

OUR HERITAGE*

To come to Canada under any circumstances is a happy event; to return to Ottawa and be greeted by such a gathering as this, is an honour and a privilege which should make me silent rather than vocal. With a sense of inability to make response as should be, I thank you heartily for the friendly and favourable omens of this gathering. I cannot give your greetings personal significance, nor ascribe your cordiality wholly to the organization of which I am for the moment the head. Truly you have fulfilled today such an injunction as Hamlet gave to Polonius, as to the players who had come to Elsinore :

Use them after your own honour and dignity. The less they deserve, the more merit is in your bounty.

I have no official or unofficial standing in the United States, which entitled me to speak here on any subject or should lead you to give authority to anything I may say or fail to say. Were this assemblage one of lawyers of your Dominion, I might speak here with some confidence and sense of right, as I did last August at the annual meeting of the Canadian Bar Association in Winnipeg. There I had the honour to be the delegate of the Bar of the United States, to our Canadian brethren. I do appreciate deeply what you have said, Mr. President, as to the service of the Bar Associations, North and South of the boundary, through the exchange of visits and ideas. Certainly we of the Bar of the United States have enjoyed to the utmost the fine lawyers and wise leaders who come to us each year from the Canadian Bar Association.

Today I shall be happier the sooner you cease to think of me as President of the American Bar Association and regard me as a summer neighbour who comes to Canada at every opportunity, by choice, and is here now to get some logs cut and hauled down one of your lakes, before the ice goes out. During more than twenty years, I have spent more summers in your provinces than anywhere else, usually with my family. We always come back to the Dominion as to an old home and to understanding friends.

The Foundations of Friendship and Respect

One thing I believe I do know, and as to that I feel I can speak here with confidence. During the past few years, and

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especially during the past seven months, I have seen a great deal of lawyers and people in the United States, on their home grounds, in virtually all parts of the country; I believe that I have come to know what they truly and deeply feel, as to their neighbour to the North; and I wish that I could put in words the friendliness which is in their hearts, along with the full confidence that whatever issues may arise between us can and will be settled in a fair and sensible way, and in any event settled without disturbance of friendship.

Your kindly expressions here are the more stirring because they seem to me to evidence an accord of good-will and mutual respect among the peoples of two great Nations—and a sense of conviction that in the continuance of good relations and an understanding friendship there are staunch protection and many blessings for the people of these lands. May I bring you assurance, if any be needed, that these sentiments of good-will are most heartily cherished and completely reciprocated, by my brethren of the Bar of the United States and by the people of the United States.

I do not mind saying to you that our experience, during the years since your men and ours came home from France, has made us feel much closer to our staunch neighbour to the North. There has been a feeling that the two nations have been pretty much in the same boat; and we have rejoiced in your successes and have felt a sense of kinship with your perplexities, as you have gone forward with your problems in your own way.

We have sincerely mourned with you the passing of that kindly and noble gentleman who was your King, and we have felt as if we knew in person his manly and democratic successor. I do not know whether you or many of us realize what the radio has done for the kinship of mankind. In countless homes in the United States, the solemn exercises of the royal funeral were followed by grieving hearts; and we heard and hailed with high regard the forthright message of His Majesty Edward VIII, as speaking the thoughts and hopes of enlightened people everywhere. At a time when the mood of dictatorship so often labels itself "leadership" and mocks at liberty, we liked his declaration that it will be

The first object of my life to maintain the liberties of my people and to promote the welfare of all classes of my subjects.

“Independent Types of Political and Intellectual Progress”

In the candour of friendship, I should say here today that if any of us in the United States ever felt a mounting pride in our great resources and our material achievements, the chastening self-scrutiny of recent years has left us humble and ready to learn. We have come to realize, as never before, the profound wisdom of the the observations of Mr. James Bryce, after visiting America more than forty years ago, that

as regards the ultimate interests of the two peoples most directly concerned, it may be suggested that it is to the advantage, both of the United States and of the Canadians, that they should continue to develop independent types of political and intellectual progress. Each may, in working out its own institutions, have something to teach the other. There is already too little variety on the American Continent.

I do not believe that there has ever been a time in the United States—certainly not in my span of years—when so genuine and hearty a respect and friendliness for Canada, and so deep an understanding and appreciation, has been as widely held by our people. Truly it is well for neighbours so near to clasp hands frequently.

Interchange of Experience May Be Helpful

In my boyhood days in the country, I remember that often, when the work and the worries of the crop or the harvest seemed severe beyond endurance, the men of the household went down the lane, in the cool of the evening, to the neighbour's house or yard, there to take counsel or find consolation. When stated to a patient and understanding friend, the perplexities and the problems of the day did not seem nearly so serious and unsurmountable. They lessened and faded in the telling, and faith returned. I might easily fall into some such state of mind today, as I come from the atmosphere of perplexity and exasperation which pervades so much of life in the United States.

I am not at all in the mood of the man described by Canning as “the friend of every country but his own”. Problems in our country are serious, but few of us despair. To realize their significance and their relation to the long march of human history, is the first step toward dealing with them in a practical way. Not many years ago, we had come hopefully to regard the United States as

A land of settled government,
 A land of just and old renown,
 Where freedom slowly broadens down
 From precedent to precedent.

Now we find many existing institutions and precedents sharply challenged. Changes are sought for the sake of change; and we are summoned

To the fields where the world's remade and the ancient dreams come true.

Re-distribution of powers of government are advocated, to take down the barriers against re-distributions of property. Abuses are revealed and agitated, not that they may be remedied by majority action, but that their continuance may stir more and more of indignation on the part of rampant minorities. From high place the challenge has recently been put to our people, as to whether "the sources of their indignation" are "deep enough," so that

Your *wrath* may sustain a genuine reconstruction of American life.

Present Developments Viewed in Terms of Our Common Heritage

What is the long-run significance of what is taking place in the United States? How does it fit into the picture of the development of our institutions and our laws? Like your own, our institutions and our concepts of law and liberty and justice came from England, with a strong infusion of French ideals and the traditions of the Roman law. Perhaps I can state some of the present issues in terms of this common heritage, so that you will see the different roads which have been travelled by Canada and the United States. Needless to say, I am not speaking of any of the changing vicissitudes of politics or the superficial controversies upon which men think that they divide.

My starting-point is in early English history which is a part of our heritage no less than yours, because we of the United States are ever conscious that, as Professor George Burton Adams pointed out in his work on *The Origin of the British Constitution*,

The England of those early centuries wrought out for us the institutions of free government; and we have a peculiar right to feel that in tracing the steps by which they were created, we are studying our own history.

Representatives of the English barons, church and people confronted royal power on the meadows of Runnymede, on June 15, 1215. The outcome was the Great Charter, which remains a part of the statute law of England today and has become "the common possession of civilized mankind".

Feudal the Great Charter was in its origins; many of its concepts are obsolete and unrelated to the political and economic structures of today; but the Great Charter went round the

world and became the Charter of liberties for men of all races, languages and lands. Its different status, under your governmental system and ours, may be responsible for one of the significant issues in the United States today.

The Beginnings of Our Bill of Rights

The first clause of the Great Charter confirmed to the freemen of the Kingdom "all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever". The basic concept was that the individual was and is possessed of fundamental rights, by "the law of the land"; that these rights may not be taken away or impaired by government; and that government should be of laws and not of men. In Clause 61, the King covenanted that he

shall procure nothing from anyone, directly or indirectly, whereby any of these concessions and liberties might be revoked or diminished; and if any such thing has been procured, let it be *void and null*.

Outstanding among the rights vouchsafed, the veritable keystones of the Great Charter were undoubtedly those enumerated in Clause 39, which assured freemen against arrest, imprisonment, exile, seizure, or other invasion of personal freedom,

except by the lawful judgment of his peers or by *the law of the land*.

This immortal phrase has echoed and dominated the law of human rights during subsequent centuries, and the cause of freedom has hinged upon the rejection of acts repugnant to "the law of the land". All appointing power might well heed the obligation imposed on the King by Clause 45, that he would

appoint as Justices, constables, sheriffs or bailiffs *only such as know the law of the realm and mean to observe it well*.

It was the view in England, for at least several centuries, that the basic rights and liberties assured to freemen by "the law of the land" were beyond the power of King or Parliament to take away or impair. In 1369, with the consent of Edward III, Parliament enacted that the Great Charter should be

holden and kept at all points, and *if any statute be made to the contrary, that shall be holden for none*.

Parliamentary Supremacy Against Fundamental Law

With this as our common starting-point, what has taken place, in your country and in mine? I shall not take your time in tracing the subsequent rise of the doctrine of parliamentary supremacy in England or the present status of the Great Charter

under British law or your own. That is unnecessary for my present purpose. A former member of the British Cabinet has written that

Parliament could pass a law that every red-headed man should be hanged, and the Courts of law would have to carry out its bidding.

Parliament has several times changed the period of its own term of office, and in one instance continued its members in office for four years longer than the term for which they were elected by the voters. There was no one to say to the contrary —no one to decree conformance to organic or fundamental law.

On the other hand, when the United States was formed and its Constitution was written, as indeed before that in the organic law of some of the Colonies, the Bill of Rights was made a part of the supreme "law of the land", so that "if any statute be made to the contrary", it would be "void and null" and "holden for none". In so far as these limitations and guaranties were not embodied in the submitted draft of the Constitution, they were covered by the first ten Amendments, adopted with the Constitution itself and virtually as a condition of its ratification at all.

Alexander Hamilton, born in the British West Indies, joined with James Madison in declaring that

an elective despotism was *not* the government we fought for.

Patrick Henry of Virginia, fiery orator of the revolt of the Colonies, avowed that

The judiciary are the sole protection against a tyrannical execution of the law.

Regarding the new structure of Federal government, he declared it to be "the highest encomium that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."

The Constitution of the United States Went Back to Fundamental Law

In other words, those who drafted the organic law of the new republic *went back* to the concept of "the law of the land" held in England at the time of the Great Charter and for centuries afterwards; they deliberately barred an ascendancy of either or both the executive and legislative power; they deliberately established the supremacy of the deliberate will of the people, as embodied in a Constitution which neither the executive nor the legislative branches could change; and they empowered the

judiciary to decree conformance by everyone to the fundamental law, at the suit of States or citizens.

Our Constitution accordingly set up guaranties of individual rights, which could not be contravened by the legislative or executive branches of government and could be changed only by the deliberate and mature judgment of the people acting through two-thirds of the States. Boundaries between the powers of the States and those granted to the Federal Government were set up in terms which doubtless seemed to be specific and definitive, when written, but have needed interpretation as life and commerce became more complex. Rights and powers not expressly granted by the Constitution to the Federal government, were declared to be expressly reserved to the States and the people. The guarantees of the Great Charter and subsequent declarations of human rights were taken so seriously that freedom of speech, freedom of the press, freedom of worship, freedom of assembly, jury trial, the rights of *habeas corpus*, the right of persons and their homes and their private affairs and papers to be exempt from search and invasion without legal warrant, and others, were each written into the basic law of the United States, to which all acts of the legislative and executive branches of government must conform.

*The Significance of Present Pressures to Ignore or Change
"The Law of the Land"*

Now, in a time of transition, when there is pressure for expansion and departure from precedent as to the activities of the National Government, it transpires that measures and policies are initiated which are believed by many to infringe and impair some of the traditional and most valued of the guaranteed rights and liberties of individuals, and are believed to encroach upon powers and prerogatives reserved to the States and the people. The demand and desire for governmental action are deemed to have resulted in steps contrary to the fundamental law. Challenge is made of these expedients and these invasions, as violative of "the law of the land" and the guaranties of the Bill of Rights as embodied in the Federal Constitution, and also as transcending the historic distribution of powers under our Federal system.

When innovation is enacted into law, the *first* questions with us are *not*

Will it work? Will it prove to be impracticable and break down of its own weight? Will it be rejected by the *spirit* of our institutions and laws, and be disapproved by common sense and the spirit of fair play?

With us, the first question is of validity, not practicality. Often it happens, with us, that a measure is rejected by its results and condemned by the judgment of the people, before it comes to the final court — that has taken place lately, in conspicuous instances; but the distinctive feature of our system is that the Federal Courts are called upon to interpret and enforce the fundamental law, and to adjudicate the validity of legislative and executive action in the light of claimed repugnance to the Constitution. The fundamental law represents the deliberate will of the people themselves, and can be and is from time to time changed by the people in a deliberate way, if the Constitution as interpreted by the Supreme Court no longer represents their sovereign will.

In enforcing the fundamental law as it now stands, the courts are only giving effect to the deliberate will of the people against the immediate desires of legislative majorities or executive "leadership"; but it is easy to claim that the courts are thwarting the popular will. Instead of changing the fundamental law, it is proposed to take away the powers of the courts to enforce it. Those who seek this method are doubtless aware that the people would not vote to change their fundamental law, no matter how insistent has become the desire of some people to spend their time in controlling the lives and property of other people.

Economic and Social Phases of the Present Issue

These may be termed the juridical aspects of the present debate in the United States — what are its economic and social phases, likewise from a long-run point of view? Although not all would recognize or admit it, the issue may perhaps be indicated in these terms: The economic, industrial and social fabric of the United States has been builded on the principle and practice of private ownership of property, private enterprise, individual thrift, and the so-called *profit* motive for individual gain and advancement. Enlightened self-interest, with public control in social aspects, was deemed to be the proper motivating force of life and government. In recent years, some place has perhaps inadequately been made for the humanitarian, the worker for the public good or for sense of workmanship; but the profit motive was ascendant.

Now it is proposed by some to substitute a new social structure, a reconstruction of society, and to eliminate for the most part the profit motive and the ambition and acquisitiveness

of the individual, as social and economic forces, all in favour of some concept of the welfare and prosperity of the people as a whole. Individual thrift and saving are to be discouraged, and existing accumulations taken away. Private charities, private schools and colleges, private benevolences and eleemosynary institutions, and many good causes which depend on private benefaction, are to be strangled through the absorption of the resources of their donors, in the guise of taxation.

Whatever accumulations and reserves are necessary to be made for old age, sickness, unemployment, or provision for dependents, are to be made by government or by quasi-public institutions under strict governmental control and compulsion. The ability of industry under private ownership to maintain itself through periods of depression or to surmount great losses by fire, flood, or other disaster, is to be crippled, through governmental appropriation of necessary reserves. The ability of private industry to absorb unemployment is to be taken away by taxation, and "the capitalistic system" then reproached and denounced for its inability to do more.

Private ownership and enterprise are to be supplanted with nobler visions of wider, social planning. Whole regions of territory, and the lives of thousands of people, are to be transformed according to the beneficent plans of central government. Everything a man could want, as government sees it, is to be supplied to some men at the expense of many. The new art in government appears to be to promise and to give sufficient quantities of other people's money to a number of people sufficiently large to form a safe and subservient working majority at the polls. The pretence, at first maintained, that this is done for the *general* good, is abandoned, as tending to destroy the *political* efficacy of such a re-distribution of wealth by government.

The Old Stabilities Unlikely Soon to Return

Of course, I shall not undertake to debate these issues here; I only point their existence and their significance, in relation to the general plan of individual life as you and I know it. We cannot fail to see what these issues may portend.

A thousand years scarce serves to form a State;
An hour may lay it in the dust.

We may as well recognize that the old sense of stability and security does not seem to be anywhere in sight. Its return cannot be forecast. Many things will be done which many of

us do not like, and the fact that we do not like them will be of little immediate consequence. In such a period, we need to hold fast to the fundamentals, which may endure.

*To Preserve Individual Freedom is the Task of These Two
Great Nations*

I remember that as a boy, living in the westernmost county of New York State, not far from the road which traverses the portage trail over which the Indians and later the French priests and explorers at one time came from the waters of the Great Lakes on their way to the waters of the Ohio and the Mississippi, I used to go to the top of the hill which marked the divide of the watersheds. There, across Lake Erie, on a clear day, I could see the shores of Canada—the first soil I looked upon that was not of my own land. And it seemed to me, in those days, that Canada was the land of adventure and exploration, hope and high aspiration. Well, I still believe that to be true, although in a different sense.

After all, is it not true that you of Canada and we of the United States are alike concerned with the realization of the individual life—not in terms of careers or goods or buildings or machines, but in terms of personal happiness, independence, security and satisfaction? If America is to be different from the Continent of Europe, then territory and possessions and all forms of collective aggrandisement must be put behind us, as destroyers of peace and security. When the masses have marched with their anthems of class revolt, and when the people have been given bread and the circus, nothing has been solved; and we return to the problem of the individual life and its free opportunities. An economic individualism does not encompass the problem.

If in our world of tomorrow there is to be much of the pleasantness and the kindness which we have loved, anything of the leisure and the open-mindedness which make men tolerant and considerate, anything of the virtues which keep men and women gracious and well-disposed, and if the pressures of economic distress are not to engender hatreds which menace freedom and submerge the individual, I believe that these two Nations of North America must go forward, side by side, in friendly and enlightened understanding, intent on providing and preserving in America the highest opportunities of individual life. If anything distinctive and enduring as an American ideal of life and its values is to be developed on this Continent from

the varied and invaluable racial strains which enter into our being, then your experimentation and your experience will make a contribution no less important than that of the United States.

We may truly say, with the vision of the late Mr. Justice Holmes :

When men have realized that time has upset many fighting faiths, they may come to believe that the ultimate good desired is better reached by *free trade in ideas* — *that the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that the truth is the only ground upon which their wishes safely can be carried out.
