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.

The Nineteenth Annual Meeting of the Canadian Bar Association will take place in the City of Montreal, on the 5th, 6th and 7th days of September, 1934.

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DECLINE OF DEMOCRACY.—Things are not looking well for democracy in our time. We speak of democracy as a form of government in which power rests with the whole body of the citizens. For all of us who believed that the twentieth century would see its advance instead of its decline the recession of it after experiment in countries other than the British world is a melancholy spectacle. As it was ethically sound we thought it might become in time a mode of social living that would lead on to an approximate realization at least of St. Augustine's *Civitas Dei.* But even in Great Britain—its modern seed-field—it is a wilting plant. The growing power of Bureaucracy and the organized tutelage of the proletariat by revolutionaries, both of the home-brew and alien type, are pregnant with menace for the permanence of political institutions as they now exist.

And what must we think of the United States in this connection? The fact is that democracy has never received more than lip-service

there. Notwithstanding the egalitarian rhetoric of the Declaration of Independence, slavery existed in America in 1776 and resistance to its abolition was the cause of civil war of the ugliest kind nearly a century later. Athenian democracy was built on slavery in an age when social philosophers could find a justification for it; no such plea could be put forward for slavery in America. Lincoln wrote in 1855: "When we were the political slaves of King George and wanted to be free we called the maxim that all men are created equal a self-evident truth; but now that we have grown fat and lost all dread of being slaves ourselves we have become so greedy to be masters that we call the same maxim a self-evident lie." So the fact is that democracy has been an unrealized ideal of high-minded Americans and a stalking-horse for fellows of the baser sort in politics and Big Business. It was as a member of the former class that Woodrow Wilson spoke these words: "I believe in democracy because it releases the energies of every human being;" the latter class would so gloss this credo as to make it read: I believe in democracy because it releases the energies of every human being to put it over some other human being. It is, however, only fair to say that their failure to live up to their eighteenth century avowal of equality of social rights has been acknowledged and satirized in the most ample way by the Americans themselves. Their literature is drenched with it. We have heard Lincoln testify against his generation; let us hear James M. Beck speak of the present: "At no time within the memory of living man has Lincoln's ideal of a government of and by and for the people been more openly denied and flouted." Then we have the following thrust by Sinclair Lewis in his latest book: "No character in pre-Prohibition America was quite so friendly with such a variety of people as was the competent bartender. His court was the only authentic democracy America has ever known."

* * The Puritans found political democracy an excellent armour against bulls and bullets on their march towards the New Jerusalem, but they overlooked the fact that a theocracy connotes of necessity a kingdom and failed to perceive that the ballot would not be used there as a symbol of sovereign power.

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EMPIRE'S CHANGE OF COURSE.—Bishop Berkeley's prophecy that the course of empire had in his time gone west to spend itself, and that the last act in its drama was staged when arts and learning became domiciled in America, has been unfulfilled. On the first of

this month, Kang Teh, alias Henry Pu-Yi, was enthroned Emperor of Manchukuo, a new empire in the ancient domain of the Manchus brought into being by the thaumaturgy of the Japanese. The ceremony of enthronement was a spectacle for gods and men—that is to say, men wearing arms. On its religious side the ceremonial taxed the lyrical powers of the young lions of the press. It would have been interesting indeed to witness its climax when "the emperor, clothed in his gorgeous robe of vivid blue and red, raised his eyes to the sky and held aloft for Heaven's consecration a great jade seal which the chief ritualist handed to him." Proceeding with the published account we read, "in awesome silence Kang Teh left the altar and entered a three-ton armoured bullet-proof limousine and returned to the palace for the second part of the ceremonies, brief civil rites for the purpose of announcing the emperor's ascension to the throne." That bullet-proof limousine and its accessory of 50,000 Manchukuo and Japanese soldiers in line to guard the recipient of the favour of Heaven and Japan from misadventure, give us pause. They are not a convincing omen of longevity for Kang Teh, nor are they indubitable proof that the imperial régime inaugurated by him is broad-based upon his people's will. Then again, the vivas of the League of Nations were not audible during the enthronement proceedings.

Our readers are admonished to be careful about the pronunciation of the august monarch's appellatives. Pu-Yi in China is pronounced Poo Yee, and in Japan Foo Ghee; while Kang Teh becomes vocal as Kahng Toe in the former country, and in the latter Co-Toe-Coo. A little irksome this, but a wriggle of one's personal toe will serve as a *memoria technica* whenever we boggle at the official name. It is to be hoped in the new emperor's behalf that the Toe will confine its activities to speech alone. But we may be permitted to wonder why he added "Henry"—so familiar to Western ears—to his unofficial name. It has not had a positively serene history in our royal circles. Charles Laughton has reminded us of late of one royal wearer of the name who anticipated by some 400 years the Hollywood flair for marriage and divorce, and there was an earlier English Henry who found occasion to apostrophize the crown he was about to inherit as a "polish'd perturbation, golden care!" And then, again, his imperial majesty might be startled by the vociferation "O, Henry" when tourists in his domain demand a light form of refreshment now popular in the United States. There's something in a name, no matter what the poets say.

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THE LEARNING OF THE BENCH—One of the *Analects* of Confucius reads in this wise: "When you feel that you know a thing, to hold to the conviction that you know it; and when you feel that you do not know it, to allow that you do not know it—this is knowledge." The wisdom of that apophthegm should sink into the mind of every man who has entered upon public office, especially the judicial Bench. Lord Bacon was probably the last of learned men who might aspire to take the whole field of human knowledge as his own, and even he was but a dabbler in physical science. Since his time knowledge has so enlarged its boundaries that specialization is demanded in order to solve the problems continuously evolved by civilization on the march towards its ultimate measure of perfection. Thus the man who realizes his limitations in respect of any problem submitted to him has *quoad hoc* transmuted his knowledge into wisdom.

The foregoing reflections were induced by a perusal of some very candid observations on the limitations of judicial knowledge by Lord Justice Scrutton in *Butcher-Wetherley & Co.* v. *Norman* (1934), 50 T.L.R. 185. We quote:

"One of the objects of justice is to satisfy the litigants that their cases are fairly and properly heard, and unfortunately some classes of commercial cases are so complex in their nature that a Judge who is not conversant with that class of commercial business has to have a great many explanations made to him in the course of the case as to matters with which he is quite unfamiliar, and so with every Judge. If I were invited to decide a question of conveyancing turning on the law of Property Act, I should display an amount of ignorance which would entirely disgust the lay client and the solicitors appearing before me, simply because they are practised and experienced in such judicial matters, whereas I have not been conversant with that branch of the law."

The learned Judge went on to explain that the necessity for specialization as indicated by him was the foundation for the resolution of the Judges in 1894 to refer commercial cases to selected members of the Bench conversant with commercial matters. And while his observations as we have presented them were in the nature of an admonition to a Judge sitting in Chambers, who had refused to adjourn a summons for directions in an action in the New Procedure List so that the defendant might apply to the Judge in charge of the Commercial List for an order transferring the action from the former to the latter list, yet the import and value of his observations to the Bench in general are such that they should not be allowed to slumber in the reports but should be widely circulated in the more active literature of the law.

Sir George Jessel was able to make a brave show of learning in a great variety of cases, having distinguished himself in his university

course in divers subjects such as mathematics, natural philosophy, vegetable physiology and structural botany; and in addition to his affluence in specialized knowledge he at no time suffered from the blight of the inferiority complex. Great as he undoubtedly was, one of his biographers could say of him that "there have been Judges more learned," and he was guilty of believing that he knew how to play whist when evidence to the contrary was palpable to less well-furnished minds.

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LORD ELLENBOROUGH AND THE DEMAGOGUE.—We are hearing something about sedition in Canadian Courts at the present time, and it serves to remind us of the trial of a demagogue named Hunt before Lord Ellenborough a century ago or so. He was a satellite of Cobbett's, and was derisively called "Orator" Hunt. He was convicted of seditious utterances, and when brought up for sentence was asked if he had anything to say in mitigation of the punishment that might be imposed upon him. Hunt launched upon a thrasonical vindication of his conduct premised by the statement that he had been accused of "stirring up the public by dangerous eloquence." Whereupon Lord Ellenborough dryly observed: "My impartiality as a Judge, calls upon me to say, sir, that in accusing you of this they do you great injustice." Lord Campbell likened the impatience of Ellenborough in dealing with his cause list to a rhinoceros rushing through a sugar plantation, but this incident shows that upon occasion Ellenborough could obey the apostolic injunction to suffer fools gladly.

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CONCERNING ARBITRATION.—In England so long ago as 1927 the Committee on the Law of Arbitration presided over by Mr. Justice MacKinnon presented its report, but reforms based upon the report were only introduced into the House of Lords last month in the form of a Bill. We have not as yet seen a copy of the Bill, but we learn from our English contemporaries that, among other important features of the proposed legislation, power is to be given to arbitrators and umpires to order specific performance of contracts other than those relating to land, and proceedings before arbitrators are to be subject to the provisions of the statutes of limitations in the same way as they apply to proceedings in the Courts.

* * *Apropos* of the subject of arbitration in the large and its advantages and disadvantages as compared with proceedings in the Courts, Mr. Philip G. Phillips writes interestingly in an article entitled "Rules of Law or Laissez-Faire in Commercial Arbitration,"

which appears in the February number of the *Harvard Law Review*. Mr. Phillips reaches the conclusion that arbitration has not been the boon to the commercial world that its advocates affirm. Pointing out that "substantial justice" is the quest of business men who submit their affairs to arbitration, he blandly asks, "Who knows what substantial justice is even at its best?" In summing up, he says:

"It is unthinkable that sooner or later courts will not and cannot be provided that will furnish satisfaction to business men. . . . Perhaps at some time not too far distant, in cases where complicated facts are involved, we may have 'business juries', composed of business men and experts, for ascertainment of business facts by business methods under limited court control in special 'Business Sessions', where courts will act with speed and dispatch, and lay down businesslike rules of law. But until that time, let us make business tribunals a part of a well-balanced judicial system, and assure that they follow our legal heritage. In spite of the cries of some propagandists, we are not ready to scrap that yet—unless they can provide us with a new and better one, and certainly not for one that offers, at best, inspirational or impromptu justice."

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PRACTISING LAW WITHOUT AUTHORITY.—At another place in this number of the REVIEW we publish a contribution by Mr. John R. Snively, of Rockford, Illinois, on the subject of the attempted invasion of the rights of the legal profession in the State of Illinois by corporations having members of the profession on their staff. It is satisfactory to learn from Mr. Snively's article that this predatory enterprise of Big Business at the expense of the Bar has been effectively discouraged by the Courts in certain recent cases cited by him. Mr. Snively very truly says that "Such unauthorized practices would largely cease if it were not for the participation therein by members of the Bar." The Canadian Bar has not been free from invasions of a similar sort and, as our readers know, efforts are being made to suppress them. We would refer our readers to the report of the sub-committee of the Benchers of the Law Society of Upper Canada bearing upon the activities of Trust Companies in this connection, as published in No. 8 of the current volume of the Ontario Weekly Notes.

Mr. Snively is a member of the Committee on Unauthorized Practice of the Law of the American Bar Association, and was Chairman (1930-1933) of a similar committee of the Illinois State Bar Association.

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THE LATE SIR CHARLES NEISH.—Sir Charles Neish, who for the past twenty-five years held the important office of Registrar of the

Judicial Committee of the Privy Council, died suddenly in the early part of February. He was well known to leaders of the Canadian Bar. At the first meeting of the Board subsequent to his death, Lord Blanesburgh, in addressing the Bar, paid the following tribute to the memory of the deceased:

Mr. De Gruyther and Mr. O'Malley, we assemble this morning under the shadow of a great loss. Since the Board sat on Friday Sir Charles Neish has passed from our sight. For twenty-five years he had held the high office of Registrar of the Judicial Committee of the Privy Council. I think only two of those qualified to sit upon this Board when he took office survive; he has, in his long years of devoted service, outlived all the others. Always jealous of the traditions of this Board, made illustrious by the great names which have adorned it in the past, Sir Charles' main ambition was that the inherited traditions should be maintained and exhibited in these days when this Tribunal holds, to a degree perhaps never before exceeded, a place of first influence and authority in the economy of the Empire. In that spirit Sir Charles Neish represented this Tribunal throughout his term of office to all whose lawful occasions brought them here; and he represented it with a dignity, a courtesy, a helpfulness and a gracious but unobstrusive hospitality which commended him to all those who participated in it throughout the whole Empire. To us who sit on this side of the table, he was a wise counsellor; no call upon his knowledge and experience was ever made in vain. He was the friend of us all, whether we sit on this side of the table or, Mr. De Gruyther, on your side of the table; whether to those who came from overseas or to those who spend their lives in this place in the service of the Board. All of us are the poorer for his passing. We mourn the loss of a great public servant and a dear personal friend.

Mr. De Gruyther expressed the regret of the Bar in the following words:

My Lords, speaking first on behalf of the Bar, of whom I happen to be at present the senior member here, I would desire to associate myself with all that your Lordship has said about Sir Charles Neish. I desire to add a few words and, though I can hardly say that I have any express authority, I am sure that what I am saying now represents the wishes and the views not only of the members of the Bar, but of the solicitors and all the persons who have been in any way connected with the practice in this Court, and with Sir Charles Neish personally. So far as Sir Charles Neish was concerned, the vast majority of persons connected with this Court could only regard him as the Registrar *par excellence*, for they knew no other. When you have long, close and cordial associations terminated, it must of necessity cause regret. When those associations are severed by sudden death and not by retirement, the regret is turned into sorrow. The duties which a Registrar has to perform are many and varied and the difficulties which he encounters are daily. We recognise and appreciate that the smooth and efficient administration of the Department of which Sir Charles Neish had charge was due very largely to his unfailing patience, tact and courtesy. We deplore the death and mourn the loss, so far as many of us are concerned, of a personal friend.

Mr. O'Malley spoke as follows:

My Lords, may I, on behalf of the Agents practising here, and as one who knew Sir Charles ever since he took office, associate myself with what has been said by your Lordship and by Mr. De Gruyther. Our duties brought us into contact with Sir Charles Neish at all times and in all seasons. He was not only courteous and helpful, but he was always kind; he treated us as personal friends; he was always accessible and he was ever anxious to assist us in our difficulties. Above all, he had about him a rare atmosphere of happiness, and the distinction of being able to impart it to others. Indeed, he made our work here not so much a business as a pleasure. We mourn the loss of a very willing counsellor and a very real friend.

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MANITOBA LAW SCHOOL.—Mr. T. W. Laidlaw of Winnipeg, has been appointed by the board of trustees of the Manitoba Law School to the post of Dean, made vacant by the resignation of Mr. E. H. Coleman, K.C., now Under-Secretary of State of Canada. Mr. Laidlaw was called to the Bar of Manitoba in 1920, and after practising his profession for two years entered the Attorney-General's department. He discharged the duties of Crown Prosecutor for five years, when he became Administrator of Succession Duties. On the transfer of the natural resources of the Province by the Dominion in 1930, he was appointed Assistant Deputy-Minister of Mines and Natural Resources. Mr. Laidlaw has also succeeded Mr. Coleman as Secretary of the Canadian Bar Association. His varied experience in these practical fields, together with his graduate courses in the University of Manitoba and the Manitoba Law School, furnish him with every qualification for successful administration of the office of Dean of the latter institution.

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DEPUTY ATTORNEY-GENERAL FOR ONTARIO.—Mr. Ira A. Humphries, K.C., has been appointed Deputy Attorney-General for Ontario to fill the vacancy in that office occasioned by the death of Edward Bayly, K.C. Prior to his appointment Mr. Humphries held the position of senior solicitor in the Attorney-General's department.

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THE LATE MR. JUSTICE ARMOUR.—The Honourable Eric Norman Armour, one of the Judges of the High Court of Justice for Ontario, died suddenly at his home in Toronto, on the 11th instant at the age of fifty-seven. He had not completed a full year of his tenure of office, having been appointed on the 17th of March, 1933.

The deceased Judge was called to the Bar in 1902, and joined the Toronto firm of Bristol, Armour and Bayly. Having had military training, when the call came for service overseas in the Great War Mr. Armour proceeded to France with the rank of Major in the 95th Battalion. Shortly after his arrival at the front, he was appointed Court Martial officer, and served with the Canadian Corps in that capacity until after the occupation of Germany by the Allies. On his return to Canada he was made a King's Counsel in 1921. In 1925 he was appointed Crown Attorney for Toronto and the County of York, a position which he held until his elevation to the Bench.

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JUDICIAL APPOINTMENTS.—Mr. John Alexander McEvoy, K.C., of the Toronto Bar, has been appointed a Judge of the High Court of Justice for Ontario.

The following gentlemen have been appointed to the Bench of the Superior Court, Montreal District: Cecil Gordon McKinnon, K.C., Alfred Forrest, K.C., (both of the Montreal Bar) and J. A. Guibault, K.C., (of the Joliette Bar). These appointments were made to fill vacancies in the Court occasioned by the death of Mr. Justice Brossard and of Mr. Justice Martineau and the resignation of Mr. Justice Campbell Lane.

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BENCH, BAR AND THE JURY.—We clip the following story from the news columns of the daily press:

The case was in its second day with no prospect of its conclusion in sight. Joseph Lamoureux was seeking $10,305 from J. A. Fortier as compensation for an alleged 40 per cent. incapacity resulting from an automobile crash.

It looked as if the 12 good men and true would have to remain until after the dinner hour. A doctor was on the stand testifying as to what, in his opinion, constituted the percentage of incapacity of the plaintiff. The court took a hand in the questioning.

"What would it be," Mr. Justice C. A. Wilson asked, "if I had a leg cut off?"

"That, My Lord," came the reply from counsel in the case, "would be crippled justice."

"Then what would it be," asked the Court with a twinkle in his eye, "if a lawyer had his tongue cut off?"

But one of the jurymen had had enough. "That, My Lord," he droned, "would be a service to humanity."