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.

CONCERNING THE BEHAVIOUR OF JUDGES.—It is an axiom of general acceptance at the present day that it is essential to the welfare and preservation of all communities organized on British constitutional principles that the Judiciary should have the confidence and respect of the people. To that end the law surrounds the occupants of the Bench with great privileges and immunities in respect of things said and done in the exercise of their official functions. Naturally correlated with these privileges and immunities is the requirement of 'good behaviour' imposed upon the Judges both as regards their relations to each other and to the public whom they serve. *Dum bene se gesserit* is one of the most pregnant phrases in our constitutional history. Upon no man who exercises authority in the State does the obligation to observe the counsel of Marcus Aurelius lie more heavily than upon the Judge: "Remember this,—that there is a proper dignity and proportion to be observed in the performance of every act of life."

It is a tribute to the sterling qualities of our Canadian Judges as a whole that public criticism of them has been seldom heard since the Dominion came into being. It has been the uniform practice of the press to refer to them with great appreciation and respect. How unfortunate, then, that at the present time there are signs of a change in this happy state of things, and a change which if it makes dis-

astrous head will be attributable to the Judges themselves. Instances have not been wanting of late where Judges have not hesitated to resort to the public prints to ventilate disputes between them in matters appertaining to their office but which had their origin wholly in personal antagonisms. Such exhibitions of impolicy and ill-temper infringe the elementary canons of judicial etiquette, and are bound to react unfavourably upon the maintenance of respect for the Bench in the public mind.

Quite recently a further instance of judicial disharmony calling for criticism has come to our notice. By referring to the case of *Brunet* v. *The King*, as reported in [1928] S.C.R. 375, our readers will learn that the Supreme Court of Canada, by a majority judgment in which both Mr. Justice Mignault and Mr. Justice Rinfret took part, allowed an appeal from the Quebec Court of King's Bench. appeal side, which had affirmed the judgment of that court, on the Crown side, finding the appellant guilty of manslaughter on the verdict of a jury. The Supreme Court of Canada ordered a new trial on the ground of the admission by the trial Judge of the uncorroborated evidence of an accomplice of the appellant without giving warning to the jury of the danger of convicting the appellant on such uncorroborated testimony. Thereupon Mr. Justice Gibsone, the trial Judge, saw fit to address a letter to the Attorney-General of Quebec in which he claimed that the ruling of the Supreme Court of Canada, being avowedly based on the jurisprudence of the English Court of Criminal Appeal, was subversive of the law of evidence prevailing in the Province of Quebec and made applicable to criminal proceedings there by the provisions of section 35 of the Canada Evidence Act. If his action is to be viewed as moved by no other impulse than a desire to conserve the integrity of Quebec law, then in addressing an expostulation of the kind to the Attorney-General of his province Mr. Justice Gibsone was undoubtedly within his rights. In any case we have no desire to argue whether the legal positions he there assumed were right or wrong. Nor do we attempt to assume the rôle of apologist for the eminent Judges of the Supreme Court of Canada whose judgment is impugned. We wish to point out, however, that the letter in question contained a very improper imputation upon them, and that the writer's conduct in making it is aggravated by the fact that the letter has found its way into public print, appearing as it does in the editorial department of [1928] 3 D.L.R. pt. 10. The portion of the letter in question to which we advert is as follows, certain words of which we have italicized:

"The written opinion in *Re Brunet*, as handed down, *would indicate the Supreme Court to have been unconscious that any consequence would be produced by their judgment other than this: to convict the trial Judge of ignorance and disregard of the law*, consequent injustice to the prisoner, a verdict quashed, a new trial ordered. If the consequences of the judgment were not greater than so supposed, there would be occasion for no comment."

How this letter was communicated to the publishers of the *Dominion Law Reports* we are, of course, unaware, but if the author of the letter was in any way privy to it then we cannot do else than regard the matter as involving a serious affront on the part of a Judge at first instance to the dignity of the highest court of appeal in the Dominion.

As the organ of the Canadian Bar Association the REVIEW is constrained to deprecate in the strongest way the public discussion by Judges of discords between themselves and between the courts in which they sit.

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SCHOLARSHIPS IN INTERNATIONAL LAW.—It is with great pleasure that we learn that Mr, Chester D. Pugsley, a New York banker, has given the sum of $500,000.00 to the Harvard Law School for the purpose of establishing scholarships in international law. This donation is intended to have a wide scope for it contemplates a scholarship for every nation of the world, including the self-governing units of the British Commonwealth. Isn't it about time for Canadian law schools to be recognized by our wealthy men as deserving of similar endowment in the interest of their country as well as of the world at large.

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OSGOODE HALL MEMORIAL.—A very beautiful memorial of the members of the Ontario Bar who laid down their lives in the Great War was unveiled in the Library of Osgoode Hall by the Lieutenant-Governor of Ontario on the 10th instant, in the presence of the Lord Bishop of Toronto, the Chief Justice of Ontario, Chief Justice Latchford, the Judges of the Supreme Court of Ontario and many members of the Bar. The memorial was executed in marble by the distinguished Canadian sculptress Frances Loring, and bears the inscription: "In memory of those who gave their lives in the War" followed by the words of Rupert Brooke: "These laid the world away."

A memorial service was conducted by the Bishop assisted by Canon Baynes-Reed, appropriate music being rendered by the choir of St. James Cathedral under the direction of Dr. Albert Ham. The Honourable W. D. McPherson, K.C., presided at the ceremony.

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EVOLUTION OUTLAWED.—It appears that the anti-evolution Bill which squeezed through the lower house of the Arkansas State Legislature two years ago but was defeated in the Senate has become law by means of a referendum vote taken on the same day as the Presidential election. Now surely must Lamarck and Haeckel and Darwin and Russel Wallace turn in their graves, for their pet theory of the drama of organic existence has got its quietus by the ballot in the hands of the denizens of darkest America. To teach belief in the ascent of man from the lower types of life to the higher is now a misdemeanor in Arkansas; and no longer are lawyers in that delectable part of the planet free to sing in the strains of the learned Scots Judge, Lord Neaves:

> "So men were developed from monkeys of course,
> Which nobody can deny."

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CRIME IN LONDON AND CHICAGO.—Lord Byng has taken over his duties in London as Chief Commissioner of the Metropolitan Police. This event serves to recall what Police Commissioner Hughes, of Chicago, said some time ago in criticism of Scotland Yard. He thought the English detectives would prove "as helpless as rank amateurs if they were moved to Chicago to suppress crime." He could name "twenty of our men who could accomplish more in a given time than one hundred of the best men of the Yard." If Mr. Hughes meant that Chicago's 'twenty' would use their guns with less provocation and more deadly results than the London 'hundred' we would not dissent from his statement. Nor do we dispute the logic of his further remarks in comparing the two bodies of police:

> We have an entirely different situation to contend with, handicaps that we cannot overcome, but have to meet every day. To begin with there are more than 50 racial groups in Chicago, each with its own customs and attitude toward the general scheme of things. Over in England the population is overwhelmingly English. Anyone convicted of murder in England is hanged within three weeks. Here the murderer is first convicted, then he gets a delay to have his case appealed, he has his execution deferred pending a rehearing,

next it is postponed to examine him as to his insanity, later he might win a new trial on some technicality, and finally he either is acquitted or his sentence is changed to a few years in the penitentiary. That difference has a tremendous bearing on crime and criminals. There are scores of similar contrasts I would cite. It is really a wonder the police accomplish as much as they do with so many other overwhelming obstacles in their way.

Chicago has had eighty-nine bomb outrages already in the present year which gives London a bad handicap in the race for criminal honours.

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LORD HALDANE ON RELIGION.—In an article published shortly before his death in one of the English magazines Lord Haldane disclosed that notwithstanding his pursuit of knowledge—on its philosophic side unceasingly and on its scientific side more than casually—he had not arrived at the conclusion that religion could be displaced from the human heart. The *"quod semper, quod ubique, et quod ab omnibus"* axiom gave him small concern, but his heart was warmed by the flame of simple christian faith. That he was on the side of the angels is fairly apparent from the following observations made by him in the article above referred to:

> We are living in a period of change in our outlook on the meaning of experience of most kinds. In physical science and biology there are taking place in our fundamental notions revolutions of which the implications are only beginning to be realised. In literature, in both prose and poetry, altered standards are apparent, though it is not clear that the highest quality, such as was attained in the last century, is being reached or preserved. In public life new ideals are making their presence apparent. In religion the recognition of its reality remains widely spread, perhaps, in truth, more widely than before. But the old intensity of religious feeling, such as dominated as lately as in the Oxford movement, is evident neither in literature nor in action. People seem less willing to die for a creed or for a symbol. Certainly fewer of them show such willingness.

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THE SPECTATOR'S CENTENARY.—The centenary number of the London *Spectator* is full of interest for those who refuse to be separated from the belief that the nineteenth century really did something worth while in the way of periodical literature. The front cover is a portrait gallery of famous men and women who were writing imperishable things when the *Spectator* was young; and retrospect and reminiscence, as instructive as they are entertaining, mark the contents of the number. It appears from the

news department that Major Astor, the chief proprietor of the *Times,* gave a dinner at Claridge's Hotel to celebrate this important centenary in the journalistic world. The Lord Chancellor and the Lord Chief Justice were among the guests. In supporting the toast of the *Spectator* as proposed by Major Astor, the Right Honourable Stanley Baldwin said the paper had become a national institution, and was chiefly admirable for the indomitable way in which it had stuck to its principles.

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WHEN THE BENCH SCORED.—Mr. Justice Maule some seventy-five years ago said that common sense still lingered in Westminster Hall, and it remained for Mr. Justice Rowlatt a short time ago to remind us that wit as well as common sense have not yet forsaken the Bench. A K.C., not content to be labelled as learned in the law but ambitious of wearing laurels in the field of biology, pompously informed the Judge that "the oyster is a highly organised fish, and can change its sex at will." Whereat the Judge drily observed: "When you say that they change their sex at will, I don't know. Have you ever discussed it with the oysters?" It occurs to us to add that the learned counsel might also have been asked if the oyster considered itself a poor fish or any kind of a fish at all.

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THE COURSE OF EMPIRE.—Sir Austen Chamberlain thinks it not impossible for the political centre of gravity of the British Commonwealth to shift from London to Ottawa. Well, there is nothing startling in that thought—did not Bishop Berkeley sometime in the eighteenth century declare that

"Westward the course of empire takes its way."

But we do hope that the building which the Dominion Government promised to erect some forty-five years ago for housing the Supreme and Exchequer Courts of Canada will materialize before the great event envisaged by Sir Austen really happens.

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NEW BOOK BY PROFESSOR WIGMORE.—We have been advised by the publishers that Professor Wigmore's exhaustive work embodying the story of the origin and development of law entitled "A Panorama of the World's Legal Systems," is nearly ready for publication.

Dean Wigmore has been engaged on this work for a considerable period. He traces the development of the sixteen legal civilizations from the earliest beginnings in Egypt down to the present time. The work is being published by the West Publishing Company of St. Paul, Minnesota, in three volumes, with many illustrations. We intend to review the work fully upon publication.

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MINERALS IN DOMINION LANDS.—On the 8th instant the Judicial Committee of the Privy Council dismissed the appeal of the Hudson's Bay Company from the judgment of the Supreme Court of Canada declaring that the gold and silver in the lands acquired by the Dominion Government from the company in 1869 belong to the Dominion. The company contended that inasmuch as the precious metals had admittedly been conveyed to them by the original charter of 1670 and constituted part of the lands in their ownership, it followed, first, that the posts and stations retained by the applicants must necessarily include the precious metals; and, secondly, that the expression 'land' must include the precious metals.

Regarding the subsidiary argument advanced for the company concerning the Dominion Lands' Act of 1877 and the later enactments, their Lordships find the argument breaks down in its initial stage. "Whatever may be the effect of the Act of 1877 it certainly does not amount to the provision that a grant of Dominion lands operates as a grant of precious metals contained therein, and it is not possible to hold that because a section confirms the appellants' right to a title in fee simple that therefore that title must be taken to include the title to precious metals which had not been granted to the appellants," the judgment concluded.

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MR. JUSTICE FERGUSON.—The Honourable William Nassau Ferguson, Judge of the First Divisional Court of the Supreme Court of Ontario, passed away on the 9th instant at his home in Toronto after a lingering illness in his fifty-ninth year. He had been an occupant of the Bench for nearly twelve years, and had discharged his judicial duties with remarkable ability. On the announcement of his death tributes to his mental gifts and high character, by the Premier and Attorney-General of Ontario, his brother Judges and members of the Bar, were published in the daily press. He was noted for his considerate treatment of young lawyers who held briefs in his Court.

JUDICIAL CHANGES AND APPOINTMENTS.—The Honourable W. E. Middleton has been promoted from the Second Appellate Division to the First Appellate Division of the Supreme Court of Ontario in succession to the late Honourable W. N. Ferguson. The Honourable Mr. Justice Fisher has been promoted from the High Court Division to the Second Appellate Division vice the Honourable W. E. Middleton. Nicol Jeffrey, K.C., of Guelph, has been appointed to the High Court Division of the Supreme Court of Ontario.

Mr. H. Carpenter of Hamilton has been appointed Junior County Judge of Wentworth, to succeed the late Judge Brandon, and Mr. R. L. McKinnon of Guelph has been appointed County Judge of Wellington.

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'COMMONWEALTH' PREFERRED.—In the course of his remarks at the dinner tendered by the Government of Canada to the Right Honourable Sir Austen Chamberlain on the 10th instant, Sir George Foster took exception to the use of the word 'Commonwealth' to describe the group of nations acknowledging King George V. as their common sovereign. Sir Austen differed from Sir George very decidedly on this point. He said:

> I hope Sir George will forgive me if in the matter of the word 'Commonwealth' I range myself on the side of the Prime Minister of Canada, and against Sir George. It is a great experiment in government that we are making, the greatest that the world has ever tried. It is something the existence of which to-day is a miracle, and which requires a miracle and good sense and judgment to continue. But, sir, I like the term 'Commonwealth of Nations,' because it indicates that each of us exists not only to pursue his own interests, but exists for the common weal. And great as any one of us may be, greatness is a small thing compared with the greatness of the whole. It is just in proportion as we appreciate the import of that term 'the Commonwealth of Nations' that we shall discharge our duty and fulfil the part which Providence has given us to play.

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CANADA'S PLACE IN THE WORLD.—The Right Honourable W. L. Mackenzie King was tendered a complimentary dinner by the Ottawa Branch of the League of Nations on his return from his official visit to Paris and Geneva. We extract the following eulogium on Canada from the concluding portion of his admirable speech on that occasion:

"I confess that, after listening to and participating in the proceedings of the League, both on the Council and at the Assembly, I have come back to Canada with a more profound conviction than ever that there is no land on the face of the globe in which the lot of men,

women and children is cast in a pleasanter place than in this Dominion; that we have more of liberty and less of fear, more of opportunity and less of poverty, more of the unfettered future and less of the mortmain of the past than any other country on the face of the globe. I feel equally that in what we have been spared of Old World discord and strife, and in what we hold of friendliness toward all nations, we have a great trust to acknowledge and maintain. A trust we have toward all who dwell in this New World and share the greater freedom which we here enjoy, a trust toward countries of the Old World to use what influence and power we may possess so to mould and strengthen world opinion that the cause of disarmament may be augmented, and the cause of conciliation and arbitration correspondingly strengthened in the relations between nations throughout the world. This is a high mission for a young land, but I have faith that as a country we will not be disobedient to the heavenly vision, nor recreant to the call of service to mankind."

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INTERNATIONAL AMENITIES.—Mr. J. A. Mann, K.C., of the Montreal Bar by special resolution of the Governing Body of the New York State Bar Association has been made an honorary member of that Association. Mr. Mann was a delegate to the annual meeting of the Association held at Albany in January last.

It is interesting to note that there have only been thirty-nine honorary members admitted to the Association during the past thirty-five years.

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PRIVATE RIGHT OF ARREST.—An interesting incident, involving the right of a private citizen to arrest a person for doing what the former might in his haste consider a breach of the law, is reported as having occurred at Plymouth, England a short time ago. It seems that a corporation motor-bus was obliged to deviate somewhat from its course on the road to pass a stationary car, and was just returning to its proper side of the road when the defendant's car approached the motor-bus at a fair speed. The motor-bus drove on to its regular stopping place when the defendant alighted from his car, mounted the motor-bus and asked the driver what he meant by "blinding down" the road like that. He asserted that the driver of the motor-bus had committed a breach of the law in deviating as he did and demanded that he should not proceed on his trip, and when the

driver ignored him the defendant applied the handbrake twice and switched off the engine. The corporation took action against the defendant, under the traffic by-laws and regulations prevailing at the place in question, and the case was tried in the Justices' court. The defendant claimed that he had reasonable cause for acting as he did because he needed the driver's number in order to report him, and as the driver refused to stop the motor-bus to allow the defendant to alight he could do nothing else than switch off the engine. It appeared on the facts that the defendant might have identified the driver of the motor-bus sufficiently by reading the number of his vehicle, as it was possible to do at the time of the false arrest. The defendant was fined forty shillings for taking the law into his own hands.