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The Organization of the Courts for the Better Administration of Justice

BY WILLIAM L. RANSOM¹

I.

This article and one which will follow it are the products of an effort to outline certain impressions and certain queries which have come to me during a brief period of service in a very busy court. They all concern one central subject, the *mechanics* of administering justice according to law, the suitability and efficacy of the *means* by which in the judicial sphere society seeks to secure the assumedly desired *result*. For the most part the paragraphs which follow are made up of impressions and queries, rather than conclusions or contentions. No merit of novelty, originality, or even finality of individual inference, is claimed for anything here written. My hope is mainly that other young men, starting out in the law, may be aided in asking themselves some similar questions and in taking into account in their work a point of view rarely gained from reported decisions or textbooks. It is this hope of indicating a point of approach which may lead some other students to similar scrutiny and appraisal of the administrative expedients through which law is applied to the arbitrament of human controversies, that has given to the opening paragraphs of this article what may seem to some to be, at least otherwise, a needlessly personal aspect.

When I began the study of law as a prospective profession, following studies in political institutions and the science of government, I recall distinctly now my disjointed view, or lack of view, as to what the law really is, how it is humanly administered, where it fits into the scheme of organized society, and just what and why the difference is between the legal doctrine which is taught in law schools and the legal determinations which become the portion of those who resort to the tribunals which society has set up. As to the executive and legislative branches of government, I think I had a reasonably clear perception of the importance and effects of the proper organization of those departments. It was clear then, as now, that upon the suitability of the constitutional or legislative provisions regarding the various departments charged with executive authority depended in large measure the ability of those departments to achieve acceptably the desired results. Inadequate, unsuited, irresponsible, cumbersome, or antiquated forms of organization in the executive departments, were

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understood to produce, almost without fail, results properly characterized by similar epithets. No less consequential than the good intentions or the wise views of the executive officer or legislative majority, was seen to be the suitability of the administrative or legislative mechanism for carrying them out. For years much of the ablest and most progressive and constructive thought in this country has been given to the perfecting of our executive and legislative machinery—municipal, county, state and national. The slogans of a dozen efforts along these lines are household words throughout this land. The “short ballot,” “the commission form of government,” the “city-manager” plan, civil service reform, the coupling of power with responsibility, the introduction of expert handling of matters requiring expert knowledge, “proportional representation,” reduction in the size of local legislative bodies, enlarging the unit from which its members are elected,—these are some of the phrases which summarize a quarter-century of constructive effort for the mechanical improvement of executive and legislative departments. The significance of these suggestions is well taught in our colleges, but parenthetically may be interjected here the first query: *Have we given, are we giving, similar attention to the perfecting of the organization of our judicial establishment?*

Do our students come out from the colleges and law schools with any similar pragmatism as to what may be called “the mechanics of jurisprudence”? It will be noted that I am not in this article discussing the advanced present-day concept of the law as a living body of doctrine and rulings ever in the course of gradual adaptation, under the pressure of new social phenomena, new standards, new experiences; I am not here discussing the demand of the business and industrial world that the application of legal rules be kept ever abreast of changing economic and commercial conditions. Important as are the processes of accommodation and adjustment in the growth of the substantive law, this article deals with the adjective and administrative side—the machinery of adjudication, not its principles. What concept of law and judicial action does the average student bring to college? What concept does he take away from law school? In my own case, I know that in early undergraduate days I thought vaguely of the law and justice as a great static science, with phenomena and rules no less fixed and unchanging than the strata of geology and the laws of nature, its manifestations varying only with the proclivity of the finite minds of individual judges to err or lean. The law seemed to me a great mass of grouped points of potential contact, like the “records” of a victrola. Selection of the proper “record” for the

particular case, and the application of the needle, reproduction-diaphragm and power, would produce always the same harmony; the appellate courts were simply safeguards and checks against wrong selection; if by any human imperfection the lower court failed to perceive and select the "record" called for by the particular case, the appellate court made the discovery and substitution. Not for some time did I gain any clear comprehension that the kind and quality and acceptability of the justice accomplished through the adjudication of a given controversy depend very deeply, not merely on the legal principles invoked in its determination, but also on the promptness, efficacy and suitability of the instrumentality and procedure through which an adjudication is reached. Justice poorly administered may be justice wholly denied. If the organization and procedure of the judicial branch of government is not kept abreast of the needs and experience of the times, of little avail may be the good intentions or the ripe learning of individual judges or the sociological acceptability of the legal doctrine they expound. It may be added that the course of judicial decision in this country during the past five years confirms strongly an observation which I think may also be drawn from the whole history of Anglo-Saxon jurisprudence, viz., that legal doctrine, as such, is far more flexible, adaptable, susceptible to wholesome influences which make for timely conformance to changed social standards, than is the machinery of jurisprudence, the organization and procedure of the courts. I have accordingly come to believe that a large part of the present-day dissatisfaction with justice as administered by the judicial branch of government is due to the consequences of poor organization and unsuitable procedure, rather than dissatisfaction with the law as such.

A Re-statement of Pertinent Fundamentals

In order to get our bearings on the problem, it may be of value to re-survey certain fundamentals. The President of the United States, in his remarks before the American Bar Association in Washington in 1914, phrased a pointed summation of the criticism which, in one form or another, has oftentimes been directed against the administration of justice,—the charge of great variance between the justice which is the product of a judicial proceeding and the justice which the sense of fair dealing innate in every human breast conceives by intuition to be applicable to the particular dispute. Thomas Hobbes in his great studies of the common law reached the conclusion that there could be no "justice" that was not identical with "law," and John Norton Pomeroy in his research into the origin of equity jurisprudence

referred to the concept of "justice" known to the Roman jurists as the *arbitrium boni viri*, which he translated as "the decision upon the facts and circumstances of a case which would be made by a man of intelligence and of high moral principle", and added that if this theory "which now prevails to some extent should become universal, it would destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his juridical rights. * * * Every decision would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost."

Legal Administration as a Factor in Government

Mr. Frederic R. Coudert, esteemed on two continents as one of the most scholarly leaders of the American bar, has recently said that: "There is in all modern states to-day a general conflict between certainty in the law and concrete justice in its application to particular cases: in other words, between the effort to have a general rule everywhere equally applicable to all cases at all times and the effort to reach what may be concrete right dealing between the parties at bar upon the particular facts in each case. On the one side is made an appeal to 'Progress'; on the other to 'Precedent' * * * * When rules (of law) become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing notions of social expediency, which, like other opinions, are constantly changing; the law thus necessarily becomes a clog upon national development, an incentive to revolutionary reform. * * * The conflict between the wisdom of past generations, as embodied in 'Precedent' and the ideas of the present day concerning right and justice, usually denominated 'Progress', has been for some time past more than usually acute."

What is the significance of the present day acuteness of the "conflict" to which Mr. Coudert has referred? The history of civilization is the history of progress of the people in governing themselves according to law. It is the history of the decline of caprice and the substitution of self-restraint, individual and social; the history of the decline of favoritism, and the substitution of a rule of equality; the history of the decline of the authority of individual and impromptu standards, and the substitution of the authority of a fundamental social conscience and common standard. The end and object of government is, as Alexander Hamilton pointed out in the Federalist papers, the attainment and enforcement of justice; that is to say, the object of government is to bring it about that in the determination of the rights

and liabilities of individuals in their relations to each other and to the community as a whole, there shall be enforced a practical conformity, not to individual standards solely, but rather to the principles of fair dealing which have come to be commonly held and generally accepted. Justice being the thing sought by the organization of government, men came readily to see that this conformance to the community standards of fair dealing could better be secured through the establishment and enforcement of definite rules of action prescribed by constituted authority—in other words through law—than through leaving the applicable ethical principles to be ascertained in each individual case as it arose, without reference to what had gone before. Thus it came about that law came to be regarded as the essence of justice, and the history of progress in government came to be virtually the history of progress in the administration of justice according to law.

"Law" versus Caprice or Casual Impression

The distinctive feature of primitive forms of the social state was government by the chieftain, military leader or king, who governed the people and administered justice according to his own caprice or discretion, based upon his views as to the particular matter before him. He may oftentimes have administered "justice", especially if "justice" be deemed the *arbitrium boni viri*, but he did not administer justice according to law; for he enforced his own, and not the community standards of fair dealing, and he generally determined each matter without reference to what had been done in any similar matter and recognized no obligation to follow any fixed rules or precedents. It was government by discretion, not justice according to law, and this was the distinctive feature of primitive forms of the social state. The distinctive feature of the Anglo-Saxon civilization of modern times is the government of the people by themselves and the administration of justice according to law,—that is to say, according to defined rules of action and standards of determination which are either established by the people themselves or are developed by the instrumentalities created by the people for the purpose of administering justice according to such rules, limitations and standards as the people have prescribed. In other words, in primitive society justice was a matter of caprice or offhand determination of the individual chieftain or ruler; in an intermediate stage of social progress justice was a matter of favor, special right or claim of privilege; in the modern state justice is a matter of order by rules and definite precedents, with limitations imposed by the people on the action of their representatives, and also on their own procedure in establishing new standards

or additional rules. The history of the progress of the race is the history of the progress of the administration of justice from the caprice of the chieftain or the favor of the courtier to the orderly action of an impartial, impersonal and law-governed court.

I have felt it worth-while to reiterate and emphasize this statement of fundamental axioms because they have vital bearing upon present-day discussion in this country. A sound grasp of these fundamentals disposes of some really superficial contentions, often encountered in current discussion. The administration of justice is, as we have seen, not necessarily justice according to law; unrivalled and perfect justice may conceivably be administered by a ruler governed only by his own discretion or by a tribunal which enforces only its own standards and views; but the enlightened experience of human kind has preferred an administration of justice according to defined standards and ascertainable rules, expressive of a generally accepted community-standard of what is right and fair,—in other words, according to law. The administration of justice according to law is not necessarily an administration of justice by courts; executive and legislative officers of government often perform a large part of the administration of justice, and especially in times of popular dissatisfaction with the work of courts there is a strong tendency to entrust to administrative commissions the determination and enforcement of the community standards applicable to special classes of property or individual rights. Yet the enlightened experience of human kind has advised that the judicial function be entrusted generally to separate tribunals, which construe and apply the rules, limitations and standards prescribed by the people as the sovereign authority, and also develop that series and system of broadening precedents which come to constitute the body of the law and provide a continuity of consistent determination of analogous cases.

Promptness and Certainty as Factors in "Justice"

The reason why this legal conception of justice has gone hand in hand with human progress and has been indispensable to it is that, as economic and social conditions became more complex, certainty and uniformity in the arbitrament of individual rights became more and more essential. Men had to know what they could depend on; they felt the need that commonly accepted standards should prevail in the determination of rights of property and personal obligation. The administration of justice according to a common and ascertainable standard became of greater social importance than the perhaps larger

individual justice which might be secured from the determination of each case without reference to what had hitherto been done in any similar case. Social needs and social justice became paramount to individualized justice. It was found that rule and order in the administration of justice alone can enable men to act with reasonable assurance for the future; alone can insure an equal and impersonal adjudication of individual rights; alone furnish security from errors of individual judgment and impropriety of personal motives; alone guard against the sacrifice of ultimate interests, social and individual, to the transient but more clamorous demands of the particular exigency. This is why the administration of justice according to law became the essence of the modern state; this is why the court of justice according to law continues the distinctive institution of popular governments. "Respect for, and obedience to, the law," is, as Theodore Roosevelt has said, "the cornerstone of this republic and of all free governments", because the respect which the people have and manifest for the law and the courts is but an expression of what respect they have for themselves and for the fundamental standards and orderly conceptions of procedure which they have themselves set up for the fulfillment of their underlying social purposes. The people established the organic law as embodied in their constitutions; from time to time they amend or revise these constitutions; directly or through their representatives they enact the statute law, substantive and procedural; and they choose the judges who interpret the written law and develop the great body of judicial precedents which come to have the force of law. Dissatisfaction with, and criticism of, the courts and the administration of justice, therefore, become social phenomena of startling significance; when generally prevalent they indicate that in some manner the courts themselves, the body of the law which they administer, or the machinery of its administration, have become no longer fairly expressive of the fundamental social standards which they were created to apply. When a wide-spread popular demand arises for the breaking down of the established restraints and the accumulated precedents, and for the restoration of a larger legislative and executive discretion pending the establishment of new judicial standards, there is need for a thoughtful re-examination of the fundamentals of our institutions and a constructive survey of the present-day relationship between law and conscience; need likewise for a re-examination of the elements of our judicial organization and legal procedure in the light of the progress which mankind has been making in methods of ascertaining the truth and expediting the conduct of business.

Shall Procedure Keep Pace with Doctrine?

To-day we are face to face with a period of frank, vigorous, thorough-going criticism of our judicial system. We are called to answer a square and reasoned challenge of the efficacy of our system of administering justice according to law. A great deal of current criticism, it is true, takes the form of violent appeals to prejudice and cupidity, and is phrased in terms of anger and unreason, and emanates from sources entitling it to neither respect nor consideration, except as recurring phenomena of unrest. I do not refer to or propose to discuss that kind of criticism; I do not in this article refer to or propose to discuss the criticisms voiced by sociologists and humanitarians who complain that their projects of human betterment are often thwarted by judicial decisions adhering to discredited theories of economics and government. I here refer only to that increasing volume of what may be regarded as conservative and constructive criticism, emanating from sources not usually given to adverse comment on our judicial system and based upon a real sympathy with the spirit of our laws and a sincere desire to make them effective instruments of justice. We are squarely asked whether juridical *mechanics* shall keep pace with legal *doctrines*; whether our machinery for administering the law shall be permitted to lag far behind the law it administers; whether justice as commonly conceived in the community shall be always delayed and oftentimes defeated by the community's own failure to provide suitable instrumentalities for its administration; whether we shall not soon begin to do for and with our judicial system and legal procedure that which we have been putting into effect as to our legislative and executive departments, in city, state, and nation.

On the substantive side of the law we are to-day in the midst of a period of transition, readjustment, adaptation. The paragraph which I have quoted from Mr. Coudert admirably epitomizes present-day developments in that regard. This is a decade of humanitarian awakening on one hand and open-minded utilitarianism on the other. There is an effort to take into account new conditions, and an effort to make instrumentalities yield more efficient results. Old formulas are being found inadequate, under rapidly changing conditions. Problems take on new complexity; new conditions bring a new point of view, a new sense of public and private duty, and the suggestion of new remedies. Employers have a new sense of obligation towards their employees. Owners of great accumulations of capital have a quickened sense of trusteeship, the managers of large private enterprises have a changed view as to the permissible limits of commercial

competition. This humanitarian spirit seeks to find expression in laws and in constitutional provisions. Yesterday's standards of what constitutes the measure of the employer's duty to the employee, for example, are definitely and almost universally discarded to-day. The community has moved on; the public conscience has broadened and quickened; adherence to yesterday's standards arouses only resentment and rebuke. The changed view comes, and then the people expect every instrumentality of government to accept and reflect that change. When the courts fail to do so, criticism results. The more emphatic the awakening of the people in any particular period, the more emphatic the popular resentment against legal precedents or legal machinery which lag behind.

Analogies from Legal History

That is the history of progress in Anglo-Saxon law. What is taking place around us to-day is not new. The Romans, sagacious in avoiding difficulties, had a most convenient system for keeping their law abreast of the times. When judicial precedents made in private suits became greatly embarrassing in their limitations upon public policies, the praetor was empowered simply to abolish them. Thus the Roman law was kept flexible. But English law has, doubtless fortunately, known no such method. With us only an uprising of public sentiment accomplishes this emancipation of justice from the thralldom of ancient precedents, and infuses into the law the vigor of new ideals and concepts. In England in the sixteenth century, justice was tied hand and foot with rigid and cumbersome rules. Precedent was everything; technicality and form was decisive; equity was unknown. A great sixteenth century judge held that, even after a bond had been paid in full, the holder thereof could sue upon it and recover the full amount, unless a formal receipt and release under seal had been executed and could be produced. When his attention was called to the unfairness and inequity of such a rule of law, such considerations meant nothing to him. He felt bound to follow only the precedents and to regard only the dry forms of the law. Rulings such as these produced an uprising of public opinion, led to the creation of courts of equity presided over by chancellors who were not lawyers but clergymen, and thus brought permanently into the law a great body of ethical conceptions which had their origin wholly outside the law. And so in the eighteenth century Lord Holt, one of the great English judges, held that a person to whom a promissory note had been endorsed and transferred could not sue upon it. The customs, needs and common practice of the business men of the United Kingdom

meant nothing to him. It was enough for him that the strict precedents of the common law did not recognize commercial paper as negotiable. He said that tradesmen should conform their business to the way which was legal, rather than that the law should be conformed to the custom and conscience of the country. Of course, Lord Holt had "guessed wrong" and Lord Mansfield was right, and the law merchant became one of the most universally approved parts of our law. The judgment and needs of the people had triumphed over the strict rules and precedents of the law. The essential justice and fairness of the law merchant was infused *en masse* into the English law and was followed in this country, although even Thomas Jefferson, supposed high priest of progress, argued vigorously for a rule of legal construction which would "rid us of Mansfield's innovations".

A Period of Transition in the Law

To-day we are in the midst of a similar period of transition in the law. Just as surely as in the sixteenth and the eighteenth centuries, our law is to-day being infused with a new body of social and humanitarian conceptions which reflect and express what is taking place in the world at large. A radical change in fundamentals of legal viewpoint is upon us and is taking place before our eyes. The sixteenth century judge who barred the doors to the doctrines of equity, and the eighteenth century judge who barred the doors to the law merchant, have had their present-day parallel in the twentieth century judges who insisted upon enforcing their own economic and political concepts, rejected by the legislature and the people, and stubbornly refused to admit into our law the humanizing influence of twentieth century concepts of social justice; likewise in those who have failed to do their part in bringing legal procedure abreast of present-day standards for ascertaining facts and weighing their import. Yet the infusion of this new doctrine has been taking place, none the less, in this and every other state; we return only to the query whether similar advance is being made on the procedural side.

Take a single aspect of the change which has come in the application of legal rules to social conditions, that which deals with the liability of the employer for injuries to his employee in the course of employment. Originally, the employer had no liability and the employee no recovery. Then came the doctrine of negligence, that the employer was liable if the injury was occasioned by his failure to use proper care for the protection of his employee from injury. Even this doctrine marked a great advance over the remedy-less plight of the injured

employee before; yet more recently the negligence doctrine came to be regarded as an inadequate expression of the humanitarian spirit of the age. The courts had introduced various refinements into the doctrine, to reduce the liability of the employer. He was held not liable if the injuries were occasioned by the negligent act of a fellow-servant or fellow-employee. Public conscience compelled the changing of this rule so as to hold the employer liable if the negligent fellow-employee of the injured worker had been entrusted with any duties of superintendence. Courts had held that the employer was not liable if the injury was occasioned by any conditions or dangers as to which the worker assumed the risk by entering the employment. This doctrine of "assumption of risk" was, by pressure of public conscience, either abolished altogether, as to some employments, or modified so as to make the risks assumed only those which necessarily remained after the employer had carried out his full duty of protecting the worker. The courts had held that the worker could recover for the employer's negligence only if he could first affirmatively prove that he (the worker) was free from contributory negligence, in other words, that no fault on his part contributed in the slightest degree to the accident. Public conscience changed this rule, either by shifting the burden of proof of the employee's negligence to the employer, or by practically abolishing the rule altogether. From time immemorial it was the steadfast doctrine of the law that no liability could be imposed on an employer for an injury not the employer's fault. When an "experimental" statute was passed in New York, imposing liability without fault on the part of the employer, our Court of Appeals unanimously followed established precedents and held the statute unconstitutional, under both the state and the federal constitutions. But the militant public sentiment of the state rose up and, in November of 1913, reversed and abrogated this ancient rule by a popular vote of about three to one, and substituted the rule that the employer might be held liable for all injuries sustained by employees in the course of their employment, even though the employers were not definitely at fault, and that the cost of compensating injured employees might be passed on to consumers of the product in whose manufacture the employees were injured. The popular adoption of this Constitutional amendment was promptly followed by the legislative passage and executive approval of a workmen's compensation law far more sweeping, drastic, and "compulsory", than the tentative and "experimental" statute which had hitherto received the condemnation of the Court of Appeals. That court, when called upon to decide whether the later statute, now expressly sanctioned by the state con-

stitution, was to be deemed to violate the federal constitution, squarely and admirably bowed to the course of events in state and nation, and sustained the validity of the new plan of compensation for industrial accidents.

Administration of the Law Taken Away from Courts

The foregoing are but some of the legal details, the legal battle-plan, of the contest which has been waged in this field between "Precedent" and "Progress", between fixed rules of law and the forward-looking spirit of the age. The incidents which I have cited as to the infusion of new and radically different social conceptions into our law governing the compensation of injured employees only illustrate the broader struggle and typify the essential principle which is slowly but surely being injected into our American jurisprudence, viz., that a first charge upon the wealth produced in this country shall be the maintenance, in reasonable comfort and according to reasonable living standards, of those who, by hand or brain, produce that wealth. The more interesting fact, from the point of view of the purpose of this article, is the effect which this agitation has had upon the procedure and mechanism of administering justice in this domain of legal right. The courts and their rules of evidence, procedure, and the like, seemed to have flung themselves in the pathway of the results a changing public opinion was trying to bring about. For a heated year or two there was in consequence a period of sharp criticism of the courts, of discussion of "judicial obstruction of the will of the people", of ways and means of "overcoming the judicial obstacle to welfare legislation", and so on. Legal *doctrine* then gave way and the courts came fairly abreast of public opinion, but the brief period of "judicial obstruction" operated to remove the administration of the new legal concepts from the courts altogether. The administration of the workmen's compensation laws was taken from the courts and placed in the hands of newly created commissions, made up preponderantly of non-lawyers and specifically freed from the "technical rules of evidence" and other court-made rules which hitherto had been judicially invoked in bar of the humanitarian plan. Instead of bringing judicial procedure abreast of present-day business methods for ascertaining facts and determining controversies, public opinion took the performance of essentially judicial functions away from the courts altogether and attached their performance at least nominally to the executive branch of government. Instead of leaving the application of this branch of the law entrusted to the trained and impartial minds of members of a court emancipated from the cumbersome procedure and evidentiary

rules it was desired to avoid, public opinion eschewed the court and the judicial atmosphere altogether, and turned this branch of the law over to men who were not lawyers and who, it was felt, would not be likely to clog and fetter the law again with outgrown rules and the trappings of a past age.

In 1913 the accident of a judicial nomination I had not sought and did not think I desired was followed by an election which transferred me from an administrative to a judicial office. In the administrative connection I had been performing functions quasi-judicial in their nature and operations,—the ascertainment of facts, the weighing of the import of conflicting statements, the application of legal rules, the summoning of expert opinion to aid on technical aspects of mooted problems, the sifting of truth from falsehood, the meritorious from the unfounded, the material from the inconsequential. In the performance of these duties I was a part of an admirably organized public department; few that I have seen in private business, and none in public affairs, surpassed it in the directness, efficiency, promptness, and accuracy of its administrative processes. Although my duties entailed impartiality and open-mindedness, neither quality was deemed negated by a prompt, direct, thorough ascertainment of the full facts, in the best way available. Although I constantly required technical aid, "opinion evidence" on expert matters, I was not called upon to listen to "hired experts" for any particular point of view or contention; the "experts" called in to counsel were as disinterested and open-minded as I was. Simplicity and responsibility in administrative mechanism were constant objectives. It was seen that one responsible officer should be placed in position to deal adequately and continuously with all phases of a given matter from start to finish, and that to create "too many cogs" in the machine or to divide and sub-divide the responsibility for decision, was to fly in the face of sound principles of staff organization to accomplish results. From the application of legal principles to concrete facts in such an atmosphere and under such an organization, I was suddenly switched to a bench and a gown, a stenographer and a corps of attendants; counsel and witnesses were placed at a distance; the atmosphere became one of a "game", a contest of wits, over which I was "umpire" but in which I was no longer regarded as an instrumentality with affirmative responsibility for seeing to it that the trial was simply, quickly, and accurately elicited and justice done according to law. Experts I found, had been transformed into hired advocates; oratory and pettifogging were substituted for quiet, direct discussion; controversies were postponed until they were a year

or two old, instead of a day or two old; perjury seemed to creep in with the administration of the oath; everyone was assumed and desired to be densely ignorant until enlightened by the developments of the particular case; and the crime of crimes became the assumption or assertion of a particle of information or intelligence not potentially inculcated by the testimony droned into the ears of the stenographer.

Courts Have Not Kept Pace with Modern Methods

This abrupt transition suggested to me from day to day certain queries, some of which I shall indicate in the second article of this series. I soon found, too, that something had happened to the business man's desire to have his controversies determined according to the certain standards of legal rules, if that meant coming to court. Business men of the very type who readily and habitually submit their transactions to the scrutiny and guidance of a legal mind, out of court, were willing to do almost anything, in the way of abdication of all or part of their rights, rather than submit to a determination of a controversy by a court. Men of a conservative, law-respecting type, who never had given me the slightest impression of disrespect for or dissatisfaction with *law*, in general or as chart and compass for business transactions, were, I soon found, ready to "settle for fifty per cent" of the amount in dispute, rather than be subjected to "a lawsuit", even in a court which has been considered peculiarly the "business man's court" in the metropolis.

This led likewise to analysis and observation as to the precise grounds of the business man's dislike for the judicial tribunal. In the past fifty years we have revolutionized our methods of the conduct of private business, and largely also the conduct of public business; our methods are more direct, exact, and to the point; they minimize the possibility of error, eliminate "lost motion" and cut "red tape". Yet to all this improvement in methods our judicial procedure has paid substantially no heed. The mechanics of a courtroom trial are still substantially the same as they were in the days when our ancestors rode in stage-coaches, used tallow dips or pine knots for lighting, and had never dreamed of "efficiency engineers" and the marvelous business development of to-day. I do not suppose that an alert business man or "business lawyer" ever comes from his well-organized, perfectly co-ordinated office into a present-day court without feeling, consciously or unconsciously, that somehow the court has failed to keep pace with the life of the community which surges outside its walls, and that somehow the organization, procedure and administra-

tive routine of that court hark back to an era which the business community outside has necessarily superseded, in order to hold its own in the commercial competition of to-day. Judging the court by present-day efficiency standards and looking upon it as a mechanism for bringing about a result, the average court is the most indirect, inexact, inefficient, uneconomical and unintegrated instrumentality in the modern state, and the wonder is, not that justice is at times so inexactly and tardily administered, but that substantial justice between man and man is so often the outcome of proceedings in such a tribunal. The improvement of the administration of justice, the reform of our legal procedure, the adaptation of twentieth century methods to the administrative organization of the courts, are tasks of the first importance, to which should be devoted the finest constructive ability that is sent forth from our colleges of law.

Is it surprising that a business man who has no quarrel with "law" nevertheless seeks to avoid the courts? The tribunal to which, as a last resort, the business man submits his controversies with his fellows is practically the only institution of private or public activity which, in its administrative and procedural methods, still lumbers on in the same old way of fifty or one hundred years ago. Right here, also, I am inclined to believe, will be found the responsibility for much of the acuteness and unacceptability of the variance between justice as administered in a court and justice as innately conceived by the average man of intelligence and good conscience. I do not find men unwilling to have their disputes and controversies determined according to the principles of our substantive law. It is not a desire to avoid the application of rules of law which drives business men out of the courts, into reluctant settlement of controversies which should be litigated on their merits or into the submission of them to arbitration tribunals established by private agencies. Litigants do not submit themselves before the arbitration committees of commercial organizations in order to secure the *arbitrium boni viri* or to subject their property and rights to individual judgment as substituted for long-established rules of the substantive law.

Popular Aversion for Legal Machinery

The aversion of the average man is rather to the procedural and administrative side of our legal machinery. He believes in and needs the administration of justice according to law; the safety of his transactions requires certainty and rule as the basis of individual and property rights. Uncertainty and inequality were long ago called "the twin bugaboos of Anglo-Saxon jurisprudence". Popular dis-

satisfaction with the law, as I have come to believe, is based not so much upon any variance between justice according to the substantive law and justice according to the *arbitrium boni viri*, as upon the great variance between the justice which would result from a fair, prompt determination of controversies according to substantive legal principles and the "justice" which does result from the existing procedural mechanism of our courts. Business men go to arbitration to avoid legal *procedure* and not legal *principles*. To "tune up" and "speed up" our judicial mechanism, to "cut out" the delay and "lost motion", to organize our courts and their workings along lines which take cognizance of twentieth-century experience and expedients, and to bring to the aid of the courts those direct and simple administrative aids which modern progress has made available in every field of activity, is one of the paramount tasks of the present-day, in which every young man coming to the bar should plan to do his part.

In a subsequent article, I shall outline more concretely some of the impressions, queries and suggestions which my day-to-day experience brings home to me. For them the more general observations of the present article may to some extent have prepared the way.