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EXECUTIVE JUSTICE.

"There is no liberty," says Montesquieu, "if the power of judging is not separated from the legislative power and from the executive power. If it were joined to the legislative power, the power over the life and the liberty of citizens would be arbitrary; for the judge would be legislator. If it were joined to the executive power, the judge might have the force of an oppressor."[1] Hitherto the development of our legal system has conformed steadily to this notion. In the sixteenth and seventeenth centuries it was settled that the crown ruled under "God and the law" and that causes which concern the life or inheritance or goods or fortunes of the subject were not to be decided by the natural reason of the executive "but by the artificial reason and judgment of law."[2] Legislative justice lingered longer in legislative divorces, acts of attainder and of pains and penalties, and private acts of parliament or of legislatures, creating special rules for particular cases or individuals, or affording special relief. But the nineteenth century saw the end of almost all of such legislation. Legislation divorces were known in New York after the Revolution,[3] and in

[1] Esprit des Lois. liv. XI, c. VI. "Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from the union with either of the other departments." Federalist, No. 78.
[2] Conference between the King and the Judges, 12 Rep. 63.
[3] 2 Kent, Commentaries, 97.

Pennsylvania,[4] Maryland,[5] and Connecticut[6] in the nineteenth century. And so late as 1887 the dissolution of a particular marriage was held a rightful subject of legislation by a territory of the United States.[7] Such divorces, however, came to an end in England in 1856 and are now precluded by constitutional provisions in the several United States. Acts of attainder and bills of pains and penalties were not uncommon in America during and after the Revolution.[8] But the federal constitution put an end to them in America, and English writers of the eighteenth century regarded them as vicious in principle and substantially obsolete.[9] The abortive bill of pains and penalties brought against Queen Caroline is probably the last of its kind. Adjustment of claims against the State by legislative assemblies still disgraces the public law of many commonwealths. In England however, by virtue of statutes, claims against the crown, after a formal petition of right and *fiat*, take the ordinary course of judicial proceedings.[10] And the federal government as well as an increasing number of the states, by providing courts of claims, have put justice between State and citizen on a footing of law rather than of politics.

The obsolescence of legislative justice apparently completed the legal structure founded by fourteenth century judges,[11] built up so laboriously by Coke, and fixed in American institutions by the federal constitution and the Fourteenth Amendment. We had achieved in very truth a *rechstat*. Our government was one of laws and not of men. Administration had become "only a very subordinate agency in the whole process of government."[12]

4*Cronise* v. *Cronise*, 54 Pa. St. 260.

5*Crane* v. *Meginnis*. 1 Gill & J. 474.

6*Starr* v. *Pease*, 8 Conn. 541.

7*Maynard* v. *Hill*, 125 U. S. 190.

8*Thompson* v. *Carr*, 5 N. H. 511, *Cooper* v. *Telfair*, 4 Dall. 14, *Slegt* v. *Kane*, 2 Johns Cas. 236, *Jackson* v. *Sands*, 2 Johns Cas. 267.

92 Wooddesson, Lectures, 382 et seq.

102 Anson, Law and Custom of the Constitution (2 Ed.) 475.

11e.g. Y. B. Mich. 12 Edw. 3, No. 23.

12Amos, Science of Law, 397.

Complete elimination of the personal equation in all matters affecting the life, liberty, property, or fortune of the citizen seemed to have been attained. Nothing is so characteristic of American public law of the nineteenth century as the completeness with which executive action is tied down by legal liability and judicial review. The tendency was strong to commit matters of unquestioned executive character to the courts, and no small number of statutes had to be rejected for such violations of the constitutional separation of governmental powers. But the paralysis of administration produced by our American exaggeration of the common-law doctrine of supremacy of law has brought about a reaction. And that reaction, just as the last remnants of legislative justice are disappearing, has brought back the long obsolete executive justice and is making it an ordinary feature of our government.

Contemporary legislation shows clearly enough that the recrudescence of executive justice is gaining strength continually and is yet far from its end. From fifteen to twenty statutes giving wide powers of dealing with the liberty or property of citizens to executive boards, to be exercised summarily, or upon such hearing as comports with lay notions of fair play, may be seen enumerated in the reviews of current legislation in each of the last ten reports of the American Bar Association. The report for 1904 enumerates nineteen of them. The report for 1905 shows at least eighteen. Nor is the legislature alone in bringing back this extra-legal—if not anti-legal—element to our public law. A brief review of the course of judicial decision for the past fifty years will show that the judiciary has begun to fall into line, and that powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to be administrative only and are cheerfully conceded to boards and commissions.

As yet, the judicial acquiescence in the revival of executive justice is a tendency only. The courts are not agreed; some courts hesitate, while some are willing

to give up everything but formal actions at law and suits in equity.[13] The tendency, however, is well marked. In general, the cases prior to 1880 tend to hold all matters involving a hearing and determination, whereby the liberty, property or fortune of the citizen may be affected, to be judicial and not capable of exercise by executive functionaries. Since 1880, the cases, at first requiring an appeal or a possibility of judicial review, but later beginning to cast off even that remnant of judicial control, tend strongly to hold every sort of power that does not involve directly an adjudication of a controversy between citizen and citizen—and in the case of disputes over water-rights and election-contests some which do—to be administrative in character and a legitimate matter for executive boards and commissions.

Perhaps the beginning of judicial acquiescence in a departure from the common-law jealousy of arbitrary executive action is coincident with the general introduction of an elective judiciary. Certainly the submissiveness of elected judges under legislative encroachments upon the judicial department has been well marked. After pleading and practice had been developed by judicial decisions and rules of court for centuries, American courts tamely submitted to legislation prescribing in minutest detail every step in procedure. With one or two solitary protests[14] our appellate courts have acquiesced in legislation prescribing how and when they shall write opinions and give reasons for their decisions. Even more, the trial judges in a majority of our commonwealths have been shorn of their just powers of advising the jury and have been reduced to mere umpires, in the interest of unfettered forensic display; and no protest has been heard.[15] But we are concerned here only with statutes involving the line between judicial power and executive power; with cases in which constitutional

[13] *State* v. *Thorne* (1901) 112 Wis. 81, 87 N. W. 797.

[14] *Houston* v. *Williams* (1859) 13 Cal. 24, *Ex parte Griffith* (1888) 118 Ind. 83.

[15] See paper of Mr. Justice Brown, Rep. Am. Bar Assn. 1889, 273.

provisions for separation of powers and committing judicial functions exclusively to the courts have been under consideration.

Irrigation statutes afford an excellent example. Disputes over water-rights, where the conflicting claims of numerous appropriators, who had often "appropriated" many times over the maximum flow of the stream, threatened to give rise to multiplicity of suits, were first taken in hand by equity. The suit to "adjudicate a stream" became a familiar proceeding.[16] Later the matter was taken in hand by legislatures and statutes were enacted whereby the power to determine the nature, priority and effect of the several appropriations and to apportion the stream was given to a state engineer, or a state board of irrigation or a state board of control.[17] In 1870, a statute of this character was held unconstitutional on the ground that the power conferred was judicial[18]. To-day, the courts are agreed that the power is not judicial and such statutes are upheld.[19] Again the older decisions were reluctant to concede to executive boards any power of hearing and determining charges against public officers and of removing them after such hearing.[20] At least one recent authority shows the same tendency.[21] But the recent cases have settled that this power of removal after investigation may be given to

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[16] *Frey* v. *Lowden*, 70 Cal. 550, 11 Pac. 838, Long, Irrigation, Sec. 95.

[17] "The legislature, finding the ordinary processes of law and the actions then known to the courts too expensive and also inadequate to meet the novel conditions incident to the appropriation of water, enacted a statute which . . . furnishes an elaborate system of procedure for the settlement of all questions of priority of appropriation of water." Long, Irrigation, Sec. 99.

[18] *Thorp* v. *Woolman*, 1 Mont. 168.

[19] *Farm Inv. Co.* v. *Carpenter*. (1900) 9 Wyo. 110, 61 Pac. 258, *Crawford*, v. *Hathaway* (1903) 67 Nebr. 325, 93 N. W. 781, *Boise City Irrigation & Land Co.* v. *Stewart* (1904) 10 Idaho, 38, 77 Pac. 25, 321. "They are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes." *Farmers' High Line Canal & Reservoir* v *Southworth*, 13 Col. 111, 21 Pac. 1028.

[20] *Police Comm'rs* v. *Pritchard* (1873) 36 N. J. L. 101, *State* v. *Towne* (1869) 21 La. Ann. 490.

[21] *Arkle* v. *Board of Comm'rs* (1895) 41 W. Va. 471, 23 S. E. 804.

executive officers or boards.[22] Power to determine who had the right to vote,[23] or to try election contests,[24] was formerly held to be judicial. To-day it is settled that executive officers, without any appeal to the courts, may determine conclusively who are and who are not citizens.[25] Election contests may now be determined by administrative boards.[26] It has been decided that a Secretary of State may hear and determine a county-seat election contest,[27] that executive officers may be empowered to pass conclusively upon disputes as to nominations for public office,[28] and that a canvassing board may be empowered to determine the cause of withholding of returns not received and if they think it due to an intent to defeat the will of the electors, proceed to canvass those received.[29] As late as 1883, a statute giving a board of county commissioners power to hear and determine complaints against holders of licenses and to revoke licenses accordingly, was held bad as giving judicial power to executive functionaries.[30] Such power is now regarded as administrative only.[31] Few things are more clearly judicial or more jealously limited by the courts than the power to punish contempts. Accordingly, legislative attempts to confer this power on county attorneys,[32] tax commissioners[33] and common councils,[34]

[22] *Donahue* v. *Will County* (1881) 100 Ill. 94, *State* v. *Oleson* (1883) 15 Neb. 247, 18 N. W. 45, *State* v. *Hawkins* (1886) 44 Ohio St. 98, 5 N. E. 228, *Fuller* v. *Ellis* (1893) 98 Mich. 96, 57 N. W. 33, *Cameron* v. *Parker* (1894) 2 Okla. 277, 88 Pac. 14, *Gilbert* v. *Board of Police Comm'rs* (1895) 11 Utah, 378, 40 Pac. 284, *State* v. *Common Council* (1895) 90 Wis. 612, 64 N. W. 304, *Gibbs* v. *Louisville* (1896) 99 Ky. 490 36, S. W. 524.

[23] *Burkett* v. *McCarty* (1874) 10 Bush (Ky.) 378.

[24] *Stone* v. *Elkins* (1864) 24 Cal. 125.

[25] *U. S.* v. *Ju Toy*, 198 *U. S.* 253, *U. S.* v. *Sing Tuck*, 194 U. S. 161, *Lem Moon Sing*, v. *U. S.* 158 U. S. 538.

[26] *Andrews* v. *Judge of Probate* (1889) 74 Mich. 278,44 N. W. 923

[27] *Bowen* v. *Clifton* (1898) 105 Ga. 159, 31 S. E. 147.

[28] *Allen* v. *Burrow* (1904) 69 Kan. 812, 77 Pac. 555.

[29] *Feek* v. *Bloomingdale* T. P. (1890) 82 Mich. 393, 47 N. W. 37.

[30] *State* v. *Brown*, 19 Fla. 563.

[31] *Hartford Fire Ins. Co.* v. *Raymond* (1888) 70 Mich. 485, 38 N. W. 474.

[32] *In re Sims* (1894) 54 Kan. 1, 37 Pac. 135.

[33] *Ex parte Doll* (1870) Fed. Cas. No. 3, 968, *Langenburg* v. *Decker* (1892) 131 Ind. 471, 31 N. E. 190.

[34] *In re Whitcomb* (1876) 120 Mass. 118.

have been thwarted by the courts. Yet a preponderance of authority concedes that such power may be given to a notary public,[35] which is surely no mean entering wedge. Recent decisions tell us that power conferred upon a state board of land commissioners to cancel leases of state lands for fraud in procuring them is not judicial;[36] that the decision of an executive officer refusing to issue a patent to state lands is not judicial;[37] and that examiners who pass on one's right to practice a profession for which he has trained himself do not act judicially.[38] How far the exercise of wide powers of determining title to land under land-registration statutes is judicial, courts are not agreed.[39] How far the power to transfer inmates of a reformatory to a penitentiary, for mistake as to age, incorrigibility, or like cause, is judicial, is a matter of dispute.[40] Nor are the courts insisting, as formerly, upon provision for judicial review. A statute making the decision of a commissioner of navigation final on all questions of collection of tonnage tax and of refunding tonnage tax erroneously or illegally collected has been upheld.[41] An administrative officer may be authorized to determine finally and conclusively not only whether an alien has or has not sufficient property to enter the United States,[42] but even whether a person, who claims to be a citizen and as such to have the right

[35] *DeCamp* v. *Archibald* (1893) 50 Ohio St. 618, 35 N. E. 1056, *Dogge* v. *State* (1887) 21 Neb. 272, 31 N. W. 929. *Contra*, *Burns* v. *Superior Court* (1903) 140 Cal. 1, 73 Pac. 597.

[36] *American Sulphur & Min. Co.* v. *Brennan* (1905, Col. App.) 79 Pac. 750.

[37] *State* v. *Timme* (1884) 60 Wis. 344, 18 N. W. 837.

[38] *Ex parte Whitley* (1904) 144 Cal. 167, 77 Pac. 879, *In re Inman* (1902) 8 Idaho, 398, 69 Pac. 120, *State* v. *Hathaway*, (1892) 115 Mo. 36, 21 S. W. 1081.

[39] *Tyler* v. *Judges of Registration* (1900) 175 Mass. 71, 55 N. E. 812, *People* v. *Simon* (1898) 176 Ill. 165, 52 N. E. 910, *State* v. *Guilbert* (1897) 56 Ohio St. 575, 47 N. E. 551.

[40] Such power is held judicial and statutes conferring it upon executive functionaries are held bad in *People* v. *Mallory* 195, Ill. 582, 63 N. E. 508, *In re Durnford*, 7 Kan. App. 89, 53 Pac. 92. *Contra*, *In re Linden*, 112 Wis. 523, 88 N. W. 645.

[41] *North German Lloyd S. S. Co.* v. *Hedden* (1890) 43 Fed. 17.

[42] *Lem Moon Sing*, v. *U. S.* 158 U. S. 538.

to enter the United States, is or is not a citizen.[43] The review of assessments and equalization may be left finally to a purely administrative board.[44] A statute may confer wide and summary powers of dealing with property to a board of health without providing for any appeal.[45]

It is instructive to set over against the foregoing decisions the claim made by Coke for the court of King's Bench:

"This court hath not only jurisdiction to correct errors in judiciall proceedings, but other errors and misdemeanors extra-judiciall tending to the breach of the peace or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done, but that this shall be reformed or punished in one court or other by due course of law."[46]

The new point of view is well expressed in these words:

"The administration of justice, properly so called, involves two parties, the party plaintiff and the party defendant, a wrong complained of by the former as done by the latter, and a remedy by way of redress or punishment applied to such wrong. Judicial proceedings which do not possess these characteristics, however closely in point of form they may approach to those which do, are essentially different from the administration of justice."[47]

To what are we to attribute this radical change of front? How are we to explain the tendency, judicial as well as legislative, to rely upon boards and commissions, to forego judicial control over arbitrary executive action, and to give free rein to summary administrative powers? Partly, no doubt, the increasing complexity of life and minute division of labor must be blamed. Yet this complexity and this division of labor developed for generations in which the common-law jealousy of administration was dominant. Rather, it seems to me, must we see in this recrudescence of executive justice one of those reversions to justice without law which are perennial in legal history and serve, when-

[43] *U. S.* v. *Ju Toy*, 198 U. S. 253.

[44] *State* v. *Thorne* (1901) 112 Wis. 81, 87 N. W. 797.

[45] *Brown* v. *Narragansett* (1899) 21 R. I. 503, 44 Atl. 932.

[46] 4 Inst. 71.

[47] Salmond, First Principles of Jurisprudence (1893) 75.

ever a legal system fails for the time being to fulfil its purpose, to infuse into it enough of current morality to preserve its life.

Equity, both at Rome and in England, was originally executive justice. It was a reversion to justice without law. The prætor interposing by virtue of his *imperium*,[48] the emperor enforcing *fideicommissa*, "having been moved several times by favor of particular persons,"[49] the Frankish king deciding, not according to law but *secundum æquitatem* for those whom he had taken under his special protection,[50] and the Chancellor granting relief "of alms and charitie,"[51] acted without rule in accordance with general notions of fair play and sympathy for the weaker party. The law was not fulfilling its end; it was not adjusting the relations of individuals with each other so as to accord with the moral sense of the community. Hence prætor or emperor or king or chancellor administered justice for a season without law till a new and more liberal system of rules developed. The executive justice of to-day is essentially of the same nature. It is an attempt to adjust the relations of individuals with each other and with the State summarily, according to the notions of an executive officer for the time being as to what the public interest and a square deal demand, unincumbered by rules. The fact that it is justice without law is what commends it to a busy and a strenuous age. Hence we must attribute the popularity of executive justice chiefly, if not wholly, to defects in our present legal system; to the archaic organization of our courts, to cumbrous, ineffective and unbusinesslike procedure, and to the waste of time and money in the mere etiquette of justice which for historical reasons disfigures American practice. Executive justice is an evil. It has always been and it always will be crude and as variable as the personalities of officials. No one

[48] Cicero, In Uerrem, 1, 45, 46.

[49] Inst. II, 23, 1.

[50] Goodwin, The Equity of the King's Court before the Reign of Edward I, 12.

[51] *Dodd* v. *Browning*, Calendars of Proceedings in Chancery, I, 13.

who attempts to decide each case *pro re nata* will be able to show that "*constans et perpetua voluntas suum cuique tribuens*" which is justice. Nothing but rule and principle, steadfastly adhered to, can stand between the citizen and official incompetency, caprice, or corruption. Time has always imposed a legal yoke upon executive justice and incorporated its results into law. But any justice is better than injustice. The only way to check the onward march of executive justice is to improve the output of judicial justice till the adjustment of human relations by our courts is brought into thorough accord with the moral sense of the public at large.[52]

Legislatures are pouring out an ever-increasing volume of laws. The old judicial machinery has been found inadequate to enforce them. But they touch the most vital interests of the community, and it demands enforcement. Hence the executive is turned to. Summary administrative action becomes the fashion. An elective judiciary, sensitive to the public will, blithely yields up its prerogatives, and the return to a government of men is achieved. If we are to be spared a return to oriental justice, if we are to preserve the common-law doctrine of supremacy of law, the profession and the courts must take up vigorously and fearlessly the problem of to-day—how to *administer* the law to meet the demands of the world that is. "Covenants without the sword," says Hobbes, "avail nothing."[53] If the courts cannot wield the sword of justice effectively, some other agency will inevitably take it up.

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[52] "The decisive reason for such specialization (i.e. the separation of powers) is not the practical security of civil liberty, but the organic reason that every function will be better fulfilled if its organ is specially directed to this particular end, than if quite different functions are assigned to the same organ." Bluntschili, Allgemeine Statslehre, Bk. VII Chap. 7. Hence if such organ fails to perform its functions in any respect, the practical ground for the separation of powers ceases to operate.

[53] Leviathan, Cap. XIV.