

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.

Circumstances have arisen which render it impossible for the sixteenth Annual Meeting of the Canadian Bar Association to be held at Calgary, as previously announced. A suggestion has been made that the meeting be held at Murray Bay, P.Q., during the first week of September. But we expect to be in a position to state definitely the time and place of the meeting in the June number of the REVIEW.

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THE SIXTEENTH ANNUAL MEETING.—At the meeting of the Council of the Canadian Bar Association held in Ottawa on the 14th March it was unanimously resolved to invite His Excellency the Governor-General to honour the Annual Meeting with his presence. Our readers are aware that the Earl of Bessborough is a lawyer by profession and a member of the Inner Temple. The extending of invitations to other guests was left to a special committee consisting of the President, the Dominion Vice-President, the Honorary Secretary and the Secretary-Treasurer.

As to practical matters to be presented for consideration at the Annual Meeting the committee charged with the preparation of the programme was directed to consider the following:

- (a) The working of the Bankruptcy Act.
- (b) The law relating to Aircraft.
- (c) Legal Education.
- (d) Contributory Negligence.
- (e) Criminal responsibility, with reference to developments since the Rule in *M'Naghten's Case*.

The Secretary placed before the Council the resignation of the Honourable A. R. McMaster, K.C., of Montreal, as Chairman of the Committee on the Administration of Justice. Mr. McMaster's resignation is due to ill-health and was accepted with profound regret. Mr. McMaster will, however, retain membership in the Committee. Mr. J. A. Mann, K.C., of Montreal, was elected Chairman of the Committee and the following additions were made to its membership: R. W. Craig, K.C., Hugh Phillips, K.C., and G. F. Henderson, K.C.

After some discussion, there was referred to the Committee on the Administration of Justice a resolution passed by the Manitoba Bar Association Council urging the enactment of legislation bringing matters relating to Dominion Income Tax Appeals, Claims against the Crown, Patents and Trade-Marks, etc., within the jurisdiction of the Superior Courts of the Provinces, rather than within the exclusive jurisdiction, as at present, of the Exchequer Court of Canada.

* * With respect to the resolution forming the last mentioned item of business before the Council, there is much to be said in favour of some tribunal or judicial board being endowed in each of the provinces of the Dominion with jurisdiction to hear Income Tax Appeals. The Exchequer Court Judges resident in Ottawa can only make periodical visits to the larger centres of population throughout Canada, and to be obliged to prosecute, in Ottawa, their appeals from assessment means burdensome expense and loss of time to persons living great distances from the Capital.

So far as the resolution affects Patent and Trade-Mark matters it must not be overlooked that the provincial courts at the present time enjoy concurrent jurisdiction with the Exchequer Court in proceedings for the infringement and impeachment of patents of invention, and for the infringement of trade-marks. On the other hand the Exchequer Court has exclusive jurisdiction to hear appeals from the Commissioner of Patents, where he refuses to grant applications for the same, as well as exclusive original jurisdiction to determine the right to a patent in cases of conflicting applications,

and these particular matters seem to be more conveniently disposed of in Ottawa than they could be elsewhere. The Exchequer Court would also seem, although the matter is not free from doubt, to have exclusive jurisdiction, under sec. 22(b) of the Exchequer Court Act, in cases where it is sought to have any entry in any register of trade-marks made, expunged, varied or rectified. This doubt emerges from the fact that in cases of infringement and impeachment of patents the Patent Act does not confine jurisdiction to the Exchequer Court, while in the above mentioned matters concerning trade-marks the Trade-Mark Act does not concern itself with the question of jurisdiction, and it is only in the Exchequer Court Act that we find it conferred, and there the jurisdiction of that Court is neither expressed to be exclusive nor concurrent. Trade-mark cases of the classes last mentioned are also capable of being tried in Ottawa with more convenience than elsewhere.

Then, again, so far as the proposal to give the provincial courts the right to hear and determine claims against the Dominion Crown is concerned, the mere suggestion of it evokes echoes of conflicting constitutional opinions when the Supreme and Exchequer Courts Act of 1875 came before Parliament. Hansard of that year shows how nice a problem is involved in the proposal. And when we turn for assistance to American constitutional law we find that the Federal Government "is not suable in a State court, for the United States is supreme within its sphere." (Cooley's *Principles of Constitutional Law*, 3rd ed., p. 132.) In *Ableman v. Booth*, 21 How. 506, Taney, C.J., said: "In the sphere of action assigned to it, it [the General Government] should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities."

These considerations should not be overlooked when the resolution of the Manitoba Bar Association Council is discussed at the Annual Meeting of the Canadian Bar Association.

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ANGUS MACMURCHY, K.C.—No one of the many who knew the late Angus MacMurchy, K.C., heard of his death, which occurred with tragic suddenness on the 3rd instant, without being touched by an acute sense of loss.

Speaking of him, first, in his professional capacity, it is interesting to know that he was associated with the legal department of the Canadian Pacific Railway Company for nearly half a century, and

was probably its oldest official in point of service at the time of his death. He was called to the Ontario Bar in 1885, entering into partnership in Toronto with the Honourable R. M. Wells, then solicitor for the railway. He was himself appointed solicitor of the Western Division of the railway in 1900, becoming more recently solicitor for the Ontario Division. Some years later he formed a partnership with Mr. John D. Spence, K.C.

Always alert in the interests of his chosen profession, Mr. MacMurchy became a Bencher of the Law Society of Upper Canada in 1921 and was continued in that honourable office until his death. He was enthusiastic in his support of the Canadian Bar Association, and as a member of the CANADIAN BAR REVIEW Committee he spared no effort to assist the Editor in making the REVIEW measurably worthy of its responsible place as the organ of the Association. His sense of obligation in this respect is poignantly shown in the fact that on his homeward journey from England which death interrupted he wrote, in conjunction with a fellow-traveller, the book review published over the initials A. MacM. and J. C. in our present number. The quality of his book on the Railway Law of Canada gives him a creditable standing in Canadian legal literature on its practical side.

But his interests in life were truly catholic, and carried his activities far beyond the boundaries of his profession. As an alumnus of the University of Toronto he never forgot its claims. He took a leading part in the organisation of the Alumni Federation, and was its president for three years. He was a leader in the movement for graduate representation on the Board of Governors, and when the graduates elected a slate for submission to the Government in 1924 he headed the poll. In 1925 his appointment marked the first of a graduate as such to the Board. He was keenly interested in the work of the Students' Administrative Council and was also a warm supporter of university extension work.

In religion Mr. MacMurchy was a Presbyterian, and forwarded the work of his church with the zeal that energized him in all his ways. Nor did he fail of interest in social welfare. He was one of the organizers of the Penny Bank of Ontario, and at his death was one of its vice-presidents.

Truly, Angus MacMurchy planned his life on broad lines of usefulness and lived up to his plan. He was one of those to whom the words of a wise man of old may be applied without adulation: "A few, through a certain excellence of nature, pursue the right path."

PATENTS AND DESIGNS IN GREAT BRITAIN.—The report of the Departmental Committee on the Patents and Designs Acts and the practice of the Patent Office, presented to the British Parliament by the President of the Board of Trade in March last, proves to be a very interesting public document indeed. It will be remembered that the committee was appointed by the Board of Trade on the 18th of May 1929, for the purpose of considering and reporting upon any desirable amendments in the Patents and Designs Acts and changes in the practice of the Patent Office. The members of the committee consisted of Sir Charles Henry Sargant (Chairman), Mr. Horatio Ballantyne, Mr. Hubert Alexander Gill, Mr. Edward Highton Hodgson, C.B., O.B.E., Sir Herbert Jackson, K.B.E., F.R.S., Mr. William Smith Jarratt, Mr. Fearnley Wells Owen, Mr. James George Weir, C.M.G., C.B.E., and Mr. James Whitehead, K.C. The report shows that the committee met on forty-three occasions, hearing evidence given by representatives of the British Science Guild and other associations and persons qualified to assist the committee in its inquiry. It is explained in the report that the committee has not thought it advisable to suggest the actual wording of any desirable amendments to the Patents and Designs Acts but have merely indicated the substance of them. The method followed in the report is to divide various matters with separate "Heads" following so far as possible the arrangement of the sections of the Patents and Designs Act of 1907. Before entering upon a discussion of the matters dealt with under the several Heads the committee states that it has found "no general demand for any alteration of the basic principles underlying the existing law in relation either to patents or to designs." Moreover the committee finds that in many features, of which the definition of patentable invention is one, "the state of our law is to be preferred to that of other countries."

It is interesting to learn that the cost of the inquiry by the British committee is estimated at something less than \$2,000 including the approximate expense of \$370 for printing and publishing the report.

* * A committee, under the chairmanship of the Honourable A. K. Maclean, President of the Exchequer Court of Canada, has recently been appointed by the Secretary of State for Canada to consider amendments to the Canadian Patent Act. To the members of this committee the report under discussion will prove of valuable service. We would particularly invite attention to the recommendations of the British committee concerning the protection of persons

aggrieved by "unwarranted threats" of prosecutions for infringement by other persons claiming to have an interest in a patent. At the present time there is no provision in our law for such protection, although it prevails in England. The British committee suggests an amendment of section 36 of the Patents Act of 1907 to the following effect:

Where a threat of the kind is made (and that whether there is a patent actually in existence or not), the person threatened or the person affected by the threat should be entitled to bring an action either for an injunction, or for a declaration that the threat is unjustifiable, on the ground that there is no patent, or that the patent is invalid, or that there has been no infringement of the patent; and should also be entitled, if successful, to recover damages against the person making the threat. Further, in order to ensure that all the issues involved are before the Court, we suggest that the defendant in the threats action, if himself the owner of the patent in respect of which the threats have been made, should be entitled to counterclaim in that action for infringement of his patent.

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EXCHANGE LECTURERS IN THE LAW SCHOOLS.—The system of annual exchange of law lecturers between Osgoode Hall Law School, McGill University and Dalhousie University, inaugurated in 1930, was continued this year, and it may now be considered as a permanent feature in the educational programme of the respective law schools.

Professor LeMesurier of the Faculty of Law, McGill University delivered a course of lectures at Osgoode Hall Law School on "Quebec Marriage Law." The topic was of peculiar interest to the law students of Ontario and the treatment of it by the learned lecturer from McGill was instructive and stimulating. Dr. Wright of Osgoode Hall visited Dalhousie Law School and lectured upon "Unjust Enrichment in the Common Law: Quasi Contract." As there is a paucity of legal writing upon this topic in England and in Canada—Dr. Wright's lectures were timely. They proved to be something more than a recapitulation of the state of English law concerning this rather obscure field; they were not only analytical but constructively critical. Dean Smith took as the subject-matter of his course at McGill University the "Trust as an Instrument of Law Reform," and attempted to lay the ground for some comparison of English law and the civil law of Quebec.

The exchange scheme, apart from the educational benefits to be derived directly from the lectures, affords an opportunity for the teachers of the three law schools to see other schools in operation, to

visit the classes, to observe teaching methods, to learn of problems and the means used to solve them. A forum for the discussion of legal education in Canada has thus been created and a closer co-operation of the law schools should result.

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SIR EDWARD CLARKE.—In our number for March we extended our congratulations to the Right Honourable Sir Edward Clarke, K.C., on the attainment of his ninetieth birthday. In the present number of the REVIEW we have to chronicle his death.

The personal history of Sir Edward Clarke demonstrates the opportunity for distinction afforded in the nineteenth century to any Englishman of mental force and probity no matter what the station of life in which he was born. Sir Edward discloses, in the story he wrote of his own life in 1914, that he came of middle-class parents of small means. Their character is attested by the fact that the son, in dedicating his autobiography to their joint memory, acknowledges that to their "loving care and teaching I owe, under the providence of God, the happiness and prosperity of my life." They were able to send him, in his tenth year, to a country boarding school kept by a man who was "a terrible impostor so far as school-work was concerned, but a shrewd and clever manager of boys and their parents." There his native bent for oratory received some stimulus from one of the masters, a decayed play-actor—"the slave of the other masters and the butt of the boys;" but he fell into disfavour with the staff and "my last six months in Edmonton were a perpetual storm. I remember being beaten three times in one day." In such untoward circumstances a change of scene was imperative, and at the age of twelve Sir Edward became a pupil in the City Commercial School in George Yard, Lombard Street, where, as he says, "the essentials of a good English education were soundly taught." Here he continued his studies until he had nearly attained his fourteenth year, when it became necessary for him to assist his father in his jewelry shop. But his zeal for learning continued unabated, and he took advantage of night classes at Crosby Hall, Bishopsgate Street, paying particular attention to English history, political economy, French and elocution. His progress in learning thenceforward was continuous. He took advantage of the Oxford extension courses, begun in 1858, and became the first Associate in Arts of that University. Then he succeeded in passing the Civil Service Examinations, and in 1859 he left his father's shop and accepted an appointment in the old East India House in Leadenhall

Street. This position he held for something less than two years, leaving the service to take up the study of law. Having secured a Tancred studentship, on the 4th of June 1861 he was entered as a student of Lincoln's Inn. In 1864 he was called to the Bar.

To pursue his career further were a work of supererogation; for all that he did and all the honour done to him down to 1914, is it not, with a pardonable degree of complacency, chronicled in "The Story of My Life?" For one thing alone the book has a perdurable value in that it bodies forth not only that Sir Edward put aside an offer of the great dignity of the Mastership of the Rolls with the remark that "there were others better fitted than himself" for the office, but that he never afterwards regretted his refusal. Of course in a community possessing a less vigorous sense of the proprieties, where the man seeks the office rather than the office the man, diffidence of this sort is neither encountered nor to be expected. But we confess to a liking for the other way round.

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T. P. FORAN, K.C., HONOURED.—It is not given to many members of the legal profession to reach the age of four score years and two and to be still in active practice with a record of sixty years of fine accomplishment behind him, but that is the experience and retrospect of Mr. T. P. Foran, K.C., the *doyen* of the Bar of the City of Hull. Mr. Foran reached the age of eighty-two years on the 14th of March last and still personally looks after the legal affairs of most of the large business concerns operating in Hull or having connections there.

But probably the most interesting thing about Mr. Foran is the way in which he succeeds in retaining the affectionate regard as well as the admiration of those with whom he comes into professional contact. The Hull Bar tendered him a complimentary luncheon on his birthday at the conclusion of which he was presented with an admirable portrait of himself by Ernest Fosbery, R.C.A. The event throughout was marked by those manifestations of the affection and esteem which all those who know him accord to Mr. Foran. It was attended by the Prime Minister and Members of his Cabinet, Judges of the Supreme Court of Canada and the Superior Court of the Province of Quebec, representatives of large business organizations in Hull and Ottawa and members of the Bar from both cities. Added interest in the occasion was due to the fact that Mr. Foran had only recently taken into partnership his son Phillip.

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THE DEATH OF T. M. HEALY, K.C. — Mr. Timothy Michael Healy, K.C., the distinguished Irish statesman, passed away at his residence, Chapelizod, Dublin, on March 26th at the age of seventy-five years.

Mr. Healy's political life was so outstanding in character as to tend to obscure the fact that he was a member both of the Irish and English Bars, and had practised his profession with success. He became a Queen's Counsel in 1899; a Bencher of King's Inn (Dublin) in 1905; and a Bencher of Grays Inn, in 1910. He first entered the House of Commons in 1880 and sat continuously there as a member for some Irish constituency until 1918. His name became a tradition in parliamentary dialectics. He ended his public career as the first Governor-General of the Irish Free State (1922-1928). His declining days were spent in peaceful retirement at his home on the banks of the Liffey.

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THE LATE C. J. C. WURTELE.—Mr. Charles J. C. Wurtele, the dean of practising lawyers in the Province of Quebec, died at his home in Sorel on the 15th instant at the age of ninety-one years. He was a son of Jonathan Wurtele, Seigneur of St. David d'Yamaska. He graduated in arts at McGill University in 1863, and subsequently studied law and was called to the Bar. He practised his profession at Sorel where for the past fifty-five years he has been Secretary-Treasurer of the Protestant School Board. It is said that Mr. Wurtele was a lineal descendant of Martin Luther.

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THE LATE GEORGE KERR, K.C.—The Ontario Bar lost a prominent and respected member by the death of George Kerr, K.C., which occurred at his home in Toronto on the 24th instant. He was born in the town of Perth in the year 1843. Obtaining his higher education at McGill University, he was called to the Bar of Ontario in 1873 and commenced practice in Toronto. At one time the Honourable N. W. Rowell, K.C., was associated with Mr. Kerr as a law partner.

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A TRUCE TO PARTISANSHIP.—King Carol of Roumania has not shown himself in all respects as seated on a throne "whose deep foundations lie in veneration," but he has made a recent gesture which at least discloses a laudable desire to suppress the political

partisanship that has distracted his country during the present period of economic distress. He is endeavouring to set up a national government representative of all parties. To further his purpose in this regard he has summoned to Bucharest, Nicholas Titulescu, Roumanian Minister Plenipotentiary at the Court of St. James, to help him to form a "Cabinet of Concentration." It is said that should Mr. Titulescu fail in securing the necessary support of the powerful National Peasants Party the King contemplates dissolving Parliament and setting up a regime of personal government similar to that prevailing in Jugoslavia. That would mean a subversion of the Constitution of 1923, and it is unlikely that a statesman of Mr. Titulescu's stamp would favour so perilous a step. He is a brilliant lawyer, possessing high educational honours conferred on him by universities in his own country and in France. He has also specialised in diplomatic and economic studies. It is reasonable to think, therefore, that he will dissuade Carol of Roumania from a course of action that might cause him to write his name next after that of Alfonso of Spain in the book of exiled kings.

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ENCROACHMENTS ON LAWYERS' ACTIVITIES.—Under this caption we published in our last number a Memorandum presented to the Conference of the Governing Bodies of the Legal Profession in Canada by Mr. W. F. Nickle, K.C., and Mr. R. J. Maclellan, K.C., the chairmen of two committees appointed to inquire and report respectively upon (1) Encroachments on the Lawyers' sphere of activities, and (2) Education of the public to take their business to trained lawyers. The object of this Memorandum is to obtain from the profession additional facts and views for the consideration of the two Committees so that their reports can be made as complete as possible before being presented to the Conference of the Governing Bodies at its next annual meeting.

Touching one of the matters referred to in the Memorandum, namely, the invasion by Trust Companies of the field formerly occupied by lawyers in respect of the drawing of wills and documents appertaining to the administration of trust estates, we are informed that active negotiations are now under way, between three of the large Trust Companies in Canada and certain members of the Conference of the Governing Bodies, looking to a reform in this matter, and that already one of the companies has taken steps to mitigate what lawyers consider an unfair invasion of their professional rights.

The profession as a whole is being splendidly served by the Conference of the Governing Bodies, and too much cannot be said in praise of the skill and energy of its members in solving problems confronting them from time to time.

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HONOURABLE GEORGE G. FOSTER, K.C.—On the first day of the present month the Honourable George Green Foster, K.C., one of the leading lawyers of Montreal, died at his home in that city. Senator Foster was held in high and affectionate esteem not only by his professional brethren but by the whole body of his fellow-citizens in the metropolis of Canada. Nor did his fine qualities fail of appreciation outside his native province. His death was announced in the newspapers as a national loss. We quote as follows from an editorial appreciation of the deceased in the *Montreal Daily Star*:

The loss the nation suffers in the death of Senator George G. Foster will be more fully appreciated by those who know what priceless, devoted and unselfish services he has always rendered the Canada he loved so passionately. The Dominion held no more sincere and single-minded patriot than George Foster. He always thought first of her real interests and her long future in which he believed so firmly.

He will be mourned alike in the legal and business circles of this city, in the political world in Ottawa and by those who knew him best in Blarney Castle, his country home. He will be too keenly missed ever to be quite replaced. But his unceasing labours for the good of his country and his untiring kindnesses to his closest friends will ever keep his memory green in the minds of those to whom he gave so freely of his richest stores of wisdom and his deepest qualities of heart.

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HONOURED IN THE ARGENTINE.—On the 18th of March 1931, Dr. Hector Lafaille, President of the College of Advocates of the City of Buenos Aires, Argentine, invited the legal gentlemen who accompanied the Trade Commission to the Argentine and were then in Buenos Aires, to attend a meeting of the Directors of the College to be held in the Library, which is in the large Court House in Buenos Aires.

The Right Honourable the Chief Justice of Canada, the Honourable L. P. de W. Tilley, and the Honourable Senator C. P. Beaubien of Montreal, were present. The other legal member, Mr. Beaumont, of Toronto, was unavoidably absent.

The proceedings consisted of a welcome by the President and his associates. This was followed by an announcement by the President

that the College had decided to elect the gentlemen above named associate and corresponding members of the College. This is understood to give these members the privilege of appearing before the Courts in Buenos Aires at any time they may desire to do so.

A certificate of membership, under the seal of the College and the hands of the President and Secretary, was then presented to each of the three new associate members, who then signed the Roll, after which a visit was paid to various parts of the Court House, and the ceremony concluded. Mr. Beaumont's certificate was forwarded to him.
