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.

PROFESSIONAL ETHICS.—It was a pleasant thing to read in the newspapers a day or two ago that under the will of a deceased California lawyer a large sum of money was bequeathed to two of his former clients for the purpose of reimbursing them for losses sustained in investments made upon his advice. We are not informed that the misadventure was attributable to anything more than an error in judgment on the part of the deceased, and in that view his testamentary conduct towards his clients has a very fine ring about it. Unfortunately the daily press does not often chronicle such items, on the contrary it is the unhandsome doings of the Bar that we hear most about, and its members are to blame if public confidence in its ethical standards is being shaken. In illustration of this we have before us at the moment a copy of a Canadian newspaper containing an editorial complimenting Sir James Aikins for what he has done through the instrumentality of the Canadian Bar Association to give the profession in Canada organization, solidarity, and a common code of ethics; and yet the article in its course touches upon a particularly flagrant case of professional misconduct and then proceeds to warn the Bar that if it desires to retain its ancient privileges it must set its disciplinary mechanism in motion and 'turn the rascals out.' Criticism of the profession of advocacy is found in literature ever since Aristophanes wrote his comedies, and it is useful that its members should be reminded from time to time of the

danger of deterioration. We wish that a little book written by a relative of Henry O'Brien, K.C. (of Toronto), and published in the year 1842 in London, could be read by every law student. It deals with the conduct of the lawyer both as a member of a noble and responsible profession and as a citizen of the State. The Introduction was written by a friend of the author, and we pause to quote a passage from it: "In the composition of this book the author had no thoughts of fame, or what is called literary success. His impulse was simply the love of justice: his only motive was the desire to assist others in the performance of their duty." The times are ripe for a renascence of literature of this kind.

In the meanwhile it is comforting to learn that the Conference of Representatives of the Governing Bodies of the Legal Profession in the Provinces of Canada at its next meeting will appoint a committee to consider the principles and practice of professional discipline.

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FOSTERING A NATIONAL SPIRIT.—Speaking as a guest at the banquet of the Dominion Commercial Travellers' Association—a non-political gathering—held in Montreal on the 19th ultimo, the Honourable R. B. Bennett, K.C., emphasized the duty of the individual citizen to take his share in fostering the welfare of the Dominion, and to keep the interests of the nation before him in his daily work. Such a duty is, of course, a most important one at the present time. He said:—

> We must, as we go forward day by day, realize that we as men do not live solely unto ourselves. So as we go on our work from day to day, whether as commercial men, doctors, lawyers, traders, merchants or average citizens, each of us makes his contribution to the welfare of this democracy, and the welfare of this democracy is the most important matter that can engage the thought and attention of men who call themselves Canadians. And if you, in your work, as it goes on, tiresome, worrying as it is, as the days go by, if you can only have this thought in mind, it will make your toil lighter. It will make your burden easier. It is by this, that whatever avocation you may be engaged in, whatever work you may do, if you are supplying honestly the requirements of other sections of this country, you are making your contribution to the development of Canada, our beloved country, to whose toast I am now responding. You are making your contribution just as truly, although perhaps not as importantly, as those who sit at the receipt of custom or endeavour to discharge great duties in the Parliament of the country. For in a democracy such as this, each young man, each middle-aged man, each old man and each woman must make his and her contribution to the welfare of the State.

CONCERNING LIEUTENANT-GOVERNORS.—It appears from a minute of a meeting of the Committee of the Privy Council of Canada, approved by His Excellency the Governor-General, on the 30th June, 1927, that gentlemen who occupy the office of Lieutenant-Governor in any of the Provinces of Canada are entitled to the designation "Honourable" during their tenure of office and are also entitled to retain it for life after their term of office has expired. Authority is also given for applying the designation "Honourable" not only to those who were occupying the office of Lieutenant-Governor on the 30th June, 1927, but also to those who formerly held such office and are still living.

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RETIREMENT AGE OF JUDGES.—In the course of an interesting debate in the House of Lords on the retirement age of Judges, Lord Buckmaster said that no Judges should be appointed who were more than fifty-five years of age, because it took them fifteen years to qualify for a pension, and they were seventy before they retired. Old age, he said, creeps on at seventy, and the doors of the five senses are being closed. Lord Darling, who retired some four years ago when seventy-four, took part in the debate. He did not seem prepared to admit, as King Lear was adjured to admit, that in his case "Nature stands on the very verge of her confine", for he claimed that he was still competent to carry out "the milder forms of judicial work such as on the Judicial Committee of the Privy Council". Personally, we should hesitate to so characterize the work discharged by the Judicial Committee, but when we come to debate the point of his observation we must not forget that Lord Darling has always been a wag.

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COINS A NEW WORD.—In trying a case recently in the King's Bench Division, involving a claim for damages by a cyclist against a motorist, Lord Hewart blandly asked counsel for the plaintiff if the London to Southend arterial road suffered from "automobiliousness". Counsel, recognizing the appositeness of the coined word, assured his Lordship that it did. Had exception been taken to the Court's enterprise in enlarging the already enormous vocabulary of the English tongue, we can imagine the Lord Chief Justice smilingly quoting Horace by way of vindication:—

"Licuit, semperque licebit,
Signatum praesente nota producere nomen."

APPOINTED TO THE SENATE.—The Honourable N. K. Laflamme, K.C., of the Montreal Bar, has been appointed to the Senate of Canada to fill the vacancy caused by the death of the Honourable L. A. David.

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DEATH OF HENRY J. ELLIOTT, K.C.—The news of the sudden death of Henry J. Elliott, K.C., of the Montreal Bar, on New Year's Day, caused widespread regret. In his profession as well as in fraternal and philanthropic circles throughout Canada, Mr. Elliott was held in high esteem. His kindly spirit endeared him to all who knew him. He was an ardent worker in the interests of the Canadian Bar Association.

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A FRESHENED FRESCO.—George Frederick Watt's great fresco in the Hall of Lincoln's Inn is being restored to its original condition. For some years, since 1890, in fact, when the last rejuvenation took place, the grime and soot of London, cobwebs and the dust of years have been permitted to accumulate on this great work of art, obscuring its beauties and placing almost beyond recognition the features of the various subjects.

This work was finally completed in 1859, having been a gift of the artist to the Benchers of Lincoln's Inn, but when the work was finished so great was the appreciation of the donees that they presented the artist with a purse of £500 and a testimonial cup, which, by the way, speaks well for the Bar in its relation to Art. It was originally named "The School of Legislation" but this title was later changed to "Justice—A Hemi-Cycle of Law Givers". The idea was to commemorate the great law givers of the past from Moses to Edward the First.

What makes the fresco doubly interesting, aside from its value as a work of art, is the fact that Watts took as models many of his friends and contemporaries. Thus Tennyson is the original for *Minos;* Sir William Vernon Harcourt for *Justinian;* Holman Hunt for *Ina;* Sir Charles T. Newton for *Edward the First;* E. Armitage for the *Earl of Pembroke* and James Spedding for one of the monks.

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BENEATH THE CARILLON.—By the time this number goes to press, Parliament will have reassembled for the second session of the 17th Parliament, and the broaching of new legislation will have

commenced. This is, of necessity, a matter which vitally affects the lawyer. One subject that will likely come up again is that of Divorce, and the turning over of Ontario cases to the courts of that province. Apparently, a large proportion of the divorce cases come from Ontario, and the work of the Senate Committee has increased to such an extent that it feels something will have to be done in the matter. Last session Bill, B.6, being an act to provide in the Province of Ontario for the dissolution and annulment of marriage, was introduced in the Senate and passed by that body, but it was never taken up by the House of Commons. The press forecasts its second introduction.

The new rules of the House of Commons have been printed and sent out to the members, so that they will be more or less familiar with them when they return to their work. One of the principal changes is the limitation of speeches to forty minutes, and the elimination of midnight and "small hour" sessions. The Clerk of the House, M. Arthur Beauchesne, K.C., carrying on the tradition established by his forerunners in office, has published a second edition of his *Parliamentary Procedure*. The members will, therefore, be well fortified with rules and the precedents of procedure for the coming session.

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THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA.—A report of the proceedings of the tenth annual meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, held at Toronto during August last, has just been issued. The idea of holding such conferences had its origin in the United States where, since 1892, the National Conference of Commissioners on Uniform State Laws has met annually, and has accomplished excellent work in forwarding the progress of uniformity in the various state laws.

On the recommendation of the Council of the Canadian Bar Association, several of the provinces of Canada passed statutes providing for the appointment of commissioners to attend an interprovincial conference for the purpose of promoting uniformity of legislation. The first meeting was held in Montreal in 1918, and at this meeting, was constituted the Conference of Commissioners on Uniformity of Legislation in Canada. Since then the Conference has assembled annually. It is pointed out by the Honourary President of the Conference in his annual address that:—

Provincial governments do not seem to be conscious of the fact that divergencies and variations in provincial legislation and laws on the same subjects and similar principles are making easy federal encroachment on provincial rights.

The fact that the Province of British Columbia has adopted and passed all the uniform acts recommended by the Conference, while the other provinces have not, was also referred to, and the fact was stressed that this, in itself, did not tend to uniformity, but to even greater divergency.

The following table, taken from the report, shows to what extent, if any, each model statute drawn by the Conference has been adopted by the provinces:—

1920. Bulk Sales Act (amended, 1925): adopted in Alberta (1922), British Columbia (1921), Manitoba (1921) and New Brunswick (1927).

1920. Legitimation Act: adopted in British Columbia (1922), Manitoba (1920), New Brunswick (1920), Ontario (1921), Prince Edward Island (1920), and Saskatchewan (1920). Provisions similar in effect are in force in Alberta, Nova Scotia and Quebec.

1921. Warehousemen's Lien Act: adopted in Alberta (1922), British Columbia (1922), Manitoba (1923), New Brunswick (1923), Ontario (1924), and Saskatchewan (1922).

1922. Conditional Sales Act (amended, 1927): adopted in British Columbia (1922), and New Brunswick (1927).

1923. Life Insurance Act: adopted in Alberta (1924), British Columbia (1923), Manitoba (1924), New Brunswick (1924), Nova Scotia (1925), Ontario (1924), Prince Edward Island (1924), and Saskatchewan (1924).

1924. Fire Insurance Policy Act: adopted (except statutory condition 17) in Alberta (1926), British Columbia (1924), Manitoba (1925), Ontario (1924), and Saskatchewan (1925).

1924. Reciprocal Enforcement of Judgments Act (amended, 1925): adopted in Alberta (1925), British Columbia (1925), New Brunswick (1925), and Saskatchewan (1924).

1924. Contributory Negligence Act: adopted in British Columbia (1925), New Brunswick (1925), and Nova Scotia (1926).

1925. Intestate Succession Act (amended 1926): adopted in British Columbia (1925), Manitoba (1927) with slight modifications, and New Brunswick (1926). Provisions similar in effect are in force in Alberta.

1927. Devolution of Real Property Act.

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THE OSCAR SLATER CASE.—Some months ago when the Sacho and Vanzetti sentences were being criticised in the press at home and abroad, the case of Oscar Slater was frequently referred to as being an instance where British justice, for once, had gone astray. Now we learn through the papers that Oscar Slater, who has been in

prison since 1909 on a commuted death sentence for murder, has recently been released on license. Ever since his trial and sentence efforts have been made on his behalf owing, as it was alleged, to the unsatisfactory nature of some of the evidence. In fact, an investigation was held in 1914, but it does not appear that this had satisfactory results. In 1909 Slater was convicted in Scotland by a majority verdict of nine to six; in England, under such circumstances, there would, necessarily, have been a new trial and the possibility of an acquittal. A special bill has been introduced in Parliament to enable the case to be considered by the Scottish Court of Criminal Appeal, and it is described as "a bill to amend the provisions of the Criminal Appeal (Scotland) Act, 1926, with regard to the power of the Secretary of State to refer a case, or any point arising thereon, to the High Court of Justiciary".

It might be noted in connection with the case, that the interest of Sir Arthur Conan Doyle was so aroused in behalf of the prisoner that he wrote a book in which he alleged that great injustice had been done. In his *Memories and Adventures* the well known author writes as follows:—

> I went into the matter most reluctantly, but when I glanced at the facts, I saw that it was an even worse case than the Edalji one, and that this unhappy man had in all probability no more to do with the murder for which he had been condemned than I had. I am convinced that when on being convicted he cried out to the judge that he never knew that such a woman as the murdered woman existed he was speaking the literal truth.

The facts of the crime were as follows:—Miss Gilchrist, an elderly woman, was murdered in her flat, while her servant maid was out for about ten minutes on an errand, and her head was beaten to pieces by some hard instrument. The noise of the act aroused the neighbours, and one of them, and also the victim's maid, saw the murderer as he left the flat, both describing him as a young man. The only thing missing was a diamond brooch. The police description of the killer did not tally completely with Slater's appearance. It was soon discovered that Slater had pawned a diamond brooch, and he was arrested at Glasgow where he had gone, preparatory to sailing for America. As it turned out, the brooch he had pawned had been in his possession for some years, and had no connection with the murdered woman. His explanation of his attempted flight was that he was trying to elude a woman with whom he had been living. In spite of apparent discrepancies, however, a case was made against him. At the trial he was, apparently, none too well defended, and according to Sir Conan Doyle, some statements made by the prosecution were very inexact, and went before the jury uncorrected. He

was condemned to death, the scaffold was erected and his commutation arrived just two mornings before the actual carrying out of the sentence. The decision of the Court of Criminal Appeals will be watched with interest.

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PUBLICITY AND DIVORCE.—*The Daily Mail* has sown the seed which, it is predicted, will germinate in a general and widespread agitation in the press to remove some of the restrictions on the reporting of Divorce cases imposed by the Judicial Proceedings, (Regulation of Reports) Act. The basis of the campaign is to be the claim that such censorship has resulted in a great increase in the number of cases instead of a diminution as was predicted. On the other hand, it is pointed out, quite aside from the influence of any such act, that there has been a steady increase in the number of cases for some years past. There were, according to *The Saturday Review*, 202 more cases in 1926 than in the previous year. It is further claimed, in the interests of the press, that publicity acts as a deterrent. It should be remembered, however, that it is not the true purpose of justice that only those who are willing to see their names flaunted in the newspaper headlines, should be the ones to obtain it. It will be interesting to note the outcome if the predicted agitation takes place.

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PAUSE BEFORE YOU PLEAD.—In one of the King's County Courts, in New York State, a prisoner was recently charged with attempted petit larceny. After thirty days incarceration his trial came to pass, he pleaded "not guilty", the evidence was heard and the jury retired to consider its verdict. During the absence of the jury, panic must have seized the prisoner or else the pangs of conscience troubled him, for he suddenly changed his plea to "guilty" and this was duly recorded and entered by the Judge. The Judge's pen, however, had no sooner been lifted from the paper and the ink barely dried, than the jury, coming back to the court room, returned a verdict of "not guilty". The Judge held that, notwithstanding the verdict of the jury, the prisoner's plea would have to stand and sentenced him to thirty days in jail, sentence to be retroactive, and accordingly, he was freed. And so, once more, justice was tempered with mercy and common sense.

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A NEW ANGLE ON THE QUESTION OF AMERICAN JUSTICE.—Not only the Judges and the lawyers, but the people themselves, are

equally culpable for whatever may be wrong with the Law Courts of our great neighbour to the south, is the opinion of Sveinbjorn Johnson, Professor of Law at the University of Illinois and former Associate Justice of the Supreme Court of North Dakota, contained in an address delivered recently to the judicial section of the Illinois Bar Association.

The Bar has imposed on itself a code of ethics which hedges it about with severe responsibilities, and imposes penalties for non-observance; it has, in fact, gone further than this, by bringing about the passing of legislation regulating its relations with the public. It should be remembered, too, that this legislation was passed not at the instance of the layman, but through the efforts of the lawyer himself.

Professor Johnson regards the public as the base of a triangle of which the other two sides are the Judiciary and the Bar. "The mental attitude of a large proportion of the American people towards the law is fundamentally the greatest obstacle in the way of an effective and efficient administration of justice, both civil and criminal," is a serious indictment, and, if true, strikes at the root of the whole difficulty so much discussed of late in the American press. Professor Johnson discusses concrete cases of various candidates for public office who, known to the public, had prison records, and deduces from the large votes polled by them the lack of moral responsibility in the public at large, and particularly in those who will not trouble themselves to go to the polls on election day.

Could not the whole matter be explained by reference to the constitution of the United States which imposes on the electors the responsibility for the selection of its Judges by recourse to the ballot, and impresses upon them that their return to office depends upon the favour of the very people over whom they sit as Judges? It is, perhaps, asking too much of human nature.

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CANADIAN INSTITUTE OF INTERNATIONAL AFFAIRS.—A Canadian Institute of International Affairs has recently been organized. The objects of the Institute are to promote through study, discussion, lectures, public addresses and other means, an understanding of international questions and problems, particularly in so far as these may relate to Canada and the British Empire, and to promote through the like means an understanding of questions and problems which affect the relations of the United Kingdom with any other of His Majesty's Dominions, or of the Dominions with one another.

It is proposed to affiliate the Canadian Institute with the Royal Institute of International Affairs, whose headquarters are at Chatham House, London, the gift of Colonel R. W. Leonard to the Institute.

The first President of The Canadian Institute is the Right Honourable Sir Robert Borden, G.C.M.G. It speaks well for the organization that it has made such a choice. Sir Robert Borden's wide experience in international affairs and his great knowledge of constitutional questions should prove of inestimable value in such an undertaking. And it is, further, a tribute to the President that he has seen fit to undertake such a task.

Groups of the Institute have already been formed at Winnipeg and Montreal. Further groups are in process of formation at Ottawa, Toronto and Vancouver. Now that Canada has taken her place in The League of Nations, Canadians will need more than ever to keep in touch with, and study, international questions. The Canadian Institute of International Affairs would appear to be a step in the right direction.

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POLITICS AND LETTERS.—Politics and letters would seem, at first glance, to be too widely differentiated to be linked together and practised by one and the same person. On investigation, however, the contrary turns out to be the truth. Throughout the ages, beginning with the days of ancient Greece and extending into our own era, statesmen and politicians have also held sway in the realm of literature. That wise Athenian statesman, Solon, devoted all his leisure hours to the cultivation of poetry, and the few fragments that have come down to us are imbued with simplicity and vigour. England had Bacon, statesman, lawyer and philosopher; Sir Thomas More, statesman, lawyer and man of letters; Sir Walter Raleigh, Burke and Macaulay. Turning to a later age we find Disraeli, Morley, Gladstone, Sir Edward Grey and a host of others.

In our own country one would imagine, perhaps, that evidence of dual talents would be lacking. But, here, once again, this is not so. That famous humourist, Judge Haliburton, familiarly known as *Sam Slick*, was also a politician and a lawyer. Then there was that tragic figure in our history, Thomas D'Arcy Magee; his addresses exhibit deep thought, wide reading, and a power of expression that is fired with poetic ardour; while his poetry shows the vigour of his personality and the strength of his imagination. Like Magee, the Honourable Joseph Howe combined the qualities of statesman

and man of letters. His poetry, although not to be ranked with the greatest, is pleasant in style and flows in easy rhythm. His addresses did a great deal towards the fostering and encouragement of literature at a time when such stimulus was urgently needed.

Coming to the present day, the Right Honourable Sir Robert Borden, G.C.M.G., has written studies on the constitution of our country that show the wide range of his reading and the deep thought he has given to his subject. He has also given courses of lectures at the Universities of Toronto and Oxford which will have their effect upon the rising generation. It is pleasant to think of such a man as Sir Robert Borden devoting his time and energy to such excellent ends.

Our present Prime Minister, The Right Honourable W. L. Mackenzie King, C.M.G., LL.D., aside from his political labours, shows great versatility in the realm of letters. He has written an essay on Heroism, a study of the relationship between capital and labour entitled, *Industry and Humanity*, and last month there was issued from the MacMillan Press a compilation of his speeches, *The Message of the Carillon and other Addresses*. The volume contains no speeches relating to political controversy so they can be read and treated as literature solely. They cover a wide range of subjects exhibiting a deep insight into human nature, a felicity of phrasing, at times, that makes the reader return to certain passages and mark them for future reference, and a love of our country, its fields and woods, its lakes and mountains, and all the simple surroundings of childhood days that are a bond with the past and a benediction on the present. It is a good thing that this tradition—the association of letters and politics—is being continued in our country.

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CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE.—The Division of International Law of the Carnegie Endowment for International Peace announces two classes of Fellowships for the academic year 1928-1929. *Teachers' Fellowships* will be awarded to applicants who have taught International Law or related subjects for at least one year; the stipend attached is $1500.00. *Students' Fellowships* will be awarded only to graduate students holding the equivalent of a Bachelors degree; the stipend is $1000.00.

In general, a knowledge of the elements of International Law, and a good knowledge of history are necessary, as well as two modern languages. Applicants who hold a degree in law or who have otherwise acquired a knowledge of law as a system, will be

preferred in the award of the fellowships. Any one interested should write to The Committee on International Law Fellowships, 2 Jackson Place, Washington, D.C., U.S.A.

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MEDICAL PRIVILEGE.—According to *The Law Journal* a member of Parliament, Dr. Graham Little, has obtained leave to introduce in the House of Commons, under the ten minutes rule, a bill to provide that certain communications between medical practitioners and their patients shall be privileged from disclosure in evidence. What has apparently brought the matter to a head is the fact that the Ministry of Health has for some years publicly invited persons suffering from venereal disease to submit themselves for treatment at clinics under a promise of secrecy. In a case, however, which arose some months ago, Mr. Justice McCardie ruled that regulations such as these in no way affected the legal position, and that medical men were bound, in spite of the fact that the patient had relied on the promise of secrecy, to answer questions as to the complaint from which the patient had suffered.

Legal professional privilege, it was pointed out by Lord Brougham in 1833, exists merely to further the interests and administration of justice. If this privilege were not allowed, a client would be deprived of professional assistance, and forced to rely on his own legal resources. It is stressed by those opposed to extension of the privilege that such grounds do not exist in the case of medical or spiritual advisers. To confer such an immunity upon the doctors and the clergy would, in many cases, defeat the ends of justice. Medical evidence, particularly in criminal cases, is essential in order to make certain that justice shall be done.

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ORDEAL BY BATTLE REVIVED.—One of our correspondents has sent us the following newspaper item describing a rather amusing incident in an American Court Room:—

> Three men were being tried for vagrancy in Yuma (Arizona) police court when their attorney ventured to assert that Yuma was "wide open" to gambling and liquor. The chief of police disputed his statement, and demanded a chance to fight him. The Judge thereupon declared the court in recess, and the sheriff was appointed referee. A space was cleared in the court room, and the ordeal by battle began. It ended by the jury declaring the policeman the winner and acquitting the attorney's clients on the charge of vagrancy.