

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.

"THE AMERICAN INVASION."—An American statesman has recently said: "Canadians and the people of the United States are one and the same people, both having the same aspirations and inspirations?" Now is this quite true? Present day Americans are a huge conglomerate of people using the English tongue as a national language: Canadians are a numerically small body of people, chiefly of British and French descent, speaking two languages which have official recognition. But English-speaking and French-speaking Canadians in the national domain share a constitution, created by the British Parliament, tracing the origin of its principles back to the era when the Anglo-Saxon and the Norman-French races became a homogeneous people and blended their political ideas into the rudiments of what is now known as the English system of government. So that it may be said that the two races in Canada have repeated history in a very intimate way. On the other hand, the Americans live under a constitution less than one hundred and fifty years old, born of embattled revolt against their parent country. Breaking, as it did, the bonds of racial unity and continuity with the past, the new order which they set up could do nothing less than rob them of that useful contact with a long discipline of experience in statecraft which not only benefits those who are entrusted with the business of government, but restrains the masses from vainly imagining that legislation is a sure and certain cure for every social malady. That the ethos of a people reflects the genius of the

political institutions under which they live is a commonplace of history, and psychology attests that it must be so. Hence, between the Canadians and the Americans there are undoubted national differences, and, recognizing this, if the remark should be heard between them *non sumus ergo pares* it is to be taken as indicating difference only and not disparagement. Both peoples, while confessing many imperfections, are keenly alive to their responsibilities in regard to making the world a better place to live in.

These observations are evoked by what is called "the American Invasion," meaning the present extraordinary investment of American capital in Canadian industries, and the contemporaneous effort being made by many American business concerns to set themselves up in this country and compete with local interests. Looked at in a broad way, and accepting the ethics of the mass of those adventuring amongst us as beyond criticism, we think that the impetus to Canadian trade and commerce arising from the so-called "invasion" will be all to the good. But while we are glad to say this in the large, we regret that we have to refer to a specific instance which does not give us the same pleasant emotion. And while it has a more or less particular relation to ourselves, we feel that we should be chargeable with incivism if we did not dilate upon it. In the current number of a bi-monthly periodical published in New Orleans under the name of *The Lawyer and Banker*, purporting to be edited by one Charles E. George, the following announcement will be found:—"The *Lawyer and Banker* will henceforth have a branch office at 21 Ossington Avenue, Toronto, Ontario, in charge of Mr. George H. Hager. We do this in order to better serve the legal, financial and investing interests of the Dominion. Our advent is accompanied by no blare of trumpets nor million specious promises; we feel we have a mission and can perform a real service to and for Canadian business men with a vision. In the performance of that service we expect to profit handsomely. The money made by this company in Canada will remain there to be used to build for the future a publication that will reflect worth and character in legitimate investment fields."

Now we rise to remark that this spate of international altruism is in no wise a response to any Macedonian cry on the part of "the legal, financial and investing interests of the Dominion." *Au contraire* what the editor is pleased to designate as "our advent" is solely due to the crusading zeal of *The Lawyer and Banker*, and it seems a pity that the effect of the high purpose it avows should be spoiled by the naïve confession of the editor that in performing

"this real service to and for Canadian business men with a vision . . . we expect to profit handsomely." It will be observed that no particular endowment of "vision" is ascribed to the legal profession in Canada, but we fancy that, however the manner of his announcement may strike the cultured ear of Mr. George, to Canadian lawyers there will be no uncertain sound of the "blare of trumpets" in it; and that sound does not commend itself to a Bar which tests its manners by a code of ethics of a very exacting kind. More than that, we should like to say, if Mr. George will spare our blushes, that the interests of the Canadian Bar are being well and sufficiently served at present by its official organ. How "our advent" will be viewed by "Canadian business men with a vision" is yet on the lap of the gods; but they have a good eye for what constitutes "real service" by anyone who expects "to profit handsomely" at their expense.

An interesting side-light upon Mr. George's cast of mind is furnished in the same number of the journal over which he presides from which we have quoted the announcement above mentioned. In the editorial department (at p. 66) he admits that "leading papers throughout the United States have sharply criticized the editor of this publication for expressions touching lynch law." And this is, in part, his reply to that criticism:—"We do not favor lynch law excepting as a means to an end and then only where through the weakness of courts, the incompetency of prosecutors, the ability of the accused by reason of great wealth and the lavish expenditure of money to the end that justice be defeated. Then only in cases where guilt is admitted and then only when the ends of justice are defeated by those processes which have been erected for the orderly and due process of law."

We leave this apologia—amazing both in substance and expression—to the judgment of our readers. We doubt if they will find that in soundness it even approaches the curate's egg.

It does not occur to us at the moment that there is anything further to be said about the "advent" of *The Lawyer and Banker* into the field of Canadian Journalism.

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TRYING TIMES FOR THE LEAGUE.—Probably the League of Nations will never pass through a graver crisis than that which arises upon the formal application of Germany to become a constituent of its Council: because if it survives this first lethal attack it will meet all others with a stouter heart and a more persistent faith in its

mission. The history of the proceedings of the Assembly at the recent meeting in Geneva which resulted in an adjournment of action on the application until September is well known to our readers, but not all of us perhaps realize the force of the opinion that has been expressed that upon the admission of Germany to the Council depends "the break-up or break-down of the League." With Germany in, Russia will soon be knocking at the door and the rest of the world will follow. The divergence of opinion manifested at Geneva last month serves to show that the provision of Article V of the Covenant requiring unanimity in the decisions both of the Assembly and the Council had its origin in a larger measure of idealism than is justified by the remorseless logic of experience. But, on the other hand, it must be admitted that if Brazil is not intransigent and can be coaxed into changing her present attitude before the date of the adjourned meeting of the Assembly, and Germany is admitted as a permanent member of the Council, holding equality there with the British Empire, France, Italy and Japan, that body will go far towards realizing its desiderated function of supreme arbiter of peace among the nations adhering to the League. Surely this is a consummation devoutly to be wished. It is idle to say that Germany seeks entrance into the League merely for the purpose of furthering her opportunity to essay another and early war upon the world. True, with all her native resources, she is even now to be accounted one of the Great Powers, yet she would be in no position to go to war for many years to come. Her army consists only of ten divisions of volunteers enlisted for a twelve-year term; all of her important fortresses have been dismantled; her navy lacks any serviceable capital ships, and has but one modern light cruiser and a few destroyers. She has no submarines and no military aircraft. If we attribute her eagerness for entrance into the League to a desire to seek permanent peace in Europe so that she may make a bid for its industrial control we would be much nearer the mark. Then, too, it must not be overlooked that it was indisputably Germany's action that called into being the Conference of Locarno—the alembic into which was thrown the remnants of the dreadful banquet of war and from which emerged what we fondly hope is the new spirit of Europe.

There is no doubt that this crisis in the affairs of the League has filled its friends with alarm and given occasion to its enemies to rejoice. In England criticism has been directed more to the impolicy—we hesitate to use a ruder term—of Sir Austen Chamberlain which eventuated in the deadlock than to the machinery of the League

which failed to respond to the strain of the crisis. In America, on the other hand, the event was hailed as a proof of the impracticable character of the League as an instrument for the pacification of the world by those who seek to make political capital out of its failure. But the REVIEW is able to say from personal discussion with a number of American men of affairs that the hope and belief of the mass of the people of the United States whose opinion is worth while, is that the League will not only satisfactorily cope with this untoward situation, but having done so will press on to the fullest measure of achievement open to a body animated by so lofty a purpose as saving the world from the future ravage of war.

In support of this presentment of the real American view of this question we make the following excerpt from a recent editorial of the *New York Times*:—

“Certain ill-informed people in this country did not conceal their rejoicing over what they believed to be the collapse of the League of Nations at Geneva this week. They did not perceive the difference between adjournment till September and dissolution. Hence their eager predictions that the disarmament conference under League auspices would go by the board, and that the entrance of the United States into the World Court would never be effected. But the League Council at Geneva proceeds in calm disregard of all these dire prophecies. It has fixed May 17 as the date for the meeting of the committee to prepare plans for a full congress on disarmament. It also has arranged for a friendly study of the reservations which the United States Senate attached to its vote adhering to the World Court. Thus in every way open to it the League of Nations shows that it is prepared to keep on doing business at the old stand.”

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WITNESSES AND THEIR REPUTATION.—The old Latin saying *Fidem qui perdit, quo se servit relicuo?*¹ points a moral for the cases of *Plumb v. W. C. MacDonald Regd.* and *Latimer v. Foster Tobacco Co., Ltd.*² These cases arose out of tobacco buying transactions similar to others which had occupied the attention of the court in *Peterson v. Dominion Tobacco Company* and other cases.² In the earlier cases the trial Judge had based his decision largely on the credibility of a witness whose name it might not be fair to publish here, though it is frequently mentioned in the reports. It will be sufficient to call

¹ 58 O.L.R. 322; (1926) 1 D.L.R. 899.

² 19 O.W.N. 463; 22 O.W.N. 99. *Jasperson v. Dominion Tobacco Co.*, [1923] A.C. 709; (1923) 3 D.L.R. 714.

him "Mr. A." As to him the trial Judge is quoted as saying:³ "most careful and anxious consideration of the whole evidence, oral and documentary, has convinced me that I ought to give credit to the evidence of (Mr. A)" as against two other witnesses. Mainly on this finding of credibility the Appellate Division and the Privy Council affirmed the decision at the trial. Then in 1924 the cases now under review came up for trial. Substantially the same points arose for determination, the transactions being similar and brought about largely as in the earlier cases through the agency of Mr. A. In December, 1924, a different trial Judge utterly discredited Mr. A. In the report of the case he says: "During this trial excellent opportunities were given to me for considering the question of the credibility of the witnesses; they were examined, cross-examined, and re-examined, at much length, standing quite near to me and under my closest constant observation. And, although at the beginning of the trials I knew nothing of those cases, yet, as something was then said that indicated that much might depend on the question of credibility of witnesses, that question was ever present to my mind throughout the trial, and no opportunity that I could perceive, for most careful consideration of that question, was lost."⁴

"My conclusion upon it, as to the witness (Mr. A.)—a conclusion reached without any kind of doubt—was, and is, that he is not a credible witness; that he would not, and did not, hesitate to make false statements whenever he thought that his interests could be advanced in that way." Where the alias appears in the quotation the name of the witness is set out in full in the report. He is evidently a young man and not a party to the litigation, so that he had no counsel present to speak for him except so far as counsel acting for their clients might think it proper to do so. Thus far we have merely the anomaly of one Judge believing a witness whom another explicitly finds to be untruthful. The case, however, went to an Appellate Division and the full court unanimously reversed the judgment at the trial, partly because the matter was *res judicata*, but also—after reviewing the evidence—because the court came to the "clear conclusion" that Mr. A. had the authority which he swore he possessed.

It is not our purpose to debate the legal points involved in these cases, nor to venture to decide which trial Judge was right in his opinion of Mr. A., but attention should be directed to the urgent need to protect the reputation of witnesses appearing in the courts.

³ 58 O.L.R. at p. 337; (1926) 1 D.L.R. at p. 913.

⁴ 58 O.L.R. at pp. 325, 326; (1926) 1 D.L.R. at pp. 900, 901.

If Mr. A. is a truthful witness his name should never have appeared in full in the official reports. For a young man to be branded early in life as untruthful in the witnesses box leaves a mark which it will take a long time to live down, and the utmost care should be exercised in publishing cases so that no such charge—subsequently found to be incorrect—shall be spread abroad through the medium of legal precedents.

But more important still is the fact that the reputation of a witness has become a matter of debate amongst the Judges. Such occasions are rare, because a Judge's finding as to credibility is usually treated as final, and the difference of judicial opinion in this case is a strong argument in favour of this rule as well as in favour of trial by jury. The confidence of the country in our Courts would be severely shaken if the character of witnesses should create differences of opinion amongst our Judges.

When faced with the divergent views of two experienced trial Judges on the truthfulness of a witness on whose veracity several cases of much financial importance depends, one also is led to wonder whether justice has in the result been done to the litigants. If one experienced trial Judge is right, much money has been recovered by plaintiffs who are not entitled to it.

The main point of these remarks is, however, the absolute importance of being right so far as is humanly possible when passing upon the character of those who in the witness box are performing one of the duties of citizenship in giving evidence, no matter whether they are willing or unwilling witnesses.

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AN UNQUESTIONED PRE-EMINENCE.—*Law Notes* in its issue for March congratulates Mr. A. L. Goodhart on his appointment to the editorship of the *Law Quarterly Review*. It adds:—"The *Review* is the most serious of all legal publications." We concur with *Law Notes* both in its word of congratulation and in its observation upon the quality of the *Law Quarterly Review*. There is no doubt about this special pre-eminence of the *L.Q.R.*; and the sprightly *L.N.*, with all the rest of us, must leave it at that.

LEGISLATURE AND JUDICIARY.—Lord Shaw of Dunfermline, one of the most philosophic of the Judicial Committee, paid, in 1911, a very high compliment to Lord Haldane in these words:

"The Chair of the Lecture Hall was occupied by my distinguished friend Mr. Haldane, now Viscount Haldane of Cloan, the Secretary

for War. He had just been inspecting the drill of the University Territorials in the College quadrangle. That being concluded, he entered the meeting and delivered a speech of even more than the expected distinction and power. Those were great days of Rome when the avenues to high place in the State were the profession of arms, eloquence and law. But even then it must have rarely happened that one man of mark could have trod those three avenues in one and the same afternoon."

The occasion was that of a lecture on "Legislature and Judiciary," delivered by Lord Shaw at University College, London, England, and the reference to his colleague on the Committee is very characteristic of the pleasant relations which so often is made manifest between the leaders of the legal profession in England.

In the lecture he touches the very intimate though differing relations of the two bodies named by him to law in its development. He speaks of the need of reconciling the evolution of new human interests with the existing body of law:—

"And to the judiciary the claim comes with a particularity, an urgency, and an immediacy which the most prompt and expert legislature in the world could not answer. The *causus improvisus* is always with us: and in ninety-nine cases out of a hundred it must be settled before Parliament can turn. The appeal is made not to laws, for there are none, but to law: call it what you like—the common law, the principles of jurisprudence—anything from *jus divinum* to common sense, from *recta ratio* to a square deal: it is on and by and with that stuff that judges have to work, and they must do so not as bondsmen but as free."

His conclusion is that in the discharge of that duty:—

"the evolution of a nation's customs and habit of mind partakes, in the region of jurisprudence, of an evolution not in intellectual breadth and subtlety alone, but of an evolution in personal and national morale;"

and he thinks that:—

"if the relations of the legislature and judiciary are ever to reach that deeper note of harmony which should accompany the co-action of two great instruments of social and constitutional progress, you must get beyond mere rule of construction to that spirit of interpretation which, nurtured in the traditions and practice of the past, is yet in accord with the spirit of the people and the spirit of the time."

There is quoted in the lecture a very interesting preamble of 25 Henry VIII c. 21 which is as applicable today as it was when it found its place in the Statute:—

“This your Grace’s realm, acknowledging no superior under God, but only your Grace, hath been and is free from subjection to any man’s laws, but only to such as have been devised, made and ordained within this realm for the wealth of the same, or to such other as by sufferance of your Grace and your progenitors the people of this your realm have taken at their free liberty, by their own consent, to be used amongst them; and have bound themselves by long use and custom to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the customed and ancient laws of this realm, originally established as laws of the same by the said sufferance, consents, and customs, and none otherwise.”

Lord Shaw’s comment on this is illuminating. He remarks:—

“[Thomas] Cromwell, even at the moment so unpropitious for a popular claim, was skilful enough to enlist in that pitiful plot (for the divorce of Katherine of Arragon) the spirit of independence of the English people, their indomitable pride, their loyalty—unquenchable and easy to fan into a flame—their loyalty to their ancient customs, habits, and traditions as the foundation of their laws. And in England, before and since, in all the times propitious for the speech and life of freedom, this foundation stands sure.”

Mr. Gladstone, in his “Chapter of Autobiography,” published in 1868, suggests the same idea. He says:—

“If it is the office of law and of institutions to reflect the wants and wishes of the country, then, as the nation passes from a stationary into a progressive period, it will justly require that the changes in its own condition and views should be represented in the professions and actions of its leading men. For they exist for its sake, not for their own. It remains indeed their business, now and ever, to take honour and duty for their guides, and not the mere demand or purpose of the passing hour; but honour and duty themselves require their loyal servant to take account of the state of facts in which he is to work, and to remember that his business is not to construct, with self-chosen materials, an Utopia or a Republic of Plato, but to conduct the affairs of a living and working community of men.”

[F. E. H.]

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MANSFIELD AND CHATHAM.—Lord Shaw of Dunfermline contributes to the current number of *The Journal of Comparative Legisla-*

tion and International Law an article on "The Enlightenment of Lord Mansfield." As might be expected from the author of the dissenting opinion in *The King v. Halliday*¹, Lord Shaw dwells upon the elevated and humane views of the great Chief Justice and the liberal spirit in which he interpreted and applied the laws of England in such cases as *Mostyn v. Fabrigas*² and *Sommersett's Case*.³ In the course of his article he refers to the contests between Mansfield and his formidable antagonist, William Pitt, and says:

"Even Horace Walpole, with his cynical flair for touching off both weakness and strength, says: 'Murray, who at the beginning of the session was awed by Pitt, found himself supported by Fox, surmounted his fears and convinced the House, and Pitt too, of his superior abilities' . . . In 1756 he became Lord Chief Justice of England—the greatest, as I think, of a great succession of men. Even then, with his peerage of Lord Mansfield, he remained dedicated to political tasks: and he met his old foeman, now Chatham; and they fought with brilliance, not without bitterness. Pitt's gibes were barbed."

Charles Butler, a famous conveyancing counsel and writer, of the end of the eighteenth and beginning of the nineteenth century, has left behind a volume of reminiscences enlivened by an abundance of anecdotes concerning the great men of that and the preceding generation. Shortly before this volume appeared, Lord Waldegrave's memoirs had been published, and Butler speaks of a letter contained in the appendix to those memoirs written by Lord Holland, a distinguished contemporary of the elder Pitt, wherein there is a reference to a debate at which the writer had been present. The passage in Butler containing this reference throws light upon the relations of the statesman and the judge. It is as follows:

"In another letter, in the appendix to the same correspondence, Lord Holland describes in half a line the effect of Mr. Pitt's oratory, when he intended to be severe, on the object of his severities. 'In both Mr. Pitt's speeches, every word fell on Murray; yet so managed that neither he nor any body else could or did take public notice of it, or in any degree reprehend him. I sat near Murray, *who suffered for an hour*.' It was, perhaps, on this occasion, that Pitt used an expression that once was in every mouth. After Murray had suffered for some time, Pitt stopped, threw his eyes around, then fixing their whole power on Murray, said, 'I must now address a few words to

¹ [1917] A.C. 260 at 276.

² [1770] 1 Cowper, 161; 20 State Trials, 81.

³ 20 State Trials, 1.

Mr. Solicitor; they shall be few, but shall be daggers': Murray was agitated; the look was continued, the agitation increased; 'Judge Felix trembles!' exclaimed Pitt, in a tone of thunder. 'He shall hear me some other day.' He sat down; Murray made no reply and a languid debate is said to have shown the paralysis of the House."

The reminiscent also quotes from the memoirs of a Mr. Glover the following paragraph:

"During this whole session (1755-6), Mr. Pitt found occasion, in every debate, to confound the ministerial orators. His vehement invectives were awful to Murray; terrible to Hume Campbell; and no malefactor under the stripes of an executioner was ever more forlorn and helpless than Fox appeared under the lash of Pitt's eloquence, shrewd and able in parliament as Fox confessedly is; Dodington sheltered himself in silence."

Lord Brougham, in a sketch of Lord Mansfield contained in his "Statesmen of the Time of George III," says of the Chief Justice: "His mind and his habits were, indeed, eminently judicial; and it may be doubted if, taking both the externals and the more essential qualities into account that go to form a great judge, any one has ever administered the laws in this country whom we can fairly name as his equal."

Yet Brougham remarks in the character of the great magistrate the same want of nerve as Lord Holland speaks of:

"The vice of the Chief Justice's character was a want of boldness, that made him shrink from personal responsibility. Hence he never would accept the first station in the law; and hence, too, he was believed to have urged or advised many things, which he either had opposed or had only passively suffered; for, when once a statesman acquires the evil reputation of shunning responsibility while he seeks power, there is no preventing the world from tracing every mischief to a source which appears to hide itself only because there is something to conceal."

That there was a weak side to the character of the great Chief Justice we may regret; nevertheless his fame rests securely upon the splendour of his accomplishments and his services in developing and expanding the law of England, especially in the department of commerce. "Mansfield, day by day and stone by stone," says Lord Shaw, "was building up the noble fabric of the Common Law of England." And, notwithstanding his leaning in favour of the prerogative and his attitude on the respective functions of judge and jury in trials for libel, we may agree with Lord Shaw that the name

of Mansfield is to be held in honour for his achievements in the cause of human freedom.

[R. W. S.]

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A RELIC OF THE PAST.—In all properly made gowns for the Outer Bar a small appendage is attached to the left-hand shoulder. If this is examined it will be found to be in the shape of a diminutive cowl or hood, which recalls the fact that in olden times the practice of advocacy was mainly in the hands of clerics, so that in those days it was commonly said "*nullus clericus nisi causidicus*." These clerical advocates were accustomed to wear a robe and round their necks was suspended their cowl, which served the double purpose of head gear in case of need and also as a receptacle into which the client might deposit a fee whereby to stimulate the zeal of the advocate. The practice of depositing fees in cowls, however, has given way to a more effective method, and the relic of the ancient cowl no longer serves any purpose except as a reminder of the past. It is somewhat analogous to the little square piece of linen which used to be inserted in the wigs of Sergeants at law as a relic of the coif or white cap which used to be worn.

[Lex.]

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THE ASSOCIATION OF IDEAS.—Among the strange things in the mental make-up of most men is the fact that certain things have the effect of recalling to the mind other things which have happened in the past with which they have no sort of connection. A curious instance of this was related to me the other day. I was in the company of an old lawyer, an octogenarian who was engaged in the prosaic and common-place proceeding of eating an apple, and he said to me: "Do you know that this simple matter in which I am now engaged has the effect of recalling to my mind a murder, and an ingenious argument offered in defence of the accused; and the last of the Barons, who, it so happened, was his counsel? You may perhaps wonder how the eating of an apple can produce any such results, and it comes about in this way: The murder I refer to was committed by a man named Tawall, who posed as a Quaker and philanthropist, and his victim was a young girl whom he had seduced, and prussic acid was the cause of her death. The case was a memorable one, owing to the fact that the electric telegraph, which had been only recently introduced, was used in order to effect the arrest of the culprit. It appeared at the trial that the girl was very fond of apples, and it was suggested by Sir Fitzroy Kelly that by eating a large quantity of apples the deceased might have poisoned herself

by means of the prussic acid contained in the pips. This ingenious suggestion did not prevail and the accused was found guilty, but the learned counsel earned for himself the sobriquet of "Applepip Kelly." He subsequently was elevated to the Bench and has the distinction of having been the last of the Barons of the Exchequer.

As I am fond of eating apple pips, you now see why in so doing my mind is apt to go back to Tawall and his counsel whenever I am so engaged."

[LEX.]
