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Federal Rules Decisions
June 17, 1964
Dean Roscoe Pound

PROCEEDINGS IN COMMEMORATION OF THE ADDRESS

Delivered in St. Paul, Minnesota August 26, 1906

before a Convention of THE AMERICAN BAR ASSOCIATION

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by MR. JUSTICE TOM C. CLARK Supreme Court of the United States

Delivered at a luncheon jointly sponsored by The Minnesota State Bar Association and The American Judicature Society, St. Paul, Minnesota, June 17, 1964.

Mr. Chairman, Members of the Bench and Bar of Minnesota, Guests and Visitors:

Let me first say thanks-thanks to the Judges Association-to the State Bar and to the Ramsey County Bar Association-and to West Publishing Company and Mr. Slater, its President, who contributes so much to our profession. It has been a most interesting and enjoyable two days-a wonderful respite from the arduous duties of the Court.

It is a great pleasure to share the platform today with my old friend, Judge Waterman. The American Judicature Society, which he heads, and the Joint Committee for the Effective Administration of Justice, of which I have the honor to be chairman, have worked closely together throughout the three years of the Joint Committee's existence. We both take great pride in their joint accomplishments.

Most of all, it is a high honor and for me a personal privilege to speak on this historic occasion when we meet to commemorate the St. Paul address of Dean Roscoe Pound. Without exaggeration it may be said to have changed the course of judicial administration in America.

***248** I came here to pay not only my own respects to Dean Pound but also that of my Brothers on the Supreme Court. He is not only a distinguished legal statesman but has for some threescore years been a tremendous force for good in our profession-He is in truth the Dean of the American Bar. We had hoped that the Dean-despite his 93 years-would be with us again today. But that not being possible he has a distinguished representative here-Professor Sutherland-likewise learned in our profession and Harvard Professor of Constitutional Law.

I shall ask Professor Sutherland on his return to convey to Dr. Pound my own affectionate regards and best wishes together with the respect and admiration of my Brothers on the Court and of all of us assembled here.

The St. Paul address of 1906 is only one of an almost innumerable list of speeches and articles that flowed from Dean Pound's pen during his long and productive professional career. When I refer to him as "Dr." Pound, the doctorate which that title represents is not in any way connected with the law, but was earned in the field of *botany*. The Index to Legal Periodicals lists literally hundreds of his writings on a wide range of legal subjects. The first entry is an article entitled "Dogs and the Law" published in the *Irish Law Times* and in the long defunct American legal periodical the *Green Bag*, back about 1890; the most recent one listed is a contribution to a symposium on judicial review and its role in intergovernmental relations, published in the *Georgetown Law Journal* in the summer of 1962.

But all this is by way of preface, for we are not here to honor Dr. Pound the man, but rather his most effective address. It is a unique event, for few speeches are worthy of being heard much less commemorated

Dean John H. Wigmore has given us a graphic picture of the setting of the speech. The magnificent new capitol building here in St. Paul, the House Chamber, the hot August evening, the polite crowd of lawyers and their ladies, with the latter more intent upon the president's reception later in the evening than on a speech. Let us hear about it in Dean Wigmore's own words.

"The profession," he said, "was a complacent, self satisfied, genial fellowship of individual lawyers-unalive to the shortcomings of our justice, unthinking of the urgent demands of the impending future, unconscious of the potential opportunities, ***249** unaware of their collective duty and destiny." And as to the pulse of the times, Dean Wigmore added: "At that period there was universal complacent torpidity in the profession; the thermometer of conscious, progressive and collective effort was at freezing point."

Pound was undoubtedly well aware of this, but there is no hint of it in the speech. He began with the dual proposition that dissatisfaction with the administration of justice is as old as law itself, but that "there is more than the normal amount of dissatisfaction with the present-day administration of justice in America."

"Assuming this," he went on, "the first step must be diagnosis, and diagnosis," he said, "will be the sole purpose of this paper."

He listed four main headings:

1. Causes for dissatisfaction with any legal system;

2. Causes lying in the peculiarities of our Anglo-American legal system;

3. Causes lying in our American judicial organization and procedure; and

4. Causes lying in the environment of our judicial administration.

It would be far beyond the proper limitations of this hour and occasion to run through, even in outline form, what Pound had to say under each of these headings. Copies of the speech have been included in the packets of all convention registrants, and others have been placed on the tables at today's luncheon. I am sure that none of us will let this occasion go by without reading this masterpiece in judicial administration. To whet your appetite for it let me read a few quotes.

Dean Pound thought that pertinent to any legal system was the difference in rate of progress between law and public opinion. On this, he said:

"The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual and economic changes, often ***250** crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess."

You will pardon my application of this notion of Dean Pound to the work of the Court on which I sit. Certainly it is true that the very nature of the Supreme Court is such as to bring to it the types of cases in which these factors come into play. We must realize that much of the controversy that has swirled about our decisions as well as that of every generation since the Court was founded can be traced in considerable measure simply to the inevitable lag between law and public opinion. I might put an addendum to the good Dean's observation, namely: Perhaps an even greater source of friction is the reverse situation in which some segments of public opinion lag behind the law.

I have noted with much relish Pound's observations regarding professional training of judges. On page 8 of your booklet he mentions as one of the causes for dissatisfaction an unfortunate impression on the part of many people that no special training or skills are needed to do the work of the judge. Then he says:

"The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class feeling or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the everyday purity and efficiency of courts of justice."

These words strike so close to my heart because they are prophetic of the work done a half century later under the leadership of the Joint Committee for the Effective Administration of Justice. For three years now the Joint Committee has been developing, on a systematic basis, professional training for judges in the art and science of judging itself. It has sponsored, in cooperation with the National Conference of State Trial Judges, judicial training seminars in every state, concentrating on the judges of trial courts of general jurisdiction. It has reached practically all of the 3,000 judges of that jurisdiction. We have participated in two in Minnesota. Now within a few weeks there will go into operation for its first term a national college for state trial judges to which newly appointed or elected judges may come to freshen up their judicial skills. It is a particular satisfaction to me to contemplate ***251** this major advance in judicial training in the light of Roscoe Pound's 1906 demand for "the highest scientific standard in the administration of justice."

Meanwhile another nation-wide series of conferences jointly sponsored by the Joint Committee, the American Judicature Society and various local organizations in the states, has been at work on the closely allied problem of procuring the finest and ablest talent for judicial office and providing the judges with adequate compensation and retirement benefits, security of tenure and judicial independence. Pound had something to say on that point also.

"Putting courts into politics," he said, "and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."

I wish there were time to go through this great document and point out every gem that strikes the eye. What appellate judge, for example, can fail to agree that one of the problems of our system, although at the same time one of its glories, is the doctrine of supremacy of law which has the curious result of making the greatest of political and constitutional decisions come about as mere incidental by-products of a small dispute between obscure litigants? Pound marveled at-

"*** seeing the validity of the legal tender laws tried on pleas of payment in private litigation, at seeing the power of the federal government to carry on the Civil War tried judicially in admiralty, at seeing income tax overthrown in a stockholder's bill to enjoin waste of corporate assets and at seeing the important political questions in the Insular Cases disposed of in forfeiture proceedings against a few trifling imports."

If the Dean were making the speech today he would have a host of current illustrations-the validity of the N.R.A. determined in litigation over a shipment of chickens, the great constitutional issue of right to counsel in criminal trials heard on a pencil-written appeal from a Florida prisoner, and another equally far-reaching constitutional issue raised and decided in determining whether a little girl should be admitted as a scholar in a certain Kansas school. But after all, who among us is not proud that we have real-life examples in constant sequence to prove that all the might of the statutes and constitutions of state and nation are at the disposal not only of governmental agencies and captains of industry but also indigent prisoners and little girls as well?

***252** To me the most significant part of the Pound speech, and, I am sure, the part that is mostly responsible for our being here today, is that which comes under the heading of judicial organization and procedure. Here, says Pound-

"*** we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that *our system of courts is archaic and our procedure behind the times*. Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible businessman in the community."

Pound dwells at length on multiplicity of courts, concurrent jurisdictions and waste of judicial power through lack of administrative means to equalize work loads when one court is congested and another idle, preoccupation with procedural complexities, and unnecessary retrials. Finally, he calls for better reporting of judicial news in the press.

I have by no means exhausted this great address, which again I urge you to read for yourselves, but I have pointed out enough to make clear why the text of the bronze plaque to be unveiled this afternoon in the beautiful Minnesota state capitol speaks of both *pattern* and *impetus* for the judicial modernization movement of America.

Shortly after the Joint Committee was established, three years ago, it adopted a "pattern" of its own to describe what it was striving for. Our pattern says:

> "Justice is effective when-
>
> "1. Fairly administered without delay

"2. By competent judges

"3. Operating in a modern court system

"4. Under simple and efficient rules of procedure."

These four main headings and the sub-headings under each of them amount only to a restatement of the points laid out by Dean Pound in his diagnosis of the ills of judicial administration 58 years ago. We may well stand in awe of this great man, who at the decidedly youthful age of 36 displayed a vision and insight rarely found at any age.

***253** What of the *impetus* from the St. Paul speech? I have already quoted for you Wigmore's gloomy portrayal of the ineffectiveness and inactivity of the bar of that day. August 29, 1906, was unquestionably a turning point. Wigmore himself tells how he and Pound and a small group met on the Capitol steps the next morning to see what could be done about it. We don't have the names of all who were there, but he mentioned Everett P. Wheeler, William Draper Lewis, a Californian, and I might add-a Texan (of course!).

The flame that grew from that spark was not an explosion. But in the ABA Reports for 1909, three years later, we find a 31-page report of a special committee headed by Everett P. Wheeler making extensive recommendations to prevent delay and unnecessary cost in litigation, and bearing unmistakable evidence of the Pound influence. Let me read just the bold face text of one of this committee's recommendations:

"The whole judicial power of each state, at least for civil cases, should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to the litigants and cost to the public."

Certain specific proposals of this committee were approved by the Association, but no action was taken on this one. Three years later, when Herbert Harley came along with a proposal for a nation-wide action organization to promote the efficient administration of justice, Pound and Wigmore were among the first to join in the founding of what they named the American Judicature Society. In due time the American Bar Association established its Judicial Section, now the Section of Judicial Administration, and William Draper Lewis lent his great mind and talents to the founding and work of the American Law Institute.

We do not have the time here to tell the story of the subsequent founding of the Conference of Bar Association Delegates, the Association of American Law Schools, the National Conference of Judicial Councils, the Institute of Judicial Administration, the Conference of Chief Justices, the National Legal Aid and Defender Association and the rest of the 17 organizations that have been working together since 1961 under the banner of the Joint Committee. But the tide of judicial modernization and improvement ***254** is rolling today as never before in the history of our country, or perhaps of any country.

On one day-November 6, 1962-voters of six states-North Carolina, Illinois, Nebraska, Colorado, Idaho and Washington-approved constitutional amendments for unified state court organization, improved court administration, improved courts of limited jurisdiction or non-political selection and tenure of judges. More are already slated for November,

1964. The list of states in which Joint Committee conferences have been held or scheduled and other activities have been under way includes every state in the union-all fifty.

The movement which Wigmore described as the "white flame of progress," spreading from a spark struck by Roscoe Pound in St. Paul on August 29, 1906, is now assuming the proportions of a Minnesota forest fire.

All hail to the man who struck the spark!

***255 ADDRESS**

by DAVID DOW

Dean, University of Nebraska College of Law

We are here today to pay homage to the ever-present spirit of Roscoe Pound, a great lawyer in every sense of the word, but particularly with respect to his constant efforts for meaningful legal reform. What we do here today of course emphasizes our great respect for his leadership, for his unbounded knowledge of all Law, for his ever-active imagination, and for his uncanny ability to express his ideas.

But surely our greatest homage to this man will not be found in memorials or speeches. It must be found in our actions, in the way we follow his leadership, and particularly in the way we catch his spirit and keep his torch forever burning.

It is the obligation of lawyers and judges to be constantly alert to the kinds of troubles that Roscoe Pound so beautifully attacked in these halls nearly 60 years ago. I say beautifully, not only because it was a masterfully contrived speech, lucid, direct, deceptively simple-but because it had the effect he intended. In large measure we are alert and active. All over the country individuals and groups are seeking to understand the problems of administering Justice in a truly effective way; that is in a way that reaches a determination of all controversies in accordance with the substantive law and the facts, as quickly as the circumstances of each case permit, without favor or bias-and available to everyone. Some of these problems can be remedied fairly easily, or at least the remedy is one that can and should be made by the bench and the bar.

But this thing we call Justice is not wholly objective or measurable in statistics-the people must *think* it is good. Remember that Pound's speech was aimed at "popular dissatisfaction". Or to put it another way, we must never forget that the administration of Justice is not only the concern of lawyers. We are only the trustees of the great interest of the public we serve, to achieve the most effective and the most efficient administration of Justice among men. We do not have and we ***256** can never have any vested interest in our learning, or in our ways of doing things.

And like any trustee, we owe a steady accounting to those beneficiaries. It is not enough to pat ourselves on the back-as in many respects we have a right to do-it is not enough to bewail the fact that not everyone loves us, or to talk about a public relations program.

We must go to the people and seek to make them understand the problems and the solutions we propose and why. Of course we have an obligation to lead, and to make the people aware of the factors which impel one solution rather than another. But many kinds of problems require public determination and it is then doubly imperative that we make a full disclosure to insure an intelligent choice. Our democracy, any democracy, is viable and effective only so long as the people are informed. Perhaps no better illustration is available than the fact that reform in the area of selection of judges has always been won more easily when substantial parts of the lay public have been drawn into the campaign. And to revert to Pound, he took pains to point out that one of the chief causes of popular dissatisfaction was the astonishingly poor caliber of newspaper reporting. I do not, however, take this as an indictment of newspapers. It is rather a failing of the bar to educate the newspapers-to take a leading role in educating the public.

I do not claim to have made an extensive investigation outside of my own bailiwick, but from what little I do know I am convinced that the trial lawyers and judges of today do keep their sights leveled on the ultimate goals of fair justice. The concepts of our adversary procedures and the weight we put upon the effectiveness of advocacy clearly embody the seeds of injustice, should unequal adversaries meet or unfair tribunals decide. But the strengths of these procedures are prevailing much more often than in the past. These strengths are of course the opportunity to state one's case freely, openly, and fairly, and the right to know what is maintained and argued in opposition-in short, the essence of due process of law. These strengths are succeeding because trial judges are better, trial lawyers are better, and fifty years of determined progress in procedural reforms have opened new avenues for fair determination of controversies on the merits. What Pound liked to call "Old Fogeyism" and "Pettyfoggism" are very nearly laid to their last rest. Even more significant is the fact (and I am convinced it is a fact) that lawyers and judges today approach the solution of a controversy with the right attitude-to decide controversies on their merits.

***257** Clearly we have not reached Utopia; and while many of us are engaged in the details of procedure, I suggest to you that there are still problems of large moment with which we should be struggling. The first I have already referred to and that is the failure to promote among the public an understanding of our problems-or rather *their* problems entrusted to us. This is ubiquitous, yet two examples are to me outstanding in their need for immediate clarification. The first example is the very touchstone of our procedure-the adversary system of presenting cases. Can you find this concept presented anywhere in the school curricula today? Or even in colleges? If it is there, it certainly hasn't come across, for time and again highly intelligent people ask me to explain it.

The second example is the constantly recurring problem of the place of our courts in determining substantive law. Despite the breathtaking prolixity of our legislatures, there are still large areas in which the common law is supreme. Think, for example, of the relatively small problems of municipal and charitable tort immunity, or the amazingly active problem of products liability. The vast area of simple contract law remains largely outside the legislative concern; and problems of constitutional and legislative interpretation are constantly before our courts. I am not suggesting at all that the place of the courts should be changed, only that somehow it be explained or the very foundation of public approval of our judicial system will crumble.

The second major problem that needs immediate attention is that of cost. I am thinking primarily of the cost to the individual litigant. How many times have you had to tell a client that the cost of securing his rights was more than it was worth? I do not mean the great corporation or the long involved anti-trust suit; I mean the five hundred dollar dispute. Once is too many!

There have been several well conceived and very instructive investigations of the public cost of maintaining our courts and the cost of alternative devices. There have been some nice studies of the costs of appeals. I am not, however, aware of any similar study of the cost of trial to Mr. Plaintiff or Mr. Defendant. Of course this is a highly complex problem. Somehow dollars must be set against risks; indirect "costs" such as loss of time, loss of business efficiency, and psychological stresses must be assessed; and alternative avenues of ending the controversy must be considered. But we should be able to find out with a good deal more certainty than we now have where the major ***258** costs lie and there is a crying need to do so. Is it in the discovery process, or the trial, or perhaps in the attorney's office? Can these costs be cut down in any fairly simple ways? Are other major changes feasible? Should we consider the English device of limiting the trial bar to experts; or should we perhaps think about expanding insurance coverage concepts? Certainly I do not recommend these, I merely pose them as distinct possibilities to explore.

Gentlemen, in our lifetime we have seen many lamps lit in the great halls of justice-but there are always more to be lighted. Roscoe Pound's torch is now ours.

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***261 PROCEEDINGS at the DEDICATION CEREMONY in the MINNESOTA STATE CAPITOL**

CHIEF JUSTICE OSCAR R. KNUTSON

SUPREME COURT OF MINNESOTA

CHIEF JUSTICE KNUTSON: We meet today to commemorate a historic speech delivered in this capitol building on August 29, 1906, by Roscoe Pound, then a young lawyer teacher in the Nebraska Law School, by the placing of this plaque in a proper place in the building in which he delivered the speech. But we do more than commemorate this historic event by the placing of this plaque. To have real value, its presence here must be a constant reminder to all of us that improvement in the administration of justice is a continuing task that must go on in the future in order that law may keep pace with society and, while never perfect, it must be improved so that we truly live under a government of law administered so that freedom, within the bounds of reason, will be a reality.

We have in our presence today a large number of distinguished guests, only two of whom will be called on to say anything at this time. The others have spoken in other places before this meeting, but I want to introduce them to you. First, it is my real pleasure to present to you the man who, more than any other single person, at least in the last decade, has encouraged many of us to become interested in the improvement of the administration of justice. It is my real pleasure to present to you Mr. Justice Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Then, again, we have Dean David Dow, who is now dean of the Law School of the University of Nebraska, in which Pound ***262** was a teacher at the time he delivered his famous address. We are very glad to have Dean Dow with us to represent his school.

Then, again, we have Mr. Glenn R. Winters, Executive Director of the American Judicature Society, whom I present to you, and Mr. Robert E. Allard, Assistant Editor of the Journal of the American Judicature Society. We also have Mr. Ernest C. Friesen, who has so many titles that I do not know what to call him, but at present he seems to go by the title of Dean of the new school for trial judges which is to be opened for the first time this year in Denver.

The plaque will now be unveiled by Mr. Irving Gotlieb, President of the Ramsey County Bar Association, who conceived the idea of this commemoration of Dean Pound's address; Mr. Philip Neville, who represents the Minnesota State Bar Association and has been very active in the culmination of this dedication; and Mr. Samuel H. Morgan, who represents the Harvard Law School Association of Minnesota and who also has had a great deal to do with the fulfillment of the idea of the hanging of this plaque.

(The plaque was unveiled by Mr. Gotlieb).

It is now my real pleasure to present to you the Honorable Sterry R. Waterman, who also could be introduced under a number of titles but for the present comes here as President of the American Judicature Society to make the presentation of this plaque.

***263 CADDRESS**

by Honorable STERRY R. WATERMAN

Circuit Judge, United States Court of Appeals for the Second Circuit

Mr. Chief Justice, Mr. Justice Clark, distinguished presidents of the co-sponsoring organizations, honored guests, ladies and gentlemen.

On this historic occasion of commemoration and of dedication at the birthplace of judicial reform in America, I am privileged to represent the American Judicature Society, of which Dean Roscoe Pound is the only living founder, and which he served as a director from its founding in 1913 until 1960, a span of 47 years, the longest tenure in the Society's history.

In placing this bronze plaque here in this building so significant of the American way of life and so significant of our political and legal traditions, we who find in the workings of the law the clearest road to reach Justice, the great yearning of civilized man, recognize that complacency has no place in our profession, that what was said here in 1906 requires us ever to improve ourselves and our procedures, our attitudes and our efforts.

The placing of the plaque would be a meaningless gesture if this were not so, for here on this hill, as certain as Moses came down from Mount Sinai with the tables of the law for the consideration of the leaders of the tribes of his people and for their government, so did this young lawyer hand down to the self-satisfied leaders of the Bench and Bar of 1906 the principles that were necessary if Bench and Bar were to keep the respect of the people and be trusted with the people's leadership. Said he:

> "Our system of courts is archaic."
>
> "Our procedure is behind the times."
>
> "Our judicial power is wasted."
>
> "Putting courts into politics has almost destroyed the traditional respect for the Bench."

***264** And having pointed out the glaring evils in the administration of American justice he then pointed out the courses of action necessary to start the long travail of those who would correct those evils-a labor characterized by one of those who came after as a labor "not for the short-winded." Yes indeed, this spot could well be called the Mount Sinai of Judicial Reform in America!

Less than six years after the Pound speech, the American Judicature Society was founded and we are today almost at the end of the fiftieth year of our existence during which we have been observing our Golden Anniversary. We are a national and international organization of lawyers and judges-and laymen, too. We have members in all 50 States, in all our insular possessions and in some 27 foreign countries. We exist for the sole purpose of promoting the efficient administration of justice.

From our offices in the American Bar Center in Chicago the Society's staff of eleven dedicated persons carries on a general research and promotional program in this behalf. This includes the publishing of the monthly Journal, and of a variety of books, pamphlets, brochures and other literature in the field, the conducting of information and consultation services, and the holding of meetings, conferences, institutes and seminar on the various facets of judicial administration.

The American Judicature Society is one of the four co-sponsors of this Saint Paul commemoration project. In fact it was the Society that was initially responsible for the idea as a part of the observance of its Golden Anniversary. It is altogether appropriate for me to express at this time our thanks and appreciation for the effective and whole-hearted assistance

and co-operation of the Minnesota State Bar Association, the Ramsey County Bar Association, and the Harvard Law School Association of Minnesota.

There are three impelling reasons why it is fitting to mark the placing of this plaque in honor of Roscoe Pound's Saint Paul speech a feature of the American Judicature Society's Golden Anniversary observance.

The first is the direct and close connection between the delivery of the speech and the founding of the Society less than seven years later. Mr. Justice Clark at lunch reviewed the story of the speech itself and the stream of influence that flowed from it. Perhaps the first substantial, tangible consequence from it was the founding of our Society, an organization specifically directed toward doing the job Pound demonstrated needed to be done, led by men ***265** who were present on that occasion and who had heard that speech.

The second reason for featuring this event in our Anniversary observances is the unmistakable influence that the Dean's speech had on the program and activities of the Society after it was founded. Pound's title, as you all know, was “Causes of Popular Dissatisfaction with the Administration of Justice”, and one of the earliest publications of the American Judicature Society was a bulletin entitled “Causes of Dissatisfaction with the Administration of Justice in Metropolitan Districts”. The evidence of Pound's influence in that monograph is apparent in the repetition of words in the very title itself as well as in the substance and content of the work.

What were the chief needs of judicial administration in America as delineated by Pound?

1. Non-political selection of judges, reasonably secure tenure, adequate compensation and retirement for them.

2. Unified state-wide court organization.

3. Simple and speedy judicial procedures established and administered under judicial rule-making power.

4. Efficient and businesslike court administration.

5. A unified legal profession with high standards of admission, ethics and self-discipline.

6. Simple, speedy and low-cost adjudication of small claims and minor offenses.

7. Legal services and equal justice for all.

These have been the outstanding objectives of the American Judicature Society these 50 years and there is no question that the 1906 speech made by Dean Pound here in Saint Paul was the starting point in the framing of that program.

The third reason why it is eminently appropriate that we honor the beginning of the judicial reform movement here in Saint Paul is that the lawyers and judges of this state have an enviable reputation for doing a good job of administering justice, and are actively at work striving for improvements in it.

The University of Minnesota Law School has contributed fine men to the bench and bar of this state and of the nation, and its dean for some years, Maynard Pirsig, long active in the American Judicature Society, pioneered there in the teaching of judicial ***266** administration courses ahead of the other law schools. The Minnesota State Bar Association has an active Section on Court Organization which is now concentrating on improvements in the minor courts. This Association has been a leader among the states in its forward-looking activities to improve the image of lawyer and judge in the eye of the public. There has been a strong movement in Minnesota for adoption of the American Judicature Society's non-political nominative-appointive-elective merit system of judicial selection, and the Minnesota State Bar

Association has endorsed it in principle. Morris B. Mitchell of this state, a former director and officer of the Society, has been a national leader in this effort.

Plans are now being laid for holding one of the series of citizens conferences on the courts co-sponsored by the Society and the Joint Committee for the Effective Administration of Justice.

Today nearly 400 Minnesota lawyers and judges are supporting members of the American Judicature Society, led by our present Minnesota directors John Burke, Ted Knudsen and Leslie Anderson.

And so, Mr. Chairman, the American Judicature Society is proud to have initiated the placing of this plaque in honor of Dean Pound and of his 1906 speech, in honor of what Dean Wigmore who heard the speech called, “The spark that kindled the white flame of progress”-a flame that is burning brightly today in Minnesota and all across the land.

You see before you a large framed parchment bearing the complete text of the Pound Address. One copy of this has been preserved within the plaque itself as perpetual evidence of the subject of the inscription. It is my privilege now, on behalf of the American Judicature Society, to present the framed copy which you see to Chief Justice Knutson for the Supreme Court of Minnesota.

CHIEF JUSTICE KNUTSON: It is a real regret on the part of all of us that Dean Pound cannot be with us today. Due to his advanced age and his physical condition, it was simply impossible for him to be here. Representing the Harvard Law School and Dean Pound, we are happy to have with us Professor Arthur E. Sutherland, who will speak in behalf of his school and the great Dean Pound.

***267 ADDRESS**

by ARTHUR E. SUTHERLAND

Professor, Harvard Law School

Chief Justice Knutson, Mr. Justice Clark, Judge Waterman, Dean Dow, fellow lawyers and other friends. Dean Pound's absence today causes us all much regret. He would have delighted to be here; he would have been warmed by this assembly of his brethren, called together to acknowledge the power of his thought. Only one thing alleviates my distress that he must miss this happy observance-that is our opportunity to speak, without reserve, of our affectionate admiration for him. In our usual talk we keep the term “lawyer's lawyer” for one of our craft whom we particularly respect; and through nearly three-quarters of a century Roscoe Pound has deservedly sensed the regard of his fellows for his pre-eminence as a lawyer's lawyer and a lawyer's scholar, and a scholar's lawyer.

His ninety-fourth birthday will come next October 27. The fifty-eight years since he here delivered the memorable address we gather to signalize have brought for him many joys of high achievement. But recent months have brought, too, some of the penalties of time that Ecclesiastes inventoried in saddened metaphor. Last Friday I visited the Dean in his room in the Harvard Infirmary. I bring to you, his brethren, thanks for today's honors, and thanks for more than that, thanks for companionship through rewarding years of work in the tillage of our common field.

In August 1906, Roscoe Pound was a young man of thirty-six, combining practice at the Nebraska bar with the Deanship of the Faculty of Law in that State's University. He had already served as a Commissioner of Appeals on his State's Supreme Court. He was a Nebraska Commissioner on Uniform State Laws. Perhaps ***268** there was more than a demonstration of coincidental versatility in the fact that for ten years he had directed his State's Botanical Survey, in the process earning at the age of twenty-seven Nebraska's Doctorate of Philosophy in that science. For Pound was then, as he always continued, a scientist in the law, an accurate observer of phenomena, and an acute and unorthodox analyst of the relevances of his observations. In 1906 he spoke here as a man of scientific mind. His analysis of the “Causes of

Popular Dissatisfaction with the Administration of Justice" caused immediate controversy between those on the one hand satisfied with things as they were, embarrassed at mention of shortcomings; and on the other those men of the law who were hopeful of better things, who welcomed the demonstration of our inadequacies because that demonstration was essential to the beginning of betterment. To this latter group young Mr. Pound's dispassionate analysis, hostile to no one, unsparing only of deficiencies in the legal process, was no accusation of failure, but was an exhortation to establish justice; not a scolding at laggards but a sounding of the call for an advance. Here where we see dedicated a permanent memorial of his words, uttered a half-century and more ago, we should do well to resolve to carry on in that same spirit, wisely appraising our accomplishments and our shortcomings, surveying the needs of our people for whom the law may hold hope, pointing out what is needed for tomorrow. We lawyers should always lead in rational dissatisfaction with the administration of justice, not because we bear ill will toward our profession but precisely because we are dedicated to its better achievements, and because change in social conditions will always call for wise concurrent changes in our law and our government.

During the last half-century we have done well. Looking the world 'round, who among us can justly say that the laws, or the justice, of other nations can, on the whole, put us to shame? We have worked doggedly at the endless, often thankless, task, of improving matters in Pound's four categories-first, those dissatisfactions inhering in any legal system, man being what he is; next, those dissatisfactions peculiar to the ancient individualist tradition in English law, accented by the impatience natural to a restless, pioneer American people, still new-come to their continent; and then Pound's third and fourth headings, those dissatisfactions engendered by defects in our judicial organization, and by certain peculiar conditions of the society in which, and for ***269** which, our courts must do their work. But while we have done well we are not so fatuous as to suppose that in any of these tribulations our work has been or will ever be completed. The American Bar Association, our State and City Bars, The Judicature Society, The Conference of Commissioners on Uniform Laws, the Law Institute, our Faculties of Law, all will have tasks to do and then do over again, long after all of us gathered here today have fallen silent out of due respect for our successors. So, conscious of tasks still to come, perhaps we are well advised this afternoon to think on those troubles of 1906 which are still with us, in some context newly accented by the demands of our own times.

I suggest, then, one problem, relevant to all Dean Pound's observations made here in 1906, a problem capable of no complete solution, susceptible to no impatient improvement, a problem so evident that much of the time we take it for granted, we accept its malfunctionings as inevitable payments on the price of our constitutional system. I refer to those troubles in the American administration of justice which arise from our federal structure-troubles which, like most of man's ills, can never be completely cured, but troubles to whose alleviation we, in this place, on this occasion, should particularly dedicate ourselves. We shall find enough to keep us busy!

From many categories of instances I here mention two classes of controversies which have in our time been particularly troublesome in this way-those arising from differences between the standards of administration of criminal justice applied in some of our State courts and those applied in the federal court system; and, secondly, differences between some State courts and the federal court systems in the standards applied to cases involving race relations. Each of these two sets of problems arouses deep emotional reactions. In each, the Supreme Court, under the mandate of the Fourteenth Amendment, is continually insisting that State justice adhere to a federal standard. In each, we men of the law, unless we are watchful of ourselves, may choose sides not rationally but hastily and unadvisedly, and by our examples we may cause others, less well-informed, to choose sides similarly. We may, by things done and things left undone, ourselves contribute to popular dissatisfactions.

Since the time of Dean Pound's great address our national population has increased from about 90 millions to nearly 190 ***270** millions. The great bulk of these people have clustered in and around huge cities; the anonymity and obscurity available in such immense aggregates of humanity have made possible criminal activity on a scale new in our history. In some instances police reaction has, perhaps understandably but always regrettably, gone beyond constitutional bounds; various opinions of State and federal courts make note that our brethren of prosecutorial staffs have sometimes been

involved in these procedures. The United States Supreme Court has, in a series of cases, found that constitutional rights of the accused have thus been invaded, and has reversed decisions of State Supreme Courts. Inevitably, in this situation, federal determination that a State has denied due process of law causes some unhappy reaction.

Even more resented in some places are Supreme Court reversals of State court judgments in racial matters. This is neither the time nor the place to retell the story, now grown familiar, of this train of decisions during the generation last past. What may properly concern us is the nature of expressed dissatisfaction with the Supreme Court of the United States, the world's most conspicuous organ concerned with the administration of justice. We may well ask ourselves whether, as responsible members of the public profession of the law, we are carrying out the full duty to which Roscoe Pound called us fifty-eight years ago. Properly we do our part to see that the whole mechanism of justice functions as it should-including our highest Court. Have we done our best to see that only just dissatisfaction is directed at the work of that essential tribunal?

I would not for a moment suggest that any of our courts be sheltered from lawyer-like criticism; what I urge is our careful thought for the professional quality of that criticism, lest we encourage citizens generally to carp at our judges in the spirit of political warfare. For the soul of government of laws is the judicial function; and that function can only exist if adjudication is understood by our people generally to be-as it is-the essentially disinterested, rational and deliberate element in our democracy. On the generality of this comprehension, on the respect that perceived disinterested rationality always draws to its own support, on this deserved respect largely depends our system of law and justice. Perhaps we ourselves have contributed by our silence or sometimes worse to one of today's popular dissatisfactions. We are perhaps called to a new reminder of the perennially difficult nature of that duty to which Roscoe Pound called us so long ago.
***271** We do well here, today, to remember his words. Of him we could well repeat much older words:

> "Let us now praise famous men, and our fathers that begat us ***.
>
> "Leaders of the people by their counsels, and by their knowledge of learning meet for the people, wise and eloquent in their instructions: ***
>
> "All these were honoured in their generations, and were the glory of their times."

Since our gathering at St. Paul a few days ago, Dean Pound has died,-quietly, in his sleep, in the midst of the University where he worked so many years. Few men have served the rule of just law as well as he.

To single out as greatest any one among his services would be a vain distinction. But surely in the long perspective of his life his words spoken in St. Paul will stand as a monument more lasting than the bronze in which they are now inscribed.

***273 The Causes of POPULAR DISSATISFACTION with the ADMINISTRATION OF JUSTICE**

By ROSCOE POUND

Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor, [1] and the king exhorts that the peace be kept better than has been wont, [2] and that "men of every order readily submit ... each to the law which is appropriate to him." [3] The author of the apocryphal Mirror of Justice gives a list of

one hundred and fifty-five abuses in legal administration, and names it as one of the chief abuses of the degenerate times in which he lived that executions of judges for corrupt or illegal decisions had ceased.[4] Wyclif complains that "lawyers make process by subtlety and cavilations of law civil, that is much heathen men's law, and do not accept the form of the gospel, as if the gospel were not so good as pagan's law."[5] Starkey, in the reign of Henry VIII, says: "Everyone that can color reason maketh a stop to the best law that is beforetime devised."[6] James I reminded his judges that "the law was founded upon reason, and that he and others ***274** had reason as well as the judges."[7] In the eighteenth century, it was complained that the bench was occupied by "legal monks, utterly ignorant of human nature and of the affairs of men."[8] In the nineteenth century the vehement criticism of the period of the reform movement needs only to be mentioned. In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice. But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.

In spite of the violent opposition which the doctrine of judicial power over unconstitutional legislation at first encountered, the tendency to give the fullest scope to the common law doctrine of supremacy of law and to tie down administration by common law liabilities and judicial review, was, until recently, very marked. Today, the contrary tendency is no less marked. Courts are distrusted, and the executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion. It will be assumed, then, that there is more than the normal amount of dissatisfaction with the present-day administration of justice in America. Assuming this, the first step must be diagnosis, and diagnosis will be the sole purpose of this paper. It will attempt only to discover and to point out the causes of current popular dissatisfaction. The inquiry will be limited, moreover, to civil justice. For while the criminal law attracts more notice, and punishment seems to have greater interest for the lay mind than the civil remedies of prevention and compensation, the true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history. The rules which define those invisible boundaries, within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer and employee must rely consciously or subconsciously in their every-day transactions, are conditions precedent of modern social and industrial organization.

***275** With the scope of inquiry so limited, the causes of dissatisfaction with the administration of justice may be grouped under four main heads: (1) Causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.

It needs but a superficial acquaintance with literature to show that all legal systems among all peoples have given rise to the same complaints. Even the wonderful mechanism of modern German judicial administration is said to be distrusted by the people on the time-worn ground that there is one law for the rich and another for the poor.[9] It is obvious, therefore, that there must be some cause or causes inherent in all law and in all legal systems in order to produce this universal and invariable effect. These causes of dissatisfaction with any system of law I believe to be the following: (1) The necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint.

The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. This is one of the penalties of uniformity. Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring the public administration of justice into touch with changed moral, social or political conditions. But such periods of

reversion result only in new rules or changed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes stable and uniform, and the new element, whether custom or equity or natural law becomes as rigid and mechanical as the old. This mechanical action of the law may be minimized, but it cannot be obviated. Laws are general rules; and the process of making them general ***276** involves elimination of the immaterial elements of particular controversies. If all controversies were alike or if the degree in which actual controversies approximate to the recognized types could be calculated with precision, this would not matter. The difficulty is that in practice they approximate to these types in infinite gradations. When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos, the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals.

In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this contrast is greatly intensified and appeals to large classes of society. Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellow so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross, and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event, ***277** judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him say with Luther, "Good jurist, bad Christian." [10]

A closely related cause of dissatisfaction with the administration of justice according to law is to be found in the inevitable difference in rate of progress between law and public opinion. In order to preclude corruption, to exclude the personal prejudices of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, cannot exist until public opinion has become fixed and settled, and cannot change until a change of public opinion has become complete. It follows that this difficulty in the judicial administration of justice, like the preceding, may be minimized, but not obviated. In a rude age the Teutonic moots in which every free man took a hand might be possible. But these tribunals broke down under pressure of business and became ordinary courts with permanent judges. The Athenians conceived that the people themselves should decide each case. But the Athenian dikastery, in which controversies were submitted to blocks of several hundred citizens by way of reaching the will of the democracy, proved to register its caprice for the moment rather than its permanent will. Modern experience with juries, especially in commercial causes, does not warrant us in hoping much from any form of judicial referendum. Public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration. All interference with the uniform and automatic application of these rules, when actual controversies arise, introduces an anti-legal element which becomes intolerable. But, as public opinion affects tribunals through the rules by which they decide and these rules once made, stand till abrogated or altered, any system of law will be made up of successive strata of rules and doctrines representing successive and often widely divergent periods of public opinion. In this sense, law is often in very truth a government of the living by the dead. [11] The unconscious change of judicial law

making and the direct alterations of legislation and codification operate to make this government by the dead reasonably tolerable. But here again we must pay a price for certainty and uniformity. The law does ***278** not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess.

A third perennial source of popular dissatisfaction with the administration of justice according to law may be found in the popular assumption that the administration of justice is an easy task to which anyone is competent. Laws may be compared to the formulas of engineers. They sum up the experience of many courts with many cases and enable the magistrate to apply that experience subconsciously. So, the formula enables the engineer to make use of the accumulated experience of past builders, even though he could not work out a step in its evolution by himself. A layman is no more competent to construct or to apply the one formula than the other. Each requires special knowledge and special preparation. None the less, the notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in extravagant powers of juries, lay judges of probate and legislative [12] or judicial law making against *stare decisis*, in most of the commonwealths of the South and West. The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class feeling or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the every-day purity and efficiency of our courts.

Another necessary source of dissatisfaction with judicial administration of justice is to be found in popular impatience of restraint. Law involves restraint and regulation, with the sheriff and his posse in the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled ***279** to it entirely. The very fact that it is a compromise between the individual and his fellows makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive. In an age of absolute theories, monarchical or democratic, this restiveness is acute. A conspicuous example is to be seen in the contest between the king and the common law courts in the seventeenth century. An equally conspicuous example is to be seen in the attitude of the frontiersman toward state-imposed justice. "The unthinking sons of the sage brush," says Owen Wister, "ill tolerate anything which stands for discipline, good order and obedience; and the man who lets another command him they despise. I can think of no threat more evil for our democracy, for it is a fine thing diseased and perverted, namely, the spirit of independence gone drunk." [13] This is an extreme case. But in a lesser degree the feeling that each individual, as an organ of the sovereign democracy, is above the law he helps to make, fosters everywhere a disrespect for legal methods and institutions and a spirit of resistance to them. It is "the reason of this our artificial man the commonwealth," says Hobbes, "and his command that maketh law." [14] This man, however, is abstract. The concrete man in the street or the mob is much more obvious; and it is no wonder that individuals and even classes of individuals fail to draw the distinction.

A considerable portion of current dissatisfaction with the administration of justice must be attributed to the universal causes just considered. Conceding this, we have next to recognize that there are potent causes in operation of a character entirely different.

Under the second main head, causes lying in our peculiar legal system, I should enumerate five: (1) The individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives

us petty tinkering where comprehensive reform is needed, and (5) defects of form due to the circumstance that the bulk of our legal system is still case law.

The first of these, conflict between the individualist spirit of the common law and the collectivist spirit of the present age, ***280** has been treated of on another occasion. [15] What was said then need not be repeated. Suffice it to point out two examples. From the beginning, the main reliance of our common law system has been individual initiative. The main security for the peace at common law is private prosecution of offenders. The chief security for the efficiency and honesty of public officers is mandamus or injunction by a tax payer to prevent waste of the proceeds of taxation. The reliance for keeping public service companies to their duty in treating all alike at reasonable price is an action to recover damages. Moreover, the individual is supposed at common law to be able to look out for himself and to need no administrative protection. If he is injured through contributory negligence, no theory of comparative negligence comes to his relief; if he hires as an employee, he assumes the risk of the employment; if he buys goods, the rule is *caveat emptor*. In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Private suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interests, common law methods of relief have failed. The courts have not been able to do the work which the common law doctrine of supremacy of law imposed on them. A widespread feeling that the courts are inefficient has been a necessary result. But, along with this, another phase of the individualism of the common law has served to increase public irritation. At the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation. The chief concern of the common law is to secure and protect individual rights. "The public good," says Blackstone, "is in nothing more essentially interested than in the protection of every individual's private rights." [16] Such, it goes without saying, is not the popular view today. Today we look to society for protection against individuals, natural or artificial, and we resent doctrines that protect these individuals against society for fear ***281** society will oppress us. But the common law guaranties of individual rights are established in our constitutions, state and federal. So that, while in England these common law dogmas have had to give way to modern legislation, in America they stand continually between the people, or large classes of the people, and the legislation they desire. In consequence, the courts have been put in a false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright.

A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. [17] But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from 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 interest 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 present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel 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." [18] It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, ***282** of the witness

function which impairs the administration of justice. It keeps alive the unfortunate exchequer rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another inning in the game of justice. [19] It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. [20] 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. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

Another source of irritation at our American courts is political jealousy due to the strain put upon our legal system by the doctrine of the supremacy of law. By virtue of this doctrine, which has become fundamental in our polity, the law restrains, not individuals alone, but a whole people. The people so restrained would be likely in any event to be jealous of the visible agents of restraint. Even more is this true in that the subjects which our constitutional polity commits to the courts are largely matters of economics, politics and sociology upon which a democracy is peculiarly sensitive. Not only are these matters made into legal ***283** questions, but they are tried as incidents of private litigation. This phase of the common law doctrine was felt as a grievance in the seventeenth century. “I tell you plainly,” said Bacon, as attorney general, in arguing a question of prerogative to the judges, “I tell you plainly it is little better than a by-let or crooked creek to try whether the king hath power to erect this office in an assize between Brownlow and Michell.” [21] King Demos must feel much the same at seeing the constitutionality of the Missouri Compromise tried in an action of trespass, at seeing the validity of the legal tender laws tried on pleas of payment in private litigation, at seeing the power of the federal government to carry on the Civil War tried judicially in admiralty, at seeing income tax overthrown in a stockholder's bill to enjoin waste of corporate assets and at seeing the important political questions in the Insular Cases disposed of in forfeiture proceedings against a few trifling imports. Nor is this the only phase of the common law doctrine of supremacy of law which produces political jealousy of the courts. Even more must the layman be struck with the spectacle of law paralyzing administration which our polity so frequently presents. The difficulties with writs of *habeas corpus* which the federal government encountered during the Civil War and the recent case of the income tax will occur to you at once. In my own state, in a few years we have seen a freight rate law suspended by decree of a court and have seen the collection of taxes from railroad companies, needed for the every-day conduct of public business, tied up by an injunction. The strain put upon judicial institutions by such litigation is obviously very great.

Lack of general ideas and absence of any philosophy of law, which has been characteristic of our law from the beginning and has been a point of pride at least since the time of Coke, [22] contributes its mite also toward the causes of dissatisfaction with courts. For one thing, it keeps us in the thrall of a fiction. There is a strong aversion to straightforward change of any important legal doctrine. The cry is *interpret it*. But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, “it is never the law itself that is in the wrong; it is

always some wicked interpreter of the ***284** law that has corrupted and abused it." [23] Thus another unnecessary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

The defects of form inherent in our system of case law have been the subject of discussion and controversy too often to require extended consideration. Suffice it to say that the want of certainty, confusion and incompleteness inherent in all case law, and the waste of labor entailed by the prodigious bulk to which ours has attained, appeal strongly to the layman. The compensating advantages of this system, as seen by the lawyer and by the scientific investigator, are not apparent to him. What he sees is another phase of the great game; a citation match between counsel, with a certainty that diligence can rake up a decision *somwhere* in support of any conceivable proposition.

Passing to the third head, causes lying in our judicial organization and procedure, we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

Our system of courts is archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves. The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects. Multiplicity of courts is characteristic of archaic law. In Anglo-Saxon law, one might apply to the Hundred, the Shire, the Witan, or the king in person. Until Edward I broke up private jurisdictions, there were the king's superior courts of law, the itinerant justices, the county courts, the local or communal courts and the private courts of lordships; besides which one might always apply to the king or to the Great Council for extraordinary relief. When later the royal courts had superseded all others, there were the concurrent jurisdictions of King's Bench, Common Pleas and Exchequer, all doing the same work, while appellate ***285** jurisdiction was divided by King's Bench, Exchequer Chamber and Parliament. In the Fourth Institute, Coke enumerates seventy-four courts. Of these, seventeen did the work that is now done by three, the County Courts, the Supreme Court of Judicature and the House of Lords. At the time of the reorganization by the Judicature Act of 1873, five appellate courts and eight courts of first instance were consolidated into the one Supreme Court of Judicature. It was the intention of those who devised the plan of the Judicature Act to extend the principle of unity of jurisdiction by cutting off the appellate jurisdiction of the House of Lords and by incorporating the County Courts in the newly formed Supreme Court as branches thereof. [24] The recommendation as to the County Courts was not adopted, and the appellate jurisdiction of the House of Lords was restored in 1875. In this way the unity and simplicity of the original design were impaired. But the plan, although adopted in part only, deserves the careful study of American lawyers as a model modern judicial organization. Its chief features were (1) to set up a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate and in divorce was to be consolidated; in the other branch, the court of appeal, the whole reviewing jurisdiction was to be established. This idea of unification, although not carried out completely, has proved most effective. Indeed, its advantages are self-evident. Where the appellate tribunal and the court of first instance are branches of one court, all expense of transfer of record, or transcripts, bills of exceptions, writs of error and citations is wiped out. The records are the records of the court, of which each tribunal is but a branch. The court and each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review is done away with. One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause. On the other hand, our American reports bristle with fine points of appellate procedure. More than four percent of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely ***286** volumes 129 to 139, covering decisions of the Circuit Court of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average,

turn wholly upon appellate procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty percent involve points of appellate procedure. In volume 87, of fifty-three decisions of the Supreme Court and ninety-seven of the Courts of Appeals, twenty-eight are taken up in whole or in part with the mere technics of obtaining a review. All of this is sheer waste, which a modern judicial organization would obviate.

Even more archaic is our system of concurrent jurisdiction of state and federal courts in causes involving diversity of citizenship; a system by virtue of which causes continually hang in the air between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court. A few statistics on this point may be worth while. In the ten volumes of the Federal Reporter referred to, the decisions of the Circuit Court of Appeals in civil cases average seventy-six to the volume. Of these, on the average, between four and five in a volume are decided on points of federal jurisdiction. In a little more than one to each volume, judgments of Circuit Courts are reversed on points of jurisdiction. The same volumes contain on the average seventy-three decisions of Circuit Courts in civil cases to each volume. Of these, six, on the average, are upon motions to remand to the state courts, and between eight and nine are upon other points of federal jurisdiction. Moreover, twelve cases in the ten volumes were remanded on the *form* of the petition for removal. In other words, in nineteen and three-tenths percent of the reported decisions of the Circuit Courts the question was whether those courts had jurisdiction at all; and in seven percent of these that question depended on the form of the pleadings. A system that permits this and reverses four judgments a year because the cause was brought in or removed to the wrong tribunal is out of place in a modern business community. All original jurisdiction should be concentrated. It ought to be impossible for a ***287** cause to fail because brought in the wrong place. A simple order of transfer from one docket to another in the same court ought to be enough. There should be no need of new papers, no transcripts, no bandying of cases from one court to another on orders of removal and of demand, no beginnings again with new process.

Judicial power may be wasted in three ways: (1) By rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary re-trials. American judicial systems are defective in all three respects. The Federal Circuit Courts and Circuit Courts of Appeals are conspicuous exceptions in the first respect, affording a model of flexible judicial organization. But in nearly all of the states, rigid districts and hard and fast lines between courts operate to delay business in one court while judges in another have ample leisure. In the second respect, waste of judicial time upon points of practice, the intricacies of federal jurisdiction and the survival of the obsolete Chinese Wall between law and equity in procedure make our federal courts no less conspicuous sinners. In the ten volumes of the Federal Reporter examined, or an average of seventy-six decisions of the Circuit Courts of Appeals in each volume, two turn upon the distinction between law and equity in procedure and not quite one judgment to each volume is reversed on this distinction. In an average of seventy-three decisions a volume by the Circuit Courts, more than three in each volume involve this same distinction, and not quite two in each volume turn upon it. But many states that are supposed to have reformed procedure scarcely make a better showing.

Each state has to a great extent its own procedure. But it is not too much to say that all of them are behind the times. We struck one great stroke in 1848 and have rested complacently or contented ourselves with patchwork amendment ever since. The leading ideas of the New York Code of Civil Procedure marked a long step forward. But the work was done too hurriedly and the plan of a rigid code, going into minute detail, was clearly wrong. A modern practice act lays down the general principles of practice and leaves details to rules of court. The New York Code Commission was appointed in 1847 and reported in 1848. If we except the Connecticut Practice Act of 1878, which shows English influence, American reform in procedure has stopped substantially where that commission left it. In England, ***288** beginning with 1826

and ending with 1874, *five* commissioners have put forth *nine* reports upon this subject.[25] As a consequence we have nothing in America to compare with the radical treatment of pleading in the English Judicature Act and the orders based thereon. We still try the *record*, not the *case*. We are still reversing judgments for nonjoinder and misjoinder. The English practice of joinder of parties against whom relief is claimed in the alternative, rendering judgment against any that the proof shows to be liable and dismissing the rest, makes an American lawyer rub his eyes. We are still reversing judgments for variance. We still reverse them because the recovery is in excess of the prayer, though sustained by the evidence.[26]

But the worst feature of American procedure is the lavish granting of new trials. In the ten volumes of the Federal Reporter referred to, there are, on the average, twenty-five writs of error in civil cases to the volume. New trials are awarded on the average in eight cases a volume, or nearly twenty-nine percent. In the state courts the proportion of new trials to causes reviewed, as ascertained from investigation of the last five columns of each series of the National Reporter system, runs over forty percent. In the last three volumes of the New York Reports (180-182), covering the period from December 6, 1904, to October 24, 1905, forty-five new trials are awarded. Nor is this all. In one case in my own state[27] an action for personal injuries was tried six times, and one for breach of contract[28] was tried three times and was four times in the Supreme Court. When with this we compare the statistics of the English Court of Appeal, which does not grant to exceed twelve new trials a year, or new trials in about three percent of the cases reviewed, it is evident that our methods of trial and review are out of date.

A comparison of the volume of business disposed of by English and by American courts will illustrate the waste and delay caused by archaic judicial organization and obsolete procedure. In England there are twenty-three judges of the High Court who dispose ***289** on the average of fifty-six hundred *contested* cases, and have before them, in one form or another, some eighty thousand cases each year. In Nebraska there are twenty-eight district judges who have no original probate jurisdiction and no jurisdiction in bankruptcy or admiralty, and they had upon their dockets last year forty-three hundred and twenty cases, of which they disposed of about seventy percent. England and Wales, with a population in 1900 of 32,000,000, employs for the same civil litigation ninety-five judges, that is, thirty-seven in the Supreme Court and House of Lords and fifty-eight county judges. Nebraska, with a population in 1900 of 1,066,000, employs for the same purpose one hundred and twenty-nine. But these one hundred and twenty-nine are organized on an antiquated system and their time is frittered away on mere points of legal etiquette.

Finally, under the fourth and last head, causes lying in the environment of our judicial administration, we may distinguish six: (1) Popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee, and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press. Each of these deserves consideration, but a few points only may be noticed. Law is the skeleton of social order. It must be "clothed upon by the flesh and blood of morality."[29] The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious. Another strain upon our judicial system results from the crude and unorganized character of American legislation in a period when the growing point of law has shifted to legislation. When, in consequence, laws fail to produce the anticipated effects, judicial administration shares the blame. Worse than this is the effect of laws not intended to be enforced. These parodies, like the common law branding of ***290** felons, in which a piece of bacon used to be interposed between the branding iron and the criminal's skin,[30] breed disrespect for law. Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench. Finally, the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game. There are honorable exceptions, but the average press reports distract attention from the real

proceeding to petty tilts of counsel, encounters with witnesses and sensational by-incidents. In Nebraska, not many years since, the federal court enjoined the execution of an act to regulate insurance companies.[31] In press accounts of the proceeding, the conspiracy clause of the bill was copied *in extenso* under the headline "Conspiracy Charged," and it was made to appear that the ground of the injunction was a conspiracy between the state officers and some persons unknown. It cannot be expected that the public shall form any just estimate of our courts justice from such data.

Reviewing the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of an age of transition and are the penalty we pay for freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the last century. Lord Kenyon, as Master of the Rolls, sat in Parliament and took as active a part in political squabbles in the House of Commons as our state judges today in party conventions.[32] Dodson and Foggs and Sergeant Buzzfuzz wrought in an atmosphere of contentious procedure. Bentham tells us that in 1797, out of five hundred and fifty pending writs of error, five hundred and forty-three were shams or vexatious contrivances for delay.[33] Jarndyce and Jarndyce dragged out its weary course in chancery only half a century ***291** ago. We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law; with active bar associations in every state to revive professional feeling and throw off the yoke of commercialism; with the passing of the doctrine that politics, too, is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

Footnotes

1 e.g., Secular Ordinance of Edgar, Cap. 1; Secular Ordinance of Cnut; 2; Laws of Ethelred, VI, 1; Laws of Edward, preface.

2 Laws of Athelstan, IV; Laws of Edward, 4.

3 Laws of Ethelred, V, 4.

4 Mirror, chap. 5, sec. 1.

5 See Maitland, English Law and the Renaissance, 53.

6 Id. 42.

7 Conference between King James I and the Judges of England, 12 Rep. 63.

8 Lord Campbell, Lives of the Chief Justice (3 Ed.) IV, 119.

9 Dr. v. Liszt, Professor at Berlin, delivered an address in the Rathaus in Berlin on this very subject recently, if we may credit press accounts.

10 Courtney Kenny, *Bouns Jurista, Malus Christa*, 19 Law Quart.Rev. 326.

11 Spencer, Principles of Sociology, II, 514.

12 See an instance noted in the address of Mr. Justice Brown, Rep.Am.Bar.Assn., 1889, 282.

13 Quoted in Ross, Foundations of Sociology, 388.

14 Leviathan, chap. 326.

15 Do We Need a Philosophy of Law? 5 Columbia Law Rev. 339; The Spirit of the Common Law, *Green Bag*, January, 1906.

16 Bl.Comm. 139.

17 Wigmore, Evidence, 127.

18 Wigmore, Evidence, 1112.

19 Holland vs. Chicago, B. & Q.R.R. Co., 52 Neb. 100.

20 De Graw vs. Elmore, 50 N.Y. 1.

21 Collectanea Juridica, 1, 173.

22 Co. Lit. Preface.

23 Fragment on Government, XVII.

24 Report of Judicature Commission, 1869, p. 13.

25 Lord Eldon's Commission, 1826; Royal Commission, 1829, 1830, 1832; Commission on Pleading and Practice in Courts of Common Law, 1851, 1853, 1860; Chancery Commissioners, 1852, 1854, 1856; Judicature Commissioners, 1869-1874.

26 Brought vs. Cherokee Nation (C.C.A.) 129 Fed. 192.

27 Omaha St. R. Co. vs. Boesen, 95 N.W. 617; Cf. Mutual Life Ins. Co. vs. Hillmon (C.C.A.), 107 Fed. 834 (tried six times).

28 Wittenberg vs. Molyneaux, 60 Neb. 107.

29 Sidgwick, Methods of Ethics, 6 Ed. 456.

30 Bentham, Theory of Legislation (tr. by Hildreth), 401.

31 Niagara Fire Ins. Co. vs. Cornell, 110 Fed. 816.

32 Lord Campbell, Lives of the Chief Justices, (3 Ed.) IV, 70-73.

33 Works, VII, 214.

35 F.R.D. 241