CASE AND COMMENT.

CROWN — PARLIAMENT OF CANADA — PREROGATIVE OF HONOURS.—With the comments in the April issue of the CANADIAN BAR REVIEW (*ante* p. 255) I substantially agree. I should like to add some notes :—

(1) Honours granted by the crown have as a general rule validity throughout His Majesty's dominions and possessions. Although it is interesting to note that the knighthoods of St. Patrick and the Thistle (two of the most distinguished) have no rank in England.

(2) Honours are granted under the prerogative, and will continue so to be granted (even by delegation as to the former Lord-Lieutenant of Ireland)[1] until the Parliament of the United Kingdom controls, in relation to them, the prerogative by statute, and then of course the crown must act in terms of the controlling statute.[2]

(3) Such statutory control by the parliament of the United Kingdom would only apply to Canada as part of the law of Canada on Canadian request.[3]

(4) The Statute of Westminster, 1931, does not touch the prerogative of honours, which has never passed to the governor-general any more than that of peace or war. It does touch the prerogative where the prerogative is controlled by British statutes (e.g. The Judicial Committee Acts)[4]; and such statutes can be repealed now in their application to Canada by Canada or any of its provinces. Thus the rule in the *Nadan Case*[5] can be made inapplicable.

(5) Honours are conferred on Canadians (i) through a convention that they are recommended by the Canadian ministry; and (ii) on the responsibility of the cabinet of the United Kingdom, for that cabinet must bear responsibility and must advise His Majesty in relation

[1] Nicolas, *History of the Orders of Knighthood*, xiii.

[2] *Per* Lord Dunedin in *Attorney-General* v. *DeKeyser's Hotel Ltd.*, [1920] A.C. 508 at p. 526.

[3] Statute of Westminster, 1931 (22 Geo. V. c. 4, s. 4).

[4] 3 and 4 William IV., c. 41; 7 and 8 Victoria, c. 69.

[5] *Nadan* v. *The King*, [1926] A. C. 482. (Cf. 48 L. Q. R. at pp. 212 seq.). The judgment in this case is confusing. (Cf. 45 *Juridical Review*, at pp. 338 seq.).

to the exercise of a prerogative through which flow honours valid throughout all His Majesty's dominions and possessions.

The Canadian intervention is merely a custom of the constitution; and His Majesty can, on the responsibility of His advisers in the United Kingdom, *legally* bestow honours of this wide validity on any subject of the crown, quite apart from anything any of His oversea advisers may or may not do. *Legal* responsibility for them lies, not in Canada, but in the United Kingdom.

(6) Canada cannot legally pass a statute prohibiting the conferring of honours but it can by statute—

(i) Negate the use of honours, after their bestowal, within its territories, and prohibit Canadian citizens from using them abroad. Professor Keith supports this suggestion,[6] but it is not without municipal difficulties, as will appear. A bill in these terms was introduced in the New Zealand legislature in 1911.

(ii) Add a clause to the Immigration Act, including those who possess honours among the prohibited classes.

(iii) The Dominion can apparently create *local* honours and so can a Province[7]. This would still remain true, under the Statute of Westminster, even though the statute contemplated in (2) (*supra*) were passed, or applied to Canada (3) (*supra*).

It may be that the action suggested in 6 (i) (*supra*) might not be easy to accomplish. Is an "honour" a "property" or "civil right"? Peerages and baronetcies [8] are undoubtedly "property"; and I presume a knighthood being a "dignity" is a "civil right."[9] Would action by the Dominion legislature under 6 (i) (*supra*) be legal? Are "honours," as far as Canadian legislation is possible in connection with them, to be regarded as "for the peace order and good government of Canada" in a time of national peril and calamity—"extraordinary peril to the national life of Canada as a whole . . . . an epidemic of pestilence"—and therefore, on Lord Haldane's arguments in the

[6] *Constitutional Law of the British Dominions* (London, 1933) at p. 38.
[7] Cf. R.S.Q. 1925, c. 53; *Lenoir* v. *Ritchie*, (1879) 3 Can. S.C.R. 575.
[8] For the dignity of baronet as property see *Re Rivett-Carnac's Will*, (1885), 30 Ch.D. 136.
[9] A knighthood is, of course, a personal dignity valid throughout the empire. *Lord Advocate* v. *Walker's Trustees*, [1912] A. C. 95.

Snider Case,[10] to be excepted out of the exclusive provincial control over property and civil rights in the provinces? Of course this seems absurd. All of which, however, suggests that the learned contributor has only opened up another aspect of the antique nature of the British North America Act; of the law's "ungodly jumble", which needs education not training for its elucidation.

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CONVERSION — MEASURE OF DAMAGES — PUNITIVE.— In *Barker* v. *Buck*[1] a thresher seized a quantity of grain, hauled it to market, and sold it to satisfy a claim of $179.25 for threshing, and $71.00 for hauling it. The *Threshers' Lien Act* gave him a lien for threshing, and a power to sell, but it did not give him a lien for hauling the grain to market. The owner of the grain brought action against the thresher for his wrongdoing; the Court decided on the strength of the *Six Carpenters' case*,[2] that the thresher lost his lien for threshing by wrongly combining it with a claim for hauling, and awarded judgment against him for the sum for which the grain sold; the Court also found that the wheat was worth for seed one dollar a bushel more than ordinary wheat, and added that to the plaintiff's award.

In the *Six Carpenters' case* the Court expounded the rule that where authority to enter upon the premises of another is given a person *by law*, and is subsequently abused by the licensee committing a misfeasance or an act of trespass, the latter becomes a trespasser *ab initio* and action may be maintained against him as if his original entry was unlawful. The rule applied not only to entry upon lands, but also to all actions which constitute the wrong of trespass whether to lands, goods, or the person of another.[3] Under it a lien created by a lawful distress was destroyed by the lien holder abusing his authority, and the plaintiff was entitled to recover damages for the entire transaction, and not only for the wrongful portion of it.[4]

[10] *Toronto Electric Commissioners* v. *Snider*, [1925] A. C. 396 at p. 412.
[1] [1934] 1 W.W.R. 223.
[2] 8 Co. Rep. 146a.
[3] See *Califf* v. *Wilson* (1835) 2 N.B. 145.
[4] See *The Six Carpenters' case* 8 Co. Rep. 146a.

In so far as the rule punishes one who exceeds the authority given by law, by committing a trespass against the person of the other, it is often highly desirable, as where the wrongdoer is guilty of an indignity to the person aggrieved; it is also desirable in many cases that a person who abuses the privileges given him by law in so far as the lands or goods of another are concerned should be punished for his tortious act in addition to making compensation; but it is not logical or just to reward a plaintiff, other than the King, by allowing him more than compensatory damages for trespass to lands or goods.

The injustice of the rule has been recognized by Parliament rendering it inapplicable in the case of seizures by landlord.[5] It has also been whittled down by the Courts, thus, unless it appears that the wrongdoer's tortious act indicated that he entered with the intent to abuse the authority given by law, the rule will probably not be applied.[6] An officer who commits a trespass by remaining an unreasonable time on the premises after making a seizure, no longer comes within the rule;[7] and where the seizure was lawful as to some of the goods but unlawful as to others the rule applies only to those goods which were unlawfully seized and the rest of the seizure continues to be legal.[8] The rule does not apply to an excessive seizure.[9]

"It is to be regretted that a legal fiction due to the misplaced ingenuity of some mediaeval pleader should have thus succeeded in maintaining its existence and oppressive operation in modern law. It has been abolished by statute in the case of distress for rent and in certain other instances, but it ought to be wholly eliminated from the law" in so far as it applies to lands or goods.[10]

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[5] See II Geo. 2 c. 19 s. 19.

[6] See Bayley J. in *Shorland* v. *Govett* (1826) 5 B. & C. 485; Littledale J. in *Smith Egginton* (1837) 7 Ad. & E. 167.

[7] See *Lee* v. *Danger* (1892) 2 Q. B. 337.

[8] See *Harvey* v. *Pocock* (1843), 11 M. & W. 740; *Canadian Pacific Wine Co.* v. *Tuley* [1921] 2 A. C. 417; *Elias* v. *Passmore* [193]4 W. N. 30.

[9] See *McLean* v. *Shannon* [1924] 3 W. W. R. 316.

[10] See Salmond on Torts, 7th Ed. 244.

TRUST—TRACING THE RES—BURDEN OF.—The recent decision of the Judicial Committee of the Privy Council in *Madras Official Assignee* v. *Krishnaji Bhat* [1], reported only in the Times Law Reports, while appearing at first glance to be merely a decision upon the interpretation of an Indian statute, is an important and far-reaching pronouncement on the rights of a cestui que trust in the following of trust funds, whether or not the same have become intermingled with and are indistinguishable from the property of the trustee, and whether or not the trust funds have been dealt with in accordance with the terms of the trust.

The facts of the case were as follows : In 1919 T. S. Bhat (hereinafter designated as the father) handed over to Sadasiva Tawker (hereinafter designated as the uncle) the sum of 10,000 rupees to invest in the uncle's jewellery firm, as a fixed deposit, on the term that it would carry interest at nine per cent. per annum payable to the father until his son, T. Krishnaji Bhat, attained the age of twenty-one years, and upon the happening of that event the capital sum would be payable to the son. The interest was paid until 1923, when the firm encountered difficulties, and in 1923 a suit was instituted in the name of the son against the members of the firm alleging that they were trustees of the fund and claiming their removal from the trust and the appointment of new trustees in their place, with a direction to hand over to the latter the said sum of 10,000 rupees. The defence was in effect an admission of the trust, but a plea that the suit was premature in as much as the plaintiff was still a minor and no breach of trust had been committed. While the suit was still pending in 1925 the defendant firm was adjudged insolvent and the Official Assignee, in whom the estate of the insolvent firm was vested, filed a written statement putting the plaintiff to the proof of the existence and validity of the trust and denying that the plaintiff was entitled to any preferential claim. Judgment was given for the plaintiff. This judgment was upheld on appeal in India, and on a further appeal by the Official Assignee to the Judicial Committee of the Privy Council.

The decision of the Judicial Committee, as set out in the written reasons of Sir George Lownes, turns upon one section only of an Indian statute stated by His Lordship as follows : "Under Section 52 (1) (a) of the Presidency Towns Insolvency Act, 1909, property held by an insolvent on trust for any other person is excluded from the assets divisible among the creditors."

[1] (1933), 49 T.L.R. 432.

This statutory provision is substantially the same as section 23 (1) of our *Bankruptcy Act*,[2] which reads as follows: "The property of the debtor divisible among his creditors (in this Act referred to as the property of the debtor) shall not comprise the following particulars: —

(1) property held by the debtor in trust for any other person;"

The Judicial Committee was of the opinion that the evidence did not warrant the finding of the trial judge that the sum of 10,000 rupees could be traced into particular assets of the insolvent firm, which had upon sale realized the sum of 22,000 rupees, but held "that the investment of the trust money in the general assets of the business was sufficient to give the respondent (the son) a charge upon the sale proceeds in the hands of the appellant" (the Official Assignee), and that by virtue of the above quoted section the assets of the insolvent, which passed to the trustee in bankruptcy, were subject to a charge of $10,000 rupees in favour of the son.

It was suggested in argument by counsel for the Official Assignee, that, if the fund had been improperly employed in the business of the bankrupt, the beneficiary would be entitled to a charge upon the whole of the assets[3] but it was argued that no such right could be accorded to the beneficiary if the employment of the fund in the business was in pursuance of the terms of the trust. The Board however refused to give effect to that argument (which seems to have been adopted by the Supreme Court of Canada in *Brighouse* v. *Morton* [4]) and, following *In re Hallett's Estate*,[5] it was held that there is no distinction between a rightful and a wrongful disposition of the property so far as regards the right of the beneficial owner to follow the proceeds.

The reasons for the judgment fail to disclose whether or not it was argued that the fund of money had become mingled with and indistinguishable from the assets of the insolvent, and that therefore there was no right to follow the money, but their Lordships, having stated that the trust fund had been invested in the business, do say:—"There was no allegation that it (the 10,000 Rs.) has been lost or ceased to exist before the insolvency. If this had been proved the case might possibly have been different; see *James Roscoe (Bolton), Limited* v. *Winder* (1915) 1 Ch. 62. Their Lordships offer no opinion upon this

[2] R.S.C. 1927, c. 11.
[3] See sec. 66 of the Indian Trusts Act, 1882.
[4] (1929) S.C.R. 512 at p. 519.
[5] (1880), 13 Ch. D. 696 at p. 709.

question as the necessary facts have not been pleaded or put in evidence *and the burden of proving them would clearly be on the appellant.*"

Therefore, it may be concluded that the view of the Judicial Committee is that, not only is it not necessary, in order to be entitled to a charge on the property passing into the hands of the trustees in bankruptcy, that the cestui que trust shall be able to follow the *res* of the trust fund into particular assets or a particular fund, but it is incumbent upon the trustee in bankruptcy, if he is to defeat the claim, to prove that the particular *res* of each trust, of which the bankrupt is trustee, has been lost or ceased to exist, i. e., that it has not "remained a part of the assets of that business and to have been there at the date of insolvency." This would be difficult, if not impossible, to show in many of our bankruptcies where there have been conversions and yet there remains in the business of the debtor goods, shares or money sufficient to compensate for the various conversions. Furthermore, an old judgment of Turner, L. J., in *Pennell* v. *Deffell* [6] is approved as laying down the correct principle, that as between a cestui que trust and a trustee or parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character and all the fruits of such property, whether in its original or its altered state, continues to be subject to or affected by the trust.

Some decisions of our Canadian courts seem to hold that the cestui que trust must trace the *res* of the trust into the assets of the insolvent, which pass into the hands of the trustee in bankruptcy, before he can have any priority as a trust creditor over ordinary trade creditors and that if there has been any intermingling of the *res* there is no right of the cestui que trust to a charge upon the assets of the bankrupt in priority to the ordinary trade creditors of the bankrupt, such as the landlord. In *Re Carson* [7] Middleton, J. A., reading the judgment of a majority of the Court said: "When the debtor has taken a trust fund, *if it remains intact or can be ear-marked* in whole or in part, the cestuis que trust can retake it, it is theirs; but when the money taken has been employed by the debtor in carrying on his business and paid away to his ordinary creditors, they may have no other remedy than to rank and take their dividends."

[6] (1853), 4 De G. M. and G. 372.
[7] (1924), 55 O.L.R. 649 at p. 655.

Further, it would appear to have been held that wherever the *res* has been converted into money and that money has been mingled with the money of the bankrupt it is impossible to trace trust property. (*Re Robertson* [8] and *Re Inrig* [9]).

The decision of the Privy Council in the *Madras* case (*supra*) raises serious questions as to the correctness of some of our Canadian decisions, because undoubtedly the 10,000 rupees, which were the *res* of this particular trust, were intended to be and were in fact invested in the business and mingled with the assets of the bankrupt and the Judicial Committee expressly finds that the particular 10,000 rupees could not be traced into any particular goods of the bankrupt.

The case of *Negro* v. *Pietro's Bread* [10] should not be neglected in considering the applicability of this decision because in that case the Court of Appeal for Ontario held that a judgment of the Judicial Committee of the Privy Council is not binding on Canadian courts unless the appeal upon which that particular judgment was given, was an appeal from a Canadian court. However, this decision has been questioned [11] and in any event any judgment of the Judicial Committee of the Privy Council is entitled to great weight.

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ENGLISH CASE LAW AND ONTARIO COURTS.

A learned contributor has sent us the following note :

In *R.* v. *Leonard Harris*, (1927) 20 Cr. App. Rep. 144 the head-note reads : —

"If a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath, the proper direction to the jury is that his testimony is negligible and that their verdict should be found on the rest of the evidence." The head-note appears to be in harmony with the language of the Court as reported.

In the Ontario case of *R.* v. *Kadeshevitz*, (1934) O.R. 213, which came on before the Court of Appeal (Mulock, C.J.O., and

[8] (1930), 11 C.B.R. 263.
[9] (1924), 4 C.B.R. 516.
[10] (1933) O.R. 112.
[11] See (1933) 11 Can. Bar Rev., pp. 281 and 287.

Riddell, Masten, Davis and Macdonnell, JJ.A.) this English case was cited and relied upon in argument. It was obviously impossible for the Court to support the conviction if this English decision was accepted as law, since the only evidence upon which a conviction could be had was that of a witness who had made an affidavit directly contrary to his evidence, and absolving the accused. The Court refused to accept the decision as law and sustained the conviction, even increasing the sentence. It was left to Mr. Justice Riddell to deal with the law and the English case, the substance of his judgment being : "If the law in England is correctly stated in this case, our law is different; the fact that a witness has, wittingly or unwittingly, voluntarily or under pressure, wilfully or mistakenly, with good or with bad intent, made a statement under oath, or otherwise, differing from that made in the witness box at the trial, does not prevent the jury from considering his testimony and giving it the effect they consider right—they are not to be instructed that they must disregard his testimony and decide the case on the other evidence only. Had the supposed rule been followed in the present case, a conviction could not properly have been obtained. . . . . We must refuse to accept it as law." (p. 220).