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.

☞Special articles must be typed before being sent to the Editor at the Exchequer Court Building, Ottawa. Notes of Cases must be sent to Mr. Sidney E. Smith, Dalhousie Law School, Halifax, N.S.

TOPICS OF THE MONTH.

THE VISIT OF GENERAL SMUTS TO CANADA.—We venture to find a happy augury for a renewed spirit of universal good-will in the fact that the visit of General Smuts was the most distinctive public event that ushered in the New Year for Canadians. General Smuts has written his name large in contemporary history. Lawyer, soldier, statesman, philosopher—to be all these with distinction to himself and profit to his fellow-men has fallen to his lot. It was a great thing for a man to emerge from the bitterness of the Boer War, in which he had the supreme command of troops fighting against British soldiers, and stand before the world as a loyal subject of the British King. It was a still finer thing for him thereafter to order his public life so that the welfare of the British Commonwealth and that of the League of Nations could be served by him with passionate devotion. It was not so much the force of his spoken word as the pervasive inspiration of the man himself that touched the hearts of his audiences in Canada. Those who were privileged to see and hear him went out from his presence with the conviction that their patriotism must be something loftier and purer, something more sacred, than mere pride in our English civilisation. They carried away with them a quickened sense of the obligation resting upon all who confess the emotion of patriotism

to do their part in making the present union of British peoples—call it a Commonwealth or an Empire as you will—a power for peace and justice throughout the world. To acknowledge this is to ascribe an abiding value to the coming of General Smuts to Canada.

* * Speaking more particularly of his visit to Ottawa, the dinner tendered to the distinguished statesman by the men and women's Canadian Clubs and the League of Nations Society was a memorable event. The very handsome new ball-room of the Chateau Laurier was used for the occasion and it was found none too spacious for the accommodation of those present. It is said to be without a parallel in the public dinners tendered to distinguished visitors in the Capital. The speech of the Prime Minister in welcoming the distinguished guest, that of Sir Robert Borden in moving a vote of thanks to him, as well as the address of General Smuts himself were broad-casted, and therefore need no special comment here. But there was one observation made by General Smuts which we cannot refrain from quoting. He said: "There is no doubt that Sir Robert Borden did more than any other statesman to secure full recognition of Dominion Status at the only time it was possible to secure its recognition. At the opportune moment we get our full place at the council table of the Empire and the nations." This is a tribute to one of our own venerated statesmen which cannot fail of appreciation by the whole Canadian people.

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APPEALS TO THE PRIVY COUNCIL.—A contributor to a recent number of *The Solicitors' Journal* contends that the proposal of the Irish Free State to withdraw the right of appeal to the Privy Council, if attempted, would be nothing more than a work of supererogation because the Free State constitution expressly provides that "the decisions of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed, or be capable of being reviewed, by any other Court, Tribunal or Authority whatsoever." That being the case, *cadit quaestio* so far as the "right" of appeal is concerned. On the other hand he declares that:

> The right to petition for special leave to appeal is one which exists without being expressly granted, and one which results from the fact that there is, and has been at all times, a prerogative of justice residing in the Crown. In other words, this right to petition for special leave to appeal, as opposed to the right of appeal, is a matter of Royal Prerogative, and it is clear that the Legislature in the Irish Free State, with the powers it enjoys under its present Constitution Act, has no power either to grant

or to take away this right to petition for special leave—a right which is possessed by every inhabitant of the Irish Free State—not because it has not yet elected to remove the right, but because the Imperial Parliament has not chosen to give the Irish Free State Legislature power to make this great amendment in its Constitution.

It must therefore be clearly understood that not only is the Irish Free State powerless to withdraw the right of appeal, but that a proposal to withdraw even the right to petition for special leave to appeal is absurd, for Imperial Parliament alone can bar this Royal Prerogative.

So far we think the writer in our English contemporary has much support for his position, but when, in arguing for the continuance of appeals to the Privy Council, he rests its reasonableness on the ground that "the inhabitants of all these Dominions are subjects of the British Empire" he speaks unadvisedly. The term "inhabitants" is wide enough to include undenizened resident aliens; moreover, persons born within the King's allegiance, or persons naturalised, are subjects of the King and not of the British Empire.

A reading of *Calvin's Case*[1] will demonstrate the correctness of this view. Speaking on the subject Sir William Holdsworth (Hist. Eng. Law, vol. IX., pp. 75, 77) says: "Though the duty of allegiance was dissociated from the tie of tenure, another and a wider territorial test became possible because it was the King—the ruler of all England—to whom allegiance was due." Again, referring to *Cobledike's Case,* decided in Edward I's reign, Sir William says: "We shall see that much reliance was placed on this ruling in *Calvin's Case,* because it was held to show that allegiance was a personal tie between the subject and the natural man who was King."

Allegiance is not locally limited. That doctrine is an effluent of the maxim *Nemo potest exuere patriam,* and it affects the King's subject everywhere until he is deprived of it, or is released from it, in a formal way.

Considering the question with particular reference to our own affairs, we do not hesitate to say that it is the combination of this tie of personal allegiance to the King—with its connotation of a just national pride — and the less praiseworthy but very natural tie of interest, that holds Canada true to her place in the British Commonwealth. Nothing else counts. The maintenance of the appeal to the Judicial Committee of the Privy Council would seem to be a matter of no importance to Great Britain and for us a mere matter of expediency which will cease to operate so soon as the several units in the Canadian federation realise that they can trust each other touching questions of provincial rights. Thus we await

[1] 7 Co. Rep. 9; 2 St. Tr. 559.

the coming of a workable national conscience. There is no other consummation more devoutly to be wished by us. Until that happy time arrives we must rest under the reproach that we have no complete Judicature in Canada.

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ENGLAND'S CONTRIBUTION TO JUDICATURE.—While England is lauded as the mother of parliaments it is often overlooked that she developed the most effective judicial system that civilisation possesses today. So far as the substantive body of the English law is concerned it may still be subject to the reproach that Guizot bestowed upon it a hundred years ago, namely, that it was the worst system of jurisprudence extant, and yet he did not fail to say that on its procedural side English law was the best administered system in the world. That is due to the common sense exercised by the judges since the courts were organized. "Common sense still lingers in Westminster Hall," said Mr. Justice Maule many years ago; and at an earlier date Lord Kenyon cautioned the skeptical against imagining that the rules of procedure were prescribed by "men writing from their closets without any knowledge of the affairs of life, but persons mixing with the mass of society, and capable of receiving practical experience of the soundness of the maxims they inculcate." From a very long period of close observation the writer is disposed to regard the trial court as an exceptional and peculiar medium for imparting a knowledge of human nature; indeed, he has come to regard it as a sort of alembic wherein the very spirit of life is distilled. Evidently Sir Frank Lockwood, of fragrant memory, thought the same of it. Because he failed of a judgeship he died under the sad impression that he was one of the inheritors of unfulfilled renown. Augustine Birrell, in his delightful memoir of Lockwood, says that his desire was to sit on the bench of the High Court and not in the Court of Appeal. One can readily understand how his nimble mind would have expatiated there in contact with a more varied assortment of human types than is to be encountered in the appellate domain.

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TWILIGHT OF THE LORDS.—How disposed certain politicians in England are to put the House of Lords out of the constitutional picture is exemplified by an incident that occurred last month in connection with the Protocol for the renewal of diplomatic relations between Great Britain and the Russian Soviet. This document,

for which Mr. Arthur Henderson, Minister of Foreign Affairs, was responsible, by its terms required the approval of Parliament in order to give it effect and validity. The Government, having obtained the approval of the Protocol by the House of Commons proceeded to act under it without submitting the matter for the pleasure of the House of Lords. Upon the conduct of the Government being subsequently challenged in the Commons, Mr. Henderson, with Cromwellian bluffness, stated that "Parliament" as contemplated by the Protocol meant the House of Commons only, and the approval of that body having been obtained every requirement for the renewal of diplomatic relations between the two countries had been satisfied.

This item was written before the letter from our London correspondent published in this number was received. It deals with the subject more fully, but everything considered we are disposed to say that if the practice involved in this incident is continued, then the lexicographers will have to rewrite their definition of the word "Parliament." Since 1911 Burke's "triple cord which no man can break" has been subjected to a parlous strain.

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MR. MACDONALD ON EDUCATION.—In the course of his address to the students on receiving the honorary degree of Doctor of Laws at the University of Toronto the Right Honourable Ramsay MacDonald spoke as follows:

> What we want to supplement our reason is imagination, taste. The beauties and the chastities of life are as essential as the knowledge of life. . . . The problem of leisure or how to use leisure is the problem of human life and there is nothing that a university can do that you will bless it for in your later years more than this—it will give you an opportunity of appreciating things for yourself. It will give you an opportunity of being your own companion. It will enable you, when the days shorten and the nights lengthen, to draw the curtains of your room, to light your candles, to pull your chair up by your fireside, to take down a book or to take down what is even more precious—a well-stored memory and a young imagination —and it is your own enjoyment to spend your own leisure time.

Although Mr. MacDonald has not yet proved himself a great statesman, what he said to his undergraduate audience at Toronto shows that he has undoubtedly attained to the distinction of being "able to think as all wise men do"—the distinction which old Roger Ascham fondly desired for all the gentlemen and yeomen of England in his day. It is a fine thing for a man to come out of the storm and stress of public life and counsel the young in an age peculiarly indisposed to the contemplative life to build their leisure moments into a fabric of tranquil joy. With the middle-aged losing the

faculty of sitting still as well as the ability to distinguish between worth while and trivial things in the daily round, we cannot expect too much at present from the young. But all is not yet lost for humanity, and so *spes sibi quisque!*

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A LIGHT FROM THE PAST.—Mr. McCuaig, in his article in the November number of the REVIEW, urges the selection of members of the legal profession for positions involving judicial or quasi-judicial functions. Here is a case where our rulers might take a leaf from an old book for their guidance. A clause in Magna Charta lays it down that "Justices, constables, sheriffs, and bailiffs shall only be appointed of such as know the law and mean duly to observe it."

Meanwhile, it is gratifying to observe that the Government of Saskatchewan, having provided for a Workmen's Compensation Board, has appointed Mr. N. R. Craig, K.C., one of the leading lawyers of the province, to be chairman of the board. The Local Government Board has always included a lawyer in its membership, and for many years has had Mr. F. P. Grosch, K.C., as its chairman.

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CHINA'S PROGRESS.—On November 8th last, in the dying hours of the Conference of the Institute of Pacific Relations, held at Kyoto, Lord Hailsham referred to the Nanking Government's announced intention of issuing its new civil and commercial codes in December and bringing them into force in January, 1930, and he observed: "To think that such codes can intelligently be applied within a month from that time (December) is preposterous."

His Lordship is further reported in *The Times of Japan* as saying:

> Various changes in the English commercial code were drafted in 1921. They were presented to eminent jurists and legal societies for consideration for four years. In 1925 the changed code was brought before Parliament for consideration. It was passed, but the date of coming into effect was placed in 1927. England allowed six years for the consideration and study of only a small fraction of the amount of legal matter which it is reported that China is considering putting into effect within a month after it is first compiled.

If this report is correct, it is difficult to say what legislation is referred to. The Imperial Statutes for 1925 contain an immense amount of legislation, filling two portly volumes. There are 91 Acts in all, of which 11 are consolidation Acts, but there is no commercial code.

His Lordship is also reported as saying:

> It is true that China has made great progress not only in drawing up its new codes but in organising a judiciary which is independent of the executive branch of the government.

He did not, however, feel that it was entirely independent or that the time had arrived when the extra-territorial privileges enjoyed by resident foreigners could be abolished.

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PROFESSOR KEITH ONCE MORE.—It appears from the columns of the last number of the *Journal of Comparative Legislation* that Mr. A. Berriedale Keith, Professor of Sanskrit in the University of Edinburgh, has not yet laid aside his claim to infallibility as an expounder of the autonomy of the Dominions. Our readers will find an interesting commentary on his latest deliverance by Professor F. R. Scott in the present number of the REVIEW.

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A MIXED METAPHOR.—In his recently published book the Lord Chief Justice of England says (p. 14) that, if certain things are done, "the coping-stone will be laid and the music will be the fuller." We have all heard of musical glasses but who up till now has heard of musical stones?

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THE MODESTY OF LABOUR.—Apropos of a recent tilt in the House of Commons between Mr. Hore-Belisha and Mr. Tom Shaw, which culminated in a general uproar when Mr. Shaw applied the term "studiously insulting" to his critic's remarks, a writer in *The Saturday Review* has been moved to say:

> Mr. Shaw was certainly very angry. This pompous sensitiveness on the part of Labour Members has always been one of their characteristics. In part it arises from the theoretical and doctrinaire habit of mind, which, like a schoolmaster's, will brook no criticism. In large part it arises from the fact that they are less inured to unmannerly opposition than are their political opponents.

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AN UNBIASSED HISTORIAN.—In response to a wide public demand, voiced in particular by so eminent a scholar as Dr. J. P. Whitney, Dixie Professor of Ecclesiastical History in the University of Cambridge, Dr. W. P. M. Kennedy, Professor of Law in the University

of Toronto, has published in separate form, and under the title "The Law and Custom of Reservation, 1547-1661," the matter contained in the tenth chapter of his *Studies in Tudor History*. Religious controversy has been a perdurable thing from the organisation of the Christian church onward. It was of benefit in so far as it led to the promulgation of the orthodox faith in the fourth century by the Councils of Nicea and Constantinople; since then perhaps it is well described in the saying: *Disputandi pruritis fit Ecclesiarum scabies*. But the historian must not be driven by fear of the embattled ranks of bigotry from any field which it becomes necessary for him to explore.

The question of Reservation has keenly agitated the minds of Anglicans in the old country for some time past, and it is one that invites careful historical study. The task of him who undertakes to write its history demands not only aptness in discerning the truth of the record but unfailing honesty in revealing it. How well Dr. Kennedy has responded to this demand is to be learned from the following remarks of Dr. Whitney in his foreword to the book:

> Professor Kennedy has in no way written as an advocate or partisan. He states the evidence clearly with no wish to exaggerate or distort. Indeed had he done either of these things, or had he written in another spirit, I should not have urged him to reprint the essay.

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A NEW CANADIAN AUTHOR.—We notice in the review department of this number Miss Emma Lorne Duff's charming book "A Cargo of Stories for Children." Miss Duff is a sister of the Right Honourable Mr. Justice Duff of the Supreme Court of Canada.

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THE HOUR AND THE MAN.—President Hoover is an idealist, as the best of Americans are, but idealism is tempered with sound judgment in all his ways and works. He has somewhat of the qualities that distinguished the benign despot of the early days of the world. Nothing finer in spirit than his farewell words to the departing delegates to the Naval Disarmament Conference could have been said: "The progress of peace for the world rests in a great measure on your shoulders."

Mr. Ramsay MacDonald is also an idealist, but he lacks Mr. Hoover's restraint and reserve. Whether he intended it or not, Mr. MacDonald's talk about the completeness of America's satisfaction

with the "sanctions" contemplated by Europe in the event of disarmament has encouraged the British Public to hope too much in that behalf. Mr. Hoover made it plain in his Armistice Day Speech that "sanctions", as contemplated by the League of Nations or in the Locarno treaties, would not prove an attractive item for Americans on the programme of the Conference, even should it find its way there.

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SOVIET MARRIAGE AND ENGLISH LAW.—The decision of Mr. Justice Hill, sitting in the Divorce Court in the case of *Nachimson* v. *Nachimson*[1] whereby he adjudged that a marriage entered into by two Russians according to the Soviet law was not valid in England, has raised a good deal of discussion in England. It is a subject of comment in the London Letter appearing in this number of the REVIEW.

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NEW SUPREME COURT JUDGE.—The Honourable Lawrence Arthur Cannon, one of the Judges of the Quebec Court of Appeals, was appointed on the 14th of this month to the Bench of the Supreme Court of Canada to fill the vacancy created by the retirement of the Honourable P. B. Mignault. Mr. Justice Cannon at the time of his appointment to the Court of Appeals was Honorary Secretary of the Canadian Bar Association, and an active worker in its interests. As a student at Laval University he had the honour of winning the Governor-General's medal and the Prince of Wales' prize. He was called to the Bar of Quebec in 1899. In 1910 he was created a King's Counsel. He was twice elected to represent Quebec Centre in the provincial legislature, once by acclamation. In 1923 he was appointed a member of a commission to revise and consolidate the statutes of the Province of Quebec and in 1924 was elected bâtonnier-general of the provincial Bar.

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NEW K.C.'S FOR MANITOBA.—The following gentlemen have been recently appointed King's Counsel by the Government of Manitoba:—

A. E. Bowles, Winnipeg; J. C. Collinson, Winnipeg; R. M. Fisher, Winnipeg; J. I. Morkin, Winnipeg; A. M. S. Ross, Winnipeg; B. C. Parker, Winnipeg; E. E. Sharpe, Winnipeg; J. T. Thorson, M.P., Winnipeg; John A. Campbell, The Pas; N. W. Kerr, Brandon; E. G. Porter, Portage la Prairie.

[1] (1929) 168 L.T. 519.