The Evolution of Reforms in Procedure

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In unfolding the records of the past for a glimpse at the history of ancient jurisprudence, the eye can trace the lines of progress back to the days of early Rome. Its development is the history of civilization. The legal embryo of the dark ages is the stately palm of modern days, whose leafy mantle o'erspreads the entire civilized world. The more ancient means of redress known to the law were insufficient and hampered by numerous difficulties. Justice was oftentimes robbed of its effect by popular whims and technicalities, so that it is not surprising that its early development was slow. Traditionary legends and superstitious uses abounded, entwined about the legal plantlet, a parasitic network that sapped much of its early life.

But under these adversities its existence continued as if reserved for the accomplishment of a noble mission. Man, in the nineteen centuries that are past, has wrought in himself a marvelous change.

From the nomadic wanderer, the untamed savage, and the barbarous man-hunter, a sober, industrious, peace-loving people has evolved. The change has been almost imperceptible.
The mild agencies of moral and intellectual development have been steadily at work; eliminating the baser elements of his nature. So gradual and slow, yet so sure has been the progress of development that even the indomitable Darwin with his mooted theories of evolution, is on principle practically sustained. But with man in his primitive state there never was a time when some form of procedure and process for securing equity and justice did not prevail. Superstitions and strange fancies were the ancient moulders of jurisprudence. Yet through it all shone the beacon-light of justice, as a star of hope for every liberty-loving, progressive people. Reverence for law and order is inherent in man. The "wager of battle" the "hot-iron test," and numerous other means of trying offenders are now dead to the world. Some even doubt the origin of the present system in such obnoxious customs and usages. But, in those days, such tests served their purpose as effectually as modern jurisprudence serves the needs of to-day.

Time and the development of industry created new demands, frequently demonstrating the necessity of changing the old
for the new. It was at this juncture that the great Justinian came to the front with his code of written laws, eradicating many of the more objectionable features of the old law. His code was practically the first of its kind. It embraced not only the better laws then in existence, but opened avenues into other fields of thought and action, demonstrating his breadth, originality, and liberal-mindedness as a man.

The learned Justice Story said of him, "The Pandects of Justinian, imperfect as they were, from the haste in which they were compiled are a monument of imperishable glory to the wisdom of the age; they gave to Rome, and to the civilized world a system of civil maxims, which have not been excelled in usefulness and equity. They superceded at once the immense collections of former times and left them to perish in oblivion; so that of all ante-Justinian jurisprudence, little more remains than a few fragments which are now and then recovered from the dust and rubbish of antiquity in the codices rescripti of some venerable library."

Up to this time equity had been comparatively unknown, existing only in a crude and primitive form. The arbiters of
justice were fearful of innovations. Conservatism was at its height, and the retention of dead forms and usages, were a source of perpetual annoyance, and a cumbersome check upon the progress of jurisprudence. The advance of time developed new wants, increasing the difficulty until the situation assumed the proportions of a perplexing problem.

The common people, strange as it may seem, were almost absolutely proof against anything new, and were even more unrelenting and uncompromising than the courts themselves. They loved and revered the ways of their forefathers, and only loosened their hold upon them when forced to, by advanced thinkers of the day. Time and civilization progressed. New nations sprang into existence in other climes, and became prominent factors in the legal history of the world.

Gradually the Anglo Saxon race forged to the front, several times their territory had been invaded by the Romans, and as a result, many Roman customs, transmitted and assimilated. It is through this channel, back to the days of early Rome, that the present system of jurisprudence is traced. Not
alone did the English system draw upon the resources of early Rome, but later, having been conquered by the Norman-French, many of their customs and usages were adopted as well.

Among the more prominent of these was the celebrated "Feudal system" which sought to regulate the holding and method of transmitting real property. Its influence upon English jurisprudence was marked. It placed the landed property in the hands of a few, and in those days it being extremely rare for any one, other than a property owner, to be honored with a public office much less elevated to the judicial bench, the law was of necessity made and administered in the interest of classes. The maxim that "the King can do no wrong" was universally accepted, making him the final arbiter of all disputes that could not be settled in his courts. The administration of equity was one of his special functions, yet was reserved in all but peculiar cases. As the business pace of the times quickened, litigation increased. Then it was that the King's Chancellor was permitted to investigate equitable causes with power of appeal to the King. And finally, this to proving insufficient, the
great court of equity as a distinct and separate system of procedure, was instituted. The clergy sat almost exclusively in these tribunals, being considered the keepers of the King's conscience, and the most satisfactory interpreters of the people's moral and spiritual rights. The equity system construed everything liberally for the furtherance of justice, in distinct contravention to the common law, which was bound by chains of precedents to limited confines, and strict interpretation of the law. Conflicts arose from the holdings of the courts which were oftentimes directly antagonistic. Each was jealous of the other's power. The condition of affairs became distressing, and is best described by Sir Richard Bethel, in his saying "It is a burning shame that a party can recover a judgment on one side of Westminster Hall, and on the other side be branded as a fraudulent rogue for having recovered it."

Tyranical rulers came frequently into power and by exercising their authority over the courts made the burden doubly oppressive. The Petition of Rights, Magna Charta, and other measures embracing popular liberty are expressions of the
grievances which these corrupt rulers were forced to correct. The workings of the common law upon certain species of foreign and domestic trade were harsh, and unfavorable to their development, necessitating the invention and adoption of the "custom of merchants". The origin of this custom is in no single country, but rather a combination of unwritten laws, promulgated by the commercial interests of the world. It was an institution separate from the common law, forming a miniature system of its own. Land and commercial interests thrived under its beneficent provisions, until England became the manufacturing nation of the world. Nor was her power less great in the military field. She planted colonies in the more important by-ways of the Atlantic and the Pacific, and secured a powerful foothold on the coast of the American continent. These latter settlements developed rapidly. The inhabitants were largely religious fugitives who resented English dominion and loved liberty in its fullest and noblest sense. Their needs were different than those of the mother country, yet the same harsh measures in vogue there were enforced here. Unrest and general dissatisfaction prevailed.
Until in 1776, the climax was reached, and a fierce, determined struggle gave them national independence.

And now that the American people were free, it would seem but natural for them to tear down the old distasteful structure and build anew, but there were certain laws of nature that are immutable. They were of English descent, had been reared to obey English laws, and however obnoxious they may have been, the principle upon which they were based were rooted as deeply in American soil as in England itself. The main difference apparent was the greater liberality shown in the administration of the laws.

The legal remnants of the old "Feudal System" were quickly swept away, and hundreds of other time-honored relics of English jurisprudence were relegated to the rear. The development of the equity system was similar to that of the mother country, it first being maintained in a single individual, and extended gradually until it formed a recognized judicial tribunal of its own. The "wager of battle" and a few other medeval tokens were retained, but the American republic progressed by rapid strides. Each State enacting its own laws,
subject only to the sovereign mandates of the National Constitution. Hence, in order to obtain a comprehensive idea of American jurisprudence, the necessity of selecting for a standard, some particular State is apparent. In scanning the list, now forty-four in all, New York in legal development as in numerous other respects, stands at the head. Demonstrating her fitness for the appellation of the "Empire State". She was the pioneer in the investigation and adoption of a reform procedure, and the fact that her system has since been approved by nearly half of the American states, makes her record from a legal standpoint of exceptional interest and value. It was Mr. Bishop in his work on Code Practice who mapped her legal career into three distinct epochs; the first extending from the adoption of the first State constitution in 1777, to the enactment of the revised statutes in 1830, the second from 1830, to the establishment of the Code practice in 1848, the third from 1848, to the present time. During the Revolutionary war the judicial system was weak, consisting of a Supreme Court and several minor tribunals. Equity jurisdiction being in the hands of
the governors and the Common pleas. The close of the war witnessed the divorce of law and equity, separate and distinct tribunals being instituted, one for legal the other for equitable causes.

In 1786, the "trial by battle", another of the old English customs was abolished. It was a means whereby the physical capacity of the claimants was tested with a mutual understanding "that to the victor should belong the spoils". During this period of construction and reconstruction the State legislature had been active, and ordered at the opening of the nineteenth century—1801-4—two compilations of the State statutes. In the year 1815, another order was issued for the revision and compilation of all laws of a general and permanent nature. But the main struggle for a sweeping reform in procedure commenced about 1828, almost simultaneously with the movement in the English Parliament. The general awakening in New York resulted in the enactment of the Revised Statutes in 1830, and opened the second epoch of her legal history. To the indefatigable efforts of John Duer, Benjamin F. Butler, and John C. Spencer, is the progress of this period
largely due.

Public attention was next centered upon the courts, for Chancery practice and the different circuits and supreme courts were no longer harmonious under the changed condition of affairs. Needless expense and delay in reaching a final hearing was the result, which combined with the growing sense that the old forms were no longer adapted to the mercantile and commercial needs of the time, created a constant feeling of dissatisfaction, which found popular expression in the Constitution of 1848. The judicial system of the state was largely remodelled, and a Court of Appeals established, which in 1869, assumed the shape of the present appellate tribunal. From 1847, to 1852, the contest over the adoption of a code system of procedure was hotly waged, culminating in the appointment of three commissioners to codify the law.

In 1848, largely through the zealous efforts of David Dudley Field, the Code of Civil Procedure was enacted, and in 1852 the completed Code reported in '49, assumed its final form. Say Bishop in his"Code Practice" "It introduced a quarter of a century in advance of England a logical and sys-
tematic body of rules governing the procedure in a civil action, and wiped out of existence at a breath, a mass of technical and burdensome hindrances to the administration of justice." During this period England had been engaged in a contest no less animated than that in New York, the only difference being the greater amount of time absorbed in coming to a conclusion. The merits and demerits of the code as against the common law was the absorbing theme of the hour, and the ultimate triumph of the code is due to the praiseworthy efforts of Jeremy Bentham. For it was he who first attacked the established system with the utmost virulence, and his theories though derided in his day became afterward the powerful bulwarks of his former opposers.

'Said Lord Brougham, one of his most formidable antagonists, "The age of law reform and the age of Jeremy Bentham are one and the same. No one before him had thought of exposing the defects in our English system of jurisprudence. It was he who first made the mighty step of trying the whole provisions of our jurisprudence by the test of expediency, fearlessly examining how far each part was connected with the
rest and with a yet undaunted courage inquiring how far its most consistent and symmetrical arrangements were framed according to the principles which should pervade a code of laws, their adaption took the circumstances of society, to the wants of men, and to the promotion of human happiness." In Bentham's day the "Feudal System", was at its height, with all of its attendant evils so distasteful to a liberty-loving, industrious, progressive people. The equity of freedom in courts of law from the technicalities which then hampered procedure was Bentham's dogma, and though bitterly opposed by men like Burke, Brougham, and Blackstone, he did not waiver in the least. His earnest, persistent efforts at a period so critical, won for reformed procedure a victory unparalleled in the history of law.

The code idea was by no means new, in fact it had been tested in Justinian's time, and afterwards elsewhere with success. It was the dread fear of innovations that had practically banished all hope of its adoption. The sentiment against legal reform is best described by Burke in his ever memorable utterance, "I do not dare to rub off a particle of
the venerable rust that rather adorns and preserves than destroys the metal. It would be a profanation to touch with a tool the stones. I would not violate with modern polish the ingenious and mobile roughness of those truly constitutional materials. Tampering is the odious vice of restless and unstable minds. I put my foot in the tracks of my forefathers where I can neither wander nor stumble. What the law has said I say. In all things else I am silent. I have no organ but for her words. If this be not ingenious I am sure it is safe! So deep-seated was the prejudice of Burke and his followers against Bentham and his favorite theories that twenty-five tears elapsed ere their hostilities ceased. In the meantime Bentham died, without learning the ultimate success of his ambition. With the conversion of Brougham and Burke progress was rapid. The people had confidence in their ability to lead, and at their instigation enacted, in 1852-3-4, the "common law practice acts", which taken together, formed an embryonic code of procedure. These acts were based largely upon the Code of Civil Procedure of N.Y., adopted in 1848, yet failed to accomplish the grandest feat and prime motive of
that code viz., that of abolishing all distinctions between actions at law and suits in equity. It was not until 1873, that the true merit of the reformed system was fully recognized when the English "Judicature Act" was passed, which followed closely the logic and systematic arrangement previously outlined by New York. The common law and equity systems were, under it, retained as separate and distinct tribunals, but the modes of procedure, the form of actions and the pleadings were completely changed. England's present method is practically free from subtleties and technicalities that surrounded her ancient practice, and if its adoption as the procedure of her more important colonies is a safe criterion for judging of its worth, its fitness for a great system in the future is clearly demonstrated. And now that the English Acts are allied so closely in fact based upon the practice of New York, a more comprehensive review of her system, and its characteristic features might not be a serious disadvantage. The adoption of the code of '48, was in a certain sense new, for it completely revolutionized the system in operation and rendered the attorney of fifty years standing as powerless as the
embryo of eighteen.

Thousands of volumes pertaining to the old practice became practically worthless, so that the welcome for the newcomer by the devotees of Chitty, was less hale and hearty than had been anticipated. The confusion was like a whirlwind but temporary. Its simplicity lent to its attractiveness until the profession began thoroughly to appreciate the merit of the change. But unfortunately the end of the difficulty was not yet, for the courts at the outset were no less embarassed than the profession, and having grown accustomed to fixed ways, yielded them reluctantly. The success of failure of the Code depended largely upon them, for in them rested the power of construing its provisions, and prejudice too often became a potent factor in stripping it of its best results. But nevertheless the simplicity of the new departure was bound to win approval. Scores of technical forms had been obliterated, and all actions both at law and in equity reduced to two. Previously separate law and equity tribunals had been maintained, now they were formally united. No longer did the remedy depend upon technical form of action, but upon
the facts of the case. In every action the process was the same until the litigants arrived in court, when their arguments as to the true nature of the proceeding was heard. The reason for the existence of two forms of action instead of one was technical. The trouble arose over cases of default in which damages were difficult to assess. The clerk was permitted to assume this responsibility when the amount was fixed and definite, as in the case of goods sold and delivered, without interference from the court. But in other cases, like assault and battery, where the damages were uncertain, special authority from the court was necessary. It was therefore upon this point that the Field Summons split. The rule briefly stated is this:—if the action was on contract, it was covered by the summons for money, if for any other purpose by the summons for relief. The certainty or uncertainty of the damages being the effectual test, liquidated damages signifying the former, unliquidated the latter remedy. This narrow distinction was recognized until Mr. Throop's commission was instituted. He immediately took the matter in hand and succeeded in reducing every action to one form,—viz., that for
money. This single civil action invented by the Troup commission cleared up many existing uncertainties. Greater simplicity prevailed, and the New York Code took a long stride in advance as a result of its contact with master minds. By this one form of civil action, in which the distinction between actions at law and suits in equity and the forms of those actions and suits were abolished, technically speaking all preliminary formal proceedings were eradicated, but the same difference between the actions themselves, exists as before. The great advantage of the code idea is the practical ease with which litigants are admitted into court, all of the fine common law distinctions so fatal oftimes under that system, are by it entirely obliterated, and any differences that may exist between the various actions themselves are now settled in court.

The success of this idea was not limited to the narrow confines of New York alone, one after another the newer states in which the principles of the old method had not grown so firmly rooted, began similar investigations, concluding invariably with a like result. It was information gleaned from
this source that enabled England to frame her "Judicature Act". For twenty-five years she had been groping in utter darkness, making vast expenditures of money with no result. It was not until the report of the Field Commission that light streamed in upon them. The battle in the home of the common law was fought and won, and the new system was adopted in England, India, Australia, and several other powerful colonies in its stead.

In this country fully half of the states have sanctioned its use, leaving it only a question of time when all must yield. It was and is still urged by certain common law states that the code practice is a change too radical in its nature, and that a gradual rise to an ideal by the introduction of suitable "practice acts" would be the wiser policy to pursue. In harmony with this idea nearly all of these states have adopted such acts, and in some of them notably Connecticut, they are a decided success. Their aim is to revolutionize procedure by degrees; to retain the old system in principle merely stripping it occasionally of an objectionable feature, while the code sweeps everything at a breath. It is held by
the advocates of radical reform that delays are impracticable and dangerous; that anything which has been conclusively proven detrimental in its workings and bad in itself ought not for an instance be tolerated, but be entirely swept away at the first opportunity. Instead of slowly working up to an ideal standard, it is maintained that the retention, for an uncertain period, of these needless forms and distinctions would work more serious detriment than could possibly result from an absolute change. At the present time there are no states proceeding strictly on the old theory. A revolution more or less extensive has been in progress everywhere, and careful scrutiny reveals the fact that several professed common law states are now, to all intents and purposes, code states. Their statutory acts regulating procedure conform so closely to proceedings under the code that an unbiased critic is bound to conclude that their difference is but nominal. Then why it is that these same states will deliberately deride a system similar to their own, because of that trifling difference is more than the unprejudiced eye can see.

But there is another field, outside the domain of statute
law, in which a heated controversy is even now being waged. The radical code supporter is here advocating the codification of the common law as well as the statute, while the more conservative element in the profession are struggling against it. The former class holds that it is the very refinement of injustice to inflict punishment for the breach of an unknown law. It is asserted that the tyrant Caligula, with his laws written in characters too small to be read, and elevated beyond public inspection, had devised a scheme no more unjust in its workings than this. Is not a repetition of this example constantly occurring on every hand today? Does it not cast a veil of uncertainty about jurisprudence that presages danger to individual liberty?

All of these queries and numerous others are being constantly asked, approximating to the premise that he who has liabilities and obligations to perform has a corresponding right to know their source and avoid their creation. The conservative immediately dissents, theorizing that the existence of these rights and liabilities as common law is sufficient notice to the individual; that a court thoroughly
cognizant with principles of equity is the only suitable tribunal to amicably settle the controversy; that any attempt to codify these rights and liabilities must at best be impracticable and imperfect, for cases frequently arise of which the code writer never dreamed. All these offenses is urged would be remediless, for the thoroughness of the reformed system permits the punishment of no grievance not enumerated within its sections. A proper sifting of these conflicting theories summarizes to this; that the codification of this feature of the law is purely a question of expediency. At this age of the world when tyranny is at an ebb and when courts of justice comprise the ablest men the profession affords, the fear of gross injustice is sensibly diminished. The most powerful argument in its favor must be that, in the course of events, all statute law will be codified, and that for convenience it would be wise to complete the system, and define every right and liability to which the individual is subject. The fear of injustice under present circumstances by the codeite, and the claim of incompetency on the part of the code-writer by the conservative, are neither of
material weight.

So deeply is justice imbedded in our judicial system that it cannot be easily uprooted, and there never has been a time when the profession was more firmly grounded in the principles that underly and control the rights of men, than they are to-day. Not alone are they versed in rules of procedure and principles of equity, but also learned in scientific legal research as well, which renders them eminently fit for the codification of any law, be it common or statute. The profession of to-day embraces thinkers capable of doing original work. The day for forensic outbursts of oratory has passed, and the day of discursive methods has taken its place. The facts in the case to be litigated will alone satisfy the desire of the court, and men who can suitably present them are in demand. The modern lawyer is elastic and easily adapts himself to new situations and changing circumstances. The code idea is in a certain sense new, being a wide departure from the practice under the common law, but the principles upon which jurisprudence is based are immutable, and must continue the same under any form of procedure.
The highest ambition of the code is to make legal practice simple and easy. To this end the zealous efforts of such men as John Duer, Benjamin F. Butler, John C. Spencer, Aphaxid Loomis, David Dudley Field, Montgomery Throop, and Charles A. Collin, have been directed. And should this system finally predominate, its success will be due in no small degree to such indefatigable workers as these. Nor is the hope of its final supremacy a vague one, for it has been said by that celebrated judicial luminary, Judge Story, "I know of but one adequate remedy for the vast accumulation of statutes and text authorities, and that is, by a gradual digest under legislative sanction of those portions of our jurisprudence which under the forming hand of the judiciary, shall from time to time acquire scientific accuracy."

By thus reducing to a test the exact principles of the law, we shall, in a great measure get rid of the necessity of appealing to volumes which contain jarring and discordant opinions; and thus we may pave the way to a general code which will present in its positive and authoritative text, the most material rules to guide the lawyer, the statesman,
and the private citizen." So that in the light of an assump-
tion so sweeping in its nature, it cannot be idle to conjec-
ture that the freedom of procedure from the maizes of uncer-
tainty that now surrounds it will be ultimately attained, and the reformed idea be finally inculcated into a system for the world.

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