THE CANADIAN BAR REVIEW

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

☞Special articles must be typed before being sent to the Editor, Charles Morse, K.C., Room 816 Ottawa Electric Building, Sparks Street, Ottawa. Notes of Cases must be sent to Mr. Sidney E. Smith, Dalhousie Law School, Halifax, N.S.

TOPICS OF THE MONTH.

COUNCIL MEETING OF C.B.A.—It has now been definitely arranged that the Mid-winter Meeting of the Canadian Bar Association will be held at the Royal Connaught Hotel, Hamilton, Ontario, on Saturday, February 3rd, 1934, commencing at the hour of 10 a.m.

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OPTIMISM IN THE NEW YEAR.—Confronted as they are by so many lay sermons on the whole duty of man in these parlous days we feel that our readers will be pleased to escape any gesture of incitement on our part for them to be brave and hopeful during the year that we have just entered upon. That they will continue to brave the storm as steadfastly as they have hitherto done goes without the saying, but lest their optimism over any sudden spate of peace, probity and prosperity might lead them to believe that our night of trial was only a prelude to the dawn of a terrestrial Elysium we quote below a bit of sound advice expressed in verse by the father of a great Judge recently retired from the Bench of the Supreme Court of the United States. The Poet contemplates the day,—

"When legislators keep the law,
When banks dispense with bolts and locks,
When berries, whortle—rasp—and straw
Grow bigger downwards through the box,—

"When lawyers take what they would give,
And doctors give what they would take,—
When city fathers eat to live,
Save when they fast for conscience sake."

After visualising certain other fields of human conduct which might achieve reform, he points the moral:

"But when you see that blessed day
Then order your ascension robe!"

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IMPERIAL HONOURS.—The most acceptable piece of news for the Canadian Bar on New Year's Day was the announcement that the Right Honourable Lyman Poore Duff, P.C., Chief Justice of Canada, had been created by His Majesty a Knight Grand Cross of the Order of St. Michael and St. George. It was felt that as the practice of conferring titles of honour upon eminent Canadians is now resumed nothing could be more appropriate both in its personal and official aspects than to head the list with the name of the present Chief Justice of Canada. Coming to the Bench as a young man possessing extraordinary gifts for the discharge of the highest form of service that the State demands, he can look back upon thirty years of fine achievement in the public interest and look forward in the maturity of his powers to a continuance of fruitful endeavour. The REVIEW tenders the Right Honourable Sir Lyman Duff its homage and sincere congratulations.

* * The Bench of the Province of Quebec was also honoured by Knighthood conferred by His Majesty upon the Chief Justice of the Court of King's Bench, Montreal Division, the Honourable Joseph M. Tellier. Having graduated with distinction in law from Laval University, he was called to the Bar of Quebec in 1883. While active in the practice of his profession he found time to enter political life and attain prominence there. Elected to the provincial legislature for the riding of Joliette in 1892, he retained the seat in the Conservative interest for the remarkable period of twenty-four years. In 1916 he was made a Judge of the Superior Court, and in 1920 was transferred to the Court of King's Bench, later succeeding the Honourable Eugène Lafontaine as Chief Justice of that Court.

* * Two members of the Bar of Canada with an enviable record of public service behind them, namely, Thomas Mulvey, K.C., late Under-Secretary of State for Canada, and Arthur Beauchesne, K.C., Clerk of the House of Commons, were made Companions of the Order of St. Michael and St. George.

SIR ROBERT W. DIBDIN.—Members of the Canadian Bar Association who were present at the great gathering of lawyers from the United States and Canada in London, in 1924, will remember with pleasure the many courtesies received by them from Mr. Robert W. Dibdin, the then President of the Law Society, who was honoured with knighthood the following year. Sir Robert passed away recently at the advanced age of 85 years. He was an honorary member of the Canadian Bar Association.

We recall a good story related by Sir Robert in responding to the toast of "The British Bar" at the Dinner given by the Law Society to the overseas guests. Remarking that the proposer of the toast—a member of the American Bar—seemed to entertain great reverence for Magna Charta, Sir Robert said that this fact induced him to show how adequate was the knowledge that the present generation of Englishmen had of that great constitutional document. For this purpose he would cite the experience of a School Inspector. On his visit to a certain school the Inspector asked a history class: "Who signed Magna Charta?" After a painful silence he exclaimed with some irritation: "Doesn't anybody know?" Whereupon a tremulous youth put up his hand and said: "Please, Sir, I didn't!" This answer tickled the Inspector to such an extent that he related the incident to the Squire of the district who entertained him at dinner the same evening. The Squire, with a very courteous laugh, remarked: "That is a very good story, indeed," but added with a shade of perplexity: "I suppose the little devil did though, after all."

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HOUSE OF LORDS REFORM.—William Cecil, Lord Burleigh, England's greatest statesman in the time of Elizabeth, said with profound insight that England could be ruined only by her Parliament. In view of that pregnant remark it is more than interesting to find one of Cecil's lineal descendants in the person of the present Lord Salisbury endeavouring to preserve the House of Lords against extinction at the hands of the Left Wing of the Labour Party should that group of iconoclasts become entrusted with power to misgovern the country. That the Parliament Act of 1911, which deprived the House of Lords of all legislative power respecting money bills and substituted a mere suspensive veto for its then existing final veto in regard to public bills other than money bills, was forced upon the Lords after one of the most vehement conflicts in English public life is a matter of history. It is equally true that the Act was only a temporary measure, in which it was formally declared that provision should thereafter be made for a reconstruction of the existing

Second Chamber of Parliament. It is not to be wondered at that so acute a problem should progress slowly towards any real solution, or that the outbreak of the Great War should cause exceptional delay in proceeding with the matter. Nothing in fact was done until the 25th August, 1917, when a committee was appointed, under the chairmanship of Lord Bryce, to consider and report upon a scheme of reform. This committee held forty-eight sittings, extending over a period of more than six months, and presented a report, in April 1918, which exhibited a very adequate comprehension of the fundamental matters demanding reform but failed to offer a frame of reconstruction for the Second Chamber that would establish the desired composite of membership and restore that balance of powers and that equilibrium of function between it and the Commons which are essential to the successful working of the English system of parliamentary government. The Bryce report did not lead to legislation.

It appears that Lord Salisbury's Bill on its first reading did not convince the House of Lords that he had succeeded where Lord Bryce's committee had failed, although it was allowed to stand for a second reading. It was said of the Bill that it "withered beneath the kindly contempt of Lord Reading." However, regarded purely as a courageous attempt to protect the constitution against the threatened assaults of Sir Stafford Cripps and his congeners, it serves to show that the patriotic instinct of the Cecils is as strong to-day as it was in the time of Queen Elizabeth. And Elizabeth, we are told, once addressed her Lord High Treasurer in these words: "This judgment I have of you, that you will not be corrupted with any manner of gifts and that you will be faithful to the State; and that without respect to any private will you will give me that counsel that you think best." Beyond doubt when Elizabeth praised a man for his patriotism she knew what manner of man he was.

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THE JUDGES AND THE EXECUTIVE.—In our last volume (10 C.B. Rev. 189) we referred to Sir William Holdsworth's criticism of the action of the British Government in passing an order in council, in alleged pursuance of the National Economy Act, for the purpose of reducing the salaries of the Judges to a very appreciable extent. In Sir William's opinion the Judges are in no sense "persons in His Majesty's Service" and cannot validly be treated as such in the administration of the National Economy Act. His view was based on the fundamental doctrine of modern British constitutional law that the powers of the State resolve themselves into three classes—

the Executive, the Legislative and the Judicial, which to quote his words, are "all to a large extent independent and autonomous units for conducting different parts of the government of the State."

The constitutional aspect of the Government's action in placing the salaries of Judges together with those of Civil Servants under the control of orders in council has been again thrust into prominence by a brief but trenchant article contributed to *The Spectator* of the 1st December by Viscount Buckmaster. Tracing, *currente calamo*, the emergence of the judiciary from subservience to the royal will as the result of two revolutions in Stuart times, he rests the complete independence of the Bench from executive control on the Act of Settlement, 12 and 13 William III. That constitutional document, to quote Lord Buckmaster's words,—

> Not only enacted that Judges should hold their office *quamdiu se bene gesserint*, but that their salaries should be "ascertained and established" and the removal of the Judges should only be effected by resolution of both Houses of Parliament. The Statute contained no reference whatever to any power to reduce their salaries during their commission, and there is no record that from that day to this it has ever been done. The reason is plain. Tenure of office is inseparably connected with security of income, and it is just as easy to threaten the independence of the Bench by a continual adjustment of the salaries paid as by other means.

After mention of the possibility of the National Economy Act affording a precedent for future legislation of a like sinister effect upon settled rights and liberties, the noble and learned jurist concludes his review of the situation as follows:

> It is impossible to contemplate this Act without realizing that it does two things. First, it enables a blow to be struck at the independence of the Bench, and secondly, it brings the Judges once more into the arena of political strife. No benefit is ever appreciated until it is lost. The mere idea of Judges deflected from their solemn duty by outside influence is, at the present time, incapable of conception, but things that have been may be again. We know that the Act of Settlement was intended once and for ever to put an end to abuses by which the Bench had been made subservient to the Royal power. The power claimed by the Stuarts is nothing comparable to the power which certain members of the Socialist Party have asserted that they will exercise through the medium of orders in council, and if the Judges are to be made subject to the operation of this machinery we may bid a long farewell to the greatest object of our national pride, a pride which has been justified before all the nations of the world.

James I did not scruple to describe the Judges as his "shadows and ministers," a phrase which across the Channel would have been translated as *les âmes damnées du prince*. One is tempted to ask if the present occupants of the English Bench are to be included in Sir Stafford Cripps's group of "Buckingham Palace people" which he is inclined to think ought to be damned for the good of the State.

LEST WE FORGET!—Listening over the radio to the stroke of Big Ben at Westminster ushering in the New Year and the subsequent singing by a London choir of "Auld Lang Syne" furnished for us a thought-compelling prelude to the perusal of an address delivered last month by Mr. M. E. Nichols before the St. Andrew's Society of Winnipeg, on "Canada's Position in the Empire." It is obvious that Mr. Nichols in his address uses the word "Empire" in its traditional sense and not in the light of its meaning since the Statute of Westminster, 1931. Starting out with the remark that he wondered whether, in the course Canada has pursued for the past ten or twelve years, "we have been living in a land of make-believe, and nursing fanciful notions of our performances in the Empire and in the world at large," he proceeds to say:—

> For many years following confederation, Canada was heart and soul in the British Empire. Once in a while in our early years there was mild agitation in favour of something different, but not once did it make a show of strength. I am not suggesting that there is anywhere in Canada today an inclination to move out of the British Empire, but he would be a poor observer who failed to note that we are not, today, heart and soul in the British Empire as we were, say twenty years ago. We are in it more and more in an abstract sort of way, with qualifications and reservations.

After pointing out that Canada as an independent nation would be a negligible factor in the making of peace or war, but in her capacity as a part of the British Empire "can be and actually is a power in shaping the currents of peace," and after reminding us that the Monroe Doctrine does not imply an obligation on the part of the United States to protect a country whose natural source of protection is the British Empire, he counsels his fellow-countrymen as follows:—

> What then should be the direction of our further building—the building of the Dominion of Canada to higher levels of prosperity among her people and higher levels of national greatness. In the balance of things to be gained on the one side and the things to be lost or hazarded on the other side, my own choice is clear and definite. I give it to you for what it may be worth. It is this: Let us build *into* the British Empire. Let us not build away from it. Let us not shiver at the cross roads or live in a political "no man's" land. Let us commit our fortunes to the Empire for better or for worse. Let us put our hearts and our faith in it. And last but not least, let us be honest with our partners. Let us pull our weight in the boat.

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SCOTLAND'S PREVAILING UNREST.—In an article contributed to a recent number of *The Spectator* Mr. C. deB. Murray writes in a temperate vein of the present disadvantages resulting to Scotland

from her union with England as consummated in the reign of Queen Anne. He concedes the soundness of the argument put forward by Mr. John Buchan at the Kilmarnock by-election against setting up a new Parliament in Edinburgh, but points out that Mr. Buchan is in accord with Scottish Nationalists, such as the Duke of Montrose and Sir Alexander MacEwen, when he admits that affairs in the northern part of the Kingdom are not at present in a "wholesome position" by reason of things done and not done south of the Tweed. The new agricultural policy of the British Government favours English farm products as against those of Scotland, while the rationalisation of industry, to the extent that it has gone, has been equally disadvantageous to the latter country. But to many of us it is a matter of great surprise to read Mr. Murray's confession that so far as education in general is concerned Scotland has lost her old time lead, and that she has, as a matter of fact, "become parasitic upon England so far as legal scholarship is concerned." He says that English text-books in jurisprudence, international law, and even in Roman law, are used in all of the four Scottish universities.

Just how far the English are to blame for Scotland's subsidence from ascendancy over them in educational training and attainment by and large, Mr. Murray does not make appear. But to the liegemen of the common law there is more in the article under notice to make them stare and gasp. Having defied the lightning of his countrymen's national pride by speaking of the provision in the Act of Union for the maintenance in Scotland of a separate legal code as follows: "In 1707 that may have been necessary: in 1933 it produces nothing but confusion," he invites ostracism from the modern Athens by asking the following questions: "Suppose a uniform system of law were applied to the whole island, so that local peculiarities in England and Scotland alike were obliterated; suppose the Government departments in Edinburgh were linked up with the departments in Whitehall, each pair under the supervision of a single Minister; can it be doubted that there would be an immense saving in public money and Parliamentary time and that Scotland especially would benefit greatly?"

Undoubtedly there have been brave men since Agamemnon whose praises deserve to be sung, and just for the above provocative words Mr. Murray might achieve his meed of fame by his "brither Scots" chanting for him a line from Burns—"Welcome to your gory bed"—and giving that welcome a touch of realism. And yet all patriotic indignation may be assuaged by his concluding words: "We are governed as though Scotland were a subject province, instead of

being part of the United Kingdom. Ultimately this method of government will fail. When that happens two courses are possible. We may follow the Duke of Montrose and Sir Alexander MacEwen into schism: or we may elect to make common cause with England and abolish those anachronisms which at present obstruct and hinder the free development of Scotland."

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DOMINION AND PROVINCIAL TAXATION.—In connection with the announcement that the economic conference between the Dominion and the Provinces will hold an effective session before the opening of Parliament, our readers will be interested in the following suggestions embodied in the third of a series of articles prepared by members of the Department of Political Science in Queen's University, Kingston, on certain problems in the economic and political structure of Canada. The series has been published in the *Queen's Quarterly*. We quote:—

There can be no doubt that a Tax Conference to consider the whole question of Dominion and provincial taxation is long overdue. Even if the Dominion should find it necessary to retain for the present both the corporate and personal income-tax in order to meet its vast war obligations and those assumed more recently during the economic crisis, a Tax Conference might accomplish a very useful purpose in removing some of the existing friction between taxing authorities and in recommending more efficient and economical methods of collection. If the provinces enter the income-tax field in an increasing measure it may be considered whether it would not be better for such income-taxes to be collected by the Dominion as supplements to the Dominion income-tax although based in each case upon legislation by the province concerned. In this manner the provinces could avail themselves of the more efficient collecting agency of the Dominion, while assuming at the same time full responsibility by their own legislation for the rate of tax imposed for provincial purposes. Such a question as this might be investigated with fruitful results by a Tax Conference composed of representatives of the Dominion and the provinces. There are many problems and misunderstandings which might be discussed with advantage by a conference of this character, but if a repetition of former failures is to be avoided the formal deliberations of the Dominion and provincial delegations ought to be preceded by an exhaustive survey of the entire field of taxation by departmental and non-official experts.

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THE HONOURABLE E. B. RYCKMAN.—By the death of the Honourable Edmund Baird Ryckman, K.C., on the 11th instant a career of citizenship at its best was brought to a close. Mr. Ryckman at the Bar, in Parliament, as well as in the conduct of important business affairs, earned for himself a reputation that should stimulate in the younger generation of Canadians a zeal for "doing well what is at their hands to be done." To profit by the example of this earnest-

minded man, to entertain and to pursue the ideals that beckoned him towards valiant effort in their realization would make the conduct of our young people a very present help in Canada's time of trouble.

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RETIREMENT OF MR. JUSTICE SMITH.—Having reached the allotted span of judicial life in the Supreme Court of Canada the Honourable Mr. Justice Smith retired last month from the Bench of that Court. He was appointed from the Bar of Cornwall to the High Court Division of the Supreme Court of Ontario on the 7th October, 1922, to the second Appellate Division of that Court on 10th July, 1923, and to the first Appellate Division on the 15th January, 1924. On the 18th May, 1927, he was called to the Bench of the Supreme Court of Canada. He was highly esteemed by his brother Judges in the several Courts in which he sat as well as by the members of the Bar who practised before him.

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PSYCHIATRY AND THE LAW.—From the report of the Dean of the Faculty of Medicine in the University of Toronto for the past year we learn that both in instruction and practical work increasing emphasis is being laid by the faculty upon the integration of psychiatry with the biological and social sciences. A year ago a weekly seminar for the purpose was inaugurated to extend through the academic session. The report states that various departments and outside agencies have taken part in the seminar, and that the interrelations of psychiatry and the law were among the questions discussed. How far mental disease should control the determination of culpability in crime is a problem of great importance in the administration of justice, and we are glad that the University of Toronto is helping the Bench and Bar to a right understanding of the problem.

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GOVERNMENT APPOINTMENTS.—The Honourable C. P. Fullerton, formerly Chairman of the Board of Railway Commissioners, has been appointed Chairman of the Board of Trustees of the Canadian National Railways . . . Roméo Langlois, K.C., of the Bar of Quebec City, has been appointed to the Bench of the Superior Court . . . The following members of the Bar have been appointed to the Senate: Alfred E. Fripp, K.C., of Ottawa, a former member of the federal Parliament; Louis Coté, K.C., of Ottawa, at the time of appointment a member of the Ontario legislature for Ottawa; Guillaume André Fauteaux, K.C., Montreal, P.Q., a former Solicitor-General of Canada; Lucien Moraud, K.C., Quebec City, and Walter B. Aseltine, K.C., Rosetown, Sask.