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RIVERS AS MUNICIPAL BOUNDARIES.

In not a few instances in the Province of Ontario rivers have been constituted the boundaries between townships, and also between counties, and we are inclined to think it has been very generally assumed that the publicity of such rivers depends on the ordinary common law affecting rivers, and that if, and so far only as, they are navigable, they are public rivers, but if, and so far as, they are not navigable, they are private rivers and as such subject to the law governing private water courses.

But it seems open to doubt whether this is the true status of such rivers; and it may be useful to inquire whether they are not in all cases to be regarded as public rivers quite independently of the question of navigability.

So long ago as 1853, the late Chief Justice Macaulay said, in giving judgment in *The Queen* v. *Meyers*, 5 C.P. at p. 354: "This investigation has convinced me of the importance of legislative declaration as to what streams and to what extent streams shall be deemed public and navigable waters." But instead of a comprehensive statute being framed on the lines suggested, we have had nothing in the meantime in the way of legislation except the usual tinkering variety, and in the meantime the Courts of law have been endeavouring to apply the English Common Law to a state of circumstances often materially differing from that of England, and on which that law was based. In Ontario we have no tidal rivers, therefore, according to English Common Law, no "navigable" rivers in the sense in which that term is understood by the Common Law, but we have rivers that are in fact navigable, and rivers that have been constituted municipal boundaries, and we have private unnavigable rivers and streams.

The Territorial Division Act (R.R.O. c. 3) contains the following provisions in regard to townships bounded by lakes and rivers:

"6—(1). Except as provided in ss. 2 and 3, the limits of all the townships lying on the River St. Lawrence, Lake Ontario, the River Niagara, Lake Erie, the River Detroit, Lake St. Clair, the River St. Clair, Lake Huron (not including the Georgian Bay), the River St. Mary's and Lake Superior (not including Thunder Bay, Black Bay and Nipigon Bay), shall extend to the boundary of the Province in such lake or river, in prolongation of the outlines of each township respectively; and, unless otherwise provided, such townships shall also include all the islands, the whole or the greater part of which are comprised within the said outlines so prolonged.

"(2) Sub-section 1 shall not apply to that part of Ontario at the head of Lake Ontario lying west of the east boundary of the County of York produced southerly to the International boundary line, but in that part the limits of all townships on either side of the lake shall extend to a line drawn from the intersection of the east boundary of the County of York produced with the International boundary line, and westerly to the old outlet of Burlington Bay.

"(3) The township of South Walsingham shall include the whole of Long Point, 10 Edw. VII. c. 2, s. 6.

"7. The limits of the townships lying on the River Ottawa shall in like manner extend to the boundary between the Provinces of Ontario and Quebec, 10 Edw. VII. c. 2, s. 7.

"8. The limits of the townships in the County of Glengarry shall in like manner extend to the middle of Lake St. Francis and to the middle of the main channel of the River St. Lawrence, and, unless herein otherwise provided, shall also include every island, the whole or the greater part of which is comprised within the outlines of such townships so prolonged, 10 Edw. VII. c. 2, s. 8.

"9. The limits of the townships on the Bay of Quinte, the Georgian Bay, Thunder Bay, Black Bay and Nipigon Bay, the River Trent and its lakes, the River Thames, the Grand River *and any other rivers*, lakes and bays not hereinafter mentioned, shall in like manner extend to the middle of such lakes and bays,

and to the middle of the main channels of such rivers respectively, and unless herein otherwise provided, shall also include every island, the whole or the greater part of which is comprised within the outlines of such township so prolonged: 10 Edw. VII. c. 2, s. 9.

"10. The last preceding four sections shall not extend to any islands which are townships by themselves or which have been expressly included in other townships in the original surveys and plans thereof remaining of record in the office of the Minister of Lands, Forests and Mines, or by statute, but the same shall remain townships or parts of such other townships respectively: 10 Edw. VII. c. 2, s. 10."

Thus we see from these provisions that in the case of river boundaries the middle of the main channel is the dividing line between the adjoining municipalities. But rivers are known to change their courses, and the main channel may be in one place to-day and in quite another place some years hence; and the question may arise: Is the municipal river boundary intended to be a fluctuating one following the vagaries of the river, or is the middle line of the channel, as it existed when the township were laid out, the fixed and unalterable boundary no matter what changes may thereafter arise in the situation of the main channel? There is something to be said in favour of a fixed and unalterable boundary. It is manifestly convenient that a piece of land should have a fixed and unalterable territorial designation and it is manifestly inconvenient that it should be liable to be one year within the territorial limits of one township and in the next year perhaps within the territorial limits of some other township and perhaps some other county. The difficulty of registering deeds affecting land subject to such fluctuations of territorial locality would be very great and it is hard to see how they could be surrmounted under our present Registry Act.

Section 16 of the Surveys Act (R.S.O. c. 106) seems to favour the view that the boundary cannot be fluctuating, but is fixed, and unalterable except by statute. That section says: "All boundary lines of townships . . . shall be the true and unalterable boundaries of all and every such townships . . . "

So far as the territoriality of river municipal boundaries is

concerned, it is clear from the statutory provisions above referred to, that the middle thread of the main channel constitutes the dividing line between the adjoining municipalities, and that as regards islands in any such rivers their territoriality depends on which side of such line they happen to be situated.

With regard to the ownership of the bed of such rivers a difficulty arises. If such rivers are public rivers, then it would seem to follow that the bed or soil and freehold of such rivers is governed by the general law relating to highways, and that, though at one time vested in the Crown, they are now under the Municipal Act, s. 433, vested *ad medium filum* in the adjoining municipalities of which such rivers constitute the boundaries. If, on the other hand, such rivers are governed by the general law relating to rivers, then the rights of riparian owners may intervene, according as such rivers may, or may not, be in fact navigable.

In considering the rights of riparian owners the provisions of the Surveys Act (R.S.O. c. 166) have to be taken into account. s. 18 (2) provides: "Where in any survey of Crown Lands made under the authority of the Minister, any lot or other sub-division bordering upon a lake or river is given an acreage covering only the land area such lot or other sub-division shall include the land area only, and not any land covered by water of such lake or river." But, by s-s. 3, s-s. 2 shall not affect the rights, if any, of any person where such rights have been heretofore determined by a Court of competent jurisdiction. This provision was first enacted in 1913 by 3 & 4 Geo. V. c. 33, but it would seem to be intended to be retrospective in its operation, otherwise the saving clause of s-s. 3 would have been unnecessary. But in cases where no definite acreage is mentioned in the grant of land abutting on a river, according to the decision in *Keewatin Power Co.* v. *Kenora*, 16 O.L.R. 184, the grant would include the bed of the stream *ad medium filum* in the case of unnavigable rivers, unless the river were a public river. Where the river is a navigable river, or otherwise a public river, the grant does not include the bed of the stream: see R.S.O. c. 31, s. 2, and such a river being a highway the soil and freehold of the river would appear to be governed by the general law relating to highways in that respect.

When we come to consider the probable reasons why rivers were made to serve as municipal boundaries, may we not conclude that they were so utilized for the facilities they offered for communication between the settlers both in summer and winter? That this was so in one case we know to be the fact. Thus, in the instructions issued by the Land Board to Jesse Penoyer, P.L.S., for laying out the township between the south and west branches of the River Rideau it was said: "As it is the opinion of us as well as the gentlemen interested in the vicinity that the Rideau River is navigable for *canoes and small boats* in that part in which the Township of Oxford will fall *and may be of public utility* you are ordered to survey and take the general course of that river so far as to fix a base or first line of the township which you are to lay out, and to run the side lines perpendicular to the general course of that part of the river on which it may fall." Ont. Arch., 1905, pp. 394-5.

Here we see the navigability of the stream for canoes and small boats, which would not constitute it a navigable stream in law, was considered a sufficient reason for making it a boundary, and for the expressed reason that it would be of public utility, a reason which, we may remark, would be absolutely frustrated if the river was not intended to be constituted a public river and highway.

The like consideration it appears to us may not unreasonably be deemed to have governed the selection of other rivers as municipal boundaries. In the instructions to Governor-General Murray, 7 Dec., 1763, we find, s. 45: "You are therefore to lay out townships of a convenient size and extent in such places as you in your discretion shall judge most proper . . . and that each township so consist of about 20,000 acres *having as far as may be natural boundaries* extending up into the country and comprehending a necessary part of the River St. Lawrence where it can conveniently be had." Ont. Arch. 1905, p. lvii., and see plan *Ib.*, p. cxviii.

These instructions were no doubt intended to apply more particularly to the lands bordering on the St. Lawrence, but the

direction to utilise natural boundaries seems to have been of general application.

In the *Queen* v. *Meyers*, 5 C.P., Macaulay, C.J.C.P., says, at p. 351: "When the territory now forming Upper Canada was devoted to settlement, the use of *all streams* practicable for navigation (if not already the common right of all His Majesty's subjects throughout the Empire as a national interest) may be justly considered as dedicated to the public use upon the principles of—first, the civil and afterwards the common law, so that, although not pre-occupied by public use, they are to be looked upon as open to the public."

This remark applies to streams "practicable for navigation," and by that he means, as other parts of his elaborate judgment in the case shew, streams that are susceptible of use for travel or transportation of goods, even though such streams might not be tidal, which alone technically are navigable rivers according to the Common Law.

But if that may be said of streams generally, it may be surely said *a fortiori* of those rivers or streams expressly dedicated by the Crown to form municipal boundaries.

In order to consider the status of river municipal boundaries it seems proper to take into account the ordinary, but, it must be admitted, not the universal method of laying out townships; and we find that, with comparatively few exceptions, there is a road dividing adjoining townships from each other. In some few cases it may be found there is no road but a mere mathematical line, but these appear to constitute exceptions to the general rule. The township line or road is usually indicated by two parallel lines which divide the adjoining townships from each other. Very often it has been found that "the township line" thus "laid out" or indicated in the Government survey or map is impracticable for travelling but we need hardly say that the traversability of the road so "laid out" does not affect the question of whether or not it is the highway between the townships: see *Badgley* v. *Bender*, 3 O.S. 221, and we find Acts of the Province of Canada passed to remedy such difficulties and to provide for the substitution of some other road in the place of the one

"laid out," *e.g.* see 14-15 Vict. c. 39; but there was no question whatever that the road "laid out" and referred to in that Act was the highway, though absolutely impracticable for travel. Such difficulties are of constant occurrence and provision is now made in the Municipal Act for remedying them without any application to the Legislature. Such being the law as regards highways "laid out" on land between townships, ought it not to be concluded that where, instead of two parallel lines on a map to indicate a road as the township line, a river is selected as a township boundary the same rule must be applied to it? Is not, for all practical purposes, the river "laid out" or established in the place and stead of a road upon the land? Is it not thereby *ipso facto*, and entirely regardless of any question as to its navigability or non-navigability, constituted a public river and therefore a public highway?

But for the decision which will be presently referred to, we should think that there could be no reasonable doubt that that question should be answered in the affirmative. One of the most recent cases in which a river constituting a municipal boundary was in question is that of *Williams* v. *Pickard*, 15 O.L.R. 655, 17 O.L.R. 547. The river in question in that case was the River Thames, which at the locus in question constituted the boundary between the townships of Howard and Camden. The plaintiff was a riparian proprietor and claimed as part of lot 5 abutting on the river a bar or deposit of sand below the bank of the river. This sand bar retained the characteristics of the bed of the stream; for the greater part of the year it was entirely covered with water, and during the remainder it was frequently under water, and during freshets it was covered to the depth of 20 or 30 feet, and the water sometimes overflowed the bank which was at least that height. The action was brought to restrain the defendant from trespassing on the bar or deposit of sand, and from removing sand or gravel therefrom. It was assumed throughout both by counsel and the Court that the case turned on whether or not the plaintiff as a riparian owner was entitled to the bed of the stream *ad medium filum*, and that that question was to be determined by the general law relating to ordinary rivers. Clute, J.,

who tried the action, held that the plaintiff as riparian proprietor was entitled to the bed of the river *ad medium filum*. The Divisional Court, Meredith, C.J., and Mabee and Magee, JJ., held that he was not, and the Court of Appeal, Moss, C.J.O., and Garrow and Maclaren, JJ.A., held that he was, and restored the judgment of Clute, J., Meredith, J.A., dissenting. If the River Thames at the locus in question is in fact a public river by virtue of its being a municipal boundary that would be an answer to the plaintiff's claim, because at that time the soil and freehold of the river as a highway was in the Crown; but that point was not raised by either counsel, nor even by any of the Courts which dealt with or considered the case. Meredith, J.A., considered that the circumstances of the river and the possibility of its being made navigable furnished reasons for assuming that the Crown did not intend to, and did not in fact grant the river bed to the riparian proprietors, which inference he deemed to be borne out by the terms of the Crown grant itself which merely extended to "the top of the bank" and "to the river," but even he did not base his conclusion on the fact that the river at the point in question was a public river. Every public river or stream is *alta via regia:* "The King's Highway," 2 Coke's Inst., p. 38; and assuming a river which is constituted a municipal boundary is thereby made a public river then it acquires the status of a highway, and is governed as far as may be by the law of highways so far as the same can apply to a way covered with water. If the river therefore in question in the case above referred to was in fact a public highway, the plaintiff would have had no right of action except in so far as he could shew special damage by reason of the act complained of: see *Small* v. *Grand Trunk Ry. Co.*, 15 U.C.R. 283, not certainly on the basis of any proprietary right in the bed of the river. In *The Keewatin Power Co.* v. *Kenora*, 13 O.L.R. 237; 16 O.L.R. 184, the general law relating to rivers was defined by the Court of Appeal and it was there held that the English Common Law relating to property and civil rights introduced into Ontario in 1792 (see R.S.O. c. 101), except so far as the same is varied by provincial legislation is the rule for decision and that where a grant of land is made bordering on a river,

if a tidal river, the title to the bed is presumed to remain in the Crown unless otherwise expressed in the grant; whereas if the river be non-tidal, whether navigable or not, the title in the bed *ad medium filum aqua*, is presumed *primâ facie* to be in the riparian proprietor. This adjudication led to the passing of 1 Geo. V. c. 6, Ont. (now R.S.O. c. 31). Under this Act, s. 2, where land bordering on a navigable body of water or stream has been heretofore or shall hereafter be granted by the Crown, it shall be presumed in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English Common Law: 1 Geo. V. c. 6, s. 2. This enactment, however, does not affect the rights of grantees previously established by judicial decision or of persons who had developed water powers prior to 24 March, 1911, under the bona fide belief that they had a right to do so.

By the Surveys Act, (R.S.O. c. 166,) s. 18 (2), which has been already referred to: see *supra* p. 284, provision is made that "where in any survey of Crown lands made under the authority of the Minister, any lot or other sub-division bordering upon a lake or river is given an acreage covering only the land area such lot or other sub-division shall include the land area only, and not any land covered by the water of such lake or river." But this provision is not to affect rights theretofore adjudicated; it, however, apparently applies to all rivers, both navigable and unnavigable—and would seem to confiscate the rights of riparian owners in the bed of all rivers bordering on lands previously granted by the Crown to which it applies.

With regard to these enactments it must be noted that R.S.O. c. 31 is entitled "The Bed of Navigable Rivers Act," although the words used are susceptible of application to all streams, for it speaks of "a navigable body of water, or stream," but whether it means "navigable stream" is open to question. "Navigable water" could include "navigable streams," why therefore add "stream"? and yet the title of the Act would rather lead to the conclusion that it is intended to apply only to streams that are navigable. But it may be asked what is "a navigable stream"

according to English Law, which, according to the decision of the Court of Appeal in the *Keewatin Power Co.* v. *Kenora*, 16 O.L.R. 184, must, unless altered by Provincial legislation, be the rule for decision. According to English law the question of navigability depends on whether or not the river is a tidal river. According to Chief Justice Macaulay there are in English law three classes of rivers:

1. Navigable rivers, technically so termed, which are practically arms of the sea or tidal rivers.

2. Rivers *not navigable rivers in law*, but so in fact; and though private in relation to the ownership of the soil, yet public highways in relation to the use of the water.

3. Private rivers, strictly so called: see 3 C.P., p. 318.

To which of these classes does the Act apply? Does it include rivers not "navigable in law but navigable in fact?"

In the Province of Ontario, where tidal rivers do not in fact exist (except in the Hudson Bay region), there appear to be in fact but two classes of rivers, viz., public rivers and private rivers. The one class being public highways and the other not. And in determining to which class any particular river is to be assigned it does not appear that the question of navigability is the sole criterion. As we have seen, a highway may be laid out and dedicated to the public, and yet prove to be quite impassable; and there seems to be no sufficient reason for supposing that a highway along a river may not in like manner be "laid out" and dedicated to the public, although it may prove in part or in whole to be impracticable for the purpose of travelling. This may be thought to conflict somewhat with what Macaulay, C.J., says: "Highways exist by land and water. In Upper Canada those by land have accrued to the public by dedication of the Crown: *Regina* v. *Inhabitants of East Mark Tithing*, 12 Jur. 332; 11 Q.B. 877, in what is commonly termed allowances for roads, in the original survey of towns and townships, or by dedication of private individuals, or under the provisions of the statute law or by occupation or long enjoyment. Upon land, therefore, highways are established only by some positive act indicating the object and its accomplishment. They are, it may be said,

artificially made, or only become such by acts in *pais*. It is otherwise with navigable rivers and water courses. They are natural highways, pre-existing and coeval with the first occupancy of the soil and formed practically the first or original highways in point of actual use. It is well known tradition in relation to portions of the Province long settled, and the common occurrence in other parts more recently occupied, that the only, or at any rate the most convenient access was by water." It is true he is referring here to streams capable of being navigated; but do not his remarks apply with equal force to non-navigable streams which are constituted municipal boundaries if, as we assume, they are thereby constituted highways? We must remember that just as the land prior to the granting of it was in the Crown so were the rivers and the river beds. If it was competent for the Crown to dedicate a highway or land by "laying out" on a map adopted as the plan of survey of a township two parallel lines, it was of course equally competent for the Crown to lay out or establish the irregular course of a river in like manner as a highway. A road allowance is *ipso facto* a highway, why should not a river established as a boundary line in like manner be *ipso facto* a highway?

If this is a correct view of the matter, then public rivers in Ontario would include not only those which are navigable, but also those which are expressly or impliedly made public even though not navigable.

The Municipal Act, (R.S.O. c.192,) s. 432, defines what shall constitute public highways as follows: "432. Except in so far as they have been stopped up according to law, all allowances for roads made by the Crown surveyors, *all highways* laid out or established under the authority of any statute, all roads on which public money has been expended . . . shall be common and public highways." It will be noticed that this section first refers to road allowances and then to "all highways" and the question may be asked does not a river designated by the Crown surveyors when laying out a township as a municipal boundary constitute that river a highway laid out, or at all events "established," under the authority of a statute? We may not be able to point to any spe-

cific statutory authority for the laying out, or establishing, any particular river as a municipal boundary or highway, but the ultimate authority for all acts done or lawfully authorized by the Government in preparing and laying out Upper Canada for settlement rests on the constitutional Act and therefore all lawful Ministerial acts may be said to rest on statutory authority, and therefore all township roads and boundaries laid out or established under the authority of the Government may, even where no express statutory authority therefor can be cited, be said to be laid out or established by statutory authority. In the early days of the Province this authority appears to have been exercised through the medium of a Land Board appointed by the Executive Government, and the surveying and laying out of the country for settlement appears to have been done under its authority and that of the Surveyor-General, and road allowances so laid out or established have always been regarded within the section. By the Common Law of England the soil and freehold of all public highways is *primâ facie* vested in the proprietors of the land abutting on such highways *ad medium filium*, and the ownership of land adjoining either side of a public highway is *primâ facie* evidence of a right to the soil of the highway *ad medium filum: Cooke* v. *Green*, 11 Price 736; *Salisbury* v. *G.N. Ry.*, 5 C.B. (N.S.) 174: and this presumption also applies to a private way: *Holmes* v. *Bellingham*, 7 C.B. (N.S.) 329. This right is said to result from a presumption of law, which, however, may be rebutted by evidence of ownership in some other person: *Beckett* v. *Leeds*, L.R. 7 Chy. 421; 26 L.T. 375, and see *Leigh* v. *Jack*, 42 L.T. 463; 49 L.J. Ex. 220; 2 Ex.D. 246. Subject to the rights of the public over the highway the owner of the soil according to English law retains the same estate therein as he or his predecessors in title had therein prior to the acquisition of the public rights, and may maintain trespass for any improper use of such highway, *e.g.*, where a person upon a highway purposely frightened game birds on an adjoining proprietor's land which he was engaged in shooting, the proprietor was held entitled to resist by reasonable force such a proceeding: *Harrison* v. *Rutland* (1893), 1 Q.B. 142; and where the owner of a newspaper, for the purpose of obtaining

information as to the performances of certain race horses, entered upon a highway and walked up and down for a considerable time within a short space to watch and take note of the horses on the land adjoining the highway, it was held by the Court of Appeal in an action by the owner of the land against the newspaper proprietor that such use of the land was a trespass for which the defendant was liable in damages: *Hickman* v. *Maisey* (1900), 1 Q.B. 752; 73 L.T. 321. These cases, it must be remembered, rest solely on the ground that the soil and freehold of the highways in question were in the adjoining proprietor: if they had been vested in any other person the plaintiff would have had no right to complain. This right or ownership in the soil carries with it the right to compensation in case the soil and freehold should be expropriated by public authority for other uses of the public: see *Re Trent Valley Canal*, 11 Ont. 687. In that case it was held that the soil and freehold were, as the statute law then stood, vested in the Crown not only of roads laid out by the Crown but also of roads laid out under the authority of any statute, even though such road were laid out on the land of a private individual to whom no compensation was paid, and the effect of that decision was that it was only in the case of highways voluntarily dedicated to the public by private owners that they retained any rights in the soil and freehold. But even in such cases that right has now been taken away, and the soil and freehold of all highways is now vested in the municipalities having authority over the same, R.S.O. c. 192 s. 433; and this, it would seem, applies not only to land but to water highways, as no exception is made.

The presumption of law that adjoining owners own the soil and freehold of a road highway *ad medium filum*, according to Bailey, J., in *Doe & Pring* v. *Pearsey*, 7 B. & C., at p. 306, is founded on a supposition, that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his enclosure and the middle of the road. If this is the foundation of the rule then it seems obvious that the presumption does not arise in regard to highways laid out by the Crown over its own domain and therefore quite apart from any statute the

soil and freehold of all roads laid out by the Crown in the Province of Ontario would seem at common law to have remained vested in the Crown unless expressly granted to the adjoining proprietors or some other person. But apparently some doubts seem to have been entertained on that point in the early days and in the Highways Act, 50 Geo. III. c. 1, s. 35, it was provided that the soil and freehold of all roads which should be altered, amended or laid out under that Act should be vested in the Crown.

Having regard to what is said above, 50 Geo. III. c. 1 would appear, as far as roads laid out by the Crown are concerned, to have been merely declaratory of the common law. This provision was subsequently amplified and extended to all roads laid out by the Crown or under the authority of any statute and in this extended form was incorporated in the Municipal Act in 1858 and in all subsequent consolidations thereof down to 1913; the rights of individuals in the soil and freehold of highways laid out or dedicated by them being preserved. In the latest consolidation of the Municipal Act, however, all distinction as to the ownership in the soil and freehold of highways is swept away, and now, by R.S.O. c. 192, s. 433, "unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act."

This provision, it may be observed, is wide enough to cover not only all highways on land but also all highways covered by water. It includes not only all highways laid out by the Crown but all highways dedicated or laid out by private individuals.

We have referred to these provisions because if rivers, which are constituted municipal boundaries are thereby made highways, then the soil and freehold of all such highways are now vested in the municipality or municipalities having jurisdiction over such highways.

If, however, as has been assumed very generally, such rivers are not public except so far as they may be actually navigable, then the somewhat anomalous condition may arise that one part of a river forming the boundary of a township may be a highway

and some other parts of the boundary may be a mere mathematical line; whereas if the whole course of the stream so far as it constitutes a municipal boundary is held to be a public river no such difficulty would arise.

If a river which is constituted a municipal boundary is thereby made a public river, then the law relating to highways in general would apply to it. The fact that it may not be traversible, or only so in part, or at intermittent periods in the year, constitutes no reason, as we have shewn, why it may not nevertheless be a legal highway, that is, if we apply to this kind of highway the law which applies to highways on land. The fact that a road is bisected by a pond or a lake, or that its course leads over a precipice does not make it any less "a highway," although it is true it may be made thereby an impracticable one, and therefore, as we have said, the non-navigability of a stream does not in law offer any obstacle to its being dedicated as a public highway.

In regard to highways on land it is not necessary that they should be actually laid out by work on the ground, the fact that they are shown on the plan of survey adopted by the Crown is sufficient: *Reg.* v. *Hunt*, 16 C.P. 145, 67 C.P. 443, unless the actual work on the ground is inconsistent therewith: *Reg.* v. *Lees*, 29 U.C.R. 221, and other cases cited in Biggar's Mun. Manual, p. 864.

Assuming a river designated as a municipal boundary to be *ipso facto* constituted a public river, to what extent should it be so regarded? It would seem that the proper conclusion is that the whole river lying between its banks if defined or from the water's edge on the one side to the water's edge on the other would constitute the way; islands within that area should be deemed to be part of the way, within that area private rights could not be acquired, and any interference with the flow of the stream, or any obstruction of the way, would give ground of action by the individual injured, or by the Crown on behalf of the public.

Attention may now be called to some of the provisions of the Municipal Act regarding boundary lines. By s. 436 (1) the council of a county shall have jurisdiction over every (*a*) highway, bridge and boundary line assumed by the council, (*b*) bridge

crossing a river . . . *forming* or crossing a boundary line between local municipalities . . .

Then by s. 437 "The council of the corporations whose duty is to erect and maintain bridges over rivers, streams, . . . *forming* or crossing a boundary line between counties shall have joint jurisdiction over such bridges."

From these enactments it seems reasonably manifest that the Legislature regards river boundaries not as mere mathematical lines, but visible and actual boundaries similar to roads on land.

"Section 446 (1) "The council of a county may by by-law assume as a county road any highway, or as a county bridge any bridge within a town not being a separate town or within a village or township . . . "

"(3) The council of a county may also by by-law assume as a county road any county or township boundary line."

These provisions may possibly be held not to apply to rivers which form boundary lines, because it may be argued that the highways which the sections have in contemplation are to be assumed as "county roads" and therefore rivers cannot be included because they are not roads; if the word had been "highways" there can be little doubt that rivers which are highways would have been included. On the other hand, it may be said that these provisions extend to "any highway" and "any boundary line," and therefore where any boundary line or highway is a river it may be assumed by the county as if it were a road and jurisdiction exercised over it "as over a county road," *mutatis mutandis*.

We may also refer to the Beach Protection Act, R.S.O. c. 244, s. 11, which *inter alia* provides that no person shall remove any stone, gravel, earth or sand from the bed of any river, stream or creek running between two municipalities . . . under which a drainage pipe or water main has been laid by or at the instance of a municipal corporation so as to endanger the safety of or injure such pipe or main without the consent of the council of the municipality or municipalities within whose limits the stone, gravel, earth or sand is to be taken." This enactment appears to assume that rivers between municipalities may not

in all cases be public highways, for otherwise there would be no need of any such law, any more than there is any necessity for a statute to forbid private individuals digging up streets so as to injure drain pipes laid by the municipality having authority over such streets. On the other hand, the Act seems to assume that the municipal authority has control over such rivers, because it assumes that it may lay public drains in the beds of such rivers, which it would have no right to do if the river beds were private property.

In the construction of this section the same difficulty arises as was felt by the Court of Error and Appeal in *Harrold* v. *Simcoe*, 18 C.P. 1, viz., how can a river be "between" townships divided by a mathematical line? and the section must, no doubt, be construed according to the popular understanding of the term. We have also to note that R.S.O. c. 245 enables the Ontario Railway and Municipal Board to make orders permitting the removal of sand and gravel, etc., from river beds subject to certain restrictions, but there is nothing in that Act inconsistent with the fact that river municipal boundaries are public highways.

It is provided in the Municipal Act, s. 453 (1): "Boundary lines between municipalities including those which also form county boundary lines shall be maintained by the corporations of such municipalities, and they shall also erect and maintain all necessary bridges on such boundary lines." And by s. 455: "All boundary lines, and all bridges over rivers . . . *forming* or crossing a boundary line between two or more local municipalities in a judicial district shall be erected and maintained by the corporations of such municipalities and their councils shall have joint jurisdiction over them . . ."

In these provisions it will be seen "boundary lines" are used as a generic term of which a river is a specific kind, and the enactments apply to such lines without any distinction as to whether they be on land or on land covered by water and they seem to lead to the conclusion that a river boundary line is to be regarded as standing on the same footing as the land boundary line. As to the meaning of boundary lines "between" townships see *Harrold* v. *Simcoe*, *supra*.

But if it be assumed that the river boundaries referred to are only such as are navigable rivers, then it would follow that over certain parts of some boundary lines the municipalities would have no jurisdiction and it would be competent for the owners on either side of such parts of the line to obstruct and fence the same so that it could not be used by the public. That such could have been the intention of the Crown in establishing a river as a municipal boundary it is hard to believe, and it seems equally hard to believe that as a matter of law rivers designated as municipal boundaries are not public highways, quite irrespective of the fact of their navigability.

G. S. H.

CANADIAN BAR ASSOCIATION.

CANADIAN UNITY AND UNIFORMITY OF LAWS.

The following is the opening address delivered by the President of this Association, Sir James Aitkins, Knt., K.C., at the meeting of the Association held in Toronto on June 15 of this year.

It deals with a subject of great interest and of vast importance to the Dominion. The difficulties to a full unity of the Provinces and uniformity of law is, of course, the fact that in one of them the civil law prevails; also that the people of that Province largely speak a foreign language, and have privileges in that respect which prevent that useful amalgamation without which there could be no full national unity. The subject is discussed in various aspects in this excellent paper of the present Lieut.-Governor of Manitoba which we give in full as follows:—

It was my intention until very recently to have spoken on some such subject as "The Development of Law in Canada" but I understood another was to give an address at this meeting on a similar subject. Moreover, I am convinced that our Association cannot justify its existence unless it does some useful work for the nation as well as for the profession. So my thought turned to the subject to which our attention has already been called

this morning, Canadian unity, and how the Canadian Bar Association may contribute to that end—the creation of a truly national spirit, a consolidated Canada.

How are the purposes of the Association related to that unity? As a profession we sometimes forget our influence. Sometimes we have not a good conceit of ourselves. Some of us individually may have but it seems to me as a profession we have not exerted the influence we can exert towards the advancement and the benefit of Canada and our profession.

The makers of confederated Canada who lived in the Eastern Provinces were men of ambition, of faith, and of vision. They longed for a larger thing than mere citizenship in a small province or a far distant British colony. They saw in British North America, most of which was unoccupied, the groundwork of a nation, in the four Eastern Provinces, its nucleus.

Ambition in a person or in a group, or in a nation, is an exacting virtue. It rebukes sordid life, it calls for ceaseless effort and self-sacrifice; indeed, all worthy achievement means sacrifice. Accompanied by their faith, it did not falter, guided by their vision, it kept the straight and narrow path that leads to successful things; it translated into substance the things hoped for. Accordingly, after great effort and after various conferences, the four Eastern Provinces agreed to unite. That did not satisfy the spirit of those men, for it constantly said to it, "Build thee more stately mansions, Oh my soul." Accordingly, the Act which united the four provinces also made provision for the incorporation of Prince Edward Island in the East, British Columbia in the West, and Rupert's Land, now formed into the three Prairie Provinces. Thus the vision of those men took form. The passage, however, of the British North America Act did not make a nation. It is one thing to plan and lay a foundation, another thing to erect the edifice and put the capstone on; one thing to create out of plastic clay the form, another thing to breathe into that form the breath of life and give it a living soul, with one heart, to the beating of which every member pulsates, one mind, to the will of which every part responds, to give it a national consciousness in which all parts of the building fitly framed together grow into a national

temple where all Canadian people will come to worship. The life of a nation does not consist in the good things it possesses but in its spirit, its dominating soul.

If that splendid purpose of a strong nation, a United Canada, which our forefathers had has departed from the heart of the leaders of Canada, from the heart of the men of our Canadian Bar, then their faith was in vain and their vision is vanishing. Let us hope it has not, and so let the work they began be continued. The present actors in it will not have the same spectacular part; their work nevertheless is just as necessary and their reward will be just as great. The difficulties appear sometimes to be insuperable; difficulties are made to be overcome, and in that very overcoming Canadians will develop and Canada as a consequence be greater.

The story of the nations which were and are not; which have failed, or which are still struggling for continuance, demonstrates the difficulties of constructing into oneness, of bringing into ready obedience to a central government, people sprung from different races, with different historic past, different ideals, and different languages, especially when those people are separated from each other by strong geographic and ethnic barriers.

Perhaps the best illustration on a large scale was the futility of the effort of the Austrian Congress of 1814 to apportion Europe among the several governments without much regard to nationality and geography. In forty years its uselessness was shown.

The difficulties are greatly increased where the government is democratic and has to depend for its existence upon popular vote; still more increased where, as the years go on, there are large accessions to the population of people from other countries, whose affiliations are very naturally with the countries whence they came They will also be greatly increased by reason of the problems which will arise out of the war, and which we with courage and with patience must face and solve. While the part Canada is playing in the present war as a factor in the British Empire will have some effect in developing conscious nationality among many people, it has also disclosed weaknesses to be regretted. As true-hearted Canadians we should therefore

constantly keep before us how we can draw into closer union the several Provinces of Canada and create in our new populations a sense of Canadianism sufficient to make them realize that they are national comrades and fellow citizens in one country. What, therefore, can the men of the Canadian Bar unite in doing in this work?

The ordinary bonds which give the people of any country cohesion are common business interests and common national sentiment. In established nations, these are entwined. In a young country, both must be stimulated and strengthened.

Of those two bonds, primary attention should be given to the business nexus, for if it is not to the material advantage of the communities or sections of Canada to remain together, the fervour of any national sentiment will cool, its tie will be strained, irritation and dispute may follow, then Atropos with her shears will wait expectant at the door. Every removable obstacle therefore that interferes between the people of Canada provincially separated should be set aside; the pathway should be made easy for commerce to travel in, all obstructions should be gathered out of it, and every facility for inter-provincial trade should be offered. Confidence between the people, which is the base of all profitable commercial transactions, should be established. One of the objects of our Association is to establish that confidence between the members of the Bars of the different provinces. Accordingly, the constitution provides "for the promotion of cordial intercourse among the members of the Canadian Bar." I like the name "The Canadian Bar," not the Bar of Manitoba or of Ontario or of any province but the Canadian Bar which expresses oneness. This Association is intended to represent as far as possible the Bar of Canada and to speak for it.

The confidence created by such intercourse is a good foundation for the efficient carrying out of the other purposes of the Association. Such personal intercourse however between the people generally in far distant communities is scarcely possible. Failing that confidence thus secured, there is a business confidence which arises out of the security offered by the law to people transacting business. Those embarking on undertakings wishing to expand

their business, or making investments, or entering into contracts involving many obligations, in different provinces, will take a chance on their own business judgment as to the propriety of their engagements, but do not care to risk the uncertainties of the laws of the different legal jurisdictions. They desire to know definitely their legal rights and remedies. They may know the law of the place in which they live, but they are timid about business which may be regulated or determined by laws of other provinces of which they are ignorant, and are made still more timid when they are informed that the laws relating to their business differ in the several provinces—not the federal law, but those laws which relate to property and civil rights, under which their transactions would mainly come. If, therefore, persons residing in one place wish to transact business or invest money or own property in another legal jurisdiction, they will do so all the more readily if they know that their rights, obligations and remedies are the same as in the jurisdiction in which they live. There is no good reason why they should not be so, for the principles of commerce and of business remain the same from generation to generation, and as those principles are constant, there is no reason why the law embodying them should not be the same and expressed in the same language, and only altered when any change in general business principles requires it. The grievances caused by differing provincial laws are not felt by the larger business interests alone, by manufacturers, wholesale merchants, financial and transportation companies, insurance corporations and employers, and the like, but also by those dealing with them, shareholders and bondholders of companies, the insured, the borrowers and workmen; all are embarrassed by the different provincial laws to which their rights are subject, and sometimes anathematize it with admirable fervour, and the lawyers along with it, though they are in no way responsible. Recently a party composed of a dozen leading Manitoba barristers visited the cities of Saskatchewan and Alberta in the interests of the Association, were entertained at a luncheon given at Edmonton by the Board of Trade. The gathering, composed of the business men of the place, was addressed by two of our

members on the objects of the Association. One of their leading dailies next day had an editorial on the subject, which was headed: "A Twentieth Century Wonder. Lawyers trying to simplify the law." In part it said:—

> The charge is not infrequently made that lawyers deliberately bring about complications and uncertainties in order to make it necessary to call on their services the oftener. But this well-rooted idea received a serious jolt when we learn of the movement that is on foot among the leaders of the Canadian Bar. They are anxious to bring about greater uniformity in the body of Canadian law. The varying methods of handling what is essentially the same problem in the different provinces they can see no excuse for. The evils accruing to those whose business extends through more than one province are obvious. Manufacturing processes are impeded and enormous additions are made to administrative expenses. The lawyers gain largely in fees and if they had purely a selfish purpose in view they would be glad to leave things as they are. Fortunately, the more eminent members of the profession, at least, are taking a broader view-point and in the reforms which they propose they should have little difficulty in securing the backing of the business men.

Manufacturers' associations, boards of trade, credit men, workmen, insurance managers and companies could not secure that sameness they require without the assistance of the lawyers of Canada, nor can we give much aid unless we are united in that purpose. We know their difficulties. Will not the "noblesse oblige" of our profession induce us to lend our aid in overcoming the difficulties met by the business men, and so help to create that national tie, that oneness in business and in business laws so necessary for the solidarity of the country?

Since the Canadian Bar Association took up the subject of standardizing the commercial laws, officers and members of the Council of the Association have been interviewed by the Credit Men's Association, boards of trade, manufacturers, insurance managers, all urging action, and offering financial support in the work. Money is indeed needed for the employment of experienced lawyers to make a comparative study of the laws of the province, to arrange the principles, on which all are agreed, and to codify and consolidate them into proper form for submission

to the several Governments. Naturally, one would expect that the funds would be contributed by the several Provincial Governments, who would reap the benefit of increased business activities and in which the citizens are interested; and they have. Alberta, Saskatchewan, Manitoba, Ontario and New Brunswick have recognized the need and made contribution, small it is true to begin with, but a beginning has been made, and good work has been done as may be seen from the reports and addresses on company law, insurance law, conditional sales and succession duties. But if these contributions are not adequate, if those Governments fail to provide sufficient funds for the work, should the Association accept the offers of contributions from the organizations which I have mentioned?

The purposes of the Association are backed by the business men. I have this morning received a telegram from the Credit Men's Association, which is meeting in Vancouver, and it is this:—

> "The Canadian Credit Men's Association, representing the wholesale trade of Canada from ocean to ocean, in annual convention assembled desire to express through you to the Canadian Bar Association their strong approval of the steps you are taking to bring about uniformity of commercial legislation in the provinces and pledge you their assistance in your efforts. Resolution passed unanimously."

The following is the resolution referred to as having been passed unanimously at that meeting:—

> "Whereas it is the opinion of the representative business men assembled from all parts of Canada at this meeting of the National Council of the Canadian Credit Men's Trust Association Limited that the laws affecting commercial transactions in the various provinces should be made uniform: that such a course would facilitate trade not only between the different provinces but with other nations, and would also mean a large economic saving to the various business interests, and moreover that greater uniformity of laws would foster and develop a better national spirit and make for a greater nation. Now, therefore, be it resolved at this meeting of the National Council of the Canadian Credit Men's Trust Association Limited, held at Vancouver, as follows:—
>
> "1. That all business and financial interests from ocean to ocean do heartily support the work of the Canadian Bar Association for standardizing the business laws of Canada.

"2. That this meeting realizes that the Canadian Bar Association is the proper medium through which the necessary reforms should be obtained.

"3. That all Provincial Governments be requested to co-operate with and assist financially the Canadian Bar Association.

"4. That the provincial branches of the Canadian Credit Men's Trust Association Limited, do hereby request its members to each pay a fee of ten dollars ($10.00), the total proceeds to be paid to the Canadian Bar Association to be applied exclusively in connection with expenses incurred in connection with the campaign for uniformity of laws.

"5. That all business interests be also invited to send in subscriptions to this fund.

That is just one instance of the thought of the business men of Canada towards us. On the 12th of June of this year there was held at Sorel the annual meeting of the Federation of the Chambers of Commerce of the Province of Quebec, and they expressed the following wishes:—

(*a*) INSOLVENCY LAW:—

"1. That a uniform insolvency law applicable to the whole of Canada be passed by the Dominion Parliament.

"2. That the draft law prepared by this Federation in 1911 be studied anew and submitted to the various boards of trade and similar institutions throughout the country.

"3. That a committee be appointed to report at the next annual meeting.

"4. That the Federation requests the assistance of the Canadian Bar Association, which will meet at Toronto, June 15 and 16.

(*b*) UNIFORMITY OF COMMERCIAL LAWS:—

"1. That the uniformity of commercial laws is eminently desirable.

"2. That this Federation requests the assistance of the Canadian Bar Association to secure such uniformity.

(*c*) EXTRA PROVINCIAL EXECUTION OF JUDGMENTS:

"That it is desirable that judgments rendered in one province of Canada, including probates, be recognized in the other provinces, provided they are rendered under conditions reciprocally accepted by two or more provinces.

"2. That the Federation requests, on this question, the assistance of the Canadian Bar Association.

There is another way in which uniformity of provincial laws may be accomplished—that is by the several Provincial Govern-

ments appointing commissioners for that purpose. This is the system which was ultimately adopted in the United States, but already some of the Attorneys-General have expressed the view that this Association had better undertake the work, the Governments providing the necessary funds. From whatever source assistance may come, let the Association members press toward the goal of this excellent and important purpose.

Here I desire to call your attention to another subject which touches one of the objects of the Association, the promotion of the administration of justice, viz., a draft bill which it is proposed to introduce into the Imperial Parliament. It is intituled: "Judgments Extension Bill." It provides that a certified copy of a final judgment by a superior Court of any part of His Majesty's Dominions whereby any sum of money is made payable may be registered in a Court of the United Kingdom and shall have effect as if it were a judgment of that Court, if that reciprocal provision is made by that jurisdiction in which such judgment is originally granted.

The other bond which will help to solidify Canada and unite the people of our several provinces is that of a common patriotic sentiment. It can scarcely be said that throughout Canada there is any well defined national consciousness. It is growing in places, but it is often confused with two other similar sentiments which are mistaken for it, namely, a British Empire loyalty and the provincial spirit, both of which exist in a marked manner; the former tends to union, the latter to isolation. Perhaps that is a strong way of putting it, but living in Western Canada as I do where we are separated by long distance from the eastern part of Canada, we sometimes think:

> "The East is East and the West is West
> And never the twain shall meet;
> Till earth and sky stand presently
> At the great Judgment seat.
> There's neither East nor West,
> Nor border nor breed nor birth,
> When two strong men stand face to face
> Though they come from the ends of the earth."

The Bars of the provinces have hitherto been as provincial in spirit as the people; necessarily so for their own provincial

boundaries limit them, and the legislation of the other provinces is mutually exclusive of them. There is no suggestion in this that the autonomy of the provinces or of the law societies should be interfered with, but that they all should work in harmony to bring about better things for the profession and the people. Already the Association is accomplishing good work. This was very noticeable in a recent visit made by leading members of the profession in Manitoba to the cities in Saskatchewan and Alberta to which I have referred.

The suggestion has been repeatedly put forward that there should be a western section of this Association. This no doubt would help to broaden the views and spirit of those in the west, but it would draw a distinction between the east and west of Canada, one of the very things the Association was formed to overcome. If the members of the Canadian Bar, men of education, experience and public spirit, are unable to overcome the exclusiveness of province, if they find that distances are too long, and the expense too great to come together for conference on matters of great importance professionally and in the public interests, how can we expect the people of Canada generally to possess the broad outlook, or to break through their isolation, or how can we hope for a great nationality, a Canada with a single dominant soul?

The theme of Lord Haldane in his Imperial address was on the power of our profession in Great Britain, Canada and the United States to create a sense of international good form, a healthy, persistent public opinion which would draw those three nations into such intimate relations that they, thus united in common purpose, would command the peace of the world. Our ambition is not so pretentious, and should have for its object the more practical scheme of how we can draw into closer union the provinces of a nation in which we have a common interest; to develop that national spirit which will overleap distances and geographical barriers, which will bring into co-operation to the accomplishment of its work its people of all races, languages and creeds and make a Canadian people strong in body, great in intelligence and upright in character. There may be diversity, but that diversity should be in unity. Canada above everything.

If such be our purpose then may we say to our Jerusalem, Canada, "thou shalt be built, and to its temple thy foundations shall be laid."

Then, members of the Canadian Bar Association, let us pursue steadfastly along the pathway marked out for us the purposes expressed in our constitution, though it may call for some effort and some little sacrifice, not to be compared with that given by our gallant brothers who are fighting and falling for us on Flanders fields.

"Shall we not be one race
Establishing and welding our nation?
Is not our country too broad for the schisms that wreck petty lands?
Yet we shall join in our might and keep sacred and pure federation;
Shoulder to shoulder arrayed,
Heart bound to heart, hand to hand."

JUDICIAL AMENITIES.

"His will was so simple and plain that *even a judge* could hardly stumble over his meaning:" per Meredith, C.J.C.P., 35 O.L.R. 270.

"Giving full effect to Lord Cranworth's doctrine which the majority of the Supreme Court of Canada in the *Adams* will case adopted *and attempted to act upon*, my finding must be against the defendant:" per Meredith, C.J.C.P., *Ib.* p. 275.

How successful the attempt of the Supreme Court of Canada to act on the case was, appears by the following passage:—"So too it is difficult for one to understand why in the *Adams* will case if the onus of proof rested on the beneficiary because of the manner in which the will was obtained, the dictum of Lord Cranworth before mentioned was not applied to him, instead of to those who were opposing the will:" *Ib.* p. 276.

"Thousands may be made pay taxes who cannot vote for councillors—the infant, the married woman (whether this be on the principle that if she has a good husband she should not require a vote, and if she has a bad one she has trouble enough)—or upon whatever principle or want of principle:" per Riddell, J.

"Whatever may be the case elsewhere, we boast that our country is a land where, 'girt by friend or foe, a man may say the thing he will,' *fiat æternum*:" per Riddell, J.

In a case where a divorced husband was sued for alimony by his divorced wife: "The appellant is not by satisfying this judgment while married to his present wife contributing to support two wives, but rather paying the legal penalty for those acts which, while enabling him to remarry, entail a yearly reminder of his past delinquencies:" per Hodgins, J.A.

"This case affords the unedifying spectacle of litigation conducted with such disregard of the rules of procedure that extrication from the resulting tangle is all but hopeless:" Lord Buckmaster, L.C. 1916, A.C. 20.

In view of the recent decision of the House of Lords in *Dominion* v. *Continental Tyre Co.*, it may well be doubted whether the judgment of the Appellate Division in *White* v. *Eaton*, 36 O.L.R. 447, ought not to have been as suggested by Hodgins, J.A., rather than as actually pronounced. The debt sued on was originally owing to an Ontario Company called "Dickerhoff Rafloer & Company" which deal in German and Austrian goods and had a suspiciously German and Austrian name; and, for aught that appears to the contrary, may have been governed and controlled by alien enemies. If so it would have had no right to sue for the debt and could not by transferring the debt give its assignee a right to do so. The case is said to have been one demanding ampler investigation than it received.

REVIEW OF CURRENT ENGLISH CASES.

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PRIZE COURT—SEIZURE OF GOODS OF ENEMY FIRM—GOODS SHIPPED BEFORE OUTBREAK OF WAR—SHARE OF NEUTRAL PARTNER.

The Anglo-Mexican (1916) P. 112. This was a suit for condemnation of a prize cargo. The goods were shipped before the war to an enemy firm, of which one of the members was a neutral. This partner did nothing to prevent delivery of the cargo to the enemy firm, but allowed matters to take their course, without actively assisting to procure delivery to the firm after the war broke out. Evans, P.P.D., held that the right of the neutral partner to have his share of the proceeds of the sale of the cargo, had not been lost; that while a British subject is bound not to do anything which might amount to trading with the enemy, or to have any business intercourse with him, there is no such duty upon a neutral, who is entitled to protection so long as he does not, after war, actively further or facilitate the delivery of goods to an enemy firm.

MORTGAGE—FORECLOSURE ACTION—DATE OF ACCRUER OF RIGHT OF ACTION—"OTHER FUTURE ESTATE OR INTEREST"—LEASE OF PROPERTY PRIOR TO MORTGAGE—RENT PAID IN ADVANCE—REAL PROPERTY LIMITATION ACT 1833 (3-4 W. 4, c. 27), s. 3—REAL PROPERTY LIMITATION ACT 1874 (37-38 VICT. c. 57), ss. 1, 2, 3—(R.S.O. c. 75, ss. 6 (11), 20).

Wakefield and Barnsley Union Bank v. *Yates* (1916) 1 Ch. 452. This was an action for foreclosure and the question was whether or not the plaintiffs were not barred by the Statute of Limitations. The mortgaged land was at the date of the mortgage, 1897, subject to a lease for 21 years from July 20, 1896, and the yearly rent of £50 had been paid in advance up to January 29, 1914. The property was conveyed in fee to the mortgagee subject to the lease to secure moneys payable on demand; and no payment or acknowledgment had been made or given since July, 1903. The action was commenced on January 15, 1916. The plaintiffs claimed that the interest claimed was "an estate or interest in reversion or remainder, or other future estate or interest" within the meaning of the *Real Property Limitation Act*, 1833, s. 3 (see R.S.O. c. 75 s. 6 (11)), and therefore the time for bringing an action was not barred by lapse of time, and

Eve, J., so held; but the Court of Appeal (Lord Cozens-Hardy, M.R., and Phillimore, and Warrington, L.JJ.) reversed his decision, holding that the estate claimed by the mortgagee was a present estate in fee simple, and none the less an estate in possession because it was subject to an occupation lease; that the mortgagee's right to bring an action first accrued immediately after the execution of the mortgage, and that, as more than twelve years had elapsed without payment or acknowledgment, the mortgagees were barred. They also held that, inasmuch as the object of a foreclosure action is not to obtain the payment of rent, but to deprive the mortgagor of his right to redeem, the fact that the mortgagee by bringing the action will not derive any immediate pecuniary benefit therefrom does not prevent the running of the statute: *Johnson* v. *Brock* (1907), 2 Ch. 533 (noted ante, vol. 44, p. 26), is approved by the Court of Appeal.

WILL—MISDESCRIPTION OF DEVISEE—EXTRINSIC EVIDENCE—GIFT TO "ALL MY RELATIONS."

In re Ray, Cant v. *Johnstone* (1916) 1 Ch. 461. In this case a will was in question whereby the testatrix devised "No. 83 Cambridge Road to my great nephew Frederick Johnson." In an earlier part of the will she had given another house "to my great nephew Richard Johnson." As a matter of fact the testatrix had no relatives of the name of "Johnson" but had a niece "Elizabeth Johnstone," who had three sons Robert William Johnstone, Joseph Francombe Johnstone (known as "Frank"), and Richard Johnstone. The question Sargant, J., was called on to decide was whether or not parol evidence was admissible to shew that by "Frederick Johnson" the testatrix meant "Joseph Francombe Johnstone," and he held that it was, whereupon it was shewn by the person who drew the will that the testatrix had devised the house in question as being suitable for a barber's shop, and was intended for the great nephew who was a barber, and that Joesph Francombe Johnstone was the only great nephew who was a barber, whereupon Sargant, J., held that he was entitled. He also held that a gift of residue to "all my relations" meant a gift to the testatrix's next of kin at the time of her death.

GENERAL POWER OF APPOINTMENT—DONEE BRITISH SUBJECT RESIDENT ABROAD—FRENCH WILL—GENERAL BEQUEST—EXERCISE OF POWER—WILLS ACT 1837 (1 VICT. C. 26), SS. 1, 9, 10, 27—(R.S.O. C. 120, SS. 51 (*e*), 12, 13, 39)—WILLS ACT 1861 (24-25 VICT. C. 114), S. 1.

Re Simpson, Coutts v. *Church Missionary Society* (1916) 1 Ch.

502. The question for decision in this case was whether or not a general power of appointment over personal property had been validly exercised by the will of the donee. The donee was a British subject domiciled in France, she had made a will unattested which was valid according to French law, and had been admitted to probate in England under the *Wills Act*, 1861. The will was sufficient in its terms, but it was contended, that not being attested in accordance with the Wills Act, 1837, it was an invalid execution of the power. In support of this contention the decision of Kay, J., *In re Kirwan's Trusts* (1883), 25 Ch.D. 373, followed by Kekewich, J., in *Hummel* v. *Hummel* (1898), 1 Ch. 642, was relied on: but Neville, J., following *D'Huart* v. *Harkness* (1865), 34 Beav. 324, held that the power was sufficiently exercised under the Wills Act, 1837, s. 27, (R.S.O. c. 120, s. 30).

WILL—CONSTRUCTION—MONEY—RESIDUARY PERSONAL ESTATE —EXTRINSIC EVIDENCE, HOW FAR ADMISSIBLE.

In re Skillen, Charles v. *Charles* (1916) 1 Ch. 518. By the will of a testatrix in question in this case, she directed her debts to be paid and gave and bequeathed her "money" unto her two nieces to be equally divided between them after payment of £20 to her executor, and expressed her wish that all her personal property, in the house of either of her two nieces at the time of her death should belong to such niece. The testatrix died in 1914 and evidence was adduced that at the date of her death she was possessed of cash in the house, money on deposit in her bank, and at the Post Office Savings Bank, a sum of Consols, and furniture, together with some small personal belongings in the house of one of her nieces. It was held by Sargant, J., that extrinsic evidence was admissible to shew of what the property of the deceased consisted at the date of her will as evidence of surrounding circumstances only, and not for the purpose of proving intention. Here the evidence shewed that the property possessed by the testatrix at the date of her will was substantially the same as that possessed by her at her death, but he attached no importance to that as regards the construction to be placed on the will; and held that by the bequest of "money," having regard to the other terms of the will, all the testatrix's residuary personal estate passed.

WILL—CONSTRUCTION—PROVISION AGAINST LAPSE OF LEGACY BY DEATH OF LEGATEE—BEQUEST BY CODICIL.

In re Smith, Prada v. *Vandroy* (1916) 1 Ch. 523. In this case a testatrix by her will made in 1894 bequeathed a number of

legacies and disposed of her residuary estate, and provided that "no legacy given by this my will shall lapse by reason of the death of the legatee before me, but shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal representative of such deceased legatee." The testatrix made seven codicils and thereby bequeathed other legacies. Each codicil contained the usual clause confirming in other respects the will. Sargant, J., held that the provision against lapse applied to the residuary bequest and also to the legacies bequeathed by the codicils; the expression "this my will" he held applied not merely to the particular instrument in which they were contained, but to the whole testamentary disposition constituted by the will and codicils.

COMPANY—CHAIRMAN — MANAGING DIRECTOR — DURATION OF OFFICE—REMUNERATION OF DIRECTORS—CONTRACT WITH COMPANY—INTERESTED DIRECTOR PROHIBITED FROM VOTING —INVALID APPOINTMENT OF MANAGING DIRECTOR—GENERAL MEETING CONFIRMING INVALID APPOINTMENT.

Foster v. *Foster* (1916) 1 Ch. 532. This was an action by a director of a company for himself and on behalf of all other shareholders except the defendant, to obtain a declaration of the invalidity of the appointment of the defendant as the managing director. By the company's article 89, it was provided that the business of the company should be managed by directors. By article 93, a director might contract with the company, but was prohibited from voting in respect of any contract in which he was interested. Article 99 empowered the directors from time to time to appoint one of their number managing director for such period and for such remuneration as they thought fit. The plaintiff was appointed a director at a remuneration of £300 per annum, he was also appointed chairman and managing director without remuneration. Two years later, at a meeting of the directors, the defendant supported by the third director appointed herself chairman in the place of the plaintiff and joint managing director with him without remuneration. At a subsequent general meeting of the company the plaintiff's remuneration as director was reduced to £25 per annum. Subsequently at a board meeting of the directors, the defendant supported by the third director, by resolution, removed the plaintiff from office as managing director, and appointed herself sole managing director at a substantial remuneration. It was claimed by the plaintiff

that, having been appointed managing director, he was entitled to retain that office so long as he remained director, but Peterson, J., who tried the action, negatived that contention. With regard to the appointment of the defendant as managing director with remuneration, it was proved that there had been a general meeting of the shareholders, but whether the appointment had been confirmed was not clear, and the learned Judge could come to no conclusion on the point, but he was of the opinion that it was competent for such a meeting to confirm the appointment notwithstanding defendant had voted contrary to article 93, and notwithstanding article 99; and he was of opinion that although the defendant's appointment as a managing director without remuneration would not be a contract within the meaning of article 93, yet that it would be where remuneration was allowed, and therefore the appointment of the defendant as managing director was invalid. He was also of the opinion that the directors, being in the circumstances unable to exercise the powers conferred upon them by the articles, a general meeting could make the appointment; also that the company had power to reduce the remuneration of an existing director and to discriminate between directors as to the amount of remuneration without infringing on article 89.

SETTLEMENT—POWER OF APPOINTMENT BY WILL—APPOINTMENT BY WILL—REVOCATION OF APPOINTMENT BY CODICIL AND NEW APPOINTMENT THEREBY UPON INVALID TRUSTS—ORIGINAL APPOINTMENT OPERATIVE.

In re Bernard, Bernard v. *Jones* (1916) 1 Ch. 552. In this case a testatrix having a power of appointment over certain settled funds in favour of her children, by her will appointed the same in favour of the objects of the power, but by a codicil she revoked the appointment in favour of one of her children "in so far (but no farther) as the same" gave to this child an absolute interest therein, and thereby purported to reappoint the same to trustees for this child for life with a gift over to her sisters. This reappointment was invalid as offending against the rule against perpetuities, and the question which Neville, J., was called on to decide was whether this share devolved as on default of appointment, or whether the appointment made by the will remained operative, and he decided in favour of the latter alternative.

WILL—CONSTRUCTION—GIFT IN REVERSION TO NEXT OF KIN—CLASS WHEN ASCERTAINED—ARTIFICIAL CLASS.

In re Mellish, Day v. *Withers* (1916) 1 Ch. 562. The will in

question in this case was made by a testator who died in 1880 and who thereby gave £1,200 out of his residuary estate upon trust for George Mellish for life, and after his death to his wife for life, and after the death of the survivor to the persons who, at the death of the survivor, should be of the blood of George Mellish and of kin to him who would under the Statutes of Distribution of Intestates Effects be entitled to his personal estate as if he were dead, unmarried and intestate. George Mellish died in 1882 and his wife in 1915, and Neville, J., held that the gift over was to an artificial class consisting of the next of kin of George Mellish to be ascertained as if he had died on the day his wife died.

DONATIO MORTIS CAUSA—GIFT OF DONOR'S OWN PROMISSORY NOTE.

In re Leaper, Blythe v. *Atkinson* (1916) 1 Ch. 579. The question in this case was whether a promissory note made by the donor can be the subject of a *donatio mortis causa*. Sargant, J., held that it could not, because a promissory note of the donor is not the indicia of property, but is merely an attempt to create a liability against himself or his estate. He also held, on the evidence, that the gift of the note in question was not in fact intended as a *donatio mortis causa*, but was a gift outright to the donee. He therefore held that the executors of the donor could not be restrained from setting up the absence of consideration as a defence to the note.

RESTRAINT OF TRADE—EMPLOYER AND SERVANT—MECHANICAL ENGINEERING BUSINESS—RESTRAINT FOR SEVEN YEARS EXTENDING TO UNITED KINGDOM—INTERESTS OF SERVANT AND PUBLIC—REASONABLENESS.

Morris v. *Saxelby* (1916) A.C. 688. This was an appeal from the decision of the Court of Appeal (1915) 2 Ch. 57 (noted ante vol. 51, p. 359). The question was as to the validity of an agreement whereby the defendant bound himself to the plaintiffs not to exercise or engage in the sale or manufacture of pulley blocks hand overhead runways, electric overhead runways, or hand overhead travelling cranes, in the manufacture of which the plaintiffs were engaged. The restraint was for seven years and extended to the whole of the United Kingdom: the Court of Appeal held it to be unreasonably wide and more than was reasonably necessary for the protection of the plaintiff company and was therefore not enforceable, and with this conclusion the House of Lords (Lords Atkinson, Shaw, Parker and Sumner) agree.

LIBEL—PRIVILEGED OCCASION — ASSOCIATION OF TRADERS FOR MUTUAL PROTECTION—COMMUNICATION TO MEMBERS—JOINT TORT FEASORS—UNINCORPORATED ASSOCIATION — PARTIES — TORT.

London Association for Protection of Trade v. *Greenlands* (1916) 2 A.C. 15. This was an appeal to the House of Lords (Lord Buckmaster, L.C., and Lords Loreburn, Atkinson, and Parker) in a case known in the Courts below as *Greenlands* v. *Wilmshurst* (1913) 3 K.B. 507 (noted ante vol. 50, p. 23). The action was for libel against an unincorporated association, its secretary, and a third party, contained in a report furnished by the secretary of the association to a member as to the financial standing of the plaintiffs, based on information received by the secretary from the third party. At the trial the jury found that the third party had been guilty of malice in furnishing the information he did to the secretary; but that the secretary and the association were not guilty of malice, and the jury assessed the damages against the third party at £750, and against the association and the secretary at £1,000, and judgment was entered accordingly. On appeal by the association and the secretary, the Court of Appeal granted a new trial, and from this decision the present appeal was brought. It appeared that one of the members of the association, without any order authorizing him so to do, had entered an appearance for himself and all other members of the association, and when the case came to be argued in the House of Lords the plaintiffs' counsel agreed that in such circumstances the action could not be maintained against the association and agreed that as to the association the judgment must be set aside. It was attempted to maintain the action against the secretary on the authority of *Macintosh* v. *Dun* (1908) A.C. 390, but their lordships held that case to be distinguishable on the ground that the defendants in that case carried on business for profit, whereas in the present case the association did not, but merely combined for mutual protection, and therefore the secretary in furnishing information to an applicant must be regarded not as the agent of the association but as the confidential agent of the particular member who applied for information, and therefore that the occasion was privileged, and the secretary was not liable, and as to him the action was also dismissed. Lord Parker points out that the judgment which remained against the third party appeared to have been recovered in respect of an alleged libel which was not the subject of the action. Altogether, the remarks of the Lord Chancellor that "the case affords the unedifying spectacle of litigation conducted with such disregard of the rules of procedure that extrication from the resulting tangle

has been all but hopeless" seem well justified; and the same observations we fear might be applied to many cases in Ontario.

PRIZE COURT—POWERS OF KING IN COUNCIL—ROYAL PREROGATIVE—ORDERS IN COUNCIL—PRESERVATION OF PROPERTY IN SPECIE PENDING ADJUDICATION—RIGHT OF CROWN TO REQUISITION PROPERTY SEIZED, WHEN IT MAY BE EXERCISED — PRIZE COURT RULES.

The Zamora (1916) 2 A.C. 77 is an appeal from the decision of the Prize Court (1916) P. 27, noted ante p. 187. The case is important, not only on the questions involved, but also as regards the legal effect of Orders in Council generally. The facts of the case were that a neutral vessel bound to Stockholm with a contraband cargo (copper), consigned to a Swedish company, was stopped at sea by a British cruiser and taken into a British port for search. A writ having been issued in prize, an application was made on behalf of the Crown to requisition. The application was supported by an affidavit of a Crown official stating merely that the Crown desired to requisition the cargo, and the Court below, considering that the Crown had an inherent right to requisition the cargo, and assuming it was bound by Prize Court Rule Ord. xxix (1), which was made pursuant to a statutory provision empowering the Crown to make rules governing the practice and procedure of the Prize Court, granted the application; the value of the cargo being thereupon appraised and paid into Court. The Judicial Committee of the Privy Council (Lords Parker, Sumner, Parmoor, and Wrenbury, and Sir A. Channell), however, held that the statutory power to make rules governing practice and procedure did not empower the Crown to alter the law, and, therefore, the Rule in question could not properly be construed as an imperative direction to the Court to allow a requisition otherwise than according to international law; and that, according to international law, a belligerent is only entitled to requisition a prize ship or cargo: (1) where it is shewn that the property is urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters concerning the national security; and (2) that there is a real question to be tried, so that it would be improper to order an immediate release; and (3) the Prize Court must determine judicially whether in the particular circumstances the right is exerciseable. These conditions, their Lordships held, had not been observed in allowing the requisition of the Crown, and it was, therefore, declared invalid, and leave was given to the owners to apply against the Crown for damages sustained by them by reason of the order in the event of their ultimately being successful in the proceedings for condemnation.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Sask.] CANADIAN NORTHERN RY. CO. v. DIPLOCK. [May 25.

Railways—Negligence—Ejecting trespasser from moving train—Liability for act of servant.

As a train was moving away from a station, where it had stopped, the conductor ordered a brakeman to eject two trespassers from it. On proceeding to do so the brakeman found a man stealing a ride upon the narrow ledge of the engine-tender and, in a scuffle which ensued, plaintiff who was on the edge of the ledge, was pushed off the train and injured. In an action for damages, the jury found that the brakeman had been at fault in attempting to eject the man whom he saw while the train was in motion and that it was "dubious" whether he was aware of the presence of the plaintiff in the dangerous position.

Held per Fitzpatrick, C.J., and Idington and Anglin, JJ., (affirming the judgment appealed from, 9 West. W.R. 1052), that the reckless indifference of the brakeman, in circumstances in which he was aware of the probably perilous position of the plaintiff, was an act of negligence for which the railway company was liable.

Per Davies and Brodeur, JJ., dissenting:—As it was not shown by the evidence nor found by the jury that the brakeman was aware of the presence of the plaintiff in a dangerous position the plaintiff, being a trespasser, could not recover damages against the company for the injuries he sustained.

Appeal dismissed with costs.

O. H. Clark, K.C., for the appellants. *Chrysler*, K.C., for the respondent.

B.C.] WEST VANCOUVER v. RAMSAY. [June 24.

Municipal corporation—Partial closing of highway—Exchange for adjacent land—Validity of by-law—Assent of ratepayers—R.S.B.C., 1911, c. 170, s. 53, s-ss. 176, 193.

Under the provisions of sub-sections 176 and 193 of section 53 of the British Columbia Municipal Act, R.S.B.C., 1911,

c. 170, empowering municipal corporations to alter, divert or stop up public thoroughfares and to exchange them for adjacent land, a municipal corporation has power by by-law to close up a portion of a highway and dispose of the strip so taken from its width in exchange for adjacent or contiguous lands to be used in lieu thereof although the effect may be to cause the narrowing of the highway. Davies, J., dissented.

Per Idington and Brodeur, JJ.—Such a by-law is valid although passed without the assent of the ratepayers previously obtained: *British Columbia Railway Co.* v. *Stewart* (1913), A.C. 816, and *United Buildings Corporation* v. *City of Vancouver* (1915), A.C. 345, applied.

The decision of the Court of Appeal for British Columbia on a previous appeal in the same proceedings (21 B.C. Rep. 401), was approved.

Appeal dismissed with costs.

Lafleur, K.C., and *R. M. Macdonald*, for appellant. *James A. Harvey*, K.C., for respondents.

Sask.] JONES v. TUCKER. [June 19.

Contract affecting foreign lands—Sale of lands in province—Exchange —Specific performance — Jurisdiction of courts of equity — Mutuality of remedy—Relief in personam—Appeal—Jurisdiction — "Final judgment"—Supreme Court Act, R.S.C., 1906, c. 139, s. 38c.

T., resident in the State of Iowa, brought suit in Saskatchewan for specific performance of a contract by which J., resident in Saskatchewan, agreed to sell him lands in Saskatchewan, part of the price being the conveyance to J. of lands in Iowa by T. The trial Judge decreed specific performance and, on appeal, the full Court varied the judgment by ordering a reference for inquiry and report upon the title to the lands in Iowa, and that, upon the filing of such report either party should be at liberty to apply for such judgment as he might be entitled to (8 Sask. L.R. 387). On the appeal to the Supreme Court of Canada the material questions were whether or not the fact that the lands to be exchanged were situated outside the province precluded the courts of Saskatchewan from decreeing specific performance for want of mutuality of relief and whether or not there was error in decreeing the reference, which, in effect, gave the plaintiff a second opportunity of proving his title.

Held, Idington, J., dissenting, that the courts of Saskatchewan, as courts of equity acting *in personam*, have jurisdiction to decree specific performance of contracts for the sale of lands situate within the province where the person against whom relief is sought resides within their jurisdiction; that, in the suit instituted by the foreign plaintiff in Saskatchewan, mutuality of relief existed between the parties, and that the discretion of the Court appealed from in ordering the reference before the entry of the formal decree ought not to be interfered with on the appeal.

The jurisdiction of the Supreme Court of Canada to entertain the appeal was questioned by the Chief Justice and Idington and Anglin, JJ., on the ground that the judgment appealed from was not a "final judgment." Davies, J., was of opinion that as the suit was "in the nature of a suit or proceeding in equity" an appeal lay to the Supreme Court of Canada in virtue of sub-sec. *c* of sec. 38 of the Supreme Court Act.

Judgment appealed from (8 Sask. L.R. 387), affirmed, Idington, J., dissenting.

Haydon, for the appellant. *G. F. Henderson*, K.C., for the respondent.

B.C.] HERON v. LALANDE. [June 24.

Assessment and taxation—Sale for delinquent taxes—Issue of tax sale deed—Premature delivery—Statutory authority—Condition precedent — Evidence — Presumption — Curative enactment—Assessment Act, B.C. Con. Acts, 1888, c. 111, s. 92—B.C. Assessment Act, 1903, 3 & 4 Edw. VII., c. 53, ss. 125, 153, 156.

The British Columbia Assessment Act (Con. Acts, 1888, c. 111, s. 92), provides that the owner shall have the right to redeem land sold "at any time within two years from the date of the tax sale or before delivery of the conveyance to the purchaser at the tax sale." The tax sale deed in question was dated on the day before the expiration of two years from the date of the tax sale. The B.C. Assessment Act, 1903, 3 & 4 Edw. VII., c. 53, ss. 125, 153 and 156, declares that all proceedings which may have been theretofore taken for the recovery of delinquent taxes under any Act of the province, by public sale or otherwise, should be valid and of full force and effect; that tax sale deeds should be conclusive evidence of the validity of all proceedings in the sale up to the execution of such deed, and that such sale and the official deed to the purchaser of any such lands shall be final

and binding upon the former owners of the said lands and upon all persons claiming by, through or under them."

Held per Fitzpatrick, C.J., and Idington and Anglin, JJ. (reversing the judgment appealed from, 9 West. W.R. 440), Davies and Brodeur, JJ., *contra*, that, in the absence of evidence to the contrary, it must be presumed that the delivery of the conveyance to the tax sale purchaser took place on the date of the tax sale deed; that the execution and delivery thereof were premature, and, therefore, the conveyance was ineffectual and insufficient to justify the issue of a certificate of title under the provisions of the Land Registry Act or of the Torrens Registry Act, 1899, and, further, that the curative clauses of sections 125, 153 and 156 of the Assessment Act, 1903, could not be applied so as to have the effect of validating the void conveyance.

Appeal allowed without costs.

W. N. Tilley, K.C., for appellants. *James A. Harvey*, K.C., for respondent.

Alta.] [June 24.

CANADIAN NORTHERN WESTERN RY. CO. *v.* MOORE.

Railways—Expropriation of lands—Arbitration—Appeal—Jurisdiction of Court on appeal—Reference back to arbitrators—Proceedings by arbitrators—Receiving opinion testimony—Number of witnesses examined—Alberta Arbitration Act, 1909—Alberta Railway Act, 1907—Setting aside award—Evidence—Admission in prior affidavit—Ascertaining value of lands.

The provisions of the Alberta Arbitration Act of 1909, in relation to references to arbitration, apply to proceedings on arbitrations under the Alberta Railway Act of 1907, and give power to the Court or a Judge, on an appeal from the award made, to remit the matters referred to the arbitrators for reconsideration. Anglin, J., inclined to the contrary opinion.

Per Davies, Idington and Anglin, JJ. (Fitzpatrick, C.J., *contra*). When arbitrators have violated the provisions of section 10 of the Alberta Evidence Act of 1910 by receiving the testimony of a greater number of expert witnesses than three, as thereby limited, upon either side of the controversy, their award should be set aside by the Court upon an appeal.

Per Fitzpatrick, C.J., and Idington, J. (Davies, J., *contra*). An affidavit of the party whose property has been expropriated, made for different purposes several years prior to the expropriation proceedings, cannot properly be taken into consideration by

arbitrators as evidence establishing the value of the property at the time of its expropriation.

Per Idington and Brodeur, JJ. In the circumstances of the case the arbitrators were not *functi officiis* as their award had been invalidly made.

The appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (7 West. W.R. 1327). and the cross-appeal therefrom were dismissed with costs.

Chrysler, K.C., for appellants. *Frank Ford*, K.C., for respondent.

(Ont.] ALGOMA STEEL CORPORATION v. DUBÉ; [June 19.
DUBÉ v. LAKE SUPERIOR PAPER CO.

Negligence—Hire of machinery—Negligence of hirer—Negligence of owner—Master and servant.

The steel company hired from the paper company a crane and crew of two men, D. to run it and a fireman. In doing the work for which it was hired, the crane fell, and D. was killed. In an action by his widow for damages, the jury found that the crane was a dangerous machine and that the steel company was negligent in not having a rigger to superintend its operation.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 371), that the steel company owed to D. the duty of seeing that the crane was properly operated; that the evidence justified the finding of the jury that a rigger was necessary for that purpose; and that the judgment against that company should stand.

The jury also found that the crane was defective when delivered to the steel company and that the paper company was guilty of negligence in not supplying proper equipment for it.

Held, reversing the judgment of the Appellate Division, Davies and Idington, JJ., dissenting, that the relation of master and servant existed between the paper company and D. up to the time of the latter's death; that the company, in sending D. to run a dangerous machine not properly equipped, would be responsible for any injury caused by its operation, and that it was not relieved from responsibility by the fact that the injury might have been avoided if the steel company had provided proper superintendence over its operation.

Appeal dismissed with costs: cross-appeal allowed with costs.

Anglin, K.C., and *J. E. Irving*, for the Algoma Steel Co., appellants.

T. P. Galt and *McFadden* for Dubé, respondent and cross-

appellant; *Tilley*, K.C., and *Atkin*, for the Lake Superior Paper Co., respondent.

EXCHEQUER COURT OF CANADA.

Cassels, J.] [April 19.

MOODIE *v.* CANADIAN WESTINGHOUSE COMPANY.

Patent for invention—Infringement—Strict construction—Discretion of Court to discriminate between claims as to validity.

In an action for the infringement of a patent for electric toasters, it appeared that the plaintiff's patent contained five separate claims. At the opening of the trial the first claim was abandoned, and the case confined to infringement of the balance of the claims.

Held, that the patent was one requiring strict construction, and that as an element specifically claimed by the patentee as essential to his invention was omitted from defendant's machine, there was no infringement.

Quære: Whether where three out of five claims are held void the Court should discriminate and sustain the patent under the remaining claims.

R. S. Smart, for plaintiff.

A. W. Anglin, K.C., for defendant.

Bench and Bar

CANADIAN BAR ASSOCIATION.

ANNUAL MEETING

HELD AT OSGOODE HALL, TORONTO, JUNE 15, 16.

June 15—Morning Session.

At the request of the President (Sir James Aikins, K.C.), Mr. R. C. Smith, K.C., of Montreal, Vice-President for Quebec, took the chair.

Addresses of welcome were delivered by Dr. John Hoskin, K.C., Treasurer of the Law Society of Upper Canada, and by Mr. E. F. B. Johnston, K.C., Vice-President for Ontario. These

were responded to by Mr. A. R. Slipp, K.C., M.L.A., of Fredericton, N.B.

The Presidential Address was then delivered by Sir James Aikins, K.C.

Hon. James M. Beck, of New York, and Hon. Henry B. F. Macfarland, of Washington, were introduced to the Association by the President.

The following resolutions were then introduced and passed:—

A resolution that a Judge or retired Judge of any Court of Record in Canada may become a member of the Association.

A resolution to increase the number of the Council so as to permit two representatives in each province to be appointed by the official Law Society body in that province.

A resolution that all Canadian barristers on active service should be carried as members without payment of fees.

Afternoon Session.

A paper on Succession Duties was read by R. C. Smith, K.C., and commented on by Hon. I. B. Lucas, K.C.

A paper on Company Law was read by A. H. Clarke, K.C., M.P., Calgary.

In the absence of Hon. H. A. Robson, K.C., Winnipeg, Mr. C. P. Wilson, K.C., read Mr. Robson's paper on Company Law.

A discussion followed, participated in by Victor E. Mitchell, K.C., Montreal, S. B. Woods, K.C., Edmonton, and others.

June 16—Morning Session.

Mr. E. F. B. Johnston, K.C., in the chair.

Address by Hon. James M. Beck, of New York, in Convocation Hall.

Whereupon a vote of thanks was moved by Sir James Carroll, of New Zealand, seconded by Sir James Aikins.

On motion of Mr. R. G. de Lormier, K.C., Montreal, seconded by H. J. Elliott, K.C., a resolution of sympathy was passed in connection with the death of the Hon. J. J. Foy, K.C., of Toronto.

An address was then delivered by Hon. Mr. Justice Riddell, on Thomas Taylor, the first Law Reporter in Upper Canada, followed by an address by Hon. Henry B. F. Macfarland, of Washington.

Afternoon Session.

This was held at Royal Canadian Yacht Club, when an address was delivered by Sir George Gibbons, K.C., on the International Waterways Commission.

A paper on Conditional Sales was presented by Fred R. Taylor, K.C., of Saint John, on behalf of the Attorney-General of New Brunswick, followed by a paper on Fire Insurance by M. H. Ludwig, K.C., Toronto.

A resolution was read by Mr. George H. Montgomery, K.C., Montreal, seconded by A. H. Clarke, K.C., M.P., Calgary, that this Association desires to record its warm appreciation of the cordial reception and excellent entertainment provided by the Toronto Bar, referring specially in this connection to Dr. John Hoskin, K.C., Treasurer of the Law Society of Upper Canada and Sir George Gibbons, K.C.

The following officers were elected for the ensuing year:

Hon. President—The Honourable the Minister of Justice.

Hon. Vice-Presidents—The Attorneys-General of the various Provinces of the Dominion.

Vice-Presidents—Ontario—E. F. B. Johnston, K.C., Toronto.
Quebec—Dr. R. C. Smith, K.C., Montreal.
New Brunswick—Fred R. Taylor, K.C., Saint John.
Nova Scotia—Hector McInnes, K.C., M.L.A., Halifax.
Prince Edward Island—A. A. McLean, K.C., M.P., Charlottetown.
Manitoba—Isaac Campbell, K.C., Winnipeg.
Saskatchewan—Norman Mackenzie, K.C., Regina.
Alberta—R. B. Bennett, K.C., M.P., Calgary.
British Columbia—G. E. Corbould, K.C., New Westminster.

Hon. Secretary—E. Fabre Surveyer, K.C., Montreal.

Hon. Treasurer—John F. Orde, K.C., Ottawa.

Associate Hon. Secretaries—R. W. Craig, K.C., Winnipeg; J. D. P. Lewin, Saint John, N.B.

The next Annual Meeting of the Association is to be held in Winnipeg either in the last week of August or the first week of September, 1917.

The Annual Banquet was given at the King Edward Hotel, at which speeches were delivered by Ven. Archdeacon Cody; Hon. W. H. Hearst; Hon. Jeremie Decarie; Dr. R. A. Falconer; Hon. Henry B. F. Macfarland, Washington; Hon. Mr. Justice Riddell; Hon. Merritt Baker, Buffalo; Mr. T. M. Tweedie, K.C., M.L.A., Calgary; Mr. Isaac Campbell, K.C., Winnipeg.

Among those present, in addition to the above speakers, were Hon. Sir James Aikins, K.C., Winnipeg, President; Sir George Gibbons, K.C., London; Hon. A. B. Hudson, Attorney-General of Manitoba; Hon. I. B. Lucas, Attorney-General of Ontario; Dr. John Hoskin, K.C., Treasurer of the Law Society of Upper Canada; Isaac Pitblado, K.C., President Law Society of Manitoba; Stuart Jenks, K.C., Deputy Attorney-General of Nova Scotia; R. W. Shannon, K.C., Legislative Counsel to Government of Saskatchewan; Sir James Carroll of New Zealand; together with a large number of the most prominent members of the Bar from the various provinces of the Dominion.

Sir James Aikins, Knt., K.C.

Sir James Aikins, who has for many years occupied a prominent position at the Bar, as well as in the political arena, has been appointed Lieutenant-Governor of the Province of Manitoba. This appointment will be as acceptable to the profession at large as to the people of that Province.

Sir James Aikins has recently done loyal service for the profession in his position as President of the Canadian Bar Association, and his work will bear fruit and be better known when we settle down to our peaceful avocations after the war. His address to the Association at its last meeting will be found in another place.

He is the son of the late Senator Aikins, who at one time held the position of Secretary of State. It is interesting to remember in connection with the recent appointment that his father also held the same honourable position to which his son has just been appointed.

Sir James was born in 1851 in the County of Peel, Ontario, and was called to the Bar in 1878. He was a member of the House of Commons since 1911, sitting for Brandon, resigning his seat last year to assume the leadership of the Conservative party in Manitoba.

Hon. Mr. Justice Garrow.

The Ontario Bench has suffered a severe loss by the death of the Honourable James Thompson Garrow, one of the Judges of the Appellate Division of the Supreme Court of Ontario, who expired on the train whilst returning from his summer residence at Penetanguishene. The learned Judge had been in bad health for some time, but his sudden death was unexpected.

We regret to notice in a recent casualty list the death of John Ure Garrow, youngest son of the late Judge, who was killed in action by gas poisoning on September 12, in France. He was a lieutenant in the Canadian Mounted Rifles. He was called to the Bar shortly before he went to the front. We deeply sympathise with the widowed mother in this two-fold sorrow.

Judicial Appointments.

Colin Gregor O'Brian, of L'Orignal, Province of Ontario, K.C., to be Junior Judge of the County Court of Prescott and Russell, vice Adam Johnston, deceased (June 15), and since appointed County Judge.

War Notes.

LAWYERS AT THE FRONT.

KILLED.

(Not previously mentioned.)

John Muir, Barrister, Moose Jaw; Sergeant, 5th Battalion, killed in action May 24, 1915, at Festubert.

William Augustus Reeve, Barrister, Qu'Appelle; Lieutenant, 10th Battalion, killed in action, May 24, 1915.

Stanley L. Jones, K.C., of Calgary; Major in Princess Patricias Battalion, died of wounds in action at Ypres.

C. A. Wilson, Barrister, Edmonton; Lieutenant, killed in action at Zillebecke.

Thomas H. Fennel, Law Student at Medicine Hat; Lieutenant, killed in action in France.

J. R. Dennistoun, Lieutenant; **C. J. Jamieson,** Lieutenant; **J. E. Reynolds,** Private; **A. J. Anderson,** Lieutenant; all Students, Law Society of Manitoba.

F. M. Hetherington, Lieutenant; **E. L. Howell,** Captain; **G. W. Jamieson,** Captain; **G. H. Ross,** Captain; all Barristers of Manitoba.

John Ure Garrow, Barrister, Toronto, Ont.; Lieutenant, C.M.R., killed by gas poisoning, Sept. 12, 1916, in France.

The kaleidoscopic incidents of the war occasionally bring up matters of legal interest. Mr. Asquith, in the House of Commons in his position as Premier said: "It appears to be true that Captain Fryatt was murdered by the Germans," and he continued: "When the time arrives the Government is determined to bring to justice the criminals whoever they may be and whatever their position. In a case such as this the man who authorized the system under which the crime was committed may well be most guilty of all."

At an immense gathering of workingmen at Trafalgar Square called in reference to the same event, resolutions were passed calling upon the Government to bring these murderers to justice. An innate sense of justice pervades the British mind probably more than that of any other nation; and we can well believe that this sentiment was the dominant one in the thoughts of those present rather than a feeling of hatred caused by the cowardly atrocities attributable to the Kaiser and his soldiers. It would be an interesting sight to see the Kaiser and Admiral Von Tirpitz in a British dock on a formal charge of wilful murder. They would get a fair trial and the impartial judgment of twelve honest men and if found guilty an ordinary gallows within prison walls would be a fitting, as a merciful termination of the career of these cold-blooded murderers.

The General Council of the Bar in England has compiled a list of Barristers now serving or who have served with His Majesty's forces in this war, corrected to July 31st, 1916. It contains about twelve hundred names, and of these nearly one hundred have been killed in action or died of wounds. Would it be within the province of the Canadian Bar Association to prepare such a list for the Dominion? We have endeavoured from time to time to give information on this subject; but, if taken up by the Association as part of their work, a more complete and an authoritative list could be secured than in any other way. No statistics are available at present, but we should think a larger percentage of professional men have joined the army from Canada and given their lives for king and country than in England.