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.

It is hoped that members of the profession will favour the Editor from time to time with notes of important cases determined by the Courts in which they practise.

☞Contributors' manuscripts must be typed before being sent to the Editor at 44 McLeod Street, Ottawa.

EDITORIAL.

THE PROFESSION AND THE PIERIAN SPRING. Some twenty odd years ago the writer of these observations discussed in one of the public prints the prevailing tendency among Canadian lawyers of the time to take little interest in intellectual matters not having any practical—and shall we say, *lucrative?*—bearing upon the concerns of their profession. We also ventured to point out that in England it had never been a deterrent to success at the Bar to have it known of one that he devoted a portion of his time in walking studious cloisters outside "the sphere of law." That this is no longer a habitude of the Canadian Bar is demonstrated on every hand to-day. Its members are now supporting in a very handsome way the arts and sciences of social value, and even the shade of Mr. Silas Wegg may not reproach them for lack of inclination to "drop into poetry" now and then. But we find the mother country still giving us a strong lead in the latter behalf. In a recent number of the *Law Journal,* we discover Mr. W. A. Greene, K.C., being honoured with the designation of "A Chancery Latinist" for adapting Terence to the Epilogue to the Westminster Play, produced last Christmas. We learn, too, that the Lord Chief Justice, in presiding at the sixty-seventh annual dinner of the Savage Club, recently held at the Savoy Hotel, provoked much learned laughter by applying the following lines from Ovid to the "savages" foregathered on that occasion:—

> "Adde quod ingenuas didicisse fideliter artes
> Emollit mores, nec sinit esse feros."

In order to show that the Canadian Bench of our day can also tread a measure with the classic muse we subjoin a passage from Vergil translated by Mr. Justice Mellish of the Supreme Court of Nova Scotia:

ÆNEID, II. Lines 1—56.

All of them held their peace, and eager fixed their attention,
Thereupon Father Æneas thus began from his high seat.

Untold grief, O Queen, do you bid me again to discover,
How Troy's opulent might and also pitiful Kingship
Danaans brought to the dust; what sights the most wretched I witnessed, 5
Myself a large sharer therein. Who speaking of such things,
Myrmidon, Dolop, or soldier serving heartless Ulysses,
Keeps him from yielding to tears? And now, too, night with its dampness
Falls down the sky, and stars that are sinking persuade us to slumber.
But, since such your desire to understand our misfortunes, 10
Also, in brief, to hear the dying struggle of Troyland,
E'en though the mind to recall it, starts, and shrank back in sorrow,
I will begin:—Repulsed by fate and broken by warfare,
Now so many a fleeting year, the Danaan leaders,
Taught by heaven-born art of Pallas, large as a mountain, 15
Build them a horse, and bind with well-cut firwood its frame-ribs;
Gift to speed their return, they pretend—and the story goes current:
Men are picked for the task by lot, whose bodies they slyly,
Shut within the gloom of its side, as they fill to the utmost
Part, with soldiery armed, it paunch and spacious recesses. 20

Lying, plain in sight, is the isle well known and reputed,—
Tenedos, opulent then, long as Priam's sovereignty lasted,
Now, but only a bay, and an anchorage faithless to shipping.
Thither borne, they lie concealed on shores now deserted.
We were convinced they had gone, outbound in the breeze to Mycenae. 25
Hence all Troy itself from longfelt sorrow relaxes,—
Gates are open spread; it's a pleasure—going to see the
Doric camp and the shore that is left, and places abandoned.
Here, the Dolopian band,—there, dire Achilles was tented;
Here was the fleet,—over there, they were wont, pitched fights to determine. 30
Some, by the fatal gift of Virgin Minerva, confounded,
Gaping view the size of the horse; and first does Thymoetes
Urge, that (drawn within the walls), it be placed in the fortress,
Either from guile,—or thus, so soon, Troy's fates were unfolding.
Capys, and whoso held to a better reasoned opinion, 35

Bids us or tumble the Danaan snare,—a gift that's mistrusted—
Into the ocean or burn with brands thrown lighted beneath it,
Else that the hollow retreats of its womb be tested by boring.
Eager for this,—for that,—is the jarring rabble divided.
First then before us all, a multitude following with him, 40
Laöcoön, hot foot, runs down the heights, and afar off,
Cries to us:—"O, wretched men! what great insanity, towns-
folk!
"Think ye the foe's been borne away? or trust ye that aught they've
"Granted, is wanting in wiles of the Greeks? So known was Ulysses?
"Shut within this wood, or lie the hidden Achivi; 45
"Else, was this device by our walls upbuilt to permit them
"Overlook our abodes, and fall from above on the town or
"Something is hidden deceptive. The horse, O, Teucrians, trust not.
"Be what it may, I'm afraid of the Greeks, though bearing up presents."

Thus he spoke, and with strength robust, his ponderous jav'lin 50
Into the side of the beast,—the bulging paunch of this frame-work,
Hurled amain. In a tremble it stuck, and the hollow recesses,
Back from the echoing womb, in a dolorous cadence resounded.
And, (so willing the Gods) had reason not been perverted,
Stirred had we been, with arms to despoil this Danaan ambush. 55
Troy then had stood to-day,—Priam's heights!—Ye still were exalted.

HUMPHREY MELLISH.

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EDITORIAL AMENITIES.—The CANADIAN BAR REVIEW greatly values the commendatory words spoken of it by the *Law Journal* (London), in its issue of January 17th. It is indeed pleasant to hear from so authoritative a source that our "Contributions deal with matters which are of as much interest to the English as to the Canadian lawyer." And then, too, doesn't Horace say somewhere in his Epistles:—"*Principibus placuisse viris non ultima laus est*"?

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Roscoe Pound, in his "Interpretations of Legal History," criticises Sir Henry Main's thesis that the movement of progressive societies has been distinguished by a gradual dissolution of family dependency and the growth of individual obligation, by the substitution of contract for status, "Starting," says Maine, "as from one terminus of history in which all relations of persons are summed up in the relations of family, we seem to have moved steadily towards a phase of social order in which all these relations arise from the agreement of

individuals . . . We may say that the movement of the progressive societies has hitherto been a movement from status to contract."

Dr. Pound finds that English legal history was not examined in making out a case for this theory. "The generalization of progress from status to contract, understood as a progress from limitations of freedom, or liabilities existing or imposed independently of will, toward a complete freedom of contract and liability only for willed undertakings or culpable conduct, is refuted by the whole course of development of the law, whether by legislation or by judicial decision, in the last generation, unless indeed we have been progressive backward . . . Limitation of free conduct and imposition of duties and liabilities as incidents of relations instead of exclusively as the consequence of manifested will, have gone forward steadily both in judicial decision and in legislation."

Sir Paul Vinogradoff, in an article in this REVIEW, vol. 1, p. 460, takes up the theme and declares that "it would be impossible to maintain that this generalization (Maine's) holds good for our age" and he proceeds to illustrate his case with examples. Not only are permanent public functionaries possessed of certain qualifications and subject to many requirements which are very different from those of other citizens, but "the working class in general is assuming under modern conditions a standing that imparts to it rights and duties co-ordinated under a law of status different from that which governs the rest of the community."

The professional Acts of Canadian provinces might also be cited in illustration of the same position, members of the professions being under the control and discipline of special governing bodies composed of their own members, and having rights, duties and obligations which pertain to them as belonging each to a certain class. How far the tendency to interfere with freedom of contract and to organise society in groups may be carried, it is difficult to say, but it is worthy of note that within the last few months a bill has been introduced into the legislatures of British Columbia and Quebec for the purpose of incorporating barbers. The proposal is to establish a board to be known as a "board of examiners in barbering" and no one is to be allowed to shave or cut hair,—bob or shingle, or to give a shampoo or massage treatment until he has obtained a certificate from the board "that he possesses the requisite skill."

There was a time in some of the far western states, so 'tis said, when any one could hang out his sign and offer legal advice or medical treatment to such as were willing to employ him, but that day has long since passed. Are we going to the other extreme, and is no one to

be permitted to perform the simplest service without undergoing an examination and obtaining a diploma or certificate of fitness from some guild or organised trade? It will require vigilance on the part of those responsible for legislation if we are to preserve a reasonable share of that freedom of contract which was supposed to have been one of the fruits of modern progress.

R. W. S.

NOTES.

In an article entitled "A Chapter on Accidents," in volume 39 of The Law Quarterly Review, the author deals with one phase of the operation of the Workmens' Compensation Act, 1906 (Imp.) and incidentally gives it as his opinion that "in all the Acts of all the Parliaments of the United Kingdom no one enactment has imposed a more copious demand upon the interpretative function of the judicatures of these islands than that brief clause which is the first subsection of the first section of the Workmen's Compensation Act, 1906."

The first subsection of the first section of the Act to which reference is made reads as follows:

"1. If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

The essential condition here prescribed has been generally adopted in the provinces of Canada, and has been here as fertile a source of litigation as in England, even in those Provinces in which by legislation most classes of workmen have been removed from its operation. There has been, too, as might have been expected, a great divergence of opinion as to the principles to be applied in interpreting the language of the statute. Well might one of our judges echo the language of Lord Wrenbury: "My lords, the language of the Act of Parliament and the decisions upon it are such that I have long since abandoned the hope of deciding any case upon the words 'out of and in the course of' upon grounds satisfactory to myself or convincing to others."

Nevertheless certain tests are emerging from the decisions by which to determine whether the accident before the court in any particular case arose "out of and in the course of" the employment.