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The Conference of Chief Justices of the Commonwealth held at Port of Spain Trinidad

The Judiciary and the State

The North American Experience

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Canada has a written constitution which is found in the British North America Act which came into force on July 1st, 1867. At that time the Dominion of Canada consisted of four Provinces, Ontario, Quebec, Nova Scotia and New Brunswick. The British North America Act was, of course, an Act of the Imperial Parliament of the United Kingdom. By amendments made from time to time Canada now embraces the Island of Newfoundland and the whole of Continental North America lying North of the United States of America except the State of Alaska. It consists of 10 provinces and two territories, the Yukon Territory and the North West Territories.

While the British North America Act may be regarded as our written constitution, it imports by reference much of the unwritten constitution of the United Kingdom. The preamble to the Act of 1867 provides in part:-

> "WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:
>
> And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:"

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Attached as Schedule "A" to this paper is an extract from a judgment delivered in 1938 by Sir Lyman Duff, Chief Justice of Canada, declaring invalid a Bill proposed to

be enacted by the Legislature of Alberta entitled "An Act to ensure the Publication of Accurate News and Information", which would have sharply curtailed the liberty of the Press particularly in regard to political matters. It will be observed that reference is made to the words which I have italicized in the preamble from the British North America Act quoted above.

Canada is now a sovereign and independent State. The final stage of her becoming so commenced with her being a separate signatory of the Treaty of Versailles and ended with the passing of the Statute of Westminster by the Imperial Parliament in 1931.

In relation to Canadian affairs, Her Majesty Queen Elizabeth II reigns as Queen of Canada, enacts laws by and with the advice and consent of the Senate and House of Commons of Canada and exercises her executive authority on the advice of her Privy Council for Canada. Her powers are, in large measure, delegated to and exercised by the Governor General of Canada whom she appoints on the advice of the Canadian Prime Minister.

While I have referred to Canada as a sovereign and independent State, it is necessary to make a qualification. We have as yet no machinery for amending the Constitution of Canada as a whole. The limited powers of amendment contained in sections 91(1) and 92(1) of the British North America Act do not enable us to make any re-arrangement of the distribution of powers between Parliament and the provincial legislatures or to amend substantive provisions of the British North America Act. Any amendments of that sort must still be made by the Imperial Parliament. The most recent of these was 9 Elizabeth II c.2 passed by the Imperial Parliament on December 20,1960, which came into force on March 1,1961, providing that judges of

the Superior Courts shall cease to hold office upon attaining the age of seventy-five years. Prior to this enactment, the judges of the Supreme Court of Canada retired on reaching the age of seventy-five, but for those of the Superior Courts in the Provinces, there was no age limit and, in my memory, two judges in Ontario continued to sit in the Court of Appeal at the age of ninety-two.

Consultations are being held from time to time between the Federal Government and the Provincial Governments seeking to devise a method by which,in future, amendments of our Constitution can be made without recourse to the Imperial Parliament. Whether a system can be devised by which amendments can be made without the unanimous consent of the Federal Government and all ten Provincial Governments remains to be seen.

However, the subject with which we are concerned is the function of the Judiciary in relation to our Constitution as it now exists. Under that Constitution, all legislative power, other than that to amend the British North America Act, in the manner mentioned above, is possessed either by the Federal Parliament or by the provincial legislatures. The distribution of these powers is made primarily by sections 91 and 92 of the British North America Act, copies of which are attached as Schedule B to this paper.

It will be observed that by head 14 of Section 92 the provincial legislature has the exclusive power to make laws in relation to:-

> " 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

while by head 27 of section 91 Parliament has exclusive authority to make laws in relation to:-

> 27. The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Part VII of the British North America Act is headed "Judicature"; it consists of sections 96 to 101. A copy is attached as Schedule C to this paper.

Section 99 assures the independence of the judiciary. In the one hundred years that have elapsed since Confederation no judge of a Superior Court in Canada has been removed pursuant to section 99, but on one occasion a judge resigned after an address had been introduced in Parliament asking for his removal, following the report of a Royal Commission criticizing his conduct.

One of the effects of section 96 is that while the Provincial Legislatures can and do create administrative tribunals with quasi-judicial powers, it has been held beyond the provincial power to confer on such tribunals jurisdiction of the sort which at the time of Confederation was exercised by judges of the Superior, District or County Courts; since any judicial officer who is to be clothed with such jurisdiction must be appointed by the Governor General.

Referring to these sections Lord Atkin, delivering the judgment of the Privy Council in Toronto v. York (1938) A.C. 415 at page 426 said:-

> " The first question touches a matter of first importance to the people of Canada. While legislative power in relation to the constitution, maintenance and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the Province, the independence of the

judges is protected by provisions that the judges of the Superior, District and County Courts shall be appointed by the Governor-General (s.96 of the British North America Act,1867), that the judges of the Superior Courts shall hold office during good behaviour (s.99), and that the salaries of the judges of the Superior, District and County Courts shall be fixed and provided by the Parliament of Canada (s.100). These are three principal pillars in the temple of justice, and they are not to be undermined. Is, then, the Municipal Board of Ontario a Superior Court, or a tribunal analogous thereto ? If it is, inasmuch as the Act of 1932 which sets it up observes none of the provisions of the sections above referred to, it must be invalidly constituted."

It will be observed that the Provincial Legislatures under section 92(14) decide upon the number of judges in the Provincial Courts. When the number is increased the vacancies created are filled by the Governor General on the advice of the Federal Cabinet and the Federal Judges Act is amended by Parliament to provide their salaries.

Pursuant to section 101, Parliament in 1875 created the Supreme Court of Canada and the Exchequer Court. The last mentioned Court has jurisdiction in Admiralty, in actions by or against the Crown in the right of Canada and in matters dealing with patents, copyright and trade-marks.

It was on the terms of section 101 that the Judicial Committee of the Privy Council, in Attorney General for Ontario et al v. Attorney General for Canada (1947) A.C.127, based its decision that Parliament had power to abolish appeals to that tribunal and to constitute the Supreme Court of Canada the final Court of Appeal for Canada.

Following this decision Parliament, by an amendment to the Supreme Court Act which came into force on December 23rd, 1949, enacted that:-

" The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive."

By another section the right of appeal to the Privy Council was preserved in regard to proceedings already commenced on or before December 23rd, 1949. As far as I am aware, there are no such proceedings remaining undisposed of. The last reported case of such an appeal was decided by the Privy Council on June 22nd, 1959.

The cases in which there is a right of appeal to the Supreme Court of Canada are limited in civil cases to those involving more than a specified amount, at present $10,000.00, and in criminal cases to questions of law in the strict sense on which there has been dissent in the Court below; but the Court has a wide power to grant special leave in any civil case, and on a question of law in any criminal case, in which the rights of appeal in the Provincial Courts have been exhausted. This power is frequently exercised in cases in which a question of law of general importance is raised.

Our Constitution, unlike that of many other nations, contains no guarantee of any fundamental human rights. This is regarded by many as a defect and, in an effort to remedy it, Parliament in 1960 enacted "The Canadian Bill of Rights". A copy of Part I of this Act is attached as Schedule D to this paper.

In so far as this is intended to take the place of constitutional guarantees it has two weaknesses; (i) being merely an Act of Parliament it is subject to repeal or amendment in the same way as any other Act and (ii) it can have no application to laws coming within the class of matters committed exclusively to the Provincial Legislatures.

The Courts in Canada accept unquestioningly the legislative supremacy of Parliament or of the Provincial Legislatures, as the case may be, provided that each is acting within its allotted sphere. Difficult questions arise as to whether in a given case the enacting body has exceeded its constitutional power. The constitutional validity of an act may be questioned in litigation between private parties or between a private party and the Crown. Whenever this occurs notice must be given to the Attorney General of Canada and the Attorneys General of the Provinces and any or all of these may intervene and be heard by counsel. Such questions are also, from time to time, referred to the Supreme Court of Canada by the Governor General in Council pursuant to section 55 of the Supreme Court Act, a copy of which is Schedule E to this paper.

It will be observed that the Governor General may refer to the Supreme Court not only constitutional questions but "any important question of law or fact" and that any question so referred "shall be conclusively deemed to be an important question".

Two recent examples of the use of this provision may be mentioned. The first raised the questions (i) whether Canada or the Province of British Columbia had ownership of, the right to explore and exploit, and legislative jurisdiction in respect of, the lands, including the mineral and other natural resources of the sea-bed and sub-soil,

to the outer limit of the territorial sea, seaward from the coast of British Columbia and (ii) which had the right to explore and exploit and legislative jurisdiction in regard to such mineral and other natural resources under the continental shelf. On November 7th, 1967, the Court unanimously answered all of these questions in favour of Canada.

The second example was in regard to a youth who had been convicted of murder and sentenced to death in September 1959 and whose sentence had been commuted to life imprisonment. At that time an appeal to the Supreme Court of Canada in a criminal case could be taken only on a question of law in the strict sense and his application for leave to appeal had been refused. In July 1961, the Criminal Code was amended to give a right of appeal to the Supreme Court on fact as well as law in a case in which the appellant had been sentenced to death. Public opinion was aroused by a book, which became a best-seller, in which the author argued that the convicted youth was innocent. The Governor General referred to the Court the question as to what disposition it would have made of the appeal if the right of appeal created in 1961 had existed in 1959. The presentation of the appeal occupied many days. The Court decided by a majority of eight to one that it would have dismissed the appeal. The dissenting judge would have directed a new trial.

The relationship between the Courts and the governments both federal and provincial is harmonious and

marked by mutual respect. It would be unheard of for any government in Canada to attempt to exert any pressure or influence upon any court. Even in the debates in Parliament or the Legislatures, it is not considered proper to discuss matters which are sub judice. The appropriate legislative body is, of course, competent to change the law as declared by the courts but seldom does so with retroactive effect.

Much of our law is now statutory although many cases still fall to be decided under the general principles of the common law. The Courts strive at all times to give full effect to the will of Parliament and the Legislatures as expressed in the Statutes.

It has become a truism that the winds of change are blowing throughout the world and they blow in Canada. It may be that at a meeting such as this held a few years from now my successor will have a somewhat different Canadian Constitution on which to bring you a report. At a constitutional conference held at Ottawa in February of this year, the Prime Minister of Canada, in making a "statement of Policy by the Government of Canada", said in part:-

> " The Supreme Court. Another essential element of federalism is the system under which disputes as to the meaning or application of the Constitution are adjudicated. There have been serious discussions in Canada concerning the composition, jurisdiction and procedures of our final constitutional court, the Supreme Court of Canada; these properly should be considered in any review of the Constitution. For example, the Supreme Court both as a general court of appeal and the final court in constitutional matters now operates under an ordinary statute of the Parliament of Canada. It has been urged that its Constitution and role should be set forth in the fundamental law."

We look forward to the future without dismay, confident that, whatever changes may come, the right of our citizens to live in freedom governed by law will be preserved.

SCHEDULE "A"

Extract from the reasons for judgment of Sir Lyman Duff C.J.C., in Reference re Alberta Statutes, The Accurate News and Information Act (1938) S.CR. 100, at pages 132 to 135.

" Under the constitution established by The British North America Act, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown

of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in James v. Commonwealth (1936) A.C. 578, at 627, 'freedom governed by law.'

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from

The British North America Act as a whole (Fort Frances Pulp & Power Co. Ltd v. Manitoba Free Press Co. Ltd (1923) A.C. 695); and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.

But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in Great West Saddlery Co. v. The King (1921) 2 A.C. 91, at 122, 'legislation directed solely to the purposes specified in section 92'; and it would be invalid on the principles enunciated in that judgment and adopted in Caron v. The King (1924) A.C. 999, at 1005-6.

The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the Alberta Social Credit Act, presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of The British North America Act and the statutes of the Dominion of Canada. Such a limitation is necessary, in our opinion, 'in order', to adapt the words quoted above from the judgment in Bank of Toronto v. Lambe (1887) 12 A.C. 575, 'to afford scope' for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly (Great West Saddlery Co. v. The King (1921) 2 A.C. 91, at 100)."

SCHEDULE E

Sections 91 and 92 of The British North America Act as amended:-

"

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,--

1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

2A. Unemployment Insurance.

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

"

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,--

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

. . .

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes: (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; (b) Lines of Steam Ships between the Province and any British or Foreign Country; (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province."

Schedule C.

Part VII of The British North America Act.

VII. Judicature

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removeable by the Governor General on address of the Senate and House of Commons.

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Schedule D.

Part I of the Canadian Bill of Rights
Statutes of Canada 1960.

Chapter 44

An Act for the Recognition and Protection of
Human Rights and Fundamental Freedoms.

(Assented to 10th August, 1960)

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

BILL OF RIGHTS.

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of

any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained
(i) of the right to be informed promptly of the reason for his arrest or detention,
(ii) of the right to retain and instruct counsel without delay, or
(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

4. The provisions of this Part shall be known as the Canadian Bill of Rights.

Schedule E

SUPREME COURT ACT R.S.C. 1952, c. 259

as amended by R.S.C. 1952, c. 335, 1956, c. 48.

Special Jurisdiction

References by Governor in Council

55. (1) Important questions of law or fact touching

(a) the interpretation of the British North America Acts;

(b) the constitutionality or interpretation of any Dominion or provincial legislation;

(c) the appellate jurisdiction as to educational matters, by the British North America Act, 1867, or by an other Act or law vested in the Governor in Council;

(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised; or

(e) any other matter, whether or not in the opinion of the Court ejusdem generis with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;

may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.

(2) Where a reference is made to the Court under subsection (1) it is the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like

manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.

(3) Where the question relates to the constitutional validity of any Act that has heretofore been or is hereafter passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney general of such province shall be notified of the hearing, in order that he may be heard if he thinks fit.

(4) The Court has power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons are entitled to be heard thereon.

(5) The Court may, in its discretion, request any counsel to argue the case as to any interest that is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation. R.S., c. 35, s. 55.

Mr. Treasurer, Ladies and Gentlemen, and especially
my new Brothers and Sisters of the Bar:

Before proceeding to the words of admonition, of the advent of which the Treasurer has warned you, and which tradition requires on this occasion, may I first say a word of thanks to those of you who come to the Bar from the Armed Forces. Time does not permit even the briefest summary of your distinguished records. It is not our custom to speak often of these things, but I am certain that none of us will ever forget that but for your valor and devotion to duty and that of your comrades in arms, this meeting would not have been possible.

This brings me to the first word of admonition. I ask of you all, vigilance in the defence of freedom. We citizens of this country and of the great Empire or Commonwealth of which it forms a part, have enjoyed freedom for so long that we are inclined to take it for granted. Some fifty years ago, Kipling wrote:

> "Ancient right unnoticed as the breath we draw -
> Leave to live, by no man's leave underneath the law."

More than one hundred years earlier, John Curran spoke his often quoted words:

> "The condition upon which God hath given liberty to man
> is eternal vigilance; which condition, if he break,
> servitude is at once the consequence of his crime and
> the punishment of his guilt."

It may seem needless to repeat such a warning when already twice in our lifetime our freedom has been assailed by armed aggression from without, and when none can fail to note the danger signals in all that is happening day by day in international affairs.

But liberty is in perpetual danger also of attack from within. The attacks may come in many forms - in the efforts of those who seek the overthrow of our Government by force - from the undue extension of bureaucratic powers - from all whose philosophy of life denies the doctrine of human dignity. While it is the duty of every citizen to be

constantly on guard and to vigorously resist all such attacks, a particular obligation rests upon the members of our profession.

It has been said that therecan be no liberty except such as is ordained and safeguarded by authority. Without such authority you have not liberty, but anarchy. It is the law which at once defines and protects our freedom. One of the surest safeguards against those who seek to destroy liberty, is a strong, prompt, efficient and impartial administration of justice by our Courts. Such administration cannot be obtained without a courageous and independent Bar. We are fortunate indeed in this Province and country in having a Bench composed of Judges of the highest standing, learned in the law and of absolute integrity. But the Bench cannot function at its best without the aid of an able and devoted Bar.

Centuries of experiment and experience have failed to produce any better way of enabling the Court to do justice than that which we have adopted, in which both sides of the case are put before an impartial tribunal by men trained in the law and in the art of advocacy.

I suggest to you that one way, not the only way, in which we can protect our freedom, is to do our best at all times to see that justice is rightly and duly administered according to law.

After what virtues should we chiefly strive? May I mention first, honesty and fair play. The one indispensable asset which every one of you must possess, is that every Judge and every fellow lawyer may know that he can rely implicitly on your statements of fact and on your given word. Your duty to yourclient never requires you to deviate from the path of honour. You say for your client everything that he could honestly and properly say for himself, if he had been trained to the special skills which would have enabled him to do so. You are under no obligation to take unfair advantage. You know already that our Courts have said that it is no part of the duty of a professional man to build up his case on the slips of his opponent. Remember that we speak in Court under the protection of absolute privilege. No counsel is subject to action for words spoken by him in the courtroom. This, far from giving us licence, imposes upon us a duty to practise careful self-restraint.

May I mention loyalty? You must at all times be absolutely loyal to your client and never permit circumstances to arise in which your personal interest can in any way be in conflict with that of your client. You must hold in the strictest confidence anything revealed to you by your client and never disclose it without the client's permission, except in those very rare circumstances where you are compelled to do so by due process of law.

May I mention industry? Your client places sometimes his property, sometimes his reputation, sometimes his liberty, and indeed sometimes his life in your hands. No weariness must be allowed to prevent you from preparing his case to the best of your ability. No man can do more than his best, but your client is entitled to expect that you will do no less.

May I mention courage? Counsel must take great responsibilities and he must at all times discharge them fearlessly. Sometimes, especially in the course of a trial, decisions must be made on the instant, unaided. I remember hearing the late Mr. Justice Riddell say that no one has the right to practise as a Counsel unless he has the courage to pursue the course which he decides is the right one, even though the Court itself seeks to dissuade him. You must, of course, obey the Court's explicit ruling, but even then you must make certain that your position has been clearly stated so that your client's rights will be duly protected and can be given effect in a higher Court.

But I feel that there is no need for me to enlarge to you on such virtues as loyalty, industry, and courage, which so many of you have learned in recent years in a stricter school than Osgoode Hall.

May I mention together, courtesy, good manners, and good humour. These you should always practise with the Judges, your fellow Lawyers and especially with witnesses and those who are not familiar with the ways of the Court. Remember that to many persons appearing in Court is a somewhat agonizing experience. The House of Lords said not long ago that even in the course of the most searching cross-examination, a witness is entitled to be treated with courtesy and consideration.

Much has been said and many books have been written on the duties and responsibilities of our profession. In the course of a few words of admonition, one can but touch on them lightly and momentarily, but I wish to mention one more. Ours is a learned profession. Help to keep it so. The English language is a rich and flexible one. Well used, it is an instrument of great power. It has been said that there has never been a really great advocate whose mind was not stored with the varied treasures of our literature. Do not confine your reading to the Law. Seek to familiarize yourself with all that is great and good in our literature.

So much, too much perhaps, for admonition. Perhaps I might better have condensed what I have said, and much more that I have left unsaid, into the exhortation that you remember always the words of the oath which each of you will shortly take.

I come to the words of welcome. This is an ancient and honourable profession. You will find it also a goodly fellowship. You will find its members willing and glad to help you when you are confronted with some novel or difficult situation. You will find generosity and good comradeship. You will find the work hard but full of interest and stimulation, embracing as it does every human relationship. There will be no need for your minds to "rust unburnished".

In the name of the Society of which we are all members and of which at the moment I am the unworthy spokesman, I bid you welcome. I wish you all good fortune.

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U. C. C. Old Boys Dinner
February 22nd 1952.

Mr.President,etc.-

May I first thank you for the great honour you have done me in asking me to speak to you to-night.

Next,may I deliver messages from two,who, though not old boys,are friends of the College and both of whom were guests and spoke to the school in the past year. One is His Excellency the Administrator of Canada,my Chief Justice,the Right Honourable Thibaudeau Rinfret who exercises all the functions of the Governor General until such time as the Governor designate takes his oath of office as it is planned he shall do on Thursday next. The other is the Prime Minister of Canada. Both of them,hearing that I was to have the privilege of speaking to you,asked me to convey their greetings and to say how much they appreciated the very kind reception which they received on their respective visits to the College.

A few weeks ago I sought out Harry Dennehy and Wyburn Eastmure to ask their help in choice of a subject,for, in my present job, I am somewhat restricted - controversial political matters being tabu. I can not,for example, put forward the attractive proposition that the Prime Minister of Canada should be an old boy of Upper Canada College. In common with the

Esquimaux and certain others I have no vote. An old boy who remembers his Greek better than I, commenting on this,reminded me that the Greeks had a word for those who take no part in politics -idiwtoi. On seeking confirmation from Messrs.Liddell and Scott I found comfort also. Those who wish to qualify fully as idiwtoi must refrain from taking part not only in politics but also in public affairs and certain public affairs are committed to our Court including the often difficult task of deciding whether and to what extent either the Parliament of Canada or the Legislatures of the Provinces have exceeded their powers.

The President and Wyburn suggested some reminisences particularly as it is the Prep's Golden Jubilee and I had the good fortune to attend the "Prep" for 3 years (05-08). I have gratefully accepted their suggestion.

I suppose the clearest memory that remains to most of those of us who attended the "Prep" in the early years of the century,certainly the clearest for me,is that of its first principal,that great school-master,distinguished scholar and charming gentleman whom it is our good fortune to have with us to-night,-Mr.J.S.H.Guest. Of course we stood somewhat in

awe of him. He had the essential gift of being able to maintain perfect discipline without the slightest apparent effort. He had the power to inspire enthusiasm in the pursuit of knowledge as well as of the sports and I know that I am voicing the sentiments of every boy who attended the Prep in those days when I acknowledge now the debt of gratitude which I shall always owe to him and tell you that then,even as now, the awe was not unmixed with affection. I can not speak from personal knowledge but if I may venture a judgment based on hearsay evidence -the Prep is still fortunate in its headmaster -the mantle of Elijah has fallen on Elisha and Mr.Stephen worthily upholds the great traditions of Mr.Guest's day.

May I recall to Mr.Guest and to you one incident of the early days? It was the day of the birth of his first-born son. The then headmaster of the College,Mr.Auden,came to the Prep and made a very short address to the assembled boys. He quoted a line from one of the Greek poets and immediately enlightened us with its translation "One ought to welcome the coming guest." He continued that he thought the most fitting welcome would be the granting of a half-holiday. As you all know, the newly arrived Guest is now a distinguished corporation lawyer,a partner in the

ancient and honourable firm known as "Blakes". I have enjoyed David's friendship for many years and derive pleasure from the recollection that even in his earliest hours he was my benefactor.

With the name of Mr.Guest we of that day will always couple that of another great master -Mr.T.B.Colley and our minds run on to the other great men who took us over when we passed from the "Prep" to the "College"r Stoney Jackson "The Duke", Billy McHugh, Jimmy Crake,Mr.Mills, Mr.Hicks,Mr.Mowbray. The mere mention of their names stirs memories in all of us. We are indebted to each and all of them for very much - but I would like to say a special word of gratitude to the memory of Mr. Jackson from whom we learned the excitement of the hunt for the right word and of Mr.Mowbray who did,I think, awake in us a love of our great English language, and particularly a desire to explore and enjoy the beauties of English verse. I remember still an incident in Mowbray's English class. The poem which had just been read aloud was Robert Browning's "Love Among the Ruins" and Mowbray said,almost as if he were thinking aloud:- "I am sure that many of you boys know just how that young shepherd felt." It tells how well the spell had been cast that his observation was received without merriment.

As we speak of those great men may I recall the lines

from Kipling's poem "A School Song":-

"And we all praise famous men-
Ancients of the College;
For they taught us common sense-
Tried to teach us common sense-
Truth and God's Own Common Sense,
Which is more than knowledge!

Wherefore praise we famous men
From whose bays we borrow-
They that put aside To-day-
All the joys of their To-day-
And with toil of theit Ro-day
Bought for us To-morrow!

Bless and praise we famous men-
Men of little showing-
For their work continueth,
And their work continueth,
Broad and deep continueth,
Great beyond their knowing! "

Time, of course, does not permit even the naming of the boys who were my special friends. All of us number many old boys among the best friends not only of our boyhood but of all our lives. We have seen them fulfil the promise of those early days and take their places with distinction in every field - in the armed forces - in the professions - in the public service -in diplomacy and in the world of business. (Quaere whether here some of the distinguished old bous present should be mentioned by name? ") And we all remember with pride and sorrow those many friends who kept a yet better promise and are dead on the field of honour.

These and a thousand other memories combine to make up our memory of the school which we carry through life and which I venture to think each one of us has found a source of strength in times of difficulty,and which, as suggested in Henry Newbolt's poem,has perhaps proved decisive in some dark hour when "England's far,and honour's a name." It is indeed a great good fortune to be an old boy of the Upper Canada College in which we are entitled to take a joyful pride-not an ill pride -not a temptation to snobbery but rather a sense of noblesse oblige and a recollection that "To whom much is given of him will much be required."

May I go back to one particular reminisence of the Prep? Those of us who were there during the first decade of this century will remember that perhaps the pleasantest of our text-books was "The Kipling Reader". It was in it that I first read in "England's Answer" the lines:-

> "Also,we will make promise. So long as The Blood endures,
> I shall know that your good is mine; ye shall feel
> that my strength is yours:
> In the day of Armageddon,at the last great fight of all,
> That Our House stand together and the pillars do not
> fall,
> Draw now the threefold knot firm on the ninefold bands,"

They thrilled me then and have not ceased to do so. They were ~~written in~~ written in 1893. In the wars that followed -The Boer War,1899 - the Great Wars of 1914-18 and 1939-45 Our House has stood together and this country and the old boys of the College

have borne their share. But the end is not yet. No one suggests we are at peace and it may be that Armageddon is close upon us. I hope,and indeed I am certain, that this school of ours and its old boys,individually and collectively, are doing and will continue to do all that each one of us can to draw firm "the threefold knot". I am convinced there is no way in which we can better serve our country,the British Empire,or the free world.

Lord Ismay is presently in Mr.Churchill's cabinet but I feel I shall not be charged with dabbling in the forbidden pool of politics if I quote a recent statement of his:-

> "I have always had the conviction,amounting to an almost fanatical belief, that the family of the British Commonwealth have a great mission to perform in this distracted world. I have no doubt that,like all the best regulated families,we will continue to have squabbles. The very fact that the present machinery for consultation is necessarily imperfect makes it all the more essential that there should be frequent personal contacts at all levels. Particularly is it necessary that we should hold a family meeting whenever an emergency arises within the Commonwealth. Although Britain herself is for the moment economically weaker than in the past, the British Commonwealth as a whole is stronger than ever before."

I learned as a boy at home to share that "fanatical belief" and I continued to learn it at the "Prep" and the College,although in those days it did not seem to be"a distracted world". Such

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little reading as I have since done and such experience of life as I have had have confirmed me in the belief.

How can we help to strengthen the bands - to ensure that "the pillars do not fall"? There are many ways. May I put forward one -that we strive not only to unite this country ever more closely with the rest of the British Empire (I use the terminology of those golden days when we were still at the "Prep") but also to unite this country within itself. There are, we can not blind ourselves to the fact, some in this land, persons of ill will, who seek to accentuate and find a cause for dissension and bitterness in our differences of race, of language,of religion; when rightly regarded these varieties should add strength as well as spice to our national life. If I may utter a small personal testimony, I have found and am finding it a great joy to work in a bi-lingual Court in the closest co-operation with our Chief Justice and the two other members of the Court who are from Quebec,whose mother tongue is French, which long since under Mr.Hicks I learned to revere as "la langue la plus belle la plus claire du monde" and who were trained in the Civil law as we from the other provinces were trained in the Common law. We find that the study of each

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system brings one to a fuller and clearer understanding of the other and we find continually that applied to the same facts each system brings out the same result.

In matters of religion,may I borrow the words of Monsignor Sheen "We do not all worship in the same pew but we are all fighting on the same side."

Perhaps I have spoken somewhat too seriously on so happy an occasion but these are serious days and the survival of this civilization may well depend on the wisdom of our leaders and the courage and industry of all of us in the coming months and years. May I turn back again to the Kipling Reader and repeat the words I read there at the "Prep" some forty-five years ago -

"Go to your work and be strong,halting not in your ways,
Baulking the end half-won for an instant dole of praise.
Stand to your work and be wise-certain of sword and pen,
Who are neither children nor Gods,but men in a world of men!"

Mr.Chancellor, Your Honour, distinguished guests, ladies and gentlemen and especially members of the graduating classes in medicine and in law,-

May I first say Mr.Chancellor how deeply I appreciate the gracious and undeserved honour which this great university has conferred upon me to-day. The value of that honour, great at any time, is enhanced by the fact that the distinguished head of another famous university is the recipient of this same degree on this same occasion.

The high standing and the long and glorious history of the University of Toronto are too well known to require any words of praise from me but I would like to pay a tribute of personal gratitude. While it was not my privilege to be a student at the University, I have the happiest memories of sharing to some extent in the delights and benefits of campus life by virtue of the fact that as a student at Osgoode Hall I was permitted to become a member of one of the University fraternities, which I am glad to say is still flourishing.

When I received the President's letter asking me "to speak briefly to the graduating classes" I accepted with mingled feelings of pleasure and of trepidation for while I have spent most of my life in close association with the Law and have been

called upon once or twice to speak to those who were about to be called to the bar, I can claim no such familiarity with the art of medicine, for which, indeed, I entertain feelings of admiration and gratitude but which remains for me a profound and beneficent mystery.

Medicine and the law have however several features in common. For example, both are numbered among "the learned professions"; in both,not only are long years of study required before one is qualified to commence practice, but the necessity of study persists throughout one's professional life; in both the right to practise is restricted by law to those who have met the high standards set by the profession and who, having been duly admitted to practise, comply with the rules of professional conduct and ethics which their governing bodies prescribe.

These restrictions are sometimes assailed by unthinking persons as monopolistic, but in truth they exist not primarily for the advantage of the members of the profession but for the protection of the public who must not be allowed to place their dearest interests in incompetent hands.

Nevertheless these restrictions do confer very real benefits upon the two professions. The doctor and the lawyer do, in a sense, belong to privileged classes. We all know that privilege entails

responsibility, indeed most of us learned this rule in familiar words of more ancient origin and of higher authority:-"Unto whomsoever much is given of him shall be much required".

When you embark on the practice of the professions for which your long years of study have prepared you, your clients will commit to you who are doctors the restoration of their health and the preservation of their lives, and to you who are lawyers the safe-guarding of their property,their reputation,their liberty and it may be at times their lives also. Such relationships require the most unreserved confidence on the one side and on the other the most complete devotion to the duty assumed.

Above all others, the professional man is bound to discharge his task to the very best of his skill and knowledge. No man can do more than this but your client is entitled to expect that you will do no less. You must be ready, as occasion demands, to sacrifice your leisure, your rest and your personal convenience to your client's need.

While I can speak only from hearsay evidence, I believe that the life of a doctor is not an easy one; I know this to be true of the life of a lawyer; and yet I congratulate you unreservedly on the choice that you have made. Of the work of either profession it may truly be said, if I may borrow words from Dorothy Sayers, that it is such as a man may do with his whole heart and do for the very work's sake;

that it is not primarily the thing he does to live but the thing he lives to do; that it can and should be the full expression of the worker's faculties, the thing in which he finds spiritual, mental and bodily satisfaction and the medium in which he offers himself to God.

It is of the members of these professions that she writes that they fight for precious time in which to get on with the job - instead of fighting for precious hours saved from the job, and that they resent as a monstrous interference with the liberty of the subject any attempt to prevent them working as long and as well as the work and their enjoyment of it demands.

Of course, the material aspects of practice must not be forgotten or neglected. The converse of the text "If any would not work,neither should he eat" holds true; and unless the doctor and the lawyer receive from society a sufficient return to enable them to support their families in a fitting manner and to carry on their work properly there will soon be an acute shortage in both professions; but it must remain the primary aim of the doctor to relieve and prevent suffering and of the lawyer to see that justice is done and liberty maintained.

I do not intend in advocating devotion to your professional work to suggest that you should lose sight of the need of moderation or forget the μεσον or balance of Aristotle. Neither medicine nor the

law is a celibate profession and a man's life should not consist in his work alone. Devotion to work, however good in itself, should not be carried to a point where it results in loss of the joys and neglect of the obligations of family and of social life, albeit there are occasions when these must for a time be sacrificed to some imperious demand.

And now may I turn to a more general topic; I said a moment ago that part of the primary aim of the lawyer is the maintenance of liberty, but, of course, this is the vital concern of every one of us whatever our profession or calling. Chesterton says in his "Life of Browning":-

> " Ingratitude is surely the chief of the intellectual sins of man. He takes his political benefits for granted just as he takes the skies and the seasons for granted."

You will remember Kipling's lines:-

> "Ancient right unnoticed as the breath we draw -
> Leave to live by no mean's leave underneath the law."

Both of these passages were written half a century ago. Few of us any longer take for granted the continuance of our Western heritage of the principles of individual freedom and human dignity that sprang from the eternal standard of values. The threats are too serious and too obvious and in many countries which formerly cherished them those principles are derided and denied by those in power.

It has been well said that individual responsibility is a part of the price of freedom. I believe that none of us wish to shirk our share of that responsibility. But many of us ask "What can I do?" I do not profess to offer any complete answer but I do suggest that each of us can help, a little, by taking pains to learn the truth, as to the facts and issues and by taking part in building up a well-informed and vigorous public opinion, alive to the imminence of our peril and not distracted by doubts as to the reality and deep importance of the struggle in which we are engaged, thus strengthening the hand of our governments in taking the steps and demanding the sacrifices which are required to cope with these pressing dangers.

For this you who have enjoyed the advantage of university life are particularly well-fitted. You have been trained in the use of the tools of learning to distinguish fact from opinion and the proven from the plausible.

I suggest too that we refrain from thoughtless and merely destructive criticism of our side, of our own governments and of those of our friends and allies. I recall again lines of Kipling:-

> The clamour of the arrogant accuser
> Wastes that one hour we needed to make good".

Of course, I do not mean by this that we should refrain from criticism. A democracy lives by listening to criticism.

While the steps to be taken to deal with the external threats to our freedom must in the main be the responsibility of government,

the internal struggle for the minds of men and the formation of those individual views which collectively make up public opinion goes on continuously,although with varying intensity,wherever persons meet together. Let us avoid what Chesterton in his essay "On Thoughtless Remarks" speaks of as "the prevalence of a sort of casual and even conversational scepticism that makes even the idle thoughts of an idle fellow busy in the interests of doubt and despair". He gives as an example the silly remark, that there is not much difference between stupidity and courage and that courage is really only a form of stupidity,and goes on to say that every normal ideal of man is assailed everywhere not by free thought but by frank thoughtlessness and that the cumulative effect of these insignificant individual perversities is to debase the currency of current thought and speech and may be more corrupting in its results than the great heresies. He wrote so a quarter of a century ago; perhaps he overstates the case; but the danger to which he calls attention is far from fanciful.

Let us avoid,too,woolly thinking and woolly speech. How often, for example, does one hear and,perhaps,alas, utter the remark:- "They really ought to do something about it", which is devoid of meaning unless the words "They", "something" and "it" are interpreted.

The word "it" probably has a definite meaning in the speaker's mind. It may be a comparatively trifling nuisance but

it may be some particular injustice or cruelty or stupidity or undue interference with individual liberty which violates that first human sense of justice which is the critic of all human institutions. But who are "they"? The federal or provincial government? The municipal council? The committee of the club? Or perhaps,the C.B.C.? And what about the "something"? Is what is needed an amendment to an act of Parliament or the institution of criminal proceedings or simply a word to a neglectful or over-zealous official?

If the speaker substitutes for the word "they" the authority that can and ought to act, and for the word "something" the action which he conceives should be taken, it is at least possible that he will find himself doing what lies in his power to correct the abuse which is designated by the word "it". This requires the effort of thought and its expression inwords with meaning but it tends to result in action, while the effect of making the remark in its original form is purely soporific.

To you graduates, I make one more appeal. You are members of "learned professions". Help to keep them so. English literature is a vast and varied treasure. The span of human life is too short to permit enjoyment of it all. Seek to familiarize yourselves with the best in its prose and its poetry. Do not confine your reading to that which has a direct bearing on your professional work and do not

waste on rubbish the precious hours you have to spare for general reading.

But now I have trespassed long enough upon your time. I thank you all for your attention and your patience and to you graduates I extend my best wishes for your happiness in the profession of your choice. I wish you indeed material success and fame and fortune but above all that you may find joy in the doing of your chosen work.

Mr.Chancellor, may I thank you again and through you this great University for the honour done to me and for your kindness in inviting me to speak to this distinguished gathering.

June 12th, 1959.

"THE RESPONSIBILITIES OF COUNSEL IN THE COURTROOM " (February 26th, 1960).

A lecture to the Bar admission Course at Osgoode Hall

It has not been possible for me to familiarize myself with what has been said in the lectures you have attended during this week and I ask in advance for your indulgence if I am guilty of repetition.

As its title suggests, my subject supposes counsel in Court retained to conduct a trial or an appeal. I take for granted that the vital work of preparation has been carefully done; that, in case of a trial, counsel is familiar with the evidence he plans to adduce to prove every fact essential to his case or defence and that he has collected and considered the relevant law; that so far as that is possible cross-examination has been prepared also; in the case of an appeal that he has familiarized himself with the relevant parts of the record and that an orderly presentation has been planned.

I understand your course includes lectures on the conduct of actions and appeals and on courtroom decorum. I propose to speak of certain aspects of the responsibilities or duties which underlie and control the conduct of counsel before the Court. In the course of one lecture one cannot, of course, hope to cover them all.

Counsel owes duties: (i) to his client; (ii) to the Court;(iii) to the State; (iv) to his opponent,and (v) to himself

as a professional man of honour. These duties are continually co-existent and from time to time conflicts apparent and real arise between them.

The duties I now mention are not necessarily placed in their order of relative importance.

The duty of <u>honesty and fair play.</u> If there is one indispensable asset which every advocate must possess it is that every Judge and every fellow lawyer may know that he can rely unreservedly on his statements of fact and on his given word. I am not so foolish as to imagine that any of you would deliberately or consciously fail in the performance of this elementary but all-important duty; but it is closely allied to the duty of industry and the danger to be guarded against is that of misleading unintentionally. It may not be out of place to recall the words of Robert Louis Stevenson in his essay "On Truth of Intercourse" where he speaks of "the monstrous proposition that it is easy to tell the truth and hard to tell a lie", and continues:- "I wish heartily it were. But the truth is one; it has first to be discovered,then justly and exactly uttered...it is not easy to be exact, it is easier,alas! to be inexact".

You may e.g.in an appellate court be asked the question "Is there anywhere in the record any evidence on a certain

point?" If the point is of importance and the case properly prepared, you will know the answer; but in preparing the case the point may not have appeared to you to be of importance and you may have no recollection of coming across any evidence dealing with it. Do not in such circumstances say "No" to the question unless you are sure. Do not hesitate to say:- "I have no recollection of any evidence on the point but I cannot safely say there is none as that point had not appeared to me to be of importance".

Always remember that your duty to your client never requires you to deviate from the path of honour. You say for your client everything that he could honestly and properly say for himself, if he had been trained to the special skills which would have enabled him to do so.

Counsel must never put into the witness box a witness, whether a party or not, who proposes to give untruthful evidence. You should not, I think, refuse to call a witness whom your client wishes to have called merely because you are sceptical of his story; your duty in such a case is discharged by warning your client of the danger of calling the witness; but if you know the proposed evidence is untruthful that is the end of the matter. You must not call the witness. (E.g. Which do you think is best?)

If an adjournment occurs in the course of the cross-examination of your client or of one of your witnesses you must not speak

or communicate with him during the adjournment.

I am sure it is unnecessary for me to point out that, of course, nothing must be said in a stage whisper at the counsel table which is intended to or that could reach the ears of the jury. (E.g - "So I did" "Rahab")

You must not, of course, be generous at the expense of your client or give up any of his legal rights without his express instructions; but our courts have said repeatedly that counsel is not under a duty to take unfair advantage and that "it is no part of the duty of a professional man to build up his case on the slips of his opponent". We are all familiar with the old saying that counsel's weapon is the sword of the warrior and not the dagger of the assassin.

A question which used to be debated is whether it is the duty of counsel to draw the courts attention to an authority adverse to the point which he is arguing and of the existence of which neither the opposing counsel nor the Judge appears to be aware. Speaking of this in an address delivered in 1916 Lord Macmillan (then Mr.Macmillan) said:-

> Must you draw the attention of the Court to this adverse precedent, although to do so may prove fatal to your client's case, which you are in a fair way to win? Or should you say to yourself that it is for the opposing counsel to find the case, and if he fails to do so that is his affair? Have you any duty to prevent the judge from giving a decision in your favour contrary to the law which is binding upon him?

The situation is complicated by the fact that it is not always possible to say whether the damaging precedent you have discovered is exactly in point or not. It may be distinguishable. My own opinion, though I know I am here on debatable ground, is that it is the duty of an advocate, if he is satisfied that the adverse precedent he has come across is directly in point, to draw the Court's attention to it, come what may, and to do his best to differentiate it, or to induce the Court not to follow it.

The point is, I think, no longer debatable, for some five years later Lord Birkenhead L.C., speaking for the House of Lords in a case Glebe Sugar Refining Company Limited v.Trustees of the Port and Harbours of Greenock (1921) 37 T.L.R.436 is reported as follows:-

> The Lord Chancellor said that a point of considerable importance had arisen upon which he thought it right to make some observations. It was not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or other, which might be relevant to the issues requiring decision in the particular case. Their Lordships were therefore very much in the hands of counsel and those who instructed counsel in these matters, and the House expected, and indeed insisted, that authorities which bore one way or the other upon matters under debate should be brought to the attention of their Lordships by those who were aware of these authorities. That observation was irrespective of whether or not the particular authority assisted the party who was aware of it. It was an obligation of confidence between their Lordships and all those who assisted in the debates in this House in the capacity of counsel.

He went on to say that the duty extends also to the solicitors who instruct counsel.

It is a good rule never to cite a case unless you have

(i) read the whole case-(To quote from the headnote of a case which you have not studied may be a misleading procedure), (ii) made certain that it has not been over-ruled, and (iii) considered the later cases in which it has been applied or distinguished. If a later case affects it bring it to the Court's attention.

Similarly you should not quote from a text without examining the cases cited and making sure they support the author's proposition. (No harm in citing living authors, in spite of ancient precedent)

Counsel in Court speaks protected by absolute privilege from any action for defamation. This protection, which is necessary to enable him to dischage his duty fearlessly, far from giving him a licence to defame, places upon him a duty of careful self-restraint. He must make no false charge in pleadings or in cross-examination. It is his duty to see that no man's good name is wantonly attacked. but p'raps as well to stick to formula.

Counsel in court must never express his personal opinion either as to the facts or as to the law.

Counsel should never act in a case in which it is necessary for him to be called as a witness or in which he has at an earlier stage made an affidavit. It has been said that the evidence of counsel if he goes into the witness box is not strictly speaking legally inadmissible but that to pursue such a course is an indecent procedure.

The duty of fair play includes that of treating witnesses properly. The House of Lords has said that even in the course of the most searching cross-examination a witness is entitled to be treated with courtesy and consideration.

May I mention,without dwelling upon it, the duty of respect to the Court and of good manners to all concerned - the Court, opposing counsel,the witnesses. While the duty of respect to the Court is a very real one, nothing is less desirable than obsequiousness or anything that approaches it.

Next may I speak of the duty of courage? Counsel must take great responsibilities and he must at all times discharge them fearlessly. Sometimes, especially in the course of a trial, decisions must be made on the instant,unaided. I remember hearing the late Mr.Justice Riddell say that no one has the right to practise as a counsel unless he has the courage to pursue the course which he decides is the right one, even though the Court itself seeks to dissuade him. You must, of course, obey the Court's explicit ruling, but even then you must make certain that your position has been clearly stated so that your client's rights will be duly protected and can be given effect in a higher Court.

What I am about to say to you would, I am sure, be unnecessary if you were destined to practise always in the Courts of Ontario before the judges who now hold office in this Province;

but the occupants of the bench change with the passing years and some of us who are older can remember days when it was at times necessary for counsel to have the courage and determination to resist very real pressure from the bench, seeking either to induce a settlement against the wish of the parties or to improperly curtail an argument. Remember that when you appear as counsel your rights are as ancient and as well established as those of the bench; that you do not appear on sufferance; that you are dominus litis and it is your right, your responsibility and your duty to conduct your client's case. The Court has of course the right to prevent repetition and waste of time but never to prevent a counsel from putting forward all the points which tell in his client's favour. A Judge may do a very real service to the parties and to the administration of justice by helping to bring about a reasonable settlement but he exceeds his duty if the seeks to compel parties to such a course.

Please do not gather from what I have just said to you that there is anything of the nature of a state of hostility between counsel and the Court. Nothing could be farther from the truth. The relationship between bench and bar in the conduct of a case is a happy and harmonious one. Their funtions are divided but they are both engaged in the task of endeavouring to see that justice is done in accordance with the law. When

you appear as counsel you may count on enjoying the confidence of the Court and you in turn are justified in having confidence in the tribunal before which you appear. The Judge is as anxious as counsel to fulfil to the very best of his ability the obligations of his oath of office. He will endeavour to help and not to hinder the efforts of counsel. When the work of preparation has been well done the task of presenting a case is full of interest and not devoid of pleasurable excitement.

While, generally speaking, it is the duty of counsel to tender all relevant and legally admissible evidence which is available to support the case of his client there is an exception to this rule. If you are acting for the Crown in a criminal case and tender a piece of evidence or embark on a line of cross-examination which, while legally admissible, would, in the opinion of the Judge, have the effect of creating a prejudice against the accused out of proportion to its true probative value on the point to which it is relevant, the Judge may, in his discretion, intimate that you should not pursue it. ¶ To such a suggestion crown counsel should defer at once.

Counsel has a wide authority to make agreements during the course of a trial which are binding upon his client but I would advise you never to so agree without your client's express instructions or approval. (e.g.Dennison et al v.Globe and Mail.)

In the not too distant future you all look forward to being called to the bar of Ontario. When you do so you will take the following oath:-

> "You are called to the degree of Barrister to protect and defend the rights and interests of such of your fellow-citizens as may employ you. You shall conduct all cases faithfully and to the best of your ability. You shall neglect no man's interestm nor seek to destroy any man's property. You shall not be guilty of champerty or maintenance. You shall not refuse causes of complaint reasonably founded,nor shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any man, but in all things shall conduct yourself truly and with integrity. In fine, the Queen's interest and your fellow citizens' you shall uphold and maintain according to the constitution and law of this Province.
>
> All this I swear to observe and perform to the best of my knowledge and ability -so help me God.

By bearing its terms in mind you will profit immeasurably more than by remembering anything I have said to you. If any one suggests that the words of the oath are counsels of perfection remember that they are the rule of our order to which we are bound not by a contract but by a vow.

Remember always that to your client his case is of an importance always great and sometimes awful and remember that you are sworn to conduct it faithfully and to the best of your knowledge and ability, but always within the limits imposed by the rules of honourable conduct. If you have so conducted a

case you will have no need to reproach yourself although your efforts are not attended with success.

In conclusion it will not be out of place to quote from the words of Mr.Justice Crampton in The Queen v.O'Connel(1844) 7 Irish Reports,at p.313:-

> "He (the advocate) is a representative, but not a delegate. He gives to his client the benefit of his learning,his talents,and his judgment;but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law-he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadquately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case or for any party or purpose can discharge him from that primary and paramount retainer."

And now I thank you all for your attention and wish you every happiness and success, but especially that you may find joy in your chosen work.

Address to the Guild of our Lady of Good Counsel - J.R.C.

Toronto, June 10, 1963.

Mr. President, Reverend Father, my brothers of the Bench, Members of the Guild:

May I first thank you for your kindness and hospitality in inviting me to this delightful dinner and say how deeply I appreciate the high honour you have done me in asking me to speak to you to-night.

When Mr. Lawlor brought me your kind invitation to talk about G.K. Chesterton I accepted with trepidation for I know that many of you are far better qualified than I to do justice to so great a subject.

I had the temerity to accept because it gives me an opportunity to pay a tiny instalment on account of a great debt. Chesterton says (in his Short History of England):-

> I would maintain that thanks are the highest form of thought.

and to-night, through your kindness, I can say a word of thanks for the work of the writer to whom I owe more than to any other.

Gilbert Keith Chesterton was born on the 29th of May, 1874, in Campden Hill close to the great water-tower which appears in many of his stories and poems. He was baptized in the Anglican Church of St. George on the same hill. His brother, Cecil, was born five years later. He attended St. Paul's school, decided to study art which he did at the Slade School but at an early age he turned to journalism and to the writing of books, essays, plays and poetry. He was married on June 28, 1901, to Frances Blogg. His brother Cecil died in a French Military hospital of the effects of exposure in the last fierce fighting of the first World War. Chesterton was received into the Roman

Catholic Church on July 30,1922 and his wife was received a few years later. He died on June 14,1936.

Into the sixty-two years of his life,he compressed an almost incredible amount of work. He was the author of more than seventy volumes in addition to his poems,plays and pamphlets,and all this is only part of his prodigious output.He wrote a great deal for the paper started by his brother and carried on by himself after his brother's death and for numerous other papers. He wrote the introduction to more than eighty books by other authors. He delivered countless lectures and took part in numerous debates. As one writer has said of him, "He wrote of every conceivable subject under and beyond the sun."

It will at once be obvious that in the course of an after-dinner talk one can touch only on one or two aspects of his life or work and I propose to speak to you about the latter.

Many books have been written about him and doubtless more will be written. For those who are not already familiar with it and who wish to follow the fascinating story of his life I commend the reading first of his autobiography, then Monsignor O'Connor's book "Father Brown on Chesterton" and then Maisie Ward's full and excellent biography.

In the opening chapter of "Heretics" Chesterton says:-

> But there are some people,nevertheless - and I am one of them -who think that the most practical and important thing about a man is still his view of the universe. We think that for a landlady considering a lodger,it is important to know his income, but still more important to know his philosophy. We think that for a general about to fight an enemy,it is important to know the enemy's numbers,but still more important to know the enemy's philosophy. We think the question is not whether the theory of the cosmos affects matters,but whether,in the long run, anything else affects them.

This provoked Mr.G.S.Street to say in an article "I will begin to worry about my philosophy when Mr.Chesterton has given us his." Chesterton responded promptly by writing "Orthodoxy". Needless to say while he was always eager to accept a challenge this was not the chief reason for the writing of the book. Indeed,in the book itself he gives other reasons, one being that on being asked by a friend to whom he had said that the men who really believe in themselves are all in lunatic asylums:-"Well,if a man is not to believe in himself in what is he to believe?", he replied,"I will go home and write a book in answer to that question." "Orthodoxy" is the book which he wrote in answer to it.

I know the proverb found in every language," De gustibus non est disputandum", as we put it in English "There's no accounting for tastes", or as Chesterton puts it in the mouth of one of the characters in "The Napoleon of Notting Hill" - "You cannot argue with the choice of the soul;" and I have some friends for whose judgment I have high regard who have read this book without enthusiasm. I find this hard to understand. For me it remains one of the most exciting books which I have read and I have lost count of the number of times that I have read it. In it the author sets out in vivid words the startling doctrines of the central Christian theology but in addition to this the book is indded an adventure story. Like the Odyssey it is the story of a man finding his way home but with this added touch of drama,that it is only when he finally arrives that he realizes that it was his home which he was seeking. Chesterton says in the introduction:-

> There may or may not be some entertainment in reading how I found at last in an anarchist club or a Babylonian temple what I might have found in the nearest parish church.

I have taken from this book a few sentences to indicate the nature of the claims which Chesterton makes for his philosophy although he would not call it his. You will remember he said:-

> I will not call it my philosophy; for I did not make it. God and humanity made it; and it made me.

He speaks of:- "the actual fact that the central Christian theology (sufficiently summarized in the Apostles' Creed) is the best root of energy and sound ethics." He says that the Christian faith supplies the answer to the question:-

> How can we contrive to be at once astonished at the world and yet at home in it? How can this queer cosmic town,with its many-legged citizens, with its monstrous and ancient lamps,how can this world give us at once the fascination of a strange town and the comfort and honour of being our own town?"

He says that it answers:-"this double spiritual need,the need for the mixture of the familiar and the unfamiliar which Christendom has rightly named romance".
He says that it enables us to live this life of practical romance, "to so view the world as to combine an idea of wonder and an idea of welcome and to be happy in this wonderland without once being merely comfortable."

In the introduction he points out that the book is concerned to discuss the Creed and is not intended " to discuss the very fascinating but quite different question of what is the present seat of authority for the proclamation of that Creed." The introduction ends with the sentence:- "But if anyone wants my opinions about the actual nature of the authority Mr.G.S. Street has only to throw me another challenge and I will write him another book." The challenge did not come from Mr.Street, but we all know the answer that Chesterton found. Its expression

is contained not in one but in many of his works -notably the Autobiography, "The Well and the Shallows", "The Catholic Church and Conversion", "The Thing" and "The Everlasting Man."

I wish to read one more passage from "Orthodoxy" because it contains a view which Chesterton held unwaveringly and which permeates all his work. He says:-

> I could never conceive or tolerate any Utopia which did not leave to me the liberty for which I chiefly care, the liberty to bind myself. Complete anarchy would not merely make it impossible to have any discipline or fidelity; it would also make it impossible to have any fun. To take an obvious instance, it would not be worth while to bet if a bet were not binding. The dissolution of all contracts would not only ruin morality but spoil sport. Now betting and such sports are only the stunted and twisted shapes of the original instinct of man for adventure and romance, of which much has been said in these pages. And the perils, rewards, punishments, and fulfilments of an adventure must be <u>real</u>, or the adventure is only a shifting and heartless nightmare. If I bet I must be made to pay, or there is no poetry in betting. If I challenge I must be made to fight, or there is no poetry in challenging. If I vow to be faithful I must be cursed when I am unfaithful, or there is no fun in vowing.
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> For the purpose of even of the wildest romance, results must be real; results must be irrevocable. Christian marriage is the great example of a real and irrevocable result; and that is why it is the chief subject and centre of all our romantic writing. And this is my last instance of the things that I should ask, and ask imperatively, of any social paradise; I should ask to be kept to my bargain, to have my oaths and engagements taken seriously; I should ask Utopia to avenge my honour on myself."

You will find this again in "The Defence of Rash Vows" and again and again in his poems. To give but one example from "The Ballad of the White Horse" where Alfred is speaking:-

> And whether ye swear a hive of monks,
> Or one fair wife to friend,
> This is the manner of Christian men,
> That their oath endures the end.

The writer of one of the countless articles which have been written about Chesterton speaks of his "tendency to

commingle his philosophy with his fiction." I think he would not have quarrelled with this observation. Indeed he asserts it in his essay "On Gargoyles". He is speaking of the other essays in the same volume but the words might, I think, have been said of all his work:-

> I have not the patience nor perhaps the constructive intelligence to state the connecting link between all these chaotic papers. But it could be stated. This row of shapeless and ungainly monsters which I now set before the reader does not consist of separate idols cut out capriciously in lonely valleys or various islands. These monsters are meant for the gargoyles of a definite cathedral. I have to carve the gargoyles, because I can carve nothing else; I leave to others the angels and the arches and the spires. But I am very sure of the style of the architecture and of the consecration of the church.

Perhaps the part of his work which has been most widely read is that consisting of his detective and mystery stories, the most famous of these are, of course, the five volumes of the "Father Brown" stories but there are several other volumes including "The Man Who Knew Too Much", "The Poet and the Lunatics","The Paradoxes of Mr.Pound" and "The Four Faultless Felons". Perhaps it is the highest compliment that one can pay to these stories to say that it is impossible to make a selection of the best ones and as far as I can find out there is no general agreement among his readers on any favourites. They are all excellent and like all his work, they are interspersed with short philosophical discussions and with prose which is pure poetry.

One could take examples from any of the stories. I will give only one. It is the last paragraph of "The Insoluble Problem",in which Father Brown,having with the aid of Flambeau solved the problem and prevented the theft of the costly reliquary containing the Roses of St.Dorothy,slips into the

chapel to say a prayer for some of those concerned:-

> He raised his eyes and saw through the veil of incense smoke and of twinkling lights that Benediction was drawing to its end while the procession waited. The sense of accumulated riches of time and tradition pressed past him like a crowd moving in rank after rank, through unending centuries; and high above them all, like a garland of unfading flames, like the sun or our mortal midnight, the great monstrance blazed against the darkness of the vaulted shadows,as it blazes against the black enigma of the universe. For some are convinced that this enigma also is an Insoluble Problem. And others have equal certitude that it has but one solution.

Chesterton had a healthy dislike of prohibition and some of his most amusing essays and poems deal with this subject or rather with the much more interesting and important subject of drinking. You will find his views throughout his work but particularly in the book "The Flying Inn" in which he pictures England in the grip of prohibition and consequently in danger of invasion by the Saracens and in book four of his Collected Poems with the sub-title "Wine,Water and Song." You will find them too, in his phrase "We can thank God for beer and burgundy by not drinking too much of them". He maintained that the worst type of drinking is "medicinal drinking" - that the primary purpose of wine is to make glad the heart of man and not to soothe his stomach or drug his mind. He says, in his book on George Bernard Shaw:-

> The dipsomaniac and the abstainer are not only both mistaken, but they both make the same mistake. They both regard wine as a drug and not as a drink.

This view finds brilliant expression in the chapter in "Heretics"- "Omar and the Sacred Vine". He pays full tribute to the beauty of Fitzgerald's translation,saying amongst other things:-

> Of the literary splendour of that work it would be merely banal to speak; in few other of the books of men has there been anything so combining the gay

pugnacity of an epigram with the vague sadness of a song. But of its philosophical,ethical,and religious influence,which has been almost as great as its brilliancy,I should like to say a word,and that word I confess,one of uncompromising hostility.

The chapter ends with a paragraph which I would like to read:-

> Once in the world's history men did believe that the stars were dancing to the tune of their temples,and they danced as men have never danced since. With this old pagan eudaemonism the sage of the Rubaiyat has quite as little to do as he has with any Christian variety. He is no more a Bacchanal than he is a saint.Dionysius and his church was grounded on a serious joi-de-vivre like that of Walt Whitman. Dionysius made wine,not a medicine,but a sacrament. Jesus Christ also made wine, not a medicine, but a sacrament. But Omar makes it,not a sacrament,but a medicine. He feasts because life is not joyful; he revels because he is not glad. 'Drink',he says,'for you know not whence you come nor why. Drink, for you know not when you go nor where. Drink,because the stars are cruel and the world as idle as a humming-top. Drink,because there is nothing worth trusting,nothing worth fighting for. Drink,because all things are lapsed in a base equality and an evil peace.' So he stands offering us the cup in his hand. And at the high altar of Christianity stands another figure,in whose hand also is the cup of the vine. 'Drink',he says,'for the whole world is as red as this wine,with the crimson of the love and wrath of God. Drink,for the trumpets are blowing for battle,and this is the stirrup-cup. Drink,for this is my blood of the new tastament that is shed for you. Drink, for I know of whence you come and why. Drink,for I know of when you go and where'.

You are probably already familiar with his "Life of St.Thomas Aquinas" and his "Life of St.Francis of Assisi". Few, I think,could read them unmoved. It was of his "Life of St. Francis" that Pope Pius XI spoke in the private audience which Chesterton had with him.

In Maisie Ward's Biography she says that "Gilbert has left no record of his papal audience" but this overlooks an account of it which is given in his book "The Resurrection of Rome". In Part VI of this book he describes not only his private audience but also the two other occasions shortly afterwards on which he saw and heard the Pope. The whole account

takes up only a few pages and I commend it to you. In describing the conclusion of his private audience he says:-

> Then he made a motion and we all knelt;and in the words that followed I understood for the first time something that was once meant by the ceremonial use of the plural,and in a flash I saw the sense of something that had always seemed to me a senseless custom of kings. With a new strong voice,that was hardly even like his own,he began 'Nous vous benissons,' and I knew that something stood there infinitely greater than an individual; I knew that it was indeed 'We'; We,Peter and Gregory and Hildebrand and all the dynasty that does not die. Then,as he passed on, we rose and found our way out of the Palace,through knots of Swiss and Papal Guards,till we were again under the open sky.

It would take more time than is at our disposal to even list the names of other authors about whom he has written - sometimes at book length and in other cases in essay form. I think that in every case the enjoyment and understanding of the author's work will be increased by having read what Chesterton has to say about him. You will remember that Bernard Shaw commented on the book which Chesterton wrote about him as "the most brilliant piece of writing which I have yet provoked". His books on Dickens,Robert Browning and Robert Louis Stevenson are among my favourites. I can assure you that the pleasure of reading Browning's poetry is redoubled by reading what Chesterton has to say of it. This is particularly so in the case of that great poem "The Ring and the Book" in which you will remember the story of the same crime is told from eight different points of view including those of the murdered and the murderer. Chesterton describes it as "the epic of free speech" explaining that Browning was upon the whole the first poet to apply the principle of free speech to poetry. I know of no better discussion of what Chesterton calls "the daring and surprising theory of free speech" than you will find in this

chapter. May I read you a paragraph in which he deals with it particularly as applied by Browning?:-

> Everything that was profound, everything indeed,that was tolerable in the aesthetes of 1880,and the decadent of 1890,has its ultimate source in Browning's great conception that every one's point of view is interesting, even if it be jaundiced or a blood-shot point of view. He is at one with the decadents,in holding that it is emphatically profitable, that it is emphatically creditable,to know something of the grounds of the happiness of a thoroughly bad man. But Browning, united with the decadents on this point,of the value of every human testimony,is divided from them sharply and by a chasm in another equally important point. He held that it is necessary to listen to all sides of a question in order to discover the truth of it. But he held that there was a truth to discover.He held that justice was a mystery,but not,like the decadents,that justice was a delusion.He held,in other words,the true Browning doctrine,that in a dispute every one was to a certain extent right;not the decadent doctrine that in so mad a place as the world,every one must be by/ nature of things wrong.
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Chesterton delighted in debate. In the columns of the newspapers,in his essays and on the platform he was perpetually engaged in controversy and he had a great impatience with the careless use of words and expressions and particularly with the making of statements without seriously thinking about them at all,basing them upon assumptions which are not only accepted without proof but are accepted unconsciously. He protests,for instance,against the use of the word "serious" as if it was necessarily synonymous with "solemn" and as if one could not be serious and gay at the same moment; and against the use of the word "spiritual" as if it were synonymous with "good" and as if we had never heard of "spiritual wickedness in high places." He assails what he describes as :- "the prevalance of a sort of casual and even conversational scepticism,making even the idle thoughts of an idle fellow busy in the interests of doubt and despair."

There is scarcely a page of his work on which you will not find some striking sentence. May I give you a few chosen at random. I might equally as well have chosen any of a thousand others.

1. There is no such thing as fighting on the winning side. You fight to find out which is the winning side.

2. Every man is dangerous who cares only for one thing.

3. It has pleased God so to isolate the human soul,that it can only learn of all other souls by hearsay.

4. The soul must be solitary or there would be no need for courage.

5. It is always the humble man who talks too much; the proud man watches himself too closely.

6. A pure horror of injustice such as that which is a great beauty in the innocent.

7. In "Heretics", speaking of Bernard Shaw and of the obvious, but sometimes forgotten fact,that no man can be a heretic in his own eyes:-

> " It may be true that the thing in Mr.Shaw most interesting to me,is the fact that Mr. Shaw is wrong. But it is equally true that the thing in Mr.Shaw most interesting to himself, is the fact that Mr.Shaw is right. Mr.Shaw may have none with him but himself; but it is not for himself he cares. It is for the vast and universal church, of which he is the only member."

8. Speaking of Voltaire:

> " But Voltaire,even at his best,really began that modern mood that has blighted all the humanitarianism he honestly supported. He started the horrible habit of helping human beings only through pitying them,and never through respecting them. Through him the oppression of the poor became a sort of cruelty to animals, and the loss of all that mystical sense that to wrong the image of God is to insult the ambassador of a King.

All of us here to-night are lawyers and, from time to time,we hear suggestions from within and without the profession that the jury system should be done away with in whole or in part. My personal view is entirely opposed to this and, indeed, I think a mistake has been made in those jurisdictions in which

the number of a jury has been reduced from 12 to 6. My view is of little importance,but if any of you should feel inclined to support a movement to abolish juries I entreat you first to re-read Chesterton's essay - "The Twelve Men". It is in "Tremendous Trifles" and was written shortly after he had served as a juryman and apparently taken part in the trial of some not very serious criminal charges.He says in part:-

> All the time that the eye took in these light appearances and the brain passed these light criticisms, there was in the heart a barbaric pity and fear which men have never been able to utter from the beginning, but which is the power behind half the poems of the world. The mood cannot even inadequately be suggested, except faintly by this statement that tragedy is the highest expression of the infinite value of human life. Never had I stood so close to pain; and never so far away from pessimism. Ordinarily, I should not have spoken of these dark emotions at all, for speech about them is too difficult, but I mention them now for a specific and particular reason to the statement of which I will proceed at once. I speak of these feelings because out of the furnace of them there came a curious realisation of a political or social truth. I saw with a queer and indescribable kind of clearness what a jury really is, and why we must never let it go.
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> .....
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> Now, it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges,magistrates,barristers, detectives,and policemen, is not that they are wicked (some of them are good), not that they are stupid, (several of them are quite intelligent),it is simply that they have got used to it.
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> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, the instinct of Christian civilisation has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets.
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> .....

> Our civilisation has decided,and very justly decided,that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter,it asks men who know no more law than I know,but who can feel the things that I felt in the jury box. When it wants a library catalogued,or the solar system discovered,or any trifle of that kind,it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.

I cannot say whether it is the general judgment but some,at least,of the critics are of the view that Chesterton's surest claim to earthly immortality rests on his poetry. It covers a wide range. His love poetry is of great beauty and you will find that all of it, although not always in name, is addressed to his wife. He does not attempt to describe her directly but uses that older and wiser fashion,as ancient as Homer,of describing the effect, May I give you two examples? The first is from the Autobiography written in prose but fairly to be included with examples of poetry:-

> I have walked across wide fields at evening and seen,as a mere distant dot in a row of houses, one particular window and just distinguishable head; and been uplifted as with roaring trumpets as if by the salute of Beatrice.

The next is from "The Praise of Dust". The poem commences "'What of vile dust?' the preacher said." and goes on to speak of the flowers and of other glories derived from the dust. It ends:-

> Pass them all by; till,as you come
> Where,at the city's edge,
> Under a tree - I know it well -
> Under a lattice ledge,
>
> The sunshine falls on one brown head.
> You,too, O cold of clay,
> Eater of stones,may haply hear
> The trumpets of that day.

When God to all his paladins
By His own splendour swore
To make a fairer face than heaven,
Of dust and nothing more.

May I say a few words about Chesterton's devotion to Our Lady, which runs through all his work. It is to be found in his note-book at school, in "The Ball and the Cross", published in 1909,in the "Ballad of the White Horse" - In the first book of that great poem there is a description of the vision in which Our Lady appears to King Alfred in the Island of Athelney where he is in hiding from the Danes. The description commences with the lines:-

He looked; and there Our Lady was,
She stood and stroked the tall live grass
As a man strokes his steed.

Her face was like an open word
When brave men speak and choose,
The very colours of her coat
Were better than good news.

Some of you may remember that after the loss of Crete in the last war, the Times had one of the shortest first leaders in its history. Under the heading "Sursum Corda" was a brief statement of that disaster followed by these words spoken by Our Lady to Alfred:-

I tell you naught for your comfort,
Yea, naught for your desire,
Save that the sky grows darker yet
And the sea rises higher.

Night shall be thrice night over you,
And heaven an iron cope.
Do you have joy without a cause,
Yea,faith without a hope?

The poem goes on with the gathering of the chiefs and the visit of Alfred to the camp of the Danes disguised as a minstrel. It is of this that Monsignor O'Connor writes:

The Harp of Alfred contains some of the best lyric thinking in all the literature known to me. Wagner is a penny trumpet in this unique tournament of song, in which the sensual Pagan,the poetic Pagan, the savage Pagan,and the cultured Pagan say their say with music,before Alfred says the say of Christian Fact.

There follows as fine a description of a battle as you will find in English verse. Alfred's forces are finally broken and routed and the climax of the poem is the story of how Alfred rallies the scattered few that are left for a final hopeless charge which ends in victory. It is just as this charge is launched that Our Lady again appears to him:-

And when the last arrow
  Was fitted and was flown,
When the broken shield hung on the breast,
And the hopeless lance was laid in rest,
  And the hopeless horn blown,

The King looked up,and what he saw
  Was a great light like death,
For Our Lady stood on the standards rent,
As lonely and as innocent
As when between white walls she went
  And the lilies of Nazareth.

One instant in a still light
  He saw Our Lady then,
Her dress was soft as western sky,
And she was a queen most womanly -
  But she was a queen of men.

Over the iron forest
  He saw Our Lady stand,
Her eyes were sad withouten art
And seven swords were in her heart -
  But one was in her hand.

You will find the expression of his devotion in the essay "Mary and the Convert" and in many of his early poems, but it comes to its full flower in the little volume "The Queen of Seven Swords" all the poems of which are devoted to her.

The influence of Chesterton on other English writers of this century has been, and I am sure will continue to be, very

great. As you know the life of a lawyer does not afford much time for general reading but I have observed it for myself in the writings of Monsignor Sheen,Ronald Knox,C.S.Lewis,Charles Williams and Dorothy Sayers.

In a lecture which Monsignor Ronald Knox delivered on G.K.Chesterton he said:-

> To me Chesterton's philosophy,in the broadest sense of that word,has been part of the air I breathed, ever since the age when a man's ideas begin to disentangle themselves from his education. His paradoxes have become,as it were,the platitudes of my thought.

A little later in the same lecture he said:-

> In all Chesterton's stories you are never introduced to a woman he wants you to dislike. There is one fussy old lady in "Manalive"; there are one or two dangerous beauties in the Father Brown stories. But I do not think there is any author, with a literary output comparable to Chesterton's, who displays so consistently chivalrous an attitude towards the other sex. This is a digression but I think it is worth making; it is of a piece with Chesterton's enormous reverence for women,with his knightly devotion, I do not know by what other name to call it, to the holy Mother of God.

It was of Ronald Knox that Chesterton wrote one of his shortest poems:-

<u>Namesake</u>

> Mary of Holyrood may smile indeed,
> Knowing what grim historic shade it shocks
> To see wit,laughter and the Popish creed
> Cluster and sparkle in the name of Knox.

Most of what I have said to you to-night has been in Chesterton's own words.

May I read what Hilaire Belloc says at the conclusion of his book "On the Place of G.K.Chesterton in English Letters"?-

> In the appreciation of a man rather than of a writer virtue is immeasurably more important than literary talent and appeal. For these last make up nothing for the salvation of

> the soul and for an ultimate association with those who should be our unfailing companions in Beatitude: the Great Company. Of that Company he now is; so that it is a lesser and even indifferent thing to determine how much he shall also be of the company,the earthly and temporal company,of the local and temporarily famous.
>
> What place he may take according to that lesser standard I cannot tell, because many years must pass before a man's position in the literature of his country can be called securely established.
>
> We are too near to decide on this. But because we are so near and because those (such as I who write this) who were his companions, knew him through his very self and not through his external activity,we are in communion with him. So be it. He is in Heaven.

May I also quote the lines which Walter de la Mare wrote about him and which Mrs.Chesterton had printed on his memorial card:-

> Knight of the Holy Ghost,he goes his way,
> Wisdom his motley,truth his loving jest;
> The mills of Satan keep his lance in play,
> Pity and Innocence his heart at rest.

It must now be time to bring these random remarks to a close. I confess,as I do so, to a certain feeling of frustration. I feel as if I had a piece of almost incredibly good news to tell and that far from telling it I have but hinted inadequately at a few of its details. But I console myself with the thought that the good news is there in his books,waiting for you.

May I go back to what I said at the beginning,that is to the note of thanks. In his life of Dickens,Chesterton says:- "This is the only final greatness of a man, that he does for all the world what all the world can not do for itself." Chesterton, I believe,has done that.

In his life of Browning, he says :- "This is indeed the

most bountiful of all the functions of the poet,that he gives men words,for which men from the beginning of the world have starved more than for bread", and I would like,Mr. President, to thank you again for your kindness which has made it possible for me to pay my little tribute of thanks to Chesterton for his so bountiful gift of words - words which clear the mind and lift the heart.

AT THE CONVOCATION OF THE LAW SOCIETY
OF UPPER CANADA on JUNE 27th, 1963.

Mr.Treasurer,Distinguished Guests,Ladie and Gentleman and especially you who have just received the degree of Bachelor of Laws:-

May I first say Mr.Treasurer how deeply I appreciate the gracious and undeserved honour which this society has conferred upon me to-day. This honour great to anyone is especially dear to me because Osgoode Hall is my Alma Mater; it is enhanced too by the eminence of those on whom it has previously been conferred,one of whom the Honourable Keiller Mackay,who is gracing this gathering with his presence, I am fortunate in counting among my oldest and closest friends. Our friendship dates from our first meeting when as a young but already distinguished Major,he was commanding a howitzer battery in the Ypres Salient. We all know his record as a brilliant counsel, a great judge and a gracious representative of Her Majesty,but first impressions are lasting and I shall always think of him primarily as a courageous soldier and a determined and successful commander.

The long and glorious history of the Law Society of Upper Canada is too well known to require any words of praise

from me but I would like to say a word of thanks not only for the solicitous and expeditious care with which in 1919 and 1920,with the aid of summer courses, the academic training of those of us students who had just returned from the war was completed, but also for countless happy memories; and turning from the past to the future I am grateful for the pleasant prospect that, should I survive to retire, I shall be a Bencher of the Society for the remainder of my days without submitting to the hazards of quinquennial election.

To all of you who are receiving your degree may I extend my heartiest congratulations and my best wishes for your continued success in the remainder of the course leading to your call to the bar, in which the emphasis now shifts from the theory to the practice of law. Your course is a long and arduous one, necessitated by the nature of the responsibilities which the members of our profession must be fitted to assume. When the time comes for you to embark on its practice your clients will commit to you the safe-guarding of their property,their reputation, their liberty and it may be at times their lives. Such a relationship requires the most unreserved confidence on the one side and on the other not only the most complete devotion to the duty assumed, but adequate knowledge and skill.

When I speak of complete devotion to your clients' interests this is subject to one qualification. Your duty to your client never requires you to deviate from the path of honour. You say and do for your client all that he could honestly say and do for himself ie he possessed the special skills in which you have been trained.

You know,better than anyone else, how much effort,how much self-denial and sacrifice on your own part and, in the case of the many of you who are married,on the part of your wives also,has been and continues to be necessary to enable you to attain the goal of being called to the bar. I am sure that you will not regret these sacrifices. You have chosen one of the greatest of the professions and the life of the lawyer is a good life, although not an easy one.

To the work of the lawyer may truly be applied the words of Dorothy Sayers that it is such as a man may do with his whole heart and do for the very work's sake; that it is not primarily the thing he does to live but the thing he lives to do; that it can and should be the full expression of the worker's faculties, the thing in which he finds spiritual,mental and bodily satisfaction and the medium in which he offers himself to God.

It is of lawyers amongst others that she writes that they fight for precious time in which to get on with the job -instead of fighting for precious hours saved from the job, and that they resent as a monstrous interference with the liberty of the subject any attempt to prevent them working as long and as well as the work and their enjoyment of it demands.

The Treasurer has told me that for the next 21 months your time will be fully occupied; you can be in no need of suggestions of additional activities,but looking beyond the immediate future, I venture to offer two. The first is,that as time goes on you should give thought to taking part in public affairs. It is a sad thought that it is not only by the ignorant that the words "politician" and "political" are sometimes thought of as derogatory and indeed are even used as terms of reproach. Nothing should be farther from the truth. In the great days of Greece,whence the words are derived,the doing of the business of the city or the state was regarded as one of the highest of duties; and while I am no Greek scholar I am informed that the Greek word "ἰδιωτος ", which is the source of our word "idiot" may be freely translated as "those who take no part in public affairs". Especially in the difficult and dangerous days in which we live the best of our citizens should be available for the task of government; it is a task for which you should be particularly wellOfitted,having been trained in the use of the tools of learning to distinguish fact

from opinion and the proven from the plausible.

My second suggestion is as to your general reading. Ours is one of the "learned professions". Help to keep it so. English literature is a vast and varied treasure. Seek to familiarize yourselves with the best in its prose and poetry. Do not confine your reading to that which has a direct bearing on the law. In a series of lectures which he delivered some years ago Lord Denning treated "Command of Language" as the first virtue of the lawyer. It has been said that there has been no really great advocate whose mind was not stored with the treasures of our literature. Do not waste on rubbish the precious hours you have for general reading.

At this stage of my address it was my plan to discuss with you a subject which has received little attention from the contributors to legal periodicals -"The effect of climatic conditions on the development of the Common Law in Ontario";but at the last moment I have decided to give you instead a practical demonstration of the effect of climatic conditions on the length of speeches.

To you graduates I extend my best wishes for your happiness in the profession of the law. I wish you indeed material success and fame and fortune but above all that you may find joy

in the doing of your chosen work.

Mr.Treasurer, may I thank you again and through you the Law Society of Upper Canada for the honour done to me and for your kindness in inviting me to speak to this distinguished gathering.

Delivered by the Hon.John R.Cartwright,P.C.,
Chief Justice of Canada.

Tribute

to

Dean I. C. Rand

by

The Hon. Mr. Justice J. R. Cartwright

delivered at Hotel London, London, Ontario

on Thursday, 26th March, 1964

on the occasion of a Testimonial Dinner

arranged by the U.W.O. Legal Society

Chief Justice of Canada.

Tribute to Dean I. C. Rand by the Hon. Mr. Justice J. R. Cartwright delivered at Hotel London, London, Ontario on Thursday, 26th March, 1964 on the occasion of a Testimonial Dinner arranged by the U.W.O. Legal Society.

Mr. Chairman, Dean Rand, My Lords Chief Justices,
my brothers of the Bench and Bar, Ladies and Gentlemen,

May I first thank you, Mr. Chairman, on behalf of my wife and myself for your kindness and hospitality in inviting us to this delightful dinner and tell you how honoured I am at being asked to speak to this distinguished gathering upon a subject so great and so congenial as your Dean, my former colleague and one who has long been for me an object of hero-worship.

I am confronted at the outset by two difficulties, the obvious one of doing adequate justice to the subject and secondly that of doing so with reasonable brevity. You remember the Texas students who were faced with the question - "Write an essay on 'Why I am glad I live in Texas' in not more than 25,000 words".

Mr. McNeill has spoken eloquently of our guest of honour in other aspects. It has fallen to my lot to pay tribute to him as a Judge.

In the Supreme Court Reports for 1943 it is noted that on the 22nd day of April in that year Ivan Cleveland Rand, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

It was a great day for the Court and for Canadian jurisprudence. His appointment was hailed by all those who knew his attainments.

Delivered by the Hon.John R.Cartwright,P.C.,
Chief Justice of Canada.

An honour graduate of Harvard Law School, a distinguished member of the Bar of three of our Provinces, a former Attorney-General, his record offered a fair promise which, in the sixteen years that he occupied the Bench, was gloriously fulfilled.

From the first, counsel who appeared before him and those of us who were fortunate enough to share the conference-room with him were impressed by his complete independence of mind. He was impatient of the slavish acceptance, without critical analysis, of any proposition of law, however august the tribunal which had pronounced it.

He disliked anything savouring of obsequiousness on the part of any member of the Bar. I can hear him now answering counsel's phrase "With the Court's indulgence I will now proceed if the Court pleases" - "You need no indulgence from the Court - it is as much our duty to listen as it is yours to speak". There was, at times, a corresponding abruptness in his manner which could be disconcerting to those who were unfamiliar with the almost passionate intensity of his search for truth. His probing questions were never intended to deter or discourage counsel but only to assist in the quest for the right answer. If, on occasion, his manner was a little terrifying it only momentarily concealed his essential kindness.

I have forgotten who it was that said:- "No trait of character is rarer, none more admirable than a thoughtful independence of the opinion of others combined with a sensitive regard for the feelings of others". Dean Rand possessed that trait of character in a high degree.

I have it on the authority of a former Lord Chancellor of England that it is not seemly to weigh the pronouncements of living Judges - and our guest of honour is happily very much alive - but it is I think permissible to say that few, if any, Judges of the past have left to the jurisprudence of this Country a legacy comparable in volume and in consistently high quality to that comprised in the judgments of Mr. Justice Rand.

These excel in both matter and manner. Never do they consist of a mere citation of a string of authorities. The analysis of the facts and the application of the relevant principles of law proceed step by step to the final decision. The frequency with which his pronouncements are cited in argument and in judgments in all our Courts is the best evidence of how they are regarded by the profession.

The style in which his judgments are written perpetually excites my admiration and indeed my envy. Much as I would wish to do so, I have no hope of being able to attain to it. It remains for me inimitable.

To describe the style of any great writer is notoriously difficult and I do not propose to make the attempt. While I might equally choose from scores of his judgments, I recommend to the interested student of style a perusal of Mr. Justice Rand's reasons in Boucher vs The Queen in 1951 S.C.R., an appeal from a conviction for seditious libel. A clear and concise statement of the relevant facts is followed by an examination of the historical development and changing concepts of this branch of the law which leads to a definite statement

of the present principles. The application of those principles to the particular facts then produces the final conclusion. Having already confessed my inability to describe the style in which the judgment is written, may I instead read one paragraph from it:-

> "There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility among groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: What is the degree necessary to criminality? Can it ever, as a mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, disaffection

and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution of truth of things generally."

This paragraph, chosen almost at random, is an example of the manner in which his judgments were written.

Fortunate indeed as he has ever been in combining a profound knowledge of the law with clarity of thought and facility of expression, the greatest of his attributes as a Judge has been, I venture to say, his deep and abiding sense of justice. Wise and experienced in the ways of the world, he never lost - if I may borrow words from G. K. Chesterton - "that pure horror of injustice which is a great beauty of the innocent".

He never lost sight of the importance of every case to those concerned in it, or of the fact that the primary duty of a Court is simply to do justice between the parties who come before it, and that we are bound to the performance of that duty to the best of our ability not by a contract but by a vow.

There is a temptation against which most holders of judicial office must always be on guard - that is the temptation to make up one's mind too soon and, having done so, to resist, perhaps subconsciously, attempts to change it. If Mr. Justice Rand was ever so tempted, he never succumbed. He was always ready to discuss and reconsider and I have the happiest recollection of hours spent in his room thrashing

out points on which we were in doubt or disagreement. He freely shared his wisdom and experience, and his example was a perpetual inspiration.

Knowing how much time he spent on the performance of his judicial duties, I have often wondered how he found time for anything else; and yet we all know that in his spare time he profoundly influenced the development of the labour union movement by devising "The Rand Formula" and that he altered the history of the world in the partition of Palestine. He has found time also to become familiar with all that is best in the rich treasure-house of English literature.

May I borrow again from a Lord Chancellor of England words which he spoke of a great English Judge and which appear to me to be equally applicable to our guest of honour:-

> "Mr. Justice Rand made a rare contribution to the deliberations of the Court. Profoundly learned in the law, he did not parade his learning; nor, though his scholarly and penetrating mind was quick to discern the finest subtleties of language or of thought, did he allow any refinement to deflect his judgment from the path of wisdom which we call common sense."

I will detain you for only a moment longer. I feel that my own words have been inadequate to pay the tribute to Mr. Justice Rand's work as a Judge which the whole profession, and my colleagues in particular, would wish to pay. That tribute is more eloquently expressed by the presence here of so many distinguished members

of the Bench and Bar who have come, some from great distances, to do him honour.

In the Land of Israel there is a forest which bears the name of Ivan Cleveland Rand. I do not know how long forests endure, although I remember that the New Forest in England has flourished for almost a thousand years. However long that forest in the Holy Land keeps fresh his name, it will not outlast the memorial fashioned of his judgments and enshrined in the law reports of this Country. Of these he is entitled to say with Horace - "I have set up a monument more lasting than bronze".

T.C.S. June 6,1964.

Mr.Chairman,Mr.Headmaster,Ladies and Gentlemen and especially boys of the graduating class:

May I first thank you Mr.Chairman for your much too kind and generous introduction and thank you too for the honour you have done me in inviting me here to-day.

I had planned to commence by, as it were,presenting my credentials and reciting the number of my relatives who have been at T.C.S.but your Headmaster has done this for me and I will content myself by adding that the earliest of them to be head boy was my cousin Edward Cayley in 1882 and the latest to be winner of the Bronze Medal was my great-nephew,John Bayly last year;and,turning from the past to the present, your assistant to the Headmaster, Mr.Dale,is my nephew. I can fairly claim that I do not come here altogether as a stranger although wearing the tie on which your Headmaster has commented.

The first occasion on which I was a guest of T.C.S. was 52 years ago this month when I came as a member of the U.C.C. cricket team for our annual match. It ended in a draw when the morning showers developed into an all-day rain.

Although not an old boy of T.C.S., I had the comparable good fortune of spending seven years at U.C.C.and I can think of no happier start in life than that of receiving one's education at one of our great Canadian schools. Of these none is richer in tradition,none possessed of a more splendid history than Trinity College School. The glorious record of your old boys'

service to our country in war and in peace is too well known to require any words of praise from a speaker on Prize Day.

You boys who are leaving the school this month are the heirs of that tradition. Yours is a goodly heritage and one in which you are entitled to take a joyful pride - not an ill pride - not a temptation to snobbishness but rather a sense of noblesse oblige and a recollection that "unto whomsoever much is given of him shall be much required".

Your memory of the school and your pride in being an old boy you will carry through life. You will find in them a source of joy in good days and of strength in times of difficulty. You may remember the poem in which Henry Newbolt (whose school was Clifton) suggests that in the past such memories have proved decisive in some dark hour when "England's far and honour's a name".

It is long since I attended a school prize day and I do not pretend to remember all that was then said but I do understand that it is customary for the speaker to offer a few words of advice and exhortation to the graduating class. In accordance with that custom I venture two suggestions. The first looks into the future (since most of you will be fully occupied at the universities of your choice during the next few years); it is that you give thought to taking part in public affairs. Sad to say, it is not only by the ignorant that the words "politician" and "political" are sometimes thought of as derogatory and indeed

are even used as terms of reproach. Nothing should be farther from the truth. In the great days of Greece, whence the words are derived, the doing of the business of the City was regarded as one of the highest duties and those of you who have studied the classics will remember that the Greek word "ἰδιώτης" which is the source of our word "idiot" may be freely translated as "one who takes no part in public matters". Especially in the difficult and dangerous days in which we live the best of our citizens should be available for the task of government. If we admit that these days are indeed difficult and dangerous we need not find in that a cause for dismay. I have always thought of Robert Louis Stevenson as one of the happiest of men and it was of him that Chesterton said:-"It was his whole business to preach that we can only have peace in this world if we accept it as a world of war."

My second suggestion is as to your general reading. Your remaining years of study and then the professional or business careers on which you embark will take up most of your time, but not all of it. Seek to familiarize yourselves with the best in English prose and poetry. It is a vast and varied treasure. No life is long enough to permit enjoyment of it all. Do not waste on rubbish the precious hours you have for general reading.

So much for advice - by way of exhortation I urge you to

hold fast those ideals which you have formed at this great school; and what better exhortation could be offered than that you remember always what we heard in the Chapel this morning. I wish each of you good fortune and especially that you may find joy in the doing of the work you choose. To conclude, I borrow words from Rudyard Kipling:-

> Go to your work and be strong,halting not in your ways,
> Baulking the end half-won for an instant dole of praise.
> Stand to your work and be wise - certain of sword and pen,
> Who are neither children nor Gods,but men in a world of men!

TORONTO CLUB - September 18,1967.

Mr.President,
Your Excellency,
Fellow-members of the Toronto Club,

I am grateful for the honour of having been asked to propose this toast; and we are all grateful to His Excellency for having accepted our invitation and joining with us in carrying on the unbroken tradition of one hundred years.

Like many of us here this evening, I have had the good fortune to enjoy the friendship of His Excellency for many years. In this centennial year, it fell to my lot to administer to His Excellency the Oath of Allegiance and the oaths of his high office and he, in turn, graciously did the same for me earlier this month. I shall cherish these occasions as life-long memories.

This province was for a considerable time the centre of His Excellency's public and professional life. While he is not a stranger in any part of Canada, we take pride in the thought that, in a special sense, he is at home in this city and in this Club as well as in Rideau Hall.

I shall not detain you by attempting even a brief summary of His Excellency's services to our country. They are well known to us all and have not been confined to this hemisphere.

It is an understandable coincidence that in welcoming His Excellency at his installation as Governor General, the Prime Minister should have quoted the same lines of poetry as I had recalled a few days earlier in my letter of congratulations to the Governor General designate. I say it is understandable because there is no one who could say more truly or more appropriately the words which Tennyson puts into the mouth of Ulysses:-

"Much have I seen and known; cities of men
And manners, climates, councils, governments,
Myself not least, but honoured of them all;
. . . . . .
I am a part of all that I have met."

It was a fitting culmination to many years of brilliant and devoted service when our guest of honour was appointed to the highest post in this country in the gift of Her Majesty.

This great honour carries with it grave responsibilities. No one is better equipped than he to deal with these and in doing so he will be encouraged and sustained by the confidence and loyalty of all Canadians of good will and especially of this company here present.

I ask you to rise and drink to our fellow-member, Her Majesty's right trusty and well-beloved counsellor, the Right Honourable Roland Michener, Chancellor and Principal Companion of the Order of Canada, Governor General and Commander-in-Chief of Canada.

Delivered by the Hon.John R.Cartwright,P.C.,
Chief Justice of Canada.

Mr.President,Mr.Treasurer,Dean Smalley-Baker,
Ladies and Gentlemen:-

May I first thank you for your kindness in inviting me here to-day and tell you how much I appreciate the honour of being asked to speak to your distinguished Society. When Mr.Morris conveyed your invitation he left the choice of subject to me but was good enough, at my request, to offer some suggestions. I must confess that I hesitated over "Memories of a fashionable divorce practice" before deciding to speak to you about a somewhat more serious topic -" Freedom of Speech under the Law." I have chosen this partly because I had occasion in the recent case of Boucher v.The King to do a good deal of reading and,I hope,some thinking about it and partly because I think it is of particular importance at this time when the world is engaged in what has been aptly described as "The Battle for Men's Minds",-a battle on the result of which the future of all of us and of our children's children depends and in which words are the chief weapons.

Freedom of speech, like any other freedom, can exist in a complex society only if it is defined and protected by authority. Your freedom to practise your profession can not co-exist with your rival's freedom to say,falsely, that you are bankrupt or incompetent. It is freedom under the law. It is, I think, peculiarly our responsibility, since we have chosen the law as our profession not only to protect and preserve this freedom but also to restrain and guard against its abuses.

First, I think it well that we should examine the legal basis on which,in this country, freedom of speech stands. We have not a written constitution as have the United States of America which you will remember provides that:-

" Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or the right of the people peacably to assemble and to petition the Government for a redress of grievances". But our freedom of speech while not defined in any one document, is, in practice, scarcely distinguishable from that of the United States except in this that the appropriate legislature could modify it at any time. Essentially under our law I think the terms "Freedom of Speech" or "Freedom of the Press" mean that no speech which is to be delivered and no writing which it is proposed to publish is required in advance to be licensed or to be submitted to any censorship. Until the end of the 17th century, I think, to be precise, until 1694, it was otherwise and a very real censorship was exercised in regard to books and indeed all printed matter. Since 1694, except in times of war, censorship in advance of publication has been unknown to the law. This has never meant that anyone and everyone is free to publish with impunity whatever he might see fit, however damaging to a fellow-citizen or however injurious to the state.

The law of defamation, that is of libel and slander, gives some protection to us all against the reckless abuse of freedom of speech. As you know, generally speaking, any one who falsely and maliciously publishes anything of another which is liable to bring that other into hatred, ridicule or contempt or to injure him in his trade, profession or calling, is liable in damages - in an action of slander if the defamatory words are spoken, of libel, if they are written.

Certain types of speech and writing are also punishable by the Criminal Law.

Defamatory libel is a crime as well as a civil wrong. Generally speaking, a libel must be of a grave nature before criminal proceedings will be taken. In other cases the party aggrieved will be left to his action for damages but the possibility of criminal action is an essential safeguard against a type of publisher who has no assets and rejoices at the issue of a writ for libel, and such proceedings are properly resorted to in many cases. Truth alone, as you know, is not a defence to a charge of criminal libel; it must also be shown that publication in the manner made was for the public benefit at the time of publication. Obscene publications are punishable. It is an offence to publish a blasphemous libel but prosecutions are rare and no attack on any religion or faith is punishable if made in good faith and couched in decent language. Threats, challenges to fight, incitements to crime are punishable. The wilful publication of any false news or tale whereby injury or mischief to any public interest is likely to be occasioned is also a crime.

Perhaps the most important and least certain branch of the criminal law which bears upon our subject is that dealing with the speaking of seditious words or the publication of seditious libels.

The definition in the Criminal Code is, I think, intentionally incomplete. In enacting the Code Parliament followed in the main the provisions of the Draft Code prepared in England but not adopted by the Imperial Parliament. In the Draft Code the subject was dealt with in Articles 114 and 115 which read as follows:-

> "Article 114 - A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom,

as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

An intention to show that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention."

"Article 115 - In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

Parliament did not adopt this definition in toto. The relevant provisions of the Code are contained in sections 133 and 133A which provide:-

"133(1) Seditious words are words expressive of a seditious intention.

(2) A seditious libel is a libel expressive of a seditious intention.

(4) Without limiting the generality of the meaning of the expression 'seditious intention' everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada.

133A. No one shall be deemed to have a seditious intention only because he intends in good faith,-

(a) to show that His Majesty has been misled or mistaken in his measures; or

(b) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or any province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any legislature, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or

(c) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects."

You will observe that the only intention expressly defined as seditious is that of the person who advocates the use, without the authority of law, of force as a means of accomplishing any governmental change in Canada. The opening words of the sub-section make it clear, however, that this definition is not intended to be exhaustive and that it is left to the Courts to ascertain from the common law what other intentions are to be held seditious.

The matter has in the last two years occupied the attention of the Supreme Court of Canada in the case of Boucher v. The King. In that case it was admitted that the accused had distributed copies of a pamphlet entitled "Quebec's Burning Hate for God,Christ and Freedom is the Shame of All Canada". I will not read it or quote from it. You may have seen copies of which more than 1,500,000 were said to have been printed. It reported outrages said to have been committed against certain of Jehovah's Witnesses, said that the perpetration of such outrages was encouraged by the police and condoned by the Courts, that the Witnesses were prosecuted instead of their attackers, that the Courts pursued a malicious policy of allowing undue postponements and fixing exhorbitant bail and, in one case, confirmed an "infamous" sentence. It was said that this was done because the Courts were "under priestly thumbs". Boucher was convicted of publishing a seditious libel and sentenced to one month in prison.

The Court of Appeal in Quebec affirmed this conviction. Two members of the Court dissenting would have set aside the conviction and directed a new trial. On appeal to the Supreme Court of Canada the appeal was unanimously allowed but three members of the Court thought that a new trial should be ordered while two thought that an acquittal should be directed.

On motion of Boucher's counsel a re-hearing was directed as no three members of the Supreme Court had agreed as to the essential ingredients of a seditious intention and the judge presiding at the new trial would have been faced with the unenviable

task of defining to the jury an offence on the definition of which the Supreme Court was unable to agree. At the new hearing and after hearing a most carefully prepared and clearly presented argument the Court was again unanimous in holding that the appeal should be allowed but by a majority of five to four directed an acquittal. Consequently Mr.Boucher will not be tried again and the trial judge is spared the task of interpreting and applying the judgment. It would not be seemly for one member of the Court, and particularly one of the minority,to assume to say just what is decided and before you advise a client in the matter I commend the judgments to your careful consideration.

You may, I think, take it as settled that the tendency of a publication to promote feelings of ill-will and hostility between different classes of His Majesty's subjects is not in itself enough to render it seditious - it must go further and tend to stir up violence against or resistance to the due functioning of lawful authority. As to a publication tending to vilify the administration of justice to bring it into contempt and cast a stigma upon it, it is, I think, more difficult to say whether the matter is finally settled.Two judges expressly held that this tendency alone was not enough to constitute the offence of seditious libel.. Three others came to the same result as to the disposition of the appeal. Three judges thought that such a tendency alone was enough to constitute the offence although they pointed out that the jury must be instructed that if the intention of the accused was to purify rather than to vilify the administration of justice,then criticism of the Courts, no matter how vigorous, is not an offence and that if in doubt as to the real motive of the accused,the jury must of course acquit. One member of the Court agreed in this result but dealt only with other aspects of the case. There is nothing, I think, in any of the judgments to suggest that the publisher might not have been liable to proceedings for contempt of Court. But you are as free as I to form an opinion as to the effect of the judgments.

The reference to contempt of Court brings us to another

form of restraint on complete freedom of speech. Contempt in face of the Court is scarcely germane to our subject but two other branches are relevant. The first of these consists of the publication of matter which may interfere with the fair trial of a pending case.

You may have noticed a recent instance of this reported in the press in which an editor in England was fined and imprisoned for printing a story stating that a man, then awaiting his trial on a charge of murder, had committed several murders.

The other branch of contempt with which we are concerned is that known as contempt by scandalizing the Court. It consists of words spoken or written calculated to bring a Court or Judge into contempt. It has been said that such contempt is punished not for the purpose of protecting the Court or the individual judge but to protect the public from the mischief which will result if the authority of the Courts be undermined. In modern times cases of this sort are comparatively rare. The right to criticize the judgments of the Courts is well established but scandalous abuse of or the imputation of corrupt motives to the Courts remains punishable.

None of the restraints I have mentioned are novel. I think that you will agree that they are just and necessary.

Blackstone in his Commentaries in 1769, or thereabouts, summed the matter up in these words:-

" In this, and the other instances which we have lately considered, where blasphemous, unmoral, treasonable, schismatical, seditious or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the <u>liberty of the press</u>, properly understood, is by no means infringed

or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper,mischievous or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry; liberty of private sentiment is still left;the disseminating,or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add that the only plausible argument heretofore used for restraining the press,i.e.,'that it was necessary to prevent the daily abuse of it' will entirely lose its

force, when it is shown (by a reasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it never can be used is any good one, when under the control of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty of the press."

Basically there has been little change in the underlying principles of the law enunciated by Blackstone. In practice much that would have been prosecuted in his day has ceased to be regarded as unlawful. In practice it may sometimes seem that the safeguards furnished by the law against the abuse of this freedem are inadequate.

In time of war the safeguards have to be strengthened and the freedom correspondingly abridged. The Defence of Canada regulations in the 1939-1945 war made it an offence to make any statements, utterances or publications likely to cause disaffection to His Majesty, to interfere in the success of the armed forces, to prejudice our relation with foreign powers, to prejudice recruiting or discipline or indeed likely, in any way, to be prejudicial to the safety of the State or the prosecution of the war. These are most necessary in times of actual war when as Mr.Justice Hope said "Our ancient liberties must be placed in pawn for freedom".

I suggest that we should consider what each of us can do to preserve this freedom and first I venture to suggest we must be on our guard against complacency; against taking this freedom for granted.

It has been said that "Ingratitude is surely the chief of the intellectual sins of man that he takes his political benefits for granted."

G.K.Chesterton has this to say about it:-

" It is not by any means self-evident upon the face of it that an institution like liberty of speech is right or just. It is not natural or obvious to let a man utter follies and abominations which you believe to be bad for mankind any more than it is natural to let a man dig up a part of the public road or infect half a town with typhoid fever. The theory of free speech, that truth is so much larger and stranger and many-sided than we know of, that it is very much better at all costs to hear every one's account of it, is a theory which has been justified upon the whole by experiment, but which remains a very daring and even a very surprising theory."

The most obvious menace to this and our kindred freedoms no doubt lies in the threat of Communism with its philosphy of ruthless tyranny and its denial of the doctrine of human dignity. You will have read Mr.Truman's recent message to Congress,in which he did not, I think, purport to speak of new things but warned once more how those who seek world domination are working steadily in every country which still possesses freedom. Their adherents taking advantage of the liberty of speech, which it is one of their purposes to destroy, present false facts and specious arguments and do,alas,win some to their way of thinking. They are carefully selected and trained for this work and are uninhibited by any moral or philosophical attachment to truth. How can we best resist and counter these insidious and continuing attacks? Must we not first be sure that we have cleared our own minds so that we understand the essential differences of the two ways of life now in conflict,so that we understand what are the apparent strengths and attractions as well as the real weaknesses and

wickednesses of the Communist philosophy. The book I have found most helpful in this regard is "Communism and Man" by F.J.Sheed published by Sheed and Ward, New York. It gives in brief and readable form the essentials of both philosophies. I commend it to you,without hesitation.

Next I borrow the suggestion from Dorothy Sayers that "we must remember that while we have a population that is literate in the sense that everyone can read and write, very few of our people have been trained or prepared to resist carefully planned propaganda." She goes on to say that a defence against the misuse of words to entrap the innocent is the wary determination to understand the potentialities of our language and to use it with resolution and skill. For this part of the struggle your special training should qualify you well. I do not mean to urge you to be continually talking about these matters but I do suggest that we should lose no opportunity to strike a blow on the right side. The fight is going on around us all the time and it is one in which no man can be neutral. Let us avoid carelessly giving aid to the enemy. Let us avoid the making of thoughtless statements tending towards indifference or sloth. The sort of thing that Chesterton refers to as:- "A sort of casual and even conversational scepticism,making even the idle thoughts of an idle fellow busy in the interests of doubt and despair."

We know that our system is the better. We know that it supports and is supported by truth, justice and freedom. We know that no normal man with a true view of both systems would choose that of the enemy. But do not let us assume that ours is perfect. Let us all work continuously, not only to keep it good but to make it better and particularly in our profession let us fight against injustices of every kind, social and legal. At a great price this freedom of speech has been obtained and preserved for us and let us use it for its own preservation and that of all our other liberties.

I thank you again for your kindness and hospitality.