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FORENSIC AND LEGISLATIVE DEBATE IN AMERICA, AS COMPARED WITH ENGLAND AND FRANCE. COMPARISON OF THE PRESENT AND THE PAST IN OUR OWN COUNTRY.

THERE is a pretty general opinion prevailing among the most thoughtful and observing in this country, that, for some reason, forensic eloquence and the power of public debate is not, and has not been for the last thirty years, much on the advance; and there are not a few among us who declare that it is on the positive decline, from year to year, and almost from day to day. There is no doubt some allowance to be made for this opinion among those considerably advanced in life, on the score of the effect of novelty and familiarity, in the estimate of everything. The familiar maxim, that no one is a hero to his *valet de chambre*, has a wide application. It is upon this principle that, to an old man, almost everything is upon the decline. We have a keener relish for everything in the outset of life, and we more readily give in our adhesion to the theories and opinions of others than after our own opinions and theories are more fully established, and thus we naturally pass a higher estimate upon all we meet in early life than afterwards.

But there is something more than this required to account for the contrast we everywhere notice, in Congress, and at the bar, and in state legislative assemblies, between the manner and effect

of public speaking twenty and thirty years ago, and at the present day. It is more difficult to assign any adequate reason for the wonderful falling off in the effect of public speaking since that time, than it is to establish the fact of the decline, or, at least, the change. But that there has in some way a change come over us in this respect there can be no question. There is not, perhaps, quite so much difference in the quality and character of the published speeches then and now, as in the effect produced by their delivery; but there is a difference in both. There are a good many learned and logical, and some eloquent, speeches now delivered, at long intervals it may be, both at the bar, and in legislative halls, and during the political campaigns from year to year. But we hear of no such overwhelming effects produced by these speeches now as formerly. There has been no such debate in Congress, in the last ten or twenty years, as there were many at an earlier day. The debate on the Jay Treaty, the reply of Webster to Hayne, the debates on the Removal of the Deposits, and many others, were of a character never equalled in modern times. But how to account for the contrast is certainly a very embarrassing problem.

We were never exactly of the number of those who believed the race of public speakers, or any other class of gifted men, was positively deteriorating, and would speedily become extinct. There may be exceptional cases, of men of very rare gifts, in forensic eloquence and public debate, which do not recur in short periods. It is scarcely to be expected that we should have another man, very soon, exactly filling the place of Daniel Webster. He was a man, not only of the rarest and most eminent gifts as a forensic and public speaker, but one almost *sui generis*. No observing and thoughtful man could possibly look at him, in his full strength and prime of life, about the halls of the Senate and House of Representatives, or the bar of the Supreme Court, and not yield an involuntary assent to the general testimony, that he was a wonderful man. And then it was equally apparent to the most careless looker-on at Washington, from 1830 to 1835, and onward for ten years, that Webster really had no rival there, in the effective power of eloquence. The palm of eloquence, both at the bar and in the Senate, was as universally conceded to him, as that of military genius was to Napoleon, or Wellington, or Washington, in their time. No man then thought of calling it in

question. He was the *facile princeps* of all assemblies where he appeared.

• And the great superiority of Mr. Webster is not in any sense to be accounted for, upon the ground that he was surrounded by a class of inferior men. Nothing could be further from the truth. His associates and his opponents equally, were all men of the highest order of talent, and many of them possessing most uncommon power of wit and eloquence. There were not only Clay and Calhoun, confessedly men of the most surpassing powers of persuasive eloquence in debate, but there were scores of lesser lights, such as John Tyler, John Forsyth, Felix Grundy, T. H. Benton, Silas Wright, Theodore Frelinghuysen, Samuel L. Southard, and many others in the Senate; and John Quincy Adams, Edward Everett, George Macduffie, Tristram Burgess, James K. Polk, Henry A. Wise, John Randolph for a time, and numerous others, in the House of Representatives, any one of whom might be regarded, in the power of public debate, quite an over-match for any one who could now be selected, either from the Senate or the House of Representatives. And still it is by no means certain that the present generation of public men in our national legislature is not possessed of equal general ability with those who occupied their places in the last generation. But it is certain that, for some cause, the quality of public debate has surprisingly declined, till it has become very tame and inefficient.

There is doubtless something due to the consideration that we are now dealing with much larger pecuniary interests than in that early day, and that for some reason, not very easily defined, these large pecuniary interests are vastly corrupting and sordid, and debasing in the influences which they produce; by which they act and are acted upon. Thirty years ago, it would have been regarded as a contempt upon our National Legislature, punishable by fine and imprisonment, for any one to have hinted that pecuniary considerations of any character could have had, either directly or indirectly, the remotest influence in carrying any measure through Congress—and the same was then true in regard to our state legislatures; and the same is still true of the British House of Commons. But now the case is certainly very essentially changed in this country. We not only have these damaging insinuations uttered in regard to the most effective measures of currency and commerce, of the tariff and internal revenue, but it

seems to be regarded as no discredit to any one that it should be generally conceded that no general and public measure of great pecuniary consequence, and especially no private enterprise of any character, can be there trusted to its fate on the high ground of merit and innate desert, without being absolutely certain to find an early grave and few mourners. It has come to be so well and so universally understood everywhere, both in state legislatures and in Congress, that no railway bill, no land grant, or public guaranty for a loan of credit to any public enterprise, can be obtained without the expenditure of fabulous sums of money, in direct pecuniary bribes, for the influence of members of the legislature, that any one who should attempt any such thing in the old-fashioned, honest, direct, natural, and straightforward mode, would be regarded as conducting with about the same degree of absurd simplicity as if he should ask the professional assistance of the bar as a gratuity! The thing is never attempted and never thought of by any one who comprehends the agencies by which all such public patronage is secured, and the obstacles which must be bought up, as it is called, before any progress can be made.

It will be obvious, then, at a glance, that the scope for the influence of public debate must be very essentially narrowed by such agencies. The man who feels that his supporters are all paid for their services, in advance, will scarcely prepare himself with the same watchful care to present the arguments in its behalf, which are only expected to influence the outside world, as if he expected his cause were to be determined upon the weight of argument, in the first instance, and that the issue of his undertaking depended mainly upon the form and manner in which it was presented to the body having the power to pass upon it. We hardly know whether it is this cause mainly, or others combining, which has led to one great and distinctive contrast, more marked than all others, between the debates in legislative assemblies in this country and in England. There is doubtless another consideration whose tendency is in the same direction, but that is the same in England as here. We refer to the practice of making all leading measures, especially those of a public character, entirely partisan, and requiring every member of the party to follow their leaders at the peril of absolute ostracism. This, of itself, converts the debates from an address to the members of the House, into an appeal to the public at large. This would naturally lead

towards the same distinction we everywhere observe between the character of the debates in Congress thirty years ago and the present time, and which does not seem to have obtained much foothold in England.

But we refer especially, as a contrast with the British Parliament, to the almost universal practice in the American Congress of reading, *verbatim et literatim*, written and sometimes printed speeches. The practice of reading written essays of interminable length and invincible stupidity has come to such a pass in Congress, that for some years it has been customary to hold evening sessions, exclusively devoted to reading speeches. Nobody attends these sessions except the readers and their hired attendants! mere essays, so to speak, as void of the spirit and fire of eloquence, as a philosophical thesis. No such thing as a written speech would be, for a moment, tolerated in the British House of Commons, nor indeed in the House of Lords. A debate in either of those assemblies is still a veritable debate. The House of Commons not only would not allow any member to read a written speech, but they will not allow any member, after his maiden speech certainly, to deviate in the slightest degree from the very point of the question before the House. This latter requirement would make short work with most of the elaborate essays which are painfully read, but never listened to, in Congress. Nine-tenths of them have not the slightest bearing upon the particular question before the House. And this practice is not peculiar to discussions, when the House are in committee. It is the same in all debates. Every prepared and studied speech is written out and read. There can be no reasonable objection to any amount of study and previous preparation, when one is called to discuss important questions of great public moment before legislative assemblies or the judicial tribunals of the country. We should regard it as a great misfortune to have, on such occasions, any but the most thoroughly studied arguments or speeches. And there are many occasions of a literary or scientific character, as on the inauguration of a school, or the institution of a professor, and numerous others where general usage demands, or expects, a formally written address, and where nothing else would be acceptable or appropriate.

But that all our public questions should be discussed by essays prepared under the weary watchings of the midnight lamp,

is certainly not calculated to improve the quality, so much as the amount of our public speaking. It may be true, that a large proportion of our members of both houses of Congress come into office, without any such previous training as will enable them to discuss public questions without writing. But that was always so, and probably always will be. And nothing is lost, by allowing such members to listen and vote in silence. There would, no doubt, be fewer persons to discuss these public questions. But they would be none the less ably discussed or less thoroughly understood on that account. And the most inexperienced debater, if he remain long enough in Congress, will very soon be able to make himself understood without writing, if he really have anything worth communicating. And if it is done in ever so bungling and stammering a way, it will be the more listened to, if it be really valuable and worth hearing. A written speech necessarily becomes prolix and vapid. There is nothing which will compel a public speaker to condense, and to come directly to the point, like the consciousness that he depends upon his present effort of mind to put the matter in shape, and upon the interest of those whom he addresses for an auditory! If he fail to create an immediate and constant interest, he falls never to rise again.

In the British Parliament you will hear somewhat distinguished public debaters pushed to the last extremity often to find words to give utterance to their feelings and opinions, and this will sometimes extend over a considerable period of time, ten or twenty and even thirty minutes. There are not, at the present time, above half a dozen fluent speakers in the House of Commons—scarcely one so fluent as were some American debaters of the last generation. Mr. GLADSTONE is almost the only one we had the pleasure of listening to who seemed entirely self-possessed and at the same time entirely fluent, never hesitating for a word or an utterance. Mr. JOHN BRIGHT is entirely self-possessed and sufficiently fluent, but he labors, at times certainly, under great difficulty of utterance. He is said to be afflicted latterly by a most embarrassing bronchial irritation or infirmity of some kind. But Mr. Bright is always interesting, both in his manner and his matter. He is apparently more entirely earnest and sincere than almost any public man you will meet, either in England or America. You are never at a loss to understand where his opinions range, and when he rises to speak he commands uni-

versal attention, both from liberals and conservatives. He has no crotchets and no trammels. His views are peculiar, and in some respects extremely radical. He has no veneration for traditions of any kind, either in church or state. He sincerely believes that cold logic and the iceberg of reason, unilluminated and unwarmed by any ray of life or heat, are entirely adequate to solve all the perplexing problems of civil and ecclesiastical polity. And every word he utters is replete with good sense and good feeling, and commands the deepest, most earnest attention of all who come within the range of his voice. But just think of John Bright sitting down to compose a speech for the House of Commons, and then standing up for two hours to deliver it! He could not read five minutes before he would be coughed down, and if he could be patiently listened to by men laboring under the same infirmity of having to read their speeches, he could not possibly command any influence in the House, since all the power of a controlling mind in debate arises from turning the exigencies of the passing moment to account.

When the first great debate in the House of Commons on the Reform Bill was opened, in the early spring of 1867, we heard DISRAELI, GLADSTONE, BRIGHT, ROBERT LOWE, LAING, WALPOLE, and some ten or twenty others discuss the subject more or less in detail, and all within the space of three or four hours. If those men had attempted to do the same thing on paper, it must have required three or four days or even weeks instead of as many hours; and instead of the auditory remaining quiet and attentive listeners throughout the debate, nobody could be found stolid enough to sit through such a hearing. There are two leading speakers in the House of Commons, DISRAELI and LOWE, whose speeches have much the appearance of having been, to some extent, and in considerable portions, pre-composed and learned by rote. And in regard to Mr. Lowe especially, there could be no question such is the fact to a considerable extent. But Mr. Lowe is not an effective speaker, merely as such. His great forte consists in the elaborate character and thoroughness of his exposition of all subjects he undertakes to discuss. Mr. Disraeli is a wonderful man in almost every point of view in which he is considered. He is a man of great sensibility to the opinions and feelings of others, and who reflects them with great accuracy; of great research and study, both of men and things;

of most amazing memory and power of illustration; and above all, he seems, in a very studied and artificial manner, to adapt his discourse to the demands of the occasion with most amazing wisdom and tact. So that, without being an eloquent man or a ready debater, he is really one of the most persuasive speakers of the age.

It is perhaps due to the occasion to say that Mr. Gladstone is, at the present time, the most observed, the best abused, and the most able and skilled debater in the House of Commons. And he pushes straight on towards his point and main purpose with such directness of aim, and such energy, that one almost forgets the freedom and elegance of his manner, and the power of his eloquence, in watching the polished smoothness and beauty of his logical sequences. There are no jars, no breaks, and no pauses in his onward rush. And if he is not always in the right, he is sure to be most exquisitely captivating in all that he says; and there is such power and force in his logical deductions, that one is scarcely safe in listening to him, unless we adopt the theory of his absolute infallibility, which it is not quite safe to affirm of any one in these degenerate days, or unless one come to cavil, and then he is in great danger, of conversion.

If our readers will pardon the digression we would be glad to bear testimony here, to our own great admiration of Mr. Gladstone's genius, eloquence, and purity of purpose. It is certain that his history has developed the most surprising, and sometimes the most sudden and inexplicable, changes of opinion. This, in the case of a public man, and especially a great political leader, naturally leads to severe and often unjust criticisms. The theory of parties in free governments is that their dogmas are infallible, and consequently can never change. If, therefore, we find a man so far reversing all his early opinions, and especially upon religious subjects, as to find himself, as Mr. Gladstone has, passing from the association with the extreme high church into the cordial embrace of the extreme low church, and even the no church party in the realm, the conclusion is not unnatural that he must have acted largely upon the principle of expediency. But when it is considered that the times have changed far more than the man, and that the same opinions or the same remedies, which are now indispensable to maintain the quiet and good order of the kingdom, would have produced a convulsion thirty years ago, from

one border of the land to the other, we need not feel surprise at the apparently new attitude in regard to the church in which Mr. Gladstone finds himself. If there is any fatal fallacy in Mr. Gladstone's character, and one which has led him more astray than all others, it is the dogged determination to follow out all his theories and speculations to their logical consequences, wheresoever that may lead him. That is indeed a beautiful theory of character, and one that savors largely of nerve and consistency, and honest purpose; but there is no plan or purpose of life more fallacious. Every man is bound to test the correctness of his theories by their practical working, and to know and admit, that when this latter test fails, there must be some innate, although invisible, defect in his logic. If Mr. Gladstone has failed at all it has been in this respect, in following too implicitly the logical consequences of his speculative theories.

We are not sufficiently familiar with the debates in the *Corps Legislatif* in France to be able to speak with much confidence of the mode of preparation. We believe it is more elaborate than in the British House of Commons. But we did not learn that anything at all approaching the slipshod and slovenly mode practised in our Congress ever obtained there. If speeches are sometimes precomposed for debates there, the offence of reading them is never attempted. There is far more action in French public speaking, both at the bar and in the *Corps Legislatif*, than in England or here, and public speaking becomes effective there as much on account of the manner as the matter.

In preparing cases for argument, in the French courts of justice, the practice is far more like the American, than in the English courts. And from considerable opportunity to watch the progress of trials both in the French and English courts, we have felt compelled to give in our adhesion to the latter. The trial of civil causes in the French courts conforms very nearly to that of the Roman civil law, and is somewhat analogous to that which is pointed out in the New York code of civil pleading and practice, and which has been largely adopted in a considerable number of the other states, with more or less modification. It consists of a general declaration, bill or plaint, setting forth briefly the cause of action. Then comes the answer, which consists mainly of denial, but sometimes introduces new matter of defence, as tender, payment, set-off, the Statute of Limitations or lapse of time, arbi-

tration and award, former recovery, &c., &c. The testimony is then taken, presumptively, before the court, but in practice, before a prothonotary or commissioner, and often, as in our chancery proceedings, is very voluminous and somewhat difficult to digest, in such a manner as to be readily understood.

The practice is in the French courts for the counsel to prepare and print, if they choose, which is commonly the case, what is there called a *Mémoire*, a memorial, or brief, rehearsing the important testimony on either side, with the arguments and legal precedents to which it is desired to refer the court. This sometimes extends to fifty or a hundred or more large quarto pages, and is thus, in itself, a laborious study. And after all it is not the case, but only a partial and one-sided statement of it. There is no doubt room for the exercise of great skill and ingenuity in getting up such a brief. And in many cases it may become of very essential aid to the court where it desires to obtain a thorough understanding of the cause. But even in that case, the only reliable course is for the court to examine the original papers and carefully read them. In any other course the judge is not only exposed, but almost sure, to be misled by the partial or imperfect statements on either side. The result generally is, that the court never attempt thoroughly to master the cause. The reading of the testimony is often wholly omitted, and the court depend upon the statements of the counsel, and even that is often omitted to be read at length, the counsel contenting himself by referring the court to the statements upon his brief. And every one who has had much experience in these matters knows how very irksome it is to the court, after an argument is closed, and the papers bundled up and laid aside, to recur to it again. There is then a direct temptation, in the mind of the court, to study to have the cause turn upon some issue, not of the essential merits of the cause, but which may be raised upon the concessions of counsel, or upon the admitted and well-known facts in the case, without the necessity of examining the testimony in detail. We have known complicated and voluminous cases in the American courts to share this fate, and we have been credibly informed, from the most reliable sources, that the same thing often does occur in the French courts.

Indeed it is fair to say we have known it to occur there. During an important trial in the Court of First Instance of the

city of Paris, a court of the most extended civil jurisdiction, although not final, there being an appeal to two higher tribunals in succession, the Imperial Court, and the High Court of Cassation, which is the final arbiter in all matters, whether civil or criminal, we noticed the judges sitting in quiet indifference, hour after hour, while the counsel on either side read most elaborate and inconclusive essays both upon the law and the fact. And it was evident to the slightest observation that the court were really obtaining or tending towards, no definite opinion of the merits of the cause. The argument was indeed closed by a very pertinent, and, as usual with that distinguished advocate, M. Berryer (it was one of his last great efforts at the bar), a most eloquent appeal on behalf of the plaintiff, which the court felt predisposed to reject on the ground of its political bearing. For the administration of justice in France is essentially political, by which we mean that it is virtually, and indeed formally, a department of the imperial cabinet, the Minister of Justice being constantly present by himself or deputy in the trial of all civil actions. And the cause just referred to being an action on behalf of the United States Government against a citizen of France, somewhat prominent in civil position, and a member of the *Corps Legislatif*, for the recovery of property of a public character, deposited in his hands by the late so-called Confederate States for purposes hostile to us during the late rebellion, naturally called into exercise the feelings engendered in France during the civil war in America; and as naturally roused the eloquent M. Berryer to a most graphic exposition of his cause, and the injustice attempted to be inflicted upon the United States by fitting out ships of war in France to prey upon our commerce.

The effect of this eloquent exposé of the wrongs attempted upon the old established national government, by the defendants in the action, in building privateers or piratical craft, to burn and destroy our mercantile marine, although a very natural thing for M. Berryer to do, and a very pleasant thing for a patriotic American to listen to, did not prove equally advantageous, in procuring the favorable ear of the court on our behalf. For, the moment M. Berryer had closed his pungent and rather damaging harangue, so far as the defendants' general conduct was concerned, the Minister of Justice gave notice to the court, that at their next session he should feel it his duty to submit some considerations bearing upon

the decision of the cause, which proved to be of a very destructive character, in regard to the interests of the United States, and the court naturally followed the lead of the Minister of Justice.

But we have occupied so much space that we shall feel compelled to be more brief in regard to the English mode of preparation and argument of causes, than we had purposed at the beginning of this article. There is one thing, especially, surprising to all American lawyers, that while with us the judges invite, and by their rules require, written or printed briefs of the points of the argument, no such thing is expected, or even tolerated, in any of the English courts. The counsel may make any extent of written or printed memorandum of his argument or authorities, which he finds convenient or desirable for his own use, but on no account will he venture to offer the same to the judge, and the judge never invites the surrender of any such brief. And in practice no such briefs are made as among us. There seems to be a very decided opinion, both at the bar and among the judges there, that such a thing would be in bad taste, if not positively offensive. The English judges have paper-books in which they enter memoranda of points, &c., during the argument. There is, in some of the States, a practice among the bar of handing the judges their briefs, throughout the docket, at the opening of the term, which always had to us rather the appearance of an effort to secure the ear of the court at the earliest moment. But as the opportunity is equally open to all sides, there does not appear to be any impropriety in that practice even. We question whether it gives much advantage any way. But it contrasts strikingly with the English practice.

But we desire to contrast the English practice with our own in another particular. It seems to be supposed with us, that unless the case is one that may fairly be regarded as frivolous, the court will hold it under advisement, and deliver a formal and prepared judgment. But in the English courts the rule is precisely opposite. It is understood there, that if the case can be decided at the hearing, with the concurrence of all the judges, it will be. More than three-fourths of the causes in the Superior Courts, and many in the courts of appeal, are so decided there. Under such a practice, extended briefs and memoranda of authorities are of very small account to any one. It is our practice of reserving judgment, and revising our first impressions,

which has led to the practice of requiring briefs. But in fact, where the court have any very great amount of labor to perform, we fear, these revisions are rather apparent than real. We have known some very able American judges, who always insisted that the impressions which they obtained of a cause during the argument were the very best they could ever reach. And we have known others who seemed to require long time for reflection upon a difficult cause, who spent days, and perhaps weeks, in turning the matter over in the mind, without ever recurring to the briefs, or reading the authorities, and the counsel would find their rows of books, carried into the court-room, just as they left them unless the judge happened to be thoughtful enough to disarrange them, to keep up the appearance of having read them!

In a hearing many years since before a committee of the House of Commons, where this subject came under discussion, Lord ST. LEONARDS declared that in his whole judicial life he had made it the rule to deliver judgment immediately upon the conclusion of the argument. There can be no question that in this mode the arguments become more compact, and very much more to the point, and that the mental discipline both to court and bar is far more effective. It is impossible for one to sit through the hearing of an important law question in any of the Superior Courts in Westminster Hall, or the Courts of Chancery in Lincoln's Inn, and not feel that every one concerned in the hearing, court as well as counsel, have made it a personal effort to contribute all in his power to bring the case to the point of determination as speedily and as fairly as it could be done. They have appliances in the courts of Westminster Hall for this very purpose. The court rooms are extensively lined with such law books as are in most constant request, among which are all the most approved digests and elementary treatises as well as reports. And at every new turn in the argument, the judges are constantly sending their messengers for one book and another, and in this way they are enabled to correct, as far as practicable, as they go along, the over-statements and false impressions of the counsel. And it is not uncommon to have four or five counsel employed in the argument of important causes on either side, each contributing his portion as the argument proceeds, and each, in order of seniority, beginning with the highest, making a formal argument to the court.

It cannot be denied that this course of practice is more