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THE DISORDER OF THE STATUTES OF LIMITATION

§ 1. DIVERSITY AND OBSCURITY OF PROVINCIAL LEGISLATION

The recent judgment of Hope J. in *Bank of Montreal* v. *Bailey*[1] does not tend to clarify questions of the applicability of statutes of limitation to an action upon a judgment or to an action or other proceedings to enforce a judgment. It is not intended to discuss here the doctrine of laches, which was applied so as to justify refusal to permit the issue of execution after the lapse of 20 years from the date of the judgment. It is submitted, however, with respect, that for reasons which will appear later in this article, a distinction should be drawn between (a) an action upon a judgment, in the sense of an action for the purpose of obtaining another judgment of the same tenor or, what would formerly have been an action of debt upon a judgment—held in Ontario to be an action upon a specialty which is barred after twenty years—and (b) an action or other proceeding to enforce a judgment. Only (b), not (a), was in question in *Bank of Montreal* v. *Bailey*; and, it is also submitted, there was and is no justification for saying in general terms that a judgment is not a specialty within the meaning of the Ontario Limitations Act. The *Bailey Case* and the case of *Thakar Singh* v. *Pram Singh*,[2] in the Court of Appeal for British Columbia, draw attention again to the inexcusable diversity and confusion of legislation prevailing in Canada on the subject of limitation of actions and other legal proceedings. The word "inexcusable" is used because, generally speaking, neither the diversity nor the confusion is due to any divergence of substantial policy, and the subject is one upon which uniformity, completeness and clarity are especially desirable. From a practical point of view what

[1] [1943] O.R. 406, [1943] 3 D.L.R. 517 (with editorial note).
[2] (1942), 57 B.C.R. 372, [1942] 2 D.L.R. 492, [1942] 1 W.W.R. 737. As to this case, see further notes 29 and 30, *infra*.

is needed is a set of statutory provisions, covering in an intelligible manner every situation as regards which a time limit is desirable; and a court ought not to be compelled, as the British Columbia court was compelled, in the year 1942, to struggle with the obscure features of two statutes passed by the Parliament of the United Kingdom in 1833 for the purpose of amending the English law of limitation of actions, and to embark on a learned excursion into ancient and modern procedure for the enforcement of judgments.

I have elsewhere given some account of the complexities of limitation legislation in the common law provinces of Canada.[3] The provinces of Manitoba, Saskatchewan, Alberta and Prince Edward Island have enacted the uniform Limitation of Actions Act prepared by the Conference of Commissioners on Uniformity of Legislation in Canada,[4] whereas in British Columbia, Ontario, Nova Scotia and New Brunswick the statutes are based in varying degrees upon former English legislation. That legislation contained many obscure and incongruous features resulting from its having been enacted in a piecemeal fashion over a period of more than 250 years, from James I to Victoria, but in England it has been superseded by the Limitation Act, 1939.

The statutory provisions with regard to the effect of acknowledgment and part payment were complicated enough in the former English legislation, and are still more complicated in Canada, especially by reason of the divergence hereinafter discussed between the case law and legislation of Ontario and the case law and legislation of the other provinces in which the former English legislation has been adopted, at least in part. As I have elsewhere[5] somewhat fully discussed the diversity and confusion which characterize the provincial legislation and case law with particular regard to acknowledgment and part payment, I refrain from saying anything more here on that topic.

[3] LAW OF MORTGAGES (3rd ed. 1942), chapter 30.

[4] CONFERENCE PROCEEDINGS (1931) 34-53, and (1932) 26-31; CANADIAN BAR ASSOCIATION YEAR BOOK (1931) 280-299, and (1932) 194-199. The uniform statute was adopted in Manitoba and Saskatchewan in 1932 (now R.S.M. 1940, c. 121, and R.S.S. 1940, c. 70), in Alberta in 1935 (now R.S.A. 1942, c. 133), and in Prince Edward Island in 1939 (c. 30).

[5] See my LAW OF MORTGAGES (3rd ed. 1942) 544 ff., 556. The "diversity" in question is due in the first place to the fact that the statutes in force in England before 1939 had been enacted at different times, and contained variously worded provisions as to the effect of acknowledgment and part payment applicable to essentially similar situations. This diversity, confusing in itself, has been perpetuated in those provinces of Canada in which the former English law has been adopted. The diversity has been rendered especially confusing by reason of the divergence of case law discussed below under the headings *Covenant for Payment in a Mortgage* and *Action upon a Judgment*.

THE TWO STATUTES OF 1833.

In the present article I desire, in the first place, to draw particular attention to another phase of the general subject, namely, the obscurity of the two statutes already mentioned, passed by the British Parliament in 1833, which, though they were superseded as regards English law by the Limitation Act, 1939, still render obscure the legislation of some of the provinces of Canada.

The first of these two statutes is the Real Property Limitation Act, 1833, (3 & 4 W.4, c. 27) s. 40, beginning as follows:

> 40. No action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same. . . . .

In British Columbia the foregoing provision is re-enacted in R.S.B.C. 1936, c. 159, s. 43, in Nova Scotia in R.S.N.S. 1923, c. 238, s. 22, and in New Brunswick in R.S.N.B. 1927, c. 145, s. 29.

The second of these statutes is the Civil Procedure Act, 1833 (3 & 4 W. 4, c. 42), s. 3, providing that

> All actions of covenant or debt upon any bond or other specialty . . . . shall be commenced and sued . . . . within twenty years after the cause of such actions or suits, but not after.

In British Columbia this provision is re-enacted in R.S. B.C. 1936, c. 159, s. 49. In Nova Scotia its language has been enlarged so as to impose a time limit of twenty years in the case of "actions upon a bond or other specialty, actions upon any judgment or recognizance": R.S. N.S. 1923, c. 238, s. 2. In New Brunswick, similarly, a time limit of twenty years is imposed on an action "upon any judgment, recognizance, bond, or other specialty": R.S.N.B. 1927, c. 144, s. 1.

The uniform statute adopted, as already mentioned, in Manitoba, Saskatchewan, Alberta and Prince Edward Island, specifically provides for a ten-year period of limitation as regards "an action on a judgment or order for the payment of money," a ten-year period as regards proceedings to recover "any sum of money secured by any mortgage or otherwise charged upon or payable out of any land," and a six-year period as regards "actions for the recovery of money (except in respect of a debt

charged upon land . . . whether on a recognizance, bond, covenant or other specialty or on a simple contract, express implied." The result is that in these four provinces the legal puzzles involved in the two statutes of 1833 have ceased to be of interest.

In England, "the provisions relating to the limitation of actions on judgments have now been separated from those in respect of money charged on land, and appear, more logically, in s. 2(4) of the [Limitation Act, 1939]:" Preston & Newsom, Limitation of Actions (1940)84. In s. 2 of that statute, immediately following a provision (sub-s. 3) that an action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued, sub-s. 4 provides:

> (4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

The discussion may therefore be confined to the divergence between the legislation and case law of Ontario on the one hand, and the legislation and case law of British Columbia (following the former English law) on the other hand; and it seems desirable, by way of preface to the discussion of an action on a judgment, to say a few words about an action on a covenant for payment in a mortgage of land.[6]

Covenant for Payment in a Mortgage

For the sake of brevity the two statutes of 1833 above mentioned—the Real Property Limitation Act, 1833, s. 40 and the Civil Procedure Act, 1833, s. 3—will be referred to as the "land provision" and the "specialty provision" respectively, corresponding exactly with ss. 43 and 49 of the present British Columbia statute, and, subject to important modifications, with ss. 23 and 48 of the present Ontario statute.

In 1878 it was held by the Court of Appeal for Ontario in *Allan* v. *McTavish*[7] that the personal remedy on a covenant for payment in a mortgage fell within the specialty provision, and that the land provision applied only so far as it was sought to recover the money out of the land. In 1882, on the other

[6] I discussed the latter topic in Law of Mortgages (3rd ed. 1942) 539, 540, 553, whereas the former topic was only casually mentioned, at p. 554.

[7] 2 O.A.R. 278, following *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640.

hand, it was held by the Court of Appeal in England in *Sutton* v. *Sutton*[8] that the personal remedy on a covenant for payment in a mortgage as well as the remedy against the land fell within the land provision. The question which provision applied had become more important than it originally was, in England because of the reduction of the limitation period under the land provision from twenty to twelve years as the result of the Real Property Limitation Act, 1874, s. 8, and in Ontario because of the corresponding reduction of the period from twenty to ten years. No corresponding reduction has been made in British Columbia, Nova Scotia and New Brunswick, where the period continues to be twenty years under both provisions. In Ontario the construction of the two provisions adopted by the Ontario courts was confirmed in 1887 by the amendment of the land provision (now s. 23) by the insertion of the words "out of any land or rent" after the word "recover" at the beginning of the section. Similarly, when in 1894 the period of limitation of action on a covenant for payment in a mortgage was reduced from twenty to ten years, the result was accomplished by the amendment of the specialty provision (now s. 48), and not by the amendment of the land provision (now s. 23).

Sutton v. *Sutton* has been followed in Manitoba[9] and in New Brunswick,[10] and it seems to be assumed in British Columbia that the case would be followed in that province.[11] In the uniform statute, adopted in Manitoba, Saskatchewan, Alberta and Prince Edward Island, the point has been covered in the same sense, though the periods of limitation have, as already mentioned, been changed — ten years in the case of a debt charged on land, and six years in the case of a debt not charged on land, whether on a covenant or other specialty or on a simple contract. In England, on the other hand, under the Limitation Act, 1939, the period of limitation applicable to an action on a covenant for payment in a mortgage of land is twelve years, either as an

[8] 22 Ch.D. 511, 16 R.C. 298. Subsequently in Ontario in *McDonald* v. *Elliott* (1886), 12 O.R. 98, Rose J. followed *Allan* v. *McTavish* in preference to *Sutton* v. *Sutton*, considering that it should be left to the Court of Appeal for Ontario to say whether it would reverse its own previous decision in obedience to the rule in *Trimble* v. *Hill* (1879), 5 App. Cas. 342. In fact in later years the scope of the rule in *Trimble* v. *Hill* has been substantially narrowed, and its rigidity relaxed; *Robins* v. *National Trust Co.*, [1927] A.C. 515, at p. 519, [1927] 2 D.L.R. 97, at p. 100; [1927] 1 W.W.R. 692, at pp. 696, 881; *City of London* v. *Holeproof Hosiery Co. of Canada*, [1933] S.C.R. 349, at p. 354, [1933] 3 D.L.R. 657, at p. 659; *Re Tod*, [1933] O.R. 519, at p. 521, [1933] 3 D.L.R. 422, at p. 423.

[9] *Colonial Investment and Loan Co.* v. *Martin*, [1928] S.C.R. 440, [1928] 3 D.L.R. 784.

[10] *Eastern Trust Co.* v. *McAleer* (1930), 2 M.P.R. 93, [1931] 1 D.L.R. 509.

[11] *Thackar Singh* v. *Pram Singh*, *supra*, note 2.

action on a specialty within s. 2 or as an action to recover money secured by a mortgage within s. 18, and the conflict, resolved in *Sutton* v. *Sutton*, between the former statutes has ceased to exist: Preston & Newsom, Limitation of Actions (1940) 184, 225. Section 18 is expressed to include a mortgage of personal property — an important change in the law: Preston & Newsom, *op. cit.*, p. 221.

Action Upon a Judgment

Next let us consider an action on a judgment under the same two British statutes relating to limitations of actions in England, namely, the Real Property Limitation Act, 1833, s. 40, called for short the "land provision", and the Civil Procedure Act, 1833, s. 3, called for short the "specialty provision", re-enacted in British Columbia in ss. 43 and 49 respectively of R.S.B.C. 1936, c. 159, and corresponding in Ontario with ss. 23 and 48 respectively of R.S.O. 1937, c. 118. When the two statutes were originally passed a judgment in England constituted a charge on land, and it was held in England that judgments fell within the land provision in which the word "judgment" occurs, and not within the specialty provision, in which the word does not occur,[12] "although, being specialties, they might be, and *prima facie* would be, included in" the latter provision.[13] In 1864 the law of England was changed by the statute 27 & 28 V. c. 112, providing that a judgment should not affect any land until the land should be "actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment," and subsequently the period of limitation under the land provision was reduced from twenty to twelve years by the Real Property Limitation Act, 1874, s. 8. It was held in *Jay* v. *Johnston*[14] that a judgment, although it had ceased to be a charge on land, still fell within the land provision and not within the specialty provision. So, in British Columbia a judgment falls within s. 43, not s. 49. In Ontario, however, as we have seen, the land provision (now s. 23) was construed as being limited to actions to recover money out of the land, so that the personal remedy on a covenant for payment in a mortgage was held to fall within the specialty provision, and not within the land provision,[15] and by parity

[12] *Watson* v. *Birch* (1847), 15 Sim. 523.
[13] *Jay* v. *Johnston*, [1893] 1 Q.B. 189, at p. 190, Lindley L.J.
[14] [1893] 1 Q.B. 189.
[15] *Allan* v. *McTavish*, *supra*, note 7, confirmed by the insertion of the words "out of any land or rent" in s. 23, as already noted.

of reasoning an action on a judgment which is not itself a charge on land should fall within the specialty provision (now s. 48) and not within the land provision (now s. 23). This was the result reached in 1878 by the Court of Appeal for Ontario in *Boice* v. *O'Loane*.[16] It was conceded that an action on a judgment was an action of debt upon a specialty, and therefore was subject to the twenty-year limitation period of the specialty provision, and it was held that such an action was not subject to the ten-year limitation period[17] of the land provision (notwithstanding the mention of "judgment" in that provision). It was argued that when the Ontario legislature in 1874 reduced the period under the land provision from twenty years to ten years, it must have known that a judgment did not operate as a charge on land, as enacted for Upper Canada in 1861,[18] and therefore could not have intended to use the word "judgment" in the land provision as referring only to a judgment operating as a charge on land, but it was held that it was impossible to give effect to this argument in view of the then recent decision of the Court of Appeal in *Allan* v. *McTavish*[19] with regard to a covenant for payment in a mortgage of land.

In 1887 the word "judgment" was omitted in Ontario from the land provision (s. 23), presumably because it had no meaning in that context in view of *Boice* v. *O'Loane*. It is submitted that the result is that an action on a judgment in Ontario falls within s. 48;[20] and this result is supported by *obiter dicta* in various cases.[21] On the other hand, in *Thompson* v. *Donlands Properties*[22] the opinion is expressed that a judgment is not a

[16] 3 O.A.R. 167: an action brought on a judgment recovered less than twenty years but more than ten years before the issue of the writ.

[17] Reduced from twenty to ten years in Ontario in 1874.

[18] Statutes of the Province of Canada, 1861, c. 41, s. 10.

[19] *Supra*, note 7.

[20] It is submitted that the legislature by inserting "out of any land or rent" in s. 23, and omitting "judgment" in s. 23, must have intended to give full effect to the doctrine stated in *Allan* v. *McTavish*, *supra*, note 7, and in *Boice* v. *O'Loane*, by which s. 23 is limited to the remedy against land and s. 48 applies to the personal remedy by action on a covenant for payment in a mortgage or on a judgment.

[21] *Mason* v. *Johnston* (1893), 20 O.A.R. 412, in which Osler J. A. points out that the omission of "judgment" from s. 23 in 1887 made it unnecessary for the court to follow the then recent decision of the English Court of Appeal in *Jay* v. *Johnston*, in obedience to the rule in *Trimble* v. *Hill* (1879), 5 App. Cas. 342 (as to which see note 8, *supra*); *Allison* v. *Breen* (1900), 19 O.P.R. 143; *Butler* v. *McMicken* (1900), 32 O.R. 422; *cf. Doel* v. *Kerr* (1915), 34 O.L.R. 251, 25 D.L.R. 577. *Butler* v. *McMicken*, like *Boice* v. *O'Loane*, was an action on a judgment. The other Ontario cases cited were actions or proceedings to enforce a judgment by execution against land.

[22] [1934] O.R. 541, [1934] 4 D.L.R. 234.

specialty within s. 48, but this opinion is an *obiter dictum*[23] because the action was not an action on a judgment in any sense which could bring the case within s. 48. As Riddell J.A. said, "this is not an action on the judgment to recover a new judgment based upon the former; but it is an action to enforce and render available the former judgment." The case will be mentioned later under the next following heading.

Proceedings to Enforce a Judgment

On the assumption that the foregoing statement of the law is accurate, namely, that an action on a judgment for the purpose of obtaining another judgment of the same tenor — an "action of debt" on a judgment — is barred after the lapse of twenty years — in Ontario under the specialty provision (s. 48), corresponding with the Civil Procedure Act, 1833, s. 3, and in British Columbia under the land provision (s. 43), corresponding with the Real Property Limitation Act, 1833, s. 40 — there remains for discussion the question what time limit, if any, is imposed on an action or other proceeding on a judgment in some other sense, as, for example, an action or other proceeding to enforce a judgment or to make available assets for the satisfaction of the judgment.

It was held in Ontario in *Doel* v. *Kerr*[24] that an application to issue execution against land under a judgment is a "proceeding" within the definition of "action" in s. 1 of the Limitations Act, and is barred after twenty years, consistently of course with the view that an action on a judgment is barred after twenty years under the specialty provision (s. 48), though probably extending that provision beyond its original scope.

On the other hand, it was held in an earlier Ontario case that the effect of placing a writ of execution in the sheriff's hands is to create a "lien" on land, and that the money mentioned in the writ is "money charged on land" within the land provision (s. 23), and that taking steps to sell is a "proceeding"[25] which is barred after ten years from the time the writ is placed in the sheriff's hands, notwithstanding that the writ has been duly renewed in the interval. The statute was amended, how-

[23] Although it was considered by Hope J. in *Bank of Montreal* v. *Bailey*, *supra*, note 1, to be binding on him.

[24] (1915), 34 O.L.R. 251, 25 D.L.R. 577. The same question arose in *Bank of Montreal* v. *Bailey*, *supra*, note 1, after the confusing dictum in *Thompson* v. *Donlands Properties*, *supra*, note 22.

[25] *Neil* v. *Almond* (1897), 29 O.R. 63, followed in *In re Woodall* (1904), 8 O.L.R. 288.

ever, in 1905 so as to provide that a lien or charge created by the placing of an execution in the hands of the sheriff shall remain in force so long as the execution remains in the hands of the sheriff for execution and is kept alive by renewal or otherwise.

Formerly s. 23 began "No action or other proceeding," whereas in 1910 the statute was amended by the omission of the words "or other proceeding" from s. 23, and the addition of a clause in the general interpretation section of the statute that "action" shall include "any civil proceedings." Then it was argued that the effect was to enlarge the meaning of "action" in the specialty provision (s. 48) so as to include the renewal of a writ of execution, and to prevent any renewal of an execution after the lapse of twenty years from the recovery of judgment, but it was held that it would be inconsistent with the context to construe "action" in s. 48 otherwise than in its ordinary sense, and that if an execution is issued within six years of the judgment and is kept continuously alive by regular renewals, it may be renewed without leave even after the expiration of twenty years from the judgment.[26]

It would be quite a long and complicated story to give an account of the common law practice with regard to the issue of execution and enforcement of judgments, as modified by statutes and rules of practice, and the practice with regard to revivor of judgments after the death of a party. Any one who is interested in pursuing this branch of legal learning will find ample material for study.[27]

If it is sought to enforce a judgment in the sense of realizing on it or obtaining payment of the judgment debt otherwise than by execution it may be that there is no time limit for doing so. It was so held by the Court of Appeal for Ontario in *Thompson* v. *Donlands Properties*,[28] in which under a judgment obtained in 1896 the judgment creditor was held entitled in 1932 to bring action against a company to which the administratrix and next of kin of the deceased judgment debtor had in 1926 transferred and released their interest in the deceased debtor's estate, the company covenanting to pay all the debts of the debtor's estate and to indemnify the administratrix and

[26] *Poucher* v. *Wilkins* (1915), 33 O.L.R. 125, 21 D.L.R. 444.

[27] See, *e.g.*, the reasons for judgment in *Poucher* v. *Wilkins* and *Doel* v. *Kerr*, *supra*; *Thackar Singh* v. *Pram Singh*, *supra*, note 2, and *infra*, notes 29 and 30; HOLMESTED & LANGTON, Ontario JUDICATURE ACT (5th ed. 1940) 1366-1368, and SUPPLEMENT (1943) 237-238, and statutes, rules of practice and cases there cited.

[28] *Supra*, note 22.

next of kin. It was held by the majority of the court, Davis J. dissenting, that the plaintiff was not barred by laches, and was not disabled from suing because he had not shown "to demonstration" that the judgment had not been satisfied. On the other hand, in *Thackar Singh* v. *Pram Singh*[29] an order of revivor, on the death of the judgment creditor, was made *ex parte* nine years after the recovery of judgment, and an order of attachment of the defendant's bank account was issued, without leave, twenty-five years after the recovery of the judgment. The Court of Appeal for British Columbia affirmed an order setting aside the attachment order. The majority of the court held that s. 43 of the British Columbia Statute of Limitations [the land provision] applies to all judgments and actions or other proceedings on them, and the attachment proceedings were therefore barred. The *ex parte* order of revivor, even if it had been followed by an order giving leave to issue execution, did not have the effect of a judgment entered on *scire facias* proceedings or of a suggestion entered on the judgment roll under the analogous proceedings substituted therefor by the Common Law Procedure Act, 1852, and, unlike these, therefore did not give a new starting point to the running of the statute. O'Halloran J.A. considered that the attachment proceedings were not barred by the statute: s. 43 applies only to judgments relating to land, and s. 49 [the specialty provision] is inapplicable because attachment proceedings after judgment are not an "action", and a judgment is not a specialty within s. 49; but that attachment proceedings are a mode of execution and leave to issue execution was essential.[30]

The Moral

It is of course possible that I have fallen occasionally into error in the foregoing exposition of the law relating to limitation of actions or other proceedings. If I have done so, that does not affect the moral of my tale, namely, that the present condition of the statute law relating to limitations is disgraceful, in so far as it is expressed (if that is the appropriate term) in such terms that it can in the middle of the 20th century give rise to the discussion of questions so utterly divorced from principle or matter of substantial merit.

Whatever excuse formerly existed for following in provincial statutes in Canada the language of legislation relating to limi-

[29] *Supra*, note 2.

[30] The foregoing statement follows in effect the headnote of the case in [1942] 2 D.L.R. 492.

tations in England, supposedly because courts in Canada would have the benefit of English decisions, was worn exceedingly thin when the obscure language of two statutes passed by the Parliament of the United Kingdom gave rise in Canada to divergent construction and finally to divergent legislation, Ontario going off on a tangent of its own, and British Columbia and some other provinces following English decisions. Obviously the excuse for perpetuating in Canada all the obscurities of former English legislation disappeared entirely when in England a clean sweep was made by the Limitation Act, 1939. One solution would be to adopt this statute in the provinces of Canada, but inasmuch as four provinces of Canada had, before the passing of that statute, adopted the Limitation of Actions Act prepared by the Conference of Commissioners on Uniformity of Legislation in Canada, it would now seem to be clear that the proper course is for the other common law provinces to adopt the Canadian uniform statute.

Title to Pure Personalty

There are, however, two features of the Limitation Act, 1939, which merit special consideration.

Firstly, it was formerly the law of England, and is still the law of the common law provinces of Canada, that while the title of the owner of land is extinguished in certain circumstances if he is out of possession for the statutory period, there is no corresponding extinguishment of the title of the owner of pure personality, notwithstanding that his right of action may be barred.[31] This curious gap in the law is in England filled by s. 3 of the Limitation Act, 1939. The same s. 3 also contains a useful provision with regard to the case of successive conversions of the same chattel. The section is as follows:[32]

> 3.—(1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention.
>
> (2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as

[31] *Cf.* my Law of Mortgages (3rd ed. 1942) 535-537.

[32] For full discussion of the former law of England and commentary on s. 3, see Preston & Newsom, Limitation of Actions (1940) 56-65.

> aforesaid has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

I have already suggested to the Conference of Commissioners on Uniformity of Legislation in Canada that the uniform Limitation of Actions Act prepared by the Conference should be amended by the addition of these provisions of s. 3 of the Limitation Act, 1939.[33]

Claims against Trustees

Secondly, I have also suggested to the Conference of Commissioners that the provisions of the uniform Limitation of Actions Act relating to claims against trustees and to land held upon trust should be reconsidered in the light of the corresponding provisions of the Limitation Act, 1939. Sections 15, 34, 35 and 36 of the uniform statute[34] correspond with ss. 24, 47(2), 46 and 47(1) of the Ontario Limitations Act, R.S.O. 1937, c. 118. For convenience of reference these two statutes will be cited below as the "Conference statute" and the "Ontario statute" respectively. Both sets of provisions faithfully reproduce four separate statutes amending or declaring the law of England, passed at different dates, with different limited objects in view.

The existence of these four separate statutory provisions was explicable, though hardly defensible, in England by reason of the fact that they were enacted by the Parliament of the United Kingdom at four different times, but they do not constitute an easily understood statement of the law relating to limitation as applied to the land held upon trust, and limitations as between trustee and cestui que trust and as regards the rights of third parties. So long as they remained in force in England there seemed to be some reason for retaining them, practically in their original form, in the statutes of the common law provinces of Canada. Obviously four statutes passed at different times amending the law of England, each statute having a background of statute law and case law which afforded some explana-

[33] Conference Proceedings, (1942) 119. By the courtesy of Mr. Eric H. Silk, K.C., I am informed that in 1943 a committee of the Conference reported favourably upon the suggestion, and that the Conference referred the matter back to the committee to draft a section based on the statute of 1939.

[34] Conference Proceedings (1931) 45, 50, 51; Canadian Bar Association Year Book (1931) 289, 296, 297. Mr. Silk informs me that the Conference adopted the recommendation of a committee that the Conference statute should be amended by the repeal of s. 34, the substitution of new sections for ss. 35 and 36, and some changes in ss. 12 and 15. The matter was referred back to the committee for further consideration and drafting.

tion of the reasons for its passing, become more obscure when they are re-enacted in a provincial revised statute as if they were a complete and understandable statement of the law.[35] Their deficiencies as a statement of the law were of course perceived when the English law was revised and restated in the Limitation Act, 1939. The manner in which the English law was restated will be explained later, after some explanation has been given of the four relevant statutes.

The statutes in question, formerly in force in England, are as follows:

(1) Section 25 of the Real Property Limitation Act, 1833 (Ontario statute, s. 47 (1); Conference statute, s. 36).

(2) Section 10 of the Real Property Limitation Act, 1874 (Ontario statute, s. 24; Conference statute, s. 15).

(3) Section 25(2) of the Judicature Act, 1873 (Ontario statute, s. 47(2); Conference statute, s. 24.)

(4) Section 8 of the Trustee Act, 1888 (Ontario statute, s. 46; Conference statute, s. 35.)

A serious source of obscurity in these statutes is that the expression "express trust" occurs in s. 25 (1833), and s. 10 (1874), as well as s. 25 (1873), whereas in s. 8 (1888) it is provided that a "trustee" includes a trustee whose trust arises by construction or implication of law as well as an express trustee. To any one who attempted to construe these sections by the light of nature the inference would be obvious that constructive and implied trusts are outside the scope of the earlier sections. After reading some case law, however, he would find that in s. 8 (1888) the wide definition of a trustee probably includes any person who under the old law was prevented by his fiduciary position from setting up the lapse of time as a defence,[36] and, marvelous to relate, that a trustee under an "express trust" in s. 25 (1873) may mean approximately the same.[37] If he pursued

[35] In my LAW OF MORTGAGES (3rd ed. 1942) 579-582, I attempted to give some appearance of coherency to the Ontario statutory provisions in question by quoting and discussing them all in one section (§301A), but the discussion was necessarily brief, and some supplementary explanation is attempted in the present article.

[36] *Cf.* BRUNYATE, LIMITATION OF ACTIONS in EQUITY (1932) 123.

[37] *Cf.* BRUNYATE, *op, cit.*, pp. 55-56, 241 ff. Section 25 (1873) was supposed to state the old equitable rule, but clearly an express trustee in the statutory statement includes some classes of trustees who are commonly called constructive trustees. For a discussion of various classes of constructive trustees who are within the old equitable rule, see *e.g. Soar* v. *Ashwell*, [1893] 2 Q.B. 390; *Taylor* v. *Davies* (1917), 41 O.L.R. 403, 41 D.L.R. 510, S.C., [1920] A.C. 636, 51 D.L.R. 75; *Clarkson* v. *Davies*, [1923] A.C. 100, [1923] 1 D.L.R. 113, [1922] 3 W.W.R. 913; *In re Eyre-Williams, Williams* v. *Williams*, [1923] 2 Ch. 533.

his reading of case law he might find that the expression "express trust" in s. 25 (1833) was probably originally intended to be taken literally, but was subsequently extended to include a resulting trust, but that in any case the expression has a more restricted meaning than that of the same expression in s. 25 (1873);[38] and presumably the expression has the same meaning in s. 10(1874) as it has in s. 25 (1833). The net result is that the four statutory provisions in question are quite unintelligible without a knowledge of an almost incredibly complicated background of case law illustrating the changes which have taken place in the meaning of the word "express" in connection with trusts under the statutes of limitation.[39]

One explanation of s. 10 of the statute of 1874 is that it is to be treated as a proviso to s. 25 of the statute of 1833.[40] Whether this explanation is valid or not, it is clear that any one who is seeking for the meaning of either section should read the other, but the two sections are widely separated in the Ontario and Conference statutes. Section 10 (1874) would seem at first reading to apply to a suit by a *cestui que trust* against a trustee holding land on trust to pay him a sum of money or an annuity, but it has been held that this is not so, and that the application of the section is confined to another class of cases altogether which may be thus described: "Where land vested in one person is charged with a sum of money in favour of another and the means of raising the amount of the charge, whether in the form of a term or otherwise, and the duty of paying such amount to the person entitled thereto when raised are entrusted to a third person as trustee."[41] These are merely examples of problems arising under these statutes, and so far as they go they do not suggest that the statutes in their present form are reasonably clear as a statement of the law. Finally, I merely mention, without discussing, the obscurity of clauses (a) and (b) of s. 8 (1888), the meaning of which has given rise to amazing differences of judicial opinion.[42]

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[38] *Cf.* BRUNYATE, *op. cit.*, pp. 54 ff, 99 ff.

[39] The word "express" in the phrase express trustee "may extend only to a trustee expressly so constituted by words written or spoken, or it may include also a fiduciary agent, or it may extend to any person who as a trustee is debarred from pleading the Statutes of Limitations": BRUNYATE, op. cit., p. 55.

[40] See my LAW OF MORTGAGES (3rd ed. 1942) 579, citing LEWIN, LAW OF TRUSTS (14th ed. 1939) 842-843; *cf.* PRESTON & NEWSOM, LIMITATION OF ACTIONS (1940) 247-248.

[41] *In re Jordison*, [1922] 1 Ch. 440, at p. 457; *cf.* BRUNYATE, *op. cit.*, p. 67.

[42] See *In re Allsopp, Whittaker* v. *Barnford*, [1914] 1 Ch. 1, and *In re Richardson, Pole* v. *Pattenden*, [1920] 1 Ch. 423, and cases there cited; *cf.* full discussion in BRUNYATE, *op. cit.*, pp. 113 ff.

In England the law was notably simplified by the Limitation Act, 1939. The general scheme of the statute, so far as it relates to trusts and trustees, is stated as follows in Preston & Newsom, Limitation of Actions (1940) 244, 245:

> (1) There is no general provision in the Limitation Act, 1939, excepting trustees or any class of them from the benefits of the Act, which, accordingly, applies to them fully, subject only to ss. 7 and 19.
>
> (2) "Trustee" is defined by reference to the Trustee Act, 1925, and comprises all trustees, and personal representatives. Further, s. 20, which deals with claims to share in the personal estate of a deceased person, is expressly made subject to s. 19(1).
>
> (3) Section 19(1) provides in direct terms that no trustee may rely on any period of limitation in the cases enumerated as exceptions to the Trustee Act, 1888, s. 8(1).
>
> (4) Section 19(2) follows the Trustee Act, 1888, s. 8(1)(b), in providing a six-year period for claims against a trustee not otherwise provided for by the Act.

In §§ 2 and 3 of this article I will discuss statutes of limitation in the conflict of laws and some questions of legislative power in Canada relating to limitation of actions.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.