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Mr. Chairman, ladies and gentlemen, I find it impossible adequately to say how gratifying to my feelings are the generous words, all too flattering words, which the Chairman has uttered, and the very kind manner indeed in which you have received them. It is altogether right and proper that individual judges should be sensible of the importance of the general confidence of the public in the Bench, and the general confidence of the Bar in the Bench. It would be altogether unfortunate if any individual judge should seek popularity, or should be highly gratified by popularity, in respect of his decisions; but it is right that the confidence of his confrères in the profession of the law, who are competent to judge, and who will judge of his work, not censoriously, but wisely and critically, should be a source of happiness to him. Indeed I think it is one great security for the administration of justice that the judge naturally finds, after the approval of his own conscience, the highest reward for the performance of his duty in the approval and the confidence of the members of his own profession.

A very distinguished member of our profession who happened to be Prime Minister and First Lord of the Treasury was being pressed from all quarters in the House of Commons, with singular unanimity, to agree to the relaxation of some rule of the Treasury for the protection of His Majesty's purse, in order that some measure which the House unanimously desired to have passed into law without delay, should pass through the House. He was urged from all quarters, by the leaders of all parties, to waive the rule. He was assured that no case at all like that particular case could arise again, and he was assured with great solemnity by everybody that waiver

* Address by the Right Honourable Lyman P. Duff, P.C., LL.D., Chief Justice of Canada, delivered at the Eighteenth Annual Meeting of the Canadian Bar Association held in Ottawa, August 30th, 31st and September 1st, 1933.

on that occasion should not pass into a precedent. He rose in a House fully expecting an affirmative response to this powerful appeal. He said: "Mr. Speaker, it is easy to rise superior to the temptations of to-morrow."

I am suffering at the present moment, and you will suffer presently, from my contempt for the obligations of to-morrow. When, some months ago, Mr. Rowell honoured me by asking me to make a speech at this meeting of the Bar Association, thinking lightly indeed of an obligation, payment of which was not to be demanded for months, I gave my assent, and now I have spent some harassing weeks in wondering what in the wide world I had to say to which an assembly of my brothers of the profession of the law could be expected to listen for twenty minutes—or half an hour I think it was that Mr. Rowell mentioned. I hope the ordeal will not last so long.

Perhaps on such an occasion we may be justified in simply surrendering ourselves to our natural gregarious impulses and contemplating some aspects of that great institution with which we all have the honour and the happiness to be connected, and in the service of which in some sort we are here—the profession of the law. I propose to refer not to the influence of the members of the profession as individuals in public life and elsewhere, or to the merits of the members of the profession as members of the community, though that might be a sufficiently tempting subject; but rather to some of the achievements of the profession in its corporate capacity, and its own proper sphere, the working of the legal institutions of the country. I purpose to remind you of some things the profession has done in the development of the law, and incidentally of some respects in which the law has influenced the temper and behaviour of the people. And throughout what I have to say, when I speak of the profession of the law I include the members of the judicial Bench.

I speak only as a common lawyer, because of the development of the Civil Law I am not competent to speak, and because what I have to say is closely related to some characteristic features of the Common Law system.

You will not suspect me of a design to deliver a discourse upon legal history, for which I am not in the least equipped; but first, I am going back to the beginnings and I am going to refer to the King's judges and particularly to that great institution, the justices on circuit. It has been said, and I fancy not without a good deal of warrant, that we owe the foundations of the Common Law, not to the genius of the Saxons in general or the Scandinavians in general or the Normans in general, but to the capacity and the industry of

definite men or bodies of men, acting as the King's judges, from the reign of Henry I to the reign of Edward I, and steadily devising legal inventions and methods for the enforcement of them, in the actual and daily business of their courts.

For the most part they and their successors were men of excellent good sense and sound acumen. Knowing something of Roman law, they used its logic and method to bring system into the old customary law of the land; but, above all, they actually worked out in its practical applications and gave concrete force to the law they made, and delivered justice throughout the land. Not only did they exert a profound influence on the development of the law; they, in applying and enforcing the law, impressed enduringly certain fundamental ideas, political in the broad sense, upon the consciousness of the nation.

Going about the country delivering the justice of the King, wherever the circuit justices appeared they carried the person of the King and they took precedence of all others, the most powerful territorial noble or the most exalted ecclesiastic; and by the majesty with which they were clothed as the King's vicegerents, by their regular circuits and by the special processes which they alone could employ (they alone could make use of a jury, for to do so was the prerogative of the King), they made the court of the King the court of general resort and the court of general competence; and—this is the vital thing—it was the law declared and enforced by that court which was the law of the land.

Parliament came, and Parliament, at once a court of judicature and a legislative body, was supreme in both capacities. But the intervention of Parliament in the development of the common law was only sporadic. That field was, in the main, left to the judges. Coke could declare, at the beginning of the seventeenth century, that not only was the common law the incarnation of human wisdom, but that Parliament had no authority to change it. The doctrine was, even at that moment, obsolete. But, beyond question, in earlier times the judges regarded the common law as supreme, and Parliament, itself the supreme court of judicature, and always jealous of attempted encroachments upon the sphere of the courts by the King's council, seems in its legislative capacity to have been disposed to acquiesce in that doctrine.

As I have said, there are certain definite habits of political thinking which can be ascribed to the administration of justice by the King's judges. First there was the recognition of the supremacy of the King's judges without respect of persons; then there was the

habit of law-abidingness pervading all classes and uniting them all in obedience to a common law; and, third, there was the habit of thinking of the liberty of the subject as something protected by the law.

The common law was the law for all, for the officer of the Crown as well as for the private individual, for the soldier as for the civilian, after some unavailing resistance, for the noble as well as for the commoner. Even the King was conceived to be *legibus alligatus*. A justice of the fourteenth century could assert that he had seen a writ addressed to His Majesty King Henry III, *Praecipe Henrico regi Angliae,* calling upon him to grant redress under the law.

Equality before the law was more than a majestic phrase. The sense of the law as a living thing, which the King's courts enforced upon all alike, was woven into the thinking of the people.

A legal right is not necessarily or mainly something resting upon a logical structure. It is a concrete right to demand this or to refuse that, to which the judges will give effect. A demand which would not be enforced by the courts was outside the category of rights.

Then to feel that you are one of the members of a society whose interests, corporate and individual, are protected by a system of laws for the punishment of wrong, and where there is a system of rights which the courts will vindicate if anybody is so rash as to challenge them, is to feel secure in the free enjoyment of your own rights, that is to say, in the enjoyment of your liberty under the law.

These two things were burned by the judges into the very substance of the people, primarily, the sense of the security of individual rights, and consequentially the sense of the value of civic liberty.

It is a profound mistake to suppose that the independence of the judges even in respect of what may perhaps be described as political causes has its origin in the Act of Settlement.

The King's Council made repeated efforts to assume a jurisdiction not sanctioned by the common law, and more than once the intervention of Parliament was necessary. The power of the Crown to deprive a judge of his office was employed by the later Stuarts without scruple to reduce the Bench to subservience; and even before the Stuarts there were venal judges, pliant judges, servile judges, who turned aside from the path of justice in deference to the wishes or policy of the Executive.

But the general principle of our law that the ordinary courts are invested with the power to enforce the law upon all persons in all cases was never relaxed with the consent of the judges or the profession of the law. It is an historical fact that "reason of State" was

never accepted by the judges or the profession as a principle of the common law; the responsibility of the officials of the Crown and their amenability to the ordinary courts was always maintained. The citizen can sue the official and the judges must entertain the suit. Bate and the five Knights can refuse on a point of law to pay an imposition or a forced loan and a court of common law will decide whether the right of the subject has been invaded or the officials of the Crown are authorized to make the demand which the subject has challenged. The Habeas Corpus Act was required to punish corrupt or arbitrary judges for denying to accused persons the right of trial; but the Stuarts at the zenith of their tyranny could not escape the common law jury, and never did absolute ruler long for power to control a legal decision as the Court of James longed in vain to control the jury in the case of the Seven Bishops.

No doubt this essential, this cardinal principle, which invests the ordinary courts with competence in all cases and over all persons, has at more than one crisis stood in very real, and as it seemed at the time, in deadly peril. The power and popularity of some of the Tudor monarchs, Henry VIII and Elizabeth, for example, might have proved such a menace but for circumstances we cannot now consider; and the assault of the Stuarts might have had disastrous results had it encountered less resolute and less vigilant guardians of the ancient law. It was the illustrious Bacon who, I am sorry to say, formally advanced the proposal that a judge, being seized of a case which raised some question of State, should not proceed to the cognizance of the case until he had consulted the Crown or its officers. He even alleged the existence of a writ the effect of which would have been that no officer of the Crown could be summoned before any tribunal for acts done in the exercise of his office without the preliminary authorization of the council of the Sovereign. His theory was the continental theory that "reason of State" was conclusive and sovereign; and the acceptance of that theory would have left a free course to the absolutist claims of the Stuarts.

These assaults were repelled; and it was the profession of the law which led the resistance.

At this point, before I mention one or two significant things connected with the struggle that finally culminated in the Revolution of 1688 and the Act of Settlement, you will, perhaps, forgive me if I revert to an earlier crisis, which in its superficial features might appear to have been merely a crisis in the development of the national jurisprudence; in truth the issue of that crisis was fraught with political and constitutional consequences of the first magnitude. It

was in the sixteenth century that occurred the movement in the history of the law, in most of the continental nations, which is generally known as the reception of the Roman law. In effect the old folk law was, in those countries, largely superseded by a system based upon the classical Roman law. England alone escaped invasion by an alien system. That escape is to be ascribed to the stout resistance of the profession of the law; and here it is worth while to emphasize this, that the most brilliant of all our legal historians ascribes that immunity to the fact that medieval England had schools of law where the traditions of the common law were preserved. "What is distinctive of medieval England," wrote Maitland, "is not Parliament, for we may see everywhere in Europe assemblies of estates, nor trial by jury, for this was slowly suppressed in France; but the Inns of Court and the Year Books, the medieval reports of legal decisions, which were there read and studied, and you shall hardly find their like elsewhere." To the reception of the Roman law it was the Inns of Court which opposed a successful front.

Now let me not be misunderstood. In the law of civil relations between man and man, I should be the last person indeed to advance a claim for the superiority of the common law over those systems founded upon the Roman law. Stripped of the differences of technical terminology, the two systems present few fundamental contrasts. Indeed, the highest excellence of each consists in its practical adaptability in the hands of a master, and the good sense which in general pervades and inspires it. Our friends from the Province of Quebec, most of whom, or very many of whom, have had considerable experience of both systems, have never shown, so far as I know, the slightest disposition to abandon the simplicity and the logical frame of their code for the crabbedness of the common law, "the lawless science," as our Victorian poet rather picturesquely names it. As to these matters, the issue of the struggle of which I have been speaking had no great significance. The significance of that issue was felt in the field of what we now describe by the term constitutional law. The bias of Roman law was definitely and naturally towards absolutism. The absolutist doctrines of that law were wholly incompatible with the fundamental doctrines and the fundamental conceptions of which I have been speaking, the responsibility of the officials of the Crown to the ordinary courts, and the legal protection of the liberty of the subject, which were of the very essence of the common law system. These fundamental principles at that time had sway in England, and nowhere else. The Roman law, employed as an implement by Thomas Cromwell or Bacon in the service of

Henry VIII or Elizabeth or James I, or by the legal advisers of James II, might well have proved a weapon for autocracy of almost overpowering weight.

It was the lawyers, I say, it was these same Inns of Court, who inspired the resistance against the autocratic pretensions of the Stuarts; but the point I wish to emphasize is that they justified their resistance on grounds that made the most powerful appeal to that ingrained feeling of the English people, veneration for the law and a profound attachment to the fundamental idea of the legal rights of the subject, which everybody, even the Crown, was bound by law to respect. They propounded no general political doctrine; phrases such as "the rights of man," "social contract," "the law of nature," were not on their lips, nor were the ideas represented by such phrases in their minds or in the minds of the English people. The appeal to the people to resist the violation of the ancient rights of Englishmen found its response in the deep-seated bias in favour of the observance of the law, nourished through generations by the regular administration of justice in the courts, and the profound jealousy and suspicion of anything that seemed to menace the security of the legal rights of the individual. Thus it was that the fundamental ideas of the common law, which formed an integral part of the common thinking of Englishmen, proved in the constitutional crisis to be a foundation of rock, against which the hurricane beat ineffectually. It seems no very extravagant claim to say that no single force, not even Parliament itself, has exercised a deeper influence on the temper of the British people than the common law.

It is more than six hundred years since the common law judges began to be selected from the practising members of the profession, having exclusive right of audience in the King's courts. It is difficult to measure the consequences of the fact that in the common law system, the judicial bench is not a separate profession, a branch of the civil service. It is not merely that the judge as an individual carries with him to the bench the experience and intellectual habits generated by the practice of the law. The common law of England, which was evolved almost entirely in a series of concrete decisions, could only attain in any adequate measure to the necessary reconciliation of the two essential characteristics, certainty and adaptability, necessary to enable it to serve the judicial requirements of the nation —it could only attain to that reconciliation by the development of a legal art, a professional technique, by which that evolution was to be controlled. That art, the art of employing the doctrine of precedent in its largest sense, the discovery of the principles implicit

in existing legal materials, and adapting and formulating them to meet the demands of new conditions—that art was perfected by the profession as a whole. It was well advanced in the seventeenth century, at the end of the eighteenth it was an effective instrument, and it was perhaps perfected in the nineteenth century.

It is an art which could only serve its purpose in the hands of a profession disciplined in the practice of the law by actual daily contact with business, and trained in the severest of schools to realize and act upon the necessity that the decisions of the courts must be reasonably predictable, and upon the equally cogent necessity that the rules of law must be capable of adaptation to the conduct of practical affairs.

When you think of the common law as broadening slowly down from precedent to precedent, the picture will be incomplete if you do not also conceive the profession of the law as a guild which for centuries has kept and practised and improved and perfected the mystery and the art of the law.

It is a strange thing, a thing difficult to explain, that this most fundamental of the functions of government should throughout all the centuries have been entrusted in so large a measure to a profession—a profession enjoying the high degree of autonomy which ours enjoys. Well, the answer probably is that our legal institutions have worked. By their fruits ye shall know them.

I think much might be said for the view that the common law judge will prove to be not the least enduring part of our legal inheritance. This does not necessarily mean a judge who administers the substantive rules of the common law; I am thinking especially of the judge who is not a civil servant, but who has been trained for his high duties in the interpretation and the application of legal rules by the practice of his profession and the discipline derived from that practice. Specific rules of law will develop, great fields of law will be systematized, simplified, cleared of obscurities, and technical obstacles will be swept away, and most of this must be accomplished under the sanction of legislation. Under the guidance of competent professional hands, as in the activities of this Association, it is and will be an entirely beneficent work. But if it is wisely done, it will not in any sphere aim at reducing law to a set of mechanical rules, but will leave free scope for the masters of the juridical art to apply and adapt the principles declared to the ever-changing circumstances of business and life. It is the practice of this art which is the characteristic and exclusive business of the lawyer, whether he is transacting

in chambers the business of his clients, or adjudicating on the Bench respecting the rights of contending parties.

The common lawyer serves a system which may perhaps be said to have been almost parochial in its origin. The civilian serves a system which, if not born in the imperial purple, attained its maturity and manhood under imperial guidance, and which owes to the genius of Greece, in the person of Trebonian, not a little of its logical form and coherence. But civilian and common lawyer alike may justly claim that the art of the lawyer has been equal to the great task of expanding the rules of substantive law to answer the needs of peoples of every race and environment, and to meet the demands of most of the complexities of modern business. We may join in the claim that this has been a "noble achievement for justice among men."

LYMAN P. DUFF.

Ottawa.