

## LAW AS A LINK OF EMPIRE.

BY THE RIGHT HONOURABLE LORD SHAW OF  
DUNFERMLINE.

(Continued).

Thus we come back to law, to the law—your profession and mine—but to law in a very noble sense as the servitor and interpreter of justice, to law as an Empire binder. This conception is not new; it is centuries old. But there is modern development of it,—a development more pronounced since the Great War.

In the second century after Christ, Florus wrote a brief epitome of the history of Rome, that little city on the Tiber, which grew to command an Empire bounded only by the unknown. Florus shrewdly remarks "*Viribus parantur provinciae jure retinentur.*" In one sense it was true of the Roman Empire, as it would have been true a year or two ago, if Germany had attained the empire of the world. Provinces, kingdoms, dominions, were made to conform in their laws to the centralized law of Rome, whose jurisprudence thus dominated the world. This compulsory conformity was supposed to symbolize Imperial conquest and Imperial pride, and at every hand was accompanied and sanctioned by the heavy weight of the force of arms. So it would have been with a law emanating from Berlin. Everywhere the light of law shining from only one centre, from which centre also came the threatening thunders and the missions of Imperial power. Provinces were retained by law, no doubt, but it was not their own law which they had been tutored in past ages to obey, but a new super-imposed system, acceptance of which as a whole was sheer submission, and rejection of which made any person, or people, or province, an outlaw or a rebel.

The genius of the law of Rome, by its inherent reasonableness, commended itself for adoption after

the edifice of force which it had compulsorily imposed was broken and disrupted. But essentially it was a system of force, proud, centralized, imposed from above. That was the *jus Romanum*. It would also have been the *jus Germanicum*. We must pay our historical homage to the scheme; but a law of that description is unfitted for any modern empire which means to be an empire of service to mankind, and an empire that will endure. The world has never known any contrast so great as between empire and law as we conceive them, and empire and law which are the concepts of what may be called the Roman-German system.

Think of how different our ideas are. Every land contributes its own crop as per its own climate; it shows forth its own needs, and these vary as from arctic to equatorial conditions; and so all the lands thus contributing and co-operating move forward in those channels of custom, to destroy which is to lay society in ruins.

To recognize these customs, to acknowledge frankly the right of self-government, to respect liberty, to respect history, that is the English-speaking system. The law, the true and enduring *jus civile*, which is the great umpire, interpreter, helper, is not English law, nor Canadian law, nor Scotch law, nor Australian law, but it is those principles of jurisprudence which inform and bind together the whole mass of co-operating provinces and states under concepts which underlie all variety of local and juristic expression, and which are the guarantee of civilization. Law, according to this modern idea, has evolved more freely in the British Empire than in any other sphere. The chances of its life are far more enduring, because it is commended by reason itself, than any system however mighty which is imposed by force. Over against it stands what I may call the Roman-Prussian system, which is self-centred. Think of it again. It passes from province to province accomplishing unity by the sword, and imposing the forms of its law to its utmost circumference. It suffers no history, no

immemorial custom, no local or sentimental attachments, to stay its hand. It achieves unity, a unity of submission by the suppression of variety and of local liberty, till, at length, the vast humiliation, with occasional extirpation, achieves its triumph.

We of the British Empire—the time may come sooner than we expect that the same may be said of the entire Anglo-Saxon race—must and do stand for the other view which finds a place of brotherhood for all nations under the sun, and which achieves that unity in variety which is harmony. Here, at the heart of the matter, law rests; for the law which can endure as an elevating, harmonising and binding force, is a respecter of tradition, which, through the ages in every land, has contributed something to the noble inheritance of mankind. It is in this way that law, as a Link of Empire, comes to be a very sacred thing. For, by force of reason and principle, law is lifted to the level of true majesty as the friend of progress. It gives liberty and individualism among the nations their chance, and receives back from them an enlightened gratitude or co-operation.

Many fine and good things have been said about the Common Law of England and by fine and good men. In a manner I look upon it from a point apart. But who, pretending to an ordinary measure of intelligence and knowledge, can look upon it without admiration and marvel? Its details, like the details of any law, present of course occasion to the scoffer; but in its mass it is an expression of the inborn sense of how an honest free-born people wish to have their affairs conducted,—a living and masterly instrument working always through history towards the light, and in every age bringing comfort to the commonwealth.

I think upon the whole that that must have been the way in which in this ampler Canadian air the sons of England still looked upon it. The instance I give is peculiar. You know the subject well; but I should just like to set a few heads down again. Canada—as one Colony and under the name of the Province of

Quebec—was ceded to England by the French in the year 1763. In 1774 the Quebec Act provided that in civil matters the old law of Quebec should still apply, “while in criminal matters the English law should prevail.” What was the old Quebec law prior to 1763? Its sources are thus stated by Baye—

(1) *The Coutume de Paris* and the Ordinances in force within the jurisdiction of Paris, except such as were clearly not intended to have effect outside Paris.

(2) The “*Arrêt du Conseil du Roi*” and the Ordinances published between 1663 and 1763, but in both cases only if they had been registered by the Council of Quebec.

(3) The Ordinances of the Administrative Authorities in Canada, chiefly those of the Intendants.

(4) The Judgments of the Courts.

So far as civil affairs were concerned, this was French, French out and out; then in 1791, the so-called Quebec was divided into the provinces of Upper Canada and Lower Canada. And in 1792, the striking change occurred; Quebec remained as Lower Canada, the remainder within a year passed its famous Statute of October, 1792, enacting what may be called the reversion to the Motherland—

“that . . . in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same.”

This reversion was acknowledged in the preamble with the utmost frankness:

“Whereas since the passing of the Act aforesaid, that part of the late province of Quebec, now comprehended within the province of Upper Canada, having become inhabited principally by British subjects, born and educated in countries where the English laws were established, and who are unaccustomed to the laws of Canada, etc.”

This broad and emphatic admission of the laws of England has extended and extended westward over

sturdy, powerful and growing provinces till it reaches to the Pacific.

Seventy years before, namely, in 1721, Governor Philipps, purporting to act under his "Instructions," had made the laws of Virginia—which was English of the English—the rule and pattern for the government of Nova Scotia.

Quebec stands alone, but are its laws therefore neglected, or less entitled to careful respect? By no means, and in no degree whatsoever. They are as much and as equally entitled to that, as any within the vast variety of customs, traditions and laws which at the foot of the Throne, are examined, deferred to, and administered as part of that network of jurisprudence which interlaces the Empire.

Canada within her own borders thus illustrates that harmony which is reached when the basic principles of justice are rested on as the solid rock of jurisprudence in its every form and its every adaptation.

I know no country, except India, where the words of Burke are so verified to the letter, and in a sense even wider than he conceived. His wonderful diction, you remember, describes Jurisprudence as a science, and he thus describes it:—

“The science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns.”

Comparative jurisprudence, as each community like your own achieves its nationhood, proves more and more the soundness of this view, that law links Empire up in co-operative brotherhood. I have mentioned to you how, in the realm of Constitutional Law, the Canadian record has become a model more than once referred to in wide spaces of the earth. In the legislative sphere everywhere the same twin principles seem to operate, the respect for great and

splendid traditions is shown nowhere in the world more clearly than in the laws of the British Empire.

In this legislative sphere the development of legal rights and the measuring out of remedies, as new ideas of progress in society evolve, may be natural enough when we think of the common origin and ideals of those who stock the home country and the self-governing dominions. It is nevertheless interesting to observe how even the language of the Mother of Parliaments seems to be watched for, and so far as may be copied, in the numerous legislatures of Dominion, Commonwealth, Province, State, as if one Empire and one Law were deliberately evolving together. Law, even in its evolutions, seems to symbolize a link of empire, forged out of reason and affection and freedom, which make the sons speak with the mother's accent, and the mother proud of the stalwart activities of the sons.

So far for the evolution of law and empire on the constitutional and legislative sides. But when you come to law pure and simple, the British Empire pays to it respect far worthier than that which could proceed from and be supported by centralized authority and power.

In the first place, an Empire, believing in freedom and self-government as a rule of right, not for the present alone, but for the future, recognizes also in the vast burden it bears the respect which is due to a mighty past; massing together the laws moved by the present-day spirit among progressive peoples, with those inspired by traditions extending from the very dawn of recorded knowledge. This is a double responsibility demanded both by the ancient and by the modern spirit. This is the genius of the British system. Law, with this double homage, wields a jurisdiction over one-fourth of the population of the globe.

It is to that wide inheritance that you, as ministers of justice, have entered within this Empire. It is but the other day in the Judicial Committee of the Privy Council that a judgment of the Board was written on

the rights of the Placer Miners in the Yukon Valley under the law of British Columbia. The ink was hardly dry upon the judgment when another had to be composed dealing with the laying out of the town of Calcutta. The municipal laws of that great city had to be construed, and respect had to be paid to the rights of the worshippers of Kale, the Goddess of Destruction, in temple, pilgrim hostels and other buildings which were true endowments of their creed.

I could detain you for hours on this topic of the variety of interests which law within the Empire has to adjust. But it is not even that which is the astounding tribute to the Imperial system. It is that the laws themselves are different. How is the reconciliation of a common appeal accomplished? It is because at the very threshold stand principles, racial, imperious, unforgettable, and they are all essentially ethical principles. They are not few in number, far from it. Only the other day I received a letter from one of the most learned and distinguished Judges of Australia. He keeps a close grip of what goes on in Whitehall, and well he may, for he recognizes that is not a British Court but an Imperial possession, his Court and your Court and my Court, our very own. He writes—

“I wish to tell you that very recently I have proved the very practical help of some of your Judgments in Indian appeals. . . . We had to consider in the Full Court a case of ‘undue influence.’ That is a branch of law that is difficult to ‘collect’ in systematic shape from the ordinary cases. But among the Indian Appeals were three that I found of immense assistance.”

He cites these which “do much to solidify the legal conception of undue influence,” and he speaks with manifest sincerity of the help received. But these are specific and detailed doctrines, and I had rather get to principles wider and more fundamental. Of these I name two. They are, for instance, so commonplace as these—Honesty and Equality.

Equality before the law. You and I, who are accustomed to it as among the familiar fundamentals of legal procedure, are apt to forget how much that signifies in the Government of an Empire upon which the sun never sets. On this point of Equality alone what a privilege, for instance, is it not? for India and the furthest bounds of the British Empire to know that law upholding freedom, creating and conserving right, is administered with an equal hand, not to the Zemindar, the Rajah, the Maharajah and Prince alone, but down from them through every rank and order, caste and creed, to the humblest cultivating ryot on the Indian and Burmese plains. I declare to you that I sometimes think that the *Pax Britannica*, as indeed the *Pax Orbis*, rests in its ultimate security on that administrative jurisprudence which, with equal hand, preserves for all alike the priceless privilege of an appeal to justice, wide and open and inviolate.

Then take the principle of honesty, deeply embedded in law, wherever law is worthy of the name. That, you will say, is a matter of course. Well, perhaps. But it is no light task that Jurisprudence has to accomplish when it administers even that fundamental principle, as one necessarily underlying august and century-old traditions. Think, for instance, of this curious illustration:—The very gods of India are juristic entities. They are the legitimate donees of vast endowments. Their properties and possessions are respected and protected. Each god, through the officers of his temple or the manager of his religious endowments, educational endowments or sacred places, has a right and title to sue. And even as against those priests or dignitaries, the ordinary worshippers have a right and title to vindicate the property or their god. It is the arraignment of the faithless by the faithful, and it is the glory of law to interpose for the simplest of reasons, namely, that honesty is at stake. The other day a Judgment of the Privy Council was delivered in a case coming from

the Carnatic, and involving a sketch of the history of that part of the world from the time of Hyder Ali. In it the rights of the god Vishnu were maintained to lands and properties and to mesne profits against a powerful Dhamakarta, a personage of ancient family to whom had descended the high office of manager and administrator of temple, jewels, lands and possessions dedicated by believers to their Deity. This personage was judged according to the eternal principles of Common Law familiar to you all, namely, those applicable to the responsibilities of a defaulting trustee. "Who is sufficient for these things?" for they reach out over a wide range, wide as the world! I think it not unfitting that distinguished men such as I see before me, even as they discern afresh that there is a world elsewhere, may have some glimpses of the splendour of the inheritance which they share.

Again I beg you to understand that I do not refer when I speak of equality to the administration throughout all the regions of Anglo-Saxon power, of the same law. That would not be the conservation, but by making no allowance for feelings and traditions in many cases older far than the history of our race, it would be the betrayal of freedom. To us, as free men, the centralized despotism of either Roman or German administration makes no appeal. But what I refer to are the underlying principles of all laws which are worthy of study. To give the Mohammedan law to the Hindu or the Hindu law to the Mohammedan, or to give British or Canadian law to either, might produce a catastrophe in many portions of the earth, the like of which history has never known. But to take all these laws, and, recognizing them in the truly British fashion, not overthrowing them as would a despot, but administering them with a scrupulous fidelity which commands respect, this is to make the great discovery that underlying all forms of Jurisprudence, ancient and modern, there rest those deep basic principles which are ethically inviolable, and which bear the mark of the eternal.

Any one who cares to study the varieties of law and circumstance which are submitted to the Judicial Committee, will receive a romantic, true and rare insight into what law means as a link of Empire. Here are administered not only English law as modified by local legislation, but French law in Quebec and Mauritius; Roman-Dutch law in South Africa; essentially Roman law in Ceylon; Hindu law, not of one school but of various schools; Mohammedan law; Buddhist law; laws which govern succession and sometimes interests and rights of vast pecuniary and social importance, and yet are but the laws of families or tribes. All this is variety indeed, but binding it all together is the unity of those ethical everlasting standards, which are but the attributes of righteousness itself.

The human heart seems, under all circumstances, everywhere, to respond to the deep note of justice, and so justice—as we come to see in everyday practice—working through law, steadies, uplifts, and binds together all subjects of the King.

The response to the Imperial effort is oftentimes of the most touching significance. Here is an illustration which was given to me the other day in some notes, by my friend, Mr. Reeve Wallace, Sub-Registrar of the Council:

“If further evidence beyond what appears above were required, of the confidence reposed in the Court by the people of India, it would be supplied by the collection of letters, often pathetic in their simplicity, which each Indian mail deposits at the Privy Council Office. These communications are always considered by the officials of the Privy Council Office with great care, and a reply is sent to the applicant advising him or her as to the course to be pursued to enable the matter to be brought forward in a regular manner.”

If on the face of the papers there appears to be a *prima faciê* case, and the applicant states that he is

too poor to engage a lawyer, the Privy Council Office sometimes asks one of the solicitors who regularly practise before the Judicial Committee to look into the case, gratuitously, for the applicant. This request is willingly complied with, and cases are often heard by the Judicial Committee which have begun in this rather irregular way. One such case (not, however, from India, but from West Africa) deserves special mention. Some years ago a letter was received from a West African native, complaining that he had not had justice in the local Court and stating that he wished to appeal to the Sovereign-in-Council. The Registrar of the Privy Council explained that such matters could not be dealt with through the post, but that the applicant must either instruct a London solicitor or appear before the Court in person. One day some months after the officials were somewhat embarrassed by the arrival of the applicant with all his papers carried in a pile on his head. He stated that he had worked his passage over and had come in answer to their invitation. A solicitor who was approached by the Privy Council Office consented to take up the case, and in the result the appeal was allowed and the applicant returned to West Africa—a happy man!

When I think of nationhood, independence, empire and law, there is an historical and international thought that often occurs to me. I do not like the word "Dependency." As for independence, it is not very likely that I myself, a Scot of the Scots, would be apt to underrate it. The glorious privilege of being independent, it is in our very bones!—but it was the poet of independence who was also the poet of brotherhood, of a great human pity and human love. Let us avoid that glamour of names which breeds confusion of mind and the train of mischances which confusion brings. Sure I am, and, I put it to you on reflection are not you sure, that Independence and Isolation are sometimes mistaken for each other? But these two things, Independence and Isolation, are

assuredly and essentially different things. Independence is the defiance of domination, Isolation is the defiance of brotherhood.

The world grows smaller and smaller every day by the facilities for inter-communication. The obstacles of a physical kind of the union of Empire and development of Empire which were seen by grave men like Sir George Cornwall Lewis in his "Government of Dependencies," and even by wildish men like Thomas Payne when he gave his counsels to the American nation—almost day by day these obstacles grow less and less. As this is so, so Isolation becomes less and less feasible in human arrangements, and yet Independence in the true sense becomes more and more priceless.

See what it has done in the case of England and Scotland. That was a difficult case. Monarchs and statesmen had grappled with it for centuries. Shakespeare puts the problem thus into the mouth of Henry V.:—

"For you shall read that my great grandfather  
Never went with his forces into France,  
But that the Scot on his unfurnish'd kingdom,  
Came pouring, like the tide into a breach,  
With ample and brim fulness of his force,  
Galling the gleaned land with hot essays;  
Girding with grievous siege castles and towns;  
That England, being empty of defence,  
Hath shook, and trembled at th' ill neighborhood."

This, so majestically expressed, was literally true. But the union of England and Scotland was accomplished, and it has been gloriously maintained.

The cardinal secret was found of not interfering with the local laws or the religion of the smaller nation. Thus left in these great areas of human interest a free and self-developing Scotland preserved the Independence which was so precious to her, but linked it with a healthy and sensible brotherhood, which has been so effectively the denial of Isolation

that she is now blamed for having taken over the whole concern!

Take the laws: one of English make, the other of Roman make. The scholarly Scot led his nation to the latter; the proud Englishman kept his own old customs; and now it is—shall I humbly say it?—the good fortune of Britain to have these different systems of jurisprudence administered in the House of Lords, and of the Empire to have its Appeals determined by the Judicial Committee of the Privy Council, by a tribunal of five persons in which it not infrequently happens that one member is an Englishman or an Irishman and the other four are all Scotchmen. The Scottish Independence does not seem to have suffered much in that transaction, but the Scottish Isolation is nowhere to be found. The Scot tries to make the best of the position and he tries to give his best to it.

Canada is coming along. Her day appears to me to be arriving quickly. In the Judicial Committee I have sat opposite good and distinguished Canadian lawyers like Sir Charles Fitzpatrick, and now we hardly think our session complete without having had the advantage of good comrades in the higher department of the law, like Mr. Justice Duff. I surprised my friend the other day and he was in strange company. He was sitting on an Indian case in the Judicial Committee. The Board consisted of himself, Lord Phillimore, an English Judge, Sir John Edge, an Englishman formerly Chief Justice of Allahabad, Ameer Ali of the Calcutta High Court, a Mohammeden jurist, and as President, Lord Dunedin, a great House of Lords Judge, a former Lord President of the Court of Session, and of course a Scotchman. They all looked as dignified as, and a good deal more comfortable than, if they had been seated in howdahs on the backs of elephants, by the sacred waters of the Ganges.

Canada, how fortunate she has been! Such good fortune the world has never known. Her southern

frontier, over 3,000 miles long, guarded for over a century by the good sense and friendship which were embodied in the Rush-Bagot Agreement. Other nations have had to defend their independence at enormous and depressing cost, with all the panoply of war. The Canadian Lakes are guarded by four of the greatest warships that the world has ever known; four vessels of 100 tons each, but each with a remarkable gun whose projectile weighs 18 pounds. To military and naval men these would be the ornaments of a doll's house, but to lovers of civilization and peaceful ways among the kingdoms of the earth, they are consecrated symbols of good sense and good neighbourhood. They foreshadow the death of force and the life of reason in the government of human affairs. Then, in her constitution also, as well as her situation, how grateful a country this wonderful Canada should be. She won it, and it has been made a model in Australia and South Africa, and even in Ireland, and in each of these cases, even the last, notwithstanding the acerbities of centuries of conflict, they strike that deep resonant chord of justice to which every land within the Empire responds, and all of these lands look upon the Judicial Committee of the Privy Council as a providentially handy keyboard upon which to sound it. With them the old notions of force and forcible restraints and forcible distortions, and still more force, all that disappears. It is justice all these nations are after that come to the British throne and ask how an impartial tribunal views their problems. At any moment if any of these nations construed Independence as Isolation, then, of course, isolation they could have, and isolation would bring in its train not a few difficulties on a stupendous scale. Any of these nations of course could say to itself:—"We want a better article than the Empire supplies. We trust our own experience and our own knowledge of law and our own skill, rather than that which has been the companion of Empire until it has reached a greatness unparalleled in the world. We prefer our own Judi-

cial wisdom." Or it may say: "Sever the legal link of Empire! Forfeit our Imperial possession! Relinquish our co-operation in law of ideals and ideas which is rendering unrivalled service to mankind! Break our partnership and throw away our birth-right!" And so on the argument would go, winding up with a "never, never, never." And the vows would be renewed to march forward into the unknown shoulder to shoulder, high-hearted comrades, comrades for ever. And fine reverberations these would be. You may think, however, that it requires some imaginative effort to think that things would ever get so far. If they did, one could also imagine an outside world jealous, envious, ready to pounce, murmuring with a smile: "Mischief's afoot!"

In recent years, more and more, Canada has been realizing her participation in this Imperial scheme.

Nowadays the range of law administered in the Privy Council does truly embrace every climate, almost every race, religion and creed under the sun. Great principles, fundamental, interpenetrating, uplifting, workable, wholesome and enduring are expounded, defended and applied; and the greatest varieties of adaptation and practice are recognized and respected in the appeal of this great brotherhood of nations within the Empire.

In the recent sittings the appeals from Canada almost equalled in number those from India, with a population of 400 million souls; and, on the whole, the vigour of the tribunal, reinforced as it is by great men from India, Australasia, Africa and Canada, does not appear to abate. Far be it from me, in my position, to make any reference of a laudatory character to the work of that tribunal. No, the reference is of a different kind. Day by day the question of the "Old Book" propounds itself to the mind—"Who is sufficient for these things?" Testimonies reach us from all ends of the earth, of respect amounting to veritable homage; but that only deepens our sense of

the magnitude of responsibility, of the need for guidance, of the consecration to Empire of the task in which we are engaged.

You see that I have come thus far, not alone because of your gratefully appreciated invitation, but because I am a believer in a British Empire which, linked together by law, dedicates the majesty of Justice to the service of mankind.