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 Fifteenth Annual Meeting of the Canadian Bar Association will be held in the City of Toronto on the 15th and 16th days of August, 1930.

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C. B. A. COUNCIL MEETING.—The annual Winter Meeting of the Council of the Canadian Bar Association, which was held at Toronto on the 1st March, was a very successful event, being largely attended by representatives from all the Provinces. The main question was the choice of a place for the annual meeting, in view of the expected visit of the members of the English, Scottish, Irish and Paris Bars, and eminent members of the Judiciary from England, Scotland and Ireland. These are expected to reach Quebec on the early morning of Tuesday, August 12th. After seeing something of the ancient City they will go to Montreal and spend Wednesday there, thence proceeding to Ottawa where they will spend Thursday, and thence to Toronto, arriving in that city on Friday morning. The annual meeting will take place there on Friday and Saturday, the following day, Sunday, will be a day of rest, and the party will then go to Niagara Falls, where they will become guests of the American Bar

Association for their meeting at Chicago, after which they will return by way of New York and Boston.

While details are not complete, it seems evident that this will be the most important event in the history of the Canadian Bar Association, and it goes without saying that it is bound to be a success.

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GOOD CANADIAN MEN AND TRUE.—At the moment of writing rumour has it that the Honourable Vincent Massey will replace the late Honourable P. C. Larkin as Canadian High Commissioner in London and that Mr. Massey's present post as Canadian Minister to the United States will be filled by the Honourable Rodolphe Lemieux, now Speaker of the House of Commons. Mr. Massey, during his short term of office in Washington, has not only popularised himself with the public men of the United States but has taught the American people as a whole to think of Canada as a country of possibly equal importance with theirs in the future history of the North American continent. With Mr. Lemieux at Washington Canada will be represented by a man who has already tried his hand at diplomacy and with success. He had the honour of composing the differences between Canada and Japan arising out of the anti-Oriental sentiment which came to a head at Vancouver in 1907. In 1922 he was instrumental in obtaining from the French government a gift of two hundred and fifty acres on the Vimy plateau to be used to perpetuate the memory of the Canadian soldiers who made the supreme sacrifice in the Great War. More than that he has distinguished himself as a publicist outside the Dominion. In his recent course of lectures at the Sorbonne he emphasised the fact that Canada is qualified by reason of her two racial origins to function as a liason agent, first between Great Britain and the United States and secondly between the Anglo-Saxon and the Latin civilisations. Mr. Lemieux has all the qualities that could be demanded of our next representative at Washington.

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LEGAL ETHICS.—We read with pleasure in a recent number of *Obiter Dicta*, the organ of the law students of Osgoode Hall an extended report of an address to the students by Mr. Justice Middleton of the First Appellate Division of the Supreme Court of Ontario, on "Ethics and the Practice of Law." The lecturer dwelt on the tendency of the lay mind to disparage the usefulness of the legal

profession to the welfare of society and showed that it was due on the one hand to the instances of unprofessional conduct that occur from time to time and on the other to the restraints it places upon the conduct of those who prefer license to ordered liberty. He pointed out that while offences by its members against the honour of the profession do unfortunately occur the number of offenders is few as compared with the whole body of the Bar. Viewed as a body he thought that the legal profession was not only entitled to popular esteem but that, despite the flings of the satirist and the hostility of the rogue, it really enjoyed that esteem. We quote the lecturer's words on this point:

> As against the cheap sneer of the man on the street who thinks all lawyers are dishonest, I would place the words of Daniel Webster: "An eminent lawyer cannot be a dishonest man. Tell me a man is dishonest and I will answer he is no lawyer. He cannot be because he is careless and reckless of justice. The law is not in his heart, is not the standard and rule of his conduct."

Some emphasis was laid by the lecturer on the reforms in procedure of recent times whereby a case is disposed of on its merits and justice is not defeated by technicalities. He also warned the students against "the sin of irrelevancy" on the part of the advocate in presenting his case, and quoted some specimens of classical satire at the expense of those who indulged in it.

After reminding his hearers that while the lawyer's duty was to see that his client's case was properly presented yet it should not be pressed without reference to the chivalrous principle of fair play, the lecturer closed with these words:

> Gentlemen, the task before you in this your chosen life work is no easy one. Lord Eldon said: "To succeed you must live like a hermit and work like a horse." Law is a hard mistress but if you are faithful to her success is certain. Have ever before you a sense of your duty. "Duty, stern daughter of the voice of God." Be patient. "In life's small things be resolute and great. Keep thy muscle trained, thou knowest not when fate thy measure takes or when she will say to thee,—I find thee worthy. Do this deed for me."
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> If you ask me to state in a word the ideal the lawyer should place before him, I give you the words of the old Hebrew Prophet: "Do justly, love mercy and walk humbly with thy God." I know no better creed.

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CANADA'S GRAND OLD MAN. — Wise and valiant words were spoken by Sir William Mulock, Chief Justice of Ontario, in his address at the complimentary luncheon tendered him by the Empire

Club of Canada in Toronto last month. Were a full report of his speech available to us we would have been glad to publish it in full in this number of the REVIEW.

How pointed and yet how just was his reference to the censoriousness and discontent of those who too early have sought rest from their labours or had it thrust upon them—"that shadowy company who spend their time in regretting their retirement and criticising their successors." And how splendid this appreciation of his present ability to carry on in public life: "I am still at work with my hand to the plough and my face to the future. *The shadows of evening lengthen about me, but morning is in my heart.*" We italicise these words because they are worthy of a place in any anthology of great sayings.

Sir William's love and loyalty for England are given expression in the following passage from his address:

> What pride must swell in the heart of everyone with British blood in his veins when he recalls her self-sacrifice, her indomitable spirit, her determination to save the world from the grasp of a nation mad with the lust for power. Today, staggering doggedly under crushing financial burdens, she is endeavouring in co-operation with other nations to find an enduring foundation for permanent world peace.
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> And what is the duty to her of her overseas dominions? Is it possible for them in any way to make any compensation to the Mother Country for her losses, such as the loss of her foreign markets? This is a delicate question, but I venture the opinion it will gladden the heart of loyal Canada if she is able, with justice to her own people, to find some means of rendering substantial material service to our Motherland in her hour of trial.

After discussing the interdependence of nations in the twentieth century world, Sir William proceeded to say:

> Let me for a moment refer to Russia. Her wicked rulers, seeking the destruction of everything sacred, are impressing upon the Russian people there is no God, no such thing as human conscience, no responsibility for human conduct, and that brute force is the one and only god. Their emissaries for the propagation of these views are scattered throughout the world. We have them in Canada. What is Canada's duty? Is it to remain silent or to voice its horror?
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> Canada is Christian and a world nation, and her opinion will have weight in the family of nations. It is Canada's duty to give trumpet-tongued expression to her opinion against such fiendish doctrines, to take the lead in arousing other nations and thus produce a world opinion that man is subject to Divine laws.

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CANADIAN UNITY.—Dr. Edouard Montpetit's speech before the Canadian Club of Ottawa last month was a praiseworthy effort to advance a constructive unity between the English and French races in Canada that will build up a nation on this continent rich in the possession of a culture expressive of the genius and ideals of both peoples. Such an aspiration is utterly opposed to the mass standardisation policy of the United States—the "100 per cent American and nothing less" idea; but to realise it would be a fascinating achievement and a real contribution to the civilisation of the twentieth century. There would then be a real difference between the American and the Canadian in the eyes of the rest of the world, and yet it would not mean that by reason of the difference the relations between the two nations would be less friendly. Dr. Montpetit saw nothing illogical in being French by birth, Latin by instinct and British politically.

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STEMMING THE TIDE.—Apropos of a proposal of the Private Bills Committee of the British Columbia Legislature to allow the City of Vancouver to license persons engaged in the business of exporting intoxicating spirits, wines or liquors and to exact a fee therefor not exceeding $1,000 per annum, Attorney-General Pooley has declared that "The federal government has definitely announced that the bonds and charters of all these establishments will be cancelled in June. We propose at the same time to cancel their provincial licenses, and legislation covering this change will be introduced during the present session. In this way the warehouses will absolutely go out of business. There can be no question about that whatever."

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DISFRANCHISING THE BRITISH UNEMPLOYED.—An interesting discussion is being carried on by correspondents in an English weekly on the propriety of disfranchising persons drawing unemployment benefit from the so-called "dole" fund. One writer expressed the view that if this proposal were carried into legal effect it would remove the whole question from the sphere of party politics. Another writer scouts this proposal and suggests that the only way to carry the matter out of politics and to abolish "the party auction of unemployed votes" is to take the administration of unemployment insurance out of the hands of the State and entrust it to rationalised Industry. He suggests that for this purpose a general administrative body representing all the industries might be formed which would

act through smaller bodies representing the individual industries and the trade unions; in this way he thinks the industrialists and the trade unionists would become "jointly responsible for a situation which they alone can finally bring to an end." By some such scheme, as the industries would have to bear a proportion of the cost of unemployment insurance, they would have a strong incentive to employ the men rather than keep them in idleness; it would also tend to remove the objection of the trades unions to productive relief works as competing with organised labour; furthermore it would promote unity of purpose in attacking the problem instead of lines of approach being thrown out from two angles, the one regarding the conservation of profits and the other the permanence of employment.

The question is one that threatens the economic stability of Great Britain, and seems impossible of settlement by the ancient method of "muddling through."

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THE INTERPRETATION CLAUSE. — The Interpretation Clause in English statutes was adopted by the draftsman for the purpose of clarifying the meaning of the words used by the legislature, but in the opinion of the Judges in many cases it has not only failed to reveal *quo animo* certain terms were employed but has created more confusion in arriving at the true construction of some particular provision of the legislation in question.

In *Lindsay* v. *Cundy,* (1876) 1 Q.B.D. 348, Blackburn, J., said that the Interpretation Clause "is a modern invention, and frequently does a great deal of harm." Cockburn, C.J., in *Wakefield Board of Health* v. *West Riding and Grimsby Ry. Co.,* (1865) 6 B. & S. 794, was even more opposed to this expedient of the draftsman. He expressed the hope that "the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion." In *R.* v. *Pearce,* (1880) 5 Q.B.D. 386, he was of opinion that the Interpretation Clause should not be allowed to disturb the plain meaning of words used in the body of the Act. In *Midland Railway Co.* v. *Ambergate,* 10 Hare, 359, it was laid down that definition clauses are not to be construed inconsistently with the purport of the words used in the remainder of the Act.

Undoubtedly in an age such as ours, when neology is going strong in the arts and sciences, a draftsman may pursue his definition of unusual words used to serve a particular purpose with advantage to lawyers and laymen alike, but care should be taken to use words

of common speech throughout the Act when they are apt to express the intention of the legislature—for the old saying that definitions are dangerous and ought to be avoided is as true today as when it was originally uttered.

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CONSTITUTIONALISM AND THE COMMONWEALTH.—In speaking at Ottawa in January last General Smuts alluded to the lack of precedent to be found in past history for the type of union now subsisting between the component parts of what up to the present has been known as the British Empire. This, however, did not disconcert him. He thought that the British genius is as capable of framing a workable and stable Commonwealth of Nations in the twentieth century as it was capable of building up the finest type of Imperial State known to the world in the nineteenth century. We share his optimism.

* * It is idle to attempt to find in the empires of the past any real norm or parallel of the British Empire as it existed at the outbreak of the Great War of our time. Ancient Greece, with a common language and a common religion existing among her city communities, and with ideals of liberty passionately extolled by her philosophers and poets, affords no example of an empire of free peoples to the modern world. There was no Hellenic solidarity at any time. Athens used her supremacy to limit the freedom of her dependencies, and in pondering her selfishness Thucydides would lead us to perceive that punishment follows as hard upon the crime of a State as upon that of the individual. Then, again, while Rome at the peak of her greatness had formulated general principles of legal right, irrespective of race and language, for the provinces under her sway, these provinces soon came to be taxed to swell the revenues of the centre of empire and their resources plundered by those who were set in government over them. Thus Virgil's great epic and Horace's famous hymn, which envisaged a new and imperial Rome arising upon the ruins of the republic, practically lost their message of hope and inspiration with the passing of the first Emperor. The grandeur that was Rome was Augustus himself. The moral and intellectual collapse of the Caesarian régime began with his first successor, Tiberius.

Nor do we find in any other modern empire the qualities that distinguish the British Empire. It translated into actuality and permanence the essentials of a State as conceived respectively by the Greeks and Romans, that is to say, Liberty and Order. The other nations have

colonised on a system which implies subservience at the outposts of empire and dominance at the centre. Under such a system there is no possibility of self-determination for the scions of the parent plant. They cannot develop into autonomous communities. Sovereignty in such a system is unitary and not partitive. It is to the everlasting credit of British statesmen in Victorian times that they could say *nous avons changé tout cela.* We do their memory a poor compliment by doubting that their imperial achievement can do no more than linger on for a few years as a survivor of itself—that it cannot be transformed into a durable union of self-governing States such as the new age demands. Let us think back through the stages of development in the organic law of Britain—from the tolerant imperial polity of the late Hanoverian era to the Stuart period, when England became Great Britain and British government passed beyond the King's Chambers into remote places of the world, and still further back until we see the foundations of political liberty laid for the little realm of England in the thirteenth century—and in so thinking we shall become convinced that as the skill of the British mind succeeded in maintaining a just equilibrium between constitutional and national expansion sufficient to meet the requirements of the past, it will not falter before the exigencies of the present. Burke declared that the political system of England as a whole is "never old, or middle-aged or young; but in a condition of unchangeable constancy moves on through the varied tenor of perpetual decay, fall, renovation and progression." The truth of that saying has been fully demonstrated since it was uttered.

When precedent can be made when occasion demands why search for one that may not be found?

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British Mandate in Palestine.—In the January number of the *University of Toronto Monthly* the Reverend Dr. S. A. B. Mercer, Professor of Oriental Languages and Egyptology in Trinity College, has an interesting article on the present conflict between the Arabs and Jews in Palestine. Dr. Mercer is one who can speak with authority. It appears from his article that the interests of the Arabs have not been conserved in the provisions of the Mandate nor in its administration. It will be remembered that in the revolt of the Arabs against the Turkish Dominion the interests of the Allies in the near East during the Great War were greatly promoted. Recognising this advantage the British Government agreed with Hussein,

Sherif of Mecca, to recognise and support the independence of the Arabs within special areas. These areas included Palestine. However it appears that the Zionists in England were able to obtain what is known as the Balfour Declaration which received before the end of the War the endorsement of the French and Italian Governments, of President Wilson, and, after the War, of the United States Congress. That document reads:

> His Majesty's Government view with favour the establishment in Palestine of a National Home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country.

When the Arabs became aware of the terms of this Declaration they recognised that their interests were practically ignored by it and complaint was made by them to the Allies. This resulted in the British and French Governments issuing a joint declaration in November, 1918, stating that it was the aim of those two countries to secure "the complete and final enfranchisement of the peoples so long oppressed by the Turks, and the establishment of national governments and administrations, drawing their authority from the initiative and free choice of the native populations."

When the Mandate system was established under Article 22 of the League Covenant that for Palestine was awarded to Great Britain, and in that Mandate the Balfour Declaration was approved. Provision was made that the Palestine administration should facilitate Jewish immigration. Upon this being done Dr. Mercer shows that immediately there began the organisation of Jewish Societies and the strengthening of already existing ones, with a view to the establishment of a National Jewish Home in Palestine. Over a million Jews became enrolled as members of the Zionist organisation, and some $50,000,000 has been spent on the enterprise. On the other hand, the Arabs were organised to oppose the provisions of the Balfour Declaration and the terms of the Mandate. So that the result has been to raise up a very disturbing situation where peace before had practically reigned undisturbed between the Jews and Arabs. The Arabs claim that the Balfour Declaration is inconsistent with Article 2 of the Mandate which foreshadows the creation of self-governing institutions in the country, and moreover violates Article 20 of the League Covenant which provides that all States, members of the League, must take immediate steps to procure their

release from any previous undertakings inconsistent with the terms of the League Covenant. In concluding his article Dr. Mercer says:

> It is earnestly to be hoped that the present British government will not try to solve the problem by refusing to face it fearlessly, but will realise that, while it must deal sternly with violence, it cannot afford to be anything but just to the majority of the native population, in spite of all promises and commitments. Palestine is a necessary factor in controlling the most direct lines of communication with India and the East; but it must be a friendly Palestine—friendly Arabs as well as friendly Jews—and the friendly Arabs are Moslems with Moslem cousins all along the way to India and the East.

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PRESIDENTIAL INDEPENDENCE IN THE UNITED STATES. — In the *Boston University Law Review* for January last will be found an interesting article by Mr. Charles Warren on what he states is a phase "in the development of our Federal Constitution which will not be found detailed in any law book or in any American history" —that is to say, the struggle of the Chief Magistrate of the United States against Congressional encroachment upon his powers and privileges. Mr. Warren reviews the history of the struggle from Washington's tenure of the presidency on to our own time. It was in connection with the Jay Treaty that Washington had his "run in" with the House of Representatives. Washington told the House that while it was his endeavour to "harmonise" with the legislative branches of the government, yet he found it "essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved."

The latest interferences by Congress with the Executive occurred in President Coolidge's administration. In 1924 Congress "directed the President" to prosecute suits for the annulment and cancellation of certain notorious oil leases. It seems that President Coolidge submitted to this dictation without resentment. However, when in 1924 the Senate adopted a resolution that "the President immediately request the resignation of the Secretary of the Navy" he determined not to submit to senatorial dictation. He said in his reply to the Senate:

> The dismissal of an officer of the government . . . other than by impeachment is exclusively an executive function. I regard this as a vital principle of our government.

Mr. Warren concludes his interesting examination of the question by referring to the statement made many years ago by Presi-

dent Buchanan of his understanding of the "rights and prerogatives" of the presidential office. These rights and prerogatives in the estimation of President Buchanan were vested in the people, and he held that every President has a duty to see that these popular rights and prerogatives should not be violated in his person, but "pass to his successors unimpaired by the adoption of a dangerous precedent." In taking that position Mr. Warren thinks that President Buchanan was not defending the office of Chief Magistrate but rather the interests of popular government.

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LORD MACMILLAN.—We were guilty of an inadvertance in last month's Topics in saying that Right Honourable H. P. MacMillan had been appointed a Lord Justice of Appeal. The correct designation is Lord of Appeal in Ordinary, and in view of the fact that there is good reason to expect that he will be with us again during the coming summer, it may be noted that he has taken the title of Lord MacMillan of Aberfeldy.