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## Technicalities in Procedure Civil and Criminal

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## TECHNICALITIES IN PROCEDURE, CIVIL AND CRIMINAL.<sup>1</sup>

JOHN DAVISON LAWSON.<sup>2</sup>

We are accustomed to divide our law into two parts; that which defines legal rights, and that which specifies the means whereby these rights may be maintained. The former we call substantive law; the latter adjective law, with its three branches, that of pleading, of evidence, and of procedure; the machinery of the law.

Now there is no great complaint in regard to our substantive law. Right and wrong are recognized by our courts and as new conditions arise new rights are judicially declared. The common law effected this when administered by broad-minded judges, and the common law was constantly supplemented by legislative enactments. The history of substantive law is one of growth and development. On the other hand, the law of procedure never kept pace with the law of rights.

*I. Civil Procedure.* At a very early day in England legal procedure ceased to develop. A new right might be conceded, but there was no form of action for it. Thus, in the reign of Edward I (1285) the Statute of Westminster II declared, "that whenever it shall happen in the chancery that in one case a writ is found and in a like case shown under the same law and requires a like remedy, no writ is found, the clerks of the chancery shall agree in framing a writ or adjourn the complaint to the next Parliament, where a writ shall be framed with consent of the learned in the law, lest it happen that a court of the Lord, our King, be deficient in doing justice to the suitors." But the next Parliament frequently refused to act, or did not act, and very soon English procedure settled down into a hard and fast form system.

There were probably sixty different common law writs in these days. As an example of the numerous actions and the numerous kinds of writs, take the action of *mort d'ancestor*,

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where the plaintiff claimed seisin of an uncle; and the action of cosinage, where the plaintiff claimed seisin of a cousin; and think of the various real actions, the writ of entry, assize, forcible entry, unlawful entry, unlawful detainer, all possessory, as they were called. And then the writ of *quoad deforcat*, the writ of dower, the writ of formdum, the writ of right, the writ of ejectment, the writ of waste, and the writ of dower *unde nihil habet*. In fact, as has been said, in these days—the office of the chancery clerk was like an armory. Every man who came to court had to choose his weapon, and the choice was very large; but he must choose only one, and he was not allowed to change it during the progress of the game, and the game was not to be decided even by the force of indisputable facts, but it was a contest of skill depending upon observing the formal rules.

In the meantime two attempts at reform grew up through the courts, first the legal fiction and second, the jurisdiction of equity. Nothing is, perhaps, more interesting to a student of law from the historical standpoint than the legal fiction which may be defined as an inference concealing, or affecting to conceal, the fact that a rule of law has been altered. New conditions arise, but the ancient letter stands in the way. Nevertheless, the courts allow these new conditions to be met, provided you can deftly conceal the fact that the old rule is being infringed upon.

But with all the fictions that could be invented, the common law courts could grant relief of only three kinds: they could order the sheriff to place the plaintiff in possession of lands; they could order the defendant to return chattels to the plaintiff or to pay their value; they could order the defendant to pay so much money to the plaintiff as debt or damages. They could not order a contract to be performed; grant an injunction to restrain an injury, declare a person's right or title, order one to make an account, appoint a receiver to look after property or to receive and collect rents, compel the plaintiff or defendant to answer questions before trial, or to disclose what documents he had in his possession that were material to the matters in dispute. Here arose the Court of Chancery—first an appeal to the King to do justice, “to the foot of the throne,” as it was said, to grant what the common law courts, on account of their deficient machinery, could not grant. The King first turned the appeal over to his chancellor, who in time constituted himself a

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court of equity. It was supposed to administer a code of morals rather than law, and to give redress out of the jurisdiction of the courts of common law. But whatever it may have done in its infancy, it had, before the seventeenth century, become even more technical than the courts of common law themselves, and its procedure had become even more rigid. By the end of the seventeenth century the chancery practice had outdone the common law practice in expense, delay and vexation. Bentham called a bill in chancery a volume of notorious lies. In his diary, written in 1745, John Wesley records:

"To-day I first saw that foul monster, a chancery bill. There was forty-two pages in large folio to tell a story which needed not to have taken up forty lines and stuffed with such stupid, senseless, improbable lies, many of them quite foreign to the issue, as I believe would have caused the compiler his life in any heathen court, either in Greece or Rome."

Delays in chancery were far worse than in the common law courts; the taking of all the evidence by interrogatories was tiresome and endless. The parties to a chancery suit were legion. It was required that every person interested must be made a party either plaintiff or defendant, it did not seem to matter much which. If some of these numerous parties died while the cause was going on, a bill of revivor was necessary to heal the broken circle, and this was liable to happen once or more a year where there were thirty or forty parties to the action.

In 1826 Lord Denman, Chief Justice of England, speaking in the House of Lords in favor of a bill to reform the procedure in chancery, thrilled the House by the recital of some cases which had come under his observation. The first to which he adverted was the case of *Ware vs. Horwood*. It had been in the court for nine years; had stood at the head of the paper for two years and a half, but had been constantly postponed, till the infant for whose benefit the suit had been instituted some twenty years before, died of a broken heart, on account of having been kept out of his property, a fund of ten thousand pounds, locked up in court pending the decision of Lord Chancellor Eldon.

The solicitor engaged in the suit thereupon wrote privately to Lord Eldon, stating these facts, and adding: "I have to contend against the bitter feelings of his relations." On this, Lord Eldon, struck with compunction when too late, sent for the

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solicitor to his private apartments, and at once noted down the minutes of his decree, which he might just as well have done two years and a half before—"before," said Denman, "the person for whose benefit it had been intended, and in whose favor it was drawn up, had perished in despair of obtaining it."

"Really," exclaimed the speaker, "after a history of the consequences of delay as this, and after seeing the ghostlike forms of the suitors that are daily hovering about the Court of Chancery, miserable, heart-wearied, heart-broken, their hopes blasted, and their fortunes squandered, the admirable description by the poet, Spenser, would appear no exaggeration."

and then he cited, with great effect, the well-known passage,

Full little knowest thou who hast not tried  
What Hell it is in suing long to bide,  
To fret thy soul with crosses and with cares,  
To eat thy heart with comfortless despair,  
To fawn, to crouch, to write, to ride, to run,  
To spend, to give, to want, to be undone.

The next case cited by Denman was that of *Collins vs. Nott*, which he stated thus:

"This was a question whether a surety paying off a bond, and not taking over an assignment, could claim as a specialty or as a simple contract creditor. The master decided for the specialty, and, in 1817, the case was argued before the chancellor. In January, 1823, six years afterward, when the chancellor was pressed for a decision, he had entirely forgotten it. The case was then re-argued at considerable expense to the parties and is still undecided."

The common law judges were particularly strict as to form of action. If the pleader selected the wrong form he would be non-suited; he tried another at his risk and was lucky if on the third trial he struck the right one. In none of the courts he tried would the judges consider whether or not an action would lie on the facts presented, but only that the particular kind of action would not lie. David Dudley Field, one of the commissioners who framed the New York Code, tells how under the old practice he nearly lost an important case.

"I sued," he said, "on a policy of insurance declaring in *assumpsit*. When the policy was produced at the trial, the defendant's counsel insisted that it had a seal, and the action should have been in *covenant*. There was plainly a mark on the paper as if it had been stamped with something, but the judge looking at it without his glasses declared he could see no seal and denied the motion of non-suit."

Five hundred years were to elapse from Edward I's day

before the conception of one single judicial instrument through which any right might be enforced and any wrong redressed, should arise. From the Statute of Westminster to the reign of Cromwell no attempt was made to reform legal procedure. The little Parliament finding great grievances, greater than could have been borne, it is said, proceeded to abolish what it thought it could, but against this it found arrayed the whole influence of the lawyers of the chancery, until the protector was forced to cry out, "These sons of Zeruiah are too strong for us." Carlyle, in his life of Cromwell, refers to this saying:

"It was merely by this attack on the lawyers, an attempt to abolish the chancery, that the Parliament perished. The lawyers exclaimed, 'Abolish Chancery,' the law of the Bible, deprive men of their properties and us of the learned wigs and lucrative long-windedness with your search for simple justice and God law instead of the learned Serjeant's law."

There was immense carousing in the temple when this Parliament ended.

It was not, however, until near the end of the eighteenth century that the reform of the law found an able and bold champion. This was Jeremy Bentham, a pupil of Blackstone. He began the movement which Lord Brougham took up, and succeeded in persuading Parliament to appoint a commission of great lawyers and jurists to consider the question of law reform. Changes were reported by this commission which were adopted by Parliament, and again in 1823, 1834 and 1838, similar commissions were appointed for similar purposes; finally, in 1875, the English Parliament, which up to that time had lagged behind the United States in efforts of actual reform, took its place permanently ahead. The English Judicature Act consolidated all the English courts into one, with different divisions. It unified the substantive law, abolished the difference between law and equity, simplified pleadings, repealed all the old forms of actions and gave to the courts authority to frame rules rather than fixing by legislation the practice of the courts. It made written pleadings absolutely unnecessary in all the most frequent causes of suits, requiring simply an indorsement of what the claim was about on the writ of summons.

Here is an example of all the plaintiff has to set out in writing in an action for breach of promise to marry:

"December 27, 1906, defendant verbally promised to marry plaintiff. August 3, 1907, he married another woman. Plaintiff claims \$1,000 damages."

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Here is a claim against a railroad company for personal injuries:

"Plaintiff claims five hundred pounds for injuries sustained by him on May 5, 1906, while traveling on defendant's railroad, as a passenger, from London to Bristol, such injuries being caused by defendant's negligence."

Here is a statement in an action to-day under Lord Campbell's Act:

"Plaintiff, as executor of C. D., deceased, sues for the benefit of Eliza, widow, and William, Margaret and Mary, children of the deceased C. D., who suffered damage from the defendant's negligence in carrying C. D. in its omnibus, whereby he was killed on January 10, 1907. Plaintiff claims \$5,000 damages."

I was a law student under the common law system, in Canada, and while I was a student, though the Common Law Procedure Act had been adopted in Canada substantially, yet most of the old forms were still in existence; but to-day Canada has a Judicature Act similar in its features to the act of 1873, and the profession there, like the profession in England, has been long enough away from the old practice and the old theories that none of them are startled at all by a union of civil and criminal remedies like the following: A few years ago, in a Canadian city, the master plumbers formed a combination for the purpose of bidding on plumbing work. When tenders were asked for plumbing, the secretary decided which firm should make the tenders for it. Only one of these was the real tender; the other two or three, as the case may be, were so high that they were sure to be rejected. But the one which was intended to be accepted was also much higher than it would have been in open competition. On the tender being accepted the secretary apportioned the percentage which was to go to the non-tenders. This had worked along for some time, the builders and owners grumbling at the way plumbing work had gone up, when, unfortunately for the association, a bid of this kind which was made on a public building was investigated by the government and the whole scheme laid bare. A prosecution was thereupon entered against the members of the association under a section of the criminal code prohibiting such combinations. There was little defense. The case was clear and the defendants were found guilty. The penalty was fine and imprisonment. When the verdict was rendered the counsel for the defense arose, stated to the court that that agreement had been submitted to counsel

and it had been deemed to be legal before the association was formed; that the members of it were leading citizens; some of them, most of them, were members of the church; one of them was a superintendent of a Sunday school; that all of them had not the slightest idea that what they were doing was against the law; that they regarded it merely as business and a fair method of getting good profits. They therefore asked the judge, in consideration of this, to be satisfied with inflicting a fine, and they pleaded that their clients being respectable citizens, should be spared the ignominy of imprisonment. At the close of this appeal the judge announced that he would defer judgment until the next day, and added that he would like to see the counsel for the defense in his private room on the adjournment of court. They appeared there an hour later: four or five of the leading men of the bar who had been retained by the defendants. The judge addressed them like this: "I was very much impressed with your plea in behalf of these gentlemen. I could see very well how they may have believed that they were not transgressing the law, and how they may have acted only in accordance with their ideas of business energy. I understood you, however, to say that they are now convinced that what they did was wrong and illegal, and that the profits they made in this way were illegal also. But I hear not one word about returning these profits to the unfortunate victims. Please tell your clients that confession alone without restitution makes a very small impression upon my mind. If before I enter court to-morrow morning these defendants place in my hands the amount which experts for the Crown have stated was more than a fair price, I shall look very favorably upon their plea for mercy. This is all. Good day."

A few minutes later counsel were closeted with their clients, to whom they related the conversation. There was much consternation. "What if we don't do it?" said one. "I can tell you," said the leading counsel, "if you don't do it, it means the penitentiary. It all depends on that little man who has just spoken to us, who will to-morrow morning take his seat on the bench and deliver sentence, and I am as sure as I stand here that if you have not put in his hands at that time every cent the evidence shows you have received through the combination, to the penitentiary every one of you will go, besides a heavy fine. There is no appeal and no power under heaven can save

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you." There was not much waiting after that. One of the counsel personally described to me how all through that night the expert accountants supplied by the Crown attorney were going through the books of the association with the secretary and ascertaining the name of every man for whom any plumber belonging to the association had done any work during its existence, and when court convened at noon next day the counsel arose with a great bundle of certified checks which he handed to the judge and which he assured him were made out to every man for whom any member of the association had done work during its existence. Thereupon the judge complimented the counsel upon their action, told the defendants they had done all they could do to atone for the breach of the law, and sentenced them to a moderate fine for that breach. But the next day dozens of people, small householders who had built houses, tenants who had made repairs, great contractors and owners who had erected large buildings, received unexpectedly through the mail a check, large or small, as the case might be, for money which had been stolen from them without their knowledge by the illegal association.

I can imagine some of us regarding this as rather arbitrary. It did not strike my legal friends over there, who told me about it, as being so, because they were accustomed to one tribunal doing its work completely, and can anyone deny that this was justice, speedy and cheap?

Reform of procedure in the United States dates from the adoption of the New York Code in 1848, the work of three commissioners appointed by the legislature. This code was substantially enacted the next year in Missouri and California, and subsequently enacted by many other states which are to-day designated code states. These code states at this time are about thirty in number; and the Common Law states, that is, those in which the common law practice prevails, though modified more or less, about twenty.

The leading ideas of the author of the New York Code were a simple form of action for all rights, whether legal or equitable, a concise statement of the substantive facts and those only, of the cause of action, and a joinder of actions and parties so that there might be in one proceeding a complete determination of all the controversies between the parties. But it was the lawyers trained in the common law pleading that had to

apply the new code, and it was common law judges who had to interpret it. Neither can be said to have accomplished his part in carrying out the spirit of the framers of the code. The lawyer without a very clear view of either its principles or its objects and with the conservatism for which our profession is noted, soon began to use the words and phrases of the old pleadings, until in many states the new pleadings instead of being simple statements of fact in ordinary concise language, became intricate and complex systems of special pleading. The judges, many of them with a hereditary hostility to reform, "stuck in the bark," so to speak, spent much time and labor on forms and technicalities until, in the opinion of more than one writer, the reformed procedure instead of simplifying procedure, became in the long run even more technical than the old.

The fact that we have not gotten away from the common law procedure is shown in our law schools, where in code states a course of common law pleading is considered absolutely necessary to a proper understanding of code procedure. That this is not so in England, appears from the statement of one of the lecturers in the English Inns of Court, who declares that an English lawyer to-day has no more need of a knowledge of the extinct common law procedure than he has of the judicial procedure of the Assyrians.

The all-important requisite to the vindication of the rights of the individual citizen is a court of justice able to do justice and to do it cheaply and promptly. A cumbersome and expensive legal system will repress and weaken even the Anglo-Saxon's instinct for law and right. That it is not designedly cumbersome and expensive will not matter much in the result. If the individual has cause to suspect the competence or fairness of the tribunal, or if the delay or expense of procuring a judgment is too great, he will stifle his sense of legal right and self-respect and submit to injustice rather than incur what to him appear to be worse ills. The proper and necessary system of jurisprudence is, therefore, that which will enable the litigant to have his cause fully and fairly tried with the least possible delay and expense.

This we do not have in any part of the United States. It is worse in some states than in others; it is worse in the state than the federal courts, except it may be in equity cases involving patents and copyrights.

We received from England with its common law, the pro-

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cedure and practice of its courts. The technicalities and uncertainties and delays of the English law half a century ago were something which it was hard for a layman to understand. You remember how Dickens satirized the Court of Chancery in *Bleak House*, and the celebrated case of *Jarndyce vs. Jarndyce*, which had outlived generations of chancellors and lawyers and litigants. In Goldsmith's delightful *Citizen of the World*, an Englishman takes a visiting Chinaman to Westminster Hall, the then seat of the courts. He tells him that he has a lawsuit there which he has been on the point of winning for ten years. His lawyer tells him that he has Littleton and Blackstone strong in his favor, and there are no less than fifteen cases in the reports exactly in point on his side. Unfortunately Coke and Hale are against him. The Chinaman cannot understand why a case should be decided on what someone else has decided before. His friend explains that it is in order to consume time, for the more time that is taken up in considering the subject, the more difficult it is to arrive at a result. Just then the attorney comes up and informs the friend that his case is adjourned for another term, whereupon the Chinaman suggests that they visit next the lunatic asylum.

But Dickens' satire and Bentham's learning, and Brougham's eloquence, and the work of later English law reformers, have abolished this, and for thirty years English justice has been certain, speedy and cheap. Between the years 1826 and 1874, five commissions of great lawyers and judges were appointed by the English Parliament to examine into the state of the law, and to report how the evils of delay and uncertainty and expense could be cured. When English law reform began in 1826, there were innumerable courts within whose conflicting jurisdictions suitors were often stuck. In 1873, the thirteen English courts were consolidated into one high court of justice with both lay, equity, original and appellate jurisdiction, with county courts below it for the smaller cases, and the House of Lords above it for appeals in cases of great importance. During the same period the old technical writs and forms were abolished, and to-day even in the High Court, written pleadings are not required, but the parties may appear in person and orally state to the court their complaints and defenses.

But while this has been going on in England, what have we been doing in America? In 1848, the New York Code of Pro-

cedure was passed with the object of simplifying pleading and practice. It was in advance of the English system of that day. This code was very soon substantially adopted in Missouri and a number of other states which have since been known as code states. But from that time until the present, we have done practically nothing; and the legal procedure of states like Illinois is the procedure of England in the time of the first George. Our code states practice is not much better, and hardly anything has been done in the matter of reducing the number of courts, abolishing appeals and doing away with technicalities.

The judicial system of all our states, both in the organization of courts and methods of procedure, is archaic. In Missouri, we have, outside of the federal courts, five kinds of judicial tribunals, namely, the Justice Court, Probate Court, Circuit Court, the Court of Appeals, and the Supreme Court. Nearly all of these may be called upon to re-examine the decisions of the others as to the merits of the case, as to the methods of procedure in those courts and as to the machinery for taking the appeal. In England there is no such thing as appellate procedure, the reports do not contain any decisions on the subject, for if a case is in one court it is in every court for any purpose that may be required. On the other hand, ten of the volumes of the decisions of the Supreme Court and Courts of Appeal of Missouri show that nearly twenty per cent involve points of appellate procedure. In late volumes of fifty-three decisions of the Supreme Court, and ninety-seven of the Court of Appeals, twenty-eight are taken up in whole or in part with the mere technics of obtaining a review.

Appeals are provided for in the higher courts of justice in England, but they are granted only when the decision of the trial court is open to reasonable doubt; and there are new trials granted in England, but only when the decision below, in the opinion of the court, appears unquestionably wrong. In this country, new trials are granted in about forty per cent of the cases appealed, and every case tried may be appealed. Hundreds and hundreds of new trials are granted in this state every year; no one can tell how many. The English Court of Appeals, having jurisdiction over a population of thirty-two millions, grants on an average only twelve new trials a year, and these are all upon the merits of the case, not on technical points. In the United States nearly one-half of the cases which are re-

versed and sent back for another trial, are not because the judgment below was wrong on the merits of the case, but because of some error in the procedure, some mistake in running the judicial machine. What would we think if other professions and trades did as badly as this; if, for example, one-half of all the concerts given in this country had to be given over again because the musicians had gotten out of tune or had ignorantly played the wrong piece, or one-half the coats and collars and boots and shoes made in our factories had to be made over again because of defects in them which made them worthless, or one-half of all the trains which left your Union Station here had to come back after a whole day's run because they had started out on the wrong track?

But it is when you get past mistakes in appellate procedure, when the litigant has satisfied the Appellate Court that all the machinery of appeal has been properly worked without the semblance of mistake, that he encounters the real thing in the game of justice, for he has now to defend every move in the trial court and show to the satisfaction of the appellate judges that everything was according to the rules of the game. The multiplicity of courts is not the worst of the administration of justice—a far greater and more outrageous and crying shame is to be found in the way our Appellate Courts decide cases which come before them on technical grounds, and without any regard at all to the vital question—the rights of the parties, and the merits of the case.

There are right and wrong methods of doing everything, and it is advisable that the former should be adhered to, so that loose practice may not be encouraged. But it hardly accords with the popular idea of justice that right should be defeated, and wrong prevail, through mistake or ignorance. Procedure, not evidence or justice, seems to be the pivotal point upon which the success or failure of a case principally depends. The right or wrong is entirely overlooked by both lawyers and the judges; the manner of engineering a case through the greatest number of courts being the primary object that engrosses the legal genius of the country. An ounce of procedure is more effective with courts than a pound of evidence.

At the close of an address made by myself some months ago at a public gathering, a well-known lawyer, one of the oldest and most respected members of the St. Louis bar, rose and said:

"Under our present practice, no matter how just the verdict might have been below, no lawyer could guarantee or be sure that his case would not be reversed on appeal to the Supreme Court."

II. *Criminal Procedure.* But all the evils of the civil law procedure are of small importance compared to the effect of these evils upon the administration of the criminal law and the punishment of crime. Just as it is in the civil courts, every criminal case in this country must go through, in some states, two courts, in others three courts and sometimes four, the trial court and appellate courts. In only one of them—the trial court—is the guilt or innocence of the prisoner ordinarily the subject of examination, the time and learning of the appellate courts being taken up in examining the machinery of the first. This right of appeal is unlimited. It matters not that, on the trial, the proof against the prisoner was clear and incontrovertible; that to the minds of the judge, jury and spectators, the correct verdict had been arrived at, beyond the shadow of a doubt; he is allowed to appeal, even though there is nothing to appeal about, and to invent reasons which everybody knows do not exist.

In England there has never been such a thing as a general appeal in a criminal case. The verdict of the jury is final. If there is anything to be said after that, the application is not to the courts but to the Crown. The Crown officers consider the case on its merits, and if there is any reasonable doubt of the prisoner's guilt, commutes or pardons, as the case may be. The last Parliament created a court of appeal, but appeals can only be taken of leave and not of right.

But the verdict of the jury and the sentence of the trial judge, what do they amount to in the United States if the prisoner has money enough to engage lawyers to exhaust the resources of legal technicalities to save him? A good illustration of how the criminal lawyer regards a mere verdict of a jury in a criminal case, is found in a story told of a well-known criminal lawyer in an adjoining county to mine. He was defending a man for murder, and after a very exhaustive trial lasting many days, during which he had made hundreds of objections to evidence, and ended with a passionate appeal to the jury, the jury returned a verdict of guilty; whereupon the prisoner broke down and began to cry. "What in the world are you crying for?" said his lawyer. "Because I have been found guilty, and

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"I am going to be hanged." "Tut! Tut!" said the lawyer, "that's nothing; why, the lawsuit has just begun."

All the technicalities of the civil law are completely lost in the labyrinth of criminal law procedure and its technics. As said recently by a federal judge, the criminal procedure which we have in our courts to-day,

"instead of speaking to us of the present time, takes us back to the time of the Stuarts in England. We abolished all the savagery of the old English common law of crime, but we have kept right along the procedure and refinement which the English judges devised to save men from the vengeance of that savage code. If we go back to the time of the Stuarts, the great body of crimes were political and religious and were mainly prosecuted for political ends. All that has been done away with. We have long since passed the time when it is possible to convict an innocent man, and the problem which confronts us to-day is whether we can convict a guilty man."

In this country to-day, society is demoralized; the old respect for law is disappearing, crime is triumphant for the reason that it has become the rule of action with our appellate courts, that the penalties consequent upon the commission of a great crime may be escaped by a criminal, because of the unintentional committal by the prosecution of an error of procedure.

The reports of our judicial decisions are crowded with examples of this. Let me cite you a few. Don't you think that Goldsmith's Chinaman would have been astonished if he had been told that a murderer escaped punishment because sometime in the course of the proceedings the clerk of the court had, in affixing the seal to the writ, moistened it with a sponge instead of following the old, the well-established, the constitutional method of licking it with his tongue? Yet such a decision would be no more absurd than scores of cases decided within the past few years by some of our American courts.

Let me cite a few of these:

Case 1. A was convicted of murder in the first degree. His conviction is set aside because the foreman of the jury, in writing the verdict, spelled first, "fust."

Case 2. S was convicted of the murder of E. The Supreme Court reversed the judgment because the indictment was not properly drawn. It read that on a certain day S "did feloniously, purposely and with premeditated malice, kill E by firing a Colts revolver loaded with gunpowder and leaden balls, which he, S, then and there had and held in his hands." "We cannot see," said the hair-splitting tribunal, "that the pistol was

shot at E; it may have been fired into the air or at a flock of birds. Nor can we see that E was hit; he may have been a feeble man who died of fright at the discharge of the pistol, for anything the indictment contains."

Case 3. L was convicted of murder in the first degree for killing A, but the Supreme Court gets hold of the indictment and finds that, after describing the wound as having been inflicted by stabbing, it charged that from the effect of this wound, A did instantly die, and they set aside the conviction because the indictment said that A did "instantly" instead of did "then and there" die.

Case 4. C was convicted of murdering L by stabbing him in the left breast. The Supreme Court, without examining the question of his guilt or innocence, ordered a new trial for no other reason than that the officer who copied the indictment had written "brest" instead of "breast."

Case 5. L was convicted of murder. The Supreme Court reversed the case because the record did not say that the prisoner was present at his own trial. But was he? O yes; it was the clerk's mistake; no one had intimated that he was not, but the court would not condescend to ask about it.

These decisions are not from one state, but are scattered all over the country, north, south, east and west. That I am not quoting from obsolete cases or reciting what our American courts used to do, let me present a case decided as late as 1905. *State vs. Woodward*, 191 Mo., 167. The facts were very simple. The prisoner was indicted for murder. The evidence of the state showed that the prisoner and one P were in a pool room; that they had a quarrel; that a scuffle took place between them after which the prisoner picked up a club, and in the language of a witness, gave him a "hard lick on the side of the head," which was heard by all the persons in the pool room. The deceased fell, never recovered consciousness, and died in thirty-six hours. The prisoner, called in his own behalf, said the deceased was going to hit him with a billiard cue, and he struck him on the head in self-defense. The jury found him guilty. His counsel appealed to the Supreme Court for a new trial on the ground that the indictment was defective. Now, had the indictment been according to the form used to-day in England and in all its colonies, it would have read like this: "The grand jury charges that on the 28th day of January, 1904, in the County

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of P, C. W. did kill and murder one P, against the peace of our Lord the King, his Crown and Dignity." Now there would not have been much chance to make anything in the nature of a defect out of a plain statement like this, but listen to the Missouri information or indictment (and the indictment in most of the states, for that matter, follows about the same form), which follows the forms of the days of the Tudors and which charges exactly the same thing, but in rather different language:

"That G. W. and C. W., late of the County of P and state of Missouri, on the 15th day of January, 1904, at the County of P and state of Missouri, did then and there, in and upon the body of one E. P., then and there being unlawfully, wilfully, feloniously, premeditatedly, on purpose, and of malice aforethought, make an assault, and with a certain dangerous and deadly weapon, to wit, a club, which said club was then and there of the length of four feet, of the breadth of two inches, and of the weight of 10 pounds, and which said club the said G. W. and C. W., then and there in hands had and held, the said G. W. and C. W. did then and there unlawfully, wilfully, feloniously, premeditatedly, on purpose, and of their malice aforethought, strike and beat him, the said E. P., at and upon the right side of the head of him, the said E. P. with the club aforesaid, and inflicting on and giving to him, the said E. P., in and upon the right side of the head of him, the said E. P., one mortal wound, which said mortal wound was of the length of four inches and of the breadth of two inches, of which said mortal wound the said E. P. from said 16th day of January, 1904, the year aforesaid, in the county aforesaid, until the 18th day of January, in the year aforesaid, in the county aforesaid, did languish, and, languishing, did live, on which said 18th day of January, in the year aforesaid, the said E. P., in the county and state aforesaid, of the mortal wound aforesaid, died; and so L. L. C., prosecuting attorney, upon his official oath as aforesaid, doth say that the said G. W. and C. W., him the said E. P., in the manner and by the means aforesaid, wilfully, unlawfully, feloniously, premeditatedly, on purpose, and of malice aforethought, did kill and murder, against the peace and dignity of the State."

The Supreme Court examines this document, which one would imagine covered everything that could be said on the subject and a good deal more, and reverses the case and orders a new trial on the ground that it does not clearly show, but leaves it to inference and conjecture, whether the mortal blow was inflicted with the club.

And in a later case it was decided that an indictment was defective which stated that the offense was committed "against the peace and dignity of state," instead of "against the peace and dignity of the state." (State vs. Campbell, 210 Mo., 202.)

Where did the courts discover such a ludicrous system as this? They found it in old English judicial history where, in the struggle between the Crown and the people, or between the Catholic throne and the Protestant citizen, or vice versa, the courts of law, the only body in any way independent of the Crown, took advantage whenever they could of all the refinements of technics and casuistry, in aid of the victims of political and religious prosecutions.

In the Life of Lord Chancellor Campbell several instances are related by him (when he was on circuit in his early days at the bar) of the efforts of the judges to save prisoners indicted for capital crimes. He says that the common law rule laid down by the judges that there could be no larceny of anything connected with the soil, was framed by them to avoid the conviction and hanging of poor fellows who from the highway plucked a vegetable or a fruit from the adjoining land; and he relates a case he heard where a man was tried for stealing horse-hair and the evidence showed that he went into a stable one night and cut off the horse's long, bushy tail, which he sold for the hair. The court held that if the jury would find that at the time the horse's hair was cut off he was tied to his manger by the halter, the prisoner would be entitled to an acquittal, as this would be a finding that at the time of the severance the hair was affixed to the freehold. But not since 1827 has an indictment been held bad in England because of such mistakes in matters of form as these I have quoted, because the English law, being no longer bloody, requires no such construction as this to shield its victims.

But our American appellate courts have brought to the demoralization of the enforcement of law, another extraordinary principle which never obtained in England, because England never had any appeals in criminal cases, viz., the doctrine of presumed error. A case comes before the Appellate Court, and the record shows that something has been said or done in the trial below which the Appellate Court thinks is not according to the rules of the game. Now, because it is easier to find error and presume prejudice than to examine the record as a whole to ascertain whether substantial justice has been done, and because they are greatly overcrowded with work, they have adopted the summary method of presuming prejudice whenever error is found. The result has been to make them courts simply for correction

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of errors, ordering retrial after retrial in the lower courts until an infallible record is produced, or litigants are worn out or dead.

Years of this in this country has made the administration of justice a contest, not a trial. As Professor Pound, in a notable address made before the American Bar Association in 1906 upon the causes of the popular dissatisfaction with the administration of justice,<sup>1</sup> points out, the sporting theory of justice, the instinct of giving the game fair play,

"Is so rooted in the profession in America that most of us take it for a fundamental legal tenet. But so far from its being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel presents it, to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record," rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations." It prevents the trial court from restraining the bullying of witnesses, and creates a general dislike, if not fear, of the witness-function, which impairs the administration of justice. It grants new trials just to give the parties a chance to play another inning in the game of justice. It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, what do substantive law and justice require? Instead, the inquiry is, have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play. The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors, in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it.

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<sup>1</sup>Proceedings of the American Bar Association, 1906, pt. I, 395 ff.

JOHN DAVISON LAWSON.

"Thus the courts instituted to administer justice according to law are made agents and abettors of lawlessness."

This is going on every day in every part of this land. Judge Amidon, a federal judge, in an address before the Minnesota Bar Association a few months ago, told this to the assembled lawyers:

"Our administration of the criminal law has broken down. It is an unworkable machine. I know we convict men and send them to the penitentiary, but I state it here as a fair statement of the administration of the criminal law in America, that if a man has the means to employ counsel so as to make a fight, as we say, in the majority of cases, he can escape punishment for crime. The trial can be so protected and enmeshed in such a complication of pleading and evidence as to result in the majority of cases in error which, under this pernicious doctrine of presumed prejudice, will nullify a conviction."

I think that we are open to the reproach that of all the callings and professions of this country, the legal profession is the only one that in the last century has learned nothing and forgotten nothing. One turns from the reading of the Missouri case referred to above (*State vs. Campbell*), with the feeling that we have not advanced one step in criminal judicial procedure since the days of Queen Elizabeth. I have shown you what the English indictment is, and how, since the year 1827, no such decision as this has been made in the English courts.

If in other lines of learning and practical affairs there had been the same conservatism, if you please to call it that, we would still be using the sedan chair and the coach of Elizabeth's day, while other countries were using the street car, the railroad train and the automobile; we would still be using the hand type setting and the hand press of the time of Benjamin Franklin, while our neighbors were using the typesetting machine and the Hoe press; and we should still be using the special messenger and the horse express of the Georges, while other nations had adopted the telegraph and the telephone.

What do we see as the result of this? First, we see a great lack of confidence in the courts by all those who wish to be governed by the law, and a large confidence in them on the part of law-breakers. How much our courts are distrusted as instruments for enforcing the law, take the enforcement of the state law against liquor selling on Sunday in the largest city of the state. This has been accomplished solely by executive officers, the governor and license commissioner, appointed by the gov-

ernor and to whom the legislature had given absolute power. The only hope of the opponents of this law enforcement was to get the courts to take a hand in the matter, but the Supreme Court having decided that the license commissioner had exclusive power, and the courts had nothing to do with the question whether a license was properly revoked or not, the contest was at an end. If any way could have been found to get the matter into the courts, you may be sure that we would have had injunctions and new trials, until the executive arm would have been paralyzed. The federal statutes give the Postmaster-General absolute power to prevent the mails from being used for defrauding the public. These fraudulent concerns shut out of the mails are petitioning Congress to take away this power from the Postmaster-General, and to give it to the courts. They fear the Postmaster-General very much; they fear the courts very little. Executive boards and commissions with summary and plenary powers and freed from judicial control, are becoming more and more in this country the only swift and certain means to a prompt enforcement of our statute law.

The man on the street has very much the opinion of the law to-day that Solon expressed more than two thousand years ago, when he said that laws were like spider's webs which catch the small flies, but through which the great flies break.

There is a strange dislike in our appellate courts to any interference with the game. Our legislatures, backed by a strong public opinion, have never taken up the matter, and gone to the bottom of the subject, but occasionally they have tried their hand at some kind of a reform. More than fifty years ago the legislature of Missouri enacted that no "indictment shall be deemed invalid, nor shall a trial or judgment be stayed or altered, for any defect or imperfection which did not tend to prejudice the rights of the defendant upon the merits," but when this statute was brought more than twenty years ago to the attention of the Supreme Court, what do you think the court said? It said that it could not have been the intention of the legislature to entirely abolish the old criminal technicalities. "To give so liberal and latitudinous a construction to this clause would undoubtedly destroy many if not all of the forms which have been hitherto observed. It would be allowing the prosecution to make a plain and concise statement of the fact constituting the offense without regard to mere technical phrases and

forms." Now, you would say that in passing this statute this was exactly what the legislature did intend. But one has to read the constant struggle made by courts to resist all law reform, whether on the criminal or civil side, to understand that this is not an unusual way of looking at it, but simply the historical temper of judicial officers when law reform is attempted. It is more than twenty years since this decision was made, and many a prosecuting attorney has told me that he has more than once tried to turn the appellate courts from the consideration of technical defects in an indictment by quoting this section of the statute which is still on our statute books, but he has never succeeded in getting the court to take any notice of it.

Second. We see a great increase in that crime which more than any other crime seems to be particularly protected by legal technicalities, namely, the crime of homicide.

Third. We see the rise of lynch law until it has become our national crime, a disgrace to our citizenship and a stain on our good name in every part of the civilized world. I do not justify lynch law, but I say that it is the protest of a people ordinarily law-abiding, but to whom the condition caused by the lax enforcement of our criminal law by our constitutional courts has become intolerable. They see the jails crowded with untried and unpunished prisoners, and criminals out on bail who have been tried more than once. They see that murder and violence are increasing, and they ask why it is that crime is increasing and criminals are going unpunished. They say, "What are our criminal courts for, if not to punish crime; and, if they cannot punish crime, what is the use of them?" They become at last so convinced of this, that, whenever a crime which particularly shocks them is committed, they do not wait for the court's slow and uncertain methods, but they constitute themselves a court whose code knows no technicalities, whose decrees are not appealable, and whose orders are promptly carried out under the nearest tree. The cause of the failure of the law is not in the law itself. It is written in the statute book, as you well know, that the murderer shall be hanged. Across the ocean, in that land whence our criminal law came, justice is sure and punishment is swift. For seventy-five years in England, in Ireland, in Scotland, in the Colonies of the British Empire scattered all over the world, among peoples of all races and of all colors, no man's life has been taken by what we call Lynch Law. In the United

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States, "Judge Lynch" executes more people every year than do all our judicial tribunals. Yet almost the same penalties are provided in both countries. The difference is only in the administration of that common law; and because there is justice, and here machinery, which seems to be the primary object of professional efforts, comes the reason that the law, which in Great Britain is an object of reverence and regard, the protection of the weak, the foil against the strong, the hope of the innocent and the terror of the guilty, is in the United States, the shield of the criminal and the despair of the defenseless—a hissing, a byword and a reproach. And for this reason—because the failure of the criminal law has been brought about by these methods—the most cultured and widely circulated magazine in this country is forced to say that "the failure of criminal justice, which makes room for mobs and lynching, is a greater disgrace than even the savagery of the mob."

The public mind is at last becoming stirred, and when those things which now occupy the public stage, the regulation of public utilities and public corporations shall have been satisfactorily settled, I look for just as great a turn in the direction of the reform of our judicial machinery. It is significant that President Roosevelt, Governor Folk and several other executives have within the past four years advocated a statute on the lines of that recommended by the Committee on Law Reform of the American Bar Association. Of that committee I have the honor to be a member and a brief statute has been adopted by it and is now before Congress. It is in these words:

"No judgment shall be set aside or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

And the framer of this brief and pointed amendment to our law of procedure is now the President of the United States—Judge Taft.

In a late case the Supreme Court of the United States says in an opinion written by Mr. Justice Holmes:

"The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common

law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." *Paraiso vs. U. S.*, 207 U. S. 372.

Above the figure of Justice, blindfolded and holding the scales, these words should be inscribed in golden letters in our appellate courts.

A commission of jurists should be appointed by Congress and the legislatures to examine the whole question, as has been five times done in England since 1826.

Great praise is given to-day to those executives who fearlessly endeavor, to the extent of their powers, to enforce all the laws on our statute books. Such men are entitled to praise, but unless they are all good laws and unless the means of enforcement are simple and sure, the public benefit will be only temporary. A higher claim to public gratitude will that president or governor have who shall bring about such a reform as I have endeavored to show we so sorely need. May I close in paraphrasing the words which Brougham, the great English chancellor and law reformer, closed his speech in Parliament in introducing his first bill for law reform:

"It was the boast of Augustus—it formed part of the glare in which the perfidies of his earlier years were lost—that he found Rome of brick and left it of marble; but how much nobler will be that president or that governor's boast, when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence."