SOME DIFFERENCES BETWEEN THE COMMON LAW AND THAT OF THE PROVINCE OF QUEBEC.*

When your genial President extended to me a gracious invitation to address you, he quite properly suggested a topic of special and practical interest to members of this Association However, when I read the papers delivered at the last two conventions, by men who were past masters of their subjects, I realized that the fundamental difference between the legal system administered in the Province of Quebec and the rest of North America are such that, on the one hand, it would be presumption for me to attempt to teach you anything about your own law, and that on the other, my remarks would be bare of all practical value if I restricted them to an exposition of our peculiar rules.

It is my experience, however, as it probably is yours, that when lawyers meet, they are prone to inquire into and discuss the differences in the laws applied in their respective jurisdictions, and as you have paid us the compliment of coming to Canada, I venture to hope that a more or less academic summary of the main differences between your law and that of my Province may not be without interest, although obviously much less absorbing than the intensely practical papers presented by other speakers.

In the Province of Quebec, our basic system is that of the civil law, as distinguished from the common law, which grew up in England after the Conquest, and which was imported into the American colonies, where it has survived in the United States and the other Provinces of Canada. The civil law, however, is that of practically the whole of the rest of the civilized world, especially of Scotland and continental Europe.

You will find the two systems admirably analyzed and compared by Mr. Roscoe Pound, Dean of Harvard Law School, in three addresses delivered in 1923 before the Bar Association of the City of New York,[1] and in three papers read by Chief Justice Anglin and Justices Mignault and Rinfret of the Supreme Court of Canada before the Canadian Bar Association,[2] which I have taken the liberty of freely plagiarizing.

* Address before Convention of International Association of Insurance Counsel, at Ottawa, September, 1930.

[1] Harvard Law Review, Vol. 36, pp. 641, 802, 940.

[2] The Canadian Bar Review, Vol. 1, p. 33; Vol. 3, p. 1; Vol. 4, p. 68.

The judges of that Court are constantly called upon to study and decide cases arising under both systems, and attain an unparalleled grasp of their respective principles. We Quebec lawyers practice and are trained under the civil law, so that our knowledge of your system is necessarily imperfect and empirical, and this must be my apology for such lapses as you cannot fail to notice throughout this paper.

In theory, civil law is written, and common law, unwritten law; in the former, rules are primarily to be found in a Code enacted by a legislature and not in judicial decisions; it is in form statute law; common law is primarily judge-made law. Dean Pound says:

> We conceived of an immemorial common custom of England that could only be developed by logical discovery of and deduction from the principles which it presupposed.

In other words, the common law is based on the fiction that it has been the law time whereof the memory of man runneth not to the contrary, even though no court, text or statute may ever heretofore have had occasion to so declare it.

He points out that in Anglo-American law the judge has a double function: to decide the particular controversy as between the parties, and to so decide that his decision will enter into the body of the law as a precedent.

The function of a judge under the civil law is merely to decide the point at issue on the pertinent legal principles, without establishing a precedent for other cases.

I again quote the same writer:

> It is almost impossible for the common lawyer and the civilian to understand each other in this connection. In fact, our practice and the practice of the Roman law world are not so far apart as legal theory makes them seem to be. We by no means attach as much force to a single decision as we purport to do in theory. Even the House of Lords, which purports never to overrule its decisions, on occasions deals with them so astutely as to deprive them of practical efficacy as a form of law. On the other hand, in continental Europe, a judicial decision tends to become the starting point of a settled course of decision, which in some countries is recognized as customary law, having the force of a form of law, and in other countries, as acquiring that effect in practice.

The learned Dean seems to assume that the common law is a logical system; to that extent, he differs from Lord Halsbury, who said:[2]

> A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from

[2] *Quinn* v. *Leathem*, [1901] A.C., at p. 506.

it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

On the other hand, logical development is the aspiration of civilians; our judges are expected to carry the principles enunciated by the Civil Code to their ultimate logical consequences.

Your judges are held to be bound by previous decisions till reversed; the doctrine of stare decisis is the keystone of the structure; in principle, our judges are not bound even by the rulings of a higher court, although in practice the modern tendency departs from this theory, and rightly so, as thereby litigants are saved the expense of unnecessary appeals, and a certain and scientific jurisprudence is developed.

It would be futile to debate the merits of the respective systems; each has its defects and its merits, its champions and its detractors.

"Why," said Lord McNaughton,[4] "should an obscure report be taken as gospel, simply because it is old?"

Lord Gardenstone said, many years ago:

> One decision is nothing. This puts me in mind of what Gulliver reports of the law of England, that once judges go wrong, they make it a rule never to come right.

A month ago, in Montreal, I heard Viscount Dunedin, a Scotch Judge, chaff his English brethren by pointing out that they were obliged to say to litigants:

> If you cannot cite me a case, I cannot hear you.

No one probably attacked the common law more viciously than Jeremy Bentham, one of Blackstone's disciples; I quote the following item as a fair sample of his power of vituperation:

> Nothing but the greatest integrity in a tribunal can prevent the judges from making an unwritten law a continual instrument of favour and corruption.

While poetical precedents may be of doubtful authority, I venture to quote the following lines from Tennyson, as evincing the point of view of many laymen:

> The lawless science of our law;
> The codeless myriad of precedent;
> The wilderness of single instances
> Through which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame.

[4] *Keightly* v. *Durant*, [1901] A.C. 248.

The Code Napoleon contains an article which was omitted from the Quebec Code and which formally forbids judges from enunciating any rules of law of general application, the effect being to leave them free in theory to disregard all precedents. With this may be contrasted a statute passed a few years ago in Ontario specifically providing that all known decisions on points of law shall be binding on judges of co-ordinate or inferior jurisdiction.

This quite unique legislation was introduced to remedy the evil caused by a judicial feud between two divisions of the High Court of that Province, each of which spent its leisure moments in reversing the other's decisions.

One of our judges, now retired, for years carried on a private war against their Lordships of the Privy Council; in one judgment, he devotes sixty-eight pages to demonstrating their ignorance of the rudiments of our civil law.

The final proof of the soundness and merits of both systems is that they work; each has proved itself to be admirably adapted to the different races whose lives and interests they regulate.

The Hon. Harlan F. Stone, in an address before the Canadian Bar Association, in 1922, succinctly defined the two opposing methods when he said:—

> The genius of the English-speaking people found expression in the law which was forged between the hammer and anvil of opposing counsel in the trial of controversies in court, rather than in the study of principles and jurisprudence by scholars in libraries or in universities.

It would be a mistake, however, to think that the civil law is entirely founded on a priori theorizing. Justinian's Corpus Juris was the work of practical lawyers and jurists, and the Code Napoleon was essentially a compilation of the customs which had grown up by practice and tradition in the many provinces of France before they were united into one sovereignty.

The conditions in England were identical; we find the proof in the address of Parliament to Henry VIII, when it declared that England had been and was free from subjection to any man's laws, except such as "the free people of this your realm have taken at their free liberty, by their own consent, to be used among them, as the customed and ancient laws of this realm, and none otherwise."

This customed or ancient law you still follow, modified to meet conditions of modern life in America.

I quote Chief Justice Anglin:

> When we consider the sources of English law and equity and those of the civil law, as it exists in Quebec, the surprising thing is not that there are many

marked differences between them to-day, but rather perhaps that the similarities are not more numerous. Roman law has exercised an enormous influence in the development of both systems; it may perhaps be regarded as more distinctly the foundation of the civil law of France and Quebec; yet undoubtedly English common law derived from it the principles that decided cases for which the common law of England did not provide.

I also quote what Mr. Geo. W. Wickersham, former Attorney General of the United States, said in addressing a convention of the American, British, French and Canadian Bars in Paris, in 1924.

> The common law itself is derived from the Norman laws and customs, which were carried from France to England at the time of the Conquest. We should remember that until the sixteenth century, French was the judicial language of England, and the American judicial language still retains many French terms. Every session of the Supreme Court, even at the present time, is opened by a crier with the words: "Oyez! Oyez! Oyez!" as in the time of Edward III.

The prototype of all modern civil codes is, of course, the Code Napoleon, promulgated in 1804 and compiled by a commission of advocates and jurists, in whose deliberations the Emperor frequently took part.

Sir Henry Maine says that it may be defined as a compendium of the rules of the common law then practised in France, but with extensions and interpretations of a few eminent French jurists, and particularly of Pothier, a contemporary of Blackstone.

The Civil Code of Quebec is described by Sir Frederick Pollock as representing the old French law of the colony, modified by free use of the Napoleonic Code and in some particulars by English influence. It covers the entire field of the law of persons, contract, property and tort and differs from the Napoleonic Code by adding several titles on commercial law, drawn almost entirely from English sources, which is specially true of the title of insurance. It was promulgated in 1866 and has been subject to remarkably few amendments to date. It does not touch such subjects as banking, bankruptcy, navigation, bills of exchange, patents and copyrights, which are ascribed to Federal jurisdiction, extending throughout Canada.

The Code is divided into numbered articles, under each of which are indicated the sources from which it is drawn. You will often find Bell, Story, Blackstone, Chitty, Arnould, Phillips and Marshall, quoted side by side with Pothier, Domat, Boudousquie, Emerigon, Troplong and Pardessus.

You will realize how greatly this method facilitates research and interpretation of the text.

I am afraid I have given too much time to what I had intended to be merely an introduction; I will now endeavour to treat of certain concrete instances of divergence between the two systems.

Possibly the subject of most interest to this gathering is that of torts. Civilians have never recognized the doctrines of common employment and contributory negligence. With us, the master is always responsible for the negligence of his servant, committed in the exercise of his functions, even where a fellow-servant is the victim, and a plaintiff is not completely barred from recovery because his own negligence may have contributed to the damage.

In England and the United States, as in Canada, within the last fifty years, numerous Employers Liability and Workmen's Compensation Acts have vastly modified the harshness of the common law doctrine, which it is now recognized gave undue protection to the employer. Within the past few years, in Canada, the other provinces have adopted by statute the civil law principle of common fault, the substance of which is that instead of being deprived of all recourse, a plaintiff will merely be penalized by the damages being reduced in the proportion in which the judge or jury decides his negligence contributed to the accident.

As a corollary to this principle, the doctrine of last chance and ultimate negligence is foreign to our system. Our entire law of tort is found in four short articles of the Code.

I may be pardoned if I reproduce Article 1053, constituting as it does an admirably concise yet complete abridgment of the law of personal responsibility:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Article 1056 reproduces Lord Campbell's Act, and deals with the case of damages caused by death; the other two Articles cover the case of vicarious responsibility for damages caused by the fault of persons under one's control or by things which he has under his care.

Dean Pound admits that the conveyance of land, inheritance and succession and commercial law have always proved susceptible of legislative statement, but he contends that no codification of the law of torts has ever maintained itself. With all deference, I venture to question this conclusion; our experience and that of the French courts during the last one hundred and twenty-five years go to prove the contrary. These few short articles, not a word of which has been amended since their enactment, have stood the test of time

and proven sufficiently elastic to conform and keep pace with all the evolutions of social and economic life during the past century.

The fundamental theory of the two systems governing the master's responsibility for the acts of his servant is practically identical; the English courts render him liable for acts arising out of and in the course of the servant's employment; the Code enacts his responsibility for acts committed by the servant in the performance of the work for which he is employed. In practice, however, different results are often reached; I think it may fairly be stated that under the English law the master will escape in many cases where he would be condemned under the civil law. In France, for instance, an owner, whose chauffeur had caused damage while using the former's car for his own purposes, without permission and against instructions, would be held liable; our Supreme Court has exonerated him in such circumstances.[5]

Our Supreme Court has held that Article 1053 gives a minor child an action in tort against his own father for injuries caused by the latter when driving his automobile, and the same rule would doubtless be followed as between husband and wife, though the point to my knowledge has not yet been raised.[6]

Another point of special interest to insurance lawyers is the law of subrogation, as it comes into play in salvage actions. Our rules are, on the whole, broader and easier of application than under the common law; one article entitles an insurer on payment to a specific transfer of the rights of the insured against the persons by whose fault the loss was caused. Our Court of Appeal has further done away with the necessity of any written subrogation or transfer, by holding that Article 1053 is broad enough to confer on insurers the right to sue the tort feasor in their own name, on the ground that by his fault he has caused the insurer loss and damage, to the extent of the amount paid by the latter to the insured.

Our jurisprudence also allows an action to be instituted in the name of the insured, but for the benefit of the insurer.

With us, a judgment does not novate, extinguish or merge a right of action; it is merely declaratory of such right and ordains the proper remedy. The creditor may renounce it by simple notice to the debtor and without the latter's consent, and institute a new action; even without such renunciation, an unsatisfied judgment against one of several debtors or tort feasors jointly liable is no bar to subsequent proceedings against the others. After recovering judgment

[5] *Curley* v. *Latreille*, 60 S.C.R. 131; *Halparin* v. *Bulling*, 50 S.C.R. 471.
[6] *Marchand* v. *Fidelity and Casualty Co.*, [1924] 4 D.L.R. 157.

against an agent who contracted in his own name, one is free to sue the principal, when subsequently discovered.

Costs of judgment constitute a debt owing directly and personally to the attorney of record, with the pleasing result that frequently a Quebec lawyer can collect his costs in cases where this might prove impossible under other systems.

Our law of slander and libel is different. With us, the truth of a defamatory statement is no defence, unless the occasion is privileged.

The status of husband and wife common as to property corresponds practically to Blackstone's description of what was the English law in his time:

> If a wife be injured in her person or property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own; neither can she be sued without making the husband a defendant.

Community is the rule, as in Louisiana and some other states. All assets acquired since marriage (with the exception of those devolving by inheritance or equivalent title) form part of the community; on dissolution, the wife is entitled to one-half of all assets; the husband administers the community, as well as the wife's private property. The consorts, however, may, by ante-nuptial contract, stipulate separation of property, or the wife may secure it by judgment, in case of the husband's insolvency or misconduct.

It has been announced that in the near future substantial changes will be made in the provisions of the Code, greatly enlarging the rights of married women.

We have preserved the institution of notaries public. They constitute a separate profession, admission to which can only be had after examination and presentation of a degree, granted after a three years' law course. They practically monopolize all conveyancing; certain deeds, such as marriage contracts and mortgages, must be executed . . . before them on pain of nullity. They attest contracts and other writings executed in their presence, of which they retain and preserve the originals, delivering certified copies, each of which is authentic and has the same probative value as the original.

Wills may be made in three different forms: before two notaries, or in the English form, before two witnesses, or in holograph form, unwitnessed, but written in toto by the testator. Wills of the last two classes are subject to probate; this is obtained on a simple petition, supported by affidavit as to the signature, without the necessity of any advertisement or notice to the heirs or the public. The

purpose is merely to enable authentic copies to be given by the Court for registration and other purposes; the will is not thereby validated, nor is any presumption in its favour created, in case of contestation. Notarial wills require no probate.

The carrying out of the will appertains to the executors, if named; if not, to the legatee; we have no letters of administration. In the event of intestacy, the legal heirs are vested with the succession ipso jure; the testator's death vests title directly in them and in legatees; neither they nor executors require any authority from the court to administer, wind up or dispose of the estate.

With us, deeds and contracts are always signed by all parties to them and not merely by the grantor, as seems to be the rule in many jurisdictions; the idea of our law being that all parties must signify their assent to every contract; a possible exception existing in the case of gifts, the acceptance of which need not be in express terms.

This rule may have disturbing implications in insurance matters; our Court of Appeal has assimilated the designation of a beneficiary to a contract of gift, requiring formal or implied acceptance, the proof of which is often impossible or difficult. This certainly constitutes a dangerous weakness in our law and is aggravated by the fact that we do not recognize the doctrine of trusts.

Trial by jury, like the poor, we still have with us, but we do not make of it the fetish which you do; it can only be had at the option of either party, in commercial cases and actions for tort where the amount involved exceeds one thousand dollars. It is not very popular with us; in the District of Montreal, with a population of over a million, we seldom have more than two or three jury trials in any one month.

Chattel mortgages are prohibited; the rights of a pledgee are respected only if he has actual or constructive possession of the pledge. An exception, however, has been made by statute to permit the hypothecation of personal property by companies as security for a bond issue.

We do not recognize any distinction between contracts under seal and simple contracts; the presence of a seal does not replace the absence of consideration. The use of seals is practically obsolete with us. As a matter of fact, I think I am right in stating that their use is practically limited to the certification of documents by notaries, corporate and public officials, and it seems to me that they are slowly but very surely losing that sacrosanct importance with which your ancestors regarded them.

An unpaid vendor has certain preferences and privileges corresponding to the common law conception of a lien, but differing from the right of stoppage *in transitu;* he may in certain cases, after delivery, recover possession of the article sold, even if the ownership has passed and after bankruptcy of the purchaser, if he exercises his remedy within thirty days of delivery.

While we apply the maxim *caveat emptor,* we grant the purchaser much greater protection than I gather to be the case under the common law; I do not believe our courts would follow *Ward* v. *Hobbs,* where the House of Lords first established the principle that "Pigs is Pigs," even if diseased, to the knowledge of the vendor.

Nor do we recognize the doctrine of *Nudum pactum.* If a creditor agrees to accept part of his claim in settlement, he is absolutely and finally bound.

I fear that I have taken up much more of your time than is warranted by the practical interest of the subject, although it is only possible within the limits of this paper to cursorily touch the highest spots. My excuse must be that I presume on the curiosity all lawyers entertain anent a system differing from their own.

In conclusion, I may be permitted to indulge in a few remarks as to the trend of modern jurisprudence and legislation. It does seem to me that the modern world has cast its ballot in favour of the civilian's idea of codification, as against the common law system of judicial precedents. In a compact country like England, where a self-contained Bench administers the law for forty million people, it may be and is obviously possible for lawyers and judges always to ascertain the present state of the law on any particular point. The task confronting American lawyers, with their innumerable state and federal courts, spread throughout your vast territory, must be enormously more difficult. That you eventually succeed, I do not doubt; I gather that you know what decisions to follow and which to discard, a task we find well-night insuperable.

Dean Pound says:

> If we actually set as much store by single decisions as we purport to do in legal theory, the path of the law would lie in a labyrinth.

That learned writer notwithstanding is still a staunch upholder of Stare decisis, and he is prepared to leave the development of the common law in the hands of the courts, where it has lain since the time of Brackton. I am not qualified to enter the lists against his opinion; it is interesting, however, to note that Mr. Geo. W. Wickersham, a practising lawyer of outstanding eminence and ex-

perience, in an address he delivered in 1924, before the Ontario Bar Association, optates for what is practically a codification of American law. He concludes:

> This work cannot wait upon the slow process of courts. It cannot be done by the working Bar; it requires prolonged study and labour. It must be done through the great university law schools and by the scholars of the law, rather than by the old Anglo-Saxon way of threshing out in the courts.

He approves and endorses the work of the Commissioners on Uniform State Legislation and the American Law Institute in clarifying and assimilating the statute law of the different States on many most important subjects, and in evolving a re-statement of the law by "relegating to the scrap heap the multitudinous volume of conflicting and often obscure precedent."

The same process is at work in Canada, where our Commissioners have evolved what are practically codes on particular subjects, several of which have already been adopted by the different provincial legislatures.

Even in England, we find the same trend, as witness the Married Women's Property Act, the Sale of Goods Act, the Bills of Exchange Act, the Partnership Act, the Factors Act, and last but not least, the Law of Property Bill.[7]

The modern tendency towards codification seems obvious, and though a prophet is without honour, I risk the prediction that, in your country as in ours, the lawyer of the future will find himself in a position to place less reliance on precedents, and to turn in ever increasing degree to codes and statutes to find his law. I say this without in any way reflecting on the immense and permanent value of those monuments of judicial learing, wherein the principles of the common law have been clarified and crystallized, and on which, in the last analysis, all such statutes have been and will be based. The common law will still remain the common law, whether codified or not, and it will always be necessary to refer to its sources for its proper interpretation.

In the evolution that is proceeding, we lawyers all have our share and our responsibility. We are all travelling towards the same bourne by different roads, and that is, whether on the Bench or at the Bar, each in our separate sphere, to attain and administer justice according to law.

Montreal. F. J. LAVERTY.

[7] See chapter on "Consolidation and Codification" in Lord Birkenhead's "Points of View."