CODE REVISION IN MISSOURI

In a public address at Indianapolis some time ago, President Wilson said: "I am not one of those who doubt either the integrity or the learning of the courts of the United States, but I do know that they have a very antiquated way of doing business. I do know that the United States in its judicial procedure is many decades behind every other civilized government in the world; and I say there is an immediate and imperative call upon us to rectify this condition, because the speediness of justice, the inexpensiveness of justice, the ready access of justice is the greater part of justice itself. If you have to be rich to get justice, because of the cost of the very process itself, then there is no justice." What the President has said of the federal courts can be applied even more strongly to procedure in the courts of Missouri.

The civil and criminal codes of Missouri were, in the first instance, largely borrowed from the codes of the older states, our present civil code dating from the year 1835. Starting with two hundred and seventy-three short sections, including those relating to chancery practice, it has grown by amendments and additions to nearly one thousand sections, some of which are of great length and cover many subjects. In addition, our criminal code contains about five hundred sections. During the past eighty years these codes have, in the main, remained the same, with additions and amendments now and then as above indicated, but which have not always resulted in their betterment. Since their adoption, no general revision has been attempted, imperative as has been the need resulting from the changed social and economic conditions of the state.

Specific Objections.

Our present code of civil procedure is not wholly bad nor is it designedly vicious, but it is too rigid and yields itself too readily to the "sporting theory" of justice, invites delays and is full of pitfalls for the feet of the unwary. It gives undue importance to the record so that in many instances we have the spectacle of the court devoting its whole time and energy to a trial of the record, and not of the cause upon its merits. It allows too much piece-meal disposition of controversies. It involves or permits too many trials and too much retrial, especially as to issues of fact. In addition, it is freely charged that litigation costs more in Missouri than in any other state in the

Union. Whether this latter charge be true cannot be asserted from personal knowledge or experience of the writer, but it cannot be denied that our system strongly tends to the excessive and unnecessary accumulation of costs. It is certainly within the personal experience or observation of every practicing lawyer in this state that cases involving originally but small amounts or trivial matters can be, and not infrequently are, kept in court until the costs largely exceed the amount involved. This ought not to be possible under any system of procedure, for, referring to the words of the President, "if you have to be rich to get justice, because of the very cost of the process itself, then there is no justice."

Our constitution declares that right and justice should be administered without sale, denial, or *delay*, yet in our highest and final court in this state a litigant in an ordinary civil action cannot now expect a decision of his case in less than three years, and sometimes longer; and if there be a reversal and the case is remanded for another trial, and the whole torturous process required to be repeated, the time that he is kept in court, trial and appellate, may be and oftentimes is extended to six and even ten years and longer. This delay in many instances amounts to an absolute denial of justice. An actual case may be given as typical of many others. More than ten years ago, in one of the circuits of this state, an action was begun by an unlettered, penniless and aged woman for the possession of forty acres of unimproved land to which she claimed title by gift from the former owner with whom she had lived and whom she had faithfully served for forty years prior to his death. The proof as to the gift was overwhelming and thoroughly convincing and in fact has never been seriously controverted by the defendants, but upon one ground and another the case has been to the supreme court three separate times, the last appeal resulting in the case being reversed and remanded for a new trial, so that as far as the final determination of the litigation is concerned, the case is now just where it was when first begun, and under our system of procedure it is still possible to keep it in court indefinitely. The plaintiff is now nearly ninety years of age, and in the usual course of human experience can hardly expect to outlive the lawsuit begun by her more than ten years ago. Assuming the merit of plaintiff's claim, who would have the hardihood to say that the delay in this case has not amounted to a substantial denial of justice? But it may be claimed that this is

an exceptional case. The deplorable fact, however, is that it is not, but can be duplicated in the experience or observation of every reputable attorney of general practice in the state. In 1906, the City of St. Louis passed a law regulating the construction of billboards, yet for fully seven years it was a dead letter by reason of pending and continued litigation over same. In 1903, the same city passed what was known as the street railway mill-tax ordinance, yet the litigation to determine the validity of this ordinance was extended for considerably more than ten years. And so other cases might be cited, almost *ad infinitum,* for the books are full of them. The result has been a general loss of respect for the courts and our entire system of jurisprudence on the part of the public. This criticism is not directed towards the courts or judges, but against a system of court procedure under which such a condition of affairs is made possible.

The supreme courts of many of our sister states, with no larger working force and with as large a volume of business, keep up with their dockets and, assuming that our appellate court judges are just as able and industrious as those of our sister states, with an improved system of appellate procedure, our people may reasonably expect our appellate court judges to likewise promptly and finally dispose of all cases appealed to their respective courts. It may be true, as claimed by some, that the present congested state of the docket of our supreme court is due in part to court rules and custom which the court, of itself, has the power to change, and if this be a fact then it is hoped that the court will, in recognition of a serious condition and in response to the undoubted sentiment of the state, of its own initiative, make such changes in these rules, customs and procedure as will give all possible relief.

Notwithstanding the honest efforts of the judges of our courts, trial and appellate, to render just decisions, yet when we consider the prevalent delay, the unnecessary expenditure of time and effort and money, the hindrance of just rights through long-continued defensive litigation without substantial merit, the litigants who abandon their pursuit of justice through weariness or lack of means, the citizens who abandon their rights rather than incur the annoying and injurious incidents of litigation in the effort to enforce them, the emboldening of the unscrupulous in whose hands delay and difficulty and expense of litigation are weapons with which to force compromises without just grounds—when we consider all these incidents of our present

system of procedure in Missouri, we are bound to admit that thorough and radical changes in our judicial and procedural systems are required. Nor can the delay in the determination of cases in our appellate courts be remedied by merely increasing the judicial force. We have tried that expedient in the past, but ineffectually. The only real remedy is by reforming the system.

This article is not intended as a bill of particulars, hence one illustration only as to needed changes must suffice. Under our present code, appeals are unnecessarily cumbersome and expensive. Our appellate courts are burdened with voluminous records which they are unable to read in the time at their command and which, instead of aiding, seriously hamper and delay the determination of causes in such courts. It was stated in a committee report made recently by a member of the supreme court to the State Bar Association that in the cases appealed to that court the records averaged over two hundred and fifty printed pages of bare record, not including the printed briefs and arguments of counsel. Every practicing lawyer knows that the greater part of these voluminous records, except in the most exceptional cases, are wholly unnecessary for the proper presentation of the issues submitted to the appellate court for determination, yet under the provisions of our code permitting the filing of a bill of exceptions embracing a verbatim copy of all the oral proceedings in the trial court, the judges of the appellate courts are compelled to waste precious time in reading hundreds of pages of record to gather facts that could have been easily given in as many lines. Would not common sense dictate an amendment of our code whereby appellants shall be required to present to the appellate court only such matters and only so much of the record as is necessary for a proper understanding and determination of the issues submitted to that court?

In breaking away from the common law procedure, especially as to pleading, in the construction of our code and in the numerous additions and amendments thereto, we have made the mistake of attempting to cover by specific statute every possible contingency that may arise in a lawsuit. Such a course inevitably leads to the discovery of new contingencies and unanticipated results, requiring continual amendment and supplement. As a general proposition, the fewer statutory rules there are to create statutory rights intervening between a citizen's demand for relief and the court's judgment upon his demand, the better. The detailed provisions of our code create

a great number of statutory rights which the courts are bound to respect because they are the law, which litigants are entitled to demand because the law gives these rights to them. In some cases they may contribute to the attainment of justice, but in many cases they constitute a serious obstruction. Not infrequently, because of these inflexible statutory provisions, the courts cannot apply the rule of justice because they must apply the law. The energies of attorneys and clients are devoted to these statutory proceedings instead of being addressed to the trial of the case upon the merits, and the facilities for delay afforded by them naturally lead to innumerable defenses for the mere purpose of delay. The great volume and technical character of our code covering every step of the procedure from the issuing of summons to final judgment, has tended to breed a class of code lawyers, acute and skilful in baffling the efforts of honest men seeking to get their rights, and with apparently no conception of the fundamental principles of jurisprudence or of the high duty of the lawyer to secure substantial justice for his client. At their hands, with our code, justice is easily tangled in a net of form. The public estimate of the profession of law is lowered, public confidence in the administration of justice is weakened, and daily men suffer grievous wrongs in silence or yield to inequitable settlements rather than hazard the assertion of their claims in the courts. Referring again to the case of the old woman above mentioned—her petition, as last presented to the trial court, was in two counts, one in ejectment and the other to declare, determine and vest title. The count in ejectment was tried before a jury and the other, of course, before the court. The trial of the law count before the jury was had first and upon a verdict being rendered in favor of the plaintiff, judgment was at once entered upon same by the clerk without waiting for the judgment of the court on the equity count, which was not entered until some days later. But alas, plaintiff's attorney had overlooked the fact, and the court's and clerk's attention was not called to it, that safely stowed away in the one thousand and more pigeon-holes of our code was a statutory provision to the effect that the judgment on the one count must await the trial on the other, and for this oversight alone, the case, on the last appeal, was reversed and remanded and the old woman required to start on her weary round again.

Senator Root, late president of the American Bar Association, in speaking of procedure in the courts of the United States in a recent

address, said, "We share with England and her colonies a highly artificial and technical body of rules of evidence, such as obtain nowhere else in the civilized world. These rules afford most delightful exercise for intellectual acumen, but it is doubtful if they produce as good results as the simple methods which obtain in the trial of cases in countries that follow the course of the civil law." The fundamental disadvantage of the rules of evidence obtaining in Missouri, in common with her sister states, is that when strictly and technically applied they do not correspond with the instincts or the habits or the common sense of any plain, sensible layman in the world. Their strict application continually impresses litigants with a sense of unreasonable and unjust restraint, giving a feeling of being bottled up and prevented from telling the whole truth, and leaving a sense of not having been allowed to present their whole case to the court. Again says Mr. Root, "In the strictness and technicality with which we enforce these rules we go far beyond England or, so far as I know, any of her colonies. I think we stand alone among civilized countries in the obstacles that we interpose to the giving of testimony in the most natural way. How common it is to see a witness trying to tell his story, hindered and worried and confused by being stopped here and there again and again by objections as to irrelevancy and immateriality and hearsay, when what he is trying to say would not do the slightest harm to anyone and would merely help him to state what he knows that is really competent and material." And let those who would abolish entirely our statutory code and substitute therefor rules of court covering all matters of procedure, bear in mind the fact that these rules of evidence complained of, and which so seriously hamper the administration of justice in this and other states, are largely court made. Therefore, let not this sin, at least, or its continuation, be laid at the door of our legislature.

Space forbids any separate or extended consideration of our criminal code, but it may be said that the just and humane principle of law that every person charged with crime is, and should remain, clothed with the presumption of innocence until his guilt has been proven beyond a reasonable doubt, should neither be abandoned, changed or amended, but we should recognize the fact that we have long since reached the point where the criminal or the person charged with crime no longer needs protection from society or from harsh and inhumane laws and procedure, but where society needs and should be

given reasonable protection from the criminal. In the days of Jeffreys and at a time when, under the English law, there were scores of offenses punishable by death, many of which are now considered minor, there was good reason for many of the rules then designed as a shield and protection for the innocent, but which now serve no purpose but that of a means of escape for the guilty. The reason for the rule having disappeared, the rule should no longer be retained.

The great trouble with criminal procedure in Missouri, and in most of our sister states, is that, in our zeal to give persons charged with crime a fair trial, we have gone too far—so far, in fact, that in cases where the defense has plenty of money and able counsel it is very hard to convict, and then generally only after great travail and much expense and delay. Through the years, various provisions of law, as a rule wholly favorable to the person charged with crime, have been enacted by our legislature and generally at the instance of lawyers making a specialty of criminal practice, and the time is now right for their revision or repeal. We need a simple criminal code—one that is fair to persons charged with crime, but one that is also fair to the state.

Why Has Revision Been So Long Delayed?

It is always easier to define a problem than it is to suggest a solution, and, again, while the public may agree in general terms yet when it is attempted to embody these principles into concrete laws it is very difficult to so frame them that they will not meet opposition from some source or faction. Another deterrent has been, and is, the lack of political value in such legislation. Our legislators are prone to give time and attention to matters which attract public attention, either to themselves or to their measures, and are not inclined to give a proper or necessary amount of time to the construction and enactment of laws dealing with the minutiae of criminal or civil procedure. This is not intended as a reflection upon our Missouri lawmakers, for the same condition exists in every state and in the Congress of the United States; and the foregoing observation is but a statement of fact well known to all and freely acknowledged by legislators themselves.

Another reason has been, until the last few years, the apathy and lack of interest on the part of the general public. The average citizen, as concerns court procedure and his personal experiences therewith, has been generally like the boy who stumps his toe while running—he

pauses for a moment to nurse the toe, perhaps curses the stone a little, and then passes on, but leaves the stone still lying in the road. Intelligent laymen, however, are fast becoming aroused to the fact that a simplified and common-sense system of court procedure is not merely a matter of professional interest but is an economic and social problem of the gravest and most general importance.

Then again, courts and lawyers are proverbially conservative. They are slow to adopt innovations of any kind and are much inclined to continue to do things in the same old way, some freely avowing that if any material changes are made in our system of procedure they would be put to the necessity of "learning everything over again." That is, whilst the proposed changes might be good for the people yet they might be temporarily inconvenient for the lawyers.

There has been opposition from other sources, more or less active and potent, but the strongest and most effectual resistance to any and all reformation has come from that class of lawyers representing special business interests and, as concerns the criminal code, from lawyers making a specialty of the criminal practice. This opposition is wholly selfish and unworthy of our most honorable profession, but be it added, in simple justice, there are numerous and honorable exceptions to the classes mentioned. The editor of a leading St. Louis newspaper put it bluntly but not unfairly when he said, "Another reason why legal methods have not been brought up to date is that a small but extremely active section of the bar has opposed improvement. There are men who make money out of the law's delays. Some of them are helping large corporations to break the law; others are helping criminals to escape the penitentiary."

How Can a Reformation Best Be Accomplished?

Sporadic attempts have been made in years past, by the Missouri Bar Association, Judicial Conferences, individual lawyers and members of the General Assembly, to remedy conditions, but not until recent years has there seemed to be such concert of action on the part of our citizens generally as gives promise of relief. This relief could in some instances be given by our appellate courts if our judges but had the backbone and initiative to break away from precedents which, on account of changed social and economic conditions, should no longer control them. That our courts are beginning to throw off the shackles that have heretofore bound them is evidenced by such de-

cisions as that in the case of State vs. O'Kelley and Fitch, and others that might be mentioned. There are other conditions, however, which the courts cannot change, but from which the legislature, by statutory enactment, can and should give relief. There are still other conditions which cannot be changed or remedied save by constitutional amendment.

Some members of our profession present as a sure palliative for all the ills complained of, a proposition to clothe the supreme court with power to make rules governing all matters of practice and procedure in the trial and appellate courts, which shall take the place of all present statutory provisions. They frankly confess their inability to grapple with the situation themselves and would wash their hands of the whole business by "leaving it to the supreme court." Briefly, but fairly, their argument is this: That sessions of the legislature are held biennially and then only for a period of about seventy days; that a revision of the code in this short time is out of the question; that under the constitution the supreme court has a general superintending control over all other courts, and, of necessity, observes and passes in review the practice and procedure in all of the courts of the state in every variety of litigation, and is, therefore, more competent than any other body in our scheme of government to determine the practice and procedure which will facilitate the determination of cases upon their merits with the least delay and at the least expense; that unlike the legislature, with its hurried biennial sessions, the supreme court, being a continuous body, can amend rules and make new rules whenever the occasion may require; that the courts and the profession are held responsible for the unnecessary expense, delay and uncertainty of litigation, and should therefore be allowed to make the rules which govern practice and procedure, and that being held thus in public opinion to full responsibility they should be given corresponding power.

Other members of the profession, constituting, it is believed, a considerable majority, do not believe that the time has yet come, in this state, at least, when it would be wise to attempt so radical an innovation. They do not believe that our supreme court would be more responsive to any real or proper demand for changes in our codes of procedure than would our lawmaking body. In fact, they assert that the history of judicial procedure in this and other countries proves absolutely to the contrary; that courts and lawyers are

proverbially conservative and that most reforms and changes have come only at the insistent demand of the people; that our appellate courts, even as to matters clearly within their powers, have invariably been very slow to abandon or change any custom, rule or practice of long standing, however obsolete, cumbersome or ill-adapted it may have become; that the much heralded rules governing practice in equity cases promulgated a few years ago by the United States Supreme Court were the result only of an insistent public demand and after many years of agitation; that no lawmaking body has ever been so slow in responding to an unquestioned public necessity as was this court; that our state supreme court is now three years behind with its civil docket and that it would be unwise, under present conditions, to place this additional burden upon them; that the most practical course for those who really want relief from present conditions would be to agree upon and then secure the adoption by the legislature of some workable plan that will enable our supreme court to clear its docket before we give them any more or different kind of work to do; that the only reason we have not in the past obtained from the General Assembly desired remedial legislation is that, as lawyers, we have not first agreed among ourselves upon what we wanted, but have always gone before that body with a divided front.

And so the contention runs. But even in this controversy there is much of hope. Aggressive interest has taken the place of indifference and, with honest minds aroused and seeking the light, the right way will surely be found.

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