CASE AND COMMENT

LIMITATION OF ACTIONS—PRINCIPAL AND SURETY—ACTION AGAINST SURETY.—The judgment of Mr. Justice Wright, of the Supreme Court of Ontario, in *Re Alexander Thomson Estate and John Macdonald & Co Ltd.*,[1] determines an important question in regard to the application of the Statute of Limitations[2] to the right of a creditor against a surety.

In consideration of time being allowed to the debtor, a third person assumed responsibility for the due payment of the amount then due with interest. The written guarantee contained, *inter alia*, the following clause: "Should said payments not be regularly made, the whole amount is immediately to become due and payable, and as stated above, I assume responsibility for payment of the whole amount." The debtor made default on the first payment and thereupon a cause of action for the whole amount arose against the surety.[3] However, the debtor subsequently made payments from time to time on this debt to the creditor.

Did those part payments keep alive the creditor's claim against the surety, so that, notwithstanding the fact that six years had elapsed from the date on which the cause of action arose against the surety, the creditor might recover on the guarantee?

It did not appear that the creditor had extended the time for payment with the debtor, behind the surety's back. It is well settled that mere delay in enforcing a claim against the principal debtor does not discharge the surety.[4]

The effect of part payment in preventing the Statute running in the case of simple contract or debt is not specifically dealt with in the Statute.[5] At Common Law, a part payment was only effectual to bar the running of the Statute where it amounted to an admission of the debt from which a new promise to pay might be implied. The part payment of the debt by a stranger, without more, would not be an admission of the debt by the debtor, and there could be no impli-

[1] As yet unreported.
[2] R.S.O. 1914, c. 75.
[3] See *Reeves* v. *Butcher*, [1891] 2 Q.B. 509.
[4] See *Black* v. *The Ottoman Bank*, (1862) 15 Moore (P.C.) 472.
[5] R.S.O. 1914, c. 75, s. 55, in providing for acknowledgments in such cases, has the only mention of part payments in this regard: ss. (2): "Nothing in this section shall alter, take away or lessen the effect of any payment of any principal or interest by any person."

cation of a new promise to pay on his part. Even in the case of joint obligors, sec. 56 of the Statute of Limitations[6] provides that any payment by one joint contractor or obligor shall not prevent another from taking advantage of the Statute.

It is always important when a surety or guarantor makes a collateral contract to observe the terms of it. Its terms may be such, that the surety binds himself to pay whatever indebtedness the principal debtor may be under at or during a future period, and the Statute on the surety's obligation will not run until that time. It may not begin to run at the same time that it begins to run on the principal debtor's indebtedness.

In the case under consideration, the surety only undertook to guarantee the due payment of the debt. The principal debtor, in making part payments, was in no sense the agent of the surety in doing so and no admission of the debt or new promise to pay could be imputed to him.

The Court, in holding that these part payments by the debtor were ineffectual to prevent the Statute running in favour of the surety, undoubtedly reached the correct conclusion. The law must be that where a principal debtor and surety are severally, or jointly[7] bound for the same debt, the principal debtor cannot in any way extend the statutory period as to the surety, without the assent of the latter given either in his original contract or subsequently.[8]

S. E. S.

* * *

BANKRUPTCY—LANDLORD AND TENANT.—The case of *Re Abraham*,[1] recently decided by the Appellate Division S.C.O., is deserving of notice, as it seems to show that the provisions of the Ontario Statute(14 Geo. V. c. 42) may be effectively evaded by landlords. In that case a Trustee in Bankruptcy of a lessee sought to recover for the benefit of the debtor's estate a sum of $1,000, which the lessee had deposited with the lessor on the granting of the lease, subject to a condition that it should be applied in payment of the rent to accrue at a future time, but to be forfeited in the event of the lessee's bankruptcy. There was no question as to the solvency of the debtor when the lease was made—but the money was claimed on the ground that it was in the nature of a penalty which might be relieved against.

[6] *Ibid.*
[7] See section 55, *supra.*
[8] See *In re Wolmershausen*, (1890), 62 L.T.R. 541; Williston on Contracts, p. 391.
[1] 59 O.L.R. 164; (1926) 3 D.L.R. 971.

The Registrar in Bankruptcy adopted that view and gave relief on that basis: but his order was subsequently reversed by the learned Judge in Bankruptcy, on the ground that the deposit was liquidated damages and therefore not recoverable. The case was carried to the Appellate Division and the appeal dismissed, but Middleton, J.A., who gave the judgment of the Court, based his decision on the ground that the deposit in question was merely a payment of rent in advance, and therefore could not be recovered by the trustee—but there was a point taken in the Appellate Division which had not been previously raised, viz., that the transaction was in effect an evasion of the law relating to the bankruptcy of lessees. This point however is not referred to in the reasons for judgment, but even admitting that the payment in question was for rent in advance, it was made obviously in contemplation of the fact that the lessee might become bankrupt, and in that event to secure for the lessor a more substantial benefit than is given by the statute above referred to. This statute, it should be remembered, is made in the interest of the creditors of the lessee and to protect them against excessive claims of landlords for rent, though expressly stipulated for and "to restrict" the claims of landlord in the event of the bankruptcy of the lessee to the rent in arrear at the date of the bankruptcy, and that accruing for three months thereafter, and for any further period for which the premises may be in the occupation of the trustee. Parties cannot always effectively contract themselves out of the provisions of a statute, even though it is made for the benefit of one of them: see *Rush* v. *Matthews*;[2] and one would think still less can any of the parties to a contract, evade the provisions of a statute enacted for the benefit of third parties.

The Act we have referred to is made to regulate the rights of landlords as against their tenants in case of bankruptcy, and so as to prevent lessors from getting any benefits other than those specified by the Act as against the creditors of their lessees notwithstanding any express stipulations or conditions in the lease to the contrary. It could hardly be contended for an instant that if the lease in question had contained an express provision that in the event of bankruptcy the lessee should pay to the lessor in addition to the rent in arrear, six months additional rent, that that provision could have had any force or effect as against the trustee in bankruptcy; and it seems to be well open to question, whether by getting the six months additional rent to be paid to him in advance by his lessee, that he can then effectively hold this excess as against the

[2] [1926] 1 K.B. 492.

trustee. May another trustee fairly say to the lessor, "you have moneys of the debtor in your hand to apply on rent, which in the event of bankruptcy is not due to you and never can become due—and therefore it is the property of the trustee. Perhaps if the question should ever come in litigation again, this may be found to be the real crux of the case; the real question being can any agreement made with a lessee in contemplation of the latter's bankruptcy give to the lessor any benefit beyond that provided by 14 Geo. V. ch. 42, Ont. If not, then under that Act the lessor's rights are "restricted" to the rights given by that Act. As to such excess the same must be treated as property of the debtor in the lessor's hands to which the trustee in the circumstances is entitled; and all questions as to penalties as liquidated damages are beside the mark, because under the Act the lessor is entitled to nothing beyond what the Act gives him. For this reason we venture to think it is unfortunate that this point in the case was not dealt with by the Appellate Court in *In re Abraham.*

A similar point, we may observe, arose before the Appellate Division of the S.C.O. in *Alderson* v. *Watson.*[3] In that case by the terms of the lease in question, the lessor had stipulated that in the event of bankruptcy a larger amount of rent should be paid to him than R. S. O. 1914 c. 139 provided, and as to this, Meredith, C.J.O., says at p. 577: "I am of opinion that the acceleration clause is void at all events as against the respondent [*as assignee for creditors*] as a fraud on the Assignment and Preferences Act;" and the observation of Mellish, L.J., in *Ex p. Mackay,*[4] quoted by Hodgins, J.A., seems equally in point: "A person cannot make it part of his contract that in the event of bankruptcy, he is to get some additional advantage which prevents the property being distributed under the Bankruptcy laws." LEX.

* * *

PATENT LAW—WHAT CONSTITUTES 'INVENTION.'.—The Judicial Committee of the Privy Council, in a recent case of *The Permutit Company* v. *Borrowman,*[1] has decided a very interesting question of patent law. The action was brought in the Exchequer Court to determine the question of priority as between two conflicting applications for patents. The applications concern the use of glauconite, or greensand in the softening of hard water. In the process by which this is secured, potassium, which glauconite

[3] 35 O.L.R. 564; (1916) 28 D.L.R. 588.
[4] L.R. 8 Ch. 643.
[1] (1926) 4 D.L.R. 285.

contains as a base, is in filtration exchanged for calcium and magnesium, which are the characteristic ingredients of hard water, these being retained by the glauconite filter, which gives up the potassium to the water. The potassium having been exhausted, the filter material may be regenerated by pouring through the filter bed a solution of common salt, the sodium in which is exchanged for the calcium and magnesium and thereafter plays the part originally played by the potassium, and the process may be repeated indefinitely. The sole contest was as to whether the defendant Borrowman or one Spencer, through whom the plaintiff claimed, was the first to invent the process.

The facts with regard to Dr. Borrowman's invention were not seriously in dispute. In November, 1913, he conceived the idea and was continuously engaged during the succeeding two years in laboratory experiments and in the construction of experimental filters in order to determine the best mode of applying his discovery to commercial and domestic uses. In 1915 he placed filters on the market and by 1916 his invention had proved itself to be a commercial success. The plaintiff's evidence was to the effect that in May, 1912, a year and a half before the idea had occurred to Borrowman, Spencer, a geologist in the employ of the United States Government, who had had some previous experience with glauconite used for purposes other than the softening of water, upon being told by one McElroy, a patent solicitor, of the use of an artificial substance called "permutit" for a similar purpose, thereupon conceived the idea that water could be softened by passing it through a filter bed of glauconite. He disclosed the conception to McElroy who, at his request, made a search of the prior art in order to ascertain whether or not the process was patentable and reported that it was. Some months later Spencer took a sample of glauconite to Mr. McElroy for submission to "the persons in New York" interested in water softening, in order that it might be tested. These persons were at that time unknown to Spencer, but were in fact the predecessors of the plaintiff company. Dr. Duggan, the plaintiff's chief chemist, tested the glauconite and found that it worked satisfactorily, but in view of the fact that the company was committed to the exploiting of "permutit" decided against taking up glauconite. The result of this test was reported to McElroy but not to Spencer, and the latter apparently thought no more about the matter, until 1916 when, at the instance of the plaintiff, he made application for a patent.

At the trial it was contended on behalf of the defendant, first, that the alleged conception by Spencer never in fact took place, and

second, that assuming the truth of the plaintiff's evidence, what was alleged to have taken place in 1912 did not constitute invention. The trial judge, the Hon. Mr. Justice Audette, decided both points adversely to the defendant's contention, holding that the doctrine of the United States Courts that in order to constitute an inveniton there must be "reduction to practice," had no application in Canada and that the sole question was, who first conceived the idea.

This decision was reversed in the Supreme Court, upon the ground that the alleged conception by Spencer had never in fact taken place and that the information embodied in his application for a patent had been obtained surreptitiously from Borrowman. Their Lordships considered the case to be one in which the reasons given by the trial judge in themselves showed that he had misunderstood the evidence and overlooked the weight and importance of facts, either undisputed or indisputably established by documents or otherwise. The Court did not therefore find it necessary to express any opinion on the question of law involved.

The Judicial Committee of the Privy Council, in a judgment delivered by the Lord Chancellor on July 9th, affirmed the judgment of the Supreme Court, but on other grounds. Their Lordships expressed no opinion upon the questions of fact dealt with in the judgment of the Supreme Court, but decided that, assuming the facts to be as alleged by the plaintiff, it was nevertheless not proved that any invention, in the true sense of the word, was made by Spencer in 1912. "It is not enough" their Lordships say, "for a man to say that an idea floated through his brain; he must at least have reduced it to a definite and practical shape before he can be said to have invented a process," and that "what Dr. Duggan did he did for his own purposes and not as the agent of Mr. Spencer."

The effect of this decision would seem to be that the doctrine laid down in the United States decisions as to the necessity of "reduction to practice" is also the law of Canada. There is however, one important distinction that must not be overlooked. Interpreting a statutory provision enacted a century ago and still in force, the United States Courts have held that where an inventor has used "due diligence" in his "reduction to practice" he is entitled, upon the completion of his invention, to date it back to the date of his first conception. No such provision is embodied in the Canadian Patent Act, and therefore in Canada, the date of invention is always the date of the completion and never the date of conception.

W. L. Scott.

RAILWAY EXPROPRIATION — TAKING LANDS OF ONE PERSON TO LESSEN DAMAGE TO ANOTHER. — Questions described by Lord Dunedin as "difficult and complicated" arose in litigation between Ellen Boland and the Canadian National Railway Company, disposed of by a judgment of the Judicial Committee of the Privy Council on 30th July, 1926. An order of the Railway Board made on application of the City of Toronto directed the Company in invitum to construct a subway for reasons of public safety, at the crossing of Bloor Street by the Company's railway. As construction of the subway deprived certain properties of access, from Bloor Street, the Company, to lessen the damages for depreciation of these properties, undertook to expropriate a 30-foot strip belonging to Mrs. Boland by which it could provide her neighbours with new means of access. Mrs. Boland objected and sought an injunction.

In the course of the various resulting proceedings, it was held,

By Orde, J.,[1] the trial Judge, that while a private company would probably not be able to do what the defendant company was doing, section 13 of the defendant's Special Act (9-10 Geo. V. c. 13) vested in it the powers which might in similar circumstances be exercised by the Minister of Railways under the Expropriation Act, R.S.C. c. 143; that where there was an actual work in progress as part of the Company's undertaking such powers extended to the taking of any lands reasonably required for the purpose of carrying out the work effectively and at a reasonable cost, including lands, of one person to be used in mitigation of damages to others; that the work, though ordered by the Board in the interest of the public, was part of the Company's undertaking, citing *Toronto* v. *C. P. R.*,[2] and *Toronto Railway Co.* v. *Toronto*,[3] and that the Dominion legislation purporting to confer such powers was not ultra vires of Parliament.

By a majority of the Second Appellate Division of Ontario,[4] on appeal from Orde, J., that it was unnecessary for the defendant company to resort to the Special Act as the Railway Board had authorized the construction of the work and the taking of the 30-foot strip; that with such authority the defendant had power under the Railway Act 1919, sec. 257(2) to take any land required for carrying out properly the order of the Board; that the

[1] 56 O.L.R. 653.
[2] [1908] A.C. 54 at p. 59.
[3] [1920] A.C. 426 at p. 438, *et seq.*
[4] 57 O.L.R. 619.

Court had no power to go behind the Board's Order, but, in any case, there was no reason why the Board should not, in ordering works for the public safety, employ "every device to avoid inflicting serious injury on one, even though this may involve expropriating the property of another." Per Riddell, J.A. (agreeing in the result), that the Expropriation Act applied and was conclusive in favour of the company. (It is to be noted that the judgment of the majority of the Court assumed that the taking of the 30-foot strip had been authorized by the Board and also that title to it was to remain in the Company.)

By the Appellate Division,[5] that as the case did not fall within the Privy Council Appeals Act, R.S.O. 191, ch. 54, no "sum or value" being in controversy, no appeal lay from its judgment as above to the Privy Council except by leave of the Judicial Committee itself (the Judicial Committee afterwards gave leave).

By the Board of Railway Commissioners (declaratory order) that its order directing construction of the subway did not authorize the taking of the 30-foot strip, and that a plan signed as approved by its engineer showing the strip as part of the land to be taken for the works was not to be regarded as giving such authority.

By the Exchequer Court,[6] that it had no jurisdiction to grant a warrant of possession to the Company, which was a separate and distinct entity from the Crown, and might apply to the provincial Court for a warrant under secs. 238 et seq. of the Railway Act, 1919.

By the Supreme Court of Canada,[7] reversing the Exchequer Court on appeal, and on a reference under section 60 of the Supreme Court Act, that the obtaining of possession fell under the fasciculus "Taking and Using of Lands" (which the Court held to include the group of sections headed "Expropriation Proceedings") in the Railway Act 1919, and therefore, under section 13 of the Special Act, proceedings for possession should be taken under section 21 of the Expropriation Act and not under the Railway Act, though the Railway Act applied to subsequent proceedings for the ascertainment of compensation. The Exchequer Court was therefore wrong in refusing jurisdiction. As to the right to expropriate, the order of the Board was sufficient (as held by the Appellate Division) to justify all that had been done by the Company.

Finally, by the Judicial Committee of the Privy Council, on appeal from the Appellate Division, it was held,

[5] 58 O.L.R. 225.
[6] (1925) Ex C.R. 173.
[7] (1926) S.C.R. 239.

1. That the original order of the Board was a proper order under sec. 257 of the Railway Act.

2. That "mutatis mutandis" in section 13 of the Special Act means that in the case of the company its "undertaking" is to be put in place of a "public work" in the case of the Minister, so that it is solely for the purpose of its "undertaking" that the company can invoke the Expropriation Act. The question therefore becomes, Is the subway part of the undertaking of the railway? and inasmuch as the so called subway is merely a lowered highway which remains a part of the roadway belonging to the municipality, crossed by a new railway bridge, it cannot be so regarded.

3. That the original plan approved by the Board, and not the subsequent "detailed" plan signed by its engineer after action begun was the measure of the company's rights to construct; and as the original plan did not show that the 30-foot strip was to be taken, the Board had not in fact approved such taking and therefore the effect of such approval, if given, need not be considered.

The result is that Mrs. Boland succeeds on the ground that the company's Special Act only allows it to invoke the Expropriation Act strictly for the purpose of its "undertaking;" and that its "undertaking" does not include a subway (railway bridge and lowered municipal highway) ordered by the Board for public safety. The ultimate tribunal does not express an opinion as to the company's right either under its Special Act or under the Railway Act to expropriate land of one party to give it to another in mitigation of damages caused by work in the carrying out of its undertaking. Nor does it decide whether the Railway Board could authorize such expropriation for such a purpose where the work is not strictly part of the "undertaking" according to the construction put on "undertaking" in this case. As to that, we are left to the judgments of the Appellate Division and the Supreme Court, with, however, a warning from the Judicial Committee that "it is not a conclusion to be easily reached that (the company) should act in such a matter with all the powers of an autocratic despot."

Some interesting questions may arise — in fact have already arisen. If a subway so ordered is not a part of the company's undertaking, is the company liable for damages occasioned by constructing it, or can it plead that it is a mere instrument of the Board to carry out a work of public convenience? A distinction as to procedure has already been made[8] between works initiated by the com-

[8] *Brant* v. *C. P. R.*, 36 O.L.R. 619.

pany and works ordered in invitum by the Board, and it has been suggested that the distinction may extend to questions of liability as well. But see *Parkdale* v. *West*.[9] Then again, it has been argued that as the judgment does not rest upon the use to be made of the Boland land, the logical result of it is that the company has no powers of expropriation, for such a work (not being part of its "undertaking") under either the Expropriation Act or the Railway Act, and a landowner affected by this very subway has been given a stay of arbitration proceedings in order to give him an opportunity to attack the whole proceeding in an action if so advised: *Re Hancock and C.N.R.*[10]

J. D. S.

BOOKS AND PERIODICALS.

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History of England. By George Macaulay Trevelyan. Toronto: Longmans, Green & Co. 1926. Pp. 703+xx. Price $4.25.

One is not permitted to read far in this most absorbing *sommaire* of the history of England without realizing that it is not for nothing that the author is a grand-nephew of the famous Lord Macaulay. Mr. Trevelyan has been so happy as to escape the defects that marred the work of his great kinsman while possessing in no small measure his lucidity, epigrammatic power, and general readableness. In proof of this, let us cull one or two specimen pieces. In the opening chapter (p. 2) he says:—"The era of Celt, Saxon and Dane is like Macbeth's battle on the blasted heath. Prophecy hovers around." Of the passing of Henry VIII we get this picture and comment (p. 300):—"The brutal and self-willed King was to die murmuring of his faith in God, his hand lying trustfully in that of the gentle and perplexed founder of Anglicanism. If one could rightly interpret the inner meaning of that scene one would know much of the curiosities of human nature." Speaking of Elizabeth's declaration that she owed nothing to Philip of Spain for her life and liberty in Mary's reign, but all to the English people, Mr. Trevelyan observes (p. 326). "It was one of those lightning flashes of sincerity that so often burst from the cloud of vain and deceitful words in which Elizabeth loved to hide her real thought and purpose. Sometimes, indeed, she lied for amusement rather than in the hope of deceiving." Parenthetically let us say here that in not mincing his words concerning the faults of good Queen Bess, Mr. Trevelyan certainly does remind us of his avuncular predecessor in the business of writing English

[9] [1887] 12 A.C. 602.
[10] Grant, J., October 20, 1926.