston & Albany Railroad should sell out half its rolling stock and half its real property, and make a cash dividend of fifty per cent., it would be "practically unwise" for courts or trustees to inquire into "such matters." Why, what are

courts and trustees made for? It being but a "cash dividend" only, "however large," the remainder-man may go to the wall. But if the Reading Railroad or any other railroad makes a lawful dividend of its net earnings, it is practically "wise" for the court to take notice of the "nature" of the funds it divides; and to say that if it is one kind of funds it shall go to the tenant for life, and if it is another kind of funds it shall go to the remainderman. And all this because courts and trustees cannot investigate "such matters!"

As to the rest of this paragraph, we have seen something very like it a few pages back. It does not acquire much additional force by repetition, so it does not require another commentary. This mode of reinforcing an argument is well described in the satirical distich: —

"He gives his opinion, —
Says it again aloud, says he has said it and goes."

But the court have a word more to say, before they go: —

"As the corporation is the legal owner of the property, and has power within the limits of its charter, to give to the shareholders either an increase of income or an increase of capital out of the money in its hands, according to the discretion of its directors, it would seem to follow that an increase of capital should be kept for the remainderman, and an increase of income should be paid to the tenant for life. This rule appears to be in conformity with the intention of the testator who gives personal property in this manner. He is held to have the interest of the successive takers equally in view."

Now there is a good deal muffled up here in words. Let us unmuffle it, and read the proposition as it stands when we use the very words appropriate to the expression of the things intended.

“As the corporation is the legal owner of the property, and has power within the limits of its charter to give to the shareholders ^{income in cash or an income in stock} ~~either an increase of income or an increase of capital~~ out of the property ~~money~~ in its hands, according to the discretion of its directors, it ^{income in stock} ~~would seem to follow, that an increase of capital~~ should be kept for ^{income in cash} the remainderman, and an ~~increase of income~~ should be paid to the tenant for life.”

But the “income” in the case before the court is given to the tenant for life; and the will makes no distinction between income in cash and income in stock. The court see this difficulty, and the income in stock, — admitted to be income, derived from net earnings, the legitimate source of all income — and lawfully divided as income (division giving the shareholder a title to what he only had a right to before), is christened “capital” and as capital reserved for the remainderman;

“And if we cannot alter things,
By G-d we'll change their names, sirs.”

But there is a concluding paragraph to this remarkable opinion: —

“The equitable rights of the *cestuis que trust* will thus coincide with the legal rights of the legal holder of the stock, who holds his shares as his capital, and his cash dividends as his income from that capital. As to him, a stock dividend is an accretion to his capital; and there is nothing to show that the testator intended that it should be otherwise as between the successive takers of his bounty.”

How do the court know judicially that the “legal holders” hold their stock dividend as capital? We know otherwise. Old Screwentight, I am aware, holds his stock dividends as capital, and as for that he holds his cash dividends in the same way; for it is just as easy to hold cash for capital, as it is to hold

shares. On the other hand, Young Makeitfly cashes his scrip or shares the moment he gets them, and makes income of every dollar. He is a "legal holder," but there is not much accretion to his capital from his stock dividends, though the court judicially determine that he "holds" them as capital. Unlike both of them my Aunt Dorothy salts down one half of her scrip for a rainy day, as "capital," and cashes the rest. So, it is impossible to say with truth that "legal holders" treat their stock dividends as capital, and that therefore the court are justified in regarding the stock dividends of equitable holders in the same light.

We make no unfair summary of the reasoning and conclusions of the court, therefore, when we say that they may be thus expressed: —

I. Earnings of corporations not divided but invested in property are *always* capital; therefore, net earnings lawfully divided are *sometimes* capital.

II. *Cestuis que trust* are always liable to have their whole income from a corporation invested and reserved by the directors for the benefit of the remainderman; therefore, when the directors do not reserve this invested income for the benefit of the remainderman, the court will!

Leaving at this the reasoning of the court, I shall now notice briefly the array of authorities, foreign and domestic, that are relied on to sustain their reasoning, and form a basis for this extraordinary judgment.

And here the first thing that strikes us is the apparent anxiety of the court to escape from the only case that in any wise sustains their views. This case is *Brander v. Brander*, 4 Ves. 800. The court con-

demn it as “*unsatisfactory* to the profession and to the English courts.” Again, the court say that the case and the principle it rests on are unsatisfactory, “and there is no reason why we should follow it.” None in the world. And yet if the court have not followed *Brander v. Brander* till it has led them into a slough of despond, we should like to know what they have followed. In that case the Bank of England had made an extra dividend in stock. The question was, whether that stock was income to the life tenant, or capital to the remainderman; and Lord Chancellor Loughborough held that it belonged to the remainderman. This was the whole of it. Wherein does it differ from *Minot v. Paine*? It runs on all fours with it. There is nothing to distinguish it.

I do not desire that this should rest on my own statement. Read what Sir Samuel Romilly says *arguendo* in *Paris v. Paris*, 10 Ves. 184: “The distinction between this case and *Brander v. Brander* and that of the Bank of Scotland, is, that in those the bank has not divided a sum of money but had given *stock*.” “In *Brander v. Brander*, and all the previous cases, the division was of *stock*.” “The reasoning in *Brander v. Brander* is singular. Through the whole of that case a great anxiety against the tenant for life appears. It is difficult to suggest the ground for that. Clearly, by making these extraordinary dividends the bank have not made the half yearly dividends they might have made.” “There is nothing in the will indicating that profit of this kind should go to the capital.”

Now the case of *Brander v. Brander*, which has been kicked and cuffed by all the courts in England and this country, and is repudiated by the Supreme

Court of Massachusetts itself, is the only ghost of an *authority* for the decision in *Minot v. Paine*. That case is supported by *Brander v. Brander*, and it is supported by nothing else; for there was no question made in *Minot v. Paine* as to cash dividends. The only question was as to stock dividends, and that was the question decided in *Brander v. Brander*.

In *Paris v. Paris* there had been an extra dividend of the bank in cash, and Lord Eldon decided on the authority of *Brander v. Brander*, that if an extra dividend in stock was capital, it must be equally capital if made in cash. "As to the distinction between stock and money," said his lordship, "*that is too thin*. It would be too dangerous to distinguish this case upon these distinctions." And though he did not like *Brander v. Brander* any better than the Massachusetts court like it, he followed it because to him it was an authority. The Supreme Court of Massachusetts have followed it without any such excuse.

It will be noted that the whole of the extraordinary rule of the Supreme Court, "cash dividends, however large, income; stock dividends, however made, capital," rests entirely on the distinction which Lord Eldon repudiates as untenable, "thin," and "dangerous."

The court review a series of English cases for the purpose of showing that *Brander v. Brander* is an "unsatisfactory" case, and in this aspect it is not necessary for us to say more of these cases than that, with their aid, the court have succeeded completely in establishing that they ought not to follow it.

But now I will follow the court into the American cases. Two New York cases are cited, *Clarkson v. Clarkson*, 18 Barb. 646, and *Simpson v. Moore*, 30

Barb. 638. The paragraph in which they are commented on commences with a slur on their authority, as not being decisions of the "highest tribunal" in the State. It is balanced, however, by a compliment at the close: "These *cases* do not differ from the *views* we have expressed." Another hocus-pocus in the use of language! New York and Massachusetts then are at one on this question, unless similar views may lead naturally to different conclusions. If these "cases" do not differ from the "views" of Judge Chapman, it must be because they row one way and look another. Let us see how this is.

The Massachusetts court give a very blind statement of *Clarkson v. Clarkson*. It was held in that case, according to Mr. Justice Chapman, that "extra dividends were to be regarded as profits, but bonds or certificates given by a railroad for the purpose of consolidation with another road were capital, and belonged to the remainderman."

Now it was not decided in *Clarkson v. Clarkson* that "extra dividends were to be regarded as profits." There was nothing in the case to instruct the court, except inferentially, whether the extra dividends were profits or not. The court said that shares of additional stock distributed to the trustees as dividends were income and not capital. So far from deciding that the extra dividends were profits, they said expressly that if the payment of extraordinary dividends had impaired the capital, such capital should be restored by additions from such dividends. And here the court made no distinction between dividends in stock and dividends in cash.

Nor does *Clarkson v. Clarkson* say that "bonds and certificates given by a railroad for the purpose of con-

solidation with another road were capital and belonged to the remainderman." This statement with regard to the bonds and certificates seems to be made purposely in a manner to convey no intelligible idea. The idea conveyed, as far as such language can convey any idea, is that the court somehow or other recognized a distinction between cash and other representatives of value; or that the bonds and certificates were capital because they were scrip of some sort and not money. They were in fact withheld from the tenant for life, not because they were bonds and certificates, but because they were issued to equalize values, and not as dividends of net earnings.

But let us give a more intelligible statement of what was decided in this "case," which does not differ from the "views" of Chief Justice Chapman. What were the facts? A testator devised a certain property in trust, with direction to the trustees to pay over the interest, dividends, and proceeds of two shares of such property to his two daughters for their life, remainder over. In 1846 the trustees invested from the fund in their hands \$12,600 in the stock of the Utica & Schenectady Railroad Company, by purchasing one hundred shares thereof at \$126 a share; and in 1853 they invested the further sum of \$6,000 in the capital stock of the Mohawk Valley Railroad Company, by purchasing sixty shares of its stock at par. The annual dividends were duly paid over. In December 1850, however, there was paid to the trustees on the shares of the Utica & Schenectady Railroad Company an extra dividend of sixty shares in the capital stock of the said company at par. In May 1853 a consolidation of the Utica & Schenectady Railroad Company, the Mohawk Valley Railroad Company, and

other railroad companies took place, and a new corporation was created and styled the New York Central Railroad Company. In the new company the trustees received two hundred and twenty shares corresponding to the number they then held in the old corporations, and as the shares in the Central were less valuable than the shares in the old companies, the difference was liquidated in bonds and certificates of the Central, to the nominal amount of fifty-five dollars a share.

The court held that the sixty shares distributed as an extra dividend in December 1850, belonged to the daughters as tenants for life; and all the dividends, bonds and certificates issued upon those sixty shares, were to go with them. The other bonds and certificates, which were only issued to make the new stock as valuable as the old, and which were not paid to the trustees as interest, dividends, or proceeds, still remained what they always had been — capital.

Is it a fair and honest statement of this “case,” then, to say that it does not differ from the “views” of *Minot v. Paine*? The one holds that stock dividends are always capital, and can never belong to the tenant for life, even if they are made lawfully from net earnings. The other holds that lawful dividends are always income, and go to the tenant for life. Or, to put it more briefly: the New York “case” holds stock dividends *income*; the Massachusetts “views” hold stock dividends *capital*. Now do or do not these “views” differ from that “case”?

Minot v. Paine holds that a cash dividend, “however large,” ought to go to the tenant for life, because trustees and courts cannot “investigate such matters accurately.” It does not care whether a dividend is or is not made from “net earnings,” if it is only made

in money. The cash supersedes inquiry, and covers all defects. *Clarkson v. Clarkson* holds that if dividends are so large as to impair the capital of a trust fund, when such a case comes before the court, the court will send it to a referee, and compel the tenant for life to make up the deficiency, and that whether the dividends are paid in cash or in stock. Does not this "case" differ in this respect from the "views" of Mr. Justice Chapman?

I assert with confidence — there is not a single point in the New York "case" which agrees in any respect whatever with the "views" of the Massachusetts case. Abandoning the jargon of the Chief Justice, and condescending to the accurate use of language, the views of the two cases are diametrically opposite. There is nothing in the reasoning or in the results of the one that does not differ *toto cælo* from the reasoning and the results of the other.

So with *Simpson v. Moore*, 30 Bar. 637. In this case, says Chief Justice Chapman, "the subject of the bequest was bank stock. The charter of the bank expired, and a dividend of eighteen per cent. was declared, with an option to stockholders to invest it in a renewed charter. It was held that the dividend was profits, except so far as it impaired the capital. So far as it did that it was directed to be retained as capital, and the balance to be paid to the tenant for life." This "case," we are told, does not differ from the "views" of the Massachusetts court.

Are these then really the "views" of Chief Justice Chapman? A cash dividend of eighteen per cent. was declared, on winding up its affairs, by a certain bank; it was a dividend, you will observe, and it was cash. What is the rule of *Minot v. Paine*? "Cash

dividends, however large, income!" This rule clearly enough would have given the whole dividend to the tenant for life; and this direction of it would have been probably right. The modern cases hold that dividends, extra dividends, and bonuses, — which the English courts, under *Brander v. Brander*, gave reluctantly to the remainderman, — belong to the tenant for life. *Simpson v. Moore*, in a sort of split-the-difference spirit, authorizes an inquiry as to where the money came from; whether or not the payment of it impaired the original capital; an inquiry which *Minot v. Paine* peremptorily repudiates as unwise and impracticable. If Chief Justice Chapman, therefore, really thinks that his "views" do not differ from the "case" of *Simpson v. Moore*, he must have very loose ideas as to what his views really are; for surely if *Simpson v. Moore* is right, *Minot v. Paine* must be wrong. But on this point *Minot v. Paine* is perhaps right. Cash divided is dividend; dividend is income. The absurdity arises when the Chief Justice undertakes to say that stock divided is not stock dividend; stock dividend is not income, even when made from net earnings.

We are a little surprised that the court do not venture to say that their "views" are the same as *Earp's* "case," reported in 28 Penn. R. 368. In this case, says Chief Justice Chapman, "the capital stock was increased by the creation of new shares. A dividend of the shares was made, and they were paid for out of the profits of the business. It was held that the additional shares should go to the legatee for life as income." "But in that case," adds the Chief Justice, "the fact that the corporation has within the limits of its charter, the power to withhold dividends, and use

all its funds in such a way as merely to increase its property, is not discussed." The old story, "Still harping on my daughter!" The question in the case was not in regard to what the corporation *withheld*, but what it divided. The Chief Justice cannot get it out of his head that, if the corporation has the power to withhold dividends of profits, and does not withhold them, the courts ought to come to the rescue of the remainderman. Of what use would it have been to discuss a question that did not arise in the case? It is too much the habit of judges to discuss everything but the point before them.

In *Earp's* case certain parties were entitled to receive during their respective lives "the rents, income, and interest" of his residuary estate, which consisted in part of 540 shares of stock in the Lehigh Crane Iron Works. At the time of Earp's death, in 1848, the stock had increased from a par of \$50 to the value of \$125 a share. This increased value was ascertained by an actual sale of 40 shares by the executors. In 1854 the surplus of profits had largely increased, and it was divided among the stockholders by cancelling the old certificates for 540 shares granted to Earp, and issuing new ones to his executors to the number of 1,350, each of the value of \$80. The Orphans' Court held that the value of 540 shares in 1848 was the principal of the trust, represented in 1854 by 844 shares of the new stock at the diminished value. This number of shares it was decreed that the executors should retain in trust; and the remaining 506 shares they were ordered to distribute and pay to the parties entitled to the income under the will. From this decree both parties appealed.

The Supreme Court of Pennsylvania on the appeal

affirmed the decree of the Orphans' Court. The principal, they decided, was the value of the stock at the decease of the testator, which represented the original capital and the accumulated profits at that time. And they held it equally clear that the additional profits represented by 506 shares of the new stock — including profits to the amount of \$40,500 — were the "rightful property" of the beneficiaries of the income. "The managers," the court say, "might withhold the distribution of it for a time, for reasons beneficial to the interests of the parties entitled. But they could not, by any form of procedure whatever, *deprive the owners of it and give it to others not entitled.* The omission to distribute it semi-annually, as it accumulated, makes no change in its ownership. The distribution of it among the stockholders in the form of new certificates, has no effect whatever upon the equitable right to it. It makes no kind of difference whether this fund is secured by 540 or by 1,350 certificates. Its character cannot be changed by the evidences given to secure it. Part of it is principal, the rest is 'income,' within the meaning of the will. . . . Standing upon principle and upon the intent of the testator, plainly expressed in his will, we have no difficulty whatever in making this disposition of it."

And now let us hear what the court say with regard to the distinction between stock and cash, a distinction so important in the eyes of the Supreme Court of Massachusetts that they hold all cash dividends, "however large," as income, and all stock dividends, "however made," as capital:—

"The distinction between an extra dividend paid in stock, and one paid in money, was repudiated by Lord ELDON in *Paris v. Paris*. If he was correct in this, his decision in *Barclay v. Wain-*

wright, 14 Ves. Jr. 76 (in 1807), must be understood as overruling *Brander v. Brander* and those which followed it. Be this as it may, however, it is very certain that these objectionable decisions, made since the Revolution, are not authorities in Pennsylvania, and as they *cannot be supported upon any just principle we have no excuse for adopting them as part of our law.*"

The Pennsylvania Supreme Court, it will be seen, not only repudiate *Brander v. Brander*, but reverse its law; whereas the Supreme Court of Massachusetts repudiate the decision and incorporate it in the law of Massachusetts.

There remain a few words to be added in reference to the interests protected by *Minot v. Paine*, and the practical advantages claimed for it by the court. Nobody would have suspected from this review that this case was decided altogether in the interest of the *cestui que trust*. Yet such is the fact. "The *cestuis que trust*," says Justice Chapman, most benevolently, "ought not to be subjected to the expense of going behind the action of the directors, and investigating the concerns of the corporation, *especially if it is out of our jurisdiction.*" I should think if a *cestui que trust* had any brains he would be anxious to get as far out of "our jurisdiction" as possible, regardless of expense. Bless your benevolent heart, it is not the action of "directors" that the *cestui que trust* wishes to "go behind," *it is the action of the court.* The directors in this case do not "withhold," it is the court. The directors, who may be guilty of all possible frauds in "refusing to make dividends," are acquitted by the court of any abuse of power in this respect. *They make the dividends*; it is the court that is guilty of the abuse of power, by withholding from the beneficiary of the income the *net earnings lawfully divided*. It is an ingenious way of saving a

man "expense" in the pursuit of his property, to give it outright to somebody else. Similar tenderness in Earp's case would have cost the *cestuis que trust* \$40,500, but then it would have saved them the expense of asserting their rights.

To save "expense" to the *cestui que trust*, then, being one ground of this decision, to save "trouble" to the trustee and the court is another ground. A trustee needs some "plain principle" to guide him, no matter what else it may be if it is only plain. Courts and trustees must be saved the trouble of "investigating such matters." Again we ask, what are courts and trustees made for, if not precisely this very thing? If the principal of his trust is running to waste by improvident division of *capital*, instead of "*net earnings*," it is the duty of the trustee to investigate it, and perhaps to call upon the court to investigate it also. It is what trustees are doing all the time, and I know no good reason why they should not continue to do so. But as for a "plain principle" to guide them, what plainer principle could trustees have than that of paying over to the beneficiary of the income all the income accruing from a property without regard to the form or manner in which it is lawfully divided? It is the court that has muddled a plain principle by undertaking to introduce a plainer one.

It is a noticeable thing in this judgment, the haste and the very slight reflection with which it was rendered. The bill was filed on the third of December; the case was submitted on the bill and answer, without argument, to plain Judge Chapman, who reserved his decision for consultation with the court. Meanwhile the judge had been made chief justice, and in the March term the first thing that signaled his

advent in that character was the resuscitation of *Brander v. Brander*, from which the English courts had been seeking for seventy years to emancipate English jurisprudence. And maliciously enough, his associate judges let the new Chief Justice have his own way without dissent. It would have looked very uncourteous to dissent from the first opinion of the Chief Justice, particularly when his "views" did not differ from the New York "cases," and would have coincided no doubt with that of the Pennsylvania courts, if an important feature in their case had not entirely escaped the consideration of the Pennsylvania judges and the Philadelphia lawyers.

Another thing to be observed, or rather repeated, is, that the question with regard to cash dividends, on which the Chief Justice has laid himself out, and cited so many cases, and declared himself so emphatically, is a question that does not arise in *Minot v. Paine*. Even the doubting trustee in that case did not seek to know what he should do with cash dividends; he knew that well enough already. It was, therefore, quite a work of supererogation to consider that question at all. Nobody but a trustee or a remainderman could have imagined that there was anything in it.

It may not be superfluous to add that with the exception of trustees and remaindermen, I have not yet found the first person who is satisfied with this decision. The lawyers whom I have conversed with talk of it in the cautious language which lawyers are in the habit of using when they criticise contemporary judges. To one it was a "disappointment;" to another a "surprise;" and a third went so far as to say that it was a "surprise to the *profession*." All avowed that

in their practice they had always regarded dividends as dividends, and advised accordingly. As to the ingenious idea of income "accruing" as capital, and of its conversion into capital by a *tour de force* in the use of language, they confess that it had never occurred to them. They do not see it yet; but express the intention of acting upon it for their own safety till the law is again changed. As a court capable of making such a decision is not likely to change it, and as judges are apt to be unnecessarily long-lived, it would seem indispensable for the legislature to intervene and to reënact the definitions of "income" and "capital" that are given by the standard lexicographers. Many years ago even the mediæval Lord Eldon expressed an apprehension that the courts could not escape from *Brander v. Brander* without the aid of an act of parliament. An act of the legislature is now necessary to deliver Massachusetts from it.

The substance of the whole matter is this. Between the 3d of December, 1867, and the March term of 1868, while the legislature of Massachusetts were in session, six gentlemen justices came together, and on the suggestions of a Bill and Answer in equity, without any argument, and obviously without much deliberation or reflection, *enacted* a very stringent, very important, and entirely novel law, on the pretence of *declaring* the law in a given case. They passed a law to the effect that henceforth the lawful dividends of net earnings of all corporations, foreign or domestic, whose shares are held in trust in Massachusetts, shall be called capital, unless they are paid in cash. They have done the very thing that the Supreme Court of Pennsylvania said could not be done by any form of procedure whatever; they have deprived the owners

in a thousand cases of their property, and have given it to others not entitled. This has been done when there is no case in the English courts, or in those of the United States, except the repudiated case of *Brander v. Brander*, and the cases which follow it, that furnishes any manner of precedent or pretence for the decision that creates this new law. To apply the rule of those cases to "cash dividends" in this country, says Mr. Justice Chapman, would be "unreasonable and absurd." To apply the rule of those cases in its extreme rigor to "stock dividends," he holds to be wise and rational. But a dividend is a dividend, or was before the passage of this law; and what microscopic eye is searching enough to detect, and what language is subtle enough to express, such a difference between a dividend in greenbacks and a dividend in other representatives of value, as will render the rule in the one case unreasonable and in the other case the perfection of reason? If such difference is justly held to exist, how thin must be the partition that separates ABSURDITY from LAW!

BOSTON, *January* 10, 1871.

THE END.