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HOW SHALL THE PEOPLE OF THE UNITED STATES OF AMERICA REFORM THEIR LEGAL PROCEDURE SO AS TO MAKE IT AN INSTRUMENT OF JUSTICE?

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THE PROBLEM.

There is a general feeling among the people of the United States that they are not securing justice under our present system for the administration of justice, and that the time for another great law reform is near at hand. It is not an unusual thing to hear such charges as the following: That the average length of a law suit, civil or criminal, is about three years; that most courts are from one year to five years behind their dockets, though this country has twenty times as many judges as England has; that, as a result of the failure of our criminal procedure, our country, in proportion to its population, has eight times as many homicides as Italy, nine times as many as Canada, thirteen times as many as Great Britain, and twenty times as many as Germany; that in both state and federal courts nearly fifty per cent of the cases appealed have been reversed; that over fifty per cent of the questions appealed have turned upon questions of pleading and practice (while in Europe new trials are unknown; and in England, since 1890, new trials have been granted in less than four per cent of the cases, and there has been no second trial for thirty years in a common law case and none for fifty years in an equity case); that in criminal cases especially failures to convict are largely due to perjury, suppression of testimony, dispersion of witnesses, manufacturing of evidence and bribery of jurors; that the real cases of litigants are often not presented for trial, because of mistakes in pleadings; that the expense of trials is so great that only the rich can afford them and the state could make money in damage cases by paying the amount of the judgments instead of trying the cases; that witnesses are partizan; that clients with good cases are often defeated, without their fault; that the situation has become

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so bad that the innocent often avoid the court room while the guilty flock thereto; and that as a result of these conditions the profession is full of shysters, ambulance chasers, police court hangers-on, petti-foggers, and the dishonest and unscrupulous. The people of the country realize these conditions. Members of the legal profession do not attempt to deny that they exist. All are looking for a solution. Some of the most distinguished members of the legal profession are the most conspicuous advocates of law reform. Legal and popular magazines have abounded with statistics as to the defects of our present system.

Because of the unanimity of the condemnation of our present legal system for the administration of justice and of the demand for law reform, this paper will not undertake to traverse this ground again, but, starting with the assumption that there is a need for law reform, will devote its time to a consideration of the causes of the defects observable in our present system and to proposing certain suggestions in the way of a solution of the problem of how to so reform our legal procedure as to make it an instrument for justice.

Before propounding a solution let us consider our problem a little further.

Most of the evils about which complaint generally is made, and to which reference has been made above, are evils connected with procedure and not with substantive law. The substantive law of the United States needs not reform so much as it needs codification and harmonization. If it in many respects is somewhat behind the times, it will soon catch up. The substantive part of our common law has always exhibited elements of growth and development. The history of the substantive law has shown it constantly in a state of change. It is a growth. It is an evolution. Its tendency is toward perfection. It is flexible. But legal procedure is rigid. Its tendency is toward imperfection. It grows, but its very growth is an imperfection. Yet even legal procedure when considered by itself needs no radical reform. The law of code pleading, when considered as a science, is well nigh perfect. Grant that cases should be tried on the theory of an issue, first formulated by attorneys, and no better instrument for forming such issue could be found, unless possibly in the old common law system of pleading. What has been said of pleading will also apply to evidence and practice, though perhaps not to practice so much as to evidence. Our rules of evidence are eminently fair and scientific when considered by themselves. Assume that attorneys must try cases and it is hard to think of making many changes in any of the rules of legal procedure. The truth of the above is demonstrated beyond peradventure by the report of a commission

of one of the states of the Union. The Governor of this state appointed a commission composed of representative judges, attorneys, and law teachers of the state to examine the rules of legal procedure which obtained in that state with a view to discovering any needed reform. Thereupon a report was to be transmitted to the Legislature to help the latter in the work of reforming the legal procedure of the state. This commission held session after session and carefully went over the entire subject of procedure, but after it was through with all of its work of investigation and discussion it could agree upon but two trifling recommendations to make in the way of reform—and one of these recommendations was the abolition of an appeal from an order overruling a demurrer! But when legal procedure in the United States is considered from the higher standpoint of justice to society, a different result is reached. It is then discovered that the rules of pleading, evidence and practice are not producing social results.

Practically all of the evils about which complaint is made and which have been catalogued above are the fault of trial attorneys. The length of the law suits and delays in trials, except for the delays caused by the practice of judges in writing long opinions, are the fault of attorneys, who use these as weapons to win cases. The reversals are due to attorneys, who either purposely or ignorantly get error into the record or secure new trials for technicalities. Attorneys are at fault in appealing cases which involve only questions of pleading and practice. Perjury, bribery, suppression of testimony and dispersion of witnesses are brought about by attorneys. The losing of meritorious cases because of mistakes in pleading, or in conduct of trial, is due to attorneys. The partisanship of witnesses is due to attorneys. The expense is caused by attorneys. If final judgments are just in most cases which are finally carried through all the steps of litigation and reported, it constitutes the miracle in the administration of justice in the United States; and is due largely to the noble work of the judges and to the excellence of the substantive law. The complaints about legal procedure do not touch the results actually finally reached in litigated cases, so much as they touch the difficulties to the litigants in securing such final results, the cases which are begun but never reach final judicial settlement, the cases which are never properly presented to the courts, the cases which are never begun because of dread of the system. The blame for this situation rests on trial attorneys.

It should not be inferred from what is said above that this article intends to convey the impression that in the United States all attorneys are bad and all judges are good. It is true that the judicial ermine does seem to have some effect upon the character of men.

The same man is more liable to be upright as a judge than as an attorney. Yet the complaint against attorneys is not a complaint against them personally but officially. The fault is in the system which farms out the administration of justice to private parties. It is trial attorneys as such who are the subject of criticism. The claim is not that all, or a large part of trial attorneys are bad as individuals, but that they are all bad as trial attorneys.

Still the attorneys of today in the United States are no worse as trial attorneys than the attorneys of the past. I believe that on the average they, as individuals, are of higher character than those of the past. I believe that substantive law has been, from the standpoint of justice, in a constant state of improvement through the ages. And I believe that there has been some such improvement in legal procedure and in the work of attorneys as trial attorneys. But we desire the work of legal evolution to go on, and I believe that to any progress along this line or to any reform that amounts to anything it is necessary, first, to agree as to what is the cause of our legal evils and then to decide what is the best feasible method of eliminating the same irrespective of who may suffer (provided it is not society). Make-shifts, patch-work, and temporary expedients will no longer do.

THE SOLUTION.

How shall the people of the United States reform their legal procedure so as to make it an instrument for justice on earth instead of a highly wrought, beautiful, but complicated, unworkable machine?

The writer would like to suggest the solution set forth in the following pages for the consideration of those interested in the reform of our legal procedure.

Place the administration of justice entirely in the hands of the State. Let officers of the State appointed by the duly chosen representatives of the people (perhaps according to the proposed California plan) decide the legal disputes of the people. If the administration of justice is not a matter for the State, what else can be? The State declares what shall be legal rights, defines what shall amount to violations thereof, and provides the legal remedies available. It should also administer those remedies.

How shall this reform be accomplished? By legislative action—preferably uniform legislation, but by as little legislation as possible. Everything but the plainest essentials should be left to the judges themselves.

Justice in the United States today is not administered by the State. It is administered by private parties. The truth of this statement ought to be self-evident to attorneys and judges. It has been almost proven already in this article by the fixing upon trial attorneys of responsibility for our wrongs of legal procedure. If any further proof is needed take a typical case, follow it through from beginning to end, and compare the work done by attorneys with that done by judges. Justice is administered by trial attorneys, as agents of those who employ them, and they are looking after their own and their clients' good, but not the common good. There is a thinly veiled fiction that attorneys are officers of the court, but that this is a fiction no one knows better than the trial attorneys themselves. Even these attorneys do not administer justice as a tribunal, commission, or committee. They are matched against each other on two opposing sides, as teams. The outcome depends upon the skill and endurance of the teams. Justice hangs upon the hazzard of a game—the game of legal procedure—the greatest game in the world! It is true that the state is represented at this game by judges and clerks, but these officers of the state are not present solely or even chiefly for the purpose of administering justice; they are present to see that the game of legal procedure is played according to the rules of pleading, evidence and practice. They are the impartial officials of the game. Justice in specific cases may generally ultimately be obtained, but it might as well be obtained by the playing of a football, or baseball game, or often by a game of cards!

What is wanted to reform our legal procedure is not the re-call of judges, but the re-call of attorneys from the actual trial of cases. Judges ought to be increased in number, so as to sit as a body of three instead of one, and should be appointed for life (subject to re-call in the event that the people should then insist upon a re-call). Only in this way shall we ever get judges who will uniformly rank high and be fit to perform the almost sacred duties of judicial magistrates. Attorneys should be relegated to private practice in name as they are in fact. They should not be allowed to put selfish bungling hands on the tools of legal procedure. Only in this way will it be possible to administer justice as a sacred duty instead of as a game of chance.

As matters now stand trial attorneys may be said to have come between the people and their agents—the judges and clerks of court. It has been charged that the political representatives of the people do not represent the people, because big business interests have come between the people and their representatives and procured those representatives to represent the big business interests. Whether this is true or not, it is true that trial attorneys stand between the

people and their judges and clerks. Perhaps judges and clerks are not acting for the attorneys instead of for the people, but they are not doing the work for the people which they should be doing. Trial attorneys have slipped in and appropriated this work for themselves without being appointed by the people to act for them. The way to reform all this is not to re-call the judges (at least not until they administer adjective law as fully as they decide upon substantive law and not until they are appointed for life), for they are not to blame for the mistakes of legal procedure; but to re-call the advocates who are to blame therefore and who have no business to be making the mistakes, for they have no business to be meddling with the legitimate work of the judicial branch of the State. This can be done only by denying to attorneys the right to try cases and by requiring of judges the obligation to try them.

"Every man his own lawyer," has been a popular slogan of the past, but popular as the slogan has been, the result desired has not been accomplished, because the obligation referred to has not been imposed on judges, and that result will never be attained until it has been so imposed.

Our legal procedure of the past has served a purpose, while the substantive law was in a process of development. But now that it has served its purpose it must go. It is now antiquated. It is not in harmony with present day civilization. Trial attorneys have unduly exalted it, largely because of their familiarity with it, until they often can see nothing else. They have forgotten that legal procedure is not an end, but only a means. It must not only be made a means again, but a better means than ever before, and one adapted to our developed substantive law. The only means thus adapted is that of public, or social, legal procedure.

REASONS.

(1) The greatest reason has already been given. Our present legal procedure is a failure and that failure is due to trial attorneys.

(2) Judges could adequately do the work of administering justice.

(a) There are many historical proofs of the wisdom and success of placing the administration of justice all in the hands of judges. The English system is noticeably tending in this direction. The Roman civil law as administered by Rome and by the modern nations where the Roman civil law obtains, especially in Belgium, gives the judges much of the power suggested herein. That finest flower of the Roman civil law—the ecclesiastical law—gave the judges almost

the identical power which is advocated in this article. The Hebrew law perhaps came even closer to giving the judges the power outlined herein. But we do not need to go to ancient times, nor to other lands, for precedents. In our own land today we can find abundant proof of the efficacy of this method of administering justice. It is found in our juvenile courts and in the Municipal Courts of Chicago and of many of our other cities; in the commissions which have been appointed by state and federal governments; and even in the submission of cases to arbitration. Parties in legal dispute who submit their disputes to arbitration are just as liable to get justice and more liable to get it quickly, than if they follow the regular course of legal procedure in this country, even though they submit their cases to men who are not lawyers. If they should submit their cases to arbiters who were learned in the law, would not they be liable to get better decisions? This is a dreadful indictment of our present system of legal procedure! It is the shame of the common law!

(b) The Program. The entire conduct of cases should be in the hands of the judges. Every step in the trial of a case from first to last, as in the civil and ecclesiastical law, should take place in open court under the direction and supervision of the judges. Each party should be bound to be in court, and no notice should ever be given by one to the other. No motions or orders should ever occur. Pleadings should be not for the purpose of forming an issue, but to inform the court and other party of the nature of the cause of action, or defense or counter-claim, and they should be submitted to a judge for approval before being admitted. These pleadings, though written, should be simple and informal, and could be drawn up either by a practicing attorney, or by the litigant himself, or possibly by the clerk or by a public attorney appointed for that purpose. There should be no demurrers, nor traverses; but a party should admit or deny, and the pleadings should be tried one at a time in order. A case started in the wrong court should be transferred. The judges should impanel the jury, and examine the parties on oath and also the witnesses. The proceedings should be mostly oral and the clerks should take minutes of the same. Any act required to be done in writing should be filed with the clerk. The judges should be supposed to know whatever the clerks know. The court should grant any relief, or defense, or cross demand which the law requires. There should be no appeal, but the higher courts should review the decisions of lower courts of their own motion, as in Belgium, or grant a rehearing on petition. A higher court should be allowed to take additional evidence and should render final judgment. A case should never be remanded. Judges should know the rules of evidence, but they

should not obtrude them into the court room. A violation of any one of them should not be a reversible error. A few necessary rules of practice for the guidance of the parties should be announced by the courts, but even these should be directory not mandatory.

These are the steps necessarily incident to a law suit and all of these could be taken by judges, as is proven by the fact that they have all been taken by them elsewhere.

(3) Attorneys are not needed in the work of the court room.

(a) The present rules of pleading, evidence and practice are largely useless. They are necessary only if attorneys administer justice. They would have no place—except perhaps in the back of the judges' heads—if the administration of justice were committed entirely to a tribunal of judges. The present rules of legal procedure exist for the attorneys and are so complicated, technical and uncertain that judges might often make mistakes in applying them without the advice of counsel. If attorneys were prohibited to play the game these rules would not be needed. The only rules that would be needed then would be a very few announced by the court to regulate the procedure of the court (directory not mandatory), and the court could certainly apply these without the assistance of attorneys.

(b) Susbtantive law has now become a wonderfully complete and fairly satisfactory system. Its various principles have been so thoroughly wrought out and applied that judges no longer need the assistance of attorneys even here as was once the case. That there are better methods than the research and arguments of attorneys for determining what are the true principles and what has been the development of substantive law has been abundantly proven by the work of some of the teachers in our law schools—as for example Wigmore, Pound, Williston, Holmes and Ames. But if the assistance of attorneys should be still needed for the correct discovery and application of the principles of substantive law there would be no objection to the continuance of the practice, in this respect, as of old. The criticism of attorneys does not touch their work in the field of substantive law—at least so far as they help to discover it, though perhaps a few of them are subject to criticism for selling their talents to persons who wish to evade it—but it touches their work in the field of legal procedure.

(4) Attorneys have no divine right to their monopoly of legal procedure.

There was a time in both American and English history when justice was administered without the assistance of attorneys. In the beginning of English history private parties administered their own justice in the form of self help and vengeance. Then the state

regulated to a certain extent this private administration of justice. Regulated vengeance and self-help were succeeded by the Anglo-Saxon ordeal and wager of law. These in turn were succeeded by the Norman wager of battle and jury trials. At length the attorney as an intellectual champion succeeded the physical champion of the wager of battle. Even after attorneys had their hands on the reins of legal procedure in England, the colonies in America were administering justice without the assistance of attorneys, because there were none. By the time of the revolution—after the English common law had supplanted the various systems of law (many of them more Hebrew law than common law) which existed in the colonies—the attorney came into his own in the United States.

Historically one of the chief reasons why attorneys have been able to retain their ascendency has been the idea of individualism, which swept over the world in Adam Smith's day and which has only recently begun to lose its potency. It will be noticed that throughout English history the tendency has been for the State to take over more and more of legal procedure and leave less and less of this to the control of private individuals. This tendency was arrested for a time by the doctrine of individualism. This doctrine has fallen down. It is seen now that the State must exercise functions not permitted by the doctrine of individualism, notably in connection with big business. Since the doctrine of individualism has failed, is it not time for the State also to take over all the work of administering justice just as it has assumed other functions? Should not the hands of attorneys be loosed from the reins of legal procedure? Should not the tendency toward government control and operation of the machinery of justice be allowed to go on until it is no longer a private matter in any respect?

Such is surely the trend of the times. Whether we will admit it or not, we are moving rapidly in the direction of placing all of the administration of justice into the hands of officers of the State. Specific examples of such trend are the creations of state and federal commissions, such as those to regulate public callings and pursuant to employer's liability acts, the agitation for compulsory arbitration, the creation of juvenile courts, the organization of municipal legal aid societies and the appointment of public defenders. Why not admit the inevitable and allow to be done at once and directly what sooner or later social pressure will compel to be done indirectly?

(5) But it will be asked: Do not parties have the constitutional right to be represented by counsel?

Our federal and state constitutions do contain provisions guaranteeing to the accused in criminal trials the right to be thus

represented. This is a relic of the times when the people and the government were two different things, and perhaps it is still appropriate so long as the government has public prosecutors who, because elective, think and act as though their business is to secure convictions. But in general such provisions are out of harmony with the spirit and genius of the age. The people have no reason to fear their own agents. A man who desires more than justice may prefer his own attorney, but it is better for society and for all criminals in the long run to have an impartial tribunal giving justice without fear or favor. With such a tribunal it would not be long before litigants and defendants in criminal actions would not care to have counsel. If parties should insist, either the constitution should be amended or the attorneys should be allowed to appear as counsel but only permitted to argue points of substantive law. Of course counsel could advise anyone outside of court and could prepare a pleading for him. At present, while no one can be represented in court by anyone else than an attorney, a party may always appear for himself. If the lumber of pleading, evidence and practice were all removed, except as it was handled by the court, parties would be only too anxious to avail themselves of this privilege. It sometimes seems as though attorneys, not as individuals but collectively, have realized that the way to get court business is to keep the rules of pleading, evidence and practice as involved as possible and in their own hands. So long as present conditions remain, litigants must have attorneys. Change these conditions, and attorneys will not be needed. The only way to change these conditions, however, is first to take the franchise of legal procedure away from attorneys.

(6) The remedy is not to appoint commissioners, who under another name shall do the work which judges should do; nor to establish legal aid societies for those who cannot afford attorneys to do a work that is superfluous; nor to appoint public defenders to neutralize and counteract the effect of public prosecutors, when if there was no public prosecutor a public defender would be neither needed nor desired. All legal signs point to a legal procedure administered by judges as the only successful means of securing justice.

RESULTS.

Placing the administration of justice in the hands of judges would primarily result in two things:

(1) The abolition of the technical rules of pleading, evidence and practice, as mandatory rules of legal procedure.

(2) The elimination of attorneys from the trial of cases and the relegation of them to purely private business.

Incidentally many other beneficent results—all of the reforms needed and demanded by the people—would follow.

(1) Expense would be reduced to a minimum. The expense to the litigants would be almost insignificant, because they would be saved the cost of attorneys and paper books on appeal. The expense to society would be reduced because, though more judges might be employed in the trial of a particular case, three judges would dispose of twenty times as many cases as come before one judge now.

(2) Delays would be eliminated. Time would no longer be consumed by attorneys by steps taken outside the court room. Juries would be impanelled, as in England today, in a fraction of the time which it now often takes. The slow examination and cross-examination of witnesses when opposite attorneys are trying to keep the truth back more than to secure it, the tedious and long-winded harangues of counsel, objections, motions, appeals, new trials and long opinions of judges would go to the limbo of things which have stood in the way of human progress.

(3) Cases would be tried on their merits instead of according to technicalities. People who are entitled to legal redress would not lose it because their attorneys did not know how to draw a good complaint or answer, or because they did not know how to introduce their evidence, or were not shrewd enough in appellate practice. There would be no reversals for tehnicalities. Men and women would win cases because of the facts, not because they knew of the most ingenious attorneys and employed them.

(4) Suits without merit would more and more cease to be instituted. Now the courts are the resorts of the wicked. Then the general tone of society as well as of the courts would be elevated, because the supposed instruments of justice could not be perverted to selfish and unlawful ends.

(5) The character and standing of juries would be improved. Prospective jurors would be treated with respect and consideration. Now many attorneys vie with each other in getting bad jurors, i.e., those who will favor their side of the case. Then every effort would be made to get the best jurors. Serving on the jury would be an honor, and good men would cease to shun such duty.

(6) Witnesses would lose their partisanship. Under the present system they enter into the spirit of the game and take sides with the side which calls them. If they were examined by judges who represented neither side, but society—including themselves—they would soon lose their partisanship. This would be especially import-

ant in the case of expert witnesses, whose testimony is now generally a farce and who generally are unjustifiably made a laughing stock.

(7) The judges—who already hold a surprisingly high rank, considering the nature of their training and the manner of their selection generally in the states—would hold a higher rank. They would be given greater responsibilities and with those responsibilities would rise to a higher dignity.

(8) Even the standing of the attorneys would be raised. The profession would be purged of a horde of so-called attorneys, who are now attracted to the legal profession because of the opportunities afforded them because of their license to appear in court. Among such are the shysters, ambulance-chasers, pettifoggers. blackmailers, police court hangers-on, criminal law sharks, jury bribers, witness fixers and makers, and any who will sell their talents to the highest bidder. All these would leave the legal profession as tramps leave a town which compels them to work. The standing of those who would remain in the profession would be raised. At present litigants do not choose attorneys (aside from reasons of friendships) because they think they are honest—except to their clients—but because they think they will win cases. This makes the honest attorney compete with the dishonest; and, with the opportunities afforded to the dishonest attorney by our present system of legal procedure, the inevitable though imperceptible effect is the lowering of the character of the bar as a whole. Remove this competition and the standing of the bar would be raised.

At present attorneys have a monopoly of the administration of justice, not only because no one can get a chance of securing justice without first getting an attorney, but because they have the right to say who shall be admitted to their ranks. The high grade law schools and a very few bar examiners are doing much to keep the unfit out of the legal profession, but in general the bar examiners and the attorneys, as their governing motive, think of the opportunity for the young prospective practitioner to make a living by any of the means afforded by the legal profession, rather than of the needs of society. The reform of turning the administration of justice over to the judges and of leaving the other legal work to the attorneys should be supplemented by raising the standards of qualifications of both judges and attorneys. Probably the unfit will never wholly eliminate themselves. The requirements for admission will have to be raised. Mental qualifications, such as required by the leading law schools of their students, will have to be required of all applicants. Moral qualifications of truth, honesty, unselfishness and social ideals only discoverable by an independent investigation will also have to be

required. And these requirements will have to be enforced, not by a committee of lawyers representing lawyers, but by a committee (mostly lawyers) representing all the people.

(9) Many other incidental evil effects caused by our present legal procedure would be eliminated. The trying of legal causes upon the theory of a legal contest causes positive as well as negative bad results. It tends to engender hard feelings among attorneys, litigants, jurors, witnesses and others who are opposed to each other in the trial of cases, thus aggravating the injuries which originally caused the law suit. All these positive evils would be abolished.

By such a reform as above outlined the people of the United States of America could, in my judgment, make their legal procedure an instrument for justice.