

New Horizons for the Bar*

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Boston

You have done me a very great honour in inviting me to address you at this historic meeting—so great an honour that I must confess I have grave doubt as to my ability to give a satisfactory account of myself. My sympathies go to the Bâtonnier. When the evening is over I at least can return to my home; but he must remain here among you with his full responsibility for having invited me.

I am labouring under several handicaps. In the first place, I cannot address you in French. When I was campaigning for office in Massachusetts I did make one speech in French; in fact, I thought it was a very good speech. But my wife, who is equally at home in French or English, and who actually went to the support of our family for a number of years by teaching French, holds quite a different opinion. When your invitation arrived, she went so far as to tell me that she would never speak to me again if I so much as uttered one word in French this evening. She said, "I know, and they will know, that your French is terrible".

Then, too, I speak to you as someone from below the border. I did not fully realize the extent of our inferiority until I came across Kipling's *Journal* the other day, *Something of Myself*. In it he describes a trip he took across Canada. I don't know whether he got out as far as Edmonton, Mr. McCuaig, but it was a trip along the border. And he comments that, "Always the marvel—to which Canadians seemed insensible—was that on one side of an imaginary line [the Canadian side] should be Safety, Law, Honour, and Obedience; and on the other [the American], frank, brutal decivilization with the overwhelming vacuity of the national life".

* The address of former Governor Robert F. Bradford of Massachusetts at the Centennial Dinner of the Bar of Montreal on February 17th, 1949. Mr. C. G. Heward, K.C., the Bâtonnier of the Bar of Montreal, presided.

However, not only have you made me completely at home by the warmth and cordiality of your welcome, but after listening to Chief Justice Tyndale I find myself on very familiar ground: the hardships and difficulties of the courts. May I say to the honourable Chief Justice that, were I here the appointing power as I was in Massachusetts until a few short weeks ago, there would be no question about those additional judges. I should gladly appoint five or even ten more; in fact, had I been able to appoint five more judges in Massachusetts in these past two years, perhaps I should not be here in exile tonight.

I come from New England — a region which has a far greater common boundary with Canada than it has with any part of the United States; a region of some nine million people, among whom those of Canadian descent are numerous and active. It was my privilege as Governor to recognize the contribution and abilities of our Canadian citizens by appointing several of them to high judicial and administrative posts in Massachusetts — one of them a graduate of Dean Beaulieu's University of Montreal, and another a graduate of Laval University, at which I understand Mr. Rivard is a lecturer.

And I have come on this visit in part as a member of the standing Committee on Canadian Relations of The New England Council, created by the President of the New England Council, Mr. R. L. Bowditch, because of the very closeness of our interests with those of the Dominion. By your courtesy Mr. Bowditch is here to-night with me, and there he sits, the only client among four hundred lawyers.

It is with a deep sense of the significance of this occasion that I bring to you of this distinguished assemblage the congratulations of your brothers-in-law of Boston, of the Commonwealth of Massachusetts, of the American Bar generally.

At such an anniversary as this, one is tempted to look forward as well as back, to pause and take inventory. Perhaps we cannot go so far as the ancient chronicler — and I don't think, Dean Beaulieu, it was Joinville—who quoted Bertrand du Guesclin as addressing the French army just before the Battle of Crecy in these words: "Men of the Middle Ages, we are about to begin the Hundred Years' War".

In a manner of speaking, every anniversary is significant — a milestone marking the passage of time, commemorating the increasing permanence of an event, an institution, or the achievement of an individual. A century is a small marker,

perhaps, as history records the life of the nation, or the church. But mankind is more likely to think in terms of the family; of individual human lives. It is of tremendous significance to celebrate an organization which, almost within the normal life span of an individual, can mark one hundred years of steadily increasing vigour and stature. The growth of this Bar has reflected the dramatic growth of Montreal, and the development of the Province and of the Dominion. In fact, to a stranger, what is most impressive in the story of your Bar is that the roster of your membership, past and present, is an honour roll of leadership in the life of Canada.

This century of the Bar of Montreal is of importance also to those of us "south of the border", as marking the triumph of the union of two great streams of legal thought; the successful blending of two great cultures. The Bâtonnier has paid eloquent tribute to your comradeship. It is a marvellous lesson in co-operation and understanding. And we can regard only with admiration and envy the flexibility of a field of practice which can jump from the common law to the civil and back, and is equally at home in two languages. To us such possibilities seem limitless.

Legend has it that in the early days of our national history, before the stature of the Supreme Court of the United States was well recognized, or its duties clearly understood, or even highly regarded, the elasticity of its jurisdiction was put to a somewhat unusual test. In those days the justices met together most informally and often lodged together in the rather primitive accommodations of early Washington. In order to establish a pattern of judicial routine, Chief Justice John Marshall ruled sternly that during court hours the Justices might drink together only when it was raining. However, scurrilous chroniclers report that, based upon this ruling, there developed a *modus vivendi* which is a tribute to the genius of the law. When court convened, so runs the apocryphal legend, it became the custom of the Chief Justice to remark, "Will Brother Storey approach the window, observe, and report whether it is raining?" If Justice Storey reported in the affirmative, the Chief Justice would then say, "Since it is raining, Brothers, let us drink". If, however, the report was in the negative, the Chief Justice would sadly shake his head and reply: "Brothers, you have heard the report of Brother Storey that it is not raining. Any report from so learned a source is entitled to the greatest respect. But, notwithstanding the weight of such eminent au-

thority, we must recognize that the jurisdiction of our court is so comprehensive and so broad, and the empire over which such jurisdiction is assumed is so vast, that it is only a natural presumption of law that, somewhere within that broad jurisdiction and vast empire, it must be raining. Therefore, Brothers, let us drink."

On this centennial anniversary, as you of the Montreal Bar embark upon the second hundred years of your history, as on both sides of our peaceful border Canadians and Americans alike find themselves linked ever closer in common purpose, it may be of value to consider not so much the state of the law as the place of the lawyer, and his responsibility in a world of conflict and confusion. That is what I should like to discuss with you this evening.

You of this Bar have shown throughout your century your awareness of the responsibility of our profession, as is attested by the record of leadership written by your members in the history of this nation.

But before we talk further of responsibility or leadership or the place of the lawyer, let me say that I am all too mindful of the weaknesses of our profession, as well as its capacity for leadership. Perhaps it was fear of these very weaknesses that caused the edict of 1679 to declare that even the admittance of lawyers to New France would be "prejudicial" to the colony. Perish the thought! But, as your good archivist, Maréchal Nantel has noted, out they were and out they stayed until 1760.

In that delightful parody of the legal mind, the *Iolanthe* of Gilbert and Sullivan, you will recall the song of the Lord Chancellor:

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault nor flaw,
And I, my Lords, embody the Law.

Of course this has no application to the Bench anywhere on this side of the Atlantic, and I am sure did not even before the recantation tonight by Chief Justice Tyndale. But far too many of our profession, at least in my experience, approach their daily contacts with their fellow men in this same, exalted attitude. Far too often their conduct, or perhaps I should say their concept, brings down upon the heads of all of us the ridicule and even hostility of the layman.

The other day, as I had occasion to pore over the mumbo-

jumbo of the draft of a legal instrument, seeking against overwhelming odds to find the verb to which all the whereases and qualifying clauses attached, I suddenly saw with appalling clarity myself and my brother lawyers in the light in which others too often see us. Surely the more legalistic we make our language, the more technical our opinions, the more we remove ourselves from the realities of an everyday world, the less competent we are to discharge the functions which make our profession necessary to mankind.

Curiously enough, I think we find this attitude most often in the man who represents the other side of a case!

Yet another revealing experience has brought home to me another realization equally valid. Some years ago I attended a conference of the leaders of an American industry assembled in Washington to consider what position they should take with regard to pending federal legislation which would affect to a profound degree the business of every one of them. From their respective places around the conference table, one after another rose to express his view. And again and again, in the course of their remarks, one after another would say in a tone of apology and excuse, "Of course I am not a lawyer, but . . .". It was the tone of that apology, "Of course I am not a lawyer, but . . ." that underscored, as nothing else could have done, the unconscious tribute to our profession and the tremendous position of leadership and responsibility it implied.

At the University from which I was graduated the bestowal of the degree of Bachelor of Laws carries with it the happy phrase that the recipient is qualified in "the wise restraints which make men free". Lawyers are, in essence, interpreters of those restraints. On a desert island a Robinson Crusoe would require neither statute nor civil nor common law to regulate his life from day to day, year to year. But the arrival of another Robinson Crusoe would immediately call for a definition of the rights of each and the limitations upon the other's freedom of activity upon that island. Our entire systems of law are based upon relationships no less primary.

Realistically, in this modern world, we cannot accept the definition of the ancients that law was the gift of some mythological deity, or that it was the teaching of the wise men who knew the good old customs acceptable to the gods. Realistically, we can no longer accept even the orthodox historical concept of the nineteenth century that the judge is neither the creator of the legal precept nor the agency by which it is

given effect. Under that theory all he does is to "discover" or "recognize" it. That definition of the law no longer fits the situation of the present day.

Today, as Dean Roscoe Pound points out, the legal order is the most conspicuous and most effective form of social control. All other agencies of social control operate under the scrutiny and in subordination of the exigencies of the law. And as the needs of social control vary, so today must our profession, as interpreters of "the wise restraints which make men free", be flexible enough to safeguard and make possible an ever greater freedom of the individual. That freedom is in danger. That danger is our challenge.

Today the relationship between man and man, neighbour and neighbour, and nation and nation reflect the fundamental difference between the ideal of our democracies, in which the maximum freedom of the individual is the goal; and the totalitarian ideal, in which the sanctity and importance of the state is the objective and the individual is of no more consequence than any other chattel.

This latter concept is repugnant to everything represented by the genius of our systems of law. Once the totalitarian idea is embraced, whether it be Communist or Fascist; the one-way ballot, the secret police, the forced confession, the condemnation by mock trial or with no trial at all, the device of ruling through the cowardly terror that strikes without warning in the dark; then "civil liberties" becomes an empty phrase; then law, as we know it, has no meaning.

We know this to be true; yet we do not know it until the whole sleeping world is roused as by a fire bell in the night, by the martyrdom of a priest of God. In the shock of horror and disbelief which has followed the persecution of Cardinal Mindszenty, as it did that of the Lutheran Bishop of Hungary last September and of Archbishop Stepinac before him, we of the free world seek an outlet in denunciation, in protest. Again and again, down through the ages, has tyranny sought to attack man's freedom by attacking man's faith. Such persecutions have always failed, and in the end they must always fail, because no one can enslave the soul.

There is one thing we can do. We can implement our defiance. Through the United Nations we can bring our protests before the Bar of the world. We can and should refuse to recognize or maintain diplomatic intercourse with a system which tolerates such official outrages upon the conscience. Under such

a system we lawyers know and the world now knows there can be no room for freedom. There can be no room for normal human expression, or normal human relationships. That is the lesson taught us by Cardinal Mindszenty and his fellow martyrs, Catholic and Protestant alike. Let us look to it that the lesson does not go unheeded.

In a dictatorship the writ of habeas corpus is incomprehensible; civil liberties are incomprehensible; justice is incomprehensible; justice, the right of the most humble to obtain a fair hearing before an impartial tribunal of any personal grievance, no matter how trivial to the state, against even the most mighty. That is why to those who believe in democracy Communism is a legal monstrosity; for, to be effective, Communism must submerge all freedom of the individual.

With this lesson ringing in our ears, let us look to the defences of our own systems of law. Even they, designed as they are to provide the maximum freedom of the individual, are no stronger than their reiterated expression through the human instrumentalities by which they are safeguarded and developed. That is our responsibility as officers of the court, as members of the Bar.

When, as in the Constitution of the Commonwealth of Massachusetts, we divide the powers of government "to the end that there may be a government of law and not of men", we merely reflect what is fundamental with you in Canada, as with us: the necessity of a disciplined but impersonal approach by recognized guideposts to the application of our statutes and decisions. Three hundred years ago, in April 1648, John Milton paraphrased the eighty-second Psalm in these words:

Regard the weak and fatherless,
Dispatch the poor man's cause,
And raise the man in deep distress
By just and equal laws.

There are times, when, with the best intention in the world, the difficulty of the lawyer is to find what is the true meaning of "just and equal laws". As human relationships become more and more complex, it becomes increasingly difficult to achieve certainty in advising a client what the law is. Yet, without the certainty of recorded decisions to fall back upon to chart the governing principles of the living law, and its gradual development as expounded by the courts, through the years and through the generations, it would be impossible for the world of commerce to exist. There could be no assurance of contract,

of binding engagement, of the rules of the game. Lawyers and courts alike must be able to follow recorded opinion in their interpretation of the law as applied to varying facts, with the confidence that amendment or change will come, not by judicial fiat or executive whim, but through the processes of legislative debate and legislative action.

It must be obvious to anyone who pauses even for a moment to think about the subject that without known rules of law, whether created by statute or otherwise, and without established decisions interpreting those rules, there can be no such thing as "just and equal laws". Almost instantaneously the wheels of commerce and industry and all semblance of personal liberty would sink beyond recovery in a hopeless morass of confusion.

What is not so obvious, and what has decisively changed the function of the lawyer and enlarged his field of responsibility, is the tremendous growth of administrative law. It is in this field, where precedents are being made, not followed, that our profession meets the first great test of our larger responsibility. The development of administrative tribunals, committees and agencies in which the rules of evidence are honoured by their omission; the uncharted and unchartable seas of bureaucratic decision; the vast jungle of conflicting directives through which even the most humble, dealing with the simplest problem, must cut his way to uneasy freedom through regulation, ruling, order and decree; these new complexities, so often administered by officers and officials without legal training, make of each one of us a front-line guardian of the defences by which our civilization exists.

The privilege of being a front-line defender is the proud right of our profession; but, like the battle honours of a regiment earned in war, it has not been lightly won. It has taken the courage of a Thomas Erskine in the eighteenth century, defending freedom of speech and of press, in the face of an attack by the majesty and might of the government of Great Britain. It has taken the courage of an Emile Zola, not himself an attorney, defying public opinion, defying sure personal contumely, defying the government of France, inviting prosecution and penalty on himself to restore justice to another.

In an instance closer home to those of us who come from Massachusetts, we can point to a young lawyer who, with equal courage, threw to the winds his chances for personal and professional advancement in the troubled Town of Boston, in the

days which preceded the American Revolution. A mob had gathered on King Street on March 5th, 1770. A patrol of soldiers confronted them. Somewhere in the tenseness of the moment someone lost his head, and the soldiers fired into the crowd. Of such incidents are revolutions made and, in the hands of inflamed public opinion, this incident became the Boston Massacre. The officer in command of the patrol was put on trial for murder. At such a time, in such circumstances, it would be difficult to conceive the possibility of a less impartial hearing. Certainly any member of the Bar who would undertake to defend that officer could expect no future consideration at the hands of his countrymen, if indeed he did not invite personal injury. Yet, knowing all these things, John Adams, a young barrister of Boston, his sympathies with the people of the town, his future before him, undertook the defence of Captain Preston and won for him an acquittal. John Adams went on to become the second President of the United States. But nothing in his career entitles him to so permanent a place on the honour rolls of our profession as that early action of his in responding to the challenge to "just and equal laws".

Few of us will ever have the opportunity, even if we possessed the courage of an Erskine, a Zola, an Adams. We can remind ourselves, however, that we are nevertheless officers of the court. We have sworn to the attorney's oath. It is easy to make a law. I say this with all deference to the distinguished lawmakers who are here tonight. It is even easier to break a law. Neither function calls for the discipline or training of a lawyer. There remains the duty of interpretation, the duty of defence, the duty of shaping public opinion. These are the functions of the lawyer. As in London during the blitz there came to be a "Mr. Sensible" at every air-raid station to whom panicky people could turn, so must a lawyer accept the responsibility in time of clamour, of rumour, and public excitement, of evaluating the facts coolly and presenting honest and forthright conclusions.

Somewhere in an address, Mr. Justice Oliver Wendell Holmes described the satisfaction that is the reward of the lawyer's discipline. He called it, "the secret, isolated joy of the thinker, who knows that one hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought".

So far I have spoken as a lawyer to lawyers; but I cannot conclude my remarks on this great anniversary without speaking for a few moments as an American to Canadians, as a former

Governor of a Commonwealth in which one out of every five citizens is either himself a former resident or descended from residents of this Province or the Maritimes. Our ties with you are very close indeed. There is an admiration and an affection with us for Canada and things Canadian. There is a dawning recognition of the tremendous strides Canada has made toward the solution of her economic problems, and perhaps I can say in a land in which there are no Democrats, if there are no Republicans — strides which seem to some of us more successful, because more sensible, than some of our own. And there is a realization that our two countries, comrades in arms at war and so close together in peace, now face together the challenge of the future in a clouded world. It is a challenge which in our case at least comes to a generation conditioned to look increasingly to their government as the provider of all wealth; and to turn to government spending as the answer to every problem; it comes to a people who are close to forgetting that in a democracy government is only a mirror they hold up to themselves.

The greatest challenge to our democracies is not from without. It is the cracking process of selfish and confusing pressures from within. If it continues unchecked, our gravest danger is not from a World War III, but from a break-down of our own society; but from apathy and the unwillingness of our people to make the business of government their business, now and in the future. Twice in the last twenty-five years we have gone to war, side by side, to preserve our freedoms. It is unthinkable that we should now throw them away by default.

As Winston Churchill said to your Parliament in Ottawa on December 30th, 1940: "We have not journeyed across the centuries, across the oceans, across the mountains, across the prairies, because we are made of sugar candy". Yet in these days, when the white heat of patriotism no longer beats upon us from the furnace of war, that possibility recurs. Are we perhaps, after all, made of sugar candy? The advertising pages of our coated paper magazines suggest a state of society whose luxurious minimum requirements at least raise the presumption of doubt. That presumption is strengthened by the success of the kind of politics which pledges a government promising everything, to everybody, for nothing.

So we come to the final responsibility of our profession: not to provide new theories of government, not to develop a special governing group, but rather to kindle a positive democracy, to generate the electricity of thought and of participat-

ing citizenship, without which no free people can long govern themselves at our present level or at any other.

This means preparing for the future. It means deriving from the past. Above all, it means building upon what we have. That is the very essence of our legal tradition. It is the tradition which Dean Beaulieu so beautifully expressed when he said, "We march upon the track of our predecessors". It has been said that civilization is only the accumulation of small but precious deposits left to us by preceding generations. We cannot discard that past, nor can we ignore it. We cannot invent a new multiplication table, nor can we repeal the law of gravity. We cannot begin all over again in a fresh, new world. And it is increasingly apparent that we cannot stay the relentless hand of science.

If we can no longer make the world safe for its inhabitants, then we must make its inhabitants safe for the world in which they are to live. That is pre-eminently the obligation of the lawyer.

The battle which lies ahead will call for the precision of the scientist, the organizing genius of the man of business, the devotion and faith of the priest. But it remains for the lawyer, because of the disciplines of his training, because of the range of his experience, because of the traditions of his profession, to rally the ranks of the forces who must defend man's heritage of freedom. That is our challenging responsibility as we usher in the second century of the Bar of Montreal.

Threatening Twigs of Birch

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.

(Shakespeare: Measure for Measure, Act II, Scene 1)