

(September 20th, 1937)

## Back to Canada

BY LORD HEWART OF BURY

MY LORD, AND GENTLEMEN:—Before proceeding to introduce our distinguished guest speaker, may I remind you that the regular season of the Club begins with the first Monday in October. It is therefore desirable that applications for membership should be made now so that new members will have the benefit of the full season. Application forms are on your tables and the Executive seeks your cooperation by asking that each of you bring in a new member. I can assure you that the schedule of speakers for our coming meetings promises to maintain the standard that our two special meetings have set. So may I ask you to take the application forms with you—and use them.

After an absence of ten years, we welcome back to the Canadian Club the Right Honourable Lord Hewart and he has chosen, appropriately enough, the all-embracing subject of "Back to Canada".

At our last meeting a great English advocate, Mr. Norman Birkett, evoked our admiration by his description of the administration of justice in England. By a happy coincidence today we honour the man who is the permanent head of the judiciary of England. Lord Hewart had a brilliant career at the bar, he was solicitor-general and then attorney-general of England, a foremost member of the British Cabinet in the post-war period, and finally he attained that greatest honour of all, the title under which we welcome him today. Gentlemen—The Lord Chief Justice of England.

MR. PRESIDENT AND GENTLEMEN:—There is no need to attempt to say what a delight it is to be once more in

Canada, and in this alluring City of Toronto, and among the warm and steadfast hearts of the Canadian Club. My happiness would have been complete if your invitation to this feast had contained the blessed words "no speeches." Yet it is pleasant to express the joy of realizing that, while during ten years, some changes, some additions, and some alterations have been made—as unhappily many losses also have been suffered,—nevertheless the essence of the matter remains, and Canada and Toronto are, what to my partial and remembering eyes they will never cease to be. It is indeed a great delight to be once more with so many old friends, including that Grand Old Man and illustrious Chief Justice, Sir William Mulock, and my dear and learned friend, Mr. Howard Ferguson, whose departure from London was, and is, deplored by all of us. You are, without doubt, a fortunate and favoured people in Canada. I will not say, with the poet of old, "o fortunatos nimium sua si bona norint," because I am quite sure that you are well aware of your blessings. Rather, I am tempted to compare you with the lucky person immortalized by another Roman poet, who is able to watch from the safety of the shore, a vessel in distress at sea, and to reflect, not indeed that the troubles of others are agreeable to behold, but that there are many sufferings from which he himself is secure.

Perhaps it would not be strictly accurate to suggest that the Canada of the present day is completely exempt from difficulties and problems which call for solution. Nobody, I think, could take that view who reads and considers, for example, the brilliant and illuminating speeches of Sir Edward Beatty. But your difficulties and problems, both economic and political, appear to be well in hand, and in good hands, and to contain nothing of an insoluble or insuperable character. As for minor questions, you can of course afford to treat them lightly. None of you, I imagine, is likely to be kept awake at night by a doubt whether appeals to the Judicial Committee of the Privy Council are really worth the money they cost. None of you, I suspect, is disposed to waste much time upon the question whether, after all, Canada might not usefully be annexed or absorbed by the United States. The only tittle of evidence, let me add, which

I have been able to discover of any such tendency or temptation is the fact that I sometimes see in Canada, at the end of the menu for dinner, not the homely word "coffee," but the insidious name "demi-tasse." Nor, again, do you appear any longer to be seriously disturbed by that somewhat varied and uncertain manifestation of the policy or prescription which was humorously called "prohibition." It may be that that is a delicate question, and a delicate question, as you know, is a question which lends itself to indelicate treatment. But, without trespassing upon forbidden ground, perhaps I may repeat to you a little criticism which I heard some time ago at a dinner-party in London. A distinguished citizen of New York—if the epithet distinguished is not superfluous—was pressed again and again to say what he thought of prohibition. The great man was evidently reluctant to express his opinion—or, at any rate, to express it in that company. But at length, after a good deal of persuasion, he did express it, and in words that I well remember, although it is beyond my power to reproduce the rich Scottish accent of the speaker. What he said was, "Well, if you must know, what I think is just this—prohibition is not good, no it is not good, it is not good, but it is a darned sight better than no drink at all."

Yet, however perfect may be your domestic bliss, however re-assuring—in spite of occasional drought or distress—may be your survey of the economic unity of Canada, you do not forget, and do not wish to forget, that you are one of the members of a large family. Nothing that is vitally important to England can be a matter of complete indifference to you. Now there are two matters to which, with your permission, I will venture very briefly to refer. It is—is it not?—a remarkable, and somewhat discouraging fact that after nearly two thousand years of professed Christianity the thoughts and the resources of Europe, and not of Europe alone, are being directed to re-arming, on a colossal scale, for purposes of defence. Notwithstanding the League of Nations—or ought it more correctly to be called the League of Hallucinations?—and notwithstanding all the sufferings, the misery, the cost and the loss of the Great War that was to end war, the minds of civilized men in the

twentieth century are so much affected by suspicion of each other that they are prepared to beggar themselves in order to exist. Every country, to be sure, claims to be preparing only for defence, and its own citizens take that view. But nevertheless they believe, or tend to believe, that every other country is preparing for aggression. A distinguished and experienced person asked me a few weeks ago, for what purpose I supposed that the dictators in Europe were getting their vast armaments ready. "They undoubtedly intend," he said, "to use them." But, I asked, "is that the view they take of our own preparations, which we know are being made solely for the innocent purpose of defence?"

It is indeed a vicious circle, and nobody can foresee the end. Everybody, it seems, is able to disclaim any passion for projects and power, and yet everybody, or almost everybody, is willing to impute it to everybody else. Now it is perfectly idle—is it not?—to disclaim against the wickedness of killing, because when the pinch comes—when, that is to say, a country believes her honour or her interests to be vitally concerned—her citizens will think only of the nobleness of dying. And it is perfectly idle—is it not?—to dwell upon the horrors and the consequences of war because men feel that, in comparison with an alternative which is intolerable, no consequences and no horrors are worth considering. I sometimes wonder, indeed, whether we always appreciate the worst consequences of war. In England, at any rate, nothing is more certain than that, in all the professions, and in all the avocations of life, we are tragically impoverished by the loss of a whole generation of our best youth—the very flower of England cut down and destroyed in battle. The ultimate dimensions of that far-reaching loss and sacrifice are beyond the power even of imagination. But we know, if feeling is evidence, that the loss can never by any possibility be repaired.

Well, we may ask ourselves, are we to drift on, or to be muddled into, another and worse catastrophe? For my own part, I am sometimes a little puzzled by that word "non-intervention." I should have thought, at first blush, that one way, and a rather good way, of non-intervention is not to intervene. Perhaps that view is too simple and old-

fashioned. But, however that may be, I should like, with great respect, to commend to you a different and deeper question—the question, namely, whether the time has not come when attention might usefully be turned from symptoms to causes, and when a sincere and sustained effort might be made first to ascertain and then, if possible, to eradicate the underlying seeds from which breaches of international peace may conceivably spring. The inquiry, no doubt, might be difficult and delicate. But that possibility affords no good reason for delay. Depend upon it, it is the kind of inquiry which some day must be undertaken, and it seems reasonable to think that it would more hopefully be undertaken in time of peace than in the atmosphere which might be generated by an actual conflict. I will venture only to remind you of those great words of Edmund Burke: “Magnanimity in politics is not seldom the truest wisdom, and a great empire and little minds go ill together.”

But let me turn for a moment or two, and only for a moment or two, to a different matter. Peace between nations is, after all, a means to an end, and that end is the good life of the citizen. More than two thousand years ago a wise man said that civil society came into existence in order to make life possible and exists in order to make life good. The essence of good life, or at least its indispensable conditions, is—is it not?—justice and freedom, and it is difficult to think of either without the other. Now, there is to-day, and has for some time been, an insidious influence at work which, while it refrains from any open attack upon justice and freedom, tends steadily to undermine them. I refer of course, to the unabated pretensions of bureaucratic usurpation. We are well aware, indeed, that what is called self-government does not mean government of every citizen by himself, but government of each citizen by all. But that system is a wholly different thing from government by an invisible and intangible body of anonymous officials. It may be that in Canada you are wholly free from this plague. But it shows little sign of diminution in England. It is indeed a commonplace to say that our civil service is a miracle of ability and efficiency. Nobody would dream of criticizing it, especially as it is hardly in a position to offer

a reply. But those facts do not afford the smallest reason why officials, or any of them, should be allowed or encouraged to go beyond their proper sphere or to exercise powers which ought not to belong to them. The excuse which is commonly offered is that Parliament attempts too much and too great a variety of things, and therefore that the working out, and the application, of the details must be left to other hands. But, whatever substance that excuse may contain, it cannot justify an abdication of Parliamentary control.

You are no doubt aware of the system, or the scheme, which is at work. A practice has been developed under which Parliament enacts statutes, in skeleton form, giving authority to some Government department or other to make orders or regulations and sometimes to pronounce decisions. But the statutes also contain provisions, for example, that the orders or the regulations departmentally made shall have the same force and effect as if they were themselves enacted in the Acts. That is another way of saying that the Courts of Law are bound by them—because in England, as you know, by reason of the sovereignty of Parliament, no court can enquire whether a statute is right or wrong. And so the orders and the regulations, which are produced in astonishing numbers, sometimes intelligible and even frequently grammatical, are placed beyond the jurisdiction of the Courts. Another provision or contrivance is that the order made or the decision given by the Minister shall not be questioned in any Court of Law by proceedings in mandamus, certiorari, or prohibition, or by case stated, or otherwise in any manner whatsoever. That seems to me another way of providing that departmental usurpation or excess jurisdiction shall go unchallenged and unchecked. There used to be another favourite device—it is fair to say that we have not lately seen so much of it—whereby a statute provided that the making of an order by the Minister should be conclusive evidence that all the requirements of the statute had been complied with. In other words, although a statute might contain certain specific safeguards and conditions, for the protection of individuals or otherwise, the mere fact that the Minister made an order was to prevent any enquiry into the question whether the safe-

guards and conditions had been duly observed. The obvious criticism was of course, that it would be shorter and simpler to pass an Act providing that, after a day to be named, the Minister could do precisely what he pleased, without question and without redress.

Now, it is natural—is it not?—to ask why, and by whom, provisions or devices of this kind are thought desirable, or are in fact desired? The apologists tell you that the desire is to avoid litigation. But a moment's reflection shows how silly that excuse really is. You do not have a legal doctrine which condemns negligence because you desire a multitude of actions for damages, but because you desire to make people take care. You do not have penalties for burglary because you desire to see great numbers of burglars in the dock, but because you desire to discourage the felonious breaking and entering of dwelling-houses by night. And it seems pertinent to ask why Ministers, and some at least of the clever officials upon whom they so greatly rely, wish to put their orders, their regulations, and their decisions beyond the reach of the law. It seems pertinent to ask what is the scrutiny which it is sought to avoid, and upon what real grounds. You may be inclined to think, as some of us do, that not the least sinister part of the whole business is that there is evidently, in some quarters, a determined wish and endeavour to escape superintendence and review by the ordinary law. It is precisely because the orders, the regulations, and the decisions might be somewhat different from what they are if it were known at the outset that they might become the subject of judicial review, that this settled policy of departmental evasion is condemned.

Well, I have been able in these few moments to touch only the fringe of a large subject. Do not allow yourselves to be persuaded or provoked into the opinion that the topics which are being purposely withdrawn from the Law Courts are matters of policy. The Law Courts are not concerned with matters of policy but with questions of law. Nobody ever supposed that a case would be stated, or that a prerogative writ would be issued, on a matter of policy. It is just because the distinction is so clear between questions of policy and questions of law that it is wrong to put questions

of law beyond the reach of the Courts. You know as well as I do that the power and the independence of the Judges are not a personal possession or privilege. They are the protection of the public. By all means let us agree, and agree sincerely, with Francis Bacon that the inclination to goodness is imprinted deeply in the nature of man. But never let us in any mood of indulgence, or carelessness, or cynicism be tempted to forget that the price of liberty is an unceasing and unrelenting vigilance.

In thanking Lord Hewart for the enjoyment that he has given us by his splendid address today, may I express the hope that we shall not have to wait ten years before he visits us again. But should we be so unfortunate, we shall nevertheless have the memory of his wit, his learning and his charm. My Lord, on behalf of the Canadian Club, I thank you most sincerely for the honour you have done us in coming here today and for the pleasure that you have given us by your address.