ADDRESS OF THE RIGHT HONOURABLE BARON HEWART OF BURY, LORD CHIEF JUSTICE OF ENGLAND, AT THE TWELFTH ANNUAL MEETING OF THE CANADIAN BAR ASSOCIATION.

There is no need for me to say how great an honour and how deep a delight it is to meet face to face so many distinguished ornaments of your Bench and Bar, so many old friends, if they will permit me so to speak of them, like Sir James Aikins, the respected, nay the beloved father and creator of The Canadian Bar Association, Chief Justice Martin, Mr. Wallace Nesbitt, Mr. Bennett, Mr. Tilley, and many more. Your kindness and hospitality to me and mine are such that I shall always find it difficult to express my gratitude in terms satisfactory to myself. Some at least of you, I am quite sure, cherish as I do, and as my colleagues of the Bench and the Bar of England do, a pleasant recollection of that memorable occasion three years ago when the Canadian Bar joined with the Bar of England in welcoming to London our good friends and colleagues of the American Bar. It is pleasant to remind one another of those happy days. It is pleasant also to meet you here in Toronto, a name enriched and endeared by so many memories, and not least by the permanent association of this city with the Law Society of Upper Canada. It is now, I think, more than a century since that great Society was incorporated, and something like one hundred and thirty years since it was founded. Am I mistaken in thinking that throughout that time the Society has never ceased to be responsible, and primarily responsible, for the education and discipline of your students and lawyers, whether counsel or solicitors? Is not the home of the Society here in Osgoode Hall, named after that Chief Justice of Canada, William Osgoode, who died about a century ago, and whose body is buried, as his life is commemorated, at Harrow-on-the-Hill? You have indeed in Canada no Inns of Court, under that name. But the Law Society of Upper Canada seems nearly to approach them, although, unlike them, it is an incorporated body and its birth is not wrapped in mystery. To possess a flourishing law school, to call members to the Bar, and to admit solicitors to practice—these are indeed great powers and opportunities. It is not surprising to learn that Ontario, which I believe is Upper Canada re-

christened, has been the proud and kindly mother of so large a family of judges and barristers who, throughout so much of the length and breadth of Canada, maintain the traditions and hold aloft the banner of the Law Society. There is no need to remind those whose loyalty is to such a school how important, nay, how necessary, it is that a nation which is engaged with other nations in affairs of world-wide dimensions should possess a body of jurists trained in a wide school of law and jurisprudence. And indeed in those conferences and conversations in London three years ago many of you, without in the least intending to do so, indicated to some of us the wide range of the topics in which, as lawyers, you take an interest. Upon two of those topics perhaps you will allow me to say a word or two to-day.

The Study of Roman Law.

One of them was the study of Roman Law. At that time, as some of you may remember, the fortunes of this branch of learning were in some peril, not indeed in the Universities but in certain other quarters which ought to be equally free from any taint of Philistinism. The peril was averted. But perhaps the mere fact that it arose caused some of us to turn our thoughts again to the reasons why a lawyer should study the Roman or Civil law, by which I mean, of course, the law of the Roman Empire, as codified by Justinian, particularly the portions of it that are contained in the opinions of the Great Jurists to be found in the Digest or Pandects. "Studies," says Bacon, "serve for delight, for ornament, and for ability. Their chief use for delight is in privateness and retiring; for ornament is in discourse; and for ability is in the judgment and disposition of business." Approaching the matter with those words in mind, one observes at once that much of the substance of the actual systems of law which are in force in the greater number of the nations of Continental Europe, and much also of the technical language which is employed in those systems, are derived from the Roman Law. Indeed, to a person who has not at least some knowledge of the Roman Law, that technical language is quite unintelligible. In France, for example, in Spain, in Holland and in Italy the actual system of law is mainly of Roman descent, and the ideas and the vocabulary of Roman Law have been carried by those countries to their respective colonies. Much, too, of the German law is also of Roman origin, and it seems true to say that the Roman Law is the key to the laws of all those countries and colonies. In England, on the other hand, the

influence of the Civil law has been definitely less pronounced. But it was allowed tolerably full play in the Ecclesiastical Courts and in the High Court of Admiralty, and many of the rules of equity which were administered by the Court of Chancery, and since the fusion of law and equity are administered in all the Courts, had their origin in the Roman Law. Some portions of the Common law also, especially in the sphere of commercial law, were borrowed from Rome. The principles of the law of wills and succession on death are in the main founded on the Civil law, wills and succession to personalty having been originally, as you know, within the jurisdiction of the Ecclesiastical Courts. The existing rules of intestate succession, which now apply equally to realty and personalty, are, apart from the share of the widow and the surviving husband, in substance the same as the rules which were established by Justinian. The principle of the "legitima portio" did not, it is true, survive as a principle of English law,—a circumstance sometimes traced to the influence of the Priests, who, it is said, desired that a man should be free to dispose of all his goods for pious uses. The rejection of that principle may be thought to constitute a blot on the English law, which leaves a man free to dispose of his property with a total disregard of the claims of his family. But, again, no small part of the British Dominions is governed by systems immediately or mediately derived from the law of Rome: for instance, British Guiana, Ceylon and the Union of South Africa, which are governed by Roman-Dutch law; your own Quebec, and St. Lucia and Mauritius, where the origin of the laws is French; and Trinidad, that derives her laws from Spain. Many of you no doubt observed with interest that last year Turkey adopted a series of Codes, all of which are based on the Civil law. And finally, the ideas and the phraseology of International law owe much to the influence of the Roman system, a system which is grounded on principles of reason and justice.

Now, a modern lawyer is often brought into contact with foreign or colonial law, and it seems clear that he may be much more likely to comprehend the principles of that law if he is familiar with the principles and the terminology of the system on which it is founded. Indeed, unless he has at least some elementary knowledge of that system, he will probably not understand the law. Moreover, to the student of legal history, a knowledge of Roman law is quite indispensable, for the reason that all later European systems of law have been influenced by it in a greater or less degree. And to the student of the Common law of England it is, if not indispens-

able, at all events most helpful, not only because the Common law has to some extent been influenced by the Roman law, but also because the terminology of the Romans has been largely resorted to in order to supply the defects of English legal terminology. Above all, the study of Roman law is of the highest value as tending to produce and to develop those qualities and habits of mind which are requisite and necessary for the making of a good lawyer. Who will be found to deny, for example, that it teaches the student to regard law as a science, a connected system of intelligible rules and principles, or that it encourages the habit of clear and logical thinking? Perhaps the way in which the English Common law has been developed by means of reported cases tends a little to obscure the fact that it is a system of rules and principles, and that the cases themselves are merely illustrations showing how in practice those rules and principles have been applied. The Roman law, on the other hand, is essentially and manifestly a scientific system, and it is—is it not?—in their command of leading principles, and the certainty with which they apply those principles to concrete cases, that the Roman jurists excel. A lawyer, it goes without saying, always seeks the principle underlying the decision of any case which he may consult, or upon which he may rely in argument. He wants the "ratio decidendi," and having found it he asks himself what is the reason for the rule. When he has obtained a clear perception of the principle, he is the more able to determine whether the case he relies upon, the facts of which may at first sight appear to be almost on all fours with those of his own case, really support that case, or whether the two cases are distinguishable.

It will no doubt be agreed that the process of mastering English law, or indeed, of mastering only a small portion of that law, is, by reason of its form and apparent—though not real—want of system, exceedingly difficult, and even an elementary knowledge of such a system as that of the Romans is of no small help in the process. The Roman system is one which, because it exhibits a scientific arrangement of principles—themselves rational and consistent, and therefore easy to grasp and to remember—can be mastered in outline in a reasonable time and without excessive intellectual effort. Any student for whom it is really worth while to study law at all can at least obtain a general view of the whole system of Roman law, and may possibly encourage thereby the mental habits and qualities which are desired. The illustrative cases that are found in the Digest are, in many instances, hypothetical, invented by

students of the Jurists, or by the Jurists themselves, in order to make clear the application of a principle. They therefore, as a rule, illustrate and explain the principle in such a way as to make it easily understood and remembered. No doubt the various portions of the writings of the Jurists are by no means of uniform importance and value. Many of them, as for instance, those which deal with slavery and family relations, are now of only historical interest. But it is no less true that other portions, such as those in which contracts and bailments are treated, are of very great value, not only as matter of history, but also for the light they throw upon so many problems of living law.

The English Court of Criminal Appeal.

Concerning Roman law, therefore, and the study of Roman law, let so much have been said. I pass to another topic, which has little connexion with what has gone before, except that, as I understand, you are interested also in it. The Court of Criminal Appeal in England was constituted, as you know, by the Criminal Appeal Act 1907, which came into operation in April, 1908. In the first instance the Court consisted of the Lord Chief Justice of England and eight Judges of the King's Bench Division appointed by him. Experience showed that the limitation of the number of Judges caused difficulty, and in the early days of the Court it was enacted that all the Judges of the King's Bench Division should also be Judges of the Court of Criminal Appeal. The Lord Chief Justice of England is the President of the Court. In his absence the Senior Member of the Court acts as President. The Act abolished writs of error, but reserved the jurisdiction under the Crown Cases Act, 1848. It is interesting to observe, however, that while there have been few cases stated under that Act in the whole period which has elapsed since the Criminal Appeal Act was passed, in recent years there have been no such cases. As to the jurisdiction of the Court, you are no doubt aware that any person convicted on indictment, criminal information or coroner's inquisition may (1) appeal against his conviction on a question of law, or (2) with the leave of the Court appeal (a) against his conviction on a question of fact or any other ground which appears to the Court to be a sufficient ground, and (b) against his sentence. A person convicted and sentenced as a Habitual Criminal may appeal against his sentence without the leave of the Court, and a person convicted at a Petty Sessional Court and sentenced at Assizes or Sessions as an Incorrigible Rogue may appeal (with leave) against his sentence.

Any members of the House of Lords who happen to be present may be reminded that the Act does not apply to convictions of any peer or peeress for an offence not triable by a Court of Assize. On the other hand, nothing in the Act affects the Prerogative of Mercy, but the Secretary of State may refer to the Court questions raised in petitions to him concerning convictions or sentences (other than a sentence of Death). Where the question which is referred relates to the whole case of a person convicted, the case is considered and dealt with by the Court exactly as it would be if it were an appeal. If the question is only some particular point in a case, it may be determined by the Court in private. There have been several instances of the first kind in nearly every year since the Court was instituted. The latter procedure has been adopted on a few occasions. A person who wishes to appeal must apply to the Court within ten days of the conviction or sentence, as the case may be, but the Court has power in all cases, except in convictions involving sentence of Death, to extend that time. An appellant has the right, if he wishes, to be present at the hearing of his appeal, unless the question on the appeal is one of law only. In practice all appellants in final appeals are allowed to be present if they wish, but not in applications for leave to appeal. The number of appellants, that is, "persons who have been convicted and desire to appeal under the Criminal Appeal Act," is barely seven per cent of the total number of convicted persons who have the right of appeal. The highest number of appellants was, I think, in the year 1910 when there were 712 appellants. An examination of the record shows that the number of appellants has ranged from 712 to 420 or thereabouts in a year, with an average of something like 520, while the number of cases in which the conviction was quashed has ranged from 39 to 14, and the number of cases in which the sentence was reduced has ranged from 47 to 17 in a year. A single Judge of the Court, who does not sit in open Court, has power to grant or refuse leave to appeal and to deal with other subsidiary applications. But an appellant, if his application is refused, has the right to have his application heard by the full Court. In practice applications for leave to appeal are usually, but by no means always, in the first instance determined by a single Judge. Many cases never reach the full Court at all. Appellants at present have the absolute right to abandon their appeals or applications, and many exercise that right. Sometimes they abandon their appeals before their case is considered at all, either by a single Judge or by the Court, sometimes after the single

Judge has refused leave to appeal. During the last year, for example, 101 appellants abandoned their appeals or applications, 57 before their cases had been considered at all by either the single Judge or by the Court, 44 after the single Judge had refused leave to appeal. The Court of Criminal Appeal, when it is duly constituted for the hearing of appeals, must consist of not fewer than three Judges, and may consist of a larger number if the Chief Justice so directs, but the number sitting must be uneven. As a rule the Court consists of three Judges. In some thirty or forty cases since the Court was created, it has been constituted with more than three Judges. In one case the Court consisted of thirteen Judges. The Chief Justice always sits if possible and, when he sits, presides. The Court sits in London, but it may, if the Chief Justice so directs, sit elsewhere. In fact it has never yet sat out of London. To dispose of the cases coming before it, the Court in recent years has sat, on an average, about forty days each year. In 1924 it sat on 41 days; in 1925 on 42 days; and last year on 35 days. There always has been one sitting of the Court during the long vacation, about the middle of August. The average time that elapses from the receipt by the Registrar of a notice of appeal, or application for leave to appeal, till the matter is finally determined by the Court is from four to five weeks. The length of time varies from various causes—for example, some shorthand writers send in their transcripts more promptly than others, and, when a trial has been very long, more time is needed for the copying of documents and the preparation generally of the case for the Court. During the time that passes between the sending to the Registrar of the notice of appeal, and the final determination of the appeal or application a prisoner is "specially treated as an appellant," that is certain privileges are accorded to him in prison. But, unless the Court gives a direction to the contrary, that time does not count as any part of the appellant's term of imprisonment or penal servitude under his sentence. In unsuccessful appeals or applications the general practice of the Court has been that it does not give any direction that the time shall count, unless leave to appeal has been granted. The result is that in most cases of appeals or applications that have no merits the appellant is kept in custody about four or five weeks longer than he would have been if he had not appealed or applied for leave to appeal. That circumstance contains really the only check which the Court has on frivolous appeals or applications for leave to appeal. The Court, it is true, has power to increase a sentence, but only on an appeal (not on an application

for leave to appeal) against sentence. Nor can it increase any sentence in consideration of any evidence that was not given at the trial. But the power to increase sentences has not in fact been often exercised. During the past 19 years sentences have not, I think, been increased in more than fourteen cases. And in every case of increase of sentence an appellant has always been expressly warned by the Court beforehand of its power, and the appellant has therefore had the opportunity of abandoning his appeal.

The experience gained by the Court of Criminal Appeal in England in the matter of frivolous appeals has led to an interesting provision in Sect. 2 (3) of the Criminal Appeal (Scotland) Act 1926, which provides that on an appeal against conviction the Court may quash the sentence passed at the trial and may substitute another sentence, whether more or less severe. That is a power which the English Court does not yet possess. There have been many instances where an appellant has made a frivolous appeal against his conviction and, though the Court has been clearly of opinion that the sentence passed at the trial was inadequate, it has had no power to deal with the sentence at all, for the reason that the appellant did not appeal against the sentence. It is hoped that the power of the Court in Scotland to increase an inadequate sentence may in Scotland prevent some frivolous appeals against convictions. It remains to mention one or two minor matters. A shorthand note of all the proceedings on every indictment tried at every Court of Assize or of Quarter Sessions in England and Wales is taken by a shorthand writer appointed by the Lord Chancellor and the Lord Chief Justice of England. No official shorthand note, however, is as yet taken of the proceedings or judgments of the Court of Criminal Appeal itself. Such a note, strange to say, is never taken unless a shorthand writer is specially instructed by some person interested in some particular case. In every appeal or application for leave to appeal the Registrar obtains from the shorthand writer of the court of trial a transcript of the proceedings at the trial. Copies of the transcript and of other necessary documents for the use of the Judges and of the Director of Public Prosecutions are afterwards made in the Law Courts. Meantime, the expense of the Court of Criminal Appeal is very slight. The total amount of the expenses of the Court paid out of money provided by Parliament has been during the past three years £11,730; £11,929; and £12,963 respectively. Those amounts cover all payments to shorthand writers for their fees and expenses for attending the courts of trial, and for all transcripts supplied by them, and

all copies made in the Law Courts, and the expenses of the Criminal Appeal Office. They do not of course include any part of the Judges' salaries nor of the Registrar's salary. But that indispensable official, invaluable as his services are, receives as Registrar no additional salary. Some payments in addition are made out of local funds and amount to about £500 a year. Those are the expenses of bringing prisoners to the Court, fees of Counsel assigned by the Court, and the like—also, a small sum amounting usually to about £250 a year is received in the Criminal Appeal Office for copies of documents supplied to appellants or their Solicitors. It remains only to add that on the hearing and determination of an appeal or any incidental proceedings under the Criminal Appeal Act no costs are allowed on either side.

Such, then, is the Court of Criminal Appeal in England. There was, as you know, a good deal of opposition to its creation. Many sensible and experienced persons, who saw no good reason why even a small money claim on the civil side should not be carried to the Court of Appeal and possibly to the House of Lords, vehemently objected to a Court of Criminal Appeal even for the gravest conviction or the most severe sentence. Those voices, no doubt, still linger but perhaps they become more and more rare. Competent observers in general perceive not merely the utility of the Court but indeed its necessity. It is not so much that a conviction is sometimes quashed, or a sentence is sometimes reconsidered. What matters, and matters profoundly, is that everybody engaged in administering the criminal law, upon whatever rung of the ladder he may be, throughout the whole hierarchy, is well aware that a Court of Criminal Appeal is in existence. The consequences of that diffused and abiding knowledge are quite incalculable. As Robert Burns said of something else:—

> "What's done we partly may compute,
> But know not what's resisted."

If anyone has any real doubt upon the matter, let him contrast and compare for example, the summing-up in a criminal case tried to-day with the summing-up in a criminal case tried fifty, forty, or even twenty-five years ago. Speaking for myself at any rate, I have not the smallest doubt that, among the many duties which belong to the Lord Chief Justice of England, there is none more important than his duties connected with the Court of Criminal Appeal.

THE VALUE OF BAR ASSOCIATIONS.

Let me end as I began. It is an honour and a delight to be here, and it is a great joy to observe the part which The Canadian Bar Association has played and is playing throughout these vast, these wonderful, these hospitable Dominions. The profession of the law is not indeed spoken of with equal and unvarying enthusiasm in all quarters and on all occasions. But you and I who are devoted to it—who have chosen it because we love it—know that, in all essential respects, it is the precise opposite of that which its acrimonious critics represent. Its business is not to foment quarrels but to compose them, not to create differences but to prevent them, not to entangle human affairs in ambiguities but with clearness of vision and exactness of phrase to provide beforehand for certainty,—not to frustrate intention but loyally and wisely to give effect to it, and above all, whether the transaction be great or small, whether its immediate effect may extend to few or many, to apply it with calmness, steadiness, vigilance, and fearless impartiality the healing principles of justice and freedom. It is well that those whose lives are absorbed in this noble and utterly independent profession should from time to time meet together for mutual encouragement—yes, and mutual exhortation—for the taking of counsel in common, for the appreciation of the errors of the past, and for the advancement of plans for the future. So much, it seems obvious, is true of a Bar Association in any country, however complete its uniformity, and however limited its territory, may be. And is it not true, to say the least, *a fortiori*, where the nation is so vast, where distances are so great, and where brethren of the same profession, trained in the same traditions and upholding the same high standard, are of necessity so widely scattered? My knowledge of Canada, whether it be derived from history or from observation, is indeed unfortunately slight—though, thanks to you, it is by no means so slight as it was. But, at any rate, it requires no great imagination to perceive how enormous and how fruitful the influence of this Society, situated as it is, may be in maintaining *esprit de corps*, in promoting unity—even, in proper cases in producing uniformity—and in influencing the course of public legislation no less than in moulding the fortunes of the individual career. A distinguished historian has written, in words which appear manifestly to be true, that the spinal cord of the new Canadian nation is the Canadian Pacific Railway. May it not be said with equal, and therefore perfect, truth that the life-blood of

the Canadian nation, the vital essence that fills its arteries and gives health and vigour to every part of its frame, is to be found precisely in those principles of freedom and of justice, to whose dominion indeed no limit of territory is or can be set, and among whose upholders and champions in these vast territories there is none more doughty, none more courageous, and none more beneficently useful than The Canadian Bar Association?

THE BRITON IN CANADA.—In an article published in the current number of *The English Review* entitled "Alien Immigration to Canada," which is addressed more particularly to the British people at home, the writer gives expression to the following candid opinion:—

> The trouble about the average Briton is that he is incurably sentimental about his country: attached soul and body to the worn and crowded islands of his fathers. The sentiment is a pretty one, and infinitely excusable. Nevertheless it is narrow. It is also, under the circumstances, unbusinesslike. Here is a country, over the shoulder of the world, not an easy country—you have to work here—but new, in process of development, full of quiet and unspectacular opportunity for the new man, and extending to you specific preference: and at present it is, beyond any questioning, passing into the hands—sooner or later into the economic and political control—of peoples strange to you. And you, with the evils of overcrowding and industrialism burning into your eyes, let it be so.
