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 also be sent to the Editor at the above address.**

TOPICS OF THE MONTH.

KNOWLEDGE OF THE LAW.—In the course of a paper on "Appeals in English Law" read before the recent meeting of the Law Society at Newcastle-on-Tyne, Mr. Philip Frere (London) referred to a suggestion that had been made to the effect that where the Court of Appeal reversed a judgment below on the ground that the Judge at first instance had made a mistake of law, the burden of paying for the mistake should not fall on the respondent but the costs of the appeal should in fairness be defrayed out of a fund collected from the Court fees. Mr. Frere approved of the suggestion and justified its adoption in the following manner :

> "You will probably remember the story of the Recorder who was charging a criminal jury in a case where the prisoner had raised the defence that he made a mistake of law. The Recorder said : 'Mistake of law is in English law no defence to a criminal charge. As soon as a Chinaman who speaks and reads no English lands on the white cliffs of Dover he is deemed to know the whole of English law which is contained in some 200 volumes of statutes, numerous volumes of statutory Rules and Orders, and in some three-quarters of a million decided cases. In short, everybody is presumed to know the law except His Majesty's Judges, who have a Court of Appeal set over them to put them right'. Thus, the Recorder. The suggestion I put forward is that this putting right should not be done at the expense of the particular litigant who thus suffers personally from the mistake of the Judge".

**At the same meeting of the Law Society, Mr. William McKeag, M.P., read an interesting paper on " The Evils of

Legislation by Regulation". He referred to Bacon's declaration that " There is no worse torture than the torture of laws," and proceeded to ask what Bacon's comment would be in these days when confronted with the mammoth proportions of the statute law and a " plethora of delegated legislation in the shape of Statutory Rules and Orders, Bye-Laws, Regulations, Provisional Orders and so forth in such profusion and bewildering variety as to be well-nigh incomprehensible". Mr. McKeag, in virtue of his dual experience as a practising solicitor and as a member of the House of Commons, felt himself justified in thinking " that there is a conspiracy on the part of highly-placed Government officials in Whitehall to usurp the legislative functions of Parliament and to oust the jurisdiction of the Courts". He also thought the position no less grave " because the conspiracy is in all probability tacit rather than plotted, and the danger none the less real because the motives actuating those officials are of the most high-minded and public-spirited character".

And so we learn that the parasite of bureaucracy has become a menace to the life of the tree of English democracy. *Cupido dominandi* is the most odious of all the passions; and the temptation which does so easily beset the civil servant is that which prompts him to become the master of the public he serves. But to the average Englishman democracy and liberty are inseparable terms. The royal autocrat of the past was taught to realize the force of this ineluctable fact and the modern bureaucrat is due ere long to learn the same stern lesson.

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CONCERNING CONSTITUTIONAL REHABILITATION.—In the year 1531 Sir Thomas Elyot published a work under the title of " The Boke named the Gouernour", designed for " the education of them that hereafter may be demed to be gouvernours of the publike weale". Now the governors of the public weal in the modern British world are those who vote at parliamentary elections, and at this particular time when Democracy is nursing a headache after its nineteenth century debauch of laissez-faire we commend to them Elyot's explication of the "blessed companye of vertues" that ornament the bearing of the good citizen, and his exaltation of "that part of Sapience that of necessitie must be in every gouernour of a juste or perfeyte publike weale". Haply, there be amongst our readers those who agree with the sage who says, " Dans les conseils d'un état il ne faut pas tant regarder ce qu'on doit faire que ce qu'on peut faire", and who would rather hear the voice of our latter-day prophets calling for

the application of pragmatic remedies to national disasters when they threaten. To all those who are at present arrested by the shambling gait of the experiment in federation so proudly launched by Canadian statesmen in 1867 we would counsel a reading of Dr. W.P.M. Kennedy's paper in *The Round Table* for September last, entitled, "Crisis in the Canadian Constitution." Dr. Kennedy there comments on the fundamental defects that have been exposed in the working of our constitution as interpreted by "the unfortunate judgments of the Privy Council." In concluding his review of a situation which has transformed Canada into "a loose league of 'Sovereign' provinces," he asks if we shall placidly accept the situation, or —

> "Shall we boldly recognize that a nation of vast potential wealth and of remarkable human achievements must not be sacrificed at a constitutional altar erected in a far-off pioneer past, and itself long since robbed of creative vitality by the barren processes of judicial obscurantism?"

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ARMS AND AMMUNITION CONTROL.—In the October number of the *American Journal of International Law*, Professor Manley O. Hudson writes an editorial note on the treaty-making power of the United States as related to the private manufacture of arms and ammunition. He points out that while the United States was a signatory to the Convention for the Control of the Trade in Arms and Ammunition held at St. Germain in 1919, it subsequently refused to ratify the convention on the ground that the government was not in a position to further legislation "which might impose penalties on private producers of arms". This position implicitly predicated a lack of constitutional power in the national government to interfere with such producers, which Professor Hudson regards as an erroneous view. He declares that the United States are now in the process of ratifying the Convention for the Supervision of International Trade in Arms and Ammunition and Implements of War which was opened to signature at Geneva on June 17th, 1925, and explains that the provisions of this convention call for the exercise of the same constitutional powers as those of the St. Germain Convention.

The position assumed by the United States government in 1919 as regards the manufacture of arms was maintained until November 18th, 1932, when the Bureau of the Disarmament Conference was informed that the United States was prepared "favourably to consider" the control of private manufacture provided that State manufacture was also controlled and super-

vised. Then, in May of this year, the General Committee of of the Disarmament Conference was advised that the United States was "willing to work out by international agreement, an effective system for the regulation of the manufacture of and traffic in arms and munitions of war." Following upon this a memorandum containing suggestions for the assertion of national responsibility for the manufacture of and traffic in arms, and for the establishment of a system of licenses for such manufacture, was submitted to the General Committee of the Disarmament Conference by the American Delegation. Professor Hudson is pleased with this abandonment of the "erroneous view of the constitutional powers of the Government of the United States with respect to the making of treaties." He very reasonably suggests that the assertion of constitutional limitations in respect of the federal power of treaty-making may be left to "other agencies".

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PROMOTION FOR SIR ADAIR ROCHE.—At the Eighteenth Annual Meeting of the Canadian Bar Association, which took place in Ottawa, the Honourable Sir Adair Roche, one of the Judges of the King's Bench Division of the High Court of Justice, was present as a representative of the English Bench and was made an honorary life member of the Association. His friends in Canada were pleased to hear of his promotion last month to the Court of Appeal to fill the vacancy created by the death of Lord Justice Scrutton. The new Lord Justice's comprehensive knowledge of commercial law makes him a worthy successor to the great lawyer whose place he has been chosen to fill. We recall that Lord Justice Roche, in his speech before the Canadian Bar Association, reviewed in a very luminous way the practice of the Commercial Court in England.

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ONTARIO UNPROCLAIMED STATUTES.—The attention of the members of the legal profession is drawn to the fact that the Table of Unproclaimed Statutes which was included at the end of the Volume of Ontario Statutes 1934 omitted reference to Sections 274 and 275 of the Insurance Act (R.S.O.) 1927, Chapter 222, which provisions of the Statute Law Amendment Act 1934, Chapter 23, Section 17 are only to be put into force by Royal Proclamation. Such a proclamation has not yet been made.