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.

ANNUAL MEETING OF THE C.B.A.—The REVIEW has been obliged to go to press very early this month, and for that reason it was impossible to publish any account of the proceedings of the Thirteenth Annual Meeting of the Canadian Bar Association, which took place at Regina on the 29th August and two following days. Some extended reference will be made to this meeting in our number for October.

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RELIEF AGAINST BUREAUCRACY.—The clamour for reform in legal proceedings against the Crown in England at the present time is largely due to the impatience of the people with a bureaucratic system that came out of the War and is subverting ideas of government that have prevailed since the autocracy of the Stuart dynasty was overthrown. It isn't the King now but rather he who bears the illusive title of 'Civil Servant' who wreaks his irresponsible and sovereign will upon broken-spirited Englishmen. John Bull's countenance, ruddy as we used to know it with the sun and wind of

freedom, is becoming etiolated in the mirk of the *Droit Administratif.* Professor Kennedy discussed this subject luminously in our May number, and the *Saturday Review* is now ventilating it in a series of articles under the title of "The State and the Subject."

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TEACHING THE YOUNG IDEA.—The recent action of the Executive Committee of the Boy Scouts of Cleveland, Ohio, in instructing the boys to address any woman found smoking in public in the following manner: "Pardon me, madam, but don't you know that smoking cigarettes coarsens one and detracts from the ideal of fine motherhood" shows that there is absolutely no limit to the crass vulgarity of the middle-class American or the tyranny that his pseudo-morality induces him to exercise over other people. He merits all the contemptuous ridicule that his saner compatriot Sinclair Lewis showers upon him in "Main Street" and "Babbitt." If cigarette smoking "coarsens" woman how immeasurably more is a boy coarsened by being taught to insult a woman in the enjoyment of that civil freedom guaranteed to the people of Ohio forever in the famous "Compact of 1787" by which the United States Government sold the territory of the future State to the Ohio Company of Associates. Heaven defend Canada from being Americanized after this fashion! If any Boy Scout attempted such an unbecoming gesture to a woman in this country we imagine he would have his breeches very thoroughly dusted for him by any male bystander.

Smoking in public by a woman may not be an edifying spectacle to those who survive from a time when social convention kept pace with the law in restricting the freedom of the female sex; but it is not nearly so offensive to people of refinement as the habit prevailing amongst women in the United States of perennially chewing malodorous gum in public. Yet we have heard of no counsel to the Boy Scouts in this regard.

We mention this action on the part of those who control the Boy Scouts of Cleveland in no spirit of idle censoriousness. There is more or less contact between the Scout organizations of the United States and Canada, and consequent danger of undesirable American activities being introduced here. The goal of Scout training should be to make the boy a gentleman, and our acquaintance extends to many Americans who might stand as fitting examples of conduct to boys the world over. But to imitate the methods of the "100 per cent. American" uplifters would do violence to the traditions of

good taste in Canada. Many years ago James Russell Lowell regretted the passing of the old patricianship of Massachusetts and Virginia, the loss of the period when cosmopolitanism "would not allow bigotry to become despotism. Manners were more self-respectful, and therefore more respectful of others. . . We had not then seen a Governor in his chamber at the State House with his hat on, a cigar in his mouth, and his feet upon the stove." We wonder what Lowell would have thought of the manners and ideals of the mass of his countryman at the present time.

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TESTING THE JUDICIAL QUALITY.—A writer in the *Manchester Guardian* recently commented on the small amount of ceremony that marks the advent of a new Judge upon the English Bench and contrasts it with the solemn formalities surrounding appointments to the judiciary of Scotland. We are told that it is still necessary for a nominee to the Court of Sessions to 'pass his trials' —a very exhaustive test of competency in the old days and to-day not devoid of alarms for those who are called upon to face the ordeal. It seems that the nominee bears the ominous title of 'Lord Probationer' until his fitness is established in the customary way. A recent instance is cited in which the L.P. after presenting his commission was required to hear two actions and to report his opinions to their lordships of the Court. Having satisfied his future brethren that he was not one who would make judgment a byword among men, the presiding Judge invited him to take the oaths of office.

We hope it will not be ascribed to midsummer madness at the time of writing if we make the suggestion that it would not be a bad idea to adopt this Scotch practice in order that the present high standard of judicial efficiency in Canada may be preserved. If the existing inadequate scale of remuneration for the members of the Bench is maintained and leaders of the Bar reasonably decline appointment, then there might well be some test of competency prescribed for those who seek the judicial office and sacrifice nothing when they get it.

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LAW AS SOCIAL SERVICE.—In the course of a recent address on the subject of the duty of the lawyer to the State in virtue of the peculiar obligations of his profession, the President of Boston University gave expression to ideas which are not new in the literature of

legal ethics but constantly require re-statement and new emphasis. We quote:

> Rightly understood the legal profession is a social service profession. If the nation is to endure, lawyers must become social servants primarily rather than chiefly the personal servants of individuals and corporations. . . . Let us have here men of brains and character; men of unimpeachable integrity and unsullied reputation; men who will not surrender to the commercialized conception of the profession, but who will hold themselves as promoters of the public weal; men who will hold fast to that which is good in the past and who at the same time will consecrate themselves to the working out of the divine idea of progress.

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ONE HUNDRED YEARS YOUNG—The London *Spectator* is the oldest of our exchanges. It celebrated the centenary of its birth on the fifth of July. There is nothing for it to be ashamed of in its long career, and much from which the whole British world has derived advantage. Wisdom is with the ancient, so we read in the Book of Job. The *Spectator* is at this moment running a series of articles on "The Younger Point of View."

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THE IRISH CIVIL SERVANTS.—Our readers will now have a more intimate interest in the claim for compensation of those civil servants who, before the establishment of the Free State in 1921, had been allotted to Ireland and were subsequently transferred to the Free State with the right of retirement. The whole question has been specially referred by the British Government to the Judicial Committee of the Privy Council, under sec. 4 of the Judicial Committee Act of 1833, for advice as to whether the proposed payment of compensation to the retired officials is a payment of compensation within the meaning of Art. 10 of the Free State Treaty of 1921. At the time of writing we learn that the Right Honourable the Chief Justice of Canada will sit as a member of the Judicial Committee on the hearing of this reference.

It will be remembered that in the case of *Wigg* v. *Attorney-General for the Irish Free State*[1] the Judicial Committee decided that where the two appellants had been established civil servants of the Crown at the time of their transfer to the service of the Irish Free State and had been subsequently retired on allowances which they claimed to be inadequate, they had a legal right, under Act I

[1] [1927] A.C. 674.

of 1922 of the Irish Free State, to the benefit of Art. 10 of the Treaty enforceable in the Courts of that State; and that as no committee had been set up, the duty of ascertaining the amount of compensation payable to appellants fell upon the Courts. Furthermore, that the appellants could assert their rights by action against the Attorney-General of the Free State. This finding of the Judicial Committee has been subjected to much criticism because of some error of fact alleged to have been made by their lordships. In a debate on the case in the House of Lords it was suggested—we think by Lord Birkenhead—that the decision should be overruled by statute. Lord Reading suggested as an alternative that the Judicial Committee rehear the case and reverse its former decision. In the result the Government has made the reference as above stated, stipulating that the decision given thereon would not affect the judgment obtained by the two appellants in the *Wigg* case or their rights thereunder. The situation is rather a peculiar one, but in the wisdom of the British Government it is the only way to learn what should be done in common justice to all other claimants than those affected by the decision in the case referred to.

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POLICE CONTROL.—We publish in this number of the REVIEW a short but interesting article by Mr. R. Andrew Smith, K.C., Law Officer of the Executive Council of Alberta, on the subject of Police Control. Mr. Smith's suggestion of provincial government control, by commission, of all the police within the several provinces of Canada in order that uniformity in equipment, organization and discipline be secured is a constructive one at a time when such an institution as the London police—hitherto regarded as well-nigh perfect in its methods—has lost the confidence of the public of the metropolis, and Parliament has ordered an enquiry by Royal Commission into the police system and its operations throughout the length and breadth of England.

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EXAMINATION OF A WITNESS ON PENDING MOTION.—Mr. G. F. Henderson, K.C., calls our attention to the fact that the note upon the judgment of Mr. Justice Orde in the case of *Rene* v. *Carling Export Brewing & Malting Company* appearing in the May number of the REVIEW[1] rather misses the gist of the decision. He points

[1] 6 C. B. Rev. 409.

out that more careful reading of the judgment shows that Mr. Justice Orde did not anywhere decide that it was necessary that there should be an affidavit filed in support of an application to examine a witness on a motion under Rule 228. In the case in question, the motion was based on an affidavit alleged to have been filed but which had not been filed, and which so far as the learned Judge could ascertain, had never existed. The result was that there was no material in support of the application and the nature of the action was such that the mention of the affidavit in the notice of motion and the failure to bring it forward, seemed to necessarily indicate bad faith. Under the circumstances, it seemed rather obvious that there was an attempt to use the process of the Court in an improper way and it is not easy to understand how any other result could have been reached by the learned local Judge, whose decision was upheld by Mr. Justice Orde.

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THE BLIGHT OF ASIA.—Sir Frederick Whyte spoke a profound truth when he said a short time ago that a great deal of the politics of the world for the next generation will depend upon what happens in Asia during the next few years. Asia has supplied humanity with its great religions — Buddhism, Christianity, Islam — but it has scourged European civilisation repeatedly in the past and contains forces now in action which menace the foundations of peace that are being happily laid in the western world. In the attitude of Japan, however, there is much room for hope that the blight of Asia will not overwhelm us. In saying this we are not forgetful of the present outcry of the Chinese Nationalists against Japan.

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SEA FREEDOM AND THE KELLOGG TREATIES.—In an article published in *The Spectator* Mr. Philip Kerr makes the following instructive comment upon the bearing of the Kellogg Peace Pact on the vexed question of the freedom of the seas as between Great Britain and the United States:

> The danger of collision between the United States and Great Britain—the danger of which has already given rise to incipient competition in naval armaments between the two—arises from one situation, and one situation only—when either uses its Navy as the instrument of its national policy. For when either of the two Navies does this it immediately begins to interfere with the neutral trade, and therefore the prosperity and security of the other in the

interests of its own national policy. This question caused the war of 1812, the troubles during the American Civil War, and the grave risk of American intervention against the Allies between 1914 and 1917. It is the only question which has ever seriously estranged the two peoples or seems likely to do so.

If the Peace Pact is concluded and really lived up to, that danger automatically disappears, for the rôle of naval power will entirely change. Instead of being the instrument by which the two nations accomplish their own national policies, it becomes the main instrument through which the use of war as an instrument of national policy can be prevented and settlement by pacific procedure can be enforced. Both nations automatically renounce the right to interfere with neutral trade in the interest of their own national policy and by implication to use naval power only as police power. Sea power —as Admiral Mahon pointed out—is essentially a police power. If war were really outlawed sea power could only be used for police purposes—that is, as the means of preventing any nation from appealing to war, and therefore for compelling them to appeal to whatever machinery may be set up for the settlement of international disputes by reason and justice.

JUDGES SITTING AS COMMISSIONERS.—The attack of many members of the British press upon the findings of the Court of Inquiry in the *Savidge* case, and particularly upon Sir John Eldon Bankes for defective judgment as a member of the Court, emphasizes the undesirability of members of the Bench—not excluding Judges who have retired—sitting on mixed boards in matters in respect of which the public mind is profoundly and elementally disturbed. The Judicial member inevitably comes in for the largest measure of censure from those who think that the finding is against the weight of evidence. Lord Hatherley held the veneration of the Bar for his judicial gifts and of the people for his great virtues. The cynical Westbury said of him that he was without one redeeming vice. Dean Stanley, when Hatherley died, remarked that he felt that a pillar in Westminster Abbey had fallen. Not all his fine reputation for honour and sound judgment in the past will win for Sir John Eldon Bankes a similar tribute in the face of the majority finding in the *Savidge* case.