THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editor, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☞**Special articles must be typed before being sent to the Editor, Charles Morse, K.C., Room 707 Blackburn Building, Sparks Street, Ottawa. Notes of Cases must be sent to Mr. Sidney E. Smith, Dalhousie Law School, Halifax, N.S.**

TOPICS OF THE MONTH.

MR. ROWELL'S SPEECH AT WASHINGTON.

In our last number we stated that the address of the Honourable N. W. Rowell, K.C., President of the Canadian Bar Association, in his capacity as a guest of the American Bar Association at Washington on the 15th of last month, had been mentioned in the press as one of remarkable force and brilliance. We have since been privileged to read the text of the address in the columns of the *New York Times,* and for the benefit of REVIEW readers who may not have seen it elsewhere we reprint it here in full:

MR. PRESIDENT:

My first duty, and a most pleasing one, is to extend to you the cordial greetings and the sincere good wishes of the members of the Canadian Bar Association. We follow your proceedings with the deepest interest and find inspiration for our tasks in the great ideals which your Bar Association is seeking to attain. Our Association owes its birth to the meeting your Association held in the city of Montreal in 1913. That meeting made such an impression upon the members of the Canadian Bar that in the following year our Canadian Bar Association was formed.

May I also, on behalf of the Canadian Bar Association, thank you for the greetings and messages of good-will conveyed to us at our recent annual meeting at Calgary by your honorary secretary, the Hon. Mr. MacCracken. We were delighted both with the message and the messenger, and his address on the development of the law of the air was a fine illustration of the adaptability of the common law to meet the changing conditions and needs of our complex civilisation.

May I also thank you for the honour of an invitation and for the opportunity of being present at that great function on Thursday morning last, at which the President of the United States laid the cornerstone of the new Supreme Court Building.

Rule of Law 'Supreme Achievement.'

The establishment and maintenance of the rule of law is one of the supreme achievements of our Anglo-Saxon communities, and the erection of this magnificent temple of justice to house one of the very greatest courts of the world is a tribute to the unique and commanding place which the rule of law holds in the constitution and government of your country, as it does also to ours.

It has been a great pleasure to my wife and myself to be present at this meeting. We did not feel we were coming among strangers, but among friends and fellow members of the American Bar Association, for you had already conferred upon me the distinction of being an honorary member of your Association.

Your hospitality has been so gracious and generous that we will carry away the warmest and most affectionate regard for you all.

I was deeply impressed by the address of the President of the United States on Thursday evening last, and by your address, sir, as president of the Association on Wednesday morning last. In both of these addresses the fundamental importance of maintaining the rule of law and the orderly and expeditious administration of justice was set forth in clear and convincing terms, and the great part which lawyers must play in securing these ends was strongly emphasised.

Cites Landmarks of Progress.

In recent years successful efforts have been made to extend the principle of the rule of law and to establish the doctrine of public right in international affairs, and I desire to express the appreciation of the members of our Association of the great contribution which your Association and its members have made to this development. May I refer to some of the great landmarks in the progress of this movement:

1. The creation in 1897 of The Hague Arbitration Tribunal with its provision for voluntary submission of disputes to arbitration and its further development in 1907.

2. The Covenant of the League of Nations in 1919, which recognizes that a war or threat of war is a matter of concern to all nations and contains an agreement by all parties to the covenant to submit all disputes to arbitration, conciliation of judicial determination, but the covenant does not eliminate the possibility of war in case arbitration or conciliation fails.

3. The establishment of the Permanent Court of International Justice for the determination of disputes of a juridical character. While your country is not yet a member of this court, we appreciate the great contribution which American jurists have made during the past ten years to its success. A distinguished member of your Bar has been a member of the court since its organisation. First, John Bassett Moore, then your present Chief Justice, the Hon. Charles Evans Hughes, and now the Hon. Frank B. Kellogg.

4. The Kellogg-Briand Peace Pact, which has been signed by practically all nations, renouncing war as an instrument of national policy and agreeing to settle all disputes by peaceable means.

5. The adoption of the general act supplementary to the covenant of the League of Nations, which covers all classes of international disputes and provides for their peaceable settlements, and binds all its signatories to accept the settlement or adjudication arrived at under its provisions.

URGES REASON INSTEAD OF FORCE.

Some may prefer the Kellogg-Briand Peace Pact to the covenant of the League and others the League to the Pact. We, in Canada, approve of all and Canada is a party to all these conventions and agreements. She has committed herself to the peaceable settlement of all international disputes, either by conciliation, arbitration or judicial determination, and has bound herself to accept the decisions so arrived at as between herself and all other nations which accept similar obligations. What is true of Canada is also true of Great Britain and the other dominions of the Commonwealth.

The members of our Association desire to march side by side with their brethren of the American Bar and to further by every means in their power the great ideal of the substitution of reason for force in the settlement of all international disputes.

While we all recognise that the world is passing through a period of almost unprecedented political and economic stress and strain, I believe that there are some very encouraging features in the situation. May I mention one or two notable developments during the year 1932.

First: The operation and interpretation of the Kellogg-Briand Peace Pact.

One of the criticisms of the Kellogg-Briand Peace Pact has been that it imposed no sanction for its violation and made no provision for consultation among its signatories in order to avoid or deal with its violation.

OUR PACT DECLARATION RECALLED.

The declaration of your government on the 7th of January last, "that it would not recognise any situation, treaty or agreement which might be brought about by means contrary to the Covenants and obligations of the Pact of Paris," was a declaration by your government that it believed that this sanction at least should operate for a violation of the Pact.

On the 11th of March, 1932, the Assembly of the League unanimously adopted (Japan refraining from voting) the following declaration: "It is incumbent upon the members of the League of Nations not to recognise any situation, treaty or agreement which will be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris." We, therefore, have a declaration, concurred in by all the powers, except Japan and Russia, that this great and powerful sanction must follow the violation of the Pact of Paris. This is a most notable advance.

In the historic address made by your Secretary of State, Mr. Stimson, in New York on the 7th of August last, he pointed out that by virtue of the Pact of Paris war had been outlawed as a means of settling international disputes and that, therefore, all existing ideas of neutrality which were based on the theory that war was a lawful means of settling international disputes have largely become obsolete. To quote Mr. Stimson's words: "It is no longer to be the source and subject of rights; it is no longer to be the principle around which the duties, the conduct and the rights of nations revolve. It is an illegal thing. . . . By that very act we have made obsolete many legal precedents and have given the legal profession the task of re-examining many of its codes and treaties."

Concurs in Stimson View.

May I express my entire concurrence in the view so clearly and forcibly stated by Mr. Stimson.

One doubts whether the public or even the members of our profession have appreciated the fundamental change which the acceptance of this view will make in the relations of nations. It is of real importance to Canada. One objection sometimes urged in Canada to the obligations which we have assumed under the Covenant of the League of Nations is that Canada might in the discharge of her obligations under the Covenant find herself committed to a course of action which conceivably might bring her into conflict with the principles of neutrality which your nation has so vigorously championed. The interpretation which Mr. Stimson has placed, and I believe properly placed, upon the Kellogg-Briand Peace Pact will largely remove the basis for this criticism.

Mr. Stimson in the same address made it clear "that the pact necessarily carries with it the implication of consultation." He points out that political platforms of both your political parties embody the idea of consultation, and he concludes his observation on the Pact by stating, "I believe that this view of the Kellogg-Briand Peace Pact, which I have discussed, will become one of the great and permanent policies of our nation."

Declares Position Significant.

As the Kellogg-Briand Peace Pact embraces practically all nations and there can be no war without its violation, I take it that the declaration of Mr. Stimson means that in all matters affecting the peace of the world your country is prepared to sit in consultation with other nations, with the view of preserving world peace. May I venture the opinion that this is a declaration of paramount significance and importance to all interested in the cause of world peace.

Another notable event during the present year has been the appointment of the Lytton Commission on the Sino-Japanese dispute. While the appointment was by the League of Nations, it was made, I believe, with the full concurrence and approval of your government, and a distinguished citizen of your country was one of the members of the Commission. The appointment and work of this Commission with full approval of both China and Japan, is practical recognition (1) of the interest of all other members of the family of nations in an armed conflict between two of its members; and (2) of the desirability and the practicability of an impartial investigation on the ground by an international commission of all relevant circumstances relating to such a conflict.

Holds Lytton Proposals Sound.

The Commission has completed its task and presented a unanimous report. The report faces the realities both of the present situation and of the future relations of these two great peoples. It outlines not only what would appear to be a fair basis of the settlement of their existing differences, but a sound and constructive policy for the establishment of more permanent peace in the Far East. Never before in history has an investigation been held under such circumstances. No matter what the final action may be in respect of this report, the fact that it has been made, the circumstances under which it was made and the terms of the report itself constitute a great advance in international co-operation for the peaceable settlement of international disputes.

One cannot too earnestly hope that it may provide a basis upon which both China and Japan may co-operate in establishing peace and a good understanding in the Far East.

In conclusion, may I say that no sounder or saner declaration was made at the recent Imperial Economic Conference at Ottawa than that there could be no return of permanent prosperity to the nations of the British Commonwealth so long as the rest of the world continued to suffer in the present world-wide economic depression. The recognition of world solidarity and of the necessity of international co-operation in political affairs, in which such progress has been made in recent years, must, I firmly believe, be extended to economic affairs if the world is to escape from the present economic distress and paralysis. May we not hope that each nation will find that it is best serving its own interests when it is seeking to serve the best interests of the whole world.

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UNITED STATES SUPREME COURT.—The *United States Law Review* for October publishes an article on the United States Supreme Court by Judge Manton, of the United States Circuit Court of Appeals, Second Circuit, in the course of which he speaks as follows:

The establishment of a national judiciary was, we now know, one of the chief advantages of the government set up by the Constitution in place of the old Confederation. If the power of the federal courts had, however, been limited to jurisdiction expressly mentioned in the Constitution, it would not have been a new thing in jurisprudence or in the common law.

What was revolutionary, though necessary, in our governmental scheme was the power which the court has exercised in interpreting and formulating the doctrines on which the government is founded. In form the exercise of this power has been by way of the judicial process of interpretation, but in fact it has been sometimes a process of formulation, *of wise and far-sighted judicial legislation* (italics ours), which has overridden the enactments of the legislative department itself.

The problems which have called for the exercise of this power have been in essence political and have called for statesmanship as well as for learning in the law. The problems were not merely new; they were of a kind radically different from any with which any court had ever dealt before, problems which had heretofore been settled by treaty, by war or by revolution.

Judge Manton's observations provoke the thought that the Constitution has found in the Supreme Court a veritable bed of Procrustes. It is a curious light indeed that the history of the Supreme Court throws on the maxim *Judicis est jus dicere, non dare.* Moreover it is clear that if the Judges had not introduced flexibility into a document designedly rigid it would have perished in its first hour of trial. Jefferson sensed the danger of rigidity, and in writing to Madison in 1789 he ventured to say that every constitution naturally expired at the end of nineteen years.

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JOSEPH HOWE AND THE BAR.—The Honourable J. A. Chisholm, Chief Justice of Nova Scotia, is contributing a series of articles to the *Dalhousie Review* under the title of "Hitherto Unpublished Letters of Joseph Howe." We append an extract from a letter, dated November 7th, 1824, which discloses that the famous Nova Scotian at one time in his youth contemplated seeking admission to the Bar. Recalling Howe's brilliant and successful defence of himself when under prosecution for libelling the Halifax Bench of Magistrates, we are disposed to think that had he entered the profession he would not have failed to ornament it. Pope regretted the poet lost in Lord Mansfield—"How sweet an Ovid, Murray was our boast." With Howe absorbed in service at the altar of Justice would not Canadian politics and Canadian poetry have been bereft of much of their distinction? But here is the extract mentioned above:

> This is my year of suspense. I am something like a poor devil of a traveller who finds himself at the entrance of three or four roads—hardly knowing which to adopt but determined to prosecute one or the other vigorously whenever his starting time may come. For the present I must remain stationary. If John hears handsomely from England between this and the time that our Journals will be published in the Spring, I think I shall remain here or at least in one of the three Provinces because then it will give us the means of extending our business, which at present we have not. If I remain, John wants me to study law, and if my other business would be sufficient to keep me above the low chicane and unprincipled pettifoggery of the profession, I think it more than probable that I may . . .

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KILLING NO MURDER.—There was a story current in the good old Victorian times to the effect that at a certain dinner in London an eminent physician and a distinguished lawyer engaged in a discussion concerning the virtues of their respective professions. After enumerating some of the obvious pitfalls that beset the legal practitioner in threading the path of duty to society the doctor summed up his criticism with the very polite remark: "All said and done, sir, you will not claim that your profession makes angels of men." "Oh! no," rejoined the lawyer, "society has long since discovered that facilitating the emigration of man from this planet to the Elysian fields is the peculiar prerogative of the medical profession." The story gathers point from a fact reported in one of our contemporaries. At the July meeting of the British Medical Association the doctors listened to a proposal that they should obtain legislative authority for special activities on their part in assisting nature to swell the celestial census. A certain Medical Officer of Health informed the meeting that he had framed a Bill providing that it should be lawful

for a person to receive, and a medical practitioner to administer, 'euthanasia' for the purpose of avoiding unnecessary suffering. The applicant for euthanasia should be twenty-one years of age or over and suffering from a painful and incurable disease. He must make application in writing, signed by him in person before two witnesses, who must be justices of the peace or hold some professional status. The application, accompanied by the certificates of two medical practitioners, one of whom must be the applicant's attending physician, is then to be forwarded to a 'euthanasia referee.' If the application is granted ten days must elapse before the euthanasia is carried into effect, preferably by some form of poison. All of which is gruesome enough and suggestive of the shambles. But we think that English civilisation must pass into a greater stage of decadence than it manifests at present before homicidal enterprises of the sort above outlined will obtain the sanction of law. We are glad to note that the proposal evoked dissent as well as approval from members of the Association.

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FOREIGN JUDGMENTS.—We have received, by the courtesy of the author, an outprint of Dr. H. C. Gutteridge's monograph in the *British Year Book of International Law* for 1932 on the subject of reciprocity in regard to Foreign Judgments. The author discusses his subject from the point of view of reciprocal enforcement of judgments *in personam,* and the recognition of foreign judgments by way of *res judicata.* In considering the first branch of his subject Dr. Gutteridge points out that there are certain countries, such as Sweden, Holland and Soviet Russia, which refuse in principle to give any effect to foreign judgments; that other countries, such as France and Belgium, whilst admitting the right to recognition and enforcement in theory, virtually deny it in practice; that another group, such as Germany, Switzerland and Roumania, recognise foreign judgments but confine enforcement, in the absence of treaty rights, to a very limited number of countries; that in countries governed by Anglo-American law, while theoretically there is no definite recognition of foreign judgments, in practice it is far more easy to secure enforcement than in other countries. In respect of the last-mentioned group we are reminded that the British Commonwealth of Nations must be excepted, as legislation governs them in the premises. On the second branch of his subject Dr. Gutteridge says that it is doubtful if a foreign judgment raised by way of defence in an English action possesses the quality of *res judicata.* It can hardly be regarded as an estoppel, but it is possible to base

this defensive aspect on the general principle of *nemo debet bis vexari pro eadem causa.*

Dr. Gutteridge concludes the study of his subject by expressing much the same view in respect of it as a branch of Private International Law as Maître Jallu did in his address on the whole body of that law before the last Annual Meeting of the Canadian Bar Association, namely, that any attempt to secure reform in the principles and practice of private international law calls for some altruism on the part of all the countries involved.

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ENLARGING LAW LEARNING.—Some time ago the Lord Chancellor (Lord Sankey) appointed a committee to inquire into the present methods of teaching law in England. Last month, in opening some new buildings connected with Downing College, Cambridge, he took occasion to explain that he was moved to appoint the committee by the fact that the legal profession had in his opinion arrived at a turning-point in its history. Great social experiments were now confronting the Courts with new juristic problems, and the merely practical man of the law will find himself in a strange land. It is, therefore, the duty of the law-schools to give their students a critical understanding of the foundations of jurisprudence so that the profession may properly discharge the function of wise leadership in State affairs. The Lord Chancellor has spoken to good purpose. It is only by sound and comprehensive learning that the lawyer is able to refute the wild social theories of his age and give authoritative support to prudent reforms.

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JUDICIAL APPOINTMENT.—Mr. Richard D. Ponton, K.C., a member of the Belleville firm of Ponton, Ponton and Graham, has been appointed Judge of the County Court of Victoria in succession to His Honour Judge Swayze, retired. Mr. Ponton is a son of Colonel W. N. Ponton, K.C., Registrar of the Canadian Bar Association. He was in active service overseas during the Great War, and at present holds the rank of major in the Canadian Militia. On the occasion of Mr. Ponton's last appearance in the Hastings County Court as a practitioner, His Honour Judge Deroche tendered him his congratulations, in the course of which His Honour said:

> Your knowledge of law and natural good sense will make for a careful, intelligent and unbiased decision in each case brought before you. Your kindly disposition will also help you to temper justice with mercy in all criminal work.

THE LATE VICTOR E. MITCHELL.—The Montreal Bar sustained a serious loss by the death of Victor Evelyn Mitchell, K.C., D.C.L., which occurred during the early summer. Born in England, he came to Canada in the year 1888, and after a few years' experience in commercial life he decided to adopt the legal profession. He graduated from McGill University as a Bachelor of Civil Law in 1896, and was admitted to the Bar of Quebec in the same year. He became a member of the firm of McGibbon, Hogle & Mitchell and at his death was senior member of the firm of McGibbon, Mitchell and Stairs. In 1909 he was appointed a King's Counsel, and in 1918 received the degree of Doctor of Civil Law, in course, from McGill University. In his practice Dr. Mitchell devoted himself to corporation and commercial law and attained distinction in both departments of his chosen field. His excellent work on the Law Relating to Canadian Commercial Corporations will serve to perpetuate his memory among the members of the Bar.