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The Reform of Civil Procedure

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IT has always been a commonplace of politics in the United States that governments derive their just powers from the consent of the governed. It is an equally fundamental principle that the stability of governments rests upon the confidence of the governed. When those who are subject to governmental action lose faith in governmental efficiency and integrity, they are well started on the road to political, if not social, revolution.

Of the three departments of government, the legislative seems the least likely to develop serious friction or distrust. It operates at a distance from individuals. Only the more intelligent citizens know much about its activities, and even they view them largely as matters of controversial or academic interest. The laws, when passed, seldom bear harshly upon large classes of people, because legislation has become extremely sensitive to popular wishes.

The executive department is also far removed from the daily lives of the mass of people. Except in so far as it participates in legislation, most of its activities are routine, and only rarely does it become a critical point of contact between the government and the governed.

But the judicial department stands in a very different position. Every individual is constantly engaged in holding his place against the social, industrial or commercial competition of others. Actual or potential enemies surround him on every side. He must fight to hold his job against others who want it, he must fight to protect his wages against employers who begrudge them, he must fight to preserve his property against a thousand assaults, and he must fight to maintain his health against those who would exploit it. Every day brings its struggle, every night its anxiety. Few would survive if they stood unaided and alone. But there is one source of protection, and one only—the department of justice. Without the courts

there would be no security. One may never use them, but they are always there—visible agents of the goddess of Justice who symbolizes the highest function of the state.

The administration of justice is, therefore, the most fundamental need of society, because through it alone individuals are enabled to maintain stable relations with one another and with the state. It is necessarily the function of government which most intimately affects the lives of all the people and is most likely to serve as the test by which they measure governmental success or failure.

In view of the enormously important contribution which the successful administration of justice can make to the political security of the state, it is strange that more systematic and intelligent efforts have not been directed toward its attainment in this country. At one period in our history there was a vigorous movement for reform, which resulted in the enactment of the New York Code of Civil Procedure of 1848. This code swept over the newly organizing west, and is the basis for the practice in many states east of the Mississippi river and in practically every state west of it. But this reform wave immediately lost its vigor. The new code was accepted as the American idea and therefore the last word in procedure. It was never anything more than a timid variation from the ancient common law procedure of England, and has probably resulted in very little real improvement in the administration of justice. Most of the worst features of common law pleading were retained, and practically no new idea of first-rate importance, aside from the general plan of carrying a few principles of equity practice over into actions at law, can be found anywhere among its provisions. It is a hard and rigid system, imposed upon the courts by legislative mandate, leaving them little freedom of action.

It was doubtless due to the fact that the New York Code came into existence just at the time when the western country was being settled, and when the newly organized legislatures were looking for a quick and easy way to put a system of procedure upon their statute books, that it attained such wide popularity. It was simply copied, grammatical errors and all, by the infant commonwealths of the west, and it may be that ease of enactment was as strong a recommendation for it as the merits of its provisions.

It would be interesting to compute what it cost the people of New York to attempt to find out from their courts what the new Code meant. More than one hundred and thirty volumes of New York practice reports have been published, containing about 20,000 cases, and if each case represented an average total cost to the parties and the public of $500.00, the aggregate cost of these practice decisions would be $10,000,000. These collected cases do not, however, represent one-tenth, perhaps not one-fiftieth, of the litigation which the people of New York have been required to endure in their efforts to obtain a judicial interpretation of the Code of Civil Procedure.

Picking up at random the last volume of the reports of the Illinois Supreme Court, which administers common law procedure, and comparing it with the last volume of the reports of the Supreme Court of Indiana, a neighboring state which has adopted the New York Code, it appears that the Code provides between two and three times as much litigation over points of practice as the common law. More comprehensive comparisons would not show greatly different results. The conclusion is fairly justifiable that the one great contribution which this country has made to simplified procedure has not been a great success.

But the seriousness of the situation in the United States is due only partly to the enormous direct cost of litigating questions of practice—a complete economic loss without a single redeeming feature. A greater injury is suffered by those who are unable or unwilling to incur the expense of such litigation and to take the risk of having their cases go off on points of procedure without a fair decision on the merits, and who for that reason are substantially denied the protection of the laws. It was an old maxim of the common law that wherever there is a right there is a remedy. A truer statement would reverse the wording, for without a remedy no right has any value. As Lord Campbell is said to have once put it, "The due distribution of justice depends more upon the rules by which suits are conducted than on the perfection of the code by which rights are defined." [1]

There is no difference in principle between a decision based

[1] *27 Law Journal*, 104.

upon a contest of procedural skill between two attorneys and a decision based upon a contest of strength between two armed champions. We smile when we are told that trial by battle, although actually obsolete, was a lawful method of trying cases in England until abrogated by Parliament only about a hundred years ago, and we marvel that a sensible nation should so long tolerate such an anomaly. But while in England trial by battle existed only in the musty pages of the law books, and was rediscovered there by accident, in the United States trial by battle flourishes throughout the length and breadth of the land, with the court rooms as the lists, the judges as the umpires, and the attorneys, armed with all the weapons of the legal armorer's cunning, as the resourceful champions of the parties. It is a system which is steadily destroying the confidence of the people in the public administration of justice.

The characteristic feature of American procedure has been its legislative origin. This was a wide departure from the traditions of the common law. It was the courts of England, not parliament, which created the rules of English practice. They were the product of experience, and were slowly evolved as an expression of the best opinion of the leaders of the English judiciary. The men who made the rules were the men who used them. Every feature was the result of careful consideration and grew out of the actual needs of contemporary litigation. There was an adequacy, an appropriateness and a technical perfection about common law procedure which showed the skillful work of highly trained specialists. Only occasionally did Parliament interfere, where some rule was thought to operate harshly, or some new principle of general policy or some novel remedy was thought to be needed. But Parliament never tried to regulate legal practice; it only undertook to supervise the broad course of its development. The delicate mechanism of litigation was largely left in the hands of those who were expert enough to keep it in proper adjustment.

When, however, the framing of rules of practice becomes a matter of general legislation, and a body of men, largely unfamiliar with legal instrumentalities and methods, undertakes the highly technical task of specifying the details of legal proceedings, an inelastic and inadequate system is inevitable. And

it is safe to say that if the American courts had not been able to resort to the rich store-house of common law procedure to aid the defects of our statutory codes of practice, a complete breakdown would have occurred. Procedure is a matter of organic growth, requiring close attention and constant adjustment to keep it operating effectively under perpetually changing conditions. Legislative assemblies, made up, as they are, largely of laymen, and meeting infrequently, are quite unfitted for the task of regulating it.

Beyond their inferior quality, legislative codes of practice have the further fault of extreme rigidity. Most American procedure statutes have undergone little change in the passing years, and even the New York code, that *monstrum horrendum*, as Mr. F. R. Coudert has called it,[1] which became so bulky and complicated as to be almost unworkable, was only an exaggerated instance of legislative tinkering with details, showing no fundamental change of principle or policy in three quarters of a century. Legislatures are timid about making important procedural changes, and fear to get beyond their depth in dealing with matters about which most of their members know little or nothing. Furthermore, legislative programs are usually crowded, bills with a strong popular appeal are given the right of way, and there is little opportunity for that careful consideration which is indispensable in successfully framing or adjusting a complicated system of interrelated rules of practice. Even commissions for revising statutes usually feel that they must avoid introducing any change sufficiently marked to arouse legislative opposition, lest the whole enterprise fail.

The legislature is the board of directors of the State, and its true function is rather to determine policies than to draw up minute directions for departmental operations. A shop superintendent would hardly expect to get a satisfactory set of specifications for an engine, or a workable set of factory instructions, from the board of directors of his company. No more should it be expected that a state legislature could make a practicable set of rules for conducting litigation or keep them properly revised to meet the needs of a constantly changing society. Technical processes call for technical knowledge.

[1] *Certainty and Justice*, p. 19.

Only at rare intervals, when long suffering from inadequate legal remedies has aroused the bar of a state to demand improvement, can reform be expected. Under normal conditions legislative control of legal procedure is sluggish, trivial, desultory and unprogressive.

Judicial regulation of legal practice, on the other hand, largely escapes the weakness of inferior technical quality. The courts constitute the judicial department of the state, and the judges who preside and the lawyers who practice in them are the selected group of trained men charged with responsibility for administering the law. They alone are experienced in the actual conduct of litigation, they alone understand the meaning and effect of the rules, they alone are adequately informed concerning their defects, the opportunities which they offer for error, and the practical possibilities of improvement. They are the only available body of experts in the use of procedural processes. It would seem self-evident that they were best qualified for the actual work of devising, prescribing and improving remedial rules.

Will judicial regulation also be free from the other drawbacks of legislative control, namely, inadequacy of scope and the tendency to stagnate?

A survey of the history of common law procedure is not encouraging in either respect. The chief source of inadequacy was the fact that rules of practice developed only as a by-product of litigation. As cases arose the remedial problems which they presented were worked out in the course of their passage through the courts. Rules grew up at random as deductions from actual decisions and were limited to such fragmentary and casual points as happened to be involved in pending actions. There was no authorized method of generalizing the rules, and litigants were obliged to stumble about in the dark when no precedent could be found. And this feature produced another unfortunate result. The precedents, when once established, were treated as binding, so that although new points of practice might freely come up for determination, points once passed upon could not thereafter be changed. As the rules approached completeness in detail they became fixed in form and binding in effect, and the elasticity, which had made the common law so delicately responsive to current needs, largely vanished.

But the English genius for administration was equal to the situation created by the fossilization of common law procedure. Instead of taking the regulation out of the control of the courts and thereby losing the benefit of professional skill and experience, England destroyed the intolerable system of procedural precedents by authorizing the courts to lay down in advance the rules by which they proposed to regulate civil procedure. It was a reform of the first magnitude and marked a new era in judicial development, definitely turning the emphasis from the past to the future. The fundamental question was no longer the static one of historical regularity, but the dynamic question of practical social advantage.

But another problem still remained. The power to regulate might be ample, the plan of regulation sufficiently broad in its scope, and the requisite technical skill available, but would there be sufficient driving force to make the regulation effective? Would it be necessary to provide machinery for keeping the regulators actively at work?

The absolute necessity of such machinery is well demonstrated by a bit of American judicial history. In 1850, before the enthusiasm for the New York Code had begun to sweep over the west, Michigan adopted a constitution which both authorized and required the Supreme Court, by general rules, to establish, modify and amend the practice in such court and in the Circuit Courts, and to simplify the same.[1] No greater opportunity for effective regulation by rules of court could be imagined. But it was eight years before the court promulgated the first set of rules, consisting of 54 Supreme Court rules, 95 law rules and 120 chancery rules. By 1896, a period of almost forty years, only 10 new Supreme Court rules had been added, 12 new law rules, and 5 new chancery rules. By that time a few progressive members of the State Bar Association became so much aroused over the deplorable condition of the practice that they prepared a complete new set of rules,[2] entirely changing the practice, and this revision was adopted by the Supreme Court. For eighteen years these rules remained almost absolutely unchanged, when another

[1] Art. VI, Sec. 5.

[2] *Proceedings Michigan State Bar Ass'n*, 1896, pp. iii, iv.

vigorous demand by a Bar Association committee again resulted in presenting to the Supreme Court a new and complete revision, with many strikingly novel features,[1] which the court again accepted almost exactly as it was submitted. Since 1915 the practice has again settled down to wait for another outbreak of reform when conditions shall have become so bad that they can no longer be endured.

I have been unable to discover who actually drew up the first set of Michigan rules in 1858, and it may be that the Supreme Court was the author, since a new broom is quite likely to do effective sweeping. But since 1858 the Supreme Court, which was charged in such magnificently broad terms with the duty and privilege of controlling procedure by general rules, has initiated practically nothing for the improvement of legal practice. The state has been left to the mercy of the intermittent efforts of casual Bar Association groups, with occasional help from the legislature of doubtful quality and value. What Michigan lacked was a permanent, responsible and aggressive agency for stimulating action on the part of the rule-making power.

England made early provision for this necessary feature. At first, in 1873, when the new Judicature Act was passed, the power to initiate rules was placed in the entire court, but this was so obviously ineffective that in 1876 it was transferred to a Rule Committee of six judges. In 1894 the Committee was changed to include three practicing lawyers and four judges, and changed again in 1899 to include two barristers, two solicitors and four judges. Meetings of the full Committee take place two or three times a year and informal discussions much oftener. Barristers, solicitors, law societies, public trustees, masters and public-spirited laymen are encouraged to send in suggestions for improving the practice.[2]

The wonderful success which has attended the English court-rule system has not been unobserved in the United States, and within a decade New Jersey has completely abandoned

[1] *Proceedings Michigan State Bar Ass'n*, 1915, p. 131. This committee seems to have made no formal report, but it did in fact completely revise the rules and drafted a large number of simplified pleading forms which were adopted by the Supreme Court as a part of the rules.

[2] Rosenbaum, *Rule Making Authority*, Ch. III.

the common law system of pleading and substituted in its place a counterpart of that employed in England.[1] Still more recently New York attempted to replace the notorious Code of Civil Procedure by a system of court rules modeled closely upon the English plan, but the effort unfortunately failed.[2]

But the last step in the complete development of a workable system of procedure control is yet to be taken in England and should be taken in the United States. This is the establishment of a ministry or department of justice with a responsible officer at its head. Every other civilized country of importance—even such British dominions as Canada and South Africa—has such a ministry, charged with responsibility for affairs of law and justice.[3] The welfare of the state is so largely dependent upon the administration of justice, and this in turn is so complex and so constantly in need of the most skillful supervision in order to keep it in touch with social demands, that the importance of such a governmental agency is obvious.

Under such a department the entire court system could be organized on efficient lines, eliminating conflicting jurisdiction and the duplication of functions. Proper administrative control of dockets, sittings, transfer of causes and assignment of judges could produce cooperative efficiency with infinite possibilities. A chief justice or presiding judge, with judicial duties of his own, can never successfully carry the administrative burden which a real department of justice involves. The head of such a department should be responsible to the public, not to fellow judges, for the proper conduct of the office. He should not be a member of the court but an outsider who can look at the affairs of the department objectively. The test of his success would be the quality of the results obtained, and the public would not be slow in calling his attention to needed improvement in the character of the service rendered. Under a responsible head the department of justice would be expected

[1] Laws, 1912, chap. 231, (Law actions); Laws, 1915, ch. 116, (Equity Actions).

[2] Civil Practice Act and Rules, prepared by the Board of Statutory Consolidation, 1915.

[3] Gaudy, *Law Reform.* Address delivered at Gray's Inn, 1919, published by the Oxford University Press.

to render reports of its activities, and instead of the utterly demoralizing American system of allowing the courts to operate year after year with never an accounting, we should develop an intelligible system of judicial data and statistics by which their performance could be judged and through which improvements could be suggested and devised. A rule committee consisting of the responsible head of the department of justice and two judges and two lawyers nominated by him could make the administration of justice as efficient as the present administration of banking or insurance. Centralized responsibility placed in competent hands is the recognized political need of the time. Nowhere would it produce more far-reaching benefits than in the public administration of justice.

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