CANADIAN AND BRITISH LAW.[1]

Mr. President, Chief Justice, Ladies and Gentlemen:—If I had been permitted to choose my introducer I could not have chosen anyone whom I would rather have had as my kindly sponsor than the distinguished Chief Justice of Quebec. When he told us that he had been called to the exercise of our common profession in 1872, it passed through my mind that I myself was not born until 1873, and so I would extend to him, if he will permit me, the expressions of filial rather than fraternal respect which properly come from one who is so much his junior. There is another circumstance which renders it especially pleasant to me to be commended to you by Sir François—the remembrance of the ancient alliance between his country of origin and my own country, an alliance which, I know, still survives on this side of the ocean, and which we both count among the happiest of our national heritages.

As I sailed up the spacious waterway of the Saint Lawrence a fortnight ago, I gazed with interest at the ancient mountains of Laurentian gneiss guarding its northern shore, compared with which the Alps and the Himalayas are but creatures of yesterday. They recalled to me a visit which I paid not long ago to the lighthouse at Cape Wrath, the last remote outpost of the mainland of Scotland, for, strangely enough, the archaean rock of which that famous promontory is composed is identically the same as that of the Laurentian mountains which face it across the ocean. Truly, I thought, the links which bind us together are as old as the hills — nay, as old as the oldest hills in the world. I should like to recall to your minds, too, a legal as well as a geological association between us. Part of the very soil of Scotland is by a happy fiction identified with that of one of your maritime provinces for it is recorded that by special royal dispensation Viscount Stirling (Sir William Alexander) in the early years of the seventeenth century took sasine of the lands granted to him in Nova Scotia by delivery of earth and stone at the castle gate of Edinburgh, his infeftment being subsequently ratified by the Scots Parliament in 1633.

But it is not merely by inanimate bonds that Canada and Scotland are linked together. We share the things of the heart and mind.

[1] Address by the Right Honourable H. P. MacMillan, K.C., at the Eleventh Annual Meeting of the Canadian Bar Association.

The exquisite lines of the Canadian Boat Song still ring true—

> "From the dim shieling on the misty island
> Mountains divide us and a world of seas
> But still our hearts are true, our hearts are Highland
> And we in dreams behold the Hebrides."

You dwell in a new land of the mountain and the flood, a new land of Highlands and Lowlands, the subduing of which to man's uses calls for the exercise of all those qualities of strength and endurance which are the essential characteristics of the Scot the world over. The hydro-electric plant and the grain elevator may be less romantic than the village mill and the crofter's barn, but they are symbols of the same energy, writ large as befits the vast resources of your country. Those of you who are not Scots by heredity, will, I hope, forgive me if I claim you as Scots by environment.

I should like to think that the Scottish element in the people of Canada has had some share in contributing to the legal development of the Dominion, of which this great gathering of Canadian lawyers affords such notable evidence. The Scottish mind is by instinct devoted to principle and to logic. You see this exemplified in the Scottish school of philosophy which flowered in Hume and Reid and Dugald Stewart; in the Scottish theology, which it would be hardly apt to speak of as flowering in Knox and the Fathers of the Disruption—for no one would apply so poetic a term to the stern and uncompromising doctrine of these divines; but, above all, you see it exhibited in the legal system of Scotland which has existed down to the present day in sturdy independence, notwithstanding the pervasive influence of our great neighbour across the Tweed.

It is interesting to compare the legal position in Canada with that which exists to-day in Great Britain. Here you have two systems co-existing side by side. Throughout the greater part of the Dominion the common law of England reigns, modified and adapted by legislation to your special requirements; but in the ancient Province of Quebec the old French law founded on the civil law of Rome still prevails. In Great Britain we have also two comparable legal systems. In England the common law rules, disclaiming any foreign admixture and denying or disguising any debt to Rome. In Scotland, on the other hand, we have a system built on the foundation of the civil law, influenced by the laws of France and Holland and developed not only by native growth but also by the absorption of much that is best in the sister system of England. I am not sufficiently familiar with the history of Canadian law to be able to say to what extent the two systems of the civil code and the common law have

interacted upon each other here. But as regards Scotland I may say that we have never hesitated to plunder the English, and I think the English have sometimes been wise enough to retaliate. At any rate we have seen it to be to our interest to bring about uniformity in most of the large matters of modern commercial law. We share in common, apart from negligible differences, the statutory codes which regulate the sale of goods, partnership, bills of exchange and companies. But in the law which regulates the domestic relations—always a conservative branch of the law—we have tenaciously held to our own doctrine and in this department I believe I should find myself more at home among my friends here from Quebec than with my brethren of the common law. Quite recently I found in Pothier the best aid in solving a difficult problem in the Scots law of donation between husband and wife. Yet even here I have to admit that the slow process of assimilation is at work, for only the other day a statute abolished the Scottish doctrine of *donatio inter virum et uxorem* in favour of the English rule. In our law of real property, or—to use our own phrase—in the law of heritable rights, the law of Scotland remains and is likely to continue to remain quite distinct from that of England. The Scots conveyancer is absolved from undergoing the pangs of a new birth which Lord Birkenhead's portentous measures have recently imposed upon Lincoln's Inn. We still rest upon the bedrock of feudal principles, however much metamorphosed by modern legislation, and we still speak familiarly of superior and vassal. It is perhaps, however (in our legal organisation that we have preserved the most distinctive traces of our old association with France, for, as you know, the head of our supreme civil court is not a Chief Justice but a President as in Paris; the members of the Bar of Scotland are not barristers but advocates; and the head of our profession is not as in England the senior law officer of the Crown, but the Dean of the Faculty of Advocates, who carries as his symbol of office an ebony staff like that from which the Bâtonnier of the Paris Bar derives his name.

We have thus in Britain as in Canada two systems of law existing side by side, and while it is true that by the attrition of time and the inevitable attraction of the great system of law which rules south of the border, the native law of Scotland has tended to lose many of its distinctive features, the Scottish lawyer still preserves and holds with conviction much of his original doctrine. The two systems seldom come into conflict because in most of the matters of daily business in which we come in contact with each other we have happily attained practical uniformity. We have diversity without

discord and the interest of variety without the waste of strife. I am thus happy to-day in this joint assembly of practitioners of the common law and the civil law to find myself in sympathy with the excellences of both systems, and to be able to bring you a message of goodwill and appreciation which comprehends you all.

I spoke a moment ago of the Scottish predilection for legal principle. I fear that, in common with lawyers everywhere, we are in danger in the modern welter of precedents and statute law of losing sight of the fundamentals. It used to be our pride that we in Scotland were not hidebound by case-law and always sought to refer our problems for solution to cardinal principles. As Bagehot, an author not unduly prepossessed in favour of the Scots—"that inclement nation," as he calls them—once wrote of a famous Lord Chancellor:—"In spite of a hundred defects Lord Campbell has the Scotch faculties in perfection. He reduces legal matters to a sound, broad principle better than any man who is now a judge. He has a steady, comprehensive, abstract, distinct consistency which elaborates a formula and adheres to a formula." Happily this is still the instinct of the Scots lawyers. It has been fostered among us by the fact that at an early age of its development the whole body of Scots law was reduced to systematic form by three, great, legal geniuses. The two centuries covered by the lives of Viscount Stair, John Erskine and George Joseph Bell were the formative period of the law of Scotland. Each of them made the whole law his province and in the treatises which they have bequeathed to us we have a *corpus* of the law such as no other modern nation possesses. Stair in his Institutions of the Law of Scotland, first published in 1681, Erskine in his Institute, published in 1773, five years after his death, and Bell in his Commentaries and his Principles, published in the early part of the nineteenth century, deduced and developed the doctrines of our law in logical form from first principles. Taken singly or collectively, their works constitute one of the most remarkable achievements in systematic jurisprudence. They are as different as can be from the modern legal text-book, which is apt to be a mere digest of case law and Acts of Parliament. They are actually readable. An eminent Lord Chancellor whose attention had been called to our institutional writers for the first time in a Scots appeal told me that he had been so attracted by them that he had read through Stair and Erskine in his vacation. These founders of the law of Scotland were students not only of the law of Rome but also of the canon law and of the treatises of the great French and Dutch jurists. "No man," wrote Stair, "can be a knowing lawyer in any nation who hath not well

pondered and digested in his mind the common law of the world." It is to these great treatises, which still possess the highest binding authority in our Courts, that we owe our training in the principles of the law. They provide a treasure house of legal learning and argument to which the lawyer of to-day can still resort with profit to enrich his scholarship.

If then, bearing in mind the precept and example of these masters of the law, I were to-day to permit myself to address an exhortation to our profession, it would be that we should not allow ourselves to become mere dexterous case lawyers or mere verbal manipulators of statutes. Whether our task lies in the framing of new laws, in the administration of existing laws, or in the actual conduct of the daily business of the law in the office or at the Bar, we cannot afford to neglect the principles which lie behind every legal problem. The lawyer whose learning enables him to discern through the complexities of a dispute the principles which should guide decision and to found himself upon the fundamental axioms of the law will convince and succeed where the mere case and statute lawyer will distract and fail.

It was never more necessary for us than it is in these days to go back to our well-springs. "The more precedents there are the less occasion is there for law; the less occasion is there for investigating principles." So said Samuel Johnson. But I venture to differ from him. The more we are swamped with precedents the more do we need the lifebelt of principle. The increasing volume of statutory enactments is also tending more and more to muddy the limpid waters of the common law. In the British Isles we have now three Parliaments at work. Here in Canada I believe you have some nine separate Legislatures. And across the border in the United States mass production as applied to legislation has brought about a state of matters which no lawyer can regard with satisfaction. I read recently that in five years the Legislatures of the United States had passed over 62,000 statutes. The reign of law, as a witty critic has said, should now be respelt. For "reign" read "rain!" The maxim that every citizen must be presumed to know the law is reduced to an absurdity by such a state of matters. The itch to legislate is an unhappy disease of democracy—particularly to legislate for others. "Daily legislation," wrote Herbert Spencer so long as thirty-five years ago, "betrays little anxiety that each shall have what belongs to him but great anxiety that he shall have that which belongs to somebody else." We are indeed travelling a long way from the fine simplicity of "*suum cuique tribuere.*" The distinguished lawyer

who has addressed you, in one of his "Meditations in the Tea Room," has recorded the profound reflection that "men would be great criminals did they need as many laws as they make." But there is room for consolation. We need not despair of the law. It has a wonderful recuperative power and though the *ardor civium prava jubentium* may prevail for a time in our Legislatures, the great principles of the law tend ever to reassert themselves for the reason that they are based on the immutable foundations of equity and justice, which no state, if it is to survive, can ultimately afford to neglect. Notwithstanding the legislative output of the United States, I have read that according to a reliable estimate ninety per cent. of the important legal disputes in that country are still decided by the principles of the common law. It is well for us if we remember that to our profession is committed the task of preserving inviolate these principles which are for us the very Ark of the Covenant, and the greatest public service which we can render is to insist in season and out of season that they shall be observed in our Senates and in our Law Courts.

And with it all, let us bear in mind that we practise a profession not a trade, a vocation not a business. Dr. Johnson has left us the words of a prayer for guidance to be used before sitting down to the study of the law; the Bench and Bar of England still attend service in Westminster Abbey at the opening of the legal year, and the Judges of the Court of Session still go in state to St. Giles Cathedral in Edinburgh on the first Sunday of the winter session. And I believe the advocates of Malta celebrate annually in the University Church at Valetta the Feast of St. Ives, the advocate of the poor and the patron saint of our profession, of whom it was said "*Advocatus sed non latro, res miranda populo*"—"an advocate, yet not a thief, a thing well-nigh beyond belief,"—for the laity will have their gibe at us. These observances serve to remind us, if reminder is necessary, that we are indeed dedicated to a high calling, and that in the words recently used by an eminent writer we are "the custodians of a very sacred and precious inheritance which enshrines the long results of the perpetual warfare of the spirit of man, the spirit of love and fellowship against the enemies of the soul, the evil hosts of selfishness and brute force and tyranny and chaos."