NOTES.

EQUITABLE JURISDICTION IN BANKRUPTCY.—In a recent case before the Appellate Division of the Supreme Court of Ontario, *Re Orczy,* 53 O. L. R. 323, a somewhat curious question was involved upon which conflicting opinions were expressed as to the law applicable to the case.

The facts were simple and as regards them there was no difference of opinion, but as to the law, three diverse views were expressed. The case arose in bankruptcy on an appeal by a creditor from the disallowance of his claim by the trustee. The creditor, whose claim was in question, was the father of the bankrupt debtor. He had advanced his son money and had taken a chattel mortgage for $6,446 as security therefor, which was duly registered. The son found that, with this mortgage standing against him, he could get no credit, and informed his father of the fact, whereupon the father agreed to release and discharge the mortgage, which he accordingly did; but he took from the son his promissory notes for the amount of the debt.

It is perfectly obvious from the very nature of the transaction that the father and son intended that the existence of the debt due to the father should be concealed by the son from those with whom he proposed to get credit, because if it were made known to persons with whom the son desired to obtain credit that notwithstanding the discharge of the chattel mortgage the debt secured thereby was still due and owing by the son, the object the parties had in view in discharging the mortgage would probably have been altogether frustrated.

It seems therefore a fair and reasonable inference that the mortgage was discharged for the express purpose of enabling the son to conceal the existence of his indebtedness to his father from all those with whom he desired to contract credit. The son did submit thereafter to one of his creditors a statement of his affairs from which the debt to the father was omitted, and obtained from that firm goods on credit. Whether the like representation had been actually made to any other creditors who subsequently gave the son credit did not appear. Not long after the debtor became bankrupt and the father filed a claim against the debtor's estate which the trustee disallowed, on the ground that the father was really a partner of his son.

On the appeal to Fisher, J., that learned Judge was of the opinion that there was no partnership but that the father had discharged his

mortgage for the purpose of enabling his son to get credit by concealing the existence of his debt, and therefore in the exercise of the equitable jurisdiction of the Court he held him to have debarred himself from competing with all other creditors whose debts were contracted after this arrangement had been entered into by the father with his son; and, therefore, although he allowed the appeal of the father as a creditor, he accompanied his order by a declaration that he was entitled to no dividend until the creditors whose claims were contracted after the discharge of the chattel mortgage had been paid in full. In short, he seems to have concluded that it would be enabling the father to perpetrate a fraud on those creditors if after entering into a scheme enabling his son to suppress the debt due to him, he should thereafter be allowed to compete with creditors whom he had contributed to induce to act on the basis that the father's debt was non-existent. This was in effect merely saying to the father: "You agreed that in order to enable your son to obtain credit your own debt should be treated as non-existing. Equity and good conscience require that you should adhere to that agreement."

From this decision the father appealed so far as it affected the direction as to the payment of dividends. In the Appellate Court (Maclaren, Magee, Hodgins and Ferguson, JJ.A.), Hodgins, J.A., was of the opinion that the direction of the Bankruptcy Act for the payment of the debts of creditors *pari passu* could not be varied by the Court on any equitable consideration of the rights of creditors *inter se*. Although he admitted that "the rule adopted by the learned Judge (i.e., Fisher, J.), may be applicable where a fund is being distributed and the Court is at liberty to apply equitable principles, or to enforce an estoppel," but he says, "in bankruptcy the rule of equality is absolute, except where the Act itself gives priority to some debts over others."

It seems to us, and we submit our observations with all deference, that in dealing with this branch of the subject Hodgins, J.A., overlooked the fact that the jurisdiction of the Court in Bankruptcy is not merely legal but also equitable (see sec. 63 (1)), and having an equitable jurisdiction it is bound to apply equitable principles to all cases which come before it for its decision. Moreover, even apart from sec. 63 (1), in Ontario it may be asked, having regard to the provisions of the Ontario Judicature Act, is there any system of civil law in force therein except an amalgamated system of law and equity subject to the provision that where any difference formerly existed between the rules of law and equity the latter are to prevail? There can hardly, therefore, be any reasonable doubt that the only

system of civil law which a Judge in Bankruptcy, or any other Judge in Ontario, can administer is a system of law modified by equity.

Mr. Justice Hodgins appears to be of the opinion that the Court in the exercise of its jurisdiction is rigidly confined to the terms of the Bankruptcy Act. But it is needless to say the Bankruptcy Act does not pretend to be, and obviously is not, an epitome of the whole law which the Court is to administer. The Law Merchant, the common law, the statute law and equity have all to be administered by the Judge in Bankruptcy so far as applicable to any case which comes before him. In no other way it seems to us can sec. 63 (1) of the Act be interpreted. The order of distribution of assets prescribed by the Bankruptcy Act which Mr. Justice Hodgins seems to think can in no case be departed from is really no more rigid than R. S. O. ch. 121, sec. 53, providing for the administration of intestates' estates, and there seems to be no good reason why the Court in the administration of either Act cannot say that a creditor has actually waived his right to participate, or that by a course of conduct he has debarred himself from so doing. And this would in no way be any violation of either Act, but merely the carrying out of a well-settled principle of law, that any man may waive an Act introduced for his own benefit. That is he may validly waive, or by a course of conduct debar himself from, any statutory right.

Magee, J.A., was of the opinion that the Judge below had gone too far and that the appellant was only debarred from competing with creditors who had been, or could be shown to have been, deceived by actual misrepresentation as to the appellant's debt; whereas Fisher, J., had treated the appellant as debarring himself from competing with all creditors whose claims accrued subsequent to his discharging his mortgage even though no actual misrepresentation was shown to have been made to them; probably because he regarded the discharge, coupled with the statement that the debt had been paid, as a holding out to the public generally, and all persons dealing subsequently with the debtor, that the debt secured by the chattel mortgage had been in fact paid, from which position it was inequitable that the appellant should be allowed to recede.

Maclaren and Ferguson, JJ.A., agreed with Hodgins, J.A., in allowing the appeal, but the latter learned Judge bases his judgment on the ground that in his opinion the practice in bankruptcy does not permit the adjustment of the rights of creditors *inter se,* but only the claims and privileges and preferences of creditors as against the insolvent and his estate, basing this view on the cases of *Ex-parte Pottinger,* 2 Ch. D. 621, and *In re Frost,* (1899), 2 Q. B. 50, 52.

"the reason or principle governing being that a bankruptcy proceeding is designed to administer the rights of creditors of the estate as against the debtor and his estate, and therefore the Court may not in that administration be delayed or hindered by being called upon to determine questions between creditors, or between a creditor and another person such as the assignee of a creditor, or as here, a question as to whether or not one creditor is estopped from taking a dividend from the insolvent estate to the prejudice of another." But with great respect we venture to suggest that that principle might be carried too far. While it might well be that a trustee ought not to be called on to decide whether or not an alleged assignment of a debt, or a dividend, is or is not valid, the Court would nevertheless have to decide the question if brought before it by either claimant, and would have to apply any equitable principles appropriate to the case for its proper determination.

If the case of *Re Orczy* is to be deemed authority for the proposition that wherever the rights of creditors *inter se* are involved, all must be parties to the litigation, it would be contrary we think to the general policy of the Act, which is intended to make the trustee the representative of the general body of creditors. Rules 120 and 121 have been hitherto interpreted as giving a trustee a right to litigate on behalf of creditors generally, and actions by the creditors individually are in effect stayed, and it is only when the trustee on instructions of inspectors refuses to take proceedings that individual creditors can be allowed to prosecute actions. (See section 35). This method of procedure has worked well and is beneficial, and it would be inimical to the real interests of creditors if any such principle as is suggested in *Re Orczy* were adopted. So far as *Re Orczy* seems to cast doubt on the right of the Court in Bankruptcy to exercise an equitable jurisdiction, it appears to be in direct conflict with the express provisions of section 63 (1), so the decision cannot be accepted as an authority for the proposition that a Court of Bankruptcy has no equitable jurisdiction; all that it can be deemed authority for is that in the particular circumstances of that case the Court was of opinion that the equitable jurisdiction of the Court was not properly exercised.

Some of the learned Judges in appeal treat the case as if it were one of equitable estoppel; and so it is, but it also seems to involve a question of fraud. It cannot be denied that an arrangement by a creditor with his debtor, whereby the former, in order to enable his debtor to obtain credit from other persons, agrees to assist him to suppress the existence of a debt due to himself is *per se* a

perfectly honest and legitimate transaction; but it may and would become a gross fraud, if after the debtor has by this means obtained credit from other persons, the creditor who has knowingly assisted him in the suppression of the existence of his own debt should then come forward, on the debtor becoming bankrupt, and claim to compete with those creditors whose debts have been subsequently incurred, unless it could be affirmatively shown by that creditor that such debts had been contracted with actual notice of the existence of his claim. Mr. Justice Magee, however, seems to have thought that the onus of showing they had no notice was on the subsequent creditors.

The whole gravamen of such a case is the fact that the creditor knowingly assists the debtor to conceal his debt from other creditors, and thereby mislead them or induce them to enter into contracts on the faith of its non-existence. That being the object of the transaction does not the onus of showing that the subsequent creditors had notice of his debt rest on him and not on those from whom it was his object to conceal it? We should think that it did. A creditor is under no obligation to disclose the existence of his debt to other creditors and he incurs no obligation if he simply lies by and does nothing. It is his active participation in the scheme to suppress the knowledge of the existence of his debt which seems to involve the necessity of a Court of Equity holding him to his agreement so far as it is consistent with honesty; and to prevent him from utilizing the agreement for the purposes of fraud on other persons. This is what the Judge of first instance essayed to do, but unfortunately as it seems to us the Appellate Division was unable to see its way to affirming his decision.

* * *

Dealings between Solicitor and Client.—In the case of *The Demerara Bauxite Co.* v. *Hubbard,* [1923] A. C. 673, which came from the civil law jurisdiction of British Guiana, Mrs. Hubbard had given to her solicitor an option to purchase certain property for $5,500. The solicitor agreed to resell the property for $11,200 to the appellant company, which was now suing Mrs. Hubbard for her refusal to complete the original transaction. The substantial question involved was the ability of a lawyer to purchase property from his client, and the judgment of the Judicial Committee is the severest limitation upon his power to do so which has yet appeared. Their Lordships are careful to point out that the principle is not merely a technical rule of English law, but is of general application. It is not sufficient for the lawyer to show that the transaction was an honest one, that the client understood it, and that the price was a reasonable one in the circumstances. He must go further and prove

affirmatively that the client received every advantage from the transaction which he might have obtained in dealing with a total stranger. Otherwise the whole contract is voidable at the option of the client. For the profession the practical moral is clear. It should be an absolute rule never to have any business dealings of any kind with your client which do not necessarily arise in the performance of the services for which you are retained. H. A. S.

* * *

BLUNDERS IN LEGISLATION.—Blackstone, in the introduction to his Commentaries on the Laws of England, observes that "almost all the perplexed questions, almost all the niceties, intricacies and appeals (which have sometimes disgraced the English as well as other courts of justice) owe their origin, not to the common law itself, but to innovations that have been made in it by Acts of Parliament, 'overladen' as Sir Edward Coke expresses it, 'with provisos and additions, and many times on a sudden pend or corrected by men of none or very little judgment in law.'"

And quite recently Sir Clifford Allbutt, commenting upon the unintelligibility of many scientific writings, has said that "official and commercial English are even worse than scientific English but the former are at any rate, standardized, and have conventions of their own, however hideous they may be. The worst offenders are probably parliamentary draftsmen. In England and America the drafting of parliamentary bills is a lost art, and the work is done, as a rule, by half-educated men of very mediocre intelligence."

As the parliamentary draftsmen of the last half century have included among their number such men as Lord Thring, Sir Henry Jenkyns and Sir Courtenay Ilbert, Sir Clifford Allbutt's standard of legislative prose style must be pronounced very exacting indeed.

The greatest care, combined with skill and experience, cannot guarantee perfect success in the draftsmen's difficult art. The Law of Property Act, 1922, 12-13 George V. ch. 16, was presumably not drawn by "half-educated men of very mediocre intelligence." It was preceded by, and is in part founded upon, a bill brought forward by Lord Haldane in 1914. Many experts were consulted in its preparation and in particular a committee of the Institute of Conveyancers. Lord Birkenhead stands sponsor for its passage. Yet a writer in the *Contemporary Review* for August speaks of it thus: "This huge and confused Act does not come into operation before January 1st, 1925, and is a clumsy attempt to reform and clarify a vast range of English law." The gigantic nature of the task undertaken by those who framed this measure must be remembered in appraising the merits of their

achievement. The Act occupies 310 pages of the statute book. It has placed "on a new footing the law of intestacy, has attempted to sink the differences between movable and immovable property, and has not only abolished customary tenures of land but has destroyed almost the last traces of the feudal régime."

The volume of statutes of the Imperial Parliament which contains the Law of Property Act also includes an Act to provide for the Constitution of the Irish Free State, a measure of momentous political importance. The schedule to this Act sets forth the constitution, Article 66 of which is as follows:

"The Supreme Court of the Irish Free State (Saorstat Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever:

"Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

Certain appeals (*Hull* v. *McKenna* and other cases) were brought before the Judicial Committee on July 25, 1923, but were thrown out on the ground that no great principle and no matter of wide public interest were involved in them.

Lord Haldane, who presided, observed "in Ireland, under the Constitution Act, by section 66, the prerogative of the Sovereign was saved, and the prerogative therefore existed in Ireland just as it did in Canada, South Africa, India and right through the Empire with the single exception of Australia, and in that case it had reference only to constitutional disputes."

In the *Journal of Comparative Legislation and International Law* for November, 1923, Prof. Berriedale Keith refers to this right of appeal and says "The Constitution of the Free State, in accordance with the treaty, leaves intact the right of the Crown to admit appeals from the final Appellate Court in Ireland, though it permits the Parliament of the Free State so to limit appeals to that court as to exclude from its competence such matters as do not involve constitutional issues. It follows naturally from the purpose of the Treaty and the constitution that the old practice, under which appeals on all sorts of topics could be brought to the House of Lords, is inapplicable, but it rests with the Privy Council itself to determine the bounds within which it will permit appeals."

While the high authorities quoted assume that there is a right to petition His Majesty for leave to appeal from the Supreme Court to His Majesty in Council and the right of His Majesty to grant such leave as mentioned in Article 66 of the Constitution, Mr. Darrell Figgis, in a closely reasoned and exhaustive examination of the subject in the *Fortnightly Review* for November, 1923, under the heading "Ireland and the Privy Council," denies that any such rights exist or ever did exist. He points out that Article 66 "does not create a right: it merely protects a right that is presumed to exist already." He examines the question historically and quotes a wealth of authority to show that Article 66 assumes something for which there is no foundation. Among other writers he cites William Molyneux, "The Case of Ireland Stated;" Matthew Bacon, "A New Abridgment of the Law;" Blackstone, "Commentaries on the Laws of England;" Sir Matthew Hale, "The Jurisdiction of the Lords House, or Parliament, considered according to Ancient Records;" Lord Campbell, "Lives of the Lords Chancellors;" Stubbs, "Constitutional History of England;" Anson, "Law and Custom of the Constitution;" and Maitland, "The Constitutional History of England." He also goes to Lefroy, Clement and Todd for apposite references to the Canadian Constitution.

Blackstone in the middle of the 18th Century stated that "an appellate jurisdiction was vested in the Privy Council from all the Dominions of the Crown, except Great Britain and Ireland," and at the end of the 19th Century Maitland says "The Judicial Committee of the Privy Council is the Supreme Court of Appeal for all the King's lands outside the United Kingdom."

It would appear from the authorities quoted by Mr. Figgis that no right of appeal existed when the Constitution of the Free State was adopted, and so there was no right that could be impaired; consequently, the proviso to Article 66 which purports to retain such a right is a nullity and the eminent authorities who have assumed its validity are mistaken. If this is the case, we have before us the constitution of a State founded upon a treaty which was intended to settle the relations between that State and other States under the same Crown, and between that State and the Crown, basing one of its provisions upon a delusion as to the historical, legal and constitutional facts underlying certain of those relations. R. W. S.

* * *

LIMITATION OF ACTIONS.—In a recent action of *Lauzon* v. *Menard,* which was tried at Ottawa by Mr. Justice Wright, and which is briefly reported in 25 O. W. N. 387, an important question arose under the Statute of Limitations. As this was the first time, so far

as the writer knows, that the exact point has been decided, either in England or in any of the Provinces having a similar Statute, and as the judgment is not to be published in the Ontario Law Reports, it may be deemed worthy of mention. Section 40 of the Ontario Limitations Act is as follows:—

"40. If at any time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under any of the disabilities hereinafter mentioned, that is to say: infancy, idiocy, lunacy or unsoundness of mind, such person, or the person claiming through him, notwithstanding that the period of ten years or five years, as the case may be, hereinbefore limited has expired, may make an entry or distress, or bring an action to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened."

The plaintiff, while under 20 years of age, married and permanently left the farm, which had belonged to her father, who died intestate, and a few months afterwards, she executed a deed of her share to her mother, who still lived on the farm. Within 10 years after signing the deed, and also after her coming of age, but not within 5 years from either time, or within 10 years after she left the farm, she brought this action to set aside the deed, or to obtain her full share of the value of the farm. One of the grounds of defence was that her claim was barred by the above section, at the end of 5 years, notwithstanding the fact that 10 years had not elapsed from her coming of age. The Judge expressed doubt as to whether he could so construe the section, considering that it was intended to be an enabling one, but he reserved judgment on the whole case. In his reasons for judgment he said:—"Section 40 of the Statute of Limitations appears to me to constitute a complete defence to the action. The plaintiff had five years after she attained her majority to commence action, and thereafter her right of action was barred." M. J. G.