"The Law Catches Up With The Times"

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Speech

of

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Over seven centuries ago, King John at Runnymede set his unwilling hand to the Great Charter of English Liberty. Among other things promised this—"to no one will we sell, to no one will we deny or delay right or justice."

King John probably never meant it and soon repudiated it, but he had set forth the ideal toward which English-speaking people are ever striving—that justice shall be swift and simple and reasonable in cost.

From the year 1215 to the administration of Franklin D. Roosevelt is a long time—and the ideal has not yet been achieved. But when he was Governor of New York, Mr. Roosevelt showed a lively interest in King John's unfulfilled promise. He obtained a commission to investigate the administration of justice in that State. The result was the creation of a permanent law revision commission to keep the law up-to-date and a judicial council to supervise the courts and keep them up with their work.

The President brought to Washington the same zeal for simple legal procedure and for speedy justice that he had demonstrated in his home State, and in spite of the more dramatic and immediate problems that faced him, he has steadily urged the need of law reform.

Cummings an Advocate.

The shaping and carrying out of such a reform he placed in the hands of his Attorney General, Homer Cummings. In private life Mr. Cummings had advocated a more swift and simple procedure for the courts. A long and practical experience enabled him to know what was practical and workable by way of remedy, as well as to locate the evils. This gave congressional leaders confidence in his advice.

Many important reforms have come about in the last five years in which Attorney General Cummings was the moving spirit. In addition to an extended attack on the crime problem, the success of which has been universally acclaimed, he went to the front for the measure which gives the Government the right to intervene in litigation between private parties whenever it involved the constitutionality of Federal statutes, so that the Government can always be heard to defend when a law of Congress is under attack. There was also the measure which prevented any single Federal judge from granting an injunction which would nullify an act of Congress. That measure requires that three judges sit in such a case, and permits direct appeal to the Supreme Court from their decision. The first

juvenile delinquency act for the Federal system has just been passed. It takes those of tender years out of the usual criminal procedure.

But the chief reform is the simplification of the court procedure for hearing civil cases—cases such as those in which any of you may at any time become involved. What was wrong with our Federal system of legal procedure?

Followed 48 Systems.

The first difficulty was that it was not a system. There were 48 systems. Each Federal court tried to function by using the practice of the State in which it was sitting. This meant that in some States the Federal courts were following some such common law practice as we inherited from Great Britain. That had become so involved in fiction and technicality that even the lawyers could not understand it. In other States the Federal courts were conforming, more or less, to legislation which reduced practice to a code, or a practice act. Some of them were very complicated, all were rigid and highly technical. But even this produced confusion, for the Federal courts were required to conform to the practice of the State "as near as may be." And how near that would be depended on the notions of the judge. The Federal courts, therefore, almost conformed to almost all kinds of practice.

The result was that the Federal courts were all tangled up in their own red tape. That is a common failing of courts. But there was confusion and conflict in Federal courts of a rather exceptional kind. A study of the work of the Federal appellate courts for several years has reported that of the points in controversy on which Federal courts ruled, almost half, 49.8 per cent to be exact, were disputes over procedure.

Think of the waste of time of the courts and the cost to those who had the misfortune to be in litigation when the lawyers devote half of their time—not to what the decision should be—but to how a decision should be reached. You could not make much progress if you spent half your time arguing over the road maps and only half of it getting somewhere. Certainly the American legal profession was capable of devising a legal procedure which would be more swift, more certain and more reasonable than that. Yet the profession had abandoned such hope, calendars of courts were congested, thousands of cases were waiting for trial. This meant that people were being delayed in getting justice.

Delayed justice, to those of slen-

der resources, is justice denied. And after trial higher courts reversed many cases and sent them back to be tried all over again, not because the result was wrong but because the wrong kind of procedure had been taken. These useless expenses, long waits and meaningless technicalities exposed the courts to criticism, the legal profession to ridicule and the Government to reproach.

Simple Remedy Devised.

What was the remedy which Attorney General Cummings induced the Congress to apply? It was simple—so simple some people thought it would not amount to anything and others — always with us — thought it almost revolutionary. The remedy was to put the full responsibility for a system of practice upon the judges themselves. The Supreme Court was authorized to prescribe rules of civil procedure for the United States District Courts.

For years the American Bar Association and other groups of lawyers had been going to Congress to get such a law. They left with Congressmen learned briefs, mostly too long for reading in one Congressional term. Now Congressmen are as anxious as anybody to see a smoothly functioning legal procedure. But they want assurances, in simple and short terms, that they are not getting a gold brick done up in lawyers' Latin phrases. Congress had forward-looking but practical men as chairmen and as members of its committees to whom such measures fell, and it passed the bill within 90 days of the time Homer Cummings began publicly to advocate it. It was promptly signed by the President and became the law of the land. The American Bar Association long recognized the need, long advocated the bill, but had discharged its committee and had given it up as a hopeless task. This hopeless task Homer Cummings accomplished.

This plan of putting the responsibility for procedure upon the judges had been tried in one branch of our law and had worked well. All controversies in court are just lawsuits to the layman. But the lawyer, influenced by the history of the law, divides them into actions at law and suits in equity. Congress had long before given the Supreme Court power to make rules to govern equity cases, and the court had made wise use of that power. Under its rules Federal equity and admiralty practice had become the most encouraging example of law practice in which tricks and technicalities had the least chance to defeat

justice. The Supreme Court's own record of liberal, progressive and effective use of the rule-making power in equity and admiralty matters gave the background of confidence necessary to the success of this proposal.

Supreme Court Acts.

The Supreme Court accepted this new responsibility and set to work to create a system of civil procedure which would be uniform, simple and non-technical and yet definite enough to be a real guide to the various steps in litigation.

An able and experienced committee was set up. It was headed by William D. Mitchell, who had won distinction as Attorney General and as Solicitor General. Former Senator George Wharton Pepper, the eminent lawyer who heads the American Law Institute, was its vice chairman. Charles E. Clark, dean of Yale Law School, was its reporter. The members brought to the service of the court a wide range of talent and experience. The Department of Justice, the bar association, individual lawyers, scholars in college posts—were canvassed for ideas and suggestions.

This committee, after three years of study, recommended 88 rules and the court approved 86 of them. Chief Justice Hughes, on December 20, 1937, sent the rules as approved by the court to Attorney General Cummings, who in turn transmitted them to the Congress. It interposed no objection, and these rules became law.

The result is that the conduct of a lawsuit in the District Courts of the United States is governed by 86 rules. Now 86 rules may seem a good many. People outside the law know that most troubles of the individual and of the country would be avoided if they would obey only 10 simple commandments. But the lawyers have never been able to achieve such sublime simplicity in their codes. For example, the New York civil practice act, itself considered something of an accomplishment in reform, has 1,578 sections. And on top of this the New York Supreme Court adopted 301 court rules to try to explain what the 1,578 sections mean. Then the New York courts have written thousands of pages of opinions to tell what the 1,578 sections, as expounded by the 301 rules, mean or don't mean. But the Supreme Court of the United States by these 86 simply stated rules replaces for the Federal courts volumes of complicated and often contradictory rulings on procedure.

The spirit and purpose of these short and simple rules is to give litigants a prompt, fair and inex-

pensive trial on the merits, regardless of technicalities.

Lawyers' Attitude Hopeful.

How will these rules fare in actual practice? The attitude of the lawyers, who are the men who will use the rules, is a hopeful sign. Some of them, of course, are annoyed because all the law they knew was a few technicalities and those have been repealed. Some others, no doubt, still survive who would consider it a calamity if procedure were so simple it could be understood by the layman, and cease to be a mystery legible only to the legal profession. But these are few—and their influence is failing.

All over the United States mature and experienced lawyers have been meeting, going to school as it were, for long sessions, to study, discuss and learn the application of the new practice. They welcome release of their energies from trifling practice questions so they can give their efforts to the real problems of their clients.

Wise lawyers know that in the long run to charge clients for vexatious and useless effort reacts to discredit the legal profession. They know that the profession can have no worse advertising than a client who has been nearly ruined by winning a long lawsuit—not to mention the poor client who lost. The intelligent bar knows that the adequacy of court procedure as a method of settling controversies is on trial, that failure of courts to provide simple, non-technical justice at a reasonable cost will certainly result in removing many cases to administrative bodies as the payment of injured workmen was taken from the courts and given to workmen's compensation commissions. So the great majority of lawyers welcome the new practice.

More doubtful, perhaps, is the attitude of some of the district judges. Most of them will welcome the freedom from technicality so that they may get at once to the heart of the controversy and do substantial justice. In 1921 about 75 per cent of them were recorded as in favor of giving rule-making power to the Supreme Court. A few of the minority—a very few—may obstruct this reform with restrictive interpretation of the new rules. Some few of them still regard a lawsuit as a game in which the lawyer chases a client in one hole and out another. Almost unconsciously such minds will get up new technicalities to take the place of discarded ones. This tendency would be sharply disapproved by an outspoken bar, by public opinion and by sharp rebukes from the appellate court.

Influences States to Reform.

While these new rules operate only in Federal courts, their influence is not so confined. In many States forward-looking members of the bar have long been trying to get legislatures to intrust greater control over the rules of litigation to the courts themselves. In some States such powers when extended were used only timidly or carelessly. Those who seek simplified legal procedure now have an example of adequate, courageous and wise use of rule-making power which will probably be the controlling influence in the development of American procedural law for some generations. The movement is already beginning in several States.

Under these new rules the trial of a lawsuit in Federal court should be a pretty straightforward piece of business. There is no need to go around Robin Hood's barn to get to the heart of the disagreement. Delay is reduced to the time that is really necessary to prevent either party from being taken unawares. Merely vexatious moves have no place in the new practice. A trial should be a search for truth, to lay bare the facts, and the forthright lawyer should put to disadvantage one that would conceal evidence, or win by trick or technicality.

We Americans apply our best ethics in our sports—where a foul play is more a failure than defeat itself. Maybe—I think these rules offer hope of it—we can get our lawsuits lifted to the same plane of good sportsmanship. We are traveling more hopefully in that direction because of the lift given to this long delayed reform by Homer Cummings. He has helped the law to catch up with the times.

We must not, however, fall into the smug attitude that all has been accomplished. We have not yet attained the perfect system of justice—indeed it is more than likely that there never will be such a system. Abuses are always creeping in. One bad precedent spawns a bad brood. The seeker after justice still finds too great a burden of expense—cost of advice as to his rights, cost of assembling and producing proof to convince the court of his claims, and cost of advocacy. To hold justice at a high price is the same as selling justice.

Fostered by Harmony.

There has been much to do in our country lately about disagreements and discord between branches of our Government. I have a peculiar relationship and an obligation to all three branches. I have found the greatest satisfaction in my professional life in work before the

Supreme Court as a member of the executive department engaged largely in the defense and interpretation of acts of the Congress. From such a vantage point I can appropriately bear witness to the American people that this most far-reaching reform in Federal legal procedure since the foundation of our Government has been achieved by co-operation to an almost unprecedented degree between all of the three branches of their Government. The executive department advanced the proposal to turn over the rule-making power to the Supreme Court, the Congress delegated this power, which had always heretofore been withheld, and the Supreme Court contributed its prestige, experience and bold thinking to the task.

The law reform has established a pattern of co-operation between the three great departments of the Government and vindicated a technique for achieving procedural law reform which is available for further steps as the need will from time to time appear.

Our Government in each of its branches must be dedicated to the ideal set forth by Brougham in the House of Commons, a difficult ideal —a still distant ideal—but an ideal which every law student should learn by heart. He said:

"It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be our sovereign's boast when he shall have it to say that he found the 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."