

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 PASSING YEAR.

L'adversité fait l'homme, et le bonheur les monstres.

In the first number of the current volume of the REVIEW we spoke of the year 1930 as a gloomy year, but one that by reason of its gloom should have proved of great service as a testing-time for the spirit of man. That it has so served is sufficiently revealed by the history of the present year. Barring the failure of the League of Nations to prevent armed strife in Manchuria, and the failure of the Round Table Conference to iron out difficulties that must be overcome before India is made a useful member of the British Commonwealth, civilization as a whole has reacted in a commendable way to the desperate trial of its faith in itself that was precipitated by the Great War and its consequences. The year has seen genuine efforts put forth by some of the Great Powers of the West towards a rehabilitation of international trade and commerce through co-operation. This is in conformity with the newly revealed principle of "Interdependence." Individual nations also have addressed themselves with fine courage to the task of setting their economic house in order. Great Britain, finding its solvency jeopardized by having to borrow money abroad to replenish a treasury depleted by costly experiments in Socialism, expelled its Labour Government

and set up an Administration that at the moment of writing confidently expects to balance the Budget. Canada, faced by a falling revenue and with her currency depreciated in the United States market, asked her own people for a loan of \$150,000,000 and they subscribed \$65,000,000 more than was asked. This manifestation of the spirit of bravery in adversity induces us to say that defeatism has not yet entered into the blood of the British people either at home or overseas.

Then, again, the year in Canada has seen heroic efforts on the part of governments, societies and individuals to mitigate the sufferings of the unemployed. This means that the purse of the man of small resources as well as that of the rich man—the *rentier* as well as the capitalist—must respond the demand of higher taxation and the urge of Christian charity. That the burdens cast upon this class of our citizens are being borne cheerfully under a torrent of abuse and vilification by the emissaries of Communism abroad in the land must in good time bring its reward. Surely, if slowly, the more intelligent among the disaffected unemployed will realize that the “dictatorship of the proletariat” would mean the extinction of the rich; and with the passing of the rich would go the riches used to help the needy in the present crisis and others which will surely come before any workable scheme of Communism in the British world could possibly be set up. Indubitably it would not be the amorphous thing that Soviet Russia has fashioned—for it is as impossible for Britons to be Slavs as it is for them to be slaves, and Stalin has made the terms largely interchangeable. Hitherto great schemes of social service for the benefit of the poorer classes have been financed out of the taxation and voluntary giving of the rich and near-rich, that is the so-called *bourgeoisie*; as one writer has said: “The idea of a workman subscribing his guineas to a hospital or a home for incurables sounds like a jest.” It is notorious that even in good times the manual labourer either refuses to give, or if he gives at all, gives niggardly to institutions for the relief of want and misery.

* * In writing as we do, we are not unmindful that a betterment of the relations between Capital and Labour is a paramount necessity in repairing the dislocations in our social order. Oppression, privilege and monopoly of benefits must be broken down, and so far as private property is stubbornly exploited for these ends it calls for the correcting hand of legislation. But as J. S. Mill asked many years ago, Why abolish private property before it has received all the improvements of which it is capable?

As compared with the drama of constitutional reform that of

economic reform is a slow-moving one with no wonder-worker in the cast, and that is because the latter moves in the field of science while the former is an emergence, more or less abrupt, from some agitation of the group mind seeking practical results rather than formulas. England saw constitutional monarchy overset and restored within the short period of eleven years in the seventeenth century, while the history of economics is a slow stream of development in the betterment of social life since the beginning of civilization. Utopias are dreamed of but not really built by human beings, and that is due to the fact that man at his best is a little lower than the angels. As George Meredith puts it: "We are not angels, which have their dulcimer ever on the choral pitch. We are mortals attaining the celestial accord with effort, through a stage of pain."

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EVOLUTION IN THE BRITISH WORLD.—"*The day of the centralized Empire is past. We no longer live in a political empire. We must now see to it that our ability and our resources are thrown into the enterprise of building and strengthening an economic union.*"

Thus spoke the Prime Minister of Canada on his return from England on the 12th instant, having regard to the passage of the Statute of Westminster. It is a statement of tremendous meaning, connoting something without a prototype in history. It proclaims the passing of an empire, not because of central weakness and decay but because of strength, stability and national aspirations at its outposts that have outgrown the imperial status of the past. Contrast the sentiment behind this rebirth of the British world with that which induced a purblind statesman in the nineteenth century to characterize the colonies as a mill-stone around the neck of Britain! If Mommsen had lived to see this new thing in the political structures of the world he might have said of it, with more propriety than he said of the Roman State as reconstructed under Augustus, that here were "fresh nations, in free self-movement, commencing their race towards newer and wider goals."

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RETIREMENT OF MR. JUSTICE AUDETTE.—The Honourable Louis Arthur Audette retired from the Bench of the Exchequer Court of Canada on the 14th instant because of the provision in the Judges' Act that vacates the commissions of Judges of the two federal courts in Canada when they attain the age of seventy-five years. The abounding vigour of mind and body possessed by the Honourable

Mr. Audette on his retirement gives point to the view of those who say that to set an inexorable time limit upon the office of Judge in many instances is a detriment to the administration of justice in that it dispenses with the services of men whose qualifications for the office are not only not impaired but as a matter of fact are at their peak of excellence at the age above mentioned.

The retired Judge was called to the Bar of Quebec in 1880 and entered the service of the Exchequer Court as Registrar in 1887, the date when the Court was separated from the Supreme Court and became an independent tribunal. The ability displayed by him in that office won for him promotion to the Bench of the Court in 1912. Many of the most important cases launched in the intervening period were heard and determined by him, and his judgments have in a large measure served to mould the jurisprudence of the Court.

The last sittings presided over by the retired Judge took place at St. Catharines in the present month. At a dinner given by the local Bar in his honour he made a reply to the toast of his health which was a noble tribute to the profession in which he had served with zeal and efficiency for so long a period.

The Honourable A. K. Maclean, President of the Court, spoke of the retirement of the Honourable Mr. Audette to representatives of the press with much feeling. We quote his remarks:

To learn of the exact place the retiring Judge has filled in the Exchequer Court is to search the history of the Court itself since it was separated from the Supreme Court of Canada in 1887. When Mr. Justice Burbidge was appointed to the Bench of the Court as its first Judge, Mr. Audette came from the Quebec Bar as Registrar of the Court. He continued in that office until 1912, when he was appointed a Puisne Judge of the Court, the Honourable Sir Walter Cassels being then its President.

As Registrar Mr. Audette's activities were many and varied. He repeatedly acted as Referee in railway cases, the most important being that arising out of the Scheme of Arrangement between the Quebec Southern Railway Company and its creditors. Outside of duties discharged as Registrar and Judge his more notable activities were connected with the secretaryship of the Board of Arbitration appointed in 1893 to determine disputed matters of account between Canada and the provinces of Ontario and Quebec, and the settlement of the pelagic sealer claims under the Washington Treaty of 1911 and the Paris Award Regulations of 1893, which were referred to him as Commissioner in 1913. Mr. Audette came to the Court thoroughly trained in the civil law, but as the Exchequer Court administered both the English common law and the civil law it was necessary for him to acquire a knowledge of the former system.

It was well said by Lord Bowen, one of the most accomplished Judges of Victorian times, that English law cannot be learned in a day, and Lord

Bowen went on to say that "there is not a study in the world more exact, more liberal, more elevating."

Mr. Audette possessed the infinite capacity for taking pains which has been said to be the prime element of genius and it is not surprising that he was able to add a mastery of the principles of the common law to his proficiency in the law of his native province. His book on the practice of the Exchequer Court bears ample testimony of that.

Mr. Justice Maclean added that his relations with the retiring Judge had been of the happiest kind, and that he was always of the greatest assistance to him in consultation. To speak of the Honourable Mr. Audette's retirement as creating a vacancy in the Exchequer Court that will be hard to fill is a truth that every practitioner in the Court would be prompt to affirm.

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A DISTINGUISHED CONTRIBUTOR.—We have much pleasure in publishing in our present number an article on "The Development of the Commercial Consulate," contributed to the REVIEW by Sir Alexander Wood Renton. The author has had a distinguished and varied career. Born in Scotland in 1861, he was educated at Glasgow Academy and Edinburgh University, graduating with high honours in arts and law at the latter institution. He entered Gray's Inn as Bacon Scholar in 1882, and was called to the Bar in 1885, joining the Oxford circuit. In 1901 he was appointed a puisne Justice of the Supreme Court of Mauritius, and in 1914 became Chief Justice of Ceylon, retiring from the latter office in 1918. Since then he has acted for the British Government in several important *affaires d'Etat* arising both within the Empire and abroad, ending with the chairmanship of the Irish Grants Committee, 1926. As the editor of the first edition of the *Encyclopædia of English Law*, his name became familiar to the legal profession throughout the world.

* * The fact that the REVIEW is being sought as a medium of publication by outstanding writers abroad is a source of satisfaction to the Editorial Committee.

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INTRANSIGENT INDIA.—Reflecting upon the tense atmosphere that surrounded the Round Table Conference on India, and the dubious outlook for the success of the British Government's formulated policy of Home Rule for federated India, one recalls Napier's famous pun on the word *Peccavi* after the battle of Hyderabad, and meditates whether England has not given the pun a new meaning by sinning against peace in India through her patience with Mahatma Gandhi and his fellow trouble-makers. That an agitator—no matter how sincere in his views of India's rights—should parade in

London in a garb as offensive to Western tastes as it was ostentatious, dictating the while the terms upon which India would consent to remain in the British Empire, was enough to make Clive, and Hastings, Wellesley and Hardinge turn in their graves. What they did to make India worthy of the claims of its proud peoples and safe for the world, is to be overset by one who would buy independence for his country at the price of its peace. At the conclusion of the Round Table Conference Gandhi announced that he was prepared to start his civil disobedience campaign all over again, and that the renewal of the conflict rested with the Indian National Congress. He boarded a steamer for home on the 5th instant attended by his English disciple, Miss Madeline Slade, who, as we have it in the press, "shepherded him up the gang-plank followed by the inevitable train of spinning-wheels, pots and pans, and bottles of goat's milk." No personage outwardly more ridiculous has ever passed over the Imperial stage; and it is only a fatuous age that would account him either a hero or a saint.

We are glad to have our opinion of him confirmed by one of his own people. Madame Cornelia Sorabji, one of the foremost Indian educationists, told the students of the University of Pittsburgh the other day that Gandhi, in her opinion, was a "tool of Communism," and that his actions are merely poses and his clothes a bid for publicity. "Gandhi is vain," she declared. "He has a most pleasing and disarming smile and a manner of speech that wins the sympathy of his audiences. He is a shrewd politician, but yet there is something childish in his vanity." If this opinion of him is just, then beyond cavil Mahatma Gandhi has a defect of character that disqualifies him as a hero or a saint—vanity. To be either requires him to measure up to the discipline laid down by Montaigne, namely, to "sequester and recover himself from himself."

* * Whatever might be said against the original credentials of the British people to govern India, it is undoubted that England's control of the country has been a notable service to humanity. For that control to be withdrawn now would mean a return to conditions that marked the struggle for power between the Mahrattas and the Moguls in the last half of the seventeenth century.

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AGRICULTURE IN SPATS.—Whatever may be said about the element of bureaucratic law-making—and sumptuary law-making at that—in the order of the British Columbia Minister of Agriculture to the members of his staff to desist from wearing spats and carry-

ing canes at plowing matches, it would seem to accord with the eternal fitness of things. Spats and canes are eloquent of the culture of city streets, not of the culture of the fields, and employees of a department of agriculture should dress the part when engaged in their proper business. How could they instruct the inexperienced plowman when so accoutred? We are persuaded that farmers have not done their plowing attired in spats and flourishing canes since Adam left Eden to "till the ground from which he was taken."

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LIBERTY OF THE PRESS.—After debate at a meeting of the Hardwicke Society held in the Middle Temple last month, a motion was carried that "This house regards the power of the Press as a national menace." It is fair to assume from this resolution that the liberty of the press holds no such sacred place in the minds of the English people as it did when Sheridan thrilled the House of Commons with his lyrical outburst:

Give them a corrupt House of Lords, give them a venal House of Commons, give them a tyrannical Prince, give them a truckling Court, and let me have but an unfettered Press, I will defy them to encroach a hair's breadth upon the liberties of England.

But we fear that the resolution of the Hardwicke Society is no more than a *brutum fulmen*; government by parliamentary debate seems to have given way to government by newspapers in twentieth century England. The fourth estate doesn't loose its ears or hands nowadays for seditious or libellous utterances as it did in the days of Good Queen Bess.

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WHAT PRICE GOVERNMENT?—It is but natural in this period of financial *Sturm und Drang* when dolour is more active among us than dollars that Canadians should ask themselves if they are not being too expensively governed. Such an enquiry was first publicly voiced by the Attorney-General of Manitoba when he proposed a short time ago that membership in the legislature of that province should be reduced from fifty-five to thirty-five in number. Since then the Premier of Ontario, during a visit to British Columbia, is reported as saying that a twenty-five per cent. reduction in the number of members in the provincial legislatures and in the federal parliament would be a good thing for the country. In the legislatures of the nine provinces of Canada the number of members in the aggregate amounts to 550, while in the Dominion sphere the House of Commons has 245 members and the Senate has 96 members. In

the legislature of one of the provinces, where the population is less than one hundred thousand, there are 30 members. If the disproportionate growth between representation and population continues we might be likened to the army which had more officers than men. A philosopher has said that a people get the government they deserve; but surely Canada has got more than it deserves.

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COMMUNISM IN ENGLAND.—In the Central Criminal Court last month, Frank Paterson, a member of the British Communist Party and editor of the *Daily Worker*, was charged with the publication of articles which were incitements to mutiny among the armed forces of the Crown, and upon conviction was sentenced to two years' hard labour. The articles related to the situation which arose in the Navy during the summer over proposed pay reductions. Speaking of Paterson's sentence, *The New Statesman and Nation* says:

It may be argued that persons who incite to mutiny—however unsuccessfully—must expect all they get; but if that is so it is hard to see how Communist propaganda can be regarded as lawful at all. The Canadian Courts have recently outlawed Communism altogether; if this is also to be English law, let it be made so openly. Then we can leave off talking about our belief in free speech.

In connection with the implications of this last sentence it is interesting to note that the *N.S. and N.* declares that it holds no brief for Communism.

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THE ACID TEST.—A writer in the *University of Pennsylvania Law Review* takes some seventy pages of that excellent publication to ask and ponder the question "Are Judges Human?" The question, of course, may be answered more shortly than that. If the old saw *humanum est errare* is sound then undoubtedly Judges are human. However, the article is replete with learning and, while it may be criticized for discursiveness, it well repays reading.

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A COURT AS NATION BUILDER.—In the course of a most instructive article on "The Supreme Court's Part in the Building of a Nation" in the last number of *The Boston University Law Review*, Professor H. M. Bowman reaches the conclusion that if it had not been for the interpretation put upon the Constitution in its earlier years by the United States Supreme Court to-day we might have seen a loose confederation of States or several wholly independent

nations. Furthermore, he is of opinion that if the Judges of the Court had not so fully perceived what he calls "the constitutional morality of the people themselves," touching the Fourteenth Amendment after the Civil War and other matters of moment to the solidarity of the nation that have arisen during the last sixty years, the present situation between the national government and the individual States might not have been what it is.

Speaking of the "golden age" of Supreme Court constitutional exegesis which came to an end with Marshall's death in 1833, he says that:

Above the clamour of many voices claiming sovereignty for the States the Court raised its voice of authority and declared that the Sovereignty that had ordained the Constitution was in the people of the United States in their collective capacity. It vitalized the Constitution. It developed the principles of Government and determined its very form.

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LOSSES BY DEATH.—Since our last number the Courts in Canada have sustained serious losses by the death of members of the Bench. The Supreme Court of Canada has lost the Honourable Mr. Justice Newcombe, the Court of King's Bench of Manitoba has lost the Honourable Mr. Justice Kilgour, and the Court of Appeal of Saskatchewan has lost the Honourable Mr. Justice McKay. An appreciation of the late Mr. Justice Newcombe appears on another page of the present number.

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INTERNATIONAL CONGRESS OF COMPARATIVE LAW.—We have received a programme of the Conference of Comparative Law to be held under the auspices of the International Academy of Comparative Law (Académie Internationale de Droit Comparé) in August next. We regret that it came to hand too late for inclusion in the contents of the present number of the REVIEW, but we hope to find room for it early in the coming year. The subjects chosen for discussion are of varied character and one and all have an intimate bearing upon questions confronting jurists and legislators at the present time. Some of them are of moment to practising lawyers, such as Company law, State responsibility in Municipal law, Administrative law, and the execution of foreign judgments. The national committee in each country represented at the Conference will select from the questions on the list those on which it wishes to report, and the reports must be sent to Prof. Balogh, Artilleriestr. 12, Berlin N. 24, before a date to be named not later than in March

next. It will interest our readers to know that a Canadian National Committee has been formed in connection with the International Academy of Comparative Law under the authority of the Canadian Bar Association given at its annual meeting held at Murray Bay in July last. The Chairman of the Committee is the Right Honourable Mr. Justice Duff of the Supreme Court of Canada, and Professor W. P. M. Kennedy, M.A., LL.B., Litt. D., Professor of Law in the University of Toronto, is acting as Secretary.

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ANTIQUATED CANADIAN JUDGES.—We were interested to read in a recent number of *The Solicitor's Journal*, London, that a Canadian correspondent of that publication had complained of the inelasticity of the law in Canada, and that the slowness of reform was due to the inability of our Judges to keep in step with the swift spirit of the age. The correspondent suggested that a remedy might be found in the appointment of younger Judges, and as to this our contemporary admonished him that he was guilty of a confusion of thought. Judges administer the law as it stands, and it is for the legislature to change it. In endorsing the rebuke thus meted out to the correspondent we should like to say that we know of no Bar in Canada which could furnish a Judge "young" enough to attempt to make the law as well as to administer it. Our contemporary's conclusion of the whole matter is implicit in the remark: "We in this country have a very high opinion of Canada, all things notwithstanding."
