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ROMAN LAW
AND THE BRITISH EMPIRE

by

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One of a series of lectures commemorating
the 150th anniversary of the University

Delivered at
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When your President asked me to participate in a programme to celebrate the hundred and fiftieth anniversary of the University of New Brunswick I found it impossible to refuse, since it is an institution particularly close to my heart as the first to give me an honorary degree and since your President is an old and persuasive friend. I shall not in this gathering, where his reputation stands so high, describe his methods of persuasion, not that I shall soon forget them. I have perhaps a further reason since New Brunswick is an ancestral home from which my forbears with others moved to Upper Canada.

With characteristic generosity under the circumstances, the President has given me complete freedom in the selection of a subject. It seemed fitting that I should be concerned with a country which has played an important role in the life of this institution, namely the United States. This province was created as a result of strategic plans of defense on the part of the second British empire against the colonies which had rebelled. Nova Scotia was divided into three separate areas, Cape Breton, New Brunswick and Nova Scotia in order to provide separate nuclei around which defensive measures might be mobilized. Loyalists migrated to New Brunswick and kept alive the memories of hostility to their native land. Christopher Sauer, a prominent figure in the history of printing in Pennsylvania, started the first newspaper in New Brunswick. This university began as your calendar states through the interest of loyalists in the education of their children and, in the words of the memorial in 1785, the "necessity and expediency of an early attention to the establishment in this infant province of an academy of liberal arts and sciences." It would be ungracious of me to elaborate on the contribution of universities to the Maritime provinces and to western civilization, since that has been done so ably and so fittingly by the late Sir Robert Falconer, the late J. C. Webster, Professor D. C. Harvey and your own professor A. G. Bailey, Mrs. C. P. Wright and others.

The late James Bryce attempted to throw light on the problems of the British Empire by emphasizing parallels with the Roman Empire and in particular suggesting the contributions of Roman law and of common law to the development of

the respective empires. [1] At the very period in which Bryce was revising his essays for separate publication in 1914 the British Empire was undergoing crucial change. Since they were published the development of the Commonwealth after the first world war in the Statute of Westminster and the changes in status of Ireland, India and Newfoundland point to a need for reconsideration.

The name of Bryce will always be associated with the results of the first major change in the Empire in *The American Commonwealth*. The American Revolution was a result of limitations of common law which have been discussed by a large number of English, American and other scholars. Prof. C. H. McIlwain has described the problem of common law in the seventeenth century when parliament reflected the influence of force in the substitution of the Cromwellian regime for that of the Stuarts. The absolute power of the Tudors was replaced by the absolute power of parliament and both were regarded as encroachments on common law. Sir Edward Coke defended the position of common law as stated in the Bonham case in 1610. "When an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void." But such limitations were not recognized by parliament under Cromwell or in the establishment of legal supremacy in the Revolution of 1689. The English colonies in North America had been established in the period before parliament had assumed this position and were unable to accept its implications. James Otis restated the position of Coke, and the Assembly of Massachusetts on March 2, 1773, refused to recognize the supremacy of Parliament. "We conceive that upon the feudal principles all power is in the king; they afford us no idea of parliament." Great Britain had seen the evolution of the supremacy of parliament at the expense of common law, and the colonies, determined to protect the position of common law, introduced a constitution designed to check the power of legislative machinery.

It will not be necessary to rehearse the steps taken by Great Britain, and the colonies remaining within the empire, to develop a constitution which would evade the disaster of the first empire. The Maritime provinces succeeded in building a second empire from the wreckage of the first in which responsible government was achieved. The common law came into its own with a recognition in Great Britain of the limitations of parliament and recognition in the colonies that the elaborate machinery of the United States to protect the common law was unnecessary. In Great Britain the effects of the common law were evident in the Reform bills and in the extension of the franchise in the 19th century. Elements in the constitution opposed to its effective operation were steadily weakened as the House of Commons increased in power at the expense of the House of Lords. Long and bitter struggles characterized the change and still characterize it but the legislation of 1911 definitely brought the power of the Lords to an end. "The House of Commons after putting under its feet the Crown and the House of Lords, has in its turn been put under the feet of the caucus." [2]

The changes within Great Britain had profound implications for the Empire. Indeed the legislation of 1911 was directly linked to the problem of Ireland and the possibility of establishing Home Rule. Defeat of the Conservative party was followed by opposition to the Liberal party supported by Irish and labor members first in the House of Lords and finally in Ulster. The unsavoury story in which the army joined hands with Ulster leaders and leaders of the Conservative party, described by Prof. M. J. Bonn [3] as the beginnings of fascism in Europe, need not be retold at this point. For the first time parliament was openly and to some extent successfully defied by force. During the first world war Irish opposition became more determined and led to the Easter rising of 1916 and eventually to the treaty and the Irish republic. A common law parliament had become impossible in the face of obstructionist tactics which developed from the Irish question.

It has been suggested [4] that British imperialism succeeded in areas in which native populations were eliminated as in America and Australia or in areas in which a bureaucracy could be established as in India and failed in areas in which a strong cultural influence dominated garrisons of settlers as in Ireland, but the suggestion overlooks the role of common law. Men trained in common law such as Gandhi were quick to see its possibilities in the protection of the rights of individuals. After his training in London, Gandhi carried on an effective campaign in South Africa on behalf of Indian immigrants, and with the techniques developed in South Africa contributed powerfully to the establishment of India and Pakistan. A common law basis implied concern with local customs and facilitated the development of the British Commonwealth by peaceful means or by minor rebellions.

We have perhaps said sufficient to indicate that the British Empire under the influence of common law has pursued a vastly different course from that of the Roman Empire. We may now inquire more directly into the characteristics of common law. Various writers have discussed the origins of common law in England to show that it consisted of customs

which existed in unwritten form and that it was necessary to discover these customs through the use of the jury system and the calling together of representatives of different communities in parliament. The words writ, oath, witness and possibly gallows did not originate in France. Parliament was concerned with the protection of individuals and not with the provision of privileges enabling members to abuse individuals outside its walls. In the words of Pollard, "A foundation of common law was indispensable to a house of common politics." Parliament until the rebellion of the seventeenth century was pre-eminently judicial rather than legislative. [5] With the increasing importance of legislation particularly after the reform act of 1832 lawyers continued to play an important role in parliament in the making and in the interpretation of statutes. Common law countries favour the election of lawyers as legislators to the exclusion for example of journalists, in contrast with Roman law countries which seem to favour journalists as legislators. In common law countries the state became a part of customs and traditions and the revolutionary tradition was weakened. Marx's withering of the state had reference to Roman law and not common law countries. Common law traditions which made politics a part of law and emphasized the relation of the state to law implied an absorption of energies in politics and a neglect of the cultural development which has characterized Roman law countries. The danger of imposing common law traditions on Roman law countries has been evident in the difficulties of the parliamentary system in those countries.

The implications of the dominance of lawyers are suggested in remarks by Sir Henry Taylor.

> "Of law-bred statesmen (if they have had practice at the bar) the peculiar merit is a more strenuous application of their minds to business than is often to be found in others. But they labour under no light counterpoise of peculiar demerit. It is a truth, though it may seem at first sight like a paradox, that in the affairs of life the reason may pervert the judgment. The straightforward view of things may be lost by considering them too closely and too curiously. When a naturally acute faculty of reasoning has had that high cultivation which the study and practice of the law affords, the wisdom of political as well as of common life will be to know how to lay it aside, and on proper occasions to arrive at conclusions by a grasp; substituting for a chain of arguments that almost unconscious process by which persons of strong natural understanding get right upon questions of common life, however in the art of reasoning unexercised.
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> The fault of a law-bred mind lies commonly in seeing too much of the question, not seeing its parts in their due proportions, and not knowing how much of material to throw overboard in order to bring a subject within the compass of human judgment. In large matters largely entertained, the symmetry and perspective in which they should be presented to the judgment requires that some considerations should be as if unseen by reason of their smallness and that some distant bearings should dwindle into nothing. A lawyer will frequently be found busy in much pinching of a case and no embracing of it—in routing and grunting and tearing up the soil to get at a grain of the subject;—in short, he will often aim at a degree of completeness and exactness which is excellent in itself, but altogether disproportionate to the dimensions of political affairs or at least to those of certain classes of them." [6]

As has been said of many lawyers all acts are to them free and equal. An elementary discussion of the conditions under which lawyers work in practising at the bar from a lay point of view may suggest more clearly the important role of the legal profession. The arrangement of the court room emphasizes power and authority such as characterize proceedings involving life and death. The bench sets off sharply the position of the judge, and below him the witness stand, the bar for opposing counsel, an inner bar for His Majesty's counsel learned in the law, and beyond seats for the public. The tradition of awe inspired by these arrangements, insistence on the dignity of the court and rigid prohibitions against smoking, chewing gum or other distractions such as may include the reading from a manuscript by counsel inspire a concern with the search for truth and justice.

Encroachment on these traditions has been evident in the demand for photographs for the press and in the interest of criminal lawyers in publicity. The court has possibilities of advertisement for young lawyers. Even members of the supreme court appear to relish the appearance of their photographs in the press. But while lawyers display a keen interest in the details of crime such as those appearing in the press they tend to dislike specialization in criminal law and to prefer a mixed practice of civil and criminal law. Concentration on criminal law is apt to be thought of as having a deteriorating effect on character and reputation.

Procedure involves dependence on the oral tradition in eliciting testimony from witnesses who have been placed under oath to give the truth, the whole truth and nothing but the truth. Facts are determined by examination and cross-examination and re-examination of counsel. Opposition between counsel is designed to check and to produce evidence

from which the judge or the jury must decide the case. When evidence has been elicited and established argument to establish the law suited to the facts follows. Respect will be shown in language and demeanour to the bench—cases of dispute with the bench always being prefaced by the words "with great respect." The maxim handed on to young members of the bar "never talk down to the bench" reflects the egoism of the bar and the necessity of emphasizing the place of the bench. The significance of the oral tradition is evident in the possibility of checking extravagant statements made by counsel or by witnesses. With a background of development prior to the spread of reading and writing, the tradition of the importance of oral rather than written evidence has persisted in the procedure of the court and in the jury system. The common law has consequently been responsive to the opinion of all classes of society including the illiterate. This contact has possibly been more effective than that of the church and religion since it is without the elaborate ceremonial and the written scriptures of the latter though it musters support from religion in requiring testimony sworn on the Bible and may exact severe penalties for perjury. English courts will insist on the appearance of living authorities rather than extracts from text-books written by them on the assumption that such an authority may have changed his mind after writing the book. In North America the difficulty of transporting a living authority over long distances has favoured a whittling down of the English rule and increasing reliance on the text. The advantage of the oral tradition shown in its sensitivity to constant change even during the course of the trial becomes evident in the exposure of weaknesses in evidence and in argument. The character of witnesses is brought out in detail and the role of intent more easily established. In the preparation of cases counsel must study intensively the character of his own and other witnesses and estimate strong and weak points if he is to work out satisfactory tactics in presentation. The common law gives great emphasis to character and to the study of character from an objective point of view. Its success is linked to individualism and necessitates a concern with the influence of the state on character and of character on the state. There is danger of forgetting the words of the Lord Chancellor (2 Eden. 113) "Necessitous men are not, truly speaking, free men." [7] "It is precisely because the force of circumstances always tends to destroy equality: that the force of legislation should always tend to maintain it." (Rousseau).

I am tempted to insert an editorial by Albany Fonblanque, written in England in the middle of the 19th century.

> "It was but the other day, however, that a most tender and touching sight was presented in Lord Carlisle's Court of Inquiry—Mr. Serjeant Wilkins weeping for Mr. Ramshay, his learned bewigged head bent to the table 'like a lily borne down by the hail'. Perhaps, prosaically, it was more like a cauliflower on a block, but let that pass. What we have to consider is the zeal, or the fee-compelling-force, which can bow a wigged head to the table, and make the eyes overflow with tears such as either genuine pity, or genuine onion, elicits—tears such as learned serjeants shed. The eye that so weeps, however, must have seen a fee. An unfeed eye would on a similar occasion be as unmoved as a stone. The fee and the feelings go together: the word feeling, in legal diction, being derived from fee. What the precise charge for weeping is we do not pretend to know; nor whether it is set down in the brief as an extra, like consultation, or a refresher: but of late years we have had several exhibitions of this black grace. Chitty wept for Thurtell, and Fitroy Kelly for Tawell, and lastly Wilkins for Ramshay. Sweet sensibility! says the tender-hearted reader; but how is it that this same sensibility of the learned is so capricious, and that the same wigged man, who blubbers over one client so affectingly, will throw another overboard without a hesitation or a scruple? Why make fish of one and flesh of another? Why so strain the duty of advocate and client in some show cases, and loosen it in others, as we see in this example?
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> "The complaisant husband who had napped during Caesar's visits, on finding that the same somnolency was expected from him by another gallant said, 'I do not slumber for everybody'. Mr. Serjeant Wilkins does not sob for everybody: but in common fairness and honesty he is bound to explain the rules of his service or disservice to his clients, specifying for which of them he goes through thick and thin, and which he throws overboard." (1851) [8]

In stressing the importance of the oral tradition it is necessary to keep in mind the role of the written and the printed tradition. In England courts are more jealous of their position and check discussion by newspapers when cases are *sub judice*. The dangers of extravagant publicity become acute when members of the jury may have come under the influence of public opinion reflected in the press. A more subtle problem arises with the spread of mechanization in reports of proceedings of the court. Since questions and answers are phrased in relation to a sworn record which may become the basis of consideration and decision by the bench they will tend to blur the sharp impressions characteristic of an oral tradition. The oral tradition is carefully warped in relation to the demands of a written or stenographic tradition. A concern with the record implies an interest in a type of question suited to reading and a neglect of the transient

impression of the spoken word. The tendency to concentrate on the record has an advantage in that it enables the bench to study the case in a dispassionate and objective fashion but a disadvantage in that it enables the bench to delay reaching a decision and perhaps encourages continuance on the bench of men who by age or inclination are reluctant to appreciate the importance of promptness in the administration of justice. But there may be warrant for the remark that truth will out even in an affidavit. The legal profession in itself has an important influence on the administration of justice. Counsel are constantly alert to the artistic character of work done by members of the profession and are continually engaged in the appraisal of respective capacities of fellow members and of those of their ranks appointed to the bench. The essentially feudal character of the legal profession is evident in references to my lord, my friend or my learned friend. Style has become more prosaic and matter of fact and even conveyancing can perhaps no longer be described as "a jungle of antiquated fooleries kept up by the pedantry and interest of those who profited by it." [9]

The clashes between opposing counsel bring out sharply the competition in ability. Each interest appearing before the court is obsessed with its own advancement and becomes extremely critical of counsel in cases of defeat. Courtesies between members of the legal profession temper the acerbities of conflict between interests and impose a severe restraint on bitterness. The appearance of conflict in the courts will meet the demands of interested parties and permit the courtesies of the profession outside the court. The protection of the courts and the interest of counsel in clients ensures that questions of fact of an embarrassing character will be brought out but the relative capacities of counsel are apt to be reflected in the size of fees paid to counsel and in the ability of interests to pay fees. Success will depend on the ability of counsel but also on the size of the legal firm. A large firm acquires enormous resources in the specialized knowledge of its members and its ability to attract energetic and able young juniors. The demands for intense industry can only be met by younger men and explain the general impression of relatively short lives in the profession. The advantage of the large firm has become more evident in the enormous increase in legislation and in the numbers of digests, indexes and abridgements of reports of cases. The large amount of printed material has been further increased by the production of text books, commentaries and the like and the growth of black letter law. Lawyers tend to become lazy with the increase of indexes and digests, to neglect a reading of cases with thoroughness and system and to demand more indexes. Large earnings assume an enormous importance in the administration of law. Ability is maintained in the bar and restricted on the bench which is apt to be impressed by counsel capable of securing large fees. There appears to be a tendency for large companies to secure protection in legal counsel and for counsel to be able to win large fees in successfully protecting them. Law tends to favour those earning large fees and to have a commercialistic bent especially with need for an expensive library and the use of abridgements. The spread of printing weakens the oral tradition. The increasing importance of the written mimeographed and printed tradition has been accompanied by a decline in the position of the courts and changes in the character of law. [10]

Executorships of wills have largely gone to trust companies and account collections to collection agencies. A marked increase in the mortgage business of insurance and loan companies has led to specialization and the handling of business by larger law firms. So too corporation work has become highly specialized and has come into the hands of large firms. Practice of law in relation to automobile accidents has fallen into the hands of lawyers acting for insurance companies. Income tax law has become the concern of legal specialists who are forced to compete with chartered accountants. Labor law has become a special field. The rise of boards of an administrative character has meant a demand for specialists other than lawyers. Law has followed the shift from individualism to collectivism. Able young graduates from law schools are apt to become immediately interested in office work rather than court work to the great disadvantage of courts. Demands on the legal profession have increased with the specialization which characterizes the Western World. Cases are presented before modern courts involving a mastery of highly technical questions in a wide range of subjects. The expert appearing as a witness, whether accountant, economist, engineer or doctor must be subjected to intelligent examination and cross-examination involving a mastery on the part of counsel of the particular subject under consideration. There is a well known maxim to the effect that one should never ask a question in cross-examination of which one does not know the answer. The legal profession must maintain a profound belief in its capacity to master any evidence and to adapt all questions to the demands of the court. Counsel are compelled to concentrate intensively on particular problems and to become obsessed with a knowledge of immediate details. The common law with its emphasis on the oral tradition has perhaps a greater interest in the ascertainment of facts than other legal systems. Facts are more important than principles. Litigious procedure for example emphasizes circumstantial evidence in contrast with the inquisitorial procedure of code countries. The importance of the jury system and opposition to the use of hearsay evidence through the fear of misinterpretation by the jury stands in contrast with other systems and involves its own handicaps. For example I am told that a purchase from a department store can be proved by an appeal

to the sales clerk but not by reference to the more certain evidence of the department store's records. The advantages of the common law system with its emphasis on facts are probably evident in a society favorable to the scientific tradition and industrial development in the sense developed by Bacon. It is further evident in the emphasis of a common law society on news. Lawyers reflect the interests of newspapers in questions of the moment. These advantages assume limitations. Considerations involving continuity in time are rather neglected and the long term factors ignored. A training in law makes for a brittle, brilliant type of work. Lawyers are compelled to master the intricacies of a case and after its completion to forget it and to master the intricacies of the next case. The memory tends to be neglected, general principles to have limited attraction, and general theory to be ignored. Law is apt to become anything "boldly asserted and plausibly maintained". A neglect of the time problem implies a lack of interest in theoretical problems. In contrast the Roman law tradition in its concern with principles attracts the highest intellectual ability to the academic field and enhances an interest in philosophical theory and theoretical speculation. In turn it becomes possible to develop an interest in problems of continuity of time, though the late Justice Holmes could write "People want to know under what circumstances, and how far, they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study then is prediction of the incidence of the public force through the instrumentality of the courts.... For the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system." [11]

The capacity of large fees to attract able counsel weakens the possibility of attracting them to the bench or to political life but the bench has become attractive as a result of income tax regulations and a prospect of holidays. It has been pointed out that separation of the barrister and the solicitor in England tempers the effect of finance on the legal profession and that the combination of the two positions in the solicitor in Canada greatly enhances the impact of business and finance on the legal profession. During periods of depression with decline in fees counsel will perhaps turn more quickly to political activity. Reluctance to forego large fees in the large cities tends to favour acceptance of appointments to the provincial bench rather than the Supreme Court in Ottawa. Dislike of living in Ottawa is accompanied by the prestige of provincial supreme courts in provincial capitals. Relative absence of restrictions on age of retirement on the provincial bench as compared with the federal court enhances the attractions of provincial courts and explains to an important extent the relatively high caliber of provincial appointments. Since the salaries of judges in the provinces are uniform, appointments in the smaller provinces with lower living costs and much less business become extremely attractive. Consequently lawyers assume an intense interest in politics and premiers have become chief justices of the provinces. Politics are apt to be dominated by lawyers and to be slanted in the interest of lawyers. Appointments to the federal Supreme Court and to the provincial courts on the other hand are subject to restrictions in religion, region and language. The Province of Quebec, partly because of the importance of the civil code as well as common law, because of French and English, has been given three judges, and in turn the Province of Ontario is represented by the same number one of whom must be an Irish Catholic. The Maritimes are represented by one member and the Western provinces by two members. The rigidity of conventions in appointments reflects the power of the legal profession to defend its interests. The domination of the Liberal Party in the House of Commons, the Senate and the judiciary assumes a monopoly of legal knowledge. The effects of these restrictions will be tested more sharply with the abolition of appeals to the Privy Council and they may well prove to have serious consequences for the success of the federal system of government.

Reluctance to accept appointments on the bench because of the attraction of large fees tends to divide the profession into two groups. Appointments to the bench are essentially political and counsel less attracted to the court are compelled to recognize the importance of political activity. The second group of lawyers therefore enter parliament and have a direct effect on legislation through statutes and following a political career receive appointments to the bench before whom practising lawyers must appear. Successful practising lawyers are compelled to interpret legislation prepared by and to practise before successful political lawyers. Counsel trained in the common law tradition in parliament and on the bench are concerned with legislation reflecting a common denominator of public opinion and registering the effects of a training with an emphasis on facts. Legal training which assumes a capacity to ascertain and to master factual presentation ensures that parliament has at its command an array of ability particularly adapted to its varied demands in the enactment of legislation covering a wide variety of subjects. The effects of legal training shown in the capacity for intense concentration and the mastery of facts in a short period of time have been evident in the success of lawyers in political life. The effectiveness of legal Prime Ministers can be illustrated with reference to Lloyd George not to mention illustrations nearer home. In the words of Lloyd George "I should always feel at liberty to override the findings

of any body of experts." [12] Lack of pensions for politicians contributes to the attraction of parliament to lawyers whose chances of appointment to the bench have been greatly improved by political activity. The hazards of political life for the lay politician and the absence of political pensions accentuates the competition among lawyers for the bench or for the Senate. As has been said of the United States Supreme Court "The court is small, the cream (sometimes not very fat cream) of a profession in which the political impulse is strong." [13]

Traditions of procedure emphasizing the oral tradition in common law countries in the court and in parliament imply a background unsympathetic to the social sciences with their emphasis on the written tradition. Inclusion of courses in the social sciences in the lawyer's and of courses in law in the training of the social scientist may contribute to a solution of the difficulty and to a reconciliation between law and the social sciences but on the other hand may weaken the distinctive contribution of each. The advantages in a legal training which permits a rapid shift from the intricacies of one case to those of another are offset by an inability to penetrate problems to an appreciable depth, whereas the advantages of a training in the social sciences in the mastery of complex problems are offset by an inability to shift quickly from the intricacies of one problem to another. The long and tedious process of working through complex problems of the social sciences is in sharp contrast with the demand for swift effective argument in the law courts. Cross fertilization quickly reaches a point at which its advantages are followed by the disadvantages of cross sterilization. The type of social scientists acceptable to the courts is marked by the ability to ask questions intelligible to lawyers and to answer questions intelligible to lawyers. This type of social scientist rarely enhances his prestige among his fellow social scientists and appears eventually to lose his prestige even among lawyers who in turn become contemptuous of the complications of the social sciences. Social scientists concerned with fine spun abstractions tend to neglect a sense of proportion and the practical matters of fact with which common lawyers are obsessed. Social scientists appearing in common law courts are necessarily concerned with immediate problems and are consequently restricted in the development and application of theory. They tend to become advocates and to reflect the points of view of their employers. The longest purse will produce the best economist. The late Justice Holmes may have been right in saying that "for the rational study of the law, the black letter man may be the man of the present; but the man of the future is the man of statistics and the master of economics" [14] and that "every lawyer ought to seek an understanding of economics" but he was certainly accurate when he said that "the present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made." [15] It is the function of the social sciences and the bureaucracies to offset the effects of the obsession of common law with nominalism. The hierarchy of the law undoubtedly weakened the ecclesiastical and military hierarchies. It has been influential in the development of an effective business hierarchy which has dangers for the hierarchy of law itself. The place of lawyers in business is strengthened by their status in the courts and the place of lawyers in the courts is strengthened by their status in business.

Following these remarks on the character and implications of common law I propose to turn to a discussion of the influence of Roman law in the British Empire. The British emerged in part as a result of a balance between the oral tradition and the written tradition, between common law and Roman law. [16] The element of Roman law, especially as reflected in the canon law, which persisted after the Reformation in England was gradually reduced in importance in the British Empire and results were evident in the Commonwealth. The divine right of the papacy was replaced by the divine right of Parliament after the rebellion. Following the submergence of the concept of fundamental law which eventually precipitated the American Revolution, the written constitution of the United States was designed to restore it and to protect its position. Emergence of a federal government in a constitution which gave enormous powers to the courts involved protection to fundamental law but in protest against the divine right of parliament assumed the divine right of the United States. Without a written constitution Great Britain was able eventually to master the problem of Empire and to digest the element of Roman law or rather to cast it out into regions which left the Empire as in the United States or regions which insisted on independence and autonomy within the Empire as in members of the Commonwealth.

The element of Roman law which became more powerful in other parts of the Empire was evident in the insistence of small areas on their autonomy and divine rights, [17] in the emergence of a federal system and in conflicts over the concept ending in the United States in the war between the states. Temporarily its significance was lessened but supremacy in the north reflected the importance of the divine right of union essential to effective opposition to the divine right of states. With the return of southern influence through the democratic party the principle of divine right in the states was protected in an emphasis on the divine right of the United States expressed in such intangibles as a way of life. The pattern of federal government in the United States was followed by members of the Commonwealth notably in Canada

and Australia.

The reaction of the United States and members of the Commonwealth in their attempts to protect fundamental law has left them more imperialistic than the mother country. As we have traced the reassertion of common law in Great Britain and the decline of imperialism we must turn to its decline in the other Anglo-Saxon regions and the right of imperialism. In the English colonies in North America which became the United States, rights were protected in the constitution. Control over land within the boundary of each state remained in control of the state but beyond the boundary of the coastal states in the interior of the continent it was in the hands of federal authorities until a new state was set up and accepted in the union. Expansion across North America proceeded to the Pacific Coast and new systems of control were developed beyond the borders in Alaska, Hawaii, the Philippines and other areas. It has been said that the British Empire was acquired in a fit of absent-mindedness, but the American Empire has grown up during periods of imperialistic fanaticism marked by such slogans as *Manifest Destiny* and *54-40 or fight*, and during periods when imperialism was thrust upon her as in the Louisiana Purchase. In Canada we have seen the devices at work in various forms ranging from the fisheries disputes to protests against construction of the Canadian Pacific Railway and the duress exercised by President Theodore Roosevelt on the arbitrators in the Alaska boundary dispute. Significantly other countries are beginning to see the character of American imperialism. American publications protest against appointments of certain cabinet members in Great Britain. An American public body passed a resolution demanding the settlement of the Irish question. Shades of George III! It has been largely in response to the pressure from American imperialism that Canada has developed her own type of imperialism. Nova Scotia entered Confederation on a condition that the resources of the larger federal unit should be used to compel the United States to recognize her rights in the fisheries. Canada has no hesitation in using her influence to prevent a treaty between Newfoundland and the United States which seemed to threaten her bargaining position in the fisheries. The Act of Union was designed to enable Ontario and Quebec to develop transportation facilities which would meet American competition. Expansion of Confederation westward was designed to check encroachments from the United States. The policy of the Dominion in the development of the Prairie provinces was evident in the support of the Canadian Pacific Railway and in land policies designed to check American aggression. In resisting American imperialism we developed our own type of imperialism: its character became evident in the growing insistence on nationalism shown in the defeat of the reciprocity treaty, in the peace treaty, in the Statute of Westminster and finally in the acquisition of Newfoundland. It would not be difficult to collect a series of slogans comparable to those of the United States illustrating our imperialistic ambitions. Fittingly enough they might begin with the comment made at the beginning of the century, "The twentieth century is Canada's." In the United States the shift from an obsession with domestic concerns to foreign policy becomes apparent towards the end of the last century. The isolationism of Washington was replaced by the imperialism of McKinley; but it was an imperialism with a bad conscience and of unbelievable crudity to refer again to the tactics of Theodore Roosevelt not only in the Alaska boundary dispute but also in the Panama Canal negotiations. It was perhaps best expressed in the phrase attributed to him, "What is the constitution between friends?" Conscience reasserted itself in the reduction of tariffs on newsprint after the reciprocity treaty was defeated by Canada in 1911 and in the repeal of measures designed to improve the position of other powers especially Great Britain in the use of the Panama Canal. Rejection of the reciprocity treaty by Canada was a protest against crude imperialism as was to some extent the defeat of the Republican party in the United States. The election of Wilson, the reluctance to become embroiled in the first world war, the lofty sentiments expressed by Wilson on the entry of the United States in the first world war and the refusal to accept the League of Nations were evidence of an uneasiness about imperialistic tendencies. Such uneasiness proved in itself however to be a spur to further imperialistic concern. Loans to European countries were interpreted as debts and consequently as subject to the payment of interest and ultimate repayment. In the words of President Coolidge, "They hired the money, didn't they?" Insistence on recognition of debts strengthened the plea of debtors for loans from the United States with which interest on debts to the United States could be paid. The burden of reparations on Germany was met by various devices in Germany and without, ranging from inflation to the expedients of the Young and the Dawes plans. The great merry-go-round which began with President Harding's interest in normalcy ended with President Hoover's earnest statement that the world was in a new financial era and that technological advance was such that it could support indefinite improvement in standards of living. Unhappily not even presidential assurances were sufficient to prevent the financial crash of 1929 and the consequent depression. The whole elaborate house of cards collapsed. Great Britain went off the gold standard, Hitler came into power and Roosevelt II became President. Uneasy imperialism or uneasy isolation had not paid off. Consequently the depression was marked by a return to isolationist and domestic policies. Roosevelt II without acknowledgement to Thoreau proclaimed that the only fear we have to fear is fear. The United States was concerned with legislation designed to protect her from foreign entanglements. Isolationist policies had been evident in high tariffs notably the Hawley Smoot

tariff and had compelled counter measures in other countries notably the Ottawa agreements of the British Commonwealth. During the period of retreat Hitler began a programme of rapid expansion in Germany paralleled to some extent by a similar programme of Mussolini in Italy and by attacks on Manchuria from Japan. Great Britain became involved in a long series of manoeuvres ranging from the abdication of Edward VIII and the visit of the King and Queen to the meetings in Munich designed to delay the inevitable struggle, and to prepare with all possible energy during the delay, notably by impressing on North America a reluctance to engage in war and a determination to become involved only on extreme provocation. The results scarcely need to be detailed since we are much too familiar with the history of the war and the phases leading to our present discontents. Lessons had been learned in the first world war of which full advantage was taken in the second world war. Systems of controls had been worked out during the long period of preparation after 1934 and were immediately applied on the outbreak of war. Devices elaborated in Canada were used by American propagandists as illustrations of possible improvement in American controls with the result that Canadians reading the literature of American propagandists obtained a very superior picture of their superior virtues. In the United States the dangers of large loans to allies were avoided by the ingenious system of lend lease. As a result of the applications of the lessons of the first world war the peace has been characterized by new developments. Fear of Germany in the east and the west following two world wars has prevented the signing of peace treaties and left that country divided between various interests. Fear of a depression during a possible reconversion period from war to peace which followed the first world war until the system of American loans for repaying American debts was devised has favoured an emphasis on military expedients ranging from the Marshall Plan to the Atlantic Pact by which full employment can be assured. Militarism becomes a necessity to the continued export of goods and to continued employment. The emphasis on communism has been an important element in persuading Americans that they must buy their own business. It would be unwise for me to comment on American foreign policy but perhaps you will allow me to quote from American writers. Archibald MacLeish in an article on "The Conquest of America" in the August number of the *Atlantic Monthly* [18] writes, "Never in the history of the world was one people as completely dominated intellectually and morally by another as the people of the United States by the people of Russia in the four years from 1946 through 1949. American foreign policy was a mirror image of Russian foreign policy. Whatever the Russians did, we did in reverse." H. Ickes in the *New Republic* [19] wrote "we have been subjugated by Russia because of our fear of Russia." "I thank God that Roosevelt is not here now to see a greater and a stronger America not on its knees but on its hands and knees grovelling before dangers of its own imagining." The outside can perhaps see more clearly than these writers the truth of their remarks in the work of the Committee on Un-American Activities, in the reign of terror introduced as a result of a revival of a system of informers in ex-communists' rackets, in trials and penalties and in rumours of suicides such as one heard in the stories from Germany and Italy. Bertrand Russell has described totalitarian countries as condemning people to lives of perpetual enthusiasm. In turn we seem to be condemned to lives of perpetual hate.

Repercussions of these developments have been strikingly evident in academic life in Canada. If a member of a staff of a Canadian institution wishes to take advantage of even a temporary appointment in the United States he must choose his relatives and his friends with much greater care than an American citizen. Presumably he must not belong to a party such as the C. C. F. or be involved in any discussions which might make him suspect as a threat to the American way of life. A Canadian citizen may not only be refused admission to the United States but the fact may be drawn forcibly to the attention of the public in American publications. Freedom of speech and of the press has not only been weakened directly as a result of American influence but indirectly as Canadians yield to the acceptance of standards imposed by the United States. The academic world will not overlook an attempt to humiliate its most brilliant scholars by American immigration officials nor will Canadians tolerate affronts to their pride at its most sensitive point. Freedom has been perceptibly narrowed in Canada as a result of American hysteria. In 1950, the middle of the twentieth century, a holy year, surely the lowest ebb in any civilization has been reached when it is possible to threaten the lives of thousands of people with atomic bombs, with scarcely a protest in the interests of common humanity. Fortunately we can still turn to Great Britain and Europe. Scholars turned back at the American border have felt much satisfaction at being given honorary degrees by British universities. But everyone must be disturbed by the appearance of the problem of the American refugee. The imposition of oaths for teachers has involved profound disturbances to American academic life and led to a concern of American scholars in appointments outside the United States. The dangers of using militarism as a device for maintaining full employment shown in American policy as a mirror image of Russian policy are shown more sharply in a mirror image of Russian policy such as we have in Canada. Ideologies are the fig-leaves of militarism. T. S. Eliot has referred to "a true satellite culture as one which for geographical and other reasons, has a permanent relation to a stronger one," [20] and to the reasons against consenting to its complete absorption into the stronger culture.

The first "it is the instinct of every living thing to persist in its own being"; the second "that the satellite exercises a considerable influence upon the stronger culture; and so plays a larger part in the world at large than it could in isolation." "The survival of the satellite culture is of very great value to the stronger culture." [21] He proceeds to suggest "that both class and region by dividing the inhabitants of a country into two different kinds of groups leads to a conflict favourable to creativeness and progress"—a point emphasized almost two centuries ago by David Hume. "I do not approve the extermination of the enemy; the policy of extermination or, as is barbarously said, liquidating enemies is one of the most alarming developments of modern war and peace; from the point of view of those who desire the survival of culture. One needs the enemy.... The universality of friction is the best assurance of peace." [22]

I have ventured to digress in these remarks as a means of suggesting that my criticism of the United States and of Canada is intended to be in the interests of both and to protest against a policy of American militarism which compels dependence on the United States. The distortions of the Canadian mirror may be more clearly seen if I describe in more detail the process by which what is called light is reflected. I need only remind you of the influence of American publication on Canadian books, and of the fact that 60 per cent of the circulation of periodicals is dominated by Americans, a reduction from 80 per cent of a couple of decades ago, but a reduction offset to an important extent by the influence of radio broadcasting to be supplemented shortly by television. The rapid advance of technology in the field of communication and the vast American market make it inevitable that the United States should dominate English culture in Canada and that it should exercise a powerful influence on French culture even though the latter is protected by language. One might almost conclude that the Canadian mirror is the American mirror but it is rather a reflection in a smaller mirror in which the American image is sharply focussed. If the American people have been described as "on its hands and knees grovelling before danger of its own craven imagining," the Canadian people might be described as standing on their heads. The most significant indication was the size of the liberal majority in the last election. No satisfactory explanation of this phenomenon based on the assumption that Canadians act rationally has been forthcoming. It has been argued that the Liberals showed themselves to be far more competent in handling election campaigns, that Mr. Drew alienated support by his application of provincial antics to the federal field, that elation over the retirement of the Rt. Hon. William Lyon MacKenzie King spurred Liberals to a new pitch of enthusiasm and so on, but these are not adequate and are scarcely sufficient to explain why the electorate felt that a strong opposition was not important. It may be suggested that militarism played its role in that emphasis was given to it by all parties and that such emphasis could have no other effect than strengthening the party in power. Nothing is more ominous than the facility with which the tendency toward totalitarianism has enabled governments to create and exploit crises particularly in periods preceding elections. Mr. Churchill's genius as a politician in the British elections was evident in his recognition of this fact shown in the popularity of his proposal for a discussion of the problem of cold war at top levels. The threat of communism was stressed by the Conservatives as a means of smearing the C. C. F. In turn the C. C. F. was compelled to stress its reactionary characteristics in order to evade criticism. The weakness of smaller parties evident in their tactics became a source of strength to the Liberals. As a result the political shape of Canada began to assume characteristics similar to those of Russia. The rise of a politburo in Canada comparable and paralleling that of Russia effectively diverts attention to its character by pointing to the dangers of the politbureau in Russia. The distortion of Canadian political life has been evident in the attempts of the ambitious to acquire prestige by exploiting Russian stupidity. The stupidity of Russians inciting the attacks of ambitious Canadian leaders has been paralleled by the stupidity of Canadians in recognizing the incitement. In the field of labor the distortion has been evident in the hardening of labour organizations following much publicized purges of communists, by a more rigid discipline, a greater capacity to exact demands and a greater determination to carry out their plans. In Canada a powerful bureaucracy, in part a product of bilingualism, built up in the depression and during the war, continued to exercise a powerful influence in a period of peace to an important extent by insisting that war had never ceased. Centralization which developed rapidly during the depression and was accompanied by a strong civil service and a decline of cruder forms of patronage was followed by the growth of provincial autonomy parties. The stupefying effects of the bureaucracy have been partly a result of the problem of a dual language in government and administration which blunts political edges. Mr. King as Prime Minister emphasized the importance of a French partner but his successor Mr. St. Laurent has no single individual who can take the place of Mr. King as an English partner. He has rather a group of younger English members of the Cabinet anxious ultimately to assume his mantle. The technique of Mr. King of eliminating rivals at the appropriate time has been to some extent denied his successor. Of more serious consequence has been the destruction of our sense of humour which has accompanied a lack of sense of proportion and a lack of criticism. No one can be a social scientist in Canada without a sense of humour. I offer this remark as a footnote to an understanding of Stephen Leacock. The appointment of the President of the Canadian National Railway because he had been deputy governor of the Bank of Canada and had built

up prestige in the Wartime Prices and Trade Board by violating the traditions of anonymity in the civil service has created no ripple of amusement throughout Canada. But perhaps I have been forced to concentrate too much on Ottawa papers. Within the space of a week or so he appeared as an authority on trade, banking, combines and railways. In the words of Anita Loos: "A joke is a joke but no one wants to die laughing." The hazards of our profession are becoming serious.

The results of an overwhelming majority in the federal government and of control by the Liberal Party of the Senate and the bench have been evident in various directions. It has left individual provinces as the only opposition, enabled the premier of a province to become the Conservative Leader of the Opposition, and accentuated the problem of federal government. Parties other than the Liberal party tend to dominate the provinces. Consequently dominion-provincial relations occupy a more important role in Canadian politics. Development of opposition from labour and the C. C. F. in some provinces has been followed by coalitions of liberals and conservatives. General disequilibrium and instability have necessitated enhancement of the power of the dominion evident in abolition of appeals to the privy council and in attempts to develop formulae for amendments to the constitution. The tendency towards centralization has accentuated an interest in defense and the creation of an impasse strengthening the influence of the United States. The sense of omnipotence derived from an emphasis on the theory of the divine right of legislatures developed in the federal government compels a sense of omnipotence in provincial governments and it is no accident that the Province of Ontario outraged a sense of justice by retroactive legislation and that the federal government created a sense of futility by disregarding its own regulations in the Department of Justice in dealing with the Combines Report on flour milling. The divine right of legislatures has contributed to the breakdown of the federal structure. Destruction of political relations between the parties of the federal government and those of many of the provinces has widened the gap between the provinces and the Dominion. A decline in the practice of the federal government of recruiting politicians from the provinces and resort to that of building up the federal cabinet from federal politicians have sharpened the differences between the provinces and the dominion. The problem has become more acute as a result of increased emphasis on central monetary policy. The basis of federalism in which the provinces maintained or acquired control over natural resources has been largely destroyed as a result of an increasing emphasis on monetary policy and particularly on large scale resort to income taxes. Provinces and municipalities have been compelled to rely to an increasing extent on other taxes and control of the federal government has been strengthened by division of powers and decline of the principle of taxation without representation. Decline of the principle of taxation without representation has implied resort to agreements and large scale arrangements for transfers between regions. Conflicts arising from the dependence of regions on European markets and of other regions on American markets and the political power of the densely populated regions dependent on the United States compels resort to political patronage on a large scale to areas less effectively represented. Federal patronage has been essential to the prosperity of agriculture in Western Canada. The extreme complexity of government and the inability of the average citizen to understand its problems increases the responsibility of the bureaucracy. The latter are compelled to insist on democracy as a means of hiding the necessity of working contrary to democratic principles. In turn scepticism, such as indicated in this paper, of discussions of democracy are inevitable. The franchise has been extended, redistribution carried out with due regard to the advantages of the party in power, and large numbers have been appealed to by the parties concerned—all designed to strengthen democracy and calculated to work out to the advantage of the bureaucracy. The great art of political success dependent on keeping Scottish Presbyterians and French Canadians in the same party is no longer necessary. It is impossible in this paper to discuss exhaustively the effects of the enormous majority of the Liberal Party in Canadian life. Politics can no longer be discussed in terms of principles and with reference to abstractions. The power of the bureaucracy precludes an appeal to principles and compels concentration on details. Effective criticism becomes impossible with the deliberate attempt to focus attention on external affairs and emphasis on the necessity of presenting a unified front to the point that essential control over military matters, regarded as the essence of sovereignty, is geared to the United States. There is still a fable to the effect that supping with certain mythological figures should only be done with a long spoon. We can appreciate the words of James Fitzjames Stephen "'Le self government', which not infrequently means the right to misgovern your immediate neighbours without being accountable for it to any one wiser than yourself." [23]

It may be argued that all these problems will be solved by the abolition of appeals from the Supreme Court to the Privy Council. I have referred elsewhere [24] to the important position of the legal profession in Canadian politics and it becomes necessary to consider the problem of law at greater length. Dicey has remarked that "federalism substitutes litigation for legislation" and if we are to understand the prospects of success of the federal system we must pay some attention to the nature of the body before which litigation is carried out.

The extent to which the new powers of an enlarged Supreme Court may be able to solve the problems of a federal state will engage the attention of citizens concerned with continuation of the traditions of common law. Federal constitutions provide hiding places for vested interests. The rights of property entrenched in written constitutions restrict possible developments of socialism such as have been evident in Great Britain. Sharp differences emerge between business and government. In federal constitutions emphasizing the traditions of Roman law in common law countries Supreme Courts occupy a crucial position. Common law traditions assume that the state is part of the law and the subject has greater difficulty in separating himself from the state. Change is consequently more gradual and less subject to revolution. Constitutions are largely protected from drastic revision. But Roman law tradition favoured by written constitutions in the United States and in members of the Commonwealth lean toward imperialism, and threaten the beneficient effects of common law in Western civilization. Without a recognition of the flexibility of common law the remark of Dean Pound that "legal precepts are almost certain to lag behind public opinion whenever the latter is active and growing" will become extremely pertinent. These fundamental problems face the Canadian Courts and the Canadian people. As a result of a firm belief in the impossibility of the spread of communism in common law countries and in the danger of American imperialism in exploiting us through its propaganda about communism I have felt compelled to seize this opportunity to describe our difficulties. The sense of terror which has seized on Canadian life has made it more imperative that I should regard the 150th anniversary of the University of New Brunswick as an occasion on which our faith in the traditions of common law, which were reflected after the American revolution in the founding of this university, could be reaffirmed.

[Footnote 1] James Bryce, **The Ancient Roman Empire and the British Empire in India: The Diffusion of Roman and English Law Throughout the World; Two Historical Studies** (London, 1914).

[Footnote 2] Goldwin Smith, **Essays on Questions of the Day** (New York, 1893) p. 98.

[Footnote 3] M. J. Bonn, **Wandering Scholar** (New York, 1948) p. 89; see also George Dangerfield, **The Strange Death of Liberal England** (New York, 1935).

[Footnote 4] M. J. Bonn, **op. cit.**, p. 101.

[Footnote 5] C. H. McIlwain, **The High Court of Parliament and its Supremacy, an historical essay on the boundaries between legislation and adjudication in England** (New Haven, 1934).

[Footnote 6] Sir Henry Taylor, **Notes from Life—The Statesman** (London, 1878) p. 384-5.

[Footnote 7] Cited E. S. Corwin, **The Twilight of the Supreme Court** (New Haven, 1934) p. 207.

[Footnote 8] **The Life and Labours of Albany Fonblanque** ed. by his nephew, E. B. de Fonblanque (London, 1874) p. 340-1.

[Footnote 9] Frederic Harrison, **Autobiographic Memories** (London, 1911) I, p. 149.

[Footnote 10] I am indebted to Mr. F. M. Covert, K. C. and Mr. G. Demarais, K. C., for general views on this subject.

[Footnote 11] Max Lerner, **The Mind and Faith of Justice Holmes** (Boston, 1943) p. 72.

[Footnote 12] Valentine Williams, **The World of Action** (Cambridge, 1938) p. 309.

[Footnote 13] E. S. Corwin, **op. cit.**, p. 54.

[Footnote 14] Max Lerner, **op. cit.**, p. 83.

[Footnote 15] **Ibid.**, pp. 85-6.

[Footnote 16] See F. W. Maitland, **English Law and the Renaissance** (Cambridge. 1901).

[Footnote 17] Brooks Adams, **The Emancipation of Massachusetts, the dream and the reality** (Boston, 1919).

[Footnote 18] 1949.

[Footnote 19] October 17, 1940.

[Footnote 20] **Notes towards the Definition of Culture** (London, 1949) p. 54.

[Footnote 21] **Ibid.**, p. 55.

[Footnote 22] **Ibid.**, p. 59.

[Footnote 23] **Liberty, Equality, Fraternity** (London, 1874) p. 268.

[Footnote 24] **Great Britain, the United States and Canada.** (Nottingham, 1948)]

Transcriber's note:

The edition used as base for this book contained the following errors, which have been corrected:

Page 4: pre-eminently judical rather than legislative => pre-eminently judicial rather than legislative

Page 11: intelligent examination and cross examination => intelligent examination and cross-examination

Page 11: plausibly mantained => plausibly maintained

Page 12: **The Mind and Faith of Justice Holmes (Boston, 1943)** => **The Mind and Faith of Justice Holmes** (Boston, 1943)

Page 13: success of lawyers in politcal life => success of lawyers in political life

Page 13: the competition among lawyears for the bench => the competition among lawyers for the bench

Page 14: E. S. Corwin, **op. cit.** p. 54. => E. S. Corwin, **op. cit.**, p. 54.

Page 16: periods of imperialistic fanticism => periods of imperialistic fanaticism

Page 17: an obsession with domestice concerns => an obsession with domestic concerns

Page 19: emphasis on military expendients => emphasis on military expedients

Page 19: buy their own business, It would be unwise => buy their own business. It would be unwise

Page 20: The academicworld => The academic world

[End of *Roman Law and the British Empire* by Harold Innis]