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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ENCROACHMENTS ON LAWYERS' FIELD.—Two of the Committees of the Conference of the Governing Bodies of the Legal Profession in Canada, the one on the Encroachments on the Lawyers' Sphere of Activities and the other on the Education of the Public with regard to the Activities of the Legal Profession, have sent out a questionnaire to a number of prominent Canadian lawyers in the hope of obtaining the information necessary to enable them to make some practical report upon the important subjects with which they have to deal, at the general meeting of the Association to be held in Toronto in August next.

It is not necessary to inform the profession generally that there is an extensive encroachment by various untrained and unlicensed persons and corporations on the field of the lawyer. The Committees desire to have lawyers in all the Provinces compare notes on the extent of this intrusion, and so the questionnaire calls for in-

formation, opinions and suggested remedies. Those to whom it is sent are reminded that a prompt return will enable the Chairman to prepare their reports in good time, so that they may be printed in the official programme and booklet, and readers of the REVIEW are cordially invited to communicate with Mr. R. J. Maclennan, K.C., of Toronto, giving any assistance they can by way of information within their knowledge, or otherwise, having that end in view.

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A PHASE OF 'EQUALITY OF STATUS.'—We are pleased to print Mr. Eric Pepler's letter in the present number of the REVIEW at page 321, because it bears upon a question which, although merely an academic one at this time, is giving rise to doubt in the minds of many thoughtful Canadians who yield to no one in their loyalty to the King and their adherence to British polity as adapted to the age in which we live. And that question simply stated is this: Whether a system which makes it possible for an extraterritorial advisory body to review and reverse the decisions of the Canadian Courts is consistent with the theory that this is a self-governing country declared by the Report of the Imperial Conference of 1926 to enjoy an "equality of status" with the other members of the British Commonwealth of Nations. The administration of justice through the Courts is a fundamental sphere of government, and no country can be said to be autonomous when and so long as the determination of cases before its Courts cannot reach finality until some body outside the country has exercised its appellate jurisdiction in the premises. It makes no difference in principle that Canadians may be called to sit on this appellate tribunal. It sits and exercises its jurisdiction abroad and the majority of its members are not Canadians. Its constitution, framed before the dominions sprang as new stars into the imperial firmament and then well adapted to colonial requirements, is not suited to the conditions and complexities of the Empire in its new dress as a Commonwealth of Nations. Its connotations so far as the *amour propre* of the younger nations in the Commonwealth is concerned may be lightly passed over, but its cramping effect upon the development of the judicial quality in the dominions is not so negligible. However, so far as Canada is concerned the Judicial Committee must presently continue to function for the reasons mentioned in our former observations to which Mr. Pepler has taken exception.

We would invite further expressions of opinion on the subject.

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THE LATE LORD BALFOUR.—A good deal of criticism circled about the head of Arthur James, Earl of Balfour, in his lifetime and now that he is dead he will become a prey for those who provide us with the best sellers in biography. But, whether his claim to a many-sided greatness is admitted in our own day or left to the discovery of a later generation, we do not think that in looking back upon his long public life he would have been disposed to say with one of old in a time of sore trial: "But now they that are younger than I have me in derision."

While we should have liked to speak fully of his qualities in their various forms, we must content ourselves with a discussion of his place as a statesman. Going early into Parliament he displayed notable gifts as a debater, yet, although nominally under the tutelage of his uncle, Lord Salisbury, he became a member of the Fourth Party, which rode a whirlwind of its own devising in the early eighties of last century. Breaking away from this political obstreperousness in 1886 he accepted the office of Secretary for Scotland in his uncle's cabinet, passing over to Ireland shortly after as Chief Secretary—a wise and brave man's job at any time and then particularly trying. He broke the infamous "Place of Campaign," and left Ireland with much respect for his fairness and courage accorded him by its people. His tenure of the Premiership from 1902 to 1905 was not a success from the point of view of the Unionist party; and his best work of a constructive character for the people of England really began when he reverted to the position of a private member of Parliament. But unquestionably his most effective work as a statesman was done as the occupant of high place during the Great War and after. He served as First Lord of the Admiralty in Mr. Asquith's Coalition government in 1915, and did not refuse to continue in public office under Lloyd George, whose temperament and methods were poles apart from his own. Although having attained the full span of seventy years of life in 1917, he then made a perilous voyage to the United States and strengthened the temper of the Americans to see the Allied Powers through their desperate enterprise. We find him again in Washington in 1921, representing Great Britain at the Naval Conference, and winning a larger measure of the esteem of the American people. He represented his country at the first meeting of the Assembly of the League of Nations, and visited Palestine in 1925 in what we believe was an endeavour to see how far he had made a mistake in reducing to action the British mandate over that country. In 1926 he reached what we venture to regard as the most far-reaching achievement of his life, namely,

giving the lead to the delegates to the Imperial Conference of 1926 in declaring Equality of Status between the "autonomous communities within the British Empire"—a momentous thing which not only changed the British world itself but has its repercussions throughout the whole civilised world. Naturally it shocked the sensibilities of the 'stand-patters,' but without such repair the imperial Ship of State might have foundered.

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THE PENALTY OF THE "CAT."—A burglar who was sentenced to ten years' penal servitude and fifteen strokes with the "cat" committed suicide recently in Wandsworth prison, in England, and his motive in doing so seems to have been the fear and shame of being flogged for his crime. The tragedy gave occasion to a public outcry against the employment of physical chastisement as a deterrent from crime; it being denounced as a savage form of reprisal by society against the individual who by his conduct has put himself outside the pale. Incidentally Lord Darling, by his levity and lack of propriety in referring to the unhappy incident, in the language we quote below has come in for some sharp criticism by the lay press. He is reported to have used the following language:

> In my opinion, public opinion which approves prize fighting, including the knock-out blow, cannot logically condemn flogging as at present administered, and the men and women who now flock to the exhibition of "The Game Chicken" and "Battling Brown" would gladly attend to see "Burglar Bill" punished by "The Wandsworth Walloper." . . . The Chancellor of the Exchequer might as well set an entertainment tax on that as on the other exhibition.

Commenting on this amazing deliverance one of the leading English weeklies says:

> Here is a flower of culture plucked from the exquisitely nurtured and talented mind of that great ornament of the Bench! We will not gild the lily. Remember that the man referred to as "Burglar Bill" had just killed himself rather than face his sentence, and that his wife and relatives are living and may be presumed to have human feelings. The man whose unenviable duty it would have been to carry out the sentence on him is "The Wandsworth Walloper." . . . If there were one grain of wit in this observation it might be forgiven him; so ponderous a piece of clowning is inexcusable. Among a few it might pass for "clear thinking;" but among many with a very different name.

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NATIONALITY OF WOMEN AND CHILDREN.—This important question is one of the items on the agenda of the Conference for the Codification of International Law which opened at The Hague on the 13th of March. It is interesting to know that the deliberations of the Conference in respect of this particular subject will be keenly watched by representatives of many women's organisations throughout the world. We would remind our readers that under the present law of Great Britain, Germany, Italy and certain other States a woman loses her nationality upon marrying a foreigner without automatically by the marriage taking the nationality of the husband. It is also true that by the law of France, Belgium, Denmark and other European countries a woman on marriage keeps her original nationality unless she automatically acquires the nationality of the husband. So that abundant opportunities are afforded for the confusion of the national status of women in Europe when they marry the nationals of other countries than their own. As to children while most countries regard those who are born in foreign parts as automatically acquiring the nationality of their parents, English law is disposed to hold children born within Great Britain as British subjects until they have exercised their election to make a declaration to the contrary when they come of age. So here the confusion of double nationality occurs until such declaration has been made. A solution of those two problems alone would demonstrate the usefulness of the Conference.

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THE CROWN AND THE COMMONWEALTH.—Speaking of the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, *The Spectator,* published in London, makes this observation:

> The Commonwealth is now held together by only one real tie—the Crown—and because this great symbol alone influences the parts to cleave together it has an importance (and in a proper sense a majesty) which has not belonged to it since the period of autocratic rule.

Thus His Most Gracious Majesty King George V. is not only every inch a King but he is a King of more inches of the earth than any other monarch known to history.

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THE THREE-PARTY SYSTEM.—Under this title Professor F. J. C. Hearnshaw, of King's College, London, contributes a thoughtful article to the February number of *The Nineteenth Century.* He

holds a very ardent and compelling brief for the return of England to its traditional two-party system in politics. It is by reason of long adherence to this system that parliamentary administration has been more successful in Britain than in any other country, and he thinks that the present confusion of groups in the House of Commons will be ended by a fusion of the enfeebled Liberal party with the Labour party. His opinion of the continuance of the three-party system is expressed in these terms:

> So deadly a menace to the British system of government and the spirit of the English Constitution is the three-party system that it is safe to say that the electorate will not reduce itself to futility by allowing it to continue. . . . . The return to the two-party system is the prime condition of the restoration of sanity and stability to British politics.

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THE NAVAL CONFERENCE ONCE MORE.—At the moment of writing there seems still to be hope that the Naval Conference will accomplish something after all the futility that has characterised its proceedings for many weeks. The announcement that the United States is willing to join in an agreement whereby the signatories pledge themselves to enter into consultation with each other should France be attacked shows how firm is the intention of the United States to forward the interests of peace notwithstanding the difficulties that the French nation has created by its attitude throughout the Conference. The long and short of the French attitude is *fear of defeat* in case of a war that France may see fit to precipitate at some future date. The militarist sentiment still prevails in that extraordinary country. Then, again, with all their bent for logic the French lack insight into the real motives of the English and American people in promoting this great gesture for peace throughout the world. They cannot understand that the danger of war is immeasurably less than it was ten years ago. This much is certain, however, that America may go far to quiet the nerves of France but she will not be a party to a Locarno for the Atlantic and Mediterranean seas.

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THE PECCABLE CROWN.—According to *The Times* of February 25th last, Lord Dunedin, in dismissing an appeal by the Crown to the House of Lords in an Income Tax appeal strongly animadverted on the practice of taking trivial cases to the House because the Tax Commissioners have been held to be wrong by the lower courts. He

said: "It is high time—and I say this insistently—that those who advise the Crown should make up their minds that the Crown can be wrong." Commenting upon Lord Dunedin's remarks *The Law Journal* speaks as follows:

> Strong words; but not a whit too strong, as those who have experience of the attitude of the authorities on questions of revenue law will agree. It is really intolerable that individuals should be forced—as they too frequently are—to go from the Commissioners to the Court, from the Court of first instance to the Court of Appeal, and from the Court of Appeal to the House of Lords, not as appellants but as respondents, because the contention of the Income Tax authorities is held to be wrong.

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THE JUDICIAL COMMITTEE.—An editorial note in the April number of the *Law Quarterly Review* contains a complimentary reference to Mr. Henderson's recent article in this REVIEW on the Eligibility of Women for the Senate, and reminds us that in an article in the *Cambridge Law Journal* in 1922 on the Judicial Committee of the Privy Council, Viscount Haldane stressed the fact that a Judge of that body must have the "statesmanlike outlook . . . that is to say, the outlook which makes him remember that with the growing constitution things are always changing in development, and that you cannot be sure that what was right ten years ago will be right to-day." The Editor suggests that the action of the Judicial Committee in *Edwards* v. *Attorney-General* was probably due to this "statesmanlike outlook" and also points out that in view of the criticism which has recently been advanced against advisory opinions, it is of interest to note that the *Edwards* case is a purely advisory opinion, no concrete case having then arisen.

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"KANSAS IS DRY, SO STAYS AMERICA."—This is the proud boast of the Wichita *Beacon* in commenting on the partial returns of the nation-wide Prohibition poll instituted by *The Literary Digest* and now in progress. According to the third report of the poll, published in the issue dated March 29th of the last mentioned journal, Kansas has polled 17,959 votes for enforcement of the Eighteenth Amendment and the Volstead Act, 6,823 for modification, and only 4,900 for repeal. This in the opinion of the Kansas newspaper establishes that the State in question is "more keenly interested in law and order than any other State from which tabulations have been received."

We must confess that we do not see the logic of this conclusion when the report shows that such important States as California, Illinois, Missouri and Ohio join with Michigan, New York and Pennsylvania in voting more largely for repeal than for enforcement or modification—thus giving rise to the inference that they think that Prohibition does not tend in the direction of law and order. The final result of the poll may indicate that the American people as a whole are determined that Prohibition has come to stay, but that Kansas could rise to national leadership on that or any other question at the present time seems highly improbable.

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AMERICA IN THE LIMELIGHT.—That America in all its ways and works is very much in the European mind at the present time is abundantly obvious to anyone who keeps himself in touch with trans-Atlantic periodical literature. It is also obvious that the European mind is not always correctly informed concerning America. In a recent article in *The Spectator*, Mr. E. Roy Calvert discusses some of the misapprehensions of Englishmen in respect of the Crime problem in the United States. Referring to a statement in one of the London dailies to the effect that twelve thousand murders are perpetrated in the United States every year, Mr. Calvert says that there is a confusion underlying this statement in the fact that in American criminal statistics "murder" is loosely used as synonymous with "homicide" while in the more precise terminology of the English records there is a distinction between the wilful and malicious taking of life (murder) and homicide without malice aforethought (manslaughter). Into this American list of malefactors go all those who have caused death by negligence in operating automobiles. So while the list is appalling enough in so far as it includes simple murderers it is well to know how it is really made up. Mr. Calvert, who is an Englishman well acquainted with social and national conditions in the United States, finds that the superabundance of crime in that country as compared with Great Britain is due to the mixed population. He says frankly that a new country is more disposed to lawlessness than an older one where the people have been moulded together for centuries into a homogeneous whole, and that the United States with its many mixed races is one of the most heterogeneous communities in the world. To quote him:

> Law, after all, is only crystallized public opinion, and respect for law cannot be artificially established, but comes only through the widespread realisation of social responsibility; and this is of slow growth.

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