

THE ENGLISH CIRCUIT SYSTEM*

SIR NORMAN BIRKETT

London, England

My first duty is to express my unqualified pleasure in attending once again the meetings of the Canadian Bar Association.

It fills me with pride and thankfulness to meet so many old friends whose great kindness has so enriched my life, to convey once more the affectionate greetings of the English Bench and Bar and to rejoice in the strengthening of the ties that bind us to each other.

When I first came to you ten years ago I came as a member of the English Bar, and in that capacity I was accustomed to say when embarking upon a doubtful case that it was good to have justice on my side. In many instances I am afraid it was the kind of justice which gave rise to the memorable reply of the Canadian lawyer. His partner telegraphed the result of a case in the words, "Justice has triumphed", and received immediately the answer, "Appeal at once!" But now that I come to you as a member of the Bench, it is still good to have justice on my side; but it is still better to have the Chief Justice by my side, and particularly a Chief Justice who deepens and intensifies my pleasure by the kindness of his introductory observations.

Sir, I cannot even begin to thank you for the hospitality you have extended to me. When I tried to do it the other day, when I was entertained by the American Bar Association, a gentleman who said he came from Oklahoma rose and said: "Sir, this is nothing; in my state we have drinks between drinks". And as though that were not quite enough, another gentleman, this time I think from Arizona, rose and said, "Why, in my state we know no such interval".

Mr. President, when I think of that visit of ten years ago and of all the accumulated memories of the intervening years, I am reminded of the observation of the American actress after spending some little time at a heart-warming cocktail party. Her observation has always seemed to me to be replete with insight and judgment, though I am not certain that I fully understand the run of the sentence; for she said: "Well, folks, I don't know how it is with you, but I feel much more like I do now than when I first came in". Well, Mr. President, if I may venture on a colloquialism, that goes for me too!

* The Address delivered at the 29th Annual Meeting of the Canadian Bar Association on September 3rd, 1947, by the Rt. Hon. Sir Norman Birkett, P.C., the representative of the Bar and Bench of Great Britain.

Now sir, when I last addressed you, or some of you, we were in the midst of war, standing shoulder to shoulder. It is a matter of very great personal satisfaction to me that at this dinner tonight there are representatives of the United States of America, in Mr. Carl Rix, and the great French Republic in M. Poignard. The world will not easily forget the valuable services rendered by those great allies, and the world will not easily forget the debt which civilization owes to those great countries and to those peoples. I mention that in passing, for this reason: that my primary purpose tonight is to speak of Canada. Great Britain will never forget the devotion and the valour of the people of Canada. They set an example to the whole world; they exalted the very name of citizenship and added new lustre to an already illustrious name. The historian of the future, when recounting the great and moving events of those memorable days, will write with a golden pen the imperishable record of this present generation.

The people of Britain have no reason to be ashamed of their record during those years. It is because they endured great hardships and grievous losses, and displayed a nobility of spirit that has won the admiration of the world, that they look upon the people of Canada as they do, with affection and admiration. These two great peoples therefore are bound together now more closely than ever because of a common danger bravely met and triumphantly surmounted, and the ties of blood, of history, of language, of literature and of law are merged in a great bond of enduring affection.

Now, Mr. President, it is my purpose to speak for a few moments tonight on one aspect of the administration of the law in England which I have called "The English Circuit System". It is that procedure whereby the English judges travel from London to every part of the country as they have been accustomed to do for centuries, to sit in the assize courts of the county towns to administer the law in the criminal and the civil courts. It is a system abounding in history and tradition, and it is an integral part of the English way of life. In these critical and anxious days in which we live, the English way of life is the subject of much discussion. The future of England is so eagerly canvassed and by so many conflicting voices that perhaps you would permit me one further general word in which to proclaim my faith, before I discuss my particular subject.

There is no doubt that we in England are passing through a grave economic crisis. It is not for me to analyze the causes,

nor to apportion blame, nor to suggest remedies. But in justice I think it must be said that a primary cause is the unparalleled exertion the country made during the hard years of war. They gave all they had. But no useful purpose would be served by seeking to minimize the gravity of the crisis, and only by resolute effort and much sacrifice will the crisis be overcome.

But I observe in some quarters a disposition to exaggerate the crisis and to say that England's day is over, that her power in the world has passed away forever, and that we are now witnessing the first stages of her permanent decline and fall. Let me say to you in all humility that I do not believe it for one moment, and nobody who reads the signs of the times aright could believe it either. It would be contrary to all history, all experience and all knowledge of the English people. Ask yourselves what Canada means to you and there you will find the convincing and reassuring answer. The indescribable grandeur of Canada, its immensity, its infinite variety, the mountains, the rivers, the forests, the prairies, the sea-girt islands — all are but the noble background to the spirit of the men and women of Canada of many generations, alike those whose fame has gone out around the earth and those who have no memorial, but who together have made this mighty land the living thing it is, so that Canada has become to you dear beyond all expression.

Sir, in like manner I ask myself what England means to me. There is an England of great natural beauty, the land of the green fields and winding lanes, of the Cotswold villages and the lakeland hills — the blue remembered hills of which Mr. Carl Rix spoke so movingly today — the country churches, the soft light stealing over the woods and the reaches of the rivers, the cathedral towns, and all the magic of the coloured counties. But, as with you, there is an England of the spirit, as real as the land itself: the England that did more than conquer and explore and colonize, though these were far from inglorious things to do; the England that bred saints and poets and soldiers, men and women who were good and brave and steadfast — people like Elizabeth Fry, going fearlessly into infected prisons; like Edith Cavell, dying bravely for love of country; like John Wesley, taking the world for his parish, and blind old Milton, justifying the ways of God to men; and a thousand others. *That* England, seen in her history, lives still today in the lives of her people; and whatever the crisis, *that* England will survive to take her place with Canada in fulfilling her great destiny and making the contribution she alone can make to the welfare and happiness of the whole world.

Mr. President, cricket will continue to be played on the village greens of England and His Majesty's judges will continue to travel the counties of England.

Now, sir, the English people have always been great lovers of tradition, and they are so still. As forms of government alter and modes and manners change, as old institutions outlive their usefulness and new institutions take their place, this desire to maintain and perpetuate the old traditions seems to grow in intensity. It springs, I think, from a sense of history, a pride in the continuity of the national life and a consciousness of a great inheritance. As Professor Saintsbury has said: "Every commemoration of the past, every linking of the common dying things that are, with the immortal and stable things that have been, is an infinite gain for the health and the life, the pleasure and profit of the soul". The members of the House of Commons, whatever their politics, preserve with the most jealous care the traditions of the House as they have existed for centuries, and the Ancient Worshipful Companies of the City of London, though most of their old powers are gone, still follow the traditional procedure of eight hundred years ago. The House of Commons, as you know, opens each day with traditional ceremonial. A school boy who witnessed it and afterwards wrote an essay upon it said: "Parliament is opened each day with prayer. The Chaplain looks upon the assembled members and then he prays for the country."

But nowhere is this respect for tradition more strikingly shown than in the administration of the law; nor with greater reason. For the supreme test of any civilized society lies in its respect for the law and its just and inflexible administration. For nearly twelve months it was my duty to sit on the International Military Tribunal at Nuremberg listening to a record of crime never surpassed in all the dark annals of human wickedness; and although the legal consequences of Nuremberg will doubtless be the subject of disputation for generations to come, one great truth has already been established. Nuremberg is a solemn warning to all peoples in all lands of the terrible fate that overtakes a nation when the rule of law is abandoned and justice is denied. The age of tyranny begins; the security of the citizens vanishes; the essential freedoms are lost, and fear invades the land so that the very knock on the door may be the sound of doom, the summons to the concentration camp, to torture, to exile and to death.

Sir, if Nuremberg did no more than to enforce the necessity of respect for the law, it would have been infinitely worth while.

In England, I am glad to say, there is widespread and deeply-rooted respect for the law, whether it be the law of the police court or the law of the Privy Council.

Paradoxically enough, there is no overwhelming love for the individual lawyer as such. He is a little suspect and, in the estimation of many, he is still thought of in the words of Swift as one who makes black white, or white black, according as he is paid. This is, of course, excessively unjust, but it will be a very long time before the lawyers reach the felicity of the medical profession, whose individual members are sometimes referred to, as was the author of the Third Gospel, as "the beloved physician". "The beloved lawyer" is a title, I am afraid, to which we must be content to aspire; although I could name several who are always so regarded by me.

But respect for the law is universal, even amongst the members of the Bar. They are not unlike to old verger of the University Church at Oxford who said: "Man and boy, I've heard every university sermon preached in this church for fifty years, and thank God I'm still a Christian". But the Bar must be permitted a little licence on occasion. I well remember, when I was at the Bar, a learned friend of mine making application to postpone a case for three weeks. The judge, in assumed horror, said: "But, Mr. Jones, three weeks! Why, all the judges of the King's Bench Division might be dead by then"; to which my learned friend smilingly replied: "Oh, my Lord! that would be too much to hope for!"

The English people not only respect the law, but they take a special delight in the circuit system, because of its history, its ceremonial and its traditions. At certain seasons of the year the majority of His Majesty's judges of the King's Bench Division leave the Royal Court of Justice in the Strand and go out to every county in England and Wales. In every county town the people see His Majesty's judges clothed in scarlet and ermine, and attended with some state, passing through the streets bringing the administration of justice to their very doors. When the judges do this, they go where English judges have gone for many centuries and, in all essentials, they still do the same things as their ancient brethren and in very much the same way. This, of course, is said without prejudice, remembering Judge Jeffreys and the Bloody Assize.

Some changes of course there are. Presents, for example, are still made to the judges on circuit, though not in the quantity they once were. Lord Campbell, you will remember,

when recording the life of Sir Matthew Hale, says that the Dean and Chapter of Salisbury gave six sugar loaves to the judges, and gifts of venison, sheep and sack were common. But still at Oxford the Vice-Chancellor gives the judges an ornamental pair of gloves, and at that superior seat of learning, Cambridge, Trinity College gives the judge six bottles of port; and the judge, as a good judge should, tries them all patiently and punishes them all severely.

At York, the judge is presented with a charming silver box filled with sweet-smelling herbs, in place of the posy of flowers formerly given to ward off gaol fever. But the most interesting present of all is made at Newcastle-on-Tyne. There the judge is given a beautiful gold coin, a Rose Noble of Edward II. Newcastle is now on the North Eastern circuit, though formerly it was on the Northern circuit which comprised the northern counties of England. In the seventeenth century their condition was deplorable, as Macaulay testifies in his famous chapter. When the judges left Newcastle for Carlisle an armed guard was provided by the corporation to protect them from the perils of the journey. Later, the judges provided their own armed guard, but the corporation paid for it. An armed guard is now no longer necessary, but the Lord Mayor of Newcastle still gives to the judges the Rose Noble of Edward II as "dagger money" for the journey, thus perpetuating the old custom and the old tradition.

Now, Mr. President, if you will allow me I think we must break off in order that I may say a final word to the radio audience who have been listening, I trust; then I will resume what I have to say to you.

The Chief Justice at Victoria used a simile the other day that has been much in my mind. He said that in cutting down some trees he observed the great rings in the trunk that marked the stages of growth in the tree's life. And, Mr. President, in our brief lives there are great moments and great occasions that leave their ineffaceable mark. For me this visit to Canada is such a one. I shall always carry with me the recollection of the grandeur and majesty of the country, of the unquenchable spirit of man that made that majesty its servant; but most of all shall I recall the kindness, the hospitality, the laughter and the love of friends. Ten years ago on a lovely summer night I was privileged to send you a word of greeting from Banff; tonight, from Ottawa, wherever you may be in Canada at this

moment, from a most thankful heart I send you greetings and wish you well.

Now, sir, perhaps I may speak with a little more freedom than I have up to the present.

It was in 1176, in the reign of Henry II, that eighteen judges of the High Court were appointed to six circuits, and so continued with some changes until 1285 in the reign of Edward I, when the Judges of Assize and Nisi Prius were appointed. The great contribution made by Henry II to the administration of the law is now universally recognized. His new system of judicial procedure, as the event proved, fashioned the whole future of English society and politics and gave distinctive habits of thought to all English-speaking nations and peoples.

Henry II was one of those fortunate people who builded much better than he knew; for with no foreknowledge of the future greatness of Canada and the United States of America he yet conferred upon them one of their greatest blessings. The Charter of Henry I has its historic importance and at the time of Magna Carta it was a powerful weapon in the armoury of the barons in the great struggle for the ultimate freedoms; but the work of Henry II was destined to leave its mark, not merely on legal procedure and practice, but on all subsequent history. He gave extended power and jurisdiction to the central courts at Westminster and clothed the itinerant Justices in all the shires of England with the same powers; and it was this simple fact, perhaps more than any other, which made possible the quick growth of the English common law that has now gone out to the far corners of the earth. This "common law" was, of course, the native system common to the whole land in contrast with the provincial customs of the shire and the Hundred Courts and the private jurisdictions. It is now recognized to be the great inheritance of the English-speaking peoples and has separated them in the most striking and the most decisive way from the habits of thought that prevail in the spheres of Latin and Roman tradition.

The development of the common law has been a most fruitful theme for jurists and historians, but it is interesting tonight in passing to recall that the work of Henry II not only affected the lawyers but affected the whole nation and was to affect the whole world. It is a great landmark recording one of the historic divisions of mankind. The praise that has been so freely lavished on the common law has, no doubt, been well deserved; but it is well to remember that a not inconsiderable

body of opinion finds the greatest virtues in the Civil Code. The power of Rome lives on and the influence of Justinian still survives. Indeed these two great systems of law symbolize the distinction between what may be crudely termed the lovers of theory and the lovers of practice. Justinian's conception was a world of order, logic and reason and the application through law of these principles to the complex and baffling field of human relationships. The common law relied on precedent and practice, and adapted itself as the occasion demanded. It was, in a measure, the expression of the English temperament, that temperament that has had on critical and momentous occasions to pay a heavy price for its indulgence, but on the whole has been the secret of its greatest triumph.

The respect for the law of which I spoke has its roots here. It is the respect of a free people, conscious of the right, to the law itself, a law deriving from their own customs and consonant with their innate sense of justice, modified and adapted from age to age to meet changing needs and upheld by that power which they themselves bestow. When that law is expounded by an expert and independent judiciary and supported by a fearless and independent Bar as the source and guardian of the virtue of the Bench, then the rule of law is established as the foundation on which all else is built.

Mr. President, there is another point of peculiar importance for any gathering of lawyers that emerges from the work of Henry II. The solidarity of the legal profession as a great community within the national life was made possible. Certainly from the time of Edward I, our English Justinian, the rapid development of the common law had brought into being practitioners who were not in holy orders, and henceforward the promotion was from Bar to Bench, and the single self-conscious society of lawyers was formed. That principle still operates today, but as the wise counsel observed, "The Bench is like heaven; everybody wants to go there — but not yet!"

The importance of this development cannot be over-emphasized. It has meant the continuance of great traditions, the maintenance of standards of probity and honour, the wise understanding between Bench and Bar and their full cooperation in the administration of justice. The present master of Trinity College, Cambridge, Professor Trevelyan, our greatest living historian, has said of this development:

"Jealous of outsiders, rivals to the ecclesiastical lawyers, 'learned brothers' to one another, makers and guardians of

a great intellectual and moral tradition, acquiring too all the faults and all the unpopularity of a powerful and highly organized profession, they were not a close 'noblesse of the robe,' but offered to any Englishman of brains and industry a ladder to wealth and greatness as attractive as the Church herself.

"The common lawyers were, as a class, the first learned laymen, and as such were of great importance to the growth of the nation. . . . Without the lawyers, neither the Reformation nor the victory of Parliament over the Stuarts would ever have been accomplished."

For nearly eight hundred years therefore the judges have been going out on circuit and the great tradition has been unbroken.

Great changes have, of course, taken place. Three factors in particular have transformed the system: the coming of the railways that brought every part of the country within easy reach of London, the establishment of the county courts with limited jurisdiction, and the continuous sittings in London. But the attraction and indeed the fascination of the circuit system remains.

When I return to London I shall go out in the Michaelmas term on the Northern circuit and visit Carlisle, Appleby, Lancaster, Liverpool and Manchester, that is to say, to the northern counties of Cumberland, Westmoreland and Lancashire. They are the three lake counties of England, perhaps the most beautiful counties of all, although our largest lake of Windermere is only twelve miles long and one mile wide; when I think of Lake Superior I feel I ought almost to apologize for mentioning it! But the judges unfortunately do not visit the lakes; they go to places like Manchester, and I cannot give you a better impression of the climate of Manchester than in the words of the little girl who lived in Devon and was being sent to visit some relatives in Manchester. She was overheard praying the night before she went, and she said: "Well, good-bye, God; I am going to Manchester for a fortnight".

Before leaving London the judge signs and delivers a series of precepts to each sheriff of the county. The authority to hold the assizes is still the King's Commission, which is now a single document, whereas in olden times assizes were held by virtue of six royal mandates. The day on which the judge travels to the assize town is called Commission Day. The old ceremonial of Commission Day is now gone and the Commission is read [in

the Crown Court by the judge on the morning of the first working day. The judges in full scarlet and ermine and wearing full-bottomed wigs, accompanied by the High Sheriff of the County and his Chaplain, the Under-Sheriff, the Judges' Marshal and Clerks and the Civic Authorities and Police attend divine service before the opening of the assizes. In York Minster, or Durham Cathedral, this is a ceremony never to be forgotten.

The existing circuits are, in addition to the Northern, the South Eastern circuit, the Midland circuit, the North Eastern circuit, the Oxford circuit, the Western circuit, and Wales and Chester. Each circuit has its own traditions and associations. Each county town is a thing peculiar to itself and everywhere are to be found oddities and survivals and reminders of the past. Let me tell you of one such reminder of the Northern circuit where I go at the opening of the Michaelmas term.

At Lancaster in the dock of the Crown Court there is still to be seen the iron clamping device into which the hand of a man could be put, the brazier and the branding iron with the letter "M" at the end of it. They were put there because of an act of Parliament of 1487. Down to the year 1826 the penalty for every felony was death, subject of course to that most remarkable element in English law called "benefit of clergy". Benefit of clergy originally arose from the immunity of the cleric from the jurisdiction of the secular courts. As clerics were supposed to be the only people who could read, benefit of clergy came to be allowed to anybody who could read in the dock. The test was to read the first verse of the 51st Psalm, which was known as the "neck verse". If it could be recited, even though the book were open at another page or upside down, it was enough. With a little ingenuity the most brutal murderer could go free if he could but say: "Have mercy upon me, O God, according to thy lovingkindness: according unto the multitude of thy tender mercies blot out my transgressions. Wash me thoroughly from mine iniquity, and cleanse me from my sin." This shocking system was mitigated by the act of 1487. After that date, a prisoner who successfully claimed benefit of clergy was branded in the thumb with the letter "M" for Murder and "T" for other felonies; and these branding instruments are still in the dock at Lancaster. Until quite recently they were to be seen at Northampton, and they have been placed in the museum at Chester.

One of the duties of the judge's marshal was to go to the dock where the prisoner was being branded by the gaoler and

cry out, "Good mark, my Lord". During the war I had the very great privilege of taking as my marshal to Warwick, on the Midland circuit, Mr. Richard Hyde, of Montreal, the son of my esteemed friend Gordon Hyde; to Kingston on the South Eastern circuit I took Mr. Stanley Biggs, of Toronto, and to Lincoln on the Midland circuit I took Mr. R. A. Ritchie of Halifax. It was a great happiness to me thus to link my association with Canada to the ancient ceremonial of the English circuit system and a greater happiness still to find those three dear friends of mine present here tonight.

Now, Mr. President, let me end, as I began, by thanking you for the never-to-be-forgotten kindness of the Canadian Bar Association. By their gracious hospitality I have been privileged to travel from Montreal to Vancouver and to see the wonders and glories of this great land.

When all Thy Mercies, O my God,
My rising Soul surveys;
Transported with the View, I'm lost
In Wonder, Love, and Praise.

In the ninth chapter of the second book of Chronicles it is recorded that one of the wonders King Solomon displayed to the Queen of Sheba was the meat at his table. Coming from England I am not so sure that a menu of the Canadian Pacific Railway Company is not a greater wonder than any King Solomon ever displayed! But I would fain adapt and adopt the language of the Queen of Sheba to express my own feelings at the wonders of Canada:

"It was a true report which I heard in mine own land of thine acts, and of thy wisdom:

"Howbeit I believed not their words, until I came, and mine eyes had seen it: and, behold, the one half of the greatness of thy wisdom was not told me: for thou exceedest the fame that I heard.

"Happy are thy men, and happy are these thy servants, which stand continually before thee . . ."