

THE CANADIAN BAR REVIEW

VOL. XIX

MARCH, 1941

No. 3

"WHERE OUR PATHS CONVERGE" *

I rejoice to find myself in the beautiful city of Omaha, but what difficulties I had to encounter! Fortunately some two months ago I made application for a passport. From that moment it has been continual warfare. I have answered hundreds of questions, during which operation I have repeatedly told the story of my life — or as much of it as I dared to tell! Last week a further inquiry from the National Capital was received asking for particulars respecting distinguishing marks. I replied that I had a substantial proboscis that was handed on by barbarous ancestors to their equally barbarous descendant. The next direction was that I send forthwith two photographs, one full face and the other profile, with instructions that I should await their diagnosis of my physiognomy, which diagnosis was "that the profile showed a strong tendency to criminality" and "I must be finger printed forthwith." I have now been immortalized in the Rogues' Gallery where I shall no doubt find some boon companions.

But half—and only half—of my heavy task was done. I now realized that I must have some American currency. I applied to my bank for \$100. Thereupon application was made to Ottawa. I presume the Minister of Finance went into solemn conclave with his advisors, the Governors and the Directors of the Bank of Canada advised, the Chancellor of the Exchequer of the United Kingdom consulted, the Banks of England and Scotland informed, and a caution sent to the Secretary of the Treasury at Washington. Finally I was advised that an amount of money so great could not be authorized because I was going to the United States on pleasure. I informed the authorities at Ottawa that my trip to Omaha would be a great pleasure for me, but in all probability great pain for my audience. With this they agreed so emphatically that I found it rather

*An address delivered to the Nebraska State Bar Association, December 27th, 1940, by Hon. Mr. Justice MacKay, representing the Canadian Bar Association.

disconcerting. Finally, however, authority was granted for \$75 in American currency, with the provision that if I live which they thought unlikely and return to my own dangerous country, the balance then remaining must be handed to the Foreign Exchange Control Board. I find, however, that the American exchange for which I worked so hard is not legal tender. I find that the authorities at the Fontenelle Hotel will not accept it, and I can only conclude that my genial hosts have suspended, as far as I am concerned, the operation of the chartered banks in the United States of America for the remainder of my stay in this great country.

In the year 1887 General Fitz-Hugh Lee, then Governor of Virginia, when speaking in Philadelphia, told this interesting story:

Mr. and Mrs. Washington, the parents of "the Father of his country" found that their supply of soap had been exhausted, and decided to make some locally. They secured the ashes and fat and gave the servant the requisite instructions. After some hours the servant reported that there was something radically wrong. The old folks proceeded to investigate and found that they had actually used the ashes of the little Cherry tree that George had cut down with his hatchet, and there was no *lye* in it.

While I am most grateful for the generous introduction of my honourable friend, I am not so sure that it is as free from that necessary ingredient in the manufacture of soap, as the ashes used by the Washingtons.

I feel confident that you will acquit me of affectation when I assure you that I am most deeply sensible of the generous warmth with which you have received my undeserving name. I should indeed be unable to sustain the heavy burden of my gratitude were it not for the fact that I am pleasantly aware that this gracious greeting honours a sentiment which in turn honours you, in which my humble personality is lost and the high compliment to the Bench and Bar of my country made clear.

Happy am I indeed that your invitation has brought me to the great State of Nebraska, and consequently to a greater appreciation of her vast agricultural acreage, material excellence, and this beautiful city which, if I apprehend rightly, and I think I do, is but fit setting for the loyal, cultured and progressive qualities of her citizenship. Strange, indeed, it would be if a lawyer visiting this mighty Union should not have his intellectual perception quickened and his moral courage fortified by

such an experience, drawing inspiration not only from this representative and highly intellectual and cultured group, but invoking the memory of those immortal workers in our profession whose lofty precepts, in ringing accents, roll down through the generations that have lived since their eloquent voices were stilled in death. Intellectual giants, whose enlightened attitude towards the law, laid well and truly in the New World the foundations upon which has been reared so noble, so imposing and so enduring an edifice. The oracles of those majestic minds are preserved for our intellectual development and should be incentives to impel us to revive our spirits frequently at the fount of justice. The purity of motive, exalted virtue and intellectual power of that "Day Star of the American Revolution," Andrew Hamilton; the love of truth, the professional learning, the humanity and intellectual power of Marshall, the mental acumen and innate judicial faculty of Story and the incomparable sagacity of Daniel Webster, whose "weighty language" in the words of Rufus Choate "whose sagacious warnings, whose great maxims of Empire, will be raised to view and live to be deciphered when the final catastrophe shall lift the granite foundations in fragments from its bed."

I salute you my American brethren, not only as co-heirs of a common legal heritage, but as joint guardians in a vital sense of the basic rights and liberties of mankind.

North of the 49th parallel lies the land of a brave and intrepid people, developed for a century and a half under slightly different institutions, but with you, lovers of liberty and haters of oppression. Can we forget that for over one thousand years our blood, our laws and our fortunes were the same? Our common ancestors tore from tyrannous Kings and corrupt Ministers the great Charters which form the common basis of our legal heritage. Our ancestors thought it not unworthy to fight; even to embrace the sharpness of death and the bondage of the grave in order that we, their descendants, might reap the inestimable fruits of freedom — fruits which *you* by your courage and unquenchable love of liberty vouchsafed for this great Nation at Valley Forge, Yorkton and Bunker Hill. But from whom did you receive the inspiration? From Magna Carta of Runnymede, from the Crusades, from the Wars of the Roses, from Agincourt, Crecy, from the Wars of the Commonwealth and even from the struggles at Quebec and Louisburg.

Gentlemen, in France and in Flanders I have with you trod and retrod ground that is hallowed and sanctified by Canadian

and American blood, and yet to-day, although that land is under the heel of the stern and watchful oppressor, its majestic memorials stand silent witness to the matchless valour of North American hearts and the deathless glory of British and American arms, proclaiming to the dictator and the tyrant that strong sons of strong fathers had not forgotten the way of duty in defence of their heritage. Neither when, in the steep ascent of war, the path of duty was marked not only by service but by crimson stains, were they struck with more of fear than was needed to complete their last "full measure of devotion."

I salute my living comrades in these United States and in the majesty of silence honour the memory of the heroic fallen.

To-day we are face to face with a monster who seeks to destroy our institutions by first destroying us.

The United States of America enjoys a noble tradition of having never engaged in, nor encouraged a war except for liberty. To-day the contribution you have made, are making, and if I understand rightly the temper and genius of your people, will continue to make in the great conflict, may very well mean victory or defeat, which in turn means freedom or servitude and a world driven back to the barbarism of the Dark Ages.

In Canada we may have been slow to recognize the full extent of our peril, but now, with determination and a grim enthusiasm, we have accepted the challenge to freedom. We are bearing cheerfully a crushing burden of taxation, and forfeiting for the time many privileges—even the joy and delight of visiting this country necessarily is denied to us other than on special occasions and for very short periods.

We prefer, however, in Tawney's pregnant phrase, "dying on our feet to living on our knees" and in this determination we are fortified and encouraged by the abiding assurance that, on this continent at least, stands behind us the might and majesty of the freedom-loving people of your great country. It is here that we find the insuperable spirit of America! The love of liberty and independence that has throughout her history made her a constant and unswerving champion of democratic institutions.

While surely we cannot claim that it is perfect, Democracy seems to be the best expedient in the way of Government designed by the brain and fashioned by the hand of man. Its purpose and mission is not to annihilate distinctions and inequalities for, alas, that is impossible, but so far as it is humanly

possible to compensate them, thereby bringing those inequalities reasonably into balance. But we must not stop at making the world "safe" for democracy. We must make the people "fit" for democracy. This involves a heavy task, a decentralizing of authority and a people sufficiently conscious of their duty to discharge it intelligently and nobly. Democracy will be more secure when we realize to a greater degree that national freedom is not incompatible with national discipline, that liberty *can* be reconciled with order. It may be that we have over-idealized democracy. It also may be that democracies have changed from a Government of the people, by the people and for the people, to a Government by a political party for a political party. Is it not of the very pith and substance of democracy that the country's welfare should be placed before that of political parties? It may be that we have failed to understand the new and adverse forces that were rising throughout the world, and failed to co-operate in preventing them from attacking the democratic system of economic, social and political freedom. Totalitarian states are at least visibly efficient, and efficiency appeals to most people. We want nothing of totalitarianism. We believe that democracies can be operated to give greater efficiency, greater effectiveness and greater comfort to mankind than any other political system. Can we liberate our leaders from party bondage? Can we reduce the awful load of the machinery of government? Is our franchise too wide? Are the unfit and unworthy to have equal rights with those who work and produce and pay?

In the midst of an evolving world adjustments must be made to meet ever changing conditions. May I express this fact in the thought-provoking words of James Russell Lowell :

New occasions teach new duties
 Time makes ancient good uncouth
 They must upward still and onward
 Who would keep abreast of truth.
 Lo ! Before us gleam her camp fires
 We ourselves must Pilgrims be
 Launch our Mayflower and steer boldly
 Through the desperate winter sea
 Nor attempt the Future's portal
 With the Past's blood-rusted key.

Gentlemen, our healing is not in the storm or in the whirlwind. Nor is it wholly in forms of Government, but will be revealed by the still small voice that speaks to the conscience and the heart, prompting us to a wider and wiser humanity.

Brethren of the Nebraska State Bar, we of the English-speaking race cherish no theory of racial superiority. Destiny may ordain leadership but in that realm we can but humbly obey the Inscrutable Decree. I submit that there was never a time when the English-speaking countries were so conscious of their *interdependence* or when that interdependence was so ethically based as at this distressing and perilous moment.

This view is based on the unassailable postulate that principles of law are not national, they are universal. That the eternal verities of justice are expressed by evolving law and that no war can be justified which has not for its purpose the abolition of lawlessness from the earth.

It is well, therefore, that we, the preferred beneficiaries of the Common Law, should recognize its beneficent mission in the realm of ordered progress. It is on the one hand a respecter of tradition which, through the ages in every land, has contributed something to the inheritance of mankind, and on the other hand in the words of a great American jurist "is not enclosed in a monumental past but feels the impact of modern ideas, is receptive of new light, and in short moves with the times." It is "responsive" in the language of Shaw of Dunfermline "to newly emergent conditions of life and thought so as to prevent in the interpretation and construction of contracts and settlements the dead hand from cramping the living spirit." In its main provisions it is an expression of the inborn sense of how an honest free-born people wish to have their affairs conducted. "Reason is the life of the Law." A living and masterly instrument working always through history towards the light and in every age bringing comfort and ordered progress to the people. Moreover its elasticity and universality commend itself to evolving life and thought.

Recognizing our joint heritage of law, of the love of liberty, the hatred of oppression, and knowing that at this very moment the destinies of the world, the fate of democracy, of civilization and christianity are trembling in the balance, I ask: If and where our paths of conviction and action converge? I submit the answer is in the affirmative and at least fourfold :

(1) When and wheresoever our way of life and the institutions upon which it rests are arrogantly challenged and dangerously imperilled by the assaults of absolutists and tyrants, our resolve is: They shall not pass.

(2) When we are ordered to exchange the eternal verities and life-giving principles of the New Testament for those of *Mein Kampf* we say: "Herr Hitler—By the Europe you devastated and by the heaven you outraged, God forbid!"

(3) When the wicked fiat of a haughty tyrant ordains that might shall crush right, the strong may persecute the weak and vice enslave virtue, we conjointly and tumultuously decry such infamy and declare the inviolability of the sovereign rights of the people to be governed by and with their consent; dedicating the majesty of justice to the service of mankind and binding all together in the unity of those ethical everlasting standards which are the very attributes of righteousness.

If there is one human force that cannot be withstood it is the banded intelligence and responsibility of free peoples, the majesty of responsibility and intelligence unified for the protection of its life and the preservation of its liberty. It is just as certain that before such a force Hitler and all he stands for should fall as that night should fade in the kindling glories of the morning sun.

(4) We must see to it that when we are concerned about the rights of self-determination for others, we do not allow a weakening of our original lofty purpose or the desertion of the immortal principles on which the Governments of our respective countries are based; in other words, to permit an autocracy or bureaucracy to form and develop within our respective jurisdictions. May I in this connection quote the concise, wise and comprehensive words of Winston Churchill :

We proclaim the depth and sincerity of our resolve to keep vital and active, even in the midst of our struggle for life, even under the fire of the enemy, those Parliamentary institutions which have served us so well, which the wisdom and civic virtues of our forbears shaped and founded, which proved themselves to be the most flexible instrument for securing ordered, unceasing change and progress, and which while they throw open the portals of the future carry forward also the traditions of the past.

Ladies and gentlemen, we must guard well the title deeds of our inheritance of freedom.

As a Scot I feel that we of the Scottish race have made a real contribution to the consummation of American Independence. In Bancroft's *History of the United States* I read :

The first move for dissolving all connection with Great Britain came not from the Puritans of New England, the Dutch of New York, or the planters of Virginia, but from the Scottish Presbyterians of North Carolina.

The voice which the Pilgrims, the Dutch and the English from Virginia followed was an echo from the heather hills of Scotland, a people to whom freedom and independence is the very breath of their nostrils, and that great charter of responsible Government,

the greatest political work that ever was struck off at one time by the brain and purpose of man"

is substantially the work of that illustrious Scottish-American, Alexander Hamilton.

The glorious privilege of independence is the very warp and woof of our race but it was Burns, the poet of independence, who was also the poet of brotherhood. Is it not true that independence and isolation are sometimes mistaken each for the other? But they are essentially and assuredly different in every respect.

Independence is the defiance of domination.

Isolation is the defiance of brotherhood.

Perhaps for a moment you will permit me to pay a tribute to the invincible purpose and unfaltering faith of the beleaguered British Isles, and especially to the English who have thus far borne the most determined assaults of the war.

With me you may have been, in the past, at times galled by the Englishman's too great a tendency to self-esteem, his too little disposition to regard the feelings, the habits and the ideas of others. But have these minor imperfections not been lost in an ocean of admiration for England's unquenchable love of liberty and independence that has, in freedom's hour of peril, made Britain freedom's unconquerable champion? Who has not been thrilled by the enterprise and dogged determination of Dunkirk? The indomitable resistance and the stout hearts of the people of London, the unflagging zeal and daring of her young aviators and the courage and unceasing vigilance of her navy?

Britain says: "If in the fight against tyranny and oppression we are defeated, we shall at least leave a memory which will inspire other men to fight another day with better fortune." This is the indomitable, invincible, unassailable spirit of an heroic race. In the burning eloquence of the Grecian patriot, Pericles — Greece, whose sons to-day are proclaiming to the world that they have not forgotten the principles of democracy, whose infant cradle they rocked with unerring hand over 2000 years ago—

Take these men for your examples. Like them remember that prosperity can be only for the free and that freedom is the sure possession of those alone who have the courage to defend it. Heroes have the whole world for their tomb. Their bodies sleep in the ground but their souls live on in other lands and other years woven into the fabric of other men's lives.

This, gentlemen, is the spirit of Britain to-day and such a spirit cannot be conquered because it is unconquerable.

Gentlemen, the Axis cannot win. Pale-faced fear in difficulty is foreign to the English-speaking people to whom there is no such word as "fail".

All our past proclaims the future
Shakespeare's voice and Nelson's hand
Milton's faith and Wordsworth's trust
In this our chosen and chainless land
Bear us witness,
Come the world against her,
ENGLAND YET SHALL STAND!

What is Britain's glory? It is not Agincourt or Crecy or Waterloo. It is Canada, Australia, New Zealand and South Africa made independent partners in a great Commonwealth, and the very suggestion of vassalage uprooted. Britain's "chief glory" may very well be this mighty nation you have carved from the ocean and the wilderness; its people legatees of the all-consuming love of liberty which burns so fervently in British breasts and which is gaining momentum attaining toward perfection in this "the land of the free and the home of the brave."

Britain's imperishable renown also is in science—throttling the plague in Calcutta, administering order in Bombay, planting industrial civilizations from Cairo to the Cape, in building roads and bridges and bringing civilized progress to Egypt and a thousand other beneficent activities; and that which had been England's fame has also been her infinite profit, so sure is duty golden in the end.

My friends, I rejoice in this occasion to meet you in the spirit of the Common Law, which makes liberty commensurate with and inseparable from American soil.

As a guest I thank you for your generous hospitality and gracious welcome. As a lawyer I shall labour with you to consecrate the majesty of the law to the service of humanity. As a brother in arms in the World War I cherish a lively and inspiring memory of your dauntless valour and high devotion. As a lover of liberty I salute you in the name of the centuries of expanding freedom in the past and all the hoped-for span of ordered liberty

that lies ahead, ushering in, may we fervently hope in this war-wasted, war-weary and war-distracted world, the dawning of a better day and nobler destiny than ever was wrought by the sword or sought at the cannon's mouth.

When the sun or the light or the moon or the stars be not darkened, nor the clouds return after the rain.

As an admirer of the triumphs and glories of our English tongue, I greet you as a brother—

For stronger far than Hosts that march
With battle flags unfurled,
It goes with Freedom, Thought and Truth
To rouse and rule the world.

To rouse the world to its supreme responsibility—and to rule it by and with the consent of the governed.

Revering that quality of integrity, rectitude and moral grandeur which we hope obtains in all lands "if Shakespeare's tongue be spoken there and songs of Burns are in the air", I pray that He who is peculiarly the God of the heroic and self-sacrificing will cherish and protect the memory of those illustrious builders who so securely laid the foundations of this great nation and perpetuate in this and succeeding generations the inspiration of their handiwork—and as one North American to another, I clasp your hands and hearing the beating of your approving hearts, invoke in these days of destiny, as yet unrevealed, a closing thought gleaned from the immortal Burns and the illustrious Emerson:

Be brethren still to brother true
Among oursel's together.
For what avail, the plow or sail
Or land or life,
If freedom fail ?

J. KEILLER MACKAY.

Toronto.