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 the Exchequer Court Building, Ottawa.

TOPICS OF THE MONTH.

ACADEMIC HONOURS FOR THE PRESIDENT OF THE C.B.A. — Our readers will be interested to learn that at a Convocation of Queen's University, held on the 12th of last month, Sir James Aikins, K.C., President of the Canadian Bar Association, received the honorary degree of Doctor of Laws. Sir Robert Borden, K.C., Chancellor of the University, presided at the Convocation. At the same time similar degrees were conferred upon His Excellency the Governor-General of the Dominion and Sir Clifford Sifton. Four other institutions of learning in Canada had preceded Queen's University in paying a tribute to the distinguished place held by Sir James Aikins as a citizen of Canada, namely, the University of Manitoba in 1919, Alberta University and McMaster University in 1921, and Toronto University in 1924. Sir James graduated in Arts in Toronto University in the year 1875.

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A NEW BRITISH WORLD.—Before the report of the proceedings at the recent Imperial Conference in London has been submitted to Parliament we cannot speak of it authoritatively, but so much of its substance as has been disclosed in the press quite justifies us in regarding it as the most important document ever drawn up in the history of empires either past or present. Take the following declaration of what is to be henceforth the actual interrelationship of the British State and its derivative States:—"The position and

mutual relation of the group of self-governing communities composed of Great Britain and the Dominions may be readily defined. They are autonomous communities within the British Empire, equal in status and in no way subordinate one to the other in any aspect of their domestic or external affairs though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of nations," where can we find a parallel to this in all the centuries of civilization? Not in the political history of Greece, for Thucydides pours scorn on Athens for refusing autonomy to her dependent communities. Nor yet in the case of Rome—although the character of the empire of the Caesars more nearly approaches our own than any other—for Roman Imperialism meant, to quote a modern writer, " the subordination of a world to a city." Other ancient empires were for the most part organized to enable conquerors to pillage the conquered in a constitutional way. Nor would any student be disposed to see in the mediaeval empire founded by Charlemagne a prototype of the British Empire as consolidated after the loss of the thirteen American colonies in the last quarter of the eighteenth century. From that time on the development of the great colonies into autonomous States, bound to the mother country only by the tie of loyalty, has furnished a unique chapter in the annals of civilisation; now a more marvellous chapter is begun with the voluntary surrender by the parent State of its former supremacy and the formation of a commonwealth of nations with no hegemony enjoyed by one member over any of the other members of the group.

In their enthusiasm to find a fitting designation for this great adventure of the British world some of the newspapers have called it a " New Magna Charta," and others profess to see in it a " New Declaration of Independence." Neither of these terms is appropriate. The liberties secured by the Great Charter were wrung from an unwilling monarch by the upper classes of the realm under arms. The Declaration of Independence was also the result of successful armed revolt of Englishmen against a foolish King. Nor indeed could it be likened to the adoption of the Constitution of the United States in 1789 which, according to John Quincy Adams, had to be " extorted from the grinding necessity of a reluctant nation." Rather is it a brand-new and unparalleled thing in history whereby the King is exalted and his royal office magnified by the free choice of the people of independent communities scattered over the face of the world. And so we are led to think that the term chosen by the Conference to signify the political entity that has emerged from its

deliberations is the correct one. A 'Commonwealth' is the word for it. Various meanings have been given to the term by philosophers of the past,—but Sir Thomas Smith (*De Republica Anglorum*) defines it adequately for our immediate use when he says "A common-wealth is called a society .. .. .. of a multitude of free men, collected together, and united by common accord and covenants among themselves." The British Empire of the past century has died but to live again in the more spacious life of the British Commonwealth of Nations—whereat all good men should rejoice.

We Canadians are honoured in the acknowledgment that the federation shaped by our own statesmen in 1867 immeasurably predisposed the minds of public men in other parts of the empire to the adoption of similar constitutional forms, all of which have logically led up to last month's momentous achievement in London. We are further honoured by the fact that our representatives there played a very important and distinctive part in securing the happy issue of the Conference. Such things stir one's patriotism, fan it into an ardour before which considerations of party politics shrivel and fade. Had Canada not been represented by men of tact and vision, of knowledge, of sound judgment and loyalty to the throne, inconceivable mischief might have ensued to the whole British world. We cannot rejoice in what has been done without at the same time acclaiming the men of our country who had so large a share in it.

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THE NEW YORK CRIME COMMISSION.—We have recently read Mr. Clarence Darrow's amazing article, entitled "Crime and the Alarmists," in the October number of *Harper's Magazine,* in which he undertakes to establish that statistics are cooked by the alarmists to "induce legislators to pass more severe laws" against crime, that as a matter of fact there is not "an increasing trend of crime in America," that while "it is true that there are many more felonies in the United States than in England in proportion to the population" yet "this condition cannot be accounted for by the severity of punishment in England." Of course Mr. Darrow fails to sustain his thesis: how can he ignore, *inter alia,* such a responsible statement as that published by Judge Kavanaugh, a member of the Committee on Observation of the National Crime Association, that "there were 11,000 murders in 1924, and statistics show 12,000 murders in 1925." Concerning the methods of the American Courts in Criminal Cases Judge Kavanaugh adds: "I have compiled a list of 800 convictions where courts of review in this country have reversed convictions with-

out any regard as to the innocence or guilt of the defendant, but considering only whether the game as played in the courts below had gone according to the rules."

No wonder, then, that the New York legislature saw fit to appoint a temporary Commission to examine the crime situation in that State; and commendable is it to the reputation of Canada abroad that this Commission should extend its enquiry into the administration of criminal justice in this country.

At Toronto the Commission had a session on the 9th November in Osgoode Hall, hearing Mr. Justice Riddell and Mr. Justice Middleton and Mr. Justice Kelly of the Supreme Court of Ontario, Mr. E. Bayly, K.C., Deputy Attorney-General of Ontario, E. Armour, K.C., Crown Attorney, and Chief Constable S. J. Dickson. Referring to Crown prosecutors, Mr. Justice Riddell pointed out that they never pressed unduly for a conviction, but merely attempted to bring out all the facts. The essential difference between an American and a Canadian prosecutor was that the latter had no hope of deriving a better position or more money by obtaining a large number of convictions. A Canadian trial was not a game. There was no "movie motion." A trial was "a solemn investigation of a crime against the State."

Both Mr. Justice Middleton and Mr. Justice Kelly regarded the Parole System as it obtained in Canada with disfavour. The latter thought that the whole trouble rested in the fact that the Parole Board instead of considering the public weal was more prone to consider the private interests of the prisoner. Pronounced opinions against the value of the Parole System were also expressed by the Deputy Attorney-General, Crown Attorney Armour and Chief Constable Dickson.

After expressing the thought that a good deal of the Parole Board's work is too sympathetic Crown Attorney Armour proceeded to say that to make paroling in the province a real success great care must be taken in choosing those who are to be given this privilege. The supervision of those put on parole should be exceptionally strict and rigid.

The Parole Board was, according to Chief Dickson, made up of "very estimable, well intentioned, but often misinformed gentlemen." Prisoners were brought before this board to tell their side of the case, but the victim was not heard, neither did the trial Judge have any say in the matter. He thought that there was not much complaint in regard to the ticket-of-leave, because the Department of Justice at Ottawa had hearkened to the police chiefs, and libera-

tions had been reduced 50 per cent. This system had the advantage, inasmuch as the police always knew where the T.O.L. man was.

The Commission also held a session at the Court House in the City of Montreal on the 12th November, when in the morning they were advised on matters within the scope of their enquiry by Mr. Justice Greenshields, of the Court of Appeals; Mr. N. K. Laflamme, K.C., and Mr. A. R. McMaster, K.C. In the afternoon session the commissioners heard Chief Justice Martin, Mr. Justice C. A. Wilson, Judge Mônet, Mr. R. L. Calder, K.C., Mr. Ernest Bertrand, K.C., and Mr. Lucien Gendron. We append some of the observations of these gentlemen as reported in the *Montreal Gazette:*

Mr. Justice Wilson said that the presence of the New York Commission reflected honor upon our criminal courts and methods. He answered a number of questions regarding the pronouncing of sentence, ticket of leave, procedure on forfeiture of bail and the working of the Court of King's Bench. Except in murder cases, he said it was preferable to postpone sentence for some time after conviction. This was in order to examine the past record of the criminal, and to gather all other information possible.

The former senior Crown prosecutor (Mr. Calder, K.C.) said that it was practically impossible to convict in serious gang crime without King's evidence. He added that this evidence must be supported and corroborated to a reasonable extent, and admitted that it would be unfair and illegal to rest a case simply upon the evidence of an accomplice-informer. He explained the duties of Crown prosecutors in preparing evidence for forthcoming trials. Unlike the district attorneys in the United States, the Crown prosecutors have their cases prepared for them. There is nothing, however, to prevent the Crown prosecutors from preparing their cases themselves, should this be in the public interest, and it had often been done he said.

"I wish to say," said Mr. Calder, in conclusion, "that I consider the jury system to be the best both for the defence and the prosecution. The habitual thief will rather go before a judge than before a jury."

This was agreed to by the next witness, Mr. Gendron, who said that he had the fullest admiration for the jury system. "I think it is the best," he said, "and it gives a better chance for full justice."

The reason for the big decrease in crime in Montreal he attributed to the fact that gang crime had been practically stamped out, that the judges insist upon very high bail, that the police and Crown prosecutors are better organized, and that it is much more difficult "to get by" the judges nowadays. He pointed out that not a single indictment had been quashed within the past few years, and that so much jurisprudence has been created in the last five years that it was exceedingly difficult to obtain acquittal by legal technicality.

"There has been some criticism," said Chief Justice Martin, "of the jury system. I am a firm believer in it, and if we could make the source of supply better, matters would be accordingly improved. A great deal has been done of late, for many exemptions have been removed by legislation. We are now getting a better class of jurors, and consequently better results."

Chief Justice Martin also said that trivial technicalities are no longer tolerated to obstruct the course of justice. The prisoner is given every chance, and all is being done so that justice be not retarded. His idea of criminal justice was that it should be prompt and effective.

"In a city like Montreal," he said, "we shall always have crime and always have criminals. But they got a severe jolt a few years ago."

The hanging of four of the men in and behind the Hochelaga Bank car robbery, the life sentences of the men implicated in the mail van robbery and other sensational crimes and trials were reviewed by the Chief Justice, who

concluded that all this had a good deterrent effect on other criminals. He described the trial of Patrick Mahon in England. There had been no "piffle in the newspapers," said His Lordship, and the time between the committal of the murder and the hanging of the guilty man only amounted to a few months.

Judge Monet described the procedure in the lower courts, and spoke of the system of bail granting and ticket of leave. As to the latter, he said, there had been some abuse in the past; but of late matters have improved. The Department of Justice will invariably accept the report of the trial judge, and when a man is sentenced to two years in the penitentiary he is not allowed to go after serving three months.

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NEGLIGENCE IN DRIVING AN AUTOMOBILE AS A CRIME.—The decision of the case of *Rex* v. *Griesman*[1] in the Appellate Division of the Supreme Court of Ontario is of such great importance to motorists as well as to the legal profession that we make it the subject of some editorial observations, instead of assigning it to the department of Case and Comment. The decision in this case was read by Middleton, J.A., and in the course of his observations he said:—"In this case death followed the alleged negligence. If the negligence was criminal at all the accused was guilty of manslaughter, and in my view ought to have been prosecuted for this offence. It is said that he was not so prosecuted because the Crown could not hope for a conviction. It is, I think, an abuse of the criminal law where the Crown prosecutes a man for an offence other than that of which he is really guilty, if guilty at all, with the intention of obtaining some conviction if at all possible."

The accused was driving a motor and failed to avoid a pedestrian who came out into the road from behind a street car. He was prosecuted and found guilty under section 284 of the Criminal Code. This section makes the doing negligently or omitting to do any act which it is his duty to do and which causes grievous bodily harm, an indictable offence. This section was by the Appeal Division held to be inapplicable to the case in hand, and the effect of the decision appears to be that section 285 of the Code dealing with furious driving, or other wilful misconduct or neglect, has indicated the measure of want of reasonable care under section 247. That section imposes the duty of taking reasonable precautions and using reasonable care in controlling anything which may endanger human life if not so controlled, and it is considered that section 284 treats of something different. But why and how different, if both sections 284 and 247 deal with the duty of reasonable care, is not stated. If it is a duty to use reasonable care in driving a motor under section 247 why is it

[1] (1926) 4 D.L.R. 738; (1926) 59 O.L.R. 156.

not equally a duty under section 284? The words of section 284 which deal with grievous bodily harm are very similar to those used in the definition of culpable homicide and should not be lightly dismissed.

While furious driving or some equally flagrant act is a breach of duty which renders the driver guilty, there are other actions, such as driving slowly but without looking to the front or to the side roads, or creeping up on a street car when embarking passengers, which may injure some one. The dictum that section 285 measures and fixes the degree of culpability necessary, when it uses the word "by wanton or furious driving or racing or other wilful misconduct or by wilful neglect," and that this constitutes the lack of reasonable care required by section 247(and apparently section 284), seems too wide.

Another proposition is stated in the quotation given at the beginning of our observations. This statement fails to take account of the unfairness of indicting a person for a more serious charge when the Crown, after considering the facts, is unable to hope for a conviction on it, while there is a lesser offence clearly committed. It is always possible for a judge on a trial for a lesser offence to stop it, if in his judgment a greater crime is evident, and to direct its presentation to a Grand Jury.

In the opinion of Sir William Meredith, the late C.J.O., in *Rex* v. *Taylor*,[2] it is permissible to prosecute for a lesser offence if conviction would not bar a prosecution for a higher crime. This is the legal rule, and it is a much more reasonable one than that a person should always be indicted for the major offence. The Crown ought to have this discretion, one which is often used, where, as in treason and other important offences, or in cases of doubt and difficulty, it is undesirable to press for the extreme penalty, if by so doing the accused might escape any punishment whatever. The Crown must of course bear in mind the well established principle of criminal law that where a party accused of a minor offence is acquitted or convicted, he shall not be charged again *on the same facts* in a more aggravated form.

Lord Denman, in *Reg.* v. *Button*,[3] points out a difficulty, not considered in the present case, thus:

It was further urged for the defendants, that, unless this defence was sustained [*i.e.* that the conspiracy charged being a misdemean-

[2] 67 D.L.R. 372; 51 O.L.R. 392, p. 405.
[3] (1848) 3 Cox 229.

our was merged in the felony of larceny, which was the effect of carrying out the conspiracy, that the defendants were accessories before the fact] they might be twice punished for the same offence. But this is not so; the two offences being different in the eye of the law. If, however, a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the court to apportion the sentence for a felony with reference to such former conviction. If the position contended for by the defendants was true, its application would be subject to much uncertainty; for it is not within the province of the judge, in general, to decide on the credibility of the witnesses, or the weight of the facts tending to prove a felony; but according to the present contention, the duty of acquitting, on his own opinion, is cast upon him; and this conclusion of fact, in which probably the jury would not have concurred, is to be subject to no review. Also, if he should be satisfied that a felony is proved, and should direct an acquittal of the misdemeanour, it is obviously uncertain whether the same evidence would be given upon a prosecution for felony, or would be satisfactory to the jury, or would be left without answer. The felony may be pretended to extinguish the misdemeanour, and then may be shown to be but a false pretence; and entire impunity has sometimes been obtained, by varying the description of the offence according to the prisoner's interest; and he has been liberated on both charges solely because he was guilty upon both."

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CONCERNING THE JUDICIAL COMMITTEE. — In an article on the Judicial Committee of the Privy Council, entitled "The Judicial Link of Empire," published in *The English Review* for October, Mr. Herbert Bentwich refers to the case of *Rex* v. *Nadan*[1] as follows:—

"The point at issue in the appeal seemed curiously trivial, namely, whether a person was properly convicted by a police magistrate of a petty offence created by the local law. But the point of principle was of the highest importance. The legislature of the Dominion passed a law as long ago as 1888 declaring that no appeal should be brought in a criminal matter from the Courts of the Dominion; but it was uncertain whether that law was effective to take away the prerogative of the Crown. The issue, though discussed during the last thirty years in a number of cases, had been continually evaded in the judgments of the Judicial Committee. The Committee, however, now decided it, by holding that the clause in the Dominion Act was of no effect. At the same time they reasserted the rule, which had been many times already declared, that they will not interfere with any judgment in a criminal case, unless there has been a disregard of 'the fundamental principles of justice.' In this particular appeal, therefore, they refused to interfere with the conviction. Cases do occur every year where the Committee think it fitting to

[1] [1926] A.C. 482; (1926) 2 D.L.R. 177.

interfere; and they thus exercise a salutary power of redressing individual wrongs similar to that exercised in the Roman Empire by Imperial rescript."

We may be quite wrong, but it occurs to us that so far as "redressing individual wrongs" is concerned the parallel set up by Mr. Bentwich between the procedure in the Judicial Committee and that prevailing in appeals to the Roman Emperor is not particularly happy. In the first place, it would appear that there was no settled procedure in appeals to the Emperor. In the late Empire it was competent to the Emperor to sit either in first instance or on appeal, but his intervention was generally by way of *consultatio ante sententiam,* and consisted of instructions to the magistrate as to how he should decide a particular case. There was also a proceeding by *relatio* before the Emperor, but that, too, was for instructions to a judicial official before judgment, and was not an appeal, as we understand it, for that very reason. Then there was the *supplicatio* to the Emperor by a private person when his case was not before a court at all. Under the Imperial Constitutions, edicts (*edicta*) were general ordinances issued by the Emperor in his judicial capacity; while judicial decisions, pronounced by him either at first instance or on final appeal were known as decrees (*decreta*). Rescripts (*rescripta*) in legal procedure were written replies by the Emperor to enquiries of judges or private persons on particular points. So that, on the whole, with all deference we think Mr. Bentwich's parallel fails.

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THE DOMINIONS AND THE FLAG.—It seems that New Zealand is the only one of the Dominions overseas which has undertaken up to the present time to legislate for a flag of its own. Under a New Zealand Act, passed so long ago as 1901, a distinctive flag for that Dominion was authorized for use both on land and sea. No other Dominion has undertaken to follow the example of New Zealand up to the present time, although of course there has been a great deal of talk about South Africa in that connection recently. For the Dominions other than New Zealand the British national flag legally used on land throughout the British Commonwealth (we prefer to use this word in preference to Empire, since the recent Imperial Conference) is the Union Jack.

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UNITED STATES AND THE WORLD COURT.—President Coolidge's melancholy confession, made in his Armistice Day speech at the

dedication of Kansas City's Liberty Memorial, that he could see no prospect of his country adhering to the World Court, is a curious commentary on a nation which, in a fit of idealism, could suggest to the world something that greatly makes for its peace, and then callously proceed to shatter the ideal after it had been reduced to practice by other nations. And Mr. Coolidge's confession means more than that: it means that even if he really believes in the efficacy of this great project he has neither the courage nor the honesty of purpose to fight for it at the expense of political advantage to himself. Our readers will remember that the United States conditioned adhesion to the Court with five reservations, namely, that America by adhering to the Court should not involve itself in any obligations to the League of Nations; that it should have an equal voice with others in the election of judges; that Congress must determine the share of American expenses; that the Statute of the Court should not be amended without American consent; and lastly (and quite unreasonably) that the Court should not give an advisory opinion on any dispute or question "in which the United States claimed an interest" unless the permission of the United States had first been obtained. The Committee which was appointed to consider these reservations was willing to accept the first four of the reservations, but questioned the last on the ground that if it were concurred in the United States might inhibit any matter being dealt with by the Court in which that country claimed an interest. That, it seems to us, would create an intolerable situation, and there the matter stands. As Mr. Coolidge has announced his unwillingness to ask the Senate to modify the fifth reservation, it looks as if the present attempt to tranquillize the world in a permanent way will have no real assistance from the United States.