

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.

LORD BIRKENHEAD.—Lord Birkenhead succumbed last month to the second attack of an illness that seized upon him early in the year.

Of all the English public men of his day Lord Birkenhead was easily first in proving the truth of the saying *Audentes Fortuna juvat*. Horace tells us that there were brave men before Agamemnon, and undoubtedly there were some who preceded Birkenhead in the great office of Lord Chancellor of England who, like him, owed their advancement to supreme confidence in their intellectual powers and unflagging courage in employing those powers both in the Courts and in Parliament. Perhaps in all the long list the early career of Lord Thurlow more nearly resembles that of Birkenhead, although the parallel must be limited to the mentality and fortunes of the two notable men. No one who met Lord Birkenhead could fail to realise that he was a remarkable man, and conversation with him might well have served to recall what Dr. Johnson said of the holder of the great seal in no less than four administrations: "I would prepare myself for no man in England but Lord Thurlow. When I am to meet him, I should wish to know the day before."

Had Thurlow possessed the same regard for the elemental decencies, the same disdain for lying and the same fidelity to his

friends as Birkenhead manifested, the parallel would be more complete.

Birkenhead looked upon life as a strenuous thing and liked it so. He never appeared to regard the earth as a vale of tears. He fought the disease which carried him off at a comparatively early age as valiantly as he fought his way to distinction as a lawyer and a statesman. He has personally told us—with the frankest egotism—that he won success because he deserved it. His steady march from birth in an uninfluential station of life to a peerage, affords a further illustration of the chances for utilising his abilities to the full that the social ethos of England has offered to every individual since the days of the Tudors. To win distinction at the Bar almost from the moment of his call, and to capture the House of Commons with a maiden speech, are rare experiences. To become Attorney-General of England at the age of forty-three, and Lord Chancellor at forty-seven, are gifts of a kind that fortune rarely bestows upon the children of men. Yet Birkenhead was permitted easy access to all these fields of honour and emolument.

To show how hard he was beset with criticism of his audacity in attempting to make the English world his own, one has only to read Mr. A. G. Gardiner's appraisal of his qualities when he was still plain Mr. F. E. Smith. Take the following passage for example:

Some men fail because they have too much respect for the world and too modest an estimate of themselves. Mr. Smith has no respect for the world, and no one ever accused him of exaggerated modesty. . . . "Mr. Smith is invariably vulgar," said Mr. Churchill on one occasion, and it is true that if he ceased to be vulgar he would cease to be witty.

Lord Birkenhead will live in our memories as a Judge through his strong decisions in the House of Lords. In *Bourne v. Keane*,¹ he purged the English law of charities of its stain of bigotry, and in *The Volute*,² he won from his colleague, Lord Finlay, a high tribute of praise in that he had made "a great and permanent contribution to our law on the subject of contributory negligence, and to the science of Jurisprudence."

His fame as a Parliamentary lawyer will rest in the momentous part he played in the reform of the law of Real Property in England.

As to his place in literature it may be said that through the medium of the essay he meditated the thankless muse with some strictness, but posterity will not exercise itself about his claims in

¹ [1919] A.C. 815.

² [1922] 1 A.C. 129.

that respect. Whether he will be permanently placed among the eminent men of his time will depend upon what the future thinks of him as a lawyer and a master of the art of rhetoric.

* * *

HAZLITT AND THE LAW.—William Hazlitt, one of the small company of English critics who have written "books that are eternally readable," died on the 18th September, 1830. The event of his centenary has been duly honoured, and much about his intellectual quality and achievements has appeared in the periodical press. There is one of his pieces, written outside the boundaries of literary criticism, which is full of interest to the lawyer in that it presents a conception of the foundations of law quite at variance with the views of Jeremy Bentham, who, though an older man, outlived Hazlitt. Bentham, writing as a member of the Bar, excludes natural law and natural rights from his theory of legislation—treating them as "fictions." Hazlitt, speaking as a layman in his "Project for a New Theory of Civil and Criminal Legislation," has this to say:

Society consists of a given number of individuals; and the aggregate right of government is only the consequence of these inherent rights, balancing and neutralising one another. How those who deny natural rights get at any sort of right, divine or human, I am at a loss to discover; for whatever exists in combination, exists beforehand in an elementary state. The world is composed of atoms, and a machine cannot be made without materials. First, then, it follows that law or government is not the mere creature of a social compact, since each person had a certain right which he is bound to defend against another without asking that other's leave, or else the right would always be at the mercy of whoever chose to invade it. . . . Secondly, society, or government, as such, has no right to trench upon the liberty or rights of the individuals, its members, except as these last are, as it were, forfeited by interfering with and destroying one another, like opposite mechanical forces or quantities in arithmetic. Put the basis that each man's will is a sovereign law in itself: this can only hold in society as long as he does not meddle with others; but so long as he does not do this, the first principle retains its force, for there is no other principle to impeach or overrule it.

Speaking so, Hazlitt is a better jurisprudent than Bentham. On every side to-day we are hearing appeals to the 'law of nature' as a corrective of the unjust rules of positive law that the past has handed down to us. Modern thought is reaching out towards the Aristotelian view that legal right is inseparable from the idea of justice.

* * *

SUPREME COURT OF CANADA.—Mr. E. R. Cameron, K.C., LL.D., has retired from the office of Registrar of the Supreme Court of Canada to which he was appointed in the year 1898. Mr. Cameron has made several useful contributions to the literature of the legal profession in Canada, among them being *The Practice of the Supreme Court of Canada*; *The Canadian Constitution and the Judicial Committee*; *Canadian Cases Judicially Noticed* and treatises on Fire and Life Insurance law in Canada. He was a member of the Royal Commission which prepared the Revised Statutes of Canada, 1906, and also served as vice-president of the Commission responsible for the revision of 1927. His *Memoirs of Ralph Van-sittart* (1902) throws an interesting light on interprovincial political and social questions in the years immediately preceding the creation of the Dominion of Canada.

We trust Mr. Cameron has many years of useful literary performance ahead of him.

Mr. James F. Smellie, K.C., of the Ottawa Bar, has been appointed to succeed Mr. Cameron as Registrar of the Court.

* * *

PROFESSIONAL FUSION IN ENGLAND.—The *Morning Post* has recently devoted some space to a discussion of the desirability of fusing the two branches of the legal profession in England on the ground of economy in litigation. Mr. H. F. Moulton, replying to a correspondent advocating the proposal in the journal mentioned, said that in his opinion there would still be 'specialisation,' first by the man who received instructions from the client, and thereupon worked up the case, and, secondly, by the man who conducted the case in Court. But that is simply begging the question. In this country no such professional separation exists, and it is a common practice for the lawyer who is retained at the outset of the case not only to prepare it for trial but to see it through the Courts without other professional assistance. Certainly such a system is less burdensome to litigants.

* * *

THE PERFECTION OF REASON.—It is hardly fair to the memory of Sir Edward Coke to say that he was devoid of imagination. To do that is to forget his ability to manufacture judgments and ascribe them to Judges who never delivered them. (See Wallace's "The Reporters," 4th ed., p. 173 ff.) Then there is a fine lyrical quality in such phrases of his as "The gladsome light of Jurisprudence"

and "The Law, which is perfection of reason." The latter bit of rhetoric must be taken with a grain of salt, because, as Coke himself explains the phrase, it "is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of everyman's natural reason; for *nemo nascitur artifex*." In other words, "reason," as used by Coke in this connection, is something different from the reason or "common sense" of the ordinary man, the latter being, perhaps, best described by J. G. Saxe:

The literal Germans call it "Mutterwiss,"
The Yankees "gumption," and the Grecians *nous*—
A useful thing to have about the house.

* * *

APOLOGIES NECESSARY.—We must apologize to our readers for erroneously referring to Sir Henry Alfred McCardie as "Sir William McCardie" on page 531 of the current volume of the REVIEW. Should our blunder arrest the eye of the learned Judge himself, we hope he will find extenuation for it in the maxim: *Nihil facit error nominis cum de corpore constat*.

* * *

THE LEAGUE OF NATIONS.—The League of Nations has had a rather difficult year, and it is reassuring to have Sir Robert Borden, on his return from Geneva, speak in commendation of its persistent effort to achieve its aims in the face of all the obstacles that are put in its path. The League has set up a new way of international living which the traditions and sentiment of many of its members find it hard to keep in step with. The reactionary spirit of France and Italy has become intensified recently, and a new difficulty to surmount has been created by the recent elections in Germany. If the delectable Herr Hitler has his way the New Germany will be purged of "the disease of internationalism and pacifism." Undoubtedly the League is faced with a tremendous task in promoting peace throughout Europe, but if civilisation is to be saved on that continent it must eventually achieve its purpose.

* * *

"TOM THUMB" GOLF.—The Supreme Court of Westchester County, New York, has recently decided that the miniature golf course, with which the American people have become sadly familiar of late, is not a golf course within the meaning of a residential

zoning ordinance which permits within zone limits the construction of a "golf course." The case is mentioned editorially in the *United States Law Review* for September, 1930, at p. 462, where it is said:

Whether the decision referred to will be effective in checking the growth of 'Tom Thumb,' who, as a so-called golfer, seems rapidly to be attaining gigantic stature, remains, of course, to be seen.

* * *

NOTABLE PLEDGE FOR PEACE.—An inspiring editorial appears in the October number of the *American Bar Association Journal* under the title of "Recessional." Realising that many of our readers would not have the privilege of seeing it at first hand, we have much pleasure in reproducing it here for their benefit:

Our brethren from across the sea have come and gone. Their visit was greatly enjoyed by all their hosts, who in turn trust that our guests found their stay among us pleasant and profitable. But at the end of all such notable incidents as this exchange of professional courtesies between the Old and the New World, the question always arises in the mind, Is this the be-all and the end-all of it, or did it have some undeclared and finer purpose and may it lead in time to real results?

We know of no one who has so well expressed the real good—the genuine influence for better international understanding—which may come of the recent meeting than Sir John Simon. In his address at the New York Bar Association banquet, held Sept. 2, after expressing on behalf of the visiting lawyers, the warmest gratitude for the inexhaustible hospitality of the American Bar, he said:

"Now, gentlemen, what is going to be the outcome, the real and permanent outcome, of this exchange of visits between the lawyers of the Old World and of the New? Our visit here is the culmination of a unique experience, the memory of which will remain with us to the end of our lives. But may not our meeting together have a consequence which would be of wider import? We have made many pleasant friendships, we have learned from personal contact something of each others' lives, but is the only result to be these happy personal and professional recollections? Forgive me if I detain you with the serious thought that the outcome might be something which would be of international value.

"We deceive ourselves if we believe that these relations of perfect understanding and concord will necessarily always exist between the countries we represent. The waters of the Atlantic when touched by some chilling wind often throw up a mist through which familiar things may assume strange and forbidding forms. Some day in the future, a temporary coolness may arise between us and there will be forces on each side of the Atlantic which may seek to magnify a cloud no bigger than a man's hand. On each side, the appeal will be to the watchwords of patriotism, to the claims of national dignity, to respect for the flag. Each side will contend that the right lies with it. Each of us may be tempted to think that the point of difference is one on which his side cannot yield.

"Now, what are we lawyers going to do then? You American lawyers have enormous powers; and in the old country from which I come we men of the law also play our part, and our profession is one which often opens a career to public influence and public service.

"Let us pledge ourselves to one another, We the lawyers of the Old World and you, the lawyers of the New, that if the day of suspicion and misunderstanding should come, we will be among those who counsel patience and self-control—that we will be faithful to the teaching of our high calling and proclaim that reason and fair play and listening to both sides are the only true solvents of international dispute. If in the future some shadow falls between us, let us recall our meeting of tonight and preserve, in the face of the passion of the mob and the excitement of the hour, the memory of this mutual friendship and esteem out of which may be built up and maintained the continued peace of the world."

The whole audience rose to its feet in response to this appeal and at the end of the applause, the Honourable John W. Davis, who presided, closed the meeting by declaring: "This demonstration is the giving of that pledge."
