

ADMINISTRATION OF JUSTICE IN THE  
UNITED STATES.<sup>1</sup>

BY THE HONOURABLE JOHN LORD O'BRIAN.

It is a very great pleasure for me to be here as a member of the American Bar Association and the official representative of the New York State Bar Association. When Judge Dykeman, the President of the New York Bar Association, asked me, as one of its Vice-Presidents, to come here and formally invite you to attend the next meeting of our Association at Buffalo, in January, he said nothing whatever to me about any address. This unpreparedness, with the lateness of the hour, must be my excuse for making to you a brief and somewhat discursive address on the subject of some of the present tendencies in the administration of justice in America. I feel diffident in attempting to treat this subject thus, after listening to the paper just read by your leader. I have heard many Bar Association papers, and I think I may say without flattery, that I never heard one having more of the authority of scholarship in it than the one that has just been presented. That brilliant paper relieves me, and relieves you, of any necessity for a formal address from me this afternoon.

I take it that both of us hold the same view, and I rejoice in the fact, whether or not other people rejoice in it, that your country and mine are being forced into a realization that we exist under a common system of law, and we have in the destinies of the world the same duties to perform. What has been said here about three forlorn American States years ago attempting to prevent practitioners from quoting English law marks the distance through which we have progressed with the years, for I think you will find the authority of English decisions markedly recognized not only by the

<sup>1</sup> Address before the Ontario Bar Association at its 17th annual meeting in March, 1923.

Supreme Court of the United States, but certainly in New York and Massachusetts, the two leading jurisdictions of the country, and generally throughout the land. Times have changed very much, and all of us have more or less altered our ideas of political philosophy. We on the other side of the line have modified our ideas of democracy during the progress of the last fifty years; but we have so many points of contact that whether we like it or not we must now realize, whether the politicians realize it or not, that there is no such thing as isolation in the world of to-day, that from this day on no nation and no group of nations can work out—to use the language of the old orators—its own “eternal salvation” unaffected by the lives of the people of other nations about us. As Mr. Harding said at the anniversary of the battle of Yorktown, the British and the Americans within a very short time have come to realize that together they are the joint trustees of the civilization of the world.

That must be my excuse for speaking to you very briefly on certain tendencies apparent in my country in the administration of justice which in time I think will become your problems also. It was a strangely familiar experience this morning to listen to the debate which took place in this room on the subject of laws passed to aid the farmer, complaints that your legislatures were being clogged with special legislation, and worst of all,—the attitude of the Board of Workmen’s Compensation toward our learned profession; because all of those conditions are present with us, and probably exist in greater degree. In short we have so many points of similarity, that you may be interested in a very brief sketch of some of our troubles.

Take, for example, the attack which Mr. Gompers has recently made, with the support of the American Federation of Labor, upon the Supreme Court of the United States. On this continent, we have elevated the courts to a position of authority which they have never held before even in the British Isles, and I think that future historians will find in this our most distinc-

tive contribution to the science of government. Prior to the enactment of our Federal Constitution, some of the American Colonial and State Courts developed the practice of interpreting the statutes of their respective legislatures in the light of their fundamental charters or constitutions. Where they found the statutes in conflict with the fundamental law they set them aside. This was the origin, although now little recognized, of the doctrine enunciated by John Marshall, the greatest of American Chief Justices, that the courts of the United States not only had the power, but were under obligation, to set aside and declare inoperative acts of the highest legislative authority which in the opinion of the court conflicted with the Federal or State constitutions. Foreign students have not as a rule appreciated the great influence exerted in the American polity—through the lodgment of this power in our courts. That is our distinctive contribution, which I think in some measure has been followed by you, and approved also in the recent change of the Constitution of Australia. That is the judicial power which has been the safeguard of minorities in the American democracy, the protector of the individual and the guarantee that not even the highest legislative power could deprive a man of the rights originally guaranteed by the Bill of Rights. Yet in this day and generation we are confronted with an attack on that judicial power led by the greatest of the American labor leaders, who insists that because the Supreme Court in a few cases has declared unconstitutional laws regulating some phase of labor, the power itself should be abolished. Thus, these men would destroy the very power that protects them. In the American political system, as well as in American jurisprudence, a very high place is naturally held by the Supreme Court. One of the incidental proofs of the stability of this Court as an organ of the government is found in the character of its personnel. For example, the late Chief Justice White, the greatest of our modern Chief Justices, came from Louisiana. He had been a soldier

in the Confederate Army, and in the Civil War fought valiantly against the Union. Beside him on that Bench of about the same age in years, sat Oliver Wendell Holmes, the son of the American author of that name, who served in the army of the Union, fought to crush the Confederacy, and who was literally shot to pieces three times in the conflict. By a curious coincidence—or, if you will, an act of Providence—those two former antagonists sat side by side, of a common mind, interpreting the fundamental law of the land.

Lord Bryce stated in one of his early addresses that political science was nothing more or less than a study of the tendencies of human nature. That is a well-sounding definition, but one a little hard to give expression to. Personally, I view the present status of the lawyer from perhaps a different angle than that presented in the able paper just read. The lawyer stands today as the interpreter of the law, a servant in the administration of justice; but in earlier times he occupied a broader position than that. In earlier times, as recently as 40 or 50 years ago, the lawyer was deferred to in his community as its recognized leader, he was the “knowledgable” person, the guide of public opinion in his particular neighborhood. As some one has said, the lawyers were always the “politically-minded class,” because they were the men who thought steadily and anxiously of the problems of government. They were the far-sighted ones who watchfully surveyed and criticised tendencies—the men who created public opinion, and were leaders in the formation or changes of policy. Due to the rise of the industrial civilization in the United States, the lawyer as such no longer holds that position of unchallenged supremacy in leadership of public opinion. You and I have come into an era where the old categories are being reopened by the curious, where many apparently think that one man’s opinion is as good as another man’s opinion. The all pervasive character of industrial problems and the great financial interests which they concern have given to the views of business men

an adventitious importance, and a corresponding influence, which in the field of public affairs has not always been well conceived or well exercised. Vital as are the intimate problems of capital and labor, there are other factors which even more seriously affect the welfare of the community in general. It is in this wider field, despite lack of popular recognition, that the lawyer still stands as chief interpreter of the common conscience of society—but he has not all of the prestige which he had in earlier days. The lawyer knows more about human relationships, human prejudices and human antipathies than the clergyman or the physician, or anybody else in the world; and the great problem, I think, before the lawyer today is how that position may be restored to him which in my country the progress of events seems to be taking away from him. We have recently organized at Washington an American Law Institute for the purpose of restating the law, and trying to bring order out of chaos in our various court decisions and our myriad statutes; but back of it all lies a different problem, how to restore the legal profession to the position of unchallenged authority and confidence in the community which apparently it still enjoys in your land.

The so-called breakdown in American criminal procedure, which is confessedly to-day the weakest feature of our legal administration, is not due to the fact that the people of the country lack respect for law and order; it is due to the fact, paradoxically enough, that they have overstressed the old English doctrine of fair play and individual right. We have surrounded the criminal in our trials with so many safeguards, with so many artificial rights of guarantee and protection, that one of your speakers said yesterday that the chances were ten to one he would escape. This was of course an exaggerated statement. It brings to mind the old story of the attorney who at the conclusion of the trial, requested the court to charge the jury "that it is far better that ninety-nine guilty men should escape than that one innocent man should be con-

victed." And the court said, "Certainly, I so charge: and I further charge the jury that in this jurisdiction more than ninety-nine guilty men have already escaped." One of your speakers remonstrated, and I entirely agree with him, against the excessive seriousness which in some American courts attends the process of drawing a jury, and his objection was to the effect that in some jurisdictions—there are only a few of them, and New York City is the worst offender—it sometimes takes a week or ten days to get a jury with which to try a man who is charged with homicide, because in those few jurisdictions the practice has grown up of putting jurors on the stand and questioning the jurors at great length before they are accepted or challenged. All this frequently gives a fictitious atmosphere of gravity and doubt to causes in which the actual issues are simple and clear cut. There is an amusing story told of an attempt to get a jury out in Missouri years ago, where an old farmer was drawn on the panel. As a proposed juror he was put in the witness box, and examined at great length. He turned out to be an ideal juror; he did not know the Judge, did not know the lawyers, did not know the accused,—in fact he did not seem to know anything at all. He was finally accepted by the defence, and he being the first juror who had been found who was absolutely impartial, the Judge said with an air of relief, "Clerk, swear the juror." The clerk put the Bible in the juror's hand, and repeated the old formula, "Juror, look upon the defendant; defendant, look upon the juror." As the clerk proceeded to administer the oath the old gentleman fixed his eye on the defendant, looking over his glasses very steadily; when the clerk stopped talking, the prospective juror turned to the Judge and said: "Judge, d——d if he don't look guilty to me." And so another possible juror was lost. But these idiosyncracies in our procedure which rightfully provoke the ridicule of sincere students of jurisprudence, are after all only idiosyncracies. They are not widely prevalent, and curiously enough they have their origin in this idea of

Anglo-Saxon fair play overdone and carried to excess, —from the overstress laid upon the individual right as against the common good of society.

Our problems are very different from those of any other people in the world. Early in the American participation in the war, the Executive Federal Law Officer at New York City pointed out to me that between the Brooklyn Bridge and Fourteenth Street on the east side, there were over 350,000 people who could neither read nor write the English language, and that among them they had several hundred foreign language newspapers. That was putting the problem very graphically. Critics draw deductions from these facts which perhaps are not warranted; but the existence of such a condition in and of itself is obviously a matter of serious concern to students of law administration. During the war, I am frank to say to you, we had less trouble with the foreigners than we did with some of our own people; for prior to the war and during the early part of the war, the doctrine of individualism in America, the alleged right of uncontrolled free speech, ran into serious excesses. Toward the close of the war there was a war hysteria existing, which in some scattered localities made it almost impossible to carry on an impartial discussion. Any radical who undertook to discuss even in a philosophical way the origin of the war stood a very good chance of getting into jail before night. In one great city a man who failed to stand up when President's Wilson's picture was put on the screen—(and he turned out to be a Roosevelt man)—found himself in jail for two or three days, apparently about to be tried for treason. Emphasis on the right of majorities to be supreme over the individual was necessarily much in evidence during the war, and extended after the war. In New York State this after-war emotion brought us to the point where several socialist members were actually expelled from the Legislature in defiance of tradition and precedent, and in defiance, I may say, of the views of President, then Senator, Harding, former Governor Hughes,

and most of the representative lawyers of the State. These actual incidents were distressing enough, but after all, the common sense of men controls government. These very instances of excitement proved symptomatic of only a passing emotion. Today they are regretted and condemned by the general public and have left no definite or permanent result in our jurisprudence.

In another field we have of late been confronting new dangers which will shortly confront you; we have passed into a form of legal administration unknown to the common law, and one which is perilous. I refer to the numerous commissions, and the increased number of administrative officials having quasi-judicial power from which there is no appeal to the courts. The most familiar examples are our public utilities commissions, the local commissions, the State commissions and the Interstate Commerce commissions, all of them exercising what they call quasi-legal powers, all of them without legal procedure or legal rules of evidence and sometimes without much regard to legal substantive right, disposing of large property rights, and from many of whose decisions there is no appeal. The danger that lies at the end of that course, both for us and for you, is the danger of bureaucracy. We cannot be too watchful to prevent the impairment of judicial power, to preserve the integrity of the judiciary. We are viewing also a great extension of the Police Power, but this is not the time or place to present an exposition of the rapid growth of that emergency power of the State. It is enough in passing to point out that in the State of New York, laws have been passed, and upheld on appeal by the United States Supreme Court, declaring that a statute fixing in public emergencies the term of a man's tenancy and the rent which the tenant shall pay was a valid exercise of the Police Power. That decision represents the farthest extension of the Police Power in America, and among our conservatives has caused grave apprehension. These tendencies are all tendencies which pro-



gress, whether the lawyers like them or not. The world moves on. Of course, on first impulse, we view all extensions of the Police Power as fraught with danger. Perhaps, however, we shall have the saving grace to remind ourselves of the old anecdote of the French woman who said to the philosopher, "What do you think is the dangerous age of life"? and he gallantly replied, "Our age, madam, is the dangerous age." Perhaps, after all, this is true of our own time; we are apt to see in these tendencies a more serious menace than they intrinsically present. Nevertheless, the theory of government by commissions is a theory born of Continental jurisprudence, and at variance with the fundamental doctrine of common law under which all English speaking peoples have lived, and desire for short cuts to alleged efficiency in government is too often the real cause of loosely spoken demands for further extensions of the Police Power.

In the enforcement of the Prohibition Law our institutions are meeting their severest test; but as Mr. Harding said the other day, the Prohibition amendment to the Constitution which created that will probably never be repealed. There will be a long period of discontent and dissatisfaction, perhaps five years—perhaps twenty-five years,—or more, but in America we have no instance of any law having been repealed which had behind it a substantial majority of public sentiment. We have not forgotten the fact that during the war we created, around the American army cantonments in the field and in France, liquor and the vice zones in which the American civil law was supreme and was administered by civil lawyers and administered with notable effectiveness. That experience certainly affords some reason for expecting that eventually the same result will come in the enforcement of national Prohibition.

We have not realized it, but we are living at the beginning not the end of an era. Could we but realize it, this is the first period of free and untrammelled criticism in recorded history.

There is no remedy for all these doctrines and tendencies except in the common sense of the individual under proper guidance; but as lawyers there is a practical way in which we can aid the world, as well as our profession. There should be something done in our Law Schools to lay more stress upon the science of government; more emphasis should be laid upon the relation of the lawyer to the community in matters of community life, in the field of government as well as in the field of law. We are prone to lay too much stress on printed records of systems of government. In these later decades, characterized by so much material prosperity, we have been forgetful of the stern conditions—the chastening and disciplinary conditions—which surrounded the origin of our Constitutional Institutions. The younger generation know very little of the long periods of anxious struggle which gave form in our Governmental Institutions to certain fundamental conceptions of social right. In our day there is great necessity, not only among the newer free nations, but among our own people, for emphasizing that liberty means not license but self-imposed restraint, and that free government cannot exist without these. The first frame-work of self-government was not the American Constitution, nor the Parliamentary enactments during the English Commonwealth. The first frame-work was the compact drawn up and signed on the Mayflower, in the Harbor of Provincetown, before the English Pilgrims landed at Plymouth. By this compact they declared that they constituted themselves into a self-governing body-politic and promised due obedience to laws imposed by themselves upon themselves for the common good. As your own Goldwin Smith has said, with this event men passed from the feudal age of privilege and force into a world of just and equal laws,—and Modern Society was placed upon its new foundation. It is our duty to see to it that our Law Schools lay more stress upon these historical origins of Governmental Institutions, as well as upon the origin of our substantive law.

You and I believe in the force of the tradition of the common law. That tradition was not embodied solely in legal decisions or statutes, it was embodied in the attitude of mind and in the conduct of life of the judges and the lawyers who believed in that theory of the common law as an article both of legal and of political faith, of legal right and of political right. In our law schools we must set up anew old standards, must teach the doctrine of civics and government, not as framework of the institutions, but as demonstrating the origin of this idea of individual right, which is the foundation of all the English-speaking peoples' philosophy to-day. This is the message that I leave with you. I believe that there is nothing more important in our two countries than to have public opinion given intelligent leadership by men learned in the history of our institutions, patient and forbearing in discussion of proposed changes, and possessing faith in those doctrines of self-imposed restraint which are to-day the common property of the English-speaking peoples throughout the world.

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