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POWER OF PROVINCIAL LEGISLATURES TO ENACT STATUTE AFFECTING THE RIGHTS OF NON-RESIDENTS. A REPLY TO SOME OF MY CRITICS.

By C. B. Labatt.

I. *Introductory.*

An article of mine dealing with the powers of Provincial Legislatures in respect of the enactment of statutes affecting the rights of non-residents was published in the Canada Law Journal of Sept., 1914. Most of it was devoted to a discussion of the views of three writers concerning the same subject. In one of the sections I replied to some comments which Mr. Masters had made (Canada Law Journal, April 1, 1914), upon an earlier article (Canada Law Journal, Feb. 2, 1914). In the other two I discussed certain theories which had been advanced by Mr. Lefroy in the *Law Quarterly Review*, and by Mr. Ewart in the *Canadian Law Times*. From all these gentlemen my article has evoked rejoinders which the pressure of other work has hitherto prevented me from noticing. The exceptional importance of the judgment of the Privy Council in *Royal Bank* v. *Rex*[1], with reference to which the controversy has been carried

[1] [1913] A.C. 283.

on, is an ample warrant for some additional discussion both of that case itself and of the questions of constitutional law which it has incidentally raised. In the present article, therefore, I propose to analyse the arguments and theories of these critics, whose views, it may be premised, are essentially different to mine in almost every respect.

But before I take up this part of my task I wish to acknowledge gratefully the support accorded to me by the letter signed "G. S. H.." which was inserted in the November issue of this Journal p. 583). This writer has shewn very clearly by a simple and readily comprehensible illustration the preposterous consequences to which Mr. Lefroy's theory would lead, if carried to its logical conclusions. Mr. Lefroy denies the pertinency of the illustration. This was only to be expected. The question is one which the readers of the letter and his rejoinder must determine for themselves, with such assistance as I may be able to render in the present article.

II. *Discussion of Mr. Masters' criticisms*

In the CANADA LAW JOURNAL, November, 1914 (p. 556), Mr. Masters again argues in favour of the doctrine which he put forward in his earlier article, and which I criticized in the article of which this is a continuation, viz., that the Alberta Act discussed in *Royal Bank* v. *Rex*, might properly have been held *ultra vires* even if the proceeds of the sale of the bonds had been situated in Alberta. He says:—

> "It must be borne in mind that this is not the case of an Act that may be *ultra vires* in part and *intra vires* as to the remainder. It is a single provision relating to specific property and must either be entirely within or beyond the competence of the legislature. That being so the simple proposition is this: The Act cannot be both *intra vires* and *ultra vires*. It is *intra vires* as dealing with property; *ultra vires* as to civil rights out of the province. Which is to govern? My opinion is that in such a case it would be *ultra vires*."

In this passage it seems to me Mr. Masters is relying upon a principle which has no application to the circumstances supposed. The Alberta Act was not a law "relating to" the "civil

rights" of the bondholders. It related merely to their "property," and its operation in respect of their rights was merely an incidental and necessary consequence of its operation with regard to that property. For practical purposes no doubt the results are the same, whether a statute relating to the property of non-residents does or does not purport specifically to deal with their rights also. But from the standpoint of constitutional law it makes all the difference in the world, whether such a statute affects those rights directly or merely consequentially. The Alberta Act was by its terms applicable simply to the fund derived from the sale of the bonds. It made no reference whatever to the rights of the purchasers themselves. It simply ignored those purchasers except in so far as they were of necessity alluded to for the purpose of furnishing an intelligible description of the subject matter with which the Legislature was undertaking to deal. Mr. Masters is apparently of the opinion that, if the situs of the fund subscribed by them had been in Alberta when the statute which declared it to be a part of the Provincial revenue was enacted, it would have operated directly upon their rights in the same sense as if it had contained a provision expressly referring to these rights. Upon this point I still disagree with him, and shall continue to do so until he is able to produce some specific authority for his opinion. In my former article I referred to two cases which seemed to me to be, so far as they went, precedents distinctly favourable to my view of the meaning of the clause of the B.N.A. Act which is under discussion. Mr. Masters distinguished these cases upon the ground that "in both the legislation was admittedly within the competence of the legislature." But is not this precisely the situation which exists when a Legislature undertakes to make a certain disposition of property which is then in the Province, but belongs to non-residents? A statute of the scope indicated is "admittedly within the competence of the Legislature" so far as the property is concerned, and to me it seems perfectly clear that its operation in respect of the rights outside the

Province is as purely incidental as was the operation of the statutes under review in the cases which Mr. Masters denies to be relevant. He proposes the following test of his theory:—

"Assume that in *Royal Bank* v. *Rex*, the bondholders had been resident in the Province and the property in Montreal. In that case the legislation would have dealt with civil rights in the Province and with property out of it, the converse of the position on which this discussion is based. Can we say that the Privy Council would have upheld the legislation in these circumstances?"

In my opinion they certainly would have upheld it. But the situation supposed is not really the converse of that involved in *Royal Bank* v. *Rex*. It is one in which the argument in favour of constitutionality would really be much stronger: for the Legislature having control of the persons owning the property would be dealing with their rights in precisely the same manner as a court deals in the ordinary course with suits involving the right of litigants in regard to property which lies beyond its jurisdiction. Under these circumstances a court adjusts those rights by acting *in personam*, not *in rem*. It would surely be going very far to argue that the B.N.A. Act should be construed in such a manner that, under the supposed circumstances, the powers of the Legislature would be of narrower scope than those normally exercised by judges. These considerations, I need scarcely say, are independent of the deduction which I should draw from the general principle on which I have been insisting, viz., that a statute relating to a subject-matter with which a Legislature is authorized to deal cannot be pronounced invalid on the mere ground that it affects consequentially another subject-matter over which the Legislature has no jurisdiction. If this principle is accepted, there will manifestly be no ground upon which an enactment of the tenor suggested by Mr. Masters could be annulled.

The statement in my former article that "the rights acquired by a non-resident shareholder as a result of an assignment, pledge, or testamentary disposition of shares in a Provincial company" are rights outside the Province, is still con-

sidered by Mr. Masters to be erroneous. He adheres to his theory that "no rights of a shareholder can be enforced elsewhere than in the Province of its origin." He deals seriatim with each of the transactions just mentioned; but for the purposes of the present discussion, it will be sufficient to quote what he says with regard to an assignment:—

"Take the case of a shareholder assigning his shares and wishing to assert his rights against the assignee. Would he be asserting the rights of a shareholder? Clearly not, for by the assignment he ceases to be a shareholder in respect of the shares assigned. He would thereby proceed to enforce the contract for a transfer of property made with the assignee. The position is the same in proceedings by the assignee."

The assertion here made, that "by the assignment, the shareholder ceases to be a shareholder" is, of course, correct only with regard to a contract which operates so as to pass the legal title completely to the assignee, leaving the assignor with a mere right of action for the recovery of the purchase price. If it is one of an executory nature, the assignor retains the legal title, and I do not perceive upon what ground it can be argued successfully that his remedial rights against the assignee are not the rights of a shareholder, or that they are not susceptible of enforcement "elsewhere than in the Province of the origin of the company." From the latter part of the passage quoted, as well as from the remarks which follow with regard to the consequences of a pledge or testamentary disposition of shares, I presume that, in Mr. Masters's opinion, a satisfactory and adequate answer is supplied by the conception that an assignor, when he asserts his remedial rights, is acting not as a shareholder, but merely as the owner of a certain piece of property which happens to consist of shares. But the doctrine that there is an essential distinction between the rights of a shareholder *quâ* shareholder, and the rights of a shareholder as a person dealing with shares as property is one which I must decline to accept, until some specific judicial authority for it has been produced. I am unable to see any rational basis upon which such a distinction can be predicated. It appears to me, more-

over, to be inconsistent with the language used in a very instructive New York case which I cited in the earliest article in which I discussed the powers of Provincial Legislatures (CANADA LAW JOURNAL, Feb. 2nd, 1914, p. 144).[1] Mr. Masters will, I suppose, readily concede that the highest respect is due to a decision rendered by one of the ablest courts in a country in which, owing to the large number of separate jurisdictions into which it is divided, questions of private international law are discussed much more frequently than in any part of the British Empire. In the first sentence of the extract quoted from the judgment, it is laid down that, "in legal contemplation the property of the shareholders is either where the corporation exists or at his domicile, accordingly (*sic*) as it is considered to consist in his contractual rights, or in his proprietary interest in the corporation."[2] That Mr. Masters read some of my article is apparent from the fact that he has commented upon it. Did the part in which I referred to this New York case escape his notice? Or had he forgotten it, when he was writing the passage upon which I am now commenting? Or does he dissent from the doctrine laid down with regard to the situs of shares and the contractual rights of shareholders? If he considers that doctrine erroneous, it is at least incumbent upon him to state the ground upon which he bases his opinion and to support it by the productio[n] of an authority not less weighty than this New York case.

III. *Further comments upon Mr. Lefroy's theory as to "civil rights in the Province."*

In his letter, which was published in the December number of the CANADA LAW JOURNAL, Mr. Lefroy has, I observe, made no reference to the point which I placed in the forefront of my criticism of his views with regard to the meaning of the expres-

[1] In *Re Brorson*, 158 N.Y. 1.

[2] A comparison with the language used in the latter part of the extract shews clearly that the alternatives in the second clause are placed in the wrong order, and that the expression, "proprietary interest" really corresponds with the words, "where the corporation exists."

sion "civil rights in the Province," viz., that the phraseology of the clause of the B.N.A. Act in which these words occur was "chosen with reference to the familiar rules of private international law which rest upon the distinction between the situs of substantive rights incident to property and the property to which those rights are incident." The essence of my argument in this connection was, of course, that, although the mere right to institute an action is unquestionably a "civil right," and consequently may *by possibility* have been one of the rights contemplated by the framers of the B.N.A. Act, that expression is preferably construed as embracing only those rights which are usually designated by the term "substantive." It seemed to me that this theory as to the meaning of the expression is more likely to be correct than one which could bring within its scope those purely "adjective" rights which, in the final analysis, cannot be said to have any independent juristic existence apart from the "substantive" rights to which they have relation. Which of two possible constructions of a statute is the more reasonable is doubtless a matter upon which there is always room for a difference of opinion. That Mr. Lefroy would not agree with my construction of the clause in question is shewn by the rest of his letter. But it is to be regretted that the readers of the JOURNAL should, as a result of his having entirely ignored what I said, be deprived of the privilege of learning what are the reasons for his disagreement. Is his silence upon this point due simply to a consciousness that, under the circumstances, an attempt to turn my position would be a more suitable manœuvre than a frontal attack?

But I need not say anything more with regard to this aspect of the controversy between us, for, in my opinion, it is quite clear that even if we assume for the purposes of the argument that "adjective" as well as "substantive" rights are within the purview of the clause in question, his position that *Royal Bank* v. *Rex* was wrongly decided is untenable. The general doctrine upon which he relies is thus formulated in his letter:—

"Neither Mr. Labatt, or G. S. H., answer my question—'What is a civil right except a right to invoke and set in operation the machinery of the Civil Courts, directly or indirectly, to gain some debt, or recover some advantage, or restrain some who is endeavouring to do so?' I must say I have never found any one who can answer this question."

It is submitted that the definition of a "civil right" which is offered in this passage is not, as its author considers, so indisputably accurate that only one answer can be returned to his question. On the contrary, it is obvious that, if phraseology of the description here used by Mr. Lefroy is adopted for the purpose of explaining the juristic nature of such a right, his words must be modified and supplemented in such a manner as to bring out clearly the essential point, that the existence of a "substantive" right is predicable only in cases in which a claim or defence can be *successfully* maintained upon the grounds alleged. From the above statement as well as from those in which he had previously explained his views it is apparent that, in forming his conception of a "civil right" he failed to distinguish clearly in his mind rights which are merely "adjective" from those which are "substantive." This is the cardinal error which vitiates the whole of his reasoning.

I think I am warranted in supposing that, if his definition be taken as it stands, and applied to the particular facts presented in *Royal Bank* v. *Rex*, it commits him to a doctrine of this purport and scope: Where a banking company organized and having its headquarters in one Province carries on business in another, and is consequently liable to be sued there, the right of action corresponding to that liability is a "civil right in the Province" in such a sense that it is competent for the Provincial Legislature to enact a statute to the effect that a specified person shall be entitled not only to institute an action against the company, but also to recover judgment and enforce it, although, at the time when the statute is enacted, the property with respect to which the action is to institute is in the custody of the company at its home office, and is claimed by a non-resident of the Province in which the statute is enacted, whose substantive

rights, apart from the operation of the statute, are admittedly superior to those of the person authorized to institute the action. The fundamental flaw which such a doctrine involves is so obvious that Mr. Lefroy's failure to perceive it is somewhat surprising. A statute which, either by its express terms, or by necessary implication therefrom, provides both that a certain person may institute an action, and also that it shall be determined in his favour, manifestly deals with two entirely distinct rights, viz., an "adjective" and a "substantive" right. Under the B.N.A. Act, a Provincial Legislature undoubtedly possess what may for the purposes of the present discussion be assumed to be an unlimited power in respect of authorizing the institution of actions in the Provincial courts. A statute by means of which this power is exercised has relation to a merely "adjective" right, the situs of which cannot possibly be in dispute. But if the Legislature undertakes to go further, and to declare that the person authorized to institute the action shall be successful therein to the extent of recovering the property which is the subject-matter of the proposed litigation, the statute is one which relates to a substantive right, and, if the property, or an interest therein, is claimed by a third person, its validity will obviously depend upon the situs of the property in question and of the right of the rival claimant. The conclusion seems to be unavoidable, that a theory of "civil rights" which ignores this aspect of the matter and its controlling importance must be unsound. Indeed, I cannot resist the temptation of suggesting that such a theory and the deductions drawn from it with respect to the decision of the Privy Council cannot be more aptly characterized than by the elegantly classical phrase, "fine flower of confused thinking," which Mr. Lefroy deems to be an appropriate description of portions of my own reasoning.

"I thank thee, Jew, for teaching me that word."

Assuredly it is only a very pronounced access of the malady of "confused thinking" that could have incapacitated my critic from realizing that the power of a Provincial Legislature to

regulate the disposition of property and substantive rights appertaining thereto is not in all cases a necessary consequence of its power to regulate the merely "adjective right" of instituting an action, or to use his own words, "invoking and setting in operation the machinery of the Civil Courts." His failure to appreciate the distinction between the two categories of civil rights, or at all events to perceive its decisive significance in any discussion of the Alberta statute, is all the more remarkable, as that distinction is constantly recognized and acted upon in ordinary judicial proceedings. Both of the parties to such proceedings are assumed in every instance to possess the "adjective" right of submitting their claims or defences to the arbitrament of the court. But manifestly it is only the successful party who can be said to possess a "substantive" right in respect of the subject-matter of the litigation.

In the general language of the two statements in which Mr. Lefroy had expounded his doctrine prior to the time when I first undertook to criticise it (see CANADA LAW JOURNAL, Sept., 1914, pp. 480, 481), I do not find any words which indicate that he then appreciated the difficulty created by the fact that the Alberta statute dealt not merely with the "adjective" right of instituting an action in the Province, but also with the "substantive" right of the English bondholders to recover the trust-fund in question. I surmise, however, that since the time when he wrote these earlier statements, it may have occurred to him that the difficulty raised by the considerations to which I have been adverting must be provided for, if his theory of "civil rights" is to be sustained; for in the paragraph of his letter which follows the passage already quoted from his letter he says:—

"My position, therefore, is simply this: The lenders in London, so far as they had a right to sue the Royal Bank in Alberta, had a civil right in Alberta, and in like manner, so far as the Attorney-General of Alberta had a right to press his action against the Royal Bank in Alberta, he had a civil right in Alberta."

The latter clause of the sentence is no wise open to objection; but it is submitted that the theory propounded in the former is

wholly erroneous. Mr. Lefroy's words can apparently bear but one meaning, viz., that in his opinion the fact that a person residing in England, but having property or interests in a Canadian Province, is *potentially* entitled to bring an action in that Province for the purpose of asserting some claim in respect of that property or those interests involves the consequence that the situs of the right of action is in that Province, even though he may have taken no active steps to assert his claim. My own view is, that the situs of his right is in England, as long as he continues to reside there, or at all events, until he has appointed an agent in the Province for the purpose of bringing the action. The conception to which apparently Mr. Lefroy's theory must be referred if it is to be sustained, viz., that a right of action is a sort of right in gross, having a juristic existence which is so far separable from the possessor, that it has a situs in each and every jurisdiction in which an action may be brought by him for the enforcement of an obligation, seems to me so highly anomalous that I must respectfully decline to accept it on the unsupported authority of Mr. Lefroy. I confess I do not see how such a conception can be reconciled with the general principle of private international law, to which I had occasion to refer on p. 487 of the article which Mr. Lefroy is here criticising, viz., that "the locality of a debt is at the domicile of the creditor."[1]

Mr. Lefroy remarks that I "seem to think that no one can have a civil right in a Province, unless he himself is domiciled in that Province." If for the term "domiciled"—which is manifestly out of place in this connection—he will allow me to substitute the words "unless he himself is actually resident in the Province, or is represented there by an agent expressly appointed for the purpose of asserting the right by legal proceedings," I have no objection to adopt this statement as being ex-

[1] The authority which I cited for this doctrine was *In re Goodhue* (1872), 19 Grant's Ch., p. 454, where Strong, V.-C., relied upon *Sill* v. *Warwick* (1791), 1 H. Bl. 665, 660. For a general discussion of the subject, see Wharton on Conflict of Laws, 3rd ed., p. 171 (§ 80—c).

pressive of my position. The reasons why I think myself to be justified in not receding from that position are apparent from what I have said in the preceding paragraph. My view is simply that the words "civil rights in the Province" must be construed with reference to what, so far as I am aware, is a recognized principle of private international law, viz., that the situs of rights, both "substantive and "adjective," is determined by the place of residence, actual or constructive, of the person in whom they are vested.

The two remaining criticisms of my article which I find in Mr. Lefroy's article do not seem to call for any special observations. Their effectiveness depends entirely upon whether his general theory as to the nature of a "civil right in the Province" is or is not correct. The grounds upon which I regard that theory to be unsound have been already stated, and the readers of the Journal may be left to form their own opinions regarding the comparative weight of the arguments put forward by Mr. Lefroy and myself.

As "G. S. H." may at some future time desire to resume the controversy, I shall not undertake any detailed analysis of Mr. Lefroy's rejoinder to his letter. But one of the points which Mr. Lefroy emphasizes in his attempt to distinguish the case stated by "G. S. H." from *Royal Bank* v. *Rex*, has such an intimate relation to some of the remarks which I have made in the present article that it may be advisable to refer to it briefly. He says:—

> "In the imaginary case which 'G. S. H.' supposes, Mr. A. B.'s agent would be able to quite truly say that he had no money when the demand was made by the Provincial Treasurer, and what is more important, that he owed no debt; *but the Royal Bank was not in a position to say that it owed no debt.*"

The final clause of this sentence—(the italics are my own)—is somewhat ambiguous. If it means that the Royal Bank owed a debt to the railway company at the time when the statute in question was passed, I dispute the correctness of the statement. At that time no part of the money which the bank was directed to

pay over to the Provincial Treasurer had been earned. This is manifest from the report of *Royal Bank* v. *Rex*. Indeed, it may safely be said that, if the bank had "not been in a position to say that it owed no debt," to the railway company, the litigation must have had a different ending; for under the general principle of private international law to which I have already referred the situs of the debt could have been in the place of the residence of the creditor, the railway company, and the Legislature would clearly have had power to direct the debt to be paid to anyone whom it chose to specify. If, on the other hand, Mr. Lefroy means that the bank owed a debt to the bondholders, and that the powers of the Alberta Legislature to require the debt to be paid to the Provincial Treasurer was predicable on the ground that the situs of their corresponding right of action in respect of the recovery of the debt was in the Province, we are simply brought back to a question of law, with regard to which, as will be apparent from my previous remarks, his views and my own are conflicting.

IV. *Mr. Ewart's refutation refuted.*

Before I discuss the main portion of Mr. Ewart's rejoinder to my comments upon the arguments by which he undertook to demonstrate the unsoundness of the decision in *Royal Bank* v. *Rex*, it may be advisable to refer briefly to the singular complaint which he puts forward in the first paragraph of his article. (CANADA LAW JOURNAL, Nov., 1914, p. 560). These comments of mine are, it seems,

> "not a reply. They are an unwitting (no doubt) misrepresentation of my criticism, and an unpardonable attack upon myself. Why the latter I am at a loss to say. I have not the honour of Mr. Labatt's acquaintance, and I have never made any allusion to him. His article would have remained without notice but for my unwillingness that the profession should be left without explanation of what he has thought proper to say about me."

I confess I do not understand on what theory an attempted refutation of legal doctrines deemed to be erroneous can be regarded as an "attack" upon the propounder of those doctrines.

It seems to me—and I presume the same view is generally held and acted upon—that the published opinions of a person who discusses such doctrines are no more immune from criticism than those of any other description of writers. If Mr. Ewart chooses to enter the controversial arena, he must, I suppose, take his chances of adverse comments from anyone who happens to disagree with him, and thinks it worth while to state the grounds for his dissent. Under such circumstances it is the arguments of the opponent that are "attacked," not the opponent itself. If I used some emphatic language about Mr. Ewart's theories, I was merely exercising a right ordinarily conceded to a critic who is dealing with statements which seem to him erroneous and reasoning which he considers to be fallacious. Nor do I see the relevancy of the fact that Mr. Ewart and I were not "acquainted" with each other before my article appeared. It certainly never occurred to me that a prior "acquaintanceship" was a necessary qualification for the task I undertook in writing that article. It is clear, however, that, so far as the future is concerned the matter is no longer of any practical importance. The article complained of may possibly have violated some code of etiquette which, without my knowledge, was applicable to the situation; but by its publication our "acquaintanceship" in a literary point of view—which is, I suppose, the only sort that Mr. Ewart has in mind—has been duly formed; and no doubt I may now, without shocking his sense of propriety, avail myself to the full of such privileges as the ceremony of introduction has conferred with regard to freedom of speech.

It is alleged, in the first place, by Mr. Ewart that what he designates as my "foundation mistake" is that I "took his article [in the *Canadian Law Times*] as a discussion of the meaning of the phrase, 'civil rights in the Province.'" Considering that the article was a criticism of a case which was decided with reference to that phrase, the "mistake" was, to say the least, venial. Mr. Ewart contends that the case was wrongly decided. Does not such a contention necessarily involve a "discussion" of the meaning of the phrase? It would, I suspect,

puzzle most people to discover a ground upon which a writer whose position is, that the constitutional limitation defined by the expression "civil rights" was improperly declared by the Privy Council to be a controlling element in the case can be said to have abstained from such a discussion. It may be that Mr. Ewart merely intends to deny that he contemplated a general discussion of the phrase in question. If this is what he means, I need say no more than that the denial is, so far as I am concerned, quite superfluous. But it would be unprofitable to dwell any further upon this phase of our controversy. For the purposes of the present article, I am quite content to accept his latest explanation regarding the real nature of his position, and to restrict my comments to the specific points which he now draws attention.

His theory, as now defined, seems to be simply this—that, even if the construction placed by the Privy Council upon the phrase "civil rights in the Province" was correct, its decision was erroneous for two reasons, viz., that the subject-matter of the Alberta statute was *intra vires* under the clause regarding the passage of laws in relation to "local works and undertakings," and that, as it was valid in this point of view, the circumstance that it affected "civil rights outside the Province" was immaterial. (See p. 561 of his article.) Mr. Ewart complains that I took no notice of his former argument in this regard. The reason why I did not make any special reference to it ought, I think, to have been perfectly obvious to anyone who had read my article. My fundamental position was that the situs of the proceeds of the bonds which were the subject-matter of the litigation was still in Montreal when the Alberta statute was passed. The facts as reported seemed to me to warrant this position. It may or may not be correct, but it was clearly entertained by the Privy Council—a consideration which, I confess, weighed quite strongly with me, however slight may be its significance in Mr. Ewart's view. As long as I held this opinion it would clearly have been a work of supererogation to discuss the argument upon which Mr. Ewart lays so much stress. The

power of the Legislature to deal as it saw fit with the property and undertaking of the railway company in the Province was, of course, indisputable; but it seemed to me to be equally indisputable that this power could not be so exercised as to affect the disposition of money which, in my view of the circumstances, had not yet become the property of the company and was still outside the Province. Under my theory the right of the company in respect of this money was merely inchoate and conditional, and by consequence the money itself was totally disconnected from the "local work and undertaking" at the time when the statute under review was passed. This explanation will shew not only the reason why I did not refer to this part of Mr. Ewart's argument, but also the reason why I was not at all impressed with the dilemma which he so triumphantly propounded in one of the sentences which he now deems it worth while to quote from his former article:—

"If under that heading [*i.e.*, local works and undertakings] all the rights of the bondholders, everywhere, to enforce their purchased bonds can be absolutely cancelled and destroyed, how can it be said that, acting under the same head of jurisdiction, the Legislature cannot deal with the railway and its assets in Alberta, in such a way as will incidentally deprive the bondholders of a right anywhere to cancel their purchase."

It is submitted that the consequences which Mr. Ewart assumes to be deducible from the predicament thus adverted to are far from being obvious. To me it appears simply to furnish an illustration of a doctrine which I have never questioned, viz., that the validity of a Provincial statute which is otherwise *intra vires* is in no wise affected by the circumstance that it prejudices the rights of persons outside the Province.

I am also charged with having ignored the argument which Mr. Ewart deduced from the circumstance that the specific point of law upon which *Royal Bank* v. *Rex* ultimately turned, viz., the right of the bondholder to demand the restoration of the trust-fund after the purpose for which the money was raised had been materially altered by the action of the Alberta Legislature had neither been properly raised by the pleadings, nor

adequately discussed at the hearing before the Privy Council. I own I cannot comprehend why he attaches so much importance to this phase of the controversy. It may be presumed that, if the counsel for the Province had deemed it desirable to ask for an adjournment of the hearing for the purpose of enabling them to consider the point, they would have done so, and that their request would have been granted as a matter of course. If they did not make such a request, the reasonable inference is that the decisive effect of the new element thus introduced into the case was immediately appreciated by them. When the point was once suggested, its relevancy was perfectly manifest, for it simply involves the application of an elementary principle of equity to the facts presented by the record. Contrary to Mr. Ewart's contention the decision relied upon by the Privy Council is, so far as its essential aspects are concerned, perfectly simple and intelligible. His insistence on this feature of the case is all the more singular, because it manifestly furnishes a strong argument against his theory that the Judicial Committee is an incompetent tribunal, so far at least as appeals from Canadian courts are concerned. That a member of that body should have been able at the eleventh hour to suggest a controlling point which had till then escaped the notice of all the learned counsel engaged on both sides, is a fact which we should scarcely have expected a critic holding his views to dwell upon.

He makes a truly astonishing comment upon what I said with regard to the imperfect character of the dilemma suggested by him, viz., that, if the Alberta Legislature had no power to pass a law disposing of the proceeds of the bonds, that fund could not be made the subject of such a law at all, the Dominion Parliament being clearly incompetent to deal with it. My suggestion was that, as the fund was deposited in the head office of the Royal Bank in Montreal, it was within the jurisdiction of the Quebec Legislature. Mr. Ewart endeavours to make out that this statement is inconsistent with another which I made elsewhere, to the effect that, in the view of the Privy Council, "the special account opened in favour of the railway company at the

Edmonton branch of the Royal Bank was retained under the control of the head office."[1] Upon what ground he regards these statements as contradictory I do not understand, unless it be that he considers that the effect of the memorandum was to transfer the situs of the fund to Edmonton. But as my position has always been, that there was no such transfer, it is clear that he has construed my second statement in a manner not justified by anything that I had said. In my point of view the situation resulting from the "retention under the control of the head office" was precisely the same as that which I intended to describe by the words "subject to the jurisdiction of the Quebec Legislature. This theory of the situs may or may not be correct; but Mr. Ewart is certainly not warranted in ascribing to my language a meaning which it manifestly does not bear, in order that he may have the satisfaction of convicting me of inconsistency. He then proceeds, still assuming that, on my own showing, the fund was situated in Edmonton, and not in Montreal, to argue that my statement to the effect that the Quebec Legislature would have been authorized to dispose of the money "in the same manner" as the Alberta statute, virtually committed me to the position that that Legislature had power to pass a law containing all the provisions of the statute by which the control of the money was transferred to the Province. Surely,

"these are but wild and whirling words,"

For a term appropriate to indicate the connection which is here traced between my own remark and the deduction which he draws I really feel constrained to resort to the vocabulary of that profound expositor of the law, the First Gravedigger in

[1] He remarks that the words "in favour of the railway company" are erroneous, because the memorandum, the memorandum which the bank gave the Provincial Government, stated that the money was "to the credit of the Province of Alberta—Alberta and Great Waterways Railway special account—in the Royal Bank of Canada." I must acknowledge that my language was not strictly correct. When I wrote the sentence I was thinking rather of the ultimate destination of the money than of the channel through which it was to reach the railway company. But the error, such as it is, does not in the least affect the argument, the essence of my position being that the situs of the fund was in Montreal, not in Edmonton.

"Hamlet." The reasoning which is supposed to confound me utterly is precisely the kind to which his clincher, "argal," is adapted. To everybody but Mr. Ewart I suppose it will be quite obvious that, when I spoke of a similar disposition of the fund, I simply meant that any money which is deposited in a bank in Montreal might be appropriated by the Quebec Legislature for the benefit of the Province, or even, *pace* my critic, for the protection of persons in the position of the depositors. Even he will scarcely go to the length of denying that, *if* the money was so deposited—and that is my contention—this Legislature would have been acting within its powers, if it had solved the controversy between the Province of Alberta and the bondholders by the enactment of a statute, declaring that the proceeds of the bonds should be returned to the persons who had subscribed for them.

In the paragraph which follows this marvellously inept specimen of an attempted *reductio ad absurdum* we find this statement:—

"If Mr. Labatt be correct in asserting that the decision of the Privy Council really was influenced by 'the circumstance that the special account was retained under the control of the head office,' he has furnished us with another example of the 'handicaps' under which their Lordships labour in applying their attention to Canadian cases. Every Court in Canada knows that there is no part of the work of a bank agency which is not under the control of the head office. And no Court, therefore, would hold that the situs of a fund could depend upon whether cheques were to be honoured under general instructions from the head office. If, according to the memorandum given by the bank the bank to the government (in the present case) the fund was in Edmonton, what possible effect upon its situs could the nature of the general or special instrument from the head office to the local manager have as between the bank and the government?"

The first emotion excited by a perusal of this passage was one of profound chagrin. Is it possible, I asked myself, that, in my well-meant advocacy of the Privy Council, I have blundered so deplorably as to disclose a hitherto unsuspected proof of its incompetency as a Court of Appeal for Canadian cases? But presently I perceived that the situation was really not so bad as Mr. Ewart suggests. I received much comfort from the reflec-

tion that it is in the whole unlikely that the Privy Council should have made any serious mistake as to the incident of a banking system which is modelled upon that of Scotland, and which, in respect of such a detail of administration as Mr. Ewart refers to, is probably not very dissimilar to that of England. But the thought that finally relieved me of all uneasiness was, that the "control" mentioned in Lord Haldane's judgment was something essentially different from the control which is usually exercised by a bank with regard to money which is committed to its custody. An ordinary deposit merely creates the relationship of debtor and creditor between the bank and the depositor. But the arrangement under which the bank became the custodian of the proceeds of the bonds manifestly operated so as to render it the trustee of the bondholders for a special purpose, viz., the payment of portions of this money from time to time, as it was earned by the railway company. The Edmonton branch was merely its agent in respect of this function, and, if the railway work had progressed in the manner contemplated, each particular instalment that became payable would have remained under its control until the accounts had been passed and the money ascertained to be payable. As matters stood, it is perfectly clear that the head office would have been chargeable with a breach of trust if it had allowed any part of this fund to pass out of its direct control, until the railway company was actually entitled to receive it. That it never was so entitled is conceded. Hence the situs of the fund when the Alberta statute came into force was the same as it had been from the time when it was deposited in the Royal Bank at Montreal. This is an aspect of the matter which obviously had not occurred to Mr. Ewart when he wrote the passage quoted above. Let me invite him to consider it now. I venture to think that his failure to appreciate the all-important fact that the proceeds of the bonds constituted a trust-fund, not an ordinary deposit, goes far to justify the assertion in my former article, that his original criticism of *Royal Bank* v. *Rex* was "merely a superstructure of unsound doctrine, erected upon a basis of misstated facts."

Before I leave this point, it may not be amiss to suggest that the history of the negotiations leading up to the arrangement with reference to which the decision under review was rendered indicates quite strongly that it was the deliberate intention of the bondholders to ensure that none of their money should come within the jurisdiction of the Alberta Legislature until it became due and payable in respect of work actually performed by the railway company. For such caution on their part it is undeniable that the contents of certain notorious statutes which had previously been enacted in more than one of the Provinces afforded an ample justification.

Mr. Ewart next offers a notable suggestion—(or shall we say insinuation?)—in the following passage:—

"The real reason for the decision of the Privy Council is not hard to find. The statute interfered with the contractual position of the bank in a way had to justify—unless by the use intended to be made of it: and the Privy Council was probably influenced by feelings which Mr. Labatt himself entertains."

The latter part of this statement alludes to a remark of mine to the effect that I should like to have found in the B.N.A. Act some provision which was susceptible of being construed in such a manner as to entail the invalidation of laws relating to property in the Provinces, whenever it should appear that they affected rights outside the Provinces. After quoting this remark he continues thus:—

"Whether the prohibitions of the United States constitution work beneficially or not, I do not know, but I feel no hesitation in saying that, while our constitutions remain as they are, the Courts ought not to permit themselves to be influenced by the impolicy or impropriety of our statutes."

Mr. Ewart, therefore, intimates that, in deciding *Royal Bank* v. *Rex*, the Privy Council grossly violated its judicial obligations to the extent of allowing its conclusions to be influenced by the "feelings" which he assumes to have been created in the minds of its members by the confiscatory nature of the Alberta statute. It is not surprising that unworthy motives should, upon a purely hypothetical state of facts, have been ascribed to a tribunal by a gentleman who has undertaken such a preposterous

crusade against it. But the charge needs no other refutation than its own absurdity.

Of course, Mr. Ewart still adheres to his main position that the Privy Council is incapable of dealing with Canadian appeals.

"I do not question the ability of the Court. I merely say that, being unfamiliar with local conditions, and local methods, and local expressions, it cannot as well qualified as our Supreme Court to deal with Canadian cases."

As a conclusive demonstration of incapacity, he then refers to the "black list" of erroneous decisions which he has exposed in the *Canadian Law Times*. He reminds us, moreover, that these represent only a portion of the mistakes that have been perpetrated by the Privy Council. It is scarcely necessary to say that I do not agree with the views expressed in this portion of his article any more than I do with those upon which I have already commented. To me it seems not unreasonable to take the ground that, even after full allowance has been made for the alleged drawbacks under which the Privy Council is declared to perform its duties, his own opinions are, on the whole, less likely to be correct than judgments deliberately rendered after careful hearing at which that court receives every assistance from Canadian counsel. The system of jurisprudence which prevails in all the Provinces except Quebec is fundamentally the same as that of England, and the preferable supposition seems to be that neither statutes nor modified social and economic conditions can introduce into Canadian cases any local factors which are beyond the comprehension of a tribunal composed of English judges. At the opening of such a case the members of that tribunal may be, and no doubt usually are, ignorant of all the factors of this description which may be involved. But as the arguments on both sides are developed the nature of those factors is fully explained: and if after the explanation their significance is still imperfectly appreciated, one may safely assume that they belong to some category which should not be recognized at all in a court of justice. In fact it may fairly be contended that an initial ignorance of such factors is distinctly

an advantage to litigants in this respect, that it ensures a total freedom from those subtle prepossessions which are apt to influence the minds of the most able and impartial judges who are called upon to decide cases which excite a good deal of general interest in the community. Considered in this point of view, that very ignorance of Canadian affairs which Mr. Ewart imputes to the Privy Council is calculated to inspire confidence rather than distrust in its judgments. A controversy determined by jurists of ample practical experience, who consider the law and the facts with the intellectual detachment of college professors forming an opinion in regard to the soundness of abstract doctrines, may well be said to have been determined under ideal conditions.

By way of refuting my charge that he had launched, against the Privy Council what I described as "sweeping censures and rhetorical diatribes," Mr. Ewart quotes the language of certain distinguished persons, notably Lord Haldane, with regard to the unsatisfactory state of the Supreme Court of Appeal. But language which merely imports that that court is not as good as it might be, and ought to be made better, certainly cannot be adduced as a justification for the indiscriminate attacks of a critic whose position seems virtually to be that the Privy Council is more likely than not to be wrong, when it reverses the decisions of Canadian courts, and who in the very article upon which I am commenting has intimated that, in *Royal Bank* v. *Rex,* it has wilfully distorted the law for the purpose of obviating what it regarded as an unjust consequence of the exercise of legislative powers. If it is not only incompetent, but even capable of such an enormity as is thus imputed, it is clearly unfit for its duties. It must be "reformed altogether" in order to be properly qualified to review cases from the Overseas Dominions.

But as a considerable period must elapse before the changes which Mr. Ewart would regard as being necessary under the circumstances can be carried out, he may perhaps deem it desirable that some temporary means should be devised by which the stream of bad law which he believes to be flowing constantly

from Downing Street should be stayed. Possibly he would himself consent, for the benefit of Canadian litigants, to act as an instructor of the Judicial Committee with regard to those local matters which he deems it to be incapable of understanding. To find a suitable appellation for such an instructor would perhaps be a little difficult. But this is a mere detail. The main point is that the court should receive the necessary information. One naturally thinks of the familiar expression, *amicus curiæ*. But the suggestion that it should be used to designate the advisory functions of a gentleman whose feelings with respect to the Privy Council are so unmistakably hostile as those which have inspired his criticisms upon it might lay me open to the charge of sarcasm—an imputation which is preferably avoided in the discussion of so serious a matter as the reinforcement of that tribunal.

C. B. LABATT.

JUDICIAL CHANGES IN ENGLAND.

A large section of the legal profession in England deplores the retirement of Lord Haldane. We have referred to this before, but whatever may have been said of him (probably quite unjustly), as to his German proclivities, it cannot affect his reputation as a lawyer and a judge. He was a distinguished scholar as well as an exceedingly able and subtle advocate with a singular clearness of mind, arriving at conclusions by applying the principles involved. One legal journal says of him, "as a lawyer, a judge and philosopher and administrator Lord Haldane well deserves to have written under his name, Mens aequa in arduis." Another writes as follows: "His period at the War Office saw the creation of our magnificent Territorial Force, which in the time of trial has been proved and not found wanting, while during the three years he has occupied the Woolsack his efforts in the direction of law reform have been equally successful. Both the House of Lords and Judicial Committee are immeasurably superior as final appellate courts since Lord Haldane was at the head of the legal world, while his exercise of patronage

has been beyond reproach. His legal attainments are beyond question, and it is eminently satisfactory to think that his valuable assistance will be still available for the courts of final resort."

Lord Haldane's successor, Sir Stanley Buckmaster, has long been known as an admirable equity lawyer with a scholarly knowledge of legal principles, enhanced by a dignified forensic style.

Sir John Simon, who might have claimed the position of Lord Chancellor, refused it for the less important office of Home Secretary. The *Solicitors' Journal* thus refers to this. "Probably no man before was ever offered the Woolsack at 42, and certainly no man has refused it for the lesser office of Home Secretary. There have been one or two lawyers who have refused the Woolsack for reasons of political conscience; of these Lord James of Hereford is the latest and most famous example. But the new Home Secretary has refused, while yet his days of youth at the Bar are scarcely over, the greatest prize in his profession, because he prefers a political career. To choose the Woolsack and the House of Lords is to bid good-bye to the future leadership of the Liberal party, for no peer is likely to lead that party in the years to come. The steadfast coolness of judgment and the intellectual courage which can lead a lawyer to reject the dazzling prize in the hand for the possible chance of a greater prize in the future are indeed rare qualities; one feels that conspicuous greatness of mind and grandeur of will are shewn by the man who can so act."

COSTS AS BETWEEN SOLICITOR AND CLIENT.

The English Court of Appeal have recently in *Giles* v. *Randall* (112 L.T. 271) been considering the proper method of taxation of costs "as between solicitor and client," and came to the conclusion that where such a taxation is ordered between party and party, the taxation is stricter than on a taxation between the solicitor and his client. Lord Justice Buckley, in his judg-

ment, styles a taxation "as between solicitor and client" as including both taxations between the solicitor and his client and a taxation of solicitor and client costs between party and party. Such a classification, however, seems unnecessarily confusing. The three methods of taxation are more properly classified as Boyd, C., points out, in *Heaslip* v. *Heaslip*, as follows:—

(*a*) Taxations "between solicitor and client."

(*b*) Taxations "as between solicitor and client."

(*c*) Taxations "between party and party."

Both (*b*) and (*c*) are taxations between party and party but, under (*b*), the party taxing is entitled not merely to the usual costs taxable between party and party but also to certain of the other costs which are taxable between the solicitor and his client—but as the case of *Randall* v. *Giles* shews, such a taxation is stricter than it would be "between solicitor and client," and as a matter of common experience very little more is taxable than on an ordinary taxation between party and party; where, however, costs as between party and party are ordered to be taxed "between solicitor and client" no greater costs can be taxed than if the taxation were ordered "as between solicitor and client:" see *Heaslip* v. *Heaslip*, 14 P.R. 165.

Lord Justice Buckley regretted that the practice had arisen of differentiating between a taxation "between solicitor and client" and "as between solicitor and client," but considered the practice to be too firmly established to be now altered.

JUDGMENTS, AS AFFECTED BY THE STATUTE OF LIMITATIONS.

Two cases have recently been before the Courts respecting the operation of the Statute of Limitations as regards judgments. In *Poucher* v. *Wilkins*, 7 O.W.N. 670, the first Appellate Division determined that where a writ of execution has been kept alive by renewals, the execution may be enforced, or the writ may be continued to be renewed, even after the lapse of twenty years from the date of the judgment. The renewal

of an execution was held not to come within the term "action" in s. 49 of the Statute of Limitations (R.S.O. c. 75). From this case it follows that although the time for bringing an action on a judgment may have expired, yet if a writ of execution has been kept duly renewed it will continue enforceable notwithstanding the expiry of the period of limitation for bringing an action on the judgment.

In *Doel* v. *Kerr*, 8 O.W.N. 244, Middleton, J., on appeal from the Master in Chambers held, that where twenty years have elapsed from the recovery of a judgment, an application for leave to issue an alias writ is an "action" and is therefore barred by the Statute. In view of the remarks of the learned Chief Justice of Ontario in *Poucher* v. *Wilkins*, *supra*, as to what is meant by "action" we think Middleton, J., was hardly justified in putting his judgment on that ground. An interlocutory application in an already existing action can hardly, on any true principle of interpretation, be said to be "an action," otherwise every action would be a series of actions within an action, like "wheels within a wheel." Such an interpretation of the word "action" does not seem to be justified by s. 2 of the *Judicature Act*, although *l. le* 3 (*b*) may be thought to give some colour to it. By the *Rule*, garnishee and interpleader proceedings are brought within the term "action," but these proceedings are between different persons to those as to whom the action in which they arise, was between, and they do in a sense have the effect of being actions within actions, but they raise new issues between different parties. But to extend the term "action" to an interlocutory application between the original parties to an action seems to be carrying the definition beyond any legitimate limits. Where a plaintiff makes an interlocutory application for an injunction, or a commission to take evidence abroad, or to examine a defendant, or for any of the other hundred and one objects which may necessitate an interlocutory application in the progress of a cause, to say that each of these applications is an "action" seems almost to border on the absurd. We do not think any such ruling was necessary for

the decision of the case on hand. The facts were that defendants recovered judgment for costs; the twenty years from the date of the judgment expired in 1903, but an execution had been kept in force till 1905 when it was suffered to lapse. In 1908, the late Master in Chambers made an ex parte order allowing the defendants to issue an alias writ, and the application with which Middleton, J., had to deal was to set aside that order, as having been improvidently made. The fact that the application was made after the judgment was barred by the Statute of Limitations seems of itself a sufficient ground for refusing the application, as a matter of judicial discretion: see *Doyle* v. *Kaufman*, 3 Q.B.D. 7, 340, without resorting to such a seemingly untenable proposition as that an interlocutory application made in an already existing action is itself "an action" contrary to the view expressed by the first Appellate Division.

Doel v. *Kerr* settles one point as far as a judge in Chambers can settle it, that the issue of a writ of execution does not constitute a new point for the running of the Statute of Limitations. At the end of twenty years from the date of the judgment unless in the meantime there has been payment on account or a written acknowledgment of liability thereunder, it is barred by the Statute, no matter how many writs may have been issued in the meantime, but this fact will not, according to *Poucher* v. *Wilkins*, prevent a writ which has been continually kept in force, from being renewed, or from being enforced by the Sheriff, even after the lapse of the twenty years. This situation seems somewhat anomalous, inasmuch as in such circumstances although no action can be brought on the judgment it may nevertheless be enforceable by execution.

This is in some measure due to the effect of s. 24 of the Limitations Act (R.S.O. c. 75), which provides that a lien created by an execution continues in force so long as the process remains in the hands of the Sheriff and is kept alive by renewal or otherwise.

REVIEW OF CURRENT ENGLISH CASES.

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PRIZE COURT—BRITISH SHIP—CARGO SHIPPED BEFORE WAR—PROPERTY NOT VESTED IN ENEMY BUYER.

The Miramichi (1915) P. 71. Two points were determined by Evans, P.P.D., in this case. First, that where goods were shipped by a neutral to an enemy buyer on a British ship before war declared, and the property in the goods had not passed to the buyer but remained in the neutral seller, such goods were not subject to seizure as a prize after hostilities commenced; and secondly, that the goods of an alien enemy on board of a British ship are seizable as a prize either on the sea or in port.

MINES—GRANT OF SURFACE—RESERVATION OF RIGHT TO WORK MINES AS IF GRANT OF SURFACE HAD NOT BEEN MADE—RIGHT OF GRANTOR TO LET DOWN SURFACE.

Beard v. *Moira Colliery Co.* (1915) 1 Ch. 257. One Gresley through whom the defendants claimed being the owner of mineral lands, granted the surface to one Harris, through whom the plaintiff claimed, reserving the minerals and full right to work the same "in as full and ample a way and manner as if these presents had not been made and executed." The present action was to restrain the defendants who claimed under Gresley from working the minerals so as to let down the surface and also for damages occasioned by their having done so. Eve, J., dismissed the action and the Court of Appeal (Lord Cozens-Hardy, M.R., and Kennedy, and Eady, L.JJ.) affirmed his decision, being of opinion that as Gresley would, before his grant to Harris, clearly have had a right to let down the surface, his grantees had the like right as that was a necessary implication from the terms of the reservation, and this notwithstanding the ordinary rule that where the right to the land and minerals are severed, the owner of the upper strata has a right to support by that beneath, as a natural incident of property: but that right as the Court held was defeated by the express terms of the reservation in question in this case.

RESTRAINT OF TRADE—COVENANT—SEVERABILITY OF COVENANT—REASONABLE PROTECTION OF COVENANTEE.

Goldsoll v. *Goldman* (1915) 1 Ch. 292. This was an action to enforce a covenant in restraint of trade entered into on the sale

of a business for the sale of imitation jewellery. The covenant restricted the defendant from carrying on business of the like nature or for the sale of real jewellery in any part of Great Britain and Ireland and the Isle of Man, the United States, Russia or Spain or within 20 miles of Berlin or Venice. Neville, J., who tried the action held that the covenant was too wide in area unless severable, but he held that it was severable and might be limited to the United Kingdom and the Isle of Man, and that so limited it was not wider than necessary for the plaintiffs' reasonable protection: and as the covenant extended to both real as well as imitation jewellery, Neville, J., granted an injunction as to both kinds of business, limited to the area of the United Kingdom and Isle of Man (1914) 2 ch. 603. (see *ante* pp. 225-6). The Court of Appeal (Lord Cozens-Hardy, M.R., and Kennedy, and Eady, L.JJ.), agreed with Neville, J., as to the severability of the covenant as to the area, and also with the limit as to which Neville, J., granted the injunction; but the Court of Appeal thought that the injunction ought not to have restricted the defendants from carrying on business for the sale of real jewellery, and therefore varied the order appealed from by confining the injunction to imitation jewellery, to which the covenantee's business was confined.

COMPANY—MEMORANDUM OF ASSOCIATION — CONSTRUCTION — POWER TO SELL PART OF BUSINESS TO NEW COMPANY—CONSIDERATION—UNION OF INTERESTS OR AMALGAMATION WITH OTHER COMPANY.

Re Thomas, Thomas v. *Sully* (1915) 1 Ch. 325. A summary application on originating summons was made to the Court in this case to determine the construction of the memorandum of association of a limited company. The plaintiff company carried on business as brick makers at various places, inter alia, at Taunton where another company, Cornishes Limited, also carried on business. The articles of association of the plaintiff company provided that it should have power to sell or deal with all or any part of its property "in such manner and on such terms and for such purposes" as it should deem proper, and also to "make and carry into effect arrangements with respect to the union of interests, or amalgamation either in whole or in part with any other company" having similar objects. It was proposed that the plaintiff company and Cornishes Limited

should sell their Taunton businesses to a new company in consideration of shares or debentures of the new company. The plaintiff company and Cornishes Limited also providing the necessary working capital by applying and paying for shares or debentures in the new company. The question was whether this could lawfully be done under the plaintiffs' articles of association. Warrington, J., held that it could, and that it would be a legitimate mode of carrying out the power of uniting and amalgamating the interests of the plaintiff company with those of Cornishes Ltd.

COMPANY—DEBENTURE—TRUSTEES FOR DEBENTURE HOLDERS — GUARANTEE OF DEBENTURES BY TRUSTEES—RE-INSURANCE OF RISK—LIQUIDATION OF COMPANY AND GUARANTORS—DEBENTURE HOLDERS' RIGHTS IN RE-INSURANCE MONEYS.

In re Law Guarantee T. & A. Societies, Godson's claim (1915) 1 Ch. 340. This was a liquidation proceeding and the society in liquidation had guaranteed the payment of the debentures of a brewery company the society being also the trustees for the debenture holders under a trust deed made by the brewery company. The society had re-insured part of their risk as guarantors of the debentures with another insurance company. Subsequently both the company and the society went into liquidation and the debentures remained unpaid. Godson who was the holder of all the debentures of the brewery company claimed to be entitled to the benefit of the re-insurances effected by the guarantors as against the general creditors of the guarantors. Neville, J., however, decided that although there was a fiduciary relation between the guarantors and the debenture holders under the trust deed, there was no such relation between them under the contract by which the payment of the debentures was guaranteed, and therefore that the claimant had no preferential claim on the re-insurance moneys.

COMPANY—WINDING-UP—PETITION OF UNSECURED CREDITORS—BUSINESS CARRIED ON BY DEBENTURE HOLDER.

In re Clandown Colliery Co. (1915), 1 Ch. 369. This was an application for a winding-up order. The company was hopelessly insolvent and its business was being carried on solely for the benefit of the chairman of the board of directors who held

£10,000 debentures and was also an unsecured creditor for £10,000 out of £13,597 unsecured debts. The petitioners in ignorance of the insolvency of the company had supplied goods on credit but when they obtained judgment for their claim the chairman appointed a receiver—the petitioner therefore applied for a winding-up order in which a few trade creditors in a similar position concurred, but the application was opposed by the chairman, and a large majority of the other unsecured creditors who gave no reasons for their opposition. In these circumstances Astbury, J., considered that it was just and equitable that the company should be wound up and he made the order.

SETTLEMENT—HUSBAND'S LIFE POLICIES—PREMIUMS PAID BY WIFE—LIEN—POWER OF APPOINTMENT—LIMITED POWER — REVOCATION—FRAUD ON POWER.

In re Jones, Stuart v. *Jones* (1915) 1 Ch. 373. Two points were decided in this case. The first that where a husband by marriage settlement settled a policy on his own life on his intended wife for life, and covenanted to pay the premiums, but owing to poverty was unable to do so and the wife thereupon without communicating with the trustees or requesting them to pay the premiums, voluntarily paid them herself; in such circumstances the wife is not entitled to a lien on the policy moneys for the premiums so paid by her. And the second point was this. Under the settlement the husband and wife or the survivor of them had power of appointing the policy moneys subject to their respective life estates, in favour of the issue of the marriage. By deed the husband and wife appointed the fund in favour of their daughter, the only issue of the marriage for her life, and after her death for her children born during the lives of the appointers or within twenty-one years after the survivor's death. When the trustees refused to pay the premiums, the widow proposed to revoke the appointment, and that she and her daughter as being then solely entitled to the fund would direct the payment of the premiums; but Astbury, J., held that the trustees would not be justified in carrying out that arrangement, and that the revocation of the appointment in order to benefit the appointor would be in the nature of a fraud on the power.

COMPANY—WINDING-UP—LIQUIDATOR—REMOVAL OF LIQUIDATOR —"CAUSE SHEWN"—COMPANIES ACT 1908 (8 EDW. VII. c. 69), ss. 149, 152—(R.S.C. c. 144, s. 32).

In re Rubber & Produce Investment Trust (1915) 1 Ch. 382. This was an application to remove a liquidator in a winding-up proceeding. The winding-up order had been made on a contributories petition containing serious charges of misfeasance against the directors; and a liquidator and a committee of inspection were appointed for the purpose of making a thorough investigation. At that time the company was apparently solvent with a balance for contributories which might possibly be increased by misfeasance proceedings. Subsequently a large claim was admitted and it was found, notwithstanding anything which might be recovered by misfeasance proceedings, that the company was hopelessly insolvent. The liquidator and committee bonâ fide and in pursuance of what they believed to be their duty continued to treat the liquidation as a contributories' liquidation and proposed to spend the creditors' assets in misfeasance proceedings contrary to the wishes of the creditors. In these circumstances Astbury, J., was of the opinion that sufficient cause was shewn for removing the liquidator under the Companies Act, 1908, s. 149 (*b*)—(R.S.C. c. 144, s. 32).

ELECTION—BEQUEST TO SPINSTER—BEQUEST TO MARRIED WOMAN —RESTRAINT ON ANTICIPATION.

In re Tongue, Higginson v. *Burton* (1915) 1 Ch. 390. By the will of a testatrix in question in this case certain personal property to which, as the judge found, the testatrix's daughters were entitled, was bequeathed by her to her four nephews and nieces and by the same will she bequeathed her residuary estate to her four daughters, three of whom were married, and one of whom was a spinster; the shares bequeathed to the married daughters were settled and were subject to a restraint against anticipation. The question was whether the daughters or any of them were, in these circumstances, put to their election whether they would take under the will or not, and Warrington, J., decided that the married daughters by reason of the restraint on anticipation could not be required to elect, but that the unmarried daughter was put to her election. As to the shares of the married daughters the learned judge says: "the testatrix, by imposing the restraint on anticipation has shewn

an intention that while under coverture they should not be capable of disposing of that which they take under her will either by virtue of election or otherwise." As to them he considered the case was covered by *In re Wheatley*, 27 Ch.D. 606. As regards the unmarried daughter the learned judge distinguishes *Haynes* v. *Foster* (1901) 1 Ch. 361, on the ground that the restraint on anticipation was confined to the period of coverture, but *In re Hargrove, infra*, Astbury, J., refused to follow that case.

ELECTION—RESTRAINT OF ANTICIPATION—CONTRARY INTENTION. —SPINSTER.

In re Hargrove, Hargrove v. *Pain* (1915) 1 Ch. 398. In this case a similar question is involved to that in the preceding case. Here a testator gave a share of his residuary estate in trust for a spinster for life, coupled with a restraint on anticipation which was not in terms limited to coverture. He also disposed of property which belonged to the spinster—and Astbury, J., held that notwithstanding the general terms of the restraint on anticipation the spinster was put to her election and he refused to follow *Haynes* v. *Foster* (1901) 1 Ch. 361.

COMPANY—DEBENTURE STOCK—TRUST DEED—DISTRIBUTION OF ASSETS—PARTLY PAID STOCK—RIGHTS OF STOCK HOLDERS INTER SE.

In re Smelting Corporation, Seaver v. *The Company* (1915) 1 Ch. 472. The facts of this case were that in 1902 a company issued debenture stock secured by a trust deed. The stock was payable by instalments which were all called up by May, 1903. Some had been paid in full, and as to some, instalments were in arrear. The trust deed provided for a distribution of the net proceeds of any sale thereunder, first in payment of arrears of interest in proportion to the amount. Secondly, in payment of principal in proportion to the stock held by the stockholders. The trustees having realized the security and the question arose whether the partly paid stockholders could participate without notion bringing in the unpaid instalments as a debt due by them in accordance with the principle of *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442. Astbury, J., however, held that that case did not apply because the transaction merely amounted to a contract to make

a loan which contract was not enforceable either in debt or by way of specific performance, but only in damages. And therefore the unpaid instalments did not constitute a debt. And he held that all debenture holders were entitled to a rateable distribution in proportion to the amounts actually advanced by them.

COMPANY—WINDING-UP—SURPLUS ASSETS—PAYMENT OF STATUTE BARRED DEBT AFTER OBJECTION BY SHAREHOLDERS—LIQUIDATOR.

In re Fleetwood and D.E.L. & P. Syndicate (1915 1 Ch. 486. In this case a liquidator having surplus assets in his hands had, notwithstanding the objection of shareholders to his so doing, paid certain statute barred debts of the company. Astbury, J., held that the payment was improper, but the recipients undertaking to refund the money, no order was made.

MALICIOUS PROSECUTION—DAMAGE NECESSARY TO SUPPORT ACTION FOR MALICIOUS PROSECUTION—PROCEEDINGS TO COMPEL ABATEMENT OF NUISANCE—DAMAGE TO REPUTATION.

In *Wiffen* v. *Bailey* (1915), 1 K.B. 600, the Court of Appeal, (Buckley, Phillimore, and Pickford, L.JJ.) have reversed the decision of Horridge, J. (1914) 2 K.B. 5 (noted ante vol. 50, p. 339). That learned judge held that the damage caused to the plaintiff's reputation by an unsuccessful proceeding to compel him to abate an alleged nuisance, was a sufficient ground for an action for malicious prosecution. The Court of Appeal were not able to agree to that, and thought that the proceedings in no way affected the fair fame of the plaintiff, and therefore that the action could not be maintained.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT OF CANADA.

Sask.] PEACOCK *v.* WILKINSON. [March 15.

Broker—"Real estate agent"—Sale of land—"Listing" on broker's books—Principal and agent—Authority to make contract.

Where the principal has merely instructed a broker to place lands on his list of properties for sale, such "listing" does not of itself constitute an authorization to the broker to enter into a contract for the sale of the lands on behalf of his principal. Judgment appealed from (7 West. W.R. 85) affirmed.

Appeal dismissed with costs.

J. F. Frame, K.C., for appellant. *W. M. Martin*, for respondents.

Que.] [March 15.

CANADIAN PACIFIC RY. CO. *v.* PARENT AND CHALIFOUR.

Railways—Shipping contract—Carrying person in charge of live stock—Free pass—Release from liability—Approved form—Negligence—Action by dependents—Conflict of laws—Railway Act, R.S.C. 1906, c. 37, s. 340.

The shipping bill for live stock, to be carried from Manitoba to its destination in the Province of Quebec, was in a form approved by the Board of Railway Commissioners and provided that, if the person in charge of the stock should be carried at a rate less than full passenger fare on the train by which the stock was transported, the company should be free from liability for death or injury whether caused by the negligence of the company or of its servants. C. travelled by the train in charge of the stock upon a "Live-Stock Transportation Pass," and signed conditions indorsed in English thereon by which he assumed all risks of injury and released the company from liability for damages to person or property, while travelling on the pass, whether caused by negligence or otherwise. While the

train was passing through the Province of Ontario, an accident happened and C. was killed. In an action by his dependents, instituted in the Province of Quebec, it was shewn that C. could neither read nor write, except to sign his name, and that he only understood enough English to comprehend orders in respect of his occupation as a stock-man; there was no evidence that the nature of the conditions was explained to him.

Held, Fitzpatrick, C.J., dissenting, that the railway company was liable for damages in the action by the dependents.

Per Davies, Idington, Duff, and Brodeur, JJ. (Fitzpatrick, C.J., and Anglin, J., contra), that, as C. could not have known the nature of the conditions or that they released the company from liability, and the company had not done what was reasonably sufficient to give him notice of the conditions on which he was being carried, the company was liable in damages either under the law of Ontario or that of Quebec.

Per Anglin, J.:—Although no action would lie in Ontario unless the deceased would have had a right of action, had he survived, and such an action would have been barred there by the contract signed by him, nevertheless, in Quebec, where there is no such rule of law, the action would lie, though the wrongful act had been committed in Ontario, as it was of a class actionable in Ontario: *Machado* v. *Fontes* ((1897), 3 Q.B. 231), applied.

Section 340 of the Railway Act, R.S.C. 1906, c. 37, provides that "no contract, condition, or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall relieve the company from such liability unless such class of contract . . . shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case or by order or regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited." The Board made an interim order permitting the use by the company, until otherwise determined, of the shipping form used, but did not expressly authorize the form containing the conditions signed by deceased.

Held, per Fitzpatrick, C.J., and Davies, and Anglin, JJ. (Idington, Duff, and Brodeur, JJ., contra), that the contract signed by deceased was one of a class authorized by the Board.

Per Duff, J.:—The contract signed by deceased could not have the effect of limiting the liability of the company because

it was not in a form authorized or approved by the Board and there had been no order or regulation made by the Board expressly determining the extent to which the company's liability should be impaired, restricted or limited as provided by subsection 2 of section 340 of the Railway Act.

Judgment appealed from, affirming the judgment of the Superior Court (Q.R. 46 S.C. 319), affirmed.

Appeal dismissed with costs.

G. G. Stuart, K.C., for appellants. *R. C. Smith*, K.C., and *Savard*, for respondents.

B.C.] [March 15.

CREVELING v. CANADIAN BRIDGE CO.

Negligence—Defective system—Injury to employee—Evidence—Verdict—Practice—Exception to judge's charge—New trial—New points on appeal.

During bridge construction a travelling crane was operated on elevated tracks under a system which did not provide of signals on every occasion when it was set in motion and it was not provided with guards for the protection of workmen employed upon the elevated stagings. A signal was given, on starting the crane, at some distance from the workmen, shortly afterwards it came to a momentary stop and moved on again towards the workmen without any further signal, and plaintiff was injured. In his action for damages, the plaintiff charged want of proper system and guards. The Court of Appeal set aside a judgment in favour of plaintiff, upon a general verdict by the jury, and ordered a new trial for the purpose of assessing damages under the British Columbia Employer's Liability Act, on the ground that it had been admitted that there was a system in existence, which, if properly carried out, would have been sufficient for the protection of the workmen.

Held, that, on a proper appreciation of the evidence, having regard to the course of the trial, the directions of the trial judge had presented the issues fully to the jury, and, there being evidence to support it, their verdict ought not to have been disturbed. Davies, and Anglin, JJ., dissented.

Per Duff, and Brodeur, JJ.:—Where exception to the directions of the judge has not been taken at the trial or in the first Court of Appeal, it is too late to urge such objections upon a subsequent appeal to a higher court: *White* v. *Victoria Lumber and Manufacturing Co.* ((1910), A.C. 606), followed.

Appeal allowed with costs, and trial judgment restored.

S. S. Taylor, K.C., for appellant. *W. N. Tilley*, for respondents.

Bench and Bar.

OBITUARY

HON. JAMES MACLENNAN.

One of the great lawyers of his day, a learned and highly respected judge as well as a distinguished citizen and a most worthy man has passed away in the person of the Hon. James Maclennan, retired Justice of the Supreme Court of Canada.

We referred at some length to his life and career up to the time of his appointment to the Bench, ante vol. 24, p. 546. We would now refer to his career as a judge, recalling also some of the principal events of his life. Mr. Maclennan was born at Lancaster in the County of Glengarry, Ontario, on March 17, 1833, being the son of Roderick Maclennan, who came to Canada in 1795. In 1849 he took his degree of B.A. at Queen's University, Kingston. He was called to the Bar with honours in Mich. term, 1857. After a short residence in Hamilton he formed a partnership with Mr. Oliver Mowat, Q.C., and Mr. Downey, in the city of Toronto. In 1871 he was elected a Bencher of the Law Society of Upper Canada, and, up to the time of his promotion to the Bench, was one of its most active and useful members. He received silk from the Dominion Government in 1873 and from the Ontario Government in 1876.

When referring to his appointment to the Bench we gave our estimate of his character and legal attainments, and predicted that he would be a strong and able judge—an expectation that was amply verified. In this regard we cannot do better than reproduce a part of the article referred to: "The appointment is one of the best that could have been made. A man of the highest personal character, Mr. Maclennan is, as our judges should be, without fear and without reproach. He is a sound and able lawyer, has had long experience at the Bar, and a judicial mind with a large fund of common sense, and is thoroughly familiar with the business of the country and the instincts of the people; at the same time he has not lost his interests in art and general literature and few men at the Bar have read more of our English classics."

On the 27th of October, 1888, Mr. Maclennan was appointed

to the Ontario Court of Appeal by Sir John A. Macdonald, vice Mr. Justice Patterson removed to the Supreme Court of Canada. This appointment of a strong Liberal by a leader of the Conservative Government was as creditable to the donor as it was to the recipient of the honour. In October, 1895, he was transferred to the Supreme Court of Canada on the retirement of Mr. Justice Nesbitt.

As a judge he was the same courteous gentleman he always had been at the Bar, and as painstaking, industrious and accurate as he had been since he first became a student. His judgments were concise, logical and lucid. He retired from the Bench in 1909; the last years of his life being spent quietly at his old home in Toronto, enjoying his well-earned repose and the society of his many friends—a cultured gentleman of the old school.

JUDICIAL APPOINTMENTS.

John Russell Armstrong, of the City of Saint John, in the Province of New Brunswick, K.C., to be Judge of the County Court for the County of the City and County of Saint John, in the said Province, vice James Gordon Forbes, who has retired from the said office. (May 27.)

War Notes.

We regret to record the death of Henry Kelleher (Queen's Own Rifles), at Langemarck in April last. He was the son of Judge Kelleher of the Bengal Civil Service. He was educated at Copenhagen, Denmark; afterwards taking his B.A. and LL.B. degrees at Christ's College, Cambridge, and was an honour man in mathematics and law. He came to Toronto in 1913, and commenced the study of the law in the office of Saunders, Torrance & Kingsmill. He was a clever student, a brilliant scholar, and a good lawyer. He contributed an article to this Journal which appears ante vol. 50 (1914), page 161. He met his death doing a very brave thing whilst reconnoitering. His fellow students and his many friends here, including ourselves, will miss him greatly.