MARGINAL NOTES

ARMISTICE DAY REFLECTIONS.—The twentieth anniversary of the Armistice that closed the Great War naturally gave rise to serious and disturbing meditation on the part of those who have lived through the amazing post-war period. During the past twenty years organic changes in the structure and policy of national governments, and the reaction of these changes on international relations, have written a deplorable chapter in the history of the world. The retrospect cannot be anything but disheartening to those who were trained to believe, in happier days of the past, that while the progress of civilization might be momentarily halted by some untoward gesture of the time-spirit, its standards and traditions would never be deliberately discarded by European nations aspiring to the leadership of mankind.

Something might be said here about Italy and the wonderful work done by her Mussolini—the last of the Caesars—in civilizing Ethiopia, and something about the struggle between the lesser breeds in the Orient, but space permits only of attention to Germany as the protagonist — which indeed she is — of the tragic world drama now in process of enactment. True, Germany was badly used by the revengeful Treaty of Versailles, but does that justify her in allowing Hitler to make the angels weep by the tricks he is now playing before high Heaven as a despoiler of the territory of small nations abroad, and a Jew-baiter and persecutor of Christians at home? By way of contrast, think of Germany's civilized past and its contribution in philosophy, history, poetry and music to the culture of the world. True, all this was accomplished by Germany before her national life was brought under the dominance of Prussia. Now the Prussians have always been a warlike people—a *Volk in Waffen* as they were styled by von der Goltz. Originally they spoke a language not belonging to the Teutonic family of dialects, but somewhat akin to the Lithuanian tongue, which contains a strong admixture of Slavonic words. Hence it has been suggested that the Prussian can hardly be called a German, that he is to be regarded as a parvenu among the races of mankind. His people first appeared in history in the tenth century of our era under the name of the Borussi, and they exhibited their native benignity in the year 997 by slaughtering the good Bishop Adalbert of Prague while he was endeavouring to convert them to Christianity. It was not until the middle of the thirteenth century that they professed acceptance of that

faith under the forceful suasion of the Teutonic Knights. They were ruled from 1618 to 1918 by the Hohenzollern-Brandenburgs, and on the reconstruction of the German empire after the Franco-German war, William I, seventh King of Prussia, was proclaimed Emperor of Germany. After the genial Kaiser William II had retired to the classic shades of Doorn to ponder whether Rhadamanthos would accord him royal honours in the next world, the National Assembly met at Weimar on the 6th of February, 1919, and changed the political constitution of Germany from an Empire to a Republic. After a hectic career under the presidency, first of Ebert and secondly of von Hindenburg, the Republic passed away in 1933 and Germany came under Nazi control with the incomparable Herr Adolf Hitler as its supreme head. Hitler swept away the old division of Germany into separate States—Prussia, Bavaria, Saxony, et cetera,—and set up a 'Totalitarian State' ruled from Berlin. How the proud Prussian Junkers, who regarded themselves as the salt of the earth—"Wir sind das Salz der Erde"—during the imperial régime, could submit to the dictatorship of the humbly-born Austrian who emerged from the war with no greater distinction as a soldier than his corporal's stripes indicated, passes understanding. Perhaps the astonishing spectacle of Germany standing before the world today as a Hitlerized rather than a civilized State can be explained by the fact that the Prussians are a stupid people, and so lacked the political ability to provide an enlightened constitution for the country they had plunged into a war which ended in revolution for the aggressor.

But aggression is another word for transgression, and we are proverbially advised that the way of the transgressor is hard. There are signs at the moment of writing that Hitler's dictatorship methods cannot long endure. The outrageous persecution of the Jewish citizens of Germany is greeted with the cry of *Ecrasez l'infâme!* on both sides of the Atlantic. Indignation abroad threatens to be translated into action in the shape of a very general refusal to purchase goods of German manufacture. This hostile gesture would have startling economic repercussions on the country responsible for its provocation. *Nous verrons.*

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THE NEW ERA.—Some people venture to look upon the Munich Pact as hoisting the curtain on a new era of history in which totalitarian Germany will hold the stage as sovereign arbiter of international affairs, and the countries that still main-

tain a democratic form of government will only be allowed to comport themselves in external matters as Germany bids them. This view is supported to some extent by the studied insolence of the Nazi press in speaking of foreign countries during the present month. But in our humble opinion the Munich Pact has operated as a boomerang on Germany itself. It has stimulated the more radical element among the Nazis to enter upon an internal policy of active terrorism and outrage at the expense of thousands of the German people who only seek to enjoy that measure of civil liberty which makes life worth the living to the normal man in modern times. This means that revolution against the Nazi government may be precipitated at any moment by these distracted people, and when it comes the barbarous Hitler régime will be swept away. Thereupon the country that was beguiled into accepting his dictatorship will, it is reasonable to suppose, adopt a form of government that should win the respect and confidence of all and singular outside her boundaries who have for a weary period stood aghast at her insane ambition to rule the world as a *Kriegsstaat*.

Strange to say, there was one Prussian who spoke in counsels of political wisdom to his countrymen so long ago as the close of the eighteenth century—Immanuel Kant. True, he was of Scotch descent on his father's side, but that by the way. Kant believed that the supreme concern of the human race is "the establishment of civil society administering right," and that in the civic State man surrenders his natural liberty "in order to find it again undiminished in a dependence regulated by law." In his essay on "Perpetual Peace" Kant said that "Nations considered as States can be judged like single individuals. Each may and should demand of the other, in order to secure its own safety, that they should enter into a constitution resembling the civic, in which the rights of each individual are guaranteed." For the complete avoidance of war between States what he suggests is of especial significance at the present time: "There should be a league of a special sort, which one could call the league of peace, which would differ from a peace pact in that the one puts an end to one war, while the other seeks to end all wars." And he adds: "Rights cannot be decided by war and its favourable result—victory, and a peace treaty, though ending the present war, does not end the state of war, since it remains possible to find ever fresh pretexts for it." Here the philosopher clearly adumbrated the League of Nations which did not come into being until the Great War had shaken the earth more than

a century after his death. But if Germany should now determine to transform herself into the enlightened State that Kant envisaged, and renew her membership in the League, then indeed the world would advance along the path of international amity and the twentieth century prepare the way for a genuine new era in history.

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REMOVAL OF AN ARBITRATOR.—The news of the promotion of Mr. Justice du Parq from the King's Bench Division of the High Court of Justice in England to the Court of Appeal, served to remind us of a judicial incident recently discussed in the press in which the new Lord Justice was concerned. In the matter of an arbitration in which the owners and cargo-owners of a ship called the *Catalina* claimed certain damages against the owners of a ship called the *Norma*, Sir William Norman Raeburn, K.C., acted as arbitrator. While the arbitration proceedings were in progress a motion was made on behalf of the claimants before du Parq and Charles JJ. in the King's Bench Division for the removal of the arbitrator on the ground that he had misconducted himself by "acting unfairly and without impartiality between the parties". The motion was granted on an uncontradicted affidavit setting forth the words of the arbitrator on which the claimants relied for an order of removal. Judgment of the Court was pronounced by Mr. Justice Charles in the course of which he said :

> The arbitrator's remarks connoted only one thing — that the Portugese were all liars and would say anything. Mr. Moreira naturally resented that imputation on his nationality. He came to this country relying, as he said, on the well-known impartiality of British justice, and was very much shocked. If Mr. Moreira had known that Sir Norman Raeburn held views of that sort he (Mr. Justice Charles) did not suppose that Mr. Moreira would ever have agreed to his acting as arbitrator. It was a most unfortunate case. One did not know how it was that the arbitrator came to make those observations, or in whose presence he thought he was making them. It was clear that he did express such an actual bias as to make it imperative that he should be removed.

Sir Norman Raeburn then wrote a letter to *The Times* which we quote in part :

> It would not be proper for me, nor do I propose, to discuss the merits or demerits of the motion before the Divisional Court, but as certain remarks alleged to have been made by me have been widely broadcast, not only in this country but probably also abroad, I hope

I may in passing take this opportunity of denying, as I do most emphatically, that I ever said (or even thought) that "all Italians are liars, and the Portugese are the same". As regards the latter, the fact happens to be that in the course of 35 years' practice at the Bar I cannot recall a single case before this one in which I have ever heard any Portugese evidence. As regards the former, I had before me, only a few months ago, the case of a collision between a large German passenger vessel and an Italian tramp steamer. Witnesses from the Italian ship (all of them Italians) gave oral evidence, and on a hotly contested and vital issue of fact I believed them and found the German ship alone to blame.

The main point, however, of this letter is a criticism of the procedure adopted. I was not a party to the proceedings, and it may surprise most people to know that my first knowledge of the words I am supposed to have used was gained from the Press. What seems passing strange is that in their enthusiasm for British justice for the foreigner (a feeling which I entirely share) the eminent pair of Judges have allowed themselves to ignore, so far as concerned myself, that elementary principle of British justice — namely, that the accused, before he is condemned, should be given some opportunity of knowing and meeting the case made against him.

I had no such opportunity. Had I been given it, the Court would have had before it a very different version.

In conclusion, I sincerely trust that this exposé of the methods employed in this case may save other members of my profession from the risk of similar treatment, which in some cases might well result in entirely undeserved professional ruin.

That was plain talk at the expense of the two Judges concerned, but criticism did not end there. His Honour Judge Cluer, of the Whitechapel County Court, wrote to *The Times* as follows :

Sir Norman Raeburn justly complains, *"Nemo debet inauditus damnari — ne judex quidem, neque arbiter."* A Divisional Court once allowed an appeal from my Court on statements wholly unsupported by facts. As a Judge, however inferior, I could "not make my woes the text of sermons in *The Times*," but I wrote to Mr. Justice Talbot, who replied, "It is plain, from what you say, that we must have been grossly misled." Sir Norman Raeburn should at least have been asked for an explanation before being censured; unless we are to imitate the Emperor Claudius, who decided cases *"Saepe audita una tantum parte, saepe neutra."*

This was followed by a letter, published over the signature of "K.C.", in these terms :

Sir Norman Raeburn "took silk" in 1919, and during the last 20 years has stood at the head of his profession, especially in arbitration work. To me and others, long and intimately connected with the Courts and the Bar Council, the action of the two Judges in publicly

removing him, without a hearing, from the judicial office of arbitrator came as a thunderclap. The accusation was so preposterous, and the procedure so contrary to our practice, that we hoped to hear the opinion of the Court of Appeal expressed in no uncertain terms. However, Sir Norman could not wait and his letter to *The Times* is clear and sufficient. His criticism of the Divisional Court is restrained and courteous, but deadly. It shows that the Judges ignored an elementary principle of British justice. He needs, I hope, no assurance that his letter will be read with satisfaction by the whole profession, who know with regret that he formerly refused a Judgeship.

In reply to the above strictures at the expense of the Court the following letter appeared in *The Times* over the signature of "Junior Counsel".

If Sir N. Raeburn has any grounds of complaint, it would appear to be against the Legislature who passed the Arbitration Acts, and against the Rules of the Supreme Court, rather than against the individual Judges.

An application for the removal of an arbitrator is an application made under section 11 of the Arbitration Act, 1889, by one of the parties to the arbitration against the other, to which the arbitrator himself is not a party, and the Court, therefore, always finds itself in the difficulty that it has to decide a question concerning the conduct of an individual in the absence of that individual.

Being in that position the Court can only act on the evidence before it, and in the present instance the only evidence appears to have been an uncontradicted affidavit that Sir N. Raeburn used the words of which complaint is made. It would obviously be impossible for the Court to act on information given to it in a letter from the arbitrator in preference to the sworn evidence of a party to the litigation, and the Court has no power to ask for an affidavit from the arbitrator.

In perusing what is set forth above, our readers will be persuaded that freedom in criticizing judicial decisions in England has advanced a long way since the time when Lord Kenyon spoke in this wise from the Bench :

I desire that after I have given the judgment of the Court, that judgment may not be talked about; I have given it upon my oath, and am answerable to my country for it. I hope I need not be admonished that I am to administer justice; if I have done amiss let the wrath and indignation of Parliament be brought out against me; let me be impeached. In protecting the dignity of the Court I do the best thing I can do for the public; for if my conduct here is extra-judicially arraigned, the administration of justice is arraigned and affronted, and that no man living shall do with impunity. (Proceedings against the Dean of St. Asaph, (1783) 21 How. St. Tr. 875.

CHARLES MORSE.

Ottawa.