

FLAWS IN THE COMMON LAW.*

I wish to preface what I have to say by observing that I claim, in my humble way, to be second to no one in my admiration for our ancient common law and our case-law system which is inseparably connected with it; and no one rejoices more than I do that the attempt made in the reign of King Henry VIII. by Reginald Pole, the King's cousin, to have the common law superseded by the civil law came to nothing. Therefore when I speak of flaws in the common law, I speak as one might speak of flaws in a diamond.

Nevertheless there are certain features and doctrines in the common law so contrary, in my opinion, to common sense, justice, reason, and humanity, or one of them, that I can suggest only one explanation of the fact that they have been allowed to continue generation after generation and century after century. Just as it is recognized as a common defect of Englishmen, that they know no language but their own, so it is, I think, a common defect of British lawyers everywhere that they study no system of law but their own. For my own part circumstances have led, during the last few years, to my acquiring a certain elementary knowledge of Roman law and the modern civil law systems built upon it; and in nearly every one of the cases to which I desire to refer this morning, the rule of the civil law is different to that of the common law.

The first point to which I wish to call your attention is the unlimited freedom of testamentary bequest regardless of claims of family. If a man be of sound disposing mind he is at liberty, however wealthy he may be, to leave his family destitute, and devise and bequeath his whole estate to a home for lost dogs, save only, in Ontario, but not in England, a wife's right to dower in his freehold lands. So far back as in the 4th edition of his Commentaries, published in 1770 (pages 449-450), Blackstone says:

'Our law has made no provision to prevent the disinheriting of children by will; leaving everyman's property in his own

*This paper was read by Mr. A. H. F. Lefroy, K.C., at the meeting of the Ontario Law Society at Osgoode Hall, Toronto, on February 22nd, 1918.