

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.

SOUTH AFRICA'S AMOUR PROPRE.—General Hertzog, with engaging naïveté, in his opening speech at the Imperial Conference now in progress, said that South Africa did not feel that her nationhood was complete because it was not "internationally recognized." It would be strange if it were at this time. We fancy that the hard question of what 'nationality' really means *within the Empire* for its constituents other than Great Britain will have to be first satisfactorily and finally settled before the other Powers will take notice of any new entrant into the family of nations. Until such time, South Africa will have to nurse its pleasing hope and fond desire in patience. Mr. Lloyd-George's thaumaturgy in the *Galerie des Glaces* in 1919 secured a novel but more or less dubious recognition of the Dominions in world politics, but subsequent events have shown that this was no final step in the march to nationhood. Had it been followed by some authoritative definition of the share to be taken by the Dominions in shaping the combined policy of the British communities throughout the world towards the other Powers, then at one and the same time it would have satisfied the reasonable aspirations of the Dominions, and assured the rest of the world that the amorphous thing called the Empire speaks to them with one voice and not a confusion of tongues.

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STRAIGHT TALK TO THE DOMINIONS.—We have never met with a plainer statement of the views of its principal member concerning

the problems confronting the British Empire than those contained in an article published in the *New Statesman* of October 9th. We have no inclination at the moment to discuss the correctness of this presentation of the reciprocal relations between Great Britain and the Dominions; but they are expressed with such vigour and valour that they deserve quotation for the benefit of such of our readers as may not see them in the original medium of publication. Thus the *New Statesman*:—

“The right way, we believe, of approaching the whole problem is to start with the hypothesis that the British Empire is broken up, or better perhaps that it has never existed, and to consider on that hypothesis how far it is worth the while of the Dominions to create some definite connection with the most powerful country in Anglo-Saxondom. In the present situation all serious discussion, it seems to us, must start from that basis. The Imperial Government must say almost in so many words, ‘You can all secede if you want to; we shall do nothing to stop you; it is for you to consider whether it is worth your while to maintain or to repudiate the close connection which you at present have with Great Britain. If it is of no value to you then you had better go, but if it is of value to you then you had better decide at once what price you are prepared to pay for it. We cannot offer you complete equality until you win it. We cannot, that is to say, offer to submit all our policies to you and to accept your decision until you are in a position to offer us that unconditional support and protection which hitherto we have given you. When you are our equals we will treat you as equals, but until then you cannot expect us to do more than pretend that a Bruce is as good as a Baldwin. Hitherto the Empire has been *our* Empire. You can break it up or take it over as you please, but if you decide to take it over, then from now on you must accept responsibilities, both moral and financial, which hitherto we have borne alone. We make no claims upon you, it is for you to decide. We believe in the maintenance of the British Empire and in the vast power which so powerful an instrument can exert in maintaining the peace of the world. But if you want to be ‘free’ you must be free; for no grudging display of the Union Jack can be of the slightest value either to you or to us. As for the Judicial Committee of the Privy Council, you may use it or ignore it as you please; but it is probably the best judicial tribunal in the world, and if you like from time to time to send one of your best judges to become a member of it, we should welcome such additional strength. Meanwhile our object is to support you, not to rule you; and if you see no value in our support and feel you would be stronger (at Geneva, for example) if you were outside the British Empire, then you had best secede at once, and we shall not blame you.’ . . . The British Empire is an entirely voluntary organisation or it is nothing. Those Dominions which are restless under the tyranny of Westminster must be frankly offered the alternative of formal secession. Their decision on that alternative will be of enormously greater importance to them than it can ever be to the inhabitants of Great Britain.”

AMERICA AND CANADA.—In the October number we gave some attention to what Lord Darling thought of the present chances of Canada becoming annexed to the United States, showing that his conclusion was that it was a most unlikely contingency, because Americans and Canadians seemed to him to be satisfied with things as they are. In the same number we also referred to the jeremiads being uttered at the present time in some of the English newspapers over the imminency of Canada's absorption by the great nation to the south of us. We also expressed our view that this panic on the part of certain English newspapers was possibly due to the pessimistic suggestions of the Gloomy Dean. Having done all this, we deem it proper in this issue to quote an American opinion on the subject recently published in the *Saturday Evening Post*:—

"We do not believe that there exists in either nation any substantial body of sentiment favoring annexation. We Americans honour and respect our northern neighbour. We pay homage to the heroic part she took in the war; we admire the pluck with which she faced grave problems during the years of reconstruction. We value her as customer and as friend; but this does not mean that we have any desire to take her into our union of states. For her part, Canada welcomes our capital. She sells us her products and profits from the exchange in goods. And yet at no time has her national consciousness been more vigorous and robust than it is to-day. It is highly improbable that she will wish to merge her identity in ours. There is no pressing reason why she should."

After quoting this very candid review of the situation, possibly it will not be out of place to present here some further views of Lord Darling on the subject as published in *The Times* since he arrived home. They are as follows:—

"Those people of British race, already the prosperous owners settled on this land, are puzzled—as I have learned from them day by day—that comparatively so few of their own blood come from home to claim a share in what they regard as a family estate in need of nothing but development. Much of the capital now being invested here for this purpose is that of Americans, and therefore to a considerable extent the direction of Canadian industries has fallen into other than Canadian hands. With regard to some businesses—especially those situate on the frontier—there appears to be some occasional gossip regarding possible amalgamation with the United States—not from any love of their institutions, by any means, but merely in order to avoid the duties now levied on Canadian exports or American imports. Feeling throughout Canada is, to my mind, thoroughly sound and truly settled in regard to growth and continuance within the British Empire. In most Provinces, indeed, this feeling amounts to a fine affection, not so much to the old Realm within the narrow seas as to the world-wide Empire of to-day—to all, actual or potential, material or mental, which is symbolized by the Union Jack.

Naturally, propinquity makes a difference in points of view; and along the border of Canada and the United States there is an ebb and flow of population. Some laments I heard that skilled artisans had been attracted by high wages to leave their employment in Canada. Some regrets, in the Maritime Provinces especially, that sport was restricted by reason of the purchase of riverain rights by alien millionaires.

I have met with some loyal Canadians who are convinced that America is carefully and consciously engaged in a system of peaceful penetration designed for the domination—commercially at first and perhaps politically in the end—of the coveted and sparsely peopled country beyond their northern border. Such apprehensions I believe to be vain and unfounded; but I must record them, although the Canadians generally are too self-reliant and occupied to waste time in regrets in the vein which dictated—

Mantua, vae, miserae nimium vicina Cremonae.

Not a few see their country as a continent varied as Europe, and not less extensive, with no need whatever to depend for exports or imports on any nations which dwell beyond the boundaries of the British Empire. One home product especially they contrast, in justifiable pride, with that of their nearest neighbours—the administration of justice. In Canada the malefactor is impartially tried, and he receives neither undeserved sympathy nor garlands. He is not regarded by an hysterical populace as a psychological complex, nor as a film artist gifted with the especial charm of complete sincerity in the playing of his part—the parallel of the tragedian who stained himself all over when he represented Othello. Indeed, I found that lately certain homicides of the class who in the United States had achieved psychological and social success under the endearing name of “crooks,” were, for having practised their art in British Columbia, incontinently hanged.”

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ADVICE TO LAWYERS. — In the course of a presidential address before the Hampshire (England) Incorporated Law Society Mr. E. Gulliford deals in a most interesting way with the history of the human side of the profession of the law. Amongst other things he said:—“Lawyers, therefore, should uphold with dignity the position and traditions of their ancient and honourable profession. But although lawyers have been constantly employed in a confidential capacity, they have nevertheless been always given a bad name. Sir Henry Wotton described an Ambassador as an honest man sent to lie abroad for the good of his country, and a lawyer as one paid to lie at home.” And again:—“Every lawyer should be respectful when addressing the Court. Occasionally, in his ardour for his client and belief in his case, he forgets the rule and brings down a severe reprimand from the Bench. In such circumstances it behooves him to withdraw as gracefully as he can. The late Mr. Benjamin once gave a good example of this when a judgment having been given against his

client, he made some severely disrespectful remarks on the Judge, who asked him whether, by what he said, he meant to express his contempt of that Court, and Benjamin replied: "Certainly not, my Lord, it would be impossible for me to do so."

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LAW AS AN 'EASY' AVOCATION. — The multitudinous automobile has displaced the 'man on the street' as the standard of average intelligence and in his place we have the man on the back seat of the flivver. To him it would seem that the life of the lawyer who holds briefs in the courts is a very pleasant and a very easy one. When he drops into court and listens to a more or less Socratic dialogue — interspersed here and there with sallies of the forensic brand of wit — carried on between judges and counsel, he is fain to think that the law must really be the best of all possible avocations because its business is pursued without the hectic rush that marks other callings at the present day. All this of course is to ignore the long and studious preparation, with no limit to working hours, that counsel must give his cases before going into court, and the anxiety that pervades him during trial and argument. Hence his face seldom lacks the "prints of worrying cares." Assuredly the lawyer is no waster of the time he is paid for. As a matter of fact, the only member of the busy community who really takes his work lightly is the business man himself. This is very well argued by Robert Lynd, who discusses present day life in London in his recently published volume called "The Orange Tree." In the course of his essay on "Waste of Time" he says—"If we wish to find human beings wasting their time, we shall do better, I fancy, to pursue our investigations in business circles. I speak as an outsider, but to me the ordinary business man seems to have greater opportunities for wasting time than almost any other man who has to earn a living. There are, no doubt, thousands of business men who work like galley slaves: if you are born with the passion for work, you will find opportunities for satisfying it even in business. But somehow the business men whom you meet in clubs at the luncheon-hour do not impress you as being men who are wearing themselves to the bone, and there is a curious lack of exhausted-looking frames in the first-class carriages on the trains that leave the city between five and six. The ordinary business man is a born conversationalist. He spends more hours of the day in cheerful conversation than any of his fellow-citizens. Much of his conversation is, undoubtedly, gossip about business, but he deceives

himself if he thinks that gossip about business is work. It was in a nation of business men that the 'Three-Hours' Lunch Club' originated."

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WALTER BAGEHOT'S CENTENARY.—There were many men born in the first half of the nineteenth century who deserve a cherished memory on the part of the Bar, although their lives were not in close or practical touch with its affairs. One of them—one of the greatest—is Walter Bagehot. The fame that Bagehot attained as a writer on economics and politics serves to obscure for us the fact that he was called to the English Bar in his twenty-sixth year. He never proceeded to the practise of his profession, but shortly after call joined his father in the business of banker and shipowner. All students know his spirited study of the English Constitution; and *Lombard Street*, a work dealing with the money-market, published some half-dozen years later, established his reputation as a thinker of great acuteness and originality. In the domain of politics as well as in that of economics he was impatient of the restraints of scholastic theory. The limitations of the Ricardian doctrine of economics were very thoroughly apprehended by him; and he was disposed to think that political science was governed by tendencies rather than by rigid laws. Bagehot was born in 1826, and died in 1877.

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AN EXPLOSIVE OFFICIAL.—A learned judge, now an honoured member of the County Court bench, thus related one of his experiences as a law student. He began his studies in a country office and before concluding his service under articles removed to Toronto in order to gain some practical experience in the practice of the law at Osgoode Hall. At that particular time the officer charged with the duty of issuing writs was somewhat noted for his irascible temper and violence of his language when exasperated—and one of the first duties the student was called on to perform was to apply to this particular officer to issue a writ of summons. The performance of this simple operation was such a common place and everyday affair that it was not thought necessary to give the youthful limb of the law any particular instructions as to how it was to be performed; so armed with a præcipe he sallied up to Osgoode Hall to perform his task. Entering the office of the official, he informed him of his desire and, being called on for the proper law stamp, had to admit that he had not provided himself therewith. He was informed that he would have to go and get one, and having made the purchase he returned

with the stamp and tendered it to the official, who replied to the tender with the words "Damn your impertinence, do you think I am going to lick your stamps for you?" Much abashed, by this time the trembling student received back the stamp and proceeded to lick it himself and without much consideration affixed it to the writ, and returned it to H.M.'s representative *pro hoc vice* to be sealed and was met with the inquiry, "May I ask young man what is your name?" and on giving it, received the following withering reply." "So I supposed, some damned Fenian traitor turning Her Majesty upside down!" Whereupon the poor student discovered that he had inadvertently placed the law stamp upside down, and meekly proceeded to correct his mistake, feeling happy to depart with a whole skin from such a dragon of the law.

POISONING THE WELLS.—The District Attorney of New York, in giving evidence some time ago before the Senate Committee on Prohibition, charged that 'fixers' were trafficking in justice openly in the federal building of that city. "In the course of a year, at least fifty thousand bar-tenders, peddlers, waiters and 'fixers' pass through the doors of that building," he said. When asked to explain the term 'fixers,' he replied, "I mean those that traffic in justice; those who hang around the corridors of the building and buy jury-men, and with money influence the memory of witnesses."

We are reasonably free from this species of offence in Canada, but the danger may become great where wealthy criminals are concerned and large interests are at stake. Hector Charlesworth, in his *Candid Chronicles* gives an interesting account of the trial of the Hyams brothers for murder in the autumn of 1895 and winter of 1896, which exemplifies the corrupting influence of gold. B. B. Osler acted for the Crown, and the defence, represented by E. F. B. Johnson, William Lount and a number of juniors, employed Francis L. Wellman of New York to lend them his services as advising counsel. He, being an American lawyer, could not take the case in court.

There were two trials, the first ending in a disagreement and the second in an acquittal. Methods of influencing the course of justice, apparently thought legitimate by the defence's American adviser, were resorted to, as appears from the following extract from Mr. Charlesworth's book:

“ In his book, *Gentlemen of the Jury*, Francis L. Wellman makes the cynical admission that he did not rely entirely on legal processes to secure the acquittal of his clients. He says that, finding public sentiment strong against them in Canada, he paid the expenses of a New York *Herald* reporter to come to Toronto, and ‘moulded’ the reports of evidence wired nightly by that individual. These reports stressed the idea that the ‘two American boys,’ as he calls them, were being ‘railroaded,’ and he instructed the reporter to flatter the Judge as the embodiment of ‘British fair play,’ and procured a picture of him in his robes which he induced the *Herald* to publish. These reports he took pains to have sent to the judge’s chambers; and he adds: ‘If the Judge, at the start of the trial, actually did share in the general prejudice against the prisoners, I was sure that it had all been removed when I heard his summing up to the jury. He gave us the benefit of every doubt, and there was not a single incident in our favour during the long trial that he failed to call to the attention of the jury.’ ”

The Judge referred to was Mr. Justice Thomas Ferguson, and the suggestion that he could be moved by flattery in the performance of his duty may be dismissed as an absurdity. The true explanation of his apparent indulgence of the defence is given by Mr. Charlesworth: “He had an exaggerated sense of fair play, especially when dealing with aliens, which I knew him to manifest on many occasions. Mr. Wellman was probably ‘tipped off’ on this when he instructed his journalistic henchman to talk of ‘American boys’ being ‘railroaded.’ ”

So much for the Judge, but the jury also came in for some attention. On this point Mr. Charlesworth says:

“I am satisfied that the Hyams defence did not stop at bringing reporters from New York, and ‘moulding’ their reports, to use Mr. Wellman’s polite phrase. After the jury panel for the assize at which the second trial was to take place was announced, a group of strangers visited their homes in the guise of book agents, photo-enlargers, and sewing-machine salesmen, and discussed the case, presenting the arguments for the defence. The captain of this gang was an old sportsman named Colonel Foster, who had at one time been manager of the Boston Ideal Opera Company. Foster was much in evidence in Toronto hotels before and during the second trial. A theatrical man who knew him happened to come to town and asked me if any important trial were coming off. I said there was, and he told me that Colonel Foster had gone down hill and had become one of the most notorious jury-fixers of the Tammany organization.

Before he had come to Toronto, Foster had boasted around 'the Rialto' of the 'job he was going to pull off in Canada.'"

Mr. Charlesworth, who was for many years a reporter on various Toronto papers, and is now a well-known musical and dramatic critic, furnishes many anecdotes descriptive of judges and leading lawyers who were concerned in famous cases that occupied the public mind a generation ago.

R. W. S.

THE ECONOMIC CEMENT OF EMPIRE.—We quote the following from *The Spectator* (London) of the 30th ultimo.:

"At the Imperial Conference on Thursday, October 21st, Sir Philip Cunliffe-Lister, President of the Board of Trade, and Mr. Amery, Secretary for the Dominions, made introductory statements on the economic work of the Conference. Sir Philip Cunliffe-Lister said that in the first half of the present year one-third of our imports had come from the Empire and nearly half our exports had gone to the Empire. In 1913 the proportion of our imports from the Empire was 24.87 per cent. and of our exports 37 per cent. He reminded the Conference that the Economic Committee which was appointed in 1925 had already presented four Reports and an Empire Marketing Board had been established. He was convinced that this Board would be more effectual in increasing sales of Imperial products than the limited Preferences for which it was substituted. He urged the Conference to consider the possibility of standardizing manufactured goods. If the products of all countries in the Empire could be co-ordinated into an Imperial standard inter-Imperial trade would be greatly helped. Finally Sir Philip suggested that the cinema should not be ignored. That 'new and all-pervading influence' would be most effective in recommending Imperial goods all over the world."