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THE DUTIES AND RESPONSIBILITIES OF THE BAR.[1]

When I received your gracious invitation to come and address you at this your annual meeting, I hesitated to accept; not that I failed in any degree to appreciate the honor implied in the invitation, but because of the uncertainty I felt as to the interest or importance of the message I might be able to bring to you, as a member of the bar of the neighboring country. But reflection convinced me that I could best acquit myself by speaking to you as I should do to a Bar Association of one of the States of our own Union. I never have been able to regard Canada as a foreign country. We are children of a common mother. We derive our conceptions of law and justice from the same fount of the common law. Our two countries but recently fought side by side in the greatest conflict in history, in defence of the application to the affairs of nations of the same fundamental principles of justice as obtain between man and man. In that struggle, Canada was forever consecrated to our hearts and minds by her heroic achievements and by the bounteous sacrifice of her best blood, in order that governments based upon the free will of free peoples might endure upon this earth.

Naturally, as I thought of meeting your Association here to-day, I reflected upon the nature of our common profession, its problems, its duties, its opportunities. I reflected upon the great part the Bar has played in the history of the English-speaking peoples, and it seemed to me that I could do no better than to invite you to consider with me for a moment, the duties and opportunities of the Bar to-day, in my country as well as in yours.

Our problems are not unlike. The stronger organization of your Bar, with the authority conferred upon it by law, gives it certain

[1] Address delivered before the annual meeting of the Ontario Bar Association, at Toronto, May 23, 1924.

advantages over ours. In some directions you have advanced further than we have. In general, I venture to think, the attitude of the Bar towards the community and the attitude of the people towards the Bar differs in no very great degree in Canada from that in the United States. If individual lawyers have less influence with the public to-day than they enjoyed a century ago, the influence of the organized Bar is greater and is increasing.

There is in the United States a growing tendency of lawyers to organize in associations, local, state and national, for purposes more or less the same as those expressed in your own Constitution, namely: "to improve the administration of justice, to uphold the honor and dignity of the profession of the law, and to promote friendly intercourse among members of our common profession."

Aside from some early and sporadic examples, organizations of this character date from the formation of the Association of the Bar of the City of New York in 1869, for the purpose of driving unworthy judges from the bench, and redeeming the administration of justice from corrupt corporate influences and especially from the domination of the Tweed ring. The Association was incorporated a year or so later, in April, 1871, by act of the Legislature, for the expressed purpose "of maintaining the honor and dignity of the profession of the law, of cultivating social relations among its members and of increasing its usefulness in promoting the due administration of justice."

The creation of this Association was the result of an awakened sense of corporate responsibility on the part of the lawyers of New York, for the continued existence of conditions which made a mockery of the whole conception of government under laws honestly administered by courts presided over by learned and upright judges. Seldom, if ever, in the history of America have such conditions existed as then obtained in New York, and never has the Bar better vindicated its high functions than in the various steps taken by the collective action of the Bar against the corrupt political and judicial powers of that time. Lord Bryce, in his chapter on Tammany rule in New York City, in "The American Commonwealth," described the origin and progress of a corrupt organization, which oozed up from the slime of local politics and gradually enveloped the government of the city with malignant power; while Charles Francis Adams, the younger, in a little book published in October, 1869, entitled "A Chapter of Erie," recorded the history of the unholy alliance of certain judges with a group of speculators who had obtained control of a great railway, and used that control to corruptly manipulate markets and rob the public.

Reviewing the conditions as they then existed, Mr. Adams said, they revealed to every observant eye the deep decay which had eaten into our social edifice.

"No portion of our system," he wrote, "was left untested and no portion showed itself to be sound. The Stock Exchange revealed itself as a haunt of gamblers and a den of thieves; the offices of one great corporation appeared as the chambers in which trustees plotted the spoilation of their wards; the law became a ready engine for the furtherance of wrong, and the ermine of the judge did not conceal the eagerness of the partisan; the halls of legislation were transformed into a mart in which the price of votes was higgled over, and laws, made to order, were bought and sold; while under all and through all, the voice of public opinion was silent or was disregarded."

These words were written and published in 1869. No wonder that the conditions Mr. Adams described filled him with ominous forebodings of the future. Yet even as he wrote, the awakening of an outraged public sentiment was at hand, and within less than two years, three corrupt judges were expelled from the bench, and Tweed and the members of his ring were driven into exile or brought to justice. Never since that time has the public conscience been sunk into like apathy and, despite corrupt and disgraceful lapses from time to time, never since then has such wholesale dishonesty prevailed in any branch of our government. From that day onwards, the Bar has felt and acted upon an increasing consciousness of its responsibilities as well as its influence. Its power as a civic force steadily has grown, as the lawyers of the country have combined, in city, county, state and national organizations, increasingly recognizing their responsibility for good government, and above all, for the administration of justice. Remarking with regret the apparent decline in the influence of the legal profession, Lord Bryce wrote, in "The American Commonwealth":

"Their influence is still great when any question arises on which the profession or the more respectable part of it, stands together. Many bad measures have been defeated in state legislatures by the action of the Bar, many bad judicial appointments averted. Their influence strengthens the respect of the people for the Constitution, and is felt by the judges when they are called to deal with public questions. But taking a general survey of the facts of to-day, as compared with those of the middle of the last century, it is clear that the Bar counts for less as a guiding and restraining power, tempering the crudity or haste of democracy by its attachment to rule and precedent than it did then."

The reasons for this decline in influence are not far to seek. The great expansion of industry and the rapid growth and increasing wealth of great corporate organizations drew the ablest lawyers away from the courts and from public service, into the employ of corporations and other great private interests, while, on the other hand, the widening circulation of great newspapers created a new and ever extending means of influencing public thought, which superseded the voice alike of the Pulpit and the Bar.

Nevertheless, lawyers still preponderate in our Congress and our State legislatures; our Presidents, twice out of three times, are of the legal profession, and the sentiment of the organized Bar steadily is moving back towards a position of greater influence upon the thought and action of our communities.

This influence increases in proportion as it is demonstrated to be exerted for unselfish purposes and towards lofty ends. It is made apparent in efforts to improve the efficiency and maintain the high character of the Bench; in ridding the Bar of unworthy members, and in raising the standards of fitness and character as conditions to admission to the Bar. It is exerted increasingly in improving the quality of legislation, and in bringing about greater uniformity in the statute laws of the different states of the Union, as well as in efforts to clarify and simplify the common law, in reforming judicial procedure, and in grappling with the various conditions which are responsible for undue delays in the administration of justice. A few illustrations will support this statement.

In the early days of the Republic, laws were comparatively simple; education for the practice of the law was obtained through the study of a few standard text books, such as the Commentaries of Blackstone and Kent and Story, Stephen's Treatise on the Law of Pleading, Greenleaf on Evidence, and Parsons on Contracts, with the aid of casual instruction in the offices of practicing attorneys. If scientific education were lacking, the student had the great advantage of acquiring familiarity with accurate drafting and exact legal expression by copying papers in his preceptor's office. He also enjoyed the advantage of close acquaintance with older lawyers, and, in many instances, the privilege of serving under the direct influence of some inspiring personality. Moreover, almost from the beginning of his apprenticeship, he made the acquaintance of the court and its attendant offices, through the daily discharge of the ordinary duties connected with litigation, which at that time constituted the larger part of the practice of the law. He constantly attended the trial of cases in court, and learned there the best methods of preparation and trial.

This sort of schooling sufficed to make a fair sort of trial lawyer. Later experience made him something more.

"Whether it be a calamity or not," Mr. Stirling Taylor recently observed, "there is no denying the fact that the English mind does not give much time to considering the fundamental principles of law. . . . Our jurists have been craftsmen rather than theorists."

On the other hand, Dean Pound, in a recent lecture, says:

"One has but to read the proceedings of our Bar Associations to perceive the revival of faith in the efficacy of effort, which is in marked contrast with the juristic pessimism of a generation ago.

"Interest in the philosophy of law, which was the foundation of legal studies when Marshall and Kent and Story were preparing for the bar, is notably reviving in all English-speaking lands."

I confess to a doubt whether or not there was much interest in the philosophy of law in America at the time referred to by Dean Pound. Certainly, Marshall felt none of it. His studies before admission to the bar were of the most superficial character. Mr. Beveridge says of him:

"He had practically no equipment except his intellect, his integrity, and his gift for inspiring confidence and friendship. Of learning in the law he had almost none at all. He had read Blackstone, although not thoroughly, but the only legal training that Marshall had received was acquired during his few weeks' training at William and Mary College."

Neither Kent nor Story had done much more. Besides, Blackstone and Coke on Littleton, the former read Grotius, Pufendorf and Hale's History of the Common Law. But I have looked in vain for evidence of any general interest or instruction in the philosophy of law during the period covered by the apprenticeship of Marshall, Story or Kent. True, there was great interest in political economy and in the science of government, but the Common Law, as Blackstone expounded it, was accepted as the ultimate expression of justice and reason.

What the present Attorney-General of the United States, the Honourable Harlan F. Stone, said in his address before this Association in 1922, was as true of the time when Marshall, Story and Kent were pursuing their studies for the Bar as in the centuries preceding, namely: that the genius of the English-speaking people found expression in the law which was forged between the hammer and anvil of opposing counsel in the trial of controversies in court, rather than in the study of principles of jurisprudence by scholars in libraries or in universities.

Mr. Stone, in that address, referred to the fact that the very gradual development of commerce and industry in England enabled this process of law-making to keep ahead of the needs of society, and thus constantly to develop a body of law adequate to the requirements of the times. But from the date of the invention of the steam engine, until the present, the process of the courts increasingly has dropped behind the demands created by new conditions resulting from the bewildering variety and complexity of scientific discovery and the application of applied science to our complex and rapidly growing populations.

It is a trite observation that no corresponding period in recorded history has thrust upon the human mind problems resulting from so many new discoveries and inventions, as the century which closed with the outbreak of the Great War in Europe. The telegraph, the ocean cable, the telephone and the radiograph, the electric railway and the gasoline engine, the airplane and the submarine, have revolutionized the conditions of human society and drawn the ends of the earth into neighborhood relations, while the moving picture, mechanical music and the radio, furnish passive instruction and diversion to millions. All these inventions combine to create constant mental agitation and diminishing repose. Impressions succeed impressions upon the retina of the eye and the processes of the brain, with a result not yet capable of reliable estimate.

The infinite variety of mechanical invention and appliance immeasurably has changed the relations of employer and employed, with a reaction upon government which finds expression in new laws, new methods of administering laws, and new conceptions of social order. The growth of cities, with perfected sanitary conditions, multiplied comforts and constant human contacts, increasingly draws population away from the rural districts, while the problems of agriculture, more and more requiring solution by scientific method, requiring large capital, make unattractive and unprofitable to millions of small producers those pursuits upon which, in the last analysis, rests our entire civilization.

The rapid progress of these events has called for the application of regulations which often are improvised by ill-digested and badly expressed legislation, hurriedly enacted in response to clamor for instant relief against conditions which should be dealt with only after profound investigation and study, in order to insure intelligent and helpful enactment. Often the well settled rules of the Common Law are entirely inadequate to meet conditions which the legislature makes worse by crudely dealing with consequences rather than causes.

The Common Law rules concerning common carriers, and the principles affecting the regulation by government of property affected with a public use, lie at the foundation of our whole modern law concerning public utilities.

A distinctively modern development of law, however, is to be found in the establishment and multiplication of administrative tribunals, in which are blended powers, legislative, executive and judicial. The Interstate Commerce Commission is the prototype in the United States of the anomalous character of governmental organ from which have been developed the Public Utility Commissions of the various States, and such other bodies as the Federal Trade Commission, as well as State Factory and Labor Commissions, and Workmen's Compensation Boards. Government increasingly touches the life of the individual citizen as civilization grows more complex, and the conception of social, as contrasted with individual, property rights increasingly finds expression in new laws to circumscribe the freedom of individual action. To a certain extent—a diminishing extent—judicial power still is recognized as invocable to prevent confiscation of private property under forms of law. But the judicial conception of private property to-day differs widely from that of half a century ago, and what then would have been thought confiscation now is accepted as permissible regulation in the public interest.

Resort to judicial protection also is often so hedged in by preliminary requirements as practically to deprive one of any effective relief. Constitutional provisions designed for the protection of the individual from governmental oppression have been largely construed away in response to popular demands. A common example of this is furnished by the history of the provisions against the taking of private property for public use without due compensation. The modern device of vesting title to the property so taken long in advance of either the ascertainment or the payment of its value, frequently results in stripping an owner of title to an income-producing property, in exchange for a tedious, prolonged and expensive litigation, with an uncertain award. Problems thus arising only can be met and abuses remedied by a clearer knowledge of the law. There is a duty imposed upon the Bar to make clear to the community what are the sound principles of law that have stood the test of time, and are adaptable to the conditions of modern life.

This work cannot wait upon the slow process of courts. It cannot be done by the working Bar. It requires prolonged study and labor. It must be done through the great University Law Schools and by the scholars of the law, rather than by the old Anglo-Saxon way of threshing out in the courts. The Commissioners on Uniform

State Legislation have made a record of valuable achievement in clarifying and assimilating the statute laws of the different States of the American Union upon many subjects, such as Negotiable Instruments, Bills of Lading, Sales, Warehouse Receipts, Fraudulent Conveyances, Limited Partnerships, Partnerships, and a number of others.

Legislative drafting bureaus have been established in a number of States, whose services have resulted in clarifying and improving the use of language in many legislative measures. Committees of Bar Associations diligently scrutinize pending legislation, and submit criticism which often results in the defeat or modification of measures which but for the opposition of these disinterested, impartial and competent bodies would, in many instances, be placed upon the statute books. More recently, a movement originating in the great law schools, received tangible direction at a representative meeting of the Bench and Bar of the country, held in Washington, in February, 1923, through the organization of The American Law Institute, for the purpose of clarifying and restating the Common Law, and securing its better adaptation to the needs of modern life. A generous endowment from the Carnegie Corporation has enabled the Institute to engage the services of the most distinguished professors of the law on different subjects to formulate, and of other special students to criticize, the work of the restatement of such great topics of the law as Contracts, Torts, Agency and Conflict of Laws, for submission to the Institute, with the view to their ultimate adoption and publication, in the hope that the prestige of the Institute and its scholarly method of production may result in the acceptance of its work by the Bar and the Courts.

Necessarily, this work must be done by those scholars whose lives are devoted to the study and exposition of the law. The practicing lawyer may contribute helpful criticism and suggestion. But the constructive work is that of legal scholars. As the Roman Law was preserved and transmitted to the modern world through the great mediæval universities, in the manner pointed out by Dean Stone in the address to which I already have alluded, so the Common Law must be clarified and restated and given to our world through the labors of the doctors of the law in our modern universities, aided and directed by the devotion of practitioners whose unselfish vision may lead them to sacrifice something of profitable private employment, to aid in the attainment of the great end of preserving the fundamental principles of our law and demonstrating their adaptability to the requirements of our complicated modern industrial civilization. After all, it is not the laws enacted by legislatures to meet passing demands, however clamorous, which abide as the accepted canons of

a national jurisprudence. It is rather that law which wells up from the People's consciousness of right living, and which reflects the popular idea of morality and correct conduct. This was the law to which the Parliament of England referred when, in addressing Henry VIII., it declared that England had been and was free from subjection to any man's laws, but only to such as had been made and ordained within the realm for the wealth of the same or to such other as by the sufferance of the King, "the people of this your realm have taken at their free liberty by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same . . . as the *customed* and *ancient* laws of this realm, originally established as the laws of the same, by the said sufferance, consents and customs, and none otherwise." (25 Hen. VII., c. 21.)

This *customed* or common law, our ancestors brought with them from England, modified to meet the conditions of their new American home.

The constitutions of many of the States adopted upon the Revolution declared the Common Law to be the heritage of the People. This heritage is yours in Canada as well as ours. It constitutes the closest tie between our peoples. It furnishes a common medium upon which are based common ideals of justice. The Bar and the Courts have sought to preserve this heritage unimpaired. But the reported decisions of the courts of forty-eight states, besides those of the Federal Government, have accumulated to such an extent that the principles of the law often are so buried under mountains of precedent as to be hard to discern. The efforts of the American Law Institute are being directed to the disentanglement from the mass of precedent of the fundamental, essential principles of the law, and their statement in terms so clear and so accurate, that the profession and the Bench may receive them as authoritative, and relegate to the scrap heap the multitudinous volume of conflicting and often obscure precedent out of which the restatements of the law shall have been evolved.

Never before in history has there been laid upon the Bar more difficult and complex problems than at this time. The Bar Associations are devoting systematic and continued effort to the improvement of the ethical standards, while the Law Schools of the leading Universities are doing their part to raise the intellectual standards of the profession. Methods of legal instruction in the great Law Schools have vastly improved since Professor Langdell revolutionized the teaching of the law by the introduction of the Case System at the Harvard Law School. A longer period of study also is being required

of the student, and higher standards of preliminary education exacted by the leading Law Schools. The legislatures and the courts lag behind. The Bar itself has been inexcusably slow in recognizing the changed conditions of our time, and the fact that education which would have been adequate a century ago, to-day is wholly insufficient to fit a young lawyer to meet the responsibilities of modern life. These problems only can be solved by an educated Bar. Obvious as this would seem to be, the tradition still is strong that any boy with a common school education is fit to study law, and if after two or three years of attendance upon lectures at a part time law school, he can pass an examination in the elementary principles of law, he should be licensed to practice. The stock argument, often repeated, against elevating the standards of admission to the Bar, is that Lincoln and many other outstanding figures in our history were without college education, and yet attained eminence at the Bar. Such arguments are not without great influence in keeping the requirements for the Bar at a low level. But a changed attitude has been manifesting itself of late. Stimulated by the action of the Association of American Law Schools, a very representative meeting of lawyers from every part of the United States was held in Washington in February, 1921, at which the entire subject of legal education was discussed and standards of preliminary education, as well as of legal training, adopted. These principles, in 1923, were reaffirmed by the Conference of State Bar Associations, and were unanimously adopted by the American Bar Association. At least two years of college education, or its equivalent, where the applicant is unable to pursue the actual course, was required as a condition to entrance upon the study of the law. The New York State Bar Association in January of this year adopted the same standards. Associations of the Bar in other States have taken like action. Substantially the same requirement of preliminary education as that mentioned has been recommended by your own Association, if I correctly understand the action taken upon Dean MacRae's report. I shall not attempt to retraverse the ground covered by Dean Stone in his address to you in 1922, upon "Some Phases of American Legal Education." I mention the subject only as one of the fields in which the Bar still has a great duty to perform, and to note the fact that it is alive to its responsibilities and is taking action as effectively as it may. The Bar in the United States does not possess the official powers which by your laws are conferred upon your Bar as a legal corporate body. With us, plenary control over the subject remains in the legislature, and even when delegated to the courts, if the latter impose requirements which go beyond standards approved by the legislature,

that body may overrule them and open the door of the Bar more widely to uneducated and imperfectly trained students, as, in fact, recently was done in the sometime conservative Commonwealth of Massachusetts.

I gather from the Legal Education Number of the CANADIAN BAR REVIEW (October, 1923) that the standard of preliminary education required of students desiring to study law recommended by your Association in 1922, that is, an education equivalent to one obtained by two years study in Arts at an approved University, already has been adopted by at least three provinces of the Dominion.

As yet, I regret to say, no State of our Union, so far as I am aware, has carried the requirements prescribed by statute or rule of court beyond the equivalent of one year's college study—requirements which, as a Judge of the Court of Appeals of the State of New York recently observed, readily can be met by any industrious boy of eighteen years of age! Democracy is slow to realize that ignorance is its greatest enemy, and that no form of ignorance is so malign as superficial education. Our population is made up very largely of people of foreign birth or parentage. Of the young men pressing to our bar, a large proportion have very little, if any, conception of the history of our institutions or the philosophy of our law. It is impossible for them in one year of college study to acquire an adequate background of knowledge necessary properly to comprehend the nature and value of our laws and institutions. How then can they exert any but an untoward influence in the application of law to the complex problems of our modern life? You must have the same problems, although probably in a lesser degree, in Canada. Our respective Bar Associations may be mutually helpful in dealing with this question. Our influence should be directed, it seems to me, not merely in endeavoring to have better standards adopted by courts and legislatures, but in convincing young men of all classes who think of studying law that it is to their advantage to equip themselves by a college education to take up that most difficult pursuit, and that only by following a full time course of at least three years in one of the Law Schools of the first rank, can they be adequately prepared to become, not mere pettifogging attorneys, but counsel, capable of sharing in the great responsibilities and the lofty opportunities of a learned and exacting profession.

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