

LAW REFORM.

Through the kindness of Mr. Stone and the Columbia University Press we are enabled to print this paper, with minor alterations, from the proofs of Chapter VIII of Dean Stone's new book, "Law and Its Administration," Columbia University Press, 1915.

Regardless of his prejudices one could not fail to be impressed with the widespread and persistent criticism of the administration of law in this country. Newspapers, popular magazines, political speeches, the utterances of social reformers, and not infrequently the graver pronouncements of more responsible critics, abound with disparaging references, not to say direct attacks, upon the courts and the legal profession. In weighing and assigning a proper value to these manifestations, some account may well be taken of the fact that the strident voice of protest and discontent not infrequently rises above the chorus of the satisfied, and that the weight of one's sorrows is often not measured by the volume of his lamentations.

Certainly the volleys of criticism which have been directed toward the Ives case as decided by the New York Court of Appeals was entirely disproportionate to any practical inconvenience which flowed from that decision, and they left quite out of account the vast volume of judicial business regularly and satisfactorily disposed of by that court. Similar observation might be made of most of the cases which have given rise to the adverse criticism of courts.

One must also make some allowance for the vagaries of a period, now, happily, drawing to a close, I believe, more characterized by fantastic political theories and by vague and impractical aspirations for sudden social reform than have characterized any previous period in our political history. Nevertheless, when such allowances are made, disinterested and competent observers as President Eliot, for example, come to the conclusion that a very considerable portion of the people believe that law is administered with too great regard for technicality and with too little regard for substantial justice, and that litigants are subjected to needless burdens and delays in securing their rights, and that such belief on the part of the people is not without some justification.

One is compelled to note, too, the disturbing frequency of trials resulting in determinations which are shocking to one's sense of propriety and justice. Without singling out cases for invidious comparison, one may call to mind cases decided in our own state in the

last few years, where defendants charged with and undeniably guilty of serious crimes were acquitted by juries, or if convicted, were sentenced to grossly inadequate punishment. Such cases, taken quite at random, are fairly typical of a considerable number of others decided in various states of the country, an examination of which leaves one with the uncomfortable conviction that in them justice has failed, that all our precautions have been in vain and that our elaborate machinery for the administration of law has broken down.

Our conclusion would hardly be just or trustworthy, however, if we failed to recognize that cases like these constitute a small minority among the thousands of cases which proceed to a just result without attracting public attention or comment. Nevertheless, we should cease to progress if we did not inquire into the causes of failures of justice and seek a remedy for defects in our judicial system, at least so far as failures of justice are attributable to such defects. At the outset, however, it will be necessary to indicate some of the limitations which, by the very nature of law and the necessities of its administration, are imposed on any program of law reform. And then as we see more clearly the possible and practicable, we may perhaps avoid the impracticable and the impossible.

That water cannot rise above its source is a law recognized clearly enough in natural science; but the like principle applied to theories of social organization is too often disregarded by some of our social and legal philosophers. Law has its source in the desire of civilized communities for justice, and in the belief that justice can be attained only through the adoption and application of a system of law; but law, as a medium of justice, can never rise above its source. If public sentiment is essentially lawless, if it is swayed by passion or prejudice, if controlled by such influences, it demands that rules of law, however wise and salutary in principle, be disregarded in special cases, it is inevitable that juries should be foresworn and that judges should be found to distort the law.

The great fact to be reckoned with in the history of the English common law is that underlying and supporting it there has always been a popular love of justice and the belief that the kind of justice which would best serve the social welfare is justice according to law. It is this fact which has made the English common law the great force which it has been in western civilization. It is this sentiment which makes the weak and faithless juryman feel the weight of an outraged public sense of justice, and makes the unsuccessful litigant bow to the decision of the court without, at least publicly, reviling it.

Without public faith and belief in justice according to law, any system of law, however skilfully devised, is but an empty form.

It is beyond the scope of this paper to make any extensive investigation or comparison for the purpose of ascertaining whether there is a waning of the popular desire for justice according to law in this country. Statistics show, I believe, that there is a decrease in the number of lynchings and cases of mob law, which have been the disgrace and still disgrace the administration of justice in this country. On the other hand, the evidence is not wanting that juries are too often swayed by prejudice or by maudlin sentimentality, to disregard laws, the soundness and morality of which are not open to question.

The popular criticism of law and courts, now, happily, somewhat subsiding, has exhibited an intemperateness and lack of sense of propriety which can be wholly accounted for only by lack of popular faith in legal justice and by a willingness to substitute for it the notions of social and political quacks. Without attempting to measure the extent of this change in popular sentiment, or to judge as to its permanency, it will be sufficient if we keep steadily in mind that no amount of law reform will ever give legal justice to a people who themselves are indifferent to it or who are controlled by passion or prejudice, or class selfishness, rather than by the love of and faith in justice administered according to some settled principles of law.

Another fact fundamental in any scheme of law reform is so obvious that, like many others of the more obvious facts of life, we are prone to overlook its true significance. Law must necessarily be administered by human agencies. Assuming a perfect system for the administration of justice, unless the human agents who administer the system are likewise perfect, a perfect result cannot be hoped for. When the other great operations of the civilized world are carried forward without loss, friction, or blunder, it will be time to demand perfection in the human agencies which make and administer our laws.

At the very foundation, therefore, of any just and adequate legal system must lie the popular desire for justice, the firm belief in justice according to law, possessing the characteristics of generality and certainty. United with this must exist a deep public concern in the selection of fit agencies for law administration, the judges and lawyers, resulting in methods of selection best adapted to that end. If these qualities in the public temper are wanting, our discussion of remedies for failures of justice, of the law's delays, its technicalities,

its lack of recognition of social needs, is a discussion of symptoms only, and not the disease. The true law reform, therefore, begins with the stimulation in the public mind of the love of justice, its education as to the nature of law, and the grave importance of delegating its administration only to those who are fit to bear that responsibility.

Judges and lawyers not only administer law; they make the common law and they give to much of the written law its character and effectiveness. The character of the judges and lawyers of this generation will determine the character of the law of the next.

If every citizen, or even a majority of our citizens, recognized the true significance of this statement, is it credible that for any length of time we would continue, as in the majority of the United States, to admit men to the bar with the barest smattering of legal training and general education and select our judges on the basis of political expediency or, as is too often the case, at the dictation of the political boss? In a previous paper I pointed out at some length the pernicious effect of our neglect of matters so vital to the standing and efficiency of the legal profession. I refer to them now only for the purpose of again calling your attention to the fact that they have a direct and immediate effect on those phases of law administration which are so much the subject of popular criticism. Of what avail to complain of the law's delays when thousands of men are admitted to the bar whose professional ideals admit of their bringing groundless actions or interposing groundless defenses?

Of what avail to seek some formal cure for the law's technicalities when we examine candidates for the bar mainly with respect to their knowledge of technicalities and send them to the bar imbued with the notion that the license to practise law is a privilege to play a game in technicalities at the expense of their clients? What boots it to complain of the law's delays and advocate special measures for the prevention of the law's delays, when the time of the court may be wasted by lawyers not competent or prepared to try their cases or who force the court to read volumes of affidavits loaded down with trivial and irrelevant matter, because it dares not accept at face value the statement of counsel made in open court.

In England there is very little criticism of the legal system and no serious problem of law reform. I think I understood the reason for this after I had spent a morning at one of the law courts in London last summer. The court was what was known as the Vacation Court; not a court for the trial of cases, but for the hearing of

special motions requiring attention during the summer vacation. The court was presided over by a judge distinguished, as are most of the English judges, for his learning and ability, elevated to the bench by appointment to his office for life. The court-room was thronged with barristers called to the bar through the medium of the Inns of Courts.

As the barristers arose in turn to present their cases to the court, each did so with a simplicity and directness indicative of a reserve power founded on thorough training and experience. His opponent replied in like manner. A few well-directed questions from the bench, and the exact question of law or fact stood revealed, stripped of all extraneous matter. The court's decision was promptly given from the bench, the case was then disposed of, and the next case was called. There was no unseemly wrangling, no waste of time of the court. The questions of the presiding judge were answered frankly, without reservation, and it was obvious that the court in rendering its decision could and did rely on the statements of counsel made in the course of the argument.

Contrast this practice with the scenes which regularly take place in our own similar court for the hearing of contested motions. After a day of listening to prolonged argument, more or less relevant to the motions pending before him, the judge reserves his decision, retires to his chamber, where he devotes his attention for days, perhaps weeks or months, to reading and sifting voluminous affidavits submitted to him, in order that he may ascertain what the motions which he has already heard are really about, and what their merits really are.

The ease and facility with which the English court disposed of its judicial business depended in part upon the fact that the English procedure is simpler than our own, but mainly upon the fact that the judge possessed pre-eminent professional qualifications for his office, and that the barristers in his court were a selected group fitted by training and character to participate in the administration of justice.

With lawyers capable of presenting their cases in court and with too high a regard for their professional position to distort the law or the facts, and with judges capable of grasping the real issues of law and fact involved, possessing the power to control the course of judicial business pending before them, and the will to exercise it, the problem of the law's delays and its technicalities is reduced to a minimum. Improvement of bench and bar, the removal of the

bench, so far as possible, from political influences, and the restoration to the judges in many of our states of the power which should properly be exercised by them, lie at the root of the problem of law reform. Without these, one may devote himself in vain to what may be called the subsidiary problems of law reform, that is to say, the mere formal legislative changes which affect in a more or less perfunctory manner those features of law administration, which are now so much the subject of popular discussion.

Let us now, however, turn to what I have termed some of the subsidiary problems of law reform. Among the criticisms of our legal system are the charges that our procedure is too complicated and technical, that there are too many appeals, that there are needless delays and technical difficulties in the selection of juries, in cases which excite general public interest, that the proof of facts involving scientific questions by expert witnesses have been subject to grave abuses, that the law is dilatory, the trial and final disposition of causes often being excessively delayed, that the administration of justice, which ought to be simple, direct, and easily accomplished, is, in fact, complicated and burdensome.

It will be observed that all of these criticisms, except those relating to the law's delays, are directly involved in our system of procedure. Whatever will improve our system of procedure will improve conditions with respect to each of these criticisms. For nearly fifty years our system of procedure has been under the direct control of the legislature, and, as was pointed out in the paper on that subject, the volume of our procedural law, its complexity, and its technicality, have steadily increased. In the discussion of this subject, a possible method of improvement was suggested by delegating the power and duty of enacting rules of procedure to the judges exclusively. But whatever the method adopted, any plan whereby the number of formal provisions governing procedure is reduced, the power and discretion of the court in procedural matters increased, and the power for frequent and haphazard amendment limited, will ultimately result in some simplification of our procedure and in lessening the cause for just dissatisfaction with our procedural law.

From time immemorial, the "law's delays" has been the subject of the bitter jibe of the layman. On my desk lies a copy of *De Laudibus Legum Angliae*, written before the discovery of America, by Sir John Fortesque, who was Chief Justice of England, and afterward Lord Chancellor to King Henry VI. In the dialogue sup-

posed to occur between the Lord Chancellor and the young prince, whom he is instructing as to the excellences of the English common law, the prince is made to say:

“There remains but one thing, my Chancellor, to be cleared up, which makes me hesitate, and gives me disgust. If you can satisfy my doubts in this particular, I will cease to importune you with any more queries. It is objected that the laws of England admit of great delays in the course of their proceedings beyond what the laws in other countries allow of. This is not only a distraction to justice, but often an insupportable expense to the parties who are at law, especially in such actions where the demandant is not entitled to his damages”;

to which the Lord Chancellor replies in effect, after pointing out that the delays were not greater in England than in France,

“But it is really necessary that there should be delays in legal proceedings, provided they are not too dilatory and tedious. . . . Judgment is never so safe when the process is hurried. I remember once at an Assises, a jail delivery at Saulsbury, that I saw a woman indicted for the death of her husband within the year. She was found guilty and burned for the same. . . . At a subsequent Assises I saw a servant of the man who was so killed, tried and convicted before the same judge for the same murder. He made ample confession that he was the only person who was guilty of the said fact.”

This passage from Sir John is interesting, first, because it informs us that the complaint as to the law's delays is by no means a new one, and because it reminds us that some delay in the law's procedure is not an unmixed evil.

Many critics of the law's delays speak as though the judicial protection of one's rights was to be obtained with the same ease with which one orders a suit of clothes from his tailor, and that justice is a commodity to be freely obtained without trouble or annoyance.

If, however, one conceives that his rights have been impaired and that the matter is of sufficient importance to induce him to resort to the courts, he naturally desires his case to be carefully prepared and skilfully presented. Preparation of the case involves a study of the facts and of the law by his lawyer, the collection of evidence, the examination of witnesses, often the investigation of accounts, the examination of documents and of papers, the drawing of pleadings,—involving prolonged study and investigation and requiring like professional service on the part of the attorney for the defendant. These tasks require time, and in performing them we have no more right to expect the work of the lawyer to be hastily and imper-

fectly done than we have to expect like neglect when important problems are submitted for solution to the engineer, the architect, or the scientist.

A not unimportant consequence of reasonable deliberation in proceeding with the trial of cases is that opportunity is thus afforded for the litigants to settle their disputes without actually proceeding to a trial. Time tends to soften the anger and correct the mistakes and errors of judgment, which are the fruitful causes of legal controversy. It is, therefore, not a fault, but a virtue, in judicial procedure that it proceeds without haste, with full opportunity for deliberation on the part of the litigants and for preparation on the part of counsel, so that the result may ultimately put an end to controversy and leave us satisfied that justice has been done.

Nevertheless, when the trials of cases are postponed two or more years, as has been the case in this and many other states, until witnesses and counsel have forgotten what the case was about and witnesses have perhaps died or disappeared, and meanwhile the plaintiff, if his case is just, has been denied his rights; or, again, when the case has been tried and appealed and a new trial ordered perhaps two or three or even more times, we have just reason to complain of the law's delays and make some inquiry as to the cause. There are many special causes operating to make delays in judicial procedure, one of the crying evils of our legal system, and almost without exception they have their origin either in the failure of the members of the bar to live up to proper professional standards, or in the faults of our system of procedure, to which reference was made in the chapter on that subject. If, for example, every case needlessly begun or needlessly defended because of the incompetence of the counsel or because of the willingness of counsel to stir up unnecessary litigation could be stricken from the court calendars, I venture to say there would be no serious problem of delay in reaching cases for trial after they had been placed upon the calendar.

"Discourage litigation," said Abraham Lincoln to the young lawyer. "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity to be a good man. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the registry of deeds in search of defects in title, whereupon to stir up strife and put money into his pocket." Lincoln not only

stated the duty of the lawyer, recognized by our code of ethics, but he touched upon one of the prime causes of the crowding of our court calendars and of the law's delay. I think the better class of lawyers recognize the morality as well as the practical good sense of Lincoln's advice.

A great volume of litigation for which neither lawyers nor our methods of procedure are wholly responsible is due to the vast increase in accident litigation for which there is common-law liability, especially in cities and industrial centers. The volume of this litigation greatly exceeds that of all other classes of litigation combined. Its wastefulness and its essential injustice under modern industrial conditions have been fully revealed in the public discussion which has led to the enactment of the various workmen's compensation acts, and these, where successfully established, should enormously reduce the number of litigated claims arising out of injuries to the employees, for the reason that the statute imposes liability on the employer without his fault and does away with the defenses of assumption of risk, contributory negligence, and the fellow-servant rule, which have been so fruitful of litigation.

The possibility of making a similar reduction in the amount of litigation growing out of the injuries to persons other than employees which are incident to the business of public service companies is a problem worthy of consideration. At present, the court calendars the country over are clogged with cases of this class. The larger corporations have generally adopted the policy of settling just accident claims when they can be settled on a fair basis, so that a considerable proportion of the litigated cases are brought in the hope of gaining some unmerited advantage by playing on the sympathies and prejudices of a jury. This method of enforcing liability is wasteful in the extreme. The cases are often taken on the contingent-fee basis, and the proceeds go mainly to benefit the ambulance-chasing attorney, and not the victim of the injury.

A serious cause of our congested court calendars, and, hence, of the law's delay, as well as a prolific source of professional misconduct and scandal, would be summarily removed if, as suggested by Moorfield Story in his excellent book on Law Reform, the losses arising from injuries incident to the business of public carriers could be distributed by the medium of a compulsory insurance scheme, the cost of which should be borne by the carrier, but taken into account in fixing its rates. This, of course, at its best, is a poor substitute for the evils which are mainly attributable to the unworthy members

of the bar and to an unfortunate system of procedure. But it would, I believe, be infinitely preferable to the conditions which now exist.

The delays which take place after a case has been placed on the calendar and is ready for trial are due, for the most part to the peculiarities of procedure, the excessive time and attention devoted to the selection of a jury, the double appeal, the reluctance or statutory inability of appellate courts in some states when error has been committed to correct the error in a proper case by modifying the judgment or reversing it, and entering a final judgment, instead of sending the case back for a new trial one, two, or even more times. These are causes of delay which are capable of remedy. The number of peremptory challenges to jurymen as fixed by statute might be reduced. The absurd practice in many states, under which a man who has sufficient intelligence to have formed an opinion about a case of general public knowledge and interest may be disqualified to serve as a jurymen, should be abolished, and, above all, we would expedite the business of courts and give litigants and juries the benefit of the learning and, experience of our judges and increase their power over the conduct of litigation.

In several states judges are denied the power to limit the time of argument of counsel or to compel counsel to limit the scope of their arguments to the evidence. Notwithstanding the fact that our judges are given the exclusive power to try questions of fact in equity cases, and that their experience in trials would be of great practical assistance to a jury, they are, in a majority of states, prohibited from expressing any opinion on the evidence to the jury, and in some states it is dangerous for them even to comment on the evidence. Instead of laying a firm hand on the proceedings of a trial, as do the English judges, and our Federal judges, and guiding the trial for the purpose of securing a just result, our state judges in many states are practically limited to acting as a presiding officer, without substantial power, except to rule on the evidence. As was said by Mr. Justice Brewer (*Patton vs. Railroad Company*, 179 U. S., 660):

“the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who, in our jurisprudence stands charged with full responsibility.”

As was said by Mr. Justice Gray, of the U. S. Supreme Court,

“Trial by jury in the courts of the United States is a trial presided over by a judge with authority not only to rule upon objec-

tions to evidence and to instruct the jury upon the law, but also when, in his judgment, the due administration of justice requires it to aid the jury by explaining and commenting upon and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination."

The power of the judge to set a verdict aside and order a new trial at the close of a trial or on appeal is a convenient way of removing the consequences of error after it has occurred, of locking the door after the horse is stolen. But it does not prevent the error's happening, which ought to be the first concern of the judge in the trial of an action at law.

In New York there is no lack of power in the judge to comment on the evidence or even express an opinion upon it, if he follows the rule laid down by Judge Gray and leaves to the jury the decision of questions of fact. There is, however, a popular impression that judges in New York do not have this power, and in many cases a singular unwillingness to exercise it. Judge Gaynor, when sitting as a judge in the Appellate Division in the Second Department, referred to this unwillingness in characteristic manner, saying (*Finnan vs. R. R. Co.*, 111 App. Div. 384):

"The appellant's fault-finding with the trial judge seems to be based on the notion that trial judges in this state are reduced to the humiliating position of having no right to say or do anything in a jury trial except to formally rule in monosyllables on questions presented by counsel; that they may do nothing to guide and control the course of the trial, or to restrain counsel and keep them within bounds and to the point, or even from taking an unfair advantage by prejudicing the jury by false suggestions, and the like. Horne Tooke told Lord Kenyon, before whom he was being sued, that his Lordship's only business was to help the tipstaffs keep order while the jury and counsel tried the case. But that extraordinary personage said it in good humor and altogether reprovingly, and to illustrate the independence of juries on questions of fact, and it was taken in that sense; while the serious and growing disposition of some in this state seems of late to be to actually reduce a trial judge to that position in the trial of civil causes, and leave counsel to do as they please. It would not be well for the administration of justice in this state if that purpose should prevail. When trial by judge and jury is reduced to trial by jury only, the uncertainties in the administration of justice will be increased tenfold. Trial judges in this state are under the law a light and a guide to juries. They may often appropriately even express their opinions on the facts to the jury in civil causes, provided they fairly leave the decision of the questions of fact to the jury, and frequently to do so."

Is it to be wondered at that in England, with its vast interests, with its chief city the financial and commercial center of the world, with its population of 40 millions of people, there are less appeals than in the state of New York with less than one-fourth of the number of the English population? Judge Gaynor undoubtedly stated the sound rule of judicial power over the conduct of trials in this state, and he also stated what unfortunately is true, that there is a growing disposition to reduce the judge to the position in which Horne Tooke tried unsuccessfully to place Lord Kenyon.

A very general cause of prolonged litigation with consequent delay in reaching its final determination is the statutory limitation on the powers of appellate courts to correct errors by a modification or reversal of the judgment from which an appeal is taken instead of sending the case back for a new trial. It often happens that some error upon the trial requires modification or reversal of the judgment and that upon the record of the case an appellate court can see that such is the proper disposition of it. But if the court is powerless to do anything but order a new trial, or if it has power and is unwilling to exercise it, it sends the parties back on their weary way to travel again the road of the new trial, the double appeal, perhaps only to be again sent back to repeat the experience. This was formerly necessary in New York, where, however, by statute, the powers of both the Appellate Division and the Court of Appeals have been increased so as to authorize the court on appeal to modify or reverse the judgment of the court below and enter judgment accordingly without a new trial. As, however, the Court of Appeals in many cases has no authority to review questions of fact, in all such cases the court is practically unable to exercise the power conferred upon it. A proposal now made and indorsed very generally by lawyers for consideration by the pending Constitutional Convention in New York is that a constitutional provision be adopted authorizing the Court of Appeals to review questions of fact in all cases appealed to it, and conferring on both the Court of Appeals and the Appellate Division power to award final judgment without new trial in all cases, if the court is satisfied that the record on appeal warrants such disposition. Such a provision would eliminate the necessity which now exists in a very large number of cases, of sending a case back for a new trial instead of the court's directing judgment in accordance with its view of the law and of the facts as shown by the record.

A typical, although perhaps extreme example of the inconven-

iences which may arise where the appellate court is unable or unwilling to modify a judgment and direct entry of a final judgment accordingly, is the celebrated case of *Williams vs. D. L. & W. R. R. Co.* which was litigated in the state of New York. In this case a suit by a brakeman to recover damages for personal injuries was seven times tried before a jury. After the first two trials the Court of Appeals having held that on the plaintiff's own testimony the trial court should have directed a verdict against him, the plaintiff changed his testimony, and with the testimony thus changed at last secured a verdict and a judgment. The court commenting on the case said,

"It frequently happens that cases appear and reappear in this court after three or four trials, where the plaintiff has changed his testimony in order to meet the varying fortunes of the case on appeal." (See "Treadmill Justice," by George W. Alger, *Atlantic Monthly*, Vol. 104, p. 696.)

Cases of this kind are, of course, extreme and exceptional. The possibility of them, however, should not exist, and they illustrate in striking fashion the consequences of a want of power in appellate judges or their unwillingness to exercise it in many states which, if it existed and were properly exercised would have put an end to such an interminable round of trials and appeals.

The disposition to minimize the power of the judge on the trial and on appeal, which has had such an unfortunate effect on the procedure of trials is undoubtedly due to the popular distrust of judicial power which has manifested itself in this country in the adoption of the elective system and of various legislative enactments limiting the power of judges in particular ways. The dependence of the judge on popular approval in order to retain his office is a constant temptation to him to evade the responsibilities which are properly his, by placing them on the jury, and this has undoubtedly resulted in an unwillingness on the part of many elected judges to exercise the power conferred upon them.

The true remedy for the delays and disappointments of our present system does not lie in increasing the number of judges. In New York we have 109 Supreme Court and Court of Appeals judges, or approximately one judge to each 100,000 inhabitants—leaving out of consideration, of course, the county judges, the judges of the City Court and of the various inferior courts of the state. In England and Scotland there are judges exercising powers corresponding to those of our Supreme Court and Court of Appeals judges numbering 49, or approximately one judge for each 840,000

of the population. In other words, New York has more than eight times as many judges in proportion to its population as has England and Scotland. If we include in our computation the County judges in both countries, there are in England and Scotland 137 judges or approximately one judge to each 300,000 population. In New York there are 186 judges, including the County judges, giving approximately one judge to each 57,000 of population. Owing to differences in the two judicial systems, these statistics do not afford a basis for accurate comparison, but they do indicate the essential fact that we have a much greater number of judges in proportion to population than England, notwithstanding its greater business and financial interest.

By continuing to increase the number of judges, we can, of course, continue to do in increasing volume, in the way in which we are now doing it, a great deal of judicial business which ought not to be done at all. Lincoln's advice to lawyers, "Discourage litigation," may well be applied to the policy of a state. If, with a greater proportion of judges as compared with our population than England, our court calendars are still crowded, and there are still complaints about the law's delays, should we not begin to try the experiment of discouraging litigation by returning to the English system by improving the character of our Bar, by giving the judges greater power and responsibility in litigation and freeing them from the ever increasing burden of legislative codes?

A burden cast upon judges and lawyers, and consequently upon the administration of law, in this country, which threatens to be overwhelming, is the steadily increasing volume of both written and unwritten law. In 1821, when all the law reports of the United States were comprised in 170 volumes, we find Judge Story lamenting the rapid increase in the mass of the law, and Kent, in his commentaries, spoke of the "multiplicity of law books" as "an evil that has become intolerable." The discussion of the project for codification of the common law which received great impetus at about this time was based in part on the assumption that the great volume of reports rendered codification inevitable. It is difficult to imagine what would have been the reflections of Story and Kent had they foreseen that the reports in the United States would reach in 1915 a total of something over 9,000 volumes or that the lawyer of New York in 1915 would have in his library more than 940 volumes of reports in his own state and 453 volumes of reports of the Federal Courts, to say nothing of text-books, digests, and the

reports of other states, and that he would add to his library in each year at the rate of 4 volumes for the reports of the Court of Appeals, 5 volumes of the reports of the Appellate Division, 5 volumes of the reports of inferior courts, 5 volumes of reports of the United States Supreme Court, 9 volumes of reports of the Federal Courts, or 28 volumes in all.

Senator Root has lately made a compilation of the law reports in this country, in which he finds that during five years ending December 1, 1913, the courts in this country rendered 65,000 decisions, in which opinions were written filling 630 published volumes.

In an earlier lecture I explained to you how the common law had grown and expanded as a law of precedent, and the significance of precedent in determining the law, and as an aid to judges and lawyers in administering the law. The multiplication of reports is indeed becoming an intolerable burden, not only to judges and lawyers in the first instance, but to litigants and ultimately to the public at large. No lawyer can now know or even refer to all the precedents on a given subject as could Story and Kent in their day. If he attempted to read all of the annual reports of his state and the Federal Courts, he would have little time left for the business of clients. Unless he knows well his legal landmarks, he will be in danger of becoming lost in a wilderness of reported decisions, often conflicting, sometimes overlooking previous decisions on the same subject and always progressively increasing in number.

This increase in volume of the law reports is, of course, due primarily to the vast increase in litigation, resulting in appeals to higher courts, whose opinions make the reports, but the real causes of their unwieldiness are the invention of stenography and type-writing, the multiplication of reports, digests, and legal literature of every type, with the consequent increase in size and elaborateness of lawyers, briefs, and finally the passion of the modern judge for exhausting his store of legal learning, and the time and patience of the reader at the same time, in each opinion which he writes. It is significant that the epoch-making decisions of the early common-law judges were models of brevity. The opinion of the court in *Shelly's case*, the famous case which decided that an heir took real estate by descent, occupies less than an ordinary page. The opinion in *Spencer's case*, which established the rule that the benefit of a covenant "touching and concerning land" passed to a transferee of the land was less than two pages in length. The opinion in *Slade's case*, which established the right to recover damages for breach of

special contract, was equally brief. Coming down to later times, the opinion of the House of Lords, in McNaghten's case in 1843, which established the modern rule relating to insanity as a defense for crime, occupies only four pages in the English reprint of the opinion. The opinions of Judge Shaw, many of them epoch-making in American legal history, were commonly two or three pages only in length, and they are notable for their clearness and accuracy. But to-day one may turn to volume after volume of the current reports and find decisions of no particular public interest, involving not a single new principle of law, which must needs be supported by elaborate opinions and copious citation of authorities. Principles relating to the law of contracts, or negligence, for example, which have been settled for at least fifty years, are constantly reiterated.

One may ask why write an opinion at all in cases which involve only questions of law, which are well settled, and thus add to the volume of legal literature, material which is of no real value from the point of view of legal history and scholarship. A partial answer is, of course, that litigants and their counsel are entitled to know the reasons for the decisions of the court. There is no reason, however, why both would not be willing to have these reasons given in concise memorandum form, and it is quite possible to prepare the memorandum in such form that it would accomplish its purpose, without giving to it any value or influence as a precedent. Unless courts set some restraints on the length and number of published opinions, it is inevitable that our present system of making the law reports the chief repository of our unwritten law will break down of its own weight. The alternative is either a gradual loss in the weight and force of precedent, and the substitution of rules or principles of theoretical jurisprudence so far as they are commonly accepted by the courts or codification. Either course would not be an un-mixed evil. But that they are very generally regarded as evils by lawyers cannot be doubted, and that the time is not yet opportune for such radical changes in our law would, I think, be very generally conceded.

Still more formidable is the mass of legislative law enacted annually in this country. According to Senator Root, Congress and the legislatures of the states of this country passed during the four years ending December 1, 1913, more than 62,000 laws. During the last five annual sessions of the legislature of New York that body has passed 3,583 laws, filling 11,110 printed pages. During substantially the same period, embodying a little more than the reign of the pres-

ent king of England, the English Parliament passed only 256 public laws, aggregating 1,602 printed pages. Last year the record of Parliament was 91 public laws, aggregating 483 pages as contrasted with the work of our own legislature, which passed 582 laws, filling 2,388 pages.

There is some difference in the legislative systems of the two countries to be taken into account, so that it is quite difficult to make an exact comparison between them; but it is substantially correct that the volume of legislation in New York is from three to four times as great as that of the English Parliament, although the population of New York is less than one-fourth as great as that directly affected by English legislation. And this is the result notwithstanding the vast interests of Great Britain and the fact that it is a great sovereign power exercising all the functions of government in its internal and external relations, whereas legislation in New York necessarily deals with only its internal affairs and with those functions of government retained by it under the Federal Constitution. To this overwhelming mass of legislation, poured out on the devoted heads of our people, may be attributed many of the existing evils of our legal system. It loads down our courts with litigation, it hampers them with a never ending succession of acts regulating and changing their organization, jurisdiction, and procedure.

What is perhaps even more serious, is that the practice of constantly adding new and changing old laws, many of which are never enforced, until the whole mass is beyond the powers of the human mind to grasp and comprehend, tends to bring all law into contempt, and to destroy the feeling of respect for law which must lie at the foundation of any adequate system of justice.

The evils of legislation in this country are due not alone to its quantity, but to its quality. The drawing of a legislative act requires very exceptional training, experience, and skill. A man who attempted to alter or repair a delicate and complicated piece of machinery without the assistance of a skilled engineer or mechanic, would be regarded as a species of lunatic; and yet we exhibit precisely this same kind of lunacy in the preparation of the great mass of our legislation. Practically no legislation can be enacted without affecting pre-existing law, written or unwritten, oftentimes both. The legislative draftsman, therefore, must know the exact legal situation which is to be affected by the proposed legislation, both historically and as a matter of existing law. He must know exactly

the end to be accomplished and how it can be accomplished, without enacting into law provisions which repeal or do not harmonize with law, intended to be preserved. This task requires wide knowledge and special training, and above all, deliberation and painstaking effort, methods which are all too seldom employed in drafting legislative bills.

The result is that a very large proportion of the legislation of the country is crudely drawn. The language used is vague and technically inaccurate; words and phrases of uncertain meaning are often used instead of those which have been interpreted by courts or have acquired by long usage a definite legal significance. The history, interpretation, and practical operation of existing law are too often disregarded altogether. The result is that the courts and lawyers are left to struggle with this confused mass of ill-considered and undigested litigation at the expense of clients and of the general public welfare.

The reasons for this monumental folly are easily discerned. To some extent they lie in the popular belief, more highly developed in this country, I believe, than in any other, at the present time, that every ill that the flesh is heir to can be cured by legislative fiat; but mainly because of certain fundamental defects in our legislative system.

Any member of a legislature may introduce bills, without regard to their form or substance, and all members of legislatures usually introduce bills on request. The consequence is that the first week of the legislative session finds an enormous number of bills introduced and referred to committees. To select two examples that are typical, in 1913, 3,922 bills were introduced into the California Legislature. In New York, between the opening date of the legislative session in January and the 25th day of March, 2,928 bills were introduced. It is often quite beyond the powers of committees to do the work of adequately considering and reviewing this mass of proposed legislation. If the purposes of the bills seem good, it generally results that they are reported out and that the closing days of the legislative session are taken up with the wholesale passing of bills which have never been the subject of careful study by any legislative agency.

The small quantity and generally excellent quality of English legislation is explained very largely by the fact that under the English parliamentary system no bill can be introduced as a matter of right, but only on the leave of the legislative body, which means

in the case of the House of Commons only on leave of the leaders of the party in power who thus acquire direct control over the form and substance of legislation. This system resulted in the permanent establishment in 1869 of the office of the Parliamentary Counsel, who, with an assistant and a clerical staff, does the work of drafting and revising all bills for public laws which are introduced into Parliament. There is thus a direct check on the amount of legislation, and through the expert aid of the Parliamentary Counsel and his permanent staff of assistants its quality is generally excellent and conforms to established legislative forms and practices.

In the past few years there has been a growing recognition of the necessity of improved legislative methods, which has borne fruit in the passage of acts in a number of states requiring all bills to be introduced in the early days of the legislative session, and for the establishment in connection with the Library of Congress and in several of the states, of legislative reference bureaus or legislative drafting commissions. A legislative research fund has been established at Columbia University for similar purposes. Such organizations can render expert assistance in legislation when it is desired and availed of; but our legislative problem cannot be fully solved without some authoritative control over legislation corresponding to that of the English system, by which the volume of legislation at any session of the legislature is checked, and all bills are required to be submitted to the scrutiny of the government draftsman.

No discussion of the subject of law reform should omit some reference to the subject of codification; that is, the enactment into more or less permanent legislative form of the rules and principles of the unwritten or common law. The notion of a legal code which should embody in precise written form all of the laws, so that he who runs may read, has always made its appeal to the idealist and the theorist.

The sentiment in favor of a general codification of our common law received its great impetus and reached its height in this country during the first half of the nineteenth century. Distrust of the common law as an English institution, naturally the subject of suspicion after the Revolution, the rapid increase in the number of law reports, the successful establishment of the Code Napoleon in France, all tended to prepare the public mind for the acceptance of the theories of Jeremy Bentham, the great English law reformer. Bentham, whose famous essays on law reform made their appearance and were widely read in this country from the revolutionary

period to the time of his death in 1832, was the determined enemy of the common law and the most celebrated and persuasive advocate of universal codification. A code he defined as a "body of law, from the respective parts of which we may each of us, by reading them or hearing them read, learn and on each occasion know what are his rights and duties."

Bentham was an extremist, without comprehension of the practical difficulties, and in some respects the impossibility of carrying into effect his scheme of reform. He ignored the influences and teaching of history, disregarded the certainty of new and essentially changing conditions to which any system of law must be applied. His theory that by legislation there could be enacted a complete and comprehensive code of written law, by the aid of which every man could be his own lawyer, has long since been abandoned. The most loyal and enthusiastic advocates of codification now recognize that a code, to be effective, must be limited to a statement of general principles, and that the work of interpreting and applying it must be left to the judges and the lawyers. Nevertheless, Bentham's writings have had profound influence, and there are few law reforms in the past hundred years which are not directly traceable to them.

Perhaps the most notable effort at codification in this country is the justly celebrated code of Louisiana, prepared by Edward Livingston. Livingston, who was of the famous New York family of that name, settled in Louisiana in 1804, and under the direct influence of Bentham's writings prepared the Louisiana Code of Procedure, adopted by the legislature in 1805. In 1824, at the request of the Louisiana legislature, Livingston had prepared a code of laws relating to crimes, punishments, criminal procedure, and evidence. This was only partly adopted by the legislature, but the work of Livingston, as a whole, has been generally and rightly regarded as a great achievement, marking him as a great legislator, possessing those qualities of mind which are essential to successful codification, and which were wanting in Bentham, notwithstanding his great powers of inspiring interest in the subject of law reform.

This program for general codification of the common law was destined to failure, for the simple reason that the enormous difficulties involved in reducing the entire body of the common law to written form, which should at once be just and comprehensive, sufficiently precise and at the same time elastic enough to meet future needs, greatly outweighed the inconvenience and occasional injustices of the common-law system.

The history of the Code Napoleon, as well as that of lesser attempts at codification, teaches us that codification comes only when the inconveniences of an existing system are so great as to induce both lawyers and laymen to be willing to endure the burden of preparing a code and adjusting themselves to it.

More or less comprehensive codifications were prepared in Massachusetts under the leadership of Edward Everett; by Salmon P. Chase, in Ohio, and David Dudley Field in New York; all of which failed of adoption.

Codification on a more limited scale in the form of a revision of the statute law, including the codification of the real property law and the law of trusts, prepared by a commission headed by James Kent, was adopted in New York in 1828. This followed three less noteworthy attempts at revision between 1786 and that date. Similar revisions of statute law with code additions took place in Pennsylvania and Massachusetts in 1836.

The codification of the law of real property and the law of trusts in New York raised new questions for settlement by the courts. The codification of the law of trusts especially, attempted in many particulars to wipe out the distinctions between legal and equitable interests, which were inherent in the nature of the subject, and it left out of account the teachings of the history of the subject. The result was that it required the decisions of courts and engaged the efforts of lawyers for at least one generation to answer these questions and to reduce the confusion produced by the codification to order and system. I think that on the whole the opinion of lawyers is that the benefits accruing from the codification of the law of trusts, for example, have just about been offset by the inconveniences and litigation which it has caused.

The movement for Codification of Procedure was inaugurated in New York in 1848 by the adoption of the Field Code, revised in substantially its present form in 1876. This code has been substantially copied in about one-half the states, with the results which were referred to at some length in the lecture on Procedure. A Short Practice Act was adopted in Massachusetts in 1851 and has been followed substantially in six states. Other states have continued with the Common Law Procedure, more or less modified by statute.

A more recent and more commendable movement for codification had its origin in the creation of the Commission for Uniform State Laws, appointed in 1892. The commission consists of representatives of each of the states, appointed by the Governor, who were

called together for the purpose of drafting and recommending for adoption by the various legislatures forms of bills "to make uniform the law of the different states and territories on various subjects on which uniformity seems practicable and desirable." The commission has continued its labors down to the present day, and they have been attended on the whole by general success. The reasons for this success are threefold, and I dwell on them because they point the way to all successful law reform by way of legislation. They are:

First. The commission has been made up of lawyers who are very generally men of high character and professional standing and they have availed themselves freely of the advice and assistance of experts in the particular field in which legislation has been prepared.

Second. They have attempted to codify only a comparatively small part of the whole Common Law in contrast to the more ambitious schemes of the early codifiers to reduce all law into a code.

Third. The particular portion of the law selected for codification has generally been that in which definiteness and certainty of the legal rule are more important than elasticity and adaptability to new conditions. This is particularly the case, for example, in the Law of Negotiable Instruments and in the Law of Sales of Goods.

The commission, since its organization twenty-four years ago, has now recommended eleven bills, including a Negotiable Instruments Act, a Warehouse Receipts Act, a Bill of Lading Act, a Sales Act, a Stock Transfer Act, and a Divorce Act, and others which need not now be mentioned. The Negotiable Instruments Act has been adopted in forty-three states, the Warehouse Receipts Act in twenty-eight, the Bill of Lading Act in eleven, the Sales Act in ten.

The history of the commission and the practical success of its work suggest the essential requirements of effective law reform. Law should be reformed by lawyers, for they have the knowledge, experience, and special training essential to the task of planning reforms and carrying them out, provided they are inspired with the sincere desire to correct the faults and abuses of an existing system.

In Bentham's time, lawyers were not inspired with any such desire, and it required the lash of his writings and his bitter attacks on law and lawyers to stir into activity the slumbering spirit of reform. To-day no such condition exists. The better element in the legal profession is not apathetic. The records of our various law organizations, the city, state, and national bar associations, show that there is an alert and healthy interest in the subject of law reform, and that it is none the less effective because intelligent and cautious. Our

experience with codification has taught us that experiments in law reform must be cautiously made, with deliberation and painstaking study of the evil to be remedied, and the methods to be employed in remedying them, and, above all, all reforms should be inspired by the desire to correct real and substantial abuses and not merely to satisfy the aspirations of theorists and doctrinaires to bring about the millennium in law administration.

If, in my occasional critical references to some features of our legal system, I have given the impression of any want of faith or belief in our legal institutions, I desire to close by correcting that impression. As a lawyer and a citizen, I am proud of our legal institutions and have unwavering faith that their future will be even greater than their past. In our legal system lies the assurance of protection of our lives, liberty, property, and happiness, and that of our children and children's children. No more sacred duty rests on the lawyer and layman alike than that of defending, maintaining, and improving it.

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