OCCASIONAL PAPERS AND ADDRESSES OF AN AMERICAN LAWYER

BY

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INTRODUCTION

The fugitive papers and addresses contained in this volume are the by-product of a busy professional life. They were prepared during the last decade; and yet the march of events has been so rapid that little more than a historic interest now attaches to the subjects they deal with. Their publication in a book was suggested by the difficulty I have encountered in collecting addresses of my father delivered three-quarters of a century ago. Aside from the desire to put in a permanent form the results of some labor, I have some hope that the publication of the contents of this volume may have some effect upon the younger members of the legal profession in stimulating them not only to greater effort in promoting the effective administration of justice, but also to a more active performance of the duties of citizenship.

The pursuit of an absorbing profession in a metropolitan city leaves little time for the indulgence of tastes in the fields of general culture. The law is such a jealous mistress that she does not suffer gladly even dilettante ramblings in art or science or literature. If a lawyer does disentangle himself from the phylacteries of a system of law and procedure whose practice frequently tends to a narrowness of vision, he quite naturally turns to some phase of public affairs, and, moreover, as I have pointed out in these papers, a sense of public duty ought to press him, more than those engaged in other pursuits, in that direction. But the complexities of modern existence in America

militate against actual office-holding by a lawyer. An interruption of professional activities is generally detrimental. There are so many competent lawyers that there is little difficulty in replacing those who forsake for politics their practice at the bar; and a lawyer who yields to the allurements of public life by accepting office generally finds that the political prestige he gains is of little practical use and that on returning to the law he must make new professional connections. In England the case is quite different and leaders of the bar may continue to practice their profession while they engage in parliamentary activities.

To participate in partisan politics in a great city like New York, and, at the same time, build up and keep together a law practice, is most difficult. It is surprising how few men of real talent have performed the double rôle of lawyer and politician. This always becomes manifest when the state or federal appointing power seeks to fill vacancies on the bench. Lawyers of eminent qualifications for such positions are numerous, but to find those who are politically anything more than ciphers is most difficult. And yet it ought to be possible to maintain a first-rate position at the bar and at the same time acquire an influence in politics of sufficient importance to enable a lawyer to contribute something to the elevation of the tone of our public life. By training, environment and aptitude, lawyers are usually well equipped to engage in political activities, and if circumstances do not permit them to hold office, at least they may and ought to devote a substantial part of their time to the discharge of the duties and responsibilities of citizenship. Conspicuous examples show that this can be done without detriment to professional success. The career of Mr. Elihu Root is a striking illustration. No member of our bar de-

voted himself more assiduously to the practice of his profession until after he became fifty-five years of age, when he entered Mr. McKinley's Cabinet. With the exception of a brief period when he was United States Attorney for the Southern District of New York, he had for many years, without holding office of any kind, kept so closely in touch with political and party affairs as to be a factor whom leaders of party organizations could not afford to ignore.

I am led by this comment on Mr. Root's career to advert to the efforts of lawyers from other parts of the country who have achieved national fame in public life and have presumed upon the reputation thus acquired to enter the ranks of the working bar of New York City. A few have succeeded,—if success consists in making adequate incomes through connections formed on account of their prestige; most, however, have failed, and to their bitter disappointment. That they should attain at the numerous and competent bar of a great city a position commensurate with a repute acquired in other fields, has been generally shown to be impossible, and when the glamour attaching to public office has—as it generally has—become dimmed, the exotic lawyer and the retired statesman either must content himself with an obscurity that irks, or return to the field of his earlier activities.

In an address to the students of the Harvard Law School printed in this volume, I attempted to point out some of the conditions under which the modern practice of the law must be conducted. In thirty-eight years of observation I have seen the most radical changes. In my early days at the bar the leaders were great advocates. Indeed, forensic power and its habitual exercise in the trial of great causes of all kinds, combined with force and elevation of character, were

the qualities esteemed to be necessary for leadership. From its foundation in 1870, the presidency of the Association of the Bar of the City of New York was the blue ribbon of professional life, and for more than thirty years it was awarded to men eminent as advocates. Thus we had a long line of men of the highest distinction such as William M. Evarts, Stephen P. Nash, Francis N. Bangs, James C. Carter, William Allen Butler, Joseph H. Choate, Frederic R. Coudert, Wheeler H. Peckham, Joseph Larocque, John E. Parsons, William G. Choate and Elihu Root. In later years, however, we find the Presidents of the Bar Association distinguished not so much for their forensic talent or their frequent appearance as advocates, as for the esteem in which they were held for qualities of leadership based upon personal character, general legal attainments, and occasional appearances in the trial of the great litigations such as have become in the last generation more frequent in settling the relations between corporate interests and the agencies of government. It may be said with certitude that conspicuous talent in advocacy, prestige on account of reputed ability in obtaining results in court, and vogue among the lay public, have ceased to play such an important part in determining leadership at the bar as they did forty years ago.

It is perhaps due to the tradition surviving from the old order that there commonly prevails among the lay public an idea that a lawyer's experience cultivates an aptitude for public speaking on general topics. But, while generalization where so many exceptions must be made is dangerous, I have observed that the pursuit of advocacy in the courts, particularly under modern conditions, while it leads to compression and lucidity of statement, tends to the impairment rather

than the cultivation of the art of oratory. In jury trials eloquence is frequently an effective weapon, but more and more in this intensely practical age unadorned statements of the facts and unemotional stimulation of the reason have taken the place of rhetorical flights and emotional appeals. The modern lawyer is continually making *points,* and lucid exposition and persuasive logic have more effect than flights of fancy, rhetorical decoration, and even humor and wit. The modern judge has little time to listen to anything except a naked discussion of the facts and the law, and even jurymen do not now tolerate such extended oratorical efforts as those we read of in the early history of the profession.

On an occasion where there is not to be an orderly treatment of some serious subject (I have included in this collection several addresses on such occasions which I fear may seem rather sporadic,—where, I say, speakers may select their own subjects, or confine themselves to none, grace in delivery and expression, lightness of touch, play of the imagination and humor or pathos, will make an appeal, and a modern lawyer does not find himself qualified by habit for an effective performance. And while brilliant speakers there have been among the members of the bar, such men, for instance, as Mr. Evarts, Mr. Choate, Mr. Hedges and Mr. Beck, they have possessed the spark of oratory not because they were lawyers but in spite of that fact.

I have to some extent touched upon the cause of the changes which have thus affected the lawyer. At this point it is sufficient to indicate that it is undoubtedly in large part due to the evolution (I might almost say revolution), which has been in progress during the last generation in certain phases of our national life. The

most important contributions of the legal profession to the recent development of the economic, industrial and political life of the country have been those which have been constructive; that is, those which have aided in putting into practical operation within the law, great conceptions of the modern leaders of finance and industry. However necessary and however inevitable litigations commanding the services of the ablest lawyers may still be, most controversies in court do not directly contribute much to human progress. In the intensely practical transformation this country has experienced in the last generation, litigation has come to be frequently viewed by the public, especially that part of it which is engaged in great business enterprises, as an obstacle to enterprise. It is no doubt due to this fact that leaders of the bar have, much less than formerly, sought employment in active litigation and have confined themselves, where they do appear as advocates, to the great causes which are incident to the enforcement of recent statutory enactments relating to our economic and commercial development, such, for instance, as the Anti-Trust Law.

But it is not alone the practical effect of such conditions as these that has affected the legal profession in particular and the administration of justice in general. The public mind during the last generation has been intensively occupied with efforts to solve pressing problems of sociology. This condition produced one of the most resolute assaults in our history on our judicial system. There was little more of an armament for the attack than an appealing phrase. "Social Justice" which had no more practical value as a basis for an ordered system of law than the elevated sentiments of the ephemeral constitution of the French Revolutionists, threatened to dislodge some of

the keystones in parts of the structure of our judicial system which, from the standpoint of both the peculiar character of our polity and its historical development, were characteristically American. But such a revolt was not new in our history. Indeed, it began early in the history of our government. Essentially it was a modern phase of a tendency in all governments based on universal suffrage to become periodically impatient of restraints imposed by fundamental law. If its avowed purpose to destroy the independence of the judiciary had succeeded, it is not probable that our federal government would long have endured, nor would the system of common law administered in the state and federal courts long have continued to protect the rights of the individual citizen.

The recall of judges and the recall of decisions could never have been made to occupy the public mind, or to become a menace, if it had not been advocated by one of the most extraordinary politicians and statesmen of his day. Neither the Republican nor the Democratic party would have had the hardihood to adopt as a basis for a political contest such a radical political doctrine. Jefferson's attacks were chiefly directed at the power of the federal judiciary. It is doubtful whether even he would have taken the political risk of a campaign upon a platform seeking to destroy the judiciary department as an independent organ of both the state and the federal government, by subjecting judicial decisions to the test of a referendum.

Whenever attacks upon the courts have been made in this country, they have resulted from a sort of straining against the constitutional fetters whose purpose has been to prevent inter-departmental usurpa-

tions or to limit the sovereignty of the states; or they have been a mere inarticulate manifestation, common, as I have said, in democracies, of impatience at restrictions imposed upon the political action of the people.

Those who seek to affect the independent character of the judiciary branch of the government have not generally realized that their attack is upon the feature of our federated system which contributes more than any other to its stability, and without which it probably would not have survived the first century of its existence. In the case of Mr. Roosevelt, if the problem had been merely a juridical one, involving general principles of jurisprudence, it would not have been surprising if he had failed fully to grasp its importance, for his education as a lawyer was not much more than superficial, and his experience and temperament led him to view public questions from a viewpoint quite different from that of a trained lawyer. But the weakening of the judiciary department as an independent organ of government would affect the system of checks and balances by which the framers of the Constitution sought to establish an equilibrium among the three departments of the Federal Government, and between the enumerated powers of the central government on the one hand and the reserved powers of the several states on the other; and a correct forecast of its probable effect upon our institutions required examination of and reflection upon the history of the proceedings of the Constitutional Convention of 1787, the state conventions which ratified the Constitution, the writings of Hamilton, Madison and Jay, and the opinions of Marshall. Both because of Mr. Roosevelt's position as an American historian and a man of letters, and because he had been for years a

practical statesman observing the workings of the federal system, one would have expected that he would give decisive weight to historical considerations and would realize the vital importance of maintaining the delicate inter-departmental balance in the federal system, and of preventing the co-existing but reciprocally exclusive sovereignties of the central government and the states from getting into a condition of unstable equilibrium.

But while Mr. Roosevelt was a man of the highest impulses, he did not always, and especially when he was moved by a sense of some immediate injustice, take account of consequences or permit the intrusion of cooling reflection based upon the teachings of experience; and, as I have intimated, at no time in his career did he have much sympathy with anything that was legalistic. He continued to the end of his life to view slightingly what he characterized as "law honesty."

I remember when Mr. Roosevelt and I were studying law at the Columbia Law School in 1881, Professor Theodore W. Dwight on one occasion announced with didactic emphasis, some familiar and long-established proposition of law. A tow-headed young man arose in the back of a crowded class-room and with a trace of pugnacity said, "Professor Dwight, is that the law?" "It is, sir," came back with the verbal rapid fire of the famous Professor, so familiar to his students; to which Mr. Roosevelt had the last word in an impulsive staccato "Well, it ought not to be." When, more than a quarter of a century later the idea of social justice became a favorite topic of a school of economists, a similar impulse seized upon Mr. Roosevelt's imagination, and with characteristic impetuosity he sought to better the condition of the people

by an emasculation of the judiciary system, without giving due weight to the broader question of its effect upon the entire governmental structure. Furthermore, its advocacy had certain alluring political advantages.

But these facts do not completely account for the advocacy by Mr. Roosevelt of the recall. Strange as it may seem, he sympathized with the fear, somewhere expressed by Mr. Jefferson, that the system of government established by our Constitution would, like an unwound clock, run down. Both of these statesmen thought that the checks by which the powers of the three departments of government were to be sustained in even balance might result in the paralysis of all effective governmental power. While Mr. Roosevelt generally had little sympathy with Mr. Jefferson in his political philosophy, he did believe that the power of the executive ought to be co-extensive with any emergency calling for its exercise. In other words, while he would perhaps not have formulated the dogma quite so plainly, he nevertheless in practice was strongly inclined to act upon the theory that the powers of the executive and the administrative branches of government, were to be exercised at the discretion of the executive to any extent necessary for emergent purposes, except so far as they were expressly limited by constitutional or statutory provision. He believed that by implication the executive was vested with plenary power to conduct all governmental operations, except so far as such power was limited by express grant to the legislative branch.

Now, a statesman entertaining such views as to the character of our governmental structure could hardly be expected to be deeply impressed with the necessity of maintaining the balance among the three depart-

ments of government. Temperamentally, if not by conviction, Mr. Roosevelt believed (and there is a large measure of truth in this view), that the legislative department, consisting of two houses, frequently of opposite political parties, and also with equal frequency failing to coöperate with the executive, was not an efficient organ of government. His vigor and extraordinary determination to accomplish results which he believed would be for the good of the people, led him, therefore, to the belief that only by the expansion of the administrative power could the government perform its proper function; and it is not altogether surprising that he should have failed, under the influence of the desire to improve the condition of the less fortunate in life, to yield to the temptation of advocating a diminution of the powers of the judiciary department, even though it had only a sort of veto power and could perform no affirmative function of government. In the last years of his life reflection and the recession of the progressive wave, seem to have led him to abandon the views which he had so vigorously pressed; at least he ceased to make them a guide for his political conduct.

I did not intend to be led into an estimate of Mr. Roosevelt's character and public career. But disapproval of his course on the recall ought not to permit us to forget the services of permanent value which he rendered to his country. I would not attempt to sum these all up; the task would be too long for this introduction. I will content myself by adverting to two things which he contributed to our national life and which were of inestimable value.

The first of these was the interest in public affairs which he was, through his boundless enthusiasm, able to arouse among multitudes of his countrymen, who

through lethargy or indifference, had failed to pay the price which the successful maintenance of a democratic form of government inexorably demands; that is, some affirmative effort and some sacrifice of personal interest and comfort, for the benefit of the general welfare.

Of the second great accomplishment of Mr. Roosevelt there is evidence in concrete results. I refer to what he did, not only in compelling great business combinations to obey the law, but in the far more subtle and difficult task of elevating the ethical standards which great business organizations, particularly those in corporate form, have adopted as a guide in the conduct of their affairs. Mr. Roosevelt's distinction and his greatest value to his country lay in his ability as a crusader against dishonest, selfish and unpatriotic methods of doing business, which threatened at one time by their excesses to convert the body politic into what would have been measurably near a plutocracy. Largely through his leadership, the danger of such a result was permanently removed and principles of justice and honesty and moderation in business methods were firmly indoctrinated. I have recently been reading some of the correspondence of von Bernstorff with the German Foreign Office before we entered the war. The German Ambassador had had ample opportunities for many years to observe the movement of public affairs in this country. We might be prepared to have the ruling caste in Germany, while enjoying the profits of their cartels and other forms of monopolies, loftily prate about the indifference of the American people to anything but money-making, but it is amazing that the German Ambassador, witnessing in this country, as he did, the most extraordinary revolution of modern times in business methods and morals, brought about largely

through the leadership of Mr. Roosevelt, and unquestionably supported by the vast majority of the American people, should with seeming honesty, entertain the view that the Americans cared for nothing but money-getting.

Some of the subjects dealt with in this volume have aroused more or less bitter controversy. If any value attaches to my treatment of them it is because I wrote before discussion had progressed far, and in a more or less impartial way attempted to inform the public concerning subjects which at the time I had, perhaps, studied more than most people. This is particularly so of the papers relating to the League of Nations, the Treaty in the Senate, the Railroads and Bolshevism. The paper on State Control of Navigable Waters was prepared as a result of a litigation relating to a subject of vast importance to the people of the United States, concerning which, however, the public at large is very inadequately informed. This chapter will naturally have an interest largely for professional students of the subject. At some time, however, the people of the country will perceive that the improvement of its waterways and waterpowers has a most vital connection with their personal comfort and their business interests, and they will insist that the relation between public control or supervision and business enterprise seeking to improve the natural resources of the country, shall be adjusted in some workable fashion.

I cannot flatter myself that my views as to the solution of the Railroad problem confronting this country after the war have had much influence. But that may with equal truth be said of the numerous plans proposed to Congress as a basis of legislation, since the views of no single individual or group of individuals,

have alone contributed much to the solution of the difficult and complicated economic and political question which was involved.

There are a number of reforms of our law which ought to be made if its administration is to be kept abreast of the needs of modern civilization. Largely through inertia we permit a system acknowledged to be defective in many respects to remain unreformed. Reiteration of this fact is necessary if an impression upon the public mind is to be made. It is amazing, for instance, that the public who witness in our courts the application every day of some of our artificial, if not ridiculous rules of evidence, do not rise *en masse* and insist that they be changed. And yet they remain indifferent. We are sadly in need of a modern Jeremy Bentham, who, even if he make use of exaggeration and ridicule, would arouse the public to a realization of some of the practices now prevailing, by which the pursuit of truth is embarrassed. This and other reforms are suggested in my annual address to the New York State Bar Association, which was designed to arouse the American lawyer to a realization of the responsibility resting upon him on account of the public function which members of the bar must perform if they would be good American citizens. At the annual dinner of the Association I discussed freedom of speech in this country and the danger confronting us that minorities, and not majorities, should rule.

The paper on Aspects of Bolshevism and Americanism was the result of a summer's study of such original material as could be obtained from all sources concerning the Russian situation, much of which consisted of inflammatory books and literature purchased at the Rand School. Only from such sources did it seem to be possible to become possessed of the Russian situa-

tion from the standpoint of the Marxian Communists, who now go under the name of Bolshevists.

The paper on the Tobacco Trust decisions resulted from the trial and finally the argument in the Supreme Court of certain questions under the Fourth and Fifth Amendments of the Federal Constitution concerning unlawful searches and the right of an individual to be free from being compelled to incriminate himself. The rule laid down by the Supreme Court in the *Hale* and *McAlister* cases as a result of this litigation, enabled the government to obtain evidence upon which most of the prosecutions under the Anti-Trust Law were ultimately commenced and carried to completion.

I have not thought that any publication that I might make would be complete without some adequate reference to the activities of the bar of this country in contributing to the enforcement of the Selective Service Law during the war. Credit has been accorded to the lawyers of the country in formal communications from government officials. But I do not believe that the members of the legal profession of the entire country have received their due meed of praise for the extent and value of the service they performed in the creation of our army of four millions of men, without unnecessary impairment of the industrial efficiency of the country, or undue disturbance of social and family life. That task was of infinite difficulty. No other nation of the world was ever confronted with such a complicated undertaking. The credit due to General Crowder and the office of the Provost Marshal General for the genius which was displayed in conceiving the plan of the Selective Service Law has never been sufficiently accentuated. The manner in which the law was executed was no less remarkable. And it is equally certain that unless the services of the entire American

bar had been placed at the disposition of the Government in advising registrants concerning their rights and obligations, and in aiding them in the preparation of the complicated questionnaires, through which the system was put into effect, confusion would have ruled from the outset. Both the President and the Provost Marshal General early perceived that an opportunity was afforded to the legal profession as a class to render a highly patriotic service, and they immediately appealed to them to put themselves at the disposition of the governmental officers. This was done promptly and effectively; and it is no more than due to the profession at large that publicity should be again given to the fact.

The chapter on the League of Nations, as well as the contributions to "The Covenanter" printed as a part of this volume, were the result of an early study of the Covenant of the League before the discussion became affected by the extraordinary bitterness with which both advocates and opponents of the League ultimately attempted to buttress their contentions. Vigor of assertion came to assume more importance to some speakers than the soundness of their reasons. Arguments of the most tenuous character were put forth with ill-timed vigor and gross exaggeration. Debaters did not consider whether their objections would ever have any practical importance. The controversy had many points of similarity to the discussion which raged in the state conventions which considered our Federal Constitution in 1788 and 1789.

Objections to our Constitution, asserted by its diehard opponents to be of the most vital importance, were based upon forebodings as to perils then thought to be certain to ensue; but most of them have never since had any importance except to illustrate how the