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REMINISCENCES FROM THE SUPREME COURT OF CANADA

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After my thirty years on the Bench of the Supreme Court of Canada, I have been struck by the tendency of those who speak of that Court to signalize the differences between the two systems of law which the Court is called upon to apply rather than to emphasize their similarities. To my mind, the latter are much more striking.

On a not too remote visit to Australia, where I attended a congress which brought together Jurists representing all countries of the British Commonwealth, I was asked continually how the Supreme Court of Canada could succeed in having to hear and decide appeals now under the Common Law and then under the Civil Law — to which should be added what they supposed to be a further difficulty that, while most of the appeals were, of course, argued in the English language, some of them were presented in the French language and, in those cases, the greater part of the Record and the Factums was in the French language. I kept on trying to convince them that this offered no handicap. In such a task I was helped by the Chief Justice of South Africa, where a similar situation occurs, except that there the French language is replaced by the Dutch language, and the French Civil law by the Roman Dutch law.

Moreover, I pointed out to the Australians that, in the Judicial Committee of the Privy Council, the difficulties, if any, would seem to be much greater, because their Lordships are called upon to interpret the laws of countries spread over the entire world. Why, since I have had the honour and the privilege of taking my place as a member of that august body, I have been sitting on appeals coming from British Guiana and Bermuda, from Malta and Ceylon, from Nigeria and East Africa, Singapore, Hong-Kong and even Sarawak and, in each case, the decision was reached immediately after the close of the arguments.

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Notwithstanding these examples and my earnest endeavour, during the five weeks that I spent in Australia, I left feeling sure that I had not succeeded in convincing them. I still had a suspicion that our sister nation remained under the impression that such an obligation constituted an inherent source of weakness in our Court of last resort.

I do not feel that it is.

May I say sincerely that, to my mind, it is an element of strength. The constant practice of delving into comparative law is apt to buttress one's knowledge of the fundamental principles of Justice as it has been envisaged throughout the ages by the wisdom of the different countries of the world. The solutions brought by them to the problems of human relationship illuminate and clarify the rules whereby it must be governed. And I say that advisedly. Perhaps to one who has not had access to the conferences of the Court, it might be hard to realize the unique service rendered, in the course of the discussions, by the Judges raised in one or the other system of law endeavoring to secure from their brother Judges explanations on the meaning and purport of some articles of the Quebec Civil Code or, likewise, of some precedents under the Common Law. When one has been accustomed to a particular aspect of his Law, he is most apt to take for granted a particular interpretation, which, very often he has ceased to take the trouble of analyzing. But if he is asked to give some explanations for it, then he is compelled to go deeper into the reason for his interpretation; and one cannot begin to appreciate to what extent and how much more thorough becomes his grasp of the intention of the legislator.

No one, I would think, could speak with more authority than my great predecessor, the late Sir Lyman Duff, who enjoyed the longest career in the Supreme Court of Canada. At the annual dinner of the Ontario Bar Association, on the 22nd May 1925, he expressed himself as follows:

> "Our experience has shown that there is no impassable chasm separating practitioners in these two systems. Counsel disciplined in the common law find themselves at home in causes in which the principles of the civil law are to be applied . . . (In the Supreme Court of Canada) judges trained in the common law sit together with those trained in the civil law and these judges deliver judgment indifferently, now in common law appeals, and now in civil appeals. Lawyers of this country are coming to think in terms not of the civil law only or of the common law only, but in terms as well of the broader principles upon which both structures are reared".

Indeed, one may ask whether the original differences in the two systems are not gradually disappearing.

Quebec now admits the rule of *stare decisis*. The other provinces accept the doctrine of contributory negligence. The law of principal and agent as expressed in the Civil Code is borrowed from the Common Law writers. The harshness of the doctrine of common employment was first mitigated by the Employers' Liability Acts and, now we have the Workmen's Compensation Acts which, in all provinces, as well as in Quebec, are framed on similar principles.

As for the laws of real property, ——— the registration system under the civil law has no resemblance with the intriguing Torrens system in force mainly in our Western provinces — a system borrowed from Australia which protects the purchaser to the detriment of all others concerned and notwithstanding all principles of law and equity. (Why go to Australia to introduce such a system in Canada?) I refrain from writing here what Sir Lyman Duff thought of it; and I have myself expressed my own views on that subject in my reasons of Judgment in *Torta* v. *The Canadian Pacific Railway & Imperial Oil Co.*,[1] when that case came to the Supreme Court of Canada.

Yes, there exists that dissimilarity in the Registration system between Quebec and the Western provinces. I, for one, hope that it will persist, unless those provinces abandon their system.

The unlimited right of disposing by will, which is the English rule, was introduced in Quebec by the Act of 1774! Whether the testator does it by notarial or holograph will, or by what is called in the Civil Code "the form derived from the laws of England", in either case it is only a matter of form.

In Quebec, community as to property between consorts is the rule if they have made no marriage contract; but all sorts of agreements may be lawfully made in marriage contracts, and it is usual in those contracts to stipulate separation as to property.

I will not pause to mention limitations or prescriptions. They in no wise constitute fundamental differences. They are exclusively matters of delay, over which our legislatures have complete control. There is nothing to prevent any province from enacting to-morrow similar limitations as prevail to-day under the Quebec Civil Code or *vice versa*.

There remains that the sale of expectant rights of inheritance is prohibited under the Code, while it is not under the Common law. One may venture the opinion that the former is preferable. But perhaps this question may be summarily dismissed by recognizing the situation that before long, under present conditions, nobody will have any inheritance to leave at his death.

No! The more one thinks of it, the more he finds that the diversity of legislation is more imaginary than real. Above all, in no way does it affect the essential unity of Justice.

On that conclusion, I am glad to find myself in agreement with a former Chief Justice of the United States Supreme Court. At the great meeting of the United States Bar, the Canadian Bar, the English Bar and the French Bar, in Paris, in 1924, referring to the respective conceptions of the Civil and the Common laws, Chief Justice Hughes said: "Under our two systems of law we render similar judgments in similar cases".

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[1]Unreported.

After my experience on the Bench of the Supreme Court of Canada, I would say that the same legal problems, whether they stand to be solved under the Civil Law or under the Common Law, almost always lead the Courts to the same solution. The result might sometimes be reached by different roads; but, in the end, to use an expression of Lord Dunedin, "it comes to the same thing". And, after all, the result in any litigation is the one practical thing. When I was still in practice, my senior partner used to tell me: "You know, our client does not care for the nice points of law or the important legal questions; all that he wishes is to win his case".

I repeat that in exploring the relations between the two great races which go to make up our country we insist too much upon our so-called differences and we do not stop sufficiently to consider our similarities. It stands as an obstacle on the road leading to what is known among Canadians as the "bonne entente".

Why persist in regarding "bonne entente" as meaning the assimilation of the two races? Even individuals forming part of the same race are not similar; they each have their own characteristics and peculiarities.

At a time when the civilized nations of the world strive to achieve unity, it would be surprising indeed that the two races to which Providence has entrusted the task of forming together our Canada should find difficulty in living in harmony.

If it be true that the fundamental principles of law are the same and that dissimilarities are found only in matters of form in order to reach the same results, could it not be said that a similar situation exists with regard to religion and to language. The essential principle of Religion is the worship of the Supreme Being. That is the substance of the matter. This worship is expressed in a different way. Yet, it is nevertheless religion with the same object: the worship of the same Supreme Being. The difference exists in the form of the Worship.

And so may it be said of language. The words are only the means of communicating our thoughts, and again, in whatever language, it resumes itself into a question of form.

I have used that expression elsewhere and I wish to repeat it again! We are all Canadians.

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