CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

Technical and Bibliographic Notes / Notes technique et bibliographiques

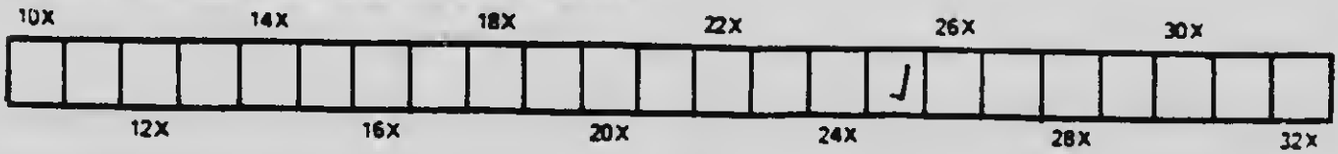
The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming are checked below.

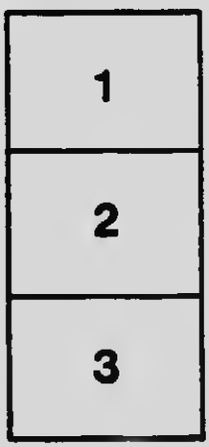
- [x] Coloured covars / Couverture da couleur
- [ ] Covers damaged / Couverture endommagée
- [ ] Covers restored and/or laminated / Couvarture restaurée et/ou pelliculée
- [ ] Covar title missing / La titre de couvertura manque
- [ ] Coloured maps / Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blua or black) / Encre de coulaur (i.e. autre qua blaue ou noire)
- [ ] Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- [ ] Bound with other matarial / Relié avec d'autres documents
- [ ] Only edition available / Seule édition disponible
- [ ] Tight binding may cause shadows or distortion along intarior margin / La raliure sarréa peut causer de l'ombre ou da la distorsion le long de la marga intérieure.
- [ ] Blank leaves added during restorations may appear within the text. Whanaver possibla, these hava been omittad from filming / Il se peut que certaines pages blanchas ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- [ ] Additional comments / Commentaires supplémentaires:

L'Institut a microfilmé le meilleur examplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modifications dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured pages / Pages de coulaur
- [ ] Pages damaged / Pages andommagées
- [ ] Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed / Pages décolorées, tachatées ou piquées
- [x] Pages detached / Pages détachées
- [x] Showthrough / Transparence
- [x] Quality of print varias / Qualité inégala da l'impression
- [ ] Includes supplementary matarial / Comprend du matériel supplémentaire
- [ ] Pages wholly or partially obscured by errata slips, tissuas, atc., hava baan refilmad to ensure the best possible image / Les pagas totalament ou partiellament obscurcias par un fauillat d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtanir la mailleura image possible.
- [ ] Opposing pagas with varying colouration or discolourations are filmed twice to ensura the best possible imaga / Les pagas s'opposant ayant des colorations variables ou des décolorations sont filméas deux fois afin d'obtenir la meillaur image possible.

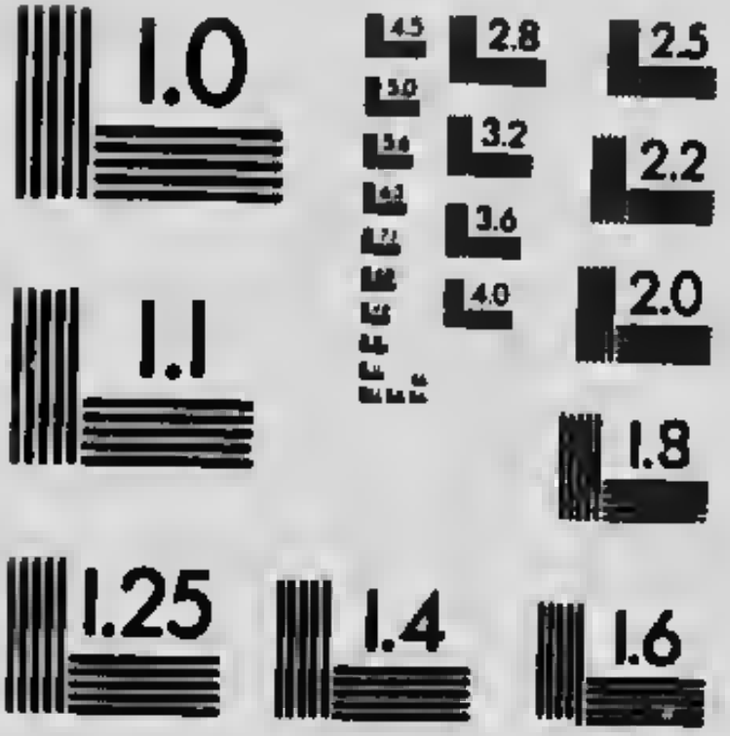
This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.





MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

ADDRESSES

BEFORE

THE CANADIAN BAR ASSOCIATION

DELIVERED
AT THE FIRST ANNUAL MEETING, MONTREAL
MARCH 19th & 20th, 1915

CANADIAN BAR ASSOCIATION

ORGANIZED 1914

CONSTITUTION.

ARTICLE 1.

"This Association shall be known as the Canadian Bar Association. Its objects shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces, uphold the honour of the profession of law, and encourage cordial intercourse among the members of the Canadian Bar."

OFFICERS.

HONORARY PRESIDENT:—Hon. The Minister of Justice.

PRESIDENT:—Sir James Aikins, K.C., M.P., Winnipeg.

VICE-PRESIDENTS:—Robert C. Smith, B.C.L., K.C., Montreal; E. F. B. Johnston, K.C., Toronto; M. G. Teed, K.C., St. John; Hector McInnes, K.C., Halifax; A. A. McLean, K.C., Charlottetown; Isaac Campbell, K.C., Winnipeg; Norman Mackenzie, K.C., Regina; R. B. Bennett, K.C., Calgary; G. E. Corbould, K.C., New Westminster.

SECRETARY:—E. Fabre Surveyor, K.C., Montreal.

ASSOCIATE SECRETARIES:—R. W. Craig, Winnipeg; W. J. McWhinney, K.C., Toronto.

TREASURER:—John F. Orde, K.C., Ottawa.

Quebec.—P. B. Mignault, K.C., J. E. Martin, K.C., E. Lafleur, K.C., G. Desaulniers, K.C., Hon. A. W. Atwater, K.C., F. E. Meredith, K.C., Pierre Beullac, K.C., Montreal; G. G. Stuart, K.C., A. Rivard, K.C., L. St. Laurent, Quebec; C. W. Cate, K.C., Sherbrooke; J. E. Perrault, K.C., Arthabaska.

Ontario.—George F. Shepley, K.C., W. D. McPherson, K.C., M. H. Ludwig, K.C., H. H. Dewart, K.C., C. A. Moss, Toronto; Sir George Gibbons, K.C., London; W. F. Nickle, K.C., Kingston; J. E. Farewell, K.C., Whitby; W. R. White, K.C., Pembroke; Frank M. Field, K.C., Cobourg; John J. Drew, K.C., Guelph; W. F. Langworthy, K.C., Port Arthur.

Prince Edward Island.—A. B. Warburton, K.C., A. A. McDonald, K. J. Martin, C. G. Duffy, D. A. McKinnon, K.C., W. E. Bentley, Charlottetown.

Nova Scotia.—Robert E. Harris, K.C., J. A. Chisholm, K.C., Halifax; E. M. Macdonald, K.C., Pictou; J. A. Gillies, K.C., Sydney; D. D. McKenzie, K.C., North Sydney; E. N. Rhodes, Amherst.

New Brunswick.—Hon. George J. Clarke, K.C., St. Stephen; Fred R. Taylor, K.C., J. D. P. Lewin, St. John; A. J. Gregory, K.C., A. R. Slipp, K.C., T. Carleton Allen, K.C., D.C.L., Fredericton.

Manitoba.—Isaac Pitblado, K.C., A. B. Hudson, K.C., C. P. Wilson, K.C., H. W. Whitla, K.C., Theo. A. Hunt, K.C., J. B. Coyne, Winnipeg.

Saskatchewan.—W. M. Martin, Regina; W. B. Willoughby, K.C., Moose Jaw; P. E. Mackenzie, K.C., Saskatoon; O. S. Black, K.C., Weyburn; J. A. M. Patrick, K.C., Yorkton; Donald Keith, North Battleford.

Alberta.—James Muir, K.C., A. H. Clarke, K.C., Calgary; O. M. Biggar, K.C., C. F. Newell, K.C., Edmonton; W. A. Begg, K.C., Medicine Hat; C. F. P. Conybeare, K.C., D.C.L., Lethbridge.

British Columbia.—E. P. Davis, K.C., L. G. McPhillips, K.C., E. A. Lucas, Vancouver; W. J. Taylor, K.C., E. V. Bodwell, K.C., Victoria; C. R. Hamilton, K.C., Nelson.

ADDRESSES

THE ADVANCEMENT OF THE SCIENCE OF JURISPRUDENCE IN CANADA.

By Sir James Aikins, K.C., M.P., President.

The purposes of this Association are professional, they relate only to our profession and its advancement, to the law and its administration and improvement. They are Canadian and apply equally to all races and languages and creeds, with which they do not interfere, nor will they conflict with any existing provincial law societies or organizations—on the contrary, the Canadian Association seeks the co-operation of these. Its design is usefulness.

Faithful and efficient service has been and is a characteristic of our profession; it is due to the client, expected by the people and willingly given by the Bar. The highest title and dignity conferred on a member of the English Bar before 1880 was that of serjeant, who is the "serviens" of Bracton's time—the "serving man" of about the Thirteenth Century. For this purpose of service members of our profession are required to be learned in the law and the principles of Government, to be of moral character and industrious, usually to take an oath of office promising to uphold the constitution of the land, to aid in the administration of its law. Their conduct after being called is always under scrutiny by fellow practitioners who are zealous for the honour of the Bar. For any dereliction in duty they are liable to discipline by the society to which they belong and by the court before which they practise. They are thus certified to the people as those having general knowledge of affairs and learning beyond the ordinary, as capable of giving advice on the written and unwritten law which governs the people and their

business, as worthy to be trusted counsellors of persons in any occupation or in positions of authority. To the credit of our profession be it said that most who have entered it have recognized the obligations and responsibilities thus assumed and have generally performed them.

Few indeed have spent energy and time and money in the preparation for admission to the legal profession and have entered it with the primary object of thereby making money. Those who have done so have shewn at the outset lack of judgment and good taste, both essentials to true professional success. It is not a calling or instrumentality suited to that purpose as is the business of the merchant, manufacturer or miner. Persons who have thus sought to commercialize it, to prostitute it to such an end in itself have lowered the professional tone and so lost the respect and esteem of their fellow-practitioners and of the people. They take no interest in the advancement of our profession and do not possess its spirit. At all times ready to make use of anything to promote their own selfish interests, they merit the remark of Lord Bacon:—

"They cared not what became of the ship of state if so be that they could save themselves in the cock-boat of their fortunes."

The lawyer's sphere cannot be as clearly defined as that of the doctor of medicine or the minister. His range is wider, *hic et ubique*, his duties multifarious, his training more versatile. Moreover, the constant practise in caring for his clients, in assuming their burden and the direction of their many affairs, added to the training of his student life, naturally increases in the lawyer that habit of service and usefulness for others. The frequency with which he examines both sides of the various questions submitted to him tends to impartiality and a judicial and temperate habit of mind. Further, the vigorous participation in affairs with the purpose to do right amid the many lures and temptations incident to his vocation is the most wholesome moral tonic which nature can have. Such employment does not certainly cultivate the scruples of the casuist or the glowing visions of the seer but it does stimulate and strengthen for the

robust work of the world and the accomplishment of noble purposes which end in things well done and not in dreams. Time was when the lawyer was regarded as aloof from the practical affairs of the world, as the learned and dignified artistocrat of society who did not concern himself with the daily duties of common life or the struggle of the people to improve their condition. Now, in our democratic country the members of the profession are not only with the people, but of the people, working among men, advising in their personal affairs, sympathising in their efforts, guiding in their business, aiding in their social movements for reform, taking share in all the departments of public government, yet, withal, maintoining the professional ideals of the past, their intellectual ottainments, dignity, strength of honour and independence of character, which will not cringe before courts or be carried away by popular emotions or a hostile press. The statement made by Thomas Lord Erskine can be repeated by most members of our profession today:—

"I will forever at all hazards assert the dignity, independence and integrity of the English Bar without which impartial justice, the most valuable part of the English constitution, can have no existence."

We do not claim that all members of the Bar are fearless, learned, faithful in the discharge of their duties and governed by the best ethics. We do not contend that all are impartial and of judicial mind or that, as opportunity offers, all wisely and unselfishly endeavour to improve our laws and the administration of justice, for there are some who, looking backward, see only good in the past and refuse to move, while others, closing their ears to the voice of experience, would create all things new on an *a priori* basis. But the aim and effort and trend of the profession is toward its ennoblement and its usefulness. Sir Walter Scott, who by the way was a lawyer, made a fair criticism of our profession and it is as applicable now as in his time:—

"In a profession where unbounded trust is necessarily im-

posed, there is nothing surprising that foola should neglect it in their stupidity and tricksters abuse it in their knavery. But it is more to the honour of those, and I will vouch for many, who unite integrity with skill and attention and walk honourably upright where there are so many pitfalls and stumbling blocks for those of a different character. To such men their fellow-citizens can safely entrust the care of protecting their patrimonial rights, and their country the more sacred charge of her laws and privileges."

I think I have thus outlined correctly the spirit, the ideals, the learning and the qualities which characterize the Canadian lawyer and how, as an adviser in human affairs, he accompanies his clients into their respective avenues of life.

If I have, it is manifest that these and his opportunities of useful service impose upon him duties and responsibilities not only of a private, but public nature far beyond those resting upon persons in other employments. In a general way we recognize this but we do not always give effect to the conclusion that we should do what we are so well qualified to do, both individually and as a profession in which concerted action is not only possible, but necessary for effective work. As a profession in Canada are we not sadly lacking in the *esprit de corps* and wanting in unity? We are a profession and not a craft. We may take lessons from the Dominion Medical Association and the Canadian Society of Civil Engineers and would do well to consider the benefits of existing Dominion associations and business men who in their day and generation are in these things wiser than "the children of Light," their legal advisers. They know the strength coming from unity.

However excellent the British North America Act as the constitution of our country, however wise its distribution of legislative powers, it cannot create or assure a real united Canada unless the spirit of union and co-operation is pervasive among the people. Our provinces are far-flung, and feelings of mistrust, lack of sympathy or cordiality, asperities which may have happened between the respective bodies of citizens in the different provinces, arise very largely from the fact that the separated

communities do not know or understand each other, or their aims and ideals, or the various steps which may have heen taken toward the development of those ideals and the accomplishment of those aims. Yet every true Canadian in his heart purposes a strong, united Canada, founded upon that spirit of freedom, justice and honour inherited from our great ancestors.

True it is that, owing to our historic beginnings, there will he diversity in our population, hut that will not prevent oneness. That very diversity in our unity may make for our safety and ennoblement. Different grafts on the one national stem, nourished hy the same soil, refreshed hy the same showers, gladdened hy the same sunshine, hringing forth blossoms of various hues, the people of Canada should produce the one rich fruit—ono true and virile Canadianism. In this our profession has an important and essential part to play.

That country is fortunate which has dwelling in it a hody of men, usually dispassionate and just and learned men, who have accommodated the teachings of experience to progressive energy and a wise philosophy and who are willing to advise and assist in its development. There never was a time when the trained and experienced memhers of the Canadian Bar, mindful of the obligations which rest upon our profession, resting there, because, as in the case of the dove when first sent from the Ark, there is nowhere else to rest, and willing to meet those responsibilities, could render more useful service to our people and country than now, in helping to consolidate our nation and to improve our jurisprudence.

The stated ohjects of the Canadian Bar Association indicate the path along which, in the public interest and our own, we should proceed. The one first mentioned is:—

"To advance the science of jurisprudence." The seemingly proper use of the word "science" in this connection is "a particular hranch of knowledge or study." So our Association undertakes to make an effort to advance that particular hranch of knowledge—jurisprudence.

This word jurisprudence also has various interpretations. It may mean as one authority states: "Knowledge or skill in

law." Thus Blackstone says: "I wish unto him the gladsome light of jurisprudence." If that be the meaning intended in our constitution or in that of the American Bar Association, it seems unnecessary to add the word "science." Another definition is: "A system or body of law; a legal system."

Buckle says the noblest gift Rome hequeathed to posterity is her jurisprudence. The practical result, however, will be the same whichever interpretation is used for if with our profession only resides that knowledge of jurisprudence then on us also is the duty to ourselves and to our country of improving and advancing it.

The Canadian lawyer knows the statement to be inaccurate that the law in Quebec differs from the law in the other provinces in that the former is the Civil Code, the other the common law, for he knows:

(1) That there applies to all the Dominion that body of the law adopted hy our Federal Parliament touching matters within its jurisdiction, e.g., the laws relating to citizenship, crime, the regulation of trade and commerce, banks, militia and defence, patents, etc.

(2) That those questions which come within the public law, using a general term, are governed in Canada, including Qnebec, hy the law of England as modified by legislation of the central authority.

But, in so far as the provinces have jurisdiction under the British North America Act, and speaking generally, the system of law known as the Civil Code of Lower Canada does govern in Quebec and the common law system in the other provinces.

Mr. Justice Cross explained in general terms the difference between these systems:—

"The binding authority of precedents is characteristic of English law. With us the Code is the law whilst decisions are particular applications of the law."

Dr. F. P. Walton, former Dean in McGill University, in a recent article on the suhject of the Legal System of Quebec says:—

"The law of property and civil rights which is peculiar to

the province of Quebec has, to a large extent, been codified in the Civil Code of Lower Canada, and in the Code of Civil Procedure the latest revision of which was in 1897. With the exception of the mercantile law, of which an outline is given in the Civil Code, that code corresponds in form and contents somewhat closely to the Code Civil des Français, formerly designated as the Code Napoleon. . . It is probably true that the Code of Civil Procedure is composed to the extent of one-half or more of rules of English origin . . . It will be seen that the special rules of law peculiar to the province of Quebec are to be found mainly in the Civil Code of Lower Canada, in the old law so far as this has not been abrogated by the Code, in the provincial statutes and in the decisions of the courts. . . . As early as in 1785 a statute was passed introducing the English rules of evidence in commercial matters . . . After the Cession the commerce of the country, and more particularly the foreign trade fell mainly into the hands of the English-speaking part of the community. Their business was principally with England, with the United States, or with the other provinces of Canada, and all of these countries were governed by the English law. It was natural, therefore, that English commercial usages should become more familiar than French, and that in the courts great deference should be paid to the decisions of English judges who had explained the English usages. . . . It must not be forgotten that English commercial law in its present shape is mainly the creation of the Eighteenth Century, and is to a large extent the work of Lord Mansfield and other judges who applied in practice and elevated to the rank of rules of law the customs of merchants and the theories about these customs, formulated by civilians, mostly French or Dutch. . . The commissioners who drafted the Civil Code of Lower Canada state very clearly the difference between the commercial law and the civil law of the province in regard to their origin. They say: 'In a few instances the rules of commercial law may be found in the statute book or in the ordinance of France, but much of it is to be sought in usages and jurisprudence. Our system, if system it may be called, has been borrowed without

much discrimination, partly from France and partly from England; it has grown up by a sort of tacit usage and recognition, without any orderly design or arrangement, and has not as yet received any well-defined or symmetrical form from the decisions of our courts . . . Much of what has been established by usage may more safely be left to be interpreted in like manner and to be modified as new combinations and experience of new wants may suggest.' "

To those who give any consideration to the subject it is evident there exists a strong similarity between the provincial commercial law of Quebec just referred to and that of the other provincea. But there are other fundamentals common to the Civil Code of Lower Canada and tbe common law of the otber provinces. Both have one common ancestor, the Roman Code. As pointed out, the Civil Code of Lower Canada corresponds somewhat closely to the Code Civil Français, sometimes designated as tbe Code Napoleon. Tbe father of that Code was a lawyer, a Doctor of Laws of tbe University of Pisa, M. L'Abbé who says:—

"de Rome nous avons admis et nous observons encore presque tous les principes de droit privé quoique notre organisation sociale soit profondement différente."

It is to be noted that in respect of real property the Code of France reproduced tbe Roman law; it differs from tbe old Englisb system of tenures, of descent and transfer. This, however, is not material for our consideration for in most provinces the old Englisb system bas been so modified by statute as to be scarcely recognizable, at all events, in respect of that portion of our Real Property law in general use. That the Roman law was an important source of ou common law is not doubted. Bracton, a Chief Justice of England in the reign of Henry III., about the middle of the Twelfth Century, wrote his commentary. Sir Henry Maine says about tbis:—

"One of the most hopeless enigmas of the history of jurisprudence, is that an English writer of the time of Henry III. sbould have been able to put off on his countrymen, as a compendium of pure English law, a treatise of which the entire

form and a third of the contents were borrowed from the Corpus Juris."

Later authorities on jurisprudence, however, conclude that external historical evidence and the internal evidence of Bracton's work shew that no inconsiderable part of the Roman law had previously become a component in the English law, and that Bracton reproduced in his work those portions of the Roman law which were in use as part of the English law and usage, and applied by the courts and judges as such. About his day students were taught Roman law in Oxford: English authors wrote on it. In 1701, Chief Justice Holt, delivering judgment in the Postmaster General's case said:—

"And this is the reason of the civil law, which, though I am loath to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law and therefore grounded upon the same reason in many things. And all this may be, though the common law be out of mind."

Baron Fortescue said in another case: "The law books of Bracton and Fleta are the ancient law of the land extending to all cases . . . These law books are so strong, that there has been no way thought of to evade them but by denying the authority of them and calling them 'civil law' . . . I have never known them denied for law, but when some statute or usage time out of mind has altered them."

Baron Montague said:—"It is objected that this is civil law; that may be, and yet it may be and is the law of the land also, and these books are often quoted by the greatest judges and lawyers heretofore in England and all as law" (Fortescue's Rep. pp. 401-440).

Blackstone included Glanville and Bracton in the list of venerated authorities. Many of our old and best known common law maxims, forms and practices, supposed to have been born on English soil, were imported from Rome. Mr. Macfarland, at the American Bar Association meeting in 1913, said

that "if our common law would return what it took out of the Roman Code it would have nothing left but its barharous usages and customs." Time does not permit to enlarge on this.

Not only is there the same juriaprudence in Canada respecting public law and all subjects coming under the Federal jurisdiction, not only aomething in common in the Civil Code and common law respecting commerce, not only some blood relationship tbrough the absorption of the principles of Roman law, but there is also a force at work the trend of which is toward greater similarity in tbat jurisprudence which is under provincial jurisdiction. That force is the insistent demand and urgent need of some codification of the local laws in the provinces where the common law systems prevaila. The common law proper ia a law library which commences with the year books and enda with the last law reports. If in this lihrary are included the Scotch and Irish reports, our provincial reports and those of the United States, to which we sometimes refer, we shall not he far wrong in saying there are seven thousand volumes of reported decisions. Sir Frederick Pollock says that down to 1895 there were over eighteen hundred volumes of English reports alone to which a lawyer is likely to refer. These have increased in twenty years. They contain, I am told, at least one hundred thousand decisiona which are constantly being added to Of Canadian reports there are eight hundred and fifty volumes, and these too are receiving yearly additions. The Canadian lawyer also has to consult the revised or conaolidated statutes of the Dominion and of the provinces, and all Acts passed aince such consolidation and revision. I find that in 1913 and 1914 the following numbers of puhlic Acts were passed in Canada:—

Parliament of Canada, 116; of Alberta, 50; of British Columbia, 166; of Manitoha, 224; of Ontario, 144; of Quehec, 125 (in 1912 and 1914 no atatutes 1913); of New Brunswick, 91; of Nova Scotia, 125; of Prince Edward Island, 43; of Saskatchewan, 67; of Yukon, 27; making a total of 1,178.

Our public Acts are frequently ill-drawn and fragmentary, containing unnecessary, meteoric and disturbing provisions. So

the originating member, to the delight of his admiring electors, keeps adding "line upon line, line upon line, here a little and there a little."

The legal adviser has also to consult hundreds of rules of court made under legislative authority and having the force of statutes.

The publication of the reports has, in too many instances, been commercialized and the judgments reported in them are not always carefully chosen. Apply the recent statement of Mr. John Bassett Moore respecting American reports to our reports and statutes as well, and we have a fair statement of the case:—"The output is little regulated and with each court (and Legislature) there is connected a pipe to convey its product to the centre of distribution from which, day by day and year by year, there is pumped out as through a great main upon a gurgling, gasping, sputtering Bar a turgid stream of judicial decision and legislative enactment."

And so courts and legislatures go ceaselessly on, piling Pelion on Ossa, and Olympus on both, to the dismay of the bewildered lawyer and a helpless people. When will there appear from those modern Sinais a follower of the great lawgiver with a suitable Code? It was no flight of imagination, but a statement of fact, when Tennyson wrote:—

"The lawless science of the law,
The codeless myriad of precedent,
The wilderness of sin; instances,
Through which a few by wit and fortune led,
May beat a pathway out to wealth and fame."

It is said that our reports supply so much information that no lawyer need take a step in the dark. His difficulty, however, is in groping to find the light in which to make the step. Those judgments come from many courts and judges who have varying qualities and in differing jurisdictions and environments, delivered in different decades and result in an irregular and incomplete development of the law on almost every subject.

Great points are left undecided, trivial ones receive elaborate judgments. Judges cannot make a complete law on any subject. The multiplicity and conflict of decisions create uncertainty. Nevertheless, the value of these reports is incalculable; a mine of wealth—they contain the accumulated radium of legal experience of many generations. They disclose an excellent judicial legislation which will benefit both the legislators and the lawyers. Bentham says:—"It affords for the manufactory of real law a stock of materials which is beyond price. All the libraries of Europe would not afford a collection of cases equal in variety, in amplitude, in clearness of statement, in a word, in all points taken together, in instructiveness."

But they are to the legislator, the lawyer and especially to the people a dense and trackless forest, ioting in the luxuriousness of its own riches. It has growth of shrub and clinging vine and tangled under-brush, also great decisions like trees of giant bole which have weathered the tempest shocks of centuries.

What then is the remedy? What else can it be but to compress, to write the principles which have been settled by decisions or statute in a well arranged Code? In 1886 the American Bar Association, led by David Dudley Field and John F. Dillon, after hearing a number of eminent lawyers, resolved:—"The law itself shall be reduced, so far as its substantive principles are settled, to the form of a statute."

Of the three varities of codification the one thus suggested seems the most likely to be adopted because the least disturbing and the most practicable, namely the preparation and legislative enactment of a digest of the established principles of the existing law.

A second form of codification is to use the existing law as a base and amend it as may be deemed advisable for the purpose of removing anomalies and then enacting it as amended. This was the principle under which the French Civil Code was formed and it has stood the test of a century with but little change. The Roman Code upon which it was based has the longest known history of any set of human institutions.

The third form is a philosophic code as advocated by Bentham, the adoption of a purely ideal system of laws founded on reason and natural justice. This, however, is not feasible, for no people are likely to abandon the reasonably good body of law evolved in their country for the scheme of a philosopher however excellent. No code of the English law or any of its branches has been of the third class.

Ilbert, in his "Legislative Methods and Forms," says:—"We know that enacted law is most useful if confined to the statement of general principles, and that the more it descends into details the more likely it is to commit blunders, to hamper action, and to cramp development."

In the early stages there was some codification of the English law such as "The Mirror" professing to be an abridgment of the English law from King Arthur to Edward I., commended by Lord Coke as more illustrative of our whole legal history for the period from the Anglo-Saxon monarchy to the Great Charter than any other extant. "Leges Henrici I" professes to be a Code of the entire kingdom. Hallam attributes them to a compiler in the reign of Stephen; they may have been later. I have already referred to Glanville, Bracton and Fleta.

Over three hundred years ago, Sir Francis Bacon wrote:—"Of the laws of England: I have commended them before for the matter, but surely they ask much amendment for the form; which to reduce and perfect I hold to be one of the greatest doweries that can be conferred upon this Kingdom." Lord Westbury said in the House of Lords in 1863:—"The wisdom and excellence of Lord Bacon's proposal for the compiling and amendment of the law of England have been admitted from age to age, and the fact that nothing has been done to give effect to it, we must attribute to the singular inertia that characterises the English legislature." And in 1869, in an address to the Juridicial Society, Lord Westbury spoke as follows:—"So far as the condition of our law was concerned, we stood completely alone in the civilized world. There was not a nation in Europe which had not made in that respect greater progress. It was the

duty of every lawgiver, not only to enact good laws, but to enact them in such a manner that the knowledge of them might be accessible to all. Was the knowledge of our law thus accessible? The people placed abundant confidence in the integrity of its administration, and deservedly so. It was that confidence that had preserved our system, for, generally speaking, the unfortunate man who found himself under the necessity of going to law, felt that he was about to commit himself to some horrid unknown region, abounding in snares and pitfalls into which he entered with fear and trembling, and rejoiced if, by any chance, after years of suffering, he was emancipated from that desert and state of bondage. Why should such a state of things be permitted to continue?"

Let me state shortly some of the reasons which have been urged in favour of such codification:—

(1) The same persons should not be both lawgivers and judges. The common law grew through the formulating of its principles by judges. To the extent to which they participate in varying the law or developing it for new circumstances, the law becomes uncertain and post facto. A proper code would impose some check upon the license of judicial liberty and discretion by creating a fixed body of principles which would be a moral necessity, and a departure from which could be detected and corrected.

(2) The laws of the land are for the people of the land. Those who are to obey them should have some opportunity of knowing them, or, at least, their general principles. The people desire to know their rights and duties that they may assert the one and perform the other. Lack of knowledge of the law, and its uncertainty, weaken reverence for the law.

(3) Codification would remove technical, obsolete and useless parts, clear up doubtful, and fill up gaps covered by conflicting decisions, and would be of orderly arrangement and comprehensive without being vague, making simple what is now complex, systematic what is now chaotic.

(4) New rules to meet new conditions can be more easily grafted on a statute or code than on the common law.

(5) The involved condition of our law makes specialization necessary and centralization, a consequence which would be avoided somewhat by code law.

(6) It would to lawyer and judge save time and worry ferreting out the law. The feasibility of a Code has been demonstrated by other countries. Codes have been adopted in modern times by most of the nations of the European continent and recently by Japan, also by some of the United States.

(7) In countries where the common law prevails, and in Canada, the tendency and quiet movement is towards codification.

(8) It is impossible to over-rate the benefits of bringing the laws of the different provinces into substantial harmony by a codification of the great underlying principles more or less common to all.

One reason, and perhaps it is the most forcible of all for keeping the codification of the common law continually in view, is its influence on the unification of law throughout the Empire. Most of the improvements in the form of the English law are followed up after no long interval by substantially identical legislation in the British Dominions. The Bills of Exchange Act, the Partnership Act and the Sale of Goods Act, for example, have been adopted, very largely, in the British Dominions. The Criminal Code, recommended by the English Commissioners but not yet adopted by the British Parliament, was enacted by our Federal Parliament. The Bills of Exchange Act has largely influenced the enactment of the Negotiable Instruments law which has now been adopted in nearly all the States and Territories of the American Union.

What Rome did under equally difficult circumstances, what other intelligent and strong nations have done, Canadians can do. This youngest of the nations, heir of all the ages, was not born for a position of insignificance but of greatness. It needs the leadership of our best jurists and lawyers.

In addition to the tendency in the common law provinces toward a form of codication such as prevails in Quebec and leading to a greater similarity of Canadian jurisprudence, there are other influences ceaselessly at work to create a more general

and better jurisprudence. The convenience of inter-provincial business requires it.

Let me say, shortly, that history shows how fatuous and destructive is any attempt of any considerable body of people to coerce into uniformity with their own the conflicting ideas and conceptions of the intelligent people of any province, state or nation. The Egyptians failed to force into uniformity with their own the Israelitish notions and conceptions; the Hebrews, though thinking themselves the Chosen People of God and the Gentiles His and their enemies who merited destruction, failed also; so did the Macedonians at Thebes, Germanicus with the Marsi, and Cromwell in Ireland. The Religious Wars of the Middle Ages and the Thirty Years' War abound in illustrations of the utter futility and disaster of such attempts. So too will fail the great War Lord of Germany, his military advisers and cohorts, to impose their boasted "Kultur," their civilization, their religion of valour upon unwilling nations.

The Canadian Bar Association has no such passion for uniformity. The powers which make for the development of any country and its unity are peaceable yet powerful. They are those of mind and heart and [illegible]ence combined with energy. The rules which regulate these [illegible] the inherent laws of human nature which are as constant as [illegible]atter and its universal laws. As the people of Canada approxi[illegible]to to these attributes and qualities, and they will, as the demands of business convenience increase, similarity of law will necessarily result. Our common law judges and our legislators have not created law; they have formulated it to express the wish and needs of the people as rules to guide in the changed and ever changing conditions of society. The law of a country is the responsive expression of its social and business life and it must expand with it, or hamper it. The ever advancing and altering relations of society and individuals, new fields of human activities, new modes of thought, increase in knowledge, demand modification of the old rules and the adoption of new. This has been the teaching of history—"the old order changeth, giving place to the new." Custom may shudder at the lack of veneration for the old, and at

the boldness of young, enterprise; grey-bearded age leaning on its staff may wonder where all this is going to end. We sometimes forget the truth that:—

"Old decays but foster new creations,
Bones and ashes feed the golden corn,
Fresh elixirs wander every moment
Down the veins through which the live past
Feeds its child—the live unborn."

These new creations need suitable laws and an adequate jurisprudence. Who can provide it? The conditions are not dissimilar to those of Rome in the days of Justinian when the people looked to the lawyers and jurisconsults to aid them. They did not look in vain. What the lawyers did in the time of Justinian surely we having the advantage of all the past knowledge can do and more. It is significant that those ancient lawyers and jurisconsults often assembled for discussion at the Temple of Apollo and also that the people of Rome selected a house in a frequented street and gave it to one of their great jurisconsults, Scipio Nasica, that he might be ever accessible to them. They gathered knowledge in the secret places of wisdom and gave it to the people among whom they dwelt. So may it be with our splendid profession in the advancement of jurisprudence and the improvement of the administration of justice.

None can so aid the Canadian people as the members of our Bar. In the common judgment of the people, the profession of the law, as they call it generally, and its learned and gifted members are held responsible for what is weak, uncertain and wrong in the law or defective in its administration, and justly so in our democracy, for on whom else can they depend to advise and pilot them to better things. Let us not then withhold good from those to whom it is due when it is in the power of our hand to do it. Canada has good statesmen and political leaders, but if our skilled lawyers will unite in wisely and energetically carrying out the purposes of the Canadian Bar Association they will confer a benefit upon the country more general and lasting than that of statesmen and politicians.

UNIFORMITY OF LAWS IN CANADA.

By Eugene Lafleur, D.C.L., K.C.

In the minds of many Quebec lawyers the mere title of my subject will arouse antagonism and alarm. In 1663 Louis XIV. cancelled the charter of the One Hundred Associates and introduced into this country the laws of his realm, and from that date until the present time the civil laws of France have been in force, except during the brief interval between Governor Murray's proclamation in 1763 and the Quebec Act of 1774. The last mentioned statute recognized that the provisions of the proclamation, including the introduction of the laws of England into the colony, were inapplicable to the state and circumstances of the province, whose inhabitants had enjoyed a system of laws by which their persons and property had been protected, governed and ordered for a long series of years from the first establishment of the province, and in consequence restored the old laws of Canada. Throughout all the subsequent constitutional changes this system has been maintained, and section 94 of the Confederation Act of 1867 in providing that the Parliament of Canada may make provision for the uniformity of laws relative to property and civil rights in the other provinces of Canada (with the concurrence of their respective legislatures) omits Quebec from the enumeration of provinces affected by this section.

No wonder, then, that the Bar of this province should look with suspicion upon any project which may seem to have for its aim the submergence of the civil code in the rising tide of the common law around its borders.

Let me at once dispel all such apprehensions by saying that the movement in favour of uniformity which took its rise in the great Republic to the south of us does not contemplate any constitutional changes or the impairment of provincial autonomy. Mr. Terry, the president of the Commissioners on Uniform State Laws, in his admirable address delivered at Washington in October last, said:—

"We are not advocating centralization of Government. We are not advising the obliteration of state lines. On the contrary, we would depreeate the former and warn against the latter. Our faith in the dual sovereignty, and the niee checks and balanees of our system of government has grown in these latter days, as the assaults upon it from both friends and foes have disclosed at onee their own futility and the inherent soundness of the ohjeet of their attack."

And so in our own case no one to-day advocates the establishment of legislative union, whieh some of the Fathers of Confederation would have preferred to the present division of legislative powers. Besides, legislative union does not necessarily mean uniformity of laws. You have a familiar exainple in the case of the British Parliament which preserves the eommon law for the English and the civil law for the Scots. We ourselves tried the experiment from 1841 to 1867 when we had a eommon parliament for Upper and Lower Canada which dealt out English law to one province and French law to the other. Even the Autoerat of all the Russias maintains German law in the Baltie provinees, Freneh law in Russian Poland and Swedish law in Finland. Nor does the project which is suhmitted to your eonsideration aim at the fusion of the two great systems of law whieh prevail in Canada. It is not that the task in itself is an impossible one. France and Germany have, indeed, achieved success in this direetion under conditions even more eomplieated than our own. In France the Roman law prevailed in the south, while Teutonic customary law prevailed in the north.

And there were sixty general or provincial eustoms, and three hundred local eustoms governing civil rights in cities, towns and villages. Such was the ehaos of jurisprudence whieh the framers of the Code Napoleon were called upon to harmonize. In Germany there were four great systems of different origin, and an infinity of locsl eustoms whieh sometimes differed in the same town according to the eide of the street on whieh you lived. However discredited things "made in Germany"

may be to-day, there can only he one opinion as to the wonderful achievement of the jurisconsults who out of this welter of diversity constructed the German Civil Code.

But however successful the great unitary systems may have proved to he in welding together and strengthening the nations which have adopted them, our choice has heen made in favour of less centralization and more local autonomy.

Recognizing the definitive character of this choice, the constitution of the Canadian Bar Association, in the enumeration of its objects, sets forth that one of them is to "promote the administration of justice and uniformity of legislation throughout Canada *so far as consistent with the preservation of the basic systems of law in the respective provinces.*"

Our programme, in fact, is identical with that of the American Bar Association which about a quarter of a century ago started the movement for unification in the United States. There, as you know, the antagonism which began in the time of Hamilton and Jefferson between Federalists and States Righters has been far more acute than our own controversies with respect to Dominion and provincial powers, and the American constitution confers far less powers on the central government than the British North America Act does on the Dominion Parliament. But notwithstanding this handicap a large field for useful work has been found and a remarkable achievement has been recorded. A glance at the history of this movement may set us thinking as to the applicability of the methods employed to our own conditions, and suggest the extent to which we may follow along those lines.

The efforts of the American Bar Association resulted in the creation of a commission on Uniform State Laws. This organization consists of commissioners appointed by the governors of the different states, territories and possessions of the United States for the purpose of drafting and recommending for adoption by the various legislatures, forms of bills or measures to make uniform the laws of the different jurisdictions on which uniformity seems practicable and desirable. In every state of the Union (48), in every territory and possession, including the

District of Columbia, Alaska, Hawaii, the Philippine Islands and Porto Rico, commissioners have been appointed, and twenty-four annual conferences have been held since 1892. From the report of the conference held last year, it appears that the Negotiable Instruments Act, adopted by the conference of 1896, is now the law in forty-seven states, territories and possessions; the Warehouse Receipts Act is in force in thirty-one; the Sales Act in eleven; the Bills of Lading Act in twelve; the Stock Transfer Act in nine; the Act Relating to Wills executed without the State in ten; and the Family Desertion Act in eight.

Reports have been presented on the Uniform Incorporation Act, the Unification of Commercial Law, the Uniform Partnership Act, Wills, Descent and Distribution, Insurance, Workmen's Compensation Act, Situs of Real and Personal Estate for purposes of Taxation, Automobile Legislation, Uniformity of Judicial Decisions, and on various other important subjects.

It is worthy of note that the State of Louisiana which, like the Province of Quebec, is governed by the civil law, has participated in the movement for uniformity, and has, up to this date, passed seven out of the nine measures presented to its legislature for adoption.

Such are the results of an undertaking which was at first regarded by many of the profession with skepticism or indifference. The pioneers who devoted their time and energy to this disinterested and patriotic endeavour are now reaping their reward, for their educative campaign of twenty years has secured them the sympathy and active co-operation not only of statesmen and lawyers throughout the country, but also of the commercial and industrial community.

It will be interesting to you to hear that the mere publication of our own programme in this country has already aroused an interest among merchants and manufacturers, and that our President has recently received letters of encouragement and offers of assistance from representative bodies.

Let us now consider the subjects upon which it would be desirable and practicable to aim at greater unity without dis-

turbing any fundamental principles in the basic systems of the several provinces of Canada, and without trenching in the least degree on treaty rights and historic traditions.

In no field of jurisprudence will greater unanimity be found to exist in favour of more uniformity than in that of commercial law. There are really no obstacles in our way, for the principles of the "law merchant" are much the same all over the world, and even in countries where ordinary contracts are governed by the civil law, mercantile relations are frequently regulated by a commercial code based on international usage. Moreover, in Canada, a very important part of this field is under the control of the Dominion Parliament, and we have Federal codes on Bills of Exchange and Promissory Notes, Banks and Banking, Savings Banks, Navigation and Shipping, Patents and Copyrights, Currency and Coinage. The Canadian Parliament has also exclusive legislative jurisdiction over Bankruptcy and Insolvency.

As to the portions of mercantile law not committed to the legislative action of the central parliament, there can be no difficulty in harmonizing the law of all the provinces whose systems are derived from the law of England. And even as to Quebec the differences in the law on this subject are negligible. The codifying commissioners in their report on the fourth book of the Code dealing with Commercial Law, state that our system has been borrowed without much discrimination partly from France and partly from England, and that the laws of commerce are of universal application and for the most part differ little in different countries except in matters of detail. Again, the law of evidence in commercial cases is of English origin, and our Code provides (C.C. 1206) that, except in the rare cases where special provisions are contained therein for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England.

It is unnecessary to state that our merchants and manufacturers, from Halifax to Vancouver, would welcome as an inestimable boon the unification of our commercial laws.

No one realizes as keenly as they do that diversity and multiplicity of laws in a great commercial community means a fixed charge on any business for legal advice and litigation, and a corresponding diminution of profits. Really, the only people who might be supposed to object to a simplification of the law are the lawyers themselves, who might be driven out of business. But, while it seems to be regarded as axiomatic that our manufacturers need protective legislation, I have never heard it contended that the activities of the legal profession require any artificial stimulation.

What could be more beneficial to the business community than a uniform statutory code on Commercial Sales? No difficulty has been found in applying the "Sale of Goods Act" to England and Scotland, and we have seen that the "Sales Act" has already been adopted in eleven jurisdictions in the United States.

The law of Insurance in Canada presents an example of wasteful and unnecessary discordance. Every province has an insurance law of its own, for the most part in the form of a statutory code, and while these systems are not differentiated by any fundamental principles, they abound in minor diversities calculated to produce conflicts and uncertainty. For instance, the statutory conditions prescribed for insurance policies vary in the several provinces, so that a great transcontinental railway is unable to get a uniform cover on its rolling stock throughout Canada, but must submit to a modification of its contract every time it crosses a provincial boundary line. The matter is further complicated by the fact that a Dominion Insurance Law is superadded to the various provincial enactments, and the companies must satisfy the requirements of nine or ten insurance departments before they can do business throughout Canada.

Further confusion is created by the fact that certain portions of the Dominion Insurance Act have been held to be unconstitutional, and the matter is still pending before the Privy Council. How much better it would be for insurers and in-

sured if we could standardize the policy conditions and have a uniform Insurance Act adopted by all our legislatures?

Our Company law is in an equally unsatisfactory condition. There are nine different kinds of provincial laws governing joint stock companies, and a Federal law in addition. The provinces are given the power of incorporating companies "with provincial objects" and the Dominion incorporates those whose objects are not so restricted. We have been litigating for years in order to ascertain the scope and meaning of these restrictive words, with the result that a great diversity of judicial opinion has been expressed, and that this question is also awaiting the decision of the Judicial Committee. Whatever the answer may be, it will not abolish the needless contrariety of these ten different systems, nor give our Company law the simplicity, certainty and uniformity which is so desirable if we intend to go on floating our securities abroad. In the address to which I have already referred, Mr. Terry informs us that in the United States the sentiment is unanimous in favour of a Uniform Incorporation Act which will bring about "corporate regeneration" and do away with "the fierce competition of various states to secure, at any cost of state dignity, and at any sacrifice of the duty to observe state comity, the revenues which result from offering in the corporate market a maximum of powers with a minimum of responsibility." I am afraid that some of our Canadian corporations have likewise been conceived in iniquity and born in sin, and that they too require to be born again under a new and uniform system in order to become innocuous. This is especially true in the case of corporations obtaining special and exorbitant powers from the legislatures. This evil would probably be lessened, and the legislatures would doubtless be more discriminating, if a uniform law of incorporation were adopted throughout Canada.

Our provincial taxing statutes furnish a conspicuous instance of overlapping and conflicting legislation resulting in manifest injustice. As you know, the local legislatures have the power of imposing "direct taxation within the province." Whether you determine what is within the province by refer-

ence to the domicile of the owner or to the local situation of the property, it seems clear that the British North America Act did not intend that the same property should at one and the same time be regarded as being within the Province of Quebec and within the Province of Ontario. One or other of the rules as to *situs* must be adopted, but both should not prevail so as to expose the taxpayer to double taxation. And yet the ingenuity of the Treasury Draughtsman in all the provinces is exercised in reaching out beyond the jurisdiction. Take, for instance, the Ontario Amendment to the Corporations Tax Act, 1914. It purports to impose a tax calculated upon the gross premiums received by insurance companies in respect of the business transacted in Ontario, and then proceeds to enact that a premium is deemed to be in respect of business in Ontario if it is payable or if it happens to be paid in Ontario or if it is payable in respect of insurance of a person or property resident or situate in Ontario at the time of payment, even where the business is transacted wholly outside of Ontario. Inasmuch as Quebec also imposes a tax on gross premiums, these companies are inevitably exposed to double taxation on the same business. Again, take an example from Quebec. The Succession Duties Acts, 1914, tax property actually situated within the province even where the transmission takes place outside of the province, and also tax the transmission in the province of property situated outside. Similar provisions in the Ontario Act bring about the inequitable result that the same property is twice taxed for succession duty.

The law of Wills offers great opportunities for improvement. It should be easy to standardize all matters relating to their formal validity, so as not to defeat the clearly expressed intentions of testators. For instance, why should a holograph will, validly made according to the laws of Quebec, be inoperative as to real estate situated in the other provinces (*Ross* v. *Ross*, 25 S.C.R. 307.)? Why should the rules governing the revocation of wills be different in different provinces, so that a person making his will when domiciled in one jurisdiction unwittingly revokes his will by becoming domiciled in another jurisdiction and

marrying therein, although no such revocation would have taken place according to the law of the original domicile (*Seifert* v. *Seifert*, 7 Ont. Weekly Notes 440)? Again, there is urgent need for the adoption of uniform rules for the distribution of estates when the property, both moveable and immoveable, is situated in different jurisdictions. In no province is the machinery adequate for such purposes; on the contrary, there seems to be an almost total absence of such ancillary provisions as an enlightened spirit of comity between provinces would suggest, in order to facilitate the prompt and inexpensive distribution of the estates of decedents.

Equally objectionable is the diversity in the rules governing the authority and effect in one of the provinces of judgments rendered in another. In order to facilitate the adoption of uniform rules on this subject it may be advisable in the first place to render uniform the rules of procedure relating to the assumption of jurisdiction by the courts of the different provinces, so that there may be as little overlapping and competition as possible.

Even when we are legislating upon new questions of general interest which transcend the bounds of the province and which have no foundations in the past, we work in isolation instead of in concert. The Workmen's Compensation Acts are not based on the existing law of torts in the several provinces, but on the contrary involve a distinct departure from traditional principles. They embody a new theory which recognizes the inadequacy of the ordinary legal principles of responsibility, and which substitutes therefor the view that risks incidental to a business should be a charge on that business. This was preeminently a case for co-operative effort in order to produce uniformity of treatment throughout the whole Dominion, instead of allowing separate provincial commissions to create diversity and conflict where none previously existed. As a result we have confusion, uncertainty and contrariety, where it would have been humane to make the law simple, sure and uniform, and to produce a measure that would not have compelled the unfortunate

victim to go through two or three courts before ascertaining what his rights are.

Not only does the substantive law invite the efforts of the reformer, but also the law of procedure. Many a suitor is deterred from pressing his claim in a sister province by the unfamiliar terms and methods employed in another forum than his own. Here, at least, we should not be hampered by the traditions of the past, for archaic forms and practices are survivals of a period when the rights of the litigants were too often lost sight of in the intricacies of procedure. Procedure should be the obedient handmaiden and not the arrogant mistress of substantive law. Some of our provinces have made greater strides than others in their emancipation from rigid and technical forms of practice, and nothing but good would result from an attempt to assimilate the different systems.

The subjects which I have selected for your consideration do not by any means exhaust the list of those which might be suggested. They are merely given by way of illustration, and my purpose has been attained if I have succeeded in convincing you of the possibility and desirability of nationalizing our jurisprudence.

You will not fail to bear in mind that the method suggested for realizing this object has nothing compulsory about it. It is founded upon the firm belief that persuasion is more potent than force in welding together communities. Much as we resent being dragooned into uniformity, we can hardly be so unreasonable as to refuse to give an attentive and sympathetic hearing to those who think that there is a great deal of good that we can learn from one another—much to borrow from every system and a great deal to discard in all.

It has indeed been contended by some writers that variety is desirable in a confederation, because it enables the component states to indulge in experiments which may prove instructive and useful to the whole country. The experience of the American Commonwealth is that in the field of law there has been too much experimentation at the expense of the litigant, and that so far from tending to the selection of the fittest

among the tentative projects, the result has been to intensify defects and perpetuate unnecessary differences. The same problem faces us in Canada. Shall we by remaining in jealous isolation encourage the aimless and inevitable differentiation of our legal systems, or shall we not rather, in so far as our special circumstances will permit, fall into line with the movement in all great nations towards the goal which a great Belgian jurist called "the universality of the law."

THE HONOUR OF THE PROFESSION.

By E. F. B. Johnston, K.C.

One of the chief objects of the Canadian Bar Association is set forth in the first article of the Constitution, namely:—"to up-hold the honour of the Profession." Perhaps it would be interesting to view this question from a standpoint somewhat apart from the line of the usual addresses delivered on such subjects as,—"The Bench and the Bar" and other similar topics, the treatment of which has become more or less commonplace. I shall, therefore, eliminate all consideration of the individual and the details which go to make up the daily round of professional life, except matters arising by way of illustration. I think the discussion of the question should be on a broader and higher plane than mere personal qualification, and should involve a consideration of matters pertinent to the profession as a whole. It is easy to lay down general principles which govern, and it is easier still to point out many of the principles which should govern and do not. But the subject is somewhat complex. The Bar as a whole is a most important element of the social, business and political life of Canada. The lawyer in towns, and even in large cities, occupies a somewhat individual position. He is admittedly an educated man, and is supposed, at any rate, to be a gentleman by Act of Parliament, and, therefore, the profession of law, according to the conduct of its members, must add to or detract from the social plane of the immed

ate community. The legal profession has also necessarily much to do with business relations. The lawyer is the guide and adviser in all matters of doubt and conflict. To a very considerable extent, his wisdom preserves the integrity of the business client, or his lack of probity or want of high moral sense may degrade the business of his clients to a mere matter of money, and perhaps to methods of sharp practice as regards creditors, and others incidentally interested. In the political world, lawyers have ever taken a very strong and important position. The men who do the really hard work of a campaign are lawyers. Perhaps their desire to hear themselves speak, or to practice oratory on the electors, may have something to do with this. I am rather inclined to think, however, that it is not owing to either of these causes, but more to the fact that the leading thinking men of the community belong to the legal profession, and are in demand on account of their competency. The training which lawyers get both professionally and by practice is such as fits them peculiarly for the discussion and solving of difficulties which arise in the political or public field. With matters of this nature, I am not so much concerned. As regards the honour of the Profession, it will be more useful to deal with the matter upon a much higher basis than this, and, therefore, the subject comes peculiarly within the province of a widely extended body like the Canadian Bar Association.

The honour of the Profession depends largely upon the reputation and conduct of its individual members. Lawyers as a body have not always achieved the highest repute in the opinion of many of their fellow-citizens,—too often unjustly due to the acts of a few individuals, who unfortunately happen to be members of the Profession.

The first great object to be kept in view is a high standard of morality. A man who lives an immoral or improper life as regards his ordinary business dealings, or his character, does much to impair the general reputation of his class. If a man is judged by the company he keeps, the company is equally judged by the conduct of some of the men who compose it. A man who is seldom sober, who fails to meet his moral and financial obli-

gations, and who disregards the calls of a good life, should not be a lawyer. It will be said that as regards this phase of the matter, the Profession has no concern. I think differently. I see no reason why the Profession of law should not adopt some well-defined rule, as one finds in the profession of the ministry. A man's personal conduct has everything to do with his professional duties. His clients are entitled to the best that his mind can give them, and if that mind is debased or clouded by his own acts, he is not in a position to fulfil the conditions and the privileges conferred upon him by the governing body. His average life, if of a high moral character, adds very materially to the repute of the profession to which he belongs, and if he lowers the tone of that life by misconduct or bad living, he unconsciously lowers his profession in the eyes of respectable men. If all lawyers were immoral in their living, or otherwise disreputable, the Profession would become out-cast and condemned. If they were all upright men, the Profession would stand as the highest and noblest calling in the world. The question is one of degree and comparative standing, and the nearer we individually approach to the ideal, the higher will be the plane reached by the organization of which we form a part.

Another element to be considered is this: How shall we uphold the honour of the Profession, except by uprightness in the practice of it? I am not referring to the matter of uprightness in the sense in which it is used by religious denominations. What is meant is the high sense of honour of each individual, the aggregate of which is crystallized in the words of my subject. What are the objects of the lawyer's calling. Amongst others, there is the conscientious performance of his duty in aiding in the administration of justice and law. There is also the desire to see that no undue advantage is taken as regards others. There are rights due by our Profession to persons other than our own clients. Do we up-hold professional honour by sharp practice, or by laying traps for an unwary antagonist to fall into, and by this method seek to advance our case at the expense of an innocent man? If we believe in truth and

honesty, are we justified in concealing facts which, if known, might militate against our clients. Are we acting uprightly when we keep a witness hidden, or a fact undisclosed, which we admit would be most important in its bearing on the issue? In other words, should we not all unite in dealing frankly with each other, and with the judges and the public, and lay bare the actual truth, and on that, and that alone, ask that the very right of the issue be determined. We might ask the question,—Why we do not come into court with full disclosure, and many lawyers would answer quite conscientiously, that the case against his client must be proved according to law, and that his duty is to present the best possible phase of the matter on his part, and not to help the opposing counsel, or his client, in the conduct of his action. Let me put a case,—Suppose that a lawyer knew of a fact capable of proof, which, if known to the court or jury, would have brought about a totally different verdict, and that he not only concealed the fact, but kept back witnesses on his own side who would have proved it, would he say that such an act tends to uphold the honour of his Profession? And yet, we nearly always consider what we shall prove or withhold, and the reputation of counsel often depends on his skill in this kind of mental and professional warfare. If we examine the matter more closely, we can really find the reason. The cause of this is egoism, the desire to win, and the flattering sensation of winning, due more to our personal vanity than to anything else. The reputation we make, and the consequent profits have an equally egoistic influence. It has nothing whatever to do with the question of right or wrong from an ethical point of view. It is the result of the system and practice of law as applicable to the individual. I am not prepared to answer what should be done in such cases as I am illustrating, but I do know that it would add greatly to our professional honour if we all united in endeavouring to approach a more ideal position on this point than we occupy at present. About one thing there is no doubt, the attempts, sometimes successful, at sharp practice, are a most objectionable part of a lawyer's professional conduct.

Lawyers who are guilty of this, consider it clever and a mark of astuteness on their part. They are mistaken. No truly great lawyer was ever guilty of sharp practice, and the men who are guilty of it command neither the esteem nor the confidence of their brethren. Good tactics are worthy of praise. Sharp practice is bad tactics and disreputable. We can not hope to raise or keep our Profession at a high level unless its members are fair and broad-minded men. The complex system of law and procedure has much to do with the matter I am discussing. A technical and complicated system means advantage to the unscrupulous and crafty mind, but these become disadvantages when they re-act on the honour of our Profession. The keeping of one's word in litigious proceedings is essential, and I am glad to say it is the rule and not the exception. But there is a tendency on the part of too many solicitors and counsel to take paltry advantages when their opponent has made a slip, or overlooked some technical matter. So much was this the case in former days, and so unjust and contrary to the cause of right and justice that the law was amended, and made to conform to equitable principles, in order to checkmate the practice which enabled a cunning solicitor or advocate to defeat the action of the opposing party by reason of the ingenuity and craft of the sharp practitioner.

When we come to deal with the question of the honour of the Profession, as relating to the Bench, the matter becomes more difficult and delicate. How does the professional honour stand in such relation? We all wish to stand well with the judiciary, and I mean by that, to have their respect and confidence. Do we always merit this respect? The obscuring of the real issue by a multitude of authorities cited by counsel is not infrequent. The attempt to present a legal argument along untenable lines is not uncommon. The twisting of precedents and principles to meet the views of the advocate is considered fair argument by some counsel, and a strenuous contention along this line is often made in the hope that it may convince some member of the court, but it frequently results in the judge promptly

placing the offender in this respect on his proper level. Confidence is weakened and suspicion is aroused, and the lawyer is carefully watched in the future lest he mislead or deceive the court. The professional honour is affected, and the innocent often has to suffer with the guilty. The statement of facts is sometimes colored; sometimes unconsciously, to suit the bias or partisanship of the advocate, or the necessities of the client's case, and the delicacy of that fine sense of honour of which we boast is dulled and vulgarized by the violation of the elementary principles of fairness and honest dealing, which are vitsl and honourable, and can only be maintained through the high character and conduct of our members. We cannot always agree with the methods and views of our judges. It would be incorrect to say that all members of the Bench are of equal degree of merit, knowledge or ability, or that every judge is entitled to the same amount of confidence which we give to some of them, but I believe we yield to all of them that respect and regard to which their high positions entitle them. We should see that by our own conduct, we merit their continued confidence and respect, and thereby add to the reputation of the Bar in the mind of the Judiciary, by the correctness of our statements and the fairness of our arguments on the presentation of the cause of our clients.

I believe we can also aid materially in upholding the honour of our Profession by putting our position as regards our clients on an impersonal ground. If a lawyer, whether solicitor or counsel, so identifies himself with the rights and wrongs of his client, that they become more or less personal in his relations, and if he makes the case his own, he fails to appreciate his rightful attitude and imparts into his professional duties feelings and prejudices which no honest lawyer should permit. Then follows the bitterness, and perhaps vindictiveness of the client affecting the issue, and its effect on his lawyer who fails under such feelings to conduct the litigation on a proper and impersonal basis. The identification of the lawyer with his client's temper, and perhaps spite, obscures the legal mind, and the battle becomes one of personal attack and reprisal. The

dignity of the Profession is lost sight of. The contest degenerates into a police court squabble, and recriminations and unfair methods take the place of that dignified state of affairs which should be maintained at all cost. The lawyer must, of course, generally trust his client, and be trusted, and should bring all his energy, industry and talent to bear in favour of the client, but he should never forget that the wrong is not against him, and that he can best serve his client's interest by being free of the unfortunate condition of mind and heart which affects the client, often to the extent of blinding his eyes to the real facts.

Perhaps one of the most dangerous causes at work affecting the reputation of our Profession is the scheming for business. In most places particularly where there are large factories, electric railways and similar undertakings, involving great personal risk, there are always a certain number of lawyers who appear on the scene in company with the ambulance or the coroner. Men, not lawyers, have to my knowledge been employed by legal vultures, and have received a commission on bringing in the body dead or alive. Retainers are promptly obtained, and actions are brought again and again, on purely speculative grounds. Relying on the sympathy of a jury, defendants are put to heavy costs, with no chance of getting a dollar from the plaintiff, and with many chances in favour of a substantial verdict against them, particularly in actions against large corporations. I have often thought that the most bitter comment on the system of trying such cases is to be found in the Ontario Municipal Act, which in many cases now directs that the trial shall take place before a judge alone. And a still more sweeping condemnation of our practice is the Workmen's Compensation Act just come into force in Ontario, which now deals with a vast body of cases on the principle of insurance against accidents. If we could have continued the old experience of thirty or forty years ago with lawyers above suspicion, the jury system would still remain as it was intended to be—a bulwark against wrong-doing, and a tower of strength in the administration of justice. The soliciting of business in the manner I

have indicated should disqualify any lawyer from ever practising again. And so with speculative litigation. Nothing is so destructive to the reputation of the solicitor, or to the legal profession generally, as the promoting and carrying on of cases on a purely speculative basis. It is unjust to the client, most dangerous to the community and absolutely demoralizing to our whole system of jurisprudence.

Another matter which is bringing the practice of the law into disrepute is caused by the strenuous effort of many Crown Prosecutors to obtain a conviction. Listening to some of the cases tried in our own courts, one would be forced to the conclusion that the fee and the oratorical fame of the Crown counsel were on trial and not the accused. Here again we find the value of the impersonal. I have always believed that the Crown officer has no brief to win, and no cause to lose. He is appointed to represent the fountain of justice, not to further the too often unscrupulous work of ambitious detectives. To my mind, incapacity along fair lines, and a consequent acquittal, are infinitely preferable to the conviction obtained by the counsel, whose conduct is governed by the dominance of one objective point—success. The honour of our Profession must depend on the exercise of the highest principles of fair play, and the true administration of that part of law which falls to the lot of the practising lawyer.

There are many other matters one would like to discuss regarding the assets of professional honour. What I have mentioned as examples to illustrate some evils are, I am glad to say, not the governing factors of the average lawyer's conduct. The Bar of Canada undoubtedly stands high in the estimation of our people, and of the citizens of the neighbouring Republic. Most of our solicitors in Canada are working along lines of probity and professional honour, and the majority of our leading counsel and advocates are actuated by feelings and motives that go to build up a great reputation. They are trusted and worthy of trust. The temptations in their calling are very great, and I have often been surprised that so few fail in the resistance. We

must expect some failures. Was it not Sir Walter Scott who said that the legal profession was like a great chimney through which the ashes and soot and bad feeling of humanity passed, and that it would be marvellous if some of the soot did not stick in its passage.

If morality is the true basis of law, every effort should be made in laying the foundation to see that the craftsmen are actuated by a proper sense of morals and a regard for professional ethics of the highest type. The great principle underlying all civilized law is one which seeks to provide a remedy for wrong-doing, a protection to individual and public rights, and a degree of justice to all. The basic element must, therefore, be one of morality. The administration of laws dpends on the character of the men who are engaged in their observance and enforcement. A poor law honestly enforced is infinitely better than a good law corruptly administered. What are we doing to see that this doctrine is carried out in practise? We are careful and exacting in the mental and legal training of our students, and we are apt to conclude that those who pass academic or highly technical examinations are eminently qualified to practice. But if they have not been trained in the fundamental elements and imbued with a proper sense of the morality of law, the most important feature of their ground work has been omitted. When I refer to "Moral Ethics" I mean those which belong peculiarly to the practice of our Profession, and not to the general code of morals which may be classed more properly as appertaining to religion. The idea is more correctly conveyed by the expression "Moral Ethics." This subject is not even hinted at so far as I know, in the curriculum of the ordinary law school in this country. Our students are carefully educated in all the legal niceties of contracts, but the honesty of the contractual relation is not dealt with. The cleverness of some lawyer may enable him to say of his opponent, "Well, I got the start of him on that deal." His mind is not affected by any well defined principle of right that should have been impressed on him in his student days. He does not feel

that the transaction may be one contrary to all teachings of moral ethics, and which he should have sqnared on the ground of conscience and not on legal expertness. In this connection, I am, therefore, taking the liberty of making a suggestion, which is simple, and would, I believe, he most beneficial.

There should be a branch of law within the purview of the students' legal training prominently dealt with under the head of "Moral Ethics." Lectures on this subject ought to be regularly given, and some methodical system adopted whereby the young mind should be impressed with their importance. If leading members of the Bar in each province would give this matter a little time, and deliver a few pointed lectures to the students each term, it would enure materially to the honour of our Profession. As the students pass to the practice of law, and meet with the practical problem awaiting every practitioner, they would often be reminded of the question of moral relations and proper conduct in the application of legal principles. I would go further than this and endeavour to enlist the sympathy of the judges of the Superior Courts in this respect. Especially it would be valuable to secure the Chief Justice of the province to give two or three addresses to the students in each year of their studies. Coming from the recognized head of the Judiciary, such lectures would carry great weight, and have unquestioned force in the minds of young men whose lives are undergoing a process of definite formation. The whole objective point of a lawyer's life is not the winning of a case, or the acquisition of a thorough knowledge of law. There are other qualities and victories equally important, and equally conducive to the elevation of a profession, of which he forms a part. In addition to this, we must not forget that we are officers of the courts, and it is in the interest of every court that its officers should be properly instructed in all that goes to make for moral efficiency and a clean professional life.

Much of what I have said applies only to the small minority,

who in any calling would not regard very highly either the honour or the dignity of their vocation. Notwithstanding this element, the Bar of Canada, as a whole, is something we have every reason to be proud of. The lawyer who conducts his work properly, and in the true spirit of the advocate, is the man who eventually stands at the head of reputation in his own town or village, and those who have greater ability and are of equal integrity find, in the larger centres, avenues to the highest and most responsible positions in the service of their country. That such is the moving spirit and objective point of this Association is matter for congratulation, and if this body does no more than uphold and add to the honour of the Profession, it will serve a great and noble purpose.

I am not presenting this address with the object of encouraging undue criticism, or on the ground that I am any better than my fellow practitioners. Rather, I am submitting some views which may aid your worthy Association in its development, and, whilst I am conscious that much of what I have said is common knowledge, my remarks have at least the merit of being the result of considerable experience at the Bar, and are the expression of a line of thought absolutely independent.