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RECIPROCAL INFLUENCES OF THE FRENCH AND ENGLISH LAWS.[1]

I may tell you at once that I found some difficulty in choosing the title of this address. As long ago as last June, the Secretary of the Association asked me to indicate the subject of it. I delayed as long as I could, but finally I had to yield, and, in a moment of weakness and presumption, I wrote him that my topic would be "The Reciprocal Influences of French and English Laws." When, however, I set to work, I soon realized that the theme was beyond my powers and altogether too vast to permit of even cursory treatment in the time at my disposal. I must therefore crave your permission to limit this paper to an attempt to trace back the sources of some principles of both laws in the provinces of Canada, and in so doing perhaps I may be permitted to traverse ground that has already been covered in the course of previous meetings.

Let me go back to the wonderful receptions of last summer in London and in Paris and the addresses given at the official functions, which have emphasized the debt which the legal institutions of both countries owe to each other. We then met in the ancient and royal hall of William Rufus, Westminster Hall, "the shrine of English law." Later we were gathered on that Ile de la Cité, brimful of historical recollections, the Lutetia of the Romans at the "time during which," in the words of Lord Birkenhead, "the Roman Empire exercised its matchless sway."

There, under the roof of the palace, where the Kings of France had for centuries been the hosts to Justice, a member of the Supreme Court of the United States, Mr. Justice Sanford, paid to French influence this glowing tribute:—

[1] Address by the Honourable Thibaudeau Rinfret, Judge of the Supreme Court of Canada, before the Canadian Bar Association at its Annual Meeting for 1925.

"For it is an historic fact that since the time of the Normans, that valiant and dominant race, the French tongue has set its indelible seal for all times upon the English law, both procedural and substantive. In the countries inheriting the Common Law, almost all the terms that have a definite legal meaning are of French origin, and in using them we render daily, in our procedure and in our thoughts, homage to the indestructibility and authority of the French language."

Immediately afterwards, at the Hotel de Ville, Mr. Wickersham, former Attorney-General of the United States, returned to the same idea. He said:—

"The Common Law itself is derived from the Norman laws and customs which were carried from France to England at the time of the conquest by William the Conqueror.

"We should remember that until the sixteenth century French was the judicial language of England and the American Judicial language still retains many French terms—a corrupt French, it is true, but one which attests its Norman origin.

"Every session of the Supreme Court of the United States, even at the present time, is opened by a crier with the words: 'Oyez! Oyez! Oyez!' as in the time of Edward III."

I need not, of course, remind you that our own Courts are also opened with the same words.

Mr. William D. Guthrie, Chairman of the Paris Committee of the American Bar Association, in an address delivered before the Bar of the City of New York, deemed it fitting, in connection with his report of the Paris meeting, to recall "some aspects of the impress made by French thought and genius upon English institutions and jurisprudence." He, in the course of his remarks, mentioned that:—

"The records available to us show that for several centuries after the Norman conquest the governance of England was essentially French. The King of England and his entourage spoke French: the laws were enacted in French: the leaders pleaded and argued in French: the Judges rendered their judgments in French: the famous Year Books were long printed in French: the only literature current, whether legal or otherwise, was French, and even the old British language, so far as it survived down to our days, became two-thirds French. But, in truth, neither Saxon nor English nor Norman French survived, for a new language, as well as a new people, were born of the all-permeating infusion of French blood and culture into Briton and Saxon.

If it be urged that French ideas and language have long since disappeared from the surface of the outward life of Englishmen, the reply must be that not disappearance but absorption is the fact: that French thought and culture have no more vanished than Anglo-Saxon ideas and language have vanished, and that the British nation and the English language to-day alike are composites of many ancient, excellent and enduring elements."

The Conqueror was endeavouring to bring in the French instead of the Saxon language, and, says Holcot: "*ideo ordinavit quod nullus in curia regis placitaret nisi in lingua gallica.*"

Mr. Guthrie quotes Pollock and Maitland in their History of English Law, showing how deeply the French influence worked: "Every royal court of Justice under the Norman kings was a French-speaking court: the men who sat in the king's court of justice were Frenchmen, few of whom could understand a word of English: in all legal matters the French element, the royal element, was the modern, the enlightened, the improving element."

Pollock and Maitland add:—

"It is not to be denied that the few legal ideas and institutions, which we can confidently describe as imported from Normandy, were of decisive importance: . . . . it is hardly too much to say that at the present almost all our words that have a definite legal import are in a certain sense French words."

There is evidently ample authority for the statement made recently at the meeting of the Ontario Bar by the Right Honourable Mr. Justice Duff: "that Norman French was the nursing tongue of the Common Law"—authority which goes back to Blackstone quoting the "ironical observation of the Roman satirist: "*Gallia causidicos docuit facunda Britannos,*" (Eloquent Gaul hath instructed British lawyers), and stating as a fact that "pleadings in the English courts were formerly all written, as indeed all public proceedings were, in Norman or law French, and even the arguments of counsel and decisions of the court were in the same barbarous dialect."

And not the least interesting result of such a situation is the striking circumstance, pointed to by Mr. Guthrie, that Magna Carta was framed at a period dominated by French culture and was wrung from King John by barons who spoke in French.

I am not, however, as you may have noticed, risking any statement of my own; and I say at once: "Honi soit qui mal y pense!"

Those of us who might think that this is unduly stressing history, and that it is claiming too comprehensive an influence on behalf of

what Blackstone has called that "barbarous dialect," will find comfort in the following passage from Sir Frederick Pollock: "The founders of the common law worked faithfully for what they could see, and were rewarded beyond all reach of vision. We cannot say that they were altogether of English race: it is at least doubtful whether some of them could speak English, and not doubtful that many of them did not habitually speak it: but they were thoroughly imbued with the national character, and though they might speak French and write Latin, spoke and wrote as Englishmen."

Although "language is no mere instrument which we can control at will:" although the "most momentous and permanent influence of legal import of the Norman conquest may have been its effect on the language of English lawyers," to the point that Maitland was able to declare "in all the world-wide lands where English law prevails, homage is done daily to William of Normandy and Henry of Anjou,"—if it were so for the legal terminology, can that also be said of the basic principles of the law? There are historians to be found who venture to discuss whether the law of England had not crossed over to Normandy before the conquest.

Sir Matthew Hale, in his History of the Common Law of England, explains that "before the Normans coming in, in way of hostility, there was a great intercourse of commerce and trade, and a mutual communication, between these two countries . . . . which might be a means of their mutual understanding of the customs and laws of each other's country: and gave opportunities of incorporating and ingrafting divers of them into each other, as they were found useful or convenient."

His conclusion is that the undoubted similarity of the laws of England and Normandy "does not at all infer a necessity that they should be imposed by the Conqueror . . . . and that there were divers other means that caused a similitude of both laws, without any supposition of imposing them by the Conqueror."

Be that as it may, and whether it be that some laws of England had already invaded Normandy through commercial intercourse or that the customary law of Northern France invaded England under the Norman and Angevin kings, the result is the same for the purposes of the particular inquiry into the reciprocal influences of the laws one upon the other. It only shows that a complete and adequate study of the genesis of both systems and their respective influence upon the final conceptions as we find them to-day could not fail to be of the utmost interest and would likewise "show to be kindred much that we might fancy were foreign and of no imme-

diate relation to what we are thinking, doing and enjoying to-day"—a thought which in another form was expressed in this way by the distinguished Bâtonnier of Paris in his opening address at last year's reception:—

" Recherche laborieuse et féconde, au cours de laquelle les origines communes des législations qui se croyaient étrangères ont été plus d'une fois reconnues.

" N'a-t-on pas démontrè déjà qu'au temps de la conquête normande, les lois des conquérants les suivirent, continuant plusieurs siècles durant à se formuler dans la langue originaire et marquant d'une empreinte définitive une législation transportée ensuite par les émigrants au-delà des mers? Quel jour n'a pas alors été projeté sur les analogies de fond de lois qui paraissaient si différentes! Et quel stimulant à multiplier les rapprochements, à resserrer les collaborations, à essayer de restituer dans toute sa vérité l'unité essentielle du droit sous l'apparente diversité des législations."

So far as they have now advanced, and notwithstanding the "*nolumus leges Angliae mutare*" of the Statute of Merton, the more recent researches do not seem to confirm Sir Matthew Hale's theories and deductions.

Mr. Edward Stanley Roscoe starts his book on "The Growth of English Law," being studies in the evolution of law and procedure in England, by the following passage:—

" Before the time of Edward I. English law did not exist: Anglo-Saxon, Danish, Norman and Roman law then partially prevailed, and Norman, ecclesiastical and Roman influences were each at work." And later he adds (p. 15): " The influence of the canon law and of the Roman law is obvious not only in its breadth of view, but in some classical pedantries, occasionally also in some actual rules which supply the absence of authority arising either from English dicta, practice or custom."

Sir Frederick Pollock ("The Expansion of the Common Law") observes rather how the Common Law has not only adopted but assimilated these divers systems, and has thereby enriched its resources for doing justice without losing anything of its individual character.

Coming then to a few illustrations, he points to the sworn inquest, a special and royal form of procedure, " ultimately of Roman origin, but imported by the Conqueror as part of the Frankish administrative machinery which the Roman Court had adopted."

Take that as a starting point and remember that the English justices of the peace, down to the Restoration and later, " combined the

functions of subordinate judges with those of public prosecutors and, in their mixed executive and judicial capacity, they did not escape the inquisitorial bent of Tudor administration and legislation." . . . . "So that, for some time, England was near having a preliminary criminal procedure not unlike that of modern Franch law."

This "inquisitorial bent" is to be retraced in the power of the Court to examine the parties on oath, which Pollock thinks is "perhaps the most striking deviation of a suit in equity from a typical action at common law."

Chancery is referred to by Bacon, in his History of King Henry VII., as "the Pretorian power for mitigating the rigour of law, in case of extremity, by the conscience of a good man." Now the version of natural justice of the early Chancellors "bore a decided civilian or canonical stamp"; and natural justice, the *jus naturale* of the Roman law, was made the ground of a not very remote English decision (*Bradford Corporation* v. *Ferrand*)[1], in which the right to running waters was in question, as being "that which is *aequum et bonum* between the upper and lower proprietors." As pointed out by Sir Frederick Pollock, there is a good deal of identity between the Roman conception of "aequum et bonum" or "aequitas" and the present English doctrine of "reasonableness," reasonable price and reasonable time being among "the most familiar elements in the law of contract."

Speaking of English decisions, two other remarkable illustrations of our point may be found in the very well-known cases of *Young* v. *Grote*[2] and *Taylor* v. *Caldwell*.[3]

In the first one, as you remember, the Court of Common Pleas had based its judgment on a passage from Pothier (Contrat de change, No. 100) and held the drawer of a cheque liable for his negligence in writing it. Chief Justice Anglin, in his address on "Stare Decisis and other subjects as viewed in the Civil Law and at Common Law," reviews at full length the history of English Jurisprudence on that question. He shows how much *Young* v. *Grote* was discussed for almost a century, until its authority finally triumphed in the House of Lords, in 1918 (*London Joint Stock Bank* v. *MacMillan*)[4], when the Lord Chancellor, Viscount Finlay, alluding to the passage from Pothier, said that it appeared to him "to embody the principles of English as well as of the Civil Law."

[1] [1902] 2 Ch. 655.
[2] 4 Bing 253.
[3] 3 B.S. 826.
[4] [1918] A.C. 777.

As for *Taylor* v. *Caldwell,* it came prominently before the Supreme Court of Canada in the British Columbia case of *Canadian Merchant Marine* v. *Canadian Trading Co.*,[5] where it was discussed by all the Judges; and Mr. Justice Mignault took occasion to point to the interesting reference made by Blackburn, J., "to the Civil Law and to Pothier, 'Obligations,' No. 668, as laying down the rule that the debtor *Corporis Certi* is freed from the obligation, when the thing has perished neither by his act, nor by his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred."

Of Pothier, in fact, it may no doubt be granted that his authority is very high before the English Courts (see Best, C.J., in *Cox* v. *Troy*[6]; also Lord Blackburn, in the House of Lords, *McLean* v. *Clydesdale Banking Co.*[7]

I will not pursue this any longer. I have tried to indicate the theme very superficially, closely following the few English authors which it has been my privilege to study, fully aware of my shortcomings and knowing that you will be able to supply what I have omitted.

Perhaps, like the Lord Chancellor and the other legal dignitaries who were present at the clandestine marriage of Coke, I may be absolved *by reason of ignorance of the law.*

Let us, therefore, cross the Ocean, land in the new world, and see these two countries, France and England, successively at work in the building up of the legal structure of this country.

French law was introduced with the first discoverers. Until the Proclamation of King George the third, in 1763, it exercised full sway. Still more, but for the short period which followed Murray's Ordinances, the Canadian law in force in the territory which now forms the Province of Quebec was all contained in the Coutume de Paris, the Edicts and Ordinances of the French Kings, the Arrêts and Règlements of their creature, the Conseil Souverain, or of the Conseil d'Etat du Roi, as well as those of the subsequent administrative authorities of the Country.

In 1774, history repeats itself. The French-speaking barons of Runnymede secured for the English people that immortal document which, until this day, constitutes the keystone of its liberties; an English King gave to his new French-speaking subjects the Quebec Act, which can be styled the Magna Carta of French Canada. Later the Legislative Assembly of the Union, half composed of English-

[5] 64 Sup. C. Rep. p. 106.
[6] 5 B. & Ald. 481.
[7] 9 A.C. 105.

speaking members, decided in 1857 to codify the laws of Lower Canada. As you know, " the object of the codification was rather to consolidate the existing law in a convenient form than to effect serious changes in its substance."

Of course, I am not speaking of the Public Law. That of England was introduced *ipso facto* by the change of sovereignty in 1763. I must eliminate also those branches of the law which are, by our constitution, ascribed to Federal jurisdiction, such as the Criminal law, Bills of Exchange and Promissory notes, Banks and Banking, Navigation and Shipping, Patents and Copyrights, Currency and Coinage, Bankruptcy and Insolvency, and, in part, the laws of Insurance, of Railways and of Joint Stock Companies. Those are in force throughout Canada and are largely copies or counterparts of the English Acts.

Our inquiry must be confined to the Codes and the Statutes adopted by the Legislature of the Province of Quebec. Let us say at once that the general scheme of the Provincial Statutes, concerning Insurance, Railways and Companies is similar to the Federal Acts and one does not find in them serious departures from the Dominion Laws, based on the English model.

It would be quite beyond the limits of this paper to follow the traces of English law throughout the numerous statutes which are yearly adopted by the Legislature of Quebec. Perhaps, however, special mention should be made of two enactments of 1914, one of which (4 Geo. V. ch. 50) renders debentures indisputable after certain conditions have arisen, and is practically borrowed from Ontario; while the other is of tremendous importance (chap. 51) introducing as it does the right of companies to hypothecate their personal or moveable property—a principle of English law incorporating the idea of the chattel mortgage, which, up to that late date, had remained wholly foreign to the Franco-Canadian legal conception of property and civil rights.

It may be added that the rules of interpretation of Statutes laid down by the English writers and precedents are mainly followed in Quebec. Endlich, Maxwell, Craies are constantly quoted.

Quebec has three codes: the Municipal Code, the Code of Civil Procedure and the Civil Code.

The present Municipal Code came into force in 1916, but it merely replaced the older Municipal Code of 1871, which was itself practically a codification of Municipal Acts, some of them dating back to the early eighties. It follows the English plan and has even adopted some rules from the United States. The American author,

Dillon, is probably the most often cited by lawyers and referred to by the Courts on questions of municipal law.

Unlike the Civil Code, the Quebec Code of Civil Procedure of 1897, following an earlier code of 1867, is not based on the French Code de Procédure Civile. Its main basis is the Ordonnance sur la Procédure Civile of 1667. It also drew much of its inspiration from Louisiana, originally a French settlement, while many of its forms and writs are of English origin, such as injunction, mandamus, quo warranto and prohibition. But, most noteworthy of all, it preserved in a limited number of specified civil cases the trial by jury, unknown to French civil procedure, and which sprang up in the English system from the solemnity and sanctity of the old popular judgments. Trial by jury was adopted in Quebec in 1785, by an Ordinance of the Legislative Council of the Province.

The same Council, the year previous, had introduced the writ of *Habeas Corpus* in criminal matters.

However, the Civil Code is at once the most important and the most instructive for the purposes of this disquisition. As already mentioned, it was made clear in the instructions given to the codifiers that, while they were to take the Code Napoleon as their model, yet they were to collect the law as they found it then to be in force (" des dispositions qu'ils tiendrent pour être réellement en force.")

For that reason, the Code Civil du Bas-Canada, proclaimed in 1866, is an exceptional document for the purpose of testing, after a little over a century, the impress of English law upon a country born, raised and kept up in the spirit of the French law.

It is curious to note, in that respect, the impression made by the Code Civil upon two eminent legal writers, one French and one English.

Sir Frederick Pollock (" The Expansion of the Common Law," p. 135): " Witness the Province of Quebec, where the Civil Code represents the old French law of the colony, modified by free use of the Napoleonic Code, and in some particulars by English influence."

And Mr. Planiol in the introduction to his very valuable work on the Droit Civil (Vol. I, p. 60): " On a rédigé (dans le Bas-Canada) un Code Civil qui a été mis en vigueur le ler août, 1866. Des éléments divers s'y combinent de la façon la plus curieuse. Ses principales sources sont la Coutume de Paris de 1580, le Code Napoléon et le droit anglais."

The importance of this question justifies my treating it with some detail.

The Commissioners entrusted with the work of codification were instructed to indicate under each article the sources from which it was derived. They have done so, and it is therefore only necessary to run through their report in order to find what articles are of English origin.

I may say, moreover, that a most valuable little book on "The Scope and Interpretation of the Civil Code of Lower Canada" was published some years ago by Mr. F. P. Walton, when he was Dean of the Faculty of Law of McGill University, in Montreal. It contains a very complete chapter on the subject and from it I intend to borrow freely.

As was to be expected, the chapters on Commercial Law in the Quebec Civil Code owe much to the English law merchant, although we are told that this law has "for the most part, nothing peculiarly English about it, but is based on the customs of merchants, whether Dutch, French or English."

The Commissioners themselves state in their report that "our system (of law-merchant), if system it may be called, has been borrowed without much discrimination partly from France and partly from England; it has grown up by a sort of tacit usage and recognition."

They based their articles relating to commercial law almost equally upon English and French authorities, and, before the Quebec Courts, the practice has been to rely on both. This constant mixture is probably unique and deserves more than a passing reference. On questions of law relating to corporations, carriers, mandate, brokers and factors, partnership, gaming contracts, maritime lien, affreightment, insurance and maritime law generally, you will find the Commissioners and subsequently the factums of Quebec lawyers as well as the judgments and reasons of Quebec Judges, quoting side by side Pothier and Blackstone, Domat and Grant, Denizart and Arnould, to whom they add sometimes United States authorities.

Merlin, Pardessus as well as Bell, Smith's Mercantile Law, Story on Bailments, are invoked in support of a point involving the law of Carriers.—The title on Mandate, Brokers, Factors and Commercial Agents is derived from Pothier and Troplong, Domat and Pardessus, but in very important respects departs entirely from the French law and relies on Story, Erskine, Bell, Chitty and Paley on Principal and Agent.

Partnership, gaming contracts and bets, and pledges offer the same eclecticism; and we find the names of Kent, Collyer and Oliphant added to those of the writers already given; while, on In-

surance: Phillips, Marshall, in English; and Clauzet, Boudousquié, Emérigon, in French, are further authorities referred to.

As to Maritime law, the English judges, and foremost amongst them Lord Mansfield, have chiefly erected its structure on continental authorities, mainly on the great Ordonnance de la Marine of 1681—published in the reign of Louis XIV. The Commissioners, while recognizing the cosmopolitan character of mercantile law, expressly refer to this Ordonnance as the chief basis of that branch of the law. Then, on Maritime lien and affreightment they give as their authorities Smith, Abbott, Bell, Erskine, Kent, Valin, Pardessus, Pothier, Emérigon, Flanders, Toubeau, Guyot, Maclachlan, Cleirac, Stracchia, Boulay-Paty, Story, Tudor, Domat, and, in some places, the Merchant Shipping Act of 1854.

It may not be amiss, however, to remind you that we are merely following our purpose of finding traces of English influence on the French law of Quebec. The commercial law of the Province of Quebec, as a general rule, is the French law. Both the Privy Council (Herse & Dufaux, L. R. 4 P. C. 468, 489; Bell & Corporation of Quebec, 1879, 5 A. C. at p. 98; Vaudry case, 1920, A. C. 662) and the Supreme Court of Canada (especially in Desrosiers & The King, 60 Sup. C. Rep. 105; and Curley & Latreille, same volume, p. 131) have warned us against the danger of attempting to interpret the articles of the Civil Code of Quebec by means of English and United States authorities, except where the Commissioners indicated that their source was of English origin.

Within the Code itself the Commissioners have inserted some provisions where recourse must be had to the laws of England. They relate to proof of facts concerning commercial matters (C. C. 1206, 1235 and 2341), to all matters concerning bills of exchange not provided for in the Code or the Federal laws (C. C. 2340 and 2354) and to the Court of Vice-Admiralty, where the Maritime laws of England are to govern (C. C. 2388).

Outside of those branches of the commercial law to which reference has already been made, the balance of the Quebec Code covers the law of persons, of property, of real rights, the modes of acquisition of property: successions, gifts, wills, substitutions, obligations *in general* and all the special contracts, security, registration and prescription. This represents some 2,270 out of a total of 2,615 articles which the Code contains. Here, the French law reigns almost supreme and the references to English sources are scarce. Russell on Crimes is mentioned in regard to the celebration of marriages; Chitty and Blackstone, under a few articles dealing with Crown

property (the minor prerogatives of the Crown forming part of the private law, according to a long line of decisions, and being therefore in Quebec determined by French law).

Sedgewick "On Measure of Damages" appears in connection with one article about the penal clause in obligations;[8] Kent, Story and Greenleaf are cited under another article of the same title having to do with delivery.[9] Writers on English law: Smith, Chitty, Kent, Sugden are the main sources of two articles[10] about certain conditions of a sale by auction. Jones on Bailments and Story also on Bailments are indicated as corroborative sources of one article in the title on Loan[11] and one in the title on Necessary Deposit.[12] Then Chitty on Bills and Chitty on Prerogatives appear in two other places under the title of Prescription;[13] and that is about all.

An important exception, however, should be made with regard to wills.

The Quebec Act of 1774 introduced the fundamental English principle of freedom of willing and did away with the compulsory restriction of the "légitime." The codifiers, in addition to the notarial and the holograph wills, accepted the will in English form, as well as the English law in respect to wills made by soldiers and sailors. For these and the probates of such wills they relied upon, and they refer us to, Parsons, Stephen, Alnutt, Jarman, Christie, Weatherly and Lovelass.

We have not perhaps exhausted the list. A few articles of the title on Delicts and quasi-delicts have, in their application by the Courts, been interpreted according to English rules, and naturally so in cases involving questions of public law.

I have gone into this branch of the subject at some length; but is it not the very object of this association and one of the most important purposes of these meetings that we should endeavour to acquaint ourselves with the two great systems which divide between them the obedience of our Dominion?

Of course, I would not venture to speak as freely of the influence of French law upon the statutes and jurisprudence of the other provinces. I feel that, on that subject, I cannot add to your knowledge. My only hope is that this exposition of French law in Quebec may bring forth a corresponding inquiry on the English law as it flourishes in the other provinces, by one trained and disciplined in

[8] C.C. 1136.
[9] C.C. 1165.
[10] C.C. 1567 & 1568.
[11] C.C. 1762.
[12] C.C. 1813.
[13] C.C. 2188 & 2215.

the Common Law, and that this effort of mine may not be without profit.

No doubt there also the same reciprocal influences can be traced. Roman law indeed has furnished some of the great principles on which English jurisprudence has been grounded and Roman law is the great ancestor of French law. For instance, the Workmen's Compensation Acts appear to be at least a mitigation of the English doctrine of common employment and somewhat partake of the civilian conception of the responsibility of the master. I believe even some provinces have gone the full length of adopting the French law on this point.

In most English-speaking provinces there have recently been passed Legitimation Acts for the purpose of legitimizing children born out of wedlock and whose parents subsequently marry, a provision contained in the Quebec Code (Arts. 237 *et seq.*) since 1867 and which has always formed part of the law expounded by Pothier, Marcadé, Toullier and the other commentators of the old French law.

The Province of Ontario adopted, last year, the civil law principle of apportioning damages in cases of contributory fault or negligence. In his truly remarkable address delivered at Vancouver, in August, 1922, my lord the present Chief Justice of Canada had expressed the desire that " the day may come when . . . respective legislatures . . . may incorporate in the laws of the Provinces of Canada . . . this feature of the civil law." His appeal is beginning to be heard. It is anticipated that the other provinces will follow.

This principle is taken from the French law of Quebec; and I need not enlarge upon it, as it has already been discussed comprehensively before this Association by Mr. Angus MacMurchy. There is nevertheless this to be noted about it, that the French system of contributory negligence as applied in the Courts of France or of Quebec is based on no special text and is only the extension made by jurisprudence of the general rule of responsibility contained in article 1053 of the Quebec Civil Code or article 1382 of the Code Napoléon. In fact, Roman law on that point was in accord with the common law (see " *La faute commune ou compensation des fautes,*" by Mr. R. Demogue in La Revue du Droit, Vol. II., p. 97). So that we now have this curious result: contributory negligence, as applied in the civil law countries of France and the province of Quebec, is unwritten law and based on jurisprudence; while, as applied in the common law province of Ontario, it has become *lex scripta.*

This leads us to the noticeable "tendency in the common law provinces towards a form of codification such as prevails in Quebec," which was referred to by the honourable president of this Association in the very first of his important annual addresses. This undoubtedly savours of civil law influence. It appears that Cicero was the first to conceive the idea of a legal code. Julius Caesar had the plan in view. Justinian had the glory of accomplishing it. The great French Ordinances of the XVIth and XVIIth centuries were Codes and so was the Coutume de Paris. Then came the Code Napoléon and then the Civil Code of Lower Canada, which Chief Justice Anglin, before the Junior Bar in Quebec, described as: "This excellent and scientific body of law, so detailed yet so logically complete."

But the Joint Stock Companies' Acts, the Bills of Exchange Acts, the Partnership Acts, the Sale of Goods Acts, the Devolution of Estates Acts, the Judicature Acts, the Bankruptcy Acts, the Banking Acts, the Railway Acts, the Copyright Acts, not to speak of the Criminal Code, are the great ordinances of the present day. Truly, they are codes on particular subjects. They mark the gradual evolution from *lex non scripta* to the system of *lex scripta*, and the "Points of View" of the Earl of Birkenhead would tend to show that English opposition to codification is not absolute.

How far shall these reciprocal influences continue to operate?

Both systems are justly proud of their achievements; and naturally enough neither is willing to forego its fundamental methods and traditions, which it very properly prizes. We must recognize that "law is not an affair of bare literal precepts, as the mechanical school would make it, but is the sense of justice taking form in peoples and races." (Pollock, Expansion of Common Law, p. 14).

It must be realized "that the laws of every nation are determined by their own historical conditions not only as to details but as to structure."[14] In the several provinces of Canada the different laws which they now enjoy have sprung from the tacit consent of their people and have proved to be especially fitted to their habits and traditions. They had their opportunity in 1791, and then they made their choice.

They should be awake to "the danger of being in haste to abandon their own methods and the still greater danger that arises from well-meant attempts to improve them by mixing them with others,"[15] which our distinguished guest, Mr. Fourcade, when warning the

[14] Pollock, p. 10.
[15] Pollock, p. 15.

French lawyers against " l'esprit de changement, si souvent confondu avec l'esprit de progrès " so happily expressed in his Discours d'Ouverture of 1923: " l'esprit présomptueux d'où sortent les critiques téméraires et les hasardeuses révisions de l'oeuvre lénte des âges . . . (Etudions) dans la pensée, d'une modestie nécessaire, que l'oeuvre, où tant de générations ont deposé le meilleur de leurs efforts pour notre grandeur, a quelque superiorité de crédit sur les improvisations en apparence les mieux raisonnées."

However, we were reminded by Lord Shaw [16] " that law must not be enclosed in a monumental past," and with due caution, it must " move with the times."

This was foreseen in the Discours préliminaire for the Code Napoléon:

" Nous nous sommes préservés de vouloir tout régler et tout prévoir . . . Les besoins de la Société sont si variés, la communication des hommes est si active, leurs intérêts si multipliés, leurs rapports si étendus, qu'il est impossible au législateur de pourvoir à tout . . . D'ailleurs, comment enchaîner l'action du temps? Comment s'opposer au cours des évènements ou à la pente insensible des moeurs? Comment connaître et calculer d'avance ce que l'expérience seule peut nous révêler? . . . Un code, quelque complet qu'il puisse paraître, n'est pas plutôt achevé que mille questions inattendues viennent s'offrir au magistrat. Car les lois une fois rédigées, demeurent telles qu'elles ont été écrites: les hommes, au contraire, ne se reposent jamais, ils agissent toujours, et ce mouvement qui ne s'arrête pas, et dont les effets sont diversement modifiés par les circonstances, produit, à chaque instant, quelque combinaison nouvelle, quelque nouveau fait, quelque résultat nouveau. C'est au magistrat et au jurisconsulte, pénétrés de l'esprit général des lois, d'en diriger l'application."

The Commissioners in their report on the Quebec Civil Code recommend a periodical revision.

Both systems should be " receptive to fresh legal concepts," though all will agree with Mr. Walton, when he says: "As a general rule, it is best to keep the French law pure and the English law pure, and not to attempt to blend them."

No one system would dare impose itself upon the other; no one would think of compulsory uniformity on any branch of the law, nor would anybody tolerate it. Law stands for liberty and individualism. It cannot serve the ends of coercion without losing its very name. " *Nolumus leges Angliae mutare.*" In Quebec we

[16] Address at Vancouver, August, 1922.

love our Civil Code; and I venture to say that this is as true of the English speaking as it is of the French speaking citizen.

But no system possesses the monopoly of wisdom. "We have long given up the attempt to maintain," says Sir Frederick Pollock, "that the Common Law is the perfection of reason." I do not need his standing and authority to make, on behalf of the Civil Law, an equally humble admission. The study and discussion of the different laws is bound therefore, if I may paraphrase Hon. Mr. Taft (address at Ottawa meeting, 1920), to show "the usefulness of uniting some of their provisions" or "extending the effect of some of their provisions," to each other. Surely, both systems are powerful enough to assimilate new matter without losing their individual character.

There was a story told by Sir James Aikins in one of his masterful annual addresses, which struck me as peculiarly apposite. It is about a clergyman from a neighbouring parish who was substituting for the local incumbent during his absence. As he was about to begin the service, the beadle presented to him the gown which, so he said, was always worn in that pulpit. The visitor asked, "Am I compelled to wear it?" "No," was the reply. "Then," came the answer, "I will."

"*Lex fit consensu populi.*" Those laws only which the people love are truly obeyed, become binding and maintain a lasting effect. But, when once they are voluntarily adopted, as a result of the conviction that they mean an improvement, they become assimilated with the whole system, which they enrich and strengthen.

This only means, no doubt, that, true to their purpose, the members of this Association are determined to preserve the basic systems of law in the respective provinces; but it also means that they will ever be responsive to the appeal of progress and anxious to keep the law capable of "growing to the demands of new times and circumstances."[17]

There is no disadvantage in this duality of the laws in the Dominion. Again I will invoke Mr. Fourcade: "La diversité des natures et des humeurs n'a jamais été un obstacle à une collaboration."

We should have faith in the co-operation of "the Canadian branches of the two great races to whom Providence has committed the destinies of this country." (Mr. Justice Duff, address before the Ontario Bar, June, 1925). One and all. we are only the servants of the Law—the foundation of Justice—Justice, which at all times and in every country, has represented the will, constant and continuous,

[17] Pollock, p. 124.

of doing right unto everyone *(Justitia est constans et perpetua voluntas jus suum cuique tribuere.)*

Whatever our creed of civil or common law, by the solidarity which springs from common ideals, by our devotion to order and to justice we feel bound and united. We have heard of Law as a link of Empire; we may well think of it as a link of the Provinces of Canada.

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ITALY'S WAR DEBT TO BRITAIN.—By agreement arrived at between Count Volpi, Italian Minister of Finance, and Mr. Winston Churchill, British Chancellor of the Exchequer, Italy has settled her war debt to Great Britain by undertaking to pay some £4,000,000 annually for 62 years, a total of £272,250,000 ($1,323,135,000).

The agreement provides also for Great Britain's concurrent repayment of the gold deposited by Italy in the Bank of England in 1915, amounting to £22,000,000, as security for war loans. The total Italy must pay is in effect less than half her admitted debt of £592,000,000 ($2,877,000,000), and the terms accorded by Britain therefore are regarded more generous than those Italy obtained at Washington.

In obtaining immediate payments Great Britain has obtatined an advantage over the United States settlement with Italy, since the United States has to wait several years for the instalments to begin and the grade of rising payments is lower.