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The Law in the Past and Present

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THE LAW IN THE PAST AND PRESENT

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In a free state it is necessary that the law should be perfected; that lawyers should be highly trained and should be not only worthy of high regard, but given high regard. Liberty can not long endure where the law and its administrators are not respected or where the law is not promptly and efficiently upheld and enforced. Wherever the law is weak or constantly changed, and wherever lawyers are condemned, the mob rule will prevail and the people will finally lose their love for free government.

With some variations, lawyers have been envied and berated with more or less sarcasm and abuse for centuries. In Athens, just preceding its greatest glory, no citizen was allowed to employ a lawyer to represent him in court. Socrates, when his life was at stake, had to make his own plea for his life and said that he was at a great disadvantage because he had never before appeared in court. He was convicted and compelled to drink the cup of poison because it was said that he, one of the purest of men, was injuring the state by creating distrust of the popular gods and teaching a false religion. In Germany now, no lawyer can appear in the Merchants' Court. In New York City many disputes are settled by arbitration in commercial boards. Mr. Roscoe Pound, of the Harvard Law School, has well explained the causes for the usual diatribes against the law and the lawyers. Mike Monaghan, in his doggerel, said that the Probate Court was instituted to see that "iviry mimber of the bair gits a fair chanet at phwat the disaysed didn't take wid 'im."

Herbert Spencer said that law was "a government of the living by the dead." Law must necessarily be general in its terms in a free country. Only a despot can make a law for each particular case. Hence, under a law intended to cover great numbers of cases, there must now and then be some cases where the law seems harsh or too technical. That

is the price we pay for certainty and uniformity and freedom. As changes occur in business and life, the laws must be changed or it will work less smoothly and less justly. Wherever the lawyer and the law are esteemed, lawyers will necessarily have much to do with the administration of any free government. In the Middle Ages, there were necessarily many conflicts between the clergy and the ecclesiastical courts on the one hand and the lawyers and state courts on the other. This excited envy and friction. The same thing happened during the period of the Reformation in Europe and in America before the Revolution, when the clergy dominated both private and public affairs. Kings and nobles in England, after King John's reign, often opposed the lawyers and the courts vigorously and greatly berated even the Magna Charta, a constitutional document which was intended to protect the people against the kings and the turbulent nobles. In modern times every man, who whether able and well informed or not, wants to alter radically our Government or to pass radical laws which he thinks will cure some present evil is impatient of the law and of the courts. He does not want to untie the Gordian knot, which may take some time and trouble; he wants to imitate Alexander and cut through the knot with his sword. The Right Honorable James Bryce long ago said that when America had become much greater in population and wealth, the Federal Courts, which were then highly esteemed, would later be often and much abused when conflicts arose over economic or political questions. In the New York World of February 21, 1915, Mr. Samuel Untermyer, in a long article, charges that "American lawyers are to blame for the lawlessness of corporations." While some of his criticisms seem unjust, some of them are sound. He asks the question: "Are we measuring up to our duties as of old, when our leaders were scholars, advocates and orators?" He is right in demanding that the leaders of the bar shall be, not only patriotic and unselfish, not mere mechanical workers or selfish money makers or servile agents of corporations, but also "scholars, advocates and orators." Too many of our lawyers and our laymen make light of scholarship and genuine eloquence at the bar. Too many of our citizens still underestimate the great value to the State of a highly educated, independent, unselfish lawyer, who, while earning an honest living in the profession, is also willing to devote his talents and some of his time in the service of the State.

Lawyers are supposed to be responsible for all our state legislation, but the number of them in the Legislature is constantly diminishing. In the last Senate there were only eleven lawyers among the thirty-eight members, less than one-third. In the House there were only thirty lawyers among the one hundred members, less than one-third. It is worth while, therefore, to consider the subject of law and lawyers. It may be

interesting to say a few words about the law and lawyers in other times and nations. Many of the complaints against the technicalities of the law apply only, in fact, to legal procedure, not to the substantive law, or the law defining the rights and duties of the citizen.

In Athens many centuries ago, in its palmyest days, the legal procedure was not so different from ours as we should expect. There was some difference between private suits and public prosecutions. Every public officer, before beginning the performance of his duties, had to undergo a close examination, which took a wide range and involved an investigation of his whole life. Any citizen could show facts in the public or private life of the candidate that might, under the law, disqualify him for office. Every official, high or petty, at the end of his term, had to submit to a public accounting. His actions were carefully investigated by legal officers, but even a private citizen could accuse a retiring officer of mis-appropriation of money, or any other illegal act in office. This legal procedure at the entrance and the exit of public office caused much litigation. Each officer had to be prepared in person to oppose others or to defend himself. At first, no litigant or accused person could employ a lawyer, but gradually it became customary for men of talent and experience to write speeches for others, and then speech writing became a profitable occupation for experts. When advocates were finally admitted in court they could receive no pay for their services. Later, compensation was allowed.

Jurors in Athens were called "judges" or "dicasts." They were selected annually and were presided over by lawyers. In the fifth century B. C. six thousand jurors were chosen each year. The qualifications of jurors were strictly defined. The lowest number of jurors used was 200, but sometimes in public trials, the number ranged from 400 to 2,500, according to the importance of the suit or the value of the property involved. There was always an odd number of jurors in a trial, and a majority could render a verdict. The court sat daily except on festivals and unlucky days. Each juror was paid a very small sum. The court was inclosed by a railing. Inside the railing were wooden benches for the jury, a platform for the presiding magistrate, one for each of the parties and one for the speakers and witnesses. There was a water-clock to regulate and limit the time of the speeches. The plaintiff summoned the defendant to appear in court on a certain day. Before that day the plaintiff presented his written indictment or claim. On the appointed day the magistrate decided whether the suit was in his jurisdiction and in proper form. If he accepted the suit he fixed a day for the preliminary hearing, and required the parties to pay the court fees. Before that day, the magistrate posted up the charge, and the defendant, or accused, answered in writing. Both parties swore to their pleadings, and

then the defendant could raise objections to the admissibility of the suit. If he was overruled, the parties produced their evidence, whether a law, a decree, documents, witnesses for oral testimony or affidavits taken by commissioners, or the evidence of slaves given under torture. All the evidence was reduced to writing and sealed up by the magistrate in a box to be safely kept until the day of the trial.

At the trial the magistrate and the jurors took their places. There was a sacrifice and a prayer led by the herald. The clerk read the charge then came the plaintiff's speech, then the defendant's speech. Either party might question his opponent, who must answer, but there was no examination or cross-examination of witnesses at the trial. That was a fatal defect. The clerk read the evidence of each witness, who meanwhile stood on the bema used by the speakers, and finally acknowledged the evidence to be his. The parties often used pleas for sympathy, enlarged on their own merits, or came with an olive branch to excite pity, or brought their children into court. There were tears and lamentations also, except in the Areopagus, where a speaker was expected to keep close to the real subject of dispute. Then followed the speeches. The jurors voted by a secret ballot, deposited in one of two urns. The judge counted the ballots. The crier announced the result. If the result was a tie, the defendant won. If the prosecutor did not get one-fifth of the vote in a public prosecution, he was heavily fined and never allowed to bring another suit of the same kind.

In a private suit, if the prosecutor did not get one-fifth of the vote he had to pay the defendant one-sixth of the sum in dispute. If the suit was one in which the jury could fix the penalty, they took a second vote to decide whether they accepted the penalty proposed by the plaintiff or defendant. Fines and banishments were mostly used, but death also was sometimes inflicted. Imprisonment for a fixed time as a direct punishment was never used. There was only one prison in Athens. The accused was kept in prison only until he paid the fine or was executed, if his punishment was death. An exile who had been banished had no civil rights in any foreign land. Anybody could mistreat him. If a murderer fled, the city was glad to be rid of him. Some of the most important speeches of that day have been preserved to this time. A few of them have never yet been surpassed in power and eloquence.

In Rome, the civil law was, in the course of centuries, slowly and at last highly developed. At first its procedure was very technical, but gradually was simplified. The great body of the Roman law has still been preserved. It is not only the foundation of the Canon law, which still prevails in ecclesiastical courts, but it is also the foundation of the law of most of the highly civilized countries of the world, outside of England and its dependencies and our own country. When we turn to

Cicero and Quintilian we see that the qualifications of a great lawyer in the century before the birth of Christ and for several centuries thereafter were substantially the qualifications required today.

Though Blackstone and other English and American law-writers have created the opinion among English-speaking lawyers that almost all the important features of our practice or procedure in common-law courts were derived mainly from English or German sources, it is nevertheless true that the conduct of a jury trial in Rome in the days of the Republic, and in the early days of the Empire, was, in many respects, like our procedure or practice today. The resemblances are greater than the differences. The unphilosophical mind is always looking for differences; the philosophical mind, for resemblances. The education, rights and obligations of a lawyer in that ancient day gradually became substantially the same as now. The qualifications, selection and oath of jurors, and their method of voting and of rendering their verdict did not greatly differ from our procedure.

Their jurors were called "judices." They took an oath to give a just judgment. They were advised as to the law, but passed on both the law and the facts. The praetor, who was not usually learned in the law, gave the litigants a preliminary hearing, and after a consultation with a skillful lawyer, known as a "juris-consult," determined the legal nature of the cause, and in civil cases usually selected a single *judex* as a juror, or arbitrator, to decide, after hearing the facts, according to the instructions given him; but, in some cases, there were at times as many as one hundred jurors.

In the prosecution of Cato, who was Pompey's father-in-law, there were 356 jurors, and Pompey, who wanted to clear Cato, had the jurors come to his house the morning of the trial and before they went to court. When the prosecutor heard of this, he abandoned the case.

In some cases, the *centum-viri*, a jury of one hundred, was divided into two or more tribunals, and an appeal was sometimes granted from one to the other. In private trials there was a simple procedure. In public trials there was greater ceremony and solemnity. If, in a private suit, many particulars were presented by one party which required a studied refutation, a postponement of several days was allowed, when both parties might argue the case in speeches, which they carefully prepared.

The qualifications of jurors varied from time to time, but prominent men were mainly the persons selected. However, the jurors who tried criminal cases were evidently like the illiterate jurors who tried the Cooper case not long ago in Tennessee, for Spalding says that a jury to try public cases generally (not always) came from the country, and that the jurors "were, for the most part, rude and illiterate." Jurors then,

as now, were generally controlled by public opinion of the neighborhood in prominent cases, and sometimes were swayed by bribery or political influence or by military force or a mob.

When Clodius, a violent young nobleman who took a very active and questionable part in politics, was indicted for a public offense and was prosecuted by Milo, the jury hearing the accused petitioned the Senate to allow them a bodyguard to protect them during their deliberations, and when rendering their verdict. Almost everybody then thought that this indicated that Clodius was to be convicted. There was great surprise when the jury rendered a verdict of acquittal; and it became generally understood that the jury had been corrupted. Next day Catullus, a Senator, when he met some of the jurors, said to them: "Why did you ask for a guard? Were you afraid your money would be taken from you?" There were fifty-seven jurors in that trial. Cicero testified as a witness against Clodius. Later in the meeting of the Senate, when he and Clodius were having a heated altercation over some public matter, Clodius said to him arrogantly: "The jury in my case gave you no credit." Cicero retorted: "Twenty-five of the jury gave me credit, but thirty-two gave you no credit, for they made you pay them in advance."

On a later day, after Milo was indicted for killing Clodius in a fight on a public highway near Rome, when each was attended by a lot of armed retainers, Cicero defended his friend Milo. During that trial, Pompey, then Dictator and a friend of Clodius, and a political opponent of Milo, came to the forum with his military officers and a large number of Roman soldiers. Cicero did not dare to make the bold and bitter speech which he had written, and which has become famous, but he made a milder speech, which was taken down in shorthand at the time, but has since been lost. There were fifty-one jurors in the trial, and thirty-eight voted for the conviction of Milo and thirteen for his acquittal. A judgment of conviction was entered, and he went into exile, and his property was sold at auction. Cato was on the jury and voted publicly for the acquittal of Milo.

When Opianicus, who was indicted for an attempt to poison Cluentius, his son-in-law, was tried, he spent \$28,000 in an attempt to bribe the jury; but through the treachery of some of his agents this became known and some of the corrupt jurors became alarmed, and only five voted for acquittal, ten voted "not proven," and seventeen voted guilty; and he was accordingly convicted. Just before the verdict was rendered Opianicus had demanded a poll of the jury to know whom he should pay, and he was, therefore, greatly surprised at the verdict.

The Roman method of producing and examining and cross-examining witnesses under oath has a familiar appearance to us. The rules laid down by Quintillian for the guidance of lawyers of his day are still well

worth our study. As human nature has not changed much in two thousand years (though that is hard for some men to believe) we find that the tricks and strategies of lawyers in Rome in jury trials, in both criminal and civil cases, were strikingly like many that are used today. In one criminal case in Rome the lawyer for the defendant, during his speech, carried around in his arms for a while the handsome little son of the accused to excite the sympathy of the jury. In a civil case in which the plaintiffs were little children who had been defrauded by the defendant, the lawyer of the children had them playing around the jury during the trial. But Roman writers condemned these sly devices. In Nero's time, *plauditores* or clappers were hired by some lawyers to applaud them. They may have had "runners," too, but it may be doubtful whether their "runners," like some here, could beat the embalmer and the undertaker to the home of the deceased.

In Rome, an advocate was any one who acted as an agent or helper of a party to a court trial. A *juris-consultus* was one skilled in law, who generally did not argue cases, but gave his opinion and advice on questions of law to clients and to the courts. Though his opinions until the time of Augustus were not binding on the courts, even when called for, they were usually followed. An orator or patron spoke for a client before the judge or jury. Orators like Cicero, Crassus and Rortensius had the technical part of their cases prepared by *juris-consults*. In France *avoues* prepare the cases for *avocats* who give legal advice and plead cases orally or in writing. In England attorneys-at-law in common law courts or solicitors in Chancery Courts, prepare the pleadings and the evidence, but are not heard in court. They summarize the case in the form of a brief for the barrister or counsellor who examines the witnesses and makes the arguments.

The attorney or solicitor rarely becomes a barrister. Their training differs widely. Lord Chief Justice Russell was one of the few attorneys that ever became a barrister. With some help from his Irish mother, and with additional money that he was earning as a practicing attorney in the north of Ireland, he was able to go to Trinity College in Dublin long enough to take his A. B. degree and later to enter himself as a law student in the Inns of Court at London; and, in due time, after he had heard a few lectures and read much and had eaten the requisite number of dinners in commons, with other students, for about two years, he was called to the bar as a barrister. He was induced to make that great struggle by the persuasion of the bright and beautiful girl who afterwards became his wife and shared in his prosperity and great fame.

If you will examine some modern book like "Robinson's Forensic Oratory," with Quintillian's book on the same subject, you will see that the training of a lawyer in his day was, in many respects, the same as the

training of today; and the rules for consultations with your clients and for the examination of your witnesses before you go into court and for the examination and cross-examination of witnesses in court are still the rules we must follow now. Pliny, a successful lawyer, as well as a good writer, properly said in one of his letters:

"It is as much the duty of an advocate sometimes to say nothing as it is on other occasions to make a long speech; and, indeed, I remember some criminal cases in which I defended my client better by saying nothing than I should have done by a most elaborate oration."

Too many men at the bar, eager to be considered orators, become only plain and tiresome talkers or mere declaimers of high-sounding words and tawdry or flowery nonsense.

When Trachalus was speaking before a jury in the forum, the one hundred jurors having been divided into four juries sitting at the same time in one large hall, his beautiful and sonorous voice rang out like a clarion; and, as he spoke with powerful and stirring eloquence, he caught and held the attention of the three other juries who neglected the business before them and joined in the general applause. Many great orators of that kind have appeared in our own country and in our own state. When Clay or Webster spoke, they spoke in keeping with their great ability and great dignity. John C. Breckinridge, handsome as a picture, brave and refined at all times, had great power before a jury and cast a spell of witchery over a hostile Senate, even when he spoke, it was said, "polished words of treason."

Many fairly intelligent people have very absurd notions about lawyers and courts. Foolish people will now and then ask: "How can a lawyer be a good man when he will take any case, no matter how bad it is?" In the first place, a real lawyer will not take or defend a bad civil case, but will try to get his client out of the difficulty as quickly and cheaply as possible, and will plainly tell him that the law is against him; that a contest in court will only give him worry and put heavy costs on him. In the second place, it is very seldom that the right of a matter is clearly on one side. In most controversies it is hard to determine who is in the right, and very often both of the litigants have made some mistakes or committed some wrongs. It usually takes a long trial to bring out clearly which side ought to win, and many a time a judge or a jury is greatly troubled on account of the uncertainties and contradictions in a case and can hardly tell to which party the victory should be given. In the third place, there are many able lawyers in cities who will not take a criminal case at all and yet, however guilty a criminal may be, he must have the benefit of whatever defense or excuse or ground of palliation can be offered in his behalf, and he must have this right of defense in every civilized community, even if the court must compel one of its lawyers to defend

him without compensation. These idle criticisms of the lawyers and the courts amount to little, but some complaints may justly be made against both. Many of the miscarriages of justice are due not entirely to the lawyers or to the courts, but to a great extent, to the juries composed of farmers and business men who have it in their power to enforce the law, and who nevertheless generally do so when there is a sound public sentiment in the community in favor of a just and rigorous execution of the law.

Without a bar of excellent well-trained lawyers, we can not have good courts; and without good courts no community can enjoy the blessings of a high state of civilization. There are many people who think that our laws are made only by a legislative body; but, in fact, the law that governs us is made largely by the courts. On some important subjects the statutes of the state are silent, and as to such subjects the courts are given absolute control. Even when statutes are passed to control the courts, the courts must still interpret them, and may warp or nullify them on plausible grounds, and by the citation of reasonable precedents. The administration of justice is the highest and most important function of the state.

Adam Smith long ago said that only three things were necessary to raise a state from the lowest to the highest condition of prosperity, namely, peace, moderate taxes and a fair and prompt administration of justice. The state can have no higher duty than to decide disputes between its citizens, and to determine justly when they have infringed the laws designed for the common good. The difference between a state in which justice is speedily, impartially and wisely administered or the reverse is the difference between a high civilization and semi-civilization. "The science of jurisprudence," said Burke, "is the pride of the human intellect—a science which, with all its defects, redundancies, and errors, is the collected reasoning of ages, combining the principles of eternal justice with the infinite variety of human concerns." That description of the law is probably too flattering, and yet, on the other hand, Tennyson hardly did the law justice when he wrote of "mastering the law" and said:

"The lawless science of our law,
That codeless myriad of precedent
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame."

The main duty of the Commonwealth is to make it as certain as possible.

(1) That trials shall be conducted at little or no cost to the litigants beyond their attorney's fees.

(2) That cases shall be tried very quickly and very soon after they are started.

(3) That pleadings and practice or procedure shall be made of little consequence, and that a just decision on the merits alone shall be the final judgment in every case.

We are making some reforms now in that direction. Many lawyers are too conservative and too much opposed to any change because their main duty is to learn and follow long established precedents. Some of them are prone to believe and to persuade others to believe that it is better for abuses to continue for generations than for temporary mistakes to be made by reform.

We borrowed our system of law from England, and we have long adhered strictly to that system, but in 1873 England made radical changes in the organization of her courts and in her methods of procedure. In England at the present time they have gotten rid to a great extent, of formal written pleadings. John D. Lawson in May, 1910, said:

"Here is an example of all the plaintiff has to set out in an action for breach of promise to marry: 'December 27, 1906, defendant verbally promised to marry plaintiff. August 3, 1907, he married another woman. Plaintiff claims \$1,000 damages.'

"Here is a claim against a railroad company for personal injuries: 'Plaintiff claims 500 pounds for injuries sustained by him on May 5, 1906, while traveling on defendant's railroad, as a passenger, from London to Bristol, such injuries being caused by defendant's negligence.'

"Here is a statement in an action today under Lord Campbell's Act: 'Plaintiff as executor of C. D. deceased, sued for the benefit of Louise, widow, and William, Margaret and Mary, children of the deceased, C. D. who suffered damage from the defendant's negligence in carrying C. D. on its omnibus, whereby he was killed on January 10, 1907. Plaintiff claims \$5,000 damages.'"

In Germany of late years a radical reform has also been made in all legal procedure. In France great improvement has been made. We must travel in the same direction. Congress by the passage of the "Judicial Act" and the Supreme Court of the United States by the adoption of the new Rules for Equity Procedure have made a great improvement. The ablest lawyers of the country are at work in that direction, and all of us must do our part.

The lawyers of Kentucky have played a prominent part in her history. Great numbers of her most ambitious and most intellectual men have sought the law as a field of labor, and, by their success, have added much to the fame of the state. We have had, in both civil and criminal trials, many stirring, memorable battles. The talents necessary for success in such contests have been highly cultivated and highly prized. Here

as elsewhere, the labor, worry and excitement of the busy practitioner are severe; but this work is lightened by many pleasant experiences and gratifying victories. Disappointments, mishaps, and even defeats, often become pleasing recollections.

It was my good fortune to get my degree at the Harvard Law School soon after the dean, C. C. Langdell, had revolutionized the system of teaching law. Nobody did more to make it clear that a young man should not study law until he has first had a good literary training, and that his legal studies, before he enters upon active practice, should be broad and thorough. In some communities it is still thought that, though a physician or a machinist must have a good preliminary training in his calling, this is not necessary for a lawyer, though valuable, and should not be required by law, lest forsooth some genius, like Patrick Henry or Abraham Lincoln, may be excluded from a great career. In exceptional cases, men of strong minds, good character and studious habits may overcome the disadvantage of starting without good training; but their example leads hosts of weaker men into a hopeless struggle against the unhappiness and temptation of idleness and the most galling form of poverty, from which, alas! there is an easy step to dishonor.

"When I came to the bar," said an old lawyer at a banquet in Louisville many years ago, "I didn't know much law, but I was industrious and honest, and I was told that industry and honesty were sure to lead to independence, if not to wealth. At that time, when I went to bed at night I did not know how I was to get my breakfast in the morning. Now, after forty years of practice, I am not sensible of any diminution in my industry or honesty, and I may say that, when I go to bed at night, I still do not know where I shall get my breakfast in the morning."

A certain distinguished general of the South, who was successful in a close case against him in Louisville just after the Civil War, said, as he was leaving the courthouse in high glee, that the judge deciding the case for him impressed him "as a judge of a strong, natural sense of justice, entirely unbiased by the trammels of a legal education." "Yes," said the general's counsel, "and he has distributed his errors in this case with such impartiality that, no matter which side takes the case to the Court of Appeals, it is sure to be reversed."

Many years ago two young lawyers here had just formed a partnership, the elder of the two having a moderate legal education, and the younger, naturally bright, having only a scant knowledge of the elementary principles. The younger man one day appeared in the office with several new law books. The elder said at once: "Now look here, my dear fellow, don't you fool with those books. You are a natural judge of law. Reading books will only confuse you, sure. Let 'em alone."

The young lawyer, however well prepared, has no easy task ahead of

him. At first he is afraid that he will not get a case, and, when he gets it, he is in dreadful alarm lest he may blunder and lose it. To fix his fee is no easy thing, whether he wins or loses. He wants and needs all he can get, and yet he fears he may charge too much, and thus be unable to retain the business and good will of his client. His social position is not in keeping with his income. The pleasures of society or the excitement of political life are constantly luring him from his office and his studies. The friends he likes best either have no legal business or have some other lawyer. Again and again he hopes by some display of learning, or talent, to excite the admiration, if not the wonder, of the court, the jury and the bar; but alas! his expected triumphs are turned into defeats or prove barren of results. The glory fades away, and perhaps the fee is never paid. Very slowly, it seems to him, he rises, if he is fit for his calling; and, if he is unfit, he sadly drops out of the race, after a great waste of time, and after losing forever that splendid enthusiasm of youth which counts for so much in preparing us for the final test of strength in the struggle of life. A false start is the almost certain precursor of defeat. Only a dull or reckless man can begin his career without being reasonably well equipped to contend for the crown.

The lawyer, at his worst, is a mere money maker who will gladly aid, or defend, in any way, and to any extent, the miser, the trickster and the criminal. At his best he is a calm shrewd counselor, and, if need be, an ardent but fair champion of the honest workman, the upright merchant, the helpless widow and orphan. The sterling lawyer does not mislead his clients and does not wish to involve them in fruitless or hopeless suits, but clients often want to be told, not what the law is, but rather what they wish it to be. They sometimes do not care so much for advice as for encouragement to engage in a legal contest. Usually each party to a controversy feels certain of being right, and will not hear of defeat, and yet, except in rare cases, the right is uncertain, and each side has good argument in his favor.

After twenty-five years of practice, with some service in the Legislature and in the last Constitutional Convention of our State and in the preparation of the charter of our city, I have seen much of lawyers and the courts and public men, and I know how conservative they are, and how difficult it is to obtain changes or reforms in legal procedure, however apparent may be their necessity; and yet some improvements seem so clearly needed that the wonder is that they have not long since been attempted. The people, most of whom are rarely involved in litigation but all of whom may at any time be forced into a trial involving everything held dear, are so accustomed to old methods as to be indifferent to the evils which bear so heavily upon them, and which could, at least, be greatly reduced; but whenever some ardent reformer attempts to make

a beneficial change, those who profit, or believe they profit, by the old abuses are quick to resist and persevering in opposition, while those to be benefitted are apathetic, if not befooled into active resistance.

A few years ago I discovered that if \$10 were paid at the beginning of every suit filed in Louisville, the revenue would be enough to pay the expenses of all the courts there. A lawsuit should be tried in court with simple procedure, without cost and with no serious delay. A free court for deciding what is right between man and man is as essential as free schools, free libraries, free hospitals and a free ballot. The indefinite and heavy costs now imposed upon litigants do not deter the litigious and unjust, but do deter the good and the careful, who will often endure oppression rather than risk further loss. The courts should not be the refuge mainly of rich men or mere paupers, but should be the refuge always of the honest, industrious citizen of little means and blameless life.

EDWARD J. McDERMOTT.

THE DEMURRER UNDER THE CIVIL CODE OF PRACTICE IN KENTUCKY

Section 89 of the Civil Code of Practice, declares, "The pleadings allowed are, 1—Petitions, answers, and replies, and such additional pleadings, by way of rejoinder and rebuttal, as may be necessary to form a material issue of fact. 2—Demurrer. It will be the purpose of this article to take up the demurrer as established under our so-called code procedure and to note the material changes that have been made in the demurrer as it existed at common law.

Section 91 of the Civil Code declares, "Demurrers are Special or general." Mr. Perry in his *Common Law Pleading*, p. 233, states: "A demurrer, as in its nature, so also in its form, is of two kinds: It is either general or special." Again the Code in defining the demurrer as used in this State says in section 92: "A special demurrer is an objection to a pleading which shows:

1. That the court has no jurisdiction of the defendant or of the subject of the action; or
 2. That the plaintiff has not legal capacity to sue; or
 3. That another action is pending, in this State, between the same parties, for the same cause; or,
 4. That there is a defect of the parties, plaintiff or defendant.
- Either of said grounds of objection shown to exist by a pleading is waived unless distinctly specified by a demurrer thereto, except the objection to