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.

LAWYERS AS WITNESSES FOR CLIENTS.—It is useful to point out that on three several occasions lately the Supreme Court of Canada has declined to hear counsel when the record of the case on appeal showed that the counsel seeking audience had given evidence as a witness at the trial. As the organ of the Canadian Bar Association the REVIEW rejoices in the fact that the standard of ethics sought to be applied to the matter in question by the rules of the Association has proved to be quite in accord with the views of the Judges of the Supreme Court of Canada.

We think it well to quote the following language from the Canons of Ethics published in the third volume of the Proceedings of the Canadian Bar Association (1918):—

19. *Appearance of Lawyer as Witness for His Client.*—When a lawyer is witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

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CONCERNING MAGISTRATES.—Interesting addresses were made by the Lord Chancellor and Mr. Justice McCardie at the annual meeting of the Magistrate's Association at the Guildhall, London, last month. The following extracts from these addresses are not without

relevancy to the qualifications and usefulness of the magistracy in Canada. Speaking of the appointment of new magistrates, which he confessed was a duty "of some anxiety" to him, Lord Cave said:— "He had always held that appointment of the Bench should be regarded, not as a decoration for past services of whatever kind, but rather as a trust to be conferred only upon those who had leisure to give to it and who had that impartiality and that high character which was necessary for its proper discharge". . . . "He had made it a practice to ask particulars of the public service rendered by persons proposed for appointment to the Bench, and such particulars were readily supplied. He did not for a moment say there might not be persons who had not been able to render some service in local government or otherwise so fit for appointment that no one would dream of passing them over. He thought that as a general rule public service was a test both of public spirit and the confidence of the neighbours of those who were proposed".

Mr. Justice McCardie extolled the value of the magistracy in the English legal system and quoted Lord Merrivale's recent remark that the justice which mattered most in the houses of the people was the justice that was administered by the magistrates who lived in their midst. The learned Judge proceeded to add that the strength of English law and respect for English law depended in a very large degree upon the magistrates who administered that law throughout the kingdom.

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WHY DO WE PUNISH?—In the course of his address referred to in the preceding item, Mr. Justice McCardie proceeded to discuss the criminal law on broad grounds. His observations are so lucid and so informing that we venture to quote them somewhat fully from *The Law Times* of October 22nd.

In the trial of criminal cases, he said, he often put to himself the question: "Why do we punish?" And he thought that, unless a man had formulated the answer as best he could, he had not begun to grip the problem of the criminal law. He felt, as an individual, that the dominant and primary object of punishment must be deterrent. He was reminded of the story of Mr. Justice Burnett, who lived nearly 200 years ago. A man who was tried before him at the Old Bailey was found guilty of stealing a horse, which crime at that time was punishable by death. The man said, "It seems a hard thing, my Lord, for a poor man to be sentenced to death for stealing a horse." The judge replied, "Oh, you are not sentenced to death for stealing a horse, you are sentenced to death in order that horses may not be stolen." After all, in his (Mr. Justice McCardie's) view the retention of punishment

was essential for the preservation of public order. Then there was the protection of the public to be considered, which was, after all, the element one had in view when considering the question of sentence; and, finally, there was the question of reformation. And these considerations led up to the subject of Probation. It was forty years since probation was first introduced, and the words in the last Probation Act were singularly broad and elastic. He himself had been challenged, as had other judges, on the subject of binding over, and he had asked himself whether the probation system had justified itself. If "Yes," it should be maintained and extended. He was under no illusion as to the state of crime in this country. The body of crime known to the police was greater in 1924 and 1925 than at any time during the last sixty-eight years; but, taking the increase of population into consideration, there was a diminution per hundred thousand. He believed he was right in pointing out that, of every five men in prison to-day, it might be said that three had been convicted before, and that, out of every five women in prison, four had been convicted before and a large proportion had been convicted many times—one-seventh had been convicted over twenty times. In the light of these figures there arose the question of probation, the question of short sentences. It seemed amazing to his mind, thinking as an individual only, that year by year the same men or women were sent to prison for the same offences, and for about the same period, and the points which he always tried to remember with regard to short sentences were, first, that the short sentence gave no opportunity for remedial training, and, secondly, that a short sentence wholly disregarded the element of protection for the public. Mercy was a great thing, he did not under-estimate it, but the public interest was a greater. He had in his mind the history of a man tried before him recently. By the calendar for the last fifteen years, he had been bound over again and again every year, once or twice, for stealing or the like offence. He had been given sentences from three or four to nine, and then twelve months. Year after year that man committed like offences and the sentences had dropped to four or six months again. He felt that the subject of short sentences would have to be reconsidered. But how did probation stand in spite of all this, and of the body of crime which existed? He could only express his own opinion, and he felt a sense of responsibility in view of the criticisms which were often made in regard to probation. In his view, if the probation system had not been adopted in this country the number of crimes committed and the number of criminals would have been infinitely greater than they were at present.

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THE JURY SYSTEM AGAIN.—Last month we referred to an extraordinary scheme for the reformation of the system of Trial by Jury put forward by Mr. J. W. Pickles in an address before a meeting of the Law Society in England—a scheme which has met with practically the unanimous disapproval of lawyers and laymen as disclosed by the British press. One writer sums up the discussion in this wise: "The twelve reasonable and unremunerated men and women will continue to be called up as heretofore to bear their con-

stitutional burden and to enjoy, if they can, their judicial functions and privileges. Mr. Pickles' proposal is dead."

It is interesting to note in referring again to the question of the usefulness of juries that Lord Birkenhead in his new book, "Law, Life and Politics," says: "I cannot remember in the thousands of cases which I suppose I must have argued before juries, more than three in which I was absolutely certain that the juries were completely wrong."

Among the contents of our present number will be found a thoughtful contribution by His Honour Judge Coatsworth on this much debated question.

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LABOUR AND THE COMMUNISTS.—It is reassuring to read in the English press that the Labour Party in England is not in any imminent danger of being controlled by the Communists. The following excerpt from a recent number of *The New Statesman* would indicate that the Red Peril is now taking on the hue of innocuous pink in the political sky:—

The Labour Party Conference has been followed by the annual gathering of the Communist Party of Great Britain, at which the leaders of the Labour Movement have come in for the usual chorus of denunciation. The delegates had a wrangle about the importance to be attached to the National Minority Movement—the special subsidiary which the Communists use in their attempts to permeate the Trade Unions. Some pure-milk-of-the-word delegates thought that too much attention was being devoted to this body, at the expense of direct Communist propaganda; but the platform and most of the delegates appeared to hold that their best chance lay in working indirectly under some camouflage of this sort. By far the most interesting feature of the Conference was the membership return. The Communist Party lost nearly a third of its members during the year—largely, we imagine, disgruntled miners and others who joined under the influence of last year's dispute. (The Communists themselves attribute the loss to an alliance of the "bosses," Right wing Trade Union officials, the I.L.P., the police, and the Church!) The total membership now stands at 7,377. We wish the newspapers and politicians that are constantly expressing alarm at the growth of Communism in this country would duly note the figures, and stop talking nonsense. But we have no great hopes. The "red spectre" is too convenient to politicians needing a peroration and lacking a policy to be laid by mere facts. Yet it is worth noting that the great Communist stronghold of South Wales musters in all 2,300 Communists; all Scotland, including the Clyde, 1,321; London 1,500, and the rest of Great Britain the terrifying total of about 2,250.

The next thing we know some intrepid soul will mount a soap-box in Hyde Park and dare to quote so sensible an advocate of the interests of Labour as old Ebenezer Elliot:

> "What is a Communist? One who has yearnings
> For equal division of unequal earnings."

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TRUCK AND TRUCULENCE.—Mr. Sisley Huddleston, writing from Paris to *The New Statesman,* speaks as follows of a threatened Tariff war between the United States and France:—

There will be no tariff war between France and the United States. The latest notes indicate a desire for a friendly arrangement, and America has abandoned the bullying which marked her earlier challenge to France. That attitude was justified by so-called moral principles. Good Americans, with whom I discussed the matter, became very heated in their denunciation of the French tariff system. They declared that the only fiscal righteousness consists in equal treatment for everybody. They pretended that if the issue were really tested, America would be solid for a single tariff, that the debate would not be merely political, but would become religious, and every pulpit in the country would resound with condemnation of European governments which employ the tariff as a bargaining instrument.

In a purely abstract sense, perhaps, these Americans are right. But it is sheer folly to talk of principles in this connection, when the whole of the United States is surrounded by a particularly high tariff wall. Inside this tariff wall, say Americans, there are no barriers to trade. That, indeed, is a lesson for European nations, but if it were conceivable that Europe should imitate the example of America, and raze the internal European barriers, leaving only a high wall around the Continent in its entirety, then indeed America would have cause of complaint. Theoretically, America has favoured the demolition of all economic frontiers in Europe, and in particular has exhorted France and Germany to an "economic Locarno." The conclusion of an iron and steel pact between France and Germany, and the adoption of other trade arrangements which apply notably to potash and textiles, were greeted with enthusiasm by the American newspapers. It was not until France and Germany entered into commercial agreements which, by admitting German goods into France on special terms, automatically excluded American goods, that the United States began to demur.

Verily, as von Bülow says, in the struggle between nationalities, one nation is the hammer, and the other the anvil. Let us add that the phrase 'economic Locarno' as coined in America would surely refresh the soul of Woodrow Wilson were he alive to-day.

AMENITIES IN PUBLIC LIFE.—The following telegrams were exchanged between the Right Honourable W. L. MacKenzie King, Prime Minister, and the Honourable R. B. Bennett, K.C., on the occasion of the latter being chosen as leader of the Conservative party of Canada. The Prime Minister's message was as follows:—

"I have just learned of your selection as leader of the Conservative party of Canada, and desire to tender to you very hearty congratulations upon the confidence thus expressed in you by the members of your party, and on the distinguished honour which they have conferred upon you."

To which Mr. Bennett replied in these words:—

"Your message is highly appreciated. The generous acceptance of my election as leader of the Conservative party by political opponents brings deep gratification, and I know it will be our common endeavour to serve the interests of our country and maintain the high traditions of British parliamentary institutions."

So fine an observance of the amenities between statesmen must have a salutary effect upon our political manners in general. Canada as a nation should wear the honours of her new estate in the world with commensurate dignity.

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OBITER FOR LADY LAWYERS.—We commend the following opinions concerning the Twentieth Century Woman to members of the Bar who were so discreet as to enter upon the stage of life in this planet in a female rôle.

On his seventy-eighth birthday Sir Edmund Gosse—speaking out of his abundance of knowledge—said: "I think that the women of today are a great advance on what their grandmothers were. I wish, however, they were not quite so boisterous. I find it a little difficult to distinguish who are the men and who the women—the only distinction seems to be the somewhat abbreviated skirt".

Mrs. Sarah Collins—one hundred and six years old—is hardly in accord with the opinion of Sir Edmund. Her view is that: "Girls who go about with skirts up to their knees, with hair cut like a man's and a cigarette dangling from their lips, ought to be smacked and put to bed".