Correspondence

Accretions in Alberta

TO THE EDITOR:

I should like to draw attention to the Crown's practice in Alberta of dealing with accretions as owner. Although this practice, it appears, has continued unchallenged for a considerable time, I believe there to be no justification for it. "The term accretion denotes the increase which land bordering on a river or on the sea undergoes through the silting up of soil, sand or other substance, or the permanent retiral of the waters" (*Clarke* v. *Edmonton*, [1930] S.C.R. 137, at p. 144, reversing [1928] 1 W.W.R. 553). This case decided, among other things, that the English law as to accretions, namely, that land formed by accretion becomes the property of the riparian owner to whose land it attaches, is applicable and forms part of the law in Alberta.

A comparison of statements in two Western cases shows a divergence between this principle and the practice of the Crown in Alberta with respect to accretions. In *Flewelling* v. *Johnston*, [1921] 2 W.W.R. 374, at p. 383, the following extract, from a book of printed instructions issued to government surveyors by the Surveyor-General of Canada, was quoted in the Appellate Division of Alberta: "S. 135. The grantee of a parcel of land fronting upon a lake or river acquires not only the land actually surveyed, but also the right to future additions to the parcel which may result from gradual alluvium or dereliction resulting from natural causes". But in the judgment of Dysart J. in *Lang* v. *Graves*, [1923] 2 W.W.R. 907, at p. 910, the actual practice of the Crown is revealed: "in harmony with the Dominion Lands Act 1908, ch. 20, and with the practice of the Department thereunder . . . , the Crown makes a survey of all land which from time to time emerges from lakes, *and deals with it as owner* [italics added]". The Crown not being represented on this particular occasion, the learned judge merely stated the practice of the Crown and expressly declined to comment on it: "Whether or not the Crown has a right to do these things is not contested as far as I know, and I decline to express an opinion upon a question of this importance unless the Crown

is made a party to these proceedings". Since then no other judge has had occasion to comment.

Apart from all speculation as to why, in view of this practice, the Surveyor-General should direct his surveyors' attention to the common-law rule, what statutory authority exists for this apparent abrogation of a common-law right? Incidentally, the common-law rule is repeated in the latest manual seen by the writer in the Provincial Land Titles Office at Calgary, presumably issued by the Department of Lands and Mines (10th ed., 1946, s. 197), though the department, having had its attention drawn to the section, says that it will not appear in the next edition. Having ascertained from the department that it follows the practice initiated by the Dominion, I asked to be informed of its statutory authority. The answer of the department was to refer to section 6(1) and (2) of the Public Lands Act (Alta. Stats. 1949, c. 81):

> Where public lands bordering on a lake, river, stream or any body of water are disposed of by the Crown, in the absence of an express provision in the disposition to the contrary, the bed or shore of the lake, river, stream or body of water shall not pass to the person otherwise acquiring such public lands and the disposition shall be construed accordingly and not in accordance with the rules of the English Common Law.

Subsection (2) contains the same enactment with respect to lands granted by the Crown before the passing of the Act. The common-law rule that a riparian owner is presumed to be the owner of the bed of the stream *ad medium filum aquae* has been held in Canada not to apply to bodies of non-tidal waters which are in fact navigable and, in Alberta, even if non-navigable (*Flewelling* v. *Johnston*, *supra*). Therefore, as regards the bed of a river, the section would seem to say nothing new. Moreover, in *Clarke* v. *Edmonton* it was expressly stated that "the right to accretion . . . does not depend on the ownership of the bed". Can it be said that it depends on the ownership of the shore? The shore is the space between the bank and the water's edge at still water—the space between high- and low-water marks (*Kennedy* v. *Husband; Kennedy* v. *Ellison*, [1923] 1 D.L.R. 1069, at p. 1077, a British Columbia decision). The riparian owner's title, then, extends to the bank and no farther. Lord Selborne, in *Lyon* v. *Fishmonger's Company* (1876), 1 App. Cas. 662, quoted in *Clarke* v. *Edmonton*, said: "With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word 'riparian' is relative to the *bank* [italics added], and not the bed, of the stream". Furthermore, as "riparian" is relative to the bank, so is "shore" relative to the water. If the course of the water changes, then the shore changes with it, and it cannot be argued by the Crown that the accretion attaches to the shore, which be-

longs to the Crown, and therefore the accretion belongs to the Crown. There is no such thing as a "shore" *in vacuo*.

I suggest, then, that the right to accretion can neither depend on the ownership of the bed nor of the shore. And so it must be concluded that this section of the Act is no authority for the Crown's practice of dealing with all land emerging from lakes as the owner. Further examination of the Act discloses no other section to justify the practice. The sole reference, in fact, to accretion is in section 113 (a)(2): "The Lieutenant Governor in Council may make regulations governing the *leasing* [italics added] of marsh land, water-covered areas and accretions". It is a well-established rule that a statute is not to be interpreted so as to deprive the subject of a common-law right, unless that statute shows a clearly-expressed intention so to do, *B. & R. Co.* v. *McLeod*, [1912] 2 W.W.R. 1093 (Alta.). Even if section 113 can be taken as assuming that the Crown is the owner of accretions (which is doubted), there is still lacking a "clearly-expressed intention".

The practice of the Crown, evidently to strengthen what it considers to be statutory authority, is shown in *Lang* v. *Graves* (at p. 910): "By describing the land as 'fractional' quarter sections, and mentioning the acreage thereof respectively, exactly as the acreage is shown on the . . . survey maps . . . , means to convey and does convey all the acreage named; and that the omission from the Crown grants of any language from which it could be inferred that the conveyed lands were either 'bounded by' or 'bordering upon' the lake, indicated clearly that certain specific land was intended to be conveyed and no more, and that the grantee does not become a riparian owner".

This may well be the intention of the Crown, but is such an intention supportable at law? In *Wolfe* v. *B.C. Elec. Ry. Co.*, [1949] 1 W.W.R. 1123, it was held that the right to accretion passes with the conveyance of the land to which the accretion adheres, even though it adheres before the conveyance *and is not mentioned therein*. This would seem to dispose of that part of the Crown's case which rests on "the omission from the Crown grants of any language" intending the grantee to become a riparian owner. Because the Crown does not describe the land as "bordering on" the water makes, it is submitted, no difference. If the boundary is in fact the bank (the title to which, as has been shown, determines riparian ownership), then the grantee is, *ipso facto*, a riparian owner. Beck J. in his dissenting opinion in the lower court in *Clarke* v. *Edmonton*, upheld in the Supreme Court, said (at p. 574):

> The whole question is whether the original boundary was the water's edge, i.e. the bank of the river which is, on the face of it, a shifting or movable boundary . . . , in which case it is of no consequence whether by examination of neighbouring objects, measurements or otherwise,

> the position of the water's edge or the bank of the river at the time of the grant is capable of being exactly ascertained or not, or whether the original boundary was a fixed and immovable line whether a bank or wall or otherwise.

If such a concrete thing as a bank or wall will not suffice, then surely will not a line drawn on a survey map.

It would seem, then, that the practice of the Crown as to accretions in Alberta not only is unsupported by anything in the Public Lands Act but is not supported by anything in the common-law. I am not familiar with the practice of other provincial governments, but since the practice in Alberta was adopted from the Dominion, it may well be that the same situation exists on a larger scale elsewhere. The answer to the question whether the practice is ultra vires in a particular province will, of course, be found in the wording of the relevant provincial statute governing Crown lands.

C. A. G. PALMER*

* * *

Problems in Litigation

TO THE EDITOR:

The panel discussion in your May issue on problems in litigation, like the previous one on wills and the administration of estates, is heartening. Many of the questions raised involve ethics. It is a good thing that leading members of the legal profession are prepared to discuss its ethics in public, for in a sense a profession is a profession because of the ethics it seeks to observe. The performance by the members of the panel was of a calibre to excite the admiration of their professional brethren and I hope that such discussions will be continued. Here are three of the many questions I should like to see aired.

First, a question in the field of labour relations. You are asked to be a representative on a board of conciliation. The fee is limited by law to $20.00 a day and you must not be associated professionally with the party nominating you. You are told that it is generally recognized that $20.00 a day is inadequate compensation and that the practice is to supplement it in some other way. You are to receive more. Regardless of the "practice", are you sound in your ethics if you accept appointment on these terms?

---

*C. A. G. Palmer, M.A. (Oxon), is at present engaged in editing the projected 2nd Western Edition of the Canadian Encyclopedic Digest for Burroughs & Company, Limited, Calgary.

Suppose that a solicitor is retained to secure a mortgage on the property of a client. The client pays a fee for all services, including searching the title; the solicitor places the mortgage with a company that pays him a finder's commission of one per cent. Is the solicitor in a position of trust, an agent receiving a secret commission? Is it his duty to disclose the commission to the client and credit the client's bill?

The position of counsel in divorce actions is unenviable. Most of us must have seen a counsel personally castigated by a trial judge because, in the view of the judge, there appeared to be collusion between the parties. In a recent decision in Ontario it was stated, "It cannot be said with certainty that there is any exhaustive definition of collusion", and further, "It is most important that there should be disclosed to the Court all previous agreements as well as details of all negotiations that have taken place between the parties". Both in criminal and civil cases it has been recognized for centuries that counsel's duty is to do the best he honestly can for his client without passing judgment upon the case. Thus, in a criminal case, counsel will call the accused or witnesses as he is instructed, though he may suspect that their evidence is untruthful, and leave judgment to the judge or the jury. What is the duty of counsel retained in a divorce action, who suspects collusion or that the evidence put before him is false? Is his duty to present the case to the court as adequately as he can or, anticipating a personal castigation by the judge, should he refuse to take the case to court?

In Ontario we have a discipline committee to punish but no ethics committee to guide. New members are entering the legal profession at the rate of over one thousand each ten years. They arrive in the profession at a time when it is difficult for them to judge what constitutes true success. They see practitioners achieve great success, in a money sense, by acting on both sides in transactions, by speculation and by all sorts of business activities that are only remotely professional.

I am in full agreement with the correspondent in your May issue who deprecates the practice of acting on both sides of transactions, real estate or otherwise. I agree that it leads to lawsuits. What is more important, for every lawsuit there are twenty instances where members of the public absorb their losses and proceed in future with a poor view of the legal profession. Yet the practice is notoriously prevalent and is well known to the Benchers of the Law Society of Upper Canada. An evidence of its prevalence is that the Solicitors' Conveyancing and General Tariff for the County of Carleton Law Association provides a fee for the solicitor who "acts for purchaser and vender simultaneously".

How idle it is to spend large appropriations to advertize to the public the virtues of lawyers when the virtues, in many instances,

are not there, and the spending body seems indifferent to correct abuses.

MALCOLM ROBB*

* * *

TO THE EDITOR:

You may be interested in a rural viewpoint on one of the problems in litigation discussed at the last Mid-Winter Meeting of the Ontario Section of the Canadian Bar Association and published in the May issue of the Review. Question 5 asked if a Crown attorney, knowing of a witness whose evidence is adverse to the Crown's case, should (a) call the witness, (b) put his name on the indictment, (c) otherwise disclose his name to the defendant. Incidentally, the panel discussing this and the other questions did not have among its distinguished personnel any of those, if one is to judge from the comments of the panel, villainous members of the profession who as Crown attorneys always seek to convict the poor accused persons who are being persecuted by the police.

The panel members who commented on question 5 appeared to hold the view that the Crown should (a) produce at a trial, or at least have available at the Crown's expense, all witnesses who can give evidence, whether or not the evidence is helpful to the defence, and (b) introduce all circumstantial evidence, although part of it points to the innocence of the accused.

Over (b) I have no quarrel, unless there are strong grounds for believing that, as is sometimes the case, the accused has planted the circumstantial evidence to mislead the police, say, by pointing to the guilt of some other person. In such cases, can it be said that the Crown attorney is doing his duty to the public by making the circumstantial evidence part of the Crown's case? I will concede that it is his duty to inform defence counsel of its existence and have it available at the trial—and be ready, if it is used, to demolish its effect in his argument or his address to the jury.

The calling of, or making available at the Crown's expense, all witnesses who can give evidence favourable to the accused is an entirely different matter. Let us suppose that the police, while investigating a robbery or some other equally serious charge, interview the members of the accused's family and several of them state that the accused was at home at the time the offence was committed. Can it be said that the Crown attorney is doing his duty to the public if he presents such witnesses as part of the Crown's case when he has reasonable grounds for believing that their story is false?

*Malcolm Robb, Q.C., of Robb, Ross, Cass & Hurley, Belleville, Ont.

Possibly we should look at a commoner example. Take the case of an accused man (or woman) who has been on a drinking party with several companions and, while driving home, without excuse goes over the curb, killing a pedestrian, or in the ditch, killing one of the passengers. A blood test indicates that the accused was intoxicated, but his companions state that during the whole evening the accused drank only the usual two beers and that his actions before the accident were normal. How far must one go in giving effect to the absurd proposition that it is the duty of the Crown attorney to call "all" witnesses? I submit that in the example just given the Crown attorney would not be doing his duty by calling the companions and making their evidence part of the Crown's case, unless of course he must call one of them to prove who was driving the death vehicle.

In conclusion, I suggest that in these examples, or in other cases where there are witnesses who may be helpful to the defence, but whose evidence is for adequate reasons believed to be false, the Crown attorney has done his duty when he informs defence counsel of the existence of the evidence and, where the accused is without funds, subpoenas the witnesses and bears the expense of making them available at the trial.

D. E. W. TISDALE*

* * *

TO THE EDITOR:

The publication in the Canadian Bar Review of the panel discussions held at the Mid-winter Meeting of the Ontario Section at Windsor was a welcome innovation. Although similar panels have been held in the past, I believe this to be the first time that the discussions which took place have been made available to the members of the profession at large. It is always helpful to have the opinions of prominent members of the profession on issues of such wide interest and importance, and the feature is one that might well be continued.

I should like to have an opportunity of expressing an opinion on question 19 relating to the admissibility of X-rays in personal injury claims and the desirability of X-ray plates being filed as exhibits in an action. After reading the discussion, I think that some further comment may be warranted. There will be general agreement with Mr. Mitchell's suggestion that courtrooms should be equipped with view-boxes so that a medical witness can demonstrate to the court and jury his explanation of an injury. I do not believe

*D. E. W. Tisdale, Q.C., Crown Attorney and Clerk of the Peace of Norfolk County, Simcoe, Ontario.

there would be, however, the same general acceptance of the proposition that X-ray plates should be filed as exhibits in an action and thus be available for examination by jurors in the jury room. I cannot agree with Mr. Springsteen when he says:

> I am unable to understand why the court and the jury are not entitled to look at the X-rays to see whether or not they can discern what the doctor says he discerns. Now, they may not be able to make the same deduction from what they see as the doctor is able to make, but at least they may be able to say that what they see seems to support the doctor's reasoning. Or, if the doctors disagree among themselves over the interpretation of the X-ray pictures, the court and jury can weigh, from what they see, the relative value of the opposing views.

The passage quoted seems to disregard the highly technical nature of an X-ray. The disagreement that often exists among doctors over the interpretation of X-rays illustrates the inherent difficulties in the way. It must be remembered that X-rays are read by a doctor in conjunction with his clinical examination. He is assisted in drawing sound conclusions from the X-rays by the professional contact he has had with the patient. I understand that it is general practice for the attending physician to obtain the report of a radiologist on the X-rays. The physician may disagree with the radiologist over the interpretation of the X-rays, but if he does his disagreement is supported by conclusions he has drawn from the clinical examination of the patient and inquiry into the patient's history. It is going pretty far to allow laymen to examine what is in effect a highly technical document and to substitute their own interpretation of it for the evidence of experts. It is preferable, in my view, that the jury should assess the weight of the evidence of opposing experts on the ordinary standards of credibility and reasonableness of explanation.

The volume of personal injury claims before the courts makes it advisable for a universal rule to be adopted. Preparation for trial under present conditions is dependent upon the likely attitude of the trial judge rather than a fixed rule of evidence. In my view, the rule should be based upon the conclusion that the harm done by allowing the jury to examine the X-rays exceeds the benefit; the prejudicial effect of allowing the plates to reach the hands of the jury is greater than the probative value of the documents. Any other view would give the jury credit for greater technical skill than experience indicates they possess.

GORDON F. HENDERSON*

* * *

*Of Gowling, MacTavish, Osborne & Henderson, Ottawa.

Narcoanalysis in the Courtroom

TO THE EDITOR:

May an observation be added to Mr. Sydney Paikin's account in the April issue of the Review, at page 458, of the recent and important Yale contribution on narcoanalysis? The effect of sodium amytal or pentothal, by depressing the subject's central nervous system, is to eliminate his control of his free will—an intrusion upon his soul. This brings the examiner beyond the physical into the spiritual sanctum of the subject's person. Is it not one thing to take a blood sample or to observe pulse and blood pressure and quite another to administer a drug for the purpose of an examination *viva voce* to be used in a court of law?

On the scientific level, the effectiveness of these drugs as "truth aids" seems doubtful, just as no experienced person would consider *in vino veritas* a reliable rule. The fact is that under the effect of amytal or pentothal the subject is very responsive to suggestion and the examiner's responsibility thereby becomes much greater than that which is usually assigned by our practice to the ordinary expert.

If in Canada narcoanalysis has not yet been used for courtroom purposes, may I propose, as an explanation additional to those alluded to by Mr. Paikin in his last paragraph, that we have an instinctive suspicion of this psychological burglar's jemmy? The function of the courts in our tradition is not to prize out the truth but to find it. It seems to me that there is at stake here something of our cultural heritage and that narcoanalysis, probably helpful in a psychiatric interview, must be controlled with great caution before allowing it to play any rôle in courtroom proceedings, if, in the concluding words of the Yale contributors, "we are to honor our belief in the dignity of the individual".

At the 1948 annual meeting of the Canadian Bar Association in Montreal, Me Maurice Ribet gave an account of the opposition of the Paris Bar to the use of narcoanalysis in medico-legal *expertise*. As a footnote to Mr. Paikin's review, reference might be made to this speech and to the Paris resolution, which are reported in the Annual Proceedings for 1948 at pages 114 and 124. The *Cens* case, to which the Yale paper refers in its opening paragraphs, and from which has followed in Europe, and now in the United States, much of medico-legal interest, was the occasion for the Paris resolution and the introduction of the subject to Canadian lawyers. The decision is reported in Recueil Dalloz for 1949, Jurisprudence, page 287. It is commented upon in an article by M. Robert Vouin of the University of Poitiers, "L'emploi de la

narco-analyse en médecine légale", in the same volume, Chronique, at page 101.

LÉON LALANDE*

Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

Current Legal Problems 1953. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. Volume 6, London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp. vii, 324. ($7.25 net)

Final Report of the Committee on Supreme Court Practice and Procedure. Presented by the Lord High Chancellor to Parliament by command of Her Majesty July 1953. London: Her Majesty's Stationery Office. 1953. Pp. 380. (11s. net)

Gatley on Libel and Slander in a Civil Action: With Precedents of Pleadings. Fourth edition by RICHARD O'SULLIVAN, assisted by ROLAND G. BROWN. With a foreword by THE RIGHT HONOURABLE SIR NORMAN BIRKETT. LONDON: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1953. Pp. cxxvi, 898. ($22.75 net)

Jurisprudence: Men and Ideas of the Law. By EDWIN W. PATTERSON. First printed edition. Brooklyn: The Foundation Press, Inc. 1953. Pp. xiii, 649. ($7.50 U.S.)

Man's Threefold Will to Freedom: Being the Fifth Series of Lectures on the Chancellor Dunning Trust Lectures Delivered at Queen's University, Kingston, Ontario, 1953. By T. V. SMITH. Toronto: The Ryerson Press 1953. Pp. xx, 73.

Marsden on the Law of Collisions at Sea. Tenth edition by KENNETH C. MCGUFFIE, B.L. No. 3 of the Library of Shipping Law. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp. lxxiv, 882. ($19.75)

Maxwell on the Interpretation of Statutes. Tenth edition by G. GRANVILLE SHARP, Q.C., B.A., LL.B. (Cantab.), and BRIAN GALPIN, M.A. (Oxon). With a foreword by THE HONOURABLE SIR HENRY WYNN-PARRY. London: Sweet & Maxwell Limited. Toronto: The Carswell Company, Limited. 1953. Pp. cxxxix, 464. ($8.50 net)

Our Heritage of Liberty. By ROSCOE S. RODD, Q.C. Toronto: League for Democratic Rights. 1953. Pp. 12. (25 cents a copy; $3.00 for bundles of 25)

The Passing of Parliament. By PROFESSOR G. W. KEETON, M.A., LL.D. London: Ernest Benn Limited. 1952. Pp. vii, 208. (21s. net)

Provincial Sales Taxes: Report of a Survey of Retail Sales Taxes in Canada. By JOHN F. DUE. Canadian Tax Papers, No. 7. Toronto: Canadian Tax Foundation. 1953. Pp. xii, 231. ($2.50)

---

*Of the Montreal Bar.